

# Questioning the Foundations of Public Law

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## Questioning the Foundations of Public Law and Questioning *Foundations of Public law*

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MICHAEL A WILKINSON AND MICHAEL W DOWDLE

### I. Introduction

This book is about *Foundations of Public Law*, but also about the foundations of public law.<sup>1</sup> The chapters do more than just address Martin Loughlin's text; they examine broader issues surrounding the nature of the subject, its autonomy and its methodology, and the nature of the object with which it is so intimately associated; the modern state. Loughlin's *Foundations of Public Law*, however, represents a distinct if not unique attempt to outline the conceptual building blocks of both subject and object, and it is where we will begin.

*Foundations of Public Law* represents both a challenge and an opportunity for the discipline. It offers a thorough reworking of the study of public law, converting it into a wide-ranging, interdisciplinary investigation into the foundational elements and evolutionary character of the modern state. This is challenging in its rejection of the idea that public law can meaningfully be captured through juridical doctrine alone, or by a method of positivist jurisprudence more generally. Instead, it requires an approach that is capable of incorporating political philosophy, political sociology and state theory. Public law is recast through *Foundations* as integral to these disciplines. Conversely, by bringing public law into conceptual and discursive interplay with these other disciplines, it provides a vital opportunity to free public law from its own jurisprudential straitjacket.

Such a reworking demands critical interrogation. Can public law maintain its internal coherence if extended in this way? Does *Foundations* offer the normative resources to renew the discipline in the context of the many serious challenges it faces? Is *Foundations*' methodology a suitable one for understanding the concrete phenomena associated with public law? Can *Foundations* capture the idea of public law as it emerges and operates outside the European nation-state or after the exhaustion of the Westphalian paradigm? The purpose of this volume is to critically explore these questions, and to advance our understanding of

<sup>1</sup> Martin Loughlin, *Foundations of Public Law* (Oxford, Oxford University Press, 2010) (hereinafter '*Foundations*').

the challenges *Foundations* poses, as well as the opportunities it provides for the development of the discipline.

*Foundations* offers a reconstruction of public law at once traditional and radical. It presents public law not simply as a discrete set of juridical doctrines and practices but as an integral part of our capacity to make political sense of the world. Public law is not an autonomous legal discipline, nor a doctrinal offshoot of private law or common law; it is an essential feature of the modern political imaginary. Public law, in this account, is not derivative but foundational to the construction and maintenance of the modern idea of the state.

If it is commonplace that in modernity the idea of the state and its authoritative apparatus of rule anchors our political being, *Foundations* argues this to be a thoroughly *juridical* phenomenon, but one that cannot be grasped by focusing on the judicial branch of government or the positive law alone. It can only be grasped through an analysis of the key conceptual building blocks of political authority, along with a thicker historical contextualisation of their evolution over time.

The outcome of this contextualisation suggests that, although central to ‘seeing and thinking like a state’, to constructing a scheme of political intelligibility, this juridical phenomenon is vulnerable, even in danger of being eclipsed, subverted or transformed in contemporary conditions—partly due to material transformations in the nature and techniques of governing and partly due to the pressures on the nation-state as the primary locus of political power and authority.<sup>2</sup> But the prospective loss is also a result of the increasingly specialised and technical nature of the discipline of public law (and jurisprudence more generally), a retreat encapsulated in the turn to systematisations of positive public law, which has its analogues in general jurisprudence (in diverse schools of legal positivism and legal pluralism).

*Foundations of Public Law* attempts to redefine the discipline of public law away from a court-centric doctrinal jurisprudence concerned primarily with judicial review—whether in positivist or moralist guise—towards a ‘political jurisprudence’. This proceeds by way of retrieval and refoundation of the discourse of public law and jurisprudence through a historical reconstruction of its origins and development.

