THE CITIZEN-FOCUSED ACCOUNT OF THE STATE

THE CONSTITUTIONAL STATE. N. W. Barber.[1] Oxford: Oxford University Press, 2010. Pp. xiii + 199. $100.00 (Cloth).

Bradley W. Miller[2]

A description of any social institution such as the state will be shaped (and limited) by the conceptual apparatus chosen by the investigator. This is an obvious point; different priorities and methodologies will highlight different features and generate different explanations. Where some features are illuminated, others are correspondingly left in shadow. When it comes to describing the state, we would expect a political scientist to ask different questions and work with different concepts than, say, a sociologist. And a lawyer? Academic lawyers who examine the state have often focused on what Nick Barber calls *legalistic* accounts: they examine rules, and the commands that the rules instantiate, and the nature of the authority by which the commands are made. These legalistic accounts of the state include the enduring contributions of Hans Kelsen and Max Weber, as well as the strain of Oxford analytical legal philosophy exemplified by the work of H. L. A. Hart, Joseph Raz, and Leslie Green. These studies attend closely to the vertical relationship between the state and its members (typically, its citizens) constituted by legal rules. In setting out his own account of the state—an account that is self-consciously more interdisciplinary in method—Barber acknowledges these intellectual debts and identifies several points of disagreement (and agreement) with them, but his focus is predominately on those features of the state that have been left neglected or under-explained in these more legalistic accounts.

1. Fellow of Trinity College, Oxford University.
2. 2012–13 Ann and Herbert W. Vaughan Visiting Fellow, James Madison Program in American Ideals and Institutions, Princeton University; Associate Professor, Faculty of Law, University of Western Ontario.

Barber's proposal is to consider the state as a social group and, specifically, a group that uses rules (legal and nonlegal) to relate members not only—or even predominantly—to the governing institutions, but to each other. This approach to the state necessitates first coming to terms with the nature of social groups generally and how the state qualifies as a social group (chapter 2), the forms of membership in that social group (chapter 3), and the rules that bind the members to the state and to each other (chapters 4–6). With the main concepts thus articulated, Barber carries on in chapters 7–10 to test drive his model. Is it intelligible, he asks, to attribute intentions and actions to the state (chapter 7)? If it is, to what extent (and in what sense) can states be *responsible* for their actions? To what extent do current members of the state share that responsibility, and what should be required of them as a consequence? Does it lessen responsibility if the actions in question took place several lifetimes ago (chapter 8)? In the book's final grouping of chapters (9–10), Barber addresses the claims of legal and constitutional pluralism, particularly in the context of the European Union.

All of this is preceded by an opening chapter that addresses methodology in constitutional theory—a free-standing essay that ought to be required reading for any serious student of constitutional theory. Barber surveys rival approaches to constitutional theory, including historical, critical, interpretive, and political. Although he argues for the priority of interpretive theory (in the sense that other approaches presuppose an interpretive account) (pp. 2–5), he nevertheless insists that other approaches to constitutional theory are "all . . . valuable, all . . . compatible, and all play a part in our understanding of the nature and functioning of constitutions" (pp. 1–2). In keeping with Weber, Hart, and John Finnis, Barber works from the postulate that it is the task of the constitutional theorist to identify the "central case" of the constitutional institution under investigation (p. 8). Identifying the central case cannot be a merely descriptive enterprise, because it requires the theorist to evaluate the criteria by which centrality will be assessed. It is inescapable that theorists begin with some "ethical framework which gives content to the good and the bad, and then use this to identify features of importance" (p. 10). From this, Barber proposes that "a good account of a constitutional institution will identify those features which enable it to advance, or to threaten, the well-being of people" (p. 11).

