
SCHMITT V. DICEY: ARE STATES OF EMERGENCY INSIDE OR OUTSIDE THE LEGAL ORDER?

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There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists. All law is "situational law." The sovereign produces and guarantees the situation in its totality. He has the monopoly over this last decision. Therein resides the essence of the state's sovereignty, which must be juristically defined correctly, not as the monopoly to coerce or to rule, but as the monopoly to decide. The exception reveals most clearly the essence of the state's authority. The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law.

—Carl Schmitt, *Political Theology*.¹

This power to act according to discretion for the publick good, without the prescription of the Law, and sometimes even against it, is that which is called Prerogative.

—John Locke, *Two Treatises on Government*.²

The technical issue in this appeal is whether . . . a power [to derogate from rights] can be justified on the ground that there exists a "war or other public emergency threatening the life of the nation" within the meaning of article 15 of the European Convention on Human Rights. But I would not like anyone to think that that we are concerned with some special doctrine of European law. Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of

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¹ CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 13 (George Schwab trans., 1985) (1922).

² JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* 393 (Peter Laslett ed., 1967).

their rulers. . . . The exceptional power to derogate from those rights also reflected British constitutional history. There have been times of great national emergency in which habeas corpus has been suspended and powers to detain on suspicion conferred on the government. . . . These powers were conferred with great misgiving and, in the sober light of retrospect after the emergency had passed, were often found to have been cruelly and unnecessarily exercised. But the necessity of draconian powers in moments of national crisis is recognised in our constitutional history. Article 15 of the Convention, when it speaks of "war or other public emergency threatening the life of the nation" accurately states the conditions in which such legislation has previously been thought necessary.

—Lord Hoffmann,
A v. Secretary of State for the Home Department.³

"Martial law," in the proper sense of that term, in which it means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals, is unknown to the law of England. We have nothing equivalent to what is called in France the "Declaration of the State of Siege," under which the authority ordinarily vested in the civil power for the maintenance of order and police passes entirely to the army. . . . This is an unmistakable proof of the permanent supremacy of the law under our constitution.

—A.V. Dicey, *Introduction to the Study of the Law of the Constitution*.⁴

INTRODUCTION

One curious feature of states of emergency is that they are brought into being by law. Law thus seems used as an instrument against itself—law is used to suspend its own operation. Carl Schmitt thought that this fact is evidence of a contradiction at the heart of liberal theories of the rule of law. Liberalism aspires to banish the state of emergency or exception from the legal order because it wants a world where all political authority is subject to law. But liberals have to recognize that legal norms cannot apply in a state of emergency. A state of emergency is a lawless void, a legal black hole, in which the state acts unconstrained by law.

³ [2005] 2 W.L.R. 87, paras. 88-89.

⁴ A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 287-88 (10th ed. 1959) (citations omitted).

There are three possible liberal responses to this uncomfortable fact. First, there is Locke's, which accepts that the sovereign is he who decides both when there is a state of emergency and how to respond to it—or, as Schmitt put it in the famous opening line of *Political Theology*, "Sovereign is he who decides on the exception."⁵ This response tries to deal with the contradiction by locating its source outside of the constitutional order. Schmitt argued that the response thereby accepted that the political authority of the state is not ultimately constituted by law.

Second, there is Lord Hoffmann's response, which locates the source of the contradiction within the constitution. The power to declare a state of emergency is an exceptional one, found in the constitution, and so the sovereign must respect the constitutional constraints on the exercise of that power. Schmitt thought that this kind of response would fail because it would turn out that the constraints are illusory.

The third response is Dicey's, which seems straightforwardly to deny that the sovereign has the authority to use law to suspend the law. Schmitt regarded this third kind of response as naïve and unable to avoid the fact that political authority is not ultimately constituted by law. Indeed, Dicey's denial is all the more striking since it is made in the context of a legal order in which the constitution is an unwritten, common law constitution, and thus one in which, Dicey argued, Parliament is omnipotent—it can pass any law it likes, including a morally insane law, for example, one that orders that all blue eyed babies be put to death.⁶

In a recent article, John Ferejohn and Pasquale Pasquino claim that dualism, the constitutional authority to use law to suspend law, thus creating an exceptional regime alongside the regime of ordinary law, is a universal feature of the "nonabsolutist western legal tradition."⁷ As evidence, they note that Dicey recognized the necessity of martial law in a Note within the Appendix to *An Introduction to the Study of the Law of the Constitution*.⁸ They do not deal with Dicey's claim in the third epigraph, which appears in the body of the book, that English constitutional law excludes martial law in the sense of the French state of siege, that is, an exceptional regime alongside the regime of ordinary law. But it is undeniable that in this Note, Dicey can be interpreted as

⁵ SCHMITT, *supra* note 1, at 1.

⁶ DICEY, *supra* note 4, at 81.

⁷ John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 239 (2004).

⁸ A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, at app. Note X at 538-55 (8th ed. 1915). This note disappeared from subsequent editions. I will refer to it as DICEY, note X. All other references will be to DICEY, *supra* note 4.

delivering a mixed message about the ability of the state to use the law to suspend the law. Consider, for example, the following passage:

[W]e must constantly bear in mind the broad and fundamental principle of English law that a British subject must be presumed to possess at all times in England his ordinary common-law rights, and especially his right to personal freedom, unless it can be conclusively shown, as it often may be, that he is under given circumstances deprived of them, either by Act of Parliament or by some well-established principle of law. This presumption in favour of legality is an essential part of that rule of law which is the leading feature of English institutions. Hence, if any one contends that the existence of a war in England deprives Englishmen of any of their common-law rights . . . the burden of proof falls distinctly upon the person putting forward this contention.⁹

Dicey seems to be saying both that the rule of law is a constitutional requirement of the English legal order and that a statute can suspend it, so long as those who claim that it is suspended can prove that that is what has in fact happened. Indeed, he even seems to suggest that something short of a statute can suspend the law—"some well-established principle of law." And Ferejohn and Pasquino think that just such a principle is to be found in Dicey's claim that "martial law comes into existence in times of invasion or insurrection when, where, and in so far as the King's peace cannot be maintained by *ordinary means* . . . [because of] urgent and paramount necessity"¹⁰ and that "[t]his power to maintain the peace by the exertion of any amount of force strictly necessary for the purpose [principle of proportionality] is sometimes described as the *prerogative of the Crown*."¹¹

Now Ferejohn and Pasquino fail to mention that Dicey is skeptical about the description of this power as a prerogative one. It is, he says, "more correctly" described as the power that every citizen has to use force to preserve or restore the King's peace, and since every citizen has it, so too does the Crown.¹² Dicey adamantly rejects that there is a legal or constitutional principle, which he calls the "doctrine of political necessity or expediency."¹³ As most, there exists what he calls "the doctrine of immediate necessity,"¹⁴ which entitles all individuals to use force to counter immediate dangers. Moreover, he is clear that, once the emergency has passed, the exercise of this power will have to be shown to meet the test of necessity if the person who wielded it is to escape

⁹ DICEY, note X, *supra* note 8, at 538-39.

