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In recent years, numerous books have appeared that detail the breakdown of American government. With provocative titles and themes such as *The Rise and Decline of the American Republic* or *It's Even Worse Than It Looks*, political scientists, legal academics, journalists, and even politicians are increasingly concerned that our political system is failing under twenty-first-century conditions. Yet for all the attention to our serious political problems, few thinkers have taken up the question of constitutional failure itself. What does it mean for the Constitution to fail? This is a question for which an answer is *assumed* by many, but articulated and defended by few. The title of the book that you hold in your hands may not be provocative, but compared to other books on the contemporary crisis of government, this one offers the most original and provocative *argument*. This is a book that unsettles conventional wisdom and fashionable academic opinion.

Institutional breakdown is not the mark of constitutional failure, Barber argues. Instead, the impossibility of reform defines consti-
stitutional failure. Reform becomes impossible when citizens lose or lack the healthy political attitudes and civic understanding necessary to recognize and contend with serious political problems. The implications of this conception of constitutional failure are stunning: the Articles of Confederation was not a constitutional failure, says Barber, because its citizens were competent to make a new constitution. The promise of the Constitution evidences the success of the Articles of Confederation. The Civil War was not a failure because it was the occasion for a refounding of the American regime. For Barber, the failure of the Constitution to remedy its defects peacefully revealed a deeper success in the fact that the nineteenth-century constitutional culture produced a statesman of uncommon ability and a citizenry that could understand, appreciate, and support such extraordinary leadership. Moreover, late-twentieth-century America—a time of unprecedented prosperity—reveals a profound constitutional failure to the extent that the American people have lost the attitudes, knowledge, and virtue characteristic of America's citizenry at its origins and in its darkest domestic hour. To sum up Barber's thesis in a nutshell: when you thought American constitutions had failed, they succeeded; and when you thought the Constitution was succeeding, it was actually failing.

Barber begins this book by noting the paradox that Americans love their Constitution even as they dislike their government. They venerate the Constitution while lacking respect for Congress, the president, and increasingly the Supreme Court. Barber urges a new kind of veneration—veneration of founding thinking rather than worship of a document, persona, or flag. Returning to the founding way of thinking, but leaving open the conclusion one might reach, raises for us the possibility that the Constitution is its own source
of failure. Barber asks us to reconsider the merits of our reliance on institutional design to replace the role of virtue and character in leaders and citizens.

At first one gets the impression that Barber thinks the Antifederalists possessed the better understanding of constitutional failure because they had such doubts about the Federalists’ new idea of separation of powers. But Barber also traces weaknesses in our contemporary thinking to the false idea that ours is and should be primarily a negative-liberties constitution—a design built on the idea that limits to governmental power are the central or most fundamental feature of our Constitution. This conception was originally an Antifederal idea. The idea that ours is fundamentally a Constitution skeptical of governmental power, and of national power especially, has rendered much contemporary constitutional theory incoherent. Barber shows that the fundamental feature of any constitution must be a positive purpose to solve some problem or accomplish some plan. If the fundamental purpose of government were to limit itself, one would have no reason to want a government in the first place. One would be better off without government. The Federalists understood this point and stressed that the Constitution creates power to accomplish legitimate public purposes. Of course, one needs to worry about the possible abuse of power, but a sound constitution provides all the power necessary to accomplish its aims. The Federalists thought the problem of too much power could be solved by creating contending institutions and contending powers rather than limiting the power of government as a whole.

Thus, Barber shows how the Antifederalists and the Federalists were both wrong—and both right. He upends the common understanding of their thought by showing that the Antifederal critique of a constitution devoid of civic education was correct, but
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not for the reasons they offered. Civic education and virtue were necessary not primarily to protect the citizenry and the states from the tyranny of the national government, but more to make the national government work. He shows that the Federalists were right to stress the need to create power to accomplish common political purposes, but they were wrong to ignore the need for a much more robust civic understanding and engagement to enable government and to hold it accountable.

Barber does not place as much explicit emphasis on the Antifederalists and Federalists, per se, as I have just done. Rather he shows how basic orientations captured by their original contest—the kind of thinking they displayed—can better connect contemporary constitutional theory to the crisis of governance today than can observations limited by categories and arguments more prominent in the writings of constitutional theorists today. Readers will thus be treated to a superb overview and introduction to the field of constitutional theory even as the book focuses on the specific topic of failure. This book offers an accessible overview of Barber’s large and rich body of work on the meaning of the American Constitution.

Barber’s broad-ranging account of constitutional failure and contemporary constitutional theory shows citizens the skill and knowledge they need to repair what ails America. Barber is only cautiously optimistic that America can be repaired. The book ends with a sharp critique of academic constitutional thinking. Barber shows that ordinary citizens, for all their ignorance and inexperience, still possess more common sense than many, perhaps most, academic constitutional thinkers. Ordinary citizens act on the belief that justice and the common good are real aspects of the world about which we disagree and for which we seek better answers.
Many academics, including my esteemed coeditor of this series, Sanford Levinson, are skeptical that there are moral truths to seek. Barber offers a pointed rebuttal to academic moral skepticism and shows how that skeptical attitude further inclines the Constitution to failure. While Barber seeks to make citizens more sophisticated, he seeks to bring sophisticated academics back to common sense. We hope that the inclusion of Sotirios Barber’s book in this series and our recognition that it is a powerful argument, despite our disagreements with it, displays the kind of healthy civic attitude he would welcome.

