know how to go about in politics'.[14] Since the 1960s, however, this veneer of effortless superiority has worn thin.[15] And today, in the face of structural developments affecting government that have all but destroyed what remains of the historic constitution, British scholars are engaged in the exercise of assembling imaginary foundations or, like alchemists, devising 'fundamental' precepts from a jumble of customary arrangements of whose practical significance they have only a dim appreciation.

Like the drunk in our tale, many lawyers—and especially those attempting to insert the precepts of modern liberal constitutionalism into the arrangements of British government—are starting from the wrong place. Rather than devising some ideal of modern liberal democracy and then re-interpreting governmental practices in compliance with this model, we should begin by paying closer attention to the particular circumstances of their evolution. As part of that general exercise, we need to reassess the way in which public law has been treated in modern thought.

Since the main objective of this book is not historical but conceptual, I do not propose to rehearse the particular intellectual arguments relating to the British case.[16] Whilst the specific circumstances of particular regimes can be instructive, the book's aim is to analyse the foundations of the concept of public law. I argue that these foundations are those of governing, politics, representation, sovereignty, constituent power, and rights. Each is examined in the chapters that follow and, building on these, I then present an account of the method of public law. Finally, by pulling these conceptual building blocks into a classificatory frame, I sketch an outline of the idea of public law. Those that prefer to read conclusions first may therefore wish to turn immediately to the last chapter. Here, I draw the argument together by portraying public law as an autonomous discipline, one that being stripped of political ideology might be called the pure theory of public law.

[14] Giovanni Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56 *American Political Science Review* 853–864, 854.

[15] See, e.g., Nevil Johnson, *In Search of the Constitution: Reflections of State and Society in Britain* (Oxford: Pergamon Press, 1977); David Marquand, *The Unprincipled Society: New Demands and Old Politics* (London: Fontana, 1988), esp. ch. 7; Ferdinand Mount, *The British Constitution Now* (London: Heinemann, 1992).

[16] These are addressed in my *Public Law and Political Theory* (Oxford: Clarendon Press, 1992) and 'Pathways of Public Law Scholarship' in G. P. Wilson (ed.), *Frontiers of Legal Scholarship* (Chichester: Wiley, 1995), 163–188.

2

Governing

Public law maintains its distinctive character because of the singularity of its object. That object is the activity of governing. With respect to this activity, law has a range of tasks to perform. It is only once the nature of these tasks is appreciated that we are able to identify public law as a special body of knowledge. But the nature of these tasks cannot be understood without first reflecting on the activity of governing itself.

As a general phenomenon, the activity of governing exists whenever people are drawn into association with one another, whether in families, firms, schools, or clubs. In order to maintain themselves, and certainly to be able to develop and flourish, such groups must establish some set of governing arrangements, however rudimentary. The formation of governing arrangements is a ubiquitous feature of group life. Whatever the type of governing arrangement established, an iron law of necessity holds sway. Since it simply is not possible for associations of any significant scale and degree of permanence to be capable of governing themselves, the business of governing invariably requires the drawing of a distinction that has become fundamental to the activity: the division between rulers and ruled, between a governing authority and its subjects.[1]

Although the general activity of governing is a feature of all human associations, a certain type of association commands our special attention, and over which the struggle to establish authority has been intense. That body has been given a variety of names. In ancient Greece it was referred to as a *polis*,[2] and the Romans thought of it as *res publica*.[3] Throughout medieval Europe, the body was commonly called a *regnum* or a principality.[4] When, during the seventeenth century, Thomas Hobbes sought to explicate its character, he made use of the expression 'commonwealth'.[5] In modern terminology, however, the body is invariably referred to as 'the state'.[6]

[1] See Michael Oakeshott, *Morality and Politics in Modern Europe: The Harvard Lectures* [1958], Shirley Robin Letwin ed. (New Haven: Yale University Press, 1993), 7–8.

[2] Aristotle, *The Politics* [c.335–323 BC], T. A. Sinclair trans., Trevor J. Saunders ed. (Harmondsworth: Penguin, 1981).

[3] Marcus Tullius Cicero, *De Respublica* [c.52 BC], Clinton Walker Keyes trans. (London: Heinemann, 1928).

[4] Ptolemy of Lucca, *On the Government of Rulers. De Regimine Principum* [c.1300], James M. Blythe trans. (Philadelphia: University of Pennsylvania Press, 1997); Sir John Fortescue, *De Laudibus Legum Anglie* [1468–71], S. B. Chrimes trans. (Cambridge: Cambridge University Press, 1942).

[5] Thomas Hobbes, *Leviathan* [1651], Richard Tuck ed. (Cambridge: Cambridge University Press, 1996). Note especially the division of this book into four parts: 'Of Man', 'Of Commonwealth', 'Of A Christian Commonwealth' and 'Of the Kingdome of Darkness'.

[6] See Quentin Skinner, 'The State' in Terence Ball, James Farr, and Russell L. Hanson (eds), *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 1989), 90–131; Raymond Geuss, *History and Illusion in Politics* (Cambridge: Cambridge University Press, 2001), ch. 2.

Whatever the complexities of the modern notion of the state, we are able to recognize its basic identity as that institution which claims the ultimate allegiance of its citizens and which maintains 'the monopoly of the legitimate use of physical force within a given territory'.[7] Some scholars have argued that the state is not qualitatively different from other group-units.[8] But, especially given our juristic objectives,[9] it seems more appropriate to maintain that the state has a unique, if ambiguous, identity. Because of its characteristic forms, distinctive ways and special tasks, the state should be regarded as an association *sui generis*.

The idea of the state emerged in recognition of the differentiation that was capable of being drawn between the personality of the ruler and the impersonal character of the arrangements through which his rule was exercised. The ancients were familiar with the distinction between private and public—between *oikos* and *polis*—and hence between the concepts of ownership and rulership.[10] But in referring to the collectivity they had a sense only of 'the public' or 'the people'; hence we find Cicero defining *res publica* as 'an assembly of men living according to law'.[11] It was not until the beginnings of the modern period that the idea of the state as an entity distinct both from its members and from its officers was articulated. This notion of the state as an institution that mediated between governed and governors arose out of attempts to make sense of a set of elaborate and bureaucratic governing arrangements: not only were the ruler's public and private capacities to be separated but these public capacities could be exercised only through a variety of impersonal forms. From this perspective, the state represents 'the second most important invention in [political] history after the Greek separation between ownership and government'.[12]

Although the modern idea of the state is of central importance to our task, the main focus of inquiry at this stage will not be on the state as such, but on the activity of governing through the institution of the state. Three basic and related issues concerning the nature of this activity need to be addressed. The first is the question of the engagement of government: what are the main tasks that have been allocated to

[7] Max Weber, 'Politics as a Vocation' [1919] in H. H. Gerth and C. Wright Mills (eds), *From Max Weber* (London: Routledge & Kegan Paul, 1948), 77–128, 78.

[8] This view was most strongly associated with the political pluralists (Figgis, Barker, Laski, and Cole) who explored these questions in the early decades of the twentieth century: see Paul Q. Hirst, *The Pluralist Theory of the State: Selected Writings* (London: Routledge, 1989); David Nicholls, *The Pluralist State: The Social and Political Ideas of J. N. Figgis and his Contemporaries* (London: Macmillan, 2nd edn. 1994); Julia Stapleton, *Englishness and the Study of Politics: The Social and Political Thought of Ernest Barker* (Cambridge: Cambridge University Press, 1994); David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 1997).

[9] See, e.g., J. D. B. Mitchell, 'The Anatomy and Pathology of the Constitution' (1955) 67 *Juridical Review* 1–22, 21: 'Governments cannot be treated as larger and more interfering Lever Bros. or ICI. They are different in purpose, different in kind, and should often be subject to different rules of law'.

[10] See, e.g., Aristotle, above n. 2, i.2: 'It is an error to suppose, as some do, that the roles of the statesman, of a king, and of a household-manager and of a master of slaves are the same on the ground that they differ not in kind but only in point of numbers of persons . . .'.

[11] Cicero, above n. 3, i.39.

[12] Martin van Creveld, *The Rise and Decline of the State* (Cambridge: Cambridge University Press, 1999), 58.

government? The second issue concerns modes of governing: how is the character of the activity of governing to be conceptualized? The third involves an inquiry into the nature of the office of government.

I have presented the issues in this sequence for a particular reason. Whenever the relationship between law and government is considered within legal thought, it is the third issue that provides the focus of inquiry and absorbs the greatest degree of attention. Legal commentary usually begins with the construction of a model of the office of government and the manner of its authorization. Only after this do lawyers generally consider questions relating to engagement and modes. By this stage, however, the stage is already set both for moralizing about the range of engagements of government and for resolving ambiguities concerning the mode of governance. Since such models are invariably based on the acceptance of liberal democratic precepts, this type of approach throws into relief the tendency of legal conceptualization to become used as an ideological device. If modern government operates at some distance from its ideal liberal democratic form and yet also seems to be a fixed feature of the contemporary world, then the scholarly postulation of a normative frame that bears little relation to the reality as experienced is unhelpful. By examining the activity of governing in this sequence, then, my intention is to address the issues from a positive perspective.

