

BRITISH ACADEMY LECTURE

A Genealogy of the Modern State

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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.

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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.¹ 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 misconceived.² 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.³ 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.⁴

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.⁵ Of late this view has gained such widespread acceptance that in common parlance the words *state* and *government* have come to be virtually synonymous terms. 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 of the state free us to re-imagine the concept 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 lecture.

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

¹ Here I correct the argument in Skinner 2002, vol. 2, esp. pp. 394–5, in which I was still operating with the assumption that there is one distinctive concept of the modern state that historians can hope to uncover. For a critique see Goldie 2006, esp. pp. 11–19.

² But for a recent attempt see Morris 1998, esp. pp. 45–6. For a more pluralist approach see Vincent 1987.

³ Nietzsche argues that ‘only that which has no history is definable’. For this observation, and a discussion, see Geuss 1999, esp. pp. 13–14.

⁴ For further considerations along these lines see Geuss 1999, Bevir 2008, Krupp 2008.

⁵ 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.

the seventeenth centuries.⁶ This development was in large measure owed to the influence of scholastic discussions about *summa potestas*,⁷ together with the growing availability of French treatises on sovereignty⁸ and Italian manuals on ‘politics’ and reason of state.⁹ 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 recognised monarch or ruling group.

This is not to say that the word *state* was the one most commonly employed to describe the form of union underlying civil government. Some writers preferred to speak of the *realm*,¹⁰ some even spoke of the *nation*,¹¹ 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 word *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 emphasised the importance of being able *mantenere lo stato*,¹² 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’, how a prudent prince must ‘take the surest courses he can to maintaine his life and State’ and how rulers in general can ‘safely keep their State’.¹³

The same vocabulary had already become well-entrenched in the English language a generation earlier with the translation of a group of French treatises—by François de La Noue, Pierre La Place, Jacques Hurault and others—on the duties of councillors and other *officiers d’état*. If we turn, for example, to Arthur Golding’s version of Hurault’s

⁶ Here I underline Maitland 2003, p. 38.

⁷ Brett 1997; Höpfl 2004, pp. 186–223.

⁸ Skinner 1978, vol. 2, pp. 254–75.

⁹ Mattei 1979; Borelli 1993. For France see Thuau 2000; for England Baldwin 2004; Malcolm 2007, esp. pp. 30–73.

¹⁰ On the *realm*, see King James VI and I 1994, pp. 138, 189; Hayward 1603, Sig. J, 4^v; Sig. O, 3^v; Sig. R, 2^r. (The pagination of Hayward 1603 is muddled: hence I quote by signature.)

¹¹ On the *nation*, see Bodin 1962, 1. 2, p. 10; Hayward 1603, Sig. E, 1^r; Sig. O, 1^r; Downing 1634, pp. 9, 15; Ball 1642, pp. 4, 6.

¹² Hexter 1973, pp. 150–72.

¹³ Machiavelli 1640, pp. 139, 141, 169.

Trois livres, which appeared as *Politike, Moral and Martial Discourses* in 1595, we already find him writing about the state or standing of kings and cities,¹⁴ and about the best means for a prince to conduct himself if he wishes to guarantee 'the maintenance of his state'.¹⁵ Hurault criticises the emperor Augustus for acting with excessive ruthlessness 'for the better assuring of his state', and adds in denunciation of Machiavelli that a prince 'ought not to do any evill for the maintenance of his state'.¹⁶

If we consult the legal theorists of the same generation, we often find them talking in similar terms about the importance of maintaining one's state or standing as a prince.¹⁷ 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 a number of legal theorists began to describe this underlying *corpus politicum* as the state. The 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.¹⁸

For an illustration of these tendencies, we can hardly do better than turn to Jean Bodin's *Six livres de la république*, first translated into English as *The Six Bookes of a Common-weale* in 1606.¹⁹ At the beginning of Book I Bodin supplies a definition of what his translator, Richard Knollys, calls 'the Citie or state'.²⁰ 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'.²¹ To speak of a city or state, in other words, is to refer to a community of people who are subject to sovereign power. Bodin concedes that this power can be that of the people themselves, but he goes on to express a strong preference for monarchy over any other form of government. To institute a monarchy,

¹⁴ Hurault 1595, pp. 10, 182, 251.

¹⁵ Hurault 1595, p. 89.

¹⁶ Hurault 1595, pp. 85, 98.

¹⁷ Bodin 1962, 4.1, pp. 415–20; see also 2.6, p. 242; 3.7, p. 384; 6.6, p. 787.

¹⁸ On this transition see Mansfield 1996, pp. 281–94; Harding 2002, pp. 252–335; Skinner 2002, vol. 2, pp. 382–7.

¹⁹ For Bodin on the state see Franklin 1973; Franklin 1991; Skinner 1978, vol. 2, pp. 284–301, 355–6.

²⁰ Bodin 1962, 1. 2, p. 10.

²¹ Bodin 1962, 1. 2, p. 10.

as he later 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 allegiance to one soveraigne monarch’ as head of state.²² Correspondingly, the fact that their basic aim is to regulate their affairs means that their sovereign has a duty to care for ‘the health & welfare of the whole state’.²³ Princes and other governors have an obligation not to inconvenience but to protect both ‘the subjects in particular’ and ‘the whole bodie of the state’.²⁴

This way of thinking about the state (which I shall call the absolutist theory)²⁵ 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,²⁶ they insist that the act of submitting to government always involves what Suárez characterises as a ‘quasi-alienation’ of political rights.²⁷ This is precisely the line of argument we encounter in a work such as Matthew Kellison’s *Right and Jurisdiction of the Prelate, and the Prince* of 1621.²⁸ Kellison writes as a Catholic, anxious to vindicate the independent authority of the Church as ‘the most eminent state’.²⁹ Nevertheless, he is keen to acknowledge the right of kings to be regarded as absolute rulers within their own proper sphere. Explicitly invoking the authority of Bellarmine and Suárez,³⁰ he concedes that the power of any people to govern themselves must originally have resided in the community as a whole.³¹ As soon as they agree, however, to ‘make choice of a King’, the effect is that ‘the Communitie despoileth it selfe of authority’, and ‘giveth all power and Authority to the King’.³² His standing is now that of an absolute ruler over the entire body of the state.

²² Bodin 1962, 1. 8, p. 99.

²³ Bodin 1962, 1. 8, p. 97.

²⁴ Bodin 1962, 6. 4, p. 714.

²⁵ Here I follow Poggi 1978 and Vincent 1987, pp. 45–76.

²⁶ Höpfl 2004, pp. 204–17, 224–30.

²⁷ Suárez 1975, 3. 4. 2, p. 49: ‘non est delegatio sed quasi alienatio’. Cf. Höpfl 2004, pp. 248–62.

²⁸ On Kellison see Sommerville 1999, pp. 60–2.

²⁹ Kellison 1621, p. 87.

³⁰ Kellison 1621, p. 43.

³¹ Kellison 1621, pp. 43–4.

³² Kellison 1621, p. 46.

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, the best-known defender of divine right in early seventeenth-century England, begins his *Patriarcha*³³ by stigmatising as a dangerous heresy the belief that ‘mankind is naturally endowed and born with freedom from all subjection, and at liberty to choose what form of government it please’.³⁴ What this argument fails to recognise, Filmer responds, is that rulers receive their authority not from the people but directly from ‘the ordination of God himself’.³⁵ 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 talked in similar terms, especially when haranguing his Parliaments about the extent of his sovereign rights.³⁶ We find him assuring the two Houses in 1605 that ‘Kings are in the word of GOD it selfe called Gods, as being his Lieutenants and Vice-gerents’, and are endowed by God with absolute authority over their states.³⁷ He refers to the mass of people who are subject to sovereign power as ‘the body of the whole State’³⁸ and he describes the two houses of Parliament as ‘the representative body of the State’.³⁹ He later adds that, because all rulers are heads of state, it follows that ‘if the King want, the State wants, and therefore the strengthening of the King is the preservation and the standing of the State’.⁴⁰

The English writer of this period who speaks with the greatest confidence in this idiom is the Roman lawyer Sir John Hayward, who first presented his views about state power in his *Answer* to the treatise on popular sovereignty published by Robert Parsons in 1594.⁴¹ Hayward’s rebuttal appeared in 1603, adorned with an effusive dedication to King James I (‘most loved, most dread, most absolute’).⁴² After an apparently conces-

³³ Sommerville 1991*a*, pp. xxxii–iv shows that, although *Patriarcha* was not published until 1680, the manuscript was completed before 1631.

³⁴ Filmer, 1991, p. 2.

³⁵ Filmer 1991, p. 7.

³⁶ On James as an ‘absolutist’ see Sommerville 1991*b*, pp. 247–53 and Sommerville 1999, pp. 107–10, 227–30.

³⁷ King James VI and I 1994, p. 147.

³⁸ King James VI and I 1994, pp. 143, 145.

³⁹ King James VI and I 1994, pp. 147, 149.

⁴⁰ King James VI and I 1994, p. 195.

⁴¹ On Hayward see Levack 1988; Sommerville 1999, pp. 51–2, 68. On Roman law in England during this period see Levack 1981.

