

**GENDER AND THE
STRUCTURAL CONSTITUTION**

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Good afternoon. I am delighted to be with you today and to have the League of Women Voters here.¹ The League dates back to 1920 and the ratification of the Nineteenth Amendment to our Constitution, protecting the right of women to vote in every state.² I am also very happy to have the students from College Park with us to celebrate Constitution Day.

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1. *History*, LEAGUE OF WOMEN VOTERS, <http://lww.org/history> (last visited Sept. 29, 2016).

2. The text of the Nineteenth Amendment reads as follows: “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

So why have more than eighty-five countries already had female prime ministers or presidents and the United States has not?³ Why are we so slow?⁴ My theory is that it is due, in part, to what Associate Dean Stearns just described in his opening remarks as our “structural constitution.” Two design choices by the Founders made it less likely that a woman would ascend to the presidency. The first of these structural features is the choice of a singular or unitary executive that combines the head of state, head of government and commander-in-chief function all in one person. The impact of that choice can be amplified by executive activism and the power of the courts via judicial review to define the scope of the executive as more or less expansive.⁵ The second structural feature is the choice of direct presidential selection, filtered through the Electoral College.⁶ With Hillary Clinton as the first viable female nominee of a major American party, it is an interesting time to consider these structural constitutional choices, how they construct our politics and their impact on the likelihood that she will be elected.⁷

In *Federalist* No. 70, Alexander Hamilton argued vigorously for an energetic and singular executive.⁸ He described this ideal executive as decisive, with the ability to act with dispatch—traits essential to being nimble enough to protect the young country. These “agentic” attributes are not gender neutral. In fact, men are seen as more assertive and forceful and women are

of sex. Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend XIX.

3. For a complete list of the countries and the women who served in executive leadership positions, see EILEEN MCDONAGH, *THE MOTHERLESS STATE: WOMEN’S POLITICAL LEADERSHIP AND AMERICAN DEMOCRACY* 112–18 (2009).

4. For a more comprehensive answer to this question see Eileen McDonagh & Paula A. Monopoli, *The Gendered State and Women’s Political Leadership*, in *FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES* 169–87 (Beverly Baines et al. eds., 2012).

5. See generally Paula A. Monopoli, *Gender and Constitutional Design*, 115 *YALE L.J.* 2643 (2006).

6. Associate Dean Stearns describes this constitutional process in his comments. Maxwell L. Stearns, *Election 2016 and the Structural Constitution: A Preliminary Framing*, 76 *MD. L. REV. ENDNOTES* 4 (2016); see also U.S. CONST. art. II; U.S. CONST. amend. XII.

7. McDonagh & Monopoli, *supra* note 4. We stated:

In her article *The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis*, Fionnuala Ni Aolain describes the powerful psychological influence that constitutions may have on the citizens of a state:

Installing a constitution is a signal to society that the rules on political and social behavior are being regulated and will bear scrutiny. The absorption of that basic creed by a state’s citizenry may have a crucial sociological impact on their perception of the state and their status within it.

Thus, language and structure of founding documents can have an effect on how citizens view who is part of the body politic, who is not, and who is qualified to lead.

Id. at 176–77 (citing Fionnuala Ni Aolain, *The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis*, 19 *MICH. J. INT’L L.* 957, 980 (1998)).

8. *THE FEDERALIST* No. 70 (Alexander Hamilton).

perceived as more nurturing and interpersonally sensitive, “communal” attributes.⁹ As a result, women are less likely to be seen as congruent with an executive who possesses full plenary power to act unilaterally, as both head of state and government, and with the warrior function associated with the commander-in-chief role.¹⁰ Such an expansive executive makes it difficult to break the stranglehold of our “monosexual” democracy, especially given the power of incumbency.¹¹ If one believes that gender diversity in political leadership in this country is a desirable normative goal and fulfills the broader promise of the Nineteenth Amendment (that women should have the right to hold political office as a corollary to having the right to vote), then it is important to understand how these structural features of our Constitution may inhibit that goal.¹²

Gender schemas date back thousands of years.¹³ In ancient Greece, men were associated with reason and women with emotion. Since reason was seen as central to participating in politics and governance, women were excluded from such participation.¹⁴ Hamilton built on the idea that the masculine was synonymous with reason and its corollary, embraced by Hobbes,

9. See Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573, 574 (2002) (describing agentic traits as those ascribed more strongly to men, including being “aggressive, ambitious, dominant, forceful, independent, self-sufficient, self-confident, and prone to act as a leader,” and communal traits as those ascribed more strongly to women, including being “affectionate, helpful, kind, sympathetic, interpersonally sensitive, nurturant, and gentle”).

