



Sovereignty in Fragments

The Past, Present and Future
of a Contested Concept

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1 The sovereign state: a genealogy

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I

When we trace the genealogy of a concept, we uncover the different ways in which it may have been used in earlier times. We thereby equip ourselves with a means of reflecting critically on how it is currently understood. With these considerations in mind, I attempt in what follows to sketch a genealogy of the modern state. Before embarking on this project, however, I need to make two cautionary remarks about the limitations of its scope. I assume in the first place that the only method by which we can hope confidently to identify the views of specific writers about the concept of the state will be to examine the precise circumstances in which they invoke and discuss the term *state*. I consequently focus as much as possible on how this particular word came to figure in successive debates about the nature of public power. The other limitation I need to signal is that I confine myself exclusively to anglophone traditions of thought. I do so in part because I need to bring my historical materials under some kind of control, but mainly because it seems to me that any study of the changing vocabularies in which moral or political concepts are formulated can only be fruitfully pursued by examining the histories of individual linguistic communities. To attempt a broader analysis would be to assume that such terms as *lo stato*, *l'État* and *Der Staat* express the same concept as the term *state*, and this would be to presuppose what would have to be shown. Hence the seemingly arbitrary restriction of my historical gaze.

To investigate the genealogy of the state is to discover that there has never been any agreed concept to which the word *state* has answered. The suggestion, still widely canvassed, that we can hope to arrive at a neutral analysis that might in principle command general assent is I think

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misconceived.¹ I would go so far as to suggest that any moral or political term that has become so deeply enmeshed in so many ideological disputes over such a long period of time is bound to resist any such efforts at definition. As the genealogy of the state unfolds, what it reveals is the contingent and contestable character of the concept, the impossibility of showing that it has any essence or natural boundaries.²

This is not to deny that one particular definition has come to predominate. As handbooks on political theory regularly point out, there has been a noticeable tendency in recent times to think of the state – usually with a nod in the direction of Max Weber – as nothing more than the name of an established apparatus of government.³ The issue that remains, however, is whether our thinking may have become impoverished as a result of our abandonment of a number of earlier and more explicitly normative theories that a genealogical survey brings to light. Can a genealogy free us to re-imagine the state in different and perhaps more fruitful ways? After presenting my historical survey, this is the question to which I turn in the closing section of this chapter.

II

Within anglophone legal and political theory, the earliest period in which we encounter widespread discussions about the state, statehood and the powers of states is towards the end of the sixteenth and the beginning of the seventeenth centuries. This development was in large part owed to the influence of scholastic discussions about *summa potestas*,⁴ together with the growing availability of French treatises on sovereignty⁵ and Italian manuals on ‘politics’ and reason of state.⁶ With the confluence of these strands of thought, the term *state* began to be used with increasing confidence to refer to a specific type of union or civil association, that of a *universitas* or community of people living subject to the sovereign authority of a recognized monarch or ruling group.

This is not to say that the word *state* was the term most commonly employed to describe the form of union underlying civil government.

¹ But for a recent attempt see Morris 1998, esp. pp. 45–6; for a more pluralist approach see Vincent 1987.

² For further considerations along these lines see Geuss 1999; Bevir 2008; Krupp 2008.

³ Forsyth 1991, p. 505; Morris 2004, pp. 195–6. For Weber’s definition see Weber 1984; for discussions in which it is presupposed see Poggi 1978; Jordan 1985; Caney 2005, esp. pp. 149–50.

⁴ Brett 1997; Höpfl 2004, pp. 186–223. ⁵ Skinner 1978, vol. II, pp. 254–75.

⁶ Mattei 1979; Borelli 1993. On England see Baldwin 2004; Malcolm 2007, esp. pp. 30–73.

Some writers preferred to speak of the *realm*, some even spoke of the *nation*, while the terminology in most widespread use referred to the *body politic*, generally with the implication that such bodies are incapable of action in the absence of a sovereign head to which they owe their direction and obedience. It was by a relatively simple process, however, that the term *state* came to be inserted into this lexicon. One of the questions addressed in the Renaissance genre of advice-books for princes had always been how rulers should act to maintain their state, that is, to uphold their status or standing as princes. Machiavelli was only the most celebrated of numerous political thinkers who had emphasized the importance of being able *mantenere lo stato*,⁷ and when Edward Dacres published his translation of *Il principe* in 1640 he duly made Machiavelli speak about how a prince must act ‘for the maintenance of his State’, and how a prudent prince must ‘take the surest courses he can to maintain his life and State’.⁸

If we consult the legal theorists, we frequently find them talking in similar terms. According to these writers, however, there is something of more impersonal significance that rulers must preserve if they wish to avoid a *coup d'état*, a strike against their state. They must preserve the welfare of the body politic, and they are warned that they cannot hope to maintain their own status unless they keep this body in security and good health. It was at this juncture that, in referring to this underlying *corpus politicum*, a number of legal theorists began to describe it as the state. The resulting linguistic slippage was slight, but the conceptual change was momentous: rather than focusing on the need for rulers to maintain their own status or state, these writers began to speak of their obligation to maintain the states over which they ruled.⁹

For an illustration of these tendencies, we can hardly do better than turn to Jean Bodin's *Six livres de la république*, which was first translated into English as *The Six Bookes of a Common-weale* in 1606.¹⁰ At the beginning of Book I Bodin supplies a definition of what his translator, Richard Knollys, calls ‘the Citie or state’.¹¹ Bodin argues that ‘it is neither the wals, neither the persons, that maketh the citie, but the union of the people under the same soveraigntie of government’.¹² He concedes that this sovereign power can be that of the people themselves, but he goes on to express a strong preference for monarchy over all

⁷ Hexter 1973, pp. 150–72. ⁸ Machiavelli 1640, pp. 139, 141, 169.

⁹ On this transition see Mansfield 1996, pp. 281–94; Harding 2002, pp. 252–335; Skinner 2002, vol. II, pp. 382–7.

¹⁰ For Bodin on the state see Franklin 1973 and 1991; Skinner 1978, vol. II, pp. 284–301, 355–6.

