

## Democratizing the Presidential Debates

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### I. INTRODUCTION

When it comes to electing the chief executive of the United States, the presidential debates play an important role in shaping public opinion and the choices facing voters. Having a fair process in place to determine who is eligible to participate in the debates and to guarantee that the debates are conducted neutrally is crucial to ensuring the integrity of the electoral process as a whole. In the past, controversies have arisen concerning which candidates should be invited to participate, which political parties should be represented, and whether the debates have been conducted in a way that is fair and neutral. Most of these controversies have never been resolved satisfactorily. Today, much more work needs to be done to ensure that our presidential primary and general election debates live up to their potential to provide truly diverse policy views to the public and are conducted in a manner that is wholly free from bias. Gender bias in terms of the questions asked of the candidates was evident in 2016, and other kinds of biases may appear in the future. Problematically, the eligibility rules for the general presidential debates have remained unchanged for decades. Meanwhile, government oversight of the debates remains virtually non-existent. The time has come to rethink how the presidential debates are conducted and how they should be regulated in the United States.

This chapter argues that we must change how the presidential debates are run and liberalize their eligibility rules so that the debates include a broader cross section of candidates who will promote a wide range of viewpoints and

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policy ideas. Only once this happens will more women, more people of color, and more minor-party candidates have a true shot at winning the presidency. For non-traditional candidates to participate and effectively communicate their ideas to the American public, the format of the presidential debates need to be radically altered. Only by changing the rules governing the debates will we be able to rewrite the formula for what makes a winning candidate in the first place. Debate reform is an essential step in achieving this goal. Debates are meant to serve twin goals: they inform voters about who is running for office, while at the same time they foster a national conversation about important policy issues. However, today's American presidential debates fall short on both counts.

This chapter articulates the many functions of presidential debates and demonstrates how our current presidential debate system fails to meet them. It offers a series of reforms that would make the presidential debates more diverse and inclusive, both in terms of the types of candidates who participate and the types of ideas they espouse. The chapter concludes by offering some broad recommendations for the individuals and institutions responsible for planning and broadcasting the presidential debates, and for the journalists who then typically break down and summarize what happens at the debates for the general public.

## II. WHY THE DEBATES MATTER

Debates are commonly portrayed by national media as competitions—either among candidates vying for a party's nomination in the primary debates or between two major-party candidates in the general election debates.<sup>1</sup> Pundits declare winners on the basis of who serves up the best one-liners and who keeps his or her opponent on the defensive. When Donald Trump chastised Hillary Clinton during their first presidential debate in 2016 for staying at home to prepare, Clinton's quipped in reply: "I think Donald just criticized me for preparing for this debate. And, yes, I did. And you know what else I prepared for? I prepared to be president."<sup>2</sup> Clinton's response prompted

<sup>1</sup> This can be seen in coverage of the first 2016 presidential debate. See *Who won the presidential debate?*, CNN (Sept. 27, 2016), [www.cnn.com/2016/09/27/opinions/hillary-clinton-donald-trump-debate-opinion-roundup/index.html](http://www.cnn.com/2016/09/27/opinions/hillary-clinton-donald-trump-debate-opinion-roundup/index.html); Anthony Zurcher, *Presidential debate: Who won – Trump or Clinton?*, BBC (Oct. 20, 2016), [www.bbc.com/news/election-us-2016-37711218](http://www.bbc.com/news/election-us-2016-37711218); *Vote: Who won the first presidential debate?*, CNBC (Sept. 26, 2016), [www.cnbc.com/2016/09/26/vote-who-won-the-first-presidential-debate.html](http://www.cnbc.com/2016/09/26/vote-who-won-the-first-presidential-debate.html).

<sup>2</sup> Tory Newmyer, *Who Won the First Presidential Debate?*, FORTUNE (Sept. 27, 2016), <http://fortune.com/2016/09/26/presidential-debate-who-won/>.

applause from the audience, which had been asked to stay quiet, and it thereafter received widespread coverage from the media on national television.<sup>3</sup>

Of course, presidential debates do more than merely demonstrate candidates' rhetorical prowess. With their large television and Internet audiences, the presidential debates are unparalleled vehicles for involving ordinary citizens in the political process. In 2016, a grand total of 259 million people watched the presidential debates, including the three live debates between Clinton and Trump and the many debates between vice-presidential candidates Tim Kaine and Mike Pence.<sup>4</sup> That was a national record. The first Republican primary debate of the 2016 election cycle similarly broke historical records, reaching 25 million people.<sup>5</sup> On the Democratic side in 2016, the first debate attracted 15 million viewers.<sup>6</sup> In 2019, the first Democratic primary debate reached more than 18 million viewers on live television, while another nine million streamed the debate online, setting another record.<sup>7</sup> That record was broken in February 2020, when the Democratic primary debate held just ahead of the Nevada caucuses attracted more than 33 million viewers, including 19.5 million who watched it on television and another 13 million who watched it online.<sup>8</sup> Many more Americans absorbed the ample post-debate media coverage, even if they did not watch the debates themselves.

Debates play a number of important roles in the run-up to a presidential election. First, they expose the candidates' core policy disagreements and help shape voters' own policy preferences. During the presidential debates, as Amber Boydston, Rebecca Anne Glazier, and Matthew Pietryka explain, candidates strategically answer debate questions in order to "draw or redraw the lines of conflict" and "to draw attention to their advantaged

<sup>3</sup> *Id.*

<sup>4</sup> A. J. Katz, *The Presidential Debates Set Ratings Records in 2016*, TVNEWSER (Oct. 24, 2016), [www.adweek.com/tvnewser/the-presidential-debates-set-ratings-records-in-2016/309089](http://www.adweek.com/tvnewser/the-presidential-debates-set-ratings-records-in-2016/309089).

<sup>5</sup> Brian Stelter, *Democratic debate hits record 15.3 million viewers*, CNN (Oct. 14, 2015), <https://money.cnn.com/2015/10/14/media/cnn-democratic-debate-ratings-record/>.

<sup>6</sup> *Id.*

<sup>7</sup> Caitlin Oprysko, *Thursday's Debate Ratings Shatter Previous Dem Record, NBC Says*, POLITICO (June 28, 2019), [www.politico.com/story/2019/06/28/democratic-debate-ratings-record-1390382](http://www.politico.com/story/2019/06/28/democratic-debate-ratings-record-1390382).

<sup>8</sup> See Rick Porter, *TV Ratings: Ninth Democratic Debate Breaks Viewer Record for Party*, HOLLYWOOD REP. (February 20, 2020), [www.hollywoodreporter.com/live-feed/democratic-debate-criminal-minds-tv-ratings-wednesday-feb-19-2020-1280119](http://www.hollywoodreporter.com/live-feed/democratic-debate-criminal-minds-tv-ratings-wednesday-feb-19-2020-1280119); Yelena Dzhanova, *Bloomberg's addition to the Democratic debate stage leads to record viewership*, CNBC.COM (February 20, 2020), [www.cnbc.com/2020/02/20/bloombergs-addition-to-democratic-debate-stage-leads-to-record-viewership.html](http://www.cnbc.com/2020/02/20/bloombergs-addition-to-democratic-debate-stage-leads-to-record-viewership.html).

topics.”<sup>9</sup> The media, in turn, highlights the policy disagreements among candidates in its post-debate coverage. A *Washington Post* article recapping the fourth Republican primary debate of 2016 remarked, for example, on how the Republican candidates “finally began to differentiate themselves on [the] specifics of their policies.”<sup>10</sup> It went on to cluster the GOP candidates according to their stances on a range of issues, from raising the minimum wage (Kasich was the only “yes”), to deporting undocumented immigrants (Trump stood alone in his embrace of deportation), to bailing out the banks (Kasich would do so, while Cruz would not).<sup>11</sup>

By exposing policy disagreements among candidates, the debates play a critical role in informing voters about important policy choices. This is a well-established finding in both the political science and communications literatures. More than four decades of research, according to Kenneth Winneg and Kathleen Hall Jamieson, has found that presidential debates inform viewers about political issues.<sup>12</sup> Similarly, as James Lemert reports, scholars of mass communication generally agree, with few exceptions, that broadcasted debates inform viewers about policies.<sup>13</sup> In turn, this helps shape voters’ own policy priorities. This process starts with the very questions that moderators ask of candidates on the stage. Although these questions are not necessarily reflective of voters’ own policy concerns (indeed, research shows that debate questions are often shaped more by the interests of journalists),<sup>14</sup> these questions undoubtedly influence ordinary viewers. A study of this phenomenon by William Benoit and Glenn Hansen found that, after watching the debates, viewers reported caring more about the issues highlighted by the moderators and the candidates.<sup>15</sup>

Second, presidential debates help voters make a more informed choice in picking a presidential candidate.<sup>16</sup> While political scientists are largely skeptical of the influence of late-stage general debates between the Republican and

<sup>9</sup> Amber E. Boydston, Rebecca Anne Glazier & Matthew T. Pietryka, *Agenda Control in the 2008 Presidential Debates*, 41 AM. POL. RES. 863, 870 (2013).

<sup>10</sup> *Where Candidates Stood on the Issues in Tuesday’s GOP Debate*, WASH. POST (Nov. 11, 2015), [www.washingtonpost.com/graphics/politics/2016-election/debates/nov-10-speakers/](http://www.washingtonpost.com/graphics/politics/2016-election/debates/nov-10-speakers/).

