
PANEL I: IS DYSFUNCTION AN ILLUSION?

ON POLITICAL AND CONSTITUTIONAL DYSFUNCTION: REMEMBERING JAMES STOCKDALE

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INTRODUCTION

For argument’s sake, let us grant that American politics is unhealthy, maybe chronically so. What might this fact indicate about the U.S. Constitution? Would chronically dysfunctional politics signify a failed constitution? This is a threshold question of our Symposium, and the answer is a firm yes: political dysfunction is a form of constitutional failure. I will argue that this proposition is hard to deny. But for theoretical as well as practical reasons, it is not an easy proposition to affirm. This situation prompts further questions for us conferees, the James Stockdale questions: Who are we and why are we here?¹

I. NO PERFECT CONSTITUTION

Before turning to whether political dysfunction is a form of constitutional failure, we should note that no manmade constitution is perfect or perpetually viable. Though no one at this Symposium would seriously claim perfection for any constitution, we might ask how we can be sure that a given constitution must eventually fail. In response, we could take the U.S. Constitution as a model and note that it declares itself to be a law that a people has imposed on itself. Then we would contend that no one would impose a law upon himself for no reason and the constituent people of the U.S. Constitution was no

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¹ See James Stockdale, Vice Admiral, U.S. Navy, Remarks at the Vice Presidential Debate in Atlanta, Georgia (Oct. 13, 1992) (transcript archived at <http://perma.cc/JZ3Q-YWT5>) (“Who am I? Why am I here?”).

exception.² These people imposed a law on themselves for the sake of social ends, ends beyond governmental efficiency or even fairness. So says the Constitution in the Preamble³ and the Supremacy Clause,⁴ and so we know from the history of the founding, the impetus of which was Congress's inability to meet concrete goals like paying down the nation's debt, maintaining the confidence of investors, and opening the Mississippi and the St. Lawrence to American shipping. The Constitution is thus an instrumental norm at the same time that it is a regulatory norm. As an instrumental norm, the Constitution can and indeed will eventually fail, for the effectiveness of means depends on contingencies that exceed the capacities of planners to predict and regulators to control.

The Constitution's framers acknowledged their fallibility and the defeasibility of law in the face of contingencies by providing an amending rule.⁵ But amending rules attempt the impossible. Amending rules cannot equip the law to meet all contingencies because amending rules are rules too, and as such will eventually fall to contingencies. Americans know this from experience. The framers of 1787 had to disregard the amending rule of the nation's first constitution, Article XIII of the Articles of Confederation,⁶ and the refounding which followed the Civil War disregarded the present Article V,⁷ which hardly envisions amendment at gunpoint. So, as a matter of both practical reason and experience, we know that constitutions are rule-constituted instruments for coping with contingencies and that contingencies eventually overtake these coping devices.

We have known from ancient times that the best prophylactic against contingencies would be rule not by law but by purely prudential authority.⁸ But

² I leave aside two questions: (1) whether a free-floating, abstract "freedom" (as opposed to specific, directed freedoms like freedom to leave or join a particular organization) exists as an object of human aspiration; and (2) whether freedom is properly defined as living according to a rule that one follows in all concrete circumstances with no regard whatever for the quality (the goodness or not) of its consequences. I disregard these questions because I take the assumptions of the present discussion to be the consequentialist assumptions of the Constitution's history and language. I think that, on balance, these assumptions reflect reality, but I leave this issue to another debate.

³ U.S. CONST. pmbl. (stating that the Constitution's ends include, for example, "insur[ing] domestic tranquility" and "promot[ing] the general welfare").

⁴ *Id.* art. VI, cl. 2.

⁵ *Id.* art. V.

⁶ ARTICLES OF CONFEDERATION of 1781, art. XIII ("[T]he Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agree to in a Congress of the United States . . .").

⁷ See John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001).