THE ENGAGEMENT OF GOVERNMENT

It might be argued that the task of governing has throughout history remained relatively constant. In general, the basic engagement of government has been one of maintaining and enhancing the well-being of the state and its people. When, for example, Hobbes suggested that the responsibilities of the state are all implicit in one phrase, *salus populi suprema lex esto*,[13] he was simply reiterating a famous Ciceronian maxim.[14] Ancient and modern writers, it would appear, have maintained a common appreciation of the basic nature of the task. But the claim has a deceptive simplicity. Although the ancient formulation has been regularly invoked in modern times, its popularity is largely the consequence of its equivocal meaning.

Even in classical Latin, the meaning of *salus* ranges widely. As Michael Oakeshott has explained, the meaning of the term has varied 'from mere *safety* (relief from threatened extinction), through *health* (which is normal), and *abundance* (which is excessive), and *welfare* (which is comprehensive), and on *salvation* (which leaves nothing to be desired)'.[15] The phrase, Oakeshott suggests, is nothing less than 'the

[13] Thomas Hobbes, *On the Citizen* [1647], Richard Tuck and Michael Silverthorne eds (Cambridge: Cambridge University Press, 1998), xiii.2.

[14] Marcus Tullius Cicero, *De Legibus* [c.51 BC], Clinton Walker Keyes trans. (London: Heinemann, 1928), iii.6. See also Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* [1673], James Tully ed. (Cambridge: Cambridge University Press, 1991), ii.11.3.

[15] Michael Oakeshott, *The Politics of Faith and the Politics of Scepticism* [c.1952], Timothy Fuller ed. (New Haven: Yale University Press, 1996), 39.

emblem of all the ambiguity of our political vocabulary'.[16] If we want to identify the basic tasks of government with any degree of precision, we cannot rest on such generalities.

Unpacking the classical formulation, Hobbes concluded that the tasks of government fell into four main categories: to maintain defence from external enemies; to preserve internal peace; to enable the citizen to acquire wealth, so far as that is consistent with public security; and to promote the full enjoyment of the citizen's liberty.[17] This package presents itself as a relatively limited range of activities. What government does within these categories, however, can vary considerably. The engagement of government is greatly affected by the knowledge-based and material resources at its disposal. Before the modern period, such resources were highly limited, and the tasks of government were correspondingly constrained. The scale and power of modern government has therefore grown in tandem with the development of techniques that have strengthened the capacity of governments to appropriate and deploy available resources in furtherance of these basic tasks. In the name of promoting security, liberty, and prosperity, modern governments have greatly expanded the range of their activities, and have now assumed responsibility for furthering economic and social development, managing the economy, and providing for the welfare of their citizens.

The modern state is the institution through which such innovation was harnessed. With the transmutation of the king's servants into officers of the state, a decisive step was taken in establishing an impersonal, specialized administrative apparatus that could exploit developments in printing, record-keeping, indexing, and such like.[18] Consequently, although the enforcement of justice and peace continued to be exercised in the king's name, these activities increasingly had little to do with the monarch.[19] With the establishment of a specialized administration, statistical information—'political arithmetic' as it was called[20]—about the territory of the state and society was acquired: borders were marked, maps of the country were drawn, and the population, property, and productive capacities of society were measured.

This improved technical competence enabled the state to increase its efficiency in extracting revenues by way of taxation.[21] But as the ancient maxim of Tacitus states,

[16] Michael Oakeshott, *The Politics of Faith and the Politics of Scepticism* [c.1952], Timothy Fuller ed. (New Haven: Yale University Press, 1996), 39. See also John Selden, *Table Talk* [1689] (London: Dent, 1898), ciii: 'there is not anything in the World more abased than this Sentence, *salus populi suprema lex esto*'.

[17] Hobbes, above n. 13, xiii.6.

[18] G. R. Elton, *The Tudor Revolution in Government: Administrative Changes in the Reign of Henry VIII* (Cambridge: Cambridge University Press, 1953), esp. 415–427.

[19] Sir Frederick Pollock, 'The King's Peace' in his *Oxford Lectures and Other Discourses* (London: Macmillan, 1890); F. W. Maitland, *Justice and Police* (London: Macmillan, 1885).

[20] Karin Johannisson, 'Society in Numbers: The Debate over Quantification in Eighteenth-Century Political Economy' in Tore Frängsmyr, J. L. Heilbron, and Robin E. Rider (eds), *The Quantifying Spirit in the Eighteenth Century* (Berkeley, Calif.: University of California Press, 1990), 343–361, 348–350.

[21] D. V. Glass, *Numbering the People: The Eighteenth-Century Population Controversy and the Development of Census and Vital Statistics in Britain* (Farnborough, Hants: D. C. Heath, 1973), ch. 2.

you need armies to maintain peace and 'you cannot have troops without pay; and you cannot raise pay without taxation'.[22] So it was that alongside the growth in revenue-generating capacity, and in a reversal of the thrust of the maxim, a transformation in the nature and scale of warfare occurred. From being a series of essentially private squabbles amongst members of the governing classes who drew on feudal obligations to form their armies, warfare became a large-scale, disciplined, and highly technical activity.[23] This was made possible only because of the establishment of regular, hierarchically organized, and bureaucratically managed armed forces of the state.[24]

But perhaps the most significant changes in the tasks of government during the modern era have been those that concern the management of the economy and the promotion of the welfare of society. Government today is involved in these activities to an extent unimaginable even in the nineteenth century. Consider, for example, the changing role of government with respect to the currency. The function of pre-modern rulers in relation to the currency was not essentially to *create* value in money. By impressing his seal on such valuable commodities as gold and silver, the king's function was mainly that of confirming an existing value.[25] By the twentieth century, however, government had become centrally involved in the business of creating and destroying the value of money. The key stages in this transformation might briefly be noted.[26]

The starting point of this modern development is the recognition that the regal underwriting of the value of the currency bolstered the people's confidence in its stability, and this meant that tokens such as tallies were able to enter into circulation. Building on this growing confidence, it became possible, after the establishment of the Bank of England in 1694, to issue paper notes. The subsequent expansion of paper currency permitted a rapid expansion of credit which paved the way for the industrial revolution. The success of paper currency, van Creveld argues, was made possible only by 'the separation between the monarch's person and the state', since after 1694 'it was no longer the former but the latter, operating by means of the Bank and resting on an alliance between the government and the city, which guaranteed the notes'.[27] Until the end of the nineteenth century, people, in theory at least, were able to exchange their paper notes for gold. But this changed with the coming of the First World War, with the result that government expenditure, which had stood at approximately 15 per cent of GNP before the war, was able to increase to 85 per cent

[22] Cornelius Tacitus, *The Histories* [c.109], W. H. Fyfe trans., D. S. Levene ed. (Oxford: Oxford University Press, 1977), iv.74.

[23] Michael Howard, *War in European History* (Oxford: Oxford University Press, 1976), chs 2–5.

[24] John Brewer, *The Sinews of Power: War, Money and the English State, 1688–1783* (London: Hutchinson, 1989); Thomas Ertman, '*The Sinews of Power* and European State-building Theory' in Lawrence Stone (ed.), *An Imperial State at War* (London: Routledge, 1993), 33–51.

[25] See, e.g., William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765), i. 266–268.

[26] For details see Glyn Davies, *A History of Money: From Ancient Times to the Present Day* (Cardiff: University of Wales Press, 1994).

[27] van Creveld, above n. 12, 229.

of GNP by 1916–17. This remarkable shift in the scale of government expenditure was achieved by increased taxation, the issuance of government bonds, and, significantly, by the government's printing of money.[28] Although the rate of government expenditure after the war decreased, it still remained at around double the pre-war rate, and after the fiasco of the attempt to return to the gold standard, all means of payment were to be made in a paper currency produced and controlled by the state. This transformation thus provided government with the tools by which—in the particular circumstances which materialized as a result of the outbreak of the Second World War—it was able to dominate the economy.

The growing involvement of government in the business of money is instructive. Once the state was in a position to determine what counted as money, the financial restraints on governmental action—restrictions that had caused rulers immense difficulties[29]—more or less evaporated. The fiscal levers acquired by government effected a vast increase in governmental power.[30] This power was applied mainly for the purpose of strengthening the state's control over society. The changes wrought by modernization and industrialization had eroded feudal ties and weakened the authority of the church. The displacement of these traditional sources of social authority led to the emergence of property ownership as the cement of modern social order. And after the possessing classes had acquired control of the state—the singular achievement of the Glorious Revolution of 1688—the task of government turned more explicitly to the protection of private property.

It is at this stage in the evolution of government that 'the people'—that is, the great majority of the population who previously had been beneath the horizon of consciousness of the governing classes—first began to emerge as a political presence. The French revolution of 1789 had provided a graphic demonstration of the potential of the masses to overthrow the most well-established of governing regimes. Its general impact on the governing classes of European states was to impress on them the need to extend the range of their controls over society. From the early nineteenth century, we see in Britain—in parallel with other European states—a series of measures which result in the formation of modern police forces, prison systems, and security services.[31]

[28] van Creveld, above n. 12, 235.

[29] Such difficulties had, for example, provided a major source of the English constitutional conflicts of the seventeenth century. See Johan P. Sommerville, *Politics and Ideology in England, 1603–1642* (London: Longman, 1986).

[30] The recent reversal of this power, whereby states become increasingly susceptible to the fluctuations of international financial markets, should, however, be noted. See: Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: Cambridge University Press, 1996). For a particular illustration—when the pound was forcibly withdrawn from the exchange rate mechanism of the European Monetary System—see Philip Stephens, *Politics and the Pound: The Tories, the Economy and Europe* (London: Macmillan, 1996), ch. 10. And the contemporary trend has been to remove this power of the state from the control of politicians. See, e.g., Art. 107 EC: 'When exercising the powers and carrying out the tasks and duties conferred upon them by this Treaty . . . neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Community institutions or bodies from any government of a Member State or from any other body'.

