# DEMOCRATIC DYSFUNCTION AND MISSING CONSTITUTIONAL ESSENTIALS

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## INTRODUCTION

Does the U.S. Constitution need to be rewritten? That question has been asked quite a lot of late. Sanford Levinson has argued for years that the American Constitution is undemocratic and profoundly flawed in its design; of late he has declared the position that the document is a positive impediment to governance.[1] Bruce Ackerman, Peter Shane, and others propose that the design of the Constitution has failed to protect us against concentrations of executive power, permitting the emergence of a form of American government inimical to our founding ideals.[2] Sotirios Barber places the blame less on the formal structural provisions of the constitutional text and more on American political culture, which he finds insufficient to support a robust constitutional order.[3]

In general, what unites these critiques is that they are written in response to a state of current dysfunction in our political system, which

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1. STANFORD LEVINSON, FRAMED: AMERICA'S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE (2012).

2. BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010); PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009). Many of these arguments were recently explored in an online symposium discussing Professor Ackerman's book. *See* Bruce Ackerman, *It Can Happen Here*, BALKINIZATION (Oct. 21, 2010), http://balkin.blogspot.com/2010/10/it-can-happen-here.html.

3. SOTIRIOS A. BARBER, CONSTITUTIONAL FAILURE (2014). Barber's critique directly challenges the Madisonian assurance that the constitutional system could, in Robert Putnam's words, "make democracy safe for the unvirtuous." ROBERT D. PUTNAM WITH ROBERT LEONARDI & RAFFAELLA Y. NANETTI, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 87 (1993).

is ascribed to inadequacies in constitutional design.[4] But there are two distinct and different conceptions of "failure" at work in these critiques. As Mark Brandon puts it, a constitution may fail because of the breakdown of the "failure to employ basic principles . . . within a regime."[5] On the other hand, a constitution may be deemed a failure because it lacks constitutional essentials, fundamental features without which the claim to constitutional status is incomplete.[6] In Giovanni Sartori's formulation, a constitution of this kind is a "fake."[7] This distinction points to an important counterargument raised by Richard Hasen. Professor Hasen argues that while the diagnoses of political dysfunction may be entirely warranted, it is a mistake to attribute those problems to a failure of the constitutional system itself.[8] Rather, Hasen argues, we should consider the existence of gridlock, excessive and unrepresentative partisanship, and decline of trust in public institutions to be symptoms of the "sub-constitutional" regime.[9] After all, the use of single party districts is an artifact of an 1842 federal statute that Congress could change at any time;[10] the filibuster and other antidemocratic mechanisms of the Senate are internally adopted rules that have no constitutional status;[11] the wildly undemocratic and partisanship-enhancing system by which parties select nominees, control redistricting, and operate in Congress are all the results of actions and decisions that have no direct connection to the constitutional text. Many aspects of the concentration of executive authority are similarly outside the reach of the Constitution. As for shifts in the culture or political consciousness, if these represent "failures" they occur at what might be called the "superconstitutional" level.

Readers will notice that Hasen is using "the Constitution" to refer only to the "large-C" constitution, the formal text and the institutional structures that it mandates rather than the system of interpretations and constructions, practices, precedents, and statutes.[12] Many constitutional

4. THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM (2012).

5. MARK E. BRANDON, FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE 18 (1998).

6. Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 861 (1962).

7. *Id.*

8. Richard L. Hasen, *Political Dysfunction and Constitutional Change*, 61 DRAKE L. REV. 989 (2013).

9. *Id.* at 995, 1009–13.

10. Apportionment Act of 1842, ch. 47, 5 Stat. 491.

11. Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1006–07, 1011–12 (2011).

12. *See* Hasen, *supra* note 8, *passim*.

scholars argue that we should understand "the Constitution" to include the subconstitutional regime that exists outside the formal provisions of constitutional adoption and the amendment procedures of Article V.[13] In this Essay, however, I will take up Hasen's (and others') challenge directly. I will argue that if we focus on the question of what constitutes constitutional "failure" solely in terms of the formally adopted text,[14] the U.S. Constitution lacks essential elements and is therefore defective on its own terms.

## I. CONSTITUTIONAL ESSENTIALS AND FIRE DEPARTMENTS

Imagine you arrive in a town and are given a tour by the mayor. He is understandably proud of his city and its government, and he extols its virtues at great lengths. Ultimately, however, you find yourself unable to resist asking a question: "I notice that your town has no fire department. Isn't that a problem?" At that point, several of the town's most respected citizens rush to reassure you. One says, "You don't really mean the problem is that there is no fire department in the City's government, you mean that there are no organized systems for preventing fires—but that is the result of the failure of our current City officials, not a flaw in the design of the City administration." Another chimes in, "The problem is not the lack of a Fire Department, the problem is that our citizens have lost their willingness and ability to be vigilant in preventing fires." And still a third chimes in to add, "Fire departments don't actually work that well anyway, lots of times fires happen and they don't do a good job of putting them out."

