

SOVEREIGNTY, PARTIES, AND PRINCIPLES: A PARTIAL REPLY

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The Principles of Constitutionalism identifies and expounds the principles that should, and to an extent must, structure the constitutions of states.¹ I hoped that the book would stimulate discussion and debate over the issues it engaged, and I am grateful for the contributions to this volume and for the generous introduction written by Malcolm Feeley. Not only are the articles deep and challenging engagements with the book, they are, also, important contributions to constitutional theory more generally. In this reply I cannot hope to engage with all of the issues raised by the authors, but will focus on three strands drawn from their work: the nature and location of sovereignty; the constitutional role of political parties; and, finally, the potential of constitutionalism to fight democratic decay and the rise of authoritarianism.

The Nature and Location of Sovereignty

The passion with which debates over sovereignty are conducted is matched only by the confusion over what sovereignty entails. Sovereignty is a term which has a number of distinct, if related, meanings, and it is important to keep a firm hold on the sense which sovereignty is accorded in the course of an argument: sometimes, what appears to be a dispute over the nature of sovereignty turns out to be a semantic disagreement over the use of the term. In the responses to *Principles*, two challenges were made to the account of sovereignty it contained. Lior Barshack argues that we should also recognise the sovereignty of the family as a constitutional phenomenon that exists alongside, and sometimes in tension with, the state.² Rivka Weill, in contrast, argues that sovereignty is vested in the people, who possess

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¹ N. W. BARBER, *THE PRINCIPLES OF CONSTITUTIONALISM* (OUP 2018). Hereafter '*Principles*'.

² L. BARSHACK, *Sovereignty and the Family: An Alternative Outlook to Barber's The Principles of Constitutionalism* 23 JERUSALEM REVIEW OF LEGAL STUDIES ?? (2021).

constituent power, and that a full account of sovereignty should include recognition of popular sovereignty.³

Barshack's article focuses on the relationship between the state and the family. At the core of his article is the claim that the family is a 'sovereign or quasi-sovereign body that is not subordinate to the state and which is necessarily antagonistic toward state power.'⁴ The article provides a powerful comparison of the social institutions of families and states, and, indeed, shows the analytical power of such comparisons. Many of the classic works on the theory of the state present the state and family as two species in a single genus, and then draw on their comparison.⁵ Not only are the family and state both types of social institution, they are both types of social institution characterised by the existence of legitimate, non-optional, authority relationships. Just as states exercise authority over many of their members and have responsibility for their wellbeing simply because those members were born into that institution, so too parents exercise authority over their children and are responsible for their wellbeing simply because those children were born into their family. It is hard to think of another type of social institution in which authority relationships of this type can exist legitimately without the agreement of the parties. Moreover, in families, as in states, this authority is often backed by coercion. Setting aside the controversial issue of punishment, the physical movement of children, such as putting them into a chair or bed, confining them to their home, or transporting them to nursery, are regarded as acceptable, even necessary, features of good parenting, even if done against the loudly expressed wishes of the child. In other private institutions, private actors would need to appeal to the state for physical interventions of this type. In her response to the book, Weill raises the question of institutions that have both public and private aspects, what she terms 'dual nature' bodies.⁶ Of all the forms of social institution we encounter, the type most structurally similar to the state is, probably, the family; whilst it is, as Barshack argues, a quintessentially private body it is, also the type of private body that most closely resembles those on the public side of the divide.⁷

³ R. Weill, *Acontextual Constitutionalism and the Relationship Between the People, Constituent Power and the State: On Nicholas Barber's The Principles of Constitutionalism* 23 JERUSALEM REVIEW OF LEGAL STUDIES ?? (2021).

⁴ Barshack, *supra* note 2, at ?.

⁵ *Principles*, 122-126.

⁶ Weill, *supra* note 3, at ?.

⁷ Barshack, *supra* note 2, at ?.