¹⁰ Ferejohn & Pasquino, *supra* note 7, at 238 (quoting DICEY, note X, *supra* note 8, at 539).

¹¹ *Id.* (quoting DICEY, note X, *supra* note 8, at 539).

¹² DICEY, note X, *supra* note 8, at 539.

¹³ *Id.* at 551-55.

¹⁴ *Id.* at 552.

punishment for having committed an illegal act. The existence of a good faith attempt to respond to a genuine state of emergency is not enough for any individual to escape punishment. In addition, that person has to show that the action taken was strictly necessary to respond to the danger. In so far as acts go beyond strict necessity, they will then be punished unless an Act of Indemnity is passed, which, as Dicey says, amounts to Parliament legalizing illegality.¹⁵ Finally, Ferejohn and Pasquino do not mention Dicey's rule of thumb test for necessity—namely, that there is a state of war, where peace is defined by the fact that the ordinary courts are open.¹⁶

In my view, there is more riding on these points than the fact that two distinguished scholars had to offer a very partial account of Dicey in order to sustain the claim that the greatest book on the English constitution cannot help but recognize what they claim to be a universal feature of a legal tradition. While they could retort that, whatever Dicey says, he has to recognize this feature, it is still the case that most of what he says is inconsistent with such recognition. Moreover, my argument is that it is only through making sense of the text that seems inconsistent with such recognition that one has the basis for responding to Schmitt's challenge. As I will show, Dicey does respond directly to both limbs of that challenge. Not only is it the case that it is for the court to decide whether the government has a justified claim that there is an emergency—the first limb—but the courts must assess whether the actual responses to the emergency are legal—the second limb.

I will also argue that Dicey's response is more powerful because it is made within the context of a common law legal order, one in which he acknowledges that an explicit statute can legalize both immorality and illegality. Schmitt's challenge is to the liberal ideal of the rule of law, however that ideal is institutionalized. It applies not only to common law legal orders, but also to legal orders where entrenched constitutions protect both the separation of powers and rights, whether or not these constitutions make provision for emergency powers and whether or not, if there is such provision, the limits on emergency powers are detailed and clear. But if that challenge can be met in a legal order where there are no explicit constitutional constraints, it can all the more easily be met by a legal order in which constraints of the right sort are explicitly constitutionalized.

Indeed, it is important to rescue Dicey from Ferejohn and Pasquino precisely to fulfill the ambition, if not the structure, of their own argument. While they wish to claim that responses to emergencies require a dualist legal order, one divided between ordinary law that

¹⁵ *Id.* at 554.

¹⁶ *Id.* at 545.

responds to the normal, and emergency law which responds to the exception, they also seem to favor the idea that the emergency legal system should be a legal order—a rule of law order, to the extent possible.¹⁷ And they imply that any derogation from the rule of law requires a justification.¹⁸

So while they concede both limbs of Schmitt's challenge, they try to blunt its force. In particular, they want to resist his suggestion that a sovereign who is determined to do so can change a dictatorship by commission—from a dictatorship limited in scope and time in order to attempt to ensure a return to normality, into a constitutional dictatorship, one which is able to use emergency powers to construct a new kind of order. My argument is that in order for that ambition to be realized, one has to resist what they call dualism. One needs to maintain the idea they associate with absolutism and Hobbes—the idea that that legal order is unitary.

Put differently, one needs to maintain Hans Kelsen's Identity Thesis: the thesis that the state is totally constituted by law.¹⁹ According to that thesis, when a political entity acts outside of the law, its acts can no longer be attributed to the state and so they have no authority. Dicey, on my understanding, subscribes to the same thesis, and differs from Kelsen²⁰ only in that he clearly takes the claim that the state is constituted by law to mean that the law that constitutes the state and its authority includes the principles of the rule of law. This has the result that a political entity acts as a state when and only when its acts comply with the rule of law. There will of course be thicker and thinner versions of the Identity Thesis, and Dicey's is much thicker, or more substantive, than Kelsen's.

From this perspective, there is no prerogative attaching to any institution of state to act outside of the law. Put differently, one can concede that there is an outside to law without being a dualist so long as one also denies that there is authority, within or without the law, to authorize the state to act outside of the law. The Identity Thesis denies the existence of the prerogative or its analogs and requires resistance to attempts to use political power to install the analogs within the law. Thus, if the executive is given the equivalent of such a prerogative either by the constitution or by statute, it is the duty of judges to try to

¹⁷ Ferejohn & Pasquino, *supra* note 7, at 228.

¹⁸ *Id.* at 222.

¹⁹ See HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY: A TRANSLATION OF THE FIRST EDITION OF THE REINE RECHTSLEHRE OR PURE THEORY OF LAW 97-106 (Stanley L. Paulson & Bonnie Litschewski-Paulson trans., 1992).

²⁰ Or at least from the standard interpretation of Kelsen. See Lars Vinx, Legality and Legitimacy in Hans Kelsen's Pure Theory of Law (Oct. 2005) (unpublished Ph.D. dissertation, University of Toronto) (on file with author).

understand that delegation of power as constrained by the rule of law. To the extent that the delegation cannot be so understood, judges must treat it as, to use terminology developed by Ronald Dworkin, an embedded mistake. This is a legal fact that judges have to recognize, but which they must try to limit to the extent possible by refusing to concede to it “gravitational force” or the ability to have any legal effect beyond what is absolutely necessary.²¹ They are entitled to do this because they should adopt as a regulative assumption of their role that all the institutions of government are cooperating in what we can think of as the rule of law project, the project which tries to ensure that political power is always exercised within the limits of the rule of law.

I will argue, however, that in order to provide a workable version of the Identity Thesis, it is important to depart in some significant respects from Dicey. The regulative assumption just sketched does not require that judges always be the principal guardians of the rule of law. Certain situations, and emergencies are one, might require that Parliament or the executive play the lead role. The rule of law project does not require allegiance to a rigid doctrine of the separation of powers in which judges are the exclusive guardians of the rule of law. Nevertheless, judges will always have some role in ensuring that the rule of law is maintained even when the legislature and the executive are in fact cooperating in the project. Judges also have an important role in calling public attention to a situation in which such cooperation wanes or ceases.

