Foundations of Public Law

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8

The Constitution of the State

The authority of the state, it has been argued, is absolute. Being itself the source of law, no concept of fundamental law that binds the state can exist. Those who appeal to 'higher' law—whether divine, natural, or customary law—do so only by treating the state as an institutional apparatus of rule, that is, by reducing the concept to just one of its aspects. The state is not simply an institutional arrangement; in its juristic meaning, it is a scheme of intelligibility. The question then arises: what is the nature of this scheme?

The means by which the question is to be addressed should now be clear: the nature of the scheme can be explained only through the medium of law. But this type of claim often leads to error: although this scheme of intelligibility is revealed through law—specifically, public law—by public law here is meant *droit politique* or *Staatsrecht*. This understanding gets blurred because of a generalized usage of the term 'law'. Stein, for example, may have been basically correct when he suggested that 'law is essentially an element in the organism of the state; it therefore takes form from the life of the state, and its value is dependent upon whether it accords with the state in its fundamental idea and specific manifestations'.[1] But even Stein, one of the most astute nineteenth-century German scholars of the state, fails fully to bring out the distinction here between positive law and *Staatsrecht*. Only once *Staatsrecht* is recognized as the concept of the state made manifest, can the basic question be reformulated: how is the state constituted? Alternatively, does the state have a constitution?

I. The Concept of the Constitution

The most detailed and profound analysis of the various concepts of the term 'constitution' is Schmitt's *Constitutional Theory*, Part I of which examines its various usages and promotes a distinctive understanding.[2] Schmitt's treatment deserves

[1] Lorenz von Stein, 'Zur Charakteristik der heutigen Rechtwissenschaft' 1841 *Deutsches Jahrbuch für Wissenschaft und Kunst* 377; cited in Ernst-Wolgang Böckenförde, *State, Society and Liberty: Studies in Political Theory and Constitutional Law* (New York: Berg, 1991), 5 (n 14).

[2] Carl Schmitt, *Constitutional Theory* [1928] Jeffrey Seitzer (trans) (Durham, NC: Duke University Press, 2008).

close examination. He begins his study by rejecting the most general sense of the concept, that is, the constitution as the essence of the thing. Since all people, things, and associations could be said to have a constitution in this sense, Schmitt dismisses the idea as yielding no precise meaning. A clear concept emerges only when the term 'constitution' means the constitution of the state. Schmitt engages in a systematic analysis of this concept of the constitution, distinguishing both its existential and normative meanings and between what he calls the absolute and relative concepts of the constitution.

Schmitt's account highlights many of the ambiguities that have arisen in our understanding of the constitution, clarifying much of the confusion that surrounds it. Although his mode of analysis draws too sharp a distinction between existential and ideal understandings, ultimately failing to provide a convincing account, his investigations are important. In particular, Schmitt's analysis helps us draw a clear distinction between two concepts of the constitution which are fundamental to the exercise of unearthing the foundations of public law. This is the distinction between the constitution of the state and the constitution of the office of government.

In order to explain its significance, we must first follow Schmitt in making a distinction between the absolute and relative concepts of the term 'constitution'; since our key objective is to identify the constitution of the state, we can then dispose of the relative concept. This relative concept of the constitution has arisen because of the modern tendency to think of constitutions as formal documents. Such written constitutions have, for a variety of reasons, come into existence at particular moments in time. Although in the early stages of constitution-making these processes were often treated as codifications of existing constitutions, the written constitution was eventually itself taken to be 'the constitution'. The constitution is thus assumed to be a text, the text is treated as a statute, and, in the course of time, the constitution is conceived as a document containing a set of individual constitutional laws. These modern developments, Schmitt argues, lead to what he calls relativization.

Relativization of the constitution means that 'the concept of *the* constitution is lost in the concept of individual constitutional *law*'.[3] That is, there is a tendency to treat provisions contained in written constitutions, *ipso facto*, as constitutional provisions. This is wrong: there are, Schmitt notes, many provisions in constitutional documents that are in no sense concerned with the fundamentals of the constitution of the state. Provisions that, for example, establish state school teachers as civil servants, or require the preservation of theological faculties in universities, or require notification to be given before holding assemblies are simply '*statutory* regulations, which became constitutional laws when incorporated into "the Constitution"'.[4] They are treated as 'fundamental' only

[3] Ibid, 71. [4] Ibid, 67.

within an 'approach to law that is indiscriminately formalistic and relativistic'.[5] The formal definition of the constitution reduces the constitution to a series of written laws. What Schmitt here refers to as relativization has close parallels with the emergence of the constitution of government, in contradistinction to that of the constitution of the state.

The point Schmitt makes is that the relative concept of the constitution distorts understanding of the nature of the activity. The absolute concept of the constitution is, by contrast, not a merely formal condition. It is a substantive condition, one that directs us towards the constitution of the state. But before focusing directly on the constitution of the state, it is necessary to distinguish between two absolute senses of the concept of the constitution. Although in its most basic meaning, the absolute concept of the constitution of the state refers to the political unity of the people, Schmitt distinguishes between the existential and ideal senses of the concept. Only through the existential meaning of the concept are we able to specify the constitution of the state.

The distinction is this: whereas in the ideal sense the constitution is only 'a closed system of norms', the existential concept of the constitution refers to 'the complete condition of political unity and order'. The ideal sense therefore designates 'not a concrete existing unity', but only 'a reflective, ideal one'.[6] Schmitt's two absolute senses of the concept reflect the distinction between fact and norm, and his argument requires that the purely normativist concept of the constitution be rejected.

Schmitt accepts that since it regards the constitution as 'a unified, closed *system* of higher and ultimate *norms*', the ideal sense addresses the constitution as an absolute concept.[7] But although the term 'constitution' here denotes unity and totality, the ideal sense is only an expression of the normative legal framework of the state. This normativist concept transforms the state into a formal legal order. The state is conceived as a system of norms that can be traced back to a basic norm which establishes the system as a closed unity. In this concept, the state exists only as an imperative entity, a system of norms. And within this system the basic norm is the constitution.[8]

[5] Ibid.

[6] Ibid, 59.

[7] Ibid, 62.

[8] It is evident that Schmitt's comments on this concept are directed primarily at Kelsen's state theory: see, eg, Hans Kelsen, *Hauptprobleme der Staatsrechtslehre, entwickelt aus der Lehre vom Rechtssätze* (Tübingen: Mohr, 2nd edn, 1923); Hans Kelsen, *Allgemeine Staatslehre* (Berlin: Springer, 1925). Schmitt argues that Kelsen 'portrays the state as a system and a unity of legal norms... without the slightest effort to explain the substantive and logical principle of this "unity" and of this "system"... The political *being* or *becoming* of the state unity is transformed into that which merely functions, the opposition of being and the normative is constantly mixed up with that of substantial *being* and legal *functioning*. However, the theory becomes understandable when one sees it as the final product of the... genuine theory of the bourgeois Rechtsstaat' (Schmitt, above n 2, 63–64). Kelsen's theory, it might be noted, is neo-Kantian: see above ch 4, 120–127.

In the normativist concept, the constitution is the state. But this equation is achieved only by reducing the concept of the state to that of the legal order. Once the state is thus reconceptualized, the relationship between state, sovereignty, constitution, and law can be reworked: the constitution is the state, the state is the legal order, the constitution is the basic norm of that legal order, and sovereignty expresses the totality of norms in that autonomous legal order. It then becomes possible 'to designate the constitution as "sovereign" ' or even, as some advocates of the bourgeois *Rechtsstaat* have put it, to declare the 'sovereignty of reason, of justice, and of other abstractions'.[9]

In opposition to such claims, Schmitt argues that a normative system cannot validate a positive constitution: the norm 'can be valid because it is correct' but the 'logical conclusion, reached systematically, is natural law, not the positive constitution'.[10] That is, the normative concept ends up being justified by a set of substantive principles. But if, as is proposed in the normative concept, all matters of history, politics, and morality are eliminated from the field of jurisprudence, such an approach cannot address questions of authority. Instead, the normative concept of the constitution presents the constitution as a self-positing and self-sustaining system of norms.

The constitution can be valid in a positive sense only 'because it derives from a constitution-making capacity (power or authority) and is established by the will of this constitution-making power'.[11] This 'will' denotes 'an actually existing power as the origin of a command'.[12] Schmitt's argument against normativism is clear: there can be no closed constitutional system of norms that forms itself as a systematic unity unless this unity arises out of 'a pre-established, unified will'.[13] Rather than being rooted in norms, constitutional unity and order 'lies in the political existence of the state'.[14] Taking the Weimar Republic as his example, Schmitt argues that the unity of the Republic rests not on the 181 articles of the Weimar Constitution but on 'the political existence of the German people'; the 'will of the German people', that is, 'something existential', establishes 'the unity in political and public law terms'.[15] The constitution originates from an act of will, and specifically from an act of the 'constitution-making power'.[16] This brings us to the existential sense of the absolute concept of the constitution.

Schmitt identifies three distinct, though related, existential meanings of the constitution. These meanings have similarities with the three aspects of the state expressed in the tradition of *Staatslehre*.

First, there is 'the concrete, collective condition of political unity and social order of a particular state'. The state 'does not *have* a constitution, which forms itself and functions "according to" a state will'; rather, 'the state *is* constitution, in other words, an actually present condition, a *status* of unity and order'.[17]

[9] Schmitt, above n 2, 63. [10] Ibid, 64. [11] Ibid.
[12] Ibid. [13] Ibid, 65. [14] Ibid.
[15] Ibid. [16] Ibid, 75. [17] Ibid, 60.

