

Introduction: Thinking the State

How does one think about an institution or concept as large and as widespread as the state? Some would prefer not to. Others have ‘succumbed to analysis’. If today the ‘question of the state is posed everywhere in the world’ it may be difficult not to think about it.¹ Yet, in thinking about it, should one be empirical or normative, theoretical or descriptive? Are we concerned with an essence of the state, or with legitimate or possible functions?² There is no agreement on the answers to these questions, yet it has been said that ‘it does appear foolish to deny a state tradition’.³ So the simplest and most basic answer to the question of the state is probably that it exists as a tradition, a body of normative and often inconsistent information that is inevitably instantiated or institutionalized in various and particular forms. This is the case for law in general,⁴ and states are legal constructions.

There remains much to be said, however, about different readings of the tradition, about their influence through time, and about the potential variety of instantiations of the state as tradition.

READINGS OF THE STATE TRADITION

The word ‘state’ has a totalitarian ring to it. It is often presented with a capital initial letter, thus State, and with the capital letter ‘Leviathan and Behemoth are already casting their enormous and oppressive shadows’.⁵ So, in reaction, there are very visible readings of the state tradition that would essentially read the state out of it, leaving only some important constituent elements. One of these readings was widespread in academic circles in the anglo-american world in

¹ Picq (1995a), *Il faut aimer l’État*, at 15 (‘Partout dans le monde, la question de l’État est posée’). Unless otherwise indicated, all translations are by the author.

² Against ‘methodological essentialism’, rejecting the essentialist question ‘what is the state, what is its true nature, its real meaning’ yet concluding that the ‘fundamental purpose’ of the state is the protection of freedom which does not harm others, Popper (1963), *Open Society*, vol. I, at 109–10.

³ Vincent (1987), *Theories of the State*, at 8, contrasting critical enquiry with historical purity or accuracy, concluding at 9 that the state has ‘no innate essence’; and see Nelson (2006), *Making of Modern State*, at 5 (‘To understand the state is to understand it historically . . . the product of historical contingency . . . the result of centuries of structural and ideological developments, none of which were predictable’). For support of indefinability, Dyson (1980), *The State Tradition* at 205, though himself providing (at 206) a ten-line definition.

⁴ Glenn (2010b), *Legal Traditions*; Glenn (2008), ‘Concept of Legal Tradition’.

⁵ Avineri (1972), *Hegel’s Theory of State*, at ix (selective capitalization of state ‘as arbitrary and intellectually scandalous as any other wilful misrepresentation’).

the mid-twentieth century when the state was ‘dropped from American social science’, partly in reaction against various forms of totalitarianism, partly to concentrate on the workings of government processes, political parties, pressure groups, and other features of contemporary states.⁶ Some concluded even that the state did not exist, or was only an imaginary community.⁷ This particular ‘rival tradition’ of pluralist political thought, itself challenging a ‘tradition embodying the total experience of statehood’,⁸ has declined in influence, as traditions do. The state would have been brought ‘back in’ in the later twentieth century, a necessary consequence of its persistence at the international level and the impossibility of treating it as a regress-stopper or pre-social fact.⁹

The academic movements of the twentieth century, however, can be seen as rooted in broader intellectual and institutional perspectives. England and Commonwealth jurisdictions have their Crown, but this has remained a ‘theoretically undeveloped and lifeless abstraction’,¹⁰ a tolerable and useful feudal remnant. The absence of development of a concept of the state would itself be a matter of philosophical choice, an underlying predominance of empiricist and pragmatic attitudes, happy with specific instances and discrete parts, mistrustful of juristic or other theory.¹¹ It has recently been described as ‘a particular state tradition rather than its absence’.¹² The chaos of the common law would follow from this, or perhaps contribute to it. Groups do not threaten a society but constitute it; the trust is an acceptable, non-state form of legal ordering.¹³ In the United States of America the underlying pragmatics would be reinforced by deliberate marginalization of the state, both in politics and in language, with reference usually to ‘the

⁶ For the state receding to the background ‘during periods of stability’, today the object of ‘critical attention and conceptualization’, Chan and Lockhart (2008), *Fixing Failed States*, at 26; and for reading out, Terrill (2003), *New Chinese Empire*, at 30.

⁷ Friedrich (1939), ‘Deification of State’, at 29 (‘pseudo-theological claptrap’); Anderson (1983), *Imagined Communities*, at 15 (imagined since most members of a state will never know or hear of their fellow members, yet ‘in the minds of each lives the image of their communion’).

⁸ Bartelson (2001), *Critique of State*, at 81, 83 (critics impliedly accepting existence of the larger tradition).

⁹ Evans, Rueschemeyer, and Skocpol (1985), *Bringing State Back In*; Bartelson (2001), *Critique of State*, at 28, 76 (on ‘futility’ of efforts to exclude); Rae (2002), *State Identities*, at 16 (once ‘back in’ state seen as ‘normative order’); Migdal (2001), *State in Society*, at 49–50 (for model of ‘state in society’).

