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Gender and Constitutional Design

One of the themes of this Symposium is whether a more or less expansive executive is the most effective, efficient, or constitutionally sound model. I would ask a different question: Does the allocation of power between the legislative and executive branches, and the way we define the scope of the executive, affect whether women ascend to executive office? I argue that the constitutional process of boundary-drawing between the legislative and executive branches of government has implications for how successful women will be in ascending to executive positions.

In *The Federalist No. 70*, Alexander Hamilton lauded energy in the executive as essential to protecting the young nation from internal and external threat.¹ For Hamilton, the energetic executive was characterized by the agentic attributes of decision, dispatch, and action. These attributes, however, are not gender neutral. Men are “assumed to be more assertive, ambitious, dominant, forceful, independent, self-sufficient, and prone to act as leaders.”² In contrast,

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1. THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
2. Marianne LaFrance, *The Schemas and Schemes in Sex Discrimination*, 65 BROOK. L. REV. 1063, 1067 (1999) (positing that because agentic traits are more valued in society, men are more highly valued than women). LaFrance cites a study by Thomas Eckes that surveyed both men and women to determine when a particular feature like assertiveness qualifies as descriptive of a male or female subtype. *Id.*; see Thomas Eckes, *Explorations in Gender Cognition: Content and Structure of Female and Male Subtypes*, 12 SOC. COGNITION 37, 40-41 (1994); see also Deborah Alexander & Kristi Andersen, *Gender as a Factor in the Attribution of Leadership Traits*, 46 POL. RES. Q. 527, 530 (1993) (“Polls confirm that women candidates tend to be seen as more compassionate and honest while men are seen to be better suited emotionally for politics.”); Richard L. Fox & Zoe M. Oxley, *Gender Stereotyping in State Executive Elections: Candidate Selection and Success*, 65 J. POL. 833 (2003) (noting that research on gender stereotypes finds that voters ascribe certain beliefs and traits to a candidate based on the candidate’s sex).

women are perceived as “more affectionate, helpful, sympathetic, interpersonally sensitive, and nurturing” – communal traits that differ sharply from the agentic traits associated with men.³

Thus, women are unlikely to be associated with the cowboy/warrior image attached to many male activist executives today.⁴ Executive activism that reinforces such gender schemas may therefore be “dangerous” to our society in a sense other than that suggested by the title of this Symposium. Power is associated with agency, and agency with masculinity. Consequently, an expansive executive may lead to an even more firmly entrenched “monosexual democracy,”⁵ especially given the power of incumbency.

If such an external effect exists, there remains the question of how heavily it should be weighted, if at all, when deciding how broadly to define the scope of the executive. I would argue that if increasing the number of women in executive office is a desirable normative goal, such subtle or invisible barriers to their engagement in political behavior should be a policy consideration. If we believe that gender diversity in political leadership is itself an important fulfillment of the promise of the Nineteenth Amendment – in other words, that the Amendment did not only grant women the vote but ensured equality of opportunity to hold political office⁶ – then we should pursue this question.⁷

This Commentary posits that the Hamiltonian vision of an expansive executive with plenary power is the model least likely to result in women’s ascending to executive office. It first traces the philosophical heritage of Hamilton’s vision. It then outlines the empirical research that links voter perceptions about competence to the gender of candidates. It subsequently explores the stagnating progress of women in American politics, particularly in

3. LaFrance, *supra* note 2, at 1067.

4. See KARIN KLENKE, *WOMEN AND LEADERSHIP: A CONTEXTUAL PERSPECTIVE* 168-69 (1996) (noting that leadership is defined in terms of male traits and that female leadership is measured against that male definition).

5. 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 French parity advocates argued that the “maleness” of the political class in France constituted a “monosexual democracy”).

6. See Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL’Y 465, 472 (1995) (“Thus, the Nineteenth Amendment can be understood as protecting more generally full rights of political participation.”).