Although Schmitt does not refer specifically to territorial exclusivity, this formulation is analogous to the notion of the state as a territorially defined status of independence and unity; that is, as *Staatsgebiet*. But there are elements that may be even broader in its grasp. As is evident from a particular illustration he presents, Schmitt's concept of the state underpinning the constitution seems similar to the idea of the state as a scheme of intelligibility. The song of a choir, he argues analogically, remains that same even 'if the people singing or performing change or if the place where they perform changes', because 'unity and order resides in the song and the score, just as the unity and order of the state resides in its constitution'.[18]

The second existential meaning is that of the constitution as an expression of a concrete type of ordering, specifically of supremacy and subordination. In this, the constitution is equivalent to state form, whether monarchy, aristocracy, or democracy. This is not an expression of a legal principle as such, but of an already existing state of affairs. In the sense Schmitt intends, once again 'the state *is* a constitution'; that is, 'it *is* a monarchy, aristocracy, democracy, council republic, and it does not *have* merely a monarchical or other type of constitution'.[19] The political shape taken by the state and reflected in its constitutional arrangements is not simply the product of legal form; it is a lived condition of order. Since Schmitt here focuses on the institutional arrangements of rule, this second existential meaning of constitution closely parallels the aspect of the state as *Staatsgewalt*.

The third meaning incorporates an active element into the concept of the constitution. This reflects the notion that the state is not simply something that exists; it is simultaneously an entity that is always emerging. This third meaning expresses 'the principle of the *dynamic emergence* of political unity, of the process of constantly renewed *formation* and *emergence* of this *unity* from a fundamental or ultimately effective *power* and *energy*'.[20] The constitution of the state in this understanding expresses 'the *free formation* of the state will' and 'the state order is the organic expression of the will so formed'.[21] Since that will 'incorporates individuals into the living body of the state organism' and 'recognizes itself as the personal unity of the will of all free personalities that is determined through self-mastery',[22] this third meaning reflects Schmitt's understanding of the aspect of the state as *Staatsvolk*. By locating the essence of constitutional understanding not in a static form but in a set of actual relations, this third existential meaning highlights the relational aspects of constitutions and alludes to the people as a politically existing entity capable of action.

In emphasizing the existential sense of the absolute concept of the constitution, Schmitt's objective is to specify the constitution of the state. He thereby rescues the concept of the state developed in the German tradition of *Staatslehre*

[18] Ibid. Cf above ch 7, 205–208.
[19] Ibid.
[20] Ibid, 61 (emphasis in original).
[21] Ibid, 62.
[22] Ibid.

from the disintegrative effects of late-nineteenth-century positivism promoted by Gerber and Laband and refined by Kelsen. Schmitt brings the sociological elements back into our understanding of the state, re-connecting with the earlier work of scholars such as Rotteck and Lassalle, who had argued for a critical distinction between the formal constitution and the true constitution of a state. In his celebrated lecture in 1862 on the nature of constitutions, for example, Lassalle claimed that while the formal constitution (what Schmitt calls either the relative or the normativist meaning) consists of the rules written down, the material constitution as 'fundamental law' (the existential meaning) expresses 'the actual power relationships which exist in a given society'.[23] And although power relations are generally given written expression, Lassalle argued that the written constitution is an adequate formulation 'only in the one case... when it corresponds to the real constitution, the real power relationships which exist in the country'.[24]

Schmitt argues that the concept of the constitution rests on a distinction between the constitution and constitutional law. Constitution-making, he argues, is not merely an exercise in norm construction; it requires the formation of a political unity. This existential concept of constitution is analogous to the basic political pact (the social contract) which founds a political unity (the state). It must always be distinguished from the particularities of an institutional form of government, that which may be called the constitution of the office of government.[25]

The significance of this distinction is revealed when we consider Schmitt's claim that 'new forms can be introduced without the state ceasing to exist, more specifically, without the political unity of the people ending'.[26] The founding of new states, such as the United States in 1775, or revolutionary changes in political order, such as in France in 1789 and Russia in 1918, might cause us to think that the establishment of a new constitution always leads to the founding of a new state, but this is not the case. When, for example, the Weimar Republic was established, the decision was made by the German people 'by virtue of its conscious

[23] Ferdinand Lassalle, 'Über Verfassungswesen' in his *Gesamtwerke* Eric Blum (ed) (Leipzig: Pfau, 1901), vol 1, 40–69, 45 (see above ch 7, 191, n 45).

[24] Ibid, 51. Lassalle's approach follows in the train of Burke who rejected the idea of a formal constitution, a 'scheme upon paper', in favour of 'a living, acting, effective constitution': Edmund Burke, 'On the Present Discontents' [1770] in BW Hill (ed), *Edmund Burke on Government, Politics and Society* (London: Fontana, 1975), 74–119, 102. The most profound influence, however, was Hegel: GWF Hegel, *The Philosophy of Mind* [1830] W Wallace (trans) (Oxford: Clarendon Press, 1971), §540: 'what is... called "making" a constitution is... a thing that has never happened in history... a constitution only develops from the national spirit'.

[25] Although Schmitt does not refer to Pufendorf on this point, his argument has parallels with the distinction that the latter draws between the pact to found a state and the pact to establish a constitution: see Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* [1673] Michael Silverthorne (trans) James Tully (ed) (Cambridge: Cambridge University Press, 1991).

[26] Schmitt, above n 2, 75.

political existence as a people'.[27] The state—the political unity—preceded the establishment of a constitutional frame of government.

Schmitt's distinction between material constitution as political unity and formal constitution as institutional frame has five significant implications for the latter. First, the formal constitution is not self-authorizing: it is valid only by virtue of an existing political will that establishes it. Secondly, its validity therefore does not rest on its normative correctness or its conceptual unity; rather, constitutional laws are valid only because they presuppose an underlying 'material' constitution. Thirdly, it follows that it is an error to treat the formal constitution as 'an exhaustive codification', since 'the unity of the constitution lies not in the constitution itself, but rather in the political unity, the peculiar form of existence of which is determined through the act of constitution making'.[28] This point leads, fourthly, to a recognition of the legitimacy of provisions that authorize the suspension of constitutional laws during a 'state of exception', since such provisions preserve the material constitution.[29] Finally, there are distinct limits to the formal powers of amendment conferred by provisions in constitutions. The power 'should not be taken to mean that the fundamental political decisions that constitute the substance of the constitution can be eliminated at any time by parliament'.[30] The Reichstag could not therefore use the provision in Article 76 of the Weimar Constitution (stating that the Constitution can be amended by a two-thirds majority legislative decision of the Reichstag) to transform the Republic into an absolute monarchy, and a 'majority decision of the English [sic] Parliament would not suffice to make England into a Soviet state'.[31] This, Schmitt claimed, is a type of pure formalism which is wrong 'both politically and juristically': 'Only the direct, conscious will of the entire . . . people, not some parliamentary majority, would be able to institute such fundamental changes'.[32]

[27] Ibid, 77.

[28] Ibid, 76.

[29] See in particular Art 48 of the Weimar Constitution, which stated, in part: 'If in the German Reich the public security and order are significantly disturbed or endangered, the President can utilize the necessary measures to restore public security and order, if necessary with the aid of armed force. For this purpose, he may provisionally suspend, in whole or in part, the basic rights established in Articles 114 [freedom of the person/freedom from detention], 115 [inviolability of the home], 117 [inviolability of correspondence], 118 [freedom of speech and expression], 124 [freedom of association], 153 [right of property]'. Debate over the function of Art 48 generated a huge literature, on which, see Peter C Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham, NC: Duke University Press, 1997), 107–116. On the use of the Art 48 power, see Clinton L Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton, NJ: Princeton University Press, 1948), 31–73. See further below ch 13, 399–402.

[30] Schmitt, above n 2, 79.

[31] Ibid, 79–80.

[32] Ibid, 80. See now *Indira Nehru Gandhi v Raj Narain* (1975) AIR 1975 SC 1590 (Supreme Court of India invalidated the 39th Amendment to the Constitution on the ground that it infringed the basic structure of the constitution); Rory O'Connell, 'Guardians of the Constitution: Unconstitutional Constitutional Norms' (1999) 4 *Journal of Civil Liberties* 48–75; Gary Jeffrey

Schmitt's claim about the primacy of the material constitution is significant. His analysis reveals how *ex facie* unqualified constitutional provisions are to be interpreted and also, more generally, the source of coherence of the formal constitution. But it also suggests that what a formal analysis of constitutional documents might treat as marginalia, actually have a critical importance. He illustrates this with reference to the Preamble of the Weimar Constitution, which states that 'the German people provided itself this constitution', and to Article 1.2, which reads: 'State authority derives from the people'. Such clauses, Schmitt argues, are not constitutional laws, or statutes, or even framework laws or fundamental principles, but neither are they something minor, unworthy of notice. They are, he claims, '*more* than statutes and sets of norms. They are the concrete political decisions providing the German people's form of political existence and thus constitute the fundamental prerequisite for all subsequent norms, even those involving constitutional laws'.[33] These general political statements provide the bedrock —the substance—on which the structure of legality and normative ordering in the regime rests.

