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REFLECTIONS ON THE AFTERMATH OF ELECTION 2016

MAXWELL L. STEARNS*

“Legislators represent people, not trees or acres.” *Reynolds v. Sims*,
377 U.S. 533, 562 (1964) (Warren, C.J.)

“Except when they don’t.” Me, Constitution Day 2016.

Like many participants in the Schmooze, I have spent no small amount of time, and experienced no small amount of anxiety, attempting to unravel what happened in this past presidential election. On September 15, 2016, between the primary season and the general election, the University of Maryland Carey School of Law held its annual Constitution Day program, titled “Election 2016 and the Structural Constitution,”¹ in which I both moderated and participated.

I argued that we appeared to be in the midst of a dimensional shift in which the Donald Trump and Bernie Sanders campaigns had captured an outsider-versus-insider populist wave, one that upended traditional ideological suppositions, typically characterized in right-left ideological terms. I explained that the left-right binary was a feature of our system’s direct election of head of state, one that produced a pure Nash equilibrium² of two dominant parties. I also explained why the two-party system is almost certain to remain, but I contended that in response to what we were observing, the parties’ compositions over time were likely to take different forms. I envisioned that at least for a time, one party would comprise the populist wave, and the other would broaden its ideological umbrella to include crossovers who sufficiently valued decent, functional, and competent governance even at the expense of some voters’ conventional ideological priors. In support, I looked to the wide primary condemnation of Trump among members of his own

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1. Maxwell L. Stearns et al., *Constitution Day Lectures*, 76 MD. L. REV. ENDNOTES 1 (2016), <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1046&context=endnotes>.

2. MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 170 (2009) (In the prisoner’s dilemma game, a “Nash equilibrium is the outcome or set of outcomes that follow from each player’s rational strategy in the absence of coordination with the other player or specific information concerning the other player’s strategy, and in which no player has an incentive to deviate given the other player’s strategy.”).

party, including former Republican presidents, and policy positions that appeared to thwart conventional right-left base positions.

My excellent colleagues and co-panelists, Professor Larry Gibson, Professor Paula Monopoli, and Professor Robert Koulish, were largely unpersuaded. Professor Gibson predicted that despite whoever won, we would retain the same basic structure with the same two parties, Democratic and Republican. To be clear, he and I agreed on the ultimate number of parties, and my thesis did not depend on their formal renaming. Pointing to other historical campaigns—Goldwater, Wallace, and Reagan—Professor Gibson disputed my characterization of Election 2016 as different in kind.

Professor Paula Monopoli forewarned of a possible, perhaps likely, Hillary Clinton defeat despite convincing contrary polls, making her claim all the more impressive. She rested her predicted contrary outcome, in part, on the agentic, or masculine-enforcing attributes of our unitary executive structure and how the presidency is widely characterized.³ She too was skeptical of my claim that this election was different in kind or that it portended some meaningful structural realignment.

And Professor Robert Koulish, who was the closest to my position, ascribed the state of the election to what he termed the “Lizard Brain.”⁴ He focused on the often coarse language of the election, and passionately discussed his students’ (primarily undergraduates at the University of Maryland, College Park) disinclination even to discuss it for fear of learning what their classmates might actually think.

WHO WAS RIGHT?

Some might conclude that history has proven my dissenting colleagues correct: We still have our two-party system, although as I mentioned, I anticipated that and did not predict an immediate seismic shift. And yet, I will concede that even many Republicans who condemned, or simply avoided, endorsing Trump in the primary cycle have since rallied, or at least acquiesced, on his behalf.⁵ Hillary Clinton, of course, not only lost, while securing

3. Paula A. Monopoli, *Gender and the Structural Constitution*, 76 MD. L. REV. ENDNOTES 17, 18–19 (2016) (describing the traits of Alexander Hamilton’s “ideal executive” as having attributes that are considered stereotypically masculine, making women “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”).

4. Robert Koulish, *The Implications of a Lizard Election*, 76 MD. L. REV. ENDNOTES 24, 25, 31 (2016) describing his “thesis that the 2016 campaign is atypical for its irrational, reptilian, or lizard . . . characteristics” and that “political campaigns now possess the capacity to tap into the lizard brain” of voters).

