**A Positivist and Political Approach to Public Law**

***Introduction***

This chapter explores the relationship between legal positivism and politics in the context of public law methodology. In general, it might be thought that there is a tension between positivist and political approaches to public law: if we are taking a ‘positivist’ approach we are severing law from a wider set of values, whereas if we are being ‘political’ this must be instrumental or normative. If so, legal positivism is focused on establishing the autonomy of the law, and its detachment from any ‘external’ norms or principles, which might, among other things, be political in nature. Perhaps as a result, there is a further detachment between positivist and political approaches: they tend to be analysed in different legal spheres. Debates about legal positivism primarily occur on the plane of legal philosophy, and are generally preoccupied by the law-morality relationship, whereas debates about the relationship between law and politics primarily occur in the field of public law. A positivist approach may therefore be positioned to provide insights into the nature of law at a general level, while a political approach may have greatest resonance in the more specific contexts of constitutional and administrative law and theory.

The aim of this chapter, however, is to outline, analyse and defend an approach to public law which is both positivist *and* political in its orientation. To do this, the chapter draws on the work of Jeremy Waldron on legal positivism and Martin Loughlin on political jurisprudence. At first sight, while there are important thematic overlaps, their work appears to exhibit the tensions and detachment identified above: Loughlin is a strident anti-positivist whose work is focused on the idea and foundations of public law, while Waldron is a legal and political philosopher whose work sits at a more general level and spans a range of concepts which include, but also go beyond, the core concerns of public law. However, there is arguably an underlying compatibility to their work which in combination provides a template for an approach to public law which is both positivist and political.

This chapter will explore the idea of a positivist and political approach to public law. First it considers the work of Loughlin and Waldron, explaining the apparent tensions between Loughlin’s idea of political jurisprudence and legal positivism, before demonstrating that a shift to the normative conception of positivism defended by Waldron resolves this incompatibility. Second, having established this basis for positivist and political public law, the chapter moves on to examine its nature, considering potential challenges to its coherence. Third, the chapter outlines the potential value of this as a methodology which provides a framework for explanation, justification and critique, before attempting to illustrate the utility of this framework through application to a number of practical examples in the field of public law.

The aim of this chapter is not to prove that this positivist and political approach is definitively correct to the exclusion of all other methodologies of public law – indeed, as the variety of methods on offer in this volume illustrates, that would be an essentially futile goal. Instead, my aim in this chapter is to argue that a positivist and political approach is a compelling and attractive one on the spectrum of potential methods. Constitutional methodology is inevitably a selective process, for theorists and legal or political actors alike. In developing this account of an approach to public law which is both positivist and political, my objective is to explain how these two important strands of constitutional studies interconnect, and how they can shape and enhance our understanding of the subject.

This is, therefore, an exercise in theorising rather than grand-theorising – in Carol Smart’s terms, it is ‘an attempt to make sense of experience or social order’ derived from ‘concrete’ knowledge, and not to ‘proclaim… unique truth above all other… systems of thought’.[[1]](#footnote-1) In making explicit the basis, nature and utility of a positivist and political approach to public law, the consequences and the opportunities of adopting this methodology will hopefully become clear, as well as opened up for further evaluation. For in employing an approach based on law’s distinctive nature as a social practice, but which is crucially located in a wider system of political activity and principles, it is essential to recognise that, ultimately, public law is a discipline which is constructed and reconstructed to serve the purposes we adopt for it.

***1. A Basis for Positivist and Political Public Law***

This chapter builds on claims developed in an earlier article exploring the work of Martin Loughlin and Jeremy Waldron.[[2]](#footnote-2) The article sought to reconcile the positions of Loughlin and Waldron to establish a conceptual basis for a positivist and political approach to public law. Before developing this further argument in this chapter, it is first necessary to set out the basis of this reconciliation of Loughlin and Waldron. There are attractive elements to both of their theoretical accounts of the nature of law, yet there is also an apparently fundamental incompatibility between the different approaches they defend.

*Loughlin’s Theory of Public Law as Political Jurisprudence*

Loughlin’s conception of public law as an exercise in ‘political jurisprudence’ is pioneering in explaining the inherently political underpinnings of constitutional order and legal authority.  He has developed the idea of ‘public law as political jurisprudence’ across a number of books,[[3]](#footnote-3) but a recent restatement of the theory illuminates a key aspect of Loughlin’s work which is of primary relevance here: that his account of public law is explicitly anti-positivist.

In the Introduction to *Political Jurisprudence*, Loughlin foregrounds the idea that his theory is diametrically opposed to legal positivism:‘Political jurists explicitly reject legal positivism’.[[4]](#footnote-4) Political jurisprudence is distinguished from other theories of law because it maintains that ‘the key to understanding the nature of legal order’ is ‘the question of how political authority is constituted.’[[5]](#footnote-5) This, according to Loughlin, is the ‘central question’.[[6]](#footnote-6) But it is one which legal positivism (‘the dominant school’) has ‘shunted to the margins of the discipline’.[[7]](#footnote-7) For Loughlin, a legal positivist approach means ‘the authority of the legal order is presupposed’, with law treated as ‘an object to be explained empirically or as a logically self-authorizing set of norms’.[[8]](#footnote-8) Consequently, ‘the province of jurisprudence narrows’ and becomes ‘limited to the task of explaining the structural form of positive law’.[[9]](#footnote-9)

Loughlin therefore rejects what he considers to be the focus of a legal positivist approach to the understanding of law, but his objection goes deeper. His approach to public law as a form of political jurisprudence also challenges the core thesis at the heart of legal positivism – the idea that law is separable from morality, and therefore that the validity of legal rules within a legal system does not inherently depend on their merit, whether judged against principles of morality, justice, or any other external normative values.[[10]](#footnote-10) Loughlin, however, rejects ‘the separation postulated by legal positivism’, arguing instead that ‘fact and value unite in an experienced political reality.’[[11]](#footnote-11) His alternative method is interpretive – it fuses ‘description and evaluation in a way that positivists are unwilling to recognise’.[[12]](#footnote-12) This is inevitable and unavoidable, because according to Loughlin, ‘[w]e are always interpreting’ when we are ‘concerned to generate meaning’.[[13]](#footnote-13) Yet Loughlin’s approach to interpretation is crucially distinct from the moralised approach to ‘constructive interpretation’ associated with Dworkin, framed around the idea that there is a right answer to legal questions which must present the law in its most appealing light.[[14]](#footnote-14) Loughlin criticises this natural law infused mode of jurisprudence as flawed because it ‘assumes the moral authority of an idealized legality’, converting ‘legal interpretation into a type of moral reasoning’ based on ‘a set of universal moral axioms’.[[15]](#footnote-15) So Loughlin’s theory of public law as political jurisprudence is anti-positivist, but not in the usual way.

Loughlin’s approach, in contrast, is rooted in ‘the political world’. From the rejection of positivism and moralised legalism, Loughlin concludes that ‘the relationship between law and authority can neither be presupposed nor assumed to rest on a set of universal values’.[[16]](#footnote-16) Instead, public law, understood as an exercise in political jurisprudence, views authority as ‘generated through a political process that draws people together in a common understanding’.[[17]](#footnote-17) This produces a ‘special type of political power’ based on ‘the capacity of a collective singular, “the people”’, which is ‘consolidated through institutionalisation’ in a system of public law.[[18]](#footnote-18) The ‘constitution of political authority’ therefore ‘determines the nature of law’, but as the constitution of authority is ‘continually contested’, there is no singular conception of law.

Instead, to understand public law as an exercise in political jurisprudence means to acknowledge the different ways of conceptualising the political role of law. In his most recent formulation, Loughlin calls these conceptions ‘Law’, ‘Legality’ and ‘Superlegality’.[[19]](#footnote-19) For Loughlin, ‘Law’ is found in ‘a set of practices operating in a discrete sphere of government’ reflected in the experience, reason and precedents of legal actors.[[20]](#footnote-20) In contrast, ‘Legality’ is law as an ‘instrument of political power’ to be deployed by the state through legislation.[[21]](#footnote-21) And ‘Superlegality’ is ‘a set of abstract principles that limits the range of legitimate action of governing majorities’ rooted in fundamental norms derived from political ideas of liberty and equality.[[22]](#footnote-22) The relative priority between these different conceptions of law will vary between different legal systems, but is to be determined as a matter of ‘political judgment’.[[23]](#footnote-23) The function of public law is to frame and facilitate the competition between these different conceptions of law: its ‘task is to negotiate between the various conflicting accounts of political right that form part of its evolving discourse’.[[24]](#footnote-24)

This is a distinctive and challenging account of the nature of public law, offering a crucial insight into the political foundations of law. Loughlin’s sophisticated account demonstrates that public law has an essential political character, which is primarily evident in its key role in generating constitutional authority. The political dimensions of law also translate into each of Loughlin’s three specific conceptions of law’s mode of operation (‘law’, ‘legality’, ‘superlegality’) revealing the complexity and variability of the relationship between the legal and the political. But while Loughlin’s work has been pioneering in explain the fundamentally political nature of public law, it is not clear that his approach to political jurisprudence is incompatible with legal positivism. There are two key reasons for this – the first concerns the positivist method, and the second concerns the function of law within Loughlin’s account of political jurisprudence.

