

THE NORMLESS AND EXCEPTIONLESS EXCEPTION: CARL SCHMITT'S THEORY OF EMERGENCY POWERS AND THE "NORM- EXCEPTION" DICHOTOMY

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Should we say that a correct application is that which takes place under normal conditions? Notice that, in one sense of normal, we may always have been under abnormal conditions. Suppose for the past two hundred million years the earth has been in the beam of an intergalactic spaceship, which leaves next week. If intentional interference with the way things otherwise would have been makes things nonnormal, then only after the spaceship leaves will we discover what normal conditions are. Perhaps we should understand the appropriate (or normal) conditions as those like the ones we now are under.¹

Please do not be alarmed . . . we will be restoring normality just as soon as we are sure what is normal anyway.²

INTRODUCTION

The recent revival of interest in the life and work of Carl Schmitt,³

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¹ ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 676 (1981).

² DOUGLAS ADAMS, *THE HITCHHIKER'S GUIDE TO THE GALAXY* (1979), reprinted in *THE MORE THAN COMPLETE HITCHHIKER'S GUIDE* 58 (1986).

³ Recent book-long studies published in English include RENATO CRISTI, *CARL SCHMITT AND AUTHORITARIAN LIBERALISM: STRONG STATE, FREE ECONOMY* (1998); DAVID DYZENHAUS, *LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR* (1997); *LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM* (David Dyzenhaus ed., 1998) [hereinafter *LAW AS POLITICS*]; JOHN P. MCCORMICK, *CARL SCHMITT'S CRITIQUE OF LIBERALISM: AGAINST POLITICS AS TECHNOLOGY* (1997); HEINRICH

the most prominent legal scholar and political thinker to lend his active support to the Nazi regime,⁴ has raised heated debates between his friends and foes.⁵ The crux of much of the debate concerns such questions as whether Schmitt sought to facilitate the destruction of liberalism and democracy, or merely attempted to point out their weaknesses and defects as a way of warning and calling for action to prevent the demise of the Weimar Republic and its constitution.⁶ The debate also revolves around the nature of the relationship between Schmitt's pre- and post-Nazi writings; namely, whether Schmitt's enthusiastic endorsement of National Socialism was the result of his opportunism and corrupt moral character, the logical outcome of his pre-Nazi writings and intellectual work,⁷ or an undesired, yet necessary, mechanism for self-preservation.⁸ On both counts I side with Schmitt's foes.

The focus of this paper is Schmitt's theory of emergency powers. Schmitt is unquestionably "the outstanding legal theorist of the *notion of exception*."⁹ The concept of "the exception" (*Ausnahmezustand*)

MEIER, FOUR CHAPTERS ON THE DISTINCTION BETWEEN SCHMITT, POLITICAL THEOLOGY AND POLITICAL PHILOSOPHY (Marcus Brainard trans., 1998); WILLIAM E. SCHEUERMAN, CARL SCHMITT: THE END OF LAW (1999); THE CHALLENGE OF CARL SCHMITT (Chantal Mouffe ed., 1999). In recent years, several conferences focusing on Carl Schmitt and his scholarship have been held all over the world. See, e.g., HANS KELSEN AND CARL SCHMITT: A JUXTAPOSITION (Dan Diner & Michael Stolleis eds., 1999) [hereinafter KELSEN AND SCHMITT]; LAW AS POLITICS, *supra*.

4 See MICHAEL STOLLEIS, THE LAW UNDER THE SWASTIKA: STUDIES ON LEGAL HISTORY IN NAZI GERMANY 97 (Thomas Dunlap trans., 1998). For biographical information about Schmitt, see, for example, JOSEPH W. BENDERSKY, CARL SCHMITT: THEORIST FOR THE REICH (1983); GEORGE SCHWAB, THE CHALLENGE OF THE EXCEPTION: AN INTRODUCTION TO THE POLITICAL IDEAS OF CARL SCHMITT BETWEEN 1921 AND 1936 (2d ed. 1989); and Manfred H. Wiegandt, *The Alleged Unaccountability of the Academic: A Biographical Sketch of Carl Schmitt*, 16 CARDOZO L. REV. 1569 (1995).

5 See, e.g., Jeffrey Herf et al., *Reading and Misreading Schmitt: An Exchange*, 74 TELOS 133 (1987-88); Bill Scheuerman, *Carl Schmitt and the Nazis*, 23 GERMAN POLITICS & SOC'Y 71 (1991); George Schwab, *Carl Schmitt Hysteria in the U.S.: The Case of Bill Scheuerman*, 91 TELOS 99 (1992).

6 See, e.g., Carlo Galli, *Carl Schmitt's Antiliberalism: Its Theoretical and Historical Sources and Its Philosophical and Political Meaning*, 21 CARDOZO L. REV. 1597 (2000) (explaining Schmitt's goal to save the democratic side of the Weimar Constitution).

7 See, e.g., Ingeborg Maus, *The 1933 "Break" in Carl Schmitt's Theory*, 10 CANADIAN J.L. & JURISPRUDENCE 125 (1997); William E. Scheuerman, *After Legal Indeterminacy: Carl Schmitt and the National Socialist Legal Order, 1933-1936*, 19 CARDOZO L. REV. 1743, 1744 (1998).

8 See BENDERSKY, *supra* note 4, at 202-14.

9 KELSEN AND SCHMITT, *supra* note 3, at 10; see also Volker Neumann, *Carl Schmitt: Introduction*, in WEIMAR: A JURISPRUDENCE OF CRISIS (Arthur J. Jacobson & Bernhard Schlink eds., forthcoming 2000) ("Schmitt's interest focused on the irregular and pathological characteristics of law and reality. No other Weimar state-law theory so deserves the label, 'jurisprudence of crisis.'").

plays a central role in Schmitt's constitutional and political theorizing.¹⁰ Schmitt's main weapon in his attack on liberalism is the inevitable existence of the exception. The exception is comprised of sudden, urgent, usually unforeseen events or situations that require immediate action, often without time for prior reflection and consideration—i.e., without allowing for preplanned responses.¹¹ According to Schmitt, the existence of exceptional situations refutes the formal face of legal liberalism, which argues that pre-established general norms cover and apply to all possible situations.¹² The need to decide the exceptional, concrete situation per force catapults the judge into the role of a law-maker. His or her decision, which creates new law, is not, as such, dictated by preexisting "objective," general norms. The need to decide the exceptional, concrete situation also emphasizes the central role of the political decision-makers who have to decide how to deal with the exception on a case-by-case basis. Thus, the exception requires concrete decisions that are not, and cannot be, constrained or guided by any sort of a priori rules. The critical role assigned by Schmitt to the theory of the exception therefore merits a careful and close scrutiny. As this article shows, Schmitt's theory of the exception cannot withstand an internal critique of its arguments, and is normatively unsound.

Despite its shortcomings, Schmitt's insights concerning the exception are not only relevant to an attempt to understand Schmitt's theory in its own particular context and time,¹³ but are also highly

¹⁰ See Kelsen & Schmitt, *supra* note 3, at 10; see also Galli, *supra* note 6, at 1605. According to Galli:

The origin of modern politics, in Schmitt's opinion, rests on contingency, on exception, on conflict; no individual subject, no political institution, no rational thinking, can ever overcome this fact [T]he origin of political order is the exception itself, not the transcendence (this is the main difference between Schmitt and political Catholicism) nor the individual (this is the main difference between Schmitt and liberalism).

Id.

¹¹ See, e.g., John P. McCormick, *Schmittian Positions on Law and Politics?: CLS and Derrida*, 21 *CARDOZO L. REV.* 1693 (2000).

¹² Schmitt's theory of the exception, as well as his general jurisprudential approach, was a rejection of the neo-Kantian, formalist, and positivist jurisprudence of Hans Kelsen. See, e.g., David Dyzenhaus, "Now the Machine Runs Itself": *Carl Schmitt on Hobbes and Kelsen*, 16 *CARDOZO L. REV.* 1, 10-14 (1994); Neumann, *supra* note 9, at 462 ("Opposition, even hostility to Hans Kelsen is a key to all of Schmitt's works."). This theory also rejects Kelsen's belief that a legal norm could be devised so as to regulate all different aspects of reality and his concomitant refusal to acknowledge the existence of states of exception that could not be regulated by a priori established legal norms. See *id.*

¹³ See Galli, *supra* note 6, at 1615. Galli suggests that:

[W]e have to learn to understand [Schmitt] in the frame of his theoretical and historical context The whole horizon of Schmitt's criticism is the concrete experience of the crisis of liberalism and parliamentarism in Germany Scholars who want to criticize Schmitt's antiliberalism must remember that liberalism and its institutions were not obvious in European political culture in the first half of the twentieth century.

significant and instructive today. His claim that liberalism has traditionally failed to account for the phenomenon of emergency, despite the centrality of that phenomenon in the real world, on one hand, and his attempt to turn the spotlight to exceptional situations—i.e., crises and emergencies—on the other, should not be rejected offhand, but rather taken seriously. However, as this article shows, while Schmitt correctly describes systemic failures in the traditional modes of thinking about emergencies, he fails to offer adequate, normative proposals to overcome these failures.

From a normative perspective, Schmitt's theory, simply put, is indefensible.¹⁴ In this article, I engage in an internal evaluation of his theory of the exception. Such a critique—taking Schmitt's own goals, parameters, and criteria as our reference point—drives substantial holes into his theoretical corpus. For all the rhetoric of Schmitt and his disciples and defenders, his theory proves to be a crude version of nihilism. Yet, this approach is hidden behind the veneer of overt aspiration to legal determinacy¹⁵ and to substantive, semireligious content of the legal order.¹⁶ Among other things, Schmitt challenges liberalism for being negligent, if not outright deceitful, in disregarding the state of exception, and in pretending that the legal universe is governed by a complete, comprehensive, and exceptionless normative order.¹⁷ Following the guidance of the natural sciences—which, according to Schmitt, do not recognize the possibility of exceptions in the natural world—liberalism presents us with a legal world view that is based on universalism, generalities, and utopian normativeness, without allowing for the possibility of exceptions. Against liberalism's intellectual dishonesty, Schmitt offers an alternative that is allegedly candid and transparent. However, Schmitt's project does not comply with his own yardsticks of legitimacy. His theory falls prey to the very same basic challenge which he puts to liberalism. Schmitt's rhetoric of

Id.

¹⁴ It ought to be noted, as shown in Part I, *infra*, that one should not speak of any single, unified, coherent, and complete Schmittian theory regarding the question of the exception. As Schmitt's own position undergoes a substantial shift in the early 1920s, the best that can be done is to distinguish between the earlier and later Schmitt. The watershed point is to be found in Schmitt's single most significant writing on the issue of the exception, entitled *Political Theology: Four Chapters on the Concept of Sovereignty*, which was first published in 1922.

¹⁵ See Scheuerman, *supra* note 7, at 1744 (“[F]or Schmitt, a central problem of modern legal theory is the enigma of legal indeterminacy Schmitt sides with the Nazis because he sees them as offering a real chance for developing a novel legal system able to ‘solve’ the dilemma of legal indeterminacy.”); see also *infra* notes 128-36 and accompanying text.

¹⁶ See, e.g., Raphael Gross, *Jewish Law and Christian Grace: Carl Schmitt's Critique of Hans Kelsen*, in Kelsen & Schmitt, *supra* note 3, at 101; Meier, *supra* note 3, at xii-xix.

¹⁷ See McCormick, *supra* note 3, at 124-29, 148-52.

norm and exception does not adequately reflect the real thrust of his theory, which calls for the complete destruction of the normal by the exception. Taken to its logical extreme, Schmitt's intellectual work, especially as reflected in his *Political Theology*¹⁸ and *The Concept of the Political*,¹⁹ forms the basis not only for a normless exception, but also for an authoritarian exceptionless exception. Part I of this article focuses on these themes.

As a normative project, Schmitt's theory of the exception and emergency powers has little to commend for it. However, despite the prescriptive failures of Schmitt's theory, it is quite instructive from a descriptive point of view. The relationship between the normal and the exceptional cases, as suggested and analyzed by Schmitt, has a certain merit to it, as a depiction of actual reality in Weimar Germany and in other modern democracies at that time. Moreover, seen from this perspective, Schmitt's discourse of emergencies and emergency powers may be an important lesson even in today's world. There is a clear distinction "between the normative ills of Schmitt's decisionist theory and what it sometimes implicitly tells us about the sad state of twentieth-century politics."²⁰ Part II of this article shows that Schmitt's most important continuing contributions in the area of emergency powers are twofold.

First is his deviation from the traditional discourse concerning emergencies. The traditional discourse, dating as far back as the Roman republic, regards the issue of emergencies through a dichotomized world view in which the normal case, the ordinary state of affairs, is separated and clearly distinguished from the exceptional case—i.e., the state of emergency. Moreover, this classical mode of thinking about emergencies has considered such phenomena to be sporadic, temporary, and exceptional against the background of an otherwise uninterrupted normalcy. Schmitt calls into question this approach by reversing the relationship between the normal and the exceptional cases. This alternative view, when disconnected from Schmitt's normative solution to the problem of emergencies and viewed as an empirical, descriptive exercise, is quite instructive.

The other major contribution of Schmitt's intellectual work, closely related to the first one, is found in the fact that he dedicated so

18 CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., MIT Press 1985) (1922) [hereinafter SCHMITT, *POLITICAL THEOLOGY*].

19 CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab trans., 1976) [hereinafter SCHMITT, *THE CONCEPT OF THE POLITICAL*].

20 WILLIAM E. SCHEUERMAN, *BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW* 14 (1994).

much attention to, and brought to center stage, an otherwise neglected area of legal and political study—namely, emergencies and emergency powers.²¹ Crisis and emergency had not been sporadic episodes in the lives of many nations when Schmitt was writing his major works. Nor have they become such episodes in the lives of nations since. They are increasingly becoming a permanent fixture in the unfolding story of humanity. One need not subscribe to notions of a climacteric of crises²² to recognize that fact.²³ Moreover, not only has emergency expanded to an even greater number of nations, but within the affected nations, it has extended its scope and strengthened its grip. Observations that “[e]mergency government has become the norm”²⁴ can no longer be dismissed. While rejecting Schmitt’s solutions, we should not ignore the important questions that he raises.

