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## The Use of Gender Quotas in America: Are Voluntary Party Quotas the Way to Go?

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THE USE OF GENDER QUOTAS IN AMERICA: ARE  
VOLUNTARY PARTY QUOTAS THE WAY TO GO?

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## INTRODUCTION

The use of gender quotas as a mechanism to increase the political representation of women is rapidly becoming a worldwide phenomenon. Why, then, is the United States not catching on? In light of the abysmal representation of women in all public offices, especially Congress, it might behoove the United States to consider them.<sup>1</sup> Although Americans are not often amenable to quotas, the widespread success of their use in uplifting the status of women around the world should encourage the United States to give gender quotas another look.<sup>2</sup>

That said, even if there is enough popular support to legislatively enact a gender quota, the issue still remains as to whether it would survive constitutional scrutiny. This Note examines the constitutional hurdles gender quotas may face and suggests how gender quotas should be structured in order to overcome them.

In Parts I.A-I.C, this Note will provide a background on the rapid, global proliferation of electoral gender quotas since 1985—quotas that were enacted with the sole purpose of increasing female political representation in national legislatures.<sup>3</sup> Research strongly suggests that gender quotas are an effective and efficient method to increase the number of female elected officials and that such measures are often necessary in light of the many barriers women face in running for public office.<sup>4</sup>

This Note in Part I.D then advocates the adoption of gender quotas as an affirmative action measure in the United States to help increase the number of women in elected office. The need for such a quota seems particularly apparent given that women's gains in other fields have far outpaced advances made by women in Congress. This discrepancy can be attributed to American women facing considerable barriers in the political process—the very same barriers found in many foreign countries that precipitated the need for those countries to enact gender quotas. Because gender quotas

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1. *See infra* Part I.D.1.
2. *See infra* Part I.B.
3. *See infra* Part I.A.
4. *See infra* Part I.B.

have helped women overcome such barriers elsewhere, a strong argument could be made that such quotas are necessary and would be effective in the United States.<sup>5</sup>

Next, in Part II, this Note examines whether the implementation of gender quotas could survive constitutional scrutiny in the United States. This Note argues that, based on an analysis of American jurisprudence, it is likely that the courts will determine that a system of reserved seats or legal candidate quotas is unconstitutional.<sup>6</sup> Thus, in Part III, this Note proposes that the political parties in the United States adopt voluntary party quotas as a mechanism to increase women's representation in Congress.<sup>7</sup> Even though Congress cannot directly set a requirement for parties to adopt such quotas, it is still constitutional for Congress to incentivize parties to do so by tying their use to funding under a public campaign-finance scheme.<sup>8</sup>

## I. BACKGROUND

### A. Gender Quotas: An International Context

Achieving representational equality for women at the national legislative level is a goal that many countries struggle to achieve. On average, women comprise only 20 percent of national legislatures worldwide.<sup>9</sup> Many scholars agree that women must at least comprise a "critical minority" of 30 to 40 percent of the decision-making body to have an influential voice and to make substantive contributions to the legislative process.<sup>10</sup> The World Economic Forum's *2011 Global Gender Gap Report* outlined the continued

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5. See *infra* Part I.C.

6. See *infra* Part II.

7. See *infra* Part III.

8. See *infra* Part III.C

9. *Women in National Parliaments: World Average*, INTER-PARLIAMENTARY UNION (Dec. 31, 2012), <http://www.ipu.org/wmn-e/world.htm>.

10. STINA LARSERUD & RITA TAPHORN, DESIGNING FOR EQUALITY: BEST-FIT, MEDIUM-FIT, AND NON-FAVOURABLE COMBINATIONS OF ELECTORAL SYSTEMS AND GENDER QUOTAS 4 (Int'l IDEA 2007); Drude Dahlerup, *Increasing Women's Political Representation: New Trends in Gender Quotas*, in WOMEN IN PARLIAMENT: BEYOND NUMBERS 141, 142 (Int'l IDEA rev. ed. 2005).

progress of women in several areas, such as health and education;<sup>11</sup> however, the report indicated that progress toward attaining political parity for women has remained stagnant since 2006.<sup>12</sup> Many countries have responded to this phenomenon by enacting gender quotas that facilitate the election of women to national legislative office.<sup>13</sup>

In the past few decades, the international movement for the use of electoral gender quotas gained significant momentum. Prior to 1985, only four countries had enacted some form of a gender quota; now, more than one hundred countries have followed in their footsteps.<sup>14</sup> Mona Lena Krook, a prominent scholar on gender quotas, attributes the rapid rise of their adoption to transnational forces, claiming that the enactment of several multilateral agreements catalyzed the use of such quotas.<sup>15</sup> The first of these agreements, the Convention Ending Discrimination Against Women (CEDAW) signed in 1979, called on its ratifying members to implement affirmative action programs to increase the political representation of women in national legislatures.<sup>16</sup> Signatories of the Beijing Platform in 1995 took this trend a step further by setting a goal for women to achieve at least 30 percent political representation in each of their respective countries.<sup>17</sup>

Countries that employ gender quotas typically classify them into three categories: reserved seats, legal candidate quotas, and volun-

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11. See RICARDO HAUSMANN ET AL., WORLD ECON. FORUM, THE GLOBAL GENDER GAP REPORT 4, 31 (2011), available at [http://www3.weforum.org/docs/WEF\\_GenderGap\\_Report\\_2011.pdf](http://www3.weforum.org/docs/WEF_GenderGap_Report_2011.pdf).

12. See *id.* at 31.

13. See generally QUOTAPROJECT: GLOBAL DATABASE OF QUOTAS FOR WOMEN, <http://quotaproject.org> (last visited Feb. 13, 2013) [hereinafter QUOTAPROJECT].

14. See SENEM ERTAN, GENDER QUOTAS AND WOMEN'S REPRESENTATION IN MUSLIM COUNTRIES 2 (2011), available at [www.academia.edu/416865/Gender\\_Quotas\\_and\\_Womens\\_Representation\\_In\\_Muslim\\_Countries](http://www.academia.edu/416865/Gender_Quotas_and_Womens_Representation_In_Muslim_Countries); see also *Country Overview*, QUOTAPROJECT: GLOBAL DATABASE OF QUOTAS FOR WOMEN, <http://www.quotaproject.org/country.cfm> (last visited Feb. 13, 2013).

15. See Mona Lena Krook, *Reforming Representation: The Diffusion of Candidate Gender Quotas Worldwide*, 2 POL. & GENDER 303, 304 (2006).

16. See DRUDE DAHLERUP & LENITA FRIDENVALL, EUR. PARLIAMENT, ELECTORAL GENDER QUOTA SYSTEMS AND THEIR IMPLEMENTATION IN EUROPE 9 (2008), available at <http://www.europarl.europa.eu/document/activities/cont/200903/20090310ATT51390/20090310ATT51390EN.pdf>.

17. See LARSERUD & TAPHORN, *supra* note 10, at 4.

tary party quotas.<sup>18</sup> A reserved seats quota mandates by law—either by the country’s constitution or electoral laws—that a certain minimum number of seats be set aside in the legislature for women.<sup>19</sup> While reserved seats quotas determine the gender ratio in *actual* composition of the legislature, in contrast, legal candidate and voluntary party quotas regulate the number of women each party *nominates* as candidates.<sup>20</sup> In addition, legal candidate quotas are *mandated by the law* and apply to all political parties, whereas individual parties adopt voluntary party quotas *by choice*.<sup>21</sup> Under these two types of quotas, women still face the hurdle of being elected after being nominated by their party.

### *B. The Success of Gender Quotas Worldwide*

The use of the gender quotas, overall, has been an effective and efficient method to increase the number of women at the national legislative level in several countries. Countries that implemented gender quotas without any significant loopholes, and with proper enforcement mechanisms,<sup>22</sup> have achieved significantly higher levels

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18. See QUOTAPROJECT, *supra* note 13. Scholars use the terms “legal candidate quotas” and “legislative candidate quotas” interchangeably to indicate the same type of quota. For the sake of consistency, this Note refers to both terms as legal candidate quotas.

19. SUSAN FRANCESCHET ET AL., *Conceptualizing the Impact of Gender Quotas*, in THE IMPACT OF GENDER QUOTAS 3, 5 (Susan Franceschet et al. eds., 2012).

20. See Krook, *supra* note 15, at 304.

21. See FRANCESCHET ET AL., *supra* note 19, at 5.

22. For example, France implemented a legal candidate quota in 2004 that required candidate lists for each election to comprise 50 percent of each gender. See Drude Dahlerup, *Women in Arab Parliaments: Can Gender Quotas Contribute to Democratization?*, AL-RAIDA, Summer/Fall 2009, at 28, 32. Despite this quota, elections to the National Assembly, in which members are elected based on a single member constituency system, yielded only 12 percent of women members in 2002 and 19 percent of women members in 2007 because women were largely placed in constituencies where the parties were historically weak. *Id.* at 32-33. Furthermore, French law calls for only a financial penalty for parties who do not comply with the quota when nominating candidates for the National Assembly. See Miki Caul Kittilson, *In Support of Gender Quotas: Setting New Standards, Bringing Visible Gains*, 1 POL. & GENDER 638, 639-40 (2005). Following the implementation of the quota, many of the major political parties preferred to take the cut in their public campaign funds rather than nominate an equal proportion of women. See *id.* at 640. In Indonesia, a 30 percent minimum quota for women candidates was introduced for the 2004 general election, but the law did not specify any placement mandates. See Novi Rusnarty Usu, *Affirmative Action in Indonesia: The Gender Quota System in the 2004 and 2009 Elections*, ASIAONLINE, Mar. 2010, at 9-10, available at <http://www.flinders.edu.au/sabs/asianstudies-files/asialonline/AsiaOnline-01.pdf>.