¹⁰ Dyson (1980), *The State Tradition*, at 42 (no identification of corporate and collectivist capacity); though for resurrection of the ‘honour of the Crown’ to impose a fiduciary obligation in regard to aboriginal peoples, see Ch. 12, ‘Reconciliation’.

¹¹ Oakeshott (2006), *Lectures*, at 31 (events, actions, beliefs not understood as example of general laws but only in relation to other events, actions, and beliefs); Dyson (1980), *The State Tradition*, at 4, 52 (even contrasting ‘state’ and ‘stateless’ societies, latter tend to diffusion of power); Vincent (1987), *Theories of the State*, at 2 (on mistrust of ‘metaphysical or juristic theories’, corresponding importance of linguistic and analytical philosophy).

¹² McLean (2012), *Searching for the State*, at 1, and see at 6 (for writing which rejects ‘superhuman overtones’).

¹³ On the importance of the trust as a non-corporate structure, prohibited in many continental jurisdictions, and the influence of von Gierke (from Germany) on the underlying confidence in non-state structures, Vincent (1987), *Theories of the State*, at 204–5.

administration' or 'the government'.¹⁴ Federalism would also be more centrifugal in emphasis.

In contrast to these minimalist readings of the state tradition, the German readings are unquestionably the most developed and conceptually rich in the world. It remains necessary to speak of readings in the plural, however, since there are traditions within what has now become a national tradition, and which even antedate the national tradition. Germany had many states prior to its unification in 1871 (the present pejorative expression is *Kleinstaaterie*) and some conceptual sense had to be made of their characteristics and relations. Thus, entire legal disciplines have existed that have no real counterpart in much of the rest of the world, notably those of *Staatslehre* (teaching or doctrine of the state) and even *Allgemeine Staatslehre* (general teaching or doctrine of the state). *Staatslehre* tells us that it is not only appropriate to think of the state, but that we should think of it in the broadest possible terms, and on a world-wide basis. Constitutions, and constitutional law (*Verfassungsrecht*), exist only within this broader cadre so one must first understand that which is prior, more general, and foundational.¹⁵ This appears today to be an entirely justifiable proposition, and this book can even be seen as an example of it, but *Staatslehre* too has had its ups and downs. There have been three, related, problems. The first is the breadth of the project and, in a world of specialized disciplines, *Staatslehre* was taxed with being methodologically ambiguous, or even with having no 'method' whatsoever, being incapable of situation within political philosophy, legal theory, sociology, constitutional history, or political science.¹⁶ This was explicitly recognized by some of the major writers on *Staatslehre*: Jellinek, for example, described his work as descriptive though at the same time theoretical ('*zugleich Erklärung*').¹⁷ It was just law, and interdisciplinary before the hour. The second problem was that *Staatslehre* was pan-national in a time of rising nationalism, with national constitutions seen as the appropriate object of attention. So constitutional law (*Verfassungsrecht*) came to be seen as the central activity in a field increasingly seen as national. Third and finally, *Staatslehre* became driven in large part by Hegelian ideas of the state, which reified it even prior to articulation of its formal sources. While Carl Schmitt wrote on constitutional law, he saw it as a 'systematic unity' of norms deriving its validity from a superior 'Will' and wrote

¹⁴ Nelson (2006), *Making of Modern State*, at 3, 104 (on fears of absolutist state); Eppler (2005), *Auslaufmodell Staat*, at 48–9 (though both inadequate to capture continuity of state).

¹⁵ Thus constitutional law is the narrower discipline, taking only an 'inner view' (*Innensicht*) of the state; Doehring (2000), *Allgemeine Staatslehre*, at 7; and for general state doctrine enabling a view of the general as well as the particular, and teaching that present state structures were not simply found independently by different groups in the world, Starck (2005), 'Allgemeine Staatslehre', at 718. For the conditions of origin ('*Entstehungsbedingungen*') of *Staatslehre* in the pre-national legal and political diversity of what is now Germany, Friedrich (1997), *Geschichte deutschen Staatsrechtswissenschaft*, at 24.

¹⁶ Vosskuhle (2004), 'Renaissance der "Allgemeinen Staatslehre"', at 2.

¹⁷ Jellinek (1922), *Allgemeine Staatslehre*, at 9; and for the need for and impossibility of dealing with all literature, of all provenances, Krüger (1966), *Allgemeine Staatslehre*, at viii.

of Allgemeine Staatslehre as 'Politik'.¹⁸ Kelsen, in contrast, defended a notion of pure law, and left Germany for Switzerland in 1933.¹⁹

In spite of such twentieth-century clouds over Staatslehre, it remains entirely appropriate to speak today of two 'constitutional traditions' in Germany,²⁰ which concentrate respectively on general teaching of the state (on one hand), and on the national constitution (on the other). Some continue to criticize Staatslehre for a view of the state as sovereign and impermeable, and prefer what would be a more open idea of a national constitution.²¹ Others, in the contemporary context of Europe and the world, speak of a return of Staatslehre as a means of overcoming 'nationally introverted norm and case-law exegesis' and as favouring a 'problem-oriented, trans-border exchange of legal arguments, solutions and experience'.²²

So there are different readings of the state tradition, which have waxed and waned. If we are of strong conviction, we can take up the torch for any of these, and any of them may wax again at a particular time. Caution is suggested, however, by the fact that no one of them has obviously prevailed, even within a particular state. Since no one of them has prevailed, no one of them has been able to shut out the others, which continue to float within relatively easy reach. Some readings are more obviously cosmopolitan in their reach; others are potentially so but may have been subject to non-cosmopolitan interpretation. So our present or current thinking of the state may have some effect on its cosmopolitan character but does not appear capable of precluding it. It has also been said, in relation to an apparently non-cosmopolitan theory of national sovereignty, that 'the fact preceded the theory',²³ so this too is a reason for conceptual caution.

