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# A THEORY OF REPUBLICAN PREROGATIVE

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*Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap—let it be taught in schools, in seminaries, and in colleges; let it be written in Primmers, spelling books, and in Almanacs;—let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation . . . .*

—Abraham Lincoln, Lyceum Address, January 27, 1838<sup>1</sup>

*“Is there, in all republics, this inherent, and fatal weakness?” “Must a government, of necessity, be too strong for the liberties of its people, or too weak to maintain its own existence?”*

. . .

*[T]he attention of the country has been called to the proposition that one who is sworn to ‘take care that the laws be faithfully executed,’ should not himself violate them. . . . To state the question more directly, are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?*

—Abraham Lincoln, Message to Congress, July 4, 1861<sup>2</sup>

It was a dark time for the United States. Hopelessly outnumbered and outgunned, the federal troops at Fort Sumter surrendered to Confederate forces on April 13, 1861. Four days later, Virginia politicians voted to secede, and the Commonwealth militia mobilized to seize federal positions throughout the state. Terror swept through Washington, D.C., which suddenly found itself “on a military frontier.”<sup>3</sup> Then things got worse. The

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1. Abraham Lincoln, Address to the Young Men’s Lyceum of Springfield, Illinois (Jan. 27, 1838), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858, at 28, 32 (Don E. Fehrenbacher ed., 1989).

2. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 426, 429–30 (Roy P. Basler ed., 1953) [hereinafter WORKS OF LINCOLN].

3. BENJAMIN FRANKLIN COOLING, SYMBOL, SWORD AND SHIELD: DEFENDING WASHINGTON DURING THE CIVIL WAR 29–30 (1975). See also *id.* at 37 (describing 2,000 Virginian militiamen setting

Maryland state legislature announced a special session to decide whether to follow Virginia's example. Riots by Confederate sympathizers exploded across Baltimore as word got out that the federal government was trying to bring in reinforcements by train. Mobs in Maryland blocked Massachusetts's troops from reinforcing the pathetically under-defended capital. Authorities in Baltimore burned the city's main railroad bridges—an act that “looked like plain treason” and left the government in Washington “defenseless and cut off from the rest of the North.”<sup>4</sup>

War was “an hour away from the capital and moving closer every minute,”<sup>5</sup> terrified civilians were flooding out of Washington,<sup>6</sup> and even the first arrival of reinforcements by boat left 1600 Union soldiers facing 8000 Confederate soldiers right outside the city.<sup>7</sup> On April 26, 1861, General-in-Chief Winfield Scott warned that “an attack on Washington was possible at any moment” and issued “desperate orders” “not to give way on the bridges leading into the city ‘till actually pushed by the bayonet.’”<sup>8</sup> The next day, Lincoln issued a tersely worded order authorizing General Scott to suspend habeas corpus “at any point on or in the vicinity of any military line, which shall be used between the City of Philadelphia and the City of Washington.”<sup>9</sup> Union forces made hundreds of arrests in the ensuing weeks, including of leading politicians and private citizens whose worst crime seems to have been skepticism about the Union case.<sup>10</sup> And Washington did not fall.

Lincoln's suspension of habeas corpus is widely recognized as

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up an artillery emplacement at Mount Vernon); JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 278–80* (1988) (discussing Virginia's secession from the Union).

4. MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 5 (1991). See also COOLING, *supra* note 3, at 34 (describing bridge burning as an effort “to prevent more northern volunteers from moving through the city to Washington”); DANIEL FARBER, *LINCOLN'S CONSTITUTION* 16 (2003) (“Washington was defended only by eight army companies, two hundred marines, and the city's militia.”). See generally GEORGE EDGAR TURNER, *VICTORY RODE THE RAILS: THE STRATEGIC PLACE OF THE RAILROADS IN THE CIVIL WAR* (1953) (describing the Union's heavy reliance on railroads for troop movements throughout the war). Note that the famous John Merryman was held without charge for burning train bridges in Baltimore. *Ex parte Merryman*, 17 F. Cas. 144, 147–48 (C.C.D. Md. 1861) (No. 9,478).