10. See McDonagh & Monopoli, *supra* note 4, at 177 (“The ancient claim that rulers derived their right to rule from their willingness to act in battle to protect those they seek to govern is also echoed in the Constitution, which connects the role of President to the role of Commander-in-Chief [B]y vesting the president with the Commander-in-Chief power, [the Founders] retained the connection between the legitimacy of the President’s claim to govern with the ancient claim of rulers’ willingness to fight in battle for those they ruled. Citizens associate all men with this attribute even though individual men may not choose to exercise it [Thus] voters are unlikely to connect women with the role of Commander-in-Chief.”).

11. See Monopoli, *supra* note 5, at 2644 n.5 (2006) (citing Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119, 1142 (2006) (noting that the term originated as a way to describe the dominantly male composition of the political class in France)).

12. See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) (arguing for a more synthetic interpretation of the Nineteenth and Fourteenth Amendments based on a sociohistoric reading of the suffrage amendment in American constitutional history).

13. See McDonagh & Monopoli, *supra* note 4, at 181 n.29 (“[I]mplicit, or nonconscious, hypotheses . . . [or] gender schemas, affect our expectations of men and women, our evaluations of their work, and their performance as professionals. . . . Their most important consequence for professional life is that men are consistently overrated, while women are underrated.” (citing VIRGINIA VALIAN, *WHY SO SLOW: THE ADVANCEMENT OF WOMEN* 2 (1998))).

14. Monopoli, *supra* note 5, at 2645 (2006) (citing DIANA H. COOLE, *WOMEN IN POLITICAL THEORY: FROM ANCIENT MISOGYNY TO CONTEMPORARY FEMINISM* 22–23 (1988) (observing that the perceived inability of women to reason was the justification for their exclusion from citizenship in the city-state)). Not only were they excluded from governance, the very idea of a woman leading was anathema to public order. In the play *Antigone*, Sophocles wrote, “Therefore it is we must

Locke, and Rousseau, that the father should be the repository of indivisible authority within the family. Hamilton's insistence on the benefits of a singular rather than a plural form of executive, such as a multi-member council, reflects these ideas.¹⁵ This unity of power was central to an effective executive in Hamilton's view and he emphasized the need for a "vigorous executive."¹⁶ I would argue that he saw vigor and energy, albeit unconsciously, in masculine terms and synonymous with virility. He was very concerned with the executive being strong enough to defend the new nation and feared weakness in the executive, a trait typically associated with the feminine. The idea that the executive should be able to act unilaterally, without consultation with the legislative branch, reflects that fear of more feminine attributes like collaboration.

In our current political climate, voters still respond to gender schemas and rate masculine traits as preferable to feminine traits for all levels of political office.¹⁷ And in a post-9/11 world, where we have been at war for fifteen years, there is significant voter concern about security. Voters have traditionally seen male candidates as more equipped to deal with national security issues. In fact, some scholars have linked a decline in the number of voters who reported that they would vote for a female candidate for president in the wake of 9/11 with that increase in concern about national security.¹⁸ As many as twenty-five percent of Americans polled said they would not likely vote for a woman for president, with a significant percentage of that twenty-five percent ascribing their position to the fact that women are not "up to the task."¹⁹

assist the cause of order; this forbids concession to a feminine will; Better be outcast, if we must, of men, than have it said a woman worsted us . . . False Foul spotted heart—a woman's follower." SOPHOCLES, *ANTIGONE* 26, 28 (Sir George Young, trans., Dover 1993).

15. Monopoli, *supra* note 5, at 2645.

16. THE FEDERALIST No. 70 (Alexander Hamilton).

17. Monopoli, *supra* note 5, at 2646–47 (citing Jennifer L. Lawless, *Women, War, and Winning Elections: Gender Stereotyping in the Post-September 11th Era*, 57 POL. RES. Q. 479, 482 (2004)).

