

The Purpose of a State

Timothy Endicott*

Abstract: In a contribution to a symposium on Nick Barber’s book, *The Principles of Constitutionalism*, I argue that Barber is right to explain the principles of constitutionalism by reference to the purpose of a state, but I defend a restatement of that purpose. Barber says that it is to advance the well-being of the citizens. I argue that the purpose is more open-ended: it is to make the political community a good one. The state has duties that are not grounded in the well-being of its citizens, and it may legitimately pursue good public purposes that do not advance its citizens’ well-being. The state is *for* its citizens, not primarily in the sense that it is there to make them better off, but in the sense that it is a way *for citizens* (and not for outsiders) to act as an organized community.

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An -ism is a tendency or an approach or an ideology, or the rough state of affairs in which a tendency or approach or ideology has sway. Nick Barber says that constitutionalism is a doctrine,¹ which is fair, as long as we remember how vague a doctrine it is liable to be, since it is an -ism. It is the doctrine that political governance should be conducted in accordance with a genuine constitution.

Barber shows very effectively that it cannot well be understood merely as a doctrine that the use of public power must be *constrained* by a constitution. That would be “negative constitutionalism.” I don’t know if anyone espouses it, but I am sure that an undue preoccupation with the power-checking functions of constitutions is engrained in the mindset of lawyers. The power-checking functions are actually secondary; their importance results from a constitution’s success in its primary function. Constituting a framework of powerful institutions is primary. Barber says that constitutionalism “requires the creation of an effective and competent set of state institutions” (1). That is positive constitutionalism. It demands “a strong government” (8)—just what some people think that constitutionalism ought to protect us against! I find Barber’s approach compelling, and I think that he has made a significant contribution to constitutional theory by accentuating the positive.

Principles of constitutionalism (also known as constitutional principles) are basic general standards for the establishment and for the good conduct of

* Vinerian Professor of English Law and Fellow of All Souls College, University of Oxford. Email: timothy.endicott@law.ox.ac.uk.

¹ N.W. Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2020), 1, 9, 11, 19, etc. I will cite passages from the book with page numbers in parentheses in the text.

effective state institutions. The principles that Barber addresses are sovereignty, the separation of powers, the rule of law, civil society,² democracy, and subsidiarity. His portrayal of ways in which those principles interact is full of original insights; one striking example is to be found in his excellent discussion of the constitutional importance of political parties. Far from being a blight on democracy, he says that parties are “requirements of the principle of democracy” (147) in a society like the UK, and “a necessary feature of a functioning democratic system” (167). He shows how adherence to the principles of subsidiarity, civil society, and separation of powers can restrain the tendency of parties to factionalism, as can adherence to the principle of democracy itself (183-5).

Barber’s positive constitutionalism and his account of the role of parties are two instances of his particular knack for pointing out the importance of aspects of a constitutional system that have been underestimated. There is so much that is original and persuasive in the book. But of course, I will focus on a small number of things that I think are worth questioning.

Starting with the first word of the title. Are those six principles *the* principles? Aren’t there many more? (see section I, “How many constitutional principles are there?”). Of course, this isn’t really an objection to Barber’s title: you can study the principles of constitutionalism by delving into six strategically important ones. But it is worth thinking about how to count the principles of constitutionalism: it provides a way of approaching a central claim of the book, that the advancement of its members’ well-being is “the defining purpose of the state” (35).

Barber is right to put the purpose of the state at the center of his project. I think that its proper purpose is more complex than advancing its members’ well-being, because there are some things that a state must do (and many things that it may legitimately do) that are not explained by the well-being of its members (see section II, “What is a state for?”). I will discuss the implications for the principle of democracy. I will suggest some reasons for thinking that democracy, in the classic sense of rule by the people in general, needs to be restricted to a crucial but narrow range of public decision making, if the state is to succeed in its purpose (see section III, “Is democracy a principle of constitutionalism?”). And if I am right about the purpose of the state, then there is reason not to adopt Barber’s “trusteeship model” of representative democracy. That model really would treat it as the duty of representatives to serve the interests of the members of the state, as a trustee serves the interests of beneficiaries. I will offer an alternative and more open-ended “public service model” of representation (see section IV, “The public service model of representation”).

