

THE FOUNDERS ON: “DOES THE CONSTITUTION WORK?”

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Does the Constitution work? An odd question to ask while Congress meets, the President acts, federal judges sit, the states are at peace, and the borders are (somewhat) secure. Nevertheless, remarks of the Founders strongly suggest that the Constitution does not work. That is, it does not meet the goals it set for itself. If the Constitution does not work, this fact would be important to know. And if the goals the Constitution set for itself are sound, failure to meet them should provoke some change in affairs. Posing and answering the question whether the Constitution works is more than academic.

What then is the Constitution to effect beyond the operation of the federal government and the union of the states? Two answers to this question predominate.¹ The first is that the Constitution is to secure liberty, broadly understood.² Unconvinced as we are of ultimate good, at least as a polity, we require a constitution to mediate among competing interests and so allow each of us the broadest mutual sway.³ This liberal answer⁴ has the Constitution maximize individual freedom.⁵

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1. See, e.g., Richard H. Fallon, Jr., Commentary, *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989); James A. Gardner, *Can Party Politics Be Virtuous?*, 100 COLUM. L. REV. 667 (2000); Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87 (1992); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Steven M. Tipton, *Republic and Liberal State: The Place of Religion in an Ambiguous Polity*, 39 EMORY L.J. 191 (1990).

2. See, e.g., Douglas Laycock, *Federalism as a Structural Threat to Liberty*, 22 HARV. J.L. & PUB. POL'Y 67, 71 (1998) (“The Constitution protects liberty against government and against concentrations of power within government.”).

3. See U.S. CONST. pmb. (the U.S. Constitution was ordained, partly, to “establish Justice” and “insure domestic Tranquility”).

4. See Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 561 (1986) (“Based on the ‘psychology of temptation and the politics of suspicion, the Constitution of 1787, and especially the Bill of Rights of 1789, represent a triumph of modern liberalism over classical republicanism.”).

Depending upon how this freedom is defined, the Constitution does seem to work, at least in some measure.

Competing with this liberal answer is that of republicanism. The Constitution is not chiefly to maximize individual freedom, as if freedom were its own end and all freedoms were equally worth promoting. Rather, the Constitution is to foster virtue in citizens.⁶ Harking back to the mainstream of the Western political tradition, the republican answer holds that there is indeed reliable knowledge of the human good, and that this good, to the extent it may be effected by a political ordering, is the chief object of the Constitution.⁷ Being governed by the Constitution and, especially, participating in the civic life it establishes, are to cultivate virtue.⁸ Recent scholarship suggests that the Founders embraced republicanism at least as much as liberalism.⁹ And, as with liberalism, the Constitution seems to work to some extent to achieve the republican end.

So whether to achieve the liberal or the republican end, the Constitution appears to work in some measure. It appears to secure liberty.¹⁰ To a lesser extent, it appears to foster virtue.¹¹ How much it

5. Justice O'Connor has stated that "[o]ur Constitution is designed to maximize individual freedoms within a framework of ordered liberty." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

6. See, e.g., Brent Adams, Feature, *Law Day Address: May 1, 1996: The Pursuit of Virtue*, 4 NEV. LAW. 26, 27 (June 1996) ("The purpose of our Constitutional government is to create the freedom for citizens to pursue virtue, not just to accumulate property."); Gardner, *supra* note 1, at 668 ("One of the Framers' paramount goals was to create the conditions in which political virtue could flourish."); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1559 (1988) (arguing that "the framers did not abandon the traditional republican belief in deliberative government and the need for civic virtue" when designing the Constitution").

7. See Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 729 (1992) ("Republicanism, however, is not essentially about countering egoism; its claim is that public spirit (not altruism) is the path to the human good and that politics is the unique forum in which to cultivate it.").

