

Spring 3-1-2017

The 2016 Presidential Election: The Next Four Years and Beyond

Dahlia Lithwick

Bertrall Ross
Berkeley Law

Joan Williams

Follow this and additional works at: <http://scholarship.law.berkeley.edu/facpubs>

 Part of the [Law Commons](#)

Recommended Citation

Dahlia Lithwick, Bertrall Ross, and Joan Williams, *The 2016 Presidential Election: The Next Four Years and Beyond*, 44 *Hastings Const. L. Q.* 255 (2017),
Available at: <http://scholarship.law.berkeley.edu/facpubs/2782>

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

The 2016 Presidential Election: The Next Four Years and Beyond

Panelists: DAHLIA LITHWICK, BERTRALL ROSS, AND JOAN WILLIAMS

Moderator: SCOTT DODSON

Preface

By most accounts, the 2016 presidential election was both strange and the most important in a lifetime. Donald Trump, a billionaire celebrity who had never before held political office, won in shocking fashion. The incoming Trump Administration faces challenges and opportunities, including the economy, foreign relations, health care, immigration, the national debt, race relations, and a vacant seat on the U.S. Supreme Court. To discuss these issues, UC Hastings College of the Law held the first academic post-election panel, on November 15, 2016, to consider what the election means for America's next four years . . . and beyond.

Biographical Sketch

Scott Dodson: Welcome, everyone. I'm Scott Dodson, Associate Dean for Research and the Harry & Lillian Hastings Research Chair here at UC Hastings, where I'm thankful to say I teach and write on absolutely nothing related to elections. Last week was a stunner for many. Donald J. Trump, a real estate mogul and TV celebrity with no prior political or military experience, won the presidency in convincing fashion by tapping into a strain of Americanism underestimated by many. He is not a true Republican, nor is he really a populist, although he ran on that kind of a platform. More than anything else, he is a wild card. And he defeated a landmark candidate, the first female candidate of a major political party.

What does his election mean for the Supreme Court? For conversations about gender, race, class, and nationalism? For the economy and security of our country?

I'm glad I'm not on this panel. Here's who is. Dahlia Lithwick writes about the courts and the law for *Slate Magazine*, and she hosts the podcast, *Amicus*. She is a contributing editor at *Newsweek*, and she received her JD from Stanford and clerked on the Ninth Circuit. As a Canadian citizen, it might be easier for her to make good on the kind of move that some of you may be contemplating.

Joan C. Williams is a distinguished professor of law and the founding director of the Center for WorkLife Law here at UC Hastings. She has played a central role in reshaping the conversation about women and work, especially regarding gender bias in the workplace, and the gender implications of work/life balance. She is the author of nine books and around 100 articles and book chapters. She is one of the top-ten scholars in her field. And I'll note that she recently penned an article in the *Harvard Business Review* about the election that has been shared more than three million times on Facebook and other social-media platforms.

Bertrall Ross is a professor of law at UC Berkeley, where he teaches legislation, election law, and constitutional law. His research focuses on democratic responsiveness, political theory, and the institutional role of courts, especially as they relate to the marginalization of the poor in the American political process. He received his JD from Yale, a master of science from the London School of Economics, and a master of public affairs from Princeton University. He also clerked on the Ninth Circuit.

I'm going to give each panelist about ten minutes to make some remarks, and then I'll ask questions from the audience. Given the sensitive nature of the topic, rather than have people ask questions personally, I'd ask you to write out your questions on the cards that are provided on the table, and then just raise them up and someone will come get them and pass them to me. And I'll try to get to as many as I can in the balance of the hour.

Immediately following the panel, Professor Debra Gerardi will facilitate a post-panel discussion for anyone who wishes to stay for a while to share thoughts, ask questions, or offer support. With that, I'm going to turn it over to our first panelist, Dahlia Lithwick.

I. President-Elect Donald Trump: His Election Campaign and Constitutional Impact

Dahlia Lithwick: So, hi. Thank you for having me. I want to thank Scott and UC Hastings. I know this is unlawyerly, but there are lots of

chairs up in the front row here if anybody who's standing back there wants to sit in the front.

I'm going to just talk a little bit about the implications of this election for the Constitution and the rule of law. And I think it's really worth stipulating that this is a very different situation that we're in than even had a Ted Cruz or a Jeb Bush won the election. Because I think they come out of a tradition of a deep respect for constitutional norms and values. And we can't judge by much, because not much has happened yet, but I think it's safe to say that the campaign that Donald Trump ran really was sort of outside the scope of what we think of as constitutional norms and values. And you can sort of just work your way through the Bill of Rights and look at the promises he's made, and say, "This is not someone who thinks about the Constitution the way you and I do."

And you can start with the First Amendment and his plans to sue newspapers to change the libel laws. He says—I don't know how you do that as executive, but, you know, change the libel laws, to bring an antitrust suit against *The Washington Post*. So a huge amount of this campaign was predicated on the promise to quell the freedom of the press; certainly overt promises to erode the wall between church and state, as First Amendment doctrine has erected it.

