

YOUNG ACADEMICS

by Nomos

Jakub Andrej Filčák

Reading Kant against the State



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Prof. Lorenz Schulz,

Prof. Maris Köpcke,

Prof. Migle Laukyte and

Prof. George Pavlakos

Jakub Andrej Filčák

Reading Kant against the State

With a Preface by Prof. George Pavlakos

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Reading Kant against the State

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Foreword

Jakub Andrej Filčák's *Reading Kant Against the State* is an exceptionally original and intellectually ambitious study. Building on a strong philosophical foundation and an impressive command of political, legal, and constitutional theory, Filčák develops an innovative framework for recovering the emancipatory potential of Kant's philosophy of right for contemporary thinking about the State. The thesis combines conceptual and metaphysical analysis with historical and genealogical argument in a manner rarely encountered in graduate work.

At the centre of the study lies a deceptively simple question: why has the State become so difficult to think beyond? Filčák's answer is partly metaphysical. Contemporary legal and political thought simultaneously treats statehood as grounded in territory and territory as a juridical category whose existence already presupposes norm-producing authority. Filčák diagnoses the resulting circularity through a sophisticated use of recent work on metaphysical grounding, distinguishing the structuring from the triggering grounds of statehood. His striking proposal reverses the orthodox explanatory order: government, understood as the capacity to generate a public normative order, structures statehood, while territory supplies a contingent condition of its realisation.

The argument is especially compelling for the range of philosophical resources it brings to bear. Filčák moves from contemporary metaphysics and international law to an imaginative reconstruction of Kant's Original Community of Land, and from there to Marxist jurisprudence and the historical transformation of the modern State. The

resulting synthesis of Kantian philosophy, Marxist theory, and critical theory allows him to identify the contingency of territorial statehood while offering a materialist explanation of its extraordinary historical resilience. Kant thereby emerges as an unexpected resource for challenging the naturalisation of the State and recovering the emancipatory possibilities of civil authority. Particularly impressive is Filčák's incisive use of Pashukanis: by extending his classic critique of the legal form to the State, Filčák argues that Kant's pre-revolutionary conception of civil authority avoids the naturalisation of the State and its collapse into an ideological mirage.

Drawing upon such a plurality of thinkers and traditions carries an obvious risk of cherry-picking, name-dropping, and ultimately superficiality. Filčák's rare achievement is to navigate these complex and extensive bodies of thought with a remarkably steady hand, maintaining throughout the argumentative relevance of the connections he establishes among them. Constructing a genuinely synthetic argument from materials whose mutual relevance must first be uncovered requires an unusually sharp philosophical eye and considerable intellectual discipline; it presents a challenge even to far more mature scholars. Filčák's achievement at this early stage is remarkable. It speaks eloquently to the breadth and quality of his intellectual formation and reflects considerable credit on the teachers and institutions that have contributed to it.

The significance of Filčák's argument ultimately lies in the research agendas it opens up. It aligns with and advances some of the most innovative strands of contemporary legal and political philosophy: research challenging the territorial boundaries of civil association; establishing the contingency of private property and the capitalist mode of production **from the fresh normative foundations provided by civil authority and self-government**; and exploring forms of political membership capable of including those whom existing territorial arrangements exclude. By bringing these concerns within a common philosophical framework, the book provides resources for rethinking the apparent naturalness of the territorial State and exploring alternative forms of juridical and political association. In the course of the book, the reader

Foreword

comes to appreciate civil authority as the grounding concept of political community, with territory occupying a contingent and derivative place within it.

George Pavlakos
University of Glasgow
September 13, 2026

Acknowledgements

I want to thank the present series' Editors and Nomos. I perceive a great risk in publishing early work: it seems likely to appear awkward and transcended, even to the author, all too early. Returning to this text a year after first drafting it, I am pleasantly surprised by being able to stand by it for now. That is a testament to the quality of the Frankfurt magisterial programme, the tireless labours of professor Lorenz Schulz and of Andrés Santacoloma, as well as to the inspiration and aid provided by the programme faculty.

Most of all, I must thank George Pavlakos. Encountering George's work caused me to radically pivot my research trajectory and kindled my faith in the emancipatory potential of jurisprudence. Discussions with George, his comments, and support were indispensable to the text and, which is more, to my education.

Further and not lesser gratitude belongs to Kostia Gorobets, who encouraged an undergraduate to write what he thought rather than what he thought he was expected to write. Were it not for Kostia, I would have taken much longer to write what I thought.

I must finally comment on the limitations of the dissertation. It bears the clumsy fingerprints of a graduate student; benefiting and suffering from naive ambition. The aim was not an encyclopaedia entry. The aim was to operationalise ideas for an emancipatory imperative: opening a juridical imaginary which appears at times hopelessly closed.

Zadar, August 14th 2026

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1. Introduction

“Hier konnte niemand sonst Einlaß erhalten, denn dieser Eingang war nur für dich bestimmt. Ich gehe jetzt und schließe ihn.”

Franz Kafka, ‘Vor dem Gesetz’ (Selbstwehr, 1 January 1915)

It is easier to imagine the end of law than the end of the state as the law’s basic unit. The optimism of the early 2000s promised an overcoming of the state form. The worst excesses of state power would be outlawed by international institutions, their inefficiencies obliterated by markets, their borders dissolved by love and trade. At the End of History, man would triumph over the rigid anachronism of sovereignty or at least over whatever in it was rigid and anachronistic. Today, that optimism and its cosmopolitan promise seem irretrievably lost.

In international relations, globalisation meant only the temporary loan of authority by states to inter-state institutions.¹ The “rules-based order” was succeeded not by bolstered cosmopolitical legality but by militarist “realism”.² The state’s position as the basic unit of global

1 See Martti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2003) 511–513.

2 Monica Hakimi and Jacob Katz Cogan, ‘The End of the US-Backed International Order and the Future of International Law’ (2025) 119(2) *AJIL* 279, 286–289; see also John Mearsheimer, ‘The Inevitable Rivalry: America, China, and the Tragedy of Great-Power Politics’ (2019) 100(6) *Foreign Affairs* 48.

politics did not shrink but grew at the expense of other political imaginaries.³

The same is happening within states. The neoliberal state apparatus is stripped back to its “core military and police functions”.⁴ The gentler machinery of the welfare state is continuously scrapped so that the rougher machinery of the realist state can be reinforced.

The “intractable persistence”⁵ of the state appears safe from harm or progress. The position of the state as the “most comprehensive legally-based social organisation of the day”⁶ remains secure. Not only secure but ascendant. One might quip in a distortion of St. Anselm that if the state grows in reality, it must also be growing in the imagination. Rather, the vindication of the state in reality has caused it to swell so much in the imaginary that it has, even there, crowded out all alternatives.

If one wished to see the discarded promise realised, one would have to contend not just with reality but also with the imaginary; a fiercer foe. There are of course the practical problems of enforcement and justice. How could any rights be secured without a state? How could rights to, say, land even be asserted except within a state? How could any law, let alone a just one, be promulgated? Who would it bind? All of these questions are logically prior to the impossible question of how a humanity mired in increasingly dire crises could even begin building such an alternate reality. And all of these questions are impossible to answer if one is unclear about what is meant by the state. We often are unclear; confounding territory with statehood and statehood with government. Thus, the present interrogation of the basic ontological

3 cf Manfred Steger, ‘Political Ideologies and Social Imaginaries in the Global Age’ (2009) 2 *Global Justice: Theory Practice Rhetoric* 1.

4 Mark Fisher, *Capitalist Realism* (Zero Books 2009) 2 and 65; see also Loïc Wacquant, ‘Three steps to a historical anthropology of actually existing neoliberalism’ (2012) 20(1) *Anthropologie Sociale* 66.

5 Timothy Brennan, ‘Cosmopolitanism and Internationalism’ (2001) 7 *New Left Review* 75.

6 Joseph Raz, ‘Why the State?’ (2014) King’s College London Research Paper no. 2014–38, 18–20 <<https://doi.org/10.2139/ssrn.2339522>> accessed 13 August 2025.

structure is a clarification of what is meant by what and for what material reasons.

But this is not, and could not be, an exercise in conceptual hygiene. The categories through which law imagines and constrains political community emerge from the material conditions law organises. If, as I argue, territory has been falsely elevated from contingency to common sense to Law of Nature, this is not because jurists have reasoned badly about the state. It is because the material developments that produced the state also produced real, analogous developments in the ideological superstructure of law. The Leviathan is no more an accident than a necessity; *both* negations must be asserted to expose its contingency.

Modern legality and statehood have their genesis in early capitalism. The consolidation of capitalism tracks a transition from contractarian statehood — of which Kant is perhaps the last theorist — to total statehood — of which Hegel is arguably the first. As the legal form mirrors the requirements of economic interaction, so the state form mirrors the emergent structure of a closed market economy.

The transition from feudalism to capitalism entailed two transitions in the primary drivers of economic activity: from land ownership to capital ownership, from rent extraction to profit extraction.⁷ If changes in the mechanics of wealth extraction were tracked by changes in the content of legal norms, the emergence of ecosystems of capital ownership was followed by the birth of statehood.

Today, capital ownership remains the foundation of the economy but rent extraction is regaining a place alongside or above profit extraction.⁸ If the state form organisationally corresponds to capital and the legal form to extraction, the reasonable inference is that the legal form is now poised to adapt while the state form will remain stable. Contrary to neoliberal vocabularies of deregulation and small government, the

7 Karl Marx, *Grundrisse: Notebook II – The Chapter on Capital* (1844) 239–250; see also Don Munro, *Marx's Theory of Land, Rent, and Cities* (Edinburgh University Press 2022) 71–81.

8 See Nicholas Gane, 'Capitalism is capitalism, not technofeudalism' (2025) 25(4) *Journal of Classical Sociology* 353–368 <<https://doi.org/10.1177/1468795X241269293>> accessed 20 August 2025.

replacement of profit with rent requires *more* regulation and intervention as wealth accumulation increasingly depends on ownership rather than activity.⁹ Statehood rises from purported decline, trailing the most recent transformations of the economy.

The work is an intervention in three parts: (i) on the concept of statehood, (ii) on Kant's state, and (iii) on the replacement of the early capitalist Kantian state by the consolidated Hegelian state.

In the first part, I lay out a case against contemporary state ontology. I begin with the observation that while it is accepted that the state is a historically contingent form of political organisation, it is still treated by law and much of political theory as a socially necessary one. I argue that the hard limit on the political imaginary — the impossibility of conceiving of a normative ordering of society without a state — is the result of an ontological sleight of hand in the concept itself. Essentially, all norms are said to emanate from states *and* the state is thought of as grounded in territory. But since territory is a normative category, the state seems to presuppose its own existence. Against this, I propose to ground the state not in territory but in government — in a-territorial civil authority.¹⁰

In the second part, I argue that my view is compatible with Kant's theory of the state. Focusing on Kant's juridical doctrine of the Original Community of Land (OCL), I argue that states enjoy only a contingent ownership of territory which temporarily suspends the juridical relation between people and land. This allows for an account of actually existing states that does not presuppose territory but remains grounded in government.¹¹

In the third, I consider why the territory-grounded state historically won out over the government-grounded state. I present a materialist

9 Slavoj Žižek, *The Relevance of the Communist Manifesto* (Polity Press 2019) 13.

10 Consider the recent ICJ opinion that loss of all territory does not necessarily mean that a state ceases to exist. see *Obligations of States in Respect to Climate Change (Advisory Opinion)* [2025] ICJ General List No. 187, para 363 <<https://www.icj-cij.org/case/187>> accessed 4 September 2025.

11 cf Craig Green, 'Beyond States: A Constitutional History of Territory, Statehood and Nation-Building' (2023) 90(3) *University of Chicago Law Review* 813, 823.

account in which the transition into capitalist class society led to the practical expropriation of territory from citizen-landowners to the state as such. This territorial state, widely associated with Hegel, has been the subject of extensive Marxist critique. I supplement this critique in two ways. First, I extend Evgeny Pashukanis' critique of the legal form; the idea that legal relations invert the logic of economic relations in order to preserve the latter. In conjunction with Marx's own observations on Hegel's state theory, this conceptualisation can explain the concept of the state as a fetish; a reversal of material reality. Second, I show how Pashukanis' refusal to engage with Kantian jurisprudence forms a limit on his analysis. A synthesised view, I argue, rescues the emancipatory potential of Kant's state and allows a more nuanced historicisation of 19th century liberal state theory.¹²

This is a highly compressed and practically motivated account of the state's intractable persistence in an otherwise changing world. Its aim is merely to lay out the case in a way that can exceptionally permit the juridical imaginary to broaden rather than contract; to clarify the legal vocabulary in a way that makes real political community conceivable outside the historical contingency of territorial statehood. If non-territorial political community sounds nevertheless like a blurry mirage, this speaks to how completely the state has conquered the juridical imaginary. It also speaks to the necessity of liberation.

12 See Georg Lukács, *The Young Hegel* (Merlin Press 1975) esp 96–98 and 146–147; Thomas Malcolm Knox, 'Hegel and Prussianism' (1940) 15(57) *Philosophy* 51, 53–54.

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.

3. Visit of Kant's Original Community of Land

A. Introduction

Having argued that statehood does not rest on a necessary territorial ground, I turn now to Kant's legal philosophy as a canonical site where this relationship is conceptualised. I will show that Kant's system supports the view that the state's relation to territory is derivative and contingent — and that this insight opens the path to a state-agnostic reading of cosmopolitical right and *government* theory.

