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# TOWARDS A PROGRESSIVE POLITICS AND A PROGRESSIVE CONSTITUTION

Mary Becker\*

## INTRODUCTION

There are two major de jure obstacles to a progressive political movement in the United States today. One is our archaic electoral system (winner-take-all geographic districts drawn by politicians), and the other is the United States Constitution. The 2000 presidential election has focused attention on a number of problems with our electoral system, including antiquated and inaccurate voting methods, oversight of elections by partisan elected officials, and an electoral-college system that is not entirely democratic. Another problem is suggested by the failure of the Green Party to obtain more than about half of the five percent of the vote needed for federal funding in the next election cycle. Given our current electoral structure, it is very difficult for a progressive political movement to develop as an alternative to the two national parties.

A number of problems are associated with the system we use for legislative bodies—winner-take-all geographic districts. Such systems are associated with high levels of negative campaigning, low voter turnout, representation of only majority groups residing in geographic districts drawn by politicians, and consideration of a narrow range of issues, options, and substantive views on a political agenda controlled by two parties vying for the middle.<sup>1</sup>

The other major obstacle to progressive reform is the United States Constitution, a conservative document interpreted by a conservative institution. The Constitution is conservative in the sense that it includes only negative rights, protecting citizens only from governmental interference, with particular emphasis on rights to private property.<sup>2</sup> And it is interpreted by a conservative institution,

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1. See *infra* notes 90-93 and accompanying text.

2. See Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. Chi. L. Rev. 453, 457 (1992) (discussing conservative nature of rights in the Constitution).

one whose legitimacy is linked to the consistency of current decisions with earlier decisions.<sup>3</sup>

In this article, I suggest a two-step program for a progressive coalition based on a vision of a new kind of politics, one grounded in the reality that all human beings need care to thrive. I begin in Part I with a discussion of some of the pressures for change that might make a progressive political movement possible in the United States in the not-too-distant future and describe some progressive solutions. In Part II, I turn to the vision thing, suggesting that the unifying vision of a new progressive politics should be built upon care: government's responsibility to give each person the means necessary to develop her capabilities to a reasonable degree. I argue that we will better achieve the goals of freedom and equality by a commitment to caring for others than by traditional liberal commitments to individual rights and autonomy. In Part III, I consider whether this vision of a politics with a core value of care for others is inconsistent with human nature.

In the last part, I discuss two sets of changes as an initial agenda for a progressive movement at the national level. First, I outline a number of needed changes to our electoral system, all of which could be implemented without constitutional amendment. The major step-one change is a shift from the winner-take-all electoral system common throughout the United States to proportional representation for legislative bodies other than the United States Senate. Second, I suggest that a significant part of the problem for a progressive movement in the United States today is the Constitution and Bill of Rights. I suggest that we start thinking about what a progressive constitutional scheme for the United States might look like and propose some specific provisions for a progressive bill of rights.

## I. PRESSURES AND POSSIBILITIES

A progressive movement in the United States seems most unlikely, nearly unimaginable, as the year 2000 comes to close. But change often seems unimaginable, even when sweeping change is just around the corner. Consider, for example, that from World War II through the seventies, the dominant ideology distrusted the market, remembering the depression and facing or having recently faced the devastation in Europe following the war. The dominant economics was Keynesian, with the government controlling the market. Change seemed unimaginable and free market fanatics, such as Frederick Hyack, lunatics. But in the eighties, almost overnight, all that changed with the Thatcher and Reagan revolutions, the fall of the Wall, and

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3. Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. Colo. L. Rev. 975, 986-1018 (1993) (discussing conservative nature of judicial review).

the collapse of communism.<sup>4</sup> The free market fanatics have, of course, been wise men for some time now.

The fact that change is unimaginable doesn't mean it isn't just around the corner. Another world depression, other kinds of catastrophes, or dissatisfaction with the results of a global market as unfettered as ours could all cause rapid change, resulting in a very different belief structure about the form government and the market should take. In this section, I first discuss more foreseeable sources of pressure for change and then possibilities for progressive change.

There are three major sources of resistance to progressive change in the United States. The first two have been with us for some time: the American dream and Americans' commitment to rugged individualism. These are intertwined—anyone can become anything in America if she only works hard enough. America's primary commitment is to individual freedom, being left alone by government, so that each is free to achieve.

The third obstacle, the power of the market, has also been with us for some time, but is becoming increasingly important in the emerging global marketplace. But increasing globalization may make the United States less provincial, less sure that our way is best, and more willing to learn from other countries. In looking at progressive possibilities, I consider policies and approaches in other countries, whose example might also be a source of progressive pressure in a less parochial United States.

### A. *Pressures*

Although the United States is the richest and strongest country in the world, there are many obvious problems within its borders from a progressive perspective. In this section I discuss five problems, each of which exerts some pressure for progressive change, and each of which is likely to exert even more pressure in the future. I begin with working parents' need for more supports; then discuss income disparities and problems related to poverty; dissatisfaction with a culture tolerant of guns, violence, and hate; and pressure to adopt the Convention on the Rights of the Child ("CRC") and the Convention on the Elimination of Discrimination Against Women ("CEDAW"). I end with a discussion of demographic changes and the pressure such changes will exert on the current makeup of legislative bodies.

#### 1. Increasing Need For Supports For Working Parents

Although most mothers of infant children work, even in two-parent

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4. Daniel Yergin & Joseph Stanislaw, *The Commanding Heights: The Battle Between Government and the Marketplace that is Remaking the Modern World* 147-49 (1998).

families,<sup>5</sup> the United States remains unwilling to provide much in the way of supports for working parents. True, women cannot be fired for being pregnant as a matter of formal law,<sup>6</sup> but it is becoming increasingly difficult for a plaintiff to win a pregnancy discrimination case.<sup>7</sup> And parents and other caretakers have the right to twelve weeks of unpaid caretaking leave per year. But that's it in terms of required supports for working parents.<sup>8</sup>

## 2. Incarceration Rates, Income Disparities, and Other Problems Related to Poverty (and the War on Drugs)

We have the highest incarceration rate of any country in the world,<sup>9</sup> and disproportionately our prisoners are African American.<sup>10</sup> Many poor communities of color have been devastated by gun violence and the war on drugs. Studies show that, at some point, incarceration *increases* rather than decreases crime in poor communities by destroying social cohesion. And that point has been reached in many poor communities in the United States.<sup>11</sup>

Income disparities between families have increased greatly since 1980.<sup>12</sup> Ninety-nine percent of the gains from the economic growth between 1979 and 1994 went to the top five percent of families.<sup>13</sup> Although we live in the richest country in the world during a prolonged period of prosperity, around twenty percent of American

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5. See, e.g., Genaro C. Armas, "Doing What's Best for Me": More Moms with Infants Back to Work Within Year, ABCNEWS.com, at [http://www.abcnews.go.com/sections/business/DailyNews/working\\_moms001024.html](http://www.abcnews.go.com/sections/business/DailyNews/working_moms001024.html) (Oct. 24, 2000) (describing United States Census report that thirty-six percent of mothers with infants are working full time and an additional twenty-three percent are either working part-time or looking for work); Children's Defense Fund, *Supporting All Parents in Their Child Care Choices*, at [http://www.childrensdefensefund.org/cc\\_supparents.htm](http://www.childrensdefensefund.org/cc_supparents.htm) (last modified Feb. 10, 2001) (reporting that sixty-two percent of married mothers with children under age six work, and seventy-two percent of single mothers with children under six work).

6. 42 U.S.C. §§ 2000e(k) 2000e-2(a)(1) & (2) (1994).

7. See *infra* note 53 and accompanying text.

8. Family and Medical Leave Act of 1993, Pub. L. No. 103-03, 107 Stat. 6 (1993) (codified at 29 U.S.C. §§ 2601-2654); see 29 U.S.C. § 2612 (providing entitlement to twelve weeks of unpaid leave).

9. Michael Wolff et al., Where We Stand: Can America Make It in the Global Race for Wealth, Health, and Happiness? 296-97 (1992).

10. See, e.g., Gary Field, *War on Drugs is Stacked Against Blacks*, USA Today, Jun. 8, 2000, at 3A (quoting Jamie Fellner, associate counsel for Human Rights Watch, that "the great majority of drug offenders in prison" are African Americans though "[f]ive times as many whites use drugs").

11. Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 Am. Crim. L. Rev. 191, 211-17 (1998).

12. See, e.g., Lawrence Mishel et al., The State of Working America 1998-1999, at 37-90 (1999); Richard B. Freeman, *The Facts About Rising Economic Disparity*, in *The Inequality Paradox: Growth of Income Disparity* 19, 30-32 (James A. Auerbach & Richard S. Belous eds., 1998).

13. Freeman, *supra* note 12, at 20 tbl.1.

children live below the poverty line,<sup>14</sup> and most of these children also attend poor schools. These children and their parents are disproportionately African Americans and Hispanic Americans. And these households are disproportionately headed by women.

Comparisons of poverty levels, income disparities, and crime rates across various states indicate that while poverty levels are not strongly correlated with crime rates, levels of income inequality *are* strongly correlated with levels of violent crime, homicide, and incarceration.<sup>15</sup>

### 3. Dissatisfaction with a Culture Tolerant of Guns, Violence, and Hate

Our children can go on the Internet and find hate speech sites where fun, interactive cartoons teach racial hate. Extremist groups, which seem to be overwhelmingly white and male, increasingly and openly advocate hate and violence, often as a part of a religion. And many young people create, and listen to, hate music. Violence and violent pornography are both widespread in the media. Many Americans are troubled by a culture in which mayhem, murder, violence, and a dehumanizing sexuality are dominant themes in entertainment and in commercials.

Guns and violence, combined with the war on drugs, have long been a problem for the poor. But guns and violence are no longer a problem *only* for the poor. White men and boys seem particularly prone to random violence. There are, of course, many causes of this problem, including: violent computer and video games; media obsession with and glorification of violence; the weakening of families and of social and religious institutions as sources of moral teaching and authority; and a celebrity culture promising fame to white men and boys who kill randomly.

Mitchell Johnson was one of the shooters in the Jonesboro, Arkansas school shootings where five people died. He was thirteen at the time of the shooting; he will be twenty-two or twenty-three when he gets out of prison. In a letter to a friend, he says that the Juvenile Detention Center where he is now isn't too bad: "He gets to watch *Jerry Springer*, eat fast food, use the gym one night a week and listen to his favorite rap song, *Shoot 'Em Up*, by Bone Thugs-N-Harmony."<sup>16</sup>

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14. See Nat'l Ctr. for Children in Poverty, *Young Children in Poverty: A Statistical Update*, June 1999, at 1, available at <http://cpmcnet.columbia.edu/dept/nccp/99uptext.html>.

15. George A. Kaplan et al., *Inequality in Income and Mortality in the United States: Analysis of Mortality and Potential Pathways*, 312 Brit. Med. J. 999, 1001 (1996); Bruce P. Kennedy et al., *Income Distribution and Mortality: Cross Sectional Ecological Study of the Robin Hood Index in the United States*, 312 Brit. Med. J. 1004, 1005 (1996).

16. Bobby Cuza, *Detained and Confused: A Jonesboro Shooter Writes to a Friend*,

But: "I will never go to a prom. I won't have sex or kiss for seven years, almost eight."<sup>17</sup> He then asks why. And adds: "I honestly didn't want anyone to get hurt. You may not think of it like this, but I have the same pain y'all have . . . . The only difference is, I was the one doing the killing."<sup>18</sup> In the letter, Johnson explains that "I was not mad at anyone. I was honestly happy. I had a very loving family."<sup>19</sup> Although the crime was clearly planned, Johnson testified in court that "he thought they would just shoot over everyone's head."<sup>20</sup>

I can imagine a thirteen-year-old boy, raised in the United States today not being able to draw the line clearly between fantasy and murder. I can imagine him standing at the top of that hill with his friend. Both aim their guns. They had intended just shooting in the air, but when the moment comes, they are not on the hill, but in a game, a fantasy, and they aim. Perhaps they even select particular people as targets, but on a fantasy level. Weeks after the shooting, when Alan Johnson finally learned who had been killed, his head hit the table and he sobbed and sobbed.<sup>21</sup> Surely we can raise our children under healthier conditions.<sup>22</sup>

#### 4. The Convention on the Rights of the Child and the Convention on the Elimination of Discrimination Against Women

The United States has a history of being slow or unwilling to sign human rights treaties. Even the Genocide Convention, submitted to the Senate in 1949 by President Truman and supported by every subsequent President, was ratified only in 1986.<sup>23</sup> The International

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Time, Aug. 16, 1999, at 32.

17. *Id.*

18. *Id.* at 33.

19. *Id.*

20. *Id.*

21. *Id.*

22. On possible explanatory factors, see Rep. Zach Wamp, *Violent Entertainment Conditions Our Children to Kill: Curbing It Should Be a Top Priority*, Chattanooga Times and Free Press, May 30, 1999, at H1 (discussing Jonesboro and similar shootings in light of evidence of a military psychologist that television and violent video games are "conditioning our children to kill much as the military trains its recruits to do the same thing"). For more on the link between television and violence, see Brandon S. Centerwall, *Exposure to Television As a Risk Factor for Violence*, Am. J. Epidemiology 643 (1989) (finding that introduction of television into a region tends to be followed by a doubling of the crime rate when the first generation raised on television comes of age); L. Rowell Huesmann & Leonard D. Eron, *The Development of Aggression in American Children As a Consequence of Television Viewing*, in *Television and the Aggressive Child: A Cross-National Comparison* (L. Rowell Huesmann & Leonard D. Eron eds., 1986) (finding that heavy exposure to television during childhood is the best predictor of later aggression, better even than poverty, grades, parental status, or exposure to actual violence).

