



**University of Maryland School of Law
Legal Studies Research Paper
No. 2007 - 40**

Gender and Justice:
Parity and the United States Supreme Court

Paula A. Monopoli



This paper can be downloaded free of charge at:
The Social Science Research Network Electronic Paper Collection
<http://ssrn.com/abstract=1028101>

GENDER AND JUSTICE: PARITY AND THE UNITED STATES SUPREME COURT

PAULA A. MONOPOLI*

I. INTRODUCTION

There is a deep concern among many American women that only one woman¹ remains on the United States Supreme Court. When Justice Sandra Day O'Connor was sworn in on September 25, 1981, most people never imagined that twenty-five years later there would still be only one woman on the Court. The assumption that progress would steadily continue until gender parity was achieved has proven to be wrong. It appears that it will be many more years before there is a critical mass of women sitting on the high court.² This is of great concern because the Court plays such a central role in American life. As one scholar said, "[t]he role of the Court in making and explaining its important decisions is to identify and define those values most fundamental in American culture."³ Given its central role, the Court should better represent the gender balance in American society.

There are more women than men in the United States⁴ and, thus, one might define our democracy as having a "dual nature." In order to better reflect this dual nature, the majority of the court should arguably consist of female justices.⁵

How can such a majority be achieved when the progress through the traditional nomination process has been so slow? In a number of other countries, voluntary or involuntary parity provisions have been used to achieve gender balance in the

* Professor of Law and Founding Director, Women, Leadership & Equality Program, University of Maryland School of Law; B.A. Yale College 1980, J.D. University of Virginia School of Law 1983. The author would like to thank Susan G. McCarty and Lindsey Miller for research assistance. She would also like to thank Marin Scordato and Mark Graber for their insights into many of the issues addressed herein.

1. That one woman is Justice Ruth Bader Ginsburg, appointed by President William Jefferson Clinton in 1993. For Justice Ginsburg's views on whether having women on the Court matters, see Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 Sw. U. L. Rev. 189 (2003).

2. Note that while the selection process for the United States Supreme Court (presidential appointment with the advice and consent of the Senate) differs from the selection process for the legislative and executive branches, the progress of women to elective office in the United States has also slowed. The projected equality of representation has not come to pass eighty-six years after the Nineteenth Amendment and forty years after the modern women's movement began in the 1960s. See generally Susan J. Carroll, *Women in State Government: Historical Overview and Current Trends*, in 36 COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 389 (2004).

3. Derek P. Langhauser, *An Essay: Nominations to the Supreme Court of the United States: Historical Lessons for Today's Debate*, 205 EDUC. L. REV. 553 (2006).

4. DENISE I. SMITH & RENÉE E. SPRAGGINS, U.S. CENSUS BUREAU, GENDER: 2000: CENSUS BRIEF 1 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-9.pdf>. The 2000 census listed 138,053,563 men and 143,368,343 women in the United States population. *Id.* at 3 tbl.1.

5. This article admittedly does not take into account the issue of "gender binarism" and the position that transgendered identity "exposes the fallacy of the presumption that humanity is composed solely of men and women." See Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119, 1136 n.74 (2006).

legislature when the rate of women elected to legislatures and parliaments has been seen as too slow. There are fewer examples of parity provisions with regard to the judiciary. South Africa is the dominant example. Its Constitution provides a conceptual foundation for a just balance on its courts.⁶ Americans are generally opposed to mandatory parity provisions or quotas because they violate basic notions of neutrality, i.e., that all citizens are equal and no one citizen should be given preference over another in a democracy. However, the time has come to consider such action to break through the social, structural and political barriers that keep women from fair representation at the pinnacle of the third branch of government. The justification for such action rests, in part, on the nature of the Court. The United States Supreme Court engages in significant policy-making and therefore it has an implicitly representative function.⁷

While mandatory parity provisions may be justifiably characterized as quotas, which can be anathema to liberals and conservatives alike, the fact that there are so few seats on the Court militates for quotas to achieve a representative balance on the Court. There is no adequate "market solution" to this issue since there are so few vacancies. Even when a President nominates a woman, it has become clear that interest groups can defeat such a nomination before it has even been considered by the Senate. Such interest groups have been effective in derailing recent presidential nominations in this regard.⁸ Without a more proactive approach, the United States Supreme Court may well be an all-male bench in the year 2050. This is especially true given the longer life spans Americans now

6. "S. Afr. Const. 1996 § 174(2); see *infra* notes 71-78 and accompanying text describing the non-mandatory position in the South African Constitution. Judith Resnik has noted that in the United States:

[W]ithin the federal system, selection processes for magistrate judges call for seeking applications from all qualified persons, with reference to "women, members of minority groups and individuals with disabilities." Delaware provides that its Supreme Court include jurists of different political parties, while other states make provisions for commissions nominating judges to have membership reflective of the diversity within their populations.

Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1582-1583 (2006) (citations omitted). Resnik also notes:

In England and Wales, reforms of the Office of Lord Chancellor and the creation of a new Supreme Court have been coupled with the establishment of a commission to make recommendations for judicial appointments. And, in Canada, after hearings in the House of Commons in 2004, the Attorney General promised to open the process of gathering nominations and of vetting potential appointees.

Id. at 1583 (citation omitted).

7. In fact, the Court has implicitly recognized the argument that diversity on the bench is essential and that they should be representative of the populace by holding that state court judges are "representatives" within the meaning of the federal Voting Rights Act. See *Chisom v. Roemer*, 501 U.S. 380, 404 (1991). See also John Copeland Nagle, *Choosing the Judges Who Choose the President*, 30 CAP. U. L. REV. 499 (2002).

8. See, e.g., George F. Will, Editorial, *Can This Nomination Be Justified?*, WASH. POST, Oct. 5, 2005, at A23; George F. Will, Editorial, *Defending the Indefensible*, WASH. POST, Oct. 23, 2005, at B7.

enjoy, a fact the Framers could have hardly envisioned when they conferred life tenure on justices.⁹

This essay proposes a conceptual framework for achieving parity on the Court through statutory reform or, in the alternative, by constitutional amendment.¹⁰ This would ensure that this important power center of government becomes gender balanced over the next generation. My normative argument for parity is grounded in the historic views of the Framers and the early leaders of the Republic, the significant value of symbolic representation, the instrumental value of women judges, and a political theory that embraces the dual nature of society and rejects a "monosexual democracy" as inconsistent with our values as a nation. One can look to historic evidence in favor of geographic diversity, empirical evidence as to the effect of women judges on decision-making, affirmative action jurisprudence and an expansive reading of the Nineteenth Amendment as the bases for a statutory parity provision.

Part II of this essay offers a unique proposal for either statutory reform or a constitutional amendment requiring that five seats be reserved for women. Part III explores how geographic diversity on the Court was viewed as essential in the early years of the Republic because a diversity of views was seen as central to the vitality and continued existence of the young nation. Part IV reviews the empirical evidence that women judges have both a symbolic value and an effect on case outcomes. Part V examines the constitutional and doctrinal bases for parity. Part VI makes the argument for why non-mandatory alternatives are insufficient. Part VII concludes that either a statutory amendment or a constitutional amendment is necessary to ensure the broad promise of full political participation under the Nineteenth Amendment to this nation's women.

II. A PROPOSED PARITY PROVISION FOR THE COURT

The Constitution provides that the "judicial Power of the United States . . . be

9. Alexander Hamilton considered the merits of a mandatory retirement age but rejected it, noting that few judges in his time "outlived the season of intellectual vigor. . . ." THE FEDERALIST NO. 79, AT 474 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Note that there is a large body of scholarship that proposes changing life tenure to a limited term for justices. See Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799, 800 (1986) (noting that "The identity of the individuals who sit on the United States Supreme Court controls to a great degree the decisions and opinions rendered by the Court."), and its progeny, listed in the response by Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407, 407-08 n.1 (noting that "[i]n recent years at least ten distinguished scholars (as well as two distinguished judges and a distinguished journalist) have proposed abolishing life tenure for Supreme Court Justices and replacing it with fixed terms of years in office.").

10. This essay is admittedly a thought experiment, given the practical difficulties of passing either a statute or a constitutional amendment. Neither approach has a strong likelihood of passage in a political system with such intransigent structural barriers to women's full political participation and political constraints on reform of the Court. See Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154, 1155 (2006) (arguing that the political forces that swirl around reform proposals conspire to prevent any significant reform. "The ash heap of history is piled high with reform proposals that have attracted no supporters.").

vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."¹¹ The Constitution further provides that the President may appoint Supreme Court justices only with the "Advice and Consent" of the Senate.¹² Admittedly, amending the Constitution itself to require gender parity would be a difficult process.¹³ Seeking a constitutional amendment guaranteeing parity on the United States Supreme Court would be slow and painstaking.¹⁴ The chance of passage and ratification would be slim, at best. However, an amendment may well be the only mechanism that does not raise constitutional concerns.