of female political representatives. For example, Rwanda incorporated a gender quota into its constitution in 2003, reserving at least 30 percent of the seats for women in every decision-making body.<sup>23</sup> Rwanda now currently ranks highest among all countries for its level of female political representation in its national legislature, with women comprising 56 percent of the lower house and 39 percent of the upper house.<sup>24</sup> Similarly, in Argentina, prior to the adoption of a 30 percent legal candidate gender quota in 1993, women held an average of only 5 percent in both legislative bodies;<sup>25</sup> now women comprise 37.4 percent of the lower house and 38.9 percent of the upper house.<sup>26</sup>

The success of gender quotas can often be measured in the course of just one election. For example, in Kyrgyzstan, prior to the enactment of a gender quota, not a single woman sat in Parliament after the 2005 elections.<sup>27</sup> After the constitutional reform process and the implementation of an electoral law that required political parties to nominate candidates that were “not more than 70 [percent] of the same sex,” the number of female members of Parliament jumped to 26 percent after the 2007 elections.<sup>28</sup>

The effectiveness of gender quotas is even prevalent in post-conflict, patriarchal countries that have a long history of denying civil rights to women. Consider the five year reign of the Taliban in Afghanistan that severely curtailed women’s rights.<sup>29</sup> After the Taliban’s fall from power, the U.N. “mandated that the interim

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As a result, predominantly male party elites were placed in winnable positions and women candidates were placed in lower positions; consequently, women were only elected to 11.3 percent of the seats in the National Parliament that year. *See id.*; *Women in National Parliaments*, INTER-PARLIAMENTARY UNION (Dec. 31, 2004), <http://www.ipu.org/wmn-e/arc/classif311204.htm>.

23. *See Rwanda*, QUOTAPROJECT: GLOBAL DATABASE OF QUOTAS FOR WOMEN, <http://www.quotaproject.org/uid/countryview.cfm?ul=en&country=192> (last visited Feb. 13, 2013).

24. *Women in National Parliaments: World Classification*, INTER-PARLIAMENTARY UNION (Dec. 31, 2012), <http://www.ipu.org/wmn-e/classif.htm>.

25. *See* Mark P. Jones, *The Desirability of Gender Quotas: Considering Context and Design*, 1 POL. & GENDER 645, 645 (2005).

26. *See Women in National Parliaments: World Classification*, *supra* note 24.

27. *See* Nurgul Asylbekova, *Kyrgyzstan’s Fight for Gender Quotas Pays Off*, GENDER & MEDIA DIVERSITY J., May 2009, at 66, 67.

28. *See id.* at 71; *Women in National Parliaments*, INTER-PARLIAMENTARY UNION (Jan. 31, 2008), <http://www.ipu.org/wmn-e/arc/classif310108.htm>.

29. *See* Krook, *supra* note 15, at 315.

government and the Loya Jirga Commission were to ensure the participation of women in both the new government and the parliament.<sup>30</sup> Consequently, the Afghani Constitution created a gender quota that reserved 25 percent of the seats in the lower house and 17 percent in the upper house of their Parliament for women,<sup>31</sup> a benchmark that the country has consistently hit since the quota's enactment.<sup>32</sup> In Iraq, another postconflict country, the government did not implement a reserved seats quota to comply with the 25 percent gender quota mandated by its constitution; rather the electoral authorities instituted a legal candidate quota by requiring a female candidate at every third position on candidate lists submitted by each political party.<sup>33</sup> Despite using a different type of gender quota, the first parliamentary elections in Iraq in 2005 resulted in women holding 25.5 percent of the seats in Parliament.<sup>34</sup>

### *C. How Quotas Help Women Overcome Barriers to Getting Elected*

Opponents of gender quotas may agree on the broader goal of increasing the political representation of women in legislative bodies, but instead prefer taking an incremental approach rather than instituting a broad-based affirmative action program.<sup>35</sup> Such opponents believe that with time, women will eventually achieve equality on this front as they have in many other areas of society.<sup>36</sup> Running for an elected office, however, poses unique barriers for women that are difficult for them to overcome on their own.<sup>37</sup> The hurdles women face internationally, ranging from declaring their

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30. *Id.*

31. *See id.*

32. *See Women in National Parliaments: World Classification*, *supra* note 24. Currently, women make up 28 percent of the lower house and 28 percent of the upper house in Parliament. *Id.*

33. *See* Krook, *supra* note 15, at 321.

34. *Women in National Parliaments*, INTER-PARLIAMENTARY UNION (Feb. 28, 2006), <http://www.ipu.org/wmn-e/arc/classif280206.htm>.

35. DAHLERUP & FRIDENVALL, *supra* note 16, at 22-23.

36. *See id.*

37. *See* Jones, *supra* note 25, at 646 (pointing out that a combination of "cultural, economic, institutional, and/or societal factors" can hinder a woman's ability to run successfully for public office).



candidacy all the way to winning their elections, has largely justified the use of gender quotas.

From a global perspective, women often face various forms of societal discrimination against their candidacies. Jane Mansbridge, a professor at the John F. Kennedy School of Government at Harvard University, argues that women face an uphill battle running for office because of surface and structural discrimination.<sup>38</sup> Surface discrimination occurs when “members of the polity sometimes vote for a man rather than a woman to represent them, even when the woman and man are equally qualified.”<sup>39</sup> Structural discrimination occurs when women “are socialized not to see themselves as competitors in politics ... [and] are therefore less likely to enter the competition for office” in the first place.<sup>40</sup>

Not only do women have to combat societal forces working against them in the electorate, but they must often do so without the support of their own family members.<sup>41</sup> In a report by the U.N. Department of Economic Affairs, the authors cite “lack of family co-responsibility within households to release women from unpaid household work” as a predominant barrier to “the political participation of women at the local level.”<sup>42</sup> The report also highlights that women often do not have the backing of their communities and thus their candidacies do not engender the recognition or legitimacy necessary to succeed.<sup>43</sup>

This lack of communal support continues even when female candidates are successfully elected to office. A study of female parliamentary members in several countries found that they are still required “to play the socially prescribed nurturing roles of mother, wife, sister and grandmother,” and that most parliamentary schedules do not take into consideration this “dual burden that women

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38. Jane Mansbridge, *Quota Problems: Combating the Dangers of Essentialism*, 1 POL. & GENDER 622, 628 (2005).

39. *Id.*

40. *Id.*

41. See U.N. Dep't of Econ. & Soc. Affairs, *The World's Women 2010*, at 120, U.N. Doc. ST/ESA/STAT/SER.K/19, available at [http://unstats.un.org/unsd/demographic/products/Worldswomen/WW\\_full%20report\\_color.pdf](http://unstats.un.org/unsd/demographic/products/Worldswomen/WW_full%20report_color.pdf).

42. *Id.*

43. See *id.*

carry.”<sup>44</sup> This reality discourages more women from running for office because they witness how other women parliamentarians “struggle to balance family life with the demands of work that often involve late hours, much travelling and few facilities.”<sup>45</sup>

In addition to societal pressures, women also face barriers to entry erected by their fellow political party members. Often, political parties do not see the electoral benefit of recruiting female candidates.<sup>46</sup> Thus, women are often unable to clear the hurdle of being nominated as candidates on behalf of their party, for it is an “important consideration ... to present candidates that the party believes will maximize its vote.”<sup>47</sup> This desire leads party leaders to select the “default option,” which is a “candidate reflecting the characteristics and qualifications of previous MP’s” as a “vote-maximizing strategy ... [that] minimize[s] electoral risks.”<sup>48</sup> This creates a reinforcing pattern in which parties do not nominate women because there are few women members of parliaments, but women never get the opportunity to increase their presence in parliament because they never have the opportunity to run. Accordingly, women become stuck in a perpetual cycle that obstructs them from increasing their presence in national legislatures.

Electoral and political party laws of individual countries can also make the nomination process more cumbersome for women. Some political party laws require every candidate to contribute a large sum of money to the party pool in order to run under the party’s banner, which has the effect of deterring women from running,

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44. Nadezhda Shvedova, *Obstacles to Women’s Participation in Parliament*, in *WOMEN IN PARLIAMENT: BEYOND NUMBERS*, *supra* note 10, at 33, 36.

45. *Id.*

46. See Frances Millard, Marina Popescu & Gabor Toka, *Impatient for Gender Parity in Parliaments but Bothered by Mandatory Quotas? Consider Preference Voting*, Presentation at the 20th Anniversary Conference of the Association of European Election Officials 1 (June 15-18, 2011) (transcript on file with author) (“Parties are deemed reluctant to select women for single-member districts for fear that voters prefer men.”).

47. Richard E. Matland, *Enhancing Women’s Political Participation: Legislative Recruitment and Electoral Systems*, in *WOMEN IN PARLIAMENT: BEYOND NUMBERS*, *supra* note 10, at 93, 97.

48. PIPPA NORRIS & MONA LENA KROOK, *ORG. FOR SEC. & CO-OPERATION IN EUR., GENDER EQUALITY IN ELECTED OFFICE: A SIX STEP ACTION PLAN 23* (2011), available at <http://www.osce.org/odihr/78432> (“The selection of the default option—a candidate reflecting the characteristics and qualifications of previous MPs—may be expected to predominate in many cases as the rational vote-maximizing strategy designed to minimize electoral risks.”).

especially in countries where large income disparities exist between men and women.<sup>49</sup> Tajikistan is an example of a country in which such onerous party regulations exist, where the candidate registration deposit in 2010 was €1,100, “approximately 24 times higher than the average monthly salary.”<sup>50</sup> Furthermore, Tajik law also requires that all candidates complete some form of higher education.<sup>51</sup> These rules create barriers for everyone in their efforts to seek elected office, but have a disproportionate effect on women, given that they earn significantly less than men and are outnumbered in tertiary education by a ratio of 40 to 1.<sup>52</sup>

Ballot access requirements are another area in which electoral laws can hinder entry of women into public office. Some nations require candidates to gather a high number of petition signatures to demonstrate support among the electorate before placing their names on the ballot.<sup>53</sup> This requirement can be particularly difficult for women to meet because they do not develop the patronage networks like those of their male, often incumbent, counterparts.<sup>54</sup>

Even if women do make it past the nomination hurdle, political parties create another barrier for female candidacies by not providing them with the necessary resources to run a successful campaign. Once nominated, a significant “performance difference” arises between women and their male counterparts “due at least in part to the greater amount of campaign resources and political experience possessed, on average, by male candidates.”<sup>55</sup> Furthermore, political parties may not invest in training or contribute money from their campaign funds to female candidates, who often face an uphill battle in winning contested races, and instead use those resources in more lucrative races with male incumbent candidates.<sup>56</sup>

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49. *See id.* at 27.

