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## On the Care and Maintenance of Constitutions

John E. Finn  
*Wesleyan University*

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## ON THE CARE AND MAINTENANCE OF CONSTITUTIONS

John E. Finn\*

SOTIRIOS A. BARBER, *CONSTITUTIONAL FAILURE* (UNIVERSITY OF KANSAS 2014). PP. 176. HARDCOVER \$ 29.95.

GEORGE THOMAS, *CONSTITUTING THE AMERICAN MIND: THE FOUNDERS AND THE IDEA OF A NATIONAL UNIVERSITY* (CAMBRIDGE UNIVERSITY PRESS 2014). PP. 252. HARDCOVER \$ 95.00.

Most constitutions have a shelf-life.<sup>1</sup> This proposition may not seem immediately obvious, especially in an era when nearly every state mouths some measure of fidelity to constitutionalism writ large and where there are few, if any, other credible alternatives for organizing and legitimating state power. But the triumph of global constitutionalism<sup>2</sup> may eclipse the reality that most constitutions proper have fairly short and often ignoble lifespans.<sup>3</sup> Indeed, constitutions fail with depressing regularity.<sup>4</sup>

If we limit our experience to the American Constitution, however, we might conclude that constitutional government is a reasonably stable and successful affair, especially if we measure “success” by time. I put the word success in the preceding sentence in scare quotes to signal my reservations about whether we should measure success temporally. Once we begin to think closely about what constitutional success means and how we might measure it, it becomes less obvious that the American Constitution is in fact a success. We might instead ask (*again*, for the question of the Constitution’s failure is a recurrent theme

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\* Professor of Government, Wesleyan University.

1. Not all constitutions admit this, as should be clear from the formal title of “The Articles of Confederation and Perpetual Union.” For discussions of perpetuity in constitutional law, see JOHN E. FINN, *CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW* 4-7 (1991); see also Kenneth M. Stampp, *The Concept of Perpetual Union*, 55 J. AM. HIST. 5 (1978).

2. See C. NEAL TATE & TORBJORN VALLINDER, *THE GLOBAL EXPANSION OF JUDICIAL POWER* (1995); STEPHEN GARDBAUM, *THE COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* (2013).

3. See generally WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER* 15-16 (2007), for a distinction between “consitutionism” and “constitutionalism.”

4. ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009).

in any honest account of American constitutional history) if the Constitution has failed.

The problem of constitutional failure is a question of deep practical import, not only because failure is the probable result of every effort at constitutional governance, but also because a genuinely robust constitutional order is one that attends to its imperfections.<sup>5</sup> It is heartening to see a renewed scholarly interest in constitutional failure, at least as measured by the appearance of several important new works on the subject.<sup>6</sup> The matter of the Constitution's success or failure has elicited a small but important body of academic literature in the past decade or so, a literature that takes seriously the idea that the United States is in a significant state of constitutional dysfunction.<sup>7</sup> This work, however, is not simply a reread of the classics.<sup>8</sup> The best of it, and Sotirios Barber's *Constitutional Failure*<sup>9</sup> is deservedly on that list, significantly advances our understanding of constitutional government. In particular, Barber reminds us that we cannot think about constitutional failure meaningfully without asking also what we mean by its correlate—the idea of constitutional success.<sup>10</sup> In asking that question, Barber both insists and demonstrates, we return constitutional theory to its origins in the founding and simultaneously highlight its contemporary urgency.

George Thomas's new book is an equally significant, if very different, take on the question of constitutional failure. *The Founders and the Idea of a National University: Constituting the American Mind*<sup>11</sup> is ostensibly a welcomed and detailed study of the several proposals during the founding and well into the nineteenth century to establish a national university. Approached in the narrowest of possible terms, Thomas's book would be a fascinating inquiry into an important, but long neglected, episode of constitutional failure, or of the failure on the part of the Founders to establish an institution many of them were convinced was an important part of establishing a successful constitutional order.

5. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011).

