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Maxwell L. Stearns

Paula A. Monopoli

Larry S. Gibson

Robert Koulish

David J. Maher

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## ENDNOTES

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### Constitution Day Lectures

#### INTRODUCTION TO CONSTITUTION DAY LECTURES: ELECTION 2016 AND THE STRUCTURAL CONSTITUTION

DAVID J. MAHER\*

The 2016 United States Presidential Election, commenters seem to agree, is different in kind from other presidential elections.<sup>1</sup> The University of Maryland Francis King Carey School of Law devoted its tenth annual Constitution Day lecture series to exploring some of the novel (or not so novel) trends and undercurrents in the current election, and tracing their roots to the

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\* J.D. Candidate, University of Maryland Francis King Carey School of Law, 2017; Executive Online Articles Editor, *Maryland Law Review*. The author, on behalf of the *Maryland Law Review*, would like to take the opportunity to thank the University and the Maryland League of Women Voters for sponsoring and hosting the program and to thank Dean Stearns, Professors Gibson and Monopoli, and Dr. Koulish for giving us the opportunity to publish these adaptations of their lectures. The author would like to thank T.P. Myers for his aid in preparing the manuscript.

1. David Leonhardt, *Why 2016 Is Different from All Other Recent Elections*, N.Y. TIMES (Jan. 19, 2016), <http://www.nytimes.com/2016/01/19/upshot/why-2016-is-different-from-all-other-recent-elections.html>; Gerald F. Seib, *Why the 2016 Election is Different*, WALL ST. J. (Dec. 29, 2015), <http://www.wsj.com/articles/why-the-2016-election-is-different-1451412444>; Jon Deutsch, *The 2016 Election: Why It's So Different*, HUFF. POST (Apr. 15, 2016), [http://www.huffingtonpost.com/jon-deutsch/the-2016-election-why-its\\_b\\_9704316.html](http://www.huffingtonpost.com/jon-deutsch/the-2016-election-why-its_b_9704316.html). *But see* David Lauter, *Very Different GOP Candidate, But 2016 Election Looks a Lot Like 2012, Polls Find*, L.A. TIMES (May 17, 2016), <http://www.latimes.com/politics/la-na-live-updates-oregon-very-different-gop-candidate-but-2016-election-lo-1463485541-htmlstory.html>.

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structural Constitution.<sup>2</sup> The speakers discussed the effect of the election of 2016 on the structure of American elections more broadly, and the ways in which the nation's government and Constitution will absorb those changes.

The University of Maryland Francis King Carey School of Law hosted these lectures; The Maryland League of Women voters was the principal cosponsor and partially inspired the choice of topics. Additional cosponsors of the Constitution Day lectures were the University of Maryland, College Park; the University of Maryland, Baltimore; the University of Maryland College of Behavioral & Social Sciences (BSOS); and the University of Maryland MLaw Programs.

The following articles are lightly edited transcripts of the lectures delivered at the Constitution Day lecture series. The authors included additional material in their footnotes, adding references and sourcing, as well as cross-commentary to the other lectures. They are not formal academic articles; rather, the *Maryland Law Review* and the authors seek to introduce these interesting, though less formal, analyses of the current election into a more widely available milieu.

The first lecture, along with introductory remarks, was delivered by Maxwell Stearns, Professor of Law and Associate Dean of Research and Faculty Development at the University of Maryland Francis King Carey School of Law.<sup>3</sup> Dean Stearns is a widely recognized expert in public choice theory and constitutional law. Dean Stearns discussed the ways in which the 2016 primary process had exposed, not merely deep rifts in the Democratic and Republican parties, but another axis on which political battles were being fought. Dean Stearns looked to the ways in which the structural Constitution imposes a system inimical to third parties, and the effect that has on candidates for office.

The second lecture was given by Larry Gibson, Professor of Law and nationally recognized expert on elections and election law.<sup>4</sup> Professor Gibson, in addition to his extensive work in elections both in the United States and abroad, has authored a notable biography of Justice Thurgood Marshall. Professor Gibson, in his lecture, argued that the election exposed nothing particularly new in American politics, but rather recapitulated pre-existing left-right divides in American politics with a substantial, though by no means unprecedented, undercurrent of desire for "outsider" candidates. Professor

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2. Professor Stearns describes the structural Constitution as the "constitution [which] constructs our politics by establishing processes through which politics finds expression." Maxwell Stearns, *Election 2016 and the Structural Constitution: Opening Remarks and Commentary for Constitution Day*, 76 MD. L. REV. ENDNOTES 4, 5 (2016).

3. *Id.*

4. Larry S. Gibson, *Election 2016 and the Structural Constitution: How Little Is Changing*, 76 MD. L. REV. ENDNOTES 13 (2016).

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Gibson looked at the ways in which the structural Constitutions, not just of the United States but also of the states, benefits and imposes the two party structure of American democracy.

Paula Monopoli, Sol & Carlyn Hubert Professor of Law, gave the third lecture.<sup>5</sup> Professor Monopoli is a leading scholar on inheritance law and on gender and the Constitution.<sup>6</sup> In addition, Professor Monopoli is the founding director of the University of Maryland Francis King Carey School of Law's Women, Leadership & Equality Program. In her lecture, Professor Monopoli analyzed the elements of the structural Constitution which had failed to yield a female chief executive in 240 years, despite more than 85 foreign countries having had female presidents and prime ministers. Professor Monopoli looked at the both the characteristics of the office of the presidency and the gender dynamics of the American electoral system to determine why it is that the United States is behind the rest of the world in this particular manifestation of gender equality.

The final lecture was delivered by Robert Koulish, the Director of the MLaw Programs at the University of Maryland.<sup>7</sup> Dr. Koulish has a Ph.D. in Political Science and is a respected scholar in the field of constitutional and electoral politics. Dr. Koulish's lecture focused on the most glaring aspects of the present election, particularly, to use his words, the ways in which the messaging of this election seems directed at our "lizard brains." The unique ugliness of this campaign, Dr. Koulish argues, emerges from the vast changes in modern communication technologies, in ways unanticipated by—but which will ultimately be absorbed by—our structural Constitution.

It has been said that people make their own history, but they do not make it however they want, under self-selected circumstances, but out of the actual given and transmitted situations. Together, the speakers at the Constitution Day lectures wrestled with this inarguably historic election, how it came about, and what implications it has for the future of our government institutions. These lectures are presented so that the reader can consider the ways and extent to which this election has been shaped by, and will likely in turn shape, our structural Constitution.

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5. Paula A. Monopoli, *Gender, the Presidency and the Structural Constitution*, 76 MD. L. REV. ENDNOTES 18 (2016).

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

7. Robert Koulish, *Implications of a Lizard Election*, 76 MD. L. REV. ENDNOTES 25 (2016).

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**ELECTION 2016 AND THE STRUCTURAL CONSTITUTION:  
A PRELIMINARY FRAMING**

MAXWELL L. STEARNS\*

Welcome! It is wonderful to have you all here. This program, now in its tenth year, has emerged an important fall marker here at the law school. The program has generally focused on a group of notable recent Supreme Court cases based on a connecting theme designed to pique the interest of those who attend, including women from the League of Women Voters of Maryland; undergraduate students participating in the The University of Maryland College of Behavioral & Social Sciences, also known as BSOS; and of course our own students and faculty here at the University of Maryland Carey School of Law.<sup>1</sup> This year, I decided to take a somewhat different approach. It seemed to me that focusing on a handful of cases, or asking if *Eight* really is *Enough*,<sup>2</sup> risked ignoring the proverbial elephant, and maybe the proverbial donkey, in our beautiful Ceremonial Moot Court room. We are in the midst of a presidential election unlike any other in recent history. And this is, after all, the League of Women *Voters*! Depending on one's view, this election promises, or threatens, to redefine the political landscape in ways that might affect us for decades to come, or at least to start a process in that direction.

Ordinarily, I don't lead this program with detailed substantive comments, but because the nature of this topic is different, so too will be my remarks. I will now offer my own reflections. My argument proceeds in three stages. First, I will explain that the principal framers were particularly concerned with what they called "factions," and what we call parties, and that they set up constitutional structures designed to avoid them or to reduce their harmful effects. Second, I will explain why in many ways this was ultimately a failed project. Despite some constitutional features and because of others,

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\* Venable, Baetjer & Howard Professor of Law, Associate Dean for Research and Faculty Development. Special thanks to Richard Boldt for helpful comments on an earlier draft, Frank Lancaster for his terrific work on graphics, and Sue McCarty for her always helpful library support. Thanks also to David Maher for his kind introduction, and to Hannah Cole-Chu and the *Maryland Law Review* editorial board for their quick work, which allowed this to get published online prior to the 2016 presidential election. As stated in the *Introduction*, except where otherwise noted, these published remarks are presented almost entirely verbatim, as they were delivered at the Constitution Day Program on "Election 2016 and the Structural Constitution," on September 15, 2016, with just a few minor stylistic edits. In addition, the footnotes, which were not part of the original remarks, provide support for several substantive propositions and respond to some of my co-panelists' comments respecting my thesis.