¹¹ Bodin 1962, 1.2, p. 10. ¹² Bodin 1962, 1.2, p. 10.

other forms of government. To institute a monarchy, he explains, is to create a type of public authority in which ‘all the people in generall, and (as it were) in one bodie’ swear ‘faithfull alleageance to one soveraigne monarch’ as head of state.¹³

This way of thinking about the state (which I shall call the absolutist theory)¹⁴ was soon picked up in two distinct strands of legal and political discourse in early seventeenth-century England. One arose out of scholastic discussions about *suprema potestas*, especially as conducted by such luminaries of the Second Scholastic as Vitoria, Bellarmine and Suárez. Although these philosophers allow that the *universitas* of the people must have been the original bearer of supreme power,¹⁵ they insist that the act of submitting to government always involves what Suárez characterizes as a ‘quasi-alienation’ of political rights.¹⁶ This is the line of argument we find in a work such as Matthew Kellison’s *Right and Jurisdiction of the Prelate, and the Prince* of 1621.¹⁷ Kellison maintains that, as soon as the people ‘make choice of a King’, the effect is that ‘the Communitie despoileth it selfe of authority’, subjecting itself to an absolute ruler who thereafter exercises absolute power over the whole body of the state.

The other and more influential way in which the absolutist theory was articulated was as part of the doctrine of the divine right of kings. Sir Robert Filmer begins his *Patriarcha* (c.1630)¹⁸ by stigmatizing as a dangerous heresy the belief in the natural liberty of mankind.¹⁹ What this argument fails to recognize, he argues, is that all rulers receive their authority not from the people but directly from ‘the ordination of God himself’.²⁰ Kings are the Lord’s anointed, the vicegerents of God on earth, and consequently enjoy supreme and unquestionable power over the body of the commonwealth or state.

King James I frequently talks in these terms, especially when haranguing his Parliaments about the extent of his sovereign rights.²¹ But the English writer of this period who speaks with the greatest confidence in this idiom is the Roman lawyer Sir John Hayward.²² Hayward’s first

¹³ Bodin 1962, 1.8, p. 99.

¹⁴ Following Poggi 1978 and Vincent 1987, pp. 45–76.

¹⁵ Höpfl 2004, pp. 204–17, 224–30.

¹⁶ Suárez 1975, 3.4.2, p. 49: ‘non est delegatio sed quasi alienatio’. Cf. Höpfl 2004, pp. 248–62.

¹⁷ On Kellison see Sommerville 1999, pp. 60–2.

¹⁸ Sommerville 1991a, pp. xxxii–iv shows that, although *Patriarcha* was not published until 1680, the manuscript was completed before 1631.

¹⁹ Filmer 1991, p. 2. ²⁰ Filmer 1991, p. 7.

²¹ King James VI and I 1994, pp. 143, 145, 147, 149. On James as an ‘absolutist’ see Sommerville 1991b, pp. 247–53; Sommerville 1999, pp. 107–10, 227–30.

²² On Hayward see Levack 1988; Sommerville 1999, pp. 51–2, 68.

presentation of his views about state power can be found in his *Answer* of 1603, in which he lays down that all authority comes not from the people but from God, so that even heathen rulers count as the Lord's anointed.²³ The underlying 'body politick' cannot possibly have been the original possessor of sovereignty, for it amounts to nothing more than 'a heedless and headless multitude' without direction or government.²⁴ Drawing on Bodin, Hayward concludes that it will always be more natural 'that one state, bee it great or small, should rather bee commaunded by one person' as head of state.²⁵

These arguments were in turn picked up by a number of polemicists whose primary concern was to vindicate – against Catholic apologists such as Kellison – the claim that temporal rulers have a right of absolute control over ecclesiastical as well as civil affairs. Hayward also contributed to this debate, and was one of the first to describe this Erastian commitment as an argument about the proper relationship between 'church and state'.²⁶ The fullest argument along these lines can be found in the work of another Roman lawyer, Calybutte Downing,²⁷ whose *Discourse of the State Ecclesiasticall* was first published in 1632.²⁸ Downing declares that the king of England must be recognized as the 'supreme Civil head' over the ecclesiastical no less than 'the Civill State'.²⁹ As in all absolute monarchies, the 'State is so framed' that there is one person with unquestionable authority to govern all the 'distinct and settled societies of that State'.³⁰

III

While the absolutist theory was widely defended in the opening decades of the seventeenth century, it was also subjected to a growing barrage of attack. Critics agreed that, when we talk about the state, we are referring to a type of civic union, a body or society of people united under government. But they repudiated the metaphor according to which this *societas* or *universitas* is a mere headless torso in need of a sovereign to guide and control it. It is equally possible, they claim, for sovereignty to be possessed by the union of the people themselves. We accordingly find these writers using the term *state* to refer not to a passive and obedient

²³ Hayward 1603, Sig. G, 3^r.

²⁴ Hayward 1603, Sig. B, 3^v; Sig. H, 3^r; Sig. K, 2^v.

²⁵ Hayward 1603, Sig. B, 3^v; Bodin is cited to this effect at Sig. D, 3^r.

²⁶ Hayward 1607, pp. 2, 6, 8, 14.

²⁷ On Downing see Levack 1973, pp. 115–17, 187–8; Sommerville 1999, pp. 40–1.

²⁸ Downing's treatise was reissued in an extended form in 1634; I quote from this version of the text.

²⁹ Downing 1634, pp. 58, 68. ³⁰ Downing 1634, p. 46.

community living under a sovereign head, but rather to the body of the people viewed as the owners of sovereignty themselves.

Two distinct challenges to the absolutist theory evolved along these lines, eventually giving rise to what I shall call the populist theory of the state. One stemmed from a group of writers who are best described as political anatomists, and whose principal interest lay in comparing the different forms of government to be found in various parts of the world. As they liked to observe, there are many communities in contemporary Europe in which the people are not ruled by a sovereign head but instead govern themselves. Focusing on the special characteristics of these polities, they frequently label them as *popular states* or simply as *states* to distinguish them from monarchies and principalities.

This usage undoubtedly owed something to the fact that such communities were generally governed by legislative assemblies in which the people were represented according to their different social ranks or 'estates'. These assemblies were usually described as meetings of the estates, while their members were said to attend them in virtue of some qualifying status or state. But whether the term *state* was used to refer to the sovereign body of the people, or alternatively to these assembled bodies of their representatives, the effect was to give rise to a sharp distinction between *monarchies* and *states*.

