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The State: A Response to Four Interlocutors

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I am most grateful to Paul Patton, the editor of the *Journal of Social and Political Philosophy*, for organising this symposium so soon after the appearance of my book on *The State* (2023). And I deeply appreciate the careful attention given to the work by my other symposiasts. I propose to respond to them in the order in which they treat topics in the book. Those topics are all covered in the first four chapters of the book. Thus, the symposium neglects the questions covered in the final two: whether the state is limited normatively by pre-political, natural rights; and whether it is limited empirically by the need for the economy to be self-regulating.

Before replying to my commentators in turn, a general comment may be useful. Some of them assume that the claims I make about the function of the state, and about what that function supports, are designed to reflect my commitment to a neo-republican theory of the ideal or just polity (Pettit 1997; 2012; 2014). This is mistaken. My claims about the function of the state, and the functional desiderata that apply to the state, are meant to be independent of normative theory and, like a prolegomenon, to constrain what such a theory can argue about the requirements of justice. The constraints identified apply to neo-republican as well as other theories, though I think that republicans can readily endorse them; hence, as I say in this book, I plan a companion volume, *From State to Republic*.

Kazutaka Inamura

Inamura offers a very clear account of the argument in the first chapter, that the issue of whether the state has a defining function is well addressed by looking at a counterfactual question of genealogy. The question is whether something deserving of the name of state would be robustly likely to emerge among creatures of our kind, living in conditions of the sort that have prevailed since the agricultural revolution, and enjoying a qualified equality.

To explain the terms of the question, such an institution would be robustly likely to emerge, if its appearance did not depend on a fortuitous occurrence: say, on the good luck of someone proposing the idea and organising an assembly to implement it. And the humanoids would enjoy a qualified equality just to the extent that at least one privileged class of individuals is large enough for only some of them to occupy ruling positions and equal enough in power for no one individual or family or clique to be able to take over unilaterally.

The claim in the first chapter, as Inamura clearly charts, is that the humanoids in the relatively equal class – I often assume for convenience that this includes all – would be robustly likely to evolve conventions and norms and to give those regularities the status of proper laws with the acceptance of measures – if you like, decision-maker laws – for clarifying and changing the regularities, and for identifying and penalising offences: this story is familiar from the classic work of H. L. A. Hart in the 1960s (2012). But, so the argument goes, the emergence of such a legal system would introduce legislative authorities for ruling on what exactly the norms require, and judicial and executive authorities

for identifying and penalising offenders. And those authorities, whether appointed on an ad hoc or procedural or hereditary basis, would be led by a concern for effectiveness to make the laws coercive and by a concern with preventing the escape of offenders to make the system territorial.

Inamura's first question about this story is whether it allows for the possibility that 'the ablest individuals' might not need or want the security that a coercive, territorial, law-giving state would give them: that, like Plato's Glaucon, they might 'disregard social norms', when it suited them. And his second, related, question is whether it can cope with the power dynamics that might operate – and that operated historically – within any pre-political group like the protagonists of the story.

I can only respond to this line of questioning by emphasising the importance of the assumption that in the pre-political society envisaged there is a modicum of equality among at least those in the most privileged class. Thus, we might think of this class, to take a European precedent, as the barons in twelfth-century England. Only one of them could be ruler or monarch under their hereditary system, and none could rule by sheer force, so that it was possible and important for others to establish the terms on which the monarch would rule. Such terms were outlined in the *Magna Carta Libertatum* – the charter of freedoms – that King John accepted in 1215.

Norman England in that period was a functional state, by my austere characterisation, but it fell far short of being a just polity by any plausible metric. There surely were individuals among the barons who had Glaucon-like ambitions, and were embroiled in the turbulent dynamics of power struggle. Thus, if we take their situation to be an example of what might obtain in our starting scenario, we can see that, even in the presence of ambition and conflict, something like a state would be likely to emerge. It would emerge there, as the genealogy has it, because of the benefit – the limited security against one another and against those in office – that it provides for individuals.

Inamura points out that the history of states in the immediate aftermath of the agricultural revolution, at least on James Scott's reading, does not resemble our counterfactual story (2017). Here I am inclined to stress that the point of the genealogy is not to sketch a likely history of actual states but to argue that, insofar as a state-like entity would be robustly likely to emerge in the imagined but reasonably realistic conditions envisaged, it is enough to show that there is a benefit it would ensure for those in the most privileged class that directs us to a plausible function that we might expect a state to play in relation to its subjects.