The word ‘sovereign’ is sometimes used to signify an area of legitimate authority. We can talk of the sovereign authority of a regional legislature or, slightly more pompously, the sovereign authority of a university over its students. To talk of families being sovereign in this sense is unobjectionable, the family contains legitimate authority relationships, but are families sovereign in the sense that states are sovereign? As I argue in *Principles*, state sovereignty consists of two elements: a claim, and the realisation of that claim.⁸ States claim sovereignty in that they assert authority over their members and territory, they purport to be entitled to have the final say about how people ought to behave. It is worth noting that, in contrast to Max Weber’s formulation of sovereignty, on this understanding the state need not claim to have authorised all exercises of authority within its territory.⁹ Instead, as Les Green puts it, the state claims to be the *supreme* authority in its territory.¹⁰ Although the state claims to be entitled to remove or fetter other authorities, it does not claim that these bodies necessarily find the source of their authority in its express or tacit permission; the state claims to be the supreme, but not the only, authority within its territory. The second aspect of state authority is the effectiveness of this claim. State sovereignty exists where the state can make good on its claims; it is, in fact, the case that it is able to regulate behaviour. Whilst the sovereignty claim made by the state is an absolute, its realisation is a matter of degree. No state ever succeeds in completely controlling power within its borders, and, on some occasions and in some places, this failure might be of such an extent as to throw into question the existence of the state.

The type and implications of the authority relations characteristic of families differ from those characteristic of states. As Barshack recognises, the authority of families is limited, there are ‘pockets of family autonomy and parental authority’.¹¹ Whilst there are some issues that fall within the jurisdiction of the family, many others do not. For example, families cannot decline to be bound by the criminal law or decide that their children will not be educated. More controversially, perhaps, parents ought not to be able to oblige their children to marry or to

⁸ *Principles*, chapter 2.

⁹ M. WEBER *Politics as a Vocation*, in H. H. GERTH AND C. WRIGHT MILLS EDS, *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* (Routledge, 1991), 78.

¹⁰ L. GREEN, *THE AUTHORITY OF THE STATE* (Clarendon Press, 1990), 78-83.

¹¹ Barshack, *supra* note 2, at ?.

take a particular career path. These are limits on the reach of their effective authority that family members ought to accept, but, accept them or not, they are limits that the state ought to impose. There is, then, an important difference between the authority exercised by families and that exercised by states: the state decides on the scope of its own authority whereas the scope of families' authority is determined by the state. This claim can be unpacked a little further. First, it is an empirical claim about the hierarchy of power in society. For the state to exist, it must, to a degree, be able to exercise some control over families, this is a core aspect of the effectiveness side of state sovereignty. A society in which family groups were completely uncontrolled would not be a society which included the state – it would be a clan-based community. But whilst the state needs to be able to exercise some degree of control over the other social groups its members belong to and which operate within its territory, the family need not exercise any sort of parallel control. The existence of the family is not dependent on its capacity, to any degree, to control the state. Second, this empirical assertion is partnered by a normative claim. Families should accept that the state ought to set the boundaries of their area of authority. In contrast, the state ought not to accept that some other body is entitled to determine its jurisdiction: it is for the state to decide the limits of its justified authority. Families should recognise that the state ought to possess this capacity because the breadth of concern of the state is wider than that of the family. Families exist and flourish because of a narrowness of moral concern – members care more for each other than for those outside of their group – but this narrowness of concern is morally defensible only because the family exists within a community with structures that can support and protect those who fall outside of well-functioning family units. Family members, as members of the community, have reason to create states to render the obligations and entitlements that define the family justifiable, and, because of the different reach of concern and membership, have reason to accept that sovereignty should vest in the state rather than at the level of the family. The state is better placed than individual families to decide on the proper limits of the authority relationships within family structures. Moreover, when the state is functioning well, family members are empowered to engage with these questions in their capacity as state members; in a different constitutional guise they review the normative structures of the family within their society.

Barshack argues that families are necessarily antagonistic towards state power. In *The Principles of Constitutionalism*, I challenge this claim.¹² As the above paragraph contends, families need states, and states, for their part, need families. The family unit provides a superior model of care to that provided directly by the state. Whilst the state can, and should, step in where families fail, the primary goal of the state in this area should be to support families, helping them to succeed. The state, seeking to advance the wellbeing of its people, should look on the family as an asset, not a threat. However, just as families can fail, so too can states. States may make unjustified incursions into family life, failing to properly delineate the areas of authority that should be left to the family. In these situations, the parallels between the family and the state, discussed earlier in this section, become of even greater importance. Some social institutions – companies, charities – depend on the state for their existence, at least in their current forms. If the state removed the legal structures that enabled them to exist, they would disappear. Families, in contrast, existed before the state and would continue to exist even if the state refused to recognise them. Their existence, along with many of their authority relationships, does not depend on the state, and does not require the support of law. This enables them to act as a point of resistance to the state, with the capacity to act and make decisions outside of state structures. Whilst not inevitable, the antagonism that Barshack identifies is certainly potential – and it is unsurprising that totalitarian states are hostile towards the family, seeing it as a rival source of authority and power. Families’ potential to oppose the state can be valuable. When the state is acting unjustly, the family can become a place of opposition to the state, providing a shelter from state power and a structure of trust that enables people to organise against state bodies. In some situations, the obligation on families to accept the right of the state to determine the bounds of their authority can be forfeit. Perhaps this explains why it seems a reasonable use of language to talk of families as ‘sovereign’.¹³ Nevertheless, antagonism between families and states is a sign of dysfunction. Where the failures of the state require families to oppose it, these state failures are requiring another social institution to distort its operation to compensate for the problems that its failure is causing.¹⁴ Even whilst defying the state, family members should be striving to restore the state to its

