



Stanford Law Review

HOLMES ON EMERGENCIES

Adrian Vermeule

HOLMES ON EMERGENCIES

Adrian Vermeule*

INTRODUCTION.....	163
I. SOURCES AND CONTEXT	165
II. EMERGENCIES AS A QUESTION OF FACT	167
A. <i>The Allocation of Institutional Competence</i>	168
B. <i>A Note on Beginnings and Endings</i>	171
C. <i>Risks, Harms, and the Desires of Dominant Forces</i>	172
D. <i>Emergencies and the Imminence of Harm</i>	174
III. ANTIMINIMALISM	175
IV. NO NONDEROGABLE RIGHTS	183
A. <i>Emergencies and Liberty</i>	184
B. <i>Emergencies and Property</i>	186
C. <i>Emergencies and Free Speech</i>	187
V. EX POST SUNSETTING AND OTHER CHECKS	188
A. <i>Legislative Control</i>	188
B. <i>Ex Post Sunsetting by Judges</i>	189
VI. COMMON LAW REGULATION OF EMERGENCIES	194

INTRODUCTION

It seems odd that despite the torrent of writing on emergencies and the law after 9/11, no one has systematically examined the view of emergencies held by our greatest judge.¹ Perhaps the problem is that Justice Holmes has so often been subdivided along doctrinal lines. There is the Holmes of free speech law, represented by the majority opinion in *Schenck v. United States*² and by the dissents in *Abrams v. United States*³ and *Gitlow v. New York*.⁴ There is the

* John H. Watson Professor of Law, Harvard Law School. Thanks to David Barron, John Ferejohn, Jack Goldsmith, Daniel Hulsebosch, Lewis Kornhauser, Richard Posner, Cass Sunstein, Mark Tushnet, and participants in the NYU workshop on Law, Politics and Economics for helpful comments. Jennifer Shkabatur and Elisabeth Theodore supplied helpful research assistance.

1. The only sustained treatments predate 9/11. See Michal R. Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 TEX. L. REV. 67 (1983); Daniel R. Hulsebosch, Note, *The New Deal Court: Emergence of a New Reason*, 90 COLUM. L. REV. 1973 (1990).

2. 249 U.S. 47 (1919).

3. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

4. 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

Holmes of property and takings law, represented by the majority opinion in *Pennsylvania Coal Co. v. McMahon*.⁵ There is the Holmes of due process law, represented by the dissents in *Lochner v. New York*⁶ and *Tyson & Bro. v. Banton*.⁷ And no one much talks about the Holmes opinions first upholding and then invalidating emergency rent control, *Block v. Hirsh*⁸ and *Chastleton Corp. v. Sinclair*,⁹ or about the opinion upholding emergency executive detention in *Moyer v. Peabody*.¹⁰ In what follows, part of my aim is to suggest that what doctrine has put asunder, a focus on emergencies can reunite. Emergencies are a central theme of Holmes's jurisprudence, one that cuts across doctrinal categories and clarifies theoretical puzzles.

My central suggestion is that Holmes's judicial and extrajudicial writings, in their best light, implicitly suggest a coherent account of emergencies, law, and constitutional adjudication. I will call this account the *epistemic theory of emergencies*, with the caveat that I use "theory" not in any rigorous way but just to indicate that Holmes tended to approach questions of emergency powers with a distinctive set of prejudices. We will see that, quite characteristically, Holmes was suggestive but not systematic about his theoretical premises. Despite the ambiguities, however, it is possible to reconstruct a Holmesian account of emergencies that is both plausible and (I hope) theoretically fresh.

The main elements of Holmes's account are these:

(1) The existence and duration of an emergency are questions of fact. Emergencies are intrinsically temporary events, so it is also a question of fact whether an emergency, once begun, has since ended. Judges will give epistemic deference to other officials—they will treat those officials' claims about the existence of an emergency as important information—but ultimately will decide for themselves whether an emergency exists. As we will see, this factual question is the crucial predicate or trigger for Holmes's approach to judicial review during (claimed) emergencies.

(2) During emergencies courts should not practice judicial minimalism or passive virtues; they should reach out, if necessary, to declare the existence of an emergency as soon as possible and to declare the termination of an emergency as soon as possible.

(3) During emergencies there are no nonderogable rights—government can do anything if circumstances warrant.

(4) The main checks on governmental action during emergencies are that:

(a) legislative limitation of executive powers trumps, where the political branches disagree; and

5. 260 U.S. 393 (1922).

6. 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

7. 273 U.S. 418, 445 (1927) (Holmes, J., dissenting).

8. 256 U.S. 135 (1921).

9. 264 U.S. 543 (1924).

10. 212 U.S. 78 (1909).

(b) judges engage in ex post sunseting, once an emergency has in fact ended, by declaring the emergency terminated and rescinding the government's emergency powers. The latter point underscores that what Holmes really offers us is a jurisprudence of emergencies; judicial review is a central component of his approach.

The structure of the discussion is as follows. Part I sketches some historical and legal context for Holmes's jurisprudence of emergencies. Part II examines Holmes's claim that the existence and duration of emergencies are questions of fact. Part III suggests that Holmes thought judicial minimalism and the passive virtues too costly during emergencies, whatever their virtues in normal times. Part IV examines the substantive scope of government power during emergencies. Part V suggests that ex post sunseting is the principal doctrinal tool of the epistemic theory of emergencies, and explains the difference between sunseting justified on deliberative or political grounds and on strictly empirical ones. Part VI offers a broader evaluation of Holmes's views. I suggest that the epistemic theory of emergencies is the best version of a common-law-centered strategy for regulating government action during emergencies. The main advantage of Holmes's version is that it speeds up the common law cycle of emergency adjudication, whereby common law courts initially defer to government claims of emergency and later reassert themselves. By speeding up the cycle, Holmes's approach avoids some of the main criticisms that have been leveled against the common law strategy.

Throughout, the enterprise is not biographical, historical, or doctrinal; it is theoretical. The subject is emergencies, not Holmes per se; the hope is just that by examining the views of a master, put in their best light, we can improve our understanding of emergencies, legal doctrine, and judicial review. The doctrinal point that several of Holmes's most famous opinions on emergency powers were later discarded or heavily modified by the Supreme Court¹¹ is, for these purposes, irrelevant.

I. SOURCES AND CONTEXT

Holmes's judicial writings on emergencies were part of a larger doctrinal current that flowed most strongly during and after World War I. Although there were earlier precedents, as there always are, it is conventional to trace this emergency powers doctrine back to *Wilson v. New*,¹² a 1917 decision that Holmes joined but did not author, which upheld the Adamson Act's eight-hour day for railroad workers. The statute had been enacted to avert labor unrest in a

11. Compare *Moyer v. Peabody*, 212 U.S. 78 (1909) (expansive view of governor's emergency powers), with *Sterling v. Constantin*, 287 U.S. 378 (1932) (narrowing *Moyer*); *Schenck v. United States*, 249 U.S. 47 (1919) (restrictive view of free speech), with *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (broader view of free speech).

12. 243 U.S. 332 (1917).

critical industry as America moved towards war, and *Wilson v. New* was handed down a mere three weeks before war was actually declared.¹³ Chief Justice White famously stated that “although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.”¹⁴ *Wilson* became a major precedent for Holmes’s opinion in *Block v. Hirsh*, a 1921 decision upholding rent control in the District of Columbia as a valid emergency measure.

Block in turn became a major precedent for New Dealers who attempted to justify Roosevelt’s legislative program, and to defend statutes such as the National Industrial Recovery Act (NIRA) from constitutional attack, by invoking the emergency powers doctrine.¹⁵ The effort was a massive failure. When the Court rejected the NIRA in 1935, it rejected the emergency powers doctrine as well.¹⁶ When the Court began to uphold New Deal legislation after 1937, there were thus two switches not one; besides the switch in outcomes, there was a switch in theories, from a doctrine centering on temporary overrides of background constitutional restrictions during emergencies, to a doctrine that weakened the background restrictions themselves.

After 1937, the emergency powers doctrine did not disappear altogether, but it was consigned to the second tier of constitutional ideas. An explicit emergency powers doctrine occasionally resurfaces in economic or peacetime contexts in American constitutional law,¹⁷ but it is not a major doctrinal tool, although similar arguments do appear under other doctrinal rubrics, such as the “compelling interest” test. The explicit emergency powers doctrine proved more robust in contexts involving war and national security. Even there, however, invocations of emergency powers in several notorious national security cases of the 1940s and 1950s, especially *Korematsu v. United States*,¹⁸ brought the doctrine into a measure of disrepute. This later distinction between war and peace, or between security emergencies and economic emergencies, was alien to Holmes’s thinking: we will see that his approach to emergency powers is invariant across those differences.

Holmes’s opinions were not the first to articulate an emergency powers doctrine, but they became a leading source for that approach. When New

13. Belknap, *supra* note 1, at 79-80.

14. *Wilson*, 243 U.S. at 348.

15. The account in this paragraph summarizes the excellent treatment in Belknap, *supra* note 1.

16. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528 (1935) (“Extraordinary conditions do not create or enlarge constitutional power.”).

17. See, e.g., *Nat’l League of Cities v. Usery*, 426 U.S. 833, 853 (1976) (relying on emergency powers doctrine to distinguish earlier precedent), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

18. 323 U.S. 214, 219-20 (1944) (upholding internment of Japanese Americans because of “circumstances of direst emergency”).

Dealers attempted to press the emergency powers doctrine into service, they turned to Holmes's writings first and foremost.¹⁹ Just as it would be wrong to say that the emergency powers doctrine was unique to Holmes or his creation, it would be equally wrong to say that he simply parroted extant formulations. We will see that in important cases Holmes emphasized the factual character of emergencies, in contrast to the rest of his colleagues, who would have disposed of the cases as matters of law.²⁰

In many sectors of his jurisprudence, of course, Holmes deliberately broke with his contemporaries, so it is equally illuminating that in the cases I will examine he championed an extant legal theory. And he improved upon it: although Holmes drew from background ideas and precedents, the most striking features of the epistemic theory of emergencies are distinctively his own. Let us now examine those features in detail.

II. EMERGENCIES AS A QUESTION OF FACT

Block v. Hirsh,²¹ decided in 1921, involved a federal rent control statute governing the District of Columbia. The statute was enacted in 1919, in the wake of World War I; wartime conditions and the growth of the administrative state had caused an influx of would-be tenants into Washington and a spike in demand for housing. Congress declared that the statute's provisions were "made necessary by emergencies growing out of the war, resulting in rental conditions in the District dangerous to the public health and burdensome to public officers . . . and thereby embarrassing the Federal Government in the transaction of the public business."²² Holmes's majority opinion upheld the statute against a due process challenge. In declaring an emergency, Holmes said, Congress had "stated a publicly notorious and almost world-wide fact."²³ Although in general "a legislative declaration of facts that are material only as the ground for enacting a rule of law . . . may not be held conclusive" by the courts, here the Court "must assume" that "the emergency declared by the statute did exist."²⁴ The 1919 statute contained a two-year sunset provision, but in 1921 and again in 1922 Congress enacted new laws to extend the emergency. Eventually, in a 1924 decision called *Chastleton Corp. v. Sinclair*,²⁵ Holmes wrote again for the Court, this time suggesting strongly that the emergency had in fact expired, although he remanded to the trial court²⁶ for factual findings on

19. Belknap, *supra* note 1.

20. *See infra* notes 34-36 and accompanying text.