In the previous part I have argued for a view of statehood grounded in government. Government — civil authority — is a moral-political mode of social organisation. It may be realised through the legal and empirical vehicle of statehood, which is a particular form of government that has manufactured for and around itself, in cooperation with others, a 'given' territorial container. The division of the whole surface of the globe into such containers is the work of a set of governments and states, but is neither conceptually prior to civil authority nor its necessary consequence.

In what follows, I consider Kant's legal philosophy as a test case for the framework developed in part 1.

Rather than dealing with Kant's theory of the state generally, I target a neglected concept in the literature: the Original Community of Land. OCL is the juridical relation between human beings and the surface of the Earth. How and whether this relationship is determined by the intercession of statehood is a question inseparable from the nature of

statehood itself. My argument in short hinges on the question of why in Kant's account, human beings possess the soil collectively in the pre-political situation, but collective possession is explicitly denied in the cosmopolitical situation. While it is possible to interpret this as the result of a transfer of possession to states, the contrary reading — that states are only ever contingent owners of whatever pieces of land their citizens happen to own — is also possible.

I do not claim that this interpretation is what Kant had in mind, merely that it is one compatible with his principles. It does require a reconstruction: reading Kant's *civitas* here as "government" rather than "state". But this is sensible because as I have shown in the previous part, the standard definition of the word state is now that of an inherently territorial unit, something I will strive to show is not the case in Kant's account. In the subsequent part, I show the conceptual break that transformed the Kantian limited state into the Hegelian total state. As the notion of statehood presently dominant in theory has many Hegelian implications, it is sensible to apply the label of government to Kant's state, its present meaning being much closer to the polity he envisions.

The starting point for this part is the double meaning of OCL in the Doctrine of Right. In the section of private right, the OCL is an idea with "practical and juridical reality".⁷² It is a situation of "the common collective possession of the soil of the whole Earth (*communio fundi originaria*)".⁷³ It is thus a *communio* in a juridical, property law sense. But there is another OCL in the chapter on cosmopolitical right: "all nations originally hold a community of the soil, but not a juridical community of possession (*communio*), nor consequently of the use or proprietorship of the soil, but only of a possible physical intercourse (*commercium*)."⁷⁴ Kant derives OCL, in both senses, from the finite size of the Earth's surface. Yet one OCL is a *communio* and the other only a *commercium*.

72 Kant, *Doctrine of Right* (1797) §6.

73 Kant, *Doctrine of Right* (1797) §16.

74 Kant, *Doctrine of Right* (1797) §62.

Contemporary scholarship often focuses on how, accepting this distinction, it might nevertheless be possible to derive from the OCL a thicker set of cosmopolitical rights than Kant does. But these strands of cosmopolitanism rarely interrogate *why* the OCL in the cosmopolitical situation is not a juridical *originaria communio fundi* (*communio* for short here). As I will attempt to show, one reason for this might be that Kant gives a structuring role to territorial statehood. Indeed, this seems to be the assumption under normative theory that seeks to show that Kant's conception of guest right does not go far enough. But I propose an alternative reading: the relative weakness of the situation of OCL that obtains between nations can itself be evidence of the contingent nature of statehood.

This reading leads to a key claim: that within Kant's framework, land ownership is always tied to a civil condition, and that the state possesses territory only derivatively, through the land entitlements of its citizens. It follows that there is no structural reason in Kant's principles of right why, in theory, land could not transfer lawfully across civil conditions — provided the original civil condition did not prohibit such transfer, and the transfer respects public right. Essentially, one must submit to civil authority to secure one's rights but it does not necessarily follow that one wrongs one's compatriots by transferring property into a different civil condition. No more than one harms those not included in the first civil condition by entering into it. The civil condition is not the Leviathan, it is merely the requirement for self-legislation which makes possession legitimate and not at the expense of the freedom of others.

While this possibility may seem surprising, it illustrates the extent to which territorial statehood is not a moral precondition of rightful landholding, but a juridical consequence of civil association that remains contingent.

B. Background of the Original Community

In this section, I introduce the Original Community of Land (OCL), a notion of Kant's legal-philosophical system explaining the original juridical position of human beings vis-a-vis the Earth's surface. I begin with some relevant introductory clarifications on Kant's legal philosophy, then situate the notion of OCL in his doctrine, especially the types of right and how they relate to one another. My aim is both to provide context for OCL and to set up how the necessity of the civil condition—though not necessarily the state—relates to the postulates of right in Kant's philosophy and his theory of state.

(i) The Doctrine and the necessity of the civil condition

Because OCL cuts across several paradigms or sites of Kant's legal doctrine, some clarifications of Kant's legal philosophy should be made: the relationship between the types of constitutions and types of right—private, public, international and cosmopolitical, and the meaning of “state”.

The distinction between the types of constitutions is present in the *Doctrine of Right* but Kant provides a much more explicit summary in *Toward Perpetual Peace*. In the latter, he distinguishes between three constitutional categories: civil, international, and cosmopolitical. The civil constitution, pertaining to the sphere of private right and public right, governs relations between individuals and their state.⁷⁵ The international constitution governs relations between states.⁷⁶ Finally, the cosmopolitical constitution “embodies the law of world citizenship, governing the relations amongst men and nation-states considered as citizens of a universal state of mankind.”⁷⁷ If the civil constitution is

75 Kant, *Toward Perpetual Peace* (1795) Second Definitive Article.

76 Kant, *Toward Perpetual Peace* (1795) Second Definitive Article.

77 Kant, *Toward Perpetual Peace* (1795) Second Definitive Article; There is an apparent discrepancy on this between *TPP* and the *Doctrine*. In §62 of the *Doctrine*, on cosmopolitical right, Kant speaks broadly of relations between nations, but the

vertical and the international is horizontal, then the cosmopolitical is diagonal.

The types of right are at the forefront of the *Doctrine* and Kant distinguishes between four: private, public, international and cosmopolitical. International and cosmopolitical right track the contents of the international and cosmopolitical constitutions respectively. Public right consists of the laws which require public promulgation “in order to produce a juridical state of society”.⁷⁸ Public right is the right of the civil condition and thus falls under the civil constitution. Finally, private right is the system of laws between individuals which requires no external promulgation and is *ipso facto* outside the scope of the constitution types.⁷⁹

To explain why no external promulgation is necessary and the relationship between private right and public right, a more detailed point about the *Doctrine* must be made. The entire system of the *Doctrine of Right* reconstructs law from the “single assumption” that everyone has a right to external freedom.⁸⁰ External freedom can be limited only by the conditions of its own possibility,⁸¹ hence the cornerstone is the Universal Principle of Right (UPR): “act externally in such a manner that the free exercise of thy will may be able to coexist with the freedom of all others, according to a universal law.”⁸²

The doctrine proceeds as an authorisation chain from the UPR to private right and public right respectively.⁸³ Assuming the UPR, the rules of private right -limiting the external freedom of action of one where it would interfere with the external freedom of action of another- become discoverable free of any promulgation. But there are

specific contents and rights he discusses regulate nations vis-a-vis people in a more private capacity. Thus the distinction drawn in *TPP* is, in practice, applicable.

78 Kant, *Doctrine of Right* (1797) §34.

79 Kant, *Doctrine of Right* (1797) Introduction, Division C.

80 Byrd and Hruschka (n 71) 24.

81 Marcus Willaschek, ‘Right and Coercion: Can Kant’s Conception of Right be Derived from his Moral Theory?’ (2009) 17(1) *International Journal of Philosophical Studies* 49, 54–60.

82 Kant, *Doctrine of Right* (1797), Introduction, Division C.

83 Kant, *Doctrine of Right* (1797), Introduction, Division C.

also certain limits which, while necessary to permit more complex freedoms —acquisition of land, for instance— which cannot be based on the will of one dominating the will of another but only on a public, omnilateral will. Hence the necessity of public right and *ipso facto* the civil constitution and the civil condition.

To summarise, Kant's argument begins in a pre-institutional situation where the harmonisation of external freedom is the universal postulate. From this postulate, the authorisation chain follows to private right, then to public right and the necessity of the civil condition, then to the relations that obtain between states and humans in more complicated constitutional frames. OCL as a doctrine cuts right across the structure of the Doctrine. Being itself pre-institutional —original— the relation between humans and the surface of the Earth determines how land rights and states can operate upon it, both in the private and cosmopolitical constitutional frame.

(ii) Kant's concept of the state

I begin here from the canonical distinction between the state in the idea and the state in reality. I then propose to map the first concept onto my notion of government and the second onto the practical, positive phenomenon of statehood.

The state in the idea is a moral and juridical reality. It is “the state operating under ideal constitutional principles and the norm for any juridical state actually founded by human beings”.⁸⁴ It contains in itself two related concepts. First, that of the civil condition (*Zustand, status civilis*) as opposed to the state of nature.⁸⁵ Second, that of the state as the ideal institutional form (*Staat, civitas*).⁸⁶

84 Byrd and Hruschka (n 71) 143.

85 Kant, *Doctrine of Right* (1797) §43–45; see generally Thomas Vesting, *State Theory and the Law: An Introduction* (Elgar 2022) 4–5.

86 Kant, *Doctrine of Right* (1797) §43–45.

A state (*civitas*) is the union of a number of men under juridical laws. These laws, as such, are to be regarded as necessary a priori — that is, as following of themselves from the conceptions of external right generally — and not as merely established by statute.⁸⁷

The state in reality by contrast refers to actual, historical states independent of the moral criterion. Byrd and Hruschka: “States’ indistinguishable from dens of thieves, slavery, despotism, concentration camps, confining walls, and the like have existed from time immemorial.”⁸⁸

For the purposes of this paper, I map these notions onto concepts established in part I. The “state in idea” (*civitas*) corresponds to my notion of government. First, because as the ideal manifestation of the civil condition it entails the same criterion — the existence of an omnilateral civil authority over a group of people. Second, because the *civitas* is in fact territory agnostic. It does not itself own territory in the way that a person owns land. Rather, its territory is meta-ownership of the land its citizens rightfully occupy, necessary to provide an omnilateral authority for land ownership and make the latter non-provisional.⁸⁹ Presumably, a *civitas* could be non territorial if its citizens declined or failed to occupy any land.⁹⁰ To the extent that they wish to do so, however, the *civitas* must have authority over that land so that it is occupied and divided pursuant to an omnilateral rather than unilateral will. But this is not incompatible with a territory-agnostic view because it again brings back this point: that saying territory should be subject to civil authority is not the same as saying that civil authority should be monopolised by territorial authority. In other words, legitimate states should exercise functional authority over land, land authority does not automatically give one sovereign civil authority.

The “state in reality” is in law and sociology simply called “the state”, an empirically existing institutional framework and a practical manifestation of government. In fact, since the state in reality could, in principle, fail to fulfil the normative criteria of the state in the idea

87 Kant, *Doctrine of Right* (1797) §45.

88 Byrd and Hruschka (n 71) 168.

89 See Byrd and Hruschka (n 71) 118, 121 and 141.

90 I explore this point in detail in chapter 4.

completely, it is an even more contingent and broad concept than the notion of statehood — the territorialised manifestation of government — proposed in part 1.

These clarifications establish the conceptual background necessary for understanding the Original Community of Land in its proper doctrinal setting. What follows reconstructs Kant's treatment of the OCL and explains how it functions within the architecture of private and cosmopolitical right.

C. The Original Community

The OCL has two meanings — *communio* and *commercium*. I argue that the difference between the two, and their presence in different parts of Kant's doctrine, opens the question of the relation between the state and territory.

The Original Community of Land⁹¹ is the situation human beings find themselves in in relation to the surface of the Earth. The stakes of this notion are high since it shapes the fundamental relation between authority and space. The idea is that the finite nature of the global surface means that humans possess common rights to it. I first sketch the historical origins of OCL and Kant's divergence, then delineate the two meanings of OCL in Kant's doctrine.

This idea of the OCL was not invented by Kant but was already present in natural law. For instance, Emer de Vattel writing (1758):

91 My copy of the *Doctrine* (ZincRead 2023) uses the literal "original community of the soil", so this formulation is used in quotes.

The earth belongs to mankind in general; destined by the Creator to be their common habitation, and to supply them with food, they all possess a natural right to inhabit it, and derive from it whatever is necessary for their subsistence, and suitable to their wants. But when the human race became extremely multiplied, the earth was no longer capable of furnishing spontaneously, and without culture, sufficient support for its inhabitants; neither could it have received proper cultivation from wandering tribes of men continuing to possess it in common. It therefore became necessary that those tribes should fix themselves somewhere, and appropriate to themselves portions of land, in order that they might, without being disturbed in their labor, or disappointed of the fruits of their industry, apply themselves to render those lands fertile, and thence derive their subsistence. Such must have been the origin of the rights of *property* and *dominion*: and it was a sufficient ground to justify their establishment.⁹²

This idea in its most rudimentary form is present at the birth of international law when Francisco de Vitoria says that “in the beginning of the world, when all things were held in common, everyone was allowed to visit and travel through any land he wished”.⁹³ But it was Kant who “secularised” this doctrine, criticising Grotius and Pufendorf for seeing it as a historical fact and proposing that it is instead an idea of reason with a practical reality.⁹⁴

Kant does not speak about the historically original situation, reasoning rather from the nature of the Earth:

All men have this right by virtue of their common possession of the surface of the earth, where (because it is a ·finite· sphere) they can't spread out for ever, and so must eventually tolerate each other's presence. Originally no-one had more right than anyone else to any particular part of the earth.⁹⁵

92 Emer de Vattel, *The Law of Nations or Principles of Natural Law* (1758) §203; also cited in Michela Massimi, ‘Normative Foundations of Kant’s Cosmopolitan Right: The Overlooked Legacy of Kant’s Metaphysics of Nature’ (2023) 28(3) *Kantian Review* 373, 379.