A more efficient vehicle for parity would be a statutory amendment. The statute that establishes the size of the Court is 28 U.S.C. § 1, which states that "the Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum."¹⁵ Consider the implications of amending 28 U.S.C. § 1 to read "The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, five of whom shall be female, and any six of whom shall constitute a quorum."¹⁶ Such a legislative enactment would guarantee gender parity on the court, reflecting the greater number of women than men in the population. Five out of nine seats would be reserved for well-qualified women from the state or lower federal courts or elsewhere.

11. U.S. CONST. art. III, § 1, cl. 1. The Judiciary Act of 1789 established the organization of the Court which came into existence on February 2, 1790. Langhauser, *supra* note 3, at 554 n.8. The Act sets the number of justices at nine. 28 U.S.C. § 1 (2000). The number of justices has been changed several times over the years from the first enactment which provided for six judges in 1789, seven in 1807, ten in 1863, reduced to eight in 1866 and finally nine in 1869. Langhauser, *supra* note 3, at 558.

12. U.S. CONST. art. II, § 2, cl. 2.

13. For example, note the many attempts to pass the Equal Rights Amendment which last failed to gain sufficient state ratification in the early 1980s. See MARY FRANCES BERRY, *WHY ERA FAILED* (1986). See also Vermeule, *supra* note 10, at 1170 (discussing President Roosevelt's court-packing plan and noting that a constitutional amendment "seems more suitable for structural reform yet may take too long to be an effective response to a crisis.").

14. For an interesting discussion of the legislation versus amendment debate in the context of the court-packing plan see Vermeule, *supra* note 10, at 1170-72 (noting that there was disagreement about the proper path among Roosevelt's advisors. Some felt that the crisis of the time required legislation while others felt that a constitutional amendment, though admittedly a protracted process, was the correct path).

The rationale for the last position [that an amendment was necessary] was never clearly stated. Although an amendment would be necessary if the bill were unconstitutional, the arguments to that effect were quite weak given the Reconstruction precedents in which Congress had manipulated the number of Justices at will Another, vaguer intuition seems to have been that it was inherently more suitable to pursue structural reform of the judiciary by amendment rather than by statute. The intuition . . . is that changing the rules of the judicial game by legislation is an attack on the referee by one of the players, and thus presumptively arises from partisan or self-interested motivations.

Id. at 1771.

15. 28 U.S.C. § 1 (2000).

16. Of course, such a provision might reserve fewer than five seats, depending upon what political compromises might be struck with regard to enactment of such a provision.

However, if there were constitutional concerns with Congress altering the qualifications for a national office, then a constitutional amendment that achieves a similar result would be the alternate means of achieving such parity.¹⁷

Neither the Constitution nor 28 U.S.C. § 1 say very much about the qualifications of Supreme Court justices, other than that they must act with “good behavior.”¹⁸ The process the Framers finally decided upon, appointment by the president with the advice and consent of the Senate, was the means by which the country would be assured competent justices. The attributes associated with being a well-qualified judicial candidate, as articulated by Alexander Hamilton, included “firmness,” “intellectual vigor,” “judicial discretion,” “independent spirit,” and “moderation.”¹⁹ People tend to also associate “consensus” with judges. While the ability to achieve consensus is often associated with women, many of the other attributes touted by Hamilton, like intellectual vigor and independent spirit, have masculine or agentic associations.²⁰

In practice, the Constitutional and statutory silence on qualifications has left a vacuum that has been filled by de facto requirements that implicate cognitive biases and their resulting gender schemas.²¹ In recent nominations, the public discourse has revolved around two de facto requirements in particular. The process now seems to require that the candidate be: (1) a “brilliant” graduate of an elite law school and (2) a sitting judge on a United States Circuit Court of Appeals.²² Of course, neither of these requirements was envisioned by the

17. See *Powell v. McCormack*, 395 U.S. 486, 522 (1969) (holding that Congress could not add to the constitutionally enumerated qualifications for its members, “which could be altered only by a constitutional amendment”); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (holding that the States could not alter the constitutionally enumerated qualifications for members of Congress, and that such qualifications could only be changed by amending the Constitution). While the Court is a different branch of government and these cases are thus not exactly on point, there might be an argument that the qualifications for the Court are also established in the Constitution and thus Congress may not add to them by statute. Note though that Congress has the ability to alter the number of justices, see note 11 *supra*.

18. Langhauser, *supra* note 3, at 558.

19. Langhauser, *supra* note 3, at 557-58 (citing Alexander Hamilton, *The Federalist No. 79, 78*, in JAMES MADISON, ALEXANDER HAMILTON, JOHN JAY, *THE FEDERALIST PAPERS* 421, 422 (Clinton Rossiter ed., 2003)).

20. See Carol Mueller, *Nurturance and Mastery: Competing Qualifications for Women’s Access to High Public Office?*, in *WOMEN AND POLITICS: ACTIVISM, ATTITUDES, AND OFFICE-HOLDING* 211 (Gwen Moore & Glenna D. Spitze eds., 1986) (finding that in a study of citizen preferences for women for President, Vice President, Convention Delegate or Supreme Court Justice that their association of mastery [masculine] attributes were highest with the offices of President and Vice President). “Correlations for the nurturance factor [traditionally female attributes] are highest for supreme court justices.” *Id.* at 221.

21. Cognitive bias has been defined as “any of a wide range of observer effects identified in cognitive science, including very basic statistical and memory errors that are common to all human beings . . . and drastically skew the reliability of anecdotal and legal evidence.” Online Encyclopedia, Cognitive Bias, http://www.onlineencyclopedia.org/c/co/cognitive_bias.html (last visited Jan. 31, 2007).

22. One might also note that the trend toward requiring graduation from an elite law school may hold the risk of reducing diversity of ideas and experiences as well as suppressing gender diversity. See William P. LaPiana, Editorial, *A Narrow Path to the Court*, WASH. POST, July 22, 2005, at A23.

Framers as essential to a seat on the Court.

Both of these criteria pose structural problems for women ascending the Court in significant numbers since women are rarely described as "brilliant"²³ and they hold few seats on United States Courts of Appeal.²⁴ As de facto prerequisites for the Court, both the masculine attribute of "brilliance" and a Court of Appeals seat have a disparate impact on the likelihood that women will be nominated for the Court.²⁵ Thus, in evaluating whether a parity provision (either by statute or constitutional amendment) is justified, one must first look to the views of the Framers and early leaders of the Republic about the value of diversity on the Court.

III. THE HISTORIC ARGUMENT FOR PARITY ON THE COURT

Historically, geographic diversity was clearly deemed important for the court:

Geographic diversity also used to be very important in the selection process. When President Madison sought a replacement for Justice Cushing of Massachusetts, he turned to Joseph Story only after Levi

23. See, e.g., Virginia Valian, *Beyond Gender Schemas: Improving the Advancement of Women in Academia*, 20 *HYPATIA* 198 (2005) (describing study where writers of letters of recommendation for women used quantitatively fewer "stand-out adjectives" than in letters for men) (citing Francis Trix & Carolyn Psenka, *Exploring the Color of Glass: Letters of Recommendation for Female and Male Medical Faculty*, 14 *DISCOURSE & SOC'Y* 191 (2003)). For a discussion of the gendered nature of attributes among citizens, see Paula A. Monopoli, *Gender and Constitutional Design*, 115 *YALE L.J.* 2643, 2643-44 (2006). One might suggest that this trend toward using "brilliance", an attribute most often associated with men, as a qualification may well have a disparate impact on women holding a position deemed increasingly important to achieving a seat on the Court, that of United States Supreme Court clerk. See David H. Kaye & Joseph L. Gastwirth, *Where Have All the Women Gone? "Random Variation," in the Supreme Court Clerkship Lottery 1* (November 10, 2006) (unpublished manuscript), available at <http://ssrn.com/abstract=944058> (describing the fifty-percent drop in the number of women clerks in the past year). Note also that this disparate impact is not only evident in the paucity of female Supreme Court clerks, but in the low percentage of women who argue before the Court. Justice Ginsburg notes that "only around 15 percent of the lawyers who argue before the Court are women." Ginsburg, *supra* note 1, at 198. Much emphasis was put on Chief Justice John Roberts having argued many times before the Court as an indicator of his qualifications for a seat on the Court. I would suggest that, again, there is a disparate impact in the intersection of such de facto requirements and the small size of the pool of women who fit that attribute or qualification.

