THE CONSTITUTION OF LAW

Legality in a Time of Emergency

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Introduction

This book explores the idea that there is a constitution of law, exemplified in the common law constitution of Commonwealth countries. It looks mainly to cases decided in the United Kingdom, Australia, and Canada in order to show that law provides a moral resource that can inform a rule-of-law project capable of responding to situations which place legal and political order under great stress, for example, states of emergency or executive decisions about national security. My argument is that the rule-of-law project is one in which judges play an important role but which also requires the participation of the legislature and the executive.

Two obstacles to such an argument will strike anyone familiar with the history of legal responses to such situations. First, in such situations the government usually claims that the exceptional nature of the situations requires a departure from the rule-of-law regime appropriate for ordinary times and so whatever role one accords to judges in ordinary times has to be significantly rethought. And often the government will follow through on this claim by procuring through a statute powers for itself which seem to permit it to act outside of the ordinary constraints of the rule of law. The government could be wrong in the claim that it needs such powers, but, and this is the second obstacle, as a matter of fact the judicial record in enforcing the rule of law in such situations is at worst dismal, at best ambiguous, and this fact might serve to buttress the government's claim.

There are different explanations of this record, and these hinge to a large extent on whether one thinks that the executive is right when it claims that exceptional situations require departures from the rule of law. If one thinks that such a claim is wrong, one might be tempted to infer that the dismal judicial record comes about because judges are in dereliction of their duty to uphold the rule of law: judges simply fold in the face of executive claims, whether or not these are supported by

statute. Alternatively, one might think that the judges are not so much spineless as prudent: judges want to avoid provoking the executive on this occasion so that, on a later more important occasion, they will be able to act effectively. They are, in other words, keeping their powder dry in the long-term interests of the rule of law.[1] But if the executive's claims are right that the rule of law does not apply in exceptional situations, then neither judicial spinelessness nor prudence is the issue. Rather, the judicial record is not so much in itself dismal as reflective of the dismal fact that the rule of law has little or no role to play in policing exceptional situations. Finally, it can be argued that the judicial record is not dismal. Rather, judges are still upholding the rule of law in the cases that make up the record because, as long as the executive has its authority to respond to exceptional situations from the law, the situations are governed by law, which is to say, by the rule of law.

This last explanation equates the rule of law with rule by law, whereas the explanations that rely on judicial spinelessness or prudence, as well as the one which relies on the peculiar nature of exceptional situations, do not make this equation. That is, unless one equates the rule of law with rule by law, one will regard the rule of law as substantive in nature so that it does not suffice to have the rule of law that the executive can claim a statutory warrant for its actions. They require not only such a warrant but also that the executive's actions comply with the principles of the rule of law. Thus only the explanations that rely on judicial spinelessness or prudence presuppose that a substantive conception might apply in the exception.

While there is something to each of these competing explanations, in practice they tend to boil down to two: either judges are in dereliction of their duty to uphold the rule of law or, on the contrary, they are doing precisely what their duty to uphold the rule of law requires given the exceptional nature of the situation. As we will see, when questions about the legality of executive action or the validity of legislation arise out of emergency situations, judges are reluctant to adopt a political questions doctrine and say that the questions are so quintessentially political that they are not regulated by law. Because interests like the interest in liberty will usually be at stake, judges prefer to find that the situation is regulated by law and therefore subject to the judicial imprimatur which certifies whether or not the executive is acting in accordance with (the rule of)

[1] This view is often associated with Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, New Haven: Yale University Press, 1986).

law. Thus, rather than find that what the executive does is beyond the reach of law, judges will find that, given the situation, they should, as a matter of law, defer to the executive's judgment about what is required. In other words, the political questions doctrine, a doctrine that says that certain questions are not justiciable or amenable to judicial review, is replaced by a doctrine of judicial deference. Similarly, judges who adopt the stance of prudence and who fail to uphold the rule of law now for the sake of the rule of law in the long term will not say that on this occasion the executive is acting outside of the rule of law. Precisely because the point is to keep the executive friendly to the rule of law, judges must find that on this occasion the executive is acting in accordance with its rule, understood in a more formal or procedural way, so that later they can enforce a more substantive conception of the rule of law.

In short, at the level of legal theory, the explanatory contest is between a substantive conception of the rule of law and a more formal one, which equates rule by law with the rule of law. And since that contest is about which conception is appropriate, it is not just about explanation but also about justification – about what judges ought to do.

In order to clarify this contest, I will start with an account of the judicial record, one which seems to support the claim that it is either dismal or at best ambiguous. Indeed, I will show that there is a plausible argument that when judges assert that they are maintaining the rule of law in exceptional situations, they make things worse not better from the perspective of a substantive conception of the rule of law. For they maintain that they are upholding the rule of law when at most there is rule by law, a statutory warrant for the executive.

I will then set out the view that in fact a substantive conception of the rule of law has no application in an exceptional situation. As we will see, this view was mostly starkly presented by the fascist legal theorist, Carl Schmitt who, during the Weimar period, argued that law cannot govern a state of emergency or exception. I will show that recent attempts by academics in the United States to respond to an allegedly different post-9/11 world turn out to support Schmitt's view. Indeed, they might make things worse, in much the same way as do judges who claim to be upholding the rule of law when there is merely rule by law. However, I will conclude that we still have a basis for not giving up on the idea that law provides moral resources sufficient to maintain the rule-of-law project even when legal and political order is under great stress. The rest of my book will take up the challenge of providing the argument that will sustain that idea.

Judges and the politics of the rule of law

My doctorate dealt with the South African judiciary during apartheid. I tried to show that the different approaches judges took to interpreting the laws of apartheid illuminated debates in philosophy of law about the relationship between law and morality. My main focus was on the statutory regime put in place to maintain national security and on the way in which the majority of South African judges had reneged on their commitment to the rule of law. The crucial moment, one which set the course for nearly all judges for most of apartheid, happened in 1961 in *Rossouw* v. *Sachs*.[2]

In issue were the conditions of detention of Albie Sachs – later a judge of South Africa's Constitutional Court – who had been detained under s. 17 of the 90-Day Law. This statute said nothing about the conditions under which detainees were to be held, only that they were to be detained for 'interrogation' for a period of up to ninety days until 'in the opinion of the Commissioner of Police' they had 'replied satisfactorily to all questions'.[3]

The case came to the Appellate Division, then South Africa's highest court, by way of the government's appeal against the decision of two judges of the Cape Provincial Division, which had said that to deprive Sachs of reading matter would amount to 'punishment' and that it would

[2] (1964) 2 SA 551 (A).

[3] The '90-day detention law' was the name given to s. 17 of Act 37 1963, enacted to assist the government in countering the underground activities of the African National Congress and other liberation organizations. Section 17(1) provided that:

> Notwithstanding anything to the contrary in any law contained, any commissioned officer . . . may . . . without warrant arrest . . . any person whom he suspects upon reasonable grounds of having committed or intending . . . to commit any offence under the Suppression of Communism Act . . . or the Unlawful Organizations Act . . . or the offence of sabotage, or who in his opinion is in possession of information relating to the commission of such offence . . . , and detain such person . . . for interrogation . . . , until such person has in the opinion of the Commissioner of Police replied satisfactorily to all questions at the said interrogation, but no such person shall be so detained for more than ninety days on any particular occasion when he is so arrested.

Section 17(2) provided that no person was to 'have access' to the detainee except with the consent of the Minister of Justice or a commissioned officer, though the person had to be visited not less than once a week by a magistrate. Section 17(3) provided that, 'No court shall have jurisdiction to order the release from custody of any person so detained . . .'

The section was effective for twelve months and thereafter was subject to annual renewal by proclamation of the State President. Security statutes enacted as the political crisis of South Africa worsened provided for indefinite detention and shielded the conditions of detention from the scrutiny of lawyers and courts.

be 'surprising to find that the Legislature intended punishment to be meted out to an unconvicted prisoner'. The discretion of the officer in charge of detention in regard to such issues was, the judges said, 'at all times subject to correction in a court of law'.[4] But the Appellate Division found that it could not order that Sachs be given reading and writing materials, since the intention of the detention provision was clearly to use psychological pressure to 'induce the detainee to speak'.[5] Moreover, the Court said that it was influenced by the fact that

> subversive activities of various kinds directed against the public order and the safety of the State are by no means unknown, and s. 17 is plainly designed to combat such activities. Such being the circumstances whereunder s. 17 was placed upon the Statute Book, this Court should, while bearing in mind the enduring importance of the liberty of the individual, in my judgment approach the construction of s. 17 with due regard to the objects which that section is designed to attain.[6]

This decision laid the basis for a sense among the security forces that they could torture and otherwise mistreat detainees with impunity. As I argued before South Africa's Truth and Reconciliation Commission, the judges were accountable for having facilitated the shadows and secrecy of the world in which the security forces operated and for permitting the unrestrained implementation of apartheid policy.[7] They thus bore some responsibility for the bitter legacy of hurt which was the main focus of the Commission. Moreover, the judges were clearly warned at the time of the consequences of their decisions. In an article aptly titled 'The Permanence of the Temporary', the authors subjected the Appellate Division to a devastating critique and argued that the judiciary had made itself complicit in a government strategy to introduce a permanent state of lawlessness into the ordinary law of the land.[8]

It was inevitable in one sense that the judges of the Appellate Division would reach this result. The National Party government had in the 1950s secured through the appointment process a compliant bench, presided over by L. C. Steyn, Chief Justice of South Africa, from 1959 to 1971. He

[4] The decision is unreported. For detailed analysis of the Appellate Division's decision, see David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Clarendon Press, 1991), ch. 4.

[5] *Rossouw*, at 560–1. [6] *Ibid.*, at 563.

[7] For my account of this hearing, see David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1999).

[8] A. S. Mathews and R. C. Albino, 'The Permanence of the Temporary: An Examination of the 90- and 180-Day Detention Laws' (1966) 83 *South African Law Journal* 16–43.

had been appointed from government service to the Transvaal Provincial Division in 1951, a move which broke with the tradition of appointing only senior members of the Bar to the Bench, and which thus brought a 'wave of protest' from the Bar.[9] Just four years later he was appointed to the Appellate Division at a time of great political and legal controversy caused by the Court's resistance to the government's attempts to use legislation as a means of sidestepping the constitutional protection given to coloured or mixed race voters. In addition, he was appointed Chief Justice in 1959 over the heads of two more senior judges, one of whom, Oliver Schreiner had been the principal defender of rule-of-law principles on the Court. L. C. Steyn ensured that his Court was utterly complicit in the apartheid regime's attempt to claim that it was a rule-of-law respecting government while at the same time the regime gave through statute its officials the power to abuse the human rights of black South Africans and those few white people who rallied to their cause.

However, in order to assist in sustaining the claim that the government respected the rule of law, the judges of the Appellate Division had to show that their conclusions were supported by law. My point about the inevitability of the result in *Rossouw* is not a crude legal realist one that the judges were supporters of apartheid and thus could be counted on to exercise their discretion in favour of the government. While some or many of them might have been with L. C. Steyn enthusiastic supporters of the apartheid regime, it is a mistake to underestimate the influence in their judgments of their understanding of law, one which inclined them to deliver results that favoured the government. I call this understanding of law constitutional positivism, and I will explore its complexities in some detail later. For the moment it suffices to say that constitutional positivism regards the legislature as the sole legitimate source of legal norms and thus in moments of interpretative doubt looks primarily to proxies for actual legislative intent in order to work out what the law requires.

Constitutional positivism was not however the creation of South African judges. Rather, it was the product of the hub of the Commonwealth – the United Kingdom – and of the way in which legal education, under the influence of John Austin, one of the principal legal positivists, and A. V. Dicey, the constitutional lawyer whose book on the English constitution takes much from Austin. Also, despite the fact that South Africa had exited the Commonwealth in 1961, in anticipation of being

[9] See C. F. Forsyth, *In Danger for Their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950–80* (Cape Town: Juta, 1985), pp. 14–33.

evicted because of the abhorrence of other members towards apartheid and the political repression required to maintain it, South African judges by and large continued to think of themselves as part of the family of the common law, proudly sustaining its traditions, including that of an independent judiciary whose first commitment is to the rule of law. It was only because South African judges had that self-image and were determined as a result to produce comprehensive legal reasons for their judgments that the apartheid government could make its claim that it respected the rule of law while using the law as an instrument of oppression.

It was thus of great importance to the Appellate Division in *Rossouw* that no less an authority than the House of Lords, the highest court in what Commonwealth judges regarded as the bastion of liberty, had in 1942 in *Liversidge* v. *Anderson*[10] set out a line of reasoning in security matters which they could follow. *Liversidge* concerned a rather different legal situation, the question whether a detention regulation which allowed the responsible minister to detain if he had 'reasonable cause to believe any person to be of hostile origins or associations . . .' should be construed objectively or subjectively. A subjective construal would mean that the minister's say-so was sufficient to ground a claim that a detainee was a security risk. Hence, only if the regulation were construed objectively could judges test the grounds for the minister's claim. The majority of the House of Lords held that, in a wartime emergency, the only possible construal is subjective.