*Political Jurisprudence and Normative Legal Positivism*

The first reason to doubt that political jurisprudence is inconsistent with legal positivism is rooted in the idea that positivists must separate considerations of ‘fact and value’ (to use Loughlin’s words) at a methodological level. This may be the aspiration of the analytical positivism of HLA Hart and his successors,[[25]](#footnote-25) but this does not mean all legal positivist work must adopt the same stance. Jeremy Waldron’s explicitly normative account of legal positivism provides a compelling alternative.

According to Waldron, the choice of a positivist theory of law (of some sort) ‘cannot credibly be presented as a matter of pure ‘analysis’’; instead, for the choice ‘to be intelligible, it must be motivated’.[[26]](#footnote-26) Waldron’s account of normative positivism is based on the idea that law might have a different relationship with moral values at the ‘retail level’ and at the ‘wholesale level’.[[27]](#footnote-27) This distinction is designed to capture the difference between decisions concerning the validity and meaning of specific legal rules at the ‘retail level’, and decisions concerning the purpose and operation of law as a social institution at the ‘wholesale level’. It is to draw a distinction between ‘the law’ and ‘law’ – the rules of law within a system, as compared with the nature of a legal system itself. And for the normative positivist, an insistence on the separation of law and morality at the ‘retail level’ – the level of determining the validity and meaning of specific legal rules – is pursued because at the ‘wholesale level’ there are normative reasons to favour this separation.

There would be a number of different ways of justifying this separation, but in broad terms it might be explained on the basis that a legal system can best fulfil its coordinating functions if ‘it is set up in a way that enables people, by and large, to determine what the law is on a given subject without having to exercise moral judgment’.[[28]](#footnote-28) Equally, normative positivism is also the legal theory which provides the conceptual underpinning for Waldron’s famous argument about the role of law in circumstances of pervasive disagreement about justice.[[29]](#footnote-29) If there is inevitable disagreement about the requirements of justice among a substantial group of citizens, the unilateral judicial determination of these questions through constitutional review is exposed as undesirable. For it overlooks the virtues of democratic debate and of resolving disagreement through collective decision-making, and instead imposes one conception of justice over others on the basis of legalised moral argument among a select, unrepresentative group.

This defence of legal positivism as a normative thesis is not a marginal or mutant strand of positivist thought. Indeed, the tradition of ‘political positivism’ within which Waldron’s work is located has deep roots.[[30]](#footnote-30) Due to its similarity with the approach of the positivist forebears Bentham and Hobbes,[[31]](#footnote-31) it may actually represent the ‘classical’ tradition of legal positivism, which ‘saw theorizing about law as part of theorizing about morals and politics’.[[32]](#footnote-32) This connection between positivism and political jurisprudence is even explored in depth in Loughlin’s own writing on Hobbes. In a recent chapter length study, Loughlin recognises that ‘[m]odern legal positivism—the conviction that positive law forms an autonomous system of law that includes its own criteria of right and wrong, just and unjust—has its origins in [Hobbes’] work’.[[33]](#footnote-33) While Loughlin reconceptualises Hobbes’ work ‘as an exercise of political jurisprudence—of addressing the issue of legitimacy and not simply accepting the authority of positive law as a postulate of thought’,[[34]](#footnote-34) this does not eliminate the positivist underpinnings of this theory of law. Instead, it reveals that the positivism of Hobbes was founded in an account of ‘political right’. For as Loughlin convincingly argues, Hobbes viewed natural law as only binding ‘when expressed in the form of positive law’, while he also ‘converted’ the laws of nature ‘into precepts of political right’.[[35]](#footnote-35) As Loughlin argues, this ‘transformation of natural law was of critical importance in refashioning the instruments of modern political rule’, based on the idea that ‘to realize liberty and equality… humans must first be subjected to government’.[[36]](#footnote-36) But crucially, this is a scheme of political jurisprudence which depends on the positivisation of law in order to establish the basis of the modern state.

Ultimately, therefore, Loughlin’s account fails to reflect the methodological variation which exists within legal positivism, and as a result, underestimates the important political dimensions of a specifically normative positivist approach. As such, we can start to see that it is wrong to dismiss every approach to public law which is positivist as incompatible with the insights derived from Loughlin’s political jurisprudence. Indeed, on the normative approach it is crucial that the way we understand law should reflect its distinctive nature as a means of coordinating human behaviour, but one which operates within a wider system of political government. As Waldron argues, ‘we should expect what we say about *what law is* to have some sort of connection to *why law is seen as an importantly distinct mode or aspect of governance*’,[[37]](#footnote-37) and this approach seems largely consonant with that underpinning an account of public law as political jurisprudence.

There is a second reason to doubt the idea that political jurisprudence is inherently incompatible with legal positivism, beyond the methodological similarities discussed above. While on Loughlin’s account there can be no singular conception of law, each of the three competing understandings of law which he sets out are compatible with legal positivism. ‘Law’, ‘legality’ and ‘superlegality’ are all non-moral conceptions of how the law may operate within a political system – ‘law’ representing ‘traditional practice’, ‘legality’ representing ‘legislative will’, and ‘superlegality’ representing ‘universal reason’.[[38]](#footnote-38) Law as practice is ‘artificial reason’ not moral reason, legality as legislative will represents a collective political decision, and superlegality is ‘an expression of a society’s fundamental political principles’ rather than universal moral norms.[[39]](#footnote-39) In substance, therefore, each of these different relationships between law and politics can be understood within a positivist framework – in each conception law reflects a different mode of politics, but law remains distinct from, rather than becomes a mere function of, political (or moral) values. Law takes a different form depending on the different understanding of politics in play, but whether legal precedent, legal statute or legal principle, each of these conceptualisations can be seen to recognise the independent force of law, with a separate status and authority from the other kinds of obligations and powers which exist within a society. Indeed, this is acknowledged by Loughlin, who observes that ‘[o]perating in these ordinary ways, law evolves as an autonomous practice’.[[40]](#footnote-40)

Yet even if it is right that these three different substantive relationships between law and politics are compatible with the overall idea of law as a positivised construct, there is a further challenge. Loughlin also argues there is a continuous conflict between these different conceptions of law, which ‘cannot be resolved by legal method’ but instead requires ‘the exercise of political judgment’.[[41]](#footnote-41) As such, ‘rather than making any claim to universal truth, political jurisprudence explains how a particular way of conceiving the political is conceived in a particular regime’.[[42]](#footnote-42) Loughlin is surely correct that the ‘interminable interplay between the relative authority of text, precedent and principle’ has no absolute solution, and that a balance between them can be reached in different ways in different legal systems.[[43]](#footnote-43) But legal positivism is not rendered irrelevant by the existence of this potential conflict. For even if the balance between text, precedent and principle cannot be determined by a scientific legal method, a normative account of legal positivism would view this as a matter of making normative choices concerning the constitutional structure in a given legal system (at ‘the wholesale level’, to import Waldron’s terminology).

Moreover, while normative positivism can account for the existence of the conflict and the need for (political) choices about the characterisation of law within a specific state, it can also establish the scope of the dispute. For it can suggest that the texts, precedents and principles in play in constitutional interpretation should be those texts, precedents and principles recognised as *legal* according to the public law of the state in question. Indeed, the fact that these are different conceptions *of law* which frame constitutional authority and decision-making within the state – rather than, for example, conceptions of morality, justice or religion – is inherent in Loughlin’s theory. All three conceptions – ‘law’, ‘legality’ and even ‘superlegality’ – have an essential and specific legal character. And so while the way in which these different concepts fit together may be a matter for normative political judgement, at the ‘retail level’ of constitutional decision-making the relevant sources and values are those recognised as internal to the system of law, while external values which are not grounded in precedent, legislation or legal principle lack authority and are excluded, at least from a determination about the current state of the law.

This does mean an end to controversy about the answers to legal questions, or the elimination of conflict between different forms of law. But a (normative) positivist approach is consistent with the existence of different ideas of law, all operating and competing for supremacy within a particular legal system. And it can narrow the scope of controversy at the ‘retail level’ of constitutional decision-making, by ensuring that those disputes are focused on norms, sources and values which are determined as legally relevant within the legal system, rather than exposing public law to a moral free-for-all. This approach may have some outer limits, and does not become an automatic or mechanical process of rule application, depending on which of Loughlin’s conceptions of law is dominant within a particular state. But in large part it can shape the choices of legal actors, establishing for them the norms which are material to reaching valid decisions about the law in operation in their society. Fundamentally, then, the idea that political jurisprudence generates no singular conception of law is consistent with – and, indeed, can enrich – a normative positivist legal framework.