5. PHILLIP SHAW PALUDAN, *THE PRESIDENCY OF ABRAHAM LINCOLN* 69 (1994).

6. COOLING, *supra* note 3, at 34 (describing an exodus of women and children from Washington).

7. NEELY, *supra* note 4, at 8.

8. *Id.*

9. Letter from President Abraham Lincoln to General Winfield Scott (Apr. 27, 1861), in 4 *WORKS OF LINCOLN*, *supra* note 2, at 347, 347. There were two versions of the letter from Lincoln to Scott. For an explanation of which order was actually received by Scott, see NEELY, *supra* note 4, at 8–9.

10. NEELY, *supra* note 4, at 14–31.

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unconstitutional. And yet, somehow, it is also widely seen as an act of necessary statesmanship. What should we make of this decision to break the law in the teeth of a crisis—and perhaps more important, what should we make of how history has evaluated that choice? Largely in response to that puzzle, this Article introduces a pair of ideas: the privilege of republican prerogative and the obligation of a republican ethic. Together, they offer a coherent and principled account of how our political culture can accommodate certain forms of executive lawbreaking without resorting to catchall claims of legal privilege or constitutional override. Republican prerogative is probably not the only plausible justification for extraconstitutional lawbreaking, but it is a crucial one, with deep roots in our intellectual tradition.

One qualification is so important as to be worth additional emphasis. As a definitional matter, and in keeping with the political theory literature, I use the word “prerogative” here to reference extralegal executive action that claims neither statutory nor constitutional sanction. As a methodological matter, that is because the Article seeks in part simply to *describe* an important intellectual tradition that as a matter of historical fact approaches certain official lawbreaking in precisely that way: as illegal, unconstitutional—and yet entirely justifiable. To be sure, the historical materials synthesized here are certainly relevant to constitutional arguments grounded in structure and tradition. But making a viable legal case for a comparable constitutional privilege would require further engagement with questions about legitimate sources of constitutional meaning and their relative priority, in a context of doctrinally relevant political practice that is limited at best.<sup>11</sup> The Article thus leaves open the question of what comparable privileges might be claimed under Article II of the Constitution.

On that background, the Article has two goals. First, it offers a coherent taxonomy of the surprisingly undisciplined field of extralegal prerogative theory. Modern prerogative theorists have focused on hotly contested debates about the conceptual relationship between emergency and the rule of law,<sup>12</sup> about whether to legalize executive lawbreaking in

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11. Some might also have normative and prudential misgivings about lodging a non-textual emergency privilege in the Constitution. *See infra* Part I.A.4 (describing potential misgivings).

12. *See generally* BONNIE HONIG, EMERGENCY POLITICS: PARADOX, LAW, DEMOCRACY 65–86 (2009); PAUL W. KAHN, POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 121–22 (2011); CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 10–12 (George Schwab trans., 1922); GIORGIO AGAMBEN, STATE OF EXCEPTION (Kevin Attell trans., 2005); NOMI CLAIRE LAZAR, STATES OF EMERGENCY IN LIBERAL

emergency,<sup>13</sup> and about whether the executive can actually be checked.<sup>14</sup> Comparably careful attention has not been paid to the requirements that would condition any extraconstitutional version of the privilege. The various views on that question tend to be hinted at rather than developed, emerging from stray comments, illustrative examples, and brief gestures toward the imponderability of such things. Even the most systematic writings on this subject, moreover, are often internally contradictory. The authors and actors contain multitudes, as real people so often do, and often cycle through a variety of different instincts about extralegal action. From that welter, this Article seeks to extract five distinct views on extralegal and non-constitutional prerogative: legal absolutism; legal nihilism; a general welfare prerogative in both permissive and restrictive forms; and a “republican” prerogative.<sup>15</sup>

As the focus of this Article, republican prerogative is both subtler and more complicated than the other views of extralegal justification. As its various threads have emerged from historical discussions, republican prerogative is available when: (1) the republic faces a sudden, irregular, and existentially severe threat; (2) the executive adopts a response that is

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DEMOCRACIES (2009); THE LIMITS OF CONSTITUTIONAL DEMOCRACY (Jeffrey K. Tulis & Stephen Macedo eds., 2010); Richard H. Fallon, Jr., *Interpreting Presidential Powers*, 63 DUKE L.J. 347 (2013).