This distinction is strongly present, for example, in Edwin Sandys' *Relation* of 1605, in which he surveys the religious and constitutional arrangements prevailing in different parts of Europe.³¹ Sandys consistently distinguishes between monarchies and 'states', reserving the latter term for those polities, especially in Italy, in which the people govern themselves.³² The same is true of Giovanni Botero's *Le Relazioni Universali*,³³ which was first translated as *Relations of the most famous kingdoms and common-wealths* in 1601.³⁴ When Botero turns to Switzerland, he describes it 'a state popular, and subject to no one Prince',³⁵ and when he examines the constitution of the United Provinces he likewise speaks of it as a state,³⁶ explaining that it is a community in which 'the people and citizens have so much voice and authoritie' that they are able to regulate their own affairs.³⁷

For many of these writers, it proved a fine line between providing descriptions of republican constitutions and celebrating the alleged

³¹ On Sandys's *Relation* see Rabb 1998, pp. 21–46.

³² Sandys 1605, Sig. N, 3^r; Sig. P, 2^v; Sig. S, 3^r.

³³ On Botero's *Relazioni* see De Luca 1946, pp. 73–89.

³⁴ On Botero see De Luca 1946; Mattei 1979. I quote from the final, most extensive version of Botero's *Relazioni*, translated by Robert Johnson and published in 1630.

³⁵ Botero 1630, p. 310. ³⁶ Botero 1630, pp. 200, 206. ³⁷ Botero 1630, p. 206.

superiority of these self-governing regimes. This preference was generally grounded on a view about how we can best hope to retain our natural liberty while submitting to government. To live under a monarchy, it was frequently urged, is to subject yourself to the prerogative rights of a king, and is thus to live to some degree in dependence upon his will. As the *Digest* of Roman Law had laid down, however, to depend on the will of another is what it means to be a slave.³⁸ If you wish to preserve your freedom under government, you must therefore ensure that you institute a political order in which no prerogative powers are allowed. The inflammatory conclusion towards which these writers are drawn is thus that, if you wish to live 'in a free state', you must be sure to live in a self-governing republic. As a result, they begin to describe such polities not merely as states by contrast with monarchies, but more specifically and more invidiously as *free states* by contrast with the dependence and slavery allegedly imposed by every form of kingly rule.

The chief inspiration for this line of thought can be traced to the Roman historians and their accounts of Rome's early transition from monarchical to consular government.³⁹ It was a moment of great significance when Philemon Holland, in publishing the first complete translation of Livy's history in 1600, described the expulsion of Rome's kings as a shift from tyranny to 'a free state'.⁴⁰ Holland went on to narrate how, when Lars Porsenna attempted to negotiate the return of the Tarquins, he was aggressively reminded 'that the people of Rome were not under the regiment of a king, but were a free state' and intended 'to be free still and at their owne libertie'.⁴¹ The body of the people no longer needed a head; they had taken possession of sovereignty themselves.

A number of early-modern commentators revived and strongly endorsed this preference for 'free states'. An influential example is provided by Traiano Boccalini's *Ragguagli di Parnasso*, which appeared in English as *The new found politike* in 1626.⁴² After ridiculing and denouncing the monarchies of contemporary Europe, Boccalini brings his discussion to a close with a series of orations in which a group of learned spokesmen vie with one another in praise of Venice. What has enabled her citizens to maintain their freedom while helping their city to achieve such grandeur and fame? Various answers are put forward, but everyone agrees that one key to Venice's success is that she has always been 'a free state'. For centuries her citizens have preserved the same

³⁸ *Digest of Justinian* 1985, 1.6.4, p. 18. ³⁹ Skinner 2002, vol. II, pp. 308–43.

⁴⁰ Livy 1600, p. 44. ⁴¹ Livy 1600, p. 54.

⁴² On Boccalini see Tuck 1993, pp. 101–3.

republican constitution, and this in turn has provided ‘the true solid foundation, wheron their Greatnesse consisted most firmly built, & withall the eternitie of their Libertie’.⁴³

By this time, a second and more radical line of attack on the absolutist theory of the state had begun to emerge. This development largely stemmed from scholastic discussions about *summa potestas* and their adaptation by Huguenot publicists in the closing decades of the sixteenth century. A minority of the Schoolmen had always argued that, in Jacques Almain’s words, no independent community can ever abdicate its original sovereignty.⁴⁴ This contention was enthusiastically taken up by such radical Huguenots as Theodore de Bèze and the author of the *Vindiciae, contra tyrannos*, the latter of whom repeatedly insists that the *populus universus* remains *maior* or greater in authority than any ruler to whom it may happen to delegate its primitive right of self-government.⁴⁵

These arguments had the effect of enlarging the case in favour of ‘free states’. We begin to encounter the broader claim that, under all lawful forms of government – monarchies as well as republics – rights of sovereignty must remain lodged at all times with the *universitas* of the people or (as some begin to say) with the body of the state. Unless this is so, the people will be condemned to living in dependence on the goodwill of their sovereign, and this will have the effect of reducing them from their pristine state of freedom to an unnatural condition of servitude.

The earliest English political theorist to lay out this exact line of argument was Henry Parker in his *Observations* of 1642. Parker speaks with confidence about ‘the whole State of England’ and ‘the whole body of the State’, to which he adds that it is our ‘nationall union’ that makes us ‘a whole state’.⁴⁶ For Parker the crucial question is how political authority is disposed between crown and state. His negative answer is that sovereignty cannot possibly lie, as the royalists were contending, with the king as head of state. Kings may be *maior singulis*, greater than the individual members of the body politic, but they are *minor universis*, of lesser power and standing than the *universitas* of the people as a whole.⁴⁷ Parker’s positive answer, although much hedged about, is thus that sovereign power must ultimately reside with the whole body of the people, and that the name of this body politic is the state.

⁴³ Boccalini 1626, pp. 191–2.

⁴⁴ Almain 1706, col. 978: ‘Nulla Communitas perfecta hanc potestatem a se abdicare potest’. On Almain see Burns 1992, pp. 138–45; Skinner 2002, vol. II, pp. 255–62.