[31] From a voluminous literature see: Geoffrey Marshall, *Police and Government* (London: Methuen, 1965); Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1750–1850* (London: Macmillan, 1978); Bernard Porter, *The Origins of the Vigilant State: The London Metropolitan Special Branch Before the First World War* (London: Weidenfeld and Nicolson, 1987); Laurence Lustgarten and Ian Leigh, *In From the Cold: National Security and Parliamentary Democracy* (Oxford: Clarendon Press, 1994).

Being part of an attempt to extend its grip over society, this growth in the state's powers for maintaining public order was paralleled by an unprecedented degree of inquiry into the conditions of the working population. The appalling conditions revealed by the blue books[32] led to ameliorative legislation relating to industrial working conditions, the relief of poverty, and the promotion of public health, sanitary, and housing arrangements. This function of the state in the promotion of the welfare of the people was considerably expanded with the growth of state education and (though not until the beginning of the twentieth century) the establishment of a system of social security.[33]

The impact of this extension of governmental tasks has been profound. At the beginning of the nineteenth century, government was mainly concerned with law and order, external affairs and defence, and raising revenue to finance these activities. By the end of the twentieth century, there were few areas not only of public but also of personal life in which government performed no role. The extent of the shift in the scope of government was summarized by the Report of the Royal Commission on the Constitution in 1973 in these terms:

> The individual a hundred years ago hardly needed to know that the central government existed. His birth, marriage and death would be registered, and he might be conscious of the safeguards for his security provided by the forces of law and order and of imperial defence; but, except for the very limited provisions of the poor law and factory legislation, his welfare and progress were matters for which he alone bore the responsibility. By the turn of the century the position was not much changed. Today, however, the individual citizen submits himself to the guidance of the state at all times. His schooling is enforced; his physical well-being can be looked after in a comprehensive health service; he may be helped by government agencies to find and train for a job; he is obliged while in employment to insure against sickness, accident and unemployment; his house may be let to him by a public authority or he may be assisted in its purchase or improvement; he can avail himself of a wide range of government welfare allowances and services; and he draws a state pension on his retirement. In these and many other ways unknown to his counterpart a century ago, he is brought into close and regular contact with government and its agencies.[34]

[32] S. E. Finer, *The Life and Times of Sir Edwin Chadwick* (London: Methuen, 1952), 39: 'The Royal Commission of Enquiry is a legislative device barely met with before 1832. By 1849 more than 100 had been set up, and every major piece of social legislation between 1832 and 1871 was ushered in by this type of legislation'.

[33] See Oliver MacDonagh, *Early Victorian Government, 1830–1870* (London: Weidenfeld and Nicolson, 1977); David Roberts, *Victorian Origins of the British Welfare State* (New Haven: Yale University Press, 1960); Jose Harris, *Unemployment and Politics: A Study of English Social Policy, 1886–1914* (Oxford: Clarendon Press, 1972).

[34] *Report of the Royal Commission on the Constitution, 1969–1973* Cmnd. 5460 (London: HMSO, 1973), para. 232.

But in moving beyond safety to embrace health and welfare, the powers of government impact not only on the individual citizen but also on business organizations of every type. The concern of government extends not only to the welfare of the individual but also to the performance of the economy and prosperity of the nation. The Royal Commission identified some of the consequences:

> Industrialists, too, are much more involved with government. An industrialist in the nineteenth century, if he wished to build a factory, could do so by entirely private arrangement, and government hardly need know about the project. In these days, however, a prospective factory developer is faced with a host of Acts and regulations—to do, for instance, with environmental planning, industrial development certificates, government grants, allowances and inducements, the welfare and training of employees, employee insurance and taxation, industrial relations, licences, waste disposal, air pollution and the collection of trade statistics—any aspect of which his nineteenth century forbear might well have regarded as an unwarranted intrusion.[35]

My general point is that the range of governmental tasks has increased dramatically. Modern government has had to acquire a large and sophisticated administrative apparatus as it has increased taxes, acquired statistical data about society, established police and security forces, formed agencies to promote health, education and welfare, and assumed responsibility for the regulation of money, trade, and the economy.[36] The interests of government today extend to a concern both for the welfare of the individual citizen and for the corporate well-being of the nation, and while the causes of this may be complicated, they are inextricably bound up with the 'rise of the masses' as a political presence. This leads to two final points. The first is that the political role of the masses has emerged in tandem with the harnessing of the forces of nationalism to the pursuit of governmental objectives.[37] And the second is that this growth in governmental power has had a major impact on government's manner of authorization: today, for example, it is almost universally accepted that since it disposes of such an immense power, government must be democratically constituted.

[35] *Report of the Royal Commission on the Constitution, 1969–1973* Cmnd. 5460 (London: HMSO, 1973), para. 233.

[36] From the extensive literature that now exists on the growth of the modern state see: Charles Tilly (ed.), *The Formation of National States in Western Europe* (Princeton, NJ: Princeton University Press, 1975); Michael Mann, *The Sources of Social Power, vol. II: The Rise of Classes and Nation-States, 1760–1914* (Cambridge: Cambridge University Press, 1993); Thomas Ertman, *Birth of the Leviathan: Building States and Regimes in Medieval and Early Modern Europe* (Cambridge: Cambridge University Press, 1997); van Creveld, above n. 12, esp. ch. 4.

[37] See Ernest Gellner, *Nations and Nationalism* (Oxford: Blackwell, 1983); John Breuilly, *Nationalism and the State* (Manchester: Manchester University Press, 2nd edn. 1993); Michael Hechter, *Containing Nationalism* (Oxford: Oxford University Press, 2000).

MODES OF GOVERNANCE

In the light of this sketch of the modern development of the tasks of government, we can now address a critical issue: how are we to characterize the activity of governing the state? The answer to this question offers a key to understanding the nature of the activity of governing. It also takes us a considerable way towards appreciating the ambiguities that pervade any inquiry into the subject of public law.

The early modern period is one in which, as a result of social, economic, and technological changes, inherited beliefs concerning divine authorization of rulers and the natural justification of a hierarchical organization of governmental authority were losing much of their authority. Jurists were thus motivated to devise more rational explanations of the nature of political association. Writing in the late sixteenth century, Jean Bodin was perhaps the first of the early modern theorists to retrieve the Aristotelian distinction between *polis* and *oikos*, between government and the household, thereby differentiating between a natural hierarchy based on master and slave (or, more generally, superior and inferior) operating in the private sphere, and an arrangement of government constituted by freely consenting individuals (in Latin, *cives*) functioning in the public sphere.[38] Bodin's work was built upon by Thomas Hobbes, who produced a systematic account of the state as an 'artificial man' which, by virtue of the idea of representation, could be distinguished both from society and from the personality of the ruler.[39] At this relatively early stage, then, jurists were exploring the idea of the modern state as a singular form of human association.

A central theme running through their attempts to specify the principles which legitimate the engagement of government is that of consent. This theme is rooted in the idea of some founding compact through which individuals agree to entrust certain of their natural rights to the governing authority in order that the common good might be realized.[40] From this body of work we derive many of the concepts that have been highly influential in shaping modern theories of government, including the public/private distinction, the idea of the representative character of governmental authority, the notion that political association is established as a result of covenanting between freely consenting individuals, and the idea of sovereignty as the form

[38] Jean Bodin, *The Six Bookes of a Commonweale* [1576], Richard Knolles trans., Kenneth Douglas McRae ed. (Cambridge, Mass: Harvard University Press, 1962), i.2. See also John Locke, *Two Treatises of Government* [1680], Peter Laslett ed. (Cambridge: Cambridge University Press, 1988). Locke's first treatise, which took the form of a critical analysis of Robert Filmer's *Patriacha*, was designed to show that paternal power and political power must be differentiated.

[39] Thomas Hobbes, *Leviathan* [1651], Richard Tuck ed. (Cambridge: Cambridge University Press, 1995), Introduction. The importance of the theme of representation in Hobbes's scheme is examined below in Ch. 4, 55–61.

[40] See John Dunn, 'Contractualism' in his *History of Political Theory and Other Essays* (Cambridge: Cambridge University Press, 1996), 39–65; Jody S. Kraus, *The Limits of Hobbesian Contractarianism* (Cambridge: Cambridge University Press, 1993); Russell Hardin, *Liberalism, Constitutionalism, and Democracy* (Oxford: Oxford University Press, 1999), ch. 3.

through which governmental power is given expression. Work of this nature also tends to elaborate the idea of the governing relationship as constituting a particular mode of association.

Important though such juristic writing may be, we should remember that it was crafted primarily with a view to providing an answer to a relatively specific question: how is the authorization of government to be explained and justified? That is, the body of work represented by, amongst others, Bodin, Hobbes, and Locke, does not provide an answer to the question of how the tasks actually undertaken by government can best be understood or conceptualized. It is this limitation of early modern political theory that Michel Foucault, in his project on governmentality, confronts.