7. This is a particularly timely inquiry given the likelihood of the first viable female presidential candidate in 2008. See WNBC/Marist College Poll (Feb. 22, 2006), <http://www.maristpoll.marist.edu/usapolls/HCo60222.htm> (“Hillary Clinton is the Democratic presidential primary frontrunner and most voters think she is going to run . . .”).

a post-September 11 environment. Finally, it concludes that the choice of a more communal executive model, rather than an exclusively agentic one, may help reverse that trend and may actually result in a more effective executive.

Certain attributes have long been associated with gender. For example, the association of women with emotion and men with reason dates back to ancient Greek philosophy. Reason was an essential prerequisite to political participation. Those who, for lack of natural inclination or lack of education, were unable to reason were unfit to participate in governance.⁸ The Framers were well versed in the works of the ancient Greeks and seventeenth- and eighteenth-century political theorists, including Hobbes, Locke, and Rousseau. Hamilton's ideas about constitutional design reflect much of this theory. For example, Hamilton placed great import on a singular rather than plural executive. This emphasis on the need for an indivisible authority in civil government echoes the views of that time on the proper role of fathers within the family. For example, Rousseau looked to Hobbes and Locke in his *Discourse on Political Economy* to argue why, "[i]n the family it is clear . . . that the father ought to command."⁹ Political theorist Diana Coole has observed that "Rousseau accepts claims by Hobbes and Locke that authority in the family is indivisible. The case [for] making the father its repository relies on a variation of Locke's 'abler and stronger' theme . . . tied to woman's reproductive function"¹⁰

Similarly, Hamilton's argument for a singular executive with plenary power (as opposed to a multi-member council) is premised on the idea that unity was a primary ingredient of the energy essential to an effective executive.¹¹ Hamilton conceived of that energy, consciously or not, as an archetypically male attribute. He endorsed a "vigorous executive,"¹² and his

8. DIANA H. COOLE, *WOMEN IN POLITICAL THEORY: FROM ANCIENT MISOGYNY TO CONTEMPORARY FEMINISM* 22 (1988) (describing the ancient Greek association of women with nature and "dark powers inimical to the mind"). Coole observes that this perceived inability of women to exercise the type of reason required for political participation resulted in their exclusion from citizenship in the city-state. *Id.* at 22-23.

9. JEAN-JACQUES ROUSSEAU, *A Discourse on Political Economy*, reprinted in *THE SOCIAL CONTRACT AND DISCOURSES* 283, 286 (G.D.H. Cole trans., E.P. Dutton & Co., Inc. 1950) (1755).

10. COOLE, *supra* note 8, at 108; see ROUSSEAU, *supra* note 9, at 287 ("[H]owever lightly we may regard the disadvantages peculiar to women, yet, as they necessarily occasion intervals of inaction, this is a sufficient reason for excluding them from this supreme authority . . .").

11. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 1, at 424 ("The ingredients which constitute energy in the executive are unity; duration; an adequate provision for its support; and competent powers.").

12. *Id.* at 423.

vision of vigor and energy was synonymous with virility—and with agentic, as opposed to communal, traits.¹³ Appearing in court to defend a female client, Hamilton argued that “[w]oman is weak and requires the protection of man.”¹⁴ That general fear of weakness, and its association with the feminine, presumably worked its way into Hamilton’s vision of an authoritarian executive, in which the sharing of power with the more feminine institution of the legislature would spell disaster for the young country. Hamilton felt that the executive must have the ability to act unilaterally, without having to engage in arguably more feminine or communal behaviors like collaboration or consultation.¹⁵

Few women were part of the intellectual landscape of Hamilton and the Framers. Mary Wollstonecraft, the most prominent female political theorist of the time, argued that women must embrace more rational or masculine traits to achieve political equality. In *A Vindication of the Rights of Woman*, Wollstonecraft wrote that “intellect would always govern,”¹⁶ and she sought to “persuade women to endeavour to acquire strength, both of mind and body, and to convince them that the soft phrases, unsusceptability of heart, delicacy of sentiment, and refinement of taste, are almost synonymous with epithets of weakness.”¹⁷ Rather than challenge the legitimacy of the benchmarks by which eligibility to participate in civil governance was measured, Wollstonecraft urged women to assimilate.

