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Constitutional Norms in a State of Permanent Emergency

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SYMPOSIUM ARTICLE

CONSTITUTIONAL NORMS IN A STATE OF PERMANENT EMERGENCY

Sanford Levinson*

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This Article was initially prepared for delivery on March 28, 2005 as the Sibley Lecture at the University of Georgia Law School. I am extremely flattered to have received this invitation, and I am grateful as well to the Law School's faculty—especially Kevin Heller, Paul Kurtz, and Michael Wells—and students for their outstanding hospitality during my visit to Athens. As always, I am grateful to Jack Balkin for his responses to a very early draft, as well as to Laura Kalman for a typically thorough response to a much later draft. I also benefited from conversations with Jack Goldsmith and Martin Lederman. Finally, I must mention some helpful comments by members of the audience following the presentation of a shorter version of these remarks at a conference on "The Dark Side of Fundamental Rights" at the Central European University in Budapest, June 10, 2005.
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I. INTRODUCTION: REMEMBRANCE OF ARTICLES PAST

Some thirty years ago I published a book review, *Fidelity to Law and the Assessment of Political Activity (Or, Can a War Criminal Be a Great Man?)*,¹ that examined the relationship, if any, between our esteem for certain political leaders—in the books under review, John F. Kennedy and Henry Kissinger—and their fidelity to the norms of international law with regard to the Cuban Missile Crisis and the Vietnam War, respectively.² Those interested in jurisprudence will recognize my question—*Can a War Criminal Be a Great Man?*—as simply a variant of the more basic question whether there is anything more than a contingent connection between law and morality. If there is no necessary connection, then there is always the possibility of a gap, or conflict, between law and morality. The obvious question then becomes which should have priority. More recently, I gave a lecture at the University of Illinois Law School whose title also took the form of questions: *Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?*³ I take very seriously the possibility that the Emancipation Proclamation is in fact constitutionally questionable and that we properly do not really care if that is the case inasmuch as the moral value of ending chattel slavery overcomes what some might view as “merely” legalistic obstacles. But Lincoln defended the Proclamation as an exercise of the war power, linking it to what might be termed the moral obligation to win the war and thus preserve the Union.⁴ This justification, of course, raises additional questions about how we define “morality” in the first place. Do national security interests—including preservation of the basic constitutional order—count as sufficiently moral concerns to trump what might otherwise be regarded as the clear meaning—“the letter”—of the law? “Reason of state” has often been interpreted as the highest obligation of political leaders, who are, as Michael Walzer has famously argued, authorized to have “dirty hands” when

¹ 27 STAN. L. REV. 1185 (1975).
² Id. at 1185-86.
⁴ Id. at 1142-43.
defending the most profound political interests.\(^5\) One can always choose to read legal texts teleologically, so that everything is "purposive." This may dissolve the tension, but only, of course, at the cost of leading to further discussion about how one identifies purposes and whether certain purposes, such as national security, almost inevitably end up subordinating all other possible ends.\(^6\)

I presume it is obvious how such questions have taken on new meaning in our present circumstances of what the Bush Administration labels the "global war on terror," which is justified as protecting our country's most basic security interests. How important is it that the President and his associates conform to internal constitutional or international norms in conducting that war? Does the President basically possess the power to unilaterally resort to preventive war, which by definition is not simply a "pre-emptive" strike against what is perceived to be imminent attack? That debate concerns the law of war—namely, the circumstances under which a nation can go to war at all. Another active debate concerns the law in war—the constraints that operate even in what is, by stipulation, a legally permissible war. The most important contemporary controversy involves the use of torture or "cruel, inhuman, and degrading" techniques as means of interrogation in spite of international and domestic law to the contrary. To what extent should the President—and those subject to presidential command—view themselves as necessarily bound by such legal norms,\(^7\) or are such constraints better defined only as political?

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\(^6\) Full consideration of this question is well beyond the scope of this Article. Aharon Barak, the President of the Israeli Supreme Court, authored the most extensive recent study of purposive interpretation. AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (Sari Bashi trans., 2005). My understanding of what may be at stake with regard to such teleological arguments was enhanced by a paper presented at the aforementioned conference in Budapest by Professor Zdenek Kühn of Charles University in Prague, "The Instrumental Use of Basic Rights by Stalinist Judiciary."

\(^7\) My major concern in this Article is presidential power, in part because of the remarkable assertions set out in the Memorandum from Jay Bybee, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf[hereinafter
One might, following the guide of my colleague Philip Bobbitt, simply say that a "prudential" approach to constitutional interpretation is every bit as legitimate as the other "modalities" of interpretation he has identified—text, history, structure, precedent, and cultural ethos. It should be obvious, however, that at some point a reliance on prudential concerns serves to deny what many see as the central norm of "the rule of law." This is clearest if one is at all sympathetic to arguments like Ronald Dworkin's, who among contemporary jurisprudges is most insistent on the priority of entrenched rights over a consequences-oriented weighing of social costs and benefits that, almost by definition, puts any particular claim of individual right at risk if its protection is costly.

There obviously exists a great temptation simply to redefine any troublesome legal norms in order to remove any discomfort that might be generated, say, by accepting the proposition that the actions of unimpeached or, more to the point, perhaps even celebrated presidents are transgressive of what we like to think of as our basic legal order. If it becomes almost literally unthinkable, for example, to accept descriptions of Abraham Lincoln or Franklin Roosevelt—widely accepted as two of our three unequivocally greatest presidents—as quite cavalier at times with regard to legal

Memorandum from Jay Bybee, discussed infra notes 149-74 and accompanying text. Some of the questioning of presidential power might be derived from concerns about separation of powers and the importance of preserving a notion of legislative accountability for basic decisionmaking in a republican political order. But even the legislative authorization of presidential decisionmaking would not still the doubts of those who view the Constitution as establishing a national government of only limited powers, which cannot be expanded by Congress. See, e.g., Samuel Issacharoff & Richard H. Pildes, Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime, in THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 161, 164-81 (Mark Tushnet ed., 2005) (examining United States Supreme Court's process-oriented analysis of limits on executive power); Mark Tushnet, Controlling Executive Power in the War on Terrorism, 118 HARV. L. REV. 2673, 2674 (2005) ("Under the separation-of-powers mechanism, nearly all of the work of regulating power is done by the principle that the President can do only what Congress authorizes.").


See generally RONALD DWORIN, TAKING RIGHTS SERIOUSLY (1977) (collecting essays criticizing Benthamite theories of legal positivism and utilitarianism).

See James Lindgren & Steven G. Calabresi, Rating the Presidents of the United States, 1789-2000: A Survey of Scholars in Political Science, History, and Law, 18 CONST. COMMENT.
norms that might have constrained their doing what they viewed as best for the country, then, as cognitive dissonance theory would predict, we redefine the law rather than redefine the presidents. As already suggested, purposive interpretation is especially useful to achieve such “happy endings” (at least for those who share the importance assigned to the controlling purposes).

I also find myself reflecting further on a book that I published in 1988 almost literally halfway between my 1975 Stanford review and my 2001 lecture at Illinois. Among other things, that book, Constitutional Faith, considered the role that the United States Constitution played in what I described as America’s “civil religion.”11 Many—I believe in fact too many—people “venerate” the Constitution and use it as a kind of moral compass, so that anything that is “constitutional” is viewed as also being morally acceptable. In any event, I concluded the first chapter by noting the irony that a culture that has experienced what Matthew Arnold over a century ago described as a “melancholy, long-withdrawing roar” from traditional religious faith can assert the continuing reality of a collectivity of citizens organized around a constitutional faith. The “death of constitutionalism” may be the central event of our time, just as the “death of God” was that of the past century. . . . The fact that the public rhetoric of American political culture remains organized, in substantial ways, as a faith community centered on the Constitution may mislead us as to the health of that culture. After all, as the senior Oliver Wendell Holmes reminded us in the “One-Hoss Shay,” a thinly disguised parable about classical Calvinism, a once-strong, indeed culturally dominant, mode of thought can collapse almost literally overnight.12

583, 587 (2001) (indicating that only Washington ranks above Lincoln and Roosevelt, with significant drop between Roosevelt and fourth-ranked Jefferson).
11 SANFORD LEVINSON, CONSTITUTIONAL FAITH 9-17 (1988).
12 Id. at 52.
It is, of course, always chastening to read what one has written in the past. It is clear that I grossly (perhaps grotesquely) overestimated the "death of God." At least since the election of Jimmy Carter to the White House—which, of course, occurred a full dozen years ago before my confident assertion—the United States has been in the midst of what some refer to as the Third "Great Awakening." For better and, most definitely, for worse, God is alive and well at least as a rhetorical force in American culture. Though I have turned out to be wrong on that central point, I believe that I need not recant my suggestion that American constitutionalism is fragile, subject, if not to outright disappearance, then at least to a transformation that would make it unrecognizable to many of us. Indeed, were I writing a different Article, I might well address the extent to which militant observance of what is thought to be Divine Law is one of the major contemporary threats to the more mundane—and secular—rule of law, both at home and abroad.

In any event, I now realize that when I wrote those lines in 1987, I believed them intellectually. However, as a matter of what might be termed emotional fact, I did not then truly feel that our basic constitutional structure was being seriously threatened, even if Lieutenant Colonel Oliver North and his minions were doing their best to subvert it. What has changed in the interim, especially over the past several years, is that I have indeed developed such fears about our constitutional future.

II. "PREROGATIVE," "NECESSITY," "EMERGENCY," AND CONSTITUTIONALISM

As I originally envisioned my remarks to my University of Georgia audience, I thought that I would go on, at this point, to explain what it is about many arguments associated with the Bush Administration—linked, of course, to the events of September 11, 2001—that indeed frighten me as a constitutional lawyer (and, more importantly, as a concerned citizen). I believe strongly, for example,

that the "global war on terror" is being used to justify a near-
dictatorial conception of presidential power, set out most vividly—and now one might even say notoriously, given subsequent developments—in a memorandum prepared by the Office of Legal Counsel within the Justice Department and transmitted to then White House Counsel Alberto Gonzales on August 1, 2002.\(^1\) I discuss that memorandum further toward the end of this Article.\(^2\)

For now, let me simply say that immediately after the disclosure of that document in May 2004, I wrote an essay for *Daedalus* arguing that the legal philosopher who provides the best understanding of the legal theory of the Bush Administration is Carl Schmitt, a brilliant German theorist of the Weimar period who became, not altogether coincidentally, the leading apologist for Hitler’s takeover of what Schmitt viewed, perhaps correctly, as a hopelessly dysfunctional German polity.\(^3\) Just to be clear, I do not believe that the Bush Administration is analogous in any serious way to the Nazi regime. But that may be cold comfort if we define the issue before us as whether or not the United States government is on a path to a far more authoritarian mode of governance than we have heretofore accepted as "the American way." It is with regard to that issue that the history of Weimar Germany may be all too relevant. Increasingly, I believe that some of Schmitt's critique of German parliamentarianism\(^4\) applies to this country, as Congress becomes ever more a forum for "grandstanding for the base" rather than serious debate—or even decisionmaking—about the country's future.

