**The Romantic Lie in the Brain: Collective Agency, Moral Responsibility, and the State**

*Abstract*
Prominent political philosophers have recently argued that nation-states can be held morally accountable because they qualify as group agents (List, 2014; Pettit, 2015; Tuomela, 1991.) Much of the ensuing debate has focused on the existence of collective agency or its consequences for individual responsibility. Critics deny that groups of people possess the self-awareness, motivation, or biological material to qualify as agents. (Miller, 2002; Ronnegard, 2013; Sepinwall, 2015.) Others question what such claims tell us about the answerability of discrete actors such as citizens in democratic states (Lawford-Smith, 2019; Stilz, 2011). Overlooked in these discussions is the fact that claims about national responsibility contain not only a theory of group agency, but also a theory of *states* – of what such entities are and what they are like. It is merely assumed that if groups can be held accountable then nation-states bear moral responsibility. My aim here is to challenge this presumption. Political institutions, I argue, predictably lack the unity and control that accounts of group agency contend moral accountability requires.

This tells us something important about the moral landscape. But even more significant is the reason *why* this misalignment between theory and reality has been overlooked. As I show, contemporary political philosophers take themselves to be able to "reason together without having to argue about what domestic states are actually like." (Blake, 2012, 122). This, I argue, is an error. As Aristotle wrote, "he who would inquire into the nature and various kinds of government must first of all determine, 'what is a state?" (Aristotle, Jowett, 1905, 100).

**The Romantic Lie in the Brain:**
**Collective Agency, Moral Responsibility, and the State**

*All I have is a voice/To undo the folded lie/*
*The romantic lie in the brain…*
*There is no such thing as the state*
*W.H. Auden, September 1, 1939*

Recent work in philosophy has revived interest in group agency. Collections of people, the argument goes, can *as a group* constitute moral agents, at least when they are rightly ordered.[1] Thus Exxon-Valdez or the Catholic Church can themselves bear responsibility for oil spills or covering-up sex abuse. Unsurprisingly, such claims are deeply controversial.[2] Critics contend that groups of people lack the self-awareness[3], motivation[4], or biological material[5] to qualify as morally accountable in this way. As R.S. Downie, for example, writes, "collectives do not have moral faults, since they don't make moral choices, and hence they cannot properly be ascribed moral responsibility."[6]

My interest lies downstream of these debates, in what happens if we accept at least for the sake of argument that groups can qualify as morally responsible actors. Many advocates of group agency not only argue that collectives can count as agents—they hold that *nation-states* paradigmatically do so. As Christian List notes, states "especially" seem to qualify as group agents. This is taken to tell us something important about the distribution of moral liability. "Collective agents such as governments," the argument goes, "sometimes do bad

---

[1] For examples, see Raimo Tuomela, "We will do it again: An Analysis of group intentions," *Philosophy and Phenomenological Research* (1991) 60: 249-277; Christian List, 'Three kinds of collective attitudes', *Erkenn* 79 (2014) 1601-1622 (noting that "especially states" are group agents.) Philip Pettit, 'How to Tell if a Group is an Agent' *Essays in Collective Epistemology* ed. Jennifer Lackey (Oxford: Oxford University Press, 2015) (noting that states are among the groups that stand out as agents).

[2] Seumas Miller, "Against collective agency', *Social Facts and Collective Intentionality* ed. Georg Meggle (Dr. Hansel-Hohenhausen AG, 2002); Michael Keeley, 'Organizations as Non-persons,' *The Journal of Value Inquiry* 15(2) 1981; Patricia Werhane, 'Formal Organizations, Economic Freedom and Moral Agency', *The Journal of Value Inquiry* 14(1) 1980; Manuel Velasquez, 'Debunking Corporate Moral Responsibility,' *Business Ethics Quarterly* 13(4) (2003): 531–562; Anthony Quinton, 'Social objects' *Proceedings of the Aristotelian Society* (1976) pp. 127.

[3] David Ronnegard, 'How autonomy alone debunks corporate moral agency' *Business and Professional Ethics Journal* 32 (2013).

[4] Amy J. Sepinwall, "Corporate Piety and Impropriety: Hobby Lobby's Extension of RFRA Rights to the For-Profit Corporation," *Harvard Business Law Review* 5, no. 2 (Summer 2015): 173-204

[5] John Searle, 'Minds, brains, and programs, *Behavioral and Brain Sciences* 3 (3) (1980): 417-457

[6] R.S. Downie, "Collective Responsibility," *Philosophy* 44 (1969): 66-69.

things like torturing people…"[7] When they do, they should be held to account. For example, it is said that the United States should pay the world for the climate costs of its carbon emissions,[8] provide Puerto Ricans with a viable development strategy[9], furnish a home for Uighurs fleeing Chinese oppression[10], prevent poverty.[11]
--

Implicit in such claims is not only a theory of *collective agency* but also a theory of *states*—of what they are and what they are like—such that *they* qualify as agents capable of being held accountable for the relevant things. Unlike questions about collective agency as such, this theory has received relatively little attention.[12] Typically, it has simply been implicitly assumed what will be found when accounts of collective agency are applied in this context.

I will argue that these widely-shared assumptions are false. While philosophers routinely presume that they have a good enough sense of what states are like to get on with more interesting questions about how such entities should behave, I show that our failure to carefully conceptualize the state has blinded us to the fact that political institutions predictably lack the features that theories of collective agency hold they need to be properly held to account: they are too disaggregated, with too little awareness of their circumstances, and too little capacity to control their actions. Failing to adequately theorisze the state has thus led advocates of collective agency to advance conclusions that their own views cannot support. Since such inattention to the state is quite widespread, this revelation has serious implications for political philosophy more broadly.

My argument proceeds as follows. In sections one and two, I sketch the most promising accounts of collective agency and show that claims about political responsibility rely on a further theory of the state. In sections three and four I work to reconstruct the model of the state employed by advocates of collective agency. As I show, the nature of the state receives remarkably little attention in contemporary political philosophy. Consequently, it is surprisingly hard to say just what, precisely, a state *is* and by extension difficult to investigate what actual states are like. Nonetheless, I develop an account that both captures widely shared intuitions and reflects the presumptions implicit in claims about state

---

[7] Frank Hindriks, "Collective Agency: Moral and Amoral," *dialectica* 29 July 2018.
[8] Joseph Curtin and Max Munchmeyer, "The United States Owes the World $1 Trillion," *Foreign Policy* (April 15, 2019).
[9] Joseph Stiglitz and Mark Medish, "What the United States Owes Puerto Rico," *Wall Street Journal* (Aug. 13, 2015).
[10] Olivia Enos, "The United States Should Give Fleeing Uighurs a Home," *Heritage Foundation* (Feb. 17, 2021)
[11] Josh Hoxie, "No one in the United States should be poor, period," *Institute for Policy Studies,* (Oct 10, 2018).
[12] One exception is Holly Lawford-Smith. However, as we shall discuss shortly, our discussion will go beyond hers in important respects. See Holly Lawford-Smith, "Not in Their Name," (Oxford: Oxford University Press, 2019).

responsibility. As I reveal in sections five and six, failing to attend to the state's nature has permitted philosophers to inadvertently make unjustified assumptions that erroneously stack the ledger in favor of states' moral answerability. Careful attention to empirical scholarship reveals that no entity satisfying extant accounts of group agency could realistically bear the kind of responsibility we classically attribute to states. As I argue in section seven, this insight calls for significant modifications to our theories of justice and our approach to civic ethics.

