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## Does the Rule of Law Require the Separation of Powers?

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The separation of powers is an enigmatic political ideal, particularly in the context of the modern administrative state, in which administrative officials routinely perform a combination of legislative, judicial, and executive functions. In this article we reexamine this ideal by interrogating Adrian Vermeule's provocative claim that the separation of powers is neither necessary nor desirable for the rule of law. We begin by comparing Vermeule's view with the constitutional models of two theorists who share a similar skepticism of the separation of powers – Thomas Hobbes and Carl Schmitt. We argue that Vermeule's view is best understood as a variation of Schmitt's apology for unitary executive power. By contrast, Hobbes emphasises what we call law's systematicity. We then proceed to elaborate this idea. We claim that at the conceptual level law's systematicity issues into a 'proto-separation' of state institutions that together realise the rule of law. Because law is systematic, it also makes normative sense to combine the rule of law and the separation of powers. The separation of powers allows us to articulate the demands of the rule of law through a process of public deliberation and scrutiny. By contrast, a political order that relinquishes its commitment to the separation of powers for the sake of unleashing the power of the executive degrades its commitment to the rule of law as well.

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## INTRODUCTION

Like other constitutional values, the separation of powers is a complex and controversial idea. While it has traditionally been regarded as an essential pillar of constitutionalism,<sup>1</sup> it is often criticised for failing to capture the operation of contemporary constitutional systems. In particular, critics contend that it

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1 National Assembly of France, 'Declaration of the Rights of Man and of the Citizen' 26 August 1789, Art 16: 'A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.'

does not align with the operation of the modern executive.<sup>2</sup> First, they argue that the canonical conception of the separation of powers (which suggests that legislative, judicial, and executive functions can be mapped neatly onto different governmental institutions) commits us to a constitutional formalism which cannot account for prominent features of the modern administrative state or provide meaningful standards for evaluating its performance.<sup>3</sup> Second and relatedly, the critics suggest that, as the challenges facing modern societies become more complex (think terrorist threats, financial crises, pandemics, and fractious geopolitics that can lead to armed conflict), there is a noticeable tendency to loosen separation of powers constraints while empowering the executive.<sup>4</sup> While many prominent constitutional and political theorists have observed this trend towards executive aggrandisement, these observations have provoked reactions ranging from alarm<sup>5</sup> and concern<sup>6</sup> to indifference<sup>7</sup> and enthusiasm.<sup>8</sup>

Against this backdrop, the question arises whether the separation of powers has any continuing relevance. This question has been posed provocatively by Adrian Vermeule. Vermeule has long advocated a vision of American constitutional law that gives pride of place to executive power.<sup>9</sup> Recently, though, he has advanced a theoretical argument, which bolsters this vision and extends it beyond American borders. That argument has conceptual and normative dimensions. At the conceptual level, Vermeule contends that there is no necessary connection between the separation of powers and the rule of law, because one can have a regime effectively governed (and presumably legitimised) by the rule of law that does not comport with the separation of powers. This conceptual claim serves a narrower and much more consequential normative claim, viz that it is a good thing to release the executive from the shackles of the separation of powers, because this will enable it to implement the right conception of the common good more efficiently.

While Vermeule's argument is rather abbreviated, his provocation provides an opportunity to explore the relationship between the rule of law and the

2 For a classic version of this critique see M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Indianapolis, IN: Liberty Fund, 1998) ch 13.

3 David Dyzenhaus, 'Formalism's Hollow Victory' [2002] *New Zealand Law Review* 525.

4 In response to such challenges, leaders of the executive branch have gradually sought to consolidate direct discretionary control over the administrative apparatus of the state, direct it strategically to realise their political aims, and insulate their discretionary decisions from external channels of legal and political accountability. See Elena Kagan, 'Presidential Administration' (2001) 114 *Harvard Law Review* 2245; Margit Cohn, *A Theory of the Executive Branch: Tension and Legality* (Oxford: OUP, 2021) ch 1.

5 See Bruce Ackerman, *The Decline and Fall of the American Republic* (Cambridge, MA: Harvard University Press, 2010); Thomas Poole, *Reason of State: Law, Prerogative and Empire* (Cambridge: CUP, 2015).

6 See Cohn, n 4 above.

7 See Kagan, n 4 above.

8 See Steven Calabresi and Christopher Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (New Haven, CT: Yale University Press, 2008).

9 Adrian Vermeule, 'Our Schmittian Administrative Law' (2009) 122 *Harvard Law Review* 1095; Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford: OUP, 2010); Adrian Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Cambridge, MA: Harvard University Press, 2016).

separation of powers, more broadly. In this article we begin this broader project by examining the two dimensions of Vermeule's argument. In the first part, we compare his view with the models of government offered by two theorists who share Vermeule's skepticism about the separation of powers – Thomas Hobbes and Carl Schmitt. We argue that, despite Hobbes' overt contempt for the separation of powers, his liberal account of the rule of law is nevertheless *systematic* in the sense that it is based on an account of the rule of law that is inter-subjective and institutionally complex. Because the relationship between legal subjects, public officials, and governmental institutions is mediated through reasoned discourse regarding publicly accessible legal standards, as opposed to the unilateral exercise of executive discretionary power, any attempt to enlist Hobbes' theory in service of Vermeule's bold conceptual claim is doomed to fail. Therefore, we argue that Vermeule's argument is best understood as a version of Schmitt's account of transcendent executive power, an intellectual debt that is explicit in Vermeule's scholarship on American administrative law. The new wrinkle is that Vermeule's more recent intervention is motivated by an illiberal conception of the common good, which welcomes the prospect that executive officials might unilaterally direct legal subjects towards that end.<sup>10</sup>

In the second part, *contra* Vermeule we argue for a close connection between the rule of law and the separation of powers. But rather than offer a full-fledged account of the separation of powers, especially as it applies to the modern administrative state, we pick up the thread from our discussion of Hobbes to elaborate the more basic idea of law's systematicity. We claim that law's systematicity issues into a set of constitutional imperatives calling for a 'proto-separation' between state institutions, particularly between law-creating and law-applying institutions, and that we can hardly conceive of the rule of law without at least such proto-separation. Moreover, we argue that, when the separation of powers goes well, it reinforces the rule of law because it allows individuals and public officials to articulate the demands of the rule of law through a process of deliberation and scrutiny. By contrast, a political order that relinquishes its constitutional commitment to the separation of powers for the sake of unleashing the power of the executive ends up degrading its commitment to the rule of law and exacerbating the risk that executive power might be abused or exercised arbitrarily.

Clearly, not everyone that champions a robust executive is committed either to Schmitt's conception of transcendent executive power or to Vermeule's conception of the common good. Even so, Vermeule's argument brings into sharp relief a way of constitutional thinking that is latent, perhaps in more nuanced and less explicit ways, elsewhere as well. This way of thinking praises the effective and efficient implementation of executive orders and is skeptical towards institutional arrangements that check it.<sup>11</sup> By arguing for the close connection between the rule of law and the separation of powers, we aim

10 Adrian Vermeule, 'Integration from Within' (2018) 2 *American Affairs*, reviewing Patrick Deenen, *Why Liberalism Failed* (New Haven, CT: Yale University Press, 2018).

11 For example, we encounter the same way of thinking in the claim that the Brexit referendum gave the executive the authority to implement the UK's withdrawal from the Euro-

to make clear what we jeopardise when we indulge this way of thinking.<sup>12</sup> In this sense, our claims go beyond Vermeule. If sound, they paint a very different picture of what a flourishing constitutional order looks like. The separation of powers may render the pursuit of government policy less efficient, but the cost is more than offset by the legitimacy gains that accrue in this way from the realisation of the rule of law. At the methodological level, too, the article has a broader aim than merely to criticise Vermeule. It suggests that the conceptual and normative inquiries into the meaning of the rule of law and the separation of powers are mutually reinforcing. Conceptual arguments show that the rule of law would not be at all attainable without a degree of institutional interaction, while normative arguments elaborate how this interaction should be configured so that the rule of law can best be advanced. Thus, even if one is unmoved by the merits of Vermeule's argument, one can nevertheless glean important insights by subjecting it to rigorous, but ultimately constructive, criticism.

## SKEPTICISM ABOUT THE SEPARATION OF POWERS

### The rule of law and the separation of powers

At first blush, it appears that Vermeule's primary concern is conceptual tidiness. Writing in this vein, he warns his audience not to conflate the separation of powers with the rule of law. The rule of law, he claims, does not necessarily entail any commitment to the separation of powers. At various points, he asks rhetorically whether the rule of law existed in ancient Rome, medieval England, or in the modern administrative state – where executive and administrative officials routinely perform a combination of legislative, judicial, and executive tasks.<sup>13</sup> However, instead of posing these questions to legal positivists who aim to identify the necessary conditions for the existence of law, Vermeule poses them more generally to 'theorists of liberal legalism' who are supposed to assume that the separation of powers is a conceptual necessity. Thus, he asserts that '[t]he liberal theorist takes it on constitutional faith that the fusion of power equates to a-legal arbitrariness,

pean Union without any parliamentary involvement. See John Finnis, 'Brexit and the Balance of Our Constitution' Judicial Power Project, Sir Thomas More Lecture at Lincoln's Inn, 12 December 2016 at Finnis-2016-Brexit-and-the-Balance-of-Our-Constitution2.pdf [https://perma.cc/4TF3-LVM4].