6. See, e.g., JEFFREY K. TULIS & STEPHEN MACEDO, *THE LIMITS OF CONSTITUTIONAL DEMOCRACY* (2010);

7. See SANFORD LEVINSON, *FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2013); BALKIN, *supra* note 5; JAMES FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS* (2015); MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2012); Louis Michael Seidman, *Let's Give Up on the Constitution*, N.Y. TIMES, Dec. 30, 2012, [http://www.ny-times.com/2012/12/31/opinion/lets-give-up-on-the-constitution.html?\\_r=0](http://www.ny-times.com/2012/12/31/opinion/lets-give-up-on-the-constitution.html?_r=0).

8. See CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* (1948); CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* (Ellen Kennedy trans., 1988); CARL SCHMITT, *LEGALITY AND LEGITIMACY* (Jeffrey Seitzer trans., 2004); MARK E. BRANDON, *FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE* (1998). For an especially illuminating study of Schmitt, see ELLEN KENNEDY, *CONSTITUTIONAL FAILURE: CARL SCHMITT IN WEIMAR* (2004); LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2013). The question of how and why constitutions fail has a long and noble history in constitutional theory. In the twentieth century, for example, and ironically just before the global triumph of constitutionalism, an entire generation of public law scholars addressed constitutional failure as a political problem of the highest order intellectual order and of the most urgent political necessity. Their work—the work of folks like Schmitt, Lowenstein, Friedrich, and Rossiter—has influenced generations of constitutional theorists, mostly for the good, but also sometimes in pernicious ways. For an overview, see FINN, *supra* note 1.

9. SOTIRIOS A. BARBER, *CONSTITUTIONAL FAILURE* (2014); MARK E. BRANDON, *FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE* (1998).

10. BARBER, *supra* note 9, at 26.

11. GEORGE THOMAS, *THE FOUNDERS AND THE IDEA OF A NATIONAL UNIVERSITY: CONSTITUTING THE AMERICAN MIND* (2014).

But as Thomas convincingly demonstrates, an inquiry into this specific failure is equally an inquiry into the prerequisites of constitutional success and failure more broadly. Like Barber, Thomas asks us to think capaciously about what successful constitutional maintenance requires, and of whom.

Put another way, these two important books about constitutional failure turn out to be two important books about constitutional care and maintenance. They are inquiries into the possibilities and prerequisites of constitutional success, inquiries into the conditions that make it possible for constitutional orders to succeed or to fail. Moreover, both Barber and Thomas emphasize a particular and too often overlooked determinant of constitutional success and failure: the capacity of such orders to constitute citizens and cultures, as well as institutions, calibrated to a vigorous constitutional politics.

### I. MINDING THE CONSTITUTION

As Thomas recounts, proposals to establish a national university both predated the Constitution of 1787 and continued to surface long after the Constitution's formal ratification. Among the earliest was the one issued by Benjamin Rush in his "Address" in *The American Museum* in January 1787. Rush urged the Continental Congress to establish a "federal university . . . to conform the principles, morals, and manners of our citizens to our republican forms of government."<sup>12</sup> Rush saw the need for republican education as a continuation of the Revolution itself, noting "nothing but the first act of the great drama is closed. It remains yet to establish and perfect our new forms of government."<sup>13</sup> For Rush, completing the revolution to republican government required new citizens, as well as new institutions. Behind this idea, Thomas shows, is an equally important realization: constitutional orders neither begin nor end with the creation of a constitutional document. "Proponents of a national university saw the institutions they were creating as furthering revolutionary and constitutional principles. This was a sort of nation building, but building on a distinctly political foundation."<sup>14</sup> One of the most significant lessons constitutionalists should draw from Thomas's close history is that a founding cannot be confined to a single discrete and bounded moment in time; a founding is performative in character. It must be reenacted as each new generation of citizens comes to the age of constitutional maturity.