The purpose of the state and the duties of democratic representatives have implications for a central question of political philosophy: what is the proper relation between a state and its members? I will say that the state is for its members (and not for others) in the sense that it is their technique for acting as a community. And the constitution must make it into a juridical person—the organized

² The “principle of civil society” is Barber’s shorthand term for the principle that “the state should see the private realm as a necessary and beneficial counterpart to the public” (Chapter 5, Abstract).

agency of their community. That agency has duties that are not the duties of any citizen, or of the citizenry (see section V, “Conclusion: state agency as the proto-principle of constitutionalism”).

I. How Many Constitutional Principles Are There?

Barber’s subject is the fundamental, abstract requirements of governance according to a constitution. There is no definite number of those requirements. There are more than six. Barber’s account of the purpose of a constitution implies that there are many.

It is a general principle of constitutionalism that corruption on the part of public officials is unacceptable. Or we might say that it is part of a wider principle that public office is not to be used for private advantage. Comity among institutions of the state is a principle of constitutionalism.³ Barber could have described the “requirement of effectiveness” (which he discusses so well, 29-32) as an independent principle of constitutionalism. Finality in public decision making is a principle of constitutionalism. We could add accountability,⁴ transparency, stability, and due process to the list. Richard Ekins has pointed out, in a review of Barber’s book, that we should see “social solidarity as a principle of constitutionalism.”⁵ And I think that constitutionalism includes an anti-legalism principle: that the law is not to be adhered to by the institutions of the state in a way that would result in disaster to the community in an emergency.

You may wish to say that these further suggestions come within principles that are already on Barber’s list, and he discusses some of them under his six headings. The rule of law gives protection against corruption, and if you state your understanding of the separation of powers broadly enough, you may have articulated the value of comity among institutions. You may say that stability is an element in the rule of law (97), and you may say the same about due process (although I think it is important that the value of due process and the value of stability both extend far beyond law). And the anti-legalism principle might be expressed along the way, if you state the principle of the rule of law in enough detail to point out its proper limits. Finality can be seen as an element in the principle of sovereignty (as Barber suggests: 24, 27). And Barber presents the requirement of effectiveness, too, as an element of sovereignty (31). Solidarity could be seen as part of, or as a ground for, the principle of democracy. And so on. The fundamental, abstract requirements of constitutional government can be distinguished and described and subdivided in various ways, but on any good account, there are many principles of constitutionalism.

³ See Barber’s discussion at 70.

⁴ It does crop up at 8. And Barber makes a rather brilliant and important point about the lack of accountability that would result from thoroughgoing direct democracy: “When the people as a whole decide, the disciplining force of potential accountability is lost: in a sense, when everyone decides, no one has decided” (153).

⁵ Richard Ekins, in a book review of *The Principles of Constitutionalism*, *Law Quarterly Review* 135 (2019): 517.

The reason is that the purpose of a state is so open-ended that its achievement depends on the constitution meeting an array of diverse and open-ended requirements.

II. What Is a State For?

One organizing principle explains all of the requirements on Barber's list and all the others that we might add. The organizing principle is that the constitution ought to provide a framework for the success of a state in attaining its purpose. I think that there is great insight in this approach, and also reason for a significant restatement of the purpose that Barber ascribes to the state. He says that:

"All of the principles of constitutionalism ultimately find their origins in the characteristic purpose of the state: the advancement of the people's well-being" (18).⁶

By 'well-being,' he evidently means their good.⁷ This idea explains positive constitutionalism, as Barber points out (18): given the purpose of the state, it is not enough for its constitution to stand against abuse of power.⁸ The constitution must equip the state to advance the well-being of its members.

The purpose of the state explains not only positive constitutionalism, but also the plurality and diversity and open-endedness of the principles. States differ quite deeply from one another, and the well-being of persons is complex, involving various incommensurable goods. While Barber shows very effectively that states share common structural features, their service to the well-being of their members is bound to be diverse and complex, and there is no reason to expect any closed list of the ways in which they can achieve it. These are insights that we can take from Barber's view of the purpose of the state. All of the state's arrangements and actions (its public policy, its law, its conduct in international

⁶ Cf.: "The principles of constitutionalism are directed towards ensuring that the state possesses an institutional structure that has the capacity to effectively advance the well-being of its members" (10); the well-being of members of the state "is the defining purpose of the state" (35); "the guiding point of the state" is "the advancement of the well-being of state members" (55); "the objective of the state" is "the well-being of its members" (133); "the point of the state" requires "the creation of constitutional structures that advance the well-being of the state's members" (147; cf. 153).