24. According to the American Bar Association, only 23.6% of federal circuit courts of appeal judges are women. AMERICAN BAR ASSOCIATION COMMISSION ON WOMEN, *A CURRENT GLANCE AT WOMEN IN THE LAW 2006*, available at <http://www.abanet.org/women/CurrentGlanceStatistics2006.pdf>.

25. This trend implicates gender schemas or stereotypes which explain much of the slow advancement of women in both the professions and in society. See generally Virginia Valian, *The Cognitive Bases of Gender Bias*, 65 *BROOK. L. REV.* 1037, 1044 (1999) [hereinafter Valian, *Cognitive Bases*].

The main answer to the question of why there are not more women at the top is that our gender schemas skew our perceptions and evaluations of men and women, causing us to overrate men and underrate women. The small daily events in which men get a slight advantage add up over the long haul to put them at a large advantage relative to women.

Id. at 1045. Most recently, gender schemas and cognitive bias were salient in the withdrawal of President George W. Bush's nominee, Harriet Miers. See *infra* notes 89-91 and accompanying text.

Lincoln—and then John Quincy Adams—declined the invitation. All three individuals were residents of Massachusetts. That was no accident, because Madison insisted that the nominee be from a New England state. It is only quite recently that Presidents have, with regularity, ignored the custom of geographic diversity.²⁶

The early leaders of the young nation understood the value of diversity of life experience and political interests on the bench. That understanding expressed itself in the adherence to geographic diversity in presidential appointments. One scholar has noted the rationale behind this adherence:

[T]here is a virtue in selecting judges belonging to different groups within the state or the nation. The benefit can be to the court if one believes that the inclusion of such diversity improves the work of the court itself. The benefit can also extend to the groups themselves if their perspective is included within the judiciary. The Court has implicitly recognized the force of this model by holding that state court judges are “representatives” within the meaning of the federal Voting Rights Act.²⁷

This view with regard to the representative aspect of state courts is even stronger when applied to the United States Supreme Court, given that its opinions have significant policy implications for all Americans. The early leaders of the Republic understood that for the Court’s decisions to retain their legitimacy among the American people, the people must feel fully represented in that institution of government. These values, promoted by the informal system of nominating justices with geography in mind, can and should extend to gender balance on the Court.

It would have been inconceivable for a woman to have been nominated to the United States Supreme Court in the late eighteenth and early nineteenth century. They would have been deemed ineligible to participate in civil governance in any branch and women did not have the right to vote.²⁸ However, most Americans would agree that the qualifications for the Court should evolve to reflect changing norms. This is particularly true given the recent understanding that subtle, cognitive bias is a significant barrier to women ascending to leadership positions in government as well as the private sector.²⁹ If the original appointment process

26. Ronald D. Rotunda, *Innovations Disguised as Traditions: A Historical Review of the Supreme Court Nominations Process*, 1995 U. ILL. L. REV. 123, 125-26 (footnote omitted).

27. Nagle, *supra* note 7, at 503 (footnote omitted).

28. For a similar observation in a different context, see CATHARINE MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 289 (2005) (observing that “[t]wo unimaginable things to the men who designed our governmental institutions were the mass media and women speaking in public. The dominance of the media over public discourse and the presence of women’s voices in that discourse were equally unthinkable to them.”).

29. See generally Valian, *Cognitive Bases*, *supra* note 25.

crafted by the Framers was intentionally fluid, one might argue that they contemplated that changing norms could be reflected in the process in future generations. Thus, providing for gender as a criterion is consistent with the approach of the Framers and their genius in allowing for changing norms to guide nominations. It is also consistent with the view of the early leaders of the republic that diversity on the Court was an important value.

The presence of women on the bench provides the kind of diversity of thought and experience that is essential to a well-balanced Court.³⁰ In addition to bringing a wealth of different experience to their decisionmaking, five women on the Court would provide the kind of symbolic value to other women and to men that is essential in breaking down the intractable gender schemas that slow the progress of American women.³¹

IV. THE SYMBOLIC AND INSTRUMENTALIST ARGUMENTS FOR PARITY

There is empirical evidence that women's presence in positions of leadership has a positive impact on women's advancement in society.³² Clearly the mere presence of a Sandra Day O'Connor on the Court had an effect on women's ability to see themselves as judges.³³ A number of women have been encouraged to persevere despite barriers, because they now see women as partners in law firms, judges, senators, congresswomen, law faculty and in other powerful positions. In addition to encouraging more young women to aspire to positions of leadership, some scholars note that achieving a critical mass of women holds the

30. For a similar proposal to increase diversity on the Court by increasing the number of justices from nine to fifteen, see Angela Onwuachi-Willig, *Representative Government, Representative Court? The Supreme Court as a Representative Body*, 90 MINN. L. REV. 1252 (2006). Onwuachi-Willig cites a number of scholars for the proposition that diversity is essential to the judiciary, including Sylvia Lazos Vargas who "relies on the reasoning in *Grutter v. Bollinger* to argue that diverse perspectives and the value of diversity in improving learning and education through a robust exchange of ideas apply equally to the judiciary." *Id.* at 1264 (citing Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That is Inclusive? What Grutter v. Bollinger Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101, 143-48 (2004)). Onwuachi-Willig also cites to Judge Richard Posner for the proposition that a homogeneous judiciary is "unrepresentative, blind to many important issues, adrift from the general culture, quite possibly extreme, and on all four counts deficient in authority and even legitimacy." *Id.* at 1265 n.64 (quoting RICHARD A. POSNER, *LAW, PRAGMATISM AND DEMOCRACY* 354 (2003)). She also cites Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 411 (2000) and Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality, and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 124-27 (1997) ("asserting that racial minorities could seek to compel states to adopt affirmative action judicial selection plans"). *Id.* at 1265 n.64 & 1253 n.6.

31. *Id.* at 1261 n.45 (citing Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 592-616 (1986)) (noting that Sherry argues that Justice O'Connor's gender informed her decision-making, an observation the Justice O'Connor herself has often resisted).

32. JENNIFER L. LAWLESS & RICHARD L. FOX, *IT TAKES A CANDIDATE: WHY WOMEN DON'T RUN FOR OFFICE* 6 (2005).

33. See Stephen G. Breyer & Ruth V. McGregor, *A Tribute to Justice Sandra Day O'Connor*, 119 HARV. L. REV. 1242, 1246 (2006).

promise of reducing gender bias and altering performance benchmarks.³⁴ Political scientists Jennifer Lawless and Richard Fox have noted that “[p]olitical theorists point to symbolic representation and the role model effects that women’s presence in positions of political power confers to women citizens.”³⁵

The instrumentalist argument for parity is based on the evidence that having women on the bench leads to different outcomes in certain kinds of cases. The presence of female judges also neutralizes the gender bias of male judges in such cases. While the research on the impact of gender on case outcomes has been somewhat mixed, recent studies have demonstrated a statistically significant connection between women sitting on the bench and outcomes in cases that are of particular importance to women, such as Title VII cases.³⁶ For example, in a recent study published in 2005, Jennifer Peresie states:

The gender impact I observed is significant. Panels with at least one female judge decided [Title VII] cases for the plaintiff more than twice as often as did all-male panels . . . increasing gender diversity of the federal appellate bench . . . will have important substantive implications. . . . The results indicate that participants in the diversification debate should acknowledge—and perhaps defend—the substantive implications of their positions for judicial outcomes in gender-coded

34. KATHLEEN HALL JAMIESON, *BEYOND THE DOUBLE BIND: WOMEN AND LEADERSHIP* 141 (1995) (“According to psychologists, women are at highest risk of stereotypic appraisal when they form less than 15 to 25% of a management level. When women move in large numbers into upper management, as in many professions they are now poised to, the evaluative norms will change.”).

35. LAWLESS & FOX, *supra* note 32, at 6 n.10 (noting that “several political scientists have attempted empirically to demonstrate the effects of symbolic representation.”).