Jeffrey K. Tulis
Coeditor, Constitutional Thinking
Americans have a low opinion of their government but a high opinion of the U.S. Constitution. These opinions make a coherent pair only if the Constitution is merely a law, in this case a law that the government may be failing to observe. One could hardly blame the law for the failure of its subjects to follow the law. Yet this reasoning doesn’t quite apply to the Constitution because the Constitution is more than a law. It is also a design or plan of government, and one would think that if a government is failing it has a defective design. In this case praising the Constitution and condemning the government would make little sense.

You could say in response that the nation’s favorable view of the Constitution is a good thing even if a favorable view of the Constitution makes little sense paired with an unfavorable view of the government. Political opinions can be salutary even if they don’t make sense in all respects. The Constitution is at least a symbol of political unity, and as a symbol of unity its value rises with the disunity that’s largely responsible for the government’s failure. Ven-
erating the Constitution is thus a good idea not despite political dysfunction but because of it.

This would be an apt response up to a point, but only up to a point. A symbol of unity has value only if it either reflects or contributes to actual unity, not if it fails to arrest or even exacerbates disunity. If the Constitution should exacerbate or fail to arrest disunity, veneration of the Constitution would be a bad idea. Veneration of the Constitution would then be blindness to its defects, and the blindness would preclude the effort to correct the defects. Facing and correcting constitutional defects is something Americans once did quite well. They did it in 1789 and again in the 1860s, and they earned the world’s admiration in the process.

On the other hand, there’d be no point in facing the Constitution’s defects without some realistic hope of reform—that is, unless some part or stratum of the community was sufficiently capable and dedicated to the task of leading the nation to constitutional change. If “capable of leading the nation” means, in part, “trusted by the nation to lead,” America is in trouble. Polls show the absence of any such leadership stratum among any of the nation’s institutions, governmental and nongovernmental. The only institution in which a majority of Americans express confidence today is the military, and the country (or part of it) accepted the military as an instrument of constitutional change only during Reconstruction. We can seriously doubt, therefore, that deliberate constitutional change of any magnitude is possible prior to trauma that might befall a people but that no people would ever wish for itself. So as a practical matter—a matter on which any part of the nation with a prayer of moving the whole is prepared to act—we’re almost certainly stuck with what we’ve got.

To appreciate just how profoundly we’re stuck with what we’ve
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got, reflect on all that constitutional failure must mean. The American Constitution is a document, ink on parchment, under special archival glass. Though we talk about “living constitution,” that’s just a metaphor; no one believes this document is a thing that can act. And since it can’t act, the Constitution itself can’t succeed or fail, for failure and success are properties of actions and cognate phenomena, like activities and practices. When we say the Constitution succeeds or fails, therefore, we’re talking about the government whose outline the Constitution describes. And since the government is supposed to represent all of us, we mean ultimately that the nation succeeds or fails, that we as a political community succeed or fail. Constitutional failure is thus the failure of a culture. And constitutional reform must therefore be nothing short of cultural reform.

Viewed against this fact virtually every current proposal for constitutional reform appears stunningly inadequate. For all but one or two of these proposals focus on governmental institutions and assume that reform is basically a matter of making institutions more responsive to democratic opinion. Few of today’s observers seem to see constitutional reform as a matter of cultural reform. Yet there could be method in this error. Perhaps we should keep the conversation going even if, for the moment, we’re talking about the wrong thing. We have no hope of eventually talking about the right thing if we stop the conversation altogether, and facing a problem as daunting as the real problem may stop the conversation altogether. Constitutional reform is all but impossible for us precisely because constitutional reform for us would mean cultural reform, and we wouldn’t need cultural reform if we were capable of accomplishing it through a process of public discussion.

Why, then, write about the real problem of constitutional fail-
Why trouble to read about it? One answer lies in what we seem to be: creatures who value truth regardless of the practical payoff. Another answer is that we can't rule out a practical payoff. Lightning strikes. It struck in America in the late 1780s, in the early 1860s, and in the early 1930s. Should it strike again, we might want to know what constitutional failure and success mean and how to think about them.
The National Endowment for the Humanities and Notre Dame’s College of Arts and Letters extended sabbatical support that made this essay possible. Friends with whom I debated key portions of my argument over the years include Jim Fleming, Steve Macedo, Walter Murphy, and Ross Jacobs. Karen Flax and Jeff Tulis read the penultimate draft and saved me from numerous errors of style and content. Larisa Martin smoothed the path to publication, and Fred Woodward prodded me along it. Warmest thanks to all.
I

Why Talk about Constitutional Failure?

This book addresses a paradox: Americans have lost faith in their government, yet they revere the constitution that established their government and continues to structure its operations. I argue in this book that this paradox is due to a misunderstanding of what the Constitution is. I believe, moreover, that this misunderstanding is a fatal misunderstanding. I argue that recovering the lost understanding (the “lost constitutionalism of the framers,” if you prefer) requires supplementing, perhaps even rejecting, the framers’ own strategy for constitutional maintenance. The framers’ strategy is called “checks and balances,” and no idea is more associated with American constitutionalism than “checks and balances.” If recovering the framers’ constitutionalism actually did require rejecting this idea, then recovering the framers’ constitutionalism would require rejecting the framers’ constitution. One paradox would thus replace another. To resolve this last paradox, I’d have to show that the American Constitution is less a document—and the behavioral theory behind it—than a political culture, and
that constitutional failure is less an institutional than an attitudinal matter. More specifically, I’d have to show that constitutional survival in America depends on attitudes like patriotism, trust, and magnanimity, and that relying mainly on checking and balancing self-serving attitudes guarantees eventual constitutional failure.