¹² *Principles*, chapter 5.

¹³ Though it is worth noting other social institutions also have this capacity, and even those that do not can persist in the face of opposition from the state by changing their identity.

¹⁴ In a similar fashion to the way a malfunctioning constitutional institution may require other institutions to distort their operation: *Principles*, at 231-239.

proper role, one in which families can, once more, accept, and be legitimately required to accept, the sovereignty claims of the state.

A second interrogation of the model of sovereignty found in *The Principles of Constitutionalism* is found in Weill's paper. Weill draws attention to the role of the people in states and in constitutionalism. In a series of important papers, Weill has argued for a dualist model of the United Kingdom constitution.¹⁵ Weill argues that there are some changes to the UK constitution that can only be accomplished through referendum, or after some other form of popular endorsement: these are decisions that must be made by the people, and Parliament is a necessary, but not sufficient, part of that process. Weill's work on the UK constitution focuses on the substance of that system's modes of constitutional change, but in her critique of *Principles* she applies this approach more broadly, arguing that sovereignty should be regarded as located within the people, rather than in the state. Weill argues that the people possess constituent power and so, ultimately, is the body that decides on constitution-making and on constitutional amendment. Weill's article then presses the case for 'popular' sovereignty against theories of state sovereignty, with constituent power resting in the hands of the people.

The concept of constituent power is a slippery one. There are at least three areas of ambiguity. First, there can be uncertainty as to whether constituent power embodies a normative or a descriptive claim. To assert that an entity, such as the people or legislature, possesses constituent power sometimes implies that the body *can* make or change a constitution, and sometimes implies that the body *should* be the body empowered to make these changes. Second, there is uncertainty over what it is that constituent power enables the body to create: is it the power to create a new constitutional order, or, more broadly, does it also encompass the power to make amendments to an existing constitutional order? Finally, when 'the people' are identified as the body that possess constituent power, is 'the people' equated with the category of state members, or are the people distinguishable from this category?

In her paper, Weill presents an account of constituent power that weaves together normative and descriptive arguments. Weill's account skilfully engages the classic dilemma over the ordering of the relationship between states and their people: on the one hand, it is

¹⁵ R. WEILL, *Dicey was not Diceyan* 62 CAMBRIDGE LAW JOURNAL 474 (2003); R. WEILL, *We The British People* PUBLIC LAW 380 (2004).

common to think of a ‘people’ creating, or being entitled to create, a state; but, on the other hand, it is the existence of the state that creates this ‘people’, with the rules of the state defining state membership. Whether the ‘people’ can exist separately from the state or are dependent on the state for their identity is one of the puzzles of constitutional theory. Weill charts a middle path. On Weill’s account, ‘the people’, is created by the state and yet, in addition, should be taken as the group which has created the state. The people, from ‘a constitutional law perspective’ come into existence when the state is created, because they have ‘earned’ this status by successfully creating the state.¹⁶ This group includes all the inhabitants of the territory at the moment of state creation. But to say this group has created the state is a constitutional fiction, a piece of constitutional ideology that, for Weill, is hard-baked into the very concepts of state and constitution. As Weill emphasises, not all of those who are then constitutionally identified as ‘the people’ fought for or wanted the creation of the state; the historical group that founded the state (and which, by so doing, drew up its first constitution) is, then, not identical with the ‘the people’ in a constitutional sense. But, for Weill, the newly created state must, or should, treat these groups as if they were synonymous, and here Weill’s claim gains normative traction: the inhabitants of the state’s territory at its moment of creation should be regarded by the state as possessing constitutive power, both as the unit which created the state and as entitled to determine its constitutional structure. For Weill, the constitutional ideology of the state requires it to treat the totality of the inhabitants of its territory at the time of its creation as exercising and possessing effective constituent power – though outside of this ideology, we can acknowledge that this is a fiction, that this power was actually exercised by another group.