1. Parts of this paragraph and the one that follows have been modified to avoid repeating content in the *Introduction*.

2. *Eight is Enough* (ABC television series 1977–1981). *But see Eight is Enough: Nine is too Much* (ABC television broadcast Sept. 6, 1978).

we have persistently had a more or less stable two-party system. Finally, I will argue that special features of the 2016 election operate in substantial tension with the resulting premises on which our electoral system, which along with other features comprise what I am referring to as the “structural Constitution,” rest. I will also reflect on the possible implications.

Let me begin by offering a bit more insight into how I am using the term “structural Constitution.” Although we often think of the Constitution as protecting individual rights, constitutions also construct our politics by establishing processes through which politics finds expression. James Madison, for example, focused on this aspect in the *Federalist* No. 10,<sup>3</sup> where he claimed that appropriate constitutional structures—an expansive electorate; representative, rather than direct democracy; bicameralism; and each House answering as much as practicable to different constituencies—would eliminate factions or substantially reduce their harmful effects. Madison and the other framers ascribed the downfall of historical democracies to factional violence, and they constructed these safeguards and others, including the presidential veto, and even judicial review, with the hope of a more enduring and stable system of governance.

Although Madison got many things right, he seems to have gotten this one quite wrong. Even in his own lifetime, parties emerged as a persistent feature, rather than a bug, within our constitutional democracy. The Twelfth Amendment ultimately recognized this, ensuring that the President and Vice President are from the same party, rather than continuing the post-election equivalent of shotgun weddings.<sup>4</sup> Another important structural aspect is the Article II direct presidential selection, albeit through the Electoral College as a filter.<sup>5</sup> These combined features, and others, comprise the structural Constitution.<sup>6</sup>

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3. THE FEDERALIST NO. 10 (James Madison).

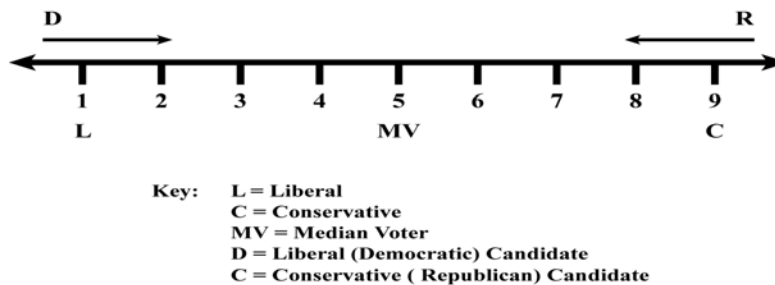
4. U.S. CONST. amend. XII.

5. U.S. CONST. art. II.

6. I agree with Professor Gibson that the processes for presidential elections are governed by the structural constitutions of the federal and state governments. Larry S. Gibson, *Election 2016 and the Structural Constitution: How Little is Changing*, 76 MD. L. REV. ENDNOTES 13, 16–17 (2016). State constitutions, for example, establish state legislatures to which Article II of the United States Constitution expressly delegates the responsibility to structure the processes for selecting the electors to the Electoral College for the president and vice president of the United States. See U.S. CONST. art. II, § 1, cl. 2. I would suggest, however, that the relevant state constitutional and statutory provisions have been structured in a manner that responds to the electoral incentives created by the United States Constitution’s system of direct presidential election. If, instead, the United States Constitution facilitated a regime of congressional, or parliamentary, selection of head of state, state constitutions would be differently structured so as to facilitate multiple parties that would allow the possibility of members of the state delegation joining an ultimately successful parliamentary coalition to form the government. Instead, we have a system of direct presidential election, which as explained below, facilitates a two-party system, and state electoral systems respond accordingly.

My central claim is that this election is different in kind from others in our recent history in ways that implicate the structural Constitution. In the Democratic Primary, the Republican Primary, and now in the general election, the landscape concerning the electoral stakes looks and feels different in important ways. It oversimplifies a bit to imagine that all politics is a right-left ideological battlefield,<sup>7</sup> but for fairly specific reasons that is a very helpful and descriptive general framing.

There are a few ways to capture this. Duverger's Law posits that a single district plurality rule tends to produce a two-party system, whereas proportional representation with dual balloting, or list voting, tends to produce multi-party systems.<sup>8</sup> Another, perhaps more intuitive, way to demonstrate this is the median voter theorem, which provides the basis for a helpful graphical explanation.<sup>9</sup>



**Figure 1**

As demonstrated in Figure 1, if we assume a single-dimensional scale, liberal at one end, conservative at the other, and if the voters are relatively evenly aligned along that spectrum, the major party candidates (Democratic

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For that reason, I focus here on the structural aspect of the United States Constitution in that selection process, which drives the relevant state processes.

7. I also agree with Professor Gibson that party alignments reflect a complex combination of factors that include geography, demographics, and ideology. Gibson, *supra* note 5, at 4. I employ ideology as the principal framing mechanism not because I think that the other criteria are unimportant, but rather because ideology is the method through which these other criteria are packaged in the creation of major party coalitions, and thus, using Professor Gibson's terminology, it is the "glue" that holds these coalitions together. Major party coalitions are apt to align and realign over time based on a variety of complex dynamics, and my thesis is that this election reveals a critical dynamic that invites a possibly notable realignment regardless of who wins the election. See also *infra* note 18 (describing the basis for that realignment).

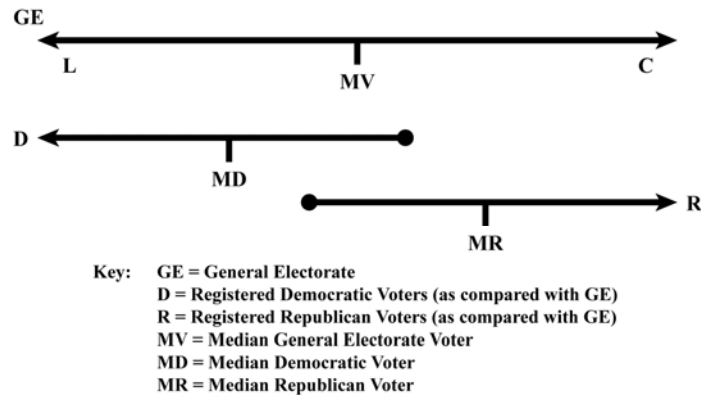
8. MAURICE DUVERGER, PARTY POLITICS AND PRESSURE GROUPS: A COMPARATIVE INTRODUCTION 23–32 (David Wagoner trans., 1972) (discussing factors affecting the formation of a two-party or multiparty electoral system).

9. For a more general discussion of the points raised in this discussion, see MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (2009). Figures 1 and 2 are adapted from Figures 6:1 and 6:2. *Id.* at 329, 331.

starting at the far left, Republican starting at the far Right) will tend to converge upon what is known as the median voter, shown here as point 5. Each increment can represent a larger number of voters, and 5 remains the point of indifference among the electorate.

Of course our politics really don't look like that. Our elections do not present the choice, as Ralph Nader dubiously claimed in the 2000 election, between *tweedledee* and *tweedledum*.<sup>10</sup> And indeed, the ideological distance between George W. Bush and Al Gore in that election was profound by any measure.

To explain this, we need to modify the spectrum to account for our two-staged process. This, of course, includes caucuses and primaries in the first stage, followed by the general election in the second.



**Figure 2**

As shown in Figure 2, through this system we choose the major party nominees, and the effect is to truncate the spectrum for the liberal, or Democratic side, and the conservative, or Republican side. By doing this, we can see the basis for the substantial policy distance that remains between the prevailing candidates despite some tendency toward convergence in the general election.

