

THE IDEA OF A CONSTITUTION: A PLEA FOR *STAATSRECHTSLEHRE*

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Philosophers of law and constitutional theorists generally agree that every legal order has a constitution. However, it is notoriously difficult to answer what I shall call ‘the question of constitutionality’: What it is that all legal orders share in having a constitution? Perhaps it is something so fundamental that every legal order has to have one, whatever the content of its actual constitution—the rules that one would collect in a textbook of the constitutional law of Canada, of Germany, of the United Kingdom, etc. For the rules of the actual constitution will vary considerably from jurisdiction to jurisdiction.

Obvious candidates for what is most fundamentally shared by legal orders are the proposals of the leading legal positivist philosophers of law of an ultimate rule or norm of legal order. H.L.A. Hart’s rule of recognition—the rule of a legal order that is ultimate in that it certifies the validity of all other rules—and Hans Kelsen’s basic norm—the norm that has to be presupposed in order to confer validity on the first historical constitution of the relevant legal system.¹ The rule of recognition differs from the basic norm in that its content is to be found in the settled practice of the legal officials that apply it and thus it will vary in content from legal order to legal order. In contrast, the content of the basic norm is always the same since it simply states the ultimate duty of legal order on those subject to law to comply with constitutional norms, although the content of the norms of the actual constitution will vary for the same sorts of reasons that the content of the rule of recognition varies.

However, as we will see below, it is unclear whether the rule of recognition is the constitution or, more like the basic norm, the rule that certifies the validity of the constitution. Moreover, it is unclear whether the rule of recognition is a legal rule or a rule that lies beyond legal order. Finally, both the rule of recognition and the basic norm might seem similarly reductionist in that each boils down to the rules or norms of the actual constitution with a somewhat mysteriously superadded duty on judges and other legal officials to apply those rules.

The second difficulty is that it is not clear how, if at all, such debates in philosophy of law relate to debates in constitutional theory, in particular, to the debate between ‘political’ and ‘legal’ constitutionalists, despite the fact that the debate in constitutional theory is precisely about questions such as what the constitution is, what makes it authoritative, and whether it is part of or beyond the law. Political constitutionalists such as Jeremy Waldron and Richard Bellamy, argue that the constitution is a set of democratic principles that legitimates the legal order and they seem to suppose further that it lies beyond the legal order in a political, not a legal constitution.² Conversely, legal constitutionalists such as Trevor Allan and Ronald Dworkin, argue that the constitution is legal and contains substantive principles of political morality that make up the legitimating basis of legal order.³

Political constitutionalists focus on the issue of the legitimacy of judicial review of a particular sort—what gets called either ‘strong judicial review’ or ‘strong-form judicial review’. Strong judicial review occurs when judges are allocated the authority to overrule the legislature when they conclude that statutory provisions violate constitutionally protected rights. This allocation of authority to judges is illegitimate in the eyes of political constitutionalists since in their view a well-functioning democracy only our elected

representatives in the legislature have the legitimacy and the competence to settle—to have ‘the last word’ about—deep societal disagreements about rights.

Allan and Dworkin do not, however, see the debate as confined to a disagreement within constitutional theory since they also contest the claim of Hart and Kelsen that at the base of a legal order one finds either a rule of settled practice or a juristically presupposed norm. As I have indicated, on their view, at the base is a legal constitution that contains substantive principles of political morality. It follows for legal constitutionalists that the focus of political constitutionalists on strong judicial review is misplaced, since in every legal order judges have the duty to interpret the law in light of substantive constitutional principles.

But legal positivist philosophers of law do not think they are in that debate. There is, they think, no real joinder between the inquiry undertaken by philosophy of law, which is to work out the necessary and sufficient conditions for X to be law, and constitutional theory. Legal philosophical inquiry is, on their view, descriptive and conceptual by contrast with the politically prescriptive inquiry of constitutional theory.

My chapter argues that joinder is both possible and desirable. It is possible because legal positivists do have commitments in constitutional theory that they share with political constitutionalists. Most significantly, they are committed both to an understanding of the constitution according to which the constitution is a legal one that consists exclusively of formal authorization rules—rules that delegate authority to various institutional actors—and to an understanding of the authority of the constitution that is ambivalent about whether the source of the authority is within or without the legal order. Joinder is desirable because with these commitments in view, we can see why otherwise arid seeming questions in legal philosophy matter to fundamental questions about constitutionality, and why central

questions of constitutional theory are important to a more general account of the authority of law.

I shall also argue that once we see that every legal order has a legal constitution, it is difficult to confine our understanding of the constitution of legal order to formal authorization rules or to locate authority outside of the legal order. For such rules imply substantive principles and the combination of such rules with substantive principles locates authority—in the sense of *de jure* or legitimate authority—within legal order. However, my main object is to establish the kind of joinder in which this kind of argument can be properly contested. For with that joinder, we come to see much of philosophy of law as a kind of *Staatsrechtslehre*, the theoretical tradition of public law in which Kelsen worked.⁴

As that hard-to-translate title indicates, the tradition approaches the question of constitutionality through a combination of philosophical and constitutional theory, since it is a question about the correct theory of public legal right, put differently, about the legitimacy of the legal state.⁵ In the next section, I sketch the assumptions I adopt in order to get the argument started that every legal order has a legal constitution. The following sections show how these assumptions frame a space in which one can see the joinder between philosophy of law and constitutional theory because within that space legal positivism and political constitutionalism merge into a theory of the legal state and its legitimacy. Since this merger happens only within the space, the assumptions might seem to have a kind of question-begging quality to them.

But my claim is not that a legal order that failed to instantiate one or more of the assumptions would fail to be a legal order, only that all the positions in the debate accept that all of the assumptions can be instantiated without this affecting their position. But it follows from that acceptance (or so I shall argue) that the answer to the question of

constitutionality is the one offered by the legal constitutionalists—that the constitution is legal and contains substantive principles of political morality that make up the legitimating basis of legal order.

I.

My first assumption has already been stated. All legal orders have a constitution and thus share something fundamental, however much their actual constitutions may differ. At this point, I want to draw out an implication of this assumption. Even if a legal order has no written or positive constitution, it will have an unwritten constitution, which is why I used ‘actual’ rather than ‘positive’ to describe the constitutional rules of a particular legal order.

The second assumption is that a legal order consists of the institutions associated with the doctrine of the separation of powers—the legislature, the executive, and the judiciary—and that there is some degree of separation between them. The legislature enacts statutes, the statutes delegate authority to the executive to implement the statutes, and judges have the main role in interpreting the law, including the statute law that delegates authority to the executive.

The third assumption is that otherwise important differences between kinds of legal order do not affect the question of constitutionality, for example, whether the legal order is federal or unitary, whether it is presidential or parliamentary, and so on. Indeed, included in this assumption is that it does not matter to answering the question whether the legal order is one in which there is parliamentary supremacy, so that the parliament can make or unmake any law it likes, or whether the order has an entrenched bill of rights and authorizes judges to invalidate legislation that they regard as violating one or more of the rights. I single out this last issue—whether a legal order is a ‘parliamentary legal order’ or a ‘bill of rights

legal order’—because while my assumption is that these features do not affect the question of constitutionality, nevertheless these two models of legal order do frame much of the debate about the question, as is illustrated in the next section of this chapter.

Notice that one can distinguish between a parliamentary legal order and a bill of rights legal order without building into one’s description of the latter that judges are authorized to invalidate legislation that does not comply with the rights. As contemporary political constitutionalists envisage, an order can entrench rights or enact rights commitments in an ordinary statute without giving to judges the authority to invalidate a law that seems to violate the rights.⁶ Indeed, it is precisely this kind of development that gives rise to the idea of strong judicial review. For that term is not supposed to contrast mainly with judicial review of administrative action in a parliamentary legal order. Rather, it contrasts mainly with judicial review of the kind judges perform when under section 3 of the UK Human Rights Act (1998) they read primary legislation ‘in a way which is compatible with Convention rights’ and when under section 4 they issue a declaration of incompatibility when a rights-consistent interpretation seems not possible. Given that Parliament can enact a statute to override a section 3 interpretation and that the validity of a statute is not affected by a section 4 declaration of incompatibility, political constitutionalists suppose that Parliament retains the last word in this kind of legal order and thus its supremacy, which is why they find the constitutional setup unobjectionable, even desirable, given that they also suppose that a society should uphold individual rights. But my second assumption is that in a bill of rights legal order, judges do have the authority to invalidate statutes.