21. 256 U.S. 135 (1921).

22. *Id.* at 154.

23. *Id.*

24. *Id.*

25. 264 U.S. 543 (1924).

26. Under the jurisdictional scheme in effect at the time, this was the Supreme Court of the District of Columbia.

“the condition of Washington at different dates in the past.”²⁷ The lower court quickly declared the emergency nonexistent and the statute invalid.²⁸

Holmes insisted in both *Block* and *Chastleton* that emergencies are a question of external or epistemic fact. This sounds odd to lawyers’ ears. Surely emergencies are at best a “mixed” question of law and fact; economic conditions or security conditions might be facts, but whether those conditions count as or rise to the level of an “emergency” is a legal question—isn’t it? Holmes’s view sounds even odder to the sophisticated or postmodern, who dismiss it as pretheoretical. Giorgio Agamben approves the view of “those jurists who show that, far from occurring as an objective given, necessity clearly entails a subjective judgment, and that obviously the only circumstances that are necessary and objective are those that are declared to be so.”²⁹ One of my main suggestions will be that to Holmes, whose thinking consistently emphasized the objectivity and externality of law, this sort of postmodernism would have been misguided, perhaps even repulsive.

Although it is natural to suspect that perhaps Holmes did not really mean it, that perhaps he was using “fact” in some unusual or theoretically freighted way when discussing emergencies, I believe that Holmes really did mean it. In Holmes’s view, an emergency is factual in a straightforward sense: it is a state of temporary economic or political dislocation in which the prevailing legal rules require the dominant forces of the community to bear a risk or harm that they are unwilling to bear. Where that is so, judges should and will let those forces temporarily override the prevailing rules, until the relevant risk or harm is no longer present.

A. *The Allocation of Institutional Competence*

To clear some ground, I begin by considering a rival interpretation. On this view, the labels “fact” and “law” are just used as shorthand for other explicit or implicit arguments about the allocation of tasks to institutions. It is not that we decide whether something is a question of fact or law, and then allocate it to the appropriate decision maker; it is that we decide which is the appropriate decision maker, and then call the question one of fact if the decision maker is a legislature or jury or (sometimes) administrative agency, and one of law if the decision maker is a court or judge. Along similar lines, perhaps when Holmes says that emergencies can “exist,” or not, and that a declaration of emergency is a declaration of “fact,” he means that legislatures, not courts, are best allocated the authority to take certain sorts of measures that are usually triggered by declaring an emergency.

This account has surface plausibility because it fits with other strands in

27. *Chastleton*, 264 U.S. at 549.

28. *Peck v. Fink*, 2 F.2d 912 (D.C. Cir. 1924).

29. GIORGIO AGAMBEN, *THE STATE OF EXCEPTION* 30 (Kevin Attell trans., 2005).

Holmes's thought. Holmes himself famously argued that judges call negligence a question of "fact" because they want to leave it to the jury.³⁰ The standards for determining negligence, although lawlike in principle, are so variable and diffuse that judges are loath to wrestle with them; insofar as the relevant standards are community standards or mores about what counts as responsible behavior, the jury is better positioned to apply them.

Yet this account is hard to square with Holmes's views, and the Court's orders, in *Block* and *Chastleton*. The central analysis of *Chastleton* appears in the following passage:

We repeat what was stated in *Block v. Hirsh* as to the respect due to a declaration of this kind by the Legislature so far as it relates to present facts. But even as to them a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. And still more obviously so far as this declaration looks to the future it can be no more than prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.³¹

The ideas that the legislature might have made an "obvious mistake" in declaring an emergency still in being, and that a legislative prediction of emergency is susceptible to disconfirmation, make little sense on the institutional allocation view. If questions of fact are just decisions entrusted to legislatures, it is incoherent to turn around and override the legislative decision on the ground that it made an obvious mistake about the facts.

It is true that in both *Block* and *Chastleton*, and (as we shall see) in *Moyer v. Peabody*, Holmes says that courts should defer to legislative and executive determinations that an emergency exists. But only within limits, and *Chastleton* shows the limits of this deference quite clearly. Holmes's view is that legislatures or executives can make obvious mistakes about the "existence" of an emergency. This is straightforward clear-error review on factual questions.

More broadly, we need to distinguish epistemic deference from authority-based deference. Epistemic deference is deference to expert judgment about whether a certain state of facts exists, while authority-based deference is deference to an agent empowered by some higher source of law to choose a policy or establish a rule, even or especially if there is no fact of the matter or right answer about which policy or rule is best under the circumstances.³² *Block* and *Chastleton* argue for epistemic deference in emergencies, not authority-based deference. Holmes's claim is that "a declaration by a legislature concerning public conditions that by necessity and duty it must

30. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 124-27 (Boston, Little, Brown, & Co. 1881).

31. *Chastleton*, 264 U.S. at 547 (citations omitted).

32. Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. REV. 289, 301-02 (2007).

know, is entitled at least to great respect”³³—not because emergencies are constructed by and a creature of laws that the legislature has the authority to enact, but because a legislature is well positioned to know whether an emergency exists.

Most importantly, the disposition in *Chastleton* was that “the facts should be accurately ascertained and carefully weighed” by the lower courts, who should take “evidence” and, Holmes pointedly added, preserve that evidence for possible review by the Supreme Court.³⁴ We know from internal documents in the Taft Court that all of Holmes’s colleagues wanted to dispose of the case as a legal matter; Holmes alone saw the issue as one of fact:³⁵

[T]he Court unanimously voted to reverse the judgment of the lower courts. Justice Van Devanter is recorded as taking the position that the extensions were ‘bad’ and that this did not depend upon any “objective question of fact.” Justices Sutherland, Butler and Sanford were noted as agreeing with Van Devanter. Justice Holmes alone contended that the constitutionality of the rent control extensions was “a question of fact” which turned on whether the “emergency” continued to exist.³⁶

It is striking, though, that despite labeling emergencies a question of fact, Holmes was intent on committing their ultimate resolution to the courts through clear-error review, rather than to the legislature or the executive. If emergencies are a question of fact, why would Holmes commit them to a court? Because some factual questions are dispositive of constitutional claims, the stricture that “a Court is not at liberty to shut its eyes to an obvious mistake” applies “when the validity of the law depends upon the truth of what is declared.”³⁷ *Block* and *Chastleton*, on this account, apply something akin to the doctrine of “constitutional facts” most prominently associated with the 1932 decision in *Crowell v. Benson*³⁸ and later invoked by the Warren Court to protect civil

33. *Block v. Hirsh*, 256 U.S. 135, 154 (1921).

34. *Chastleton*, 264 U.S. at 549.

35. Justice Brandeis, however, favored a nonconstitutional legal ground, while the other members of the majority (apart from Holmes) favored a constitutional legal ruling. *See infra* note 58.

36. Robert Post, *Defending the Lifeworld: Substantive Due Process in the Taft Era*, 78 B.U. L. REV. 1489, 1497-98 (1998) (citations omitted). Perhaps Holmes was merely being strategic here, turning to a “factual” question in order to pretermite a constitutional ruling, favorable to property rights, that he would have disliked. However, as I discuss in Part III, there was also a subconstitutional legal ground for reaching the same result that was available to Holmes, one that Brandeis actually adopted; but Holmes rejected it. *See infra* notes 58-59 and accompanying text. Even if Holmes was acting strategically, his *choice* among strategic instruments revealed a genuine preference for treating the case as presenting a question of fact. What is true is that Taft no doubt acted strategically in assigning the opinion to someone with Holmes’s (sincerely held) view. *See Post, supra*, at 1498 (noting that Taft assigned the opinion “[w]ith characteristic shrewdness”).

37. *Chastleton*, 264 U.S. at 547.

38. 285 U.S. 22 (1932).

liberties.³⁹

The key point, then, is that Holmes did not say that emergencies were a question of fact because he wanted to commit the determination of whether an emergency exists to legislatures. He said that emergencies were questions of fact despite committing the ultimate determination—however constrained by epistemic deference—to the courts. On Holmes’s view, two theses are crucial: (1) the existence of emergencies is a question of fact and (2) courts decide that question of fact, albeit with “great respect” for a legislative determination that an emergency exists. For Holmes, the answer to the “who decides” question is ultimately that courts decide.

B. A Note on Beginnings and Endings

This account of Holmes’s view does not distinguish between the beginning and the end of the emergency; there are some ambiguities here.⁴⁰ In *Chastleton*, Holmes’s majority opinion held that courts could declare a preexisting emergency terminated, even if so doing required overturning a legislative determination that the emergency was ongoing. However, the textual evidence is somewhat ambiguous about whether Holmes thought that courts could engage in clear-error review of a legislative or executive finding that a new emergency has begun. In *Block*, in the context of a statute declaring a new emergency, Holmes wrote that a legislative declaration of fact cannot be held conclusive, although it “is entitled at least to great respect.”⁴¹ We will see in Part IV that in *Moyer v. Peabody* Holmes included a famous passage stating that a governor’s determination of an emergency “is conclusive of that fact,”⁴² but I will show that another passage of *Moyer* essentially repeats the “great respect” standard of *Block*.

The evidence on this point is not wholly clear because Holmes was not focused on the distinction between the beginning and end of an emergency. In the cases he encountered, the fighting issue was not whether the emergency was genuine or rather bogus when first declared; it was whether it had been excessively prolonged. In that respect, Holmes’s jurisprudence is especially useful for us today. No one (sane) claims that 9/11 was a ginned-up event, like the Reichstag fire; the hard question is what extraordinary powers the government (somehow defined) should have, and how long those extraordinary powers should continue. Accordingly, in the discussion in Part V, I will focus on judicial power to terminate preexisting emergencies.

39. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (independent examination of the record by reviewing courts necessary to protect free speech). For an overview, see Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427 (2001).

40. Thanks to Jack Goldsmith for pressing this question.

41. *Block v. Hirsh*, 256 U.S. 135, 154 (1921).

42. *Moyer v. Peabody*, 212 U.S. 78, 83 (1909).

C. Risks, Harms, and the Desires of Dominant Forces

Having questioned the account from institutional competence, the problem remains: if emergencies are factual, the sort of question on which there can be factual findings by legislatures and courts, what sort of facts are they? My suggestion is that for Holmes, whether an emergency exists is shorthand for a longer question: whether there is a temporary dislocation between the legal rules and the wishes or desires of the dominant forces of the community. A dislocation means that the legal rules are imposing a risk or harm on dominant majorities that they do not wish to bear. By determining that an emergency exists, the judges recognize this state of affairs and temporarily override the background rules in order to let the dominant forces have their way.

Certainly whether risks and harms exist are questions of fact, in some quite mundane sense. The risk that I will be hit by a bus while crossing the street is not dependent on whether I know of the risk (perhaps I have never heard of buses), although if I do know of it I can take precautions to reduce the risk. Harms are perhaps relative to preferences, like costs; but so are pleasure and pain, which are undoubtedly factual in whatever sense it is factual that there is a tree outside my office window. In both cases, we can observe the phenomenon with appropriate technology.