5. Russell Berman, *Republicans Rush to Support Trump*, ATLANTIC (May 10, 2017), <https://www.theatlantic.com/politics/archive/2017/05/top-republicans-lead-trump-crucial-support/526122/>

three million more votes than Trump⁶—demonstrating that along with legislators, presidents too sometimes represent acres and trees, not people—she did so against the ultimate alpha-male candidate, one whose crudeness and misogyny would have done in any other candidate. And I will leave to you all to consider the implications of what has transpired for our collective amygdala.

A dimensional shift certainly has the potential to correspond to what one might call “Democracy in Crisis,” and thus the subject of the Schmooze. When the dimension that we long assumed to define our politics no longer does so, the result can evoke a crisis. Up seems down, and down seems up, a characterization that many have used to describe our present political climate. And personally, I continue to believe that we are experiencing a dimensional shift, one that indeed does correspond to a constitutional crisis.⁷ For those who disagree, what follows may be beside the point since my comments build on, rather than defend, that premise. One difficulty in thinking about a dimensional shift is the challenge of anticipating what the new framing might look like. By way of analogy to Malcolm Gladwell’s *The Tipping Point*,⁸ it is hard to know you are in one until it is past tense, meaning the tipping has already happened.

The factors that I am going to describe might be causal, or they might merely be correlative. Sorting correlation and causation is a particular challenge, but even identifying correlative factors can be helpful since they might lead us eventually to a root cause. I will focus on three factors that I believe are important and that are interconnected in perhaps nonobvious ways. I believe that the following factors are undermining our constitutional democracy: (1) an increasingly bimodal voter distribution that has a *de minimis* crossover voting cohort focused on competence and good governance; (2) an increase in the fractionalization of media sourcing, largely, but not exclusively, attributable to the rise of the Internet; and (3) an ongoing and largely

6. FED. ELECTION COMM’N, OFFICIAL 2016 PRESIDENTIAL GENERAL ELECTION RESULTS 2, 6 (2017), <https://transition.fec.gov/pubrec/fe2016/2016presgeresults.pdf> (last visited September 17, 2017).

7. Since the Schmooze, I have published several posts on this theme on my blog, *Blindspot*. See Maxwell L. Stearns, *The False Inevitability of Donald Trump*, BLINDSPOT (August 15, 2017), <https://www.blindspotblog.us/single-post/2017/08/15/The-False-Inevitability-of-Donald-Trump> (discrediting alternative dimensionality account based on misreading of data respecting Trump election and explaining why, properly understood, the data better support my original dimensionality thesis); Maxwell L. Stearns, *Ideological Blindspots (part IV): The Dimensionality of Trumpism*, BLINDSPOT (April 14, 2017), <https://www.blindspotblog.us/single-post/2017/04/14/Ideological-Blindspots-part-IV-The-Dimensionality-of-Trumpism> (providing further analytical foundation for my original dimensionality thesis).

8. MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 7 (2002).

unsuccessful struggle to superimpose onto our structural constitutional system features that can be more easily accomplished within a parliamentary democracy, as opposed to our geographical, district-based structure, coupled with the direct election of the President as our head of state.⁹ I believe that these three factors have generated a problematical feedback loop and that we are now experiencing the fallout.

I will now try to explain these relationships. My main thesis is this: our constitutional democracy rests on premises that no longer hold, and it is increasingly obvious to this observer that the conventional stories that those of us who teach constitutional law often tell our students about our constitutional exceptionalism associated with structural resilience and adaptability are increasingly Pollyannaish—and perhaps downright false.

Our constitutional structure operates on several premises, of which two are particularly important. First, the system embeds the premise of direct, albeit filtered (through the Electoral College), selection of the president. Second, it assumes that a critical normative component of the coalition structure for nearly all elections, not just for the president, is necessarily geographically determined. The first premise continues to hold; the second has been under considerable strain, and the combination is deeply problematic.

Start with the breakdown of geographical determinism, first at a micro-level, and then at a macro-level. For most of us in the room, setting aside any local family, religious institutions to which we belong, professional associations, and schools, we are apt to form part of broader social networks more distant in physical space. At a macro-level, it is a common insight that the East and West Coasts, plus major non-coastal cities, have more in common with each other than with the great red center. More simply put, today's communities of interest are rarely, or at least less commonly, geographically determined.