In performing this radical reorientation of the enterprise of public law—radical only in the proper sense of uncovering and reclaiming its *roots*—*Foundations* draws on work in legal scholarship as well as writing in political theory, social theory, moral theory, state theory (*Staatslehre*), and political science. It does this in a historical rather than abstract orientation, integrating material from the UK, continental Europe, and the US, much of which has evolved independently, to offer an evolutionary narrative of public law, tracking the development of the modern state and the pressures it faces in the latter half of the twentieth century.

In the manner of this synchronic retrieval, *Foundations* develops a unique theoretical frame by incorporating writers in the cannon of political and legal philosophy—Hobbes and Rousseau, Kant and Hegel, Schmitt and Foucault, amongst many others—who have sought to uncover ‘the laws of the political’, or the basic rules and precepts of political association.

<sup>2</sup> See, eg C McAmhlaigh, N Walker and C Michelon (eds), *After Public Law* (Oxford, Oxford University Press, 2013).

Throughout *Foundations*, these giants of political philosophy are rendered central figures in the tradition of political jurisprudence and of a reconstructed public law.

For these reasons *Foundations* stands as deserving of special attention, not only from public law scholars, but also from political theorists, constitutional theorists, constitutional historians and all those interested in the fate of the modern constitutional state and the chances of its survival, renewal or transcendence. Even those who contest the particular claims made in *Foundations*, or doubt its overall endeavour, will not doubt that it contributes centrally to this project, if only, as one major critic notes, because it now provides the starting point for any deeper inquiry into the subject of public law.<sup>3</sup>

The purpose of this collection is to begin precisely such an inquiry. And it aims to do so in a thoroughly critical manner, taking neither the methodology nor the content of *Foundations* for granted. To pursue this aim, we have collected commentators from diverse traditions and disciplines to contest the claims—both general and particular—made in and by *Foundations*.

In the remainder of this introduction we first single out and examine in more detail two features in *Foundations* that stand out: the integration of law and politics into a coherent conceptual scheme, and the integration of the history of public law into the state's evolving political form. We then turn to consider, categorise and summarise the series of trenchant critiques made of *Foundations* in the chapters that follow. Serious doubts remain about the viability of the project of *Foundations* as a whole, as well as about its discrete claims; the doubts raised are conceptual and synthetic, methodological as well as particular. These doubts—and the critiques that generate them—will be categorised here under four headings: *methodological*, *normative*, *materialist*, and *comparative*, in an attempt to organise the critical reflections, and provide some coherence to the endeavour.

## II. Law and Politics

Constitutional theory and public law scholarship commonly approach politics as outside the law, to be tamed or contained by law, or even as antithetical to the logic of the law. Political order is presumed to follow a distinct logic of power, or to inhabit the realm of fact as opposed to norm. Alternatively, it is ignored, occluded by a formalist or positivistic approach to the constitution of the polity. In normativist traditions, particularly in the liberal constitutional imagination, public law exists to protect the individual from interference by the political organs of the state; constitutional scholarship then consists in identifying, specifying or offering suggestions for the consolidation or improvement of these structures, explicating their interrelationship and their overall architecture.

*Foundations* suggests this ubiquitous vision to be distorting. Public law, understood in the broader sense of political jurisprudence, does not simply constrain the organs of the

<sup>3</sup> D Dyzenhaus, 'The End of the Road to Serfdom' (2013) 63 *University of Toronto Law Journal* 326. Other review articles include M Walters, 'Is Public Law Ordinary?' (2012) *Modern Law Review* 894–913; J Grant, *Times Literary Supplement*, 7 Oct 2010, 22–23; C Thornhill, 'Martin Loughlin, Foundations of Public Law' (2011) *Public Law* 673–79; B Mauthe and T Webb, 'Realism and Analysis Within Public Law' (2013) 34 *Liverpool Law Review* 27–46.

state; it creates, shapes and maintains them. It does so by establishing and sustaining the governing relationship, between rulers and ruled. And since this governing relationship is not exhausted by the positive law narrowly conceived, public law as political jurisprudence captures all aspects of its institutionalisation and regulation, and also, significantly, those occasions of abrogation or suspension of ordinary forms and norms.