23. See U.S. Senate Resolution of Advice and Consent to Ratification of the International Convention on the Prevention and Punishment of the Crime of Genocide, 132 Cong. Rec. 2349 (1986). The Senate required implementing legislation, which was enacted in 1987. Genocide Convention Implementation Act of

Covenant on Civil and Political Rights, adopted by the United Nations in 1966,<sup>24</sup> was ratified by the United States only in 1992.<sup>25</sup> The Convention on the Elimination of All Forms of Racial Discrimination, adopted by the UN in 1965, was ratified by the United States only in 1994.<sup>26</sup> The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the UN in 1984<sup>27</sup> and ratified by the United States ten years later, in 1994.<sup>28</sup>

Consistent with this pattern, the United States has yet to ratify either the CRC or CEDAW. The UN adopted the CRC in 1989<sup>29</sup> and it has been ratified by all but two countries: Somalia and the United States.<sup>30</sup> The United States tends to consider only one rights treaty at a time, and is currently considering CEDAW. Before the Bush election, CEDAW was considered the top priority human rights treaty by the United States, so it is likely to be some time before the Convention on the Rights of the Child is ratified, despite its ratification by every other country in the world but one.<sup>31</sup>

The CRC "states frequently that States need to identify the most vulnerable and disadvantaged children within their borders and take affirmative action to ensure that the rights of these children are realized and protected."<sup>32</sup> The CRC provides that "States Parties shall ensure to the maximum extent possible the survival and development of the child."<sup>33</sup> And it obligates states "[t]o ensure the provision of necessary medical assistance and health care to all children."<sup>34</sup> And, finally, it aims to ensure that:

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1987 (the Proxmire Act), Pub. L. No. 100-606, 102 Stat. 3045 (codified at 18 U.S.C. §§ 1091-93).

24. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, *available at* [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm); see Office of the UN High Comm'r for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, 1, 7 (Jan. 19, 2001) at <http://www.unhchr.ch/pdf/report.pdf> [hereinafter *Status of Ratifications*].

25. *U.S. Ratifies UN Covenant* [sic], 3 U.S. Dep't St. Dispatch 457 (1992); *Status of Ratifications*, *supra* note 24, at 1, 7.

26. *Status of Ratifications*, *supra* note 24 at 1, 7.

27. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85, *available at* <http://www.unhchr.ch/html/menu3/b/heat39.htm>.

28. U.S. Dep't of State, *Treaties in Force* 466 (1999) (effective Nov. 20, 1994); *Status of Ratifications*, *supra* note 24, at 1, 7 (ratified Oct. 21, 1994).

29. Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* <http://www.unhchr.ch/html/menu3/b/k2crc.htm> [hereinafter *CRC*].

30. See UNICEF, *Convention on the Rights of the Child: Frequently Asked Questions*, at <http://www.unicef.org/crc/faq.htm> (last modified Oct. 20, 2000) ("Q: Who has not ratified and why not?").

31. *Id.*

32. UNICEF, *The Convention on the Rights of the Child*, at <http://www.unicef.org/crc/convention.htm> (last modified Oct. 20, 2000).

33. *CRC*, *supra* note 29, art. 6.2.

34. *Id.* art. 24.2(b).



Prior to or shortly after ratifying the Convention on the Rights of the Child, States are required to bring their national legislation into line with its provisions—except where the national standards are already higher. In this way, child rights standards are no longer merely an aspiration but, rather, are nationally binding on States. Ratification also makes States publicly and internationally accountable for their actions through the process in which States report on the Convention's implementation. At the centre of the monitoring process is the Committee on the Rights of the Child, an independent, elected committee whose members are of "high moral standing" and are experts in the field of human rights.<sup>35</sup>

This international commitment to the well-being of children has created at least some *slight* pressure on the United States. And it is possible that in the future, groups within the United States will be able to use this international Convention to press for better treatment of our children, particularly the many living in poverty.

CEDAW was adopted by the UN in 1979<sup>36</sup> and signed by President Carter in 1980. In September, 2000, Saudi Arabia became the 166th nation to bind itself to the treaty.<sup>37</sup> Among the non-signatory nations, in addition to the United States, are Afghanistan, North Korea, Iran, and Sudan.<sup>38</sup> As CEDAW becomes binding law in more and more of the world, pressure for its adoption by the United States is likely to increase.

CEDAW is another source of pressure for progressive change helpful to families with working mothers (most families) and, more broadly, for progressive change in the relative status of women and men. Pressure from women within the United States for ratification of CEDAW has been mounting in recent years and can be expected to increase as globalization increases American women's understanding of women's rights outside the United States.

CEDAW is the most comprehensive treaty on human rights for women. It defines discrimination broadly as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedoms in

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35. UNICEF, *The Convention on the Rights of the Child*, at <http://www.unicef.org/crc/convention.htm> (last modified Oct. 20, 2000); see CRC, *supra* note 29, art. 4 ("States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.")

36. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13, *available at* <http://www.unhchr.ch/html/menu3/b/1cedaw.htm> [hereinafter CEDAW].

37. *Status of Ratifications*, *supra* note 24, at 6-8; UN Division for the Advancement of Women, *CEDAW: States Parties*, at <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last modified Nov. 22, 2000).

38. *Status of Ratifications*, *supra* note 24, at 5-8.

the political, economic, social, cultural, civil or any other field.”<sup>39</sup> CEDAW requires States Parties to protect women from discrimination and to take positive steps to eliminate all forms of discrimination against women. Article 3 provides:

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.<sup>40</sup>

Indeed, States Parties are obligated

[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.<sup>41</sup>

CEDAW has important provisions for working women. It requires a comparable-worth standard for pay inequities<sup>42</sup> and paid maternity leave or comparable social benefits.<sup>43</sup> And CEDAW requires States parties “[t]o encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities.”<sup>44</sup>

President Carter submitted CEDAW to the Senate for ratification in 1980, but the accompanying report from the State Department indicated that many reservations were necessary and the Senate “took no action.”<sup>45</sup> In 1994, President Clinton urged Senate ratification but “with four reservations, three understandings, and two declarations.”<sup>46</sup> After hearings, the Senate Foreign Relations Committee recommended ratification of the Convention subject to the reservations, understandings, and declarations suggested by the Clinton administration, together with an additional understanding added by Senator Helms. Again no action was taken by the Senate.<sup>47</sup>

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39. CEDAW, *supra* note 36, art. 1.

40. *Id.* art. 3.

41. *Id.* art. 5(a).

42. *Id.* art. 11(1)(d).

43. *Id.* art. 11(2)(b).

44. *Id.* art. 11(2)(c).

45. Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 Geo. Wash. J. Int'l L. & Econ. 49, 54 (1997).

46. *Id.* at 55.

47. *Id.*

Reservations, understandings, and declarations function as objections to certain treaty provisions or interpretations of treaty provisions, so that the signatory nation is able to bind itself only to those parts of the treaty with which it agrees. Indeed, the United States reservations, understandings, and declarations, as specified by the Senate Foreign Relations Committee, were designed to ensure that if enacted, CEDAW would have absolutely no effect within the United States. As with most other human rights treaties, the United States, had it ratified CEDAW, would have included a declaration that withheld United States agreement to jurisdiction before an international human rights tribunal<sup>48</sup> and another declaration that the treaty was not self-executing, i.e., would not become part of United States law (the usual effect of a ratified treaty) unless separately enacted.<sup>49</sup> These practices completely undermine the purpose of an international treaty on human rights and eliminate any point to its ratification.<sup>50</sup>

Although the United States routinely puts reservations on international treaties and conventions of this type to ensure that America's decisions on human rights cannot be overruled by any international tribunal, it has not taken this same approach to treaties dealing with free trade. When the question is not human rights but the elimination of barriers to free trade, the United States has been quite willing to bind itself to external authorities.

The United States does not, of course, publicly admit opposition to women's rights. Opponents argue that they are not opposed to women's rights, but rather insist that United States law already adequately protects the rights of women.<sup>51</sup> But, in fact, the American approach to women's rights is quite different from that in other, similar, parts of the globe. For example, throughout Europe, women have the right to paid maternity leave and a right not to be fired during pregnancy or maternity leave for any pregnancy-related reason (such as being unable to work).<sup>52</sup> Women in the United States have only the right, as indicated earlier, to a short unpaid leave, and they can be fired while pregnant for, e.g., being late for work because of morning sickness.<sup>53</sup>

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48. *Id.* at 60.

49. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int'l L. 341, 348 (1995).

50. See Halberstam, *supra* note 45, at 60-62.

51. See Sen. Comm. on Foreign Relations, Convention on the Elimination of All Forms of Discrimination Against Women, S. Exec. Rep. No. 103-38, at 7-8 (1994).

52. See Case C-394/96, *Brown v. Rentokil, Ltd.*, 1998 E.C.R. I-4185, 4222-23 (holding that under European Union law, an employer cannot fire an employee during pregnancy or maternity leave for any reason connected to pregnancy, such as inability to do the job because of pregnancy-related disability).

53. See, e.g., *In re Carnegie Ctr. Assocs.*, 129 F.3d 290, 297 (3d Cir. 1997) (finding no pregnancy discrimination for employer to fire a secretary on maternity leave rather than, for example, the one with least seniority or the lowest job evaluations,

American notions on women's rights are also quite different from emerging international standards in the political arena. CEDAW Article 7 provides:

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.<sup>54</sup>

This may sound consistent with American notions that women cannot be formally excluded from political participation, but subsection (b) in particular has a much thicker meaning in the context of international women's rights. It is an expression of the political goal of the international woman's movement: gender mainstreaming. This requires that women be involved in all levels of governmental policy-making and implementation in appropriate numbers, given their presence in the population, to ensure that women's interests, needs, and concerns are taken into account consistently and from the beginning to the end of governmental policy making and implementation.<sup>55</sup> Gender mainstreaming, and its international support, will be discussed in greater detail later in this article when I consider what a modern electoral system might look like.

A new international norm for democratic legitimacy is emerging: a democracy is legitimate only if women participate at all levels of government in proportion to their presence in the population. In Europe, as discussed in detail below, this norm is routinely implemented by election quotas requiring that a certain percentage of candidates be women. According to this emerging standard, equal participation in governmental decision-making is a *prerequisite* for

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when a reduction in force was necessary); *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 737-38 (7th Cir. 1994) (finding no pregnancy discrimination for employer to fire pregnant worker on the day before she was to go on maternity leave, even though supervisor told her she was being fired because employer thought she would not return to work; employee had been tardy or left early a number of times during pregnancy because of morning sickness).

54. CEDAW, *supra* note 36, art. 7.

55. See Fourth World Conference on Women, *Beijing Declaration and the Platform for Action* (1996) (strategic objective G.189) at <http://www.un.org/womenwatch/daw/beijing/platform/decision.htm> (last modified Jan. 28, 1998).

women's equality. How can women achieve equality if the government is disproportionately controlled by men who tend to be more conscious of and concerned with men's needs, concerns, and interests than women's?

The notion that democratic legitimacy should be measured by the extent to which legislatures reflect the population has the potential to create a great deal of pressure for change in the United States given, not just women's under-representation, but the fact that American government is dominated by a (shrinking) minority group. As discussed next, demographic changes in the general population will exacerbate the disparity between those in elected office and those they are representing, thus increasing greatly pressure for change.

### 5. Demographic Changes

White men are, and always have been, a minority. But at some point during this century, perhaps during the 2050s, non-Hispanic white people will be a minority group in the United States. Yet non-Hispanic white men run this country. Consider the current Congress:

Table 1: Voices in the United States Congress, 2000<sup>56</sup>

	Percent Population	Percent House	Percent Senate
Anglo American men	35.1	77.8	84
Women of all colors	51.1	13.6	13 (all white)
African Americans (men and women)	12.9	8.5	0
Hispanic Americans (men and women)	11.42	4.4	0
Asian Americans <sup>57</sup> (men and women)	4.09	0.7	2
Native Americans <sup>58</sup> (men and women)	0.87	0	1

56. See Jim Abrams, *Diversity of Congress Still Lags Behind Nation*, AsianWeek.com (Dec. 8-14, 2000), at [http://www.asianweek.com/2000\\_12\\_08/news5\\_undiversecongress.html](http://www.asianweek.com/2000_12_08/news5_undiversecongress.html), for data on women, African Americans, Hispanic Americans, Native Americans, and Asian Americans in the Senate after the 2000 election and on women, African Americans and Hispanic Americans in the House of Representatives. Data on Native Americans and Asian Americans in the House are from Charles Pope, *New Congress Is Older, More Politically Seasoned*, Cong. Q. Wkly., Jan. 9, 1999, 60, 62, which reports the numbers of women and minorities in the House and Senate after the 1998 elections. General population data is from United States Census Bureau, Statistical Abstract of the United States: 1999, 25-26 tbls.24-25 (1999) [hereinafter 1999 Statistical Abstract].

57. Including Americans who have descended from Pacific Islanders.

58. Including Eskimo and Aleut peoples.

Judged by a measure of democratic legitimacy that considers whether those elected resemble those represented, the United States does poorly. In the most recent election, women gained three seats in the Senate to reach an all-time high (of thirteen white women) and also added three members in the House. But African Americans and Hispanic Americans made no gains in either chamber, despite the fact that neither group has a single member in the Senate.<sup>59</sup>

As we move towards a majority-minority America, there will be increasing pressure for the makeup of Congress to change. And that change will be progressive. In the last presidential election, Gore won ninety percent of the African American vote, two-thirds of the Hispanic vote, and fifty-six percent of the Asian American vote.<sup>60</sup> As one columnist points out, when Gore's votes are combined with Nader's, "[t]his is the best election result for the American left since 1964."<sup>61</sup>

Increasing globalization may result in a less provincial United States, one more aware of the progressive policies in other countries addressing problems discussed thus far in this section. I turn now to discuss progressive approaches taken by other countries.