As I thought more deeply about what I wanted to share with my Sibley Lecture audience, however, I found myself, as is often my wont, turning to the history of American constitutional development. And the lesson taught by that history is that what we are experiencing today is only the latest episode in what is in fact an ongoing debate, literally as old as the Constitution itself, about the

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\(^1\) Memorandum from Jay Bybee, *supra* note 7.

\(^2\) See *infra* notes 149-74 and accompanying text.


meaning of constitutional restraints in times of "emergency." In this sense, at least, September 11 is nothing new, even if its particular form is different from other events that have generated similar views of vulnerability and a felt concomitant need to respond with alacrity, whatever some stodgy lawyers might suggest are limitations on permissible responses.

This point is brilliantly made by the cartoonist Tom Tomorrow in a four-panel drawing. Panel one is an exchange between two persons: "Boy, the threat of terrorism has really changed EVERYTHING!" "It sure has! I don’t think we’ll EVER live in a world as safe as the one WE grew up in!" At this point, a penguin-type figure, who presumably speaks for the cartoonist, interrupts: "You guys grew up in a world in which two rival superpowers had immense nuclear arsenals trained at each other, ready to launch at a moment’s notice. Do you REALLY believe that people felt safer THEN—with the threat of GLOBAL ANNIHILATION hanging over their heads like the sword of Damocles?" The third panel has no words, as the initial speakers seem to be thinking about the comment. Then, in the fourth panel, they go on: "Boy, this country is more divided politically than EVER BEFORE IN HISTORY!" "It sure is! I don’t think things were THIS bad during the CIVIL WAR!" The penguin is reduced to saying, "Um—excuse me—oh, never mind." That is, September 11 is only the latest example of a dire event that provokes great public anxiety and, as much to the point, action by political leaders that calls into question the meaning of constitutional fidelity. We should always remember the admonition of Ecclesiastes that there is nothing new under the sun, least of all the imagining (and, alas, the reality) of catastrophe. What is new, perhaps, at least since the eighteenth century, is the phenomenon of constitutionalism as a way of organizing our collective response to the travails posed by life.

What, after all, do we mean by constitutionalism? Although a number of different answers might be offered if one were asking the question at a political science seminar, if the we being referred to is

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19 Ecclesiastes 1:9.
American citizens, the answer almost invariably involves some notion of limited government and the linked notion of a "government of laws and not of men [and, today, women]."\(^{20}\) That is, we expect our leaders to subordinate their own goals and agendas (and visions) to the impersonal constraints of the Constitution, to which they all take an oath.

The central mantra of the founding generation was that the national government established by the 1787 Constitution was a "limited government of assigned powers," and that mantra retains its own power even in 2006. It is, for example, at the core of the past decade's Supreme Court backlash against what had been interpreted by the post-New Deal Supreme Court as the almost limitless power of Congress to base legislation on the Commerce Clause. It is said that Solicitor General Drew Days lost the 1995 *Lopez* case, which involved the constitutional propriety of a statute prohibiting guns within 1000 feet of schools,\(^ {21}\) when he was unable to offer a single example to the Justices of a substantive issue that would be beyond congressional power if his particular theory of *Lopez* were accepted.\(^ {22}\) If I had more time, I could discuss myriad cases and opinions, throughout our history, that feature, as a basic rhetorical trope, statements by many Justices that acceptance of the legitimacy of given action by the government would basically bring our experiment in constitutionalism to an end by substituting an all-powerful government for the limited one envisioned by the Framers.

As one looks back on some of these articulated fears, we rather unhandsomely dismiss them as expressions of a "Chicken Little" mentality because, as a matter of historical fact, the Court and country did accept the legitimacy of the enhanced governmental power that was being described as the death of our constitutionalism. But this may be just to say that all of us live within history, and that what we accept as the legal norm, including

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\(^{20}\) *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).


\(^{22}\) Though he did, I am informed by Martin Lederman, suggest that there might be structural limits on the method of implementation, citing the Court's then recent decision in *New York v. United States*, 505 U.S. 144 (1992), regarding the "commandeering" of state officials to enforce federal law.
a very powerful national government, for example, is indeed stunningly different from the constitutional order that was viewed as "normal" (and normative) by the judges who believed that their skies were falling. I strongly doubt that any of us in fact embraces the prospect of "unlimited government." I am absolutely confident that each and every person reading this Article, including its author, would invoke the importance of limits and denounce certain conceptions of state power in more or less apocalyptic terms.

A key problem, though, is that from the very beginning of American history, such notions of limitations and absolute fidelity to law have contended with equally compelling emphases on the importance of having leaders who are willing to respond to exigencies of the moment and to do what is "necessary," regardless of the law. At the ultimate level, one might put the American Revolution in this context. After all, the legal arguments offered by partisans of the Crown were scarcely frivolous.

More to the present point, perhaps, are certain legal difficulties presented in the formation and ratification of the Constitution itself. The long and the short of it is that the Framers in Philadelphia not only went well beyond their limited mandate from Congress, but also, and more significantly, simply disregarded America's existing constitution, the Articles of Confederation, Article XIII of which required the unanimous consent of all state legislatures for amendment. In contrast, Article VII of the Constitution required ratification by only nine state conventions, changing not only the number, but also, and equally importantly, the identity of the actual ratifiers. No longer, for example, could Rhode Island exercise any veto. Thus Madison wrote in the 40th Federalist, as a part of his general argument for the legitimacy of the Convention's going well beyond its congressional mandate, that any suggestion that the Convention should simply have proposed amendments to the Articles was refuted by "the absurdity of subjecting the fate of 12 States, to the perverseness or corruption of a thirteenth." That "absurdity" was, presumably, close to what one might describe as a

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23 ARTS. OF CONFEDERATION art. XIII.
24 U.S. CONST. art. VII.
“self-evident” reason for the rejection of the letter of Article XIII. As University of Texas Law Professor Calvin Johnson writes, “Rhode Island’s opposition” to the enterprise of reforming the Articles “meant that necessary changes could not operate within the framework of the Articles of Confederation,” a thesis amply proved by the fact not only that Rhode Island sent no delegates to Philadelphia, but also, and even more significantly, juridically, that it rejected the Constitution on March 24, 1788.

In his epochal revisioning of American constitutional history, to which I am much indebted, Bruce Ackerman views Philadelphia as the first of three great “constitutional moments,” all of which are characterized by transgression of existing norms as a prelude to the creation of new—and presumably better—constitutive understandings. How was the transgressive nature of the Convention, which was no secret, defended? Speaking to the Philadelphia Convention on June 16, 1787, Virginia Governor Edmund Randolph told his fellow delegates that “[t]here are great seasons when persons with limited powers are justified in exceeding them, and a person would be contemptible not to risk it.” Two days later, “Alexander Hamilton agreed: ‘To rely on & propose any plan not adequate to these exigencies, merely because it was not clearly within our powers, would be to sacrifice the means to the end.’” Consider the implications of Hamilton's use of the word merely to introduce “because it was not clearly within our powers,” as if going beyond assigned powers has no more significance than

27 Rhode Island ultimately ratified the Constitution in 1790 when faced with the prospect of invasion should it not accept the fait accompli of a functioning United States of America.
28 1 BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS 40-50 (1991) [hereinafter ACKERMAN, FOUNDATIONS]. The other two such “moments,” according to Ackerman, are Reconstruction—in particular, the addition of the Fourteenth Amendment to the Constitution—and the New Deal. Id.; 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 7, 160 (1998) [hereinafter ACKERMAN, TRANSFORMATIONS]. A short version of Ackerman’s argument is set out in Bruce Ackerman, Higher Lawmaking, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 63 (Sanford Levinson ed., 1995).
30 Id. (emphasis added).
brushing off any other impediment to the realization of one's goals. Hamilton was a leading lawyer of his time, but he could scarcely be described as possessing what Judith Shklar might have called a "legalist" temperament.\textsuperscript{31}

What about James Madison, who is often viewed as the "father of the Constitution"? He did not address the Convention on this point, but he did contribute as one of the authors, with Hamilton, of \textit{The Federalist}. Thus he indirectly conceded, in \textit{The Federalist No. 40}, that the Convention had behaved irregularly by proclaiming that the "approbation" by the people being asked to ratify it would "blot out all antecedent errors and irregularities."\textsuperscript{32} Though one might praise the virtues of limited government and leaders who would scrupulously stay within only their assigned power, it was presumably of equal importance to know when it would be "contemptible" to feel so confined and who would seek the "approbation" of the people, presumably in the next election, for any transgressions. The political theorist Jon Elster has offered the term "constitutional bootstrapping" to refer to "the process by which a constituent assembly severs its ties with the authorities that have called it into being and arrogates some or all of their powers to itself."\textsuperscript{33} Such "bootstrapping" may be an ever-present temptation—dare one say necessity?—for the political system established by the bootstrapping convention.\textsuperscript{34} In any event, the Convention was clearly going beyond the congressional mandate and the limits imposed by the Articles of Confederation on the amendment process. One ought not denigrate the importance of

\textsuperscript{31} See Judith Shklar, Legalism 1 (1964) (defining legalism as "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules").

\textsuperscript{32} The Federalist No. 40 (James Madison), supra note 25, at 266.


\textsuperscript{34} To the extent that new constitutions grow out of revolutionary situations, this is simply a version of the paradox by which revolutionaries attempt, perhaps pathetically, both to "legalize" the new revolutionary order and to still the possible antinomian tendencies of their successors by writing constitutions. See Ulrich K. Preuss, Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution, in Constitutionalism, supra note 33, at 143, 143-45 (discussing constitutional formation subsequent to revolutions and noting that revolutionary forces, by enacting constitutions, sever themselves from the revolution itself).
Madison's emphasis on public "approbation"; it is, after all, what distinguishes the dictator from the democrat. But one ought not confuse this with what might be termed a "strict" theory of limited government and prerogatives of public office.

Indeed, I am engaging in a certain play on words in using the word "prerogative." One can have little doubt that many of the Framers were familiar with John Locke's *Second Treatise on Government*. One of the most important arguments made by Locke concerns what he calls "prerogative," particularly of the executive.\(^{35}\)

It is true that Locke views governments as instituted to protect individual rights, but this does not entail, for him, an at-all-times limited government.

[The] Power to act according to discretion, for the publck good, without the prescription of the Law, and sometimes even against it, is that which is called *Prerogative*. . . . This power whilst employed for the benefit of the Community, and suitably to the trust and ends of the Government, is undoubted Prerogative, and never is questioned. . . . [T]he People . . . are far from examining *Prerogative*, whilst it is in any tolerable degree imploy'd for the use it was meant; that is, for the good of the People, and not manifestly against it.\(^{36}\)

Though Locke was, of course, writing against the background of the English monarchy (whose powers he in fact wished to limit), his theoretical endorsement of prerogative is most certainly not confined to monarchs. Indeed, one is hard-pressed to understand American constitutionalism without including a place for the "prerogative" of leadership to ignore the law on occasion. The question, of course, is whether this "completes our constitutionalism," as it were, or in fact significantly threatens it.

