PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

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in the rules concerning direct effect in EC law. On the other hand, there is a common academic view—characterised in much of the scholarship concerning regulation and 'New Public Management'—that the distinction is in some sense outmoded or inappropriate. We seem, Cane suggests, to be caught between wanting to reaffirm (through legislation and case law) that government is different from civil society, and needing to make sense of the array of phenomena—such as regulation—which appear to challenge the distinctions between public and private. Cane's answer rests on making a careful division between the approaches to the distinction. He suggests that functional approaches distinguish between public and private law on the basis of the nature of the function under scrutiny, while institutional approaches employ a blunter distinction based on the nature of the body. While the performance of governmental tasks by non-governmental bodies has reinforced the functional approaches, differing combinations of both can be found in cases concerning the scope of judicial review, the definition of a 'public authority' within section 6 of the Human Rights Act 1998, and the ambit of direct effect under EC law: a point which neatly illustrates the multi-layered nature of the contemporary constitution.

Cane argues that recent criticisms of the public law-private law distinction are analytically flawed. He also engages in detailed scrutiny of the regulation scholarship. Scott's argument concerning governance, Cane suggests, can only be used to undermine a public law–private law distinction understood in institutional terms: it supports no conclusion about the viability or desirability of a functional divide.[49] Cane also suggests that since arguments about a functionally-drawn distinction rest on competing normative considerations of distributive justice, empirical observations concerning the ease or difficulty with which such a distinction works in practice are unlikely to have strong persuasive effect. The paradox identified at the start of his chapter can, Cane argues, be solved only by recognising that supporters and opponents of the public law–private law distinction are talking past each other at normative level. Opponents are making the empirical claim that the distinction misrepresents the way in which power *is* distributed and regulated, while supporters make the normative claim that the distinction embodies an attractive theory of the way power *should be* distributed and regulated. Cane's own formulation of the distinction is therefore normative: he suggests—in stark contrast to Oliver[49a]—that certain values are distinctively public and others (for example, those associated with making profit) distinctively private.

Cane's conclusion is important. We tend to assume in political theory that the role of the state, seen in terms of its duties and responsibilities, is in some sense unique. Cane's values-based distinction helpfully makes this point explicit, and gives us a basis for understanding the apparently contradictory tendencies adopted (empirically speaking) in the areas of regulation and human rights. One could

[49] It should also be noted that, from the standpoint of service *delivery*, differences between public and private remain strongly evident: see further S. Prentice, 'People, not structures, hold the key to public services reform' (2002) 10 *Renewal* 48.

[49a] D Oliver, *Common Values and the Public–Private Divide* (London, Butterworths, 1999).

properly say that we would no longer need to overlook one area in order to make sense of the other. What Cane's normative distinction does not do, however, is to free us entirely from empirical argument. For, having recognised the existence of a normative justification for the public law–private law distinction, we are still faced with practical questions about where the distinction should be drawn in individual cases. The role of Cane's normative approach is to supply us with a more honest mechanism for answering such questions. Whatever substantive conclusion one arrives at, it must be noted that the four chapters discussed here all draw attention, from different perspectives, to an important feature of the existence of multiple constitutional layers: namely that definitions of the public—and indeed the significance of the concept of the public—can vary from layer to layer. It is perfectly possible, in a unitary constitution, to argue about the positioning and significance of the public law–private law divide: in a multi-layered constitution, such questions acquire greater importance given the possible variations between the different layers.

The final five chapters focus on the role of the courts in a multi-layered constitution. As such, they focus specifically on the appropriate remit of legal—as opposed to political—controls over public power in different layers of the constitution. As with the earlier chapters by Tomkins and Harlow focusing on political accountability, the arguments relating to legal accountability deployed in the present chapters utilise a variety of approaches. In the first of the five chapters, Nicholas Bamforth engages in a largely analytical exercise by evaluating the response of United Kingdom courts to the emergence of a multi-layered constitution. By contrast, the next three chapters—by Professor Michael Taggart, Murray Hunt and Professor Conor Gearty—focus, from differing normative perspectives, on the proper role of the courts now that the Human Rights Act 1998 is in force. They do so, in particular, by considering the degree to which judges should defer to decisions made by elected bodies. At one level, the chapters are therefore concerned with the distribution of power between the courts, the executive and the legislature, and the comparative merits of legal and political accountability, within the national layer of the constitution. However, the three chapters also contain broader reflections on the interaction between different constitutional layers, specifically by focusing—again, from divergent perspectives—on the implications of the jurisprudence of the European Court of Human Rights for the emerging Human Rights Act jurisprudence at national level. The final chapter—by Joanna Miles—is also concerned both with the divergent role of the courts in different constitutional layers and with the appropriate judicial role, but considers such questions through the specific question of which litigants should have access to the courts.

