

2011

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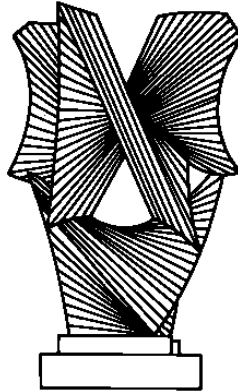
## Recommended Citation

Eric Posner & Adrian Vermeule, "Demystifying Schmitt" (University of Chicago Public Law & Legal Theory Working Paper No. 333, 2011).

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# CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 333



## DEMYSTIFYING SCHMITT

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THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

January 2011

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## Demystifying Schmitt

Eric A. Posner\* & Adrian Vermeule\*\*

Carl Schmitt is too important to be left to the Schmitt specialists. To their credit, the Schmitt specialists were the first to recognize this. In recent years many of Schmitt's most important works have been given authoritative new translations,<sup>1</sup> while intellectual historians and political theorists specializing (at least in part) in Schmitt and his contemporaries have labored to set Schmitt's work in intellectual and historical context, explaining its content and significance for academics in other disciplines.<sup>2</sup>

The goal of open-access to Schmitt's thinking, however, requires more than translation and historical context. Even when those indispensable first steps have been accomplished, there remains a barrier to entry for those who would draw upon Schmitt's work to illuminate subjects such as the design and operation of constitutions, emergency powers, and the administrative state. The barrier is that Schmitt's work grows out of and exemplifies a continental tradition of legal and political theory that is heavily conceptual and laden with jurisprudential jargon. Especially for American lawyers whose interdisciplinary toolkit is drawn from the social sciences that flowered after World War II, Schmitt's thought seems relentlessly abstract and mystifying.

In this chapter, we attempt to demystify some of Schmitt's core insights by interpreting them in light of simple causal intuitions and models drawn from the social sciences, including economics, law-and-economics, and political science. The aim is not exegetical or historical; of course we do not suggest that Schmitt thought in such terms, or that the social-scientific interpretations we offer are the best contextual understanding of Schmitt's ideas from the internal point of view. Rather, the aim is utilitarian. It is to make some of Schmitt's ideas usable for research in other disciplines, and to illustrate a general approach to Schmitt that can be applied to all of his writings.

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<sup>1</sup> Carl Schmitt, *Legality and Legitimacy*, Jeffrey Seitzer trans. (Durham: Duke University Press, 2004); Carl Schmitt, *Constitutional Theory*, Jeffrey Seitzer trans. (Durham: Duke University Press, 2008).

<sup>2</sup> See, e.g., Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Durham: Duke University Press, 2004); John McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge: Cambridge University Press, 1997); William E. Scheuerman, *Carl Schmitt: the End of Law* (Lanham: Rowman & Littlefield, 1999); William E. Scheuerman, *Liberal Democracy and the Social Acceleration of Time* (Baltimore: Johns Hopkins University Press, 2004).

In Section 1, we focus on Schmitt's distinction between legality and legitimacy, and the associated idea that legitimacy often amounts to a strictly negative power on the part of mass publics to resist elite proposals, either through negative votes in referenda or through extralegal resistance. Although liberal theorists worried by the specter of a plebiscitary executive have cast these ideas in ominous terms, as a form of proto-fascist democracy-by-acclamation or "soccer-stadium democracy,"<sup>3</sup> we interpret the ideas in terms of recent work on the political foundations of constitutionalism. Schmitt's distinction between legality and legitimacy, we suggest, rests on the unimpeachable insight that constitutional rules amount to nothing more than "parchment barriers" unless supported by the equilibrium political strategies of officials, citizens, political parties and other actors. In this setting, Schmitt's emphasis on the latent threat of mass violence amounts to nothing more than an attempt to dig down to the ultimate microfoundations of constitutionalism.

In Section 2, we focus on Schmitt's distinction between the norm and the exception. This distinction is related to legality and legitimacy, because Schmitt claimed that legality and legitimacy are convergent in normal times and divergent in exceptional situations. Yet the distinction between norm and exception raises separate issues as well, because Schmitt famously claimed that the exception necessarily has the potential to intrude upon the "closed system"<sup>4</sup> of constitutional legality in liberal regimes. We interpret this point in terms of the economic distinction between rules and standards, and in terms of the lawyerly idea of purposive interpretation. Schmitt's idea of "commissarial dictatorship" as a form of dictatorship that may violate certain constitutional rules in order to protect and conserve the overall structure of the constitutional order is a form of standard-based purposivism writ large.