Schmitt's *Constitutional Theory* is a treatise written within the tradition of *Staatslehre*. Its primary objective was to rescue the concept of the state from the relativizing tendencies of late-nineteenth- and early-twentieth-century neo-Kantian legal positivism. Despite its ostensible focus on constitutional theory, its main message is that the concept of the constitution refers to the constitution of the state, and therefore that the nature of the constitution can only be grasped by first recognizing the state as an existential unity. Schmitt thus draws a clear distinction between constitution and constitutional law. He is able to do so because for him constitution refers to the state as a sovereign entity of indivisible authority, reflecting its character as a political unity. As a consequence, the essence of the constitution is not contained in a statute or a norm, but in the fact that the constitution is an existential phenomenon giving shape to the political unity of the state.

II. The Normative Power of the Factual

Is Schmitt able, through his reworking of *Staatslehre*, to furnish a convincing juristic account of the constitution of the state? When, for example, Lassalle extended his argument on the nature of constitutions to claim that 'constitutional questions are primarily not questions of *Recht* but questions of power',[34]

Jacobsohn, 'An Unconstitutional Constitution? A Comparative Perspective' (2006) 4 *International Journal of Constitutional Law* 460–487.

[33] Ibid, 78.

[34] Lassalle, above n 23, 68: '*Verfassungsfragen sind ursprünglich nicht Rechtsfragen, sondern Machtfragen; die wirkliche Verfassung eines Landes existiert nur in den reellen tatsächlichen Machtverhältnissen, die in einem Lande bestehen; geschriebene Verfassungen sind nur dann von*

the limitations of juristic analysis seemed to have been reached. Is this also the case with respect to Schmitt's analysis? Schmitt's basic argument is that it is not the constitution that sets up the state, but the state that undertakes to establish a constitution. In his framework, it follows that the state, as a political unity, is an entity that is *factually* given, and that 'the relative homogeneity of the people is also factually given rather than a normative postulate'.[35] But if the state is indeed an existential entity that precedes the formal constitution, is it possible to talk in juristic terms about the constitution of the state?

The specifically juristic question is this: how can the sovereign entity of the state be subject to law? If the state is only a legal phenomenon, as neo-Kantian theory suggests, then the problem simply evaporates: the state is the legal order *tout court*. But if the existential (sociological) aspects of the state are accommodated with law conceived as a norm backed up with coercive power, then we are faced with a situation in which right is reduced to might.

This is the contradiction that Jellinek sought to resolve with his two-sided theory of the state.[36] In *Allgemeine Staatslehre*, Jellinek argued that the state has two faces: the normative or legal side (*Recht*), and the factual or power side (*Macht*). The state presents itself both as an expression of the autonomy of the legal order and as an expression of the ultimate power of command. For Jellinek, these two faces of the state do not present themselves sequentially, with the existential-power side appearing before the ideal-normative side. They present themselves simultaneously and are directly linked: the state may have supreme power to govern, but this power is limited by the constitution and the laws of the state. This claim provided Jellinek with the solution to the problem, based on his theory of auto-limitation (*Selbstbeschränkung*). His argument takes the form of a series of precepts:

> A power to rule becomes legal by being limited. Law is legally limited power. The potential power of the ruling commonwealth is greater than its actual power. Through auto-limitation it gains the character of legal power. Such auto-limitation is not arbitrary, i.e., whether the state actually wants to cultivate this is not something that lies at the state's pleasure. The limitation is, in type and extent, disclosed through the entire antecedent process of history.... *Staatsgewalt* is thus not power (*Gewalt*) *per se*, but power exercised

Wert und Dauer, wenn sie der genaue Ausdruck der wirklichen in der Gesellschaft bestehenden Machtverhältnisse sind—das sind die Grundsätze' (Constitutional questions are basically not legal questions, but questions of power; the actual constitution of a country exists only in the actual power relations that emerge in that country; written constitutions are only then of value and durability when they are the exact expression of the actual power relations that emerge in that society').

[35] Ernst-Wolfgang Böckenförde, 'The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory' in David Dyzenhaus (ed), *Law as Politics: Carl Schmitt's Critique of Liberalism* (Durham, NC: Duke University Press, 1998), 37–55, 42–43.

[36] See above ch 7, 192–194.

within internal legal limits, and hence legal power. Consequently, all governmental actions are subjected to legal evaluation.[37]

The notion that power is transformed into law as it assumes a normative character does, of course, suggest a sequence. But this historical development, Jellinek suggests, has to be reinterpreted juristically. He does this by posing the critical question of how patterns of human conduct acquire normative force. Here, he invokes the phenomenon of 'the normative power of the factual' (*die normative Kraft des Faktischen*).[38]

This notion of 'the normative power of the factual' provides Jellinek with a method of linking the two sides of his theory of the state and overcoming the gulf between facts and norms. In this sense, his ideas follow in the steps of Spinoza. Spinoza not only drew a similar distinction between norm and fact in the frame of the state—that is, between the right of rule (*potestas*) and the actual power to realize governmental objectives (*potentia*). He also claimed that efficacy is a condition of validity: right exists only so long as the ruler is able to ensure that his will is obeyed.[39] Spinoza was drawing a distinction between the philosophical and the sociological idea of a norm: whereas a norm is valid in a philosophical sense when it is identified as an intrinsic part of a coherent scheme, in the sociological sense norms exist only by observing what happens if they are infringed. Although Jellinek's approach has similarities, he innovates by offering a specifically socio-psychological explanation.

Jellinek's psychological method runs as follows. He recognizes that 'law leads a double-life' between what he calls existence and validity (*Sein und Gelten*), that is, between being a social force in human conduct and forming a structure of norms.[40] But rather than analysing the structure of ethical and legal norms, he seeks to capture the inter-connectedness between facticity and validity. He does so by highlighting the ways in which ordinary life is organized and the modes of human interaction governed. This is a world in which a multiplicity of norms emerges in an inchoate and unconscious manner. Social norms governing interaction, more commonly labelled customs or practices, are best studied, Jellinek suggests, by analysing how children develop and become socialized.[41] This shows us how norms become enfolded into the ordinary ways of human interaction.

[37] Georg Jellinek, *Allgemeine Staatslehre* (Berlin: Springer, 3rd edn, 1922), 386–387: '*Eine Herrsgewalt wird dadurch zur rechtlichen, daß sie eingeschränkt ist. Recht ist rechtlich beschränkte Macht. Die potentielle Macht des herrschenden Gemeinwesens ist größer als seiner actuelle. Durch Selbstbeschränkung gewinnt sie den Charakter der Rechtsmacht. Solche Selbstbeschränkung ist keine willkürliche, d.h. es ist nicht des Staates Belieben gestellt, ob er sie überhaupt üben will. Durch den ganzen historischen Prozeß, der ihm vorangegangen, ist dem Staate Art und Maß dieser Beschränkung gegeben. . . . Staatsgewalt ist daher nicht Gewalt schlechthin, sondern innerhalb rechtlicher Schranken geübte Gewalt und damit rechtliche Gewalt. Damit sind alle staatlichen Akte rechtlicher Wertung unterworfen*'.

[38] Ibid, 337–344.

[39] See above ch 3, 102–106.

[40] Jellinek, above n 37, 138, 337.

[41] Ibid, 337–340.

Jellinek's method drew on ideas circulating in European thought around the turn of the century.[42] It had similarities with the ideas of the institutional theorists of public law whose work flourished in France during the same period. Influenced by an existential philosophy that the world comes first, then awareness of it, and only thereafter human reflection on it, the institutionalists argued that juridical rules are secondary, existing only to limit the powers of individuals and institutions, these latter being the true sources of action.[43] With respect to the normative power of the factual, Hauriou, the leader of this school, claimed that 'the juridical situations that seem self-sustaining [*droit objectif*] are in reality bound to ideas that remain subconsciously in the minds of an undetermined number of individuals'.[44] These ideas 'live in us without our realizing it', they 'influence our judgments and our acts', and they breathe life into objective law.[45] The general message—one that Jellinek's method highlighted—is that state power has normative force essentially by virtue of its existence.

Dahrendorf called Jellinek's notion of the normative power of the factual 'the picture puzzle of legal sociology' (*Vexierbildern der Rechtssoziologie*).[46] And so it must remain because although the ways in which customs, practices, and norms, embed themselves into the structure of social reality are central to an inquiry into the foundations of public law, Jellinek had no more success than Schmitt in explaining the nature of the relationship between fact and law.[47]

One way in which both Schmitt and Jellinek fail is by maintaining that power is an empirical phenomenon.[48] On this point the existentialism underpinning French institutional scholars marks a real advance.[49] In the frame of political jurisprudence, however, political power is a phenomenon generated through allegiances amongst and between people.[50] These allegiances manifest themselves as sets of practices. The concept of practice is of particular value here because it blends empirical and normative considerations. It explains the way things are and,

[42] See Kenneth Dyson, *The State Tradition in Western Europe* (Oxford: Martin Robertson, 1980), esp 14–18, 174–183. Note also the similarities with Wittgenstein's later reflections on how instructions can properly be understood only in the context of a shared form of life: Ludwig Wittgenstein, *Philosophical Investigations* GEM Anscombe (trans) (Oxford: Blackwell, 1953), §19.

[43] See Albert Broderick (ed), *The French Institutionalists: Maurice Hauriou, Georges Renard, Joseph T. Delos* (Cambridge, MA: Harvard University Press, 1970); HS Jones, *The French State in Question: Public Law and Political Argument in the Third Republic* (Cambridge: Cambridge University Press, 1993), ch 7.