The South African judges rightly took the basic principle at stake in *Liversidge* to be the same as that in *Rossouw*: should authoritative legal texts be read subject to common law values in the face of some legislative indications to the contrary and despite the fact that the executive was dealing with judgments about national security, judgments in which the executive claims and judges often accept it has a special expertise? So *Rossouw* is evidence of the rather depressing fact that within the family of Commonwealth legal orders, the fruit born of the migration of legal ideas from one to another can be bitter.

In my doctorate, I argued that one should not let such depressing facts shape one's understanding of law. Rather one should look to the few South African judges in the lower courts who took their cue not from the judgments of the majority of the House of Lords in *Liversidge*, but from the kind of stance Lord Atkin adopted in his lone dissent in that case. Such judges, in my view, did more than maintain their commitment to the rule

[10] *Liversidge* v. *Anderson* [1942] AC 206.

of law. They also showed how law itself contains the moral resources that make it possible for them to resist the attempts by an allegedly omnipotent legislature to undermine the rule of law. My optimism was helped by the fact that I fully accepted at the time the official ideology of English public law that Lord Atkin's dissent represented the true spirit of the common law, so that the majority's reasoning in *Liversidge* should be regarded as an unfortunate aberration in an otherwise unbroken tradition of legality.

But at my oral exam, one of my examiners – Jeffrey Jowell – gently pointed out to me that the official ideology masked the fact that when English judges had after the Second World War confronted the issue of review of national security, they tended to forget about Lord Atkin's dissent in *Liversidge* and to revert in substance, if not in name, to the majority's approach. Jowell was, of course, right at the time. And not only have judges for the most part continued to prove him right in the wake of 9/11 but *Liversidge* was not the first decision of its kind by the House of Lords, which brings me to the First World War decision, *R* v. *Halliday, ex Parte Zadig*[11] and the recent article by David Foxton, '*R* v. *Halliday Ex Parte Zadig* In Retrospect'.[12]

Foxton's article does the important service of bringing out from the shadow of *Liversidge* the judgments of the majority of the House of Lords from the First World War in *Halliday* on which the majority in *Liversidge* relied. He also brings out from the shadow of Lord Atkin's dissent in *Liversidge*, Lord Shaw's dissent in *Halliday*, on which Lord Atkin did not rely. The situations were again somewhat different. In *Liversidge* there was no issue about the validity of Regulation 18B, since the Emergency Powers (Defence) Act 1939 clearly gave the Cabinet authority to make regulations detaining people without trial. In the First World War, the Defence of the Realm (Consolidation) Act 1914 did not grant any such power and so the question in *Halliday* was whether the very wide grant of power in the Act included by necessary implication the authority to make detention regulations.[13] But again, the fundamental issue was the same in both: whether an authoritative legal text should be read as if it were intended to respect common law values.

Foxton reports that Shaw was impressed from the outset by Zadig's lawyers' argument that a constitutional convention required that

[11] [1917] AC 260. [12] (2003) 119 *Law Quarterly Review* 445–94.

[13] As I will explain in ch. 3, it was this difference which Lord Atkin relied on to distinguish the cases, though it is, in my view, clear that he was embarrassed by the fact that he had as a lower court judge in *Halliday* concurred in a decision which upheld the validity of the regulation.

Parliament could only suspend habeas corpus by express enactment. But it seems that the 'final catalyst', as Foxton calls it, in Shaw's decision to dissent came through a dinner at the Middle Temple with Jan Smuts, who had come to London to attend an Imperial Conference, and whose name adorns the lectures which are the basis for this book.[14] In Shaw's own words:

> I broke the ice and I discussed this very judgment with him. He saw the crux of the case in a moment, and informed me that the same point had been settled in a case decided in the Privy Council on an appeal from Pondoland. I asked the date, and he gave me the date within six months. I turned up the Reports and found that he was right in every particular, and a page and a half of that judgment is really in that way the work of General Smuts rather than myself.[15]

Foxton continues that Shaw was particularly receptive to Smuts's argument. Shaw had been an opponent of the Boer War. Not only had he protested against demands to dispense with due legal process, but he had organized a petition to the King to prevent the execution of another Boer general. Foxton says that '[p]opular fervour would have demanded the same fate for Smuts. Smuts' presence at the Imperial process, and in the Middle Temple, vividly demonstrated that Shaw had been right to resist popular clamour then . . .'[16]

[14] Smuts went from being a Boer general in the war against England to becoming one of South Africa's most distinguished politicians of the twentieth century. As well as a stint as Prime Minister of South Africa, he was a member of the Imperial War Cabinet during the First World War, played a significant role in the foundation of the League of Nations, and was made Chancellor of the University of Cambridge. Whether Smuts would have approved of my arguments is very doubtful. The issue is not only or even mainly that Smuts was a racist, whose own policies in South Africa laid the basis for apartheid: after all, in holding racist views, he was in the mainstream of politics. Rather, he strongly favoured a unitary system of government over a federal one for South Africa because he thought it desirable to have a system of absolute parliamentary supremacy and, correspondingly, wished to avoid giving judges any excuse to arrogate legislative power and thought that a federal constitution offered such excuses. See Bernard Friedman, *Smuts: A Reappraisal* (London: George Allen & Unwin Ltd, 1975), pp. 41–4. Friedman also suggests that Smuts was quite aware that a unitary Parliament in the colonial context might be even more absolute than in Britain since it would be established without the restraining conventions and traditions in place in Britain. Smuts' fondness for the Privy Council decision could perhaps be explained by the fact that he saw it as a blow against colonial authority – not only against the Governor, but also against the Prime Minister, Cecil John Rhodes who, was one of the parties to oppose Sigcau's petition for his release.

[15] Foxton, 'R v. Halliday', 484. The case was *Sprigg* v. *Sigcau* [1897] AC 238.

[16] Foxton, 'R v. Halliday', 485.

In this case, the Privy Council decision upheld a decision of the Supreme Court of the Cape Colony that, in the absence of express delegated authority, the Governor of that Colony could not by proclamation give himself powers to arrest and detain indefinitely and without charge a dissident African chief. So I would like to claim that *Halliday* shows that the migration of legal ideas does not always go from centre to periphery in the Commonwealth and that those that go from periphery to centre can bear good fruit.

But like Lord Atkin in *Liversidge*, Lord Shaw was alone in dissent so the two stories of judges and wartime detention have the same unhappy ending. Together they seem to merge into one to show that Jowell's objection cannot be met by revising somewhat the myth that the majority's judgment in *Liversidge* is an aberration. The line from the majority judgments in *Halliday* through the majority judgments in *Liversidge*, via the Appellate Division's decision in *Rossouw*, to post-9/11 highly deferential decisions such as the 2002 decision of the House of Lords in *Secretary of State for the Home Department* v. *Rehman*[17] is unbroken. In the last decision, the House of Lords articulated an understanding of the separation of powers which requires almost complete deference by judges to executive determinations of the interests of national security – and with it, the House of Lords once again initiated the process of exporting bad legal ideas to the former colonies.

Moreover, even Lord Atkin's dissent can be understood as not achieving much more than lip service to a conception of the rule of law as the rule of fundamental values. Brian Simpson has suggested that Lord Atkin's argument that judges were entitled to read Regulation 18B objectively, so that the Home Secretary was obliged to provide reasons for Liversidge's detention that could be scrutinized in a court of law, was ineffectual. Given the secrecy and duplicity of the secret services and the judicial inability to go beyond their claims about the need to protect their information from scrutiny, the kinds of reasons that will be offered, and with which judges will have to content themselves, will not allow for any genuine testing of the validity of the administrative decisions. Simpson thus concludes that Lord Atkin's dissent in *Liversidge* is itself an example of judicial lip service to the rule of law – an attempt by a judge to shore up his sense of role in the face of the reality of necessarily untrammeled executive discretion.[18]

[17] [2002] 1 All ER 123.

[18] A. W. Brian Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (Oxford: Oxford University Press, 1992), p. 363.

If Simpson is right, then Lord Shaw's dissent in *Halliday* is a lonely and futile beacon of the rule of law: lonely because it is the sole exception in the historical record; futile not only because it was a dissent, but also because its potential to inspire future courts could be nipped in the bud by a clearly expressed legislative delegation of authority to make regulations concerning detention. Thus the Emergency Powers (Defence) Act 1939 explicitly gave the Cabinet the authority to make detention regulations because Sir Claude Schuster, a senior civil servant, thought that the lesson of *Halliday* was that a severe power such as the power to detain should be expressly authorized by the statute.[19]

We might thus conclude not only that the judicial record during emergencies is a dismal one, but that it could not be otherwise. Moreover, it might seem, following Simpson, that for judges to try to pretend otherwise, to pay lip service to the rule of law in situations where the rule of law cannot do any work, is likely to make matters worse by giving to government the façade of the rule of law without the judges being able to enforce its substance.

The seriousness of this last concern is graphically illustrated by the political stance of Lord Woolf, a former Lord Chief Justice of England, in the post-9/11 period. Indeed, as I will show, his stance illustrates two further and no less serious concerns. The first is that judicial lip service to the rule of law in exceptional situations has consequences for the way judges deal with ordinary situations. One finds that judges begin to be content with less substance in the rule of law in situations which are not part of any emergency regime, all the while claiming that the rule of law is well maintained. Second, the law that addresses the emergency situation starts to look less exceptional as judges interpret statutes that deal with ordinary situations in the same fashion. As a package, these concerns seem to show that once the exceptional or emergency situation is normalized, that is, addressed by ordinary statutes and treated by judges as part of a 'business as usual',[20] rule-of-law regime, so the exception starts to seep into other parts of the law.

Now the first episode in the story of Lord Woolf's stance will seem to undermine my claims for he condemned publicly, in a lecture at Cambridge University in 2004, the ouster or privative clause which the government intended to introduce by statute to shield immigration

[19] *Ibid.*, p. 46.

[20] I take the term from Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' (2003) 112 *Yale Law Journal* 1011–134.

decisions almost totally from judicial review.[21] He castigated the government for contemplating a measure that would be 'fundamentally in conflict with the rule of law and should not be contemplated by any government if it had respect for the rule of law'.[22] He predicted that the measure would 'bring the legislature, the executive and the judiciary into conflict',[23] thus suggesting that the judiciary might well invalidate it or at the least find some means of reading it down. And he threatened the government with a campaign to enact a written constitution:

> Immigration and asylum involve basic human rights. What areas of government decision-making would be next removed from the scrutiny of the courts? What is the use of courts, if you cannot access them? . . . The response of the government and the House of Lords to the chorus of criticism of clause 11 will produce the answer to the question of whether our freedoms can be left in their hands under an unwritten constitution.[24]

These comments of Lord Woolf caused a public stir and may have been a significant factor in the government's decision to withdraw the measure. Less noticed, however, were his remarks in the same speech about the Nationality, Immigration and Asylum Act 2002. He said that what made the proposed privative clause 'even more objectionable' was that the statute had

> introduced a form of statutory review by the High Court on the papers which is extremely expeditious (taking a few weeks rather than months) and which gives every indication of being successful. The judiciary recommended this new procedure and cooperated in its introduction to prevent abuse of the protection afforded by the courts. Because this process is so speedy, there is no great advantage to be gained from making abusive applications and this is one of the reasons why the number of statutory reviews has, so far, been relatively modest.[25]

[21] For an account of the government's strategy, see Andrew Le Sueur, 'Three Strikes and It's Out? The UK Government's Strategy to Oust Judicial Review from Immigration and Asylum Decision-Making' (2004) *Public Law* 225–33 and for a general overview, see Richard Rawlings, 'Review, Revenge and Retreat' (2005) 68 *Modern Law Review* 378–410. Lord Woolf's comments were made in the Squires Lecture, delivered in the Faculty of Law, University of Cambridge, 3 March 2004, now published as Lord Woolf, 'The Rule of Law and a Change in the Constitution' (2004) 63 *Cambridge Law Journal* 317–30. For Lord Woolf's earlier reflections on judicial reactions to statutes that clearly flout the rule of law, which seemed to indicate a limited judicial authority to invalidate statutes, see Lord Woolf, 'Droit Public – English Style' [1995] *Public Law* 57–71 at 69.

[22] Woolf, 'The Rule of Law', 328. [23] *Ibid.* [24] *Ibid.*, 329. [25] *Ibid.*, 328.