There is not only the complication of multiple readings of the state tradition. There is also the problem of thinking the state through time.

THE STATE TRADITION THROUGH TIME

Staatslehre has taught, consistently with its own objectives, that there is no spatial or temporal limit in thinking the state.²⁴ Our readings of the state tradition can therefore extend, as it is said, backwards in time. Is there, however, a temporal

¹⁸ Schmitt (1928), *Verfassungslehre*, at viii, and 9 (for constitution based on a power ('Gewalt') acting through its will ('Wille'), constitution as purely positive norm a 'contradictory confusion'); and for Hegelian and other notions of the state, see Ch. 5, 'Nation'.

¹⁹ Kelsen (1989), *Pure Theory*. One of Kelsen's first books was on Allgemeine Staatslehre and his Pure Theory of Law demonstrates great knowledge of the public law of the world.

²⁰ Murkens (2007), 'Future of Staatsrecht', at 732.

²¹ For the debate, Murkens (2007), 'Future of Staatsrecht'; though for national constitutions as scarcely immune from phenomena of closure, see Ch. 11, 'The Cosmopolitan Turn in Constitutional Sources'.

²² Vosskuhle (2004), 'Renaissance der "Allgemeinen Staatslehre"', at 4, and also at 6 for return of Allgemeine Staatslehre as coinciding with an 'open constitutional state'; Starck (2005), 'Allgemeine Staatslehre', at 712 (on a 'new' discipline dealing with the state).

²³ Post (1964), *Studies Medieval Legal Thought*, at 449; though for the question whether there has ever been a 'fact' of sovereignty, see Ch. 7, 'Sources'; and on the wider phenomenon of the relations of 'theory' to 'practice', see Ch. 9, 'Cosmopolitan Theory'.

²⁴ Starck (2005), 'Allgemeine Staatslehre', at 712.

limit to the state, one which limits or expands our conception of it, and of its cosmopolitanism?

Contemporary historians and others, impressed with notions of periodization and the nation-state, as it has been perceived, have spoken of the state as existing essentially from the time of the Italian renaissance. Machiavelli would have played a large role in this, and is often credited with effecting a tilt to the Italian word *stato* from a status or condition to the institution we know today as the state.²⁵ The emergence of the word, and its contemporary meaning, would therefore correspond to the emergence of the institution. The state would be a 'recent phenomenon', a 'construction politique nouvelle', a 'comparatively recent invention', an intellectual product of 'modern Europe'.²⁶ It would even be an anachronism to speak of the state prior to its linguistic emergence, and the proposition is advanced that the modern idea of the state was born with the word.²⁷

Historical work is insidious and diverse, however, and if the emergence of the word and concept 'the state' can be traced to the mid-sixteenth century, it also appears possible to trace the historic roots and development of the state to earlier times. States as we know them appear to have emerged from national monarchies (as opposed to cities, empires, and fiefdoms) and monarchies reach far back.²⁸ With such an 'open-textured' word as state, moreover, there might not have been a single, charismatic moment of emergence, but parallel, staggered shifts in meaning, in what remained a largely oral society. Dyson speaks of the first step towards the modern state in the *Ständesstaat* (literally the state based on status or classes) which emerged as early as the late twelfth century in many places in Europe, and of use of the word *state* to indicate a polity in the Netherlands in the fifteenth century and by particular authors in Italy in the fourteenth. The Germans would have taken it from the Dutch in the fifteenth century.²⁹

If practice does indeed precede theory, then practice may precede precise language as well. Harding thus chose to write on a 'pre-theoretical understanding' of the state, finding it in various applications of the word (and its cousins

²⁵ See notably Skinner (1989), 'The State', at 101 (most important linguistic innovation of renaissance Italy), 102 (Machiavelli 'most consistent willingness to distinguish the institutions of *lo stato* from those who have charge of them').

²⁶ See respectively Vincent (1987), *Theories of the State*, at 10 (Greek or medieval states 'misnomers'); Chevallier (1999), *L'Etat*, at 9; van Creveld (1999), *Rise and Decline of State*, at 1 (distinguishing governments from states); Krüger (1966), *Allgemeine Staatslehre*, at 5. Add Spellman (1998), *European Political Thought: 1600–1700*, at 1 ('emergence' of sovereign state in seventeenth century); Böckenförde (1991), *Recht, Staat, Freiheit*, at 92 (no longer possible to speak of hellenic state, state of middle ages, etc.); Morris (1998), *Essay on Modern State*, at 17 (pleonastic to speak of 'modern state').