## B. Possibilities

There are progressive approaches taken elsewhere in the world which would ease the pressures discussed above. I start by describing a variety of supports for working parents in France, then discuss anti-drug policies of prevention and care, gun control and restrictions on hate speech, and finally modern electoral systems.

### 1. Supports for Families

In France, families with children receive many supports from the state. The result is that although child poverty rates are about equal in France and the United States prior to governmental supports (based on parental income alone, about 24.7% of French children are poor whereas 23.3% of American children are poor), after governmental supports, only 5.7% of French children remain poor, whereas 21% of American children remain poor.<sup>62</sup> Similarly, although 24% of French adults and 20% of American adults are poor based on wage income alone, only 8% of French adults are poor after governmental supports, whereas 16% of American adults remain poor

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59. Abrams, *supra* note 56.

60. John O'Sullivan, *Inclusive GOP Shuts Out Base*, Chi. Sun Times, Dec. 5, 2000, at 31.

61. *Id.*

62. Barbara R. Bergmann, *Saving Our Children from Poverty: What the United States Can Learn From France* 6 tbl.1.1 (1996) (1984-87 data).

after considering such supports.<sup>63</sup> And in the United States, proportionately more poor adults are women than in France. In the States, 38% more women than men are poor, whereas in France only 11% more women than men are poor.<sup>64</sup>

Many supports are available to all parents and children regardless of income. Free nursery schools are available for children (regardless of whether the mother works) from the time they are toilet-trained (about two and a half years) until they enter first grade. Parents who use private centers receive cash benefits and tax breaks. When mothers of younger children work, the government heavily subsidizes placements in daycare centers.<sup>65</sup>

Daycare workers in France are well-trained and well-paid relative to the United States. Indeed, because of the higher level of teacher training (and better pay?), nursery quality surpasses that of American pre-schools with lower teacher-child ratios. In 1991, French daycare workers started at \$14,153 per year and also received free housing or a tax-free housing allowance. The maximum salary was \$29,061 per year. In the United States, "employee turnover is high and the employees are often ill-educated, have no special training in childhood education, and are paid at the minimum wage" (\$5.25 per hour, which would be \$10,920 for a year of forty-hour weeks).<sup>66</sup> Thus, women working for wages as caretakers in France are paid significantly more than those workers in the United States.

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63. Colin Hughes & Kerry McCuaig, *When Mom Must Work: Family Day Care as a Welfare-To-Work Option* (Apr. 2000), § 2.13 tbl.1 at 4 at [http://www.childcarecanada.org/CPAG\\_CCEF/moms\\_welfare/index.html](http://www.childcarecanada.org/CPAG_CCEF/moms_welfare/index.html).

64. Karen Christopher et al., *Gender Inequality in Poverty in Affluent Nations: The Role of Single Motherhood and the State*, 12 tbl.2 (Jan. 5, 2000), available at Joint Center for Poverty Research, [http://www.jcpr.org/research\\_summaries/vol1\\_num1.html](http://www.jcpr.org/research_summaries/vol1_num1.html).

65. Bergmann, *supra* note 62, at 35-37. Subsidies for care of infants and toddlers vary with income level. In 1991, a family with a monthly income under \$681 and one child would pay the equivalent of \$4.15 per day for care of an infant or young toddler; such a family would pay the equivalent of \$3.38 per day per child for two children in such care. A family with a monthly income under \$1,286 would pay \$7.68 and \$6.45, respectively. A family with a monthly income under \$2,496 would pay \$15.21 and \$12.60. *Id.* at 40 tbl.3.7.

66. *Id.* at 31. In France, the ratio tends to be about sixteen children to one adult. This would be regarded as inadequate in the United States, where:

an adult-child ratio of 1:9 [is thought] to be crucial to providing high-quality care; U.S. preschools abide by this finding. However, a group of American experts on day care who observed French child-care facilities in 1989 concluded that, despite the larger number of children per adult, the quality . . . was as high as or higher than the best and highest-cost American day-care centers. More systematic studies of teacher-child interactions confirm this impression. One study concluded that the teacher training in France, which encourages teachers to carefully plan daily activities and constantly monitor the children, explained the good results.

*Id.* at 31.

The gap between men and women's pay is smaller in France than in the United States. In the States, full-time, year-round, wage-earning women earn an average of \$0.75 for every dollar earned by men in similar jobs. The same women in France earn about \$0.81 for every \$1.00 earned by men.<sup>67</sup> This is particularly important for families headed by single mothers, the families most likely to be poor.

All education is free, from nursery school through university, and "supervised recreational programs for school-age children for the after-school hours, and during summers and school vacations, subsidized by the government, are common."<sup>68</sup> Family allowances are available to all families with more than one child under sixteen (or eighteen, depending on the child's earnings from age sixteen to eighteen) and are not income-tested. The benefit varies only with the number of children, and in 1990 was \$91 per month for a family with two children, and \$207 a month for a family with three children.<sup>69</sup> In addition, every pregnant woman is entitled to a new-baby allowance each month from the third month of pregnancy until the baby is three months old. In 1991, the new-baby allowance was \$134 per month. For low and medium income families, this allowance continues until the youngest child is three years old.<sup>70</sup>

If parents do not live together, the government pays a minimum child support payment each month and is responsible for collecting child support from the non-custodial parent. In 1991, the Child Support Assurance benefit was \$66 per month per child. This benefit is not means-tested.<sup>71</sup>

Handicapped children receive an additional allowance independent of family income. In 1991, it was \$304 a month for a child requiring constant help in eating, dressing, etc., and \$164 a month for a child needing less help.<sup>72</sup>

Income tax deductions for children are also available and are about the same size as those in the United States on a per child basis.<sup>73</sup> Mothers receive sixteen weeks of paid maternity leave at the birth of a first or second child and twenty-six weeks on the birth of a third child. The stipend is paid by the social security agency, and in 1991 was 84% of the mother's base salary up to a maximum of \$1,742 dollars per

67. Joni Seager, *The State of Women in the World Atlas 68* (1997); Human Development Report 36 (Published for the United Nations Development Programme 1995).

68. Bergmann, *supra* note 62, at 28.

69. *Id.* at 59 tbl.4.5. All members of the European Community, even England, provide family allowances. In England, the allowance is \$46 per month for one child, \$92 for two children and \$138 for three children. *Id.*

70. *Id.* at 59-60.

71. *Id.* at 61.

72. *Id.* at 62.

73. *Id.* at 68.



month.<sup>74</sup> In addition, all families are covered by national health insurance.<sup>75</sup>

Finally, caretaking is made easier by the fact that the French, like other Europeans, work significantly fewer hours per year than Americans. Many American workers receive only ten paid vacation days a year. In Europe, including France, the norm is at least five paid weeks of vacation—twenty-five paid days off. In the United States, full-time workers average forty-four hours a week under unenforced laws setting the maximum work week at forty hours. In France, a recent law mandates a maximum work week of thirty-five hours (down from thirty-nine hours, with no reduction in pay).<sup>76</sup> In 1997, American workers worked an average of 1,966 hours, compared to the French who worked only 1,656.<sup>77</sup> Thus, the French worker works an average of about six hours less each week.

Poor families with three or more children (and no new-baby allowance) are entitled to an additional family allowance. In 1991, this benefit was \$122 per month.<sup>78</sup> For families of modest means (\$17,669 yearly income for a family with one child), an allowance of \$57 is available for each child between the ages of six and ten at the start of the school year.<sup>79</sup>

The Single-Parents Subsistence Allowance ensures that total family income, from wages, government benefits, child support, etc., reaches at least a set minimum level if there is a child under three in the family (\$582 per month in 1991 for a parent with one child, with an additional \$146 per month for each additional child).<sup>80</sup> Substantial

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74. *Id.* at 46. The mother is entitled to \$192 a month if she had a job immediately before the pregnancy or during it, even though she no longer has the job. *Id.*

75. *Id.* at 70.

76. Anders Hayden, *France's 35-Hour Work Week*, Canadian Dimension, Feb. 1, 2000, at 8. The law was designed as a way to cut the unemployment rate, which has been very high (though it is now steadily falling). Prior to the new law, unemployment was 12.5%. Although there was some controversy about the legislation even among workers, some of whom worried that employers would merely require employees to do the same amount of work in a shorter amount of time, "84 per cent of workers who had their hours reduced said that there were more advantages than disadvantages, and 75 per cent said their quality of life had improved." Workers reported that they were likely to use the time to "[s]pend[] more time with family and children." Employers have implemented the change in "diverse ways, such as: seven-hour days, alternating four- and five-day weeks, additional days off on an annual basis—usually 22 or 23, and 'time savings accounts' for accumulation of long periods of leave." Many workplace agreements "have gone beyond 35 to 32 hours or given individual workers the choice of reducing their hours further." *Id.*

77. Elizabeth Olson, *Americans Lead the World in Hours Worked*, N.Y. Times, Sept. 7, 1999, at C9.

78. Bergmann, *supra* note 62, at 64-65.

79. *Id.*

80. *Id.* at 65-66. When she no longer has a child under three, the single parent may qualify for additional assistance under the Minimum Income to Assist Job Entry program. *See id.* at 66-67.

housing subsidies are also available to families at very low income levels, though they decline sharply as income rises.

The French support system has two important effects. First, by working, even at a minimum wage job, parents can pull their families out of poverty. Good supports provide no disincentive to work in France, because families remain poor if parents don't work, but can rise above the poverty level if they do. Second, many of the supports needed by poor families are either available to all families or to all but wealthy families. Because these supports are available to all or most families, they enjoy broad support.

As the United States becomes more diverse and (perhaps) more progressive in the future, it is possible that there will be increased political pressure for supports for working parents combined with reduced hours of wage work (embodied in a new generation of hours legislation). Such changes would greatly increase the well-being of families with children and significantly ease the pressures on working parents today.

## 2. Anti-Drug Policies of Prevention and Care

The European Union is moving from repressive drug policies in some states (e.g., Germany, Italy, and Luxembourg) towards a strategy emphasizing prevention and care.<sup>81</sup> "In general, all Member States agree that drug users should not be imprisoned because of their addiction. A variety of alternatives to punishment are therefore being implemented across Europe, ranging from performing community tasks to outpatient or in-patient treatment."<sup>82</sup> Treatment is available to prisoners throughout the European Union, and in many countries there are increased efforts to reintegrate drug users who have been in prison or treatment into communities.<sup>83</sup>

Although many poor minority communities in the United States have, as indicated earlier, been devastated by the war on drugs for some time now, the demographic changes described above may increase the pressure to reevaluate the American approach to the drug problem.

## 3. Gun Control and Restrictions on Hate Speech

Other countries have lower levels of gun-related violence and stringent gun control laws. On this issue, the National Rifle Association has successfully kept even modest gun controls, such as prohibiting hand guns, off the agenda. Instead, even minimal

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81. European Monitoring Centre for Drugs and Drug Addiction, *Annual Report on the State of the Drugs Problem in the European Union*, at 28 (2000), available at [http://www.emcdda.org/publications/publications\\_annrep\\_00.shtml](http://www.emcdda.org/publications/publications_annrep_00.shtml).

82. *Id.*

83. *Id.*

controls—such as requiring background checks for guns sold anywhere, including “gun shows”—are controversial. At some point, it is at least possible that Americans will demand real gun controls.<sup>84</sup>

In most of what we call the “civilized world,” those nations we see as most like ourselves, such as Europe and Australia, violence is much lower<sup>85</sup> and gun ownership tightly regulated.<sup>86</sup>

To date, the First Amendment has precluded any regulation of hate speech in the United States. In most of the world, however, hate speech is regulated. Every other Northern Atlantic industrialized nation which we regard as a free democracy, including Canada, England, and Germany, has a ban on hate speech.<sup>87</sup> Indeed, the International Covenant on Civil and Political Rights provides that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”<sup>88</sup> The United States has ratified this convention but with a reservation that “article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association as protected by the Constitution and laws of the United States.” In addition, a declaration states that the Covenant

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84. On the need for gun control, see generally Franklin E. Zimring & Gordon Hawkins, *Crime Is Not the Problem: Lethal Violence in America* (1997) (identifying firearms used in assaults and robberies as the single feature of the American environment most clearly linked to the extraordinarily high death rate in the United States as a result of interpersonal violence).

85. In a study of thirty-six countries, the United States came out first in the rate of death from gun violence, with a rate 3.3 times that of Canada, 5.4 times that of Australia, 6.0 times that of New Zealand, 34.7 times that of England and Wales, 26.4 times that of Scotland, and 284.8 times that of Japan. E.G. Krug et al., *Firearm-Related Deaths in the United States and 35 Other High- and Upper-Middle-Income Countries*, 27 *Int'l J. Epidemiology* 214, 216 tbl.1 (1998).

86. See, e.g., Shawn Donnan, *Australians Claim Success for Tough Gun Controls: First Indications Vindicate Firearm Restrictions and Cast Doubt on Gun Lobby Arguments*, *Fin. Times* (London), Apr. 29, 2000, at 8; Center to Prevent Handgun Violence, *Concealed Truth: Concealed Weapons Laws and Trends in Violent Crime in the United States*, Oct. 22, 1999, at <http://www.handguncontrol.org/research/studies/conctruth.asp> (reporting on study finding that states with laws allowing people to carry concealed weapons have seen a significantly smaller drop in crime rates in recent years relative to states banning the carrying of concealed weapons); Center to Prevent Handgun Violence, *Saving Lives By Taking Guns Out of Crime: The Drop in Gun-Related Crime Deaths Since Enactment of the Brady Law* (2000), at <http://www.handguncontrol.org/research/studies/savinglives.asp> (studying effectiveness of the Brady Bill, which strengthened background checks on buyers of handguns, in reducing the use of handguns in robberies and assaults).

87. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 *Mich. L. Rev.* 2320, 2346-47 (1989) (describing hate speech regulation in other countries); see also David Kretzmer, *Freedom of Speech and Racism*, 8 *Cardozo L. Rev.* 445, 500 (1987) (noting restrictions in the Netherlands, Norway and Finland); Cass R. Sunstein, *Words, Conduct, Caste*, 60 *U. Chi. L. Rev.* 795, 814 n.67 (1993) (noting restrictions allowed in Germany).

88. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 20, 999 *U.N.T.S.* 171, available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm).

on Civil and Political Rights is not self executing, that is, does not become law in the United States unless enacted as independent legislation.<sup>89</sup>

Again, as with gun control, it is at least possible that a more progressive United States may at some future time agree with the rest of the world that some restrictions on hate speech are compatible with a free and open society. Indeed, as the International Covenant on Civil and Political Rights indicates, such restrictions are necessary to ensure every citizen basic civil and political rights.

#### 4. Modern Electoral Systems and New Standards for Democratic Legitimacy

Demographic changes and the emerging standard for democratic legitimacy will create increasing pressure for elected officials to look more like the people they represent. Modern democracies use some form of proportional representation, thus facilitating representation of women and minority groups.

Single-member, winner-take-all electoral systems use geography as the basis for representation of groups identified by district borders. We inherited this system from England, where its roots are feudal: "it was the land, and not men which should be represented."<sup>90</sup> Seeing interest groups as requiring division only along geographic lines might have made some sense when the republic was founded—the franchise was then limited to propertied white men<sup>91</sup>—and winner-take-all systems with geographic districting can create effective democracies in homogeneous populations.<sup>92</sup> But today we have an extremely diverse population of voters, often within the same districts.

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89. Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DePaul L. Rev. 1257, 1257 (1993); Henkin, *supra* note 49, at 348.

90. A.F. Pollard, *The Evolution of Parliament* 164 (2d ed. 1926), *quoted in* Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* 128 (1994).

91. Daniel Hays Lowenstein, *Election Law: Cases and Materials* 22-23 (1995) (noting that because of "cheap land and scarce labor, most white men who could not meet the property qualifications during their youth could do so by the time they had attained middle age"); *see also* Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* 220-22 (1990) (arguing that the Framers saw the major problem of democracy as the possibility that the unpropertied majority might interfere with the property rights of the propertied minority, and the latter therefore deliberately structured government to create barriers to ordinary people's participation, including multiple levels of government and rule by a distant elite, and mentioning that in general only white men of property could vote).

92. Lani Guinier, *Lift Every Voice: Turning a Civil Rights Setback into a New Vision of Social Justice* 256 (1998); Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* 3-4 (1984).

Winner-take-all single-member districts are "drawn not by voters but by incumbent politicians and other partisans" whose purpose is "not to give voters maximum choice but the opposite: they are drawn to give elected officials maximum protection from the voters."<sup>93</sup>

Indeed, England is reconsidering *its* commitment to winner-take-all single-member districts. In 1997, England's Labor and Liberal Democratic Parties agreed to hold a referendum on proportional representations if they succeeded in evicting the Conservatives in the next general election.<sup>94</sup> Proportional representation is very much on the agenda in England today, though it is not clear that there will be a referendum before the next general election.<sup>95</sup> The new regional parliaments for Scotland, Wales, and Northern Ireland use proportional representation.<sup>96</sup> Members of the new upper house of Great Britain's parliament are likely to be elected in the future using proportional representation (there will no longer be a hereditary House of Lords).<sup>97</sup> And limited proportional representation is used to elect Great Britain's representatives to the new European Parliament.<sup>98</sup> Proportional representation is more difficult to achieve in the lower house of parliament since its members have won in winner-take-all single-member district elections, and are therefore reluctant, regardless of their party's position, to change the status quo.<sup>99</sup>

Given the problems with winner-take-all, single-member electoral schemes, it is not surprising that almost all democracies younger than ours have some form of proportional representation.<sup>100</sup> Under a typical proportional representation scheme, each individual votes for

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93. Guinier, *supra* note 92, at 255. Guinier goes on to note that:

Indeed, the reason so few congressional districts 'turn over,' meaning switch party affiliation, is that the districts are drawn consciously to collect like-minded voters into geographic units. Those who dissent, who support a different candidate, are free to vote. But their dissenting votes simply don't count. The outcome is stacked every ten years when the districts are drawn in light of new census figures.

*Id.*

94. *Labour, Liberal Democrats Agree British Constitutional Reform*, Agence France Presse (France), Mar. 5, 1997, Int'l News Section.

95. Michael Clarke, *Asdown Hail New Deal*, Press Assoc. Ltd., Nov. 15 1998, Home News Section.

96. Toby Harnden, *Blair's Secret Peace Plan for Ulster*, Daily Telegraph (London), Jan. 10, 1998, at § 1 (describing plan for Northern Ireland Assembly to be elected by proportional representation); Denis Campbell, *When X Marks the Split*, Herald (Glasgow), Oct. 29, 1998, at 8. In part of this column, Margaret Ewing argues for proportional representation and notes that it is being used for the Scottish Parliament, the Welsh Assembly, and the European Parliament.

97. Robert Shrimley & George Jones, *Cabinet Plan for Lords to Become Senate*, Daily Telegraph (London), Jan. 20, 1999, at 1.

98. See Campbell, *supra* note 96 at 8.

99. *Id.* (noting that many thought Tony Blair could never "endorse moving over to a system which could see the loss of perhaps 80 Labour MPs").

100. Guinier, *supra* note 92, at 258.

one party: the Greens, the Reds, the Blues, or the Oranges. If the Green Party gets twenty percent of the votes in an election for a hundred-member parliament, then twenty members of the new parliament will be Greens: the top twenty on the Green's list of candidates.<sup>101</sup> If the Reds get thirty percent, then thirty members of parliament are the top thirty individuals on the Red's list, and so on. In this sort of electoral scheme, it is voters, not politicians, who draw the lines around represented groups—voters do so by deciding which party to vote for.

There are numerous variations of proportional representation.<sup>102</sup> For example, in a variation characterized as semiproportional,<sup>103</sup> voters have a "single transferable vote" which is used to vote for particular candidates.<sup>104</sup> In such a system, the ballot contains the names of all the candidates and voters rank them in order of preference. Votes are then transferred according to certain rules to ensure that as many votes as possible count towards the election of a candidate. For example, if the Chicago metropolitan area elected 10 representatives to Congress under such a system, each voter would get a ballot with all the candidates listed and would be asked to rank them in order from 1 to 10. Two kinds of vote transfers then take place:

[F]irst, any surplus votes not needed by candidates who already have the minimum quota of votes required for election are transferred to the next highest candidates; second, the weakest candidate is eliminated and his or her votes are transferred in the same way. If necessary, these steps are repeated until all of the available seats are filled.<sup>105</sup>

This system ensures, not only that as many voters as possible vote for a winning candidate, but also that political minorities do not scatter their votes for so many different candidates that none are elected.<sup>106</sup> And it is voters who draw the lines around represented groups.

Cumulative voting in modified at-large systems (also sometimes called semiproportional representation)<sup>107</sup> can function in ways quite similar to proportional representation and also allows voters to vote for particular candidates.<sup>108</sup> Lani Guinier describes such a system:

Under a modified at-large system, each voter is given the same number of votes as open seats, and the voter may plump or cumulate her votes to reflect the intensity of her preferences.

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101. See Lijphart, *supra* note 92, at 153.

102. See *id.* at 153-54.

103. See *id.* at 152 (Japan's single transferable vote system styled "semiproportional" representation).

104. *Id.* at 153.

105. *Id.* at 153-54.

106. Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. Chi. Legal F. 241, 260.

107. *Id.*

108. Guinier, *supra* note 92, at 258-61.

Depending on the exclusion threshold, politically cohesive minority groups are assured representation if they vote strategically. Similarly, *all* voters have the potential to form voluntary constituencies based on their own assessment of their interests. As a consequence, semiproportional systems such as cumulative voting give more voters... the opportunity to vote for a winning candidate.<sup>109</sup>

In this semiproportional representation scheme, as in proportional representation schemes, it is voters, not politicians, who draw the lines around represented groups—voters do so by deciding which candidates to support and how many votes to cast for each. Indeed, empirical studies have shown that as long as districts have at least five seats in a proportional representation system, how politicians draw lines has no effect on representation in the legislature. And women do best in districts with seven to ten seats.<sup>110</sup>

Limited voting provides protection for minority voters similar to that in single-transferable-vote systems by giving each voter fewer votes than the number of open seats. For example, voters might be given only two votes in electing a seven-member board. In such a scheme, the majority cannot possibly win every seat.<sup>111</sup> Here, too, it is voters who draw lines around represented groups.

Proportional and semiproportional representation schemes have occasionally been used in the United States. For example, the New York City Council was elected under a proportional representation scheme in the thirties and forties.<sup>112</sup> The Illinois House was elected under a cumulative-voting scheme with multimember districts (semiproportional representation) for over 110 years, ending in 1980.<sup>113</sup> In Illinois, each legislative district for the Illinois House elected three representatives. Each voter had three votes, and could vote for one, two, or three candidates, with their votes distributed among the candidates for whom they voted. Thus, a Republican in a Democratic district (or vice versa) could use all three of their votes to support a single Republican candidate.<sup>114</sup>

These sorts of electoral systems—proportional or semiproportional representation—have a number of advantages. Most importantly, they facilitate the representation of traditionally underrepresented groups. For example, during Illinois' semiproportional representation era, "women were forty percent more likely to be represented in the Illinois House" than in Congress, and the electoral system "helped

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109. *Id.*

110. Douglas J. Amy, *Real Choices/New Voices: The Case for Proportional Representation in the United States* 51-53, 110-11 (1993).

111. Pildes & Donoghue, *supra* note 106, at 253.

112. Guinier, *supra* note 92, at 258, 264.

113. *Id.* at 266.

114. *Id.*

propel Illinois to the forefront of women's representation."<sup>115</sup> Proportional or semiproportional representation schemes encourage more diverse candidates to run and voters to vote because their participation is more likely to matter than in a winner-take-all district.<sup>116</sup> Candidates are less likely, under such schemes, to engage in negative campaigning rather than to engage the issues, since they must not just defeat one specific opponent but maximize their own vote.<sup>117</sup>

Debates on policy issues can be substantively better when more options and interests are brought to the table.<sup>118</sup> In Illinois, multi-member districts with cumulative voting created a less divided legislative body because Democrats and Republicans were not so neatly divided between the city of Chicago (Democratic) and the rest of the state (mostly Republican). There were Republicans from Chicago and Democrats from downstate. As a result, there were members of the Republican caucus who shared interests with Chicago Democrats, such as improving city schools.<sup>119</sup>

Both the New York City and Illinois proportional or semiproportional electoral systems were replaced by winner-take-all single-member districts, but not because either system failed the voters. In New York City, the Democratic Party bosses "resented its loss of control over the nomination process and the fact that formidable third-party candidates . . . were elected from areas that in a winner-take-all district system would have been Democratic strongholds."<sup>120</sup> To repeal the system, Democratic Party leaders spent over eight times as much as proponents and "capitalized on fear of communism," characterizing the proportional representation as undemocratic and "a threat to the two party system" essential to democracy in the United States.<sup>121</sup> It is less clear why the Illinois system, which had lasted for over 110 years, was repealed. Guinier reports that the 1980 repeal was "part of a budget-cutting proposal to eliminate fifty-nine state representatives."<sup>122</sup>

In Chilton County, Alabama, cumulative voting in multi-member districts was adopted to remedy a possible violation of the Voting Rights Act.<sup>123</sup> The new system did increase African American

115. *Id.* at 268.

116. *See id.* at 264, 268 (noting, for example, that in New York City, while proportional representation was in place for the city council, there were more "energetic and public-spirited candidates" as well as more voters).

117. *Id.* at 254-55.

118. *Id.* at 264 (noting that in New York, proportional representation resulted in "new, able politicians; their diverse viewpoints enabled substantive and lively debate on public policy issues").

119. *Id.* at 266.

120. *Id.* at 264-65.

121. *Id.* at 265.

122. *Id.* at 266. It seems possible that some supporters of repeal might have had more political reasons.

123. Pildes & Donoghue, *supra* note 106, at 260.



representation: with few crossover white votes, an African American was elected to the County Commission for the first time by African American voters who were able to give multiple votes to an African American candidate.<sup>124</sup> And minority representation resulted in substantive changes making the distribution of services more equitable across minority and non-minority communities.<sup>125</sup>

A study of the Chilton County experience concludes that "since cumulative voting began, groups that previously had not been represented—blacks, Republicans, and women—have been elected in significant numbers to both the County Commission and the Board of Education."<sup>126</sup> Despite these results, the people in Chilton County strongly dislike the cumulative voting system because it is widely seen as unconstitutional and inconsistent with the principle of one person one vote,<sup>127</sup> though it worked relatively smoothly.<sup>128</sup>

The standard concern with proportional and semiproportional representation systems is fear of balkanization. Such schemes can result in unstable parliamentary governments and confer great power on extremist groups in legislative bodies, whose support is often necessary to form a government or for legislative action.<sup>129</sup>

It is, however, only in parliamentary systems that government falls when legislative coalitions are unstable.<sup>130</sup> Further, as Guinier points out, the power of extremist groups in the legislature in a non-parliamentary system depends on *how* proportional (or semiproportional) representation is structured. Two issues are particularly important here: the threshold of support needed for a party to be included in the legislature and whether the entire legislature, or only part of it, is elected via a proportional (or semiproportional) representation scheme rather than single-member districts.<sup>131</sup> For example, Israel is often used as an example of proportional representation's potential to create instability and to give too much power to extremist groups.<sup>132</sup> But in Israel, a party is represented in the legislature if it has the support of just one percent

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124. *Id.* at 272-73.