As I will argue, it is in seeing that judges are but part of the rule of law project that one can begin to appreciate the paradox that arises when rule by law, rule through a statute, is used to do away with the rule of law, to create a legal black hole. I will claim that there is a contradiction in the idea of legal black hole. In other words, one cannot have rule by law without the rule of law. But precisely because I want to argue that judges are but part of the rule of law project, I also am not committed to the conclusion that judges are always entitled to resist statutes that create legal black holes. Whether they are so entitled will depend on the constitutional structure of their legal order. But whatever that structure, they are under a duty to uphold the rule of law. Even if they are not entitled to invalidate a statute that creates a legal black hole, it is their duty to state that the legislature has made a decision to govern arbitrarily rather than through the rule of law.

²¹ RONALD DWORKIN, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 81, 121-22 (1977).

I. 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.”²² 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 “hand back this power to the regular authorities just as soon as its purposes had been fulfilled.”²³

Rossiter argued that three “fundamental facts” provide the rationale for constitutional dictatorship.²⁴ First, 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.”²⁵ Therefore, second, 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.”²⁶ Third, this altered government, which might amount to an “outright dictatorship,” 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.”²⁷ Rossiter was anxious, however, to stress the importance of the qualifying adjective in the idea of constitutional dictatorship.²⁸ 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 [W]hen the crisis goes, it goes.”²⁹ Thus, in his concluding chapter, he listed eleven criteria that 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.”³⁰

²² CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP* 314 (Princeton Univ. Press 1979) (1948).

²³ *Id.* at 4-5.

²⁴ *Id.* at 5.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 5-7.

²⁸ *Id.* at 4.

²⁹ *Id.* at 8.

³⁰ *Id.* at 298.

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."³¹ The second 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."³² 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.³³ As Rossiter immediately recognized, this second criterion is not uniformly observed in modern experience with emergency powers; he remarked that the "greatest of constitutional dictators was self-appointed, but Mr. Lincoln had no alternative."³⁴

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.³⁵ 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."³⁶ This power included one ratified by the Supreme Court: "an almost unrestrained power to act toward insurrectionary citizens as if they were enemies of the United States, and thus place them outside the protection of the Constitution."³⁷

³¹ *Id.*

³² *Id.* at 299. The remaining nine are: "[n]o government should initiate a constitutional dictatorship without making specific provisions for its termination"; "all 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"; "no 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"; "[t]he measures adopted in the prosecution of a constitutional dictatorship should never be permanent in character or effect"; "[t]he dictatorship should be carried on by persons representative of every part of the citizenry interested in the defense of the existing constitutional order"; "[u]ltimate 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; "[t]he 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"; "[n]o constitutional dictatorship should extend beyond the termination of the crisis for which it was instituted"; and "the 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." *Id.* at 300-06.

³³ *Id.* at 20-23.

³⁴ *Id.* at 229.

³⁵ *Id.* at ch. XIV ("The Constitution, the President, and Crisis Government").

³⁶ *Id.* at 229.

³⁷ *Id.* at 230 (referring to *Prize Cases*, 67 U.S. 635, 670 (1863)).

Rossiter's difficulties here illustrate rather than solve the tensions inherent 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 with fundamental laws. These laws are not the constitution that is in place for ordinary times; rather, they are the laws that govern the management of exceptional times—the eleven criteria that he developed for constitutional dictatorship. 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 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, which 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, Lincoln, not only gave himself dictatorial powers but, Rossiter supposes, 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 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. And Rossiter said, "whatever the theory, in moments of extreme national emergency the facts have always been with . . . John Locke."³⁸

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 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.

³⁸ *Id.* at 219.

Giorgio 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.³⁹ 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.⁴⁰ He operates within a black hole, in Agamben's words, "an emptiness of law."⁴¹ Agamben thus 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.⁴² And in coming to this conclusion, Agamben sides with Carl Schmitt, his principal interlocutor in his book.

However, it is important to see that 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 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 veneer of legality on the political, which allows the executive to do what it wants while claiming the legitimacy of the rule of law. We have seen that Rossiter presents a prominent example which supports Schmitt's view, and as I will now show, it is a depressing fact that much recent post 9/11 work on emergencies is also supportive of Schmitt's view.

³⁹ GIORGIO AGAMBEN, *STATE OF EXCEPTION* 47-48 (Kevin Attell trans., 2005).

⁴⁰ H.L.A. HART, *Positivism and the Separation of Law and Morals*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 49, 59 (1983).

⁴¹ AGAMBEN, *supra* note 39, at 48.

⁴² *Id.* at 41-42.

II. RESPONDING TO 9/11

For example, Bruce Ackerman in his essay, *The Emergency Constitution*,⁴³ starts by claiming that we need “new constitutional concepts” in order to avoid the downward spiral in protection of civil liberties that occurs when politicians enact laws that become increasingly repressive with each new terrorist attack.⁴⁴ 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.”⁴⁵ 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.”⁴⁶ Hence, it is better to rely on a system of political incentives and disincentives, a “political economy” that will prevent abuse of emergency powers.⁴⁷

He calls his first device the “supramajoritarian escalator”⁴⁸—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.⁴⁹ The second device requires the executive to share security intelligence with legislative committees and that a majority of the seats on these committees belong to the opposition party.⁵⁰

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

⁴³ Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004).

⁴⁴ *Id.* at 1029-30.

⁴⁵ *Id.* at 1044.

⁴⁶ *Id.* at 1031.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1047.

⁴⁹ *Id.* at 1047-49.

⁵⁰ *Id.* at 1050-53. Ackerman would also insert a constitutional requirement of an actual, major attack, before the executive may declare a state of emergency, *id.* at 1060, and have the constitution provide for adequate compensation for the individuals and their families who are harmed by emergency measures, *id.* at 1062-66.

suspend the emergency constitution and that this assertion might enjoy popular support, he supposes that if the courts declare that the executive is violating the constitution, this will give the public pause and thus will decrease incentives on the executive to evade the constitution.⁵¹ 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 should be 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 both to give the suspects a public 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.⁵²

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.”⁵³ 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.⁵⁴

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, a 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 a necessity to operate outside of law’s rule. For that reason, he constructs a political economy to constrain emergency

⁵¹ *Id.* at 1067-68.

⁵² *Id.* at 1068-76.

⁵³ *Id.* at 1069.

⁵⁴ *Id.*

powers. But that political economy still has to be located in law in order to be enforceable, which means that Ackerman cannot help but rely on judges. 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 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 conceding 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 of legality where rule by law ceases to be in accordance with the rule of law.

Ackerman's argument for 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. 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. And 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 that he thinks judges should adopt in deciding all

constitutional matters.⁵⁵ Sunstein differs from Ackerman and others engaged in the American debate in that he does not advocate a minimalist role for judges during emergencies solely on the basis that judges have shown themselves incapable of doing more. Rather, his argument rests on the notion that judicial minimalism is appropriate during normal times, but even more appropriate during an emergency situation.