I have long since pondered, and used in my writings, the quotations I have given you from Randolph, Hamilton, and Madison,

\(^{35}\) *See John Locke, Two Treatises of Government* 392-93 (Peter Laslett ed., Cambridge Univ. Press, 2d ed. 1967) (1690) (discussing discretionary power of executive).

\(^{36}\) *Id.* at 343 (first emphasis added).
not to speak of similar statements made by such eminences as Jefferson, who defended the propriety of the Louisiana Purchase by reference to "the laws of necessity" and, needless to say, Lincoln, who somewhat rhetorically asked, when defending his unilateral suspension of habeas corpus, if "all the laws, but one, [are] to go unexecuted, and the government itself go to pieces, lest that one be violated?" Moreover, I spend much time in my introductory course on constitutional law on *McCulloch v. Maryland*, not least because of the assertion by Chief Justice John Marshall that we should always remember that the "constitution we are expounding" is "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." Interestingly enough, Marshall himself italicized the word *crises*, though it seems at least equally important to emphasize the phrase "to be adapted." Indeed, University of Michigan law professor James Boyd White has described Marshall's opinion in *McCulloch* as "less an interpretation of the Constitution than an amendment to it, the overruling of which is unimaginable." In effect, then, at least according to White, one might see *McCulloch* as exemplifying a certain kind of judicial "prerogative" to adjust (or adapt) the Constitution to the *crises* of government, a description that Richard Posner has notably defended with regard to the Supreme Court's 2000 decision in *Bush v. Gore*. So it now appears that all branches of government—legislative,

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37 Defending the Purchase, Jefferson wrote in a letter the following:
A strict observance of the written law is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.


40 *Id.* at 415 (emphasis added save for *crises*).


42 531 U.S. 98, 105-06 (2000) (holding that manual recounts of Florida votes in 2000 presidential election ordered by Florida Supreme Court did not satisfy nonarbitrary requirements of fundamental right to vote secured by Equal Protection Clause). In *Breaking the Deadlock*, Posner does not attempt to defend the decision in orthodox legal terms, but
executive, and judicial—have their own occasions for engaging in "prerogative" decisions that have, at best, an uneasy relationship with conventional legal norms.

Consider in this context one of the objections to the original U.S. Constitution by George Mason, a leading Virginian who was one of only three members of the Convention who refused to sign the Constitution. The usual explanation is that Mason was upset that the original Constitution raised the specter of a too-powerful, unlimited government because it included no Bill of Rights. That is surely correct, but it is not the whole story. After all, Mason echoed the earlier quotations from Randolph and Hamilton in his own statement to the Philadelphia Convention on June 20, 1787, that "[i]n certain seasons of public danger it is commendable to exceed power." He praised those who had negotiated the "treaty of peace, under which we now enjoy the blessings of freedom" for "exceed[ing] their powers" and earning "the approbation of the public." He was, therefore, not in principle opposed to Elsterian "bootstrapping." The complexity of Mason's views are further demonstrated in his "Objections to the Constitution of Government formed by the Convention," where he unexpectedly expresses his concerns about a part of the Constitution that would ordinarily be understood as an important guarantee of individual rights, the Ex Post Facto Clause prohibiting retroactive criminal legislation by legislatures. He is critical of the fact that "[b]oth the general Legislature and the State Legislatures are expressly prohibited" from passing such laws. The reason is that "there never was, or can be a Legislature but must and will make such Laws, when necessity and public Safety require them; which will hereafter be a Breach of all the

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45 Id.


47 Id. at 13.
Constitutions in the Union, and afford precedents for other Innovations."48

How do we understand Mason's objection? He is, I believe, saying that it is inadvisable absolutely to prohibit state and national legislatures from passing ex post facto laws because "necessity and public safety" may sometimes require them. A categorical "thou shalt not" is therefore a mistake. But, note carefully, he is not merely suggesting that it will be unfortunate in the future if such legislatures find themselves unable to pass legislation thought "necessary" to protect the "public safety." Rather, he is asserting that a responsible legislature will, like the Framers in Philadelphia, transcend their assigned power and pass legislation that is, at least on paper, beyond its capacities. It will, that is, prefer to "breach" the Constitution rather than appear impotent in the face of "necessity." And such breaches will, he believes, ultimately negate the idea of constitutional limits at all. It would be far better, he seems to suggest, that the Constitution be written, at least with regard to ex post facto laws, in a more "conditional" modality. That is, ex post facto laws ought not be passed except when "necessity and public safety" require them.

Though discussing a different part of the Constitution, Madison makes a similar point in Federalist No. 41: "It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions."49 Thus, although Madison strongly disagreed with the specific analysis of Marshall's opinion in McCulloch, particularly regarding the breadth of meaning Marshall assigns to the Necessary and Proper Clause, he almost certainly had to agree with the language quoted earlier about the importance of "adapting" the Constitution when crises—defined, perhaps, as instantiating questions about "self-preservation"—presented themselves.50

48 Id. (emphasis added).
49 The Federalist No. 41 (James Madison), supra note 25, at 270 (emphasis added).
50 See supra note 40 and accompanying text.
This has important implications, of course, for the general enterprise of constitutional design, a topic that I increasingly find myself teaching about. A basic question is precisely the extent to which a well-designed constitution should, on the one hand, be "rigid," pretending to an impermeability to change and "adaptation" even in times of perceived emergency; or, on the contrary, be flexible enough even to "suspend" the normal operations of the constitutional order when such emergencies present themselves. The United States is a notable example of the former, save for the permission granted by Article I to suspend the writ of habeas corpus should Congress so determine. Yet the most famous such

51 See U.S. CONST. art. I, § 9, cl. 2 (explaining that writ cannot be "suspended, unless when in cases of Rebellion or Invasion the public safety may require it"). In contrast, see, for example, the 1958 French Constitution, which states:

(1) When the institutions of the Republic, the independence of the nation, the integrity of its territory, or the fulfillment of its international commitments are under grave and immediate threat and when the proper functioning of the constitutional governmental authorities is interrupted, the President of the Republic shall take the measures demanded by these circumstances after official consultation with the Prime Minister, the Presidents of the Assemblies, and the Constitutional Council.

(2) He shall inform the nation of these measures by a message.

(3) These measures must be prompted by a will to ensure within the shortest possible time that the constitutional governmental authorities have the means of fulfilling their duties. The Constitutional Council shall be consulted with regard to such measures.

(4) Parliament shall meet ipso jure.

(5) The National Assembly may not be dissolved during the exercise of emergency powers.

La Constitution [1958 CONST.] art. 16 (Fr.), available at http://www.oefre.unibe.ch/law/icl/fr0000_.html. Similarly, the Turkish Constitution states:

In times of war, mobilisation, martial law, or state of emergency, the exercise of fundamental rights and freedoms can be partially or entirely suspended, or measures may be taken, to the extent required by the exigencies of the situation, which derogate the guarantees embodied in the Constitution, provided that obligations under international law are not violated.

TURK. CONST. art. 15(1), available at http://www.oefrc.unibe.ch/law/icl/tu00000_.html. France and Turkey are certainly not unique in explicitly addressing the possibility of emergency power and the suspension of at least some ordinary constitutional norms. Interestingly enough, Article 15(2) of the Turkish Constitution explicitly limits the breadth of potential suspension:

Even under the circumstances indicated in the first paragraph, the individual's right to life, and the integrity of his material and spiritual entity shall be inviolable except where the death sentence has been decided upon; no one may be compelled to reveal his religion, conscience,
suspension in American history took place at the unilateral behest of Abraham Lincoln, an action found unconstitutional by Chief Justice Roger Taney in *Ex parte Merryman*. Lincoln basically ignored Taney's decision, and, of course, he is widely regarded as our greatest President, from whom contemporary analysts continue to draw important lessons.

Thus University of Minnesota Law Professor Michael Stokes Paulsen, in a recent article tellingly entitled *The Constitution of Necessity*, offers a robust defense of Lincoln's actions and develops a theory of what can only be called executive prerogative—though Paulsen nowhere mentions John Locke—based on the President's Oath of Office. That is, so long as the President can plausibly be claiming to defend the overarching constitutional order, he (or, in the future, she) is apparently authorized by the Oath itself to disregard any particular part of the Constitution if fidelity to it might, according to the President, threaten the survival of the order itself. Paulsen quotes Lincoln: "I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation." Paulsen fully recognizes that he is defending "dangerous principles," but, he concludes, "if I am mistaken in all this, so was President Lincoln." Perhaps it is easier in Georgia than elsewhere to countenance the possibility that Lincoln was indeed mistaken, but, as already suggested, one might have to reject many other American icons as well.

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thought or opinion, nor be accused on account of them; offences and penalties may not be made retroactive, nor may anyone be held guilty until so proven by a court judgment.

*Id.* art. 15(2).

52 17 F. Cas. 144, 148-49 (C.C.D. Md. 1861) (finding that only Congress can suspend "the privilege of the writ").


54 *Id.* at 1257-58.

55 *Id.* at 1283 (quoting Letter from Abraham Lincoln, President of the United States, to Albert G. Hodges, U.S. Senator (Apr. 4, 1864), in 2 ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859-65, at 585, 585 (Don E. Fehrenbacher ed., 1989)).

56 *Id.* at 1296.

57 *Id.* at 1297.
Such questions about the relative “rigidity” and “flexibility” of constitutional forms, including the recognition of “prerogative” powers, can arise with regard both to declarations of rights and to the governing structures of the societies themselves. I will concentrate on the former, though one should have no doubt that structures are at least as important as rights. Consider in this context that the British Parliament sat from 1935 to 1945, in spite of the (unwritten) constitutional norm that elections be held at least every five years, because it was viewed simply untenable to hold elections during time of war. One may view it as one of the glorious features of American democracy that we did hold presidential elections in 1864 and 1944, but perhaps we would be less inclined to celebrate this had either Lincoln or Roosevelt lost and the United States had been forced to contend with the potential consequence of a change of government during time of war.