It has long been a popular view, and Barber is in good company; he says, "Aristotle drew the defining purpose of the state broadly: it exists to advance the well-being of its members" (5). Compare Joseph Raz's suggestion that "The justification of rules of law and of governmental actions should be that they are, as we say, 'in the interests of the governed.'" Joseph Raz, "The Law's Own Virtue," *Oxford Journal of Legal Studies* 39 (2019): 7. Raz used that justification as a basis for explaining the principle of the rule of law, in the same way that Barber uses his similar account of the purpose of the state as a basis for explaining constitutional principles in general.

⁷ "Representatives should enact laws that will forward the well-being of the people; like all other parts of the constitution, the legislature should be oriented towards the good of the people it serves" (160).

⁸ Note that on Barber's approach, constitutional safeguards against abuse of power patently promote the constitution's purpose, insofar as they protect the well-being of those who would otherwise be abused, or prevent state action for purposes that do not advance the well-being of the citizens.

relations . . .) ought to serve its purpose, and the constitution ought to configure the state to achieve that purpose.

But it seems to me that the purpose of a state is subtly but significantly distinct from the advancement of its members' well-being. Serving their citizens' well-being in certain ways is one of the great things that states can do. But the relation between a state and its members' well-being is indirect and partial. The specific good that a state can attain is complex and is not all directed at the well-being of its members.

The state cannot actually *advance* your well-being, if advancing it means increasing it. We should bear in mind Joseph Raz's maxim: "We cannot make others have a good life. They have to lead their own life."⁹ The state can bring about certain sorts of conditions in which people are able to lead their own life well. But the state's proper concern is not directly to increase your well-being or mine. It is to make and to sustain a political community that does what a community can do to support people, without taking over control of their lives. The state's direct concern is with *public* goods, and its concern with your good or mine follows from that concern for our community.

Many aspects of our well-being are none of the state's business. The state would be presumptuous and inept if it tried to advance our well-being in general. A good state, of course, does much to make it possible for us to love each other and to appreciate the blue sky from time to time, and the stars at night. But it does so incidentally, out of a concern for peace and order and freedom from crime and invasion, and for the coordination of public projects for the good of the community, such as sewers and good transportation infrastructure. Every good state welfare programme (understanding 'welfare' broadly) is such a project. Public education, housing, healthcare, midwifery, social care for the elderly and disabled, child protection and social security all serve the well-being of individuals. But those projects are the business of the state because they meet *social* needs: needs that, given economic and social conditions, demand a coordinated response from the political community. The state does not do those things (and others) for the well-being of individuals because delight and love are its responsibilities. Its concern for your well-being or mine is always mediated through its proper, operative concern: public goods. It would be impertinent if the United Kingdom government singled me out and asked, "now then, how can we advance *his* well-being?" The state's proper concern is always with the public good of the community. Barber's account of the purpose of the state is attractive because if a state succeeds in making the political community a good one, then citizens will be able to live far, far better lives than if the community is a wreck. But advancing the well-being of citizens is an indirect concern of the state.

And the state has duties that are not at all directed to the well-being of its members. The obvious examples concern other states, and individuals who are

⁹ Joseph Raz, "The Role of Well-Being," *Philosophical Perspectives* 18, *Ethics* (2004): 291.

outsiders to the state. Think of the duty not to engage in a war of conquest.¹⁰ It is conceivable that a war of conquest might be just,¹¹ but international law quite rightly treats it as a categorical wrong, because a scheme in which states are free to engage in conquest is inevitably a failure of international cooperation for the sake of peace, order, and justice (as it always was in the long history of wars of conquest). A good state adheres to the duty not to annex other states' territories (and, of course, does not evade that duty under a pretense of self-defense or the defense of others). Adhering to that duty prevents a state from advancing the well-being of its citizens.

And having made a treaty, a good state abides by the treaty even when doing so does not advance its citizens' well-being. And a good state does not free ride on the efforts of other states to solve problems that need international cooperation.

And a state may have a duty of rescue toward people of another state (or persons with no state), and a duty of asylum. The considerations of human need that ground those duties towards human beings may also ground duties of one state to defend another state, or to grant aid to a state (or to civil society within another state). And the ground of those duties is not the well-being of the members of the state that bears the duty.

