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The Anti-Emergency Constitution

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The Anti-Emergency Constitution

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INTRODUCTION

The season for talk of leaving the Constitution behind, while we grit our teeth and do what must be done in times of grave peril—the season for talk of saving the Constitution from the distortions wrought by sheer necessity, while we save ourselves from the dangers of genuine fidelity to the Constitution—is upon us. Such talk, the staple of commentary on the survival of constitutional democracies in wartime and other similarly trying periods, was to be expected in the wake of September 11.

It was once an unspeakable thought that our Constitution should have lacunae—temporal discontinuities within which nation-saving steps would be taken by those in power, blessed not by the nation's founding document but by the brute necessities of survival.¹ But the unspeakable became more readily articulable when the inimitable pen of Robert H. Jackson gave word to the thought in his canonical dissent from the Supreme Court's justly infamous *Korematsu* decision,² proclaiming that the great harm to liberty

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1. In *Ex parte Milligan*, Justice Davis put the point this way:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism

71 U.S. (4 Wall.) 2, 120-21 (1866).

2. *Korematsu v. United States*, 323 U.S. 214 (1944). *Korematsu* held that exclusion of all persons of Japanese ancestry from a designated "Military Area" was constitutional. *Ex parte Endo*, decided on the same day, held that the War Relocation Authority was without lawful power to detain concededly loyal and law-abiding United States citizens, some 61,000 of whom (of

and equality done by the military expulsion of Japanese Americans from their homes and communities was dwarfed by the still greater harm done by bending the Constitution into a form that could rationalize that course of action.³ Better by far, Jackson darkly suggested, would have been a strategy whereby the military would have been left free to do what the law of necessity called for, while the courts washed their hands of the affair and did nothing to create a precedent by holding the military's actions to be constitutional.⁴

Although Justice Jackson failed to work out a scheme that could actually achieve both of those results, there has been no dearth of commentators seeking to close the Jackson gap by dreaming up elaborate superstructures of doctrine and meta-doctrine that could essentially square the circle that the Justice left unsquared.⁵ By no means the first of these commentators but by far the most ambitious has been, not surprisingly, Bruce Ackerman, who brings to the task his special gift for provokery.⁶ His work, even (perhaps especially) for the unpersuaded reader, persists in memory—reorients resistant thought and recasts problems, working materials, even expectations.⁷ *The Emergency Constitution*⁸ is no exception. It is brave. Ackerman proposes that we assume the trauma of September 11 will recur often, and that we face up to the task of thinking through the work constitutional law must do given this assumption.⁹ It is startling.

Japanese ancestry) were at that point confined in internment camps, as most of them had been for about two years. 323 U.S. 283, 296 n.19 (1944).

3. *Korematsu*, 323 U.S. at 245-46 (Jackson, J., dissenting).

4. *See id.* at 247-48.

5. For leading recent discussions (including references to the larger literature), see Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004); and Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273.

6. A word we created for the occasion, to be sure, but one we think is more aptly active than "provocation."

7. One of us has on occasion underestimated the transformative undercurrent of the distinctively Ackermanian take on the enduring puzzle of constitutional upheaval and discontinuity, treating Bruce Ackerman's powerful and illuminating (if still problematic) notion of "constitutional moments" with too little generosity to see what it has to teach even the unconverted. *See* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1225, 1301-03 (1995). The other one of us has suggested that some of Professor Ackerman's arguments might supply a defense for cannibalism. *See* Patrick O. Gudridge, *The Persistence of Classical Style*, 131 U. PA. L. REV. 663, 768 (1983).

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

9. Some might think it insensitive—while the memorial for September 11 is still being planned, while the inquiries into why America was caught so unprepared that day are still being pondered, and while the grief of those who lost the most in the attacks remains almost as fresh as yesterday—to brush past that tragedy quite so quickly, locating it on history's map as but one of what we claim to know will be a long series of similar events, each terrible in its psychic toll but none so awful as to crush the nation. It is part of Professor Ackerman's flinty appeal as a hardheaded realist that he is undeterred by such considerations. What's done is done, he tells us;

Ackerman believes that ordinary constitutional law in all its elaborateness (mostly “fog,”¹⁰ he seems to think) should overtly give way in states of emergency like that occasioned by September 11. It is inventive. Ackerman proposes that in states of emergency a constitution of his own devising should instead apply.

In the United States, he thinks, this constitution would likely take the form of a framework statute. Basic procedures are clearly outlined. Each particular state of emergency would require congressional authorization; such authorizations would be subject to time limits and provisions requiring escalating supermajorities for renewals. Congress would be able, in a structured way, to obtain pertinent information developed by executive officials.

But it is not always easy to grasp more than the vaguest contours of Ackerman’s scheme. For example, the content of the powers granted to executive officials by a declaration of emergency seems to be left to improvisation by unspecified institutions and at unspecified times (whether by Congress *ex ante*, or by Congress at the time of the emergency’s invocation, or by the emergency-invoking Executive at that time). Ackerman often talks as though authority to engage in wide-scale preventive detention will be the principal power conferred.¹¹ On this assumption, individuals would be afforded a limited set of procedural and substantive rights, including time limits on detention, a ban on torture, and a right to compensation for those ultimately determined to have been wrongly incarcerated. But at other points, especially in *This Is Not a War*,¹² Ackerman suggests that any of a seemingly open-ended list of counterterrorism measures might come into play.¹³ As a result, this Essay at times must proceed in the alternative, yielding a regrettable cumbersomeness that may make it especially helpful to identify at the outset the broad themes we pursue in the pages that follow.

we’d best get on with the stern work of constitutional engineering to prepare ourselves for more, much more, of the same or worse. We do not pretend to know how sound that pessimistic prediction is. Serious terrorist attacks take place with disturbing regularity around the world—if, at this writing, not yet repeatedly within the United States. In the very nature of the case, only optimistic predictions about such matters can ever be falsified—except, of course, for those pessimistic predictions that are foolhardy enough to set a date certain for their forebodings to materialize. (Think of how many “Repent, for the world ends on June 24!” signs must be recycled annually!) For the sake of argument, however, we are prepared to accept Ackerman’s geopolitical projections so that we might focus attention on the constitutional response he prescribes.

10. *E.g.*, Ackerman, *supra* note 8, at 1042.

11. *See, e.g., id.* at 1033, 1037, 1062.

12. Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871 (2004).

13. *See id.* at 1889-91. He says almost nothing about what other rights, if any, would be recognized in connection with such non-detention-related measures, and nothing about the foundation, theoretical or practical, on which the definition of those other “emergency rights” might rest. And there are, as we will see, substantial additional ambiguities as well.

Our first concern is pragmatic: Is Ackerman's "emergency constitution" a remotely *plausible* way to organize government action? To the extent that the scheme sets itself up outside ordinary constitutional law—as freestanding—it warrants a particularly searching examination to test for unexpected implications or byproducts, including any that may be so troubling as to bring the entire enterprise into doubt. Based on that examination, we believe the grounds are overwhelming for rejecting the Ackerman proposal as anything beyond an interesting thought experiment—a useful reminder of the reasons for *not* following the sirens that beckon us in times of crisis to set the Constitution aside and to live by another code altogether.

Second, we worry about the enormity of what proposals like Ackerman's would have us give up in order to create bracketed times and spaces within which we might do terrible things without thereby becoming terrible people. Ackerman, it often appears, genuinely means to jettison much of ordinary constitutional law during the brightly demarked periods within which his emergency constitution is in force. It therefore becomes important to evaluate how the propositions of constitutional law that are retained by—or, more properly, incorporated by reference in—the Ackerman emergency constitution will work in their new context. Beyond that, there is the large question of what Ackerman is willing to abandon, however temporarily: a complex body of conceptualizations, arguments, and points of departure regarding the content and limits of individual rights—one that presents the *law* of the American Constitution as a *system*, rather than simply as a pile of rules from which some might be drawn and others discarded as suits the fancy of the alternative constitution-builder. Is this imposing resource, the product of much conflict and hard thinking, really so fragile or so useless in the emergency contexts that Ackerman addresses that it is better to discard it for the time being than to work within its ambit?

Third, we call attention to the role of memory—or rather, of *amnesia*. Professor Ackerman would treat the state of emergency as discontinuous from and fundamentally outside of ordinary constitutional law and, therefore, as largely irrelevant, except for cleanup matters, to constitutional law after the emergency ceases. To disarm Justice Jackson's loaded pistol,¹⁴ waiting for the tyrant who would but fire it, one must essentially erase it from memory—or at least drain it of virtually all its power as precedent, reducing its traces to mere wisps left over from the fog of war. But this constitutional amnesia is likely to be at least as superficial as it is alluring.

14. "The principle . . . lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

At its best, such contrived forgetting would merely relegate awareness of previously rationalized abuse to a hard-to-address constitutional subconscious. It is in any case no boon: The memory of how we once rationalized what we later take to be a wrong, sometimes a great and terrible wrong, contributes to constitutional law no less than does the memory of how we have in the past kept our affirmative commitments to do right.

The first Part of this Essay sketches some of the difficulties that seem to us prominent on the face of what Professor Ackerman proposes. But we do not mean to dwell too long on matters of detail: It is the general line of Ackerman's thought that we mean to pursue and, in the end, to criticize. The second and third Parts of this Essay—in which we begin to re-explore our own thinking “after Ackerman,” and to re-view the constitutional context—accordingly attempt to take the process of provokery a step or two further. We locate the elements of ordinary constitutional law that Professor Ackerman retains (however implicitly) in his proposal and mark an important question of constitutional reform that he does not discuss. In the process, we also identify what is, at bottom, an important problem of distributive justice created by his proposal. Finally, we emphasize the density of ordinary constitutional law. Its accumulated lines of thought and argument are indeed tantamount—however familiar the metaphor—to the threads of a complex tapestry. We pick out certain of these threads and consider what their patterns suggest about what it is possible to expect—to weave—from constitutional law even in the course of emergencies.

In the process of these explorations, we shift our focus away from Professor Ackerman's specific proposals, although we draw on resources that reflecting on those proposals brings to mind. We propose to complement more than criticize. To that end, we describe judicial responses within constitutional law—in the United States and abroad. Professor Ackerman's analysis, however dialectically, alerts us to much that we had not previously recognized. India's response to constitutional emergency in the 1970s is especially illuminating. Utterly familiar Cold War domestic security cases also disclose considerable judicial ingenuity in framing constitutional inquiries into governmental actions in periods of great peril. This is so not because our Supreme Court always reached conclusions in the Cold War era with which we agree. Rather, it is because the Court's struggles, across close to twenty years, led the Justices to develop useful ways of structuring disagreement—among themselves, within government, and within the country at large—in the very process of defining rights and limits to rights.

Do we think Ackerman's proposal is unconstitutional within the terms of ordinary constitutional law? In an important sense, the question answers itself. Of course we do: Unless the Ackerman Constitution unleashed

government to take steps permissible within its terms that Ackerman sees as vital for the nation's security but that the normal Constitution would condemn, the Ackerman Constitution would purchase nothing for the nation that its current Constitution, sans Ackerman, did not already provide. Even at the narrowest technical level, take the version of Ackerman's proposal that emphasizes preventive detention of individuals who could not lawfully be held in custody under normal constitutional standards (even considering the flexibility of the Fourth Amendment's crucial terms): The closest one could come to giving the Ackerman Constitution a "normal" constitutional seal of approval would be to shoehorn it into the form of a complex, conditional, and partial suspension of the writ of habeas corpus pursuant to Article I, Section 9. Ackerman does provide for congressional action—the declaration of emergency—as the immediate precondition to the suspension of habeas on which his scheme hinges, and as a post hoc ratification of any very short-term presidential action tantamount to suspension. But we must also suppose that whatever events qualify as sufficient to trigger the Ackerman emergency constitution constitute "Cases of Rebellion or Invasion" in which "the public Safety may require" the suspension of habeas for unlawful detention or for detention under unlawful conditions.¹⁵ The jurisprudence of "rebellion or invasion" is not so well-developed, however, that one can say with any certainty that anything less than a "war," in the ordinary constitutional sense of that term (and the very sense that Professor Ackerman is determined to argue is inapplicable to the attacks of September 11 and our military responses to those attacks), could suffice to permit a suspension of habeas by Congress.¹⁶

Moreover, Ackerman necessarily supposes that, within the emergency period, government actions will occur that would ordinarily be unconstitutional—a supposition that is unaffected by the lawfulness of the

15. U.S. CONST. art. I, § 9, cl. 2.

16. Perhaps the determination of precisely when an "invasion" becomes an act of "war" against the United States such that a full-scale military response involves an exercise of the warmaking power is, within broad boundaries, nonjusticiably political. At the very least, however, there is tension between Professor Ackerman's desire to deny that the military response of the United States to al Qaeda's attack upon our nation has involved us in a "war," and the need to squeeze the entire bulk of his "emergency constitution" within the relatively confining channel defined by the notion of an "invasion." See Ackerman, *supra* note 12, at 1871-73. We do not share Professor Ackerman's conviction that the military conflict being waged by the government against al Qaeda and cognate groups is less than "war" in the constitutional sense simply because the entities that are our adversaries in the current conflict are supranational in nature and, rather than being merely "state-sponsored," have gone so far as to take over a state (Afghanistan, through the Taliban). Indeed, we suspect that a mindset that could not fathom profound threats to the nation coming from sources other than nation-states and their armies may have handicapped efforts to respond effectively to al Qaeda in the months leading up to September 11. For especially elegant discussion of the matter, see PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 819-23 (2002). Our problem is not with calling this war a "war" but with calling it a "war against terrorism"—a label so amorphous and all-encompassing that, like the "war on crime" or the "war against evil," it can never be ended, much less won.

suspension of habeas corpus for testing the legality of those actions insofar as they result in anyone's detention. Ackerman provides for some remedies as alternatives to the writ he has temporarily erased—judicial hearings, compensation schemes, potential punitive damages suits. Whether these arrangements are sufficient even from a strictly remedial perspective to meet the demands of ordinary constitutional law depends, of course, on the details. But those details are left to the imagination—as are the answers to additional questions of importance to the remedial inquiry. For example, would the usual injunctive or declaratory actions be available even if habeas corpus writs were not? If the answer is yes, then how would the ordinary purposes of suspending habeas (so as to free the government from the encumbrances of having to pause in mid-battle to persuade a judge of the legitimacy of its course) be advanced? If the answer is no, then in what sense would the underlying substantive rights, which are still secured by the Constitution and which no mere statute could entirely obliterate, not have been utterly destroyed? In any event, the outlines of how constitutional law should approach questions of court-closing are well-known. The brooding omnipresence is Henry Hart.¹⁷ What to make of the scheme as a whole—how to assess the seriousness of its numerous departures from the Constitution as normally understood—must, for now at least, be described as a question shrouded in mystery.

Are we simply stating a preference for the courts over Congress—for adjudication over legislation—as the principal governmental guardian of individual rights? Hardly. No less than Professor Ackerman and in some ways perhaps more, we recognize a crucial role for Congress—a constitutionally granted role—in limiting executive unilateralism. Nor are we any less committed than is Professor Ackerman to the proposition that constitutional law includes not only judicial understandings of constitutional texts, but also congressional, presidential, and popular understandings—however complicated the paths along which and the modes by which those understandings combine. We do discuss the work of courts at length. But the issue to be addressed here is *not*, or at least not exclusively and perhaps not even primarily, courts and their limits. The issue, rather, is whether constitutional law, as we experience it (make it, interpret it, teach it, deploy it) in all its ordinary complexity, should in important respects be set to the side and suspended during certain defined episodes that will punctuate our lives as we engage in the grave business of fighting terrorism.

17. See generally RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 345-61, 1289-93 (5th ed. 2003). Ackerman's proposal also raises constitutional questions insofar as the framework statute fixes supermajority voting rules for Congress. See *infra* note 139.

I. PROFESSOR ACKERMAN'S NEW CONSTITUTION

Bruce Ackerman proposes that we set aside ordinary constitutional law in the event that government finds itself confronting future terrorist attacks like those of September 11, 2001. He thinks we would be better off proceeding instead within the framework of a purpose-built "emergency constitution." He sketches a sequence of institutional arrangements in terms sufficiently general to be adapted and adopted not only in the United States but in other representative democracies as well:

Emergencies can be declared only after an actual attack; they can be continued for short intervals only by increasing supermajorities in the legislature and only after minority parties obtain privileged opportunities to inform themselves as to the real-world operation of the emergency regime and to publicize the facts as they see fit; and the scope of emergency powers is limited to the needs for relief and prevention that justify them in the first place.¹⁸

Ackerman believes that the paradigmatic government response to a terrorist attack will be some scheme of mass arrest, confinement, and interrogation. Accordingly, he adds to his constitution a requirement that, after their release, the government pay "financial compensation to all innocents who have been swept into preventive detention."¹⁹ Government officials would be obliged to bring detainees "expeditiously" before judges—although the detainees would not initially be permitted to challenge the government's stated grounds for detention.²⁰ "Decency, not innocence," would be the "overriding concern"—"*Do not torture the detainees.*"²¹ Detainees also would be entitled to "[r]egular visits by counsel."²² Ultimately, after forty-five or sixty days, some sort of evidentiary hearing would become a necessary precondition for further confinement.²³ Once released, detainees could not be immediately reconfined.²⁴

Taken together, these accumulated procedures and constraints are meant "to present a picture of the 'state of emergency' as a carefully limited regime, tolerated only as a regrettable necessity, and always on the path toward termination."²⁵ This "picture," Ackerman seems to suppose, should remain apt even if emergency powers encompass measures—surveillance

18. Ackerman, *supra* note 8, at 1060-61.

19. *Id.* at 1062.

20. *Id.* at 1070-71.

21. *Id.* at 1071.

22. *Id.* at 1073.

23. *Id.* at 1070-71.

24. *Id.* at 1074.

25. *Id.* at 1076.

programs, say—quite different from campaigns of preventive detention and questioning. Is this what we see? Or just an uneasy jumble?

A. *Demonstrative Constitutionalism*

For Bruce Ackerman, what we need to picture, to bring into focus, is the idea of “necessity.” Necessity is, it seems, first of all something like an impulse or motive propelling government action. “When a terrorist attack places the state’s effective sovereignty in doubt, government *must act visibly and decisively* to demonstrate to its terrorized citizens that the breach was only temporary, and that it is taking aggressive action to contain the crisis and to deal with the prospect of its recurrence.”²⁶ But this proposition, Ackerman recognizes, is opaque: Why must government act? Why must action be visible and decisive? Terrorist attacks like those of September 11 do not, he thinks, directly threaten the survival of government—such attacks are too limited in scope to pose the “existential” risk of utter obliteration or disintegration.²⁷ In this, we think he is surely right. There exists a category of terrorist attacks, which we are prepared with Ackerman to suppose will occur with greater frequency on American soil in this century than in the century past, that do not challenge our survival as a nation in the way that the Civil War, World War II, and certain moments in the Cold War, such as the Cuban Missile Crisis, no doubt did. Yet a successful terrorist attack is, all the same, politically perilous—far more perilous than either a natural disaster of comparable scale, or an economically motivated criminal conspiracy with the usual sordid mix of corruption, drug dealing, witness tampering, urban violence, and even murder—because such an attack is profoundly destabilizing and insulting, a “blatant assault on . . . sovereign authority.”²⁸ The terrorist attack dramatically and tragically calls into question the claim of government to maintain public safety, at least temporarily “shattering . . . the ordinary citizen’s confidence in the government’s capacity.”²⁹

Ackerman’s language calls to mind the metaphor of the duel. Government must respond in order to afford “reassurance,” “demonstrate” that the insult rests on a false premise in order to “demonstrate” the true depths of “the government’s general capacity,” restore “the ordinary citizen’s confidence,” and therefore also restore “sovereignty.”³⁰ Shock begets awe: “The only way to meet this challenge is for the government to demonstrate to its terrified citizens that it is taking steps to act decisively

26. *Id.* at 1037 (emphasis added).

27. *See id.* at 1039.

28. *Id.* at 1036.

29. *Id.*

30. *Id.* at 1036-37.

against the blatant assault on its sovereign authority.”³¹ Hence the “dragnet” and other strong responses: Government acts first and foremost to “demonstrate” its power to protect.