36. Those studies include: Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH. J. GENDER & L. 113 (2005); Sue Davis et al., *Voting Behavior and Gender on the U.S. Court of Appeals*, 77 JUDICATURE 129, 131-32 (1993); Jon Gottschall, *Carter’s Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165, 208 (1983); Robert J. Gregory, *You Can Call Me a “Bitch” Just Don’t Use the “N-Word”: Some Thoughts on Galloway v. General Motors Service Parts Operations and Rodgers v. Western-Southern Life Insurance Co.*, 46 DEPAUL L. REV. 741, 742 (1997); Gerald S. Gryski et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143, 153 (1986); John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 676 (1971); Elaine Martin, *Men and Women on the Bench: Vive La Difference?*, 73 JUDICATURE 204, 208 (1990); Lynn Hecht Schafran, *Not From Central Casting: The Amazing Rise of Women in the American Judiciary*, 36 U. TOL. L. REV. 953 (2005); Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 433 (1994); Carl Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 178 (1990); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596 (1985); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005); Susan Moloney Smith, Comment, *Diversifying the Judiciary: The Influence of Gender and Race on Judging*, 28 U. RICH. L. REV. 179 (1994); Sarah Westergren, Note, *Gender Effects in the Courts of Appeals Revisited: The Data Since 1994*, 92 GEO. L.J. 689, 690 (2004).

cases. Judges' gender matters both to what the bench looks like and to what it decides.³⁷

In addition, one scholar studied the voting patterns of the Minnesota State Supreme Court, the first high court in the United States to achieve a majority of women justices.³⁸ She found that "while female justices will not be in agreement with one another all of the time or across all categories of cases, in areas of law affecting women as a category we can expect higher levels of agreement between the female justices."³⁹ Studies like these establish the basis for a persuasive instrumentalist argument in favor of mandatory parity on the Court.

Thus, both symbolic and instrumentalist arguments grounded in empirical evidence favor a mandatory parity provision on the Court. The presence of more women would have a demonstrably positive effect on the number of women in leadership positions as well as increasing substantive justice and reducing bias among other male justices. However, one might argue that the means proposed to reach such normatively desirable ends, parity provisions or quotas, are inherently anti-democratic because they prefer one group in society over another. The next section argues that such means are justified and are actually consistent with full civic membership for women in a democracy.

V. THE CONSTITUTIONAL AND DOCTRINAL BASES FOR PARITY

A mandatory provision for parity on the Court may be grounded in an expansive reading of the Nineteenth Amendment. Some scholars have argued that that Amendment guaranteed full political participation for women, not just

37. Peresie, *supra* note 36, at 1787.

38. Linda S. Maule, *A Different Voice: The Feminine Jurisprudence of the Minnesota State Supreme Court*, 9 BUFF. WOMEN'S L.J. 295 (2000-2001) (noting the Minnesota Supreme Court became majority female in 1991). By the time the article was published, the Minnesota Supreme Court was no longer majority female. *Id.* at 295. Since then, several states have had female majorities in their highest courts, including New York, Ohio, and Washington. See *Women Rising in Ranks of Court Leadership*, CENTER COURT, Spring 2003, http://www.ncsconline.org/D_Comm/Projects/CenterCourt/CenterCourtVol6-2/Women_Rising.htm. The Massachusetts Supreme Judicial Court was majority female from September to December of 2000. Frank Phillips, *Ex-Federal Prosecutor Seen as Cellucci's Choice for SJC*, BOSTON GLOBE, Dec. 12, 2000, at B2. The Wisconsin Supreme Court was briefly majority female in 2003, until one female Justice was appointed to the federal bench that same year. See WISCONSIN BLUE BOOK 2005-2006, at 184 (2005), available at <http://www.legis.state.wi.us/lrb/bb/05bb/index.htm>. Currently, only New York and Ohio remain majority female. See THE AMERICAN BENCH: JUDGES OF THE NATION 1671, 1930 (17th ed. 2006).

39. Maule, *supra* note 38, at 315. Maule also found that:

[A]s the number of women increased on the court, so to [sic] did their willingness to express themselves. Although the level of consensus for the court as a whole increased as more women were placed on the bench, the female justices also began to dissent more frequently. Thus, increasing the number of women on the court apparently helped to make the court both more collegial and a safer place for women justices to express dissonance.

Id.

the vote.⁴⁰ Reva Siegel and Akhil Amar have argued that in fact the Nineteenth Amendment provides a constitutional foundation for a broad view of “equal citizenship in a democratic polity.”⁴¹

Siegel observes that, “if we read the Nineteenth Amendment in light of the normative concerns that prompted its passage. . . we would recognize that the Nineteenth Amendment has implications for practices other than voting.”⁴² This includes the right to hold political office among other rights. She notes that some scholars have argued that the women’s suffrage movement “demonstrates that political rights embrace group-based as well as individual interests.”⁴³

Amar has made similar arguments that the Nineteenth Amendment guaranteed full political participation for women, not just the vote:

Thus, the Nineteenth Amendment can be understood as protecting more generally full rights of political participation. For example, let’s ask the question, “Can a woman be president today?” If we’re narrow about it, we look at Article II, and find that the Constitution says “he” over and over again to describe the president. At the Founding, presidents are always analogized to kings and never to queens—yet we know that the Founders had experience with queens. (Virginia is named after one, William and Mary is named after another.)

But however plausible that kind of Originalist argument might be under the original Constitution, it makes no sense after the Nineteenth Amendment. The Nineteenth Amendment is about women’s equal political participation, even though it doesn’t explicitly modify the language of Article II.⁴⁴

Darren Rosenblum has suggested that the work of scholars like Siegel and Amar and the constitutional arguments they make based upon “the Nineteenth Amendment and its connections to the Fourteenth and Fifteenth Amendments” provide a constitutional foundation for the adoption of parity provisions for legislative office here in the United States.⁴⁵ The proposal in this article for a

40. See Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL’Y 465, 472 (1995) (arguing that “the Nineteenth Amendment can be understood as protecting more generally full rights of political participation”). For a recent and comprehensive discussion of the relationship between the Nineteenth Amendment, women, and civic membership, see GRETCHEN RITTER, *THE CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER* (2006).

41. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1046 (2002); see Amar, *supra* note 40, at 472. Siegel notes the paucity of scholarship in this area. See Siegel, *supra*, at 950 n.2.

42. Siegel, *supra* note 41, at 1039.

43. *Id.* at 950 n.2 (citing Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 956-72 (1998)).

44. Amar, *supra* note 40, at 472.

45. Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119, 1186 (2006). Rosenblum cites to Amar’s work on the Fifteenth Amendment that describes that Amendment as extending to broader political rights than

provision guaranteeing parity on the Court is admittedly an extension of Rosenblum's argument that there is a constitutional foundation for parity provisions with regard to legislative office. Legislative office is more clearly a representative institution in American government, while there is debate about whether the Court should have any representative function. However, as noted above, the Court has recognized a representative aspect of state court judges and the unique role of the Court as policy-maker provides a basis for arguing that it should be representative of the broader public. As Siegel observes, "Our relation to past acts of constitution-making is . . . irreducibly normative. Even if past generations of Americans have shaped the constitutional order we inherit, we continually make judgments about the ways in which we are prepared to adopt their choices and actions as our own."⁴⁶ Similarly, while the Framers and early leaders of the republic never envisioned women on the Court, this generation should not be bound by those views but rather should better mirror a contemporary understanding of the structural barriers to full political participation by women. This includes their participation as members of the Court. As Siegel suggests, it is appropriate to consider new knowledge, like the impact of gender schemas, in shaping our constitutional order.⁴⁷

If one embraces this expansive interpretation of the Nineteenth Amendment, then a parity proposal for the Court is an effective tool to achieve the promise of full political equality for American women. Mandatory parity proposals are admittedly a form of affirmative action. In the case of the United States Supreme Court, affirmative action is an appropriate response given the notable lack of any progress in appointing more women to the Court over the past twenty-five years. Affirmative action programs have been one of the most important means to achieving gender equality in the areas of education and employment. In this country however, such initiatives have not been used to any significant degree in the political realm.⁴⁸

simply the vote. *Id.* at 1185 (citing Akhii Reed Amar, *The Fifteenth Amendment and "Political Rights,"* 17 CARDOZO L. REV. 2225, 2226 (1996)). Most importantly, Amar argues that the "cluster of political rights" includes the right to hold political office. Amar, *supra*, at 2226. This argument extends to gender after passage of the Nineteenth Amendment. See Rosenblum, *supra*, at 1185.

46. Siegel, *supra* note 41, at 1034.

47. Siegel notes that part of the opposition to granting women the vote was the idea that they were already represented by the head of their household, their husband. Siegel, *supra* note 41, at 982-83. It is interesting to note that a version of such "virtual representation" mirrors the status quo on the Court today. Although women are more than fifty percent of the population, the current membership on the court—eight men and one woman—in essence requires such a virtual representation argument to grant legitimacy to the Court's decisions.