93 Francisco de Vitoria, *On the American Indians* (1538) in Anthony Pagden and Jeremy Lawrence (eds), *Vitoria: the Political Writings* (Cambridge University Press 1992, 2010) 278.

94 Massimi (n 92) 377; cf Rousseau: ‘Let us begin by laying the facts aside, for they have no bearing upon the question’ in *Discourse on the Origins of Inequality* (GDH Cole tr, JM Dent & Sons Ltd 1913) [1754] 12.

95 Kant, *Toward Perpetual Peace* (1795), Second Definitive Article, The Law of World Citizenship.

The Earth is finite, human beings cannot disperse so much as to avoid having relations, nor can they appropriate land without limiting others, thus there is an OCL. This relation cuts across Kant's legal philosophy, from private right to cosmopolitical right as the original, juridical condition of humanity. It determines the contents and nature of right vis-a-vis land because it explains the original position.

In Kant's doctrine, OCL actually has two different meanings: it is the idea of the Earth as a common space of interaction (*commercium*) and of the common possession of land (*communio*).⁹⁶ While Kant invokes *commercium* in both the context of private law and cosmopolitical law, *communio originaria fundi* only applies in his doctrine of private law.

(i) *Commercium*

Commercium is the thinner meaning of OCL; it is the relations based notion that all places on Earth are connected with one another and one cannot avoid having relations with others. The basic idea is "that my

96 As Byrd and Hruschka point out, the word *communio* has two meanings in Kant's usage, see Byrd and Hruschka (n 71) 129–130. The first (narrower) is that of a common ownership of a thing, which is in line with the meaning of *communio* in Roman law, see D.10.3 esp D.10.3.2.1 Gaius 7 ad ed. The second (broader) meaning refers to common membership in a whole. Kant is using both meanings because he is seeking to replace Grotius' concept of the *communio primaeva*, which is broader than a community of ownership, see Macarena Marey, 'A Kantian Critique of Grotius' (2019) 95 *Problemas* 67–80. Byrd and Hruschka argue that the *communio fundi originaria* is not a narrow *communio* but by appealing to what Kant says about the Original Community of Land (broad *communio*) in cosmopolitical right, i.e. that it is not a juridical community of ownership, see Byrd and Hruschka (n 71) 130, note 40. But one may not use what Kant says of OCL in the cosmopolitical doctrine (§62) to clarify what he says in the private doctrine. For not only does he never refer to the *communio fundi originaria* in his cosmopolitical doctrine, but he speaks there of the situation arising between peoples not people (*Alle Völker* not *Alle Menschen*). Even if Kant is using *communio* with a broader meaning than it has in Roman law, this does not mean that he does not mean still a *juridical* community. I use *communio* for the narrower meaning, entailing at least a degree of juridical ownership as in the *communio fundi originaria*, and I use OCL for the broader meaning encompassing also *commercium*.

right to be here on this portion of the earth must be counterbalanced by your right to be there on that portion of the earth”.⁹⁷ This is already dynamic since, in an echo of Kant’s natural philosophy, this balance is already a dynamic relation in which the latter two rights are inherently connected.⁹⁸ Moreover, from this reality the rightfulness to attempt (commercial) intercourse follows.

As a juridical situation, *commercium* is inseparable from older concepts of guest right and trade. De Vitoria bases his defence of colonialism on the notion that since intercourse between humans is inevitable, Europeans have a right to trade with non-Europeans and to conquer them if they resist.⁹⁹ *Commercium* originates in universal economy doctrine, appearing at least as far back as the 4th century: “God had made sure that commodities were dispersed among various countries and different regions, thus offering an incentive to trade”.¹⁰⁰ The necessity of and thus right to commercial intercourse is thought to be a God-designed feature of the Earth. Kant rejects the colonial implications of the argument, namely that Europeans may conquer those who resist or impede trade.¹⁰¹ But he still bases guest right upon it as a weaker right to *present oneself* for intercourse with the new caveat that the intercourse may decline.¹⁰²

97 Massimi (n 92) 382.

98 Massimi (n 92) 382.

99 Anghie (n 22).

100 Georg Cavallar, *The Rights of Strangers: Theories of International Hospitality, the Global Community, and Justice since Vitoria* (Ashgate 2002) 265; For the theological rootedness of the universal economy doctrine, see also: ‘In the world to come there will be no eating and drinking, nor any generation and reproduction. There will be no commerce and trade [...]’ (Talmud, b Berakhot, 17a) in Giorgio Agamben, *The Kingdom and the Glory* (Stanford University Press 2011) 247.

101 Anghie (n 22).

102 Kant, *Doctrine of Right* (1797) §62; see also Pauline Kleingeld, ‘Kant’s Second Thoughts on Colonialism’ in Katrin Flikschuh and Lea Ypi (eds), *Kant and Colonialism: Historical and Critical Perspectives* (Oxford University Press 2014) 43.

(ii) *Communio*

Communio is the stronger meaning of OCL, and implies not only intercourse but in fact the common possession of land by all:

All men are originally and before any juridical act of will in rightful possession of the soil; that is they have a right to be wherever nature or chance has placed them without their will. Possession (*possessio*), which is to be distinguished from residential settlement (*sedes*) as a voluntary, acquired and permanent possession, becomes common possession, on account of the connection with each other of all the places on the surface of the Earth as a globe.¹⁰³

OCL in the sense of *communio* is juridical, common possession¹⁰⁴ of the soil:

This original community of the soil and of the things upon it (*communio fundi originaria*) is an idea which has objective and practical juridical reality and is entirely different from the idea of a primitive community of things, which is a fiction.¹⁰⁵

Communio is what simultaneously opens the way and constrains property rights in land. Occupancy, though rooted in OCL, entails the taking of possession of a portion of the Earth.¹⁰⁶ Since the Earth is limited in size, taking possession of part of it limits the external freedom of another, since they then cannot do the same.¹⁰⁷ Having a right to be where I am does not entitle me to any particular part of the Earth, but it does entitle me to *some* part of it, thus it would be contrary to my external freedom if the entirety of it were expropriated through

103 Kant, *Doctrine of Right* (1797) §13; There is a possibly significant difference between Kant's account and Vattel's: Vattel presupposes an original position before men became significantly multiplied where scarcity was not an issue whereas Kant's abstraction would hold true even if there were only two or three people on the globe.

104 Byrd and Hruschka (n 71) 130: 'Achenwall uses the word in its legally technical sense to mean a community of right-holders, in particular a community of co-owners of a thing. In obvious reliance on Achenwall, Kant also uses the word *communio* in this narrower sense.'

105 Kant, *Doctrine of Right* (1797) §6.

106 Kant, *Doctrine of Right* (1797) §14.

107 Kant, *Doctrine of Right* (1797) §14.

unilateral will(s).¹⁰⁸ Thus the taking of possession of land is a coercive act of will which, if it were unilateral, would without a proper basis arbitrarily limit the freedom of another and would therefore breach the UPR.¹⁰⁹ Thus, peremptory — as opposed to provisional — acquisition of a thing, in this case the soil, requires an omnilateral authorisation and, *ipso facto*, a civil condition.¹¹⁰ The necessity of basing land rights on omnilateral authorisation thus explains why territory should be subject to civil authority, anything else would entail not only a constraint on the freedom of another, but also their expropriation from the *communio* in which humanity holds ownership of land.

(iii) The Two Communities

Considering the fundamental role of OCL in urging and shaping the emergence of civil authority, the doctrine of right contains a strange reversal of it: in the private right paradigm, OCL includes both *commercium* and *communio* but in cosmopolitical right, it is only *commercium*.

That the private right entails *communio* is clear enough from Kant's explication of the *originaria communio fundi* in section 6 of the Doctrine. That the private right OCL is *also* a *commercium* is less obvious — unless we were to assume that *communio* is a subset of *commercium* cases. But the *commercium* in private right becomes apparent in the dispersal counterfactual in ss 13:

For, had the surface of the Earth been an infinite plain, men could have become so dispersed upon it that they might not have come into any necessary communion with each other [...]¹¹¹

This proof, being identical to the proof for *commercium* both in ss 63 of the Doctrine and in 2:3 of *Toward Perpetual Peace*, suggests that the weaker case of OCL also obtains at the base of private right.

108 Byrd and Hruschka (n 71) 128.

109 Byrd and Hruschka (n 71) 128.

110 Kant, *Doctrine of Right* (1797) §15.

111 Kant, *Doctrine of Right* (1797) §13.

On the contrary, addressing cosmopolitical right, Kant explicitly identifies the relevant OCL as being not *communio* but only *commercium*:

Nature has enclosed them together within definite boundaries [...] Hence all nations¹¹² originally hold a community of the soil, but not a juridical community of possession (*communio*), nor consequently of the use or proprietorship of the soil, but only of a possible physical intercourse (*commercium*) by means of it.¹¹³

Thus, within the doctrine, *communio* appears at the beginning but either does not apply to mankind within the law of world citizenship, or has somehow been lost or expropriated along the way.

Table 1: OCL in constitution types, my reconstruction.

	<i>Commercium</i>	<i>Communio</i>
In Private Right	Yes	Yes
In Cosmopolitical Right	Yes	No

Kant does not explicitly argue why in the cosmopolitical situation, OCL is only *commercium*. As I argue in the following chapter, the answer to that question is not obvious but is inseparable from the role and nature of the state.

D. How States Did Not appropriate Territory

The question is why humanity possesses the Earth in common in private right but loses this right by the time we arrive at the cosmopolitical

112 The reference to nations here reflects the ambiguity about the subjects of cosmopolitical right which is present in the Doctrine, specifically whether cosmopolitical right concerns relations between nations or between nations and citizens of third countries. However, though the first part of the chapter is ambiguous, the only right of world citizenship is guest right, which obtains between nations and citizens of third countries. Furthermore, since Kant does not provide an explicit definition of the cosmopolitical constitution, there is no reason to depart from that presented in Definitive Article 2 of *Toward Perpetual Peace*.

113 Kant, *Doctrine of Right* (1797) §62.

question. The world as we encounter it in the cosmopolitical situation is divided into territorial states, real states. Between these states, only the weaker notion of *commercium* obtains. Why? To clarify: *communio* stops applying between individuals when they enter into the civil condition. But states still find themselves in an original situation vis-a-vis each other yet this is not one of *communio*.

I argue in this part that there are two potential explanations. The first, in line with the orthodox construction in which Kant's state is inherently territorial, claims that *communio* was extinguished by the creation of states. Following the dissolution of the state of nature¹¹⁴ the juridical possession right held by all in common is vested in states and therefore expropriated from individuals. Arguments that adopt this conception have to concede that for Kant, statehood implies virtual omnipotence limited in the cosmopolitical sphere only by guest right. To the extent that they nevertheless seek to find an external juridical limit to state power, they argue that one can derive from *commercium* stronger rights than Kant did.¹¹⁵ But considering Kant's treatment of territory as a contingent meta-position, this answer is not as convincing as it may appear. This is why I propose a contrary interpretation: that *communio* between individuals is never abolished but only suspended by statehood. If *communio* were to apply in the cosmopolitical situation, this would entail expropriating ownership from individuals to states, which is why it cannot be the case. On this reading, the *communio* does not obtain in the cosmopolitical situation not because states expropriated this right but precisely because they did not. States themselves are not proper but only contingent owners of land and the *communio* thus continues to underpin the relationship between human beings generally, though it is dissolved between them locally to the extent that they find themselves in a mutual civil condition.

My argument will proceed in the following way. I first return to a clarification of what the state is and is not for Kant, highlighting its contingency in two dimensions: the non-structuring nature of territory

114 Massimi (n 92) 377.

115 Kant, *Doctrine of Right* (1797) §21.

for Kant and the precarity of the state's possession of land. After clarifying this, I will show why it is only the existence of the civil condition, not statehood, which can suspend or dissolve the state of nature and *ipso facto* the *communio fundi originaria*. Consequently, owned land is not locked away in territorial containers but is in a state of flux not entirely subject to state will. Hence, in the third part, I defend the claim that land should be transferable between sovereigns without authorisation by the sovereign within whose public authority it was originally acquired. In doing so I actualise the general government-first, territory-second claim.

(i) Necessity of the civil condition; contingency of the state

Returning to the clarification in B(ii), Kant's primary distinction is between the state in the idea (which contains both the general *status civilis* and the *civitas*) and the state in reality which, given our present reality, refers to the 200 territorial sovereigns. Although Kant does use the word state for *civitas*, I will favour here the word government not only to distinguish it more easily from the state in reality but also because, as I have argued, the *civitas* as an idea works just as well without territory. It is simply the civil condition human beings must enter in order to limit their freedom through a unilateral will. *Civitas* contains certain stronger criteria such as the separation of powers as necessary but it is only territorial insofar as its members choose to occupy territory and, in fact, they can only non-provisionally occupy territory once they have entered into the *civitas*.¹¹⁶

The way in which the state owns territory is fundamentally contingent and precarious. It only owns it in virtue of its citizens owning it. Rather than being fixed, territory is dynamic and relational. The radical version of this view would suggest that while one may need government to acquire land, one would nevertheless be free to change citizenship and take land with them into a new government. There would thus

116 See Japa Pallikkathayil, 'Kant on the State' in Anil Gomes and Andrew Stephenson (eds), *The Oxford Handbook of Kant* (Oxford University Press 2024) 432–4.

be no fixed territorial containers, only mappings of the authoritative division of land at any given time. I dedicate this section to showing the compatibility and support of this view with Kant's account.