8. See *id.*; Adams, *supra* note 6.

9. William Michael Treanor, *Fame, The Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 736 (1997); see also Stephen A. Siegel, *The Marshall Court and Republicanism*, 67 TEX. L. REV. 903, 914 (1989) (reviewing G. EDWARD WHITE, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE 1815-35* (1988)) (stating that "[m]ost historians concede that republicanism played an important role in revolutionary thought").

10. See, e.g., *D.C. v. Heller*, 554 U.S. 570, 616 (2008) (holding that the Second Amendment protects the right to bear arms for self-defense independent from any service in the military); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Florida v. Royer*, 460 U.S. 491, 498 (1983) (stating that, pursuant to the Fourth Amendment, an individual "may not be detained even momentarily without reasonable, objective grounds for doing so").

11. The government's protection of rights such as trial by jury, freedom of assembly, and private property can be understood as promoting the republican goal of virtue. Sunstein, *supra* note 6, at 1562-63; see also Daniel F. Piar, *Morality As A Legitimate Government Interest*, 117 PENN ST.

actually works towards these ends is uncertain. Also uncertain is which of these ends is correct, or whether some other end altogether is correct. But how then to establish whether the Constitution works?

A pauper may find that the Great Seal works for cracking nuts, but the pauper does not thereby find that the Great Seal works. This analogy suggests a wholly different way to determine whether the Constitution works. If one were to know that the Great Seal were designed to serve the Lord Keeper or Lord Chancellor, and were to know how these gentlemen were expected to act, one might very well determine whether the Great Seal works. Instead of determining more abstractly what might be the purpose of the Great Seal and whether it successfully serves that purpose, one might determine for whose hands the Great Seal was made and whether it is being used by those hands. Used by hands for which it was not designed, it is unlikely to be working. While the pauper held the Great Seal, it was not sealing documents of state. Unless in the hands for which it was designed, it did not work.

The ultimate end of the Constitution, and to what extent it achieves those ends, may be uncertain. But far less uncertain are the hands for which it was designed.

While our country remains untainted with the principles and manners which are now producing desolation in so many parts of the world; while she continues sincere, and incapable of insidious and impious policy, we shall have the strongest reason to rejoice in the local destination assigned us by Providence. But should the people of America once become capable of that deep simulation towards one another, and towards foreign nations, which assumes the language of justice and moderation while it is practising iniquity and extravagance, and displays in the most captivating manner the charming pictures of candor, frankness, and sincerity, while it is rioting in rapine and insolence, this country will be the most miserable habitation in the world; because we have no government armed with power capable of contending with human passions unbridled by morality and religion. Avarice, ambition, revenge, or gallantry, would break the strongest cords of our Constitution as a whale goes through a net. Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.¹²

L. REV. 139, 164 (2012) ("Over the course of the last century, constitutional adjudication has had a homogenizing influence on American life, particularly regarding questions of civil rights, which often invoke moral issues.").

12. *John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts* (Oct. 11, 1798), in 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 228, 228-29 (Charles F. Adams ed., 1854).

President Adams, writing in 1798, was certain that the Constitution presupposes citizens both moral and religious.¹³ It was made for such, and without them the Constitution does not work.

That “[o]ur Constitution was made only for a moral and religious people”¹⁴ is plainly the truth. Many statements from many Founders demonstrate their belief that such a people is necessary to the operation of any republic.¹⁵ “It was axiomatic for . . . nearly all the founders, that virtue *and therefore religion* were necessary conditions for republican government. This was so because virtue was thought to be necessary for maintaining republican liberty, and religion in turn was thought to be necessary for virtue.”¹⁶ In 1776, Adams himself had written privately,