In 'Courts in a Multi-Layered Constitution', Nicholas Bamforth analyses the implications of the emergence of a multi-layered constitution for judicial decision-making at national level. Bamforth suggests that there have been contradictory tendencies in the case law, leading to a fragmentation between judicial approaches depending upon the area concerned. For example, before the Human Rights Act came into force, proportionality could officially be used as a ground of

judicial review only in cases involving EC law points; its use was officially prohibited in purely domestic cases. Nonetheless, considerable evidence exists to show that proportionality-style review was unofficially employed in practice. In similar vein, the official refusal to recognise proportionality could be contrasted with the courts' enthusiasm for developing domestic remedies by analogy with EC law—notably in the areas of injunctive relief against ministers and restitutionary relief against public authorities. The recognition of proportionality as a basis for review in cases falling within the Human Rights Act also raises the possibility of fragmented judicial approaches. It is unclear, for example, whether its availability in Human Rights Act cases will encourage courts to allow proportionality officially to play a role in cases involving no Convention or EC law points, or how Convention jurisprudence will interact with case law of the European Court of Justice in cases where both are relevant. Bamforth argues that such issues will depend, for their resolution, on the degree to which courts accord priority to their perceived role at national constitutional level by contrast to their role in the enforcement of rules emanating from the two European layers of the constitution (a balance which in itself begs many questions concerning the way in which courts understand the constitutional basis of the present multi-layered structure). The case law concerning the Human Rights Act and EC law reflects these competing priorities. At a more theoretical level, Bamforth points out that any account of the appropriate role of the courts in the present-day constitution—whether that account is more sympathetic to the notion of a 'political constitution' or to legal constitutionalism—must now take account of the significance of the two European layers. A simple distinction between a political constitution and legal constitutionalism may no longer be appropriate given that neither standpoint can offer—in and of itself—clear-cut guidance to courts as to the priority (if any) to be accorded to the European layers.

In relation to the national layer, Professor Taggart argues in his chapter 'Reinventing Administrative Law' that the 'classic model' of United Kingdom administrative law—characterised by restrictive grounds of judicial review (most obviously, where the exercise of discretionary power was concerned) and an emphasis on judicial restraint—is being swept away by the advent of 'constitutional', judicial reasoning focused on rights. Taggart illustrates the workings of the 'classic model' by analysing the famous *Wednesbury* decision[50]: which, he suggests, was characteristic of the tendency of the courts at the time to steer clear of apparently 'political' questions. At face value, the 'classic model'—which sought to keep courts away from 'political' questions—contrasts sharply with the inquiry which a court must now carry out when reviewing the exercise of discretionary power in Human Rights Act cases involving 'qualified' rights (that is, rights which may permissibly be overridden in specified circumstances). Courts must now begin by considering the nature of the right allegedly infringed, and then decide whether that right has been justifiably limited in terms of the express qualifications

[50] See Lord Greene MR's judgment in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

imposed upon it. The burden of justifying the restriction falls on the public authority, which must provide clear and sufficient evidence. This 'right-centred' approach, Taggart suggests, requires more focused, consistent and transparent judicial methodology than was the case under the 'classic model'. Taggart argues, however, that judges will still remain wary, under the rights-focused model, of intervening in certain types of case. The central idea behind the 'classic' *Wednesbury* approach—that it is inappropriate for the courts to adjudicate in *every* dispute between citizen and state—lives on. The real distinction between the rights-focused model and the *Wednesbury* approach is that under the former, such an idea must be more clearly articulated in the case law: something which requires the development of a coherent theory of judicial deference which pays close attention to considerations of democratic legitimacy and judicial expertise.