Sixteenth century writing, Foucault explains, tended to treat the activity of governing as a common undertaking. Three basic types of governing provide recurrent themes of the period: self-government (morality), family government (economy), and the science of running a state (politics). In contrast with the work of early modern political theorists such as Bodin and Hobbes, who sought to draw a line between a juridical conception of authority and other forms of power, Foucault argues that these types operate on a spectrum. A common strand, he suggests, was that 'a person who wishes to govern the state must first learn how to govern himself, his goods and his patrimony, after which he will be successful in governing the state'.[41] The generic skills acquired in these activities, such as those of economy and efficiency, are also instilled into the practices of governing the state. The precepts derived from experience in such practices came to be known as the science of police[42] or political economy.[43]

Foucault argues that with the emergence of 'the social question' or what he calls 'the problem of population'—the extension of the consideration of government to those parts of the population that had previously been beneath its notice—the art of government moved beyond the juridical frame of sovereignty. This resulted from a revaluation of the idea of economy, together with the formation of a science of statistics. With the consequent realization 'that population has its own regularities, its own rate of deaths and diseases, its cycles of scarcity'[44] the family or household was displaced as a model of government and the art of government emerged as a distinctive mode of association. But this notion of the art of government 'has as its purpose not the act of government itself, but the welfare of the population, the improvement of its condition, the increase of its wealth, longevity, health'.[45] And while the population is the subject of needs, 'it is also the object in the hands of the government'.[46]

[41] Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon, and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (Hemel Hempstead: Harvester Wheatsheaf, 1991), 87–104, 91.

[42] See Albion Woodbury Small, *The Cameralists: The Pioneers of German Social Polity* (Chicago: University of Chicago Press, 1909); Adam Smith, *Lectures on Jurisprudence* [1766], R. L. Meek, D. D. Raphael, and P. G. Stein eds (Oxford: Clarendon Press, 1978), 331–339.

[43] Blackstone, above n. 25, iv.162: 'By the public police and oeconomy I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations'.

[44] Foucault, above n. 41, 99. [45] Ibid. 100. [46] Ibid.

Foucault highlights the character of this distinctive mode of association by invoking the idea of pastorship, government understood in terms of the metaphor of the shepherd and his flock. The shepherd 'gathers together, guides, and leads his flock', he wields power over a flock rather than over the land, and his role is that of ensuring its 'salvation'.[47] In the Christian tradition of pastorship, knowledge of the general state of the flock is not sufficient; the pastor must possess an individualized knowledge, to be acquired through the techniques of self-examination and guidance of conscience. Foucault argues that, as a result of the growth of political technology, the type of individualized power implicit in the notion of pastorship can be combined with the growing centralization of political power that is a characteristic of the modern idea of the state. Through this conjunction, a transition takes place 'from the art of government to a political science, from a regime dominated by structures of sovereignty to one ruled by techniques of government'.[48] He calls this process 'the governmentalization of the state'.[49]

This development is not to be seen 'in terms of the replacement of a society of sovereignty by a disciplinary society and the subsequent replacement of a disciplinary society by a society of government'.[50] Foucault suggests that 'in reality one has a triangle, sovereignty-discipline-government, which has as its primary target the population and as its essential mechanism the apparatuses of security'.[51] That is, the two modes of governance—rulership (sovereignty) and pastorship—are each bound up in a modern process of governmentalization.

Foucault's argument has a particular significance for the idea of public law. Although law performs a pivotal role within the idea of rulership, it tends to be displaced within pastorship, where the art of government becomes essentially one of 'disposing of things'. By this, he means that government becomes a method 'of employing tactics rather than laws, and even using laws themselves as tactics—to arrange things in such a way that, through a certain number of means, such and such ends may be achieved'.[52] Within the idea of rulership, the objective of government is internal to itself. By contrast, the end of government understood as pastorship resides in the things it manages. Here Foucault claims, 'law is not what is important' since 'it is not through law that the aims of government are to be reached'.[53]

Foucault's analysis of modes of governance can usefully be compared with Michael Oakeshott's earlier account of the character of the modern European state. Like Foucault's, Oakeshott's analysis is historical rather than philosophical. The formation of the modern state, he explains, has its origins in a ceaseless process of conquest, rebellion, secession, murder, treaties, intermarriage of ruling families, hereditary succession to estates, and such like. The states of Europe were forged from a variety of ancient communities or their fragments, often by yoking together communities

[47] Michel Foucault, '*Omnes et singulatim*: Towards a Criticism of "Political Reason"' in Sterling M. McMurrin (ed.), *The Tanner Lectures on Human Values II* (Salt Lake City: University of Utah Press, 1981), 225–254, 228–229.

[48] Foucault, above n. 41, 101. [49] Ibid. 103. [50] Ibid. 102.

[51] Ibid. [52] Ibid. 95. [53] Ibid. 95–96.

without a common history, a common language, or a common tradition of law. They began as 'mixed and miscellaneous collections of human beings precariously held together, disturbed by what they had swallowed and were unable to digest, and distracted by plausible or fancied *irredènta*'.[54] No European state, he emphasizes, 'has ever come within measurable distance of being a "nation state"'.[55]

The point Oakeshott impresses upon us is that the modern state is a 'somewhat ramshackle construction', being 'constructed, for the most part, by second-hand materials . . . by artisans who were their own designers following conventions they made for themselves'.[56] Consequently, 'the claims of governments to authority have been supported, for the most part, by the most implausible and gimcrack beliefs which few can find convincing for more than five minutes together and which bear little or no relation to the governments concerned: "the sovereignty of the people" or of "the nation", "democracy", "majority rule", "participation" etc.'.[57] As Oakeshott puts it, governments 'have become inclined to commend themselves to their subjects merely in terms of their power and their incidental achievements, and their subjects have become inclined to look only for this recommendation'.[58]

Given the circumstances of its formation, the modern state can hardly be conceived as some pristine model. In this respect Oakeshott is only echoing Maitland's observation that 'the more we study our constitution whether in the present or the past, the less do we find it conform[s] to any such plan as a philosopher might invent in his study'.[59] But although Oakeshott rejects easy analogies, such as the state as being analogous to the family or an organism, he does suggest that two ideas encapsulate the kind of thinking around which notions of the modern state have revolved. These two ideas, deriving from Roman law, represent two different modes of association: the idea of the state as *societas* and that of the state as *universitas*. Oakeshott argues that the modern state is to be understood as an unresolved tension between these two irreconcilable dispositions.[60]

The mode of association understood as *societas* suggests that agents comprise an association that is *not* an engagement in pursuit of a common substantive purpose or some common interest; the only tie that joins them is that 'of loyalty to one another, the conditions of which may achieve the formality denoted by the kindred word "legality"'.[61] *Societas* is simply the product of a pact to acknowledge the authority of certain arrangements: it is 'a formal association in terms of rules, not a substantive relationship in terms of common action'.[62] Oakeshott specifies these terms of association as follows:

> [T]he ruler of a state when it is understood as a *societas* is the custodian of the loyalties of the association and the guardian and administrator of its conditions which constitute the relationship of *socii*. He cannot, for example, be the owner or trustee of its property, because there is none; and he is not the manager or director of its activities, because there are no such activities to be managed. This ruler is a master of ceremonies, not an arbiter of fashion. His concern is with the 'manners' of convives, and his office is to keep the conversation going, not to determine what is said. . . . [I]ts government (whatever its constitution) is a nomocracy whose laws are understood as conditions of conduct, not devices instrumental to the satisfaction of preferred wants.[63]

[54] Michael Oakeshott, 'On the Character of a Modern European State' in his *On Human Conduct* (Oxford: Clarendon Press, 1975), 185–326, 188.
[55] Ibid. [56] Ibid. 198. [57] Ibid. 191. [58] Ibid. 192.
[59] F. W. Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1908), 197.
[60] Oakeshott, above n. 54, 201. [61] Ibid. [62] Ibid.

Oakeshott here expresses *societas* as an ideal form, a conception abstracted from the contingencies and ambiguities of its actual manifestations.[64] By doing so, he is able to capture with greater precision what Foucault meant by the condition of sovereignty (what I have termed rulership), when the latter stated that:

> What characterizes the end of sovereignty, this common and general good, is in sum nothing other than submission to sovereignty. This means that the end of sovereignty is circular: the end of sovereignty is the exercise of sovereignty. The good is obedience to the law, hence the good for sovereignty is that people should obey it.[65]

This mode of governance is clearly recognizable in the idea that the king occupies an office of authority. This office incorporates certain expectations about the conduct of the ruler as the supreme dispenser of justice and defender of the realm, and it claims the allegiance of those he rules. Even if medieval kings were over-zealous in seeking to protect the rights—and especially the income—of the crown, the 'emergent realm was neither a landed estate, nor a commercial enterprise (customs dues were not items in a design to direct traders into more profitable undertakings), nor a military organization but an association in terms of legal relationships'.[66]

This image of the office of ruler was not, however, without a rival. This is the state as *universitas*, the state conceived not as a partnership but as a corporate association. Medieval jurists were familiar with the idea of the corporation aggregate, exemplified in such group units as churches, boroughs, and universities. Corporate bodies of this type united 'persons associated in respect of such identified common purpose, in the pursuit of some acknowledged substantive end, or in the promotion of some specified enduring interest'.[67] When the idea of the state emerged in early modern Europe, this corporate form—the *persona ficta*—offered a ready analogy.