In assessing these remarks, it is important to know that this statute put in place the recommendations of Mr Justice Collins, at that time the President of the Immigration Appeal Tribunal, who had designed a process of statutory review to replace judicial review in immigration and asylum cases. This process is regarded by human rights lawyers as vastly inferior to judicial review because it is confined to review by a High Court judge on the basis of written submissions, the applicant has only five days to lodge an application, and the decision of the High Court is final – there is no further appeal to the Court of Appeal or to the House of Lords. Since, as Lord Woolf acknowledged, it is in immigration and refugee matters that important issues about human rights often arise, human rights lawyers were concerned that a particularly vulnerable group of people were being denied the kind of scrutiny by the superior courts that is required when human rights are at stake. Moreover, the government's justification for both the ouster clause and the statutory review procedure is that there is large-scale abuse of the present system. But the government has never produced any hard evidence of such abuse, choosing to rely on what it acknowledges to be 'anecdotal' evidence and on the suggestion that if a large proportion of appeals are failing this shows that there must be abuse.[26]

Collins appeared on 3 February 2004, before the Select Committee on Constitutional Affairs, to answer questions about the process. He was asked if it were possible to have his judgment about whether the process had done 'fundamental injustices', given that he recognized that the process was his idea. He replied: 'No – well, I would say that, wouldn't I but no, I do not think it has and I do not think anyone thinks it has.'[27] At this time, that is, the same time that debate about the privative clause was taking place, a challenge was launched to the statutory review process on both common law and European Convention on Human Rights[28] grounds. The challenge was heard by Mr Justice Collins now sitting in the High Court of Justice on 11 and 12 March 2004. On 12 March, he announced that he was dismissing the appeal with reasons to follow.[29]

[26] See Letter from Lord Filkin, Parliamentary Under Secretary of State, Department for Constitutional Affairs, to the Chair of the Joint Committee on Human Rights, Appendix 1a to the Seventeenth Report of Session 2003–04.

[27] Select Committee on Constitutional Affairs, Minutes of Evidence, 3 February 2004.

[28] The Convention for the Protection of Human Rights and Fundamental Freedoms also known as the European Convention on Human Rights, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221.

[29] Reasons were given on 25 March 2004. See *R (G and M)* v. *SSHD* [2004] EWHC 588 (Admin).

It is I think intriguing that a judge should preside over a challenge to a statutory scheme, which he himself has designed. It is even more intriguing that on 15 March, just three days after Collins had announced his decision, Lord Woolf welcomed in the House of Lords the government's statement that it was abandoning the privative clause.[30] In his view, this meant that the government was affirming its commitment to the rule of law. He then went on to praise again the success of the statutory review process, thus suggesting by direct implication that it is consistent with the rule of law.

The government has since brought forward a version of statutory review to replace the ouster, which will apply to immigration and asylum generally.[31] Lord Woolf again said that he was pleased that the government had chosen not to come 'into conflict with the rule of law' and seemed to signal that this new provision was not so in conflict because it did give the High Court 'some power of review'. Somewhat strangely, in view of his past interventions, he did this through a letter he deposited in the library of the House of Lords, saying that it would be unwise for him to speak in the debate.[32] This provision was then adopted by Parliament despite the fact that some members took up the human rights and rule-of-law concerns about it that had been raised in a report by the Joint Committee on Human Rights.[33] The appeal against Collins' decision was heard and dismissed by the Court of Appeal.[34]

My claim is not that the Court of Appeal's decision was unequivocally wrong. Rather, it is that the story of Lord Woolf's participation in these debates supports a claim that the privative clause became a 'lightning conductor' to attract concerns about the rule of law so that the government could then slip through a provision that achieved the same substantive ends.[35] In other words, the government manipulated the political process to replace a proposed legal black hole, a space devoid of rule-of-law controls, with a grey hole, a space in which there are some rule-of-law controls. But these controls might not suffice to give to those who find themselves in the hole sufficient protection either from the perspective of the rule of law or from the perspective of the human rights regime to which the United Kingdom is officially committed. Moreover, the issue is

[30] Hansard, HC, vol. 659, cols. 60–61. 15 March 2004.
[31] The Asylum and Immigration Act 2004.
[32] Letter from the Lord Chief Justice to the Lord Chancellor, 29 April 2004.
[33] See Thirteenth Report of Session 2003–04.
[34] *M* v. *Immigration Appeal Tribunal* [2004] EWCA Civ 1731.
[35] See Sedley, 'Everything and Nothing' 10. Note that Sedley was one of the panel that decided the appeal. It is not that I think that the government was insincere about its desire to exclude judicial review.

not just government manipulation but active participation by the judiciary in legitimizing the rule-of-law credentials of a dubious procedure. Lord Woolf's advance approval bestowed an aura of legitimacy on the provision which is difficult to challenge in court, especially when it is given by the Lord Chief Justice. It seems obvious that had Lord Woolf presided over the appeal against Mr Justice Collins' decision, there would have been unanswerable grounds for the appellants to seek his recusal, as there would have been had Mr Justice Collins been asked to recuse himself. But even without Lord Woolf's presence, concerns remain that he could be interpreted as having publicly decided in advance of his Court hearing the challenge that the statutory review process complies sufficiently with the rule of law and with the United Kingdom's commitments to human rights. Thus it seems that while the judges are prepared to go to the wall to protect some role for themselves – hence the opposition to the proposed privative clause – all that they really care about is that they have a role, not its substance. They turn out to be sheep in rule-of-law clothing.

Now the issue in this story was not one of emergency or national security, but immigration. However, it is important to remember both that immigration law is often the area where executive decisions about those who are considered threats to national security are made and that control over aliens is often claimed to be of a piece with protecting the security of the state. More important is that Lord Woolf's participation in this political debate reflects the positions he had taken earlier in judgments on emergency law.

He was one of the panel of judges which decided *Rehman* and in substance the House of Lords upheld his judgment in that case. And he gave the lead judgment in *A* v. *Secretary of State for the Home Department*,[36] better known as the *Belmarsh* decision because the individuals who were appealing were detained in Belmarsh prison. *Belmarsh* concerned the statutory derogation from the Human Rights Act 1998[37] permitting the government to detain indefinitely non-citizens who are considered security risks but who cannot be deported because they face a risk of torture in their home country. Since the statute does not permit citizens who are security risks, and who cannot in virtue of their citizenship be deported, to be detained, the statute seems an affront to the rule-of-law principle of equality before the law as well as to the principles of any regime which purports to treat all those subject to its power as full bearers of human

[36] [2004] QB 335. [37] See s. 23 of the Anti-Terrorism, Crime and Security Act 2001.

rights.[38] In the Court of Appeal, Lord Woolf, relying on *Rehman*, held that it was 'impossible for the Court to differ with the Secretary of State on the issue whether action was necessary only in relation to non-national suspected terrorists',[39] that aliens are 'objectively' in a 'different class from those who have a right of abode',[40] and that to discriminate only against aliens promotes human rights because one does not then have to discriminate against the class of those with a right of abode.[41]

Lord Woolf thus let the government off the hook of accepting the full political costs of an official disregard for human rights which might be incurred if citizens were indefinitely detained. For if the emergency the United Kingdom claims to face in fact requires indefinite detention of those who are thought to be risks, and thus requires a derogation from the state's commitment to human rights, then all who are thought to pose a threat should be detained. Put differently, if there is no need to detain citizens, then the government's case about the extent of the emergency and the necessity of its response to it is greatly weakened. Indeed, Lord Woolf's reasoning in *Belmarsh* sustains Simpson's charge of judicial lip service to the rule of law as, in an obvious, face-saving ploy, Lord Woolf warned against the dangers of repeating past mistakes when it came to internment of aliens and said that his judgment conserved the rule of law.[42]

Now the House of Lords has with one dissent upheld the appeal against the Court of Appeal's decision largely on the ground that the statutory provision is discriminatory.[43] However, with the exception of Lord Hoffmann, the judges in the majority did not question the government's

[38] In particular, it was argued that the derogation was incompatible with Articles 5 and 14 of the European Convention because it permitted discrimination on the grounds of nationality. Article 5 enshrines the right of the individual not to be arbitrarily detained while Article 14 requires that all rights and freedoms secured by the Convention are to be enjoyed without discrimination, including discrimination on the ground of 'national . . . origin'.

[39] *Belmarsh*, at 359–60. [40] *Ibid*., at 361–2. [41] *Ibid*., at 362. [42] *Ibid*., at 348.

[43] [2005] 2 WLR 87. It is well known that the government was successful in its anticipatory challenge to the participation by Lord Steyn, a very different Afrikaner judge from L. C. Steyn, in the panel which has now heard the appeal against Lord Woolf's judgment in *Belmarsh*. Lord Steyn was not considered fit to hear this matter because he had publicly expressed doubt about the government's claim that the United Kingdom faces an emergency of the kind that justifies derogations from its commitment to human rights. In the same speech, Lord Steyn articulated his concern about the American government's willingness to flout the rule of law in its establishment of a 'legal back hole' at Guantanamo Bay and suggested that the House of Lords has perhaps strayed from the rule of law path in its post-9/11 decisions, including *Rehman*, a decision in which he wrote one of the concurring judgments; Johan Steyn, 'Deference: A Tangled Story' [2005] *Public Law* 346.

decision that there was a state of emergency, only its decision about how to respond to it. Further, none of the judges in the majority confronted the question of how to square their decision with *Rehman*, and thus have set up a tension in English public law between a conception of the judicial role which requires complete deference to the executive and the legislature in a time of emergency and one which gives judges a significant role in evaluating the decisions made by the other branches of government. Finally, the fact that a decision under the Human Rights Act declares an incompatibility between a provision in a statute with human rights commitments without invalidating the provision can be seen as letting the judges off the hook. They can reap kudos from human rights enthusiasts for taking a stand, and so affirm their role in legal order. But the law remains valid with government taking the decision whether or not to amend the statute, either by executive order or through legislation. Indeed, one of the judges in the majority, Lord Scott, seemed to understand the Human Rights Act as forcing him into the non-judicial role of making a political declaration about the content of legislation which could embarrass the government but which had no more legal effect than that.

Later in this book, I will discuss in detail *Halliday*, *Liversidge*, *Rehman*, and *Belmarsh*. Here I want to draw your attention to the complex issues raised by my sketch of judges and their role in maintaining the rule of law in times of emergency. Following Simpson, it would be better for judges to confess that in an emergency situation, they cannot uphold the rule of law. Such a conclusion follows from the last chapter of Simpson's magisterial book on Regulation 18B, where he points to the fact that in ordinary administrative law judges have developed highly nuanced rule-of-law controls on administrative discretion, controls whose worth he seems to recognize.[44] So for him the rule of law has content which judges can develop and enforce, but he does not think them capable of doing that job in an exceptional situation such as that presented by national security.

However, since it is a regulative assumption of the judicial role that judges are under a duty to uphold the rule of law, it might seem that they cannot make that confession and at the same time purport to be doing their job. I will argue later that it does make sense for judges to make such a confession in order to make public the fact that they are not capable of doing their job. They must, that is, be prepared to say that they are no longer able to occupy the role that judges have to take in maintaining the integrity of legal order.

[44] Simpson, *In the Highest Degree Odious*, p. 420.

For the moment, I want to explore the idea that it is antithetical to legal theory, as well as to judges, to think that states of emergency lie outside the law, and thus outside the reach of the rule of law. That thought requires one to succumb to the challenge put by Carl Schmitt that the rule of law has no place in an emergency. As I have mentioned, Schmitt issued this challenge during Germany's first experiment with democracy in the Weimar period.

In the opening line of his book *Political Theology*, Schmitt claimed that 'Sovereign is he who decides on the state of exception'.[45] He thus asserted that in abnormal times the sovereign is legally uncontrolled. Schmitt's thought of course goes further. Not only is the sovereign legally uncontrolled in the state of emergency; the quality of being sovereign, he who *is* the sovereign, is revealed in the answer to the question of who gets to decide *that* there is a state of emergency.

Closely bound up with Schmitt's claim about states of emergency is another claim about 'the political'.[46] According to Schmitt, the political is prior to law and its central distinction is between friend and enemy, so that the primary task of the sovereign is to make that distinction. It is in the moment of the emergency that the existential nature of the political is revealed. Since to make that distinction is to make a kind of existential decision, he who makes it has to be capable of acting in a decisive way, which, for Schmitt, ruled out both the judiciary and Parliament, leaving the executive as the only serious candidate.[47]

There is, in Schmitt's view, a continuum of exceptional situations, ranging from a global threat or the situation of war where the state – the political and legal order as a whole – is in danger, to situations which occur within the political and legal order, which are local manifestations of the global external threat. The sovereign must respond to all exceptions. He is the only figure in the political and legal order capable of acting as the guardian of the constitution, since he alone has the power to make the ultimate decision as to who is an enemy. Once one recognizes the possibility of a threat from without that threatens the life of the state, and that it is the sovereign's role both to determine that there is such an emergency and to deal with it, one should also recognize that in more local emergency situations, the sovereign should play the same role.

[45] Carl Schmitt, *Political Theology: Four Chapters on the Theory of Sovereignty*; translated by George Schwab (Cambridge, Mass: MIT Press, 1988), p. 5.

[46] Carl Schmitt, *The Concept of the Political*; translated by George Schwab (New Jersey: Rutgers University Press, 1976).

[47] Carl Schmitt, *Der Hüter der Verfassung* (Berlin: Duncker & Humblot, 1985).