Public law as seen through the lens of political jurisprudence thus consists in the fundamental laws and practices that structure the governing relationship as well as those prudential judgments required to maintain—or regain—stability in that relationship. The set of practices and the manner of their ordering is captured in the term *droit politique* or ‘political right’. This might be usefully contrasted with what in the English-speaking world has emerged in the field referred to as ‘general jurisprudence’. If the purpose of general jurisprudence is to provide an account of the systemic coherence of positive law as such, the purpose of *Foundations* is to provide an account of the socio-epistemic coherence of the laws of politics, of what gives claims to political authority traction—and of what undermines them—in the world of lived experience.

To capture the phenomenon of public law therefore demands an analysis that transcends the positive law. This is reconstructed through an account of the key building blocks of ‘state’, ‘constitution’ and ‘government’, as they emerge and evolve in concrete public law traditions (especially but not limited to the German tradition of *Staatslehre*) and in tandem with classical works of political theory, from Hobbes through to Foucault, which seek to explain or deconstruct the grounds of authority of the modern state.

It is from the practice and discourse of political right as a state- and polity-building exercise that the distinctive jurisprudence of public law is reconstructed. The task of this political jurisprudence is to make theoretical and practical sense out of the various relations and configurations of power and authority that emerge, enabling their recognition as a set of relatively coherent phenomena. But because of the inherently conflictual nature of the human condition—conflict over material as well as symbolic resources—the ways in which relative coherence and stability are achieved will perpetually evolve.

For the governing process to remain in productive tension, converting conflict into manageable contest, an overall unity of purpose and character needs to be established and maintained through representational devices. And the dominant mode this takes in the context of modern public law is the unity of the state and autonomy of the political on which its power and authority rests. The arrangements of public law thus contribute to the maintenance of the state as a political unity, one that discharges political responsibility to its subjects.

This political unity, according to Loughlin, can never be fully captured by rule-based categories, not least because conflict can never be fully or finally resolved. If ‘the establishment of an autonomous domain of the political is therefore a historical achievement’,<sup>4</sup> it is also a precarious one, particularly as through late modernity the legal-political coupling is put under increasing pressure from social, economic and geo-political developments.

The significance of this reconstruction—as well as the pressure it is put under—can be appreciated by considering that outside the Anglosphere, in both continental Europe and in Asia, the formational appeal of public law continues to exist precisely in its state-creating

<sup>4</sup> See also Loughlin, ‘Political Jurisprudence’ in chapter 2, ? of this collection.

and state-shaping functions. The same can be said of the public law of the European Union, where the polity-building function of the law, as well as its limits in performing this function, is well documented and continues to offer an experimental case in reconfiguring relations of political power and authority. *Foundations* thus facilitates the cross-fertilisation of public law scholarship, representing the most promising framework to date for integrating diverse experiences of public law into a common discourse rooted in the particular context of modern European state development.

### III. The Evolution of the Modern State

To expand on this last claim, we can consider briefly a crude version of the exercise in historical reconstruction. There are two key foundational shifts that occur with the emergence of the modern state. The first is a change in the belief system on which political authority rests: political jurisprudence thus captures the process of secularisation of authority, corresponding to Weber's well known account of the process of modern 'disenchantment', involving a loss of faith in divine or substantive natural law. In a constitutional vernacular associated with the period of modern revolution, but which becomes widespread over time, 'We, the people' are the new foundation of political authority.

But *Foundations* rejects the equation of this process of secularisation with total positivisation of rules and norms, of the reduction of power to sheer coercive force, and the complete separation of fact and value. The normative power of the factual—including the symbolic imaginary—survives secularisation; disenchantment is far from total. This is nowhere more apparent than in the realm of public law, despite the pressures of modernisation. And the point of political jurisprudence is to capture in a scientific manner the ways in which the normative power of the factual is retained in the modern constitutional imagination (if also transformed in comparison to the medieval and the pre-modern understanding).