This strand of constitutional ideology then shapes the ways in which the constitution should be amended and has implications for the provisions the constitution should contain. Amendment of the constitution requires the people to re-emerge, to exercise their constituent power once more. There are some changes that require their endorsement. This endorsement can either be effected through a referendum or, sometimes, it is the institutions of the state that ‘lose their mundane character... ..and become vehicles of expressing the popular will.’¹⁷ The legislatures, courts, even the executive, may, sometimes, play this role. Under Weill’s model, the constitution can access the popular will through these institutions in two ways: there may

¹⁶ Weill, *supra* note 3, at ?.

¹⁷ WEILL, *supra* note 3, at ?.

be a pre-determined agreement that the body is able to express the popular will in some situations, or ‘there must be a consensus that constitutional change has occurred after the fact.’¹⁸ As well as for amendment, states’ subscription to popular sovereignty also has implications for the content of the constitution. Rights of secession, Weill argues, are incompatible with constitutionalism. On Weill’s account, a secession right challenges the unity of the people who underpin the state, and whose unity constitutions necessarily presuppose.¹⁹ The ideological commitment on which the state’s legitimacy turns requires the unity of people, territory, and state, precludes the state from recognising the existence of groups of inhabitants within its territory which possess the right to secede and start a new state. To do so would run contrary to the state’s necessary ideological commitment to the unity of the people as a constituent entity.

By taking ‘the people’ to be the group of state members, the claim that this group possesses ‘constituent power’ is rendered plausible. After all, the primary aim of the state is to advance the wellbeing of its members, and, when the state is functioning well, we can talk of those members ‘owning’ the state, sharing in its governance and being responsible for its actions. This is the core truth in theories of popular sovereignty: as Lincoln put it, there should be government of the people, by the people, for the people.²⁰ However, setting constitutional ideology aside, this cannot be equated with a right to *create* a state, as the people, on this interpretation, are a group *formed by* the state’s existence; the group did not predate the state and so cannot be said to have possess the right to create the state, even if the constitution, retrospectively, purports to accord them this right. As to the capacity to amend the constitution, Weill is correct that, as a descriptive matter the people can amend the constitution in almost any way they choose. If state members decide, unanimously, to change the constitution they can do so by acclamation, no matter what processes the existing rules of the constitution require. The impracticalities of unanimity, though, make this capacity of little practical importance and, indeed, as the institution of state membership and the group of state members are, themselves, institutions of the state, this capacity remains internal to the state and is one

¹⁸ Weill, *supra* note 3, at ?.

¹⁹ See also R. WEILL, *Secession and the Prevalence of Both Militant Democracy and Eternity Clauses Worldwide* 40 CARDOZO LAW REVIEW 905 (2018).

²⁰ G. WILLS, *LINCOLN AT GETTYSBURG* (Simon & Schuster, 1992), chapter 4.

of the elements that builds up state sovereignty. Even if it were possible, though, it would be a mistake for the people to try to take decisions through unanimity. The internal institutional structure of the state is created precisely because of the impracticalities and dangers brought by large groups trying to make decisions in this way; these are structures created, in part, to make decisions in a manner that permits and accommodates disagreement, leading those who disagree, however reluctantly, to accept the legitimacy of the collective decision. Consequently, courts and legislatures cannot be said to be channelling the popular will, even in highly charged constitutional disputes, because there is no unanimity to be channelled: the decision is given to these institutions *because* there is dispute within the group of state members over the correct course of action. The claim that these bodies articulate the popular will in some way when making fundamental constitutional decisions is, at most, a fiction aiming to legitimate the decision rather than an identification of a change in the process or nature of their decision-making. As Weill's work shows, there is a strong case to be made that, on occasion, decisions about fundamental constitutional questions should be put to the people through referendums, or other processes that will enable citizens to express their views, but this important constitutional argument need not be tied up with more problematic claims about constituent power and the popular will.