⁸ See, e.g., ERNEST BARKER, *THE POLITICAL THOUGHT OF PLATO AND ARISTOTLE* 164-72 (1959) (describing Plato's argument that written law is inferior to rule by wise and virtuous prudential authority).

we have also known that this solution cannot be institutionalized. It cannot avoid the problems of succession and recognition. Even if a perfectly competent and public-spirited monarch could exist, she could neither live forever nor guarantee her successors. And at that point where our Good Queen prescribed pain for her benighted subjects, they would project their moral and intellectual limitations on her, question her motives or her competence, and leave her with a choice between retirement and tyranny. Aside from what might await us in heaven, therefore, there is no salvation on earth. The best constitution will not be good enough to avoid eventual failure. This fact should affect our attitude toward the Constitution. Its success can be no more than partial, qualified, relative, and provisional. Bumping along and muddling through may be the best we can do. And precisely because constitutional failure is unavoidable, a necessary condition of constitutional health – alas, a mere necessary condition – is citizens like us worried about constitutional failure.

II. POLITICAL DYSFUNCTION AS CONSTITUTIONAL FAILURE

By political dysfunction, I mean divisions in the electorate that prevent the government from real progress toward constitutional ends. This definition is contentious; it represents a choice between competing theories of the Constitution as a whole. It also implies objectively valid or objectively better conceptions of ends like justice and the general welfare, all packaged in a comprehensive end that we might call “the common good.” In *Federalist No. 45*, Madison called this comprehensive end “the real welfare of the great body of the people.”⁹ In *Federalist No. 63*, Madison indicated that a government responsible for this end would be an educative government.¹⁰ This government would not follow public opinion so much as reconcile the public to its true interest. Jim Fleming and I have argued that practical reason and the nation’s experience confirm this positive conception of constitutional government over its process and rights-oriented rivals.¹¹ I will not repeat these arguments here beyond noting that, with respect to a rights-oriented constitution, no rational person would establish a government for the *chief* purpose of restraining that government. And with respect to a process-oriented constitution, since government can represent and coordinate only those preferences that can be represented and coordinated, a responsible government would give a reason for not representing recalcitrant interests and preferences. This reason would imply an objective conception of the general welfare – one which all thoughtful persons, including those currently left out, would accept, if they

⁹ THE FEDERALIST NO. 45, at 286 (James Madison) (Clinton Rossiter ed., 2003).

¹⁰ THE FEDERALIST NO. 63, *supra* note 9, at 382-83 (James Madison).

¹¹ See SOTIRIOS BARBER & JAMES FLEMING, CONSTITUTIONAL INTERPRETATION 35-55 (2007) (examining the *Federalist* as establishing a positive Constitution granting the government powers to pursue the public good, as opposed to a negative one that limits the government against the people’s rights).

could think straight. Observers who accepted these arguments could not judge government's performance as tending toward success without a substantive theory of the general welfare, a theory they had good reason to believe was truer than its rivals. If we are right – if only an ends orientation can yield a successful general theory of the Constitution – then much needs doing before we can talk about constitutional success.

But the test for constitutional failure would be simpler than the test for constitutional success. Observers would not need a substantive theory of the common good for a test of constitutional failure. A simpler test follows from Madison's conception of responsible government as one that educates the public to its true interests. By Madison's theory, long-term public approval of the nation's direction is not a sufficient condition for governmental success, but it is a necessary condition. A successful constitutional government has to head in a direction that is both right and popular – at least eventually popular. Chronic failure to garner public approval would therefore mean governmental failure.

Our question then would be whether governmental failure would amount to constitutional failure. The answer would seem to be yes for a government structured to pursue preambular ends.¹² If the government is not working, the plan of the government is not working. If by working one means both progress toward the general welfare and perceived progress toward the general welfare, the absence of the latter means the plan is not working. The workings of the government under the Constitution is what Jack Balkin aptly calls the "Constitution-in-practice," and if the government is failing to redeem the Constitution's promises, then the "Constitution-in-practice" is failing to redeem its promises.¹³

Yet there is a different view of this matter. Jim Fleming and others hold that governmental failure does not necessarily mean constitutional failure. They see the Constitution failing only if constitutional provisions are contributing *causes* of governmental failure.¹⁴ This position reflects the lawyer's emphasis on the Constitution as law or prescription. You cannot blame the law or any prescription if its subjects fail to follow it – that is, if its subjects lack the personal motivation to follow it. But, I submit, this reasoning does not hold in the Constitution's case. Madison spoke for his version of positive constitutionalism when he promised a constitution that would ensure good

¹² See U.S. CONST. pmb1.

