

REFLECTIONS UPON THE DRIFT AWAY FROM DEMOCRACY IN THE UNITED STATES

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In this article Sir Geoffrey reflects on democracy in the context of the United States, with special attention to the events of recent years both in the United States and internationally. A drift away from democracy is noted and an agenda for reform of the United States system is advanced for the purpose of strengthening democracy in a country which is a role model for many others.

I WHO WANTS AUTOCRACY?

For those outside the United States, recent developments in governance and politics there raise issues of deep concern. The Anglosphere, including New Zealand, is particularly affected. Historian Keith Sinclair, when searching for the national identity here, isolated two strong influences, British and American. He quoted with approval a visitor who said that New Zealand must "daily Americanize".¹ Recent developments concerning democracy in the United States challenge that view.

There appears to be a drift away from democracy, coupled with a degree of political polarisation that threatens to make the United States ungovernable. The fallout from these features could spread to other countries, where democracy is well established. The rot and decay could spread. Convergence on such matters is a risk.² Global instability, great power rivalry and the weakness of the Security Council of the United Nations to prevent the unlawful use of force after the invasion of Ukraine are all matters for serious concern. Further decline in the faith of democratic governments to meet the needs of people will not be helpful. Ample literature charts the crisis in which contemporary

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1 Keith Sinclair *A History of New Zealand* (revised ed, Penguin Books, Harmondsworth, 1980) at 323.

2 Felipe Fernández-Armesto *Out of Our Minds: What We Think and How We Came to Think It* (Oneworld Publications, London, 2020) at 401.

democracies now find themselves.³ And seldom have they faced such existential challenges—think climate change, the COVID-19 pandemic and an unstable global situation.

The assumption that democracy is inevitable needs to be revisited. Ian Shapiro, a political theorist, wrote in 2003 in relation to democracy that "its political legitimacy is seldom seriously challenged in the contemporary world".⁴ It is challenged now. It is challenged by China—consider its behaviour in Hong Kong and the fact that Xi Jinping (the President of the People's Republic) is no longer subject to terms. It is challenged by developments in such countries as Russia, Belarus, Brazil, Hungary, Poland, Thailand, Turkey, Venezuela, Myanmar and Kyrgyzstan. A tendency toward authoritarianism is clearly discernible. It appears to involve not telling the truth, polarising the population and being populist. The number of democracies has declined; democracy is seen to be in retreat. A recent and rigorous 2020 report produced by the Centre for the Future of Democracy at the University of Cambridge concluded: "We find that dissatisfaction with democracy has risen over time, and is reaching an all-time global high, in particular in developed democracies."⁵ Across the globe democracy is in a state of malaise. Dissatisfaction has risen sharply since 2005.⁶ The gains made by the liberal democratic state are now endangered. Retreat could occur.

This is an essay by a New Zealand lawyer with some experience in American law and the United States Constitution, honed by being a student at the University of Chicago Law School and having taught at the University of Iowa College of Law and the University of Virginia. The essay casts a comparative light on how others may see what is going on in America. Teaching comparative constitutional law on half a dozen occasions in the United States gave me insights into the American

3 Mark A Graber, Sanford Levinson and Mark Tushnet (eds) *Constitutional Democracy in Crisis?* (Oxford University Press, New York, 2018); Jack M Balkin "Constitutional Crisis and Constitutional Rot" (2017) 77 *Md Law Rev* 147; Steven Levitsky and Daniel Ziblatt *How Democracies Die* (Viking, London, 2018); and AC Grayling *Democracy and Its Crisis* (Oneworld Publications, London, 2018).

4 Ian Shapiro *The State of Democratic Theory* (Princeton University Press, Princeton, 2006) at 146.

5 RS Foa and others *Global Satisfaction with Democracy Report 2020* (Centre for the Future of Democracy, 2020) at 1. The report states there has been an especially acute crisis of democratic faith in the Anglo-Saxon democracies: at 18. Dissatisfaction has doubled. New Zealand, however, has avoided the "trajectory of soaring public discontent"; this may be because it is the only country in the group to have adopted a proportional representation electoral system: at 19. See also Zselyke Csaky *Nations in Transit 2020: Dropping the Democratic Façade* (Freedom House, 2020): this study found that 2018 was the 13th successive year of deteriorating freedoms around the globe. The decline of democracy was alarming with more countries moving toward authoritarian rule. Populist forces were pushing against long-held democratic principles. That organisation's latest annual report published in 2021 stated it was the 15th year in a row that it had reported that democracy was going backwards. Three quarters of people who live on Earth live in countries where freedom is declining: Freedom House *Freedom in the World 2021: Democracy under Siege* (2021). New Zealand scored 99 out of 100. Sweden, Finland and Norway scored 100. V-Dem Institute reports that dictatorships are on the rise and the "last 30 years of democratic advances are now eradicated": Vanessa A Boese and others *Democracy Report 2022: Autocratization Changing Nature?* (V-Dem Institute, 2022) at 6.

6 Foa and others, above n 5, at 2.

attitudes to government in general. Holding high political office in New Zealand gave me an understanding of the practical political issues faced in making policy decisions. These reflections are personal but grounded on long exposure to the issues.⁷

New Zealand is a Westminster-style democracy of five million people, although much simpler than the English model. It has a unicameral Parliament of 120 members and a proportional representation electoral system resulting from a Royal Commission report in 1986 that was greatly impressed by the electoral system in Germany from which it borrowed.⁸ New Zealand also has constitutional similarities to the United Kingdom, Australia, Canada and other members of the Commonwealth, of which the Queen is the Sovereign. And like the United States, New Zealand is a common law country. These connections mean we share a number of civic values similar to those that have traditionally characterised the United States. New Zealand was part of the British Empire and I have often thought the war of American independence encouraged the British to grant responsible democratic self-government very early, in 1856, after colonising New Zealand in 1840.

This essay will explore in outline some issues of the American polity. These are designed to stimulate thought about how to address some of the present difficulties. It concludes with some observations about what could be done to improve the situation.

II NO TWO DEMOCRACIES ARE THE SAME

This issue need not detain us long. Democracies and their institutions vary enormously one from another. The political cultures vary too. Some believe in strong government; others with governments of more restricted powers. The Greek word *demos* means "the people" and the people are at the heart of thinking about democracy. President Lincoln's Gettysburg address in November 1863 was to the effect that the Union meant "government of the people, by the people, for the people". It means that the people are in control, at least in theory.

The main instrument by which this control is achieved is through representative democracy, by which voters in democracies through fair and free elections decide who shall be the primary decision-makers for a period. Their decisions are scrutinised by a legislature and can be rejected or modified by it after due consideration. Some say this makes the people "sovereign", although that is a tricky word with many different meanings in different legal contexts, including the Westminster doctrine of

7 For an account of those experiences see Geoffrey Palmer *Reform: A Memoir* (Te Herenga Waka University Press, Wellington, 2013). An American historian who visited New Zealand wrote a book contrasting the two political cultures of New Zealand and the United States in an interesting way. New Zealand was characterised by fairness, the United States by freedom: David Hackett Fischer *Fairness and Freedom: A History of Two Open Societies – New Zealand and the United States* (Oxford University Press, New York, 2012).

8 Royal Commission on the Electoral System *Towards a Better Democracy* (House of Representatives, December 1986).

parliamentary sovereignty.⁹ The reference in the Preamble to the United States Constitution to "We the People", and some of its other provisions, suggests a type of popular sovereignty vested in the people.¹⁰ All this suggests that people should share power by voting and engaging more broadly in the democratic process.