It would be an interesting natural experiment to map degrees of Facebook friendship, for example using incidents of correspondence, or even “likes,” based on geographical location. I would be surprised if the experiment did not reveal that once we account for the categories listed above, most density pairings correlating frequency of interaction are geographically remote, typically including friends from college or graduate school, or other

9. Here I focus on two features of what I term our Structural Constitution: (1) direct election of head of state, and (2) geographically districted representation. There are two other features that would require further exposition in a complete analysis: (1) the problematic relationship between formal separation of powers and the influence of parties in driving our political branches and in affecting the relationships among all three branches; and (2) the value of temporal stability that a system failing to anticipate no-confidence votes (short of impeachment) brings. I will touch on the second of these in my conclusion. For a thoughtful exploration of the implications of political parties for separation of powers, see Darryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

loved ones, who live elsewhere. This is partly due to the increasing geographical fluidity of elites. But even among those who lack resources for such higher education access, communities of interest have become increasingly dispersed as a result of the now stunningly low cost of technology, allowing such communities to form in virtual space based on education, avocation, race, gender, sexual orientation, religion, and yes, ideology.¹⁰

Now consider common state gerrymandering practices that place communities together in contiguous, but bug-splatter-like districts, as the North Carolina Twelfth District was described in *Shaw v. Reno*,¹¹ or the slightly less bizarre (at least not sufficiently bizarre as to be explainable only due to race), yet still oddly shaped district described in *Miller v. Johnson*.¹² These districts effectively forge what should be non-contiguous communities of interest, held together by the conceit that geography holds continuing normative relevance. This is a bit like the antiquated Golden Age of Hollywood *Hays Code* demanding women on screen keep one foot on the ground, thus avoiding risqué scenes,¹³ at least for the unimaginative. Both the *Hays Code* and physical geography in redistricting have produced results reminiscent of the Milton Bradley game “Twister”; namely, forced contortions flowing from compliance with arbitrary “rules of the game.”

We have similar rules in school districting, and yet, non-contiguity arises in practice through magnet schools, busing, and other practices that draw in students of interest (or their parents) from non-contiguous communities. Vote districting has been more stubbornly resistant, and the consequence has been district mapping that led Justice Stevens (borrowing from Pamela Karlan) famously to observe that in a sea of such districts, one forming a coherent shape would ironically appear bizarre.¹⁴

“Bizarre” districts¹⁵ are a feature of the misfit of non-geographical communities of interest, and perhaps interest groups (in the public choice sense), forced to remain superimposed on a system that rigidly insists on geography

10. See, e.g., Drew Hendricks, *Are Interest-Based Networks the Way of the Future?*, FORBES (Oct. 16, 2014), <https://www.forbes.com/sites/drewhendricks/2014/10/16/are-interest-based-networks-the-way-of-the-future/#6a613d29643f>.

11. 509 U.S. 630, 635–36 (1993).

12. 515 U.S. 900, 909 (1995).

13. *Useful Notes, The Hays Code*, TV TROPES, <http://tvtropes.org/pmwiki/pmwiki.php/UsefulNotes/TheHaysCode?from=Main.HaysCode> (last visited Aug. 15, 2017) (“It was necessary in all romantic scenes for a woman to have at least one foot on the floor, to prevent love scenes in bed. This led to Foot Popping becoming popular.”).

14. *Bush v. Vera*, 517 U.S. 952, 1036 (1996) (Stevens, J., dissenting) (“The great irony, of course, is that by *requiring* the State to place the majority-minority district in a particular place and with a particular shape, the district may stand out as a stark, placid island in a sea of oddly shaped majority-white neighbors.” (citing Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMBERLAND L. REV. 287, 309 (1996))).

15. *Shaw v. Reno*, 509 U.S. 630, 644 (1993).

as the basis for formal electoral legitimacy. But this is certainly not inevitable. Within a parliamentary list-based system, there is no need for bizarrely shaped districts because there is no need for districts at all. Voters who share common party preferences, like distant Facebook friends, can reside in non-contiguous communities, and we can tally the per-party candidate votes and allocate assembly seats accordingly. We simply go as far down the party list as needed to reflect the outcome. In effect, gerrymandering is our way of imperfectly accomplishing this fairly simple parliamentary objective in a system demanding formal geographical justification.