The Initial Paradox

Over the last half century Americans have grown increasingly doubtful about their government’s ability to meet the country’s economic, social, and environmental challenges. Congress has been the chief focus of this worry, due mainly to undemocratic aspects of the Senate’s composition and operation, a practice of financing electoral campaigns that beggars Congress to special interests, and ideological division that makes it impossible for Congress to function as a deliberative body. In June 2013, Gallup reported that only 10 percent of the public had “a great deal or quite a lot” of confidence in Congress, with 52 percent expressing “very little” to no confidence, and 37 percent having only “some” confidence in Congress. This contrasts with the 47 percent who voiced “a great deal” or “quite a lot” of confidence in Congress in May 1973. Congress is far from the only worry. Confidence in the presidency as an institution declined from 72 percent in March 1991 to 36 percent in June 2013. And confidence in the Supreme Court declined from an average of 45 percent in the ten-year period from 1973 to 1983 to 34 percent in June 2013.¹

A puzzling element of this situation is the public’s esteem for the Constitution. According to the AP–National Constitutional Center Poll of August 2012, 69 percent of the public (down from 74 percent in both 2010 and 2011) considers the Constitution an “enduring document” that does not need to be “modernized.”²
These figures provoke the question of how Americans can have a good opinion of their Constitution and a bad opinion of their government. Isn’t one supposed to be the plan of the other? Federalist 1 calls the Constitution a “plan” of government, a plan for a “good government,” one that will facilitate the people’s “dignity,” “liberty,” and “happiness.” Because The Federalist offers the plan to the public as a remedy for “the insufficiency of the existing federal government” (i.e., the Articles of Confederation), the plan resembles a physician’s prescription: follow this plan and you’ll do better, says The Federalist. Can a prescription be a good one if it’s wrong for the patient? And is it wrong to assess the value of a prescription by whether the patient actually improves? The patient did improve in the 1780s and periodically thereafter. But at this writing future prospects for the country don’t look good, and the prescription was supposed to be good indefinitely.

True, you can’t blame a plan if the patient doesn’t follow it. But though the nation has ignored the plan in the past, especially during the Civil War, the patient follows the plan today. Right-wing critics of the New Deal and its successors deny this last proposition. They bemoan the manner in which so-called leftist judges and politicians “rewrote the Constitution,” and they dream of “restoring the lost Constitution” of the Coolidge era. But by “the plan” I mean the Constitution’s structural provisions—the Constitution’s policy-making and adjudicatory procedures, including the procedures for appointing law makers and judges and the rules that specify their tenure of office. Sanford Levinson calls these provisions the Constitution’s “hard wired provisions” to distinguish them from the variable standards found mostly in the Bill of Rights and the Civil War Amendments. Structural provisions are “hard wired” be-
cause there’s little debate about what they prescribe. They don’t invite competing conceptions the way “due process” and “freedom of speech” do, and this gives them some insulation from change by judicial interpretation.4 Right-wing critics of today’s national government claim that it has exceeded its authorized powers, usually at the expense of the states; they don’t normally claim that national institutions were unlawfully established, or that national politicians occupy their offices illegally, or that officials and institutions employ unlawful procedures. So when they charge that the national government is exceeding its powers they say, in effect, that a constitutional government is doing unauthorized things. By their account, the government remains constitutional even if much of its conduct is unconstitutional.

There are times when officials are said to occupy their offices illegally and proceed to their decisions in unlawful ways. Military tribunals in wartime are frequent targets of these accusations. Congress was an unlawful body when it effectively denied representation to somewhere between a quarter and a third of the nation between 1865 and 1870. The current Senate practice of letting forty-one votes block consideration of politically significant actions and the Hastert Rule among House Republicans effectively defeat the constitutional plan of decision by legislative majorities for routine domestic matters. And for over two centuries many observers have seen the Constitution’s ratification itself as an unlawful act. But critics don’t normally refer to structural issues like these when they claim the national government exceeds its powers. And if the national government has in fact exceeded its powers, the Constitution deserves some of the blame. More than a set of rules for governing and recruiting governmental officials, the Constitution’s hard-wired provisions include rules that define and arrange
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constitutional offices. These rules can't be understood apart from the assumptions that justify them. Among the Constitution’s key structural ideas is the principle of checks and balances. If the national government has exceeded its authority, or to the extent that it has, then the system of checks and balances hasn’t done what *The Federalist* says it was designed to do: prevent abuses of authority.

The framers’ claim for checks and balances was far from modest. With a measure of pessimism about the patriotism and law-abidingness of Americans generally, *The Federalist* promises that the system of checks and balances will prevent abuses of authority even among officials who are personally inclined to exceed constitutional restraints, because they answer to constituents governed more by their private interests and partisan commitments than their devotion to the Constitution and the common good.5 So if politicians have exceeded their authority, then the Constitution has failed to that extent, for constitutional checks and balances were supposed to confine institutional actors to their proper spheres. In general, therefore, it’s hard to deny that sustained political dysfunction has at least some constitutional connection—even when the political dysfunction results from constitutional infidelity. As Jack Balkin puts it, American politics is conducted within a constitutional framework, and this makes it fair to call the actual conduct of the national government and American political institutions generally as “the Constitution in practice.” To say that our politics is failing is to say that the constitution in practice is failing, and therefore so is the Constitution.6

Why deny that the Constitution is failing? Why the reluctance to acknowledge the constitutional dimension of our sick politics? The explanation, of course, is that the general public venerates the Constitution and its framers. In *Federalist 49* James Madison ar-
argued that the public’s veneration of the Constitution was necessary to political stability because postrevolutionary America couldn’t be trusted with the tasks of constitutional repair. All of the nation’s existing constitutions, he said, were formed “in the midst” of revolutionary pressures and opportunities that “stifled the ordinary diversity of opinions on great national questions,” produced “a universal ardor for new and opposite forms” of government, and promoted “an enthusiastic confidence of the people in their patriotic leaders.” “The future,” he said, promises no “equivalent security” against “the spirit of party.” And therefore, he concluded, it’s best to make the Constitution hard to amend and trust time to make it an object of veneration (49:340–341).