50. *Id.*

51. *See id.*

52. *See id.*

53. *Id.*

54. *See id.*

55. *See* Mark P. Jones, *Gender Quotas, Electoral Laws and the Election of Women: Evidence from the Latin American Vanguard*, 42 *COMP. POL. STUD.* 56, 72 (2008).

56. *See* NORRIS & KROOK, *supra* note 48, at 24; Kittilson, *supra* note 22, at 640.

*D. The Need for Gender Quotas in the United States*

*1. The Underrepresentation of Women in Congress Makes the Environment in the United States Ripe for a Gender Quota*

The women's movement in the United States has made great progress towards achieving equal rights for women in various areas, especially with regard to reproductive rights, education, and labor participation,<sup>57</sup> however, despite making several advances in the political realm, women are consistently underrepresented at the congressional level.<sup>58</sup> American women continue to lag in holding public office, both in relation to their male counterparts in Congress and women who hold public office abroad.<sup>59</sup> Currently, women comprise only 16.9 percent of the House of Representatives and 17 percent of the Senate.<sup>60</sup> And despite the fact that female representation in Congress has gradually increased over the past two decades,<sup>61</sup> female representation actually fell for the first time in thirty years after the midterm elections in 2010.<sup>62</sup>

America's track record for electing women to Congress is paltry in comparison to the rest of the world. With women comprising only roughly 18 percent of the House and 20 percent of the Senate, the United States ranks 77 out of 188 countries worldwide in the percentage of women in the national legislature.<sup>63</sup> The United States also ranks lower than the worldwide average, which currently stands at 20 percent.<sup>64</sup> Several countries that rank higher on the list are not generally considered as prosperous or democratic as the

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57. See U.N. DEV. PROGRAM, HUMAN DEVELOPMENT REPORT 2011, at 139-42 tbl.4 (2011), [http://hdr.undp.org/en/media/HDR\\_2011\\_EN\\_Table4.pdf](http://hdr.undp.org/en/media/HDR_2011_EN_Table4.pdf). Women, for example, now outnumber men in enrolling in professional schools. See U.S. GEN. ACCOUNTING OFFICE, GENDER EQUITY: MEN AND WOMEN'S PARTICIPATION IN HIGHER EDUCATION 4 (2000), available at <http://www.gao.gov/new.items/d01128.pdf>.

58. Jennifer Steinhauer, *More Women in Senate, but Seats Are at Risk*, N.Y. TIMES, Oct. 21, 2011, at A20 ("Even as women have made strides in many areas of political life, Congress remains male dominated.").

59. See *Women in National Parliaments: World Classification*, *supra* note 24.

60. *Id.*

61. See Steinhauer, *supra* note 58.

62. See *id.*

63. *Women in National Parliaments: World Classification*, *supra* note 24.

64. *Id.*

United States, such as Ethiopia, Iraq, Pakistan, and Cambodia, yet they continue to elect more women to their national legislatures.<sup>65</sup>

The predominant factor that accounts for the wide discrepancy in female representation between these countries and the United States is the use of gender quotas. Of the ninety-five countries that rank higher than the United States in the number of women they elect to their legislatures, approximately sixty-eight of them employ some form of a gender quota.<sup>66</sup> Given the discrepancy between the significant underrepresentation of women in Congress and the advances of women in other realms of American society and abroad, the United States presents an ideal case for implementing a gender quota.<sup>67</sup>

## *2. American Women Face Similar Barriers in Seeking Elected Office*

Discrimination against women in the United States is not as widespread as in some of the countries that employ gender quotas;<sup>68</sup> however, American women face similar barriers, although often more subtle, in running for public office. First, women in the United States run up against similar societal pressures that cause them to be “more reluctant candidates.”<sup>69</sup> Even though women outnumbered men in the U.S. workforce for the first time in January 2010,<sup>70</sup> societal attitudes still construe their natural role as the primary caregiver of the family: “In families where both adults are working, generally in high-level careers, women are 12 times more likely than men to be responsible for the majority of household tasks, and more than 10 times more likely to be responsible for the majority of

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65. *Women in National Parliaments: World Classification*, *supra* note 24. Women comprise 27.8 percent of the lower house of Parliament in Ethiopia, 25.2 percent in Iraq, 22.5 percent in Pakistan, and 20.3 percent in Cambodia. *Id.*

66. QUOTAPROJECT, *supra* note 13; *Women in National Parliaments: World Classification*, *supra* note 24.

67. See Jones, *supra* note 25, at 649.

68. See U.N. DEV. PROGRAM, *supra* note 57.

69. Steinhauer, *supra* note 58.

70. Casey B. Mulligan, *In a First, Women Surpass Men on U.S. Payrolls*, N.Y. TIMES ECONOMIX (Feb. 5, 2010, 2:51 PM), <http://economix.blogs.nytimes.com/2010/02/05/in-historical-first-women-outnumber-men-on-us-payrolls/>.

child care responsibilities.”<sup>71</sup> Thus, women in the United States are more likely to find themselves unable to juggle their perceived responsibilities at home and the responsibilities associated with running for public office.<sup>72</sup> This struggle is reminiscent of the lack of familial support that acts as a barrier to running for office in certain countries abroad.<sup>73</sup>

A gender gap between men and women in their personal perception about being fit for office also explains the reluctance of American women to run for public office.<sup>74</sup> Studies reveal that “[60] percent of men, but less than 40 percent of women, think they’re qualified to run for office,” even though the women had “the exact same credential[s] and qualifications” as the men.<sup>75</sup> Women are also more likely than men to let these doubts prevent them from seeking office.<sup>76</sup> In contrast, men who lack the “relevant experience will jump in without a second thought.”<sup>77</sup> This gender gap in attitudes likely stems from American women being raised in a culture that socializes them to both “not see themselves as political candidates” and perceive themselves as being “uniquely unqualified to run.”<sup>78</sup>

Political parties in the United States also discourage women from running for office by not aggressively recruiting women for such positions. Recruiting women or suggesting they run for office can be a powerful impetus for increasing the number of women candidates because women are less likely than men to have planned a career in politics and thus may need extra encouragement.<sup>79</sup> Women who are

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71. Jennifer Lawless, *Why More Women Don't Hold Office*, AFL-CIO, [http://staging.aflcio.org/mediacenter/speakout/jennifer\\_lawless.cfm](http://staging.aflcio.org/mediacenter/speakout/jennifer_lawless.cfm) (last visited Feb.13, 2013).

72. See Amanda Terkel, *Senate Women Face High Stakes in 2012*, HUFFINGTON POST (Nov. 2, 2011, 9:48 AM), [http://www.huffingtonpost.com/2011/11/02/senate-women-female-senators-2012\\_n\\_1035222.html](http://www.huffingtonpost.com/2011/11/02/senate-women-female-senators-2012_n_1035222.html) (last updated Jan. 2, 2012, 4:12 AM) (“A lot of women are supporting their families .... They’ve got other things in their lives that make it that much harder for them to think about running for office.”).

73. See *supra* Part I.C.

74. See Lawless, *supra* note 71.

75. *Id.*

76. See *id.*

77. Steinhauer, *supra* note 58; see also Lawless, *supra* note 71 (“The average man who doesn’t think he’s qualified still has about a 60 percent chance of contemplating throwing his hat into the ring.”).

78. Terkel, *supra* note 72.

79. See KIRA SANBONMATSU ET AL., CTR. FOR AM. WOMEN IN POLITICS, POISED TO RUN: WOMEN’S PATHWAY TO THE STATE LEGISLATURES 8 (2009).

reluctant to seek elected office usually require heavy cajoling, for “[w]omen need to be recruited and asked multiple times by multiple people in order to consider running.”<sup>80</sup> Studies show that potential women candidates are four times more likely to enter the political arena upon encouragement by a political leader than without encouragement.<sup>81</sup> Furthermore, “women are more likely than men to run for [elective] office” for the first time “because they were recruited.”<sup>82</sup>

Studies also show that political parties play a very influential role in the recruitment process for women. Recruitment is most effective and influential if conducted by political party leaders or by elected officeholders.<sup>83</sup> The problem, though, is that women are twice as likely as men to have never been encouraged by a political leader to run for office.<sup>84</sup> Political parties also play an influential role in discouraging candidates from seeking office. A study by the Center for American Women in Politics revealed that a political actor was the most common source of discouragement to women during their first pursuit of political office.<sup>85</sup> Thus, political parties in the United States can create barriers to entry similar to those of political parties around the world.

Finally, women who do run for public office in the United States often receive heightened public scrutiny and face sexist bias in media coverage, thus impeding their chances for success.<sup>86</sup> Research shows that women candidates “receive less issue coverage than males, but more coverage on appearance, personality, and family”; as a result, voters are less likely to learn about what issues they stand for.<sup>87</sup> Furthermore, stories are also likely to cast women in their nurturing roles rather than as political candidates, leading to women being taken less seriously at the beginning of campaigns.<sup>88</sup>

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80. Steinhauer, *supra* note 58.