With regard to rights, though, consider only the grammatical form of the First Amendment added to the Constitution in 1791, which states that Congress shall pass “no law” abridging the freedom of speech. Justice Hugo Black, one of the greatest civil libertarian jurists of the twentieth century, built his judicial career in part on asking, as we might put it today, “what part of 'no' do you not understand?” Indeed, he proudly defined himself as an “absolutist” with regard to freedom of speech and the press, not least because that is just what the Constitution, as he read it, required him to do. Liberals, however, who celebrate Black’s commitment to the language of the First Amendment are often less inclined to pay similar heed to another text from the original Constitution. The Contract Clause of Article I, Section 10 states, quite clearly, that “[n]o state shall . . . pass any . . . Law impairing

58 See supra notes 35-36 and accompanying text.
60 U.S. CONST. amend. I.
61 See, e.g., Barenblatt v. United States, 360 U.S. 109, 140 (1959) (Black, J., dissenting) (“The First Amendment says in no equivocal language that Congress shall pass no law abridging freedom of speech.”).
the Obligation of Contracts." Again, one might ask "what part of 'No state shall pass' is ambiguous?"

But, of course, every contemporary well-trained lawyer realizes—and we who are law professors teach our students—that whether or not these texts are linguistically ambiguous is quite beside the point. The fact is that "no law" does not mean "no law"; rather, it means, in our contemporary world, that the state must demonstrate what we call a "compelling state interest" in order to justify the transgression of the stipulated norm. To be sure, there is a strong presumption against the legitimacy of laws that abridge freedom of speech, but a strong presumption is not, obviously, the same thing as an absolute prohibition. In our contemporary constitutional universe, to label oneself a First Amendment "absolutist" is the equivalent of branding oneself as intellectually unsophisticated and, indeed, a potential menace to the deepest interests of the polity in "self-preservation." Justice Robert Jackson echoes George Mason when he states, in a long and heartfelt dissent against the Court's protection of someone who could accurately be described as a raving fascist, "there is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."

III. BLAISDELL AS A PARADIGM CASE

The Contract Clause is, perhaps, even more illuminating as to the difficulty of believing that the Constitution "means what it says," at least to legislators and judges who are called upon to interpret it as a living reality rather than a literary artifact. By

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63 U.S. CONST. art. I, § 10, cl. 1.
64 See, e.g., NAACP v. Button, 371 U.S. 415, 438 (1963) (suggesting that First Amendment rights can only be abridged if there is a "compelling state interest").
65 Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). For what it is worth, I note that I continue to agree with Justice Douglas's majority opinion and its vision of freedom of speech. But one can scarcely dismiss the concerns raised by Jackson, who had been profoundly affected by his experience as the chief U.S. prosecutor at Nuremberg and who had become well aware of how skilled propagandists like Josef Goebbels could wreak havoc on a society.
happy coincidence, what I believe to be the greatest single set of opinions in the history of the United States Supreme Court was delivered in a 1934 case, *Home Building & Loan Ass'n v. Blaisdell*, which examined the meaning of the Contract Clause. Chief Justice Charles Evans Hughes's superb opinion for the majority is followed by an equally well-argued and gripping dissent by Justice George Sutherland. From a pedagogical point of view, no set of opinions repays closer study with regard to the complexities involved in what it means to take the Constitution seriously as a set of understandings that structure the conduct of American politics.

In his book *The Constitution and the New Deal*, Professor G. Edward White discusses *Blaisdell* in a chapter tellingly titled "The Constitutional Revolution as a Crisis in Adaptivity," which is exactly right. The opinions in *Blaisdell* are important not only because of their theoretical excellence, but also because they do indeed directly confront the all-important question of how we are to understand the Constitution (and the role of legislatures and courts) during a time of emergency when "adaptation" is at the forefront of our politics. Given the provenance of "adaptation" in Marshall's opinion in *McCulloch*, I certainly do not mean to suggest that the topic of emergency powers had not earlier been considered by the Court. Rather, *Blaisdell* offers an unusually good set of opinions for considering the issue and for clarifying our own responses to similar arguments today.

No one should doubt that the worldwide depression of the 1930s was viewed as an emergency. In the background loomed possibility of popular revolution and the installation of "national socialist" or fascist parties, as had already occurred in Italy and Germany. Communism, of course, also represented a widely feared possibility, though, as a matter of fact, no country responded to the Depression

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67 290 U.S. 398 (1934).
68 Moreover, Walter Murphy some years ago discovered in the Library of Congress an unpublished opinion by Justice Benjamin Nathan Cardozo that ranks with the two published opinions in its depth. Justice Cardozo's opinion is reprinted in BREST ET AL., supra note 29, at 423-24.
by going communist; it was fascism that seemed on the march. In any event, the fragility of liberal democracy had certainly been exposed, and the United States scarcely seemed invulnerable to calls of "revolution" or mob violence.

One way of conceptualizing Blaisdell is to ask whether basic constitutional norms, including the "absolute" ban on states' interference with the enforcement of preexisting contracts, presuppose a background of social and political stability, which President Warren G. Harding so memorably labeled "normalcy." If so, this suggests that they are subject to suspension whenever these background conditions dissolve into sufficient instability to be labeled an "emergency." Hughes himself had told his 1927 audience at lectures at the Columbia Law School that

> the Supreme Court has recognized that the legislature may meet public emergencies by action that ordinarily would go beyond its constitutional authority. This principle is not limited to military exigencies in the theater of war, or to the extraordinary requirements of some great public calamity. Less grave, but unusual and urgent conditions, may justify temporary expedients.

Such emergencies are sometimes viewed as "states of exception," a term associated especially with Carl Schmitt. It was Schmitt, for example, who wrote that "[t]here exists no norm that is applicable to chaos" or, perhaps, even "crisis." The chaos that pervaded Germany was economic; most of the more than 250 presidential

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71 "Normalcy" was "used by President Warren Harding to describe the calm political and social order to which he wished to return the United States after the idealism and commotion of the presidency of Woodrow Wilson." THE NEW DICTIONARY OF CULTURAL LITERACY (E.D. Hirsch, Jr. et al. eds., 3d ed. 2002), available at http://www.bartleby.com/59/12normalcy.html.


74 Id. at 13.
suspensions of rights ostensibly guaranteed by the Weimar Constitution, as allowed by the notorious Article 48, involved the attempt by Germany to respond to the difficulties of managing a post-Versailles economy in a society bitterly divided, at the margins, between Communists and Nazis. Although the Italian social theorist Giorgio Agamben has written that "the state of exception tends increasingly to appear as the dominant paradigm of government in contemporary politics," it should now be clear that there is in fact nothing new about the notion of what Hamilton called "exigencies" or Schmitt viewed as "exceptions" or "emergencies." Indeed, the political scientist Clinton Rossiter, who published in 1948 a brilliant and disturbing book, Constitutional Dictatorship, noted that the idea goes back at least to ancient Rome, which institutionalized the role of a "dictator" who could safeguard the constitutional order in a time of emergency. Schmitt was thus building on an idea with an ancient lineage.

I have no idea whether Charles Evans Hughes and his colleagues had read Schmitt or other disputants in the Weimar jurisprudential debates. It is unthinkable, though, that he was unfamiliar with the overarching debate occurring throughout the West about the ability of traditional notions of the "rule of law" to survive the development of what Philip Bobbitt calls the "nation state" and its newly embraced duty to concern itself with the economic welfare of its citizens, especially during periods of economic travail. Many Americans, of course, had become debtors during the Depression, within a constitutional order generally stacked in favor of creditors

75 CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 33 (1948).
76 GIORGIO AGAMBEN, STATE OF EXCEPTION 2 (Kevin Attell trans., 2005).
77 ROSSITER, supra note 75, at 16.
as exemplified by the text of the Contract Clause itself. But could creditor interests be accommodated in full without threatening the basic stability of a polity that increasingly recognized the legitimacy of protecting debtors as well? Blaisdell is an essential symbol of the transformation of the duties of the state—and, therefore, the interpretation of our foundational text—in this regard.

The Minnesota legislature passed the Minnesota Mortgage Moratorium Law in 1933 in response to what it explicitly referred to as the homeowner "emergency" generated by the Great Depression.\(^7\)\(^9\) Even today, rising unemployment—not to mention unanticipated medical expenses—can generate difficulties for marginal homeowners faced with the task of covering their monthly payments. It is important to understand that at that time, mortgages were structured very differently from those today, which generally have fixed and equal payments from the first to the last month of the term of the mortgage. Then, however, it was common for relatively low monthly payments to end with a large "balloon payment" in the last month. Thus one might owe, $100 per month until the 60th or 120th month when the payment would be $5,000. If one has a decent job, one could simply take out a new mortgage, "rolling over" the balloon payment until the end of the new contract. The problem, of course, is that the Depression meant that many "homeowners"—there is a reason to use "scare quotes" with the term, since one does not really "own" one’s home until the mortgage is paid off—no longer had decent jobs or could rely on a reasonable return from their farms. Thus, they had to come up with the $5,000 or face the loss of their home.

As banks started foreclosing loans upon failure to meet the obligations of the mortgage, the Minnesota legislature intervened with the “moratorium” law, which basically freed beleaguered homeowners from the burden of their contract. So long as they continued to pay the reasonable rental value of the home, they could remain in it. The hope, obviously, was that the economy would begin to recover. According to the legislature, the Act was to remain in effect “only during the continuance of the emergency and in no

\(^7\) 1933 MINN. LAWS 514, 515 (repealed 1935).
event beyond May 1, 1935."80 Presumably by then the home-dwellers would again be creditworthy and, along with the creditor-banks, would be satisfied to roll over the mortgage as initially more or less planned.

The Home Building & Loan Association foreclosed the Blaisdells’ fourteen-room house—they lived in three of the rooms and rented out the other rooms—upon their failure to meet the terms of their mortgage.81 The Association then bought the property at the foreclosure sale for approximately two-thirds of its market value.82 The Blaisdells, however, had obtained an extension of the redemption period under the Minnesota law, which meant they had until May 1935 to “redeem” their home by paying the Association $4,258.82.83 In the interim, the Blaisdells were required to pay what a court had ascertained to be the fair market rental value of $40 per month.84

The problem with the legislation, at least from a constitutional perspective, appears glaringly obvious. Recall the Contract Clause of Article I, Section 10 of the Constitution and its command that “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts.”85 The bank argued that the moratorium law was in clear violation of the Contract Clause.86 The Blaisdells’ obligation was to pay off their mortgage in 1933, not in 1935.87 Minnesota’s declaration of the moratorium was, therefore, an impairment of the bank’s contractual rights. What more is there to say?