For Weill, a constitutional right of secession is incompatible with the very idea of a constitution; if constitutions must be conceptualised as the products the totality of people within a territory, a people who are then regarded by the constitution as possessing and exercising a right to create a state, the constitution cannot also recognise a sub-group of those people living in a subset of that territory as also possessing this right. Such a right would embody a rejection of the equation of people, territory, and state that, on Weill's account, is a claim that lies at the core of the ideology of the constitution. But, we might ask, need states make this assumption? Some states, like the United States of America do hold to this ideology: we, the people, have founded the state, and there is no legitimate constitutional space left for secession. Other states, though, like the United Kingdom, regard themselves as a union of peoples, constitutive territories that have come together to form a state and which may, one day, come apart.²¹ Whilst some states may adopt the ideological origin story that Weill identifies, not all need do so, and state constitutions can include secession rights without risking

²¹ N. W. BARBER, *THE UNITED KINGDOM CONSTITUTION: AN INTRODUCTION* (Oxford University Press, 2021), part 3.

conceptual contradiction. Secession rights may or may not be a good idea, but they do not run against the nature of constitutions.

The Constitutional Role of Political Parties

Political parties have not received the attention they deserve from constitutional scholars, and, until recently, when they have received attention, parties have tended to be presented as problems for constitutions to navigate. Over the last few years, however, there has been a revival of interest in parties, and a reassessment of their constitutional role.²² The core truth, long recognised by political scientists, has now been embraced by political theorists and writers on constitutions: rather than impediments, political parties are necessary elements of democracy, democratic government cannot operate in their absence. Daniel Weinstock's important paper is a contribution to this discussion, and engages the wider question of the constitutional role of parties through the narrower issue of party manifestos.²³ Manifestos are so ubiquitous and mundane that it is easy to lose sight of how remarkable they are. A manifesto consists of a set of commitments produced by the party before an election that its candidates then advocate during the campaign. Voters can be reasonably sure that the candidates will stick to the manifesto once in office because of party discipline within the legislature: pressure is put on representatives to stick to the party line. Manifestos are interesting because they embody a challenge to the popular understanding of the role of the representative in the legislature, and, in so doing, present us with an apparent paradox. The popular understanding of the role of the representative, an understanding shared by many constitutional scholars, is that the representative should vote on issues according to her conscience; she should weigh the issues and come to a conclusion about what is best for the people she represents. Manifestos appear incompatible with this understanding in a number of ways. First, given that candidates can only have a limited input into the manifesto, they often ally themselves with a document that does not precisely track their views. It is likely that some of the positions they argue for in public are ones that they think, privately, are suboptimal. When presenting the manifesto to their electors there is, then, a sense in which the representatives are required to be deceptive,

²² For an important reappraisal, see N. ROSENBLUM *ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP* (Princeton, 2008).

²³ D. WEINSTOCK, *Two Cheers for the 'Mandate' View of Representation: Remarks on N. W. Barber's The Principles of Constitutionalism* 23 JERUSALEM REVIEW OF LEGAL STUDIES ?? (2021).

recommending policies to their voters to which they are not fully committed. Secondly, once in office, the effectiveness of the manifesto depends on the party's ability to pressure its representatives to adhere to these policies. Again, this might seem constitutionally problematic, with representatives pressured to vote for policies they would not, but for the coercion of the party, have supported. But countering these concerns, as political scientists have pointed out, manifestos and parties are essential for the operation of effective elections in large democracies. It is impossible for every voter to know their representative intimately, and the existence of parties, with manifestos, allows voters to choose from a range of policy platforms. Furthermore, given that the representative will be one person in a chamber of several hundred, it is unlikely that a single representative will be able to effectively implement her personal policy preferences in the chamber, after all, her say in the decisions of the legislature will be vanishingly small. It is the party structure that enables the representative to cooperate with like-minded representatives in the formation of laws, making the choice given to the electorate meaningful. Finally, it is easy to overlook the vital role parties play in enabling the legislature to supervise and control the executive: in parliamentary systems, it is the parties that identify and create leadership teams, headed by the Prime Minister.²⁴ Without political parties and manifestos, voters would have little real chance to pick the policy direction of the state or to choose the leadership team that will head the executive branch. We then have an apparent paradox: whilst the operation of political parties seems to be in tension with the popular theory of the democratic role of the representative, it is also necessary for the successful operation of democracy within real-world constitutions.

Taking this reality as his starting point, Weinstock mounts a powerful and subtle attack on the model of representation advocated in *The Principles of Constitutionalism*. There I sought to resolve the apparent paradox through reflection on the operation of the legislature.²⁵ Given that parties are essential to the operation of the legislature, the conscientious representative will work to create and maintain an effective set of parties: the task of the representative, to bring about the best possible governance for the people she represents, requires her to work within and support the party structure. Consequently, representatives may rightly modify the political positions they advocate to enable their party to produce a coherent

²⁴ BARBER, *supra* note 21, chapter 10.