Interpreting Schmitt in our terms might just amount to a different form of translation, not from German to English but from jurisprudential to social-scientific terms. Yet we think there is more to it than that. Casting Schmitt's insights in the more concrete and pragmatic terms of the social sciences might make it possible also to cast them, or some of them, in the form of testable hypotheses, letting the fresh air of fact into the occasionally feverish world of Schmitt scholarship. The ultimate aim would be to test whether and to what extent Schmitt's work generalizes beyond Weimar, to other times and constitutional or political systems. This is an aim that will to some degree de-contextualize his work, yet it is the logical conclusion of the Schmitt specialists' work in broadening access to his ideas.

## 1. Legality and Legitimacy: Political Foundations of Constitutionalism

Schmitt's last major work before the collapse of Weimar was Legality and Legitimacy, published in 1932. The work is in some respects inevitably time-bound and place-bound; in part, Schmitt was participating in the politically fraught legal polemics of the day, particularly

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<sup>3</sup> Stephen Holmes, *The Anatomy of Antiliberalism* (Cambridge, Mass: Harvard University Press, 1993) at 49.

<sup>4</sup> Schmitt, *Legality and Legitimacy*, *supra* note 1, at 4.

involving President Hindenburg's use of the emergency powers granted by Article 48 of the Weimar constitution. In this sense, Legality and Legitimacy is the hardest possible test case for our aim of interpreting Schmitt in generalizable social-scientific terms. Perhaps the work is so pervasively a creature of its background circumstances that it is hopeless to try to salvage any of its ideas from the wreck of Weimar, in many respects an outlier case for constitutional democracies. Yet we think that Legality and Legitimacy pioneers several major insights that political scientists and lawyers interested in constitutionalism have recently begun to appreciate and explore, in most cases seemingly without any awareness of Schmitt. Although the richness of Legality and Legitimacy means that one is somewhat spoiled for choice, we will focus on the connections among legality, legitimacy and the issue of the political foundations of constitutionalism.

Schmitt begins Legality and Legitimacy with a new typology of regimes, intended to supersede Aristotle's threefold classification of monarchy, aristocracy and democracy (each of which has both healthy and degenerate forms – the degenerate forms being respectively tyranny, oligarchy and mob rule). In Schmitt's taxonomy, there are legislative states in which the central locus of lawmaking is a representative parliament, jurisdiction states in which the courts develop freestanding legal norms, and governmental-administrative states in which the executive or the bureaucracy issues situation-specific decrees. One of the book's main theses is that the legislative state equates legitimacy with legality, which Schmitt argues is an impoverished account of legitimacy.

The problems with this equation are twofold. First, the general norms or rules of law enacted by representative legislatures through statutes typically assume a normal, stable state of affairs in which it is possible to imagine a "closed system of legality"<sup>5</sup> covering the whole space of possible policies. In such an environment, legality and legitimacy are largely congruent. Where the political and economic environment changes rapidly, however, exceptions to general statutes become necessary and legality and legitimacy may diverge. This is the problem of the exception, which we take up in Section 2 below.

A related but distinct problem, however, is logically antecedent to the distinction between the norm and the exception. In the legislative or parliamentary state, there is no role for direct political action by the masses, as opposed to the peaceful procedures of representative democracy; as Schmitt puts it, "[a] closed system of legality grounds the claim to obedience and justifies the suspension of every right of resistance."<sup>6</sup> But it is unclear, Schmitt points out, how legality by itself could causally motivate compliance with law (whether or not as a normative matter it justifies compliance with law). The legislative state "assumes away the issue of

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<sup>5</sup> Schmitt, *Legality and Legitimacy*, *supra* note 1, at 4.

<sup>6</sup> Schmitt, *Legality and Legitimacy*, *supra* note 1, at 4.

‘obedience’ .... Schmitt avers that contemporary legality does not account for *why* authority is obeyed.”<sup>7</sup>

Schmitt here is offering a critique, quite explicitly, of Max Weber’s famous classification of the grounds of legitimacy. Weber distinguished three sources of legitimacy: traditional, charismatic, and rational-legal. Schmitt in effect argues that the third cannot be sufficient by itself to support the legislative state, and that in fact “legality is in direct opposition to legitimacy.”<sup>8</sup> More precisely, legality is neither necessary nor sufficient for legitimacy. As Schmitt put it:

Linguistic usage today has already proceeded so far that it perceives the legal as something ‘merely formal’ and in opposition to the legitimate. Without a sense of contradiction, for example, one can today consider a dissolution of the Reichstag ‘strictly legal,’ even though it is, in fact, a coup d’état, and, vice versa, a parliamentary dissolution might substantively conform to the spirit of the constitution, and yet not be legal.