81. *See* Lawless, *supra* note 71.

82. *See* SANBONMATSU ET AL., *supra* note 79, at 8.

83. *See id.* at 11.

84. *See* Lawless, *supra* note 71.

85. *See* SANBONMATSU ET AL., *supra* note 79, at 12.

86. Diana B. Carlin & Kelly L. Winfrey, *Have You Come a Long Way, Baby? Hillary Clinton, Sarah Palin, and Sexism in 2008 Campaign Coverage*, 60 COMM. STUD. 326, 328 (2009).

87. *See id.* at 329.

88. *See id.*

This type of coverage diminishes their perceived credibility as qualified candidates,<sup>89</sup> making it harder for women to win elections.

The quintessential example of such bias is apparent in the media's treatment of Hillary Clinton's candidacy for President in 2008. The media and pundits repeatedly made sexist comments about her, including "the coverage of Clinton's pantsuits, and her cleavage, and the famous 'cackle,'" that were "treated as acceptable forms of expression."<sup>90</sup> Furthermore, the media did not address sexist remarks made in reference to her, deeming such stories not newsworthy.<sup>91</sup> As a result, some scholars reflecting on the 2008 Democratic primary claim that "Hillary Clinton did not get a fair chance."<sup>92</sup>

The 2008 elections further proved to be a banner year for women with the nomination of Sarah Palin as the Republican vice presidential candidate. The media's portrayal of Palin focused on her "sexiness," stemming from her "beauty queen background, her youthful appearance, wardrobe, and her unabashed feminine non-verbal communication such as winking."<sup>93</sup> Such objectification of Palin "deflect[ed] discussion of qualities related to political office" and was ultimately "used to dismiss her as a serious candidate."<sup>94</sup> What proved to be troublesome was that sexism in the media towards Clinton and Palin was a widespread phenomenon, not merely limited to the fringe groups or to subtle and playful jabs.<sup>95</sup> Thus, societal pressures in conjunction with barriers erected by political parties and the media demonstrate the uphill battle women candidates in the United States continue to face in winning elections.

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89. *See id.* at 328.

90. Susan J. Carroll, *Reflections on Gender and Hillary Clinton's Presidential Campaign: The Good, the Bad, and the Misogynic*, 5 *POL. & GENDER* 1, 13 (2009).

91. *See id.* at 12-13.

92. *Id.* at 14 (quoting Berkeley law professor and senior Clinton campaign advisor Maria Echaveste, who went on further to say that there was "a zone of protection around Senator Obama on race where none existed on gender" (internal quotation marks omitted)).

93. Carlin & Winfrey, *supra* note 86, at 330.

94. *Id.* at 330-31.

95. *Id.* at 339.



*3. Why the United States Should Pursue the Fast-Track Route of Gender Quotas*

In addition to the systemic barriers mentioned above, a number of additional factors suggest that the United States would benefit from adopting a fast-track, rather than an incremental, approach to gender quotas, so that more women are elected to Congress sooner rather than later. These two models focus on different policy outcomes: the incremental approach “promotes formal equality based on the principle of gender equality as equal opportunity,” while the fast-track approach “promotes substantive equality based on the principle of gender equality as equality of results.”<sup>96</sup> Thus, those who follow the fast-track route are more amenable to the use of gender quotas as a means to achieve the desired goal of increasing women representation.

One such benefit of pursuing a fast-track route of a gender quota is that more women in Congress will benefit the American democratic process. If women amass the necessary “critical minority” of 30 or 40 percent” in Congress to have an influential voice in the process,<sup>97</sup> they can represent all women, and thus half of the electorate, more effectively.<sup>98</sup> Research indicates that female members of Congress “raise new issues that are important to women as a group and that they demonstrate greater commitment to these issues in the legislative process,” regardless of “their partisan affiliations.”<sup>99</sup> An example of this phenomenon is noticeable in the debate leading up to the Health Care Reform Act of 2008, when Senator John Kyl argued that maternity care was something he did not need and thus wished to exclude it on the basis of cost considerations.<sup>100</sup> It was Senator Debbie Stabenow who interjected and informed him that he benefitted from the maternity care his mother received.<sup>101</sup>

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96. See DAHLERUP & FRIDENVALL, *supra* note 16, at 21.

97. See Dahlerup, *supra* note 10, at 142.

98. See Kittilson, *supra* note 22, at 642 (“More women means greater odds that the issues that affect women’s lives disproportionate to men’s will be debated among political decision makers.”).

99. *Id.*

100. See Terkel, *supra* note 72.

101. See *id.*

Congresswomen can also bring a fresh perspective to negotiations that take place during the legislative process. Although women are not a monolithic group, their general nature is characterized as more “communal.”<sup>102</sup> They are thought to have a different approach to law making that is “more integrative, collaborative, and consensual.”<sup>103</sup> As a result, their governing style can make them more productive and more effective than their male counterparts.<sup>104</sup> Women in Congress are also more likely to set aside their partisan differences and be “more pragmatic and results oriented.”<sup>105</sup> Anecdotal evidence from female senators during the debt ceiling crisis in 2011 further corroborates this view; they claimed that the issue would have never escalated to the point of bringing the country to the verge of default if female senators had brokered a deal on their own.<sup>106</sup> Thus, the election of more women to Congress will likely help ameliorate the current gridlock in our political system.<sup>107</sup>

Critics argue that a fast-track gender quota mechanism is not appropriate in the American system. These critics prefer the current incremental approach for women attaining equality in governance—an approach based on the notion of “a gradual evolution based on equality of process and the presumption that prejudice against women will disappear as society evolves.”<sup>108</sup> Opponents of gender quotas point to the fact that women are well on their way to

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102. Carroll, *supra* note 90, at 5.

103. Alana Jeydel & Andrew J. Taylor, *Are Women Legislators Less Effective? Evidence from the U.S. House in the 103rd-105th Congress*, 56 POL. RES. Q. 1, 19 (2003).

104. *See id.* at 20.

105. *Id.*

106. *See* Steinhauer, *supra* note 58 (“She [Republican Senator Susan Collins] touched my arm and said, ‘Kirsten, if you and I were negotiating the budget we would have gotten it done a week ago,’ Ms. Gillibrand [Democratic Senator from New York] said.” (internal quotation marks omitted)); *see also* Terkel, *supra* note 72 (quoting Senator Clair McCaskill: “There was a moment at the end of the debt ceiling [debate] that some of the women, on a bipartisan basis, were talking about, ‘We need to take this over and get this done’.... [S]ometimes there is a tendency to like the fight for the fight’s sake every once in awhile with some of the guys.” (internal quotation marks omitted)).

107. *See, e.g.*, Rosalind S. Helderman, *The Budgeting Breakdown: Gridlock over Spending Prompts Calls for Desperate Measures in Congress*, WASH. POST, Oct. 27, 2011, at A17.

108. Nancy Millar, Note, *Envisioning a U.S. Government That Isn’t 84% Male: What the United States Can Learn from Sweden, Rwanda, Burundi, and Other Nations*, 62 U. MIAMI L. REV. 129, 136 (2007) (emphasis omitted).

achieving parity, citing the rapid increase in female legislators in the past two decades,<sup>109</sup> and argue that women will reach this goal in due time. However, female representation in Congress seems to have stagnated, with the number of congresswomen falling for the first time in the 2010 elections.<sup>110</sup> Incremental and gender-neutral approaches to addressing the underrepresentation in the legislature “have not created the equal opportunities they promise.”<sup>111</sup> These approaches may also just take too long given the significant barriers women still face<sup>112</sup> and the fact that women make up such a minority in Congress despite gaining the right to vote in 1920 with the ratification of the Nineteenth Amendment.<sup>113</sup> As mentioned above, several tangible benefits exist from having more women in the legislature,<sup>114</sup> and there is a strong case that representation should increase now, rather than at some point in the distant future. The only way to do so is by enacting some form of a gender quota.<sup>115</sup>

The use of gender quotas throughout the world has led to the rapid increase in the number of female legislators, allowing women in myriad countries to overcome significant barriers to pursuing public office.<sup>116</sup> Women in the United States are significantly underrepresented in Congress because they face the same barriers as their international counterparts.<sup>117</sup> Several tangible benefits stem from the presence of women in Congress,<sup>118</sup> and the United States should adopt gender quotas in order to achieve greater parity in the

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109. See Steinhauer, *supra* note 58 (“The Senate has been a particularly tough electoral mountain for women to climb. In 1922, Rebecca L. Felton of Georgia served a mere 24 hours to replace a dead member, and from then on, women accounted for just one or two members—at times none at all—until 1993. It took the last two decades for the count to reach the current 17.”).

110. See *id.* (highlighting also that “the loss of just one female Senate seat with no replacements would cost women ground in the Senate for the first time since 1978”).

111. See Kittilson, *supra* note 22, at 642 (“In political systems where prescriptions for women’s numerical underrepresentation merely call for incremental change based on women’s educational and professional gains, such as in the United States, women’s numbers in the national legislatures lag far behind those where direct steps are taken.”).

112. See *supra* Part I.D.2.

113. U.S. CONST. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”).

114. See *supra* notes 97-107 and accompanying text.

115. See DAHLERUP & FRIDENVALL, *supra* note 16, at 22.

116. See *supra* Part I.B.

117. See *supra* Part I.D.2.

118. See *supra* notes 97-107 and accompanying text.

political representation of women. Part II discusses the constitutionality of enacting such a gender quota in the United States.