Professor Ackerman’s picture sketches a disturbing to-and-fro of insult and response, terrorist mass murder and government mass incarceration. Its depiction of government action juxtaposes Franz Kafka and Joanne Freeman—evokes both the penal colonies and punitive expressionism of the twentieth century and the calligraphies of republican honor and democratic order of two centuries earlier.³² And Ackerman is rightly uneasy about what he puts before us as his distinctive mode of response. But he thinks that mode is needed because repeated terrorist attacks are inevitable. “The attack of September 11 is the prototype for many events that will litter the twenty-first century.”³³ All we can do—or at least the only thing that constitutional theory can try to do—is provide a form for organizing government’s equally inevitable responses. Our task as mature constitutionalists, according to Ackerman, is to organize those responses in a manner calculated to minimize the harms that our own government does to us in the process of reassuring us—shades of Alexander Haig—that *it is* “in control here.”³⁴

Damage control of the sort that reassures a panic-prone public, Ackerman suggests, requires attention to three overlapping dangers. There is, most obviously, the risk of a “downward cycle”: “After each successful attack, politicians will come up with repressive laws and promise greater security—only to find that a different terrorist band manages to strike a few years later.”³⁵ There is the exacerbating risk of demagoguery: “Above all else, we must prevent politicians from exploiting momentary panic to impose long-lasting limitations on liberty.”³⁶ And there is, to cap things off, the risk of honest error on the side of caution: “Unless careful precautions are taken, emergency measures have a habit of continuing well beyond their time of necessity.”³⁷

Ackerman’s constitutional design responds to this dystopian specter. Without attempting to specify much in substance about how serious a terrorist attack need be, or about who precisely might be subjected to

31. *Id.* at 1036.

32. See JOANNE B. FREEMAN, *AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC* (2001); FRANZ KAFKA, *In the Penal Colony*, in *THE METAMORPHOSIS AND OTHER STORIES* 53 (Stanley Appelbaum trans., Dover Publications 1996) (1919).

33. Ackerman, *supra* note 8, at 1029.

34. Steven R. Weisman, *Bush Flies Back from Texas Set To Take Charge in Crisis*, N.Y. TIMES, Mar. 31, 1981, at A1 (quoting Secretary of State Alexander Haig’s assertion that “I am in control here in the White House” in the aftermath of the 1981 attempted assassination of President Reagan).

35. Ackerman, *supra* note 8, at 1029.

36. *Id.* at 1030.

37. *Id.*

preventive detention and under what conditions, or about what the government's other emergency powers might be, Professor Ackerman instead emphasizes political process concerns. Most significantly, he would impose a requirement that legislative authorization of the declaration of emergency be repeated at regular, short intervals, each time demanding a larger legislative majority. He means thereby to make the question of necessity—at least, the threshold question of the existence of a state of emergency—a matter for legislative deliberation, not executive fiat. To assure, as far as is possible, that this deliberation is a matter of reason and not of rush to judgment or of opportunism, he adds his scheme for bipartisan information-sharing among legislators. In addition, whatever their other justifications, several of the individual rights Ackerman includes in his limited substantive outline of the emergency constitution—for example, the rights to just compensation, counsel, no double jeopardy—work to counter the moral hazards presented to executive officials by time-limited authorizations.

Ackerman's system of repeated votes serves several ends. The votes make possible an operational rather than theoretical resolution of what counts as an "emergency." They introduce an increasing bias in favor of a time-limited definition. Most importantly, the votes themselves, whatever their outcomes, enact a kind of constitutional normalcy. Legislators participating in the process, simply by participating, acknowledge limits.

B. *Some Pragmatic Questions*

The scheme that Professor Ackerman outlines immediately raises questions as to its value: Are its goals the right ones? How likely is the scheme to advance those goals, as a matter of fact? Neither of these questions can be resolved definitively.

First: Ackerman's overriding concern—he characterizes it as "*the purpose of a newly fashioned emergency regime*"³⁸—is the need to offer public reassurance, calming fears otherwise likely to dominate government responses to every large-scale terrorist attack. We agree that this concern is a valid one; indeed, other things being equal, fear and dread are evils in themselves. Unwarranted worry that the government may not be making us as secure as claimed—particularly when the truth is more upbeat than our fears—may lead us to suspicions that can get in the way of progress on other fronts. If significant enough, such concern can also pressure government into unwise sacrifices of important constitutional values; even if undue public anxiety could in no objective sense be deemed harmful, the very existence of alarm in the public mind is thus in itself a reason for a

38. *Id.* at 1031 (emphasis added).

constitutional democracy to respond.³⁹ Accountability and responsiveness to the public are, after all, defining hallmarks of democracy, and the government's effectiveness depends in no small part on its perceived legitimacy. Of particular concern to Professor Ackerman are the restrictions on personal liberty that a government in search of greater security and fuller protection is invariably tempted to impose—and that a populace eager for greater security may be willing to tolerate and may even demand. Reassuring the public might be the only way to forestall the even greater and more lasting backlash against civil liberties that Ackerman worries an unreassured public might irresistibly insist upon.

All of that seems sensible enough, but we have considerable doubt that the objective of enhanced public reassurance—even as a means to the end of holding the temptation to sacrifice rights at bay—is defensible as the only, or even the primary, goal of an emergency regime. There is, to begin with, the matter of objectively *justified* public worry. The lack of reassurance might, after all, reflect the lack of any sufficient ground for feeling reassured. Remove the pressure that a justly alarmed electorate can bring to bear, and the incentives for those who govern to remove the root causes of alarm will fall below the optimum (that is, farther than they should).⁴⁰ Reducing public hysteria by putting baseless rumors to rest is one thing; pretending that genuine sources of worry are but idle rumor is quite another.⁴¹ In any event, shouldn't a responsible government be most concerned with *actually* preventing and responding effectively to acts of terrorism, and with *actually* protecting, trite though it may have come to sound, the basic freedoms on which our country's very identity is founded? Shouldn't a responsible government be concerned only secondarily with convincing the public that government is providing that protection—and,

39. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), of course, is not to the contrary. It holds, in the relevant respect, only that irrational alarm seemingly triggered by antipathy toward a marginalized group—there, a group of mentally disadvantaged residents—cannot meet the equal protection command of the Fourteenth Amendment. *Id.* at 442.

40. For suggestive elaboration, see Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 628-31 (2003).

41. Professor Ackerman argues that distinguishing between genuine worry and rumor is simply not possible in this context: “[N]obody has the slightest idea what may happen next.” Ackerman, *supra* note 12, at 1886 (emphasis omitted). This fatalism may be overstated. The September 11 commission hearings—including the sworn testimony of the Bush Administration's National Security Advisor, Condoleezza Rice, and of former counterterrorism “czar” Richard Clarke—suggest, at least at the level of widespread public impression, that government officials were evaluating the risks of al Qaeda acts of terrorism against civilian targets in the United States well before 2001, and were debating how to deal with these risks in the face of inevitable uncertainties about the place and time of any attacks. Whether one thinks Rice or Clarke the more credible witness to the government's degree of focus pre-September 11 on the al Qaeda threat, it appears that the government's risk analysis was well enough developed to be properly subject to reasonable criticism now. Some such risk analysis—careful identification of genuine worries and appropriate responses—may often be possible in the future as well.

we would add, not at all concerned with convincing the public that it is doing *more* than it is in fact doing?

Professor Ackerman agrees that these are important questions.⁴² But he believes that the sort of crisis that we ought to worry about most is the “double whammy”—a first terrible attack followed after a not-too-long interval by a second murderous strike. Such a sequence, he thinks, would utterly undermine public confidence in government.⁴³ The state of emergency, in this scenario, would be the period of crisis in which government officials, beginning with their roundups, would urgently try to catch up with terrorists before we are hit with the “second strike.”⁴⁴ This is, to be sure, a dramatic script. But in the almost three years since the September 11 attacks, we have witnessed (at least outside Israel) either near-simultaneous attacks in one or more countries, or carefully planned efforts substantially separated in time resulting in attacks in several countries, not just the United States. Ackerman’s relatively short-term emergency heroics seem, against this backdrop anyway, rather beside the point.

Surely many of the most effective responses (in terms of preventing recurrence of a terrorist attack, even if not in terms of reassuring the populace that one is doing so) are likely to involve relatively obscure and colorless changes in ways of processing, translating, and collating information—changes not nearly dramatic enough to reassure any but the least emotional among us.⁴⁵ Professor Ackerman acknowledges that surveillance and information processing undertaken independently of preventive detention may matter a great deal. He would treat authority to engage in such efforts as a grant of power properly—if not necessarily—included in the framework statute.⁴⁶ It is not at all clear, however, why such efforts require a declaration of emergency before being pursued. They appear to be day-in, day-out efforts, achieving success through persistence and coordination. We wonder, as a result, whether some of the most dramatically reassuring measures are likely to have little or nothing to do

42. *See id.* at 1880.

43. *Id.* at 1883.

44. *Id.* at 1883-84.

45. Marketing techniques that appeal to the most primitive fears of a supposedly sophisticated public are nothing new; the strategy for selling monstrous vehicles that make no net contribution to anyone’s safety (and that might indeed make a net *negative* contribution, once the additional protection afforded by a larger vehicle is offset by its decreased maneuverability) is a prime example. *See* Malcolm Gladwell, *Big and Bad: How the S.U.V. Ran Over Automotive Safety*, *NEW YORKER*, Jan. 12, 2004, at 28. Several thoughtful suggestions for some genuinely effective measures may be found in PHILIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* 37-84 (2003). In fairness, it should be added that even so careful a pragmatist as Professor Heymann acknowledges the legitimacy and utility of at least some steps in response to terrorist attacks whose principal justification is their tendency to foster public morale and confidence. *See id.* at 89-90.

46. Ackerman, *supra* note 12, at 1889-91.

with actually enhancing the security of the nation and its people. Such measures might, by creating a false sense of security, actually diminish salutary sources of pressure on government to do more of the thankless work of the plain-vanilla variety that needs to get done. The emergency constitution provides sweeping, short-term executive authority in an effort to stop terrorists from striking in the immediate aftermath of another attack. What may be needed is narrow but constant power. The emergency constitution is broad where it needs to be narrow, and short when it needs to be long.

It is not altogether obvious, moreover, that Ackerman's emergency regime would actually increase public reassurance: His assumption that it would is not grounded in any particular evidence, as far as we can tell (though neither, admittedly, is the following speculation to the contrary). Any declaration of emergency may be perceived as a sign of panic or as a political stunt rather than as a sign that the government has everything under control. It is not unreasonable to suppose that the first declared emergency under a regime of the sort Professor Ackerman proposes would be perceived as especially unnerving—far more so, we would assume, than the first instance of “Code Red,” should that danger signal ever be emitted by the post-September 11 Department of Homeland Security. However that may be, it seems likely that after the first few declarations of emergency⁴⁷—at least some sequence of which is bound to appear in hindsight to have been a series of successive false alarms—a widespread perception may develop that such declarations are mere instances of government stage-managing just in case things should go wrong, temporarily releasing law enforcement authorities from shackles they had long wished to be rid of anyway for reasons having nothing to do with terrorism.⁴⁸ Were this the case, such declarations, in and of themselves, might well accomplish little or nothing. However the details work out, it seems quite likely that the public would eventually come to view each succeeding declaration of emergency as a fairly empty political exercise—a constitutional version of “Code Orange.”

Second: Even if political checks make it difficult to sustain an emergency beyond several months, hundreds of days is not a short time.⁴⁹ Creating the “emergency” label may make it difficult, moreover, not to invoke emergency powers in any situation that might remotely qualify.⁵⁰

47. Recall that Ackerman assumes periodic attacks. *See* Ackerman, *supra* note 8, at 1029.

48. *See also infra* text accompanying notes 95-99 (discussing the USA PATRIOT Act).

49. If terrorist attacks really occur every five years or so, even six-month periods of emergency (about what Ackerman contemplates) would amount to a very large percentage of total time—making the state of emergency a rather nonexceptional state.

50. Indeed, Ackerman acknowledges this concern, but never ultimately resolves it. *See* Ackerman, *supra* note 8, at 1041 (“If you build it, they will come—officials will seek to invoke

Suppose an al Qaeda shopping mall attack kills a dozen people. This would be a terrible tragedy, but one not even close to September 11 in scale. Yet imagine politicians trying to explain to the public, and to victims' families, that this attack was not serious enough to amount to an "emergency," even though American lives were taken by foreign attack on American soil and the terrorists who pulled it off are likely still at large. Or imagine that a suicide attack by seemingly isolated extremists of some sort kills several thousand people—a genuine emergency in magnitude, no doubt, but perhaps not justifying emergency powers of detention and the like: After all, the actual perpetrators are now all dead. Even if most representatives—and possibly even most members of the public—do not consider either of these events a true national "emergency," it will be difficult for them to say so, for fear of looking soft or favoring some victims over others.

Third: It seems far from clear that the probable response of the public to periodic terrorism is escalating cycles of panic. That this is indeed the likely response is, of course, the assumption undergirding Ackerman's belief that public reassurance through an emergency regime is necessary to prevent eventual worse restrictions on civil liberties.⁵¹ Yet the recurring attacks he predicts might instead have a depressing, even if in some ways salutary, effect: Such events may normalize terrorist "crises"—that is, cause the public to adapt to a fairly constant level of terrorist threat and to a tragically, but no longer shockingly, steady series of actual terrorist episodes. It is bound to be quite a long time—even if all goes well with efforts at coalition-building among the principal targets of each new wave of global terrorism, and even if democratic nation-building proceeds more smoothly than anyone has grounds at the moment to predict—before we can feel any confidence that the kind of terrorist assault to which our nation was first exposed on September 11 will not recur in the foreseeable future.

Such confidence seems unlikely to be warranted until we (and the other similarly successful economies of the West) have ceased to inspire resentment, fear, and blinding rage on the part of too many individuals in too many places. Fanatically, even suicidally, anti-American and anti-Western ideology—in combination with the resources and aptitude for deploying the technology and theater of terror—will continue to provide at least the preconditions for more of the same. We seem more likely to grow accustomed to terrorist attacks than to sell off larger and larger chunks of who and what we are in a transparently masked attempt to make those attacks go away. For, as we will hopefully never have to learn from firsthand experience, not even a locked-down police state is totally immune

'emergency' powers to handle middling crises, resulting in yet another sad story of unintended consequences.").

51. For criticism of beliefs like these from a perspective rather different from ours, see Posner & Vermeule, *supra* note 40, at 631-34.

to such attacks; not even a regime of state terror is an ironclad guarantee against terror from outside the state.

It is a commonplace that September 11 stunned Americans because we had thought of ourselves, at least since the end of the Cold War, as immune from external attack on any scale capable of generating nationwide apprehension. We don't think that way anymore. In many other countries with recurring, although smaller-scale, terrorism, each attack does not necessarily induce panic, felt needs for reassurance, and heightened repression. If the assumption of recurring terrorist attacks holds true, such stoicism might become the norm here as well. To be sure, the normalization of terror is a dismal prospect. The silver lining, however, is the possibility that the wider range of our civil liberties may persist, even under pressure, past the point that Ackerman fears.⁵²

C. *The Danger of Discordant Demonstrations*

Tableau vivant constitutionalism requires that individual participants behave in ways consistent with the overall picture that, as a group, they are supposed to construct. Professor Ackerman would have legislators communicate deliberateness, bipartisanship, care, and a sense not only of emergency needs but of a commitment to return to normalcy as soon as possible. His scheme means to minimize the importance of exaggerated appeals to fear and to divisive rhetoric. The repeated votes, accompanied by the bumping-up of the required supermajority as the state of emergency continues in force, will presumably enable legislators to support needed emergency measures, while at the same time forcing them to recognize and grapple with what those measures might cost.⁵³ Repeated votes, by dividing the emergency into separate periods, each demanding separate assessment, should thereby encourage legislators to analyze rationally the *marginal* costs and benefits of continuing the emergency—an analysis separable from the question whether the initial declaration was justified.⁵⁴ The legislative process Ackerman envisions should prove congenial to even the most exquisite “good government” sensibility.

Legislative processes, however, are as vulnerable in these circumstances as elsewhere (indeed, perhaps more so) to the ordinary vagaries of collective decisionmaking. This dynamic—or at least its most obviously pernicious manifestations—is a familiar, recurring concern within constitutional law. It is enough to recall Chief Justice Marshall's

52. We illustrate this possibility within our discussion of the Cold War national security cases. *See infra* Section III.B.

53. *See* Ackerman, *supra* note 8, at 1047-49.

54. *See id.* at 1049.

analysis in *McCulloch v. Maryland*,⁵⁵ then-Justice Stone's footnote in *Carolene Products*,⁵⁶ and John Ely's classic, *Democracy and Distrust*.⁵⁷ Recent work in behavioral economics, game theory, and associated fields of psychology—considered, synthesized, and put to use in legal studies most notably by Cass Sunstein⁵⁸—expands significantly our awareness of distorting tendencies too often resident in collective mechanisms like legislative voting. We do not mean to suggest that these difficulties will necessarily eventuate. We are not, we think, “deeply distrustful” of legislative politics.⁵⁹ But we do think that adverse possibilities ought to figure in the reckoning along with also possible positive developments.⁶⁰

Even the casual reader of Professor Sunstein's writings would worry about the procedural optimism implicit in Ackerman's regime. Individuals may suppress their own views in the face of a cascade of opposing views, either because of a heightened awareness of the incompleteness of the information available to them, or because individuals are concerned to protect their reputations.⁶¹ Groups of individuals largely in agreement tend to adopt extreme versions of their common position, thus heightening polarization.⁶² Repeated deliberations may increase this polarization.⁶³ Supermajority requirements may also.⁶⁴ Perhaps legislators are less affected by these collective dynamics than other individuals are.⁶⁵ The bipartisan information-management rules that Professor Ackerman specifies might work to increase deliberations cutting across views different enough to disrupt polarizing convergences.⁶⁶ Ex ante, of course, we cannot know.

55. 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.).

56. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (Stone, J.).

57. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

58. We refer chiefly to CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* (2001) [hereinafter SUNSTEIN, *DESIGNING DEMOCRACY*]. Other recent relevant work of Sunstein's includes Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 *YALE L.J.* 61 (2002); and Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 *NW. U. L. REV.* 1295 (2003).

59. Ackerman, *supra* note 12, at 1891; *see also infra* Subsection II.A.1 (discussing constitutional requirements of concurrency).

60. Professor Ackerman reads us as trying to extrapolate from modes of analysis better-suited to studies of jury behavior and the like. *See* Ackerman, *supra* note 12, at 1892-93. Cass Sunstein puts his descriptions of pitfalls of collective decisionmaking to work for purposes of speculative constitutional theory. *See* SUNSTEIN, *DESIGNING DEMOCRACY*, *supra* note 58. We do not mean to suggest that he would agree with us, only that we are writing here within the same genre (as is Professor Ackerman, of course). The question is one of possibility and what to make of it. In the end, Ackerman also acknowledges doubts not too different from ours. Ackerman, *supra* note 12, at 1899-902.

61. *See* SUNSTEIN, *DESIGNING DEMOCRACY*, *supra* note 58, at 19-22.

62. *See id.* at 24-27.

63. *See id.* at 30.

64. *See id.* at 24.

65. *But see id.* at 37.

66. *See generally id.* at 43-45 (stating that heterogeneity is a possible solution to problems of polarization and the like).

These worries seem to be especially pertinent because, by and large, Ackerman avoids the question of what the government's emergency powers would be. It is also unclear from his discussion how their content would be defined. The framework statute Ackerman proposes could spell out the President's emergency powers *ex ante* and across the board—either specifically, or by establishing criteria for determining which provisions or facets of the Constitution are to be suspended under which circumstances.⁶⁷ Alternatively, the content of emergency powers could depend on *ad hoc* judgments, either made and enforced on the spot by state or local “first responders,” or made by way of a congressional decision about what powers to grant the President in addition to as well as in conjunction with whatever framework statute might have been enacted. Such an effort at amendment might occur at the time Congress declared an emergency.

This is a significant ambiguity, because either approach has a major drawback. On the one hand, specifying the substance of the government's powers in the framework statute would prevent Congress from tailoring its response to the particular crisis at hand—and might result in the President being given powers that go far beyond what is necessary, while perhaps depriving him of some he needs. On the other hand, *not* specifying those powers ahead of time would essentially force Congress to engage in crucial deliberations regarding the balance between security and constitutional liberties at exactly the moment when it is least equipped to give the latter the weight they merit—in the panicked days immediately following a terrorist attack or a highly credible warning that one is imminent.

It does not seem wrong to worry, therefore, that Ackerman's scheme of repeated authorizations of states of emergency coupled with increasing supermajority requirements will with each vote tend to deepen legislative polarization, and in the course sweep undecided or otherwise independent-minded legislators into the larger group of sharply like-minded colleagues. This dynamic may or may not induce shifts sufficient, in any given vote, to generate a large enough majority in favor of authorizing or reauthorizing a state of emergency. But if, with Ackerman, we give first priority to reassuring the public that nothing is amiss, then such distortions in the legislative process would become problematic whenever they are strong enough to become visible, not just whenever they affect policy outcomes.