Schmitt’s examples here are provocative, perhaps deliberately so, and instill in liberal legalists a sense of foreboding; they tend to read Schmitt as implicitly referring to the street violence of the early 1930s, and perhaps even foreshadowing the events of 1933. Yet there is a less lurid interpretation. On this interpretation, Schmitt is pointing to the problem of parchment barriers. As Madison noted, in the face of widespread public sentiment, legal rules in written or convention-based constitutions may be swept away.<sup>9</sup> Constitutions face a pervasive commitment problem: for self-sufficient national states, there is no enforcer external to society who can police attempts to deviate from the constitutional rules.<sup>10</sup> Rational, self-interested citizens and political agents have no clear incentive to obey and enforce the law. The “closed system of legality” in the legislative state cannot, by itself, secure the political conditions for its own enforcement; obedience to or compliance with the law needs microfoundations in the incentives and beliefs of political actors, including voters, officials, political parties, interest

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<sup>7</sup> John P. McCormick, Identifying or Exploiting the Paradoxes of Constitutional Democracy?: An Introduction to Carl Schmitt’s *Legality and Legitimacy*, in Schmitt, *Legality and Legitimacy*, *supra* note 1, at xxi (quoting Schmitt, *Legality and Legitimacy*); emphasis in original.

<sup>8</sup> Schmitt, *Legality and Legitimacy*, *supra* note 1, at 9.

<sup>9</sup> James Madison, *Federalist Papers* No. 48: “Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? [...] [A] mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.” See also James Madison, *Letter to Thomas Jefferson, October 17, 1788* (“[E]xperience proves the inefficiency of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current.”)

<sup>10</sup> Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge: Cambridge University Press, 2000) at 58, 94-95; Daron Acemoglu, “Why Not a Political Coase Theorem? Social Conflict, Commitment, and Politics,” *Journal of Comparative Economics* 31[2003] 622-23, 638.

groups, and social movements. In the terms of legal theory, Schmitt anticipates the point that compliance with the large-c Constitution is shaped and constrained by small-c constitutionalism.

A literature in political science recognizes this problem – what are the political foundations of constitutionalism? -- and attempts to identify conditions under which constitutions generally, or particular constitutional structures such as elections, can become incentive-compatible or self-enforcing for rational, self-interested agents.<sup>11</sup> In one pioneering model, an incumbent government faces two or more political actors – perhaps classes, or ethnic groups, or political parties. If either cooperates with the incumbent, then those two may join forces to prey upon the other political actor. The actors must then coordinate in order to block predation by the incumbent, which if it occurs would benefit the incumbent but reduce overall welfare. If the two actors have Assurance Game preferences, such that cooperation is the first choice for both, then the two may resist the incumbent so long as there is a focal point that allows them to coordinate their resistance. Even if the two actors have Prisoners' Dilemma preferences, such that defection (i.e. cooperation with the incumbent) would be the dominant strategy for each in a single-shot game, cooperation to resist the incumbent is an equilibrium<sup>12</sup> so long as the long-run benefits of doing so are sufficiently high, neither actor discounts the future too heavily, and what counts as a cooperative move is sufficiently clear. The last proviso means that focal points have a role even in the indefinitely repeated Prisoners' Dilemma game, insofar as the would-be cooperators need to possess common knowledge about what cooperation entails.

This model focuses on agency problems; the actors' problem is to prevent welfare-reducing exploitation by the incumbent. A different but compatible class of models puts microfoundations under constitutionalism by asking under what conditions parties, classes of other groups will or will not have incentives to rebel against the constitutional order, or instead play within the rules of the political game. These models particularly resonate with the concerns that animated legal and political theorists situated within Weimar, whose constitution teetered precariously above a whirlpool of competing political movements, some of which aimed to subvert the constitution altogether.

The basic idea of these models is to endogenize elections, rather than taking them for granted. In one model,<sup>13</sup> elections grant the winning party control of the state, which is assumed

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<sup>11</sup> Barry R. Weingast, "Political Foundations of Democracy and the Rule of Law," *American Political Science Review* 91[1997]: 245-263; Barry R. Weingast, "Self-Enforcing Constitutions: With An Application to Democratic Stability in America's First Century," Working Paper, Hoover Institution, September 2007; James D. Fearon, "Self-Enforcing Democracy," Paper presented at the 2006 Annual Meetings of the American Political Science Association, Philadelphia, PA, August 31-September 3; Adam Przeworski, *Capitalism and Social Democracy* (Cambridge: Cambridge University Press, 1985) at 35-38. For legal applications, see Daryl Levinson, "Parchment and Politics: The Positive Puzzle of Constitutional Commitment," *Harvard Law Review* (forthcoming).