There are consequently good reasons to believe that Loughlin’s theory of political jurisprudence is compatible with a normative account of legal positivism, rather than standing in opposition to it. That may feel like a relatively thin position, but it is significant in establishing a basis for a positivist and political approach to public law. Indeed, it may even understate the substantive overlaps between Loughlin’s work and normative positivism. For example, if we think about Waldron’s normative approach to legal positivism specifically, which views the insulation of law from external values at the point of its application as reflecting a democratic political choice, we can identify a number of strong affinities between these two ostensibly competing theories. In particular, both approaches highlight the contingency of legal rules, and the extent to which law is simply a product of real political choices and circumstances, rather than a derived from a rational repository of superior moral values.[[44]](#footnote-44)  And both theories embrace and foreground the idea that disagreement is a central feature of legal and political experience, rather than an aberration to be pushed to the fringes of our understanding of constitutional concepts.[[45]](#footnote-45) In that sense, we can begin to see that while these theories start from quite different places, in combination they can provide a basis for a positivist and political approach to public law.

***2. The Nature of Positivist and Political Public Law***

To this point, the chapter has considered the possibility of a theory of public law which is simultaneously positivist and political, grounded in the work of Loughlin and Waldon. But if we go beyond thinking about this as a mere possibility to an actual method, what does a combination of Loughlin’s political jurisprudence and Waldron’s normative legal positivism offer? Loughlin may rely on a reductive view of legal positivism which underestimates its implications as a normative theory – yet a normative account of legal positivism can still be enhanced by drawing from the deeper political foundations of Loughlin’s rich work on public law as political jurisprudence. This demonstrates the fundamental need to examine public law in its political context, in light of its political origins and the constitution of its authority, and not to assume that positivism is only concerned with the positive law. Instead, we also need to think about the advantages and disadvantages of rule by (positive) law – or as Waldron puts it, ‘to grasp the desirability of being governed in certain ways (eg by law) rather than other ways (eg by decree or managerial direction)’.[[46]](#footnote-46) In my view, this can only be done in the context of an account of the authority and legitimacy of positive (public) law, which we can generate from Loughlin’s theory of political jurisprudence.

In this section we therefore consider the nature of a positivist and political approach to public law: how it might be defined and some potential objections to the coherence of this approach.

*Defining a Positivist and Political Approach*

A positivist and political approach to public law is based on a normative account of legal positivism, understood in a political context which is necessary to explain the authority, functions and limitations of law.

On this approach, law can be seen to retain its role as a distinctive social construct for structuring and organising human activities, but its political dimension is essential to understand the context in which law operates, the manner and extent to which legal arrangements are justified, and to provide a basis for critique of the legal system and its operation. Positive law and the political framework in which that law exists are inherently and unavoidably linked, but this connection is not at the point of assessing the legality validity of specific rules. Instead, the connection is broader and more fundamental.

First, as Loughlin’s work demonstrates, there is a constitutive relationship between positive law and politics – public law constitutes and is constituted by political necessity within the state. And second, as Waldron’s work illustrates, this relationship requires normative judgements to be made at a systemic level – constitutional arrangements can be structured in different ways, and so choices about how positive law will take shape in a particular political context must be determined by reference to political principles. As a result, the constitutive relationship between positive law and politics does not displace normative questions about the structure of constitutional systems – instead it demands them, given the variation possible in the way which public law is operationalised in constitutional reality. As Loughlin shows, there are political judgements to be made about the balance between different conceptions of law, legality, or superlegality in a specific legal order and this is inevitably in part a normative task. Equally, the positivist separation of legal validity from non-legal values does not mean that law exists in a vacuum – instead it necessitates that law must be conceptualised as part of a wider political system for this choice of separation to be meaningful. Whether the positivist instinct to insulate legal decision-making from abstract ideas of morality or justice at the point of determining the legal validity of legal rules derives from the pursuit of basic legal certainty, or to reflect the virtues of a democratic law-making process, it is this political rationale which makes a defence of legal positivism constitutionally intelligible.

A positivist and political approach can therefore provide us with an account which deals with how the validity of specific legal rules is determined, and the wider authority and functions of law as a political construct. Crucially, the positivist and political approach demonstrates that specific questions about validity are essentially connected to broader questions about the political purposes and (potential) legitimacy of law. As Waldron’s account of normative positivism demonstrates, there is no need to assume that the relationship between law and politics must be the same at the ‘retail level’ of specific legal decision-making as at the ‘wholesale level’ of an overarching theory of law. But it does illustrate the importance of considering the relationship between the ‘retail’ and the ‘wholesale’ to have a full understanding of law. Or, as we might characterise this for application in a public law context specifically, what Waldron calls ‘retail’ and ‘wholesale’ may equally be thought of as representing the different considerations and questions in issue at the level of constitutional practice and the level of constitutional design.

What I have set out here is inevitably a broad template for an approach to public law. It is also obviously contestable in a number of respects. However, this positivist and political approach provides us with the basic underpinning for a framework to engage with public law. As I will argue shortly, that framework has three elements: it provides us with the tools to explain, to justify and to critique the law. Before we turn to assess the value of this framework, and the positivist and political perspective which generates it, we must first consider some broader objections to the coherence of the approach I am defending in this chapter.

*The Coherence of a Positivist and Political Approach – Some Potential Objections*

There are three potential objections to the coherence of a positivist and political approach I want to explore here. The first is whether normative legal positivism is itself a coherent theory of law. The second is whether the method considered here is better understood as a form of positivism or of interpretivism. The third is whether this positivist and political approach is simply a rebranded version of ‘political constitutionalism’.

*(i) is normative positivism coherent?*

While I have argued above that normative accounts of legal positivism have potentially deep roots in the ‘classical’ positivist theories of Bentham and Hobbes, the idea of normative positivism remains controversial. This is especially the case in the dominant modern analytical tradition of legal positivism. From the perspective of descriptive positivism, normative positivism might be viewed as an irrelevant or parasitic gloss: either there is a conceptual separation between law and morality as a matter of empirical fact, or there is not. As Coleman has argued, ‘‘normative positivism is a thesis *about* legal positivism, not a version *of* legal positivism’.[[47]](#footnote-47) As such, normative positivism might be thought to add little other than a series of reasons for why an inevitable state of affairs is normatively attractive.

The difficulty with this position is that it views normative theories as hierarchically inferior to descriptive or analytical theories, rather than simply different from them. The very starting point of a normative account of positivism of the kind developed by Waldron is that a descriptive account of the world as it is cannot be completely severed from the reasons which motivate that position – instead the argument is ‘normative all the way down’, and ‘does not really presuppose any purely descriptive, conceptual, or non-normative phase at all’.[[48]](#footnote-48) The dispute about whether a normative account of positivism can be coherent is therefore a function of a wider dispute concerning the very nature of legal theory. In practice this is likely to be irresolvable, given the persistence of real world disagreement about the truth of competing legal theories, whether internal to legal positivism, or between positivists, natural lawyers and others.[[49]](#footnote-49) In such circumstances, it seems problematic to entirely discount one set of arguments about the nature of law as incoherent – at the very least, the question of the coherence or otherwise of normative theories must become a central part of the debate about law, rather than imposing descriptive truth as a precondition cutting off further discussion.

There is a second layer to this critique, however, which follows from the claim that the truth of legal positivism as a descriptive thesis is logically prior to any normative discussion of positivism. As Gardner argues, from this perspective normative legal positivists become simply ‘positivity-welcomers’ who reach the ‘rather self-congratulatory conclusion’ that ‘the positivity of law is not only something we have to live with, but also something we can be proud of’.[[50]](#footnote-50) Yet as Waldron notes, the normative positivist does not have ‘to view law as *a good thing*’.[[51]](#footnote-51) Moreover, to consider the normative implications of positivism is not to assume that legal positivism provides a perfect model for legal order in a society. Instead, it is to undertake a relative assessment of the advantages and disadvantages of a system based on positive law. And by identifying the limitations of law as a means of organising human activity, a normative approach may suggest that legal positivism is simply the least-worst conception of legal practice available to us. In this sense, engagement with normative argument, and by extension a normative evaluation of positivism, can be justificatory or critical in nature (or indeed, incorporate elements of both justification and critique).