He's been I think—fair to say—not a threat to the Second Amendment. Or the Third—quartering of soldiers—I think he hasn't spoken on. But then if you sort of work your way down, I think he's talking about vast dragnets; he's talking about nationalized stop-and-frisk, which would be in violation of the Fourth Amendment; the notion that Muslims will have an extra burden to turn in their neighbors seems to violate the Fifth Amendment. So you can sort of go down and say—the Fourteenth Amendment—each and every one of the promises he's made in terms of constitutional values. These are not right/left promises. These are promises that the Constitution does not necessarily bind some of his programmatic reforms.

And so I just think, bracketing the sort of conservative/liberal label—and I love that Scott makes the point that he doesn't really run as a Republican—but bracketing sort of the anxiety one might have about choice or about worker's rights or the environment, I think there is this meta concern about whether the rule of law means to him what it might mean to those of us who come up inside the constitutional and legal tradition. And I would just note—and I think this is the wait-and-see part, and I suspect you're going to hear a lot of "Wait and see" from all of us—that that may have just been campaign bluster. I mean, it may have simply

been that he was saying he's going to squelch press freedoms, but in fact there's no programmatic way to do that. So it may be nothing.

But it's certainly, I think, interesting that this is a person who has a view of the law that really is: "I win lawsuits; I win them by whatever means I can win them. If I lose them it's because the judge is bad and corrupt." We've seen on the campaign trail, not once, but twice, Donald Trump going after judges for being biased and unfair, only because Trump didn't like the outcome. So I just think you can't approach this the way you would a normal presidential candidate. This is somebody who really thinks that the law exists to advance certain ends, and not necessarily to protect basic norms of democracy and freedom and equality.

So that's my sort of predicate: that I think that, beyond just thinking about this question of "Is he conservative or liberal?" I think there's another matrix on which to think about this, which is "Does the Constitution as we conceive of the Constitution constrain him?" And I would add to that the layer that he's got Congress and possibly a Court that are not in a position to necessarily check some of these impulses. And so it becomes I think doubly urgent to think about: is the rule of law going to mean to him what it means to you and me?

I just, in the remainder of my time, I think it probably behooves me to talk a little bit about the Supreme Court. As some of you may know, we've had a vacancy there since February 13th when the President named Merrick Garland in March as his nominee. Garland has now waited some 240 days for a hearing and a vote that never came. The record before Merrick Garland was 125 days. That was held by Louis Brandeis: 125 days, 100 years ago. So what we've seen in terms of just declining to give a hearing and a vote to the President's nominee is surely unprecedented. We've never seen anything like this in history.

And I think it's fair to say that the Democrats, not having won the Senate, we're going to see very little resistance. I think the only question will be whether Senate Republicans kill the filibuster if Democrats try to filibuster whomever Donald Trump puts up in that seat.

And the last thing I think I want to say just about the Court is—and I should add one other thing, because I'm getting an awful lot of email now, after the election, from readers and listeners to the podcast saying, "Well, but what can we do? Can't we get Garland a hearing?" And the answer is: there's no legal mechanism to do this. This is not a constitutional problem. It is not a legal problem. It is a norm that was violated in the Senate. And it was an elections problem. It was a problem that would've been cured at the ballot box, if anywhere. And I know there's this petition going around

that the Senate Republicans have constructively waived their constitutional duty to have a hearing and a vote.

But I would not put a lot of stock in petitions at this juncture. I think this was an issue that needed to be resolved at the ballot box. And that almost every Republican Senator who ran on the principle that they would obstruct—and by the end they were openly running on the principle that they would obstruct not just Merrick Garland, but by the end of it we were hearing Senator Richard Burr from North Carolina saying, “No, I’m going to obstruct any of Hillary Clinton’s nominees.” So the premise that the Senate existed to obstruct I think was actually a winning principle for Senate Republicans. And so we have to query what that means going forward in terms of: When you’re overtly promising to not confirm anyone for four years and winning an election on that.

So the very final thing I would say, just on the Supreme Court, is that Donald Trump has a list of twenty-one nominees that he is thinking about. He has actually taken down that list—it disappeared from his website over the weekend, interestingly enough. So who knows what that means? If you look at the names on the list, it’s intriguing for two reasons. One, is that it is very much not an inside-the-Beltway list.

It is a list of people who are from state supreme courts and appellate courts around the country, people who did not go to Harvard and Yale, which are the only two law schools represented at the current U.S. Supreme Court. In fact, the list quite deliberately leaves out people like Paul Clement, former Solicitor General, and Brett Kavanaugh on the D.C. Circuit Court of Appeals, I think widely considered to be bright lights of the conservative legal thinking universe. So it very deliberately leaves out the kind of inside-the-Beltway, D.C. privileged elites, and reaches out across the country to find other people who went to other schools and work in other states, and that’s really interesting.

But I would just close by saying: It’s incredibly interesting to people who are watching the Court and watching not just the U.S. Supreme Court, but the dozens and dozens of vacancies in the lower courts and in the circuit courts. You know, these are seats that have, some of them, gone vacant, and are now considered judicial emergencies. But it is really interesting to see whether Donald Trump is going to turn out to have some kind of constitutional theory, some kind of evolved vision of what he wants in his judges, or if those lists were largely constructed by the Federalist Society and the Heritage Foundation.