²⁷ Jellinek (1922), *Allgemeine Staatslehre*, at 131; Hont, (1995), 'Permanent Crisis of Divided Mankind', at 184 ('new model'); Dowdall (1923), 'The Word "State"', at 114–15 (by explicitly naming it, Machiavelli 'founded' the modern science of the state); and for anachronism, Bartelson (1995), *Genealogy of Sovereignty*, at 99.

²⁸ See Ch. 2, 'Affirmative Crowns'.

²⁹ Dyson (1980), *The State Tradition*, at 25–7, 56 (for the *Ständesstaat*); and for Henry III's affirmation of the 'prosperity of our state' as early as the thirteenth century, Harding (2002b), *Medieval Law and Foundations of State*, at 145.

status, estate, etc.) in the judicial and administrative practices of the middle ages, criticizing a teleology only interested in a 'modern' idea.³⁰ Bartelson finds states by 1300, in the continuity by then of bodies politic in time and space.³¹ Limitation of the state to 'modern' times, therefore, may be simply an extension of the thinking of 'modernity', with its insistence on periodization and discontinuity. The 'modern' could not exist without these underlying attitudes, while the notion of an anachronism is tied to the notion of linear time and would itself be a nineteenth-century, pre-Raphaelite creation.³² That nothing can be situate outside its distinct period is thus a 'modern' idea. There appears to be no fundamental reason why one cannot think of degrees in the emergence of what we know as states, just as it appears possible, and even necessary, to think today of degrees of their disintegration. If the term 'nation-state' came into being only in the early twentieth century, as appears to have been the case,³³ must it follow that there could have been no nation-states in the nineteenth century?

It may therefore be necessary to think of the state without any limit in time, though there will be variations in the types of state we then encounter. This would also flow from the strikingly large array of informed opinion, across disciplines, that rejects any temporal limit to the notion of the state. Experts differ, and differ greatly. Anthropologists appear particularly unimpressed with temporal boundaries to the state. Bruce Trigger has thus written extensively on 'States: City and Territorial' and demonstrates more interest in the possible difference between them than in the notion of a state. The 'city-state' is situated in ancient Greece, renaissance Italy, parts of the ancient Middle East, and in classic Mayan society.³⁴ Robert Bellah speaks without apparent hesitation of the 'early state' of pre-monarchical Israel.³⁵ Claessen, in *The Early State*, sees the state as a social phenomenon that first appeared 'only' several thousand years ago.³⁶ Broadly speaking, the anthropological and sociological literature would be interested in the 'rise of formal political organization as compared to tribal or kinship associations'.³⁷

Even amongst historians, the modernist, periodized view is far from dominant. The great German historian of antiquity, Eduard Meyer, argued for the universality of the state in human history and for its being historically the 'primary form

³⁰ Harding (2002b), *Medieval Law and Foundations of State*, at v, 1, though, at 5, even 'theoretical' use began with Aquinas in thirteenth century.

³¹ Bartelson (1995), *Genealogy of Sovereignty*, at 99; and see Ch. 2, 'Affirmative Crowns'.

³² Manguel (2006), *Library at Night*, at 317 (notion of a 'cosmopolitan past' with us for many centuries, till then).

³³ See Ch. 5, 'Nation'.

³⁴ Trigger (2003), *Understanding Early Civilizations*, at 92 (for 'States: City and Territorial'), 93, 266 (on debated dichotomy between them).

³⁵ Bellah (2011), *Religion in Human Evolution*, at 289 (stimulated by military pressure from Philistines).

³⁶ Claessen and Skalnik (1978), *The Early State*, at 3.

³⁷ Spruyt (1994), *The Sovereign State*, at 195, pointing out discipline-specific concepts of the origin of the state; Morris (1998), *Essay on Modern State*, at 26 (state 'in broad anthropological sense' found in non-'primitive' social organization, first appearing in ancient Egypt, Mesopotamia, 'and elsewhere').

of human community'.³⁸ Contemporary historians may adopt the anthropological view, explicitly,³⁹ or for their own reasons extend the concept of the state to the various institutions they examine.⁴⁰ The 'empire-state' has also existed, in both pre- and post-renaissance times,⁴¹ as has the 'company-state' of some empires.⁴² Some, moreover, prefer nuance, applying a 'presumption' of independent communities, or allowing for how 'rigorous one wishes to be'.⁴³

Specialists in explicitly normative views of the world are understandably less inclined to periodization. Charles Taylor has criticized the media, literature, and the social sciences for having us think of society in terms of 'vertical time-slices, holding together myriad happenings, related and unrelated',⁴⁴ apparently lacking any normative connection to that which has preceded, and Paul Ricoeur stoutly affirms his preference to 'summon this or that author according to the requirements of the argument, without concerning myself with the epoch'.⁴⁵ Without discussion, lawyers and legal historians have often identified early versions of their concept of the state. Jennings saw England already existing as a state by the middle of the fourteenth century;⁴⁶ going further back in time, Professor van Caenegem speaks of the 'rebirth' (even) of the state in the twelfth century.⁴⁷ Jellinek, Ellul, and Herzog wrote of different versions of states in antiquity,⁴⁸ while leading historians of Roman law also speak explicitly of the Roman state, in early and later forms.⁴⁹ Mitteis wrote of the 'state' of the high middle ages and,⁵⁰ more recently, Noah Feldman extended the notion of an Islamic state to the

³⁸ Meyer (1907), *Geschichte des Altertumes*, at 11.