However, this raises a final challenge: is critical positivism even possible? As Carol Smart argues in a radical challenge to the idea of a specifically feminist jurisprudence, such an approach to critical legal theory fails to ‘de-centre law’ – ‘[i]t encourages a ‘turning to law’ for solutions, it fetishizes law rather than deconstructing it’ – which ‘ends with a celebration of positivistic, scientific feminism which seeks to replace one hierarchy of truth with another’.[[52]](#footnote-52) Even a feminist theory of jurisprudence would therefore take on ‘the mantle of a positivism which assumes that there must be an ultimate standard of objectivity’.[[53]](#footnote-53) This is a powerful critique, yet if positivism is understood as existing in a deeper political context, there is no reason to assume it provides a complete hierarchy of objective truth. Rather, positivism may offer an initial basis for critical understanding of the effects of law, by exposing the state and character of legal order within a given society. An account of legal positivism which emphasises the contingent authority of law should therefore provide a basis to facilitate rather than suppress critical deconstruction. Indeed, it is difficult to see how law can be redeemed (if that is possible) from a feminist or any other critical perspective other than through political action, rather than through attempts to make legal theory internalise specific values. In this sense, the goal of ‘de-centring’ law can arguably best be achieved through a positivist and political approach, which offers relative clarity about the content of law so that its full effects can be politically evaluated and confronted, rather than legal outcomes fetishized.

*(ii) positivism or interpretivism?*

A second and related challenge concerns whether the approach defended in this chapter can actually be understood as a positivist theory at all, or whether normative legal positivism is better viewed as a form of interpretivism. There are two different varieties of interpretivism potentially in play here.

The first is the moral interpretivism of Dworkin, according to which we choose a theory of law on the basis of whether it fits with our understanding of the practice, and also whether it presents that practice in a morally attractive light.[[54]](#footnote-54) There may be some overlap between this approach and that of normative positivism, in so far as a normative assessment is an important part of defending a legal theory. But unlike Dworkin’s approach, normative positivism is not necessarily rooted in a constructive approach to interpretation – the aim is not to develop a theory which presents the practice of law in its best possible light. Instead, as discussed above, a normative account of legal positivism can be justificatory and/or critical in nature, distinguishing it from the interpretivism of Dworkin which has an overriding moral purpose. Furthermore, there is a substantive difference – as Waldron argues, unlike natural law theories, ‘normative positivism need not commit itself to any particular meta-ethics, nor to any particular account of how we arrive at an understanding of the goods or values that law serves’.[[55]](#footnote-55) Whether or not Dworkin’s interpretivism is classified as a natural law theory, this distinction applies equally to his theory of law as integrity, which operates to serve a specific conception of ‘equal concern and respect’.[[56]](#footnote-56)

The second version of interpretivism relevant here is the ‘non-moral’ approach relied on by Loughlin.[[57]](#footnote-57) Loughlin’s version of interpretivism rejects freestanding moral arguments, instead viewing law as a social phenomenon like any other, which must be interpreted to be understood. Loughlin argues that the ‘assumption that there are indisputable facts in this field that can be acquired by objective empirical investigation is erroneous: we are constantly seeking to fit this evidence to our pre-existing assumptions about the subject’.[[58]](#footnote-58) Instead, public law values such as ‘liberty, democracy and accountability’ can only be determined by ‘the way in which they are set to work within a defined field’ – these ideas ‘take on more precise meanings’ only when they are located in ‘specific social and historical contexts’.[[59]](#footnote-59) The values which animate public law do not therefore derive from abstract principles, but the principles obtain meaning from their deployment in practice.

As noted above, there are important methodological parallels between normative positivism and Loughlin’s interpretive approach. But there is an important difference too, which flows from a positivist recognition of the distinctive nature of law. While Loughlin views law as interpretative in the same way as history and other social sciences – ‘history is made by historians and their task is thoroughly interpretative’[[60]](#footnote-60) – there are important differences between law and history. Unlike history, law has direct and concrete consequences for the actions of humans, and authoritative institutional actors designated with the power to conclusively resolve disputes about the meaning or application of law for these purposes. Interpretations of history can be continuously debated and updated. However, law makes demands on our behaviour and while we can disagree about the demands it is making, the courts are systematically empowered to impose a final interpretation on everyone else. Normative positivism tries to recognise both of these aspects of law’s nature – that at a structural (‘wholesale’) level law is a concept which is subject to interpretation like any other social science, but at the (‘retail’) level of practice legal rules have a definitive existence, and not all interpretations of them are equally authoritative.

Is this combination – positivism in terms of the internal operation of the legal system, interpretivism in terms of the choice of system itself – better understood as ‘positivism plus’ or ‘interpretivism minus’? While it could arguably be the latter, the core idea of normative positivism is that it is based on an account of the relationship between the retail level and wholesale level, or between the nature of specific legal rules and the nature of law as a social construct. It would therefore be wrong to suggest this is an interpretive theory by focusing on this dimension in isolation from the overall method. As such, an approach which is focused on understanding positivism in its political context for political reasons is not best characterised as interpretive, but as grounded in normative legal positivism.

It may also be worth asking whether the label applied to this theory has great significance. Waldron questions whether it really counts against normative legal positivism if it can ‘no longer easily be distinguished from modern natural law theory’, concluding that the dilution of these distinctions ‘should not be counted as a loss’, as the ‘preservation’ of the positivism-natural law divide ‘is not to be regarded as a methodological imperative’.[[61]](#footnote-61) Yet while there may be little point in agonising over the retention of categories simply for the sake of having categories, there is still a signalling function to be fulfilled through the use of appropriate theoretical labels. And from this perspective, it seems more important to emphasise the part of the theory which is a normative choice (here, to defend a positivist approach within a legal system) over the part which is arguably unavoidable (the normativity of the idea of law as a social construct). While ‘legal positivism is a label associated with a very broad cluster of theories’,[[62]](#footnote-62) it is better to view normative positivism as part of that tradition, rather than absorbing it into the (arguably even broader) category of interpretivism, which would risk diminishing its specific positivist features.

*(iii) is this just political constitutionalism?*

A final question concerning the coherence of a positivist and political approach is whether this is just a rebranding of political constitutionalism. And if so, does that simply make it an elaborate way of defending something that already exists?

The idea of political constitutionalism has featured prominently in public law scholarship in recent decades. However, it remains contested – from outside the tradition and within it, both conceptually and, increasingly, politically.[[63]](#footnote-63) Loughlin in particular has been critical of the idea that a ‘so-called’ theory of political constitutionalism could be engineered from the functionalist writings of John Griffith, most famously in his influential lecture on ‘The Political Constitution’,[[64]](#footnote-64) and then subsequently juxtaposed with a model of legal constitutionalism.[[65]](#footnote-65) Loughlin is clearly right that theoretical debates which create a superficial competition between law and politics miss the key question, which is ‘not whether we have a legal or political constitution: it is how the idea of law within the political constitution (i.e. the constitution of the polity) might best be conceptualized’.[[66]](#footnote-66) Yet this does not necessarily mean the idea of political constitutionalism must be rejected – instead, it can be seen as attempting to acknowledge and frame the relationship between law and politics. This is a relationship where law is not the exclusive or inherently superior mode of constitutionalism, but which emphasises ‘the political character of the constitution, and the potentially constitutional character of the political’.[[67]](#footnote-67)

However, there remains considerable disagreement about the parameters and purposes of political constitutionalism. It is a broad school of thought, with few (if any) absolute unifying tenets. Crucially for present purposes, political constitutionalism is not inherently positivist, nor is it unquestionably a normative theory. There are nevertheless some strong connections between legal positivism and political constitutionalism. For example, in his famous Chorley Lecture, Griffith defined his approach as follows:

‘I am arguing then for a highly positivist view of the constitution; of recognising that Ministers and others in high positions of authority are men and women who happen to exercise political power but without any such right to that power which could give them a superior moral position; that laws made by those in authority derive validity from no other fact or principle, and so impose no moral obligation of obedience on others’[[68]](#footnote-68)

That Griffith’s approach was not just positivist, but ‘highly positivist’, suggests the choice of a version of positivism on normative grounds, rather than the simple acceptance of a fixed idea of positivism as a descriptive inevitability. Yet even so, political constitutionalism in its current form exists independently of any specific position adopted by Griffith,[[69]](#footnote-69) and there is little to be gained from attempting to divine a ‘true’ theory from his work.

The positivist and political approach defended in this chapter could therefore be understood as a further instantiation of political constitutionalism, within that wider and increasingly fragmented school. It speaks to the broader aims of political constitutionalism in attempting to explain the nature of the relationship between law and politics in a way which recognises the relevance and limitations of both, and the essential connections between them. But it also attempts to expand on the claims of political constitutionalism, especially the legal theoretical claims which might underpin it, which have often been overlooked. Equally, however, this positivist and political approach is certainly not an attempt to provide a definitive statement of political constitutionalism, which is no more likely to be achievable than providing a definitive statement of the nature of law. In that sense, the positivist and political approach explored in this chapter stands (or falls) on its own independent merits, entirely apart from whether political constitutionalism is thought to be a meaningful strand of constitutional theory.

