

2. Grounding Statehood in Territory and Government

My argument is that the reason why we seem to be increasingly stuck in the state is ontological confusion: it is unclear what the state is. Žiga Vidovnik argues that this “epistemological challenge” is why discourse on statehood oscillates between incorrect naturalisation and naïve rejection.¹³ In other words, it is difficult to imagine something other than the state because it is unclear what one should be thinking against. On the contrary, this limitation of the imaginary facilitates discourses that seek to naturalise the state and make it appear as either the only possible or the only desirable frame of political organisation.

My central claim in this part is that this unclarity is in how we conceptualise the relationship between states and territory. I use the metaphysical notion of grounding to explore this because it enables an explanatory but synchronic (not historical) clarification of the relationships between the elements of statehood: state, territory, and government. The question is not what explains the state causally as a historical phenomenon but how to account for it ontologically. Government generates juridical properties, so government works as an explanatory premise for the juridical category of territory. But if government can only manifest as statehood and territory is a premise of statehood, then there is a problem.

13 Žiga Vidovnik, ‘Rethinking the State in the 21st Century’ (2021) 58(2) *Teorija in praksa* 249.

If the state manifests in a *given* territory — i.e. within a pre-existing normative-juridical landscape — then there must exist non-state sources of normativity; civil authorities that are not necessarily states. Yet the state insists that it is the sole source of norms, resulting in circularity. Thus, we must reject either the equivalence of statehood and governance or the structuring position of the territorial container. State theory often accepts both, but this is not workable. The best alternative explanation, I argue, is to accept that there can be pre-territorial norm-producing institutions, for which I use the term governments. Thus, whereas the theories I argue against presuppose territory and see statehood activated by its governance, my theory presupposes government and sees statehood as the result of the activation of space by government.

I begin by elaborating on the historical contingency of statehood in contradiction to its normative naturalisation, highlighting how this is the result of an unclear state ontology. I then summarise how grounding works in metaphysics. In the second chapter I show how territory is treated as a structuring ground of statehood in international law and political theory; in the third I argue why government rather than territory is the correct structuring ground. A formal logical representation of my argument can be found in the appendix.

The point is to lay the groundwork for a theory of the state that treats it as contingent, both because it indeed is contingent and because this can upend the theoretical contradiction in which the state is treated as the condition of its own possibility.

A. Stuckness and Grounding

(i) The historical contingency of the state

A familiar story is reproduced, *always* on page 4, of every introductory international law textbook. In this story, territorial sovereignty saved Europe from a permanent war of all against all. Pre-Westphalian Europe was a “patchwork of feudal entities and kingdoms” that would give

way to the “‘State’: a permanent political unit, supported by institutions and bureaucracies, and independent courts with an authority to give final judgments”.¹⁴ Sovereign states and international law¹⁵ arose from this normative protoplasm to resolve its instability; “a semblance of order and structure in an otherwise anarchical and disorderly European world”.¹⁶ Underpinning this local narrative is a broader notion of linear historical development in which Modern statehood is the pinnacle of human progress beginning with small egalitarian bands and gradually developing more complex and specialised modes of government.¹⁷ This story suggests that even if the state paradigm is not the best of all possible worlds, it may be the best of all worlds heretofore.

Yet both of these narratives are heavily contested. As for the global notion of progress toward statehood, there is now ample evidence in anthropology that there never really were small egalitarian bands. As Graeber and Wengrow argue, human societies have organised authority, space, and obligation in radically different ways, often without centralised territorial sovereignty: “from the very beginning, or at least as far back as we can trace such things, human beings were self-consciously experimenting with different social possibilities”.¹⁸ Many societies consciously rejected permanent political institutions despite being familiar with them.¹⁹ Statehood was not a transformative *heureka* moment and if most humans for most of history did not live in fixed territorial hierarchies, it was not because they were too ignorant to imagine them.

14 Gleider Hernandez, *International Law* (Oxford University Press 2019) 4.

15 James Crawford, *Brownlie's Principles of Public International Law* (8th Edn, Oxford University Press 2012) 3–5.

16 Anders Henriksen, *International Law* (3rd Edn, Oxford University Press 2021) 4; see also Henry Kissinger, *World Order* (Penguin 2014) 11.

17 Mohammad-Mahmoud Ould Mohammedou, ‘In Search of the Non-Western State: Historicising and de-Westphalianising statehood’ in Dirk Berg-Schlosser, Bertrand Badie and Leonardo Morlino (eds), *The SAGE Handbook of Political Science* (SAGE 2020) 1335, 1336–7; cf Peter Turchin et al., ‘Evolutionary Paths to Statehood: Old Theories and New Data’ (preprint, 2018) <https://osf.io/h7tr6> accessed 24 May 2025.