Rush was more than a solitary voice in the wind. As Thomas details, the call for a national university dedicated to a curriculum grounded in the principles and precepts of republican government and new constitutional ideas—a form of nation building<sup>15</sup>—was echoed by several of the Founders, including, notably, Noah Webster, Samuel Blodget, Benjamin Franklin, Thomas Jefferson, James Madison, and President George Washington. Washington's support in particular ran deep. He was willing, for example, to endow such a university in the District of Columbia with his shares in the Potomac River Company, and included a formal proposal in his message to Congress on December 7, 1796, noting that a national university would contribute to "our prosperity and reputation," as well as

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12. *Id.* at 21 (internal quotation marks omitted).

13. Benjamin Rush, Address to the People of the United States at the American Museum (Jan. 1787).

14. THOMAS, *supra* note 11, at 14.

15. *Id.* at 24.

help to cement the bonds of Union: “The more homogeneous our Citizens can be made, the greater will be our prospect of permanent Union; and a primary object of such a National Institution should be the education of our Youth in the science of Government.”<sup>16</sup> Washington repeated the call throughout his presidency, including in his last message to Congress.

Although calls for a national university were never realized, Thomas convincingly shows that the debates had a profound impact on the development of university curricula, and indeed, on the idea of the university itself in American public life. The founding era was a rich one for educational invention, with no fewer than nineteen colleges founded between 1782 and 1802.<sup>17</sup> Changing too were ideas about the purposes and character of university education. One prominent example of this change, as Thomas shows in Chapter 4, was the transition from private (though heavily funded with public money) sectarian education in places like Harvard, Yale, and William and Mary, to a secular curriculum that would help to effect “a revolution of the mind,” which in turn “would clear the way” to a “republican and commercial society.”<sup>18</sup> The development of secular curricula also helped to establish the “separation of the ‘civic’ from the ‘theological’ and the ‘public’ from the ‘private,’”<sup>19</sup> and in so doing helped to map education “to replicate the general outlines of the constitution and ‘modern life.’”<sup>20</sup>

If, as Thomas shows, the ultimate purpose of a national university was to create a new kind of citizen, appropriate to a new constitutional politics, then such a citizen had to be possessed of a certain mind, of a character and disposition suited to advance the constitutional project. This is a critical point in Thomas’s work: the Founders understood that the effort to constitute a new politics required new citizens as well as new institutions, and that both would have to be made rather than assumed. As a consequence, proposals to establish a national university were part of an effort to craft institutions sufficient to the task of creating a new American mind or of creating citizens equal to the task of sustaining a new political community founded on certain elemental constitutional precepts and values. Consider, for example, a quote by Rush: “Let our pupil be taught that he does not belong to himself, but that he is public property.”<sup>21</sup> This understanding of both the purpose and the content of civic education, Thomas admits, seems difficult to reconcile with some prominent contemporary understandings about the purposes and proper reach of the liberal state. Implicit in this conception of civic education are understandings about state and society that many contemporary liberal theorists might find objectionable or illiberal, more reminiscent of Rousseau (and especially of the Rousseau writing in *The Government of*

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16. *Id.* at 32.

17. FREDERICK RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY* 35 (1990).

18. THOMAS, *supra* note 11, at 16, 124-58.

19. *Id.* at 16.

20. *Id.*

21. BENJAMIN RUSH, *Thoughts Upon the Mode of Education Proper in a Republic* (1798), in *THE SELECTED WRITINGS OF BENJAMIN RUSH* 87, 90 (Dagobert D. Runes ed., 1976).

*Poland*<sup>22</sup>) than of Rawls.<sup>23</sup> Thomas's discussion of this in Chapter 6, "The Civic Dimensions of American Constitutionalism," is especially illuminating. Thomas notes that much of contemporary debate about liberal democracy and the role of a liberal education is "largely dominated by variations on Michael Sandel's plea for 'civic republicanism,' on one side, and John Rawls's 'political liberalism' on the other. And yet neither understanding captures, nor encompasses, the subtleties of the thinking behind the national university."<sup>24</sup> Thomas argues that a more nuanced understanding of civic education, as dedicated to the project of constitutional attachment and the teaching of civic principles, should lead us away from a "misguided quest" for liberal neutrality and toward an understanding of constitutional development itself as educative and transformative in nature.<sup>25</sup> Building on a concept borrowed from German constitutionalists and the emergency theorists of the mid-twentieth century, Thomas sees the work of civic education as directed to the development of constitutional patriotism, or an education into the Constitution's principles and into "values that might be said to transcend the particular polity."<sup>26</sup>