**Section One: Collective Agency**

Let's begin by considering theories of collective agency. What must be true for a collection of people to be blameworthy *as a group* for some action or omission: the absence of housing for the mentally-ill, the torture of detainees?

Broadly speaking, such responsibility has three requirements. There must (1) be an agent (2) of the sort that can be held accountable (3) who has the right relationship to the relevant action or omission. Absent the first, there is nobody who can be said to bear responsibility for an act. Without the second there is nobody who can properly be blamed, even if there is somebody who bears causal responsibility (as when a bear steals trash, or an infant pulls your hair). If the third feature is lacking then there is no agent who should be blamed *for that thing* (as when a waiter couldn't possibly have known that you were allergic to parsley or knocked over your glass because they unavoidably tripped.)

Start with the bare requirements of agency.[13] While there are several competing theories, each holds roughly that a collective, like an individual, qualifies as an agent when it can:

1. Form *beliefs* about its environment,
2. *desires,* and
3. has the capacity to *act in pursuit of these desires*, at least in ordinary conditions.[14]

Importantly, it must be the *collective* that has these features. That is to say, the relevant beliefs and desires must be recognizably those *of the group*, not merely the persons who make up the collective. As Kendy Hess writes, "ACME does not necessarily deliberate when its members deliberate. A casual debate among members about whether the Red Sox are likely to win the pennant is not something that ACME does. If it is not motivated or guided by ACME's commitments, then it is not ACME's action. ACME has its own processes of

[13] I focus here on accounts of *group* rather than *plural* agency such as those defended by Michael Bratman or Eric Beerbohm.

[14] Philip Pettit, How to Tell if a Group is an Agent, 99. For similar claims see Pettit and List, *Group Agency: The Possibility, Design, and Status of Group Agents* (Oxford: Oxford University Press, 2011).

reflection, deliberation, and discovery…and thus its own processes for developing its beliefs and desires."[15]

For a group to satisfy these desiderata it must have a revisable process for identifying and cohering beliefs and desires and appropriate mechanisms for tying actions to these judgments. An action belongs to a collective when it (1) instantiates the judgment of the group's decision-making process, (2) because it is the outcome of that process, and (3) is performed by the person or persons designated by the process to enact that judgment (4) because they were so authorized.[16] In addition, since many people take it to be an important feature of agency (or at least of moral agency) that it is neither ephemeral nor routinely irrational, the relevant process must provide a means for ensuring consistency of belief across time.[17]

While accounts of collective agency differ at the level of particulars (the degree of discontinuity required between individual and collective beliefs, the extent to which individual members must share intentions, or intend collective action)[18] they share these general features. So, for example, Philip Pettit writes, "the members of a group will have to subscribe, directly or indirectly, to a common set of goals, plus a method for revising those goals, and to a common body of judgments, plus a method for updating those judgments. And in addition they will have to endorse a method of ensuring that one or more of them—or an appointed deputy—is selected to form and enact any intention, or perform any action, that those group attitudes may require."[19] Holly Lawford-Smith echoes this, holding that collective agency requires that a group, "establishes: a set of non-conflicting goals that are intended to be common, and a procedure for assigning roles whose fulfilment will enable the pursuit of the goals," intends these goals and procedures to bear upon their decision-making, and assigns roles to those who so intend in accordance with those procedures, "whose fulfillment will enable the pursuit of the [common] goals." When individuals act as they are "programmed" to do by these assignments, their behavior constitutes that of the group, distinguishing the case from instances of "mere" joint action, where collections of

---

[15] Kendy Hess, "The Free Will of Corporations (And Other Collectives.) *Philosophical Studies* 168(1): 257.

[16] This view comes in a weaker version (such as that endorsed by Carol Rovane or Kendy Hess) which demands the presence of an identifiable and revisable point of view that can arise through distributed decision-making, and a stronger version (such as that endorsed by Philip Pettit or Christian List) according to which a settled decision-making process must be known to and abided by all. Either will suffice for our concern.

[17] See, for example, Amy Sepinwall, "Corporate Moral Responsibility."

[18] For a range of views see Philip Pettit and David Schweikard, "Joint Actions and Group Agency," *Philosophy of the Social Sciences* 36 (1):18-39 (2006), Stephanie Collins and Lawford-Smith "We the People, Is the polity the state?" *Journal of the American Philosophical Association* 7 (1):78-97 (2021), Lawford-Smith, Scott Shapiro, Hindriks.

[19] Philip Pettit, 'Rationality, Reasoning and Group Agency, *dialectica* 61 no. 4 (2007), pp. 504.

people work together to achieve a goal without coming to constitute a single agent.[20]

If accounts of collective agency are to be believed, satisfying these requirements gets us an agent. *Moral* agency of the sort that interests us requires something more.[21] To be *morally* responsible for a given action, a group—like an individual—must be able to have beliefs about right and wrong, as well as the capacity to evaluate and apply those beliefs to practical reasoning.[22] The *group*-exemplified through its decision-making procedure—must be able to tell that causing unnecessary pain is wrong, that torturing puppies constitutes an instance of this wrong, that undertaking a particular set of actions tortures a puppy, and so on.

And of course, to be responsible for a *particular* outcome a collective moral agent must have (or be negligent in lacking) the information and control necessary to reach the right decision and act accordingly in the context at hand. In the ordinary course of events I am not responsible for tripping, or the fact my colon cells become cancerous, or my neighbors' house burns down in a gas fire I knew nothing about. In the same way, Walmart is not responsible for any contributions it made to climate change before scientists had heard of the matter or for the fact that several of its employees spontaneously decided to arson their neighbors' houses in their spare time.

**Section Two: The Need for the State**

Whether traits like those described above qualify groups of persons or collectives as moral agent is hotly contested. But for the sake of argument, let's assume they do. Our question is this: do *states* meet the criteria??

To answer we need a *theory of the state*, an account of what states are so that we can analyze their features. Few contemporary scholars explicitly offer any such attempt at conceptualization. Amongst recent advocates of group agency only Holly Lawford-Smith has made any serious attempt to consider the nature of the state. Most simply side-step the matter in a few brushed-off sentences, taking it largely for granted that if any group agents exist, states possess the relevant capacities. Philip Pettit, for example, writes of collective agents that "examples

---

[20] David Copp, 'On the Agency of Certain Collective Entities: An Argument from 'normative autonomy,' *Midwest Studies in Philosophy* 30(1) (2006). Anna Stilz suggests something similar in taking it to be a requirement for responsibility that groups have sufficient authority over members to carry out their intentions. Anna Stilz, "Collective Responsibility and the State," *The Journal of Political Philosophy,* 19(2) (2011), 190-208 at 195-196.

[21] Frank Hindriks, for example, points out the possibility of amoral collective agents. Frank Hindriks, "Collective Agency: Moral and Amoral," *Dialectica* Vol 72 1(2018) pp. 3-23.

[22] See, for example, Pettit (2007: 177).

are…states that shape the lives of people throughout the world. Such entities certainly involve collections of individuals in coordinated relationships, and they certainly count as groups since they are individuated by their common acquiescence in what is done in their name. But their capacity to act, and more generally to perform as agents, marks them out."[23] Christian List writes that, "not all collectives are capable of holding corporate attitudes; only those that qualify as group agents are. For example…especially states."[24]

Advocates of group agency are not unusual in taking the nature of the state for granted. As David Runciman writes, "it is rare to encounter a direct attempt to answer…the question…'what is the state' in recent works of political or economic theory; more often the answer to the question is assumed, and assumed to be irrelevant to the task at hand."[25] This represents a sharp historical break. Traditionally, arguments in political philosophy began by developing an account of the state. Aristotle wrote "he who would inquire into the nature and various kinds of government must first of all determine, 'what is a state?'"[26] More recently, however, such inquiries have been treated as unnecessary. Contrast Aristotle's approach to that of Michael Blake, who boasts that contemporary philosophers "can reason together about justice, without having to argue about what domestic states are actually like."[27] My aim in the rest of this essay is to reveal this turning away from serious consideration of the state as a methodological error, one with significant implications for political philosophy.