13. See generally BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM (2006); CLEMENT FATOVIC, OUTSIDE THE LAW: EMERGENCY AND EXECUTIVE POWER (2009); MICHAEL A. GENOVESE, PRESIDENTIAL PREROGATIVE: IMPERIAL POWER IN AN AGE OF TERRORISM (2011); OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE (2006); BENJAMIN A. KLEINERMAN, THE DISCRETIONARY PRESIDENT: THE PROMISE AND PERIL OF EXECUTIVE POWER (2009); CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN MODERN DEMOCRACIES (1948).

14. See generally BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010); JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 (2012); ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010); FREDERICK A.O. SCHWARZ JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR (2007).

15. The use of “republican” here is meant in a relatively thin and emphatically historical sense. The basic sketch in the Stanford Encyclopedia of Philosophy is as good a summary as any:

“[Classical] republicanism refers to a loose tradition or family of writers in the history of western political thought, including especially: Machiavelli and his fifteenth-century Italian predecessors; the English republicans Milton, Harrington, Sidney, and others; Montesquieu and Blackstone; the eighteenth-century English commonwealthmen; and many Americans of the founding era such as Jefferson and Madison. The writers in this tradition emphasize many common ideas and concerns, such as the importance of civic virtue and political participation, the dangers of corruption, the benefits of a mixed constitution and the rule of law, etc.; and it is characteristic of their rhetorical style to draw heavily on classical examples . . . .”

Frank Lovett, *Republicanism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2014), <http://plato.stanford.edu/archives/sum2014/entries/republicanism>. To that list I would add two points of particular emphasis: (1) a special concern with the positive aspects of liberty, especially the capacity to participate in the collective construction of national identity; and (2) a faith in the rule of law as grounded in the legitimacy that only popular sovereignty can bestow.

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strictly necessary and strictly limited to the exigency of the moment; and (3) the executive discloses and takes responsibility for the violation. This view has the peculiar characteristic of being advocated in worked-out form nowhere and yet gestured at piecemeal almost everywhere. The Article therefore places special emphasis on identifying and systematizing republican prerogative as one particular claim of lawbreaking privilege that has a long (though theoretically underdeveloped) historical pedigree and a striking (though latent) coherence.

The Article's second goal is to engage a problem that has plagued discussions of extralegal prerogative for centuries: if the prerogative framework exists by definition entirely outside of the legal infrastructure, then how can we speak intelligibly of limits on its exercise? The existing literature does not appear even to recognize this problem, let alone offer a solution to it. At least for republican prerogative, it seems the answer must be grounded in what is described here as the republican ethic: a normative claim that our constitutional republic, in the form that we have given it, is an intrinsically value-bearing entity, worthy of moral consideration and creating moral obligations in its own right. On this view, the republican prerogative must be grounded in a belief that the moral requirements of a republican ethic trump the legal requirements of our Constitution and laws. In that sense, the elements of republican prerogative collectively reflect a sufficient (though likely not necessary) condition for officials to break the law.

We are all familiar with the idea of moral obligations trumping legal ones. But this draws on moral considerations of a somewhat different stripe. Exercising republican prerogative is like violating a categorical ban on theft by stealing bread for your hungry child, in that it answers moral imperatives to which a particular law is blind. But it is unlike that sort of morally justified illegality in its imposition of a far more demanding necessity requirement. It is like the civil disobedience of Jim Crow protests in that it relies on a moral claim that offers no cognizable legal defense. But it is unlike that form of morally justified illegality in that it does not elevate non-legal considerations over the law, much less contemplate resistance to laws that are themselves systematically unjust. Instead, the prerogative contemplates a regretful, even tragic, violation of the very laws that the violator's act aims ultimately to preserve.