³⁹ Wickham (2005), *Framing Early Middle Ages*, at 57.

⁴⁰ For example, Canning (1988a), 'Introduction: politics, institutions and ideas' at 350–52 (England a state from reign of Henry II, though given 'minimum requirements . . . for the existence of a state, it is arguably misleading' to apply term earlier than mid-twelfth century); and for further examples, Barber (2010), *Constitutional State*, at 4.

⁴¹ Burbank and Cooper (2010), *Empires*, at 8; Benton (2010), *Search for Sovereignty*, at 36.

⁴² Stern (2011), *The Company-State* (English East India Company and its problems of governance).

⁴³ Respectively Post (1964), *Studies Medieval Legal Thought*, at 247 (for as early as 1100), and at iii ('no distortion to use our own term "State" instead of the medieval term'); Canning (1988a), 'Introduction: politics, institutions and ideas', at 350.

⁴⁴ Taylor (2007), *A Secular Age*, at 195.

⁴⁵ Ricoeur (2004), *Memory, History, Forgetting*, at xvii.

⁴⁶ Jennings (1959), *Law and Constitution*, at 2 (a general and common law, main functions of government with 'central authorities').

⁴⁷ Van Caenegem (1988), 'Government, law and society', at 185; and for a still earlier 're-appearance' with Charlemagne, Lepointe (1965), *Histoire droit public français*, at 22.

⁴⁸ Jellinek (1922), *Allgemeine Staatslehre*, at 53 ('antike Staatslehre'); Ellul (1955), *Histoire des institutions*, at 48 (Spartan state, Etruscan city-state); Herzog (1988), *Staaten der Frühzeit*, notably at 9 (given imprecision of word, better to be inclusive in seeking understanding), 10–11 (state understood in terms of degrees of organization of society), 15 (state over 4,000 years); and see Jowett's translation of Aristotle's *Politics* (Aristotle (2008b) at I.1 ('[e]very state is a community of some kind'); Johnson (1990), *Aristotle's Theory of State*, at xxii (using both state and constitution to render Greek *politeia*).

⁴⁹ Notably Kunkel (1973), *Roman Legal and Constitutional History*, at 3, 9 (though not thought of in abstract way as today); Kaser (1967), *Römische Rechtsgeschichte*, at 19, 92 (original 'Bauernstaat' developing into 'Territorialstaat').

⁵⁰ Mitteis (1975), *State of the Middle Ages* ('Der Staat des hohen Mittelalters'); and the use of 'state' in Alan Gewirth's translation of Marsilius of Padua's *Defensor pacis* of 1324: Marsilius (1980), *Defensor pacis*.

time of Muhammad.⁵¹ A specialist in the history of political theory recently and splendidly concluded that historical differences and fears of anachronism are ‘no warrant to wallow in historical immediacy’.⁵²

Why does all of this matter for the cosmopolitan character of the state? If the state is a modern, post-renaissance structure, we will see in Chapter 4 that some attempted form of territorial or other closure will have accompanied it throughout its history. The state will appear intrinsically less cosmopolitan; the argument for cosmopolitanism will be more difficult to make. If the state has existed throughout organized society, recent efforts at closure appear more as a blip in a much longer narrative. National closure has vastly more to overcome. Since the ‘longue durée’ of the state cannot be excluded, however, Chapter 2 will have to examine some antecedents of the contemporary state, and Chapter 3 the possibility of persistence of some of their fundamental concepts. These may constitute the cosmopolitan origins of the state as tradition, and later chapters trace the playing-out of the tradition.

THE STATE AS TRADITION

Since the state is today being questioned, both internally and externally, there is a normal reaction to no longer take it for granted but to seek its justification, historical or otherwise. Its possible disintegration is a factor for renewed interest in it;⁵³ in legal philosophy there would now be a ‘burgeoning’ group of ‘normative’ positivists, those who justify the state and its law as opposed to attempting to describe it.⁵⁴ Legal philosophy that is not purely descriptive, however, has obvious ties to normative philosophy that has preceded it, so normative arguments from both past and present come together; both are more visibly affirmations of a tradition. A rational justification of the state is provided, it is said, when people ‘have reasons’ to respect its laws,⁵⁵ and the best reasons may well be those that have attracted the widest adherence.⁵⁶

⁵¹ Feldman (2008), *Fall and Rise of Islamic State*, at 1 (Islamic states ranging from ‘fortified towns to transcontinental empires’).