Not surprisingly, the answer to this last question is, quite a bit. The Supreme Court, in an opinion written by Chief Justice Hughes, upheld the law against the bank’s challenge.88 From a formal perspective, it was difficult to gainsay the fact that Minnesota had “impaired” the Association’s “obligation of contract.”89 For the

80 Id. at 522.
82 Id. at 419.
83 Id. at 420.
84 Id.
85 U.S. CONST. art. I, § 10, cl. 1.
86 Blaisdell, 290 U.S. at 415-16.
87 Id. at 420.
88 Id. at 447.
89 But see Olken, supra note 72, at 578 (“Unlike the [Minnesota Supreme] court below,
Minnesota Supreme Court, however, this was basically beside the point. Times were perilous. After offering a summary of the ravages facing the state and nation, it concluded that "the court cannot well hold that the Legislature had no basis in fact for the conclusion that an economic emergency existed which called for the exercise of the police power to grant relief."\(^9\)

A concurring judge tellingly compared "[t]he present [nationwide] and [worldwide] business and financial crisis" to a "flood, earthquake, or disturbance," depriving "millions of persons in this nation of their employment and means of earning a living for themselves and their families" and generating "widespread want and suffering among our people."\(^9\)\(^9\) The reference to "natural disasters" is significant. As Michelle Landis Dauber has brilliantly argued, a basic issue throughout our history is whether individuals' suffering was viewed as their own fault or as the result of outside forces that they could not realistically be expected to have protected themselves against.\(^9\)\(^2\) To be the faultless victim of such a disaster is to make oneself eligible for public sympathy and, more to the point, aid, whatever might be thought to be constitutional limits in this regard.

An 1884 exchange in the House of Representatives about the constitutional legitimacy of a proposal to allocate $300,000 in aid for the victims of an Ohio River flood is illuminating. Republicans gleefully taunted Democratic representatives for contradicting their usual position that the limited powers assigned by the Constitution to Congress included no right to pass disaster relief legislation.\(^9\)\(^3\) After all, one might well argue that helping folks in Ohio or Kentucky did not count as "general welfare," as required by the Constitution, but in effect was simply a naked transfer of resources from taxpayers in one part of the country to the lucky recipients of congressional beneficence in another. Such arguments had been

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\(^9\) Blaisdell v. Home Bldg. & Loan Ass’n, 249 N.W. 334, 337 (Minn. 1933).

\(^9\) Id. at 340 (Olsen, J., concurring).


\(^9\) Id. at 406.
made almost from the beginning of the country; indeed, one of the first great subjects of such a debate involved reconstructing Savannah after a disastrous fire in 1796.\footnote{\cite{Currie1997}} Why should Congress have the power to send national tax revenues to Savannah? Should not that be a matter of local concern for Georgia alone?

One response was a high-toned argument that the Constitution indeed granted such powers to Congress. Another was that made by Ohio Democrat John Follett: “[N]ecessity knows neither law nor constitution and never did in this country.”\footnote{Dauber, supra note 92, at 406 (quoting Congressional Record, 48th Cong., 1st Session, 1884, 15, pt. 2:1033).} His colleague Adoniram Warner concurred: “[M]ingled with the appeals that come to us for help are the cries of children and the petitions for women homeless, shelterless, hungry, and in this presence I cannot stop to argue literal construction of the Constitution. I will take the side of mercy and risk it on that.”\footnote{Id. (quoting Congressional Record, 48th Cong., 1st Session, 1884, 15, pt. 2:1039).} Finally, there was Isaac Jordan, also of Ohio, who forthrightly admitted that he did “not know whether this bill is constitutional or not. We have no time to enter into a discussion of this question. While we would stand here debating it the floods would not abate and the people would perish.”\footnote{Id.} For these representatives, refined constitutional arguments were little better than scholastic debates about angels and pins. The imperative to respond to emergencies, to save lives, was far more important than arid constitutional logic.

Perhaps it is relevant to note that only four years before this debate Oliver Wendell Holmes had forthrightly declared that the “life of the law” is “experience” and not “logic.”\footnote{\cite{Holmes1881}} I would be shocked beyond belief if any of these particular legislators could even identify Holmes, who was then an obscure Massachusetts judge, but it should be clear that Holmes could have based his central jurisprudential insight on the actual practices of American constitutional argument. And no “experience” was more important than “emergency,” “necessity,” or “crisis.” Indeed, Holmes would

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\item Dauber, supra note 92, at 406 (quoting Congressional Record, 48th Cong., 1st Session, 1884, 15, pt. 2:1033).
\item Id. (quoting Congressional Record, 48th Cong., 1st Session, 1884, 15, pt. 2:1039).
\item Id.
\item OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).
\end{enumerate}
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later write, in a seminal case that upheld against First Amendment attack the criminalization of antiwar speech during World War I, that "[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."99 So much, then, for the seeming language of the First Amendment and its protection against abridgements of speech! But, as illustrated by the congressional debate, war was only the most obvious illustration of crisis or exigency. Natural disasters or economic depressions could be viewed in much the same way. A nation, therefore, might not necessarily be "at war" in order to believe that certain formalities of law had to give way to the practical solution of human problems.

Holmes had left the Supreme Court in 1931, though it would have been interesting indeed to know what he might have said with regard to the issues raised by Blaisdell. In any event, Chief Justice Hughes agreed that the case required the Court to "consider the relation of emergency to constitutional power."100 He went on to write, in oft-quoted paragraphs:

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. . . .

While emergency does not create power, emergency may furnish the occasion for the exercise of power. Although an emergency may not call into life a power which has never lived, nevertheless emergency may

afford a reason for the exertion of a living power already enjoyed.\footnote{Id. at 425-26 (citation omitted).}

Can one take such language seriously, or is this a mixture of a pathetic and valiant effort to deny a central reality of American constitutionalism, which is that perceived emergencies from the very origins of the Constitution itself have “call[ed] into life” powers that had never theretofore lived?

Not surprisingly, my own answer is that Hughes here is the equivalent of the “unreliable narrator” in much contemporary fiction, even if, perchance, he believed his own argument. After all, unreliable narrators, who wish to deny certain aspects of their lives, often believe their own descriptions, even as third-party observers have a very different perspective. I believe, therefore, that we are almost literally kidding ourselves if we accept his language as descriptively or conceptually accurate; instead, we should recognize the vitalizing role of emergencies and then decide whether what is called forth is like Frankenstein’s monster. Or, perhaps, a better analogy might be atomic energy or recombinant DNA, which can be a force for great good or immense evil, depending on circumstances.

In any event, Hughes wants to reassure us that limited government lives, whatever the result in the particular case (which, of course, upheld the Mortgage Moratorium Law). Thus, he insists, for example, that:

Even the war power does not remove constitutional limitations safeguarding essential liberties. When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus, emergency would not permit a State to have more than two Senators in the Congress, or permit the election of President by a general popular vote without regard to the number of electors to which the States are respectively entitled, or permit the States to “coin money” or to “make anything but gold and silver coin a
tender in payment of debts.” But where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause.\textsuperscript{102}

There are, of course, notorious problems with this theoretical approach to interpreting the Constitution. The first is his proffered distinction between “specific” and “general clauses, which afford [only] a broad outline” that must be filled in, or “constructed,” by courts. Presumably, the Court is stuck with “specific” clauses and must apply them regardless of the consequences to the polity. This had been suggested by James Madison in his speech to the House of Representatives setting out certain “rules” of interpretation by way of explaining why the bill that would charter the Bank of the United States was unconstitutional.\textsuperscript{103} Thus, he told his colleagues, “Where the meaning is clear, the consequences, whatever they may be, are to be admitted.”\textsuperscript{104} One might ungenerously translate this as, “Follow the text though the heavens—or constitutional order—fall,” which, of course, is a lunatic notion. (It is \emph{not} similarly lunatic to say, “let justice be done though the heavens fall,” though, as a matter of fact, almost no one believes in this proposition either.) Madison, however, had prefaced this “rule” of interpretation by a statement that “[a]n interpretation that destroys the very characteristic of the Government cannot be just,”\textsuperscript{105} which suggests, at the very least, a tension between accepting the consequences of “clear” text, “whatever the consequences” and the sensible duty to interpret texts in order to preclude “destroy[ing] the very characteristic of the Government.” As a matter of fact, Madison offered as “the essential characteristic of the Government” its composition “of limited and enumerated powers,”\textsuperscript{106} but this, obviously, just restates the problem: What if it is a specific limit on government that is itself viewed as a danger to maintaining the

\textsuperscript{102} \textit{Id}. at 426 (emphasis added).
\textsuperscript{103} BREST ET AL., \textit{supra} note 29, at 8-11.
\textsuperscript{104} \textit{Id}. at 9.
\textsuperscript{105} \textit{Id}.
\textsuperscript{106} \textit{Id}. at 10.
overarching society? Why in the world would we consider ourselves bound by such a limit, “whatever the consequences”? For better or worse, however, the Constitution does not come with such labels as to what parts of its text are “clear” as against “unclear.” To be sure, one might well believe that what Justice Jackson once called “the majestic generalities of the Fourteenth Amendment” are the very illustration of “general” clauses, since they serve, prior to “construction,” as an “inkblot”—Robert Bork’s famous description of the Ninth Amendment—that has only the meaning projected on it by a given interpreter. In any event, would anyone sorting constitutional text into bins labeled “specific” or “general” place either the First Amendment or the Contract Clause into the latter rather than the former? If the answer is yes, I am confident that it has nothing to do with the properties of the language itself, but rather, the obvious fact that it would be a mistake, in terms of public policy, to accept “absolute” readings of either text.

A second embarrassment with Hughes’s argument should be readily understandable by Georgians. Georgia, like almost all states of the defeated Confederacy, was in fact deprived of its seats in the House and Senate because of military Reconstruction, and the seating of representatives and senators elected by reconstructed state governments depended on the state’s ratification of the highly controversial Fourteenth Amendment. Indeed, Professor Ackerman has argued that the Amendment cannot easily be defended as a standard-form Article V amendment given the

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108 Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States, Hearings Before the S. Comm. on the Judiciary, 100th Cong., 1st Sess. 249-55 (1987). Bork was not complimenting the Amendment in this regard, and, of course, he is a noted opponent of judicial “construction” of such general language. He would basically let legislatures do whatever they wished, free of potential judicial interference.

multiple irregularities of its provenance. This does not mean that he does not consider it a legitimate part of the Constitution, but, rather, that one must adopt a far more sophisticated narrative of American constitutional development than the civics-book version that continues to be dominant even in American law schools. I have publicly suggested that this more sophisticated narrative, which I heartily endorse, has Schmittian overtones inasmuch as it depends on the propriety of overriding preexisting rules, even of constitutional dimensions, in order to respond adequately to what are popularly perceived as great exigencies.

Hughes also canvasses many prior decisions of the Supreme Court that, he argues, legitimate the kind of law passed by Minnesota. To be sure, he concedes that no case justifies "a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." That, he insists, is not the case here. Instead, he argues that acceptance of this general principle does not apply under conditions when "a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision," which, he says, is to preserve a functioning economy.