As noted above, gender schemas, like those reflected in the eighteenth-century writings of Rousseau, Hamilton, and Wollstonecraft, continue to play a central role in modern American politics.¹⁸ Voters still “deem ‘masculine’

13. Historians like Richard Beeman have characterized Hamilton’s exclusively agentic model as “far removed from th[at] of every other delegate on the convention floor.” Richard R. Beeman, *The Founding Fathers and Executive Power*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 17, 2006, at B12. Beeman argues that most of the Framers supported an executive “of limited powers in which no single branch, and no single person, could lay claim to unilateral authority.” *Id.* Thus, one might argue that a majority of the Framers would embrace a less agentic and more communal executive as equally energetic and effective.

14. RON CHERNOW, *ALEXANDER HAMILTON* 189 (2004).

15. See THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 1, at 423-24 (“Energy in the executive is a leading character in the definition of good government. . . . Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number . . .”).

16. MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMAN* 7 (The Legal Classics Library 1993) (1792).

17. *Id.* at 5.

18. Gender schemas are “hypotheses that we use to interpret social events. Schemas . . . assign different psychological traits to males and females.” Virginia Valian, *The Cognitive Bases of*

characteristics as more important than ‘feminine’ traits . . . regardless of the level of office at stake . . . [and] rate men as more likely to possess masculine traits and women more likely to possess feminine traits.”¹⁹ Twenty-seven percent of voters still say they would not be likely to vote for a woman for President, and thirty percent of those voters say it is because women are not “up to the task” – emotionally or otherwise.²⁰ One political scientist has linked a decline in the number of voters who say they would vote for a woman for President with the post-September 11 ascendance of security concerns.²¹ With the male executive of a major state openly deriding his legislative opponents as “girlie-men,”²² it is clear that gender schemas about weakness, strength, and spheres of competence continue to influence the behavior of both politicians and voters.

A significant body of work by gender politics and leadership scholars focuses on the role of gender in our electoral system.²³ Consistent with the

Gender Bias, 65 BROOK. L. REV. 1037, 1044 (1999). Schemas have been identified as a major cause of women’s lack of advancement in politics, academia, and other professions. Valian notes, “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.” *Id.* at 1045.

19. Jennifer L. Lawless, *Women, War, and Winning Elections: Gender Stereotyping in the Post-September 11th Era*, 57 POL. RES. Q. 479, 482 (2004).
20. WNBC/Marist College Poll, *supra* note 7 (reporting a national poll that surveyed 1132 adults within the continental United States, including 931 registered voters, 335 of whom were Democrats, 271 of whom were Republicans, and 305 of whom were independent voters). See Lawless, *supra* note 19, at 485 n.9.
21. See Lawless, *supra* note 19.
22. Peter Nicholas, *Schwarzenegger Deems Opponents ‘Girlie-Men’ Twice*, S.F. CHRON., July 18, 2004, at A7; see also Alexander & Andersen, *supra* note 2, at 530 (“The public judged men better at directing the military, managing business and labor issues, strengthening the economy and dealing with demonstrations and international diplomacy, while women were thought to be better on issues about children and family, education, the arts, health, poverty and consumer issues.”).
23. See, e.g., Richard L. Fox, *Gender, Political Ambition and the Decision Not To Run for Office* (Ctr. for Am. Women & Politics 2003), available at <http://www.cawp.rutgers.edu/Research/Reports/Fox2003.pdf>. Fox notes that:

[M]any scholars find that gender stereotyping, linked to traditional sex roles, continues to pervade the electoral environment. While the assumption that women do not belong in politics has dissipated, vestiges of traditional sex-role orientations continue. Many actors in the electoral arena – voters, party officials, candidates, journalists – transfer their stereotypical expectations about men and women to male and female candidates. Despite the apparent role of gender, these studies are usually not linked to the final question of whether women win or lose elections.

thesis above, leadership scholar Karin Klenke has noted that “traditionally women were believed to lack the traits and behaviors considered prerequisites for effective leadership, traits such as aggression, competitiveness, dominance, Machiavellianism, ambition, and decisiveness.”²⁴ These beliefs may help explain the “Catch-22” that female candidates face. Women are disadvantaged because they are thought not to possess agentic, masculine traits, while at the same time they are criticized if they are too agentic or masculine.