⁴⁵ *Vindiciae, contra tyrannos* 1994, pp. 74, 78. For a discussion see Garnett 1994, pp. xxii–xxxii.

⁴⁶ Parker 1642, pp. 29, 45. ⁴⁷ Parker 1642, pp. 2–4.

IV

No sooner was the populist theory put into circulation than it was vehemently denounced by royalists and absolutists of every stamp. Some of them merely reverted to the claims put forward by Charles I's father in support of his divine right. But others attempted to meet the critics of the monarchy on their own ground. When, for example, John Bramhall published his line-by-line critique of Parker's *Observations* as *The Serpent Salve* in 1643,⁴⁸ he conceded that 'Power is originally inherent in the People', and described the 'collected Body' underlying civil government as the 'Body of the State'.⁴⁹ But he then proceeded to reaffirm the scholastic orthodoxy that, when the people submit to government, the legal act they perform is that of 'divesting' themselves of sovereignty, in consequence of which their ruler becomes the absolute head of 'the whole Body' of the state.⁵⁰

Still other defenders of absolutism responded by laying out a very different theory of the state, a theory in which the relationship between subjects and sovereigns was conceptualized in unprecedented terms. Among these writers by far the most important was Thomas Hobbes, who announces at the outset of his *Leviathan* of 1651 that, in putting forward his theory of public power, he will speak 'not of the men' but 'in the Abstract' about the nature of the COMMON-WEALTH or STATE.⁵¹

Hobbes opens his analysis by reflecting on what he describes as the natural condition of mankind. He promptly launches a scathing attack on the belief that sovereign power must originally have been possessed by the body of the people. One of his underlying purposes in presenting his celebrated picture of man's life in the state of nature as nasty, brutish and short is to insist that the image of the people as a united body makes no sense. The condition in which nature has placed us is one in which we live entirely 'dissociate' from one another, subsisting as a mere multitude in a state of solitude in which 'every man is enemy to every man'.⁵²

Hobbes is no happier, however, with the absolutists and their rival theory according to which the proper relationship between the people and their rulers is that of a passive and obedient body to a sovereign head of state. He fully endorses the parliamentarian contention that the only mechanism by which lawful regimes can be brought into existence

⁴⁸ On Bramhall's 'moderate royalism' see Daly 1971; Smith 1994, pp. 220–3.

⁴⁹ Bramhall 1643, pp. 17, 21, 89. ⁵⁰ Bramhall 1643, pp. 14, 21, 23.

⁵¹ Hobbes 2008, Epistle Dedicatory, p. 3; Introduction, p. 9.

⁵² Hobbes 2008, ch. 13, pp. 89–90.

is 'by the consent of every one of the Subjects'.⁵³ To which he adds that, even after the members of a multitude have subjected themselves to sovereign power, they remain the 'authors' of whatever actions may subsequently be performed by those to whom sovereignty has been assigned.⁵⁴

Due to these commitments, Hobbes never talks in the manner typical of absolutist theorists about the reverence due to kings as the Lord's anointed or God's vicegerents on earth. He always maintains that the status of even the most absolute monarchs can never be higher than that of authorised representatives.⁵⁵ Furthermore, he proceeds to give an exacting account of the duties attaching to their office, arguing that their fundamental obligation is to act at all times in such a way as 'to procure the common interest' by conducting their government in a manner 'agreeable to Equity, and the Common Good'.⁵⁶

As well as registering these objections to prevailing theories of the state, Hobbes lays out his own rival theory at the same time. He begins by explaining what it means to speak of a sovereign as a representative:⁵⁷

A PERSON, is he, *whose words or actions are considered, either as his own, or as representing the words or actions of an other man, or of any other thing to whom they are attributed, whether Truly or by Fiction.*

When they are considered as his owne, then is he called a *Naturall Person*: And when they are considered as representing the words and actions of an other, then is he a *Feigned or Artificiall person*.⁵⁸

What Hobbes is basically telling us here is that a representative is the name of a person who takes upon himself the 'artificial' role of speaking or acting in the name of another man (or another *thing*) in such a way that the words or actions of the representative can be attributed to the person being represented.

With this exposition, Hobbes arrives at a question that no earlier theorist of the state had been obliged to raise. If sovereigns are representatives, what is the name of the person whom they represent? To understand Hobbes' answer, we need to begin by attending to his distinctive account of the political covenant.⁵⁹ As we have seen, he denies

⁵³ Hobbes 2008, ch. 16, p. 114; ch. 28, p. 219; cf. ch. 21, p. 150.

⁵⁴ Hobbes 2008, ch. 16, p. 114; ch. 17, p. 120.

⁵⁵ Hobbes 2008, ch. 19, pp. 130–1.

⁵⁶ Hobbes 2008, ch. 19, p. 131; ch. 24, p. 171.

⁵⁷ For Hobbes on representation see Pitkin 1967, pp. 14–37; Jaume 1986; Skinner 2007.

⁵⁸ Hobbes 2008, ch. 16, p. 111.

⁵⁹ Hobbes speaks of two ways in which political authority can be established: by 'institution' or by 'acquisition'. It is only in respect of the former case, however, that he fully works out his theory of authorization and representation, which is why I concentrate on 'government by institution' in what follows.

that such agreements can ever be made between the body of the people and a designated sovereign in the manner presumed by Henry Parker and his ilk, simply because there is no such thing as the body of the people. It follows that, if there is to be a political covenant, it can only take the form of an agreement between each and every individual member of the multitude, who agree to authorize an individual or assembly to act in their name.