Schmitt's claims, forged in the hothouse of Weimar politics and the disintegration of the attempt to establish democracy in Germany,[48] might seem overblown to the common lawyers of jurisdictions such as the United Kingdom, Canada, and Australia, let alone to lawyers in the United States, given the place of the bill of rights in American political culture. However, as I have indicated, the judicial record largely supports Schmitt's claims, albeit not through the idea that the rule of law has no place in an emergency, but through the idea that only a formal or wholly procedural conception of the rule of law is appropriate for emergencies. But, as I will now argue, the latter idea might make things worse from the perspective of the rule of law, at least from the perspective of a substantive conception of the rule of law, than a total surrender to Schmitt's challenge. Indeed, it might succumb more subtly but also more fully to Schmitt's challenge, since Schmitt also thought that liberals found unbearable the idea that the rule of law cannot constrain the political, so that they prefer to pretend it constrains while recognizing that in substance it does not.

Carl Schmitt's challenge

In what remains one of the leading studies of the state of emergency, *Constitutional Dictatorship*, Clinton L. Rossiter concluded in 1948 that '[n]o sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself'.[49] Crucial to his argument was the claim that the dictatorship necessary to respond to an emergency can be constitutional. Here he took his cue from the Roman dictatorship, one that was legally bestowed on a trusted individual whose task it was to 'restore normal times and government' and to 'hand back this power to the regular authorities just as soon as its purposes had been fulfilled'.[50]

Rossiter argued that three 'fundamental facts' provide the rationale for constitutional dictatorship – the complex system of the democratic, constitutional state is designed to function during peace and is often 'unequal to the exigencies of a great constitutional crisis'; thus, in a time of crisis, the system of government must be 'temporarily altered to whatever degree is necessary to overcome the peril and restore normal conditions'; this altered government, which might amount to an 'outright dictatorship',

[48] For further discussion see David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Clarendon Press, 1997).

[49] Clinton L. Rossiter, *Constitutional Dictatorship* (Princeton: Princeton University Press, 1948), p. 314.

[50] *Ibid.*, pp. 4–5.

can have only one purpose – the 'preservation of the independence of the state, the maintenance of the existing constitutional order, and the defense of the political and social liberties of the people'.[51]

Rossiter was, however, anxious to stress the importance of the qualifying adjective in the idea of constitutional dictatorship.[52] What distinguishes it from fascist dictatorship is that it is 'temporary and self-destructive' and that the 'only reason for its existence is a serious crisis; . . . when the crisis goes, it goes'.[53] Thus, in his concluding chapter, he listed eleven criteria which have to be met for a dictatorship to remain constitutional. They fell into three main categories: 'criteria by which the initial resort to constitutional dictatorship is to be judged, those by which its continuance is to be judged, and those to be employed at the termination of the crisis for which it was instituted'.[54]

Rossiter's first criterion was that constitutional dictatorship should not be initiated 'unless it is necessary or even indispensable to the preservation of the state and its constitutional order'.[55] The second criterion followed hard on the heels of the first: 'the decision to institute a constitutional dictatorship should never be in the hands of the man or men who will constitute the dictator'.[56] Here Rossiter referred to the institution of Roman dictatorship, in which it was the Senate which initiated the proposal that the consuls appoint a dictator, a citizen who had absolute power but who was limited to a six-month period in office.[57] As Rossiter immediately recognized, this second criterion is not uniformly observed in modern experience with emergency powers, and he remarked that the

[51] *Ibid.*, pp. 5–7. [52] *Ibid.*, p. 4. [53] *Ibid.*, p. 8. [54] *Ibid.*, p. 298. [55] *Ibid.*

[56] *Ibid.*, p. 299. The remaining nine are: '[A]ll uses of emergency powers and all readjustments in the organization of the government should be effected in pursuit of constitutional or legal requirements', that is, 'no official action should ever be taken without a certain minimum of constitutional or legal sanction'; '[N]o dictatorial institution should be adopted, no right invaded, no regular procedure altered any more than is absolutely necessary for the conquest of the particular crisis'; 'The measures adopted in the prosecution of a constitutional dictatorship should never be permanent in character or effect'; 'The dictatorship should be carried on by persons representative of every part of the citizenry interested in the defense of the existing constitutional order'; Ultimate responsibility should be maintained for every action taken under a constitutional dictatorship' – that is, officials should be held responsible for what they have done after termination of the dictatorship; 'The decision to terminate a constitutional dictatorship, like the decision to institute one, should never be in the hands of the man or men who constitute the dictator'; 'No constitutional dictatorship should extend beyond the termination of the crisis for which it was instituted'; '[T]he termination of the crisis must be followed by as complete a return as possible to the political and governmental conditions existing prior to the initiation of the constitutional dictatorship.'

[57] *Ibid.*, pp. 20–3.

'greatest of constitutional dictators was self-appointed, but Mr. Lincoln had no alternative'.[58]

Rossiter had in mind Lincoln's actions during the Civil War, including the proclamation by which Lincoln, without the prior authority of Congress, suspended habeas corpus.[59] Lincoln, he said, subscribed to a theory that in a time of emergency, the President could assume whatever legislative, executive, and judicial powers he thought necessary to preserve the nation, and could in the process break the 'fundamental laws of the nation, if such a step were unavoidable'.[60] This power included one ratified by the Supreme Court: 'an almost unrestrained power to act towards insurrectionary citizens as if they were enemies of the United States, and thus place them outside the protection of the Constitution'.[61]

Rossiter's difficulties here illustrate rather than solve the tensions in the idea of constitutional dictatorship. On the one hand, he wants to assert that emergency rule in a liberal democracy can be constitutional in nature. 'Constitutional' implies restraints and limits in accordance not only with law, but also with fundamental laws. These laws are not the constitution which is in place for ordinary times; rather, they are the laws that govern the management of exceptional times – his eleven criteria. The criteria are either put within the discretion of the dictator – they are judgments about necessity – or are couched as limits that should be enshrined either in the constitution or in legislation.

However, Rossiter does not properly address the alleged fact that judgments about necessity are for the dictator to make, which means that these criteria are not limits or constraints but merely factors about which the dictator will have to decide. Other criteria look more like genuine limits. Moreover, they are limits that could be constitutionally enshrined, for example the second criterion requires that the person who makes the decision that there is an emergency should not be the person who assumes dictatorial powers. Yet, as we have seen, Rossiter's foremost example of the modern constitutional dictator not only gave himself dictatorial powers but, Rossiter supposes, Lincoln had no choice but to do this.

Moreover, if these criteria are constitutionally enshrined, so that part of the constitution is devoted to the rules that govern the time when the rest of the constitution might be suspended, they still form part of the constitution. So, no less than the ordinary constitution, what we can think of

[58] *Ibid.*, p. 229.
[59] *Ibid.*, ch. 14: 'The Constitution, the President, and Crisis Government'. [60] *Ibid.*, p. 229.
[61] *Ibid.*, p. 230, referring to *Prize Cases* 67 US 635 (1863); 2 Black (67 US) 635 (1863) at 670.

as the exceptional or emergency constitution, the constitution that governs the state of emergency, is subject to suspension, should the dictator deem this necessary. This explains why, on the other hand, Rossiter equated emergency rule with potentially unlimited dictatorship, with Locke's idea of prerogative, defined by Locke as '*nothing but the Power of doing publick good without a Rule*'. Locke holds that the prerogative is 'This power to act according to discretion for the publick good, without the prescription of the Law and sometimes even against it'.[62] And Rossiter says, 'whatever the theory, in moments of national emergency the facts have always been with . . . John Locke'.[63]

So Rossiter at one and the same time sees constitutional dictatorship as unconstrained in nature and as constrainable by principles – his eleven criteria. The upshot is that 'constitutional' turns out then not to mean what we usually take it to mean; rather it is a misleading name for the hope that the person who assumes dictatorial powers does so because of a good faith evaluation that this is really necessary and with the honest and steadfast intention to return to the ordinary way of doing things as soon as possible.

In his reflections on politics and law after 9/11, the Italian philosopher Girgio Agamben is thus right to remark that the bid by modern theorists of constitutional dictatorship to rely on the tradition of Roman dictatorship is misleading.[64] They rely on that tradition in an effort to show that dictatorship is constitutional or law-governed. But in fact they show that dictatorship is in principle absolute – the dictator is subject to whatever limits he deems necessary, which means to no limits at all. As H. L. A. Hart described the sovereign within the tradition of legal positivism, the dictator is an 'uncommanded commander'.[65] The dictator thus operates within a black hole, in Agamben's words, 'an emptiness and standstill of law'.[66] Hence, Agamben suggests that the real analogue to the contemporary state of emergency is not the Roman dictatorship but the institution of iustitium, in which the law is used to produce a 'juridical void' – a total suspension of law.[67]

In coming to this conclusion, Agamben sides with Carl Schmitt, his principal interlocutor in his book. While Schmitt had in his first major

[62] John Locke, *Two Treatises on Government* edited by P. Laslett (Cambridge: Cambridge University Press, 1988), p. 375 (author's emphasis).

[63] Rossiter, *Constitutional Dictatorship*, p. 219.

[64] Girgio Agamben, *State of Exception*; translated by Kevin Attell (Chicago: Chicago University Press, 2005, first published in 2003), pp. 47–8.

[65] Hart, 'Positivism', p. 59.

[66] Agamben, *State of Exception*, p. 48.

[67] *Ibid.*, ch. 3, pp. 41–2.

work on the topic of dictatorship made a distinction between commissarial dictatorship,[68] the constitutional dictator who is constrained by his commission, and the unconstrained sovereign dictator, it seems that he did not think that this distinction could work in practice. As I have pointed out, the notorious opening sentence of Schmitt's *Political Theology*, 'Sovereign is who decides on the state of exception', is meant to make the point that the sovereign is he who decides both when there is a state of emergency/exception and how best to respond to that state. And that decision for Schmitt is one based on the considerations that he took to be the mark of the political – existential considerations to do with who is a friend and who is an enemy of the state.[69]

Schmitt's claim is, however, more radical than Agamben's. The space beyond law is not so much produced by law as revealed when the mask of liberal legality is stripped away by the political. Once that mask is gone, the political sovereign is shown not to be constituted by law but rather as the actor who has the legitimacy to make law because it is he who decides the fundamental or existential issues of politics. So Schmitt's understanding of the state of exception is not quite a legal black hole, a juridically produced void. Rather, it is a space beyond law, a space which is revealed when law recedes leaving the legally unconstrained state, represented by the sovereign, to act.

In substance, there might seem to be little difference between a legal black hole and space beyond law since neither is controlled by the rule of law. But there is a difference in that nearly all liberal legal theorists find the idea of a space beyond law antithetical, even if they suppose that law can be used to produce a legal void. This is so especially if such theorists want to claim for the sake of legitimacy that law is playing a role, even if it is the case that the role law plays is to suspend the rule of law.

Schmitt would have regarded such claims as an attempt to cling to the wreckage of liberal conceptions of the rule of law brought about by any attempt to respond to emergencies through the law. They represent a vain effort to banish the exception from legal order. Because liberals cannot countenance the idea of politics uncontrolled by law, they place a thin veneer of legality on the political, which allows the executive to do what it wants while claiming the legitimacy of the rule of law. And we have seen that Rossiter presents a prominent example which supports Schmitt's view.

[68] See Carl Schmitt, *Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (Berlin: Duncker & Humblot, 1989, first published in 1922).

[69] Schmitt, *Political Theology*, p. 5.

It is a depressing fact that much work on emergencies in the wake of 9/11 is also supportive of Schmitt's view. For example, Bruce Ackerman in his essay, 'The Emergency Constitution',[70] starts by claiming that we need 'new constitutional concepts' in order to avoid the downward spiral in protection of civil liberties when we wait for politicians to respond to each new terror attack by enacting laws that become increasingly repressive with each attack.[71] We need, he says, to rescue the concept of 'emergency powers from fascist thinkers like Carl Schmitt, who used it as a battering ram against liberal democracy'.[72] Because Ackerman does not think that judges are likely to do, or can do, better than they have in the past at containing the executive during an emergency, he proposes mainly the creative design of constitutional checks and balances to ensure, as did the Roman dictatorship, against the normalization of the state of emergency. Judges should not be regarded as 'miraculous saviors of our threatened heritage of freedom'. Hence, it is better to rely on a system of political incentives and disincentives, a 'political economy' that will prevent abuse of emergency powers.[73]

Ackerman calls his first device the 'supramajoritarian escalator',[74] basically the requirement that a declaration of a state of emergency requires legislative endorsement within a very short time, and thereafter has to be renewed at short intervals, with each renewal requiring the approval of a larger majority of legislators. The idea is that it will become increasingly easy with time for even a small minority of legislators to bring the emergency to an end, thus decreasing the opportunities for executive abuse of power.[75] The second device requires the executive to share security intelligence with legislative committees with opposition political parties guaranteed the majority of seats on these committees.[76]

Ackerman does see some role for courts. They will have a macro role should the executive flout the constitutional devices. While he recognizes both that the executive might simply assert the necessity to suspend the

[70] (2004) 113 *Yale Law Journal* 1029–91. There are of course many interventions which argue for control by substantive conceptions of the rule of law, for example, Laurence Tribe and Patrick O. Gudridge, 'The Anti-Emergency Constitution' (2004) 113 *Yale Law Journal* 1801–70; Jonathan Masur, 'A Hard Look or a Blind Eye: Administrative Law or Military Deference' (2005) 56 *Hastings Law Journal* 441–521; D. Cole, 'Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis' (2002–03) 101 *Michigan Law Review* 2565–95.