The second foundational shift that characterises the modern state is more material in nature: the evolution in the structures of power and authority necessary to produce and sustain a political community in the face of political and economic pressures. To respond comprehensively to military and other kinds of security threat and provide for the well-being of the people in conditions of economic scarcity requires the actual exercise of particular forms of governing power. This real power to dominate can be captured by the term, used initially by Spinoza, *potentia*, in contrast to a rightful claim to command and assert political rule understood as *potestas*.<sup>5</sup> The state cannot govern by *potestas* alone; the legitimacy of the governing relationship must be based on more than a claim to a formal right to rule, even as its authority becomes increasingly rationalised on the basis of legal rules and formal practices. The state must generate allegiance through its actual achievement of certain public goods—not least in order for its claim to rightful rule to be credible and match a corresponding set of beliefs in its legitimacy on the part of those who are ruled.

<sup>5</sup> B de Spinoza, *Tractatus Theologico-Politicus, Tractatus Politicus* (translated by RHM Elwes) (London, Routledge, c1951).

To put the point differently, authority requires both a claim to rightful rule and the compulsion or compliance that corresponds with actual obedience; authority is *de jure* and *de facto*. But for the purpose of understanding public law in terms of political jurisprudence, it makes little sense to make a formal separation of these elements. Authority is thus not a purely normative concept—reducible either to moral principle or positive law. Neither, however, is it a purely materialist concept that can be reduced to sheer coercion or violence or any other causal forces of nature. It must be based in political right and be able to produce political goods.

*Potestas* and *potentia* are interdependent and dialectical rather than alternatives; political authority ‘is a product of their relationship’. And it is also an evolving beast. Political power and authority change over time with the evolution of the constitutional imagination and constitutional circumstances. *Foundations*’ contribution here is to chart this in the language of public law as political right. Significantly, it insists that there will and can be no consensus on the nature of political right—on the correct manner of the production of political goods over time. As such, ‘the law of the political cannot be an ethic of ultimate ends’. Political conduct ‘involves a trade-off between rival and often incommensurable goods in circumstances where there is no authoritative principle or standard for resolving any dispute.’<sup>6</sup> Prudential judgment is therefore required; governing is an activity without end.

And yet throughout the twentieth century, this governing activity and the dialectical process on which it is based becomes increasingly fraught. More and more is required of the state in terms of both its normative and its factual legitimacy (*potestas* and *potentia*), just as its overall authority is increasingly called into question by processes of European integration and economic globalisation. So although the normative standards of rightful rule become increasingly demanding, as the governing arrangements of the state are increasingly called on to satisfy principles of democracy and the rule of law, so too do the expectations of its capacity to protect and enhance the welfare of its citizens in increasingly pressing conditions. This has led to the emergence of new forms of rule and regulation, as well as increasingly prescriptive formal and informal goal-setting. If the apparatus of rule of the modern state, both as a practical and as an ideological matter, is classically grounded in traditional legal categories—constitutional law, administrative law, competition law, and various aspects of private law—much of its standards are increasingly prescribed by soft or informal law. The disciplinary and regulatory character of its governing arrangements increasingly derives from routinisation, expectation and informal coercion rather than from threat of official state sanction.

As normative standards and practical expectations come into conflict with one another, particularly in times that are considered critical for the polity’s identity or even survival, practices and methods of sustaining the governing relationship thus change and even transform the nature of the relationship and the practices and methods that undergird it. The challenge then is to grasp the juristic significance of these phenomena. This challenge is significantly aided with the conceptual edifice reconstructed in *Foundations*. But it also leaves open the question of whether the phenomenon of public law as it emerges into the twenty-first century has developed to the stage where it requires a new set of conceptual tools to be properly scrutinised and fully understood.

<sup>6</sup> See also Loughlin, ‘Political Jurisprudence’ in chapter 2, of this collection.

## IV. Continuity and Critique

In synthesising diverse and sometimes competing intellectual traditions into a coherent whole which tracks the dynamics of state development, *Foundations* contributes to the very discourse of public law it identifies, precipitating further syntheses with new ideas and related phenomena. But the project, in its rather terse concluding sections, also calls into question the stability and durability of public law in contemporary social and political conditions, suggesting the enterprise of political jurisprudence is itself ripe for renewal. Critique is therefore necessary for continuity of the discipline, whether through integration, refinement or abandonment of the project of ‘political jurisprudence’.