So he will either contract out to the conservative legal movement his thinking about these issues, or he might surprise us all and put his sister—who is, by the way, a sitting judge—on the Supreme Court, and just prove

to be, yet again, as much of a loose cannon on judicial and constitutional issues as he's been on others.

Thank you very much.

Scott Dodson: Thank you. Professor Ross.

Bertrall Ross: Thank you all. It's great to see you all here, and the interest in this election. You know, I think that I'm still stuck on Wednesday, November 9th. I haven't really gotten beyond that day. A colleague of mine asked me what I was going to say on the panel, and I said, "I have no idea because I'm still speechless."

Now, am I surprised by the election results? In kind of the Dave Chappelle, *Saturday Night Live* approach to things, I guess I'm not surprised. I think that there is this strain of Americanism that has always existed in our society. And it just came out in this election, and it was kind of a perfect storm. Disappointed? Yes, I am. But I'm stuck on November 9th, because I'm still trying to diagnose what happened and why it happened.

And I'll start where Dahlia left off with respect to the Supreme Court. I don't know if you remember the third debate. It was hosted by Fox News, and there was a Fox moderator. And there were a lot of things surrounding that debate, a lot of issues with respect to emails, with respect to Trump's claims that the election would be rigged, a lot of different issues that I expected to be discussed early in that debate. But the first question that the Fox moderator asked was about Supreme Court nominees.

Now, I was taken aback. I was driving my son home from soccer practice, and Supreme Court nominees—of course it mattered. It had not been, at least from what I'd seen, as much a central focus of the debate that Clinton and Trump were having on the campaign trail. And yet it made a lot of sense.

Now, Clinton came. She spoke first, and she talked about the type of progressive justice that she would nominate that would respect people's rights and recognize the lives of people and have a certain sense of empathy. It's kind of a continuation, in a sense, of what President Obama has been saying and his justification for nominating whom he has nominated.

But then Donald Trump came back and his message was rather simple, although much more long-winded than I'm saying it: "I will protect your guns. I will protect life. And I will not nominate judges that will legislate from the bench." That was a clarion call, a clarion call to all of those folks that might have misgivings about Trump from a variety of

perspectives, whether it's his misogyny, whether it's his racist rhetoric: "Whatever other things that you might be concerned about, I will do these things for you with respect to the Supreme Court."

So when he went on the trail and talked about Clinton taking away people's guns, he wasn't saying literally that Clinton was going to legislate and take people's guns. It was code message for: "She will nominate judges, or justices to the Supreme Court, who will overturn *Heller*," who will overturn the case that upheld the individual right to bear arms under the Second Amendment. And this is an opportunity because Scalia has died, and Scalia was the main proponent for that interpretation of the Second Amendment.

And so if you really try to understand this seeming tension and hypocrisy with respect to Christian conservatives supporting Donald Trump for the election, I think you could look back to that question that was asked during the third debate about whom he would nominate as justices to the Supreme Court.

A second point with respect to the election is: *What's the matter with Kansas?* This is Thomas Frank's journalistic account of working-class white voters and why they voted a certain way in Kansas. And he pointed to the fact that these white voters tended to vote against their interests; they tended to vote for Republican candidates to office who tended to support policies that actually went against the economic interests of working-class individuals. Now, a lot of people have focused in on this particular point that Thomas Frank made. And they note the fact that perhaps these voters are irrational in their thinking.

But there's another message from Thomas Frank's book that gets overlooked. His point was that they don't vote their economic interests because their economic interests are rarely on the table during an election. Rarely do politicians campaign on issues that really matter to working-class and low-income individuals. Or if they do, it's usually kind of throwing a little bit of red meat, but not engaging with those issues in a sustained sort of way.

And so what you see here with respect to this election is you did have a candidate who engaged the issues that matter to the economic interests of low-income individuals, or at least the interests that they perceive that they have with respect to their economic interests. He talked about trade. Now, these weren't very deep and detailed account of what he would do with respect to trade issues. But he said he would renegotiate trade treaties; he would rip them up; he would make sure that these jobs stayed in the United States.

And then he talked about immigration. And the immigration fear is built on this anxiety about immigrants taking away people's jobs. Now, again, building a wall, all this other rhetoric that went along with that—those were all metaphors for a point that he was trying to make: “I will be the candidate that will tend to your economic anxiety.”

Now, will he truly be? Or will he be another Ronald Reagan who talked about trickle-down economics: “If you give tax cuts to the rich, it will help you at the end of the day,” which did not actually support and help the lower income and working class at that time? I don't know. There are a lot of promises that Donald Trump has made that he has already backed away from, and he may back away from those promises that he made to working-class and low-income individuals.

But as part of the perfect storm, you have the Christian evangelicals with respect to the Supreme Court; you have working-class and low-income individuals identifying a candidate who is speaking about their interests. And that combination of forces adds up to a third part of the victory that I think is particularly notable, and it's the movement nature of the Trump campaign.