This idea also forms a primary focus of Murray Hunt's chapter, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"'. Hunt suggests that a proper approach has yet to be articulated, in Human Rights Act cases, concerning when and on what basis judicial deference to elected institutions is appropriate. The notion of a 'discretionary area of judgment'[51] is inappropriate as it presupposes the existence of a definitive constitutional boundary between legal and political redress: a specific *area* within which the judiciary will defer, with matters falling within this area being seen as inappropriate for judicial resolution. Hunt's preferred approach is known as 'due deference'. Since rights can cut across all substantive areas of public decision-making, courts should approach the deference issue in a focused, issue-specific way, with decision-makers being required in each case to show why they deserve judicial deference. Having identified the specific issue in respect of which deference is being claimed, courts should ask—in relation to *that* particular issue—how *much* deference should be shown to the decision-maker. Hunt ties his analysis to what he categorises as a much deeper problem in public law thought. He suggests that modern accounts of public law struggle unsuccessfully to reconcile the traditional Diceyan notion of Parliament's legal sovereignty with the modern constitutional notion of the sovereignty of the individual, with its concomitant respect for constitutional rights. This leads to a public law of competing supremacies, and forces courts to employ uneasy spatial analyses such as the 'discretionary area'. By contrast, Hunt suggests, the 'due deference' approach can steer the courts between the two extremes of judicial submission to elected bodies and judicial supremacy. By focusing on the value of rights and the cogency of the reasons advanced for restricting them, it prevents courts from grounding their analyses in formalistic notions such as the will of Parliament.

Hunt stresses that his 'due deference' approach presupposes that the courts and Parliament *share* a commitment to representative democracy and to certain rights, freedoms and basic values. His project, however, is to develop a suitable methodology for the courts to use, a methodology might also accompany Michael Taggart's notion that judicial deference to elected bodies will continue to be relevant. In his

[51] Stemming from Lord Hope's judgment in *R. v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, 380.

chapter 'Civil Liberties and Human Rights', Conor Gearty similarly concludes that the Human Rights Act requires a commitment from Parliament, the executive and the courts, but the scope of this commitment—to those principles of civil liberties which make our society a self-governing community of equals—would appear to be rather different from Hunt's. In particular, Gearty carves out a distinctive—and arguably pre-eminent—role for political accountability. In doing so, Gearty draws a sharp distinction between civil liberties and human rights. Civil liberties are, he suggests, concerned with the freedoms which are essential to the maintenance and fostering of representative government: the right to vote and to stand for election, together with a list of associated rights such as freedom of expression and freedom of assembly. Since civil liberties are rooted in a commitment to the idea of a representative democracy, they may sometimes be qualified in the interest of democratic necessity. Gearty argues that human rights, by contrast, are of a more absolute and general nature, and that arguments about when rights should be qualified are often hard to resolve given that answers cannot be provided by reference to a unifying underlying commitment to representative democracy. Gearty characterises the Convention as a charter of civil liberties rather than human rights, and suggests that this is entirely consistent with the Human Rights Act's protection of Parliamentary Sovereignty via the declaration of incompatibility procedure. Ultimate decisions concerning the restrictions of civil liberties should, he suggests, lie with elected bodies, and courts should adopt a restrained approach to statutory interpretation under section 3 of the Act.[52] Although he stresses the predominant role of political institutions, Gearty is keen to argue that this does not leave civil liberties undefended against a potentially authoritarian legislature. For one thing, any analysis must be politically realistic: it is inevitable, in practice, that undesirable restrictions on civil liberties are sometimes enacted. The appropriate remedy in this situation is political rather than legal. Furthermore, the record of United Kingdom courts in civil liberties cases is, Gearty argues, unimpressive, both in absolute terms and in contrast to the Westminster Parliament. While Gearty does not extend his analysis into the area of deference explicitly, it is clear that he would take a very different view—as a committed supporter of traditional Parliamentary sovereignty—from that advocated by Hunt.

The Taggart, Hunt and Gearty chapters highlight the fact that one's normative view concerning the appropriate division between legal and political accountability is central to any assessment of the proper role of the courts in the contemporary constitution. Hunt believes that constitutional accountability is best protected by giving the courts a principled and clearly articulated role, in which deference to elected institutions (and the scope for mechanisms of political accountability) is carefully calibrated and controlled. A coherent balance must therefore be struck between competing notions of sovereignty. For Gearty, by contrast, legal accountability is better seen as an adjunct to political accountability, with the sovereignty of Parliament remaining pre-eminent. Both approaches beg

[52] See further C Gearty, 'Reconciling Parliamentary Democracy and Human Rights', n 25 above.

many questions. A crucial question for Hunt's analysis will be whether the 'due deference' approach in fact keeps the courts away, to a sufficient extent, from questions which are unsuitable for judicial resolution. At a more theoretical level, questions might also be raised about whether the tension he identifies between competing notions of sovereignty is in fact such a crucial underlying issue. Crucial questions for Gearty will be whether the distinction between civil liberties and human rights is in fact as stark as he maintains, given the existence of many competing theories of the nature of human rights; and whether Parliament is in fact as successful a guarantor of civil liberties, and the courts as unsuccessful in this role, as he maintains.