Who would not Exchange the discordant Scenes of Envy, Pride, Vanity, Malice, Revenge, for the sweet Consolations of Philosophy, the serene Composure of the Passions, the divine Enjoyments of Christian Charity, and Benevolence? Statesmen my dear Sir, may plan and speculate for Liberty, but it is Religion and Morality alone, which can establish the Principles upon which Freedom can securely stand The only foundation of a free Constitution, is pure Virtue, and if this cannot be inspired into our People, in a greater Measure, than they have it now, They may change their Rulers, and the forms of Government, but they will not obtain a lasting Liberty. They will only exchange Tyrants and Tyrannies. You cannot therefore be more pleasantly, or usefully employed than in the Way of your Profession, pulling down the Strong Holds of Satan. This is not Cant, but the real sentiment of my Heart.¹⁷

Adams’s view of the Christian religion as a support for republican government was also commonplace. For example, Noah Webster wrote

13. And these citizens are apparently in both respects very unlike those of Revolutionary France.

14. *Adams to the Officers of the First Brigade*, *supra* note 12, at 229.

15. See, e.g., JOHN WITHERSPOON, *The Dominion of Providence Over the Passions of Men*, in THE SELECTED WRITINGS OF JOHN WITHERSPOON 126, 144 (Thomas Miller ed., 1990) (“[H]e is the best friend to American liberty who is most sincere and active in promoting true and undefiled religion, and who sets himself with the greatest firmness to bear down profanity and immorality of every kind. Whoever is an avowed enemy of God, I scruple not to call him an enemy to his country.”); Hall, *supra* note 1, at 106-07; Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. REV. 1, 22-24 (2008).

16. JEFFRY H. MORRISON, JOHN WITHERSPOON AND THE FOUNDING OF THE AMERICAN REPUBLIC 28 (2005); see also Michael W. McConnell, *Religion and Its Relation to Limited Government*, 33 HARV. J.L. & PUB. POL’Y 943, 947 (2010) (“Republican government, almost everyone agreed, required a degree of public virtue, and the only way most people could imagine inculcating public virtue was through religious teaching.” (footnote omitted)).

17. Letter from John Adams to Zabdiel Adams (June 21, 1776), in 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 399, 401 (Charles F. Adams ed., 1854).

[T]he Christian religion is the most important and one of the first things in which all children under a free government ought to be instructed. No truth is more evident than that the Christian religion must be the basis of any government intended to secure the rights and privileges of a free people.¹⁸

Perhaps the locus classicus on the Founders' belief that citizens of a republic must be moral and religious is in Washington's Farewell Address of September 17, 1796:

Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable *supports*. In vain would that man claim the tribute of Patriotism, who should labour to subvert these great Pillars of human happiness, these firmest props of the duties of Men and citizens. The mere Politician, equally with the pious man ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation *desert* the oaths, which are the instruments of investigation in Courts of Justice? And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.

'Tis substantially true, that virtue or morality is a necessary spring of popular government. The rule indeed extends with more or less force to every species of free Government. Who that is a sincere friend to it, can look with indifference upon attempts to shake the foundation of the fabric.¹⁹

The Founders seemed convinced that a republic requires a moral and religious people.

18. NOAH WEBSTER, Reply to a Letter of David McClure, Esq., on the Subject of Proper Course of Study in the Girard College, Philadelphia (Oct. 25, 1836), in A COLLECTION OF PAPERS ON POLITICAL, LITERARY AND MORAL SUBJECTS 291, 291 (1843); *see also* Letter from Noah Webster to James Madison (Oct. 16, 1829) (on file with Library of Congress, Madison Papers, Series 2) ("[T]he Christian religion . . . is the basis, or rather the source, of all genuine freedom in government . . . I am persuaded that no civil government of a republican form can exist and be durable in which the principles of Christianity have not a controlling influence."); *cf.* Letter from John Marshall to Jasper Adams (May 9, 1833), in 12 THE PAPERS OF JOHN MARSHALL 278 (Charles Hobson ed., 2006) ("[W]ith us, Christianity and religion are identified. It would be strange, indeed, if with such a people our institutions did not presuppose Christianity and did not often refer to it and exhibit relations with it.").