I will not here dwell upon the state of constitutional theory. Normative thinking on the field is extensive and stretches back to Plato and Aristotle, but the competing theories are unsatisfying and do not lead anywhere when it comes to practical government.¹¹ In the end government has to work in fact and produce results. How that is achieved can be accomplished in different ways. American constitutional law doctrine spends much time analysing the legitimacy of judicial review of legislative action and perhaps not enough on exploring how the whole system operates, particularly how each branch relates to the others.

As a student of American constitutional law at the University of Chicago more than 50 years ago, I often wondered who or what comprised the government of the United States. Whom does one hold to account? In Westminster systems it is Cabinet government, which means a body of elected Members of Parliament who enjoy the confidence of the lower house, if there is more than one, and who are accountable to it.¹² (This "Cabinet" bears little resemblance to the institution with the same name in the United States.) One knows in a Westminster system what comprises the government and what to do to get rid of it—vote at a general election. Sheeting home responsibility is not so simple in America.

Democracy has its problems. Winston Churchill told the House of Commons in 1947:¹³

No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.

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- 9 Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999). The doctrine is becoming increasingly threadbare.
- 10 Lawrence H Tribe *American Constitutional Law* (3rd ed, Foundation Press, New York, 2000) vol 1 at 106.
- 11 Louis Michael Seidman *Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review* (Yale University Press, New Haven, 2001) at 1–11.
- 12 I recall a fascinating seminar conducted by Professor Philip B Kurland for which I wrote a paper about whether the President of the United States or the Prime Minister of Great Britain had the greater power to start a war. It was a close-run thing.
- 13 Antony Jay (ed) *Oxford Dictionary of Political Quotations* (Oxford University Press, Oxford, 1996) at 93. The less than perfect nature of democracy led the British novelist EM Forster to offer only two cheers for democracy: "So two cheers for Democracy: one because it admits variety and two because it permits criticism. Two cheers are quite enough: there is no occasion to give three": EM Forster *Two Cheers for Democracy* (Penguin, London, 1965) at 11.

Mistakes and policy blunders occur in all democracies.¹⁴ In democracies the electorate demands change. If the plan is not thought through properly it may fail. Delivering change requires careful planning, analysis and legal drafting where law changes are needed. Emergencies such as COVID-19 place great strains on the systems because of the need for speed, coupled with the lack of adequate scientific knowledge of the precise characteristics of the virus. The machinery of government needs to be up to the challenge.

Politics speaks the language of priorities. Government cannot do everything at once. But in these times of severe policy challenges of a type never before confronted, policy decisions must be made and governments must act in the public interest. Political decision-makers involve themselves in negotiations, advocacy, persuasion, log-rolling and compromise in order to get a programme across the line and enacted. Policy shops, on the other hand, speak the language of policy analysis of impacts, economic consequences and the relative merits of different policy options.¹⁵

This segment ends with an observation the British statesman Edmund Burke made in his *Reflections on the Revolution in France* in 1790: "A state without the means of some change is without the means of its conservation."¹⁶ Some may think this is the situation that now applies to the United States. Burke was suggesting that the 1688 so-called bloodless revolution in England achieved the necessary capacity to change.

III IS THE UNITED STATES A DEMOCRACY?

It is far from self-evident that the United States is a democracy, at least in the sense that the majority rules. The late Professor Robert Dahl from Yale published in 2001 *How Democratic is the American Constitution?*¹⁷ He found that only 23 countries had been steadily democratic since 1950.¹⁸ The list includes both the United States and New Zealand. Dahl isolated seven issues for analysis to answer the question he posed:¹⁹

- (a) Tolerance of slavery;
- (b) Suffrage;
- (c) Election of the President;

14 Anthony King and Ivor Crewe *The Blunders of Our Governments* (Oneworld Publications, London, 2014).

15 Geoffrey Palmer "The Law Reform Enterprise: Evaluating the Past and Charting the Future" (2015) 131 LQR 402.

16 Edmund Burke "Reflections on the Revolution in France" in *Reflections on the French Revolution and other Essays* (JM Dent & Sons, London, 1955) at 19–20.

17 Robert A Dahl *How Democratic is the American Constitution?* (Yale University Press, New Haven, 2001); and Robert A Dahl *On Democracy* (2nd ed, Yale University Press, New Haven, 2015).

18 Dahl *How Democratic is the American Constitution?*, above n 17, at 186.

19 At 15–20.

- (d) Representation in the Senate;
- (e) Election of Senators;
- (f) Judicial power; and
- (g) Limitations on congressional power.

As Dahl understood, some of these features compare unfavourably in democratic terms with the frameworks in other democratic countries.

All of Dahl's issues remain live to a greater or lesser extent today. Unfavourable circumstances, Dahl acknowledged, could tip the balance between stability and undesirable changes tending toward dictatorship. One may argue that the presidency of Donald Trump headed in that direction.

One feature that strikes outsiders about the United States Constitution is how difficult it is to alter or amend. Article V of the Constitution provides two methods by which amendments can be made. Article V provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Achieving amendments has been difficult. The first method requires a two-thirds majority of the Senate and the House to agree that the proposed amendment is necessary. Then it must be ratified by three fourths of the several states. Since there are 50 states, this means 38 states. The second method requires amendments to be proposed by two thirds of the several states, which is 34, calling for a convention to propose amendments and the proposal must be ratified by a constitutional convention in three fourths of the states. The ratifying convention procedure has been used only once, for the 21st Amendment which repealed prohibition in 1933.

The difficulty of securing changes to the Constitution seems almost designed to produce policy paralysis, a situation greatly increased where that is accompanied by partisan polarisation and an inability to compromise. The United States Constitution has been amended on 27 occasions, but 10 of those were Madison's Bill of Rights amendments in 1791. Three more amendments resulted from the civil war. The idea that a constitution can be set in stone in this way appears unsuitable for the conduct of modern democratic government. Too many issues of great public concern cannot be satisfactorily addressed and settled.

After 230 years so many things have changed. It is not easy to see how the United States Constitution is fit for purpose in modern times. Special majorities are from a practical political point

of view hard to procure in any elected legislature. The Benthamite proposition that the greatest happiness of the greatest number is the foundation of morals and legislation seems to be absent from political thinking in the United States.

The Constitution of the Commonwealth of Australia is a federal constitution which has also been resistant to change. The Australian experience shows change is hard where a referendum of the voters is involved. There are many features of Australia's constitutional law that owe debts to the United States model.²⁰ It is, however, much easier to get things done in a unitary system of government. The variety of COVID-19 measures in federal countries like the United States and Australia appears confusing and ineffective to unitary New Zealand eyes.

Section 128 of the Commonwealth of Australia Constitution Act 1900 (Imp) 63 & 64 Vict c 12 is complicated. It requires that the Act not be altered except by way of the proposed law for its alteration being passed by an absolute majority of each House of the Federal Parliament, or by one House twice, and passed by a referendum of the people that attains a majority of the people in a majority of states. The new Constitution began to work in 1901, having been passed by the Imperial Parliament at Westminster in 1900. Only eight of 44 proposals for amending the Constitution have succeeded, the last one being in 1977.²¹ It should be noted that elaborate negotiations between the Australian colonies took place over many years before the new Constitution was passed. The covering clauses still provide that New Zealand could join, but it did not then and is most unlikely to do so now.