The three essays also highlight the interaction between different layers of the constitution, again in rather different ways. Michael Taggart suggests that the rise of rights-focused, 'constitutional' litigation is related, at least in part, to the growing number of domestic, regional and international human rights instruments around the world. The 'reinvention' of administrative law is underpinned both by the growth of 'constitutionalism' within the United Kingdom and by the internationalisation of human rights standards on a global basis. Taggart does not develop this analysis at length, but it is clear that he sees normative questions concerning the proper role of the courts—and, in consequence, the proper division between legal and political accountability—to be integrally-related to the emergence of a multi-layered constitution. Hunt and Gearty adopt divergent views about the European Convention on Human Rights, in parallel with their contributions to the debate concerning the role of courts at the national layer. Both agree that the Convention is now an important point of reference for national courts, but they differ as to the lessons which the reasoning of the Strasbourg Court might offer at national level. Hunt argues that the Strasbourg Court's 'margin of appreciation' principle suffers from similar deficiencies as the domestic 'discretionary area of judgment', and therefore looks on the principle with disfavour. However, he appears to view the Convention as offering—at least *prima facie*—statements of the value to be attached to particular rights, something which would be important for national courts in deploying a 'due deference' analysis. Gearty's view is (as indicated above) that the Convention is clearly a charter for civil liberties rather than human rights. One aim of the Convention is to promote an effective political democracy, and many of the central Convention rights relate to that aim. The Convention allows for such rights to be qualified in the face of overriding and deeper democratic necessities, and Gearty argues that the Strasbourg Court has generally approached this matter in a principled and coherent fashion. The implication of this, clearly, is that national courts must similarly seek to treat Convention rights as civil liberties.

The final chapter, by Joanna Miles—entitled 'Standing in a Multi-Layered Constitution'—also focuses, albeit in the specific context of the range of litigants who are entitled to litigate in essentially public law disputes—on the appropriate division between legal and political accountability, and on the complexities associated with the existence of multiple constitutional layers. Miles traces—in particular, by

using a case study based upon the standing and intervention rights of the pressure group Greenpeace—the differences between standing and intervention rules in Human Rights Act judicial review cases, devolution disputes, EC law cases, and ordinary judicial review under section 31 of the Supreme Court Act 1981. The existence of so many different tests reflects the multi-layered nature of the contemporary constitution, in which courts are required to interpret and apply laws deriving from many different sources. While it may be appropriate to have different tests in different contexts, Miles points out that one difficulty with the present position is that some of the formally separate areas of case law are not in practice discrete. Miles suggests that we can only determine which tests for standing and intervention are appropriate by reference to our views concerning the appropriateness and legitimacy of different types of claimant or intervener raising their arguments in the legal—rather the political—sphere, and concerning the proper role of courts within the constitution. Are courts, for example, supposed merely to safeguard the rights of individuals against the state, or are they concerned to correct illegalities, whoever the litigant happens to be? Miles canvasses a variety of possible answers, but her main concern is to stress the need for any solution to be of a principled nature.

CONCLUSION

We have argued that the United Kingdom can now be said to possess a multi-layered rather than a unitary, self-correcting constitution. The processes whereby such a constitution has emerged have sometimes been controversial, as is demonstrated by the ongoing debate about the basis—as a matter of national constitutional law—for the courts' recognition of the supremacy of EC law. However such deep-level debates are resolved, it is at least clear that the existence of a (and of this particular) multi-layered constitution gives rise to many lower-level practical questions, and it is with such questions that this collection of essays seeks to engage. We cannot claim that the essays in the collection engage with—still less answer—all such questions. Nonetheless, by highlighting the sheer range of questions—particularly concerning the similarities and differences between the different layers, the scope for cross-over between them, the appropriate role of political and legal accountability mechanisms, and the boundaries between state and non-state actors—we hope that they go some way towards sketching a map of the terrain on which debate about the contemporary constitution must nowadays be conducted, and indeed that they stimulate further contributions to that debate.

2

Constitutional Law: the Third Order of the Political

MARTIN LOUGHLIN*

FOR MOST OF the twentieth century, constitutions were generally regarded—like most formal legal documents—as being rather dry and dreary matters, likely to be of interest only to three relatively discrete groups of people: officials with responsibilities relating to the system of government, lawyers who were occasionally called on to advise and litigate in the circumstances of a particular dispute, and to a small group of academics who continued to believe in their importance as objects of scholarly inquiry. Within this last group in particular, the importance of constitutional investigation seemed during the course of the century to have diminished. In the latter half of the twentieth century, for example, most political scientists (in the English-speaking world at least) appeared to have given up on constitutions, as the intellectual orientation of their discipline shifted away from the study of the institutional framework of public decision-making and towards the more 'scientific' study of political behaviour. Formal constitutional arrangements, it was suggested, presented a façade that acted as a barrier to the acquisition of a scientific understanding of politics as an extended power play. The field of constitutional investigation was therefore left mainly to a relatively small group of lawyers who remained interested in studying those basic rules concerning the allocation of governmental authority.