12 At this point, it is important to ward off a possible misunderstanding. In this article, we do not undertake to defend the canonical conception of the separation of powers with its tripartite distinction of functions and branches of government. In fact, we are of the view that in order to make sense of how the separation of powers applies to the administrative state we must move beyond it. Hence, when we speak of the separation of powers here, we have in mind a more generic idea, namely that there is value in the constitutionally regulated interaction among a plurality of different state institutions, each with a distinct role (though not necessarily separate along the lines of the canonical conception). It is this idea that we will try to relate to the rule of law.

13 Adrian Vermeule, 'The Rule of Law Without the Separation of Powers: Legality in the Classical Tradition' *The New Digest* 13 September 2023, 2–4.

but the first does not conceptually entail the second, nor does history allow the assumption that the second flows predictably from the first'.<sup>14</sup> There is a commonsensical air about this assertion: If we think of the rule of law as a set of requirements of non-arbitrary governance (for example non-retroactivity, generality, and clarity), then it is conceivable that a benign executive leader can observe them of her own volition without the need for any external institutional checks. History is supposed to reinforce the theoretical point. If we accept that the rule of law existed in ancient Rome, medieval England, or in the modern administrative state, then we should 'entertain the heretical thought that, perhaps, building the separation of powers into the conceptual essence of the rule of law is too demanding'.<sup>15</sup>

What is the payoff from focusing on the relationship between the rule of law and the separation of powers? It is important to recall that the rule of law is commonly taken to be an essential ingredient of the legitimacy of executive action.<sup>16</sup> We say that, to be legitimate, executive action must be authorised by law, and that means that it must comply with the rule of law. If Vermeule is right, then we do not need to adhere to the separation of powers to legitimise executive action. That Vermeule's main interest is with the legitimisation of executive action becomes obvious when we view his conceptual claim side by side with the normative one. As we shall see in more detail below, Vermeule contends that, more than merely a conceptual possibility, a legal order that relinquishes liberal legal theorists' hang-up about the separation of powers is morally superior, because it enables a muscular executive to realise certain 'public-regarding ends, the affirmative public benefits, that underlie the combination of powers'.<sup>17</sup> In this sense, then, the conceptual claim is a stepping stone towards that full-blooded normative judgement.

### Varieties of skepticism about the separation of powers

Vermeule does not elaborate his conceptual claim through close historical or philosophical analysis of the rule of law.<sup>18</sup> So his view must be reconstructed, and this will be our aim in the rest of the section. We shall ask: What kind of legal order does he have in mind when he says that we can subscribe to the rule of law while forsaking the separation of powers? How is the rule of law conceived in such an order?

To answer these questions, we shall start by examining two theorists who seem to share Vermeule's skepticism about the separation of powers and enthusiasm for consolidated executive power – Thomas Hobbes and Carl

14 *ibid.*, 4.

15 *ibid.*, 5.

16 See characteristically A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 8th ed, 1915) ch 4.

17 Vermeule, n 13 above, 6.

18 See for example Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, rev ed, 1969); Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law* (Oxford: OUP, 1979) 210; David Dyzenhaus, *The Long Arc of Legality: Hobbes, Kelsen, Hart* (Cambridge: CUP, 2022).

Schmitt. We shall contend that there is an important difference in the way that Hobbes and Schmitt construe the legal order and the place of the executive in it. Drawing this contrast will help us shed light on the theoretical complexion of Vermeule's proposal. Like Schmitt and unlike Hobbes, Vermeule champions an executive power that is untrammelled by legal standards embedded in the constitution, legislation, the common law, administrative decisions, or the parliamentary decision-making process.

Thomas Hobbes famously argues that individuals confronted by pervasive political disagreement in a pluralistic state of nature can nevertheless reason their way toward establishing essential institutions required for establishing and maintaining legal order.<sup>19</sup> Put simply, he asserts that reasonable individuals will agree to surrender their natural right to liberty via a social contract that empowers the Sovereign to maintain peace and security through law.<sup>20</sup> This arrangement, Hobbes argues, is conducive to the common good, because 'if their actions be directed according to their particular judgements, and particular appetites, they can expect thereby no defence, nor protection, neither against a Common enemy, nor against the injuries of one another'.<sup>21</sup> Thus, the common good, according to Hobbes, refers to the mutual advantages of living in civil society (most importantly the advantage of self-preservation)<sup>22</sup> that are otherwise unobtainable in a state of nature, in which individuals are blinded by self-interest and violently pursue their desired ends to the detriment of others.<sup>23</sup>

When Hobbes proceeds to define the 'Rights of Sovereigns by Institution' in chapter 18 of *Leviathan*, he seems to endorse something akin to Vermeule's conceptual claim – that neither the existence of law nor the rule of law entails any commitment to the separation of powers. Moreover, he suggests that the Sovereign's primary role is to steer individuals away from their private interests toward the common good – their mutual or shared interest in maintaining security under the law. Thus, Hobbes states that 'it is no wonder if there be somewhat else required (besides Covenant) to make their Agreement constant and lasting, which is a Common Power, to keep them in awe, and to direct their actions to the Common Benefit'.<sup>24</sup> The vehicle for establishing an effective Sovereign is for individuals 'to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will'.<sup>25</sup>

What follows resembles the elements of illiberal and authoritarian rule by an indivisible and unfettered executive power: legal subjects are prohibited from repudiating or revising the social contract without the Sovereign's permission,<sup>26</sup> are precluded from arguing that the Sovereign forfeits the

19 Thomas Hobbes, *Leviathan* Richard Tuck (ed) (Cambridge: CUP, 1996).

20 *ibid.*, c. XIV.

21 *ibid.*, 118.

22 *ibid.*, 88–89.

23 *ibid.*, ch XIII.

24 *ibid.*, 120.

25 *ibid.*

26 *ibid.*, 122.

right to rule if it breaches the social contract,<sup>27</sup> and those who opposed the Sovereign's initial appointment 'must either submit to [the Sovereign's] decrees, or be left in the condition of warre he was in before; wherein he might without injustice be destroyed by any man whatsoever'.<sup>28</sup> The Sovereign is immune from liability<sup>29</sup> and has unlimited discretion to secure peace and order,<sup>30</sup> regulate speech,<sup>31</sup> choose public ministers and magistrates, declare war,<sup>32</sup> and distribute public honours and riches.<sup>33</sup> The Sovereign also retains 'the Right of Judicature; that is to say, of hearing and deciding all Controversies, which may arise concerning Law, either Civill, or Naturall, or concerning Fact'.<sup>34</sup> Hobbes argues that this impressive catalogue of sovereign powers is both 'incommunicable' and 'inseparable',<sup>35</sup> and reprimands Parliamentarians for tearing at the fabric of sovereignty by saying that '[i]f there had not first been an opinion received of the greatest part of *England*, that these Powers were divided between the King, and the Lords, and the House of Commons, the people had never been divided, and fallen into this Civill Warre'.<sup>36</sup>

Nevertheless, despite his grandiose characterisation of sovereign rights, Hobbes' theory retains a liberal ethical foundation. Instead of resorting to transcendent myth, tradition, divine right or divine revelation to justify the Sovereign's temporal right to rule, Hobbes lays out a complex and relatively nuanced account regarding the normativity of law from the internal perspective of legal subjects.<sup>37</sup> According to this account, the legitimacy of sovereign authority is ultimately grounded by a social contract between free and equal individuals reasoning together in order to establish an institutional framework for legitimate self-government capable of resolving otherwise internecine political disagreements. That institutional framework is designed to generate and sustain 'Artificiall Chains, called *Civill Lawes*, which they themselves, by mutuall covenants, have fastened at one end, to the lips of that Man, or Assembly, to whom they have given the Sovereign Power; and at the other end to their own Ears'.<sup>38</sup> Within this framework of civil laws that secures the conditions of peace and security that cannot be obtained in the state of nature, individuals retain the freedom to pursue their personal goals and interests.<sup>39</sup>

The tension between authoritarian and liberal themes in Hobbes' political theory crops up repeatedly throughout *Leviathan*. Shortly after compiling the catalogue of sovereign powers in chapter 18, he discusses the inalienable

27 *ibid*, 122–123.

28 *ibid*, 123–124.

29 *ibid*, 124.

30 *ibid*.

31 *ibid*, 124–125.

32 *ibid*, 126.

33 *ibid*.

34 *ibid*, 125.

35 *ibid*, 127.

36 *ibid*.