My last assumption is that in all of the legal orders in which we pose the question of constitutionality, judges have the authority to review state action even if their review authority is of the weakest form possible—the authority to pronounce on whether public

officials have acted within the limits of their statutory mandates, which in the parliamentary legal order of the United Kingdom is traditionally the only public law review authority that judges are thought to have. Notice that this assumption is controversial to the extent that it suggests that the kind of weak judicial review that is instantiated in the field of law that goes under the name of administrative law is a kind of constitutional review. For the suggestion undermines the distinction between constitutional law and administrative law within public law and, if it does have this effect, it also undermines the political constitutionalist distinction between strong and weak judicial review.

I shall indeed argue that the assumption does have these implications and that they are salutary. But for the moment I want just to emphasize that in the debates that are the subject of this chapter, this assumption—like the others—is not controversial in that no-one involved in the debates would think that the assumption that judges have such a review power affects in any way their central claims. According to both legal positivists and political constitutionalists, it is a truism that in any legal system with a rudimentary separation of powers, judges will have the authority to ensure that officials who wield delegated powers stay within their legislative mandate and that such authority is necessary if the rule of law is to be maintained.⁷

II.

With the bill of rights legal order and the parliamentary legal order in place as our two basic models of a legal order, we can ask what they share by way of a constitution. We have already encountered one problem that gets in the way of answering the question of constitutionality, whether the constitution is in or outside the legal order, that is, whether it is a political or a legal constitution.

Another problem, as already indicated, is that there seem to be two rival versions of the basis of constitutionality, of its fundamentality. Is it a set of *formal authorization rules* that authorize legislators, judges and other legal officials to make, interpret and implement the law or is it a set of *substantive principles* that materially limit what certain officials are permitted to do, for example, by entrenching individual rights against the state as in a bill of rights legal order? The answer ‘both authorization rules and substantive principles’ is vulnerable to the following challenge. In a parliamentary legal order, there are authorization rules—the formal or procedural rules of ‘manner and form’ that the parliament has to follow in order to make law. But there might be no substantive principles, at least none that limit the parliament’s authority to make a law with any content. So the answer to the question of constitutionality would seem to be ‘necessarily authorization rules and contingently, in addition, substantive principles’. This answer will seem intuitively plausible when we consider some obvious examples of well-functioning legal orders such as the US bill of rights order which has a written constitution that entrenches right and that requires (or at least from a long time has been asserted to require) judges to invalidate statutes that, in their view, violate those rights, and the UK order in which there is parliamentary supremacy.

With that answer, legal positivism seems to emerge victorious in its argument with thinkers in the natural law tradition who argue that there is a necessary connection between law and morality. More to the point of this chapter, the answer establishes the lack of joinder between philosophy of law and constitutional theory mentioned in the last section. Recall Austin’s famous line: ‘The existence of law is one thing; its merit or demerit another’. Austin follows that claim with: ‘Whether it be or not is one enquiry; whether it be or not conformable to an assumed standard is a different enquiry’.⁸ These two lines continue to shape legal positivism’s view of legal philosophy since the distinction between philosophy of

law and constitutional theory tracks the distinction between the ‘is’ and the ‘ought’ of law, the distinction stated in Hart’s ‘Separation Thesis’ that there is no necessary connection between law and morality.⁹

However, for reasons that will become clear in a moment, I shall refer to the distinction as Hart referred to it in 1958 in his first major statement of legal positivism as the ‘utilitarian distinction’¹⁰ in recognition that Bentham and Austin who had proposed it were not only legal positivists, but also the founders of utilitarianism: a political philosophy about the common good and the design of political and legal order. Notice that to make the distinction is not to declare the second kind of inquiry to be less worth doing than the inquiry undertaken by philosophy of law. It is only to say that it falls within the domain of another kind of inquiry—political theory—of which constitutional theory is a branch.

But at least three things should make us hesitate before accepting legal positivism’s apparent victory. First, political constitutionalists usually adopt a positivistic understanding of law as determined as a matter of social fact. That is, they regard as highly suspect the legal constitutionalist suggestion that judges should interpret statutes in light of their understanding of the substantive principles of their legal order. Rather, judges should adopt interpretative approaches to law that search for facts about legislative intent; and there are well-known examples of judges who profess allegiance to such approaches.¹¹

Second, and as Hart rather casually acknowledged in referring to the ‘utilitarian distinction’ between law and morality, Bentham and Austin deployed that distinction in the service of a conception of law that models legal order in such a way as to make law an effective instrument for the top-down transmission of the political judgments of utilitarian elites to legal subjects. Bentham, as we know, wished to avoid as much as possible giving judges the opportunity to impose their views on the content of legislation, whereas Austin

differed mainly in that he worried that legislators are beholden to the uneducated public,¹² so he thought it desirable to give a larger role to the judicial elite than Bentham.

In other words, for Hart's positivist predecessors while the answer to the question of what the law is on a matter is not answerable to a political standard, they designed a conception of law and of legal order to make this conception so answerable. This is the standard set by utilitarianism that requires, as in political constitutionalism, that legal order should be designed a particular way and that questions about the law of that legal order must be resolvable to the extent possible without judges having to rely on debate about the merits of that content; only interpretative methods that rely exclusively on social facts about the law are legitimate.

Third, Austin regards constitutional law not as law properly so called but as 'positive morality'—as a set of moral conventions that stand outside of the legal order and that cannot affect the validity of law.¹³ But that is because, with Bentham, Austin regards as illegitimate judicial reliance on moral principles as criteria for the validity of statutes, though unlike Bentham he wants to grant judges a large interstitial law-making role.¹⁴

Bentham and Austin are then the original political constitutionalists, at least in the English tradition of legal thought. They differ from their descendants in Waldron and Bellamy only in that the descendants are not hostile to bills of rights, even entrenched bills of rights, as long as the legislature is recognized as the final interpreter of the rights. It might even be that if one sets contemporary positivist or 'Hartian' legal philosophy in the tradition of positivist thinking about law that stretches from Bentham to Waldron, its mode of doing legal philosophy looks rather aberrant since positivist legal philosophy before Hart and in the hands of contemporary political constitutionalists is a kind of *Staatsrechtslehre*. Indeed, as we

will see below, the rule of recognition might best be understood as an unhelpful placeholder for the normative commitments of this political constitutionalist tradition.

Moreover, figures in the common law tradition have argued for centuries that the authority of a supreme lawmaker in a parliamentary legal order to legislate is controlled by substantive principles that judges discern in interpreting the legal traditions of their political community. In their view, such principles are more fundamental in the constitution of legal order than authorization rules, so if we are looking for the basis of constitutionality, we should look to such principles. This argument has been revived in our time in the work of Allan and Dworkin as it is entailed by their and the common law tradition's *version* of the argument that the 'is' and the 'ought' of law cannot be separated in answering the question what law is, whether at the most abstract level where the question is the correct conception of law, or at the most concrete level, where in issue is the answer to a question about what the law is on a matter.

Somewhere in between these two levels, then, is the level at which the question of constitutionality is to be answered. And I emphasized 'version' because for political constitutionalists, their answer to the question at the most abstract level might appear to have the result that there is no intermediate level of legal constitutionalism. In their view, the constitution is a political one located outside of the legal order and the task of law is to transmit to those subject to law the results reached by the legislature, the primary institution of the political constitution.

Notice that while we know that political constitutionalists think that it is a political mistake to establish a bill of rights legal order, it is not clear whether they also think that even in such an order the constitution is ultimately a political and mistaken one, or whether the mistake resides in establishing a legal constitution. Austin, as Hart noted, held the

former view whereas Bentham held the latter.¹⁵ But, as we shall now see, the same kind of problem bedevils Hart's attempt to understand the fundamental or constitutional basis of legal order, that is, to answer the question of constitutionality.

Moreover, as I shall also show, although there is some ambiguity in their position, both political constitutionalists and legal positivists seem committed to the claim that the legal constitution is ultimately a formal one—one that consists only of formal authorization rules—thus establishing the promised joinder. Put differently, both political constitutionalists and legal positivists must suppose that there are rules that determine what counts as valid legislation, which goes to show that the idea of a thin legal constitution is implicit in their position. The rule of recognition and the basic norm are attempts to express that kind of normative constitutional commitment in an apparently neutral fashion.

III.