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

19. Paula A. Monopoli, *Gender and Executive Activism: Will the United States Elect a Female President in 2008* 4 & n.5, 7 n.19 (Centre for Advancement of Women in Politics, Occasional Paper Series, No. 13, 2007), <http://www.qub.ac.uk/cawp/research/Monopoli%20paper.pdf>; *see also* Susan Page, *Call Her Madame President*, USA TODAY (Oct. 11, 2005, 1:42 PM), http://usatoday30.usatoday.com/life/2005-10-10-woman-president_x.htm. In 2005, a poll conducted by Marist College showed that eighty-six percent of respondents said they would vote for a woman for president, but thirty-four percent said most of their neighbors would not—and that may be a more accurate measure. *Id.* In 1937, two-thirds of voters said they would not. By the 1950s a bare majority said they

Politicians still play on gender schemas in appealing to potential voters as well. Donald Trump asked his audience in a recent speech, “She doesn’t look presidential to me. Does she to you?”²⁰ Clearly, such gender schemas about competence and fitness to govern still play a salient role in our politics. We see this in the “Catch-22” that female candidates face. If voters prefer male traits with regard to executive office, and women behave in an agentic way to appeal to that preference, they are in fact punished by voters and the media for behaving contrary to gender norms. But if they conform to gender norms and behave in communal ways, collaborating and consulting, they are not seen by voters as a good fit for the job.²¹ There is evidence that voters “fit” the candidate to the office.²² So, research demonstrates that voters are more likely to select female candidates if they are running for legislative offices that voters associate more closely with communal behavior like collaboration.²³ Thus, how we structure the office itself matters. The Founders

would. In 1984, seventy-five percent said they would. But the trend stalled in 1987 and for the past two decades has stayed the same. *Id.* In a *USA Today* poll conducted around the same time, Americans said 2-to-1 that a female president would be better able to handle domestic policy. *Id.* But, respondents also reported 2-to-1 that a man would be better able to handle national security. *Id.* “[A]bout eight in 10 Americans said they would be ‘very comfortable’ with women as members of Congress, presidents of universities, editors of newspapers, heads of charities and CEOs of businesses. But only 55% said they would be very comfortable with a woman being president.” *Id.* Only “two occupations showed more discomfort with having a woman in the top job, . . . coach of professional sports team [and] a general in the military.” *Id.*

20. Ashley Parker, *Donald Trump Says Hillary Clinton Doesn’t Have ‘a Presidential Look’*, N.Y. TIMES (Sept. 6, 2016), http://www.nytimes.com/2016/09/07/us/politics/donald-trump-says-hillary-clinton-doesnt-have-a-presidential-look.html?_r=0. As Professor Koulisch notes in his comments, Election 2016 may be one of the most “vile” in our nation’s history. Robert Koulisch, *Implications of a Lizard Election*, 76 MD. L. REV. ENDNOTES 25,25 (2016). It certainly stands out as one in which a candidate feels comfortable on a national stage openly mocking the appearance of female candidates, and playing on gender schemas about who is suited to be a political leader. In addition to his comment about Hillary Clinton not looking presidential to him, Donald Trump said about fellow candidate Carly Fiorina, “Look at that face. Can you imagine anyone voting for that? That face, the face of our next President.” And, he added that her voice gives him a headache. Amy Chozick & Patrick Healey, *Showdown Between Carly Fiorina and Donald Trump Expected at Republican Debate*, N.Y. TIMES (Sept. 14, 2015), http://www.nytimes.com/2015/09/15/us/politics/showdown-between-carly-fiorina-and-donald-trump-expected-at-republican-debate.html?_r=0.

21. Monopoli, *supra* note 5, at 2649 & n.28 (noting that “[h]aving a style that is assertive . . . rather than cooperative and participative, is especially costly for women” (quoting VIRGINIA VALIAN, *WHY SO SLOW: THE ADVANCEMENT OF WOMEN* 133–34 (1998)); *see also id.* at 2649 n.30 (finding that “if women engage in agentic behavior . . . they suffer a backlash effect in the form of social repercussions” (quoting Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743 (2001))).

22. *See* McDonagh & Monopoli, *supra* note 4, at 181 n.30 (“[L]eaders are likely to be judged in terms of the fit between their sex and the conception of the job. If the job is 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.” (citing VALIAN, *supra* note 21, at 134)).