According to Sunstein, minimalists favor 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 favor narrowness over width. They proceed “one case at a time,” thus avoiding the need to resolve more than the case demands, although minimalism is consistent with a strategy of which Sunstein approves, the strategy of forcing “democracy-promoting decisions”—decisions which prompt judgments in the form of clear statements from “democratically accountable actors, above all Congress.”⁵⁶ This aspect of minimalism requires that as little be 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, favor depth; they adopt foundational theories which they articulate in their judgments, confident in the correctness of their views. And they also favor width, because laying down “firm, clear rules” in advance cuts down on the judicial discretion that minimalism perforce leaves to judges while at the same time providing a “highly visible background against which other branches of government can do their work.”⁵⁷

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 that they would in peace—indeed, that

⁵⁵ For the stance, see CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). For the extension, see Cass Sunstein, *Minimalism at War*, 47 SUP. CT. REV. 48 (2004).

⁵⁶ *Id.* at 47–48.

⁵⁷ *Id.* It is interesting that Justice Scalia’s positivist jurisprudence is the example Sunstein offers of maximalism, an attempt to lay down rules that will constrain the future to the greatest extent possible. This choice means that Sunstein does not have to confront a subtler opponent, who argues that the issue is not laying down rules but articulating principles.

in emergency times it is all the more important that judges play this role.⁵⁸ 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, the government has greater justification to intrude on liberty.⁵⁹ And he rejects National Security Maximalism for the following reasons. First, its reading of the Constitution is tendentious in its claim that the Constitution gives the President exclusive authority in an emergency. Second, 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 third, 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.⁶⁰

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.”⁶¹ Liberty is thus promoted “without compromising legitimate security interests.”⁶² Courts should also “insist, whenever possible, on the core principle of the Due Process Clause.”⁶³ Some kind of hearing must be put in place to ensure against erroneous deprivations of liberty. Finally, judges must exercise self-discipline by giving judgments that are shallow and narrow.⁶⁴

In combination, these three features of his minimalist approach will, Sunstein thinks, promote democracy by requiring that executive action have 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 “[will] reflect[] the most familiar aspect of the due process guarantee”;⁶⁵ and the requirement of narrow and shallow rulings from a court means that those not before the court—that

⁵⁸ *Id.* at 48.

⁵⁹ *Id.* at 51-52.

⁶⁰ *Id.* at 52-53.

⁶¹ *Id.* at 53-54.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 54-55

is, those whose cases arise later—will be provided with an opportunity to be heard.⁶⁶

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

But it follows for him and for others that decisions that were regarded until recently as badges of shame in American legal history, most notably, the Second World War decision of the majority of the Supreme Court in *Korematsu*,⁶⁷ have to be seen in a new light. They are not to be understood as decisions 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.”⁶⁸

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 revisionists⁶⁹ now wish to point out that in a case decided on the same day, *Endo*,⁷⁰ 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 offense “to remain in . . . any military area or military zone”⁷¹ prescribed by a competent official. Sunstein says that in *Endo*, in contrast, there was no statute on which the executive could base its detention order. Sunstein concludes that an executive survived legal

⁶⁶ *Id.*

⁶⁷ *Korematsu v. United States*, 323 U.S. 214 (1944).

⁶⁸ Sunstein, *supra* note 55, at 51.

⁶⁹ See Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach During Wartime*, 2 INT'L J. CONST. L. 296 (2004). Mark Tushnet offers not so much a revisionist view as an account of the inevitability of *Korematsu* in Mark Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273 (2003).

⁷⁰ *Ex parte Endo*, 323 U.S. 283 (1944).

⁷¹ *Korematsu*, 323 U.S. at 216.

attack only when “congress had specifically permitted its action.”⁷² 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.⁷³ Further, in *Endo* the government argued that the same statute authorized detention. The majority of the Court responded that the word “detention” was not used in the statute and certainly could not be used as a basis for detaining Endo, who was found 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.⁷⁴ 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. 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 than the revisionists who have subsequently relied on his work acknowledge.⁷⁵ 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*.⁷⁶ Black’s claim, that is, was that exclusion was temporary, a measure responding to the exigencies of the moment. He wanted to resist the argument proffered 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 a whole to accomplish long-term detention.⁷⁷ In addition, Gudridge points out that it is misleading to characterize Justice Douglas’s majority opinion in *Endo* as an ordinary exercise in statutory, in contrast to constitutional, interpretation, despite Douglas’s own less-than-wholehearted attempt to portray the opinion in this fashion.⁷⁸

⁷² Sunstein, *supra* note 55, at 92-93.

⁷³ *Korematsu*, 323 U.S. at 244.

⁷⁴ Sunstein, *supra* note 55, at 92-93.

⁷⁵ Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933 (2003).

⁷⁶ *Id.* at 1934.

⁷⁷ *Id.* at 1942.

⁷⁸ *Id.* at 1938-39. Less than whole-hearted because Douglas later said that he wished to write the opinion as a constitutional one, but other Justices, including Black, refused. *Id.* at 1953; see

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.⁷⁹ Rather, Justice Douglas used the Constitution to set the stage for his exercise in statutory interpretation.⁸⁰ Moreover, Gudridge suggests that even were it not for these explicit signals in the text of the majority opinion 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.⁸¹ 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.

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 the question of whether, as Gudridge puts it, it is "possible for constitutional law to be *both* intermittent and organizational."⁸² *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."⁸³

In other words, *Korematsu*, on its most charitable reading, held that a state of emergency is a grey hole, but one which has to be properly created, that is, 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.⁸⁴ And such deference means that judges create a situation in which the executive seems subject to review, but in substance is not, meaning that in effect there is a black hole. 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 them.

It is troubling enough that Sunstein and other revisionists think that a black hole of the sort into which Japanese Americans were placed 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*,

also the text of Douglas's draft opinion with the constitutional assumptions crossed out, reproduced by Gudridge, *id.* at 1955.

⁷⁹ *Id.* at 1959.

⁸⁰ *Id.* at 1947-53.

⁸¹ *Id.* at 1953, 1964.

⁸² *Id.* at 1967 (emphasis added).

⁸³ *Id.*

⁸⁴ See Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441 (2005).