I.

The first of the four chapters on the concept of sovereignty, which together comprise Schmitt’s most celebrated and controversial work, *Political Theology*, revolves around the concept of “the exception” (*Ausnahmezustand*) and its relationship to the idea of sovereignty. The

²¹ See, e.g., Ian Brownlie, *Interrogation in Depth: The Compton and Parker Reports*, 35 MOD. L. REV. 501, 501 (1972) (“Books on constitutional law find little to say about emergency powers aside from consideration of wartime regulations in the United Kingdom and the somewhat derelict concept of martial law.”).

²² See Arthur S. Miller, *Reason of State and the Emergent Constitution of Control*, 64 MINN. L. REV. 585, 613-14 (1980).

²³ For example, a study published in 1978 estimated that at least 30 of the 150 countries then existing were under a state of emergency. See Daniel O’Donnell, *States of Exception*, 21 THE REV.: INT’L COMMISSION OF JURISTS 52, 53 & n.1 (1978). Similarly, a substantial number of states have entered a formal derogation notice under Article 4(3) of the International Covenant on Civil and Political Rights (“ICCPR”). See *International Covenant on Civil and Political Rights*, Dec. 19, 1966, 999 U.N.T.S. 171; see also *International Covenant on Civil and Political Rights* (visited Feb. 7, 2000) <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_4.html> (displaying a list of derogation notices). This number does not include states that are not signatories to the ICCPR or that experience de facto emergencies that they do not officially proclaim and notify, nor does it take account of those states that have routinized and institutionalized emergency measures in their ordinary legal systems. See SUBRATA ROY CHOWDHURY, *RULE OF LAW IN A STATE OF EMERGENCY: THE PARIS MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EMERGENCY* 45-46 (1989); *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, U.N. ESCOR, 35th Sess., Agenda Item 10, §§ 99-111, 129-45, at 26-28, 31-2, U.N. Doc. E/CN.4/Sub.2/1982/15 (1982) (N. Questiaux) [hereinafter *Implications for Human Rights*].

²⁴ UNITED STATES SENATE SPECIAL COMMITTEE ON NATIONAL EMERGENCIES AND DELEGATED EMERGENCY POWERS, 93D CONG., 2D SESS., *A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES* v (1974); see also Arthur S. Miller, *Constitutional Law: Crisis Government Becomes the Norm*, 39 OHIO ST. L.J. 736 (1978) (predicting that crisis government will become a worldwide norm).

link between the two concepts is made clear by Schmitt from the very first sentence of the book, where he declares that the “[s]overeign is he who decides on the exception.”²⁵ He goes on to emphasize the point that “[i]t is precisely the exception that makes relevant the subject of sovereignty, that is, the whole question of sovereignty.”²⁶ Thus, one cannot underestimate the centrality of the concept of the exception in Schmitt’s thinking as part of the trinity of sovereignty, decisionism, and exception.²⁷

To fully appreciate the significance of the “exception,” it must be remembered that Schmitt considers the exception to be the purest expression and reflection of the political.²⁸ “The specific political distinction to which political actions and motives can be reduced,” writes Schmitt, “is that between friend and enemy.”²⁹ It is the ever-present possibility of combat and armed conflict that gives the friend-foe (more appropriately in this context, friend-enemy)³⁰ dichotomy its real meaning. “The friend, enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing. War follows from enmity. War is the existential negation of the enemy. It is the most extreme consequence of enmity.”³¹ For its part, characterized as a case of “extreme peril, a danger to the existence of the state, or the like,”³² the clearest instance of a state of exception is war, whether an international or internal armed conflict. War constitutes the core of the exception and, as such, paints the exception with the colors of the political. It is thus that the inherent link between the political and the exception is fully established, for “the exceptional case has an especially decisive meaning which exposes the core of the matter. For only in real combat is revealed the most extreme consequence of the political grouping of friend and enemy. From this most extreme possibility human life derives its specifically political tension.”³³ Since political groupings always stand above all other groupings (e.g., religious, economic, cultural, and legal),³⁴ and since

25 SCHMITT, *POLITICAL THEOLOGY*, *supra* note 18, at 5.

26 *Id.* at 6.

27 *See, e.g.*, Neumann, *supra* note 9, at 461.

28 *See* SCHEUERMAN, *supra* note 20, at 67.

29 SCHMITT, *THE CONCEPT OF THE POLITICAL*, *supra* note 19, at 26; *see also* JUDITH N. SHKLAR, *LEGALISM* 125 (1964) (regarding Schmitt’s definition of politics as the only clear example of a politics-as-power definition).

30 *See* SCHWAB, *supra* note 4, at 53-54 (using “foe” or “enemy” as the appropriate term to capture the meaning of Schmitt’s “*feind*”).

31 SCHMITT, *THE CONCEPT OF THE POLITICAL*, *supra* note 19, at 33.

32 SCHMITT, *POLITICAL THEOLOGY*, *supra* note 18, at 6.

33 SCHMITT, *THE CONCEPT OF THE POLITICAL*, *supra* note 19, at 35.

34 *See id.* at 38. In Schmitt’s words:

every sphere of human conduct could potentially rise to the level of the political—“if it is sufficiently strong to group human beings effectively according to friend and enemy”³⁵—the exception inevitably permeates all aspects of human existence, and deciding on it becomes the single most important moment in every respect of human activity.³⁶

Important as it is, Schmitt does not define this central term. In fact, he argues that no such definition is at all possible. He contends that “[t]he exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like.”³⁷ However, the exception “cannot be circumscribed factually and made to conform to a preformed law.”³⁸ For all its centrality and significance, no comprehensive and exhaustive definition can be attached to the “exception.” Thus, while existential crises facing the state may be said, in an anti-Schmittian fashion, to constitute the core of the exception, the external limits and boundaries of its penumbra are unclear, and cannot be made clear in advance. While “not every extraordinary measure, not every police emergency measure or emergency decree, is necessarily an exception,”³⁹ the concept of the exception relates not only to existential crises, but to a wider range of political phenomena that cannot otherwise be understood within the parameters of, or governed by, a set of universally applicable legal rules.⁴⁰ Indeed, it is this fundamental characteristic of the

[T]hat grouping is always political which orients itself toward this most extreme possibility. This grouping is therefore always the decisive grouping, the political entity. If such an entity exists at all, it is always the decisive entity, and it is sovereign in the sense that the decision about the critical situation, even if it is the exception, must always necessarily reside there.

Id.

³⁵ *Id.* at 37.

³⁶ See SCHWAB, *supra* note 4, at 73-75.

³⁷ SCHMITT, POLITICAL THEOLOGY, *supra* note 18, at 6.

³⁸ *Id.*

³⁹ *Id.* at 12.

⁴⁰ SCHEURMAN, *supra* note 20, at 21. Other authors argue that the concept of “state of exception” ought to be understood in light of the specific context of Weimar Germany, confronted as it were with recurrent economic and political crises, which often jeopardized its very existence and its basic constitutional order. Some are of the opinion that, rather than expounding general theories of jurisprudence and political science, Schmitt’s project was directed at particular problems and issues that were of relevance to Germany in the 1920s and 30s. See BENDERSKY, *supra* note 4, at 35 (pointing out Schmitt’s emphasis on the “concrete situation” rather than on general, universal, abstract constructions); SCHWAB, *supra* note 4, at 7, 144. Schwab defines the state of exception as “any type of severe economic or political disturbance that requires the application of extraordinary measures, and for which the constitution makes provisions. Legally it usually means the temporary, partial or total suspension of ordinary and constitutional laws by the president to restore order.” *Id.* at 7; see also BENDERSKY, *supra* note 4, at 37 (“[State of exception is] a situation in which domestic order, or the very existence of the state, [i]s seriously endangered by political or economic crises.”).

exception which negates any belief in the possibility of constructing, in advance, a set of general, objective norms that will cover all future situations, without any need for further subjective discretion and decision-making, and which are independent of a mechanistic, technical application of the general norms to concrete scenarios.

Be that as it may, it seems clear that for an exception to be a meaningful concept, it has to be evaluated and understood against the background of an ordinary case. The very term “exception” points to something that stands outside the normal rule or state of affairs, and does not conform to the ordinary case.⁴¹ The crucial inquiry then becomes that of understanding the relationship between the normal case and the exception, between the normal rule and the irregular case. It is precisely on this point that we can detect a marked shift in Schmitt’s work on the exception, with *Political Theology* marking the watershed of change. Whereas in his earlier work Schmitt followed the well-established pattern of classical legal thought on emergencies and emergency regimes, after 1922 he broke sharply with that tradition and developed an alternative model of the relationship between the normal and the exception.

Schmitt was writing his Weimar tracts against the backdrop of the traditional treatment of emergencies and emergency powers. That treatment has been characterized by a dichotomized dialectic.⁴² The term “emergency” connotes a sudden, urgent, usually unforeseen event or situation that requires immediate action,⁴³ often without time for prior reflection and consideration. The notion of “emergency,” therefore, is inherently linked to a concept of “normalcy,” in the sense that the former is considered to be outside the ordinary course of events or anticipated actions. Furthermore, classical notions of emergency powers regard the phenomenon of emergency and the expansive powers exercised by a government in facing threats to the life of its nation to be temporary and of an exceptional nature. For normalcy to be truly “normal,” it has to be the general rule, the ordinary state of affairs,

Conceptually, a political state of exception is a similar phenomenon to the theological miracle; in both cases, there is a marked deviation from the regular norm. See SCHMITT, *POLITICAL THEOLOGY*, *supra* note 18, at 36-37; JOHN E. FINN, *CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW* 171 (1991).

41 See Oren Gross & Fionnuala Ni Aoláin, *To Know Where We Are Going, We Need to Know Where We Are: Revisiting States of Emergency*, in *HUMAN RIGHTS: AN AGENDA FOR THE 21ST CENTURY* 79, 80-89 (Angela Hegarty & Siobhan Leonard eds., 1999).

42 See Oren Gross, “Once More unto the Breach”: *The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 *YALE J. INT’L L.* 437, 439-40 (1998).

43 See *THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES* 806 (5th ed. 1993).

whereas emergency must constitute no more than an exception to that rule—it must last only a relatively short time and yield no substantial permanent effects. Regardless of the definitional difficulties concerning the concepts of “emergency” and “exception,” the elements of temporal duration and exceptional nature are widely accepted as the common denominators that make a dialogue on emergencies possible.⁴⁴ Moreover, the fundamental principles of temporal duration and exceptional nature also result in the normal case being regarded as superior to the exception, in that extraordinary powers exercised by the government when dealing with a state of emergency are to be used for the sole purpose of re-instituting or preserving and maintaining the status quo ante in its entirety, in as expeditious a manner as possible.⁴⁵ Thus, traditional discourse on emergency powers posits normalcy and exigency as two separate phenomena and assumes that emergency is the exception. The governing paradigm is that of the “normalcy-rule, emergency-exception.”⁴⁶

In his 1921 book, *The Dictatorship*,⁴⁷ Schmitt clearly follows this traditional approach. Schmitt’s distinction between commissarial and sovereign dictatorship, and his endorsement of the former model, whose roots can be traced as far back as the Roman republic⁴⁸—both as a normative proposition and as the model incorporated into Article 48 of the Weimar Constitution⁴⁹—follow ideas expressed earlier by Machiavelli,⁵⁰ as well as by the great liberal writers of the seventeenth and eighteenth centuries. The commissarial dictatorship—which is essentially a constitutional dictatorship, inasmuch as it is grounded in the existing legal order and follows its dictates, both substantive and procedural⁵¹—can only be justified and legitimated if it is directed at re-

44 See Gross, *supra* note 42, at 454-55; Gross & Ní Aoláin, *supra* note 41, at 90-94.

45 See CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 7, 306 (1948) (arguing that a return to status quo ante is the only legitimate purpose of emergency measures). *But see* FINN, *supra* note 40, at 40-43 (arguing for the possibility of constitutional reconstruction as opposed to mere restoration).

46 Gross, *supra* note 42, at 440. The formula of “normalcy-rule, emergency-exception” may be replaced by a formula referring to a presumption of normalcy, where emergency constitutes a rebuttal to that presumption. See Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 963 (1995) (“A rule with necessity or emergency exceptions might be described, somewhat imprecisely, as a strong presumption.”).

47 CARL SCHMITT, DIE DIKTATUR (1921).

48 See MCCORMICK, *supra* note 3, at 122-29.

49 For an example of an interpretation of Article 48, see SCHWAB, *supra* note 4, at 37-43.

50 See *infra* notes 58-67 and accompanying text.

51 The concept of constitutional dictatorship became central in post-World War II discourse of emergency regimes, due, first and foremost, to the writings of Carl Friedrich and Clinton Rossiter. CARL J. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY 557-81(4th ed. 1968); ROSSITER, *supra* note 45.

establishing or defending the existing legal order. Surely, the commissarial dictator may, if the need arises, suspend some of the ordinary laws; but he may not modify the existing legal order by introducing any changes or amendments into it, nor replace it with a new order altogether. Schmitt recognizes the power of the commissarial dictator to sidestep existing norms, but denies him the legitimate power to change the legal order.⁵² The exception is thus defined by the norm. It is the existing, ordinary, legal order that defines the circumstances under which resorting to a dictatorship may be necessary. It is that same legal order that sets out precise procedures that ought to be followed in the appointment of the commissarial dictator, as well as prescribes in advance the conditions for the termination of her office. Significantly, it is the existing legal order that establishes a separation between taking the decision on the very need to resort to extraordinary emergency measures and the decision of what particular measures ought to be taken in order to successfully overcome the particular emergency. The power to take these decisions must be vested in different organs, such as the consuls and the Senate, on one hand, and the dictator, on the other. Finally, it is the preservation or the re-establishment of the normal order—i.e., the pre-emergency legal order—which serves as the *raison d'être* of the dictatorship.⁵³ For such a model to be viable, it is necessary to have clear demarcation lines drawn around the boundaries of normalcy and the exception. Deviations from the regular legal order must be kept to a minimum, both as to duration and extent. The extreme case, which may give rise to such legitimate deviations, must, therefore, be confined to the exceptional. It must be “associated with a

⁵² For a discussion of Schmitt's 1917 article, in which he develops the concept of military dictatorship and distinguishes it from the traditional model of the state of siege, see PETER C. CALDWELL, *POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW: THE THEORY & PRACTICE OF WEIMAR CONSTITUTIONALISM* 56-62 (1997), and David Ohana, *The Leviathan Opens Wide its Jaws: Karl Schmidt [sic] and the Origins of Legal Fascism*, in *LAW AND HISTORY* 273, 274-75 (Daniel Gutwein & Menachem Mautner eds., 1998). In his article, Schmitt argues that, faced with a substantial threat to the state, the military commander may temporarily suspend laws and take all other necessary temporary measures in order to successfully overcome the emergency, although he may not legislate, for this is beyond the scope of his authority.