18 David Graeber and David Wengrow, *The Dawn of Everything: A New History of Humanity* (Penguin 2021) esp 107.

19 Graeber and Wengrow (n 18) 96–97.

As for the more recent story, it is now uncontroversial to say that “the accepted IR narrative about Westphalia is a myth”.²⁰ Many of the institutions and concepts narratively connected with the 1648 agreements at Münster and Osnabrück pre- and post-date them by centuries. The most famous Westphalian principle, *cuius regio eius religio* is already in the Peace of Augsburg.²¹ But the more important point is that statehood is not the result of linear European development. As Antony Anghie has argued, sovereignty doctrine was produced through the colonial encounter, by logics of exclusion and recognition.²² Francisco de Vitoria’s foundational 1538 lectures, containing the seeds of Modern international law and sovereignty theory, responded not to internal political development, but to the necessity of making intelligible the interaction between European and non-European societies.²³ The state, in other words, was not the *telos* of political organisation but a contingent structure imposed and replicated through global power, often defined by what Europeans believed the Other to lack.²⁴

(ii) The ontological problem

If the state was not always meant to be, it is a legitimate question for normative theory whether the world *ought* to be divided principally between 200-odd entities; whether we should assume statehood as an organising normative unit. Normative political theory, as many critics note, often “take[s] the state for granted”.²⁵

20 Andreas Osiander, ‘Sovereignty, International Relations, and the Westphalian Myth’ (2001) 55(2) *International Organization* 251.

21 See Peace of Augsburg (Treaty, 1555), arts 15 and 16.

22 Anthony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2004) 21–28.

23 Anghie (n 22).

24 See Ntina Tzouvala, *Capitalism as Civilisation* (Cambridge University Press 2020).

25 John Hoffman, ‘Consider the States We’re In’ (2012) *Times Higher Education* (25 October 2012) <<https://www.timeshighereducation.com/books/consider-the-states-were-in/421363>> accessed 21 May 2025.

First, there is a corpus of projects such as legitimate state theory which avoid the “ontological problem”²⁶ (what the state actually is) and skip to asking what demands we can make of states assuming they already exist.²⁷ But when the state is assumed, it is unclear in virtue of what facts we make demands of it. Does the state have certain obligations because it has power or because it has authority? Because it has government or because it has territory? If a band of brigands sets up a new entity with normative territorial monopoly, the first question is not what obligations it has *as* a state²⁸ but in virtue of what facts we do or do not take it to be a state.

But the state is also presupposed in debates *about* the state.²⁹ I illustrate this on Thomas Nagel’s *Problem of Global Justice*. Nagel sets up the debate as a dichotomy, there is a “fork in the path” of normative theory: that between cosmopolitical and political conceptions of global justice.³⁰ Cosmopolitanism takes the individual to be the basic moral unit and thus demands a universal political paradigm: “the cosmopolitan conception points us toward the utopian goal of trying to extend legitimate democratic governance to ever-larger domains”.³¹ At minimum, it demands a certain suspension of patriotism and sovereignty in favour of the collective globalised exercise of certain political powers.³² The political conception, on the contrary, holds that certain normative demands can only be formulated from within and against a state.³³ But phrased this way, both of these are statist conceptions: the disagree-

26 Colin Hay, ‘Neither real nor fictitious but “as if real”: a political ontology of the state’ (2014) 65(3) *British Journal of Sociology* 459.

27 e.g. Anna Stilz, ‘Nations, states, and territory’ (2011) 121(3) *Ethics* 572.

28 David Copp, ‘The Idea of a Legitimate State’ (2005) 28(1) *Philosophy & Public Affairs* 3, 4–5.

29 Andreas Wimmer and Nina Glick Schiller, ‘Methodological nationalism and beyond: nation-state building, migration and the social sciences’ (2002) 2(4) *Global Networks* 301.

30 Thomas Nagel, ‘The Problem of Global Justice’ (2005) 33(2) *Philosophy & Public Affairs* 113, 126.

31 Nagel (n 30).

32 See Stan van Hooft, *Cosmopolitanism: A Philosophy for Global Ethics* (McGill University Press 2009) 21.

33 Nagel (n 30) 127.

ment is about whether the political system is or ought to be a universal or local frame, whether there should be 200 states or one. The *cosmopolis* is a *polis*.³⁴

This is problematic already because it smuggles in statehood as a necessity when, as argued, it is a historically contingent phenomenon. The question is how to reject or overcome this. One way may be to point out that both conceptions share an institutional paradigm, that is, they presuppose that demands of justice are articulated through and against institutions. Contrary to this, one may argue that demands of justice exist already in pre-institutional relations onto which institutional facts map.³⁵ This framework does solve the issue and I generally adopt it. But I believe there is another valid critique of the paradigm: its profound unclarity about what the state *is*.

