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Book Review: on What the Constitution Means. by Sotirios Barber.

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ON WHAT THE CONSTITUTION MEANS. By Sotirios Barber.[1] Baltimore: Johns Hopkins University Press. 1984. Pp. viii, 245.

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Of the recent books developing general theories of the Constitution or the role of the courts in constitutional adjudication, this work is the most ambitious.[3] Before considering the legitimacy of "noninterpretive" judicial review or the tension between judicial review and democracy—the questions that have absorbed most constitutional commentators—we must ask the question posed by Barber, "What does the Constitution mean?" In exploring this qustion, Barber takes the perspective of an ideal citizen. He thus avoids the typical lawyer's confusion of constitutional law with the Constitution itself, as well as the typical social scientist's conceit that we can know all the constitutional facts but nothing about constitutional values. In this work, Barber takes constitutional interpretation to uncharted depths of meaning where it must penetrate some of the toughest and most enduring questions of political authority. That Barber's reach should exceed his grasp can hardly be surprising, but the flaws of his argument appear deep, stemming both from the basic logic of this argument and the fabric from which he fashions the Constitution's meaning and authority.

I

Barber's argument is sufficiently complex that it must be outlined in some detail. The first two chapters rebut the objection that the Constitution has no meaning (dealing with the contention that the Constitution is what the Supreme Court says it is, and the "realist" claim that the disposition of the justices, not the Constitution itself, determines what the Court says).[4] Professor Barber then begins the construction of his argument in chapter three. Its keystone is an account of article VI, where the Constitution pro-

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3. S. BARBER ON WHAT THE CONSTITUTION MEANS (1984).
4. *Id.* at 5, 16.

claims itself the "supreme law of the land." "Meaning" for Barber is primarily a matter of "making sense,"[5] and making sense requires conforming to the structure of reason and to fundamental concepts. Thus, since law is in part a command one cannot coherently command someone to do contradictory things; if the Constitution is law, all aspects of it must have singular and noncontradictory meanings. And since means are subordinate to ends, if we establish an aspect of the Constitution as a mere means, it must be subordinate to whatever end it serves.

These basic points present a problem for "making sense" of the supremacy clause. The preamble of the Constitution seems to cast justice, domestic tranquility, the common welfare, etc., as the ends for which the Constitution itself becomes a mere set of means. But given the varying circumstances the nation must face in pursuing these ends, the Constitution's means must sometimes be imperfect. And if means are subordinate to ends, the means of the Constitution, by the Constitution's own terms, cannot reasonably claim to be the "supreme law of the land." Thus either the supremacy clause is not to be taken seriously, for its terms are contradicted by the apparent relation of the Constitution to its preamble, or alternatively, the relation must be one other than that of means to ends. Pursuing the latter view, the Constitution could be considered the concrete embodiment of the preamble's abstract ideals and thus an end in itself, that is, "the good society, or the best society of which we are capable."[6] But this solution presents difficulties of its own, for it arrogantly assumes complete knowledge of what is good society, an assumption belied by the presence of article V's amending provision. So, having shown that the Constitution is neither a body of pure means nor an absolute end, Professor Barber sets forth the following as the basic logic of the Constitution's claim to authority:

Major Premise: We the people want justice, the general welfare, domestic tranquility, the common defense—in brief, the ingredients of the good society.

Minor Premise: The ways of the Constitution constitute our best current conception of the good society—our best understanding for now.

Conclusion: We therefore accept this Constitution—that is, we accept it as supreme law.

Viewing the Constitution through this logic and as an end in

5. *Trying to Make Sense of the Supremacy Clause*, as he titles chapter three. *Id.* at 39-62.

6. *Id.* at 56.

itself brings a couple of twists in conventional constitutional interpretation. First, practices usually considered of instrumental value take on intrinsic worth. "Exercising the powers of government and honoring constitutional rights can be valued as ends in themselves for the same reason that self-restraint, moderation, and autonomy are looked upon as virtues and objects of praise independently of their success as means to other desiderata."[7] Second, doubts about the Constitution's authority are actually preconditions to reaffirming the Constitution as law. That is, he maintains, we do not experience the Constitution as law unless we have some inclination to disobey it (since law presupposes an inclination towards disobedience). Similarly, we cannot accept the claim to supremacy unless we reason that the Constitution is our best current conception of the good society, reasoning that must consider the possibility that the Constitution won't measure up. A Constitution blindly obeyed is a Constitution unaffirmed.[8]