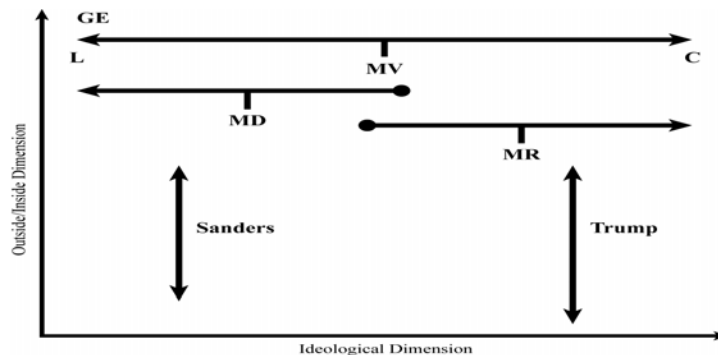
I should note that although the degree of divergence is affected by the distribution of voters over this ideological spectrum, the general result, substantial policy divergence, remains even if we have a bell curve, clustering in

10. Steven Greenhouse, *The 2000 Campaign: the Green Party; Nader, in Harlem, Attacks Gore and Bush with Gusto*, N.Y. TIMES (Nov. 7, 2000), [http://www.nytimes.com/2000/11/07/us/2000-campaign-green-party-nader-harlem-attacks-gore-bush-with-gusto.html?\\_r=0](http://www.nytimes.com/2000/11/07/us/2000-campaign-green-party-nader-harlem-attacks-gore-bush-with-gusto.html?_r=0).



the form of overlapping bell curves, or an even stronger bimodal distribution.<sup>11</sup> The combined dynamic of the median voter theorem, also reflecting Duverger's Law, is that a centrist third-party candidate in the general election's first-past-the-post scheme will be squeezed out, restoring the two dominant parties. Those on the sides will have nowhere to go but to vote for the candidate closer to their ideological position, also known as their "ideal point." And third parties positioned in the wings are also likely to occupy insufficient policy space to prevail, although they might serve as spoilers, ironically throwing the election to the more ideologically distant major-party candidate. Indeed, some claim that Ralph Nader did just that in the 2000 election.<sup>12</sup>

Election 2016 potentially thwarts this story in a profound way. In both the primary and caucus stage, and now in the general election, the challenges to the mainstream candidates were not based on ideological positioning, at least not entirely or even dominantly. The primary cycle instead pitted outsider versus insider, upset candidate versus stable party statesmen or stateswomen, in both instances, with candidates assuming an ideology that provided the basis for a credible challenge. And yet, I am arguing, the ultimate challenges rested along a separate analytical dimension, one that thwarts our conventional presidential politics as that has been understood now for several decades.



**Figure 3**

This is illustrated in Figure 3, which depicts an additional dimension as compared with Figure 2.

My thesis is hard to prove empirically, but like paleontologists, we can locate some helpful fossil evidence. The Bernie Sanders campaign was not

11. For a more detailed analysis, see STEARNS & ZYWICKI, *supra* note 9, at 327–38.

12. See, e.g., Bill Scher, *Nader Elected Bush: Why We Shouldn't Forget*, REAL CLEAR POL. (May 31, 2016), [http://www.realclearpolitics.com/articles/2016/05/31/nader\\_elected\\_bush\\_why\\_we\\_shouldnt\\_forget\\_130715.html](http://www.realclearpolitics.com/articles/2016/05/31/nader_elected_bush_why_we_shouldnt_forget_130715.html).

markedly ideologically distant from Hillary Clinton's, but the tone was. Notably an outsider, not a member of the Democratic party, Sanders fashioned himself a Democratic Socialist, advancing a progressive agenda on the minimum wage, suggesting replacing Obamacare with a single payer system, and more generally challenging the premises of an electoral funding system that placed him at a distinct disadvantage as compared with Hillary Clinton, his principal rival and the ultimate victor, securing the Democratic nomination.

On the Republican side, there are many things one can say about Donald Trump. But here is one thing that would be hard to say: He was notably more conservative than his principal rivals. Indeed, arguably his most conservative rival, Ted Cruz, along with his most centrist rival, John Kasich, with Jeb Bush and Marco Rubio somewhere in between, all ultimately disavowed him, at least implicitly.<sup>13</sup> But this was not based on ideological positioning; rather, it was based on Trump's personal style and manner of conduct throughout the campaign.

Donald Trump has attempted to capture the excitement of Sanders supporters, and although this might seem implausible, the two primary campaigns did share in common a profound challenge to the general premises undergirding right-left politics embedded in the structural Constitution. For them, this election seems to be about something else, which we might think of as *out-versus-in* or *us-versus-them* politics.

As I previously explained, our constitutional system, which includes direct presidential election, is conducive to a stable two-party system. And yet, this election demonstrates a potentially persistent, and quite large, minority group that favors upsetting that with either an alternative configuration of parties, or perhaps with pressure to revise the system to facilitate a genuine multiplicity of parties.<sup>14</sup> Indeed, this minority might even be close to or at a majority. Consider Table 1.<sup>15</sup>

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13. These remarks were delivered prior to the October 7, 2016, release of a 2005 videotape in which Donald Trump was observed to make several highly offensive comments concerning women and his personal conduct in interacting with them. This occurred just two days prior to the second presidential debate and led several Republicans who had not already done so to renounce his candidacy and many party leaders to call upon him to withdraw from the race. See Jonathan Martin, Maggie Haberman & Alexander Burns, *Lewd Donald Trump Tape Is a Breaking Point for Many in the G.O.P.*, N.Y. TIMES (Oct. 8, 2016), <http://www.nytimes.com/2016/10/09/us/politics/donald-trump-campaign.html>.

14. This point is important to emphasize: It would take constitutional change to bring about a multiparty system. Although I do not anticipate that, I do anticipate that the anti-establishment pressure, which is unlikely to forge a viable third party for reasons explained here, might instead force a realignment in the coalition structures of the existing major parties. See also *infra* note 18 (describing possible realignment).

15. The relevant data are taken from Real Clear Politics. *2016 Democratic Popular Vote*, REAL CLEAR POL., [http://www.realclearpolitics.com/epolls/2016/president/democratic\\_vote\\_count.html](http://www.realclearpolitics.com/epolls/2016/president/democratic_vote_count.html) (last visited Sept. 26, 2016); *2016 Republican Popular Vote*, REAL CLEAR

Candidate Name	Total Votes Cast Per Candidate	Total “Establishment Candidate” Votes	Total “Anti-Establishment Candidate” Votes
<b>Republican</b>			
<b>Trump</b>	<b>13,300,472</b>		<b>13,300,472</b>
Cruz	7,637,262	15,284,153	(excludes Cruz)
Rubio	3,481,610		
Kasich	4,165,281		
<b>Democratic</b>			
Clinton	15,805,136	15,805,136	
<b>Sanders</b>	<b>12,029,699</b>		<b>12,029,699</b>
<b>Aggregate Data</b>			
<b>Total by Category</b>	56,419,460	31,089,289 (55.1%)	<b>25,330,171</b> <b>(44.8 %)</b>

**Table 1: Anti-Establishment Votes as Percentage of Total Primary Votes Cast\***  
 \*Real Clear Politics, [http://www.realclearpolitics.com/epolls/2016/president/democratic\\_vote\\_count.html](http://www.realclearpolitics.com/epolls/2016/president/democratic_vote_count.html)  
[http://www.realclearpolitics.com/epolls/2016/president/republican\\_vote\\_count.html](http://www.realclearpolitics.com/epolls/2016/president/republican_vote_count.html)

And now, consider this: As this table demonstrates, in the Democratic and Republican primaries and caucuses, we had the following vote breakdowns. I have tallied the votes cast for Trump and Sanders, the outside challengers, to get just over 25 million. I have likewise tallied the votes for Clinton and the other Republicans, to get just over 31 million. This might understate the ratio of outside challenger to traditional inside candidate, for example, by excluding supporters of Ted Cruz, who many viewed as a more credible outside challenger than Trump notwithstanding Cruz’s senatorial career and term as Texas Solicitor General. But even conservatively, 44.8% of the electorate, based on votes cast, arguably viewed this election as outside-

POL., [http://www.realclearpolitics.com/epolls/2016/president/republican\\_vote\\_count.html](http://www.realclearpolitics.com/epolls/2016/president/republican_vote_count.html) (last visited Sept. 26, 2016).

versus-inside rather than in more conventional right-left terms, whereas 55.1% arguably viewed the election in more conventional ideological terms.

One serious challenge is that our structural Constitution, including the institutions that have developed around it, does not create a happy outlet for disgruntled voters forming a minority of the electorate, however large. Here the minority is approaching half the voting population. We do not have viable smaller parties as do, for example, parliamentary democracies. We do not run our elections based on proportional representation with the use of party lists. In those systems, because votes cast translate to percentage representation based on party strength, third party votes are not lost, wasted, or even at odds with the voter's ideal point.

The closest institution that we have is the Electoral College. But this has become more a method of vote counting and error management than a meaningful deliberative body through which we choose our head of state.<sup>16</sup> One critical difference between our voting system and a parliamentary system is that ours motivates the formation of governing coalitions at the caucus and primary stage, and thus *before* the general election takes place. By contrast, absent a majority winner, parliamentary systems push coalition formation to the post-election phase, thus allowing smaller parties to negotiate a place in governing coalitions.

This election highlights the frustration associated with a pent up desire for third party candidates, those who reject the major party candidates or a system in which two parties inevitably dominate. And it also highlights the lack of an effective means of translating that energy into the operative machinery of governance. Whatever one thinks of their candidacies, one thing is clear: neither Gary Johnson, the Libertarian party nominee, nor Jill Stein, the Green party nominee, will form part of a Clinton or Trump presidential administration. Doris Kearns Goodwin's study of Abraham Lincoln's *Team of Rivals*, referred to his *primary rivals*, not those he defeated in the 1860 general election.<sup>17</sup> Indeed, facilitating a party-based executive branch team is also what the Twelfth Amendment was about. Although there have been notable changes since Lincoln, this feature of our structural Constitution persists.