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 opinion. For example, Sunstein is enthusiastic about the judgment of the plurality in *Hamdi*, the 2004 United States Supreme Court's decision on enemy combatants.⁸⁵

In *Hamdi*, the plurality held that the detention of such combatants was authorized by the Congressional Order that gave the President authority to "use all necessary and appropriate force" to respond to terrorism.⁸⁶ The plurality also held that while the detainees were entitled to contest their detention orders, a military tribunal would be the appropriate forum in which this contest would take place, with its procedures determined in accordance with a cost-benefit calculation, that is, one which weighs security and rights considerations together.⁸⁷

Sunstein endorses both of these holdings: the first, because it recognizes the need for congressional authorization;⁸⁸ the second, because it exhibits the requisite degree of self-discipline.⁸⁹ But in endorsing this decision, he also endorses the claim that a general delegation of authority necessarily includes the delegation of authority to detain, and that the executive is entitled to limit due process rights so as not to afford a detainee a real opportunity to contest his detention. Concerns about the first issue were raised by Justices Scalia and Stevens in dissent, and by Justices Souter and Ginsburg in an opinion that concurred reluctantly with the plurality in order to give the decision of the plurality practical effect.⁹⁰ Justices Souter and Ginsburg also expressed grave doubts about the plurality's views about adequate due process. A subsequent federal court has held that the administration's procedures, which put into practice the plurality's recommendations, are inadequate.⁹¹

My concern is that Sunstein's minimalism is committed to a view of legality that not only permits the executive to claim that a system of arbitrary detention is one which operates under the rule of law, but also

⁸⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); Sunstein, *supra* note 55, at 92-95.

⁸⁶ *Hamdi*, 542 U.S. at 512-24.

⁸⁷ *Id.* at 524-39.

⁸⁸ Sunstein, *supra* note 55, at 94-95.

⁸⁹ *Id.* at 102.

⁹⁰ *Hamdi*, 542 U.S. at 540-65 (Souter, J., concurring in part and dissenting in part & Scalia, J., dissenting).

⁹¹ *Id.* at 550-52 (Souter, J., concurring in part and dissenting in part).

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. Such a judgment would put the executive and legislature on notice that what they do decide will be vulnerable to further judicial scrutiny, instead of telling them what they need to do to achieve a bare constitutional pass.⁹² 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.

Contrary to his argument, an authentic clear statement rule works only when judges reject the first dimension of his minimalism—the avoidance of full justifications for results that seek to preserve the rule of law. But in addition, a clear statement rule is normatively vacuous unless judges presume that until the legislature tells them otherwise, the rule of law is fully operative. In other words, judges must reject the second dimension of Sunstein’s minimalism—minimalism not about the language of the judgment, but about the result. They are under a duty to reach conclusions that preserve the rule of law to the greatest extent possible if they are to avoid permitting the executive to operate with the form and thus legitimacy of the rule of law without being constrained by its substance.

Indeed, 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

⁹² Sunstein, in my view, misunderstands the Israeli Supreme Court’s decision on torture in *Judgment Concerning the Legality of the General Security Services’s Interrogation Methods*, 38 I.L.M. 1471, 1488 (1999) [hereinafter *Interrogation Methods*]. See Sunstein, *supra* note 55, at 77-78. While the Court did say that if torture were to be permitted, the legislature would have to authorize it explicitly, it went far beyond a minimal requirement of clear authorization. It also hinted that the legislative scheme to give advance permissions to torture might fail on its own terms since it would have to find a way to make judgments in advance about necessity, which in their nature can only be vindicated with the benefit of hindsight. And it hinted that the Court might find any such scheme unconstitutional. See *Interrogation Methods*, 38 I.L.M. 1471 at para. 36 (the discussion of the nature of a defense of necessity), read in light of the last line of para. 39 (“It is there [in the legislature] that the required legislation may be passed, provided, of course, that a law infringing upon a suspect’s liberty ‘befitting the values of the State of Israel,’ is enacted for a proper purpose, and to an extent no greater than is required. (Article 8 to the Basic Law: Human Dignity and Liberty).”).

Hamdi. Thomas accepted the government's main argument—that the executive had a blank check to detain, even without Congressional authorization, since Article II of the Constitution provides that the President is “Commander in Chief of the Armed Forces.”⁹³ And he put forward a basically Schmittian argument to the effect that it is necessary that the executive have the authority, unconstrained by legality, to respond to exceptional situations. This strategy does less damage 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's strategy, taken literally, 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. 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 to 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 that Sunstein and the plurality find acceptable. But once there is such a clear statement, Scalia is prepared to give the stamp of legality to the legal black hole. Blank checks are fine as long as they are properly certified.⁹⁴

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: 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 are more harmful to the rule of law than black holes. As I have indicated, a grey hole is a space in which the detainee has some procedural rights but not rights sufficient for him effectively to contest the executive's case for his detention. It is in substance a legal black hole, but it is worse because the procedural rights available to the detainee cloak the lack of substance. It is of course a delicate matter to decide when the blackness shades through grey into something that provides a detainee with

⁹³ *Hamdi*, 542 U.S. at 579-85 (Scalia, J., dissenting).

⁹⁴ *Id.* at 563-64 (“When the writ is suspended, the Government is entirely free from judicial oversight.”).

adequate rule of law protection—when, that is, on the continuum of legality, the void ceases to be such. 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.⁹⁵ Gross sketches two traditional models that 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.⁹⁶ 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.⁹⁷ 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.⁹⁸

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."⁹⁹ This assumption makes it easier for us to accept expanded government powers and extraordinary measures, since we suppose both that we can return to normal once the threat has gone, 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."¹⁰⁰

⁹⁵ See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, 112 YALE L.J. 1011 (2003).

⁹⁶ *Id.* at 1021.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1021-22. Gross finds several different models within the Accommodation camp, but for the sake of simplicity I will talk about one model.

⁹⁹ *Id.* at 1022 (footnote omitted).

¹⁰⁰ *Id.* at 1023.

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 American 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 by claiming 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."¹⁰¹ 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."¹⁰² Gross's claim is that this model is best suited to preserving the "fundamental principles and tenets" of the constitutional order.¹⁰³ 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.¹⁰⁴ The process involved will promote both popular deliberation and individual accountability, while the uncertain outcomes will provide a break on public officials' temptation to rush into action.¹⁰⁵

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 by the government in emergencies will eventually seep into the legal system even after the crisis.¹⁰⁶

The model, in his view, recognizes the force of all three points, but by rejecting the naivety 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 Dicey in his

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 1023-24.

¹⁰⁴ *Id.* at 1024.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1097.

theoretical armory. 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."¹⁰⁷

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, which 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.

Moreover, Gross has also come to suggest that 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.¹⁰⁸ He immediately noted the dilemma that arises. The claim that the power to act outside of law is itself a legal power, one inscribed in the constitutional order whether 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."¹⁰⁹

In recognizing this dilemma, Gross acknowledged precisely the point that Agamben made in 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.

¹⁰⁷ DICEY, *supra* note 4, at 412-13.