Territorialisation is, for Kant, a posterior juridical effect. States are not themselves landowners in the same way that citizens are. State territory is merely meta-ownership of the territory a state's citizens occupy.¹¹⁷ This being the case, territory is a synthetic normative category which requires, in the first instance, occupation. But occupation itself already presupposes a public element since one of its requirements is "[a]ppropriation, as the act, *in idea*, of an externally legislative common will, by which all and each are obliged to respect and act in conformity with my act of will".¹¹⁸ Until such an omnilateral will is constituted, occupation remains only provisional.¹¹⁹ Presumably, if state territory is meta-ownership, it would itself remain provisional unless there were a civil condition.¹²⁰ Since it is the civil condition that comes first and territorialisation that comes second, then the civil condition itself only enables but does not require statehood. A group of people could submit themselves to a civil authority and then decline or fail to occupy any land.¹²¹

To recapitulate here, land ownership requires a rightful condition to become acquired but it is then only held by the state in virtue of being held by the citizen. If I were to acquire land rightfully and then declare that I change my citizenship to another, equally rightful *civitas*, there does not appear to be an axiomatic reason why the land I own would therefore not become part of my new state. As bizarre as this example may sound, it is not alien to the logic of feudal law in Mediaeval Europe. Limitations *could* presumably be placed on such

117 see Byrd and Hruschka (n 71) 118, 121 and 141.

118 Kant, *Doctrine of Right* (1797) §10. Italics added.

119 Kant, *Doctrine of Right* (1797) §15.

120 Supposing, of course, that there can be 'states' in which a civil condition does not obtain. This proposition seems counterintuitive, but if we suppose that a band of robbers can constitute a sociologically real state entity nevertheless incapable of producing binding omnilateral norms, this would be possible.

121 Consider Jewish communities prohibited from land-ownership in Mediaeval Europe.

switches where, for instance, I were landlocked by neighbours. That is, I could be prevented from forming a territorial enclave were enclaves deemed undesirable or incompatible with the rights of my neighbours. This did not seem to pose an issue for feudal law; indeed there are today communities who live in territorial enclaves more or less happily. But even then, the limitation is only a contingent one, for if I live on the border between two states, there do not appear to be reasonable grounds for an objection to the switch.

This dynamic account of territory disagrees with a particular canon of literature that claims Kant treats territory as an *a priori* and therefore implicitly fixed category.

For an archetype, I turn to Jeremy Larkins' *From Hierarchy to Anarchy*. For Larkins, Kant gives territory a structuring role by providing an "essentialist account of the relationship between the state and territory as the 'territorial a priori.'"¹²² Larkins' argument is that Kant, adopting Newtonian physics and giving space an *a priori* status in the *Critique of Pure Reason*, gives territory an analogous status in his theory of international relations.¹²³ "Kant does not desire the borderless space of a universal state. Indeed, international justice requires the 'separate existence of many independent adjoining states.'"¹²⁴

This argument flounders for several reasons, most importantly because Kant's arguments are equally coherent if we understand the state as contingent. International justice requires the existence of states¹²⁵ conceptually because otherwise it would not be international. Without states, there would be no need for *international* justice, but there could still be interpersonal and institutional justice. Kant's argument about relations between states *can* be read by treating statehood as a practical constraint — as contemporary normative theorists do. If the world is divided into states as a matter of fact, Kant may simply be asking what rights and obligations this facticity generates. To the extent that

122 Jeremy Larkins, *From Hierarchy to Anarchy: Territorial Politics Before Westphalia* (Palgrave Macmillan 2010) 2.

123 Larkins (n 122) 19.

124 Larkins (n 122) 26.

125 "States" being here synonymous with "nations".

the remainder of Kant's legal philosophy does not produce territorial state as a necessity, then his conception of international can itself be understood as contingent rather than necessary.

That this is a better reading is reinforced by the second objection: Kant treats neither space nor territory as neutral. As Massimi points out, Kant's philosophy of nature may favour Newton over Leibniz, but is an altogether different philosophy of nature in that it is relational and dynamic.¹²⁶ Space itself and *Commercium* too are not structured as a pool table but as situations of reciprocal dynamism.¹²⁷ Kantian space is not a pool table because in a pool shot, both balls do not bear equal metaphysical responsibility. Kantian space, contrary to the pool table dream of Early Modernity, is intersubjective and constructed. Thus even if one assumes that, for Kant, territory is the political equivalent to space, this does not mean territory is a structuring condition. Rather, one would have to then imagine Kantian territoriality as itself dynamic and intersubjective, a consequence of states and their interaction.

But actually, for Kant, the role played by territory is not analogous to space, except in that just as every object is situated in space, every person occupies *some* place on Earth. But the analogy struggles for two reasons. First, because it is people that occupy space not states. The world is divided into places occupied by individuals, this is inherently the case. It is not inherently the case that the world is divided into territories. Places of rightful occupation only become territory through the additional and juridical act of social contract. But even without this act, one might argue, the juridical dimension maps onto the category of space through human beings themselves among whom it is *divided* into places of rightful occupation. But in fact it is not divided. For individuals may have an inherent right to be *somewhere* but *where* they have a right to be is not in any particular place but rather wherever they happen to be at any given time.¹²⁸ The world is not *divided* into plots of rightful occupation; it merely *contains* them. To the extent that a place

126 Massimi (n 92).

127 Massimi (n 92).

128 Byrd and Hruschka 128.

of rightful occupation becomes a fixed coordinate, this is through the subjective action of an individual, which is not *a priori* but additional to the basic structure. Since individuals are merely somewhere but not anywhere in particular, the civil condition they enter into through omnilateral contract is itself only contingently territorial.

Even if the latter weren't the case, territory as a feature of political community is necessarily contingent insofar as it requires a public juridical act to be non-provisional and is itself a secondary state of meta-ownership, tying the state only to the people who make it up to the extent that they occupy land not to an *a priori* territorial container. The juridical condition creates but does not fix territory. With these constructions, it is possible to provide a new answer to the *communio-commercium* switch; that is, why the existence of states seems to extinguish individuals' common proprietorship of the Earth.

(ii) Two explanations for the switch

The previous section established two points. First, that the state's possession of land is contingent in a broad sense since the territorial state is not the necessary manifestation of the civil condition or *civitas*. Second, that territory is not, for Kant, an *a priori* juridical category; the world is not *divided* into territorial containers but consists only contingently of the land appropriated by a state's citizens. These premises set up my argument that the weakness of *commercium* in the cosmopolitical situation reflects that the cosmopolitical situation is itself contingent, being a *pro tempore* juridical situation that arises between states not only before the eventual establishment of a federation or world state, but also only following the contingent development of a geopolitical structure of territorial states.

This view of why only *commercium* obtains is different from the alternative *residual conception*, which suggests that states, having appropriated ownership of land from the mass of humanity which held it in common, remain bound only by the residuum of that common right,

manifested in the weak rights of people stemming from the Earth as a common interaction.

This conception can be found, for example, in Ripstein. The sole reference to OCL in *Force and Freedom* comes up in the context of roads and freedom of movement. “Consider a system in which all land is privately owned.”¹²⁹ In such a system it is possible for any landowner to become landlocked; surrounded by other landowners who, exercising their property rights, can deny him egress out of his own parcel.¹³⁰ Suppose then that roads are necessarily public goods presupposed by the system of land ownership.¹³¹ Interrogating Taylor and Dworkin’s arguments on the matter, Ripstein proposes a dichotomous basis in the OCL:

Are roads like the high seas, uninhabitable zones that are available for all to traverse? Or are they somehow a residue of an original commons, the bit of land that has not been appropriated?¹³²

Ripstein’s own answer roots roadship, ultimately, in the necessity of harmonising freedom.¹³³ But in the present context, the prior dichotomy deserves further consideration. The high seas, the standard case of *commercium*, are apparently *commercium* because they are uninhabitable and thus unclaimable.¹³⁴ The other option is that a degree of *communio* persists because the land has not been appropriated yet.

Ripstein fits into the general summary of the *residual conception* I now offer. In the beginning, humans held land under *originaria communio fundi*. But, entering into the juridical state, land was divided into territorial spheres, themselves composed of plots of land subject to states. For this reason, *communio* was extinguished and only guest right

129 Arthur Ripstein, *Force and Freedom* (Harvard University Press 2009) 243–250.

130 Suppose, more radically, that a person who owns no land is in this situation everywhere and at all times.

131 Ripstein (n 129) 249.

132 Ripstein (n 129) 249.

133 Ripstein (n 129) 249.

134 That the seas are not property because they are uninhabitable is incompatible not only with the tendency of states to appropriate them but more importantly with ideas such as the Common Heritage of Mankind (seabed) in the Law of the Sea.

prevailed as between peoples on land while it prevailed on sea because the latter was not possessable in the first place.

Essentially, the collective possession of land once held by humanity is now moved into the hands of states and divided between them. That this is a consistent interpretation of Ripstein is supported by his understanding of the relationship between property and sovereignty. Ripstein agrees with the Kantian canon in the assertion that sovereignty is not *just* large-scale ownership. Property and sovereignty, he argues, share structural similarities but are differentiated by the fact that the sovereign is accountable to an internal norm — power must be exercised for and on behalf of the people — while the property owner is not.¹³⁵ Ripstein's is the state known to international law as well as to Rawls, a fixed territorial entity that must be held to minimal internal standards.

This is not the same view as that of “meta-ownership” explained by Byrd and Hruschka, where the state's territory is composed of land only incidentally, in virtue of the landowning status of citizens. Rather, it is a view of territorial containers with internal norms who have appropriated land almost perfectly but remain bound by certain minimal standards.

Yet Byrd and Hruschka also echo the residual conception, seeing *commercium* as what remains after successful appropriation of land out of the juridical situation of the *communio*:

Humankind forms an original community only in relation to division of the land and it is this community alone that can call forth an originally united will. It is this community alone upon which arguments supporting the postulate of public law can be predicated and it is this community alone that is a necessary consequence of our existence on earth. Without the goal and the duty to divide the earth there would be no original community of all human beings whatsoever other than as a product of our imagination.¹³⁶

The entire purpose of the *communio* is to permit the division of the world into states. After that, only *commercium* remains.

135 Arthur Ripstein, ‘Property and Sovereignty: How to Tell the Difference’ (2017) 18(2) *Theoretical Inquiry* 243, 243–244.

136 Byrd and Hruschka (n 71) 140.

The problem with this argument is that it is in fact incompatible with the proposed dynamic view of sovereignty and property ownership, in which the division of land is tied to people rather than states and to states only secondarily. The latter idea — that state meta-ownership results from the members of the body politic and is only as stable as the latter — is much more compatible with Kant's dynamic conception of territory and space. In other words, seeing *Commercium* as a residuum of territorial sovereignty implicitly assumes that territorial sovereignty is necessary rather than contingent.

For a view more compatible with contingent sovereignty, I propose a *persistence conception*, which goes as follows. The *communio* is the situation that obtains between human beings as a default relation toward the surface of the Earth. It requires that we establish a civil condition and *civitas* before acquiring possession of land and determines that the initial acquisition is always tied to a *civitas*. But the government, the state, does not really own the land.¹³⁷ It has territory to the extent that its citizens do. The *communio* is not extinguished; it is merely suspended in the context of the civil condition I happen to find myself in and *vis-a-vis* my co-citizens. Should I wish to change citizenships and take my land elsewhere, this is not incompatible with the principles of right unless it was explicitly prohibited by the original contract and so long as I take my land into a different civil condition.¹³⁸

On this view, *commercium* is not what is left after *communio* is extinguished by states. Rather, *commercium* is the situation that obtains in the specific and contingent condition where the Earth is speckled with states. *Communio*, on the other hand, the stronger relation between

137 Huber proposes a similar but distinct reading in which *commercium* relates to the right to Earth dwellership and is parallel but separate from the structure of innate and state right. The shared instinct here is the idea that entry into civil society is not merely the culmination of the right to the soil. see Jakob Huber, *Kant's Grounded Cosmopolitanism: Original Common Possession and the Right to Visit* (Oxford University Press 2022) 11–37.

138 Of course, whether actual legal systems today permit such transfers is another matter. The claim here is that Kant's principles of right do not, in themselves, prohibit such transfer — provided the original civil condition did not explicitly forbid it.

people and land, is not a question for cosmopolitical law because it is not for states to expropriate. It is only for individuals to suspend if, when and only for as long as they enter into civil society with others.

The upshot of the *persistence conception* is that in it, unlike in the *residual conception*, the invention of territorial sovereignty does not foreclose the horizon of normative possibility. States do not extinguish or expropriate the right to constitute juridical relations. Their existence merely suspends this right between their citizens.

(iii) The permissibility of unauthorised land transfers

I propose at this point that if my view is sound, the latter idea — that there is nothing in the *Doctrine of Right* prohibiting an individual from changing memberships in civil conditions and taking their land with them — is defensible. Or rather: if it is defensible in a Kantian framework, this suggests that my conception is viable.

Kant does not consider the possibility of a change of citizenship or emigration, which opens the conceptual space for the operation that follows. *A contrario*, Hobbes does consider it and believes that emigration entails a forfeiture of all rights except self-preservation.¹³⁹ Kant, unlike Hobbes, believes that property rights do not emanate from civil authority, merely that civil authority is necessary to secure them.