I'm always hesitant to describe a campaign as a movement, so I won't really—I don't want to equate it with the social movements that we are quite aware of and we have quite a bit of respect for. But there are things called campaign movements. And what's the difference between a campaign and a campaign movement? Well, a campaign movement is able to elicit volunteers to advocate and to push for your cause, and to go out, go to the mat for you, knock on doors, make phone calls, do whatever it takes to get you elected. Obama had a movement back in 2008. He had volunteers that were begging to get out of their law school classrooms, begging to get outta class for reasons having to do with the election so they could go to Pennsylvania, go to Ohio, go to wherever to knock on doors, to walk through walls for President Obama.

Donald Trump had that same set of people. And Hillary Clinton, frankly, did not. And what you see here is that it's hard to have a movement for the status quo. It's easier to have a movement for change. And Trump took advantage of his position as the “change agent” in the election to mobilize people to support him and to get them to go out and knock on people's doors.

Now, he didn't do it in the same formal way that Obama did, which is build up a ground game and have these folks come to offices sprinkled throughout the country, and have a plan and a script that you would go door-to-door with. No, it's more informal with the Trump campaign. He didn't have much of a ground game at all. The RNC supported his ground

game to a certain extent, but he had volunteers not even working for the campaign directly going out informally, reaching out to their neighbors, encouraging them to come out to vote for Trump. And I think that that had a much more profound effect than many of us anticipated and what the pollsters expected.

Thank you.

Joan C. Williams: Well, I've spent most of my life studying gender and class. And this election was about . . . gender and class. Why didn't Hillary Clinton win? Well, first of all, as a woman, she wasn't qualified until she proved it over and over and over again, until she had such a long record she was suddenly unqualified. That's the first pattern of gender bias, called "Prove-It-Again." The second pattern is called the "Tightrope": Clinton didn't have the right combination of likability and competence, because the right combination for women at that level is about three centimeters wide. So she was a "nasty woman," whereas Trump was a "real man."

We heard again and again is: "I'd totally support a woman being president; I just don't support this woman being president." Well, whom do you support? A hypothetical perfect woman. This election also showed once again that women don't hang together, and especially white women don't. They do not identify by gender first. A lot of them voted for Trump because they were identifying by class. If white working-class women had split just 50/50, Hillary would have won. They didn't.

But I think the central dynamic driving this election cycle was what I call "class cluelessness."

I am strictly a silver spoon girl, born and bred. On the other hand, I married into a white working-class family nearly forty years ago, so I understand why Trump was so effective at channeling the anger of white working-class families. The biggest mistake we could make is to write their votes off as just stupid racism. Was there stupidity? Yes. Was there racism? Yes. Where there are white people, there will be racism. When elites call white working class people racist, they seem to forget that they, too, are racist. Racism is pervasive in the United States, and no group is immune to it.

What progressive elites do not understand is the real chasm between them and the working class—I call it the "class culture gap." The white working class has different patterns of family. They have different patterns of friendship. They have different social networks. They even have different patterns of food. They think we're idiots for paying \$70.00 for

three morsels of meal with little leaves sprinkled on top. They may have a point.

We need to begin to understand, imaginatively, why decent people voted for Trump. They voted for Trump not because they thought that he was going to give them what they needed right away. They voted for Trump because they're as disillusioned with the progressive elite, as they are with the Republican elite. They are disillusioned with elites, period. For good reason. Because if you look at what has happened to the white working class since 1973, it has been economically eviscerated.

Now, how's that different for people of color? They never had 1973. That's the only difference. Totally get that. Many more people of color were left out of the postwar economic boom that delivered middle class lives to whites.

But isn't the goal to deliver a modest middle class standard of living to all hardworking Americans regardless of race? White Americans had that for two short generations after World War II, and now many have lost it. Their anger is understandable. They figured no elite was actually going to give them their economic future back, and at least Trump was giving them their dignity back. I disagree, but this is a crucial moment for progressives. Are we going to perpetuate the failure of imagination that brought us to this pass? I hope not.

What we need now is to bridge the class culture gap. White working-class people resent professionals because we're very different from them and frankly, we often condescend and look down on them. And I'm afraid I include Hillary Clinton as well as myself in that description. Working class whites often admire the rich because that's what they aspire to be. They don't want to adopt the food, friendship, and family patterns of professionals; they want to keep their own folkways, just with more money.

Working class whites also often resent the poor. Why? I'll just give a specific example from the area that I focus on. Thirty percent of the poor using center-based care have child-care subsidies. Virtually no one in the working class does.¹ That seems unfair to many Americans who feel that they work hard and yet are overlooked.

Let me define what I mean by the working class here. I mean the missing middle, the middle fifty percent of Americans, median income: \$64,000.00.² I'm not talking about the poor. Middle class Americans

1. Joan C. Williams & Heather Boushey, *The Three Faces of Work-Family Conflict*, CENTER FOR AMERICAN PROGRESS, 9 (Jan. 25, 2010, 9:00 AM), <https://www.americanprogress.org/issues/economy/reports/2010/01/25/7194/the-three-faces-of-work-family-conflict/>.

2. *Id.* at 7.

sometimes don't get subsidies available to the poor because we've designed our social safety net around means-tested programs. Is resenting that stupid, or is it just wanting your piece of the pie in a context where the wages of white working-class families have plummeted since 1973³?

