The Routledge Handbook of Interpretive Political Studies

CH. 23: PUBLIC LAW

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Outline

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I: INTRODUCTION

In law, interpretativism refers to a diverse family of theoretical approaches founded on the central category of meaning. It maintains that the phenomenon of law cannot adequately be grasped by imitating the methods of the natural sciences. Interpretativism covers such a broad range because law itself is widely recognized to be an interpretative practice. Given the potential range of inquiry, we offer a synthetic overview by distinguishing between three contemporary varieties of legal interpretativism: descriptivist, normativist, and phenomenological. Each postulates a particular conception of law and adopts a distinctive methodological framework. These three varieties are examined in the sections that follow and they are illustrated through analysis of the ideas of leading legal theorists working mainly within the Anglo-American tradition.

We should begin, however, by differentiating between an interpretative legal theory and a theory of legal interpretation. The aim of a theory of legal interpretation is to explain how rules that form a legal system are deployed as justificatory reasons in particular judicial decisions; it reveals the method by which general rules are to be applied to individual cases. A theory of legal interpretation therefore seeks to explain how judges do, or should, resolve disputes about the meaning of the law. This type of theory must be distinguished from an interpretative legal theory. The latter type requires a more basic theoretical investigation since it is intended to offer an explanation of the nature and development of law as a complex social phenomenon. An interpretative legal theory acknowledges the intrinsically hermeneutical character of the human sciences (Taylor, 1985).

This chapter examines the range of interpretative theories of public law. This too covers a broad range of theories because the category of public law is ambiguous. Jurists commonly draw a distinction between public law and private law, that is, between the law regulating relations between institutions of government or between government and its subjects on the one hand, and the law regulating relations between subjects on the other. The difficulty is that this distinction reduces public law merely to that of a subset of positive law. But this is a product of a philosophy of legal positivism and legal positivism is an aspect of naturalism that

interpretative theories aim to challenge. Consequently, instead of assuming that public law is a subset of positive law, interpretative theories of public law must begin by addressing a foundational question: rather than accepting the authority of the constitution as a presupposition of legal analysis, interpretative theories of public law are obliged to offer a juristic account of the constitution of public authority. This is a challenge that interpretative theories of public law ultimately cannot avoid.

II: CONSTITUTIONAL THEORY

Legal interpretation is a central element of legal argumentation and the development of a theory of legal interpretation has always been a critical part of the jurist's theoretical apparatus (MacCormick 1978; Alexy 1989). An interpretative legal theory, by contrast, is a general theory of law which, rather than offering an account of the canons of legal interpretation, presents an explanatory account of the nature of law. With respect to public law, this distinction is most clearly expressed by drawing a distinction between a theory of constitutional interpretation and a theory of the constitution.

This distinction is of primary importance. Historically, the tendency to conflate constitutional theory to the theory of constitutional adjudication has been bolstered by the predominance of a professional conception of legal education which conceives the main task of legal education as that of providing students with the techniques needed to become successful practitioners. This professional orientation also came to dominate public law scholarship, especially in the United Kingdom, where public lawyers avoided theoretical inquiry in favour of the production of textbooks, casebooks, and case-analyses (McAuslan 1978, Galligan, 1982). Although American constitutional scholarship has been more sophisticated in the range of its inquiry, historically it too has tended to equate constitutional theory with a theory of constitutional interpretation. The critical issue became that of the legitimacy of judicial review and, as a consequence, scholarly writing sought primarily to offer guidance to the Supreme Court on the correct interpretation of the US Constitution. Scholarly inquiry into constitutional ordering thus came to be equated with the development of cogent legal arguments to be made before an authoritative legal tribunal (Griffin 1989).

Within the boundaries of a professionally-prescribed view of the subject, public lawyers could only produce what might be called a 'shallow' sort of constitutional theory, that is, a theory which limited its ambition to that of presenting positive public law in a systematic fashion. The task became that of ordering the mass of legal texts and judicial decisions on a principled basis to expound the relevant legal materials as a coherent whole. Interpretative constitutional theory has a more ambitious objective, that of presenting an account of public law founded in a general theory of law and politics (see Brudner 2004, ch.1).

While 'shallow' theories promote the coherent development of constitutional law and facilitate an on-going learned conversation amongst judges, lawyers and scholars, 'deep' theories are obliged to maintain a critical distance from practice and put into question the assumptions on which professional legal discourse is founded. Scholarly inquiry into the foundations of public law requires the incorporation of historical, sociological and philosophical insight into the exercise of understanding the manner in which public authority is established and maintained (Griffin 1989). Deep theories make use of cross-disciplinary methods of inquiry. The nature of their inquiry also comes to be framed by the type of questions that are more likely to engage the interest of social scientists. What precisely is a constitution? How does a constitution acquire its authority? To what extent does the constitution play the role of an integrating mechanism in society? What is the relationship between constitutional legality and constitutional legitimacy? Questions of this nature extend the range of inquiry and deepen its complexity.