The standard economic story about how something like money would be robustly likely to emerge in a barter society directs us to a plausible function of money in our own societies. And it does this, regardless of whether money actually originated in that way historically (*pace* Graeber 2011). The same holds, so I hope, of the story I sketch in the case of the state.

Miguel Vatter

Directly and indirectly, Vatter addresses claims made in the second and third chapters of the book. Whether or not readers accept the genealogical argument of Chapter 1, they may go along with the idea that the function of the state is to establish a coercive, territorial regime of law under which citizens – we may use this term for the most privileged members of the society – know roughly where they stand in relation to one another and to those who make and impose the laws. The following two chapters defend apparently conflicting claims about the desiderata that a state should satisfy if it is to effectively to discharge this function.

Chapter 2 argues that the state should incorporate fully as a group agent pursuing its function reliably across the various situations in which its authorities act, whether as legislators, administrators or judges, or in subsidiary roles like those of the police or military. This requires that the law should speak with a single voice as between the legislature and the courts, for example, and that those acting in the name of the state, like police officers or military personnel, should not be able to go rogue.

Chapter 3 then goes on to defend a second, apparently conflicting claim that that state should be organised in a polycentric manner around bodies that operate in mutual tension, as with the legislature in relation to an independent judiciary, administrators in relation to impartial regulators, and a government in

relation to an empowered citizenry. This second claim is grounded in the fact that without such checks and balances, those in office would find it too easy to put the satisfaction of their own private interests above the promotion of the public function of the state.

Vatter raises two interconnected questions about the proposed functional ideal. The first is, why the people should accept such a polycentric arrangement: such a mixed constitution, in the traditional term. 'Where does it receive its authority', he asks, 'to be the law of law-making agents?' This is a good question but an ambiguous one. First version: what is the function-related reason why the citizens of a polity should go along with a mixed constitution? Second version: what is the normatively compelling reason, if there is any – what is the reason compelling in a theory of justice – why they should go along with the arrangement?

Only the first version of the challenge is relevant to the argument of this book. And the answer, clearly, is that the citizens should go along with it insofar as that will help to safeguard them against those in public office abusing their power in pursuit of their private concerns. The second question bears on whether those living under a mixed constitution are obliged in justice to accept that arrangement. And here the answer is surely that that depends on whether the state, however functional, is just. Thus, assuming that the citizenry are inclusive of all, as justice plausibly requires, the members will not have a reason in justice to go along with the arrangement if it is unfair to some. And even if it is fair to all, the members will not have a reason in justice to go along if the arrangement is imposed by a colonial power.

The commitment to unifying the state as a group agent implies that the polity should be organised under a supreme ruler or sovereign. And that prompts the second question raised in Vatter's commentary. On the sovereigntist model, laws are commands issued by that sovereign. And that worries him, on the ground that 'if law is command, then necessarily the rule of a person stands above the law'. One reason why this is worrying, so he observes, is that it offends against the republican tradition. This looks for 'an empire of laws' rather than 'an empire of men', in James Harrington's classic formulation in the 1650s (1992); it seeks a 'rule of law' rather than 'a rule of persons', as Vatter formulates it.

But a more general reason at which Vatter gestures is more relevant to this book: that allowing the sort of sovereignty I take to be functionally necessary allegedly ensures that 'the rule of a person stands above the rule of law'. The idea is that a commitment to sovereignty will end up giving the person or party in government absolute discretion and power. Even in a democracy, it will follow, as Vatter takes Carl Schmitt (2005) to have underlined, that 'if laws are commands, then the democratic commander still stands above the authority of laws'. The concern, formulated from the viewpoint of this book, is that the arrangement will end up giving the commander the sort of absolute power that citizens who seek a functional polity – a polity that best promotes its function – ought to fear.

But Vatter introduces a false dichotomy, I think, when he worries about giving authority to a person rather than the law. In the long tradition, republican or not, it has always been assumed that the law must be framed and implemented by individuals, whether acting individually or together. Only Kant (1996: 294, fn) came close to denying this when he wrote in a romantic vein: 'the sovereign … is the personified law in itself, not its agent'. But nothing so romantic is intended when someone like Harrington contrasts the empire of laws with the empire of men. The idea expressed in that mantra is that the individuals who formulate and apply the law should do so – I would say, as a functional ideal – under the constraints imposed by the decision-maker laws that characterise a legal system, not at their own changing whim. Kant (1996: 481) expresses that very idea when he says in a more prosaic spirit that 'law itself rules and depends on no particular person'.