In his classic essay in the 1958 *Harvard Law Review*, Hart rejected the command theory of law that he took to be advanced by his positivist predecessors, Bentham and Austin. According to that theory, the sovereign is legally unlimited and his law consists of commands backed by sanctions. Hart objected that 'nothing which legislators do makes law unless they comply with fundamental rules specifying the essential law-making procedures'. 'They lie', he said, 'at the root of a legal system' and 'what was most missing in the utilitarian scheme is an analysis of what it is for a social group and its officials to accept such rules'. Hart thus suggested that this notion of fundamental rule plus acceptance, not that of a command as Austin claimed, is the "key to the science of jurisprudence", or at least one of the keys'.¹⁶

In *The Concept of Law*, Hart elaborated his account of fundamental law by describing a ‘primitive’ society in which there are only ‘primary’ rules, rules that impose duties on the individuals in the society, and in which problems arise in regard to: the ‘uncertainty’ about what social norms counts as such rules; the ‘static’ nature of these rules since there is no clear way of changing them; and ‘inefficiency’ because of the lack of recognized means of determining rule violations and of rule enforcement.¹⁷ In his view,

The simplest form of remedy for the uncertainty of the regime of primary rules is the introduction of what we shall call a ‘rule of recognition’. This will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the local pressure it exerts.¹⁸

The static quality of primary rules is remedied by the introduction of ‘rules of change’ and the problem of inefficiency by the introduction of ‘rules of adjudication’.¹⁹

Now from the 1958 essay it might seem that the fundamental law of a legal order is the rules of change and that their existence shows that even in a parliamentary legal order there are legal limits on what the legislature may do, thus refuting the command theory’s claim that the sovereign is legally unlimited. But in *The Concept of Law* Hart made it clear that it is the rule of recognition that is fundamental since it specifies the law-making procedures.

The rule of recognition is more fundamental than the other ‘secondary’ rules—the rules of change and adjudication—because the other secondary rules are not ultimate in the way that the rule of recognition is. Indeed, that a rule of change is a rule of the system will depend on whether it is certified as such by the rule of recognition. And the ultimate nature of the rule

of recognition is indicated by the fact that its existence is not certified by any other rule. It exists as a matter of fact in the practice of the officials of the system and they apply it because they take the ‘internal point of view’ towards it—they regard it as providing ‘a public, common standard of correct judicial decision’.²⁰ Moreover, the rule does not so much limit what sovereign law-making bodies may do as constitute them as law-making bodies, just as the rules of contract law do not so much limit what the contracting parties may do, but make it possible for them ‘to create structures of rights and duties for the conduct of life within the coercive framework of the law’.²¹

The idea of a rule of recognition seems to enable legal positivism to account for the existence of both parliamentary and bills of rights legal orders in a way that was not open to Bentham and Austin, given their shared political opposition to such orders as well as Austin’s legal theoretical opposition—his claim that even in a bill of rights legal order, the constitution amounts to no more than positive morality and that its sanctions are moral, not legal. The rule seems to supply the answer to the question of constitutionality that a constitution contains ‘necessarily authorization rules and contingently, in addition, substantive principles’. The make-up of any actual constitution is thus a matter of description and legal positivism itself takes no stance on whether it is advisable to incorporate substantive principles into a constitution.

But the idea of a rule of recognition turns out to be quite mysterious. While Hart often spoke as if the rule of recognition of a legal order is its constitution, there are also indications in his work and in the work of his followers that the rule of recognition is more basic than the constitution. Consider for example the parliamentary legal order of the United Kingdom, described as follows on the website of the UK Parliament:²²

Parliamentary sovereignty is a principle of the UK constitution. It makes Parliament the supreme legal authority in the UK, which can create or end any law. Generally, the courts cannot overrule its legislation and no Parliament can pass laws that future Parliaments cannot change. Parliamentary sovereignty is the most important part of the UK constitution.

On this description, the rules of change for statutes—that is, formal authorization rules—are the fundamental part of the UK constitution. As a result, in an inquiry into the validity of a statute, all that a court may have regard to is whether there has been compliance with those rules. But there must be something that makes it the case that judicial inquiries into validity are so confined, and if it is the rule of recognition that makes it the case, is the rule really the constitution or is it something that lies beyond the constitution?

Hart said that this kind of question ‘extracts from some a cry of despair: how can we show that the fundamental provisions of a constitution which are surely law are really law?’²³ Others, he said, ‘reply with the insistence that at the base of legal systems, there is something which is “not law”, which is “pre-legal”, “meta-legal” or is just “political fact”’. His own solution:

The case for calling the rule of recognition ‘law’ is that the rule providing criteria for the identification of other rules of the system may well be thought a defining feature of legal system, and so itself worth calling ‘law’; the case for calling it ‘fact’ is that to assert that such a rule exists is indeed to make an external statement of an actual fact concerning the manner in which the rules of an ‘efficacious’ system are identified.

Both these aspects claim attention but we cannot do justice to them both by choosing one of the labels 'law' or 'fact'. Instead, we need to remember that the ultimate rule of recognition may be regarded from two points of view: one is expressed in the external statement of fact that the rule exists in the actual practice of the system: the other is expressed in the internal statements of validity made by those who use it in identifying the law.²⁴

Hart also acknowledged that the consensus on which the internal point of view seems to depend could break down because there could be disagreement about the 'ultimate criteria to be used in identifying a law'.²⁵ In this regard, he went on to remark that when the courts have to settle such disagreements—'previously unenvisaged questions concerning the most fundamental constitutional rules'—'they *get* their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success.'²⁶

Hart's students do little, in my view, to dispel the despair. John Gardner, for example, points out that Hart was uncertain whether to classify the rules of recognition as themselves legal. On Gardner's view, rules of recognition do not 'quite belong to' their legal systems. They 'lie beyond the constitution' since one needs rules of recognition in order to identify rules as constitutional rules. 'Even the constitution needs to be constituted somehow'. 'Is it constituted by law?' Kelsen, Gardner says, thought so, but then faced an infinite regress, which the fiction of the validity of the first historical constitution was supposed to end. In contrast, Hart avoided this problem, Gardner claims, by presenting the ultimate rules of recognition as 'borderline legal rules'. They provide criteria, but 'by their nature' do not meet those criteria. They are, he says, to be found in the 'custom of law

applying officials' but need not identify that custom as a source of law. 'In that sense they are above the law rather than part of it.' We can thus agree that there are 'ultimate rules of recognition that are, so to speak, above the constitution' and that 'there is no *law* that is above the constitution. Constitutional law is as high as the law goes'.²⁷

Joseph Raz rejects the thought that the constitution of a country is its rule of recognition because while most constitutions can always be changed 'in accordance with procedures they themselves provide', the rule of recognition 'can change only as the practice that it is changes'. It 'cannot give way to statutory law'. It is unlike the rest of the law. 'It is the practice—that is, the fact—that the courts and other legal institutions recognize the validity, the legitimacy, of the law, and that they are willing to follow it and apply it to others'. 'It is the point . . . at which—metaphorically speaking—the law ends and morality begins.' 'If the rule of recognition exists . . . then the law exists. But only if . . . [the courts] are right in so conducting themselves is the law actually legitimate and binding, morally speaking'.²⁸

Finally, Waldron has argued that if we are looking for the ultimate rules of a legal order, rules of change are more worthy of our attention than the rule of recognition.²⁹ Waldron suggests that the validity of a rule depends not on any rule of recognition but on whether the rule was made in accordance with the rules of change. He also suggests that in a parliamentary legal order the rule of recognition gets 'its distinctive content from the rule of change' that empowers the parliament to legislate and that 'it is not clear . . . that the rule of recognition actually does anything with that content that the rule of change has not already done'.³⁰ Further, contrary to the arguments made by most legal positivists, Waldron alleges that we do not need the rule of recognition to tell us that there is a duty to observe the rules of change, since the power that a rule of change confers on, say, the legislature to enact a

statute implies that the duties of other actors in the system will be changed when the power is exercised. In Waldron's view, the claim that every legal order contains a rule of recognition might be driven by a perceived need for closure—that is, for a rule that would make it the case that a legal order produced a kind of certainty that one might think desirable on normative or conceptual grounds. But there is, he says, 'some effrontery in the positivists' insistence that every legal system must contain a rule cast in terms that represents the positivists' own jurisprudential position!'³¹

Waldron could have called in aid Hart's own observation that in parliamentary legal orders we do not need to look beyond the constitution to find a rule that puts judges under a duty to apply the constitution: 'It seems a needless reduplication to suggest that there is a further rule to the effect that the constitution (or those "who laid it down") are to be obeyed'.³² Gardner, however, thinks that the observation is mistaken in regard to written constitutions—constitutions which are "laid down"—though it is true of unwritten constitutions. In the former, there is no 'needless reduplication' but 'a separate rule of recognition without which there is no written constitution to contain those rules'.³³

But on this view the rule of recognition when there is a written constitution turns out to be nothing more than Kelsen's basic norm, as Gardner seems to acknowledge.³⁴ And Waldron himself reverts to Kelsen, though he suggests that we might try to understand the basic norm as a normative practice. In line with his general argument Waldron adds that the norm is better understood as a dynamic process than a static recognition, since the basic norm empowers those who laid down the first constitution to make that change.³⁵

One might well ask whether Waldron's remark about the effrontery of the positivist position does not come back to bite him, given his argument. Suppose that the fundamental or constitutional rules of a legal order are rules of change of the sort we associate with the

rules of manner and form of the UK parliamentary process. The main constitutional task of judges when confronted with a statute is to recognize it as valid when it complies with such rules of change. If the constitution contains only such rules of change, its content is purely formal. It contains only those rules that are required to enable a supreme legislature to maintain its supremacy, which is exactly what political constitutionalists from Bentham to Waldron have thought appropriate.