We often hear: "Well, if these white working-class men would just take pink-collar jobs"—that's the solution. You know, I'm here to say: I wish masculinity were constructed a little differently.

[Laughter]

Just a little. But most men want to feel they have their full human dignity, male varietal. And most men feel pressure to be breadwinners. If we're going to ask why blue-collar men want traditionally male jobs, I suspect they would tell us, "You know what? Elite men get that privilege." I don't see elite men flooding into jobs as nurses or social workers. I totally wish the world was different, but it isn't. So to look at the people who delivered the election to Trump and to tell them to take pink-collar jobs, that's a good way to guarantee Trump a second term.

I think that there is beginning to be a hunger to understand this different axis of social privilege, one that affects the white working class. To do this, we do not need to minimize racism. We do not need to deny that part of the white working class's sense of bereft loss entails a loss of white privilege. That's there. But their sense of loss, of loss of economic stability, of loss of personal dignity: these things are real. And what we've just seen is that if we don't connect with them, other people will.

Thank you.

[Applause]

III. The Role of Gender in the Presidential Election

Scott Dodson: So, I just wanted to briefly pick up on Professor Williams's comments and ask her a follow-up: Could any woman have won this election? If it's not really about Hillary, if you disbelieve that people are saying, "Well, I could've voted for a woman, just not this woman," and that really that's just blanket gender bias, could any woman have won, and why or why not?

And it doesn't really help to explain why Trump won such a lion's share of the women vote. He won non-college-educated women by a substantial margin. And he also only lost college-educated women by six points. So this particular demographic voted for someone who clearly

3. JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE* 69 (Harvard University Press, 2012).

demonstrated his misogyny on a number of occasions. Is it cognitive dissonance? Is it just that gender just wasn't a driving issue in this election? Maybe you could follow up and comment on a few of these questions.

Joan C. Williams: I wonder if Elizabeth Warren could've won. She can connect with the white working class in a very profound way. She would've dodged a lot of the class issues that Hillary really was disserved by. We're in a situation where the Electoral College is functioning exactly the way it was designed to function, which is to give disproportionate power to the rural vote. And the urban/rural distinction has become a proxy for class conflict. I've made my name as a feminist, but right now I would hesitate for the Democrats to run another woman, except one who has a demonstrated ability to connect with the white working class. But, then again, all Democratic candidates need to do that, male or female.

Hillary Clinton was particularly ill-suited to win for exactly the reason she was well-suited to be the first woman candidate. She's almost exactly my age. When we were coming up, we had to tune out a lot of social cues, because if we hadn't tuned them out, we would've all been housewives. That's what we were slated for. So it's been real challenge for women of my generation to let those social cues back in. And we tend to be plodders who are just encouraged by impossibility. We try harder, and prove ourselves over and over. All of that, I say with a deep affection, characterizes Hillary Clinton.

IV. The Republican Party's Role for the Next Four Years

Scott Dodson: I have a couple questions on how Republicans—since they now control all three branches of government, or they will control the Supreme Court shortly—how Republicans or conservatives might try to reign Donald Trump in, or whether they won't, and will just let him run rampant. Are there protections for the rule of law in the next four years? How about Professor Ross's thoughts?

Bertrall Ross: I think that the common theme in a lot of commentary after the election is that Donald Trump doesn't owe anything to anyone. He didn't run the traditional campaign that relied on donors and relied on surrogates in the form of current Representatives and Senators going out on the trail and advocating on his behalf. He had a little bit of that with

respect to the surrogates, and he did have some donors. But he's pretty much a free person in terms of governing how he wishes to govern.

And it's particularly troubling and concerning given the weakness of Congress. Ordinarily in our system of checks and balances, Congress acts as that check to the presidency. But executive power has been enhanced over the last thirty or forty years. And it's in part due to Democratic presidents as well as Republican presidents. So it's hard to imagine how well the Republicans or how the Republicans are going to reign Donald Trump in.

Now, one potential silver lining is that he doesn't really seem to have a clear idea how to govern. He had his meeting with President Obama and he was very much leaning on him to give him advice on what he's supposed to be doing right now. And I think that, to the extent that his dependence leads him to moderate or listen to others, may be the only way that he can, in a sense, be controlled. Another silver lining that's related to that is that, given that the learning curve is going to be steep on learning how to govern, it's gonna take him a while to get to governing. And so that perhaps gets us closer to the next election.

[Laughter]

But I don't hold out tremendous hope with respect to Republicans reigning him in. With respect to his early appointments to his staff, it doesn't seem that the Republicans did any reigning of him in with respect to the placement of a person who has been a key symbol to the alt-right movement. So I question their capacity to do so, or even their willingness to do so.

What we have remaining, and the one institution we have remaining as a check is the filibuster. I imagine that, as Dahlia said, that Republicans will be willing to get rid of the filibuster with respect to Supreme Court nominees. I think that they might be a bit more hesitant to get rid of the filibuster with respect to legislation. And that will allow a certain gumming up of the system that will perhaps slow the Trump onslaught.