The civil condition is necessary because without it, acquisition of land would be incompatible with the freedom of all others and would amount to an unauthorised unilateral usurpation from that which all, by virtue of its necessity and finitude, hold in common. Thus, one must enter into a civil condition in the first place to secure an omnilateral authorisation for the occupation and possession of land.

My land, thus acquired, was acquired compatibly with the freedom of others. Not only — this is key — without infringing the freedom of my compatriots but to all other human beings on Earth. The latter must mean that an omnilateral authorisation based on social contract,

139 See Patricia Sheridan, 'Resisting the Scaffold: Self-preservation and the Limits of Obligation in Hobbes' *Leviathan*' (2011) 24 *Hobbes Studies* 137–157.

even where the latter does not include the entirety of humanity, is nevertheless legitimate. In other words, it is the fact that the acquisition took place within public right — even of a non-universal scope — that makes it legitimate. Otherwise, it would be impossible to acquire property legitimately outside of a world-republic. It is the mere possibility of the inclusion of all within public right — by virtue of its own universal nature and even without universal membership — that makes it legitimate.

Since my ownership of property is justified against anyone not merely against my compatriots, the only special duty that I could thereby have towards them might be compliance with the terms of a contract. Undoubtedly, it would be possible for the social contract to determine that I cannot take my land elsewhere; this is what the laws of states in reality invariably do. But this cannot be derived by necessity from the nature of the acquisition.

If I decide to emigrate and become the member of a new body politic, it seems logical that my previous body politic loses its meta-ownership of my land and that my new body politic gains it. Certainly, this is permissible with consent of both sovereigns. But my claim is that it does not require the consent of my former sovereign.

The logical counterargument is that the proposed course of action is an act of unilateral will. This is true, but human beings are entirely justified in acting unilaterally with regard to what is theirs; indeed, that is the essence of property. For such an act of will to be impermissible, it would have to be incompatible with the freedom of others.

If, however, the act of taking land away from the state was itself incompatible with the freedom of my compatriots because they did not authorise it, then the original acquisition would have had to have been incompatible with the freedom of citizens of other states since they also did not authorise it. Since the latter is not the case, neither should the former be.

Rather, the only intelligible requirement is that I must take my land into a new civil condition, not merely out of the former one. In doing so, the degree of authorisation remains the same; valid by virtue

of its universal nature. In fact, it cannot be any other way because merely taking land out of the civil condition would mean appropriating for myself without *any* omnilateral authorisation and thus would be incompatible with the freedom of others.

This is precisely the moment in which the *originaria communio fundi* is fictionally unsuspended to prohibit me from withdrawing land without simultaneously submitting myself to a different civil condition.

If *communio* is, in this sense, persistent, then the reason why it does not obtain in the cosmopolitical situation is simply that states themselves are not the owners of land. Their obligations vis-a-vis citizens of other states are mediated by the physical finitude of the Earth and necessity of interaction, yes, but this is in fact proof of the transient nature of their authority. Rather *communio* remains suspended above the citizens of states as a principle that prohibits the unilateral appropriation of the soil but simultaneously, being compatible with land transfer, determines a class of human relations that remain free from states.

E. Chapter Conclusions

The use of the clarifications drawn in the previous chapter is here to show that what Kant defends as necessary is what we may more aptly call government than statehood. Kant does not advocate for the state as a totality but for the *civitas* as a unification of individuals under an omnilateral authority. The basic structure of governmentality is nothing more than compatriotship under a common authority which makes it possible for the individual to exercise more complex freedoms in such a way that others are not thereby limited in theirs. Within the definitions established in this thesis, this is yet only government but not necessarily statehood. Statehood — government actualised in territory — obtains only if such a polity is actualised spatially. That may happen — indeed, it may *always* happen — but it is a further step. In this step, the omnilateral authorisation permits individuals to own land and the government thereby manifests in space as the collection of plots

rightfully held by its citizens. But there is no ontological necessity of this. Many individuals do not — by choice or otherwise — hold land. Such individuals may associate under an omnilateral authority.

If the ‘state’ as it is now understood is a consequence of Kant’s argument, this would only be the case if individuals *must* hold land. One may very reasonably argue that Kant would agree with the latter. Nevertheless, such necessity would still be the consequence of an additional synthetic judgment and is not inherent in the nature of governance or norm-production. Moreover, such a state remains contingent if, though its citizens occupy land, they are nevertheless permitted to change citizenship and transfer their land elsewhere without the consent of the sovereign. The territory of such a state is not only meta-ownership, it is dynamic and unstable. As strange as this idea may appear, it *was* possible in the pre-Modern situation.¹⁴⁰ The suggestion then is that Kant’s account seems pre-Modern in this aspect; incompatible with the 19th century territorial Leviathan that insists on its juripoly.

In the subsequent, final part I propose a materialist explanation for the state-theoretical rupture between Kant and that 19th century totality conceptualised by Hegel in opposition to him. The liberal Leviathan, as I will endeavour to show, is a state fetish that justifies the expropriation of land, abolition rather than suspension of the OCL, prohibition of the unauthorised land transfer, naturalisation of the state and its juripoly. Kant’s theory of the state can be read in just the emancipatory way proposed here: justifying not the totality of the state but the ideal of government.

140 See e.g. David Abulafia and Nora Berend (eds), *Mediaeval Frontiers: Concepts and Practices* (Ashgate 2002) xi-xii; Tony K Moore, ‘The loss of Normandy and the invention of Terre Normannorum, 1204’ (2010) CXXV(516) *The English Historical Review* 1071.

4. State Fetishism

The *Cartographers' Fable* speaks of an empire of excellent map-makers who, in their effort to make increasingly more accurate maps, ended up covering the whole country with a 1:1 scale chart. Suppose that the drawing of the map was obscured by history. The cartographers' guild began to insist that they were mere stewards and the map must have been there before the empire. Otherwise, how could the empire have articulated that it existed? If the imperial lawyers began repeating this argument and interpreting Kant to agree with them, we should ask why and when.

In the second half of the 20th century, West Germany was the site of the state derivation debate.¹⁴¹ The essential question was posed by Soviet jurist Evgeny Pashukanis in 1929: if class domination is constituted in the realm of private relations, why does it not remain private but instead assumes the form of domination through official state power?¹⁴² The historical entity known as the state is not neutral vis-a-vis social relations but neither is it a simple extension of them.¹⁴³ As those who rehabilitated Pashukanis into the Western Marxist canon argued, the

141 Elmar Altvater and Jürgen Hoffman, 'The West German State Derivation Debate: The Relation Between Economy and Politics as a Problem of Marxist State Theory' (1990) 24 *Social Text* 134.

142 Altvater and Hoffman (n 141) 141.

143 Altvater and Hoffman (n 141) 141; see also Gregory Albo and Jane Jenson, 'A Contested Concept: the Relative Autonomy of the State' in Wallace Clement and Glen Williams (eds), *The New Canadian Political Economy* (McGill-Queen's University Press 1989) 205–206.

state is a separate ontological entity and not a straightforward manifestation of class relations. On the contrary, what defines the state is precisely its claimed neutrality and universality.¹⁴⁴

But the character of this universalisation is not monolithic amongst classical theories of statehood. One form of state universalisation is that which occurs in international law and which I explored in the first part: the claim that the elements of statehood — most importantly territory — are ontologically hardwired to the world and that the state follows as a necessity. This is clearly not the same as the universalisation immanent in Kantian statehood. As I have shown, Kantian statehood — or, rather, government — follows only from the necessity of citizenship and civil authority, the latter following from the necessity of harmonising the external freedom of individuals. So long as one does not presuppose land ownership — and there seems to be no good reason for doing so — the universal necessity of government does not lead to a universalisation of the state in reality. It thus seems unsatisfactory to settle for the reductive materialist reading which sees all normative state theory as false universalisation without distinction.

Thus my claim in this last chapter is two-fold. First, that Marxist theory correctly attributes the ontological confusion surrounding much of Modern statehood to an ideological sleight of hand. Second, that Kantian government should be exempted from this critique or at least treated with more charity. I show this difference by considering the difference between Kantian government and Hegelian statehood; the former neglected by Marxist theory,¹⁴⁵ the latter heavily critiqued.

I reconstruct the Marxist critique of the emergence of statehood especially in the context of the turn of the 19th century and emergence of early capitalism, relying on Marx and Pashukanis but focusing not on their social critique but specifically on what they have to say on state ontology. Marx's critique recognises that this "speculative" concept re-

144 See John Holloway, 'State and capital: the state of the debate on the derivation of the state' (2025) 16(1) *Revista Direito e Práxis* <<https://doi.org/10.1590/2179-8966/2025/88992>> accessed 10 September 2025.

145 Suzanne M Love, 'Kant After Marx' (2017) 22(4) *Kantian Review* 579, 580.

verses the conditions of statehood. Instead of treating civil society as a good thing that we need states to protect, the protective mandate of the state comes to justify the claim of ontological priority. Essentially, because the state protects civil society, civil society would be impossible without the state, therefore the state came first. As Marx points out in reference to commodity fetishism, this is the religious moment in which relations between men are made to appear as relations between things. Consequently, relations are naturalised and the political imaginary shrinks. Pashukanis notes that this is what law does to economic relations, we can reconstruct Marx to say that this is what the 19th century state did to the economy as a whole.

Historicisation achieves two things. First, it situates reversal as distortion of the Kantian account. This is omitted by both Marx and Pashukanis. It is seemingly omitted by Marx because of a general disinterest in reacting to Kant,¹⁴⁶ by Pashukanis presumably due to the latter's overt focus on Kantian ethics rather than jurisprudence. But this historicisation is important because it ties the reversal precisely to that moment in which, as Marx says, the bourgeoisie ceases to be an estate and becomes a class.¹⁴⁷ This is the moment where the liberal state can draw on official history rather than mythology to justify itself but also when it must expropriate property in order to represent the collective interests of the owning class.

I argue that there is a conceptual break in state theory at the bourgeois revolutions, between the contractarians and the positivists or, put simply: between Kant and Hegel. Essentially, the concept of the state becomes the fetish of the state.

Marx identifies in Hegel a mystification of the state and its relationship to civil society which he explains through the material needs of the bourgeoisie. This mystification takes the form of fetishism. After laying out the historical argument, I consider the Marxist perspective on legal fetishism in the work of Evgeny Pashukanis. I argue that the internal logic of fetishism as illuminated by Pashukanis explains neatly

146 Love (n 145).

147 Marx, *The German Ideology* (1845–6).

the ontological disconnect between the Kantian *civitas* and the 19th century Leviathan, but I claim that Pashukanis himself uncharitably misapplies this logic in his consideration of Kant.

The historical argument that follows is highly schematic, offered in service to a conceptual claim. These events could hardly be compressed into the French Revolution, nor is this historical period without a plethora of nuances and contradictions which entirely escape the scope of this book. The point is only to illustrate the course of historical processes and the tendencies behind a theoretical development.

A. When the State was Fetishised

Classical contractarian reasoning — the broad idea that legislation is the result of a normative act of consent by the governed — is today both persistent and surpassed. Folk versions are still routine in politics; for instance in the idea that convicts should not have voting rights because they breached the social contract.¹⁴⁸ The core logic persists also in contemporary normative theory in the idea of self-legislation; that people should be subject to such limits on their freedom that they themselves choose or could choose as rational agents. What has however been surpassed is the historical fiction of an original act and the preceding state of nature from which humanity emerged.

It is no accident that the production of notable accounts of the State of Nature ceases after the turn of the 18th century, with Kant and Paine representing some of the last theorists to offer examples. Rather, it is evidence of a rupture in state theory accompanied by other material and ideological developments, notably the revision and mystification of the concept of the state. Kant's state is replaced by Hegel's state, rooted no longer in an act of will but in totalising and historical necessity, emerging not out of a counterfactual State of Nature but from the progressive force of history. This state must, above all, preserve proper-

148 See e.g. Jonathan Young, *Electoral (Disqualification of Sentenced Prisoners) Amendment Bill — Third Reading* (8 December 2010) 669 Hansard 15977 (New Zealand).

ty rights. To do so, it must preserve itself. Self-preservation by force and ideology becomes the state's first imperative, generating, producing and justifying an ontological circularity. Thus is born a paradoxically circular account in which the state is ontologically prior to the things it secures. After the bourgeois revolutions, the emancipatory idea that the State of Nature gives way to civil society with a state as the guarantor of rights is replaced by a theory of the state as a historical totality, the pre-existing frame that made society possible.

(i) The demise of contractarian mythology

State of nature accounts are liberal mythologies. They have not only theological origins and logics, but a discernible function as a bourgeois counter-history.

As for mythological origins of pre-historical State of Nature accounts, this is perhaps most clear in the narratives of the *communio primaeva* considered in the previous part: the idea that at one time human beings held the Earth as common property before a rupture event that caused their dispersal across the planet. The parallel is obvious and has been drawn by others: “*Ius gentium* itself rests on the following paradox: after the Tower of Babel, humankind dispersed into many languages and cultures.”¹⁴⁹ Theological roots were of direct significance for the early questions of *ius gentium*, for instance: was Christ's Kingdom, taken as the basis for the authority of the Holy Roman Emperor, temporal or only spiritual?¹⁵⁰ But the more important point is that even when theology is explicitly discarded, its logic persists in these accounts. Consider for instance, Rousseau's State of Nature in which human beings were innocent and devoid of the knowledge of good and evil.¹⁵¹ It was only after original sin (for Rousseau, the

149 Francesca Iurlaro, *Unpuzzling Customary International Law (CIL)* (PhD thesis, European University Institute, 2018), 82.