[44] Maurice Hauriou, 'The Theory of the Institution and the Foundation: A Study in Social Vitalism' in Broderick, ibid, 93–124, 94.

[45] Ibid.

[46] Ralf Dahrendorf, 'Die zweite Stufe der Währensreform oder die normative Ohnmacht des Faktischen' in Hans Oswald (ed), *Macht und Recht* (Opladen, 1990), 51; cited in Jens Kersten, *Georg Jellinek und die klassische Staatslehre* (Tübingen: Mohr Siebeck, 2000), 369.

[47] On the problems of Jellinek's formulation, see esp the analysis by Kersten, ibid, 364–375.

[48] Note especially Jellinek's claim, above 217, that 'the potential power of the ruling commonwealth is greater than its actual power'.

[49] Cf Maurice Merleau-Ponty, *Phenomenology of Perception* [1945] Colin Smith (trans) (London: Routledge & Kegan Paul, 1962).

[50] See above ch 6, 164–171.

by dividing action into correct and incorrect forms of behaviour, provides normative standards of conduct. But the norms in themselves are abstractions: they are formal abridgements of more thickly textured ways of living that we might call ethical (*Sittlich*). As has been argued, political power is generated only through such ethical engagement. Political power, then, is not an empirical phenomenon identified through causal laws; it is a dynamic energy generated through modern political formations—that is, through assemblages of practices.

Adoption of the concept of practice blurs any clear distinction between fact and norm. Whether the language used is that of custom (Hume), forms of life (Wittgenstein), *Dasein* (Heidegger), traditions (Gadamer), tacit knowledge (Polanyi), practices (Oakeshott), paradigms (Kuhn), discursive formations (Foucault), *habitus* (Bourdieu), cultural templates (Geertz), 'conventions without convenors' (Lewis), or ideological morphologies (Freeden),[51] a common theme emerges: normative claims make sense only as a set of assumptions that individuals acquire tacitly, by virtue of their membership of an existing community. The concept of practice indicates that norms acquire meaning only by reference to the culture of the society in which they are made manifest.

Knowledge of a practice is acquired only indirectly through inference, by analogical reasoning, by being inducted by imitative, habitual processes. From the perspective of 'hard' social science, such accounts present difficulties. If norms acquire meaning only within a particular set of practices (ie, within a culture), the inquiry is simply pushed back. How are such cultures formed and why do they vary from one regime to another? This in turn leads to more basic questions. What type of entity is a culture? How does it perform its function? If 'practice' and its analogues offer an understanding of the relationship between fact and norm, and practice can be understood only in the context of a particular culture, what may be needed is a social theory of practices. The difficulty is that no one has been able to identify any objective entity to which the term 'practice' refers, so that practices are essentially metaphors. Consequently, argues Turner, there is no clear reason why we should accept them as part of the explanation of anything

[51] David Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals* [1748] (Oxford: Clarendon Press, 2nd edn, 1902), 39; Wittgenstein, above n 42; Martin Heidegger, *Being and Time* [1927] Joan Stambaugh (trans) (Albany: State University of New York Press, 1996); Hans-Georg Gadamer, *Truth and Method* [1960] J Weinsheimer and DG Marshall (trans) (London: Sheen & Ward, 2nd rev edn, 1989); Michael Polanyi, *Personal Knowledge* (Chicago: University of Chicago Press, 1958); Michael Oakeshott, *On Human Conduct* (Oxford: Clarendon Press, 1975); Thomas S Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 2nd edn, 1970); Michel Foucault, *The Archaeology of Knowledge* AM Sheridan Smith (trans) (London: Routledge, 1989), ch 2; Clifford Geertz, 'Ideology as a Cultural System' in David E Apter (ed), *Ideology and Discontent* (New York: Free Press, 1964), 47, 63; Pierre Bourdieu, *The Logic of Practice* Richard Nice (trans) (Stanford: Stanford University Press, 1990), 59; David Lewis, *Convention* (Cambridge, MA: Harvard University Press, 1969); Michael Freeden, *Ideologies and Political Theory* (Oxford: Clarendon Press, 1996).

as central as truth or intentionality.[52] He may or may not be right.[53] General social theory has been unable to provide any better account of these matters than a theory of practice; at present, practice-related formulations offer us the best method available of making sense of the political world.

A practice-orientated approach has the distinct advantage of overcoming some of the limitations of Jellinek and Schmitt's attempts to accommodate both normative and factual dimensions in their accounts of the constitution of the state. Jellinek was right to argue that the state cannot be understood without considering both its juristic and sociological sides. And Schmitt was right to argue that the constitution of the state was not only an objective system of norms but had an existential reality. There is a way forward. Rather than treating the power of the state as both absolute in a juristic sense and limited in an empirical sense (ie, limited by existing economic, psychological, and social relations), or treating its constitution as formally a structure of norms but materially an existential reality, we can overcome the fact-norm divide by treating both juristic and sociological sides as dimensions of a social practice. Further, once the constitution of the state is conceived as an assemblage of practices, the way is open to explain their workings dialectically. Contrary to Jellinek's claim that 'the potential power of the ruling commonwealth is greater than its actual power',[54] for example, it might be acknowledged that the concept of power cannot be specified without institutionalization: potential power *is* actual power.

This argument can be advanced first by addressing the power that forms the constitution of the state (the constituent power) and then, more generally, of elaborating the constitution of the state itself (the public sphere). In advancing this argument, we are not addressing issues of pure normativity or of sociology: we are using the methods of *droit politique*.

III. Constituent Power

The concept of constituent power presupposes the existence of an entity which is the bearer of political unity and which, through an act of will, constitutes the office of government. It suggests a distinction between the pact that creates the political unity and the constitutional contract which establishes the constitution of the office of government. The power created as a result of the political pact,

[52] Stephen Turner, *The Social Theory of Practices: Tradition, Tacit Knowledge, and Presuppositions* (Chicago: University of Chicago Press, 1994); Stephen Turner, 'Practice Then and Now' (2007) 17 *Human Affairs* 110–125.

[53] Cf Theodore R Schatzki, *Social Practices: A Wittgensteinian Approach to Human Activity and the Social* (Cambridge: Cambridge University Press, 1996); Theodore R Schatzki, Karin Knorr Cetina, and Eike von Savigny (eds), *The Practice Turn in Contemporary Theory* (London: Routledge, 2001).

[54] See above 217.

which then authorizes the constitutional contract, is the constituent power. Since constituent power is a modern concept, generated in the process of shaping modern political existence, it is generally considered to vest in 'the people', a unity brought to political consciousness and equipped with the power to act by authorizing the constitutional contract.

Before considering further this notion of the people as constituent power, it is worth noting that the concept can exist within a purely monarchical theory of government. On the premiss that original legal authority vests in the crown, it can be argued that the institutions of government all owe their existence to the will of the crown, that they derive their powers from that will, and that such powers as are vested in these institutions can be withdrawn or amended solely at the will of the crown. Even if a written constitution exists, this constitution might simply be the product of a bequest by the crown, with the authority of that constitution ultimately resting on such will.

Monarchical arrangements of this type are not common in modern governmental regimes. The closest illustration is perhaps Imperial Japan. The Meiji Constitution of 1889 declared that the emperor 'is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them according to the provisions of the present Constitution'.[55] Under the Constitution, the emperor 'exercises the legislative power with the consent of the Imperial Diet'.[56] But lest this provision be treated as a limitation on sovereign authority, it is declared that the Emperor 'gives sanction to laws, and orders them to be promulgated and executed'.[57] The notion that ultimate authority vests solely in the emperor is reinforced by the first two articles of the Constitution, which declared that the Empire of Japan 'shall be reigned over and governed by a line of Emperors unbroken for ages eternal' and that the emperor 'is sacred and inviolable'. In a commentary on the Constitution, Prince Ito explained that:

> The sovereign power of reigning over and governing the State is inherited by the Emperor from His Ancestor, and by Him bequeathed to His posterity. All legislative as well as executive powers of State, by means of which He reigns over the country and governs the people, are united in this Most Exalted Personage... His Imperial Majesty has Himself determined a Constitution, and has made it a fundamental law to be observed both by the Sovereign and by the people.[58]

Ito claimed that the emperor possessed much more than a veto power over legislation: in the Meiji Constitution, he stated, 'a positive principle is adopted, that is to say, the laws must necessarily emanate at the command of the Emperor'.[59]

[55] Constitution of the Empire of Japan 1889, Art 4. See <http://www.geocities.com/Tokyo/Temple/3953/conmeiji.html>.

[56] Ibid, Art 5

[57] Ibid, Art 6.

[58] Cited in Westel W Willoughby, *The Fundamental Concepts of Public Law* (New York: Macmillan, 1924), 103–104 (n 1).

[59] Ibid, 104.

Given this provision, alongside the fact that constitutional amendments could be initiated only by the emperor, it could be claimed that the constituent power of the Imperial Constitution of Japan vested in the emperor.