Perhaps then the legal positivist answer to the question of constitutionality is that the constitution of every legal order is fundamentally a matter of formal authorization rules or rules of change. Precisely this thought seemed to animate Austin's reflections on the US constitution the essence of which, he thought, lies in its amendment formula.³⁶ Austin held the view that Gardner describes unkindly: that in the USA 'the Presidency, Congress and the Supreme Court are . . . mere administrative bodies regulated by a kind of jumped up administrative law'.³⁷

Political constitutionalists like Waldron and Bellamy, and perhaps Bentham and Austin too, turn out then not to be arguing against legal constitutionalism, but for a particular kind of legal constitution, a formal one that is not only limited to rules of the manner and form sort, but also to rules that do not constrain the legislature's authority to effect any legal change by ordinary statute. They are then formal legal constitutionalists, though for substantive reasons to do with this kind of constitutionalism's fit with the political theory of utilitarianism or with a theory of democratic legitimacy and competence that requires that the legislature have the last word when it comes to settling rights disagreements.³⁸ And because this fit is with some external source of legitimacy, they can understand all authority within the legal order as delegated authority, with 'the people' being the ultimate author.

It is significant that Kelsen also regarded constitutional law as jumped up administrative law.³⁹ On his view, the parliament in any legal order creates law at a very high level but still at a level below the constitution. So the parliament, just like an administrative body, exercises authority delegated by the level above. Indeed, Kelsen appears to think that even the constitutional level is not ultimate since states have their authority delegated to them by international law.⁴⁰ Constitutional law is then the ‘ultra vires’ principle of administrative law writ large, the principle that a body that wields delegated power cannot go beyond the terms of its mandate.⁴¹

On this view, in every legal order there is not only a constitution but also a legal constitution, since every constitution will contain more or less complex rules of change. The choice as to such rules is, Kelsen supposes, political.⁴² The question of how political power should be distributed in order to bring into being the will of the community is a political not a legal-theoretical question. But whatever the answer to that question, it will be expressed in the formal authorization rules of a legal constitution.

When the actual legal constitution contains in addition what Kelsen calls ‘material norms’, for example a right to freedom of expression, and gives to judges the authority to determine whether norms have been violated by the legislature, the question of whether the norm has been violated is still, according to him, formal rather than substantive or material. For in such an order, whether or not a statute that violates the norm is unconstitutional depends ultimately on whether it was enacted in accordance with the amendment formula.⁴³ However, Kelsen warns sternly against the introduction of terms such as ‘freedom’ into the constitution unless these terms can be given a determinate content. If they cannot, a ‘fullness of power’ is conceded to judges which is ‘altogether intolerable’ as it involves a ‘shift of power from parliament to an extra-parliamentary institution’ and which might involve the

judges becoming the ‘exponent of political forces completely different from those that express themselves in parliament’.⁴⁴

Notice that most features of this kind of position might seem to characterize Raz’s account of the relation of the rule of recognition to the constitution. Recall that he says that most constitutions can be changed ‘in accordance with procedures they themselves provide’, hence, the rule of recognition cannot be the constitution. Thus he seems to envisage that the legal constitution is in most legal systems fundamentally a matter of formal rules of change. Why then is the rule of recognition necessary? Because, or so the answer seems to be, there must exist something that makes these rules authoritative for officials. But, as we have seen, it is not clear that the rule of recognition can do that job. For Raz, the source of judicial duty is morality, and so it is located beyond not only the legal order and its constitution, but even beyond the rule of recognition. Indeed, on Raz’s account of authority, actual legitimacy or authority depends on whether the law is the effective instrument of moral judgments that legal subjects should follow because this will serve their interests better than if they decided for themselves. Hence, law lives up to its ideal as law when it conforms to fundamental formal norms that conduce to its service as an effective instrument of morality.⁴⁵ But then the authority of the constitution finds a moral resting point outside of law in the argument that legitimate authority inheres in the authors of the law in fact doing a better job of moral reasoning than its subjects would, if left to their own devices.

As we have seen, the political constitutionalists also find a resting point outside of law in the politics of sovereignty, though they insist that the sovereign is a supreme parliament.⁴⁶ But they have to manage the fact that the legislature is not a purely political construct—it is a legally constituted institution. They do so, as we have seen, by claiming either that it is not or that it should not be subject to substantive constitutional limits, that is,

through the claim that the legal constitution is or should be limited to a particular kind of formal authorization rule. Hence for them authority becomes located both inside and outside of legal order. It is located inside in the formal rules of change of a particular kind legal constitution, and it is located outside in what legitimates restricting the rules of change so as to ensure the supremacy of a democratically elected parliament.

Similarly, both Hart and Kelsen think that behind the actual constitution is something more fundamental than positive law, something that gives rise to what Hart in a perhaps unguarded moment called ‘legal legitimacy’.⁴⁷ It is what makes law into an authoritative order and not ‘the gunman situation writ large’.⁴⁸ As they understand things, there has to be a source of duty and that source cannot be the constitution, because there has to be something that validates that constitution—otherwise we encounter the logical problem of an infinite regress.

However, that problem arises only for those who make what I shall term ‘the assumption of linearity’, after Mark Walters’ perspicuous distinction in this volume between ‘linear’ and ‘circular’ theories of law.⁴⁹ Linear theories assume ‘that the authority of legal norms can be traced back along a line of increasingly higher norms until an originating source is located. Law from this perspective is held up by a string, and someone or something must hold the end of that string’.⁵⁰

Political constitutionalists differ from legal positivist philosophers when it comes to such questions as where the string ends, within or without the legal order. The best explanation for this difference is as follows. There is only one position in play but it makes its argument within two registers and it is the movement between these registers that creates ambiguity and mystery.

Legal positivism in its constitutional theory register is ambivalent about whether the constitution is political or legal, but insistent that the constitution ought to contain only formal authorization rules of the kind one finds in a parliamentary legal order. It also insists that authority, in the sense of *de jure* or legitimate authority resides outside of legal order, though when the constitution is limited to formal authorization rules it will be the case that the laws enacted by parliament are by definition legitimate.

In contrast, in its philosophy of law register, legal positivism holds that the constitution is legal but is ambivalent about whether its authority is located in or outside of legal order. That ambivalence leads to another, about whether whatever gives the constitution authority (an ultimate rule or a basic norm) is itself in or outside the legal order. Moreover, in this register legal positivism still tends to cling to the claim that the constitution either should be or is in fact limited to formal authorization rules, though in its attempts to rise above the constitutional theory fray, it is usually compelled to concede that the constitution can contingently contain substantive principles.

The way forward for legal positivism is to merge the two registers by arguing that the constitution is legal, that it should be confined to formal authorization rules of the kind one finds in a parliamentary legal order, and that once so confined, the law made by the parliament enjoys legitimate authority. ‘The people’ who delegate authority from the outside can then be identified with the democratically elected legislature, and *de facto* authority becomes *de jure* authority. In other words, the way forward for legal positivism is to reconceive itself as a participant in the project of *Staatsrechtslehre*, as involved in the debate about the correct theory of public legal right.

But, as I shall now suggest, legal positivism reconceived in this way encounters a different set of problems. Once the concession is made that the constitution is legal and that

it is the locus of legitimate authority, it is difficult both to stick with a linear theory and to confine the constitution to formal authorization rules. In terms of Walters's distinction, the justification of authority becomes circular and answers the question of constitutionality with 'both authorization rules and substantive principles'. Moreover, with circularity the accusation of effrontery is stripped of its force. The values that legitimate legal order and that figure fundamentally in the theory of that order are to be found in a process of justification that circulates within the legal order.