V. The Democratic Party's Role for the Next Four Years

Scott Dodson: Now, I want to try the flip side of that question: what can liberals do in this intervening four years—let's just say it's an intervening four years—and perhaps set the stage for a more palatable candidate in four years? Can they check a Donald Trump presidency by any mechanism, perhaps through the media? Or are there opportunities for a new kind of election in 2020? How about Ms. Lithwick's thoughts?

Dahlia Lithwick: Well, first of all, I think the most important thing that liberals can do is figure out what went wrong, that this sort of autopsy, post-mortem, “How did we so badly misperceive the state of facts?” I think is crucial. It does seem to me—you know, obviously what you can do is realize that environmental protections are now on the line, DACA and DAPA are on the line. I mean, pretty much all of President Obama’s legislative agenda, the Affordable Care Act—we’re going to have to fight for every part of that. And some of that is going to go away, I think, with the stroke of a pen. And so it’s going to be incumbent on progressives who value—whether it’s choice or religious freedom, whatever it is—to double down.

I think undergirding your question, though, for me, is that there are really big systemic problems with the way we vote. And part of it is the Electoral College. Part of it is the shocking regime of vote suppression that we live with. I mean, hundreds fewer polling places in this presidential election than we had four years ago; state legislatures literally deliberately reverse engineering the shutdown of voting places so as to suppress minority votes and young votes. So I think these are things that we always think about exactly one month before elections. You know, we’re like, “Hey, the voting system kind of sucks again.” And we don’t work on it in the intervening time.

And so, I think some of these problems—if you are bothered by dark money and *Citizens United*—I would strongly suggest not waiting till 2019 to be affronted by it. And so, I think these are all boring process problems like gerrymandering. Oh my God. I can’t even say it. When I write about it, my dad is always like, “Hey, I’m the one person who hit ‘like.’” Nobody cares about these issues because they’re boring. And I think it’s much more fun, particularly on the left, to just be really busy blaming each other and getting mad at Bernie people and getting mad at third-party voters. And I think that is utterly pointless. I mean, utterly pointless.

So, I think we have to really think about the big systemic ways in which we vote wrong in this country, and think about not just organizing, knocking on doors. That stuff is important, but also if you think that gerrymandering is an issue that is very much inflecting on how we vote, then you’ve got to get involved in that. It’s boring. But I think we have to work on that. We have to work on voting rights. We have to work on the Electoral College. Those things matter. And they don’t just matter six months before a presidential election.

VI. The President-Elect Verses the Media

Scott Dodson: Just a quick follow-up. How do you think Donald Trump's hostility to the media will reflect on the press's ability to shed light on what he's doing with the White House press corps, or the newspaper outlets and media outlets? Will that affect the press in any way?

Dahlia Lithwick: I think there are two things that are very worrisome, even in the week since he has become President-elect. One is that he's tweeting virulently anti-media things. He's tweeting that it's lies by the press that's inflaming the paid protesters. There's no such thing as genuine protesters. And the press apparently is telling them lies and getting them to go out and—that's worrisome. I mean, that's just objectively worrisome. We don't have that kind of discourse toward the press, particularly when it's demonstrably untrue. But I think the other thing is that the day that he met with President Obama—there's always been a press pool—there was no press pool. There was no one covering Donald Trump and Barack Obama meeting at the White House last week, and he was literally dark—went dark for six hours on that day—with no press access.

So in addition to what I think is an ongoing kind of campaign to delegitimize the press, he's already tweeting, "Everybody hates *The New York Times*. Nobody's buying"—already he's sort of victory dancing. You may or may not agree that the *Times* is the paper of record, but I think it's still a kind of fundamentally important cornerstone of how we check our leaders. And I think this campaign of delegitimizing the press and simultaneously giving the corner office to the former CEO of *Breitbart*, which is not the press as I construe the press, is incredibly worrisome.

And then over and above the sort of delegitimization of what I would call the fact-based press, there's also really really, I think, this career he has made of suing people who say things he doesn't like, and litigating and making it impossible for folks to defend themselves. In other words, a lifetime posture of assailing press freedom. And I think both those things are, in tandem, very worrisome.

VII. 2016 Election Demographics

Scott Dodson: Professor Williams made a comment about the white working class voting for Trump somewhat against—and Professor Ross picked up on this—somewhat against their own economic interests. But Trump really put together a coalition that had very different branches. It included evangelicals; it included white working-class demographics,

especially in the Rust Belt, which we don't typically associate as having, say, the sort of white-nationalist race-minded policies; rather, they're more economic policies. And so I guess a question for the panel is: how did Trump manage also to generate greater support than Romney among even Hispanics and African Americans? He also, in certain areas of the country, gained greater votes than Romney did in those key demographics. How is that?

Joan C. Williams: Well, one thing I would say is that ninety-four percent of black women voted for Trump.⁴

Scott Dodson: Sorry: ninety percent of what?

Joan C. Williams: I'm sorry: for Clinton.

[Laughter]

For her. Ninety-four percent of black women voted for Clinton. Sorry about that. I would actually like to jump back, in terms of what we can do. And I think that Dahlia has really pinpointed some very important things. But I would pinpoint quite different things.

We need to recognize that means-tested social programs that target the poor and leave out the middle are fuel for class conflict. We also need to avoid messaging universal programs by highlighting only their benefits for the poor. The key message Obama gave about the Affordable Care Act was, "We're going to give twenty million people health-care coverage."