150 Vitoria (n 93) 256.

151 Jean-Jacques Rousseau, *Discourse on the Origins of Inequality* (GDH Cole tr, JM Dent & Sons Ltd 1913) [1754] 11–12.

first enclosure of land!)¹⁵² that humans are cast out of the Garden, into civil society, and gain such knowledge.¹⁵³ Massimi credits Kant with the secularisation of these ideas¹⁵⁴ but this misses the fact that *inter alia* Rousseau already presents them as ahistorical; “Let us begin by laying the facts aside as they have no bearing upon the question.”¹⁵⁵

Rather, by severing the claim to theological and historical fact, these accounts are able to function as counter-historical mythologies that legitimise the Modern state. Why they do so is explored at length by Michel Foucault in his consideration of mythology. In short, Foucault argues that the bourgeoisie had a disadvantage in historical argument because the production of history was controlled by the clergy and nobility, with Louis XIV even centralising historiography under a dedicated cabinet minister.¹⁵⁶ This is not to say that members of the Third Estate did not make historical arguments, but they relied on Rousseauan mythology precisely because produced historical fact often favoured the Church and aristocracy.¹⁵⁷ “Mythology” in this sense refers not to untruth but to the status of these accounts as alternatives to pedigreed historical fact.¹⁵⁸

It is no coincidence then that no further State of Nature accounts are produced after the economic-political ascendance of the bourgeoisie at the beginning of the 19th century. From then on in historiography, “All the past is given over to war and the economy of conquest; from now on, however, with the overthrow of the Ancien régime, the world is dedicated to peace and the economy of exchange.”¹⁵⁹ The history-producing institutions were seized and the evolutionist theory

152 Rousseau (n 151) 13–14.

153 Rousseau (n 151) 29–30.

154 Massimi (n 92).

155 Rousseau (n 151) 12; Graeber and Wengrow (n 18) 11.

156 Michel Foucault, *Society Must be Defended: Lectures at the Collège de France 1975–76* (David Macey tr, Picador 2003) 66–67 and 177–178.

157 Foucault (n 156).

158 Foucault (n 156); Graeber and Wengrow (n 18) 11–12.

159 Lionel Gossman, ‘The Privilege of Continuity: Bourgeois History as the Mediator Between Chronicle History and Philosophical History’ (1976) 15(4) *History and Theory* 37, 38.

of progress was elevated from mythology to history.¹⁶⁰ By the time Marx deals with history, the linear advancement of society from small egalitarian bands into increasingly complex civil states is treated as history. To echo Graeber and Wengrow: these conceptions — prevalent until today — share the logic of the State of Nature account but present it as fact.¹⁶¹

If then such a rupture point occurs shortly after Kant and Paine write the last of these accounts, the pertinent question is what other shifts in state theory accompanied it.

(ii) The mystification of the state

The early 19th century state is hardly a *civitas*. As it manifests in the institutionalisation of the first secret police forces in Europe and the domination of the Other abroad, it is no longer a liberal concept but a real totality.¹⁶² As Wallerstein observed, the international system became an interstate system, citizenship became a metric of exclusion rather than inclusion, and the state began to support the social sciences¹⁶³ — the latter point echoing Foucault’s observation about the seizing of epistemic institutions.

There is an accompanying political-theoretical shift, perhaps best reflected in the state theory shift between Kant and Hegel.¹⁶⁴ The first conceptualisation of the 19th century Leviathan is commonly ascribed to Hegel. “Already in 1821 Hegel referred to states as ‘completely au-

160 Foucault (n 156) 129–130.

161 Graeber and Wengrow (n 18) 446.

162 See George Steinmetz, ‘A Liberal Leviathan: the Creation of the Strong State in Nineteenth Century Europe’ (2012) 41(1) *Contemporary Sociology* 23; It is ill-spirited and Popperian to associate Hegel’s state with secret police forces and it is not my intention to imply this, see also Knox (n 12) 63. What the 19th century police state and the Hegelian universalising state have in common is not their actions but their ontological character.

163 Steinmetz (n 162) 24.

164 I stress again that this is an abridged argument the function of which is only to demonstrate the theoretical origin points of state ontology.

onomous totalities in themselves' and as 'the absolute power on earth (in which the world spirit unfolds itself)'"'.¹⁶⁵

The logic of this mystification lies in Hegel's reaction to Kant's theory of the state. Hegel agrees with Kant that the family and civil society are *cognitively* prior to the state; that is, one should first *explain* civil society, then the state. But *ontologically*, Hegel argues that the "state is the foundation of both of these institutions."¹⁶⁶ Essentially, Hegel does not agree with Kant that (property) rights can follow from the unification of the "arbitrary" will of individuals prior to statehood.¹⁶⁷ To enable the realisation of freedom, the state must "curb the self-interested interactions of civil society" that would otherwise tear it apart.¹⁶⁸ State institutions universalise and mediate social forces and in doing so, make civil society possible.¹⁶⁹ The state transcends civil society and is not a mere extension of the self-determination of citizens.¹⁷⁰ In both cases, the state might be said to be "necessary" to civil society. But in Kant's case this is because it makes possible the acquisition and exercise of rights in a way that does not limit the freedom of others, not because the alternative would be necessarily unsustainable but because it would be immoral. The necessity of entering into a civil state is

165 Catherine Brölmann and Jane Nijman, 'Legal Personality as a Fundamental Concept for International Law' (2016) Amsterdam Law School Legal Studies Research Paper No 2016-43 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2845222> accessed 6 August 2025, 5; Hegel, *Grundlinien der Philosophie des Rechts* (1821 – Knox translation of 1952, Suhrkamp 1986), §§260-269, §330 and §331.

166 Jiří Chotaš, 'Justification of the State: Kant and Hegel' in Christian Krijnen (ed), *Concepts of Normativity: Kant and Hegel, Critical Studies in German Idealism vol. 24* (Brill 2019) 164. Fully engaging with Hegel's argument would be far beyond the scope of this thesis. I note here that treating them through the prism of Marxian critique is indeed reductive. I nevertheless do it because it facilitates my general argument about the problem of how the nineteenth-century state conceives of itself, for which Hegel is an apt example.

167 Chotaš (n 166) 164.

168 SP Tijsterman, 'Generating Freedom: Hegel's Conception of the Political Order' (Leiden University 2024) 194 <<https://hdl.handle.net/1887/3736094>> accessed 20 August 2025.

169 Tijsterman (n 168) 194.

170 Shlomo Avineri, *Hegel's Theory of the Modern State* (Cambridge University Press 2012) esp 138.

simply that we *ought to* find a way to harmonise our freedoms because this follows from the postulate of right. On the contrary, the Hegelian necessity is rather practical in that our external freedom could not only not be exercised in a moral way, it arguably could not be exercised at all. Submission to civil authority is thus an ontological necessity rather than a moral obligation.

Yet this argument contains the essence of the ontological problem addressed in part 1. The territorial state is said to be realising itself in landed property while simultaneously being its precondition. Ontological priority is inseparable from practical necessity or origins. This is what Robert Pippin calls Hegel's "organicist" view of the state wherein "the individual parts of this ethical organism had no more claim to individual standing and intelligibility as proper ontological actualities than a severed hand, a kidney, or a lung might have."¹⁷¹

But it seems one might define nearly anything as a totality and show thereby that all its components are merely anatomical parts to be mediated and subsumed. If I define my debating society as the totality underpinning my social life, I can show that all parts of social life are only intelligible when interpreted through it. Clearly, it would be incorrect to conclude that my debating society *is* the totality of social life or, by substitution, that it is a state. Perhaps less outlandishly, conservative thinkers sometimes claim, with a pseudo-Aristotelian turn, the reverse of Hegel: that the family is the totality of social life and its other phenomena are either parts to be mediated or the products of an interaction of families; a multiplied geopolitics. Thus, the position that the state occupies a position of totality analytically seems unsatisfactory.

If, however, the state's position as a totality follows from an empirical judgment, then this is a historically particular judgment, since such a totality did not obtain for most societies across most of history.¹⁷² And historically, the state could not have come to be from the things that constitute it. On the contrary, the organics of the state bear out that

171 Robert Pippin, *Hegel's Practical Philosophy* (Cambridge University Press 2008) 93.

172 See Graeber and Wengrow (n 18)

civil society *does* precede it. This is why Marx takes issue with Hegel's state:

The Idea is given the status of a subject, and the actual relationship of family and civil society to the state is conceived to be its inner imaginary activity. Family and civil society are the presuppositions of the state; they are the really active things; but in speculative philosophy it is reversed. But if the Idea is made subject, then the real subjects – civil society, family, circumstances, caprice, etc. – become unreal, and take on the different meaning of objective moments of the Idea.¹⁷³

Leaving aside for now the great significance of this passage for my overall argument, the direct consequence here is the elevation of the state from a meta-owner, steward of civil society into civil society's condition of possibility. The state as the "march of God through the World"¹⁷⁴ is emblematic of the 19th century reduction of the whole of international law to the law of states, encapsulated in the idea that *only* states have international legal personality, effectively the idea that the state is the only real thing.¹⁷⁵ One must, in response to this, point out that the international law on personality is part of international law and that states would not legally exist without it. Thus, states must have, again, produced the condition of their own possibility. This is the mystifying reversal which I pointed to in the relationship of territory and government in part one. Marx's critique of Hegel is "that [the] schema of rationality comes in advance and is glued to particular institutions which then only appear as rational".¹⁷⁶ That is, the institutional frame was already presupposed and is merely rationalised.

I began this chapter with the hypothesis that this theoretical reversal is the result of contemporary transformations of the political economy and class relations. Both Kant and Hegel are bourgeois theorists. But the bourgeoisie of which they are theorists is not the same. For around the time of the transition from Kantian theory to Hegelian theory, the

173 Marx, *Critique of Hegel's Philosophy of Right* (1843) s 261 2.

174 Hegel (n 165) §258ad.

175 See Brölmann and Nijman (n 165).

176 Michal Lipták, 'Alienated Citizens: Marx and Hegel on Civil Society' (2023) 78(9) *Filozofia* 760, 764.

European bourgeoisie changed, in very broad terms, from a subaltern class to a dominant one.

Kantian state theory is emancipatory because it is the product of the pre-revolutionary bourgeoisie whereas 19th century state theory is the product of a reigning bourgeoisie. Marx, having observed the reversal in Hegel's response to Kant, offers a supporting diagnosis in *The German Ideology*:

By the mere fact that it is a class and no longer an estate, the bourgeoisie is forced to organise itself no longer locally, but nationally, and to give a general form to its mean average interest. *Through the emancipation of private property from the community*, the State has become a separate entity, beside and outside civil society; but it is nothing more than the form of organisation which the bourgeois necessarily adopt both for internal and external purposes, for the mutual guarantee of their property and interests.¹⁷⁷

Two of Marx's claims here are important. First, the idea that the transformation of the bourgeoisie results in the transformation of the state. Rather than a steward, it must now be a separate entity *so that* it can properly represent the bourgeoisie constituted as a class. "The Revolution did not begin as a class struggle, except for the peasantry, but it became a class struggle, just as it became a national struggle."¹⁷⁸ The class structure comes into being proper with this nationalisation — that is, generalisation — of the political-economic relation. Per Hobsbawm: bourgeois democracy characteristically transforms the political structure by instituting representative assemblies in which the entities represented are not estates but groups of individuals of equal legal status.¹⁷⁹ From this equality of status arises the mean average interest, which we might also call the collective interest that leads to the constitution of a state outside civil society.

The state in this moment becomes the institutionalisation of the market economy. The internal/external distinction follows from its

177 Marx, *The German Ideology* (1845–6). Italics added.

178 Michael Mann, *Sources of Social Power*, vol II, *The Rise of Classes and Nation-states, 1760–1914* (Cambridge University Press 1993) 167.

179 Eric Hobsbawm, *Age of Capital* (Abacus 1977) 123.

manifestation internally as the institutional frame that maintains economic relations and externally as a manifestation of the totality of the economy vis-a-vis other economies.

The second key point is that this happens through the “emancipation of private property from the community”. In other words, the state must be able to act as an owner rather than a meta-owner in order to represent the collective interest of the bourgeoisie. As I have shown, a territory-agnostic, governance-grounded Kantian state does not inherently proscribe unauthorised land transfers. But such transfers would be incompatible with the Hegelian state which has a right to territory preceding and superior to the rights of its citizens. The Hegelian state must mediate and protect the mean average interest of the property owners, not merely their individual rights. Thus, land is expropriated, the Original Community of Land abolished even as a suspended possibility because this is in the interest of the owning class.

The transformation of the class structure results not only in a surpassing of the State of Nature account, but also of the Original Community of Land. The theory of the bourgeoisie as an estate sought to secure property rights *against* the state and thus saw them as prior to the state. Having secured these rights, the theory of the bourgeoisie as a dominant class must secure rights *for* the state;¹⁸⁰ for the bourgeoisie as a class rather than for the individual property owner and again for the subject as a property owner rather than as citizen. The emancipatory, rebellious attitude toward political authority is discarded and the Original Community of Land along with it. The abolition is naturalised through the ideological transformation of the concept of government into the fetish of the state. There is difficulty in showing why governments as associations of people should have any claim to land independently of their citizens. But the state as a totality pre-dating all rights can explain this easily.