⁵² Nederman (1995), *Community and Consent*, at 147, while warning at 2 of ‘undesirable byproducts’ of the ‘new historicist school’; and see Koselleck (2002), *Practice of Conceptual History*, at 8 (for warning against the ‘mythical schema’ of the triad of antiquity, the middle ages, and modernity). Douglass North and his colleagues are aware that specialists will argue that they have ‘lifted . . . examples out of context, and we have. However, our intention is to put these examples in a new context, to provide a new framework for . . . human history . . . and to open new ways of thinking . . .’; North, Wallis, and Weingast (2009), *Violence and Social Orders*, at xii–xiii, and see also at 2, 13 (for ‘natural state’ having origins five to ten millennia ago).

⁵³ Nelson, (2006), *Making of Modern State*, at 128; and see, for pressure of globalization driving return to original sources, Goldman (2007), *Globalisation and Western Legal Tradition*, passim; Picq (1995a), *Il faut aimer l’État*, at 52 (on nation dying without its own memory).

⁵⁴ Coleman (2007), ‘Beyond the Separability Thesis’, at 600.

⁵⁵ Morris (1998), *Essay on Modern State*, at 122; and see Bagehot (1958), *English Constitution*, at 185 (on free government as government by persuasion, necessarily implying reasons for persuasion, as opposed to its simple fact).

⁵⁶ Condorcet famously sought to prove this through probability calculations and it is the case that an increase in participation can increase the probability of a correct solution, so long as precise conditions

Traditions are the objects of handing down, of *traditio*, but it is normative information that is the substance of tradition.⁵⁷ To the extent that states exist in institutional form, they so exist because there is normative information that favours institutionalization. Western institutions did not simply spring up on their own; there were underlying ideas of human control over human destiny, and of how that control was best brought about. They were ideas developed and refined over centuries, and handed down. This has consequences for our thinking about the state, consequences that are becoming clearer in present circumstances.

In the first place, the recognition of the state as a product of tradition requires greater reliance on historical data, an awareness of 'historical contingency'.⁵⁸ How is this material from the past developed and appreciated? There is (first of all) more of it, and Brian Tierney has commented on the importance of new research in making it possible to see continuity in the growth of constitutional thought from the twelfth to the seventeenth centuries.⁵⁹ In its turn, the ability to perceive continuities strikes at the periodization of legal history, so that the broad view of the state over time that is taken by some historians, as well as normative thinkers, is reinforced by historical work itself.⁶⁰ The more we learn of the disparate and early origins of the state the more plausible becomes its extension through time and the stronger is the case for its cosmopolitan character. We are, of course, interested in focused historical work, on the 'history of the present' as Foucault put it,⁶¹ on lines of thought that took off, though in doing so we must stand within and without the tradition, both situating it so as to understand it and looking at temporal connections that could not be appreciated at an earlier time.⁶²

In a second place, recognition of the state as a product of tradition, of diverse elements of normative information over time, situates the state squarely within

are met. If each of three persons has a $2/3$ or 67 per cent chance of reaching a correct solution, together they have a 74 per cent chance, since they have $8/27$ probability of a correct, unanimous solution ($2/3 \times 2/3 \times 2/3 = 8/27$) and a $12/27$ probability of a correct, split decision ($2/3 \times 2/3 \times 1/3 = 4/27$, multiplied by 3 for the three possible combinations = $12/27$, yielding $20/27$ or 74 per cent). The calculation presumes, however, no mutual influence amongst the deciders and precise calculation of probability. For the original text (which apparently lacks a full English translation), Condorcet (1785), 'Essai sur l'application de l'analyse'. Condorcet, however, being 'subtle mathematically, but not philosophically... a Platonic realist, believing in objective moral truths' viewed the 'failure of humans to agree... [as] a failure of perception': McLean and Hewitt (1994), *Condorcet*, at 32. The idea was present in Proverbs 11:14 ('... in the multitude of counsellors there is safety').

⁵⁷ Glenn (2010b), *Legal Traditions*, at 13–14.

⁵⁸ Nelson, (2006), *Making of Modern State*, at 127 (problematical character of general and universal theories, empiricism reflective of historical given); Stolleis (1987), *Staatsdenker*, at 11, 12 (distance from nineteenth century permitting clearer view of its ideology, questions of end of state raising questions as to its beginnings).

⁵⁹ Tierney (1982), *Religion, law and constitutional thought*, at 7.

⁶⁰ Oakley (2005), *Natural Law, Laws of Nature*, at 23 (traditional periodization into ancient, medieval, and modern 'as much a hindrance as a help'); Nicholas (2003), *Urban Europe, 1100–1700*, at viii (on distinction between 'medieval' and 'early modern', 'essentially irrelevant' in study of urban history).

⁶¹ Foucault, however, sought not a history of the past, but a 'history of the present' as an instrument of radical reform; Foucault (1979), *Discipline and Punish*, at 31.

⁶² Tierney (1982), *Religion, law and constitutional thought*, at viii.

contemporary information theory. The state even emerges as the most significant of contemporary 'informational societies', 'virtual communities', or 'epistemic communities'.⁶³ It is true that it is usually thought of today as a combination of institutions and territory, but these are simply manifestations of the underlying informational base and are themselves variable over the history of the state, particularly when a non-periodized view of that history is taken. It is true that contemporary information theory sees a technological revolution in the application of knowledge and information to the processes of generating and communicating information, but this is precisely how the state achieved its pre-eminence in the places of its origin, through the application of second-order theories of sources of law to the actual production and use of it. Before there could be codes there had to be authorization of codes, and before codes became accepted as law there had to be normative information justifying their acceptance.⁶⁴ State officers were masters of information theory in bringing about a view that the state could be a source of law, despite massive resistance and attachment to prior sources. If, today, the state is losing some of its pre-eminence this is because it is losing some of its control over information. If there are competing sources of information there are inevitably competing sources of normativity, some of which will be recognized as law. The current debate about law and globalization is part of the ongoing tradition of the state.