Now, I'm just a garden variety progressive; I think that result is awesome. But messaging the ACA that way is heard as, "We're gonna help the poor and the working class is gonna have their premiums rise." That just fuels white working-class resentment. An important message is to beware of means-tested programs and of messaging universal programs as means-tested programs.

Another message is that trade deals are a lot more expensive than we thought they were. Because just to put a trade deal in because it's going to be great for GDP without being attentive to those whose jobs are going to get gutted—that's one of the things that got us to where we are today. If we have trade deals, they're going to be a lot more expensive, because they need to include real and effective job retraining programs.

4. Vanessa Williams, *Black Women—Hillary Clinton's Most Reliable Voting Bloc—Look Beyond Defeat*, WASH. POST (Nov. 12, 2016), https://www.washingtonpost.com/politics/black-women—hillary-clintons-most-reliable-voting-bloc—look-beyond-defeat/2016/11/12/86d9182a-a845-11e6-ba59-a7d93165c6d4_story.html?utm_term=.8dc72118c26c.

All of that is not so controversial. More controversial is that we need to be attentive to progressives' focus on cultural issues. And, again, this is painful for me; they're *my* cultural issues. I have worked on diversity and women's advancement for thirty years. But when the Democrats had a wide, broad coalition in this country in the half century before 1970, what was at the center of that coalition were economic issues. Those are the issues that bind together the working class and the poor of all races.

VIII. Social Media Influence Over the Election

Scott Dodson: A couple of questions, good ones, about social media and what role social media played in the election, both Twitter and Facebook and blogs and other postings. And, in addition, privacy bubbles known as social bubbles, and the fake news that had been propagated on some sites. What role did social media play in this election?

Dahlia Lithwick: I'll talk. I mean, I think it is entirely true that we have two medias now. I had a Facebook thread going yesterday where I asked people, "Is there a single publication that your Republican friends and your friends who are Democrats read, that they agree on is true?" And there isn't. And CNN is too left and *USA Today* is too—I don't know what. We have two different medias in this country now. And I think more pernicious than that, we have now taken the posture with respect to the media that the other side is in bad faith and lying. In other words, they're not getting it wrong on MSNBC; they're not getting it wrong on Breitbart; they're pushing a factually flawed agenda in order to manipulate us. And that's an amazing thing to try to come back from. You know, once you've sort of broken trust.

So, I think we are in two entirely different media bubbles. We don't encounter ideas ever that do not comport with our preexisting ideas. And I'm curious what the other panelists think, but I also think we're in a very curious moment that I haven't quite been able to identify what it is, but there is a way in which Steven Bannon—it seems as though we should all be able to agree that he ran an alt-right publication; he said under his own name and his own pen some egregious things about women and minorities. And we're watching even the mainstream media now not even know quite what to call him. You know? "Provocateur," you know? "Pugilistic"? No. White supremacist. Seems like we could stipulate and he would stipulate.

And so, I think that the thing that's kind of falling apart is the media's ability to call out things that are not true. And clearly in an effort to be

balanced, to be unable to say this, "This is what it is." And I have to say, drinking notwithstanding, I don't have a solution for how my profession is gonna get its way out of this. But I will say: I have never in my lifetime seen a process where you could get five Pinocchios every day, every day from the fact checkers, and it mattered zero.

Bertrall Ross: Yeah. The media-checking function is seriously under threat. And I think that that is perhaps the most fundamental threat to our democracy that has emerged from this election. I'll just tell you an anecdote of a colleague of mine, a former classmate of mine who ran for a Minnesota State Senate seat. And he ran as a Democrat in a rural district in which Hillary Clinton got twenty-five percent of the vote. He ended up getting thirty-nine percent of the vote. He lost. He described, in this email that he sent to us on a listserv, his process in which, for 142 days he spent knocking on people's doors, knocking on people's doors, engaging them, engaging them on what he believes, what he supported, what he valued, what he wanted to do.

And what he got as a response, as the days went on and got closer to the election, was all of these media accounts that were being mimicked back to him about who he is. "You're going to take away my guns, aren't you?" And even to the wildest conspiracies that he didn't feel that he wanted to discuss because they were quite vicious. The spectrum of media sources is so wide right now that you can get information about a whole variety of things that you don't know how to separate what's true and what's not true. And since there's so much broad distrust of the media that there's no one that you can look to to help you identify what is true and what's not true.

So how does a democracy exist when there are no accepted facts? I don't know.

Dahlia Lithwick: And I would just add: If we're thinking about this through a legal lens, I think it's also really of utility to think about institutions that need to be neutral in order to be legitimate. And in this case I'm thinking about the courts. And throughout this entire past nine months, as the U.S. Supreme Court was being not only assailed because it was shorthanded and couldn't do its jobs and had to not take any interesting cases this term, but also assailed in the campaign, you know, really vicious language directed not just at one end or the other, but at like John Roberts. You know, the most neutral, boring, Wonder Bread guy in the world, is suddenly this hippie pot smoker.