The arrangements for the conduct of government need to be capable of change to meet changing conditions and to provide the capacity to respond to new problems. Policy problems in a democracy require a response. It is not possible to govern effectively in any country if it is not possible to resolve important issues. At the bottom of that issue lies the question of the proper role of government.²²

20 William G Buss "Andrew Inglis Clark's Draft Constitution, Chapter III of the Australian Constitution, and the Assist from Article III of the Constitution of the United States" (2009) 33 Melbourne University Law Review 718.

21 George Williams, Sean Brennan and Andrew Lynch *Blackshield and Williams Australian Constitutional Law and Theory* (6th ed, Federation Press, Sydney, 2014) at 1338–1341. See also James Stellios *Zine's The High Court and the Constitution* (6th ed, Federation Press, Sydney, 2015). Professor Buss of the University of Iowa was teaching at Victoria University of Wellington when he first encountered the Australian Constitution, having to introduce it to the New Zealand students: see Mai Chen and Geoffrey Palmer *Public Law in New Zealand: Cases, materials, commentary and questions* (Oxford University Press, Auckland, 1993) at 268. I might add I taught Australian constitutional law to New Zealand law students on several occasions because they may go and practice law there. They found it mystifying in the extreme and could not see the point of the restricted nature of the Australian federal power. The nature of the commerce clause historically in Australia was highly restrictive and the federal power seemed to me to be less than that of the United States.

22 Some years ago, I recall hearing *The New York Times* columnist Thomas L Friedman tell a public meeting in the Wellington Town Hall that in his view the entire range of political opinion within both Australia and New Zealand could be contained within the Democratic Party of the United States.

I have been struck over the years how suspicious American students are of the government engaging in extensive remedial activity. The prevailing ideology and political philosophy seemed to lean more towards Robert Nozick than that of Jeremy Bentham or John Rawls. I found this when I taught torts in the United States and introduced the students to New Zealand's accident compensation scheme that abolished the right to bring personal injury actions in tort and under which all those injured receive compensation from the state. The notion the state should do such a thing attracted considerable resistance among the American students.²³ But after all the common law is not immutable, as the earlier reforms with workmen's compensation in the United States demonstrates. It has always seemed to me that the American political experience lacks anything that resembles social democracy or a developed welfare state that the people in many democracies enjoy. The New Deal accomplished some of what is necessary, but much remains to be done. The health system in the United States comes as a shock to many people who live in other democracies.

It is my view that the Westminster system can resist special and vested interests more readily than the "congressional government", as Professor Woodrow Wilson in his first book called it.²⁴ Where special interests prevail in the Westminster system, they win big, but they prevail less frequently. The number of obstacles that must be overcome to cement a policy in the congressional system appears to be a recipe for gridlock in too many instances. Surely that has contributed to the feeling that the United States system is not performing in the interests of the broader American public. The over-elaborate checks and balances produce frustration and inaction.

Over many years I have debated with Emeritus Professor Arthur Earl Bonfield of the University of Iowa the merits of the congressional system versus the Westminster system of democratic government. I believe I have made progress in persuading him to view Westminster more favourably in recent years. That is not to say such an alteration alone would change the American political culture. To suggest now the Americans should adopt a parliamentary system seems a stretch too far.

I used to ask the students at Iowa whether there was merit in Iowa adopting the unicameral legislature model found in Nebraska. Remember, New Zealand's appointed upper house had been abolished by a National Party government in 1950. The Nebraska solution found no favour with the students. On the other hand, when the students were addressed by Lord Acton, then a serving member of the semi-reformed House of Lords, they found that institution with its mixture of life peers and

23 For the detailed story of accident compensation see Geoffrey Palmer *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* (Oxford University Press, Wellington, 1979). A difficult issue the Australian reform faced, chaired by Justice Woodhouse from New Zealand who designed the New Zealand scheme, was whether the Commonwealth Government had the power to enact such a scheme because the common law falls within the ambit of the states.

24 Woodrow Wilson *Congressional Government: A Study in American Politics* (Houghton Mifflin, Boston, 1885).

hereditary peers incomprehensible.²⁵ I used to show the students C-SPAN recordings of Prime Minister Tony Blair at Prime Minister's Question Time in the House of Commons. I asked them how the second President Bush would have fared if he had had to undergo such an examination by an Opposition.

No democratic government can meet all the criteria for democracy set out in the literature. Notwithstanding its imperfections, there are many advantages in democracy. These include avoiding the rule of oppressive autocrats, providing citizens with fundamental rights, providing a range of personal freedoms, and giving people a stake in their government, as well as the provision of a high amount of political equality.

IV THE UNITED STATES CONSTITUTION WAS NEVER DESIGNED TO BE DEMOCRATIC

Max Boot wrote in late 2021 that the United States has "a uniquely dysfunctional political system—and it's not clear that it can be fixed".²⁶ It is hard to disagree with his analysis. The antiquity of the United States Constitution is now one of its principal weaknesses. It lacks the necessary flexibility to evolve.

In 1775 when the revolt of the American colonies of George III began, there were no democracies in the world. Great Britain was certainly no democracy, although it had other civic virtues, including Magna Carta, trial by jury and a powerful rule of law via the common law. There was within the British system a powerful commitment to personal and political liberty that was unusual at the time. The views of English political philosopher John Locke articulated the case for liberty and his views coincided with those of many in the American colonies.²⁷ The dominant group of the founding fathers were inheritors of a Whig tradition rather than a Tory one.

It took many years in Britain for the franchise for parliamentary elections to be extended. The great Whig reforms brought it about. Before the first great reform Act, the Representation of the People Act 1832 (UK) 2 & 3 Will IV c 45, voting was highly restricted; it was restricted in counties to freeholders of land having a tenement with annual value of two pounds. These property qualifications prevented most men having a vote. And even for those who could vote, there was no secret ballot—that did not arrive until 1872. And often only a narrow range of people in the borough

25 Lord Richard Acton and Patricia Nassif Acton authored a marvellous book *To Go Free: A Treasury of Iowa's Legal Heritage* (Iowa State University Press, Ames, 1995).

26 Max Boot "Why can't our political system address our biggest problems? Blame the Founders" *The Washington Post* (online ed, Washington DC, 14 September 2021).

27 Jill Lepore *These Truths: A History of the United States* (revised ed, WW Norton & Co, New York, 2019) at 34.

and municipalities could vote. There were many rotten or pocket boroughs where very few voters or local grandees controlled the result. The middle class were agitating for the vote.

The political struggle to achieve an extended franchise in 1832 was long and involved. One of the bitterest opponents was the Duke of Wellington, the victor at the Battle of Waterloo and a Prime Minister, who thought the class of English gentlemen would not last long afterward.²⁸ The electorate was 435,000 before the 1832 Act and 632,000 after. Professor Dahl calculated that this increased the percentage of adult males who could vote from 4.4 per cent to 7.1 per cent.²⁹ Broadening eligibility to vote in parliamentary elections in Britain took place in slow steps over nearly a hundred years. Not until 1928 did all women get the vote.³⁰ In New Zealand all males could vote from 1879 and all women from 1893. The writer recollects that at secondary school in New Zealand he was taught British history by an Oxford University graduate who told us he had enjoyed two votes for elections to the House of Commons, one as an Oxford graduate and one where he lived. This plural voting was not abolished until 1948.