⁴² Hayward 1603, Sig. A, 3^r.

sive opening, Hayward declares that all authority comes not from the people but from God, so that even heathen rulers count as the Lord's anointed.⁴³ 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.⁴⁴ 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.⁴⁵

These arguments were 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 no less than civil affairs. Hayward also contributed to this debate, and is one of the first to describe this Erastian commitment as an argument about the proper relationship between 'church and state'. His *Report of 1607* on religious policy begins by reminding his readers, with a quotation from Bodin, that 'the rights of Sovereignty or of majesty' consist in 'an absolute and perpetuall power, to exercise the highest actions and affaires in some certaine state'.⁴⁶ He then declares that 'there is nothing in a Common-wealth of so high nature' as the care of religion, this being 'the onely meanes to knit and conserve men in mutuall societie'.⁴⁷ It is for this reason that it is indispensable to commit 'the government for matters of Religion, to the Sovereigne power and authoritie in the State'.⁴⁸ The regulation of religion is the most important means by which a sovereign can display his concern for the well-being of 'the whole body of the State'.⁴⁹

Perhaps the most extensive argument along these lines can be found in the work of another Roman lawyer, Calybutte Downing,⁵⁰ whose *Discourse of the State Ecclesiasticall* was first published in 1632.⁵¹ Downing agrees that the king of England is 'the supreme Sovereigne' and 'the Lords annoynted', exercising 'chieftly of power over the whole body

⁴³ Hayward 1603, Sig. G, 3^r.

⁴⁴ Hayward 1603, Sig. B, 3^v; Sig. H, 3^r; Sig. K, 2^v.

⁴⁵ Hayward 1603, Sig. B, 3^v; Bodin is cited to this effect at Sig D, 3^r.

⁴⁶ Hayward 1607, p. 6.

⁴⁷ Hayward 1607, p. 8.

⁴⁸ Hayward 1607, p. 14.

⁴⁹ Hayward 1607, p. 2.

⁵⁰ On Downing see Levack 1973, pp. 115–17, 187–8; Sommerville 1999, pp. 40–1.

⁵¹ Downing's treatise was reissued in an extended form in 1634; I quote from this version of his text.

of the Common-wealth'.⁵² He must therefore be recognised as 'supreme Civil head' over the ecclesiastical no less than 'the Civill State'.⁵³ 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'.⁵⁴

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 monarch to guide and control it. It is equally possible, they claim, for supreme power to be possessed by the union of the people. We accordingly find these writers using the term *state* to refer not to a passive and obedient 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 kings 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 alter-

⁵² Downing 1634, p. 49, 57, 69.

⁵³ Downing 1634, pp. 58, 68.

⁵⁴ Downing 1634, p. 46.

natively to the assembled bodies of their representatives, the effect was to give rise to a sharp distinction between *monarchies* and *states*.

One of the most influential of these taxonomies can be found in Jean Bodin's *Six Bookes of a Common-weale*. Bodin is of course no friend to popular states, and always insists that they are 'an enemy unto wisdom and good counsell'.⁵⁵ As we have seen, his own emphatic preference is for a type of monarchy in which the body of the state is wholly subject to a sovereign head. Nevertheless, in Book II of his *Six Bookes*, in which he lays out his classification of constitutions, he includes a lengthy chapter on 'popular estates'. These are polities, he explains, in which 'every citizen is in a manner partaker of the maiestie of the state'.⁵⁶ This leads him to introduce a categorical distinction between 'monarchies' and 'states', a distinction that subsequently echoes throughout his text.⁵⁷ We are told that 'in a popular estate nothing can be greater than the whole body of the people', whereas 'in a monarchie it is otherwise', for 'all the people in generall' swear allegiance to a single head of state.⁵⁸

If we return to the political anatomists, we find them making the same point in emphatic terms. Consider, for example, Edwin Sandys's *Relation* of 1605, in which he surveys the religious and constitutional arrangements prevailing in different parts of Europe.⁵⁹ Sandys consistently distinguishes between monarchies and 'states', reserving the latter term for those polities, especially in Italy, in which the people govern themselves.⁶⁰ The same is true of Giovanni Botero's *Le Relazioni Universali*,⁶¹ which was first translated as *Relations of the most famous kingdomes and commonwealths* in 1601, and thereafter appeared in many English versions in the early decades of the seventeenth century.⁶² When Botero turns to Switzerland, he describes it as 'a state popular, and subject to no one Prince',⁶³ and when he examines the constitution of the United Provinces he likewise calls it a state,⁶⁴ explaining that it is a community in which 'the

⁵⁵ Bodin 1962, 1. 8, p. 99.

⁵⁶ Bodin 1962, 1. 6, p. 60.

⁵⁷ Bodin 1962, 1. 8, p. 101; 2. 1, p. 196; 6. 2, pp. 653–4, etc.

⁵⁸ Bodin 1962, 1. 8, p. 99.

⁵⁹ On Sandys's *Relation* see Rabb 1998, pp. 21–46.

⁶⁰ Sandys 1605, Sig. N, 3^r; Sig. P, 2^v; Sig. S, 3^r.

⁶¹ On Botero's *Relazioni* see De Luca 1946, pp. 73–89.

⁶² 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.

⁶³ Botero 1630, p. 310.

⁶⁴ Botero 1630, pp. 200, 206.

people and citizens have so much voice and authoritie' that they are able to regulate their own affairs.⁶⁵

Everyone agreed that the most important contemporary example of such a state was Venice. Botero speaks about 'the State of Venice',⁶⁶ and mounts a comparison between its constitution and that of 'the Kingdome of France'.⁶⁷ Publishing his translation of Gasparo Contarini's *De magistratibus et republica Venetorum* in 1599, Lewes Lewkenor likewise describes the city as a commonwealth and as 'the state of Venice'.⁶⁸ Referring to the Venetian laws on citizenship, he adds that it is possible for foreigners to become naturalised 'if they have done the state some notable service'.⁶⁹ Othello recalls this arrangement when he draws attention to his own employment by the republic, proudly remarking that 'I have done the state some service'.⁷⁰

For many of these writers, there was a fine line between describing republican constitutions and celebrating the alleged superiority of such self-governing regimes. This preference was generally grounded on a view about how we can best hope to retain our natural freedom 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.⁷¹ If you wish to preserve your freedom under government, you must therefore ensure that you institute a political order in which no prerogative or discretionary powers are allowed. If and only if the laws rule, and you yourself give consent to the laws, can you hope to remain free from dependence on the will of your ruler, and consequently free from servitude. 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.

⁶⁵ Botero 1630, p. 206.

⁶⁶ Botero 1630, pp. 339–61.

⁶⁷ Botero 1630, p. 597.

⁶⁸ Contarini 1599, pp. 9, 18, 126, 138, 146.

⁶⁹ Contarini 1599, p. 18.

⁷⁰ Shakespeare 1988, *Othello*, 5. 2. 348, p. 853.

⁷¹ *Digest* 1985, 1. 6. 4, p. 18.

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.⁷² 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'.⁷³ 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'.⁷⁴ The body of the people no longer needed a head; they had taken possession of sovereignty themselves.

Livy's analysis was forcefully underlined when Thomas Heywood published his translation of Sallust in 1608. Sallust had prefaced his narrative of Catiline's conspiracy with a history of early Rome in which he had given an extraordinarily influential explanation of the city's rise to greatness. He had described 'how our Auncestors managed the state', in such a way that it 'increased and prospered' while remaining 'most just and excellent'.⁷⁵ The early Romans were able to achieve these results only after they repudiated the 'sole Sovereignty' of their kings and established a republic, thereby creating a 'forme of Liberty in Government'.⁷⁶ As soon as they instituted a regime in which 'the wisest and most sufficient spirits, were most employed in the affaires of the state', they rose at once to riches and power, so that 'by valor and Justice the state flourished'.⁷⁷ Civic glory and greatness, Sallust concludes, can be attained only by free citizens, and we can hope to live as free citizens only in a free state.

Among early-modern commentators, it was widely agreed that, in order to appreciate the continuing relevance of this argument, we need only revert to the case of Venice. Contarini notes that under its republican constitution 'every one is a citizen & freeman', and ends by suggesting that it is because of this 'equall temperature of government' that Venice has achieved her unparalleled greatness.⁷⁸ Thomas de Fougasses, whose *Generall historie of the magnificent state of Venice* first appeared in

⁷² Skinner 2002, vol. 2, pp. 308–43.

⁷³ Livy 1600, p. 44.

⁷⁴ Livy 1600, p. 54.

⁷⁵ Sallust 1608, Sig. B, 3^{r-v}; Sig. B, 4^r and Sig. C, 1^v. (The pagination of Sallust 1608 is muddled: hence I quote by signature.)

⁷⁶ Sallust 1608, Sig. B, 4^r.

⁷⁷ Sallust 1608, Sig. B, 4^v; Sig. C, 1^r.

⁷⁸ Contarini 1599, pp. 34, 146.