Although shallow constitutional theorizing remains the prevailing type in Anglo-American law schools, the more challenging type of inquiry represented by deep constitutional theory is becoming more prominent (see Tushnet 2004; Loughlin 2005). Deep constitutional theories can be elaborated following different methodological strategies, leading to the establishment of different conceptual frameworks; some are formulated from general normative theories of law and political morality (eg Dworkin; Allan), while others draw on the findings of empirically-orientated political science and political history (eg Griffin 1996, 1999 in the USA; Jennings, Robson and Griffith in the UK – see Loughlin 2014 for overview). In this contribution only those that can be considered a variety of interpretative legal theory will be discussed.

III: DESCRIPTIVE INTERPRETATIVISM

For those coming from other disciplines within the humanities and the social sciences, it may come as a surprise that twentieth century analytical legal positivism constitutes the point of departure of contemporary interpretative legal theory. The reason is that one finds the earliest statements of interpretative legal theory in the work of the two leading legal positivists of the last century, Hans Kelsen and HLA Hart. Each developed general theories of law in which, rather than taking the natural sciences as their methodological model, the category of meaning occupies a central place.

III.1: The Pure Theory of Law

In *The Pure Theory of Law*, first published in 1934, Hans Kelsen presented the first fully developed statement of a distinctive approach to law which he continued to develop and revise during a long career. His general objective was to produce a theory of scientific legal knowledge. He argued that this can be realized only when the theory both has law as its exclusive object - that it grasps the uniqueness of its object of enquiry - and is scientific – that it is orientated exclusively to the cognition of law free from all ideology. Kelsen's *Pure Theory* sought to determine the conditions that make possible such a system of legal knowledge.

The pure theory requires two conditions to be met. First, that knowledge of the law must be strictly separated from all ideological questions, which for Kelsen means questions that pertain to politics and morality, but not science (Kelsen 1992, §§ 8-13). Secondly, it means that law must be acknowledged as a social phenomenon, which means that it can be grasped only from the perspective of the human sciences (§§ 7, 15, 16). Kelsen maintains that natural law theory and sociological theories of law both fail to develop a scientific understanding of law. Natural law theory fails because the transcendental notion of an absolute value that a moral theory of law supposes cannot be the object of scientific cognition. Sociological theory fails because, in treating legal acts as causally connected behavioural regularities rather than as social acts that carry specific normative meanings, it ignores the specific normative meaning of legal acts.

The reason why sociological theories fail to offer a scientific account of law is of a particular importance since it identifies the pure theory as an interpretive theory. Kelsen argues that the uniqueness of law as an object of enquiry is grasped only once it is appreciated that law is a phenomenon that can only be observed in society. This specifically legal dimension of a social event cannot be comprehended from the viewpoint of the natural sciences. Although legal phenomena are experienced as natural events that are perceptible through the senses (as decisions and actions), its legal dimension is understood only once its specific normative *meaning* is recognized. A material event constitutes a legal datum only to the extent that it can be interpreted as such according to a valid legal norm. In this sense, legal norms constitute a *scheme of interpretation* according to which the objective legal meaning of an act can be attributed.

Kelsen noticed that if *causation*, which connects causes and effects, is the fundamental structure of explanation within the natural sciences, *imputation*, which links events interpreted as legal acts with their legal consequences, is the functional equivalent within legal science (§§ 2, 4, 5). Law therefore constitutes an *autonomous realm of meaning* and the challenge for the pure theory is to determine how it can be scientifically known in its *specificity* (§ 7). But why do certain acts have a legal meaning and others do not? Kelsen maintains that an act acquires a legal meaning by virtue of the existence of another 'higher' legal norm. And that norm similarly is valid only because a further 'higher' norm authorizes it. The difficulties arise when this chain of authorization runs out.

Assume that a group assemble and vote on a certain proposition. Those actions do not in themselves make law. We recognize these events as law-making acts only by interpreting their meaning in a particular manner; that is, only by recognizing the existence of a higher norm that identifies that assembly as a legislature which is authorized to make laws. Where does this higher norm that confers legal validity on this act come from? The answer is that the norm is contained in the Constitution. But one must then ask: what makes the Constitution valid? Kelsen's answer is that there comes a point in every legal order at which one must presuppose the validity of some basic norm. The basic norm, then, is a normative hypothetical presupposition: it is to be understood as the objective validity of the first act which originates the *chain of validity* (viz. the ordered series of legal acts) that granted normative authorization to

the norm-creating act that generates the norm used as a scheme of interpretation (§§ 16, 27-9). Kelsen contends that there is simply no alternative to this pre-supposition, because otherwise we offend against the Humean injunction of deriving an 'ought' from an 'is'.

III.2: Law as the union of primary and secondary rules

The descriptive interpretative theory of law was further advanced by the publication in 1961 of HLA Hart's *The Concept of Law*. Hart defined a legal order as comprising a union of primary and secondary rules, in which the primary rules impose duties and the secondary rules confer powers. We recognize primary rules as forming the sharp end of law; these impose obligations, such as an obligation not to dishonestly acquire another person's goods. Secondary rules are more complex; they include the power of officials to execute the primary rules and to resolve disputes and of legislators to make new laws. Hart argued that there was a special secondary rule, called the rule of recognition; this rule is analogous to Kelsen's basic norm in that it is the ultimate rule for conclusive identification of all other rules forming part of an existing legal order.