To be clear, I'm not predicting that in the immediate aftermath of this election, we will witness a seismic constitutional change.<sup>18</sup> But depending

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16. Brandon Marc Draper, *Popular Fallacy: A Public Choice Analysis of Electoral College Reform*, 1 INT'L J. PUB. L. & POL'Y 49 (2011) (positing that Electoral College serves the function of rendering most election errors harmless error and focusing attention on those rare instances of error that could bring about a change in the election outcome).

17. DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* (2005).

18. On this point I agree with both Professors Larry Gibson and Robert Koulish. The system we have will remain in place. In response to a question following the formal remarks, I observed

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on the outcome, we might witness a major reconfiguration of at least one party. And if one party is reconfigured, then almost by definition, so too is the other in a two party system.<sup>19</sup> We might also witness greater pressure than in the past to ensure a minority voice in governance, although as a constitutional matter, that is extremely difficult to accomplish. I do think we are witnessing something real and significant. To paraphrase Malcolm Gladwell,

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that as the lone superpower, the United States attaches particular importance to committing to the duration of any presidential administration, which would be in tension with the parliamentary practice allowing a general no confidence vote. Professor Gibson and I appear to disagree on the potential effect of this election in working a restructuring of coalitions within the existing major parties. Professor Gibson claims that there are no notable voting blocks from 2008 and 2012 that are apt to switch sides in this election. I disagree. The Republican elites, including major party leaders, past Republican Presidents, and most candidates from the Republican primary have declined to endorse Donald Trump or endorsed him only nominally. Indeed, many Republican party leaders, including former President George H.W. Bush, have stated that they plan to support Hillary Clinton. Aaron Blake, *Here's the List of Republican Politicians, Donors and Operatives Supporting Hillary Clinton*, WASH. POST (Sept. 29, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/06/30/heres-the-growing-list-of-big-name-republicans-supporting-hillary-clinton/>.

Some of these trends have been exacerbated by more recent events. *See supra* note 13. This is certainly symptomatic of a notable major-party realignment. And this realignment has the potential to force the Democratic party leadership, for example a Hillary Clinton administration, to make difficult choices concerning whether to appease fiscal conservatives or progressive liberals on critical issues going forward as needed to retain whatever eventual coalition forms, especially were she to win by a narrow margin. Depending on how this plays out, this dynamic could exacerbate the discontent of the Sanders coalition, and to the extent some members view the Republican party as the outsider party challenging the two-party system, some might support a future Republican nominee as a means of protest, thereby suggesting a weakening of that wing of the Democratic party. To be clear, I certainly would not suggest large numbers of former Sanders supporters pulling the lever for Trump, but the tightness of the election might not require large numbers to signal a notable coalition shift. I also agree that the dynamics of the Sanders and Trump coalitions are not the same, Gibson, *supra* note 5, at 4, but unlike Professor Gibson, I believe that they share common elements, beyond the coincidence of timing, that might contribute to a realignment of the major-party coalition structures.

19. My primary disagreement with Professor Robert Koulisch appears to be that he is ascribing what I would identify as symptoms of a dimensionality shift as an independent causal account. I am not surprised that Professor Koulisch describes this election as particularly vile; as one that undergraduates prefer to avoid discussing with friends or potential friends, or even knowing their classmates' voting preferences; and as one in which particular aspects appeal to what he describes as the "reptilian" or fight-or-flight parts of our brain. I also agree that this election thwarts the Framers' assumptions that ultimately, however vile an election might be, rational discourse eventually prevails over substantive policy. Koulisch, *supra* note 7, at 25. One of the features that makes the election vile is that facts do not seem to matter to many voters, and in fact, pointing out critical factual errors counterintuitively appears to bolster the core support for the Republican nominee. *See* David Ignatius, *Why Facts Don't Matter to Trump Supporters*, WASH. POST (Aug. 4, 2016), [https://www.washingtonpost.com/opinions/why-facts-dont-matter-to-trumps-supporters/2016/08/04/924ece4a-5a78-11e6-831d-0324760ca856\\_story.html](https://www.washingtonpost.com/opinions/why-facts-dont-matter-to-trumps-supporters/2016/08/04/924ece4a-5a78-11e6-831d-0324760ca856_story.html); *see also* Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 307 (2010) ("[I]ndividuals who receive unwelcome information may not simply resist challenges to their views. Instead, they may come to support their original opinion even more strongly—what we call a 'backfire effect.'"). To the extent that Professor Koulisch and I disagree, it is with respect to the causes of these features of the election. I view the appeal to the amygdala as a symptom, rather than the cause, of a dimensionality shift.

it's often hard to know that you are approaching a tipping point before it actually tips.<sup>20</sup> Our politics no longer neatly aligns with the embedded assumptions that undergird our constitutional democracy. Those stresses won't go away no matter who wins in 2016.

### ELECTION 2016 AND THE STRUCTURAL CONSTITUTIONS: HOW LITTLE IS CHANGING

LARRY S. GIBSON\*

My colleague, Professor Maxwell Stearns, argues that “the structural Constitution” promotes the two-party system. I agree, except that I would say “structural constitutions,” to include state constitutions. It is state law—constitutions and statutes—that regulates most aspects of our election system.

The United States Constitution gives congressional seats to the states, but leaves it to the states to decide how to allocate those seats into districts and to decide how the elections for those seats are to be conducted.<sup>1</sup>

For example, nothing in the Constitution or federal law would prevent a state, or all of the states, from holding runoff elections, requiring candidates for Congress to receive not just pluralities, but a majority of the votes.

Some states, mostly in the South, do have runoff elections in the primaries, but not in the general elections.<sup>2</sup>

I have been actively involved in national elections in three African countries.<sup>3</sup> They all require candidates to reach a majority to be elected; they all conduct runoff elections among the top two vote getters in the first round; and they all have multiple political parties. Requiring the ultimate winner to obtain a majority of the votes in an election gives real power and enduring relevance to smaller political parties and factions.

In this country, where state law regulates the elections of national, state, and local officials, many state procedures promote and preserve the two party system and frustrate efforts to grow other parties.

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20. MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000).

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\* Professor of Law, University of Maryland Francis King Carey School of Law.

1. U.S. CONST. art. I, § 5 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . .”).

2. Eleven states hold primary election runoffs—Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, and Vermont. *Primary Runoffs*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/primary-runoffs.aspx> (last updated May 12, 2014).

3. Ghana in 2008, Liberia in 2005, and Madagascar in 2006, 2003, and 2001.

Let me give a few examples here in Maryland. Maryland Elections Law calls the incumbent Governor's political party "the majority party,"<sup>4</sup> regardless of the size of the party's actual membership. The political party whose candidate for governor received the second highest number of votes in the most recent gubernatorial general election is labeled the "principal minority party."<sup>5</sup> Those two parties, traditionally the Republican Party and the Democratic Party, are called in the statute the "principal political parties."<sup>6</sup>

Numerous advantages flow from that status. All of the members of the Maryland State Elections Board<sup>7</sup> and the twenty-four local boards of election are by law required to be members of the principal political parties.<sup>8</sup> At each polling place, with minor exceptions, the election judges are an equal number of Republicans and Democrats.<sup>9</sup> Under Maryland law, only the two principal political parties may nominate their candidates in state-run primary elections.<sup>10</sup> The other political parties must use conventions, petitions, and other measures to nominate their candidates.

I teach a course called Election Law that, among other things, details the advantages that Maryland law gives to the "majority party" and the "principal minority party."

From my vantage point, I see nothing happening now or on the horizon that signals significant movement away from this approach in Maryland or in the overwhelming majority of states. I do not believe that the current election cycle is creating or revealing any real strain on the future prospects of the two-party system.

Once the dust of this election settles, the party structure will look much like it has looked for many years. Of course, there will be changes in the specific people involved and changes in the substantive issues drawing attention. Additionally, there are ongoing changes in technology and in the means by which campaigns are conducted and voters are reached. But, what will remain structurally will still be the Democratic Party and Republican Party. Virtually every member of Congress will be a Democrat or a Republican. Likewise as to the Governors and state legislators.

The current presidential election has been and continues to be entertaining and has its own special features. But, it does not portend any fundamental change.

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4. MD. CODE ANN., ELEC. LAW § 1-101(dd) (West 2015).

5. *Id.* § 1-101(jj).

6. *Id.* § 1-101(kk).

7. *Id.* § 2-101(e)(1).

8. *Id.* § 2-201(b).

9. *Id.* § 10-201(b).