The Article proceeds in three steps. The first should be of interest for both legal and extralegal theories of executive lawbreaking. The second and third are of most obvious interest to the latter, although they also bear on questions of constitutional structure and tradition. Part I starts with an

indispensable predicate inquiry: how does the rule of law fall predictably short, and how can the office of the executive be empowered to respond? This question turns out to be of central importance for understanding and evaluating the range of historical views on extralegal prerogative. Relying on that discussion, Part II then isolates, identifies, and descriptively synthesizes as “republican prerogative” an important historical strain that has not previously been recognized for what it is. This second part seeks both to describe the elements of republican prerogative and to explain how a republican ethic limits its exercise. It concludes by reviewing four historical episodes as test cases for the theory. Part III then explores some important implications of republican prerogative and confronts the most significant problems that it raises. At a minimum, it suggests, the republican prerogative offers a moral safe harbor for some kinds of executive lawbreaking and subverts claims of historical precedent for a constitutional privilege to break the law.<sup>16</sup>

The concept of republican prerogative neither specifies a foolproof formula for deciding difficult cases nor renders this inherently troubling area untroubling. But it may offer a normatively appealing and honest way to approach one of the hardest ethical problems of crisis governance.

#### I. EXECUTIVE POWER AND THE SHORTCOMINGS OF LAW

To develop the conceptual tools for identifying, understanding, and critiquing the various understandings of executive prerogative that have emerged from our intellectual tradition, we have to start out basic. Why should a liberal democracy committed to the rule of law have an executive at all?<sup>17</sup> Political theorists have for centuries claimed that liberal constitutionalism cannot function without an executive power, whether

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16. Note in this respect that the republican prerogative may unsettle the custom and tradition analysis that has long been a central feature of our separation of powers jurisprudence. Before the presidency of George W. Bush, it was Abraham Lincoln and Franklin Roosevelt who came closest to asserting an authority to violate substantive legal restrictions. On Lincoln, see *infra* Part II.C.1. On Roosevelt, see 88 CONG. REC. 7,042–45 (1942) for Franklin Roosevelt’s speech on the Emergency Price Control Act. Even stipulating that this is the best way to understand what Lincoln did and what Roosevelt threatened to do, the possibility that their approach was grounded in some form of extralegal prerogative has significant implications for custom and tradition analysis. Certainly if the trigger conditions for republican prerogative have ever been in play in the United States, it was at the front end of the crises that those two presidents confronted. This is a complicated possibility and requires further analysis, but at a minimum, the existence of an American tradition of republican prerogative complicates any argument that Roosevelt and Lincoln were embracing a *legalized* claim of constitutional privilege.

17. I use the term “executive” to refer to that political function as it has been understood in Anglo-American political thought. Asking why we have a President, in the sense of the constitutionally independent office created by Article II, would require a different and much longer answer.

located within the legislature or not. Why? If liberal constitutionalism is substantially defined by a rights-respecting commitment to governance through ex ante legislative enactment, what problem within that framework is the executive function meant to solve? It turns out that some<sup>18</sup> of the answers to that foundational problem of liberal political theory play a vital role in motivating executive prerogative in all of its various forms.

#### A. HOW DOES THE LAW FALL SHORT?

##### 1. The Execution Problem: Letter of the Law

Let's start with the Execution Problem: a liberal democracy has an executive because the laws won't execute themselves. This is true in at least two respects. First, *imperfect obedience*. In a world where a nation of reasonable citizens obeyed reasonable rules selected by a reasonable legislature through a reasonable process, the executive branch might look pretty superfluous. The world we actually inhabit, however, doesn't look anything like that, with the unfortunate result that our laws don't execute themselves spontaneously. The G-Men have to nab counterfeiters. The IRS has to track down tax evaders. And the EPA has to round up sludge dumpers.

But even if everyone outside the government did exactly what the law required, we would still need an executive. That is because of the second component of the execution problem: the need for *active agency*. Some government objectives require a creative force rather than a crossing guard.<sup>19</sup> Besides making sure that private citizens comply with law in the largely negative sense of respecting legislative prohibitions, society also needs some power always in being that will carry out the affirmative

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18. This part offers not an exhaustive account of the executive's role, but a survey of executive functions that appear conceptually necessary for a liberal state to remain viable in the real world. So, for example, the sometime roles of the executive as a parliamentary-style legislative leader or as symbolic head of state are not addressed. These are in the category of contingent and (potentially) helpful functions of the executive branch, but they are not necessary components of a functional liberal constitution. Similarly, the role of an executive as administrative gap filler, while related to the Anticipation Problem discussed *infra*, is left to one side because it has more to do with the efficiency of the liberal state than with its viability. See *infra* Part I.A.2.