37 H. L. A. Hart, *The Concept of Law* (Oxford: OUP, 2nd ed with a new Postscript, 1994) 57.

38 Hobbes, n 19 above, 147.

39 *ibid*, ch 21, 152.

rights that individuals retain in civil society in chapter 21. While individuals necessarily relinquish their right to natural liberty (the unlimited freedom to decide how best to survive according to their own judgement) and assume a broad duty to obey the law, Hobbes nevertheless insists that not all individual rights are alienable.<sup>40</sup> An individual retains the unconditional right to self-preservation and is therefore justified in resisting a Sovereign's commands to commit suicide, wound himself,<sup>41</sup> self-incriminate, 'or to abstain from the use of food, ayre, medicine or any other thing, without which he cannot live'.<sup>42</sup> Similarly, individuals retain a conditional right to disobey dangerous or dishonourable commands and are therefore justified in refusing conscription or military service, provided that one's decision does not jeopardise the survival of the Commonwealth.<sup>43</sup> Finally, individuals are altogether released from their duty to obey when the Sovereign is no longer capable of maintaining the conditions necessary for peace and security, because 'the right men have by Nature to protect themselves, when none else can protect them, can by no Covenant be relinquished'.<sup>44</sup>

In addition, Hobbes offers an equally complex and nuanced account of the rule of law, which guides and constrains how sovereign authority is exercised.<sup>45</sup> Even though he defined law as 'not Counsell, but Command',<sup>46</sup> Hobbes' account of law's normativity focuses on how systematic features sustain a framework of civil laws that are publicly accessible, relatively stable, and interpreted equitably by legal officials.<sup>47</sup> When setting out this account, Hobbes remains agnostic when it comes to questions about institutional form, but is more prescriptive when it comes to the institutional process by which the content of the law is interpreted and applied. Instead of attempting to define the essential composition or function of different governmental institutions, Hobbes lays out a *modus vivendi* for resolving political disagreements within a framework of civil laws.

For example, when defining the office of the legislator, he simply states that the legislator 'is only the Sovereign, be he one Man, as in a Monarchy, or one Assembly of men, as in a Democracy, or Aristocracy'.<sup>48</sup> The more important point is that the legislator's commands 'are to be signified by sufficient Signs; because a man knows not otherwise how to obey them'.<sup>49</sup> While Hobbes states that the legislator 'is not subject to the Civill Lawes', he immediately clarifies that this only means that the legislator can change the law through

40 See generally Susanne Sreedhar, *Hobbes on Resistance: Defying the Leviathan* (Cambridge: CUP, 2010).

41 Hobbes, n 19 above, ch 14 and ch 27.

42 *ibid.*, 151.

43 *ibid.*

44 *ibid.*, 153.

45 See for example Dyzenhaus, n 18 above, ch 2; David Dyzenhaus, 'Hobbes on the Authority of Law' in David Dyzenhaus and Thomas Poole (eds), *Hobbes and the Law* (Cambridge: CUP, 2012) 186.

46 Hobbes, n 19 above, 183.

47 Dyzenhaus, n 18 above, 90.

48 Hobbes, n 19 above, 184.

49 *ibid.*

the process of legislative repeal and amendment.<sup>50</sup> Thus, while Hobbes is equivocal about the legislator's formal character, he nevertheless asserts that the normativity of legislation cannot be secured simply through some brute combination of executive fiat and coercion, but through a relatively complex institutional framework capable of producing and revising publicly accessible and intelligible legal standards that can be perceived as legitimate from the perspective of legal subjects.

Similarly, when it comes to the delegation of sovereign authority, Hobbes simply states that the Sovereign has broad powers to employ public ministers 'to represent in that employment, the person of the Common-wealth'.<sup>51</sup> Interestingly, Hobbes does not draw an essential analytical distinction between administrative officials and judges. Rather, he refers compendiously to them as public ministers, because 'all Judicature is essentially annexed to the Sovereignty, and therefore all other Judges are but Ministers of him, or them that have the Sovereign power'.<sup>52</sup> The more important point is that, while an individual's duty to obey the law extends to ordinances issued by public ministers, those public ministers 'can do nothing against [the Sovereign's] Command, or without his Authority ... because they serve him in his Political Capacity'.<sup>53</sup> In addition, he argues that disputes regarding the exercise of delegated power must be resolved impartially by an arm's length adjudicator. Thus, he states that 'a controversie between the party Judged, and the Judge; which because they both be Subjects to the Sovereign, ought in Equity to be Judged by men agreed on by consent of both; for no man can be Judge in his own cause'.<sup>54</sup> The point is that, while Hobbes does not draw an essential distinction between judges and administrative officials, he nevertheless claims that they share the same basic duty to act congruently with previously enacted legislation. And if a dispute regarding the exercise of delegated power should emerge, that dispute should be adjudicated impartially by officials who do not have a conflict of interest regarding the outcome.<sup>55</sup>

Later, Hobbes elaborates on the theme of equitable interpretation by saying that law of nature (ie those qualities that dispose men to peace and obedience) and the civil law 'contain each other and are of equall extent'.<sup>56</sup> Thus, he says 'if the Sovereign employ a Publique Minister, without Instructions what to doe, he is obliged to take for Instructions the Dictates of Reason', because the Minister should assume 'his Sentence ought to be according to the reason of his Sovereign, which being always understood to be Equity, he is bound to it by the Law of Nature'.<sup>57</sup> While Hobbes recognises that '[a]ll

<sup>50</sup> *ibid.*

<sup>51</sup> *ibid.*, 166.

<sup>52</sup> *ibid.*, 168.

<sup>53</sup> *ibid.*, 167.

<sup>54</sup> *ibid.*, 168.

<sup>55</sup> *ibid.*, 109: 'no man in any Cause ought to be received for Arbitrator, to whom greater profit, or honour, or pleasure apparently ariseth out of the victory of one party, than of the other; for hee hath taken (though an unavoidable bribe, yet) a bribe; and no man can be obliged to trust him.'

<sup>56</sup> *ibid.*, 185.

<sup>57</sup> *ibid.*, 188.

Laws ... have need of interpretation',<sup>58</sup> he states that legal officials should employ a mode of legal interpretation that is based on evidence tendered by witnesses,<sup>59</sup> avoids contradictions,<sup>60</sup> is rationally connected to the Sovereign's declared objectives,<sup>61</sup> and produces reasonably justifiable outcomes.<sup>62</sup> And, in the unlikely event that 'the Words of the Law do not fully authorise a reasonable Sentence', Hobbes advises the decision-maker 'to supply it with the Law of Nature; or if the case be difficult, to respite judgement till he have received more ample authority' from the legislator.<sup>63</sup>

The upshot is that, despite his grandiose definition of sovereignty and apparent opposition to nascent arguments about the separation of powers, Hobbes simultaneously identifies important procedural, institutional, and normative constraints that are necessary for establishing and maintaining a framework of civil laws that can be plausibly perceived as legitimate from the internal perspective of legal subjects. Plucked from the broader context of Hobbes' theory, the sweeping catalogue of Sovereign rights in chapter 18 of *Leviathan* appears to support Vermeule's general argument that the separation of powers is unnecessary, at least insofar as the existence of law or the rule of law is concerned. However, when one tries to reconcile Hobbes' characterisation of sovereign powers in chapter 18 with his recognition of inalienable individual rights in chapter 21, the normative constraints on delegated authority in chapter 23, and his theory of legality in chapter 26, any attempt to enlist Hobbes in support of Vermeule's argument seems doomed to failure. At the very least, Hobbes' response to the sort of rhetorical questions posed by Vermeule is far more complex and nuanced than it might appear at first glance.

The broader theoretical point is that, while Hobbes was clearly skeptical about a formal conception of the separation of powers whereby different institutions perform essentially distinct roles, his theory nevertheless has a systematic dimension with normative implications. Law, for Hobbes, is not merely a heap of ad hoc primary rules or orders issued by an uncommanded commander, but a relatively complex inter-subjective and inter-institutional normative practice. Thus, the legislator (whatever its composition) is constrained to express its decisions or act in accordance with a principle of legality – legislation must be publicised and can only be amended through the process of enactment, repeal, or amendment. And while the legislator can delegate authority to various public officials through law, those public officials must act congruently with the delegation of authority and any interpretive disputes regarding the exercise of delegated authority must be adjudicated impartially. Finally, the adjudication of interpretive disputes must be based on verifiable facts and justified reasonably in light of shared legal standards. We will elaborate further on this systematic dimension of legal order in the next part of the article.

58 *ibid.*, 190.

59 *ibid.*, 109, 193, 195.

60 *ibid.*, 187.

61 *ibid.*, 187, 191.

62 *ibid.*, 187, 192.

63 *ibid.*, 194.

The relatively complex nature of Hobbes' theory might explain why Vermeule employs Carl Schmitt as his preferred interlocutor when expounding upon the nature of executive authority<sup>64</sup> and American administrative law.<sup>65</sup> Whereas Hobbes provides a systematic liberal account of the legal institutions and processes that preserve peace and security in a pluralistic society, Schmitt argues that the institutional and procedural constraints integral to liberal constitutionalism weaken the sovereign's ability to maintain a certain type of social order. Thus, even though Schmitt was inspired by the god-like status of the leviathan and Hobbes' authoritarian definition of sovereign rights, he was harshly critical of the liberal elements and broader normative implications of Hobbes' theory.<sup>66</sup> Amongst other things, Schmitt claimed that the liberal elements in Hobbes' theory (especially the confluence of individual rights, institutional checks, and legal constraints normally associated with constitutionalism or *Rechtsstaat*) had been exploited by Jewish political philosophers to neutralise the essential power of the state, rendering it vulnerable to external and internal enemies.<sup>67</sup> In order to rescue the sovereign powers of the presidency from this threat, Schmitt articulated an illiberal paradigm that combined a transcendent conception of executive power with a nihilistic critique of liberal constitutionalism.

