

**Preface to**  
*The Doctrine of State*  
*and the Principles of State Law*

This book is a translation of Book IV of *The Doctrine of Law and State*, entitled “The Doctrine of State and the Principles of State Law.” It is a tour de force: a gauntlet thrown down before the ignorant modernist who cannot conceive of the state as anything other than the creature of the will of man, the construct of autonomous citizens. It is such, despite its predilection for monarchy: for it transcends the choice for monarchy versus republic, which in Stahl’s day was of the utmost urgency. It is easy to dismiss this book for the attention it gives to monarchy; but it is precisely that attention which enabled Stahl to attain the depth it contains. For in defending monarchy in the face of a republican age, Stahl was forced to plumb depths of detail and philosophical penetration left unexplored by others, who did not feel compelled by the same urgency to penetrate to the heart of the matter. For this reason, there is more to Stahl’s discussion than meets the superficial eye.

For starters: the state for Stahl is, above all, a God-given reality. It is something which precedes the will of man, whether ruler or subject or citizen. Its existence is bound up with the existence of peoples and nations. For although it is a God-given reality, the state is also such an expression of popular essence. This is the true popular character of law and state (cf. *Principles of Law*, §§. 2, 25) as opposed to what Stahl labels the revolutionary character of popular sovereignty as the ephemeral will of the people. This historical derivation is bound up with the God-giveness, and although the two cannot be equated, Stahl’s high view of providential action in history dovetails with this profound respect for the received patrimony of an order of law and state which, to that extent at least, transcends the will of “downstream” man.

Does this mean that Stahl discounts this will of the people, the notion of the consent of the governed? No – rather, it means that his concept of sovereignty differs fundamentally from the modern, Revolution concept. For the Revolution concept makes the will, be it of the people, be it of the ruler, into a law, subjecting it to no law, in fact denying the concept of a transcendent standard altogether.

This is the first counterpoint of Stahl's conceptual framework. He then embeds this notion of transcendence within the concept of what he calls the ethical kingdom. This is the supreme category by which to understand human community. The ethical kingdom is "self-conscious, indivisible rule, in accordance with ethical and intellectual motives, over conscious, freely obedient beings, thereby also spiritually uniting them. Accordingly, it is rule of a personal character in every aspect, a *kingdom of personality*." (p. 1). The ethical kingdom is a kingdom, thus rule, over persons, but it is an ethical rule, thus entailing the assent of those persons. Therefore, it is not rule over robots or slaves, but over freely-choosing, voluntarily submitting persons, by an ethically accountable, personal ruler, either individual or corporate.

The state is just such an ethical kingdom. It therefore partakes of the character of personality. In monarchy, this is evident, as the ruler is a physical personage; but it is just as much the case in a republic. For the ruling authority in a republic is likewise of a personal character, but in corporate form. This ruling personality stands over the people, otherwise it could not rule; this is its God-given status (Romans 13:1 ff.; below, §§. 48-52).

The character of personality is crucial to Stahl's conception. Rule can never be of an entirely abstract, objective nature, as if natural laws existed which are self-evident and self-enforcing. Above all, God in Heaven rules over the affairs of men and makes His will to be known, and He empowers peoples and nations to participate in that rule on their own account and for their own benefit. As Stahl put it in the *Principles of Law*:

Now then, in accordance with the self-reliance and unique originality that runs through the entire realm of personal being, the human community is to establish this order [i.e., the state], through which it maintains God's world order, *on its own as its own order*.... That is the high position and worth to which the human race is called, that it not simply fulfill God's commands but that it also establish and maintain this order as an instrument and vessel of world rule under God's influence. Man thereby assumes the godlike position of ethical steward, of lawgiver and judge.<sup>6</sup>

Both laws *and* persons are integral elements of the ethical kingdom. And the state is one form of that kingdom, a low form because of the fragmentary, irregular manner of fulfillment of the ethical requirement, but nevertheless a full-fledged level in the scale, so to speak, of ethical being.

The state is the form taken by our society as ethical kingdom. "the state is the *association of a people under a rulership (ruling authority)*" (§. 36 below). It is therefore more than just the government: it is the union of all the members of the nation into an ethical kingdom. Stahl distinguishes this sharply from an ethical organism: "The organism contains determinate, various members, each of which mutually supplements the other, of which none have an independent existence, of which all, in fact, are required for the organism to exist (head, rump, two arms, legs, etc.). The kingdom, on the other hand, contains an unlimited quantity of equal, independent, existing beings, which neither mutually presuppose each other, nor are required for this concept the way they are in the case of the organism; they are subject to a higher rule" (§. 1 below). In other words, the state is not an organization, not a group whereby the members are dependent and harnessed to the pursuit of a result; it is not a "command economy;" it is rather an association united by a general rule, both of government and of laws, wherein the members are autonomous and enjoy a relative independence while pursuing the common goal of a public ethi-

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<sup>6</sup>Stahl, *Principles of Law*, p. 8-9.

cal order. Hence, “the state is... based not on the ethical vocation (ethos) of individual persons but on the ethical vocation of the human community (of the people) as a whole.” (§. 36 below).