## II. AMERICAN JURISPRUDENCE: THE CONSTITUTIONALITY OF A GENDER QUOTA

If Congress decided to implement a gender quota for the election of its members, such a quota would first have to survive several constitutional challenges. For Congress to pass a legally mandated quota, either in the form of a reserved seats quota or a legislative candidate quota, it would first have to establish that it has the power to do so under the U.S. Constitution and that it does not violate the Equal Protection Clause. A legal candidate quota must also survive a First Amendment challenge for the burden it places on the freedom of association of political parties. Because no judicial precedent exists on the use of gender quotas in governing bodies, we must infer outcomes based on the Supreme Court's jurisprudence in analogous situations.

### *A. Does Congress Have the Power to Implement a Gender Quota?*

Congress has broad discretion to regulate the election of its members. Article I, Section 4 (hereinafter the Elections Clause) of the U.S. Constitution delegates authority to the states to determine the "Time, Place[] and Manner" of their elections but allows Congress to retain the right to "alter such Regulations" at "any time."<sup>119</sup> The Supreme Court has interpreted the scope of Congress's power very broadly to encompass nearly all procedural aspects of federal elections.<sup>120</sup> The Court held in *Smiley v. Holmes* that Congress "has a general supervisory power over the whole subject."<sup>121</sup> This has since been vindicated in practice; for example, no one contested Congress's power to regulate campaign finance during the challenge to the Federal Election Campaign Act of 1971.<sup>122</sup> The Supreme

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119. U.S. CONST. art. I, § 4, cl. 1.

120. *Foster v. Love*, 522 U.S. 67, 71 (1997) ("When the federal statutes speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make a final selection of an officeholder.").

121. 285 U.S. 355, 367 (1932).

122. *Buckley v. Valeo*, 424 U.S. 1, 13 (1976).

Court reinforced Congress's authority to regulate campaign finance in *McConnell v. Federal Election Commission*, holding that Title I of the Bipartisan Campaign Finance Reform Act of 2002 did not exceed the power granted to it under the Elections Clause.<sup>123</sup> Furthermore, the Court extended this scope to allow federal oversight over primary contests in *United States v. Classic*, deeming them "elections" under Article I, Section 4.<sup>124</sup>

The issue remains, however, whether encouraging the use of an affirmative action program for women falls within the ambit of election procedures or if it is beyond the scope of power granted by the Elections Clause. The constitutional authority of Congress's power under the Elections Clause extends only to regulating the procedural "mechanics of congressional elections" but does not extend to substantive aspects.<sup>125</sup> A grant of authority to Congress to regulate the election of its members beyond mere procedures could "lead inevitably to congressional self-aggrandizement and the upsetting of the delicate constitutional balance."<sup>126</sup> Ultimately, gender quotas affect the substantive nature of an election because they determine who can be a candidate rather than control the time, manner, and place of the election; therefore, Congress likely cannot derive its power to implement gender quotas under the Elections Clause.

Congress can also look to Article I, Section 5 of the Constitution as an alternate source of power for enacting a gender quota. Article I, Section 5 states that "each House shall be the Judge of the Elections, Returns and Qualifications of its own Members."<sup>127</sup> One can make a plausible argument that Congress's ability to determine the qualifications of its own members authorizes it to set a qualification that a certain number of its members must be women. The Supreme Court, however, narrowly construed this power in *Buckley v. Valeo*, characterizing it not as a "a general legislative power upon

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123. 540 U.S. 93, 101-02 (2003), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

124. 313 U.S. 299, 320 (1941) ("The words of §§ 2 and 4 of Article I ... require us to hold that a primary election which involves a necessary step in the choice of candidates for election as representatives in Congress ... is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it.")

125. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 894 (1995) (Thomas, J., dissenting).

126. *Id.* at 832 (majority opinion).

127. U.S. CONST. art. I, § 5, cl. 1.

the Congress, but rather a power ‘judicial in character’ upon each House of the Congress.”<sup>128</sup> The Court further said that “[t]he power of each House to judge whether one claiming election as Senator or Representative has met the requisite qualifications ... cannot reasonably be translated into a power granted to the Congress itself to impose substantive qualifications on the right to so hold such office.”<sup>129</sup> Thus Congress must derive its legislative power from Article I, Section 4 instead of Section 5. Accordingly, it is unlikely that the Congress has the power to set gender specifications for its members under this section.

Congress, however, already uses an affirmative action program in order to elect members of minority race and language communities through the auspices of the Voting Rights Act of 1965 (VRA).<sup>130</sup> Congress could arguably enact a gender quota following a similar model. Section 2 of the VRA prevents individual states from enacting any voter qualification that effectively denies or abridges the right to vote based on race.<sup>131</sup> Courts have further interpreted this provision as a tool to combat minority vote dilution. Minority vote dilution occurs when states, through various election laws and practices combined with a majority group that systematically votes as a bloc, diminish or cancel the right to an effective vote for one or more race or language minority groups.<sup>132</sup> Under *Thornburg v. Gingles*, the Court laid out a three-prong threshold test to determine whether a state was engaging in such vote dilution by not creating a sufficient number of majority-minority districts.<sup>133</sup>

Furthermore, section 5 of the VRA mandates that changes to election laws by states that are subject to the preclearance requirement be held to a nonretrogression standard, whereby states are not permitted to reduce the number of districts in which minorities comprise the majority population from the previous redistricting cycle.<sup>134</sup> The cumulative effect of section 2 and section 5 yields the

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128. *Buckley v. Valeo*, 424 U.S. 1, 133 (1976) (citing *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929)).

129. *Id.*

130. 42 U.S.C. § 1973 (2006).

131. *See id.*

132. *See generally* *Allen v. State Bd. of Elections*, 393 U.S. 544, 566-67 (1969).

133. *See* *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

134. *See* *Beer v. United States*, 425 U.S. 130, 138-42 (1976).

election of more minority candidates to Congress by setting the guidelines for drawing congressional districts in a manner that favors their election. Without such standards, minority candidates otherwise might not have been elected.

These provisions are clearly an example of Congress implementing an affirmative action program that sets a substantive qualification—race—for the election of its members. And the Court deemed the most invasive provisions of the VRA to be constitutional in *South Carolina v. Katzenbach*.<sup>135</sup> In that case, rather than deriving its power from the Elections Clause, the Court upheld Congress's authority to enact the VRA under Section 2 of the Fifteenth Amendment,<sup>136</sup> which gives Congress the “full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.”<sup>137</sup> Unfortunately, no such equivalent to the Fifteenth Amendment exists regarding the abridgement of the right to vote based on gender.

Congress, however, may have the power to interject itself into the redistricting process to create similar affirmative action programs for the election of its members based on gender. This power might derive from the Elections Clause, which “provides clear precedent for congressional control over redistricting,” as demonstrated by the Apportionment Act of 1842, which enacted federal restrictions to congressional district boundaries.<sup>138</sup> Although Congress does have the authority to do so, extending a VRA-type scheme of majority-minority districts to districting based on gender is problematic. Vote dilution of minorities requires proof that minorities who comprise a majority in a district vote as a bloc and demonstrate a strong preference for the minority candidate.<sup>139</sup> In contrast, women in

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135. See 383 U.S. 301, 337 (1966). Section 5 of the VRA was challenged in the Supreme Court during the October 2012 Term. See Adam Liptak, *Supreme Court Faces Weighty Cases and a New Dynamic*, N.Y. TIMES, Sept. 30, 2012, at A1.

136. U.S. CONST. amend. XV (“Congress shall have power to enforce this article by appropriate legislation.”).

137. *Katzenbach*, 383 U.S. at 325-26.

138. Ryan P. Bates, Note, *Congressional Authority to Require State Adoption of Independent Redistricting Commissions*, 55 DUKE L.J. 333, 361 (2005).

139. See *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119, 1131-32 (2006) (“Proving second generation remedies of vote dilution depend on black voters’ strong preference for black candidates.”).

America “do not vote as a block, face no substantial geographical segregation, and do not necessarily prefer women candidates by substantial margins,” thus making a purely procedural redistricting scheme infeasible as an effort to increase female representation in Congress.<sup>140</sup>

For the reasons noted above, it is highly unlikely that the Constitution vests Congress with the authority to pass an electoral gender quota.

*B. Implications of the Equal Protection Clause on the Constitutionality of a Gender Quota*

Even if Congress does have the power to authorize an electoral gender quota, such legislation will likely face scrutiny for violating the Equal Protection Clause by discriminating on the basis of gender. Historically, American jurisprudence has disfavored the use of outright quotas by state actors.<sup>141</sup> In *Regents of the University of California v. Bakke*, the Supreme Court held that it was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment for a state medical school to reserve sixteen out of one hundred seats in its class for disadvantaged minorities.<sup>142</sup> Even though this situation involved a case of reverse discrimination, the Court held that the use of a rigid quota still counted as a race-based classification and thus subjected it to a strict scrutiny analysis.<sup>143</sup> The Court determined the state medical school had a compelling interest in enhancing the diversity of its student body but ultimately held that the use of a quota was not narrowly tailored to serve its interest.<sup>144</sup> Accordingly, race could still serve as one of the factors that the admissions office used to admit candidates.<sup>145</sup>

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140. Jones, *supra* note 25, at 649 (“The lack of gender-based housing segregation, combined with the relative absence of gender-polarized voting, indicates that the majority-minority district model is not an option for the enhancement of women’s representation in the United States.”); Rosenblum, *supra* note 139, at 1131-32 (“[T]he voting rights paradigm cannot stretch to endorse a remedy for electoral gender inequality.”).

141. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). See generally *Gratz v. Bollinger*, 539 U.S. 244 (2003).