But the idea animating Hart's account was that in order to understand any social practice — and, in particular, law— the observer must consider not simply the *externally observable behaviour* of actors but also the *internal point of view* of participants in the practice. Hart's main insight was, more concretely, that in order to explain what is a (social) rule and what it means to affirm that a rule exists in a social group, one needs to consider not only whether most of its members share a certain pattern of conduct (the *external aspect*) but also whether they also adopt a critical reflective attitude towards the pattern of behaviour (the *internal aspect*), meaning that they accept it as a reason for acting and a reason justifying critical reaction towards deviant conduct (Hart 1994: 55-7, 82-99).

Hart's hermeneutic approach shows why normative language and normatively structured social practices cannot be explained by assuming the purely external point of view of an observer who only registers perceptible behavioural phenomena. It shows that law can be understood only once one recognizes the internal perspective of participants who take the law to be a binding normative system and for whom these rules operate as *reasons* for acting and judging

actions. Such recognition, Hart emphasizes, does not imply acceptance on the part of the observer; it requires no acceptance of the moral value or justice of that legal order (Hart 1994: 102-5, 242). Hart too accepts Hume's distinction: the task of descriptive (analytical) legal theory is to determine what the law is and it must be kept separate the normative (critical) theory of justice, of determining what the law ought to be (Hart 1983a; Hart 1983b).

III.3: Positivism and Public Law

The major advances in interpretative legal theory marked by Kelsen and Hart's jurisprudence at the same time present significant challenges for interpretative theories of public law. Two features might be highlighted. The first is that these general theories of law make no distinction between public law and private law; a conventional distinction between the types of norms or rules of an extant legal order can obviously be drawn but for Kelsen and Hart they have no essential juristic relevance. The second is of greater significance. These are general theories of *positive* law and they treat public law only as a subset of that positive law. These positivist interpretative legal theories conceive the broader conception of public law – public law as the law constituting the authority of government – as a subject analogous to political sociology, and one that lies beyond the sphere of legal cognition.

These shared limitations leave unanswered the central question of constitutional theory: what are the foundations of the authority of a politico-legal system? Kelsen discarded that question as a problem that could not be addressed by legal science. He therefore avoided altogether certain fundamental questions of public law: he buried the problematic of the constituent power under the fundamental hypothetical postulate of the basic norm, the problem of final jurisdictional decisions under the doctrine of the tacit alternative clause, and the problem of external sovereignty under a monistic theory of international public law (Kelsen 1992: §§28-31). Similarly Hart converted all such questions into empirical problems relating to the determination of the fundamental criteria that higher officials use to identify the law in their decisions (Hart 1994: 102-110, 114-17). The austere methodological approach of descriptive interpretativist legal theories does not provide conceptual space for adequately addressing the central questions of constitutional theory.

Descriptive interpretativism has nevertheless had a significant impact on constitutional discourse, especially in the USA. It provides the intellectual grounding of an influential mode of constitutional interpretation which seeks to restore a science of interpretation by treating the constitutional text as the sole source of interpretative fidelity. This technique, sometimes called originalism (Bork 1985; Scalia 1997), has been labeled the 'pure interpretive model' (Grey, 1975) or 'clause-bound interpretivism' (Ely 1980, ch.1). It stands opposed to theories of constitutional interpretation that invite judges to treat the constitution as a 'living document' and to interpret the text liberally and in accordance with contemporary social norms that vary significantly from the world of the authors of that text. In this positivist argument, interpretativism is restricted to documentary exegesis, otherwise of written textualism. Many regard this as highly restrictive and ultimately self-defeating (eg Dworkin 1996-97). But its influence has been such that many of its adherents regard normative and phenomenological interpretativists – those theories addressed in the following sections – as 'non-interpretivists', in that they are either not interpreting the authoritative text or are interpreting some unwritten supplement, such as moral values of society (Grey 1975; Ely 1980).

IV: NORMATIVE INTERPRETATIVISM

IV.1: Law as argumentative social practice.

The pathway to the second type of interpretative legal theory was opened by critical reactions to interpretative legal positivism. Of particular importance has been the work of the American legal theorist, Ronald Dworkin, who since the 1960s has developed a sustained assault of the underpinnings of analytical legal positivism. The distinctive traits of his approach derive from its commitment to an interpretative theory that rejects descriptivism. Dworkin argues that legal theory must be both normative and internal. Law cannot be understood without adopting normative positions about its justificatory values and it is internal in the sense that there can be no category distinction between philosophical and doctrinal discourse about law. The key lies in the realization that law is an *argumentative* social practice. That is, law is a social practice whose function, complexity and consequence depend on this crucial *structural feature*: in large

part legal practice consists in participants making and debating claims about what the law requires. This is the 'central, propositional aspect of legal practice'. In order to be able to explain the practice of law we need to understand what Dworkin calls 'the grounds of law', that which makes propositions of law true (Dworkin 1986: 14-15).

Dworkin maintains that once this argumentative character of legal practice is given its central explanatory role, a fundamental feature of legal practice is revealed: that the truthfulness or soundness of propositions of law is sensitive to what participants take to be the scheme of principles or values that the law expresses. Law therefore constitutes an instance of what he called an *interpretive* practice, a shared tradition whose requirements are interpreted and applied in a way that is sensitive to what is taken to be its point. It follows that law is something that cannot be determined without taking a position on the values and principles it exists to serve. A strict distinction between explanation (what the law is) and justification (what the law ought to be) cannot therefore be drawn. Any theory of law that seeks to be explanatory must be, at least implicitly, normative (Dworkin 1986: 87-113).

