

FOREWORD

FIXING AMERICA'S BROKEN DEMOCRACY

by
*Erwin Chemerinsky**

Democracies are there until they are not. No form of government lasts forever. The events of late 2020 and early 2021 caused many to realize the fragility of American democracy and how easily it could have been lost. What if Republican election officials or Republican legislators in Georgia and Michigan and Pennsylvania gave those states' electoral votes to Donald Trump? Or what if Mike Pence, as Vice President, had ruled to make Trump the winner, as John Eastman outlined and Trump insistently urged? The core feature of democracy—that elections decide who holds power—would have ended in the United States after 237 years.

If just 42,921 votes had changed in Arizona, Georgia, and Wisconsin, Donald Trump would have been reelected President despite losing the popular election by almost seven million votes. The Republicans then would control the Senate as well. It would be impossible to regard the United States as a democracy in any meaningful sense if the losing political party controlled the government yet again.

Everyone breathed a sigh of relief and the media was filled with self-congratulations about how the guardrails of democracy held. But I fear that this has resulted in overlooking the real threats to democracy that have developed over the last half century. The existential danger to democracy remains, even though Trump is gone from the White House.

The events of January 6 were not within the realm of the acceptable for a democracy. As the hearings of the House of Representatives January 6 Committee has shown, there was an effort at an armed insurrection at the Capitol. This, thankfully, never has occurred before in American history. There was a concerted effort

* Dean and Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley School of Law. President, Association of American Law Schools, 2022.

by the President of the United States to undermine and overturn the results of the November 2020 election, including encouraging the armed assault on the Capitol. To this day, Donald Trump claims the election was stolen and repeated polls shows that 70% of Republicans believe this,¹ despite the total lack of evidence to support this claim. This, in itself, makes one worry about the future and fate of American democracy.

I never believed I would say this, but the very survival of American democracy is in danger. The Trump presidency, the events after the November 2020 election, and the insurrection at the Capitol on January 6, all revealed the fragility of American democracy. And nothing that has occurred since has allayed that threat.

In response to all of this, in May 2021, the Association of American Law Schools hosted a two-day conference on rebuilding American democracy. The leadership of the AALS—Executive Director Judith Areen, President Vincent Rougeau, Immediate Past President Darby Dickerson, and I as President-Elect—felt it was vital that we convene a conference in response to the unprecedented Trump administration and the events following the November 2020 election. The AALS plays many functions, but one is as a scholarly society within legal education. We believed that convening this conference was enormously important and we hoped for a chance to make a difference.

The first day was inspired by a magnificent book by Bob Bauer and Jack Goldsmith, *After Trump: Reconstructing the Presidency*.² The second day focused on the electoral system and voting. The symposium featured top experts on both topics and had terrific presentations and discussions. After the symposium, I was both frightened and encouraged. The presentations were unsparing in revealing the extent of the threat to democracy, but they also offered concrete solutions for how to fix a broken system.

I am grateful to the Lewis & Clark Law Review, and especially Victoria Bejarano Muirhead, for their interest in publishing papers related to the symposium. The papers published in this issue of the Lewis & Clark Law Review include some that were presented at the AALS symposium. Also, this issue includes some that were not heard there, but that would have made a very valuable contribution to the discussion.

The excellent six articles that are published here, individually and collectively, make two crucial points. First, our system of government, including our election system, are dangerously flawed. Second, the defects can be fixed and each paper offers concrete steps towards a solution.

¹ Jon Greenberg, *Most Republicans Still Falsely Believe Trump's Stolen Election Claims. Here Are Some Reasons Why*, POYNTER (June 16, 2022), <https://www.poynter.org/fact-checking/2022/70-percent-republicans-falsely-believe-stolen-election-trump/>.

² BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* (2020).

As for the former, the papers focus on different aspects of what is broken. Professor David M. Driesen looks at an important aspect of the presidency: the power to remove heads of agencies and to install replacements without congressional approval.³ In a careful examination of the use of the removal power by Andrew Johnson, Richard Nixon, and Donald Trump, Professor Driesen demonstrates how presidents can remove top officials and then replace them with individuals who never received—or even could receive—Senate approval. Professor Driesen chillingly points out that this is how autocrats consolidated power in places like Turkey and Hungary.

Professor Michael Vitiello looks at the Trump presidency as not an aberration, but as a result of the direction of the Republican party over the last two decades.⁴ Professor Vitiello explains why Republicans reflect a minority view, but have been able to disproportionately control the federal government. He powerfully shows how this poses a serious threat to the long-term future of American democracy.