It has been suggested that the Prussian king occupied a similar position,[60] but this is more contentious. With respect to the German Empire, Gerber had argued that although the Kaiser was the embodiment of the abstract personality of the *Staatsgewalt*, his authority was not synonymous with that of the state itself.[61] Gerber maintained this position because despite accepting that the rights of rule formally vest in the monarch, he argued that the state was an entity distinct from the monarch and the state rested on the natural foundation of the people.[62] Consequently, although the monarch was the highest will-institution *in* the state, the monarch's rights were rights *of* the state. The institution of the monarchy thus presupposed the existence of the state; the monarch might possess the absolute rights of rulership, but these exist only to serve the ends of the state.[63]

The imperial regimes of Japan and Germany no longer exist. But does this claim about the monarchical constituent power offer insight into the British constitution? After all, the crown or monarch (and there is still some confusion over these terms) continues to this day formally to represent the *Staatsgewalt*. It is the queen's fiat which makes laws, it is her sentence which condemns, and her judgments which determine the rights and liabilities of her subjects. The queen, as head of the government, not only appoints all ministers but also summons, prorogues, and dissolves parliament. Justice is said to emanate from the monarch: all jurisdiction is exercised in the monarch's name, and all judges derive their authority from her commission. And as the fountain of honour, the queen maintains the power of dispensing honours and dignities. Is this not evidence of the existence of a monarchical constituent power?

The short answer must be that the British case is altogether different.[64] This argument might express the formal position in law, but in the British system there are numerous practices—conventional understandings—governing how

[60] See Willoughby, ibid, 102–103.

[61] Cf von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts* (Leipzig: Tauchnitz,1865), 19 (n 1).

[62] von Gerber, ibid, 19–20: '*... und sonach der Monarch die Persönlichkeit des Staats formell in seiner Persönlichkeit aufnimmt. Aber diese Wahrheit führt keineswegs zu der Annahme, dass der Staat selbst nur in Monarchen vorhanden sei. Er besteht vielmehr für sich, und zwar nicht als eine bloss begriffliche Erscheinung, sondern als ein auf natürliche Grundlage, nämlich dem Volke, beruhendes Wesen*' (... and thus the monarch formally absorbs the personality of the state in his own personality. But this truth leads in no way to the assumption that the state itself exists only in the monarch. It consists of much more in itself and not simply as a conceptual appearance, but instead as a physical entity built on natural foundations, namely the people).

[63] von Gerber, ibid, 29: '*Die Staatsgewalt ist keine absolut Willensmacht. Sie soll nur dem Zwecke des Staats dienen, nur für ihn bestehen*' (The ruling power is not an absolute power of will. It ought only to serve the purpose of the state, only for its existence).

[64] See further Martin Loughlin, 'The State, the Crown and the Law' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999), 33–76.

these powers are constitutionally exercised. While the prerogative powers remain vested in the crown, the queen is advised, directed, and controlled by others.[65] The legal form remains monarchical but, owing to evolutionary changes reflecting political accommodations not always expressed in positive law, it is impossible to assert that the crown is the ultimate source of constitutional authority.[66] Today, even in the British system, constituent power—the power to make and alter constitutional contracts—rests with 'the people'.

How is the constituent power of the people to be conceptualized? This power cannot refer to the multitude in their diversity and plurality, since the action of the multitude leads only to conflict which corrodes the sense of unity that bolsters the concepts of state and sovereignty. But if the state is merely an idea founded *on* the people, rather than actively formed *by* them, then it is an entirely symbolic notion that does no meaningful work. The concept of 'the people' must surely incorporate some sense of a collective body, conscious of its political existence and with the capacity for action.[67] How can these empirical and symbolic aspects be reconciled? These questions were extensively debated during the various phases of the French Revolution,[68] debates of particular importance since, despite the existence of the French state (as *Staatsgebiet* and *Staatsvolk*) throughout this period, the Revolution was the critical moment when the people could decide the particular institutional form of their own political existence (*Staatsgewalt*).

From amongst the various deliberations, Sieyes, in his influential tract, 'What is the Third Estate?', offers the greatest juristic insight. Sieyes observes that it is 'impossible to create a body for an end without giving it the organization, forms and laws it needs in order to fulfil the functions for which it has been established': this is called the body's constitution, and every government must have its constitution.[69] He argues further that this constitution must build in protections to ensure that the powers delegated are not used in such a way as to injure the nation,

[65] Hence the importance of what Dicey called 'conventions of the constitution': AV Dicey, *Law of the Constitution* (London: Macmillan, 8th edn, 1915), ch 14. Bagehot elaborated on their significance in drawing a distinction between the 'dignified' ('those which excite and preserve the reverence of the population') and 'efficient' ('those by which it, in fact, works and rules') dimensions of the constitution: Walter Bagehot, *The English Constitution* [1867] (Oxford: Oxford University Press, 2001), 7. 'The Crown is ... "the fountain of honour"', noted Bagehot, 'but the Treasury is the spring of business' (ibid, 11–12). Note, however, that these conventions are 'vague and slippery' and 'they cannot be understood "with the politics left out"': GHL Le May, *The Victorian Constitution* (London: Duckworth, 1979), 2, 21.

[66] For an analysis of some of the constituent complexities, see Martin Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007), 27–48.

[67] These issues are considered in more detail in Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003), ch 6.

[68] See Lucien Jaume, 'Constituent Power in France: The Revolution and its Consequences' in Loughlin and Walker (eds), above n 66, 67–85.

[69] Emmanuel-Joseph Sieyes, 'What is the Third Estate?' in his *Political Writings* M Sonenscher (trans) (Indianapolis: Hackett, 2003), 92–162, 135.

that is, those who have delegated these powers. But could a constitution be given to the nation itself? Sieyes is adamant: 'The nation exists prior to everything; it is the origin of everything. Its will is always legal. It is the law itself'.[70]

Sieyes' argument needs to be explicated. He notes that the initial type of positive law emanating from the will of the nation is constitutional law. Constitutional laws are called fundamental, he says, 'not in the sense that they can be independent of the national will, but because bodies that can exist and can act only by way of these laws cannot touch them'.[71] This fundamentalism is therefore an application of the principle that no form of delegated power is free to alter the terms of its delegation. Sieyes emphasizes that the political pact is antecedent to the constitutional contract: 'We have seen how the birth of a constitution took place in the second epoch' and therefore it is evident that this constitution 'was designed solely for the *government*'.[72] 'It would be ridiculous to suppose', he elaborates, 'that the nation itself was bound by the formalities or the constitution to which it had subjected those it had mandated'.[73] While governmental power is legitimate only in so far as it is constitutional, 'the national will, on the other hand, simply needs the reality of its existence to be legal. It is the origin of all legality'.[74]

But could the nation, 'by a primary act of will which is completely untrammelled by any procedure', bind itself thereafter only to express its will in a particular way? Sieyes answers that a nation 'can neither alienate nor waive its right to will; and whatever its decisions, it cannot lose the right to alter them as soon as its interest requires'. With whom, he asks, would this nation have entered into such a contract? The answer can only be: with itself. But what, then, is a contract with oneself? Since both parties are the same will 'they are obviously always able to free themselves from the purported engagement'. In short: 'Not only is a nation not subject to a constitution, but it *cannot* and *should* not be'.[75]

In this analysis, Sieyes argues unequivocally that there can be no concept of a constitution of the state. The state (or nation) cannot be bound and cannot bind itself by law. And even if it could, 'a nation *should* not subject itself to the restrictions of a positive form'; that 'would expose it to the irretrievable loss of its liberty', since tyranny 'needs no more than a single moment of success to bind a people, through devotion to a constitution'.[76] A nation must be conceived as existing only within the natural order or state of nature and the exercise of its will is independent of all civil forms: 'Every form is good, and its will is always the supreme law'.[77] While government is the product of positive law, the nation owes its existence to natural law alone.

Sieyes clearly explains the logic of the concept of constituent power as it has been received in modern discourse. His account is evidently influenced by the

[70] Ibid, 136. [71] Ibid. [72] Ibid (emphasis in original). [73] Ibid.
[74] Ibid, 137. [75] Ibid (emphasis in original). [76] Ibid. [77] Ibid, 138.

accounts of Spinoza and Rousseau,[78] and Sieyes, in turn, influences Schmitt's formulation. When Schmitt argues that the state contract must be distinguished from the constitutional contract, since in the latter 'the people must be present and presupposed as a political unity', whereas the former founds 'the political unity of the people in general', his argument parallels that of Sieyes.[79] The people, Schmitt claims, 'remains the origin of all political action, the source of all power, which expresses itself in continually new forms, producing from itself these ever renewing forms and organizations'.[80]

How is this apparently prior existential form of the people to be explained? One can understand how monarchical constituent power persisted as a residue of religiously inspired transcendentalism, but this claim is not so easily available to those claiming that constituent power rests in the people. The problem is analogous to that which Rousseau identified at the foundation: how is a multitude of strangers able to meet, deliberate, and rationally agree a common framework of government in the common interest?[81] Within the frame of constituent power, this is ultimately a problem concerning the nature of collective identity.

Schmitt is clearly right to claim that the normativist treatment evades that question by positing the existence of normative ordering and eliminating the idea of 'the people' as a collective subject from juristic analysis. But his answer—to posit a collective subject (the people) as the constitution-making power—has its own difficulties.[82] Normativist accounts treat the foundation as a pure act of representation and thereby absorb constituent power into the constituted power. But Schmitt argues that constituent power is an expression of the direct power of the people to give itself a constitutional form.[83] Whereas normativism is purely formal and self-grounding, Schmitt's existential unity presupposes a mysterious prior substantial equality of the people. Can we move beyond this opposition between representation and presence?