⁵³ Rossiter enumerates eleven criteria, which fall into three broad categories that ought to be maintained for a dictatorship to qualify as constitutional or, in Schmittian terminology, commissarial. ROSSITER, *supra* note 45, at 298-306. These categories are concerned with criteria for the initial invocation of a crisis government, criteria that apply during the lifetime of a constitutional dictatorship, and criteria for the termination of the dictatorship. *See id.*; *see also* FRIEDRICH, *supra* note 51, at 559, 566-70 (identifying four constitutional bases for the institution of the Roman dictatorship as a paradigmatic case of a constitutional dictatorship; applying these bases to the modern practice of democracies with respect to emergency powers; and concluding that constitutional limitations on the modern expressions of constitutional dictatorship are inadequate and insufficient).

borderline case and not with routine.”⁵⁴

The “normalcy-rule, emergency-exception” paradigm has been adopted as normatively desirable by most of the legal and political thinkers who have considered the subject of emergencies and emergency powers. The mechanism used by the Roman republic to deal with acute crises—the “celebrated Roman dictatorship”⁵⁵—as seen to exist before its corruption and subversion by Sulla and Caesar, served as the common starting point in this context.⁵⁶ The salient features of that ancient emergency institution—its temporary character, appointment according to specific constitutional forms, nomination for a particular goal, and, most importantly, ultimate goal of upholding the constitutional order rather than changing or replacing it—have been adopted by many as the basic guidelines for a modern-day emergency regime.⁵⁷

Thus, for example, in his *Discourses*,⁵⁸ Niccolo Machiavelli embraces the model of the Roman dictatorship as the best mechanism to handle emergencies, stating that “[i]t is clear that the dictatorship, so long as it was bestowed in accordance with public institutions, and not assumed by the dictator on his own authority, was always of benefit to the state.”⁵⁹ He offers several reasons that account for the positive contribution of the dictatorship to Rome. First, the dictator was appointed for a limited time, which was necessary to achieve a specific goal. Indeed, one of the main defects in the election by the Romans of

54 SCHMITT, *POLITICAL THEOLOGY*, *supra* note 18, at 5.

55 ROSSITER, *supra* note 45, at 15.

56 See Oren Gross, *Theoretical Models of Emergency Powers 120-40* (1997) (unpublished S.J.D. dissertation, Harvard Law School) (on file with author); see also ROSSITER, *supra* note 45, at 15. Rossiter states that:

The splendid political genius of the Roman people grasped and solved the difficult problem of emergency powers in a manner quite unparalleled in all history, indeed so uniquely and boldly that a study of modern crisis government could find no more propitious a starting point than a brief survey of the celebrated Roman dictatorship.

Id.

57 Thus, for example, in his argument for a strong and vigorous executive, Alexander Hamilton brought in the Roman example:

Every man the least conversant in Roman history knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.

THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

58 NICCOLO MACHIAVELLI, *THE DISCOURSES* (Bernard Crick ed., Pelican Classics 1970) (1513-1517).

59 *Id.* at 194. He goes on to claim that the dictatorship is an institution which “deserves to be considered and ranked among those to which the greatness of Rome’s vast empire was due.” *Id.* at 195.

the *Decemviri*⁶⁰ had been that these ten men were granted absolute authority for a long period of time (Machiavelli considered a year to be a long time for that purpose).⁶¹

Second, the authority of the dictator had been substantially limited. It extended to confronting a particular perilous situation and permitted the dictator to devise the means by which the danger would be removed from the republic. However, in fulfilling his tasks, the dictator “could do nothing to diminish the constitutional position of the government, as would have been the case if he could have taken away the authority vested in the senate or in the people, or have abolished the ancient institutions of the city and made new ones.”⁶² The dictator’s authority did not extend to the promulgation of new legislation, which was an authority reserved for the Senate. Thus, the dictatorship could not have brought about a change in the ordinary legal order of the republic. Using Schmitt’s subsequent terminology, the Roman dictator, occupying a commissarial position, could not use his powers in order to change the basic character of the state or its institutional framework. Moreover, during the operation of a dictatorship, the regular institutions of the state—the consulship, the tribunes, the Roman Senate, and all other office holders—continued to fulfill their normal functions and retained their full authority. “The result was that, as the authority of the senate, the consuls and the tribunes still stood, they came to be, as it were, [the dictator’s] guardians, to see that he kept to the straight path.”⁶³

Third, the dictators had been appointed to their office “in accordance with public institutions, and not assumed by the dictator on his own authority”—i.e., according to the recognized procedures of the constitutional order of the republic.⁶⁴ Finally, the Roman citizens were “not corrupt”⁶⁵ (in an implicit contradiction to the Florentines of his own time). Yet, Machiavelli cautioned that where people were willing

60 *See id.* at 197-98 (explaining how it came about that the appointment of the *Decemviri* in Rome was harmful to that republic in spite of their having been appointed by free and public suffrage).

61 *Id.* at 197. As originally constructed, the term of office of the Roman dictator was limited to six months and could not be renewed upon the expiration of that period. *See* 1 W. E. HEITLAND, *THE ROMAN REPUBLIC* § 150 (Greenwood Press 1969) (1909); THEODOR E. MOMMSEN, *THE HISTORY OF ROME* 325-26 (Macmillan rev. ed. 1908) (1864).

62 MACHIAVELLI, *supra* note 58, at 194-95.

63 *Id.* at 197. This feature of the dictatorship is contrasted with the rule of the *Decemviri*, when “[q]uite the contrary happened . . . for the appointment of consuls and tribunes was suspended, and the Ten were given power to make laws and in general to act as if they were the Roman people.” *Id.*

64 *Id.* at 194.

65 *Id.* at 195.

to confer unlimited powers on a government for an unspecified duration, they would not be saved from the fate of tyranny merely because they were not corrupt in character, for “absolute power will very soon corrupt [the material] by making friends and partisans.”⁶⁶

Hence, the common threads passing through these different attributes of the ancient Roman emergency mechanism were: (1) the emphasis on the temporal duration of the extraordinary dictatorial powers; (2) their exceptional nature as well as the exceptional nature of the circumstances that brought them about; (3) their operation within the context of the existing legal and constitutional order; and (4) their purpose of re-establishing the pre-emergency order.⁶⁷ Temporal duration, exceptionalism, and a limited scope of emergency powers are thus the three hallmarks of the Roman-commissarial model of emergency regime.

These same hallmarks have since continued to characterize much of the thinking in the area of emergency powers, even for those who rejected Machiavelli’s model of emergency regime as developed in the *Discourses*. One example is Jean Jacques Rousseau’s treatment of the issue of emergencies in *The Social Contract*, where he expresses the opinion that:

[I]f . . . the peril is of such a kind that the paraphernalia of the laws are an obstacle to their preservation, the method is to nominate a supreme ruler, who shall silence all the laws and suspend for a

⁶⁶ *Id.* at 198. It is interesting to note that whereas Lord Acton’s famous parable regarding power and absolute power focuses on the wielders of power—i.e., the rulers—Machiavelli refers in this context to the people rather than the government.

⁶⁷ One of the legends of the early Roman Republic, which has always been hailed as the paradigmatic example of the Roman dictatorship in its purest form, is the story of a poor farmer, L. Quinctius Cincinnatus. He was made dictator in 458 B.C., in order to save a Roman force that was headed by one of the consuls. This force, which was surrounded by enemy forces, was unable to break its way out. William E. Heitland tells the story as follows:

The deputation of senators come on their serious errand: the sturdy farmer is requested to put on his gown and hear it. Washed and gowned . . . he is saluted Dictator, and steps from the spade or plough straight to the head of the state, apparently without the least exultation or nervousness or even surprise. Coolly he gets together a relieving army, every man bearing twelve stakes, three or four times the usual number, beside his food and arms. The dictator marches off and reaches the seat of war about nightfall, and during the night surrounds the surrounding Aequi with a palisade.

¹ HEITLAND, *supra* note 61, § 106. Machiavelli uses the story of Cincinnatus in order to argue that the citizens of the ideal republic ought to be poor for that republic to be successful. MACHIAVELLI, *supra* note 58, at 475-77. He thus alludes to the fact that although Cincinnatus’s plot of land was merely four *jugeri* (half-acres) in size, he was still appointed as dictator. His poverty did not stand as an obstacle on his way to the supreme office of the republic. The same is true for Cincinnatus’s Master of the Horse, who was so poor that he had to fight on foot. Immediately upon his victory over the enemy and the release of the besieged force, Cincinnatus stepped down from his office, relinquished all his special powers, and returned to work his land. See ROSSITER, *supra* note 45, at 16.

moment the sovereign authority. In such a case, there is no doubt about the general will, and it is clear that the people's first intention is that the State shall not perish. Thus the suspension of the legislative authority is in no sense its abolition; the magistrate who silences it cannot make it speak; he dominates it, but cannot represent it. He can do anything, except make laws.⁶⁸

Rousseau puts the emphasis both on the exceptional nature of the threat and on the limited powers that are handed over to the supreme ruler. The concepts of "legislator" and "dictator" are distinct and apply to different spheres in the life of the society.⁶⁹ The "supreme ruler," tailored around the outline of the Roman dictator, enjoys absolute powers as necessary for the preservation of society and its members, but he does not possess the power to arbitrarily alter the basic legal framework of that society, as put in place by the legislator. Whatever the nature and content of the legal order which is implemented in times of crisis, it does not—indeed, cannot—affect the character and the substantive content of the ordinary legal order. The former legal order is characterized by the image of the supreme magistrate and the exercise of arbitrary and absolute powers; the latter, by the institution of the legislator and the attribute of rationality. The ordinary laws and the constitutional order, in all or in part, may be suspended under the reign of the supreme ruler, but they cannot be modified, amended, or repealed during that time. In addition, the power of the supreme ruler is also limited by the fact that it is subject to the general will (*volonté générale*). The exercise of power by the ruler is legitimate only so long as it is warranted as a means to promote that general will. Again, based on the experience of the Roman dictatorship, Rousseau suggests that the nomination of a dictator should be for a short period, should be limited in advance, and could not be prolonged (especially not by the supreme ruler himself).⁷⁰ "It is wrong therefore," argues Rousseau, "to wish to make political institutions so strong as to render it impossible to

⁶⁸ JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 294 (G. D. H. Cole trans., Everyman 1993) (1762).

⁶⁹ See C. J. FRIEDRICH, *CONSTITUTIONAL REASON OF STATE: THE SURVIVAL OF THE CONSTITUTIONAL ORDER* 85 (1957).

⁷⁰ ROUSSEAU, *supra* note 68, at 296. Rousseau states that:

However this important trust be conferred, it is important that its duration should be fixed at a very brief period, incapable of being ever prolonged. In the crises which lead to its adoption, the State is either soon lost, or soon saved; and, the present need passed, the dictatorship becomes either tyrannical or idle. At Rome, where dictators held office for six months only, most of them abdicated before their time was up. If their term had been longer, they might well have tried to prolong it still further, as the decemviri did when chosen for a year. The dictator had only time to provide against the need that had caused him to be chosen; he had none to think of further projects.

Id.

suspend their operation. Even Sparta allowed its laws to lapse.”⁷¹

Schmitt follows this line of thought in *The Dictatorship*, in which he embraces the commissarial dictatorship—with its notions of limited dictatorial powers, separation of the normal from the exception, and the establishment of the normal case as superior to the exception—as the preferred model for a counteremergency mechanism. Soon thereafter, however, Schmitt abandons the “normalcy-rule, emergency-exception” paradigm and replaces it with another.

Political Theology, published merely a year after *The Dictatorship*, represents a departure from Schmitt’s earlier position on the issue of emergency powers and a shift to a revolutionary model of emergency regimes. If his earlier position is characterized by his endorsement of commissarial dictatorship, Schmitt’s new formula embraces the model of sovereign dictatorship.⁷² Schmitt supplants the classical model of limited emergency powers with a model of unlimited dictatorial powers. According to this new model, an exception is characterized by “principally unlimited authority, which means the suspension of the entire existing order.”⁷³ But it is not merely the suspension of the existing order that is at stake here. More significant is the sovereign dictator’s power to actively change the existing legal order and transform it, in whole or in part, into something else. In other words, it is the norm that becomes subservient to the exception, thereby reversing the relationship between the two phenomena, as opposed to the situation under the traditional commissarial model of dictatorship.

Yet the full thrust of Schmitt’s changed position goes much deeper than that. What Schmitt is really doing in *Political Theology* is not limited to reversing the roles of the ordinary legal order and the normal case, on one hand, and the exception, on the other. In fact, Schmitt’s new position eliminates altogether the notion of the normal and replaces it with the exception. It is not only that the exception confirms the rule and that the rule’s very existence “derives only from the exception,”⁷⁴ but rather that the exception gobbles up the normal case and becomes, in and of itself, the ordinary, general rule. In that respect, there is no place to continue talking about rule and exception. The exception

⁷¹ *Id.* at 293.