Professor Barber calls this approach to the Constitution "aspirational."[9] Concerning any provision of the Constitution, the interpreter must ask what is "the best reason" for the adoption of the provision "in the first place."[10] Thus while the framers' basic "concept" remains authoritative, the meaning of a provision does not have to conform to the specific "conceptions" or intentions that they had in mind.[11] And our understanding of the Constitution can evolve as we develop better reasons for constitutional provisions. On the other hand, the Constitution's language and tradition prevent it from becoming just anything, even if the meanings we wish to attach would make it a superior document. For such changes there is the amendment process. Thus the Constitution is neither wholly closed nor wholly open to "ideas of independent content and worth, like simple justice." Towards these, "the Constitution is and must be partially open."[12]

In the light cast by this analysis Professor Barber then attempts to "make sense" of the Constitution's three major aspects: constitutional powers, rights, and institutions. The enumeration of powers in the Constitution, he argues, shows both that there are "tasks to be performed" by the national government and, conversely, that there are "some things that the national government

7. *Id.* at 55-57.
8. *See id.* at 35, 50, 57, 114.
9. *Id.* at 10.
10. *Id.* at 76.
11. In this Barber follows R. DWORKIN, TAKING RIGHTS SERIOUSLY 134 (1977). S. BARBER, *supra* note 3, at 39-40, 117.
12. *Id.* at 11-12. See also *id.* at 59.

[is] not to do."[13] Examining the "best reasons" for granting the enumerated powers, Professor Barber gives them an expansive reading, unqualified by any concern for the claims of states rights (whose *bona fides* he doubts), and reaffirming Justice Stone's characterization of the tenth amendment as "a truism."[14] Yet, according to Barber, there can be no praise or honor for acting upon reasons "that only the states, if anyone, can lawfully invoke." If, in enacting a law, Congress harbors an unavowed "primary purpose" that only a state can claim while invoking one of its enumerated powers as a mere pretext, it violates the Constitution.[15]

Just as chapter four emphasizes "the negative implication of the enumeration of powers," chapter five emphasizes "the affirmative, forward-looking implication of the Constitution's enumerated rights."[16] Respecting rights is not a matter of simple inaction. Instead, "honoring constitutional rights" should be our "highest political value."[17] Holding that a true right must be a genuine "trump," a true "exemption from power" and hence an "absolute," Professor Barber maintains that, "we cannot have a *constitutional* reason for violating a *constitutional* right *no matter what the sacrifices*."[18] To those who say that absolutism renders the Constitution a suicide pact, Barber replies that dishonoring rights is itself a form of suicide, constituting as it does an essential change of the polity's character. And if our choice is defeat through revolution, coup d'etat, or war while honoring rights, versus a dishonorable victory, Professor Barber views defeat, from a constitutional perspective, as the more laudable.

On the actual content of these rights, Professor Barber understandably provides only sketches. He does indicate that the first amendment prohibits all prior restraint "no matter what judges may think about the threat of irreparable harm" and "regardless of the cost." He argues for the application of the Bill of Rights to the states and contends that this application derives neither from the words nor the intentions of the framers of the fourteenth

13. *Id.* at 64.

14. United States v. Darby, 312 U.S. 100, 124 (1941).

15. *Id.* at 91. Barber's reliance on "primary purpose" affronts democratic authority. For example, as an exercise of the commerce power, he argues, the Civil Rights Act of 1964 should be declared void. *Id.* at 91-102. As everyone knows, its primary purpose was not the promotion of commerce, but the safeguarding of civil rights. But if the effect of discrimination on the flow of interstate commerce is substantial, as seems to be the case, that should be sufficient reason for upholding the Civil Rights Act. Barber's contrary position implies the anomaly that if Congress did indeed honor civil rights less than a can of beans, the statute would be constitutional.

16. *Id.* at 108.

17. *Id.* at 105.