In terms of *universitas*, the state is recognized as a form of joint undertaking in pursuit of a common substantive objective. Consequently, its responsibility for maintaining the *salus populi*—a purely formal requirement of *societas*—acquires a more precise teleocratic meaning. The land and resources of its territory—even, ultimately, the talents of the people—may be treated as corporate property. The activity of governing becomes a managerial undertaking, with the ruler being 'related to this enterprise in some such manner as that of its custodian, guardian, director, or manager'.[68] This

[63] Ibid. 202–203.
[64] This ideal character of the state understood as *societas* can be equated with what Oakeshott elsewhere calls a *civitas*: see Oakeshott, 'On the Civil Condition' in his *On Human Conduct*, above n. 54, 108–184.
[65] Foucault, above n. 41, 95. [66] Oakeshott, above n. 54, 212. [67] Ibid. 203.
[68] Ibid. 218.

conception of the state as *universitas* parallels, and in many respects enhances, Foucault's account of the mode of governing that emerges as a science of police.

Oakeshott recognizes that the ideas of *universitas* and *societas* were intermingled in the formation of the modern state mainly because in medieval practice the distinction between rulership and lordship—'between ruling a realm and managing a *seigneurie* or a manor, between a subject and a tenant, a retainer or an *homme*, between a "public" and a "private" relationship, between the exchequer of a realm and the fisc of a ruler's household, between a custodian of law and a custodian of a common interest'[69]—had never fully been separated. But there is a further reason, which connects with Foucault's idea of pastorship, and this is the influence of the jurisprudence of the Christian church.

Oakeshott argues that although the Pope's claims to possess a *plenitudo potestatis* over the *universitas humana* never even came close to being accepted by medieval rulers, when the modern state emerged, secular rulers absorbed aspects of this papal mission as part of their sovereign authority. This had particular significance because, by virtue of his office, the Pope claimed not only to be custodian of the law and property of the corporation (his *potestas jurisdictionis*), but also to be guardian of the Faith (his *potestas ordinis*) and to be director of education, guardian of learning, and arbiter of knowledge (his *potestas docendi*).[70] Rulers thus became 'the residuary legatees of a notionally all-embracing ecclesiastical authority'[71] and acquired, in particular, aspects of the Pope's *potestas docendi* relating to the moral and spiritual welfare of the community.

The existence of these two competing modes of governance, especially when placed alongside Foucault's triangle of 'sovereignty-discipline-government', offers an illuminating insight into the character of the modern state. The tensions between these modes that were present at the birth of the state have become much more intense as a result of the growth and extension of the apparatus of central government. This, as Oakeshott emphasizes, has nothing to do with the concept of sovereignty as some mistakenly believe, but has its source in our understanding of the state as a particular mode of association. This administrative engagement of government is distinctive 'because its procedures were not those of a court of law and its agents were not themselves judicial officers: constables, comptrollers, surveyors, prefects, commissioners, proctors, wardens, superintendents, inspectors, overseers, collectors of information, and officials of all kinds, together with their assistants, their Bureaux, Boards, Commissions, Committees, Conferences etc., and the regulations they enforce and administer'.[72] This extensive administrative apparatus, common to all modern states, does not necessarily mean that the conception of the state as *universitas* predominates. But what is evident is that the pursuit of a common substantive purpose could hardly be undertaken without the existence of such an administrative apparatus.

[69] Oakeshott, above n. 54, 218–219.

[70] Ibid. 220, 279–295. See further Michael J. Wilks, *The Problem of Sovereignty in the Later Middle Ages* (Cambridge: Cambridge University Press, 1963), esp. Pt. I.

[71] Ibid. 224.

[72] Ibid. 267.

In a passage that has strong affinities to Foucault's analysis, Oakeshott highlights a particular aspect of the state understood as *universitas* that recently has come to prominence: that of the state as 'an association of invalids, all victims of the same disease and incorporated in seeking relief from their common ailment'.[73] In this mode, the office of government becomes a form of remedial engagement in which rulers 'are *therapeutae*, the directors of a sanatorium from which no patient may discharge himself by a choice of his own'.[74] Just as Saint-Simon identified the industrial enterprise as the predominant form of modern society and concluded that the state should itself be an industrial enterprise,[75] Oakeshott surmises that here 'the outstanding "fact" of modern times is understood to be universal neurosis and it is concluded that a state should be understood as an association of human beings undergoing treatment'.[76] Remote as this might seem from the character of the modern state,[77] Oakeshott argues that 'numerous writers have guided European thought along this path', a path leading to a place in which 'everything is understood in relation to "sanity"; that is, a uniform so-called normality' and where subjects are 'understood to be "disturbed" patients in need of "treatment"'.[78] And, in a comment echoed in Foucault's theme on the displacement of law, Oakeshott quips that while utopia has no lawyers, 'it bristles with inspectors and overseers'.[79]

Although *societas* and *universitas* each stand for an independent self-sustaining mode of association, Oakeshott's argument is that they have become 'contingently joined' in the character of a modern European state. Since these two modes of association yield somewhat divergent understandings about the activity of governing, they add significantly to the complexity of our task. But if this is the situation, then rather than suppressing one or other modes, it is essential that this condition of modernity be recognized.[80] The only way forward in developing a positive account of public law is to incorporate these competing modes of governing within a framework that permits us to acknowledge these complexities of governing within the modern state.

[73] Ibid. 308.

[74] Ibid.

[75] On the thought of Henri, Comte de Saint-Simon, see Geoffrey Hawthorn, *Enlightenment and Despair: A History of Social Theory* (Cambridge: Cambridge University Press, 2nd edn. 1987), ch. 4.

[76] Oakeshott, above n. 54, 309.

[77] See, however, Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (London: Duckworth, 2nd edn. 1985), ch. 3.

[78] Oakeshott, above n. 54, 309–310. Cf. Foucault on the issue of 'normalization': see Michel Foucault, *Discipline and Punish: The Birth of the Prison*, Alan Sheridan trans. (Harmondsworth: Penguin, 1991), 177–184; François Ewald, 'Norms, Discipline and the Law' in Robert Post (ed.), *Law and the Order of Culture* (Berkeley: University of California Press, 1991), 138–161.

[79] Oakeshott, above n. 54, 268.

[80] For a sociological analysis of this aspect of ambivalence of the modern condition, see Peter Wagner, *A Sociology of Modernity: Liberty and Discipline* (London: Routledge, 1994).

THE OFFICE OF GOVERNMENT

Government is an office of authority. When, in *Leviathan*, Hobbes offered an explanation of how the modern state is instituted, at the core of his account lay the formation of the 'office of the soveraign representative'.[81] This office of government is charged with the making and enforcing of those rules of conduct that sustain the association.[82] Government and the state are not identical: the government is the person or group that discharges the tasks of government, whereas the state is an expression of a particular historical form that government has taken. But modern government and the state are closely connected. The way in which states have been formed has invariably had a profound influence on the constitution of authority of government. But our understanding of the activity of governing has exerted an influence on the way in which the modern state is configured. The modern state rests on an unresolved tension between the two irreconcilable modes of governance represented in *societas* and *universitas* and this tension might help us not only to understand the character of the modern British state but also certain ambiguities concerning the office of its government.

Our starting point must be that of the office of the crown. The origins of the distinction between king and crown lie buried in the medieval juristic thought of the twelfth century, when a distinction needed to be drawn between the personality of the king and the office he occupied.[83] This distinction was well understood by the fourteenth century, when the coronation oath of the period required kings to swear to maintain unimpaired the rights of the crown.[84] The crown represented the entire body politic or the community of the realm. In the reports of Plowden, the body politic is defined by the judiciary as 'a body . . . consisting of policy and government, and constituted for the direction of the people, and the management of the public-weal'.[85] Although the history is messy, with no consistent differentiation being effected in law between the king and the crown,[86] it is from this idea of the crown that our understanding of the office of government has evolved.

[81] Hobbes, above n. 5, ch. 30.

[82] Cf. Oakeshott, *Rationalism in Politics and other essays* (London: Methuen, 1962), 187–189: 'the office of government is merely to rule [and] the only appropriate manner of ruling is by making and enforcing rules of conduct'. Foucault defined government as 'the conduct of conduct': see Colin Gordon, 'The Soul of the Citizen: Max Weber and Michel Foucault on Rationality and Government' in Sam Whimster and Scott Lash (eds), *Max Weber, Rationality and Modernity* (London: Allen & Unwin, 1987), 293–316, 296.

[83] George Garnett, 'The Origins of the Crown' in John Hudson (ed.), *The History of English Law: Centenary Essays on 'Pollock and Maitland'* (Oxford: Oxford University Press, 1996), 171–214.

[84] R. S. Hoyt, 'The Coronation Oath of 1308' (1955) 11 *Traditio* 235–257; H. G. Richardson, 'The Coronation Oath in Medieval England: The Evolution of the Office and the Oath' (1960) 16 *Traditio* 111–202; Gaines Post, 'Roman Law and the "Inalienability Clause" in the English Coronation Oath' in his *Studies in Medieval Legal Thought: Public Law and the State, 1100–1322* (Princeton, NJ: Princeton University Press, 1964), 415–433.

[85] *Case of the Duchy of Lancaster* (1561) 1 Plowden 212, 213.

[86] I examine this issue in 'The State, the Crown, and the Law' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999), 33–76.

The concept of the crown provides the basis for differentiating between private and public, and between lordship and office. These are the key terms by which, for example, the historic importance of Magna Carta of 1215 is to be assessed. In Finer's summation, the overriding significance of the charter was that it 'limits the Crown as *dominus* but upholds it as *rex*'; its thrust 'was to accept the strengthened Crown and its expanded jurisdiction, yet to try to eliminate the caprices of the individual monarch'.[87] The king's authority to govern was not questioned. What the charter emphasizes is that this authority must be exercised through his council. Stubbs may have both exaggerated and misconstrued its significance in his famous comment that 'the whole of the constitutional history of England is little more than a commentary on Magna Carta',[88] but in the recognition that acts of the king have an official character that must be exercised through certain forms, the charter marks a milestone in the emergence of English governing arrangements.