If Professor Ackerman's supermajoritarian escalator results not in moderation but in a push toward extremes driven by individual concessions in the face of growing consensus, the result would be very much at odds

67. Presumably a terrorist attack that employs sophisticated computer programming, advanced “hacking” techniques, and telecommunications equipment to knock out the power grid for the northeastern United States for a month during the dead of winter, causing thousands to freeze to death, would call for an array of techniques different from those that might be appropriate when searching for and attempting to apprehend a would-be suicide bomber.

with Ackerman's vision. To whatever extent it presents itself, a politics of extremes, of partisan mobilization, at a minimum disrupts the appearance of a politics of careful deliberation, of respect for limits, of acknowledgement of dissent. To this extent, therefore, legislative process will not signal the persistence of a constitutional ethos.⁶⁸

Doubts of the sort that Professor Sunstein's work raises about the ability of legislative process to assume the burden of responsible government severely undercut Ackerman's emergency scheme. He relies almost entirely on the legislative process—rather than on substantive constitutional protections—as a check on extreme violations of civil liberties. Ackerman assumes that, in the United States at least, there will ordinarily be no effective judicial “backstopping,” no second look and thus no second chance to acknowledge constitutional expectations, apropos legislative determinations to declare (or presumably continue) states of emergency.⁶⁹ He notes the possibility of “egregious cases” justifying “[j]udicial intervention on the merits”—but without elaboration.⁷⁰ “[W]e should rely on the legislature, not the judiciary, to restrain arbitrary power.”⁷¹ It is obviously important to consider why he draws this conclusion.

D. *Absent Substantive Ground*

Bruce Ackerman places his bet on the legislative process as a check on executive power in large part, it appears, because he has little confidence that adjudicative processes will accomplish much in emergency situations. He acknowledges that “the common law fog” enables judges and commentators to create “a cloud of suspicion” concerning use of emergency powers: This fog works to restrict executive officials “[d]uring normal times.”⁷² Ackerman notes that the same “fog” also makes it possible for judges to show “remarkable flexibility” during “a real crisis” even as they “cover[] their tracks with confusing dicta and occasional restrictive

68. We wonder whether the vagaries of legislative process might also become pertinent in the course of drafting the framework statute. Professor Ackerman tends to see this crucial legislation as the product of an oasis of calm. *But see* Ackerman, *supra* note 12, at 1899-900. He also, however, imagines that passage of the framework statute will be an occasion to consider the relevance, in times of terrorist threats, of other statutes—with the possible result, in his view, that some such statutes would be limited, or even declared to be irrelevant. *Id.* at 1887-89. We have seen, as well, that the grants of authority included in the framework may be multiple, and extend well beyond preventive detention. Complexities might compound, therefore. There are easy-to-see risks of inconsistency and ambiguity, but also, we think, an entirely possible breakdown, in the face of all this difficulty, of the sense of common purpose that Ackerman seems to suppose.

69. Ackerman, *supra* note 8, at 1067.

70. *Id.*

71. *Id.* at 1066.

72. *Id.* at 1042.

holdings”; later, “[a]s the crisis abates,” they can gradually “return to their older habit of casting aspersions on the entire idea of emergency powers.”⁷³

Ackerman thinks, however, that this “common law cycle” takes too long to run.⁷⁴ “It supposes a lucky society in which serious emergencies arise very infrequently—once or twice in a lifetime.”⁷⁵ If terrorist attacks occur much more often—even if several years apart—there is a risk that there will not be enough time for the back half of the cycle to run. We will be left only with an accumulation of cases displaying “remarkable flexibility.”⁷⁶ The consequence would be “the normalization of emergency conditions—the creation of legal precedents that authorize oppressive measures without any end.”⁷⁷ We would, he worries, find ourselves possessed of *Korematsu*, but not its repudiation.⁷⁸

Professor Ackerman is conspicuously unimpressed by the impact, standing alone, of the Constitution’s substantive guarantees of individual rights. These are, he suggests, simply “legalisms”:

[T]hey will only function effectively when they are embedded within a vibrant system of separation of powers. If a political panic prevails, and there is no institutional check on the President, textual formulae will not be enough to constrain him in the crunch. Lawyers are cheap, and the President can always call upon the best and brightest to stretch the legalisms to cover his case. Though opponents may energetically protest, the resulting fog will only serve to perplex the general public—who will be far more impressed by the President’s explanation of the pressing need for decisive action.⁷⁹

This must be at least part of the thinking behind Ackerman’s willingness to toss what might to a schoolchild seem like the most basic rights of all into the black hole of his “emergency constitution.” Professor Ackerman is willing to put substantive human rights, with the exception of the right not to be tortured, on the chopping block—as subject to emergency truncation if not entire sacrifice—because, inter alia, he sees their content as dependent upon the least legitimate branch, the one most wrapped in clouds of words: the overrated judiciary.

Yet, notwithstanding his hearty legal realism, even Ackerman’s own scheme in fact relies considerably on judges, and on ideas of individual rights, in order to check executive action. Judges, he posits, could be

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 1043.

78. *Id.* at 1042-43.

79. *Id.* at 1056.

expected to oppose a president who ignored a legislative refusal to extend a state of emergency: “Their opposition to the continuation of the emergency regime will transform the nature of the political battle. The President can no longer pretend that he is merely fighting a bunch of minority politicians.”⁸⁰ “To dramatize the stakes further, the emergency constitution should explicitly command the courts to begin considering habeas petitions immediately upon the legal termination of the emergency.”⁸¹ Within the emergency period, judges would supervise treatment of individual detainees by executive officials, by simultaneously enforcing the right to counsel, the ban on torture, and the ultimate right to release belonging to detainees as to whom there is no evidentiary basis for suspicion.⁸² It is not clear what the origin of these rights would be in this setting. Ordinary constitutional law? The framework statute? In either case, with what would judges work, in these various contexts, if not the “fog” and “legalisms” Ackerman scorns?

He seems to suppose that judges would work with the clear lines fixed by the state-of-emergency scheme itself: In the case of the scofflaw president, Professor Ackerman seemingly sees no difficulty whatsoever. “The court will not be obliged to justify its intervention with complex legalisms. The issue will be clean and clear: Is the country prepared to destroy the rule of law and embark on a disastrous adventure that may end with dictatorship?”⁸³ What about cases involving individuals caught up in the dragnet of preventive detention? What if officials argue, after forty-five days have passed and they are required to come to court, that they are not sure whether various detainees pose risks? What if they evoke ambiguities in what they have learned?

Ackerman seems to think that, at least sometimes, the question is one of judicial confidence. Judges will feel free to think through claims of ongoing or impending violations of human rights if they do not need, at the same time, to assess whether a state of emergency truly obtains. He draws this

80. *Id.* at 1067.

81. *Id.* at 1068.

82. The U.S. Supreme Court has recently (on January 12, 2004) denied certiorari to review the Bush Administration’s refusal to reveal the names of, and other identifying information regarding, nearly 1000 non-U.S. citizens it arrested in the United States and detained during the months following the September 11 attacks. See *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004); Linda Greenhouse, *Justices Allow Policy of Silence on 9/11 Detainees*, N.Y. TIMES, Jan. 13, 2004, at A1. What, precisely, to make of this shroud of Court-tolerated, if not Court-approved, secrecy is far from clear. Should it persist, however, one clear implication is that whatever the rights of access to courts and counsel the Court decrees for detained unlawful “enemy combatants” like Yaser Esam Hamdi or Jose Padilla (whose cases were argued before the Court just as this Essay went to press), those rights might be only so much tissue paper for the thousands or tens of thousands of detainees whose ability to assert them is no greater than the public’s ability to discover who and where they are. Whether the circumstances during a declared state of emergency would be any more transparent is at best an open question. It is difficult to imagine that they would be.

83. Ackerman, *supra* note 8, at 1068.

conclusion explicitly in discussing judicial action after a legislative decision to allow a state of emergency to lapse: “The key point for judges is that they are off the hook, that the legislature has taken responsibility for terminating the emergency in a highly public fashion.”⁸⁴ Ackerman’s discussion of the adjudication of claims of rights abuse during the period of the emergency itself is more tentative. But sometimes, at least, he seems to think that judges will be able to derive a sense of what counts as government abuse by considering whether officials are acting against individuals, in significant part, simply in order to get around or otherwise reduce the significance of the time limits.

Real difficulty lurks here. Sharply separating states of emergency from ordinary constitutional periods requires that the usual resources of constitutional law—Ackerman’s “fog” and “legalisms”—be set to the side, rendered (or recognized as) unavailable for judicial use. One consequence is that rights that we ordinarily regard as well-established and richly elaborated appear, within the emergency context, as only awkwardly justifiable. Procedure must be pressed hard to serve as a substitute for substance.⁸⁵ Thus, Professor Ackerman explains the continuing applicability of normal free speech prohibitions against censorship this way:

Quite simply, if the government can censor, the political opposition will have a new incentive to vote for the premature termination of the state of emergency, so as to regain its full rights to communicate to the public. By expressly insulating political expression and association from the emergency power, the constitution not only enhances the vitality of the democratic process; it encourages the minority to contribute constructively to the legislative decision terminating the emergency regime.⁸⁶

We protect free speech in order to help assure continuance of the state of emergency! Freedom of speech, celebrated in our familiar, anti-emergency constitution as the “matrix” of all our freedoms,⁸⁷ becomes the matrix of all our fears.

84. *Id.* at 1069.

85. It is enough to mention two principles that Ackerman derives from his scheme for use by judges—“antinormalization” and “antiobstruction.” See Ackerman, *supra* note 12, at 1895. The first counsels judges to resist use of arguments likely to be of any general relevance beyond the case at hand; the second suggests to judges that they try to minimize the impact of whatever result they decree in any particular case. Taken together, the two principles work to reduce adjudications to a sequence of singularities. His scheme, as Ackerman describes it, is minimalist in the extreme—aims for decisions with no resonance whatsoever outside the case at hand.

86. Ackerman, *supra* note 8, at 1059.

87. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

Ackerman's discussion of torture is even more baffling. He thinks there should be an absolute ban, and he criticizes Alan Dershowitz at length for suggesting otherwise. "[J]udges are no more immune from panic than the rest of us."⁸⁸ They will not be well-positioned to distinguish between cases in which torture is justifiable and cases in which it is not. But what if the question is whether a particular executive practice—say, sleep deprivation or extended exposure to loud, badly played music—is in fact prohibited “torture”? Judges would need some sense of just why it is that torture is so profoundly troubling if they are to resolve borderline cases. Within ordinary constitutional law, they would find much raw material.⁸⁹ Within the Ackerman scheme, however, the torture ban is absolute—but it is also free-floating. “Just say ‘no’” figures as a self-evident truth. There seems to be nothing more to say. There is no “there” there—or at least not within Professor Ackerman's own elaboration.⁹⁰

E. *The Artifice of the Frame*

Professor Ackerman's arrangements propose to establish—and depend entirely upon—sharply drawn lines. In more ways than he acknowledges, however, such lines are arbitrary. The emergency constitution treats as its trigger any “actual attack” by terrorists—but not events, apparent to intelligence agencies although possibly not to the public, that point to imminent danger of such an attack.⁹¹ The emergency constitution's color codes span a limited spectrum: Its only codes are green and red. We can appreciate why: If declaration of a state of emergency is a matter of legislative discretion, as Ackerman insists it is and must remain, an open-

88. Ackerman, *supra* note 8, at 1072.

89. Starting points include decisions exploring notions of “cruel and unusual punishment,” *e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 737-38 (2002), and “coerced confessions,” *e.g.*, *Brooks v. Florida*, 389 U.S. 413 (1967) (per curiam); *Beecher v. Alabama*, 389 U.S. 35 (1967) (per curiam). Notably, Francis Lieber had little difficulty identifying moral and pragmatic underpinnings for the ban on torture that he thought was part of martial law. *See* Francis Lieber, War Dep't, General Orders No. 100: Instructions for the Government of Armies of the United States in the Field § 1, paras. 15-16 (Apr. 24, 1863), in RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 45, 48 (1983).

90. Professor Ackerman briefly refers to the ban on torture included in the International Covenant on Civil and Political Rights. *See* Ackerman, *supra* note 8, at 1073 n.99. He notes that a reservation filed by the United States invokes ordinary constitutional law—its familiar points of departure (for example, the Eighth Amendment)—to give content to the Covenant provision. *See id.* This certainly solves the problem, even as it advertises the emptiness of Ackerman's scheme otherwise. But why doesn't the framework statute preempt the Covenant? Notably Ackerman also relies upon the Covenant in a short discussion of racial profiling. *Id.* at 1075-76. The Covenant prohibition of discrimination solely on grounds, *inter alia*, of race, color, and language is associated, in the United States, with an “understanding” that the prohibition does not reach distinctions evident only from disproportionate effects. *See id.* at 1076. Once more, we can see that complex ordinary constitutional law figures in the background. Does Ackerman also mean for it to be accessible in this context?

91. *Id.* at 1059.

ended description of its trigger creates an obvious risk that the state of emergency becomes a too-often-available alternative to the ordinary constitutional order—a real challenge, therefore, to the constitutional ethos. “A ‘clear and present danger’ test . . . generates unacceptable risks of political manipulation.”⁹² But however necessary as a matter of constitutional design, isn’t Ackerman’s “actual attack” bright line also artificial? He disagrees:

I would insist on an actual attack, basing this requirement on the reassurance function that serves as my organizing constitutional rationale. Something large and dramatic like September 11 shakes ordinary citizens’ confidence in their government’s capacity to discharge its most basic sovereign function: the preservation of law and order. The best way for government to respond to these fears is to do something large and dramatic to reassure the populace that the breach of sovereignty was only temporary and that the state is taking every plausible step to prevent a second strike. But when an attack has not occurred, panic-reactions do not seem unmanageable by standard techniques.⁹³

This is a remarkable passage.

First of all, it flies in the face of common experience. We all know that the ban on crying fire in a crowded theater applies only if there is no fire, because in such cases we expect the crowd to panic, and people to be trampled, for no good reason—whereas the lives saved seem well worth the identical panic and ensuing injury if a fire is in fact about to engulf the theater. We all know that memories may be just as powerful motivators as present events—after the first hurricane, we are much quicker to flee in the face of even the prospect of a second storm. We all know that “we have nothing to fear but fear itself.” Ackerman’s line between actual and imminent attacks, therefore, may not match up with patterns of public anxiety. We may worry much—because of what we remember, because of what we predict—even when Ackerman would bar declarations of emergency. Why is he so sure that “standard techniques” of reassurance will work in the circumstances covered by that bar?⁹⁴ (What *are* these techniques?) His scheme may substantially underserve its own goal of reassurance.

Second, the government response to September 11 was not *only* “large and dramatic.”⁹⁵ Professor Ackerman is right that there was a dragnet, and extended preventive detention—preventive detention of dimensions that

92. *Id.* at 1060.

93. *Id.* at 1059-60.

94. *See id.* at 1060.

95. *Id.* at 1059.

will remain unknown unless and until information that the government insists might aid the terrorists has been forced to the surface.⁹⁶ But there was also the rapid enactment of the USA PATRIOT Act,⁹⁷ a statute held together more by its acronym than by any logic of actual need, authorizing a long-term extension and reorganization of government surveillance efforts, and promising large but (as a result of secrecy, invisibility, and intricacy) difficult-to-discern consequences. Ackerman's scheme, insofar as it focuses on preventive detention, would not seem to put us in any better position than we are now either to criticize or to defend the USA PATRIOT Act or any of the plethora of measures—federal, state, and local—that have been taken or begun in the wake of September 11. Why would not government, within the future that Professor Ackerman envisages, propose and enact second-, third-, or fourth-generation USA PATRIOT Acts?

Ackerman ultimately addresses this difficulty in his response, arguing that adoption of the framework statute might be enough to satisfy felt needs to legislate, and that the process of adoption of the framework would lend itself to a measured evaluation of a wide array of antiterrorist measures.⁹⁸ We have already discussed the pressure such a general review might put on legislative deliberation. But there is also the question of metrics. How would Congress think through the comparisons involved? The framework statute, presumably, would be assembled "at a time of relative calm."⁹⁹ It is difficult to see how consideration of hypothetical cases could resolve such a complex inquiry. Delegation of responsibility to the executive branch—often used as a legislative way out in circumstances like these—is precisely what Professor Ackerman does not want, perhaps even more than aggressive judicial review, the usual second option seized by stymied legislators.

Third, there is another, perhaps subtler danger that lurks in Professor Ackerman's implicit assumption that governmental responses to future terrorist attacks may be confined to discrete, identifiable collections of actions, squarely directed at both alleviating the popular anxieties triggered by such attacks and (one would hope) actually enhancing the safety of Americans. That barely articulated vision of an insulated and self-contained—and therefore suitably containable—set of reactions to terrorism as the proper referent for developing an emergency constitution ignores too much of what we have learned since September 11 and its aftermath. The reality of American life in the post-September 11 world reveals something

96. *See supra* note 82.

97. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (to be codified in scattered sections of 8, 12, 18, 21, 22, 28, 31, 47, and 50 U.S.C.).

98. Ackerman, *supra* note 12, at 1888-89.

99. *Id.* at 1893.

very different from a finite and legally bounded panoply of measures that one might imagine subsumed within the steps authorized under an Ackerman-like emergency constitution.

One need only consider the multitude of governmental decisions taken, or at least rationalized, on the basis of the fundamentally altered social, economic, and political landscape of America after September 11, 2001, to recognize that responses to terror and emergency defy logical confinement, and tend to bleed into matters that bear no particular connection to terrorist threats akin to the one just endured, or indeed to terrorist threats at all. Thus, after September 11, the most commonplace bureaucratic and policing decisions involving the prevention of criminal or otherwise dangerous acts—not only at obvious focal points of precaution like airports but also at other, seemingly unconnected institutions such as public libraries—suddenly became, and remain to this day, occasions for invoking and reliving the September 11 attacks, for intoning the mantra that nothing will ever be the same again, and for recalling the maxim “better safe than sorry.”¹⁰⁰ The result has been an erosion of civil liberties not only of the sort implicated in the much-discussed “terrorism cases” of *Padilla*¹⁰¹ and *Hamdi*¹⁰²—the sort that would presumably be addressed, if not resolved, by a proposal like Ackerman’s—but of a sort implicated in the everyday settings of general police procedures¹⁰³ and criminal prosecutions of defendants charged with strictly domestic crimes.¹⁰⁴ It may well be the case that this bleeding of emergency into nonemergency, of extraordinary into ordinary, is temporary and reversible, and one can inveigh against it, but there seems little if anything anyone could possibly do to prevent at least its initial manifestations short of radically transforming the nature of the human psyche.

100. See, e.g., *Cady v. Cook County*, No. 02 C 8333, 2003 WL 21360898, at *2, *6-7 (N.D. Ill. June 11, 2003) (upholding the Cook County Law Library’s refusal to admit a patron because he could not produce photo identification including a current home address on grounds that “especially after 9/11,” it is difficult to see how such a “security requirement could be viewed as outside the mainstream”).

101. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), cert. granted, 124 S. Ct. 1353 (2004) (No. 03-1027).

102. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), cert. granted, 124 S. Ct. 981 (2004) (No. 03-6696).

103. See, e.g., *Hiibel v. Sixth Judicial Dist. Court ex rel. County of Humboldt*, 59 P.3d 1201, 1205-06 (Nev. 2002) (upholding a requirement that people furnish identification to police during the course of an investigatory stop conducted only on the basis of suspicion, in part because “we are at war against enemies who operate with concealed identities and the dangers we face as a nation are unparalleled”), cert. granted, 124 S. Ct. 430 (2003) (No. 03-5554).

104. See, e.g., *People v. Vaquera*, No. B155179, 2003 WL 21135485 (Cal. Ct. App. May 16, 2003) (unpublished decision). *Vaquera* concerned a gang member on trial for assaulting a girl with a deadly weapon. The prosecutor concluded her opening argument by invoking “the events of September 11th. . . . [W]e are all justifiably concerned and frightened about . . . the acts of these terrorists, but I’d like to remind you today that not all terrorists are from foreign shores. Some of them are home-grown terrorists.” *Id.* at *1 n.1 (internal quotation marks omitted).

To recognize and acknowledge the shifts in mental topography that follow terrorist attacks, particularly when those attacks are deliberately designed to achieve maximum penetration into the nation's cultural and imaginative life, is to realize the danger of designing states of emergency as though their boundaries could neatly contain the whole or even the great bulk of social and therefore governmental reaction to the terrorist events triggering such emergency proclamations. We say the "danger" and not simply the futility of designing states of emergency on that premise of tidy containment because we suspect that the allure of the emergency constitution idea is bound up with the unspoken premise of a Faustian bargain: We agree not to be too purist in our dedication to civil liberties—to look the other way for a time and within a defined range of executive responses while those in positions of military leadership and command do what they must in order to restore order and provide reassurance that the holes in our defenses have been identified and largely closed—and, in return, we can rest assured that the extraordinary and, frankly, scary actions that our Constitution in its normal form would never tolerate will be confined to that specific space and time. We thus agree to clear the dense forest of constitutional constraints that normally get in the way of what those in executive and particularly military positions agree needs to be done if we are to restore the sense of normalcy that alone makes the normal Constitution something we can afford to live with rather than a luxury for less troubled times. In effect, we agree to make our Constitution something less than a "constitution for all seasons." The devil assures us that, in all but the brief season during which we hand him the reins of power subject only to a radically thinned-out constitution, all will be normal.