18. *Id.* at 140 (emphasis added).

amendment, but rather from the logic of a document that places highest political value on honoring rights.[19] "Due process" rights he also regards as absolutes, as "real exceptions to what government can do in pursuit of its ends." Professor Barber's understanding of due process goes beyond core "fair trial" conceptions and has substantive implications: due process of *law* exists only when there are constitutionally defensible reasons for the action—"a reason, that is, to believe that what [the government] is doing serves the common good."[20] Thus he criticizes the abstention of the contemporary Court from questions of economic liberty and defends its protection of personal liberty, including *Roe v. Wade*. Against the woman's liberty to procure an abortion through the second trimester, government can assert no constitutionally defensible reason for interference. The primary motivation behind anti-abortion legislation, he maintains, is religious in character; other arguments are mere pretexts. Echoing his earlier argument regarding the unlawfulness of pretext, and viewing as most unlikely plausible nonreligious opposition to abortion, he concludes that "for a long time to come, as far as I can see, the right to abortion will, or certainly should, appear to be a constitutional right."[21]

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19. *Id.* at 151, 153, 155. To contend, as did Chief Justice Marshall in *Barron v. Baltimore*, that the Constitution's history, language, and structure firmly establish that the Bill of Rights applies only to the federal government is to engage, according to Professor Barber, in bad logic. "If constitutional rights can trump the powers of the national government, and if national policies can defeat state policies, it seems anomalous," he reasons, "to conclude that state policies can defeat constitutional rights." *Id.* at 155. But Barber's "refutation" has logical problems of its own, as we see when we take his argument to its implied next step: "If constitutional rights can trump the powers of state governments, and if state policies can defeat an individual's policies, it would seem anomalous to conclude that the individual's policies can defeat constitutional rights." That is, constitutional limits would have to be extended to the private sphere, so that an individual could be held to answer in court for alleged discrimination on the basis of race in his or her personal decisions—who to marry, who to invite to dinner—or for giving money to a religious establishment. In short, Barber begs the question of the relation of the Bill of Rights to the states by assuming that a right against one party is a right against all. But of course not all rights if any have this universal character. The Bill of Rights thus can quite sensibly be understood, as Marshall stated, as "limitations on power . . . applicable to the government created by the instrument," Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

20. S. BARBER, *supra* note 3, at 126, 128.

21. *Id.* at 140. Like his argument against the constitutionality of the Civil Rights Act of 1964 (as an exercise of the commerce power), *see* note 19 *supra*, his argument against abortion legislation affronts democratic authority. Assuming *arguendo* his constitutional premise, that reasons with religious roots count for nothing, it does not follow that their presence, even if assumed to constitute the primary reason, must fatally infect *sufficient* explanations that are not religiously based. And that sufficient explanations exist, is hard to deny. Since few wish to prohibit timely abortion of a pregnancy resulting from rape or incest, yet these offences are regarded by most as lesser crimes than murder, the slogan "abortion is murder" no doubt overstates the real sentiment of the nonreligious opposition. But on the other hand, few people, even among the most ardent advocates of the freedom

Turning to constitutional institutions, Professor Barber argues that "the Constitution makes no real sense from a checks and balances perspective."[22] Checks and balances cast the Constitution as mere means, a structuring of ambition against ambition to prevent usurpation of power; it prevents us from seeing the separation of powers as an end in itself, "the institutional embodiment of a national aspiration to rise above accident and force by governing ourselves by the claims of reason."[23]

Two more implications for constitutional institutions follow from his attempt to make sense of the Constitution. One is that the provisions of the Constitution cannot bend to prevent conflict amongst themselves or to accommodate pressing circumstances. The other concerns the role of the courts. That the Constitution itself cannot meet all circumstances or survive all emergencies, he maintains, follows from the basic concept of the Constitution as law and its claim to supremacy. To be supreme on its own terms, the Constitution depends on a reasoned affirmation; but affirmation, to be reasonable, must include the possibility of rejection. "To believe in advance that the Constitution can be anything it has to be," he argues, "is to eliminate the possibility of rejecting it."[24] That is, to preclude rejection is to preclude reasoned affirmation, which in turn is to preclude the possibility of a sensible claim to be the supreme law of the land. Thus, the possibility of emergencies or circumstances that make it impossible or senseless to follow the Constitution is necessary if we are to regard the Constitution as supreme law. And, although the Constitution always binds officeholders and citizens to its provisions, this does not mean (paradoxically) that they should always follow the Constitution. As Professor Barber understands the Constitution, it "presupposes more or less ideal circumstances,"[25] and therefore actual circumstances may bring its provisions into conflict or render some provisions impossible to honor. When one who occupies office faces such circumstances, he acts no longer as the officeholder (because one who holds office must honor all duties of that office),

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to abort, regard abortion as just another form of contraception; and virtually no one could view without moral nausea the decision to abort in the sixth month of pregnancy for a frivolous reason—say to fit into a dress for a special dance. Lying somewhere between contraception and infanticide, abortion can with good secular reason be considered wrong. How wrong and whether this wrong balances the hardship imposed by an unwanted pregnancy presents tough questions on which reasonable people can differ—and which consequently should be resolved by the legislature.