[71] Ackerman, 'The Emergency Constitution', 1029–30. [72] *Ibid.*, 1044.

[73] *Ibid.*, 1031. [74] *Ibid.*, 1047. [75] *Ibid.*, 1047–9.

[76] *Ibid.*, 1050–3. Ackerman would also insert a constitutional requirement of an actual, major attack, before the executive may declare a state of emergency (at 1060), and have the constitution provide for adequate compensation for the individuals and their families who are harmed by emergency measures (at 1062–6).

emergency constitution and that this assertion might enjoy popular support, he supposes that if the courts declare the executive to be violating the constitution, this will give the public pause and thus decrease incentives on the executive to evade the constitution.[77] In addition, the courts will have a micro role in supervising what he regards as the inevitable process of detaining suspects without trial for the period of the emergency. Suspects should be brought to court and some explanation given of the grounds of their detention, not so that they can contest it – a matter which Ackerman does not regard as practicable – but in order to give the suspects an identity so that they do not disappear and to provide a basis for compensation once the emergency is over in case the executive turns out to have fabricated its reasons. He also wishes to maintain a constitutional prohibition on torture which he thinks can be enforced by requiring regular visits by lawyers.[78]

Not only is the judicial role limited, but it is clear that Ackerman does not see the courts as having much to do with preventing a period of 'sheer lawlessness'.[79] Even within the section on the judiciary, he says that the real restraint on the executive will be the knowledge that the 'supramajoritarian escalator' might bring the emergency to an end, whereupon the detainees will be released if there is no hard evidence to justify detaining them.[80]

In sum, according to Ackerman, judges have at best a minimal role to play during a state of emergency. We cannot really escape from the fact that a state of emergency is a legally created black hole, or lawless void. It is subject to external constraints, controls on the executive located at the constitutional level and policed by the legislature. But, internally, the rule of law does next to no work – all that we can reasonably hope for is decency. But once one has conceded that internally a state of emergency is more or less a legal black hole because the rule of law, as policed by judges, has no or little purchase, it becomes difficult to understand how external legal constraints, the constitutionally entrenched devices, can play the role Ackerman sets out.

Recall that Ackerman accepts that the reason we should not give judges more than a minimal role is the history of judicial failure to uphold the rule of law during emergencies in the face of executive assertions of necessity to operate outside of law's rule. But why should we accept his claim that we can rely on judges when the executive asserts the necessity of suspending the exceptional constitution, the constitution for the state of emergency, when one of his premises is that we cannot so rely? Far from rescuing

[77] *Ibid.*, 1067–8 [78] *Ibid.*, 1068–76. [79] *Ibid.*, 1069. [80] *Ibid.*

the concept of emergency powers from Schmitt, Ackerman's devices for an emergency constitution – an attempt to update Rossiter's model of constitutional dictatorship – fails for the same reasons that Rossiter's model fails. Even as they attempt to respond to Schmitt's challenge, they seem to prove the claim that Schmitt made in late Weimar that law cannot effectively enshrine a distinction between constitutional dictatorship and dictatorship. They appear to be vain attempts to find a role for law while at the same time they concede that law has no role.

Of course, this last claim trades on an ambiguity in the idea of the rule of law between, on the one hand, the rule of law, understood as the rule of substantive principles, and, on the other, rule by law, where as long as there is a legal warrant for what government does, government will be considered to be in compliance with the rule of law. Only if one holds to a fairly substantive or thick conception of the rule of law will one think that there is a point on a continuum where rule by law ceases to be in accordance with the rule of law.

Ackerman's argument about rule by law, by the law of the emergency constitution, might not answer Schmitt's challenge, but at least it attempts to avoid dignifying the legal void with the title of rule of law, even as it tries to use law to govern what it deems ungovernable by law. The same cannot be said of those responses to 9/11 that seem to suggest that legal black holes are not in tension with the rule of law, as long as they are properly created. While it is relatively rare to find a position that articulates so stark a view, it is quite common to find positions that are comfortable with grey holes, as long as these are properly created. As I have indicated, a grey hole is a legal space in which there are some legal constraints on executive action – it is not a lawless void – but the constraints are so insubstantial that they pretty well permit government to do as it pleases. In addition, since such grey holes permit government to have its cake and eat it too, to seem to be governing not only by law but in accordance with the rule of law, they and their endorsement by judges and academics might be even more dangerous from the perspective of the substantive conception of the rule of law than true black holes.

An example of such endorsement can be found in Cass Sunstein's elaboration of the extension to the emergency situation of the 'minimalist' stance which he thinks judges should adopt in deciding all constitutional matters.[81] Sunstein thus differs from Ackerman and others engaged in

[81] For the stance see Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, Mass: Harvard University Press, 1999). For the extension, see Cass R. Sunstein, 'Minimalism at War' (2004) *The Supreme Court Review* 47–109.

the American debate because he does not advocate a minimalist role for judges purely on the basis that judges have shown themselves incapable of doing more. Rather, he puts his argument on the basis that judicial minimalism is appropriate during normal times, but even more appropriate during an emergency situation.

According to Sunstein, minimalists favour shallowness over depth. They avoid taking stands on the most deeply contested questions of constitutional law, preferring to leave the most fundamental questions – 'incompletely theorized disagreements' – undecided. Sunstein's hope is that such shallowness can attract support from people with a wide range of theoretical positions or who are undecided about answers to the deep questions. Minimalists also favour narrowness over width. They proceed 'one case at a time', thus avoiding any attempt to resolve more than the case demands, although minimalism, Sunstein says, is consistent with a strategy of which he approves, the strategy of forcing 'democracy-promoting decisions' – decisions which prompt judgments by 'democratically accountable actors, above all Congress'.[82] This aspect of minimalism requires that as little is said as possible about what the legislature should do, thus leaving it up to the democratically elected body to decide how best to respond to the problem identified by the court.

Maximalists, by contrast, favour depth; they adopt foundational theories which they articulate in their judgments, confident in the correctness of their views. And they also favour width, because laying down 'firm, clear rules in advance' cuts down on the judicial discretion which minimalism perforce leaves to judges at the same time as providing a 'highly visible background against which other branches of government can do their work'.[83]

Sunstein argues that minimalism can better reconcile the tension between national security and constitutional rights in a time of emergency than either of two alternatives. These he styles 'National Security Maximalism', which requires a highly deferential role of the judiciary, and 'Liberty Maximalism', which insists that judges must protect liberty to the same extent as they would in peace; indeed, that in emergency times it is all the more important that judges play this role.[84] He rejects Liberty Maximalism both because judges have refused to take this role in the past and because it is 'inherently undesirable': when security is at risk,

[82] Sunstein, 'Minimalism at War', 47–8. For a detailed discussion on this point see Sunstein, *One Case at a Time*, pp. 26–39.

[83] Sunstein, 'Minimalism at War", 47–8.

[84] *Ibid.*, 48.

the government has greater justification to intrude on liberty.[85] And he rejects National Security Maximalism for the following reasons. Its reading of the Constitution is tendentious in its claim that the Constitution gives the President exclusive authority in an emergency. The executive is capable of striking the wrong balance between security and liberty especially because deliberation within the executive branch is likely to lead to reinforcement of existing attitudes rather than to checks on those attitudes. And, in the nature of things, the selective denial of liberty for the targets of security measures is likely to have low political costs for the executive.[86]

Courts, he argues, will not have the requisite information to second-guess the executive on the balance between security and liberty; but they can still require clear congressional authorization for any executive action that intrudes on constitutionally protected interests. This requirement both provides a check and 'such authorization is likely to be forthcoming when there is a good argument for it'. Liberty is thus promoted 'without compromising legitimate security interests'. Courts should also 'insist, whenever possible, on the core principle of the due process clause'. Some kind of hearing must be put in place to ensure against erroneous deprivations of liberty. Finally, judges must exercise self-discipline.[87]

In combination, these three features of his minimalist approach will he thinks promote democracy by requiring that executive action has a basis in legislation while still ensuring that judges retain a significant role in upholding the constitutional order. The approach thus amounts to 'due process writ large'. Congressional authorization will ensure attention from a diverse and deliberative body; the hearing requirement before a court 'reflects the most familiar aspect of the due process guarantee'; and the requirement of narrow and shallow rulings from a court means that those not before the court, that is, those whose cases arise later, will be provided with an opportunity to be heard.[88]

Both Ackerman and Sunstein accept that the past teaches us that as a matter of fact one should not expect much of judges in a time of emergency. But Sunstein differs from Ackerman in that he seems unperturbed by the way in which Congress and the executive have reacted to 9/11, in part because he thinks that the judges are doing a good job of upholding the rule of law. In other words, his conception of minimalism is the correct stance for judges to adopt on constitutional questions even in ordinary times. And since that conception is also being displayed in the American

[85] *Ibid.*, 51–2. [86] *Ibid.*, 52–3. [87] *Ibid.*, 53–4. [88] *Ibid.*, 54–5.

response to 9/11, there is no special problem from the perspective of the rule of law.

But it follows for Sunstein and for others that decisions which were regarded until recently as badges of shame in American legal history, most notably, the decision of the majority of the Supreme Court in *Korematsu*,[89] have to be seen in a new light. These decisions cannot be unproblematically understood as ones in which the Court failed to uphold the rule of law. Rather, they should be seen 'as a tribute to minimalism – requiring clear congressional support for deprivations of liberty by the executive, and permitting those deprivations only if that support can be found'.[90]

In *Korematsu*, the Court upheld an executive order which two years prior to the decision authorized the evacuation of American citizens of Japanese descent from the West Coast to facilitate their detention so that the military could make determinations of who among them were loyal. Sunstein and other revisionists[91] now wish to point out that in a case decided on the same day, *Endo*,[92] the Court held that the detention of those citizens was illegal. They emphasize that the Court found that there was Congressional authorization for the evacuation order, but not for the detention order.

In *Korematsu*, the order was based on a recent statute which made it an offence 'to remain in . . . any military area or military zone' prescribed by a competent official. In *Endo*, in contrast, Sunstein says, there was no statute on which the executive could base its detention order. Sunstein claims that the conclusion is that the executive survived legal attack only when 'Congress had specifically permitted its action'. But, as Sunstein acknowledges, Justice Jackson, in his dissent in *Korematsu*, argued that there was no Act of Congress that authorized the evacuation; its sole basis was a military order.[93] Further, in *Endo* the government argued that the same statute authorized detention. The majority of the Court responded

[89] *Korematsu* v. *United States*, 323 US 214 (1944).
[90] Sunstein, 'Minimalism at War', 51.
[91] See Samuel Issacharoff and Richard H. Pildes, 'Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach During Wartime' (2004) 2 *International Journal of Constitutional Law* 296–333. Mark V. Tushnet offers not so much a revisionist view as an account of the inevitability of *Korematsu* in 'Defending *Korematsu?* Reflections on Civil Liberties in Wartime' (2003) *Wisconsin Law Review* 273–307.
[92] *Ex parte Endo*, 323 US 283 (1944).
[93] *Korematsu*, at 244. Justice Jackson's dissent has the curious feature that he agreed with the majority that military decisions are not 'susceptible of intelligent judicial appraisal'; (at 245). For this reason, Jonathan Masur argues that Justice Murphy's dissent is to be preferred, since Murphy demonstrated that the military had no reasonable basis for its claims – Masur, 'A Hard Look or a Blind Eye?', 455–6.

that the word detention was not used in the statute and certainly could not be used as a basis for detaining Endo, who had been determined to be loyal.

Sunstein congratulates the Court in *Endo* for avoiding, in minimalist fashion, controversial constitutional issues by confining its analysis to an ordinary exercise in statutory interpretation.[94] But he does not say what is wrong with Justice Jackson's similar point in *Korematsu* that the 1942 statute nowhere explicitly authorized evacuation orders of the sort visited on Japanese Americans.[95] Nor does he mention that in *Endo* Justices Murphy and Roberts in their concurring judgments argued strongly for the necessity for the Court to confront the constitutional issues.

The revival of interest in *Endo* in a bid to sanitize *Korematsu* is troubling. It is true that the majorities in both cases saw them as in some kind of symbiotic relationship. But in the article which first brought this relationship to the attention of the post-9/11 legal public, Patrick O. Gudridge argued that the relationship is far more complex. And this complexity is not acknowledged by the revisionists who subsequently rely on his work.[96]

Gudridge points out that Justice Black, who wrote the majority opinion in *Korematsu* wanted to portray *Korematsu* as addressing an 'already-past short term' – the time of emergency – a term whose closing was marked by *Endo*.[97] Black's claim was that exclusion was temporary, a measure responding to the exigencies of the moment. He wanted to resist the argument put by one of the dissenting judges in *Korematsu*, Justice Roberts, that the exclusion order had to be seen as part of a package meant as whole to accomplish long-term detention.[98] In addition, Gudridge points out that it is misleading to characterize Justice Douglas' majority opinion in *Endo* as an ordinary exercise in statutory, in contrast to constitutional, interpretation, despite Justice Douglas' own less than whole-hearted attempt to portray the opinion in this fashion.[99]

Indeed, in explicit reference to Sunstein's first development of the theory of constitutional minimalism, Gudridge rejects outright the thought that *Endo* is a version of constitutional minimalism.[100] Rather, Justice Douglas used the Constitution to set the stage for the exercise in statutory

[94] Sunstein, 'Minimalism at War', 92–3. [95] *Korematsu*, at 244.