Madison’s argument is not what it appears to be. It is not really an argument for venerating the Constitution—it is not an argument that the Constitution deserves veneration. It is at best an argument for cultivating veneration on the part of those who, if they don’t venerate the Constitution, are likely to make it worse. It’s also an argument that assumes a measure of constitutional adequacy. It assumes, in other words, that government under the Constitution is approximating constitutional ends more or less as well as can be expected under the circumstances. It assumes further that some element in the community is exempt from its scope, for if all venerated the Constitution, none could make the calculations and comparisons needed to determine whether the government was actually doing reasonably well. Madison’s argument for veneration is thus an argument for pretending to venerate, not really to venerate. As such, it could be a good argument if incorrigible political division or incompetence threatened to make things worse. Pretending to venerate a constitution would also make sense if there were no way to arrest constitutional decline. Why not comfort the dying
with illusion if that's the best one can do? So I'm not saying that Madison's argument is a bad argument in all circumstances. In fact, I concede, as I believe all candid observers must, that it's probably (though not quite certainly) a good argument today. Nevertheless, it's a bad argument for those who have any hope for the Constitution's survival. And since the present discussion would be pointless without such hope, it's a bad argument here.

Why Venerating the Constitution Is a Bad Idea

Veneration is a state of mind that takes its value from the value of its object and the consequences of venerating the object. No one would, or should, venerate a golden calf, or the gold in the calf. Yet even regarding things that deserve veneration, veneration has a regrettable side. This is certainly true when the objects of veneration are human things. Veneration implies a kind of blindness: we're blind to the flaws of the persons and things we venerate, insofar as we venerate them. Veneration of the Constitution can blind us to the need for constitutional reform, and a constitution beyond timely reform is a failure waiting to happen. As an abstract matter, instruments are subordinate in value to their ends; the effectiveness of an instrument depends on contingencies beyond the instrument's control; an instrument that can't adapt to changing circumstances will fail when circumstances change; and, sooner or later, circumstances will change. This argument of general practical reason is beyond debate. Yet how this argument applies to the Constitution is not at all beyond debate. No one will deny that things change—that is, that matters subject to government change. Most will agree or should agree that the Constitution can't work under
any and all conditions, like severe natural disasters and sustained terrorist assault. True, it’s been said that the Constitution “is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.” But even if anyone seriously believed this, the contrary is implied by the amending provisions of Article V. The very existence of an amending rule in the constitutional document implies that the nation may need to change the Constitution to meet changing conditions, and therefore that at any given point in time the Constitution may not be adequate to conditions. We’d surely agree that no government could control all of its natural and political environments and that, therefore, constitutional government can’t guarantee the conditions for its successful operation. And since a constitution that hasn’t reformed before it’s too late is a dead constitution, we can agree that, by definition, timely reform (reform that’s not too late) and the capacity for timely reform are essential to constitutional survival.

With all this, however, we might still disagree about the Constitution’s instrumental nature. That is, we might disagree about the wisdom of understanding the Constitution for what the document’s preamble clearly says the Constitution is: a set of means to independently valued goods like justice, the common defense, and the general welfare. As a matter of general practical reason there can be no question that ends are more important than means. But since politics rarely bends to practical reason, one can deny that ends are always more important than means. Ends may not be more important if the meaning of the means is less contested than the meaning of the ends and if the means serve an array of ends broad enough to avoid violence. If we disagree about the meaning of ends like justice and the general welfare, if this disagreement
falls short of violence, and if the meaning of justice and the general welfare is pursued through institutional rules that are clear enough to minimize debate about who performs what functions (constitutional means), then in this context means acquire a heightened importance.

Heightened importance or no, however, institutional means remain subordinate to ends. Institutions exist in a context that assumes that they have a point—that they serve some ends or goods—and at no point could we conceive institutional means as ends in themselves. That is, constitutionalists can’t conceive institutional means as ends in themselves. For propositions within a constitutionalist framework must be consistent with the idea of people establishing a constitution, and no one would establish a government with powers to extinguish life, liberty, and property for the sole pleasure of watching the government operate. The ends, moreover, must be conceived as public goods. Even if individuals agreed to a government solely to secure their personal safety and property, they would have to justify the government to each other in terms broader than their personal interests. They’d have to say the government served some public purpose or common good, like the security of everyone’s person and property, a common good that would restrain the private pursuits of each contracting party. (A tyrant might, but no democrat would say to other persons generally: “This is a good government because it secures my property alone.”)

Yet the greater importance of constitutional ends remains debatable for a further reason: the Constitution’s self-proclaimed status as “supreme Law.” Where a set of means is supreme law, means are more than mere means. We would need no more than Jefferson’s “light and transient causes” to abandon a set of mere means. We would need much more than “light and transient causes” to
disregard supreme law. Where means became supreme law, we’d have “to suffer, while Evils are sufferable,” acting only when evils approach the unbearable. But as mandatory means became increasingly unbearable they would revert to mere means, and we could and should act by “Right” and “Duty” to replace them with new means—that is, real means, means that work.