Law, then, is an argumentative practice that is 'principle-embedded', meaning that 'we justify legal claims by showing that principles that support those claims also offer the best justification of more general legal practice in the doctrinal area in which the case arises' (Dworkin 2006a: 51-2). It is for this reason that ordinary legal discourse and legal theory are not independent universes of discourse; they differ only in the way they reason (inside-out v. outside-in) and the levels of abstraction (concrete and particular v. abstract and overarching). This intrinsic continuity becomes visible in the hard case because it is here that legal practice, which always focuses on what the law requires in particular disputes, is obliged to start the journey in search of the answer to the question of which interpretation is favoured by the principles that are served by the relevant branch of law, and which ultimately justify legal practice as whole. Hard cases force legal practice to embark on a *theoretical ascent* (Dworkin 2006a: 53-7), requiring practice and theory become so similar that 'the difference can be defended, if at all, only as an elusive matter of degree' (Dworkin 2006b: 79). This is why 'jurisprudence is the general part of adjudication, [the] silent prologue to any decision at law' (Dworkin 1986: 90).

IV.2: The moral reading of the constitution

Dworkin's normative interpretativism suggests that legal theory should be understood as 'a special part of political morality', a sub-category of moral theory identified only by its distinct institutional structures (Dworkin 2006c: 34-5). This leads him to the *moral reading* of the Constitution: competing strategies of constitutional interpretation —and, thus, all existing large-scale patterns of judicial decisions in constitutional cases— involve the articulation of 'different understandings of central moral values embedded in the Constitution's text' (Dworkin 1996: 2). This moral reading is bolstered by an important feature shared by most contemporary political constitutions: a catalogue of basic rights that declares individual rights against the government in abstract moral language. The task of constitutional theory becomes that of restating at the most general possible level the central moral principles set out in the Bill of Rights in order to 'make their force clearer to us, and to help us to apply them to more concrete political controversies' (Dworkin 1996: 7). Contrary to the naïve views of originalism – descriptive textualism – judges should respect not only what the framers 'intended to say', but also have regard to the 'structural design of the constitution as whole' and the 'dominant lines of past constitutional interpretation by other judges' for the purpose of elaborating a *coherent constitutional morality* (Dworkin 1996: 10).

In American debates, constitutional interpretation is closely linked to the issue of the legitimacy of judicial review in a democracy. For Dworkin, the variety of answers given to this question expresses different understandings of what is 'democracy's fundamental *value* or *point*' (Dworkin 1996: 15). Contrary to majoritarian conceptions that claim that judicial review necessarily compromises democracy, Dworkin posits the *constitutional conception*.

Democracy presupposes a collective decision in which a group of individuals not only act together as a function of what each individually determines (statistical collective action), but also *as a community* in which individual actions merge together to form a distinct type of collective agency (communal collective action), attributable to a collective entity called 'the people' (Dworkin 1996: 19-20). Democratic self-government also presupposes certain

conditions of membership of a political community that 'makes it *fair* to treat him [the member]—and *sensible* that he treat himself— as responsible for what it does' (Dworkin 1996: 23). These *democratic conditions* of moral membership stipulate that a person can be counted as a member of a political community only if: (i) s/he is able to take part in collective decisions (through universal suffrage, effective elections and representation); (ii) his/her stake is acknowledged (i.e. the consequences of collective decisions on his life are given the same consideration as the consequences they have on others); and (iii) his/her moral independence is respected (i.e. while deferring to authoritative collective decisions, individuals should be able to form their own views on these matters and determine how to live their lives within the opportunities and resources that collective decisions leave to them) (Dworkin 1996: 24-6).

The constitutional conception suggests that only governments subject to these conditions are democratic and that the defining aim of democracy is to ensure that collective decisions be made by political institutions that treat all their members with equal concern and respect (Dworkin 1996: 17). On this account, democracy demands the existence of representative institutions but it neither requires that all political decisions be taken by elected officers nor requires that legislative institutions have the final authority in all matters. The many moral dimensions of these democratic conditions suggest that in some cases majoritarian legislative decisions could erode the democratic character of the community. In such cases, a court that invalidates these decisions should not be deemed anti-democratic, as the majoritarian conception suggests; rather, the court's action should be seen as enhancing democracy (Dworkin 1996: 32).

Dworkin recognizes that this account does not amount to a positive argument for judicial review. By virtue of its account of the complex moral dimensions of democratic conditions, however, the constitutional conception is able to show two things: first, that the institution of judicial review does not necessarily compromise democracy and, secondly, that there can be no presupposition in favour of any one of the institutions established under democratic conditions. This suggests that democracy is 'a procedurally *incomplete* scheme of government' and therefore that democratic political communities may combine a variety of solutions to the articulation of the institutional structures involved in interpreting these democratic conditions (Dworkin 1996: 33). He argues further that, as applied to American constitutional practice, this

constitutional conception leads to recognition that judges have final interpretative authority to explicate the Bill of Rights as a constitution of principle without needing to provide strained or distorted readings more congenial to the majoritarian conception (Dworkin 19962: 35).