IV.

Consider the claim that the constitution has to be more than 'jumped up administrative law'. That claim is really a conclusion that depends on two premises: the major premise that the constitution can't be understood in terms of delegated power; the minor premise that there is no more to administrative law than delegated power. The first premise is correct but the second is wrong. Administrative law is constitutional law writ small, for it is not just a matter of formal authorizations, but also of values and principles that govern administrative action. And it is only if one holds a linear theory of authority that one is driven to suppose that the values and principles have to be attributed to the tacit will of some lawmaker.⁵¹ It is for this reason that it is significant that, as I claimed earlier, legal positivists and political constitutionalists are willing to assume that in any legal system with a rudimentary separation of powers, judges will have the authority to ensure that officials who wield delegated powers stay within their legislative mandate and that such authority is necessary if the rule of law is to be maintained.

My argument starts with what will seem to many legal positivists to be two 'parochial' examples which cannot form the basis for a claim that sounds in philosophy of

law, both taken from the UK parliamentary legal order.⁵² The first is the great dissent in World War I by Lord Shaw in *R v. Halliday*, in which he reasoned that a blanket legislative authorization to the executive to make regulations to deal with a situation of wartime emergency should be read by judges not to include the authority to make a regulation governing detention in the absence of explicit authority in the authorizing legislation.⁵³ On Lord Shaw's view, the Habeas Corpus Acts and other constitutional documents, for example, Magna Carta, give expression to principles that are part of the constitution. They 'in one sense confer', he said, 'no rights upon the subject, but they provide whereby his fundamental rights shall be vindicated, his freedom from arrest except on justifiable legal process shall be secured, and arbitrary attack upon liberty and life shall be promptly and effectually foiled by law'. He also said that if Parliament had intended to make this colossal delegation of power it would have done so plainly and courageously and not under cover of words about regulations for safety and defence'. For judges to allow the right to be abridged is to 'revolutionize' the constitution, perhaps, more accurately to undertake a counter-revolution. It amounts to what he called a 'constructive repeal of habeas corpus', a repeal by the executive that is then ratified by judges.⁵⁴

Notice that in Kelsenian terms, this material or substantive norm is formally protected, because the legislature has to be utterly explicit about its intentions to override that norm in any statute. Moreover, on some definitions of strong judicial review, Lord Shaw would have exercised such review had he been able to persuade a majority of his fellow judges to join him. Waldron, for example, says such review exists not only when judges have the authority to decline to apply a statute but also when they have the authority 'to modify the effect of a statute to make its application conform with individual rights (in ways that the statute does not itself envisage'.⁵⁵ But that is arguably what judges do much of the time in

administrative law, dramatically in the *Anisminic* case in which the Judicial Committee of the House of Lords found a path to evading a provision in a statute that precluded judicial review, but less dramatically in many decisions on the validity of administrative action.⁵⁶ These are cases that political constitutionalists do not generally find problematic from the standpoint of democratic legitimacy because they take for granted that public officials must stay within their legislative mandate.⁵⁷

As Kelsen argued, however, if one accords to judges the authority to interpret statutes in order to guarantee the legality of executive action implementing those statutes, one should be likewise be committed to according to judges the authority to interpret the norms of the constitution that govern the legality of statutes. To think that a statute is the guarantee of its own legality is, according to Kelsen, a kind of nonsense,⁵⁸ a point well illustrated by my second example—*Jackson v Attorney General*.⁵⁹

That case was on the surface about formal rules of change. The judges had to decide whether the Hunting Act 2004, which criminalized certain kinds of hunting, was a lawful Act of Parliament. The House of Lords had refused to assent to the Act. Prior to the Parliament Act 1911 such a refusal was an effective veto but the 1911 Act made it possible for the House of Commons to override the upper House after two years. The Parliament Act of 1949 reduced the period to one year, but because the House of Lords opposed the bill, it had to be enacted in accordance with the requirements of the 1911 Act.

The appellants in *Jackson* argued that the 1911 Act could not lawfully be used to amend itself, that the 1949 Act was not, therefore, a validly enacted Act of Parliament, and that the Hunting Act, having been made under the amended procedure, was not an Act of Parliament. Their argument thus depended on the claim that legislation made under the 1911 Act was a species of delegated legislation which entailed that the validity of legislation made

under it could be questioned in a way that the validity of primary legislation may not and the House of Commons had acted *ultra vires* by enlarging the powers that had been conferred on it by the 1911 Act. The argument was thus designed to meet the counterclaim that when a statute is on its face valid, the courts may not look behind it at the process by which it was enacted in order to test its validity.⁶⁰

The government did not as a matter of fact make this counterclaim. Instead, it argued that as long as the House of Commons followed the procedure set out in the 1949 Act it could enact any statute whatsoever. Nevertheless, the judges did find it important to dismiss the counterclaim. Lord Bingham, for example, said that '[t]he appellants have raised a question of law which cannot, as such, be resolved by Parliament. But it would not be satisfactory, or consistent with the rule of law, if it could not be resolved at all. So it seems to me necessary that the courts should resolve it, and that to do so involves no breach of constitutional propriety.'⁶¹

Moreover, the judges agreed that Parliament as constituted under either of the Acts could not evade a prohibition in the 1911 Act against extending the life of Parliament beyond five years. Lord Bingham and two others supposed that this was the only restriction on Parliament's authority,⁶² while four reserved judgment on this matter.⁶³ Lord Steyn and Lady Hale, in contrast, expressed their disquiet at the thought that the House of Commons as long as it waited the requisite period could do anything it liked, enacting 'undemocratic and oppressive legislation', or abolishing the upper House or judicial review in cases where governmental action affects the rights of individuals.⁶⁴ As Allan has said, 'Rather than treat these remarks as a threat to overthrow the established legal order, with which the courts have become disenchanted, we should interpret them—much more plausibly—as a reminder

of qualifications already latent within the supremacy doctrine, awaiting elaboration if and when circumstances dictate.’⁶⁵

In other words, Kelsen’s argument is correct, but it cannot find a resting place in formal authorization rules, for it is only at the most superficial level that we can regard constitutional disputes about formal rules of change as formal in nature. They are deeply substantive disputes about the nature of democracy and the role of law and the rule of law in it, even when judges do their best to treat the disputes as formal.⁶⁶ Further, when the substance rises to the surface, we find that there is no need for judges to reach outside of the law for constitutional authority. They do not engage in linear reasoning that can find an ultimate stopping point that responds to the problem of infinite regress.

Rather, their reasoning becomes circular, because (as Walters explains) circular theories of authority

do not need to address the problem of infinite regress. Law from this perspective is embedded within a network of interlocking strands of normative value that bend back upon themselves never reaching an end. The relevant image on this account is not a string but a web of strings shaped into a globe or sphere.⁶⁷

Such location leads to circularity because the authority has to be sought within the legal order, which means that appeals have to be made to the resources of normative value in the public record of that order. And it leads to seeing the authority of law as legitimate because in making the appeals and in organizing them into a sustained argument about what the requirements are of the actual constitution, one is necessarily involved in a process of justification. As Neil MacCormick put the point:

Understanding a constitution is not understanding any single rule internal to it as fundamental; it is understanding how the rules interact and cross-refer, and how they make sense in the light of the principles of political association that they are properly understood to express. If there is a fundamental obligation here, it is an obligation toward the constitution as a whole. It is the obligation to respect a constitution's integrity as a constitution, an obligation that has significance both in moments of relative stasis and in more dynamic moments.⁶⁸

This statement picks up on Dworkin's claim that the central value of legal order is 'integrity', a value that requires legal actors to find a way of interpreting the law so that it can be understood as the expression of a unified political community.⁶⁹ The principles that have to be invoked in public law to make sense of the law in this way are the constitutional, legitimating principles of the order.⁷⁰

It is important to see that this idea is hardly new in philosophy of law. It goes back at least to Hobbes, who argued that the sovereign, however constituted, has to speak with one voice as the representative of the people who are subject to his laws. The sovereign's subjects have to understand themselves as owning his laws as if they each had made the laws themselves, and for that reason the laws have to be understandable as the product of a single person.⁷¹ Put differently, the constitution of the people as a unity—as a unified political community—depends on the sovereign's laws being understood as the product of one person. Moreover, to understand the laws in that way is to understand them as *de iure*, as enacted with right or legitimate.