Such is the understanding of the American creed that Jefferson recorded in the Declaration of Independence. Madison reiterated this understanding in *Federalist* 45 where he recalled the Revolution and said that “the real welfare of the great body of the people, is the supreme object,” and that “no form of government whatever,” including the Union, “has any other value than as it may be fitted for the attainment of this object” (45:309). Supreme law thus remains instrumental if not *merely* instrumental, and the apparent leap in logic that reduces supreme law to mere means is bridged when we recall that, by its own preamble, the document declares that supreme law was proposed and ratified *as means*. The Federalist supporters of the Constitution justified it as means, and the Antifederalists criticized it as means. So when the “Constitution in practice” ceases to function as means, it is no longer what was ratified, and our right to abandon it, as the framers abandoned the Articles of Confederation, is continuous with the right that established it.

Descending from constitutional logic to constitutional history, we notice an important fact: though Madison urged veneration of the Constitution to his public readership, he said something different in private. In letters to Jefferson of September and October of 1787, five months before he wrote *Federalist* 49, Madison doubted that the Constitution would either achieve “its national objects” or prevent injustices by the states—injustices, he said, “which ev-
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erywhere excite disgust against the state governments.” The chief cause of Madison’s pessimism was the refusal of the Constitutional Convention to adopt a general congressional veto over state laws.\(^8\) Madison also saw equal representation of small and large states in the Senate as “a lesser evil” forced on the Convention by political realities. These concessions of the Convention in behalf of state sovereignty ran counter to the large-republic argument that Madison offered in *Federalist* 10 as the heart of his constitutional theory. Such were Madison’s worries in the late 1780s. In writing *Federalist* 49, therefore, he was advising reverence for a constitution that he believed to be seriously defective.

Madison’s advice poses problems. The first would be identifying its addressees. Who exactly was Madison talking to? Who should cultivate veneration for an admittedly defective constitution? Would the nation be divided into an enlightened few—the Washingtons, the Jeffersons, the Madisons—and a benighted many, with the few finding ways to get around at least some constitutional defects while deceiving the many about the Constitution’s virtues for the good of all? Might an elite judicial corps or a standing congressional committee engineer gradual constitutional change through constitutional interpretation? Since Madison was no populist, we can’t dismiss some such possibility as consistent with his principles, if not his expectations.

But if we granted such a possibility for argument’s sake, other problems would rush in. Constitutional interpretation has its limits. It can change our understanding of ideas like due process and equal protection, but it can’t reach the Electoral College, the equal representation of states in the Senate, or a politics that, thanks partly to the framers themselves, emphasizes private interests over public purposes. Once interpretation reaches its limits, an enlightened
few would find themselves cultivating reverence for a constitution they knew to be defective. Their question would be what ours is today: How can veneration for a defective constitution correct its defects? How can constitution-worship improve the nation’s ability to defend itself from foreign enemies or facilitate the well-being and foster the decency of its people? We’re left to wonder, therefore, why anyone would follow Madison’s advice in *Federalist* 49. Why would anyone foster reverence for a constitution with potentially fatal defects? Such a constitution wouldn’t need reverence; it would need reform. It would need the constructive criticism that precedes reform. It would also need an institution of some sort (necessarily an informal one, as we shall see) that concerned itself with the problem of constitutional reform on a continuing basis, a stable institution to address a standing problem, the possibility of constitutional failure in a world of contingencies.

No one denies that we have to accept and work with a defective constitution, for there’s no such thing as a perfect constitution. Elsewhere I’ve gone to the trouble to show that a perfect constitution is more than practically impossible; it’s conceptually impossible, unimaginable. But accepting and working with a constitution is one thing; venerating it is another. Venerating something blinds us to its defects, the opportunities to correct them, and the need to foster the skills, attitudes, and institutions for correcting them. By obscuring the need to cultivate reformist virtues, venerating a constitution defeats hopes for achieving the general welfare at the same time that it risks moral disaster. Let me explain why this is so.

Acknowledging the Constitution’s defects, as Madison did to Jefferson, presupposes that the Constitution and the government it establishes are answerable to standards of good policy and right conduct that are not of its making—goods and standards that it
can fail to approximate. Acknowledging potential failure thus goes hand in hand with belief in the existence of real goods and real standards—real goods as opposed to merely subjective or conventional goods. The preamble records this understanding perfectly. It refers to things like justice and the general welfare. It places none of these ideas in quotation marks or scare quotes in the manner of today’s academic moral skeptics. It contains no hint that, in the manner of today’s vaunted patriots, it’s talking about some exceptional American conception of justice and other goods. It refers to justice and the general welfare, plain and simple. *Federalist* 1 underscores the idea of justice and welfare, plain and simple, not just American justice and welfare, when it says that failure of the nation’s constitutional experiment would “deserve to be considered as the general misfortune of mankind” (1:3).

Venerating a constitution proceeds from a different view of the world. When we think of veneration we think of reverence and therewith of religion and the attitude of believers toward God. We revere God the Creator or the maker, “the Creator of heaven and earth.” We can’t revere the Constitution that way unless we believe the Constitution is a creator or maker, the maker of America as a nation. Many have said that the Constitution made the nation. But that’s not what the Constitution says. That the Constitution made the nation can’t be said consistently with the history of the Constitution, as confirmed by the Constitution’s preamble and Article VII. This language indicates that a preexisting sociopolitical entity of some sort (an identifiable “We”) made the Constitution. God is often revered as the source of American rights. We can’t revere the Constitution that way unless we believe it is the source of our rights. Yet the preamble, the Declaration of Independence, and the Ninth Amendment all indicate that our rights preexist the
chapter 1
Constitution. But never mind the preamble, the Declaration, and
the Ninth Amendment. Let’s not appeal to any authority beyond
our own common sense. Let’s grant for argument’s sake that the
Constitution deserves veneration in ways analogous to our venera-
tion of God.