If one reads Nagel against the relations approach, his principal objection might be that only certain relations are pre-institutional. Human beings stand in a universal relation of justice in the context of negative rights; respect for free speech and bodily autonomy can be formulated pre-institutionally. But, Nagel claims, demands for socio-economic justice can only be formulated in socio-economic relations which, according to him, are inherently institutional:

It depends on positive rights that we do not have against all other persons or groups, rights that arise only because we are joined together with certain others in a political society under strong centralized control. It is only from such a system, and from our fellow members through its institutions [...] ³⁶

But what justifies the leap from “political society”, that is, the existence of collective relations and even institutions to “strong centralized control”? Critics are well served by pointing out that associative relations can and do cross state borders, that they are in fact pre-institutional.³⁷

34 This is not a criticism of cosmopolitanism *per se*, only of the falsely dichotomous opposition of the term to statehood.

35 See George Pavlakos, ‘The Kantian Legal Relation as Radical Non-Positivism’ in P.A. Hersch and M Brecher (eds), *Law and Morality in Kant* (Max Planck 2025) 1, 6; cf Nagel (n 30) 127.

36 Nagel (n 30) 127–8.

37 AJ Julius, ‘Nagel’s Atlas’ (2006) 34(2) *Philosophy & Public Affairs* 176, 188–9.

The argument is perfectly serviceable. But one does not have to go so far. One might concede that certain relations depend on or at least correlate with institutionalised collective association yet reject that the latter implies statehood. In other words, the problem with this argument is that the state is smuggled in rather than defended.

That a certain degree of ontological indeterminacy surrounds the concept of statehood becomes even clearer in explicit attempts to formulate state-neutral theories. John Rawls consciously discards the word “states” in favour of the neutral “peoples”. But what is a people?

[A]n important role of government, however arbitrary a society’s boundaries may appear from a historical point of view, is to be the effective agent of a people as they take responsibility for their territory and the size of their population [...]³⁸

A people has a territory, a population, an effective government, and independence. A people thus fulfils all the legal criteria of statehood³⁹ and is simply a state by another name.

My claim is that stuckness is not a problem of justification but of ontology. As Katherine Jenkins describes this problem: ideology functions by distorting the ontological form of a cultural *technē* in order to perpetuate and naturalise it.⁴⁰ In the state, the distortion occurs at the level of the *internal* structure of the ontological form. Elements like government, territory, and population are clearly part of statehood, but how they relate to one another is rarely clarified and often distorted. Without clarity on *this*, attempts to imagine alternatives keep returning only more state. There is an old Soviet joke about a factory that, after the war, was ordered to stop making tanks and start making tractors. Despite the engineers’ best efforts, tanks kept coming out. Perhaps the problem was not that they did not understand tractors but that they did not understand tanks.

38 John Rawls, *Law of Peoples* (Harvard University Press 1999) 8.

39 See Convention on Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 (Montevideo Convention) art 1.

40 Katherine Jenkins, *Ontology and Oppression: Race, Gender, and Social Reality* (Oxford University Press 2023) 47–52.

(iii) Grounding as a way out

I propose to apply the metaphysical notion of grounding and the further distinction between structuring and triggering grounds to clarify statehood. Grounding is a relation of constitutive determination: it explains what something is by reference to the conditions that make it possible, not just how or when it appears. This is distinct from causal or probabilistic explanation, which concerns diachronic development.⁴¹ Grounding, by contrast, is synchronic: it concerns the explanatory structure of things conceived in a time-independent snapshot of reality.⁴²

Not all grounds are created equal. Following recent work in metaphysics and legal philosophy, I distinguish between structuring and triggering grounds. A structuring ground makes a thing possible in principle; it constitutes its kind. A triggering ground is a condition under which that possibility becomes actualised or visible.⁴³ Triggering grounds can only function as grounds if the structure they activate already exists.⁴⁴

To clarify the distinction: a structuring ground explains what a phenomenon is; it provides its constitutive basis. It is that without which the phenomenon could not exist in kind, not merely in fact. A triggering ground, by contrast, is a contingent condition under which the phenomenon becomes actual or visible — a catalysing circumstance, not a defining one. Structuring grounds are metaphysically prior in the sense of being explanatorily fundamental; triggering grounds are

41 Ricky Bliss and Kelly Trogdon, 'Metaphysical Grounding', *Stanford Encyclopaedia of Philosophy* (Summer 2024 Edn) <<https://plato.stanford.edu/entries/grounding/>> accessed 20 May 2025.