19. Washington's Farewell Address (Sept. 17, 1796), in 2 AMERICAN POLITICS (NON-PARTISAN) FROM THE BEGINNING TO DATE 14, 19 (Thomas Valentine Cooper & Hector Tyndale Fenton eds., 1888).

If so, for what other sort of people would they have adopted the Constitution? The Constitution they certainly thought created a republican form of government.²⁰ If they thought as well that republics need a moral and religious people to operate successfully, they must have presupposed such a people for the Constitution. Consequently, “[o]ur Constitution was made only for a moral and religious people.”²¹

Especially interesting evidence of this presupposition of a moral and religious people comes from an unlikely source, James Madison of *The Federalist*. Madison’s political theory emphasizes political structures that minimize the effect of human faults, or that direct these faults toward the common good.²² For (perhaps the most famous) example, *Federalist* 10 explains how the Constitution dilutes the baleful effects of faction. Similarly, *Federalist* 51 explains how the separation of powers established by the Constitution uses a less-than-noble human self-interest to keep powers in check:

[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man, must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. *A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.*²³

Human imperfection is to offset human imperfection. But note also the

20. See THE FEDERALIST NO. 10 (James Madison); see also U.S. CONST. art. IV, § 4 (reading “[t]he United States shall guarantee to every State in this Union a Republican Form of Government”).

21. *Adams to the Officers of the First Brigade*, *supra* note 12, at 229.

22. Recent scholarship questions the generally accepted notion that many Framers shared this theory. See Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611 (1999).

23. THE FEDERALIST NO. 51, at 268-69 (James Madison) (George W. Carey & James McClellan eds., 2001) (emphasis added).

“dependence on the people.” This “primary control on the government” operates, though the people themselves also be actuated by base sentiments. But the people must not be actuated by them alone:

As there is a degree of depravity in mankind, which requires a certain degree of circumspection and distrust: so there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us, faithful likenesses of the human character, the inference would be, that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.²⁴

Republican government depends upon virtue in its citizens. Or at least, the Framers thought so.²⁵ If they thought so, they wrote the Constitution for citizens they would have thought moral and religious.

Because the Framers and the other Founders thought a moral and religious people necessary to any republican government, they thought such a people necessary to the republican government they adopted with the Constitution: And so, “[o]ur Constitution was made only for a moral and religious people.”²⁶ But were the Founders right to think such a people necessary for a republican government, including their own? If they were not right, Adams erred when he wrote that the Constitution “is wholly inadequate to the government of any other” than a “moral and

24. THE FEDERALIST NO. 55, *supra* note 23, at 291 (James Madison). Madison dilated at the Virginia Ratifying Convention:

I have observed, that gentlemen suppose, that the general legislature will do every mischief they possibly can, and that they will omit to do every thing good which they are authorised to do. If this were a reasonable supposition, their objections would be good. I consider it reasonable to conclude, that they will as readily do their duty, as deviate from it: Nor do I go on the grounds mentioned by gentlemen on the other side—that we are to place unlimited confidence in them, and expect nothing but the most exalted integrity and sublime virtue. But I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks—no form of government can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea. If there be sufficient virtue and intelligence in the community, it will be exercised in the selection of these men. So that we do not depend on their virtue, or put confidence in our rulers, but in the people who are to choose them.

James Madison, Address to Virginia Ratifying Convention (June 20, 1788), in 1 THE FOUNDERS’ CONSTITUTION 409 (William T. Hutchinson et al. eds., 1987).

25. See, e.g., Adams to Zabdiel Adams, *supra* note 17; THE FEDERALIST NO. 55 (James Madison).

26. Adams to the Officers of the First Brigade, *supra* note 12, at 229.

religious people.”²⁷

Americans have long shared the Founders’ view that the Constitution requires a moral and religious people.²⁸ Until yesterday, American education, for example, was ordered toward producing such citizens as necessary to American constitutionalism.²⁹ The republican freedom and limited government secured by the Constitution have long been thought to depend upon widely held moral and religious scruples. Alexis de Tocqueville, for example, observed in the second quarter of the nineteenth century:

Up till now no one in the United States has dared to profess the maxim that everything is allowed in the interests of society, an impious maxim apparently invented in an age of freedom in order to legitimize every future tyrant.