This collection begins with Loughlin’s restatement of political jurisprudence, presenting in a condensed manner its key elements. It continues with the various critiques divided into four parts: methodological, normative, material and comparative. This division does not of course reflect any tight or neat separation, it merely serves a heuristic purpose—it exposes common themes, and often from positions that would otherwise seem heterogeneous, as well as opposing critiques from otherwise common positions. The collection then ends with a response to the chapters from Loughlin. But it is hoped that this is just the beginning of a new chapter in the development of the discipline of public law.

### A. The Methodological Critique

The first set of critiques of *Foundations* is in some sense ‘external’ in that it questions its basic methodological approach and working assumptions. In different ways, each of the chapters under this heading cast doubt on the viability and desirability of a search for any singular, scientific account (however internally complex and differentiated) of an object that can be called ‘public law’ when the practices that come under that label constitute a contingent, complex and incommensurable set of experiences. *Foundations*, in this view, is ultimately an incoherent exercise in conceptualisation; moreover, to the extent it claims purity, it may be an ideological view of, even an apology for, the modern state’s particular ruling forms and apparatus.

Andrew Halpin’s critique is the most direct assault on the methodological underpinnings of *Foundations*. It questions both the possibility as well as the desirability of projecting a uniform concept of public law based on a master narrative of the modern state. Halpin thus challenges each of *Foundations*’ key claims: the *autonomy* of public law, the possibility of a *science* of political right, political jurisprudence as the prudential *approximation* of this science, and public law as a *grammar* of political jurisprudence. For Halpin, the characteristics of public law are determined by particular social and political circumstances; there is no uniform conception of a state (or of its institutional branches) that undergirds public law. The attempt to impose one elides the variety of questions that public law needs to answer and of problems it is and might be called on to resolve. Since there is no single problematic that gives the modern state its *raison d’être*, public law loses any claim to autonomy. And if there were such a problematic, there is no reason to suppose it would be restricted to public as opposed to private law ordering. *Foundations*’ arguments do not therefore establish the purity Loughlin claims for his account. On the contrary, since there are multiple concepts

of public law, stained by their own ideological hues, it succeeds only in providing an account of one more, albeit dressed in a (spurious) garb of objectivity. This not only overlooks important local differences, skewing our understanding of public law as a particular phenomenon, but also is liable to elevate its own unwarranted trust in juristic forms to 'negotiate' social tensions at the expense of an authentic political hearing.

Panu Minkkinen argues that the problem with *Foundations*' own purportedly pure and scientific account of the negotiation of claims of political right through prudential judgment is that it is neither truly scientific nor explicitly political. The claim to offer a scientific account actually undercuts a key feature of the modern political and democratic imaginary, captured by Claude Lefort's characterisation of political democracy as holding open 'the empty space of power' (and which *Foundations* also advances in its account of public law emerging out of the secularisation of fundamental law). Maintaining the empty space of power demands active resistance to the totalising tendencies of modernity, including those offered by way of a purportedly scientific account of the prudential judgment of state discourse. There is no way of transcending politics in a manner consistent with this emptiness; the starting point to overcoming the antinomy would instead be to offer a 'metapolitics' of public law, Minkkinen drawing on French political theorists Jacques Rancière and Alan Badiou to suggest a possible way forward. The metapolitical alternative would regard science, including the 'science' of political negotiation that *Foundations* itself advances, 'as one divided and divisive element amongst others on the political stage.'

Jacco Bomhoff's methodological critique is less direct. But it also takes aim at the suggestion, explicit but underdeveloped in *Foundations*, that the modern state is autonomous or conceptually self-contained in the sense of marking a specific break and rupture with the theological frame of the medieval world that preceded it. Critiquing this basic methodological premise serves two purposes. First, it problematises the neat modernisation and secularisation thesis on which *Foundations* depends and second, it reveals aspects of the theological that remain embedded in the mode of political jurisprudence. Bomhoff explores a question that follows from this: does Loughlin's elision of the theological and the juridical in political jurisprudence undermine the broader endeavour to maintain irreconcilability and openness in the discourse of political right?