42 Samuele Chilovi and George Pavlakos, 'Law-determination as Grounding: A Common Grounding Framework for Jurisprudence' (2019) 25(1) *Legal Theory* 53, 57–8.

43 Jonathan Schaffer, 'On What Grounds What' in David Chalmers, David Manley and Ryan Wasserman (eds), *Metaphysics: New essays on the foundations of ontology* (Oxford University Press 2009) 364.

44 Jonathan Schaffer, 'Anchoring as Grounding: On Epstein's the Ant Trap' (2019) 99(3) *Philosophy and Phenomenological Research* 749, 752; Samuele Chilovi and George Pavlakos, 'Law-determination as Grounding: A Common Grounding Framework for Jurisprudence' (2019) 25(1) *Legal Theory* 53, 59–60.

necessary in context, but dependent on the existence of a structure to trigger. The distinction is itself synchronic: it is not about temporal development but conceptual priority. For example: a glass falls off the counter and shatters. The fragility of the glass and the laws of nature are structuring grounds: they explain why a glass would shatter if dropped. The triggering ground is the actual dropping of the glass: a contingent event that activates the fragility and causes the shattering.

Asking what grounds statehood thus means asking what constitutively determines the phenomenon and distinguishing between its structural pre-conditions and what we might call its operational reasons.

In this part, I argue that there is a dogma cutting across law and normative political theory which grounds statehood in territoriality. Territory as part of the metaphysics of right is understood, implicitly and explicitly, as a structuring ground. But since one can only define territory through statehood, this argument is circular and falters.

Opposing this, I propose that the structuring ground of statehood is government or civil authority — the capacity to generate a public, omnilateral normative order. Territory, on this view, is a triggering ground: a contingent condition through which civil authority becomes visible or effective *as a state*.

B. Territory as a Structuring Ground

The problem with the black box of statehood is not that we do not know what is inside but that we do not know how the things that *are* inside relate to one another. States have, *de minimis*, governments, territory, populations, and independence. But do they happen to have governments because they are territories, or do they have territories because they are governed? This is the question to which I apply the distinction between structuring and triggering grounds.

My aim in this section is to show that the orthodox position identifies territory as the structuring ground of statehood. What this means is that territory is treated as existing *ex ante*, as a given spatial container,

and statehood is triggered by an entity exercising sufficient control or authority over said container. The *Stanford Encyclopaedia* defines sovereignty as the supremacy of authority in a territory.⁴⁵ Territory thus constitutes an explanatory baseline within which legal-political authority emerges, which is already latent in Max Weber’s canonical definition of the state as the entity claiming a legitimate violence monopoly within a “given territory”.⁴⁶ The territory is “given”; the question is who does or ought to control it. In this sense, territorial control is not an empirical property of statehood. Rather, the empirical assessment of legitimacy tests whether the *ex ante* structure has been appropriately triggered by the emergence of control and government. This logic persists in both law and normative theory.

(i) Statehood as territory in international law

The claim is not merely that territoriality — the projection of normativity/jurisdiction onto physical space — is a key aspect of statehood.⁴⁷ It is that the orthodox view assumes that the world is divided into territorial containers *ex ante* and sees the existence of statehood as a control function that may or may not be triggered within that territory.

There may be no better illustration that this is in fact how the law operates than the definition of statehood found in the Montevideo Convention. Importantly, the latter instrument belongs to the canon of the declaratory theory of recognition; the notion that statehood is a fact independent of recognition by other states.⁴⁸ Article 1, a widely cited definition of statehood, lists the criteria as being: “(a) a defined

45 Daniel Philpott, ‘Sovereignty’ in Edward N Zalta and Uri Nodelman (eds), *Stanford Encyclopaedia of Philosophy* (Fall 2024 Edn) <<https://plato.stanford.edu/entries/sovereignty/>> accessed 30 April 2025.

46 Max Weber, ‘Politics as a Vocation’ [1921] in HH Gerth and C Wright Mills (trs and eds), *From Max Weber: Essays in Sociology* (Oxford University Press 1946) 77.

47 Steven Grosby, ‘Territoriality: the transcendental, primordial feature of modern societies’ (1995) 1(2) *Nations and nationalism* 143, 148–149.