English in 1612, warmly endorses this judgement. Recalling the losses sustained by the republic in the early sixteenth century, he records that even Venice's nearest rivals wanted her to remain a free state, if only because they recognised that on her success 'depended the liberty of Italy'.⁷⁹

The rejection of monarchy implicit in this analysis was made fully explicit for English readers when several leading texts of Italian republicanism were translated in the early decades of the seventeenth century. Traiano Boccalini's *Ragguagli di Parnasso*, which appeared as *The new found politike* in 1626, not only satirises the monarchies of contemporary Europe, but ends with a series of orations in which a group of learned spokesmen vie with one another in praise of Venice.⁸⁰ What has enabled her citizens to maintain their freedom while helping their city to achieve such grandeur and fame? Everyone agrees that one key to Venice's success is that she has always remained a free state. For centuries her citizens have preserved the same republican constitution, and this has provided 'the true solid foundation, wheron their Greatnesse consisted most firmly built, & withall the eternitie of their Libertie'.⁸¹ Still more forthrightly, Edward Dacres's translation of Machiavelli's *Discorsi*, first published in 1636, makes Machiavelli declare that 'it is an easy thing to guesse, whereupon it is that people take such an affection to their liberty: because we see by experience, that cities have never bin much amplified neither in dominion nor riches unless onely during their liberty'.⁸² Most challengingly of all, Dacres's translation of Machiavelli's *Principe* in 1640 opens with the observation that 'All States, all Dominions' in the world 'are accustomed either to live under a Prince, or to enjoy their liberty'.⁸³ We are being told, in other words, that it is impossible to live in liberty under a prince. If you want freedom, you must live in a free state.

By this time, a second and yet more radical line of attack on the absolutist theory of the state had begun to emerge. The main inspiration for this development arose out of scholastic discussions about *summa potestas* and their adaptation by Huguenot publicists in the closing decades of the sixteenth century. As we have seen, the Schoolmen had generally argued that, when a body of people submits to government, the legal act they

⁷⁹ Fougasses 1612, vol. 2, p. 18; cf. vol. 2, pp. 149, 305.

⁸⁰ On Boccalini see Tuck 1993, pp. 101–3.

⁸¹ Boccalini 1626, p. 197.

⁸² Machiavelli 1636, 2. 2, p. 260.

⁸³ Machiavelli 1640, pp. 1–2.

perform is that of alienating their political rights. However, an influential minority had countered that, in the words of Jacques Almain, ‘the power in question is one that no independent community can ever abdicate’, in consequence of which the people must remain in possession of their original sovereignty at all times.⁸⁴ 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.⁸⁵

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—the 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 first English political theorist to lay out this exact line of argument was Henry Parker in the remarkable series of tracts he published in the early 1640s. During the previous decade, King Charles I had ruled without Parliament, meeting his fiscal needs by invoking the royal prerogative to impose general levies without parliamentary consent. Among the resulting impositions, one of the most controversial was Ship Money, which the crown began to collect not merely from seaports but from inland counties after 1635. When growing insolvency forced the king to recall Parliament in 1640, the exercise of this prerogative was one of the grievances immediately singled out by his adversaries. This was the moment at which Parker stepped forward, publishing *The Case of Shipmony* to coincide with the opening of the Long Parliament in November 1640 and subsequently extending his argument in his *Observations* of July 1642.⁸⁶

Parker opens his *Observations* by reflecting on the form of union underlying civil government. We are speaking, he says, about a *universitas* or ‘societie of men’, a ‘politique corporation’ with ‘its owne inherent puissance’.⁸⁷ Sometimes Parker describes this union as the nation and

⁸⁴ Almain 1706, col. 978: ‘Nulla Communitas perfecta hanc potestatem a se abdicare potest’. On Almain see Burns 1992, pp. 138–45; Skinner 2002, vol. 2, pp. 255–62.

⁸⁵ *Vindiciae, contra tyrannos* 1994, pp. 74, 78. For a discussion see Garnett 1994, pp. xxii–xxxi.

⁸⁶ On the start of Parker’s campaign see Mendle 1995, pp. 32–50; Skinner 2008, pp. 84–6.

⁸⁷ Parker 1642, pp. 1–2, 4. On Parker see Tuck 1993, pp. 227–33; Mendle 1995, pp. 70–89.

sometimes as the kingdom, but in *The Case of Shipmony* he already refers to it as the state.⁸⁸ Here and subsequently, he occasionally uses the same term to refer to the three States or Estates in Parliament. But in the *Observations* he also talks about ‘the whole State of England’ and ‘the whole body of the State’,⁸⁹ to which he adds that it is our ‘nationall union’ that makes us ‘a whole state’.⁹⁰

The key question for Parker is how political authority is disposed between crown and state. Turning to consider the nature of the authority in question, he sometimes refers to it as ‘dominion’ and sometimes as ‘supreme command’.⁹¹ But he also describes it as ‘soveraignty’ and ‘Soveraign Power’, the kind of power that enables ‘acts of soveraignty’ to be performed.⁹² Who, then, is the ultimate bearer of soveraignty? As he puts it at the end of his *Observations*, what is the share of the king, and what is the share of the state? (p. 41).⁹³

Parker’s negative answer is that soveraignty cannot possibly lie, as the royalists were contending, with the king as head of state. As he asserts at the outset of his *Observations*, soveraign power ‘is but secondary and derivative in princes’ (p. 2). 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 (p. 2). Parker’s positive answer is thus that the true bearer of soveraignty must be ‘the whole universality’ of the state (p. 44). ‘The King’, as he later summarises in his *Ius populi* of 1644, ‘is a servant to the State, and though far greater, and superiour then all particulars; yet to the whole collectively taken’, he is ‘a meer officer or Minister’ of state.⁹⁴

Parker readily concedes that the state can never hope to act on its own behalf. We are speaking of ‘so cumbersome a body’ that its movements cannot fail to be ‘distracted and irregular’ because of ‘the vastnesse of its owne bulke’ (pp. 14–15). This being so, its powers need to be exercised by others in its name, and in England these powers are normally exercised by the king in Parliament. However, the specific duty of Parliament is to check the arbitrary power of kings, thereby ensuring that the interests of the people are satisfied. If a king is misled by malignant counsellors,

⁸⁸ Parker 1642, pp. 9, 22, 31; cf. Parker 1640, pp. 16, 40.

⁸⁹ Parker 1642, pp. 29, 45.

⁹⁰ Parker 1642, p. 29.

⁹¹ Parker 1642, pp. 1, 37, 44.

⁹² Parker 1642, pp. 20, 42, 45.

⁹³ Here and hereafter, single-page references to Parker 1642 are given in the body of the text.

⁹⁴ Parker 1644, p. 25.

Parliament retains the right to act alone in the name of preserving the state. We may therefore say, as Parker ends by affirming, that in the last resort ‘the Sovereign Power resides in both Houses of Parliament’ (p. 45).

This revolutionary conclusion might appear to be inconsistent with Parker’s starting-point. He begins by announcing that sovereignty is the property of the people or state, but he ends by vindicating the sovereignty of Parliament, and it is evident from the organisation of his treatise that this is the conclusion in which he is chiefly interested. He is able, however, to save his consistency by introducing one further and deeply influential argument. The two houses of Parliament, he adds, constitute the representative body of the state, elected and entrusted to act in the name of the people as a whole (p. 10). But what gives the two houses their authority is that they offer at the same time a representation—an image or likeness—of the body politic so exactly proportionate, and hence so lifelike, that they ‘are to be accounted by the vertue of representation, as the whole body of the State.’⁹⁵ The reason why no danger attaches to entrusting sovereign power to Parliament is that ‘Parliament is neither one nor few, it is indeed the State it self’ (p. 34).

Parker’s final conclusion, although much hedged about, is thus that sovereignty ultimately resides with the body of the people, and that the name of this body politic is the state. As he summarises in *Ius populi*, ‘Parliament is indeed nothing else, but the very people it self artificially congregated, or reduced by an orderly election, and representation’, into a body ‘proportionable’ to ‘the rude bulk of the universality’.⁹⁶ As an image or representation of the state, Parliament ‘can have no interests different from the people’, and it is in virtue of this identity that it comes to hold ‘the supreme reason or Judicature of this State’.⁹⁷

Parker’s analysis had a visible impact on many other defences of Parliament at the outset of the English civil war.⁹⁸ One of the earliest restatements of his case can be found in *The unlimited prerogative of kings subverted* of November 1642. Like Parker, the anonymous author begins by speaking of ‘the whole body of the people’ as a unity that can be ‘considered together’.⁹⁹ This community was originally possessed of sovereign power, so that we may say that ‘the people are the originall of the power

⁹⁵ Parker 1642, pp. 23, 28, 45.

⁹⁶ Parker 1644, p. 18.

⁹⁷ Parker 1644, p. 19.

⁹⁸ Coffey 2006, pp. 76–96.