In a third place, the nature of the state as tradition means that it is inherently open or cosmopolitan in character. Tradition as information is impossibly difficult to control or shut down. Efforts to reify states (or civilizations), by depicting them as 'entities' inevitably clashing or in conflict, are challenged by the ongoing, uncontrollable, flow of information that both constitutes them and questions them. They are not entities themselves, however many monuments, institutions, or gunboats they may bring about, and however massive may have been the doctrinal effort to constitute the state as an entity beyond the information that is its base.⁶⁵ Closure in the flow of information was key to some measure of closure of state structures and institutions in single territories, but closure in the flow of information is impossible to maintain over time. The collapse of the Soviet Union has been correctly identified as a failure in information control.⁶⁶ In the rise and relative decline of the state tradition we thus see that '[c]losures are realised in the context of an environment that is open, and are themselves open', in the sense that the completion of closure is impossible.⁶⁷

⁶³ Castells (2000), *The Information Age*, vol. I, at 22; Haas (1992), 'Epistemic Communities'.

⁶⁴ Carbonnier (1982), '*Usus hodiernus pandectarum*', at 109–10 (cassation for violation of Roman law remaining possible for years after enactment of French Civil Code); and see Glenn (2004) 'La codification à la française'.

⁶⁵ For corporatist accounts, see Ch. 4, '*The state as body, crown, or corporate person*'.

⁶⁶ Castells (2000), *The Information Age*, vol. III, at 368.

⁶⁷ Lawson (2001), *Closure*, at 1, and 119 (closure always subject to failure because texture offers new closure which in turn potentially undermines current closure); and for the historical processes of flow from closures of tribe, city, manors, states, Clough and Cole (1952), *Economic History Europe*, notably at 20 (for decline of manor caused in part by rise of state).

Thinking the state as tradition, or information, means that states may vary, in degree and type, according to the information they rely upon.

DEGREES AND VARIETIES OF STATES

In the twentieth century there was widespread resistance amongst legal thinkers to the idea of states existing in degrees or even in a variety of types. The state would be based on the idea of a legal system, with its territorial boundaries, and whatever the contents of the legal system it would above all *exist*. It would exist, moreover, as a dichotomous fixed idea ('dichotomischer Fixbegriff')⁶⁸ and, though there might be degrees of presence of various constitutive elements (such as levels of obedience), there could be no law without it. Either there is law and a legal system, or there is not.⁶⁹ In this insistence on the constancy and uniformity of the state in modern legal thought there is a curious parallel with Marxist and some sociological literature, in the sense that all states are simply the result of evolutionary stages of different economic or other systems, and there would be no need or even possibility of distinguishing amongst them.⁷⁰ Some have seen, in this overlooking of the legal (or its detail), an implicitly totalitarian character of the state.⁷¹

Conceiving the state as tradition is not incompatible with this view of a uniform and constant state (which is one instantiation of the tradition) but the state tradition is a larger one. We have already seen that it can be seen as extending far back in time and as including a multiplicity of predecessors or antecedents of the contemporary state. The contemporary state is thus the product of a process of emergence, and previous states would represent various degrees of present concepts of statehood. Many states in the world would also have failed or be failing, and there is no clearly recognizable boundary between

⁶⁸ Möllers (2000), *Staat als Argument*, at 424.

⁶⁹ On the tendency of legal philosophers of many persuasions to 'cling dogmatically to classificatory ideas', rejecting analysis of legal systems as matters of degree, Füsser, 'Farewell to "Legal Positivism"', at 124, 155, with references (Dworkin opposing Fuller's non-classificatory proposals); Coyle (2002), 'Hart, Raz and Concept of Legal System', at 282 (albeit in the complete absence of an uncontroversial theoretical characterization of a legal system). For John Finnis's acceptance that 'the central case of law and legal system is the law and legal system of a complete community', though warning that 'we must not take the pretensions of the modern state at face value', Finnis (1980), *Natural Law*, at 148, 149. Cf. van Creveld (1999), *Rise and Decline of State*, at 314 (for construction of Latin American states having succeeded 'only up to a point').

⁷⁰ Kriegel (1995), *State and Rule of Law*, at 5 (German romantic doctrine given canonical form by Marx), 66 (blind to juridico-institutional forms); Tilly and Blockmans (1994), *Cities and Rise of States*, at 3 (on sociological view of state of Poggi).