Now consider how this relates to our direct election of head of state. Within a parliamentary system, there is a market for third parties; within ours, the pure Nash equilibrium is two dominant parties, each bonding some ideological distance apart at the coalition-forming—primary or caucus—stage, then merging somewhat inward in the general-election stage, after the essential coalitions have formed. By contrast within parliamentary list systems, coalitions largely form post-election, as there remains a market for those who would form a critical part of the eventual governing coalition. With direct election, the dimensional shift will still support two major parties—however named—in the long term, but the composition of the parties will change over time.

This also relates to the observation concerning news media sourcing. Although I have not assessed this comprehensively, here is my intuition: I believe that the number of major newspapers in major cities is endogenous to the manner of selection of the head of state. Traditionally, major U.S. cities had two main papers, for example, the *New York Times* and *New York Post*; the *Washington Post* and *Washington Times*; the *Boston Globe* and *Boston Herald*, one generally catering to elites, and typically somewhat left of center; the other catering to the working class and generally right of center. But compare, for example, London or Tel Aviv, where there is a generally larger assortment of papers, each catering to a somewhat smaller segment of the voting electorate with a more sectoral (or non-binary) approach to ideology, one that might also implicate more than a single normative dimension.¹⁶ This is less surprising when you consider the persistence of smaller parties who sometimes are in, and other times out, of governing coalitions.

In the period of our history when this was descriptive, it was generally the case that these major sources included some crossover “voice,” commentary from the other side as a means of enhancing legitimacy. And not long

16. See, e.g., *The Daily Mail*; *The Daily Telegraph*; *London Evening Standard*; *The Morning Chronicle* (London); *Haaretz*, *The Jerusalem Post*, *Ha'ir* (Tel Aviv). Consider also, in Israel, for example, *Hamodia* and *Yated Ne'eman*, two newspapers that cater to the Heradim, who form parties that have historically joined governing Labor-led or Likkud-led governing coalitions as the price of ensuring religious exemptions from military service.

ago, educated persons, whether liberal or conservative, read one or more major news sources, such as a newspaper and weekly magazine—*Time*, *Newsweek*, and *U.S. News and World Report* (when its central mission was other than to torture legal academics). In doing so, we all gained exposure to the “other side” of the ideological spectrum with which we typically associated. This norm has now broken down largely as a result of the rise of social media, the ability to publish at zero marginal cost, and the choice among millennials to get their “news” from nontraditional, and more entertaining, sources. The result is information silos, and information that is bias-confirming, rather than bias-challenging.¹⁷

The biasing problem also coincides with a concern for veracity. When those of us who regularly read newspapers came of age, we developed instincts for recognizing a fake story as compared to a properly vetted one. My strong hunch is that those roughly under the age of twenty-five or so are generally less able to successfully perform the gut-check test on actual fake news than those who are older and who grew up reading print and properly sourced media. This is a skill, not a trait with which one is born. A consequence is that this younger generation not only receives a higher incidence of bias-confirming news in general, but also that it is less able to distinguish bias-confirming fake news from bias-challenging real news. I increasingly believe that millennials themselves often believe the “alternative facts”¹⁸ they embrace, and I do not ascribe this exclusively to either side, right or left.

Return to the direct selection of head of state. We know that our electorate is bimodal. (Think here of the difference between a dromedary (one hump) and a camel (two humps)). The reality is that we have generally had some degree of bimodalism, but there has always been substantial occupied space between the humps. These crossover voters are fundamental to a system with direct election of a head of state, as they have the special capacity to make choices that ensure that our system functions properly and electoral disaster is averted. Parliamentary systems instead rely on internal checks for this through post-election coalition formation in which political elites make the ultimate selection, also with the benign effect, often, of averting disaster.

Our model works better when the relative size of the crossover voter cohort is greater. The breakdown of traditional news sourcing, though, has caused the opposite phenomenon: an increase in both bimodalism and the distance between the modes. Historically, the distancing between modes was

17. See, e.g., Walter Quattrociocchi, Antonio Scala & Cass R. Sunstein, Echo Chambers on Facebook 1–2 (June 13, 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2795110.