10. *Id.* § 5-701.

Certainly, candidates running and succeeding by calling themselves “outsiders” is not new. It often happens. The very first presidential campaign in which I was heavily involved was for a candidate who ran for President as an “outsider”—Jimmy Carter in 1976.

Carter’s political career had included only four years as a state senator and one term as Governor of Georgia. He was mainly a businessman and a peanut farmer. When he began his campaign for the Presidency, Carter had no national organization and no standing in the polls. Jimmy Carter started out facing sixteen other Democratic candidates, many of whom were much better known, including Indiana Senator Birch Bayh, Arizona Congressman Morris Udall, California Governor Jerry Brown, and former Alabama Governor George Wallace.<sup>11</sup>

When Carter first came to Baltimore, there were no elected officials who welcomed him. It was so bad that they asked me to introduce Jimmy Carter in his first public rally in Maryland as a candidate for President. I did so from a platform erected on Lexington Street in the shopping area between Howard Street and Park Avenue.



Winning as an “outsider” is not always the hardest thing to do, especially if there are multiple so-called “establishment” candidates and only one main “outsider.” In a multi-candidate race, sometimes the best spot is as the lone “outsider” facing a large field of “establishment” candidates. Donald Trump’s recent success in the Republican primaries against the large field of

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11. The candidates for the Democratic Party nomination were Indiana Senator Birch Bayh, Oklahoma Senator Fred Harris, Minnesota Senator Walter Mondale, Idaho Senator Frank Church, Washington Senator Henry “Scoop” Jackson, Arizona Congressman Morris Udall, former Ambassador to France Sargent Shriver, former North Carolina Governor Terry Sanford, former Alabama Governor George Wallace, West Virginia Senator Robert Byrd, former Georgia Governor Jimmy Carter, D.C. delegate to Congress Walter Fauntroy, D.C. Mayor Walter Washington, Texas Senator Lloyd Bentsen, Pennsylvania Governor Milton Shapp, and California Governor Edmund “Jerry” Brown.



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“establishment” candidates was largely a function of arithmetic—particularly division.

Professor Stearns presented today some statistics that combined the votes for Senator Bernie Sanders in the Democratic primaries with the votes for Donald Trump in the Republican primaries, producing a high percentage of votes for the “outsiders.” He seems to suggest that this combined vote evidences a movement away from ideological left-right, progressive-conservative determinants on the parties towards an “insider-outsider” dynamic.

But, I suspect that combining for analysis the Sanders primary voters and the Trump voters, as tempting as it may be, could lead one to make too much of the “insider-outsider” element. The Bernie Sanders votes and the Donald Trump votes did not grow out of the same phenomena.

During the primary voting, the political press often over-simplified reality by saying that both the Sanders campaign and the Trump campaign appealed to “angry” voters who were disenchanted with the major parties. In my view, the success of those two campaigns had not much in common, other than that they happened at about the same time.

First, let us consider the Sanders voters. The Sanders campaign was mainly about left-right, progressive-conservative ideology. The Sanders supporters, many of whom have been personal friends and political allies of mine for many years, were liberals (who now call themselves “progressives”) who believe that the Democratic Party has moved too much to the center and too far away from the liberal agenda. They believe that this shift began with President Bill Clinton, that there has not been a sufficiently dramatic and substantive shift back to the left under President Obama, and that Hillary Clinton would likely continue, and perhaps accelerate, the Democratic Party’s movement to the center.

The Sanders people were concerned that Hillary Clinton is not progressive enough and would not give sufficient priority to a progressive agenda. I guess one could say that they were “angry.” But I would describe it more as “anxious,” anxious about moving more aggressively on issues they consider important. Those are the Sanders voters.

The Trump voters are a very different phenomenon. Many of them are angry, and it is not principally about particular substantive issues. The anger is about politics. Trump voters became angry when their party lost the presidency eight years ago to Barack Obama. Their initial reaction to that anger was the emergence of the Tea Party. That anger reached a boiling point when President Obama and the Democrats were re-elected four years later.

Their anger is directed at the party leaders, the Republican “establishment.” They ask, how could they have let that happen? There is some ideology and substance involved, but the dominant reaction was partisan anger that their team lost again.

The anger has led to a call to “fire the coaches.” Let’s get someone who will help us win again. The Republican establishment’s approach is now labeled “political correctness” and is to be abandoned for a new approach. As Donald Trump would say to Republicans, “What do you have to lose?”

Those were the Sanders and Trump campaigns in the primaries. So what about the political parties after this general election?

Professor Stearns seems to be saying that the current election has seen a shift away from the parties as left-right ideological centers towards “insider-outsider” dynamics.

But, I am not sure I agree. I have never viewed the major political parties as mainly ideologically focused. The two major parties are held together by a combination of geographical, demographic, and ideological considerations.

The mix and dominance of one force over the other two varies from time to time. But, if I had to rank them in significance over time, I would give geographical factors (north-south, urban-rural, coastal-Appalachia) the number one spot. Second would be demographic factors, such as race, age, education, and income. Left-right, progressive-conservative ideology, as an influence, would be third.

I see nothing in this election that is changing that. Regardless of who wins the Presidential election, the federal and state structural constitutions will remain in place and will control. The President, the Congress, the state governors, and the state legislators will almost all be Democrats and Republicans, with each party held together loosely by geographical, demographic, and ideological forces, much as they have been for decades.

## GENDER AND THE STRUCTURAL CONSTITUTION

PAULA A. MONOPOLI\*

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

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

2. The text of the Nineteenth Amendment reads as follows: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22. *See* McDonagh & Monopoli, *supra* note 4, at 181 n.30 (“[L]eaders are likely to be judged in terms of the fit between their sex and the conception of the job. If the job is characterized as masculine, men will be considered more effective leaders, but if the job is characterized as feminine, women will be perceived as better leaders.” (citing VALIAN, *supra* note 21, at 134)).

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

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

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

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

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

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

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

27. Erin Cox, *Where Are the Women to Succeed Mikulski? A ‘Leaky Pipeline’ in Md. Politics*, BALTIMORE SUN (Sept. 26, 2016, 12:40 PM), <http://www.baltimoresun.com/features/women-to-watch/bal-maryland-women-politics-leaky-pipeline-20160926-story.html>; Rachel Weiner, *Van Hollen Defeats Edwards in Heated Maryland Primary for U.S. Senate*, WASH. POST (Apr. 27, 2016), [https://www.washingtonpost.com/local/md-politics/2016/04/26/ad03cdf4-0bbc-11e6-bfa1-4efa856caf2a\\_story.html](https://www.washingtonpost.com/local/md-politics/2016/04/26/ad03cdf4-0bbc-11e6-bfa1-4efa856caf2a_story.html). As Professor Gibson notes in his comments, the state’s own party structures have their own significance in constructing our politics. Larry S. Gibson, *2016 Election and the Structural Constitution: How Little Has Changed*, MD. L. REV. ENDNOTES 13, 14 (2016). I have previously suggested that the dynamics I am describing with regard to the presidency at the federal level play out in similar ways at the state level when voters are selecting their governors. See Monopoli, *supra* note 19, at 6.

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

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

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

The Nineteenth Amendment to the United States Constitution ensured that all American women could vote in every state. That amendment engendered tremendous fear when it was ratified in 1920. What havoc would doubling the electorate wreak? Oscar Leser, a prominent member of the Baltimore legal community, brought suit to strike the names of two other Baltimoreans, Cecilia Streett Waters and Mary D. Randolph, who had dared to register to vote after ratification of the Nineteenth Amendment in August 1920.<sup>33</sup> The case reached the United States Supreme Court, and one of Leser's arguments was that the massive expansion of the electorate without a state's consent was such a profound change that it destroyed the state's political autonomy and thus the amendment itself was unconstitutional. The Court disagreed and upheld the amendment.<sup>34</sup> Despite these concerns about its impact, the Nineteenth Amendment and its tremendous expansion of the electorate did not have a significant effect on the outcome of presidential elections for many years after its ratification.<sup>35</sup> However, in 1980, the so-

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

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

31. *Id.* at 178–79.

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

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

34. *Id.* at 136–37.

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



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

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

### THE IMPLICATIONS OF A LIZARD ELECTION

ROBERT KOULISH\*

Thank you very much to the League of Women's Voters, Associate Dean Stearns and the Carey Law School for organizing and hosting today's Constitution Day event.

My comments are intended as a response to Dean Stearns' claim that the 2016 election is different in kind in ways that implicate our structural Constitution. While I agree with Dean Stearns on his general thesis, I disagree with his contention about party realignment and this being an insider-outsider election. In the following argument, I will discuss characteristics of the campaign that might make one believe that this election is different in

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

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

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\* Director, MLaw Programs, University of Maryland, College Park. I would like to acknowledge my MLAW students for their astute observations of the 2016 campaign. I would also like to acknowledge Lindsay Bramble for editorial assistance, and Stephanie Flores-Koulish for her expertise in media literacy and support in writing this piece.

kind than other elections and implicate the structural constitution, but in fact do not, and then I introduce my thesis about what makes this campaign truly atypical.