48 David Tan, ‘The Metaphysics of Statehood’ (2018) 31(2) *Canadian Journal of Law and Jurisprudence* 403, 406 and 419.

territory, (b) a permanent population, (c) government, and (d) capacity to enter into relations with other states”.⁴⁹

That territory functions as the structuring ground is evident not only in the order of the criteria, but in their operation. The sufficient permanency of a population is defined through its ties to the territory,⁵⁰ while the effectiveness of government is assessed by control over territory and the population thereon.⁵¹ In other words, territory — even if newly carved out — is the site on which statehood can occur. Statehood then depends on whether further grounds — population, government — obtain within that territory.

The final criterion: the capacity to enter into relations with other states is also a trigger pressed on territory, though this requires a lengthier explanation. This criterion is also called independence and it is simply the negative condition that an entity cannot be a state if it is part of another state.⁵² This means that its statehood must either be sanctioned by the state it was part of —in which case independence is presumed⁵³— or it must be breaking away from that state, presumably as part of a process of decolonisation or secession. Focusing on secession: this would presumably have to be grounded in an exercise of the right to self-determination. While self-determination can also be exercised non-territorially, for instance through non-territorial autonomy, it is very clear that secession is conceptually unfeasible in such cases.⁵⁴ A people cannot secede without at least attempting to seize territory. Thus, even here, territoriality structures statehood.

The more general point that international law takes a state to be a territory with its own government rather than the reverse can also be

49 Convention on Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 (Montevideo Convention) art 1.

50 *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 41–42, paras 87–89.

51 Niko Pavlopoulos, *The Identity of Governments in International Law* (Oxford University Press 2024) 95.

52 Alex Green, *Statehood as Political Community* (Cambridge University Press 2024) 85–87.

53 Green (n 52).

54 Balázs Vizi, ‘NTA and international minority rights’ in Marina Andeva and others (eds), *Non-Territorial Autonomy: An Introduction* (Springer Nature 2023) 49.

shown by a counterfactual. If a state were a government with territory, there might be governments without territory. There are two standard examples of non-territorial sovereigns: the Holy See and the Knights of Malta. But not only are these two grandfathered into the system, their sovereignty is premised on them having had territory in the past.⁵⁵ In practice then, contemporary international law does not permit sovereignty without territory. On the other hand, it admits of the possibility of a territory without a government: *terra nullius*. *Terra nullius* is not restricted to unpopulated territories. On the contrary, it was historically deployed as a colonial argument in which factually peopled territories were proclaimed to lack laws and government, therefore to be “substantially unpopulated”, and therefore to be *terra nullius*.⁵⁶ Here again, territoriality is the fixed point which is only potentially actualised into statehood by the recognition of a government and population.

That international law does not admit the possibility of government without territory does not, by itself, prove that territory structures statehood. It might simply mean that government cannot be realised without territory, not that territory ontologically precedes government. On this reading, government could still be the structuring ground of

55 see John R Morss, ‘The International Legal Status of the Vatican/Holy See Complex’ (2015) 26(4) *European Journal of International Law* 927; Charles d’Olivier Farran, ‘The Sovereign Order of Malta in International Law’ (1954) 3(2) *International and Comparative Law Quarterly* 217.

56 *Mabo v Queensland (No 2)* [1992] HCA 23, (1992) 175 CLR 1 [33] (Brennan J); see Gerry Simpson, ‘Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence’ (1993) 19 *Melbourne University Law Review* 195, 210.

I avoid a detailed discussion of the population criterion here not only for clarity but because “population” may be understood in two ways. On a minimal reading, it is a factual precondition: that a political community must consist of people, which is uncontroversial. On a critical reading, however, population is not antecedent to government but produced by it — in the Foucauldian sense of biopolitical subjectivation. This is evident, for example, in the colonial practice of declaring peopled territories “substantially unpopulated” on the grounds that they lacked recognisable legal systems. In this sense, population, like territory, may be posterior to government. See generally Joseph-Achille Mbembe, ‘Necropolitics’ (2003) 15(1) *Public Culture* 11, 27.

statehood — the necessary form — but fail to function as a ground in the absence of a territorial trigger. That possibility must be kept open.

However, for territory to be a necessary precondition of government itself — rather than merely of its recognisability or effectivity — it would have to ground not only statehood, but government. That would not conclusively prove its structuring role, but it would reinforce its primacy to the latter elements.

But territory is not understood in this reasoning *merely* as prior to government. Rather, it behaves as a structuring category of geopolitical reality. This is the case because government is not required for territory to obtain as an ontological category. Rather, the absence of government can cause territory to obtain in the form of *terra nullius*. The world is thus divided into these territorial containers and the absence or presence of government triggers *merely how* they actualise but not *whether* they actualise. They are *always* actualised because there is either government or there is not. If there is, statehood obtains. If there is not, *terra nullius* obtains. Territory, therefore, is a basic structure of the world always actualised and contingently triggered by government into statehood.