The paradox of constituent power can only be overcome by recognizing that, in Lindahl's words, 'the "self" of self-constitution speaks to reflexive identity, to

[78] See above ch 4, 112–119. Schmitt, above n 2, 128, notes: 'In some of Sieyès's writings, the *pouvoir constituant* in its relationship to every *pouvoirs constitués* appears as a metaphysical analogy to the *natura naturans* of Spinoza's theory. It is an inexhaustible source of all forms without taking a form itself'. (*Natura naturans* is an expression that Spinoza uses to suggest 'nature doing what nature does'.)

[79] Schmitt, above n 2, 112. See further Schmitt's positive analysis of Sieyes: ibid, 126–129.

[80] Ibid, 128.

[81] See above ch 4, 116.

[82] 'The term 'people' here is used interchangeably with 'nation'. Cf Schmitt, above n 2, 127: 'Nation and people are often treated as equivalent. Nation is clearer and less prone to misunderstanding. It denotes, specifically, the people as a unity capable of political action, with the consciousness of its political distinctiveness and the will to political existence, while the people not existing as a nation is somehow only something that belongs together ethnically or culturally, but not necessarily a bonding of men existing politically'.

[83] See Schmitt, above n 2, 289: 'The idea of representation contradicts the democratic principle of self-identity of the people present as a political unity'. See further Carl Schmitt, *The Crisis of Parliamentary Democracy* [1923] Ellen Kennedy (trans) (Cambridge, MA: MIT Press, 1985).

identity as collective selfhood in contradiction to identity as sameness'.[84] Lindahl argues that 'collective self-constitution means constitution both *by* and *of* a collective self', and this irreducible ambiguity lies at the core of all attempts to found political community.[85] This means that there can be no 'we' that forms a people 'in the absence of an act that effects closure by seizing the political initiative to say *what* goal or interest joins together the multitude into a multitude, and *who* belongs to the people'.[86] Consequently, 'although Schmitt is right to assert that foundational acts elicit a presence that interrupts representational practices, this rupture does not—and cannot—reveal a people immediately present to itself as a collective subject'.[87] Constituent power not only involves the exercise of power by a people; it simultaneously constitutes a people.

This reflexive argument suggests that those who claim to exercise constituent power act as an already constituted power; after all, even a constituent assembly or convention authorized to draft a constitution is an already constituted governmental institution. It might be contended that the exercise of constituent power to establish constitutional ordering can only be said to have existed in retrospect: constituent power is identified only when 'individuals retroactively identify themselves as the members of a polity in constituent action by exercising the powers granted to them by a constitution'.[88] But it is also the case, as Lindahl recognizes, that 'there is a form of constituent power—a normative innovation and rupture—that proceeds from a radical outside no political community succeeds in domesticating'.[89] Constituent power expresses the fact that unity is created from disunity, inclusion from exclusion, reminding us that constitutional ordering is an ambiguous and provisional achievement. Constitutional ordering is dynamic, never static.

Emphasizing the reflexive nature of constituent power opens the way for a dialectical interpretation. Rather than treating the constituent power of the people as an existential unity preceding the formation of the constitution, this power expresses a dialectical relation between 'the nation' posited for the purpose of self-constitution and the constitutional form through which it can speak authoritatively. This collective entity of the people 'must rely on a past that never has been present and a future that never will become a present, hence on a past and a future that elude its control'.[90] That is, the exercise of constituent power 'is never a pure decision that "emanates from nothingness" '; the people 'can only act by re-acting to what, preceding it at every step, never ceases to confront it with the question, "Who are we?" '.[91] So, constituent power cannot be understood without reference to constituted power; it acts for the purpose of establishing a constitutional form of government, and it continues to work through the established constitutional form by questioning and modifying the meaning of that structure.

[84] Hans Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in Loughlin and Walker (eds), above n 66, 9–24, 9.
[85] Ibid, 10. [86] Ibid, 18. [87] Ibid. [88] Ibid, 15–16
[89] Ibid, 22. [90] Ibid, 20. [91] Ibid, 21.

Constituent power and constituted power exist in a dialectical relation, operating between *Staatsvolk* (the people as an active political agency) and *Staatsgewalt* (the institutional apparatus of governmental authority). Only in this dialectical form do they together constitute the state—what alternatively might be called the public sphere.

IV. The Public Sphere

Once the relation between constituent power and constituted power—between the people and the office of government—is recognized as reflexive, we can directly address the constitution of the state. There is a clear trajectory of argument—from Bodin, through Pufendorf, Spinoza, Rousseau, and Sieyes, to Schmitt—insisting that public law can be understood only once sovereignty is differentiated from government, the political pact from the constitutional contract, the state from the institutional form, and the constituent power from the constituted power. This division is axiomatic for public law, but the way the relationship between the former and the latter concepts is expressed remains contentious. My argument is that these relationships are not causal, but reflexive. Furthermore, since the state and its institutional form are reciprocally connected, the confusion that arises when the concept of the state is reduced to one of its aspects is avoided when we refer instead to the public sphere.

This idea of the public sphere expresses the autonomy of a modern political world that has been formed in thought and set to work in practice. The public sphere is thus synonymous with the idea of sovereignty as 'a representation of the autonomy of a political sphere' and the state as 'a scheme of intelligibility'.[92] And just as those formulations suggest the existence of a particular form of representation, the public sphere carries with it the idea that it is in some sense constituted. The question is: what are its constitutive elements?

The most basic element is the generally accepted belief that political power ultimately rests with an entity called 'the people' and that it is the people who, through the constitutional contract, authorize the establishment of the institutions of government. Although the office of government can take a variety of forms, there are certain constitutive principles through which it operates in the modern world. Perhaps the most commonly accepted, derived from the ultimate authority of the people, is that government amounts to a representative office: governing power is exercised in the name of the people and in the common interest.

These basic principles indicate that government is an office of trust. It follows that appropriate mechanisms of authorization (normally through election), check (through the institutional differentiation of governmental powers), and recall

[92] See above ch 7, 184–186, 205–208 respectively.

(through limitation of terms of office) should be set in place. It is, of course, conceivable that the arrangements establish authority on some monarchical figure in whom the powers of government are entrusted, but in the modern world this is an unlikely form of government. In general, the constitution of the public sphere is based on the concepts of representative, responsible, and accountable government.

Since it is implicit in these foundational arrangements that the constitution of government rests on the principle of consent, another basic element can be specified. The constitution of the public sphere rests on the figure of the citizen-subject. Notwithstanding differences in talents, innate strength, or acquired wealth, individuals in the public sphere are conceived as free and equal agents who participate in public affairs subject only to those restrictions and limitations authorized by the laws. Individuals are both bearers of equal rights and subjects of generally prescribed duties. This element gives us the principle of legal and political equality.

From these constitutive principles the idea emerges of a sphere of both absolute and conditioned power. Political power is absolute, in the sense that the authority of the people to fashion the political world is unbounded: the authority exercised through the public sphere cannot be limited by the claims of history, custom, or inherited religious beliefs. The only constraints are immanent, those that the people or their representative governors determine to be in the public interest. This expresses the principle of public autonomy, or sovereignty. In a constituted, or constructed, world, however, that power is also conditioned by the terms of its establishment. The most important condition for the establishment of this modern political reality is recognition of the principle of the equality and liberty of the individuals who comprise it. This is the correlative principle of private autonomy.

The concept of the public sphere cannot be grasped without acknowledging the complex character of the political power it generates and sustains. Political power is not located in the authority of the established institutions of government to command; that is merely *potestas*, rightful authority, or the distributive aspect of power. The essence of power inheres in the way it is generated, and it is generated by the drawing together of a people in ties of allegiance to a particular constitution of the state. If authority is ultimately a product of the consent of 'the people', they have to transcend their manifest differences and material inequalities and participate in this collective exercise of imagination.

This definition of political power has juristic implications. Since power is generated from the relation between constituent and constituted power it requires a dynamic conception of law to grasp its significance. In his reflexive account of constituent power, Lindahl notes that 'political unity not only acquires existence through individual acts of self-attribution but also depends on the renewal of such acts to continue in existence'.[93] This type of 'living law' ensures that the

[93] Lindahl, above n 84, 20. This point is similar to that made by the Weimar jurist, Smend, who argued that the state 'exists and is present only in this process of constant renewal, continuously

posited law can never fully comprehend this power. But since the initiative in giving meaning to this 'living law' rests with the governing institutions, the activity of governing is always a major factor in public life. From this perspective, those in authority have an active responsibility to promote what has variously been called a 'civil religion',[94] or stories of peoplehood,[95] or 'in the representation of the values at each point in history through political symbols such as flags, coats of arms, heads of state (especially the monarch), political ceremonies, and national festivals'.[96]

This way of conceptualizing political power means that the conditions of establishment of the public sphere do not amount simply to limitations on that power. These conditions simultaneously lead to the strengthening of the state. This point needs some elaboration. As Bodin was first to demonstrate, sovereignty is a concept concerning the public sphere, that is, the republic or commonwealth. But there are certain matters of human existence—such as freedom of conscience or pursuit of religious truth—that are not matters of public concern. One reason for this is that questions of belief—as distinct from conduct—are beyond the remit of command. Another is that the imposition of public conformity in matters of worship undermines the principle of individual liberty and equality. A blend of principle and efficacy ensures that the modern state withdraws from the region of truth and belief (matters of private conviction) to concern itself solely with questions of public conduct. By placing such questions within a sphere of private conviction, basic disputes over ultimate truth, which had undermined the unity of a people and engendered instability, were placed beyond the public sphere. The state must be secular precisely because it is supreme. Absolute supremacy is freely yielded because the state exists only to address matters of public welfare and concern.