22. *Id.* at 185.

23. *Id.* at 180.

24. *Id.* at 191.

25. *Id.* at 189.

but as one "strategically positioned" to do what he thinks best for the country.[26]

On the role of the courts, Professor Barber develops three points. First, while courts have the authority and duty to exercise judicial review, they do not have exclusive authority to interpret the Constitution. Though the Constitution does have "*one meaning*," this "does not imply *one interpreter*."[27] Within his range of authority, every office holder must abide by his own interpretation of the Constitution. Second, while Congress, in accord with the Constitution can (indeed, should) refuse to cooperate with judicial decisions it thinks unconstitutional, it cannot define the constitutional rights to be followed by the courts nor can it limit the remedial authority or the jurisdiction of the federal courts. In fact, declaring the "exceptions" clause a constitutional "superfluity," Professor Barber contends that jurisdiction of the federal courts must be coextensive with federal authority.[28] Third, the judiciary should not "defer" to other branches or exercise "judicial self-restraint." Neither the argument from democratic authority nor the argument from limited judicial capacity can authorize judges to do anything other than act upon their own best conception of what the Constitution means.

II

The basic logic of Barber's Constitution is this: "We want . . . the good society. The ways of the Constitution constitute our best current conception of the good society. We therefore accept this Constitution . . . as supreme law."[29] In this brief syllogism there are troubling ambiguities and apparent contradictions. The syllogism implies that "the good" is superior to "the just" as the basis of political authority. Suggesting the superiority of Platonic and Aristotelean over Kantian philosophy, this proposition may well be correct, but more than an assertion is necessary to establish its truth. And even if he had developed the argument to sustain this proposition, it seems inconsistent with other parts of his theory. For example, in his insistence that the Constitution re-

26. *Id.* at 189-90, 201.

27. *Id.* at 197.

28. *Id.* at 209. The Constitution, as Barber understands it, has a surprising number of nullities and superfluities. In addition to the exceptions clause (art. III, sec. 2, cl. 2), there are the fugitive slave clause (prior to the passage of the thirteenth amendment) (art. IV, sec. 2, cl. 3), the tenth amendment, the authority to suspend the writ of habeas corpus (art. I, sec. 9, cl. 2), and, as a means of applying the Bill of Rights to the states, the privileges and immunities and due process clauses of the fourteenth amendment. S. BARBER, *supra* note 3, at 200, 70, 193-96, and 154-59.

29. *Id.* at 55-57.

quires inflexible adherence to fixed conceptions of rights and authority, even if such adherence causes the destruction of the polity, Barber implies a morality of conviction rather than the morality of consequences more often associated with the idea of the good.

One must wonder, too, about Barber's "typical citizen," who virtuously pursues the basic logic of the Constitution's claim to supremacy. This citizen must experience temptation to disobey the Constitution, for only this temptation, Barber maintains, stimulates the intellect to inquire if the current conception of the Constitution is the best conception. If this temptation is truly necessary, however, this citizen's intellect would seem subservient to his nonintellectual passions.[30] But Barber says his typical citizen is "governed by an attitude that places *the highest social or political value on the activity of reasoning about how one ought to live.*"[31]

Professor Barber says, "*we* the people," "*our* best conception," and "*we* therefore accept." Seemingly, he refers to the collective views of all United States citizens. But if he does, his logic approaches the tautological or its development is radically incomplete. Assuming he wishes his minor premise[32] to be taken as a statement of fact or a condition of authority rather than a mere hypothetical in a logic puzzle, then how do we know that the people regard the Constitution as their best current conception of the good society? If it is by the fact of ratification, then the statement is tautological: the Constitution is our best conception because (and only because) we have ratified it. Once ratified, the Constitution can never be disjoined from our best current conception. Even amendments become part of our best conception only at the instant of their ratification and not a moment before. To avoid this tautology, Professor Barber might have tried to develop some way by which one could understand a collective judgment on such matters. For example, he could have explicated Justice Cardozo's richly suggestive reference to the judgments "of men and women who the social mind would rank as intelligent and virtuous."[33] Or