⁹⁹ *The unlimited prerogative of kings subverted* 1642, Sig. A, 2^v.

that is in Kings'.¹⁰⁰ Turning to the royalists, the author fastens on their contention that, if you cut off the King as 'head of the State', then 'you destroy the whole State together with Him'. This metaphor, he retorts, 'doth not hold good'. We ought to distinguish between 'a naturall head' and 'the civill Head of the State'. It is not true that 'if the head of the State be cut off, the State dies', for 'the whole power of all the body of the people' remains, and this body can readily choose for itself another head of state.¹⁰¹

Among the parliamentarians who endorsed this argument, perhaps the most prominent was William Bridge, who received a commission from the House of Commons to restate its case, and duly obliged in *The Truth of the Times Vindicated* in July 1643.¹⁰² Specifically invoking the authority of Jacques Almain and the author of the *Vindiciae*,¹⁰³ Bridge begins by reiterating that 'ruling power' was originally possessed by 'the whole people or body politicke', in consequence of which 'the authority of ruling in a Commonwealth' can only arise as a grant 'given by the people to him that ruleth'.¹⁰⁴ When speaking of this underlying community, Bridge usually refers to it as the commonwealth, but he also describes it as the state.¹⁰⁵ He adds that 'if the State be wronged and oppressed' by its ruler, it can always take back the power it mistakenly assigned to him.¹⁰⁶ Sovereign authority remains at all times a property of the whole body of the state.

IV

No sooner was the populist theory of the state put into circulation than it was vehemently denounced by royalists and absolutists of every stamp. Some defenders of Charles I's cause reverted to the claims put forward by his father, James I, in support of his divine right. When, for example, William Ball published his reply to Parker's *Observations* as *A Caveat for Subjects* in September 1642, he opened by insisting that political power is 'not inherent in the people' but is 'derived immediately from God' as 'the

¹⁰⁰ *The unlimited prerogative of kings subverted* 1642, Sig. A, 2^v.

¹⁰¹ *The unlimited prerogative of kings subverted* 1642, Sig. A, 3^r.

¹⁰² On Bridge see Nuttall 1957, esp. pp. 11–14.

¹⁰³ Bridge 1643, pp. 3, 5.

¹⁰⁴ Bridge 1643, pp. 4–5.

¹⁰⁵ See, for example, Bridge 1643, p. 14.

¹⁰⁶ Bridge 1643, pp. 15, 19.

author of all power.¹⁰⁷ The king of England must be recognised as a ‘form politicall’ in himself, a true possessor of sovereignty to whom his subjects owe ‘whole subjection & obedience’.¹⁰⁸ As head of state he ‘governeth and directeth the whole body’, and like every true sovereign he holds complete authority to maintain or alter the state.¹⁰⁹

By contrast with this intransigent response, a number of royalists attempted to meet the parliamentarians on their own ground. When John Bramhall published his line-by-line critique of Parker’s *Observations* as *The Serpent Salve* in 1643,¹¹⁰ he conceded that ‘Power is originally inherent in the People’, and thus that it can be lawfully held only by their ‘grant and consent’.¹¹¹ Turning to consider the ‘collected Body’ that underlies civil government, he first describes it as ‘the whole compacted Body Politicke of the Kingdome’, but later speaks of it as the ‘Body of the State’, and indeed as ‘the essentiall Body’ of the State.¹¹² He then proceeds, however, to reaffirm the scholastic orthodoxy that, when the people submit to government, the legal act they perform is that of ‘divesting’ themselves of their primitive sovereignty.¹¹³ As a result, when he confronts Parker’s conclusion that, in times of extremity, ‘the State hath an interest Paramount’ in preserving itself, he simply asks: ‘What State?’¹¹⁴ How can we have ‘any State in England without the King?’¹¹⁵ The question is purely rhetorical, for Bramhall takes himself to have shown that, as soon as the people alienate their sovereignty, their ruler becomes absolute head of ‘the whole Body’ of the state.¹¹⁶

There were other defenders of absolute sovereignty, however, who responded to the parliamentarians by laying out a very different theory of the state, a theory in which the relationship between subjects and sovereigns was conceptualised in unprecedented terms. The earliest work in which we encounter this development is Thomas Hobbes’s *Elements of Law*, which he completed and circulated in the spring of 1640. Among those who studied *The Elements* was Dudley Digges,¹¹⁷ who made

¹⁰⁷ Parker 1642, pp. 2–4.

¹⁰⁸ Ball 1642, p. 16.

¹⁰⁹ Ball 1642, pp. 6, 8.

¹¹⁰ On Bramhall’s ‘moderate royalism’ see Daly 1971; Smith 1994, pp. 220–3.

¹¹¹ Bramhall 1643, pp. 6, 14.

¹¹² Bramhall 1643, pp. 17, 21, 89.

¹¹³ Bramhall 1643, pp. 14, 23.

¹¹⁴ Bramhall 1643, p. 171.

¹¹⁵ Bramhall 1643, p. 171.

¹¹⁶ Bramhall 1643, p. 21.

¹¹⁷ On Digges see Tuck 1993, pp. 274–8; Smith 1994, pp. 223–6.

extensive use of it in his *Unlawfulness of Subjects taking up Armes* in 1644.¹¹⁸ Digges explicitly denounces Parker, Bridge and other parliamentarians,¹¹⁹ to whom he replies with a strikingly Hobbesian account of how a multitude can institute the kind of civil union that makes ‘the essence and being of a State’.¹²⁰ For the definitive presentation of Hobbes’s argument, however, we must turn to his *Leviathan* of 1651, in which he informs us at the outset that, in putting forward his theory of public power, he plans to speak ‘not of the men’ but ‘in the Abstract’ about the nature of the COMMON-WEALTH or STATE.¹²¹

Hobbes opens his analysis by reflecting on what he describes in chapter 13 of *Leviathan* 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 everyone else, subsisting as a mere multitude in a state of solitude in which ‘every man is enemy to every man’.¹²² Turning directly to the parliamentary theorists—and addressing them in his most sarcastic tones—Hobbes adds that there is therefore ‘little ground for the opinion’ of those who say that sovereign kings are ‘of lesse power’ than the body of the people. Since there is no such thing as the body of the people, the argument is simply absurd.¹²³

Hobbes is no happier, however, with the absolutists and their rival theory according to which the proper relationship between the people and their rulers can only be that of a passive and obedient body to a sovereign head of state. His own view is that the individual members of the multitude have a continuing and indispensable role to play in the conduct of government. He fully endorses the parliamentary belief that the only mechanism by which lawful regimes can be brought into existence is ‘by the consent of every one of the Subjects’, each one of whom must give authority ‘from himselfe in particular’ to the holders of sovereign

¹¹⁸ For quotations from *The Elements in The Unlawfulness* see Digges 1644, pp. 3, 4, 7, 31–4.

¹¹⁹ See, for example, Digges 1644, pp. 62, 64, 85, 121, 129.

¹²⁰ Digges 1644, pp. 14, 32, 64–5.

¹²¹ Hobbes 2008, Epistle Dedicatory, p. 3; Introduction, p. 9.

¹²² Hobbes 2008, ch. 13, pp. 89–90.

¹²³ Hobbes 2008, ch. 18, p. 128.

power.¹²⁴ To which he adds that, even after the members of a multitude have subjected themselves to a designated sovereign, they remain the ‘authors’ of whatever actions may subsequently be performed by those to whom sovereignty has been assigned.¹²⁵

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 as God’s vicegerents on earth. He always maintains that the status of even the most absolute monarch can never be higher than that of an authorised representative. When he refers to Charles I in *Leviathan*, he describes him as the ‘absolute Representative’ of his people, making it clear that he takes him to be the holder of an office with specific duties attached.¹²⁶ Furthermore, he gives an exacting account of the duties involved, devoting the whole of chapter 30 to this theme. As he had already made clear in explaining the political covenant, he assumes that we can never be expected to submit to sovereign power unless we believe that the outcome will be a more peaceful and settled way of life than we could hope to lead in the state of nature. But if that is so, then the sovereign to whom we submit ourselves must incur a corresponding obligation to act in such a way as ‘to produce the Peace, and Security of the people’.¹²⁷ It is true that, because all sovereigns are by definition absolute, they cannot be punished or removed from office if they behave iniquitously.¹²⁸ When they do so, however, they are in clear dereliction of their duty, which requires them to aim at all times ‘to procure the common interest’ by conducting their government in a manner ‘agreeable to Equity, and the Common Good’.¹²⁹

As well as registering these objections to prevailing theories of the state, Hobbes lays out his own rival theory at the same time. As we have seen, his basic contention is that no lawful sovereign can be said to enjoy a status any higher than that of an authorised representative. This is not a claim he had explicitly formulated in *The Elements of Law* or *De cive*, but in *Leviathan* he inserts a new chapter—Chapter 16—in which he unfolds an intricate analysis of what it means for someone to represent someone else.¹³⁰ He begins without preamble as follows:

¹²⁴ Hobbes 2008, ch. 16, p. 114; ch. 28, p. 219; cf. ch. 21, p. 150.

¹²⁵ Hobbes 2008, ch. 16, p. 114; ch. 17, p. 120.

¹²⁶ Hobbes 2008, ch. 19, pp. 130–1.

¹²⁷ Hobbes 2008, ch. 19, p. 131.

¹²⁸ Hobbes 2008, ch. 18, p. 124.

¹²⁹ Hobbes 2008, ch. 19, p. 131; ch. 24, p. 171.

¹³⁰ For Hobbes on representation see Pitkin 1967, pp. 14–37; Jaume 1986; Skinner 2007.

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*.¹³¹

Hobbes is telling us 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. He adds that this analysis holds good even if the words and actions in question cannot ‘truly’ be attributed to the person being represented, but only by a fiction of the law.