⁷² See MCCORMICK, *supra* note 3, at 133-41; John P. McCormick, From Constitutional Technique to Caesarist Ploy: Carl Schmitt on Dictatorship, Liberalism, and Emergency Powers (paper presented at *Conceptualizing Bonapartism*, conference held at Hunter College, Apr. 9-11, 1999) (on file with author). But see CRISTI, *supra* note 3, at 63-70 (arguing that in *The Dictatorship*, Schmitt has already promoted the idea of the sovereign dictatorship over the alternative commissarial model as a means of reinvigorating “the monarchical principle” and countering the use by Marxism of the sovereign dictatorship model).

⁷³ SCHMITT, *POLITICAL THEOLOGY*, *supra* note 18, at 12.

⁷⁴ *Id.* at 15.

becomes everything; the rule is reduced to nothing.⁷⁵ The exception is no longer merely *normless*; it is also *exceptionless*.

Aware of the authoritarian implications of his new position, and realizing that, in 1922, the time has not yet come for a full unequivocal exposition of this new standpoint, Schmitt resorts to using an ambiguous rhetoric which helps to obscure the real impact of his modified theoretical stance.⁷⁶ Rhetorically, Schmitt continues the distinction between the normal and the exceptional cases and adheres to some version of a normalcy-exception dichotomy. He proclaims that the definition of sovereignty, which is bound up with the decision on the exception, is “associated with a borderline case and not with routine.”⁷⁷ Indeed, the mere use of the term “exception” points the reader to the classical dialectic concerning emergency powers. Connecting the exception with a case of extreme peril and a danger of existential proportions threatening the state serves to emphasize further the exceptional nature of the extreme case, and thus its separateness from the normal way of things.

Schmitt continues to speak of the normal situation and the exceptional case as two distinct phenomena. He argues that every legal norm presupposes the existence of a certain normal and ordinary state of affairs, and can be applied only as long as this state of affairs continues to exist.⁷⁸ Schmitt explains that “[t]his effective normal situation is not a mere ‘superficial presupposition’ that a jurist can ignore; that situation belongs precisely to [the norm’s] immanent validity.”⁷⁹ In exceptional circumstances, when this normal state of affairs is interrupted, the legal norm is no longer applicable and cannot fulfill its ordinary regulatory function. “For a legal order to make sense, a normal situation must exist.”⁸⁰ General norms are limited in their scope of application to those circumstances in which the normal state of affairs prevails. Crises undermine this factual basis and thus pull the rug out from under the feet of ordinary norms. Law is not omnipresent and omnipotent;

⁷⁵ Schmitt states that “[t]he rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception.” *Id.*

⁷⁶ Volker Neumann describes Schmitt as a “master of puzzles,” whose texts “promise to decipher secrets.” Neumann, *supra* note 9, at 469. Neumann states:

The reader encounters what he or she believes to be conceptual clarity and evidence, but at the same time things that are inexact and hazy. Upon reading a text a second time, one realizes that what seemed to be the firm center is not nearly as exact as it appeared on first reading.

Id.

⁷⁷ SCHMITT, *POLITICAL THEOLOGY*, *supra* note 18, at 5.

⁷⁸ *Id.* at 13.

⁷⁹ *Id.*

⁸⁰ *Id.*

general a priori rules cannot regulate the exception. “There exists no norm that is applicable to chaos.”⁸¹ The exception resides in those areas where the norm breaks down and loses its “immanent validity.”⁸² This, together with the idea that the exception “cannot be circumscribed factually and made to conform to a preformed law,”⁸³ makes it *normless*. However, it is precisely this normless characteristic of the exceptional situation that implies the very existence of a normal state of affairs, and, in fact, a normal constitutional order that is controlled and regulated by constitutional norms.⁸⁴

The normless character of the exception is not, in and of itself, something new to either political thought or political action before Schmitt. It is certainly an integral feature of the institution of the Roman dictatorship.⁸⁵ Another example is John Locke’s discussion of the prerogative power. According to Locke, there are times when a strict and rigid observation of the laws may lead to societal harm, especially when the preservation of society or its members is at stake.⁸⁶ In times such as these, the executive is trusted with the prerogative power, which is the power “to act according to discretion for the public good, without the prescription of the law, *and sometimes even against it.*”⁸⁷ Put somewhat differently, “prerogative can be nothing but the people’s permitting their rulers to do several things of their own free choice where the law was silent, *and sometimes, too, against the direct letter of the law*, for the public good, and their acquiescing in it when so done.”⁸⁸ Accordingly, the power of prerogative encompasses executive discretion, the power of pardon,⁸⁹ and the power to act without the prescription of positivist law, and, in appropriate cases, even against it.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 6.

⁸⁴ See FINN, *supra* note 40, at 171 (arguing that a similar inference does not necessarily result from the use of the term “state of emergency”); SCHWAB, *supra* note 4, at 7.

⁸⁵ See Gross, *supra* note 56, at 122-131.

⁸⁶ JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT §§ 159-160 (Russell Kirk ed., 1955). Thus, for example, he states that “it is fit that the laws themselves should in some cases give way to the executive power, or rather to this fundamental law of Nature and government, viz., that as much as may be all members of the society are to be preserved.” *Id.* § 159.

⁸⁷ *Id.* § 160 (emphasis added).

⁸⁸ *Id.* § 164 (emphasis added).

⁸⁹ See *id.* § 159. The power of pardon can be used to mitigate the severity of the law when, under the circumstances, a strict observation of the laws might have done more harm. See *id.* The law may make no distinction between criminal offenders and persons who, although they broke the law, deserve reward and pardon. See *id.* For some modern expositions of the same idea, see, for example, Christine Noelle Becker, *Clemency for Killers? Pardoning Battered Women Who Strike Back*, 29 LOY. L.A. L. REV. 297 (1995), and Victoria J. Palacios, *Faith in Fantasy: The Supreme Court’s Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311 (1996).

As the particular uses of the prerogative power cannot be established in advance, the sole criterion as to whether the prerogative power has been appropriately used in any given case is a functional one—i.e., whether the exercise of power was directed at promoting the public good or not.⁹⁰

Government cannot have any legitimate ends apart from the well-being of the community. Governmental power used for any purpose other than the public good is properly regarded as tyrannical⁹¹ and may justify, under certain circumstances, a revolution designed to regain the people's rights and limit the resort to such arbitrary power in the future.⁹² Thomas Jefferson's use of the Lockean concept of the prerogative power is also well known and documented.⁹³ Yet, unlike Machiavelli, Locke, Rousseau, and Jefferson, who sought to minimize the exception and feared its long-term detrimental effects on society, Schmitt enthusiastically embraces the exception. He does not follow Locke's warning of the danger which lurks in any resort to such extraordinary, normless powers, even when they are wielded by "Godlike princes."⁹⁴ For so perilous may be the consequences of the precedent thus created and put into place, cautions Locke, that "[u]pon this is founded that saying that the reigns of good princes have always been most dangerous to the liberties of their people."⁹⁵ For Schmitt—inasmuch as crises represent the sphere of the political, and given the primacy of politics over all other spheres of human endeavor—it is the exception that defines the norm, not vice versa. The exception is primary to the norm and defines and informs that norm.⁹⁶ "The rule

⁹⁰ See, e.g., LOCKE, *supra* note 86, § 161 ("But if there comes to be a question between the executive power and the people about a thing claimed as a prerogative, the tendency of the exercise of such prerogative to the good or hurt of the people will easily decide that question."); see also, e.g., *id.* §§ 163, 164, 168.

⁹¹ See *id.* § 199 ("[T]yranny is the exercise of power beyond right, which nobody can have a right to. And this is making use of the power any one has in his hands, not for the good of those who are under it, but for his own private separate advantage."); see also *id.* § 202 ("Wherever law ends tyranny begins, if the law be transgressed to another's harm.") (emphasis added).

⁹² See *id.* §§ 203-209.

⁹³ See Gross, *supra* note 56, at 252-55; ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 23-25 (1989); ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER* 226-27 (1976); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 *YALE L.J.* 1385, 1392-93 (1989); Lucius Wilmerding, Jr., *The President and the Law*, 67 *POL. SCI. Q.* 321, 322-28 (1952).

⁹⁴ LOCKE, *supra* note 86, § 164.

⁹⁵ *Id.* § 166.

⁹⁶ See, e.g., Galli, *supra* note 6, at 1616. Galli notes that:

[F]rom a liberal standpoint exception is exception, not the rule. In other words, it is obvious that in any liberal theory contingency can't ever take the dramatic aspect it takes in Schmitt's thought Liberals can't agree that contingency is not simply concreteness, nor relativism, but the original and permanent tragedy of politics.

proves nothing; the exception proves everything.”⁹⁷

Schmitt does not stop after transforming the normal into being subservient to the exception. His ultimate goal is the complete destruction of the normal case. His theory’s most radical move comes next. It involves the creation of the *exceptionless* exception.

In describing the exception, Schmitt states:

The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited The most guidance the constitution can provide is to indicate who can act in such a case. If such action is not subject to controls, if it is not hampered in some way by checks and balances, as is the case in a liberal constitution, then it is clear who the sovereign is. He decides whether there is an extreme emergency as well as what must be done to eliminate it.⁹⁸

The sovereign dictator enjoys unlimited powers.⁹⁹ Such unlimited powers pertain both to his unfettered discretion as to whether an exception does, in fact, exist, as well as to what measures ought to be taken in order to counter the concrete threat. In taking such countermeasures, the sovereign dictator is not limited by the existing legal order. As is the case under a commissarial dictatorship, he may disregard existing norms, but he may also put in place substitute norms.

Id.

⁹⁷ SCHMITT, *POLITICAL THEOLOGY*, *supra* note 18, at 15. Schmitt quotes Søren Kierkegaard when he states:

The exception explains the general and itself. And if one wants to study the general correctly, one only needs to look around for a true exception. It reveals everything more clearly than does the general. Endless talk about the general becomes boring; there are exceptions. If they cannot be explained, then the general also cannot be explained. The difficulty is usually not noticed because the general is not thought about with passion but with a comfortable superficiality. The exception, on the other hand, thinks the general with intense passion.

Id.

⁹⁸ *Id.* at 6-7; *see also* THE FEDERALIST NO. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton stated:

[I]t is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.

Id.

⁹⁹ *See* SCHMITT, *POLITICAL THEOLOGY*, *supra* note 18, at 12 (“[N]ot every extraordinary measure, not every police emergency measure or emergency decree, is necessarily an exception. What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order.”).

The powers of the sovereign dictator are not confined to the power to suspend, but also encompass the power to amend, revoke, and replace.

When are such unlimited powers available? Surely they are exercisable in the context of the extreme case—i.e., the exception. However, we may continue to ask: when does the exception begin; what signifies its commencement; and how do we know that it has ended? The only logical outcome of Schmitt's collapsing together the power to decide the existence of the exception and the breadth of counteremergency powers to be used in order to bring the exception to a conclusion, and depositing them both in the hands of one person, is that the dictator's unlimited powers are never turned off. The dictator is the person who needs to decide that the normal state of affairs has been replaced by an extreme case, and then decide what powers to use to counter the particular danger. However, the exception is a possibility that may never be discounted or disregarded.¹⁰⁰ It may occur at any given time, without prior warning, and create a "danger to the existence of the state."¹⁰¹ What ought to count is not the actual occurrence of an exception, but rather the *possibility* of its taking place; and, in a world governed by the exception, such a possibility is all the more inevitable.¹⁰² The existence of an exception, or a possibility thereof, means that the sovereign must always be vigilant and, in fact, paranoid (or, as Schmitt would have it, the sovereign is not paranoid, they are really out to get him!).¹⁰³ The result is that the sovereign is not only the one who decides on the exception, but also the one who definitely decides whether the normal situation actually exists.¹⁰⁴ It is only the sovereign dictator who can authoritatively distinguish the exception from the normal and decide to take state action. At the same time, Schmitt considers sovereignty and the powers attached to it as indivisible.¹⁰⁵ Thus, one cannot say that only part of the sovereign's powers are operational at any given moment. Subject to the personal decision of the sovereign dictator, the sovereign's unlimited powers may be put to use at any time. No external, objective limitations may be imposed on the exercise of these powers. Hence, should the

100 See, e.g., Galli, *supra* note 6, at 1615 (referring to Schmitt's "dramatic theory of modern politics as permanent crisis").

101 SCHMITT, *POLITICAL THEOLOGY*, *supra* note 18, at 6.

102 Of course, a world governed by a permanent exception is a fit description of Schmitt's own environment when writing the essays discussed in this article.

103 See Anthony Carty, *Interwar German Theories of International Law: The Psychoanalytical and Phenomenological Perspectives of Hans Kelsen and Carl Schmitt*, 16 *CARDOZO L. REV.* 1235, 1237 (1995) ("[F]or Schmitt[,] paranoia is all that stands between [the German] people and the specter of extinction.").

104 See SCHMITT, *POLITICAL THEOLOGY*, *supra* note 18, at 13.

105 *Id.* at 8.

sovereign dictator so desire, his unlimited powers—originally designed to apply to the exceptional case—may come to control the norm, indeed, *be* the norm.

These radical consequences of Schmitt's version of exceptionalism are already reflected in his 1923 essay, entitled *The Crisis of Parliamentary Democracy*.¹⁰⁶ In his essay, Schmitt puts forward a model of a plebiscitary dictatorship—fashioned after the republican model of ancient Rome, with modifications—which ought to replace the dysfunctional and dangerous model of parliamentary democracy. That latter model is dysfunctional and dangerous because it ignores the issue of sovereignty and prevents the sovereign from effectively exercising her powers in the exceptional case.¹⁰⁷ In *Parliamentary Democracy*, Schmitt follows the theme set out in *Political Theology* concerning the scope of powers which the supreme authority may legitimately exercise in circumstances of exception. Even more significantly, Schmitt now seems to acknowledge that these powers may legitimately be exercised not only in the extreme case, but also under normal, ordinary conditions. The merger of the normal with the exception is virtually complete; it comes about when the exception takes over the normal and replaces it entirely. Once again, we are reminded of Machiavelli's warning that if people are willing to confer unlimited powers on a government for an unspecified duration, they will not be saved from the fate of tyranny.¹⁰⁸

Does not all that mean that no room is left for the political—Schmitt's argument on the centrality of the political notwithstanding? If we understand, as Schmitt would have it, the origin and essence of the political to be found in the exception, which is seen against the background of the normal, ordinary rule, what does it mean to speak of an exceptionless exception? Schmitt does not see this as a problem. On the contrary, he argues that the political will only disappear in “[a] world in which the *possibility* of war is utterly eliminated, a completely pacified globe.”¹⁰⁹ Only such a world—in which the distinction between friend and foe is obsolete—can be a world without politics. “The phenomenon of the political can be understood only in the context of the ever present *possibility* of the friend-and-enemy grouping.”¹¹⁰ In

¹⁰⁶ See CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* (Ellen Kennedy trans., 1985).