30. *Id.* at 120. Even to posit temptation or disinclination as an aspect of virtue appears curious. To become virtuous one must initially repress temptation, but at least according to an Aristotelean understanding of virtue, the passions and desires of the truly virtuous man (*sophron*) have become so controlled and properly habituated that he no longer experiences them as temptation. What Barber describes as a virtuous man seems closer to what Aristotle regarded as a distinct and less noble species of the admirable soul, the morally strong man (*enkrates*). This person indeed does experience powerful temptations, but is strong enough to resist them.

31. *Id.* at vii (emphasis added).

32. *Id.* at 57.

33. B. CARDOZO, PARADOXES OF THE LEGAL SCIENCE 37 (1928).

he could have explored the work of the second Justice Harlan or Alexander Bickel or the many others who have offered plausible ways of understanding collective rather than merely personal judgments.

From the text, it is impossible to say whether Professor Barber considered these possibilities and then rejected them; but after his statement of the basic logic of the supremacy clause, all his arguments refer to the *individual's* best conception of the Constitution. Since Barber maintains that our best current conception of the Constitution will surely fall short of the ultimate criteria of true meaning (*the* best reasons for adopting it in the first place), it seems far from obvious why an individual should prefer his own imperfect conception over the collective imperfect conception. Assuming, as both the oath of office and Professor Barber's notion of political responsibility require, that legislators do strive to follow the Constitution, then laws embody a collective conception (though perhaps not the best collective conception) of the Constitution, one implying that the enacted law conforms to it.

What problems for democratic authority are then presented by officeholders and citizens who still insist, as Barber's Constitution requires, upon basing their conduct only on their own best conception of the Constitution? For example, Professor Barber argues that "the judiciary has no constitutional warrant for deferring to any branch." Admitting that judges should be skeptical of their own answers, he maintains that "judges should be at least equally skeptical about the constitutionalism of others, since all are equally subjects of the Constitution as law." He continues: "It is therefore difficult to see how constitutional judges can follow anything less than their best conceptions of what the Constitution requires—in defiance of the other branches of government and public opinion, if need be."[34] The rhetorical device that lends credence to this statement is the phrase "anything *less* than their best." Of course no one wants any inferior conception to become authoritative, but why accept anything less than the best *congressional* conception of the Constitution? When the legislators' best conception of the Constitution is incompatible with that of the judiciary, though the judiciary admits that the legislators' conception is a reasonable one—one that just might be right and their own conception wrong—why should the judiciary's opinion prevail over the legislators? If this is the proper way to frame the question, it is hard to resist the general force of James Bradley Thayer's answer: only when the court believes the legislature has

34. S. BARBER, *supra* note 3, at 218-19; *see also id.* at 165.

made a clear mistake, should it declare the law void.[35]

Apart from the concern of democratic authority is the question of order. What would be the practical consequence of Barber's insistence that each citizen and every officeholder has a constitutional obligation to follow only his or her best understanding of the Constitution?[36] While he is quite correct that the Court should have no monopoly on determining the meaning of the Constitution, this individualist approach threatens a paralyzing disorder. Consider one scenario: Congress passes a bill conforming to its members' best conception of the Constitution. The president on the basis of his best conception thinks the bill unlawful and vetoes it. Reaffirming its initial judgment, Congress passes it over his veto by the necessary two-thirds majority. The president then refuses to enforce it. But the attorney general believes, according to his own best conception, that the bill does have the status of law, and he proceeds to enforce it against the express demand of the president. One solution would be for the president to dismiss the attorney general, giving the executive the last word on constitutional issues. Or perhaps the president would not dismiss the attorney general, and the law would be enforced through a court that agrees with the congressional best conception and accordingly convicts and sentences a defendant. Yet the warden to whose prison the convict has been sentenced agrees with the presidential interpretation and refuses to lock the prisoner in his cell. The prisoner is recaptured and sentenced to another prison, but this prison's warden disagrees with the court on an evidentiary question, and following his best conception of due process, sets the prisoner free again. The permutations of Professor Barber's logic are endless, yet the consequence is clear—imbalance or disorder bordering on anarchy.