<sup>11</sup> *Id.*

<sup>12</sup> Kenneth Winneg & Kathleen Hall Jamieson, *Learning From the 2016 U.S. General Election Presidential Debates*, 61 AM. BEHAV. SCIENTIST 362, 364 (2017).

<sup>13</sup> See generally James B. Lemert, *Do Televised Presidential Debates Help Inform Voters?*, 37 J. OF BROADCASTING & ELECTRONIC MEDIA 83 (1992).

<sup>14</sup> William L. Benoit & Glenn J. Hansen, *Presidential Debate Questions and the Public Agenda*, 49 COMM. Q. 130, 134–36 (2009).

<sup>15</sup> R. Lance Holbert, et al., *The Role of Communication in the Formation of an Issue-Based Citizenry*, 69 COMM. MONOGRAPHS 296 (2010).

<sup>16</sup> *Id.*

Democratic nominees,<sup>17</sup> they agree that primary debates do shift voter preferences. A study by Mitchell McKinney found that a full 60 percent of primary debate viewers “changed their pre-debate candidate preferences, including more than one-third of all primary viewers switching their allegiance from one candidate to another, and nearly one-quarter of our primary viewers switching from undecided to a particular candidate following debate viewing.”<sup>18</sup> For their part, voters certainly believe that the debates influence their decisions. According to a 2008 Pew Research Center poll, a full two-thirds of voters said that year’s presidential debates shaped their vote.<sup>19</sup>

Relatedly, the debates also serve the important role of informing the public about lesser-known candidates. Political scientist Thomas Holbrook has found that debates help the public learn more about lesser-known candidates than about frontrunners.<sup>20</sup> In this sense, the debates serve to level the playing field between candidates, some of whom will have received more media attention and coverage than others or been in the public eye for a longer period of time before the debate. Excluding a lesser-known candidate from the debates, meanwhile, can be a death blow to one’s candidacy, as this prevents a candidate from ever building the name recognition necessary to clinch an electoral victory.

Finally, the debates play a role in shaping the long-term perceptions of the office of the presidency and in building confidence in American democracy. Just as the debates influence voters’ policy agendas, they also influence what voters believe it means to be presidential—that is, they highlight what sort of traits, both personal and professional, are necessary to succeed at the job. In a related vein, the presidential debates also serve to build confidence and trust in American democracy. Given the precipitous decline in public trust in government since the 1960s, this function of the debates is arguably one of the most critical. By presenting candidates on the same stage, requiring them to engage in a shared discussion about key policy topics, and broadcasting this discussion to the electorate, the debates embody and reify key tenets of American democracy: that presidential hopefuls must compete on an even

<sup>17</sup> Dylan Matthews, *Do Presidential Debates Usually Matter? Political Scientists Say No*, WASH. POST (Oct. 3, 2012), [www.washingtonpost.com/news/wonk/wp/2012/10/03/what-political-scientists-know-about-debates/?utm\\_term=.ea322bd2ace3](http://www.washingtonpost.com/news/wonk/wp/2012/10/03/what-political-scientists-know-about-debates/?utm_term=.ea322bd2ace3).

<sup>18</sup> Mitchell S. McKinney, *Do Presidential Debates Matter? Examining a Decade of Campaign Debate Effects*, 49 ARGUMENTATION & ADVOC. 238, 252 (2017).

<sup>19</sup> Russell Heimlich, *Most Say Presidential Debates Influence Their Vote*, PEW RESEARCH CTR. (Sept. 11, 2012), [www.pewresearch.org/fact-tank/2012/09/11/most-say-presidential-debates-influence-their-vote/](http://www.pewresearch.org/fact-tank/2012/09/11/most-say-presidential-debates-influence-their-vote/).

<sup>20</sup> Thomas M. Holbrook, *Political Learning from Presidential Debates*, 21 POL. BEHAV. 67 (1999).

playing field, must prove themselves worthy of the office by virtue of their ideas, and must ultimately be chosen for duty by the people.

### III. A BRIEF HISTORY OF THE PRESIDENTIAL DEBATES

Leading up to the 1928 presidential election, the League of Women Voters, which was then a new organization, held a year-long series of national political debates that were broadcast to the nation on the radio. However, the presidential candidates did not participate in these debates directly. Rather, they had surrogates, including journalists, scholars, and other politicians, who argued for their policy positions on their behalf.<sup>21</sup> However, the advent of the medium of television would change the course of the presidential debates. Starting in 1960 with the debates between Richard Nixon and John F. Kennedy, the public was able to see the candidates, who now squared off against each other face-to-face. In 1960, Nixon and Kennedy held a series of four televised debates, with over 70 million people watching the first one alone.<sup>22</sup>

Over the next thirty years, the rules and structure of the debates changed. In order to conduct the 1960 Nixon–Kennedy debate, Congress found it necessary to suspend its long-standing “equal time” rule, which guaranteed all candidates equal time on television. First articulated in the Communications Act of 1934, the equal time rule originally required television stations that allowed a candidate to appear on their airwaves to extend the same opportunity to the candidate’s opponents.<sup>23</sup> The 1960 debates would not afford equal time to all candidates, just to the two frontrunners; accordingly, in order to conduct the 1960 Nixon–Kennedy debate without running afoul of the law, Congress found it necessary to suspend the equal time rule for the 1960 election.<sup>24</sup> With the assassination of President Kennedy, however, who was a supporter of the congressional suspension, the desire for debates waned. President Johnson did not seek, and Congress did not provide, a suspension from the equal time rule for the 1964 election, with the result being that the candidates never debated face to face. The same was true for the 1968 and 1972 elections.<sup>25</sup> Thus, there were no general election presidential debates held between 1964 and 1972.

<sup>21</sup> NEWTON N. MINOW & CRAIG L. LAMAY, *INSIDE THE PRESIDENTIAL DEBATES: THEIR IMPROBABLE PAST AND PROMISING FUTURE* 9 (2008).

<sup>22</sup> *Id.* at 14.

<sup>23</sup> Anne Kramer Ricchiuto, *The End of Time for Equal Time?: Revealing the Statutory Myth of Fair Election Coverage*, 38 *INDIANA L. REV.* 267, 267–68 (2005).

<sup>24</sup> *Political Broadcasts*, *CQ ALMANAC*, at 352 (15th ed. 1959).

<sup>25</sup> MINOW & LAMAY, *supra* note 21, at 2.

By 1976, the Federal Communications Commission reinterpreted the equal time rule and defined presidential debates as “bona fide news events,” which allowed them to be exempt from equal time.<sup>26</sup> Thus, the presidential debates resumed in 1976. The debates were then conducted under the sponsorship of the League of Women Voters until 1988. However, in 1988, the League voted to withdraw from sponsoring the debates. Its concern was that the major parties were meeting behind closed doors to negotiate terms for how the debates would be conducted, and these were not in the public’s interest. Specifically, these terms sought to give the campaigns unprecedented control over the debate proceedings, including the selection of questioners, the composition of the audience, and the access that the press would have to the debates.<sup>27</sup>

After the League withdrew, control of the debates was assumed by the two major political parties, which jointly formed the Commission on Presidential Debates (CPD). The CPD required debate participants to have achieved at least 15 percent support in opinion polling in order to participate in the debates — a rule frequently subjected to criticism. While the 15 percent rule technically existed before the formation of the CPD, it was not always set in stone. In 1980, when the presidential debates were still hosted by the League of Women Voters, independent candidate John B. Anderson was invited to participate in the first presidential debate, despite many polls showing him below the 15 percent threshold. Additional polling by the ABC News-Harris Survey had found that a majority of voters wanted Anderson on the debate stage, even if they did not plan to vote for him. As the League explained in a press release, the survey results “clearly indicate that big majorities of the voters would feel sorely let down if the League of Women Voters does not invite Anderson to debate because of an arbitrary stipulation that he must achieve at least 15 percent in the opinion polls.”<sup>28</sup>

What the League apparently did not anticipate, however, was that Anderson’s inclusion would stoke the ire of then-President and Democratic nominee Jimmy Carter, who had little desire to debate a rival candidate in public who had little hope of winning the election. Upon learning of the League’s decision to include Anderson in the first debate,

<sup>26</sup> See Ricchiuto, *supra* note 23, at 271.

<sup>27</sup> League of Women Voters, *League Refuses to “Help Perpetrate a Fraud,”* LVW.ORG (October 3, 1988), [www.lvw.org/newsroom/press-releases/league-refuses-help-perpetrate-fraud](http://www.lvw.org/newsroom/press-releases/league-refuses-help-perpetrate-fraud).

<sup>28</sup> Louis Harris, *Majority Favors Inclusion of Anderson In League of Women Voters’ Debates*, ABC NEWS – HARRIS SURVEY (Aug. 21, 1980), <https://theharrispoll.com/wp-content/uploads/2017/12/Harris-Interactive-Poll-Research-MAJORITY-FAVORS-INCLUSION-OF-ANDERS-ON-IN-LEAGUE-OF-WOMEN-VOTERS-DEBATES-1980-08.pdf>.

Carter refused to participate.<sup>29</sup> By the time the second debate rolled around, the League had changed tactics; Carter and his Republican opponent, Ronald Reagan, were invited to participate, but Anderson was not.<sup>30</sup> From that point on, the 15 percent rule became a formal litmus test that candidates had to pass in order to participate in the general election presidential debates. Thus far, not a single minor-party candidate has managed to satisfy this test.