Accordingly, the state has two poles, which Stahl elsewhere characterizes as “institutional” and “congregational.”<sup>7</sup> In the same way that the church embodies these two aspects, the state has an institutional, “top-down” element, in his view epitomized in the monarch, and a congregational or associational, “bottom-up” element such as is evidenced in a republic. Both of these poles need to be accounted for in a properly constituted state, just as they exist in every form of ethical kingdom. It is not all subjection and it is not all autonomy and independence. Historically, the progression is for monarchy to be ever more fully supplemented by popular representation. But the latter is no end in itself; the state must ever remain a vehicle of order and authority, no matter the level of popular participation. And the ruling authority exists on the basis of divine right, regardless of the degree to which popular participation and the consent of the governed become reflected in it.

This is ultimately the reflection of what Stahl refers to (*Private Law*, §. 21) as the “Two Poles of World Order: The Fear of God and Full Humanity.” Contemporary society has taken on board the concept of full humanity, which constitutes its true claim to fame: the principle of humanity, the recognition of the rights of man, “the idea that the well-being, the right, the honor of every individual, even the most humble, is the concern of the community, which views each person in accordance with his individuality, which protects, honors, looks after him without regard for descent, class, race, gift, as long as he has a human face” (*Private Law*, p. 37). But in doing so it has forgotten the fear of God, the source of goals and higher principles, the elevating principle in life. “The state [in the modern conception] is based solely on human rights, not on higher goals; this is the sympathy for all opposition against all authority; it lacks the recognition of unconditional commands for the legal order. From this springs op-

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<sup>7</sup>See my biography of Stahl, *Authority Not Majority*, pp. 29ff.

position to the death penalty and in fact to any sort of punishment.... From this everywhere stems the revolt against all discipline, against all restrictions established for the fulfillment of a higher order of life" (*Private Law*, p. 39).

In terms of the state, this one-sided contemporary philosophy is expressed in a one-sided emphasis on law and freedom without any recognition of the concept of ruling authority. "The newer school of thought, as it confronts us in the great multitudes, and in the times in their totality, has appropriated essential aspects of the ethical kingdom (freedom, self-action of peoples and individuals, the law as the all-permeating necessity of public life, in contrast to arbitrary rule); but, in exchange, has forfeited the first and foremost of those aspects, the given higher real authority, the ruling authority, for and over the people, in which the people is to become politically unified" (§. 1 below). This one-sidedness leads to the loss of an understanding of law as anything other than a man-made construct. "Accordingly, it does not conceive of law as a given higher thing, as the law of the great institution which, as one and the same, passes through the ages, albeit understood in constant advancement; rather, for this school, the law is merely a self-made thing, the will of the then-living generation" (§. 1).

The times, then as now, are in need of the restoration of both of these principles together in a harmonious unity: "not the ongoing onesided advance of humanity and the rights of man, but the restoration of the fear of God as the energetic principle in both hearts and public institutions, while in it and through it preserving humanity and the rights of man" (*Private Law*, p. 41).

This is an extended argument for the rule of law, which cannot be understood or implemented apart from these notions of personality and divine institution. Where there is no transcendent standard, and a personal guardian of that standard, there can be no rule of law, but only of will. This leads directly to Stahl's institutional criticism of modern constitutionalism. The focus of that criticism, beyond the purported "neutral" character of the state, is on the doctrine of the separation of powers.

Stahl's criticism runs together with his criticism of popular rather than monarchical forms of government, and to that extent must be disentangled from that criticism, for the principle he enunciates is valid despite the seeming linkage of it to his defense of monarchy.

Superficially, then, Stahl argues that the separation of powers is untenable because, by subordinating the executive to the legislative power, it subordinates the monarch to the popular power. Modern constitutions which include a princely element attributed the executive power to this element, and the executive power, in the separation of powers doctrine, is restricted to implementing the will of the legislature, which then is popularly elected. This zeal to restrict the princely power is understandable in view of the recent position of monarchy as an unaccountable power over against the other elements of society, whether noble or common. But it is an unacceptable restriction on true monarchy, says Stahl, for true monarchy embodies sovereignty, which cannot be divided up the way the separation of powers doctrine would like, but which rather holds sovereignty in a unified fashion and allows for the exercise of the powers of sovereignty through various elements under it, such as the civil service and the judiciary. Here, the popular representation fulfills a role of a check on the monarch, not that of a dictator of its will to the monarch.