The focal point for Schmitt's theory, which he developed during the tumultuous decade prior to the collapse of the Weimar Republic, was Article 48 of the Weimar Constitution<sup>68</sup> that empowered the *Reichspräsident* to assume control over individual states and suspend individual rights when the public order and security of the nation were threatened.<sup>69</sup> In his initial analysis of the issue, written in 1921,<sup>70</sup> Schmitt likened the President's emergency powers to the classical idea of a commissarial dictatorship, a legally defined office whereby the diverse powers of the Roman state were consolidated and delegated to an executive official for the limited purpose of overcoming an existential threat and restoring the *status quo ante*.<sup>71</sup>

However, within a year he changed tack by arguing that the '[s]overeign is he who decides on the exception'<sup>72</sup> or 'the highest, legally independent,

64 Posner and Vermeule, n 9 above; Eric Posner and Adrian Vermeule, 'Demystifying Schmitt' in Jens Meierhenrich and Oliver Simons (eds), *The Oxford Handbook of Carl Schmitt* (Oxford: OUP, 2017) 612.

65 Adrian Vermeule, 'Our Schmittian Administrative Law' n 9 above; Vermeule, *Law's Abnegation* n 9 above.

66 Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* George Schwab and Erna Hilfstein (trans) (Chicago, IL: University of Chicago Press, 2008); John McCormick, 'Teaching in Vain: Carl Schmitt, Thomas Hobbes, and the Theory of the Sovereign State' in Jens Meierhenrich and Oliver Simons (eds), *The Oxford Handbook of Carl Schmitt* (Oxford: OUP, 2013) 269.

67 Schmitt, *ibid*, chs IV–VI.

68 *ibid*, 11–12.

69 Constitution of the German Reich of 11 August 1919, Art 48.

70 Carl Schmitt, *Dictatorship: From the Origin of the Modern Concept of Sovereignty to Proletarian Class Struggle* (Cambridge: Polity Press, 2014) ch 1.

71 John McCormick, 'The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers' (1997) 10 *Canadian Journal of Law and Jurisprudence* 163.

72 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* George Schwab (trans) (Chicago, IL: University of Chicago Press, 1985) 5.

underived power<sup>73</sup> to decide whether a state of exception exists and how to eliminate it.<sup>74</sup> From Schmitt's perspective, 'the legal order rests on a decision and not on a norm', because the will of the sovereign transcends the framework of legal norms and institutional constraints deemed essential to liberal constitutionalism.<sup>75</sup> At most, the sovereign is only nominally subject to indeterminate legal constraints that effectively enables it to exercise unrestrained power. As Schmitt puts it, '[t]he most guidance the constitution can provide is to indicate who can act in such a case. If such action is not subject to controls, if it is not hampered in some way by checks and balances, as is the case in a liberal constitution, then it is clear who the sovereign is'.<sup>76</sup>

Instead of grounding the legitimacy of sovereign authority in law or social contract, Schmitt argues that it is merely contingent upon its ability to solidify the existential distinction between friend and enemy in the political arena.<sup>77</sup> This distinction marks 'the intensity of an association or disassociation of human beings whose motives can be religious, national (in the ethnic or cultural sense), economic, or of another kind and can effect at different times different coalitions and separations'.<sup>78</sup> A friend is fellow member of a social group with a homogenous collective identity, whereas an enemy is 'in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible'.<sup>79</sup> While individual members of a political society ultimately decide who their enemy is,<sup>80</sup> the function of the sovereign is to represent their collective judgement by taking decisive action on existential issues that define the collective identity of the *demos*. Such issues are the ones that the members of society are prepared to resolve ultimately through war and violence.<sup>81</sup> Put simply, the efficacy of the sovereign's power depends on its ability to draw the political distinction between friend and enemy in a manner that elicits popular acclaim.

While much of Schmitt's argument revolves around relatively abstract claims about the political foundations of sovereign power, he buttresses those claims with a nihilistic critique of the institutional and normative features he associated with liberal constitutionalism – a parliamentary system of government, individual rights, and the separation of powers.<sup>82</sup> The systematic logic of liberal constitutionalism, Schmitt noted, is premised upon the belief that 'the truth can be found through an unrestrained clash of opinion and that competition will produce harmony'.<sup>83</sup> A system of government in which political disagreements are resolved through open parliamentary debate, but-

73 *ibid.*, 17.

74 *ibid.*, 1–2.

75 *ibid.*, 10.

76 *ibid.*, 7.

77 Carl Schmitt, *The Concept of the Political* George Schwab (trans) (Chicago, IL: University of Chicago Press, 1996) 27.

78 *ibid.*, 38.

79 *ibid.*, 27.

80 *ibid.*

81 *ibid.*, 29–35.

82 Carl Schmitt, *The Crisis of Parliamentary Democracy* Ellen Kennedy (trans) (Cambridge, MA: MIT Press, 1988) ch 2.

83 *ibid.*, 35.

tressed by freedom of speech and a free press, and balanced by a division of institutional powers might arguably be perceived as legitimate (at least from a liberal perspective). As one leading theorist insightfully points out:

the principle of division or separation of powers is a principle intended to achieve a balance that will prevent the abuse of power by placing checks on all repositories of power, but most especially on the power of the legislature. It is meant to tame power itself.

The principal device in this taming is the requirement that political power has to be manifested in general legal norms. For that requirement requires in turn that a distinction between the norm and its concrete application be maintained; that all citizens are equal before the law, which means simply that particular commands or mere measures are not employed as the basis for state action; and that judges are independent, which means that they are entirely dependent on, limited to the application, of general statutory norms.<sup>84</sup>

However, Schmitt argued that the package of institutions and norms essential to liberal constitutionalism is outdated and threatens the very existence of the state. Instead of invigorating the body politic by clarifying and intensifying the distinction between friends and enemies, liberal constitutionalism channels political disagreements through a complex set of procedures, norms, and institutions designed to produce reasoned compromise between a plurality of individual identities, rights, and interests;<sup>85</sup> instead of rallying individuals around a common banner to annihilate foreign and domestic enemies, liberals construct 'a series of methods for hindering and controlling the state's and government's power' in order to protect individual freedom and bourgeois property rights;<sup>86</sup> and instead of consolidating executive power and vesting it in a popular political leader capable of taking decisive action, liberals attempt to impose ethical constraints via the separation of powers.<sup>87</sup> In what is clearly meant to be a damning indictment, Schmitt notes that the liberal response to the question 'Christ or Barabbas?' ends typically with 'a proposal to adjourn or appoint a commission of investigation'.<sup>88</sup>

Writing amidst the War on Terror that erupted after the 9/11 terrorist attacks and in the aftermath of the 2008 economic crisis, Vermeule harnessed Schmitt's theory to highlight the futility of law and the separation of powers as means of regulating executive power.<sup>89</sup> Following Schmitt, Vermeule argues that the emergency powers possessed by the President and administrative agencies are impervious to legal norms and institutional checks, saying:<sup>90</sup>

Emergencies cannot realistically be governed by *ex ante*, highly specified rules, but at most by vague *ex post* standards; it is beyond the institutional capacity

84 David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford: OUP, 1997) 62.

85 Schmitt, n 82 above, 39–45.

86 *ibid*, 70.

87 *ibid*, 61.

88 Schmitt, n 72 above, 62.

89 Vermeule, 'Our Schmittian Administrative Law' n 9 above; Posner and Vermeule, n 9 above.

90 Vermeule, *ibid*, 1101.

of lawmakers to specify and allocate emergency powers in all future contingencies; practically speaking, legislators in particular will feel enormous pressure to create vague standards and escape hatches – for emergencies and otherwise – in the code of legal procedure that governs the mine run of ordinary cases in the administrative state, because legislators know they cannot subject the massively diverse body of administrative entities to tightly specified rules, and because they fear the consequences of lashing the executive too tightly to the mast in future emergencies.

He then attempts to debunk what he considers to be a myth popularised by liberal legal theorists (like Lon Fuller)<sup>91</sup> that administrative and executive officials can be held legally accountable for their decisions through judicial enforcement of general common law principles of due process and substantive reasonableness.<sup>92</sup> From Vermeule's perspective, liberal constitutionalism is 'hopelessly utopian',<sup>93</sup> because it cannot grapple with the structural gaps and indeterminacy that are inherent to American administrative law.<sup>94</sup> Some gaps, like the canon of constitutional avoidance excluding the President (in the absence of explicit Congressional authorisation) from judicial review for abuse of discretion under the federal Administrative Procedure Act (APA),<sup>95</sup> constitute legal 'black holes' or 'law-free zones'.<sup>96</sup> Other gaps, like the variable 'arbitrary and capricious' standard of judicial review under the APA, constitute legal 'grey holes' within which administrative officials can effectively act with impunity despite being nominally subject to judicial oversight.<sup>97</sup> While judicial review remains theoretically available in legal grey holes, judges abandon the principles of legality by rubber stamping administrative decisions rendered in a state of emergency regardless of their procedural or substantive propriety.<sup>98</sup> Vermeule argues that black holes and grey holes of legality are not necessarily symptomatic of any institutional failure or abdication of official responsibility to uphold legal principles, but reflect a broad (but unspoken) consensus amongst legislators and judges that it is either pointless or undesirable to impose legal constraints on executive officials in a real or perceived state of emergency.<sup>99</sup> This demonstrates that, contrary to the claims of liberal theorists, the vitality of executive power and politics transcend traditional

91 Posner and Vermeule, n 9 above, 3: 'Liberal legalism cannot be defined in a sentence; it is a complex of theoretical views and institutional commitments related by a family resemblance, including elements of philosophical and political liberalism, constitutionalism, and deliberative democracy. But the simplest version of liberal legal theory holds that representative legislatures govern and should govern, subject to constitutional constraints, while executive and judicial officials carry out the law. The basic answer that liberal legalism supplies, then, is that law does and should constrain the executive.'