The history of the presidential primary debates is more recent and less well-defined than the history of the general election debates. There were Democratic primary debates in 1972 between Hubert Humphrey and George McGovern. Some of these involved just Humphrey and McGovern, while others involved additional candidates for the nomination.<sup>31</sup> In 1980, a New Hampshire newspaper limited a Republican primary debate to frontrunners George H. W. Bush and Ronald Reagan, while the other candidates for the Republican nomination were forced to watch from the audience.<sup>32</sup> In 1987, a joint primary debate was held, with Democratic primary candidates included alongside Republican primary candidates. In that debate, one party would provide answers to questions, with critiques from candidates from the opposing party.<sup>33</sup>

This ad-hoc approach to primary presidential debates, in a process largely run by the media, continued until the 2016 election cycle. But in 2016, the Republican Party, which had fielded an unusually large number of candidates, became concerned over the lack of a satisfactory debate process. It thus decided to take over its primary debates. It scheduled a total of twelve intra-party debates, making efforts to ensure a wide range of questions were asked.<sup>34</sup> However, because the candidate field was so large, Republicans divided debate participants into an upper tier and a lower tier and forced the candidates to participate in separate debates.<sup>35</sup>

<sup>29</sup> Hendrick Smith, *Carter Declines to Debate After Anderson Is Invited; First Clear-Cut Test Anderson Gets Invitation to Debate So President Declines to Take Part 3 Other Invitations Cited Carter Called "Reluctant Debater" Three Polling Specialists Used*, N.Y. TIMES (Sept. 10, 1980), <https://timesmachine.nytimes.com/timesmachine/1980/09/10/11290136.pdf>.

<sup>30</sup> Randy Shipp, *Anderson to debate, too, via cable-TV network*, CHRISTIAN SCI. MONITOR (Oct. 27, 1980), [www.csmonitor.com/1980/1027/102722.html](https://www.csmonitor.com/1980/1027/102722.html).

<sup>31</sup> Seth Masket & Julia Azari, *How the Parties Took Over the Primary Debates*, VOX (Aug. 30, 2016), [www.vox.com/mischiefs-of-faction/2016/8/30/12679346/parties-took-over-debates](http://www.vox.com/mischiefs-of-faction/2016/8/30/12679346/parties-took-over-debates).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*



Democrats faced similar challenges in the primary elections for the 2020 presidential nomination after more than two dozen candidates declared they would run. To ensure fair participation, the Democratic Party established a series of new qualification rules. It would allow a maximum of twenty candidates to participate in each primary debate. To qualify, a Democratic candidate had to attract at least 1 percent support in three national polls, or in polls conducted in the early primary states. Alternately, the candidate had to raise money from a minimum of 65,000 donors located in twenty different states, and to have at least two hundred separate donors in each state.<sup>36</sup> If more than twenty candidates qualified under these criteria, only those candidates who had met both the polling and fundraising thresholds would be allowed to participate. If there were still more than twenty candidates qualifying, the Democratic Party would invite only those candidates with the highest polling averages. Finally, if there still wound up being too many candidates, the Democratic Party decided it would randomly assign candidates to debates and hold multiple debates on different days.<sup>37</sup> As the primary debates progressed, the Democratic Party raised the donation threshold so that the qualifying candidate had to have 130,000 donors located in at least twenty different states. Under this new threshold, at least 400 unique donors had to contribute to the qualifying candidate from each of these twenty states. Campaigns began spending large amounts of money to attract new individual donors, with some reportedly spending \$60 or more on online advertising aimed at new donors for every \$1 they received in contributions.<sup>38</sup> In late January 2020, the Democratic National Committee (DNC) changed its rules again to create a path for Michael Bloomberg to participate in the debates. Because Bloomberg had been self-funding his presidential campaign, he could not meet the numerical donor threshold needed to qualify for the debates. The revised DNC rules dropped the donor threshold entirely and instead began to require that candidates earn at least 10 percent support in four different national polls conducted between mid-January and mid-February, or at least 12 percent support in two polls conducted only in the states of Nevada or South Carolina.<sup>39</sup> By the time of the tenth

<sup>36</sup> Julia Azari & Seth Masket, *The DNC's Debate Rules Won't Make the 2020 Primaries Any Less Chaotic*, FIVETHIRTYEIGHT (Feb. 20, 2019), <https://fivethirtyeight.com/features/the-dncs-debate-rules-wont-make-the-2020-primaries-any-less-chaotic/>.

<sup>37</sup> *Id.*

<sup>38</sup> Edward-Isaac Dove, *The Democratic Debates Aren't Pleasing Anyone*, ATLANTIC (Sept. 19, 2019), [www.theatlantic.com/politics/archive/2019/09/2020-democratic-debates-arent-pleasing-anyone/598306/](http://www.theatlantic.com/politics/archive/2019/09/2020-democratic-debates-arent-pleasing-anyone/598306/).

<sup>39</sup> Zach Montellaro, Sally Goldenberg & Christopher Cadelago, *DNC Overhauls Debate Requirements, Opening Door for Bloomberg*, POLITICO (Jan. 31, 2020), [www.politico.com/news/2020/01/31/dnc-shifts-debate-requirements-opening-door-for-bloomberg-110017/](http://www.politico.com/news/2020/01/31/dnc-shifts-debate-requirements-opening-door-for-bloomberg-110017/).

Democratic debate, held ahead of the South Carolina primary on February 29, the debate rules had changed yet again. Candidates could not qualify for this debate unless they met yet another new polling threshold or had been allocated at least one pledged delegate to the Democratic National Convention from the earlier primary and caucus contests held in Iowa, New Hampshire, or Nevada.<sup>40</sup>

#### IV. HOW THE DEBATES ARE FALLING SHORT

Given that the primary and general presidential debates have been around for a few decades now, it is surprising that there has not been a more robust effort to improve how they are organized and conducted. Because the presidential candidate debates play such a vital role in shaping people's policy preferences, choice of candidates, and trust in the political process, outstanding problems with the debates must be identified and rectified.

##### A. *Problems with Polling*

Both the general and primary debates suffer from a fatal flaw: their reliance on public polling data to determine which candidates make it onto the debate stage. Pre-election polls can be imprecise, as evidenced by the 2016 presidential election (and, earlier that year, the United Kingdom's surprising Brexit vote). More importantly, even the most accurate polls do not capture Americans' preferences around which candidates should participate in the debates. Instead, these polls focus on the less relevant question of which candidate voters intend to support on Election Day. This relentless focus on inviting only the most electable candidates ultimately skews voters' issue and electoral preferences while depriving them of important policy information.

Modern polling has become a complicated endeavor, making it increasingly difficult to achieve accurate, reliable results. There is perhaps no better demonstration of this than the 2016 presidential election. In the lead-up to the election, polls consistently forecast a loss for Donald Trump, the Republican nominee. Predictions of Hillary Clinton's likelihood of victory typically hovered around 90 percent; even Trump's own pollsters were surprised to learn

<sup>40</sup> Sarah Ewall-Wice, *DNC Announces Qualifications for South Carolina Democratic Presidential Debate Hosted by CBS News*, CBSNEWS.COM (Feb. 24, 2020), [www.cbsnews.com/news/south-carolina-debate-dnc-announces-qualifications-for-south-carolina-democratic-presidential-debate-hosted-by-cbs/](http://www.cbsnews.com/news/south-carolina-debate-dnc-announces-qualifications-for-south-carolina-democratic-presidential-debate-hosted-by-cbs/).

that he had won the presidency.<sup>41</sup> The result, as the American Association for Public Opinion Research (AAPOR) put it, “was (and continues to be) widespread consensus that the polls failed.”<sup>42</sup>

In the aggregate, the national polls were not that far off from the actual result, according to a postmortem on election polling conducted on behalf of AAPOR.<sup>43</sup> Clinton was predicted to have a 3-point lead in the national popular vote—just a point off from her eventual 2-point lead on Election Day.<sup>44</sup> Polling also predicted a close race in the Electoral College. However, Clinton’s predicted lead was overinflated in the Upper Midwest, a region critical to Trump’s ultimate victory. “Polls showed Hillary Clinton leading, if narrowly, in Pennsylvania, Michigan and Wisconsin, which had voted Democratic for president six elections running,” explained the AAPOR’s report. “Those leads fed predictions that the Democratic *Blue Wall* would hold. Come Election Day, however, Trump edged out victories in all three.”<sup>45</sup>

The AAPOR’s report identified at least three reasons for this underestimation of Trump’s support: pollsters failed to adjust their results for the overrepresentation of college-educated respondents, some respondents “did not reveal themselves as Trump voters”<sup>46</sup> until the election was over, and a meaningful number of people changed their minds about which candidate to support in the final days of the campaign. Because of these (and possibly other) problems, an otherwise robust polling apparatus failed to anticipate Trump’s surprising Election Day upset.

These sorts of polling challenges were not unique to the 2016 election. Polling is incredibly difficult, in part because it is seldom feasible to contact every likely voter. Instead, pollsters typically contact a sample of likely voters, doing their best to ensure that the sample is representative of the broader group of people who will turn out on Election Day. But depending on the circumstances, this is sometimes easier said than done. One challenge has to do with modern technological advancements; polling that used to be conducted by contacting people on landline phones must now be conducted by contacting them through cell phones and the Internet, technologies disproportionately

<sup>41</sup> Jennifer Jacobs, *Trump Says He Expected to Lose Election Because of Poll Results*, BLOOMBERG (Dec. 13, 2016), [www.bloomberg.com/news/articles/2016-12-14/trump-says-he-expected-to-lose-election-because-of-poll-results](http://www.bloomberg.com/news/articles/2016-12-14/trump-says-he-expected-to-lose-election-because-of-poll-results).