Other papers focus on flaws in the electoral system. Professor Edward P. Foley's paper shows how the current electoral system encourages the election of extremist candidates to both the House and the Senate, making it harder for moderates to get elected.⁵ He explains how this has contributed greatly to the deep political polarization that threatens American democracy.

Professor Joshua A. Douglas examines the undue deference given to the states in the 2020 election and how the courts failed to enforce constitutional requirements with regard to voting.⁶ This article is prescient in that since it was written the Supreme Court granted review in a case, to be heard in the Fall of 2022, on the “independent state legislature” theory.⁷ This is the idea that state legislatures have exclusive power as to elections, so that state courts could not enforce state constitutional requirements to constraint legislative actions. Professor Douglas's concerns about legislative control all apply with great force to what would be a radical change

³ David M. Driesen, *Making Appointment the Means of Presidential Removal of Officers of the United States*, 26 LEWIS & CLARK L. REV. 315 (2022).

⁴ Michael Vitiello, *Trump's Legacy: The Long-Term Risks to American Democracy*, 26 LEWIS & CLARK L. REV. 467 (2022).

⁵ Edward B. Foley, *Requiring Majority Winners for Congressional Elections: Harnessing Federalism to Combat Extremism*, 26 LEWIS & CLARK L. REV. 365 (2022).

⁶ Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 26 LEWIS & CLARK L. REV. 405 (2022); Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. 59 (2021).

⁷ *Moore v. Harper*, 868 S.E.2d 499 (N.C. 2022), *cert. granted*, 2022 WL 2347621 (June 30, 2022) (No. 21-1271); *Moore v. Harper*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/moore-v-harper-2/> (“Whether a state’s judicial branch may nullify the regulations governing the ‘Manner of holding Elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof,’ and replace them with regulations of the state courts’ own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a ‘fair’ or ‘free’ election.” (quoting U.S. CONST. art. I, § 4, cl. 1)) (June 30, 2022).

in our political system if the Supreme Court were to accept the independent legislature theory.

Mark Bohnhorst, Reed Hundt, Kate E. Morrow, and Professor Aviam Soifer discuss the grave threat to democracy posed by the way in which the president is chosen.⁸ Since 2000, twice the candidate who lost the popular vote became president of the United States and it almost happened two other times. The core of democracy is that the electoral winner takes office. These authors explain the many ways in which presidential elections are flawed and the threat to democracy from these defects.

Finally, President Nora V. Demleitner examines a continuing embarrassment of American electoral system: the disenfranchisement of those who have been convicted of felonies.⁹ She focuses especially on the Virginia experience. Keeping citizens from voting is inconsistent with democracy and it has a racially and politically discriminatory effect.

But these excellent articles go beyond identifying the serious defects in our system. Each offers concrete proposals for change. Professor Driesen suggests congressional legislation linking removal to the appointment of a successor confirmed by the Senate and argues persuasively why this would be constitutional. Professor Vitiello offers proposals for reforming the selection process for federal district court and court of appeals judges to decrease the likelihood of extremists being appointed and confirmed.

Likewise, the articles focused on the electoral system offer excellent avenues for change. Professor Foley proposes empowering the states to devise methods to ensure that the candidate with the most support gets elected to Congress as a way of decreasing the role of ideological extremists. Professor Douglas explains the imperative for judicial enforcement of the Constitution, state constitutions, and federal and state laws. The article by Mark Bohnhorst, Reed Hundt, Kate Morrow, and Professor Soifer offers concrete, practical steps to reform the election of the president to decrease the likelihood that the loser in the Electoral College will become President of the United States. And President Demleitner describes how the electoral system must be reformed to eliminate disenfranchisement of voters.

Reading the articles in this issue of the Lewis & Clark Law Review is both sobering and inspiring. These authors pull no punches in exposing the significant flaws in the American political and electoral system. Their indictments are searing and reinforce a sense of how much our democracy is in danger. But they are encouraging because they remind us that the problems are not hopeless. There are solutions that can make a real difference if only we can act to implement them.

This is legal scholarship at its very best and most important.

⁸ Mark Bohnhorst, Reed Hundt, Kate E. Morrow & Aviam Soifer, *Presidential Election Reform: A Current National Imperative*, 26 LEWIS & CLARK L. REV. 437 (2022).

⁹ Nora V. Demleitner, *Criminal Disenfranchisement in State Constitutions: A Marker of Exclusion, Punitiveness, and Fragile Citizenship*, 26 LEWIS & CLARK L. REV. 531 (2022).