So precisely what kinds of citizens did the proponents of a national university seek to create and to educate? We might describe them as citizens with a mind to constitutional life or as citizens possessed of two characteristics essential to the constitutional project. The first characteristic is a mind for politics, equipped with the sort of knowledge and sentiments appropriate to civic life and engagement under the Constitution. Here, Thomas's discussion of proposed curricula in the national university, and in the nation's elite universities and colleges, is particularly revealing. The ultimate purpose was to instruct citizens in what it means to pursue a constitutional way of life, "the body of beliefs, principles, and attitudes toward human life that have dominated western civilization since the seventeenth century arguably through our own time."<sup>27</sup> The second characteristic of citizens educated in a constitutional way of life is a disposition to tend to political life as an object of care and solicitude. (Here, Thomas utilizes the work of Sheldon Wolin.)<sup>28</sup>

Why should we care about the Founders' failure to establish a national university? Thomas's detailed history of these efforts is valuable in its own right, but the real contribution Thomas makes is to show how conversations about such an institution were necessarily conversations about how to create and sustain a constitutional way of life. As Rogers Smith notes, "[t]he reasons why many Founders favored a national university, and the reasons why many others resisted one, reveal profound tensions in American hearts over nationalism and localism, reason and religion, and democracy and wisdom."<sup>29</sup> Debates

22. JEAN JACQUES ROUSSEAU, *THE GOVERNMENT OF POLAND* (Willmoore Kendall trans., 1985).

23. JOHN RAWLS, *POLITICAL LIBERALISM* (2005).

24. THOMAS, *supra* note 11, at 195.

25. *Id.* at 192-223. For two versions of this sort of argument, see JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* (2013) and STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* (1990).

26. THOMAS, *supra* note 11, at 212.

27. Thomas is careful to note that these substantive principles "are themselves deeply contested." *Id.* at 11.

28. For a general discussion of the concept of tending, see SHELDON S. WOLIN, *THE PRESENCE OF THE PAST: ESSAYS ON THE STATE AND THE CONSTITUTION* 82-101 (1989); see also JOHN E. FINN, *PEOPLING THE CONSTITUTION* 25-27 (2014).

29. Rogers Smith makes this point in his comments on the back flap.

about the wisdom and necessity of a national university, as Washington's reference to a homogeneous people implies (as well as debates about its constitutionality), went to the heart of our emerging constitutional identity. Indeed, "[h]ow to bring the people together, and on what basis," was not only "a central constitutional question" at the founding, but it also remains one today.<sup>30</sup> It remains a point of tension not because calls for a national university were never realized (it seems difficult to believe now that a national university could have overcome these fundamental fissures), but rather because such tensions are a part of our collective constitutional identity.

So these are recurrent tensions in our constitutional life: if a national university is unimaginable in our time, the sense that civic education might remain a way to navigate and manage such tensions nevertheless remains a significant part of constitutional thinking for many constitutional theorists.<sup>31</sup>