125. *Id.* at 277-81.

126. *Id.* at 276.

127. *Id.* at 282-84. The authors of the study of the Chilton County experience "explored whether dislike of cumulative voting was a cover for resistance to minority political power," but "ultimately rejected this explanation." *Id.* at 283. People did appreciate the need for minority representation, but would have preferred other solutions, such as drawing majority-black districts, to avoid the unconstitutionality of cumulative voting. *Id.* at 283-84. Ironically, cumulative voting is "clearly constitutional," whereas the "setting aside of a seat for minority officeholders" is "blatantly unconstitutional." *Id.* at 283-84.

128. *Id.* at 284-85.

129. See Lijphart, *supra* note 92, at 157; Guinier, *supra* note 92, at 263-69.

130. Guinier, *supra* note 92, at 263, 268-69.

131. *Id.* at 268-69.

132. *Id.*

of the population.<sup>133</sup> Germany is an example of a stable democracy with proportional representation because it has both a “relatively high threshold for representation” (five percent) and half the members of its legislature are elected on the basis of single-member districts and half on the basis of proportional representation.<sup>134</sup>

In sum, balkanization can be a serious threat, but will be limited in the United States because we have a President elected independently of the legislature (a non-parliamentary system). In addition, a well-designed electoral system can avoid any risk of balkanization by having high thresholds for representation together with some single-member districts.

Moreover, including a proportional representation component in an electoral scheme can actually stabilize a democracy. To the extent proportional representation encourages voter turn out, it is likely to contribute to stability. Guinier points, for example, to a 1989 study finding that “democracies with lower voter turnout levels have higher amounts of citizen turmoil and violence.”<sup>135</sup> Arend Lijphart argues that Hitler’s rise is attributable to the rapid political mobilization of a large group of voters who had previously been disengaged.<sup>136</sup> He concludes that proportional representation can protect democracies from extremist takeovers by keeping more voters engaged in the political system.<sup>137</sup>

The United States does not do well when compared, as Table 2 below does, with other countries in terms of the presence of women in the country’s highest legislative body. Indeed, with a ranking of fifty-six, there are fifty-five countries around the world in which women are represented in the highest legislative body in higher numbers.

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133. *Id.* at 268.

134. *Id.* at 269.

135. *Id.* at 251.

136. See Lijphart, *supra* note 92, at 157. In Chilton County Alabama, cumulative voting in multi-member districts did not result in the election of extremists. Indeed, “some Chilton County observers believe cumulative actually tends to produce more centrist candidates—at least more centrist minority candidates—than the alternative of ‘safe’ minority districts.” Pildes & Donoghue, *supra* note 106, at 292-93.

137. Pildes & Donoghue, *supra* note 106, at 292-93.

Table 2: Women in National Legislatures: All Countries in the European Union, Canada and the United States, as Ranked for Participation of Women on a World-Wide Basis by the Inter-Parliamentary Union<sup>138</sup>

Rank	Country	Lower or Single House		Percent Women	Upper House		Percent Women
		Seats	Women		Seats	Women	
11	Sweden (party quotas)	349	149	42.7	—	—	—
22	Denmark (party quotas)	179	67	37.4	—	—	—
33	Finland (party quotas)	200	73	36.5	—	—	—
44	Norway (party quotas)	165	60	36.4	—	—	—
55	Netherlands (party quotas)	150	54	36.0	75	20	26.7
77	Germany (party quotas)	669	207	30.9	69	41	59.8
112	Spain (party quotas)	350	99	28.3	259	59	22.58
115	Austria	183	49	26.8	64	13	20.3
222	Belgium (quota law)	150	35	23.3	71	20	28.2
223	Switzerland (party quotas)	200	46	23.0	46	9	19.6
330	Canada	301	60	19.9	105	32	30.5
333	United Kingdom (party quota in 1997)	659	121	18.4	666	105	15.8
337	Portugal (quota law unconstitutional <sup>139</sup> )	230	40	17.4	—	—	—

138. Rankings of the Inter-Parliamentary Union are current as of December 15, 2000 and include every country in the world (not all of which are included in the table in text, hence there is, for example, no entry with a rank of 6 in the table in text). Inter-Parliamentary Union, *Women in National Parliaments*, Dec. 15, 2000, at <http://www.ipu.org/wmn-e/classif.htm> [hereinafter *Women in National Parliaments*]. Although the Inter-Parliamentary Union's ranking data are used, numbers are not skipped when there is a tie. In the Inter-Parliamentary Union's rankings, if two countries tie for eleventh place, the next country is still ranked twelfth. In this table, the next-ranked country is ranked thirteenth, since there are twelve countries ranked ahead of it.

139. One party has a quota of twenty-five percent women, but "the necessary rules for its implementation have not been approved" and the quota has been only partly applied. Directorate of Human Rights, *Women in Politics in the Council of Europe Member States*, Oct. 1997, at <http://www.dhdirhr.coe.fr/equality/Eng/women%20in>

441	Luxembourg (party quota or other <sup>140</sup> )	60	10	16.7	—	—	—
56	United States <sup>141</sup>	435	56	12.9	100	9	9
661	Ireland (party quotas <sup>142</sup> )	166	20	12.0	60	11	9
668	Italy (quota law unconstitutional)	630	70	11.1	326	26	8
771	France (quota law for next election)	577	63	10.9	321	19	59
??	Greece	300	?	?	—	—	—

The European countries with highest proportions of women in their parliaments have proportional representation systems *and* some sort of formal quota system either by law or party rule. In Sweden, the five major parties have internal rules requiring that men's and women's names alternate on the party list for proportional representation. In Germany the Social Democratic party has set a forty percent quota for women on its lists of candidates. In 1997, British Prime Minister Tony Blair set a quota of fifty percent women for open seats and increased the number of women in the lower house of Parliament from 63 to 122.<sup>143</sup>

In France, women responded to the low levels of women in parliament with a movement for "Parité," which gained momentum in the late 1980s and 1990s, as the combination of proportional representation and quotas increased the level of women's participation in other European parliaments to levels much, much

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%20politics.html [hereinafter *Women in Politics in the Council of Europe*].

140. Each party has either quotas or "a system of positive discrimination towards women candidates. The statutes of one party stipulate that one of the vice-presidents must be a woman." *Id.*

141. One hundred seventy-seven countries are included in the ranking. Other countries higher than the United States are: Iceland; New Zealand; Mozambique; South Africa; Bosnia and Herzegovina; Venezuela; Cuba; Grenada; Argentina; Turkmenistan; Viet Nam; Namibia; Seychelles; Australia; Monaco; China; Lao People's Democratic Republic; Croatia; Democratic People's Republic of Korea; Costa Rica; Guyana; Uganda; Estonia; Lithuania; Rwanda; Botswana; Latvia; United Republic of Tanzania; Dominican Republic; Angola; Bahamas; Czech Republic; Tajikistan; Eritrea; Ecuador; Burundi; Slovakia; Jamaica; Saint Kitts and Nevis; San Marino; and Poland. *Women in National Parliaments*, *supra* note 138.

142. In Ireland, three of the six major parties have quotas, varying from 20-40%. Of the other three parties, "one party has adopted a Positive Action Programme to increase the participation of women, and another party has set a target of 40% to be reached by the year 2000." *Women in Politics in the Council of Europe*, *supra* note 139.

143. Liane Hansen, *Women from Around the World Look for Ways to Increase Their Numbers in Elected Positions and Leadership Roles*, Nat'l Pub. Radio, Weekend Edition, June 11, 2000 (Sweden); Rachel Giese, *Voters Should Count on Women*, Toronto Star, Apr. 27, 2000 (Germany and England).

higher than those in France. The Parité Movement pushed for a quota to be enacted by the overwhelmingly male parliament—and succeeded. Proponents published lists of men against Parité, and women voted against them. Within two to three years, eighty percent of voters supported Parité.<sup>144</sup>

In May, 2000, the French legislature passed a statute implementing Parité by requiring that every party's political slate must include as many women as men or lose its government-provided campaign financing.<sup>145</sup> The effectiveness of the French Parité movement can be seen in Table 3, below. At the time of the 1999 election of representatives to the European Parliament, the French law was not yet in effect. Yet on *this* list, unlike that in Table 2, above, France ranks second in representation of women. This success would also, of course, be attributable to the fact that elections to the European Parliament, unlike those to the French Parliament, are under a proportional representation scheme.

Table 3: Women in the European Parliament  
1999 Election<sup>146</sup>

Rank	Country	Seats	Women	Percent Women
1	Sweden	22	11	50.0
2	Finland	16	7	43.8
3	France	87	35	40.2
4	Austria	21	8	38.1
5	Denmark	16	6	37.5
6	Germany	99	36	36.4
7	Spain	64	22	34.4
8	Ireland	15	5	33.3
8	Luxembourg	6	2	33.3
9	Netherlands	31	10	32.3
10	Belgium	25	7	28.0
11	United Kingdom	87	21	24.1
12	Portugal	25	5	20.0
13	Greece	25	4	16.0
14	Italy	87	9	10.3
	TOTAL	626	188	30.0

144. Hansen, *supra* note 143.

145. Jane Eisner, *Women Win Clout*, Miami Herald, Aug. 11, 2000, at 7B.

146. Data in this table is from European Database, *Women in Decision-making, Results of the Election to the European Parliament, June 1999*, at <http://www.db-decision.de/FactSheets/EP-Results.htm> (last modified Mar. 13, 2000).

In general, electoral quotas for women have become an increasingly important part of the international feminist agenda. The Platform for Action of the Fourth World Conference on Women in Beijing in 1994 includes the following explanation of the importance of equality in governmental decision-making:

Equality in political decision-making performs a leverage function without which it is highly unlikely that a real integration of the equality dimension in government policy-making is feasible. In this respect, women's equal participation in political life plays a pivotal role in the general process of the advancement of women. Women's equal participation in decision-making is not only a demand for simple justice or democracy but can also be seen as a necessary condition for women's interests to be taken into account. Without the active participation of women and the incorporation of women's perspectives at all levels of decision-making, the goals of equality, development and peace cannot be achieved.<sup>147</sup>

The goal, described earlier, is "gender-mainstreaming":

In addressing the inequality between men and women in the sharing of power and decision-making at all levels, Governments and other actors should promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes so that before decisions are taken, an analysis is made of the effects on women and men, respectively.<sup>148</sup>

The Beijing platform for action explicitly calls for governments to use "positive measures" to correct the "low proportion of women among economic and political decision makers at the local, national, regional and international levels."<sup>149</sup> Governments are to "[t]ake measures, including, where appropriate, in electoral systems that encourage political parties to integrate women in elective and non-elective public positions in the same proportion and at the same levels as men."<sup>150</sup> When appropriate, electoral systems are to be reformed to increase women's representation,<sup>151</sup> and governments are to "[a]im at gender balance in the lists of national candidates nominated for election."<sup>152</sup>

The Council of Europe, a broader (and looser) organization than the European Union and the organization behind the European Convention on Human Rights, also supports gender mainstreaming and stresses the importance of women in fifty percent of all governmental decision-making positions for democratic legitimacy.

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147. Fourth World Conference on Women, *Beijing Declaration and the Platform for Action* (1996) (strategic objective G.181) at <http://www.un.org/womenwatch/daw/beijing/platform/decision.htm>.

148. *Id.* (strategic objective G.189).

149. *Id.* (strategic objective G.186).

150. *Id.* (strategic objective G.1.190(b)).

151. *Id.* (strategic objective G.1.190(d)).

152. *Id.* (strategic objective G.1.190(j)).

For example, at the 4th European Ministerial Conference of the Council of Europe on Equality between Women and Men in November, 1997, the Ministers of the Council of Europe issued a Declaration on Equality between Women and Men as a Fundamental Criterion of Democracy.<sup>153</sup> It recommends gender balance at all levels of governmental decision-making, and encourages assessment and reform of electoral systems to facilitate the integration of women in proportional numbers.<sup>154</sup>

The European Union is also taking actions in support of gender mainstreaming. In July, 2000, the Commission of the European Communities submitted a proposal to the Council of the European Union, the European Parliament, the Economic and Social Committee, and the Committee of the Regions laying out a "[c]ommunity framework strategy on gender equality."<sup>155</sup> This proposal identifies as the goal of equality "an inclusive democracy."<sup>156</sup> Such a political structure requires that "all citizens women and men alike . . . participate and be represented equally in the economy, in decision-making, and in social, cultural and civil life."<sup>157</sup>

The goal is "gender mainstreaming": to ensure that "[w]omen's concerns, needs and aspirations should be taken into account and assume the same importance as men's concerns in the design and implementation of policies."<sup>158</sup> One of the five areas of focus is promoting "equal participation and political representation" in all areas of decision-making.<sup>159</sup> The Commission acknowledges that the "persistent under-representation of women in all areas of decision making marks a fundamental democratic deficit which requires Community level action."<sup>160</sup> Among other things, the Commission

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153. 4th European Ministerial Conference on Equality Between Women and Men, *Declaration on Equality Between Women and Men as a Fundamental Criterion of Democracy*, Nov. 13-14, 1997, at <http://www.humanrights.coe.int/equality/Eng/Equality%20res.html>.