My comments will be divided into four sections: 1) Responding to Dean Stearns about realignment and the insider-outsider distinction; 2) Discussing the general consensus that this has been a vile and nasty election campaign; 3) Discussing how this campaign coincides with a larger view of celebrity in presidential politics; and 4) Introducing my thesis that the 2016 campaign is atypical for its irrational, reptilian, or lizard (words I use interchangeably) characteristics.

In response to Dean Stearns, I will argue that some hefty part of the insider-outsider narrative is actually a manipulation driven by insiders. Moreover, this year does not seem to be a realignment year for a variety of reasons. Next, although some experience this year's campaign as particularly vile, the campaign tone is not unprecedented. Negative campaigning is a quintessentially American version of John Locke's conception of human nature: self-interest and ambition herein playing out in the relative free form of a presidential campaign. Americans love negative campaigning, and sometimes they love hating it. Why else have an election campaign lasting so long and with so little focus on policy? It's also a celebrity campaign, but celebrity candidates have been featured in previous runs for the presidency.

Finally, I will argue that a difference is to be found in a profound shift in campaign narratives from those of the past, which appealed to self-interested reason, to an almost exclusively impulse-driven campaign. The 2016 Presidential campaign narrative borrows techniques from corporate branding efforts. The narrative evokes impulse responses to immigrant rapists and border walls, rather than engaging the citizen in ideological or practical deliberations about qualifications, competencies and policy recommendations. This year's campaign skirts the norm of recent campaigns to appeal overwhelmingly to the impulsive, angry, fearful and hate-filled side of the human character, making for a particularly reptilian election.

#### I. REALIGNMENT ELECTION?

A few years from now we may reconvene and agree that 2016 was indeed a party realignment year. In the meantime, realignment and insider-outsider narratives are not dominant features in this campaign—at least not as it played during the primaries. Although the Republican Party has not coalesced around its nominee, giving hope to those who envision such disengagement as a sign of realignment, the Party appears positioned to portray the Trump candidacy as an anomaly should he lose, but not as evidence of party realignment. That is, Trump is politically inexperienced, yes, but not *outside* of Republican values. And although the Democratic Party ran a

rough primary campaign, most Sanders supporters have since boarded the Hillary Clinton bus, with few vocal exceptions.

On the whole, the country remains starkly democratic and republican, or Blue and Red, with no realignment in sight.<sup>1</sup> Were realignment looming on the horizon, we'd likely see it coming in polls for local and statehouse elections.<sup>2</sup> We might observe rumblings in state democratic and republican organizations. All is quiet on those levels. Instead, what is evident at the state and local level is that this election is a decidedly insiders' election. Party elites are in firm control of state and local offices and party apparatuses. Outsiders have yet to storm local town or city councils, state houses, governorships or congressional districts.<sup>3</sup> As Red states hold a majority of state houses and governorships nationally,<sup>4</sup> party elites retain control. And, even though the Tea Party made successful inroads on Republican governorships and state houses in 2014, it comprises neither the bulk of GOP office-holding dominance nor the preponderance of Trump's outsider voting bloc.<sup>5</sup>

Consider also the late summer 2016 resurgence of party elites in down ticket primary elections. Establishment Republicans Senator John McCain, House Speaker Paul Ryan,<sup>6</sup> and former presidential candidate and Senator Marco Rubio—all publicly offering only tepid support for Trump—won their primaries against outsider opponents by landslide or near landslide proportions. Instead of imploding, party elites are holding tight on the reins of power and, assuming Clinton wins, the Republican National Convention (“RNC”) will likely refer to Trump's campaign as an anomaly.

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1. See ORIGIN OF RED STATES, BLUE STATES, [http://www.baruch.cuny.edu/library/alumni/online\\_exhibits/pres\\_election\\_08map/page2.htm](http://www.baruch.cuny.edu/library/alumni/online_exhibits/pres_election_08map/page2.htm) (last visited Sep. 29, 2016).

2. Toni Monkovic, *Red States, Blue States: 2016 Is Looking a Lot Like 2012 (and 2008)*, N.Y. TIMES (Sept. 8, 2016), [http://www.nytimes.com/2016/09/09/upshot/red-states-blue-states-does-this-map-look-familiar.html?\\_r=0](http://www.nytimes.com/2016/09/09/upshot/red-states-blue-states-does-this-map-look-familiar.html?_r=0).

3. PARTISAN COMPOSITION OF STATE HOUSES, BALLOTPEdia, [https://ballotpedia.org/Partisan\\_composition\\_of\\_state\\_houses](https://ballotpedia.org/Partisan_composition_of_state_houses) (last visited Sept. 29, 2016) (demonstrating that more than ninety-nine percent of state houses are made up of Democrat or Republican representatives).

4. David Byler, *The Other GOP Wave: State Legislatures*, REAL CLEAR POL. (Nov. 11, 2014), [http://www.realclearpolitics.com/articles/2014/11/11/the\\_other\\_gop\\_wave\\_state\\_legislatures\\_\\_124626.html](http://www.realclearpolitics.com/articles/2014/11/11/the_other_gop_wave_state_legislatures__124626.html).

5. John Avlon, *The Tea Party Governor Backlash of 2014*, DAILY BEAST (Aug. 25, 2014, 5:45 AM), <http://www.thedailybeast.com/articles/2014/08/25/the-tea-party-governor-backlash-of-2014.html>; Louis Jacobson, *In 2014 Governors Races, Where's the Tea Party?*, GOVERNING (Nov. 2014), <http://www.governing.com/topics/elections/gov-tea-party-missing-governors-races.html>.

Sean Illing, *Donald Trump and the Tea Party Myth: Why the GOP Is Now an Identity Movement, Not a Political Party*, SALON (Aug. 5, 2016, 2:39 PM), <http://www.salon.com/2016/08/05/donald-trump-and-the-tea-party-myth-why-the-gop-is-now-an-identity-movement-not-a-political-party/>.

6. David Smith, *Paul Ryan Beats Outsider 'Mini-Donald Trump' Challenger in Wisconsin Primary*, GUARDIAN (Aug. 10, 2016, 3:06 PM), <https://www.theguardian.com/us-news/2016/aug/10/paul-ryan-beats-mini-donald-trump-challenger-in-wisconsin-primary>.

Additionally, despite claims that GOP standard-bearer Donald Trump brought outsiders into the political process to vote in the primaries, the numbers suggest otherwise.<sup>7</sup> Most Trump voters were already registered, and had previously voted in the general election. The one thing he accomplished was to bring already-registered voters into the primary campaign.

Finally, the Republican party establishment—secure in their positions within the RNC—remain firmly in control and have distanced the RNC from Trump’s candidacy, even since he became the official nominee.<sup>8</sup> A realigning election might expect Trump supporters to assert control over the RNC. The RNC is to the contrary devoting vast resources down ballot,<sup>9</sup> a sign of distancing itself from Trump. Reince Priebus, the RNC chair, has also announced he will run for reelection even in electoral defeat, further indicating establishment GOP leaders intend to dismiss the Trump candidacy and outsider support, should he lose.<sup>10</sup>

As for Democrats, Bernie Sanders’s primary challenge surprised party elites and democratic voters, possibly even Sanders himself. Sanders’s outsider support grew spontaneously and quickly. Although it developed more organically and perhaps more authentically than Trump’s, the Sanders campaign did little to campaign for progressives down ballot, and thus help to institutionalize an outsider movement. Like Trump, Sanders’ campaign was more a one-man effort than an authentic social movement.

Nor have outsiders taken steps to fuse with existing third parties to launch a credible threat on the Democrats or Republicans.<sup>11</sup> Both Gary Johnson and Jill Stein have failed to gain a toehold with Sanders supporters or supporters of other outsider candidates within the existing two-party system.

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7. Shane Goldmacher, *Donald Trump Is Not Expanding the GOP: A POLITICO Analysis of Early-Voting Data Shows Little Evidence for One of the Republican Nominee’s Core Claims*, POLITICO MAG. (May 17, 2016), [www.politico.com/magazine/story/2016/05/donald-trump-2016-polling-turnout-early-voting-data-213897](http://www.politico.com/magazine/story/2016/05/donald-trump-2016-polling-turnout-early-voting-data-213897).

8. Alexander Burns & Maggie Haberman, *Tensions Deepen Between Donald Trump and R.N.C.*, N.Y. TIMES (Sept. 2, 2016), <http://www.nytimes.com/2016/09/03/us/politics/donald-trump-rnc-reince-priebus.html>.