Every state has special duties within its own territory, resulting from the state's responsibility for the public good of its community (a responsibility that it does not have in relation to other communities). It might be wrong for a state to make a show of giving large amounts of foreign aid to destitute communities abroad to provide clean drinking water, when people in the donor state have no access to clean drinking water. It is, of course, those special duties that lend attraction to Barber's understanding of the purpose of a state. But they do not mean that the state has no duties to anyone else, any more than parents' special duties to their children mean that they have no duties to others.

And there is no sharp boundary between a duty of rescue on the one hand, as to which a state's failure would be culpable, and any of the historically great things that a state might legitimately do out of benevolence and generosity.

¹⁰ As set out, for example, in United Nations Charter Article 2, paragraph 4: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state" (with an exception in Article 51 for self-defense).

¹¹ Hear me out, if that seems outrageous: I think it is just as true as the proposition that in some circumstances a revolution would be justifiable. A war of conquest might be just if State B is a failing state, with endemic injustice that does not meet the requirements of international law for humanitarian intervention, and State A is capable of annexing State B, and State A has a genuine and reliable and practicable commitment to governing the annexed territory with respect for its people, and with a good prospect of establishing and sustaining peace, order, and good government in B. The self-determination of the people of B and the principle of democracy would have to be respected, as they might be if State B is undemocratic and its injustices include internal failures of respect for self-determination, and if State A has a genuine and reliable commitment to subsidiarity. The circumstances would need to satisfy all the requirements of any just war, including the prospect of success without disproportionate harm. Notice that for reasons explained in the text, I do not propose that it ought to be done even in such circumstances. The fact that the circumstances are far-fetched is part of the reason why international law is right to prohibit it.

A good state benefits its citizens indirectly by acting for the public good, which is the good of the political community; and it also acts for purposes that have nothing to do with the well-being of its citizens. The purpose of a constitution—a rule-governed framework of political governance—is to equip the state to advance that complex and open-ended public good. The organizing principle of constitutionalism is that the constitution ought to be apt for the state's purpose of making the political community a good one, and the goodness of the community is not the same as the well-being of the citizens.

A state can only be a good one if it is virtuous. This feature of states is a general feature of human community. Consider the comparisons that Barber draws between the institutions of a state, and the conduct of families and of corporations. A family that makes a practice of stealing from the neighbors, or starts a feud for its members' own gain, has gone wrong. To the extent that it is like a mafia, it is not a good family. If a corporation advances its shareholders' interests by degrading the environment where it can lawfully get away with it, it is not a good corporation.

Families and corporations can be ways for persons to be one and to act as one, and it is no more justifiable for them to wrong others for the benefit of their members, than it is for an individual person to wrong others for his or her own benefit. It must sometimes be tempting for people to think that it is ok to cheat or to steal if they are doing it for the good of the family, and for corporate officials to think that environmental degradation is ok if it is for the good of the shareholders. Then they will be making their family or corporation like the mafia. Likewise, it must be tempting for state officials to think that starting a war of conquest is ok if it is for the good of the nation, and to think that spending the nation's wealth to help destitute outsiders is not a legitimate use of taxpayers' money. My central point is that in all of these forms of more or less organized action-as-one by a group of persons, the group itself may have duties not only to its members but to others. And that is paradigmatically the case with the state.

Barber does not exactly deny that. He suggests that states can owe moral duties to outsiders (40). And he says that 'the creation of an international community, and fostering of positive relationships between states in this realm, is also one of the state's tasks' (32). Perhaps he has in mind that such pursuits may advance the well-being of the citizens of a state, and of course they may do so. But I do not think that the benefit to the state's citizens is generally the operative reason for a state to adhere to the resulting duties. Belonging to a genuine community (even an international one) and having positive relationships in general entail duties that do not necessarily advance the interests of the citizens of a state—even though it is generally in their interest for their state to be part of an international community and to have positive relationships.