<sup>42</sup> Ad Hoc Committee on 2016 Election Polling, *An Evaluation of 2016 Election Polls in the U.S.*, AAPOR, at 2 (May 4, 2017), [www.aapor.org/getattachment/Education-Resources/Reports/AA-POR-2016-Election-Polling-Report.pdf.aspx](http://www.aapor.org/getattachment/Education-Resources/Reports/AA-POR-2016-Election-Polling-Report.pdf.aspx).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 3.

used by certain segments of the population. This poses a challenge to ensuring that a true sample of the voting population is reached.<sup>47</sup> Even the best pollsters must also make difficult decisions about how to weight the responses of certain demographics over others.<sup>48</sup>

Other challenges have to do with the responses people give when answering survey questions. People do not always reveal their true voting preferences to pollsters, often out of a desire for social acceptance.<sup>49</sup> Some research suggests this was the case for many Trump voters, who hid their preference for Trump from pollsters.<sup>50</sup> And, critically, people's minds change over time. People responding to polls may say they intend to vote for someone one day, but that may not be the candidate they eventually support at the ballot box on Election Day.

To the extent that polling does accurately reflect public opinion, it succeeds only in identifying which candidates likely voters intend to support in the presidential election—which is a different issue from which candidates Americans want to see on the debate stage. In 1980, when the League of Women Voters asked likely voters whether they thought John Anderson should be included in the first presidential debate, 63 percent said yes, despite fewer than 15 percent saying they intended to vote for him on Election Day.<sup>51</sup> In 2000, more than half of American voters told pollsters that they wished Ralph Nader had been invited to participate in the first debate.<sup>52</sup> In 2016, in an election without an especially strong minor-party candidate, nearly half of voters supported including Green Party candidate Jill Stein and independent candidate Gary Johnson in the first debate; only 39 percent wanted the debate restricted to the two major-party candidates.<sup>53</sup> Another 2016 poll found that

<sup>47</sup> D. Sunshine Hillygus, *The Evolution of Election Polling in the United States*, 75 *PUB. OP. Q.* 962 (2011).

<sup>48</sup> See, e.g., Cliff Zukin, et al., *Sources of Variation in Published Election Polling: A Primer*, AAPOR, at 7 (Dec. 2015), [www.aapor.org/getattachment/Education-Resources/Election-Polling-Resources/Election-Polling-AAPOR-2015-primary\\_cz120215-FINAL.pdf.aspx](http://www.aapor.org/getattachment/Education-Resources/Election-Polling-Resources/Election-Polling-AAPOR-2015-primary_cz120215-FINAL.pdf.aspx).

<sup>49</sup> NORMAN BRADBURN ET AL., *ASKING QUESTIONS: THE DEFINITIVE GUIDE TO QUESTIONNAIRE DESIGN – FOR MARKET RESEARCH, POLITICAL POLLS, AND SOCIAL AND HEALTH QUESTIONNAIRES* 11 (rev. ed. 2004).

<sup>50</sup> See, e.g., Peter K. Enns, et al., *Understanding the 2016 US Presidential Polls: The Importance of Hidden Trump Supporters*, 8 *ST. POL. & POL'Y* 41 (2017).

<sup>51</sup> See Harris, *supra* note 28.

<sup>52</sup> Keating Holland, *Poll: Presidential race a dead heat. Two point Bush lead within margin of error*, CNN (Oct. 6, 2000), [www.cnn.com/2000/ALLPOLITICS/stories/10/06/cnn.poll/index.html](http://www.cnn.com/2000/ALLPOLITICS/stories/10/06/cnn.poll/index.html).

<sup>53</sup> Monmouth University Poll, *National: Prez Race Narrows on Debate Eve*, MONMOUTH UNIV. (Sept. 26, 2016), [www.monmouth.edu/polling-institute/documents/monmouthpoll\\_us\\_o92616.pdf/](http://www.monmouth.edu/polling-institute/documents/monmouthpoll_us_o92616.pdf/).

nine in ten people would be just as likely or more likely to watch a debate that was “more inclusive of independent or third party candidates.”<sup>54</sup> Voters consistently say they prefer a more inclusive debate environment—just the opposite of what the two major parties, which jointly organize the debates, prefer.

### B. Exclusion of Candidates

The organizations responsible for planning and hosting the presidential primary and general election debates tend to assume that because alternative candidates are extremely unlikely to win the primary or general election, they do not belong on the debate stage. As Keith Darren Eisner has argued, this narrow conception of “who belongs” misses the ways in which “third-party and independent candidates play a vital role in the American political process, a role independent of electoral success.”<sup>55</sup> Eisner identifies at least three important roles that alternative candidates play in elections: they push for innovative policies, reassure voters that “major parties will be held accountable,” and ultimately influence electoral outcomes (even if they do not themselves get elected as President).<sup>56</sup>

The exclusion of certain candidates from the debates has the perverse effect of limiting the range of policy issues discussed by the candidates. When the major candidates only debate one another, rather than also having to respond to the ideas of other contenders, they ignore any issues on which they already agree. These often include the most transformative policy proposals, such as those concerning overhauling the nation’s campaign finance system,<sup>57</sup> declaring a national state of emergency over climate change,<sup>58</sup> or abolishing major government programs.<sup>59</sup> These issues may be popular among the general

<sup>54</sup> Harvard IOP Spring 2016 Poll, *Clinton in Commanding Lead over Trump Among Young Voters, Harvard Youth Poll Finds*, HARV. KENNEDY SCH. INST. OF POL. (Apr. 25, 2016), <https://iop.harvard.edu/youth-poll/past/harvard-iop-spring-2016-poll>.

<sup>55</sup> Keith Darren Eisner, *Non-Major-Party Candidates and Televised Presidential Debates: The Merits of Legislative Inclusion*, 141 U. PA. L. REV. 973, 979 (1993).

<sup>56</sup> *Id.* at 977–79.

<sup>57</sup> *Ralph Nader on Campaign Finance Reform*, ON THE ISSUES (Sept. 9, 2018), [www.ontheissues.org/Celeb/Ralph\\_Nader\\_Government\\_Reform.htm#Campaign\\_Finance\\_Reform](http://www.ontheissues.org/Celeb/Ralph_Nader_Government_Reform.htm#Campaign_Finance_Reform).

<sup>58</sup> Edward Helmore, *Green Party Candidate Jill Stein Calls for Climate State of Emergency*, GUARDIAN (Aug. 20, 2016), [www.theguardian.com/us-news/2016/aug/20/jill-stein-green-party-climate-state-of-emergency](http://www.theguardian.com/us-news/2016/aug/20/jill-stein-green-party-climate-state-of-emergency).

<sup>59</sup> Maureen Sullivan, *Gary Johnson on Education: 5 Things the Presidential Candidate Wants You to Know*, FORBES (May 30, 2016), [www.forbes.com/sites/maureensullivan/2016/05/30/gary-johnson-on-education-5-things-the-presidential-candidate-wants-you-to-know/#48fie14826bb](http://www.forbes.com/sites/maureensullivan/2016/05/30/gary-johnson-on-education-5-things-the-presidential-candidate-wants-you-to-know/#48fie14826bb).

voting public—for instance, 85 percent of Americans believe our country’s system for funding political campaigns needs to be either fundamentally changed or completely rebuilt<sup>60</sup>—but if the major-party candidates have similar stances on them, they will not score political points by highlighting them. Instead, divisiveness sells. Accordingly, each major party candidate focuses on a narrower set of issues on which they believe they have the upper hand over an opponent.

The result is that voters are hindered from learning where the candidates stand on the full range of issues that matter to them and, more generally, from encountering innovative policy ideas that they may not have considered before. If history is any indication, this has negative consequences for America’s social and economic development. As Gregory Magarian writes, minor-party candidates “have often proposed and popularized new substantive policies which the major parties have lacked the political awareness or foresight to develop.”<sup>61</sup> This includes policies for how to implement “free public education, tougher child labor laws, federal regulation of railroads and other corporations, civil service reform, flexibility in the currency supply, an end to antilabor injunctions, progressive income taxation, and social insurance for the aged and unemployed.”<sup>62</sup> When some candidates are denied the opportunity to promote their policies at the most widely viewed political event of election season, the entire country suffers the cost.

Voters also may become increasingly disillusioned with the political system when a broad range of candidates do not appear on the debate stage. Political trust is at a near-historic low in the United States today; in 2019, only 18 percent of Americans said they trusted government to do what is right just about always or most of the time.<sup>63</sup> This distrust extends to the parties themselves, with distrustful voters less likely to vote for a major-party candidate.<sup>64</sup> Overly restricting the debates likely perpetuates voters’ sense that the two-party system is “rigged” to serve politicians and their vested interests, not the interests of voters.

<sup>60</sup> *Americans’ Views on Money in Politics*, N.Y. TIMES (Jun. 2, 2015), [www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html](http://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html).

<sup>61</sup> Gregory P. Magarian, *Fighting Exclusion from Televised Presidential Debates: Minor-Party Candidates’ Standing to Challenge Sponsoring Organizations’ Tax-Exempt Status*, 90 MICH. L. REV. 838, 879 (1992).