These are individual-level points. For Holmes, however, the desires of a dominant majority or the dominant forces of the community were also factual. Holmes thought there was no such thing as a “social” interest⁴³—at least not in the sense of aggregate total or average utility—but it was central to his thinking that social classes and forces could come together in dominant coalitions, and would then try to impose their joint and several desires on others.⁴⁴ If collective desires are understood in this mundane joint-and-several way—you hold a desire, I hold the same desire, and so on—there is nothing conceptually puzzling about them. Collective desires can exist in fact, or not; it is a matter of counting noses.

On this interpretation, an emergency arises when there is a short-term dislocation between the ordinary legal rules and the collective desires of the dominant social forces (a factual issue) who object to bearing a risk or harm (a factual issue). In *Block*, for example, the ordinary background rules of property law temporarily thwarted the dominant desire of the national government and its constituents in creating a sufficient supply of housing for the sharply expanded cadre of public officials, soldiers, and others present in the District during and after World War I.

Why did Holmes assume that emergencies in this sense were only

43. Oliver Wendell Holmes, Jr., *The Gas-Stokers' Strike*, 7 AM. L. REV. 582, 583 (1873).

44. See David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 496-501 (1994).

temporary? It is not obvious that this is the case, and even less true that judges can know that an emergency is temporary when it begins; consider that at the outset of World War II, or the Cold War, it might well have seemed reasonable to believe that the emergency would go on indefinitely, and indeed the latter did go on for some forty years. On the other hand, as an emergency runs its course, uncertainty declines and emotions of fear and anger tend to dwindle away.⁴⁵ Even if one does not know when the emergency will end, one may justifiably be confident that it will end sometime; it is wrong to infer from the indefinite character of the emergency, as perceived *ex ante*, that it will go on forever.⁴⁶ It is also wrong to think that emergencies do not really end unless they end at some very definite time, as when a foreign state formally surrenders a war. Most emergencies do not end that way; instead they peter out, reaching a point where it is clear to all that the threat has been contained and the crisis has passed, even if it is not clear when exactly those things occurred. Later, I will suggest that the Supreme Court's recent *Hamdan* decision may be read to say something similar about the post-9/11 emergency.

Still, it is frustrating that Holmes's opinions and extrajudicial writings fail to explain the assumption that emergencies have a temporary or cyclical character. I speculate that the assumption derives from the social-Darwinist strand in Holmes's thought. An emergency is a temporary dislocation of a political, social, and economic equilibrium, but the equilibrium will eventually reassert itself or (Holmes might have said) the social "organism" will "adapt." Whatever its general merits, this assumption has some resonance in the particular contexts that Holmes addressed.

In *Chastleton*, Holmes wrote, "[i]t is a matter of public knowledge that the Government has considerably diminished its demand for employees, that was one of the great causes of the sudden afflux of people to Washington, and that other causes have lost at least much of their power."⁴⁷ This is in part an economic point about market adjustment due to long-run elasticity in the supply of housing. If owners are receiving supracompetitive economic rents, more housing will be built, and indeed Holmes noted the possibility that "extensive activity in building has added to the ease of finding an abode."⁴⁸ To be sure, emergency regulation will itself affect the play of market forces; after *Block*, the interim emergency regulation would limit the expected returns on new housing stock and thus dampen new supply. But if economic actors anticipate that the judges will eventually sunset the emergency regulation—as Holmesian judges will—then ordinary economic adjustment will operate at least to some degree. The basic conjecture is that Holmes saw the adjustment of

45. See RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11, at 188-89 (2005).

46. See *id.* at 187-88.

47. *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548 (1924).

48. *Id.*

the housing market as an instance of a broader general pattern in which the causes of dislocation sooner or later peter out, as economic and social forces make compensating adjustments. If this is vague, so are the most famous Darwinian and organicist passages in Holmes's writings.

Another important question is why the temporary dislocation between the prevailing legal rules, on the one hand, and the desires of the dominant forces, on the other, should be addressed by an "emergency" override to the rules.⁴⁹ Why should the judges not just adjust the background rules directly? Instead of an emergency override of property rights, why not just alter property rights in the necessary respects through common law adjudication, or through common-law-like constitutional adjudication? One answer is that the dominant forces themselves shaped the background common law rules and will not want to discard them too casually in the face of a merely temporary emergency. Better to just set them aside for the time being, and reinstate them when the dislocation has passed, particularly because adjusting a complex body of common law rules requires more time and effort than implementing a conceptually simple emergency override. Another answer is that if most of the background common law rules are set by state courts and legislatures, there are sharp constraints on what the Supreme Court can do to adjust them directly and in the short run. But the alternative, temporarily adjusting the constitutional parameters through an emergency powers doctrine, is within the Court's power.

D. *Emergencies and the Imminence of Harm*

So far I have not said anything about Holmes's free speech opinions, some of which might suggest that Holmes held a different account of the nature of emergencies. Dissenting in *Abrams v. United States*, Holmes's view was that free speech could only be suppressed in cases of "clear and imminent danger," or, not quite equivalently, a "present danger of immediate evil or an intent to bring it about."⁵⁰ And the *Abrams* dissent also contains one of Holmes's most famous ideas about emergencies and free speech: that what defines an emergency, in this class of cases at least, is that an emergency "makes it immediately dangerous to leave the correction of evil counsels to time,"⁵¹ the idea being that time allows for counterspeech.

The *Abrams* dissent might be taken to suggest that an emergency is a kind of imminent or immediate risk. Surely that is a familiar and plausible view; two points about it bear emphasis. First, a risk, I have argued, is a kind of fact. So if Holmes's view of emergencies centers on the idea of an imminent risk, it is not inconsistent with the main suggestion I am offering, which is just that Holmes saw the existence of an emergency as a question of fact. So too, imminence is

49. Thanks to Mark Tushnet for helpful comments on this point.

50. *Abrams v. United States*, 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting).

51. *Id.* at 630.

“a question of proximity and degree,” as Holmes said in *Schenck v. United States*,⁵² but that is equally factual. Perhaps there is implicit in the idea the constraint that the risk must be *significant*, not merely imminent; and significance is a normative rather than factual judgment. But this would make Holmes’s implicit definition of emergencies into a factual question constrained by a normative threshold, not a nonfactual question.

Secondly, the emergency-as-imminent-risk idea is also consistent with my further suggestion that Holmes implicitly defined an emergency as an inherently temporary dislocation between legal rules and the desires of the dominant forces of the community. What is distinctive about the free speech settings that Holmes addressed is that the dislocation occurs suddenly, sharply, and in the form of a risk rather than an accomplished harm. But this is just one end of a spectrum of immediacy and severity that runs from cases like *Schenck* and *Abrams*, through cases like *Moyer*, to cases like *Block* well down at the other end of the spectrum. I believe that Holmes, with his propensity to turn all conceptual questions into judgments of degree, would have found this picture congenial.

III. ANTIMINIMALISM

In adjudication generally and in emergency cases in particular, should courts decide as much as possible as soon as possible, or as little as possible as late as possible? Familiar strands of legal theory counsel the latter course. Bickel’s “passive virtues” suggest that the Court in general does well to follow a restrained course in agenda setting.⁵³ In cases in which a validation of the government’s policy would violate rights or create a bad legal precedent, while an invalidation is impossible because of political constraints, a third way is to keep the case off the Court’s discretionary docket. Related to the passive virtues, but focusing on the merits of cases rather than on agenda setting, is the theory of judicial minimalism, under which the Court should generally issue narrow and shallow rulings.⁵⁴ Both ideas are sometimes said to apply even more strongly during emergencies; on this view the higher stakes of emergency decisions, the inflammation of public passions, and the possibility of setting bad precedents under the pressure of extraordinary circumstances all counsel courts to keep a low profile until the emergency has passed.

The passive virtues, understood narrowly as prudent agenda setting by the Supreme Court, are not directly relevant here, for the simple reason that Holmes’s central emergency-related opinions were all decided before the Court

52. 249 U.S. 47, 52 (1919).

53. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-98 (1962).

54. See generally CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

acquired discretionary certiorari jurisdiction under the Judiciary Act of 1925. Before the Judiciary Act, the Court's control over its own docket was substantially constrained. It had to hear many more mandatory appeals, and the appeal in *Block v. Hirsh* was one such. In some of the relevant cases, moreover, the Court's subsequently developed standards for granting certiorari would have constrained the Court to hear the case anyway. In *Block*, the court of appeals had invalidated a federal statute on constitutional grounds. Even today, the Court will hear such cases with high probability.

If the passive virtues in this technical sense are not relevant to Holmes's jurisprudence of emergencies, minimalism is relevant, regardless of whether the Court has discretionary jurisdiction. In a constitutional case, courts can decide more or less broadly even if they have no discretion about whether to hear and dispose of the case at all. Minimalists suggest that in general, and especially during emergencies, courts should decide narrowly and shallowly, proceeding in incremental steps.⁵⁵ Nothing in the Court's jurisdictional scheme before 1925 prevented this sort of approach. Moreover, there is a broader nontechnical sense of the passive virtues—involving the avoidance of constitutional questions, at least until a clear question is directly posed by a concrete case, and a kind of free-floating judicial prudence—that was a major feature of the Court's practice long before 1925.

Holmes, however, consistently rejected minimalism and the passive virtues in his judicial writing on emergencies. In *Block*, the statute gave the owner of the rent-controlled unit the right to occupy it for his own use or that of his family by giving thirty days' notice. Hirsh, the owner, claimed that he wanted the regulated unit for his own use but refused to give the required notice because he thought the statute wholly invalid, and obtained a judgment from the court of appeals that the statute was invalid "root and branch." Rather than simply reversing that judgment by deciding that the statute was wholly valid, Holmes could have decided the case on the narrower ground that the requirement of thirty days' notice for owner occupancy effected a deprivation of property without due process or effected an uncompensated taking, while leaving undecided whether the statute's broader provisions for rent control were valid. In a striking passage, however, Holmes rejected that approach:

Perhaps it would be too strict to deal with this case as concerning only the requirement of thirty days' notice. For although the plaintiff alleged that he wanted the premises for his own use the defendant denied it and might have prevailed upon that issue under the act. *The general question to which we have adverted must be decided, if not in this then in the next case, and it should be disposed of now.* The main point against the law is that tenants are allowed to remain in possession at the same rent they have been paying . . . and that thus the use of the land and the right of the owner to do what he will with his own and to make what contracts he pleases are cut down.⁵⁶

55. See Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47.

56. *Block v. Hirsh*, 256 U.S. 135, 156-57 (1921) (emphasis added).