Thus, while the law allows the American people to do everything, there are things which religion prevents them from imagining and forbids them to dare.

Religion, which never intervenes directly in the government of American society, should therefore be considered as the first of their political institutions, for although it did not give them the taste for liberty, it singularly facilitates their use thereof.

The inhabitants of the United States themselves consider religious beliefs from this angle. I do not know if all Americans have faith in their religion—for who can read the secrets of the heart?—but I am sure that they think it necessary to the maintenance of republican institutions.

27. *Id.*

28. *See, e.g.*, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 724 (1833) (“Indeed, in a republic, there would seem to be a peculiar propriety in viewing the Christian religion, as the great basis, on which it must rest for its support and permanence, if it be, what it has ever been deemed by its truest friends to be, the religion of liberty.”); Hall, *supra* note 1, at 108-12; James J. Knicely, *High Wall or Lines of Separation?*, 6 WM. & MARY BILL RTS. J. 261, 261-67 (1997); Tipton, *supra* note 1.

29. *Cf.* ANNE COLBY, ET AL., EDUCATING CITIZENS 25 (2003). Lee Shulman, in the foreword to *Educating Citizens*, explains that the founding fathers “understood that if a democratic society were to function as intended, as ‘a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people,’ such covenants can only be entered into by an educated citizenry.” Lee S. Shulman, *Foreword* to ANNE COLBY, ET AL., *id.*, at vii, viii (citing DAVID MCCULLOUGH, JOHN ADAMS 221 (2001)). Modern approaches to education, however, “stress the abilities to function in a culturally diverse, globally interdependent, technologically sophisticated, and rapidly changing world.” ANNE COLBY, ET AL., *supra*, at 29. Consequently, “[a]s American higher education has evolved from the eighteenth century to the present, moral and civic concerns have moved from its center, inherent in the very concept of a college education, to its margins, segregated from the rest of academic life. If these trends prevail, education for responsible citizenship could be squeezed out altogether, at least in some kinds of institutions.

Id. at 25.

That is not the view of one class or party among the citizens, but of the whole nation; it is found in all ranks.³⁰

Like the Founders, generations of Americans have thought a moral and religious people necessary to the Constitution.³¹ If they have been correct, and if the American people are not moral and religious, a necessary conclusion is that the Constitution does not work.

It could be difficult to prove these premises—that the Constitution requires a moral and religious people, and that the Americans are not such people (at least now). Instead of proving them, let us take them as plausible and look for telltale signs of their truth. If the American people were not moral and religious as required *ex hypothesi*, what failures would appear in the workings of the Constitution?

Here again President Adams's letter of 1798 suggests a path for inquiry.³² Much like the passage above from Tocqueville³³ of two generations later, Adams's letter observes that "we have no government armed with power capable of contending with human passions unbridled by morality and religion. Avarice, ambition, revenge, or gallantry, would break the strongest cords of our Constitution as a whale goes through a net."³⁴ The limited republican government of the Constitution leaves much to self-government.³⁵ Without the strictures of morality strengthened by religion, a people would be intractable for the civil government established by the Constitution.³⁶

A difficulty with framing such a failure of the Constitution solely in these terms is that to do so disparages the governments of the states. Especially as Adams and other Founders would have viewed matters, the states are the primary civil governments to take up the slack of self-government.³⁷ The federal Constitution supplies "cords" only secondary

30. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 292-93 (George Lawrence trans., J.P. Mayer ed., 1969) (1850).

31. See Hall, *supra* note 1, at 98 (stating that "American political discourse has never completely divorced itself from appeals to the common good and to the virtues that make such a good accessible").