<sup>62</sup> *Id.*

<sup>63</sup> *Public Trust in Government: 1958–2019*, PEW RESEARCH CTR. (Apr. 11, 2019), [www.people-press.org/2017/12/14/public-trust-in-government-1958-2017/](http://www.people-press.org/2017/12/14/public-trust-in-government-1958-2017/).

<sup>64</sup> Geoff Peterson & J. Mark Wrighton, *Expressions of Distrust: Third-Party Voting and Cynicism in Government*, 20 POL. BEHAV. 17, 20 (1998).

By excluding alternative candidates, the Commission on Presidential Debates withholds “a critical source of the mass exposure upon which campaigns depend for legitimacy.”<sup>65</sup> To be clear, this “legitimacy” is not necessarily dependent upon a candidate’s ability to win the presidential election. Non-traditional candidates may join the presidential race in order to raise awareness of an issue, to pull the closest major-party nominee in a more liberal or conservative direction, or even to play the role of “spoiler” for one of the major parties.

In America’s winner-take-all voting system, an alternative candidate can impact electoral outcomes by siphoning enough votes away from a similar major-party nominee to swing the election to the opposing candidate. This phenomenon, commonly referred to as “the spoiler effect,” has played a significant role in several major presidential elections throughout U.S. history, most notably ensuring that George W. Bush defeated Al Gore in the 2000 election. Research shows that if Florida voters who supported Green Party nominee Ralph Nader had instead been forced to support either Bush or Gore, most would have supported Gore, and the state—and the country—would have elected a Democrat to the presidency.<sup>66</sup>

When a full range of candidates are prevented from participating in the debates, then, they are denied the opportunity to influence electoral outcomes via their critical role as both advocates and spoilers. Chief Judge Abner Mikva of the U.S. Court of Appeals for the D.C. Circuit emphasized this point in his dissent in *Fulani v. Brady*, a case brought by Lenora Fulani of the New Alliance Party after she had been excluded from the presidential debates.<sup>67</sup> The first woman and first African-American to appear on the ballot as a presidential candidate in all fifty states,<sup>68</sup> Fulani sued the IRS to challenge the tax-exempt status given to the Commission on Presidential Debates. She argued that the CPD did not meet the qualifications for tax-exempt status because it presented a partisan political viewpoint by excluding her from the presidential debates as a minor-party candidate. The CPD argued that Fulani did not have “a realistic chance of being elected to the Presidency or Vice-Presidency,”<sup>69</sup> a determination it made after examining a candidate’s “ballot

<sup>65</sup> See Magarian, *supra* note 61, at 856.

<sup>66</sup> Michael C. Herron & Jeffrey B. Lewis, Did Ralph Nader Spoil a Gore Presidency? A Ballot-Level Study of Green and Reform Party Voters in the 2000 Presidential Election (Apr. 24, 2006) (unpublished manuscript), [www.sscnet.ucla.edu/polisci/faculty/lewis/pdf/greenreform9.pdf](http://www.sscnet.ucla.edu/polisci/faculty/lewis/pdf/greenreform9.pdf).

<sup>67</sup> *Fulani v. Brady*, 935 F.2d 1324 (1991).

<sup>68</sup> *About Lenora B. Fulani, Ph.D.*, ALL STARS PROJECT, <https://allstars.org/members/lenora-fulani-ph-d/> (last visited May 22, 2019).

<sup>69</sup> *Fulani*, 935 F. 2d at 1235.

listings; professional opinions of the media, campaign managers, and political scientists; column inches of news coverage; and findings of national pollsters.”<sup>70</sup>

Although the D.C. Circuit denied Fulani’s ability to advance her lawsuit against the IRS for lack of standing, it did not do so without a dissent. In his dissent, Judge Mikva argued that the political communication of minor-party candidates is important, even if it does not lead to electoral victory. Fulani suffered broad injuries because she lost a critical opportunity to communicate her political ideas to the electorate. As Judge Mikva wrote:

Fulani does *not* assert that she could have won the 1988 election if she had participated in the presidential debates. Instead, she claims 1) that her credibility as a ‘spoiler’ and public advocate was undermined by the Commission’s refusal to invite her, and 2) that allowing then-Vice President Bush and Governor Dukakis to debate alone boosted their campaigns in comparison to hers.

It follows from Fulani’s allegations that whatever advantage major-party candidates have going into two-candidate presidential debates is exaggerated by the debates themselves, and that such debates disadvantage minor-party candidates. . . . This disadvantage constitutes sufficient injury to support a finding of standing.<sup>71</sup>

Going forward, the CPD and the primary debate organizers should give consideration to the inclusion of a broad range of perspectives. This can help restore the eroding trust in government and provide voters with fuller choices and information on the issues that matter most to them.

### C. *Lack of Governmental Oversight*

Government oversight of the candidate debates has traditionally been minimal. In recent years, however, the Federal Election Commission (FEC) has promulgated some regulations regarding presidential debates. These regulations stem from the Federal Election Campaign Act (FECA), which prohibits any corporation, or any labor organization, from making a contribution or expenditure in connection with any election at which presidential or vice-presidential electors are to be selected.<sup>72</sup> However, there are important

<sup>70</sup> *Id.* at 1236.

<sup>71</sup> *Id.* at 1332–33.

<sup>72</sup> 52 U.S.C. § 30118(a).



exemptions for non-partisan activity, especially of those organizations designed to educate voters or encourage voting.<sup>73</sup>

The task of the FEC has been to clarify this exemption. Its approach has been to exempt non-profits that avoid endorsing, supporting, or opposing political candidates or parties, allowing them to receive corporate or labor union funds to educate voters about issues, or in the case of the CPD, which is a non-profit, to defray the cost of staging the debates. The FEC's regulations also state that the presidential debates may not be structured to promote one candidate over another, and that tagging organizations use "pre-established objective criteria to determine which candidates may participate in a debate."<sup>74</sup> And for general election debates, staging organizations cannot use nomination by a particular party as the sole objective criterion to include a candidate in a debate. The purpose of the FEC requirement for objective criteria is "to avoid the real or apparent potential for a quid pro quo, and to ensure the integrity of fairness of the process."<sup>75</sup> Accordingly, criteria cannot be "designed to promote or advance one candidate over another,"<sup>76</sup> and the "rule contains an implied reasonableness requirement."<sup>77</sup> If a debate were to fail to comply with the regulations, the value of the debate would be construed as a campaign contribution or expenditure made in violation of the law.<sup>78</sup>

In September 2014 and June 2015, administrative complaints were filed with the FEC against the CPD.<sup>79</sup> The complaints took issue with the CPD's "Non-Partisan Candidate Selection Criteria," which state that candidates will be invited to participate in debates if they are constitutionally eligible to run, appear on a sufficient number of state ballots to have a mathematical chance of winning a majority vote in the Electoral College, and attract the support of at least 15 percent of the national electorate (as determined by five national polling organizations). The complaints alleged that, in the 2012 presidential election, the CPD was not, in fact, a non-partisan debate-staging organization, because its candidate selection criteria amounted to endorsing, supporting, or opposing certain political parties. In particular, the 15 percent polling threshold had the effect of barring participation from minor-party and independent candidates. (This alleged preferential treatment of major-party candidates has continued to

<sup>73</sup> 52 U.S.C. § 30101(g)(A)(i).

<sup>74</sup> 11 C.F.R. § 110.13.

<sup>75</sup> *Commission disposition of debate rulemaking* (2017), FED. ELECTION COMM'N (March 29, 2017), [www.fec.gov/updates/commission-disposition-debate-rulemaking/](http://www.fec.gov/updates/commission-disposition-debate-rulemaking/).

<sup>76</sup> 11 C.F.R. § 110.13.

<sup>77</sup> 60 C.F.R. § 260; 64 C.F.R. § 262.

<sup>78</sup> *Id.*

<sup>79</sup> *Level the Playing Field v. FEC (LPF II)(New)*, FED. ELECTION COMM'N (Sept. 9, 2015), [www.fec.gov/updates/level-the-playing-field-v-fec-lpf-ii/](http://www.fec.gov/updates/level-the-playing-field-v-fec-lpf-ii/).

be a criticism leveled at the CPD. For its part, the CPD disputes this allegation, saying that its selection criteria have only sought to identify the candidates whose widespread public support makes them the leading contenders for president.) The complainants asked the FEC to revise its regulations to bar debate-staging organizations from using a polling threshold to help determine who could participate in general-election debates. The FEC dismissed the complaints and decided not to initiate any new rulemaking on the issue.

This was not the end of the story, however. In *Level the Playing Field v. FEC*, the Green Party, the Libertarian National Committee, and Dr. Peter Ackerman sued the FEC in the U.S. District Court for the District of Columbia over the FEC's complaint dismissals and the FEC's refusal to engage in rulemaking on these issues.<sup>80</sup> In 2017, the district court issued a decision in which it found that the FEC acted arbitrarily and capriciously when it determined that the CPD did not endorse, support, or oppose political parties during the 2012 president election.<sup>81</sup> The court also acknowledged the difficulty of any independent candidate in reaching a 15 percent approval rating in the polls, and it noted that polling involving minor-party candidates suffers from errors that makes the results less reliable.