¹⁰⁷ Parliamentary democracy, according to Schmitt, is unable to successfully confront the extreme case. Among other things, it overemphasizes debate and undermines decision, and is unable to account for the possibility of the extreme case, the exception.

¹⁰⁸ See *supra* note 66 and accompanying text.

¹⁰⁹ SCHMITT, *THE CONCEPT OF THE POLITICAL*, *supra* note 19, at 35 (emphasis added).

¹¹⁰ *Id.* (emphasis added).

a world governed by the exceptionless exception, however, there is an ongoing possibility of external conflicts among collectivities of people, as well as internal conflicts within any given collectivity, which may create the need to distinguish between friend and foe, thus invoking a political decision. With this exceptionless exception world view, where the political is ever present and ever relevant and where ordinary day-to-day questions are very much interested in, and concerned with, the concept of sovereignty,¹¹¹ Hobbes's twentieth-century self-proclaimed heir¹¹² throws us back into the Hobbesian state of nature.

Schmitt throws two punches at liberalism. First, he attacks liberalism's built-in failure to account for the inevitability of the exception. Second, he argues that even if liberalism were to acknowledge the exception, it is structurally prevented from doing anything about it and, in particular, it is prevented from effectively separating the normal case from the exceptional.¹¹³ According to Schmitt, liberalism's rhetoric hides and disguises both defects.¹¹⁴ As far as liberalism is concerned, the normativistic, technical, mechanistic attributes of liberalism, which leave no room for the possibility of exceptions, make the exception transparent and nonexistent. On the other hand, modern reality reeks of exceptionalism, resulting from the growing role played by emergencies and emergency powers,¹¹⁵ and from the increase in the various legal forms designed to accommodate the modern interventionist welfare state.¹¹⁶ Thus, liberalism is out of sync with reality and, as such, is a utopian exercise. However, its adherents seek to cover up this critical weakness of their position by

¹¹¹ Contrast this with Schmitt's critique of liberal jurisprudence as one "concerned with ordinary day-to-day questions [and having] practically no interest in the concept of sovereignty." SCHMITT, *POLITICAL THEOLOGY*, *supra* note 18, at 12.

¹¹² See CARL SCHMITT, *THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBS: MEANING AND FAILURE OF A POLITICAL SYMBOL* (George Schwab & Erna Hilfstein trans., 1996) (1938); see also DYZENHAUS, *supra* note 3, at 85-97; MCCORMICK, *supra* note 3, at 249-58; GERSHON WEILER, *FROM ABSOLUTISM TO TOTALITARIANISM: CARL SCHMITT ON THOMAS HOBBS* (1994); Dyzenhaus, *supra* note 12, at 2, 5-10.

¹¹³ See, e.g., MCCORMICK, *supra* note 3, at 124-29, 148-52.

¹¹⁴ See Dyzenhaus, *supra* note 12, at 5 (stating that, in Schmitt's opinion, "[t]he peculiarity of liberalism as a political doctrine resides, then, in its concealment, conscious or not, of its politics").

¹¹⁵ See, e.g., ROSSITER, *supra* note 45; Gross, *supra* note 42, at 460-90; Gross & Ní Aoláin, *supra* note 41, at 82-90, 94-162; Lobel, *supra* note 93, at 1397-412, 1418-21.

¹¹⁶ See Scheuerman, *supra* note 7, at 1746 (specifying that there is an inclusion of vague clauses and principles within contemporary law, as well as extensive delegation of broad and often unchecked discretionary powers to the executive branch of government). Such phenomena, linked to the interventionist state, expand and deepen the existence of "gaps" within the legal system, leading to judicial decisionism. See MCCORMICK, *supra* note 3, at 207 ("Just as judges must exercise prudence in adjudicating 'gaps,' a 'sovereign'—a mutually identified people and executive—must be allowed the prudence to 'decide' on the exception.").

rhetorical denials of the existence of the exception.

To be sure, Schmitt, for his part, is also engaged in plastering a conceptually similar rhetorical facade on his own theoretical position. His rhetoric speaks of the normal case and of the exception as two separate and distinct phenomena. He argues that “[f]or a legal order to make sense a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists.”¹¹⁷ At the same time, his theory virtually advocates the complete destruction of the normal and its substitution by the exception. For all his allegations that liberalism is negligent, if not outright deceitful, in ignoring the exception and pretending that it does not exist, Schmitt’s theory is open to the same type of challenge. His rhetoric carves out a space for both the normal case and the exception, while the logical terminus of his theory abolishes the former and substitutes it with the latter.

Therefore, there is little wonder why Schmitt’s contemporary rivals—first and foremost, Hans Kelsen—have challenged his exceptionalism as practically making any constitutional provisions (save those pertaining to emergencies and emergency powers) wholly redundant and irrelevant. In the context of the Weimar Constitution, Kelsen has argued that Schmitt’s theory reduced the Constitution to nothing more than Article 48.¹¹⁸ However, Schmitt’s exceptionalism does not attach much practical significance even to constitutional provisions such as the ill-fated Article 48. The sovereign dictator’s unlimited powers include the power to suspend, revoke, amend, and replace. They are by no means confined by the substantive norms—or, indeed, the constitutional procedures—laid out in those provisions related to emergency powers. One should not even expect the constitutional document to be able to give a meaningful indication of the institutional identity of who will assume legal authority during a state of exception.¹¹⁹ Unlike the case under the commissarial dictatorship—in which the dictator enjoys the power to suspend the constitution, but that power does not extend to a certain institutional core¹²⁰—nothing can withstand the sovereign dictator. There is no

117 SCHMITT, *POLITICAL THEOLOGY*, *supra* note 18, at 13.

118 *See* MCCORMICK, *supra* note 3, at 144.

119 *See* SOTIRIOS A. BARBER, *ON WHAT THE CONSTITUTION MEANS* 188-90 (1984); *see also* BENDERSKY, *supra* note 4, at 37; FINN, *supra* note 40, at 171.

120 Once again, Schmitt’s earlier writings on the subject often hide the real thrust of his later theory on this point. In the context of his earlier support for the model of commissarial dictatorship, Schmitt developed the concept of an “inviolable minimum of organization.” CALDWELL, *supra* note 52, at 108; *see also* ROSSITER, *supra* note 45, at 69 (translating the concept as an “untouchable minimum of organization”). The idea was that the basic organization of the Weimar Republic and its constitution could not be modified, amended, suspended, or abrogated—even in times of dire emergency, when the president of the republic used his authority

immovable wall that can withstand his unstoppable force.

Do legal order and a constitution have any real meaning under such a theory? The only answer truly consistent with the aforementioned must be negative. Ohana describes Schmitt as “an intriguing test case of . . . ‘legal fascism.’”¹²¹ What exactly is the role to be played by the “legal” under Schmitt’s system? Dyzenhaus argues that, after all was said and done, “Schmitt could not bring his vision of law completely into line with Nazi ideology. Simply put, he still maintained a shred of hope for law as an autonomous element in politics, one which could stand in the way of an all powerful state.”¹²² But what does that mean? Schmitt’s intellectual relationship with Thomas Hobbes has been analyzed extensively elsewhere.¹²³ Hobbes’s absolutist model of political and legal authority contains some external limit on the powers exercised by the sovereign—namely, those derived from the supreme principle of self-preservation, which also means individual self-preservation. Hobbes’s theory leaves room for the individual in the overall framework, inter alia, by acknowledging her right to resist the dictates of the sovereign when the latter attempts to take her life.¹²⁴ This right of resistance presents an outer limit on the Leviathan’s otherwise sweeping power and authority. However, even this minimal limitation is removed by Schmitt, as he considers this aspect of Hobbes’s theory as undermining the effectiveness, and indeed the viability, of the Englishman’s position.¹²⁵ For his part, Schmitt is left

and invoked Article 48. Thus, under this construct, presidential emergency powers under Article 48 could only be exercised against “nonessential” elements of the constitutional system. See CALDWELL, *supra* note 52, at 108.

As Article 48 itself assigned specific roles to the president, cabinet, and the Reichstag, these governmental institutions would constitute that inviolable minimum of organization, and their functions could not be suspended or abrogated even in the face of an acute exigency. Of special interest is Schmitt’s observation that Article 48 asserted the competence of the president, but “what the word Reichspräsident means is deduced . . . only from the constitution,” and, therefore, the president could not, as part of his emergency measures, change the character of his office. SCHWAB, *supra* note 4, at 40. The requirement of ministerial countersignatures on all orders and decrees indicated the place of the cabinet within the inviolable minimum of organization, and the requirement that the government enjoys the Reichstag’s confidence added that organ to the list. See *id.* at 40-41; see also FINN, *supra* note 40, at 176-77. Thus, this “inviolable minimum of organization” was basically a set of procedural guarantees, rather than substantive restrictions on the exercise of presidential power. Of course, the concept of an inviolable minimum of organization has no room in the framework of a sovereign, as opposed to commissarial, dictatorship.

¹²¹ Ohana, *supra* note 52, at 274.

¹²² David Dyzenhaus, *Holmes and Carl Schmitt: An Unlikely Pair?*, 63 BROOK. L. REV. 165, 186 (1997).

¹²³ See *supra* note 112.

¹²⁴ See Leo Strauss, *Comments on Carl Schmitt’s Der Begriff des Politischen*, reprinted and translated in SCHMITT, *THE CONCEPT OF THE POLITICAL*, *supra* note 19, at 81, 88-89.

¹²⁵ See Dyzenhaus, *supra* note 12, at 16.

with no defense mechanisms against the “strong total state.”¹²⁶ Nor is he looking for such defense mechanisms, for his vision is precisely that of the “all powerful state.” In *Political Theology*, Schmitt argues that:

What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order. In such a situation it is clear that the state remains, whereas law recedes. Because the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind.¹²⁷

To argue that an order that is characterized by an “unlimited authority” of the sovereign dictator is an “order in the juristic sense” means nothing. Additionally, since the normal case and the exception collapse into one exceptionless exception, this disorderly order also becomes the “ordinary kind” of order in the Schmittian state.

Schmitt’s obsession with the problem of legal indeterminacy has been well dealt with elsewhere,¹²⁸ as has been his allegation that liberalism “reduces the legal order to a situation of ‘chaos’ and ‘anarchy,’ unable to provide a minimal measure of legal predictability.”¹²⁹ Yet, once again, Schmitt finds himself falling into a similar trap. Schmitt’s machine does not run by itself. The ever existing exception feeds into the “decisionistic and personalistic element in the concept of sovereignty.”¹³⁰ Actually, nothing is left but this decisionistic and personalistic element. Exception and normlessness are everywhere, and, to the extent that the exception is linked to chaotic circumstances under whose pressure general norms crumble and come to naught, one may validly ask whether there is anything outside chaos and catastrophes. Schmitt attacks Kelsen for his identification of the lawfulness of nature and normative lawfulness. “This pattern of thinking,” submits Schmitt, “is characteristic of the natural sciences. It is based on the rejection of all ‘arbitrariness,’ and attempts to banish from the realm of the human mind every exception.”¹³¹ Schmitt’s own position is open to the challenge that it attempts to banish from the realm of the human mind every normal case.

Schmitt’s alternative model, which he offers as a replacement to the liberal model, introduces as much predictability as the sovereign’s whim. If liberalism’s fault inheres in the normative and utopian nature

¹²⁶ See CALDWELL, *supra* note 52, at 112-14.

¹²⁷ SCHMITT, *POLITICAL THEOLOGY*, *supra* note 18, at 12.

¹²⁸ For a discussion of Schmitt’s obsession with the problem of legal indeterminacy, see, for example, Scheuerman, *supra* note 7.

¹²⁹ *Id.* at 1748.

¹³⁰ SCHMITT, *POLITICAL THEOLOGY*, *supra* note 18, at 48.

¹³¹ *Id.* at 41.

of its structures, Schmitt's fault lies with the apologetic overtones of his proposals.¹³² Against liberalism's rigidity, Schmitt puts forward an all too flexible alternative. Whatever the sovereign decides is legitimate. There is no substantive content against which legitimacy of such actions can be measured—not even Hobbes's minimalist principle of self-preservation. Despite Schmitt's attacks against the content-neutrality of liberalism and positivism, his theory, in the last account, is nihilistic.¹³³ In its purest form, a decision emerges out of nothing, i.e., it does not presuppose any given set of norms, and it does not owe its validity or its legitimacy to any preexisting normative structure. No such structure, therefore, can attempt to limit the decision's scope in any meaningful way.¹³⁴ Similarly, since the decision is not the product of any abstract rationality, but is rather reflective of an irrational element, it cannot—by definition—be bound by any element found in the rational dimension.¹³⁵ As William Scheuerman pointedly notes:

A rigorous decisionist legal theory reduces law to an altogether arbitrary, and potentially inconsistent, series of power decisions, and thus proves unable to secure even a modicum of legal determinacy. It represents a theoretical recipe for a legal system characterized by a kind of permanent revolutionary dictatorship Decisionism, at best, simply reproduces the ills of liberal legalism, and, at worst, makes a virtue out of liberalism's most telling jurisprudential vice.¹³⁶

Indeed, Schmitt himself became aware of the defects and flaws that are inherent in his position, and sought to modify it during the 1930s.¹³⁷ In the preface to the second edition of *Political Theology*, written in November, 1933, Schmitt concedes that “the decisionist, focusing on the moment, always runs the risk of missing the stable content inherent in every great political movement.”¹³⁸ And so, personal decisionism cannot, after all, guarantee legal determinacy and predictability, nor

¹³² For examples of a similar tension between utopian and apologetic arguments in a different context, see MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989), and Martti Koskenniemi, *The Politics of International Law*, 1 *EUR. J. INT'L L.* 4 (1990).