The state, then, must be evaluated (as must its constitutional institutions) and Barber follows Aristotle in selecting the well-being of the state's members as the central criterion for evaluation (p. 12). Unavoidably, a theorist's account will be shaped by what Barber labels one's "ethical beliefs," generated from one's understanding of "human flourishing" (p. 11). For Barber, this is "an unhappy consequence" because, he explains, the attractiveness of the theorist's account of the state will depend on "the attractions of the rival political ideologies that lie behind them" (p. 11). But what, a reader might well ask, is the reason for this regret? Is it a function of a relativistic meta-ethics? Does it flow from a belief that well-being is the product of whatever ideologies to which one happens to be attached? But despite a few lines in which Barber suggests that one's conclusions about what constitutes well-being will be the products of pre-existing social commitments,[3] such a reading should be resisted on the grounds that it would be inconsistent with Barber's overall methodology. And like Hart (and notwithstanding Hart's characterization of his own work as an in part an exercise in descriptive sociology),[4] Barber never backs away from judging some practices as choice-worthy and denouncing others as "entirely bad" (p. 13). Instead, Barber's misgiving is better read as stemming from the concern that disagreement about what constitutes human well-being (whatever the truth of the matter is) will be an unavoidable barrier to agreement about what constitutes a good account of the state.

The decision not to pursue a more comprehensive account of human well-being (or even take sides in any debate about the nature of well-being) is regrettable but defensible; the methodological injunction to use well-being as a criterion for understanding the state can be compatible with many conceptions of well-being, and the theorist who is articulating a methodology can be content to observe that his methodology is compatible with all (or many) of them.[5] But even though it is defensible for Barber to remain largely aloof from questions about the nature of well-being, one can wish that he had said something more about the state's jurisdiction to advance well-

3. *E.g.*, "a theorist's account will be conditioned by her ethical beliefs," such as the ethical beliefs of individualists, communitarians, nationalists, and libertarians, and these "different political ideologies will generate different accounts of social phenomena" (p. 11).

4. H.L.A. HART, THE CONCEPT OF LAW vii (Oxford 1961).

5. Once again, there are echoes of Hart's methodology in articulating of a general theory of law that was to be independent of conceptions of human flourishing.

being. Here again, there is a constellation of possibilities: can the state prohibit conduct that harms the well-being of the actor, or just the well-being of third parties? Is the state authorized to promote every aspect of a person's or group's well-being, or just some subset related to interpersonal life? Or does well-being instead require that persons be allowed maximum autonomy to define and follow their own conception of well-being? Once again, these questions are off-menu. But one should be reluctant to quibble about what is left out when so much else is on offer. Throughout, *The Constitutional State* identifies more areas of fruitful inquiry (drawing on the resources of many disciplines including political philosophy, action theory, psychology, and neuropsychology) than it can fully pursue. The book's breadth and interdisciplinarity leads to many unexpected discoveries, but the result is sometimes (as in this instance) like settling in to a conversation with a learned friend, wrestling together with questions that provide both new insight and further questions and then—too soon—it's time to go.

At the heart of *The Constitutional State* is a trio of chapters devoted to understanding legal and nonlegal rules: how they constitute social groups, how they provide reasons for action, how they contribute to a legal order. Although these chapters are part of a progression of thought intended to illuminate our understanding of the state, they serve equally as free-standing essays in jurisprudence and constitutional theory. Chapter 4, on "The Constitution of Social Groups," clearly locates Barber within the Oxford tradition of analytical legal philosophy. But although Barber is fully conversant in the paradigms of rules explored by Hart, Raz, Finnis, and others, he is not writing a mere history of ideas; he clears away debris where conflict is more apparent than real, and picks up the fruitful strands of thought that were left neglected by others. The premise of chapter 4 is that "[a]ll social groups are constituted by rules" (p. 67). At a minimum, even for the simplest of social groups, there must be shared rules setting "the objective the group is aiming to achieve," the membership of the group, who is to be bound by the rules of the group, and how the group will make decisions (p. 67). These rules can be as simple and open-ended as a resolution of a group of friends "to meet up with the intention of undertaking an activity together, without any clear idea of what that activity will consist" (p. 67). For such a group, the constitutive rule identifies (1) the reason that the group has for

being a group (*e.g.*, to pursue a good such as friendship), as well as (2) a means chosen to participate in that good (p. 67).