¹⁰⁸ See Oren Gross, *Stability and Flexibility: A Dicey Business*, in GLOBAL ANTI-TERRORISM LAW 90 (Victor Ramraj, Michael Hor & Kent Roach eds., 2005). He relies here on CARL J. FRIEDRICH, CONSTITUTIONAL REASON OF STATE: THE SURVIVAL OF THE CONSTITUTIONAL ORDER 110-11 (1957). Friedrich does not quite say what Gross takes him to say but the more interesting issue for my argument is Gross's temptation to constitutionalize the prerogative.

¹⁰⁹ Gross, *supra* note 108, at 97.

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—that will permit government to claim that it is acting according to law when it in effect has a free hand and will, the longer the exceptional regime lasts, create the problem of seepage of government outside of the rule of law into the ordinary legal order. As I will now argue, a promising start in this endeavor lies in understanding Dicey's denial that the English constitution made any place for martial law in the sense of the French state of siege.

As we will see, for Dicey a rule of law response to a state of emergency is by necessity a legislative response since he does not think there is any constitutional authority for the executive to act except under the authority of statute. Now this stance might seem to be the product of his view of the facts of the matter about the English constitution. But, as I will show, it is much more the product of his substantive conception of the rule of law. The claim that there is no such constitutional authority gives rise to a regulative assumption for judges that a rule of law regime responsive to an emergency requires statutes that delegate authority to officials in such a way that the authority can be exercised subject to the rule of law, substantively understood.

If, contrary to Schmitt and the positions discussed above, such a regulative assumption is both possible and beneficial, we can reach a conclusion that transcends the contingencies of the English constitution. For it is the case that neither Ackerman's proposal for constitutional reform nor Gross's Extra-Legal Measures model are candidates for viable responses, at least because of the alleged permanent or indefinite nature of the current emergency. Even if Ackerman's proposals were accepted, governments would decide to operate under the radar of his emergency constitution in order to find some way of crafting a long term response to the perceived dangers. And Gross's Extra-Legal Measures model turns out, as I have argued, not to be a model but a description of after-the-fact responses to a situation where there is no time to craft a legislative response. As the American Supreme Court's decision in *Hamdi* illustrates, judges, even if they don't require a proper legislative response, will require that the executive fits itself into some legislative scheme that permits the judges to feel that they are doing their job of guarding the rule of law, even though their conception of the role of law is damagingly thin or minimal. So whatever the dangers of accommodation and seepage, there is no choice but to engage in

legislatively prompted experiments in institutional design. This is where Dicey, in a way despite himself, is helpful.

III. DICEY'S MODEL OF LEGALITY

There are times of tumult or invasion when for the sake of legality itself the rules of law must be broken. . . . The Ministry must break the law and trust for protection to an Act of Indemnity. A statute of this kind is . . . the last and supreme exercise of Parliamentary sovereignty. It legalises illegality. . . . [It] . . . combine[s] the maintenance of law and the authority of the Houses of Parliament with the free exercise of that kind of discretionary power or prerogative which, under some shape or other, must at critical junctures be wielded by the executive government of every civilized country.¹¹⁰

In general, Dicey was deeply opposed to the claims of the royal prerogative because those claims purport to stand above or beyond the law. 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 either an extra legal power or a constitutional or statutory power to create such a black hole. But as we have also seen, he accepts that in a common law legal order, a statute, rule by law, can achieve whatever ends legislators desire. It seems to follow that a statute can create a legal black hole—rule by law can do away with the rule of law.

I mentioned earlier the 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 of legality where rule by law ceases to be in accordance with the rule of law. But the point I want to extract from Dicey goes beyond this thought. It is that a thick conception of the rule of law is committed to the conclusion that it is possible to use rule by law to take one off the continuum of legality. One does not have rule by law let alone the rule of law. Here it is important to see that the difference between a statutory creation of a legal black hole in anticipation of officials acting in violation of the law and an Act of Indemnity, which, to use Dicey's phrase in the epigraph to this section, "legalises illegality" retrospectively, is not just a question of timing.

¹¹⁰ DICEY, *supra* note 4, at 412-13.

The closest Dicey comes to acknowledging the existence of prospectively created legal black holes is in his discussion of Habeas Corpus Suspension Acts—statutes which suspended habeas corpus for those charged with treason during periods of “political excitement.”¹¹¹ But he says that while they are popularly thought of as Habeas Corpus Suspension Acts, this name is inaccurate. All such a statute can do is make it impossible for a detainee “to insist upon being discharged or put on trial.”¹¹² But it “falls very far short of anything like a general suspension of the right to the writ of habeas corpus” and does not “legalise any arrest, imprisonment, or punishment which was not lawful before the Suspension Act passed.”¹¹³ It thus falls far short, Dicey claims, of a constitutional suspension of guarantees. This is illustrated by the fact that, before the Act runs out, its effect is “almost invariably, supplemented by legislation of a totally different character, an Act of Indemnity.”¹¹⁴

Dicey’s point is that without such an Act of Indemnity, the officials who imprisoned detainees would likely be guilty of a number of unlawful acts. Indeed, the “unavowed object of a Habeas Corpus Suspension Act is to enable government to do acts which, though politically expedient, may not be strictly legal.”¹¹⁵ It follows that the combination of a Suspension Act with the prospect of an Indemnity Act does “in truth arm the executive with arbitrary powers.”¹¹⁶ However, the relief the Indemnity Act will in fact grant is “prospective and uncertain,” dependent on its terms, and it is unlikely that it will cover acts of “reckless cruelty.”¹¹⁷ Moreover, despite the fact that an Act of Indemnity is an “exercise of arbitrary sovereign power,” it is, Dicey insists, still legislation and so “very different from the proclamation of martial law, the establishment of a state of siege, or any other proceeding by which the executive government at its own will suspends the law of the land.”¹¹⁸ It thus “maintains in no small degree the real no less than the apparent supremacy of law.”¹¹⁹

But a legal black hole is very different from a suspension of habeas corpus followed by an Act of Indemnity, no matter how confidently the latter can be predicted. For a legal black hole comes about through an immediate statutory combination of the two. It creates a zone in which

¹¹¹ *Id.* at 229.

¹¹² *Id.* at 230.

¹¹³ *Id.*

¹¹⁴ *Id.* at 232.

¹¹⁵ *Id.* at 234.

¹¹⁶ *Id.* at 236.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 237.

¹¹⁹ *Id.*

officials can act unconstrained by the rule of law and in advance declares what they do to be legal. It declares, that is, that official decisions are by definition both necessitous and made in good faith.