III

If Professor Barber's Constitution cannot govern in normal times, it might seem superfluous to ask how it can govern in times of crises, but its inadequacy here derives from a different source, so that even if the former problem were corrected the latter would remain. This source might be called its fabric of construction.

Barber is persuasive, even eloquent in developing his proposition that viewing constitutional problems with a commitment to

35. Thayer, *Origin and Scope of the American Doctrine of Judicial Review*, 7 HARV. L. REV. 129-55 (1893). I develop this argument for judicial restraint in greater detail in *Reconsidering Dworkin's Case for Judicial Activism*, 46 JOURNAL OF POLITICS 503-19 (1984).

36. S. BARBER, *supra* note 3, at 198.

a constitutionally ideal state of affairs gives constitutional theory a coherence it cannot otherwise achieve, yet he goes on to understand the Constitution not simply "in light of" its aspirations, but to *be* those aspirations; when these cannot be achieved, the Constitution is no longer in effect. Recall that for Barber, the Constitution presupposes more or less ideal circumstances. When officeholders cannot enforce these provisions, they are no longer officeholders but people "strategically positioned"[37] to exercise power, people who are no longer obliged by its provisions, but released to exercise "whatever prudential devices they can get away with in an effort to restore conditions requisite to following the Constitution, *if that is the end they seek.*"[38] On the other hand, when it is conceivably possible to comply with a provision of the Constitution within one's range of authority, one is constitutionally obliged to do so regardless of the consequences, even if that includes the political death of the nation.[39]

In these assertions—that the Constitution's obligations bind one regardless of the consequences and that necessity liberates one from the Constitution's obligations—Professor Barber reveals that curious combination of idealism and cynicism that often results from a refusal to recognize the Constitution as part of the political universe and to see politics as the art of the possible. Although he frequently quotes Abraham Lincoln, Professor Barber refuses to acknowledge what Alexander Bickel called "the Lincolnian tension,"[40] the tension between principle and expediency within which all decent governments must reside. Professor Barber is surely correct in saying we should understand the Constitution in light of its aspirations. But despite his protestations to the contrary,[41] his is a utopian document if it does not contain mechanisms for mediating the tension between these aspirations and brute facts.

In melding idealism with cynicism, Barber has constructed his constitution from a brittle fabric; it absolutely resists counter-

37. *Id.* at 189.

38. *Id.* at 201 (emphasis added).

39. Thus Professor Barber argues that a "constitutional judiciary," *id.* at 199, should have realized from the start that the fugitive slave clause and any other constitutional recognition of slavery were "constitutional contradictions"or "mistakes," and should have refused to give effect to any law attempting to enforce these provisions. Concerning the Constitution's aspirations, Professor Barber is no doubt correct, but the action he advocates—which would have its analogue in the spheres of authority of all other constitutional officeholders and citizens—would surely have precipitated an early secession of the southern states that would have doomed the union.

40. A. BICKEL, THE LEAST DANGEROUS BRANCH 56-72 (1962).

41. S. BARBER, *supra* note 3, at 62, 114.

vailing pressure—up to a point—then it simply snaps. This point is illustrated well by his treatment of constitutional rights. All true rights, he tells us, are trumps, genuine exemptions from power; whatever they protect, they protect absolutely. The Constitution cannot even contemplate a right in conflict with another constitutional right or power. And if honoring a right requires suicide, better death than dishonor.

We can agree that the Constitution must mandate noncontradictory actions (and incidentally that some dishonors are worse than death), but his characterization of rights is only one of three courses to reach this conclusion. One course is to give the rights such a narrow reading that they could never conflict and it would always be possible to honor them. Although the Constitution would then always govern, such narrow rights would not meet Professor Barber's aspirational ideal. So Barber gives generous content to constitutional rights, but recognizing that they cannot always be honored, holds that the Constitution does not always govern.