19. "[L]awes without execution, be no more profitable, than belles without clappers." JOHN PONET, A SHORT TREATISE OF POLITIC POWER 7 (photo. reprint 1970) (1556). As a thought experiment, we might collapse this function into the first by imagining a society where every legislative program was carried out by commandeering private citizens ("Amalia, you collect taxes from everybody and keep them in your bank account; Seong, it's your job to drive the fire truck next month; George, you're militia captain this week; Oscar, you have to spend Saturday building that bridge on West Stadium."). But in the real world, the institutional executive has an agency function that is distinct from and additional to its job of compelling the people to comply with their individual legal obligations.

services that the legislature elects to provide: traffic signs; fire stations; welfare programs; aggressive foreign wars. That's where the executive comes in: these government programs won't execute themselves without an agent acting at the behest of the legislative principal, and in many cases, outsourcing to private parties is neither politically nor practically viable.

Together, the twin needs to enforce public obedience and to implement the legislature's affirmative projects constitute the first answer to our question. We have an executive because we need someone to carry out—to *execute*—the legislature's will. Note that if this first answer is the only one we settle on, it yields a conceptually limited vision of the President's powers. This is the “messenger-boy” of *Youngstown* fame,<sup>20</sup> one who does what (and only what) the legislature specifically commands him to do, and who stops citizens from acting if (and only if) the legislature specifically so commands. Grounded in a longstanding Anglo-American fear of concentrating legislative and executive power in the same hands,<sup>21</sup> this vision has an illustrious pedigree that stretches from English republicans to American ultra-Whigs, including at least three Presidents.<sup>22</sup>

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20. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 708 (1952) (Vinson, C.J., dissenting). Think also of *Bowsher v. Synar*, which defines “the executive power” essentially as doing what Congress tells you to do. *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (“Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”).

21. The most stringent version of this view demands that all determinate rule content come from the legislature, and is nearly as offended by broad delegations of rulemaking power as by executive lawbreaking. See, e.g., O.A. BROWNSON, *THE AMERICAN REPUBLIC: ITS CONSTITUTION, TENDENCIES, AND DESTINY* 372 (1865) (criticizing the “growing disposition on the part of Congress to throw as much of the business of government as possible into the hands of the Executive,” and observing that “the danger in this respect is all the greater because it did not originate with the [Civil War], but had manifested itself for a long time before”); DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 48, 61 (2006) (arguing that it abandons legality to replace “the normal situation of law, where positive law provides clear, determinate answers” with broad delegations that offer “a hint of legislative authorization”); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *HARV. L. REV.* 1231, 1231 (1994) (“The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.” (footnote omitted)). Cf. EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 47 (1947) (asking “how, in view of the scope that legislative delegations take nowadays, is the line between *delegation* and *abdication* to be maintained?”); A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION*, at xxxviii (reprint 1920) (8th ed. 1915) (describing delegation to administrative agencies as evincing a “marked decline” in “the rule of law . . . in England”).

22. See, e.g., James Madison, *Helvidius Number 1*, in *THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING* 55, 59 (Morton J. Frisch ed., 2007) (“The natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws. All his acts therefore, properly executive, must presuppose the existence of the laws to be executed.”); 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 65 (June 1, 1787) (Max Farrand ed., 1911) (describing “the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect”); ALGERNON SIDNEY, *DISCOURSES CONCERNING GOVERNMENT* 176, at ch. 2, § 24 (1702) (The magistrate “is not set up to do what he lists, but what the

Yet it has often been subject to various versions of Harvey Mansfield's criticism: "if any real president confined himself to this definition, he would be contemptuously called an 'errand boy,' considered nothing in himself."<sup>23</sup> This is overstated, but the point stands. Many people feel there's more to being President than mechanistically effectuating the precise letter of highly specified laws. What more is there, and how might we justify it?