During the last decade or so, however, this twentieth century trend underwent a marked reversal. The general interest that recently has been shown in constitutions as frameworks for the control and regulation of government and, perhaps even more importantly, in constitutionalism as a political theory which expresses the fundamental values of contemporary society, has been quite remarkable. Both politically and intellectually, questions concerning the form and nature of

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constitutions have captured an unusual amount of public attention. During the twenty-first century, constitutions might well reacquire the status that they once enjoyed in the nineteenth.

Many factors have contributed to this regeneration of interest in constitutional matters. On the global stage, probably the most important has been the train of events that has followed the collapse of the Soviet Union. This episode, which marks a change of world-historical significance, has led to a major exercise of constitution-making in the newly independent states of the former Soviet empire; and invariably these documents have taken the form of liberal constitutionalist texts, establishing a law-governed democratic republic which pledges to respect the rights and freedoms of the individual.[1] As a result of the growing number of states which have formally pledged to respect constitutionalist principles, international organisations have taken up the challenge of promoting constitutionalism—a theory resting on such basic concepts as the separation of powers, the rule of law, respect for human rights, and the institutionalisation of effective judicial remedies—as a tool of social and economic development. Today, respect for the norms embedded within constitutionalism is often treated as a vital condition for the receipt of aid by western governments or as a precondition imposed on states seeking to join various international clubs.[2]

But it is not only change on the international stage that has shunted constitutional questions higher up the political agenda. Over the last 20 or so years, advanced western democracies, labouring under the pressure of a growing public expenditure burden, have been obliged to undertake a reassessment of the role of the state. This has led to a set of reforms, illustrated by such initiatives as privatisation and 'new public management', which has brought about a restructuring of the welfare state.[3] One consequence of the reconfiguration of government's role is that the state is no longer treated as a general agency for wealth redistribution. Discussion has thus moved away from the language of social justice with respect to governmental programmes that reallocate material resources and towards a more individualised language of rights, whether of minority ethnic groups or of various categories of vulnerable people. The resulting growth in the discourse of human rights within domestic politics has had the effect, implicitly at least, of heightening interest in constitutional concerns. Politics, it would appear, seems increasingly to be concerned with the obligations of government and the rights of citizens.

There are, of course, other more local factors that have led to a revival of interest in constitutions. In Britain, where because of its peculiar political history there

[1] See AE Dick Howard (ed), *Constitution-making in Eastern Europe* (Washington, DC, Woodrow Wilson Center Press, 1993); Ulrich K Preuss, 'The Politics of Constitution Making: Transforming Politics into Constitutions' (1991) 13 *Law & Policy* 107–123.

[2] The Council of Europe, for example, today requires all states seeking membership first to sign and ratify the European Convention on Human Rights and the European Charter of Local Self-Government.

[3] See, eg, David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (New York, Plume, 1993); Christopher D Foster and Francis J Plowden, *The State under Stress: Can the Hollow State be Good Government?* (Buckingham, Open University Press, 1996).

exists no formal constitution of the modern variety, this phenomenon is now often perceived not as a cause of celebration but rather as a deficiency that must be remedied.[4] In Canada, by contrast, the motivating impetus has been the perpetuation of concern about the identity of Canadian society, especially with respect to the status of minority language groups and of the first nations.[5] Whatever the mix, the political message being spread around the Western world is that we are all constitutionalists now.

Political scientists now express much more interest in the institutional aspects of governmental decision-making[6] and even in courts, both as decision-making institutions and as vehicles for the articulation of public values.[7] It is scarcely an exaggeration to suggest that today the concerns of political theorists seem to be dominated by various aspects of constitutionalism, such as rights,[8] constraint theory[9] and constitutional design in general.[10]

However, at more or less the same time that matters constitutional have shot up the agendas of politicians, political scientists and political theorists, a sceptical strain amongst lawyers about the discipline of constitutional law has emerged. This scepticism—cynicism might be a better term—assumed its most ideological and strident form in the work of the American critical legal studies movement of the 1980s, where the objective appeared to be that of questioning many of these liberal constitutionalist values and reducing constitutional discourse to that of partisan politics.[11] But even beyond the confines of that highly politicised movement, many students now tend to come away from constitutional law courses mouthing the slogan (albeit with a more world-weary inflection): 'Well, it's all just politics'.[12]

[4] See Institute for Public Policy Research, *A Written Constitution for the United Kingdom* (London, Mansell, 1993).