The 13 American colonies before the revolution enjoyed a measure of self-government through bicameral legislatures. The colonial charters were in writing and this fact made a fixed written constitution limiting government after the revolution not so strange as it would have been in Britain with its largely unwritten constitution.³¹ The franchise was far from universal.³² The British appointed a governor who remained powerful. It seems the main criterion for voting for the assemblies was a property qualification. There were no secret ballots in these elections. Voting appears to have ranged between 20 and 40 per cent of all adult males.

Clearly the aristocratic features of Britain, derived from a landed gentry that descended from feudalism, were not present in the American colonies. And after 1776 the colonies developed rapidly, adopting their own constitutions, and engaging in interesting political experiments, one of which was

28 Denis Richards and JW Hunt *An Illustrated History of Modern Britain* (Longmans, Green & Co, London, 1954) at 118–124.

29 Dahl *On Democracy*, above n 17, at 24.

30 Robert Blackburn *The Electoral System in Britain* (St Martin's Press, London, 1995) at 74–75; and David Lindsay Keir *The Constitutional History of Modern Britain since 1485* (8th ed, Adam and Charles Black, London, 1966) at 374.

31 Linda Colley *The Gun, the Ship and the Pen* (Profile Books, London, 2021) at 110–111.

32 There is a useful entry on Wikipedia: "Colonial government in the Thirteen Colonies" (9 July 2022) Wikipedia <www.en.wikipedia.org>. See also John Ferling *A Leap in the Dark: The Struggle to Create the American Republic* (Oxford University Press, New York, 2003) at 25: "The provincial governments were modeled on that at home, as governors and bicameral assemblies were minuscule versions of king and Parliament, and in the towns and counties sheriffs and justices of the peace were familiar figures, as they were in the English countryside."

to widen the franchise.³³ Democracy with universal suffrage in those days, however, was regarded as likely to produce rule by the mob. Nevertheless, it appears that male suffrage in the United States was by that time expanding:³⁴

... the rise of Jacksonian democracy from the 1820s to 1850s led to a close approximation of universal manhood suffrage among white people being adopted in all states by 1856.

This suggests that popular sovereignty had weight as the United States developed.

Fighting the war of independence required cooperation and money and there were difficulties in securing both. General George Washington was at the heart of those problems, and he became the key person advocating a strong federal government. Securing a new governance framework proved to be controversial and protracted. The draft Articles of Confederation were sent to the states in 1777 and not ratified until 1781.

One key complaint of the revolutionaries was that the Government of George III and Lord North was too remote and out of touch. It had also become tyrannical in imposing new taxes. The colonies themselves were also remote from one another and communications between them took time. The point they had in common was that they were part of the British Empire. Forming a new polity from the disparate colonies did not prove to be easy. People who have power do not often easily surrender it. The development of a new political culture posed serious challenges. The colonies did not have a common identity.

The founding fathers were an extraordinarily gifted group of men and the literature upon their activities is vast. To cut a long story short, once the war had been won and a peace treaty with the British negotiated, it became evident that the Articles of Confederation did not supply enough power for the federal government, nor did they permit the development of a national political culture. The struggle to produce a replacement to the Articles of Confederation has been called the second American revolution spanning the years 1783 to 1789.³⁵

Under the Articles all power remained with the states except that expressly delegated to the United States. The idea of a national constitution that gave the federal government power over the states was strongly resisted. It is not possible to follow here all the political steps in the intricate dance that led to ratification. The process was not completed until 1791, when one examines the dates of ratification of the first 10 amendments. The constitution that emerged from Independence Hall in Philadelphia has been regarded as a miracle, not only because it emerged but also that it was ratified. Joseph Ellis

33 Lepore, above n 27, at 112–113.

34 "Universal manhood suffrage" (22 August 2022) Wikipedia <www.en.wikipedia.org>. See also Arthur M Schlesinger Jr *The Age of Jackson* (Little, Brown and Company, Boston, 1945).

35 Joseph J Ellis *The Quartet: Orchestrating the Second American Revolution, 1783–1789* (Random House Large Print, New York, 2015).

regards Washington, Alexander Hamilton, James Madison and John Jay as the quartet who turned the sentiment around.³⁶

The power of the executive in the new government was the critical issue. There was concern that having one president might develop into a new species of monarchy to which large amounts of blood and treasure had been recently devoted to ousting.³⁷ Although that view did not prevail there was nervousness about it. After tortuous negotiations the compromise framework that emerged was composed of a president who was the chief executive, and a bicameral legislature, composed of the House of Representatives and the Senate. The House of Representatives, elected every two years by the people of the several states, "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature", as Article I puts it. It goes on to say:

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

It is also noteworthy for present purposes that Article V provides that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate". However, it is true that provision itself could be amended.

Thus, the political deal arrived at meant the House of Representatives was composed of elected representatives in proportion to the population, whereas the Senate composition retained state sovereignty by ensuring that each state had two senators regardless of its population. Ellis characterises this as a hybrid, "part confederation and part nation".³⁸ This, he says, meant "an ever-shifting political dialogue that, like history itself, was an argument without end".³⁹ So the new arrangement was partly "national and partly federal leaving the all-important sovereignty question inherently ambiguous".⁴⁰ And so it remains. It was the best arrangement obtainable at the time. Such a hybrid which is neither majoritarian nor proportional may suffer from the weaknesses of both.

The issue that must be faced by Americans is whether they can go on this way. The philosopher of the American Revolution, Thomas Jefferson, by 1816 did not think so. The United States

36 Ellis, above n 35.

37 Alexander Hamilton, James Madison and John Jay *The Federalist: A Commentary on the Constitution of the United States* (Robert Scigliano (ed), Random House, New York, 2000) at 429–430. Federalist No 67 by Alexander Hamilton complained of misrepresentation in the public discussion of the office "as the full-grown progeny, of that detested parent [the monarchy]". See also Edward S Corwin *The President: Office and Powers 1787–1957* (4th ed, New York University Press, New York, 1964) at 3–30.

38 Ellis, above n 35, at 285.

39 At 260.

40 At 224.

Constitution was not too sacred to be touched and as things changed he thought "institutions must ... keep pace with the times".⁴¹

It is worth pausing for a moment to consider Jefferson, a founding father, extraordinarily well-read and politically experienced in the Virginia House of Burgesses. He was something of an aristocrat in American terms, a large landholder with slaves. He was very clever with a wide range of intellectual interests, a wide education at William and Mary in Williamsburg and then a long legal education with a leader of the Virginia Bar, George Wythe. He then returned to Monticello, near Charlottesville, to tend his estates and practise law. Later he established the University of Virginia and even designed the memorable precinct known as the Lawn, with student accommodation, and the Rotunda.⁴²

He drafted the Declaration of Independence asserting that people were created equal, "endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness". This was a statement of political belief with a strong democratic base. Jefferson was a democrat with a strong agrarian bias. Jefferson was in favour of a greater element of democracy and his biographer found three dominant themes running through his philosophy as a revolutionary: democracy, nationality and enlightenment.⁴³ He apparently thought that a rebellion every 20 years was a good thing. That seems to be going too far, but periodic stocktaking and review of the machinery would seem desirable. Constitutions should be remade regularly.⁴⁴ Jefferson was the inspiration for American democracy.