[96] Patrick O. Gudridge, 'Remember Endo?' (2003) 116 *Harvard Law Review* 1933–70.

[97] *Ibid.*, 1934. [98] *Ibid.*, 1942.

[99] *Ibid.*, 1938–9. Less than whole-hearted because Justice Douglas later said that he wished to write the opinion as a constitutional one, but other Justices, including Black, refused (at 1953). And see the text of Justice Douglas' draft opinion with the constitutional assumptions crossed out (at 1955).

[100] *Ibid.*, 1959.

interpretation.[101] Moreover, Gudridge suggests that even were there no explicit signals in the text of the majority opinion that indicated that the Constitution sets the stage, the use of a doctrine of authorization in this kind of context presupposes constitutional premises, whether these are articulated or not.[102] The issue is not then, as Sunstein would have it, that there are incompletely theorized disagreements, but that the judges prefer for strategic reasons to keep their principles below the surface.[103]

The conclusion to be drawn from the combination of *Korematsu* and *Endo* is not then that the conjunction of the two legitimizes *Korematsu*. Rather, together they raise a puzzle, whether, as Gudridge puts it, it is 'possible for constitutional law to be *both* intermittent and organizational?'[104] *Korematsu*, a decision which bows to an executive claim of necessity, and *Endo*, a decision which affirms constitutional values, are, Gudridge says, 'mutually repelling perspectives'.[105]

In other words, *Korematsu*, on its most charitable reading, held that a state of emergency is a grey hole and that such holes have to be properly created, that is, created by the legislature. It stands not for minimalism but for the grand constitutional claim that in times of emergency judges must blindly defer to the executive. And such deference means that the judges themselves created a situation in which there is the façade of judicial review of the executive, and thus of the rule of law, while in effect they gave the executive a black hole, a situation in which it could operate free of rule-of-law constraints. In contrast, *Endo* held that statutes that respond to emergency situations have to be read down in order to comply with constitutional values because judges should assume to the extent possible that an emergency situation is governed by constitutional values.

It is troubling enough that Sunstein and other revisionists think that such a black hole is legitimized by the fact that it was created by a statute. But it is more troubling that they are willing to relax, with the majority in *Korematsu*, the conditions for telling when a statute in fact authorizes the executive to create a black hole. Most troubling of all is that the revisionist interpretation of *Korematsu* is used to prepare the way for vindicating positions taken by the Bush administration after 9/11.

The revisionists do not support the completely naked assertions of executive authority that the Bush administration initially made, but the more moderate claims it has made as it has tested both public and judicial

[101] *Ibid.*, 1947–53. [102] *Ibid.*, 1953 and 1964.

[103] For a more cautious appraisal of *Endo*, see Masur, 'A Hard Look or a Blind Eye?', 456.

[104] Gudrige, 'Remember Endo?', 1967. (Author's emphasis.) [105] *Ibid.*

opinion. For example, Sunstein is enthusiastic about the decision of the plurality in *Hamdi*, the 2004 US Supreme Court's decision on enemy combatants.[106]

In *Hamdi*, the plurality held that the detention of such combatants was authorized by the Congressional Order which gave the President authority to 'use all necessary and appropriate force' to respond to terrorism.[107] And it held that while the detainees were entitled to contest their detention orders, a military tribunal would be an appropriate forum for this contest to take place with its procedures determined in accordance with a cost-benefit calculation, that is, one which weights security and rights considerations together.[108]

Sunstein endorses both of these holdings because the first recognizes the need for congressional authorization[109] while the second exhibits the requisite degree of self-discipline.[110] But in endorsing this decision, he also endorses the claim that a delegation of authority in general terms necessarily includes the delegation of authority to detain, and that the executive is entitled to stipulate due process rights that will not afford a detainee a real opportunity to contest his detention. Concerns about the first issue were raised by Justices Scalia and Stevens in dissent[111] and by Justices Souter and Ginsburg in a judgment which concurred reluctantly with the plurality, in order to give the decision of the plurality practical effect by making it into a majority decision.[112] Justices Souter and Ginsburg also expressed grave doubts about the plurality's views about adequate due process.[113]

My concern is that Sunstein's minimalism is committed to a view of legality which not only permits the executive to claim that a system of arbitrary detention is one which operates under the rule of law, but also requires judges to endorse that claim. As long as there is a hint of legislative authorization in the air, judges should accept that the legislature has authorized the measures the executive chooses to take. And when it comes to the question of the compliance of those measures with the rule of law, judges should let the executive decide how best to comply as long as it does put in place some procedures.

Indeed, a truly minimalist court would not have told the executive what sort of measures were minimally appropriate. I will argue later that this aspect of minimalism is unobjectionable as it puts the executive on

[106] *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004). [107] *Ibid.*, at 2637–43.
[108] *Ibid.*, at 2643–52. [109] Sunstein, 'Minimalism at War', 94–5. [110] *Ibid.*, 102.
[111] *Hamdi*, at 2651–66. [112] *Ibid.*, at 2653–6. [113] *Ibid.*, at 2659.

notice that what they do decide will be vulnerable to further judicial scrutiny instead of telling the legislature what it needs to do to achieve a bare constitutional pass.[114] Moreover, the message should have been delivered not to the executive but to the legislature, if minimalism was to do its job of forcing 'democracy-promoting' decisions. But Sunstein is precluded from making this point because his clear statement rule turns out to allow vague authorizations. Indeed, as I will argue in chapter 2, an authentic clear statement rule works only when judges reject the first aspect of minimalism – the avoidance of full justifications for results that seek to preserve the rule of law.

From the perspective of the rule of law, minimalism does more damage than the strategy Sunstein terms National Security Maximalism, which was the strategy adopted by Justice Thomas in *Hamdi*. Thomas accepted the government's main argument – that the executive had a blank cheque to detain even without Congressional authorization since Article II of the Constitution provides that the President is 'Commander in Chief of the Armed Forces'.[115] And he put forward a basically Schmittian argument to the effect that it is necessary that the executive have the authority to respond to exceptional situations unconstrained by legality. This strategy does less damage to the rule-of-law project than Sunstein's approach because it accepts that the government is acting in a space outside of law, ungoverned, that is, by the rule of law.

Now Justice Thomas' strategy is politically unacceptable because it strips from government the basis to claim that the executive's response to the emergency is a legal one. But that is precisely why it is better from the perspective of the rule of law than Sunstein's minimalism, which permits the government to have its cake and eat it too by endorsing an equation of the façade of the rule of law with its substance. In addition Sunstein's minimalism is also worse than Justice Scalia's dissent, which reads like the dissent of a civil libertarian until one realizes that what he objected to was not the executive's decision to dump those it deemed enemy combatants into a legal black hole, but to the fact that the executive has not obtained the proper authorization to do so. That is, Justice Scalia required an explicit Congressional suspension of habeas corpus, an authentically clear statement rather than the vague statement which Sunstein and the plurality find acceptable. But once there is such a clear statement he is prepared to

[114] Kent Roach and Gary Trotter, 'Miscarriages of Justice in the War Against Terror' (2005) 109 *Penn State Law Review* 967–1041, at 1018.

[115] *Hamdi*, at 2674–7.

give the stamp of legality to the legal black hole.[116] Blank cheques are fine as long as they are properly certified. Justice Scalia's approach is problematic in that he sees no problem from the perspective of the rule of law as long as the black hole is legally created. But it is preferable to Sunstein's in two respects. Justice Scalia requires the legislature to make clear its intention to create a legal black hole and does not attempt to shade its blackness, to pretend that it is anything other than a legal void.

Another way of making my point is to say that grey holes cause more harm to the rule of law than black holes. Recall that a grey hole is a space in which the detainee has some procedural rights but not sufficient for him effectively to contest the executive's case for his detention. It is in substance a legal black hole but worse because the procedural rights available to the detainee cloak the lack of substance. As we will see, it is a delicate matter to decide when the blackness shades through grey into something which provides a detainee with adequate rule-of-law protection, when, that is, on the continuum of legality, the void fills up with rule-of-law content. But for the moment I want simply to establish that minimalism is too close to the black hole end of the continuum for comfort. A little bit of legality can be more lethal to the rule of law than none.

It might seem, then, that the only conclusion to be drawn by someone committed to a substantive conception of the rule of law is Schmitt's. One should concede that, in the state of exception or emergency, law recedes leaving the state to act unconstrained by law. Just this conclusion is reached in a fascinating article by Oren Gross. Gross sketches two traditional models which are adopted to respond to emergency situations. The first is the 'Business as Usual' model, which holds that the legal order as it stands has the resources to deal with the state of emergency and so no substantive change in the law is required. The second model is one of 'accommodation', which argues for some significant changes to the existing order so as to accommodate security considerations, while keeping the ordinary system intact to the greatest extent possible. The principal criticism of the Business as Usual model is that it is naïve or even hypocritical, as it either ignores or hides the necessities of the exercise of government power in an emergency. The Accommodation model, in contrast, risks undermining the ordinary system because it imports into it the measures devised to deal with the emergency.[117]

[116] *Ibid.*, at 2665–6: 'When the writ is suspended, the Government is entirely free from judicial oversight'.

[117] Gross, 'Chaos and Rules', 1021–2. Gross finds several different models within the accommodation camp, but for the sake of simplicity I will talk about one model.

Gross argues that two basic assumptions dominate debates about the state of emergency and thus underpin the models. The first is the assumption of separation between the normal and the exceptional which is 'defined by the belief in our ability to separate emergencies and crises from normalcy, counterterrorism measures from ordinary legal rules and norms'.[118] This assumption makes it easier for us to accept expanded government powers and extraordinary measures, since we suppose both that once the threat has gone, so we can return to normal, and that the powers and measures will be deployed against the enemy, not us. The second assumption is of constitutionality: 'whatever responses are made to the challenges of a particular exigency, such responses are to be found and limited within the confines of the constitution'.[119] Gross supports the critiques of both models and he also calls into question both assumptions.

The assumption of separation between the normal and the exceptional ignores the way in which emergency government has become the norm, a trend which has only gathered strength since the US administration's reaction to 9/11, a reaction which has been widely copied. And the assumption of constitutionality, whether it is made by claiming business as usual or that the accommodations made conform to constitutional values, risks undermining the legal order.

Thus Gross puts forward a new model, the 'Extra-Legal Measures model'. This model tells public officials that they may respond extra-legally when they 'believe that such action is necessary for protecting the nation and the public in the face of calamity, provided that they openly and publicly acknowledge the nature of their actions'.[120] Gross' claim is that this model is best suited to preserving the 'fundamental principles and tenets' of the constitutional order.[121] In addition, public officials will have to disclose the nature of their activities and hope for 'direct or indirect ex post ratification', either through the courts, the executive or the legislature. The process involved will promote both popular deliberation and individual accountability, while the uncertain outcomes will provide a brake on public officials' temptation to rush into action.[122]

In order to persuade us to accept the Extra-Legal Measures model, Gross suggests that we should agree on three points: '(1) Emergencies call for extraordinary governmental responses, (2) constitutional arguments have not greatly constrained any government faced with the need to respond to such emergencies, and (3) there is a strong probability that measures used

[118] *Ibid.*, 1022, footnote omitted. [119] *Ibid.*, 1023.
[120] *Ibid.* [121] *Ibid.*, 1023–4. [122] *Ibid.*

by the government in emergencies will eventually seep into the legal system after the government has ended.'[123] The model, in his view, recognizes the force of all three points, but by rejecting the naïvety of the Business as Usual model at the same time as requiring that exceptional government responses happen outside of law, it greatly, Gross claims, diminishes the probability of seepage.

Gross relies in his argument on two main sources: Locke's account of the prerogative and Schmitt's argument that legal norms cannot apply to exceptions. He has also more recently enlisted A. V. Dicey in his theoretical armoury. He finds support for the Extra-Legal Measures model in Dicey's recognition that officials might have to resort to illegal action in an emergency and that, if they acted in good faith, they should be entitled to an Act of Indemnity to 'legalise their illegality'.[124]

But this enlistment of Dicey comes with costs. It shows that, despite the boldness of his argument, Gross is unable to stick to the claim that drives both Locke and Schmitt that a state of emergency is a lawless void. Law still plays a significant role for Gross after the fact, since it is through law that the public will react to official lawlessness, either by permitting the officials to be punished for their crimes or by using law to exempt or indemnify the officials from punishment. As I have argued elsewhere, a significant problem for the Extra-Legal Measures model is that if it is adopted as a model, as a prescriptive set of considerations for officials who face or think they face an emergency, it is likely that they will come to anticipate and anticipate correctly that the legal response to their extra-legal activity will be an Act of Indemnity or its equivalent.[125] The difference between a statutory creation of a legal black hole in anticipation of officials acting in violation of the law and one which, to use Dicey's phrase, 'legalises illegality' retrospectively, is not merely a question of timing.