In short: In the logic of international law, territory is appropriately called the structure in which statehood is realised whereas its other criteria show whether territory has been appropriately activated.

(ii) Territory as a moral horizon

In this section, I argue that a similar view — territory as *a priori* structure — persists in certain strands of normative theory. I show this through two examples. First, I claim that when Thomas Nagel presents statehood as the moral boundary of justice, he views territory as the arbitrary structure within which it manifests. Second, I turn to Anna Stilz's recent defence of territorial sovereignty. While Stilz acknowledges that territory is produced by political institutions, she nonetheless treats it as a structuring condition of statehood — one that remains conceptually prior to the authority it enables.

Nagel's defence of statehood focuses on the necessity of strong collective institutions. "The kind of all-encompassing collective practice or institution that is capable of being just in the primary sense can exist only under sovereign government."⁵⁷ Statehood and sovereign government are shorthands for this institutional framework, but what is its nature? It clearly has a government and it also has territory:

The political conception of justice therefore arrives, by a different route, at the same conclusion as Hobbes: The full standards of justice, though they can be known by moral reasoning, apply only within the boundaries of a sovereign state, however arbitrary those boundaries may be.⁵⁸

It is not only borders which are arbitrary but also the population in a given polity; "co-membership is itself arbitrary"⁵⁹ since one does not choose *where* one is born or the government that obtains in the territory one happens to be in. The scope and functions of the government are clearly not arbitrary since they are the subject of possible normative demands. The state is *structured* by the arbitrary; the territorial nature and even the specific demarcation of territory is given before considerations such as justice and government. While arbitrariness means that borders do not have moral weight in themselves, the acceptance of their arbitrariness means that we must assume borders and then reason morally within them.

The structural primacy of territory persists in accounts that acknowledge that it is itself produced by law. In *Territorial Sovereignty: A Philosophical Exploration*, Anna Stilz defends the "structuring role" of "jurisdictional boundaries".⁶⁰ Stilz acknowledges that "[p]ast political orders have not always given geographical boundaries the structuring role granted them by the states system."⁶¹ Her argument is that while the present system is historically contingent, it is normatively defensible. For Stilz, there are certain territorial rights held *a priori* by the

57 Nagel (n 30) 116.

58 Nagel (n 30) 121–2.

59 Nagel (n 30) 128.

60 Anna Stilz, *Political Sovereignty: A Philosophical Exploration* (Oxford University Press 2019) 249.

61 Stilz (n 60) 6.

occupants of a place and territorial statehood is justified insofar as it can protect and institutionalise these territorial rights.

If this is how statehood comes about — in a synchronic, ahistorical sense — what is the structuring ground and what is the triggering ground? As in international law, this question can be tested by looking at the acquisition of territory. If territory is the structure and government the trigger, one can expect territory to achronically precede government. This is what happens in Stilz's account. "[A] state acquires jurisdiction over territory when it legitimately represents rightful occupants".⁶² The populated territory exists *a priori* and presumably could exist as *terra nullius* if no state were to acquire jurisdiction. If, conversely, one saw government as the structure and territory as the trigger, the act of acquisition would have to begin with the government and recognise that the acquisition itself *produces* territory,⁶³ causing it to obtain as a ground.

Thus, though for Stilz territory may not structure the historical development of statehood, it is nevertheless its structuring ground. "Unlike their internal claims, states' territorial claims have to be understood against the backdrop of the Modern states system."⁶⁴ In other words, states are themselves stuck, trapped, and structured by statehood and its territorial paradigm.

Such a conception does not necessarily follow from an occupation-based account. Lea Ypi phrases her view in similar terms but with the caveat that territory remains contingent and provisional based on its legitimate acquisition by citizens and their commitment to a global political structure.⁶⁵

Thus, my point is that within normative theory, *some* accounts presuppose territory as a structuring ground while others do not. In the former, territory is presented not as a trigger of authority, but as the structure in which it obtains. The relevant strands of normative theory

62 Stilz (n 60) 56.

63 See Gail Lythgoe, *The Rebirth of Territory* (Cambridge University Press 2024) 30.

64 Lythgoe (n 63) 2.

65 Lea Ypi, 'A Permissive Theory of Territorial Rights' (2014) 22(2) *European Journal of Philosophy* 288, 310–312. This, as I shall argue later, is the orthodox Kantian view.

share with international law a vision of the globe divided *a priori* into territorial containers.

C. Government not Territory

In this chapter, I argue that the structuring ground of statehood is not territory but government. In the first part, I critique the orthodox position by arguing that since territory is a juridical category, it requires an ontologically prior juridical source. But if the latter holds, territory seems to fail as a structuring ground of law and normativity. In essence, territory is not the major premise of the state system but a minor premise that follows government. In the second part, I outline the view in which government forms the structuring ground.