48. Note that quota systems to achieve political equality for women in elective office are now common in the international realm:

Forty-one countries have constitutional quotas or electoral quota laws in effect as of 2004, according to the Global Database of Quotas for Women. In four of these countries, the regulations are only valid for the local or regional political bodies. . . .

In many of the [forty-one] countries quota legislation was introduced in the 1990s, often after strong pressure by women's organizations. International organizations have also

There has been a long debate about whether or when affirmative action programs constitute "quotas." In a recent article exploring parity in the context of elective office, Rosenblum notes that "[a]cross the political spectrum, conservative, liberal, and critical legal thinkers in the United States generally reject the idea of quotas. . . and parity arouses such broad opposition in the United States because it is viewed as a quota."⁴⁹ Liberal theorists object to quotas for three reasons: (1) they are inconsistent with the constitutional doctrine of neutrality, i.e., no one group deserves better treatment than another; (2) they raise the Rawlsian question of how to choose which group to prefer and are inconsistent with the answer under such an analysis, i.e., that none should be preferred; and (3) they are inconsistent with the concept that ideas rather than identity are what matters in assessing whether there is adequate representation.⁵⁰ Critical theorists object to quotas on the grounds of tokenism and as a rejection of essentialism,⁵¹ "the metaphysical theory that an object or person's essential properties can be distinguished from those that are incidental to it, or learned."⁵² Quotas also implicate the concept of "descriptive representation."⁵³ Descriptive representation is "concerned with representatives' characteristics, what they are or are like, 'on being something rather than doing something.'"⁵⁴ Conservative theorists would likewise object to parity legislation as inconsistent with principles of equality of opportunity rather than outcome.⁵⁵

Would a mandatory parity provision for the Court be properly characterized under all of these modes of thought as anti-democratic? One might argue that the doctrine of constitutional neutrality requires equality of opportunity for all regardless of identity and a mandatory parity provision for the Court would violate that principle. One could also argue that quotas are indeed essentialist

advocated the inclusion of gender quotas in new constitutions, like the one of Rwanda and recently in the constitution of Iraq. An important motive to make these changes is the notion that democracy is based upon the participation of all citizens in political decision making and, secondly, having greater numbers of women in politics is a clear sign of importance attached to gender equality.

Monique Leyenaar, Briefing, *Achieving Political Gender Balance: Use of Parity Quotas and Quota Laws*, WIDE ANGLE (July 2004), http://www.pbs.org/wnet/wideangle/printable/rwanda_briefing_print.html (footnote omitted). See also International Institute for Democracy & Electoral Assistance (IDEA) & Stockholm University, Global Database of Quotas for Women, <http://www.quotaproject.org> (last visited Nov. 28, 2006).

49. Rosenblum, *supra* note 45, at 1133.

50. *Id.* at 1133-34.

51. *Id.* at 1135-36.

52. *Id.* at 1124.

53. *Id.* at 1135.

54. Georgia Duerst-Lahti & Dayna Verstegen, *Making Something of Absence: The "Year of the Woman" and Women's Representation*, in GENDER POWER, LEADERSHIP AND GOVERNANCE 213, 216 (Georgia Duerst-Lahti & Rita Mae Kelly eds., 1995).

55. See Robert H. Bork, *Federalist Society Symposium: Tenth Anniversary Banquet Speech*, 13 J.L. & POL. 513, 520 (1997) (characterizing the Court as having taken sides with liberals who support "radical egalitarianism, which is a shift from the equality of opportunity to the equality of results—hence, affirmative action, quotas, multi-culturalism.").

because they invoke the idea that women are different than men and that difference is salient. However, some scholars have looked to other countries to explore how they have grappled with and resolved these questions in favor of parity. A mandatory parity provision for the Court benefits from such a comparative approach.

In his examination of the French political system, Rosenblum notes that France managed to reconcile its version of neutrality, "universalism", with a parity provision for elective offices. The concept of "the universal," that all citizens should be treated equally without regard to membership in any particular group, was derived from the eighteenth-century enlightenment ideas that inspired the French Revolution.⁵⁶ However, Rosenblum notes that many French feminists decried what they called a crisis of democracy as a result of the political gender inequality that existed in that country.⁵⁷ In June 2000, with the support of seventy percent of the French population, the Constitution of the Fifth Republic of 1958 was amended by law.⁵⁸ This law requires parties to name women to half of their candidacies.⁵⁹ If they did not, they stood to lose entirely the ability to be listed on ballots or to lose financial support by the state. The law has had varying results, with more success at the local level than at the national assembly.⁶⁰

The groups supporting parity quotas in France succeeded in overcoming philosophical opposition to parity. That opposition was grounded in the idea that parity was inconsistent with the revered concept of "universalism." In response to this opposition, parity advocates argued for a redefinition of universalism itself and asserted that "humanity was dual, instead of focusing on sex differences."⁶¹ They argued that the universal was fundamentally male and that "the universalism of the rights of man, sexless, becomes very quickly the moment to valorize the rights of the virile man, while pretending that it's about all of humanity."⁶² Supporters of parity embraced a view of civic membership in which women were fundamentally different from men and that difference warranted separate

56. Rosenblum, *supra* note 45, at 1153.

57. *Id.* at 1143.

58. *Id.* at 1144.

59. *Id.*

60. *Id.* at 1146. See Catherine Fletcher, "Il Reste des Bastille à Prendre": Gender and Equal Opportunities in France, 13 MODERN & CONTEMP. FRANCE 85, 90-91 (2005) (remarking on the "disappointing" gains in national political parity, with women constituting only 38% of Assembly candidates in 2002, and only 12.3% winning election, despite increasing at the local level to nearly half of elected municipal councilmembers); Sheila Perry, *Gender Difference in French Political Communication: From Handicap to Asset?*, 13 MODERN & CONTEMP. FRANCE 337, 340 (2005) (cautioning that women have only obtained "near parity" only in regional assemblies, and have "relatively low representation [10.8%] . . . in the municipal and regional executives"); see also Claudie Baudino, *Parity Reform in France*, 20 REV. POL'Y RES. 385, 396-97 (2003) (assessing the effect of parity provisions and noting that "indirect financial incentives" were not enough to "effectively bring[] women in to the electoral arena.").

61. Rosenblum, *supra* note 45, at 1162.

62. *Id.* (quoting Elizabeth Sledziewski, *Rapport sur les Ideaux Démocratiques et les Droits des Femmes*, in JANINE MOSSUZ-LAVAU, FEMMES/HOMMES: POUR LA PARITÉ 67 (1998)).

representation.⁶³

Similarly, in proposing mandatory parity for the Court one must make a philosophical shift. This shift moves away from viewing the doctrine of neutrality as inconsistent with any recognition of difference among citizens to one which acknowledges that some differences are so fundamental that they must be recognized in order to achieve an equal playing field. Gender is one such difference.⁶⁴ That reality must be given expression in order to achieve full civic participation for women. Requiring more than fifty percent, or five out of nine seats, on the Court to be held by women could be grounded in such a reconceptualization of American democracy—one in which both genders make up the whole.

A parity provision would extend this idea to a mandatory provision that ensures gender-balanced representation on the Court. While this approach risks being characterized as essentialist, it is the only approach guaranteed to achieve parity within a reasonable timeframe.⁶⁵ Some would argue that the Court is not a representative body like the legislature. However, it is clear that the United States Supreme Court differs from other courts.⁶⁶ It is vested with broad policy-making authority through its power to review legislation, and thus should be seen as having some representative function. As noted above, the early leaders of the nation acknowledged this when they sought geographic diversity in appointments to the Court.

Parity provisions are solidly within the doctrinal framework of affirmative action, the mechanism used in the past forty years to achieve full participation by women in the workplace and in educational institutions. There is a well-developed jurisprudence approving the use of certain kinds of affirmative action to remedy past racial and gender discrimination, including most recently *Grutter v. Bollinger*⁶⁷ and *Gratz v. Bollinger*.⁶⁸ While recent cases have rejected the use

63. *Id.*

64. In addition, American support for the inclusion of parity provisions in the Iraqi Constitution is arguably consistent with making similar efforts here at home. See Ellen Knickmeyer, *U.S. Envoy Presses Iraq to Ensure Equal Rights*, WASH. POST, Aug. 7, 2005, at A18.