This work of the crown in council was gradually amplified through the formation of a parliament that came into existence as an act of royal will and as an instrument of royal government. Although in modern thought parliament is often presented as an institution that operates as a counterbalance to government,[89] parliament's origins lie entirely in its perceived value to the king in assisting him in the activity of governing. In order to appreciate its strength, it is essential to recognize that the king's council was centrally embedded within his parliament. When we talk of the establishment of sovereign authority, then, we should in strictness refer to the work undertaken by the 'crown in council in parliament'. The great service which the English parliament rendered in the later middle ages, A. F. Pollard notes, 'was not . . . to make England a constitutional state, but to foster its growth into a national state based on something broader and deeper than monarchical centralization'.[90]

The role of parliament in forging a national state is seen most clearly in relation to the innovative work of the Reformation parliament which, using the authority of the crown in parliament to the full, sought to eliminate those medieval liberties or privileges which had acted as encumbrances on the complete exercise of sovereign authority. The greatest of these medieval privileges belonged, of course, to the church. The revolutionary act of breaking with the church in Rome was one in which Henry VIII made full use of the instrumentality of parliament; crown and parliament united to challenge any rival jurisdictions. Consequently, while making full use of his regal

[87] S. E. Finer, *The History of Government from the Earliest Times* (Oxford: Oxford University Press, 1997), ii. 904–905.

[88] William Stubbs, *The Constitutional History of England in its Origins and Development* (Oxford: Clarendon Press, 1880), i.597–598. Cf. J. C. Holt, *Magna Carta* (Cambridge: Cambridge University Press, 2nd edn. 1992).

[89] This tradition—based on a division between the function of governing and that of 'checking of government'—can be traced to James Mill, *An Essay on Government* [1820], Ernest Barker intro. (Cambridge: Cambridge University Press, 1937). The theme is developed by John Stuart Mill, *Considerations on Representative Government* [1861] in his *Three Essays* (Oxford: Oxford University Press, 1975), 145–423, esp. 211–228.

[90] A. F. Pollard, *The Evolution of Parliament* (London: Longmans, 1920), 133.

powers of kingship, Henry also accepted that 'we at no time stand so highly in our estate royal as in the time of Parliament; wherein we as head and you as members are conjoined and knit together into one body politic'.[91]

The process by which an absolute legislative power was established marks a critical stage both in the formation of the modern state and in the extension in the apparatus of government. In the early medieval period, legislation was regarded as a declaratory process, and therefore as an aspect of judicial procedure. In juristic terms, all governmental action was understood to involve the interpretation and application of the law. The activity of legislation, and hence its differentiation from adjudication, comes about only as the result of the growing acceptance of law as an expression of the command of the sovereign rather than as a reflection of an unchanging pattern of custom. But of equal importance is the recognition that this power of command is impersonal and institutional. Authority resides not in the personal power of the king but in the institutional power of the crown in council in parliament.

Of similar importance is the acknowledgement that executive government itself is a public office. The Henrician age saw great strides being made towards the realization of this condition. In addition to establishing a modern conception of legislative sovereignty, Henry's reign saw the creation of a 'revised machinery of government whose principle was bureaucratic organization in place of the personal control of the king, and national management rather than management of the king's estate'.[92] Notwithstanding the transformation in central government from household to bureaucratic methods and instruments, it remained the case that throughout the sixteenth century, appointments to governmental offices were invariably obtained through patronage. But the basis had been provided for the challenge to patrimonial government and the eventual establishment of a more impersonal public administration.[93]

The growing recognition that the jurisdictional authority of government was absolute thus coincided with an acknowledgement that the exercise of such power was circumscribed in form. Competence was unlimited; as Blackstone explained, the crown in parliament 'hath sovereign and uncontrolable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal'.[94] But this 'omnipotent' power could be exercised only through established forms and defined procedures, and generally only in accordance with some basic understanding of the 'proper' uses of such power. The establishment of such formalities indicates the formation of a constitutional regime.

[91] *Ferrers' case* (1543); excerpted in G. R. Elton, *The Tudor Constitution: Documents and Commentary* (Cambridge: Cambridge University Press, 1960), 267–270, 270.

[92] G. R. Elton, above n. 18, 4. Cf. Christopher Coleman and David Starkey (eds), *Revolution Reassessed: Revisions in the History of Tudor Government and Administration* (Oxford: Clarendon Press, 1986).

[93] See Ertman, above n. 36, ch. 4; Sir Norman Chester, *The English Administrative System, 1780–1870* (Oxford: Clarendon Press, 1981); Richard A. Chapman and J. R. Greenaway, *The Dynamics of Administrative Reform* (London: Croom Helm, 1980).

[94] Blackstone, above n. 25, i.156.

Some form of constitutional ordering is, of course, implicit in the medieval notion of the 'body politic'.[95] This became more explicit in the idea of 'mixed government', whereby the king (as head) and peers and people (as members) exercised a co-ordinated power, the object being to ensure that one estate was unable unilaterally to impose its will on the others.[96] In the late seventeenth century, the ancient organic language of the mixed constitution tended to be replaced by the mechanical metaphor of the 'balanced constitution', in which the king, lords, and commons were presented as operating a complex system of checks and balances.[97] This shift in metaphor contained the seeds of innovation, especially since the idea of balance presupposed a separation of functions that was almost entirely novel in conception.

In the early modern period, writers such as Bodin and Hobbes had deliberated over the principal 'marks of sovereignty', being such basic activities of government as law-making, declaring war and making peace, appointing magistrates, and coining money.[98] But such discussion focused on the engagement of government: it could be transformed into a discourse on the office of government only by re-ordering these 'tasks' into an appropriate institutional allocation of certain basic 'functions'. Since the strength of parliamentary institutions throughout the medieval period resided in the fact that the king's court, council, and parliament constituted an elaborate system of multi-layered government, this was no simple exercise. It was the intimacy of these connections rather than a separation of institutional functions that accounted for the peculiar strength of English medieval government.

There was one precedent to work from: England's first and only written constitution—the Instrument of Government of 1653—had provided for a formal separation of legislative and governmental power.[99] Although at the Restoration this idea of separation—since it would have removed the crown from a role in legislation—could not be countenanced, the theme became a significant one in contemporary political thought. The necessity of separating legislative and executive power underpinned Locke's *Second Treatise*[100] and during the eighteenth century Montesquieu developed the theme in his chapter in *The Spirit of the Laws* on the nature of the English constitution. Montesquieu claimed that the key to England's political liberty lay in

[95] For the most elaborate presentation of the imagery of the body politic—one based on the necessity of the king to exercise power in a moderate manner—see John of Salisbury, *Policraticus* [c.1154–1156], Cary J. Nederman trans. (Cambridge: Cambridge University Press, 1990).

[96] See Francis D. Wormuth, *The Origins of Modern Constitutionalism* (New York: Harper & Brothers, 1949), 50–58; James M. Blythe, *Ideal Government and the Mixed Constitution in the Middle Ages* (Princeton, NJ: Princeton University Press, 1992), esp. 260–277.

[97] The transition is most clearly marked in Hobbes's *Leviathan* (above n. 5). At the outset, Hobbes uses the metaphor of the sovereign as the 'artificial soul' that gives 'life and motion to the body' (ibid. 9, 18). But mechanical metaphors tend to take over as Hobbes, who likens the state to those 'engines that move by themselves by springs and wheels as doth a watch' (ibid. 9), elaborates on its nature.

[98] See Bodin, above n. 38, i.10; Hobbes, above n. 5, ch. 18.

[99] Wormuth, above n. 96, 59–72; M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Indianapolis: Liberty Fund, 2nd edn. 1998), 52–57.

[100] John Locke, above n. 38, ii. § 159: 'Where the Legislative and Executive Power are in distinct hands (as they are in all moderated Monarchies, and well-framed Governments) . . .'.

the separation of legislative, executive and judicial power, noting that 'as they are constrained to move by the necessary motion of things, they will be forced to move in concert'.[101]

Montesquieu was quite wrong about the eighteenth century English constitution: what made the peculiar arrangements of British government work in a relatively harmonious fashion was not 'the necessary motion of things' but the fact that the entire apparatus of government was in the hands of the landed class. Since Montesquieu's basic objective had been to indicate how arrangements to preserve English political liberty are 'established by their laws'[102] this may perhaps be pardonable. But Blackstone, in copying Montesquieu's error, had no such excuse.[103] The mistake has ever since been a source of confusion about the nature of the office of government within the British system. After the Restoration and the Revolution of 1688, the course taken was not that of dividing and separating power but of maintaining the formal unity of the office of government. This was achieved by ensuring that the crown remained an essential element in parliament and that, far from separating executive and legislature, ministers of the crown were obliged to maintain their positions within the legislature. The idea that 'the king can do no wrong' thus flourished as a maxim during the eighteenth century precisely because it was recognized that the king could only act officially through a set of arrangements which ensured that governmental action commanded the confidence of parliament.[104] And the vital link in these arrangements—what Bagehot was later to call the 'efficient secret' of the constitution[105]—was the emergence of the cabinet as the collective decision-making institution of the government.