Now then, in modern democracy such a "monarchical principle" does not have any place. What, then, can be gleaned from this criticism? A good deal: for Stahl's criticism of the separation of legislative from executive power goes deeper than the defense of monarchy. It runs directly into a defense of the rule of law itself. For the doctrine of the separation of powers misunderstands the nature of law and the nature of government; it does not properly distinguish between these two, and it ends up subordinating law to government, thus putting us precisely in the position of the sovereignty of will over law, the rule of will rather than the rule of law. Stahl's argument anticipates Friedrich von Hayek's in his seminal *Law, Legislation, and Liberty: Vol. 3: The Political Order of a Free People* (Chicago: University of Chicago Press, 1979). Having provided an extended discussion of

this topic in my book *Common Law & Natural Rights: The Question of Conservative Foundations* (Aalten: WordBridge, 2009), I refer the reader to that work for further details.

There is more to this work as well, including a generally common-law orientation to the question of legislation versus “judge-made” or court-evolved (to use Francis Lieber’s more felicitous expression) law. In line with the German “Historical School” of jurisprudence, of which he was a part, Stahl viewed law as being generated primarily by custom and secondarily by legislation. This led, on the one hand, to his claim that the law was a distinct entity apart from state power (the ruling authority). The two together formed the state’s rule or dominion (§. 53 below). The law as the expression of the “popular ethos” stands over against the ruling authority, as a coordinate power in the state which conditions and restricts the ruling authority. And yet, through the power of legislation, the constitutionally-empowered agent of the ruling authority may change this law at its own discretion, and beyond this, Stahl denies the authority of the judiciary to strike down unconstitutional laws (see p. 441 below). This structural flaw would seem to make it difficult to maintain the rule of law in the face of the kind of absolute sovereignty Stahl opposed.

Stahl’s discussion of federalism is also of interest. He does not devote an inordinate amount of attention to it, which is interesting in the light of various federalism-oriented projects under way at the time of his writing, envisioning a united Germany. Since he generally opposed, or at least viewed as rather impracticable, the project of unification, he did not devote much attention to the question of how it could be accomplished. But he did discuss federalism in the context of republicanism. In fact, he viewed federalism as the logical development of republicanism. For republicanism at bottom is a function of local communities which join together to form an associational union. This fundamental difference in origin explains why the U.S. Constitution is impracticable as a model for European countries. The divergence in origin is too great. The U.S. Constitution is tailored to the demands of a localist state structure, where power gravitates to the local community, and greater state unions are

composite. This is fundamentally different from the organic union formed by European nations, which they have by virtue of having grown out of tribal structures (see §§. 87, 131 below).

One area which will strike modern readers is Stahl's effusive praise for government proper. These sections (e.g., §. 57) have the merit of highlighting the positive, indeed necessary, role government plays, in addition to merely enforcing the laws, national defense, and the like. But they also reveal the lack of experience with governments "gone wild" since then, governments which littered the 20<sup>th</sup> century with destruction the likes of which had never been seen before, and which have gone far to create a sham citizenry focused on the proverbial bread and circuses, and looking to government to meet their every need and solve their every problem. In his defense, Stahl is quite aware of the dangers posed by mechanistic, centralized, bureaucratic government, examples of which are scattered throughout the text.

One more note of interest involves Stahl's discussion of written versus unwritten constitutions. His discussion complements nicely the current scholarly interest in what has become known as "common-law constitutionalism," whereby the written constitution is viewed as being the main, but not sole, embodiment of the constitution, and where the body of the common law is viewed as likewise of the level of constitutional law, providing both context and additional content to the written constitution. Stahl's discussion, as contained in particular in §. 82 below, emphasizes the essentially unwritten nature of the constitution, and provides helpful criteria for determining the proper role of written constitutions, which should be kept in mind even today, when written constitutions are considered the be-all and end-all of constitutionalism.

There is much more, both of theoretical and of historical interest. In particular, the discussion of the historical growth of the

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<sup>8</sup>For example, Douglas Edlin, "Judicial Review Without a Constitution," in *Polity*, vol. 38, no. 3 (2006), pp. 345ff.; Edlin, *Judges and Unjust Laws: Common Law Constitutionalism and the Foundations of Judicial Review* (Ann Arbor: University of Michigan Press, 2008).

ancient estates-systems into modern representative bodies is of the utmost importance to understanding the history of representative government. Of course, the critique of the French Revolution and its spawn retains its relevance, as the progeny of that revolution continue to pursue dominance in today's world. Stahl's work is an antidote to such thinking. If it is not applicable in its entirety, it is at least thorough in its appraisal of the underlying issues involved. The recovery of this treasure is long overdue, and I for one am honored to have played a role in it.

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