If the core of minimalism and the passive virtues is that constitutional questions that can be decided in the next case presumptively should be, then this passage is the essence of antiminimalism; Holmes is saying that constitutional questions that can be decided in the present case should be, if possible. Here Holmes brusquely ignored earlier cases declaring that the Court should avoid constitutional questions if possible and should decide constitutional cases on the narrowest possible grounds.⁵⁷

One of the progenitors of the minimalist view was Brandeis, Holmes's frequent comrade-in-arms; so it is also striking that in *Chastleton*, the next case in the sequence, Holmes's antiminimalism forced Brandeis into disagreement. The *Chastleton* plaintiffs were real estate owners who claimed they had never received valid notice of the rent-control order against them. Brandeis's partial concurrence accordingly argued that if the owners' claim was correct, the rent control order was invalid on narrower due process grounds even if the statute itself was valid. And Brandeis quoted several of the controlling prominimalist cases, suggesting that Holmes was deciding a constitutional case on broader grounds than necessary.⁵⁸ Quite remarkably, Holmes adverted to Brandeis's argument only by saying that "[t]he allegations do not make the position of [the owners] sufficiently clear and therefore we feel bound to consider the constitutional question that the bill seeks to raise [i.e. the statute's general validity]."⁵⁹

To the minimalist, of course, this is an utter non sequitur. The minimalist presumption is that the broader constitutional question should be left undecided unless and until it is clearly implicated; Holmes's contrary presumption is that the broader question should be decided unless a narrower disposition is clearly required. Holmes followed the same approach when writing about emergencies in dissent. His famous free speech dissent in *Abrams v. United States*, for example, argued first that the statute did not cover the defendants and then passed on to "a more important aspect of the case"—the constitutional question.⁶⁰ A judge with minimalist instincts could have rested a dissent solely on the statutory ground. But Holmes had no such instincts.

However, these brisk decisions leave the rationale for Holmes's antiminimalist position quite obscure. What sort of view must one implicitly hold in order to say what Holmes said in *Block* and *Chastleton*? The answers to these questions are underdetermined by the sparse texts, but I will nonetheless venture a reconstruction of Holmes's view. The nub of the claim is that legal certainty was a crucial element in Holmes's thought; that his bias, whether in dissent or writing for the Court, was usually in favor of promoting a kind of

57. See, e.g., *Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 38-39 (1885).

58. *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 551 (1924) (Brandeis, J., concurring in part).

59. *Id.* at 546-47 (emphasis added).

60. *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting).

legal certainty by answering more questions sooner, rather than fewer questions later; and that he thought this approach more important, not less important, in emergencies.

The main arguments for minimalism involve information and the pace of legal change. Minimalists worry that courts or judges sitting at any particular time will make mistakes by issuing broad and deep decisions that resolve many contested questions. Minimalism promises to reduce the costs of judicial mistakes by limiting the stakes in any particular decision. Moreover, minimalists hope that leaving things undecided, for now, will allow future judges to decide the open questions with more information than present judges possess. Finally, bracketing the question of judicial error, minimalists believe that proceeding by small steps will minimize both direct decisionmaking costs for judges and the collateral systemic costs of adjudication. Fewer sharp breaks will reduce disruption and transaction costs; incrementalism can allow the expectations and behavior of officials, litigants, and citizens to adjust more smoothly.

For our purposes, the key question is not the general validity of minimalism but a question of comparative statics. As compared to normal times, do emergency conditions make minimalism more or less attractive? On one view, however minimalist courts should be in normal times, they should be all the more minimalist during emergencies.⁶¹ In emergencies the stakes of judicial decisions are higher, which suggests that the need to proceed cautiously is greater: more damage can be done by a large and ill-considered decision during emergencies than during normal times. Hence Justice Robert Jackson's famous worry, expressed in dissent in the 1944 *Korematsu* decision, that a judicial decision upholding an otherwise invalid policy because of a claim of military necessity has validated a "principle" that "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."⁶² Minimalism maximizes the option value—the value inherent in waiting for more information⁶³—of judicial decisions, and this is especially valuable during emergencies, where information is at a premium; minimalist courts can wait for the fog of emergency to lift before deciding what to do.

I suggest that Holmes thought the opposite about this question of comparative statics. The opinions admit two possibilities: Holmes may have thought that (1) courts should not be minimalist either in normal times⁶⁴ or in

61. See, e.g., Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693, 694 (2005) ("In the aftermath of September 11, minimalists want courts to proceed in small steps, leaving the largest issues undecided as long as possible.").

62. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

63. See AVINASH K. DIXIT & ROBERT S. PINDYCK, *INVESTMENT UNDER UNCERTAINTY* 6 (1994).

64. Consider the following remarkably antiminimalist passage from *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922):

emergencies; he may also have thought that (2) courts should be less minimalist in emergencies than in normal times. Even if (1) is correct, it would not mean that Holmes's antiminimalism had no significance for emergencies in particular. General antiminimalism across both emergency and nonemergency cases would necessarily reject the view that courts should be *more* minimalist under emergency conditions than in normal times.

Suppose, however, that (2) is the best reading of Holmes's view. The normative rationale for that position might run as follows. The principal cost of minimalism is legal uncertainty. Minimalist decisions leave things undecided, which itself imposes a cost on all actors in the legal system, bracketing the content of (foregone) decisions. It may be true that the costs of judicial error rise during emergencies, as does the option value of deciding questions later rather than now. However, the systemic costs of legal uncertainty rise as well. Precisely because information is at a premium during emergencies, since emergencies pose novel questions about policy and about the allocation of institutional authority, courts might do well to clarify the legal position as soon as possible. Doing so allows emergency policymaking to proceed expeditiously with all actors having clear lines, and without the false starts, wheelspinning, guesswork, and hesitation that legal uncertainty produces. One can see here a real echo of Holmes's general view of precedent, which itself emphasized the benefits of legal certainty, clarity, and settlement. As Holmes put it, "almost the only thing that can be assumed as certainly to be wished is that men should know the rules by which the game will be played."⁶⁵ Plausibly, Holmes thought this to hold all the more strongly during times of crisis.

On this view, the option value of leaving things undecided, and the reduced error costs that arise from postponing high-stakes decisions until more information is available, might indeed be good *for courts* during emergencies, but what is good for courts might be bad for the system overall. We might reconstruct Holmes as implicitly suggesting that the Brandeises of this world focus too much on judicial costs and benefits and not enough on total social costs and benefits. Here a kind of marginalism comes into play: Holmes was willing to tolerate small procedural imperfections in the case that would serve as the vehicle for deciding important legal questions, if getting the issue settled one way or another would itself produce larger gains to political and social

If we were called upon to deal with the plaintiffs' position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.

But the case has been treated as one in which the general validity of the act should be discussed. The Attorney General of the State, the City of Scranton and the representatives of other extensive interests were allowed to take part in the argument below and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.

65. THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 206 (Richard A. Posner ed., 1992).

actors beyond the Court's walls.

Uncertainty might not be all cost during emergencies. Even if particular actors or institutions always prefer knowing more to knowing less, so that uncertainty is a pure cost to them (bracketing the content of decisions), one might hold that at the systemic level some degree of uncertainty has valuable consequences. Perhaps uncertainty creates a kind of caution, keeping all actors or institutions from pressing the limits of their authority;⁶⁶ perhaps uncertainty about the allocation of authority during emergencies preserves a kind of civilizing veil over governmental and especially executive power.

In general, this account of uncertainty's benefits must cope with three problems.⁶⁷ First, the account must specify the mechanisms by which uncertainty in the legal system produces institutional caution. Another response to uncertainty could be a kind of institutional aggression, as officials respond to the lack of clear legal demarcations—the ambiguity of institutional property rights—by moving to seize disputed territory. In one model of constitutionalism, clear rules, such as the requirement of holding periodic elections, create focal points that allow citizens or groups to coordinate their resistance to an aggrandizing government when the rules are violated.⁶⁸ Second, the account must show that there are no alternative means for generating the claimed benefits of uncertainty that would produce lower collateral costs. If there are lesser-cost mechanisms for keeping institutional aggrandizement in check, then uncertainty is a deadweight loss. Finally, the account must go beyond functionalist speculation; it should specify a mechanism ensuring that minimalism and the passive virtues produce the right amount of systemic uncertainty—as much as necessary to deter aggrandizement but no more, at least on average. I will focus on this last

66. Cf. JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 11-12 (2005) (“In the area of foreign affairs, the Constitution does not establish a strict, legalized process for decisionmaking. Instead, it establishes a flexible system permitting a variety of procedures. This not only gives the nation more flexibility in reaching foreign affairs decisions, it gives each of the three branches of government the ability to check the initiatives of the others in foreign affairs.” (emphasis added)); Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* 1029, 1042 (2004) (“During normal times, the common law fog allows judges and other legal sages to regale themselves with remarkably astringent commentaries on the use of emergency powers, cautioning all and sundry that they are unconstitutional except under the most extreme circumstances. This creates a cloud of suspicion and restrains officials who might otherwise resort to emergency powers too lightly.”).

67. I bracket the view that because institutional and individual incentives diverge, institutions do not systematically press the limits of their authority anyway, a view that is implicitly rejected by the account we are considering. See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 *HARV. L. REV.* 915 (2005).

68. See generally Barry Weingast, *Self-Enforcing Constitutions* (Nov. 2005) (unpublished paper, available at <http://polisci.stanford.edu/faculty/documents/weingast-self-enforcing%20constitutions.pdf>). James D. Fearon has applied Weingast's model to elections. See James D. Fearon, *Self-Enforcing Democracy* (Aug. 24, 2006) (unpublished draft, available at <http://repositories.cdlib.org/igs/WP2006-16/>).

problem.

Suppose that the fog of emergency-related constitutional law—the deep uncertainty about the allocation of war powers, about the scope and nature of implied emergency powers, and so on—is beneficial at some level of thickness, but could be too thick or too thin. What, if anything, pushes the system towards an optimal level of uncertainty? Clarity arises, in part, from constitutional showdowns between and among institutions—constitutional confrontations that result in clarifications of the limits of institutional power, such as the *Steel Seizure Case*.⁶⁹ The problem is that decisions by the executive, legislature, and courts to engage in this kind of clarifying showdown are decentralized, ad hoc, and carried out for whatever motives actuate individual officials, rather than in order to produce the systemically optimal level of clarity. This failure of coordination would not matter if, somehow, the interaction among these institutions produced the right amount of uncertainty at the systemic level. But why should it? There is no invisible-hand mechanism, like the price system in markets, that generally ensures that a system of this kind will produce optimal uncertainty. It might produce too much or too little; if it produces just the right amount, it would be but a happy coincidence, and not one that is likely to be stable or persistent over time.

These antiminimalist points fit especially well with the other elements of Holmes's epistemic theory of emergencies. Holmes's view was that emergencies begin at a definite time and end at a definite time. Once the emergency has begun, government can and should take extraordinary measures that would not be permissible in ordinary times. Once the emergency has ended, government power contracts. On this account, it is important that courts issue a clarifying declaration that there is an emergency, as soon as possible after it has begun, as Holmes did in *Block*; it is equally important that courts issue a clarifying declaration that the emergency has ended, as soon as possible after it has ended, as Holmes did in *Chastleton*. If courts wait for the perfect vehicle to make these announcements, interim losses will be incurred by officials and citizens who are uncertain of the scope of their powers, duties, and rights. Courts do best for the system overall by accepting tradeoffs between judicial and social benefits—by using the first adequate vehicle for making the relevant announcements, even if doing so is not best for the functioning of the courts viewed in isolation.

I conclude by considering, from a Holmesian antiminimalist perspective, whether the Court was correct in the recent *Hamdan* case to decide—in a somewhat abstract procedural posture—the question whether statutes and treaties prohibited an executive order for military commissions to try enemy combatants accused of violating the laws of war.⁷⁰ I assume, for purposes of

69. See Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991 (2008).

70. Technically, this question implicates the passive virtues of prudent agenda setting

this discussion, that *Hamdan* should in some sense be understood as a case decided during an emergency. In Part V, I relax this assumption and suggest that *Hamdan* might instead be understood as a post-emergency decision that imposes an ex post sunset on the emergency powers of the executive.