Barber says that families and corporations, "rely on a sort of moral myopia to function; they require their participants to set aside, at least temporarily, the essential moral equality of persons" (36). He accounts for the state as having the responsibility as "the group of groups," with its broader perspective on the moral

equality of persons, to regulate the family and the corporation so as to protect the well-being of all members of the state. The moral myopia of groups is a striking idea. It is probably a common phenomenon. But the persons who act for families or corporations—or states—do not necessarily act with moral myopia when they seek to make their family or corporation or state a good one. Suppose your parents have a duty to make your supper. The radical equality between human beings does not mean that they have a duty to make my supper, too. They are not necessarily treating me as if I were less than equal with you, if they send me home to my house at supper time. Companies are not myopic when they issue dividends to their shareholders, rather than to others. These special duties—of your parents to make your supper, of a corporation to its equity investors—arise from the relationship between you and your parents, or between corporation and shareholder. Likewise the state: there are special reasons for it to provide clean drinking water in its own community if it can do so; that duty arises from a relationship of community (that is, from the state's responsibility for the political community). The state's resulting special duties to its own citizens do not stop it from having duties to other states and to their citizens and to stateless persons and to international organizations. Those duties to others are not necessarily based on the well-being of the state's own citizens.

Barber says that families and corporations can be regulated by an agency (the state) that has a less restricted role than the family or the corporation in furthering the well-being of all the citizens. I wonder if Barber thinks that states have, and ought to have, a sort of moral myopia toward outsiders in their service to the well-being of their members. And there is no democratic global framework for regulating states so as to advance the well-being of all of humanity. He suggests that it is up to the citizens of each state to decide what their state should be doing in international relations. He concludes that: "Where there are decisions that need to be taken that span states, these decisions should be the product of agreements between institutions that are controlled by the citizens of those states." (40) Even regarding such agreements—treaties—Barber is ambivalent about the duty of the state. He says, "having signed a treaty, the states are now bound as a matter of international law. But in a more fundamental sense, the state's freedom of action remains: states can break treaties" (40). I do not know what this claim means. It seems not to be a proposition of international law. States have a duty in international law to adhere to their treaties except where international law allows departure from a treaty. Perhaps it is, instead, a reminder that domestic law may allow a state's officials to take an action that counts as breaking a treaty? But when that is the situation in domestic law (as in UK law, which imposes no duty on state officials to conform to international law), that takes nothing away from the binding force of the treaty in international law.

If the proposition that states can break treaties is meant as a proposition of political morality, I think that it is only as true as the proposition that parties to a contract in domestic law can break their contract. Barber's suggestion seems to be that states do not *really* have duties. Perhaps Barber views the state's capacity for democracy as providing a justification for breaking a treaty that is not in the

interest of the state's members (there being no democratic technique for any international authority to decide whether to hold a state to its treaties).

I think that a good account of the state (and, therefore, of constitutionalism) has to account for duties of the state, the fulfilment of which does not advance the well-being of its members. Just as a good person is a virtuous person and not merely one who acts to advance his own well-being, a good family or corporation is one that faces up to duties that do not advance its members' interests. A good state does so too, and does not merely advance the well-being of its members.

III. Is Democracy a Principle of Constitutionalism?

Barber suggests that the constitutional principle of democracy justifies the state in regulating families and corporations, because democracy enables the state to assert the equality of all citizens. On the other hand, he is ambivalent about whether the state has duties to outsiders, since there is no democratic agency at the global level. I think that these views rate the legitimizing force of democracy too high.

I hope, conversely, that the following remarks won't sound as if I am against democracy, which is, within its limited role, indispensable. I think that Winston Churchill was right when he said in a debate in a democratic bear pit—the British House of Commons—“it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.”¹² It is worth fighting for the least bad form of government.

It would be the death of constitutionalism, though, if the people decided everything. In one sense, democracy is no constitutional principle at all: there is no *general* principle that state decisions should be made by the people, or even through forms of decision making that are subject to the influence of the people.

Although Barber so often shows such bracing good sense, I think that he succumbs, to some extent, to the ideology that we might call democratic idealism: “Democracy is intrinsically valuable: that is, the decision-making processes required by the principle are the only way in which state decisions can be made in ways which respect the moral equality of persons, and instantiate that moral equality within the structures of the state” (149). He doesn't quite say that democracy *makes us equally powerful*. It does not do so; Joseph Raz made this point cogently, too: “In no democratic country today do all inhabitants, or even all adult citizens, enjoy equal political power. . . . It is an impossible dream, which is not to say that it is impossible to limit disparities in political power.”¹³

¹² He did not say who had said it. *Parliamentary Debates*, Commons, 5th series, vol. 444, col. 207 (11 November 1947).

¹³ Joseph Raz, “The Democratic Deficit” (2018), King's College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2018-07: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3101720, p 23.

As a result, the way in which democratic states respect the moral equality of persons is not by sharing power among them equally. It is symbolic. The symbol may be important, and valuable in itself.¹⁴ Perhaps it is enough reason to prefer democracy over all those other forms of government that have been tried from time to time, since no one has a right to rule *to the exclusion of the people*.