[5] See, eg, Will Kymlicka, *Multicultural Citizenship* (Oxford, Clarendon Press, 1995); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, Cambridge University Press, 1995).

[6] See, eg, JG March and JP Olsen, *Rediscovering Institutions: The Organisational Basis of Politics* (New York, Free Press, 1989).

[7] See, eg, David Robertson, *Judicial Discretion in the House of Lords* (Oxford, Clarendon Press, 1998); Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (New York, Oxford University Press, 2000).

[8] See, eg, Hillel Steiner, *An Essay on Rights* (Oxford, Blackwell, 1994); Attracta Ingram, *A Political Theory of Rights* (Oxford, Clarendon Press, 1994); Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, NJ, Princeton University Press, 2001).

[9] See Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge, Cambridge University Press, 2000).

[10] See, eg, Russell Hardin, *Liberalism, Constitutionalism, and Democracy* (Oxford, Oxford University Press, 1999).

[11] See, eg, Roberto Unger, 'The Critical Legal Studies Movement' (1982) 96 *Harvard Law Review* 563; David Fraser, 'Truth and Hierarchy: Will the Circle be Broken?' (1984) 33 *Buffalo Law Review* 729; Mark Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional* Law (Cambridge, Mass., Harvard University Press, 1988); Allan C Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto, University of Toronto Press, 1995).

[12] The apotheosis of this tendency can be seen in the response to the US Supreme Court's role in *Bush v Gore*, in which, however sophisticated the justificatory or critical explanation, it proved almost impossible to discern a discrepancy between any scholar's legal analysis and their voting behaviour. For a useful overview see EJ Dionne Jr and William Kristol (eds), *Bush v Gore: The Court Cases and the Commentary* (Washington, DC, Brookings Institution Press, 2001).

Although some jurists have directly responded to this trend, much of this work has been geared towards the attempt to explicate law's ideal qualities.[13] From this perspective, it is not difficult to demonstrate how law is capable of being differentiated from politics. But this type of legalistic approach tends to be constructed around an image of the individual pitted against the state and ultimately it seems to be underpinned by a desire to identify law and politics as the positive and negative polarities of modes of public decision-making.[14] Whatever value this approach—which is itself an act of political choice—may have, it is unlikely to be of any help in the search for finding effective means of negotiating differences. Formalism might be a useful device for taking forward the philosophical quest of isolating the phenomenon of the legal. But it acts as a positive hindrance to the exercise of advancing the more sociologically inspired objective of understanding law and politics as competing, but also related, modes of public discourse.

How then are we to proceed? If the reductive position of saying of constitutional law that 'it's all just politics' is uninteresting and the formalist stance of presupposing an ideal quality to law—that is, of starting with a transcendental view which elevates law into a realm above politics—is unhelpful, how can matters be advanced? We might begin by noting that what unites these two otherwise directly opposing positions is a common starting position. Both begin by trying to identify what, if anything, is special about law; and it may be the law-centred nature of their inquiry that leads ultimately to a distortion and polarisation of views. Perhaps a better way forward, then, would begin with an inquiry into the nature of politics and from this perspective to identify what seems to be special about law. Rather than starting with law and analysing whether or not it is reducible to politics, we might start with politics and consider how politics is capable of being elevated to law. By taking this line of inquiry, I hope to show that constitutional law can best be understood as what might be termed the third order of the political.

THE CONCEPT OF THE POLITICAL

In his influential essay on the vocation of politics, Max Weber defined politics as an activity through which 'the leadership, or the influencing of the leadership of a *political* association, hence today, of a *state*' is acquired.[15] Weber's definition highlights important aspects of the conduct of politics. Most significantly, perhaps, it suggests that politics is to be conceived as a practice that operates within an

[13] See, eg, Ernest Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 *Yale Law Journal* 949.

[14] See Judith N Shklar, *Legalism* (Cambridge, Mass: Harvard University Press, 1964), esp 1–28.

[15] Max Weber, 'Politics as a Vocation' [1919] in HH Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (London, Routledge & Kegal Paul, 1948), 77–128, at 77. See also Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Guenther Roth and Claus Wittich (eds), Berkeley, University of California Press, 1978), 55: politics is public activity aimed at 'exerting influence on the government of a political organisation; especially at the appropriation, redistribution or allocation of the powers of government'.

institutional setting and is primarily concerned with the guidance of public decision-making—that is, with governing the state.