**Section Three: Uncovering the State**

Though advocates of group agency rarely *explicitly* endorse a theory of the state, we can nonetheless reconstruct the outlines of an account from their claims about state responsibility.[28] On their view, the state has:

1. *Agency* - A decision-making process that reliably establishes coherent goals and assigns the task of fulfilling those aims to identifiable actors who are dependably adequately positioned to do so,
2. *Moral responsiveness*- in a manner that is responsive to moral concerns,
3. *Identity*- is fundamentally directed by those occupying widely-recognized roles like lawmaker, head of state, and so on,

[23] Pettit, "How to tell If a group is an agent," 98.
[24] List, Three Kinds of Collective Attitudes, (14).
[25] David Runciman, "The concept of the state, the sovereignty of a fiction," *States and Citizens,* ed. Quentin Skinner and Bo Strath (Cambridge University Press, 2001) p. 31.
[26] Aristotle, *The Politics,* trans. Benjamin Jowett (Mineola: Dover Publications, 1905), 100.
[27] Michael Blake, "Global Distributive Justice: Why Political Philosophy Needs Political Science," *Annual Review of Political Science* 15 (2012), 122-123.
[28] The exception is Lawford-Smith, who we will consider shortly.

4. *Power-* and exercises control over important common goods like public health, safety, a clean environment, and suchlike.[29]

The first identifies the state as an agent, the second as a moral agent, and the third and fourth establish it as a distinct type of agent such that (at the very least) particular widely acknowledged state actors can be held to account for the kinds of things that advocates of group agency have in mind when they talk about states (rather than, for example, qualifying the group as a restaurant, a police force, or a social media company all of which may satisfy the first two desiderata and thus constitute moral agents, but not ones properly held to account for things like public safety or health writ large).

Let's call this the *unitary sovereign model*. We see this model implicitly reflected in how advocates of group agency (and as we shall see later, political philosophers more broadly) describe states. Anna Stilz, for example, writes, "Is the state an incorporated group that can similarly be held holistically responsible for its acts? Yes…these institutions define various offices…that make and enforce law on that territory…allocate responsibilities across those officers and specify the procedures used in taking collective decisions. Like an incorporated group, then, the state is defined by its internal 'constitution.' This constitution allows it to form intentions by means of standing decision procedures…the state is also capable of grasping moral reasons through the deliberations of its officials and role occupants…the state can coordinate its subjects to execute its intentions by issuing authoritative directives…"[30] In a similar vein, Philip Pettit, declares that states are group agents because they, "have their own goals and commitments, which their subsidiary organs need not share," and are, "routinely held to expectations of consistency." [31] As agents, he notes, states are expected to promote causes, "such as defense and social welfare." [32]

The model enjoys equal support in the only account of collective agency to overtly address the nature of the state. As I noted earlier, Holly Lawford-Smith is the only contemporary advocate of group agency to explicitly note the need for a theory of the state and to offer a concrete specification.[33] Though she considers a

---

[29] It is common in such discussions to refer to the fact that states "claim authority to regulate all aspects of life" but it is clear that this makes sense only if they reasonably possess the capacity to do so. For a description that focuses on claimed general authority to regulate see Joseph Raz, *The Morality of Freedom* (Oxford, Oxford University Press, 1986).

[30] Anna Stilz, "Collective Responsibility and the State," *The Journal of Political Philosophy,* 19(2) (2011), 190-208 at 195-196. Stilz' interest is in the assignment of task responsibility to citizens, not blameworthiness, but the central features of group agency on which she relies remain the same.

[31] Pettit, 40.

[32] Pettit, 181

[33] Importantly, though Lawford-Smith considers different ways of thinking about who might count as part of the state she offers no grounding theory as to the state's nature which would explain what might *justify* the inclusion or exclusion of particular actors as part of

wide range of ways of conceptualizing the state (including identifying states with their leaders, formal named elected officials and heads of agency, the whole of society, and those who causally contribute to specific harms)[34] she ultimately settles on the unitary sovereign account.[35] The state, she argues, consists in "those aspects of the formal apparatus of governance that produce consistent, rational decisions."[36] She includes in this apparatus widely-accepted roles like members of parliament, the cabinet, judges in the federal judiciary, the employees of government departments, and so on. Such entities, Lawford-Smith holds, collectively undertake activities like, "healthcare, security against unemployment, legal services, education, and so on."[37]

Identifying the unitary model is helpful in two ways. First, the model enjoys widespread, if rarely discussed, support among advocates of collective agency and political philosophy more broadly. Second, it is a relatively modest account, one that does not (for example) include citizens as state actors. Alternatives are typically more ambitious. The model thus serves as an effective test case: challenges for it raise significant concerns.

**Section Four: Fleshing out the state**

At first glance the unitary model seems unproblematic. *If* this is what states are like, and *if* proponents of group agency are right about the grounds of moral responsibility, then states are answerable in just the way these advocates describe. But before we adopt this sanguine attitude, we need to compare the unitary model to the actual organizations about which we wish to make claims. How closely does this model reflect the real world?

For that, we can turn to legal theory. In the United States longstanding cannon holds that *state actors* are uniquely subject to certain constitutional requirements.[38] Only such actors, for example, are forbidden from abridging the

---

the state. At most she hints at the need to capture "ordinary intuitions," or the sense of guilt and connection that some people feel to the state, or the usefulness a model has in making it easy for us to think about agency. Lawford-Smith, 17, 18, 29.

[34] The last of these is essentially circular, since Lawford-Smith presumably takes state action to involve causal contributions *to harms specifically associated with the state*, not just any old harm.

[35] She calls the model she endorses the "unitary actor model" but implicitly includes the additional features of our unitary sovereign account, identifying states not just with any old unified actor but rather with one who controls common public goods. Indeed her own view, (that membership in states is defined by the robust transfer of moral duties) is focused on just the sort of duties the unitary sovereign model describes.

[36] Lawford-Smith, 29

[37] Lawford-Smith, 20.

[38] *The Civil Rights Cases,* 109 U.S. (1883) The Civil Rights Cases consist of five cases (ultimately consolidated) in which black citizens were denied access to white only facilities (

privileges and immunities of citizenship specified by the fourteenth amendment. Thus, while political philosophers have largely avoided detailed consideration of the state, legal scholars have been forced to consider with a high level of specificity who counts as part of the state, and what actions are properly attributed to the state. In making these assessments, courts have sought to apply the unitary model to real-world institutions.

Consider the tests by which courts seek to identify state actors. Each tracks one of the unitary model's central features.[39] Insofar as these models do a good job of describing the world, these testes should then easily pick out those who represent the state.