These views are reinforced by the media through masculine descriptions of male activist executives and disparate treatment of women leaders. For example, the media has recently lauded male politicians like Gavin Newsom, Eliot Spitzer, and Rudolph Giuliani for their agentic behavior.²⁵ In contrast, coverage of female executives, such as Louisiana Governor Kathleen Babineaux Blanco and former Maryland Lieutenant Governor Kathleen Kennedy Townsend, has not been nearly as positive.²⁶

Women who hold office and wield power are perceived very differently, and more negatively, than their male counterparts.²⁷ If executive activism embodies a notion of the macho exercise of unbridled power, one would predict that women who wield or seek to wield such power may be perceived by the public and the media in a very different way, even when engaging in

Id. at 1 n.2 (citations omitted). Lawless, however, notes that much of the research on the role of gender in electoral outcomes was done in an era when domestic policy issues dominated elections, *see* Lawless, *supra* note 19, at 485 n.8, and none of this research was done “in an atmosphere of war,” *id.* at 485. *See also* JENNIFER L. LAWLESS & RICHARD L. FOX, *IT TAKES A CANDIDATE: WHY WOMEN DON’T RUN FOR OFFICE* 2-3 (2005) (noting that, while previous studies find no discernible systematic electoral bias against women, there has been little research on the salience of gender differences in political ambition in explaining the continuing gender imbalance in elective office).

24. KLENKE, *supra* note 4, at 9.

25. Some commentators argue that the public has always “responded well to macho behavior” on the part of politicians. *E.g.*, Alexander DeConde, *The History of Macho Presidents*, HIST. NEWS NETWORK, Sept. 16, 2002, <http://hnn.us/articles/970.html>.

26. *See* James Dao, *After Hurricane, She Tries To Mend State, and Career*, N.Y. TIMES, Dec. 29, 2005, at A20 (comparing the negative reaction to Blanco’s post-Hurricane Katrina leadership with the hero status afforded Giuliani after September 11); *see also* David Nitkin, *Townsend Never Shook Off Lightweight Label: Drumbeat About Lack of Leadership Qualities Dogged Her to the End*, BALT. SUN, Nov. 6, 2002, at 25A (“That’s the sort of albatross that she could not shake, that she’s not capable of leadership, which defies logic. . . . Had it been a man, the whole issue of fitness to lead would have never come up. There’s some serious gender bias.” (quoting political science professor Thomas F. Schaller)).

27. *See* Alexander & Andersen, *supra* note 2, at 527, 529-30 (“[S]tudies reveal that gender has been associated with differential ratings of elected officials’ job performance of identical tasks at identical levels of achievement.”) (citation omitted).

behavior similar to men.²⁸ Consistently, “[w]omen like Hillary Clinton who lead aggressively are labeled ‘bossy,’ ‘obnoxious,’ ‘overbearing,’ and ‘ambitious’ in newspaper reports”²⁹ while their male counterparts who do the same are praised for being bold and innovative.³⁰

Thus, women who exhibit agentic characteristics by exercising power may continue to be viewed unfavorably, and women who engage in communal behavior may be deemed unqualified to assume office. In addition, voters are more likely to support women for offices associated with communal as opposed to agentic traits.³¹ Women who seek executive office will continue to face these barriers unless and until an effective executive becomes more associated with communal traits.

As a matter of achieving political equality, either we can try to alter deeply entrenched gender schemas or we can reconsider the attributes essential to an energetic and effective executive.³² The latter goal is more readily achieved than the former. If the archetype of the agentic male executive remains the norm, women will not fare well. Indeed, the picture for women in American politics is

28. See VIRGINIA VALIAN, *WHY SO SLOW?: THE ADVANCEMENT OF WOMEN* 133-34 (1998) (“A meta-analysis of studies concentrating on evaluations of women as leaders suggests that women are at a particular disadvantage when their leadership style is perceived as masculine. Having a style that is assertive to the point of appearing autocratic, rather than cooperative and participative, is especially costly for a woman The reviewers hypothesize that a highly assertive style is incongruent with our conception of women and that women are penalized if they adopt such a style.”) (citation omitted).

