
SYMPOSIUM

AMERICA'S POLITICAL DYSFUNCTION: CONSTITUTIONAL CONNECTIONS, CAUSES, AND CURES

EDITORS' FOREWORD

In recent years and especially in recent months, many have despaired over America's political dysfunction. A conference at University of Texas asked, "Is America Governable?"¹ Some, like Thomas Mann and Norman Ornstein, have contended that "it's even worse than it looks."² Others, like Sanford Levinson, have claimed that we face a "crisis of governance."³ Kay Schlozman, Sidney Verba, and Henry Brady have criticized "the broken promise of American democracy";⁴ Amy Gutmann and Dennis Thompson have lamented the breakdown in "the spirit of compromise";⁵ and Lawrence Lessig has argued that we have "lost" our republic through the corruption of money.⁶

More generally, there is considerable talk of dysfunction, breakdown, and failure in the air these days. Consider these titles: Bruce Ackerman, *The Failure of the Founding Fathers*⁷ (not to mention *The Decline and Fall of the American Republic*⁸); Ronald Dworkin, *Is Democracy Possible Here?*⁹ Alan

¹ See *Is America Governable?*, THE UNIV. OF TEX. AT AUSTIN, <https://www.utexas.edu/law/conferences/governable/participants> (last visited Apr. 8, 2014), *archived at* <http://perma.cc/S455-DKXC>.

² THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS* (2012).

³ SANFORD LEVINSON, *FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012).

⁴ KAY LEHMAN SCHLOZMAN ET AL., *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* (2012).

⁵ AMY GUTMANN & DENNIS THOMPSON, *THE SPIRIT OF COMPROMISE: WHY GOVERNING DEMANDS IT AND CAMPAIGNING UNDERMINES IT* (2012).

⁶ LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011).

⁷ BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2005).

⁸ BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010).

Wolfe, *Does American Democracy Still Work?*;¹⁰ Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*,¹¹ and, most recently, Sotirios Barber, *Constitutional Failure*.¹²

Boston University School of Law held a Symposium assessing such claims about dysfunction, breakdown, and failure on November 15–16, 2013. Unlike some prior symposia,¹³ ours focused on constitutional connections, causes, and cures. Taking up the forms and manifestations of dysfunction, breakdown, and failure, the conference asked: What, if anything, does the Constitution have to do with all this? For example: Are we experiencing a constitutional failure, as distinguished from a moral failure, a political failure, an institutional failure, or a failure of policy that may or may not be directly related to the Constitution? Are the lamented dysfunction, breakdown, and failure caused by the Constitution? Do they stem from a feature or defect of the Constitution? Do they result from constitutional requirements? Are they made more likely by our constitutional design?

The Symposium addressed not only whether there are such constitutional connections to and causes of dysfunction, but also whether any proposed cures would likely alleviate it. For example, some have proposed amending the Constitution or holding a constitutional convention to adopt a new one. Will such proposals alleviate dysfunction or will the conditions giving rise to them virtually insure that they will fail?

We organized the Symposium as follows:

Opening Keynote Address: The Regulatory Lookback

Cass Sunstein delivered the opening keynote address. He recently returned to Harvard Law School after serving for three years in the Obama Administration as Administrator of the White House Office of Information and Regulatory Affairs. Professor Sunstein offered some prescriptions for dysfunction based on his experience and drawn from his recent book, *Simpler: The Future of Government*.¹⁴

⁹ RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE* (2006).

¹⁰ ALAN WOLFE, *DOES AMERICAN DEMOCRACY STILL WORK?* (2006).

¹¹ SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

¹² SOTIRIOS A. BARBER, *CONSTITUTIONAL FAILURE* (forthcoming 2014).

¹³ For one exception, which focuses on connections between dysfunction and the Constitution, see Symposium, *The U.S. Constitution and Political Dysfunction: Is There a Connection?*, 61 *DRAKE L. REV.* (2013).

¹⁴ CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* (2013).

Panel I: Is Dysfunction an Illusion?

