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The Rule that Proves the Exception: A Constitutional State of Emergency in the United States

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**The Rule that Proves the Exception:
A Constitutional State of Emergency in the United States**

Senior Project submitted to
The Division of Social Studies
of Bard College

by

Ben DiFabbio

Annandale-on-Hudson, New York

May 2013

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Introduction

Through the two war-worn centuries of our Constitution's lifespan, reasoning through precedent, analogy, and necessity has enabled the Supreme Court to make many nuanced judgments about the overlapping boundaries of constitutional rights and national security interests in periods of crisis. However, those judgments are very obviously not the product of careful scrutiny of constitutional text, which provides almost nothing of substance in the way of national emergencies or states of exception. Those judgments, rather, are the product of weighing precedent—i.e. judge-made law—against the exigencies of the moment. The reasoning in these opinions may pretend to revolve around the Constitution, but anyone who has read that document can plainly see that they do not. There are no provisions in the Constitution that define in explicit terms how the government can derogate from constitutional rights in the midst of emergencies and threats to national security.¹ Absent any substantive constitutional guidance in appropriating the line between civil liberties and threats to national security, all discretion resides with the justices and their application of precedent to the necessities of the moment. Considering the fact that the Constitution has given them virtually no guidance, our judges have done an admirable job in attempting to answer these very difficult and often time-sensitive questions. However, in periods of national emergency—perhaps more visibly than at any other juncture—judges are compelled to remove their veils of rational, constitutional objectivity and expose themselves as the policymakers that they so often must become.

¹ There are two exceptions to this claim: The first is Article 1 Section 9 of the US Constitution, which allows for the suspension of habeas corpus when “the public safety may require it.” The second is the Fifth Amendment's exemption from the privilege of a grand jury hearing for cases arising in the military “when in actual service in time of War or public danger.” While the Suspension Clause has been raised in the discussion of habeas cases, it has never dominated that discussion, which suggests that it is too narrow and vague to offer judges much in the way of interpretive guidance. As for the Fifth Amendment, the Supreme Court has never held that the grand jury exception contains any limitation or comment on the scope of war powers or constitutional rights in emergencies.

With this defect in mind, this project asks the reader to imagine a constitution that *does* provide for such derogations, and a bench of judges who *are* guided and limited by a constitution that clearly defines the extent of the government's power to respond to a national emergency. This project offers a model for such a constitution, but it does not pull it out of thin air. My proposal draws from emergency provisions that exist in international treaties and foreign constitutions, whose impact is understood through the judgments of foreign jurists, sitting on courts similar to our Supreme Court and asking questions similar to the ones asked by our nine justices. The difference is that these foreign jurists have the luxury of working from a concrete framework of constitutional law in arriving at their decisions, whereas our judges in states of emergency are often more like sharpshooters in an indoor firing range during a power outage.

The decision to view US constitutional law through a comparative lens is built on the assumption that American judges and lawmakers may have something to learn from an evaluation of the efficacy of foreign constitutions to guide jurists in appropriating the line between threats to national security and the protection of civil liberties. That position may be quite unpopular in America. American civic culture reveres the US Constitution as a sacred artifact, and we Americans tend to view our judicial system as a beacon of civil-libertarian and democratic ideals, which the rest of the world should aspire to emulate. In consequence, our constitutional culture revolves around notions of supremacy and exceptionalism. We are generally unwilling to concede that we might have something to learn from the rest of the world, especially in the realm of political rights and civil liberties. This project sets out to challenge that attitude of exceptionalism, and in doing so, it intends to promote a vision of constitutional law that would provide our justices with a more substantive framework for balancing constitutional rights against the exigencies of our time.

In his 2005 book *State of Exception*, Giorgio Agamben offers a theoretical interpretation of the relationship between legal and political authority in a state of public emergency, in light of what he perceives to be a normalization of the exception in post-9/11 America. Agamben characterizes the state of exception as the “no-man’s-land between public law and political fact.”² He insists that “the veil covering this ambiguous zone” ought to be lifted, and he emphasizes the urgency underlying the task of staking out the questionable borders “between the political and the juridical.”³ Agamben argues that a theory of the state of exception—his theory—is a necessary defensive measure against the dangerous ambiguity of a law that provides for an exception to itself. He writes:

If the law employs the exception—that is the suspension of law itself—as its original means of referring to and encompassing life, then a theory of the state of exception is the preliminary condition for any definition of the relation that binds and, at the same time, abandons the living being to law.⁴

The central argument of this project rejects Agamben’s assumption that the legalization of the state of exception embodies an irresolvable contradiction, which invariably leads to an “emptiness of law” akin to the type of legal fiction that the Bush Administration constructed to justify human rights abuses against detainees at Guantanamo. In opposition to the Agamben view, this project argues that it is precisely the *absence* of a set of elaborate and specific emergency provisions in the United States Constitution that permits—and perhaps even promotes—a normalization of the exception. My proposal aligns with the vision of legal theorist Bruce Ackerman, who believes that “liberal constitutionalists should view the state of emergency as a crucial tool enabling public reassurance in the short run without creating long-term damage

² Agamben, Giorgio. *State of Exception*. Trans. Kevin Attell. Chicago: University of Chicago, 2005. Print, 1.

³ *Ibid.*, 2.

⁴ *Ibid.*, 1-2.

to foundational commitments to freedom and the rule of law.”⁵ With Ackerman’s perspective in mind, the primary goal of this project is to lay out the specific terms of a constitutional amendment or framework statute that would clearly define the boundaries of “public law and political fact” at the height of a national emergency.⁶

In pursuit of that end, this project divides Agamben’s central theoretical question into three categorically practical ones:

- 1) How *does* the law provide for an exception to itself?
- 2) How *can* the law provide for an exception to itself?
- 3) How *should* the law provide for an exception to itself?

Assuming the vantage point of the United States, which is the perspective taken in this project, the first question is essentially diagnostic, while the latter two are prescriptive.

Chapter 1, predictably, addresses the above Question 1, as it applies to United States constitutional law. The structure of this chapter follows a selective historical timeline of landmark cases in US history that have raised questions about the application of constitutional rights and civil liberties (especially the writ of habeas corpus and the freedom of speech) in times of war or political crisis. The purpose of this timeline is to trace the evolution of case law developed by the Supreme Court that defines the extent of the US government’s power to respond to national emergencies at the expense of individual rights. This close reading of US Supreme Court decisions in periods of crisis aims to illustrate the following: Over the course of our Constitution’s lifespan, wars, public emergencies, and threats to national security have often compelled judges to make exceptional interpretations of an overtly unexceptional (and, perhaps, anti-exceptional) Constitution. As a function of the principle of stare decisis in the common law

⁵ Ackerman, Bruce A. *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*. New Haven: Yale UP, 2006. Print, 89.

⁶ Agamben, 2.

system, these exceptional decisions become binding precedents themselves, thereby potentially opening the door for future derogations and gradually normalizing the state of exception.

Once Chapter 1 has defined the problem at home, Chapter 2 sets off to travel the world in search of a solution. Drawing from emergency provisions that exist in foreign constitutions and international covenants, this chapter aims to answer the above Question 2: How *can* the law provide for an exception to itself? The discussion includes an in-depth analysis of the derogation provisions contained in the international human rights treaties (ECHR, ICCPR, and ACHR), Supreme Court case law defining declarations of emergency under the Constitution of India, and the breakthrough innovations of the 1996 Constitution of post-apartheid South Africa. In preparation for Chapter 3, which proposes the specific terms of a constitutional amendment providing for a state of emergency, Chapter 2 sets out to discover which types of emergency provisions are most effective in guiding judges through the process of weighing national security interests against constitutional rights and civil liberties.

Building on the discoveries of the previous two chapters, Chapter 3 will assemble the world's wisdom on legal states of emergency into a model constitutional amendment, which offers an answer to the question of how the law *should* provide for an exception to itself. The luxury of academia, of course, is that it allows us think beyond the confines of political reality. The perspective taken in Chapter 3 is that a constitutional amendment of this kind is an impractical necessity. It is impractical because the procedure for amending the US Constitution is notoriously difficult, and it does not allow much room for the amount of controversy and dissent that this proposal would arouse. It is necessary, however, for very much the same reason. The nearly insurmountable challenge of constitutional amendment in the United States has compelled judges to apply very loose and permissive interpretations of constitutional text in

order to keep it up to date. In states of emergency, this permissive paradigm of interpretation has allowed judges to permanently erode large chunks of our constitutional rights through jurisprudential doctrines aimed at balancing the language of the Constitution against the exigencies of the moment. The central argument of this project is that the only way to stop that cycle of erosion, which promotes a normalization of the state of exception, is to amend the Constitution in a way that legitimizes—but also limits—these otherwise extraconstitutional government responses to national emergencies.

Chapter 1

The Perils of Precedent:

Judicial Review, Deference, and the Crisis Courts

As the preface provides, the guiding question of this chapter is the following: How, in the absence of a constitutional state of exception, does the United States government justify derogations from constitutional rights in the presence of a national emergency? Of course, the most appropriate direction to look for an answer to this question is back, into history: How has the government responded to crises of the past, and how have these responses been interpreted by the courts vis-à-vis the Constitution? In nearly every example explored in this chapter, the pattern is the same. As a crisis emerges—usually war or the threat of war—the President or Congress responds by issuing an executive order or an act of legislation that responds immediately to the perceived necessities of the moment, often in a manner that violates some aspect of somebody’s constitutional rights. Since the Constitution stipulates that the courts can rule only on “cases or controversies” rather than abstract issues of law, the Supreme Court cannot rule on the permissibility of a legislative or executive action until it hears the case of someone who has already been affected. When a case arrives, the Court can either choose the route of deference to the authority of the other branches or strike down their actions with the power of the Constitution.

Since the Constitution is virtually silent on the subject of exception, the decision of deference must be justified by an interpretation of a document that does not change according to the tides of public panic and political exigency. Conferring this discretion to judges would be relatively unproblematic if it were not for the precedential character of the American judicial system, which through the principle of *stare decisis* bestows a level of permanence upon judicial

decisions. On this principle, the line of interpretive reasoning presented by a judge in a century-old case could be cited today and carry legal weight. So when Bruce Ackerman, in his discussion of the questionable constitutionality of post-9/11 counterterrorism measures, writes that “the most important thing to say about these precedents is that they are irrelevant,” it should give us pause.⁷ This chapter of the project takes the position that there is more to these precedents than sheer irrelevance. In fact, to dismiss their applicability is to overlook their potentially perilous significance in the evolution of constitutional law.

There are seven major episodes in American history during which the United States government has responded to a national crisis by abridging civil liberties: The first was in 1798 when Congress enacted the Alien and Sedition Acts in anticipation of a war with France. The second was the Civil War (1861 - 1865), when President Lincoln suspended the writ of habeas corpus to detain pro-secessionist figures in the interest of salvaging what was left of our national unity. Third, during the American involvement in World War I, Congress passed the Espionage Act of 1917 and the Sedition Act of 1918 in order to silence vocal critics of the war effort. Fourth, after the surprise military strike by Japan on Pearl Harbor (1941) and America’s subsequent entrance onto the stage of World War II, President Roosevelt signed Executive Order 9066 to authorize the infamous internment of Japanese Americans and resident aliens,⁸ leading to the landmark case of *Korematsu v. United States* (1944). The fifth episode was the era of McCarthyism and the abridgment of free speech under the Alien Registration Act (aka, the Smith Act) of 1940 and the subsequent prosecutions of individuals advocating for the overthrow of the U.S. government during the Cold War. The sixth circumstance in which the United States

⁷ Ackerman, Bruce A. *Before the next Attack: Preserving Civil Liberties in an Age of Terrorism*. New Haven: Yale UP, 2006. Print, 20.

⁸ Wert, Justin J. *Habeas Corpus in America: The Politics of Individual Rights*. Lawrence, Kan.: University of Kansas, 2011. Print, 133.

government took action to suppress the freedom of speech in response to a national crisis was during the Vietnam War, which provoked large outbursts of antiwar demonstrations during the 1960s - 1970s and a consequent influx of speech cases heard and decided by the Supreme Court. Finally, this timeline of case law in exigent circumstances concludes with a discussion of the reemergence of the writ of habeas corpus as the fulcrum of the familiar rivalry between government prerogative and individual liberties in the post-9/11 “war on terror.”

The Sedition Act and the “Quasi War” of 1798

The First Amendment of the US Constitution reads, “Congress shall make no law [...] abridging the freedom of speech, or of the press [...].” It should come as a surprise, therefore, that nine short years after those words were crystallized in the most fundamental source of federal law, Congress could muster the political will to enact legislation criminalizing the publication of “false, scandalous, and malicious writing” against the government or its officials.⁹ The Sedition Act of 1798 was passed in the context of a heated debate between the newly emerging political parties over the meaning and purpose of the Constitution in defining the role of government and protecting civil liberties. The Federalist Party, led by Alexander Hamilton, sought to “save the nation from the perils of democracy” by swelling the powers of the central government.¹⁰ The Republican Party, headed by Thomas Jefferson and James Madison, were champions of popular government. In the words of Geoffrey Stone, the Republicans “feared tyranny more than anarchy, and valued liberty more than security.”¹¹ These two parties had vastly different visions of the kind of country they were constructing, and in 1798, their passions propelled by the proximity of war ushered the Federalist vision into a position of preeminence.

⁹ The Sedition Act, July 6, 1798; Fifth Congress; Enrolled Acts and Resolutions; General Records of the United States Government; Record Group 11; National Archives.

¹⁰ Stone, Geoffrey R. *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*. New York: W.W. Norton &, 2004. Print, 25.

¹¹ *Ibid.*, 25.

President John Adams signed the Alien and Sedition Acts into law amid much enthusiasm and patriotic clamor for war with the new French administration that was established in the wake of the 1789 Revolution. Although France had been a close ally of the nascent American nation during the Revolutionary War against our British colonizers, the newly independent United States had since softened relations with Great Britain, especially after creating close diplomatic and economic ties through the Jay Treaty of 1794. This angered the French, provoking an undeclared naval war (often referred to as a “Quasi War”) between the United States and France from 1798 to 1800, which became the inaugural test of the new nation’s commitment to its recently ratified Constitution.

A pattern to watch throughout this exploration of United States law in times of crisis will be the ways in which the government has officially called into question the loyalty of the ‘other’—especially resident aliens and citizens of ‘enemy’ ethnicities living in the US. As Stone rightly emphasizes, “With fears about the French in 1798, the Germans in World War I, the Japanese and Germans in World War II, and Muslims in the War on Terrorism, the United States has long wrestled with the question whether noncitizens enjoy constitutional rights.”¹² The Alien Friends Act of 1798 gave the executive power to deport any resident alien deemed “dangerous to the peace and safety of the United States.” While no one was ever actually deported under the Act, it created a culture of suspicion, in which “apprehensive French immigrants fled the country, and the flow of immigrants into the United States trickled to a halt.”¹³

Numerous public figures were tried and convicted under the Sedition Act for publicly criticizing the American government (especially the Federalists). Stone observes, “From July 1798 to March 1801, when the Sedition Act expired, the Federalists arrested approximately

¹² *Ibid.*, 30.

¹³ *Ibid.*, 33.

twenty-five well-known Republicans under the Act. Fifteen of those arrests led to indictments. Ten cases went to trial, all resulting in convictions.”¹⁴ Hence, even when the First Amendment was hot off the press, Congress and the courts were compelled to limit the extent of its application in periods of crisis. As the French threat dissipated, and Americans began to realize that “France did not want war with the United States,” the Federalists grew increasingly more unpopular.¹⁵ In the election of 1800, Thomas Jefferson defeated Adams, and the Republicans won a majority in Congress. When Jefferson assumed office, he pardoned and released those convicted and nullified the Sedition Act.

Although no direct judicial precedent on the constitutionality of the Sedition Act arose from these events (the Court did not assert the power of judicial review until *Marbury v. Madison* in 1803), this early breach of civil liberties did eventually make its way into the historical category of ‘lessons learned,’ and it set into motion the discussion defining the substance and scope of First Amendment freedoms in times of war and national crisis. In the landmark Supreme Court decision of *New York Times v. Sullivan* (1964), which strongly fortified the freedom of the press, Justice Brennan wrote: “This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, which first crystallized a national awareness of the central meaning of the First Amendment.”¹⁶ This “national awareness,” arising from a fierce debate between the Republicans and the Federalists and the eventual displacement of the Adams presidency by Jefferson and the Republicans, came about as a political and social fact before it was enshrined as a legal one. However, the executive and legislative responses by the Jefferson administration in the aftermath of this crisis were so significant that they came to inform judicial reasoning in crises to come. This example demonstrates that the aftermath of such abridgments

¹⁴ *Ibid.*, 63.

¹⁵ *Ibid.*, 69.

¹⁶ Qtd. in Stone, 73.

of constitutional rights and liberties amid real or perceived exigencies of war and national crisis can potentially engender great progress in the way of judicial protection for civil liberties. However, this section is intended to serve as a cautionary tale, and so the true lesson from this section can be found in a paraphrase of the late Prince of Denmark: ‘Though this be progress, yet there is peril in’t.’

“All the Laws but One”: Lincoln, *Habeas*, and the Civil War

As President Lincoln famously demanded of a special session of Congress on July 4, 1861, “Are all the laws but one to go unexecuted and the government itself go to pieces, lest that one be violated?”¹⁷ Responding to his own rhetoric, Lincoln proceeded to unilaterally suspend the writ of habeas corpus and declare martial law. Yet, his question is one that has endured the greater part of American history, and will likely continue to resurface as new crises emerge.