As the experience following September 11 makes all too plain, building an imaginary wall around a state of emergency and proclaiming only a thin emergency constitution to be operative inside that wall offers no realistic hope of preventing the ripple effects of any given terrorist attack, and of the government responses to that attack, from breaking through cracks in that wall and bleeding into ordinary affairs—into the broad vistas of American life that bear no real connection to the attack, to the techniques it employed, or to the risks it represents. So any realistic assessment of what that constitutional bargain with the devil might be expected to yield had better not proceed on the wishful premise that whatever zone is covered by the emergency constitution even begins to define the ways in which our liberties are likely to be diluted as a result of what the latest attack will have wrought in the collective consciousness of the nation. And, lest anyone suppose that accepting an emergency constitution will do no *harm* in the realms that lie beyond its defined reach, it should be remembered that the sense of security that comes with the territory whenever we talk the talk of emergency measures with self-limiting sunset clauses—a sense of security

without which the bargain would never have seemed so tempting in the first place—is the very thing that threatens to lull us into being most forgiving of government encroachment in the interest of patriotism precisely when the lessons of history teach us we had best be most on guard.

Fourth, the “actual-attacks-only” approach advocated by Professor Ackerman, which contributes to the illusion that the space being cleared for the devil is but a tiny one in the end, may make states of emergency pretty much beside the point for purposes of actually preventing terrorism. Ackerman supposes—and we are sadly unable to argue strongly to the contrary—that the threat of terrorism is likely to be more or less constant, or at least enduring, for the foreseeable future. The best defense, in addition to understanding and confronting terrorism’s root causes abroad, may therefore be *constant* vigilance. The principal security objective ought to be preventing the next attack, not responding to previous ones. But the sacrifices of rights that are closely tied to prevention—sacrifices occasioned by increases in the government’s surveillance as well as by its detention and perhaps other powers—may not be needed only in the wake of an attack. If increased surveillance and detention efforts can help prevent an attack, then surely we should want those powers to be available on September 10 even more than on September 12. The idea of sharply marking an emergency period, at least from this perspective, makes little sense even if we overlook the point just made about the impossibility of confining responses to the latest attack within any tightly defined circle of government action.

Professor Ackerman’s justification for the emergency approach is largely grounded in the specter of a terrorist “second strike.” The language seems to be borrowed from the Cold War nuclear strategy lexicon, thus calling to mind an *immediate* second attack, i.e., one launched within hours. (Within the Cold War model, actually, a second strike would follow retaliation for a first strike.) Perhaps, therefore, a greater risk is present just after a terrorist attack—since, as September 11 and the Madrid bombings horrifyingly showed, al Qaeda conspirators (or their associates or successors) were and likely still are capable of launching dramatic, coordinated, multiple attacks. In the future, other groups might possess a similar reserve capacity. But Ackerman’s proposal for emergency powers is both unhelpful and unnecessary in the hours following an attack; the government already has considerable powers to detain suspects and take other measures (e.g., grounding flights, barricading streets, and stopping all cars) in truly exigent circumstances, and, in any event, Congress could not meet to authorize additional powers until the immediate threat had passed. But as for the *months* that follow, the period that Ackerman’s proposal emphasizes, nothing suggests that attacks are more likely then than at any

other time. Al Qaeda's style (and that of other terrorist groups) seems to be to attack when we *least* expect it, not when we're *most* on guard.¹⁰⁵

Two conclusions, sadly ironic, in effect summarize the difficulties in Professor Ackerman's design that we have been sketching.

First, the constitutional cost of Ackerman's wager must not be underestimated. Within his scenario, as the "real Constitution" repeatedly alternates with succeeding "emergency constitutions," the fact that each emergency constitution, and its series of supermajority extensions, will be succeeded in time by another will appear to declare that each emergency constitution failed—failed to prevent the next attack. This history, we think, will virtually guarantee that the next emergency constitution will include fewer protections of rights than its predecessor. The framework will be amended. The upshot is that the Ackerman algorithm guarantees an interrupted or punctuated version of the downward spiral he plainly fears. But there is no systematic mechanism, within his scheme, to prevent the succession of emergency constitutions from provoking this spiral.

Second, in one important regard, the terrorist risk may increase.

Terrorists needn't master rocket science to find an optimal strategy. It's no wonder that our nation's recent resort to color-coded signals to announce the government's recommended level of apprehension seems so surreal. The system obviously offers less guidance to our civilian population ("go shopping but be on the alert!") than to would-be terrorists, telling them when our guard is down. Anything like the Ackerman proposal would only make matters worse. At its heart, the proposal is a transparent scheme with a binary "on air" signal that tells friend and foe alike precisely what it takes to plunge the nation into Code Red for real, what emergency powers are triggered and what rights suspended when the light is on, and exactly how long to wait—no secret because the time limits and congressional processes for extending states of emergency have to be spelled out in the Ackerman scheme—before those emergency powers will be turned off. Planning the next attack and gauging how best to disrupt our normal routines—even to make us sacrifice some of the rights we say define us as a nation—becomes that much easier. Rather than building up our immune system, any such scheme seems perversely designed to break it down, heightening our vulnerability to painful and programmed convulsions whenever the

105. Of course, some genuine *emergency* responses will be required: containing the scope of the tragedy (e.g., preventing hazardous materials from spreading through the water supply); minimizing casualties through rescue efforts; rebuilding destroyed areas; aiding victims; and creating clear lines of succession and procedures for restoring operations if important government buildings are destroyed or officials killed. All of these functions should be planned in advance, with a coherent statutory framework, to enable the best response and to reassure the public. But these responses don't, at least for the most part, raise hard constitutional questions, and they therefore don't demand and certainly can't justify an "emergency constitution."

terrorists choose to strike. Why one would want to do them that favor is a mystery to us.

How, then, should we think about the importance and limits of ordinary constitutional law, on the assumption of *constant risk*? What if we want to think through government responses more nuanced and less crude than preventive detention—responses involving curfews and evacuations, new types of border control, new forms of surveillance or of data compilation, government planting of deliberate disinformation, electronic signal interceptions, tightened restrictions on access to hitherto-public information and facilities, and so forth? These questions, we can see, all fall outside the frame of Bruce Ackerman's picture of states of emergency. We need another account.

II. CONSTITUTIONS, INSTITUTIONS, EMERGENCIES

Such an account would address two topics: the question of institutional arrangements in emergency situations, and the question of individual rights. As we have seen, Professor Ackerman gives priority to the first of these. We ultimately emphasize the second. Before we reach the question of rights—the principal preoccupation of ordinary constitutional adjudication within emergency periods—we revisit the question of institutions. This time, we work less within Ackerman's own proposals than without. We consider what he takes for granted and what he leaves out.

A. "*The Constitution as an Institution*"¹⁰⁶

Ackerman begins *This Is Not a War* with a discussion of presidential rhetoric. "There is something about the presidency that loves war-talk."¹⁰⁷ He believes that martial imagery, however useful, may be dangerous—especially now. "An embrace of the 'war on terrorism' can generate a dynamic that justifies the permanent and broad-scale destruction of fundamental rights."¹⁰⁸ He derives grim conclusions from recent events:

President Bush . . . has *already won* in the court of public opinion.

. . . [T]here is a very large risk that future presidents—Republicans and Democrats alike—will escalate war-talk in response to terrorist attacks. . . . So long as the general public accepts the notion that America can make "war" on something as amorphous as "terrorism," future presidents will have a much easier

106. Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 1 (1934).

107. Ackerman, *supra* note 12, at 1872.

108. *Id.* at 1872-73.

time convincing the nation to engage in old-fashioned wars against sovereign states.¹⁰⁹

The framework statute—the idea of the emergency constitution—will, Professor Ackerman argues, work to reduce presidential resort to war-talk. It is, he says, “a new bulwark against the presidential war-dynamic.”¹¹⁰ The framework statute will be the originating source of a new rhetoric. “This is not a war, but a *state of emergency*.”¹¹¹

When the next terrorist strike occurs, we should not turn to our television sets to see the President . . . heating up the war-talk to an even higher pitch. It would be far better to see him go before Congress and somberly request its support for a declaration of a limited state of emergency.¹¹²

Understood as straightforward argument, Professor Ackerman’s discussion of war-talk is at best puzzling; so understood, it falls apart at the lightest touch. Ackerman’s proposal does not, after all, include a presidential muzzle clause. He seems simply to suppose that the idea of the “state of emergency” of itself possesses enough rhetorical heft—despite the numerous such “states” we have declared that have never been formally ended.¹¹³ Instead of rattling a saber, the President will be empowered to sound an air raid siren and declare an(other) “emergency.” But why, precisely, would a president eschew the rhetorical opportunity to rally his troops, both military and political, and fend off an attacking army with talk of war? Ackerman seemingly appreciates these worries. “[T]he mere availability of a new framework doesn’t guarantee its use.”¹¹⁴ There is also, he recognizes, an obvious, and worst-of-both-worlds, possibility—“the President embraces *both* war-talk *and* the new powers granted to him by the emergency statute.”¹¹⁵ And why in the world wouldn’t he?

We do not read Ackerman so literally. His claim that the existence of the framework statute and its availability for use will constrain presidential rhetoric is too palpably problematic to be taken seriously as a real-world strategy. But what he puts forward here is also, we would suggest, a kind of parable (provokery!)—a reminder that constitutional ideas are not *just* frameworks, but starting points for politics, and thus sources of institutions.

109. *Id.* at 1876.

110. *Id.* at 1873.

111. *Id.*

112. *Id.* Professor Ackerman entertainingly contrasts what he imagines a presidential rhetoric should sound like with an artful conjunction of our most Henry James-like sentences. *See id.* at 1875. We will stipulate that our language here is not the language of presidential speechwriters.

113. *See* Ackerman, *supra* note 8, at 1077-81.

114. Ackerman, *supra* note 12, at 1900.

115. *Id.* at 1901 (emphasis added).

Institutions organize the thinking of individuals within them, we all know, and this defines in turn limits of plausible rhetoric. We agree with Professor Ackerman that sensitivity to institutional dynamics is an important element in constitutional inquiry. We propose to take such dynamics seriously indeed in discussing here a dimension of Ackerman's emergency constitution that is not at all fanciful or allegorical—its use of the basic constitutional proposition that, absent extraordinary circumstances, the President and Congress should act concurrently.

The Constitution's terms suggest, the Supreme Court has repeatedly declared, and Congress and the President often enough agree, that Congress and the President are to act concurrently, whenever possible, in committing the United States to extraordinary courses. Professor Ackerman—sketching an emergency constitution that he otherwise depicts as pretty much independent of the ordinary constitutional law of individual rights—starts from this institutional presupposition as well. His scheme is thus a notably *selective* exercise in innovation. It is a reasonable question, we think, to ask whether the deference that Ackerman pays to concurrency, to the ordinary pattern of institutional interaction, is consistent with the thinking that underlies Ackerman's concern for states of emergency. Or is Professor Ackerman—once again the realist, consciously or unconsciously—simply acknowledging the inertial difficulties confronting a more thoroughgoing effort? The institutional politics that the Constitution's design prompts is too much to take on. Given this assumption, though, the onesidedness of Ackerman's scheme—its manifestly partial erasure of ordinary constitutional thinking—seems particularly problematic.

1. *The Ubiquity of Concurrency*

Given Professor Ackerman's doubts that the judicial process can contribute very much to the ends he seeks—and given his preference that the legislative branch play the lead in the drama that pits freedom from terrorist attack against freedom from government assault on liberty—it seems a shame that he doesn't pay more attention to the successful role the American judiciary has in fact played in framing the processes of government so that prior legislative approval is a prerequisite for a number of broad categories of executive action. Such categories include even those thought by American presidents to be matters of the most imperative necessity, perhaps not in terrorism cases as such, but in military emergencies when presidents predictably trot out the standard arguments about how slow and sluggish legislative bodies tend to be and how rapid must be our response to swiftly changing conditions. Notwithstanding executive arguments of necessity or of inherent authority, and with little if any demonstrable ill effect, courts have often held prior approval by

Congress to be indispensable in a wide range of pressing circumstances—sometimes requiring the whole nine yards of formal bicameral passage and presentment to the President for veto subject to override only by a two-thirds majority of both houses. Judicial restrictions of this kind have been imposed upon presidential seizures of privately owned businesses to supply American troops engaged in military combat abroad,¹¹⁶ presidential invocation of the injunctive powers of the courts to restrain the publication of classified documents bearing on the internal process of decisionmaking in the conduct of an ongoing war,¹¹⁷ and, of course, presidential use of military commissions to put American citizens on trial for allegedly conspiring with the enemy and actively endangering United States troops engaged in battle, at least where the civilian courts are still functioning and martial law has not been declared.¹¹⁸

Nor does Professor Ackerman seem particularly interested in the kinds of “framework” statutes that Congress has sometimes enacted, not at the prod of the judiciary but under its own steam, in order to ensure that specified sorts of deprivation by the Executive, emergency or no emergency, not be instituted without specific authorization by act of Congress.¹¹⁹ Thus, although he does discuss the National Emergencies Act of 1976, Professor Ackerman has nothing to say about the Non-Detention Act of 1971—enacted to prevent a recurrence of the shameful treatment of American citizens of Japanese ancestry approved in the infamous *Korematsu* decision—which provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”¹²⁰

116. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (enjoining President Truman’s seizure of steel mills in the face of his claim that the seizure was necessary to prevent work stoppages and maintain a steady flow of weapons to U.S. forces in South Korea).

117. See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam). The point is made repeatedly in the several individual opinions of the Justices. See *id.* at 718 (Black, J., concurring); *id.* at 722-23 (Douglas, J., concurring); *id.* at 730 (Stewart, J., concurring); *id.* at 740 (White, J., concurring); *id.* at 741-42 (Marshall, J., concurring).

118. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121-22 (1866); see also *id.* at 139-41 (Chase, C.J., concurring in part and dissenting in part). On the complexities and significance of *Milligan*, see Issacharoff & Pildes, *supra* note 5, at 9-18.

119. Ackerman does not discuss the War Powers Resolution—perhaps the most famous framework attempt. This may be because the Resolution does not, within its own terms, announce any changes in individual rights. It is also, of course, a matter of some debate as to how successfully the Resolution has worked. See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 48-49 (1993).

120. Non-Detention Act of 1971, Pub. L. No. 92-128, § 1(a), 85 Stat. 347, 347 (codified at 18 U.S.C. § 4001(a) (2000)); see also *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (holding that U.S. citizens captured in the United States cannot be held as enemy combatants pursuant to the President’s commander-in-chief powers), *cert. granted*, 124 S. Ct. 1353 (2004) (No. 03-1027). The decision relied in part on the Non-Detention Act, reasoning that the Act’s requirement of legislative authorization for the detainment of U.S. citizens was not satisfied by the Authorization for Use of Military Force passed on September 18, 2001. See *id.* at 722-23. The September 18 authorization did not extend to detaining a U.S. citizen apprehended in the United States and

Only some such frameworks are put in place by Congress. Others are inscribed specifically in constitutional text, as with the explicit command of the Third Amendment that, “in time of peace,” no home may, “without the consent of the Owner,” be taken over by the military, however supposedly essential to the defense of the nation, “nor in time of war, but in a manner to be prescribed by law.” Other such framing precepts have been inferred without much fanfare from the basic architecture of the Constitution, understood as a blueprint for government. An illustration is the long-settled proposition that the President may not suspend the writ of habeas corpus without congressional authorization—a proposition whose wisdom we do not doubt but whose derivation appears to rest in large part on the underwhelming ground that the Constitution’s provision expressly authorizing suspension of the writ (“when in Cases of Rebellion or Invasion the public Safety may require it”)¹²¹ is to be found in Article I, which “vest[s] in . . . congress” “all legislative powers therein granted.”¹²² Still other such framework-defining principles have been extrapolated by courts from considerably more sophisticated arguments drawing on a mix of textual, structural, and functional considerations suggested by the Constitution and the history both of its founding and of its interpretation. That has been the case with each of the examples noted above—involving seizures of private property, restraints on publication, and trials by military tribunals.

2. *The Costs of Inertia*

Whatever their derivation, these commitments to congressional authorization (rather than mere congressional acquiescence) constitute, we think, more than a disconnected set of default rules that all just happen to stay the presidential hand even when it wields the sword of war in periods of sudden peril. On the contrary, these requirements—tightly linked and interrelated, although honored sometimes in the breach—both memorialize and give life to the constitutional (or, at times, congressional) recognition of what we take to be the hard-learned lesson of our past: Precisely when our peril seems greatest, we dare not entrust our fate to the judgment of any one individual, even though that individual be elected by the whole People of

suspected of cooperating with al Qaeda to detonate a radioactive device on U.S. soil. *See id.* at 723. Because the Constitution granted powers to both Congress and the President to act in a matter of this sort, unilateral presidential authority could not be inferred. *See id.* at 715.

121. U.S. CONST. art. I, § 9, cl. 2.

122. *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487) (Taney, Circuit Justice) (quoting U.S. CONST. art. I, § 1). On the derivation of the principle from the arrangement of the Constitution’s vesting articles, see WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 32-42 (1998); and 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-11, at 725 n.15 (3d ed. 2000).

the United States.¹²³ These are the commitments whose binding force persists through crisis and calm alike—even, in other words, during genuine emergencies.¹²⁴

These commitments are basic pillars of the Constitution within which Professor Ackerman hopes to situate his “emergency constitution,” and—to the degree they reflect an insistence that Congress be consulted and its approval be secured for executive actions in a large number of areas where the President, left to his own devices, might well prefer a hefty dose of completely unilateral power—it seems noteworthy that the Ackerman Constitution, resting as it does on a measure he would have Congress enact, does not undertake to sidestep or pull down those pillars. The Ackerman Constitution, in these respects, accepts and incorporates the Constitution as it ordinarily stands. The reason, presumably, is not that the requirement of congressional approval might not get in the way of effective responses to terrorist threats; reordering our constitutional structure to give the President vastly enlarged essentially lawmaking powers might enhance the nation’s safety and security more than would relaxing the legal constraints on rounding up the usual suspects in a massive dragnet. The reason that changes of that sort are off the Ackerman table, we may suspect, is that they would be nonstarters in light of the interests they would palpably compromise. Constitutional law, we all know, begets constitutional politics.

Obviously enough, the pertinent interests in this regard appear not to include the interests of those thousands of individuals most likely to be rounded up and imprisoned as persons suspected of supporting terrorism in some way.¹²⁵ Equally obviously, the constitutional provisions that define

123. For a discussion of these linked requirements of prior congressional approval in the particular setting of presidential proposals to set up and conduct a system of military tribunals for enemy combatants charged, among other things, with crimes against the laws of war, see Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1298-308 (2001). See also Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right To Bear Arms*, 139 U. PA. L. REV. 1257, 1309-16 (1991).

124. The exception, one always supposes, is for emergencies that qualify as fully existential—those that so threaten our very survival as a nation that it would become absurd to worry much about the constitutionality of our mode of proceeding (the old “rearranging the deck chairs on the *Titanic*” syndrome).

125. We would certainly reject the suggestion, commonly heard but never so far as we are aware convincingly defended, that constitutional rules that describe or constitute institutions of governance and the organizing relations among them—sometimes described as the “structural” rules—belong in the “fixed-until-expressly-amended” camp, while constitutional rules that recognize human rights against a particular branch or level of government (or sometimes against government in general) belong in the “suspendable-when-things-get-really-tough” camp. Apart from the fairly obvious difficulty of characterizing any number of rules (such as rules about fair trials, or rules about the separation of church and state) as belonging in one camp or the other, there is the even more fundamental problem that virtually *all* rules and principles worthy of inclusion in a constitution ultimately relate to the allocation of decisionmaking authority over various matters among potentially competing centers of power. These centers of power range from the “person” variously conceived and defined, to the “family” in its many guises, to any

the respective powers and responsibilities of the great branches and levels of government figure as sacrosanct within Professor Ackerman's scheme not because they are the least likely to stand in the way of enhanced safety and security: To the contrary, the deliberate inefficiencies built into our fabled system of checks and balances may be among the greatest obstacles to a rapid and fully effective response to terror. Nor does the reassurance function explain Ackerman's allegiance to divided government; it cannot be claimed that suspending key features of our intentionally fractured system of diffused power would be less conspicuous or dramatic, and hence less potentially reassuring, than suspending protections against censorship or lifting requirements for search warrants. From the perspective of Ackerman's own concerns, his deference is thus inexplicable. He is, instead, acknowledging a constraint. Constitutional inertia is at its maximum when a proposed change would rearrange the principal lines of government authority and thereby destabilize existing patterns of power and privilege among those who govern.¹²⁶

Asking those in positions of power under the status quo to restrict their own freedom of action or to rearrange their respective shares of authority entails asking for that which government officials are most loath to give. Proponents of a balanced budget amendment to the Constitution learned that lesson and had to settle for framework legislation of varying degrees of efficacy. Of course, constitutional amendments of any sort—including, happily, amendments to dilute or delete portions of the Bill of Rights—are notoriously difficult to enact in our system, partly because of the design of the amendment process and partly because of the symbolic attachment of the culture to provisions like the First or Fourth Amendment, at least when so identified. But proposals to relax on a temporary basis some of the restrictions that such amendments impose on government activities,

number of intermediate associations and organizations, to the bureaus and departments of government—including, in a federal system like ours, both the state and local governments on the one hand, and the national government on the other. There is no sound reason for imagining that either type of rule or principle is, as a general proposition, more "basic" than the other in any sense relevant to how resilient and resistant to claims of emergency need any given rule or principle ought to be.