There is a strong case that the Court's antiminimalist posture was correct, despite Justice Thomas's suggestion, in dissent, that the Court should have waited until after a military trial had actually taken place.⁷¹ Part of what drove Justice Thomas's view may have been the undoubted truth that the costs and benefits to the Court, or to the judicial system generally, counsel waiting; the Court could decide in the future with better information about the actual operation of the military commission system, and there is no real loss to the judges from foregoing a decision now. On the Holmesian view, however, this overlooks a kind of externality, arising because the costs and benefits to the Court need not track net costs and benefits to the broader legal order and society overall. To practice the passive virtues, or minimalism, in these circumstances is to elevate a divergence between private and social costs to the level of a constitutional principle.

Suppose that by waiting until a concrete prosecution had occurred, the Court would have acquired only a small increment of relevant information, either because the basic question in the case was simply whether the military commissions were permissible at all under relevant statutes and treaties,⁷² or because the prosecution would have proceeded in predictable fashion, merely following rules that were already apparent on the face of the executive order and implementing regulations. Suppose also that a great deal of uncertainty about the validity of the military commissions would have persisted, with costs to many actors in the broader system. Detainees would have to undergo military trials or suffer under a Damoclean threat of military trials, with only a vague chance of eventual judicial relief; administration officials would have to formulate an overall response to the threat of terrorism under long-term ignorance about whether military commissions are valid; legislators and citizens would face a shifting target for democratic debate. The last point underscores a major social benefit of *Hamdan*, which clarified the statutory and treaty-based rules and thus provided a fixed point from which democratic debate could proceed. The result was the Military Commissions Act of 2006, which drew lines that are quite clear (whether or not constitutional or desirable).

Uncertainty is a cost whenever courts practice the passive virtues or minimalism. But the high stakes of the questions just described illustrate the basic concern I have attributed to Holmes, which is that the costs of uncertainty

by the Court, rather than the minimalist injunction to decide cases narrowly and shallowly on the merits, but the main points are similar.

71. *Hamdan v. Rumsfeld*, 548 U.S. 557, 720 (2006) (Thomas, J., dissenting).

72. This was the majority's basic response to Justice Thomas. *See id.* at 626 n.55 (majority opinion).

are systematically higher during emergencies. If so, and if the offsetting benefits are no higher during emergencies, then courts should be less minimalist and less passive during emergencies than in normal times. Of course it is difficult, for Holmes or for us, to say with any precision how these costs and benefits net out, and how to assess the comparative statics of uncertainty, error, and option value across emergencies and normal times. Yet the view that minimalism and the passive virtues are desirable (generally or during emergencies) itself assumes answers to these questions, just as much as Holmes's contrary view. There is no escape from the cost-benefit question; neither the minimalist view nor the antiminimalist view can be dismissed a priori.

IV. NO NONDEROGABLE RIGHTS

Suppose that an emergency in fact exists, and that the Court has reached the constitutional merits; what is the scope of governmental power during the emergency? Later I will ask how, in Holmes's view, emergency powers are allocated between and among legislative and executive institutions. Here the question is just what emergency powers inhere in government, taken as a whole. During emergencies, are there any policies that government cannot pursue, any means that are put off limits, any rights that government cannot dilute or abrogate?

In constitutional design after World War II, the trend has been to establish a two-tier system of rights. In one tier are rights that government can abrogate during emergencies (perhaps only insofar as it can demonstrate to the courts' satisfaction a necessity to do so), while in a second and higher tier are categories of "nonderogable rights" that cannot be violated even in emergencies, such as rights to life and of bodily autonomy, political speech, and access to the courts.⁷³

Holmes's view of emergencies is, of course, not pitched at the level of ex ante constitutional design. It is an ex post account of how courts in a common law system (including a system of constitutional common law) should regulate emergencies under vague or open-ended constitutional provisions, where an emergency has already come into being and government has already acted. Still, it is helpful to underscore that in Holmes's view, there are no nonderogable emergency rights at all. Holmes's view of permissible regulation during emergencies is fact-bound and consequentialist, not deontological.⁷⁴ There is nothing that government cannot do in emergencies, if circumstances

73. For an overview and a suggested list of nonderogable rights, see Richard B. Lillich, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. INT'L L. 1072 (1985).

74. For a modern account, quite Holmesian in spirit, see generally RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006).

warrant. I will illustrate this theme in three settings, involving liberty, property, and free speech.

A. *Emergencies and Liberty*

Here the central opinion is *Moyer v. Peabody*,⁷⁵ decided in 1909 (and partially repudiated by the Court's 1932 decision in *Sterling v. Constantin*⁷⁶). *Moyer* involved a Colorado labor leader who was detained for some two and a half months by the governor, and held without access to the courts (which were open) and without being charged with any crime. The governor, acting under a clause in the state constitution giving him the power to call out the state national guard to "execute laws, suppress insurrection and repel invasion," had "declared a county to be in a state of insurrection, had called out troops to put down the trouble, and had ordered that the plaintiff should be arrested as a leader of the outbreak, and should be detained until he could be discharged with safety."⁷⁷ The background law, of course, included the decision in *Ex parte Milligan*,⁷⁸ holding that civilians alleged to be enemy combatants could not be tried by courts-martial where the courts were open. By analogy, the plaintiff in *Moyer* was claiming that civilians could not be detained at the executive's pleasure if the courts were open.

Holmes swatted all this away by observing that "what is due process of law depends on circumstances. It varies with the subject matter and the necessities of the situation."⁷⁹ This is a tradeoff theory of due process, with cost-benefit undertones.⁸⁰ But what were the necessities of the situation that justified the governor's actions? Three determinations are central: (1) whether an emergency exists; (2) the authority to detain without criminal charges during an emergency; and (3) the duration of the detention.

On the first issue, Holmes assumed throughout the opinion that the existence of an insurrection was a question of fact, although he afforded the executive a great deal of epistemic deference on the factual questions. In one passage Holmes wrote that the governor's declaration "that a state of insurrection existed is conclusive of that fact," but he later diluted that statement by saying that the executive's determination would merely be afforded "great weight"⁸¹—essentially repeating the "great respect" formula of

75. 212 U.S. 78 (1909).

76. 287 U.S. 378 (1932).

77. *Moyer*, 212 U.S. at 82-83.

78. 71 U.S. 2 (1866).

79. *Moyer*, 212 U.S. at 84.

80. *Cf. Matthews v. Eldridge*, 424 U.S. 319 (1976); *North Am. Cold Storage Co. v. City of Chi.*, 211 U.S. 306 (1908). The tradeoff between security and liberty is a major theme of POSNER, *supra* note 74.

81. *Moyer*, 212 U.S. at 78, 83, 85.

Block v. Hirsh.⁸² Holmes's position here is consistent across both the economic emergencies in *Block* and *Chastleton* and the security emergency in *Moyer*.

Given an emergency, what power does the executive possess? Here the crucial argument is that the governor's greater power to use military forces to kill persons who engage in insurrection implies the lesser power to detain them. "[The governor] may kill persons who resist, and, of course . . . he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution, to prevent the exercise of hostile power"⁸³ and are merely a type of "temporary detention to prevent apprehended harm."⁸⁴

The only constraint on this temporary detention that Holmes explicitly acknowledged is that the detention is for preventive purposes only, and may not continue after the necessity has passed (a question, he implies, that the judges would determine, albeit with great deference to the executive's view). Holmes pointedly emphasized that "[i]t is not alleged that . . . the plaintiff was detained after fears of the insurrection were at an end" and left future judges an out by saying that "a case could be imagined in which the length of the imprisonment would raise a different question."⁸⁵ As I will elaborate below, this emphasis on judicial review of the duration of detention is typical of Holmes's jurisprudence of emergencies. Holmes's main doctrinal tool for checking the emergency powers of government was *ex post* judicial review of the duration of temporary emergencies and *ex post* judicial rescission of special governmental powers after the emergency ended.

For Holmes, however, there is seemingly little that the executive cannot do to individuals during the insurrection or emergency. There is no explicit Holmesian endorsement of rights or liberties or interests that the executive cannot infringe or override during an emergency; killing and preventive detention without access to the courts are permissible, as are, presumably, other lesser intrusions—even when the courts are open. No rights are nonderogable, even the metaright of court access. Doubtless one can hypothesize extreme cases in which even the bloody-minded Holmes would have balked at executive abuses during emergencies—"not while this Court sits" and so forth—but it is characteristic and revealing that Holmes was concerned to establish what the executive could do during emergencies, not what it couldn't do.

Here it is instructive to compare *Moyer* with the Supreme Court's 2004 detention decision, *Hamdi v. Rumsfeld*.⁸⁶ Roughly speaking, *Hamdi* held that

82. 256 U.S. 135, 154 (1921).

83. *Moyer*, 212 U.S. at 84-85.

84. *Id.* at 85. I do not mean to endorse the merits of this argument, of course. Holmes had a penchant for such greater-power-includes-the-lesser-power arguments, which are analytically suspect in many cases.

85. *Id.*

86. 542 U.S. 507 (2004).

(1) the President has statutory authority under the 2001 Authorization to Use Military Force (AUMF) to detain alleged enemy combatants who engaged in armed conflict against the United States in Afghanistan, but that (2) due process required that a United States citizen being held as an enemy combatant be given a meaningful opportunity to contest the factual basis for the detention. What is missing from *Moyer v. Peabody*, and central to *Hamdi*, is a procedural constraint on the executive's ability to designate a person as an insurrectionist (or, analogously in *Hamdi*, an enemy combatant), even where an emergency gives the executive substantive authority to detain. In *Hamdi*, this is a kind of nonderogable right: even during emergencies, individuals have rights requiring that government use minimally adequate procedures to sort insurrectionists or enemy combatants from the innocent. This dimension was missing from *Moyer* in part because, as a labor leader, there was little doubt of the plaintiff's participation in the activities that were deemed insurrectionary; but there is also no hint at all that such rights are part of the general structure of constitutional law during emergencies.

The *Hamdi* plurality did suggest, obliquely, that there might be judicial review of the duration of the conflict that gives rise to authority to detain.⁸⁷ However, this sort of ex post review of the duration of the emergency is Holmes's central strategy for regulating extraordinary governmental action, in *Moyer* and elsewhere. As I shall discuss further in Part V, the main constraint on governmental action during emergencies for Holmes was not a scheme of nonderogable individual rights enforced at retail, in every particular case. Rather, it was a kind of wholesale structural review aiming to "keep government within the bounds of law,"⁸⁸ using judicial sunseting to enforce the temporary or cyclical character of emergency powers.

B. *Emergencies and Property*

There is one possible counterexample to the claim that, on Holmes's view, all rights are derogable if emergency circumstances warrant regulation according to a pragmatic cost-benefit test. Holmes sometimes suggested that even if "exigency" gave government license to act, it would still have to compensate affected parties either in-kind, by supplying some other regulatory good, or through damages. In *Block*, Holmes wrote that "a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation."⁸⁹ However, in *Pennsylvania Coal Co. v. Mahon*,⁹⁰ the famous opinion invalidating the Kohler Act as an uncompensated taking, the

87. *Id.* at 521.

88. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1736 (1991).