Alexis de Tocqueville, the French analyst who closely studied the United States during a nine-month trip, publishing in 1835 and 1840 two volumes entitled *Democracy in America*, thought democracy was a salient American characteristic. He sensed an American passion for equality. The editors of a recent edition say the book "is at once the best book ever written on democracy and the best book ever written on America".⁴⁵ One observation quoted indicates the nature of the American democracy as he saw it: "The social state of the Americans is eminently democratic. It has had this character since the birth of the colonies; it has it even more in our day."⁴⁶

41 Merrill D Peterson *The Portable Thomas Jefferson* (Penguin Books, New York, 1975) at 558–559.

42 Merrill D Peterson *Thomas Jefferson and The New Nation: A Biography* (Oxford University Press, New York, 1970) at 961–988. When I taught at the University of Virginia, I walked through the precinct every day to the old Clark Hall. That then housed the law school.

43 At 46.

44 Richard Hofstadter *The American Political Tradition and the Men Who Made It* (Alfred A Knopf, New York, 1957) at 24 in which Jefferson is characterised as the aristocrat as democrat.

45 Alexis de Tocqueville *Democracy in America* (Harvey C Mansfield and Delba Winthrop (eds, translators), University of Chicago Press, Chicago, 2000) at xvii.

46 At 46.

It seems difficult to justify the disparity of populations in the representation in the Senate as being democratic by modern standards, however compelling it was in 1776. An approach based on equality of voting power among voters would produce a different outcome. An even more remarkable feature to outside eyes lies in the fact that notwithstanding the malapportionment of the Senate it is further exaggerated by the institution of the filibuster, being prolonged speech-making in the Senate intended to delay or stop a legislative proposal. How that can be justified seems quite surprising to democrats in other countries. Frequently the majority does not rule in the United States.

Obviously at the time it was ratified the constitution could not have been ratified had the original view of the quartet prevailed. As it was, the ratification struggle was hard enough. The arguments advanced to ratify were contained in the Federalist Papers published in the newspapers. Madison later produced the Bill of Rights amendments that helped get ratification over the line.

Federalist No 51, which contains the famous passage "If men were angels, no government would be necessary", concludes:⁴⁷

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

It goes on to argue that the people are the primary control on the government, but that "experience has taught mankind the necessity of auxiliary precautions".⁴⁸ The real point here is that the auxiliary precautions have prevented action on many issues a majority of people favour, for example increased gun control. Few if any other democratic countries permit such access to firearms as the Americans do. Why it persists given the continuing carnage it causes seems hard to understand to outsiders. A Pew Research Center survey in 2019 showed that 60 per cent of Americans thought gun control laws should be stricter.⁴⁹ Why should that majority not prevail on the issue? A recent set of changes agreed by Congress in 2022 goes only a small distance to curb the problem.⁵⁰

History shows that it is possible to make the United States Constitution more democratic by amending it. Amendments adopted after the civil war, XIII, XIV and XV, rectified the effects of slavery, provided for the equal protection of the laws and gave citizens the right to vote. Amendment

47 Hamilton, Madison and Jay, above n 37, at 331.

48 At 332.

49 Katherine Schaeffer "Share of Americans who favor stricter gun laws has increased since 2017" (16 October 2019) Pew Research Center <www.pewresearch.org>. However, concerns over safety have apparently led more women and minorities to arm themselves, so gun sales are going up and support for stricter gun laws has dropped by five points: "Annette gets her guns" *The Economist* (London, 22 January 2022) at 33.

50 Emile Cochrane and Zolan Kanno-Youngs "Biden Signs Gun Bill into Law, Ending Years of Stalemate" *The New York Times* (online ed, New York, 25 June 2022). The new law prevents dangerous people from accessing firearms and increases investment in the mental health system.

XIX in 1920 ensured women were entitled to the vote. Amendment XXVI in 1971 gave people 18 years and older the vote. The time has now come, it is submitted, to go further.

V THE TRUMP ASCENDANCY

The presidency of Donald J Trump, its aftermath at the Capitol on 6 January 2021 and the ongoing activities of the Republican Party to assert the 2020 election was stolen without any credible evidence shocked many who inhabit democracies. The behaviour of Donald Trump in the presidency of the United States may have damaged its politics, possibly permanently.⁵¹ His methods are likely to have damaged the reputation of the United States in the eyes of many nations. A flurry of books has been published on American extremism.⁵²

The degree of polarisation and the inability to compromise do not bode well despite the relief provided by the electoral victory of President Joseph Biden. The level of support secured by Trump remains a brake on a return to orthodoxy and will test the methods by which government is conducted in the United States. It is sad that democracy has become a partisan issue—it is as if the country has split into two camps that believe different versions of reality. The United States has endured democratic breakdowns before and has overcome them. It can do so again.

Some believe Trump behaved as if he was imbued with the divine right of kings, which the American Revolution of 1776 was intended to stop.⁵³ Trump's Attorney-General took an extremely

51 Bob Woodward *Fear: Trump in the White House* (Simon & Schuster, London, 2018); Bob Woodward *Rage* (Simon & Schuster, London, 2020); and Michael Wolff *Fire and Fury: Inside the Trump White House* (Henry Holt & Co, New York, 2018). The tendencies that found their expression in the Trump administration have been building in the United States for some years: see Thomas Frank *What's the Matter with America? The Resistible Rise of the American Right* (Secker & Warburg, London, 2004); and Ezra Klein *Why We're Polarized* (Profile Books, London, 2020). Earlier developments are also clear from former President Obama's recent memoir *A Promised Land* (Viking, New York, 2020) vol 1 at 403–407; Lepore, above n 27, at 718–781, which gives a chilling account of the forces that culminated in the election and presidency of Trump; and Timothy Snyder *On Tyranny: Twenty Lessons from the Twentieth Century* (The Bodley Head, London, 2017). For a review of the most recent literature see Adam Gopnik "Are today's dictators different?" *The New Yorker* (New York, 23 May 2022) at 56.

52 "Fear and loathing: Assessing the threat from America's far right" *The Economist* (London, 12 December 2020) at 75; and Francis Fukuyama *Liberalism and its Discontents* (Profile Books, London, 2022). See also Francis Fukuyama "Liberalism and its Discontents: The Challenges from the Left and the Right" *American Purpose* (online ed, 5 October 2020). Much of what is said in this segment comes from the author's reading of *The New York Times* and *The Washington Post*. Correspondence with law professors in the United States has also been very helpful. To provide a citation for every point seems unnecessary since most of the facts can be derived from the internet.

53 In 1787 there were discussions about the dangers of George Washington becoming a monarch. See also Andrew Cohen "First a strongman, now a king – Donald Trump has become America's modern monarch" *The Globe and Mail* (online ed, Canada, 7 February 2020).

generous and unduly wide view that everything the President did was constitutional.⁵⁴ Trump has a reputation for telling lies. Indeed, he was himself the origin of much of the "fake news" about which he fulminated.⁵⁵ He continued to lie after the polls closed. Bigotry, narcissism, deceit and divisiveness, contempt for women and civil rights are the charges most frequently laid against him.⁵⁶

White supremacy was encouraged again in America, notably with the "Unite the Right" rally in Charlottesville in 2017. 152 years after the end of the civil war that stopped slavery, and long after the Civil Rights Act of 1964 and the Voting Rights Act of 1965—great reformist pieces of legislation—were enacted by Congress, it looked as though efforts might be made to return to the discrimination reimposed in the south after reconstruction.⁵⁷ A tendency to encourage belief among his supporters in conspiracy theories was a conspicuous feature of Trump's political behaviour. Trump persisted in asserting, contrary to all the evidence, that he won the 2020 election and he deliberately stirred up his political base to support these unverified assertions. He continued long after to engage in this discredited argument at large political rallies.