## B. The Normative Critique

The next set of challenges casts doubt on whether *Foundations* does justice to the full panoply of normative concerns associated with the idea and practice of public law. In particular, it suggests that the occlusion of an ethical dimension leaves *Foundations* without the tools to address contemporary anti-statism, authoritarianism, and post-state problems that require global political coordination. In privileging a top-down discourse of *potentia* based on sovereignty, *Foundations* neglects the generation of power through pre-institutional acts of egalitarian solidarity or claims of subjective right. Its statist bias also undercuts the potential of public law as political right to respond to challenges of globalisation and of political community as it emerges in post-state forms more generally.

Hauke Brunkhorst's chapter challenges *Foundations*' basic prioritisation of a top-to-bottom dynamic of state formation and political development. In its place Brunkhorst

resurrects the idea of *potentia* as social or communicative power, which emerges from the ‘bottom-up’, in the manner suggested by, for example, Hannah Arendt or Jürgen Habermas. *Foundations* thus overlooks the possibilities of a *rational* (more than prudential) grounding of public law in the communicative power of the people, a discursive process that *precedes* concrete order formation and reunites *voluntas* and *ratio*. This is advanced not only in order to hold open the possibility of emancipation, but to retrieve traditions of public law that *Foundations* alludes to in its early outline of political jurisprudence, but which ‘go missing’ as *potentia* becomes merely technical regulatory power in its later stages (a loss explained by *Foundations*’ adoption of a meta-narrative of constituent power as state-sovereignty rather than as egalitarian solidarity).

From a very different perspective, James Penner also tackles the relationship between *potestas* and *potentia*, reframing it in the language of analytical philosophy. From there, Penner argues that, although it cannot be straightforwardly mapped onto the distinction between the moral and the ethical, or the right and the good, there is an analogy which suggest *potestas* is prior and non-negotiable and that *potentia* is derivative and negotiable. Kant’s doctrine of right, as well as writers within the liberal tradition such as Nozick and Rawls, struggle with justifying the exercise of the state’s *potentia*, because beyond establishing the rightful or civil condition *potentia* demands the making of complex ethical judgments about the well-being of citizens. Although Raz has a way of responding to this problem, it is not one that Penner finds convincing. Penner’s critique, although a challenge to Loughlin’s position that *potestas* and *potentia* are irreconcilable as a matter of human nature, thus also constitutes a profound challenge to the tradition of liberal political philosophy itself.

Anna Yeatman argues that to successfully revive the tradition of political right requires the retrieval not only of a practical and prudential discourse—as *Foundations* attempts—but also, as it rejects—precisely such an explicitly ethical discourse based on subjective right. The unification in the early modern imagination of state and subjective freedom (which through Spinoza and Hegel play a significant part in the construction of political jurisprudence) is lost along the way in *Foundations*, and once it recedes, the emergence of social law and a functionalist mindset comes to resemble ‘the road to serfdom.’<sup>7</sup> Rather than suggesting the termination of the dialectic of *potentia* and *potestas* (and lamenting the ‘destruction of the modern edifice of public law’) we should instead view the rise of the social through the lens of an *evolution* of subjective right in an increasingly complex world, a further stage in the dialectic of *potentia* and *potestas*. Only then might contemporary neo-liberal anti-statism be properly contested, as it must be in order to conceive of the state as expressing a form of public freedom rather than merely patrimonial service. *Foundations*’ equivocation and ultimate denial of any normative standpoint thus ultimately threatens to undermine its overall promise and leaves it impotent to respond to the challenge of neo-liberalism.