But what does it mean to *authorize* such a representative? Hobbes gives his answer in discussing the role of ‘Persons Artificiall’ in chapter 16:

Of Persons Artificiall, some have their words and actions *Owned* by those whom they represent. And then the Person is the *Actor*; and he that owneth his words and actions, is the *AUTHOR*: In which case the Actor acteth by Authority.⁶⁰

Here Hobbes is telling us that, when we authorize someone to represent us, we must be willing to regard ourselves as the ‘owners’ of whatever is subsequently said or done by our representative. The reason is that, by our act of authorization, we grant him authority to speak and act in our name. We must therefore be prepared to accept responsibility for his words and actions as if they had been *our own*, as if we had spoken or acted ourselves.⁶¹

With this analysis Hobbes arrives at his central contention about the implications of the political covenant. When we authorize a sovereign, we transform ourselves from a mere multitude into a unified group. We are now united by our common agreement to live in subjection to law, and by the fact that we have a single determining will, that of our sovereign representative, whose words and actions count as those of us all. But this is to say that, rather than being ‘dissociate’ from one another, we are now capable of willing and acting as one person. As Hobbes summarizes, ‘a Multitude of men, are made One Person, when they are by one man, or one Person, Represented’.⁶²

The act of covenanting may thus be said to engender two persons who had no previous existence in the state of nature. One is the artificial person to whom we grant authority to speak and act in our name. The name of this person, as we already know, is the sovereign. The other is the person whom we bring into being when we acquire a single will and voice by way of authorizing a man or assembly to serve as our representative. The name of this further person, Hobbes next

⁶⁰ Hobbes 2008, ch. 16, p. 112.

⁶¹ For Hobbes on authorization see Gauthier 1969, pp. 120–77; Baumgold 1988, pp. 36–55; Skinner 2007.

⁶² Hobbes 2008, ch. 16, p. 114.

proclaims in an epoch-making moment, is the commonwealth or state.⁶³ ‘The Multitude so united in one Person, is called a COMMONWEALTH’,⁶⁴ and another name for a commonwealth is a CIVITAS or STATE.⁶⁵

We are now in a position to solve the puzzle raised by Hobbes’ initial contention that all lawful sovereigns are merely representatives. Whom do they represent? Hobbes’ answer is that they represent the state.⁶⁶ He categorically distinguishes the state not merely from the figure of the sovereign, but also from the unity of the multitude over which the sovereign rules at any one time. While sovereigns come and go, and while the unity of the multitude continually alters as its members are born and die, the person of the state endures, incurring obligations and enforcing rights far beyond the lifetime of any of its subjects.⁶⁷

As with the other theories of the state I have examined, Hobbes’ fictional theory (as I shall call it) is basically intended to furnish a means of judging the legitimacy of the actions that governments undertake. According to the absolutist theory, such actions are legitimate as long as they are performed by a recognized sovereign as head of state. According to the populist theory, such actions are only legitimate if they are performed by the will (or at least the represented will) of the sovereign body of the people. According to the fictional theory, the actions of governments are ‘right’ and ‘agreeable to Equity’ if and only if two related conditions are satisfied.⁶⁸ The first is that they must be undertaken by a sovereign – whether a man or assembly – duly authorized by the members of the multitude to speak and act in the name of the person of the state. The second is that they must basically aim to preserve the life and health of that person, and hence the common good or public interest of its subjects not merely at the time of acting but in perpetuity.⁶⁹

V

Hobbes’ fictional theory had little immediate impact on English political debate.⁷⁰ During the constitutional crisis of 1679–81, when the

⁶³ For further discussion see Tukiainen 1994; Skinner 1999.

⁶⁴ Hobbes 2008, ch. 17, p.120.

⁶⁵ Hobbes 2008, Introduction, p. 9 and ch. 17, p. 120.

⁶⁶ Jaume 1983; Skinner 1999; Loughlin 2003, pp. 58–64.

⁶⁷ Hobbes 2008, ch. 19, pp. 135, 221.

⁶⁸ Hobbes 2008, ch. 24, pp. 171–2; ch. 30, pp. 239–40.

⁶⁹ Hobbes 2008, ch. 17, p. 120; ch. 19, p. 131; ch. 24, p. 171; ch. 30, pp. 239, 241.

⁷⁰ Parkin 2007, pp. 334–44, 361–77 reports a largely hostile reception, with no specific discussions of Hobbes’ theory of the state.

Whigs attempted to exclude the heir presumptive from the throne, they mainly sought to legitimize their renewed attack on the Stuart monarchy by reviving and consolidating the populist theory of the state.⁷¹ Meanwhile, their Tory opponents, in repulsing their attack, mainly defended the crown by reverting to the claim that the king must be recognized as the God-given head of the passive and obedient body of the state.⁷²

During the same period, however, the fictional theory began to capture the attention of numerous European commentators on the *ius gentium* and the law of nature. The earliest important philosopher to draw heavily on Hobbes' account was Samuel Pufendorf in his *De iure naturae et gentium* of 1672.⁷³ Soon afterwards, Pufendorf's work became widely known in France through the efforts of his translator and editor, Jean Barbeyrac, whose annotated version of Pufendorf's *De iure naturae* appeared as *Le droit de la nature et des gens* in 1706.⁷⁴ Thereafter, the same theory was articulated by such jurists as François Richer d'Aube in his *Essais* of 1743 and Martin Hubner in his *Essai* of 1757.⁷⁵ Of all these restatements, however, by far the most influential was that of Emer de Vattel in *Le droit des gens* of 1758. Vattel likewise speaks at length about *l'Etat* as a distinct *personne morale*, and his analysis played a role of exceptional importance in the assimilation of the idea into English political thought.⁷⁶

This process of assimilation may be said to have begun with the publication of White Kennet's translation of Barbeyrac's edition of Pufendorf in 1717. When Pufendorf turns to the question of political association in Book VII, Kennet's translation makes him speak of 'the inward Structure and Constitution of Civil States'.⁷⁷ The state is said 'to exist like *one Person*, endued with Understanding and Will, and performing other particular Acts, distinct from those of the private Members' who make up its subjects.⁷⁸ Pufendorf adds that 'Mr *Hobbes* hath given us a very ingenious Draught of a Civil State', and in framing his own definition he closely echoes Hobbes' account.

As a purely moral person, Pufendorf next concedes, the state cannot hope to act in its own name; it stands in need of a representative to speak and act on its behalf.⁷⁹ Pufendorf is emphatic that anyone – whether an

⁷¹ Houston 1991, pp. 101–45. ⁷² Houston 1991, pp. 69–98.

⁷³ For Pufendorf's dependence on Hobbes see Palladini 1990.

⁷⁴ On Barbeyrac's translation see Othmer 1970, pp. 124–34.

⁷⁵ Glaziov 1993, pp. 62–3, 65–7.

⁷⁶ Jouannet 1998; Beaulac 2003, esp. pp. 254–60. ⁷⁷ Pufendorf 1717, p. 465.