92 Vermeule, 'Our Schmittian Administrative Law' n 9 above, 1101. See Fuller, n 18 above. Ironically, Vermeule argues elsewhere that Fuller's general principles of legality underwrite the legitimacy of American administrative law. See Cass Sunstein and Adrian Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Cambridge, MA: Belknap Press, 2020).

93 Vermeule, *ibid*, 1097.

94 *ibid*, 1103.

95 *ibid*, 1108. See *Franklin v Massachusetts* 505 US 788 (1992), 800–801.

96 See also *Trump v United States* 603 US \_\_\_\_ (2024).

97 *ibid*, 1119–1121.

98 *ibid*, 1106.

99 *ibid*, 1131–1142.

notions of legal authorisation and the separation of powers.<sup>100</sup> As he points out repeatedly, the most that legislation or the common law can offer is to identify who decides whether an emergency exists and how to eliminate it.

Vermeule's decidedly Schmittian account of American administrative law is meant to furnish an example of an actual political order where a pale version of legality exists without meaningful checks on executive power by other state institutions. In it, law is viewed strictly as a means for conveying executive will unconstrained by legislation, common law principles, or constitutional rights. Thus, it illustrates his conceptual claim that there is no necessary link between the rule of law and the separation of powers. However, Vermeule goes further and holds up such a political order as a moral ideal because it facilitates the implementation of his preferred conception of the common good, which, as we shall see in the following section, is itself institutionally untethered.

### Common good constitutionalism

Of course, invocation of the common good is ubiquitous in political philosophy. What makes Vermeule's conception of the common good provocative is that it is neither liberal, nor utilitarian, nor democratic; it is neither informed nor inhibited by arguments about individual rights, public welfare, or democratic legitimacy. Unlike Jeremy Bentham, who argued that law and legal institutions were vehicles for maximising public welfare, Vermeule asserts that public officials have an overarching duty to pursue a conception of the common good that is distinct from any attempt to aggregate individual utilities, preferences, or interests;<sup>101</sup> and unlike, say, Lon Fuller, who argued that administration in accordance with law's internal morality provides a baseline of protection for individual freedom, dignity, and autonomy,<sup>102</sup> Vermeule argues that the common good is 'the highest felicity or happiness of the whole community' as well as 'the highest good of the individuals comprising that community'.<sup>103</sup> Citing a Papal Encyclical Letter, Vermeule claims that the common good consists of '*peace, justice, and abundance*', '*health, safety, and economic security*', and the principles of '*solidarity and subsidiarity*'.<sup>104</sup> Indeed, when one scratches beneath the surface of such platitudes, the common good turns out to be a euphemism for a reactionary political ideology<sup>105</sup> disillusioned by recent developments in American jurisprudence regarding

100 Posner and Vermeule, n 9 above, 'Introduction'.

101 Vermeule, *Common Good Constitutionalism* (Cambridge: Polity Press, 2022) 26–28.

102 Lon Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630; Fuller, n 18 above.

103 Vermeule, n 101 above, 28–29.

104 *ibid.*, 7.

105 Adrian Vermeule, 'A Christian Strategy' *First Things* 1 November 2017; Brian Leiter, 'Politics by Other Means: The Jurisprudence of 'Common Good Constitutionalism'' (2023) 90 *University of Chicago Law Review* 1685; David Dyzenhaus, 'Schmitt in the USA' *Verfassungsblog* 4 April 2020.

‘race relations, women’s rights, gender identity, or what have you’,<sup>106</sup> and bent on protecting the moral environment from what it views as liberal excesses.<sup>107</sup>

At a more practical level, Vermeule argues that constitutional law should be fashioned to promote the common good thus conceived. His so-called common good constitutionalism, thus, recommends a new interpretive strategy for rectifying the pervasive gaps of legal indeterminacy that he diagnosed in his Schmittian account of American administrative law. According to this strategy, ‘the law of a particular jurisdiction (the *ius civile*)’ is interpreted ‘in the light of the *ius gentium* (the law of nations or peoples) and the *ius naturale* (natural law), which the civil positive law is taken to specify or “determine” within reasonable boundaries’.<sup>108</sup> To better understand the import of these claims, it is helpful to contrast common good constitutionalism with Ronald Dworkin’s theory of law. Dworkin famously argues that the practice of law is interpretive: to determine the content of the law we must interpret legal practice. Even in hard cases where there is apparent disagreement over a question of law, the correct legal answer is the one that ‘shows the community’s structure of institutions and decisions – its public standards as a whole – in a better light from the standpoint of political morality’.<sup>109</sup> For example, Dworkin refers to a line of cases regarding the Due Process Clause,<sup>110</sup> arguing that they are best understood as protecting a right to privacy that includes the right to access contraceptives, reproductive choice, and freedom from discrimination on the grounds of sexual orientation.<sup>111</sup> That right both fits those cases and morally vindicates them by showing that they flow from an attractive principle of political morality.

Despite endorsing Dworkin’s method of constitutional interpretation, Vermeule has very different ideas about how the common good informs the content of the law. We are not so much interested in the glaring differences between Dworkin’s ‘substantively liberal account of justification’ and Vermeule’s ‘classical theory of rights as *ius*, founded in the injunction of justice to give to every person what is due to them in a political order devoted to the common good’.<sup>112</sup> More pertinently for our purposes – and anticipating some themes that will be picked up in the following sections – we note

106 Vermeule, n 101 above, 119.

107 *ibid*, 169–178.

108 *ibid*, 3.

109 Ronald Dworkin, *Law’s Empire* (Oxford: Hart Publishing, 1998) 256.

110 *Griswold v Connecticut* 381 US 479 (1965); *Loving v Virginia* 388 US 1 (1967); *Eisenstadt v Baird* 405 US 438 (1971); *Roe v Wade* 410 US 113 (1973); *Carey v Population Servs. Int’l* 431 US 678 (1977).

111 Ronald Dworkin, ‘Law’s Ambitions for Itself’ (1985) 71 *Virginia Law Review* 173.

112 Vermeule, n 101 above, 6. In a pointed critique of *Obergefell v Hodges*, a case in which a majority of the Supreme Court held that the Due Process and Equal Protection clauses in the Fourteenth Amendment protect the right to same-sex marriage, Vermeule complains that ‘*Obergefell* is what progressive constitutionalism looks like when it has become detached from the objective legal and moral order that underpins classical legal theory and the common good’. *Obergefell*, he contends, was wrongly decided, because ‘the *telos* of the institution [of marriage] is oriented to the common good through reproduction, the *sine qua non* of a continuous political community and of a flourishing, full human polity’. On the political underpinning of Vermeule’s account of constitutional interpretation see Leiter, n 105 above.

that, whereas Vermeule believes that institutional history does not impose a meaningful interpretive constraint because the law is riddled with gaps of indeterminacy, for Dworkin it is meant to be a genuine parameter of interpretive success. For the former, executive officials only need to be guided by an account of the common good whose content is determined independently of the democratic process and the common law method of adjudication. For the latter, interpreters must strive to identify principles of political morality that ‘fit’ past political decisions, because only such principles represent their community’s moral commitments, as opposed to a transcendent moral standard with little connection to its political life. Furthermore, past political decisions properly exert this ‘gravitational force’ on interpretation because and insofar as they embody values of institutional morality such as political equality (legislation) or procedural fairness (judicial decisions). In this way Dworkinian interpretation becomes a collaborative project,<sup>113</sup> involving multiple institutional actors, each deserving a say in shaping the political community’s enduring commitments thanks to their diverse moral credentials. In this project, the separation of powers does have a role, as an organising principle for these various contributions. By contrast, for Vermeule’s common good constitutionalism there is little that those other institutional actors contribute to the project of governing which cannot be achieved by a solitary Schmittian executive, heeding only the dictates of the common good, as it cognises it.<sup>114</sup> Once again, the separation of powers turns out to be superfluous.