IV.3: Normativist constitutional jurisprudence

This grasp of law as an interpretative practice has a relatively long lineage in American constitutional discourse. It origins can be traced to Cardozo's claim that law is best understood as an exercise in 'reasoned elaboration' (Cardozo 1931). This was given more systematic expression in the 1960s, most prominently by Alexander Bickel. Bickel rejects the descriptivist account that judicial review is justified 'from the constitutional text, from history, or from the record of their own … prior decisions'. These 'deposits of experiences' are merely 'empirical aids' to interpretation. In their search for answers to constitutional questions, Bickel argues, the judiciary must 'immerse themselves in the tradition of our society … in history and in the sediment of history which is law, and … in the thought and the vision of the philosophers and the poets' (Bickel 1962, 236). Bickel maintains that the constitutional role of the judiciary is to interpret the fundamental principles of a nation's political morality. Dworkin's work is significant, then, in offering the most philosophically rigorous account of this lineage of thought. This line of normative interpretativist inquiry has focused on the two major issues that have come to dominate American constitutional theory. Dworkin's moral reading is thus intended to answer the question of how the Constitution should be interpreted, and his constitutional conception of democracy seeks to resolve the question of how judicial review is justified.

Notwithstanding the American tone and object, Dworkin's legal and constitutional theory has inspired the development of normativist revisionary interpretations of the British constitution. Foremost among these is the work of TRS Allan who 'defend[s] an interpretative approach to law that seeks to show, not merely what the law requires or permits, on correct analysis, but why that reading of the law is morally justified—consistent with basic political values that we can affirm as proper guides to the practice of liberal democracy' (Allan 2013, 20). Allan argues that it is only by adopting 'the internal approach appropriate to an interpretation of law—an interpretation of the British constitution respectful of the value of individual freedom' that 'we

can perceive the right way to reconcile' the 'superficially conflicting principles' of parliamentary sovereignty and the rule of law (Allan 2013, 32).

Allan deploys a method of constitutional interpretation that is 'broadly consistent with Ronald Dworkin's influential account', especially with respect to the 'interplay of fact and value, uniting historical inheritance and moral judgement' (Allan 2013, 340). In developing this account, he highlights in particular the limitations of Hart's descriptive interpretativism, arguing that the 'ought' that is a feature of the internal aspect of rules is necessarily a moral 'ought'. Allan maintains that once we recognize 'the rule of law' as the fundamental ideal, 'our concept of law is closely linked to our ideas about justice and freedom' and 'Hart's legal positivism is hard to sustain' (Allan 2013, 44).

V: PHENOMENOLOGICAL INTERPRETATIVISM

V.1: Critique of descriptive and normative interpretativism

Descriptive interpretativism presents itself as a theory of positive law: law, it is claimed, should not be confused with issues of social justice and morality since this is to confuse description and evaluation. It is able to present law as science only by pre-supposing in legal thinking a basic authorizing norm. The question of authority – the question: why should one obey? - is therefore removed from legal cognition. Since the source of authority of any constitutional order must remain a central question for constitutional theory – public law in its broader conception – descriptive interpretativism is revealed as an inadequate explanatory framework for public law.

Normative interpretativism builds on the 'internal aspect' of rule ordering highlighted in descriptive interpretativism to reveal law as a 'forum of principle' concerned to elaborate the moral justification of legal authority. It addresses the question of authority but it treats that question – and public law in its broader conception – as a matter of moral reasoning. Although the third type – phenomenological interpretativism – accepts that critical morality is an aspect of the inquiry, it maintains that normativism privileges an ideal image of 'the rule of law'

derived from universal moral axioms. This is said to skew understanding of the character of public law. If a political philosophy seeks an ideal theory of justice and constitutional theory offers a theory of an actually existing constitution, the phenomenological critique is that normativism converts an immanent exercise into a transcendental one. Rather than interpreting the practices of actually-existing regimes, normativism constructs 'the moral sovereignty of the community of rational beings' (Hunter 2001, 366).

Phenomenological interpretativism, by contrast, seeks to discern 'the autonomous working of a public reason in principles already lying before us in the mundane practice of constitutional jurisprudence' (Brudner 2004, 11). Its essential features 'are sifted from pre-existing material through an autonomous conception of public reason given a considerate justification and distinguishing what is ephemeral in constitutional law from what is rationally enduring' (Brudner 2004, 11). It is an exercise in excavation rather than rational construction. It is therefore an exercise in 'political justice' in the sense that it considers 'justice in the exercise of coercive power by those who claim a right to rule over comprehensive human associations—that is, over human associations sufficient for all human needs (however these may be understood)' (Brudner 2004: 12).