The constitutionality of Lincoln’s suspension of habeas corpus and declaration of martial law is dubious. The US Constitution contains one provision concerning the suspension of habeas corpus—Article I, Section 9—which reads: “The privilege of the Writ of Habeas corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” As for “martial law,” there are no provisions in the Constitution that contain this phrase explicitly. Declarations of this kind have typically been made in the United States by way of executive order, based on the precedent established here, by President Lincoln. However, the Supreme Court has since imposed strict jurisprudential limitations on declarations of martial law. Consider the restrictive language of the following passage from the majority opinion of *Ex parte Milligan*, a habeas case that arose in 1866 as a result of Lincoln’s declaration of martial law:

¹⁷ Wert, Justin J. *Habeas Corpus in America: The Politics of Individual Rights*. Lawrence, Kan.: University of Kansas, 2011. Print, xi. See also: Rehnquist, William H. *All the Laws but One: Civil Liberties in Wartime*. New York: Alfred A. Knopf, 1998. Print.

“Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.”¹⁸ In effect, *Milligan* defined the imposition of martial law to consist in the trial of civilians in military tribunals, and held that it is impermissible as long as the civil courts are “open and functioning.”¹⁹

Judicial reasoning has revealed, moreover, that martial law and the suspension of habeas corpus must be authorized by Congress in order to fall permissibly within the purview of the Suspension Clause. In his book *All the Laws but One*, Rehnquist (the 16th Chief Justice of the Supreme Court) revives the rationale of Taney (the 5th Chief Justice of the Supreme Court) in *Ex parte Merryman* (1861), which holds that the Suspension Clause should apply only to Congress because of its placement in Article I, which defines the powers of Congress.²⁰ Since there is no mention of habeas suspension in Article II, which establishes the powers of the President, it follows that this is not contained under the umbrella of the President’s “war powers.”²¹ Citing the exigent circumstances of the Civil War, however, President Lincoln claimed these powers as his own.

This questionable constitutionality of Lincoln’s exercise of unprecedented presidential powers during the Civil War gave way to what Wert deemed “the triumvirate of wartime jurisprudence cases”: *Ex parte Merryman* (1861), *Ex parte Milligan* (1866), and *Ex parte McCordle* (1869).²² All three of these cases involved a challenge to the Union’s military detention of pro-Confederate civilians, and each decision marked a significant development in the judicial approach to the constitutionality of suspending habeas corpus during wartime.

¹⁸ *Ex parte Milligan*, 71 U.S. 2. (1866).

¹⁹ *Ibid.*

²⁰ *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

²¹ Rehnquist, 36-37.

²² Wert, 76.

It was in *Merryman* where Justice Taney first stated his position that only Congress had the power to suspend habeas corpus, and therefore Lincoln committed a constitutional transgression in suspending the writ unilaterally. David Cole observes that the Taney opinion in this case, along with the President's subsequent snubbing of this decision, called into question the Court's "credibility and legitimacy."²³ However, in spite (and in some sense, in consequence) of "Lincoln's blatant defiance of Chief Justice Taney's order in *Merryman*,"²⁴ the principles laid out in that decision were not only "strongly upheld" by the Court in *Milligan*,²⁵ but developed substantially to project a clear vision of the role of the Constitution in times of war and national emergency. In the clearest of terms, Justice David Davis' majority opinion in *Milligan* maintains:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false, for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority.²⁶

This broad assertion by the Court that no exceptions to Constitutional provisions are permissible in times of national crisis (except, naturally, those provided for in the Constitution itself—i.e., the Suspension Clause) is perhaps less groundbreaking than it may, in letter, appear. As Stone points out, "Lincoln clearly accepted that the Constitution governs in time of war. [...]" He was equally clear, however, that the application of the Constitution may be different in time

²³ Cole, David. "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis." *Michigan Law Review*, Vol. 101, No. 8, Symposium: Judging Judicial Review: Marbury in the Modern Era (Aug., 2003), p. 2570.

²⁴ Stone, 123.

²⁵ Qtd. in Wert, 84.

²⁶ *Ex parte Milligan*, 71 U.S. 2. (1866).

of war than in time of peace.”²⁷ Given that Article I, Section 9 permits the suspension of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it,” this passage from *Milligan* could be interpreted to mean that the Constitution *already* provides for an exception, and therefore “it” (i.e. the Constitution, writ large) applies under all conditions. This arouses Agamben’s question of how a system can exist in which “the law employs the exception—that is the suspension of law itself.”²⁸ Setting this question aside for the moment, it is clear that the Court in *Milligan* had intended to impose strict limitations on the government’s ability to abridge civil liberties in times of crisis. This ruling seems to be a clear and accurate interpretation of the effect of constitutional guarantees in times of national crisis, and as such, it appears to be a resounding victory for civil liberties. However, the complex realities of Congress-Court relations tell a rather different story.

A mere two months after the Court decided *Milligan*, Congress passed the Habeas Corpus Act of 1867.²⁹ That piece of legislation effectively endowed the Supreme Court with full appellate jurisdiction over habeas petitions. However, when former Confederate soldier and newspaper publisher William McCardle petitioned for habeas after being arrested for publishing articles criticizing the military’s reconstruction efforts, a majority Republican congress quickly passed a “repealer” of the Act in order to block the Court from supporting Democratic efforts to challenge the constitutionality of reconstruction. After postponing their consideration of the *McCardle* petition to the following term, the Court finally settled on the side of deference to Congressional authority and dismissed the petition on jurisdictional grounds.³⁰ In modern times, this precedent has been cited by the conservative side of the bench as a reason to deny habeas

²⁷ Stone, 113.

²⁸ Agamben, 1.

²⁹ Wert, 96.

³⁰ Wert, 98-105.

petitions by Guantanamo detainees, as Justice Scalia argued in his dissenting opinion to *Hamdan v. Rumsfeld* (2006).

In reference to the application of Civil War habeas decisions to prisoners at Guantanamo, Richard Posner chides the judiciary's "thralldom to precedent" in attempting to make constitutional sense of today's national security concerns. He writes, "The idea that a case almost a century and half old should guide us in dealing with al-Qaeda is ridiculous, as I think most of the Supreme Court justices would acknowledge, at least sotto voce."³¹ The reality of US constitutional law, however, is that no matter how "ridiculous" it may be to cite 19th century cases to address 21st century problems, these opinions are all that our justices have to draw from. Precedent carries weight, especially in cases where the Constitution is unclear, and in the domain of emergencies, the Constitution gives them virtually no guidance whatsoever. In the absence of an emergency provision, the Supreme Court has fumbled to develop an interpretive framework of jurisprudential doctrines to define the scope of constitutional rights in crisis. There is perhaps no clearer example of this than the evolution of the "clear and present danger" test, a doctrine created by the Court to justify prosecution on the basis of speech and press in the interest of national security.

The First World War: A "Clear and Present Danger"

The Great War was as colossal in scale as it was in casualties. Prior to the United States' late entrance into the European theater, there was widespread support for President Wilson's position of neutrality, since most Americans felt removed from the conflict and did not believe that it implicated national interests. However, in the wake of Wilson's reelection in 1916, naval skirmishes between American and German submarines grew increasingly more difficult to

³¹ Posner, Richard A. *Not a Suicide Pact: The Constitution in a Time of National Emergency*. New York: Oxford UP, 2006. Print, 28.

ignore, and by the spring of 1917, Wilson had resolved to seek a Congressional declaration of war. Addressing his belief that public dissent would undermine America's war efforts, Wilson subsequently proposed the Espionage Act of 1917, which was "the first federal legislation against disloyal expression since the Sedition Act of 1798."³² In a speech to Congress, the President proclaimed that "if there should be disloyalty, it will be dealt with with a firm hand of stern repression."³³

Once the war effort was underway, cases began to rise to the Supreme Court to challenge the repressive effect of the Espionage Act on the freedom of speech. Through a series of postwar decisions beginning in 1919, the Court struggled with the question of how to balance the Constitution's explicit proscription of any "law abridging the freedom of speech, or of the press" against the perceived necessities of war. Stone recalls that in this period, the Court "established dismal precedents that took the nation half a century to overcome."³⁴ The most prominent among them was the "clear and present danger" test. The permutations of this test can be examined in the opinions of the following cases: *Schenck v. United States* (1919), *Abrams v. United States* (1919), *Gitlow v. New York* (1925), *Whitney v. California* (1927), and *Brandenburg v. Ohio* (1969).³⁵

It was Justice Holmes' opinion in *Schenck* that first proposed the "clear and present danger" test in response to charges against the appellant (Charles Schenck, Secretary of the Socialist Party of America) for violating the Espionage Act of 1917 by "causing and attempting to cause subordination" in the conscription process during the First World War. He had been

³² Stone, 137.

³³ Wilson, Woodrow. 65th Cong, Spec Sess, in 55 Cong Rec S 214 (Apr 4, 1917), qtd. in *ibid*.

³⁴ Stone, 138.

³⁵ I will treat *Schenck – Whitney* as WWI cases, although *Gitlow* and *Whitney* were technically decided in the interwar period. The outlier, *Brandenburg*, is notable because it (arguably) resolved the question of First Amendment freedoms that were consistently abridged during World War I. Even more notably, it did so in the midst of another major crisis, the Vietnam War, when the Court's commitment to the freedom of speech was once again being tested.

handing out pamphlets that encouraged drafted individuals to “assert [their] opposition” to the draft. The Court conceded that in “ordinary times” the act would have been protected under the freedom of the press, but “the character of every act depends on the circumstances in which it is done.”³⁶ The circumstance of this case, of course, was war, which to Holmes made all the difference. Holmes expressed his opinion about the application of constitutional rights in wartime as follows: “When 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.”³⁷ Drawing a (weak) analogy to the act of “falsely shouting fire [...] and causing a panic,” Holmes wrote that the question is “whether the words are used [...] to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”³⁸ However, what exactly constituted a “clear and present danger”—as well as how “substantive” such “evils” needed to be—remained to be seen.

In *Abrams*, Justice Holmes countered his previous opinion, joining with Justice Brandeis in a dissent which claimed that the majority had misapplied the “clear and imminent danger” test to condemn a publication that did not, in their view, have “the quality of an attempt” to impede the US in its war efforts. Brandeis and Holmes were compelled to voice this opinion, it seems, because they recognized that the freedom of speech and press were critical for the preservation of a functioning democracy, and thus, the existence of this publication would threaten the life of our nation far less than its prohibition. They wrote that “the ultimate good desired is better reached by free trade in ideas,” which, in their view, is “the theory of our Constitution.” Their

³⁶ Barker, Lucius Jefferson. *Civil Liberties and the Constitution: Cases and Commentaries*. Boston: Longman, 2011. Print. 38.

³⁷ *Ibid.*

³⁸ *Ibid.*

dissent leaves us with a weighty warning: “I think that we should be eternally vigilant against attempts to check the expression of opinions that we loath [...] unless they so imminently threaten to immediate interference with the lawful and pressing purposes of that law that an immediate check is required to save the country.”³⁹

In *Gitlow*, the pair dissented again, to a similar effect, claiming that the test was inappropriately applied, and that the majority missed the mark on determining the nature of a punishable provocation. “Every idea,” Holmes writes, “is an incitement.” It could only be prosecuted, however, if there were “any danger that the publication could produce any result.”⁴⁰ In *Whitney*, Justice Brandeis produced an enigma of opinions, which reads like a dissent but is labeled as a concurrence. In this opinion, Brandeis draws a clear line between “advocacy” of a violation and “incitement.”⁴¹ He writes that a “clear and present danger” could only be shown in the event of “imminent serious violence,” which allows no “time to expose through discussion the falsehood and fallacies” of the speech. He claims, furthermore, that “only an emergency can justify repression,” and that no such emergency was present.⁴²

It was not until 1969 in *Brandenburg* that the Holmes-Brandeis position appeared in the majority opinion of a case of this kind. *Brandenburg*, which overruled *Whitney*, held that the law must distinguish between “mere advocacy” and “incitement to imminent lawless action.”⁴³ The Court held that only the latter, defined as “preparing a group for violent action and steeling it to such action,” could justify an abridgment of the freedom of speech.⁴⁴ The “clear and present danger” test was thereby abandoned in favor of a far stricter set of limitations on the

³⁹*Ibid.*, 42.

⁴⁰*Ibid.*, 45.

⁴¹*Ibid.*, 48.

⁴²*Ibid.*, 48-49.

⁴³*Ibid.*, 59.

⁴⁴*Ibid.*, 58.

government's ability to abridge the freedom of speech in times of war or national crisis. As a later section on the Vietnam War will emphasize, the *Brandenberg* decision may very well be viewed as the Court's final word on the freedom of speech in times of crisis. For confirmation of this, however, we can defer only to time itself.

The historical relationship between precedent and the passage of time serves as an indication that any court's "final word" is never truly final. When the law is left to the discretion of judges, interpretations—even those guided by precedent—are subject to change. There is a certain danger in the fact that an escalation of threats or exigent circumstances can propel judges to edge further and further in favor of the government's capacity to derogate from constitutional rights, and there is nothing in the constitution that limits their discretion. The true peril of precedent, therefore, is not its mutability but its permanence. In theory, as exigencies come and pass, justices could negotiate away our liberties altogether if no constitutional distinction is made between normative and exceptional jurisprudence. Judges—as rational and objective as their title may require them to be—are not immune to being swept up in the panic of a crisis. The perceived necessity for deference to military intelligence and executive authority during wartime may compel the Court to apply a very loose line of constitutional reasoning to justify blatantly unconstitutional government activities, thereby crystallizing that derogation in precedent and tainting the Constitution for crises to come. For an example of this type of pernicious precedent, we need to look no further than *Korematsu*.

World War II: *Korematsu* and Jackson's "Loaded Weapon"

On December 7th, 1941, fear reverberated throughout the continental United States as Japan's surprise attack on the US naval base at Pearl Harbor led President Franklin D. Roosevelt to declare that date one "which will live in infamy." The net effect of that attack—to the dismay

of both the Japanese government and the ethnically Japanese residents of the American west coast—was to turn a “sleeping giant” into a stumbling one. In February of 1942, President Roosevelt signed Executive Order 9066, which authorized the compulsory evacuation of Japanese Americans from their west coast homes to inland “internment camps.” Fred Korematsu was an American citizen of Japanese ancestry who was arrested for remaining in his home in San Leandro, California, which was declared a “Military Area” subject to Civilian Exclusion Order No. 34. The Supreme Court, in a 6-3 decision, upheld Korematsu’s conviction. This decision is perhaps the most infamous example in American history of judicial deference to military and executive authority, and it is widely considered one of the greatest failures of the Court to defend constitutional rights against the perceived necessities of war.

The majority opinion of the Court in *Korematsu*, delivered by Justice Black, justifies the constitutionality of a law that discriminately applies to a racial group on the grounds of “pressing public necessity.”⁴⁵ Black’s opinion declares that the Civilian Exclusion Order was constitutional because it was a “military imperative” that was not “based on antagonism to those of Japanese origin.”⁴⁶ The following passage captures Black’s conception of the impact that war has on the Constitution, “citizenship,” and the “power to protect”:

But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direct emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger [...].⁴⁷

⁴⁵ *Korematsu v. United States*, 323 U.S. 214 (1944) (Black, majority).

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

This excerpt illustrates what a powerful influence the wartime context had on the judicial reasoning of this case. The interpretive principle being applied in this decision was, in Justice Black's own words, the principle of "rigid [or strict] scrutiny." This principle is used in cases where a law, such as Civilian Exclusion Order No. 34, discriminately targets a specified group that the Court considers to be a "suspect classification," such as race. A modern understanding of strict scrutiny maintains that the law in question must be declared unconstitutional unless it satisfies all of the following criteria: The legislation must be (1) justified by a "compelling state interest," (2) "narrowly tailored" to meet the needs of that interest, and (3) it must be the "least restrictive" means of promoting it. In wartime cases such as *Korematsu*, however, it seemed to suffice that if the state interest (i.e. national security, military necessity) were compelling enough, the other two criteria could be circumvented or simply ignored.

It is significant to note that *Korematsu* was the first case in which the standard of strict scrutiny was applied, and it was one of only a small collection of cases in which the Court held that the government sufficiently satisfied that standard. On behalf of the majority, Justice Black writes the following:

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that the courts must subject them to the most rigid scrutiny.⁴⁸

The Court decided that the government satisfied this "rigid" standard of scrutiny with a military order mandating the exclusion of all persons of Japanese ancestry from certain regions of the west coast, without any investigation of individual loyalties. This position was justified by the military judgment that "there were disloyal members of that population, whose number and

⁴⁸ *Ibid.*

strength could not be precisely and quickly entertained.”⁴⁹ Justice Murphy’s dissent questioned the “sweeping” nature of these measures, implying that they did not meet the ‘narrowly tailored’ and ‘least restrictive’ requirements, and he argued that the order could not even satisfy the lowest standard of scrutiny, “reasonable [or rational] relation.” However, what the majority opinion essentially decided was that when the “public necessity” is “pressing” enough—i.e., when the “state interest” is “compelling” enough—the other two requirements of strict scrutiny do not carry nearly as much weight.

In a separate dissent, Justice Jackson presents an interpretation of the majority decision which poses a significant challenge to the case for the efficacy of judicial review in exigent circumstances. His argument draws a line between what is militarily expedient and what may be deemed constitutional. He writes, “It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality.”⁵⁰ His criticism of the majority is grounded in the notion that because of the precedential character of judicial review, any opinion that uses a constitutional rationale to defend a necessary but unconstitutional military order runs the risk of “normalizing the exception.”⁵¹ His argument is captured in the following passage:

A military order, however unconstitutional, is not apt to last longer than the military emergency. [...] But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.⁵²

⁴⁹ *Ibid.*

⁵⁰ *Korematsu v. United States*, 323 U.S. 214 (1944) (Jackson, dissent).

⁵¹ Tushnet, Mark. *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 Wis. L. Rev. 273.

⁵² *Korematsu v. United States*, 323 U.S. 214 (1944) (Jackson, dissent).