But the real gains from democracy are not symbolic; they lie in the practical predicament in which it puts the rulers: the democratic bind. The crucial thing is not state decision-making in general. It is the direct or indirect election of representatives to a legislature, along with some direct or indirect form of democratic election or appointment of the leadership of the executive, making it representative, too. The good for constitutionalism is the predicament that faces legislative and executive leaders: they can be thrown out by a decision-making body that is relatively hard to suborn. The democratic bind is generally overwhelmingly constructive for the public good, when we contrast it with the political dynamics of autocratic or oligarchic or Leninist or Maoist government.

Barber embraces representative democracy as a general technique, in preference to direct democracy. Of the matters that ought to be governed democratically, as Barber shows, most are best governed by the people only indirectly, and should be decided by representatives. He makes a compelling argument against generalized direct democracy (148–154). It would run contrary to constitutionalism, because it could not meet “the need for the process of democratic decision-making to be regulated and structured” (154).

The equivocal relation between democracy and constitutionalism needs to be worked out in the constitution through intelligent framework decisions as to the sorts of public decision that ought to be made by the voters (i.e., by the people), and the sorts that ought to be influenced by the voters, and the sorts on which the voters ought to have no influence. We can only be governed in a genuinely constitutional fashion if a vast array of public decision making is free from the democratic bind. Judicial decisions are a paradigm, but there are many more: they may include parole decisions, initiation and conduct of prosecutions and various forms of investigation of wrongdoing, very many matters of public employment, and many forms of inspection and audit of public bodies, and regulation of trade and industry, education, hospitals, care homes, etc. The reasons for those decisions to be insulated (more or less, in various ways) from the democratic bind may be that they involve matters of principle that should be protected against politics. But the reason is sometimes that policy making will be carried out better that way. A wide variety of considerations yield crucial restrictions on the legitimate power of the voters the people, and they are genuine restrictions in spite of the fact that the voters ought to have power to elect the legislative officials who enact frameworks for sentencing and parole and so on.

¹⁴ I think that Richard Ekins puts it well in his review of Barber’s book when he says that it must “be possible for citizens to see themselves in the decisions of the state” (Ekins, above n.5, 517). He also says that they should act “jointly, to exercise real control over those decisions” (ibid.). I try to explain the real control that democracy requires in the text below. That real control is liable to be necessary for the symbolic value of democracy, unless the voters are only kidding themselves.

If the wrong sort of decisions were made or controlled by the people, the country would become more democratic, and would depart from constitutionalism. You could, of course, say that the challenge is to reconcile the principle of democracy with the principle of the separation of powers. We don't usually think of a constitution as separating powers *from the people*. But the reason why sentencing or parole powers should be separated from the legislature and the executive is not that politicians are terrible. The reason is that it would be democratic. Democracy is an equivocal constitutional principle: some powers must not be exercised by the people, and some powers must be exercised in a way that is not even influenced by the people.

IV. The Public Service Model of Representation

Given that democracy ought to be representative rather than direct, the form of representation will determine the form of democracy. Barber addresses three of the models of representation outlined in Hanna Pitkin's classic work:¹⁵ "descriptive" representation (in which the representatives are a representative sample of the population; the idea is that their preferences will be representative of the preferences of citizens in general), representation as mandate (in which the representative's duty is to do the will of the voters), and representation as trusteeship. On the trusteeship model, "the task of the representative is to make decisions that will best advance the well-being of the citizenry as a whole" (160), and you will see that Barber prefers it because it frames the legislature (and any representative institution) to contribute to the purpose of the state as he sees it.¹⁶

Edmund Burke, as Barber mentions, rejected the mandate model of representation and advocated a trustee model on the ground that a representative owes the electors an exercise of judgment, which must not be sacrificed to their opinions (160). Burke was right to reject the mandate model. But I can't actually see that a representative owes anything to the voters at all (I do realize that people standing for office don't generally say, "If elected, I will owe you nothing!"). The representative and the voters are all citizens. The citizens in general exercise the power of the vote; they ought to use that power for the public good. They don't do the representative a favor for which a return is owed, even if the successful candidate is over the moon; they impose a responsibility of public service.

¹⁵ Hannah Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1972), ch. 4.