Hobbes, of course, was concerned with the problem of infinite regress, though he saw the issue as a practical one of not subjecting the sovereign to the rule of any other sovereign.⁷² There has to be a stopping point within legal order for questions about what the law requires. Hobbes also argued that in the exit from the state of nature, sovereign authority comes about through the individuals in the state of nature agreeing to be bound by the one who will act in their name.⁷³ But it is important to see that for him the one who acts is an artificial person, constituted by the agreement of individuals who on entering that agreement find themselves reconstituted from a state of individuals who make up a multitude into a unified people.

The story of exit from the state of nature becomes a just so one, though not in a pejorative sense. It is the story one has to tell in order to make sense of the idea of the people who are the subjects of the law being at the same time its authors and in which authority is to be understood reflexively or as determined within legal order in the circular fashion just described. Put differently, it is the kind of story that one has to tell if one makes the regulative assumption that legal authority is a matter that is determined legally.

Hobbes's thought here echoes faintly in Hart in that he insists that there is only one rule of recognition, an insistence that is undermined only because he used the metaphor of a rule to capture what it is that gives unity to a legal order. For there is no one such rule that can do that kind of work, as Dworkin argued in two of his earliest critiques of legal positivism,⁷⁴ and as is acknowledged by Hart's students who try to save the idea by positing a multiplicity of rules.⁷⁵ It echoes more strongly in Kelsen in that the basic norm is a norm that has to be presupposed in order to make sense of the hypothesis of the unity of legal order and to explain why from the perspective of the legal official and subject, the order has to be understood as legitimate.⁷⁶ But it echoes most strongly of all in Dworkin and Allan.⁷⁷

There are, of course, major differences between Kelsen and Hart, on the one hand, and Dworkin and Allan, on the other. Kelsen and Hart regard judicial interpretation of the law as a kind of legislation, whereas Dworkin and Allan regard judges as under a duty to give the ‘one right answer’ that the best principled interpretation of the law can deliver.⁷⁸ But in retrospect debate about this issue seems to have been a tremendous waste of energy. The debate makes sense if with Bentham one argues that judicial interpretation should be marginalized to the extent possible in legal order because from the perspective of democratic utilitarianism such interpretation is an arbitrary intervention in the law-making process. But from Austin on, legal positivists and political constitutionalists have conceded to judges a legitimate role in deciding cases when it is controversial what the law requires. And as Hart’s take on the judicial virtues shows, discretion seems to vanish from the positivist vocabulary when it comes to describing what judges do in such cases.⁷⁹ Put differently, from the internal point of view of a legal official charged with interpreting the law, the answer has to be the judge’s good faith and best shot at showing both that the legal order speaks with one voice on the question and that the answer is based on principles that justify or legitimate it to those who are affected by it.⁸⁰

Examples such as *Halliday* and *Jackson* are thus parochial only in that they illustrate that the way in which judges in one jurisdiction dealt concretely with actual questions of constitutional law can help to answer the more abstract question of constitutionality. Put differently, that question will always be answered in the same way—by resort to both formal authorization rules and substantive principles—even though the content of the actual answers must differ according to time and place.⁸¹ In addition, one of the ways in which the examples are parochial is significant. They show that even in a parliamentary legal order there are, following Allan, constitutional and substantive ‘qualifications already latent within

the supremacy doctrine, awaiting elaboration if and when circumstances dictate.’ That entails that while the content of the actual answers will vary greatly, there is a limit to that variation because the ultimate addressee of the circular process of justification is the individual, who wants to understand both why the legal order speaks with one voice on the question and why its answer is based on principles that justify or legitimate it to him or her.

The answer to the question of constitutionality is thus part and parcel of satisfying what Bernard Williams called ‘the Basic Legitimation Demand’ that every legitimate state has to satisfy if it is to show that it wields authority rather than sheer coercive power over those subject to its rule. In order to meet that demand, Williams said, the state ‘has to be able to offer a justification of its power *to each subject*’.⁸²

Constitutional law, on this view, is no more than ‘jumped up administrative law’, as long as we understand that the implicit assumption behind this label is wrong. The assumption is that there is a qualitative difference between administrative law and constitutional law that philosophers of law have to explain because administrative law is a matter of delegated authority, or linear, whereas constitutional law is not. But this thought misperceives the quality of administrative law as did the proponents of the ‘ultra vires doctrine’, who argued some years ago in the United Kingdom that the grounds of judicial review of administrative action have to be sourced in a doctrine of actual legislative intent. As the critics of the ultra vires doctrine showed, administrative law is best understood as a project in which judges and other legal officials seek to work out the constitutional principles that discipline the decisions taken by those who act on behalf of the state.⁸³ And as Kelsen argued, there is a quantitative not a qualitative difference between this kind of review and review of statutes for their constitutionality,⁸⁴ a powerful argument as long as one grasps the quality of administrative law review. Indeed, with this qualification in place, one can go

further with Kelsen and reject Gardner's assertion that '[c]onstitutional law is as high as the law goes' because international law is higher still, and so has to be taken into account in understanding state authority.⁸⁵

On this view, every legal order has to have a constitution because it comes about through the complex interactions of institutions which have more or less differentiated roles to play in both producing and maintaining the order.⁸⁶ That constitution has to contain formal authorization rules that delineate the roles but it also has to contain substantive principles of two sorts. First, the formal authorization rules are themselves justified by substantive principles that will come into view when an institution is challenged on the basis that it has not performed its role. Second, the public law of the order will require interpretation and when the institution or institutions charged with interpreting it perform that role the answer they give has to present itself as the good faith and best shot answer described above.

Here too principles will come into view as a result of challenges to the way in which institutions are performing their roles. The point about challenge is important because the legal order orders relations between the individuals subject to it and legal subjects are entitled to get answers from the appropriate institution about the content of their legal rights and duties.⁸⁷ The answers have to make the good faith attempt at making sense of their subjection to law—of the claim that order exists to make it possible for them to interact under conditions of stability and security.

This rather sparse Hobbesian constraint permits a wide variety of different institutional arrangements for determining the legal will of the political community and of different content for what I called earlier the actual constitution. In a bill of rights legal order, the discussion of the content of the actual constitution will be framed but not

determined by the abstract and general statements of the commitments in the bill. In a parliamentary legal order, the discussion will be framed but not determined by the public statements of rights commitments over time, notably in a common law system by judicial pronouncements.

But in both cases, the content of the actual constitution is always a matter of both form and substance and, ultimately, a matter of argument and justification. In both cases, the legal constitutionalists recognize—as did Bernard Williams in his critique of utilitarianism—that value is partly constituted by our projects.⁸⁸ And when we regard ourselves as having united our wills with others to empower a sovereign, we find that we have done more than create a mechanism through which to exercise our unbounded will. We are also a collective self that is defined (as human persons are) by commitments and projects that have normative force in our deliberations. They are not reducible to ‘what we have reason to do all things considered’, whether this is established by utilitarian calculation or by one or other way of moral deliberation recommended by a moral realist position. But they are binding and they confer authority on our collective decisions all the same in a never-ending process of seeking to ensure the integrity of the public decisions to be found in our legal record. Coherence is a crucial aspect of ‘integrity’. But another aspect which Williams highlighted is remaining true to one’s long-held projects and substantive commitments.⁸⁹

That is, the necessary connection of legality to certain constitutional substantive commitments is really part of a larger disagreement about the sources of public normativity. The legal positivist tradition, broadly understood, finds the sources outside of law and so wants to insist on a methodology for establishing value that makes it possible for law to transmit its results as a linear theory of legal authority prescribes. That builds into the legal positivism a tendency to respond to the question of constitutionality with the answer ‘formal

authorization rules'. In contrast, the legal constitutionalists find the sources within the law and so try to make sense of the fundamental, substantive, public commitments of their order in the way a circular theory of authority requires, and as is suggested by Williams' point about projects, commitments, and integrity.

In this light, the debate about the question of constitutionality is reconceived as one to be approached within a *Staatsrechtslehre*, a combination of philosophical and constitutional theory, since it is a question about the correct theory of public legal right, about the legitimacy of the legal state. And in that same light a productive joiner is achieved between the merger of legal positivism and political constitutionalism, on the one hand,⁹⁰ and legal constitutionalism, on the other.

* Professor of Law and Philosophy, Toronto. I thank Hillary Nye for valuable research assistance, the participants in the Toronto conference and in a public law seminar in Cambridge for discussion, and Trevor Allan, Lars Vinx, and Mark Walters for written comments as well as an ongoing debate on its themes.

