

BOOK REVIEWS

THE US CONSTITUTION – A VERY SHORT INTRODUCTION

*David J. Bodenhamer (Oxford University Press 2018) pp 143
Jocelynn A. Scutt**

The Oxford University Press began its very short introduction series in 1995 and now, two decades into the 2000s, comprises some 500 volumes translated into more than forty-five different languages, covering ‘everything from Psychology and Philosophy of Science to American History and Relativity’. The aim of the series, says Oxford University Press, is to provide ‘a stimulating and accessible way into a new subject’ for readers unfamiliar with the topic. David Bodenhamer’s *The US Constitution – A Very Short Introduction* fulfils this aim, yet does far more than this and its title may imply.

David Bodenhamer has produced an impressive piece of scholarship. Comprising eight chapters, *The US Constitution* covers ‘The revolutionary Constitution’, ‘Federalism’, ‘Balance of powers’, ‘Property’, ‘Representation’, ‘Equality’, ‘Rights’ and ‘Security’ as well as ‘The future Constitution’ in a short ‘Epilogue’. Included, too, is an impressive list of ‘Further Reading’ along with a comprehensive compendium of ‘References’. These provide a good lead-in for readers who do wish to explore further. Particularly in the current climate of political turmoil and ignorance of the rule of law at the highest levels of the United States administration (and, one hesitates to say, ‘leadership’), the book and the resources contained in it are more than timely.

Moving back a pace for the moment, however, *The US Constitution* is of interest to the United Kingdom because the country prides itself on lacking a written Constitution, whilst it is equally of interest to countries with written Constitutions. For the latter, the book is of particular relevance where, as is so with Australia, the country’s Constitution is constructed with a direct United States’ influence. As Bodenhamer notes in his preface, ‘the US Constitution is the world’s oldest written Constitution’ albeit ‘its impact is as recent as today’s news’,¹ and this goes beyond the United States with its contemporary relevance being observed

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¹ David J Bodenhamer, *The U.S. Constitution – A Very Short Introduction* (OUP 2018) xix.

elsewhere. At the same time, as he implies, no other country (written Constitution or not) relies so much on, or invokes so often, the Constitution as a justification for supporting or decrying not only actions of government, but the conduct of private enterprise and individuals in their everyday lives.

That this document is so powerful a backstop and platform for present and future action is belied by its composition: the original United States Constitution comprised seven articles and 4,400 words. Nevertheless, it ‘established a framework for a national government ... allocat[ing] carefully prescribed powers among its branches and between national and pre-existing state governments...’² addressing the potential for creating new states, and ensuring a process for amendment. The latter has a contemporary relevance for the United Kingdom, in the light of the havoc, disunity, upset and dilemma unleashed by the 2016 referendum on whether to remain within the European Union (EU), or leave it.³

One of the most significant features of the US Constitution is its dedication to the separation of powers, with judicial, executive and legislative arms of government being distinct. Australia adopted this insofar as separation of the judicial arm is in issue, however adhered to the United Kingdom position whereby the executive and legislature are intertwined. For Americans, the United Kingdom’s original lack of separation of the three arms would be confounding, and most would be astonished that the present separation of the judiciary from the legislature is so recent.⁴ Bodenhamer’s chapter 3 ‘Balance of powers’ traverses well the struggle each arm of government has in the United States to take a pre-eminent role, one arm sometimes being more apparently so, at other times another. He points out that from the outset the struggle engaged the states and the Federal government, and the arms of the Federal government itself, with the Supreme Court and the President ‘seizing opportunities to define their own constitutional powers as equal to Congress’. Thus, *Marbury v Madison* (1803) provided the justices ‘with an early victory ... confirm[ing] the principle of judicial review’.⁵ However, the Civil War and Reconstruction brought about ‘a period of legislative dominance’, preceded by a short time of executive supremacy when President Lincoln engaged in wartime actions under his exclusive direction. This then led to a period of domination by the judiciary when, in consequence of ‘weak’ Presidents and the public’s dissatisfaction with a Congress perceived of as corrupt and

² Ibid.

³ See further Jocelyne A. Scutt, ‘Change the Constitution? Interpretation, (Mis) Calculation, Reaction and Wrongs Righted’ p 121.