*Entanglement* tests align with the model's first desiderata: *agency.* These tests seek to assess whether an action is properly attributed to the state's decision-making procedure rather than to the individual or collective person or persons who directly undertakes it. Courts have looked to many factors in making this assessment. *Entwinement* tests, for example, consider how closely recognized government decision-making processes are connected to a group's management or control,[40] *nexus* tests analyze whether there exists a close enough link between the state and an entity that the "action of the latter may be fairly treated as that of the state itself,"[41] *state compulsion* tests examine the degree to which the state exercises coercive power over the choices of a purportedly private organization or person,[42] and *symbiotic relationship* tests consider the level of interdependence between an entity and the state.[43] Judges rely on a wide range of information to make these assessments, including: the extent to which the people or institution in question receives government benefits,[44] whether they receive overt assistance from state officials,[45] whether they are deliberately imbued by governmental authorities with the capacity to undertake actions traditionally associated with the state such as the "power to subpoena witnesses, to impose contempt sanctions, or to assert

---

U.S. v. Stanley , Ryan, Nichols, Singleton, and Robinson v. Memphis and Charleston Railroad.)

[39] For obvious reasons courts do not consider whether actors are capable of responding to moral concerns, though the entire exercise of seeking to hold the relent actors to account can be understood as an implicit assessment that they are reason-responsive.

[40] Brentwood v. Tenn., 531 U.S. 288 (2001) (holding that a sports association counts as a state actor because it is entangled with state action).

[41] Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992) (finding that a community mental health center was not a state actor).

[42] Blum v. Yaretsky, 457 U.S. 991 (1982) (holding a nursing home did not count as a state actor).

[43] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (finding that a coffee shop counted as a state actor because of a close symbiosis between the shop and government.)

[44] Tulsa Professional Collection Services v. Pope, 485 U.S. 478 (1988) (finding a collection agency connected to a hospital to count as a state actor).

[45] Sniadach v. Family Finance Court, 395 U.S. 337. (1969).

sovereign authority over any individual,"[46] whether a purportedly private action is "intertwined with governmental policy,"[47] and whether the state has provided a great deal of "encouragement, either overt or covert" for the entity's actions.[48]

*Traditional state actor tests* track the unitary model's third desiderata, *identity.* On this approach courts identify individuals or institutions as state actors on the grounds that they occupy offices long associated with the state in public and academic discourse. For example, in *Shelley v. Kramer*, the Supreme Court found that judges count as state actors even when enforcing private contracts on the grounds that their holding that role whenever they act in their official capacities, "is a proposition which has long been established by decisions of this court."[49]

*Public function* tests reflect the model's fourth desiderata: *power.* On these accounts persons or groups qualify as state actors if they exert distinct control over goods like public health and safety. Such criteria was most notably employed in *Marsh v. Alabama* where courts found that an otherwise clearly private corporation counted as a state actor because it governed in a particular region, as exemplified by the fact that it owned and operated all the sidewalks and streets in the area, employed a police officer, and provided the usual accouterments of municipal life. Courts have used similar reasoning to classify as state actors those who perform a wide variety of services, including (to name but a few) people who make peremptory challenges during jury selection, organizations that provide medical care in prisons, groups that provide transportation, as well as people who oversee parks, take custody of neglected children, or manage libraries.[50]

---

[46] NCAA v. Tarkanian, 488 U.S. 179 (1988) (holding that the NCAA does not constitute a state actor).

[47] Evans v. Newton, 382 U.S. 296 (1966) (finding that operating a park is a public function).

[48] Brentwood, 53.

[49] Shelley v. Kraemer, 334 U.S. 1, 14 (1948).

[50] West v. Atkins, 487 U.S. 42 (1988) (Finding that private physicians under contract to provide prisoners with medical care constitute state actors as part of the state's standing obligation to provide medical care to prisoners); Edmonson v. Leesville Concrete, 500 U.S. 614 (1991) (finding lawyers who make peremptory challenges to prospective jurors in civil trials to be state actors on the grounds that shaping the body that administers justice is a quintessentially state power); Correctional Services Corporation v. Malesko Evans v. Newton, 382 U.S. 296 (1966) (finding the trustees of a park to be state actors on the grounds that the park was an integral park of the city's activities, that parks were necessary to maintain the public domain and that citizens needed places to recreate free from the constraints private actors place on their property.); Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974) (Finding that private hospitals who provided health services to neglected children are subject to section 1983 claims because the provision of care to abandoned and neglected children is a clearly public function); Chalfant v. Wilmington Institute, 574 F.2d 739 (3d Cir. 1978) (Finding that a corporation operating a library under contract with the city was performing a public function because there is a public interest in an informed citizenry).

The state action doctrine thus provides a useful means of assessment. If the unitary model adequately captures real-world institutions we should have little trouble (at least once empirical facts are known) assessing who counts as a state actor, and by extension who can properly be held to account by advocates of group agency.

**Section Five: The downfall of the unitary model**

And now we can see the problem. Far from seamlessly revealing who constitutes the state, the state action doctrine has proven one of the most troubled elements of modern legal theorizing. Charles Black famously noted the doctrine resembles "a torchless search for a way out of a damp echoing cave.[51]" Laurence Tribe has declared the doctrine to be in a state of bankruptcy.[52] Even the lightest perusal of literature on the subject turns up sentences like, "the state action doctrine is slowly descending into utter confusion,"[53] "the state action doctrine [is] one of the most complex and discordant doctrines in American jurisprudence,[54]" or, as Daniel Gifford gently puts it, the "case law exhibits a remarkable lack of coherence."[55] A workable method of identifying state actors has been called the "Holy Grail that has eluded state action theorists for decades."[56]

Importantly for our purposes, the failure of the doctrine is not due to *empirical* uncertainty. It isn't that we lack information about who reports to whom, or the degree of influence exercised by particular individuals, or the nature of the outcomes they influence. The issue is more fundamental and more concerning. The tests produce deeply contradictory results that confound our intuitions. They seem to simultaneously capture everyone, or no-one, excluding entities that strike us as quintessential components of the state (like prison guards)[57] and including others that feel deeply inappropriate (like certain baristas).[58] Consequently, as Christian Turner writes, "it is unclear which facts truly matter, how much they matter, or why they matter."[59] Indeed, the recent rise of the traditional state actor test can be viewed as a response to just this concern. Rather than attempt to develop a grounding account of the state's nature that could explain and help further specify

---

[51] Charles Black, "Foreword: 'State Action,' Equal Protection, and California's Proposition," 14 *Harvard Law Review* 81, 95 (1967).
[52] Laurence Tribe, *American Constitutional Law* 1149 (1978).
[53] Julie Brown, "Less is More: Decluttering the State Action Doctrine," 73 *Missouri Law Review* 561 (Spring, 2008).
[54] Developments in the Law, "State Action and the Public/Private Distinction," 123 *Harvard Law Review* 1248, 1250 (March, 2010).
[55] Daniel Gifford, "A Consistent Free-Market *Policy*", 44 *Emory Law Journal* 1229 (1995).
[56] Thomas Rowe Jr, "The Emerging Threshold Approach to State Action Determinations: Trying to Make Sense of Flagg Brothers v. Brooks", 69 *Georgetown Law Journal* 745, 769 (1981).
[57] 5 Holly v. Scott, 434 F.3d 287 (4th Cir. 2006); Richardsonv. McKnight, 521 U.S. 399 (1997).
[58] Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961)
[59] Christian Turner, "State Action Problems," 65 (2013) *Florida Law Review* 281, 290.

qualifying actors, courts have simply thrown their hands up and declared that they will count as state actors those and only those that they have long included as such, with no further theory of what links the relevant roles or individuals.