Although simple social groups can be constituted by rules that remain largely unconscious, large and complicated groups, like states, need formal institutions for making decisions and resolving disputes (pp. 72–73). Barber usefully distinguishes between those internal rules that a group sets for itself and those external rules that are set by others outside of the group. In an interesting discussion, Barber points to the possibility of conflict between internal and external rules, and observes that when conflict occurs, it is not obvious as to which will prevail, which will become the "real" rule. In an example drawn from the law of charities, Barber demonstrates that a charity that finds that its chosen purpose violates an external rule (such as some rule of charity law) has several options: it can change its purpose to bring it to conformity with the law, or it can pretend to conform to the external rule while secretly leaving its conduct unchanged, or it can openly defy the external rule (pp. 70–72). The opportunity for conflict between internal and external rules is magnified in the case of the state, and Barber specifically applies his account of rules to the complex case of the state in chapter 5 (and further develops it in his discussion of constitutional pluralism and the case of the European Union in chapters 9 and 10).

Constitutions, Barber tells us, can contain both legal and non-legal rules, and can include laws drawn from other legal systems. So despite Kelsen's historical (and contemporary) influence over much British constitutional scholarship (p. 77), Barber argues that Kelsen's account of the state is "incompatible with a central strength of [British constitutional] scholarship: the recognition of the plurality of sources of the constitutions" (p. 78). Within this plurality of sources, Barber would include, for example, international law, regardless of whether it has been incorporated within the domestic system by a rule of domestic law. His reasoning is that, to the extent that such an unincorporated rule is followed by state officers and institutions and *treated by them as binding*, it forms part of the constitution (p. 80). Broadly ecumenical, Barber would include constitutional principles in the constitution, rejecting a sharp divide between constitutional rules and principles. Principles, such as those based in references to "dignity" or "equality" in constitutional preambles, may be understood as generalized rules that may or may not be legally enforceable, but nevertheless may have

directive force for state officers and institutions (pp. 86–87).[6] Similarly, Barber rejects a sharp distinction between constitutional laws and conventions, arguing that conventions and laws are two types of social rule that share many common qualities and functions, and that the differences between them are matters of degree. Conventions can be converted into laws by both legislatures and courts (p. 103).

Having explored the nature of the rules that bind citizens to the state and to each other, Barber turns in chapters 7 and 8 to a novel exploration of the moral character and responsibility of the state. The argument ranges freely through psychology and philosophy (culminating in the half-apologetic "[w]e have strayed a long way from constitutional theory" (p. 118)) in the service of an intensely practical set of questions: Is it meaningful to conclude that a state is responsible for it actions? What is the rationale for holding it responsible? What are the state obligations that flow from this responsibility? And can citizens—as members of the state—be rightly held responsible for state actions that they not only did not participate in, but disavowed? What obligations for redress fall on citizens? It is important to understand in what sense the state possesses intentions and undertakes actions in order to understand: (1) what it has done, (2) what it is responsible for, and (3) what character it possesses. The implication for the citizen is again mediated through the concept of well-being: Being a member of a morally deficient state makes one's life less of a success than it otherwise would be (p. 104).

"States form intentions and undertake actions. They have successes and failures, embarking on commendable projects and vicious schemes" (p. 124). It is important to get clear on the concept of responsibility for state action (both at the level of the state and the level of the citizen), because it bears on what remedial action may be required of both the state and the citizen. Barber catalogues the various categories of responsibility (including causal, moral, legal, role, and remedial (pp. 124–30)) and discusses different respects in which a state or person can be judged to be responsible for an action or occurrence. Determinations of responsibility are particularly tricky when there is a

6. There is also an extensive literature on the question of what functions constitutional principles ought to have in constitutional litigation. See, for example, chapters by T. R. S. Allan, Mark Walters, and Jeffrey Goldsworthy in EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY (Grant Huscroft ed., Cambridge, 2008).

break in the constitutional continuity of a state. To what extent (and in what sense) is the contemporary South African state responsible for the misdeeds of Apartheid South Africa? A critical concept highlighted by Barber is *remedial* responsibility. While the new state may in no way be morally responsible for the actions carried out by its predecessor, it may nevertheless bear a remedial responsibility for cleaning up the mess left behind. The question is important because, as Barber notes, "[d]iscussion of responsibility often rapidly shades into discussion of how we should react to a finding of responsibility; when blame or punishment is an appropriate reaction to a person's conduct" (p. 127).