With this exposition, Hobbes arrives at a question that no earlier theorist of the state had been obliged to confront. If sovereigns are representatives, whom do they represent? To understand Hobbes’s answer, we need to begin by attending to his distinctive account of the political covenant.¹³² As we have seen, he denies that such an agreement 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. As Hobbes explains, it is as if everyone agrees with everyone else that some particular person—a man or assembly—shall have the right to speak and act in their name. The formula in which the covenant is expressed is accordingly said to be as follows: ‘*I authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner.*’¹³³

But what does it mean to *authorise* a representative? Hobbes has already given 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

¹³¹ Hobbes 2008, ch. 16, p. 111.

¹³² 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 works out his theory of authorisation and representation, which is why I concentrate on ‘government by institution’ in what follows.

¹³³ Hobbes 2008, ch. 17, p. 120.

words and actions, is the AUTHOR: In which case the Actor acteth by Authority.¹³⁴

Here Hobbes is telling us that, when we authorise a representative, we must be willing to regard ourselves as the ‘owners’ of whatever is subsequently said or done by the person representing us. The reason is that, by our act of authorisation, 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.¹³⁵

With this analysis Hobbes arrives at his central contention about the implications of covenanting. When we agree to authorise 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 summarises, ‘a Multitude of men, are made One Person, when they are by one man, or one Person, Represented’.¹³⁶ The effect is to produce ‘a reall Unitie of them all, in one and the same Person, made by Covenant of every man with every man.’¹³⁷

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 authorising a man or assembly to serve as our representative. The name of this further person, Hobbes next proclaims in an epoch-making moment, is the Common-wealth or State.¹³⁸ ‘The Multitude so united in one Person, is called a COMMON-WEALTH’,¹³⁹ and another name for a commonwealth is a CIVITAS or STATE.¹⁴⁰

¹³⁴ Hobbes 2008, ch. 16, p. 112.

¹³⁵ For Hobbes on authorisation see Gauthier 1969, pp. 120–77; Baumgold 1988, pp. 36–55; Skinner 2007.

¹³⁶ Hobbes 2008, ch. 16, p. 114.

¹³⁷ Hobbes 2008, ch. 17, p. 120.

¹³⁸ For further discussion see Tukiainen 1994; Skinner 1999.

¹³⁹ Hobbes 2008, ch. 17, p. 120.

¹⁴⁰ Hobbes 2008, Introduction, p. 9 and ch. 17, p. 120.

We are now in a position to solve the puzzle raised by Hobbes's initial contention that all lawful sovereigns are merely representatives. Whom do they represent? Hobbes's answer is that they represent the state.¹⁴¹ Summing up at the end of chapter 17, he accordingly declares that the commonwealth or state can actually be defined as '*One Person, of whose Acts a great Multitude, by mutuall Covenants one with another, have made themselves every one the Author*', while the sovereign is the name of the man or assembly that 'bears' or 'carries' the person of the state.¹⁴²

Hobbes is emphatic that the state is a person distinct from both rulers and ruled. He gives it a name of its own, announcing that what he has been describing is 'the Generation of that great LEVIATHAN'.¹⁴³ He subsequently explains how the state can hope to live a secure and healthy life,¹⁴⁴ and devotes a whole chapter to examining its distinctive diseases and the dangers attendant on its death.¹⁴⁵ 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. Hobbes concedes that no state can be immortal,¹⁴⁶ and he takes himself to have witnessed the death of the English state in his own time.¹⁴⁷ Nevertheless, he insists that the fundamental aim of those who institute a state will always be to make it live 'as long as Mankind', thereby establishing a system of 'perpetuall security' that they can hope to bequeath to their remote posterity.¹⁴⁸

The state is admittedly fragile, and in the absence of a sovereign is 'but a word, without substance, and cannot stand'.¹⁴⁹ Not only is it incapable of acting in its own name, but it is incapable of authorising anyone else to act on its behalf. It is capable of speech and action only because the individual members of the multitude have authorised someone to represent it. To express the point in the terminology introduced at the start of

¹⁴¹ Jaume 1983; Skinner 1999; Loughlin 2003, pp. 58–64.

¹⁴² Hobbes 2008, ch. 17, p. 121.

¹⁴³ Hobbes 2008, ch. 17, p. 120.

¹⁴⁴ Hobbes 2008, ch. 29, p. 221.

¹⁴⁵ Hobbes 2008, ch. 29, pp. 221–30.

¹⁴⁶ Hobbes 2008, ch. 21, p. 153.

¹⁴⁷ Hobbes 2008, ch. 29, p. 230.

¹⁴⁸ Hobbes 2008, ch. 19, pp. 135, 221.

¹⁴⁹ Hobbes 2008, ch. 31, p. 245.

chapter 16, the state is thus a person ‘by fiction’.¹⁵⁰ It is never ‘truly’ the case that it performs actions and takes responsibility for them.¹⁵¹ The only person who ever truly acts in such circumstances is the artificial person of the sovereign, whose specific role is to ‘personate’ the fictional person of the state.¹⁵²

Nevertheless, it would be a grave mistake according to Hobbes to dismiss the importance of the state on the grounds of its merely fictional character. This would be to forget that, when an authorised representative speaks or acts in the name of someone else, the words or actions of the representative are *attributed* to the person being represented.¹⁵³ As a result, even persons by fiction are capable of acting as powerful agents in the real world. Hobbes offers as an example the heathen gods of antiquity. They never amounted to anything more than a ‘Figment of the brain’. But because they were represented by priests, they were capable not merely of performing actions but of holding possessions and enjoying legal rights.¹⁵⁴

As soon as we grasp the concept of an attributed action, it is easy in Hobbes’s view to appreciate how it comes about that the person of the state, in spite of its fragile and essentially fictional character, can nevertheless be a figure of unsurpassable force and might. When the members of a multitude covenant to institute a sovereign, they assign him the fullest possible powers to act for the common good.¹⁵⁵ But the sovereign upon whom these powers are conferred is merely ‘personating’ the state: whatever actions he performs in his official capacity are always attributed to the state and count as actions of the state. It is therefore the person of the state who must be regarded as the true possessor of sovereignty. If we ask who makes the laws and enforces obedience, Hobbes’s answer is that these are the powers of the state. ‘The Common-wealth only, praescribes, and commandeth the observation of those rules, which we call Law’, so that ‘the name of the person Commanding’ is *Persona Civitatis*, the person of the state.¹⁵⁶

¹⁵⁰ Here I accept the criticism in Runciman 2000 of my formulation in Skinner 1999.

¹⁵¹ Hobbes 2008, ch. 16, p. 113.

¹⁵² Hobbes never speaks in *Leviathan* of bodies politic as fictitious, but in *The Elements of Law* he uses this precise term. See Hobbes 1969, 21. 4, p. 120.

¹⁵³ Hobbes 2008, ch. 16, p. 111.

¹⁵⁴ Hobbes 2008, ch. 16, p. 113.

¹⁵⁵ Hobbes 2008, ch. 17, p. 120.

¹⁵⁶ Hobbes 2008, ch. 26, pp. 183, 184.

As with the other theories of the state I have examined, Hobbes's 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 recognised 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.¹⁵⁷ The first is that they must be undertaken by a sovereign—whether a man or assembly—duly authorised 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.¹⁵⁸

V

Hobbes's fictional theory had little immediate impact on English political debate.¹⁵⁹ During the constitutional crisis of 1679–81, when the Whigs attempted to exclude the heir presumptive from the throne, they mainly sought to legitimise their renewed attack on the Stuart monarchy by reviving and consolidating the populist theory of the state.¹⁶⁰ Meanwhile their Tory opponents defended the crown by reviving Sir Robert Filmer's patriarchalism,¹⁶¹ and more generally by reverting to the absolutist claim that the king must be recognised as the God-given head of the passive and obedient body of the state.¹⁶²

¹⁵⁷ Hobbes 2008, ch. 24, pp. 171–2; ch. 30, pp. 239–40.

¹⁵⁸ Hobbes 2008, ch. 17, p. 120; ch. 19, p. 131; ch. 24, p. 171; ch. 30, pp. 239, 241.

¹⁵⁹ Parkin 2007, pp. 334–44, 361–77 reports a largely hostile reception, with no specific discussions of Hobbes's theory of the state.

¹⁶⁰ See, for example, Algernon Sidney's *Discourses Concerning Government* (1990), partly drafted at the time of the Exclusion Crisis and first published in 1698. The *Discourses* include a series of invidious comparisons between monarchies and republics or 'states' (pp. 211–12, 248–9, 269, 467, 512) which are also described as 'popular states' and as 'free states' (pp. 262, 270, 391). For a discussion see Houston 1991, pp. 101–45.

¹⁶¹ Laslett 1988, pp. 51–2, 57–9, 67–71; Houston 1991, pp. 89–98. For Filmer on the state see Filmer 1991, pp. 26, 30, 31–2.

¹⁶² Houston 1991, pp. 69–98.