23. Monopoli, *supra* note 5, at 2649 (citing Carol Mueller, *Nurturance and Mastery: Competing Qualifications for Women’s Access to High Public Office?*, 2 RES. POL. & SOC’Y 211, 214 (1986)).

chose an expansive, agentic executive model—the very kind of model we would predict voters would see a candidate with masculine traits as a better fit for than a candidate with feminine traits.²⁴ And the United States Supreme Court has chosen to draw that elusive boundary line between the legislative and the executive branches to expand the role of the executive at various times in our history.²⁵ Thus, the fact that the United States lags behind more than eighty-five other countries in choosing a woman for the presidency is not surprising when one focuses on our uniquely expansive executive.

The progress of women has slowed in recent years. In 2004 and 2007, we had nine female governors across the country. We now have six.²⁶ This retrenchment can also be seen in Maryland, where we will likely no longer have any women in our congressional delegation after the November 2016 elections.²⁷ So, the progress of women in elective office is not inevitable and we must be vigilant in evaluating what holds them back.

The second feature of our structural constitution that plays such a role is the Founders' choice of direct presidential selection as the mechanism by which we choose our head of government, unlike a parliamentary system.²⁸ The evidence is mixed as to whether parliamentary systems benefit women candidates seeking to be the head of government.²⁹ In such systems, voters

24. See McDonagh & Monopoli, *supra* note 4, at 179 (“It is clear why the voters associate executive political leadership with men rather than with women, given the fundamental way the contemporary modern state in general and the executive branch in particular represent male traits, even in a democracy.”) (citing GENDER, POWER, LEADERSHIP AND GOVERNANCE (Georgia Duerst-Lahti & Rita Mae Kelly eds. 1996)).

25. McDonagh & Monopoli, *supra* note 4, at 179 (citing Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2075 (2009)).

26. *Women in Elective Office 2016*, CTR. FOR AM. WOMEN & POLITICS, <http://www.cawp.rutgers.edu/women-elective-office-2016> (last visited Sept. 27, 2016).

27. Erin Cox, *Where Are the Women to Succeed Mikulski? A ‘Leaky Pipeline’ in Md. Politics*, BALT. SUN (Sept. 26, 2016, 12:40 PM), <http://www.baltimoresun.com/features/women-to-watch/bal-maryland-women-politics-leaky-pipeline-20160926-story.html>; Rachel Weiner, *Van Hollen Defeats Edwards in Heated Maryland Primary for U.S. Senate*, WASH. POST (Apr. 27, 2016), https://www.washingtonpost.com/local/md-politics/2016/04/26/ad03cdf4-0bbc-11e6-bfa1-4efa856caf2a_story.html. As Professor Gibson notes in his comments, the state’s own party structures have their own significance in constructing our politics. Larry S. Gibson, *2016 Election and the Structural Constitution: How Little Has Changed*, MD. L. REV. ENDNOTES 13, 14 (2016). I have previously suggested that the dynamics I am describing with regard to the presidency at the federal level play out in similar ways at the state level when voters are selecting their governors. See Monopoli, *supra* note 19, at 6.

28. Although, as noted above, this direct selection is subject to the Electoral College process. See *supra* note 6 and accompanying text.

29. See HELEN IRVING, GENDER AND THE CONSTITUTION: EQUITY AND AGENCY IN COMPARATIVE CONSTITUTIONAL DESIGN 132 (2008) (noting that “the statistical and historical evidence does not support the conclusion that parliamentary systems are any more likely than presidential systems to produce women heads of government”). *But see* McDonagh & Monopoli, *supra* note 4, at 178 (“When we turn to democracies comparable to the United States, we find presidential systems that are much less marked by a unitary executive. Rather the executive branch of government is characterized by fragmentation, often including a split between a head of state and a head

vote for party representatives who in turn select a head of the party who may become prime minister. If the percentage of American voters who say they would not vote for a woman remains as high as twenty-five percent, one can see how direct presidential selection as a mechanism could disadvantage women who seek the presidency. If voters simply voted for party representatives, who then could overcome gender schemas about masculine and feminine traits because they know the candidate in a much more personal way, it might be more likely that we would see a female head of government. And, indeed, in western democracies that are similar to us in norms and culture, we see that those who have had female heads of government tend to fragment the roles, separating the head of government from the head of state and commander-in-chief functions.³⁰ Many have parliamentary systems for selecting the head of government.³¹ Most recently, we saw two viable female candidates in a parliamentary system vying for the position of prime minister in Great Britain, with Theresa May prevailing.³²