And just think about how much you heard from the Court in defense of itself in the last nine months. There was zero. The justices, to the extent that they talked about the vacancy, were all like, “I don’t know. It’s fine. Maybe it’s bad. I don’t know what’s going on. Squirrel.”

[Laughter]

You know, there was just no capacity to defend itself. And if you think about the multi-million-dollar campaigns in jurisdictions that elect their judges and the judicial canons which prohibit judges from talking about ads that are directed against them, I just think: In addition to the fact that we are fact-based, we have kneecapped those institutions that need to be neutral, and so that they can’t in fact say, “This is wrong; you’re hurting us.”

And Judge Curiel, who did not answer when he was called a Mexican and biased—did not say a word. What does that mean for the judiciary too? And so, I think in addition to the fact that there are no facts, the fact that “neutral” now means: “You’re being thrown under the bus; there’s nothing you can do,” is I think another huge threat.

Joan C. Williams: I think we have to ask why facts have become so unimportant. And what we just saw is an election that wasn’t about facts; it was about emotions. It was about very deeply held emotions. And the fact is Trump is not going to bring back jobs to Youngstown, Ohio. You heard it here. Ain’t gonna happen. So, I think that the disillusionment with the elites will continue.

Now, the choice I see is whether we can reach out, just as you do in a family when people have completely lost it and are completely at each other’s throats, and somebody says, “You know? I hear you. I don’t necessarily agree with you, but I hear you.” That is the way we bridge emotions. That’s the opportunity that we have. Since Trump is not going to be able to bring back those \$25.00-an-hour white working-class jobs, in some ways, I think the choice is between reaching out in a genuine way to really hear people across all kinds of vectors of social difference, or else it’s going to get really ugly.

Scott Dodson: Yeah. I just wanted to pick up on that. Because perhaps not coincidentally, the nation’s going through a turbulent time on a number of other fronts during this election cycle, with Black Lives Matter and police encounters. And that also is a dynamic that is exacerbated by the failure of each side to listen to each other. But it doesn’t strike me as if Trump is really listening. He’s speaking to one particular side, and I’d love comments from the panel on what his rhetoric and his presidency might

mean for the inculcation of cultural norms on fronts like Black Lives Matter versus police conduct. Do you have thoughts on that?

Bertrall Ross: Yeah. I'll start. The prediction was that during the primary election, Donald Trump took these extreme positions, and that when we got to the general election, he was going to hue towards the center. And that he was going to reach out and broaden his base to other groups and bring them into the coalition. Now, he didn't do much of that during the general election. It's not likely that he's going to do much of that when he governs.

And so it will be perhaps as close to what could be described as a base presidency as we perhaps have seen in a long time. And what I mean by a base presidency is that it's going to be a presidency that's focused on the needs and concerns of the base supporters of Donald Trump. And what that means for those that are not inside the base is that it's going to be an extraordinary struggle.

I don't see Donald Trump necessarily holding a listening session or a meeting with members of the Black Lives Matter movement. If there is a reincarnation of the Occupy movement, I don't see Donald Trump engaging those folks with any sort of dignity or willingness to listen. I see him as doubling down on the support for police, doubling down on policies such as stop-and-frisk. And what this will have the effect of doing is further polarizing and pulling this country apart. And that's what makes it challenging. I agree completely with Professor Williams in terms of reaching across and engaging each other. But what we'll have as a counteracting force is a president that looks like he will be working to pull us apart.

And so can we overcome the force of the president in our daily lives as we engage with each other to listen to each other and to bridge our differences so that we could de-polarize our country? That's the open question for the next four years.

Joan C. Williams: It is just unbelievably disheartening for someone who has been at this as long as I have, is that forms of racist and misogynistic speech that were common when I was growing up—like the sentiment that any woman worth her salt could take care of sexual harassment on her own. Same thing with race. These forms of speech have been taboo now for some years. And they're coming back. There are two ways to read this, and the jury's out. I don't know which is true. One is that we're going backwards and it's really painful. The other is that this

is backlash, which is what happens when you have true progress. It's in our hands to determine which it's going to be.

IV. Affordable Education

Scott Dodson: We're almost out of time. There's just one more question that's probably the most important one of the evening. What will happen to the public-interest loan-forgiveness program?

[Laughter]

Any speculations?

Bertrall Ross: So, he offered some red meat to Bernie Sanders supporters, in the end, saying: "I will work to make your college education debt-free," or whatnot, without any real policy prescriptions underlying it. I don't imagine that support for higher education is going to be at the top of Donald Trump's agenda, or anywhere near the top of his agenda.

In fact, to the extent that he sees higher education as a bastion for liberals that are contrary to his beliefs and what he values and what he thinks should be done, he might actually work, Governor-Scott-Walker-style, to undermine higher education, which would be to the detriment of students and would actually put a death knell to our hopes for a freer or at least more affordable higher education system. So I don't hold out much hopes in terms of loan-repayment programs, or even the government program that's set up. And I think that that might be going away over the next couple years.

Scott Dodson: Well, that's all the time we have. I want to say that there were a number of excellent questions that were handed to me that I did not get to. But I want to keep them for the organizers of the post-panel debrief, and maybe that will help spur conversation there.

Please join me in thanking our panelists today.

* * *