At the court's direction, the FEC reconsidered the allegations brought by the plaintiffs. Nonetheless, it again found no basis to rule that the CPD made prohibited contributions or expenditures to certain candidates by bestowing a debate platform to them, as the CPD used "objective criteria" to determine who participated in debates. Further, the Commission again chose not to enter into new rulemaking. When the case came back to the U.S. District Court for a second time, the court granted the FEC's motion to dismiss.<sup>82</sup> For now, the CPD's approach to deciding who can participate in the presidential debates continues without any meaningful government oversight or without an eye toward broadening its participation rules. The FEC, an agency long hamstrung by its bureaucratic paralysis, is unlikely to pass additional regulations that provide meaningful change in this area. Either future litigation or activist pressure is needed for the CPD to re-examine its policies and for change to occur.

#### D. Gender and Racial Bias in Debates

Hillary Clinton was not the first woman to run for president of the United States. Since 1940, forty women have been nominated by various political

<sup>80</sup> *Level the Playing Field v. FEC*, 232 F. Supp. 3d 130 (2017).

<sup>81</sup> *Id.* at 140.

<sup>82</sup> *See Level the Playing Field v. FEC*, 381 F. Supp.3d 78 (2019).

parties for the highest office in America. Many of these women managed to get on the general election ballot in various states, and ten of them attracted at least 40,000 votes in the general election. Female contenders have been similarly active in presidential primaries. Since 1964, ten women have campaigned in a major-party primary or caucus and received at least 5,000 votes.<sup>83</sup>

Despite this long history of women aspiring to the presidency, 2016 marked the first time that a female candidate participated in a general presidential debate.<sup>84</sup> While election-year primaries and caucuses have certainly made the nomination process more democratic, the primary and general election debates still play a central role in shaping public perceptions and determining the ultimate success of presidential candidates. Because only one woman candidate, Hillary Clinton, has ever received the nomination of a major party for the presidency, only one woman has ever been invited to participate in a general presidential debate.

The story is similarly bleak for African-American candidates. Since the Voting Rights Act of 1965 enshrined into federal law the right of African-Americans to participate equally in the electoral process, particularly in the South, nine black candidates have received at least 40,000 popular votes in the general election.<sup>85</sup> In 1984, Reverend Jesse Jackson attracted three million primary votes as the first black candidate to compete nationally in a major-party primary.<sup>86</sup> Yet it was not until Barack Obama made history by clinching the Democratic nomination that a black candidate appeared on the general presidential debate stage.

We need to make the presidential nomination process more welcoming for non-traditional candidates if we want to increase the diversity of the candidates who appear in the presidential debates. Public perceptions of the presidency are shaped by who appears on the debate stage. Any rules or practices that exclude or disadvantage women and people of color from the debates

<sup>83</sup> *List of female United States presidential and vice-presidential candidates*, WIKIWAND, [www.wikiwand.com/en/List\\_of\\_female\\_United\\_States\\_presidential\\_and\\_vice-presidential\\_candidates](http://www.wikiwand.com/en/List_of_female_United_States_presidential_and_vice-presidential_candidates) (last updated May 20, 2019).

<sup>84</sup> WITW Staff, *Hillary Clinton goes where no woman has ever gone before in 1st presidential debate*, WOMEN IN THE WORLD (Sept. 26, 2016), <https://womenintheworld.com/2016/09/26/hillary-clinton-goes-where-no-woman-has-ever-gone-before-in-1st-presidential-debate/>.

<sup>85</sup> *List of African-American United States presidential and vice-presidential candidates*, WIKIWAND, [www.wikiwand.com/en/List\\_of\\_African-American\\_United\\_States\\_presidential\\_and\\_vice-presidential\\_candidates](http://www.wikiwand.com/en/List_of_African-American_United_States_presidential_and_vice-presidential_candidates) (last updated May 30, 2019).

<sup>86</sup> Eudie Pak, *Jesse Jackson and 6 Black Politicians Who Ran for President of the United States*, BIOGRAPHY (May 30, 2019), [www.biography.com/news/jesse-jackson-black-politicians-ran-president](http://www.biography.com/news/jesse-jackson-black-politicians-ran-president).

perpetuate a social perception that white men are better suited for the presidency. Though many voters have made up their minds between the two major parties before debate season, a surprising number also report that they rely on the debates to help them choose a candidate; according to the Pew Research Center, a full two-thirds of voters in 2008 said that year's presidential debates between Barack Obama and John McCain were "very helpful" or "somewhat helpful" as they decided whom to support at the ballot box.<sup>87</sup>

Thus, the way the presidential debates are run today leads to a vicious cycle. The parties, cognizant of the impact of the debates, are most comfortable throwing resources behind candidates they deem likely to thrive in a traditional debate setting. The candidates who lack these "winning" characteristics—which historically have included whiteness, maleness, and a dominating television personality—are often relegated to second-tier status, and are ultimately prevented from fairly participating on the debate stage. This lack of participation only reinforces the parties' notion that women and people of color are not presidential material. Obama's presidency and Hillary Clinton's two high-profile campaigns almost certainly broadened people's sense of who belongs in the White House. It was little surprise, then, that the 2020 presidential debates featured a more diverse slate of candidates, with more women running for president than in any previous election. Yet the format of the Democratic primary debates remained particularly problematic for women. Candidates were incentivized to engage in back-and-forth personal attacks in order to gain speaking time and attract media attention,<sup>88</sup> resulting in debates that were "combative"<sup>89</sup> and "rife with insults and interruptions."<sup>90</sup> This made it difficult for the women candidates to showcase critical leadership skills such as collaboration and relationship-building—areas in which women tend to excel relative to men.<sup>91</sup> It also left women candidates uncertain over how to engage with their opponents without

<sup>87</sup> Russell Heimlich, *Most Say Presidential Debates Influence Their Vote*, PEW RESEARCH CTR. (Sept. 11, 2012), [www.pewresearch.org/fact-tank/2012/09/11/most-say-presidential-debates-influence-their-vote/](http://www.pewresearch.org/fact-tank/2012/09/11/most-say-presidential-debates-influence-their-vote/).

<sup>88</sup> Mark Preston, *CNN Announces Rules for Next Democratic Presidential Debates*, CNN (July 9, 2019), [www.cnn.com/2019/07/09/politics/cnn-debate-rules/index.html](http://www.cnn.com/2019/07/09/politics/cnn-debate-rules/index.html).

<sup>89</sup> Max Greenwood & Jonathan Easley, *5 Takeaways from Combative Democratic Debate*, THE HILL (July 30, 2019), <https://thehill.com/homenews/campaign/455475-5-takeaways-from-democratic-debate-slugfest>.

<sup>90</sup> Jonathan Martin & Alexander Burns, *Amid Insults and Interruptions, Sanders Absorbs Burst of Attacks in Debate*, N.Y. TIMES (Feb. 25, 2020), [www.nytimes.com/2020/02/25/us/politics/south-carolina-debate-recap.html](http://www.nytimes.com/2020/02/25/us/politics/south-carolina-debate-recap.html).

<sup>91</sup> Jack Zenger & Joseph Folkman, *Are Women Better Leaders Than Men?*, HARV. BUSINESS REV. (March 15, 2012), <https://hbr.org/2012/03/a-study-in-leadership-women-do>.

facing public blowback, as gender stereotypes often lead women who assert themselves to be interpreted as mean or pushy. As Adam Grant explains, “Male candidates are free to interrupt, while female candidates face a double bind: stay silent and fail to be heard, or speak up and get judged as too aggressive.”<sup>92</sup> This is not a new problem. As Gloria Steinem commented forty years ago, “If you are assertive and aggressive enough to do the job, you’re unfeminine and therefore unacceptable; if you’re not aggressive, you can’t do the job—and in either case, goodbye.”<sup>93</sup>

Gender bias is not limited to the question of who makes it onto the debate stage or the rules structuring candidate engagement. The questions asked at the debates themselves also need to be free of bias. When past debates, including the vice-presidential and primary debates, have featured women candidates, they have been plagued by biased questions. If we are to seek ways to improve in the future, it is critical to examine how issues of gender bias have impacted our past debates. In a 2015 study, researchers Jason Turcotte and Newly Paul examined all of the questions that have been asked at every past presidential debate.<sup>94</sup> One of the findings of their study was that debate moderators tended to focus their questions more on policy issues that mattered to them personally and less on issues that mattered to the public generally and to women in particular.

There are several reasons why this happens. First, the journalists who moderate the debates have different goals than the public; the media focuses on questions designed to generate conflict, while members of the public want questions answered about their everyday concerns. Sometimes when journalists ask questions to generate conflict, the question becomes biased toward women, which is particularly problematic. As another study found, women politicians are “more likely to make bills dealing with women’s issues and [make] children and family issues a priority.”<sup>95</sup> When they are not given the opportunity to highlight these issues in the debates, women must instead play

<sup>92</sup> Stephanie Saul, *Interrupting Is Different for Men and Women, Even on a Debate Stage*, N.Y. TIMES (June 27, 2019), [www.nytimes.com/2019/06/27/us/politics/debate-interruptions.html](http://www.nytimes.com/2019/06/27/us/politics/debate-interruptions.html).

<sup>93</sup> Leslie Bennetts, *On Aggression in Politics: Are Women Judged by a Double Standard?*, N.Y. TIMES (Feb. 12, 1979), [www.nytimes.com/1979/02/12/archives/on-aggression-in-politics-are-women-judged-by-a-double-standard-one.html](http://www.nytimes.com/1979/02/12/archives/on-aggression-in-politics-are-women-judged-by-a-double-standard-one.html).