I want to offer an explanation for this confusion, one with significant implications for our claims about state accountability. In practice, our intuitions about the state are fundamentally in conflict. As in the first desiderata of the unitary model, we believe the state to be a single organized entity. As in the fourth, we believe it to be defined by the possession of power over social conditions. But these desires do not—cannot realistically—align. No unified entity does *or realistically can* exercise the kind of control we seek. Instead, a less coherent set of actors (including but not limited to those picked out by the model's third desiderata) each influence but do not independently dictate the provision of important goods. When we look for a unified entity we can find it—but not with the control we seek. When we look for actors who share in control we can find them—but not with the unity for which we search. Consequently, we both see and lack the state everywhere we look, depending on which desiderata draws our attention. We cannot find our way out of the cave because we are looking for a chimera.

To see this, let's start with a seemingly simple example, the Federal Communications Commission. This organization performs an action classically associated with the state--the regulation of radio, television, wire, satellite and cable. And indeed, it is widely accepted as part of the state. The average person—and likely the average philosopher—would be utterly flummoxed by the *question* is the FCC part of the state?

Per the unified model it follows from *agency* that the FCC must be acting at the direction of the state's decision-making process. According to advocates of group agency the FCC must therefore undertake actions because the state has "formed intentions" through "standing decision-procedures" and is using "authoritative directives" to effectively "coordinate its subjects." The relevant decision-making procedure—as both courts and advocates of collective agency suggest—is the constitutionally dictated process of lawmaking. Thus, if the unified model is to be believed, the FCC must be instantiating legislators' official directives.

In *theory* this is precisely the relationship that exists between the FCC and lawmakers. Indeed, in *theory* the alternative would be unconstitutional. According to the *non-delegation* doctrine agencies are forbidden from exercising regulatory power unless Congress provides an intelligible principle to guide their action. As the Hoover Commission Report of 1949 noted, "The organization and administration of the Government…. must establish a clear line of control from the President to these department and agency heads and from them to their

subordinates … cutting through the barriers which in many cases made bureaus and agencies partly independent of the Chief Executive."[60]

Reality is quite different. Legislators have given the FCC nothing like a clear principle to guide its action. The agency's operating instructions are to issue regulations, "as public convenience, interest or necessity require"—hardly the stuff of clear collective judgment or non-conflicting aims.[61] This kind of functional non-directive is routine. As anyone with even passing familiarity with American legal history is aware, the non-delegation doctrine is an empty shell. Since 1936, the U.S. Supreme Court has upheld every statute it has reviewed under the doctrine, permitting agencies to exercise authority pursuant to authorizing statues that provide little to no direction, in circumstances where they are subject to little or no meaningful control or review. Indeed, it has always been so. Popular narratives aside, historians have shown that apart from a brief blip around the new deal, the notion that the non-delegation doctrine was *ever* meaningfully enforced is "more mythical than historical." In practice courts have always permitted extremely broad delegations of power with minimal direction.[62]

The resulting picture is quite different than what the unitary model suggests. Rather than a single decision-maker directing goals into action, we confront instead an array of quasi-independent actors shaping public goods, often on the basis of their own judgment. As Walter Kickert writes:

Government is only one of many actors who influence the course of events in a social system. Government does not have enough power to exert its will on other actors. Other social institutions are, to a great extent, autonomous. They are not controlled by a single, subordinated actor, not even the government. They largely control themselves.[63]

Of course, advocates of the unitary sovereign have a ready response. Unity, they might contend, is enforced ex-post, not ex-ante. What ties the behavior of actors like the FCC to a rational group decision-making process is not the existence of *authoritative directives* but rather the presence of *ongoing oversight* which ensures that actions are corrected if they go astray from what the group desires. Lawford-Smith suggests just this, writing that government actors can produce coherent decisions because, "there is overarching coordination between such departments and agencies sufficient to resolve coordination and cooperation

---

[60] U.S. Commission on Organization of the Executive Branch of the Government, 1949. (http://www.archives.gov/research/guide-fed-records/groups/264.html)
[61] United States v. Southwestern Cable Co. 392. U.S. 157 (1968.)
[62] Keith Whittington and Jason Iuliano, "The Myth of the Non-Delegation Doctrine," *University of Pennsylvania Law Review* 165 (2017).
[63] Walter Kickert, 'Autopoiesis and the science of (public) administration: essence, sense and nonsense, Organization Studies, 14(2) (1993) 275.

problems between them."[64] This is true, in her estimation, because the government, "has the ability to establish select committees on particular matters, and make policy recommendations that revise existing decisions and commitments. In this way, it is possible for the bodies of government to recognize an inconsistency or contradiction arising (or potentially arising) and to take steps to resolve it." [65]

Notice, this is an empirical, not a normative or a conceptual contention. Lawford-Smith's claim rests on it really being the case that lawmakers can recognize and correct conflicting courses of action or remedy behaviors that deviate from desired paths. The problem for this move is that there is often little meaningful evidence of such effective oversight.[66] Quite the opposite—there is instead evidence that congress *lacks the ability* to undertake such oversight. As Matthew Stephenson notes, "the informational asymmetry that justifies the delegation in the first place makes it difficult for Congress, or other overseers, to monitor [an] agency."[67] Lawmakers delegate because they lack the knowledge to provide meaningful direction or the attention span to notice when direction is required—and they routinely fail to provide ex-post correction for just those same reasons. As one political scientist writes, "scholars who have examined congressional oversight are in general agreement that very little of it gets done."[68] Ironically studies show that efforts to increase legislative oversight can foster further policy incoherence – the very thing agency requires—by introducing competing demands and sources of influence.[69]

This is enough to show that the state's collective decision-making processes routinely fail to exercise the sort of control over public goods that the unitary model envisions. But the model's failure to reflect reality is far more dire than even this suggests. So far I have focused on the relationship between centralized decision-makers and agencies to whom power is formally delegated. A reader might be left with the impression that those who influence the provision and distribution of public goods are (and are *only*) those to whom legislators have explicitly ceded power. All that is missing for the world to align with the unitary model is effective guidance or oversight of that delegation. However, reality departs much further from the model's image. In many cases lawmakers don't

---

[64] Lawford-Smith, 86

[65] Lawford-Smith, 83.

[66] See, for example, Jamelle Sharpe, arguing that the size of the information deficits allows for expansive slack between agency action and congressional preference. Jamalle Sharpe," Judging Congressional Oversight", Administrative Law Review 65 (2013). See also, Kenneth Abbot et al, "Two logics of indirect governance: delegation and orchestration," British Journal of Political Science, 46(4) 2015.

[67] Matthew Stephenson, (2007) "Bureaucratic Decision Costs and Endogenous Agency Expertise." *Journal of Law, Economics and Organization*s 23.

[68] D. Kiewiet and Matthew McCubbins, *The Logic of Delegation* (Chicago: The University of Chicago Press, 1991) Pg. 11

[69] Joshua Clinton, David Lewis and Jennifer Selin, "Influencing the Bureaucracy: The Irony of Congressional Oversight," *American Journal of Political Science* 58(2) April 2014.

formally or even consciously delegate power. Instead, actors –including many not traditionally associated with the state—often simply *find* themselves in a position to autonomously influence public goods. Their knowledge, skills, resources, or localized authority lends them such power. As the business writer Matthew Levine notes:

> There is a government of the U.S., consisting of a president and Congress and so forth…There is another government… consisting of a handful of gigantic institutional asset managers—BlackRock, Vanguard, Fidelity, etc.—who own (on behalf of their customers) most of the stocks of most of the public companies, and can, in some loose sense, tell those companies how to behave… There is a lot of overlap between what the regular government does and what the government-by-asset-managers does. Not total overlap, of course—the U.S. government has an army, BlackRock does not, etc.—but in broad areas of business and business-adjacent conduct, the U.S. government, and state governments, and BlackRock all have overlapping legislative power.