<sup>12</sup> By virtue of the folk theorem, noncooperation is also an equilibrium.

<sup>13</sup> For various versions, see Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge: Cambridge University Press, 1991), ch. 1; Adam Przeworski, "Democracy as an Equilibrium," *Public Choice* 123[2005]: 253-273.

to be an indivisible good. The losing factions then face the choice whether to fight, or else to wait for the next election cycle and take the chance of winning power for themselves. If the long-run net benefit of participating in the electoral system is greater than the net expected benefit of fighting now, rather than waiting for a turn in office, then each party will have self-interested incentives to play within the rules. In this account, elections are essentially a randomizing device that gives each party an equal (or at least sufficient) expectation of taking power in the future. Just as one might divide a toy between two children through “taking turns,” in order to prevent them from fighting over it, so too the indivisible good of state power is allocated intertemporally, in expectation, through elections.

A critique of this model is that elections are inefficiently expensive if they serve as little more than randomizing devices. An alternative model thus explains elections as focal points for coordinating resistance to leaders.<sup>14</sup> Whether the leaders do or do not comply with the results of elections is an easily observable public signal that provides the crucial element of common knowledge; all concerned know that others know what has occurred, and so on. Leaders are disciplined by the “rebellion constraint”<sup>15</sup> and elections have no very elevated political function, but do help to make democracy in a minimalist sense<sup>16</sup> a political equilibrium.

Finally, the relationship between mass political action and democracy is explored from another angle in a model of the expansion of the franchise in democratic polities.<sup>17</sup> In this model, the threat of mass rebellion induces wealthy elites to grant a broadly democratic franchise. Given reasonable assumptions about the distribution of wealth, a broad franchise ensures that the median voter will favor redistributive measures, so democratization in effect allows elites to commit to future redistribution. This model assumes that a commitment to an expanded franchise is credible whereas a simple elite promise to enact redistributive policies would not be, yet this is hardly obvious; if mass rebellion is costly, so that elites can simply renege on their promises to enact first-order redistributive measures, then perhaps elites can also renege on the grant of an expanded franchise.<sup>18</sup> Yet violations of the franchise and of the results of elections may be more visible, and thus less costly for mass publics to monitor, than elite incumbents’ undermining of redistributive policies. Here too, the relative clarity of electoral rules makes their violation a useful focal point for coordinating mass uprising against exploitative incumbents.

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<sup>14</sup> Fearon, “Self-Enforcing Democracy,” *supra* note 11.

<sup>15</sup> Adam Przeworski, “Political Parties and Results of Elections,” in *Democracy and the Rule of Law*, Adam Przeworski & José María Maravall eds., (Cambridge: Cambridge University Press, 2003) at 135.

<sup>16</sup> Adam Przeworski, “Minimalist Conception of Democracy: A Defense,” in *Democracy’s Value*, Ian Shapiro & Casiano Hacker-Cordón eds. (Cambridge: Cambridge University Press, 1999).

<sup>17</sup> See Daron Acemoglu & James A. Robinson, *Economic Origins of Dictatorship and Democracy* (Cambridge: Cambridge University Press, 2006).

<sup>18</sup> Fearon, *supra* note 11.



In Schmittian terms, models of the political foundations of constitutionalism both offer an account of legitimacy and also connect legitimacy to constitutional legality. All the models interpret legitimacy as a game-theoretic equilibrium: a constitution is legitimate when it has microfoundations in the preferences, beliefs and choices of relevant actors, none of whom can do better by unilateral attempts to subvert the constitutional order. Legality by itself is insufficient to create legitimacy in this sense; writing a constitution on a piece of paper, by itself, does nothing to make the constitution incentive-compatible. Yet legality can play an indirect role in securing legitimacy-as-equilibrium: a written constitution or clearly defined constitutional conventions<sup>19</sup> may establish focal points that enable political actors to coordinate on action, including mass resistance or rebellion. In a sense, then, these models help to answer the question Schmitt posed to Weber, about what exactly legality has to do with legitimacy, and what exactly grounds obedience to the legislative rule-of-law state.