In contrast, a Suspension Act does not suspend the law but only the remedies to which the person would otherwise be entitled. It is not, that is, a total derogation from law, but a temporary denial of access to certain parts of the law. Moreover, when the Act of Indemnity is enacted, it does not remove the substantive quality of illegality from the illegal acts that were done. Rather, it immunizes the officials from criminal and civil liability for what they did. The substantive law to which the officials were accountable is, in other words, unaffected. Moreover, the law that gives them immunity does not come about by executive fiat but through legislation. While the two occasions of rule by statute law, suspension followed by indemnity, do introduce arbitrariness into the legal order, the arbitrariness is contained, and so the statutes do not do away with the rule of law.

It is for this reason that Dicey says that it would be erroneous to suppose that the Acts of Indemnity which follow Suspension Acts merely substitute the “despotism of Parliament for the prerogative of the Crown.”¹²⁰ “[T]he fact that the most arbitrary powers of the English executive must always be exercised under Act of Parliament places the government, even when armed with the widest authority, under the supervision, so to speak, of the courts.”¹²¹ In his view, the judges would exercise a control on executive action informed by their understanding of the “general spirit of the common law.”¹²² And he claimed that in England “Parliamentary sovereignty has favoured the rule of law. . . . [T]he supremacy of the law of the land both calls forth the exertion of Parliamentary sovereignty, and leads to its being exercised in a spirit of legality.”¹²³ In other words, the rule of law is preserved to the extent that the officials who act illegally are still accountable to a statute and because judges will interpret that statute to ensure that the officials act in good faith and in a fashion that does not amount to reckless cruelty.

However, the extent to which the rule of law can be preserved is obviously dependent on the terms of the Act of Indemnity. An Act of Indemnity could make it clear that any acts, including acts done in bad faith and acts that are recklessly cruel, are covered, and that judges are not entitled to review official action during the emergency. Dicey might conclude that, just as in the case of the statute that ordered that blue-eyed babies be put to death, judges would be powerless in the face

¹²⁰ *Id.* at 413.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 414.

of such a statute. This Act of Indemnity would establish a legal black hole—a zone of illegality—retrospectively. Dicey would surely have no hesitation in labeling it despotic.

But even if judges are powerless before such a statute, Dicey's legal theory is not. Rule by law and the rule of law are for Dicey two sides of the same coin, which is why he claimed that the two features of the English constitution are the sovereignty of Parliament and the rule or supremacy of law.¹²⁴ It follows 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. If suspension and indemnity are combined in the same statute, whether prospectively or retrospectively, not only is the rule of law done away with but also rule by law. Law—even on a very thin conception of law—no longer guides the officials who are given power by the statute. My claim is not that law's function should be taken to be exclusively or even mainly about providing guidelines. Rather, it is that, even for those who hold this to be law's main or exclusive function, there comes a point where rule by law subverts itself.

Dicey did not, as far as I know, contemplate how a statute might prospectively provide for an executive response to a state of emergency in a fashion that preserves the rule of law.¹²⁵ This had a lot 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 that could be exercised free of judicial control. He thought that the administrative state is an affront to the rule of law precisely because a state in which officials are given vast discretionary powers to implement legislative programs necessarily places such officials beyond the reach of the rule of law. Put more generally, Dicey was deeply opposed to the administrative state.

But Dicey's reflections on Acts of Indemnity open up the conceptual space for prospective legislative responses to states of emergency that give officials authority to act, for example, to detain individuals, but which require that at the time they act they justify to an independent tribunal their decisions as both necessary and made in good faith. In order for such a tribunal to effectively review such decisions, it must be the case not only that it is independent but that it has access to all the information that the officials claim support the judgment that the

¹²⁴ *Id.* at 183-84.

¹²⁵ I misinterpreted Dicey on this issue in Dyzenhaus, *The State of Emergency in Legal Theory*, in *GLOBAL ANTI-TERRORISM LAW*, *supra* note 108, at 65, in that I claimed that Dicey, in *DICEY*, *supra* note 4, at 412-13, 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 in the text after this note.

individual detained is, say, a threat to national security. In addition, it must be the case that, contrary to the suggestion of the plurality in *Hamdi*, the state bears the onus of demonstrating that the individual is a threat. Such responses do exactly what Dicey hoped a Suspension Act and an Act of Indemnity could achieve in tandem: they provide a statutory basis for official decisions and at the same time seek to ensure that the decisions are made in a spirit of legality. And they have the additional advantage of rendering each decision, as it is made, testable to see whether it complies with the regime of legality established by the statute.

It is important to see that this idea is no mere thought experiment. The Special Immigration Appeals Commission in the United Kingdom is such a tribunal. It does have defects—most notably, that when confidential information is tested in closed session before it, the detainee and his lawyer do not have access to the information but must instead rely on a special advocate to contest the government's case. But more important is that it goes much further than the United Kingdom had gone before in trying to ensure that a rule by law response to a perceived emergency is coupled with the rule of law.

Almost as important is that in previous detention regimes created by statute or under the authority of statute, the government was anxious to avoid appearing to create black holes, to do away with all legal protections. Instead, it created grey holes, that is, protections which did not give detainees anything substantive. But even the impulse to create grey holes shows some recognition that rule by law has to be accompanied by the rule of law. And to the extent that holes created by statute are grey rather than black, judges, as long as they are not minimalists, can use the legal protections provided as a basis for trying to reduce official arbitrariness to the greatest extent possible. In doing so, they challenge the government either to make clearer its intention that detainees should be placed outside the protection of the law or to come up with some better way of fulfilling its claim to be committed to the rule of law.

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.

The solution, in my view, lies in appreciating the paradox that a concession that a statute is a valid one is not necessarily a concession that it has legal authority. Dicey is helpful here because he shows us how to avoid what I call the validity trap—the trap we fall into if we think that a sufficient condition for the complete 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 content, it has complete legal authority. The better position, I will argue, is to see that a law might be valid on the one hand and yet, on the other hand, have only a doubtful claim to legal authority because it overrides explicitly fundamental principles of the rule of law.

As I pointed out in the Introduction, the Identity Thesis denies the existence of the prerogative or its analogues and requires resistance to attempts to use political power to install the equivalents of the prerogative within the law. Thus, if the executive is given the equivalent of such a prerogative either by the constitution or by statute, it is the duty of judges to try to understand that delegation of power as constrained by the rule of law. To the extent that the delegation cannot be so understood, judges must treat it as, to use terminology developed by Ronald Dworkin, an embedded mistake, that is, a fact which they have to recognize, but whose force they should try to limit to the extent possible.¹²⁶ They are entitled to do this because they should adopt as a regulative assumption of their role the view that all the institutions of government are cooperating in what we can think of as the rule of law project, the project which tries to ensure that political power is always exercised within the limits of the rule of law.