9. Janet Hook, Beth Reinhard & Reid J. Epstein, *GOP Scrambles to Salvage Election After Donald Trump’s Latest Imbroglia*, WALL STREET J. (Oct. 8, 2016, 7:26 PM), <http://www.wsj.com/articles/gop-scrambles-to-salvage-election-after-donald-trumps-latest-imbroglio-1475969203>; Eli Stokols & Kenneth P. Vogel, *RNC Considers Cutting Cash to Trump*, POLITICO (Aug. 14, 2016, 7:29 AM), <http://www.politico.com/story/2016/08/donald-trump-rnc-support-226987>; Jonathan Martin, *With Uncertainty at Top of the Ticket, Republicans Back Off In Some States*, N.Y. TIMES (Apr. 21, 2016), [http://www.nytimes.com/2016/04/22/us/politics/with-uncertainty-at-top-of-ticket-republicans-back-off-in-some-states.html?\\_r=0](http://www.nytimes.com/2016/04/22/us/politics/with-uncertainty-at-top-of-ticket-republicans-back-off-in-some-states.html?_r=0).

10. Press Release, The Republican Party of Texas, RNC Chairman Reince Priebus Will Seek Re-Election, <https://www.texasgop.org/rnc-chairman-reince-priebus-will-seek-re-election/> (last visited Sept. 29, 2016).

11. ORIGIN OF RED STATES, BLUE STATES, *supra* note 1.

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Despite the characteristics of this election that appear to indicate party realignment, it remains a question whether outsider voices can mobilize resources to make a play on the insiders within the two-party system. In the meantime, insiders retain control.

## II. A VILE CAMPAIGN

About a week ago I asked my students what they thought of the campaign, and they told me they hated it. It's the first time in my experience that students ever expressed such dislike in the heat of a presidential campaign.

No doubt this year's presidential campaign is particularly distasteful.<sup>12</sup> It oozes anger, hatred and fear both in the images it conveys, the media conveys about it, and in the public's response. It is also an unpredictable—perhaps even irrational—campaign. The academy is unable to predict events thus far. Models showing Trump winning the election, for example, are dismissed for using conventional variables to measure opinion in a highly unconventional and volatile campaign.

But as nasty as the campaign has been, it is unlikely to go down as the nastiest in history. To put our disgust in context, consider how the country loves nasty presidential politics, and it always has. Consider the 1800 electoral campaign between John Adams and Thomas Jefferson, one of the nastiest in history. As Professor Monopoli argues herein, presidential campaigns can play dirty with the gender card. Appealing to misogynistic impulses, hyper masculinity tropes are exploited to represent strong, proactive leaders on one side, as opposed to feminine tropes representing passive, low energy and weak candidates on the other. In such regard, 2016 pales beside the 1800 election of Thomas Jefferson. Mr. Trump's efforts to belittle primary opponents do not measure up to Mr. Jefferson's depiction of John Adams as a "hideous hermaphroditical character." As Adams was trumped by this trope, so were Trump's opponents during the primaries. A retort from Adams: "if you want you daughters to retain their chastity, then don't vote for Jefferson" did little to reverse the public humiliation. In the 1828 campaign, John Quincy Adams criticized Andrew Jackson for his "dictatorial" ways, introducing yet another trope 2016 has borrowed, this one by the Clinton campaign.<sup>13</sup>

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12. Phillip Rucker, *It's Not Just Trump: Voter Anger Fuels Outsider Candidates*, WASH. POST (Aug. 12, 2015), [https://www.washingtonpost.com/politics/its-not-just-trump-voter-anger-fuels-outsider-candidates/2015/08/12/cd3fdb06-40f8-11e5-846d-02792f854297\\_story.html](https://www.washingtonpost.com/politics/its-not-just-trump-voter-anger-fuels-outsider-candidates/2015/08/12/cd3fdb06-40f8-11e5-846d-02792f854297_story.html).

13. Alexander Burns, *Clinton's Portrayal of Trump as Dictator Aims at the Left and Right*, N.Y. TIMES (July 29, 2016), <http://www.nytimes.com/2016/07/30/us/politics/democrats-donald-trump.html>.

As scholars suggest, nasty campaigns can build on antipathy. Recently, Alan Abramowitz came up with a notion of negative partisanship, which documents how people vote based on antipathy toward the candidate from the opposing party more than voting for a candidate they support.<sup>14</sup> This aspect of American politics helps us to understand the abundance of anti-Hillary and anti-Trump vitriol, and polls suggesting voters will be voting against Clinton more than for Trump and vice versa.<sup>15</sup> Is it unseemly? Yes. Is it damaging to constitutional structure? Hardly. Indeed if a key distinction for this campaign is to be drawn from notably negative past campaigns, it is this: Previous campaigns have integrated negativity into the more full-bodied context of public discourse. This campaign has downplayed core competencies, policy positions and mastery of reasonable discourse, for tropes that incite impulsive responses to cries to build a great wall, or calls to ban Muslims. The take away is that this campaign has sacrificed the inspirational oratory of JFK or FDR for campaign porn that serves celebrity social media and the two campaigns as long as it goes viral.

### III. A CELEBRITY CAMPAIGN

Third, we have a celebrity campaign. Never have we enjoyed two candidates with near 100% name recognition when the campaign began. Then-former Governor Jimmy Carter never had such name recognition outside Georgia, as Professor Gibson discussed, nor did Congressman Morris Udall outside Arizona. But, celebrity campaigns are not new. In 1957, William Carlton wrote about the celebrity campaign of 1956. The celebrities he referred to were Dwight D. Eisenhower and Estes Kefauver. Were they game show hosts, reality television stars? Is that why the public knew who they were? No, they gained fame through public service: Ike gained celebrity as a general and Kefauver through televised committee hearings. Although there is nothing new about celebrity campaigns, and Clinton's celebrity connotes a Clinton brand—"vote for one and get two"—this campaign will likely be known as a campaign featuring a major party candidate, Trump, that represents a brand without the product: a celebrity without public service experience. Clearly, the nature of what constitutes "celebrity" has changed but not the element of celebrity in a presidential campaign. This, as a result, advances the question:

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14. Alan Abramowitz & Steven Webster, *All Politics is National: The Rise of Negative Partisanship and the Nationalization of U.S. House and Senate Elections in the 21st Century* (unpublished manuscript), [http://stevenwebster.com/research/all\\_politics\\_is\\_national.pdf](http://stevenwebster.com/research/all_politics_is_national.pdf).

15. Harry Enten, *Americans' Distaste for Both Trump and Clinton Is Record-Breaking*, FIVETHIRTYEIGHT (May 5, 2016, 8:29 AM), <http://fivethirtyeight.com/features/americans-distaste-for-both-trump-and-clinton-is-record-breaking/>. Never before have two major party candidates been so disliked as this election.

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So what is truly unique about this campaign?

#### IV. A LIZARD CAMPAIGN

Rather than discussing the 2016 election as made up of “outsiders,” I am more interested in the lack of impulse control among candidates and citizenry as a particularly distinctive driving force of this campaign. Unlike campaigns past that combine shenanigans with strategy and thus appeal to self-interested reason, campaign 2016 will be notable for its high tech manipulation of the primitive brain, which does, in fact, implicate for the structural Constitution.

In a recent commentary of the 2016 campaign, Judd Legum viewed the 2016 campaign through the lens of Roland Barthes, a French philosopher.<sup>16</sup> Before I discuss the lizard campaign, please consider the following quote by Barthes.

This public knows very well the distinction between [professional] wrestling and boxing; it knows that boxing is . . . based on a demonstration of excellence. One can bet on the outcome of a boxing-match: with wrestling, it would make no sense. A boxing-match is a story which is constructed before the eyes of the spectator; in wrestling, on the contrary, it is each moment which is intelligible, not the passage of time. . . . The logical conclusion of the contest does not interest the wrestling fan, while on the contrary a boxing-match always implies a science of the future. In other words, wrestling is a sum of spectacles, of which no single one is a function: each moment imposes the total knowledge of a passion which rises erect and alone, without ever extending to the crowning moment of a result.<sup>17</sup>

I argue that the boxing metaphor represents the ideal of campaigns past: rule-bound, merit based and strategic, if at times bloody. The 2016 campaign, however, has been a wrestling match, where campaign rallies tally up to a “sum of spectacles.”<sup>18</sup> As Legum noted, where the boxer measures up her jab, the wrestler decks her over her head with a metal chair.<sup>19</sup> Winning a boxing match depends on strategy of one grievant against another. The self-interested strategic thinker depending on hard work, commitment and a little luck wins as merit counts in such contests. The professional wrestling match,

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16. Judd Legum, *This French Philosopher Is the Only One Who Can Explain the Donald Trump Phenomenon*, THINKPROGRESS (Sept. 14, 2016), <https://thinkprogress.org/this-french-philosopher-is-the-only-one-who-can-explain-the-donald-trump-phenomenon-47afad40647c#vmcy6ujst>.