89. *Block v. Hirsh*, 256 U.S. 135, 156 (1921).

90. 260 U.S. 393 (1922).

idea was more nearly the opposite:

The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They were to the verge of the law but fell far short of the present act

We assume, of course, that the [Kohler Act] was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall.⁹¹

It is not clear that *Block* and *Mahon* can be reconciled, except with Holmes's vague suggestion that the regulation in the former case went to "the verge of the law" while the regulation in the latter case went "too far." There is a separate suggestion in the quoted passage from *Mahon* that the deprivation of property in *Block* was compensated by the reasonable rental rates set by the rent control board. But that is inconsistent with the discussion in *Block*, which recognized that the setting of reasonable rents itself deprived owners of a property interest—the value "usually incident to fortunately situated property" of "profiting by the sudden influx of people," a profit that "it [would be] unjust to pursue . . . with sweeping denunciations."⁹² Holmes's point was that the uncompensated taking in *Block* of this situational value was valid; he was not suggesting that there was no uncompensated taking at all.

In a broader perspective, then, we can see Holmes as just saying that the power to engage in *uncompensated* takings is like any other power of government. It is permissibly used where circumstances warrant, and an emergency may well present those circumstances. On this account, the right not to have one's property taken without just compensation is merely another derogable right, just as liberty and due process rights were held derogable, during emergencies, in *Moyer v. Peabody*. In both domains, "what is due process of law [or constitutional protection for property rights] depends on circumstances," and so "varies with the subject-matter and the necessities of the situation."⁹³

C. Emergencies and Free Speech

This circumstantial account of governmental power during emergencies, in which the prevention of public harms trades off against infringements, was for Holmes also the key to free speech law. When Holmes wrote for the Court to uphold speech restrictions in *Schenck v. United States*, he took the following view:

[T]he character of every act depends upon the circumstances in which it is

91. *Id.* at 416.

92. *Block*, 256 U.S. at 157.

93. *Moyer v. Peabody*, 212 U.S. 78, 84 (1909).

done. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right.⁹⁴

When he famously wrote in dissent in *Abrams*, Holmes modified the test, changing “clear and present” to “clear and imminent.”⁹⁵ What changed in the passage from *Schenck* to *Abrams* was Holmes’s threshold for finding a sufficient risk to trigger emergency power, and his judgment about whether suppression of free speech was warranted in the circumstances of the two cases. However, the circumstantial character of the inquiry ultimately remained the same, as did the governing assumption that where the tradeoffs so indicated, constitutional rights were eminently derogable.

V. EX POST SUNSETTING AND OTHER CHECKS

On the Holmesian view there is no ultimate rights-based constraint on emergency powers, nothing that government cannot do during emergencies, at least conceivably and if circumstances warrant. However, there are two structural checks on governmental abuse: (1) legislative control of the executive through statutes and (2) ex post sunset—judicial review to determine whether the emergency has ended and, if it has, to rescind the temporary grant of emergency power to the government. Of these two, only the second mechanism is developed at any length in Holmes’s writings. I will offer some brief remarks about the former mechanism, as to which Holmes was sketchy in the extreme, and then focus on the latter.

A. Legislative Control

Holmes generally has little to say about the allocation of emergency powers (and for that matter lawmaking powers generally) among branches of government. Inferentially, it seems plausible to think that Holmes thought that Congress holds the whip hand in any contest with the executive branch over such powers. The familiar cases are *Myers v. United States*,⁹⁶ in which Holmes dissented from a holding that Congress could not condition the removal of executive officers on Senate consent, and *Springer v. Philippine Islands*,⁹⁷ in

94. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

95. *Abrams v. United States*, 250 U.S. 616, 627-30 (1919). For the full background and a detailed exegesis, see RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH* (1987).

96. 272 U.S. 52 (1926).

97. 277 U.S. 189 (1928).

which the majority held that territorial legislation violated the grant of executive powers to the Governor-General in the Philippines' Organic Act. In the former case Holmes suggested that the duty to take care that the laws be faithfully executed, and perhaps the executive power itself, do not "require [the President] to achieve more than Congress sees fit to leave within his power."⁹⁸ In the latter case Holmes's dissent majestically critiques essentialism about the separation of powers—"[t]he great ordinances of the Constitution do not establish and divide fields of black and white"⁹⁹ and so forth—but Holmes did not do much to indicate concretely whether there are any limits to legislative control of the executive, and where those limits might lie.

Overall, although legislative control of the executive was an undeveloped strand in Holmes's constitutional thinking, his guiding assumption may have been that even during war—and presumably emergencies generally—statutes and treaties have the final word. Holmes's main focus was elsewhere. For him the main problem was not so much what the executive or Congress can do separately, but what the government can do as a whole, as when the executive acts with clear statutory authority. In our day, with the passage of the 2001 AUMF, the Patriot Act, the Military Commissions Act, and the Protect America Act, that question is now central once again.

B. *Ex Post Sunsetting by Judges*

The main doctrinal weapon in Holmes's arsenal for regulating governmental power during emergencies was *ex post* sunsetting by judges: judicial review to determine whether the emergency has run its course and, if so, to rescind the temporary grant of emergency powers to the government.

Some brief taxonomy is necessary. *Ex ante* regulation of emergencies is sometimes said to occur when constitutional provisions or framework statutes enacted *before the beginning of the emergency* structure governmental powers during a future emergency. I will use "ex ante sunsetting" in an extended sense that includes that case, but that also includes the following common sequence: after an emergency has begun, the legislature enacts emergency legislation containing a sunset clause, so that the emergency powers granted by the statute lapse on a future date certain. In the latter case, the sunsetting is *ex ante* in the sense that it is announced before the date on which governmental emergency powers are to terminate.

Although the most common form of *ex ante* sunsetting occurs when legislatures themselves insert sunset clauses, other institutions can also do so. Many provisions in recent constitutions terminate future declarations of emergency, or rescind extraordinary grants of power to the government, after a

98. *Myers*, 272 U.S. at 85.

99. *Springer*, 277 U.S. at 209 (Holmes, J., dissenting).

time certain.¹⁰⁰ In the United States Constitution, an example of ex ante constitutional sunseting with historical connections to wars and other emergencies is the Article I provision that restricts military appropriations to a two-year period.¹⁰¹ Finally, nothing prevents judges themselves from engaging in ex ante sunseting, by announcing that governmental powers will lapse on a future date certain. Actual examples are rare, but an arguable one (outside the setting of emergencies) is Justice O'Connor's suggestion, in the recent *Grutter* case, that affirmative action will no longer be constitutionally permissible after another twenty-five years have passed.¹⁰²

Ex post sunseting, by contrast, occurs when an emergency is declared to be terminated, and governmental powers rescinded, after the fact. I will focus on ex post sunseting by judges, but a legislature might also engage in ex post sunseting. Congress did so in the National Emergencies Act, when it terminated all extant national emergencies previously created under statutory delegations. The Act also provided that future declarations of emergency by the executive would terminate after one year, unless formally renewed, so this statute combined both ex post and ex ante sunseting (applying to different declarations of emergency).¹⁰³

One further distinction is necessary, between *political* sunseting and *epistemic* sunseting. On the political rationale, the basic virtue of sunseting is that the reversion to the status quo explicitly forces onto the legislative agenda the question whether the law should be renewed, thereby promoting fresh deliberation, increasing legislative accountability, and activating political checks.¹⁰⁴ Thus Hamilton defended Article I's two-year limitation on military appropriations in the following terms:

The Legislature of the United States will be obliged, by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents. . . . As often as the question comes forward, the public attention will be roused and attracted to the subject, by the party in opposition: And if the majority should be really disposed to exceed the proper limits the community will be warned of the danger and will have an opportunity of taking measures to guard against it.¹⁰⁵

100. See, e.g., CONSTITUTION OF POLAND art. 230, available at <http://www.verfassungsvergleich.de/> (allowing executive declarations of emergency for up to ninety days, renewable for up to sixty days with the consent of the Sejm).

101. U.S. CONST. art. I, § 8, cl. 12.

102. Vikram David Amar & Evan Caminker, *Constitutional Sunseting?: Justice O'Connor's Closing Comments in Grutter*, 30 HASTINGS CONST. L.Q. 541 (2003).

103. 50 U.S.C. § 1622(b), (d) (2002). For an overview, see HAROLD C. RELYEA, CONG. RESEARCH SERV., NATIONAL EMERGENCY POWERS (2001).

104. See Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 260-62 (2007).

105. THE FEDERALIST NO. 26, at 164, 168 (Alexander Hamilton) (Jacob E. Cooke ed.,

Epistemic sunseting, by contrast, assumes that the point of sunseting is not to produce politically desirable decisionmaking, but rather to track changes in real facts. When and because the emergency has in fact ended, governmental power should lapse, because there is no further purpose to emergency powers; any further use can only be abuse.

Political and epistemic sunseting overlap when governmental emergency powers are first granted, but diverge thereafter. The testing case involves repeated sunseting. Consider a case where an emergency occurs at Time 0, and a Time 1 legislature grants the executive extraordinary emergency powers until Time 2. At Time 2, the legislature renews the grant until Time 3; at Time 3, the grant is renewed until Time 4; and so forth. On the political rationale, there is no objection even if this sequence stretches on indefinitely. So long as the lawmaking body at Time 1, 2, . . . N, has “declared their sense of the matter, by a formal vote in the face of their constituents,” political accountability is preserved, as are the other values Hamilton mentioned. On the epistemic rationale for sunseting, by contrast, the sequence becomes increasingly objectionable as time passes, because it is increasingly likely that the emergency has in fact terminated.

With these distinctions in hand, we can more precisely locate Holmes’s distinctive ideas about the temporary character of emergencies and the consequences for adjudication. Holmes’s view, more precisely, was that judges should engage in *ex post sunseting on epistemic grounds*. On this view judges could read due process and other constitutional guarantees to permit government to wield temporary emergency powers, the flipside being that judges would rescind those powers when the emergency lapses. It is a question of fact whether the emergency has lapsed; although the judges will afford epistemic deference to nonjudicial officials as to that question of fact, ultimately they will determine for themselves whether the emergency still exists. If it does not, there is no further reason for emergency powers, and no amount of deliberation or accountability or other political virtues will matter. From that point on, judges will invoke the Constitution to invalidate even temporary measures.

The sequence from *Block* to *Chastleton* illustrates Holmes’s approach. The original rent control statute was enacted in 1919 and was, by virtue of a sunset clause, slated to expire in 1921. In 1921 the Supreme Court upheld the law in *Block*, and a new statute continued the law in force until 1922. When the latter year arrived, a third statute declared that the original emergency still existed and reenacted the original statute until 1924. Before the 1924 sunset date arrived, the Court revisited the law in *Chastleton*. Holmes’s majority opinion, after noting that the legislature might make “an obvious mistake” about the “truth” when declaring an emergency, emphasized that:

[a] law depending upon the existence of an emergency or other certain state of

facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed

The [rent control order under review] was passed some time after the latest statute, *and long after the original act would have expired*. In our opinion it is open to inquire whether the exigency still existed upon which the continued operation of the law depended.¹⁰⁶

Here the function of the original sunset clause is to provide a kind of evidence about how long the emergency would extend; that evidence is indirect—it is merely the judgment or, as Holmes says, “prophecy” of the 1919 Congress—and is to be weighed independently by the judges along with other evidence on the same question, as the remainder of the opinion proceeded to do.