154. *Id.*

155. Commission of the European Communities, *Communication from the Commission to the Council, The European Parliament, The Economic and Social Committee and the Committee of the Regions: Towards a Community Framework Strategy on Gender Equality (2001-2005)*, June 7, 2000, at 2, 3, 7-9, available at [http://www.europa.eu.int/comm/employment\\_social/equ\\_opp/news/arsenal\\_en.htm](http://www.europa.eu.int/comm/employment_social/equ_opp/news/arsenal_en.htm) [hereinafter *Community Framework Strategy*]. The Commission is one of the major institutions of the European Union, with twenty members, each serving for a term of five years and with three distinct functions: initiator of proposals for legislation, guardian of the Treaties, and the manager and executor of Union policies and of international trade relations. See European Union, *Role of the European Commission*, at [http://www.europa.eu.int/comm/role\\_en.htm](http://www.europa.eu.int/comm/role_en.htm) (last modified Oct. 6, 1999); European Union, *Institutions of the European Union*, at <http://www.europa.eu.int/inst-en.htm> (last modified Feb. 2, 2001).

156. *Community Framework Strategy*, *supra* note 155, at 2.

157. *Id.*

158. *Id.* at 3.

159. *Id.* at 4.

160. *Id.* at 7.

suggests an assessment of “the influence of electoral systems, legislation, quotas, targets and other measures on gender balance in elected political bodies (supporting programme).”<sup>161</sup> The goal of this and other European Commission and Council actions related to political representation of women is to see women participate as fifty percent of decision-makers throughout the Union, whether the decision-making body is a local commission or the major institutions of the Union itself.<sup>162</sup>

At first glance, similar quotas in the United States seem blatantly unconstitutional. But aside from the Voting Rights Act of 1965 (which the Supreme Court has sometimes interpreted as requiring racial balance as a remedy for violations), quotas do exist today in various forms in our governmental system and in party structures. For example, the Federal Election Commission has six members, and no more than three are to be “affiliated with the same political party.”<sup>163</sup> The Securities and Exchange Commission, the Federal Trade Commission, and the Commodity Futures Trading Commission, each consist of five members, no more than three to be “members of the same political party.”<sup>164</sup> Similar rules apply to the Board of Directors of the Federal Deposit Insurance Corporation,<sup>165</sup> and the Federal Housing Finance Board.<sup>166</sup> Both major parties have National Committees consisting of one man and one woman from each state.<sup>167</sup> From time to time there have been quotas with respect to convention delegates.

Several states have enacted gender balance legislation, providing that boards, commissions, committees, and councils of all kinds appointed by elected officials be gender balanced. Two states have enacted such legislation as binding law: North Dakota<sup>168</sup> and Iowa.<sup>169</sup> Montana has a non-binding gender balance resolution.<sup>170</sup> Iowa has mandatory quotas for *elected* Judicial Nominating Commissioners, one man and one woman to be elected from each district.<sup>171</sup>

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161. *Id.* at 8.

162. *See id.* at 7-8.

163. 2 U.S.C. § 437c(a)(1) (1994).

164. 15 U.S.C. § 78d(a) (1994) (Securities and Exchange Commission); *id.* § 41 (1994) (Federal Trade Commission); and 7 U.S.C. § 4a(a)(1) (1994) (Commodity Futures Trading Commission).

165. 12 U.S.C. § 1812(a)(2) (1994).

166. *Id.* at § 1422a(b)(2)(A) (West Supp. 2000).

167. *See* *Bachur v. Democratic Nat'l Party*, 836 F.2d 837 (4th Cir. 1987) (upholding constitutionality of Maryland rules implementing policies of the national party requiring voters to cast an equal number of votes for women and men as delegates to the Democratic convention).

168. N.D. Cent. Code § 54-06-19 (1989).

169. Iowa Code Ann. § 69.16A (West 1999).

170. Mont. Code Ann. § 2-15-108 (1999).

171. Iowa Code Ann. § 46.4 (West 1999).



It is nevertheless likely that the Supreme Court would strike down European-style quotas for women in elected office. I do not, therefore, propose such quotas in this article except as a constitutional amendment.

I have talked about a number of factors that might create pressure for progressive change in the United States as well as a number of progressive approaches to these pressures. As our population becomes less and less white, and poor people of color become poorer and poorer relative to the predominantly-white rich, something will give. Perhaps there will be violence. Perhaps the government will become increasingly repressive. Perhaps Jesse Ventura will be elected President. There will be change, even though it does not appear likely to occur in the immediate future. I now explore a possible core vision for a progressive politics.

## II. THE VISION THING: TOWARD A POLITICS OF CARE AND EQUALITY

In her recent book, *Caring for Justice*, Robin West argues that justice and care are both required for moral decision-making.<sup>172</sup> In using the word "care," West begins with the nurture of individuals: "When we nurture, we nurture particular persons, not groups, nations, or species, and when we nurture a particular person, we seek to make that person as fulfilled as possible . . . ."<sup>173</sup> But the "circle of care" can also extend to groups and be the basis for an egalitarian social order based on "a sense of brotherhood and sisterhood" rather than on "an abstract and bloodless zeal for consistency."<sup>174</sup> West goes on to argue that progressive social programs, such as "redistribution of wealth, progressive taxation, welfare programs, or subsistence rights," can be based on empathy with those in need.<sup>175</sup> Empathy can be the basis for "a commitment to egalitarianism, albeit grounded in shared fellow feeling rather than in principle."<sup>176</sup> West concludes that "[o]f the two commitments—one from principle" (an abstract commitment to equality for those similarly situated) and "one from fellow feeling" (an empathy-based commitment to help those in need), the commitment based on empathy may "prove to be the more enduring."<sup>177</sup>

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172. Robin West, *Caring for Justice* 22-93 (1997).

173. *Id.* at 69.

174. *Id.* at 72. See also Hugh LaFollette, *Real Men*, in *Rethinking Masculinity: Philosophical Explorations in Light of Feminism* 59 (Larry May & Robert A. Strikwerda eds., 1996) (arguing that women and men in intimate relationships should think in terms of needs and care rather than rights and equality).

175. West, *supra* note 172, at 72.

176. *Id.*

177. *Id.*

A commitment to nurture others based on needs, empathy, and feeling may also be less empty than a commitment to equality. An abstract commitment to equality, understood as treating similarly those similarly situated, has done little to eliminate real social inequalities, since those who are unequal tend not to be similarly situated (the rich and the poor, the abled and the disabled, women who are caretakers as well as workers and men who are primarily workers—individuals in these groups tend *not* to be similarly situated). On the other hand, a commitment to help those in need can translate into an obligation of those who are best off to help those in far-different circumstances because of “shared fellow feeling.” To the extent such empathy actually exists, there will be a commitment to doing something despite, indeed because of, differences.

There is another way in which care and equality are linked. Traditionally, women have been—and women continue to be—caretakers of dependents, the young, the old, and others unable to care for themselves. Women have done this work for no pay, in their own families, or for low pay, when caring for dependents in other women’s families. Many women, particularly poor women and women of color, do both: care for dependents in their own families without pay and for dependents in other women’s families for low pay. Workers with significant caretaking responsibilities are at a disadvantage in the wage-labor market, in politics, sports, and other “public” areas of human endeavor. One of the points West makes in her book, and a point made by an increasing number of feminists writing about equality today, is that until we place greater value on caretaking and provide support for caretakers of dependents, women will continue to be unequal.<sup>178</sup>

Eva Kittay emphasizes the link between acknowledging dependency and valuing caregiving, on the one hand, and equality for women on the other:

The call for sexual equality has been with us for a long time. But until relatively recently, the demands of even the most farsighted women have assumed very traditional and gendered arrangements of dependency work. Radical visions in which dependency work is taken out of the family have left many women cold—largely, I suggest, because they have failed to respect the importance of the dependency relationship. A view of society as consisting of nested dependencies, so constituted as to provide all with the means to achieve functioning that respects the freedom and relatedness of all citizens, is a view that can only emerge now, as women taste the

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178. See, e.g., Eva Feder Kittay, *Love’s Labor: Essays on Women, Equality, and Dependency* 186-88 (1999); Mona Harrington, *Care and Equality: Inventing a New Family Politics* 44-60 (1999); Joan C. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* 101-80 (1993); Michele M. Moody-Adams, *The Social Construction and Reconstruction of Care, in Sex, Preference, and Family: Essays on Law and Nature* 3 (David M. Estlund & Martha C. Nussbaum eds., 1997).

fruits of an equality fashioned by men—and find it wanting. This equality has not left room for love's labors and love's laborers. It is time to shape a new vision by creating new theories and by forging the requisite political will. We need to revise our social and political commitment to ourselves as dependents and as dependency workers. Only through these efforts may we come to see what it means for men and women to share the world in equality.<sup>179</sup>

In her recent book, *Care and Equality: Inventing a New Family Politics*, Mona Harrington argues that care should be "a national political value":

The key idea for a new politics of family care . . . is to add care to the pantheon of national social values. That is, to assure good care to all members of the society should become a primary principle of our common life, along with the assurance of liberty, equality, and justice.

We need to elevate care to this level of importance for the basic reason that it is essential to human health and balanced development. It is also crucial to developing human moral potential, to instilling and reinforcing in an individual a sense of positive connection to others. And it is this sense of connection that makes possible the whole range of mutual responsibilities that allow the people of a society to respect and work toward common goals. As political theorist Joan Tronto puts it, thinking about care seriously, recognizing that everyone at different times is both a giver and receiver of care, underscores for people the *fact* of their personal and social interdependence. And, she says, this insight can enhance a commitment to the responsibilities of democratic citizenship.<sup>180</sup>

In seeking a more just social order, we want to create a society in which everyone, regardless of race, class, sex, sexual orientation, etc., has an equal chance for human fulfillment and happiness. We need both economic redistribution and cultural recognition, economic and cultural changes to move toward a society in which government responds to the needs of all Americans, rather than ignoring or minimizing the needs of those who are not members of politically and culturally privileged groups. We need to move towards a society in which the culture values qualities that are valuable, good for human beings, rather than the qualities valued by the dominant group.

This vision could, I believe, be the basis for a broad coalition of progressive women and men of all colors. The focus would be on shaping a government and a legal system that would be more likely to respond to the needs of all and which would foster a culture that is not dominated by one group's values, but rather open to, and appreciative of, what is valuable in the values of all groups. This vision sounds,

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179. Kittay, *supra* note 178, at 188.

180. Harrington, *supra* note 178, at 48-49.

however, inconsistent with human nature as we understand it in the United States at the beginning of the twenty-first century.

### III. HUMAN NATURE AND WELL-BEING

According to the dominant understanding of human nature in the United States today, human beings are motivated primarily by the desire to increase their individual well-being by seeking material goods and pleasure. The American dream teaches that each individual (or perhaps her or his parents) is (are) responsible for his own success, and for his own failures. If these views are accurate, it would be pointless to talk about a politics of care and equality.

In *Three Seductive Ideas*, Jerome Kagan, a Harvard Professor of Psychology, discusses three things we tend to believe despite overwhelming evidence to the contrary.<sup>181</sup> His third example is our belief that “most human action is motivated by a desire for sensory pleasure.”<sup>182</sup> According to this view, human beings are motivated primarily, not by moral principles of good and bad, but by the desire for individual pleasure, increasingly understood as something money can buy.

Kagan points out, however, that most human beings spend most of their time trying to behave in an ethical and virtuous manner. The recognition of good and bad emerges in the child between the second and third birthday. In Kagan’s words:

Children build sand castles and adults climb rugged mountains because implementing actions that are guided by an idea of perfection is as much a biologically prepared disposition as are the pursuit of sweet taste and the avoidance of bodily pain. After we have protected ourselves from actual or possible harm, the affirmation of virtue takes precedence over the search for sensory pleasure most of every day.<sup>183</sup>

There is a “universal desire” in human beings “to regard self as good and, as a consequence, to think and act in ways that support rather than disconfirm that evaluation.”<sup>184</sup> When an individual sees herself as having failed to be good, she feels shame and guilt:

When people must choose between avoiding a future state of sadness, fear, anxiety, shame, or guilt, or attaining the state that follows possession of power, wealth, or sexual pleasure, most have a preference, not always honored, for the former because the dysphoria usually lasts longer than the joy. Suppression of behaviors that might bring on guilt and shame serves a motive—Thomas

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181. Jerome Kagan, *Three Seductive Ideas* (1998).

182. *Id.* at 6.

183. *Id.* at 153.

184. *Id.*

Aquinas called it an aptitude—for virtue that is the basis of human morality.<sup>185</sup>

Kagan sees empathy, the ability to imagine and sympathize with another's thoughts and feelings (which also emerges in the second year), as *the* attribute distinguishing human beings from the rest of the animal world, and as the basis for humans' unique moral sense.<sup>186</sup>

Of course, what is virtuous depends on one's culture and one's position within it. Kagan:

What is historically new but not unique about current Western society is that the single-minded seeking of power, prestige, wealth, and sexual delight, which earlier centuries had criticized as moral flaws, has become for many a modern ethical code that enjoys the privilege of being treated as "good."<sup>187</sup>

Psychologists have been studying happiness for some time now, and have reached conclusions much like those of Amartya Sen and Martha Nussbaum. Psychologists see three factors as of crucial importance for human happiness: competence, autonomy, and connection.<sup>188</sup> Competence refers to an individual's ability to develop her or his capabilities, whether building sand castles, climbing mountains, learning to read and write, or learning to do a job well. Autonomy refers to the ability to make decisions about one's life. And connection refers to relationships with other people. Wealth is not irrelevant to human happiness but, as the discussion below clarifies, of limited importance once basic needs are met. Income disparities are, however, a problem in terms of human happiness, a point also explored below.

Sen defines substantive freedom as the individual's ability "to lead the kind of life he or she has reason to value."<sup>189</sup> From this perspective, "poverty must be seen as the deprivation of basic capabilities rather than merely as lowness of incomes."<sup>190</sup> Here is a more detailed description from Nussbaum:

Central Human Functional Capabilities

1. *Life*. Being able to live to the end of a human life of normal length . . .
2. *Bodily health and integrity*. Being able to have good health, including reproductive health; being adequately nourished; being able to have adequate shelter

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185. *Id.* at 9.