142. See *Bakke*, 438 U.S. at 289, 320 (plurality opinion).

143. See *id.* at 305.

144. See *id.* at 314-15.

145. See *id.*



In *Gratz v. Bollinger*, the Court again struck down a higher education admission practice, which, instead of using quotas, relied on a point system that assigned a fixed value of points to minority students.<sup>146</sup> Ultimately, in *Grutter v. Bollinger*, the Court held that a more fluid program of affirmative action in an admissions process, one that considered race as a factor in addition to other criteria, was constitutionally valid.<sup>147</sup>

It is important to note that the distinguishing factor of these cases was a quota based on race classifications that automatically triggered strict scrutiny analysis. Gender classifications, by contrast, receive an intermediate form of scrutiny,<sup>148</sup> meaning a gender-based affirmative action measure may survive constitutional challenge when a race-based program may not.<sup>149</sup> The Supreme Court has yet to provide guidance as to the appropriate standard of review for gender-based affirmative action programs. Currently, the circuits are split with the Sixth Circuit and the Federal Circuit applying strict scrutiny to gender affirmative action programs, while the Third, Fifth, Ninth, Tenth, and Eleventh Circuits use an intermediate scrutiny standard.<sup>150</sup> For example, the Ninth Circuit, in *Associated General Contractors of California, Inc. v. City and County of San Francisco*, upheld an affirmative action program for women by applying intermediate scrutiny and struck down a similar program for members of minority races by applying strict scrutiny.<sup>151</sup>

If the Supreme Court applies its current intermediate scrutiny analysis of gender classifications to affirmative action programs as well, then the use of gender quotas may withstand an equal protection challenge. The Court first established an intermediate

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146. See *Gratz*, 539 U.S. at 273-76.

147. See *Grutter v. Bollinger*, 539 U.S. 306, 341-43 (2003).

148. See Jason M. Skaggs, Comment, *Justifying Gender-Based Affirmative Action Under United States v. Virginia's "Exceedingly Persuasive Justification" Standard*, 86 CALIF. L. REV. 1169, 1173 (1998) (citing *Craig v. Boren*, 429 U.S. 190 (1976)).

149. See *id.* at 1175 ("The application of intermediate scrutiny to gender-based affirmative action programs means that race-based affirmative action is subject to a higher level of constitutional scrutiny. Thus, it is more likely that a race-based remedial program will be invalidated than an affirmative action program based on gender, even though racial minorities are meant to receive a higher level of protection from discrimination than women.")

150. Rosalie Berger Levinson, *Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved, and Ricci*, 34 HARV. J.L. & GENDER 1, 14-15 (2011).

151. See 813 F.2d 922, 938-42 (9th Cir. 1987).

scrutiny analysis for gender-based classifications in *Craig v. Boren*, which required such laws to “serve important governmental objectives and [to] be substantially related to achievement of those objectives.”<sup>152</sup> In *United States v. Virginia*, the most recent Supreme Court case dealing with gender classifications, the Court used an “exceedingly persuasive” standard for the justification of the law, a heightened form of intermediate scrutiny that does not rise to the level of strict scrutiny.<sup>153</sup> The Court also held that the justification “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>154</sup> Furthermore, the Court held that a gender-based classification would qualify as “exceedingly persuasive” if it is “used to compensate women ‘for particular economic disabilities [they have] suffered,’ to ‘promot[e] equal employment opportunity,’” and “to advance full development of the talent and capacities of our Nation’s people.”<sup>155</sup> Thus, if Congress could demonstrate that a gender quota advanced these interests, it is possible that such a quota could withstand constitutional scrutiny.

Some lower courts, however, have stricken down gender quotas for membership to state judicial nominating commissions because of the state’s failure to prove an important or substantial interest to justify the gender-based classification. In *Back v. Carter*, the plaintiff, a white male former member of the Lake County Judicial Nominating Commission (JNC), argued that amendments to the Indiana Code that implemented race and gender quotas for JNC members violated his right to equal protection under the law.<sup>156</sup> The court held that “[s]ome degree of discrimination must have occurred in the particular field targeted by the classification before a gender-specific remedy applies.”<sup>157</sup> The court construed the interest nar-

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152. *Craig*, 429 U.S. at 197.

153. 518 U.S. 515, 532-33 (1996); see also Skaggs, *supra* note 148, at 1188.

154. *Virginia*, 518 U.S. at 533.

155. *Id.* (alterations in original) (citations omitted).

156. 933 F. Supp. 738, 746, 748 (N.D. Ind. 1996). The amendments to the law required that two attorney members, which were elected positions, be held by women and the remaining two seats be held by men. The same restrictions also applied to the JNC’s nonattorney appointed positions. See *id.* For the attorney positions, the top four candidates who received the most votes were elected to the JNC provided they satisfied the requisite racial and gender quotas. See *id.* at 747.

157. *Id.* at 757.

rowly, focusing on gender discrimination specific to elections to the JNC and not to the electoral franchise of women as a whole.<sup>158</sup> Even though not a single woman was successfully elected to the JNC up until that point, the court focused its analysis on state-sponsored discrimination rather than societal discrimination, claiming there was no “direct evidence of gender-based discrimination in this case” because there was “no evidence that women were prevented from registering and running for an attorney position on the JNC.”<sup>159</sup>

Similarly, *Mallory v. Harkness* involved a parallel fact pattern, in which a white male plaintiff argued that a Florida statute violated the Equal Protection Clause because it instituted racial and gender quotas for the appointed positions to the JNC for Florida’s Fourth District Court of Appeal.<sup>160</sup> The court in *Mallory* did not distinguish between the race-based and the gender-based quotas and instead used a strict scrutiny analysis to strike down the whole statute based on the racial classifications alone.<sup>161</sup> The court held that the State did not demonstrate a compelling interest because it failed to show evidence of prior discrimination by JNCs in the screening of the judges; a state interest in promoting diversity, without more, was insufficient.<sup>162</sup>

In both cases, the courts found that the use of the gender quota was not narrowly tailored to serve the state’s interest. In *Back*, the court held that the indefinite duration of the gender quota did not substantially relate to the State’s interest, noting that “a gender classification imposed indefinitely can outlive the interest that justifies its use.”<sup>163</sup> The court in *Mallory* also found the indefinite duration of the quota problematic.<sup>164</sup> That court further held that the statute was not narrowly tailored by pointing out that an absolute quota was not necessary when other, less intrusive means existed, and that the use of a quota was too inflexible.<sup>165</sup>

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158. *Id.*

159. *Id.* at 758.

160. See 895 F. Supp. 1556, 1557-58 (S.D. Fla. 1995), *aff’d*, 109 F.3d 771 (11th Cir. 1997).

161. See *id.* at 1559-60.

162. See *id.*

163. *Back*, 933 F. Supp. at 758-59.

164. See *Mallory*, 895 F. Supp. at 1560-62.

165. *Id.* at 1561-62.

The enactment of an electoral gender quota for members of Congress would likely face similar challenges under the Equal Protection Clause. Although the Supreme Court has recognized ameliorating past harms as a substantial interest that could uphold gender-based classifications, it may construe the government interest narrowly by focusing specifically on the election of women to Congress. Even though women were denied the franchise until 1920,<sup>166</sup> the Supreme Court may disregard this point as an insufficient showing of discrimination against women as the courts in *Back* and *Mallory* did. The Court could conclude that women have not faced any discrimination from the government in registering and running for office. This lack of discrimination does not amount to an exceedingly persuasive interest that can justify the need for an electoral gender quota. Even if the Court agrees that the desire to enhance the equal opportunity of women to run for Congress as a remedy for past injustices does qualify as a substantial interest, the use of a rigid quota in itself, even as a temporary measure, will likely be invalidated as not narrowly tailored to achieve this interest.

### *C. First Amendment Challenges to Legal Candidate Quotas*

In addition to the constitutional hurdles mentioned above, legal candidate quotas uniquely implicate associational freedoms protected by the First Amendment. In reviewing the different types of gender quotas, a reserved seats quota would set aside a certain number of seats in Congress that women were guaranteed to fill, whereas a legal candidate quota would require each political party to nominate a certain percentage of women as candidates in congressional races.<sup>167</sup> In other words, a reserved quota changes the apparatus of the government itself, whereas a legal candidate quota controls the behavior of political parties, and thus triggers scrutiny under the First Amendment.

Several decisions by the Supreme Court, known cumulatively as the *White Primary Cases*, ultimately sustained the federal government's right to constrain political parties' nomination of candidates

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166. U.S. CONST. amend. XIX.

167. See *supra* notes 18-21 and accompanying text.

in order to enforce the Fifteenth Amendment of the Constitution.<sup>168</sup> Initially, the Court favored protecting the associational rights of political parties. In *Newberry v. United States*, the Court held that Congress could not limit federal campaign expenditures during the primary elections process because such elections were considered a private activity in which political party members nominate their leader.<sup>169</sup> Consequently, the Elections Clause did not give Congress the power to regulate primary elections even though they inherently affected Congress's responsibility to protect voting rights.<sup>170</sup>

This tension came to a head when the Democratic Party, which essentially was the only political party in many southern states, excluded African Americans from voting in its primary elections. In *Grove v. Townsend*, the Court upheld the precedent in *Newberry*, asserting that the private associational rights of the Democratic Party allowed it to deny African Americans access to its primaries.<sup>171</sup> The Supreme Court then reversed course in *United States v. Classic*, which overruled the precedent set in *Newberry* by permitting federal regulation of primaries.<sup>172</sup> The Court justified its holding on the fact that primary elections are funded by the state and that public officials implement those elections.<sup>173</sup> The Court extended this logic to permit the regulation of white primaries in *Smith v. Allwright*, holding that, because primaries were essentially state actions, political parties could not avoid the Fifteenth Amendment by disenfranchising African American voters.<sup>174</sup> Thus, some precedent exists that allows the federal government to regulate the nomination process of political parties without infringing on their associational rights.

Mandating gender quotas, however, differs significantly from the precedent set in the *White Primary Cases* because Congress would not be regulating who can vote in the primary. Rather it would set

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168. See generally *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *Grove v. Townsend*, 295 U.S. 45 (1935); Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 58-59, 61-63, 66-68, 88 (2001).