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. Hobbes had owed an evident debt to a body of Continental treatises on corporations as *personae fictae*,¹⁶³ and this may help to account for the fact that his view of the state essentially as an instance of such a corporation so readily commended itself to Dutch and German legal theorists, accustomed as they were to thinking in terms of federal states.¹⁶⁴ Towards the end of the seventeenth century, many of these writers began to draw on Hobbes's analysis in formulating their own views about the *ius gentium*, thereby initiating the assimilation of his theory into the mainstream of Continental juristic thought.

Hobbes's own statement of the fictional theory began to circulate more widely after Abraham van Berkel published his Dutch translation of *Leviathan* in 1667, and especially after Hobbes produced his own Latin version in 1668.¹⁶⁵ The first major philosopher to draw heavily on Hobbes's account was Samuel Pufendorf in his *De iure naturae et gentium* of 1672,¹⁶⁶ in which he discussed the concept of the *civitas* as a *persona moralis* at length.¹⁶⁷ Due in large part to Pufendorf's influence, similar discussions soon appeared in such works as Johann Christian Becmann's *Meditationes politicae* of 1674¹⁶⁸ and Ulric Huber's *De iure civitatis* of 1684.¹⁶⁹ Huber mounts a particularly extensive examination of Hobbes's contention that the *civitas* itself is the possessor of *Imperium*,¹⁷⁰ and his own definition basically endorses Hobbes's account.¹⁷¹

Soon afterwards, Pufendorf's adaptation of Hobbes's fictional theory became widely known in France through the work 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 1706.¹⁷² Although Barbeyrac criticises both Hobbes and Pufendorf, his translation gave further currency to the claim that the union which brings civil associations

¹⁶³ See Skinner 2002, vol. 2, pp. 391–2 on Althusius, Werdenhagen and other writers on corporations as *personae*.

¹⁶⁴ Hobbes relates his theory to this tradition in Hobbes 1969, 27. 7, pp. 172–4.

¹⁶⁵ Malcolm 2002, pp. 459, 465.

¹⁶⁶ For Pufendorf's dependence on Hobbes see Palladini 1990.

¹⁶⁷ Pufendorf 1672, esp. 7. 2. 13–14, pp. 886–8.

¹⁶⁸ On Becmann see Malcolm 2002, pp. 525–7.

¹⁶⁹ Huber first published his treatise in 1673; the 1684 edition, from which I quote, is much revised. For the printing history see Malcolm 2002, p. 526 n.

¹⁷⁰ Huber 1684, pp. 9–17.

¹⁷¹ Huber 1684, p. 29: 'Voluntas autem una ista nihil est aliud quam *Imperium Civitatis*'.

¹⁷² On Barbeyrac's translation see Othmer 1970, pp. 124–34.

into existence is formed when a number of individuals join together into a single '*Personne Morale*',¹⁷³ and that the name of this *Personne* is *l'Etat*.¹⁷⁴ Thereafter we find the same view taken up in France by such jurists as François Richer d'Aube in his *Essais* of 1743¹⁷⁵ and Martin Hubner in his *Essai sur l'histoire du droit naturel*, which first appeared in London in 1757.¹⁷⁶ Hubner is fiercely critical of Hobbes's views about the state of nature,¹⁷⁷ but he fully accepts that the effect of the political covenant is to create a *personne morale* which becomes the bearer of sovereignty.¹⁷⁸ Of all these restatements, however, by far the most influential was that of Emer de Vattel in *Le droit des gens* of 1758. Vattel is likewise critical of many of Hobbes's assumptions, and roundly condemns him for his numerous detestable maxims and paradoxes.¹⁷⁹ But he too 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.¹⁸⁰

This process of assimilation may be said to have begun with the publication of White Kennett's translation of Barbeyrac's edition of Pufendorf in 1717.¹⁸¹ When Pufendorf turns to the question of political association in Book VII, Kennett's translation¹⁸² makes him speak of 'the civil state' and 'the inward Structure and Constitution of Civil States'.¹⁸³ 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.¹⁸⁴ 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's account:

¹⁷³ Pufendorf 1706, 7. 2. 6, vol. 2, p. 204.

¹⁷⁴ Pufendorf 1706, 7. 2. 8, vol. 2, p. 206: 'cette union & cette soumission de volontez, qui acheve de former l'Etat, & en fait un Corps, qu l'on regarde comme une seule Personne'.

¹⁷⁵ On Richer d'Aube see Glaziou 1993, pp. 62–3.

¹⁷⁶ On Hubner see Glaziou 1993, pp. 65–7.

¹⁷⁷ Hubner 1757–8, vol. 2, pp. 150–68.

¹⁷⁸ Hubner 1757–8, vol. 2, pp. 206–8. It is arguable, however, that in this passage Hubner assimilates sovereign and state.

¹⁷⁹ On Vattel as critic of Hobbes see Glaziou 1993, pp. 64–5.

¹⁸⁰ Jouannet 1998; Beaulac 2003, esp. pp. 254–60.

¹⁸¹ Or perhaps, as argued in Saunders and Hunter 2003, with the publication of Andrew Tooke's translation of Pufendorf's abridgment of *De iure naturae* in 1691.

¹⁸² The translation of Book 8 appears, however, to have been the work of William Percivale, although he is not credited in the edition of 1717.

¹⁸³ Pufendorf 1717, p. 465.

¹⁸⁴ Pufendorf 1717, p. 475, cols. 1–2. For discussion see Denzer 1972, esp. pp. 185–8; Wyduckel 1996.

The most proper Definition of a Civil State seems to be this, It is a compound Moral Person, whose Will, united and tied together by those Covenants which before pass'd among the Multitude, is deem'd the Will of all; to the End, that it may use and apply the Strength and Riches of private Persons towards maintaining the common Peace and Security.¹⁸⁵

This pivotal passage is little more than a quotation from Hobbes's definition of the state in chapter 17 of *Leviathan*.

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. 'The State in exerting and exercising its Will' is obliged to 'make use' of a single person, and in doing so 'the State is supposed to chuse and desire whatever that one Man (who is presumed to be Master of perfect Reason,) shall judge convenient; in every Business or Affair, which regards the End of Civil Government'.¹⁸⁶ We may therefore say of such monarchs that, when they exercise their 'publick Will', they are 'representing the Will of the State'.¹⁸⁷ As Pufendorf later adds, echoing another of Hobbes's key concepts, this is how it comes about that the actions performed by sovereigns in their public capacity are actions 'which we attribute to the State'.¹⁸⁸

Pufendorf is emphatic that anyone—whether an individual or an assembly—who has been instituted to represent the person of the state is thereby endowed with irresistible sovereignty.¹⁸⁹ 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.¹⁹⁰ 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

¹⁸⁵ Pufendorf 1717, p. 475, col. 2.

¹⁸⁶ Pufendorf 1717, p. 476, col. 1.

¹⁸⁷ Pufendorf 1717, p. 476, col. 1.

¹⁸⁸ Pufendorf 1717, p. 491, col. 1.

¹⁸⁹ Pufendorf 1717, p. 517, cols. 1–2.

¹⁹⁰ Pufendorf 1717, p. 569, col. 1; p. 571, col. 1.

perpetual Advantages, to be derived from the present Establishment, upon their Children and their whole Posterity.¹⁹¹

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 sovereign states, and accordingly begins by analysing the concept of the state itself.¹⁹² 'States', he lays down, 'are bodies politic, societies of men united together to procure their mutual safety and advantage' (p. 1).¹⁹³ As a union of individuals, the state is the name of a distinct 'moral person' possessed of 'an understanding and a will peculiar to itself' (p. 1). 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*' (p. 10).¹⁹⁴

After these preliminaries Vattel turns to the substance of Book 1, the opening chapter of which is entitled 'Of Nations or sovereign States'. He begins by conceding 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. When a nation resolves to keep this authority in its own hands, the result is a democracy, whereas 'if it confides the government to a single person, the state becomes a monarchy' (p. 10). As soon as one particular form of government has been instituted, the bearer of sovereignty is invested with the highest powers 'of commanding whatever relates to the public welfare' (p. 21). These powers belong, 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' (p. 19). Vattel enjoins them to remember that 'it does not debase the dignity of the greatest monarch to attribute to him this representative character', for no higher status can ever be enjoyed by the ruler of any lawfully constituted state (p. 21).

¹⁹¹ Pufendorf 1717, p. 481, col. 1.

¹⁹² On Vattel's use of the term *state* in discussing the *ius gentium* see Beaulac 2003.

¹⁹³ Here and hereafter, references to Vattel 1760 are given in the body of the text.

¹⁹⁴ On the specific context in which Vattel formulated this principle see Toyoda 2009.