More than 60 lawsuits relating to the election were dismissed in a variety of state and federal courts. The Supreme Court of the United States refused to intervene in cases involving the critical issue to Trump: the lack of restrictions on voting by mail.⁵⁸ The suspicion was that he set out in advance of the election consciously to discredit the electoral process, especially voting by mail brought on by COVID-19, in the hope he could challenge the results later and thus remain in power. These developments damaged the rule of law in the eyes of many people. The culmination occurred in the effort the President made on 6 January 2021 to organise a rally in Washington DC and urge his supporters to march upon the Capitol Building where the Senate and the House were then considering the certification of the election results from the Electoral College.⁵⁹

54 Tom Hamburger "How William Barr, now serving as a powerful ally for Trump, has championed presidential powers" *The Washington Post* (online ed, Washington DC, 16 May 2019).

55 Glenn Kessler "Trump made 30,573 false or misleading claims as president. Nearly half came in his final year" *The Washington Post* (online ed, Washington DC, 23 January 2021).

56 "The Talk of the Town" *The New Yorker* (New York, 5 October 2020) at 10–11 and 11–16.

57 It is as if the doctrine of concurrent majorities of John C Calhoun, the redoubtable supporter of slavery, has a new lease of life: Hofstadter, above n 44, at 85.

58 "Current Litigation" (30 April 2021) American Bar Association <www.americanbar.org>. This is the most helpful source of the disposition of the cases that reached the Supreme Court. No attempt will be made to cite the many decisions of other state and federal courts.

59 Philip Rucjer and Carol D Leonnig "'I Alone Can Fix It' book excerpt: The inside story of Trump's defiance and inaction on Jan 6" *The Washington Post* (online ed, Washington DC, 15 July 2021). See also Luke Mogelson "The Storm: In the weeks before the assault on the Capitol, the President and his supporters kept stoking paranoia and rage" *The New Yorker* (New York, 25 January 2021) at 33–53.

The mob stormed the Capitol and broke in. Proceedings were suspended. People died. Order was not restored for several hours. When business resumed the results were certified and Vice President Pence, who was presiding in the Senate, refused to heed requests from Trump to overturn the declared results. These actions led to the impeachment of Trump for the second time in his administration and calls to deploy the 25th Amendment of the Constitution to suspend him from office on the ground that what he had done demonstrated that he was "unable to discharge the powers and duties of his office".⁶⁰ This was not agreed by Vice President Pence and could not therefore proceed. The President was widely accused of promoting a riot and insurrection. His behaviour and actions remain under criminal investigation by the Department of Justice.

The House of Representatives voted on 13 January 2021 to impeach the President for the second time.⁶¹ The National Guard was called out, substantial efforts were made to stop another mob invasion and similar steps were taken to protect state legislatures and official buildings. Big deployments of trained military ensured a peaceful transition of power on 20 January 2021. The inauguration ceremony signalled a return to the normal conventions and administrative practices of American democracy. The message called for national unity and a commitment to democracy with a recognition of its fragility.⁶² More than 18 months later it is evident that national unity has not been achieved and divisions have not healed.⁶³

It later emerged that behind-the-scenes groups had been combining to take steps to protect the election through a highly organised voter protection programme. They were well funded and their extensive efforts in combatting the challenges to the election results were effective.⁶⁴ The process of impeachment in the United States Constitution is based on the British practice that was common before American independence, but which fell into disuse in Britain not long after the revolution and for good reason.⁶⁵

As an instrument of accountability, the mix of political advantage and legal principle makes impeachment unmanageable. Trials are better conducted in courts. After a trial in the Senate, Trump

60 Chris Cameron and Mike Ives "Trump, muted and isolated, faces the threat of impeachment next week" *The New York Times* (online ed, New York, 9 January 2021).

61 Noah Weiland "Impeachment Briefing: Trump Is Impeached, Again" *The New York Times* (online ed, New York, 13 January 2021).

62 Peter Baker "Biden Inaugurated as the 46th President Amid a Cascade of Crises" *The New York Times* (online ed, New York, 20 January 2021).

63 It should be noted that this article was completed before the 2022 mid-term congressional elections.

64 Molly Ball "The Secret History of the Shadow Campaign That Saved the 2020 Election" *Time* (online ed, New York, 4 February 2021).

65 I taught a short course on impeachment at Iowa while President Clinton was undergoing an impeachment trial. It seemed to me then the House Managers in the Senate made the mistake of conducting it as a political trial and did not concentrate on the narrow forensic issues necessary to secure a conviction.

escaped impeachment by a vote of 57 to 43, thus falling short of the two-thirds majority required for conviction. Seven Republican senators voted for conviction. Prime ministers in Westminster systems have no such protection from a majority vote on a no-confidence motion or removal by elected members of the governing party, as illustrated by the resignation of Boris Johnson as Prime Minister of the United Kingdom in July 2022.⁶⁶

Impeachment was not the end of the investigations into the events of 6 January 2021. The House of Representatives set up an investigation which has continued for more than a year. The hearings have been dramatic in casting light on what happened and what role Trump played at the time. The activities of groups like the Proud Boys were investigated and charges for serious offences against individuals have been brought in the courts and they will continue for a long period. Stephen K. Bannon defied a subpoena from the Committee and was convicted on 22 July 2022 of two counts of contempt of Congress. The Committee is sharing with the Justice Department the evidence it has accumulated to help with criminal prosecutions.

Trump aides gave evidence to the Committee of a type highly damaging to Trump and suggested that he had encouraged the riot. Trump failed for a long period to call his supporters off. He resisted efforts by his staff to get him to act in that regard.⁶⁷ What consequences the hearings will have and what legal steps will emerge is unknown at the time of writing.⁶⁸ It seems clear however that efforts to cover up the conduct and move on have failed.

Developments within the media and social media loom large in the Trump presidency. Trump made "tweeting" on Twitter a prime instrument of government communication. Many of the social media platforms banned him from access after his actions on 6 January; these included Facebook, Twitter, YouTube and a number of other digital platforms.⁶⁹ But for most of his presidency, Trump used social media to attack people, to provide false information and encourage conspiracy theories. The existence of these digital platforms and their effects upon democratic politics is an issue that appears to require regulatory attention.

66 "The parable of Boris Johnson" *The Economist* (London, 22 January 2022) at 70. For a summing up see William Davies "The Seduction of Declinism" (2022) 44(15) *London Review of Books*.

67 Maggie Haberman "Sarah Matthews witnessed efforts by Trump aides to get him to act on Jan 6" *The New York Times* (online ed, New York, 21 July 2022). See also Annie Karni and Maggie Haberman "In Jan 6 Hearings, Gender Divide Has Been Strong Undercurrent" *The New York Times* (online ed, New York, 23 July 2022) that describes the strong efforts by Republican Congresswoman Liz Cheney to dig down into the details.

68 Charles M Blow "We Can't Afford Not to Prosecute Trump" *The New York Times* (online ed, New York, 24 July 2022).

69 David Alba, Elle Koese and Jacob Silver "What Happened When Trump Was Banned on Social Media" *The New York Times* (online ed, New York, 7 June 2021).