What, then, should we make of the persistent failure of long-standing and oft-repeated efforts to establish a national university, an effort supported by an impressive roster of constitutional luminaries? One way to get at this question is to imagine what a successful national university might have meant for our constitutional life. Its benefits might have included a citizenry well educated in the meaning and value of the norms and precepts that characterize a commitment to a constitutional way of life and by extension a richer, more robust, and perhaps even a more secure (and secular) constitutional order, one whose legitimacy and perdurability would be grounded more in reason and less in idolatry. "Certainly, surveying contemporary politics, we would benefit tremendously from . . . a knowledgeable and more civil leadership."<sup>32</sup> Perhaps the more interesting question, however, is, as Thomas puts it: "[W]hat might we have lost with a national university?"<sup>33</sup> Thomas suggests we might have lost the great diversity of private and public institutions of education that has contributed so much to American life.<sup>34</sup> But we might push the question further—maybe a national university was just a bad idea and its loss was no constitutional failure at all? Even if a national university might have helped to ground "constitutional principles in the civic sphere,"<sup>35</sup> it seems difficult to imagine that a national university could have overcome or would have smoothed out the persistent cleavages that continue to dominate American political life, though of course its critics feared it would.<sup>36</sup> Indeed, in creating a necessarily small, but likely influential cadre of citizen-graduates, one cannot help but wonder if a national university would not have exacerbated such tensions and in so doing, made constitutional governance even more remote from most of its citizens.

## II. CONSTITUTIONAL ATTITUDES

Barber's book on constitutional failure begins with a familiar complaint: American

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30. THOMAS, *supra* note 11, at 15.

31. See FLEMING & MCCLAIN, *supra* note 25; MACEDO, *supra* note 25; FINN, *supra* note 28.

32. THOMAS, *supra* note 11, at 227.

33. *Id.*

34. *Id.*

35. *Id.* at 212; see, e.g., FINN, *supra* note 28; ELIZABETH BEAUMONT, *THE CIVIC CONSTITUTION: CIVIC VISIONS AND STRUGGLES IN THE PATH TOWARD CONSTITUTIONAL DEMOCRACY* (2014).

36. THOMAS, *supra* note 11, at 15.

political life, he observes, is deeply and fundamentally dysfunctional.<sup>37</sup> Its politics is sickly, as evidenced in part by deep ideological division, “religious and free-market zealotry, and academic value-neutrality.”<sup>38</sup> A sick politics (and Barber is clear that our politics is sickly, though the point is assumed rather than argued) is “a sure sign” of constitutional trouble as well.<sup>39</sup>

Barber’s contribution to the burgeoning literature on constitutional failure is significant: Barber posits that constitutional failure is ultimately attitudinal.<sup>40</sup> In reaching this conclusion, Barber highlights the incompleteness of Madison’s institutionalism as a way of securing the Constitution.<sup>41</sup> As does Thomas, in a different way. In arguing that institution building in the new republic extended to educational institutions, Thomas expands our understanding of what constitutional institutions are as well as why they are necessary. As Barber argues, most readings of Madison see his elaborate institutionalism, with its reliance on separation of powers and checks and balances, as premised on the belief that constitutional architecture can and should compensate for our lack of civic virtue.<sup>42</sup> Barber rejects the idea that these constitutional contrivances, or constitutional engineering generally, are enough to secure a vibrant and successful constitutional order.<sup>43</sup> Indeed, in Barber’s view, the conceit that we can compensate for the “defect of better motives” through institutional design was bound to fail, precisely because it assumed that constitutional government could survive without creating citizens (and their representatives) with a mind to constitutional life.<sup>44</sup> Indeed, both Barber and Thomas show how such proposals, if not a major part of the *Federalist Papers* proper, were nonetheless widely shared by Federalists and by Madison himself.<sup>45</sup>

For Barber, therefore, inquiries into constitutional failure should be centered not on the durability of constitutional institutions or on our (lack of) respect for rights, but rather should examine constitutional ends and the extent to which we have or have not realized those ends.<sup>46</sup> This is consistent with Barber’s well-known argument for a welfarist reading of the Constitution,<sup>47</sup> or the argument that “the Constitution envisions more than a government that proceeds fairly and respects rights. It envisions what its Preamble says it envisions: a good state of society, good things like national security . . . and a prosperous people.”<sup>48</sup> Barber describes this as a “preambular test.”<sup>49</sup> So a welfarist conception of

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37. BARBER, *supra* note 9, at 27.

38. *Id.* at 141-42.

39. *Id.* at 27.

40. *Id.* at 79-83.

41. *Id.* at 26.

42. BARBER, *supra* note 9, at 98-100.

43. *Id.* at 45.