He refers to some instances in which the sanctity of contract has been subordinated to other exigencies:

It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake. The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts, as is the reservation of state power to protect the public interest in the other situations to

110 ACKERMAN, TRANSFORMATIONS, supra note 28, at 99-252.
113 Id. (emphasis added).
114 Is there any reason to treat "interposition" as different from "impairment"?
which we have referred. And if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other and economic causes.115

The deepest purpose of the Contract Clause, he suggests, is to preserve a political order in which the general system of contract can in fact be used as a method of private ordering, and, regardless of the failure of the Constitution to specify the point, it is simply the fact that "all contracts" incorporate a recognition that the state may, after all, decide to impair them in order "to protect the public interest." Or should we say that regulation in "the public interest" is not really an impairment? I confess that I find this suggestion implausible, an attempt to adhere to constitutional "literalism" by defining "impairment" in a way that neutralizes its application to any situation that we find as meriting regulation. I am reminded, in this context, of Justice Black's joining Justice Blackmun's almost pathetic labeling of Paul Cohen's wearing a jacket with "Fuck the Draft" on its back as "conduct" rather than "speech" in order to countenance his conviction by California.116

One should note Hughes's emphasis on the temporary nature of the moratorium, based on what one might uncharitably call the delusional belief by the Minnesota legislature that the ravages of the Great Depression would indeed have been sufficiently alleviated by May 1, 1935 to allow the expiration of the program. Moreover, it may be no small matter that it was in fact the Minnesota legislature that took responsibility for the details of the moratorium. Imagine that the state legislature instead had delegated to the Governor the power to impose a moratorium "upon the declaration by the Governor that an economic state of emergency exists, and the

115 Blaisdell, 290 U.S. at 439-40 (emphasis added) (citation omitted).
moratorium shall continue until the Governor declares that the emergency has ended? Would the indefinite period of this moratorium, as well as the delegation of power to the Governor, have generated a different response from Hughes and, therefore, the Supreme Court as an institution?

A case decided a year later, the famous Schechter Poultry decision that invalidated the National Recovery Administration, illustrates what may be the limits of Hughes's embrace of the emergency rationale. Writing for the Court, Hughes rejected the ultimate thrust of the United States' claim "that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted." To be sure,

> [e]xtraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.

It certainly did not help the government's cause that Chief Justice Hughes, like everyone else on the Court, almost certainly disapproved of the particular mechanism at issue, the "virtually unfettered" discretion handed to the President to impose codes on all of American business.

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118 Id. at 528.
119 Id. at 528-29.
120 Blaisdell, 290 U.S. at 442.
It seems impossible, however, to doubt that Chief Justice Hughes and, presumably, the other four Justices who joined his majority opinion, basically agreed with the Minnesota legislature about both the exigencies of the moment and the propriety of governmental action. My confidence is based on a single sentence: "It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends." It would be a mistake, I believe, to interpret Blaisdell as illustrating the kind of judicial abdication of reviewing authority—and a concomitant rubber-stamping of legislative action—that typified many post-1937 decisions invoking the mantra of "minimum rationality." Here the Court retained the authority to determine whether "the exigency still exists" that justifies the extraordinary action, however it is described. This is no small point, as shall be seen presently.

Justice Sutherland wrote a probing dissent, based largely on the text of the Contract Clause and the "original intent" of its supporters, who saw it precisely as a way of heading off debtor-relief legislation like the moratorium. It is not, of course, that Minnesota was without legal resources to help those losing their homes; the legislature could, for example, have raised taxes in order to fund a program by which zero-interest loans could be given to honest, though economically downtrodden, Minnesotans that would have allowed them to comply with their contractual obligations. It is obvious why a legislature would prefer to avoid raising taxes and instead foist the costs of what was in fact a public welfare program on banks and their customers instead of the public in general. In any event, Sutherland concluded his dissent with these ringing words:

[Whether the legislation under review is wise or unwise is a matter with which we have nothing to do. Whether it is likely to work well or work ill presents a question entirely irrelevant to the issue. The only legitimate inquiry we can make is whether it is constitutional. If it is not, its virtues, if it have any, cannot save it; if it is,]

121 Id. at 442.
122 Id. at 448 (Sutherland, J., dissenting).
its faults cannot be invoked to accomplish its destruction. If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned.\textsuperscript{123}

If one sentence can be said to capture the essential dilemma of constitutionalism, it is surely this last one: What do/should we do when we find the Constitution to “pinch” instead of to “comfort”? I have previously written that our history suggests that, altogether understandably, we prefer a “comforting” constitution, one with what I have elsewhere called “happy endings” to our constitutional conundra, as against a constitution that feels hurtful and, indeed, suggests that the Constitution, at bottom, commands tragic rather than comic outcomes when faced with dilemmas.\textsuperscript{124} At the very least, it is difficult to understand why we would build our civil religion around a constitution that seems to operate as a barrier to public happiness.

If I had more time, I could certainly look at other important cases and discussions, especially those surrounding the detention of Japanese nationals and Japanese-Americans during World War II, the subject of the notorious \textit{United States v. Korematsu} decision,\textsuperscript{125} or the unsuccessful attempt by a Lincoln-citing President Truman to seize steel mills during the Korean War in order, according to his own justificatory statement, to assure uninterrupted supply of war material to our troops risking their lives on the Korean peninsula.\textsuperscript{126} None resolves the central issue, though, which is our willingness, whether as a voting public or adjudicating judges, to accept the presence of “emergencies” as a justification for deviation from ordinary constitutional norms.

\textsuperscript{123} Id. at 483.
\textsuperscript{125} 323 U.S. 214, 215-18 (1944) (upholding detention as constitutional under war power of Congress and President).
\textsuperscript{126} Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 582 (1952).
I now turn, as promised, to consideration of our present situation. On the one hand, I believe that the Bush Administration threatens our basic constitutional order more than any other administration in my lifetime. On the other hand, I confess that I have experienced some genuine difficulty constructing a satisfying language to make this argument. Or, more to the point, it is unclear to me whether my criticisms follow from what might be termed my "professional expertise" as a professor of constitutional law and sometime political theorist or, instead, reflect my politics as an admittedly very partisan Democrat. Normally, my own political identity would be an inappropriate topic for discussion in a lecture or Article such as this one. I increasingly believe, however, that the discussion of emergency powers is ultimately a profoundly political one, with law, at least as traditionally conceived, having relatively little to do with the resolution of any truly live controversy.

Consider for a moment earlier examples, including Thomas Jefferson's betrayal of his own constitutional vision in order to purchase Louisiana and Abraham Lincoln's willingness to act extra-constitutionally, if need be, in order to preserve the Union. Can one possibly decide whether to condemn either of these distinguished Presidents without taking a political stand on the merits of the Purchase or the preservation of the Union? Is not the same true with regard, say, to Franklin Roosevelt's "secretly and unlawfully transferring arms—including over 20,000 airplanes, rifles, and ammunition—to England" prior to congressional approval in the Lend-Lease Act. And one could go on and on, marching

\[127\] Or, to be more precise, a partisan "anti-Republican," since I am scarcely inspired by the example of the Democratic Party with regard to many of the issues under discussion.


\[129\] See supra note 38 and accompanying text.

\[130\] Cass R. Sunstein, Impeaching the President, 147 U. Pa. L. Rev. 279, 297 (1998); see also Steel Seizure, 343 U.S. at 645 n.14, 649 n.17 (Jackson, J., concurring) (expressing reservations about advice he offered as attorney general to Roosevelt); ROBERT H. JACKSON, THAT MAN:
through the cases turning on the presence of “compelling interests” that justify the abrogation of traditional norms.

My title refers to the possibility of our living now in a world of “permanent emergency.” I think this may well be true, for reasons I shall elaborate in a moment. But it should now be clear that in some ways our entire history has featured the presence of emergencies, even if no single emergency has had the permanence likely to be the case with the “global war on terror.” But an impressive—or depressing—number of years of our national life have been spent fighting wars, some declared, many more not, against foreign enemies, our fellow American citizens between 1861 and 1865, or myriads of American Indians who had the effrontery to resist our seizure of their homelands. If we add to this the years featuring significant economic downturns or the occurrence of “natural disasters” whose victims made a claim on the public fisc, I wonder if we would not find that years with proclaimed “emergencies” outnumber placid years of ostensible normality. I am now struck by the fact that my own life that began in 1941 has been spent in “wars,” whether of the shooting kind, as in World War II, Korea, Vietnam, Iraq, Kosovo, and Iraq again, or the “cold” kind, as with the Soviet Union, or the more metaphorical, but no less constitutionally significant, kind, such as our “war” on drugs that has operated to limit many of our constitutional rights against aggressive police behavior. Even were the “global war on terror” declared over tomorrow, there would be more than enough “emergencies” to assure that the basic tension of which I am speaking would remain.

One might well consider in this context Judge Richard Posner’s most recent book (at least as of this Article!), Catastrophe, which alerts us to awful possibilities ranging from asteroid collisions to the
creation of world-threatening biological viruses or physics experiments that could collapse the earth into a small ball of dark matter. Among Judge Posner's counsels is that we should modify conventional notions of academic freedom in order to allow far greater regulation of potentially "mad"—or merely narcissistic and socially irresponsible—scientists. It may be no coincidence at all that one of Judge Posner's most notable books is entitled Overcoming Law, a notion that, if taken entirely seriously, suggests that we are all wasting our time if we believe that abstract legalism—what Holmes, who is Posner's hero, dismissed as "logic"—takes precedence over a basically prudential cost-benefit calculus. To be sure, this allows room for great debates about the costs and benefits of traditional rights, but it means, at the end of the day, that, contrary to Ronald Dworkin, we do not treat them as "trumps" if the perceived social costs are too high.

So on to the Bush Administration. I have already indicated my belief that the best entry-point into the jurisprudence of that Administration is Carl Schmitt, who elaborated a powerful theory of an executive dictator who would serve as "guardian of the Constitution," or, perhaps more accurately, the nation, against attacks by its enemies. An essential function of the executive is, in effect, to seize the most basic attribute of "sovereignty," which, according to Schmitt, is the ability to decide on the state of the exception. One should recognize that what begins as "the

133 Id. at 221-24.
135 See supra note 9 and accompanying text.
136 SCHMITT, supra note 73, at 26. Perhaps I should make clear, if it is not so already, that I do not believe that Schmitt's insights apply only to the Bush Administration. Indeed, a major point of this Article is to note the persistent presence in American political and constitutional life of claims to executive power that were viewed at the time—and sometimes by posterity—as "overreaching." I am grateful to Jack Goldsmith for forcing this recognition upon me.
137 See id. at 5 ("Sovereign is he who decides on the exception."). This is the first line of the book, and Professor John P. McCormick describes it as "perhaps the most famous sentence—certainly one of the most infamous—in German political theory." John P. McCormick, The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers, in LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM 217, 217 (David Dyzenhaus ed., 1998). McCormick includes an extensive discussion of Schmitt's book Die Diktatur, originally published in 1921 and, alas, untranslated into English. Id. at 218-30.
exception" can, quite easily, be redefined as the new "normal" over time. Thus, says Schmitt, "A normal situation must exist, and he is sovereign who definitively 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." It would be a profound, perhaps wishful, mistake to believe that Schmitt can simply be dismissed as a Nazi-sympathizing anti-Semitic fascist, even if this might be an all-too-accurate description of his politics especially during the 1930s. I alluded earlier to the American political scientist Clinton Rossiter, who ironically is probably best known as the editor of the most widely used edition of The Federalist. His 1948 book Constitutional Dictatorship, which, perhaps tellingly, was republished after a half-century in 2002 with a cover picture showing the burning Twin Towers juxtaposed with a seemingly burning Constitution, has distinctly Schmittian overtones: "[A] great emergency in the life of a constitutional democracy will be more easily mastered by the government if dictatorial forms are to some degree substituted for democratic, and if the executive branch is empowered to take strong action without an excess of deliberation and compromise." An executive branch that believes itself "empowered to take strong action without an excess of deliberation and compromise" is, I believe, an almost perfect description of the Bush Administration.