From this foundational argument, a broader platform of basic liberties—freedom of speech, freedom of expression, freedom of association, freedom from arbitrary detention—can be justified as constituent elements of the public sphere. In

being-experienced-anew; it exists, to borrow Renan's famous characterization of the nation, because of a plebiscite repeated daily': Rudolf Smend, *Verfassung und Verfassungsrecht* (Munich: Duncker & Humblot, 1928), 18; excerpted in Arthur J Jacobson and Bernhard Schlink (eds), *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2000), 213–248, 218 (*'Er [der Staat] lebt und ist da nur in deisem Prozeß beständiger Erneuerung, dauernden Nueuerlebtwerdens; er lebt, um Renans berühmte Characterisierung der Nation auch hier anzuwenden, von einem Plebiszit, dass sich jeden Tag wiederholt'*).

[94] Rousseau, 'The Social Contract' in his *'The Social Contract and other later political writings* V Gourevitch (trans) (Cambridge: Cambridge University Press, 1997), Bk 4, ch 8.

[95] Rogers M Smith, *Stories of Peoplehood: The Poiltics and Morals of Political Membership* (Cambridge: Cambridge University Press, 2003).

[96] Smend, above n 93, 48: *'Das geschieht institutionell durch die Repräsentation des geschichtlich-aktuellen Wertgehalts im politischen Symbol der Fahnen, Wappen, Staatshäupter (besonders der Monarchen), der politischen Zeremonien und nationalen Feste'*; excerpted in Jacobson and Schlink (eds), above n 93, 230. For analysis, see Werner S Landecker, 'Smend's Theory of Integration' (1950–1951) 29 *Social Forces* 39–48.

part, such fundamental rights explicate the principle of liberty and equality of persons, that is, the correlative principle of private autonomy on which the public sphere is founded. But this is intermingled with an argument from utility: by placing matters concerning personal identity beyond the public sphere and guaranteeing the conditions needed to sustain a vibrant civil society, the authority of the state is strengthened. Allegiance—the generator of power—is enhanced not so much when competence is limited but when the conditions for open, accountable, and responsive government are in place.[97]

The basic principle can be concisely stated.[98] In seeking to identify the most basic elements in the constitution of the public sphere, the predominant theme is that constraints are enabling; apparent limitations on power generate power; power and liberty are correlative terms. The ways in which these purposes are achieved vary across different governing regimes. But within the frame of public law the logic of the discourse remains the same: it is an immanent logic operating in a manner analogous to Spinoza's *natura naturans*—nature doing what nature does. The elaborate frameworks of modern constitutional contracts do not impose a set of constraints on the exercise of public power; they establish the institutional forms through which such power can be generated.

V. *Droit Politique* as the Constitution of the State

The argument I have been developing is that the constitutive elements of the public sphere form the constitutive rules of public law and must be distinguished from the constitution of the office of government, which amount only to the regulative rules of a particular regime. By retaining this distinction, the nature of the juristic discourse of public law can more clearly be identified. The first point is that the public sphere is constituted through a singular type of juristic discourse—that which we have called *Staatsrecht, droit politique*, or public law in its distinctive meaning. In his account of the nature of constituent power, Sieyes suggested that although the office of government is subject to a constitution, the nation is not. The nation—the people or the state—is the ultimate source of authority and its will is always legal. But Sieyes did recognize that prior to the nation, there exists natural law.[99] If *droit politique* is taken to be a form of secularized natural law—

[97] See in particular the argument of Alexis de Tocqueville, *Democracy in America* [1835] Henry Reeve (trans) Daniel J Boorstin (intro) (New York: Vintage Books, 1990), vol 1, 248: 'the people... obey the law, not only because it is their own work, but because it may be changed if it is harmful; a law is observed because, first, it is a self-imposed evil, and, secondly, it is an evil of transient duration'. For analysis, see Stephen Holmes, 'Tocqueville and democracy' in David Copp, Jean Hampton, and John E Roemer (eds), *The Idea of Democracy* (Cambridge: Cambridge University Press, 1993), ch 1.

[98] See above ch 6.

[99] Sieyes, above n 69, 136–137: 'A nation is formed only by *natural* law'.

that which sustains the political world—the public sphere (the state) may be said to have a constitution.

By distinguishing between *droit politique* and positive law, the essential conceptual distinction between state and government is retained. When set in a relational frame, this distinction enables us to resolve the apparent paradox between state and law that permeates discussion of the subject. Consider, for example, the problem that Lindahl presents:

> ... the paradox of constituent power indicates that self-constitution begins as the constitution *of* a political unity through a legal order, not as the constitution of a legal order *by* a political unity. Someone must seize the initiative to determine what interests are shared by the collective and who belongs to it. Schmitt's explicit denial notwithstanding, 'political unity first arises through the "enactment of a constitution" '.[100]

Although Lindahl may be right about the implications (ie, the necessity of political decision), many of the difficulties are removed when it is recognized that 'the constitution of a legal order by a political unity' involves an exercise in positive law-making, whereas 'the constitution of a political unity through a legal order' refers not to the positing of a legal order (in a strict sense) but to the constitution of political unity through *droit politique*. Consequently, it is incorrect to say that political unity arises through the 'enactment' of a constitution, since this suggests an exercise in positive law-making to establish a formal constitution of government. Political unity comes about through a different process: the way in which *droit politique* works to frame the constitution of the state.

The critical issue is that of explaining how *droit politique* frames the public sphere. Schmitt was not so far removed from this explanation as some have suggested. Aspects of his argument indicate that he was thinking in terms of a causal relationship (ie, the prior existence of a political unity that, through the exercise of will, establishes a constitutional contract), but other parts of his analysis are more reflexive. He argued, for example, that 'the people' is the 'formless formative capacity' with complete freedom of self-determination, that 'as an entity that is not organized, they also cannot be dissolved', and that 'their life force and energy is inexhaustible and always capable of finding new forms of political existence'.[101] The language used (formless–formative; cf constituent–constituted) has obvious reflexive aspects. And despite claiming that the 'natural form of direct expression of the people's will is the assembled multitude's declaration of consent or their disapproval, the *acclamation*', he also noted that in 'modern, large states' this has changed its form: now 'it expresses itself as public opinion'.[102]

Schmitt's argument about public opinion parallels Rousseau's claim about the importance of custom.[103] For Rousseau, this special category of law, which is impressed in the hearts of citizens, undergirds all others. As the living law that

[100] Lindahl, above n 84, 22.
[101] Schmitt, above n 2, 129, 131.
[102] Ibid, 131.
[103] Rousseau, above n 94, 81. See above ch 5, 133.

sustains the nation in its institutional form, it is in reality 'the State's genuine constitution'.[104] If custom, belief, and opinion are what is meant by the primacy of expression of the people's will, then it is anything but fixed and finished. This is precisely the point Lindahl makes in arguing that political unity comes not from a single constituent act but depends on continuous renewal of terms.[105] Although he is not consistent on this question, Schmitt did incorporate a similarly dynamic aspect into his concept of constituent power.

The position we are moving towards is that the constituent elements of the public sphere are a set of customs and beliefs (ie, practices) that sustain this type of ordering. This is, of course, only an alternative expression of the argument already made about the nature of political jurisprudence: that humans are assumed to be free and equal beings equipped with the collective capacity to determine the nature of their political existence and to establish institutional frameworks of government within which power and liberty involve reciprocal relations.[106] It is this political dynamic expressed as juristic discourse—the discourse of the public sphere—that produces the constitutional ordering of the state.

The notion of *droit politique* was widely—if only implicitly—understood around the turn of the twentieth century when a self-consciously modern idiom of public law was being advocated in many European regimes. It was given specific expression by Hauriou, the leading French public lawyer of the period, in his pivotal concept of directing ideas (*idées directrices*) that played a creative role in the shaping of public institutions. Although Hauriou believed in the 'profoundly juridical character of the birth, life, and death of institutions', he argued that positive legal rules tend to be limiting rules in that they 'merely delineate the contours of things'.[107] The generative function, by contrast, is performed by the directing ideas which shape the character of the institution, and which are revealed 'in what concerns fundamental and constitutional rules'.[108]

Hauriou noted that 'the highest forms' through which the directing ideas of an institution are expressed 'are not properly juridical', but 'are moral or intellectual', adding that 'if they become juridical, they do so as higher principles'.[109] Exemplary of the latter are the Declarations of Rights formulated during the American and French Revolutions: 'The declarations express the heart of the idea of the modern state in what concerns the individualist order that the state has the mission of protecting in society'.[110] These directing ideas sustain the institutions of government: institutions make legal rules, he suggests, but legal rules do not make institutions. Directing ideas give meaning to the basic principles of French public law, which unfold progressively with the power to shape the character of governmental institutions.[111]

[104] Ibid. [105] See above 229. [106] See above ch 6.
[107] Hauriou, above n 44, 122, 114. [108] Ibid. [109] Ibid.
[110] Ibid, 115.
[111] See Maurice Hauriou, *Précis de droit constitutionnel* (Paris: Sirey, 2nd edn, 1929), 73–74.