32. *Adams to the Officers of the First Brigade*, *supra* note 12.

33. TOCQUEVILLE, *supra* note 30.

34. See *Adams to the Officers of the First Brigade*, *supra* note 12 and accompanying text.

35. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

36. See Mark A. Noll, *The Election Sermon: Situating Religion and the Constitution in the Eighteenth Century*, 59 DEPAUL L. REV. 1223, 1242 (2010) (stating that "[a]lmost all of the Founders presupposed that government under the Constitution would prosper only so long as morality, backed by religion, remained strong among the people at large").

37. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 295 (1936) ("The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-

and few as against human passions rampaging at large.³⁸ Private failure of self-government is of more concern to the states than to the federal government.³⁹

But there is a kind of failure of self-government that is of grave concern to the federal government. Again, Adams points the way. The play of the human passions of which Adams warns is not so much private as public. He warns of following French revolutionary footsteps, footsteps of national error more a feature of civil government than a force outside it.⁴⁰ The passion to be feared is a passion that distorts and abuses civil government itself.⁴¹ The cords of the Constitution at risk are the cords that direct and limit the federal government. Adams and his fellows feared Caesars. Morality and religion would suppress Caesars⁴² and keep up the supply of (effective, if miniature) Catos and Ciceros.⁴³

If such constitutional cords were to work only with a moral and religious people, what breaks in the cords would be expected in the absence of such a people? Perhaps most obvious would be breaches of explicit constitutional limitations. If our present Constitution, despite its

government in all matters not committed to the general government is one of the plainest facts which emerges from the history of their deliberations. And adherence to that determination is incumbent equally upon the federal government and the states. State powers can neither be appropriated on the one hand nor abdicated on the other.”); *see also* *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885) (“The right of local self-government, as known to our system as a constitutional franchise, belongs, under the constitution, to the states and to the people thereof, by whom that constitution was ordained, and to whom, by its terms, all power, not conferred by it upon the government of the United States, was expressly reserved.”).

38. *See* A.E. Dick Howard, *Garcia and the Values of Federalism: On the Need for A Recurrence to Fundamental Principles*, 19 GA. L. REV. 789, 789 (1985) (“Drawing on the lessons of history, [the Founders] sought to give the central government sufficient authority to deal with such national concerns as commerce among the states, while dispersing power in such a way as to protect individual liberty and local self-government—two of the ends for which the war of independence had been waged.”).

39. “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” THE FEDERALIST No. 45, *supra* note 23, at 241 (James Madison).

40. *See Adams to the Officers of the First Brigade, supra* note 12 and accompanying text. “Ahead of anyone in the [United States] government, and more clearly than any, Adams foresaw the French Revolution leading to chaos, horror, and ultimate tyranny.” DAVID MCCULLOUGH, JOHN ADAMS 418 (2001).

41. For example, Adams despised political parties and warned that such factions could silence moral citizens who truly sought to serve in an honest manner. *Id.* at 422.

42. “Statesmen, my dear Sir, may plan and speculate for liberty, but it is religion and morality alone, which can establish the principles upon which freedom can securely stand.” Adams to Zabdiel Adams, *supra* note 17, at 401.

43. For Adams there was no statesman greater than Cicero. MCCULLOUGH, *supra* note 40, at 375.

amendments—most notably the Fourteenth⁴⁴ and the Seventeenth⁴⁵—is taken to be close enough to the Constitution of which Adams spoke, present breaches might corroborate Adams's claim. One might well ponder whether the enumerated powers carry much of a negative implication any more.⁴⁶ The commerce clause springs to mind, for example.⁴⁷ Are the avarice and ambition in a people lacking morality and religion behind the breaking of such cords?