Ironically, this answer may after all be compatible with Weber's views. Although Weber can be read to suggest that legality is itself a form of legitimacy, another reading is that, in Schmitt's paraphrase of Weber, "the most widely prominent form of legitimacy today is the belief in legality" (emphasis added).<sup>20</sup> If the key point is public belief in legality, rather than legality as judged by the expert analyst, then we are not so far either from later sociological accounts of legitimacy in the jurisprudence of H.L.A. Hart,<sup>21</sup> or from the equilibrium accounts of the political foundations of constitutionalism that we have reviewed. In the latter accounts, public belief in legality is crucial; what matters is whether governmental violation of a clear constitutional rule, such as holding elections and respecting their results, becomes common knowledge among the public. In this sense, we may see Legality and Legitimacy as situated within a theoretical stream that runs from Weber all the way to the contemporary political science of constitutionalism. Within this stream, Schmitt has the honor of reviving Madison's critical question about parchment barriers – about why constitutional rules, written or indeed unwritten, have any causal efficacy in politics – and using the vivid context of Weimar, in which the political foundations of constitutionalism were patently problematic, in order to put the question in its sharpest possible form.

Finally, the models of the political foundations of constitutionalism allow a demystifying and less ominous interpretation of Schmitt's insistence that the public's role under constitutionalism is in effect restricted to negative measures – either rejection of proposals in a referendum or, in extreme cases, resistance to the ruling power.<sup>22</sup> In the models we have canvassed, political groups exert influence on incumbents and competitors for powers not through persuasion or democratic deliberation, but through credible threats of resistance or

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<sup>19</sup> Conventions in the sense of "norms," not "assemblies."

<sup>20</sup> Schmitt, *Legality and Legitimacy*, *supra* note 1, at 9. Although the exact quote does not appear in Weber, the point is consistent with Weber's views. See the translator's note at 126 n.14.

<sup>21</sup> H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

<sup>22</sup> Schmitt, *Legality and Legitimacy*, *supra* note 1, at 29-31, 87-90.

armed conflict. In the lurid context of Weimar these ideas call up associations with torchlight rallies and thuggish street violence – “soccer-stadium democracy” – but this is to overlook that a credible threat of mass public resistance to exploitative action by incumbents can be necessary for the health of constitutionalism and democratic institutions. As Schmitt put it, “the ancient problem of ‘resistance against the tyrant’ remains, that is, resistance against injustice and misuse of state power, and the functionalistic-formalistic hollowing out of the parliamentary legislative state is not able to resolve it.”<sup>23</sup> Here too, Schmitt’s distinction between legality and legitimacy opens up a way of thinking about constitutionalism that proves more fruitful, because more politically realistic, than liberal insistence that legitimacy can straightforwardly be reduced to legality.

## 2. Rules, Standards, and Executive Primacy

Schmitt famously declared that “[s]overeign is he who decides on the exception.”<sup>24</sup> This enigmatic statement, which underlies his critical view of parliamentary democracy, is related to two themes of American jurisprudence: the distinction between rules and standards, and the limits on executive power.

Let us begin with rules and standards. Schmitt did not use the modern law-and-economics argot, but his argument that legislatures cannot enact into law general rules that adequately guide and constrain executives during crises can be put into the modern idiom.<sup>25</sup> In law and economics, a rule is a norm that is specified in advance of the conduct that it regulates. A standard is a norm that is applied retroactively to conduct that has already occurred. For example, a simple traffic rule—speed limit of 60 miles per hour—is determined in advance, and then applied to drivers. The tort standard—drive with “due care”—does not specify in advance the speed or other attribute of driving behavior that will be sanctioned. A police officer or court will determine whether a driver has acted with due care on the spot, or afterward. The legislature that enacts a standard puts off the determination of the norm by delegating that function to an enforcement agent or court.

In order to enact a sensible rule, the decisionmaker must invest resources in predicting the future and evaluating future behavior. This investment is the cost of using rules. One does not incur this cost with standards because they are applied after the behavior has occurred. The benefit of using rules is that they render predictable the legal consequences of one’s actions, enabling people to plan and deterring them from socially harmful behavior. By contrast, because standards are vague, decisionmakers will have difficulty implementing them consistently and

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<sup>23</sup> Schmitt, *Legality and Legitimacy*, *supra* note 1, 29.

<sup>24</sup> Carl Schmitt, *Political Theology*, George Schwab trans. (Chicago: University of Chicago Press, 1985) at 5.

<sup>25</sup> Schmitt’s views on the limits of parliamentary democracy can be found in Carl Schmitt, *The Crisis of Parliamentary Democracy* (Ellen Kennedy trans., 1985), among other places. This aspect of his thought, and its relationship to modern jurisprudential debates, is lucidly described in Scheuerman, *Liberal Democracy and the Social Acceleration of Time*, *supra* note 2, at 124.

individuals will have a hard time predicting the legal consequences of their actions. Thus, it is better to use rules when the behavior in question recurs frequently and predictably<sup>26</sup> – when the behavior is the “norm.” The investment in determining the optimal rule is spread over a large set of actions. When a particular action does not recur frequently and predictably – when it is the “exception” -- decisionmaking should be deferred until the action occurs, that is, a standard should be used.