Another issue relates to the nature of the media in the United States. In politics now with Fox News it appears truth is often the first casualty.⁷⁰ Fox News contains blatant propaganda. That Sean Hannity can be paid USD 25 million a year in 2020 seems to be a sad example of market forces.⁷¹ When I taught defamation law in the United States I had to deal with the fairness doctrine of the Federal Communications Commission, or as Nicholas Johnson from Iowa put it in the title to his book: *How to talk back to your television set*.⁷² There is no fairness doctrine now. In a recent essay in *The New York Times* Rebecca Solnit asks the question "Why Republicans Keep Falling for Trump's Lies".⁷³

One serious consequence of the Trump presidency from the point of view of a democratic future lies in his use of rhetoric to inflame a mob by repeating lies over and over again. Since he occupied the highest office in the land, many people believed him. The effort to undermine democracy by storming the Capitol has caused many to turn upon Trump. Ten Republican members of the House of Representatives voted for his impeachment. While there has been an atmosphere of authoritarianism from the beginning of the Trump administration, it developed into a serious attempt to change the result of the election and conduct something in the nature of a coup d'état based on conspiracy theories. The idea was that the government of the United States lacked legitimacy. This tendency could lead to something approaching fascism if it prevails. An American historian has written: "Post-truth is pre-fascism, and Trump has been our post-truth president."⁷⁴ Without agreement about basic facts, citizens cannot form a civil society or maintain vital institutions. The development also illustrates how, over time, an atmosphere can be created that will allow democratic practices and procedures to be discredited and fade away.

The response of the United States to COVID-19 did not protect its citizens adequately.⁷⁵ For the President to deny the science, attack his advisers and encourage people to attend his rallies without

70 Brian Stelter *Hoax: Donald Trump, Fox News and the Dangerous Distortion of Truth* (One Signal Publishers/Atria, New York, 2020).

71 "Profile: Sean Hannity" (4 June 2020) Forbes <www.forbes.com>. See also Hayley C Cuccinello "Trump Bump: How Sean Hannity Earned \$36 Million This Year" *Forbes* (online ed, United States, 16 July 2018). In 2020 Hannity dropped from the number one rated star on Fox News for the first time falling behind Tucker Carlson. He remains however the highest paid star on Fox News.

72 Nicholas Johnson *How to talk back to your television set* (Little, Brown and Company, Boston, 1970). Nicholas has been an FCC Commissioner.

73 Rebecca Solnit "Why Republicans Keep Falling for Trump's Lies" *The New York Times* (online ed, New York, 5 January 2022).

74 Timothy Snyder "The American Abyss: A historian of fascism and political atrocity on Trump, the mob and what comes next" *The New York Times* (online ed, New York, 9 January 2021).

75 Lawrence Wright "The Plague Year: The mistakes and the struggles behind America's coronavirus tragedy" *The New Yorker* (New York, 4 January 2021) at 22–59.

wearing masks was not a good example of leadership. Nowhere in the world has this global pandemic been worse than in the United States, and the failure to vaccinate a higher proportion of the population seems politically motivated.

Trump combined the power of the presidency with his personal businesses and did not separate the two. He refused to make his tax returns publicly available as is the custom. It seems after investigations by *The New York Times* that this is because, as wealthy as he says he is, he has paid little tax.⁷⁶ More than a few of Trump's enablers and assistants have been indicted and a number imprisoned.

Trump's trade policies damaged the World Trade Organization by his refusal to appoint appellate judges, thereby disabling the rules-based system. International treaties, cooperation and the rules-based system of international law were not promoted, and the United States withdrew from a number of treaties.⁷⁷ The attack waged on the International Criminal Court by the Trump administration, including the imposition of sanctions on some people associated with the Court, was an attack on the rule of the law.⁷⁸

The degree of political polarisation remains high. The Black Lives Matter demonstrations and the reaction to them signals the need for significant reform of policing in the United States. Trump failed to address important policy issues in any systematic way. The fact is that Trump remains a big political presence and remains popular. He received 10 million more votes for president in 2020 than he did in 2016. The appeal he has to American voters is undeniable and persists. The long-term consequences of the situation cannot be predicted at the time of writing. But it seems likely to alter American politics in important ways.

How far President Biden can remedy the problems and advance a positive agenda on the policy front seems in the balance at the time of writing. Two developments will help determine the future: the results of the mid-term elections in November 2022 and whether Trump decides to run again. These will be important indicators of where American democracy is travelling. The Republican Party has gone along with most of Trump's methods. One big Republican effort has been to try to prevent

76 "President Trump's Taxes: A Reader's Guide" *The New York Times* (online ed, New York, 31 October 2020).

77 Jessica T Mathews "Losing No Time" *The New York Review of Books* (New York, 27 May 2021) at 10 reported that President Biden has rejoined a number of international organisations and agreements Trump had walked away from: the Paris Climate Accord, the United Nations Human Rights Council, the World Health Organization, the New Start Arms Control Treaty and the Trans-Pacific Partnership Agreement (TPP). Biden has also made efforts to repair alliances and open negotiations with Iran on nuclear issues.

78 John Bellinger III "The Trump Administration's Approach to International Law and Courts: Are We Seeing a Turn for the Worse?" (2019) 51 *Case W Res J Intl L* 7. Bellinger is a former Legal Adviser to the State Department under President George W Bush.

people from voting by erecting barriers to suppress the vote and then not count it.⁷⁹ Trump's assertions on postal voting lack any factual basis despite their constant repetition. Constant repetition of big lies does not make them the truth, but it does sow the seeds of mistrust in the minds of many people. The facts are that the election was not close—Biden won the popular vote by more than seven million and secured a 306–232 majority in the Electoral College.

The erosion of the rule of law and the politicisation of the judiciary have been damaging and that tendency has been going on for some years.⁸⁰ What the Senate under the then majority leader Senator Mitch McConnell achieved for the Republicans under Trump were numerous conservative judicial appointments and tax cuts. Three new Supreme Court judges ascended the bench. The conservative majority on the Supreme Court voted to overturn the long-standing 1973 abortion law precedent in *Roe v Wade*⁸¹ in *Dobbs v Jackson Women's Health Organization*.⁸² They held the Constitution does not confer a right to abortion. This set off a political furor, the results of which remain uncertain. Polling shows that a majority favoured a more liberal abortion law than permitted by the Supreme Court. Considerable uncertainty, confusion and argument within the states will result.

The former President remains a significant presence in American politics. The Republican Party seems interested in right-wing ideology. The influence of Trump seems to be a principal issue with which the Party is concerned. There are strong indications that Trump will contest the presidency again in 2024. If that occurs two scholars predict it will produce a shattering constitutional crisis.⁸³ Under § 3 of the 14th Amendment it will be argued that Trump is barred from holding the office again, as he engaged in 2021 in an insurrection against the Constitution after swearing to uphold it. Such a development would put in issue the stability of the United States.

Anger and the propagation of conspiracy theories seems alive. The mainstream moderate Republicans of yesteryear like Nelson Rockefeller, John Lindsay and Congressman Jim Leach from Iowa appear to be an extinct political species. Further, at the time of writing a Trump resurgence is not seen as a losing strategy. The Party maintains the support of a large share of the electorate, perhaps

79 Spencer Bokart-Lindell "The Voting Suppression Tipping Point" *The New York Times* (online ed, New York, 29 October 2020).

80 Steven M Teles *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton University Press, Princeton, 2008). Despite the politicisation of judicial appointments, it is encouraging to note that this did not result in the numerous Republican appointed judges who considered Trump's challenges to the 2020 election results misapplying the electoral law.