Hauriou's writing illustrates the way French institutionalist scholars used the idea of *droit politique* to explain the development of public law while recognizing the relational character of constituent power and constituted power. But the public law scholar of the period who did most to develop this understanding was Heller. Although Heller's work, in particular his magnum opus on *Staatslehre*, remained incomplete owing to his death in 1933 at the age of 42, it is evident that he had specified the tension between positive law and *droit politique* as the driving force of public law. Heller argued that a concept of law depends on the idea of law, which is in no way identical to it. The latter can only be formulated by 'the relativization of positive law by supra-positive, logical and ethical (*sittliche*) basic principles of law'.[112] Against positivists like Gerber and Laband, who had argued that a state built on opinions and beliefs 'can only have an unsure and fluctuating existence',[113] he claimed that these guiding principles only come from existing practices. Against both scholars who sought the security of transcendental principles and those who reduced law to power politics, Heller argued for a dialectical understanding of public law in which basic principles emerge as immanent ethical practices that often sit in a relationship of tension with, or contradiction to, the enacted rules of positive law.

From this dialectical insight, Heller developed a comprehensive theory of the state,[114] understood as 'the autonomous organization and activation of social co-operation within a territory'.[115] State power (*Staatsgewalt*) 'manifests itself and is maintained by a co-operation between people, which orientates itself to a common order of rules'.[116] In contrast to military power—'merely a technical power, which has its purpose determined and gets its legitimation first of all from the state'[117]—this political power must be directly orientated towards social conceptions of justice and legitimacy. State power is always a 'legally organized, political power' and, owing to its intrinsic social function, it 'must not only strive for legality in the legal technical sense, but also, for the sake of its self-preservation, for an ethical justification of its positive legal or conventional norms, i.e. for legitimacy'.[118] State power thus 'has authority only when the justification of its

[112] Hermann Heller, 'Bemerkungen zur Staats- und Rechtstheoretischen Problematik der Gegenwart' [1929] in his *Gesammelte Schriften* (Leiden: AW Sijthoff, 1971), vol 2, 249–278, 275: '*. . . der Begriff des Rechtes kann nicht gebildet werden ohne die keineswegs mit ihm identische Idee des Rechtes, die letztere aber nicht ohne die Relativierung des positiven Rechtes auf überpositive, logische und sittliche Rechtsgrundsätze*'.

[113] Carl Friedrich von Gerber, *Über öffentliche Rechte* (Tübingen: Laupp, 1852), 21; cited by Heller, ibid, 276: '*Ein Staat der auf Meinungen gegründet ist, kann nur eine sichere und schwankende Existenz haben*'. For discussion of Laband, see Heller, ibid, 269–271.

[114] Hermann Heller, *Staatslehre* [1934] in his *Gesammelte Schriften*, above n 112, vol 3, 79–395 ('*Staatslehre*'). Most of Pt III of this work has been translated by David Dyzenhaus as Hermann Heller, 'The Nature and Function of the State' (1996) 18 *Cardozo Law Review* ('CLR') 1139–1216. I am indebted to this translation, on which I rely for quotations.

[115] *Staatslehre*, 310; CLR, 1143.

[116] *Staatslehre*, 311; CLR, 1144.

[117] *Staatslehre*, 316; CLR, 1149.

[118] *Staatslehre*, 355; CLR, 1179.

power enjoys recognition' and this authority 'is based in legality only insofar as the legality is founded legitimately'.[119]

Heller claimed that 'all the ideologists of force fail to recognize this power formation by law, while conversely all the pacifist ideologists do not want to recognize law formation by power'.[120] On this basis, he could offer a fresh explanation of the 'normative power of the factual' by means of which 'a power that, while for a time existing merely as a matter of brute fact and though experienced as unjust, succeeds in winning for itself, bit by bit, the belief in its justification'.[121] Although this transformation of normality into normativity is often emphasized, Heller noted that it is invariably a partial recognition: 'For alongside this normative force of the factually normal, a very great and unique significance is due to the normalizing force of the normative' since 'the constitution formed by norms elevates itself on the foundation of the non-normed constitution, which crucially contributes to it'.[122] This relationship between facticity and normativity, Heller argued, is dialectical, especially since the 'content and validity of a norm are never determined merely by its text, and never solely by the standpoints and characteristics of its legislators, but above all by the characteristics of the norm addressees who observe them'.[123]

At the core of Heller's state theory is a tension not only between the formal and material constitution but also between positive law and *droit politique*, the latter concept similar to what Hauriou called *idées directrices* and which Heller calls *Rechtsgrundsätze*. Schmitt recognized a similar distinction, but his argument was that the absolute constitution rested ultimately on an existential entity, the political unity of the people. For Heller, this material constitution could not be understood simply as fact. 'Every theory that begins with the alternatives, law or power, norm or will, objectivity or subjectivity', Heller contended, 'fails to recognize the dialectical construction of the reality of the state and it goes wrong in its very starting point'.[124] The reason is that once the 'power-forming quality of law' has been grasped, it becomes impossible to understand the constitution 'as the decision of a norm-less power'.[125] He argued against the normativists on the ground that 'efficacy and validity, the existence and normativity of the constitution, must indeed be logically distinguished, but they nevertheless apply to the same constitutional reality, in which the assertion of one always supposes the other at the same time'.[126] But he similarly argued against the materialists on the ground that, although a collective political will can be designated as that which determines the existence of the political unit, 'without a normative act, a collection of people has neither a will capable of decision nor power capable of action, and at the very least it has

[119] *Staatslehre*, 355; CLR, 1180.
[120] *Staatslehre*, 356; CLR, 1180.
[121] *Staatslehre*, 356; CLR, 1180.
[122] *Staatslehre*, 365; CLR, 1187.
[123] *Staatslehre*, 368–369; CLR, 1190–1191.
[124] *Staatslehre*, 393; CLR, 1214.
[125] *Staatslehre*, 393; CLR, 1214.
[126] *Staatslehre*, 393; CLR, 1214–1215.

no authority whatsoever'.[127] Heller argued instead that, rather than contradicting one another, the existential and normative aspects of constituent power remain mutually dependent.

In his state theory, Heller specified that the constitution of the state is distinct from the constitution of government. He also identified the juristic discourse through which this constitutive arrangement can be expressed. He argued that the concept of constitution in its substantive sense, that dealing with the '*total situation* of the political unit', is of little value because it 'includes all natural and cultural conditions of the state unity without any worthwhile differentiation'.[128] Instead, he advocated the adoption of what he called 'the second realist-scientific constitutional concept', in which 'a basic structure of the state is judged to be fundamental from a particular historical-political standpoint and is singled out as the relatively permanent structure of the unity of the state'.[129] Heller suggested that two juristic concepts of the constitution correspond to these sociological concepts. The first incorporates 'all the legal norms contained in the constitutional instrument together with all other laws of the state order that comply with the constitution', although this again is too broad. More useful is a basic re-ordering of that part of the substantive constitution that is judged to be foundational. But this also is of limited use since 'a concrete historic constitution has never exhibited a closed logical system, resting on suprahistorical axioms'.[130] For Heller, this suggests the need for a fifth concept, the formal constitution, understood as 'the totality of the laws fixed in writing in the constitutional instrument', necessary because there is never a complete coincidence between the substantive and formal constitution.[131]

Tensions between these contrasting concepts of the constitution of the state are paralleled by tensions between concepts of law. Heller's account of the constitution of the state reconstructs the argument about facticity and normativity in order to demonstrate that power and law (power and liberty) are mutually constitutive and reciprocally dependent. But by law here is meant *droit politique*, 'the fundamental principles of law which are foundational of positive law'.[132] These basic principles cannot generate particular legal decisions and are only indicative of general orientation. Consequently, 'there is established in the modern state a necessary and untranscendable conflict between legality and legal certainty'.[133] This reflects the tension between positive law and *droit politique*. The conflict is made indispensable 'because, within a vital people of a particular state, complete agreement can never rule over the content and application of valid fundamental legal principles'.[134] And it 'is untranscendable because both the state and the

[127] *Staatslehre*, 394; CLR, 1216.
[128] *Staatslehre*, 390; CLR, 1211.
[129] *Staatslehre*, 390; CLR, 1211.
[130] *Staatslehre*, 391; CLR, 1212.
[131] *Staatslehre*, 391; CLR, 1212–1213.
[132] *Staatslehre*, 332; CLR, 1157.
[133] *Staatslehre*, 336; CLR, 1161.
[134] *Staatslehre*, 336; CLR, 1161.

individual are alive only in the relationship of tension in which positive law and the legal conscience find themselves'.[135]

Heller's state theory is considered to be both highly abstract and vague in its formulation.[136] While this is true, Heller does manage to identify more precisely than any other legal scholar a juristic logic that makes sense of the constitution of the state. In an incisive account, Dyzenhaus explains that Heller's argument involves 'elaboration of an ethical foundation to law which has content, though one which is not prescribed by any particular philosophy or ideology'.[137] This content is that which maintains the public sphere as autonomous. Its juristic character belongs to the special type of law we have identified as *droit politique*. When scholars such as Dyzenhaus suggest that Heller's notion of an 'ethical right of resistance . . . which has weight but no legal recognition' is 'fraught with ambiguity',[138] this can be resolved by drawing a distinction between positive law and *droit politique*. The concept of *droit politique* provides the key to understanding the constitution of the state.

[135] *Staatslehre*, 336; CLR, 1161.

[136] See Wolfgang Schluchter, *Entscheidung für den sozialen Rechtsstaat* (Baden-Baden: Nomos 2nd edn, 1983), 182–216.

[137] David Dyzenhaus, 'Hermann Heller and the Legitimacy of Legality' (1996) 16 OJLS 641–666, 651.

[138] Ibid, 659.