This type of definition is one that is commonly offered today. But although it is able to provide some explanation of the nature of political practice within an institutional framework, it does not reach to the core of the engagement of politics. It suggests that politics is action aimed at influencing the leadership of a political association, thereby laying itself open to the criticism of being self-referential. If the phenomenon is to be grasped, we cannot start by assuming any particular form through which the activity of politics is conducted within the state. Rather than deriving an understanding of the political from a theory of the state, the concept of the state presupposes the concept of the political.

This is the approach adopted by Carl Schmitt, who suggests that if the concept of the political is properly to be identified, it must rest on its own distinctions. Just as 'in the realm of morality the final distinction is between good and evil, in aesthetics beautiful and ugly, in economics profitable and unprofitable,' the question, Schmitt asks, is 'whether there is a special distinction which can serve as a simple criterion of the political'.[16] The answer he provides—somewhat controversially—is that political action is action founded on the distinction between friend and enemy.

Schmitt's provocative answer is rooted in the conviction that conflict is a primordial condition, and it is this basic fact which gives rise to politics. Schmitt's position is liable to be misunderstood. He is not suggesting that, say, the contest between opposing political factions within the state is to be understood in terms of this distinction between friend and enemy. Nor does he maintain that the distinction yields the substance of politics.[17] Schmitt here is not concerned with the practices of politics—what I will be calling the second order of the political—but with a first order phenomenon: the concept of the political itself.

Schmitt's contention is that at the core of the concept of the political lies 'the most intense and extreme antagonism', in other words, 'the ever present possibility of conflict' and even of 'armed combat'.[18] It is the persistence of this threat 'which determines in a characteristic way human action and thinking and thereby creates a specifically political behaviour.'[19] Only through this most basic understanding of the concept of the political, Schmitt contends, are we able to render meaningful that which otherwise must remain obscure and incoherent. His claim is that the political is a fundamental and inescapable aspect of the human condition.[20]

[16] Carl Schmitt, *The Concept of the Political* [1932] George Schwab trans (Chicago, University of Chicago Press, 1996), 26.

[17] This is the error that Agnes Heller appears to make in her assessment of Schmitt: see Agnes Heller, 'The Concept of the Political Revisited' in David Held (ed), *Political Theory Today* (Cambridge, Polity Press, 1991), 330–43, 332–33.

[18] Schmitt, above n 16, at 29, 32. Cf Heraclitus (535–475BC): 'War is the father of all and king of all, and some he shows as gods, others as men; some he makes slaves, others free.' See GS Kirk, JE Raven and M Schofield, *The Presocratic Philosophers: A Critical History with a Selection of Texts* (2nd edn, Cambridge, Cambridge University Press, 1995), Frag 53, Hippolytus, ref IX.9.4.

[19] *Ibid* at 34.

[20] Cf Leo Strauss, 'Notes on Carl Schmitt, *The Concept of the Political*' in Schmitt, above n 16, 81–107, 94: 'The political [for Schmitt] is a basic characteristic of human life; politics in this sense *is* destiny; therefore man cannot escape politics' (emphasis in original).

By pursuing an understanding of the political to its very foundations, Schmitt seeks to reveal its essential character. That this continues to be a pressing question is illustrated by John Dunn's recent declaration to the effect that:

> Here we all are, loose in history and dubiously at ease within ourselves and with each other. What are we going to do about it? This is certainly the political question: and an eminently practical and exceedingly insistent one too.[21]

The Concept of the Political can therefore be read as an attempt systematically to address a basic issue about politics. But it also goes further and tries to answer to one of the most critical questions posed in classical political thought: how should I live? In *Euthyphro*, Plato asks about the nature of those disagreements that we could not settle and which would cause us to be enemies. The answer offered in the dialogue is not so dissimilar to Schmitt's:

> I suggest you consider whether it would not be the just and the unjust, beautiful and ugly, good and evil. Are not these the things, when we disagree about them and cannot reach a satisfactory decision, concerning which we on occasion become enemies—you and I, and all other men?[22]

Moral values are certainly not irrelevant in politics. The point that Schmitt impresses upon us is that they are not authoritative. Although humans are norm-loving animals, they live in a world comprising a multiplicity of moral maps. And it is the inevitability of clashes between these that determines the political. There is, after all, scarcely a war that has been fought in which all of the combatants did not believe that they had right on their side. The political can thus 'derive its energy from the most varied human endeavours, from the religious, economic, moral and other antitheses.'[23] But, whatever its cause, the 'political entity is by its very nature the decisive entity, regardless of the sources from which it derives its last psychic motives.'[24] The enemy in Schmitt's reading is not an evil person to be reviled: that would be too moralistic. Nor is he a criminal to be punished: that is too legalistic. The enemy is simply a foe to be defeated.