Indeed, if one had to stake a claim to a rule's appropriate degree of insulation from arguments for emergency suspension, one would probably choose a rule that corresponded to a human rights norm reflected in customary and written international instruments and in all or virtually all national constitutions—such as a norm about equal dignity before the law or about freedom from torture or about rights to intimate personal association—rather than a rule that appeared highly contingent and peculiar to the organizing structure chosen by a few societies and rejected by many others.

126. It is principally for this reason that proposals to streamline our cumbersome tripartite system of separated powers by borrowing some of the most successful features of parliamentary structures are such predictable perennial nonstarters. Arguments that the genius of our system might be preserved through arrangements that are less prone to deadlock at crucial times may or may not have merit, but their deficiencies, such as they are, do not explain the reason such arguments get no serious hearing in the United States.

packaged as antiterrorism techniques in a suitably labeled framework statute, may well fall within the range of the politically possible. Professor Ackerman, of course, does not acknowledge and surely would not accept this premise. The limits of his proposal, however, call attention to the impact of this constitutional inertia. When we think about candidates for temporary suspension in an emergency constitution, the reasons for focusing on human rights against government oppression bear little or no logical connection to the underlying case for such a constitution, if a case for it indeed can be made.

This is injustice (there seems no way to avoid the term). Its shadow, we suspect, would cloud whatever Ackerman's scheme otherwise accomplishes. Professor Ackerman indeed thinks so too. His compensation scheme is at bottom a mechanism of corrective justice—a means of undoing the wrong (a wrong that he hopes to minimize). No doubt the money matters. But whether or not the individual recipients would regard their awards as adequate compensation, whether or not the individuals that Ackerman identifies are the only persons arbitrarily constrained during his states of emergency, it is not likely that the roundups, the incarcerations, and the interrogations would disappear from public memory. There is, of course, a cost to this too. We return to this question shortly.

B. Institutions and Emergencies: The Easy Case for Constitutional Change

Perhaps because he leaves institutional politics largely as it is, Professor Ackerman pretty much ignores a more obvious agenda for constitutional reform—identifying and closing constitutional gaps to ensure continuity in and preservation of the republican form of the federal government in the event of a terrorist attack that leaves the nation intact but decapitates or cripples one or more of the three national branches.

Article IV, Section 4 of our Constitution leaves to “[t]he United States,” without further specification, the task of “guarantee[ing] to every State in this Union a Republican Form of Government” and puts on the United States the onus of “protect[ing] each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.” Unlike Article IV, Section 1—which empowers “Congress . . . by general Laws” to “prescribe the Manner in which . . . [public] Acts, Records and [judicial] Proceedings shall be proved, and the Effect thereof” and thereby creates an assured vehicle through which Congress may implement that same Article's Full Faith and Credit Clause—Article IV, Section 4 leaves up in the air the form and locus of any implementing power.

If we construe Article IV as vesting a power and not merely an obligation in the U.S. government, then the Constitution is, happily, gapless when it comes to a chain of authority for protecting a state against, for example, a military takeover by terrorists who proceed to install a theocratic government. For the Necessary and Proper Clause of Article I, Section 8, empowers Congress to make whatever laws might rationally be deemed useful “for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹²⁷ But there is at least a question as to whether Article IV is a vesting provision at all, so the constitutional basis for emergency congressional intervention to protect a state’s people from terrorist takeover and its aftermath is not absolutely clear.¹²⁸

Even more serious is a gap of a related but different sort. Who, one might ask, is out there to guarantee the United States of America as such will remain a constitutional republic? That the states will not be stripped without their consent of their equal representation in the Senate—something that Article V says not even a constitutional amendment may do?¹²⁹ That *we* will be able to absorb and survive anything less than a fully existential strike at our core?

If we were one day to be absorbed into a transatlantic or transpacific or fully global political/legal entity, then that entity or one of its arms might become our guarantor—just as the mission of coming to the defense of a member state of NATO that has been unlawfully attacked, as we were on September 11, 2001, falls to that alliance. But just as any one of our fifty states may need, at least in theory, some mechanism for asserting its own sovereignty vis-à-vis external attack should the central government be crippled, so our central government presumably cannot treat the prospect of being defended by NATO or by the United Nations as sufficient to defend against a similar assault. Our nation needs a greater guarantee in the event of an attack that is not (or need not be) existentially catastrophic, but is unusually grave in that it disables, for example, the Office of the President, the Senate, the House of Representatives, or the Supreme Court.

Should it be the President who is disabled or assassinated, the Constitution finally provides a fairly seamless recovery mechanism—not necessarily for the President, to be sure, but for the presidency—in Article II as amended by the Twelfth, Twentieth, and Twenty-Fifth Amendments, which together address most of the grim scenarios that might unfold and

127. U.S. CONST. art. I, § 8, cl. 18.

128. To the degree any such takeover were to come in the form of an “insurrection” or an “invasion,” Congress could, of course, invoke its explicit authority “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” *Id.* § 8, cl. 15.

129. “[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” *Id.* art. V.

which expressly empower Congress to fill out the remaining possibilities and all the details. But should terrorists ever succeed in doing what the September 11 hijackers evidently intended to do, and hit the Capitol or the Supreme Court while Congress or the Court is in session, it doesn't take a world-class imagination to read the Constitution and figure out that, unfortunately, the document offers only an incomplete blueprint for what comes next.¹³⁰

This is, moreover, the kind of incompleteness that quite plainly cannot be overcome by any hermeneutical exercise: Complete blanks appear where one might expect to find answers to questions about "what happens if" . . . all the sitting Justices are killed or disabled? Or "what happens if" . . . so many members of the House or Senate are killed or disabled that there is no quorum to conduct business and enact legislation? Neither interpretation nor a mere statute enacted by Congress in anticipation of such a disaster would suffice to remove the debilitating cloud of doubt about the constitutionality of whatever choices have been made. This incompleteness truly is a gap in the constitutional structure, and it is one that can be filled only if we amend the Constitution to add a provision addressing possibilities not contemplated in Article I, Section 2, Clause 4 (dealing with vacancies in the House of Representatives),¹³¹ in the Seventeenth Amendment, Clause 2 (dealing with vacancies in the Senate),¹³² or elsewhere in the current document. Unless we're willing to take our chances that an event requiring this kind of provision just won't occur and that, if it does, either we'll be lucky enough to improvise our way out of the ensuing chaos (a near impossibility) or the event will be so horrendous that *no* constitutional provision would be of use, we had better get going on this matter without delay. Happily, an impressive bipartisan group has been at work for some time preparing possible alternatives for the necessary gap-filling amendment. The technical and frankly boring nature of the task

130. The blueprint is not incomplete in the standard sense that a word such as "liberty" or a phrase such as "freedom of speech" or "the free exercise of religion" has many possible meanings and, given the familiar problems of infinite regress, the Constitution has no way of specifying beyond all ambiguity and beyond all possibility of change just which of those meanings is to govern in what context and in what way. Our Constitution copes with that kind of incompleteness by implicitly entrusting each branch with the task of construing the Constitution for itself, with a preeminent role—how and why and in what respects preeminent, we will not get into here—going to the Supreme Court. The Constitution itself also supplies two master "default" rules for cases of doubt, by allocating power to the states when its locus in the national government cannot be affirmed (the Tenth Amendment), and by reserving some matters for the people themselves to decide even when the enumeration of rights against government somehow failed to cover the matters in question (the Ninth Amendment).

131. "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." U.S. CONST. art. I, § 2, cl. 4.

132. "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." *Id.* amend. XVII, cl. 2.

should help in securing congressional promulgation and rapid state legislative ratification of a suitable provision, which would of necessity include an empowering clause leaving various details to Congress.¹³³

C. *Inertia and Injustice Revisited*

The kinds of legal measures that Professor Ackerman contemplates putting in place to cope with terrorist-triggered emergencies that do *not* decapitate parts of the government are measures, he recognizes, that would not be likely to survive constitutional challenge today even with the flexibility that many parts of the Bill of Rights (think “unreasonable searches and seizures,” for instance) already incorporate—or, worse still, just might survive such challenge but only at the cost of terrible distortions in the law of the Constitution that remains to guide future generations.¹³⁴ Changes of that sort, needless to say, are anything but technical or boring. As such, they would, given the great difficulty that attends ratification of any deeply controversial constitutional amendment in this country, be virtually impossible to enact in the constitutional amendment form that would otherwise be the natural procedure to follow. That much, of course, Professor Ackerman acknowledges—hence his suggestion that the framework he has in mind be put in place by a simple act of Congress.

The gamble in Ackerman’s proposal—or one of its gambles at any rate—is that, despite their constitutionally shady character, the pieces of his framework statute could come to be accepted not as “constitutional” in the usual sense,¹³⁵ but as something we could learn to live with under a nonbinding but mutually advantageous social compact. And, having agreed to live with it, we would, Ackerman hopes, agree that specific steps taken by the President or others within the ambit of that emergency constitution (put in place, remember, by a mere act of Congress) would be subject to review only under the terms and procedures that the “emergency

133. The Continuity of Government Commission, initiated by the American Enterprise Institute in the fall of 2002 to deal with this set of issues, held hearings that fall and issued a report in June 2003 on the continuity of Congress. It is now addressing continuity in the Supreme Court and problems in the statute addressing presidential succession. Relevant information may be found at Continuity of Government Commission, <http://www.continuityofgovernment.org> (last visited Feb. 16, 2004). For one suggested solution, see S.J. Res. 23, 108th Cong. (2003), a proposed constitutional amendment dealing with the consequences of the death or incapacitation of one-fourth or more of the membership of either house of Congress.

134. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (worrying about the “loaded weapon” that a constitutional interpretation capable of supporting the government’s actions will leave lying about in the form of dangerous precedent).

135. After all, the distortion of constitutional law (and thus of the Constitution as we ordinarily encounter it) in the name of necessity is one of the evils Ackerman seeks to avoid through his proposal.

constitution,” rather than our ordinary Constitution, would have put in place.¹³⁶

As we have already noted, the victims of the kinds of steps Professor Ackerman has in mind are unlikely to be among society’s most powerful and best-represented members. He is not proposing, for instance, that the emergency constitution would permit the President to make temporary treaties to cope with global terrorism in a multilateral way without the usual rigamarole of ratification by two-thirds of the senators present—something that might actually make a greater difference in terms of protecting the public than would broader arrest or surveillance powers, but that would also immediately incur the concerted and fatal opposition of many senators, and that would not, in any event, provide the drama that his argument suggests is needed in order to reassure the public.

Thus, rounding up the usual suspects in the world according to Ackerman would come to mean not just what it has always meant but one thing more: To have a snowball’s chance of creating, and then insulating from utter deconstruction, what amounts to a period of constitutional amnesia, you’ve got to *round up the usual set of rights to sacrifice*—not necessarily the rights that are most essential to combating terrorism effectively, but the rights that have the weakest political constituencies. It ought not to be necessary, at this late date, to recount in detail the most troubling aspects of government responses to September 11—the too-often-accepted invitations to discrimination on the basis of race, nationality, or religion, notwithstanding President Bush’s contrary appeals. Dean Edley put it succinctly: “[M]inorities, old and new, are in the soup.”¹³⁷ Professor Ackerman is, of course, aware of our contemporary history—and he is rightly troubled. But his scheme does little more than try to fix time limits for our worst moments. These limits might provoke useful debate, stir an “informed civic discourse” that would “soon retrieve the inconvenient liberties scatt[er]ed in the gutter.”¹³⁸ We think that a less oblique response is in order. Indeed, we would propose something very much like a principle of justice. Our recent experience is harbinger enough of such a sufficiently unappealing prospect that it should oblige us to take account of the full

136. Part of the difficulty, of course, is that our “ordinary” Constitution already contains provisions specifically dealing with war and warlike emergencies. As we have already noted, the Third Amendment provides that only “in time of war” may government quarter soldiers in someone’s home without the owner’s consent and that, even in wartime, such military occupation must be in accord with a “law” enacted by Congress. And the Suspension Clause specifies that the great writ may be suspended only “when in Cases of Rebellion or Invasion the public Safety may require it,” U.S. CONST. art. I, § 9, cl. 2, and then only, it has been held, pursuant to and in conformity with a “law” enacted by Congress, *see supra* notes 121-122 and accompanying text.

137. Christopher Edley, Jr., *The New American Dilemma: Racial Profiling Post-9/11*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 170, 192 (Richard C. Leone & Greg Anrig, Jr. eds., 2003).

138. *Id.*

range of resources available to better the odds that no scheme would be accepted if the particular constituencies who would be most at risk from its implementation entirely exclude the movers and shakers of our society. To bring this position to bear, we need—along with a lot more besides—to consider how to put ordinary constitutional law to work.¹³⁹

III. AGAINST THUCYDIDES

Professor Ackerman appears to believe that however matters appear within the moment itself, it will too often be obvious after the fact that executive officials and judges alike had, in the emergency, “changed the accepted meanings of words as they saw fit.”¹⁴⁰ It is this Thucydidean pessimism (or realism), ultimately, that underlies Ackerman’s conclusion that constitutional guarantees and judicial review mean so little. “When the language in which the world is constituted falls apart, it becomes impossible, as Thucydides shows us, not only to act rationally within it but to make satisfactory sense of it.”¹⁴¹ Are Ackerman and Thucydides right that we need to worry about this particular danger now?

We appear to have reached, in the spring of 2004, a time in which judges are beginning to come to grips with the emergency measures adopted by the government in the wake of September 11, 2001, even while those measures remain in force. The Supreme Court has recently agreed to review three cases, at current count, concerned with direct challenges to these measures, and one other case in which a state supreme court opinion evoked “emergency” concerns.¹⁴² Both within the judicial process and in the public sphere generally, there has also been much stock-taking

139. The supermajority rules that Professor Ackerman would write into the framework statute would not pose much of a constitutional problem from the perspective of future Congresses if, as Ackerman supposes, the supermajority rules could be repealed by majority vote. Ackerman, *supra* note 8, at 1089; *see also* 1 TRIBE, *supra* note 122, § 2-3, at 124 n.1. But what if Congress, in a given instance, failed to extend a state of emergency by the needed margin, even though a majority voted for it? Could the President claim that the majority vote was all that Congress could require constitutionally, and insist that the emergency remained in force?

140. THUCYDIDES, THE PELOPONNESIAN WAR 130 (Walter Blanco trans., Walter Blanco & Jennifer Tolbert Roberts eds., W.W. Norton & Co. 1998). This phrase is also famously translated as referring to times (originally civil war) “when words themselves los[e] their meaning.” *E.g.*, JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 3 (1984).

141. WHITE, *supra* note 140, at 90.

142. *See* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003) (holding that U.S. citizens detained in the United States cannot be held as enemy combatants pursuant to the President’s commander-in-chief powers), *cert. granted*, 124 S. Ct. 1353 (2004) (No. 03-1027); Al Odah v. United States, 321 F.3d 1134 (D.C. Cir.) (holding that federal courts lack jurisdiction over habeas petitions brought by detainees at Guantánamo Bay, Cuba), *cert. granted*, 124 S. Ct. 534 (2003) (Nos. 03-334, 03-343); Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (holding that a U.S. citizen captured abroad could be held as an enemy combatant solely on the basis of a Department of Defense affidavit), *cert. granted*, 124 S. Ct. 981 (2004) (No. 03-6696). The state case is *Hiibel v. Sixth Judicial District Court ex rel. County of Humboldt*, 59 P.3d 1201 (Nev. 2002), *cert. granted*, 124 S. Ct. 430 (2003) (No. 03-5554).

underway in the past year or so, including efforts to assess the damage done legally, politically, and culturally by the initial governmental responses to the attacks, and to assess as well the possibilities of rectification and redress. How much has actually been accomplished, or will be accomplished, remains to be seen, of course. But rumors of the recent death of all critical capacity seem, at this writing, to be greatly exaggerated.

Professor Ackerman may be mistaken if he supposes that constitutional reassessment can be productively undertaken only during times of calm and not in crisis. Indeed, sharply distinguishing between crisis and calm—or between declared emergency and nonemergency, as Ackerman’s model would have it—may obscure an important possibility. “Emergencies” may progress in stages, and opportunity for reassessment may thus overlap “emergency” administration. If so, there may still be a part to play for ordinary, elaborately articulated constitutional law, at least within the course of sufficiently extended states of emergency.¹⁴³

A. *Some Perhaps Positive Examples*

In this regard, Professor Ackerman’s discussion of *Korematsu v. United States* is especially provocative. Ackerman treats *Korematsu* as “common law fog” at its worst, illustrative of the leeway that the usual constitutional law formulations leave judges to acquiesce in profoundly troubling emergency measures—even Justices as assertedly and assertively rigorous as Hugo Black. If Black, then anyone. And, Ackerman observes, it took a long time to undo *Korematsu*.

Readers of Eugene Rostow—Ackerman is one, of course—know that direct attack on *Korematsu* began almost immediately.¹⁴⁴ (It is also true, of course, that official acknowledgement, apology, and sadly small reparations payments were decades late.) But we all also know that *Korematsu*, decided at the end of 1944, was not itself emergency adjudication as such. Like *Hirabayashi v. United States* a year earlier,¹⁴⁵ *Korematsu* did not require the

143. In the discussion that follows we draw our examples from crises that do not precisely fit Professor Ackerman’s model of a state of emergency. The internment of Japanese Americans in 1942 followed a troubling sequence of stated fears of invasion, exercises in economic opportunism coupled with racism, and tabloid sensationalizing—not panic as such. The emergency in India in 1975 was a period of high political tension, but more an internal matter than an externally provoked crisis. The Cold War did involve an external adversary, did involve threats of horrific violence, and did feature periodic crises, but it was a conflict between governments (as well as much more). We think that in each of these periods, however, judiciaries came under stress, and that the responses of the judges in these circumstances suggest something important about how well or badly positioned judges are likely to be to deal with at least some dimensions of terrorism crises of the sort that Ackerman emphasizes. We certainly are not making the claim that all emergencies are the same.

144. See Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

145. 320 U.S. 81 (1943).

Supreme Court to rule at the peak of crisis: Although the war overseas continued, any real prospect of Japanese military attack on the American mainland was past. The Court was well-positioned, therefore, to recognize the changed setting and to undertake an exercise in reassessment. The opportunity had presented itself to stage an inquest—to treat review of the convictions at issue in either *Korematsu* or *Hirabayashi* as an occasion to judge the constitutional damage done by forced removal and confinement in 1942 of Japanese Americans living on the West Coast. Had the Court concluded that the prosecutions under review were wrongful, constitutional commitments would have been reinforced, and the injustice suffered by confined Japanese Americans would have been acknowledged. It is this refusal to seize that moment, we may think, first in *Hirabayashi* and then especially obviously in *Korematsu*, that in important part fuels justified outrage (and for some, cynicism) over and above the sense of shame and anger provoked by the detention policy itself.¹⁴⁶

Not long before *Hirabayashi*, the Supreme Court had demonstrated in spectacular fashion its ability to give critical consideration to measures propelled by wartime fervors or fears. *West Virginia State Board of Education v. Barnette*¹⁴⁷ not only overturned the Court's own earlier approval of mandatory flag salutes in public schools; Justice Jackson's majority opinion also stood (and stands) as a notably eloquent summary of ideals informing constitutional law and American government. *Korematsu* in particular cannot bear comparison. Justice Black acknowledged the constitutionally suspect status of racial classifications at the outset.¹⁴⁸ But in the course of affirming the conviction in *Korematsu*, Black worked conspicuously to drain the case of any large significance, narrowing the range of official actions reviewed and characterizing as abstractly as possible the concerns prompting those actions. This approach, as the dissenters in *Korematsu* were perhaps the first to note, obviously smacked of apologetics.¹⁴⁹ What we know now—concerning the conduct of government lawyers, the vagaries of scheduling, and the like—suggests worse and surely does not exclude the Supreme Court from criticism.¹⁵⁰

But *Korematsu* was also the companion case to *Ex parte Endo*,¹⁵¹ handed down the same day. Justice Black appears to have drafted *Korematsu* with an eye to *Endo*, and *Endo*, we too rarely recall, closed the

146. See Jerry Kang, *Denying Prejudice: Internment, Redress and Denial*, 51 UCLA L. REV. 933 (2004).

147. 319 U.S. 624 (1943) (overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)).

148. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (Black, J.).

149. See, e.g., *id.* at 232 (Roberts, J., dissenting).

150. Jerry Kang makes this point with great force. See Kang, *supra* note 146, at 949-55, 976-79. For rightly famous pioneering research, see PETER IRONS, *JUSTICE AT WAR* (1983).

151. 323 U.S. 283 (1944).

camps.¹⁵² Justice Douglas wrote *Endo* in understated fashion, carefully noting that the detention camps had come under civilian administration, and relying crucially on the efforts of administrators to sort “loyal” and “disloyal” occupants.¹⁵³ Yet *Endo* did ultimately declare that the question of statutory authorization to hold “loyal” detainees turned on the application of a rule of interpretation originating in the Constitution’s parallel recognition of individual rights along with government authority.¹⁵⁴ And this way of proceeding did mark an important choice—albeit only implicitly. In 1942, the British House of Lords had reached more or less the opposite conclusion in *Liversidge v. Anderson*, declaring that usual common law freedoms were to be treated as irrelevant for purposes of construing security measures—in that case, detention.¹⁵⁵ Such measures were therefore to be construed only in light of their own immediate aims.¹⁵⁶ Lord Atkin dissented sharply:

I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. . . . In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King’s Bench in the time of Charles I.¹⁵⁷

Justice Douglas, it would appear, lined up—quietly—with Lord Atkin.¹⁵⁸

152. For more detailed discussion, see Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933 (2003).

153. The efforts to ascertain loyalty in the camps are described in disturbing detail in DOROTHY SWAINE THOMAS & RICHARD S. NISHIMOTO, *THE SPOILAGE* 53-112 (1946).

154. See *Endo*, 323 U.S. at 298-300. *Endo* figured prominently in the Second Circuit majority’s opinion in *Padilla v. Rumsfeld*, 352 F.3d 695, 722-24 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 1353 (2004) (No. 03-1027). Professor Ackerman works hard to show that his emergency constitution will suggest grounds for limiting the reach of other statutes seemingly granting executive officials broad power in times of crisis. See Ackerman, *supra* note 12, at 1887-89. We have already criticized this effort as implausible on its own terms. See *supra* text accompanying notes 98-99. Here, we would note that in *Endo* and *Padilla* basic propositions of ordinary constitutional law were readily put to work to generate such rules of construction—so readily that, for readers of *Endo* especially, the constitutional reference is often easy to overlook.

155. [1942] A.C. 206 (H.L. 1942).

156. *Id.*

157. *Id.* at 244 (Atkin, L.J., dissenting).

158. *Liversidge* later “exercised a pervasive influence on the way South African judges . . . interpreted security laws” during the apartheid regime. DAVID DYZENHAUS, *HARD*

It remains an important fact that Douglas did not try to write so emphatically as Atkin. Even if *Endo* was an important decision founded on an important proposition basic to the organization of the Constitution—and it emphatically was—it did not, as written, address directly those aspects of internment that were, it appeared, most obviously wrong. There was no discussion of racial categorization as an evil, of the surrender to prejudice and economic opportunism, of the extraordinary disruption and insult introduced into the lives of the individuals confined in the camps.¹⁵⁹ It may be that American constitutional law, at that time, did not possess the resources needed to address these matters adequately. Justice Jackson, the author of the *Barnette* opinion, sought to compose a concurring opinion in *Endo* sharper than the Douglas effort, but seemingly did not pursue the project past an initial typewritten draft.¹⁶⁰

In any event, we draw this conclusion: There will be opportunities within a protracted period of emergency for reassessment, as there were in World War II in connection with internment and as there surely have been in the wake of September 11, and as there are bound to be in the aftermath of later terrorist attacks. Adjudication will be more likely to contribute to the process, to serve successfully as an inquest, if adjudication generates—even if largely (or, at times, only) in eloquent and cogently reasoned dissent—an apt language for potent criticism. Such language must catch and identify at the time, and not only in distant hindsight, whatever might be widely understood as profoundly wrong within the emergency regime. *Endo*, however much it otherwise accomplished, did not make this attempt.

It can be done, of course: A conjunction of cases famous in Indian constitutional law is instructive.

The state of emergency declared by the government of Indira Gandhi in 1975 resulted in the preventive detention of large numbers of suspected agitators.¹⁶¹ Widely noticed habeas corpus proceedings challenging

CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY 85 (1991). On *Liversidge* within its own context, see generally A.W. BRIAN SIMPSON, IN THE HIGHEST DEGREE ODIOUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN (1992).

159. Professor Kang's criticism of the 1980s decisions granting coram nobis relief to Korematsu and other internees is also apt criticism of Justice Douglas's opinion: "There was a moment to write the truth into law. There was a moment to acknowledge honestly a tragic mistake. There was a moment to show that such opinions can and should be written. That moment was lost." Kang, *supra* note 146, at 1004.

160. For the text of the Jackson draft, see Gudridge, *supra* note 152, at 1969-70; and Dennis J. Hutchinson, "The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases, 2002 SUP. CT. REV. 455, 483-84. Professor Hutchinson's important article explores at length Justice Jackson's difficulties in settling on a way of approaching *Hirabayashi* and *Korematsu*.

161. As Professor Ackerman notes, the Indian state of emergency followed, most immediately, decisions of courts, including the Supreme Court of India, that Prime Minister

detention quickly reached the Supreme Court of India after several lower courts held that officials were obligated to justify detention by showing that arrests of particular individuals satisfied the substantive conditions precedent of the framework statutes setting out emergency procedures. In *Jabalpur v. Shukla*, the Supreme Court of India disagreed, holding that the habeas writ was unavailable within the emergency period.¹⁶² Chief Justice Ray invoked *Liversidge* at length.¹⁶³ The principal issue in dispute concerned Article 21 of the Constitution of India, which provided that “[n]o person shall be deprived of his life or personal liberty except according to procedure established by law.” Provisions in the constitution authorized the president to suspend Article 21 during a state of emergency, and the presidential order did so in this instance. “The heart of the matter” thus became “whether Article 21 [was] the sole repository of the right to personal liberty. If the answer to that question be in the affirmative the Presidential Order will be a bar.”¹⁶⁴ Article 21 was indeed exclusive: “Article 21 is our Rule of Law regarding life and liberty. No other rule of law can have separate existence as a distinct right.”¹⁶⁵ The *Liversidge* rule was thus implicit in the constitutional structure: “If there is a pre-Constitution right which is expressly embodied as a fundamental right under our Constitution, the common law right has no separate existence under our Constitution.”¹⁶⁶ Ray was untroubled by this result:

Rule of law is not a law of nature consistent and invariable at all times and in all circumstances. The certainty of law is one of the elements in the concept of the Rule of Law but it is only one element and, taken by itself, affords little guidance. . . . Rule of Law is a normative as much as it is a descriptive term. It expresses an ideal as much as a juristic fact. The Rule of Law is not identical with a free society.¹⁶⁷

Justice Khanna dissented:

Gandhi had not been validly elected to Parliament—it is surely also true that Mrs. Gandhi’s own inclinations to one-person rule were an important part of the story. See Ackerman, *supra* note 12, at 1891 n.56. But the situation at the time, it seems, also encompassed other, more complex dynamics. The events preceding the declaration of emergency, and the politics of the emergency period itself, are discussed in P.N. DHAR, INDIRA GANDHI, THE “EMERGENCY,” AND INDIAN DEMOCRACY 223-68, 300-51 (2000). For our purposes, in any event, it is the several responses to the crisis on the part of the Supreme Court of India—and not the preceding events—that are pertinent.

162. A.I.R. 1976 S.C. 1207. Detainees participating in the litigation included Atal Bihari Vajpayee, currently Prime Minister of India. See *id.* at 1207.

163. See *id.* at 1222-23.

164. *Id.* at 1228.

165. *Id.* at 1229.

166. *Id.*

167. *Id.* at 1234.

Sanctity of life and liberty was not something new when the Constitution was drafted. It represented a facet of higher values which mankind began to cherish in its evolution from a state of tooth and claw to a civilized existence. Likewise, the principle that no one shall be deprived of his life and liberty without the authority of law was not the gift of the Constitution. It was a necessary corollary of the concept relating to the sanctity of life and liberty; it existed and was in force before the coming into force of the Constitution. . . . Government under law thus seeks the establishment of an ordered community in which the individual, aware of his rights and duties, comprehends the area of activity within which, as a responsible and intelligent person, he may freely order his life, secure from interference from either the government or other individuals

. . . .

Even in the absence of Article 21 in the Constitution, the State has . . . no power to deprive a person of his life or liberty without the authority of law.¹⁶⁸

After eighteen months or so, the state of emergency ended, and election results drove the Gandhi government from power. The Indian Parliament amended the constitution to provide that Article 21 remained in force in states of emergency.¹⁶⁹ The Supreme Court of India marked the new era with its decision in *Maneka Gandhi v. Union of India*,¹⁷⁰ a case concerning—ironically—suspension of the passport of a relative of the former prime minister. The attorney general conceded that, contrary to the assertion of the officials immediately responsible, Gandhi had a right to challenge the suspension.¹⁷¹ The court nonetheless took the opportunity to reread Article 21, declaring that its content derived not just from its own language, but from the language of other rights stated in the constitution, and that it was the entirety of these rights that Article 21 enforced. Chief Justice Beg, in a concurring opinion, made the point especially vividly:

Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. They are all parts of an integrated scheme in the Constitution. Their

168. *Id.* at 1254-55 (Khanna, J., dissenting).

169. See Gopal Subramaniam, *Emergency Provisions Under the Indian Constitution*, in SUPREME BUT NOT INFALLIBLE 134, 134-58 (B.N. Kirpal et al. eds., 2000); see also Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT'L L. 311 (2001).

170. A.I.R. 1978 S.C. 597.

171. See *id.* at 599.

waters must mix to constitute that grand flow of unimpeded and impartial Justice (social, economic and political). Freedom (not only of thought, expression, belief, faith and worship, but also of association, movement, vocation or occupation as well as of acquisition and possession of reasonable property), of equality (of status and of opportunity, which imply absence of unreasonable or unfair discrimination between individuals, groups, and classes), and of Fraternity (assuring dignity of the individual and the unity of the nation), which our Constitution visualizes. Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat the very objects of such protection.¹⁷²

This is, we can see, the gist of Justice Khanna's conception of "ordered community," now brought within the terms of the constitution itself. *Maneka Gandhi*, obviously, was revolutionary—and its revolution took hold. The case marked the beginning of the great period of rights jurisprudence in Indian constitutional law.¹⁷³

Notwithstanding his impressively cosmopolitan invocation of examples drawn from the experience of other nations that have drafted explicit provisions for the declaration of states of emergency, Professor Ackerman does not discuss states of emergency in the constitutional law of India. But the constitutional treatment of states of emergency, and the implementing framework statutes as well, are subjects of intricate analysis within Indian law worth careful study. For present purposes, the example of India is important mostly for what it suggests about judicial reassessment of crisis action. As Ackerman might have predicted, in the initial period of crisis, the Supreme Court of India gave way, acceded to government arguments, and indeed arguably even deepened the public sense of crisis. But Khanna's dissent, amplifying ideas not much different from those we have already noted in Atkin's dissent in *Liversidge* and Douglas's muted *Endo* opinion, provided a template in the succeeding period.¹⁷⁴

In that next phase, remodeled constitutional law elaborated explosively. To be sure, within the emergency itself, only Justice Khanna was prepared to act critically and to bring to bear conceptions of constitutional law apt to

172. *Id.* at 606 (Beg, C.J., concurring).

173. See M.P. Jain, *The Supreme Court and Fundamental Rights*, in FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH 1, 23-37 (S.K. Verma & Kusum eds., 2000). The subheadings in this part of Jain's article tell much of the story—"Humanization of Criminal Justice," "Quality of Life," "Right to Livelihood," "Right to Education," "Sexual Harassment," "Ecology." It is as though Frank Michelman had been reincarnated in the pages of the *All India Reporter*.

174. See T.R. Andhyarujina, *The Evolution of Due Process of Law by the Supreme Court*, in SUPREME BUT NOT INFALLIBLE, *supra* note 169, at 193, 203; Jain, *supra* note 173, at 23 ("The judicial attitude . . . underwent a metamorphosis after the traumatic experiences under the internal emergency imposed in 1975 which was lifted in 1977.").

the moment. The Supreme Court on which he sat did not itself end the emergency. But Khanna's criticism was apt. It seems to have provided a point of departure for constitutional adjudication to reformulate itself, and extend its agenda.

The example of India is thus provocative but only almost apposite. The Supreme Court of India, itself initially caught up in the crisis atmosphere, quickly and dramatically repudiated its first reaction, and in the process institutionalized that repudiation within the substance of constitutional law. We noted earlier our regret that Professor Ackerman, despite his doubts about the value of the judicial process as compared with the legislative process in containing the excesses of government reaction to terrorist-induced emergencies, has not paid more attention to the role that the judicial process has played in helping to establish the primacy of legislatures in structuring reactions to wartime emergency in the United States. The example of India, though, poses another question: Are there instances in which courts, acting within periods of emergency, have proven themselves to be capable—without the strongly mediating role of framework legislation—of developing modes of criticism and reassessment with some generalizable utility? The most instructive example we have found, remarkably, lies close at hand, within American constitutional law itself.¹⁷⁵

B. *Cold War Structures of Rights*

Without making much of the fact, Professor Ackerman sets his enterprise within a period in time that postdates not only September 11, 2001, but also 1989, the year we treat as marking the end of the Cold War. The Cold War era is notable for present purposes because it too was a time in which the suspicion was prevalent—if waxing and waning—that the population of the United States included persons and “cells” more or less at war with the United States government, or in any case willing to aid or act in the interests of a ruthless and formidable adversary. It was also another time in which the United States government, joined by state governments, attempted in various ways to test that suspicion and to defend against perceived risks. We remember these efforts as controversial (to say the least). The House Committee on Un-American Activities (HUAC), the blacklists, the rise and fall of Senator McCarthy, the investigation and conviction of Alger Hiss, the trial and execution of Ethel and Julius

175. We agree with Professors Eric Posner and Adrian Vermeule that neither rights-limitations nor rights-vindications are *necessary* features of states of emergency. See Posner & Vermeule, *supra* note 40, at 625-26. We would emphasize, perhaps more than they do, a corollary: Absent necessity, the question of rights becomes, at least in part, a question of effort, of imagination, of articulation. This is, especially, the underlying theme of the next Section.

Rosenberg—these and other episodes associated with the era continue to resonate in public memory, sometimes still in sharply divisive ways.

Ackerman notes that Cold War security efforts for the most part put to work the usual mechanisms of the criminal law. He believes that these mechanisms are not altogether apposite in the present circumstances—indeed, that neither the model of crime nor the model of war neatly fits our “struggle” against international terrorism.¹⁷⁶ Prevention must be the watchword, threats of punishment cannot be expected to deter adversaries who are willing and sometimes eager to die for their cause, and the normal structures of warfare against enemy nation-states with organized military machines are largely if not entirely irrelevant. But the Cold War, of course, was also not a “war” fought chiefly in the usual way. And within the Cold War context the uses made of criminal prosecutions, administrative procedures, and legislative investigations were certainly not “ordinary course of business.” The Cold War does differ from our current situation, as Ackerman understands it, in at least one important respect: The confrontation with the Soviet Union was conceived, by and large, as a long-term, continuing contest, an ongoing crisis, and not a series of separated incidents. We have suggested, criticizing Professor Ackerman, that the present moment might also be perceived as an extended, persistent confrontation. Thus, from our perspective, the Cold War looks more pertinent.

In particular, we think, the Cold War work of the Supreme Court is very much worth recalling as we reflect on what ordinary constitutional law has to contribute today. The many efforts of the Court—across some two decades—to come to grips with, limit, and ultimately largely dismantle Cold War security efforts do not figure at all in *The Emergency Constitution*. This is perhaps not surprising in an account that associates judicial process with “common law fog” and “legalisms.” To be sure, the Cold War Court’s effort was not a straightforward civil liberties success story. Domestic security arguments prevailed often—indeed, throughout most of the period.¹⁷⁷ Early cases in particular reveal the Supreme Court in dramatic disarray.¹⁷⁸ Professor Ackerman might plausibly argue that there

176. We use the word “struggle” and not, say, “battle,” because we agree with Professor Ackerman—and other commentators like Professor Heymann—that much more is to be lost than gained by describing the current struggle as a “war on terrorism.” See HEYMANN, *supra* note 45, at 19-33.

177. We do not think, as Professor Ackerman seems to, that the Cold War cases can be divided into two groups—McCarthy-era and afterwards. See Ackerman, *supra* note 12, at 1896 & n.69. The patterns of results, and divisions within the Supreme Court, were too complicated and too long-lasting, as we will see, to fit this model. Our discussion will also not fit easily, for the same reason, within the well-known picture of “two” Warren Courts.

178. Compare, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951), with *Dennis v. United States*, 341 U.S. 494 (1951). In the first of these cases, the profoundly fragmented Supreme Court ruled, however obscurely, against a government effort to stop an

is evidence here not only of “fog,” but of confusion close to panic.¹⁷⁹ Decisions throughout the period frequently revealed close divisions, and the changing roster of Justices plainly mattered; it certainly appears as though congressional and popular hostility sometimes also had effects.¹⁸⁰ Nonetheless, we are able to glimpse, in the organization and themes of many opinions, the emergence and elaboration of distinctive “rights structures,” complex compounds within whose interplaying terms opposed constitutional imperatives might be acknowledged without collapsing into obvious contradiction. We describe in some detail the work of the Cold War Supreme Court. We do so not to extract conclusions of substance concerning constitutional law. Instead, we mean to make a show of *possibility*—to depict judicial work illustrative of the capacity of ordinary constitutional law to come to grips with—to *judge*—claims of individual rights in emergency settings.¹⁸¹ All of this work, whatever the limits of its accomplishment, was no mean feat. Why suppose that something equivalent is not possible now? The “garrison state” that Cold War Americans feared the United States would become, and the relentless “emergency state” that concerns us now, may not be substantially dissimilar dystopic worries.¹⁸² We might want to learn from the past in order to repeat (at least part of) it.

It was evident early on that the Cold War was a contest playing out on several levels. Threats of nuclear annihilation and intensely fought, sometimes long-lasting localized military conflicts proceeded in parallel with each other and also with what was understood, seemingly by many on both sides, to be an extended cultural tournament. Nikita Khrushchev’s

administrative blacklisting effort; in the second, almost as divided, the Court upheld (even as it bitterly debated) Smith Act prosecutions.

179. William Wiecek writes:

Beset by the same anxieties that gripped other Americans at the time, most of the Justices of the Vinson Court acknowledged anticommunism as a legitimate expression of democratic politics. . . . Stampeded by the frightening sequence of international setbacks to American foreign policy from 1946 through 1950, facing a genuinely brutal and repressive totalitarian regime in a world increasingly bipolar and dangerous, . . . the Justices gave free rein to executive, legislative, and popular determination to destroy the domestic arm of the international Communist movement.

William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 SUP. CT. REV. 375, 433-34.

180. Political dynamics are discussed in considerable and sobering detail in LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 75-102, 135-56, 491 (2000). Professor Powe provocatively stresses the overlap and interaction of civil rights cases and domestic security cases, arguing that it was the civil rights commitments of the Supreme Court that ultimately broke what he sees as a domestic security stalemate. We adopt a narrower focus here.

181. For a helpful, if perhaps too cheerful overview, giving less emphasis overall to the decisions upholding domestic security concerns, see MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 52-73 (1998) (chapter titled “Standing Up to McCarthyism”).

182. On the “garrison state” worry in the early Cold War period, see AARON L. FRIEDBERG, *IN THE SHADOW OF THE GARRISON STATE* 53-58 (2000). For the initial elaboration of the idea, see Harold D. Lasswell, *The Garrison State*, 46 AM. J. SOC. 455 (1941).

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declaration—"We will bury you"—is the most famous of the Soviet bugle calls proclaiming the social, economic, and political race. The American equivalent, published in 1947, appears near the end of the immediately classic essay that George Kennan wrote for *Foreign Affairs*:

Thus the decision will really fall in large measure in this country itself. The issue of Soviet-American relations is in essence a test of the over-all worth of the United States as a nation among nations. To avoid destruction the United States need only measure up to its own best traditions and prove itself worthy of preservation as a great nation.