180 See also Reidar Maliks, ‘Kant and the French Revolution’ (2023) 12(2) *Las Torres de Lucca. Revista internacional de filosofía política* 113, 118; Daniel Lee, ‘The Legacy of Mediaeval Constitutionalism in the “Philosophy of Right”: Hegel and the Prussian Reform Movement’ (2008) 29(4) *History of Political Thought* 601, 633–634.

Marx's broad notion of commodity fetishism, already poised for emancipation from economics, explains the ideological chassis of this transformation:

There it is a definite social relation between men, that assumes, in their eyes, the fantastic form of a relation between things. In order, therefore, to find an analogy, we must have recourse to the mist-enveloped regions of the religious world. In that world the productions of the human brain appear as independent beings endowed with life, and entering into relation both with one another and the human race.¹⁸¹

This turn with regard to the state occurs through the state's transformation into an independent being (a total legal person). The specific operation of fetishism in law is the subject of Evgeny Pashukanis, to whose work I turn next to explore whether the concept can shed light on the ontological problem of statehood.

B. The State as a Fetish and a Defence of Government

In this part I (i) apply Pashukanis' theory of the legal form to reconsider the emergence of the state as a legal subject but (ii) argue that Pashukanis himself reads Kant uncharitably, missing the point that the Marxist critique of Hegel is compatible with a Kantian view of government.

Pashukanis sees Modern law as a fetish-distortion of economics and argues that the legal subject as the fixed bearer of rights is constituted through the logic of fetishism identified by Marx, also in the latter's critique of Hegel. Pashukanis' application of this critique to the constitution of the state as the *international* legal subject is effective and shows how, unlike the Kantian government-state, the state as fetish comes to suffer from the ontological shortcomings identified in the first part of this thesis.

In the second subsection, I argue that Pashukanis dismisses the emancipatory potential of Kant's theory too readily. I ultimately argue that this is because Pashukanis' engagement with Kant, though

181 Marx, *Capital*, vol 1, 1:4.

assertive, is highly superficial. By showing what Pashukanis misses, I reinforce the point that Kantian government retains an emancipatory potential precisely because it rejects the idea that the state is the sole source of norms and rights.

(i) The fixed bearer of rights

When in the 19th century the state becomes increasingly an agent of the bourgeoisie rather than of the nobility and clergy, when the former seizes the epistemic institutions, the emancipatory idea of government is replaced by the speculative totality of the police state. But the question is not merely whether necessity is produced but how:¹⁸² saying that the state is an ideological construct without further explanation risks mystifying it further. Rather, supposing that ideological entities have an existence as “real illusions”, the point is to clarify their inner logic. The term fetish is not used here as a buzzword. If Marx correctly critiques the reversal in state theory at the hands of speculative theory, then Marxist theory might illuminate not only *that* this happened, but also the anatomy of the reversal, i.e., *how* this happened. In this part I first lay out Pashukanis’ extension of the logic of commodity fetishism to law, then apply it specifically to the state and land relationship.

Pashukanis argues that the legal form is itself a fetish, a stabilising reversal of economic relations. Building on Marx’s insight that in commodity fetishism, a relation between people is made to appear as a relation between things, he argues that the economic relation is made to appear as relation of right: “[t]he legal relation between subjects is simply the reverse side of the relation between products of labour which have become commodities.”¹⁸³ The legal form elevates relations from contingency to fixity:

182 Susan Marks, ‘False Contingency’ (2009) 62(1) *Current Legal Problems* 1, 20.

183 Evgeny Pashukanis, *The General Theory of Law and Marxism* (Transaction Publishers 2002) [1924] 85.

It is not hard to see that the possibility of taking up a legal standpoint is linked with the fact that, under commodity production, the most diverse relations approximate the prototype commercial relation and hence assume legal form. Similarly, it is a matter of course for bourgeois jurists to infer the universality of the legal form, either from eternal and absolute characteristics of human nature, or from the fact that official decrees can be arbitrarily applied to any subject.¹⁸⁴

Fetishism, also of the law,¹⁸⁵ functions not as a lie but as a material distortion of the underlying social relation. The product of this distortion is not merely the legal obligation but, perhaps more importantly, legal subjectivity itself:

Historically, however, it was precisely the exchange transaction which generated the idea of the subject as the bearer of every imaginable legal claim. [...] Only the continual re-shuffling of values in the market creates the idea of a fixed bearer of such rights.¹⁸⁶

Abstracting from this, I contend that the problem with the legal subject is that it presents itself as the premise of interaction rather than its product. In doing so, it puts the real forces that constitute it beyond dispute. Reasoning from subjectivity, one must already presuppose the things that create it; specifically, the commercial intercourse of the market economy. The subject is not merely mystified or mysterious, its essence is the reversal of the order of priority between exchange and subjectivity.

Consider now by analogy the status of the state, the international legal person, as the bearer of rights. The state is not only the *fixed* bearer of rights; per doctrine, it “possesses the *totality* of international rights and duties recognized by international law”.¹⁸⁷ Thus within the sphere of international law, the position of the state as a fixed bearer of rights is arguably stronger than that of the individual in municipal law. Suppose then that we apply Pashukanis to explain also the broad reason for this; the distortion of the economic relation. This then quite

184 Pashukanis (n 183) 82.

185 Pashukanis (n 183) 87.

186 Pashukanis 119.

187 *Reparations (Advisory Opinion)* [1949] ICJ Rep 174, 180. Italics added.

naturally leads to Pashukanis' own conclusion about the state, namely that:

The state, that is, the organisation of political class dominance, stems from the given relations of production or property relations. The production relations and their legal expression form that which Marx, following in Hegel's footsteps, called civil society. The political superstructure, particularly official statedom, is a secondary derived element.¹⁸⁸

Pashukanis thus adopts Marx's critique and formulates it in the detail necessary here; state subjectivity is produced by civil society. Quoting Marx, he argues that "political superstition" reverses this point into the argument that the state is necessary for civil life.¹⁸⁹ The state thus imagined maintains but does not create injustice, the latter being a product of civil property relations. The state is part of the legal form's self-mystification and operates by the latter's logic.¹⁹⁰

Yet the logic of the relations of dominance and subservience can only be partially accommodated within the system of juridical concepts. That is why the juridical conception of the state can never become a theory but remains always an ideological distortion of the facts.¹⁹¹

How the distortion operates is a metaphysical question about the transformation of the product of the social relation into the premise of the legal relation. Here, moving from the broad notion of civil society to the specific notion of territory is useful. The land-property relation between individuals is a private relation. Kant's argument is that for this to be a rightful relation, that is one ultimately compatible with the UPR, individuals must enter into a civil condition with one another. Territory as the sum of parcels possessed by the citizens of such a government, comes into existence through the constitutive act of civil society. But in Hegel's state this relation is reversed. Not only is the state the precondition for property — as opposed to a necessary construction for the non-provisional, rightful possession of property — but territory is

188 Pashukanis (n 183) 91.

189 Pashukanis (n 183) 91–92.

190 See Dan Swain, 'Justice as Fetish: Marx, Pashukanis and the Form of Justice' (2018) 2(2) *Contradictions: A Journal of Critical Thought* 13, esp 21.

191 Pashukanis (n 183) 96.

the precondition for the state. In just this way, the territorial parcelling of the surface of the Earth, being itself a second-order outcome of the civil association of people into governments is transformed into the ultimate precondition for such association.

Not only is this ahistorical but it amounts to the complete destruction of human agency. If the Kantian acquisition of territory is an act of will, it must be possible for humans to decline to exercise their will in such a way. That is, humans must have the option of *not* occupying territory. But the total state cannot conceive of this as a possibility, it must see land as always and necessarily already parcelled. Hence the only unoccupied places are *terra nullius* which despite not containing (European) people are already parcels. Now, one could support the necessity of occupation with the necessity of agriculture. But here a key new insight from anthropology comes in: as Graeber and Wengrow point out, there is now evidence that many pre-historical societies were aware of agriculture and consciously decided not to adopt it.¹⁹² Presupposing that this is the case, one can make an even firmer case for the Kantian view of occupation as an act of will, that is, non-occupation of land external to oneself is also a possibility.

The Kantian account maintains emancipatory potential, but classical Marxist jurisprudence consistently denies this. I turn finally to why this is the case.

(ii) Pashukanis' Kant

Pashukanis identifies, following in Marx's footsteps, that Hegel's state reverses the relation between civil society and the state in a way that makes the state inescapable and positioned to maintain existing relations. What Pashukanis would not agree with is my claim that this is not only a reversal of reality but also a reversal of Kant. Pashukanis treats Kant as an embodiment of bourgeois jurisprudence and certainly not as an emancipatory theorist.

192 Graeber and Wengrow (n 18) 210–217.

Reviewing Pashukanis' engagement with Kant thoroughly, I argue that this is superficial and unfair. I reconstruct the best case of Pashukanis' argument against Kant but claim nevertheless that it is possible to read Pashukanis' indictment of Hegel as a defence of Kant.

Hegel's treatment of the ontological relation between the civil society and the state is in explicit response to Kant.¹⁹³ Its transformation of territory from a consequence to a premise was so thorough that even neo-Kantians end up hedging their bets between the two. Weber's given territory is an example of this¹⁹⁴ but it also happens in Kelsen: "The order constituting the community must be effective for a certain territory, or, more exactly, for the individuals living in a clearly demarcated territory".¹⁹⁵ Kelsen treats these definitions as effectively equivalent. But the first is broadly Hegelian in that it treats territory as structural while the second is broadly Kantian in that it treats it as a thing intersubjectively constituted.

As for Pashukanis, he acknowledges the distinction between Kant and Hegel in their theories of international relations, but he does not see Kant's philosophy of the state as emancipatory. In a piece written on the centenary of Hegel's death, Pashukanis identifies a state-theoretical shift from Kant to Hegel in bourgeois philosophy.¹⁹⁶ Indeed he goes on to say that Hegel is the philosopher of early capitalism following the period of feudalism, and that, prioritising the self-preservation of the state, he rejects Kant's internationalism.¹⁹⁷ From all this, one might

193 Chotaš (n 166).

194 cf Jonathon Allen Lee, 'Max Weber', *The Stanford Encyclopedia of Philosophy* (21 September 2022) para 46 <<https://plato.stanford.edu/entries/weber/>> accessed 20 August 2025. Allen Lee points to Weber's departure from Kant on this point but argues that it is also a departure from Hegel because for the latter the state had the normative aim of realising freedom. This ignores the distinction that for Kant territory manifests only through statehood, which is not the case for Weber who presupposes territory.

195 Hans Kelsen, 'Recognition in International Law: Theoretical Observations' (1940) 35(4) *American Journal of International Law* 605, 608.

196 Evgeny Pashukanis, *Hegel. State and Law (On the Centenary of His Death)* (1931) <<https://www.historicalmaterialism.org/article/hegel-state-and-law-on-the-centenary-of-his-death/>> accessed 12 August 2025.

197 Pashukanis (n 183).

piece together the narrative presented in this chapter: Kantian theory as pre-revolutionary emancipatory doctrine, Hegelian mystification of the state in service to nascent capitalism and the preservation of the state. But that is not Pashukanis' view of Kant.

As Suzanne Love notes, a persistent lack of attention to the *Metaphysics of Morals* has resulted in Marxist theory understanding Kant almost exclusively through his ethics.¹⁹⁸ This is very true of Pashukanis' engagement with Kant. Of the six explicit references to Kant in the *General Theory*, four are to the categorical imperative.¹⁹⁹ The Kantian ethic, for Pashukanis, "typifies the commodity producing society" by conceiving of the atomised individual liberated from feudal or familial bonds.²⁰⁰ In Lon Fuller's words: "[According to Pashukanis,] Kant's conception that every man should be treated as an end in himself implies a trading economy [...]" since only in such an economy does Adam Smith's self-interested baker nevertheless contribute to the general welfare.²⁰¹ Why treating people as ends results in a surrender to self-interest rather than a commitment to liberation is unclear.²⁰² Marx himself speaks of the "categoric imperative to overthrow all relations in which man is debased".²⁰³

But this question is less relevant to the discussion than the remaining two references to Kant in the *General Theory*, which appear to address the *Doctrine of Right*. First, Pashukanis points out that on the battlefield of class struggle, law bears little resemblance to Kant's definition as "a minimal limitation of the freedom of the personality indispensable to human coexistence."²⁰⁴ Quoting Gumprowicz, Pashukanis notes that the measure of people's freedom is directly proportional to their

198 Suzanne M Love, 'Kant After Marx' (2017) 22(4) *Kantian Review* 579, 580.

199 Pashukanis (n 183) 154–155.

200 Pashukanis (n 183) 154–155.

201 Lon Fuller, 'Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory' (1949) 47(9) *Michigan Law Review* 1157, 1162.

202 Bill Martin, *Ethical Marxism: The Categorical Imperative of Liberation* (Open Court 2008).

203 Marx, *Critique of Hegel's Philosophy of Right* (1843) Introduction; Martin (n 202) 45.

204 Pashukanis (n 183) 150.

domination by others. This might be interpreted as the juxtaposition of positive and negative freedom, which has been argued for but also reconsidered: as Byrd and Hruschka point out, the obligation to enter into the civil condition follows precisely from the necessity of making possible the positive exercise of freedom in a way compatible with the freedom of others.²⁰⁵ With regard to the *General Theory's* final Kant reference, it is unclear whether it is aimed at his ethics or jurisprudence. There, Pashukanis credits Kant with a significant advancement of the notion of equality of personality.²⁰⁶ But while again he claims that Kant reconceptualises the individual as no longer defined by feudal or familial relations, this is said to only cement the legal form.