⁷¹ Picq (2005), *Histoire et droit des États*, at 12, 19 (on totemic character of state in some societies, citing Russian philosopher Berdiaev that totalitarian state not accidental but implicit in concept of state). For impatience with the detail of the law in the theoretical conceptualization of national legal systems, and corresponding abandonment of treatises of civil law after the first volume, Gambaro (2002), 'Structure of Legal Systems', at 56 (authors not considering it fruitful 'to strain themselves in writing the remaining part').

these categories.⁷² It therefore cannot be a question of states existing or not, but only of the degree to which the concept of a state is currently persuasive for the people said to be subject to it. This notion of degrees of statehood (degrees of sovereignty if you prefer) appears also to be the only way of appreciating what is happening to states in current world circumstances. Traditions are not on–off in their realization. They are phenomena of influence, even when instantiated as a national legal system or modern state. It is accurate, therefore, to speak of a possible decline in the influence of states in a time of globalization, since this may be what is actually going on. Moreover, since today many things are quantified (levels of corruption, quality of life), it would also be possible to quantify the extent to which individual states function as such, or have achieved statehood. In French it is possible to speak of degrees of ‘étatisation’ and this is a useful expression, difficult to duplicate in English.⁷³ Quantifying levels of state existence does not yet appear to have been done, but it would provide a more useful form of appreciation than that of international diplomatic recognition. Even the latter, however, is beginning to recognize degrees in the process.⁷⁴

States vary, however, not only in the degrees of their acceptance by populations, but also in their type and structure, and these differences are primarily legal. The great variety of contemporary states is an indication of the cosmopolitan character of the state tradition, and its internal variety. The state tradition, like any tradition, ‘tolerates and unites an internal variety and displays an ability to change without losing its identity’.⁷⁵ If there is some control over the degree of ‘statehood’ through the process of diplomatic recognition, there is no control over the type or structure that may be adopted, and in developing their own instantiation of the state tradition states have been inventive in the extreme.⁷⁶ There is widespread agreement on the singularity of individual states, their ‘utter particularity’ in the language of Phillip Allott.⁷⁷ This is important both for the

⁷² See Ch. 5, ‘Fragmentation, failure, and violence’; and for historical examples (Litva, Borussia, Etruria, Tsernagora), Davies (2011), *Vanished Kingdoms*, notably at 729ff. (‘How States Die’).

⁷³ Chevallier (1999), *L’Etat*, at 11; and in German, with a touch of Gallic elegance, ‘Etatisierung’, though once accomplished the result is a more solid ‘Staatlichkeit’; for different levels of ‘statishness’ (in English) during the nineteenth century, Bayly (2004), *Birth of Modern World*, at 253.

⁷⁴ See, e.g., *The Economist*, 10 April 2010 at 62 on the difficulty of qualifying as a state (citing South Yemen, South Ossetia, Taipei, Kosovo, others), degrees of diplomatic recognition (ranging from full diplomatic ties to denying a state’s existence) as a ‘calibrated set of tools’ to reward and penalize; recognition of a state may be distinguished from recognition of its government for diplomatic purposes, but here degrees are also possible (*de jure, de facto*, belligerent status, etc.); and for a rare recognition of ‘degrees of legitimacy’, Morris (1998), *Essay on Modern State*, at 110 (no such thing as legitimacy *simpliciter*). For the complexity of the process, Crawford (2007), *Creation of States*, though recognizing at 37 that ‘there has long been no generally accepted and satisfactory legal definition of statehood’. For failed states, see Ch. 5, ‘Fragmentation, failure, and violence’.

⁷⁵ Dyson (1980), *The State Tradition*, at 5.

⁷⁶ This is not to suggest a clear boundary between degrees of ‘statehood’ and its type or structure. Micro-states have been said to represent a ‘category problem’: Saladin (1995), *Wozu noch Staaten?*, at 226.

⁷⁷ Allott (2002), *Health of Nations*, at 117 and 118 (‘of the nature of a nation to be uniquely itself’). The World Bank agrees: see World Bank (1997), *The State in a Changing World*, at 1 (‘differences in size, ethnic makeup, culture and political systems make every state unique’); as do Saladin (1995), *Wozu noch Staaten?*, at 225; Picq (2005), *Histoire et droit des États*, at 11; Chevallier (2004a), *L’Etat post-moderne*, at 9; and Opello and Rosow (2004), *Nation-State and Global Order*, at 245.

idea of law (since recognition of difference implies recognition of law's role) and for any idea of exceptionalism on the part of a particular state. All are exceptional, out of the necessity of adapting to local circumstance, whether historical or social. Here is to be found the detail of the cosmopolitanism of each.

Yet at the same time there is language of commonality in discussion of states. Henke even speaks of the 'relative uniformity' of present states, the product of European expansion,⁷⁸ and Jellinek, while insisting on individuality, nevertheless acknowledged common elements, better appreciated if the state or legal elements can be isolated from all else.⁷⁹ It remains a state tradition, in spite of all of the differences. How this is brought about is the subject of this book.

⁷⁸ Henke (1988), *Recht und Staat*, at 294; and for sharing by some states of particular traditions of democracy, the rule of law, human rights, open government, Koopmans (2003), *Courts and Political Institutions*, at 7.

⁷⁹ Jellinek (1922), *Allgemeine Staatslehre*, at 33.

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