Let’s assume that the Constitution made us a nation and that it
is the source of our rights. Then let’s notice that the Constitution
speaks for “We the People.” Now combine these thoughts: if the
Constitution made us as a people, and if the Constitution speaks
for us as a people, it follows that we made ourselves a people and
that we are the source of our rights. We the People decide the big-
gest questions for ourselves: who and what we are; what’s good for
us; what rights we have; how we should treat each other. Since the
Constitution declares our voice the “supreme Law,” we as a people
answer ultimately only to ourselves. Never mind higher authority,
like God or nature; never mind the dissenting individual, for whom
the Constitution provides in several ways and who implicitly ap-
peals to higher authority of one form or another; and never mind
the rest of the “candid world” to which Jefferson and his confed-
erates once gave reasons for declaring the nation’s independence.

Revering the Constitution thus turns out to be a form of self-
worship, and the big problem with self-worship is that it doesn’t
work. Not for us, at least. It doesn’t work to secure a people’s
well-being in a world not of human making and beyond human
control. Some politicians and some intellectuals will say things to
the effect that we do make our own reality. No one really believes
this, however. We can cope with reality, of course, changing things
to our liking temporarily and at the retail level. But coping is not
making, and retail is not wholesale. If we really could make our
own reality our success would follow upon the mere declaration
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of it, and failure would be impossible. Indeed, failure would be inconceivable; we’d have no concept of it. We wouldn’t labor for results because we wouldn’t have to labor for results. We’d just go around saying (for no reason, since we’d have no needs) “let it be,” as God created the world by saying, let it be. Although we creators might see our animated creations falling short of what they might call “their ends,” we wouldn’t count their falling short as “failure” if we made them (for our amusement?) to fall short. Their view of their nature and situation might include notions like action, choice, agency, and failure; but we, the makers, would know these notions to be illusions. If we could make our own reality the Constitution would be a good constitution and we’d be happy (boredom aside?) solely by proclamation. If we could make our own reality we’d see America’s present situation as a case of national masochism, explicable by some theory of “different strokes.” Suffice to say that if we have made our own reality, the reality that we’ve made includes a reality beyond our making, and beyond our control.

There would also be the problem of whom the word “we” included. Who would be the “we” who decided what’s good and right for ourselves? The Reconstruction Congress and the U.S. Army tried to settle this question for the country in 1868 when they forced the Southern states to ratify the Fourteenth Amendment. This amendment makes all native-born and naturalized persons members of the constituent we, regardless of race, parentage, religion, or wealth. This, at any rate, is the constitutional part of the answer to who we might be. This constitutional answer would not only have a force of its own, it would register in any scientific answer. The social-scientific finding that segments of the population felt politically disfranchised would be visible partly in light of the legal-moral fact that it ought to be otherwise. Of course, for much
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of the nation's history—a shocking three-quarters to date—it was
otherwise. For much of the nation's history, law-abiding and so-
cially productive parts of the adult population were excluded from
the constituent we, despite the creed that none should be governed
without their consent. The nation's history thus shows that the
identity of the constituent we is itself a political problem, even the
biggest political problem. It makes no sense, therefore, to say that
we decide the biggest questions; for with no prior agreement on the
biggest questions, there is no we.

The American constitutional text supposes a preexisting com-
munity whose members aspire above all else to public goods like
the common defense and the general welfare. The text is written as
if these goods are real goods, goods that naturally attract compet-
ing conceptions. Articles I, V, and VII indicate by their provision
for deliberative institutions that the best versions of these goods
and the means thereto will be pursued through a continuing pro-
cess of public reason. By banning titles of nobility and religious
tests for national office, Articles I and VI indicate that the evidence
supporting policy choices will be accessible in principle to people
generally, not solely to any special generation, bloodline, or divinely
privileged calling or group.

Agreement in these things—what and who we are, what we
want most, how to find the best conceptions of what we want
most, the best means thereto, and what counts as evidence in such
matters—agreement in these things wouldn’t be everything, but
it would be a whole lot—enough to keep things going. Disagree-
ment in these things was enough to cause one civil war and may yet
cause another. Agreement in these things depends altogether on
the attractiveness of real goods, goods not of our making, pream-
bular goods like justice and the general welfare that stand proudly
on their own, without apologetic quotation marks. By implicitly denying the existence of such goods, constitution worshippers leave nothing for competing conceptions of an idea to get closer to. Competing conceptions are no longer versions of general ideas in whose light some conceptions are better than others; they’re just competing conceptions, period. You have your view of “Justice,” I have mine, and there’s no truth of the matter for us jointly to strive for and embrace at the expense of our initial opinions. With nothing to get closer to, deliberation degenerates from a truth-seeking process to a bargaining process. But bargaining for personal advantage, even bargaining in good faith, in the manner of “enlightened” self-servers, is no substitute for deliberating about truth. Bargainers as such support the practice of good-faith bargaining only to the extent that its payoff to them personally is more likely and more attractive than that of other processes. When bargainers come to believe that processes like fraud and violence are sure to pay more, they may continue bargaining from habit, but they can see no reason for bargaining. Reduce real goods to apparent goods and deny that (as the preamble and Article V indicate) the quest by fallible actors for real goods is foundational to the national community, and there can be no unconditional reason to prefer bargaining over fraud and violence.