Schmitt reinforces the distinctively political nature of this 'enemy' by highlighting its public aspect. The enemy, he claims, is 'not the private adversary whom one hates' but 'is solely the public enemy': the enemy is *hostis*, not *inimicus*.[25] 'The enemy exists,' he elaborates, 'only when, at least potentially, one fighting

[21] John Dunn, 'What is Living and What is Dead in the Political Theory of John Locke?' in his *Interpreting Political Responsibility* (Cambridge, Polity Press, 1990), 9, 21–22.

[22] Plato, *Euthypro*, 7c-d in *The Dialogues of Plato* [c.399–387 BC] RE Allen trans. (New Haven, Yale University Press, 1984), i.47. See also Plato, *The Laws* [c.335–323 BC] RG Bury trans. (London, Heinemann, 1926), Bk1, where Clinias explains why the original Cretan legislator had devised such a warlike polity: 'And herein ... he condemned the stupidity of the mass of men in failing to perceive that all are involved ceaselessly in a lifelong war against all States ... every State is, by a law of nature, engaged perpetually in an informal war with every other State.'

[23] Schmitt, above n 16, 38.

[24] *Ibid* at 43–44.

[25] *Ibid* at 28.

collectivity of people confronts a similar collectivity.'[26] Echoing Hobbes, whose work he much admired,[27] Schmitt argues that it is this potential which underpins the political:

> The political does not reside in the battle itself, which possesses its own technical, psychological, and military laws, but in the mode of behaviour which is determined by this possibility, by clearly evaluating the concrete situation and thereby being able to distinguish correctly the real friend and the real enemy.[28]

Schmitt's work is not without its ambiguities and difficulties.[29] But by focusing on the existential character of the political, his thought yields acute insights into the role of the state, the conduct of politics within a system of governance, and also—especially as Schmitt himself claimed that his studies were of a juristic nature[30]—into the nature and functions of constitutional law.

POLITICS AND THE STATE

Schmitt's work is less clear than it might be on the question of the relationship between the state and the political. Since politics orders everything, he argues that it does not simply function within a particular domain: properly understood, it is an aspect of intensity of conflict. But because Schmitt also indicates the role of politics in managing conflict, on occasions he conveys the converse impression and implies that it is the limitation rather than the intensification of conflict that provides the essence of the political. Consequently, although he starts by asserting

[26] *Ibid.* This distinction also has parallels in classical political thought. See, eg, Cicero, *De Officiis*, III.29: 'There are also rights of war, and the faith of an oath is often to be kept with an enemy ... [But] if you should not pay a price for your life, agreed on with robbers, it is no fraud if you should not perform it, though bound by an oath. For a pirate is not comprehended in the number of lawful enemies, but is the common foe of all men.'

[27] Schmitt refers to Hobbes as 'truly a powerful and systematic thinker': *ibid.* at 65. Cf Strauss, above n 20, at 89–93.

[28] *Ibid* at37. Cf Hobbes, *Leviathan*, ch XIII: 'the nature of War, consisteth not in actuall fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary. All other time is Peace.'

[29] Schmitt's work has recently attracted a great deal of attention from Anglo-American scholars. For valuable critical appraisals see especially: Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (London, Verso, 2000); David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Herman Heller in Weimar* (Oxford, Oxford University Press, 1997), ch 2; David Dyzenhaus (ed), *Law as Politics: Carl Schmitt's Critique of Liberalism* (Durham: Duke University Press, 1998); John P McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge, Cambridge University Press, 1997); Chantal Mouffe (ed), *The Challenge of Carl Schmitt* (London, Verso, 1999); William E Scheuerman, *Carl Schmitt: The End of Law* (Lanham,: Rowan & Littlefield, 1999).

[30] Of *The Concept of the Political*, Schmitt later wrote that: 'The challenge that issues from the text itself is aimed primarily at experts on the constitution and jurists of international law'. See Carl Schmitt, *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien* (Berlin: Duncker & Humblot, 1963), Preface; cited in Heinrich Meier, *Carl Schmitt and Leo Strauss: The Hidden Dialogue* J Harvey Lomax trans. (Chicago: University of Chicago Press, 1995), 3. See also Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* [1922] George Schwab trans. (Cambridge, Mass: MIT Press, 1988), 29–31.