This essential unity must be acknowledged, and those who present the crown and parliament as distinct and competing entities generally fail so to do. Textbook writers often state that the legislature controls the executive, leading critics to retort that it is the other way round—the executive in fact controls the legislature. Both are in danger of missing the basic point. It is the extensive and intricate character of the connections between legislative and executive (and, notwithstanding formal independence, also judicial[106]) functions that is the defining feature of the British system.

[101] Montesquieu, *The Spirit of the Laws* [1748], Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone trans. (Cambridge: Cambridge University Press, 1988), xi.6.

[102] Montesquieu, ibid: 'It is not for me to examine whether at present the English enjoy this liberty or not. It suffices for me to say that it is established by their laws, and I seek no further'. This point is reinforced by Oakeshott's (above n. 54, 246) observation that in reality Montesquieu was concerned primarily with 'modes of association and with the offices of government' rather than with the constitutions of states.

[103] See Blackstone, above n. 25, i.157. See further, Vile, above n. 99, 110–116.

[104] Blackstone, ibid, i. 239; Janelle Greenberg, 'Our Grand Maxim of State, "The King can do no Wrong"' (1991) 12 *History of Political Thought* 209–228.

[105] Walter Bagehot, *The English Constitution* [1867], Miles Taylor ed. (Oxford: Oxford University Press, 2001).

[106] Although since the Act of Settlement 1700 the judiciary has maintained its formal independence, there has been no clear separation of functions. Having begun life as a court, parliament retains many of the features of a court through its writs, petitions, and such like and, with respect to private bill procedure, it fulfils the equivalent of a judicial function. Judges are lords of parliament appointed by the crown and

This juristic unity of the office of government, symbolized by the crown, expresses the basic difference between the British system of government and modern constitutional arrangements that provide the framework of the governing regimes of other European systems. Modernization in the British system has been an evolutionary rather than a revolutionary achievement. Rather than a fundamental reconstitution of the structure of the office of government taking place, there has been a rearrangement in predominance of the partners in authority. Modernization is the product of political adaptation, not juristic reconstruction.

THE TASKS OF LAW

This peculiar history has bequeathed an ambiguous legacy. The emergence of the modern state within the frame of a formal unity of the office of government has left us confused about the subject of public law. The fundamental legal doctrine of the British constitution—that of the omnicompetence of the crown in council in parliament—has meant that, especially in the hands of the analytical positivists, lawyers have had little of significance to contribute to an understanding of modern governmental arrangements. One law lord summarized the orthodox position in these terms:

> It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts would not hold the Act of Parliament invalid.[107]

If the basic duty of the judge is to give effect to the will of the state as expressed through Acts of Parliament, then the judiciary is unable to perform any significant role in specifying and elaborating the constitutional framework of government. The failure of modern scholars of public law is (in a juristic sense) to have defined their discipline within the frame of the positive law that is enforced in the courts. But even in such terms, the nature of the modern tasks of law has unsettled many traditional assumptions.

One of the defining features of modern government has been the dramatic expansion, over the last 150 years, in the range of its tasks as a consequence of the extension in its administrative responsibilities. This has resulted in an unprecedented degree of interaction between government, economy, and society. We live in a highly regulated society. Since this growth in the range of government has been achieved

are removable on an address from both houses, and the most senior—the law lords and lords justices of appeal—are sworn privy counsellors. And presently we have two supreme courts of appeal (the House of Lords and the Judicial Committee of the Privy Council), one of which is a branch of the legislature and the other a committee of the executive. But see Department for Constitutional Affairs Consultation Paper, *Constitutional Reform: A Supreme Court for the United Kingdom* (London: Department for Constitutional Affairs, July 2003).

[107] *Madzimbamuto* v. *Lardner-Burke* [1969] 1 AC 645, 723 *per* Lord Reid.

through the instrument of legislation, the emergence of this administrative state has had a significant impact on the character of modern positive law.

The formation of the administrative state has resulted in an explosion of legislative activity, as duties are laid down by law and new agencies of government are formed to carry out new tasks or to oversee the implementation of new responsibilities. Since the late nineteenth century, the statute books have been growing in length, changing in form, and increasing in technical complexity. The volume of executive legislation now greatly outstrips the amount of primary legislation, and the great bulk of legislation is more likely to be directed to the specific, often highly technical concerns of particular bodies rather than laying down general rules of conduct. The rise of the administrative state has therefore resulted in the emergence of an extensive body of administrative law, as agencies are equipped with jurisdictional competence, allocated powers and duties, and subjected to elaborate statutory codes of procedure.

This growth in the volume of administrative law has also had a major impact on the workload of the judiciary. Even in the 1880s, Maitland was able to note that if you 'take up a modern volume of the reports of the Queen's Bench division, you will find that about half the cases reported have to do with the rules of administrative law'.[108] This growing body of administrative law has posed major problems for the judiciary. Because England had been able so early in its history to establish the authority of its centralized institutions of government, it had never found it necessary, unlike most European systems, to establish a special jurisdiction to deal with legal disputes concerning government.[109] This factor, alongside the unusual degree of continuity in the form of its governing institutions, has had important juristic consequences. It has meant, for example, that the state has never been accorded a formal status in English law. And the fact that all officials have, since the reign of Henry II, been made subject to the jurisdiction of the High Court has given the concept of the rule of law a special meaning.[110] In Ernest Barker's words, 'not our Parliament, or our Cabinet, but the rule of our judicature constitutes our form of State a different species'.[111] But this common law tradition of 'the rule of law', with its avoidance of any formal jurisdictional division between public law and private law, has come under strain during the twentieth century.

The evolutionary character of the British constitution has meant that the administrative functions of the modern state have grown in an unsystematic manner. A plethora of boards, agencies, commissions, and inspectors have been brought into existence without any institutional pattern of design being readily discernible.[112]

[108] F. W. Maitland, above n. 59, 505.

[109] See J. W. F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford: Clarendon Press, 1996).

[110] The *locus classicus* is A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 8th edn. 1915), 198–199: the rule of law means 'the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts'.

[111] Ernest Barker, 'The Rule of Law' (1914) 1 (o.s.) *Political Quarterly* 117–140, 118. Although Barker is right about the judiciary, he seems on less sound ground about the impact of our traditions of parliamentary and cabinet government.

[112] See W. H. Greenleaf, *The British Political Tradition*, iii: *A Much Governed Nation* (London: Methuen, 1987), chs 1–6, 10.

This has generated a certain juristic confusion. The inherited problem has been that since the courts were, in Dicey's words, obliged to act in accordance with 'the strict rules of law', they were unsuited to 'manage a mass of public business'.[113] Consequently, when administrative bodies were vested by statute with a broad range of decision-making powers which could significantly affect the rights and interests of citizens, the courts were ill-equipped, both procedurally and temperamentally, for the task of maintaining adequate judicial supervision.[114] After various faltering starts, it was only from the late 1960s that the judiciary was able to begin to develop more efficient procedures and more rationalistic principles for reviewing such administrative action.[115]

The basic concepts that have since been developed—legality, rationality, fairness, and proportionality—appear to provide the basis of a more coherent framework of public law. But this edifice rests on uncertain foundations. This is because modern government generally employs 'tactics' rather than 'laws', and thus has a tendency to use law tactically[116] or as 'instruments of managerial policy'.[117] This in turn has meant that positive law often forms part only—and not necessarily the constitutive part—of an administrative scheme, and this presents obvious problems of legal interpretation. Underlying this difficulty—one that the legacy of the juristic unity of the office of government has masked—is that of identifying modern government as an expression of a particular mode of association. Is modern government a formal engagement concerned with maintaining order through the establishment of general rules of conduct? Or is it a purposive engagement in which the rules of conduct are to be interpreted as being incidental to the pursuit of some common good? This basic tension cannot be resolved through the judiciary's project of modernizing the machinery and the conceptual framework of judicial review. Shifting the language of judicial review from jurisdiction to legality, from reasonableness to rationality, or from natural justice to fairness might enable the judiciary to grapple in a more intellectually satisfying manner with the question of whether governmental decision-making has taken account of the interests of others. But this type of exercise inevitably falls prey to fundamental ambiguities concerning the legitimate aims and purposes of the modern state.

In the face of such complexities, many lawyers have simply withdrawn from the attempt to understand the character of the modern state and have retreated to a

[113] Dicey, above n. 110, xxxix.

[114] See Judith Shklar, 'Political Theory and the Rule of Law' in Allan C. Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology?* (Toronto: Carswell, 1987), 1–16, 6: 'The Rule of Law [as interpreted by Dicey] was . . . both trivialized as the peculiar patrimony of one and only one national order, and formalized, by the insistence that only one set of inherited procedures and court practices could sustain it. Not the structure or purposes of juridical rigour, but only its forms became significant for freedom. No wonder that Dicey thought England's law and freedoms were already gravely threatened. If its liberty hung on so slender a thread as the avoidance of new courts to deal with new kinds of cases, the end was indeed at hand'.

[115] See Martin Loughlin, 'Courts and Governance' in P. B. H. Birks (ed.), *Frontiers of Liability* (Oxford: Oxford University Press, 1994), i.91–112.

[116] Foucault, above n. 52.

[117] Oakeshott, above n. 54, 312.

simplistic interpretation rooted in classical liberalism.[118] It may be tempting to portray law solely in the image of *societas*—as a set of general, non-purposive rules of conduct—but this ideal bears little relation to the tasks that law now performs in relation to the activity of governing. Modern government in the image of *universitas* may indeed be the product of what Oakeshott calls an 'unpurged relic of "lordship" hidden in the office of modern monarchs and which the successors to kings inherited', but it is an aspect of governing that modern rulers 'have shown no inclination to relinquish'.[119] In the late nineteenth century, Maitland warned that if the administrative role of government, and the tasks of law with respect to it, were left out of the picture, one would be left with 'a partial one-sided obsolete sketch'.[120] If administrative law were omitted from the 'general conception of what English law is', he elaborated, 'you will frame a false and antiquated notion of our constitution'.[121] This is a warning that few contemporary public lawyers have heeded.