Surely, there was never a fairer test of national quality than this. In the light of these circumstances, the thoughtful observer of Russian-American relations will find no cause for complaint in the Kremlin's challenge to American society. He will rather experience a certain gratitude to Providence which, by providing the American people with this implacable challenge, has made their entire security as a nation dependent on their pulling themselves together and accepting the responsibilities of moral and political leadership that history plainly intended them to bear.¹⁸³

Chief Justice Warren, writing for the majority in *United States v. Robel*, one of the last of the security cases, echoed Kennan's challenge:

Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those

183. "X," *The Sources of Soviet Conduct*, 25 FOREIGN AFF. 566, 582 (1947). NSC 68, sometimes thought to be the equivalent of the Constitution for purposes of initial Cold War policymaking, reformulated Kennan's observations in more aggressive terms:

The vast majority of Americans are confident that the system of values which animates our society—the principles of freedom, tolerance, the importance of the individual, and the supremacy of reason over will—are valid and more vital than the ideology which is the fuel of Soviet dynamism. Translated into terms relevant to the lives of other peoples—our system of values can become perhaps a powerful appeal to millions who now seek or find in authoritarianism a refuge from anxieties, bafflement, and insecurity.

....
... The potential within us of bearing witness to the values by which we live holds promise for a dynamic manifestation to the rest of the world of the vitality of our system. The essential tolerance of our world outlook, our generous and constructive impulses, and the absence of covetousness in our international relations are assets of potentially enormous influence.

NSC 68: United States Objectives and Programs for National Security (Apr. 14, 1950), in AMERICAN COLD WAR STRATEGY: INTERPRETING NSC 68, at 23, 42 (Ernest R. May ed., 1993). On Kennan's disagreements with NSC 68, see WILSON D. MISCAMBLE, GEORGE F. KENNAN AND THE MAKING OF AMERICAN FOREIGN POLICY, 1947-1950, at 309-13 (1992).

ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.¹⁸⁴

The point—a point as worth making now as in 1947 or 1967—was in fact made over and over throughout the period, especially in dissenting and concurring opinions of Justices Black and Douglas.¹⁸⁵ Black's conclusion to his opinion in *Yates v. United States* is characteristic:

Doubtlessly, dictators have to stamp out causes and beliefs which they deem subversive to their evil regimes. But governmental suppression of causes and beliefs seems to me to be the very antithesis of what our Constitution stands for. The choice expressed in the First Amendment in favor of free expression was made against a turbulent background by men such as Jefferson, Madison, and Mason—men who believed that loyalty to the provisions of this Amendment was the best way to assure a long life for this new nation and its Government. . . . The First Amendment provides the only kind of security system that can preserve a free government—one that leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us.¹⁸⁶

Freedom of speech, of course, was not the only constitutional right that appeared to be salient in domestic security cases¹⁸⁷ and that distinguished our polity from that of the nations we were combating. But Justice Black's free speech opinions were (and still are) especially notable. Invoking ideas of freedom of speech in sufficiently abstract terms, Black was able to posit insistent equations of present and past, with an attendant parade of heroes and villains, as well as similarly pressing equations of security concerns and practices in the United States and unnerving governmental procedures elsewhere—say, in the Soviet Union or Nazi Germany. The forcefulness of these comparisons worked, in turn, to burnish the plausibility of Black's so-called textualism, his asserted commitment to enforcing constitutional language as directly as possible (“Congress shall make no law . . .”). The relatively abstract terms used in the Constitution, Black had already shown

184. 389 U.S. 258, 264 (1967) (Warren, C.J.).

185. See, e.g., *Konigsberg v. State Bar*, 366 U.S. 36, 77-79 (1961) (Black, J., dissenting); *Adler v. Bd. of Educ.*, 342 U.S. 485, 510-11 (1952) (Douglas, J., dissenting).

186. 354 U.S. 298, 343-44 (1957) (Black, J., concurring in part and dissenting in part).

187. See, e.g., *United States v. Brown*, 381 U.S. 437 (1965) (Bill of Attainder Clause); *Aptheker v. Sec'y of State*, 378 U.S. 500 (1964) (right to travel); *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551 (1956) (privilege against self-incrimination); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (Supremacy Clause); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (substantive due process).

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his readers, were altogether appropriate for judicial use, plainly able to express and explain strong conclusions and strong feelings.

There was this difficulty, however: Concern for domestic security could also be framed in general, emphatic terms, pointing to conclusions pretty much opposite those reached by Justice Black. In *Harisiades v. Shaughnessy*, for example, Justice Jackson wrote for a majority of the Court to uphold a federal statute authorizing deportation of an otherwise legally resident alien who was (or had been) a member of the Communist Party.¹⁸⁸ The statute, Jackson concluded, was consistent with due process:

This Act was approved by President Roosevelt . . . when a world war was threatening to involve us, as soon it did. Communists in the United States were exerting every effort to defeat and delay our preparations. Certainly no responsible American would say that there were then or are now no possible grounds on which Congress might believe that Communists in our midst are inimical to our security. . . . It would be easy for those of us who do not have security responsibility to say that those who do are taking Communism too seriously and overestimating its danger. . . . We, in our private opinions, need not concur in Congress' policies to hold its enactments constitutional. Judicially we must tolerate what personally we may regard as a legislative mistake. . . . We think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation.¹⁸⁹

It was possible, against this backdrop, to depict opinions limiting constitutional rights as *therefore* antitotalitarian, indeed altogether Kennanesque. *Harisiades* is again illustrative. Addressing a free speech claim, Justice Jackson wrote:

True, it often is difficult to determine whether ambiguous speech is advocacy of political methods or subtly shades into a methodical but prudent incitement to violence. Communist governments avoid the inquiry by suppressing everything distasteful. Some would have us avoid the difficulty by going to the opposite extreme of permitting incitement to violent overthrow at least unless it seems certain to succeed immediately. We apprehend that the Constitution

188. 342 U.S. 580 (1952) (Jackson, J.).

189. *Id.* at 590-91. John Lewis Gaddis has noted a similar dynamic in the argument of NSC 68: "The document paid obeisance to the balance of power, diversity, and freedom, but nowhere did it set out the minimum requirements necessary to secure those interests. Instead it found in the simple presence of a Soviet threat sufficient cause to deem the interest threatened vital." John Lewis Gaddis, *Gaddis's Commentary*, in *AMERICAN COLD WAR STRATEGY: INTERPRETING NSC 68*, *supra* note 183, at 141, 145.

enjoins upon us the duty, however difficult, of distinguishing between the two.¹⁹⁰

We can glimpse, in these Black and Jackson passages, important elements of what would often appear to be a fundamental division within the Cold War Supreme Court. On one view, the question in the domestic security cases concerned, simply and exclusively, the pertinence of constitutional rights. If applicable, these rights ruled: Their usual (constitutionally framed) terms by themselves determined the outcomes of individual cases. The second view held that security concerns were also relevant and worthy of deference. It was therefore necessary to draw distinctions, to accommodate somehow both constitutional rights and security concerns. In principle, at least, there was no necessary hierarchy ordering the competing considerations. Interests, it was often said, needed to be balanced.

Neither of these competing modes of analysis and justification succeeded in entirely marginalizing the other. Justices Black and Douglas, prominently on the one side, and Justices Frankfurter and Harlan, equally visibly aligned on the other, persisted in their views, seizing whatever opportunities the cases presented, repeatedly asserting the merits of their own approaches, and criticizing—often trenchantly—the opposing perspective.¹⁹¹ Importantly, however, this methodological conflict, although it appears to have ratcheted up the degree of adjudicative difficulty in the domestic security cases generally, figured mainly as a sort of tense backdrop. Justices, including direct participants in the dispute, were often able to assemble subsuming accounts integrating enough elements of the opposed approaches to enable the Court to reach and justify decisions.

The most successful of these opinions employ forms of argument that look like nothing so much as several constitutional law equivalents of *matryoshki*—Russian nesting dolls. This analogy is not just ironic. Within the sequences of “insets” (dolls within dolls, as it were) that organize the arguments of Chief Justice Warren and Justices Harlan and Brennan in particular, points of view attributed to and thus depicting both official actors and individuals caught up in official security efforts figure prominently. The Justices disagree about how these points of view should be described: Should viewpoints be described in terms linked with and

190. *Harisiades*, 342 U.S. at 592 (Jackson, J.).

191. For criticism, see, for example, *Konigsberg v. State Bar*, 366 U.S. 36, 49-51 (1961) (Harlan, J.); and *Barenblatt v. United States*, 360 U.S. 109, 141-45 (1959) (Black, J., dissenting). Justice Jackson famously resists categorization in either camp, perhaps because his tenure on the Court was punctuated by his service as chief prosecutor at Nuremberg. See WILLIAM H. REHNQUIST, *THE SUPREME COURT* 179-81 (new ed. 2001); see also Patrick Schmidt, “*The Dilemma to a Free People*”: Justice Robert Jackson, Walter Bagehot, and the Creation of a Conservative Jurisprudence, 20 *LAW & HIST. REV.* 517 (2002).

derived from government domestic security concerns—in the language and from the perspective of state necessity and national interest? Or should viewpoints be represented in terms derived from the constitutional protections to which individuals are entitled—in terms, that is, of constitutional rights? Justices also disagree about which constitutional rights matter most in which settings, and thus about the specificity and presuppositions of individual viewpoints in particular.¹⁹²

The ongoing controversy in the Supreme Court is thus driven by, and makes palpable, an underlying competition among differing visions of the world as seen from the vantage point of the individuals and government officials who populate it. These visions encode the world as an array of interests properly represented by government, as a pattern of rights belonging to individual persons, or as presenting itself afresh to individuals who are understood as standing outside both the map of interests and the map of rights. The clash among those visions in turn reflects a competition among differing conceptions of individuals—as objects of governmental concern, as subjects of constitutional protection, or as inset within neither governmental nor constitutional agendas but instead as exterior to (prior to) both. It is principally the structure and play of this competition that—we think—we ought to recall now.

First matryoshka: In *Watkins v. United States*, a contempt prosecution originating in the refusal of a witness to answer questions posed by a subcommittee of HUAC, Chief Justice Warren concluded that the serious concerns that might lie behind committee member questions did not, standing alone, require witnesses to cooperate.¹⁹³ Rather, in view of equally serious concerns for individual rights, the challenged questions needed specific grounding in the subcommittee charter that had been granted by the full committee; this grant in turn needed grounding in a sufficiently detailed congressional delegation. “Protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need.”¹⁹⁴ Warren proceeded similarly in *Sweezy v. New Hampshire*, addressing a state legislative investigation delegated to the state attorney general:

The lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from petitioner must be treated as the absence of authority. It follows that the use

192. There are, of course, also disagreements about the content of any given right, but that level of disagreement is transparent; about it, there is little one can say other than to rehearse the debate itself.

193. 354 U.S. 178, 214-16 (1957) (Warren, C.J.).

194. *Id.* at 205. Only one Justice dissented in *Watkins*. See *id.* at 217 (Clark, J., dissenting). Justice Frankfurter wrote a brief concurring opinion. See *id.* at 216-17 (Frankfurter, J., concurring). Two Justices did not sit.

of the contempt power, notwithstanding the interference with constitutional rights, was not in accordance with the due process requirements of the Fourteenth Amendment.¹⁹⁵

Warren's requirement of "indications" or "clear determination" was, we can see, a demand that the investigative agenda itself acknowledge the importance of constitutional rights of individuals, a demand that legislative action *within its own terms* display constitutional concerns—in its tight focus, in the concreteness of its preoccupations, reveal, however obliquely, the impress or "shape" of constitutional requirements.

Yates v. United States,¹⁹⁶ issued on the same "Red Monday,"¹⁹⁷ showed Justice Harlan engaged in a similar exercise in the course of reviewing the convictions of fourteen members of the Communist Party for political organizing and advocacy in violation of the Smith Act. Harlan inset free speech rights within the Smith Act, as it were, reading the statute, with notable creativity, as acknowledging differences in forms of "advocacy" that the Supreme Court had already recognized as constitutionally significant as of the date of the Act's passage in 1940.¹⁹⁸ The Smith Act was thus read as satisfying the requirement that the legislative investigations at issue in *Watkins* and *Sweezy* had failed to meet. Justice Harlan insisted that the constitutional impress be apparent within seemingly secondary instruments as well: The jury instructions in *Yates* were flawed because they did not stress differences in advocacies enough to fit within the parameters of the compound constitutional and statutory scheme.¹⁹⁹ Harlan ultimately parsed the trial record, identifying which Communist Party defendants, given proper instructions, might be retried and which were plainly entitled to acquittal.²⁰⁰

Second matryoshka: The approaches of Justice Harlan and Chief Justice Warren also differed in an important way. Thoughtful discussions of free speech and due process concerns in *Watkins* and *Sweezy* provided justifications for the requirement that legislative committee questions plainly fall within the scope of prior legislative determinations of pertinent matters of concern. But the problems of self-censorship and fair notice that Chief Justice Warren identified suggested little about what the precise content of legislative agendas ought to be. Warren's requirement was in

195. 354 U.S. 234, 254-55 (1957) (Warren, C.J.) (plurality opinion). Chief Justice Warren wrote for four Justices. Justices Frankfurter and Harlan concurred, balancing interests at length. *See id.* at 255-67 (Frankfurter, J., concurring in the result). Two Justices dissented. *See id.* at 267-70 (Clark, J., dissenting). One Justice did not sit.

196. 354 U.S. 298 (1957).

197. On the origin of the phrase and its ramifications, see POWE, *supra* note 180, at 93-103.

198. 354 U.S. at 324-25 (Harlan, J.).

199. *Id.* at 320.

200. *Id.* at 327-34.

substance entirely formal—insisted that the investigative scope be “precise” and “specific.” In *Yates*, however, Justice Harlan drew from constitutional law and attributed to statutory language what he understood to be a richly substantive distinction, between “advocacy of abstract doctrine and advocacy directed at promoting unlawful action.”²⁰¹ It was this distinction that the trial court failed to acknowledge and elaborate sufficiently clearly and that Harlan put to work himself in declaring whether individual defendants were to be acquitted or might be retried. He took a similar approach in the succeeding Smith Act decisions in *Scales v. United States*²⁰² and *Noto v. United States*.²⁰³ In these latter cases the issue was criminal membership, and Justice Harlan, very much as he had in *Yates*, identified within statutory terms constitutional requirements, tracing to rights of freedom of association and due process, that membership in an organization engaged in illegal activity must be knowing, active, and specifically intended to advance the illegal activity. Evidence at trial showed that the Communist Party participation of the *Scales* defendants met these tests—but the evidence concerning the *Noto* defendants showed otherwise.

In all three opinions, Justice Harlan depicted constitutional rights as inset in statutory language, but at the same time characterized the *content* of those rights in terms that precisely identified the proper focus of legislative domestic security concerns, and thus inset statutory preoccupations within constitutional specifications. “Advocacy of action,” “knowing, active membership,” “specific intention to further illegal aims”—these criteria worked much like a photographic negative to picture in reverse, as it were, constitutionally protected speech or association; at the same time, they directly disclosed actual security threats. Importantly, descriptions of constitutional rights that took this form personified rights, indeed personified them in a particular way—gave content to otherwise abstractly defined rights (or explained the inapplicability of such rights) by invoking images of acting individuals and, in particular, of individuals motivated and acting in troubling ways. Harlan’s terms in the first instance supplied criteria for picking out individuals whose purposes and acts did not warrant constitutional protections—and thus indirectly identified individuals who might properly claim constitutional rights.

In other cases, Justice Harlan put several versions of this approach to use. In *Barenblatt v. United States*,²⁰⁴ he dramatically gutted *Watkins* (if only for purposes of *Barenblatt* itself—*Watkins* continued to be invoked in

201. *Id.* at 318.

202. 367 U.S. 203 (1961) (Harlan, J.).

203. 367 U.S. 290 (1961) (Harlan, J.).

204. 360 U.S. 109 (1959).

other Supreme Court decisions²⁰⁵). Harlan declared at the outset that “[the congressional power of inquiry] and the right of resistance to it are to be judged in the concrete, not on the basis of abstractions.”²⁰⁶ In application, this approach largely took the form of a close look at committee work from a perspective attributed to the individual charged with contempt for not answering committee questions. Sometimes this focus was implicit. Because HUAC throughout its history had engaged in an “unremitting” investigation of committee activities,²⁰⁷ this generalized agenda could not be truly regarded as unconstitutionally vague (i.e., should not have surprised the witness). *Watkins* worries were therefore irrelevant. In other instances, Harlan was explicit: The memorandum that the witness submitted to the subcommittee in order to explain his refusal did not in so many words object to particular questions, and the fact that the memorandum was “prepared” in advance showed that the witness was “well aware of the Subcommittee’s authority and purpose to question him as it did.”²⁰⁸ The witness’s *Watkins* argument was in effect estopped—the pertinence worry was again irrelevant. Individual conduct, as in the Smith Act cases, was judged closely, once more ultimately from the perspective of government concerns—albeit, in *Barenblatt*, now concerns about witnesses’ legal maneuvering and not subversive advocacy, concerns thus more procedural than substantive.²⁰⁹

*In re Anastaplo*²¹⁰ and *Konigsberg v. State Bar*²¹¹ concerned character qualifications for admission to the state bar. Justice Harlan treated administrative procedure as both the context within which individual acts were to be judged and as itself the government preoccupation fixing the standard for judging individual acts. He described the concern of bar officials as an altogether general interest in resolving doubt about character, pertinent in all cases whether or not statements or associations of individual applicants provided reason for specific concern. His opinions in these cases thus were of a piece with *Barenblatt*. The refusal of applicants to answer

205. For decisions in which *Watkins* retained force, see, for example, *Gojack v. United States*, 384 U.S. 702 (1966); *DeGregory v. Attorney General*, 383 U.S. 825 (1966); and *Deutch v. United States*, 367 U.S. 456 (1961).

206. *Barenblatt*, 360 U.S. at 112 (Harlan, J.).

207. *Id.* at 119-20.

208. *Id.* at 124; see also *id.* at 123-25 (identifying other aspects of *Barenblatt*’s conduct as a witness).

209. The famous interest-balancing exercise in *Barenblatt* occurs only after Justice Harlan has disposed of *Watkins*, and thus only after the most pressing issue in the case has been resolved. The balancing, perhaps not surprisingly in this context, is actually rather perfunctory, framing governmental concerns as a “long and widely accepted view,” *id.* at 128, without closely examining that view, and dismissing closer scrutiny as resting on an entirely opposed perspective, see *id.* at 128-29. There is no real discussion of contrary individual interests. See *id.* at 134. For a largely similar approach, see *Uphaus v. Wyman*, 360 U.S. 72, 77-81 (1959).

210. 366 U.S. 82 (1961).

211. 366 U.S. 36 (1961).

questions was made to appear as nothing more than noncooperation, in itself both a procedural problem and substantively troubling in the context of administrative character inquiries. Noncooperation, seen in this light, also appeared to be a politically neutral matter, and thus administrative action could be depicted as falling outside the scope of free speech concerns.²¹²

Third matryoshka: In *Watkins*, Chief Justice Warren described the free speech problem of self-censorship in quite context-specific terms. Discretion is the better part of valor: The virtue of cautious exercise of rights of free speech and freedom of association was the lesson taught by legislative committee “show trials” themselves and, even more importantly, by public hostility to witnesses appearing before the committees.²¹³ Warren also represented the due process difficulties he noted as another artifact of the committee setting, as originating in the quandary of individuals needing (but unable) to determine the pertinence of questions.²¹⁴ In his opinion for the Supreme Court in *Speiser v. Randall*, Justice Brennan radically rearranged and restated the *Watkins* concerns.²¹⁵ In the process, Brennan developed a mode of argument that reversed Justice Harlan’s emphases.

California property tax assessors had denied exemptions to otherwise qualified veterans who had refused to sign a legislatively mandated loyalty oath. The state constitution did not require the oath, but it did deny the tax exemption to anyone who “advocate[d] the overthrow of the Government . . . by force or violence or other unlawful means.”²¹⁶ The California Supreme Court had declared that the state constitutional loyalty test reached only conduct that U.S. Supreme Court decisions held to fall outside the scope of the First Amendment. Veterans who did not sign the oath were obliged to appeal the assessors’ decisions and prove that the constitutional condition was not in fact applicable.

212. Justice Harlan had already adopted an approach much like this in a Fifth Amendment case. *See Lerner v. Casey*, 357 U.S. 468 (1958); *see also Beilan v. Bd. of Pub. Educ.*, 357 U.S. 399 (1958) (concluding that refusal to answer was indicative of “incompetency”).

213. *See Watkins v. United States*, 354 U.S. 178, 222-23 (1957). Chief Justice Warren wrote: The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. And when those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous. This effect is even more harsh when it is past beliefs, expressions or associations that are disclosed and judged by current standards rather than those contemporary with the matters exposed. . . . Those who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy. Beyond that, there is the more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate at some future time.

Id. at 197-98.

214. *See id.* at 208-15.