⁷⁸ Pufendorf 1717, p. 475, cols. 1–2. For discussion see Denzer 1972, esp. pp. 185–8.

⁷⁹ Pufendorf 1717, p. 476, col. 1.

individual or an assembly – who is instituted to represent the state is thereby endowed with irresistible sovereignty.⁸⁰ He is no less emphatic, however, that when sovereigns exercise these powers they do so merely as representatives, and hence as holders of offices with duties attached. The specific duty of sovereigns is to procure the safety of the people, together with the ‘internal Tranquillity’ of the state.⁸¹ Moreover, this is a task of much greater complexity than that of merely fostering the common good of the populace at any one time. The original aim of any multitude in establishing a state is to construct what Hobbes had described as a lasting edifice:

For they who were the Original Founders of Commonwealths, are not supposed to have Acted with this Design, that the State should Fall and be Dissolv'd upon the Decease of all those particular Men, who at first compos'd it; but they rather proceeded upon the Hope and Prospect of lasting and perpetual Advantages, to be derived from the present Establishment, upon their Children and their whole Posterity.⁸²

With this affirmation, Pufendorf supplies one of the earliest unequivocal statements of the claim that the person of the state is not merely the bearer of sovereignty but the means of guaranteeing the legitimacy of governmental action over time.

A moment of still greater significance in the reception of the fictional theory was reached when an English version of Emer de Vattel's treatise on the law of nations was published in London in 1760. Vattel defines the *ius gentium* as the law governing the relations between independent states, and accordingly begins by analysing the concept of the state itself. As a union of individuals, the state is said to be the name of a distinct ‘moral person’ possessed of ‘an understanding and a will peculiar to itself’.⁸³ Separate states can in turn be regarded as ‘moral persons who live together in a natural society’, and ‘every nation that governs itself, under what form soever, without any dependence on a foreign power, is a *sovereign state*’.⁸⁴

Vattel concedes that the person of the state is not itself capable of action; if it is to speak and act, there must be some agreed form of public authority to represent it. As soon as such a government is instituted, the bearer of sovereignty is invested with the highest powers ‘of commanding whatever relates to the public welfare’.⁸⁵ These powers belong,

⁸⁰ Pufendorf 1717, p. 517, cols. 1–2.

⁸¹ Pufendorf 1717, p. 569, col. 1; p. 571, col. 1.

⁸² Pufendorf 1717, p. 481, col. 1. ⁸³ Vattel 1760, p. 1.

⁸⁴ Vattel 1760, p. 10. For the context in which he formulated this principle see Toyoda 2009.

⁸⁵ Vattel 1760, p. 21.

however, 'originally and essentially to the body of the society', and all sovereigns exercise them merely as representatives entrusted to act 'for the safety of the state'.⁸⁶ Sovereigns come and go, but the person of the state endures, which is why its interests must be given the highest priority. Like Pufendorf, Vattel concludes by offering a vision of the state not merely as a guarantor of the legitimacy of governmental action, but of its power to bind whole nations to their promises over long tracts of time.

By this stage the fictional theory had begun to catch the attention of English legal theorists, a process undoubtedly fostered by the appearance in 1750 of the first collection of Hobbes' political works to be issued in England since the publication of *Leviathan* a century before. Among the lawyers drawn to Hobbes' theory, none enjoyed a higher reputation than Sir William Blackstone, who incorporated its basic tenets into the introductory essay in his *Commentaries on the Laws of England* in 1765.⁸⁷ Blackstone begins by insisting that it makes no sense to treat the body of the people as a natural collectivity. The problem thus raised, however, is that 'many natural persons, each of whom has his particular will and inclination' cannot 'by any *natural* union be joined together' in such a way as to produce 'one uniform will of the whole'.⁸⁸ The only solution is to institute what Blackstone calls a '*political* union' of the multitude, to which he adds that the name of this union is the state. 'A state is a collective body, composed of a multitude of individuals, united for their safety and convenience and intending to act together as one man'.⁸⁹ The distinguishing mark of sovereignty – that of having the authority to legislate – may equally well 'reside' in different forms of government, but the authority itself is always part of 'the natural, inherent right that belongs to the sovereignty of a state'.⁹⁰

VI

By the mid-eighteenth century, the idea of the sovereign state as a distinct *persona ficta* was firmly entrenched in English as well as continental theories of public and international law. Towards the end of the century, however, the English branch of the genealogy I have been tracing began to ramify in a strongly contrasting way.⁹¹ No sooner had Blackstone introduced the fictional theory to a broad English readership than it

⁸⁶ Vattel 1760, p. 19.

⁸⁷ For Blackstone on law and the English state see Cairns 1984; Lieberman 1989, pp. 31–67.

⁸⁸ Blackstone 1765, p. 52. ⁸⁹ Blackstone 1765, p. 52. ⁹⁰ Blackstone 1765, p. 49.

⁹¹ For this contrast see Dyson 1980.

fell victim to an almost lethal attack. Furthermore, out of this violently hostile reaction there emerged a way of thinking about public power in which the concept of the state as a legal personality was allowed to slip almost entirely from sight.

This attack may be said to have rolled forward in two successive waves. The first was associated with the rise of classical utilitarianism, and in particular with the reforming jurisprudence of Jeremy Bentham. Bentham's earliest published work, his *Fragment on Government* of 1776, took the form of a scornful and vituperative critique of precisely those sections of Blackstone's *Commentaries* to which I have referred.⁹² Launching his tirade, Bentham announces that 'the season of *Fiction* is now over',⁹³ and that the time has come to ground legal arguments on observable facts about real individuals, and especially on their capacity for experiencing, in relation to political power, the pain of restraint and the pleasure of liberty.⁹⁴ His response to Blackstone's description of the state of nature, the union of the multitude and the creation of the state is accordingly to pronounce these passages completely *unmeaning*, a mere sequence of fictions of just the kind that legal theory must learn to avoid.⁹⁵

Bentham's repudiation of legal fictions had an overwhelming influence on the subsequent direction of utilitarian thought. We look in vain among other early utilitarians – William Paley, William Godwin, James Mill – for any sustained discussion of the state, and insofar as we encounter such discussions in later utilitarian theory they invariably echo Bentham's commonsensical account. A classic instance is provided by John Austin's lectures on *The Province of Jurisprudence Determined* of 1832.⁹⁶ As Austin informs us, his own understanding of the state is that the term simply denotes 'the individual person, or the body of individual persons, which bears the supreme powers in an independent political society'.⁹⁷ Later we find the same view summarized – along with so much else in the utilitarian creed – by Henry Sidgwick in his *Elements of Politics* of 1891, in which the state is viewed as nothing more than an apparatus of government empowered to command the exclusive allegiance of those living under it.⁹⁸

It is true that by this time a reaction had set in against these commonsensical accounts. During the closing decades of the nineteenth century

⁹² For Bentham on Blackstone see Burns 1989; Schofield 2006, pp. 51–7.