¹³ JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 9-10 (2011) (differentiating between the Constitution and "Constitution-in-practice," and arguing that while the "Constitution-in-practice" can be deeply unjust, the people must have a means to bring the Constitution-in-practice closer to their ideal constitution).

¹⁴ See, e.g., James E. Fleming, *Successful Failures of the American Constitution*, in THE LIMITS OF CONSTITUTIONAL DEMOCRACY 29, 32 (Jeffery K. Tulis & Stephen Macedo eds., 2010) (arguing that failures stemming from nonconstitutional sources, such as Senate filibusters, should not be considered "constitutional failures").

government, which can only mean a government that more often than not is making reasonable progress toward constitutional ends. What is more, amazing as it seems, Madison promised a constitution that would ensure good government even if its subjects and its officials lacked a personal interest in good government. In *Federalist No. 51*, Madison said the system of checks and balances would “supply[] . . . the defect of better motives” by connecting the self-serving interests of office holders to offices designed to serve the public interest.¹⁵ This system is now failing to supply a necessary test of good constitutional government: long-term public approval.¹⁶ Even if the Constitution does not mandate things like noncompetitive House seats, legalized bribery, and wholesale minority obstructionism, neither does it forbid them. It does not even inhibit them. It lets bad things happen, and a government cannot redeem a promise of good things by letting bad things happen. Of course, it is possible for both good and bad things to be happening. Let us not forget that bumping along may be the best we can hope for. But when good and bad things are happening, we cannot say with firmness that the government is dysfunctional. The question I have been discussing is what we should say about the Constitution *if* we agreed that the government was dysfunctional.

III. REMEMBERING JAMES STOCKDALE

Is the present government dysfunctional, then? If so, for how much longer? Can we reasonably expect the government’s performance and reputation to bottom out and rise again? Assessments of the Constitution cannot help but reflect our answers to these questions, and these answers are at least partly personal. That some of us are pessimistic hardly means everyone should be, especially since the government cannot be more than partially, relatively, and provisionally successful. But, for what it is worth, I am pessimistic. The root of my pessimism is a trend toward oligarchy that is aided and abetted by virtually all of our institutions. As you might expect, the list of culpable institutions includes free-market dogmatism and consumerism. To these I would add value-neutral social science; the decline of the humanities; and the rise of the religious right, which inadvertently supports value-neutral social science by grounding values in a will (the will of God) that is ultimately beyond the reach of human understanding or rational comprehension.¹⁷ These are cultural institutions, not legal structures, and their influence on the nation’s politics shows that constitutional reform stretches or would stretch all the way to

¹⁵ THE FEDERALIST NO. 51, *supra* note 9, at 319 (James Madison).

¹⁶ Joy Wilke & Frank Newport, *Fewer Americans than Ever Trust Gov’t to Handle Problems*, GALLUP POL. (Sept. 13, 2013), <http://www.gallup.com/poll/164393/fewer-americans-ever-trust-gov-handle-problems.aspx>, *archived at* <http://perma.cc/CGN4-NET4>.

¹⁷ See LEO STRAUSS, *STUDIES IN PLATONIC POLITICAL PHILOSOPHY* 149-50, 156-57, 165-66 (1983) (elaborating the difference between reason and revelation in terms of the “unfathomable character” of the will of the biblical God).

cultural reform. These cultural institutions combine to foster the regime of an ever-stronger, strident, and dogmatic few over an ever-pliant and benighted many – all at a time when problems like global warming, culture wars, and the decline of happiness in market democracies call for rethinking the tenets of our social order. This rethinking is something historicists, dogmatic free-marketeters, social Darwinists, and religious fundamentalists cannot do. This rethinking calls for virtues that the authors of the *Federalist* claimed for themselves and their generation: a combination of patriotism, philanthropy, and a scientist's respect for evidence and argument. In *Federalist No. 49*, Madison predicted that these virtues would disappear as the Revolution and the Founding receded from memory, and he was right.¹⁸