It should be clear that law by standards is nearly the same as retroactive determination of law. The difference is that the standard is specified in advance, ruling out at least some behavior. The due care standard, for example, rules out a subsequent determination that driving at 150 miles per hour is lawful. Standards can be more or less specific; the more specific, the more they resemble a rule. Indeed, the choice between rules and standards is not binary; a perfectly specified rule and an extremely vague standard lie at the end of a spectrum, and all legal norms lie in between. Although we will continue to refer to rules and standards as ideal types, the continuous nature of this variable should be kept in mind.

The U.S. Congress enacts both rules (the Tax Code) and standards (antitrust law). Even highly complex rules, however, have pockets of vagueness—standards—that are left to courts to work out over time. And vague statutes gradually resolve themselves into sets of rules as judicial interpretations accumulate and form precedent. The same dynamic processes are familiar from the common law. In the bloodless language of law and economics, rules and standards reflect tradeoffs, and it is not surprising, indeed it is predictable, that certain areas of the law are dominated by rules, while other areas of the law are dominated by standards.

From this perspective, the subversive reputation of Schmitt’s work on sovereignty might seem hard to understand. To understand why Schmitt’s work is in fact radical, one should recall that lawyers who discuss rules and standards almost always do so in the context of the common law. When a legislature enacts a standard, it expects courts to interpret it in the course of resolving disputes between litigants. Judges are expected to be impartial, and various rules ensure that they usually are. Trial judges are monitored by appellate courts; and judicial decisions, while important for the litigants, do not have larger, systemic effects unless other judges in other courts find them persuasive. As judges decide cases, the vague standards gradually take on content and resolve into rules of varying specificity. Legislatures can intervene and overturn opinions that run counter to the original purposes of the statutes that are being interpreted. In interpreting statutes, and in other forms of common law development, judges in this way engage in retroactive lawmaking but of a type that is gradual and relatively predictable, that is subject to legislative veto, and hence that does not offend the rule of law.

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<sup>26</sup> See Louis Kaplow, “Rules Versus Standards: An Economic Analysis,” *Duke Law Journal* 42[1992]: 557-629.

Now consider the setting that interested Schmitt: the role of the executive. To understand Schmitt's argument, we need to introduce another concept from economics—agency costs. An agency relationship consists of two people: a principal and an agent.<sup>27</sup> In the simplest models, the agent takes some action that benefits or harms the principal, and then the principal rewards or punishes the agent. For example, an employer (the principal) will reward a worker (the agent) with a high wage if the agent produces a high level of output, and sanction the worker with a low wage or some other penalty if the agent produces a low level of output.

In the standard agency model, the agent's level of effort stochastically determines the level of output. A high level of effort is more likely to produce a high level of output, but luck may intervene, so that high effort leads to low output or low effort leads to high output. If the principal can observe the level of effort, the optimal contract simply rewards the agent who uses high effort and punishes the agent who uses low effort. But the model assumes that the principal cannot directly observe effort and can only observe output. Thus, a contract that rewards high output may inadvertently punish the high-effort worker who experiences bad luck. Nonetheless, the principal can spur a worker to high effort only by rewarding him for high output. If the worker is risk-averse, the principal may blunt the incentive somewhat, reducing the payoff slightly when output is high and increasing the payoff when output is low, but maintaining a difference between them.

This model has been applied to political institutions,<sup>28</sup> and indeed is implicit in Madison's theory of separation of powers. Madison and the other founders feared an unconstrained government. Most of the direct power to do harm (as well as good) lay with the executive, who commands the troops. The executive is the agent; the people are the principal. The challenge was to design a constitution that gave the executive the power to govern, while aligning his interests with those of the people.

Simplifying greatly, the original solution combined elections and separation of powers. The people elect (directly or indirectly) members of Congress who deliberate and determine policy which is embodied in law. The president—also (indirectly) elected by the people—merely executes the law determined by Congress. The courts ensure that the president executes the law in good faith. The people reward the president who faithfully executes the law by reelecting him, and punishes the president who does not by ejecting him from office. The public also uses elections to select among candidates the one who seems most likely to take the rule of law seriously. Electoral mechanisms similarly discipline Congress. The overall picture is one where the people elect two agents—the president and Congress—and uses one of the agents (Congress) to help control the other (the president).