¹ H. L. A. Hart, 'The Foundations of a Legal System' in *The Concept of Law* 2nd edn (Oxford: Clarendon Press, 1994) ch 6; H. Kelsen, 'The Legal System and its Hierarchical Structure', in B. L. Paulson and S. L. Paulson (trans) *Introduction to the Problems of Legal Theory: A Translation from the First Edition of the Reine Rechtslehre*, (Oxford: Clarendon Press, 1992), ch V.

² For example, J. Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346; R. Bellamy, 'Political Constitutionalism and the Human Rights Act' (2011) 9 *International Journal of Constitutional Law* 86.

³ T. R. S. Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford University Press, 2013); R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Mass.: Harvard University Press, 1996).

⁴ 'Much of' because this kind of inquiry in philosophy of law does not of course seek to answer questions about the normative structure of particular fields of private law. It is inclined, however, to give public law priority over private law in understanding legal order, for reasons I sketch in D. Dyzenhaus, 'Liberty and Legal Form', in L. Austin and D. Klimchuk (eds) *The Rule of Law and Private Law* (Oxford: Oxford University Press, 2014), 92.

⁵ Indeed, to draw the distinction between *philosophy* of law and political or constitutional *theory* rather than between the former and political or constitutional philosophy is to beg the question along with contemporary legal positivists about the nature of legal philosophical inquiry, and I shall contest this distinction as well. There is often more than a hint of disparagement in the remarks of positivist legal philosophers about those they consider constitutional theorists, especially about Ronald Dworkin. Consider, for example, J. Gardner, 'The Legality of Law' (2004) 17 *Ratio Juris* 168, at 173, where he calls Dworkin a 'theoretically ambitious lawyer' because Dworkin is not engaged in the philosophical inquiry of searching for the necessary and sufficient conditions of . . . Gardner hastens to add that he does not mean by this claim to 'underestimate the philosophical importance of . . . [Dworkin's] work', but it is unclear what else he had in mind, as might be demonstrated by the fact that he decided to change the comment somewhat when the essay was republished in his collection, J. Gardner, *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012), where he now says at 184: 'Dworkin was and remains more of a lawyer than Hart', driven as his arguments are by 'parochial counterexample'.

⁶ For example, Waldron, above n 2; Bellamy, above n 2.

⁷ See J. Raz, ‘The Rule of Law and its Virtue’, in J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1983), 210, at 217, his sixth principle; and Waldron, above n 2, 1354.

⁸ J. Austin, *Province of Jurisprudence Determined* 2nd edn (London: John Murray, 1861), vol 1, at 233.

⁹ H. L. A. Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593.

¹⁰ For example, *ibid* 612.

¹¹ See, for example, J. Waldron, ‘Can there be a Democratic Jurisprudence?’ (2009) 58 *Emory Law Journal* 675, 682ff; and Bellamy, above n 2, 91. In regard to judges, consider ‘textualists’ and ‘originalists’ in the USA, such as Justices Scalia and Thomas, or in the United Kingdom, Lord Sumption. For the last, see ‘The Limits of Law’, available at <https://www.supremecourt.uk/docs/speech-131120.pdf>. In J. Gardner, ‘Legal Positivism: 51/2 Myths’, in Gardner, above n 5, 19, at 24, Gardner accuses those who dwell on the way that central features of legal positivism play a role in practice—his examples are Dworkin and Gerald Postema—of creating a ‘fundamentally anti-philosophical climate’.

¹² See, for example, Austin, above n 8, vol 1, 65–66; and Austin, above n 8, vol 2, 348–355.

¹³ *Ibid* vol 1, 230.

¹⁴ *Ibid* vol 2, 348–355.

¹⁵ Hart, above n 9, 599.

¹⁶ *Ibid* 603.

¹⁷ Hart, above n 1, 92–93.

¹⁸ Ibid 94.

¹⁹ Ibid 95–97.

²⁰ Ibid 116.

²¹ Ibid 27–29.

²² Available at <http://www.parliament.uk/about/how/sovereignty>.

²³ Hart, above n 1, 111.

²⁴ Ibid 111–112.

²⁵ Ibid 122.

²⁶ Ibid 153 (his emphasis).

²⁷ J. Gardner, ‘Can There be a Written Constitution?’, in Gardner, above n 5, 89, at 107 (his emphasis).

²⁸ J. Raz, ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’, in L. Alexander (ed) *Constitutionalism: Philosophical Foundations* (New York: Cambridge University Press, 1998), 152, at 161.

²⁹ J. Waldron, ‘Who Needs Rules of Recognition?’ in M. Adler and K. E. Himma (eds) *The Rule of Recognition and the US Constitution* (New York: Oxford University Press, 2009), 327.

Waldron might be thought to have an ambivalent relationship with the positivist tradition, but that thought depends, in my view, on supposing that the tradition starts with Hart. If the tradition is seen as including Bentham and Austin, and in line with my argument as a kind of *Staatsrechtslehre*, Waldron is more of a torchbearer of that tradition than most legal philosophers who work in broadly the positivist style of legal philosophy.

³⁰ Ibid 342.

³¹ Ibid 344. Note that Norberto Bobbio, one of the finest legal philosophers of the last century, held the same view of the rule of recognition. See the illuminating discussion in R. Guastini, ‘The Basic Norm Revisited’ in L. Duarte d’Almeida, J. Gardner, and L. Green (eds) *Kelsen Revisited: New Essays on the Pure Theory of Law* (Oxford: Hart Publishing, 2013), 65, at 72–73.

³² Hart, above n 1, 293.

³³ Gardner, above n 27, 109. See further P. Cane, ‘Public Law in *The Concept of Law*’ (2013) 33 *Oxford Journal of Legal Studies* 649, at 669–673.

³⁴ Gardner, above n 27, note 51 at 109.

³⁵ Waldron, above n 29, 346–348.

³⁶ Austin, above n 8, vol 1, 222.

³⁷ Gardner, above n 27, 115.

³⁸ There are other theories of legitimacy that underpin this kind of formal constitutionalism, for example, the theory of constitutional monarchy.

³⁹ H. Kelsen, ‘The Nature and Development of Constitutional Adjudication’ in L. Vinx (ed) *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge: Cambridge University Press, 2015), 22.

⁴⁰ Ibid 34–35.

⁴¹ Note that Gardner himself struggles to escape this view in Gardner, above n 27, 109–116. In his view, bodies like legislatures and courts wield inherent not delegated power. In explaining why they have inherent power he suggests that originally the power was delegated to them, but at a certain point they came to be viewed by relevant officials as wielding powers that are not revocable, and from that point on they have inherent power.

⁴² See Kelsen's critique of Carl Schmitt, H. Kelsen, 'Who Ought to be the Guardian of the Constitution?' in Vinx, above n 39, 174.

⁴³ Ibid 187–188; and H. Kelsen, 'The Nature and Development of Constitutional Adjudication', in Vinx, above n 39, 29.

⁴⁴ Ibid 61–62.

⁴⁵ In my view, these two lines summarize the position that comes out of a combination of J. Raz, 'Authority, Law, and Morality', in J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press: 1994), 194; and Raz, above n 7.

⁴⁶ For further exploration, see D. Dyzenhaus, 'Constitutionalism in an Old Key: Legality and Constituent Power' (2012) 1 *Global Constitutionalism* 229.

⁴⁷ See H. L. A. Hart, 'Answers to Eight Questions', in D'Almeida, Edwards, and Dolcetti above n 21, 279–298.

⁴⁸ Hart, above n 9, 603.

⁴⁹ Walters in this volume.

⁵⁰ Ibid 1–2.

⁵¹ See D. Dyzenhaus 'Process and Substance as Aspects of the Public Law Form' (2015) 74 *Cambridge Law Journal* 284.

⁵² See Gardner, 2012, above n 5, 184.

⁵³ *R v Halliday, ex parte Zadig* [1917] AC 260.

⁵⁴ Ibid 293–294.

⁵⁵ Waldron, above n 2, 1346.

⁵⁶ *Anisminic Ltd. v. The Foreign Compensation Committee* [1969] 2 AC 147.