All sovereigns are instituted, in other words, with a duty to promote the welfare of the person whom they represent, the person of the state. 'A good prince, a wise conductor of society, ought to have his mind impressed with this great truth, that the sovereign power is solely intrusted to him for the safety of the state' (p. 20). Sovereigns come and go, but the person of the state endures, which is why its interests must be given the highest priority. As Vattel summarises in his remarkable chapter on the duties that nations owe to themselves, the fundamental aim in civil association is 'to prevent, and carefully to avoid whatever may hinder the perfection of the people, and that of the state', and to pursue this policy 'throughout the duration of the political association' they have formed (pp. 12, 14). Like Pufendorf, he 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's political works to be issued in England since the publication of *Leviathan* a century before.¹⁹⁵ Among the lawyers drawn to Hobbes's theory, none enjoyed a higher reputation than Sir William Blackstone, who incorporated its basic tenets into his introductory essay 'Of the Nature of Laws in general' in the first volume of his *Commentaries on the Laws of England* in 1765.¹⁹⁶ Blackstone opens in Hobbesian vein by insisting that it makes no sense to treat the body of the people as a natural collectivity. 'The only true and natural foundations of society are the wants and the fears of individuals' (p. 47).¹⁹⁷ The problem thus raised, however, is that 'inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any *natural* union be joined together' in such a way as to produce 'one uniform will of the whole' (p. 52). The only solution is to institute what Blackstone calls a '*political* union' of the multitude. As he explains—in a virtual quotation from *Leviathan*—everyone must agree 'to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority is entrusted', thereby enabling them to act as a single

¹⁹⁵ Hobbes 1750.

¹⁹⁶ For Blackstone on law and the English state see Cairns 1984; Lieberman 1989, pp. 31–67.

¹⁹⁷ Here and hereafter, references to Blackstone 1765 are given in the body of the text.

person or (as Blackstone prefers to put it) as if they are ‘one man’ with ‘one uniform will’ (p. 52).

To this argument Blackstone adds, in a passage yet more reminiscent of Hobbes, that the name of this political union is the state. ‘For 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’ (p. 52). The distinguishing mark of sovereignty—that of having 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’ (p. 49). The ‘supreme power’ is always ‘the power of making laws’, and this power is always that of the state (p. 52).

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. This is not to say that this way of thinking about the state was no longer contested. Even after the revolution of 1688 the absolutist theory remained a powerful weapon in the hands of such unyielding defenders of divine right as Henry Sacheverell and Charles Leslie.¹⁹⁸ Leslie in particular repeatedly challenged the Whigs with an account of the English constitution grounded on the claim that the ‘Original Institution’ of government is invariably the work of God alone. One sign of God’s providence, Leslie unrepentantly maintains, is that he grants supreme and unquestionable power immediately to kings as absolute heads of state.¹⁹⁹

During the next generation, we also encounter a widespread reassertion of what I have been calling the populist theory of the state. According to such leading supporters of the American revolution as Tom Paine and Richard Price, the only type of civil association in which it is possible to live freely as a citizen is a self-governing community in which sovereignty is possessed by the people as a whole. This commitment leads Price to declare that, as he puts it at the outset of his *Observations* in 1776, when we speak of a lawful state we can only be referring to the sovereign

¹⁹⁸ Schochet 1975, pp. 192–224.

¹⁹⁹ Leslie 1709, pp. 56–7, 74.

power of ‘the collective body of the people’.²⁰⁰ ‘The will of the state’, he repeats in *Additional Observations*, is equivalent to the general will of the community, ‘the will of the whole’.²⁰¹ Judged by this criterion, the American colonists are living in slavish dependence on the British crown, in consequence of which they have a natural right to liberate themselves from their unnatural condition of servitude and establish their own free state.

Nevertheless, the rival conception of the state as the name of a distinct moral person attained an almost hegemonic standing in the Enlightenment, and subsequently became embedded in the public law of several major European countries, most notably Germany and France. Hegel’s theory of the *Rechtsstaat* draws on it, as does Gierke’s account of the real personality of groups, while in France the image of the state as a *personne morale* became the subject of an extensive legal literature.²⁰² It would not be too much to say that the fictional theory was one of the most important legacies of the Enlightenment to the political theory of Continental Europe in the course of the nineteenth century and beyond.

Towards the end of the eighteenth century, however, the English branch of the genealogy I have been tracing began to ramify in a strongly contrasting way.²⁰³ No sooner had Blackstone introduced the fictional theory to a broad English readership than it 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 distinct legal person 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 in the closing decades of the eighteenth century, and in particular with the reforming jurisprudence of Jeremy Bentham. Bentham’s earliest published work, his *Fragment on Government* of 1776, takes the form of a scornful and vituperative critique of precisely those sections of Blackstone’s *Commentaries* to which I have already referred.²⁰⁴ Launching his tirade, Bentham announces that ‘the season of *Fiction* is now over’,²⁰⁵ and that the time has

²⁰⁰ Price 1991, p. 22.

²⁰¹ Price 1991, p. 76.

²⁰² For a note on this literature see Maitland 2003, p. 71 n.

²⁰³ For this contrast see Dyson 1980. The idea of the state as a non-corporeal body can still be found in the late eighteenth century. See Ihalainen 2009, esp. pp. 34–5. On the subsequent loss of the concept see Dow 2008.

²⁰⁴ For Bentham on Blackstone see Burns 1989; Schofield 2006, pp. 51–7.

²⁰⁵ Bentham 1988, p. 53.

come to ground legal arguments on observable facts about real individuals, especially on their capacity for experiencing, in relation to political power, the pain of restraint and the pleasure of liberty.²⁰⁶ 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.²⁰⁷

Bentham's purported demystification leaves him with nothing to say about the state except that, if the term has any meaning at all, it can only refer to some actual body of persons in charge of some identifiable apparatus of government. This is what he finally tells us towards the end of his *Introduction to the Principles of Morals and Legislation* of 1789 when he turns to consider 'offences against the state'. Here he lays it down that what it means to have a *state* is simply to have 'particular persons invested with powers to be exercised for the benefit of the rest'. If there were no such persons equipped with such powers 'there would be no such thing as a *state*'.²⁰⁸

Bentham's repudiation of legal fictions exercised 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 reductionist account. A classic instance is provided by John Austin's lectures on *The Province of Jurisprudence Determined* of 1832.²⁰⁹ 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'.²¹⁰ Later we find the same view summarised—along with so much else in the utilitarian creed—by Henry Sidgwick in his *Elements of Politics* of 1891. Sidgwick explicitly denies that the bond of union underlying the state can be anything other than an agreement by a number of individuals to obey the same laws, and accordingly describes the state as nothing more than an apparatus of government empowered to command the exclusive allegiance of those living under it.²¹¹

²⁰⁶ Schofield 2006, pp. 32–44.

²⁰⁷ Bentham 1988, p. 113. For Bentham on fictions see Schofield 2006, pp. 14–27, 74–7.

²⁰⁸ Bentham 1996, 17.1.18, p. 292.

²⁰⁹ On Austin and Bentham see Lobban 2007, pp. 173–87.

²¹⁰ Austin 1995, p. 190 n.

²¹¹ Sidgwick 1897, p. 221.

It is true that by this time a reaction had set in against these purely reductionist accounts. During the closing decades of the nineteenth century 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. One aspect of this development took the form of an attempt to treat the state as part of a more general theory of corporations. The legal theorist who did most to reanimate this argument was F. W. Maitland, who had begun life as a pupil of Sidgwick's at Cambridge. Drawing on Otto von Gierke's magisterial treatise on the history of group personality (part of which he translated) Maitland went on to publish a series of classic articles in which he bewailed the gaps and inconsistencies introduced into English law as a consequence of its failure to create an adequate theory of fictitious persons, among which he listed the *persona ficta* of the state as the most 'triumphant' fiction of all.²¹²

Still more contentiously, an influential group of English moral philosophers of the same generation turned to Rousseau and especially Hegel for help in articulating the claim that the state is the name of a person with a real will of its own. T. H. Green edged towards this position in his *Lectures on the Principles of Political Obligation*, posthumously published in 1886, in which he argued that the state is an institution with a duty to maintain the rights and serve the common good of its citizens,²¹³ and that 'it is not a state unless it does so'.²¹⁴ Green's argument was in turn elaborated with greater boldness (or perhaps merely with less nuance) by Bernard Bosanquet in his *Philosophical Theory of the State*, which first appeared in 1899.²¹⁵ Although Bosanquet praises Hobbes for having recognised that the state is the name of a distinct person,²¹⁶ his own theory embodies a denial of the assumption, crucial to Hobbes, that it is a legal fiction to describe the state as having a will and being able to act. Bosanquet responds in his most Hegelian tones that the person of the state is far from being 'an empty fiction'.²¹⁷ 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. Bosanquet is thus led to propose what he calls 'the identification of the State with the

²¹² Maitland 2003, p. 71.

²¹³ Green 1986, section G, pp. 89–106. For a discussion see Nicholson 1990, pp. 157–65, 186–97.

²¹⁴ Green 1986, p. 103.

²¹⁵ On the place of this text in Bosanquet's thought see Nicholson 1990, pp. 198–230; Boucher and Vincent 2000, pp. 87–126.

²¹⁶ Bosanquet 1910, pp. 93–4, 105.

²¹⁷ Bosanquet 1910, p. 94.