But still, I do argue that, as a functional ideal, there should be a sovereign authority to preside over the law, unifying the demands it makes into a coherent whole and guarding against the emergence of rogue agencies. And how could such an authority operate under the regime of checks and balances – another functional ideal, by my account – that would constrain any individual authority?

The reconciliation I offer in the book, which Vatter does not discuss as such, is to argue – against the absolutist tradition of Bodin and Hobbes – that the polity constituted out of mutually competitive and constraining bodies can constitute a higher-order sovereign insofar as their interaction is designed to support a coherent body of law and to guard against the appearance of rogue elements. The absolutists

claimed that the sovereign must be an individual or agency within the polity, where that claim served them well in arguing that the mixed constitution – an arrangement they wanted to discredit – would create rival sovereigns and introduce chaos or civil war. It is true that technically the polity that acts as a group agent will constitute a corporate person. But being constructed out of mutually constraining agents and agencies within the polity, this is not the sort of person whose sovereignty would inevitably threaten to introduce an empire of men rather than an empire of laws.

Tongdong Bai

Bai raises a number of interesting questions. One of them, in the later part of his paper, is very close to the issue pressed by Vatter. He cites an argument that a recent scholar, Lv Simian, constructs in support of a traditional Chinese defence of absolutism against a polycentric regime. According to this argument, there is nothing to 'stop the institutions of checks and balances from abusing the law', making it impossible to 'settle anything', so that in any state 'there has to be a final authority'. Thus, if it seems that the institutions in a regime of checks and balances did settle things appropriately, 'one of the institutions must have had the highest (but hidden) authority'.

The argument here bears some resemblance to Vatter's. Bai recognises explicitly, however, that my resort to the idea of a higher-order sovereign is designed to combat it, arguing that the sovereign does not have to be an agency within the polity, as traditional absolutists certainly assumed. And he finds an analogy I use to support that idea 'illuminating'. The analogy is with the higher-order status of the University of Oxford in relation to the colleges that interact to create the university. Its relevance appears in the fact that someone who has seen the colleges and asks then to see the university is guilty of what Gilbert Ryle called a category mistake. Someone who was told about the different agents and agencies within a state would make a similar mistake, if they then asked to see the state itself, or indeed the sovereign.

Despite the higher-order nature of the sovereign, Bai worries that the decisions ascribed in my model to the emergent sovereign may still require one of the mutually checking institutions to be the 'ultimate decider', thereby constituting 'an absolute and eventually unchecked mini-sovereign'. I think this concern is overstated. Take my simple example of a polity constituted out of two committees, one with the power of proposing laws, the other with the power of deciding on whether a proposed law should be enacted. I do not see why one of those committees will have to be the ultimate decider. Perhaps, in the end, Bai is sympathetic since he concludes that we may have to settle for a compromise proposal, favouring a state that combines the efficiency we might expect from a sovereign with the 'protection offered by checks and balances'.

Bai raises other issues in the earlier part of his paper. One bears on whether the assumptions about the nature of the protagonists in my narrative are compelling; he characterises these as Lockean rather than Hobbesian. Why assume, to take the example he highlights, that the protagonists will seek to enjoy esteem or reputation: the good opinion of others? My response is that this assumption has a long history, figuring even in Hobbes, and that it is borne out in empirical social science and modelling. True, I go a different direction from Hobbes in holding that it is likely to support the emergence of conventions and norms prior to a state. But that claim is borne out in the arguments I provide, which replicate points now routinely defended in game theory and related disciplines; Hobbes ignored observations like these, perhaps because they did not fit with his desire to argue that the state is needed even to establish the most trivial conventions.

Apart from this concern about my assumptions, Bai wonders whether laws are as central to states as I suggest, arguing that 'governing techniques and institutions' are also important, answering to a broader sense of law than he ascribes to me. But I do endorse such a wider sense of law, focusing in particular on the decision-maker laws that establish a variety of political institutions.

Generalising his complaint, Bai suggests that like other 'mainstream political thinkers' I neglect the administrative and bureaucratic aspects of the state. I think this is unfair since, as he himself goes on to acknowledge, I give a good deal of attention to the differences consequent on organising a polycentric state in a parliamentary or a presidential role. Moreover, I emphasise the importance to the state of domain-specific authorities such as the courts and, more important, the bodies and officials whose job is to

regulate the conduct of elections, to audit elected authorities, to provide information on government performance, to fix interest rates, and so on.

Qin Cao

Cao discusses Chapter 4 of *The State*, focusing in particular on the paradox of constitutional regress. This arises on the assumption that the people of a state exist as a people in virtue of the framework of laws – roughly, the constitution – that establishes the state. If that is the case, so the paradox goes, it would seem that the people cannot act extra-constitutionally to change the constitution on which they depend for their continued existence.