Of course, hindsight provides some reassurance that Jackson's foreboding vision of a "loaded weapon" was not the true effect of this decision. As Stone rightly observes, "Over the years, *Korematsu* has become a constitutional pariah. The Supreme Court has never cited it with approval of its result."⁵³ However, what if the *Korematsu* decision *had* "for all time" opened up a constitutional gateway that effectively "validated the principle of racial discrimination" whenever the military should consider it expedient? Can we always count on a backlash in judicial culture against decisions that radically expand government prerogative to violate constitutional liberties in times of crisis?

Certainly not. But the alternative position that civil courts should simply refuse to "dirty their hands with the military's business," as proposed by Jackson in *Korematsu* and expanded upon by commentators like Tushnet,⁵⁴ might prove infinitely more pernicious to civil liberties than the risk of another precedential "loaded weapon." Upon their argument, the potential risk that the Court might fail, as it did in *Korematsu*, to adequately defend constitutional liberties in an emergency—thereby opening the floodgates for further infringements in ordinary times—does not begin to compete with the danger of having the courts remain silent.

But their argument is built on a false dilemma. What it overlooks is a third option—the one proposed in this project—to expand the language of the Constitution in a way that limits executive and legislative authority *and* provides a concrete framework justices to decide which derogations are permissible under what circumstances. The conflict surrounding the question of deference can be resolved by a Constitution that appropriately defines—and thereby limits—extraconstitutional action in states of emergency. The Constitution applies to all branches equally, although it is the judiciary's job to apply it. If it is clear on questions of crisis, then

⁵³ Stone, 307.

⁵⁴ Cole, 2586.

judicial interpretations will carry a lighter load on the path of deliberation, which would lower the risk of passing along another “loaded weapon.”

Dennis, Yates, and the Imminence of the “Red Menace”

The Cold War was by far the most trying time in American history for the freedom of speech. Perhaps the reason was that the constant threat of a nuclear Soviet Union created conditions that resembled a normalized state of emergency. A prior subsection on the First World War traced the evolution of the “clear and present danger” test on speech cases from *Schenck* in 1919 to *Whitney* in 1927, and indicated that this test was finally abandoned in *Brandenberg* in 1969. The test, however, was still the prevailing doctrine of the Supreme Court governing its interpretation of the boundaries of the freedom of speech during much of the Cold War. Stone indicates that there were six speech cases that arose from World War I, whereas over the course of the Cold War, the Court “handed down *sixty* such decisions.”⁵⁵ Hence, while the World War I cases laid the foundation for the discussion of the scope of constitutional speech protections in wartime, the Cold War cases designed the architecture.

Amid all the traffic of First Amendment cases, Stone identifies the one case that produced the “key decision” which “shaped the debate”—*Dennis v. United States* (1951).⁵⁶ *Dennis* involved the indictment of twelve leaders of Communist Party USA for “conspiring to advocate” for the overthrow of the US government.⁵⁷ The petitioners had been indicted under the Alien Registration Act of 1940, also known as the ‘Smith Act,’ which made it a criminal offense to “knowingly or willfully [...] advocate, abet, advise, or teach the duty, necessity, desirability or propriety of overthrowing or destroying any government in the United States by

⁵⁵ Stone, 395 (original italics).

⁵⁶ *Ibid.*, 396.

⁵⁷ *Ibid.*

force or violence [...].”⁵⁸ This reincarnation of the Sedition Act of 1798 and the Espionage Act of 1917 was aimed at silencing communist dissidents and revolutionaries at a time when memories of the Russian Revolution were so vivid and tensions with the Soviet Union so immediate that the threat of a communist overthrow of the US government was very real in the eyes of the American people. The question before the court in *Dennis* was whether the semantically (and accurately) distant construction of “conspiring to advocate” to overthrow the government could be imminent enough to constitute a “clear and present danger.”

Although the Holmes-Brandeis formulation of the “clear and present danger” test had not been applied in a majority opinion since *Schenck* (1919), it had become a “controlling precedent” in First Amendment interpretation by the time *Dennis* arrived at the Court.⁵⁹ Stone suggests that “by 1951 the underground tradition of Justices Holmes and Brandeis had become more powerful precedent than the opinions from which they had dissented.”⁶⁰ Proof of this can be found in the language of the opinions themselves, each of which arrives at its decision through a discussion of whether or not the “clear and present danger” test applies.

Writing the majority opinion in *Dennis*, Chief Justice Vinson cited the following interpretation of the test made by Court of Appeals Judge Learned Hand: “In each case, [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”⁶¹ Hand’s interpretation, however, is as incongruous with the Holmes-Brandeis definition of the test as it is insidious to the freedom of speech. In effect, it allowed the Vinson Court to weigh the imminence of a “danger” against its “gravity,” so that speech associated with a “20 percent chance of a more serious evil” is as

⁵⁸ *Dennis v. United States*, 341 U.S. 494 (1951), selections reproduced in Barker, Lucius Jefferson. *Civil Liberties and the Constitution: Cases and Commentaries*. 9th ed. Boston: Longman, 2011. Print, 49-57.

⁵⁹ Stone, 396.

⁶⁰ Stone, 403.

⁶¹ *Dennis v. United States* (Vinson, majority), in Barker, 52.

vulnerable to government restriction as a “90 percent chance of a relatively modest evil.”⁶² As Stone succinctly puts it, this is “a very bad idea.”⁶³ The express purpose of the clear and present danger test was to limit government restriction of the freedom of speech as a function of the amount of time, space and probability separating the speech from the impending danger. “Insisting on a close temporal connection and a high likelihood of serious harm assures us that it is the *danger* and not abhorrence of ideas that is driving the government’s action.”⁶⁴

The majority in *Dennis* failed to adhere to the prevailing doctrine laid out by Holmes and Brandeis in the prior three decades, and—at least in the immediate aftermath of the decision—it vastly expanded the legal space in which the government could prosecute outspoken advocates of communism. In the longer term, however, the fallout of this decision eventually led to a “reversal of the course of constitutional history,”⁶⁵ which confirmed the promising prophecy posed by Justice Black in the last lines of his dissenting opinion in *Dennis*:

Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that, in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.⁶⁶

The decision that made a seer of Black was *Yates v. United States* (1957). In overturning the convictions of the appellants in *Yates*, which “seemed a routine rerun of *Dennis*,” the Supreme Court “sounded the death knell for the Smith Act as a weapon in the campaign against American Communists.”⁶⁷ It should be noted that *Yates* arrived in the Court under very different circumstances than *Dennis* in 1951. By 1957, Stalin had suffered a fatal heart attack, the Korean War had wound to an end, Joseph McCarthy had been silenced by the Senate, and fears of the

⁶² Stone, 409.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Stone, 413.

⁶⁶ *Dennis v. United States*, 341 U.S. 494 (1951) (Justice Black, dissenting).

⁶⁷ Stone, 415.

“Red menace” were, for the most part, abated.⁶⁸ Without attempting to identify the precise combination of causes that led to the *Yates* decision, we can be sure that its effect on the freedom of speech was pivotal. The majority opinion, written by Justice Harlan, reads: “The Smith Act does not prohibit advocacy and teaching of forcible overthrow of the Government as an abstract principle, divorced from any effort to instigate action to that end.”⁶⁹ This ruling meant that the Court was no longer able to uphold convictions on the basis of mere advocacy for viewpoints which are antagonistic to the US government. The outcome of this decision deepened the Supreme Court’s obligation to protect the freedom of speech during wartime, and it marked the beginning of the (arguable) end to this lengthy and litigious debate.

***Brandenberg* and the Pentagon Papers: “The Perfect Ending to a Long Story”?**⁷⁰

Although the facts of *Brandenberg* bore no direct relation to the subject of wartime dissent—it was a criminal case against a Ku Klux Klan leader who advocated racial violence at a rally—its outcome had a substantial impact on the First Amendment in times of crisis through its restrictive interpretation of the judicial doctrines developed since the First World War. As a prior section mentioned in passing, *Brandenberg* marked the culmination of the process of judicial creation that aimed to define the relationship between national security interests and the suppression of speech, through increasingly restrictive definitions of the “clear and present danger” test.

In *Brandenberg*, the Court decided to abandon the test in favor of a standard which substantially restricted the government’s ability to prosecute individuals for insidious or otherwise unwanted speech. The *Brandenberg* decision required the Court to distinguish “mere

⁶⁸ *Ibid.*, 413.

⁶⁹ *Yates v. United States* 354 U.S. 298 (1957) (Harlan, majority).

⁷⁰ Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America*, 232, qtd. in Stone 524.

advocacy” from “incitement to imminent lawless action,” allowing it to uphold legislation proscribing the latter but not the former. Stone describes *Brandenburg* as an attempt by the Court to “tie its *own* hands and to make it difficult, if not impossible, for the government to suppress seditious criticism in the next era of fear and hysteria.”⁷¹

Further confirmation of the Court’s desire to defend the First Amendment against government interference—even at a potential risk to national security—came two years later, when the Court decided a case concerning the publication of classified government documents, referred to as the Pentagon Papers, in the *New York Times* and the *Washington Post*. The newspapers received this “top secret” study from Daniel Ellsberg, a strategic analyst at the Rand Corporation who had grown disaffected with the government’s lack of transparency in the Vietnam War and wished to expose its deception to the American public. Upon learning of the leak, the Nixon Administration sought to prevent the newspapers from publishing the study by appealing to the Court. The Court maintained that the government “carries a heavy burden of showing justification for the imposition of such a restraint” and held that it “had not met that burden.”⁷²

The Pentagon Papers decision was no small victory for the protection of the freedom of press during wartime. In choosing not to defer to the executive, the Court claimed competence to issue judgments that weigh national security interests against the protection of civil liberties. Stone characterizes the decision as a “bold, confident, and courageous assertion of judicial independence and authority in the face of emphatic and disingenuous executive claims of national security.”⁷³ Announcing his opinion of the Court’s proper role in protecting civil

⁷¹ Stone, 524.

⁷² *New York Times Co. v. United States [The Pentagon Papers Case]*, 403 U.S. 713 (1971), reproduced in Barker 170-8.

⁷³ Stone, 516.

liberties during wartime, Stone writes that the outcome of the Pentagon Papers case “showed the nation what an *independent* federal judiciary can and should do.”⁷⁴ In his concurring opinion to the *per curiam* decision, Justice Black asserted that “[t]he word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.”⁷⁵ This elevation of fundamental constitutional rights above vague governmental claims of national security was a pivotal move by the Court, and it signals a decisive shift in the judicial approach to protecting civil liberties in times of crisis.

Stone writes that “the Pentagon Papers controversy changed the nation’s understanding of the First Amendment and the Supreme Court’s conception of its responsibilities under the Constitution.”⁷⁶ This characterization could be applied to *Brandenburg* as well, since it dramatically reconfigured the precedential landscape for future speech cases in eliminating the “clear and present danger” test. However, whether these decisions mark—as Harry Kalven christened it—“the perfect ending to a long story” of First Amendment interpretation remains to be seen.⁷⁷ The reality, of course, is that there is no “ending” to this story, since the Constitution will continue to protect the freedom of speech, and there will continue to be temptations to suppress dissidence in the interest of national security.

In a joint dissenting opinion in *Abrams v. United States*, Justice Holmes pronounces the Court’s obligation to remain “eternally vigilant against attempts to check the expression of opinions that we loathe.”⁷⁸ The vigilance Holmes calls for, however, cannot always be counted on—particularly in periods of panic or public emergency. It is only necessary because there is a question about where the Constitution stands on the protection of the freedom of speech under

⁷⁴ *Ibid* (original italics).

⁷⁵ Barker, 172.

⁷⁶ Stone, 516.

⁷⁷ Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America*, 232, qtd. in Stone 524.

⁷⁸ *Abrams v. United States* 250 U.S. 616 (1919) (Justice Holmes, dissent).

exigent circumstances. Should speech be protected no matter the circumstances, or are there situations in which certain limited derogations should be allowed? It is both unfair and unsafe to rely completely on judges and their application of precedent to locate an answer to this question. In the interest of preserving our liberty and our security through the uncharted threats of the future, the Constitution ought to speak for itself.

September 11th, *Habeas*, and the Guantanamo Cases

The terrorist attacks of September 11th, 2001—resulting in the highest number of civilian casualties ever suffered on US soil in a single day—shocked and horrified the American people. The shared trauma incurred on that morning sent the nation into a mode of crisis and fear, which gave President Bush and Congress license to act decisively, radically, and immediately in the interest of national defense. In an address delivered at Buffalo Law School on May 9th, 1951, Justice Robert Jackson warned: “It is easy, by giving way to the passion, intolerance and suspicions of wartime, to reduce our liberties to a shadow, often in answer to exaggerated claims of security.”⁷⁹ Luckily, the Supreme Court after September 11th has not suffered severely from the crazed irrationality and judicial deference that tends to follow an attack of this scale. In fact, the Court was not always unwilling to step in and challenge the government’s response to the terrorist threat, especially on matters of indefinite detention, as occurred (and continues to occur) at Guantanamo Bay. The cases that have emerged out of this constitutional quagmire share a common concern with the Suspension Clause and the writ of habeas corpus, calling upon the prominent precedents, such as *Milligan*, that have interpreted this provision in the past. The problem with these precedents, however, is that the Civil War habeas cases are so dissimilar and

⁷⁹ Jackson, Robert H. “Wartime Security and Liberty Under Law.” Address. Buffalo Law School. 9 May 1951. *The Jackson Center Research Archive*. The Robert H. Jackson Center. Web. 1 Dec. 2012.

so far removed from the current context of international terrorism that they often obscure, rather than clarify, the questions before the Court.

In *Hamdi v. Rumsfeld*, the Court decided that even those to whom the government has assigned the quasi-legal status of “enemy combatants” are entitled to the due process of law under the Constitution, including the ability to challenge their detention in civilian courts through the writ of habeas corpus.⁸⁰ The majority opinion of *Rasul v. Bush*, written by Justice Anthony Kennedy, extended to noncitizens the right of Guantanamo detainees to challenge their detention by petitioning for habeas in US civilian courts, “severely undercutting the Bush administration’s understanding of the jurisdictional reach of the federal courts.”⁸¹ *Hamdan v. Rumsfeld* arrived in the wake of a 2005 piece of legislation called the Detainee Treatment Act, which sought to subvert the Court’s prior rulings claiming habeas jurisdiction for Guantanamo detainees. In *Hamdan*, the Court struck back by invalidating both the Detainee Treatment Act and the military commissions, and concluding that “no prisoner could be held without the baseline protections contained in Common Article 3 of the Geneva Conventions.”⁸² Congress responded by passing yet another piece of “court-stripping” legislation, the Military Commissions Act of 2006 (MCA), which denied habeas corpus to all noncitizens detained as “enemy combatants.”⁸³ Less than two years after the enactment of the MCA, the Court struck it down in *Boumediene v. Bush* (2008),⁸⁴ which affirmed the right of Guantanamo detainees to habeas corpus and invalidated the Military Commissions Act on the grounds that it “unconstitutionally suspended habeas rights.”⁸⁵

⁸⁰ *Hamdi v. Rumsfeld* (03-6696) 542 U.S. 507 (2004).

⁸¹ Wert, xii.

⁸² Hafetz, Jonathan. *Habeas Corpus after 9/11: Confronting America's New Global Detention System*. New York: New York UP, 2011. Print, 5.

⁸³ *Ibid.*

⁸⁴ *Boumediene et al. v. Bush, President of the United States, et al.* 553 U.S. 723 (2008).

⁸⁵ Wert, xii.

What this narrative indicates is that the battles between the judiciary and the other two branches over the suspension of the Great Writ are potentially endless. As often as the Court may rule them unconstitutional, the executive and the legislature seem enduringly willing to make attempts to circumvent or suspend it, ostensibly in the interest of promoting national security in the ongoing “war on terror.” Although Hafetz is mindful of the fact that habeas alone is an “insufficient” defense against certain state-sanctioned human rights abuses such as secret detention and extraordinary rendition,⁸⁶ he maintains that it is “the single most important check against arbitrary and unlawful detention, torture, and other abuses.”⁸⁷ His book concludes with an important observation about the impact of judicial review on the protection of human rights and constitutional guarantees after 9/11:

The vitality of habeas has become clearer since 9/11, both despite and because of the sustained efforts by the executive and Congress to eliminate it. [...] Supreme Court decisions have helped ensure the possibility of habeas review over any U.S. detention, regardless of a prisoner’s citizenship or location. Those decisions serve as a check against further abuses and deterrent against the creation of more law-free zones like Guantanamo.⁸⁸

An analysis of the impact of the Guantanamo decisions, however groundbreaking they may be, is somewhat less meaningful to this inquiry than an examination of their reliance on judicial decisions reached in exigencies of the past. In the final paragraphs of the earlier section on Lincoln and the Civil War, I alluded to the idea that these 19th Century habeas rulings played a substantive role in shaping the discussion of the Great Writ in the Guantanamo cases. Unsurprisingly, the most frequently cited Civil War habeas decision in the majority opinions of each of the four Guantanamo cases was *Ex parte Milligan* (1866). In response to Lincoln’s unilateral declaration of martial law to allow for indefinite detention of dissidents and trial by

⁸⁶ Extraordinary rendition refers to the extrajudicial transfer of a prisoner to foreign country for interrogation or further detention. (See Hafetz, 192).

⁸⁷ Hafetz, 6.

⁸⁸ Hafetz, 257.

military tribunals, *Milligan* maintained that even in times of war, the government cannot try civilians in military tribunals so long as the civil courts remain “open and functioning.”⁸⁹ This ruling, while certainly not the primary controlling precedent, was impactful on the Court’s reasoning in the Guantanamo cases. However, the net direction of its impact is unclear.