Real Will of the Individual in which he wills his own nature as a rational being'.²¹⁸ 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 vociferous restatement of the reductionist argument originally put forward by the Benthamites.²¹⁹ One of the most irascible of these reactions can be found in L. T. Hobhouse's polemic, *The Metaphysical Theory of the State*, which first appeared in 1918. Confronted with Bosanquet's definition of the state as the person who wills the real will of the people, Hobhouse's immediate instinct is to respond in self-consciously commonsensical style by asking what we ordinarily mean by the word *state*. 'By the state', he responds, 'we ordinarily mean either the government or, perhaps a little more accurately, the organisation which is at the back of law and government.'²²⁰ The state is merely the name of a 'governmental organisation', and in speaking of the powers of the state we are simply referring to acts of government.²²¹

A year later, Harold Laski launched a similar attack in his treatise entitled *Authority in the Modern State*. Laski begins by criticising Rousseau and his disciples for committing the dangerous error of supposing the state to be the name of a distinct person. This analysis, he retorts, fails to meet the obvious objection that 'our obedience, in reality, goes to a government'.²²² 'A realistic analysis of the modern state thus suggests', he goes on, 'that what we term state-action is, in actual fact, action by government.' Bosanquet and Green are castigated for introducing further confusion by arguing that the state is the name of a 'collective moral person'.²²³ The 'sober fact', Laski repeats, is that when we talk about the state we are merely referring to a prevailing system of legal and executive power, together with an associated apparatus of bureaucracy and coercive force.²²⁴

By the time Laski published these thoughts, the second wave of the attack on the state was already well under way. Laski was still content to assume that the state remains the master concept that needs to be

²¹⁸ Bosanquet 1910, p. 154.

²¹⁹ On this reaction see Nicholson 1990, pp. 189–90.

²²⁰ Hobhouse 1918, p. 75.

²²¹ Hobhouse 1918, pp. 75–6.

²²² Laski 1919, p. 30.

²²³ Laski 1919, pp. 26, 66.

²²⁴ Laski 1919, pp. 29, 37.

analysed. As he observes, it is ‘with a sovereign state that we are today confronted’ and the goal must therefore be to construct ‘a working philosophy of the state’.²²⁵ By this stage, however, it was precisely this article of faith that a number of political theorists had begun to doubt.

Among the developments that helped to foster this increasingly sceptical stance, one of the most salient was undoubtedly the rise of international legal organisations in the period immediately preceding the first world war. The Hague conferences of 1899 and 1907, out of which emerged the Hague Conventions on the laws of war, extensively limited the rights of sovereign states to engage in military actions on their own terms.²²⁶ 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 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. We are told that to think of the state as the basic unit of political analysis is hopelessly outdated and ‘at variance with the facts’, and we are enjoined to give up ‘the habit of thinking in States’.²²⁷ A. D. Lindsay repeated the argument in an article on the future of political theory published in 1920. ‘The first thing to be said about this doctrine of the independent sovereign state is that political facts have obviously outrun it.’²²⁸ Most obviously, ‘the League of Nations, if it is to mean anything at all, will have to impair the sovereignty of the states which join it’.²²⁹ We have lived on into a world in which the state as ‘the be-all and end-all of political theory’ is finally out of date.²³⁰ We stand in need of a theory focused instead on the international arena, and possibly on the prospects of a world state.

More recently, the decline and fall of the state has become a cliché of political theory.²³¹ No doubt this outcome has partly been due to the

²²⁵ Laski 1919, pp. 26, 32. But he concedes (p. 109) that the state’s days may be numbered.

²²⁶ See Keefer 2006 and Keefer 2007.

²²⁷ Angell 1914, p. xxviii.

²²⁸ Lindsay 1920, p. 173.

²²⁹ Lindsay 1920, p. 174.

²³⁰ Lindsay 1920, p. 174.

²³¹ On attempts to ‘excommunicate’ the state see Bartelson 2001, pp. 77–113.

continuing growth of international organisations with authority to overturn the local jurisdictions of individual states. More significance, however, ought probably to be attached to two further developments that are clear for all to see. One is the rise of multi-national 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.²³² The other development has been the increasing acceptance of an overarching ideal of human rights. The European Court of Human Rights was established not merely with authority to point out violations of the Convention on Human Rights as promulgated in 1950, but with further authority to require its jurisprudence to be taken into account by individual member states. More recently, some international legal theorists have gone on 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.²³³

These developments have convinced a growing number of commentators that, as Richard Falk has declared, ‘the old statist categories that have informed diplomacy and statecraft for centuries’ are now being ‘so evidently superseded’ that we shall soon cease to describe political life in these terms at all.²³⁴ The powers of individual states, we are meanwhile informed, are in terminal decline; the state is shrinking, retreating ‘fading into the shadows’.²³⁵ As a result, the concept of the state is losing any significance in political philosophy and the theory of international relations alike.²³⁶ 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’.²³⁷

VII

To trace the genealogy of the state is to discover that the concept has been the subject of continuous contestation and debate. Of late, however, we

²³² For examples see Strange 1996, pp. 91–109, 122–79; Hertz 2001, pp. 40–61, 170–84.

²³³ See Tesón 1997; Wheeler 2000; Caney 2005, esp. pp. 231–46; for a survey see Weiss 2007.

²³⁴ Richard Falk, ‘The Waning of the State and the Waxing Of Cyberworld’: <http://www.diplomacy.edu/books/mdiplomacy_book/falk>.

²³⁵ Strange 1996, pp. 82–7; Crevelde 1999, pp. 420–1.

²³⁶ See, for example, Crevelde 1999; Hertz 2001, esp. pp. 18–37. For other writers who converge on this point see Bartelson 2001, p. 1 n.

²³⁷ Ankersmit 2007, p. 36.

have chosen to confront this complex intellectual heritage in such a way as to leave ourselves astonishingly little to say about it. We seem largely content to reiterate the two propositions that underlie the latest version of what I have been calling the reductionist view of the state: that the term *state* is best understood simply as a way of referring to an established apparatus of government; and that such governments are of slight and diminishing significance in our newly globalised world.

This outcome strikes me as deeply unsatisfactory. One weakness of many recent discussions arises from their excessive eagerness to announce the death of the state.²³⁸ 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.²³⁹ 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.²⁴⁰ Furthermore, such states remain by far the most significant political actors within their own territories. They have become more aggressive of late, patrolling their borders with increasing attention 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 penalise 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.

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 reductionist 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,

²³⁸ As argued in Bartelson 2001, pp. 149–81.

²³⁹ MacCormick 1999, pp. 123–56; Bellamy 2003; Prokhovnik 2007, esp. pp. 105–16, 183–246.

²⁴⁰ See the examples discussed in Tesón 1997, pp. 175–266; Wheeler 2000.

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.²⁴¹ 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. As Pufendorf summarises, echoing Hobbes, ‘the general Rule which Sovereigns are to proceed by, is, *Salus Populi suprema lex esto; Let the Safety of the People be the Supreme Law*’.²⁴²

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’s *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.’²⁴³

Of late a neo-liberal version of this argument has been noisily defended in Anglophone public debate, especially in the United States. Consider, for example, the Republican response in Congress to the pleas from the American car industry in 2008 to grant them over \$30 billion to ‘bail them out’. The reaction of the Republican Senate minority leader, Mitch McConnell, was to invoke the principle of fairness and the need to grant priority to the rights of individual taxpayers. ‘A lot of struggling

²⁴¹ See McLean 2003, 2005; Runciman 1997, 2000, 2003; cf. Bartelson 2001, pp. 149–81.

²⁴² Pufendorf 1717, p. 569, col. 1.

²⁴³ Rawls 1971, p. 3.

Americans’, he replied, ‘are asking where *their* bailout is’, and are wondering ‘why one business would get support over another’. The key priority, he concluded, must be that of ‘protecting the taxpayer’, and in fairness ‘we simply cannot ask the American taxpayer to subsidise failure’.²⁴⁴

It is arguable, however, that this reaction points to the limitations as much as the strengths of the neo-liberal case, refusing as it does to acknowledge that it may sometimes be necessary—especially in times of emergency—for the maintenance of individual rights to yield place to broader notions of the public interest. It is perhaps not surprising that, at the end of 2008, this was the reaction of the President-elect, Barack Obama, whose political rhetoric had long been suffused with references to the common good. It is more remarkable that the same reaction should have come from the then President, George W. Bush. He not only agreed to pay a large percentage of the funds being sought, but spoke of the ‘challenge facing our nation’ and the need to meet it by recognising that the basic duty of government is ‘to safeguard the broader health and stability’ of the entire community, especially at vulnerable times.²⁴⁵ His policy of *de facto* nationalisation was subsequently followed out, and by July 2009 General Motors had mutated into a new firm over sixty per cent of which was owned by the state.

While acknowledging the value of promoting the common good, neither George Bush nor Barack Obama made any reference to the state. It is arguable, however, that if they had done so they would have been able to make their point more effectively. One reason for wishing to reintroduce the fictional theory into the heart of our political discourse is that this would provide 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

²⁴⁴ For the full text see *National review online*, Thursday, 11 Dec. 2008.

²⁴⁵ For the text of Bush’s speech see <<http://www.clipsandcomment.com/2008/12/19/>>.

a government to incur a public debt.²⁴⁶ 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 prevailing reductionist style, that the debt must be owed by the government that incurred it. Even if the government changes or falls, the debt will remain to be paid.

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 conclude 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's phrase, with an artificial eternity of life.²⁴⁷

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²⁴⁶ My discussion here is indebted to Maitland 2003, pp. 39–45, 70–1.

²⁴⁷ For further discussion of this point see McLean 2003, esp. pp. 175–6, 178–83.

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