Cords of constitutional limitation are the most obvious to be at risk of breaking by a people of passions ungoverned by morality and religion. But they are not the only cords of the Constitution at risk. Cords direct towards desired ends as well as away from undesired means. So another sign of lacking a necessary moral and religious people may be cords broken by passions that misdirect government under the Constitution so that ends go unattained.

While continuing to prescind from identifying the ultimate ends of

44. U.S. CONST. amend. XIV.

As adopted, the first eight amendments to the Constitution applied only to the federal government. *See* *Barron v. City of Baltimore*, 32 U.S. 243, 250 (1833) ("Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention."). Since the passage of the Fourteenth Amendment, however, many of these rights have been extended to apply with equal force to the various states through the Due Process Clause. Robert R. Baugh, *Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.*, 49 ALA. L. REV. 551, 569 (1998).

The Supreme Court's application of the Bill of Rights to the states has been a major blow to federalism, wresting from states the deference and flexibility they previously had enjoyed. Justin F. Marceau, *Un-Incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns That Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1232-33 (2008); *also see* Louis Henkin, "Selective Incorporation" in the *Fourteenth Amendment*, 73 YALE L.J. 74, 88 (1963) (arguing that selective incorporation has created "rigidities and runs counter to the direction of growth of the Constitution to embody flexible standards permitting the increase of individual safeguards with the growing enlightenment of contemporary civilization").

45. U.S. CONST. amend. XVII.

As originally constructed under the Constitution, "[t]he Senate was not intended to be the people's representative body, but that of the *states*." Charles C.W. Cooke, *Repeal the 17th Amendment!*, NATIONAL REVIEW ONLINE (March 1, 2013), at <http://www.nationalreview.com/articles/341894/repeal-17th-amendment-charles-c-w-cooke?>

Senators were essentially obligated to vote in a manner consistent with the views of their state legislature or else they were putting at risk their re-election by that legislature. Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 YALE L.J. 1711, 1737 (1990). The ratification of the Seventeenth Amendment put an end to this system "of federalism and bicameralism which had previously checked expansionist federal activity." Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 233 (1997).

46. *See* *Gonzales v. Raich*, 545 U.S. 1, 57-74 (2005) (Thomas, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 584-602 (1995) (Thomas, J., concurring).

47. *See id.*

the Constitution in our inquiry on whether the Constitution works, identifying mediate ends may help in our testing for a mismatch between the Constitution and the people it governs. If a failure to achieve some particular mediate end is a failure to be expected from lacking a necessary moral and religious people, Adams's claim will have garnered further support, and a more general failure from that lack may be expected.

The Constitution itself proclaims its ends in the Preamble:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.⁴⁸

Are any of these ends unfulfilled? The reader may doubt whether the government under the Constitution establishes justice (in blocking state response to the killing of a class of human beings?⁴⁹), insures domestic tranquility (in precipitating financial collapse?⁵⁰), promotes the general welfare (in fomenting pork, earmarks, and similar methods to purchase votes?⁵¹), or secures the blessings of liberty to ourselves (in enforcing stifling regulation and schemes of taxation?⁵²) and our posterity (in saddling the costs of the welfare state upon the backs of generations to come?⁵³). One may be sure that Adams and his fellows would have

48. U.S. CONST. pmbl.

49. See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992).

50. See, e.g., Dale Arthur Oesterle, *The Collapse of Fannie Mae and Freddie Mac: Victims or Villains?*, 5 *ENTREPREN. BUS. L.J.* 733 (2010); David Reiss, *The Federal Government's Implied Guarantee of Fannie Mae and Freddie Mac's Obligations: Uncle Sam Will Pick Up the Tab*, 42 *GA. L. REV.* 1019, 1022 (2008).

51. See, e.g., Vincent Ostrom & Elinor Ostrom, *Public Choice: A Different Approach to the Study of Public Administration*, 31 *PUB. ADMIN. REV.* 203 (1971); Dwight R. Lee, *Politics, Ideology, and the Power of Public Choice*, 74 *VA. L. REV.* 191 (1988).