***3. The Value of a Positivist and Political Approach to Public Law***

I have argued in section one that the basis for a positivist and political approach to public law can be found in a reconciliation of the work of Loughlin and Waldron, and in section two I have outlined the essential nature of this approach. But how can this method be used to enhance our understanding of public law? The final aim of this chapter is to respond to this question, by setting out the value of this approach for analysing public law. This section therefore offers an initial account of the value of a positivist and political method, in two parts. First, it establishes a framework for public law analysis which flows from the adoption of a positivist and political approach. Second, it explores the utility of that framework, by applying it to illustrative examples of public law issues.

*A Positivist and Political Analytical Framework*

An approach which combines normative legal positivism and political jurisprudence provides a basis for the explanation, justification and critique of public law. It generates the potential to develop a distinct analytical framework for understanding the operation of public law. The three elements of this framework – its explanatory, justificatory and critical dimensions – are inevitably interconnected, given they emerge from a normative theory of law which combines considerations of ‘what is’ and ‘what ought to be’. But these elements draw on political ideas and concepts in different ways for different purposes. They can also be understood to operate at two analytical levels – the ‘retail level’ of constitutional practice, and the ‘wholesale level’ of constitutional design. We will first consider how this positivist and political framework operates at the ‘wholesale level’ of the design of constitutional structures, before moving on to discuss how it might work at the ‘retail level’ of constitutional practice.

The purpose of setting out this framework is not to try to establish an absolute monolithic structure, but to demonstrate that a positivist and political approach has multi-layered possibilities as a public law method, while attempting to show the potential implications of working within this conceptual scheme.

*Explanation, Justification and Critique of Constitutional Structures*

First, the explanatory value of a positivist and political approach is that it reveals that the purpose of public law is defined by reference to its political context. As Loughlin shows, the idea of public law is developed to constitute an autonomous political realm based on the sovereignty of the state, to which all other claims to authority become subject.[[70]](#footnote-70) This demonstrates both that public law is not simply concerned with the limitation of government, but has a crucial empowering character. In addition, this empowerment of the state through law creates a system of government based on representation, with the public power generated capable (at least in principle) of superseding other forms of power – crucially including religious authority and the private power flowing from control of capital.

This provides key context for understanding the potential of positive law, which forms part of and operates within a distinct model of political order. It explains why we might understand law as a set of generally authoritative and enforced rules which exist and have effect regardless of their substantive compatibility with standards of justice: positive law is the product of a specific set of governmental arrangements, and the authority of law flows from the fact it is located in such a political system, rather than because legal rules exist to serve any preordained set of moral ideals or a particular scheme of justice.

Second, there is an important justificatory strand to this approach to public law. Understanding law by reference to its political purpose raises key questions for constitutional design. It requires normative political choices to be made about the shape and nature of constitutional structures, depending on what values and functions we want law to serve. This is not therefore about the complete elimination of moral considerations, but about the appropriate place of non-legal values within our legal systems, and the powers or privileges we give to legal actors to determine their reach and practical consequences. In essence, this is about how legal arrangements can be justified – in what ways legal systems should be organised, and what powers legal institutions should have.

When legal questions arise about the nature of the political system (as they inevitably do) solutions are required. But in circumstances of real-world disagreement about justice, if public law is understood as inherently connected with morality, then that disagreement will simply be reproduced in the legal arena.[[71]](#footnote-71) It may be impossible to avoid normative debate about the proper structure of political systems at a theoretical level, but we can try to insulate dispute resolution at the practical level from disagreement at the level of the principled normative debate. This separation of the validity of positive law from moral standards is justified by normative values, and in particular, the dominant modern political principle of democracy.[[72]](#footnote-72) On this basis, a normative positivist approach supports a system giving priority to legislative decisions over judicial reasoning or Crown / executive prerogatives, when legislation is produced in a democratic framework based on universal suffrage, which respects the political equality of citizens, allowing them to contribute equally to decisions in circumstances of disagreement about justice.[[73]](#footnote-73)

The positivist and political approach therefore shows us that the place of moral or political values is in debate about the whether the arrangements of a legal system can be justified at the structural level. And then at this structural level, democratic principles can be understood to justify the general separation of legal rules from moral or political values at the point of determining their validity or meaning in the context of specific public law disputes. Legal positivism is therefore justified for normative political reasons, because this way of structuring a legal system can afford citizens ‘equal voice and equal decisional authority’ within their political community.[[74]](#footnote-74)

The third dimension to this framework is a critical one, which must temper any conclusions about the extent to which normative positivism establishes a ‘good’ system of government, as opposed to one which is merely the most defensible way of structuring legal arrangements. For this cannot be an unreflective or complacent acceptance of democratic political systems or the legal institutions of which they are comprised. There must also be normative political evaluation of law’s effects, in specific contexts and systematically. And this requires critical normative reflection on the political limitations of legal order.[[75]](#footnote-75)

It is obvious (in theory, and as a matter of historical record) that a positivist system of law may exist for ‘bad’ reasons, whether that is the consolidation of elite power, colonial exploitation, suppression of the wider population or discrimination against particular groups. In this sense, any normative defence of legal positivism must be relative – law is better understood from a positivist perspective than a moralistic perspective because it allows coordination for good (democratic) political reasons as well as bad, and has countervailing advantages, such as legal clarity and predictability.[[76]](#footnote-76) In this sense, legal positivism emerges simply as the least worst conception of law, because it creates space for democratic politics to potentially (but not necessarily) legitimise legal authority. As such, a democratic system of legislative decision-making is justified in relative terms only – it may exhibit greater political legitimacy than other modes of legal reasoning, but it is far from perfect. This establishes the need for critical scrutiny of the political legitimacy of (legal) public power, exposing failings and (if possible) exploring ways to enhance the system itself.

It could therefore never be enough to view law in purely positivist terms, as if legal standards are the only ones against which a judicial decision can legitimately be evaluated. But legal positivism does provide the foundation for deeper critique, because it retains the distinctiveness of law as a social practice. If a crude form of ‘legal realism’ becomes the basis for critical theory, then law simply becomes a cypher for political action, and critique becomes exclusively political because law is merely a means to an end.[[77]](#footnote-77) Such an approach has limitations, because it overlooks the complexity of law and narrows the scope of critical theory.

So while the political character and ends of law are absolutely crucial to a critical understanding of legal practice, critique of law should not be purely instrumental. Instead, the specific and distinct contribution made by law to the functioning of our societies must be acknowledged rather than sublimated, for this too can be the target of critical reflection. This must be in addition to, rather than a replacement for, reflection on the political ends to which law is put. Consequently, a positive and political approach provides a foundation which requires us to think critically about the effects of our overall structures of law – such as the process of law formation and validation, or the role and composition of our legal institutions – and not only the substantive justice or injustice of legal outcomes.

*Explanation, Justification and Critique of Constitutional Practice*

At the level of constitutional practice, a positivist and political approach allows us to understand legal decisions in a political context. It first provides us with a way of explaining what the law on a particular matter is, by offering insights into the determination of the validity and meaning of legal rules. To understand this as operating in a political context does not mean that legal validity become merely a function of political desirability or political pragmatism. Indeed, a crucial explanatory virtue of a positivist approach is that it highlights the distinctiveness of legal reasoning (whether compared to moral, ethical, or political reasoning, among others). But understanding this in context is essential to show that a positivist approach is explicable for political reasons. And as discussed above, those reasons are primarily based on the relative political legitimacy of a democratic legislative process (where one exists) which is therefore a mode of legal decision-making which ought to attract judicial deference, with the judicial role accordingly more limited than on a moral account of law’s nature.

But even the way in which a positivist approach establishes the process by which courts (and other actors) determine the validity of law must be explained in a political context. A positivist approach to public law functions as a constraint on judicial power, which is justified in light of the non-democratic credentials of courts. Yet this will not be a complete or absolute constraint. Judicial discretion could never be eliminated (if that were even desirable) for the conceptual reasons identified by Hart concerning the inevitable indeterminacy of law, which means there will always be potential cases where the positive law ‘runs out’ and the courts are expected to fill the legal gap.[[78]](#footnote-78) Judicial discretion is also unavoidable in practice because at the point that a legal decision is made, the extent of judicial power is effectively self-determined, and decisions which appear to disregard the clear terms of positive law can sometimes be reached.[[79]](#footnote-79)

However, even in the face of such decisions, legal positivism remains a central part of the background framework which shapes and frames judicial power. It provides the conceptual tools to critique those decisions which overlook or disregard positive law – sometimes within the courts themselves itself, in the form of dissenting judgments.[[80]](#footnote-80) But it also discourages the courts from engaging in interpretation which prioritises the judges’ preferred outcome over the terms of positive law. There continue to be numerous examples of judicial decisions where ‘the law’ is applied even despite explicitly stated judicial dissatisfaction with the outcome it produces,[[81]](#footnote-81) which is evidence of the influence of a positivistic understanding of law.[[82]](#footnote-82) The impact of positivism in establishing a distinctive form of legal reasoning in relation to public law is therefore not just conceptual, but also political, in structuring the interactions between constitutional institutions in practice.