²⁵ *Principles*, at 169-174.

policy platform, knowing that they are more likely to get more of what they believe is in the interests of those they represent by working within parties, than by working in isolation. Manifestos are one of the products of this process, expressing the compromises reached between party members.²⁶ Weinstock agrees with me to this point, but argues that this reasoning pushes us towards a mandate theory of representation rather than the trustee model advocated in the book.²⁷ Trustee models of representation take as their starting point Edmund Burke's contention that the representative should do her best for those she represents, rather than blindly carry out their commands.²⁸ Mandate models, on the other hand, present the representative as bound to the views of her voters. As Weinstock shows, mandate theories have greater potential than I acknowledge in *Principles*. He argues that given the policies presented to the electorate are those generated by the parties, rather than individual representatives, the electorate should be taken as having endorsed the manifesto, rather than the candidate. Consequently, on Weinstock's account, the basic model of representation should be taken to be mandate, rather than trustee, with the manifesto standing as the basis of that mandate.

Weinstock's mandate model of representation is carefully nuanced and accommodates the need for representatives to shift away from their manifestos once in office if they discover that the policies in the manifesto are suboptimal. Weinstock's mandate theory requires that representatives explain their departures from the manifesto, rather than that they invariably adhere to those promises, this gives manifesto promises weight rather than treating them as absolute obligations. Indeed, Weinstock's nuanced mandate theory of representation produces an outcome close to the trustee theory of representation found in *Principles*, where I argue that the trustee model can accommodate some of the strengths of the mandate model. If, as I argue in that book, responsiveness to the views of the electorate makes representatives better equipped to reach decisions that meet the demands of the trustee model, representatives should explain and discuss their decisions to their electorate, and part of this process of explanation will include explaining why they departed from their manifesto promises, an explanation the voters can weigh when the representative comes up for re-election.

²⁶ ROSENBLUM, *supra* note 22, at 306-311.

²⁷ H. PITKIN, *THE CONCEPT OF REPRESENTATION* (California, 1972).

²⁸ E. BURKE, *Speech at the Conclusion of the Poll at Bristol* in E BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE AND OTHER WRITINGS* J. NORMAN ed. (Everyman, 2015), 151.

Weinstock and I agree about far more than we disagree, and it could be that we are moving towards a shared model of representation, one which accommodates the strengths of both trustee and mandate models. There remains, however, a problem with taking the mandate model as the starting point for a theory of representation: the mandate model either cuts against the overarching purpose of the state or it is nested within the trustee model. Legislatures and representatives, like all other state institutions and officials, should be oriented towards the primary purpose of the state, that is, the advancement of the wellbeing of the state's members. The mandate model, if taken as the starting point for a model of representation, runs against this: the representatives would take their manifesto commitments as their primary goal. Taking this as the starting point frames the dilemma the wrong way around. Rather than asking how the overarching duty of the representatives to further people's wellbeing can accommodate the value of adherence to manifestos, we are led to ask when the impact on people's wellbeing can justify a departure from a manifesto promise. A possible response to this might present the mandate theory as grounded in the overarching purpose of the state. So, perhaps, representatives should regard themselves as bound to manifestos because this empowers their electors, protecting voter's autonomy and capacity to choose, and so advances their wellbeing. But now the mandate theory of representation has become embedded in the trustee model: representatives should regard themselves as bound by the manifesto because those policies are the best options for those they represent. The trustee model has swallowed up the mandate model.

Political parties are also discussed in Weill's paper, where she raises the question of their constitutional nature: whether they should be considered public or private entities.²⁹ The public or private nature of political parties is a complicated and important question. It is complicated because both of the breadth of types of political parties and because of the constitutional roles they play. Some entities that are labelled parties are, clearly and unequivocally, public institutions. In one-party states, like China, the party is an element of the constitution of the state; its decision-making structures are parts of the constitution and its members occupy constitutional offices.³⁰ Parties in one-party states should be seen as public

²⁹ WEILL, *supra* note 3, at ?.

³⁰ *Principles*, at 174-176.

bodies because those who wish to share in the governance of the state have no choice other than to join, and work within, the party organisation. In multi-party states, in contrast, parties lie within the private sphere and engage with the state. They are private entities because people are free to create parties; there is no necessity to join a particular party to engage in governance of the state, and no single party is permanently in power. Whilst the line between parties that are parts of the state and those that are separate from the state is sharp in theory, it is blurred in practice, as the distinction between single and multi-party states can be hard to draw. In some hybrid regimes, the ruling party is virtually unremovable, but elections still occur and a change in regime is not completely impossible within the existing constitutional framework. Here, it might be hard to decide if the regime is a one-party state with a façade of a competitive electoral process, or a multi-party state in which one party possesses disproportionate power.