This distinction between moral responsibility and remedial responsibility leads Barber to conclude that to the extent that contemporary Britons, for example, benefit from wrongs that may have been done by their colonizing ancestors, they may (while not attracting any blame for any wrongs committed by the state in carrying out imperialist policies) nevertheless have a remedial responsibility to others for the benefits that they have retained and currently enjoy (p. 128).

The discussion of the citizen's responsibility leads to some surprising conclusions. Members of the state, Barber argues, are not simply responsible for those actions which they are personally implicated in. They are also responsible—in some sense—"for actions they oppose or are neutral towards" (p. 134). This is because a citizen has the capacity to participate in the state's decision-making, and therefore bears some responsibility for failing to stop measures that the citizen judges to be wrongful. This surprising conclusion is generated from the judgment that "[i]t is better to have been a citizen who opposed a bad policy, and failed, than to have been a citizen who defended this measure—but it is far better still to have succeeded in stopping your state embarking on a misguided action" (p. 134). Barber is willing to follow the logic of the argument to its unappealing terminus: That state members who are themselves victims of state wrongs (*e.g.*, are members of a persecuted minority) are partly responsible for their own mistreatment. Barber fully acknowledges that to attribute responsibility in such a scenario "might appear unduly onerous" (p. 134). Nevertheless, he insists, such a concern would "rest on a misunderstanding of the implications of responsibility for those individuals" (p. 134). Membership would be, he says, "a form of tragedy" (p. 134). Doubtless it would be tragic, but on any

conception of responsibility surveyed by Barber, the ascription of responsibility in these circumstances seems bizarre.

In chapters 9 and 10, Barber shifts his focus to the legal order and challenges what has become a growth industry in legal scholarship—legal pluralism. Barber focuses on two strands of legal pluralism: (1) the co-existence of legal and non-legal rules, and (2) contradiction between rules (pp. 146–48). A pluralist model for a legal order requires both multiple sources of law and the possibility of inconsistency between legal rules. Notwithstanding much scholarship to the contrary, Barber argues that it is in fact difficult to find examples of the legal contradictions that are needed to make legal pluralism an interesting phenomenon (pp. 147–48). The Rhodesian crisis is explored as one example, and the European Union as the other. Barber concludes that having multiple sources of legal rules (such as EU and domestic legal systems) that create the possibility of inconsistency is not something to be necessarily feared. Constitutional dilemmas can remain unresolved "provided that each side exercises restraint" (p. 170). Inconsistent claims to authority can co-exist, and not undermine a stable framework for governing, provided that each side refrains from pressing their competing supremacy claims in the absence of actual conflict. The risks of actual conflict—of ultimately destabilizing the legal order—"provide incentives on each party to strive towards harmonious interpretations of the law" (p. 171).

Constitutional pluralism is addressed as a distinct form of legal pluralism in chapter 10, one which is concerned with the overlap of states rather than legal systems. Barber works up to the ultimate question in the application of his conception of the state: Is the EU a state? It clearly possesses a territory, a membership, and a set of institutions. But the question is to be answered in terms of the relationship between these institutions and its members (p. 175). Indeed, the EU claims authority over its members, and expresses that authority directly through law. It claims primacy over contrary provisions of national law, its court claims supremacy over the interpretation of its law as well as the authority to determine its own jurisdiction, and it characterizes its members as citizens (p. 176). Although the authority claims of the EU may suggest that it understands itself to be a state, it is unclear that the people of Europe—the people whom the EU claims as citizens—accept the EU as a state. Barber endorses the argument that EU will only have become a state "when the people of Europe obey the commands of the Union because the

Union wills it, and not because of their allegiance to their national constitutional order" (p. 181). But Barber leaves open the possibility that the relationship between the EU and the people of Europe could change and make the authority claims of the EU more plausible. Were that to occur, it would generate genuine constitutional pluralism, where the authority claims of the EU and the member states would be in conflict.

The Constitutional State is unfailingly intelligent and provocative, and should be welcomed by students of constitutional theory, constitutional law, political science, and legal philosophy.