Second, the justificatory element of a positivist and political approach prompts us to consider the legitimacy of constitutional practice in an expansive way. Rather than thinking exclusively about the substantive outcomes of legal decision-making, we must also recognise that the political legitimacy of decisions is affected by the manner in which they were reached. The legitimacy of the political processes according to which law is made, and within which different constitutional institutions perform different roles, is also an important part of the legitimacy of any system of public law. And therefore the justice or injustice of legal outcomes (while still significant, as will be discussed momentarily) must not displace consideration of the justice or injustice of legal processes.

There are two consequences of taking this position. First, it creates space for concerns about the extent of judicial power even where the judges might be thought to have reached some 'good’ decisions in constitutional practice. Of course, what counts as a good or just judicial decision will be a matter of intense political debate, which is a key part of the problem. But even in principle, there are freestanding political reasons to favour a more limited conception of the judicial role, which are not negated if, for a particular period of time, some moderately good outcomes are being achieved in the courts. Second – and more significantly – if political legitimacy derives from legal processes and not just outcomes, then this requires sustained attention to be given to developing politically strong processes for the creation of law. Limitations on non-democratic actors are not enough – instead a positivist and political approach requires us to explore how public law practice can be enhanced to produce ever more legitimate arrangements. Accepting a traditional separation of powers and functions between a legislature, executive and judiciary will not be sufficient to meet this requirement – instead the challenge is to attempt to re-examine the legitimacy of the very institutional foundations of our legal and political systems.

The third dimension of a positivist and political approach is to facilitate a critical attitude towards constitutional practice. This is based on an assessment of which legal norms are problematic, and which legal arrangements should be altered. Positivism preserves a set of legal standards against which we can critique what courts do, but such internal legal critique must be accompanied by wider political critique of decisions reached within the system, and of the system itself. After all, the impact of law is not just a consequence of its formal legal validity or effects – the way in which the law is enforced is inevitably important, but it can also have wider social ramifications. The social or political impact of law is difficult to assess or measure (and any measurements can be contested), but it remains crucial to think critically about the broader consequences of legal decisions or enactments. While positivism may demarcate the boundaries between legal and political critique, it does not establish a hierarchy between the two; rather, the existence of the boundary highlights the need for both.

A positivist and political approach therefore positions us to understand the limitations of law as a means of generating change. While change through law is possible, law is also the tool which exists to reinforce the power of the state, and often therefore the interests of the status quo.[[83]](#footnote-83) Engagement with law is unavoidable in practice, but a positivist and political approach offers a corrective to the increasing legalisation of constitutionalism and moralisation of legal interpretation which provides a false perception of law as marking the path to utopia.

*The Utility of Positivist and Political Public Law*

The framework which flows from the positivist and political approach I have outlined above is inevitably contestable, not least given it is grounded in normative legal theory. Consequently, the results generated by the theory become key, because a normative theory must offer something for it to be worthwhile. The normative dimension therefore shifts the parameters for testing the approach – what is offered in terms of our understanding of law becomes more significant than whether it is conceptually true or false, which is likely to be the subject of endless, unresolvable argument. This does not mean that such arguments are pointless, but instead that disputes about true methods may ultimately miss out all of the interesting constitutional questions, and perhaps rob us of the agency and responsibility for choices about how legal systems are structured and operate.

If we therefore take the positivist and political approach as one theory on a wider spectrum of constitutional methods, its vindication depends in significant part on the application of the theory. Therefore, to try to illustrate the value of this approach, in this final section I explore three examples of public law issues. The aim is not to offer a comprehensive analysis, but to show the insights this framework offers, in explanatory, justificatory and critical terms, into public law.

The first issue is how we analyse ideas of parliamentary sovereignty. While this is a legal doctrine, applied by the courts, which establishes the legally unlimited legislative authority of the UK Parliament, it is a doctrine which can only be explained and justified in wider political context. In particular, the absence of legal limits can be seen to make sense when we recognise that this is because Parliament operates in a wider network of political constraints and on the basis of democratic political inputs. The choice here is not to have an unconstrained legislature, but to rely on political rather than legal factors to shape the exercise of legislative power, with Parliament’s status as the constitutionally ultimate decision-maker justified by its democratic credentials (in contrast to the unrepresentative nature of the judiciary).

Further, while the doctrine emerged following a key political conflict in the seventeenth century,[[84]](#footnote-84) this does not mean that if the modern political conditions underpinning sovereignty have changed, so too must the law be seen to have changed.  Loughlin and Tierney, for example, argue that 'the absolutist legal doctrine has been qualified by political developments' and should be dispensed with in favour of a modern concept of sovereignty.[[85]](#footnote-85)  A positivist and political approach, however, would reject the premise that when political context changes, the law necessarily also changes too. While we might argue the law needs to change as part of a critical assessment of political legitimacy, the positivist authority of the legal doctrine is independent from the underlying dynamics of the political situation. Drawing a sharper distinction between law and politics at this level retains a firm line which the courts cannot transgress, despite some recent obiter dicta gesturing at the idea of new ‘rule of law’ limits on parliamentary sovereignty.[[86]](#footnote-86) Indeed, it is this distinction which lays the ground for both legal *and* political critique of any attempts by the courts to subvert this fundamental constitutional norm.

The second issue which illustrates the distinctive nature of a positivist and political approach is the relationship between the courts and the political institutions as characterised in the two famous *Miller* cases, which arose during the process of the UK exiting the European Union. Taking a positivist and political approach to these cases reveals the limitations of courts focusing on substantive outcomes over the wider structures of political power. In both cases the UK Supreme Court relied on expansive (and pretty vague) ideas of constitutional principle to constrain executive powers in ways which are legally questionable, while both cases also reveal the importance of analysing the wider political consequences of judicial decision-making.

In *Miller (No.1)*[[87]](#footnote-87), a majority held that the government could not begin negotiations under the foreign affairs prerogative because ‘[i]t would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone’.[[88]](#footnote-88) Parliament was therefore required to legislate to authorise negotiations (despite the fact this was not an explicit requirement in the statute governing the UK’s relationship with the EU),[[89]](#footnote-89) in addition to the legislation which would always have been required at the end of the process to reflect the outcome in domestic law. Parliament promptly legislated to give the government the necessary formal powers,[[90]](#footnote-90) in effect providing a statutory endorsement of the referendum result which could then be used politically to show that the legislature had ‘voted for Brexit’ throughout the rest of the process. The majority’s focus on broad principles over the detail of statute law can therefore be criticised from a positivist perspective, and while the decision had little immediate impact (because negotiations were authorised and commenced on schedule) it also had important (no doubt unintended) political consequences for the Brexit process.

In *Miller (No.2)[[91]](#footnote-91)* the Supreme Court drew on the principle of parliamentary accountability in a novel way, apparently giving legal force to what is better understood as a foundational idea of the political constitution. The court unanimously held that the government’s attempt to prorogue Parliament for five weeks, to prevent the legislature from obstructing an apparent plan to leave the EU without agreeing a withdrawal deal, was unlawful because there was no justification for executive action ‘which had such an extreme effect upon the fundamentals of our democracy’.[[92]](#footnote-92) While the Divisional Court had held that the prerogative power to prorogue was to be regarded as non-justiciable because ‘it is impossible for the court to make a legal assessment of whether the duration of the prorogation was excessive by reference to any measure’,[[93]](#footnote-93) the Supreme Court had no such reservations. The Supreme Court tried to present this as a unique case – ‘a “one-off”’[[94]](#footnote-94) – and the intervention is only truly explicable when understood in its exceptional political context. But given the result has been to push the government to launch a process to reform (or narrow) judicial review powers,[[95]](#footnote-95) it is unclear whether the intervention was worthwhile. Especially when, prior to the decision that prorogation was unlawful, Parliament had *already* legislated to protect its role in the Brexit process, placing the government under a legal obligation to seek a further extension to negotiations with the EU,[[96]](#footnote-96) and thereby defeating the purpose of the five-week prorogation before it had even begun.

Finally, the third issue which highlights the distinctive possibilities of a positivist and political approach is the status of human rights within constitutional law. This approach gives us the tools to ask the key theoretical questions about the law-morality relationship established by modern human rights law. For the analytical debate about whether there is an inherent conceptual separation between law and morality starts to seem less significant in the age of legalised fundamental human rights, which are premised on a fusion of moral values and positive law, and (at least in general) purport to have overarching authority to which most other categories of legal rules are subject. From this perspective, the need for normativity in public law theory is clear, to allow us to ask questions about the consequences and effects of using positive law to make moral ideals legally effective standards with (usually) overarching status.