Yet, you remain concerned and unconvinced. A fire department may be imperfect or even inadequate to its task, it may depend on the cooperation and support of the citizenry to be effective, and it may be that its functions can be taken up by less formal institutions or performed by the City without the need of a formally committed department. And yet, the absence of a fire department still seems like a serious defect. A fire department seems to be what might be called a municipal essential, a necessary piece of any well-designed system of urban government. For

13. WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010); DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); Thomas C. Gray, *Do We Have an Unwritten Constitution?*, 27 STANFORD L. REV. 703 (1975).

14. One interesting implication of this approach is that the standards for evaluating "failure" in a system that relies more on conventions and less on positive enactments might be different. In this discussion the commitment to a basically Madisonian system of formal governing institutions those terms of reference are contained in a formal charter is taken as a given.

one thing, the existence of a designated "department" to deal with fires permits accountability. The failure is not a diffuse, nonlocalized atmosphere; it is a failure of specific agency. For another, the fire department's existence tells us where to start; it provides an institutional platform for action. And furthermore, if there is a fire department we are given a focus for discussion: debates can center on what the department should do, how it should be funded, how it should interact with other offices.

Constitutions have equivalent essentials of their own. Whether they work perfectly, can be supplemented or even replaced by subconstitutional mechanisms, or depend on norms and conventions to do their work does not alter the fact that they are essential to the constitutional project. Constitutions are created to do several things:

- channel conflict, provide a system of deliberation, veto points, and distribute authority that permits political conflict to exist without destabilizing the system;
- provide a basis for legitimation by articulating a set of sufficiently shared core principles that the legitimacy of government is not called into question each time an outcome is not one the speaker would prefer; and
- give effective voice to the popular will within established constraints—including limitations and countermajoritarian principles such as federalism—through a representative system that is sufficiently inclusive to satisfy the requirements of legitimation and conflict management.

If this list or something like it is accepted, then it is not difficult to sketch in some ideas of constitutional essentials. Formal guarantees of rights are one example, a system of representative government is another. It is worth noting that "representation" here is not necessarily the opposite of universal participation; the term may, instead, refer to a particular capacity that is assumed by members of the polity at moments of decision making undertaken according to previously established procedures. Conversely, the form and basis of representation may vary widely among constitutional systems. But any "constitution" establishes a system for the communication of preferences to authorized participants in the decision-making process, limits to the authority of the constituted government, and a set of rules of recognition for the legitimation of collective action.

## II. DEMOCRATIC DYSFUNCTION AND CONSTITUTIONAL FAILURE

The reference to a fire department is a mixed metaphor. Perhaps the better equivalency is to the Supreme Court—a department of government which has been given the key role in a particular area—so that any complaints about constitutional failures can be laid at the subconstitutional level after all. The problem is that to accept Hughes's dictum that "the Constitution means what the Supreme Court says it does" may be already to acknowledge that the Constitution (big "C") lacks essential elements. Nonetheless, Supreme Court cases do provide insights: no less than political dysfunction or public attitudes, particular decisions may be smoke that shows us the locations of fires, at which point we may be troubled to discover that there seems to be no official commitment of responsibility to put these particular fires out. The failure of the Constitution in this instance may, in fact, be the failure to specify that it is the function of the Court to put out democratic fires.

The issue of partisan gerrymandering is a good illustrative case. In general, where racial gerrymandering is involved the Court is willing to find a constitutional issue, but where political gerrymandering is at issue the justices abandon any claim to justiciability.[15] The difference, as Justice Scalia explained in 2004, is that the manipulation of the system to secure partisan advantage is *a constitutionally legitimate goal*.[16] As a result, any complaint can only be of the form that an otherwise proper action somehow reflects "the excess of an ordinary and lawful motive."[17] Or consider the unwillingness of the Court to acknowledge the possibility of any form of political "corruption" other than the *quid pro quo* exchange of contributions for specific actions, explained on the grounds that purchasing influence or access raises no constitutional concerns.[18] The result is that empirical evidence of oligarchic tendencies in policy outputs is simply irrelevant to any constitutional discussion because "democracy" is not a constitutional value.

These judicial opinions are subconstitutional actions; a different court might have ruled differently. But the textually defined context in which these discussions take place reveal a glaring lacuna in the formal constitutional structure. The arguments in these cases were not constitutionally required, but they are only possible—they can only be

15. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 886 (rev. 2d ed., 2001).

16. *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (holding that manipulating election district lines to secure partisan advantage is not prohibited by the Constitution).

17. *Id.* at 286.