This paradox, as I argue in the book, is central to the case made by absolutists like Hobbes against popular power. According to the Hobbesian argument, it makes no sense to allow that the people might act in this way to topple their sovereign, where that would amount to changing the constitution, not just to changing the government that acts under the constitution. The notion of the people may refer, he says, to the unincorporated multitude or to the people incorporated as a group agent within a state. But the multitude cannot change anything, Hobbes claims, since the fact that they are unincorporated means that they are not organised to perform any action together. And while the people incorporated as a state can certainly do things in their guise as a state, they cannot overthrow the constitution or sovereign, for that would be to eradicate themselves as a people.

The response to this argument in the book, as Cao details, is to argue that there is a third form that the people assume when, as citizens, they coordinate with one another in obeying the law and in discharging roles assigned to them, taking such actions only insofar as they expect others to act in the same way. This is the incorporating people, as I call them, and they exemplify the now familiar idea of a group of people who, without constituting a group agent, act together on this or that occasion for an episodic or recurrent purpose. They will fail to constitute a group agent, since they will not be organised to pursue their goal across significantly distinct scenarios, registering in a shared belief what is required in each scenario to realise that goal.

Cao is generally sympathetic to this line of argument, registering that it makes sense of how we can say that the American people altered their constitution extra-constitutionally in 1787 when they overthrew the 1776 articles of confederation and began under a new constitution. He notes that according to my argument we may say, first, that the same people – the people in the incorporating sense – existed before and after that constitutional shift and, second, that the people in that sense actually enacted the change. The American people incorporated under the 1776 articles did not continue to exist through that change but the incorporating people did. And the unincorporated people did not act to effect that change in 1787 but the incorporating people did.

Cao raises a question about each of these two claims. As against the first, he observes that there are other changes in their constitution that a people might undergo, without any action of the kind I associate with the incorporating people; an example would be the change that an invader's conquest of the country might introduce. And he makes the correct point that in such a case it is the continuity of the unincorporated people – roughly, the separate residents of the territory – that explains why we can say that the same people continue to exist through that change.

But Cao recognises that it is the second claim that is really important in making a case against the absolutists and in resolving the constitutional paradox. As he says, 'the aim is to explain how a people can give itself a new constitution by extra-constitutional means'. Indeed, he suggests that unless the claim can be defended, 'the autonomy and self-determination of the people is jeopardised'.

He raises a problem, however, about my defence of the claim. He observes correctly that it is hard to imagine a whole people acting together jointly to initiate a change in the constitution, noting that most plausible, domestically sourced changes will begin with 'one or more factional groups' within the society. Can the people be said to have acted to change the constitution when only a few pursue the action and most stand passively by?

He holds that in such a case 'the change was not initiated by the incorporating people'. I think that's a plausible claim, although in the book I take a more 'pragmatic' line. I suggest that an extra-constitutional change of constitution that is brought about actively by a small group can be credited to the people as a whole when others generally do not oppose the change, even when they might have done so without serious cost (Pettit 2023: 210, 220).

But if Cao and I differ on that particular point, we agree on another. This is that in at least some cases where the whole people cannot be said to have brought about a relevant change of constitution, they may be plausibly held to support the change once it has materialised. This change may have had a 'not-so-perfect beginning', as he says, but once inaugurated, it may receive 'informed and enduring approval from the people'; and this, in a way that puts them in control of whether the change is maintained.

This possibility, as Cao says, makes perfect sense on a view we share, that there are two possible modes of control: active control and virtual or standby control. The people will be in standby control of whether to maintain a constitutional change insofar as they would be able and willing to contest it with some chance of success did it not seem acceptable to them. Thus, the fact that they do not actively say 'yea' to the change – and perhaps were never invited to say 'yea' – is consistent with their still enjoying control so long as they could now effectively say 'nay' but choose not to do so. Rousseau makes a similar point in the *Social Contract* about the control of a sovereign over laws enacted previously: 'the sovereign is free to oppose them and does not do so' (1997: II.1.4).

For Cao, and for me, it is really important that the people – the incorporating people – should enjoy such standby control over the constitution that shapes its polity. It offers a reason, as he puts it, why 'we need not be very anxious about the absence of autonomy or self-determination embodied in the founding moment of a new constitution'. Standby control can ensure such autonomy or self-determination in a more important domain: the continuing life of the constitution and the state.

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