186. *Id.* at 8-9, 173-75.

187. *Id.* at 186.

188. This view of what humans need is entirely consistent with that of Amartya Sen and Martha Nussbaum.

189. Amartya Sen, *Development as Freedom* 87 (1999).

190. *Id.*

3. *Bodily integrity.* Being able to move freely from place to place; being able to be secure against violent assault, including sexual assault, marital rape, and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction

4. *Senses, imagination, thought.* Being able to use the senses; being able to imagine, to think, and to reason—and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, . . . being able to use one’s mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech and freedom of religious exercise; being able to have pleasurable experiences and to avoid nonbeneficial pain

5. *Emotions.* Being able to have attachments to things and persons outside ourselves; being able to love those who love and care for us . . .

6. *Practical reason.* Being able to form a conception of the good and to engage in critical reflection about the planning of one’s own life . . .

7. *Affiliation.* (a) Being able to live for and in relation to others, to recognize and show concern for other human beings, to engage in various forms of social interaction; being able to imagine the situation of another and to have compassion for that situation; having the capability for both justice and friendship . . . (b) Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others . . .

8. *Other species.* Being able to live with concern for and in relation to animals, plants, and the world of nature

9. *Play.* Being able to laugh, to play, to enjoy recreational activities

10. *Control over one’s environment.* (a) *Political:* being able to participate effectively in political choices that govern one’s life . . . (b) *Material:* being able to hold property . . . having the right to seek employment on an equal basis with others . . . having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.<sup>191</sup>

Thus, for Sen and Nussbaum, human capabilities encompass competence, connection, and autonomy, the three factors psychologists consider important for human happiness. It follows that “the central goal of public planning should be the *capabilities* of

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191. Martha C. Nussbaum, *Sex and Social Justice* 41-42 (1999); see also Amartya Sen, *Capability and Well Being*, in *The Quality of Life* 30 (Martha Nussbaum & Amartya Sen eds., 1993) (describing and discussing meaning of capabilities).

citizens to perform various important functions.”<sup>192</sup> And the political organization of a country should be judged by the extent to which the people of the country have been able to develop their capabilities.<sup>193</sup>

Wealth is not wholly irrelevant to human well-being, of course. Recent empirical work on wealth and human happiness indicates that any given society at any given time, individuals who are wealthier tend to be happier. (The effect of income on happiness is, however, small once other factors have been taken into account.) But these studies also reveal that an increase in a society's wealth does not increase reported happiness. An analysis of happiness surveys in the United States from 1946 to 1977—a period during which “real per capita disposable income rose by a third”—finds no trend toward increased happiness with rising prosperity. Indeed, data through 1994 reveals “no improvement in happiness in the United States in over almost half a century in which real GDP per capita more than doubled.”<sup>194</sup>

The experiences of Europe and Japan have been similar, and that of Japan is particularly dramatic because income levels in Japan in the aftermath of World War II were much lower than in Europe or the United States. Japan experienced a five-fold increase in real per capita income between 1958 and 1987, bringing Japan to a “living level equal to about two-thirds of that of the United States.” At the start of this period, few homes contained washing machines, refrigerators, televisions, etc. By the end of the period, almost every household contained such items and sixty percent owned cars. Yet “there was no improvement in mean subjective well-being.”<sup>195</sup>

Another set of happiness studies indicate that an individual's pursuit of affluence and power are inconsistent with the pursuit of happiness. Individuals who value extrinsic goals (e.g., power, wealth, fame, image) relative to intrinsic goals (e.g., personal growth, competence, relatedness, community service, community) experience lower levels of well-being. Intrinsic goals “can directly satisfy basic psychological needs for autonomy, relatedness, and competence.”<sup>196</sup> Extrinsic goals “provide only indirect satisfaction of these basic needs and may actually distract from or interfere with their fulfillment.”<sup>197</sup> Higher incomes do not produce greater happiness “because material aspirations increase with a society's income.” Indeed, researchers find that “material norms and income increase, not only in the same direction, but at the same rate.”<sup>198</sup>

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192. Nussbaum, *supra* note 191, at 42.

193. *Id.*

194. See, e.g., Richard A. Easterlin, Will Raising the Incomes of All Increase the Happiness of All?, 27 J. Econ. Behav. & Org. 35, 37, 38, 41 (1995).

195. *Id.* at 38-39.

196. Richard M. Ryan et al., *The American Dream in Russia: Extrinsic Aspirations and Well-Being in Two Cultures*, 25 Personality & Soc. Psych. Bull. 1509, 1510 (1999).

197. *Id.*

198. Easterlin, *supra* note 194, at 41.

Increased GNP that brings with it increased income inequality can actually cause unhappiness. This is a point made by Kagan in his book. The American dream teaches that any one can achieve status, power, wealth, etc., through personal effort. Failure is not, therefore, just bad luck or the result of social class, but evidence of a defective moral character; those who fail are morally culpable and "vulnerable to shame and guilt." Being poor in a poor village full of people who are similarly poor is not damaging to the psyche. Being poor in a country like ours with great disparities in income and a definition of virtue synonymous with wealth is extremely damaging, even if the poor American is objectively better off than the poor villager.<sup>199</sup>

In addition, as Sen emphasizes, "*relative deprivation in terms of incomes can yield absolute deprivation in terms of capabilities.*"<sup>200</sup> Part of Sen's definition of capability is ability to participate in the life of the community (what the psychologists would refer to as the ability to form connections with others). But a poor person in a rich community may be unable to participate in the life of the community because she or he lacks Internet access or does not own a car.<sup>201</sup> Even though the poor person in the rich community might objectively be better off in terms of assets and income than a poor person in a poor community, the poor person in the rich community will suffer a capability deprivation not necessarily suffered by the poor person in the poor community, who may be fully capable of participating in the life of the community.

Of the three basic human needs, competence, connection, and autonomy, autonomy dominates the American political agenda. Given the high level of autonomy individuals "enjoy" in the United States, those without assets are often unable to achieve competence. The ability to achieve competence is very problematic for the poor. For all groups of Americans, the level of connection is decreasing. In his recent book, *Bowling Alone*, Robert Putnam notes that Americans' social connections with each other are on the decline. Fewer people are married and people tend to be less involved in all kinds of formal and informal social networks, including neighborhood interactions, participation in political or civic or religious or other kinds of organizations.<sup>202</sup> This trend is cause for concern because social engagement and trust promote human happiness as well as economic prosperity, children's well-being, health, democratic institutions, and democracy.<sup>203</sup>

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199. Kagan, *supra* note 181, at 175-76.

200. Sen, *supra* note 189, at 89.

201. *Id.*

202. Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (2000).

203. *Id.* at 287-349.



The empathy necessary for a politics based on care both requires and generates trust of others. If we could manage to feel empathy for other Americans, even Americans who differ from us in terms of race and class, this change would be more conducive to greater happiness within the United States than continued growth of the GNP at high levels. As we have seen, once basic human needs are met, growth in the GNP does not increase human well-being. Indeed, as just noted, if accompanied by increased economic inequality, increased GNP may cause harm.

In the election of 2000, both parties seemed to regard continued economic prosperity, measured by GNP growth, as *the* primary goal of government. No one questioned this ordering, a result that is not surprising given corporate ownership of the media. One would think, from listening to the national conventions and media coverage of them, that GNP was a direct indicator of human happiness. In fact, France has substantially higher levels of national happiness than the United States, despite the fact that its economy has been somewhat less robust because hampered by the social support systems described above.<sup>204</sup>

Seeing GNP growth as the undisputed *primary* concern of government should be troubling to many people. Without a doubt this goal is ideal from the perspective of business. But it is not in and of itself a goal that fosters human well-being. Indeed, it can be inconsistent with attainment of the real human needs of connection and competence. As noted above, people who pursue affluence and power are *less* happy than those who pursue goals that directly lead to competence and connections with others.

Further, when increasing wealth for some comes with increased income disparities, as has been the case in the United States in recent decades, it brings with it problems in all three areas (connection, autonomy, and capability) for the poor. Poverty places great, often unbearable, stress on human relationships. Those who live in poor neighborhoods tend to have fewer connections to formal and informal social supports, including churches, schools, and civic and political organizations.<sup>205</sup> The poor have less autonomy because they have less control than others over where they live, how they get from one place to another, which schools they or their children attend, etc. And the poor have less ability to develop their competence, since they tend to go to inadequate schools and, as adults, face jobs that are likely to be tedious and numbing rather than challenging.

As noted several times earlier, the American dream teaches that in America, anyone can become anything if she just works hard and

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204. Steven Stack & J. Ross Eshleman, Marital Status and Happiness: A 17-Nation Study, 60 J. Marriage & Fam. 527, 532 (1998).

205. Putnam, *supra* note 202, at 296-318.

keeps her nose to the grindstone. The reality is, of course, that one's success in life correlates most strongly, not with individual attributes, but with the socioeconomic class into which one is born. Again, the election of 2000 illustrates this point, as two sons of privilege, one the son of a former president and the other of a United States Senator, battled for the presidency.

The American belief that anyone can be anything is grounded in Americans' commitment to egalitarianism, the belief that all are equal. In *Three Seductive Ideas*, Jerome Kagan points to the many longitudinal studies showing that "[t]he social class of a child's family is a better predictor of an adult's vocation and personal traits than the child's psychological profile at age two."<sup>206</sup> Although social class "is the best predictor of future vocation, academic accomplishments, and psychiatric health, Americans wish to believe that their society is open and egalitarian, without rigid class boundaries."<sup>207</sup> Because we do not recognize the power of class in determining a child's future, we are able to believe that the early relationship with the mother is far more determinative than it actually is. The middle class need not, therefore, respond with "moral outrage" to "the impaired health and psychological state of so many poor children" by demanding "public support for benevolent interventions."<sup>208</sup> If these children have problems, it is not class that is the cause, but inadequate mothering by blameworthy women.<sup>209</sup> Unfortunately, human confidence is no guarantee of truth.<sup>210</sup>

Because some of the barriers to effective implementation of a politics of care are embedded in the structure of our political system—winner-take-all geographic districting and our constitutional structure—I suggest that the first item on a progressive agenda should be a shift to proportional representation where possible without constitutional change. And I suggest that the second step should be constitutional change: a progressive bill of rights with strict limitations on judicial review.

#### IV. A PROGRESSIVE AGENDA IN TWO STEPS

##### A. *Step One: Proportional Representation*

As discussed earlier, winner-take-all systems with geographic districting can create effective democracies in countries with homogeneous populations.<sup>211</sup> This electoral system probably worked

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206. Kagan, *supra* note 181, at 149.

207. *Id.* at 147.

208. *Id.* at 177.

209. *Id.* at 5, 147, 177-78.

210. *Id.* at 146-47.

211. Guinier, *supra* note 92, at 256; Lijphart, *supra* note 92, at 3-4.

fairly well at the time the American republic was founded, since the franchise was limited to a relatively homogenous population: propertied men of European descent. It no longer works well. Those in elective office today do not reflect the diversity of American voters. Instead, as the tables above demonstrate, those in high office remain disproportionately white and male. As political scientist Douglas Amy put it in the opening sentence of his 1993 book, "[t]he American election system is unfair, outmoded, and undemocratic."<sup>212</sup>

Yet few Americans "are even aware of these problems. . . . We assume that this system is the epitome of democracy and a model for the rest of the free world. But nothing could be further from the truth."<sup>213</sup>

Almost all younger democracies have some form of proportional representation. Even England—from whom we inherited this archaic voting structure based on the notion that it is the land that should be represented—is reconsidering its use of single-member winner-take-all districts.<sup>214</sup> As noted earlier, there are many forms of proportional representation. And proportional representation schemes could be adopted without constitutional amendment for all elections other than those to the Senate. Cumulative voting in modified at-large schemes, described earlier, seems especially appropriate for the United States, since it would allow voters to continue to vote for individual candidates. Each voter would have as many votes as people to be elected (but could cast all her votes for a single candidate) and each district would elect at least seven representatives. As indicated earlier, under such a scheme, voters, not politicians, determine what groups are represented by whom. In addition, districts electing seven to ten members maximize the chances of women being elected.

Proportional and semiproportional representation schemes have a number of advantages. Most importantly, they facilitate the representation of the entire population, particularly women of all colors and members of other minority groups. Debates on policy issues can be substantively better when more options and interests are brought to the table. Voters are more likely to vote when their vote counts and they have more options than two parties both trying to capture the middle.

In addition, candidates are less likely to engage in negative campaigning and more likely to actually engage on issues, since they must maximize their own vote, not just defeat one specific opponent. Because candidates can win election by expressing substantive views with which only a minority of voters agree, they are more likely to talk about substantive issues rather than mouthing platitudes and

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212. Amy, *supra* note 110, at 1.

213. *Id.*

214. See *supra* notes 93-99 and accompanying text.

projecting an attractive image. In recent years, Cynthia McKinney, a former political science professor and a Democratic member of the House of Representatives, has twice "introduced legislation . . . to allow states to adopt proportionate and semiproportionate voting systems for congressional elections."<sup>215</sup>

For all legislative elections other than the Senate, we should therefore shift to a system of at-large cumulative voting in districts with at least seven seats in order to realize the many benefits of proportional representation while retaining the ability of voting for specific candidates. Such a shift would not require any constitutional amendment and would greatly enhance American politics in all kinds of ways, including representation of caretakers, women, and minorities.

In addition, of course, a number of other electoral reforms are needed, particularly campaign finance reform,<sup>216</sup> votes for children to be exercised by parents,<sup>217</sup> and reform to maximize voter turn out.<sup>218</sup> Once electoral reform is in place, so that legislative bodies are more representative of the people of the United States, we can move on to consider progressive constitutional reform.