David Dyzenhaus discusses Schmitt's 1931 book, Der Huter Der Verfussung [The Guardian of The Constitution], in DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN, AND HERMANN HELLER IN WEIMAR 76-85 (1997). William Scheuerman, in his valuable study, Carl Schmitt: The End of Law, links Schmitt's theory of the discretion accorded the dictator to the critique of legal indeterminacy, see WILLIAM SCHEUERMAN, CARL SCHMITT: THE END OF LAW 27-35 (1999), but it should now be clear that the problem of legal exceptionalism arises most dramatically precisely when law, at least on its face, is most determinate (as in provisions like the First Amendment and the Contract Clause).

138 SCHMITT, supra note 73, at 13.
140 ROSSITER, supra note 75, at 288.
141 Though, as the distinguished American historian Laura Kalman suggested in responding to an earlier draft, this may be a "good description of the administrations of Lincoln, both Roosevelts, Wilson and LBJ, not to mention a whole lot of other folks." E-mail from Laura Kalman, supra note 130. This, of course, only underscores the difficulty of finding an adequate leverage point from which to criticize the Bush Administration without, at the same time, calling into question most of America's "great" presidents.
As suggested at the outset, the defining feature of the Bush Administration, evidenced, of course, in the recent presidential election, is the centrality of the “global war on terror” and the associated freedom this gives the President to make any decision he deems suitable with regard to carrying out this war. This freedom applies both to what is sometimes called “the law of war” and “the law in war.” As to the first, President Bush has essentially monopolized the decisionmaking process of when and against whom the United States shall unleash military power, regardless of what Congress or, even more certainly, the United Nations might think. In fairness to President Bush, one should acknowledge that not only were similar claims made by his father at the time of the first Iraq War, at least with regard to Congress, but, just as significantly (at least for Democrats), President Clinton also went to war in the South Balkans without bothering very much about either statutory authorization by Congress—refused by the House of Representatives in a 213-213 vote on April 28, 1999, after the bombing had in fact been going on for a month—or compliance with our treaty


143 On May 10, 1991, President George H.W. Bush spoke at Princeton University:

It is the President who is responsible for guiding and directing the Nation’s foreign policy. The executive branch alone may conduct international negotiations, appoint ambassadors, and conduct foreign policy. Our founders noted the necessity of performing this duty with “secrecy and dispatch,” when necessary. The President also serves as Commander in Chief of our Armed Forces, as it was my role to do in the Persian Gulf.

This does not mean that the Executive may conduct foreign business in a vacuum. I have a great respect for Congress, and I prefer to work cooperatively with it wherever possible. Though I felt after studying the question that I had the inherent power to commit our forces to battle after the U.N. resolution, I solicited congressional support before committing our forces to the Gulf War. So, while a President bears special foreign policy obligations, those obligations do not imply any liberty to keep Congress unnecessarily in the dark.

George H.W. Bush, U.S. President, Remarks at Dedication Ceremony of the Social Sciences Complex at Princeton University in Princeton, New Jersey (May 10, 1991), available at http://www.presidency.ucsb.edu/ws/index.php?pid=19573&st=&stl= (emphasis added). But what if there were no U.N. resolutions to serve as justifications (plausible, as with Iraq I) or otherwise (as with Iraq II)?

obligations under the United Nations Charter. This is not to say that Clinton Administration lawyers did not attempt to develop arguments, however strained, that reassured the President as to the legality of his conduct, but Clinton did not feel a need to engage in public discussion of the legal justification for his actions, nor were any such "internal" arguments that might have reached the White House exposed to public scrutiny and debate. Perhaps as much to the point is that the dubious legality of American policy never became the subject of significant public debate, even after a lawsuit challenging the President was filed immediately following the House action by Republican Representative Tom Campbell of California—a former professor at the Stanford Law School—and thirty other members of Congress, both Republican and Democratic. Few Democrats were heard defending "rule of law" values—whether domestic or international—against presidential prerogative, and Republican opposition was dismissed by admirers of President Clinton's policy as partisan.

As to "the law in war," surely the most significant contemporary debate concerns the propriety of torture. There are two great debates about torture. One of them involves how we define the term. That is a very important topic, about which I have written elsewhere, but it is well beyond the scope of my topic today. That is not true, however, of the second debate, which involves the extent to which the executive branch (which includes, of course, the Central Intelligence Agency) is bound by international and domestic laws prohibiting torture (however defined). Both issues are central to the notorious memorandum written for the Office of Legal Counsel by John Yoo, who has returned to the University of California Law School, and submitted under the signature of Jay

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145 See U.N. Charter art. 2, para. 4 (asking member nations to refrain from "threat of force or use of force").


Bybee, then head of the OLC and now a member of the Ninth Circuit Court of Appeals, to Alberto Gonzales, then White House Counsel, now, of course, the Attorney General of the United States.\(^\text{149}\) I focus here only on the second debate.

The essential background of the ensuing discussion is that federal law clearly and unequivocally bars the use of torture by any official of the United States, without exception.\(^\text{150}\) This should scarcely be surprising inasmuch as the United States Senate ratified, in the name of the United States, the United Nations Convention Against Torture, Article 2 of which states not only that "[e]ach State Party shall take effective legislative . . . measures to prevent acts of torture in any territory under its jurisdiction," but also that "[n]o exceptional circumstances, whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification of torture.\(^\text{151}\) This may be the most "Kantian" passage in all of law inasmuch as it self-consciously precludes any appeal to necessity or similar "exceptional circumstances" as a justification for evading the legal command. Moreover, Article 3 states that "No State Party shall expel, return, or extradite person to another State where," in language added by the Senate, it is "likely" that there would be a "danger of being subjected to torture."\(^\text{152}\) It would seem that the President's Article II duty to "take care" that the laws be faithfully executed\(^\text{153}\) would make almost impossible any argument that he has the authority to order torture or even to "render" suspects to countries where torture is commonly practiced (especially, it should go without saying, if the point of the "rendition" is to take advantage of the willingness of the host countries to engage in torture as a means of interrogation).

This is not the position of the Bush Administration, at least from August 1, 2002, until December 30, 2004, when the earlier

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\(^{149}\) Memorandum from Jay Bybee, \textit{supra} note 7.


\(^{151}\) \textit{Id., reprinted in} Levinson, \textit{supra} note 148, at 40 (emphasis added).

\(^{152}\) \textit{Id., reprinted in} Levinson, \textit{supra} note 148, at 41.

\(^{153}\) U.S. CONST. art. II, § 3, cl. 4.
memorandum was publicly withdrawn. In that earlier memorandum, the OLC construed the President's authority as Commander in Chief to include the overriding of any apparent barriers to torture. That is, "[i]n order to respect the President's inherent constitutional authority to manage a military campaign against al Qaeda and its allies, [statutory law] must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority." In other words, it would be unconstitutional to limit the President's ability to authorize torture.

As it happens, the discussion of the President's Commander in Chief power was eliminated from the December 30, 2004 memorandum, but the Administration, and its new Attorney General, never repudiated the discussion in the way that it explicitly repudiated the extraordinarily narrow definition of torture that was also part of the earlier memorandum. Instead, the Administration's position is that discussion of the President's legal authority to order torture is irrelevant because the United States simply does not torture. This is almost certainly a lie, though, sad to say, all-too-few people seem to care. I have no doubt that the Administration's position as to presidential power—what might, referring back to Locke, be deemed presidential "prerogative"—is precisely that set out by Professor Yoo and Judge Bybee in the withdrawn memo, though it is now what might be termed a "secret" position.

Consider this, however: If the President is authorized unilaterally to engage the United States in preventive wars, or to

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155 Memorandum from Jay Bybee, supra note 7, at 31.

156 See Memorandum Opinion, supra note 154 (noting that discussion in August 2002 memorandum concerning President's Commander in Chief power was unnecessary and had been eliminated in 2004 memorandum).

157 Id.

158 The position, of course, continues to be defended in public by those sympathetic to the February 1, 2002 claims of the Administration, including Professor Paulsen. See supra notes 53-57 and accompanying text; see also John Yoo, Transferring Terrorists, 79 NOTRE DAME L. REV. 1183, 1192-1222 (2004) (defending President's war powers in historical and constitutional context).

159 As a matter of fact, both Iraq wars received congressional authorization. It was,
authorize torture, then are there any limits to the President's "emergency power"? Charles Evans Hughes once notably stated that "We are under a Constitution, but the Constitution is what the judges say it is." Is what might be termed the "Bush (or Paulsen) corollary" that "we live under a Constitution, but the Constitution is what the President, as Commander in Chief or presidential oath taker," says it is?

As I have suggested throughout this Article, one need not turn only to a fascist sympathizer like Carl Schmitt to find the basis for such arguments. Abraham Lincoln will do just fine. Indeed, Giorgio Agamben writes that "[i]n the ten weeks that passed between [the outbreak of war on] April 15 and [the return of Congress on] July 4, Lincoln in fact acted as an absolute dictator," and he notes as well that Schmitt referred to Lincoln as "a perfect example" of what Schmitt called the "commissarial dictatorship," that is a dictatorship entered into ostensibly in order to save the existing constitutional order. Rossiter basically agrees:

The eleven weeks between the fall of [Fort] Sumter and July 4, 1861 constitute the most interesting single episode in the history of constitutional dictatorship. The simple fact that one man was the government of the United States in the most critical period in all its 165 years and that he acted on no precedent and under no restraint, makes this the paragon of all democratic, constitutional dictatorships.

however, the position of President George H.W. Bush that no such authorization was, as a matter of constitutional law, required, and there is no reason to believe that his son holds a different view. See, e.g., Memorandum from John Yoo, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dept of Justice, to Alberto Gonzales, Counsel to the President, The President's Constitutional Authority to Conduct Military Operations Against Terrorist and Nations Supporting Them (Sept. 25, 2001), available at http://www.usdoj.gov/olc/warpowers925.htm (discussing President's constitutional and statutory power to engage in preventive war).


AGAMBEN, supra note 76, at 20.