Before proceeding with the argument, it is important to distinguish between space and territory. Space is a physical category. In the context of the present argument, space is the surface of the Earth; an (essentially) tangible reality. Territory is a juridical category.⁶⁶ A physical globe without humans could contain mountains but not political boundaries, it could show space but not territory. Even where a political boundary is reified — a stone wall is constructed — it blocks our path not only as a physical obstacle but as a communication of meaning: do not cross here.⁶⁷ Territory — space with juridical meaning — is a product of law and government.⁶⁸

(i) Why territory cannot structure

In the orthodox position, states are the principal authors of normativity, both domestically and internationally. At the same time, they are structured by spatial containers — Weber's "given" territory. But if terri-

66 Stuart Elden, *The Birth of Territory* (University of Chicago Press 2013) 322–324.

67 See Pauline Westerman, 'Weaving the Threads of European Order' (2023) 8(3) *European Papers – A Journal of Law and Integration* 1301, 1305.

68 Jeremy Crampton, 'Foucault and Space, Territory, Geography' in C Falzon, T O'Leary and T Sawicki (eds), *A Companion to Foucault* (Blackwell 2012) 3.

tory is itself a normative category, these two claims are contradictory. If states produce normativity, and territory is normative, then territory must be a product of states — not their precondition. In that case, statehood cannot be structured by something it itself brings into being.

This is my central claim in this section: territoriality is normative; statehood cannot be explained by territoriality if all normativity flows from statehood. In what follows, I consider several objections to this claim and explore their implications.

First objection: It might be argued, as Stilz does, that a new state arises into a world already territorially organised. It finds itself within pre-existing political geography—within borders not of its own making. On this view, territory precedes the particular state and thus plausibly structures it.

This argument fails on two counts. First, it conflates particular states with statehood as such. It is certainly true that a new state today emerges into a world where territorial divisions are already in place. But this does not show that statehood depends on territoriality — it only shows that this state does. The structuring claim is not about historical context but about ontological priority. Second, this objection confuses general structuring effects with structuring grounds. Territorial configurations may constrain or shape how statehood is realised, but they cannot constitute its possibility in principle. If territory is a product of state normativity, then the true premise of a *particular* new state is not territory but the prior existence of other states. This is fine for the practical case of new statehood but clearly not for the emergence of the state as a form or ontological category.

Second objection: Territory might be normative without being created by the state. Perhaps other normative forces — religion, culture, custom — can generate territorial order, which then structures statehood. On this view, statehood is downstream of a pre-existing, non-state political geography.

A clarification of the term *normative* is necessary here, insofar as it can mean either any value-imperative ordering or a specifically legal one. *Inter alia* religion and culture may be normative systems capable

of producing value categories and behavioural imperatives. So are the rules of chess. But territory is clearly not *merely* a normative category in this thin sense but normative in the latter sense that is, in a legal sense.

If we work with the understanding of normativity as legality *and* with the orthodox assumption of the state as the legality monopolist, then territory cannot be the product of non-state normativity, for there is no such thing as *legal* non-state normativity.

If, however, the presently intended definition of normativity is that of non-legal normativity, other problems arise. For the question raised is normative-meaning-legal. Thus, the objection is specifically that territory might be the product of non-legal normativities.

There may be water to such an explanation as a matter of history but not within the synchronous account sought. For in order for a non-legal normativity to gain the status of a legal explanans, it must first be recognised as such by law; it must be incorporated into the juridical by the juridical. Thus, even if religion or culture shape spatial orderings, these only become territory in the juridical sense once they are recognised or incorporated into the legal-political order. Since this objection presupposes such recognition, it also presupposes legality. Normative spatial orderings originating in the state are only legally relevant if one presupposes a political authority capable of recognising and thereby legalising them. They thus cannot normatively ground the thing that grounds their own normative nature.

Third objection: This entire critique conflates statehood with government. Perhaps the correct model is: government produces territory, territory produces statehood. In this view, territory might still structure statehood, even if it is not first in line ontologically.

This is closer to my own argument but incompatible with the orthodox position. If government is the original source of normativity — including the normativity of territory — then there is no justification for treating territory as the horizon of political and legal possibility. One cannot hold both that territory is the structuring ground of statehood and that normativity depends on it, if that normativity is itself contingent on government. In such a model, government — not territory —

is the structuring ground, and territory becomes merely a triggering or operational condition.⁶⁹

(ii) Why government can structure

The alternative is to view government as the prior, structuring ground of statehood. I first clarify the term in this context, show why government can be ontologically prior to territory and even independent of space, then outline its operation as a structuring ground.