Moreover, Gross has also come to suggest that perhaps the better interpretation of Locke, and it seems of his own position, is that the prerogative of the executive to act outside of the law might be located within the constitution.[126] He immediately notes the dilemma that arises – the claim that the power to act outside of law is itself a legal power, indeed, one

[123] *Ibid.*, 1097.

[124] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, London: MacMillan, 1959), pp. 412–13.

[125] David Dyzenhaus, 'The State of Emergency in Legal Theory' in Victor Ramraj, Michael Hor and Kent Roach (eds.), *Global Anti-terrorism Law* (Cambridge: Cambridge University Press, 2005) pp. 65–89.

[126] See Oren Gross, 'Stability and Flexibility: A Dicey Business' in Victor Ramraj, Michael Hor and Kent Roach (eds.), *Global Anti-terrorism Law*, pp. 90–106 at p. 97. He relies here on Carl J. Friedrich, *Constitutional Reason of State: The Survival of the Constitutional*

inscribed in the constitutional order whether this is explicitly stated or not, seems to permit the holder of that power to exercise it 'in violation of the prescribed legal limitations on the use of that very power, turning it into an unlimited power, constrained neither by legal norms nor by principles and rules of the constitutional order'.

In recognizing this dilemma, Gross acknowledges precisely the point that Agamben makes in his critique of Rossiter and other theorists of constitutional dictatorship. To concede to Schmitt the claim that emergencies are a black hole is to give up on the idea that law can control emergencies, however the controls are conceived. Further, as I have argued, to try to maintain that law does play a role risks legitimizing whatever steps the executive takes. Even the barest forms of rule by law seem to evoke the idea that the rule is legitimate because it is in accordance with the law, that is, the rule of law.

However, I do not think we should resist the temptation to bring law into the picture. If we are to answer Schmitt's challenge, we have to be able to show that contrary to his claims the exception can be banished from legal order. We also have to be able to show that one can respond through law to emergencies without creating an exceptional legal regime alongside the ordinary one which will permit government to claim that it is acting according to law when it in effect has a free hand and which will, the longer the exceptional regime lasts, create the problem of seepage of rule of lawlessness into the ordinary legal order. States of emergency can be governed by the rule of law. Here it is significant that Dicey, though he recognized that officials might resort, and might even be justified in so doing, to illegal action in response to an emergency, did not contemplate anything like Gross' Extra-Legal Measures model. He did not, that is, recommend extra-legal action as the way in which public officials should respond. Rather, he emphasized the importance of responses being governed by the rule of law which would require a statute that made it possible for judges to supervise public officials in order to check that the officials had acted in a 'spirit of legality'.[127] Such legislation would be legitimate not only because it emanated from Parliament but also because it could be implemented in accordance with the rule of law. It did not get rid totally of official arbitrariness but cut it down to an acceptable degree.

However, if the legislature is able, whether prospectively or retrospectively to legalize illegality in the sense that judges can no longer enforce

Order (Providence: Brown University Press, 1957), pp.110–11. Friedrich does not quite say what Gross takes him to say but the more interesting issue for my argument is Gross' temptation to constitutionalize the prerogative.

[127] Dicey, *Law of the Constitution*, pp. 412–13.

the spirit of legality, it might seem that Dicey's aspiration is naïve. This book argues that such an assumption is not naïve, indeed, that it should be seen as one of the most important assumptions of legal theory. And I will show that Dicey's account of the rule of law in fact contains rich, albeit somewhat problematic, resources both for the philosophy of law and for the practice of the rule of law. So I will now set out some of the main features of Dicey's theory in order to frame that argument.

Parliamentary or judicial supremacy?

Dicey's account of the rule of law has two features: the 'omnipotence or undisputed supremacy' of Parliament and the 'rule or supremacy of law'.[128] The supremacy of law is said to require in the first place that:

> no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.[129]

In the second place, supremacy requires not only that 'no man is above the law', but also that 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'.[130] In the third place, it means that 'the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as, for example, the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts'.[131]

The problem with this set of resources is that it creates the potential for what Murray Hunt has aptly called a contest of 'competing supremacies', between the legislative monopoly on making law and the judicial monopoly on interpreting the law.[132] Dicey is clear that if these supremacies should come into conflict, Parliament will win. Parliament he said has 'the right to make or unmake any law whatsoever . . . and no person or body is recognised by the law of England as having the right to override or set aside the legislation of Parliament'.[133] Thus there is 'no legal basis for the theory that judges, as exponents of morality, may overrule Acts of Parliament'.[134] Judicial dicta which seem to suggest there is such

[128] *Ibid.*, pp. 183–4. [129] *Ibid.*, p. 188. [130] *Ibid.*, p. 193.
[131] *Ibid.*, p. 195. [132] Murray Hunt, 'Sovereignty's Blight'.
[133] Dicey, *Law of the Constitution*, p. 40. [134] *Ibid.*, p. 62.

a basis merely assert that judges when interpreting statutes will presume that Parliament did not intend to violate morality or international law.[135]

Dicey is often placed within the positivist camp in legal theory because he asserts that in a legal order where there is no bill of rights, a statute that explicitly violates morality is no less valid for that reason. He is also often taken as an apologist for parliamentary supremacy, which is why he and John Austin are credited with putting forward the view of public law which gives rise to the doctrine I called earlier constitutional positivism – the doctrine that regards the legislature as the sole legitimate source of legal norms. Hence the fame of Dicey's example of a statute which decreed that all blue-eyed babies should be put to death. Dicey said that 'legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it'. This showed that there are 'internal' and 'external' limits on what Parliament can do. But Dicey's point is that a law that goes beyond those limits is still a law.[136] He also offered as proof of the 'highest exertion and crowning proof of sovereign power' the validity of Acts of Indemnity, statutes which make legal 'transactions which when they took place were illegal' just because such statutes bring about the 'legalisation of illegality'.[137]

However, the idea that the very existence of a statute makes possible its supervision by judges in a spirit of legality indicates that Dicey cannot be taken as a simple apologist for parliamentary supremacy. To revert to terms used in the Introduction, it seems that rule by law, by statute, presupposes the rule of law. And Dicey in his treatment of parliamentary sovereignty defines a law as 'any rule which will be enforced by the courts',[138] which might seem to suggest that the judges could simply say that a statute that offends the rule of law does not count as law, and hence does not have to be enforced. The intuition here is that there is a difference between a statute that violates a moral principle which is also a principle of the rule of law and a statute that violates a moral principle which, no matter how important it is, is not a principle of the rule of law. While the latter kind of violation might be much more heinous than the former, the former has for a judge a special quality to it. It introduces a tension or even a contradiction into the judge's attempt to make sense of his legal duty – his obligation of fidelity to law.

135 *Ibid.*, pp. 62–3.

136 *Ibid.*, pp. 81–2. Dicey took the example and the quotation from Leslie Stephen, *Science of Ethics* (London: Smith, Elder, 1882).

137 Dicey, *Law of the Constitution*, pp. 49–50.

138 *Ibid.*, p. 40.

Armed with this intuition, we can note that Dicey's blue-eyed baby example was likely to be problematic from the perspective of both legality and morality. A statute which required the execution would be a bill of attainder, a law which attempts to declare guilt and stipulate punishment in the same breath, thus bypassing the courts which are supposed to ensure that no one is punished who had not been fairly determined to be guilty of a pre-existing crime. I will come back to the interesting topic of bills of attainder in later chapters. But it is probably the case that Dicey supposed that if the supremacies come into conflict, Parliament must win, whatever the nature of the conflict.[139] So the first major problem with Dicey's account of the rule of law is that it depends on Parliament choosing to cooperate with judges, which is why it seems naïve.

A second problem is that Dicey did not contemplate how a statute might prospectively provide for an executive response to a state of emergency in a fashion that preserved the rule of law.[140] His stance had a lot, perhaps everything, to do with the fact that he was averse to any legislative delegation to the executive of an authority that would amount to a discretion which could be exercised free of judicial control. Dicey thought that the administrative state is an affront to the rule of law precisely because he considered that a state in which officials were given vast discretionary powers to implement legislative programmes necessarily placed such officials beyond the reach of the rule of law. Put more generally, Dicey was deeply opposed to the administrative state,[141] as were Lord Hewart[142] and F. A. Hayek[143] after him.

There is no doubt that all three of these figures were opposed to the administrative state for an additional reason: as proponents of laisser-faire, they disliked the socially progressive programmes in whose cause the administrative state was constructed. But whatever one's views on this second issue, it would be a mistake to neglect their concern about the rule of law and unfettered official discretion, a concern which is in principle independent of one's opposition or support for the policies which the officials are supposed to implement. It is this concern which also motivates Dicey's opposition to the claims of the royal prerogative,

[139] See the discussion in *ibid.*, note 1, pp. 68–70.

[140] I misinterpreted Dicey on this issue in Dyzenhaus, 'The State of Emergency in Legal Theory' in that I claimed that Dicey clearly expresses a preference that Parliament gives to officials in advance resources to deal with emergencies in accordance with the rule of law. The correct interpretation follows this note in the text.

[141] See for instance, Dicey, *Law of the Constitution*, pp. 227–8.

[142] Lord Hewart, *The New Despotism* (London: Ernest Benn Ltd, 1929).

[143] F. A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1994).

just because those claims purport to stand above or beyond the law.[144] His view can be summed up by saying that the difference between the royal prerogative and a statutory discretion is only a matter of form. While the latter is created by law, both are black holes from the perspective of the rule of law.

Dicey thus claimed that the English constitution made no place for martial law in the sense of the French state of siege, where civil liberties are suspended for a period with power over life, death and detention granted to military tribunals.[145] In other words, his conception of constitutional order rejects the idea that the state can operate qua state in a legal black hole and so does not tolerate a constitutional or legal power to create such a black hole.

In making this claim, Dicey suggested that he was merely describing the constitution. But the better view is that he rejects for normative reasons the Schmittian claim that in an emergency the state perforce acts in a black hole. As Schmitt rightly saw, the Kelsenian idea that the state is completely constructed by law, so that officials act illegitimately when they step outside of the law, starts to look less like (as Hans Kelsen claimed it was) an epistemological hypothesis and more like the expression of a normative even natural law aspiration.[146]

Dicey was drawn to that same kind of idea and thus to that same aspiration, despite his own claims to be engaged in mere description. And from that aspiration it follows that it is not sufficient that there is clear legislative authorization for officials; what they do in the name of the law must also comply with the rule of law. Rule by law and the rule of law are for Dicey two sides of the same coin so that when the rule of law is under stress, a question is raised about whether we even have rule by law. We might have, that is, the true legalization of illegality, a state of affairs brought about by law but one in which there is neither the rule of law nor rule by law.

As I will argue, Dicey's position contains the resources for a sophisticated account of the role of Parliament in legal order which helps us to avoid what I will call the validity trap – the trap we fall into if we think that a sufficient condition for the authority of particular laws is that they meet the formal criteria of validity specified by a legal order. It follows from the trap that if the legal order provides no institutional channel to invalidate a law, then no matter how repugnant we might think its

144 Dicey, *Law of the Constitution*, pp. 63–70.

145 *Ibid.*, pp. 287–8.

146 Schmitt, *Political Theology*, pp. 40–2.

content, it has complete legal authority. The better position, I will argue, is to see that a law might be both valid and yet have only a doubtful claim to legal authority because it overrides explicitly fundamental principles of the rule of law.

In other words, I think it is important to see that Sir Edward Coke might have drawn the wrong conclusion from a correct claim in his dictum in *Dr Bonham's Case*: 'the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void.'[147] That is, while Coke was right to say that the common law constitution will control Acts of Parliament, he was wrong to suppose that it necessarily can void Acts that violate the constitution. However, it does follow from Coke's correct claim that the legal authority of such Acts is in doubt.

But for the moment, I want only to point out that an answer to Schmitt need not accept the terms of his challenge. Indeed, my critique of the positions I have sketched in this section can be summed up in just this fashion. One succumbs to that challenge when one accepts that a substantive conception of the rule of law has no place in a state of emergency, whether this is because one thinks that it is appropriate only for ordinary times or because one thinks that a thin conception is appropriate across the board. To answer that challenge one needs to show that there is a substantive conception of the rule of law that is appropriate at all times. The issue is not how governments and officials should react to an emergency situation for which there is no legislative provision. Rather, it is whether when there is the opportunity to contemplate how the law should be used to react to emergencies, it is possible to react in a way that maintains what I called earlier the rule-of-law project, an enterprise in which the legislature, the government and judges cooperate in ensuring that official responses to the emergency comply with the rule of law. Such reactions will, as we will see, draw on the way in which common law judges have found, contrary to the gloomy predictions of Dicey, Hewart and Hayek, not only that the administrative state is controllable by the rule of law, but also that it has a legitimate role in maintaining the constitutional order.