This overlapping legislative power is a widespread phenomenon. Consider, for example, the American Society of Mechanical Engineers, which the Supreme Court declared in 1982 to be, "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce."[70] The same could be said of the North American Electric Reliability Corporation (NERC), a nonprofit corporation which sets standards, ensures compliance, and guarantees the overall reliability of the (literal) power system. The NERC has meaningful coercive power: for instance, its website explicitly features a Compliance Enforcement section, which lays out in detail how sanctions against violators are determined, enacted, and lifted.[71] Or consider the Marine Stewardship Council (which sets guidelines on the management of global fishing stocks) and France's Autorité de Régulation Professionnelle de la Publicité (through which all prospective TV advertisements must be evaluated for fairness standards before they are cleared to run). Or consider FINRA, the Financial Industry Regulatory Authority, a private corporate self-regulatory organization that oversees brokerage firms and exchange markets. These organizations (and many others) exert meaningful autonomous influence over public goods. Citizens' way of life—their access to public health, safety, environmental quality and so on—has the shape it does because of these entities' independent choices.

The existence of so many independent or quasi-independent sources of influence over public life puts the *agency* desiderata and the *power* desiderata of the unitary model at odds. There is no single unified actor that controls public goods. Thus by the models' standard, there is no state. When we find the state, it is

---

[70] American Society of Mechanical Engineers, Inc. v. Hydrolevel *Corp,* 456 U.S. 556, 570 (1982).

[71] https://www.nerc.com/pa/comp/Pages/Default.aspx

because our attention is drawn to just *one* of the desiderata. Where we find the state thus depends on which desiderata draws our attention. If we focus on *agency*, we will identify actors that are tied together by a singular decision-making process---but they will share control over public goods with others who operate as distinct agents in their own right. If we focus on *power* we will identify many actors who potently influence the availability and distribution of public goods—but they will lack the unity that agency requires. This mirrors courts' experiences and makes sense of the utter discordant confusion surrounding the state action doctrine.

All this suggests that the unitary model fundamentally misrepresents the structure of our social life and political communities. That is important enough: it tells us that advocates of group agency are unjustified in drawing the inferences they do about responsibility here and now. But I think the failure is even more significant. There is a way of reading the divergence between the unitary model and real life that suggests that what we are witnessing is merely a temporary and remediable failure of institutional design or public morality. If only we enacted the right committee structure, put the right people in office, then we would achieve the model's form. This perspective, I think, represents a serious mistake, one that has left contemporary political philosophers failing to adequately grapple with the need to develop a different way of conceptualizing public life.[72]

Certainly, there are ways of organizing political institutions and social structures that would create *more* unity. We might elect officials with more policy training and experience,[73] pare down the number of oversight committees to promote attention and continuity[74], hire more and better educated congressional staffers,[75] better fund the Congressional Research Service. But while these moves might *increase* the unity of our political institutions and the degree to which they exercise control over public goods, they would achieve nothing like the unitary model.

---

[72] We see some attempt at such discussions in the early debates around the nature of the basic structure, but it is surprising how little such discussions examined empirical evidence on the distribution or possible distributions of power. John Rawls, "The Basic Structure as Subject," in Alvin Goldman, *Values and Morals* (13) (1978) 47-71; "The Basic Structure of Society as the Primary Subject of Justice," Samuel Freeman, in *A Companion To Rawls,* ed David Reidy, Jon Mandle, (Wiley, 2013); Thomas Pogge, "On the site of Distributive Justice: Reflections on Cohen and Murphy," *Philosophy and Public Affai-rs* 29(2) 2000.0

[73] Linda Fowler, *Watchdogs on the Hill*, (Princeton, Princeton University Press, 2015), Pg 177

[74] "Politics Over Security: Homeland Security Congressional Oversight In Dire Need of Reform," Jessica Zuckerman, *Heritage Foundation Issue Brief*, September 10, 2012.

[75] Crosson, Jesse, Geoffrey Lorenz, Craig Volden, and Alan Wiseman. 2020. "How Experienced Legislative Staff Contribute to Effective Lawmaking." In *Congress Overwhelmed: The Decline in Congressional Capacity and Prospects for Reform* ed. Timothy M. LaPira, Lee Drutman, and Kevin Kosar. Chicago, IL: University of Chicago Press.

Consider the reason why courts have been reluctant to enforce the non-delegation doctrine. Asking lawmakers to provide meaningful direction or oversight is, the Supreme Court writes, "impractical in view of the vast and varied interests" involved. It would "bring about confusion, if not paralysis, in the conduct of public business."[76] The issue is this: public goods are the product of a complex system—one involving a dizzying array of actors and a gordian knot of interconnected instruments and challenges (policy scholars often refer to them as "wicked problems" for just this reason.)[77] It is a common feature of complex systems that they resist effective centralized control. As Jan Kooiman writes," No single actor public or private has the knowledge and information required to solve complex, dynamic, and diversified problems; no actor has an overview sufficient to make the needed instruments effective, no single actor has sufficient action potential to dominate unilaterally."[78]

This is as true of the provision of public goods as it is of other complex systems. As one political scientist writes:

No amount of congressional dedication and energy, no conceivable increase in the size of committee staffs, and no extraordinary boost in committee budgets will enable the Congress to carry out its oversight obligations in a comprehensive and systematic matter. The job is too large for any combination of members and staff to master completely.[79]

As this quotation suggests, the knowledge and skills required to exercise the power that the unitary model envisions are too vast, the set of information to be processed and understood too expansive, the circumstances too rapidly changing, the issues too sweeping and varied to be effectively managed by any singular decision-maker, individual or collective. Efforts to bring about unity face a dilemma. Increasing centralized control leaves the relevant actors doing better by the agency desiderata, but often worse with regards to the power desiderata, at least insofar as it is measured by the capacity to bring about a desired amount and distribution of public goods. As Richard Stewart notes, policy failures can often be blamed on "excessive reliance on command-and-control methods of regulation, which suffers from the inherent problems involved in attempting to dictate the conduct of millions of actors in a quickly changing and very complex economy and society throughout a large and diverse nation."[80] As the Congressional

---

[76] Union Bridge Co v. United States, 204 US 364, 386 (1907), Standard Oil Co of NJ v United States, 221 US 1.

[77] See, for example, Brian Head and John Alford, "Wicked Problems: Implications for Public Policy and Management," *Administration and Society* 47(6) 2015.

[78] Jan Kooiman, *Levels of Governing: Interactions as a Central Concept, in* Debating Governance (Jon Pierre ed., 2001) (Oxford, Oxford University Press, 2001) p. 142.

[79] Morris Ogul, *Congress Oversees the Bureaucracy*, (University of Pittsburg press, 1976) p. 5

[80] Richard Steward, "Administrative Law in the Twenty-First Century" *New York University Law Review* 78(2) (2003, 446)

Research Service itself, "organizing for complexity means giving up some control to search for new solutions…"[81]

It follows that the unitary model's failure to align with the world is not a temporary glitch easily remedied by a better organizational structure. Rather, it is a predictable feature of the practices and structures that shape complex goods like health and security. For that very reason, public administration scholars have moved away from talk of government to notions of "governance," a more encompassing term that recognizes that many different actors exercise autonomous influence over social conditions.[82]

**Section Six: Clarifications and Objections**

Before we consider the implications of this failure for theories of state responsibility, I want to issue two clarifications, and consider an objection.