V.2 Phenomenological method

Phenomenological interpretativism begins with the recognition that humans are historically-situated beings. We engage in critical reflection but cannot remove ourselves from history. The resulting tension between belonging and critical distance involves, in Gadamer's language, 'the fusion of horizons', a concept suggesting the play of difference between one's own and the alien, or between actuality and ideal (Gadamer 1989, 300-379). The implications for constitutional understanding come to the fore once the issue of state formation is brought into consideration. As sketched by such political philosophers as Hobbes, Locke and Rousseau, this type of inquiry into the foundations of the state involves an exercise in imagination. In each of their imaginative schemes, the passage to the civil state is envisaged as establishing a law-governed constitutional regime founded on the consent of an equal citizenry. There is evidently a considerable degree of mystification in the presentation of such abstract schemes, especially when such schemes are invoked for the purpose of bolstering the authority of

existing governing regimes. Nevertheless, it is recognized that only by bringing this tension between actualization and critical reflection to consciousness can the character of constitutional discourse properly be grasped.

The central insight of phenomenological interpretativism is derived from this unfolding tension between critical reflection and actuality. This can be expressed in many ways: between sovereignty and the sovereign, between state and government, between reason and will, between norm and decision, between text and life (Ricoeur, 1965). Phenomenological interpretation evolves through acknowledgment that the pact establishing equal citizenship also establishes a governing hierarchy; the task of determining the general will must, of necessity, be entrusted to the agencies of government. Public law – the law relating to the establishment and maintenance of the authority of government – is obliged to mediate between these registers.

According to this phenomenological interpretation, constitutional narratives organize and clarify an unfolding experience relating to the activity of governing. Events acquire significance only by being drawn into a narrative scheme. This suggests that intelligibility, the ability to mould events into a constitutional narrative, is the key criterion. The significance of this type of interpretative exercise can be highlighted by distinguishing it from descriptive and normative modes of interpretation.

Phenomenological interpretativism treats modes of constitutional understanding that fall under the category of originalism as fundamentally misconceived. It suggests that the intention of those who drafted the constitutional document permits of no direct and immediate understanding; there is no alternative to mediation. Further, the precise language used in drafting the constitution is not simply speech; it is also an act. It becomes text, the condition of discourse, only by freeing itself from the immediate situation of its creation, thereby making itself available for interpretation. That is, it does its work not only through 'internal' dynamics – having regard to the political circumstances of the document's production, the intentions of its drafter, and its reception by the original audience – but also by 'external' projection.

Ricoeur explains that the task of hermeneutics is to reconstruct this twofold undertaking, by looking back on 'the first presupposition, that of philosophy as reflexivity, by way of the second, philosophy as phenomenology, right up to the third, that of mediation first by signs, then by symbols and, finally, by texts' (Ricoeur 1991, 18). The objective of constitutional discourse is not to discover some original intent in the words of the document but to grasp 'the dynamic of the text and to restore to the work its ability to project itself outside itself in a representation of a world' we could inhabit (Ricoeur 1991, 18).

V.3 Public law as political discourse

It is evident that this phenomenological approach rejects originalism as a technique of constitutional interpretation on the ground that it is founded on a positivist illusion of textual objectivity. But this approach also differentiates itself from normativism. It does so on three main grounds, which can most concisely be labelled monism, moralism and legalism. Each ground will be explained in turn.

While normativists treat interpretation as an exercise in the law 'making itself pure', a purity that exposes its liberal virtues (Dworkin, 1986), phenomenologists recognize that the exercise of promoting narrative coherence will invariably lead to the generation of a variety of competing schemes of interpretation. One prominent example is to be found in the work of Cass Sunstein, who argues that the search for some neutral reading of the constitution is an impossible dream. Since the exercise is shot through with value judgments, there can be no 'right answer'. Sunstein illustrates this general claim by arguing that the dominant mode of interpretation of the US Constitution today is highly partial; notwithstanding its republican origins, the prevailing interpretation is influenced by the values of classical liberalism (Sunstein 1993).

This liberal bias, generated by a search for one true interpretation, is closely linked to the second critique, that of moralism. If within any constitutional regime there exists a variety of conflicting narrative schemes, the criticism of normativism is that it skews our understanding of legal interpretation by maintaining that it is a form of moral reasoning. Phenomenologists, by contrast, maintain that, faced with a variety of plausible competing schemes, authoritative

constitutional decisions are reached through the emergence of a pragmatic overlapping consensus produced in the context of 'incompletely theorized agreements' (Sunstein 1998). Alternatively expressed, it is claimed that constitutional decision-making is prudentially managed and negotiated (Loughlin 2003: 131-52). Rather than involving the search for what is morally right, the exercise of constitutional jurisdiction entails pragmatic and prudential accommodations determined by the need to maintain political authority (Posner 1998).

The underlying monism and moralism of normative interpretativism is bolstered by its constitutional legalism. Normativists invariably assume that the constitution's meaning is authoritatively determined by an established institution, that of a supreme court. From a phenomenological perspective, the assumption that lawyers and judges possess a special insight into the meaning of a state's constitution is placed in question. This type of argument has undergone a recent revival in American constitutional discourse, with scholars arguing that the earlier meaning of 'fundamental law' as a special type of law that bound 'morally and politically, not legally' should be restored (Snowiss 1990: 42), that each of the three main institutions of state has an equal authority to determine its own rights and duties under the constitution (Kramer 2004: 106), and that, far from being a monopoly of lawyers, the original sense of the constitution as an arrangement that evolves through an active citizenry and as the product of broad public deliberation should be rekindled (Tushnet 1999).