44. *Id.* at 100 (quoting THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961)). I should note here that this description of Madison’s design may understate those aspects of Madisonian political thought that *did* envision some role for the cultivation of constitutional virtue.

45. *Id.* at 98-99, 102-05.

46. *Id.* at 26-29.

47. See SOTIRIOS A. BARBER, WELFARE AND THE CONSTITUTION (2003).

48. BARBER, *supra* note 9, at 26.

49. *Id.* at 53.



constitutional success “turns out to be the reasonable pursuit of constitutional ends—reasonable debate about what they mean in practice and how to realize them.”<sup>50</sup> In Chapter 2 of *Constitutional Failure*, Barber describes these ends in more detail:

They initially appear to be economic growth, economic fairness, and other features of “the Large Commercial Republic” that Martin Diamond derived from *The Federalist*. . . . Yet [this] proves to be no more than a conception of the good life for Americans, and conceptions of ends like the common defense and the general welfare can be wrong, especially as circumstances change.<sup>51</sup>

A preambular test of constitutional success, Barber posits, must include “reasonable progress toward reasonable understandings of constitutional ends, good things like security, prosperity, and fairness.”<sup>52</sup> These ends are aspirational in character—we cannot fully realize them, but we can make reasonable and good faith efforts to pursue them.<sup>53</sup> Barber concedes that the pursuit and the achievement of such ends is not an uncomplicated matter.<sup>54</sup> Sometimes one or another of these ends exists in tension with others, to say nothing about how reasonable persons might disagree about what they mean and how—and perhaps even if—they should be realized.

Readers familiar with Barber’s work will anticipate where this is headed: reasonable debate about the nature and realization of constitutional ends both anticipates and requires what Barber calls “secular public reasonableness” and “a disposition to account for one’s actions to others in ways that others can understand and live with.”<sup>55</sup> Such a disposition is both a civic virtue and a central feature of a robust constitutional order.<sup>56</sup> Among the most interesting and important of Barber’s claims is that a healthy constitutional order should yield “a healthy politics”—and inversely, that a sick or failed politics is a sign of constitutional failure.<sup>57</sup> One wonders about the causal imprecision in this claim. Surely some forms of political disorder can and should be traced to constitutional sources, but on reflection this turns out to be more difficult than first appears. As James Fleming has observed, all sorts of failures might be “attributable to the Constitution in the sense that they are made more likely by our constitutional design.”<sup>58</sup> “Collapsing them all under the rubric of constitutional failure is likely to mislead us as to the reasons why states have failed, and just as likely to misdirect our efforts to forestall or remedy failure.”<sup>59</sup> What makes constitutional failure “constitutional” in character?

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50. *Id.* at 27.

51. *Id.*

52. *Id.* at 51.

53. BARBER, *supra* note 9, at 57.

54. *Id.*

55. *Id.* at 81, 27.

56. *Id.* at 27, 77-78, 81.

57. *Id.* at 27.

58. James E. Fleming, *Towards a More Democratic Congress*, 89 B.U.L. REV. 629, 632 n.16 (2009).

59. Ellen Kennedy made this point strongly in her excellent study of constitutional failure in the Weimar Republic. See KENNEDY, *supra* note 8.

Constitutional failure is “mostly a matter of public and elite attitudes” about the meaning and importance of constitutional ends.<sup>60</sup> A definition of constitutional success as tied to a secular public order and informed by our commitment to preambular ends has great significance for how we define constitutional failure. It means that neither constitutional success nor constitutional failure can be measured by the durability of constitutional institutions. Indeed, the persistence of such institutions, absent a commitment to constitutional ends by engaged and civically committed citizens, may obscure a larger failure—similar to what I have called constitutional rot, where considerations of legality obscure questions of constitutionality and where “We the people” are unwilling or unable to take up such questions as our own.<sup>61</sup> Rather, failure occurs when there is no meaningful prospect for constitutional reform. For Barber, then, the most visible sign of constitutional failure in the United States is our collective inability to take the prospect of constitutional reform seriously. Indeed, constitutional failure is not really about the text because “[t]he Constitution itself can’t succeed or fail, for failure and success are properties of actions and cognate phenomena, like activities and practices . . . . Constitutional failure is thus the failure of a culture. And constitutional reform must therefore be nothing short of cultural reform.”<sup>62</sup>