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<sup>27</sup> For a textbook treatment, see Jean-Jacques Laffont & David Martimort, *The Theory of Incentives: The Principal-Agent Model* (Princeton: Princeton University Press, 2001).

<sup>28</sup> See, e.g., Timothy Besley, *Principled Agents?: The Political Economy of Good Government* (Oxford: Oxford University Press, 2007).

Madison's theory rested on a key assumption about legislative-executive relations that Schmitt clearly saw, in a different historical setting, but that has been mostly neglected by modern scholars. In order to control the president, Congress must enact law in the form of rules, not standards. Rules can constrain the president by making it clear in advance what he may do and not do; this makes it easy for Congress, the courts, and the people to determine later whether the president has complied with or broken the law. Standards cannot constrain the president, or at least not as well.

Consider a recent example. After 9/11, Congress enacted the Authorization for Use of Military Force, which enabled the president to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."<sup>29</sup> The president was also subject to a number of existing statutes, such as the Foreign Intelligence Surveillance Act and the Anti-Torture Statute. The AUMF created a standard governing the deployment of forces against terrorist threats. Policy questions such as how much force to use, against whom, and where, were left to the president to answer. As a result, when the president expanded the war against terror to Pakistan, no one could argue that the president had broken the law, whatever the merits of this decision as a matter of policy. By contrast, the wiretapping and interrogation policies adopted by the Bush administration more clearly violated the relatively specific rules in FISA and the Anti-Torture Act.

Schmitt believed that constitution-writing assemblies and legislatures cannot enact substantive laws that govern the executive during emergencies; the most the rulemaker can specify in advance is who will exercise emergency powers.<sup>30</sup> The argument falls out of the rules/standards analysis. Emergencies are, by their nature, unique. Every threat to the nation is different. If emergencies are unique, then their features cannot be predicted on the basis of the past, which means that legislatures will not be able to use rules to govern the executive's behavior during them. The cost of predicting the nature of the next security threat is too high; and given their busy agendas, legislatures have little motivation to invest the resources in trying to predict the future. Instead of enacting rules that govern the executive during emergencies, legislatures enact standards, in effect delegating to the executive the power to take aggressive actions to defend the nation under ill-defined conditions and subject to ill-defined constraints. In the United States, most emergency legislation takes the forms of standards; and it exists alongside a constitutional understanding that the executive has the primary responsibility for fending off foreign attacks and addressing other threats, and may draw on military and law enforcement resources to do so.

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<sup>29</sup> *Authorization for Use of Military Force Against Terrorists*, Pub.L. 107-40, 115 Stat. 224, § 2(a).

<sup>30</sup> *Political Theology*, *supra* note 24, at 7.

If Congress cannot regulate in advance of emergencies, might it not be able to regulate once the emergency begins? The problem is that in the early stages of the emergency, the legislature is hampered by its many-headed structure. Large bodies of people deliberate and act slowly (unless they act as mobs). The best that the legislature can do is ratify the executive's actions by blessing it with a retroactive authorization, or call a halt to the executive's response by defunding it. As the emergency matures, the legislature continues to be hampered. Crises unfold in an unpredictable fashion; secrecy will be at a premium. Public deliberation compromises secrecy; the unpredictability of the threat eliminates the value of lawmaking. The legislature's role in the emergency is marginal. It can grant or withhold political support; and it can legislate along the margins. The legislature may be able to undermine the executive response by defunding it, but it will rarely do so because some response is always better than none. The problem for the legislature is that it cannot make policy in a fine-grained way; its choice—broad support or none at all—is no choice at all. Anticipating a body of literature in positive political theory, Schmitt noted that “the extraordinary lawmaker [i.e. the President of the Reich] can create accomplished facts in opposition to the ordinary legislature. Indeed, especially consequential measures, for example, armed interventions and executions, can, in fact, no longer be set aside.”<sup>31</sup> The President's first-mover role – the “presidential power of unilateral action”<sup>32</sup> – implies that he can create a new status quo that constrains Congress' subsequent response, both in practical terms and because the President can use his veto powers to block legislative attempts to restore the status quo ante.

Courts face similar problems. Detailed statutes enacted before the emergency will seem antiquated and inapt. Courts will feel pressure to interpret them loosely or use procedural obstacles to avoid their application. For this reason, violations of FISA and the Anti-Torture Act never led to prosecutions. Vague statutes enacted before and after the emergency provide no rule of decision, and courts are reluctant to substitute their views about policy for those of the executive, which has far more expertise and resources. Commentators have urged courts to use constitutional norms or even international law to control the executive, but these norms also prove to be ambiguous standards rather than clear-cut rules. To apply such standards, courts would have to engage in judicial policymaking. But judges do not believe that they have the information or expertise to make policy during emergencies and so they have seldom taken this approach.