Between these choices—generous rights in a Constitution that governs only in ideal circumstances and niggardly rights in a Constitution that governs always—there is of course a sensible middle course. It is possible to say that a person has a right of some definite, but not absolute strength. When the force of a justification falls short of the strength of the right, the right is protected; when the force of the government's justification exceeds the strength of the right, governmental authority will prevail. If one is addicted to the language of absolutes, one can say that a citizen has an absolute right to have his right counted at its full strength, not an absolute right to prevail. Or alternatively, if the language of rights if restricted to outcomes, that a citizen has *claims* that must be absolutely recognized for their full worth but no absolute *rights.*

When an officeholder makes a good faith assessment of the competing claims of governmental authority and individual rights, he does no "dishonor" to the right if he decides that the government's is stronger. Indeed where the governmental claim is clearly stronger than an individual's right, an officeholder who "honored" the individual claim would be more deserving of ridicule or anger rather than admiration. Some rights (e.g., the right to a fair trial), are so strong that they are virtually absolute. For the health of the body politic, perhaps courts should *call* them absolute,[42] since the circumstances in which governmental authority

42. C. Black, *Mr. Justice Black, the Supreme Court and the Bill of Rights,* HARPER'S, Feb. 1961, at 3.

could outweigh them would likely be so extraordinary that courts could not even operate. In contrast, the right to advocate imminent lawless action seems appropriately outweighed, as it is in contemporary judicial doctrine, when the advocacy "is likely to incite or produce such action."[43] Even the weighty right to be free of state-imposed segregation could be counterbalanced by the need to quell a prison race riot—if indeed, following contemporary court doctrine, the means were truly necessary to effect the clearly compelling end.

Barber does not directly criticize this prudent middle course, seemingly because his idealism prevents him from seeing it. For him, a Constitution able to handle all contingencies, fit to meet "the various crises of human affairs,"[44] would be a document of infinite flexibility, thus of infinite meaning, therefore devoid of meaning. "[A] plastic constitution cannot be a real constitution."[45] Upon this understanding of what a constitution must be, Professor Barber expresses what would otherwise seem a perverse sense of vindication in noting constitutional failures; to him failures are necessary to affirm the Constitution's meaning.[46]

But Barber confuses a flexible Constitution with a fluid one. The fluid Constitution is his plastic Constitution. Like Heraclitus's river it is always in flux, once one thing, now another, soon to be yet another. A flexible Constitution, on the contrary, is constant in meaning but its meaning allows for adaptation to changing circumstances. It establishes ideals, but does not require ideal conditions for the exercise of its authority. Even in the worst of emergencies when its literal terms must be violated to allow its spirit to prevail, its authority remains a gravitational force, guiding the emergency powers back to the norm as circumstances permit. It does not turn officeholders loose in difficult times to do whatever they think is right, at liberty to return to constitutional norms "if that is the end they seek."[47]

Barber's excessive idealism, and hence the brittleness of his Constitution, derives not simply from an absolutist concept of rights. Nor does it rest in fatuous sentimentality—indeed, if anything, Barber is exceptionally rigorous in pursuing the logic of his argument even if this places him occasionally in the camp of his adversaries. Rather, its deep source is the tragically flawed desire to unite the concerns of philosophy and politics. Barber describes

43. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
44. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 415 (1819).
45. S. BARBER, *supra* note 3, at 191.
46. *Id.* at 50, 60, 151, and 191.
47. *Id.* at 201.

the highest value of his ideal citizen both as the distinctively political value, "honor," and the distinctively philosophical value, "reason." He wishes love of truth to be identical to the love of country. His book is written from the perspective of a citizen, but that citizen must be a philosopher. Barber's citizens are to be taught that "favoritism of anything other than the truth [is] immoral" and that they must hold "truth above all other values."[48]

Can the Constitution truly share so singularly the philosopher's end of truth? Perhaps it would be possible for politics to hold truth and its pursuit above all other values, *if* politics concerned only disembodied souls. But politics generally, and especially the politics of liberal democracies, is concerned as well with the needs and desires of the body; and consequently politics must be concerned not simply with the hierarchy of ends but also with their urgency. Thus even if we hold with Barber that truth should be the highest pursuit of man, a polity must sometimes yield instead to demands for privacy and physical security and well-being.