¹³³ See Ohana, *supra* note 52, at 273-74; see also Carty, *supra* note 103, at 1270-71 (arguing that Schmitt, like Kelsen, demonstrates “a flight from the complexity of political compromise into a nihilistic one-dimensionality which leaves completely open who is deciding what for whom”).

¹³⁴ See MCCORMICK, *supra* note 3, at 153 (“If the constitution's primary purpose is to establish an institution, such as a presidency, to exclusively embody the preconstitutional sovereign will in a time of crisis, then the constitution is inviting its own disposability.”).

¹³⁵ For a discussion of the irrational dimensions of Schmitt's legal thought, see, for example, Izhak Englard, *Nazi Criticism Against the Normativist Theory of Hans Kelsen—Its Intellectual Basis and Post-Modern Tendencies*, in KELSEN AND SCHMITT, *supra* note 3, at 133, 142-47.

¹³⁶ Scheuerman, *supra* note 7, at 1755-56.

¹³⁷ See *id.* at 1752-64.

¹³⁸ SCHMITT, *POLITICAL THEOLOGY*, *supra* note 18, at 3.

political stability. Schmitt then gravitates towards a new general type of legal thinking that he calls institutional legal thinking, or “concrete orders thinking.”¹³⁹ He notes that:

I now distinguish not two but three types of legal thinking; in addition to the normativist and the decisionist types there is the institutional one Whereas the pure normativist thinks in terms of impersonal rules, and the decisionist implements the good law of the correctly recognized political situation by means of a personal decision, institutional legal thinking unfolds in institutions and organizations that transcend the personal sphere.¹⁴⁰

Yet, even here, his rhetoric tries to hide the defenselessness of his original position, for he describes the decisionist as implementing “the good law of the correctly recognized political situation.”¹⁴¹ Surely, in this context, “good” can only mean “formally valid,” as opposed to “substantively legitimate.” Furthermore, there is no guarantee that the sovereign will, indeed, correctly recognize the political situation, or even if he does correctly recognize and identify the situation, that he will act appropriately and provide a “good” response. Moreover, even at this stage, when Adolf Hitler was already in office for ten months as the German chancellor, Schmitt’s retreat from radical decisionism was not instigated by any acknowledgment of its potentially disastrous consequences. On the contrary, it is an attempt to present a position that is even more supportive of the National Socialist cause than the decisionist model, *inter alia*, by formulating the case for “purifying” the ranks of the legal profession of “alien” elements—first and foremost Jewish elements—and ensuring its ethnic, racial, cultural, spiritual, and ideological homogeneity.¹⁴² It is here that Schmitt finally introduces substantive content into his legal and political model, and the color of that normative order is unmistakably black and brown.

II.

When viewed from a prescriptive standpoint, Schmitt’s intellectual enterprise does not present a strong case. Yet, when regarded as an empirical exercise, describing actual realities in the struggling Weimar Republic, as well as telling us something “about the sad state of twentieth-century politics,”¹⁴³ Schmitt’s work may still be telling us something interesting. I fully agree with Scheuerman when he writes

¹³⁹ Scheuerman, *supra* note 7, at 1752-53.

¹⁴⁰ SCHMITT, *POLITICAL THEOLOGY*, *supra* note 18, at 2-3.

¹⁴¹ *Id.* at 3.

¹⁴² See Scheuerman, *supra* note 7, at 1756-64.

¹⁴³ SCHEUERMAN, *supra* note 20, at 14.

that “[h]owever horrible its normative structure, Schmitt’s attack on the rule of law unfortunately corresponds to a variety of empirical trends.”¹⁴⁴ It is this correspondence of Schmitt’s position on the exception with empirical trends which I will briefly explore in this section.

Schmitt’s most important continuing contribution in the area of emergency powers is his deviation from the traditional discourse concerning emergencies. In addition, Schmitt’s work is interesting because he focuses on an otherwise neglected area of legal and political study—i.e., emergencies and emergency powers. When Schmitt was writing his major works, crises and emergencies had not been sporadic episodes in the lives of many nations—particularly not where the Weimar Republic itself was concerned. Nor have they become such episodes in the lives of nations since. They are increasingly becoming a permanent fixture and playing a bigger, more extensive role in the unfolding story of humanity. Therefore, the subject matter of emergency powers should receive much greater attention than it has attracted thus far.

As mentioned above,¹⁴⁵ the traditional discourse concerning emergencies and emergency powers has been characterized by a dichotomized dialectic, in which “emergency” plays opposite “normalcy.” The idea of “emergency” is inherently linked, according to this mode of thinking, to a concept of “normalcy”—i.e., the normal case—in the sense that the former is considered to be outside the ordinary course of events or anticipated actions. Furthermore, emergencies have been thought of in terms of brief temporal duration and exceptional nature. For normalcy to be “normal,” it has to be the general rule, the ordinary state of affairs, whereas emergency must constitute no more than an exception to that rule—it must last only a relatively short time and yield no substantial permanent effects. Thus, the basic paradigm of the classical models of emergency regimes is that of the “normalcy-rule, emergency-exception,” which is based on a clear separation of the normal and exceptional cases. Moreover, emergencies are considered to be sporadic, temporary, and exceptional phenomena against the background of an otherwise uninterrupted normalcy. Schmitt calls this approach into question, by reversing the relationship between the normal and the exceptional cases. This alternative view,

¹⁴⁴ *Id.* Scheuerman goes on to correctly state that “this is not to suggest that Schmitt’s empirical political and legal analyses . . . are defensible or especially sophisticated . . . some facets of a crisis of liberalism in our century are expressed or mirrored within certain aspects of Schmitt’s theory.” *Id.* at n.1.

¹⁴⁵ See *supra* notes 42-46 and accompanying text.

when disconnected from Schmitt's unacceptable, normative solution to the problem of emergencies and viewed as an empirical, descriptive exercise, is quite instructive and should not be disregarded or ignored.

In the last two decades, several international studies have directed their attention to the issue of emergencies and emergency powers.¹⁴⁶ As a detailed analysis of these studies is beyond the scope of this Article,¹⁴⁷ I shall focus on the common theme that unites them. The approach taken by these studies is premised on the conception that a "reference model" of emergency powers exists.¹⁴⁸ Thus, for example, the Questiaux Report, undertaken at the behest of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,¹⁴⁹ emphasizes the characteristics of the typical, reference model of emergency powers. It points out that: (1) the fundamental precept on limiting governments in bringing states of emergency into effect is consistency between emergency legislation and democratic principles; (2) emergency legislation predates the occurrence of the crisis; (3) such legislation contains a priori or a posteriori control procedures on the exercise of those emergency powers; and (4) such legislation and powers are to be applied as provisional, temporary measures.¹⁵⁰ The three major elements of the classical model of emergency regimes—namely, temporal duration, exceptional nature, and limited powers—are all incorporated into the reference model. Alongside the reference model, the various studies identify "deviations" or "aberrations" from the model—namely, emergencies and emergency regimes that fail to conform to the general model. Such deviations or aberrations include de facto, permanent, complex, and institutionalized, as well as unnotified, emergencies.¹⁵¹

¹⁴⁶ See, e.g., INTERNATIONAL COMMISSION OF JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS 413 (1983); ERICA-IRENE A. DAES, INDIVIDUAL'S DUTIES TO THE COMMUNITY AND THE LIMITATIONS ON HUMAN RIGHTS AND FREEDOMS UNDER ARTICLE 29 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS at 197-202, U.N. Doc. E/CN.4/Sub.2/432/Rev.2, U.N. Sales No. E.82.XIV.1 (1983); *Implications for Human Rights*, supra note 23; CHOWDHURY, supra note 23; THE SIRACUSA PRINCIPLES ON THE LIMITATION AND DEROGATION PROVISIONS IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1984), reprinted in 7 HUM. RTS. Q. 3 (1985); Richard B. Lillich, *Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. INT'L L. 1072 (1985); *International Law Association, Second Interim Report of the Committee on the Enforcement of Human Rights Law* (1988).

¹⁴⁷ See Gross & Ní Aoláin, supra note 41, at 82-90.

¹⁴⁸ See JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY 21 (1994).

¹⁴⁹ See *Implications for Human Rights*, supra note 23.

¹⁵⁰ See *id.* §§ 34-35; see also *id.* § 69 ("[A]bove and beyond the rules [of emergency regimes] . . . one principle, namely, the principle of provisional status, dominates all the others. The right of derogation can be justified solely by the concern to return to normality.").

¹⁵¹ See *id.* §§ 99-147; CHOWDHURY, supra note 23, at 45-55. A de facto state of emergency

A conception of a “reference model” is not confined to scholarly studies, but is played out in legal systems worldwide. Both the Questiaux Report and the study by the International Commission of Jurists are based on extensive empirical examinations of numerous domestic legal systems with respect to emergency powers.¹⁵² The basic “normalcy-rule, emergency-exception” paradigm, which informs the reference model, is also reflected generally in the international and regional regimes dealing with human rights, and particularly in the relationship between human rights and states of emergency.¹⁵³

The problems start, however, when casting a cold, hard look at the

arises in circumstances where “there is no proclamation or termination of the state of emergency or . . . the state of emergency subsists after it has been officially proclaimed and then terminated.” *Implications for Human Rights, supra* note 23, § 103. Permanent emergencies cover those states of emergency which are “perpetuated either as a result of de facto systematic extension or because the Constitution has not provided any time-limit a priori.” *Id.* § 112. According to Questiaux, permanent emergencies share several common features. First, the more prolonged an emergency becomes, the less account is taken of the actual danger that led to the invocation of the particular emergency regime. Second, as the state of emergency is extended, less weight is given to adherence to the principle of proportionality between the probability and magnitude of the threat and counteremergency measures. Third, no time limits are imposed on the emergency regime.

While not defining “complex state of emergency,” Questiaux finds a common feature which is shared by all emergency regimes falling into this category—namely, “the great number of parallel or simultaneous emergency rules whose complexity is increased by the ‘piling up’ of provisions designed to ‘regularize’ the immediately preceding situation and therefore embodying retroactive rules and transitional regimes.” *Id.* § 118. More than in any other category of emergencies, it is under complex states of emergency that legislation of an emergency nature finds its way into the ordinary laws. Under the conditions of a complex state of emergency, it may also be difficult to determine the legal basis for certain governmental actions. To demonstrate this point, Questiaux quotes Professor Alfonso Arinos, who, in 1978, was asked by the Brazilian government to examine the legal aspects of a return to “the normal rule of law.” *Id.* § 127. In his report, Professor Arinos found that “in the Brazil of 1978, the norms of public law as a whole appear[ed] to be a mixture of two constitutions neither of which would seem to be in force.” *Id.* His conclusion was that “the only possible way of establishing a list of the constitutional provisions actually in force was to use a computer.” *Id.*

Institutionalized emergency regimes refer to situations in which emergencies facilitate an institutional transformation of a democratic regime into an authoritarian or “restricted” democratic regime. *See id.* § 131. When changes in the institutional basis of the existing pre-emergency regime are made during or in the context of a crisis, with the avowed purpose of moving to a new democratic structure for the community in question, they may later be abused so as to “consolidate a constitutional order containing incipient autocratic tendencies.” *Id.* Finally, an unnotified state of emergency refers to the obligation that some states may incur, under international legal instruments, to notify other parties to those instruments of the existence of a domestic state of emergency. The main significance of this failure to notify is that it may “preclud[e] the international surveillance authorities from exercising their judgment to the fullest extent.” *Id.* § 100.

¹⁵² *See Implications for Human Rights, supra* note 23; INTERNATIONAL COMMISSION OF JURISTS, *supra* note 146; *see also* Gross & Ni Aoláin, *supra* note 41, at 82-87.

¹⁵³ *See* Gross, *supra* note 42; Fionnuala Ni Aoláin, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 *FORDHAM INT’L L.J.* 101 (1995).

real world, where—all too frequently—the stated aberrations come closer than the reference type to being the norm of practice. The normative rules prescribed under the “normalcy-rule, emergency-exception” paradigm may prove useful in a world governed by that basic paradigm. When applied to situations diverging from the general reference model, however, these rules fail to safeguard the very interests that such rules are intended to protect. Following the traditional view concerning the normalcy-emergency relationship has led domestic, as well as international, judicial organs to give too little attention to, if not ignore altogether, the phenomena of permanent, entrenched, or *de facto* emergencies in the cases coming before them. In turn, this has led to attempts at solving the questions at hand by applying the wrong medicine because of a faulty diagnosis.¹⁵⁴ By perpetuating a myth that emergencies follow a constant pattern, and by failing to identify shifting patterns of crisis management (warranted or not), academic commentary, court jurisprudence, and institutional international actors fail to adequately come to terms with the various phenomena of emergencies.

To say that, in certain instances, reality demonstrates a greater propensity towards convergence of the normal and the exceptional cases is but half of the picture. Whenever the boundaries between normalcy and emergency become semitransparent, it is almost invariably the reality of emergency that exerts more influence on its counterpart than vice versa. Therefore, the blurring of the distinctions between normalcy and emergency results in a subsequent swing of the pendulum towards the “emergency” or “security” end of the continuum, rather than towards the “normalcy” or “legal” pole. “An insidious outcome of continuing crisis is the tendency to slide into a new conception of normality that takes vastly extended controls for granted, and thinks of freedom in smaller and smaller dimensions.”¹⁵⁵ The final outcome, therefore, is likely to be more emergency- than normalcy-oriented. In other words, we must contend with a reality in which the fusion of normalcy and exception leads to an ever-greater role for the latter at the expense of the former.

Viewed from this perspective, Schmitt’s focus on the phenomenon of the exception—in fact, his placement of that concept at “the heart of his constitutional deliberations,”¹⁵⁶ and his claim for the reshuffling of priorities between the exception and normalcy—is quite powerful, if taken to be a descriptive, rather than prescriptive, project. Hence, while

154 See, e.g., Gross, *supra* note 42, at 460-501.

155 HAROLD D. LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 29 (1950).

156 KELSEN AND SCHMITT, *supra* note 3, at 10.

rejecting Schmitt's answers, we must not disregard the questions he poses. Many examples may be given to demonstrate and support the arguments made above.¹⁵⁷ I shall focus on the dichotomy between national security and nonsecurity issues that follows, to a great extent, a similar pattern to that of the normalcy-emergency divide.