<sup>94</sup> Jason Turcotte & Newly Paul, *A Case of More Is Less: The Role of Gender in U.S. Presidential Debates*, 68 POL’Y RES. Q. 773 (2015).

<sup>95</sup> Kira Sanbonmatsu, *Why Women? The Impact of Women in Elective Office*, POL. PARITY (Oct. 2017), [www.politicalparity.org/wp-content/uploads/2017/10/Parity-Research-Women-Impact.pdf](http://www.politicalparity.org/wp-content/uploads/2017/10/Parity-Research-Women-Impact.pdf).

on their opponents' issue turf. This denies a key opportunity for women candidates to differentiate themselves from their male opponents.

Second, because most debate moderators tend to be men, Turcotte and Paul's study found these moderators inadvertently deprioritize policy issues that resonate more with women. Turcotte and Paul found not only that more debate moderators were men than women,<sup>96</sup> but also that the media entourage covering presidential campaigns in general was much more likely to consist of men. And, frequently, this media will cover an issue differently for a woman than for a man. For example, Senator Amy Klobuchar, a 2020 presidential candidate, received substantial, ongoing critical media attention due to her "reputation" as an abusive boss in the Senate. Senator Bernie Sanders, however, was celebrated for his "curmudgeon" style as a boss, despite allegedly engaging in similar behavior.<sup>97</sup>

Finally, post-debate media analysis plays an important role in shaping public opinion of who "won" a debate, and such post-debate analysis has been shown to be especially biased against women. As Jennifer Brubaker and Gary Hanson noted recently, "Research has suggested that media coverage does not give voters an accurate portrayal of the debates." They cite Benoit, Hansen, and Stein, who "found that newspaper coverage of primary debates accentuated the negative, emphasized character over policy and told voters relatively little of the content of these debates," and highlight additional research drawing similar conclusions in regards to television coverage of debates.<sup>98</sup> Not surprisingly, post-debate news coverage has tended to have more male than female participation. This has been improving in recent election cycles. However, both male and female media commentators tend to skew toward discussing conflict instead of substance. Further, as Brubaker and Hanson found, the media uses post-debate analysis to view the debate as a horse race, with the purpose of trying to determine a winner, rather than providing a full analysis of what was said substantively.

Improvements need to be made to the format of the presidential debates, to the selection of questions asked, and to the media analysis that takes place afterward to allow for greater public consideration of female candidates. Ideas

<sup>96</sup> Turcotte & Paul, *supra* note 94, at 776.

<sup>97</sup> Laura McGann, *The Suspiciously Sexist Views of Amy Klobuchar's Management Style, Explained*, VOX (Feb. 24, 2019), [www.vox.com/2019/2/24/18218279/amy-klobuchar-fork-combad-boss-binder-staffers-angry-management-style-explained](http://www.vox.com/2019/2/24/18218279/amy-klobuchar-fork-combad-boss-binder-staffers-angry-management-style-explained).

<sup>98</sup> Jennifer Brubaker & Gary Hanson, *The Effect of Fox News and CNN's Postdebate Commentator Analysis on Viewer's Perceptions of Presidential Candidate Performance*, 74 SOUTH. COMM. J. 339, 341 (2009).

such as involving more unscripted questions from the general public during the debates must be considered to address these issues.

### E. Audience Reaction Bias

Both primary and general election presidential debates have generally been conducted in front of a live audience. This audience is typically admonished by debate moderators not to provide either a positive or negative reaction to questions or responses, out of a fear that audience reactions will bias home viewers. Yet this admonition is frequently ignored. As a result, live audiences may be harmful to the goal of providing an informative, fair debate.

There are several historical examples of how audience reaction has impacted a presidential debate. Perhaps the most famous took place in 1984, during the debate between Ronald Reagan and Walter Mondale. When Reagan was asked by the debate moderator if he thought age should be an issue in the campaign, he replied, "I will not make age an issue of this campaign. I am not going to exploit, for political purposes, my opponent's youth and inexperience."<sup>99</sup> The debate audience erupted in laughter, creating the impression that Reagan had "won" the debate and dispelling concerns that his age would affect his ability to serve as President. Similarly, in the 2012 presidential debate, Mitt Romney asserted that Barack Obama had hesitated for weeks before denouncing the attack on the American embassy in Benghazi, Libya, as an "act of terror." This erroneous assertion was quickly corrected by the debate moderator, Candy Crowley, and then followed by a joking request from Barack Obama: "Can you say that a little louder, Candy?" This comment drew immediate audience laughter and applause, becoming a signature moment in the campaign.

Experimental research confirms that home viewers of debates are influenced by audience reactions. In a 2007 study, Steven Fein, George Goethals, and Matthew Kugler conducted an experiment in which participants watched one of three versions of the 1984 Reagan-Mondale presidential debate: a version with no editing, a version that removed audience reactions, or a version that removed the candidates' "soundbite" one-liners (including Reagan's aforementioned quip about Mondale's age).<sup>100</sup> Participants who viewed the unedited version of the debate felt that Reagan and Mondale

<sup>99</sup> Steven Fein et al., *Social Influence on Political Judgments: The Case of Presidential Debates*, 28 POL. PSYCHOL. 165, 165 (2007).

<sup>100</sup> *Id.* at 175.

performed “virtually equally.” However, in the other two experimental conditions, “Reagan tended to be rated more negatively than Mondale . . . particularly in the condition in which the soundbite remained but the audience reaction was deleted.”<sup>101</sup> In other words, audience reactions had a large impact on how participants perceived candidate performance.

#### F. *Post-Debate Media Coverage*

The presidential debates are susceptible to media influence and media bias, which in turn shapes the beliefs and voting patterns of viewers at home. This runs contrary to the ostensible purpose of the debates: to inform voters about the issues and candidates that matter most to them, and to let the voters make up their own minds. The problem of media influence begins with the questions that the moderators choose to ask of debate participants. While the process of how the moderators determine which questions to ask is somewhat opaque, a leaked 2004 memo from the CPD indicates that the moderators themselves, rather than the Commission or the parties, have control over which questions they pose to which candidates and in which order they ask them. At first glance, this makes sense as a question-selection strategy. Highly esteemed journalists must be approved as moderators in advance by the debate’s participants, and these journalists have every incentive to ask both hard-hitting and well-balanced questions during their moment in the spotlight.

However, research indicates that this choice has a major downside: it results in candidates being asked questions on issues that matter to journalists, not to voters.<sup>102</sup> Moderators are not required to demonstrate beforehand that their lines of inquiry reflect the public interest, much less to solicit questions from voters themselves. Moreover, as members of the media establishment, journalists are especially attuned to—and often personally interested in—whichever hot scandals may be creating a current buzz in news circles. In an era of manufactured controversies pushed by parties, interest groups, and foreign actors alike, moderators who craft debate questions around scandalous material risk unintentionally propagating misleading or overly sensationalized information to home viewers.

This is precisely what happened in the second general presidential debate of 2016. In that debate, moderator Martha Raddatz asked Hillary Clinton whether Clinton thought “it was acceptable for a politician to be

<sup>101</sup> *Id.* at 176.

<sup>102</sup> Benoit & Hansen, *supra*, note 14, at 134–36.



two-faced?”<sup>103</sup> This was a thinly veiled reference to a passage from one of Clinton’s newly released paid speeches to a large financial institution. She faced a similar question in the third debate, when moderator Chris Wallace cited a snippet from a 2013 speech Clinton had given to a Brazilian bank to suggest that she supported “open borders.” As Jane Mayer of *The New Yorker* explained, both questions misrepresented Clinton’s speeches. But the result of being asked these questions, coupled with Clinton’s defensive answers, was that “viewers who watched the second and third debates subsequently saw Clinton as less forthright, and Trump as *more* forthright.”<sup>104</sup> As Kathleen Hall Jamieson also explained to Mayer, strategic actors on the right (including Wikileaks and Russian hackers) ensured that an anti-Clinton narrative dominated the media during the weeks of the presidential debates; the debate moderators and the media, in turn, promulgated this narrative before a national audience of millions.<sup>105</sup>

The influence of the media is not limited to the questions asked of the presidential candidates. Journalists also shape public perception through their broad framing of the debates as competitions, and their coverage of the debates often encourages viewers to value clever zingers above informative policy content. In their post-debate coverage, reporters declare winners and losers, going so far as to report the results of temperature-tracking polls conducted during the debates. This polling almost certainly contributes to groupthink, making it harder for viewers to make up their own minds as to their assessment of each candidate and his or her ideas.

Finally, the media’s notorious tendency to disproportionately cover the negative aspects of elections and campaigns extends to its reporting on presidential debates, likely leading to greater public negativity toward candidates and toward the government at large.<sup>106</sup> The negativity of media coverage during presidential campaigns has been well-documented.<sup>107</sup> A study by the Shorenstein Center at Harvard University found that every week of the 2016

<sup>103</sup> Jane Mayer, *How Russia Helped Swing the Election for Trump*, *NEW YORKER* (Oct. 1, 2018), [www.newyorker.com/magazine/2018/10/01/how-russia-helped-to-swing-the-election-for-trump](http://www.newyorker.com/magazine/2018/10/01/how-russia-helped-to-swing-the-election-for-trump).

<sup>104</sup> *Id.* (emphasis in original).