If Yeatman’s injunction is to take anti-statism seriously in order to defend the state, Neil Walker’s approach tackles a different problem, suggesting that post-statism must be taken more seriously in order to defend the need for political authority *beyond the state*. Walker thus takes the critique of Loughlin’s refusal of a normative standpoint a step further, pursuing the increasing challenges that political community as such and in general faces

<sup>7</sup> See also Dyzenhaus (n 3).

in conditions of globalisation and Europeanisation. Walker suggests *Foundations* is too quick in rhetorically deflecting their significance. He queries first whether it has sufficient resources to explain what would count as a transformation or underlying shift in governing arrangements such that we would be in a position to consider constitutional forms beyond the state. The charge is that *Foundations* suffers from a settlement bias, a reinforcing pattern of ‘deep imaginary and surface form, of the abstract and concrete’. As such Walker doubts, second, whether there is sufficient scope within its own hermeneutic to imagine alternative non-state forms of authority—not only those already in evidence, but those that are transparently required to deal with global problems such as climate change or threats to national and transnational security.

### C. The Material Critique

There is a different set of challenges to *Foundations* that emerge from a quite distinct perspective which we group here under the rubric of ‘materialism’. From this perspective, the problem with *Foundations* is that it presents conflicting claims over the common good in overly abstract terms, even naturalising in a Hobbesian fashion the human condition of antagonism and formalising the relationship between rulers and the ruled. In other words, rather than being insufficiently normative, *Foundations* is insufficiently concrete, in a sense that is familiar to critical theory and Marxist traditions. Rationalising the art of governing requires an account—missing from *Foundations*—of how concrete social conflict, real domination, and power dynamics are translated into and in turn shape the ordering and outcome of political negotiations and of the content of political right. *Foundations*, in other words, fails to account for the material, economic and geo-political phenomena that condition claims to political right, whether the interplay of concrete subjectivities from below, through, for example, class struggle or from above, through, for example, geo-political imperialism and interstate competition. From a materialist perspective, this omission betrays a residue of formalism and even ideology, privileging—or reifying—one particular but contingent form of rule, neglecting that the state (and the interstate system) is not only a political but also a political-economic, and geo-political order.

Bob Jessop presents a comprehensive overview of state theory from different disciplinary angles, including conceptual history, systems theory, historical materialism, ideology critique and institutionalism, which complement but also compete with *Foundations*’ jurisprudential account. Jessop highlights that *Foundations* does not explain *why* its particular juristic categories come to settle and dominate in the way they do, why certain ideas and practices become embedded and hegemonic, and others fail or fade away. Nor does it consider whether the dominant position of ideas that do come to settle might be subject to an ideology critique. Does public law, for example, serve particular interests; does it entrench particular positions? What would an account of the foundations of public law look like if it considered the asymmetries of authority and domination inscribed in the particular constellations and relations between rulers and the ruled, as well as the state’s strategic role in reproducing patterns of exploitation and oppression? Given the range of materials addressed by *Foundations*, it is surprising that this is not given more consideration, even if only to be dismissed.

Whilst complementing *Foundations'* adoption of a dialectic of authority and power, Marco Goldoni also suggests that its analytical framework is overly formal. Goldoni picks as an example its metaphor of public law as grammar, which elides the element of political agency at play in the generation of different grammars or even of an overarching 'Ur-grammar'. As a corrective, Goldoni proposes the integration into political jurisprudence of the political subjects whose actions are responsible for forging the content of the material constitution. Integrating these insights means more than merely emphasising the formal possibility of revolutionary interruption or 'disruption' of the status quo (a la Rancière); it requires analysing in greater detail the political-economic organisation of society, including those hegemonic forces that shape it. By establishing the 'conditions of visibility' of political subjects, the potential dividends of a focus on the material constitution can be fully cashed out, not by a crude reductionism of politics to causal economic forces but by an integration of economic and material features into the analysis of the evolving political constitution.