In *Rasul*, the Court cited *Milligan* alongside two cases from the Second World War—*Ex parte Quirin* (1942) and *In re Yamashita* (1946)—as evidence of “the federal courts’ power to review applications for habeas relief [...] in wartime as well as in times of peace.”⁹⁰ In *Hamdi*, O’Connor’s majority opinion employed *Milligan* as a means to a rather different end—namely, to validate the government’s claim that the executive was authorized to hold individuals as “enemy combatants,” as distinct from prisoners of war. O’Connor argued that because the outcome in *Milligan* “turned in large part on the fact that Milligan was not a prisoner of war,” the precedent “does not undermine our holding about the Government’s authority to seize enemy combatants, as we define that term today.”⁹¹ In *Boumediene*, the *Milligan* precedent resurfaced once again as confirmation of the fact that the Constitution’s Suspension Clause (Article I, Section 9) can be applied only “if, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law.”⁹² Because this qualification, established by *Milligan*, was not representative of the conditions following 9/11 and in the ongoing war on terror, the Court was compelled to hold that Congress was not constitutionally permitted to suspend habeas corpus, as it purported to do by enacting the Military Commissions Act of 2006.

⁸⁹ Stone, 126.

⁹⁰ *Rasul v. Bush*, (03-334) 542 U.S. 466 (2004), (Justice Stevens, majority).

⁹¹ *Hamdi v. Rumsfeld*, (03-6696) 542 U.S. 507 (2004), (Justice O’Connor, majority).

⁹² *Ex parte Milligan*, 71 U.S. 2 (1866), cited in *Boumediene v. Bush*, 553 U.S. 723 (2008), (Justice Kennedy, majority).

The purpose in framing this discussion of the Guantanamo cases around citations of relevant historical decisions such as *Milligan* is to demonstrate the fact that the role precedent plays in informing judicial decisions is dubious. The greatest guiding impact that the Civil War habeas decisions seemed to have on the outcome of the Guantanamo cases was to serve as justification for the policy positions of the justices. As Richard Posner points out, it is abject lunacy to apply 19th century precedents to 21st century problems. The fact of the matter is that the modern terrorist threat differs from the dangers of the Civil War in almost every conceivable way. This “thralldom to precedent” is at best, a farce, and at worst, an attempt to fill a constitutional void with decisions that “either were unsound when created or have become obsolete as a result of changed political, social, economic or technological circumstances.”⁹³ The most obvious way to address this problem, in this context, would be to fill that constitutional void with a clear definition of government power in states of emergency, which is precisely what this project proposes to do.

Conclusion

Justice Jackson’s dissenting opinion in *Korematsu* describes the peril of precedent so shrewdly that it merits repetition:

A military order, however unconstitutional, is not apt to last longer than the military emergency. [...] But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.⁹⁴

In the heat of a crisis, judges are compelled to reason according to necessity. The majority of the Court in *Korematsu* believed that their decision of deference to military and executive authority

⁹³ Posner, 28.

⁹⁴ *Korematsu v. United States*, 323 U.S. 214 (1944) (Jackson, dissent).

was necessary, but I firmly doubt they were convinced that it was constitutional. Of course, the self-imposed duty of the Supreme Court is not to review laws based on their utility, but based on their constitutionality.

The difficulty arises, however, when an act under review takes the vile form of being both flagrantly unconstitutional and seemingly crucial to interests of public policy. In such a situation, the justices have no other option but to pass along a decision which “rationalizes the Constitution” in a way that sanctions the act in question. The legal box they live in (built not from cardboard, but from the fabric of our Constitution) does not allow them to hold that an act under review is unconstitutional, but that it should be exempted from annulment on the basis of public necessity. In the absence of a constitutional provision that defines the space for limited derogations in states of emergency, the Court has been compelled to lay down “loaded weapons” in the form of foul reasoning and loose interpretations of constitutional language in the interest of public policy. *Korematsu* is a prominent example of this kind of perilous precedent, and although legal culture has gradually come to view it as a four letter word among Supreme Court decisions, its memory serves to remind us of the constitutional condition that ought to be treated with all deliberate speed.

Chapter 2

Lessons from Abroad:

India, South Africa, and the International Covenants

Chapter 1 aimed to demonstrate how the Court has (slowly and often somewhat less-than-surely) established an amorphous but nevertheless substantive body of case law defining the Constitution in periods of crisis. The goal of this chapter is to examine the concept of a constitutional state of exception through a comparative lens, with a view toward understanding the successes and failures of different types of emergency provisions that exist around the world. In the coming pages, we will analyze the language and application of the derogation protocols in the international human rights treaties and the emergency provisions contained the Indian and South African Constitutions. The purpose of this discussion is to understand the contexts of these conventions and constitutions and decide which provisions could be adapted to appropriately address the deficiencies of the American constitutional system. No existing institution of constitutional emergency is perfect, of course, and the effectiveness of certain provisional prototypes will vary across institutional and cultural borders. Nevertheless, this Chapter argues that the conversation surrounding constitutional law in the United States would benefit substantially by taking lessons from abroad.

Derogations in International Human Rights

In the woeful wake of World War II, when the United Nations unanimously affirmed its “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family” through the 1948 adoption of the Universal Declaration of Human Rights (UDHR), no credence was paid to the caveat that exigent circumstances may require certain rights to be suspended in the interest of public safety or political necessity. This qualification

was unnecessary, since the UDHR was adopted more as a pronouncement of universal values and aspirations than as binding principles of international law. Two years later, however, when the nascent Council of Europe came together to draft the European Convention on Human Rights (ECHR) as the first legally binding international human rights treaty, the framers were forced to consider its practical implications as a check on state authority. If the governments of the contracting parties are held accountable by supranational body to protect individual rights, then what will happen when a national emergency requires a state to act contrary to its obligations under the covenant? This dilemma led the framers of the ECHR to include Article 15, establishing the principle of derogation.

The derogation provision (Article 15 § 1) of the ECHR stipulates that a contracting party “may take measures derogating from its obligations” under the Convention “in time of war or other public emergency threatening the life of the nation,” provided that the measures do not exceed what is “strictly required by the exigencies of the situation.”⁹⁵ As a qualification to this provision, Article 15 § 2 lays out a list of *jus cogens*, peremptory rights under this Convention from which there can never be any derogation, even in a declared state of emergency. This section sanctifies the right to life (Article 2) as a peremptory right “except in respect of deaths resulting from lawful acts of war;” it also prevents derogation from the prohibitions of torture (Article 3), slavery (Article 4 § 1), and *ex post facto* punishment (Article 7).

This list of peremptory rights is significant. Surely one could conceive of an emergency in which a state would consider it expedient to use torture, for example, to gain information in the interest of national security. As we know, in the aftermath of the September 11th attacks the United States government became the world’s premier advocate of torture for the prevention of international terrorism. This choice by the framers of the ECHR to enshrine certain rights as

⁹⁵ “European Convention on Human Rights.” *European Court of Human Rights - Basic Texts*. Web. 10 Mar. 2013.

sacrosanct, even in states of emergency, created a significant paradigm in the politics of exception that was replicated in the derogation provisions of future international human rights treaties—most notably, the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights (ACHR).

The drafting of the ICCPR and the ACHR were both completed in the late 1970s, within four years of one another—the ICCPR in December 1966 and the ACHR in November 1969. Both treaties contain derogation provisions, which are in very much the same spirit as the ECHR’s Article 15. The ICCPR’s derogation protocol is contained in Article 4, and its language closely mirrors that of the ECHR. Article 4 § 1 begins, “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation [...]”⁹⁶ So far, the section may as well be a direct quote from the ECHR’s Article 15. The second half of Article 4 § 1, however, includes a stipulation not found in the ECHR, which is that measures taken in a state of emergency must not “involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”⁹⁷

This provision is conspicuous in its implication that there is no acceptable ground for discrimination along these classifications, even in a state of emergency. In considering this qualification, we are reminded of the hideous calculations made by the US Supreme Court in *Korematsu* in 1944, when the panic of the war and the threat of another attack by the Japanese compelled the Court to hold that the Constitution condones racial discrimination. If Roosevelt had declared a constitutional state of emergency under a provision similar to this one, which

⁹⁶ “International Covenant on Civil and Political Rights.” *United Nations Library of International Law*. Web. 10 Mar. 2013.

⁹⁷ *Ibid.*

prohibited suspension of the Equal Protection Clause, then the Court would have had no choice but to strike down Executive Order 9066 mandating the concentration of ethnic Japanese into internment camps. In the absence of such a provision, the justices were forced to weigh the magnitude of the threat posed by people of Japanese ancestry against the Fourteenth Amendment guarantees of liberty and equal protection of the laws. If the US Constitution had an emergency provision similar to Article 4 of the ICCPR that enumerated proscribed categories of discrimination, the outcome of *Koremastu* would very likely have turned out differently. History shows us, however, that when the Constitution is silent on states of emergency, all calculations of the evanescent boundary between constitutional guarantees and national security interests are left entirely to judicial imagination.

Like Article 15 § 2 of the ECHR, Article 4 § 2 of the ICCPR also contains a list of *jus cogens*, non-derogable rights. This section bans any derogation from the right to life (Article 6), the right to legal personhood (Article 16), the freedom of thought, conscience and religion (Article 18), and the prohibitions against torture (Article 7), slavery (Article 8 § 1), servitude (Article 8 § 2), debtors' prison (Article 11), and *ex post facto* punishment (Article 15). This list contains everything from Article 15 § 2 of the ECHR and more. The significant additions to the list of sacrosanct, peremptory rights are Articles 16 and 18—the right to legal personhood and the freedom of thought, conscience and religion. Imagine this in the context of a post-9/11 emergency regime in the United States. If the United States had responded to the modern terrorist threat by declaring a constitutional emergency through a provision similar to this one, the non-derogable right of legal personhood, for example, might have weighed into the Supreme Court's discussion of the legal status of the Guantanamo detainees. Furthermore, the peremptory freedom of thought, conscience and religion might have been invoked to defend Muslims against

racial profiling and targeted surveillance programs, such as the tactics that have been employed by the NYPD after September 11th, 2001.

In the ACHR, Article 27 is the counterpart to Articles 15 and 4 of its predecessors. This derogation provision, however, is framed in slightly different terms. Rather than the ECHR and ICCPR language of “a time of war or other public emergency threatening the life of the nation,” the ACHR permits limited derogations from obligations under the Covenant “in time of war, public danger, or other emergency that threatens the independence or security of a State Party.” The qualification that the emergency must threaten the “independence or security” of the contracting party in order to be a valid cause for derogation provides a more specific definition of the vague ECHR paradigm that an emergency must threaten “the life of the nation.”

This difference is significant in the context of Latin American history, which had been particularly fraught with political instability as a result of the protracted struggles for independence in the 19th Century.⁹⁸ As a general drafting principle for emergency provisions, however, the lesson to be gleaned from this example is that more specificity is always better. An effective emergency provision should aim both to legalize the exception as well as to limit it. In order to enter into a state of emergency under the ECHR and the ICCPR, a head of state merely needs to insist that the current conditions threaten “the life of the nation,” a term that could be loosely interpreted to encompass anything from an isolated terrorist threat to a full-scale foreign invasion. If a state party wishes to derogate from the rights contained in the ACHR, Article 27 requires the government to demonstrate that the conditions threaten the “independence or security” of the state. Of course, this hurdle is only incrementally higher than the others, if at all, and it does not provide for exigencies which may not fall under the categories of “independence”

⁹⁸ Carozza, Paolo G. "From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights." *Human Rights Quarterly* 25.2 (May 2003): 281-313. *JSTOR*. Web. 19 Mar. 2013.

and “security”—for instance, a financial crisis or a natural disaster. Such inadequacies notwithstanding, the language of Article 27 indicates a higher level of awareness for the practical importance of specificity and concrete limitations in emergency provisions.

This observation is equally apparent in the list of non-derogable rights enumerated in Article 27 § 2, which is significantly longer than the lists laid out in Articles 4 and 15. The ACHR consecrates the following guarantees as peremptory and categorically immune to suspension: the right to legal personhood (Article 3), the right to life (Article 4), the right to humane treatment (Article 5), freedom from slavery (Article 6), freedom from *ex post facto* punishment (Article 9), freedom of conscience and religion (Article 12), rights of the family (Article 17), the right to a name (Article 18), rights of the child (Article 19), the right to a nationality (Article 20), and the right to participate in government (Article 23). This list differs from the non-derogable rights listed in the ICCPR and the ECHR in that it includes not only the rights that are considered the most fundamental and inalienable—such as the right to life and the freedom from slavery—but also the rights which a government should not have any legitimate cause to suspend in a state of emergency—such as the right to a name and a nationality. The quality of the drafting process of the ACHR derogation provision that merits special recognition is the apparent care that was paid to the task of scrutinizing what might actually be necessary to respond to the exigencies that would prompt derogation.

This angle of foresight is important, and it illustrates one major success of the Inter-American derogation model that is not nearly as pronounced in its predecessors. All three models, however, share significant drawbacks that make them virtually valueless in the discussion of United States emergency powers in the age of international terrorism. The problem with these derogation provisions is that they are framed around an “existential rationale,” to

borrow a term from Bruce Ackerman.⁹⁹ The existential rationale defines the state of emergency in terms of “apocalyptic scenarios” such as the threat of an enemy invasion or a civil war, which would require the government to “take extraordinary measures in its life-and-death struggle for survival.”¹⁰⁰ This is the way a state of emergency is defined in the French Constitution, for instance, which offers the President practically unfettered authority to respond to an existential threat. Article 16 of the French Constitution provides:

Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take measures required by these circumstances [...].¹⁰¹

This model is, admittedly, much worse than the derogation provisions of the international human rights treaties, in that it does not reserve any rights as *jus cogens* or otherwise off-limits in a state of emergency. It gives the President absolute authority to “take measures required by the circumstances,” the sole stipulation being that he is required to “formally consult” with the Prime Minister, the Presidents of the Houses of Parliament, and the Constitutional Council. However, Ackerman comments (with a hint of sarcasm) that this “ingenious French provision” gives the President “unilateral power to ignore its advisory opinion, should the Court condemn his action.” Such extreme allowances are justified by the apocalyptic definition of a state of emergency put forth by Article 16 of the French Constitution and Articles 15, 4, and 27 of the international human rights treaties. The practical problem with this existential rationale is that it is liable to produce one of two (equally undesirable) outcomes: a state of emergency that is too extreme to

⁹⁹ Ackerman, Bruce. “The Emergency Constitution.” *The Yale Law Journal* 113.5 (Mar., 2004): 1029-1091. *JSTOR*. Web. 14 Oct. 2012.

¹⁰⁰ *Ibid.*, 1037.

¹⁰¹ “Constitution of the Fifth Republic (October 4, 1958).” *The French National Assembly*. Web. 29 Mar. 2013.

use, or one that is too easy to abuse. Neither application of this rationale is useful in the post-9/11 context of international terrorism.

Consider the British example: On December 18, 2001, the Blair administration sent a representative to the Council of Europe to declare a public emergency in the United Kingdom as a result of the recent attacks on United States soil. The UK subsequently became the first and only signatory nation of the ECHR to invoke the derogation provision under Article 15 as a result of the threat of international terrorism after 9/11. In that declaration, the UK requested to derogate specifically from Article 5.1 of the Convention, the right to liberty and security, in order to extend its powers to arrest, detain, and deport foreign nationals suspected of terrorist activities. The decision to classify the post-9/11 terrorist threat, under the language of Article 15.1, as a “public emergency threatening the life of the nation” is most likely a product of the national memory associated with the decades of brutal struggle against the IRA for control over Northern Ireland. This conflict was easily identifiable as an existential threat, in the sense that the objective of the IRA was to seize a territory that was under sovereign British control. Emotionally, the panic associated with the post-9/11 terrorist threat probably bore a close resemblance to recent recollections of the resistance movement executed by the IRA. The reality, however, is that the threat following from the September 11th terrorist attacks presents a dissimilar problem, especially in relation to the language of Article 15. Al-Qaeda and the Islamic terror networks have never expressed any interest in usurping British territory or overthrowing the British government; their actions are aimed at instilling fear in the civilian populations. It is unclear from the language of Article 15 whether this threat satisfies the derogation condition of “a public emergency that threatens the life of the nation.”

This question was raised in a case called *A and Others v. United Kingdom*, which was brought before the Strasbourg Court (the European Court of Human Rights) in 2009, leading the Court to interpret the derogation provision of the ECHR as it applies to the threat of international terrorism. The Court's decision in this case exposes the weakness of the existential rationale in the ECHR's derogation provision. The petitioners denied the existence of a "public emergency that threatens the life of the nation" in the United Kingdom on the grounds that the emergency was "neither actual nor imminent" and that it was "not of a temporary nature."¹⁰² They further argued on the grounds of state practice, citing the suspicious absence of derogation proclamations by any other signatories in this supposedly international threat.

The Court, however, was compelled to uphold the validity of the UK's derogation under Article 15, maintaining that "it falls to each Contracting State, with its responsibility for 'the life of [its] nation,' to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency."¹⁰³ The judgment lays out the doctrine upon which the derogation provisions of these international human rights treaties were built: the hallowed "principle of subsidiarity." This principle presupposes that the international body (here, the Strasbourg Court) should play a supervisory and secondary role to national institutions that are capable of addressing comparable problems. Here, subsidiarity suggests, in the words of this Court, that "national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it."¹⁰⁴

¹⁰² *Case of A. and Others v. United Kingdom* (Application no. 3455/05). European Court of Human Rights. 19 Feb. 2009. Par. 175.

¹⁰³ *Ibid.*, par. 173.

¹⁰⁴ *Ibid.*

The Court, therefore, felt that it was in no place to altogether invalidate the UK's invocation of Article 15. This is the way the provision was designed. The vague and expansive definition of a "public emergency" was intended prevent international treaty obligations from interfering with a signatory government's ability to effectively respond to exigencies. The downside, of course, is that this gives the justices sitting in Strasbourg very little authority to challenge the grounds upon which a state party enters into a period of derogation, allowing states to decide for themselves what constitutes a threat to the "life of the nation."