ROSSITER, supra note 75, at 224.
But Rossiter immediately follows this with an all important caveat: "[If] Lincoln was a great dictator, he was a greater democrat." This, I regret to say, is what still is to be determined with regard to the presidency of George W. Bush. Characterologically, Bush seems far more authoritarian than democratic. And, ultimately, it may well be the character—or what the Founders would have described as the "virtue"—of the President that is ultimately more important than the ostensible rules laid down in the Constitution.

An obvious truth about the events of 1861 through 1865—you will notice that I do not give them a label, for any name, whether "Civil War," "the War Between the States," or the like, is to take a position on a very controversial political issue, which is the constitutional legitimacy of secession—is that they were always perceived as only temporary. Though Lincoln was obviously mistaken in believing, like most Northerners in 1861, that the war would be won relatively quickly, no one envisioned that it would continue forever, and it did not. That, of course, is not the case with the "global war on terror," which is defined in such a way as to make almost certain that it will never conclude, whether in my own relatively limited lifetime or even the lifetime of the youngest reader of this Article. The "emergency" is thus permanent, and claims of presidential authority with regard to emergency powers, whether based on the Commander in Chief Clause or the Oath of Office, are equally permanent. The claims made on behalf of Bush's authority are, in this respect, far more similar to those that Hughes disdained in Schechter than the more limited bow to emergency authority articulated in Blaisdell. But, of course, it was liberals who cheered on the kind of delegation of power, temporarily stymied in Schechter, but ultimately accepted as the basis of the modern administrative state.

What is most dismaying, in many ways, is not the articulation of arguments about the need for more, and at times basically unfettered, presidential power. The people making such arguments are mostly serious men and women who are responding to

163 Id.

something real in their lives—namely, the threat from terrorists who do not wish us well and are willing to attack us and our institutions in order to make their point. What is most dispiriting is the basic lack of concern on the part of Congress and the general public in responding to the vitally important issues about presidential prerogatives that are raised by the August 1, 2002 memorandum. The Administration has chosen to engage in what might be called a strategic withdrawal of its arguments, and the Republicans who dominate the Congress are more than happy to participate in this charade.

Among other things, this amply refutes Madison's argument in Federalist No. 51 that "[a]mbition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place." Madison assumed, and many others have agreed, that members of Congress would jealously protect the powers of their own institution against overly aggressive presidents so that there would be a built-in institutional check against presidential aggrandizement. As Professor Daryl Levinson pointed out in a brilliant recent article, there is no particular reason to believe this. Among other things, loyalties to one's political party may well take precedence over the presumed institutional interests of the House and Senate. Nothing else, I believe, can explain the straight party-line vote last year in the Senate Judiciary Committee with regard to subpoenaing the Justice Department for documents relating to the issue of torture. No one heretofore had suggested that there was a party position on torture, with one party in effect supporting it (or, at least, doing nothing seriously to block it) and another opposing it. But that seems to be our present situation politically. Perhaps the Administration will so overreach regarding its claims of inherent presidential authority as to provoke

165 THE FEDERALIST No. 51 (James Madison), supra note 25, at 349.
166 See Daryl Levinson, Empire-Building Government in Constitutional Law, 118 HARV. L. REV. 915, 952 (2004) (questioning whether it is rational to believe that institutional loyalty will characterize elected representatives).
167 See Helen Dewar, GOP Senators Block Subpoena on Memos but Prod White House, WASH. POST, June 18, 2004, at A24 (reporting on 10-9 vote against Democrat-led attempt to subpoena Justice Department memoranda concerning torture of suspected terrorists).
a serious response from Congress, but that certainly has not happened yet.

There are also the courts, of course, and Chief Justice Hughes's reminder that they must make their own independent determination about the presence of sufficient "emergency" to legitimate certain uses of state power. One might take some comfort from the Supreme Court's willingness last year to reject some of the Administration's arguments regarding indefinite detention of American citizens in the absence of congressionally authorized suspension of habeas corpus, but, as Zhou Enlai once famously suggested with regard to the consequences of the French Revolution, "[I]t is too soon to say." Justice O'Connor's opinion, to put it mildly, did not offer a very robust conception of the rights of suspected terrorists; more to the point, Justice Thomas's lone opinion was everything that Carl Schmitt or Clinton Rossiter could have hoped for with regard to giving the president unlimited power to fight the war against terror. One does not know how many appointments to the Supreme Court George W. Bush will get—one might remember that William Howard Taft in his one term was able to name six members of the Court—but we do know that he has publicly identified Thomas as one of his favorite Justices. It is hard to escape the belief that one reason for the President's choice of John Roberts as his first nominee for the Supreme Court is Bush's pleasure in Roberts having joined a recent opinion that, according

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169 Id. at 586.

170 See id. at 581 (Thomas, J., dissenting) ("[T]he President has constitutional authority to protect the national security and . . . this authority carries with it broad discretion.").


172 See Mary Leonard, 2000 Election Likely to Tip Court Balance, BOSTON GLOBE, June 11, 2000, at A1 ("[B]ush has told Republicans that they can rest assured he will appoint justices who 'will strictly interpret the Constitution' and model themselves after conservative Justices Antonin Scalia and Clarence Thomas.").

173 See Hamdan v. Rumsfeld, 415 F.3d 33, 44 (D.C. Cir. 2005), cert. granted, 74 U.S.L.W. 3287 (U.S. Nov. 7, 2005) (No. 05-184) (joining of Judge Roberts in decision upholding military tribunals as authorized by Congress's extensive delegation of power to President in
to Emily Bazelon, functioned as "a blank-check grant of power to the Bush administration to try suspected terrorists without basic due-process protections." By the time this Article is published, readers will know whether his Judiciary Committee interlocutors will have interrogated him on the issues of emergency power and basically "untrammeled delegation" of decisionmaking authority to the President.

V. CONCLUSION: IS IT POSSIBLE TO HAVE AN ADULT CONVERSATION ABOUT THESE ISSUES?

We are, I believe, at a crossroads in American constitutional development. The United States—justifiably—feels itself threatened by attack, and we have an administration in power that is both stunningly ambitious with regard to its view of executive power and almost contemptuous of the claims of any other institutions or of the citizenry to engage in independent constitutional judgment. It is naive to regard the Constitution as speaking clearly to the resolution of such dilemmas. The decision must be our own as to the kind of political order in which we wish to live.

I conclude by returning once more to what I believe is the single greatest opinion in our history, Justice Robert Jackson's concurrence in the Steel Seizure case. I suspect that some of you have been waiting for a discussion of that opinion, given that Jackson set out a very influential tripartite schema for determining the limits of presidential power and, notably, concurred with the majority's view that President Truman did not possess the power to seize the mills in question. My own view is that there is less to the tripartite schema than meets the eye; it is, I believe, at best only a


Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

See id. at 635-38 (describing implications of President acting "pursuant to an express or implied authorization of Congress," "in absence of . . . a Congressional grant or denial of authority," and "incompatible with the express or implied will of Congress").

Id. at 634.
place to begin discussion and not at all a way of ending it. If that were all that Jackson had done, I would scarcely give it pride of place within my own personal pantheon of opinions. What entitles it to that place for me is what I have elsewhere described as its completely "adult" tone. It is a serious, reflective essay written by an unusually able judge who, more to the point, had experienced government from the perspective of a member of President Roosevelt's cabinet (at which time he had offered a rather expansive notion of presidential power in order to justify the "Lend Lease" operation) and, not irrelevantly, the chief United States prosecutor at Nuremberg, in which the recipients of Carl Schmitt's jurisprudential beneficence were called before the dock of history.\textsuperscript{178}

Jackson was also what might be called a post-Realist; he had, after all, been a key participant in the transformation from what Ackerman has called the "Second Republic,"\textsuperscript{179} structured by a sense of limited government instantiated in such decisions as \textit{Lochner v. New York}\textsuperscript{180} and \textit{Hammer v. Dagenhart},\textsuperscript{181} to the considerably more liberated government brought into being by FDR and legitimized by Roosevelt's appointees to the Court, including, obviously, Jackson himself. For me, therefore, more important than the three-part schema is his acknowledgment, near the outset of his opinion, that:

\begin{footnotes}
\item[178] See The Supreme Court Historical Society, http://www.supremecourthistory.org/02_history/subs_timeline/images_associates/070.html (last visited Jan. 21, 2006) (detailing timeline of Jackson's life). Jackson was typical of the justices of his time in bringing a wealth of such practical experience to the Court; Charles Evans Hughes had himself been Governor of New York before being named to the Supreme Court by President Taft and then resigned in 1916 to run for the presidency. Before returning to the Court as Chief Justice in 1930, he was Secretary of State in the Harding Administration. See The Supreme Court History Society, http://www.supremecourthistory.org/02_history/subs_timeline/images_chiefs/011.html (last visited Jan. 21, 2006) (detailing timeline of Hughes's life). The collective experience of every member of the current Supreme Court, including Judge Roberts, comes nowhere near those of Jackson or Hughes. One might well wonder if a Court made up of relative nonentities would have the willingness or public authority to stand firm against presidential overreaching.
\item[179] ACKERMAN, \textit{Transformations}, \textit{supra} note 28, at 280.
\item[180] 198 U.S. 45, 53 (1905) (holding that New York law restricting number of hours bakery owners could require employees to work impermissibly interfered with employees' Fourteenth Amendment liberty rights).
\item[181] 247 U.S. 251, 277 (1918) (holding law restricting interstate commerce of products created by child labor unconstitutional).
\end{footnotes}
A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. . . . And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.182

This strikes me as exactly right; nothing in the following half-century since Jackson wrote affects his basic description. This means that our resolution to issues of presidential authority in times of emergencies is a matter not of "law" in any standard-model sense, but, rather, of what my friend and frequent coauthor Jack Balkin and I have termed "high politics."183 Or, let me put it slightly differently: It should be "high politics" that inform our decisions, where "high politics" means precisely an elaboration of our most fundamental political visions for the collective enterprise in self-government that we call the United States of America. Instead, I fear that it is, more and more "low politics" that is making decisions by reference to the immediate consequences for one’s own partisan interests, that drives our discussion.

Perhaps you would accuse me of displaying just such a partisan temperament in my analysis here. And perhaps I have, since I certainly harbor a deep distrust of the Bush Administration. Yet I would like to believe that the central theme of this Article is not that the Administration’s views should be automatically rejected in the name of a rather simplistic notion that “the President is not above

182 Steel Seizure, 343 U.S. at 634-35 (Jackson, J., concurring).
the law." For better and worse, that is not what our constitutional history teaches us, unless, of course, we offer such a supple and nuanced—and, some might say, tendentious—understanding of "the law" that it basically becomes an apologia for the actions of at least those presidents whose policies we happen to like. Whatever one thinks of the specifics of Clinton Rossiter's *Constitutional Dictatorship*—which concludes with what some might regard as the Orwellian statement that "[n]o sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself"—he was attempting to initiate a deadly serious conversation about constitutional fundamentals. He failed. The question is whether we can do any better now.

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184 ROSSITER, supra note 75, at 314.