For Barber, the Constitution's authority depends on its fidelity to the standard of truth. Under his basic logic, one can affirm the Constitution's claim to authority only following a critical and reasoned assessment that the Constitution matches one's best conception of the best society; as one's knowledge grows, one must continually subject the Constitution to this test to affirm its supremacy.[49] Given Barber's unyielding philosophical standard, affirmation would seem a rare event; nothing less than the best merits allegiance. Deeply concerned with the conditions of this affirmation, Barber curiously neglects the consequences of rejection. One of these consequences, of course, is that with no affirmation of the Constitution, obedience to laws passed under its authority becomes a matter of expediency rather than general obligation. It is most unlikely that in such conditions one could comfortably contemplate "how one ought to live."[50] In short, if the life of the mind is to prevail or even survive, it cannot reign sublimely oblivious to politics. The true philosopher should thus affirm the general authority of the decent regime that assists, with-

48. *Id.* at 162-63. His position on prior restraint follows logically from this; as long as it is plausible that one publishes for the purpose of "influencing public policy . . . there can be no *constitutional* prior restraint, no matter what judges may think about the threat of irreparable harm." *Id.* at 151. Barber confesses that his position will render the Constitution a suicide-pact; but this, he indicates, is nonetheless the requirement of a document resting its authority on the independent affirmation of citizens who examine all relevant knowledge. *Id.* at 151.

49. *Id.* at 160.

50. *Id.* at vii.

out completing, his development and tolerates, without necessarily following, his teaching.

Inappropriate for politics, inexpedient as a measure of obligation, the singular concern of the philosopher as the end of constitutional authority is in a very basic sense unnatural. Consider his attempt to remold the concept of "Founding Fathers." The ideal or true father, he indicates, is the one "who knows what is best."[51] The meaning of this idea of fatherhood, which superficially hints of paternalism, Barber unfolds with relished irony as teaching that children must think for themselves—otherwise they will not know who their "true" father is. In seeking guidance, children should regard their natural parents indifferently among the millions from whom advice might be obtained; each potential "father" will be judged according to the child's capacity to decide who truly knows best. As her own thinking changes, the child will become attached first to one person then to another. Similarly, by implication, the true Founding Fathers are not those responsible for writing the Constitution, but the great teachers of mandkind: Moses, Plato, Aristotle, Christ, Hobbes, as well as those whose relation to the actual founders is remote, such as Confucious, Buddha, and Mohammed.[52]

In retaliation for teaching exactly this sort of subversive distance from one's own father and fatherland, the Socrates of Aristophanes' *Clouds* was made to suffer the burning of his home by an enraged parent and on such a charge the real Socrates was made to drink the hemlock. For one as well educated in classical philosophy as Professor Barber, it is curious that he appears to take Plato's reply to these charges in the *Republic* as earnest rather than ironic:[53] recall that as a condition to the *Republic*'s perfect union of philosophy and politics, parents (who do not share the philosopher's passion for wisdom) must *force* the philosophers (who would rather reason rather than rule) to become kings and then abandon to them their children, land, and country. The *Republic* thus defends the enterprise of philosophy by portraying its perfect regime of philosopher Kings with supreme Socratic irony,

51. *Id.* at 119.

52. Or perhaps Mick Jaggor and Michael Jackson, since the individual decides for himself who is a great thinker. It should be emphasized that the question here is not whether the Constitution should be interpreted in light of the teachings of the compassionate Buddha; Barber is clear that towards such teachings the Constitution can at most be only marginally open. Rather the question for one embracing Buddhism is whether in light of its teaching the authority of the Constitution can be affirmed as the best embodiment of a Buddhist society. (Indeed, it is far from clear that many Christians could give a similar affirmation.)

53. *See, e.g., id.* at 135-37.

by showing the very impossibility of a perfect regime, philosophy demonstrates the defensibility of imperfect but decent regimes.

Barber seems oddly to take this ironic defense of philosophy, the construction of a deliberately unnatural and impossible regime, as his standard of evaluation and of allegiance. In doing so his argument corrupts the spheres of both politics and philosophy. As Aristophanes correctly taught, perfect indifference to one's own family and fatherland in the name of impartial and perfect justice destroys the loyalty that makes civilized life and *pro tanto* actual justice possible. By the same token, in pretending that the pursuit of truth heedless of personal interest—the extraordinarily rare and precious gift for philosophy—can be the common lot of typical citizens, Barber debases its high and noble character, a character that presupposes and yet transcends politics.

These are serious criticisms, but then Barber has written an eminently serious book, one that ties constitutional analysis to the most basic questions of western civilization. If there are faults in the analysis, as I maintain there are, one can still say that there is sometimes more to learn from the errors of great efforts than from the truths of petty ones.