Instructive here is Robert Alexy's example of a constitution which declares in its first provision that the political entity it creates is unjust.¹²⁷ Alexy rightly thinks that, whatever our theoretical position about law, such a provision looks crazy. It confronts judges and others with what looks like a contradiction installed by law within the legal order. Judges, I suspect, would have to deal with such a provision by ignoring it. More pertinent in the present discussion are constitutional or statutory provisions that seem to give the executive the authority to act outside the rule of law. Such provisions create, in my view, even more severe tensions for judges, if they adopt the regulative assumption that all the institutions of legal order are by definition committed to the rule of law project.

¹²⁶ See *supra* note 21.

¹²⁷ Robert Alexy, *A Defence of Radbruch's Formula*, in *RERAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER* 15, 27-28 (David Dyzenhaus ed., 1999).

Consider the following provision. Article 15(1) of the European Convention states:

In time of war or public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention, to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.¹²⁸

Its equivalent in the United Kingdom's Human Rights Act (1998), section 14(6), states simply that "[a] designation order may be made in anticipation of the making by the United Kingdom of a proposed derogation." But in *A v. Secretary of State for the Home Department*,¹²⁹ the majority of the House of Lords read section 14 to incorporate the terms of Article 15.

It was this reading that permitted Lord Hoffmann to hold that the derogation order was invalid because a declaration of a state of emergency had to be justified to a court and that the government had failed in this endeavor.¹³⁰ And it was the same reading that permitted the majority to find that the order was invalid on the different ground that the indefinite detention of aliens was disproportionate and discriminatory.

Suppose that the legislature reacted to such a judicial ruling by redrafting section 14 as follows:

In time of war or public emergency threatening the life of the nation, the United Kingdom government may take measures derogating from any or all of its human rights obligations. The decision that there is such a war or public emergency lies within the unfettered discretion of the government, so that neither that decision nor any of the measures it takes are subject to review in a court of law on any basis whatsoever, whether fact or law.

In putting such a provision into a statute, or a constitution, the government would be using a statute to give itself the mechanism to create a legal black hole. Judges faced with a challenge to such a provision would, I think, be able to declare it incompatible with the commitments in the rest of the Act. But whether they would go further and find an authority to invalidate the provision is not something that can be predicted, whatever judges say outside of their judgments.

But even if the judges were to find that they could not go beyond a declaration of incompatibility, they would in issuing it be pointing out that the government had ceased to govern under the rule of law, that it

¹²⁸ European Convention on Human Rights, Rome, Nov. 4, 1950, 213 U.N.T.S. 221.

¹²⁹ [2005] 2 W.L.R. 87 (Eng.).

¹³⁰ In David Dyzenhaus, *An Unfortunate Outburst of Anglo-Saxon Parochialism*, 68 MOD. L. REV. 673 (2005), I argue that Lord Hoffmann's position turns out to be the same as Scalia's in *Hamdi*—legal black holes are fine as long as they are properly created.

had transformed itself into a political entity that exercised power outside of the law. In fact, this derogation provision would not be an authentic derogation provision, since a derogation requires a justification both for the decision and for the responses it puts in place. Any rights not specifically derogated from are left intact.

In addition, a derogation from a human rights regime is not a derogation from the rule of law. An attempt to derogate from the rule of law places the body making the attempt in a contradictory position whose tensions become heightened when the ability to so derogate is written into a constitution or a quasi-constitutional document like the Human Rights Act. It follows that emergency provisions in written constitutions should be treated by judges as derogation provisions, and not as mechanisms for creating legal black holes.

It is perhaps even more important to see that these issues arise in situations in which the executive or the legislature or both have ceased to cooperate in the rule of law project. But an answer to Schmitt need not accept the terms of his challenge. Indeed, my critique of the positions I have sketched in the last 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, given an opportunity to contemplate how the law should be used to react to emergencies, it is possible to react in a way that maintains 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.

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 the constitution even as they try to confine it. Similarly, it is a mistake to take as the test 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 the sense used by Ernst Fraenkel when he described the Nazi state as dual, because in many respects it continued to govern through law while in others, it established rule by prerogative.¹³¹ But it does not follow from the fact

¹³¹ ERNEST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (Octagon Books 1969). I am not following Fraenkel's sense precisely because the

that such dualism has existed that it is necessary and hence that Schmitt's challenge is unanswerable. The real test for his 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.

POSTSCRIPT

On November 10, 2005, the Senate voted to strip "enemy combatants" held at Guantanamo Bay of their right to challenge their detentions in US courts.¹³² If enacted, this legislation would amount to a clear statement that these detainees were deprived of the right of habeas corpus. But it would be a clear statement that is not in the spirit of legality.

Recall Justice Scalia's all-or-nothing approach in *Hamdi*: either detainees have all their rights or none, and to conclude that there are none there must be an explicit statutory suspension of habeas corpus. One way of understanding his judgment is that a suspension of habeas corpus is a total suspension—it comes about because the legislative branch concludes that there is a state of emergency such that no one is entitled to habeas corpus. Because everyone subject to U.S. law, including citizens suspected of crimes far removed from terrorism, would have their rights suspended, the political costs of such a suspension would be close to unbearable; at the least, the suspension would have to be short-lived.

A statute that suspended the habeas corpus rights of "enemy combatants" would be quite different. Such a suspension would still permit a court to ask whether a person had correctly been categorized as an enemy combatant and to require that that categorization follow extensive due process requirements. The statute would, that is, suspend the detainee's rights only after it has been ascertained that his detention order is valid.

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 (chapter 1) and the Normative State (chapter 2). 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, e.g., *id.* at 9-11. He regarded Schmitt as the chief theorist of the prerogative state.

¹³² Eric Schmitt, *Senate Approves Limiting Rights of U.S. Detainees*, N.Y. TIMES, Nov. 11, 2005, at A1.

In contrast, the legislative measure contemplated by the Senate not only removes the habeas corpus right of enemy combatants, it also strips them of their right to due process in a court's determination of whether they are, in fact, enemy combatants. The detainees will, it appears, be able to contest the question of whether the government followed its own procedures when it detained them via an annual review. But this is such a thin veneer of legality that the grey hole sanctioned by the plurality in *Hamdi* will shade into blackness. And the legislature will have decided to give the executive what the Bush administration had claimed it could have without legislative authorization—arbitrary power to respond to emergencies.

How the U.S. courts will react remains to be seen. But it is quite possible that with a Chief Justice who does not have a record of strong regard for the rule of law, the Supreme Court will give its blessing to the drift in the United States towards the prerogative state. That would underscore a paradox suggested by the main argument in this Article. Common law legal orders might, as Dicey thought, have better resources to maintain the rule of law than legal orders in which there is strong form judicial review—that is, judicial authority to invalidate statutes—for strong form judicial review encourages an all-or-nothing approach.