215. Guinier, *supra* note 92, at 261.

216. On campaign finance reform in general, see Marlene Nicholson, *Political Campaign Expenditure Limitations and the Unconstitutional Condition Doctrine*, 10 Hastings Const. L.Q. 601, 603-05 (1983) (summarizing doctrinal debate about constitutionality of spending limits); Marlene Arnold Nicholson, *Basic Principles or Theoretical Tangles: Analyzing the Constitutionality of Government Regulation of Campaign Finance*, 38 Case W. Res. L. Rev. 589 (1988) (arguing for spending limits to ensure equality of opportunity in participating in politics and influencing political outcomes); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Colum. L. Rev. 609 (1982) (arguing for spending limits); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 Yale L.J. 1001 (1976) (same); Harold Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345 (1977) (same); Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405 (1986) (arguing that "traditional" free speech analysis should not apply to campaign spending); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281 (1994) (arguing for the constitutionality of spending limits in light of candidates' and incumbents' need to focus exorbitant amounts of time and energy on fund raising, a factor not considered by the Supreme Court in striking spending limits as unconstitutional in *Buckley v. Valeo*, 424 U.S. 1 (1976)).

217. See Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 Minn. L. Rev. 1463, 1495-1525 (1998) (noting that children cannot vote, nor can anyone else vote on their behalf today and arguing for giving parents proxies to vote for children); Sylvia Ann Hewlett & Cornel West, *The War Against Parents: What We Can Do for America's Beleaguered Moms and Dads* 240-41 (1998) (arguing that parents should have votes to cast on behalf of children). For a study reporting on the importance of parental status to parents when they vote, see Charney Research, *The Parent Vote: Moms and Dads up for Grabs*, Oct. 2000, available at <http://www.parentsunite.org/parentvote.pdf>.

218. See Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. Chi. Legal F. 21, 74-78 (describing details of the kinds of changes needed, in addition to proportional representation, to maximize voter participation rates).

### B. *Constitutional Reform: A Progressive Bill of Rights*

In this section, I make two kinds of suggestions for a progressive bill of rights. The first is severe limitation on judicial review. The second is a set of tentative proposals for progressive provisions. This is intended to begin a discussion of what a progressive bill of rights might look like.

#### 1. Limited Judicial Review

Judicial review under the federal Constitution is one of the obstacles to a progressive movement. As a general matter, progressives should be suspicious of judicial review. It has caused or contributed to a number of the problems we face today. Overall, although there is no way to prove this one way or the other, I suspect the Supreme Court's constitutional jurisprudence has been overwhelmingly conservative.

I offer only a few examples. The first three all involve the Supreme Court's interpretation of the free speech provision in the First Amendment. Campaign finance reform, an always difficult issue for politicians, has been made more difficult by the Supreme Court's decision in *Buckley v. Valeo* which held that spending limits on non-candidates were unconstitutional.<sup>219</sup> Bans on the use of broadcast media for political advertisements, common in a number of other Western democracies, would quickly be declared unconstitutional under the First Amendment by the Supreme Court. And finally, regulation of hate speech, hate music, pornography, and violence in media, the Internet, games, etc., would also be declared unconstitutional. Every other Western democracy regulates hate speech (and music).

Another problem is the constitutional standard for equality. The constitutional standard for equality of sex and race under the Fourteenth Amendment captures only a very small piece of discrimination, misses most group-linked inequalities, and increasingly bans affirmative action. More seriously, this conservative standard has come to dominate Americans aspirations: it is the only form of equality we can envision. It legitimates inequalities that do not come within its narrow ambit.

My final example is that the Court is increasingly striking down legislation as unconstitutional because it is beyond the power of Congress. Laws threatened or declared unconstitutional by the Supreme Court include the private cause of action in the Violence Against Women Act,<sup>220</sup> and anti-discrimination statutes protecting

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219. 424 U.S. 1, 86 (1976).

220. See, e.g., *United States v. Morrison*, 529 U.S. 598, (2000) (holding unconstitutional a private cause of action provision of the Violence Against Women Act).

state employees.<sup>221</sup> The Civil War was fought to establish the supremacy of the federal government. It is being undone by the Supreme Court.

Neither the original Constitution nor the Bill of Rights provided explicitly for judicial review. Nor did either indicate that judicial review was *not* part of the constitutional structure. We have learned a great deal in the last two hundred years about the advantages and disadvantages of judicial review in the context of various specific provisions. I suggest that we start thinking seriously about what an optimal system of judicial review would look like. I suggest two possible approaches here.

A progressive bill of rights might explicitly indicate what level of judicial review is appropriate for various specific provisions of the Constitution. For example, as indicated below, the provision in the progressive bill of rights guaranteeing equal protection to women should not be subject to judicial review with respect to legislation enacted by Congress. With a fair electoral system and a Senate fifty percent women, as suggested below, women would likely be hurt more than helped by judicial review.

Alternatively, a progressive bill of rights might in general provide for only very limited judicial review as other constitutional democracies do. France, like other European nations, lacks a Supreme Court with the broad powers to declare legislation or executive action unconstitutional. Constitutionality of legislation is determined by the Constitutional Council, and the request for constitutional review must be submitted within fifteen days from the date the newly-enacted law was officially sent to the President. Requests for constitutional review can only be brought by the President of the Republic, the President of the National Assembly, or sixty members of the Assembly. Once a law has been promulgated and is enforceable, it can no longer be challenged on constitutional grounds. And, since the French Constitution does not establish a federal system, there are no local entities with the power to complain that Parliament has regulated beyond its power. Ordinary courts determine whether executive orders are constitutional.<sup>222</sup>

## 2. Substantive Provisions, Including Positive Rights

The Constitution and Bill of Rights include only "negative" rights. Neither includes any provision guaranteeing, or even defining as an important concern of national government, the economic and

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221. See, e.g., *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955 (2001) (holding suits by state employees for money damages under Title I of the ADA barred by the Eleventh Amendment).

222. Roger Pinto, *Comparison of the French and American Constitutions and Constitutional Law*, 5 Tulane J. Int'l & Comp. L. 368, 372 (1997).

educational rights so important to women as caretakers. A Constitution with only negative rights will better protect the powerful against government action harmful to their interests than the less powerful, who need protection against the powerful as well as against the government. Although positive rights are often aspirational rather than self-executing, constitutional aspirations are important. They affect the political agenda, provide arguments for substantive enactments, and influence values.

*a. Substantive Rights Expressing Government's Commitment to Give Individuals What They Need to Flourish As Human Beings*

Positive rights should be based on a politics of care, with special concern for the needs of children and their caretakers. Children are the country's future, and caretakers need support of others if they are to "caretake" well and without impoverishing themselves. Positive rights should include: a commitment to afford individuals and families the conditions necessary for their nurture and development;<sup>223</sup> a right to health care; a right to education; a right to employment;<sup>224</sup> and a

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223. This right is modeled after a right in the French Constitution. The preamble to the French Constitution of October 27, 1946, incorporated into the current Constitution, includes the following:

On the morrow of the victory achieved by the free peoples over the regimes that had sought to enslave and degrade humanity, the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights. They solemnly reaffirm the rights and freedoms of man and the citizen enshrined in the Declaration of Rights of 1789 and the fundamental principles acknowledged in the laws of the Republic.

They further proclaim, as being especially necessary to our times, the political, economic and social principles enumerated below:

The law guarantees women equal rights to those of men in all spheres.

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Each person has the duty to work and the right to employment. No person may suffer prejudice in his work or employment by virtue of his origins, opinions or beliefs.

\* \* \* \*

The Nation shall provide the individual and the family with the conditions necessary to their development.

It shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure. All people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working, shall have the right to receive suitable means of existence from society.

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The Nation guarantees equal access for children and adults to instruction, vocational training and culture. The provision of free, public and secular education at all levels is a duty of the State.

Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* 562-63 (1999).

224. For a view of what a progressive labor policy might look like—including limits on the number of hours employees at all levels can work and government supplements to low-wage workers wages, see Vicki Schultz, *Life's Work*, 100 Colum.

right to affordable, quality day care for all children over the age of three months.

b. *Equality: Race, Religion, National Origin, and Sexual Orientation*

A progressive bill of rights should include a provision stating that no American should be subject to discrimination on the basis of race, class, religion, national origin, or sexual orientation and including a broad definition of discrimination, including recognition of the fact that for many minority groups, race is a complex mix, not just of skin color, but also, religion, clothing, language, culture, etc. Obviously, a broad definition of discrimination would not be judicially enforceable, but an aspiration. The provision on racial discrimination should specifically indicate the constitutionality of affirmative action on the basis of race. The most difficult question is whether, even with a safe haven for affirmative action, any judicial review of race discrimination claims is dangerous from a progressive perspective.

c. *Equality: Sex*

For women, I propose a new ERA requiring that half the Senators be women, and placing decisions in constitutional sex discrimination cases solely in the hands of Congress.

Section 1. Neither any state nor the federal government shall deprive any woman or man of life, liberty, or property, without due process of law; nor deny to any woman or man within its jurisdiction the equal protection of the laws.

Section 2. Each state shall have at least one senator who is a woman. Congress shall, through appropriate legislation, establish laws to enforce this provision and may determine that it becomes effective only upon the retirement of male incumbents in the Senate.

Section 3. Congress shall have the ultimate power to enforce this Amendment and to determine its scope and meaning.<sup>225</sup>

This amendment would both (1) require that one Senator from each state be a woman; and (2) give ultimate power to determine the meaning of sex equality to the United States Congress (with fifty percent women in its upper chamber) rather than to the United States Supreme Court.

Placing sex equality issues in the hands of a Congress with fifty percent women in its upper chamber will better protect women than judicial review by the United States Supreme Court, and will do so

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L. Rev. 1881 (2000).

225. Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 Wm. & Mary L. Rev. 209, 264 (1998).



without dampening political movements for equality. Indeed, this approach will encourage political movements for equality, without binding Americans to any particular view of what equality between the sexes would look like.

d. *A Right to an Independent News Media*

A new First Amendment should ensure independent news media by requiring that newspapers, newsmagazines, and TV news programs be the product of independent entities. They cannot be owned by Disney or Amoco. This approach would be similar to rules about the ownership of banks after the Great Depression, rules which required that banks be independent of other corporations.

e. *A Right to Protection from Gun Violence*

This amendment would give people the right to be safe from gun violence and would include stringent gun control (no handguns; no assault weapons; strict registration, to be enacted by Congress, of guns for hunting purposes only) both at home and with respect to sales of guns abroad.

f. *A Right to a Fair Trial for Criminal Defendants*

A progressive bill of rights should include provisions ensuring criminal defendants certain rights in the criminal justice system, such as a requirement that every state have public defenders for indigent defendants, with adequate funding for investigation of cases as well as reasonable case loads.

g. *A Right to Protection from Hate Speech and Media Violence*

This provision could be based on the wording of the Convention on Civil and Political Rights: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by laws."<sup>226</sup> This provision would give Congress the power and the duty to regulate hate speech and violence in games and the media.

h. *An Environmental Commitment*

As an aspirational matter, the progressive bill of rights should include a Green commitment: a statement that the United States is

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226. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 20(2), 999 U.N.T.S. 171, *available at* [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm).

obligated to do its share in preserving the planet and requiring congressional action to achieve this goal.

i. *Worker's Rights*

Those who work should have the right to a decent living, with government support (as in France<sup>227</sup>) of wages to reach this level where necessary.<sup>228</sup> Obviously, the constitutional provision would not include the details, but it could direct the Congress to implement such a system. Perhaps the provision on workers' rights should also give workers a certain proportion of seats on corporate boards.

j. *Religious Freedom*

A new provision on religious freedom is needed, one giving better protection to non-mainstream religions.

k. *World Trade*

Perhaps a progressive bill of rights should include something on world trade, such as a provision indicating that free trade is a goal subordinate to human needs.

Obviously, this is just a sketch of what some provisions in a Progressive Bill of Rights might look like. I am only suggesting that we start talking about its provisions. We need to consider questions such as: What would constitute good criminal justice protections? Should courts be able to enforce the provision on racial equality? How should it be worded? When should judicial review of congressional decisions be allowed and when should Congress' decision be final?

Jesse Jackson, Jr. has recently argued for fundamental change and constitutional "amendments to provide every American with economic security."<sup>229</sup> He is working to forge "a supermajority for fundamental change" because one "cannot buy into economic conservatism and have a dream of justice for America. It doesn't work."<sup>230</sup> Jackson would therefore "amend the Constitution to guarantee healthcare, education, affordable housing, employment security, equal rights for women and minorities, and a clean

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227. See *supra* Part I.B.1.

228. For a discussion of how such a system might operate, see Schultz, *supra* note 224.

229. John Nichols, *Jesse Jackson, Jr.: A Different Vision*, *The Nation*, Sept. 18, 2000 at 11.

230. *Id.*

environment... [as well as] an amendment mandating truly progressive taxation."<sup>231</sup>

This is the kind of thinking progressives need to be doing and the kind of platform progressives should be developing and advocating.

### CONCLUSION

Human well-being is not well served by a political system controlled by two parties, both of whom seem to regard growth in the GNP as the primary goal of government. Given the importance of corporate donations to the campaign finance system and corporate control of the media, including news organizations, it is not surprising that the parties and many Americans today agree on the primacy of the GNP.

In contrast, a progressive politics could see the primary goal of government as care: creating an environment in which everyone is able to develop her basic capabilities as a human being in light of basic human needs. Humans need strong connections with others, the ability to exercise autonomy, and the means to develop their abilities. In this article, I have argued that both the electoral system in the United States and the Constitution stand in the way of a progressive movement grounded in a politics of care. I have suggested changing from winner-take-all geographic districting to some form of proportional representation. After this change is in place, we should join Jesse Jackson, Jr. in pushing for a progressive bill of rights.

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231. *Id.*