By government, I do not mean an empirical administration or institutional apparatus, but a form of authority: the capacity to generate public, omnilateral norms — norms that bind all members of a body politic in virtue of their shared membership in a normative community. Membership is citizenship; the juridical link between the individual and the collective body. The authority of government is civil in the sense of being anchored only in the collective, omnilateral authority of the citizenry.

There is no necessary spatial aspect to government. The capacity of government to issue norms binding its citizens, being grounded merely in the standing of citizens as authors and addressees of norms, is independent of geography. It is an authority composed only of the people it addresses.⁷⁰ Government can extend over people in unjuridified space — including cyberspace — or over people located in space juridified by and belonging to other governments. The government of a minority nation with non-territorial autonomy is still government. There can be government aboard a mutinous ship in international waters. There have been governments in exile that held full normative authority over a people despite territorial displacement. In the former, there was previously territoriality, in the latter there was not. Previous territoriality is non-essential. There is nothing preventing any group of

69 For a formal reconstruction of the contradiction and my alternative, see Appendix A.

70 Unlike territory or even population, government is, from the start, a relational category without pretense to factual “out there” basis.

individuals however dispersed from entering into a civil condition with one another.

Since government can produce norms, it can also juridify space — and in doing so, produce territory. A government can hold land on behalf of a people, and its juridification defines the site on which property rights or political boundaries are enacted. Territory, on this view, is not a given spatial frame within which government arises. It is a normative product of government: a site governed as ours or, on a more conventional reading, the sum of the space occupied by the subjects of government.⁷¹ This view is compatible with Stilz' defence of sovereignty; if people occupy land as individuals, it may be perfectly legitimate and even desirable for them to submit their land rights to common government. But the latter is the prior ground and it is only its existence that allows us to speak of territory. Moreover, such government is not territorial inherently but contingently.

Because government can function both with and without territory, it is the more apt structuring ground of statehood. Territory may be a necessary condition for the effectivity of government in certain contexts, but it is not a condition of its possibility. Statehood, on this view, is a phenomenon grounded in both government and territory, but government is ontologically prior to territory. Government is the structuring ground that makes statehood intelligible as a kind, whereas territory is the triggering ground that renders it visible and effective as a stately fact. It is only because there is a government that one can even speak of territory as belonging to someone, or as constituting a domain of rights.

In this sense, statehood is the political actualisation of a normative structure — the public authority of government — through the contingent medium of territory.

Part 2 illustrates the operation of the full scheme through a reading of Kant's OCL. In part 3, I explore the origins of the circular self-grounding argument.

71 See B Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right: A Commentary* (Cambridge University Press 2010) 118.

D. Chapter Conclusions: Conceptual Smuggling

This clarification on statehood, territory, and government yields a clearer picture of what the state is — government with territory, and what an imaginable alternative might be — government without territory. In doing so, it exposes an argumentative vice inherent in many defences. The general institutional argument — that certain demands of justice are possible only in an institutional frame — does not in itself justify statehood, only government. To the extent that space intervenes as a mediating dimension of human relations, the conclusion should be that space also should be subject to civil authority. Indeed, this is Stilz's argument for the sovereign *qua* protector of occupancy rights. But this argument explains only why territory should be subject to civil authority, not why territorial authority should be the supreme form of civil authority. But statehood appears unequivocally as the latter: states are those civil governments with territory and, on this basis, the supreme legislators of the globe and of the human imagination. Yet there is little basis for the latter and it appears obvious only because the role of territory is fudged.

In short, I have argued that the state paradigm is presently difficult to escape because notions of statehood, territory, institutions and government are difficult to separate. Without clarity on what the state is, it is difficult to imagine an alternative; to imagine something other than a state. The difficulty, I claimed, comes from the contradictory position of territory as both product and structuring ground of statehood. Against this, I have proposed to structure statehood by a territory-agnostic notion of government.

This reversal supports a view of statehood as territorialised government rather than governmentalised territory. It reopens questions about the legitimacy of territorial jurisdiction and statehood generally. To outline the exigency: if civil institutions are not territorial inherently, why should they enjoy a presumption of competence to regulate conduct in their territory? Why should such a presumption not at least demand that the conduct in question has a territorial element?

The question then is how to explain the relationship between government and land. As I argue in the following chapters, one may — as Kant — see territory as an incidental feature of government and, therefore, see the state as a contingent manifestation of government. Applying the framework developed in this chapter to Kant’s legal philosophy yields a serviceable reading but one that is contrary to much mainstream interpretation.