The study of the relationship between security and nonsecurity issues is interesting for several reasons. First, the special treatment of issues pertaining to "national security," and the extreme universal deference that courts and legislators give to decisions and actions of the executive branch of government in those areas,¹⁵⁸ are primarily derived from the notion that when the security and safety of the state are at stake, special rules must apply. Whether explicitly stated or not, the prevailing sense is that matters of national security are of a different nature altogether. The realm of national security is often perceived as an area where normal rules do not apply, or are applied with certain modifications. It is, thus, reminiscent of the exceptional case. Second, in modern day reality, national security may be seen to occupy the geometric point of convergence of emergency and normalcy. On one hand, the breakdown of clear boundaries separating security from nonsecurity issues has resulted in the examination of a growing number of issues through the prism of national security. National security considerations are thus an integral part of the normal discourse. On the other hand, governments tend to use the language and rhetoric of emergency in situations which may have a certain bearing on the state's security interests, but which cannot be said to rise to the level of a real emergency. As the discussion below shows, one should at least wonder to what extent the demarcation lines are clearly indicated and kept, as a matter of practice, between national security and other, "normal" considerations and situations. Moreover, one should question what it

¹⁵⁷ See, e.g., Oren Gross, *On Terrorists and Other Criminals: States of Emergency and the Criminal Legal System*, in *NEW TRENDS IN CRIMINAL LAW* (Eliezer Lederman ed., forthcoming 2000); Gross & Ni Aoláin, *supra* note 41; Lobel, *supra* note 93, at 1397-412, 1418-21; Miller, *supra* note 24; William E. Scheuerman, *Globalization and Exceptional Powers: The Erosion of Liberal Democracy*, 93 *RADICAL PHIL.* 14 (1999); William E. Scheuerman, *The Economic State of Emergency*, 21 *CARDOZO L. REV.* 1869 (2000); Dermot P.J. Walsh, *The Impact of the Antisubversive Laws on Police Powers and Practices in Ireland: The Silent Erosion of Individual Freedom*, 62 *TEMPLE L. REV.* 1099 (1989).

¹⁵⁸ See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 54-60 (1993); THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 10-30 (1992); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 117-49 (1990); LAURENCE LUSTGARTEN & IAN LEIGH, *IN FROM THE COLD: NATIONAL SECURITY AND PARLIAMENTARY DEMOCRACY* 320-59 (1994); George J. Alexander, *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 5 *HUM. RTS. L.J.* 1, 15-63 (1984).

means if they are not so clearly drawn.

Like “exception” and “emergency,” the concept of “national security” is hard to define.¹⁵⁹ It is an amorphous, open-ended concept that is amenable to legal and political manipulation.¹⁶⁰ Such ambiguity and nebulousness have resulted in an almost complete absence of legal definitions for the concept of national security, both on the domestic level and in international instruments.

The context in which the term “national security” is used has undergone significant changes during the twentieth century. The crux of this transformation has been the shift in the understanding of national security from a purely military to a much broader concept, which encompasses almost all areas of human endeavor. The discourse related to national security is not confined to a relatively narrow military dimension; it also comprises civilian ingredients.¹⁶¹ If, in the past, it

¹⁵⁹ See, e.g., Thomas I. Emerson, *National Security and Civil Liberties*, 9 YALE J. WORLD PUB. ORD. 78 (1982); Peter Hanks, *National Security—A Political Concept*, 14 MONASH U. L. REV. 114, 117-18 (1988); J.A. Tapia-Valdés, *A Typology of National Security Policies*, 9 YALE J. WORLD PUB. ORD. 10, 10 (1982). Attempts to define “national security” and “national security policy” abound in the area of strategic studies. Recognizing, for the most part, the multidimensional nature of these concepts, most definitions attempt to incorporate the military and civilian elements relevant to the formulation of an appropriate national security policy. Regardless of the differences between the many definitions, they all include many variables, vague terms, uncertainty, great leeway for discretion, and flexibility of implementation. The plethora of proposed definitions for the concept of “national security” comes against the obstacle of setting meaningful guidelines to distinguish between what is legitimately a national security concern and what is not. Moreover, the variables involved are, to a large extent, state-contingent, and are affected by circumstances unique to each and every state. The concept of “national security” is intrinsically linked to perceptions of threats by the citizenry and leadership of any particular state. A perception of a threat is, for its part, intertwined with perceptions as to the interests endangered and threatened. The more vital and essential the threatened national interest is, the more likely that lesser dangers would be deemed to pose grave threats to the security of the state. National interests, in general, and the prioritization of those interests, in particular, vary greatly from one nation to another.

¹⁶⁰ See, e.g., LUSTGARTEN & LEIGH, *supra* note 158, at 20-23; Hanks, *supra* note 159. Lustgarten and Leigh claim that “the primary political function of security” is to be “a part of the coinage of power, hoarded and used by ministerial and bureaucratic élites to ignore or short-circuit normal democratic processes.” *Id.* at 20-21. They go on to identify five main categories of “dangers and undesirable consequences” connected with the use of “national security” in “the internal politics of Western parliamentary democracies.” *Id.* at 21-22. The categories are: enthronement of a political orthodoxy; exercise of new and greater governmental powers; arbitrary governmental conduct; secrecy of actions and information; and the invocation of national security considerations “in the perennial tussle of fiscal and social priorities.” *Id.*

¹⁶¹ See, e.g., R. N. BERKI, *SECURITY AND SOCIETY: REFLECTIONS ON LAW, ORDER AND POLITICS* (1986); Dan Horowitz, *The Israeli Concept of National Security*, in NATIONAL SECURITY AND DEMOCRACY IN ISRAEL 11 (Avner Yaniv ed., 1993); Daniel J. Kaufman et al., *A Conceptual Framework*, in U.S. NATIONAL SECURITY: A FRAMEWORK FOR ANALYSIS 3-26 (Daniel J. Kaufman et al. eds., 1985); Moshe Lissak, *Civilian Components in the National Security Doctrine*, in NATIONAL SECURITY AND DEMOCRACY IN ISRAEL, *supra*, at 55; ROBERT MANDEL, *THE CHANGING FACE OF NATIONAL SECURITY: A CONCEPTUAL ANALYSIS* (1994); Frank N. Trager & Frank L. Simonie, *An Introduction to the Study of National Security*, in

had been possible to discuss national security as a distinct, exceptional area, modern times have witnessed the blurring of this separation, as the concept of national security becomes increasingly intertwined with areas previously considered outside its scope. In the post-World War II era, identifying national security with the “freedom from foreign dictation”¹⁶² has led many to view national security policy as combining ingredients of foreign and domestic policy on a wide range of topics.¹⁶³ As one author noted in the *Harvard Law Review*:

“National security” is not a term of art, with a precise, analytic meaning. At its core the phrase refers to the government’s capacity to defend itself from violent overthrow by domestic subversion or external aggression. But it also encompasses simply the ability of the government to function effectively so as to serve our interests at home and abroad. *Virtually any government program, from military procurement to highway construction and education, can be justified in part as protecting the national security.*¹⁶⁴

This evolution of national security from a purely military concept to a broader strategic concept may be attributed to a wide variety of causes. The two World Wars signaled a fundamental change in the scale and nature of warfare. The introduction of the total war and the demands it made on the warring communities with respect to the mobilization of manpower and industry, for example, injected civilian elements into the discussion of national security.¹⁶⁵ The totality of war also served to blur the distinction between the battle front and the home front, as well as between combatants and noncombatants.

The fear of a total war (especially nuclear war) has also led to two other significant phenomena. First, a sense of permanent, international insecurity prevailing among different nations has encouraged the rise of the rhetoric of national security in a wider range of issues. A state-centric conception of national security is contrasted with global trends of interdependence, globalization, and internationalism. This

NATIONAL SECURITY AND AMERICAN SOCIETY: THEORY PROCESS AND POLICY (Frank N. Trager & Philip S. Kronenberg eds., 1973); A. Ayalon, *National Security*, 27 MONTHLY REV. 6, Vol. 3-4, 1980.

¹⁶² LASSWELL, *supra* note 155, at 51 (emphasis omitted).

¹⁶³ *See id.* at 50-75.

¹⁶⁴ Note, *Developments in the Law: The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1133 (1972) (emphasis added); *see also* Peter M. Sanchez, *The “Drug War”: The U.S. Military and National Security*, 34 A.F. L. REV. 109, 151 (1991) (“[I]f the drug problem is perceived as a national security threat, will any social problem become a national security threat in the future?”). For more information on the United States military’s involvement in the drug war, *see also* John P. Coffey, *The Navy’s Role in Interdicting Narcotics Traffic: War on Drugs or Ambush on the Constitution?*, 75 GEO. L.J. 1947 (1987).

¹⁶⁵ *See generally* EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION (1947).

combination broadens the scope of “the security dilemma.”¹⁶⁶ When a state considers its security to be jeopardized and endangered it will take what it feels are the necessary steps to preserve and maintain its security. Yet, these very measures may invoke a sense of insecurity in other countries that will take their own measures to counter the newly perceived threats. Once again, such measures may stir a sense of danger in the first actor, leading to the creation of a vicious circle of escalation in pursuit of an illusory security. This security dilemma cannot be confined to that which is military; it applies to a much more general range of issues perceived to be essential to the national security of states.

Second, and closely related to the first point above, the fear of a military clash with global implications has underscored the possibilities of economic, cultural, and political “warfare” as viable alternatives to actual wars. Not that actual wars became a matter of the past; but, increasingly, other methods of conflict have been regarded as more and more important.¹⁶⁷ Socio-economic issues became as relevant to a state’s national security as are military considerations. This development was compounded by a contemporaneous, ideological conflict epitomized by an East-West rift during the cold war. Under the Communist agenda, all aspects of society—military as well as civilian—were to be harnessed in the fight against the West for global domination. The Western powers did not stay behind. As the perception of threats has expanded geographically,¹⁶⁸ and broadened to encompass more than purely military perils, so, too, has the scope of

¹⁶⁶ See John H. Herz, *Idealist Internationalism and the Security Dilemma*, 2 *WORLD POL.* 157 (1950); Robert Jervis, *Security Regimes*, in *INTERNATIONAL REGIMES* 173 (Stephen D. Krasner ed., 1987).

¹⁶⁷ Indeed, even with respect to “war,” the world has witnessed a marked shift to armed conflicts waged indirectly between the great superpowers by proxy after the Second World War. Civil wars, revolutions, wars between relatively small neighboring states, and so forth, all came to play a part in the global tug-of-war. See, e.g., KALEVI J. HOLSTI, *PEACE AND WAR: ARMED CONFLICTS AND INTERNATIONAL ORDER 1648-1989*, at 285-305 (1991).

¹⁶⁸ Thus, for example, as the United States became a leading global power, it came to identify its national security concerns with events taking place all over the globe. Technological developments made the potential magnitude of each crisis disproportionate to anything known before, as well as brought crises back home in the most graphic manner, thus intensifying the perception of emergency. Growing international interdependence in all spheres of human activity expanded and extended the possible range of threats to the nation’s security. See KOH, *supra* note 158, at 84-100; Lobel, *supra* note 93, at 1397-409. It is interesting to note that Machiavelli considered the pursuit of greatness, in the long-run, to be fatal to the liberty of the city (contrasting the Roman model with the Spartan and Venetian models). MACHIAVELLI, *supra* note 58, at 473-74. Roman expansion, leading to prolonged tenure of military commanders, was one of the causes of the loss of liberty. See *id.*; see also Roger B. Oake, *Montesquieu’s Analysis of Roman History*, 16 *J. HIST. IDEAS* 44 (1955) (explaining that Montesquieu considered Rome’s militarism and imperialism the effective cause of her decadence as a republic).

measures deemed necessary to confront such threats. Defensive strategies could not be limited to the military realm; they called for a “total strategy.”¹⁶⁹

Not surprisingly, concepts of “total strategy” were readily adopted by many totalitarian regimes around the world. Many Latin American countries have, for example, seen the implementation of a “national security doctrine” by ruling military junta.¹⁷⁰ Under this doctrine, the East-West conflict was waged not only on the international, but also on the domestic, level. The conflict was considered to be total—i.e., not only of a military character, but also involving social elements as well as elements of ideology, culture, economy, and so forth. The military elite would, upon “identifying” grave internal threats to the nation, proceed to overthrow the incumbent government and replace it with a military rule whose main, self-professed goals were to restore and safeguard the nation’s security, which the former government had been deemed unable to do. The fight against subversive elements within the domestic community would then be waged with a vengeance on all fronts, military and civilian. Every aspect of society would be considered essential for that nation’s security, bar none. “Subversion” would be broadly defined with respect to the type of activities that were deemed to undermine national security; the concept was not limited to any certain areas of human activity.¹⁷¹

Another cause for the transformation of the concept of national security is the reality of increasing global interdependence. As states become increasingly interdependent, tension builds between international and global considerations, on one hand, and national and

¹⁶⁹ See, e.g., DANIEL YERGIN, *SHATTERED PEACE: THE ORIGINS OF THE COLD WAR AND THE NATIONAL SECURITY STATE* 196 (1977). Yergin acknowledges the modern expansion of national security:

And what characterizes the concept of national security? It postulates the interrelatedness of so many different political, economic, and military factors that developments halfway around the globe are seen to have automatic and direct impact on America’s core interests. Virtually every development in the world is perceived to be potentially crucial. An adverse turn of events anywhere endangers the United States. Problems in foreign relations are viewed as urgent and immediate threats. Thus, desirable foreign policy goals are translated into issues of national survival, and the range of threats becomes limitless. The doctrine is characterized by expansiveness, a tendency to push the subjective boundaries of security outward to more and more areas, to encompass more and more geography and more and more problems. It demands that the country assume a posture of military preparedness; the nation must be on permanent alert.

Id.