The Nineteenth Amendment to the United States Constitution ensured that all American women could vote in every state. That amendment engendered tremendous fear when it was ratified in 1920. What havoc would doubling the electorate wreak? Oscar Leser, a prominent member of the Baltimore legal community, brought suit to strike the names of two other Baltimoreans, Cecilia Streett Waters and Mary D. Randolph, who had dared to register to vote after ratification of the Nineteenth Amendment in August 1920.³³ The case reached the United States Supreme Court, and one of Leser's arguments was that the massive expansion of the electorate without a state's consent was such a profound change that it destroyed the state's political autonomy and thus the amendment itself was unconstitutional. The Court disagreed and upheld the amendment.³⁴ Despite these concerns about its impact, the Nineteenth Amendment and its tremendous expansion of the electorate did not have a significant effect on the outcome of presidential elections for many years after its ratification.³⁵ However, in 1980, the so-

of government, as well as a greater connection with the legislative branch of government in the form of parliamentary association, if not control, of the executive branch.”).

30. McDonagh & Monopoli, *supra* note 4, at 178.

31. *Id.* at 178–79.

32. Steven Erlanger, *Race for Britain's Prime Minister Down to Theresa May and Andrea Leadsom*, N.Y. TIMES (July 7, 2016), <http://www.nytimes.com/2016/07/08/world/europe/theresa-may-andrea-leadsom.html>.

33. Leser v. Garnett, 258 U.S. 130 (1922). The Maryland General Assembly was not one of the thirty-six states that ratified the Nineteenth Amendment in 1920 and did not do so until 1941, twenty-one years after it became part of the United States Constitution.

34. *Id.* at 136–37.

35. J. KEVIN CORDER & CHRISTINA WOLBRECHT, COUNTING WOMEN'S BALLOTS: FEMALE VOTERS FROM SUFFRAGE THROUGH THE NEW DEAL 281 (2016).

called gender gap in voting began to emerge.³⁶ Women as a bloc have begun to swing presidential elections.³⁷ If this holds in Election 2016, given the historic gender gap in favor of Hillary Clinton, women may finally break the gender barrier to the presidency.

Thus, part of the explanation for why we have lagged so far behind in this regard may be found in the structural constitution, in particular in the features I have noted today, a consolidated executive with plenary power, subject to the power of the judicial branch to interpret its scope in an expansive way, and the choice of direct presidential selection as the manner by which we choose our head of government. Thank you.

36. The gender gap in voting is the difference in the percentage of women and the percentage of men voting for a given candidate. *Gender Gap in Voting*, CTR. FOR AM. WOMEN AND POLITICS, http://www.cawp.rutgers.edu/facts/voters/gender_gap (last visited Sept. 27, 2016). In this election, the gender gap is as large as it has ever been. Statistician Nate Silver characterized it as “a massive split” in favor of Hillary Clinton, with her advantage among women averaging fifteen percent. Nate Silver, *Election Update: Women Are Defeating Donald Trump*, FIVETHIRTYEIGHT (Oct. 11, 2016, 6:26 PM), <http://fivethirtyeight.com/features/election-update-women-are-defeating-donald-trump/>. Silver concludes that, “[I]f Trump loses the election, it will be because women voted against him.” *Id.* The Silver post gave rise to the hashtag #Repealthe19th, reflecting his observation that Donald Trump would win if only men voted. *US Election 2016: #repealthe19th tweet Urges US Women to be Denied the Vote*, BBC NEWS (Oct. 13, 2016), <http://www.bbc.com/news/election-us-2016-37639738>.

37. CORDER & WOLBRECHT, *supra* note 35, at 272 (“[W]ithout the Nineteenth Amendment, Mitt Romney may well have been elected president in 2012. Exit polls showed Romney securing 52 percent of men’s votes while 55 percent of the women cast their ballots for Barack Obama.” (citations omitted)).