Ultimately Holmes remanded for evidence-taking in the lower courts about the “condition of Washington at different dates in the past”—with the admonition that “if the question were only whether the statute is in force today, upon the facts that we judicially know we should be compelled to say that the law has ceased to operate.”¹⁰⁷ This suggests, although it does not quite say, that the Court was establishing a *terminus ante quem* of April 21, 1924—the date *Chastleton* was handed down—for the statute’s constitutionally compelled lapse, leaving it open to the lower courts only to determine whether the statute might indeed have lapsed at an earlier time.

On Holmes’s view, then, sunset clauses in legislation have an epistemic function for judges exercising constitutional oversight: they inform the judicial judgment about whether an emergency still exists, but are not otherwise valued for the political functions that Hamilton detailed. There is not a word in Holmes’s emergency jurisprudence about accountability, or deliberation, or other political virtues being relevant to assessing the constitutionality of extraordinary legal measures. There is only the single question whether the conditions that justified the measures are, in fact, still present.

Does this central feature of Holmes’s emergency jurisprudence have any current purchase in Supreme Court law? Not explicitly, but there are traces of similar ideas. I have mentioned the suggestion, in the *Hamdi* plurality opinion, that the courts would engage in some sort of ongoing review to decide “[i]f the record establishes that United States troops are still involved in active combat in Afghanistan”—the factual precondition for the Court’s holding that detention of enemy combatants found in that theater are necessary and appropriate under the AUMF.¹⁰⁸ This is a kind of *ex post* review to see whether the conditions that gave rise to temporary emergency powers are met, in a manner quite similar to Holmes’s approach in *Chastleton*.

Stretching farther, we might even see *Hamdan* as a case of *ex post* sunseting of emergency powers. In Part III, I assumed that the majority’s

106. *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-48 (1924) (emphasis added).

107. *Id.* at 548-49.

108. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

decision to reach the merits of the statutory questions, rather than wait for a concrete prosecution, represented an attempt to clarify the scope of the executive's legal authority while the post-9/11 emergency was ongoing. Alternatively, we might understand *Hamdan* as a case in which the Court implicitly decided that the post-9/11 emergency had passed and that it was time to decide, quite clearly, that executive action against terrorism would once again be reviewed under normal legal standards. This idea draws some support from Justice Stevens's emphatic rejection of any suggestion that "exigency" or "military necessity" would, as of 2006, make impracticable adherence to the normal statutory code governing courts-martial.¹⁰⁹ On this account, then, *Hamdan* would represent a judicial attempt to return to normalcy, along the lines of *Ex parte Milligan*, decided in the wake of the Civil War; Holmes's opinion in *Chastleton*, decided in the wake of World War I; and the decisions in *Ex parte Endo*¹¹⁰ and *Duncan v. Kahanamoku*,¹¹¹ decided in the wake of World War II.

I offer this account just for its intrinsic interest; there are real problems with it.¹¹² First, *Milligan* and *Chastleton* were constitutional decisions, whereas *Endo* and *Duncan* used a form of constitutionally freighted statutory interpretation to put an end to ongoing policies of racially based detention and martial law in Hawaii, respectively. In this respect *Hamdan*, a nominally statutory decision, is more like *Endo* and *Duncan* than like *Chastleton*, even if one believes that *Hamdan* too was a case of constitutionally freighted statutory interpretation.¹¹³ Second, there is little explicit discussion of a return to normalcy on the face of the opinions. Despite these problems, however, it is hard to doubt that the public events of 2005 and 2006—the period in which the Bush administration's competence came to be widely doubted and its antiterrorism policies began to be widely condemned, and the year that some began to urge that the terrorist threat had been overestimated after 9/11¹¹⁴—were a strong subterranean influence in the case.

Suppose that this account of *Hamdan* is plausible. Two points about timing follow. First, *Hamdan*'s rejection of the passive virtues—the decision to adjudicate the statutory validity of military commissions without waiting for a concrete prosecution—follows Holmes's implicit injunction to decide that an emergency has lapsed as soon as possible after it has lapsed, without waiting

109. *Hamdan v. Rumsfeld*, 548 U.S. 557, 622-24 (2006).

110. 323 U.S. 283 (1944).

111. 327 U.S. 304 (1946).

112. Thanks to David Barron for helpful discussion of these points.

113. For the view that *Hamdan*'s statutory interpretation was constitutionally loaded, see Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 SUP. CT. REV. 1 (2006); for a contrary suggestion, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 HARV. L. REV. 941 (2008).

114. See, e.g., JOHN MUELLER, *OVERBLOWN: HOW POLITICIANS AND THE TERRORISM INDUSTRY INFLATE NATIONAL SECURITY THREATS, AND WHY WE BELIEVE THEM* (2006).

for a procedurally perfect vehicle. Second, during the period from 2001 to 2006 the Court mostly ducked its chances to issue pronouncements on the statutory or constitutional limits of executive power, as when it declined to review conflicting lower court cases about whether immigration proceedings could be closed to the public on national security grounds.¹¹⁵ When the Court did reach the merits in *Hamdi*, the only major national security decision in this period, the Court issued an importantly ambiguous decision that left a great deal of uncertainty in its wake.¹¹⁶ By this course of action the Court in effect rejected the other part of Holmes's approach, in which judges should clarify the newly expanded boundaries of governmental power as soon as possible after the emergency has arisen.

Holmes would have approved of the first course of action but disapproved of the second. If legal uncertainty during emergencies has a systemic benefit it is that it checks institutional aggrandizement and instills a kind of caution in political actors, especially the executive; but there is no evidence that the uncertainty created by the Court's silence between 2001 and 2006 helped to keep the executive within legal bounds. Quite the contrary: if the factual status quo on the ground, outside the law books, favors broad executive power, then continuing legal uncertainty merely leaves that status quo in place and leaves the executive unchecked.¹¹⁷ From a Holmesian perspective, the high legal uncertainty that arose after 2001, and that *Hamdan* and the Military Commissions Act only partially dispelled, was just a deadweight loss. If, however, *Hamdan* can plausibly be read as an example of ex post judicial sunset of governmental emergency powers, then it is a decision of which Holmes would have approved.

VI. COMMON LAW REGULATION OF EMERGENCIES

It is time to venture a broader evaluation of Holmes's views. My basic suggestion is that Holmes offers the best possible version of a certain type of legal strategy for coping with emergencies—what William Scheuerman has labeled the strategy of “common law emergency oversight.”¹¹⁸ Holmes's version avoids or minimizes some of the main costs of the common law

115. See *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), cert. denied, 538 U.S. 1056 (2003).

116. One major source of uncertainty after *Hamdi* is the question whether the due process requirement of a hearing on enemy combatant status can be fully satisfied by a military “combatant status review tribunal,” or whether judicial review is required. For a discussion of some uncertainties created by *Hamdi*, see ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 23, 256-57 (2007).

117. Cf. Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132 (1999).

118. William E. Scheuerman, *Emergency Powers*, 2 ANN. REV. L. & SOC. SCI. 257, 265-70 (2006).

approach. If Holmes's version fails, then it is unlikely that the common law approach is tenable at all.

In Scheuerman's useful taxonomy, there are four main approaches to regulating emergency powers:¹¹⁹

(1) "Constitutional relativists," such as Harvey Mansfield, Michael Paulsen, and John Yoo, believe that executive discretion during emergencies is largely unbounded; it is "justified by vague constitutional language, while neither statutory nor constitutional law is allowed to check executive authority."¹²⁰ (This last claim is at least overstated as to some in this camp. Many defenders of executive authority cheerfully concede that the appropriations power and other legislative powers can be used to check executive abuse.¹²¹ But that issue is tangential to my concerns here).

(2) Theorists of "extralegal emergency powers," such as Oren Gross and Mark Tushnet, believe that emergency measures should be cordoned off from the ordinary legal system.¹²² If executives or other officials desire to take extraordinary measures, they must deliberately step outside the legal system to do so, hoping for some sort of ex post political ratification. The risk of doing so will keep the exercise of extralegal emergency powers within reasonable bounds, or so these theorists hope.

(3) Theorists who praise "common law emergency oversight" hold that ex post judicial review, under constitutions or statutes, can provide government with needed flexibility during emergencies while ensuring that expanded powers are contracted again once the emergency has passed. As discussed shortly, common law theorists claim that structural features of judicial institutions, such as a focus on particular cases, the time lag between the enactment of emergency measures and judicial review of such measures, and the disciplining effect of precedent combine to make common law regulation of emergencies the least bad of the alternatives.¹²³

(4) Finally, "emergency legal formalists," such as the drafters of many of the new Eastern European constitutions and Bruce Ackerman,

119. *Id.* at 258.

120. *Id.* at 259-62.

121. See YOO, *supra* note 66, at 22-24, 154-60.

122. Scheuerman, *supra* note 118, at 262-65. Richard Posner has defended a view of this sort, with respect to torture and presidential defiance of habeas corpus. See POSNER, *supra* note 74, at 85-87.

123. See David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003). For a sustained defense of a common law approach to enforcing the rule of law in times of emergency, see DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* (2006). For a common law approach to habeas corpus adjudication in terrorism cases, see Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007). However, Fallon and Meltzer use the "common law" rubric differently than do Cole and Dyzenhaus. For the first pair, but not for the second, the antonym of a common law approach is an "agency" approach based on constitutional texts and original understandings.

propose *ex ante* statutory and constitutional regulation of emergencies, rather than *ex post* judicial regulation in the common law mode.¹²⁴ Their main mechanisms involve constitutional provisions and framework statutes that are supposed to provide clear and specific limitations on governmental powers before an emergency event occurs.

I will focus on the third approach. Common law regulation of emergencies is a genus, containing different species. Holmes's epistemic theory is one species, but not the most widespread. In contrast to Holmes, David Cole and others argue that the advantage of the common law system as a mechanism for regulating emergency powers lies precisely in a tight focus on the particulars of cases; in the judicious use of the passive virtues and minimalism; and in common law elaboration of legal precedent to provide a "measured development of rules in the context of specific cases."¹²⁵ The claim is that these virtues show to best advantage during emergencies. Where other officials panic, judges insulated from politics by constitutional structures or by the background norms and professional ethos of a common law system decide cases with a time lag, after passions have cooled.¹²⁶ Common law judges thus bring rational deliberation to bear on emergency policymaking and avoid creating bad precedents while the emergency is at its hottest.¹²⁷ Related to the last point, common law judges are disciplined by the knowledge that they will be creating precedents, during emergencies, that will also govern nonemergency conditions in the future.

Scheuerman, however, quite rightly points out that these claimed benefits are ambiguous at best, and at worst are more plausibly seen as costs.¹²⁸ First, the delay inherent in a virtuously passive and minimalist common law system "provides plenty of time for the other branches of government (and most likely the executive) to have already undertaken damaging forms of far-reaching emergency action Before our cautious common law judges have even begun to grapple with the legal ramifications of the last round of presidential

124. Scheuerman, *supra* note 118, at 270-73.

125. Scheuerman, *supra* note 118, at 267; *see* Cole, *supra* note 123; *see also* Sunstein, *supra* note 61.

126. *See* Cole, *supra* note 123, at 2575-76.