The upshot is that the Madisonian theory is a poor description of how modern democratic governments operate during emergencies and in anticipation of emergencies. Congress cannot realistically enact rules in advance, and cannot commit to enforce them if violated, so the policymaking authority during emergencies rests with the executive. Indeed, because the

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<sup>31</sup> *Legality and Legitimacy*, *supra* note 1, at 69-70 (internal quotation marks omitted).

<sup>32</sup> T.M. Moe & W.G. Howell, “The Presidential Power of Unilateral Action,” *Journal of Law, Economics, and Organization* 15[1999]: 132-179; William G. Howell, *Power Without Persuasion: The Politics of Direct Presidential Action* (Princeton: Princeton University Press, 2003).

executive has responsibility for protecting the country during emergencies, only the executive has motivation to prepare for emergencies, which it does by putting into place institutions and agencies, and the legal authority that they will rely on. It is the executive that has constructed the national security state; Congress has mostly ratified the policies adopted by a series of presidents. Congress retains a very crude veto power; it can interfere executive policymaking during emergencies only by withdrawing funds and, in effect, calling the emergency off. But Congress is highly constrained by the nature of the threat, and can use this blunt instrument only in extreme circumstances. The current system, then, is better described as one of executive primacy than separation of powers. The president makes and executes policy subject to weak vetoes by Congress and the courts, which can be exercised only after the president has committed the country to a response to the perceived threat, and hence have little practical effect.

Although he saw clearly that the conditions of modern politics and the administrative state tended to generate a plebiscitary executive,<sup>33</sup> Schmitt went astray by arguing that such a system would eventually result in a Caesarist form of democracy by acclamation.<sup>34</sup> Electoral institutions remain an effective means to control the executive. Recall that the agency model requires that the principal observes output (“payoffs”) and reward or punish the agent accordingly. In the United States, the public observes the output—security or no security—and holds the executive responsible. Democracy, albeit of a limited sort, continues to work. Schmitt believed that an executive with the power to declare emergencies and dictate policy during emergencies, could use the same power to undermine electoral institutions, the press, and other checks. But that has not happened in the United States; Lincoln, who enjoyed near-dictatorial powers, submitted to an election in 1864, as did Franklin Roosevelt in 1944. Perhaps it has not happened because of luck, but for the time being it does seem likely that the public would repudiate any president who used an emergency as an excuse for attacking democratic institutions. Indeed, it seems unlikely that his subordinates in the government would cooperate with him.<sup>35</sup>

Lincoln famously asked “are all the laws *but one* to go unexecuted and the government itself go to pieces lest that one be violated?”<sup>36</sup> Schmitt took a similar view, arguing that during an emergency, a “commissarial dictator” must violate existing laws to save the state.<sup>37</sup> This idea follows from the problem with rules: that they cannot provide adequate guidance for unique situations. If the legislature nonetheless enacts rules for emergencies, or general rules that lack exceptions for emergencies, the executive must be willing to violate them in order to save the

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<sup>33</sup> Schmitt, *Legality and Legitimacy*, *supra* note 1, at 88-91.

<sup>34</sup> Schmitt, *The Crisis of Parliamentary Democracy*, *supra* note 25, at 16-17.

<sup>35</sup> For a discussion, see Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford: Oxford University Press, forthcoming).

<sup>36</sup> Abraham Lincoln, “Message to Congress in Special Session (July 4, 1861),” reprinted in 4 *Collected Works of Abraham Lincoln* 421, 430 (Roy P. Basler ed., 1953) (emphasis in original).

<sup>37</sup> See Carl Schmitt, *Die Diktatur* (Munich: Duncker & Humbolt, 1921).

nation. However alarming this proposition might seem, it follows from a standard notion in the law: the rule-interpreter must enforce the purpose behind the rule when enforcement of the literal terms of the rule itself would have bad consequences. This notion is termed “purposivism” and, in America, is associated with the “legal process” approach to interpretation.<sup>38</sup> In this sense, Schmitt can be understood as a legal process or purposivist interpreter, writ very large.<sup>39</sup> What is different in the emergency case is that the stakes are higher, and the executive rather than the courts takes primary responsibility for interpreting the rule. But there should be no great mystery about Schmitt’s argument for executive primacy, which is perfectly straightforward – whether or not correct – when read in light of the modern distinction between rules and standards.

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<sup>38</sup> See Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, William N. Eskridge, Jr. & Philip P. Frickey eds. (Foundation Press, 2001).

<sup>39</sup> We thank Fred Schauer for this point.