Mention of patriotism brings me back to James Stockdale, Ross Perot's running mate in the presidential election of 1992. "Who am I? Why am I here?" he asked at the beginning of his opening statement during the vice presidential debate.¹⁹ His performance in the debate made him a laughing stock.²⁰ "Indeed," said the public, led by TV comedians and talk show hosts, "who are you, and what on earth are you doing running for high office?" So we remember Stockdale by his questions and the seemingly bewildered tone in which he asked them. We have forgotten Admiral James Stockdale, the war hero – in fact, one of the most highly decorated officers in American naval history, recipient of the Congressional Medal of Honor for service in Vietnam and twenty-six additional combat awards that included two Distinguished Flying Crosses, three Distinguished Service Medals, two Purple Hearts, and four Silver Star medals.²¹ I recall Admiral Stockdale here because I see parallels between his position and ours. Though his rise and fall from public esteem was due partly to questions he should have kept to himself, I doubt that we can meet our challenges without asking these same questions of ourselves.

The sentence "snow is white" is different from the act of saying snow is white. The first is thought to describe a part of reality; it has truth value. Saying it is an act, and as an act, it serves a purpose; it has a point. Saying it occurs in a context, and saying it in the wrong context would be puzzling. Saying "snow is white" here and now would be puzzling not because we would not know what was being said but because we would not know the reason for saying it, and by reason I mean the purpose for saying it, the good that comes from saying it. The same holds for the proposition we are considering at this Symposium. Aside from whether the Constitution really is or is not failing, which is essentially a scientific question, why ask the question? One answer would be an interest in the truth. This answer appeals to all of us here because of who we are. We ask the question and answer it as best we can because we

¹⁸ THE FEDERALIST NO. 49, *supra* note 9, at 312 (James Madison).

¹⁹ Stockdale, *supra* note 1.

²⁰ See, e.g., *Saturday Night Live* (NBC television broadcast Oct. 24, 1992).

²¹ Steven A. Holmes, *James Stockdale, 81, Dies; Perot's Running Mate in '92*, N.Y. TIMES, July 6, 2005, at C15.

are interested in the truth. But we have a mixed identity. True, we are scientists of sorts, but we are also citizens. We are observers of phenomena which we ourselves are parts of, and our accounts of these phenomena are accounts of our fate. This last aspect of our identity raises a further question: Why ask whether the Constitution is failing if we are not prepared to say that it is, even if it is? Why offer something to be believed if believing it undermines comforting illusions while serving no good beyond correcting those illusions? Surely we know of situations in which truths are best kept to ourselves. Talking about constitutional failure can serve a point beyond the truth only if we assume the possibility of constitutional reform and salvation. Yet I doubt that any serious observer thinks constitutional reform is remotely likely in the United States, at least not until some calamity forces it upon the nation. I know that Jack Balkin and Sandy Levinson are here, and of course I count them as serious observers. I just do not think that they really believe constitutional change can occur either through social movements or national constitutional conventions. If I thought they really believed that the nation's people could be roused to demand constitutional reform, I would say, respectfully but sincerely, that they have led sheltered lives. I would challenge them to reaffirm their faith in the possibility of bottom-up reform after watching one hour of daytime television and listening to one hour of right-wing talk radio.

CONCLUSION

What excuse, then, might we have for being here? Well, I would have to concede that there may be life after calamity in America and elsewhere. So talking about constitutional failure may serve a remote but nevertheless possible good. Knowing what went wrong would be a good thing for people who had opportunities to experiment with constitutions again. In any event, constitutional failure has brought constitutional theory to a crossroad. Depending on our assessment of humanity's prospects and our understanding of ourselves and our obligations to the nation, we can either administer palliatives in the form of false hope, or we can tell it like it is, if only to ourselves.