But regardless of the various forms this idea may have assumed it expresses nothing but the fact that as soon as the products of labour are exchanged as commodities, the different concrete types of socially useful labour are reduced to labour in the abstract.²⁰⁷

Essentially, the notion of equality constitutes the anonymous, Modern legal subject as the abstract reversal of real economic relations. On one hand, questions of ethics should be separated here from questions of law. As with law, Pashukanis believes that “when communism is finally achieved all moral duties will disappear.”²⁰⁸ But there is an ambiguity in that Kant's conception of the free individual is also the cornerstone of his legal doctrine.

Without engaging with the Kantian subject generally, it suffices to argue here that the objections Pashukanis raises against the subject of private law — its distortion of the dynamism of market relations into a fixed subjectivity — do not apply to Kant's construction of the state. The state as subject, as has been argued, is not fixed. Defined by

205 Byrd and Hruschka (n 71) 77 et seq.; see Nuria Sanchez Madrid, ‘Kant on poverty and welfare: the conflict between social demands and juridical goals in the Doctrine of Right’ in Larry Krasnoff, Nuria Sanchez Madrid and Paula Satne (eds), *Kant's Doctrine of Right in the Twenty-first Century* (University of Wales Press 2018); Edward Demenchonok, ‘Learning from Kant’ (2019) 75(1) *Revista Portuguesa de Filosofia* 191.

206 Pashukanis (n 183) 153.

207 Pashukanis (n 183) 153.

208 Lon Fuller, *The Morality of Law: Revised Edition* (Yale University Press 1964) 26.

its citizens and with only a second-order ownership of property, the Kantian government understood in light of contemporary readings is altogether innocent of the charge of fetishism. Treating Kant almost exclusively through the prism of his ethics, Pashukanis misses that the pre-revolutionary notion of civil authority, despite its origins and limitations, does not naturalise the state and holds back its collapse into ideological mirage.

Thus, if one accepts Pashukanis' extension of Marx's critique of Hegel, then one might as well say that Pashukanis takes the side of Kant against Hegel. Whatever the historical-political origins of the emancipation of property and distortion of the relation between civil society and the state, one can mount exactly the same critique as Marxists from a Kantian position: the state is a false totality. Marxism here is necessary only to supply an explanation, but not for the observation of falsity itself. Besides offering a reconsideration of Pashukanis' engagement with Kant, this also indicates that the critique is a fair one since one can arrive at the same reconstruction through Marxist critiques as through Kantian ones.

The point then is this: that Kant's theory of government is a dynamic and emancipatory one but must be contrasted to the ideological distortion in which the state is defined by the misrepresentation of its real dimension — territory especially — as its circular premise rather than product.

C. Partial Conclusions

Without historicisation, the mystification of the state becomes itself mystified. The double move of this part has been to excavate the idea of the state as an ideological entity produced by the capitalist economy and to situate its birth in the emergence of early capitalism. It is no doubt reductive to equate the mystified state with the Hegelian state. But Hegel's reversal of the Kantian account does track with the historical transformation of economic structure observed here. Kant's account, being in a sense "pre-revolutionary" is because of this also

emancipatory. This is not contradicted by Marxist critiques of Hegelian statehood, but it is neglected by them. Yet if the issue is that ideology makes relations between men appear as relations between things, then this is precisely what Kant's account avoids. For Kant, the basic structure is government over people rather than things. In Marx's theory of democracy, elections constitute an immediate and direct relation between civil society and state institutions. In the moment of democratic control, the mystified relation between the economy and the state is dissolved into a real relation²⁰⁹ and the primacy of citizenship is thus revealed.

If Kant's state is necessarily territorial, it is only because Kant imagines the citizen as a landowner. But one must only dispose of this assumption to see a highly radical conception in which land is persistently held by all people in common and government is pure civil authority. This is bolstered by the fact that an act of will is an act of freedom and individuals must have the option of willing *not* to occupy external land. And it is exactly this idea which cannot be sustained within state theory written from positions of power.

209 Paul Raekstad, *Karl Marx's Realist Critique of Capitalism* (Palgrave Macmillan 2022) 98; cf Lea Ypi, 'From revelation to revolution: the critique of religion in Kant and Marx' (2017) 22(4) *Kantian Review* 661, 681.

5. Conclusion

The argument has been a lengthy excursus through jurisprudence, but the destination is simple: the state persists because capital persists.

The state is not necessary; it is a historical development. The total conception of the state treats the conditions it constantly reproduces as necessary realities. The territorial container, that is, the sum of land occupied by the subjects of civil authority, is given ontological priority over the association of citizens into authority. Yet one need only place civil authority first to resolve this dilemma and ground statehood in omnilateral authorisation rather than land. Doing so, one arrives at the Kantian conception of land and law in which civil authority only provisionally suspends the common possession of the finite Earth by all human beings. Yet this would also lead one to see states as fundamentally provisional and unstable, their borders never too safe from unauthorised land transfers. Thus, the state is threatened by the Kantian conception and the latter is discarded.

This is not an abstract turn but a historical one; it is well explained by the transformation of the economic structure of European society. Contractarianism is the theory of the revolutionary bourgeoisie, the Third Estate. It posits, against the contradictions of feudal relations,²¹⁰ a theory of the state as the product of the exercise of individual agency. The territory of the state is viewed as constituted through civil association. This is supported by State of Nature mythologies rather

210 See Munro (n 7) 70.

than official history because it is still a subaltern account. The transformation of the bourgeoisie from an estate into a dominant class is tracked by the switch from an emancipatory theory of the state to a speculative-ideological theory which reproduces the state eternally. The state, now charged not with the safeguarding of civil rights but with the representation of collective ownership interests, must emancipate land from its owners. But this emancipation does not take the form of a legal act but of an ideological turn. Territory is expropriated through a conceit: it is said to always have been expropriated. Expropriation through a rightful act would permit only the production of the state, expropriation through ideology permits its infinite reproduction. The ideological state form is a stabilising inversion of the whole economy in the same way as the legal form is the inversion of particular economic relations.

The intractable persistence of the state form is the intractable persistence of the capitalist economy as an ontologically closed system. To represent the interests of capital, the state must emancipate it. That is, it must constitute itself as the entire economy against other economies. It is insufficient to settle for concluding either that the state is a product of economics or a mere “expression of capitalist hegemony in the field”.²¹¹ Such superficial engagement leads critics to extend Pashukanis by saying that the decentralisation of the international legal form makes it even more *like* the commodity since the private ownership of a commodity and consequent exclusion of others from said ownership also implies a decentralised violence.²¹² But such analysis imagines that the truth of the commodity form is better revealed in some sort of primordial pre-state market situation as opposed to the complex state form that is inseparable from capitalist commodity production. It reduces the international sphere to a market situation. While there may be market forces at play, the social and economic relations between states are clearly not the same as those between private legal persons.

211 Ntina Tzouvala, ‘International Law and (the Critique of) Political Economy’ (2022) 121(2) *South Atlantic Quarterly* 297, 312.

212 Tzouvala (n 211) 311.

This is the insight I dare offer as a new one. That the state is not merely the international analogy of the municipal legal subject. Rather, the state form is the inversion of the entire economy. Perhaps there is an analogy to be found in the private legal person representing ultimately not a human being but an entire household (*οἶκος*). One could support such an argument by the Common Law doctrine of coverture, i.e. that the legal personality of a wife merges with that of her husband,²¹³ and draw a parallel between the private/public distinction and the internal/external distinction. But the starting point is that the state as this kind of legal person is an ideological inversion of contractarian civil authority.

Here are two reasons to engage with Kant. First, to recognise that the state form is not a monolithic fixture of Modernity. Kant's account is not ideologically distorted and is grounded in citizenship. The separation of the state from civil society and its assertion of ontological priority appears to happen after Kant or rather to him. Second, because grounding state power in civil authority rather than in property overcomes the state form we are today presented with. The humanist position that citizens make governments and governments make states is, in international law, a radical proposition.

The present dilemma for international law is that, as a result of climate change, some states will sink into the ocean and might therefore stop being states.²¹⁴ That these states cannot secure their existence simply by acquiring other forms of “trans-national” capital suggests that land is not simply one of the forms of property emancipated into the state but an essential one. Historically the status of land as “real” property may also follow from its stability. But that stability is now challenged by rising sea levels and a reconceptualisation may be in order and, in fact, may already be underway.²¹⁵

213 1 BI Comm 15, 8–14.

214 Andrea Caligiuri, ‘Sinking States: The statehood dilemma in the face of sea-level rise’ (2022) 91 *Questions of International Law: Zoom-Out* 23, 23–24.

215 *Obligations of States in Respect to Climate Change (Advisory Opinion)* (n 10) para 363.

The beginnings of reconceptualisation may rest in a civil-authority-first conception that demotes territory to a contingency. That statehood is (and ought to be) grounded in civil authority not territory is not only a metaphysical position but potentially a legal argument, one Hans Kelsen almost reaches.²¹⁶ Yet it is a legal argument that transcends the argumentative paradigm in which it is situated by opening up a radical political question about the organising premises of social life.²¹⁷ That question is not merely whether the political community must manifest as a territorial community. Rather, it is why political and social life should be trapped in and consumed by the real frame of the economy.

It is not emancipatory in this context to say that politics is, in any case, just economics. That depoliticises government when what is clearly necessary to escape the presently narrow imaginary is re-politicisation. If the former proceeds by collapsing the political question into morality and economics,²¹⁸ then the latter must ontologically distinguish government from morality and economics; not because they are not connected but because they are not the same.

216 Kelsen (n 195) 608.

217 See Robert Knox, 'Strategy and Tactics' (2011) 21 *Finnish Yearbook of International Law* 193, 221–222 and 228–229.

218 See Chantal Mouffe, *The Democratic Paradox* (Verso 2000) 99.

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Appendix: A Formalisation

Orthodoxy

Let: S = statehood T = territory G = government P = population I = independence

$G \rightarrow S$ *Inter alia*, juripoly means that government must always be realised through statehood.

$T \wedge G \wedge P \wedge I \rightarrow S$ Montevideo Criteria as grounding.

Population, not crucial to my argument, can nevertheless not be defined simply as a group of people but must be a group of people constituted by a relation with sovereign authority and located on territory.

$([T \wedge G] \rightarrow P) \wedge (\text{humans} \rightsquigarrow P)$ (Grounded in territory and government but triggered by the existence of human beings within those conditions.)

With regard to independence, the assertion is merely that a state can be neither legally nor territorially part of another state without being, for international law, identical to it. Sovereignty cannot be “nested”: $(S1 \subseteq S2) \rightarrow (S1 = S2)$

I limit the present inquiry into the relation between statehood, government, and territory.

$T \wedge G \dashv S$ The orthodox view is that statehood is grounded in territory and government.

Assumptions:

1. $G \rightarrow S$ (Limit on the political imaginary; government implies statehood; juripoly.)
2. $S \rightarrow T \wedge G$ (Montevideo criteria.)
3. $G \dashv T$ (Territory is juridical, grounded in governance.)
4. $T \wedge G \dashv S$ (Statehood is grounded in territory and government.)
5. $S \rightarrow G$ and $G \rightarrow S \Rightarrow S \equiv G$ (Government and statehood treated as equivalent.)
6. Grounding is asymmetric and transitive.

Argument:

7. $T \dashv S$
8. From (3) and (5) : $(S \equiv G) \wedge (G \dashv T) \Rightarrow S \dashv T$
9. From (4) again: $T \dashv S$
10. From (3) again: $T \dashv G$
11. Substituting: $(T \dashv S)$ and $(S \dashv T) \Rightarrow S \dashv S \Rightarrow \perp$
12. $\therefore S \equiv G$ leads to circularity/self-grounding. A thing cannot self-ground.²¹⁹

Alternative

Assumptions:

1. $\neg(G \rightarrow S)$ Rejection of state juripoly.
2. $S \rightarrow G$ (All states have government.)
3. $T \dashv G$ (Territory is a juridical concept; grounded in governance.)
4. S includes G (Statehood necessarily includes government.)
5. Grounding is asymmetric and transitive

219 Self-grounding $\neq$ self-constitution of e.g. liberal democracy.

Argument:

6. G can exist independently of S (from 1)
7. But S cannot exist without G (from 4)
8. $\therefore G$ is **ontologically prior** to S
9. $\therefore S \dashv G$ (Government grounds statehood)

Compare:

10. $G \dashv T$
11. Orthodox view: $T \dashv S$
12. If $G \dashv T \dashv S$, then consistent.
13. But if $G \equiv S$, then $T \dashv S \wedge S \dashv T \Rightarrow S \dashv S \Rightarrow \perp$ (Self-grounding is not possible.)
14. $\therefore T$ does **not** ground S — the contradiction is avoided only if T is first mediated by G but not by S but the latter is impossible if $G \equiv S$. Thus either $\neg(G \rightarrow S)$ or $\neg(T \dashv S)$. It is said that $T \dashv S$, thus $\neg(G \rightarrow S)$.

Q.E.D. *Territory can only ground statehood if states did not claim juripoly; if states claim juripoly, territory cannot ground statehood. That they assert both simultaneously is not logical but ideological — a distortion designed to insulate statehood from critique and to secure unjustified control over land as a factor of production.*

Cases

Mabo v Queensland (No 2) [1992] HCA 23, (1992) 175 CLR 1

Obligations of States in Respect to Climate Change (Advisory Opinion)
[2025] ICJ General List No. 187

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