17. *Id.* (quoting ROLAND BARTHES, *MYTHOLOGIES* (Annette Lavers trans., Hill & Wang 1972) (1957)).

18. *Id.*

19. *Id.*

on the contrary, rewards impulsive action absorbed in spectacle. Its success—measured by audience size and ratings—counts on appealing to the primitive brain.

With the help of state of the art marketing and social media technologies—viral marketing, niche marketing, social media, and more—political campaigns now possess the capacity to tap into the lizard brain, quicker and more efficiently than before. Twitter, for example, appeals to impulse—at least it has for me. A couple of weeks ago, for example, I could not stop tweeting for much of the morning about something that was said in the campaign. It had that effect on me. After consuming several minutes reading my Twitter feed, I embarked on a Twitter rampage, tweeting angry messages of my own for which I later regretted hitting send. For these moments, my impulse to tweet out angry messages won out. Twitter technology enabled a direct path to my amygdala, to which I responded in kind.

The “lizard” metaphor refers to the part of the brain shared with reptiles called the amygdala. The amygdala is the center of the brain that controls survival impulses, including anger, hatred and fear. It drives the primal need for survival and comfort.<sup>20</sup> Through the amygdala, individuals act and feel, but do not think. Appeals to the amygdala and limbic systems of the brain are proven effective in consumer marketing.<sup>21</sup> Although rudimentary versions of these techniques date back as early as the 1964 campaign—where LBJ’s “Daisy ad” attacking his GOP opponent Barry Goldwater lit up the responses of political commentators of the day—today’s political consultants are transferring them to politics with increasing alacrity. This year, a candidate, a real estate tycoon with no political experience, and an expert at the “art of the deal,” brought marketing techniques to bear on his own campaign and as an outcome was crowned the party’s nominee. The Trump campaign convinces voters that the candidate’s representations of hubris, machismo and power add up to a remedy in real time for cataclysmic dangers that evidence suggests do not exist outside the campaign narrative. The relevant consequence to consider for my purpose is how such appeals to the amygdala are meant to evoke the impulsive response that helps voters—even candidates—to confuse fact and fiction, or even conclude the distinction between the two is irrelevant.<sup>22</sup> This, in my opinion, is the game Donald Trump successfully played during the primaries.

20. See Michael P. Ewbank et al., *The Amygdala Response to Images with Impact*, 4 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 127 (2009).

21. See, e.g., CLOTAIRE RAPAILLE, *THE CULTURE CODE: AN INGENIOUS WAY TO UNDERSTAND WHY PEOPLE AROUND THE WORLD LIVE AND BUY AS THEY DO* (2007).

22. In his book *Simulations*, Jean Baudrillard says, “to simulate is not simply to feign[;] . . . feigning . . . leaves the reality principle intact: . . . whereas simulation threatens the difference between ‘true’ and ‘false,’ between ‘real and ‘imaginary.’” JEAN BAUDRILLARD, *SIMULATIONS* 5



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Thus far, the Trump campaign has been particularly well served by two techniques: social media and the old time campaign rally. While one is high tech and the other low tech, the success of each relies on its ability to exacerbate hate, anger and fear and magnify an immediate audience response. Imagine the implications of Trump's reliance on Twitter to disseminate information. Social media heightens the speed and intensity of political messaging, making it increasingly consumable by the primitive brain.

In addition to triggering parts of my own lizard brain with obsessive tweeting, campaign 2016 has triggered the racist imagination and violence. At one event, cameras rolled as an elderly white man punched an African American man in the face as the latter man was being led out of a Trump rally for holding up a protest sign. The campaign has appealed to racial divisions, fear of the ethnic and religious "otherness." It has stereotyped African-Americans as inner city ghetto dwellers, Mexicans as rapists, Muslims as terrorists, and women as weak and low-energy.

These aspects of the Trump campaign assume characteristics of a campaign simulation on steroids that is perhaps more conducive to a reality TV show seeking immediate clicks, thumbs ups, or ratings, than a real campaign seeking votes.<sup>23</sup> In a reality TV series, there would be no serving in office following the campaign. Consider the possibility that Trump has not been running for president to serve as president. He is running for the spectacle of it. Of course he wants to win, but perhaps he doesn't really want to serve as president, an office for which he has no relevant experience. Additionally his campaign lacks organization and has little ground strategy, such as get out the vote planning that is necessary to win. Perhaps, the campaign really is about spectacle.

Appeals to the amygdala that make sense for a simulated campaign however would likely be quite ruinous of democratic institutions in part because democratic institutions involve the neocortex—the part of the brain that processes the written word—as opposed to images—and is where reason and thinking occur. They require the strategic play among branches of government. Trying to get an immense executive branch bureaucracy behind your leadership, for example requires deliberative thinking and impulse control.

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(Paul Foss et al. trans., *Semiotext(e)* 1983). My argument is that appeals to the amygdala help to blur the difference between true and false.

23. A real campaign is waged for the purpose of delivering a message and, if victorious, of governing. Jean Baudrillard's *Simulations* argues that such efforts, on the contrary, are "beyond true and false, beyond equivalences, beyond the rational distinctions upon which function all power and the entire social." *Id.* at 40. In a simulated campaign, there is no office to serve after the campaign ends. It has been reported that Trump does not want to govern, and while seeking a running mate, offered a prospective running mate the role of president should he win the election.

A. *Governing Is Ill Suited to the Lizard Brain*

Governing requires the deliberative reasoning that exists beyond the lizard brain. Perhaps no document provides more convincing justification for having slow moving layers of government in a democratic republic as *The Federalist Papers*. In *Federalist* Nos. 10, 47 and 51, not only was Madison prescient in his diagnosis of (the deleterious effects of) faction as perhaps the greatest risk to a democratic republic, but his prescription of deliberative government (federalism, separation of powers, checks and balances, the electoral college) effectively constrained the deleterious effects of faction for 140 years, with the civil war as a notable outlier. Madison's prescription of limited government also came with a theory of human nature, that humans are self-interested and their behavior driven by reason.<sup>24</sup>

Constitutional structures were designed to constrain the boxing match (metaphorically speaking) not professional wrestling, which turns reasonableness and logic on its head. Even in times of potential constitutional crisis throughout American history, justices<sup>25</sup> and presidents,<sup>26</sup> even scoundrels driven from office, have assumed the role of boxer, and crises have been averted or at least mitigated as an outcome of their ultimate acceptance of the rules of the game. The country has yet to face the reality of a lizard president throwing a chair over a judge's head.

Trump's antics have already been legitimized through Constitutional structures at the federal and state level, as Professor Gibson suggests, that provide for federal elections. Additionally, they have been normalized through media spectacle, social media and the 24/7 news cycle.<sup>27</sup> The campaign discourse has made such play at the lizard brain that it is no longer shocking for a major party candidate for the presidency to say he would trust his own obstinate instincts over rulings by a judge, and advice from generals and national security advisors. Damage has already occurred. It is reasonable to imagine a governing scenario where the lizard would certainly implicate the integrity of constitutional structures. While campaigns may now appeal to the amygdala governing still requires the neocortex.

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24. As *Federalist* No. 51 says, "Ambition must be made to counteract ambition." THE FEDERALIST NO. 51 (James Madison).

25. In *Marbury v. Madison*, 5 U.S. 137 (1803), Chief Justice John Marshall's ruling relied on rational self-interest. His winning strategy introduced the doctrine of judicial review even while he backed down from an unwinnable fight with President Jefferson, in a famously strategic opinion.

26. President Richard Nixon, who famously said, "If the president does it, it's not against the law," threatened to disobey a Supreme Court order in *United States v. Nixon*, 418 U.S. 683 (1974), to release his secret tape recordings, but then resigned, thus averting a constitutional crisis. He played the game as far as he could and then walked away.

27. Adam Gopnik, *The Dangerous Acceptance of Donald Trump*, NEW YORKER (May 20, 2016), <http://www.newyorker.com/news/daily-comment/the-dangerous-acceptance-of-donald-trump>.

*B. Critical Citizenship Can Spot The Lizard*

Media literacy scholarship is a form of civic pedagogy, which could serve us well in our understanding of our reptile. It is designed to teach skills to the concerned citizen to spot the lizard and move past it with critical thinking. The task at hand is for reasonableness to conquer fear, anger and hatred. A couple hints for spotting the lizard: When searching for the lizard notice inflammatory and charged language attacking persons rather than policies and ideas, and victim-blaming. Instead of questioning authority, such appeals tend to question those who question authority, like the critical (democratic) citizen should. It bears mention that this rather authoritarian campaign tactic—blaming those who question authority—is decidedly un-outsider-like and anti-democratic. It's a "tell" that insiders will be the real beneficiaries of a lizard election.