18. *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); *Citizens United v. FEC*, 558 U.S. 310, 359–60 (2010).

made sensible in the grammar of constitutional discourse[19]—if the Constitution lacks any commitment to a conception of democratic governance; which, it turns out, is precisely the case. There is no right to vote to begin with. There is no right to any particular form or degree of representativeness in government, nothing that prevents private organizations called "parties" from controlling the process, and nothing that requires attempts or even payment of lip service to ensuring equal or adequate opportunities for political participation. There is the Republican Guarantee Clause,[20] but the terms of that clause are so vague and its purpose so ill defined that courts and pretty much everyone else have found it easy to ignore.[21]

Modern constitutional systems do not follow the U.S. model. For example, the European Court of Human Rights (ECtHR) has found the right to free elections to include "subjective rights of participation," such that measures that have the effect of limiting access to voting or standing for office are subject to strict proportionality tests and can only be acceptable if they "do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness . . . . In particular, such conditions must not thwart 'the free expression of the opinion of the people in the choice of the legislature.'"[22] Employing this analysis, for example, the ECtHR struck down a UK-blanket rule prohibiting voting by prisoners in 2005.[23]

The Supreme Court of India has confronted the question of constitutional guarantees of democracy directly. In the landmark *S.R. Bommai v. Union of India*[24] case in 1994, the Supreme Court upheld the act of the President of India in dismissing elected governments in three provinces on grounds that the religious nature of the elected governments violated a constitutional commitment to secularism.[25] The action was held to be a justified exercise of executive power under Article 356 of the Constitution,[26] which provides for the imposition of "President's Rule" in a state when "a situation has arisen where the Government of

19. For a discussion of constitutional grammar and discourse, see HOWARD SCHWEBER, THE LANGUAGE OF LIBERAL CONSTITUTIONALISM (2007).

20. U.S. CONST. art. IV, § 4.

21. *See, e.g.*, Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994).

22. *Mathieu-Mohin v. Belgium*, App. No. 9267/81, 10 Eur. H.R. Rep. 1, 16 (1987).

23. *Hirst* v. *United Kingdom*, App. No. 74025/01, 42 Eur. H.R. Rep. 41 (2005).

24. A.R.I. 1994 S.C. 1918 (India).

25. *Id.* at 2003–04. For a thorough and penetrating analysis of Indian constitutional secularism in comparison with American and Israeli practice, see GARY JEFFREY JACOBSOHN, THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT (2003).

26. *S.R. Bommai*, A.R.I. 1994 S.C. at 2003–04.

the State cannot be carried on in accordance with the provisions of this Constitution."[27] Writing for the majority, Justice S. Ratnavel Pandian declared, "The Indian Constitution is both a legal and social document. It provides a machinery for the governance of the country. It also contains the ideals expected by the nation. The political machinery created by the Constitution is a means to the achieving of this ideal."[28] The content of these constitutional ideals was found in references to a "secular" republic in the Preamble,[29] Articles 25–30 guaranteeing freedom of religious conscience and practice,[30] and Article 51-A "Fundamental Duties," a nonjusticiable provision declaring the duty of every citizen to, *inter alia*, "abide by the Constitution and respect its ideals and institutions."[31]

In another case that directly contradicts the American approach, the Indian Supreme Court upheld an anticorruption statute that limited the deployment of religious claims in election campaigns as a form of "corruption," understood as both the "corruption of fundamental values" and as "undue influence."[32] As Jacobsohn explains:

> The constitutional essentials of the Indian polity were forged out of the tension between religion and equality. To the extent that political corruption represents an erosion of the core commitments of a given polity, then the most compelling interpretation of [election speech laws] is that it seeks to reinforce the special character of *Indian* secular constitutionalism.[33]

## III. A NEW REPUBLICAN GUARANTY CLAUSE

These comparative examples demonstrate there is nothing inherently contradictory about the idea of constitutional guarantees of democratic politics. That does not imply any end to disagreements; one of Sotirios Barber's strongest points is his observation that the persistence of constitutional structures in the *absence* of serious public

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27. INDIA CONST. art. 356, § 1.

28. *S.R. Bommai*, A.R.I. 1994 S.C. at 1942.

29. INDIA CONST. pmbl.

30. *Id.* art. 25–30.

31. *Id.* art. 51-A; *see generally* JACOBSOHN, *supra* note 25, at 125–60 (discussing secualarism in India); *see also* Soli J. Sorabjee, *Decision of the Supreme Court in* S.R. Bommai v. Union of India*: A Critique*, EASTERN BOOK COMPANY, http://www.ebc-india.com/lawyer/articles/94v3a1.htm (last visited Feb. 9, 2015).

32. *Z. B. Bukhari v. B. R. Mehra*, A.R.I. 1975 S.C. 1788 (India).

33. JACOBSOHN, *supra* note 25, at 172 (discussing *Z.B. Bukhari*, A.R.I. 1975 S.C 1788)).

debate about their meaning may be a sign of constitutional failure.[34] The point is to ensure that there is something to have debates about and a common point of focus. A constitutional order that secures collective agreement that "freedom of the press," "federalism," and "checks and balances" are the correct subjects for constitutional discussion should be able to specify the same kinds of values with respect to the operation of democratic institutions.

What is needed, in other words, is a new version of the Republican Guaranty Clause, one that specifies principles of democratic government as the constitutionally guaranteed rights of American citizens. Debates over the meaning of those terms could then proceed in the same way as other constitutional arguments. Different views would be expressed in judicial opinions, legislation, and the language of political discourse, but all participants would be required to acknowledge that they are arguments about *constitutional* values entitled to the same respect as other constitutional rights. A constitution that says nothing about these issues is missing essential elements and, by contrast, is like a town that lacks a fire department.

34. BARBER, *supra* note 3.