⁹³ Bentham 1988, p. 53. ⁹⁴ Schofield 2006, pp. 32–44.

⁹⁵ Bentham 1988, p. 113. For Bentham on fictions see Schofield 2006, pp. 14–27, 74–7.

⁹⁶ On Austin and Bentham see Lobban 2007, pp. 173–87.

⁹⁷ Austin 1995, p. 190n. ⁹⁸ Sidgwick 1897, p. 221.

a determined effort was made to reintroduce into English legal and political theory the idea of the state as the name of a distinct person. Some legal theorists, notably F.W. Maitland and his disciples, extended the theory of corporations as *personae fictae* to include the state as the most 'triumphant' fiction of all.⁹⁹ Still more contentiously, an influential group of English moral philosophers turned to Rousseau and especially Hegel to help them articulate the claim that the state is the name of a person with a real will of its own. The fullest presentation of this argument can be found in Bernard Bosanquet's *Philosophical Theory of the State*, which first appeared in 1899.¹⁰⁰ According to Bosanquet the state possesses its own substantial will, the contents of which are equivalent to what we would ourselves will if we were acting with complete rationality. He is thus led to propose what he calls 'the identification of the State with the Real Will of the Individual in which he wills his own nature as a rational being'.¹⁰¹ The moral freedom of citizens is taken to reside in their ability to conform to the requirements of their real or rational wills, and thereby conform to the will of the moral person of the state.

For a short while this way of thinking enjoyed a considerable vogue, but it soon provoked a strong reaction in favour of what I have been calling the commonsensical approach.¹⁰² One particularly irascible response came from L.T. Hobhouse in his *Metaphysical Theory of the State* of 1918. The state, Hobhouse retorts, is nothing more than the name of a 'governmental organisation', and in speaking of the powers of the state we are simply referring to acts of government.¹⁰³ A year later, Harold Laski published his *Authority in the Modern State*, in which he argued in very similar terms. When we speak about the state, he declares, we are merely referring to a prevailing system of legal and executive power, together with an associated apparatus of bureaucracy and coercive force.¹⁰⁴

By the time Laski published these thoughts, the second wave of the commonsensical attack was already well under way. Laski was still content to assume that the state remains the master concept that needs to be analysed.¹⁰⁵ By this stage, however, it was precisely this article of faith that a number of political theorists had begun to doubt.

Among the developments encouraging this sceptical stance, perhaps the most salient was the rise of international legal organizations in the

⁹⁹ Maitland 2003, p. 71.

¹⁰⁰ Nicholson 1990, pp. 198–230; Boucher and Vincent 2000, pp. 87–126.

¹⁰¹ Bosanquet 1910, p. 154. ¹⁰² Nicholson 1990, pp. 189–90.

¹⁰³ Hobhouse 1918, pp. 75–6. ¹⁰⁴ Laski 1919, pp. 29, 37.

¹⁰⁵ Laski 1919, pp. 26, 32.

period immediately preceding the First World War. In particular, the Hague conferences of 1899 and 1907 extensively limited the rights of sovereign states to engage in military actions on their own terms.¹⁰⁶ Still more significantly, the establishment by the League of Nations of the Permanent Court of International Justice in 1922 brought into being a legal authority whose judgments were capable, at least in theory, of overriding the jurisdictions of individual states in many areas over which they had previously taken themselves to enjoy an inviolable sovereignty.

Reflecting on these changes, a growing body of commentators began to suggest that the sovereign state was a concept that had simply had its day. This is already the thrust of Norman Angell's argument in *The Foundations of International Polity* in 1914. To treat the state as the basic unit of political analysis, he asserts, is hopelessly outdated and 'at variance with the facts'.¹⁰⁷ More recently, the decline and fall of the state has become a cliché of political theory.¹⁰⁸ No doubt this outcome has partly been due to the continuing growth of international organizations with authority to overturn the local jurisdictions of individual states. More significance, however, ought probably to be accorded to two further developments that are clear for all to see. One has been the rise of multinational corporations and other such agencies that, by controlling investment and employment, coerce individual states into accommodating their demands even when these may conflict with the social and economic priorities of the states concerned.¹⁰⁹ The other development has been the increasing acceptance of an overarching ideal of human rights. The European Court of Human Rights was established with express authority to override the local jurisdictions of member states if they could be shown to violate the European Convention on Human Rights adopted in 1950. More recently, some international legal theorists have gone so far as to argue that, in the name of securing such rights, it may be permissible to interfere, by military force if necessary, in the internal arrangements of purportedly sovereign states.¹¹⁰

These developments have convinced a growing number of commentators that the powers of individual states are in terminal decline. The state, we are told, is shrinking, retreating, 'fading into the shadows'.¹¹¹ As a result, the concept of the state is losing any significance in political

¹⁰⁶ Keefer 2006 and 2007. ¹⁰⁷ Angell 1914, p. xxviii.

¹⁰⁸ Bartelson 2001, pp. 77–113.

¹⁰⁹ For examples see Strange 1996, pp. 91–109, 122–79; Hertz 2001, pp. 40–61, 170–84.

¹¹⁰ See Tesón 1997; Wheeler 2000; Caney 2005, esp. pp. 231–46; for a survey see Weiss 2007.