¹⁶ Barber adopts elements of the "descriptive model" because diversity of membership in the legislature may equip it to advance the well-being of the citizens (161-4). And he adopts elements of the "mandate model" because representatives ought to be responsive to the views of the voters, presumably so that they will do better at advancing their well-being (166). There is nothing inherently democratic about trusteeship, as Pitkin pointed out: "The implications of calling government a trusteeship are . . . by no means democratic ones." (*ibid.*, 130). Beneficiaries of a trust do not necessarily get to decide who should serve as trustees. Edmund Burke considered all public office holders including the King to be trustees (see *ibid.*, 129). Perhaps we might say that Barber, like Burke, really has a trusteeship model of the role of state officials in general. And then the democratic elements that Barber adopts from the descriptive model and the mandate model can be seen as ways of democratizing trusteeship in the case of representatives of the people.

The citizen elected to hold office ought to exercise the office as a good citizen exercises the vote, for the public good: deciding what the community ought to do, and acting within his or her remit to bring it about. The range of things that the community ought to do is wider than the advancement of its members' well-being, and the range of things that it may legitimately choose to do is wider still. And I think that a democratic representative can responsibly advocate and seek to achieve whatever the state can legitimately do.

And the legitimate options for public choice and action include things that a trustee cannot properly do. In private law, a trustee cannot spend the *res* of the trust in doing good things for other people on behalf of the beneficiary; the duty is all to the beneficiary. In fact, if we suppose that the trustee rightly considers it the duty of the beneficiaries to use their wealth for relief of some desperate need of others, it would still be a breach of trust to use the *res* for that purpose.

There is a similarity between trusteeship and public office, for both roles impose on the holder a duty not to act for his or her own benefit. I think that the similarity ends there. The obvious attraction is to think that there is a much closer similarity, in that both roles require action for the good of others. But a trust in private law deliberately blinkers the trustee, ruling out action for all sorts of good purposes. There is very good reason for such a blinkered decision-making regime in private law, since the blinkering provides a remarkably useful facility for the management of the use of private property for private purposes.

But why should a public servant be blinkered? Why shouldn't an MP in the UK vote in favor of a bill to increase the overseas aid budget not because it is in the interests of the voters, or even because the voters want it increased, but because it is the right thing for the United Kingdom to do? The potential legitimacy of such a decision is the core of my argument against the trustee model, and against the view that the purpose of the state is to advance the well-being of the citizens.

I hasten to add that there is a risk of arrogance or stupidity on the part of representatives of the people who think they know what the state ought to be doing. To that risk, a good constitutional system has an answer: it is the democratic bind, which pinches any representative or would-be representative. Barber thinks that although representatives should not feel bound to act in accordance with the views of the voters, the desire for re-election should "give them pause for thought before making an unpopular decision" (166), and I think that is right. And they should not merely feel frustrated that others won't agree with them; they should take what others think very seriously. Representatives need the humility of a conscientious public servant; if it doesn't come naturally to them, a democratic constitution buttresses it with powerful forces that make it necessary to pursue good public purposes in a way that garners support (and to do so through political means, choosing fights that may conceivably be won, working with individuals, with parties, with groupings within a party, using the media, persuading, forming alliances, showing up the flaws in the other side of the argument . . .). And a good representative in the public service model sees value in the constitution as a framework for decision making by the community, and is

committed to the proposition that the decisions he or she makes, or is involved in, are to be the community's decisions. Good representatives don't really even want to dodge the democratic bind; they want to bring people with them.

But benevolence and generosity toward outsiders to the trust and even justice toward outsiders to the trust are ruled out as grounds of action by the trustee model of representation (just as they are ruled out by the private law of trusts).

In summary, although the role of a trustee has a sort of metaphorical appeal (an appeal to a form of unselfishness), it is not the best model for the role of a public official.¹⁷ The reason is that the role of a beneficiary of a trust is not the best model for the role of a citizen. The citizen is potentially an official, and is actually the wielder of a tiny share of public power (if he or she votes). The democratic process is itself the decision-making action of the state. The voter's political role in a democratic state is deeply different from the role of a beneficiary in a trust in private law. I think that a truer model involves seeing the citizen and candidates for office and holders of office (whether democratically elected or not) as engaged, in an unblinkered fashion, in the political community's process of deciding what is to be done. The best model is the rather open-ended model of public service. It is not service directly to a number of persons (not even to the overall number of voters, or citizens); it is service to their community. The state is those people's agency, and is the bearer of duties that ought to be a concern to them in their service to their community.