The first panel considered the following questions: Is dysfunction an illusion? Is all the talk about dysfunction misconceived? Perhaps this is simply how our constitutional system operates. Or maybe we are instead in a period of transition. If so, to what are we transitioning? The panelists were Sotirios Barber, Mark Graber, Gerald Leonard, and Nancy Rosenblum.

Panel II: Is the Constitution Responsible for Electoral Dysfunction?

This panel considered whether the Constitution is responsible for electoral dysfunction, not only through its provision for the Electoral College, but also through its failures affirmatively to guarantee an equal voice in the national political process and prevent the corruption brought on by money and hyperpartisan gerrymandering. Hugh Baxter, Guy-Uriel Charles, Joseph Fishkin, Ellen Katz, and Kay Schlozman together with Sidney Verba contributed to this discussion.

Panel III: Has the Constitution Exacerbated the Crisis of Governance?

This panel debated whether the “hard-wired features” of the structural Constitution have made America not only undemocratic but indeed ungovernable. Have these features fostered the politics of extremism or somehow undermined the spirit of compromise? Providing diverse views on these questions were Jack Beermann, Douglas Kriner, R. Shep Melnick, Stephen Skowronek, and Jay Wexler.

Panel IV: Has the Constitution Fostered a Pathological Rights Culture?

This panel considered the question whether the Constitution has fostered a pathological rights culture of rights without responsibilities and regulation. It focused on the case of the right to bear arms and gun control. The panelists were Joseph Blocher, Robert Cottrol, James Fleming together with Linda McClain, Richard Thompson Ford, and Robin West.

Panel V: Utopia as Dystopia?

This panel debated whether we have reached a dysfunctional situation in which disagreement about constitutional visions is so fundamental that one side's ideal or utopia is the other's nightmare or dystopia, and vice versa. Participants considered the case of radically opposed visions of federalism through a mini-symposium on Sotirios A. Barber's *The Fallacies of States' Rights*¹⁵ and Michael Greve's *The Upside-Down Constitution*.¹⁶ This panel, which is to be published in our book symposium series in the July issue,

¹⁵ SOTIRIOS A. BARBER, *THE FALLACIES OF STATES' RIGHTS* (2013).

¹⁶ MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2012).

featured Sotirios Barber, Michael Greve, David Lyons, Abby Moncrieff, and Larry Yackle.

Panel VI: What Can We Learn from Other Nations' Experiences?

Are the U.S. Constitution and constitutional experience exceptional when it comes to dysfunction? What can we learn from other nations' constitutions and constitutional experiences? Yasmin Dawood, Ran Hirschl, Mark Tushnet, Graham Wilson, and Katharine Young addressed these questions.

Panel VII: What Are We to Do About Dysfunction?

In light of the foregoing discussions, the final panel considered what we should do about any constitutional dysfunction. The panelists considered proposed cures for dysfunction and their constitutional connections. Richard Albert, Ken Kersch, Gary Lawson, Sanford Levinson, and Frank Michelman took part in this panel.

Closing Keynote Address: The Last Days of Disco

Jack Balkin delivered the closing keynote address. Balkin concluded that the U.S. political culture is, in fact, dysfunctional, and reasoned that this is so because we are in the middle of a long and difficult period of political transition. Once this transition is completed, he argued, we will no longer complain – at least for a time – that our nation is ungovernable or that our politics are dysfunctional. Balkin analogized our situation today to that of the last days of disco at the end of the Carter Administration.

The *Boston University Law Review* is honored to publish the thoughtful reflections of these scholars (including not only law professors but also political scientists) on these timely and important topics. We would like to thank all the contributing scholars, including our own Boston University professors who participated in and wrote for the Symposium. We also want to thank Dean Maureen O'Rourke for her continuing support of the *Law Review* and the annual symposium. Thanks especially to Professor James Fleming, *Law Review* faculty advisor, who organized the Symposium (in consultation with Professors Hugh Baxter and Jay Wexler) and greatly assisted in this publication. This special symposium issue would not be possible without the hard work of our dedicated *Law Review* editorial board and staff.

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