¹¹¹ Strange 1996, pp. 82–7; Creveld 1999, pp. 420–1.

philosophy and the theory of international relations alike.¹¹² Frank Ankersmit has recently gone so far as to conclude that ‘now for the first time in more than half a millennium the State is on the way out’.¹¹³

VII

To trace the genealogy of the state is to discover that the concept has been a subject of continuous contestation and debate. Of late, however, we have chosen to confront this intellectual heritage in such a way as to leave ourselves astonishingly little to say about it. We seem largely content to reiterate that the term *state* is simply a way of referring to an established apparatus of government, and that such governments are of slight and diminishing significance in our newly globalized world.

This outcome strikes me as deeply unsatisfactory. One weakness of many recent discussions has arisen from their excessive eagerness to announce the death of the state.¹¹⁴ It is of course undeniable that individual states have forfeited many of the traditional attributes of sovereignty, and that the concept of sovereignty itself has to some extent become disjoined from its earlier associations with the rights of individual states.¹¹⁵ Nevertheless, the world’s leading states remain the principal actors on the international stage, and the ideal of humanitarian intervention has yet to be invoked in such a way as to challenge the sovereignty of any major state.¹¹⁶ Furthermore, such states remain by far the most significant political actors within their own territories.¹¹⁷ They have become more aggressive of late, patrolling their borders with increasing vigilance and maintaining an unparalleled level of surveillance over their own citizens. They have also become more interventionist, and in the face of their collapsing banking systems they have even proved willing to step forward as lenders of last resort. Meanwhile they continue to print money, to impose taxes, to enforce contracts, to engage in wars, to imprison and otherwise penalize their errant citizens, and to legislate with an unparalleled degree of complexity. To speak in these circumstances of the state as ‘fading into the shadows’ seems one-sided to the point of inattentiveness.

¹¹² See, for example, Creveld 1999; Hertz 2001, esp. pp. 18–37. For other writers who converge on this point see Bartelson 2001, p. 1n.

¹¹³ Ankersmit 2007, p. 36. ¹¹⁴ Bartelson 2001, pp. 149–81.

¹¹⁵ MacCormick 1999, pp. 123–56; Bellamy 2003; Prokhovnik 2007, esp. pp. 105–16, 183–246.

¹¹⁶ See the examples discussed in Tesón 1997, pp. 175–266; Wheeler 2000.

¹¹⁷ As Troper argues in Chapter 7 of this volume, there are even good reasons for remaining sceptical about the extent to which the institutions of the European Union have undermined the traditional sovereignty of member states.

Even if we agree, however, that the concept of the state remains indispensable to legal and political theory alike, we still need to ask whether it is sufficient to operate with what I have been calling the commonsensical account. What, if anything, has been lost as a result of the widespread repudiation of the earlier and more explicitly normative ways of thinking about the state that my genealogy has brought to light?

My own answer would be that, if we reflect on what I have been calling the absolutist and populist theories, it is hard to avoid the conclusion that they are nowadays of exclusively historical interest. If we turn, however, to the fictional theory, we come upon a way of thinking that ought never to have been set aside. As a number of legal and political theorists have begun to urge, we can scarcely hope to talk coherently about the nature of public power without making some reference to the idea of the state as a fictional or moral person distinct from both rulers and ruled.¹¹⁸ I should like to end by explaining why I agree that this element in our intellectual heritage stands in need of reappraisal and indeed of reinstatement.

We need to begin by recalling why the proponents of the fictional theory were so anxious to mark a categorical distinction between the apparatus of government and the person of the state. They had two connected reasons for this commitment. One was a desire to provide a means of testing the legitimacy of the actions that governments undertake. According to the fictional theory, the conduct of government is morally acceptable if and only if it serves to promote the safety and welfare of the person of the state, and in consequence the common good or public interest of the people as a whole.

There is admittedly an obvious objection to this line of thought, and it has been central to liberal political theory at least since the publication of John Rawls' *A Theory of Justice* in 1971. Rawls proclaims at the outset of his treatise that the first virtue of all social institutions is justice. The proper method of assessing the legitimacy of a state's actions must therefore be to ask whether they are fair or just. If we ask what justice requires, one inescapable part of the answer is that priority must be assigned to the rights of individuals over any attempt to promote such inclusive goals as the common good. 'Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.'¹¹⁹

It is arguably a weakness of this case, however, that it refuses to acknowledge that it may sometimes be necessary – especially in times of

¹¹⁸ See Runciman 1997, 2000, 2003; McLean 2003, 2005; cf. Bartelson 2001, pp. 149–81.

¹¹⁹ Rawls 1971, p. 3.

crisis – for the maintenance of individual rights to give way to broader notions of the public interest. One reason for wishing to reintroduce the fictional theory into the heart of our political discourse is to furnish us with a means not merely of testing the legitimacy of government conduct, but of vindicating the actions that governments are sometimes obliged to take in times of emergency. If there is a genuine national crisis, there must be a strong case for saying that the person whose life most urgently needs to be saved is the person of the state.

I turn finally to the other and more powerful reason for conceiving of public power in these terms. We need to be able to make sense of the claim that some government actions have the effect of binding not merely the body of the people but their remote posterity. Consider, for example, the case that Maitland took to be of exemplary significance: the decision of a government to incur a public debt.¹²⁰ Who becomes the debtor? We can hardly answer, in the manner of the populist theory, that the debt must be owed by the sovereign body of the people. If the debt is sufficiently large, the people will lack the means to pay it. But nor does it make any better sense to suggest in commonsensical terms that the debt must be owed by the government that incurred it. If the government changes or falls, this will have no effect in cancelling the debt.

By contrast, it seems a decisive reason for accepting the fictional theory of the state that it offers a coherent solution to this and several related puzzles. It does so by declaring that the only person sufficiently enduring to be capable of owning and eventually repaying such debts must be the person of the state. As a *persona ficta*, the state is able to incur obligations that no government and no single generation of citizens could ever hope to discharge. I would go so far as to say that, in the present state of contract law, there is no other way of making sense of such obligations than by invoking the idea of the state as a person possessed, in Hobbes' phrase, with an artificial eternity of life.¹²¹ We need to recognize that one reason why states are likely to remain powerful actors in the contemporary world is that they will outlive us all.

¹²⁰ My discussion is indebted to Maitland 2003, pp. 39–45, 70–1.

¹²¹ For further discussion see McLean 2003, esp. pp. 175–6, 178–83.