52. See, e.g., Ilya Shapiro & Carl G. DeNigris, *Occupy Pennsylvania Avenue: How the Government's Unconstitutional Actions Hurt the 99%*, 60 *DRAKE L. REV.* 1085 (2012); Sarah E. Shive, *If You've Always Done It That Way, It's Probably Wrong: How the Regulatory Flexibility Act Has Failed to Change Agency Behavior, and How Congress Can Fix It*, 1 *ENTREPREN. BUS. L.J.* 153 (2006).

53. See, e.g., Katherine Bradley & Robert Rector, *Confronting the Unsustainable Growth of Welfare Entitlements: Principles of Reform and the Next Steps*, *BACKGROUNDERS* (The Heritage Foundation, Washington, D.C.) (June 24, 2010), available at http://thf_media.s3.amazonaws.com/2010/pdf/bg2427.pdf; David Hartman, Stephen Moore & Michael Tanner, *The Work Versus Welfare Trade-Off: An Analysis of the Total Level of Welfare Benefits by State*, *CATO POLICY ANALYSIS* No. 240 (Sept. 19, 1995), available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa240.pdf>.

Especially poignant regarding this solicitude for posterity in the light of current events are these words from Joseph Story:

doubted.⁵⁴ And if government under the Constitution is failing to fulfill an end given in the Preamble, it would not be difficult to attribute some of this failure to "human passions unbridled by morality and religion."⁵⁵ Surely "[a]varice" and "ambition"⁵⁶ would have played substantial parts. Such a failure to fulfill a mediate end would suggest a broader failure, similarly engendered.

It is very likely that "cords of our Constitution"⁵⁷ have been broken. It also is very likely that these cords would be more intact if we were "a moral and religious people."⁵⁸ The Constitution, then, governs a people for which it is unsuited, a situation against which John Adams and other Founders warned⁵⁹ and a situation portending a general frustration of the ends of the Constitution. If so, the Constitution does not work, however well it may appear to keep the peace and in fact keep offices filled.

Whether the Constitution works depends upon the purpose of its working. Discerning that purpose, however, has resisted consensus. Consequently, this article has suggested a roundabout way to supply at least a tentative answer to the question whether the Constitution works. The Founders believed that the Constitution, like any republican form of government, would work only for a moral and religious people.⁶⁰ They framed and adopted the Constitution in that belief. John Adams warned that without morality and religion, the passions of the people "would break the strongest cords of our Constitution."⁶¹ A glance at how some cords have fared with a people very likely less than moral and religious

The last clause in the preamble is to "secure the blessings of liberty to ourselves and our posterity." And surely no object could be more worthy of the wisdom and ambition of the best men in any age. If there be any thing, which may justly challenge the admiration of all mankind, it is that sublime patriotism, which, looking beyond its own times and its own fleeting pursuits, aims to secure the permanent happiness of posterity by laying the broad foundations of government upon immovable principles of justice. Our affections, indeed, may naturally be presumed to outlive the brief limits of our own lives, and to repose with deep sensibility upon our own immediate descendants. But there is a noble disinterestedness in that forecast, which disregards present objects for the sake of all mankind, and erects structures to protect, support, and bless the most distant generations.

1 STORY, *supra* note 28, at 485-86.

54. Adams assigned as the object of a legislature "to do strict justice at all times." John Adams, *Thoughts on Government*, in 4 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 17, 195 (Charles F. Adams ed., 1854).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. See, e.g., Madison, Address to Virginia Ratifying Convention, *supra* note 24; Washington's Farewell Address, *supra* note 19.

60. See Adams to the Officers of the First Brigade, *supra* note 12.

61. *Id.*

in the standards of the Founders has supplied some evidence that, more generally, the Constitution does not work. The Constitution, broadly, may not be suited to the people it governs. If so, whatever convenient ends it may produce, it nevertheless does not work.