65. See Rosenblum, *supra* note 45, at 1161.

Together, women and men combine to define and perpetuate the species. Together, they should combine in equal numbers to organize communal life. . . not in the name of the difference of one sex in relation to the other, but in the name of their dual participation in the human race.

Id. (quoting FRANÇOISE GASPARD ET AL., *AU POUVOIR, CITOYENNES!: LIBERTÉ, ÉGALITÉ, PARITÉ* 2 (1992)) (alteration in original).

66. "Once we recognize that the Supreme Court is America's authoritative faculty of political theorists and not a mere court of law, then we can readily see that the necessity for formal legal training is no greater for Supreme Court Justices than for officers of the other branches of government." Arthur S. Miller & Jeffrey H. Bowman, *Break the Monopoly of Lawyers on the Supreme Court*, 39 VAND. L. REV. 305, 306 (1986).

67. *Grutter v. Bollinger*, 539 U.S. 306 (2003). See also John C. Duncan, Jr., *Two "Wrongs" Do/Can Make a Right*, 43 BRANDEIS L.J. 511, 529-30 (2005) ("Grutter claimed that the law school had 'discriminated against her based on race in violation of the 14th Amendment, Title VI of the Civil Rights

of explicit quotas in higher education to achieve equality, many commentators have noted the fluid line from formal quotas, to point systems used by the University of Michigan in *Gratz*, to flexible systems like those used by the University of Michigan Law School and upheld by the Court in *Grutter*.⁶⁹ In a recent article, Sylvia Lazos Vargas makes a persuasive argument "that *Grutter v. Bollinger* . . . [held] that it is a legitimate state objective for key democratic institutions, like a public university (or in the instant case a judicial body), to want to achieve discursive diversity."⁷⁰ Lazos Vargas' observation is germane to the proposal for a mandatory parity provision for gender balance on the Court offered in this article. It is a legitimate goal of government to engage in action intended to enhance diversity in the dialogue that goes on in classrooms and also in judicial chambers. As Lazos Vargas argues, *Grutter* lays the groundwork for programs to enhance diversity based on their furtherance of the goal of fostering democratic principles through enhanced discourse. The mandatory parity proposal herein is grounded in just such a rationale.

Therefore, a mandatory parity provision can exist within a theoretical and doctrinal framework consistent with democratic values and constitutionally permissible mechanisms to remedy past discrimination. A political theory that embraces the dual and gendered nature of society, as well as an expansive interpretation of the Nineteenth Amendment and affirmative action jurisprudence, provide constitutional and doctrinal support for a mandatory parity provision for the Court.

VI. WHY NON-MANDATORY PARITY MECHANISMS ARE INSUFFICIENT

The difficulty with non-mandatory or aspirational parity proposals lies in the

Act of 1964, and 42 U.S.C. § 1981.' Her primary contention was that the law school used race as a major factor in determining admission and gave applicants belonging to certain minority groups a significantly greater chance for acceptance. . . . The Supreme Court held that the law school's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause." (footnotes omitted); Lazos Vargas, *supra* note 30, at 443-44 (arguing that *Grutter*, etc., provide a foundation for increasing the racial diversity of courts generally). Lazos Vargas remarked that:

In *Grutter*, O'Connor went further than Justice Powell and found another basis for diversity in public higher education: that it promoted democratic principles. In particular, O'Connor noted that in a democracy, "it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."

Id. at 113-14 (footnotes omitted) (quoting *Grutter*, 539 U.S. at 332).

68. 539 U.S. 244 (2003).

69. See, e.g., Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1906 (2006) ("But it is reasonable to wonder whether this possibility, a matter of appearance and psychology rather than reality, really distinguishes the two programs, and it is reasonable to doubt that it should make a constitutional difference.").

70. Lazos Vargas, *supra* note 30, at 109. Note that *Grutter* involved a strict scrutiny standard due to the fact that the case implicated race. Gender would be subject to the lower, intermediate level of scrutiny and thus one might argue it would be harder to sustain an argument that quotas would be justified.

intractable nature of cognitive bias and its resulting gender schemas. Recent developments in social psychology demonstrate the powerful role cognitive bias plays in the slow advancement of women. This subtle but persistent barrier renders a mandatory provision a necessary tool in achieving gender equality. In light of the experience in other countries with non-mandatory parity provisions and the role of cognitive bias, mandatory measures may well be the only way to make progress.

For example, the 1996 South African Constitution includes an explicit provision for greater gender and racial diversity in the judiciary to restore legitimacy to a judicial system in which, under apartheid, ninety-seven percent of the judges had been white men.⁷¹ The Constitution recites the "need for the judiciary to reflect broadly the racial and gender composition of South Africa."⁷² It explicitly provides that diversity "be considered when judicial officers are appointed."⁷³ Under the 1996 Constitution, the appointment power was transferred from the President and Minister of Justice to the Judicial Service Commission (JSC), chaired by the Chief Justice of South Africa and several other members.⁷⁴ The JSC was to select candidates for judicial appointments with a specific concern for gender and racial diversity.⁷⁵ Increased diversity was thought to be an essential component of a comprehensive plan to reestablish the legitimacy of the courts in a new post-apartheid South Africa.⁷⁶

Even with such unique constitutional provisions, one scholar has concluded there has not been a significant increase in the number of women judges in South Africa.⁷⁷ Ten years after the new Constitution, only 12.4% of the judges in the superior courts were women. This is in large part due to residual patriarchal and sexist attitudes, as well as customary and religious law and "lackluster efforts" on the part of the JSC to appoint women judges.⁷⁸ One might add that the JSC does not operate under a mandatory regime and that it is not a surprise that a voluntary, discretionary system has not yielded significant improvement in the face of continuing, entrenched sexism.

Such gender bias against women has been well documented in the social psychology literature and by political scientists.⁷⁹ In this country, gender

71. Ruth B. Cowan, *Women's Representation on the Courts in the Republic of South Africa*, 6 U. MD. L.J. OF RACE, RELIGION, GENDER & CLASS (2007) (Copy on file with author. This paper was given at *The Global Advancement of Women: Barriers and Best Practices* symposium, held at the University of Maryland School of Law, Baltimore, Maryland on Apr. 8, 2006).

72. S. AFR. CONST. 1996, § 174(2).

73. *Id.*

74. *Id.* § 178.

75. Cowan, *supra* note 71, at 9.

76. *Id.*

77. *Id.* at 7.

78. *Id.* at 12-14.

79. See VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* (1998).

[A] set of implicit, or nonconscious, hypotheses about sex differences plays a central role in shaping men's and women's professional lives. These hypotheses, which I call *gender*

schemas have played a role in nominations to the Court. California Court of Appeals Justice Mildred Lillie was vetted and seriously considered by President Richard Nixon for a nomination to the Court.⁸⁰ She would have been the first woman nominee to the Court. Just before he was to nominate her, the American Bar Association rated her as "unqualified" and Nixon decided against nominating Lillie. He eventually nominated a young administration official with no prior judicial experience, William Rehnquist, whom he had previously derided as a "clown."⁸¹ In a radio interview, Nixon staff member and White House Counsel John Dean noted:

And Justice Lillie had been selected by a very liberal democratic governor, but was known as a conservative on law enforcement issues, which Nixon liked. And she was a Catholic, so she was right on the abortion issue for Nixon . . . I think she would have made a great Justice . . . But what happened was the American Bar Association at that time was made up of all men and the old boys did not think that it was time for a woman to be on the high court.⁸²

Justice Lillie served for more than fifty-five years on the California Municipal, Superior, and Appellate Courts.⁸³ She was still serving when she died at the age of eighty-seven in 2002.⁸⁴ Lillie was enormously well respected by members of the bar.⁸⁵ Her distinguished career as a jurist casts serious doubt on the genuine

schemas, affect our expectations of men and women, our evaluations of their work, and their performance as professionals. Both men and women hold the same gender schemas and begin acquiring them in early childhood. Their most important consequence for professional life is that men are consistently overrated, while women are underrated. Whatever emphasizes a man's gender gives him a small advantage, a plus mark. Whatever accentuates a woman's gender results in a small loss for her, a minus mark.

Id. at 2.

80. Former Nixon staff member and White House Counsel John Dean noted, "[Lillie] was one of the people I vetted." Minnesota Public Radio, American Radioworks, *Interview with John Dean* (2003), available at <http://americanradioworks.publicradio.org/features/prestapes/johndean.html>.