169. See 256 U.S. 232, 257-58 (1921).

170. See *id.*

171. See *Grove*, 295 U.S. at 53-55.

172. See *Classic*, 313 U.S. at 327-29.

173. See *id.* at 311-13.

174. See *Smith v. Allwright*, 321 U.S. 649, 664-66 (1944).

a qualification as to who the party can and cannot nominate on the basis of gender. The narrow holding in *Smith* was limited to restricting the right to vote in primaries; the Court held that “[t]he privilege of membership in a party may be ... no concern of a State,” and the privilege transforms into a state action only when “that privilege is also the essential qualification for voting in a primary to select nominees for a general election.”<sup>175</sup> The Court was silent as to whether actions of the party are deemed state actions for anything beyond voting in primaries. Based on this limited holding, however, it is unlikely that Congress will be allowed to interfere in other matters, such as the qualifications parties set for membership, without infringing on the First Amendment rights of political parties.

### III. SOLUTION? CONSIDER VOLUNTARY PARTY QUOTAS

As mentioned above, any attempt by Congress to directly impose a gender quota, either in the form of reserved seats or as legal candidate quotas, would likely be rendered unconstitutional for multiple reasons.<sup>176</sup> One alternative, though, is for a party to implement a gender quota in its platform so that it must nominate a certain percentage of female candidates each cycle. The use of voluntary gender quotas would prove just as effective as the two former types of quotas in achieving the desired result of increasing female political representation in Congress.<sup>177</sup> Furthermore, the implementation of the quota by the party itself would avoid several constitutional hurdles because the party would not be a state actor.<sup>178</sup> However, persuading political parties to voluntarily adopt such a quota will likely be a challenge. Congress should incentivize the adoption of gender quotas by implementing a scheme, akin to Title IX, that conditions public funding of state political parties on the use of a gender quota.

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175. *Id.* at 664.

176. *See supra* Part II.

177. *See infra* Part III.A.

178. *See infra* Part III.B.

*A. Voluntary Party Quotas—Just as Effective*

The use of voluntary party quotas in several countries demonstrates that they are just as successful in increasing the representation of women in national legislatures.<sup>179</sup> Although voluntary party quotas are mostly associated with Western European countries,<sup>180</sup> currently, political parties in fifty countries employ such voluntary party quotas.<sup>181</sup> Thirty-two of them rank higher than the United States on the basis of political representation of women, with most of them attaining 25 percent or higher female representation in the lower house of their national legislatures.<sup>182</sup>

When such voluntary party quotas are implemented properly, without loopholes or merely symbolic compliance, countries see an especially high level of female representation.<sup>183</sup> Sweden, where the Social Democratic Party and left-leaning parties were among the first to adopt such quotas in the 1980s, provides a prime example of how to successfully implement voluntary party quotas.<sup>184</sup> Currently, the Social Democratic Party utilizes a “zipper system” quota,<sup>185</sup> whereas the Green and Left Parties both employ a 50 percent quota.<sup>186</sup> The Moderate Party also mandates that of the top four candidates on the party list, two must be women.<sup>187</sup> Consequently, Sweden ranks fourth in the world for female representation in its

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179. See *supra* Part I.B.

180. See Drude Dahlerup, *supra* note 10, at 145.

181. See QUOTAPROJECT, *supra* note 13.

182. *Women in National Parliaments: World Classification*, *supra* note 24.

183. See DAHLERUP & FRIDENVALL, *supra* note 16, at 29, 32.

184. See *id.* at 100-03. It is important to note, however, that the high percentage of women elected to Parliament in Sweden is not solely attributable to voluntary party quotas. Many of the center- and right-leaning parties have adopted soft quotas—nonmandatory targets and minimum recommendations—that allow them to consistently elect at least 30 percent female members from their party. *Id.* at 102. However, “the proportion of female parliamentarians ... is higher in parties with voluntary party quotas than in parties that do not have party quotas,” and that “the proportion of women in parties with quotas has remained relatively stable, while it has fluctuated to a greater extent in those parties that do not have quotas.” *Id.* at 103-04.

185. A zipper system quota requires alternating between one man and one women on the candidate party list for members of Parliament, essentially resulting in a 50-50 outcome. See *Sweden*, QUOTAPROJECT: GLOBAL DATABASE OF QUOTAS FOR WOMEN, <http://www.quotaproject.org/uid/countryview.cfm?Country Code=SE> (last visited Feb. 13, 2013).

186. See *id.*

187. See *id.*

National Parliament, boasting 45 percent of its members as women.<sup>188</sup>

Voluntary quotas are especially effective when a single party dominates the political system, such as the African National Congress (ANC) in South Africa.<sup>189</sup> The ANC's party statute mandates that no less than 50 percent of women be included in all elected bodies.<sup>190</sup> Moreover, the ANC controls two-thirds of all of the seats in the national legislature<sup>191</sup>—a fact that has likely contributed to women holding 45 percent of the seats in the National Assembly, ranking South Africa eighth worldwide for the number of women in national parliaments.<sup>192</sup>

Even if all of the major parties do not implement a party quota, the use of a quota by only one major party can also lead to large gains for female political representation. In the United Kingdom, for example, when the British Labour party adopted an all-women shortlist for the first time in 1996, women comprised 25 percent of all of the Labour Party candidates.<sup>193</sup> When the Labour Party was elected in 1997, after winning a landslide election with women comprising 24 percent of Labour MP's elected, the representation of women in the House of Commons jumped from 9 percent to 18 percent.<sup>194</sup>

In the American political context, which maintains a strong two-party system, the use of voluntary party quotas by either the Democratic or the Republican Party would likely yield similar increases for the overall representation of women in Congress.

### *B. Voluntary Party Quotas Are Constitutional*

As stated above, the enactment of legally mandated quotas by Congress will not survive constitutional scrutiny because of

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188. *Women in National Parliaments: World Classification*, *supra* note 24.

189. See DAHLERUP & FRIDENVALL, *supra* note 16, at 32.

190. African National Congress Constitution, Rule 6.1 (S. Afr.), available at <http://www.anc.org.za/show.php?id=207>.

191. See *South Africa*, QUOTAPROJECT: GLOBAL DATABASE OF QUOTAS FOR WOMEN, <http://www.quotaproject.org/uid/countryview.cfm?ul=en&country=246> (last visited Feb. 13, 2013).

192. *Women in National Parliaments: World Classification*, *supra* note 24.

193. See DAHLERUP & FRIDENVALL, *supra* note 16, at 113.

194. See *id.*



Congress's lack of authority to mandate such quotas,<sup>195</sup> as well as equal protection<sup>196</sup> and First Amendment concerns.<sup>197</sup> By sidestepping the government as the actor altogether, the enactment of quotas by the parties themselves avoids several of these constitutional problems. Because the actor is not Congress, voluntary, party-implemented quotas avoid the concern about Congress's lack of authority to enforce such quotas. Furthermore, because the political party is acting on its own accord, it is asserting its own First Amendment associational rights, and thus there is no third-party infringement on those rights. The main issue that remains is whether the political party, by virtue of its influence on election, takes on enough of a public role to qualify as a state actor and, consequently, whether the imposition of a gender quota as a candidate qualification infringes on the rights of male candidates.

In an analogous situation, a gender quota imposed by the Democratic Party in the form of its Equal Division Rule for delegates chosen for the Democratic National Convention withstood a constitutional challenge. In 1978, the Democratic Party enacted the Equal Division Rule, which established a "fifty-fifty" gender quota for the selection of its delegates to its national convention that still applies today.<sup>198</sup>

Although there is no precedent by the Supreme Court on the matter, the Fourth Circuit upheld the constitutionality of the Equal Division Rule in *Bachur v. Democratic National Party*.<sup>199</sup> In *Bachur*, members of the Maryland Democratic Party alleged that the Equal Division Rule infringed on their right to vote for the delegate of their choice.<sup>200</sup> In particular, they alleged that it was unconstitutional for the national party to require them to allocate their votes based on the gender of the candidates for delegates to the Democratic National Convention.<sup>201</sup> The court determined that the act of voting for a delegate constituted a state action given that

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195. See *supra* Part II.A.

196. See *supra* Part II.B.

197. See *supra* Part II.C.

198. See Lisa Schnall, Comment, *Party Parity: A Defense of the Democratic Party Equal Division Rule*, 13 AM. U. J. GENDER SOC. POL'Y & L. 381, 390 (2005).

199. See 836 F.2d 837, 842-43 (4th Cir. 1987).

200. *Id.*

201. See *id.* at 838.

voters used state machinery to conduct the elections.<sup>202</sup> The court, however, ultimately held that casting a vote for a delegate was far enough removed from the act of voting for a candidate for public office, and thus the quota did not infringe on the fundamental right to vote.<sup>203</sup> Furthermore, the court described the Equal Division Rule “as a means to broaden public participation in party affairs,” making it similar to a party’s right to open its primaries to unaffiliated voters, which was upheld in *Tashjian v. Republican Party of Connecticut*.<sup>204</sup> To hold otherwise would be to infringe on the “scope and sanctity of a political party’s associational rights.”<sup>205</sup>

In her student comment, Lisa Schnall arrived at the same conclusion as the Fourth Circuit by claiming that the Equal Division Rule should survive judicial scrutiny if it encounters further challenges.<sup>206</sup> She argued that such challenges are nonjusticiable under the political question doctrine, and even if they are justiciable, the claim will not involve a state action subject to constitutional challenges.<sup>207</sup> Further, Schnall assumed, for argument’s sake, that even if challengers could overcome these hurdles, the Equal Division Rule would not violate the Equal Protection Clause because the Democratic Party had an exceedingly persuasive justification for enacting it—its leadership was composed predominantly of males even though women made up over half of its members.<sup>208</sup> Here, the gender-based classification specifically addressed the harm of inequality among party leadership.<sup>209</sup>

Outside of the specific context of gender-based distinctions by parties, the Supreme Court has been reluctant to limit the First Amendment rights of political parties by interfering with their internal party regulations. For example, in *Tashjian*, the state Republican Party adopted a party rule that allowed for an open primary, which “permit[ted] independent voters—registered voters not affiliated with any party—to vote in Republican primaries for

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202. *See id.* at 839-40.