## CONCEPTUAL AND NORMATIVE APORIAS OF AN UNBOUND EXECUTIVE

### What’s in a concept?

Having established the interconnection between Vermeule’s antipathy towards the separation of powers and the rest of his account of law, we now proceed to its critical evaluation. We begin in this sub-section by examining whether there are any conceptual links between the separation of powers and the rule of law. Admittedly, it is rather surprising that Vermeule would set much store by conceptual clarification. In previous work he appears less optimistic that conceptual analysis can deliver useful theoretical and practical insights. For instance, while defending his account of US administrative law, he dismisses the conceptual possibility of a non-Schmittian administrative law,<sup>115</sup> because he prefers to focus on ‘the nature of real-world institutions’.<sup>116</sup> For the same reason, one might doubt whether speculations about what ancient Romans

113 Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press, 2016) 135–136.

114 Not all common good constitutionalists reject the separation of powers. See for instance Michael Foran, ‘Rights, Common Good, and the Separation of Powers’ (2023) 86 MLR 599.

115 Vermeule, ‘Schmittian Administrative Law’, n 9 above, 1136.

116 *ibid.*

would countenance as compatible with the rule of law tell us much about the 'real-world institutions' of today.<sup>117</sup>

We are similarly doubtful that conceptual analysis alone, without resort to moral considerations, can deliver complete answers to questions about the meaning of complex concepts like the rule of law and the separation of powers. But contrary to Vermeule we think that even at a very abstract – or conceptual, if you prefer – level they are intertwined. What is the theoretical payoff of focusing on this level of analysis? First, it is important to bear in mind that the separation of powers and the rule of law are heavily contested, value-laden concepts. The moment we start making more fine-grained claims about their meaning, we come up against persistent moral disagreements. So, by isolating a thin layer of meaning from contentious questions of moral merit, we hope to be able to furnish a 'plateau' of agreement among our competing accounts that can organise these more particular disagreements.<sup>118</sup> Second and relatedly, it matters a great deal if it turns out that some aspects of constitutionalism are not up for grabs but rather constitute shared reference points that transcend our moral differences. For one thing, it exposes how radically revisionist Vermeule's proposal is. This is not simply about going against the grain of intellectual consensus. (In an age that reveres iconoclasts, this for many would not be a handicap.) Rather, as will be argued below, Vermeule's proposal sweeps away a fundamental structural feature of the way our legal systems deliver the rule of law. However much they clash morally, our constitutional theories must at least respect such features. (This, we contend, is partly why we can discern them without much moral heavy-lifting.)

To show this, we return to an idea that we introduced in our discussion of Hobbes' theory. We saw there that, despite his championing the absolute power of the sovereign, Hobbes highlights legal orders' systematic dimension, which suggests the sovereign's impact on law's content is tempered by procedural, institutional, and normative constraints that are necessary for establishing and maintaining a framework of civil laws that can be plausibly

117 Vermeule could perhaps reconcile his latest conceptual argument and his earlier skepticism by saying that it is not him that thinks conceptual analysis has much to teach us about the separation of powers but rather his opponents, the champions of the separation of powers, who assume that, since the separation of powers is conceptually linked to the rule of law, they do not need to adduce normative arguments for it. Why does Vermeule assume that liberal arguments defending the separation of powers universally depend upon conceptual, as opposed to normative, claims about the nature of law and the rule of law? One possibility is that Vermeule mistakenly attributes conceptual claims made by contemporary legal positivists, like Hart or Raz, regarding the necessary conditions for the existence of law and the rule of law to liberal legal theorists across the board. True, contemporary legal positivists reoriented analytical jurisprudence around attempts to identify and explain social facts necessary for the existence of law and at the same time denied that the presence of such facts enhances law's moral legitimacy. Thus, while they concede that the existence of law depends to a degree on the existence of independent and impartial legal institutions whose role is to determine the validity of legal rules, they argue that this requirement merely ensures 'justice in the administration of the law, not justice of the law' (Hart, n 37 above, 264). However, as we will try to show, a full defence of the separation of powers must combine such 'conceptual' arguments with normative ones.

118 Not accidentally, this scheme resembles the distinction between concepts and conceptions proposed by John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1971) ch 5.

perceived as legitimate from the internal perspective of legal subjects. The systematicity that we speak of is not to be confused with the idea that law is a system of norms. Rather, it is meant to track the dependence of the law on different institutions that contribute in a more or less structured way to the content of the law and its implementation.<sup>119</sup> Although systematicity, thus understood, is disavowed in Schmitt's account of the sovereign (and in Vermeule's Schmittian brand of constitutional law), we claim it is a recurring theme in legal and political theory. Indeed, as our interest is in identifying a morally thin jurisprudential common ground, we primarily seek to trace it in the work of legal philosophers that were not particularly concerned with offering moral defences of law.

Before we turn to them, though, let's locate this theme where it is most at home, in theories like William Blackstone's that are favourably disposed towards the separation of powers on moral grounds. Following Montesquieu's lead,<sup>120</sup> Blackstone observed a counterpoise between the Crown, Lords, and Commons.<sup>121</sup> But unlike Montesquieu, he attributed greater constitutional significance to the judiciary, arguing that public access to the courts of justice that would adjudicate legal disputes in accordance with the common law method provided valuable protections for personal security, liberty, and property.<sup>122</sup> Thus, despite relatively subtle differences between them, both Montesquieu and Blackstone offered a systematic account of legal order that supports the separation of powers on the basis that it preserves political liberty.

But we do not need to embrace such a heavily moralised notion of systematicity. A similar idea serves as a cornerstone of positivist legal theories, which hold that the existence of law depends on conventional rules and an institutionally complex system for validating their content, but deny any essential connection between law and political morality. H. L. A. Hart, for example, famously argued that John Austin's command theory of law was fundamentally deficient, because it 'failed to reproduce some of the salient features of a legal system'.<sup>123</sup> Among other things, the concept of a command backed by threats could not account for the complex institutional apparatus and rule-based behavior that was essential to establish and maintain a durable legal order. Thus, Hart argued that 'the step from the pre-legal into the legal world' is marked by the introduction of a rule of recognition that provides 'an authoritative mark' and 'introduces, although in embryonic form, the idea of a legal system'.<sup>124</sup> The rule of recognition consists in the practice of law-applying officials, primarily judges, and it contains the system's criteria of validity,<sup>125</sup> typically designating certain institutions such as the King in Parliament as sources of legal norms. Moreover, Hart maintains that, as part of their responsibilities, the law-applying officials whose practice sustains the rule of recognition are

119 See relatedly Dimitrios Kyritsis, *Shared Authority: Courts and Legislatures in Legal Theory* (Oxford: Hart Publishing, 2015).

120 Montesquieu, *The Spirit of Laws* (Edinburgh: T. Ruddiman, 1793).

121 William Blackstone, *Commentaries on the Laws of England* Book I (Oxford: OUP, 2016) ch 2.

122 *ibid.*, 95–97.

123 Hart, n 37 above, 79.

124 *ibid.*, 95, 116.

125 *ibid.*, 115.

often called upon to exercise judgement or discretion, when in the context of deciding individual cases they encounter a gap in the extant law or when the case before them falls in the penumbra of existing legal norms.<sup>126</sup>

Nevertheless, Hart insists that the systematic nature of law was unrelated to questions about law's moral legitimacy.<sup>127</sup> He is not saying that it is a good thing that one institution creates norms by legislating and another recognises those norms as legal, occasionally ironing out indeterminacies through the exercise of moral judgement, but that a political order that does not exhibit this kind of institutional interaction would not be law. Accordingly, while he concedes that principles naturally associated with the legal process – like the principles of natural justice and treating like cases alike – ensured 'justice in the administration of the law',<sup>128</sup> he concludes that 'a legal system that satisfied these minimum requirements might apply, with the most pedantic impartiality as between the persons affected, laws which were hideously oppressive'.<sup>129</sup>

Joseph Raz sharpens these points by examining the systematic nature of law or 'the presuppositions and implications underlying the fact that every law necessarily belongs to a legal system'.<sup>130</sup> Discrete laws, unlike mere orders backed by threats, belong to a broader system of legal norms that are interrelated in a distinctive way.<sup>131</sup> Like Hart, Raz rejects Austin's command theory because it cannot explain the institutional structure and operation of a legal system; and he rejects Hans Kelsen's assertion that the normative unity of a legal system can be explained by presupposing the existence of a basic norm, arguing instead that it is grounded by social facts reflected by the concordant legal practice of institutions and officials. Thus, he claims that all legal systems must have 'a certain minimum degree of complexity' in the sense that 'every legal system must regulate the existence and operation of some courts',<sup>132</sup> and that 'the difference in normativity between legal systems and orders can be explained by the fact that legal systems have a built-in possibility of dynamic justification of most of their norms'.<sup>133</sup> The upshot of this arrangement is that '[s]tatutes or regulations, etc., which are disregarded by the law-applying organs are not really part of the legal system'.<sup>134</sup>

126 Famously Hart and his followers also think that sometimes these officials will have a practice of treating moral principles as criteria of legal validity, which they will have to combine with source-based criteria by exercising moral judgement. But because this is taken by them to be a contingent, not necessary feature of law, we do not invoke it here.

127 H. L. A. Hart, 'Positivism and the Separation of Law and Morals' (1957) 71 *Harvard Law Review* 593.

128 *ibid.* 624.

129 *ibid.*

130 Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (Oxford: OUP, 2nd ed, 1980) 1.

131 *ibid.* 129.

132 *ibid.* 141.

133 *ibid.* 137.