The decision in this case, however, was not entirely deferential. While it upheld the validity of the derogation on its face, the Court reserved the right to rule on questions of proportionality—i.e., whether the measures taken by the United Kingdom have eclipsed the "extent strictly required by the exigencies" of the crisis. On this measure, Strasbourg sided with the petitioners to hold that the UK's arrest and detention of foreign nationals in the aftermath of September 11th did not fall permissibly within the purview of its derogation proclamation under Article 15. The Court expresses this holding in what is perhaps one of the most significant statements in the judgment: "The Court does not accept the Government's argument that Article 5 § 1 permits a balance to be struck between the individual's right to liberty and the State's interest in protecting its population from terrorist threat."¹⁰⁵

Like the United States, the UK has never had a constitutional provision providing for a state of emergency; in fact, there is a fog of uncertainty surrounding the question of whether the British have any constitution at all. As a result, the common law cycles in both countries have been trusted to strike the appropriate "balance" between individual liberties and national security interests in periods of crisis. The hard line drawn by this judgment is between an unregulated system in which the necessities brought on by exigent circumstances must be "balanced" against

¹⁰⁵ *Ibid.*, 171.

the rule of law, and the system delineated in the derogation protocol of the ECHR, which provides for legitimate exceptions that are contained within identifiable legal limits.

This is the very same contrast that this project aims to portray: Is it more desirable for the law to, in the words of Giorgio Agamben, “employ the exception—that is the suspension of law itself”¹⁰⁶ or to mummify the Constitution as a venerated ideal, protecting it from the difficult and delicate “lesser evil”¹⁰⁷ calculations made by judges in the face of a public emergency? The Strasbourg Court, in *A and Others v. United Kingdom*, claimed that the derogation provision contained in Article 15 of the ECHR does not imply a balancing act between individual liberties and state interests. It implies a temporary, proportional, and above all, legal exception to the rules laid out in the Convention.

I have argued that this type of constitutional exception is necessary for the United States to respond appropriately to the realities of a terrorist threat. It is necessary so that our Supreme Court justices can rely on something other than 19th Century precedents to inform them of how to respond to a uniquely 21st Century problem. It is necessary so that the Court does not need—in the words of Justice Jackson in *Korematsu*—to “rationalize the Constitution” to show that it sanctions flagrant violations of constitutional rights in deference to a perceived military necessity. The more open the law is to interpretation and judicial discretion, the more it encourages executive and legislative lawlessness. An effective emergency provision will clearly define what it means to act within the boundaries of the law in response to a national crisis.

It is clear from this analysis that the derogation provisions contained in the international human rights treaties—while they do offer some insight into the proper avenues for regulating a

¹⁰⁶ Agamben, Giorgio. *State of Exception*. Trans. Kevin Attell. Chicago: University of Chicago, 2005. Print, 1.

¹⁰⁷ This phrase is borrowed from Michael Ignatieff’s insightful essay, which discusses the nuances of the balancing act between civil liberties and national security in the post-9/11 world order: Ignatieff, Michael. *The Lesser Evil: Political Ethics in an Age of Terror*. Princeton: Princeton UP, 2004. Print.

state of emergency—do not go nearly far enough. Their greatest common deficiency is that they provide for only one inchoate variety of “public emergency” built around an “existential rationale,” which is wholly inappropriate for addressing the dangers associated with the threat of international terrorism. It would be useful, then, for this study to cast a wider net in order to gather the ingredients necessary to prepare an appropriate model for our emergency constitution. The remainder of this chapter will begin with an analysis of the language and judicial interpretations of the emergency provisions in the Constitution of India, and it will conclude with a discussion of the breakthrough innovation for legislative control made by the Constitutional Assembly in post-apartheid South Africa.

Emergency Powers and Judicial Review in India

Since its Constitution first came into effect in January 1950, the Republic of India has weathered a long and difficult history of use and abuse of its constitutional emergency powers. From the early 1960s until the late 1970s, India was in a nearly perpetual state of national emergency. In 1962, an emergency was declared in response to the Sino-Indian War, which lasted until the end of that decade. The emergency was renewed with the onslaught of the Indo-Pakistani War of 1971, which was one of the shortest wars in history, lasting only 13 days.¹⁰⁸ The corresponding state of emergency, however, was extended (under very dubious pretenses) until 1977, by request of then-Prime Minister Indira Gandhi. The period from June 26, 1975 to March 21, 1977—often referred to simply as “the Emergency”—is widely considered an all-time-low for Indian democracy.¹⁰⁹ During this period, virtually all civil and political rights were suspended, and Gandhi employed her ‘rule by decree’ to delay elections and suppress political

¹⁰⁸ Austin, Granville. *Working a Democratic Constitution: The Indian Experience*. New Delhi: Oxford UP, 1999. Print.

¹⁰⁹ Dhar, P. N. *Indira Gandhi, the "Emergency", and Indian Democracy*. Oxford UP, 2000. Print.

opposition.¹¹⁰ The lament of this emergency rule prompted an era of constitutional reform and active judicial review aimed at limiting the scope of the emergency provisions. The decisions that arose out of this self-reflective period in India's constitutional history are illustrative of the values and structures that an emergency constitution should aim to embody. We will find that there are significant lessons to be learned from the Indian experience.

The fact that the Indian Constitution contains an especially elaborate scheme for declarations of emergency, which has been interpreted and amended substantially since its inception, makes it a subject of interest for this inquiry. Unlike the one-dimensional, catch-all derogation protocols in the international human rights treaties, the emergency provisions defined in Articles 352 - 360 of the Indian Constitution reveal a more multifaceted, protean approach to the constitutional state of emergency. The proclamation of a state of emergency in India can come in one of three different variations: the national emergency (Article 352), the state emergency (Article 356), and the financial emergency (Article 360).

The national emergency is the type that most closely resembles the derogation protocol in the international human rights treaties. Article 352 provides that the President may issue a proclamation of emergency if s/he is "satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion." According to the original language of the Constitution enacted in 1950, the President's proclamation of emergency would last for two months, and then after approval by both houses of Parliament, it would continue indefinitely until it is lapsed by another proclamation. The grim experience of Indira Gandhi's protracted Emergency of the mid-1970s, however, demonstrated that this framework was vulnerable to abuse. In 1979, the Indian

¹¹⁰ Klieman, Aaron S. "Indira's India: Democracy and Crisis Government." *Political Science Quarterly* 96.2 (Summer, 1981): 241-59. *JSTOR*. Web. 11 Mar. 2013.

Parliament passed the 44th Amendment, which revised the procedure for proclaiming and continuing a national emergency under Article 352. The 44th Amendment gave the President's proclamation a sunset period of one month unless it is confirmed by resolutions in both houses of Parliament by a two-thirds majority, in which case it will expire six months after the passage of the second resolution. In order for a proclamation to be renewed, it must pass a vote of two-thirds majority in both houses for each subsequent six-month period. This amendment brought about a very significant improvement in the design of India's emergency provisions: it elevated the legislature's role as a check to executive power in a state of emergency. A central element of Bruce Ackerman's theory of constitutional emergency powers is that they require a well-calibrated system of checks and balances in order to be effectively self-regulating.¹¹¹ The 44th Amendment to the Indian Constitution created a framework for an Article 352 emergency that established greater accountability and balance between legislative and executive authority.

The post-Emergency period saw a powerful movement towards judicial activism in order to prevent the type of abuse that occurred from 1975-1977. It might be appropriate to draw the analogy that India's *Korematsu* was Indira's Emergency. The *Korematsu* decision weighs on the consciences of American constitutional lawyers and judges as a failure to properly exercise the power of judicial review to curtail executive authority in times of crisis. In a similar way, the Emergency in India is a source of deep regret, especially on the part of the Indian Supreme Court, for failing to step in and challenge the excesses the emergency government. The critical difference, however, is that the post-Emergency Court in India responded actively and immediately to reinterpret the emergency provisions in a way that would protect them from abuse.

¹¹¹ Ackerman (2004).

In the year following the adoption of the 44th Amendment, the Indian Supreme Court asserted the power of judicial review over Article 352 emergency proclamations in a case called *Minerva Mills vs. Union of India*.¹¹² The *Minerva Mills* case concerns a suit brought by a private textile company against the Union of India for nationalizing its management in October 1971. The government's argument rested largely on the fact that India was in a state of emergency in 1971, and the Minerva Mills Company had been managing its affairs "in a manner highly detrimental to public interest."¹¹³ In its decision in 1980, the Court ruled in favor of Minerva Mills, and it took the opportunity to elaborate on the role of the judiciary as the "ultimate interpreter of the Constitution" and its corresponding obligation to intervene against any "manifestly unauthorised exercise of power."¹¹⁴ This self-proclaimed duty compelled the Court in *Minerva Mills* to hold that—regardless of the "political colour" of the question—"There is no bar to the judicial review of the validity of a proclamation of emergency issued by the President under Article 352."¹¹⁵

This statement by the Court was a very powerful one to make, and it clearly crystallizes (at least in principle) the check of judicial review over presidential proclamations of emergency. Its effect in practice, however, is tempered by the permissive language of the provision itself, which applies the virtually unactionable limit of mere "satisfaction" on the part of the President that a grave emergency exists. The Court concedes:

The constitutional jurisdiction of this Court does not extend further than saying whether the limits on the power conferred by the Constitution on the President have been observed or there is transgression of such limits. The only limit on the power of the President under Article 352 clause (1) is that the President should be satisfied that a grave emergency exists whereby the security of India or any part thereof is threatened whether

¹¹² *Minerva Mills Ltd. and Ors. vs. Union of India and Ors.* (AIR 1980 SC 1789).

¹¹³ *Ibid.*, par. 235.

¹¹⁴ *Ibid.*, par. 230.

¹¹⁵ *Ibid.*

by war or external aggression or internal disturbance. The satisfaction of the President is a subjective one and cannot be decided by reference to any objective tests.¹¹⁶

This passage portrays the weakness of the language of Article 352 to sustain a meaningful balance among the branches of government in their power to regulate the declaration and duration of a state of emergency. Although the Court was perfectly prepared in *Minerva Mills* to decide on the constitutional validity of the 1971 proclamation of emergency, it found itself in want of an appropriate constitutional foothold from which to make such a ruling. The Constitution virtually guarantees the President total prerogative to decide whether or not a national emergency exists under the description defined in Article 352.

According to Article 358 of the Indian Constitution, one of the effects of a proclamation of emergency is that all rights under Article 19—which protects, *inter alia*, the freedoms of speech, expression, assembly, and association—may be suspended if they “restrict the power of the State [...] to make any law or to take any executive action which the State would [...] be competent to make or to take [for the duration of the emergency].” In a 1978 decision called *Madan Mohan Pathak vs. Union of India*, the Supreme Court conveyed an interpretation of the legal effect of Article 358 that should serve as an exemplary model for the application of suspension provisions in any emergency constitutional framework.

This case involves a bonus settlement between the state-owned Life Insurance Corporation (LIC) and one of its employees, which was entered into in 1974, prior to the proclamation of Indira Gandhi’s infamous “Emergency” of 1975 - 1977. In 1976, the central government passed a law invalidating the settlement, which was challenged by the employee Pathak as a violation of Article 19(1)(f) of the Indian Constitution, protecting his right to own

¹¹⁶ *Ibid.*, par. 309.

property.¹¹⁷ In its defense, the government invoked Article 358, which allows for the suspension of constitutional guarantees under Article 19 during a state of emergency.

Having heard the case in 1978, after Indira's Emergency was over, the Court ruled in favor of the petitioner, holding that Article 358 does not imply suspension of the *existence* of any rights under Article 19 in a state of emergency, but merely a suspension of their *operation*. This distinction has the effect of safeguarding constitutional rights so that "valid claims cannot be washed off by the emergency per se."¹¹⁸ Since the emergency only suspends operation of the laws rather than the laws themselves, this means that after the emergency is over, legal remedies can be sought for transgressions that occurred during the emergency. For the employees of LIC, this meant that "no payment of bonus could be demanded during the emergency but as soon as the emergency was over, the settlement would revive and what could not be demanded during the emergency would become payable even for the period of emergency for which payment was suspended."¹¹⁹

Thus, the Court's decision in *Pathak* passes on a fascinating and important interpretive principle concerning the effect of the Article 358 suspension clause in states of emergency: It suggests that the constitutional exceptions provided for by a proclamation of emergency are allowable only in the interest of expediting the government's response to the exigencies of the moment, and they do not imply a lapse in constitutional accountability after the exigencies subside. This principle not only protects the normal operation of the Constitution against the temporary rule by exception, but it also lends the laws a retroactive reach onto government activity during an emergency.

¹¹⁷ The right to property was removed from the list of fundamental constitutional rights by the 44th Amendment, but the interpretive principle established in *Pathak* endures as a jurisprudential doctrine, as applied to the suspension clause in Article 358.

¹¹⁸ *Madan Mohan Pathak vs. Union of India & Ors. Etc* (1978 AIR 803, 1978 SCR (3) 334), p. 336.

¹¹⁹ *Ibid.*

This is an ingenious scheme designed by the Indian Supreme Court in *Pathak*, and it should be read widely as a model for the appropriate use of judicial power in securing government accountability for measures taken in a state of emergency. If a suspension clause effectuates a mere hiatus in the operation of certain constitutional provisions for a temporary period, then the Court will never be put in the position of having to make “lesser evil” calculations in order to strike a “balance” between civil liberties and national security interests. The government is free to violate constitutional rights during a state of emergency if absolutely necessary, but it does so with the knowledge that it may be held accountable for those violations after the emergency expires.

The *Minerva Mills* and *Pathak* decisions deal with the state of emergency as it relates to presidential proclamations under Article 352 (the national emergency). I mentioned earlier in this section that the Indian approach to the constitutional state of emergency was more ‘multifaceted’ and ‘protean’ than the derogation provisions of the international human rights treaties. This is true, in the sense that it is separated into three classifications of emergency—the national emergency (Article 352), the state emergency (Article 356), and the financial emergency (Article 360). However, these distinctions, which may have appeared more meaningful in the drafting process, actually tell us very little about emergency jurisprudence in practice.

There are a number of reasons for this. The most obvious among them is that a financial emergency has never been declared under Article 360, which means that the Court has never had an opportunity to interpret this provision.¹²⁰ On the opposite extreme, the state emergency under Article 356 has been declared more than 100 times, and in nearly every state.¹²¹ In large part,

¹²⁰ Tummala, Krishna K. “The Indian Union and Emergency Powers.” *International Political Science Review* 17.4 (2006): 373-84. *JSTOR*. Web. 1 Mar. 2013.

¹²¹ Reddy, K. J., and Joy V. Joseph. “Executive Discretion and Article 356 of the Constitution of India: A Comparative Critique.” *Electronic Journal of Comparative Law* 8.1 (Mar., 2004). *ECJL.org*. Web. 1 Mar. 2013.

however, the jurisprudential doctrines developed in the post-Indira period concerning Article 352 emergencies have been extended to apply to Article 356 as well. The Court's opinion on the proper exercise of President's Rule under Article 356 is clearly defined in its 1994 decision of *S.R. Bommai vs. Union of India*.¹²²

The *Bommai* decision lays out a familiar paradigm—that declarations of emergency are not immune to judicial review. The case arose out of a political controversy in the state legislature of Karnataka, wherein the results of a recent election revoked the majority party's control over the Council of Ministers. In an overtly political move, the governor of that state petitioned the President to request an invocation of Article 356 on the ground that the Chief Minister Bommai could not constitutionally hold his position if his party did not command a majority in the state assembly. Bommai challenged the validity of the proclamation of President's Rule over Karnataka and the subsequent dissolution of the Legislative Assembly, arguing that the invocation of Article 356 was unnecessary under the circumstances, which were of a political—rather than constitutional—nature.

In its decision, the Supreme Court came down hard to shut the door on abuses of Article 356. The language of the *Bommai* decision is explicit and direct in its limitation of presidential prerogative to override the operation of state governments: “The power conferred by Article 356 is a conditioned power; it is not an absolute power to be exercised in the discretion of the President.”¹²³ The Court maintained that the President's power to assume authority over state governments cannot be invoked for ordinary or minor political controversies, but rather “it is an extreme power to be exercised where there is actual or imminent breakdown of the constitutional

¹²² *S. R. Bommai vs. Union of India* ([1994] 2 SCR 644 : AIR 1994 SC 1918 : (1994)3 SCC1).

¹²³ *Ibid.*, p. 219.

machinery.”¹²⁴ In the interest of supervising the impact of such limitations, the Court reserved the right to “strike down the Proclamation [under Article 356(1)] if it is found to be mala fide or based on wholly irrelevant or extraneous grounds.”¹²⁵ This was the opinion of the Court in *Bommai*, as the holding suggests, and its decision effectively reigned in the President’s authority to temporarily dissolve federal-state divisions of governance under Article 356.

The Court, however, faced the same problem in *Bommai* as it encountered in *Minerva Mills*—namely, that the condition attached to a presidential proclamation of emergency is just as subjective and difficult to invalidate in Article 356 as it is in Article 352. The President may, under Article 356, declare an emergency and assume the functions of a state government if s/he is “satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution.” This permissive condition could just as easily have dissuaded the Court in *Bommai* from invalidating the President’s proclamation on its face, as it did in the *Minerva Mills*, wherein the Court conceded that “the satisfaction of the President is a subjective one and cannot be decided by reference to any objective tests.”¹²⁶ This decision to challenge the legitimacy of the President’s “satisfaction” in *Bommai*, therefore, was primarily a product of judicial volition to curb the scope of Article 356, rather than a limitation imposed by the language of the provision itself.