81. *Id.*

82. *Id.* The ABA was not the only opponent to the prospective Lillie nomination. Dean notes, "the principal person who really objected to Nixon selecting a woman was none other than the Chief Justice himself, Warren Burger, who threatened that he would resign if Nixon put a woman on the court." *Id.*

83. Myrna Oliver, Obituary, *Mildred L. Lillie—55 Years as a Judge*, SFGate.com, (Oct. 29, 2002), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2002/10/29/BA239560.DTL>.

84. *Id.*

85. Dean goes on to observe that:

Actually, as it turned out, when the American Bar Association said that Mildred Lillie was unqualified, which how they could say that—it was a real reach to reach that conclusion—but when they said that, Nixon realized he was in the best of both worlds. One, he had done his best to put a woman on the court, but the American Bar Association had really blocked him and he knew he couldn't have won that fight. So he thought he could get credit politically for having wanted a woman but yet having been blocked and really his true desire—he said, "can you imagine putting a woman on the Court? It'd be like putting a woman in a spaceship!"

nature of the "unqualified" rating given by the ABA and raises the specter of gender bias as the true motive for the rating.⁸⁶

Commentators have noted that the "intellectual rigor card" is often used as the bludgeon for opponents to block nominees who do not fit into a traditional mold based on their race, gender or ethnicity.⁸⁷ For example, when one of the most renowned Supreme Court justices, Louis Brandeis, was nominated in 1916, those who opposed his nomination (in large part due to religious bias since Brandeis was Jewish) cited his "unfitness" and lack of intellectual ability.⁸⁸ The recent nomination of accomplished lawyer and White House Counsel Harriet Miers to the Court demonstrated the residual gender bias in the culture and the continued use of "the intellectual rigor card" as a weapon against nominees.⁸⁹ Unlike Justice Lillie, the ABA panel did not actually rate Harriet Miers as "unqualified" prior to her withdrawal.⁹⁰ However, the pundits certainly did with their savage

Minnesota Public Radio, *supra* note 81. Lawrence Walsh, later special prosecutor on Iran Contra, was the President of the ABA at the time they deemed Mildred Lillie unqualified. *Id.*

86. Oliver, *supra* note 83.

87. See Anita Hill, *Why Harriet Miers Mattered*, Ms. MAG., Winter 2006, at 19.

88. See *id.*; Langhauser, *supra* note 3, at 566 (noting "It was not until the controversial nomination of Boston attorney Louis Brandeis in 1916 that the Senate experienced its first organized third-party opposition campaign. There, the American Bar Association, over one-third of its living ex-presidents and [fifty-five] of Boston's most prominent business and academic leaders opposed the nomination.").

89. Of course, many commentators who derided Miers refused to accept the notion that their opposition was based in part on gender bias. But several women did write persuasively in the press about the sexism inherent in the opposition. Anita Hill wrote in *Ms. Magazine* that she "was concerned that the failed Miers nomination will make it that much harder for future women judicial nominees." Hill, *supra* note 87. Hill noted that when opposing candidates in the past based on race and ethnicity, the intellectual rigor card has been played. "I am reminded that the late Supreme Court Justices Thurgood Marshall and, much earlier in our history, Louis Brandeis faced similar criticism about intellectual ability and lack of appropriate legal experience when they were nominated to the Court. Even today, gender, race and religion cloud our assessments of intelligence and competence." *Id.* Indeed, in contrast to how he introduced John Roberts, President Bush gave Harriet Miers "few accolades for her outstanding legal mind, her specific legal experiences and her long career" instead focusing on the past five years of her experience in the administration. *Id.*

90. The American Bar Association website states, "Ms. Miers withdrew her nomination on October 28, 2005. Consequently, the Standing Committee did not conclude its evaluation or submit a rating of the nominee to the Senate Judiciary Committee." ABA Standing Committee on the Federal Judiciary, Supreme Court Nominations, <http://www.abanet.org/scfedjud/SCpage.html> (last visited March 29, 2007). The ABA states that "To merit the Standing Committee's evaluation of 'Well Qualified' or 'Qualified,' a Supreme Court nominee must have standing at the top of the legal profession, demonstrate outstanding legal ability and exceptional breadth of experience, and meet the highest standards of integrity, professional competence, and judicial temperament. The evaluation of 'Well Qualified' is reserved for those found to merit the Standing Committee's strongest affirmative endorsement." See <http://www.abanet.org/scfedjud/alito-letter.pdf> (last visited on March 29, 2007). Note that Harriet Miers clearly met each of these criteria. Had the process gone forward, she should have been deemed "well qualified" for the Court having, "received her bachelor's degree in mathematics in 1967 and her JD in 1970 from Southern Methodist University [where she was a member of the Law Review.] Upon graduation, she clerked for U.S. District Judge Joe E. Estes from 1970 to 1972." Her experience included managing a large private law firm and representing both large corporate and individual pro bono clients. Miers was a state and national leader in the legal profession as well. "In 1985, Miers was selected as the first woman to become president of the Dallas Bar Association. In 1992, she became the first woman

invective:

Such is the perfect perversity of the nomination of Harriet Miers that it discredits, and even degrades, all who toil at justifying it. Many of their justifications cannot be dignified as arguments. Of those that can be, some reveal a deficit of constitutional understanding commensurate with that which it is, unfortunately, reasonable to impute to Miers.⁹¹

The nomination of Harriet Miers and her subsequent withdrawal was a pivotal moment in American history. It illustrated the profound gender bias still at play in the nomination process and in society generally. As noted above, nominees are increasingly required to be "brilliant" graduates of an elite law school and sitting United States Circuit Courts of Appeal judges.⁹² Women who are brilliant are rarely characterized as such. Rather they are described as "hard-working," "good managers" or "well-organized." Those who are concerned about this trend can either challenge these kinds of de facto requirements or they can move for enactment of a parity provision. The latter is far more likely to bring change in the

elected president of the State Bar of Texas. . . . She played an active role in the American Bar Association. [and] served as the chair of the ABA's Commission on Multijurisdictional Practice [and as the chair of the powerful ABA Rules and Calendar Committee as well as chair of the board of editors of the ABA Journal]. On numerous occasions, the National Law Journal named her one of the nation's 100 most powerful attorneys and as one of the nation's top 50 women lawyers." Like Justice Sandra Day O'Connor, Miers experience included a term as an elected and appointed public official. "Miers also has been involved in local and statewide politics in Texas. In 1989, she was elected to a two-year term as an at-large candidate on the Dallas City Council. . . . From 1995 until 2000, Miers served as chairwoman of the Texas Lottery Commission, a voluntary public service position she undertook while maintaining her legal practice and other responsibilities." Finally, her positions as assistant to the president, deputy chief of staff and counsel to the president gave Miers extensive daily experience in questions of constitutional law. See <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/03/AR2005100300305.html> (last visited Dec. 21, 2006). It should be noted that Miers eventually resigned in January 2007 and was replaced by Fred Fielding, described in a Washington Post article as a "battle-hardened" "wise-man" who brought "stature and gravitas" to the position. WASH. POST, Jan. 9, 2007, at A4. Once again, the gender bias implicit in this article is clear, i.e., attributes like "wisdom" and "gravitas" are associated with men rather than women.

91. George F. Will, Editorial, *Defending the Indefensible*, WASH. POST, Oct. 23, 2005, at B7; see also George F. Will, Editorial, *Can This Nomination Be Justified?*, WASH. POST, Oct. 5, 2005, at A23; Clarence Page, Commentary, *Inside the President's Mind*, CHI. TRIB., Nov. 2, 2005 at 27 ("Although Christian conservative leaders like James Dobson, Jerry Falwell and Pat Robertson defended Miers, conservative elites as varied as William Kristol, Pat Buchanan and Ann Coulter roared disapproval, as Bush's approval ratings sank to new lows.").