⁴ See Andrew le Sueur (eds), *Building the UK’s New Supreme Court: National and Comparative Perspectives* (OUP 2004).

⁵ Ibid 37.

incompetent, the Supreme Court ‘filled the vacuum of power, establishing its role as the preeminent branch of the general government for the last three decades of the nineteenth century...’⁶

Bodenhamer draws attention to the fact that the Constitution is explicit in its definition of the powers of Congress, yet is ‘much less exact in outlining presidential authority’. The Constitution states simply that the executive power ‘shall be vested in a president of the United States of America’, but as *The US Constitution* observes, what this vesting clause actually means is ‘left unanswered’.⁷ Thus it is that Presidents George W Bush and Donald Trump may be seen as moving the role increasingly towards a reassertion of the ‘divine right of Kings’, in both cases a disturbing development. For Bodenhamer (and indeed for all Americans and the global community, one might add), ‘one of the most vexing questions of power in American constitutional history’ has been whether the vesting clause gave the President ‘inherent, unilateral authority to protect the safety and well-being of the nation’.⁸ Bodenhamer in this regard reflects upon the crisis generated by Watergate and President Nixon’s incumbency, with notions of an ‘imperial presidency’ and assertions of ‘absolute privilege and absolute immunity’ rejected by the Supreme Court in *United States v Nixon* (1974). President Nixon was not entitled to refuse access to the tapes which recorded his discussions with presidential aides H R Haldeman and John Erlichman.⁹ Readers may look forward to an updated volume in light of matters surrounding the Trump presidency and the current composition of the Supreme Court.

Chapter 5 ‘Property’ is particularly insightful in covering the constitutional provisions, legislative and executive action, and Supreme Court decision-making for a country that has capitalism and private property ownership at its heart. Having covered this question from the United States foundation, through the early days of railway development and earlier expansionism, Bodenhamer discusses The New Deal and President Roosevelt’s plans for economic recovery following the 1929 crash.¹⁰ He raises a matter connecting back to the balance or separation of powers issue covered in chapter 3: President Roosevelt’s plan to restructure the Supreme Court, consistent with article III of the Constitution. This effectively gives the President the power to gain judicial support by appointing more justices,

⁶ Le Sueur (n 4) 38.

⁷ Le Sueur (n 4) 39.

⁸ Le Sueur (n 4) 40.

⁹ ‘The Smoking Gun Tape’ (Watergate.info) <<http://watergate.info/tag/haldeman>> accessed 5 November 2018; *United States v Nixon* 418 US 683 (1974).

¹⁰ For a short, reflective history, see John Kenneth Galbraith, *The Great Crash – 1929* (Penguin Books/Pelican Imprint 1955, 1961).

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as Roosevelt sought to do, perceiving that the Court, as then composed, would not uphold his New Deal measures. In the event this restructure did not take place, due to the lack of popular support.¹¹ Further, this power is not constitutionally unbridled: any new Supreme Court appointments require the Congressional process of Senate Hearings, providing a possible check and balance where a President seeks to ‘stack’ the Court.¹²

The chapters on ‘Representation’ (ch 5), ‘Equality’ (ch 6) and ‘Rights’ (ch 7) are central to issues confronting the United States today. In 2020, the 100 year celebration of ratification of the Nineteenth Amendment granting women voting rights is a significant milestone in equal rights, representation and equality, and it is ironic that, as Bodenhamer remarks, war has been ‘important in crystallizing support for a more democratic Constitution’. This occurred with the Fifteenth Amendment (extending voting rights to African-American men after the Civil War), as it did with the Nineteenth Amendment (First World War), and later with the Twenty-sixth Amendment lowering the voting age to eighteen (Vietnam War).¹³ Today, rights and equality are under significant attack. Efforts are made by some states to curb voting rights, particularly for African Americans and racial and ethnic minorities.¹⁴ The rights of refugees and asylum seekers are under continuing assault, promoted by presidential efforts to bar entry to the United States on the basis of ethnic or national origin or religion.¹⁵

¹¹ Ibid 57.