Constitution worship thus indicates that force is the ultimate source of what’s good and right—the source, rather, of what’s called good and right. This downward spiral from Constitution worship to moral skepticism and ultimately force makes constitution worship a bad idea. And it is altogether incompatible with the framers’ idea that the chief function of the American Constitution is reconciling public opinion to objective standards of the public interest and political morality.
Venerating the Constitution is a bad idea because it obscures the inevitability of constitutional failure and the corresponding need to promote reformist institutions and foster reformist virtues. Venerating the Constitution can be a good idea when failure is irreversible and illusion is the way to keep a dying nation comfortable for as long as possible. Venerating the Founding (not the Constitution) is different, actually quite different.

A constitution in the American sense is a legally obligatory arrangement of offices, powers, and rights written out on paper or parchment. Founding of a constitution, on the other hand, is a kind of action. This kind of action has its own preconditions, stages, agents, and subjects; it also requires its own competences and virtues. To venerate the Founding we would venerate the crafting and ratification of a set of means for ends external and superior to the means crafted. This understanding of a founding act is preserved in the Constitution’s preamble, which declares the document established for the sake of ends such as the common defense, the general welfare, and the blessings of liberty. As a matter of practical reason, ends are superior to means. From a framer’s view, the common defense and the general welfare are superior to institutions established to pursue those ends. Madison affirms the superiority of ends to institutional means when he says in *Federalist* 45 that “the real welfare of the . . . people, is the supreme object to be pursued; and . . . no form of government whatever has any other value than as it may be fitted for the attainment of this object.” Madison seemed dead serious about this principle. He applied it to the proposal of the Philadelphia Convention and to the Union itself. “Were the
plan of the convention adverse to the public happiness,” he said in *Federalist* 45, “my voice would be, reject the plan. Were the Union itself inconsistent with the public happiness, it would be, Abolish the Union” (45:309)—the very Union, mind you, that the preamble and Article XIII of the Articles of Confederation declared to be “perpetual.” Thus, to venerate the Founding is to revisit a perspective in which the Constitution is both a mere proposal and a mere set of means. To commemorate the Founding is to recall a point of view in which the Constitution is not the most important thing and where fidelity to law is no substitute for public-spiritedness, deliberation, leadership, and trust. Better, I submit, to venerate the Founding than the Constitution.

But this conclusion needs refinement. We should venerate the Founding and the framers, but only in the service of a larger good. Were our admiration focused on a particular act and particular actors, the reason would lie in the excellence of their particular product, which, like all manmade constitutions, is at best a contingent and potentially failed instrument of its ends. If there’s lasting, noncontingent value in venerating our framers and our founding it lies not in who they might have been but in what they aspired to demonstrate, namely, humanity’s capacity for “establishing good government from reflection and choice.” They made and remade constitutions, we’re sprung from them, maybe we can emulate them, when the time comes, as it has come. Venerating the framers and their act makes sense if they can realistically serve as a model for our own conduct.

This position may open me to the charge of lawlessness, ingratitude, and even impiety—sins against a document and a system that we, actually or virtually, are sworn to preserve and pass to the future.10 So permit me a brief defense against this charge. First a
quick review: I've argued that we should commemorate the Founding, not the Constitution, and I've argued for commemorating the Founding for the virtues it represents, not for the constitution it produced. My argument so far has been an argument from the possibility of constitutional failure, a possibility no one can deny. I've argued elsewhere to the same conclusion from the nature of the people's welfare, which Madison says in *Federalist* 45 is the supreme object of any good government, regardless of form. Arguments from the possibility of failure and from the nature of human welfare appeal to goods higher than the positive law. Because American systems of law are expressly established to pursue these goods, laws disconnected from reasonable versions of these goods aren't really laws, aren't really constitutional laws.

Though this instrumentalist attitude toward law reflects traditional doctrine, some will call it a formula for chaos, and I concede it may well be. Better, you might say, some authority, however flawed, than none at all. I respect the point. Appeals to higher authority or, as I prefer, true authority, have led to death and destruction in the past. So let me try a different tack. Let me try to defend venerating constitution makers and their virtues by appealing not to higher values but to the law itself, to the Constitution itself.

Assume that we all take an oath to preserve and defend the Constitution. Many of us have taken the oath in good faith, as have our representatives in all parts of our governments. Our question now is whether the oath favors the Constitution and the historical act that established it more than the virtues that the American founding aspired to represent. Here again, we can't venerate both at the same time, for a constitution that worked perfectly would eliminate the need for further acts of constitution making and reform, and celebrating virtues associated with constitution making
and reform would be both pointless and subversive of a good government. Why remind people of things that aren’t needed anymore and whose revival might be harmful? So, our question: does the oath to preserve and defend the Constitution elevate this constitution and its founding over mankind’s capacity to establish good government from reflection and choice?

Swearing to preserve and defend the Constitution is not promising to leave it as is, for the Constitution itself provides for change in Article V. By providing for amendments, Article V implies that the Constitution may need amending. Article V thus bestows on the Constitution a specific property, the property of amendability. The amendability of this constitution and therewith the opportunity and the right to redo our founding is thus made part of what we take an oath to preserve and defend. Our constitution is thus officially “open to thought”—that is, open to reasoned criticism and change. Let’s think about this a bit further.