It is thus a mistake to take regimes of constitutional dictatorship as a test for a substantive conception of the rule of law, for such regimes have already conceded defeat to Schmitt by embedding a black hole in

[147] *Dr Bonham's Case* (1610) 8 Co Rep 114.

the constitution even as they try to confine it. Similarly, it is a mistake to take legislative regimes which explicitly announce an intention that officials may do more or less as they please in responding to an emergency. Such regimes establish a dual state in a sense analogous to that used by Ernst Fraenkel when he described the Nazi state as dual, because, while in many respects it continued to govern through the rule of law, in others it established rule by prerogative or legally unchecked power.[148] But it does not follow from the fact that such dualism has existed that it is necessarily the case that emergencies require the establishment of an exceptional legal order alongside the ordinary one, and hence that Schmitt's challenge is unanswerable.[149]

The real test for Schmitt's challenge is whether legislative responses to emergencies necessarily create black holes or grey holes which are in substance black but, as we have seen, in effect worse because they give to official lawlessness the façade of legality. A crucial part of meeting that test is the demonstration that judges can play a meaningful role in keeping legislatures and governments within the rule-of-law project. Moreover, judges can play this role both when the legislature and the executive are cooperating and in keeping them within the project when the legislature and executive seem to indicate that they wish to avoid control by the rule of law.

The rest of this book undertakes that task. It has a normative and theoretical dimension – the account of the substantive conception of the rule of law – and a practical one – an inquiry into the complex nature of adjudication when the rule of law is under stress. Both dimensions come into view at the same time, in seeing how best to understand judicial

[148] Ernest Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (New York: Octagon Books, 1969). I am not following Fraenkel's sense precisely because the dualism of the Nazi state for him was not between the prerogative state and the rule-of-law state, but between what he called the Prerogative State and the Normative State. The Normative State is what remains of the rule-of-law state when the legal order has deteriorated to the point where the executive can set aside any legal rule whenever this seems convenient. In this situation the Prerogative State can claim jurisdiction and hence unlimited power over any matter. Fraenkel did not argue that a constitution which allows for the suspension of the rule of law necessarily leads to the creation of legal black holes but simply emphasized how the Nazis had abused the Weimar Constitution to create the prerogative state. See for example, at pp. 9–10. He regarded Schmitt as the chief theorist of the prerogative state.

[149] John Ferejohn and Pasquale Pasquino claim that dualism is a universal feature of the 'non-absolutist western legal tradition' in 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 *International Journal of Constitutional Law* 210–39 at 239. In order to make this claim, they argue that Dicey recognized the necessity of martial law. I will respond to their claim in ch. 4.

reactions to such stress. But first it is important to sketch the basis for undertaking this task.

The moral resources of law

In his critique of the idea of constitutional dictatorship, Agamben shrewdly picks up on the fact that Schmitt's claim that legal norms have no application to an exceptional situation depends on his position in general legal theory – that in cases where an answer to a question about the law cannot be derived directly from relevant legal norms, the official – that is, the judge – charged with answering that question has to make a quasi-sovereign or legislative decision, one that is ultimately unconstrained by legal norms.[150]

In other words, the claim about the state of exception is a claim about discretion writ large, but it depends on a claim about discretion in ordinary situations. For Schmitt also thought that less dramatic examples of exceptions could be found throughout liberal legal orders, in all those situations where legal officials have to exercise a discretion because the positive law does not dictate an answer. While such situations did not always or even often involve existential decisions, they reveal the incompetence of the rule of law to address even mundane instances of public decision-making that is based on political considerations. Liberals, Schmitt said, attempt to address the exception either by marginalizing it or by attempting to expel it from legal order. But neither tactic works, a fact revealed when an exceptional situation is especially fraught or intense because it involves authentically political or existential considerations, considerations to do with what Schmitt took as the principal mark of the political – the distinction between friend and enemy.

Agamben accepts this view of general legal theory, a view which, shorn of Schmitt's political baggage, is also shared by H. L. A. Hart, with Kelsen, the last century's most eminent legal positivists. For Hart the situation in which a judge has to decide what he called a penumbral case, a case where the determinate content of legal rules does not dictate a result, is exceptional in the sense that the result is not controlled by law, but reached through an extra-legal, quasi-legislative exercise of judicial discretion.[151]

It is not, I think, too much of an exaggeration to say that for Hart and for many other legal positivists the moment of discretionary judgment in a penumbral case is a kind of mini state of emergency or exception.

[150] Agamben, '*State of Exception*', pp. 47–8.

[151] Hart, *Positivism*, pp. 62–4.

If one takes the function of law to be to provide a framework of rules of sufficiently determinate content such that legal subjects are able to plan their lives securely, then that function is undermined on those occasions when it is not clear what the law requires of the subject. However, the emergency is mini as long as the core of settled law is considerably larger than the penumbra of uncertainty. If that is the case, the stability of legal order is not undermined and the emergency is containable in that it is brought to an end authoritatively by the judge's act of discretion.

In other words, the normal situation of law, where positive law provides clear, determinate answers to questions about what the law requires of its subjects, dominates over the exception and that dominance is constantly shored up by judges.[152] The problem posed by the state of emergency is that the exception puts the core of law in doubt by suspending its application. And that problem becomes worse in the post-9/11 world, because the legislative response to emergencies does not create one vast black hole for a limited time, but rather a multitude of black (or grey) holes within the ordinary law of the land. Ackerman's attempt to revive the institution of constitutional dictatorship and Gross' advocacy of an Extra-Legal measures model react precisely to the concern that that this kind of response is likely to become a permanent feature of legal order and to spread.

Since Agamben accepts that Schmitt's general position is right, he does not address the kind of legal theory that tries to show that it does not follow from the fact that a problem is ungovernable by rules, that is, by highly determinate legal norms, that necessarily a decision about its solution takes place in a legal void.[153] For example, Lon L. Fuller argued that positivists failed to appreciate that legal order must aspire to realize principles of an 'inner morality of law', principles on which judges should draw in answering legal questions.[154] And Ronald Dworkin argues that a judge who approaches even the hardest of hard cases with the right

[152] In fact, Schmitt adopted just this solution to the exception in his earliest work. See Carl Schmitt, *Gesetz und Urteil: Eine Untersuchung zum Problem der Rechtspraxis* (Munich: CH Beck, 1969, first published in 1912). For a more detailed discussion, see David Dyzenhaus, 'Holmes and Carl Schmitt: An Unlikely Pair' (1997) 63 *Brooklyn Law Review* 165–88 at 180–6.

[153] Strangely, Agamben relies on Hans-Georg Gadamer's theory of interpretation to support his claim, despite the fact that Gadamer's theory is very close to Dworkin's; Agamben, '*State of Exception*', p. 40, referring to H. G. Gadamer, *Truth and Method* (London: Sheed & Ward, 1979). It is Agamben's neglect of such responses that permits him to proceed to his dramatic and utterly opaque conclusions about not-law and pure violence.

[154] Fuller, *Morality of Law*.

interpretative attitude will find that he does not have discretion in any strong sense of that term. Rather, the judge will find that the law provides principled answers to legal questions which show the law in its best light, by which Dworkin means best moral light.[155]

I will come back to the debate between positivists and their critics later in this book. For the moment, I want to note that, as we have seen, when it comes to the issue of legal control over states of emergency, many scholars who are well acquainted with the Anglo–American debate seem to think that it has scant relevance. Even if, like Ackerman and Gross, they accept that a substantive conception is appropriate for ordinary times, they generally suppose that it has little or no purchase during a state of emergency. Indeed, it is because they think that history teaches that judges are incapable of playing a role in enforcing the rule of law during states of emergency that they conclude that the rule of law has little or no purchase.

In other words, even if these scholars suppose that during normal times government can and should be subject to a substantive, principled conception of the rule of law, something blocks the conclusion that the same conception should prevail during an emergency. For them, the historical record of judicial failure to uphold the rule of law during emergencies figures prominently in their explanation of the block.

In contrast, as we also have seen, some scholars, for example, Sunstein, start from the position that a much thinner conception of the rule of law is appropriate for all times, ordinary as well exceptional, so for them it is no surprise that the substantive conception is inappropriate for emergencies. For this second group, our understanding of the historical record has to be revised so that we can appreciate that decisions which were traditionally regarded as badges of shame, as examples of judicial spinelessness in the face of executive assertions, were in fact properly decided.

In my view, it is important to keep a grip on the fact that at one level the debate about the rule of law is a theoretical and normative one and as much about what is appropriate during ordinary or normal times as it is about the kind of test that emergency situations pose for different conceptions of the rule of law. For if we can keep that grip, we keep alive the possibility that a substantive conception of the rule of law has a role to play in legal responses to emergencies. And with that possibility vivid, we maintain a critical resource for evaluating the legal responses to emergencies as well as the judicial decisions about the legality of those responses.

[155] Dworkin, *Law's Empire.*

I cannot deny the fact that the record of the judiciary is a problem. But imagine making a decision in a class on the rule of law to teach *Halliday* or *Liversidge* or *Korematsu* without paying any attention to the dissents. Such a class would take as exemplary of the rule of law and of the judicial role in upholding it the reasoning of the majorities in those cases. Consistent sceptics about judicial review would not be bothered by this point because their scepticism about judges is matched by their scepticism about any attempt to understand the rule of law as anything more than the rule by law, which is to say the rule of statutes understood as the rule by the commands of the uncommanded commander. For these sceptics, the slogan ‘the rule of law rather than the rule of men’ is the slogan of those who want rule by judges.[156]

But for those who think that the dissents are important these judgments are at the same time a record of failure and success. They are a record of failure but the failure that is recorded is that of the majority. We look back on these dissents with approval, and on the majority with disapproval, because the dissents show us that it was open to the majority to decide differently. And because we have the benefit today of understanding why the majority should have decided differently, the dissents point to the moral resources of the law that judges and lawyers can draw upon when the rule of law is again put under stress, as it has been since 9/11. That judges in the United Kingdom, Australia, and Canada are showing that they too are capable of folding under stress, that they do not have the nerve of Lord Shaw, Lord Atkin, and Justice Jackson, does nothing by itself to undermine my claim about the moral resources of the law.

Indeed, the very fact that some judges and academics are tempted to rewrite history to support a continuation of the dismal judicial record might show us that law’s potential to provide us with moral resources in times of stress is inexhaustible. One day, and I hope the day is not too far off, judges will have to reckon with the fact that when they had the opportunity to stand up for the rule of law, they decided to take the path of South Africa’s Appellate Division during apartheid, or of the majority of the House of Lords during the two world wars, or the American Supreme Court in *Korematsu*. Prominent in their number will be Lord Woolf, for his own decision in *Rehman* as well as in *Belmarsh*, the judges of the House of Lords who decided *Rheman* and the judges who have decided equivalent cases in Australia and Canada.

[156] See for example Conor Gearty, *Principles of Human Rights Adjudication* (Oxford: Oxford University Press, 2004), pp. 67–8.

Even worse, these judges have made their decisions in full awareness of the past, so with the complete benefit of foresight. And they have done so at a time when, in Canada and the United Kingdom, their jurisdictions had either enacted or entrenched legal protections for human rights and at a time when in all three jurisdictions judges had gone a long way in developing the common law understanding of the rule of law in ways consistent with the postwar drive to protect human rights.

I do want to sound one very necessary cautionary note. I just spoke about law's potential to provide us with moral resources in times of stress. In making that claim, it is important to put the emphasis on 'us' and not 'law'. It would be a mistake to think that judges or the law can save us in times of stress. The first president of postwar Germany made the point that the collapse of the Weimar Republic took place not because of flaws in the Weimar Constitution, but because in Germany's first experiment with democracy there were not enough democrats. Similarly, without enough believers in the rule of law, law cannot deliver its resources to us. Moreover, it is not enough that many lawyers and judges are committed to the rule of law. It is important, indeed much more important, that politicians, public officials, journalists and plain 'we the people' share this commitment. But to say that public opinion is the ultimate basis of the rule of law does not make its principles contingent on what the public thinks.

Towards the end of his dissent in *Korematsu*, Justice Jackson said that that the courts 'wield no power equal to' restraining the command of the war power, should the people let it 'fall into irresponsible and unscrupulous hands'. Thus he concluded that the 'chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history'. But prior to reaching this conclusion, Justice Jackson warned against the danger of a court upholding the constitutionality of the evacuation order after the alleged emergency was over, especially when the order was based on the principle of racial discrimination in criminal procedure:

> The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.[157]

[157] *Korematsu*, at 246.

Taken together these remarks make the point that even though judges cannot restrain power when it is in the wrong hands, so that it is ultimately up to the people to exercise that restraint, judges must nevertheless carry out their duty to uphold the rule of law. If the judges fail to carry out their duty, they will also fail to clarify to the people what constitutes responsible government – government in compliance with the rule of law. I will now turn to my defence of the claim that judges have such a duty and, moreover, one to uphold a substantive conception of the rule of law.