First, my claim is *not* that traditionally recognized government actors (Presidents, Senators, Cabinet members, Agency heads, and so on) exercise no power over public goods or make no difference. They surely do, and often significantly so. As literature in development studies, political science, and public management makes clear, good structures of traditional governance are often but-for causes of the effective production of public goods.[83] However, recognizing that these actors have power does not entail concluding that they are *unified* in their exercise of it, or that they possess it *uniquely.* As the legal scholar Jody Freeman writes, our access to public goods results from, 'a set of negotiated relationships… policy making, implementation, and enforcement is dynamic, nonhierarchical and decentralized,' involving 'give and take among public and private actors, information, expertise, and influence flow downward from agency and public actors, upward from private actor to agency, and horizontally among private and public actors.'[84] Traditional state actors are among those who shape public goods—but they are not the only ones who do so.

Just as importantly, this disaggregation of power is nothing new. Discussions of this phenomena often carry the implicit hint that all this disunity is

---

[81] "Congressional Reorganization: Options for Change," Report of the congressional Research Service, Library of congress, to the Joint Committee on the Organization of Congress S. Prt. 103-19 103rd Con., 1st Sess 60 (1993) Congress overwhelmed, 19.
[82] See for example, RAW Rhodes, "The New Governance: Governing Without Government," Political Studies, 1996 XLIV 652-667.
[83] See, for example, Bo Rothstein, "Good Governance," in *The Oxford Handbook of Governance,* ed. David Levi-Faur (Oxford University Press, 2012); Xiaobo Zhang et al. "Local governance and public goods provision in rural China" *Journal of Public Economics*, 88(12) December 2004, 2857-2871; Joachim von Braun, "Addressing the food crises: governance, market functioning, and investment in public goods," *Food Security,* 1 9-15 (2009).
[84] Jody Freeman, "The Private Role in Public Governance," *New York University Law Review,* 75 (543)(June, 2000).

a novel modern occurrence. The implication is that my claim about the predictable shape of social structures is wrong—if only we went back to the old ways—dialed back globalization, gave up federalism, had a congress with a spine, took an authoritarian turn, the unified model would once again accurately characterize the world. We can see this suggestion, for example, when Justice Blackmun says of the supreme court's failure to enforce the non-delegation doctrine: "Our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[85] The inference is clear: in the old more simple days, unity prevailed.

But the truth is quite the opposite. While the nature of disunity has shifted over time (that is, the identity of the actors who share in power and the reasons they are able to do so), the fact of disunity has not. If anything, modern technology has *tightened* the links between centralized decision-making and public goods, however tenuous they remain. It *matters* that it no longer takes days for information to get from Tennessee to Washington D.C., or that we can video-record who enters banks, or easily produce excel spreadsheets detailing expected outcomes of policy choices. Past social structures were even *less organized* and *less centralized* in their allocation of responsibility and their adherence to collectively determined aims. As Roger Ettam writes, Louis XIV, often put forward as the shining exemplar of centralized control, "lacked the independence of action implied in the word 'absolutism.'" In reality "much of government within the realm was always a dialogue between the crown and a series of local elites, institutions and social groups…the king sought their co-operation but could never hope totally to dominate them."[86]

Before we proceed, I want to respond to one lingering worry. Of course, someone might think, real world institutions fall away from the ideal the unitary model envisions. Nonetheless, the model does a *good enough* job for us to get on with our theorizing. It is, they might ironically argue, "good enough for government work." However, this is precisely what the history of the state action doctrine proves false. That the doctrine is the "most discordant in American jurisprudence" points to how far the model diverges from our social reality. The utter incoherence that ensues from courts' attempts to apply the model drives home how much clinging to the ideal distorts our vision and obscures the need to work out more carefully the features of social life to which we want to pay attention and to identity where they are actually found.

**Section Seven: Beyond State Agency**

---

[85] Mistretta v. United States 488 U.S. 361 (1989.)

[86] Roger Mettem, "Louis XIV and the Illusion of 'Absolutism',' *Seventeenth Century France Studies* 5 (January 1, 1983) pp. 29, 34.

What does the failure of the unitary model tell us about moral responsibility? Let's start with what it *does not* tell us. Nothing we have said threatens the notion of group agency. Our claim is perfectly consistent with the idea that a group of people or collective persons can constitute a single morally responsible agent.

Nor does our argument reveal that *states* cannot qualify as group agents, at least when we focus on the *agency, moral responsibility,* and *identity* desiderata, that is, when they are understood to be defined as the set of individuals or collective agents genuinely acting at the behest of particular structured decision-making processes. There are almost certainly individuals and groups whose behavior satisfies this standard. Entanglement tests, after all, routinely identify actors with the relevant features.

What our argument *does* show is that there is no single agent who exercises (or could realistically exercise) the kind of control over social conditions that political philosophers routinely attribute to states. We thus face a choice. We can *either* associate "the state" with the relevant group agent, recognizing that it shares influence over social conditions with many others and thus cannot be taken to bear distinct responsibility for these circumstances *or* we can associate "the state" with the *power* desiderata, that is, with the *set* of actors that independently influence such conditions, recognizing that they do not collectively qualify as a group agent.

Either approach does significant explanatory work in clarifying long-standing puzzles and calls out for serious revisions to our picture of the moral landscape.

For legal scholars, our work explains why courts have been unable to develop a coherent test to identify state actors. There is nothing that has the traits we seek: a single unified actor with unique control over public goods. In practice, are looking for two related but often distinct things: a unified agent, and those who exercise meaningful influence over public goods. Because the two represent overlapping but distinct sets, no single test will capture both intuitions nor will any collection of tests pick out the same actors.

Acknowledging the failure of the unitary model not only helps make sense of our doctrinal mess: it suggests a way through the resulting morass. The very existence of the state action doctrine has often seemed nonsensical. Mark Tushnet, for example, writes that, "[t]he state action doctrine is analytically incoherent . . . There is no region of social life that even conceptually can be marked off as 'private' . . ."[87] Cass Sunstein holds that state action is always present. "Suppose," he writes, "that an employer refuses to hire women . . . If an

87. Mark Tushnet and Gary Peller, "State Action and a New Birth of Freedom," *Georgetown Law Journal 779, 789* (2004) at 789.

employer . . . is being allowed to do so, it is not because nature has decreed anything. It is because the law has allocated the relevant rights to the employer."[88] If you adopt the unitary model, the very idea of a non-state action makes no sense, just as Sunstein and Tushnet note. After all, anything that is happening (or at least permissibly happening) occurs *because the sovereign state chose to let it be so.*

But giving up the unitary model and accepting governments as limited collective agents makes sense of this distinction. There are things that happen because lawmakers command them or permit it to be so. And there are things that happen that fall outside of their real control, that are best seen as reflecting the autonomous or quasi-autonomous choices of other actors. Similarly, there are actors who have the power to independently shape the distribution of certain public goods, and there are actors who do not. When we consider the value and appropriate role of the state action doctrine we must decide what justifies holding actors to different standards, and by extension, which characteristics—that is to say, what way of thinking about the state—we seek to pick out.[89] Grounding our interest in something like promise-keeping, for example, will speak in favor of an agent-centered approach, while grounding it in worries about welfare would better align with a power-based model. Acknowledging that there simply will not be one conceptual entity capable of playing both these roles permits us to get started on this investigation.