203. *Id.* at 841.

204. *Id.* at 843; *see also* *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986).

205. *Bachur*, 836 F.2d at 842.

206. *See* Schnall, *supra* note 198, at 383.

207. *See id.* at 396-402.

208. *See id.* at 405-06.

209. *See id.* at 408-09.

federal and statewide offices.”<sup>210</sup> The Republican Party consequently challenged a state statute that required voters in a primary to be registered for that respective party.<sup>211</sup> The Supreme Court struck the statute down, holding that the statute infringed on the private associational rights of the parties and that the compelling interests put forward by the state were “insubstantial.”<sup>212</sup> The Court emphasized that the “State ... may not constitutionally substitute its own judgment for that of the Party ... [whose] determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution.”<sup>213</sup> The Supreme Court, thus, grants individual parties great deference in managing their affairs due to the concern that meddling with their internal regulations and decisions will infringe on their First Amendment private associational rights.

The Eleventh Circuit extended the Supreme Court’s logic by allowing state parties to determine which candidates may participate in the party’s nomination process. In *Duke v. Massey*, the Georgia Republican Party excluded Republican presidential candidate David Duke, a controversial public figure who openly supported the Ku Klux Klan, from the presidential preference primary ballot.<sup>214</sup> Although Duke petitioned the Republican Party for reconsideration, the Party, acting pursuant to a Georgia statute, unanimously affirmed its decision to exclude him from the ballot.<sup>215</sup> Duke, along with voters who wished to support his candidacy, subsequently filed suit arguing that his exclusion from the ballot violated their rights under the First and Fourteenth Amendments.<sup>216</sup>

The court upheld the district court’s finding of summary judgment in favor of the defendants, holding that although the statute burdened the rights of Duke and his voters, the “state has a compelling interest in protecting the First Amendment rights of political organizations to define their identity and to select their

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210. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 210-11 (1986).

211. *See id.* at 211.

212. *Id.* at 217, 225.

213. *Id.* at 224 (citations omitted) (internal quotation marks omitted).

214. *See Duke v. Massey*, 87 F.3d 1226, 1229 (11th Cir. 1996).

215. *See id.*

216. *See id.*

candidates.”<sup>217</sup> The court further held that the burdens on the plaintiffs were minimal, claiming that although “Duke has a First Amendment right to express his political beliefs free from state discrimination ... he does not have a First Amendment right to express his beliefs as a presidential candidate for the Republican Party.”<sup>218</sup> Similarly, the court analogized that “Duke supporters do not have a First Amendment right to associate with him as a Republican Party presidential candidate,” and that the exclusion of Duke from the Republican primary ballot did not “foreclose[] [them] from supporting him as an independent candidate, or as a third-party candidate in the general election.”<sup>219</sup> Given the court’s reasoning in this case, any potential *legal* challenges from candidates or voters over a political party’s selection of its candidates in conformity with the party platform is unlikely to succeed.

In drawing inferences from the analysis above, political parties will likely be successful in implementing a candidate gender quota of their own. Although the parties will not likely be able to restrict candidates from contesting a primary based on gender,<sup>220</sup> they may adopt, as a party doctrine, a goal to put forth women candidates in at least 30 percent of all contested congressional races, and institute mechanisms to achieve these results. This will provide party leaders with the incentive to recruit more female candidates. The act of recruiting female candidates in itself will eliminate a crucial barrier women face in successfully pursuing a bid for public office<sup>221</sup> and will likely lead to more female members of Congress.<sup>222</sup>

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217. *Id.* at 1230; *see also id.* at 1232-33 (“Although Duke is correct in identifying his First and Fourteenth Amendment interests, those interests do not trump the Republican Party’s right to identify its membership based on political beliefs nor the state’s interests in protecting the Republican Party’s right to define itself.”).

218. *Id.* at 1234 (citations omitted).

219. *Id.*

220. *See supra* Part II.

221. *See supra* Part I.D.2.

222. *See supra* Part I.B.

*C. Congress Should Incentivize Voluntary Party Quotas, and It Has the Power to Do So*

The use of voluntary party quotas to increase the representation of women in Congress can be an effective tool, but the problem of encouraging political parties to adopt them in the first place still remains. Even though Congress cannot mandate gender quotas,<sup>223</sup> it can still incentivize political parties to adopt them. For example, Congress, through the auspices of its spending power, could provide federal campaign funds to political parties but make those funds contingent upon the parties enacting a voluntary gender quota.<sup>224</sup> Congress can further avoid the First Amendment concerns that accompany any public financing scheme for campaigns by making the program sufficiently voluntary and ensuring that parties would not be severely disadvantaged if they opted out of the program.

Legislation to incentivize the adoption of gender quotas by Congress can be modeled after Title IX of the Civil Rights Act of 1964, which prohibits discrimination based on sex in “any education program or activity receiving Federal financial assistance.”<sup>225</sup> Although Title IX does not explicitly call for a quota, the actual implications of the provisions provide a quota-like effect.<sup>226</sup> This is especially apparent in athletic programs at colleges and universities. The Department of Health, Education, and Welfare created a three-part test to determine whether athletic programs comply with the mandates; the quota-like tendencies stem from a heavy influence on the first part, which states that “all such [federal financial] assistance should be available on a substantially proportional basis to the number of male and female participants in the institutions’ athletic program.”<sup>227</sup> Because men have claimed that Title IX discriminates against them yet Title IX continues to survive

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223. *See supra* Part II.

224. *See* Title IX, 20 U.S.C. § 1681(a) (2006).

225. *Id.*

226. Darren Rosenblum, *Loving Gender Balance: Reframing Identity-Based Inequality Remedies*, 76 *FORDHAM L. REV.* 2873, 2882 (2008) (“Title IX relies on the entirely distinct methodology of requiring substantial proportionality to reduce and/or eliminate gender-related harm in education. While Congress clearly did not intend Title IX to be a quota, closer examination of Title IX’s provisions reveals quota-like aspects.”).

227. Title IX of the Education Amendments of 1972, Policy Interpretation, 44 *Fed. Reg.* 71,413, 71,414 (Dec. 11, 1979).

constitutional scrutiny,<sup>228</sup> Congress presumably could condition receipt of federal campaign finance on a party's adoption of a gender quota.

One main concern with the use of this scheme is whether it implicates the First Amendment associational rights of political parties. The Supreme Court has upheld the use of a public financing scheme that conditioned such funds to expenditure limits as constitutional.<sup>229</sup> Such schemes, however, are only constitutional if the acceptance of funds is sufficiently voluntary and not coercive.<sup>230</sup> A scheme is coercive if it provides too much financial assistance such that it gives complying parties a substantial advantage over those who do not comply and essentially forces a party to comply in order to remain viable.<sup>231</sup>

Thus, a scheme tying federal funds to the use of a voluntary gender quota must be specifically tailored to make compliance sufficiently voluntary. This is possible if federal funds are available to individual state parties, rather than to national parties, which will allow individual states to opt out. Determining compliance based on individual state parties will also allow funding to be tied to the population of each state. One possible scheme would be to give political parties that comply with the quota a certain amount, perhaps ten cents, for every resident of voting age in that state. As a result, state parties would receive an amount of money proportionate to the actual cost of running a campaign in that state. Furthermore, given the high costs of running campaigns,<sup>232</sup> this scheme may strike an ideal balance: the amount of money offered will be sufficient to incentivize parties to participate but still not significant enough to hinder a party who chooses not to accept the funds.

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228. See, e.g., *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 104-05 (4th Cir. 2011).

229. See *Buckley v. Valeo*, 424 U.S. 1, 85-86 (1976). *Buckley* held that campaign expenditure limits violated the First Amendment speech rights of candidates, *see id.* at 56-59, but found these limits permissible if they were merely a condition to receiving public financing, *see id.* at 57 n.65.

230. See *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 470 (1st Cir. 2000).

231. *See id.*

232. See *Who Benefits in Money Game, Democracy or Donors?*, NPR (Sept. 9, 2012, 4:24 PM), <http://www.npr.org/2012/09/09/160844969/who-benefits-in-money-game-democracy-or-donors>.

## CONCLUSION

The use of gender quotas in the United States is both a necessary and desirable means to increase the number of women in Congress. The biggest hurdle to enacting such a quota is ensuring that it is designed properly to survive constitutional scrutiny. In light of American jurisprudence in analogous situations, the Supreme Court will likely strike down reserved seats or legal candidate quotas mandated by Congress. Even though legally mandated quotas will not survive constitutional scrutiny, the same desirable effects can be achieved through voluntary party quotas. Political parties are well within their First Amendment associational rights if they voluntarily chose to adopt a gender quota. Although Congress cannot directly mandate such quotas, it can greatly incentivize them by tying public campaign funds to their use. Even though the United States may not be able to enact a typical quota structure employed by other countries, it can, with some legal maneuvering, produce the same desirable effect of increasing the number of women in Congress.

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\*J.D. Candidate 2013, William & Mary Law School; B.A. 2005, University of Virginia. I would like to thank my parents, Anwar and Farida Somani, for their unconditional love and support; my brothers, who bring laughter to my life; my boyfriend, who always inspires me to do better and reach for my goals; and my friends, who keep me sane even during the toughest of times, in particular the special few who share a certain table with me. Many thanks to the staff at IFES for introducing me to this topic and to the *Law Review* staff for their countless hours of hard work.