134 *ibid.* 201. It is true that Raz thinks we can have a legal system with only law-applying officials, thus arguably doing away with systematicity as understood here. He writes: 'Norm-applying institutions and not norm-creating institutions provide the key to our notion of an institutionalized system.' See Joseph Raz, *Practical Reason and Norms* (Oxford: OUP, 1990) 132. He singles out '[c]ourts, tribunals and other judicial bodies' as 'the most important examples'

In his later work, Raz reinforces this argument by claiming that law is essentially ‘an institutionalized normative system’<sup>135</sup> and that norm-applying institutions (like courts, tribunals, and other judicial bodies) are a necessary feature of all legal systems.<sup>136</sup> More importantly, he says that these essential norm-applying institutions ‘combine norm-making and norm-applying in a special way’, in that they ‘are concerned with the authoritative determination of normative situations in accordance with pre-existing norms’.<sup>137</sup> Thus, Raz argues that the law regulates its own production by determining procedures for changing the law and regulating the operation of norm-applying institutions.<sup>138</sup> He elaborates on this point in his famous essay on the rule of law by asserting that the rule of law requires not only that the making of particular orders be guided by open and relatively stable rules, but that the independence of the judiciary is guaranteed, the principles of natural justice are observed, courts are accessible, and that they have the power to review the legality of legislation and administrative action.<sup>139</sup> Like Hart, though, Raz contends that these requirements do not bestow moral legitimacy on a legal system. Rather, they are motivated by the basic intuition that, if law, good or bad, is to be capable of guiding the behaviour of its subjects, there must be minimal procedural and institutional guarantees in place to ensure conformity with the rule of law.

Clearly, the aforementioned philosophers elaborate the idea of law’s systematicity in widely divergent ways. Some envisage a more active role for the judiciary, while others contend that judicial creativity is interstitial. Our interest in this section is not to adjudicate their differences, not least because we do not think that we can fruitfully specify how best to cash out law’s systematicity exclusively by means of conceptual analysis.<sup>140</sup> What we hope to have shown is that, at its most basic, law’s systematicity recommends a certain ‘proto-separation’ among state institutions. This is not yet the moral ideal of the separation of powers that we find in Montesquieu and the Founding Fathers. But it does undermine Vermeule’s conceptual point. Even a notion as rudimentary as proto-separation vitiates the proposition that the legal order is merely a conveyor-belt that transmits a vision of the common good from an all-powerful sovereign down to the legal subject. According to proto-separation, law-creating and law-applying institutions have distinct but enmeshed roles, and the content of the law emerges from their interaction.

It could be countered that, even if what has been said so far is true, it only serves to establish a connection between the primitive version of the

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of norm-applying institutions (*ibid.*, 136). But this wrinkle in his theory is of little use to Vermeule because, rather than affirm the preeminence of the executive, it puts law-applying institutions at the helm.

135 Joseph Raz, *The Authority of Law* (Oxford: OUP, 2nd ed 2009) 105.

136 *ibid.*, 105.

137 *ibid.*, 108.

138 *ibid.*, 175.

139 *ibid.*, 214–219.

140 The parsimony of proto-separation also serves to drive a wedge between our approach and the one taken by Jeremy Waldron in ‘The Concept and the Rule of Law’ (2008) 43 *Georgia Law Review* 1, where he emphasises the special characteristics of the judicial process.

separation of powers that we called proto-separation and the concept of *law*. But Vermeule focuses on the rule of law, not the law, and the former is an altogether different beast. For one thing, the critic continues, the rule of law is commonly thought to be a virtue, whereas the law is taken by theorists like Hart not to be by its nature either good or bad. Sure enough, we need to have law in order for the ideal of the rule of law to be even applicable, but it does not follow from this that the concept of law is folded root and branch into the concept of the rule of law. However, this criticism misconstrues the thrust of our claim. We are not simply saying that, because proto-separation is an element of the concept of law, it must also be read into all cognate concepts, including the rule of law. Rather, we are making the narrower claim that proto-separation speaks specifically to the way the rule of law is given effect. The rule of law tells us that the law rules when legal norms are being applied and enforced. Proto-separation adds that this is achieved by institutions that are characteristically separate from the institution that is charged with creating the law. Along the way, law-applying institutions have the power to contribute to or qualify the content of the legal norms they apply and enforce, which are as a result more nuanced than whatever vision of the common good animated law-creating institutions in the first place.

Alternatively, Vermeule could perhaps retreat to a fallback position, namely that what severs the conceptual link between the rule of law and the separation of powers is simply the fact that the executive branch in ‘real-world’ legal systems defies the distinction between the three functions, partaking of all three. But this fallback position would be vulnerable to the same objection that the critic sought to level against ours in the previous paragraph. Whatever the merits of Vermeule’s account of the executive branch, it arguably tells us little about the very concept of the rule of law.

### The value of law’s systematicity

Our – inevitably limited – survey of some notable accounts of law in the previous sub-section revealed an enduring shared commitment to what we called law’s systematicity. We explained that this general feature of law has a particular bearing on the rule of law because it teaches us something important about how that ideal is meant to be attained, at least in the legal systems with which we are familiar. And because law’s systematicity gives pride of place to the interaction between law-creating and law-applying institutions, it establishes a general, morally thin connection between the concepts of the rule of law and the separation of powers. However, we noted that there is only so much that conceptual analysis alone can deliver by way of spelling out the implications of law’s systematicity and the way it bridges the rule of law and the separation of powers. For one thing, theoretical perspectives regarding these concepts have waxed and waned over time, and what is constant across them is unlikely to be particularly deep and informative. More importantly, these perspectives, properly understood, do not simply aspire to report our ‘common understanding’ of these concepts. Rather, generalising W. B.

Gwyn's apt characterisation of the classic formulations of the separation of powers in the 17th century, they are 'definitely of a normative character'.<sup>141</sup> That is, they are in the business of recommending institutional arrangements as judged against this or that normative standard, and their soundness is measured by the strength of their normative case.<sup>142</sup> Consequently, there is a close connection between the value being ascribed to the separation of powers or the rule of law and the meaning of those ideals. Depending on what each author takes to be good about them, she will construe them to prescribe different institutional arrangements. Vermeule offers controversial conceptions of those concepts, as do the liberal theorists he attacks.

Given the fundamental normative orientation of our reflection on the rule of law and the separation of powers, competing conceptions must ultimately be assessed on moral grounds. Unlike Vermeule, who sees the separation of powers as disposable and obstructive, we take it to be an essential ingredient of the rule of law. In this article we do not try to argue for this more sweeping proposition or offer a full-blown alternative. Instead, we shall return to law's systematicity and identify certain institutional virtues that it makes possible. More specifically, we shall argue that it creates a space for a process of public deliberation and scrutiny that makes the demands of the rule of law sharper, more considered, and effective.<sup>143</sup> In turn, we ought to work out the content of the separation of powers (at least in part) in light of this purpose to arrive at detailed prescriptions about how the relationship between different state institutions like the executive and courts should be organised so that this process of deliberation yields optimal results. By so doing we move from proto-separation to the ideal of the separation of powers. By contrast, by empowering the executive at the expense of law's systematicity, Vermeule's conception drastically reduces the space for official deliberation and thereby undermines the rule of law as well.

141 W. B. Gwyn, *The Meaning of Separation of Powers: An Analysis of the Doctrine from the Origin to the Adoption of the United States Constitution* (The Hague: Martinus Nijhoff, 1965) 8.

142 See relatedly Dimitrios Kyritsis, 'Normative Approaches to the Separation of Powers' in Mathieu Leloup and others (eds), *The Cambridge Handbook on Separation of Powers* (Cambridge: CUP, forthcoming).

143 Given the mainly critical thrust of our claim, it is not necessary to specify further what we mean by public deliberation. The literature on this topic is vast. See among others Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* William Rehg (trans) (Cambridge, MIT Press, 1998); Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, Belknap Press, 1996); Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton, NJ: Princeton University Press, 2004); Henry Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (Oxford, OUP, 2002); and, more specifically, with regard to constitutional law, Dyzenhaus, n 18 above; Peter Hogg and Allison Bushell, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' (1997) 35 *Osgoode Hall Law Journal* 75; Conrado Mendes, *Constitutional Courts and Deliberative Democracy* (Oxford: OUP, 2013); Ron Levy and others (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge: CUP, 2018); Roberto Gargarella, *The Law As a Conversation among Equals* (Cambridge: CUP, 2022); Ignacio Giuffrè, 'The Coming of Age of Deliberative Constitutionalism' (2024) 37 *Canadian Journal of Law and Jurisprudence* 397; Aileen Kavanagh, *The Collaborative Constitution* (Cambridge: CUP, 2023).