### III. WHERE NOW?

If, as both Barber and Thomas argue, constitutional success requires citizens with a suitably constitutional mindset, then there remain significant questions for constitutional theorists to take up. Two of the most significant are also the most obvious. First, what sorts of attitudes cement the constitutional order and what sorts subvert it? It is all well and good to note that constitutional failure is ultimately attitudinal, but what attitudes ought we to favor and which ones ought we to abjure? And second, how do we develop such attitudes? In Barber’s words, “constitutional survival . . . depends on attitudes like patriotism, trust, and magnanimity.”<sup>63</sup> Thinking in this way, as Thomas shows, forces us to (re)think what kinds of institutions the process of constitution making requires. It also asks us to expand our understanding of constitutional institutions to include, as the Founders did, the institutions in and of civil society, where one might plausibly think (as did Madison, to a degree many of us overlook) that civic virtues are nurtured and cultivated. Here, both Barber and Thomas identify the failure of the Founders to create a national university as a significant failure of constitution building. There is no possibility now of a national university (and that might be a good thing), but civic education remains an important mechanism for cultivating the civic virtues necessary to sustain the Constitution. What sort of civic education best supports the Constitution?

Thomas makes an important contribution here in distinguishing between an educa-

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60. BARBER, *supra* note 9, at 79, 106-08 (“Mostly,” Barber writes, but not entirely. Barber also attaches some weight to structural rules, especially to Article 5.).

61. FINN, *supra* note 28, at 31-32.

62. BARBER, *supra* note 9, at xvii.

63. *Id.* at 2.

tion geared to Constitution worship and veneration, which both Barber and Thomas condemn, and one dedicated to what Thomas calls “constitutional patriotism.”<sup>64</sup> Constitutional patriotism “is not, then, an uncritical patriotism, but neither is it neutral with regard to the constitutional order.”<sup>65</sup> Its curriculum includes a “commitment to a political creed” and a commitment to “regime defining characteristics,” including “equality, liberty, government under law, tolerance, and other such constitutional values.”<sup>66</sup> Thomas’s distinction between a civic education in the principles of constitutional patriotism and constitutional cheerleading rejects as unsuitable to a vibrant constitutional culture the sort of Constitution worship and veneration that Barber also decries. It assumes, put another way, that a successful constitutional order must include what Barber describes as “reasonable public debate” about constitutional (preambular) ends.

Barber agrees that Constitution worship undermines the civic virtues necessary to sustain a healthy constitutional order. Veneration ill-suits constitutional maintenance for several reasons. First, it obscures the possibility of constitutional failure and diminishes, as a consequence, the prospects for meaningful constitutional reform. Barber’s arguments here recall the complaints of other well-known critics of Constitution worship, including the prominent works of Levinson, Balkin, and several other scholars.<sup>67</sup> Moreover, Constitution worship subverts the larger constitutional project by rendering improbable if not impossible the development of citizens who can engage in reasonable public discussion about preambular ends. Constitution worship thus obscures any real possibility of public discussion of what preambular ends demand of us or whether we are making reasonable progress toward achieving them.

One of the more interesting subtleties of Barber’s argument is his distinction between venerating the Constitution and venerating the Founders/founding itself. The latter we should indeed venerate, but “for the virtues it represents, not for the constitution it produced.”<sup>68</sup> At this point Barber’s argument slides uneasily into a discussion of Article 5 and the principle of amendability, which Barber considers key. Why? We should venerate the Founders, he argues, not for what they produced (this Constitution), but rather for what they imagined themselves to be demonstrating, “namely, humanity’s capacity for ‘establishing good government from reflection and choice.’”<sup>69</sup> This is why the Constitution’s amendability is key. In venerating what the Founders did, instead of what they produced, we can imagine ourselves as engaged in the same constitutional project, and being so engaged demands of us a commitment to certain civic or constitutional virtues, among them public reasonableness, or the capacity for “reflection and choice.”<sup>70</sup>

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64. THOMAS, *supra* note 11, at 195.