215. 357 U.S. 513 (1958) (Brennan, J.).

216. *Id.* at 516 (citing CAL. CONST. art. XX, § 19 (1952)).

The state, Justice Brennan wrote, had put in place “a short-cut procedure which must inevitably result in suppressing protected speech.”²¹⁷ The problem was the allocation of the burden of proof. “[D]ue process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition.”²¹⁸ The fact that the California loyalty test, in substance, satisfied the First Amendment was not dispositive:

The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied provide but shifting sands on which the litigant must maintain his position. How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result that the State could not command directly. It can only result in a deterrence of speech that the Constitution makes free.²¹⁹

Matryoshka, matryoshka, matryoshka: Within this brief passage, we can see, Justice Brennan inset free speech concerns within due process analysis and also proceeded precisely oppositely. Brennan acknowledged that California had confined its loyalty test within First Amendment terms, but nonetheless showed that, within the due process perspective, the pertinence of First Amendment notions (as formulated by the United States Supreme Court!²²⁰) made matters worse because of the “complexity” and “generality” of free speech tests. The uncertainty and the corresponding incentive to steer clear of certain statements or associations attributable to the allocation of the burden of proof was a due process problem and not simply a commonplace “inherent in all litigation,” because of the free speech concerns—“deterrence of speech which the Constitution makes free.”²²¹ This troubling “deterrence” was made apparent, however, because of the shift from the free speech to the due process perspective. The

217. *Id.* at 529.

218. *Id.*

219. *Id.* at 526 (citations omitted).

220. Justice Brennan referred specifically to *Dennis v. United States*, as Justice Harlan had somewhat similarly in *Yates v. United States*, 354 U.S. 298, 320-21 (1957).

221. *Speiser*, 357 U.S. at 526.

individual deterred was not caught up within the swirl of questions, statements, and public opinion that Chief Justice Warren had described so powerfully in *Watkins*—rather, the individual was positioned within the ordinary context of litigation, engaged in an utterly ordinary lawyerly analysis of risks.²²²

Association of individuals with the lawyerly perspective²²³ is also evident in Justice Stewart's opinion in *Cramp v. Board of Public Instruction*, decided on due process vagueness grounds, in which Stewart picked apart the language of a Florida teacher's oath with a paragraph of machine gun questioning reminiscent of first-year law school.²²⁴ Justice White adopted the same approach, now as a matter of free speech analysis, in *Baggett v. Bullitt*, another teacher's oath case.²²⁵ Justice Brennan subsequently invoked *Baggett*, and also *Speiser*, in *Dombrowski v. Pfister*, striking down provisions of a Louisiana subversive activities control law enforced through criminal prosecutions rather than oaths:

[W]e see no controlling distinction in the fact that the definition is used to provide a standard of criminality rather than the contents of a test oath. This overly broad statute also creates a "danger zone" within which protected expression may be inhibited. Cf. *Speiser v. Randall*. So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression.²²⁶

Dombrowski, standing alone, is famously controversial. This is in part because later critics were, not surprisingly, inclined to read *Dombrowski* in

222. Dissenting a year later in *Uphaus v. Wyman*, Justice Brennan again situated his analysis within the legal procedural context, this time to discredit an investigation undertaken by the New Hampshire attorney general. "The citation of names in the book does not appear to have any relation to the possibility of an orthodox or traditional criminal prosecution, and the Attorney General seems to acknowledge this." 360 U.S. 72, 95 (1959) (Brennan, J., dissenting); see also *id.* at 88-96.

223. It was an association that Justice Brennan was to develop into a veritable art form of its own in his imagined dialogue between the black defendant, on trial for his life on a charge of having murdered a white victim, and the defendant's attorney, trying to answer his client's question "whether a jury was likely to sentence him to die" and feeling "bound to tell [his client] that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks," and that, "more likely than not . . . the race of [his] victim would determine whether he received a death sentence." *McCleskey v. Kemp*, 481 U.S. 279, 321 (1987) (Brennan, J., dissenting).

224. See 368 U.S. 278, 286 (1961) (Stewart, J.). Justice Stewart also viewed the oath from the perspective of a hypothetical perjury prosecution. See *id.* at 286-87.

225. 377 U.S. 360 (1964) (White, J.); see also *Whitehill v. Elkins*, 389 U.S. 54, 58-62 (1967) (overlapping vagueness and free speech analyses); *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

226. 380 U.S. 479, 494 (1965) (Brennan, J.) (citation omitted).

light of the Supreme Court's subsequent decision in *Younger v. Harris*,²²⁷ and thus to look closely at the parts of the Brennan opinion intertwining equitable and federalism dictates (the parts of the opinion that we do not discuss here), disconnecting these parts from the discussion of the unconstitutionality of the Louisiana law challenged in the case.²²⁸ In the constitutional analysis as such, though, Brennan also appeared to assume, troublingly without any real explanation, that statutory language standing alone—the “law in books” by itself—was the key, without much in the way of regard for the precise way in which statutory terms influenced individual conduct—the law in action. It would seem to be one thing to suppose that an individual required to swear an oath would examine closely and skeptically the terms of that oath. But do individuals really proceed similarly in considering the language of statutes that officials might bring to bear to constrain individual action?²²⁹

Keyishian v. Board of Regents returned to this last question.²³⁰ There, citing both *Cramp* and *Baggett*, Justice Brennan first held that an elaborate New York teacher-loyalty program was unconstitutionally vague, even though New York had eliminated any resort to oaths. “Vagueness of wording is aggravated by prolixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross-references to interrelated enactments and rules.”²³¹ He then invalidated a separate state prohibition of Communist Party membership. This prohibition was utterly clear in its coverage of any and all forms of Party membership, without regard to knowledge, activity, or specific intent. But it was, Brennan concluded, just as invalid as a vague statute. “Where statutes have an overbroad sweep, just as where they are vague, ‘the hazard of loss or substantial impairment of . . . rights may be critical,’ since those covered by the statute are bound to limit their behavior to that which is unquestionably

227. 401 U.S. 37 (1971).

228. See, e.g., Owen Fiss, Dombrowski, 86 YALE L.J. 1103 (1977).

229. Well-known discussions of what came to be known as the overbreadth doctrine address ramifications of this difficulty with considerable depth and subtlety. See, e.g., Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1; Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970). Notwithstanding the complexities of the First Amendment overbreadth doctrine, judicial scrutiny of statutes on their face of course remains an important element within constitutional adjudication generally. See Monaghan, *supra*. One example can be found in contexts in which the “law in books,” even if virtually never directly enforced, may serve to excuse hostile treatment of individuals thought to be singled out for social condemnation by the terms of that law—a phenomenon famously identified in, and made the jurisprudential centerpiece of, the Supreme Court’s invalidation of laws banning sodomy among consenting adults in private, which the Court understood had become synonymous with gay-bashing. See *Lawrence v. Texas*, 123 S. Ct. 2472 (2003). For extended discussion, see Laurence H. Tribe, *Lawrence v. Texas: The ‘Fundamental Right’ That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

230. 385 U.S. 589 (1967).

231. *Id.* at 604.

safe.”²³² “[T]hose covered . . . are bound”—this is, we recognize, the ex ante perspective of the careful, lawyerly reader, and of Holmes’s famous “bad man.” It is also the perspective that *Speiser* built up through its reciprocal insets of free speech and due process (Brennan’s citation to *Speiser* in *Dombrowski* was no doubt meant to suggest this association). It is the individual thus conceived who will respond as Brennan supposes.

This perspective achieves its apotheosis, arguably, in *United States v. Robel*.²³³ Addressing loyalty requirements conditioning employment in defense industries, Chief Justice Warren, writing for a majority, proceeded much as he had in *Watkins* (and as Justice Harlan had in *Yates*), emphasizing the failure of the regulatory scheme suitably to acknowledge within its own terms vital First Amendment concerns. Justice Brennan concurred—but wrote an extended opinion analyzing the federal statute at issue from the perspective of the delegation doctrine. His opinion was a virtuoso amalgamation of *Watkins*, administrative law, and fair notice preoccupations.²³⁴ It took for granted that the perspective of constitutional law here was the perspective of the risk-averse lawyerly reader—his readers consider the regulatory scheme entirely within this gaze. The individual as such seems to disappear—there is only the skepticism of the judicial reader. But this is an illusion. The perspective of the individual is conceived as itself lawyerly, as the same perspective as that of the judge (the judge becomes the representative individual). It is this judicial skepticism, therefore, that within Brennan’s approach itself describes the content of the individual right.

C. *Ordered Controversy*

Whatever it was that the Cold War Supreme Court accomplished, it was achieved because some Justices sharply disagreed with regard to what they thought were fundamentals. They persisted in this disagreement and persisted in their intensity, their eloquence, and their criticisms of each other. This was not cacophony. Justices committed to working within this conflict recognized that they must identify means of ordering opposed positions in ways that either suggested relative priorities in particular cases or proposed superseding perspectives. No single such approach carried the day. But the ongoing conflicts were subjected, because of this overlay of intricacy, to the chance of variation, a kind of crucial indeterminacy. As a result, there appeared within the cases a real prospect that individual rights

232. *Id.* at 609 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

233. 389 U.S. 258 (1967).

234. *See id.* at 269-82 (Brennan, J., concurring). For Justice Brennan’s remarkable *McGautha* dissent, in which he elaborates many of these same themes, see *McGautha v. California*, 402 U.S. 183, 248-312 (1971) (Brennan, J., dissenting).

would be acknowledged and protected (sometimes), and that government concerns would be respected (sometimes). The deep structure of the Constitution—implicit in the juxtaposition of the 1787 text and its first ten Amendments, glossed in the Reconstruction recapitulation—revealed itself again in the “inset” conceptions of the Cold War Supreme Court. Justices improvised within, around, and over this structure, articulating increasingly elaborate, subtle, and powerful arguments. There is a depth to their work, in the end, that should command our respect. And it is a depth that could only be achieved by grappling with emergencies and mortal threats, never by bracketing them.

There is no reason now why judges and critics cannot learn from Black, Douglas, Frankfurter, Harlan, Warren, and Brennan. We do not want to claim too much. The Cold War Supreme Court did not always enforce constitutional rights quickly; it deferred, at least sometimes, to government domestic security concerns; the legal language it brought to bear persisted in a state of chronic controversy; its precedents plainly send a mixed message. But that is only to say that the Cold War Supreme Court worked with constitutional law in ways not so different from the ways—we learn over and over—that Justices ordinarily do. There are no golden ages, only ongoing argument and accumulating possibilities—and ordinarily, we think that this is enough. If we are right in thinking this, it should be just as possible now for constitutional law to undertake the work of complicating crisis—putting opposed concerns to the work of *renvoi*, explicating each other. In the process, it should become possible to debate, from case to case, the intricacies that thereby become apparent. This is the state of anti-emergency. This is the state of constitutional law as we have it now.

This is an important and welcome conclusion. No less important is the fact that the complete obliteration of the “ordinary” Constitution and its temporary replacement by the Ackerman emergency constitution is necessarily something of an optical illusion. The background persistence of a constitution and of courts to enforce it—a background persistence that Professor Ackerman also acknowledges—means that at some point, even if the day of reckoning is delayed by the operation of the “emergency constitution,” those courts will end up being confronted with controversies implicating the constitutionality of whatever framework statute put that emergency constitution into effect. Perhaps more relevantly, they will also be confronted with whatever steps were taken by the executive pursuant to that emergency framework—steps that may have long-lingering consequences that could easily remain “live” enough to support Article III adjudication.

When such adjudication takes place, courts will be asked to make—and may feel enormous pressure to make—exactly the same kinds of lasting compromises in the background doctrines of the “ordinary” Constitution

that Professor Ackerman fears trusting the current common law process will require them to make. The only difference is that these new compromises may be even more severe if, as Ackerman apparently contemplates, steps driven by felt necessity end up being taken under the umbrella of the emergency constitution when the “ordinary” Constitution would roundly condemn them.

The “loaded weapon” that Justice Jackson feared—in the haunting, Chekhovian image of his *Korematsu* dissent—cannot, it seems, be buried forever in a world where the “Constitution for all seasons” remains alive, even if dormant, and thus remains subject to reactivation when the emergency and all of its time extensions have passed into history. Even if precedents that speak from behind the veil of an emergency constitution come to us inflected with a special caveat that seeks to confine them to “the present circumstances”²³⁵ or to other circumstances equally exigent, the effect any such caveat will properly have on future readers—on our own future selves, among others—is impossible for anyone to determine *ex ante*: Only future political and judicial actors can decide just how much and what sort of weight to give any precedent, even one that seeks to contain its own reach by proclaiming that it is rigged to self-destruct once certain barriers of time or other circumstance have been surpassed.²³⁶

Put differently, there is simply no way, while under the sway of an “emergency constitution,” for us to position ourselves completely beyond the outer perimeter of the *anti*-emergency Constitution so as to contain within an “event horizon” (of the sort that physicists who study the cosmos tell us surrounds any black hole and prevents light—or indeed information of any kind—from leaking out into the surrounding space-time continuum of the universe) the voices of precedent that are destined eventually to reach us from within the zone of emergency. What we do while “under the influence,” as it were, will come back to haunt us one way or another. *Constitutional amnesia is unattainable.*

Given the impossibility, therefore, of creating a dead zone within which we may simply escape the boundaries of the anti-emergency Constitution

235. We recall, of course, *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam).

236. Professor Ackerman worries that individual judges working with ordinary constitutional law will, within emergency periods, make “catastrophic” decisions, releasing terrorists who go on to launch the second strikes he especially fears. Ackerman, *supra* note 12, at 1895-96. As we have already observed, we are not as sure that the second strike model describes likely terrorist tactics (at least tactics uninfluenced by Ackerman’s own scheme). See *supra* text accompanying notes 42-44. It is also not necessary here to describe the host of constraints built into ordinary federal judicial procedure—extraordinary writs and the like—to minimize the impact of off-the-wall judging. We cannot claim (nor could Ackerman with respect to adjudication under his scheme) that wrong decisions (tilting either in favor of individuals or against them) are impossible. We do think that a body of law like constitutional law as we ordinarily understand it is a better bet insofar as the question of mistake is an explicit topic, and part of the history (with famous or infamous examples), of that law itself.

under whose aegis we spend our ordinary lives and are always bound to do so again, we might as well *embrace* that anti-emergency Constitution and the rich framework within which we have operated for so long. It is within this framework that we have articulated and argued for a succession of tentative resolutions of competing values, ideals, and interests. It is within this framework that we have found the terms to recognize and sometimes repudiate our mistakes. This is all we need to address the dramatically heightened time and space surrounding acts of terrorism like those of September 11.

IV. THE METAPHOR OF THE BLACK HOLE

The metaphor of the black hole is increasingly used to sum up what appears to be a characteristic feature of legal problems posed by a range of government actions undertaken since September 11.²³⁷ But what precisely are we picturing? It may be just a way of referring to something like sudden blindness: Dealing with a particular problem, we see nothing with which to work, nothing we can recognize, no solution. A black hole in this sense is not an astrophysical phenomenon—it is literally a place beyond the light of ordinary law into which, it seems, we have suddenly fallen. But the sense that we are trapped within the blackness—and this does seem to be part of

237. Professor Ackerman thinks that elements of his scheme—in particular, its provision for compensation for detained but innocent individuals—will have sufficient impact on our thinking about constitutional law generally to make concerns about “black holes” inapposite, at least for purposes of judging his effort. *See* Ackerman, *supra* note 12, at 1885 & n.38. It is certainly the case that adjusted versions of his proposal, at least, do introduce substantial fragments of ordinary constitutional law and judicial review into the “emergency constitution.” We have already noted his one-step-removed borrowing of Eighth Amendment law in connection with elaboration of the torture ban, and an apparently similar effort to incorporate usual equal protection analyses. *See supra* note 90. His provision for punitive damages actions aimed at individual instances of “bad faith” official acts, *see* Ackerman, *supra* note 8, at 1075, might be thought to establish another overlap, and thus an opening for ordinary constitutional analyses. In connection with additions to the framework statute during emergency periods, Ackerman would mandate “strict scrutiny” by the Supreme Court. Ackerman, *supra* note 12, at 1901 n.79.

Nonetheless, his central thought begins with the idea of “isolation”—or “quarantine” as he makes clear in a revealing extended analogy. *See id.* at 1881-82. His compensation scheme is, it appears, supposed to function like workers’ compensation. Benefits will flow to detainees pretty much automatically and immediately. *See* Ackerman, *supra* note 8, at 1065-66 & n.88. Even if this is practical, the compensation requirement will not provide occasions, on any regular basis, for challenges to government reasons for acting, even narrowly specified. The punitive damages actions, similarly, seem to focus on ad hoc transgressions of particular officials. The strict scrutiny mandate, covering only the one contingency, is left unexplained: Is Ackerman referring to the usual inquiries into reasons for government action shaped by sensitivity to individual rights at stake, or risks to constitutional values posed? We think that the “normal form” of judicial involvement, and thus recordmaking for the future, is the extraordinary minimalism we described earlier. *See supra* note 85. If adjudication is nothing but pinpoint results, it verges on invisibility, becomes no record for memory, might well be thought to describe something very much like a black hole. We think that it is important to distinguish between inchoate reports and anecdotes (these will not disappear during or after emergency periods) and densely organized analyses of the sort that routinely accumulate in ordinary constitutional law.

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what it is that we mean to evoke—does catch something of the physicist’s idea of the event horizon, the idea that the gravity of the situation (as it were) keeps us from seeing anything other than the crisis. If we add the sense of intensification, of crushing concentration, we may get a good analogy—a kind of jurisprudential equivalent—of the experience of panic: We think about immediate circumstances continuously, continuously coming up with nothing. Consciousness of gravity, of course, weighs down the image. The idea of crushing panic, not necessarily inaccurate, does not suggest much about what the right response is (the jurisprudential equivalent of rolling up into a ball, maybe?). Stephen Hawking famously characterizes black holes as sites of information loss, as reductions in dimensionality. This formula, or something like it, may be easier to work with.

Svetlana Alpers had this to say in an essay describing and discussing Vermeer’s painting *The Art of Painting*:

Like a surveyor, the painter is within the very world he represents. He disappears into his task, depicting himself as an anonymous, faceless figure, back turned to the viewer, his head topped by the black hole of his hat at the center of a world saturated with color and filled with light.²³⁸

The phrase “black hole . . . at the center of a world saturated with color and filled with light” seems to approximate, in an elegant way, Stephen Hawking’s notion of information loss and dimension-collapse. The idea that the black hole is the work of the artist obscuring as well as depicting the artist at work is provocative. The painting might be understood to play a game with its viewer: It is difficult not to look at the painter, who is right in the middle of the painting, whose back is turned to the viewer, who is dressed in black and white, whose hat really is just a black blob—but all around the painter we see a tremendous amount of patterning and color set within a kind of gold light. The effect is akin to a gestalt problem—although here, the effect is achieved through astonishing virtuosity. To view the painting, we realize, we need to train the eye not to keep coming back to the painter.

Professor Ackerman precisely embraces information loss. Within his states of emergency, there is no ordinary constitutional law, no consideration of new justifications (or no justifications) for familiar rights. Ackerman is untroubled by the darkness: He means, by working with constitution *noire*, to commit his emergency constitution as little as possible to accounts of the substance of what government can do or should not do

238. SVETLANA ALPERS, *THE ART OF DESCRIBING: DUTCH ART IN THE SEVENTEENTH CENTURY 168* (1983).

during the emergency. We cannot know, we do not want to know, we will not judge directly.

We propose—rather, Professor Ackerman provokes us—to try not to approach matters this way. Alpers (or maybe Vermeer) prompts a simple suggestion, really: Look around. Another way to reach something like this conclusion, perhaps, supposes that we think about black holes not as sudden physical manifestations—like holes in the ground—but as excavations or deconstructions. We are (or at least we might be if we follow Ackerman) the ones who—in response to the terrorist event—remove altogether what was there before. This may be proper as a form of memorial. But for other purposes, this might be altogether mistaken and profoundly premature. If this is in some pertinent sense right—if it is we who would needlessly construct the black hole, we who would be its designer, its painter, its architect—then the truly urgent question is a very different one from any of the questions Professor Ackerman’s project impels him, even permits him, to ask.

The urgent question for us becomes how to *disrupt* that process—not so that we ignore the hole, not so that we fail to take the pragmatic steps that need to be taken (clear away what makes us unbearably vulnerable to recurring terrorist attacks), but in order that we might try to assure the persistence of things past, to maintain the place of constitution *blanche* alongside constitution *noire*. We should want to retain the ability to recognize what we have *not* deleted, *must* not delete, from what Justice Jackson famously imagined as our “constitutional constellation.”²³⁹ The experience of permanent vulnerability may have put in doubt our belief that there are “fixed stars” in the night sky. It will be our own doing if it erases the dawn.

239. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (Jackson, J.).