81 *Roe v Wade* 410 US 113 (1973).

82 *Dobbs v Jackson Women's Health Organization* 597 US (2022).

83 Bruce Ackerman and Gerald Magliocca "Biden vs. Trump: The Makings of a Shattering Constitutional Crisis" *Politico* (online ed, United States, 1 February 2022).

about half. The tide for Trump is not going out. The Republican Party seems to believe Trump is fit to occupy the office of president again.⁸⁴

This point is reinforced by the Republican National Committee officially declaring that the 6 January attack on the Capitol and its prelude was a "legitimate political discourse".⁸⁵ Republicans Liz Cheney and Adam Kinzinger who condemned it were censured. There is now serious reason to believe that a radical plan for Trump's second term has been constructed.⁸⁶ The most recent evidence of Trump's wrongful behaviour is a detailed investigation of his battle with the military to have them help with his effort to hang on to office.⁸⁷ It was a close-run thing. Then there was a federal search warrant executed over his residence in Florida.⁸⁸

How can it be that the United States has come to this? Issues important to the voters are not adequately addressed. Poor political behaviour has been tolerated. There is a drift away from democracy. The rule of law is threatened and current developments are inimical to future advances in democracy in the United States.

VI WHAT CAN BE DONE?

It appears that an agenda for constitutional and political reform needs to be developed in the United States. As a New Zealander with a background in constitutional reform I set out my view on what an agenda for reform could look like in the United States. No doubt the response will be: "it is impossible". But a place to begin has to be found. If efforts to change are not made what is the counterfactual? Probably it will be increasing democratic decline. Small democracies may have something to offer here. How small democracies deal with constitutional issues may carry some weight in discussions for the future of democracy globally.

A robust but small democracy, such as New Zealand, would be at risk should the developments concerning social media and conspiracy theories take hold and become the norm. Historically, we have been influenced by American culture and institutions. I used to call the New Zealand system

84 "The Republicans are still Donald Trump's party, and they can still win" *The Economist* (London, 1 January 2022) at 16. In an editorial in the same issue at 9 the newspaper accuses the Republican Party of an alarming infatuation with Trump.

85 Jonathan Weisman and Reid J Epstein "GOP Declares Jan 6 Attack 'Legitimate Political Discourse'" *The New York Times* (online ed, New York, 4 February 2022).

86 Jonathan Swan "A radical plan for Trump's second term" (22 July 2022) *Axios* <www.axios.com>.

87 Susan B Glasser and Peter Baker "Inside the war between Trump and his generals" *The New Yorker* (New York, 15 August 2022).

88 Glenn Thrush, Maggie Haberman and Ben Protess "Trump Search Said to Be Part of Effort to Find Highly Classified Material" *The New York Times* (online ed, New York, 11 August 2022); and James Politi, Courtney Weaver and Peter Wells "Donald Trump's Mar-a-Lago residence raided by FBI agents" *The Financial Times* (online ed, United States, 9 August 2022).

"Wash-minster" because of the American influences, particularly in our extensive development of parliamentary select committees.

The New Zealand democracy has benefited from the mixed-member proportional representation system for electing Members of Parliament. New Zealand has benefited from the complete absence of gerrymandering, which is legally prohibited, and electoral boundaries are drawn up by an independent Representation Commission. Elected people cannot control it. The institutions and practices of democracy are fragile and easily lost. Think of the three-week-long occupation of the grounds of Parliament in New Zealand and the law school grounds in February and March 2022. Compare that with the attack on the Capitol in Washington DC on 6 January 2021.⁸⁹ With the new media such events travel and are easily organised.

- (1) The United States republic needs to commit itself to democracy and combat the drift away from it that has become evident. Steps can be taken to make the United States more democratic than it is currently. Abolishing the Electoral College and its arcane machinery and substituting the popular vote across the whole of the United States as the means of determining who shall be president would be a sound beginning. Otherwise the risk is that a candidate could lose the popular vote and yet still win in the Electoral College. It has occurred in the past, and that raises serious issues of democratic legitimacy.
- (2) Adopting a more proportional electoral system would unlock many possibilities for democracy in the United States. Electoral systems have an important influence on political behaviour. It would improve both accountability and representation. It would produce a system with more than two political parties. Such systems have been successful in many democracies. This will allow decisions to better reflect the state of public opinion at elections than does the first-past-the-post plurality method of determining elections. The number of senators should be proportional to the population of each state. The functioning of a federal system does not depend on each state having two senators. It should be noted, however, that no state can be deprived of its equal representation in the Senate without its consent. Thus, amendment would be necessary to Article 5 before such a change could be brought about. That Wyoming with less than a million people should have the same number of senators as California with nearly 40 million cannot make sense now. And the filibuster in the Senate should go. It is simply another weapon against the majority.
- (3) Efforts should be increased to educate people on how the system of government works; civics needs to be taught more extensively so people can understand how the system works and in whose interests. Efforts should be made to increase civic knowledge and encourage more people to vote. Many seem at present to believe they cannot make any difference so

89 Geoffrey Palmer "Peace, order, and police powers in demonstrations" *Stuff* (online ed, New Zealand, 22 February 2022).

they just do not bother. I recall bumper stickers in the United States: "Don't vote, it only encourages them". Perhaps it is because there are too many elections. A four-year term for the House of Representatives and for the Senate would stop the constant electioneering that prevails in American politics. Despite all the voting nothing much changes. Determined efforts to prevent gerrymandering should be introduced by having the boundaries set by truly politically independent people. Getting rid of primary election contests would also be helpful.

- (4) The insidious influence of money and the raising of money for United States elections needs to be better regulated. The consequences of the United States Supreme Court decision in *Citizens United v Federal Election Commission* seem to have had a baleful effect on the democratic process.⁹⁰ Allowing corporations to spend without restriction for political campaigns fuels special interests and vested interest lobbying. Further regulation is necessary.
- (5) In the long term a means must be found of reviewing and modernising the United States Constitution to ensure it is fit for purpose in the 21st century. Policy paralysis and inaction will not solve the problems that now beset the world. The burst of creativity present in 1787 needs to come again or the greatness that was once the United States will wither away.
- (6) People need to feel a sense of trust and commitment toward their democratic institutions and see that the government is working in their interests. When the disparities of wealth are as vast as they are in the United States it can be readily understood why many are not imbued with a sense of belonging. That needs to be turned around and social cohesion fostered.
- (7) It would be desirable to change the process for selecting judges of the Supreme Court to remove politics from the process. The polarisation that has occurred in this regard threatens the legitimacy of the whole legal system and the integrity of the rule of law. The way things are now, the Supreme Court is beginning to behave as if it is a political branch of government. Further, requiring judges to retire at the age of 70 would be appropriate. Furthermore, the growth of the strange but modern doctrine of "originalism" among Supreme Court justices seems to be just another way of ensuring that new policy problems can be ignored if the founding fathers had not thought of them.

None of us can see the future, but it seems a fair bet that some remedial action is required to rescue the American republic from slipping into a slough of political despond, when it used to be a beacon of light.

⁹⁰ *Citizens United v Federal Election Commission* 558 US 310 (2010). The writer remembers attending a law firm in Washington DC some years ago in which there were large numbers of members of Congress who were engaged in raising money from donors. I often wondered whether they spent more time raising money than doing their job as legislators.