Even when political parties fall squarely into the private realm, they remain closely linked to the state and, as we have seen in the previous paragraphs, play a number of vital constitutional roles, enabling the operation of democratic government. However, the importance of their constitutional roles does not, in itself, mean that we should regard these as public bodies; they are not, and should not be, absorbed into the state. There is value in keeping parties within the private realm, permitting them to decide for themselves how they are regulated, how they make decisions, whom they nominate as candidates for election, and so forth. In a perfect democracy the principal constraint on parties would come from the electoral process rather than the law: they must persuade the voters they are suitable to be entrusted with power and competent to decide policy. So far as they are regulated by law, they would be treated as similar private entities are regulated, and established through private law structures, such as contract. However, the power of Weill's challenge emerges here: given that no real-world democracy functions perfectly, should the law treat parties simply as private entities, or do their constitutional functions require public law-type regulation? Recognising the essential constitutional role played by parties in constitutions – and acknowledging that in many systems only a very few parties have a real chance of power – states might rightly impose public law-type obligations on parties. Amongst other things, the law may regulate parties' capacity to expel their members, the manner in which they raise funds, and the processes by which decisions are made, imposing standards of reasonableness and fairness that go beyond those normally imposed on private law entities. Sometimes, because of their public roles, the law might not allow political parties the same latitude as other private associations; though they remain private entities they are, for some purposes, treated as possessing public characteristics.

Constitutionalism and Democratic Decay

Renata Uitz is one of the leading scholars on the constitutions of Eastern Europe, and is the co-author of an important book on constitutionalism, a book informed by her studies of post-communist regimes.³¹ At the core of her paper is a challenge that builds on her scholarship: faced with the rise of authoritarianism and the fear of democratic decay, how, if at all, can reflection on constitutionalism help states?³² Without endorsing negative constitutionalism, Uitz notes the risks inherent in moving away from that model. Negative constitutionalism presented constitutionalism as a set of constraints, restrictions placed on state institutions to preserve the liberty of individuals. In *Principles*, negative constitutionalism is used as a foil to generate an account of positive constitutionalism, an account which requires the constitution to be structured to make institutions work effectively, able to advance the wellbeing of the members of the state. Uitz identifies a cost with this move: the value of liberty, emphasised by negative constitutionalism, within constitutions is side-lined.³³ Given our experiences of democratic decay, this loss of emphasis might be a high price to pay to gain a reformed model of constitutionalism. There are, though, at least three reasons why the shift to conceiving of constitutionalism in positive terms may better protect the liberty of individuals than its negative counterpart and provide a better response to the challenges of democratic decay.

First, negative constitutionalism provides a dangerously easy target for those opposed to democracy and liberty. There is a superficial attraction to negative constitutionalism, especially for those living in affluent countries. In wealthy states it is easy to overlook the role that the state plays in creating and maintaining that wealth. The provision of education, the maintenance of transport, the regulation of the economy through an effective legal system, and a host of other vital activities undertaken by the state, slide into the background when the state is undertaking them reasonably well. It is possible to forget that these are, indeed, areas of

³¹ A. SAJÓ AND R. UITZ, *THE CONSTITUTION OF FREEDOM: AN INTRODUCTION TO LEGAL CONSTITUTIONALISM* (OUP, 2017)

³² R. UITZ, *Barber's Pursuit of Positive Constitutionalism: Towards Exposing Illiberal Constitutional Chicanery* 23 JERUSALEM REVIEW OF LEGAL STUDIES ?? (2021).

³³ Ibid, ?.

state activity, they seem, like rivers and trees, to be part of the environment in which the state exists, rather than things the state creates and maintains. In such societies to present the state purely as a danger, as a threat the constitution needs to contain, is plausible, but only because a significant part of its activity has been overlooked. In contrast, in developing countries, the need for an effective state is obvious; to gain the advantages enjoyed by their wealthier counterparts, the state needs to be able to act, building the institutions and structures that are necessary for a flourishing community. It is, then, possible to present negative constitutionalism as a luxury that developing states simply cannot afford, or, more darkly, as an ideological strategy by the rich to prevent poorer states achieving their full potential. Perversely, perhaps, some illiberal regimes may welcome accounts advocating negative constitutionalism: these accounts are pressing models of constitutionalism that are unlikely to prove attractive to their people, and which, indeed, their people have good reason to reject. Positive constitutionalism, then, may provide a more effective ideological counter to illiberal regimes than its negative counterpart because it seeks to make failing states work better, rather than simply preventing those states from doing harm.