Based on the standard applied by this project, which is suspicious of emergency provisions that leave too much open for judicial interpretation and governmental abuse, the Indian Constitution is not an example of a model drafting process. The important lessons that we should draw from the Indian context come from the restrictive jurisprudential doctrines developed by the Indian Supreme Court, motivated in large part by a reaction to the two decades

¹²⁴ *Ibid.*, p. 104.

¹²⁵ *Ibid.*, p. 297.

¹²⁶ *Minerva Mills* (1980), Par. 309.

of abuse of these permissive provisions in the 1960s and 1970s. In *Minerva Mills* (1980) and *Bommai* (1994), we witnessed the Court call upon the power of judicial review to strictly define the limits of presidential prerogative in proclaiming a national or state emergency. In the *Pathak* judgment (1978), the justices elaborated a scheme of governmental accountability for measures taken during a state of emergency, whereby legal or equitable remedies may be sought for suffering caused by valid derogations after the emergency expires. This development is ingenious, in my opinion, and it should be incorporated into the United States model for emergency jurisprudence.

But while our model should embrace the insightful jurisprudential developments made by the Indian Supreme Court to reign in the expansive powers of the President in states of emergency, it should avoid the structural errors in the drafting process that led them there. The problem with the constitutional framework for emergency powers in India—as Indira Gandhi so infamously illustrated—is that it lends too much discretionary power to the executive, and it thereby fails to set up an appropriate system of checks and balances among the branches of government. As Ackerman observes, “the problem of legislative control [...] exposes the most important constitutional weakness of existing practices throughout the world.”¹²⁷ The most vital balancing function of the legislature, in Ackerman’s view and my own, is to ensure that a state of emergency is eventually brought to an end, so that the normal institutional mechanisms can resume operation. In response to the brutal abuse of emergency powers by the apartheid government in the 1980s, the Constitutional Assembly in post-apartheid South Africa confronted this problem squarely, producing “the first supermajoritarian escalator in the constitutional world.”¹²⁸ The South African model is not perfect, but I believe that its innovative idea for

¹²⁷ Ackerman (2006), 87.

¹²⁸ *Ibid.*, 89.

legislative control—the supermajoritarian escalator—should serve as the basis for the role of Congress in an emergency constitution in the United States.

Post-Apartheid South Africa and the “Supermajoritarian Escalator”

The preamble to the 1996 Constitution of South Africa begins, “We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land [...]” Many of these past injustices were carried out at the hands of the apartheid government under the guise of legitimate law—through declarations of emergency. Prior to the end of apartheid, the state of emergency was employed by the South African government as a political tool to suppress internal unrest and silence dissent. The first emergency in post-colonial South Africa was declared in 1960, in the aftermath of a police massacre on a peaceful protest in Sharpeville that left 69 people dead and 180 wounded.¹²⁹ The public uproar that resulted from this exercise of police brutality led the government, on March 30, 1960, to declare a state of emergency in 83 magisterial districts.¹³⁰ By May 6 of that same year, the state had already arrested and detained 18,000 dissidents under the guise of “emergency.”¹³¹ In the 1980s, the measures taken by the emergency regime follow a similar narrative, on an even larger scale. From July 1985 until October 1990, South Africa was in a perpetual state of emergency.¹³² The first six months of the 1985 declaration of emergency saw 575 casualties of political violence, mostly at the hands of the state. From June of 1986 to June of 1987, an estimated 26,000 people were detained under emergency rule.¹³³

¹²⁹ “Sharpeville Massacre, 21 March 1960.” *South African History Online*. Web. 30 Mar. 2013.

¹³⁰ “States of Emergency in South Africa: The 1960s and 1980s.” *South African History Online*. Web. 30 Mar. 2013.

¹³¹ *Ibid.*

¹³² This is not exactly true. Technically speaking, there were two separate declarations of emergency during this period: The first emergency, declared in 36 of the country’s 260 magisterial districts, lasted from July 25, 1985 until March 7, 1986. Three months later, on June 12, 1986, a nation-wide emergency was declared, which was lifted on June 8, 1990 for all provinces except Natal, which remained under emergency rule until October of that year. *Ibid.*

¹³³ *Ibid.*

When the apartheid regime was finally dismantled in the early 1990s, the widespread suffering caused by the abuse of emergency powers led to a national discussion of how they could be curtailed. The product of that discussion, contained in Article 37 of the 1996 Constitution, embodies a rejection of the prevailing “existential rationale”¹³⁴ for a constitutional state of emergency, applying an entirely new vision for how emergencies should be exercised and regulated. Perhaps as a testament to its effectiveness, there has yet to be a declaration of emergency in post-apartheid South Africa. This also means, however, that the provision has not yet been applied in practice or interpreted by the Constitutional Court. Its utility in this study, therefore, is simply to serve as a starting point for fresh thinking on the subject of drafting an emergency provision in the United States.

If it were to be framed in terms of the emergency edifices discussed so far in this chapter, Article 37 of the South African Constitution could be said to combine the *jus cogens* protections of the international human rights treaties and the judicial review of the Indian Supreme Court with a brand new scheme for legislative control. According to Article 37 § 1, “A state of emergency may be declared only in terms of an Act of Parliament, and only when (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and (b) the declaration is necessary to restore peace and order.” This declaration condition is similar to the ones we have already seen, but with greater specificity in the enumeration of different varieties of emergency. The most significant innovation, however, is that the declaration is defined as a parliamentary act, rather than a presidential one. Subsection 2 goes on to suggest that the executive may declare a prospective state of emergency, but it will expire in 21 days unless the National Assembly votes to approve a three month extension by a

¹³⁴ Ackerman (2004).

simple majority. In order for the emergency to be renewed, it requires the support of a supermajority of 60% for each subsequent three month period.

This design ensures legislative control over emergency proclamations and a minority (albeit, a large minority) veto over any extensions. This 60% figure for escalations might be more effective in the United States than it is in South Africa, since it is unusual for Republicans or Democrats to control more than 60% of the seats in Congress. In South Africa, on the other hand, it is relatively common for one political party to win large parliamentary majorities.¹³⁵ Nonetheless, the idea of a supermajoritarian escalator is novel. If it is implemented properly, perhaps with increasingly larger requisite supermajorities at each escalation, this framework virtually ensures that the state of emergency will be brought to an end through a natural democratic process.

Article 37 § 3 secures the principle of judicial review over the state of emergency. It reads, “Any competent court may decide on the validity of (a) a declaration of a state of emergency; (b) any extension of a declaration of a state of emergency; or (c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.” This principle—which is essential to the operation of a functioning constitutional democracy—is one that needed to be interpreted and claimed by the Supreme Court of India, whereas here it is enshrined in the constitutional language explicitly. Here we find another novelty of the South African model: While the declaration of emergency has traditionally been a power conferred primarily or entirely (e.g., in the French Constitution) to the executive, in South Africa this power is predominantly legislative and judicial.

The final component of Article 37 is a derogation protocol similar to the ones contained in the international human rights treaties, including a reader-friendly table of non-derogable

¹³⁵ Ackerman (2006), 90.

rights and an entire subsection stipulating conditions for administrative detention. The peremptory rights enumerated in subsection 5 include the right to life; the right to dignity; prohibitions against torture, servitude, and forced labor; the freedom of conscience, religion, thought, belief, and opinion; the right to fair labor practice; as well as an anti-discrimination clause. Subsection 6 provides that any citizen detained without trial under a declaration of emergency must, *inter alia*, be guaranteed access to legal representation, medical care, review by a court within 10 days of detention, and access to a written justification by the state for the detention. Furthermore, the state is required to contact an adult family member or friend of the detainee “as soon as reasonably possible” and publish a notice in the national Government Gazette stating the detainee’s name and place of detention and a reference to the emergency measure being invoked.

This is an exemplary model for a derogation protocol because it moves beyond the *jus cogens* fundamental guarantees toward specific and elaborate limitations and requirements for what the state cannot, can, and must do in a state of emergency. No other constitution in the world has gone as far as South Africa’s to ensure the protection of civil liberties and fundamental human rights under emergency administration. Article 37 is unique, in that it combines substantial legislative and judicial checks on executive power in states of emergency with an extensive list of non-derogable rights, freedoms, and constitutional guarantees. In the third and final chapter of this project, I will revisit these basic components of an effective emergency provision, with a view to the central objective of this project—to propose a model for an emergency provision that should become (in some ideal universe, political challenges notwithstanding) the 28th Amendment to the United States Constitution.

Chapter 3

The Model Amendment:

Practical Challenges and the Role of the Judiciary

Thus far, this project has traced the history of United States case law in periods of crisis in order to demonstrate the potentially perilous effects of a Constitution that is silent on states of exception. In the previous chapter, we have seen that there are other ways to approach constitutional law in states of emergency, which might offer more adequate safeguards against the incremental erosion of constitutional rights over the long term. This third and final chapter seeks to assemble the wisdom gathered in the earlier discussions into a proposal for a constitutional model—Amendment XXVIII—which provides for formal declarations of emergency that are strictly limited both in scope and in duration. As an academic exercise, the value of this proposal resides more in its explication of the concepts underlying the model than in the precise terms of the amendment itself. The bulk of this chapter, therefore, aims to elucidate the essential principles of an effective emergency provision in the context of US constitutional law.

The discussion begins with an argument for the necessity of a constitutional, rather than statutory, framework for declarations of emergency. The second section outlines the precise terms of the provision, drawing upon the lessons learned both home and abroad. Finally, this chapter concludes with a discussion of the institution which this entire model is designed to fortify: the institution of judicial review. In the absence of active enforcement by the courts, this final section argues, all impact and value of the amendment is lost. The judiciary is the voice of the Constitution, and hence, the central goal of this proposal is to provide our justices with something more to say.

The Amendment Process: An Impractical Necessity

It would be dishonest—however convenient—to complete this project without acknowledging the political and practical challenges facing a constitutional amendment of this kind in the United States. The bar for amending the US Constitution is set extraordinarily high, which is perhaps an indication that the framers intended their creation to endure the test of time. As a result, the constitutional culture in the United States is about as resistant to systemic change as the Constitution itself. Article V outlines two possible paths for amendment, each of which is completed in two steps—proposal and ratification. The first path requires the support of a two-thirds supermajority in both houses of Congress to propose an amendment, and this proposal must be ratified by three-fourths of all of the state legislatures. The second path, which has yet to be taken, begins with a proposal by a convention of two-thirds of the state legislatures, and ratification requires an affirmative vote by three-fourths of all of the states.¹³⁶

Any proposal to amend the US Constitution is bound to elicit some amount of controversy, and a proposal like this—one that would fundamentally and permanently alter the character of constitutional law in this country—is obviously no exception. Unfortunately (but certainly not without purpose), the constitutional amendment process described in Article V was not designed to tolerate large factions of dissent. In my view, the impracticality of actually implementing proposals such as this one should not discourage theorists from making them. Sadly, however, it has. The only influential piece of writing published since September 11th that has outlined a specific model to address the problem of emergencies in US Constitutional law was Yale Law School professor Bruce Ackerman's book, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (2006). But his model, too, shies away from proposing a constitutional amendment on account of the political challenges that such a proposal would

¹³⁶ “The Constitutional Amendment Process.” *National Archives*. Web. 01 Apr. 2013.

undoubtedly face. He writes, “Constitutional amendment is notoriously difficult in the United States, and there is no realistic chance that something as controversial as the emergency constitution would ever be enacted as a formal amendment.”¹³⁷

In the place of a proper amendment, Ackerman advocates for the adoption of a “framework statute” that would “impose constitutional order” on the problem of regulating emergency powers,¹³⁸ but it would only need to satisfy the conditions of ordinary legislative procedure—a simple majority in both houses and the President’s signature.¹³⁹ On that standard, the “framework statute” idea seems like a solid practical alternative, assuming that a proper constitutional amendment would be confined by political gridlock to the academic imagination. The problem with this tactical compromise, however, is that the drawbacks of a framework statute for these purposes render it almost entirely unworthy of consideration.

There is something special about constitutional law, which makes it fundamentally different from an act of legislation. The most salient difference can be viewed from the perspective of the courts. In the eyes of a judge, the Constitution is the great invalidator, the supreme legitimizer, the primary instrument of judicial review, the map that guides a court toward its decision. The problem with a framework statute is that its sub-constitutional status makes it *subject* to judicial review, while a constitutional amendment would become the *basis* for judicial review. This is an extremely important distinction, and—as past experience indicates—it will make the difference between an effective emergency provision and a dead letter.

I refer to “past experience” because the emergency framework statute is something that has been tried many, many times already in the United States. Ackerman himself acknowledges

¹³⁷ Ackerman (2006), 77.

¹³⁸ *Ibid.*, 123.

¹³⁹ U.S. Const., Art. I, § 7.

the eyebrow-raising legislative experience that precedes him: “From the Great Depression through the Cold War, Congress passed some 470 statutes granting the president authority to exercise one or another power during a declared state of ‘national emergency.’”¹⁴⁰ These provisions have all failed fatuously to fill the void of a state of emergency in US constitutional law. In 1976, in the aftermath of the Watergate scandal, Congress adopted a “new approach” to the state of emergency in the form of the National Emergencies Act (NEA).¹⁴¹ This statute instituted an innovative framework aimed at limiting the duration of an emergency and establishing congressional checks to executive power, but it has been embarrassingly ineffectual. The NEA has left the United States in a perpetual state of emergency since November 1979, and very nearly nobody has noticed.

A main reason for the NEA’s remarkable inconsequence is the fact that it lacks constitutional status, meaning that the courts are capable of turning a blind eye to its enforcement—and they have. The termination clause of the NEA stipulates that every six months after presidential proclamation of national emergency, “each House of Congress shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated.”¹⁴² A meeting of this sort has never occurred. Instead, both houses of Congress have simply ignored the termination provision altogether, allowing every president since Carter to quietly extend the emergency without any congressional oversight.

Due to the statutory status of the NEA, the courts have been unable (or unwilling) to exercise judicial power to enforce it. In *Beacon Products Corp. v. Reagan* (1986),¹⁴³ the plaintiffs challenged the constitutionality of an embargo against trade with Nicaragua, which the

¹⁴⁰ Ackerman (2006), p. 124.

¹⁴¹ *Ibid.*

¹⁴² “Title 50—War and National Defense,” § 1622 (b).

¹⁴³ *Beacon Products Corp., et al. v. Ronald Wilson Reagan, et al.* 633 F. Supp. 1191 (1986).

Reagan Administration justified on the basis of the exceptional powers granted to the President under the NEA. The plaintiffs argued that Reagan's extension of the emergency was invalid because it had not been confirmed by a joint resolution in Congress on the six month interval required by the NEA's termination clause. In its decision, the First Circuit Court of Appeals held that there was "no legal remedy for a congressional failure to comply with the statute."¹⁴⁴ Moreover, the decision expresses the view that it would be "an imprudent exercise of judicial review [...] to assess the wisdom of the President's judgment" of whether the extant threat justified an emergency under the terms of the NEA.¹⁴⁵

As a later subsection of this chapter will argue, the efficacy of an emergency provision should be evaluated based on the impact it has on judicial reasoning in the decisions which call it into question. In opposition to Ackerman, my proposal favors judicial checks on emergency powers over legislative control. Both are necessary, which is why my model also includes the "supermajoritarian escalator." However, the primary purpose of an amendment defining the terms of a constitutional state of emergency is to alter the landscape of constitutional law in a way that prevents precedential normalization of the exception. A framework statute is incapable of exercising a binding or guiding influence over judges in periods of crisis, when they are most susceptible to public panic and political pressure to defer to congressional and presidential prerogative. If the Constitution clearly stipulates what is permissible and impermissible in states of emergency, then the courts will have no option but to rule according to those provisions. However, if the provisions come in the form of a framework statute rather than a constitutional amendment, then the courts—as we have just seen—are under no such obligation.

¹⁴⁴ Lobel, Jules. "Emergency Power and the Decline of Liberalism." *The Yale Law Journal* 98 (May, 1989): 1417. *LexisNexis*. Web. 1 Apr. 2013., qtd. in Ackerman (2006), p. 125.

¹⁴⁵ *Beacon Products Corp. v. Reagan* (1986).

This project rejects the notion that a proposal is valueless if it is unlikely to be adopted in practice. The end goal of this exercise is not to march onto the floor of Congress, wielding a constitutional amendment in one hand and a sword in the other. The object, rather, is a far more modest one: to employ the privilege of academia that allows us to think beyond the confines of the present political reality and explore new avenues for addressing an important real-world problem. With this aim in mind, I would like to put forward an argument that may appear to be a contradiction in terms, but in this context, is not: The necessity of a constitutional amendment of this kind can be understood as being, in part, a consequence of its impracticality.

Richard Posner has observed that “the line between judicial interpretation and judicial creation is frequently—particularly in the case of American constitutional law—fine to the point of invisibility.”¹⁴⁶ He argues that more often than not, the ‘constitutional’ rights that we hold dear and the jurisprudential doctrines that define the scope of their application are “created” by judges, working within the pliant parameters of the common law. In Posner’s view, these acts of “judicial creation” are necessary in order make the vague and often obsolete language of constitutional text applicable in the modern day. This is especially apparent in light of the practical impossibility of modernizing and clarifying the language through frequent constitutional amendments. He writes, “Because the Constitution is extremely difficult to amend, the pressure on the Supreme Court to interpret it loosely so as to keep it up to date is acute, in fact irresistible.”¹⁴⁷

This is particularly true in periods of national emergency, when the exigencies of the moment have pressured judges into applying permissive interpretations that promote deep and enduring erosions of constitutional rights and civil liberties. The extreme difficulty of amending

¹⁴⁶ Posner, 17.

¹⁴⁷ *Ibid.*, p. 18.

the constitution is one of the primary sources of such expansive acts of judicial “interpretation.” Applying this same rationale in the opposite direction, the fact that constitutional language is so prone to permissive interpretation implies that the Constitution must be amended if this problem is ever going to be solved. Hence, a constitutional amendment of this kind is necessary—both in spite and in consequence of its impracticality.