29. KLENKE, *supra* note 4, at 124.

30. See generally Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743 (2001) (finding that if women engage in “agentic behavior to be perceived as qualified for leadership roles, they are rewarded with competence ratings equal to those for agentic men, but [they] suffer a backlash effect in the form of social repercussions”) (emphasis omitted) (citation omitted).

31. See Carol Mueller, *Nurturance and Mastery: Competing Qualifications for Women’s Access to High Public Office?* 2 RES. POL. & SOC’Y 211, 214 (1986).

32. See VALIAN, *supra* note 28, 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 seen as masculine, men will be considered more effective leaders, but if the job is characterized as feminine, women will be perceived as better leaders. 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. (citation omitted). Studies have shown that voters “approved of women for the highest offices of president or vice-president to the extent that they believed that female politicians possess an agentic orientation” toward problem-solving. LaFrance, *supra* note 2, at 1067.

not encouraging. The progress of women toward elective office has slowed. As political scientist Susan Carroll has warned:

Although women have made substantial progress over time in increasing their presence in state government, the recent leveling off of women's numbers among statewide elective officials and state legislators is a puzzling development. For advocates who someday would like to see parity between women and men in government, it is a troubling development as well. At a minimum, the leveling off is evidence that increases over time are not inevitable; there is no invisible hand at work to insure that more women will seek and be elected to office with each subsequent election.³³

The recent ascension of several female heads of state suggests that voters may be moving away from a male archetypical vision of the executive.³⁴ However, if one looks closely at some of these elections, the explanation may be more nuanced. For example, in Chile, many people stated that they voted for President Michelle Bachelet because they were looking for a different, more compassionate approach to governance. Thus, traditional gender schemas did play a role in electoral choices—they simply worked in favor of the female candidate.

If more women are to assume executive office in the United States—at the national, state, and local level—then we should consider the role of gender schemas in constitutional design. When merit is equated with agency, and agency with masculinity, women will be undervalued and at a political disadvantage.³⁵ Thus, recent political phenomena like the rise of executive activism and the expansive view of the executive³⁶ may well have an impact on women's advancement in American politics. In considering how to transform our monosexual democracy into a more representative and vibrant political system, we should be cognizant of the impact that choices about the constitutional allocation of power itself may have on that system.

33. Susan J. Carroll, *Women in State Government: Historical Overview and Current Trends*, in 36 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 389, 396 (2004).

34. Those heads of state include Michelle Bachelet (President, Chile), Ellen Johnson-Sirleaf (President, Liberia), Angela Merkel (Chancellor, Germany), and Portia Simpson Miller (Prime Minister, Jamaica).

35. See LaFrance, *supra* note 2, at 1067.

36. In its recent decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), however, the United States Supreme Court reiterated that, at least in one substantive area of dispute, the President's authority to establish military commissions, there are indeed limits to executive power.

In his opening remarks for this Symposium, Dean Harold Hongju Koh characterized as flawed the idea that an exclusively agentic executive is the only model that yields an effective executive. He argued that the inclusion of communal attributes like consultation may yield an even more energetic and effective executive. I would extend this idea further. If we expand our conception of the attributes essential to an effective executive to include more traits typically identified with women, we may increase both the efficacy of our executive and the number of women who ascend to that office.³⁷

37. Normative prescriptions are beyond the scope of this Commentary. However, some scholars have noted the irony of imposing parity quotas in the Iraqi Constitution while maintaining that the very idea of such requirements arguably offends neutrality principles here at home. Cf. Rosenblum, *supra* note 5, at 1124 n.17 (discussing the inclusion of parity provisions in the new Iraqi Constitution).