127. *See* *Korematsu v. United States*, 323 U.S. 214, 242-48 (1944) (Jackson, J., dissenting); Sunstein, *supra* note 55, at 103 ("In the context of war . . . judges ought to avoid setting precedents that will, in retrospect, appear to give excessive authority to the President.").

128. Both Cole's defense of the common law regulatory approach and Scheuerman's critique of that defense assume certain empirical, causal, and normative premises—for example, that executives are relentless power-maximizers, or that panic arising from emergencies makes governmental decisions worse—that are dubious at best. On power-maximization, *see* Levinson, *supra* note 67; on panic, *see* POSNER & VERMEULE, *supra* note 116, ch. 2. For present purposes, however, I will put those reservations aside, to evaluate Holmes's approach from within the premises that Cole, Scheuerman, and many others share.

emergency measures, the executive has already undertaken new ones.”¹²⁹ In a similar vein, Bruce Ackerman critiques the common law approach to regulating emergencies on the ground (among others) that the

time-tested cycle of judicial management [of emergencies] . . . presupposes a lucky society in which serious emergencies arise very infrequently—once or twice in a lifetime. . . . But this premise is no longer valid. The realities of globalization, mass transportation, and miniaturization of weapons of destruction suggest that bombs will go off too frequently for the judicial cycle to manage crises effectively.¹³⁰

There are two complementary suggestions here. One is that there is a kind of common law cycle of deference to government action during emergencies, followed by repudiation of government action after the emergency has passed. Scheuerman and Ackerman then submit that the common law cycle operates too slowly, at least under current conditions.¹³¹ Another suggestion is that the “presidential power of unilateral action”¹³² means that the executive can change the legal and factual status quo in ways that courts, deciding cases well after the fact, will be unable fully to undo. The result will be a gradual accretion of executive power: two steps forward, one step back.¹³³ Scheuerman and Ackerman are especially worried about the executive, but the point is more general, and applies to all governmental action. The common law approach builds in a time lag for the review of emergency measures, but if what government does during emergencies (whether through executive or legislative action) changes real-world facts in ways that are costly for later courts to undo, then the lag is bad, all else equal.

A second problem is that a core feature of the common law system, the development of precedent, misfires during emergencies. Emergencies are novel situations, so the informational value of precedent is reduced. The law and historical lore surrounding military commissions, for example, represents a

129. Scheuerman, *supra* note 118, at 268.

130. BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 61 (2006).

131. See Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 *YALE L.J.* 1801, 1820 (2004).

132. Moe & Howell, *supra* note 117.

133. For a somewhat more optimistic account of the common law cycle, emphasizing increasing respect for civil liberties over time, see Jack Goldsmith & Cass R. Sunstein, Comment, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 *CONST. COMMENT* 261 (2002); Mark Tushnet discusses the possibility of social learning through the common law cycle, but ultimately argues that “[w]e learn from our mistakes to the extent that we do not repeat precisely the same errors, but it seems that we do not learn enough to keep us from making new and different mistakes.” Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 *WIS. L. REV.* 273, 292. Eric Posner and I have argued that the common law cycle tends to neither systematically increase government power nor to increase protection of civil liberties. POSNER & VERMEULE, *supra* note 116, at 146-48. Again, however, I will assume the pessimistic picture developed by Scheuerman and Ackerman in order to explore the advantages of the Holmesian approach.

kind of interrupted tradition, one that was developed in fits and starts during the Mexican-American War, the Civil War, and World War II. It is thus of lower informational value than a stream of precedent or tradition developed continuously over time.¹³⁴ These points are *ex post*, but the *ex ante* disciplining function of precedent is also reduced during emergencies. Judges will anticipate that the precedents they develop during extraordinary times will not even be applicable to the mine-run of cases in the legal system and to ordinary times.

To the extent that these critiques of the common law approach are correct, however, the Holmesian variant of common law regulation looks better than the more standard model; the main features of Holmes's theory sidestep the critiques. I do not assert, of course, that Holmes's theory was designed to do so. Rather I mean to suggest that whatever the historical genesis of Holmes's approach, it is theoretically plausible on strictly contemporary grounds.

Procedurally, Holmes's antiminimalism or disregard for the passive virtues minimizes scope for legislative or executive action that changes facts on the ground in irreversible ways. Holmes thought that courts should declare the existence of an emergency as soon as possible after it arises and, more importantly, should declare the termination of the emergency as soon as possible after it has lapsed. Although Scheuerman and Ackerman intend a wholesale critique of the common law approach to emergencies, their points, even if valid, could also be taken just to show that the best version of the common law system would *accelerate* rather than *delay* judicial review. If the problem is, as Ackerman says, that the common law cycle spins too slowly, dispensing with the common law approach altogether is not the obvious solution; one might also just attempt to speed up the cycle. That is the main effect of Holmesian antiminimalism, which (as compared to the common law system with minimalism and the passive virtues) accelerates both the declaration that an emergency exists and the declaration that it has lapsed.¹³⁵

Substantively, Holmes's main doctrinal contribution, *ex post* sunseting of emergency powers by judges, is designed precisely to prevent the gradual accretion of governmental power that is said to afflict the common law model. The epistemic theory combines a very capacious scope of emergency powers with vigorous judicial policing of the temporal limits of emergency powers. Ordinary constitutional doctrine is not corrupted by the pressure to bend rules to uphold governmental measures, which are explicitly judged under extraordinary legal standards. On the other hand, the temporal limitation means that there is, at least in theory, a sharp alternation between periods of expansive governmental power and normally restricted power.

134. These points are amplified in Eric A. Posner & Adrian Vermeule, *Originalism and Emergencies: A Reply to Lawson*, 87 B.U. L. REV. 313 (2007).

135. Short of issuing an outright advisory opinion, of course; Holmes was nudging the common law system as far as he could towards early review, within the constraints of an established legal order.

Most important of all, Holmes's theory is oriented towards present facts, not towards precedents, traditions, or law generally. The virtue of the common law system for regulating emergencies, on Holmes's view, lay not at all in a backward-looking orientation to traditions or precedents, or even in the forward-looking discipline that might arise when judges anticipate that emergency precedents will govern the future. There is not a word about these things in Holmes's judicial treatment of emergencies. Rather Holmes's idea was that common law judges could tie the alternator of governmental powers to something objective, beyond the courthouse walls, through a factual inquiry into the existence of emergencies suitably understood. In modern terms, the question is whether it is plausible that an external trigger of this kind is sturdier than the value-laden doctrinal standards that are characteristic of the standard common law approach. We have seen that Holmes did not succeed in wholly stripping the normative components from the concept of emergency; for example, there is always the question whether a risk is or is not "significant." However, his approach does objectify the determination of an emergency as far as possible.

As always, there is a price to be paid for the advantages of the Holmesian approach. In fact there are several different costs, some of which we have already discussed. Thus Holmes's antiminimalism during emergencies has the acknowledged cost that the court's decisionmaking will be less informed than it would be with a longer delay, and in a sense will also be riskier, because of the higher expected costs of judicial mistakes during emergencies (although a minimalist or passive-virtues approach increases the corresponding risk of costly failure to act). Here I want to suggest a different problem, which is that the epistemic theory of emergencies might have an excessively binary or knife-edged quality. Everything hinges on a single threshold determination: whether the court finds that an emergency exists or fails to exist.

This may be too great a load for any single part of the doctrinal structure to bear.¹³⁶ If there are valid concerns that the standard common law model creates too much legal uncertainty, cycles too slowly, and puts too much pressure on judges to apply normal legal rules in the face of governmental claims of exigency, there are mirror-image concerns that judges using a Holmesian approach will twist their factual determinations of emergency's existence under the same pressures. Perhaps a doctrinal regime that tries to build in this sort of sharp temporal alternator will be unstable, and will end up in a permanent state of emergency. Many judges will not be as tough-minded as Holmes was in

136. Cf. Kim Lane Scheppele, Comment, *Small Emergencies*, 40 GA. L. REV. 835, 839 (2006) ("America has not in general had a toggle-switch approach to crises, where normal constitutionalism continues until a switch is flipped to stop it, and then the emergency continues until the switch is flipped back."). This is a positive, not a normative claim, but if it is right it might support a claim that the toggle-switch approach is either infeasible or undesirable. On the other hand, Scheppele does not discuss Holmes's decisions, which do take precisely that approach.

Chastleton in sunseting emergency powers. Perhaps the Holmesian approach works only in the hands of a Holmes.

It should be noted, however, that the evidence for this worry is surprisingly thin in the American history of the emergency powers doctrine. The leading account of the doctrine from World War I through the New Deal suggests the opposite.¹³⁷ On this account, it was rather a widespread *rejection* of the emergency powers doctrine in the mid-1930s that paved the way for a permanent expansion of government powers. Once that doctrine had been rejected, courts were faced with a stark choice between enforcing the pre-New Deal rules though the heavens fall, an unacceptable course of action, or else modifying even the normal legal rules in a permissive direction, a modification that was by hypothesis not confined to emergency circumstances. They chose the latter course, but the resulting permanent expansion of government powers does not count as a failing of the emergency powers doctrine to which Holmes was a central contributor.

What is true is a related but different proposition, that judges throughout American history have been especially deferential to government at the outset of a perceived emergency, whatever the nominal legal rules, although this deference tends to decrease over time.¹³⁸ But this alone does not show that emergency powers become permanent (if that is bad),¹³⁹ and does not show that a Holmesian regime with an epistemic trigger for its alternating device is as likely to yield *permanent* accretions of government power as is the standard common law model. Most importantly, the Holmesian regime aims to accelerate the eventual return to normalcy that is the sunny upside of the common law cycle; if it does so successfully, it may prevent many executive abuses.

A final issue involves the scale and complexity of the emergencies Holmes faced. Perhaps they were in some sense “small emergencies,”¹⁴⁰ as compared to later ones; and perhaps scale matters for the evaluation of Holmes’s approach. Both these points seem to me to be half-truths. While the economic dislocations flowing from World War I can reasonably be described as small, the armed insurrection at issue in *Moyer* cannot; imagine what would happen today if Colorado exploded into armed conflict. Analytically, an increase in the scale of emergencies has ambiguous effects for Holmes’s approach. On the one hand, increasing scale may put even greater stress on judges’ ability and willingness to sunset the emergency, which is the weakest point in the Holmesian framework. On the other hand, Holmes’s other major claims—that emergencies can exist in fact, and that all rights can be overridden if the

137. Belknap, *supra* note 1, at 92-98.

138. See POSNER & VERMEULE, *supra* note 116, at 43-44.

139. Eric Posner and I have argued that emergency powers do not systematically tend to become permanent, and that where they happen to do so, social welfare is often improved. *Id.* at 131-56.

140. See Scheppele, *supra* note 136.

emergency is bad enough—become more plausible, not less, as the scale of the emergency increases. The problems vary with scale, but the effects of increasing scale cut in both directions.

I conclude that within the genus of common law approaches to regulating emergencies, the Holmesian species is at least a legitimate competitor to the standard common law approach. If the Holmesian approach fails, it fails on grounds that also condemn the other species in the genus, perhaps even more strongly. At a minimum, proponents of the standard common law model would do well to explain why Holmes's epistemic theory of emergencies, and the broader pre-New Deal emergency powers doctrine surrounding it, is inferior to their preferred approach.