For advocates of group agency, the failure of the unitary model calls into question the breezy pronouncement about state responsibility we encountered earlier. As we have seen, the claim that states are morally liable for torture, or climate change, public health, or poverty depends not only on carefully worked out theories of collective agency, but also on little-considered presumptions about what states are and what they can do. It is precisely these notions that we have called into question. It is not at all apparent what set of actors possess the kind of organizational structure that advocates of group agency envision, or what these actors have the ability to do.

Insofar as proponents of group agency wish to continue making claims about state responsibility, two things follow. First, we need theories of collective agency that operate at a higher level of precision.[90] How much control over a course of action must a collective decision-process be capable of exercising for a

88. Cass Sunstein, "State Action is Always Present," *Chicago Journal of International Law* 3(2), at 467.

[89] Redacted

[90] Of course, accounts of individual agency have the same problem, to which they have been more attentive. See, for example, *Cognitive Disability and Its Challenge to Moral Philosophy,* ed. Eva Kittay and Licia Carlson (Wiley-Blackwell, 2010); David Shoemaker, *Responsibility from the Margins* Oxford University Press, 2015); Samuel Murray et al, "Responsibility for Forgetting," *Philosophical Studies,* 176(5) 2019; Adam Piovarchy, "Responsibility for Testimonial Injustice," *Philosophical Studies* 178(2) 2021.

behavior to be properly attributed to the group as such? How much direction or oversight must those processes provide sub-components for them to count as part of the agent rather than as distinct entities in their own right? Second, claims about the moral responsibility of *particular states* for *particular actions* will need to pair this theoretical work with empirical scholarship that attends to the structure and capacities of real, lived institutions.

Our work has equally weighty implications for our picture of individual civic responsibility. Many accounts of such liability are parasitic on theories of state responsibility. Citizens, we are told, authorize the state since it operates to interpret and instantiate their rights or become complicit co-principles or accessories when they coordinate through the state or support it with their votes and taxes.[91] Consequently, they share in moral responsibility for what it does. These claims, of course, are controversial. But debate has typically focused on *whether* relationships of this sort trigger genuine moral responsibility: can people be held to account when they are not difference-making causes? When they are subject to coercion? The failure of the unitary model adds further complication. Even if we accept that individuals bear real responsibility for the actions of states to which they are tied, we need a more nuanced picture of what follows. The behaviors that bind them in this fashion and the outcomes for which they are therefore answerable will themselves depend on who qualifies as the state and for what those actors are themselves properly held to account.

Consider, for example, Lawford-Smith's claim that government employees bear responsibility for state actions because they are "usually aware, or at least they should be aware, of the commitments of the groups that they are joining by accepting employment."[92] This responsibility, she suggests, exists because particular actions are "commanded" or performed as part of the ends specified by a well-functioning government. But our investigation suggests the routine absence of well-defined coherent goals that can be attributed to the state as such. If that is so, then Lawford Smith's view would not seem to justify her claim that employees bear accountability in these arenas. At the very least, the boundaries of responsibility may be narrower than she implies.

Or consider Eric Beerbohm's claim that citizens share in complicity for the wrongs of their state. "When citizens participate in electoral life they *aim* for a certain kind of basic structure," he writes.[93] Consequently, they are liable for causally contributing to political injustice when they go to the polls, canvass for a party, contribute to a candidate.[94] Our discovery both limits and potentially

---

[91] Anna Stilz, 200; John Parrish, Collective responsibility and the state, International theory 1(1) March 2009, 119-154; Beerbohm *In our Name*, Avia Pasternak, "The collective responsibility of Democratic publics," *Canadian Journal of Philosophy* 41(1) March, 2011. s

[92] Lawford-Smith 85

[93] Beerbohm, 239.

[94] Beerbohm, 241

expands the reach of this accountability. If elected actors can only do so much—if they merely *share* in influence over the state of social conditions—then citizens can only acquire so much liability in contributing to their efforts. If other types of non-electoral actors also play an independent part, then citizens should perhaps see themselves as aiming for a certain basic structure when they interact with those institutions—choose particular jobs, buy from companies who lobby in particular ways, support particular media outlets, and so on.

Perhaps most importantly, our discussion has implications for political philosophy quite broadly. Advocates of group agency are far from the only philosophers to rely on an under-recognized and under-considered theory of the state. As we saw earlier, it is out of fashion these days to pay much attention to conceptualizing or assessing the state. Typically, theorists simply presume something roughly like the unitary model and get on with the business of asking questions about the nature of justice or blameworthiness. Consider, for example, debates between statists and cosmopolitans as to the scope of distributive justice. Many statists hold that such principles are limited to the domestic context because *only the state* is an agent who can be held to account for the distributive scheme. Saladin Meckled-Garcia, for instance, writes of the global arena:

> "there are many and varied agents participating…with varying but significant horizontal impact. These include states, their alliances, and consent based international finance, trade, and development institutions…as well as non-state actors including individual, private enterprises, and their associations…[This] reliance on state agency and state consent…means that there is no unified agency satisfying the authority condition…they depend on agreements to act by those involved... at the global level, their only way of affecting distribution is through economic regulation on a coordinated level."[95]

On these grounds, Meckled-Garcia and others conclude that principles of distributive justice do not exist in the global realm. "Without an overarching authority capable of background adjustment, he writes, "the equivalent of domestic justice cannot apply internationally."[96]

The presumption implicit in Meckled-Garcia's adoption of statism, of course, is that *a unified agent with the overarching capacity to effectively perform background adjustments exists in the domestic realm*. But this is just what our investigation calls into question. At the *domestic* level there are many and varied agents participating with varying but significant horizontal impact. This includes traditional state actors, and consent-based finance, trade, and development institutions as well as individuals, private enterprises and their associations. There

[95] Saladin Meckled-Garcia, "On the Very Idea of Cosmopolitan Justice: Constructivism and International Agency," *The Journal of Political Philosophy* 16(3) (2008), 245-271, 267.
[96] Ibid, 269.

is no unified agency satisfying the authority condition. As the political economist Andrew Gamble (2000, 113) writes, "there is no single site from which the economy is governed…there are not only several different modes of economic governance, but many different agents." It follows that advocates of statism—like proponents of group agency—must reconsider what their claims tell us about the domestic realm. How unified must actors be for principles of distributive justice to apply? To what extent can an array of independent and quasi-independent agents be held to account for such conditions? My interest here is not to propose a solution to these matters, but to make apparent the serious questions that have gone unassessed –and indeed—unconsidered because philosophers have avoided consideration of states' nature and consequently overlooked the need to better conceptualize our social reality. The answers have the possibility to reconfigure our moral accounts of both the domestic and the international realm.

**Section Eight: Conclusion**

Michael Blake writes of contemporary political philosophers, "However much we disagree about what justice means, and how we might best pursue it, we have tended to operate with a remarkably similar vision of the empirical backdrop to the pursuit of domestic justice…we disagree widely about what policies and practices the state ought to pursue, but we tend to agree about the nature, and powers, of the state itself."[97] Our discussion reveals the weakness in this methodological approach. Political philosophers have maintained the agreement that Blake praises in good part by overlooking difficult questions about states' nature. In doing so, they have left themselves vulnerable to serious error and oversight. If we want to say something useful about our moral landscape, we need to see clearly where we are. Treating the state seriously as a subject of investigation promises to significantly upend our accounts of civic ethics and political responsibility—pushing us to think more carefully about joint action and about the social responsibility of actors not traditionally associated with government.

[97] Blake, "Global Distributive Justice: Why Political Philosophy Needs Political Science," Annual Review of Political Science, 2012 15: 121-36, 124