¹⁷⁰ See Tapia-Valdés, *supra* note 159, at 28-35; Kathryn J. Zoglin, *The National Security Doctrine and the State of Siege in Argentina: Human Rights Denied*, 12 *SUFFOLK TRANSNAT’L L.J.* 265 (1989).

¹⁷¹ See Zoglin, *supra* note 170, at 274-75.

domestic considerations, on the other.¹⁷² No state is currently willing to fully depend on another in any aspect related to the well-being of its citizens and the protection of its vital national interests. Fears of political, military, economic, cultural, and social domination invoke an internal drive towards the maintenance of a core of independence and self-sufficiency, which would not be handed over to any foreign element. Any impairment of this core, whether actual or perceived, is regarded as posing a serious threat to the security of the state, although its substantive scope varies from one nation to another.

Economic considerations may weigh as heavily as military considerations in a state's perception of its own national security needs. Therefore, it is no surprise that national security considerations have traditionally carried special weight in debates concerning free trade, where the argument for exceptions to otherwise liberal trade policies is often heard.¹⁷³ Thus, it is argued that restrictions on imports may be required in the event of war or emergency in order to protect domestic industries.¹⁷⁴ It is also the case that national security considerations are used to restrict exports of "sensitive products,"¹⁷⁵ or to limit foreign investment possibilities.¹⁷⁶ The economic validity of such policies aside,¹⁷⁷ it has been noted that "the concept of national security has proven *highly elastic*, being invoked to justify restrictions on such unlikely imports as clothes pegs from Poland on the grounds that domestic productive capabilities in clothes pegs would be required in

¹⁷² See, e.g., Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 *Yale J. Int'l Law* 257, 260-66 (1999); Oscar Schachter, *The Decline of the Nation-State and Its Implications for International Law*, 36 *COLUM. J. TRANSNAT'L L.* 7 (1997).

¹⁷³ See, e.g., JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 229-32 (2d ed. 1997); PETER H. LINDERT & THOMAS A. PUGEL, *INTERNATIONAL ECONOMICS* 169-70 (10th ed. 1996).

¹⁷⁴ This argument is frequently combined with the "infant industry" argument. See LINDERT & PUGEL, *supra* note 173, at 162-64.

¹⁷⁵ See, e.g., Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 *INT'L LAW.* 715, 746-50 (1992) (discussing the American Export Administration Act, which is designed, among other things, to channel exports to allies and prevent certain goods and technologies from reaching hostile countries); Edward E. Groves, Note, *A Brief History of the 1988 National Security Amendments*, 20 *L. & POL'Y INT'L BUS.* 589 (1989); Peter S. Malloy, Note, *Controls on the Export of Militarily Sensitive Technology: National Security Imperative or U.S. Industry Impediment?*, 18 *RUTGERS COMPUTER & TECH. L.J.* 841 (1992).

¹⁷⁶ See MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 342-45 (2d ed. 1999). One example is the Exon-Florio Amendment to the American Omnibus Trade and Competitiveness Act of 1988. See, e.g., Paul I. Djuriscic, Comment, *The Exon-Florio Amendment: National Security Legislation Hampered by Political and Economic Forces*, 3 *DEPAUL BUS. L.J.* 179 (1990).

¹⁷⁷ See, e.g., JACKSON, *supra* note 173, at 21-25; LINDERT & PUGEL, *supra* note 173, at 169-70.

the event of hostilities with the (former) Communist Bloc countries.”¹⁷⁸ National security constitutes one of the general exceptions to international trade agreements such as the General Agreement on Tariffs and Trade (“GATT”),¹⁷⁹ and the North-American Free Trade Agreement (“NAFTA”).¹⁸⁰ In either case, the language used in this context has been described as “broad, self-judging, and ambiguous”¹⁸¹—undoubtedly the result of the definitional difficulties alluded to above, and the permeation of national security rhetoric and thinking in many aspects of traditionally civilian activity.

In the context of international instruments, a mention should also be made of the major human rights conventions. Many of the limitation clauses found in these documents include national security as a permissible ground for restricting certain rights and freedoms otherwise guaranteed under the relevant instruments.¹⁸² Cases coming before the

178 TREBILCOCK & HOWSE, *supra* note 176, at 11 (emphasis added). Lindert and Pugel also mention arguments made by the president of the footwear industry of America before the Armed Services Committee of Congress. LINDERT & PUGEL, *supra* note 173, at 169. The president claimed that:

In the event of war or other national emergency, it is highly unlikely that the domestic footwear industry could provide sufficient footwear for the military and civilian population We won't be able to wait for ships to deliver shoes from Taiwan, or Korea or Brazil or Eastern Europe [I]mproper footwear can lead to needless casualties and turn sure victory into possible defeat.

Id.

179 Article XXI of the General Agreement on Tariffs and Trade (“GATT”) provides for a general exception to all GATT obligations with respect to disclosure of national security information, regulation of fissionable materials, regulation of traffic in arms, and action in pursuance of U.N. Charter obligations related to the maintenance of international peace and security. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXI, 55 U.N.T.S. 194; 1 GUIDE TO GATT LAW AND PRACTICE 599-610 (updated 6th ed. 1995); JACKSON, *supra* note 173, at 229-32; JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 983-86 (3d ed. 1995); JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 748-52 (1969); Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 MICH. J. INT'L L. 558 (1991); Hannes L. Schloemann & Stefan Ohlhoff, “Constitutionalization” and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 AM. J. INT'L L. 424 (1999).

180 See North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 296.

181 JACKSON, *supra* note 173, at 230 (referring especially to the catchall provision in Article XXI of GATT that allows a contracting party to act in a manner it “considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations”) (alteration in original). It ought to be noted that governments, for the most part, have been reluctant to use the “national security” exception. See *id.* One reason may be their fear of setting a precedent which might be used by other contracting parties.

182 Limitation clauses permit—even in ordinary times—a breach of an obligation, imposed upon a state with respect to human rights by an international human rights convention, for specified reasons such as public order, public safety, morals, or national security. See Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281, 281 (1978); Christoph Schreuer, *Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights*, 9 YALE J. WORLD PUB. ORD. 113, 113 (1982). Examples of such clauses include Articles 6(1), 8(2), 9(2), 10(2), and 11(2) of the

European Court and European Commission of Human Rights thus far have demonstrated the wide discretion left to governments in determining the legitimacy and sufficiency of national security considerations as grounds for limiting protected rights.¹⁸³

An important result of the patterns described above, which, in turn, has helped to strengthen the trend of expanding the scope of national security, has been the growing role of the military in traditionally civilian affairs.¹⁸⁴ While classic constitutional models assign to the military the responsibility for security affairs (narrowly constructed), clear trends of “role expansion” of the military and convergence between the military and civilian sectors can be detected.¹⁸⁵ This can lead to the somewhat peculiar result, in societies such as the United States, that the military’s role in the civilian aspects of the community’s life expands while the former continues to be treated as a “separate community.”¹⁸⁶ While the “separate community” doctrine has, for the

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

183 See, e.g., *A., B., C., and D. v. The Federal Republic of Germany*, 18 Eur. Comm’n H.R. Dec. & Rep. 176 (1979) (wiretapping telephone conversations conducted between journalists and other persons in a lawyer’s offices); *Arrowsmith v. United Kingdom*, App. No. 7050/75, 19 Eur. Comm’n H.R. Dec. & Rep. 5 (1978) (restrictions on distribution of propaganda to soldiers); *Case of Klass and Others*, 1978 Y.B. Eur. Conv. on H.R. 622 (Eur. Ct.) (legislation allowing secret surveillance of mail, post, and telecommunications); *X v. The Federal Republic of Germany*, 1970 Y.B. Eur. Conv. on H.R. 888 (Eur. Comm’n on H.R.) (disclosure of official secrets).

184 See Lissak, *supra* note 161, at 58-63, 72-80; see also J.R. Dutton, *The Military Aspects of National Security*, in NATIONAL SECURITY: A MODERN APPROACH 100, 102-03 (Michael H.H. Louw ed., 1978). “[A]lthough the ultimate role of the military is the use of armed force, the military strategist must look far beyond guns, ships, aircraft and explosives to ensure a sound military strategy. Every activity of state and society becomes pertinent to his task.” *Id.* Dutton goes on to state that “[t]he military role in National Security can no longer be confined exclusively to the employment of armed force. It is broadened to include contributory roles in virtually every other sphere of strategic action, and specifically in the psychological, economic and political spheres.” *Id.* at 114.

185 See Lissak, *supra* note 161, at 58-63.

186 For criticisms of the “separate community” treatment of the military in other contexts, see, for example, Kirstin S. Dodge, *Countenancing Corruption: A Civic Republican Case Against Judicial Deference to the Military*, 5 YALE J.L. & FEMINISM 1 (1992), and Stephanie A. Levin, *The Deference that is Due: Rethinking the Jurisprudence of Judicial Deference to the Military*, 35 VILL. L. REV. 1009 (1990). For a view supporting the “special community” concept, albeit in the somewhat more limited sphere of servicemen’s rights, see James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen’s Constitutional Rights*, 62 N.C. L. REV. 177 (1984). For other implications of “separate community” thinking, see Barry Kellman, *Judicial Abdication of Military Tort Accountability: But Who is to Guard the Guards Themselves?*, 1989 DUKE L.J. 1597; Stanley Levine, *The Doctrine of Military Necessity in the Federal Courts*, 89 MIL. L. REV. 3 (1980); John B. McDaniel, *The Availability and Scope of Judicial Review of Discretionary Military Administrative Decisions*, 108 MIL. L. REV. 89 (1985); Darrell L. Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL. L. REV. 1 (1975); Gabriel W. Gorenstein, Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387 (1984).

most part, been directed at issues arising within the military,¹⁸⁷ an argument can be made that the growing convergence between military and civilian sectors, resulting, *inter alia*, in the adoption of similar structural and operational modes as well as social norms,¹⁸⁸ may lead to attempts to apply the same approach in those points of contact between the two spheres.¹⁸⁹

CONCLUSION

A. *Good Questions, Bad Answers*

For Carl Schmitt, normalcy is of little, if any, interest; the exception—emergency and crisis—is what consumes his entire attention. Schmitt has been described as:

[T]he outstanding legal theorist of the *notion of exception*, hence much less a thinker of the norms reflecting normalcy—that is to say laws—than the outspoken legitimizer of the form and practice of measure: acts unilaterally taken by the executive in a state of political despair, as stipulated in a separate legal tradition of *martial law*, of *état de siège*, and of *Ausnahmezustand*.¹⁹⁰

Schmitt's theory revolves entirely around pathological cases of legal and political orders. His worldview is apocalyptic, inasmuch as he identifies politics with permanent crisis and conflict.¹⁹¹

Schmitt is confronted with a grave situation in his own country in the early 1920s. His initial attempt to offer one constitutional solution to Germany's troubles takes him in the direction of adopting the model of the commissarial dictatorship. Yet, within a short time, he changes his earlier position and, in 1922, he formulates his radical theory of the exception, which is so succinctly summed up by the opening statement in *Political Theology*: "Sovereign is he who decides on the exception."¹⁹² *Political Theology* was originally published in March, 1922. Its second edition, published twelve years later, in 1934, remained, according to the author's own testimony, "unchanged."¹⁹³ In fact, in the preface to the second edition, Schmitt invites his readers to

¹⁸⁷ The Supreme Court, in *Parker v. Levy*, 47 U.S. 733 (1974), stated that "the different character of the military community and of the military mission" as well as "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Id.* at 758.

¹⁸⁸ See Lissak, *supra* note 161, at 58-63.

¹⁸⁹ For a similar argument, see Kellman, *supra* note 186, at 1606.

¹⁹⁰ Kelsen and Schmitt, *supra* note 3, at 10.

¹⁹¹ See Galli, *supra* note 6, at 1615.

¹⁹² Schmitt, *POLITICAL THEOLOGY*, *supra* note 18, at 5.

¹⁹³ *Id.* at 1.

“judge to what extent this short publication . . . has withstood the test of time.”¹⁹⁴ When viewed against the history of the Weimar Republic, this lack of change is significant in itself. Schmitt obviously finds no reason to rethink his theory, despite the rise to power of the National Socialist Party and the nomination of Adolf Hitler as chancellor some ten months before Schmitt extends this “invitation to judge” to his readers. Even those who may wish to argue that Schmitt was not fully aware of the dangerous implications of his own theory in 1922, will be hard pressed to argue the same with respect to his clear statements twelve years later.

Schmitt’s exceptionalism is indefensible as a normative project. His challenge to liberalism’s perceived inadequacy in dealing with the state of exception leads him to set his sights solely on the exception to the utter disregard of the normal—the rule. However, Schmitt’s attack on liberalism does seem to have a point, insofar as real world practice is concerned. It is this aspect of Schmitt’s writing which ought to interest us and which is still significant today.

B. *The Accountability of the Academic: A Personal Note*

For ten out of twelve people in my paternal grandfather’s immediate family in Poland (four of them young children) the Final Solution exercised by the murderous Nazi machine was no political exercise, nor a theoretical debate. It was their “existential negation.” Unlike Carl Schmitt, they did not live to be 96 years old or fulfill their individual potential, because they were decreed to be the public enemy, and for so many of Schmitt’s ilk, also a very private enemy. My maternal grandfather, who completed his Ph.D. in law in Germany and practiced there, was luckier. He merely lost his career, not his life, on the altar of homogeneity of the legal profession—necessary, according to Schmitt, in order to achieve determinacy and predictability in the legal order.

There are times when academics do not enjoy the privilege of not taking sides and not expressing positions. And when they do, their words and actions matter and they stand accountable for them. Carl Schmitt expressed his positions clearly and acted upon them. All those who continue to debate his legacy must remember at all times that this is not some exercise conducted in the ivory towers of academia with which we are involved. It is a matter of life, and even more so, of death. “[T]heoretical discussions never take place in a vacuum and there can be no philosophical thought without political consequences.”¹⁹⁵

¹⁹⁴ *Id.*

¹⁹⁵ ZEEV STERNHELL ET AL., THE BIRTH OF FASCIST IDEOLOGY: FROM CULTURAL

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