If your normative lodestar is a single-minded notion of government efficiency,<sup>144</sup> you will likely be attracted to the idea of an unshackled and powerful executive. With its strongly hierarchical and centralised character, the executive can more easily translate the abstract precepts of the common good into concrete policy. However, the common good is a contested concept. What moral warrant does the executive have to implement its own controversial conception of the common good, with its ranking of various government aims and its weighting of individual rights and the public interest? Why not another one that ranks government aims differently and strikes a different balance between rights and the public interest? It is no good saying that its moral warrant is its democratic credentials, if it has any. We are trying to figure out precisely what authority its democratic credentials bestow on it. Vermeule's critics do not dispute these credentials. They simply contend that the separation of powers imposes limits on what someone having them may permissibly do. Nor will it do to say that this warrant comes from the epistemic confidence of executive officials in the correctness of their preferred conception of the common good. Executive officials steeped in the political theory of, say, John Finnis may well possess such inner confidence. But it does not follow without further argument that they thereby acquire the moral authority to impose it on others, including those who oppose it. Yet, this is what Vermeule in essence proposes with his vision of a vigorous executive branch implementing the common good like a conveyor belt, free from separation-of-powers constraints. It is largely left to the executive to determine what compliance with rule-of-law requirements amounts to in the circumstances and how these requirements can be reconciled with its policy aims. Do we have reason to follow along?

Perhaps Vermeule's conveyor-belt understanding is at home in emergency situations. Recall, this is the setting in which he had originally developed his account of an unbound executive. But, of course, not all questions about the common good fit into the emergency paradigm. And even when they do, the reason we are inclined to accept executive officials' determination without much scrutiny has less to do with our (or their) confidence in the rightness of that determination and much more with the heightened need for speed and dispatch in an emergency. Arguably, this need displaces our ordinary moral expectations from those in power. Where it recedes, however, these expectations reassert themselves. We ordinarily expect those in power to act in accordance with standards that have been hammered out in a process with a strong element of public deliberation and scrutiny. In such a process complaints and objections are heard, exercises of public power are assessed against rules formally authorising them as well as more general principles of good governance, justifications for them are given and evaluated and adjustments

144 It is controversial whether this kind of efficiency is the moral point of the separation of powers. For many theorists, including Montesquieu, that point is the preservation of freedom. See also Eric Barendt, 'Separation of powers and constitutional government' [1995] PL 599. And even many efficiency theorists construe this value such that it is compatible with strong checks on the executive. See Nick Barber, *The Principles of Constitutionalism* (Oxford: OUP, 2018) ch 3. See also Foran, n 114 above.

are made when they are found to unduly burden individuals. When this happens, we have reason to submit to those exercises of public power, even if we object to them on substantive grounds. Likewise, by being involved in this process, those in power are compelled to step out of their echo chamber and get a better sense of how their actions impact their addressees.<sup>145</sup>

This process of deliberation and scrutiny is enhanced when a legal order harnesses its systematicity in the right way. In fact, the process described in the previous paragraph neatly maps onto familiar institutional arrangements like judicial review of executive action. Judicial review seeks to measure executive decisions against principles of good administration embedded in the constitution, legislation, and the common law. When a court applies these principles, it articulates a particular vision of the procedural and substantive requirements of the rule of law. We may complain that on a particular occasion it has gone too far or not far enough, but that is to be expected when an essentially contested concept like the rule of law is at play.<sup>146</sup>

Judicial review is also strongly supported by separation of powers considerations. Hence, it matters a great deal that reviewing courts are functionally independent from the executive. Whatever we think about the ability of our executive officials to internalise the demands of the rule of law and adopt them as a yardstick for their decision-making, it surely improves a polity's compliance with them if they are also sometimes policed by other impartial officials, as separation of powers recommends. Equally, it matters that the role of the reviewing court is to, as the mantra goes, assess the legality and not the merits of an administrative decision. By limiting itself to this role, the court is supposed to uphold a certain division of public power among branches of government, not as neat, to be sure, as the traditional conception of separation of powers would have us believe, but a division nonetheless. In these and other respects we can see a convergence of the rule of law and the separation of powers, made possible by law's systematicity.

Needless to say, judicial review is not the only site of this type of convergence, nor is our argument that, for a legal order to be in good working order, it must include a system of judicial review. We are focusing on judicial

145 The process described in the text can be augmented to include the legislative process through which executive action is authorised, as outlined by Jeremy Waldron in 'Separation of Powers in Thought and Practice' (2013) 54 *Boston College Law Review* 433, 457ff. Waldron contends that, when a political order channels the exercise of public power through processes of this sort that 'offer multiple points of access, participation, and internalization' (*ibid.*, 458), it realises the value of 'articulated governance', which he thinks undergirds the principle of separation of powers. While our claim has affinities with Waldron's, it differs from it in that it does not aim to vindicate the traditional tripartite distinction of government functions, nor does it stand and fall on its soundness. In fact, we think that the value of 'articulated governance' should be independent of that distinction, but it is not necessary for our purposes to pursue this point.

146 More broadly, it would be entirely appropriate to criticise an actual practice of judicial review for systematically failing to track those requirements. To adapt a term coined by Leslie Green, judicial review is rule-of-law apt, in the sense that it 'is the kind of thing that is apt for inspection and appraisal in light of the rule of law. See Leslie Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83 *New York University Law Review* 1035, 1050. Green writes that law is 'justice-apt' in the same sense.

review for purposes of exposition. For instance, when it works well, the legislature's involvement through statutory delegation and legislative oversight of executive power furnishes a forum of public contestation with inputs from a diversity of perspectives as well as a degree of public accountability.<sup>147</sup> In addition, we do not want to denigrate the role of the executive in promoting the rule of law. In fact, one of the reasons for limiting the scope and intensity of judicial review is precisely so that we can leave more room for the executive to have a go first at articulating its own vision of what the rule of law requires and how it can be combined with the other desiderata of executive action.

By contrast, Vermeule's account suppresses deliberation and scrutiny and thus largely pre-empts the realisation of the associated institutional virtues. But how are we to prevent the erosion of our constitutional order without these virtues? This, after all, is a threat that Vermeule also recognises when he endorses the Aristotelian view that legitimate forms of government (monarchy, aristocracy, and polity) can be corrupted and turn into their illegitimate mirror-images (tyranny, oligarchy, and democracy).<sup>148</sup> Vermeule would have us think that all it takes to thwart this risk is for the all-powerful executive to pursue the common good, properly understood. However, even if there exists such an objectively correct understanding of the common good, waiting to be discovered, Vermeule's constitutional solipsism puts all its chips on the executive getting it right. We do better to place our trust in a process that is reflective and sensitive to the possibility of error – and learning from others – even if we sometimes grow impatient with it.

Of course, we do not claim that all forms of institutional division of labour and interaction can foster the kind of deliberation and scrutiny that enhance the legitimacy of government action. Often, the sharing of government power produces undesirable gridlock and confrontation.<sup>149</sup> In light of this, we have to be more discerning. Our institutional choices must be governed by a more detailed account of the separation of powers and the rule of law (as well as the associated concepts of deliberation and scrutiny). To repeat, this account will be normative; it will be guided by a vision of what makes an institutional arrangement morally attractive. The aforementioned concepts are essential building blocks of that vision.

## CONCLUSION

If nothing else, Vermeule's challenge shakes us from our complacency. The separation of powers is not an untouchable totem, nor is our commitment

<sup>147</sup> We are not disputing that the legislative forum is meant to promote other values apart from the rule of law. For example, it makes sense for legislators to criticise executive action for being inefficient or wasteful, though clearly being efficient and economical is not part of the rule of law. What we are saying is that it is entirely appropriate for legislators also to pinpoint rule of law failures in executive action.

<sup>148</sup> See Vermeule, n 101 above, 26–27.

<sup>149</sup> We thank a reviewer for this journal for urging us to make this qualification.

to it unfaltering. It must be constantly argued for and its status as an essential ingredient of constitutionalism defended anew. What is more, its content cannot be lazily deduced from what we have always done in the past. In this article we hope to have opened a promising avenue for unpacking the meaning of separation of powers. We have argued that, far from showing that the separation of powers is superfluous, reflection on its relationship with the rule of law actually solidifies its key position in the constellation of constitutional principles and enriches our understanding of it. At a conceptual level, the rule of law is intertwined with an element of institutional interaction, which we labelled proto-separation, especially among law-creating and law-applying bodies. At a normative level, by construing and enforcing the demands of the rule of law through inter-subjective and inter-institutional processes, a legal order enhances public deliberation about their content and scrutiny for failures to comply with them.

What specific shape those processes should take to achieve this result will be determined by a more fine-grained conception of the separation of powers, which we have not provided here. But what we have insisted on is that, in order to develop such a conception, we will have to go beyond conceptual platitudes and embrace moral evaluation. More specifically, we will have to assess the merit of competing models of separation of powers, among other things, by how conducive they are to sustaining the type of institutional interaction that realises rule of law values. Our answer to this question will likely vary from one society to the other and must be worked out in light of contemporary challenges to the rule of law like, for example, the looming threat of an overweening executive branch.

Here, too, Vermeule's account provides an instructive counterpoint. His defence of a powerful executive combines constitutional law and political philosophy. It places constitutional law in the service of the common good, understood as a transcendent political value, whose requirements are determined largely independently of legislation, common law principles, or individual rights reflected in juridical discourse. In this picture, the separation of powers has no place; what reigns supreme is the efficient pursuit of the common good by an untrammelled executive. But Vermeule's understanding of the common good and efficiency is highly contestable on moral grounds. If it can be undermined, so will his constitutional recommendations.