In challenging the intrinsic monism, moralism and legalism underpinning normative interpretativism, the phenomenological approach suggests that our starting point must be to treat public law as a distinctive type of political discourse (Loughlin 1992: 4; 2003: ch.3). Phenomenological interpretativism takes form as a commitment to the idea that, at base, public law involves the attempt to grasp the meaning of an extensive range of governmental practices and that neither the observation of political behaviour nor the study of ordinary legal materials is in itself sufficient. Understanding requires an expansion of the range of inquiry beyond the formal materials of positive public law by unveiling that which is implicit in them, opening up 'a range of important issues for examination and encourag[ing] us to render explicit, systematic and rigorous what in legal writing and legal practice is often implicit and based on intuition or "common sense".' (Loughlin 1992: 57).

One prominent illustration of this type of inquiry is found in Ackerman's study of American constitutional development. Ackerman contends that 'the basic unit of analysis should be the *constitutional regime*, the matrix of relationships and fundamental values that are usually taken as the constitutional baselines in normal political life' (Ackerman 1991: 59). Through this relational method, which 'builds bridges to the political scientists, historians, and philosophers with whom lawyers should be collaborating' in seeking to understand constitutional development (ibid. 59), he conceives the Constitution as 'an evolving historical practice' (ibid. 35). Ackerman's objective is to use this cross-disciplinary approach drawn from the regime perspective to show 'concretely how it provides new resources for the resolution of classic problems of legal doctrine' (ibid. 60). Using such interpretative methods, Ackerman is able to demonstrate how the US Constitution has been transformed at certain critical periods, which he calls 'constitutional moments', in ways that are not adequately explained by, or reflected in, the legal edifice of the written constitution and its judicial interpretation.

Ackerman's account of 'constitutional moments' has been subject to various criticisms (Griffin 2007; Loughlin 2010: 303-5). Nevertheless, by extending the scope of constitutional analysis from formal legal materials to the constellation of rules, practices, institutions and ideas that help shape a distinctive identity, he provides a powerful illustration of the type of interpretative analysis that can be undertaken from a phenomenological perspective.

Phenomenological interpretativism thus maintains that public law constitutes an essentially political practice whose complexity, structure and function derives from the ambiguous and contentious character of the activity of governing under modern constitutional arrangements ridden by the dialectical interaction between popular sovereignty and individual rights, democracy and rule of law, constituent power and ordinary politics, right and command, norm and exception, higher law and ordinary statute, legislation and administration, law-making and adjudication, and so on. The moralized views of public law practice and theory proposed by normative interpretativist theories underrate the crucial fact that the practice of modern public law is marked by a gulf between norm and fact, and that the contested constitutional articulation of the activity of governing continuously generates conflicts that cannot adequately be resolved by notions of 'fit' and 'justification'. Consequently, public law discourse is best grasped by studying the competing self-understandings – traditions or 'styles of thought'

(Loughlin 1992) – that have emerged and which present contrasting accounts of the contours and boundaries of the subject and assign different meanings to the concepts that structure the practices of government –sovereignty, liberty, rights, democracy, and so on – whose origins are to be found in theories politics and society.

VI: CONCLUSION

This overview of interpretative theories of public law leads to three general conclusions. First, that notwithstanding evident differences, the varieties of interpretative legal theories examined in this chapter share one basic insight: that law is a social phenomenon which cannot be adequately grasped by use of the explanatory frameworks characteristic of the natural sciences. All interpretative theories of law conceive the exercise as a hermeneutic undertaking. Secondly, that the movement from descriptivism to normativism and then to phenomenological interpretativism reflects a significant trend in contemporary public law thought. It marks, in particular, the transition from interpretation within a professionally-prescribed frame towards more all-encompassing conceptions that exhibit distanciation from the discursive forms of lawyers and judges and to locate law more explicitly within the domain of the political. The third is that this trend also exhibits differences over whether public law is conceived as a sub-category of positive law or whether a more ambitious enquiry into meaning is undertaken and the relation between legality and legitimacy examined.

Debates in public law today are primarily polarized between normativist and phenomenological interpretations of the discipline. These debates are acquiring an additional layer of complexity as we move into a world in which a greater degree of governmental action is taking place through institutional arrangements that lie beyond the frameworks of nation-states (Grimm 2005; Dobner and Loughlin eds 2010; Walker 2014). It is being reconfigured as a debate between cosmopolitans and statists (see, eg, Habermas 2001 v Grimm 1995). It therefore seems unlikely that the intensity of these debates will recede in the foreseeable future.

REFERENCES

Ackerman, B. 1991 *We the People: vol. 1 Foundations*. Cambridge, Mass: Belknap Press.

Alexy R. 1989 *A Theory of Legal Argumentation*. Oxford: Clarendon Press

Allan, T.R.S. 2013 *The Sovereignty of Law* Oxford: Oxford University Press.

Bickel, A. 1962 *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* New Haven: Yale University Press, [2nd edn. 1986]

Bork, R. H. 1985 'Styles in Constitutional Theory' 26 *South Texas Law Journal* 383-395.

Brudner A. 2004 *Constitutional Goods*. Oxford: Oxford University Press.

Cardozo B.N. 1931 *Law and Literature*. New York: Harcourt, Brace & Co.