The Amendment Proposal

The aim of Chapter 2 was to draw lessons from foreign constitutional contexts and international treaties that would inform the construction of a model amendment to the US Constitution that stipulates the terms of an effective emergency provision. That discussion shed light on a number of significant discoveries and conclusions that will be put to use in the coming pages, where I will lay out the terms of my amendment proposal. As the previous subsection suggests, this proposal is, above all, an academic exercise. The principal objective of this project is to make a meaningful contribution to the discussion of emergency powers in US constitutional law. The precise numerical values assigned to sunset periods or escalation percentages, therefore, are far less important than an analysis of the concepts themselves. In that spirit, this subsection aims not only to lay out the components of a model provision, but also—and more importantly—to explain why each piece ought to be included, in light of the examples discussed in Chapter 2.

In very general terms, the discussion in Chapter 2 offers guiding wisdom from two opposing angles—paradigms to avoid and examples to imitate. It seems sensible to begin with the negative lessons and conclude with the positive ones. We have seen that the derogation provisions in the international human rights treaties and nearly all extant constitutional emergency provisions in the world—including our own habeas suspension clause—suffer from a

common condition: the “existential rationale.”¹⁴⁸ Upon Ackerman’s application of the term, the existential rationale defines the state of emergency in terms of “apocalyptic scenarios” such as the threat of an enemy invasion or a civil war, which would require the government to “take extraordinary measures in its life-and-death struggle for survival.”¹⁴⁹

For this exercise, I think it would be most interesting to look to our own Constitution for an example of a clause that is constructed around an existential rationale. Article I, Section 9, our Constitution’s solitary suspension provision, reads: “The privilege of the Writ of Habeas corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” The inadequacy of this provision to deal with the present crisis of international terrorism comes from the fact that it is confined to crises that are apocalyptic, or at the very least, political and existential—“rebellion” and “invasion.” The threat of international terrorism is *not* synonymous with or analogous to the threat of a rebellion or an invasion, but it *is* (as I have argued) demanding of exceptional attention in US constitutional law.

In the Guantanamo habeas cases, the Supreme Court has held that the suspension provision in Article I, Section 9 cannot be invoked as a constitutional justification for denying petitions made on behalf of Guantanamo detainees for the writ of habeas corpus. The majority opinion of *Boumediene v. Bush* (2008), written by Justice Kennedy, addresses this question directly:

[I]n the system the Framers conceived, the writ [of habeas corpus] has a centrality that must inform proper interpretation of the Suspension Clause. That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken in the Suspension Clause to specify the limited grounds for its suspension: The writ may be suspended only when public safety requires it in times of rebellion or invasion.¹⁵⁰

¹⁴⁸ Ackerman (2004).

¹⁴⁹ *Ibid.*, 1037.

¹⁵⁰ *Boumediene v. Bush* 553 U.S. 723 (2008).

This “proper interpretation of the Suspension Clause,” as Kennedy describes it, compelled the Court to hold that “the Suspension Clause has full effect at Guantanamo,” meaning that the writ of habeas corpus is fully protected for Guantanamo detainees.

This decision should certainly be viewed as a victory for civil liberties in the “war on terror.” However, it should also serve as an indication that the existential rationale underpinning our Constitution’s sole emergency provision renders it entirely ineffective for regulating the government’s response to the threat of international terrorism. The *Boumediene* holding ensures that the government cannot constitutionally justify the suspension of habeas corpus for terror suspects on the ground of Article I, Section 9. But what if there were compelling evidence that a terror suspect presented such an immediate danger to the “public safety” that he must be detained without challenge? We can safely assume that the Court would have created an entirely different “proper interpretation of the Suspension Clause” that would have justified its denial of the writ. Adopting the famous quotation by Justice Jackson, Posner proclaims that the Constitution is “not a suicide pact.”¹⁵¹ This is poignantly true, and our justices have never been inclined to treat it that way. Hence, in the interest of preserving the continuity and integrity of constitutional law, we need to provide our government with constitutionally and morally appropriate avenues for responding to exceptional circumstances.

Just as we have seen in the United States context in relation to the Suspension Clause, the United Kingdom’s post-9/11 invocation of the ECHR’s derogation provision (Article 15) also exposes the inadequacies of the existential rationale. Article 15 of the ECHR allows a state party to derogate from certain treaty obligations in the event of a “public emergency threatening the

¹⁵¹ Justice Jackson first coined this phrase in his dissenting opinion in *Terminiello v. Chicago*, a 1949 Supreme Court case involving incitement to anger and the freedom of speech. Richard Posner applies the phrase to the modern context of international terrorism in his 2006 book *Not a Suicide Pact: The Constitution in a Time of National Emergency*.

life of the nation,” provided that such derogations do not exceed “the extent strictly required by the exigencies of the situation.” In the 2009 case *A and Others v. United Kingdom*, the European Court of Human Rights upheld the validity of the UK’s derogation proclamation, providing that “it falls to each Contracting State, with its responsibility for ‘the life of [its] nation,’ to determine whether that life is threatened by a ‘public emergency’ [...].”¹⁵² This outcome illustrates how the existential rationale may also suffer from failings on the opposite extreme of the decision in *Boumediene*—that its permissive language serves as an invitation for deference to executive and legislative authority. We have seen this same problem also in the Indian context, both in *Minerva Mills* and in *Bommai*, through the Supreme Court’s inability to challenge the executive’s “satisfaction” that an emergency exists. What all of these examples indicate is that the existential rationale for a state of emergency must be avoided because it runs a great risk of being, on the one hand, too restrictive to be useful, and on the other, too permissive to empower the courts to exercise judicial review.

In order to defend our model provision against the fatal flaws of the existential rationale, the qualifications for declaring a state of emergency must be both extraordinarily specific and extraordinarily diverse. In the Indian Constitution, we have seen an innovative approach in drafting which makes distinctions among three different types of emergencies: the national emergency (Article 352), the state emergency (Article 356), and the financial emergency (Article 360). This is a very good idea for a drafting model, but as we have seen, it did not go nearly far enough to be effective in practice. The best example of an emergency provision that expands

¹⁵² *Case of A. and Others v. United Kingdom* (Application no. 3455/05). European Court of Human Rights. 19 Feb. 2009.

this idea of specificity and differentiation to its most developed form is the Canadian Emergencies Act of 1988.¹⁵³

Canada's Emergencies Act provides for emergency declarations of four distinct varieties: public welfare emergencies (Part I), public order emergencies (Part II), international emergencies (Part III) and war emergencies (Part IV). Each part begins with a definition of the emergency type, and then proceeds to discuss in particular terms the corresponding orders and regulations, revocation and continuation procedure, consultation requirements, and the effects of expiration. For the sake of brevity, I will discuss only the definitions of each type of emergency, as my model will draw from other examples in order to satisfy the various procedural requirements. It is sufficient to say that the specificity and differentiation of emergency provisions is the aspect of the Canadian Emergencies Act that this proposal seeks to imitate.

Part I defines a public welfare emergency to address "real or imminent" natural disasters or other environmental phenomena including "(a) fire, flood, drought, storm, earthquake [...] (b) disease in human beings, animals or plants, or (c) accident or pollution." In order to be "so serious as to be a national emergency," it must satisfy the condition that it "results or may result in a danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources." This variety of emergency is useful because it allows for an exceptional government response to a natural disaster, but it avoids conflating such exceptions with those required by wars or other political crises, which are of a fundamentally different nature.

Part II defines a public order emergency as "an emergency that arises from threats to the security of Canada." This phrase "threats to the security of Canada" is clearly defined (in section 2 of the Canadian Security Intelligence Service Act)¹⁵⁴ to include espionage or sabotage; foreign

¹⁵³ Emergencies Act, RSC 1985, c 22 (4th Supp).

¹⁵⁴ Canadian Security Intelligence Service Act (R.S.C., 1985, c. C-23).

influenced activities that are clandestine or deceptive or threatening to any person; the threat or use of violence to achieve a political, religious or ideological objective; or unlawful covert acts aimed at a violent overthrow of the government. The provision expressly does not apply to “lawful advocacy, protest or dissent.” In the United States, this is the type of emergency that would be most suited to apply to the threat of international terrorism.

Part III defines an international emergency as “an emergency involving Canada and one or more other countries that arises from acts of intimidation or coercion or the real or imminent use of serious force or violence and that is so serious as to be a national emergency.” Part IV defines a war emergency (predictably) as a “war or other armed conflict, real or imminent, involving Canada or any of its allies that is so serious as to be a national emergency.” Considered in conjunction, these four varieties of emergency provide a wide range of specific government responses to particular types of exigencies. In the United States context, this level of specificity and differentiation in declarations of emergency will enable Congress and the Court to review the basis for an emergency declaration and decide whether, for the former body, it should be confirmed or renewed, and for the latter, constitutionally upheld.

The Canadian Emergencies Act is an excellent example of a model that effectively avoids the pitfalls of the existential rationale through specific and differentiated variations of emergency declarations. But there are many other useful models outlined in Chapter 2 that this proposal should aim to imitate or improve upon. We have seen that the international human rights treaties all include lists of *jus cogens*, peremptory rights which are protected under all circumstances, emergencies notwithstanding. This model was first conceived in the ECHR’s Article 15, and then expanded upon in Article 4 of the ICCPR and Article 27 of the ACHR. These provisions have inspired many signatory states to include non-derogable rights in their constitutions.

Article 37 of the 1996 South African Constitution provides an eminent example of how this model can be expanded to its fullest potential in defense of constitutional and human rights in a state of emergency.

In order for this model to be relevant in the United States context, of course, it must define derogation in terms of those rights which are expressly guaranteed by the United States Constitution. Borrowing from the language of the international human rights treaties, this model should allow for derogations from the rights protected by the Constitution in states of emergency “to the extent strictly required by the exigencies of the situation.” Of those expressly protected by the US Constitution, the following rights should be non-derogable in states of emergency: The Article I, Section 9 prohibition against bills of attainder and ex post facto laws; the First Amendment freedoms of religion, speech, press, assembly, and petition; the Eighth Amendment protection against cruel and unusual punishment; and the Fourteenth Amendment right to life and equal protection of the laws.

The final clause of this provision should borrow an item from the ACHR, which prohibits derogation from “the judicial guarantees essential for the protection of such rights.” This clause will serve not only to secure the fullest extent of judicial review in the protection of the non-derogable rights contained in this provision, but it will also open the door for many more rights to interpret their way into the *jus cogens* elite over time. The Supreme Court has already developed an extremely rich body of jurisprudence defining the many “penumbras” of those rights expressly provided for in the Constitution.¹⁵⁵ Through the application of precedent, this final clause will allow for justices to expand—but never erode—this list of non-derogable rights in states of emergency.

¹⁵⁵ This is a reference to the majority opinion of *Griswold v. Connecticut* (1965), a landmark Supreme Court case which identified the right to privacy as a “zone” defined by the overlapping “penumbras” of many other existing constitutional rights.

Recognizing that one of the most commonly abused derogation measures in states of emergency is arbitrary and indefinite detention, Article 37 § 6 of the South African Constitution enumerates a list of guarantees that must be provided for any person detained without trial under a declaration of emergency. This list includes the right to legal representation and access to a written justification from the government for the detention. These guarantees would prove extraordinarily useful in the American context as stipulated conditions for the suspension of habeas corpus and other procedural due process rights, which are very vulnerable to abuse. With adequate legal representation and a written statement from the government, the hope is that a detainee will be able to bring his or her case to court and seek remedies after the emergency expires. The significance of this provision is further magnified by the idea—developed by the Indian Supreme Court in *Pathak*—that judicial review ought to have a retroactive reach into measures taken in a state of emergency after the emergency expires.¹⁵⁶ A statement of this important judicial paradigm will be incorporated into the model amendment in the following language: “Any case arising after the expiration of a state of emergency in reference to measures taken during a state of emergency shall be considered under the full effect of the provisions in this Constitution.” This provision will be contained in the third section, defining the role of judicial review in states of emergency.

I have drawn the analogy that India’s *Korematsu* was Indira’s Emergency. This model draws many lessons, therefore, from the post-Emergency judicial activism of the Indian Supreme Court in the late 1970s. The Court in that period sought to secure its role as guardian of the state of emergency, proclaiming the necessity for judicial review to protect the Constitution’s emergency provisions against governmental abuse. The resounding lesson of India, which post-apartheid South Africa apparently heard, is that the institution of judicial review over all aspects

¹⁵⁶ *Madan Mohan Pathak vs. Union of India & Ors. Etc* (1978 AIR 803, 1978 SCR (3) 334).

of an emergency should be expressed in the language of the provision itself, so that the courts will have no question as to whether they should exercise this power to abrogate abuse. For this section, my model will turn again to the South African Constitution, adopting the crucial language of Article 37 § 3: “Any competent court may decide on the validity of (a) a declaration of a state of emergency; (b) any extension of a declaration of a state of emergency; or (c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.”

The final building block of my proposal is a concept that was vaguely inspired by the South African model for legislative control, but vastly expanded upon by legal theorist Bruce Ackerman: the supermajoritarian escalator. The greatest failure of the world’s emergency provisions, which has made them prone to abuse, is the absence of a sufficiently strong procedure for termination, allowing for a normalization of the state of exception. This is precisely the phenomenon that this project seeks to eradicate. My proposal, therefore, would be fruitless if it failed to include the supermajoritarian escalator, which ensures that the constitutional state of emergency is brought to an end through a natural democratic process.

Ackerman’s model provides the President with an extremely limited time frame in which he can act unilaterally to declare a state of emergency before it must be confirmed by a simple majority in the legislature—one week if Congress is already in session, and two weeks if it is not. Once the declaration has been confirmed, it will last for two months, and then it must be reviewed for continuation. Continuation requires “an escalating cascade of supermajorities,” beginning with 60% for the next two months, then 70%, and then 80% for each subsequent two month period.¹⁵⁷ This institutional design allows for prolonged emergencies, but only if the political consensus is that continuation of the emergency is absolutely necessary. As Ackerman

¹⁵⁷ Ackerman (2006), 80.

observes, “Modern pluralistic societies are simply too fragmented to sustain such broad levels of support—unless, of course, the terrorists succeed in striking repeatedly with devastating effect.”¹⁵⁸ Even for emergencies that do not involve terrorism per se, it seems prudent for an institutional structure to provide increasingly small minorities with the power to veto the emergency’s continuation. For this reason, the supermajoritarian escalator must be included as a foundational component of an emergency provision in the United States Constitution.

The item below, with the heading AMENDMENT XXVIII, is my model for the 28th Amendment to the United States Constitution. It is perfectly possible to quibble endlessly about the details of this provision, but such discussion would exceed both the scope and the length of this project. This project presents this proposal with the express intention of including the kitchen sink. The object of this exercise is to include every mechanism that would prove useful in protecting civil liberties and preserving the integrity of the Constitution in times of crisis. Negotiations, if they ever do occur, should begin here and whittle their way down to an acceptable compromise.

¹⁵⁸ *Ibid*, p. 81.

Amendment XXVIII

Section 1. Declaration of Emergency

- a. A state of emergency may be declared by the President or by an act of Congress under one of the following four categories:
 - i. A public welfare emergency, caused by a real or imminent natural disasters or other environmental phenomena including (a) fire, flood, drought, storm, earthquake (b) disease in human beings, animals or plants, or (c) accident or pollution, which results or may result in a danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources.
 - ii. A public order emergency, arising from threats to the security of the United States such as espionage or sabotage; foreign influenced activities that are clandestine or deceptive or threatening to any person; the threat or use of violence to achieve a political, religious or ideological objective; or unlawful covert acts aimed at a violent overthrow of the government. A public order emergency cannot be declared in response to lawful advocacy, protest, or dissent.
 - iii. An international emergency, involving the United States and one or more other countries that arises from acts of intimidation or coercion or the real or imminent use of serious force or violence and that is so serious as to be a national emergency.
 - iv. A war emergency, arising from a war or other armed conflict, real or imminent, involving the United States or any of its allies that is so serious as to be a national emergency.

Section 2. Confirmation, Continuation and Expiration

- a. A presidential declaration of emergency must be confirmed by a simple majority in both houses of Congress within 7 days, if both houses are already in session, or 14 days, if they are not yet convened at the time of declaration.
- b. A congressional declaration of emergency must be passed by a simple majority in both houses of Congress.
- c. A state of emergency will expire two months after the confirmation by the last house of Congress. Congress may vote to continue a state of emergency for no more than two months at a time. The first continuation must be confirmed by a supporting vote of 60% of the members of each house of Congress. The second continuation must be confirmed by a supporting vote of 70% of the members of each house of Congress. Any subsequent extension must be confirmed by a supporting vote of 80% of the members of each house of Congress.

Section 3. Judicial Review

- a. Any competent court may decide on the validity of
 - i. a declaration of a state of emergency;
 - ii. any continuation of a declaration of a state of emergency; or
 - iii. any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.
- b. Any case arising after the expiration of a state of emergency in reference to measures taken during a state of emergency shall be considered under the full effect of the provisions in this Constitution.

Section 4. Derogations

- a. Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the rights protected in this Constitution only to the extent strictly required by the exigencies of the situation.
- b. The foregoing provision does not authorize any derogation from the Article I, Section 9 prohibition against bills of attainder and ex post facto laws; the First Amendment freedoms of religion, speech, press, assembly, and petition; the Eighth Amendment protection against cruel and unusual punishment; the Fourteenth Amendment right to life and equal protection of the laws; or of the judicial guarantees essential for the protection of such rights.
- c. Any citizen detained without trial under a declaration of emergency shall be guaranteed the right to legal counsel and access to a written justification by the state for detention.