The fact is that public law is a highly polarized discourse. The polarities, which elsewhere I have characterized as being between the normativist and functionalist styles of thought,[122] are replications in legal consciousness of unresolved tensions between *societas* and *universitas*. We are unlikely to make progress in understanding the idea of public law by devising some ideal construct of law—whether as a model of rules[123] or a model of rights[124]—and then seeking to re-interpret the world in accordance with its precepts. From a positive perspective, it is essential that we keep these competing rationalities open to investigation and accommodation. Such tensions have generally been placed within a bounded framework whenever states have adopted a modern formal constitution. Within the British system, however, these ambiguities can and do permeate all facets of legal discourse. Henry Maine expressed this point well when, writing in 1885, he suggested that there is 'no country in which the newer view of government [*sc.* the state as *societas*] is more thoroughly applied to practice, but almost all the language of the law and constitution is still accommodated to the older ideas concerning the relation of ruler and subject'.[125] The significance of

[118] See, e.g., T. R. S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993); Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001).

[119] Oakeshott, above n. 54, 268. [120] Maitland, above n. 108, 506. [121] Ibid.

[122] See Martin Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992), esp. ch. 4.

[123] See H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). Oakeshott (above n. 64, 151) presents a more sophisticated conception of law, even under the conditions of *societas*, when he explains that civil association is a practice in which 'all civil rules are conditions to be subscribed to in conduct, and there is none . . . which is exclusively a rule for the recognition of the authority of other rules. There is no place in civil association for any but a conditional distinction between so-called "private" and "public" law. Nor can there be a single rule of recognition, an unconditional and unquestionable norm from which all others derive their authority: a "constitution" not subject to interpretation and immune from inquiry. . . . In short, the validity of *lex* is a matter to be decided in terms of the resources for decision which *lex* itself provides'.

[124] See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1977); Dworkin, *Law's Empire* (London: Fontana, 1986).

[125] Sir Henry Sumner Maine, *Popular Government* [1885] (Indianapolis: Liberty Classics, 1976), 35.

the tensions between positive law and governmental practice inherent in the British system now seem lost to contemporary lawyers. If some understanding of this matter is to be retrieved, we need to adopt a broader and more inclusive conception of the subject: public law as practice.

PUBLIC LAW AS PRACTICE

The argument of this chapter has been that the activity of governing must be understood as a complex practice that has emerged as a living tradition within European thought. This notion of practice requires some elaboration, especially since practices can vary in their complexity from simple conventions (such as queuing) to embrace an entire way of life. Alasdair MacIntyre defines a practice as 'any coherent and complex form of socially established co-operative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity'.[126] This is a broad conception of practice, that can include games like chess as well as a variety of activities that sustain human societies. But it provides an appropriate starting point for recognizing the activity of governing as a practice.

The critical point about government understood as a practice is that it is an activity that is neither fixed nor finished, since in Oakeshott's words 'no practice can be so definitively contrived or so securely insulated from circumstance as to become immune to modifications incidentally imposed on it by the performance it qualifies'.[127] The practice of governing is thus 'composed of conventions and rules of speech, a vocabulary and a syntax, and it is continuously invented by those who speak it'.[128] A practitioner is always a performer, one who is not commanded to undertake specific actions but who, when acting, must have regard to certain adverbial considerations. The customs, rules, canons, and conventions that comprise a practice are not commands but considerations to be taken into account. A practice, Oakeshott pithily observes, 'is an instrument to be played upon, not a tune to be played'.[129]

In European thought, the activity of governing incorporates implicit standards of correctness. Just as a language generates norms of grammar and pronunciation, so too does the practice of governing contain criteria of right conduct. Adherence to these conventions, whether of language or of governing, remains an essential aspect of effective performance. But there is no ultimate standard of correctness: the way that it is generally done within the practice supplies its own justification. Just as the standard of correctness about the way we pronounce words is just the way we do, so too in relation to the activity of governing the appropriate mode of conduct is that of

[126] MacIntyre, above n. 77, 187.

[127] Michael Oakeshott, 'On the Theoretical Understanding of Human Conduct' in his *On Human Conduct*, above n. 54, 1–107, 56.

[128] Ibid. 58. [129] Ibid.

adherence to the ways it is conventionally carried on.[130] Standards of conduct are internal to the practice and have nothing to do with morality in the sense of 'strong evaluation', that is, of making discriminations between right and wrong that are independent of the ways of the practice.[131]

Once the activity of governing is understood to be a practice—albeit a highly complex practice replete with ambiguities and tensions[132]—the idea of public law can be grasped. What I want to argue is that public law—the law relating to the activity of governing—must be conceived as an assemblage of rules, principles, canons, maxims, customs, usages, and manners that condition and sustain the activity of governing. More specifically, public law is neither a system of general principles nor a code of rules. Rather, it is a vernacular language.[133] Although general principles and specific rules certainly provide part of the corpus of public law, these should be treated as cribs, or guides to conduct; they do not in themselves yield the source of knowledge of the subject. Public law is generated through usage (by a variety of governmental actors); it is not simply the creation of grammarians (i.e., judges and jurists). In this sense, the law relating to the activity of governing is not solely a mechanism for determining judgments about conduct but is a practice within which criteria about right conduct are elicited.[134] And while the language of public law often presents itself as a language of propriety, this language is governed by precepts of prudence.

The subject of public law cannot be grasped without having regard to a myriad of informal practices concerning the manner in which the activity of governing is

[130] Cf. Hegel's notion of *Sittlichkeit*: G. W. F. Hegel, *Philosophy of Right* [1821], T. M. Knox trans. (Oxford: Clarendon Press, 1952), § 153; Hegel, *Natural Law* [1802–3], T. M. Knox trans. (Philadelphia: University of Pennsylvania Press, 1975), 115: 'As regards ethical life, the saying of the wisest men of antiquity is alone true, that "to be ethical is to live in accordance with the ethics of one's own country" '.

[131] See Charles Taylor, 'The Diversity of Goods' in his *Philosophical Papers*, ii: *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985), 230–247.

[132] Oakeshott (above n. 54, 201) specifically recognizes that the tension between the dispositions represented as *societas* and *universitas* 'has imposed a particular ambivalence upon all the institutions of a modern state and a specific ambiguity upon its vocabulary of discourse'. See further, Michael Oakeshott, 'The Vocabulary of a Modern European State' (1975) 23 *Political Studies* 319–341; 409–414.

[133] Cf. Oakeshott, above n. 127, 78.

[134] This notion of public law as practice has certain similarities with Pierre Bourdieu's theory of practice, rooted in the key concepts of *habitus* and field. Bourdieu argues that just as grammar organizes speech, so the structures of *habitus* organize a range of possible practices: see his *The Logic of Practice*, Richard Nice trans. (Stanford, Calif.: Stanford University Press, 1990), chs 1, 3. For Bourdieu, the idea of field denotes the social setting within which *habitus* operates. Hence, *habitus* + field = practice. See Bourdieu, *Distinction: A Social Critique of the Judgement of Taste*, Richard Nice trans. (London: Routledge, 1984), 101. For an application of Bourdieu's theory to law see his 'The Force of Law: Toward a Sociology of the Juridical Field' (1986–87) 38 *Hastings Law Journal* 814–853, esp. 818–819: '[T]he juridical field tends to operate like an "apparatus" to the extent that the cohesion of the freely orchestrated *habitus* of legal interpreters is strengthened by the discipline of a hierarchized body of professionals who employ a set of established procedures for the resolution of any conflicts between those whose profession is to resolve conflicts. Legal scholars thus have an easy time convincing themselves that the law provides its own foundation, that it is based on a fundamental norm, a "norm of norms" such as the Constitution, from which all lower ranked norms are in turn deduced. The *communis opinio doctorum* (the general opinion of professionals), rooted in the social cohesion of the body of legal interpreters, thus tends to confer the appearance of a transcendental basis on the historical forms of legal reason and on the belief in the ordered vision of the social whole that they produce'.

conducted. David Easton has used the term 'regime' as an expression meaning the 'regularized method for ordering political relationships'. By this, he means 'much more than a mere "constitution", for the term implies also the notions of the goals and limits of tolerance, the norms and accepted procedures and the formal and informal structure of authority, all rolled up together'.[135] Easton's use of regime to incorporate the temper and manner as much as the formal arrangements of rule comes close to identifying the sense in which public law must be understood. Positive law acquires its meaning only within a context of conventional understandings, and conventions 'cannot be understood "with the politics left out" '.[136] Although this feature of the British system is often expressed, its juristic significance has rarely been recognized. In this book, I explore this idea of public law by examining a number of practices which have evolved within the European tradition of governing—including politics, representation, sovereignty, democracy, and rights—and which both have shaped our understanding of the discipline and established conditions for effective utterance within it.

[135] David Easton, *The Political System: An Inquiry into the State of Political Science* (New York: Knopf, 1953), 193.

[136] G. H. L. Le May, *The Victorian Constitution* (London: Duckworth, 1979), 21.

THE IDEA OF PUBLIC LAW

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