⁵⁷ See Waldron and Bellamy, above n 2. Political constitutionalists may object that in these cases the judges are doing something other than apply the statutes and that only if the judges were to stick to literal application that they are interpreting the statute legitimately. In other words, as I pointed out above, they hold that judges should adopt interpretative approaches to law that search for facts about legislative intent. But that of course is to adopt a controversial stance about the correct interpretative theory that cannot appeal in any non-question begging way to facts, since what the facts are is conditioned by fundamental, normative commitments. It is also, in my view, misleading to suppose as political constitutionalists do that the main issue is which institution gets the last word. Whether the legal constitution consists of substantive principles as well as formal authorization rules does not depend on whether judges are recognized as having authority to enforce the principles against the legislature. Legal positivists from Austin are misled by the same false picture.

⁵⁸ Kelsen, above n 39, 22–27.

⁵⁹ *Jackson v Attorney General* [2005] UKHL 56.

⁶⁰ See *ibid* para 7 (per Lord Bingham).

⁶¹ *Ibid* para 27, and see para 51 (per Lord Nicholls). For an argument that the judges had no jurisdiction, see R. Ekins, ‘Acts of Parliament and the Parliament Acts’ (2007) 123 *Law Quarterly Review* 91. *En route* to this conclusion, Ekins asserts that the UK Parliament was ‘not constituted by law and the way in which it may act is not prescribed by law’, by which he means that its ‘nature and action . . . is not stipulated by any set of rules’; 101–102. This is question-begging as he does not take into account the possibility that it is constitutional principle that is at stake.

⁶² Above n 59, para 31 (per Lord Bingham), para 61 (per Lord Nicholls), para 127 (per Lord Hope). It is significant that Lord Hope invoked Hart's idea of the rule of recognition in support of the claim that the 'open texture of the foundations of our legal system . . . defies precise analysis in strictly legal terms'. From that, he said, it followed that 'the rule of Parliamentary supremacy is ultimately based on political fact . . .' (ibid para 120) But he also wanted to claim that there are limits on the 'power to legislate', limits which are a 'question of law for the courts, not for Parliament'. 'The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based' (ibid para 107); The tension between these two claims—that the constitutional limits are internal legal limits and that they are external political limits—became even more palpable when he asserted both in the same sentence: 'There is a strong case for saying that the rule of recognition, which gives way to what people are prepared to recognise as law, is itself worth calling "law" and for applying it accordingly' (ibid para 126).

⁶³ Ibid para 139 (per Lord Rodger), para 141 (per Lord Walker), para 178 (per Lord Carswell), para 194 (per Lord Brown).

⁶⁴ Ibid para 100–102 (per Lord Steyn), para 159 (per Lady Hale) though her remarks are inconsistent with the position she took at para 158 and with her qualification in para 159 that the 'constraints upon what Parliament can do are political . . . rather than constitutional'.

⁶⁵ Allan, above n 3, 144.

⁶⁶ This is true also of the constitutional disputes in South Africa in the 1950s, to which Hart referred when dealing with the problem of disagreement about the 'ultimate criteria to be used in identifying a law'—see Hart, above n 1, 122 and 153. On these disputes, see *Jackson v*

Attorney General, above n 59, para 84 (per Lord Steyn). For an elaboration of the relationship between form and substance, see Dyzenhaus, above n 51.

⁶⁷ Walters, above note 49, 2.

⁶⁸ N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999) 93. Quoted in Allan, above n 3, 145. Note that Allan quotes these remarks in his response to Lord Hope's position in *Jackson*—Allan, above n 3, 145. See further, Allan in this volume.

⁶⁹ R. Dworkin, *Law's Empire* (London: Fontana, 1986).

⁷⁰ Dworkin at times rejected this interpretation of his position, but, as I have argued elsewhere, it is both the natural interpretation and one that he had reason to maintain—D. Dyzenhaus, 'Dworkin and Unjust Law', in S. Sciaraffa and W. Waluchow (eds) *The Legacy of Ronald Dworkin* (Oxford: Oxford University Press, forthcoming).

⁷¹ T. Hobbes, *Leviathan*, R. Tuck (ed) (Cambridge: Cambridge University Press, 1997), ch 17, 120.

⁷² *Ibid* ch 29, 224.

⁷³ *Ibid* chs 13–17.

⁷⁴ See R. Dworkin, 'The Model of Rules I' and 'The Model of Rules II' in R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1981, third impression), 14, 46.

⁷⁵ See J. Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Oxford: Clarendon Press, 1970) 197–200, who says at 200 that only some 'jurisprudential criterion', some 'general truth about law' can answer the question whether a law is a law of a system.

⁷⁶ For insightful remarks along these lines, see L. L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630, at 638–643. By far the majority of

Kelsen scholars would reject this interpretation; see, for example, the essays in M. Troper, *Pour Une Théorie Juridique de L'État* (Paris: Presses Universitaires de France, 1994). But see L. Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford: Oxford University Press, 2007). See further Vinx's important argument, *ibid* 157-163, that seeks to make sense of Kelsen's rather bewildering set of definitions of 'constitution'.

⁷⁷ And see MacCormick, above n 68, 93, where he follows the passage quoted above with:

This, I think, shows that Kelsen was right in thinking that any fundamental norm underlying the whole of legal order has to be conceived as external to the constitution itself. The constitution is a totality of interrelated rules or norms that is historically given and yet dynamic in providing for the possibility of its own change by processes for which it itself makes provision. As was argued in Chapter 2, however, there is no reason to follow Kelsen in treating this as a mere presupposition or transcendental hypothesis. Surely a working constitution requires this to be the kind of shared custom or convention held among those who treat the constitution as foundational of normative order. That is, then, a common social practice, and it is a practice that necessarily involves shared membership in what Dworkin calls a 'community of principle', not a mere chance overlap of practical attitudes among those who hold power. . . . The idea of a *Grundnorm*, it is submitted, should be adapted to this sense.

It is unclear, however, how the basic norm can in this light be considered 'external'.

⁷⁸ R. Dworkin, 'Hard Cases', in Dworkin, above n 74, 81.

⁷⁹ Hart, above n 1, 204–205.

⁸⁰ Gardner claims that Dworkin's view is 'crazy' that the constitution's meaning never changes at the hands of judges, a claim so crazy he says that he is 'reluctant' to attribute it to Dworkin. But, far from being crazy, it is entailed when one adopts the internal point of view of a judge. Gardner, above n 27, 38. Gardner also suggests at 37 that Dworkin possibly never held the view, referring to R. Dworkin, *Justice in Robes* (Cambridge, Mass.: Harvard University Press, 2006) 266; and that Dworkin seemed to have changed his mind when in Dworkin, above n 69, 255–263, he seems to say that the 'right answer' is 'relativized to the convictions of each judge'. In *Justice in Robes*, however, at 266 note 3, Dworkin insists that he did not change his mind about the thesis and he is clear in *Law's Empire* that his view is that the right answer thesis is consistent both with recognizing that the law changes over time at the hands of judges and that judicial convictions are an intrinsic element of working out the right answer.

⁸¹ In a bill of rights legal order when the issue is whether a statutory provision violates one of the protect rights, it might seem that only substantive principles are in play. But I think it is almost always the case that judges should consider that the legislature has issued a formal judgment on the matter, so in issue will be questions of deference and proportionality. In some jurisdictions, for example the USA, such 'formal' questions get submerged, just as in parliamentary legal orders issues of substantive principle lurk below the surface of formalistic judgments. See Thorburn in this volume.

⁸² See B. Williams, 'Realism and Moralism' in B. Williams, *In the Beginning was the Deed: Realism and Moralism in Political Argument* (Princeton: Princeton University Press, 2005), 1, at 5 (his

emphasis). For relevant argument in this volume, see Lindahl in this volume; Stacey in this volume.

⁸³ Many of the main interventions in this debate can be found in C. Forsyth (ed), *Judicial Review & The Constitution* (Oxford: Hart Publishing, 2000).

⁸⁴ Kelsen, above n 39.

⁸⁵ Though the qualification requires that international law be seen as circular and thus, as E. Fox-Decent argues in this volume, as ‘co-constituted by national and international law’ (Fox-Decent in this volume).

⁸⁶ For a basically linear account, see Kavanagh in this volume; and for a circular account, see the section on the separation of powers in Allan, above n 68.

⁸⁷ For discussion, see Lafont in this volume.

⁸⁸ B. Williams and J. J. C. Smart, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973).

⁸⁹ Ibid 116–117.

⁹⁰ Jeffrey Goldworthy’s work is a fine example of what I have in mind in this merger, though he may not quite see things this way. See, for example, J. Goldworthy, *Parliamentary Sovereignty, Contemporary Debates* (Cambridge: Cambridge University Press, 2010).