In view of Article V, we’re under an obligation to preserve and defend almost no part of our existing constitution because almost every part is amendable. This includes Article V itself. We can reconsider Article V, and we will surely have to do so eventually, for Article V has insuperable problems. Article V purports to put equal suffrage of the states in the Senate virtually beyond amendment by permitting change only on the consent of each state. In addition, three-quarters of the states are most unlikely ever to make the Constitution easier to amend than it presently is. These virtually unamendable provisions of Article V are virtually closed to thought—closed to reasoned reconsideration. And because they are closed to rethinking, they offend the principle of amendability itself, the very thing that Article V is supposed to embody. Article V is thus at war with itself; it represents a principle that it defeats
in practice. This isn't a problem unique to Article V; under the right circumstances any process or rule can defeat the purpose it was designed to serve. Under the right circumstances (or the wrong ones) a rule can be at war with the principle that justifies it. Yet this is a special problem for an amending rule, which is supposed to provide for the defect of rules generally. If and when a constitution's amending rule becomes unworkable or unworkable in a timely way, the rule ceases to be what the constitution says it is: part of a larger scheme for pursuing real goods. It ceases to be an amending rule because it doesn't work and can't be made to work as an amending rule.

Americans have faced this situation before. The framers of our present constitution encountered an unworkable amending rule in Article XIII of the Articles of Confederation. Here was a rule that gave a bare majority of Rhode Island (1/60th of the nation's total population) a veto over everyone else, and past experience had shown Rhode Island's willingness to use the veto. Madison was clear in *Federalist* 40 about the only rational course in this circumstance: ignore the old rule, submit a new rule to the people, and let them accept or reject the new rule as they choose to act on it or not. Quoting from the Declaration of Independence and citing the nation's revolutionary experience with unauthorized committees, congresses, and constitutional conventions, Madison said that “in all great changes of established governments, forms ought to give way to substance” lest the “transcendent and precious right of the people to ‘abolish or alter their . . . to effect their safety and happiness’” be rendered “nominal and nugatory.” Since the people can't “move in concert towards their object” in a spontaneous fashion, Madison added, “it is . . . essential that such changes be instituted by some informal and unauthorized propositions, made by some
patriotic and respectable citizen or number of citizens” (40:265). The country evidently agreed. It ignored the old Article XIII and followed the new Article VII to establish the new Article V and the rest of the new constitution. And it did all this in the only way it could peacefully have done so: by following the lead of “some patriotic and respectable . . . number of citizens” and approving propositions that were “informal and unauthorized.”

So, in my defense against the charge of lawlessness, I invoke the constitutional text that embodies the principle of amendability and the historic words and actions that honored that principle. Venerating the Founding as founding over both the Constitution and the Constitution’s founding would therefore be no lawless act. Nor would it violate the constitutional oath. The Constitution itself, as written, together with the actions that produced it and the tradition that justifies it—all these things display a principle of amendability. As a logical matter, this principle of amendability cannot be captured by any sort of rule. It points ultimately not to a set of rules but to an attitudinal situation. As Madison indicated, in *Federalist* 40, it points to a competent and patriotic leadership community that enjoys the public’s trust. The nation’s “openness to thought”—the possibility in America of government “by reflection and choice”—depends on this ensemble of virtues and actors. So does the Constitution’s survival.

*The Plan of This Book*

If we have good reason to talk about constitutional failure, what, exactly, are we talking about? What questions do we ask in deciding whether or to what extent the Constitution is failing? Chapter 2 of this book will show how different answers to this question re-
flect three different views of the Constitution’s central purpose: either to protect rights, or to provide processes of democratic choice, or to pursue the ends listed in the preamble. Chapter 2 reiterates my argument in other places that while the Constitution was designed to perform all three functions, its chief function is to pursue preambular ends conceived as a set of substantive social conditions, such as peace and prosperity. Chapter 3 takes a closer look at the substantive social ends discussed in chapter 2 and applies principles of practical reason to any specification of constitutional ends to conclude that the one unquestionable constitutional end is a secular public reasonableness as the attitude of Americans taken at random. I call the political manifestation of this secular public reasonableness a “healthy politics,” and upon describing this state of affairs I conclude that maintaining a healthy politics is essential to constitutional success. I conclude also that the chronic absence of a healthy politics is one form—the crucial form—of constitutional failure. This “attitudinal” test of constitutional failure is the answer to those who think that because American institutions are intact the American Constitution still works, even if American politics is sick. My contention is that sick politics is the decisive sign of a bad constitution and that incurably sick politics proves constitutional failure, even if (as presently) the dead man still walks.

Chapter 4 applies the central finding of the preceding chapter—constitutional failure as a matter of attitude—to Madison’s belief that checks and balances can serve as a substitute for virtue—a substitute for what Madison believed to be, and what I’ll argue must be, a government by a trusted and trustworthy elite. The chapter situates Madison between classical and modernist traditions about the need for virtuous political leadership and shows that the ancients were right. Though Madison himself deemphasized the
need for virtue in *The Federalist*, he effectively conceded the tradition’s greater wisdom when, both in the Constitutional Convention and later as president, he called for a national university as the font of a national leadership community. Chapter 5 returns to the implications of the Constitution’s preamble to elaborate and defend Walter Murphy’s proposal that the preeminent constitutional virtue is not fidelity to an existing constitution but the capacity for constitutional reform. Chapter 5 discusses developments in America’s political and intellectual cultures, from the rise of the religious right and free-market absolutism to academic valueskepticism, that defeat realistic hopes for a healthy politics and the prospects for constitutional reform. The chapter argues that what little hope remains depends almost entirely on chance. Hope rests also on constitutional studies programs in a dwindling handful of the nation’s universities, notwithstanding the fact that some of these programs have been captured or are being captured by the hard ideological right. Though the Constitution’s prospects are at best poor, the concluding chapter, like the book as a whole, assumes that, in the right circumstances, accurate diagnosis can be a step toward cure and that the right circumstances may chance again.