18. *Meet the Press, Conway: Press Secretary Gave “Alternate Facts,”* NBC NEWS (Jan. 22, 2017), <https://www.nbcnews.com/meet-the-press/video/conway-press-secretary-gave-alternative-facts-860142147643>.

never complete, or at least as complete as it appeared to be in the 2016 election.

I contend that the confirmation-biasing tendencies of the breakdown of traditional media, and the increasing non-geographical-based communities of interest, have combined with our peculiar direct election system to create a breakdown of the protections needed for the system to function effectively. The fundamental problem is that we have no viable space left for crossover good-governance voters to go, forcing an extreme binary choice dominated by those lacking a deeper understanding of how our system was designed to work.

CONCLUSION

Where does this leave me? Conflicted. One might say that although Trump won, he won by negative three million votes. And although true that he was elected based on prevailing rules, and that he claims he would have won by more votes had the rules been otherwise, thereby securing the mandate he nonetheless dubiously claims, there is good reason to doubt him. Personally, I think he hit his maximum for the simple reason that his supporters, unlike Hillary Clinton's, were genuinely motivated voters. If that is right, then the 2016 election might be a quirk, and the system could right itself. I will concede that, even for me, this seems Pollyannaish.

Instead, I think that the more plausible read is that we are in a place that is hard, maybe not possible, to extricate ourselves from, at least without fundamental constitutional structural reform. This is my twenty-fifth year teaching constitutional law. I was an optimist for most of that time. I no longer am. I bought into the notion of constitutional adaptability, and for me this informed my sideways glance at constitutional scholars who, in my view, rigidly insisted upon original meaning or strict textualism, clubs that I could never join. My scholarly project on the constitutional law side has long been to construct patterned stories from cases, standing, the Commerce Clause, the Dormant Commerce Clause, and most recently, tiers of scrutiny. I viewed the emerging doctrinal corpus as a kind of legitimating constitutional common law process, one that informed the adaptability of the overall constitutional system itself. The system, including the system of precedent, seemed far more important to me personally than the technical textual details or strict claims to contemporaneous historical meaning. I bought into the premise that to the extent those details mattered, it was in constructing a functional system, one capable of enduring for an extended period of time. Even on that reading, however, some premises are foundationally hard wired and cannot be altered within the framework of the existing Constitution. That, after all, was the

real lesson of the Articles of Confederation, explaining why it had to be formally abandoned, not amended, to be changed.¹⁹

One might read this to imply that a parliamentary democracy is a panacea. It is not. Once more celebrating his recent passing at the ripe age of ninety-five, we need go no further than Kenneth Arrow's Impossibility Theorem²⁰ to recognize that no voting system is perfect; all have profound, or at least potentially profound, flaws. And if we have learned nothing else, we have learned that, potentially profound flaws become actually profound flaws if you give them long enough. One risk in a parliamentary system is the inability to forecast the end of the governing coalition. No-confidence votes encourage a lack of stability as compared with our presidential election system, and impeachment, invoked only twice thus far, has yet to result in removal. As the sole superpower in the world, the United States might be viewed as providing a public good of sorts in bonding itself to stable, predictable regimes and regime change. But this is only beneficial to the extent that our system operates properly. I am increasingly skeptical of that claim. I do not claim to have an answer as to how to fix it, and as I said, my goal here is to find correlations and possibly the root cause of our dysfunction.

Our Constitution is the second oldest operating constitution in the world. It had a pretty good run. It might be time to give it a rest and try something new. Depending on how things play out going forward, I might even find myself ironically quoting someone who once famously asked: "What have you got to lose?"²¹

19. Jack Rakove, *The Legacy of the Articles of Confederation*, PUBLIUS, Fall 1982, at 45.

20. KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963).

21. Tom LoBianco & Ashley Killough, *Trump Pitches Black Voters: "What the Hell Do You Have to Lose?"*, CNN (Aug. 19, 2016, 8:22 PM), <http://www.cnn.com/2016/08/19/politics/donald-trump-african-american-voters/index.html>.