From this vantage point, the debate is about much more than simply whether something like the Human Rights Act 1998 should be repealed or amended (or indeed lauded). Instead, the pervasive potential of human rights law makes this question peripheral. But that is also not to be fatalistic about the existence and implications of capturing human rights standards in positive constitutional law. The critical dimension of a positivist and political approach creates space for scepticism about the ultimate wider consequences of the legalisation of moral rights to be enforced by the judiciary. And this critical reflection can draw in both the structural and practical elements of constitutionalism. In a structural sense, this can include analysis of the overall impact of the human rights revolution on ideas of justice in our society, or whether even in this form the law leaves underlying inequalities unaddressed.[[97]](#footnote-97) And at the level of practice, we might ask political questions about who human rights law empowers in our communities.[[98]](#footnote-98) Or how the abstraction and formality of law might work to separate morality from politics.[[99]](#footnote-99) Or how the apparent universality of fundamental rights standards may be in tension with the selective way in which these norms can be actually deployed.[[100]](#footnote-100)

In highlighting the issues relating to parliamentary sovereignty, the courts and the government, and human rights, I am not suggesting that a positivist and political approach prescribes any particular overall substantive theory of public law. Instead, these examples demonstrate the way in which public law can be understood, and the ways in which specific public law challenges can be assessed, when a positivist and political approach is adopted.

***Conclusion***

This chapter has explained and defended a positivist and political approach to public law. This approach is rooted in the (somewhat unlikely) combination of Loughlin’s political jurisprudence and Waldron’s normative legal positivism. But this combination establishes an approach to public law which is distinctive in its own right. I have argued that this approach is conceptually coherent and has considerable value as a means of understanding public law. In particular, it provides a framework for the explanation, justification and critique of public law, both at a structural and a practical level. And I have tried to demonstrate the utility of this framework using three examples to show the kind of insights it can generate, and the kind of questions it prompts us to ask about public law.

No constitutional method will be perfect, and inevitably the methods we choose shape the conclusions we reach. As Lakin has argued, the positivist and political approach may be seen as ‘loading the dice’ in favour of certain values or outcomes.[[101]](#footnote-101) But that is likely to be true of any method. In circumstances of methodological disagreement, therefore, perhaps the best we can do is to be clear about what we are trying to do, how we go about it, and why, so that the method can be contested as much as the different positions we reach in relation to substantive legal or constitutional matters.

As I have tried to show, a positivist and political approach is based on the idea that we should accept that legal method is not abstracted or insulated from political context or political values, while also appreciating that this does not mean law (or legal analysis) simply becomes a function of political or moral interpretation. Perhaps this is an accommodation which will satisfy few people, but it is based on the democratic idea that while law is a tool of public power, legal actors can and must still be challenged for their actions and decisions by reference to a broad set of political values. Recognising the connections between law and politics is not a path to legal perfectionism, where all law is engineered to be compatible with our chosen political principles. Instead, it has a more modest and realistic aim: to allow us to explain law’s political role as a distinct social construct, while also giving us an expansive set of tools to evaluate and criticise its effects.

1. Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) 71. [↑](#footnote-ref-1)
2. M Gordon, ‘A Basis for Positivist and Political Public Law: Reconciling Loughlin's Public Law with (Normative) Legal Positivism’ (2016) *Jurisprudence* 449-477 [↑](#footnote-ref-2)
3. See especially M Loughlin, *The Idea of Public Law* (OUP, 2003) and *Foundations of Public Law* (OUP, 2010). [↑](#footnote-ref-3)
4. M Loughlin, *Political Jurisprudence* (OUP, 2017) 3. [↑](#footnote-ref-4)
5. Ibid 2. [↑](#footnote-ref-5)
6. Ibid 4. [↑](#footnote-ref-6)
7. Ibid 10. [↑](#footnote-ref-7)
8. Ibid 2. [↑](#footnote-ref-8)
9. Ibid 2. [↑](#footnote-ref-9)
10. See eg J Austin, *The Province of Jurisprudence Determined* (1832); HLA Hart, ‘Positivism and The Separation of Law and Morals’ (1958) 71(4) Harvard Law Review 593–629; HLA Hart, *The Concept of Law* (OUP, 1961); J Coleman, ‘Negative and Positive Positivism’(1982) 11(1) The Journal of Legal Studies 139–164. [↑](#footnote-ref-10)
11. Loughlin, *Political Jurisprudence,* 9. [↑](#footnote-ref-11)
12. M. Loughlin, ‘Theory and Values in Public Law: An Interpretation’ [2005] *P.L.* 48-66, 62. [↑](#footnote-ref-12)
13. Ibid 63. [↑](#footnote-ref-13)
14. See eg R Dworkin, *Law’s Empire* (Hart, 1998). [↑](#footnote-ref-14)
15. Loughlin, *Political Jurisprudence,* 4, 3. [↑](#footnote-ref-15)
16. Ibid 4. [↑](#footnote-ref-16)
17. Ibid 4. [↑](#footnote-ref-17)
18. Ibid 4. [↑](#footnote-ref-18)
19. There is overlap between this new scheme and Loughlin’s earlier account of ‘law as custom’, ‘law as command’, and ‘law as right’ in M. Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992). [↑](#footnote-ref-19)
20. Loughlin, *Political Jurisprudence,* 6. [↑](#footnote-ref-20)
21. Ibid 6. [↑](#footnote-ref-21)
22. Ibid 6. [↑](#footnote-ref-22)
23. Ibid 7. [↑](#footnote-ref-23)
24. M. Loughlin, *Foundations of Public Law* (Oxford: OUP, 2010), 164. [↑](#footnote-ref-24)
25. See Hart, *Concept of Law* (Oxford: OUP, 2nd ed. 1994), 239-240. There are also reasons to doubt whether Hart’s theory was successful in avoiding reliance on ‘evaluative’ claims; see eg S.R. Perry, ‘Hart’s Methodological Positivism’ in J. Coleman (ed.), *Hart’s Postscript: Essays on the Postscript to the Concept of Law* (Oxford: OUP, 2001), 323. [↑](#footnote-ref-25)
26. J. Waldron, ‘Normative (or Ethical) Positivism’ in J. Coleman (ed.), *Hart’s Postscript: Essays on the Postscript to the Concept of Law* (Oxford: OUP, 2001), 433. [↑](#footnote-ref-26)
27. J. Waldron, ‘Normative (or Ethical) Positivism’ in J. Coleman (ed.), *Hart’s Postscript: Essays on the Postscript to the Concept of Law* (Oxford: OUP, 2001), 415. [↑](#footnote-ref-27)
28. J. Waldron, ‘Normative (or Ethical) Positivism’ in J. Coleman (ed.), *Hart’s Postscript: Essays on the Postscript to the Concept of Law* (Oxford: OUP, 2001), 430. [↑](#footnote-ref-28)
29. J Waldron, *Law and Disagreement* (OUP, 1999). [↑](#footnote-ref-29)
30. See eg R Stacey, ‘Democratic Jurisprudence and Judicial Review: Waldron’s Contribution to Political Positivism’ (2010) 30(4) *Oxford Journal of Legal Studies* 749-773. [↑](#footnote-ref-30)
31. See generally J Bentham, *Of Laws in General* (HLA Hart ed, Athlone Press, 1970) 1; T Hobbes, *Leviathan* (Penguin, 1985), Ch 17, [391]. [↑](#footnote-ref-31)
32. See D Priel, ‘Toward Classical Legal Positivism’ (2015) 101 *Virginia Law Review* 987-1022, 992. [↑](#footnote-ref-32)
33. Loughlin, *Political Jurisprudence*, 26. [↑](#footnote-ref-33)
34. Ibid 27. [↑](#footnote-ref-34)
35. Ibid 30, 33. [↑](#footnote-ref-35)
36. Ibid 32-33. [↑](#footnote-ref-36)
37. Waldron, ‘Normative (or Ethical) Positivism’, 420 (emphasis in original). [↑](#footnote-ref-37)
38. Loughlin, *Political Jurisprudence,* 6. [↑](#footnote-ref-38)
39. Ibid 5, 6. [↑](#footnote-ref-39)
40. Ibid 6. [↑](#footnote-ref-40)
41. Ibid 6, 5. [↑](#footnote-ref-41)
42. Ibid 9. [↑](#footnote-ref-42)
43. Ibid 5. [↑](#footnote-ref-43)
44. See eg Loughlin, *Political Jurisprudence*: ‘All phenomena… are products of history’ (8); ‘political jurisprudence is both anti-rationalist and relative’ (3). See eg Waldron, ‘Constitutionalism: A Skeptical View’ in *Political Political Theory* (Harvard University Press, 2016). [↑](#footnote-ref-44)
45. See eg Loughlin, *Political Jurisprudence*: ‘For political jurists these disputes are not just symptoms of crisis; they are intrinsic to modern political and legal practice’ (4). See eg Waldron, *Law and Disagreement* (n.X). [↑](#footnote-ref-45)
46. Waldron, ‘Normative (or Ethical) Positivism’, 427. [↑](#footnote-ref-46)
47. J. Coleman, ‘Negative and Positive Positivism’ (1982) 11 *Journal of Legal Studies* 139-164, 147. [↑](#footnote-ref-47)
48. J. Waldron, ‘Normative (or Ethical) Positivism’ in J. Coleman (ed.), *Hart’s Postscript: Essays on the Postscript to the Concept of Law* (Oxford: OUP, 2001), 421. [↑](#footnote-ref-48)
49. For a sample reflecting the endurance of these debates, see eg N Simmonds, *Law as a Moral Idea* (OUP, 2007); M Kramer, *Where Law and Morality Meet* (OUP, 2008); S Shapiro, *Legality* (Harvard, 2011); K Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart, 2013). [↑](#footnote-ref-49)
50. J. Gardner, ‘Legal Positivism: 5½ Myths’ (2001) 46 *American Journal of Jurisprudence* 199-228, 205. [↑](#footnote-ref-50)
51. J. Waldron, ‘Normative (or Ethical) Positivism’ in J. Coleman (ed.), *Hart’s Postscript: Essays on the Postscript to the Concept of Law* (Oxford: OUP, 2001), 428. [↑](#footnote-ref-51)
52. Smart (n.X) 88-89. [↑](#footnote-ref-52)
53. Smart (n.x) 71. [↑](#footnote-ref-53)
54. Dworkin, *Law’s Empire*, 90. [↑](#footnote-ref-54)
55. Waldron, ‘Normative (or Ethical) Positivism’, 418. [↑](#footnote-ref-55)
56. See eg Dworkin, *Law’s Empire*, 381; R Dworkin, *Taking Rights Seriously* (1978). [↑](#footnote-ref-56)
57. See Goldsworthy chapter in this volume. [↑](#footnote-ref-57)
58. Loughlin, ‘Theory and Values in Public Law: An Interpretation’ [2005] *P.L.* 48-66, 63. [↑](#footnote-ref-58)
59. Ibid 65. [↑](#footnote-ref-59)
60. Ibid 63. [↑](#footnote-ref-60)
61. Waldron, ‘Normative (or Ethical) Positivism’, 418. [↑](#footnote-ref-61)
62. Ibid 432. [↑](#footnote-ref-62)
63. The literature is considerable; for a recent sample, see eg the special edition of the *King’s Law Journal* edited by Gee and McCorkindale, ‘The Political Constitution at 40’ (2019) 30(1) *KLJ*. [↑](#footnote-ref-63)
64. JAG Griffith, ‘The Political Constitution’ (1979) 42 *MLR* 1-21. [↑](#footnote-ref-64)
65. M Loughlin, ‘The Political Constitution Revisited’ (2019) 30(1) *KLJ* 5-20, 18. [↑](#footnote-ref-65)
66. M Loughlin, ‘Towards a Republican Revival? (2006) 26 *OJLS* 425, 436. [↑](#footnote-ref-66)
67. M Gordon, ‘Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit’ (2019) 30(1) *KLJ* 125-147, 125. [↑](#footnote-ref-67)
68. Griffith (n.64) 19. [↑](#footnote-ref-68)
69. For contrasting accounts, see eg A Tomkins, *Our Republican Constitution* (Hart, 2005); R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP, 2007); G Gee and G Webber, ‘What Is a Political Constitution?’ (2010) 30 *OJLS* 273. [↑](#footnote-ref-69)
70. Loughlin, *Idea of Public Law*, ch 5. [↑](#footnote-ref-70)
71. Waldron, *Law and Disagreement*. [↑](#footnote-ref-71)
72. See eg J Dunn, ‘Conclusion’ in J Dunn (ed), *Democracy: The Unfinished Journey 508 BC to AD 1993* (Oxford, Oxford University Press, 1992) 239: democracy is ‘today the overwhelmingly dominant, and increasingly the well-nigh exclusive, claimant to set the standard for legitimate political authority’. [↑](#footnote-ref-72)
73. See Waldron, *Law and Disagreement*, esp chs 3&13. [↑](#footnote-ref-73)
74. J Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale Law Journal* 1346, 1389. [↑](#footnote-ref-74)
75. This is all the more important due to the friction often evident between democratic theory and traditional analytical positivism; see eg Michelle Chun, ‘The Anti-Democratic Origins of Analytical Jurisprudence’ (2021) *Jurisprudence* 1-30. [↑](#footnote-ref-75)
76. See eg Raz, ‘The Rule of Law and its Virtue’ (1977) 93 *LQR* 95. [↑](#footnote-ref-76)
77. See eg EA Purcell Jr, ‘American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory’ (1969) 75(2) *The American Historical Review* 424-446, esp 434-437. [↑](#footnote-ref-77)
78. Hart, *The Concept of Law*, (n.X). [↑](#footnote-ref-78)
79. See eg *R (Evans) v Attorney General* [2015] UKSC 21. [↑](#footnote-ref-79)
80. See eg Lord Wilson in *Evans*, [168]: ‘in reaching its decision, the Court of Appeal did not in my view interpret section 53 of FOIA. It re-wrote it.’ [↑](#footnote-ref-80)
81. For a recent example, see eg *R (Black) v Secretary of State for Justice* [2017] UKSC 81. [↑](#footnote-ref-81)
82. See eg the discussion of the limits of judicial interpretation of legislation of the Divisional Court in *Hertfordshire County Council v Secretary of State for Housing, Communities and Local Government* [2021] EWHC 1093 (Admin). [↑](#footnote-ref-82)
83. See eg KD Ewing and CA Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (Clarendon Press, 1990); GN Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 1991); R Hirschl, *Towards Juristocracy: The Origins and Consequences of New Constitutionalism* (Harvard University Press, 2004). [↑](#footnote-ref-83)
84. See J Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP, 1999). [↑](#footnote-ref-84)
85. M Loughlin and S Tierney, ‘The Shibboleth of Sovereignty’ (2018) 81(6) *MLR* 989-1016, 1016. [↑](#footnote-ref-85)
86. See eg *Jackson*, *Privacy International*. [↑](#footnote-ref-86)
87. [2017] UKSC 5. [↑](#footnote-ref-87)
88. Ibid [81]. [↑](#footnote-ref-88)
89. See ibid, the dissent of Lord Reed. [↑](#footnote-ref-89)
90. EU (Notification of Withdrawal) Act 2017. [↑](#footnote-ref-90)
91. [2019] UKSC 41. [↑](#footnote-ref-91)
92. Ibid [58]. [↑](#footnote-ref-92)
93. [2019] EWHC 2381 (QB), [54]. [↑](#footnote-ref-93)
94. [2019] UKSC 41, [1]. [↑](#footnote-ref-94)
95. See the Independent Review of Administrative Law (July 2020-Jan 2021): https://www.gov.uk/government/groups/independent-review-of-administrative-law. [↑](#footnote-ref-95)
96. EU (Withdrawal)(No.2) Act 2019. [↑](#footnote-ref-96)
97. See eg Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso, 2019); S Moyn, *Not Enough: Human Rights in An Unequal World* (Harvard, 2019). [↑](#footnote-ref-97)
98. See eg JAG Griffith, *The Politics of the Judiciary* (5th ed, Fontana, 1997). [↑](#footnote-ref-98)
99. See eg Roberts [2015] UKSC 79, where the UK Supreme Court upheld discriminatory practices of ‘stop and search’ as compatible with the ECHR, while dubiously endorsing a highly problematic stereotype when noting that that young black and ethnic minority people, who were disproportionately targeted by these powers, ‘will benefit most from the reduction in violence, serious injury and death that may result from the use of such powers. Put bluntly, it is mostly young black lives that will be saved if there is less gang violence in London and some other cities’ [41]. [↑](#footnote-ref-99)
100. For eg, in relation to the right of access to justice, compare the rhetoric of *UNISON* [2017] UKSC 51 in the context of employment tribunal fees with the complete absence of this concept from the judgment in *Begum* [2021] UKSC 7 in the context of removal of citizenship. [↑](#footnote-ref-100)
101. S Lakin, ‘The Manner and Form Theory of Parliamentary Sovereignty: A Nelson’s Eye View of the Constitution?’ (2018) 38(1) *OJLS* 168-189, 175-178. [↑](#footnote-ref-101)