The Importance of Judicial Review

In the conception of this project, I have borrowed a substantial amount of wisdom from Bruce Ackerman, who has written extensively on the subject of a constitutional state of emergency in the United States. However, my proposal diverges from Ackerman's on two significant counts: The first, as an earlier subsection of this chapter has made clear, is that I disagree with his decision to reject the idea of a formal constitutional amendment in favor of the more practical (but far more problematic) "framework statute." The second significant point of divergence this project takes from Ackerman's proposal is in reference to the role of the judiciary as the primary guardian of civil liberties, which is the subject of this subsection.

David Cole, a law professor at Georgetown, is one of the most vocal critics of Ackerman's proposal for an "emergency constitution." In an article entitled "The Priority of Morality: The Emergency Constitution's Blind Spot," Cole criticizes Ackerman for offering the supermajoritarian escalator as a "magic bullet" that will cure the state of emergency of its (allegedly) pathological desire for judicial review.¹⁵⁹ He argues that one of Ackerman's faulty premises can be found in "his underestimation of courts and overestimation of legislatures as guardians of liberty."¹⁶⁰ Cole believes that the judiciary—in spite of its failings—is the only branch of government that can truly be trusted with the task of defending civil liberties in states of emergency. Playfully paraphrasing Winston Churchill's famous quote on democracy,¹⁶¹ he claims that "judicial review is the worst protector of liberty in times of crisis, with the exception

¹⁵⁹ Cole, David. "The Priority of Morality: The Emergency Constitution's Blind Spot." *The Yale Law Journal* 113.8 (Jun., 2004): 1757. *JSTOR*. Web. 5 Apr. 2013.

¹⁶⁰ *Ibid.*, 1758.

¹⁶¹ In a House of Commons speech on Nov. 11, 1947, Churchill memorably mentioned that "democracy is the worst form of government, except for all those other forms that have been tried from time to time."

of all the others.”¹⁶² From this standpoint, Cole rejects Ackerman’s idea for legislative control over states of emergency, disposing of the entire emergency constitution along with it.

My proposal suggests, however, that Cole’s counterargument may have thrown the baby out with the bathwater. Ackerman proposes his emergency framework statute in the form of a supermajoritarian escalator, in part, so that the judiciary does not need to be relied upon as a check to executive power. He writes, “When working smoothly, the framework statute shouldn’t require aggressive management by the courts [...]”¹⁶³ In Ackerman’s view, the legislative control established by the supermajoritarian escalator would be a more effective and reliable check on executive power in a state of emergency than judicial review. I am proposing the emergency constitution (supermajoritarian escalator included) for the exact opposite reason. I am proposing the emergency constitution so that courts *can* be relied upon as a check to executive and legislative power in times of crisis. The many failings of the judiciary in crises past have occurred largely in consequence of the Constitution’s conspicuous silence on matters of emergency and exception. With no appropriate constitutional avenues for addressing exigent circumstances, judges have been prone to deference, allowing for ever-widening jurisprudential gaps in the protection of constitutional rights. If the amendment proposed in this project were to be adopted as part of the US Constitution, it would immediately become the basis for judicial review in times of crisis. This model amendment is intended, above all, to serve as a judicial instrument that will allow the courts to govern the state of exception in constitutional law.

Ackerman expresses the common concern that the courts should not be relied upon to make these types of decisions because their process is undemocratic. He writes that we should “leave it to elected politicians, not judges” to decide which circumstances will require

¹⁶² Cole (2004), 2568.

¹⁶³ Ackerman (2006), 133.

derogations from constitutional rights. However, the fact that judges are not democratically accountable to the general public is not nearly as worrisome for me as it is for Ackerman. Actually, I view it as an advantage. The fact that judges are unelected means that they are accountable only to the Constitution, and there is nothing politically profitable that they stand to gain from stirring the passions of public panic. The veil that protects judicial decision making from the pressures of public opinion makes it the perfect branch of government to exercise control over states of emergency.

History shows us, furthermore, that the courts are quite capable of exerting a constraining power over the other branches of government in states of emergency by way of judicial review. For as many cases as we can encounter exposing the disastrous effects of judicial deference during periods of crisis in the United States, there are at least as many decisions that have demonstrated the profound power which the courts can wield in limiting legislative and executive power within the confines of the Constitution. The famed Civil War habeas case *Ex parte Milligan* was one such decision. The *Milligan* majority, as we saw in Chapter 1, expressed its firm belief that there are no permissible exceptions whatsoever to constitutional provisions in times of national crisis. The decision reads, “The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.”¹⁶⁴

The effect of *Milligan*, apart from setting a precedent for future cases involving habeas corpus and the Suspension Clause, was to define the power relationship between the President and Congress in their respective responses to the extant emergency. In its judgment, the Court upheld a recent act of legislation that expressly guaranteed habeas corpus to civilian residents in Indiana, a category which included Lambdin P. Milligan. In doing so, the *Milligan* decision

¹⁶⁴ *Ex parte Milligan*, 71 U.S. 2. (1866).

simultaneously rejected Lincoln's invocation of his Presidential powers as commander-in-chief to unilaterally suspend the writ. This holding clearly defined the limits of presidential power, requiring that the President defer to the authority of Congress on matters of military detention and martial law.

Milligan is not the only decision to have boldly defined the scope of Presidential power in states of emergency vis-à-vis Congress and the courts. Special attention should be paid to a case arising out of the exigencies of the Korean War called *Youngstown Sheet & Tube v. Sawyer* (1952), commonly referred to as the Steel Seizure Case. In view of a threatened strike by the United Steel Workers labor union due to the federal government's failed attempts to stifle wage inflation, the Truman Administration responded by seizing the production facilities of all major steel producers in the United States. Its justification for the seizure was that a strike would weaken the domestic economy and disastrously hinder the war efforts abroad. The Court acted decisively, as it did in *Milligan*, to uphold an act of legislation which expressly prohibited government seizure in response to a strike (the National Labor Relations Act).¹⁶⁵ In doing so, it reinforced executive accountability to legislative acts during states of emergency.

Justice Jackson's concurring opinion in the Steel Seizure Case is one of the most cited and significant assessments of executive power in US constitutional law. Jackson sets up a structured measurement of presidential power as a function of three specified tiers of congressional support. First, Jackson provides that the President's power is at its peak when he "acts pursuant to an express or implied authorization of Congress."¹⁶⁶ Second, when Congress is silent on the activity in question, i.e. "in absence of either a congressional grant or denial of authority," Jackson claims that the President "can only rely upon his own independent

¹⁶⁵ Ackerman (2006), 138.

¹⁶⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), p. 635.

powers.”¹⁶⁷ Upon this formula, the Steel Seizure Case falls into a third category, where presidential power “at its lowest ebb,” since President Truman had taken measures that were “incompatible with the expressed or implied will of Congress.”¹⁶⁸ At this level, a president “can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter,”¹⁶⁹ which left President Truman, in the eyes of the Court, with hardly a leg to stand on.

The significance of the Steel Seizure decision in the context of this discussion is to illustrate that the Court can—and has—played a pivotal role in appropriating, in the words of Justice Jackson, “the balanced power structure of our Republic.”¹⁷⁰ This project presupposes that the proper function of the judiciary in states of emergency is to act as the superego to the baser desires of the other two branches of government in their response to exigent circumstances. In assuming this supervisory role, the courts should follow the examples of *Milligan* and the Steel Seizure decision, both of which asserted the power of judicial review to strike a constitutionally appropriate balance between executive and legislative power in states of emergency. Justice Jackson wrote that the Steel Seizure decision was aimed at preserving the power “equilibrium established by our constitutional system.”¹⁷¹ The purpose of the model amendment proposed in this project is to redefine this “equilibrium” in terms that are unmistakably clear, in order to permanently establish the crucial role of the courts as the primary arbiters of constitutional authority in states of emergency.

When the constitution is silent on states of exception, judges will have often have no other option but to remain deferential. Continued judicial deference to the executive and the

¹⁶⁷ *Ibid.*, 637.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*, 634.

¹⁷¹ *Ibid.*, 637.

legislature in times of crisis can lead to a precedential snowball effect that permanently erodes our constitutional rights in the long term. The only way to effectively avoid this problem is to adopt a constitutional emergency provision that clearly distinguishes the exception from the norm and empowers justices to use judicial review in order to preserve the “equilibrium” which it establishes. The constitutional amendment proposed in this project aims to satisfy both of those conditions. If it, or some similar model, were ever to be adopted into our constitutional framework, it would greatly enhance the security of American citizens—both in our constitutional rights and our faith in government to effectively respond to a public emergency.

Conclusion

Terror strikes. Smoke rises, sirens blare, and commentators clamor at us through our computers and our television screens. The news media, blogosphere, and politicians all become prisoners of war—detained indefinitely by fear, rhetoric, and unanswered questions. Who is responsible? Why did they do it? Who or what is to blame for this terrible tragedy? An ethnic group? A nationality? An ideology? A religion? How must we respond—swiftly and sweepingly—to secure ourselves against a second attack? How will we, the victims, unite against the evil that has become our new common enemy? How can we demonstrate to the world and to ourselves that our strength as a nation endures—that we will not tacitly permit terror to permeate our social order?

Amid all of this panic and uncertainty, the government feels great pressure to respond with exceptional fervor and force. As recent history proves, panic can be very good for politics. After September 11th, the Bush Administration profited greatly from the regime of rhetoric it employed to stir the passions of public panic. It claimed that the entire world order had been altered by the attacks, and therefore our old legal paradigms (e.g., those prohibiting torture and indefinite detention) were no longer applicable—at least not to terror suspects. President Bush declared a “war on terror,” which allegedly gave him license to invoke the full extent of his powers as commander-in-chief. Through its rhetoric, the administration made a point of inciting “war fever,” while at the same time asserting that the war would never end—that terror had become the new normal.¹⁷² The basic assumption upon which this rhetorical strategy rests is the notion that extraordinary times call for extraordinary measures. On such grounds, a cynic might argue that the “exceptional” circumstances which have arisen from the threat of international terrorism are only exceptional because political rhetoric has made them so.

¹⁷² Stone, 535.

Perhaps the problem, then, is politics. Perhaps the Constitution, as it stands, is perfectly suited to promote security and to secure liberty in times of crisis, provided that we, as a nation, are able to withstand the Sirens of political rhetoric and remain firmly tied to the mast, steadfast in our principles. Perhaps. The flaw in that position, however, is that it requires us all to retain our right-mindedness and skepticism and rationality amid the pandemic contagions of panic and fear. It demands that our politicians firmly refuse to bypass the arduous process of deliberation, quite possibly at the expense of a speedy response. But in a state of emergency, deliberation is often the first thing we forfeit.

In her recent book *Thinking in an Emergency*, social theorist Elaine Scarry recalls the Aesop fable about a young boy who is drowning and shouts to a nearby huntsman for help. Disapproving of the boy's rashness, the huntsman begins to lecture him. The boy cries out, "No. Save me now. Lecture me later."¹⁷³ Scarry argues that we are faced, in a state of emergency, with a strong seduction to stop thinking. The emergency requires the government to act quickly, and therefore (as the argument goes) the deliberative process must be abandoned because it is slow. According to Aristotle, however, deliberation "has no other function than precisely to *enable* the taking of actions."¹⁷⁴ Thus, "the call to suspend thinking," writes Scarry, "is precisely a call to suspend governance."¹⁷⁵ And yet, when civil libertarians voice their concerns about the constitutionality of measures taken by the government in response to a crisis, the overwhelming public sentiment tends to be: "No. Save me now. Lecture me later."

The constitutional model that I have proposed in this project is not a magic bullet. It does not—and cannot—promise to formally end abuses of government power in states of emergency. It does not pretend to carry the cure for arbitrary violations of constitutional and human rights in

¹⁷³ Scarry, Elaine. *Thinking in an Emergency*. New York: W.W. Norton &, 2011. Print, 9.

¹⁷⁴ *Ibid.*, 8. (emphasis added)

¹⁷⁵ *Ibid.*

the name of national security and the preservation of public order. What it can do, however, is offer a level of institutional guidance in addressing the sociological problems underlying our current system of emergency jurisprudence and governance. Most pertinently, the emergency constitution provides a direct avenue for deliberation in the context of a crisis. Under the 28th Amendment, the balance of power in the deliberative process surrounding a state of emergency is clearly defined: The President decides when it is necessary; Congress decides when it has gone too long, and the Court decides when it has gone too far. At every stage, the emergency constitution would demand rationality and deliberation through a strict separation of powers. Moreover—and particularly on the part of the judiciary—the type of deliberation it demands is the kind that would enable and encourage governmental action.

This paper takes the position (controversial though it may be) that the courts should be the carriers of our country's moral compass. In defining the terms of the exception explicitly within the language of the rule, the emergency constitution encourages judges to take on the full measure of this responsibility. The United States context has demonstrated time and again that law without exception is an invitation to lawlessness. Anticipating that extraordinary circumstances will inevitably arise alongside clamor for extraordinary reactionary measures, our Constitution must contain (i.e. include) them in order to contain (i.e. restrict) them.

The most critical component of the proposed amendment, in this regard, is Section 3—Judicial Review. The language of this section enables and encourages the courts to decide on the constitutionality of any declaration or continuation of a state of emergency and any legislation passed or executive action taken in consequence of the emergency. Not only does this provision ensure that the limitations contained in the amendment are enforced, but it also compels the courts to erect a clear barrier of separation between normal and exceptional jurisprudence.

Such separation is the primary function of the emergency constitution. My proposal, therein, echoes Giorgio Agamben's claim that the greatest danger in a state of emergency is the normalization of the exception. The common law alone—in the absence of a constitutional state of emergency—is extremely vulnerable to the incremental incorporation of exceptional and pernicious precedents into the domain of normal jurisprudence. The most appropriate way to prevent this from occurring, as I have argued, is to create a constitution which compels judges to distinguish between ordinary and extraordinary judgments. As cases and controversies arise, the hope is that a constitutionally restricted state of emergency will coincide with a comparably restrictive emergency jurisprudence.

I have denied the allegation that the constitutional state of emergency is a magic bullet. It would serve this project well, I think, to deny it again, and even more emphatically. There are virtually limitless varieties of rights violations that can occur even in the presence of a constitutionally limited state of emergency. Let us consider the Indian context as a salient example: Sanjib Baruah calls our attention to the Indian Armed Forces Special Powers Act (AFSPA) of 1958, a piece of legislation—unassociated with any declaration of emergency—which empowers the military to take very exceptional measures in regions that are deemed to be “disturbed.” This act of legislation “empowers the armed forces to make preventive arrests, to search premises without warrant, and to shoot and kill civilians. It also provides significant legal immunity to soldiers charged with misusing those powers [...]”¹⁷⁶ The AFSPA legalizes such violations without invoking the emergency provisions in the Indian Constitution, making it immune to the jurisprudential doctrines designed to limit declared states of emergency.

¹⁷⁶ Baruah, Sanjib. “Routine Emergencies: India's Armed Forces Special Powers Act.” *Sovereignty and Citizenship: Ethnographic and Political Economy Perspectives on Civil War in South Asia* (2013, forthcoming): Oxford UP, India and Georgetown UP, USA. Print, 1.

The innumerable human rights violations that have occurred in India under the auspices of the AFSPA illustrate that the existence of emergency provisions in the Indian Constitution has not prevented extraconstitutional activity in the absence of a formal declaration. In fact, as Baruah points out, the Indian government has a greater incentive *not* to invoke the Constitution's emergency powers to justify the AFSPA in order to keep the law from falling under the jurisdiction of the ICCPR's Article 4, which would invite stricter scrutiny from UN human rights institutions.¹⁷⁷ Still, the fact that the US Constitution lacks emergency provisions means that *all* of our government's 'extraordinary' activities are analogous to the AFSPA, in the sense that they are undeclared and therefore do not necessarily demand extraordinary levels of scrutiny by the concerned public and the courts.

Nevertheless, plenty of room remains within the realm of political possibility for uncontained violations of constitutional rights even in the presence of the proposed amendment. This project would benefit, therefore, by carving a clear line of distinction between the emergency room physician and the epidemiologist.¹⁷⁸ In the E.R., it is a doctor's duty to treat the ailments of every individual patient who comes through the door. The object of the epidemiologist, however, is a categorically different one: to contain the spread of an endemic and preserve the public health. Upon this analogy, my proposal aligns more closely with the concerns of the epidemiologist than those of the E.R. doctor. In that vein, this project espouses a form of "lesser evil morality"—to borrow a phrase from Michael Ignatieff.¹⁷⁹ It concedes to the possibility that eliminating political excesses and rights violations entirely in the wake of a crisis is an unattainable ideal. Instead, the object of the emergency amendment is to curtail the exorbitance of government in states of emergency by reinforcing the separation of powers,

¹⁷⁷ *Ibid.*, 6.

¹⁷⁸ Credit is due to Peter Rosenblum, who recommended that I frame the analogy in these terms.

¹⁷⁹ Ignatieff, Michael. *The Lesser Evil: Political Ethics in an Age of Terror*. Princeton: Princeton UP, 2004. Print.

encouraging deliberation, and demanding strict discrimination between the exception and the norm.

In short, the health of the body politic is at risk. As exceptional claims continue to infect the rhetoric of political discourse surrounding the threat of international terrorism, the preservation of American constitutionalism demands an epidemiological approach. The model amendment proposed in this project is designed to contain the spread of extraconstitutional government activities by confining them within a concrete constitutional quarantine. But even the most ingenious institutional design can only impact our society to the extent that we are willing to embrace it, both in letter and in spirit. True restraint can only come from a combination of honest and ethical political leadership, a perceptive and mindful press, and an informed citizenry that has the wisdom and courage to speak out against abuses of power, in the interest of preserving our coveted constitutional liberties. In the words of Justice Holmes, our society must remain “eternally vigilant” if we are to properly contain the excesses of government.¹⁸⁰

¹⁸⁰ *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, dissent).

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