Dobner P & Loughlin M 2010 *The Twilight of Constitutionalism?* Oxford: Oxford University Press

Dworkin R. 1986 *Law's Empire*. Cambridge, Mass.: Belknap Press.

Dworkin R. 1996 *Freedom's Law: The Moral Reading of the American Constitution.* Oxford: Oxford University Press

Dworkin, R. 1997 'The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve' 65 *Fordham Law Review* 1249-1293.

Dworkin R. 2006a 'In Praise of Theory' in *Justice in Robes***.** Cambridge, Mass: Belknap Press.

Dworkin R. 2006b 'Darwin's New Bulldog' in *Justice in Robes***.** Cambridge, Mass: Belknap Press.

Dworkin R. 2006c 'Law and Morals' in *Justice in Robes***.** Cambridge, Mass: Belknap Press.

Ely, J. H. 1980 *Democracy and Distrust: A Theory of Judicial Review* Cambridge, Mass.: Harvard University Press.

Gadamer, H.-G. 1989 *Truth and Method* [1960] J. Weinsheimer and D.G.Marshall trans. London: Sheen & Ward, 2nd rev. edn.

Galligan, D.J. 1982 'Judicial Review and the Textbook Writers' 2 *Oxford J. of Legal Studies* 257-276.

Grey, T. 1975 'Do we have an Unwritten Constitution?' 75 *Stanford Law Rev.* 703-718

Griffin S.M. 1989 'What is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition' 62 *S. California Law Rev* 493.

Griffin, S.M. 1996 *American Constitutionalism: From Theory to Politics* Princeton: Princeton University Press.

Griffin S.M. 1999 'Constitutional Theory Transformed' 108 *Yale Law J.* 2115.

Griffin, S.M. 2007 'Constituent Power and Constitutional Change in American Constitutionalism' in M. Loughlin and N. Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* Oxford: Oxford University Press 49-66.

Grimm, D 1995 'Does Europe need a Constitution?' 1 *European Law Journal* 282-302.

Grimm, D 2005 'The Constitution in the Process of Denationalization' 12 *Constellations* 447-463

Habermas, J 2001 'Why Europe needs a Constitution' 11 *New Left Review* 5-26.

Hart HLA 1983a 'Positivism and the Separation of Law and Morals' in his *Essays in and Philosophy* Oxford: Clarendon Press, 49-87.

Hart HLA 1983b 'Problems of the Philosophy of Law' in his *Essays in Jurisprudence and Philosophy* Oxford: Clarendon Press, 88-119.

Hart, HLA 1994 *The Concept of Law*. Oxford: Clarendon Press, 2nd edn.

Hunter, I. 2001 *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany*. Cambridge: Cambridge University Press.

Kelsen, H. 1992 *Introduction to the Problems of Legal Theory* B.L. Paulson and S.L. Paulson trans. of first edn. [1934] of *Reine Rechtslehre.* Oxford: Clarendon Press.

Kramer, L.D. 2004 *The People Themselves: Popular Constitutionalism and Judicial Review* New York: Oxford University Press.

Loughlin, M. 1992 *Public Law and Political Theory* Oxford: Clarendon Press.

Loughlin, M. 2003 *The Idea of Public Law* Oxford: Oxford University Press.

Loughlin, M. 2005 'Constitutional Theory: A 25th Anniversary Essay' 25 *Oxford J. of Legal Studies* 183-202.

Loughlin, M 2010	*Foundations of Public Law* Oxford: Oxford University Press.
Loughlin, M 2014	'Modernism in British Public Law, 1919-79.' *Public Law* 56-67.
MacCormick, N. 1978	*Legal Reasoning and Legal Theory*. Oxford: Clarendon Press.
McAuslan P. 1978,	'Administrative Law and Administrative Theory: The Dismal Performance of Administrative Lawyers' 1978 *Cambrian Law Review* 40.
Posner, R.A. 1998	'Against Constitutional Theory' 73 *New York University Law Review* 1-22.
Ricoeur, P. 1965	'The Political Paradox' in his *History and Truth* Evanston, Ill.: Northwestern University Press, 247-70.
Ricoeur P. 1991	'On Interpretation' in his *From Text to Action: Essays in Hermeneutics, II*. Evanston, Ill.: Northwestern University Press, 1-20.
Scalia, A. 1997	*A Matter of Interpretation: Federal Courts and the Law* Princeton: Princeton University Press.
Snowiss, S. 1990	*Judicial Review and the Law of the Constitution*. New Haven: Yale University Press.
Sunstein, CR. 1993	*The Partial Constitution* Cambridge, Mass.: Harvard University Press.
Sunstein, CR.1998	*Legal Reasoning and Political Conflict*. New York: Oxford University Press.
Taylor, C. 1985	*Philosophy and the Human Sciences: Philosophical Papers, vol.2* Cambridge: Cambridge University Press.
Tushnet, M. 1999	*Taking the Constitution away from the Courts* (Princeton: Princeton University Press, 1999).
Tushnet 2004	'The State of Constitutional Theory in US Law Schools in the 2000s' 13 *The Good Society* 21-4.
Walker, N 2014	*Intimations of Global Law*. Cambridge: Cambridge University Press.