¹² Although the 2018 Senate hearings resulting in acceptance of the nomination of Judge Brett Kavanaugh as an associate justice of the Supreme Court may bring into question the ‘check and balance’ principle: Committee on the Judiciary, ‘Judge Brett M. Kavanaugh – Nominee to Serve as an associate justice on the Supreme Court of the United States’ (*Hearings*) <<https://www.judiciary.senate.gov/kavanaugh>> accessed 19 November 2018.

¹³ Ibid 69–70.

¹⁴ See for example Common Dreams, ‘Federal Civil Rights Commission Finds Voting Rights Under Attack’ (Common dreams, 12 September 2018) <<https://www.commondreams.org/newswire/2018/09/12/federal-civil-rights-commission-finds-voting-rights-under-attack>> accessed 5 November 2018.

¹⁵ See National Archives, ‘2017 Donald Trump Federal Executive Orders’ (Federal Register) <<https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2017>> accessed 5 November 2018; National Archives, ‘2018 Donald Trump Federal Executive Orders’ (Federal Register) <<https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2018>> accessed 5 November 2018; ‘Explaining Trump’s Executive Order on Expanding Family Separation’ *New York Times* (20 June 2018) <<https://www.nytimes.com/2018/06/20/us/politics/family-separation-executive-order.htm>> accessed 5 November 2018.

Free speech, addressed in chapter 7 ‘Rights’, is today confronted in replication of George Orwell’s *Nineteen Eighty-Four* ‘New Speak’,¹⁶ with charges of ‘fake news’ filling the media and common in everyday conversation. This is a warning in light of Bodenhamer’s conclusion that free speech is a ‘bellwether for the expanded conception of rights’ under the Constitution.¹⁷ The Supreme Court’s decision in *Citizens United v Federal Election Commission* (2010), striking down congressional limits on campaign spending by corporations, groups and individuals despite this making it ‘easier for wealthy interests to drown out other voices’¹⁸ has played a part in the current offensive against rights. All this confirms the need for continuing vigilance in the struggle to ensure that government plays a role supportive of human, civil and political rights rather than undermining them. Bodenhamer recognises this in chapter 8 ‘Security’, in his observations on the role of the Constitution, the President, Congress and the Supreme Court in the ‘war on terror’ which has led to contemporary side-lining of rights formerly recognised as ‘given’.

In the brief ‘Epilogue’, Bodenhamer recognizes that the Constitution is ‘one constant in American history’, and as circumstances have changed, ‘so has the Constitution’.¹⁹ He concludes:

How this framework for government will evolve is uncertain, but ... it is once again facing serious challenges to its revolutionary legacy. Endless wars, an aggressive presidency, a gridlocked and hyper-partisan Congress, a sharply divided electorate, economic inequality, immigration, cybersecurity and privacy, and foreign interference in the nation’s democratic processes, among a host of other issues, have placed demands on government and on society that test its constitutional values.²⁰

Whether the 2018 mid-term elections and the renewed influx of Democrats into a formerly Republican dominated House of Representatives²¹ will make the difference some anticipate remains unknown. Quoting Benjamin Franklin’s remarks at the 1787 Constitutional Convention, Bodenhamer wonders whether

¹⁶ George Orwell, *Nineteen Eighty-Four* (Penguin Modern Classics 2013).

¹⁷ *Ibid* 102.

¹⁸ Orwell (n 16) 102.

¹⁹ Orwell (n 16) 123.

²⁰ Orwell (n 16) 124.

²¹ ‘US mid-term elections 2018 results’ *Financial Times* <<https://fig.ft.com/us-midterm-elections/>> accessed 19 November 2018.

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indeed power has been addressed successfully: does a rising or setting sun characterise the United States in its original and present form?

In response to the question: ‘Well, Dr Franklin, have you given us a republic or a monarchy?’ Benjamin Franklin replied: ‘A republic, if you can keep it.’²² Today, Bodenhamer concludes:

How Americans interpret the Constitution during unsettled and disturbing times makes Franklin’s challenge the most important one that the United States as a nation will ever face.²³

This small book provides both a foundation and insights into how this question may be answered.

²² US Constitution, ‘Speech of Benjamin Franklin’ (17 September 1787) <<https://www.usconstitution.net/franklin.html>> accessed 5 November 2018; Ibid 125.

²³ Ibid 125.