Michael A Wilkinson makes this material critique more explicit, asking what the autonomy of the political looks like from the perspective of the relationship between politics and economics. He suggests that the autonomy of the political should be understood as a continuous political struggle taken up in the conflict between democracy and capitalism. He takes a diachronic approach to explore the contextual evolution of the Western European state in the twentieth century, considering political-economic as well as geo-political material factors that condition the claims and exercise of political authority, specifically the severe stress in the interwar period as a result of internal (political economic) pressures of democratisation and class consciousness and external (geo-political) pressures of inter-state competition. The state that inhabited the constitutional landscape of the long nineteenth century is refounded on a new basis in Western Europe in the postwar period in the project of European integration, materially transforming the very foundation of *Foundations*: the modern state itself as well as the coupling of law and politics on which political jurisprudence depends.

#### D. The Comparative Critique

If the methodological critique suggested that *Foundations'* dependence upon a singular and uniform paradigm of the modern state fails to account for the actual diversity of political and public law forms as they have emerged across time and space, this suggestion only invites further specification of what these different forms are, where they might be found, and why they depart from the paradigm. It invites, in other words, a critique from the perspective of comparative public law. This section presents three very different case studies that each call into question any claim to universality, to public law reflecting a unitary ordering of political right based on the edifice of the modern European state: first, US public law with its written constitution rather than state foundation; second, French and UK administrative law based on court-centric practice that emerged sporadically and laterally, and finally Indian constitutional law with its mix of cultural particularity and postcolonial legacy. They suggest, in other words, that whilst *Foundations* may have offered an account of the 'foundations' of a very particular tradition of public law (although one that remains underspecified), it is far from having offered a persuasive account of the foundations of public law *per se*.

Mark Tushnet argues that the project pursued in *Foundations* arises out of distinctly parochial British concerns, specifically those emerging from the modernising pressures that the British style of governing has come under since the latter half of the twentieth century. In the US, by contrast, the answer to the question of public law's foundations is relatively trivial and uncontested: it is the written constitution, and popular allegiance to it, that constitutes the state and grounds the constitution of government. And because of its dominant position in the world economy, the US is not under the kind of pressure faced by the UK to negotiate relationships with supranational political entities like the EU that would force a questioning of its basic authority structure. As a result of its relative political isolationism, US constitutional culture has also remained relatively autarkic; it has not therefore faced the same need to reflect on its constitutional basis. *Foundations* thus scratches an itch that simply isn't (yet) felt in the US context.

Mathew John examines the foundations of public law in India, providing a non-European perspective on *Foundations*, but one that has been highly influenced by British colonial history. John argues that the kinds of constitutional pedagogy espoused in the British colonial-constitutional settlements imposed in India, and reflected in *Foundations*' own conceptual categories, has difficulty in capturing the social reality of Indian political culture as well as the distinct problem of minority rights that it has had to confront. In the presence of such entrenched inequality and difference, the autonomy of the political and the unity of the state on which it depends can only seem a distant dream. A different set of conceptual tools and analytical devices would therefore be required to capture its public law tradition.

Denis Baranger, on the other hand, picks two phenomena which arguably should be central to the vernacular of *Foundations*: British and French administrative law. Specifically he queries whether *Foundations* fully captures the emergence of the court-based jurisprudence which has generated administrative law in both jurisdictions. This, after all, is the law commonly referred to by 'public law' in a contemporary context, including administrative action, regulation, and judicial review. In Baranger's view, modern administrative law does not emerge out of a foundational process of 'political jurisprudence'; it is rather a 'lateral' development, emerging in a 'sporadic and peripheral' fashion. And yet it evolves into a feature that becomes central to the discipline of public law as a whole. In other words, the French and British fields of administrative law, despite their significant differences, have both developed outside any foundational narratives of 'the State' or of 'the Constitution', and they remain in that suspended state. This autonomy is best explained as a process of 'differentiation', the state distinguishing (or 'derogating') the exercise of its powers from private law ordering. But in that sense, public law is derivative rather than foundational. In conclusion, however, Baranger offers an olive branch, seeing in *Foundations*' project of elaborating a 'science of right ordering' a way of retrieving a 'foundational narrative' of the quest for (political) *justice*, which might be renewed in contemporary conditions in the face of increasing and evolving discretionary administrative powers.