92. For an interesting analysis of the general trend toward elitism, see Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALA. L. REV. 671, 674-75 (1995) ("[T]he words of the Constitution, our fundamental charter of rights and of government, have become the exclusive province of an elite cabal of high priests. The priests are careful to recite the formulae of their predecessors, rather than the words of the document itself, and so keep up the illusion that their guardianship is necessary in order to translate an increasingly incomprehensible document (which they have made so) into concrete commands they then issue to the (small "p") people as "law." The people are treated, rightly as it turns out, as constitutional illiterates who lack the understanding necessary to read the Constitution with their own eyes. That task must be performed by a special class of intermediaries.").

next generation.⁹³

Scholars have identified three general approaches to judicial selection: (1) enhancing diversity; (2) choosing the "best qualified" candidate; and (3) selecting candidates with a compatible judicial philosophy.⁹⁴ The second approach, which is reflected in the new de facto requirements noted above, runs the risk of excluding women if the benchmarks for "best qualified" skew toward those attributes most often associated with men rather than women. These include intellectual acumen or brilliance in particular. As long as merit is equated with masculine traits like brilliance, it is less likely that the public will view women candidates as qualified nominees for the Court.⁹⁵

Embedded in the argument based on the intractability of gender schemas, is the gendered nature of law itself and the resistance to women judges:

The judicial enterprise is regarded as the quintessential locus of legal authority, a perception that is antipathetic to the feminine. The Bench has been likened to the priesthood of a secular religion, a simile that underscores its masculinity, as well as the conceptual difficulty encountered by many in changing the gender of the judge.⁹⁶

Some scholars have proposed fluid or non-mandatory mechanisms to achieve electoral equality without violating the principle of neutrality and embracing essentialism.⁹⁷ However, these methods are not likely to be effective in the context of the United States Supreme Court.⁹⁸ Unlike thousands of federal, state and local elective offices, there are only nine seats on the Court. Given the intractability of gender schemas and the few seats on the Court, waiting for the vagaries of the current nomination process to achieve parity may take another

93. See VALIAN, *supra* note 79, at 134.

Yet another, later, meta-analysis notes that leaders are likely to be judged in terms of the fit between their sex and the conception of the job. If the job is characterized as masculine, men will be considered more effective leaders, but if the job is characterized as feminine, women will be perceived as better leaders. Whether a job is seen as masculine or feminine depends, in turn, on whether it requires typical masculine characteristics, such as task-orientation, or typical feminine characteristics, such as cooperativeness.

Id. at 134 (citing A.H. Eagly et al., *Gender and the Effectiveness of Leaders: A Meta-analysis*, 117 PERSONALITY & SOC. PSYCHOL. 125 (1995)).

94. Nagle, *supra* note 7, at 502-04.

95. Marianne LaFrance, *The Schemas and Schemes in Sex Discrimination*, 65 BROOK. L. REV. 1063, 1067 (1999) (positing that when merit is equated with masculine or agentic traits, women will always be undervalued).

96. MARGARET THORNTON, *DISSONANCE AND DISTRUST: WOMEN IN THE LEGAL PROFESSION* 201 (1996). Note the similarity to Michael Stokes Paulson's comparison of the United States Supreme Court to a high priesthood. See Paulson, *supra* note 92.

97. See Rosenblum, *supra* note 45.

98. Of course, some sort of transition rule would have to be established so that each of the next four appointments would be women. This process could take a number of years to come into compliance with a revised 28 U.S.C. § 1 or a constitutional amendment to the same end.

generation.⁹⁹ As has been demonstrated in South Africa, non-mandatory or aspirational parity provisions are not likely to be effective in the face of an intractable barrier like gender bias.

VII. CONCLUSION

It is clear from the absence of specific criteria that the Framers envisioned a process of judicial selection for the Court that would be flexible. Presumably, they left the qualifications vague so that the process could be adapted to changing norms and times. Some early nominees did not have a formal legal education but rather had trained by apprenticeship.¹⁰⁰ In subsequent years, some nominees did not graduate from "elite" law schools.¹⁰¹ Several distinguished nominees were not even judges.¹⁰² Clearly, the qualifications required for nominees have evolved over time to fit changing social structures and norms. Thus, introducing gender as a qualification at this point in our history would be consistent with the evolving nature of the nomination process. Such a requirement would reflect current knowledge about cognitive bias as an intractable barrier to women's advancement and the failure of the nomination process, as it currently operates, to yield more women justices on the Court.

A mandatory parity provision need not last forever. However, it should be

99. A conservative blogger's recent post about former Massachusetts Governor Mitt Romney's nomination of four women to the judiciary reflects the merit versus gender debate:

Isn't it wonderful? Governor Romney nominates four women to be judges, all in the spirit of diversity in the judiciary.

Frankly, I couldn't care less if it is a handful of women, men, black, white, hispanic, or whatever. Who cares? I want to know if those nominated are good judges. I want to know if those nominated are going to be judicial activists. I want to know if those nominated are going to legislate from the bench. I want to know if they are conservative jurists who will bring some credibility back to the judiciary.

I don't like it when nominations like this are more about fulfilling some kind of non-mandated quota for the sake of "feel good politics." The most important aspect of these nominees is their qualifications, not their gender.

It's time to end these stupid quotas, both mandated and non-mandated, and let merit be the ruler from which we measure the nominees to the bench.

Posting of Aaron Margolis to Hub Politics, *Judicial Nominations, or Judicial Quotas?*, <http://www.hubpolitics.com/archives/000484.php> (Apr. 27, 2006, 07:49 EST).

100. See ALBERT P. BLAUSTEIN & ROY P. MERSKY, *THE FIRST ONE HUNDRED JUSTICES* 20-21 (1978) ("[I]t was not until March 25, 1957, that all nine members of the Supreme Court were law school graduates. . . . It should come as no surprise that the vast majority of justices did not have law degrees. There were no law schools at all during the first seventy-five years of the nation's experience—not as we know law schools today. . . . The overwhelming majority of the bar was trained under the apprenticeship system until after World War I.").

101. *Id.* at 22 (listing the diverse group of law schools that justices attended or graduated from, including the University of Alabama, Centre College, University of Kansas, St. Paul, and the University of Colorado).

102. HENRY J. ABRAHAM, *THE JUDICIARY* 64 (10th ed. 1996) (including Salmon Chase, Brandeis, Sutherland, Frankfurter, and Robert Jackson). Fifty-eight of the first one hundred justices had never served as judges. BLAUSTEIN & MERSKY, *supra* note 100, at 16.

retained until gender parity is established and it may be repealed by later generations once parity had been achieved.¹⁰³ The historical value placed upon diversity, the symbolic and instrumentalist value of gender balance and a theory of the body politic that reflects its gendered nature all militate in favor of such a plan. As Arthur Miller and Jeffrey Bowman wrote in their 1986 article advocating that non-lawyers be considered for the court:

Alfred Whitehead also once said that many ideas, when first broached, seem foolish. Surely it is not foolish, when one reflects on the question, to break the closed shop of lawyers on the Supreme Court. One hundred and fifty years ago Alexis de Tocqueville wrote that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." The time has come for nonlawyers to take part in that debate.¹⁰⁴

Much like Miller and Bowman's proposal for non-lawyer justices, the idea of mandating seats on the Court for women may seem radical. However, as Miller and Bowman observe, the Court is the repository of significant decisions about how our democracy will proceed. Thus, the presence of women is essential to a vision of representative democracy which reflects the dual and gendered nature of society.¹⁰⁵

The country has waited long enough for the current nomination process to result in a fair balance of women on the most important American bench.¹⁰⁶ Women are more than fifty percent of the American population. They constitute one-third of the legal profession and fifty percent of law school entrants are now women.¹⁰⁷ The recent appointment of two relatively young men, rather than women, to the Court should be the clarion call that more radical means of achieving full political participation in our democracy may be necessary. We fail to heed that call at the peril of future generations of American women.

103. Much like "Danish left-wing parties, for example, cancelled the quota system in the mid-1990s. A political representation of about forty percent women is now common there, and parties need no extra stimulus to add more women to their ranks." Leyenaar, *supra* note 48.

104. Miller & Bowman, *supra* note 66, at 320 (alteration in original) (footnotes omitted).

105. *See Id.* at 307.

106. Some commentators stress that "we should focus on the long-term. We should hope and expect that by 2030, if not earlier, the Court's membership will consist of roughly equal numbers of men and women, rendering any talk of a 'woman's seat' archaic." Michael C. Dorf, *Should a Woman be Named to Succeed Sandra Day O'Connor?: What Her Own Opinions Suggest*, in SEVENTH ANNUAL SUPREME COURT REVIEW: OCTOBER 2004 TERM 215, 222 (2005). Unfortunately, I would argue that such hope is not justified and action must be taken if gender balance on the Court is to come to pass.

107. *See supra* note 4 (citing population statistics); ABA COMMISSION ON WOMEN IN THE PROFESSION, CHARTING OUR PROGRESS: THE STATUS OF WOMEN IN THE PROFESSION TODAY 4 (2006), available at <http://www.abanet.org/women/ChartingOurProgress.pdf> (noting that as of 2003, women constitute 29.1% of all lawyers in the United States and 50% of all law school entrants).