<sup>105</sup> *Id.*

<sup>106</sup> Research has found that watching political television leads to greater cynicism and distrust toward government. See Michael J. Robinson, *Public Affairs Television and the Growth of Political Malaise: The Case of “The Selling of the Pentagon,”* 70 *AM. POL. SCI. REV.* 409 (1976).

<sup>107</sup> David Niven, *Bias in the News: Partisanship and Negativity in Media Coverage of Presidents George Bush and Bill Clinton*, 6 *HARV. INT’L J. OF PRESS/POL.* 31 (2001).

presidential election saw the average presidential candidate receive at least 64 percent negative media coverage, including during the weeks of the primary and general election debates.<sup>108</sup> In fact, the percentage of negative coverage has increased while the percentage of positive coverage has declined steadily since 1960, when presidential candidates received an average of 76 percent positive coverage.<sup>109</sup>

The study by Fein, Goethals, and Kugler, discussed above, explains how people's perceptions of the presidential debates are influenced by the expressed opinions put forth by others.<sup>110</sup> This is undoubtedly true as well for the negative media coverage of the presidential debates; though research on the effect of debate coverage on public opinion is sparse, related research on media coverage of the President's State of the Union addresses finds that "conflict-laden television coverage decreases public evaluations of political institutions, trust in leadership, and overall support for political parties and the system as a whole."<sup>111</sup>

Certainly, free speech and press rights cannot be infringed, especially in terms of political commentary. But greater awareness of these issues may lead the media to adjust how they cover the presidential debates, so as to foster greater political trust and avoid biasing viewers watching at home.

### G. Debate Format

The traditional debate format is also problematic for several reasons. In the traditional format, there is a typical back-and-forth debate style that privileges candidates who thrive in an "us-versus-them" environment. A clear example of this occurred during the 2016 presidential debates, where Donald Trump "stalked" Hillary Clinton on stage, exacerbating an already antagonistic format. This is likely to have particularly negative consequences for women candidates, who are disproportionately penalized for appearing aggressive.<sup>112</sup>

Alternative formats should be explored—not only to avoid privileging certain candidates, but also to give voters what they want. According to a study by

<sup>108</sup> Thomas E. Patterson, *News Coverage of the 2016 General Election: How the Press Failed the Voters*, HARV. KENNEDY SCH., SHORENSTEIN CTR. ON MEDIA POL. & PUB. POL'Y (Dec. 7, 2016), <https://shorensteincenter.org/news-coverage-2016-general-election/>.

<sup>109</sup> *Id.*

<sup>110</sup> Fein et al., *supra* note 99, at 187–90.

<sup>111</sup> Richard Forgette & Jonathan S. Morris, *High-Conflict Television News and Public Opinion*, 59 POL. RES. Q. 447, 447 (2006).

<sup>112</sup> Rebecca Adams, *People Reward Angry Men but Punish Angry Women, Study Suggests*, HUFFPOST (Oct. 16, 2015), [www.huffpost.com/entry/people-reward-angry-men-but-punish-angry-women-study-suggests\\_n\\_561fb57be4b050c6c4a47743](http://www.huffpost.com/entry/people-reward-angry-men-but-punish-angry-women-study-suggests_n_561fb57be4b050c6c4a47743).

the Annenberg Public Policy Center, voters would prefer debates that limit the number of topics discussed, that vary the topics from debate to debate, that adjust time limits to allow for more in-depth discussion on each issue, and that allow candidates to more clearly flesh out their differences.<sup>113</sup>

The Annenberg study discussed several alternative models for the debate format, including a “chess clock” model, a “reformed standard” model, and a continuation of the “town hall” model.<sup>114</sup> In the “chess clock” model, each of the candidates has an equal, finite amount of time to use during the debate. Each time they speak, their clock runs down. Once it reaches zero, candidates cannot offer additional comments, ensuring equal speaking time to all participants. The model also features questions drawn from a broader pool of sources than just the moderators, and it allows candidates to ask follow-up questions of each other.

The “reformed standard” model is closer to the existing back-and-forth debate format, with several key distinctions. The time for question and response is similar to that currently used, with short periods for response and rebuttal. However, the questions are pulled from sources other than the moderator, and each candidate is allowed to choose to have additional time on a select number of issues. The model also affords each candidate two in-depth questions, provided in advance, and gives him or her more time during the debate for response, allowing for greater clarity and understanding on a few key issues.<sup>115</sup>

## V. HOW TO IMPROVE PRESIDENTIAL DEBATES

Given the many challenges faced by the presidential debates, reform is needed. All revisions to the existing debate process should be undertaken with an eye to fulfilling the many important purposes of presidential debates, from informing voters about the full spectrum of presidential candidates and their policy ideas to building deeper trust in the political process.

First, the use of polls as a determining factor of who gets to participate in primary or general election debates should be re-examined. Beyond being conducted fairly and accurately, polls should also capture general public interest in candidates and their ideas, not simply whether people intend to

<sup>113</sup> *Democratizing The Debates: A Report of the Annenberg Working Group on Presidential Campaign Debate Reform*, ANNENBERG DEBATE REFORM WORKING GROUP 10 (2015), <https://cdn.annenbergpublicpolicycenter.org/wp-content/uploads/Democratizing-The-Debates.pdf>.

<sup>114</sup> *Id.* at 10–11.

<sup>115</sup> *Id.* at 11.

vote for a given candidate on Election Day. Polling to determine which candidates voters want to see participate in the debates is one possible reform.

Second, all gender and racial bias must be eliminated from the presidential debates. Beyond expanding the selection criteria for participants include more diverse candidates, the audiences and questioners at the debates should themselves be representative of the American public. This might be done through an audience quota to ensure representation of women, people of color, and other underrepresented groups. Alternatively, the CPD could hold a random lottery to determine who will be in the audience. Debate moderators should be more diverse, as well, helping ensure that candidates are asked a more balanced and representative set of questions. Finally, all candidates should each be asked the same questions. If, for example, female candidates are asked how they will balance family with the role of the presidency, male candidates should be asked this, too.

Third, moderators should be required to ask questions centered around the public's concerns, not their personal interests. Debate questions should be solicited from diverse media outlets and from the general public. Research finds that soliciting questions from voters improves the diversity of questions; as one study's authors explained, people generally support "using town hall forums to create debate agendas that are more in line with public priorities."<sup>116</sup>

Fourth, the debate format should change to ensure that voters learn more substantive information and that candidates have an equal opportunity to express their ideas. Most importantly, the format must avoid biasing debate outcomes, with all candidates treated the same way. Since each debate format is likely to reward certain skills above others, there should be multiple debates in different styles, so there are opportunities for different candidate qualities to come through and shine. For example, town halls allow audience members to ask questions directly to candidates, privileging a relational communication style that may come more naturally to women candidates (and that voters might reward more in women than men). Again, the key is having a variety of debate formats so that the same candidate's strengths are not privileged each time. Speaking time must also be equitably distributed across candidates; this can be accomplished by adopting a "chess clock model" that gives each candidate an equal amount of time and then mutes the microphones of those whose time has run out.

Fifth, we need to find ways to allow voters to make up their own minds about debate outcomes, instead of being influenced by outside actors. A first step in

<sup>116</sup> Turcotte & Paul, *supra* note 94, at 781.

this direction would be to ensure that more people can access the debates in real time, even without a cable or network TV subscription. The direct viewing audience could be greatly expanded by distributing the debates on social media. This will result in more people having direct knowledge of the content communicated in the debates and, presumably, would somewhat mitigate the influence of the “hot takes” offered by media pundits and political campaigns on the major TV networks. Additionally, the CPD should consider eliminating the on-site audience for debates, thereby eliminating any chance of audience reactions biasing home viewers.

Other reforms could be instituted directly by media organizations. These might include eliminating on-screen displays of temperature-tracking polls during debate coverage and, importantly, requesting that political pundits and journalists refrain from declaring for their viewers who the debate’s winners or losers were. The latter reform would be similar to the existing widespread prohibition on journalists declaring electoral winners before an election is over; in both cases, the goal is to prevent media outlets from skewing election outcomes.

## VI. CONCLUSION

The primary and general election debates have become critically important events leading up to the election of an American president. This is particularly true in today’s world, where information about candidates is disseminated to the public not only through newspapers and television but also through the Internet and social media. This increased access serves to enhance the importance of the presidential debates and solidifies their role as a defining event in the life of a presidential campaign. Given that the debates play a vital role, it is crucial that they be used as a platform to share a multitude of policy ideas and reflect fundamental fairness.

The FEC and the courts should take a second look at their assessment of the current debate structure. They could start by re-examining the requirement that candidates must meet a 15 percent polling threshold to participate in the debates. This requirement may be a self-fulfilling prophecy, as it withholds from lesser-known candidates the very exposure they would need to increase their polling numbers. The Commission on Presidential Debates and the media must also make a more concerted effort to provide fairness to women and people of color, both in the format of the debates and in the questions that are posed to candidates. The media must also re-examine its post-debate coverage, guiding its programs toward more substantive analysis and moving away from horse-race commentary.

Debates will always be an imperfect way of informing voters about candidates and issues. There is simply not enough time or space for every presidential contender to make his or her case on stage. But the perfect should not be the enemy of the good. The reforms recommended above will move us toward a better system in which candidates are treated fairly, policy is taken seriously, and voters are given the information they need to make the most educated choice possible on Election Day.