Secondly, positive constitutionalism accommodates the strengths of negative constitutionalism. In the previous paragraph it was argued that positive constitutionalism provided a stronger ideological response to illiberal regimes than negative constitutionalism. But many of those living in illiberal regimes will feel the attractions of the negative model: faced with an over-bearing state, the value of liberty, a value at the core of negative constitutionalism, would be of plain importance. In her critique of my book, Uitz rightly argues that I give insufficient attention to the place of liberty within constitutionalism, and that even if negative constitutionalism is rejected, the importance of liberty remains. States should, indeed, recognise that liberty is, itself, valuable, and a successful state, seeking to advance the wellbeing of its people, should respect and foster liberty. Liberty, which I understand to mean the freedom to choose, is important both because the capacity to author one's life is morally important and, additionally, because many valuable options are only valuable if chosen.³⁴ In terms of authorship, enabling people to decide for themselves on key issues in their lives is important simply because it should be *their* life, and not a life determined by the choice of another. And many crucial life choices are only valuable if freely chosen – the value of

³⁴ T. ENDICOTT, *The Purpose of a State*, 66 THE AMERICAN JOURNAL OF JURISPRUDENCE 69 (2021).

marriage, for example, is radically undermined if coerced. Obviously, given the constraints of this article, it is impossible in this paper to develop these claims adequately, but they provide the beginnings of an explanation as to why a state oriented towards the wellbeing of its members would want to ensure that people's liberty was maintained. A successful state would recognise that whilst it should ensure a range of valuable options is open to its people, and should encourage people to take up those options, it could not coerce people into leading successful lives.

Finally, a further strength of positive constitutionalism is that it speaks to a wider range of state actors than negative constitutionalism. Many models of negative constitutionalism are addressed to the courts, or, perhaps, to the courts and to the drafters of the constitution; constitutionalism focuses on the law, and on the regulation of power by the judges. Positive constitutionalism, in contrast, speaks to all the institutions of the state and to all state officials, a category which includes the office of state member and the institution of the citizenry. This, of course, includes the judges, and constitutionalism provides a background set of principles that they should draw on when interpreting statutes and developing the law,³⁵ but constitutionalism extends further than this. Civil servants, members of the army and police, legislators, are all subject to its demands. This gives positive constitutionalism, where it is accepted, potentially a greater resilience to democratic decay than its negative counterpart. Resistance to rulers with authoritarian tendencies should come from within the executive as well as from the judges; rulers may find that their commands are ineffective, that parts of the executive branch simply will not follow orders they regard as constitutionally inappropriate or, at the very least, will slow the implementation of those orders. Citizens also share responsibility for ensuring that the state is functioning well, and some of the responsibility for the problems of democratic decay and populism falls directly upon the voters.³⁶ Citizens should vote for leaders who support constitutionalism and should try to dissuade those within their group who are tempted by the allure of populist leaders. If this fails, and populists are elected, citizens should try to minimise the harm done by their rule: a standard tactic of populists is to divide the citizenry, arguing that some of their number are not 'truly' part of the

³⁵ See BARBER, *supra* note 21, where I trace the significance of the principles for judges in the United Kingdom constitution.

³⁶ N. W. BARBER, *Populism and Political Parties* 20 German Law Review 129 (2019).

people.³⁷ It is the responsibility of citizens to resist this, by continuing to treat their fellow citizens with the respect that is one of the hallmarks of citizenship. In short, positive constitutionalism sees responsibility for the successful functioning of the state spread across all of the institutions of that entity; it is not confined to the courtroom.

Conclusion

The articles in this volume have engaged with *The Principles of Constitutionalism* in many different ways, challenging an array of the arguments made in that book. I am very grateful to the contributors, and am uneasily aware that I have left unaddressed many of the points they make. The issues have ranged from the constitutional relationship of the family and the state, the importance of sovereignty, the role of political parties, and the capacity of constitutionalism to resist democratic decay: these are amongst the most important constitutional challenges of our time, and I look forward to returning to them in future work.

³⁷ J. MÜLLER, *WHAT IS POPULISM?* (University of Pennsylvania Press, 2017), 43.