65. *Id.* at 230.

66. *Id.* at 229-30.

67. See, e.g., SANFORD LEVINSON, FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE (2012); JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011); Jeremy D. Bailey, *Should We Venerate That Which We Cannot Love? James Madison on Constitutional Imperfection*, 65 POL. RES. Q. 732 (2012); see also THE FEDERALIST NO. 49, at 313 (James Madison) (Clinton Rossiter ed., 1961).

68. BARBER, *supra* note 9, at 20.

69. *Id.* at 19.

70. THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Some of us may think that a vision of civic education committed to constitutional patriotism goes too far in an ostensibly liberal republic or that it violates liberal notions of political community.<sup>71</sup> Others may think the line between civic education and Constitution worship is too dim or too fuzzy—and that the former will inevitably become the latter. Indeed, what Barber envisions seems far removed from the reality of contemporary Constitution worship, which makes none of the finely grained distinctions between the Founders and the Constitution that Barber defends.

#### IV. CONCLUSION

Is constitutional failure in the United States imminent or irreversible? Barber equivocates, writing in several places that our sickly politics is a sure sign of constitutional decay and noting that our pronounced inclinations to Constitution worship inhibit any prospect of meaningful constitutional reform. He states “what little hope remains depends almost entirely on chance.”<sup>72</sup> “As a practical matter,” he concludes, “we’re stuck with what we’ve got.”<sup>73</sup> Barber repeats the message in his last chapter, but writes too that some measure of optimism might be located in the works of constitutional scholars who seek to revive our constitutional capacity. As Barber phrases the problem, “[t]he nation’s apparent loss of constitutionalist capacity confronts the American legal academy with a dilemma. . . . What can constitutional scholars responsibly do or say when there’s nothing to do or say that isn’t harmful to the country in some way?”<sup>74</sup> Barber’s answer is that “[c]onstitutional scholars who would contribute to the survival of American constitutionalism must quit the business of celebrating the unworkable. They must come to see themselves as the American Founders saw themselves: less as constitutionists than as constitutionalists.”<sup>75</sup> This is the right prescription, but as Thomas intimates, it is better addressed to citizens than to scholars.

Every constitution imagines a certain kind of citizenry into being—a citizenry made in its own image and best-suited to advance its vision of a constitutional way of life. Likewise, in a constitutional state, every call for civic education rests, sometimes explicitly but more often only implicitly, on an assessment of the people’s capacity for self-governance. If we think the people are not and cannot be made to be reliable stewards of constitutional values, then we must educate citizens to think about the Constitution in a particular sort of way—as an object of veneration. In my judgment, Barber’s despondency rests on an assessment of our civic life that is insufficiently attuned to the possibilities for civic engagement in American politics and to how the institutions of state can develop and cultivate them. As I have written elsewhere, reinvigorating civic constitutionalism in the United States is more a matter of restoration and renewal than of constitutional invention.<sup>76</sup> But Barber, like Thomas, is right to show us how much that project depends on our willingness to think about what the Constitution means and less about how it shines.

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71. Both Thomas and Barber reject this understanding of liberalism.

72. BARBER, *supra* note 9, at 25.

73. *Id.* at xvi-xvii.

74. *Id.* at 113-14.

75. *Id.* at 144.

76. FINN, *supra* note 28, at 222-24.

Ultimately, studies of constitutional failure, especially those that stress the importance of constitutional thinking and civic education, will not much matter if we think the Constitution is pretty much a success or unlikely to fail. In such cases, the Constitution already has all that it needs—citizens who love it from afar. We hardly need add that such a Constitution has no need of a national university or a civic education that will help to create citizens with a mind to care for the Constitution in any meaningful way.