Suppose it is the case that our country ought to double its overseas development budget. If it is not in the interests of the citizens to do so, and the citizens don't want it done, I can see no general reason of democracy for a representative not to vote for the increase. And then there is something poignant about the democratic bind. It exists to protect political justice, but it may well make it impossible for the state to do the right thing. But since there is no reason for a constitution to presume that a legislative or executive official is better than the people at deciding what is right, the democratic bind is in itself an unmixed constitutional good.

The process of representation is itself a process of working out the role of the representative. No model of representation gets the constitution's endorsement. This fact actually supports the public service model: it is for the representatives and the voters to decide the terms of representation as they go along, in a complex and open-ended dynamic. Accountability at the polls gives the voters power to throw their representatives out with no theory of representation, for any reason, or for no reason. That accountability may impose strict limits on the politically possible, but it imposes no limits on the *legitimacy* of action to give effect to the duties of the state.

¹⁷ For arguments in favor of trusteeship as a general model for the duties of public officials and agencies, see Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: Oxford University Press, 2011); and the essays in Evan J. Criddle, Evan Fox-Decent, Andrew S Gold, Sung Hui Kim, and Paul B Miller, eds., *Fiduciary Government* (Cambridge: Cambridge University Press, 2018). In Criddle et al., I argue that public duties are not generally fiduciary (Timothy Endicott, "The Public Trust," in *ibid.*, 306-30).

V. Conclusion: State Agency as the Proto-Principle of Constitutionalism

How could you explain duties of a state to outsiders, if you accept Barber's view that the purpose of the state is to advance the well-being of its members? First of all, perhaps you could say that action by the state to benefit outsiders is legitimate if (and only if) the citizens approve of it; you might see this idea as a kernel of truth in the mandate model of representation. In my view, that would not be enough. Someone needs to decide what is to be done on behalf of the state. To the extent that the citizens have a say, I think it becomes their duty to exercise their governmental power so as to see to it (so far as they are able) that the state fulfils its duty. Whoever exercises power in a state—voters, prime ministers, anyone—ought to do that; the normative force of the duty does not depend on whether the citizens wish it to be fulfilled.

Secondly, though, what would happen if you adopted Socrates's approach to human well-being? He argued that it is for the good of a person to be just.¹⁸ Why not say that just as a person who fulfils a duty of justice may be advancing his or her own well-being, the well-being of the citizens may be advanced if their state fulfils its duties? It is good *for them* to be citizens of a just polity.

I find that quite attractive, actually. There is reason to be glad if your country acts justly. Aiming to make you glad in that way would be a good proxy for just conduct by state officials.

But making you glad is not the reason for it. And here is a problem with this idea that just state action advances the well-being of the citizens: the duties of my state are not *my* duties. If my country stands by an ally in need, or provides relief to the people of another country who need it in a natural disaster, the state has fulfilled its duty, not my duty. I have not done the right thing, so I am not in the position of a virtuous person in Socrates's account, who is happy (*eudaimon*) because he does what is just. The duties of the state *are not any citizen's duties, or even the duties of the citizenry as a whole*. Insofar as just conduct on the part of their state is good for the citizens at all, that is not because it makes them good persons. So the purpose of the state is not simply the advancement of the well-being of the citizens.

A state gives a community agency. The state is *for* its citizens, not primarily in the sense that it is there to make them better off. It is *for* them primarily in the sense that it is a way *for citizens* (and not for outsiders) to act as an organized community. The people need the state. They do not need it simply to promote their interests; they need it in order to act as an organized community.

¹⁸ See the argument that he deployed against Thrasymachus in Book I of *The Republic*, that "the just [person] is happy and the unjust miserable" and that "injustice can never be more profitable than justice." *The Republic of Plato*, trans. Benjamin Jowett (Oxford: Oxford University Press, 1881), 34. It has to be admitted, though, that Socrates swerves into an avowal of ignorance at the end of that phase of the dialogue: "For I know not what justice is, and therefore I am not likely to know whether it is or is not a virtue, nor can I say whether the just man is happy or unhappy" (*ibid.*).

The proto-principle of constitutionalism is that the political community must be constituted as an agent. That makes it capable of having duties, which are not duties of the citizens; they are specifically the duties of the state. And then a good state, like any good actor, does its duty.