## 2. The Anticipation Problem: Spirit of the Law

That's where the Anticipation Problem comes in. Even in a state generally committed to the rule of law, the executive function offers an essential safety valve in the face of uncertainty, unpredictability, and the limits of legislative foresight.<sup>24</sup> On this view, executive discretion is the political analogue of judicial equity, which developed historically as a way to effectuate the spirit of the laws when their letter failed to do so.<sup>25</sup>

Such discretion takes two forms. As John Locke put it, the executive may be forced to "act according to discretion for the public good, [1] without the prescription of the law and [2] sometimes even against

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Law appoints . . . and as he has no other Power than what the Law allows, so the same Law limits and directs the exercise of that which he has."); JOHN MILTON, DEFENCE OF THE PEOPLE OF ENGLAND 182, 202 (1695) (the King of England "was not constituted to make laws, but to see those laws kept, which the people made," and "the King was created to put [Parliament's] laws in execution"). *See also* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 19 (1940) (describing "Jefferson's conception of executive power" as "more Whig than that of the British Whigs themselves"); WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 139-40 (1916) ("[T]he President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant . . . . There is no undefined residuum of power which he can exercise . . . .").

23. HARVEY C. MANSFIELD JR., TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER 2-3 (1989). This is surely overstated. In the first place, most people don't tend to disdain someone who wields the kind of physical force monopolized by the government. Perhaps more to the point, in the modern administrative context of broad delegations to the executive power, doing "what the legislature specifically tells him to do" often entails an extraordinary amount of discretion.

24. The very first page of probably the most famous American treatise on executive power defines it in essentially those terms, as "the power of government which is most spontaneously responsive to emergency conditions; conditions, that is, which have not attained enough of stability or recurrency to admit of their being dealt with according to rule." CORWIN, *supra* note 22, at 1.

25. JILL E. MARTIN, HANBURY & MARTIN: MODERN EQUITY ¶ 1-001 (19th ed. 2012) ("Rules formulated to deal with particular situations may subsequently work unfairly as society develops. Equity is the body of rules which evolved to mitigate the severity of the rules of the common law."). Note that adopting equity as a rule of decision renders it law as this Article uses that term. *Cf.* 2 WILLIAM BLACKSTONE, COMMENTARIES \*430 ("[D]raw[ing] a line . . . by setting law and equity in opposition to each other, will be found totally erroneous or erroneous to a certain degree."); Douglas Laycock, *The Triumph of Equity*, 56 L. & CONTEMP. PROBS. 53-54 (1993) (arguing that equity is no longer a distinct subdivision of the law).

it . . . ”<sup>26</sup> This formulation calls out two very different attributes of executive power: the ability to act without legislative authorization; and the ability to act despite legislative prohibition. It is no accident that these categories map roughly onto a familiar expository device from American constitutional law. In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson’s concurring opinion split the separation of powers playing field into what we now know as Zone 1 (presidential action pursuant to congressional authorization), Zone 2 (presidential action in the face of congressional silence), and Zone 3 (presidential action in defiance of a congressional prohibition).<sup>27</sup> That model has guided separation of powers discussions ever since.

What does this mean in practice? Let’s start with Zone 2—executive action without the prescription of the law. Why might this sometimes be necessary? Well, imagine that a statute authorizes the executive to stop anyone from bringing pistols, machine guns, or shotguns into the park. Now imagine that a lunatic shows up in the park with a bag of grenades and starts lobbing them at the kids’ play structure. Must police officers just stand by until the legislature meets to say, “that was silly; we should have added explosive devices too”? Or may they intervene at once? Locke’s answer is simple: of course the executive may step in, and post-haste.

This is the stuff of *In re Neagle* and *In re Debs*, a pair of nineteenth-century cases in which the statutory framework failed affirmatively to authorize executive action that was reasonably understood to be necessary under the circumstances. In *Neagle*, the question was whether a federal marshal had exceeded his delegated power when he shot a man who was trying to murder a Supreme Court Justice.<sup>28</sup> In *Debs*, the question was whether a U.S. Attorney could seek an injunction to prevent strikers from illegally disrupting train service.<sup>29</sup> Students are often surprised to hear that *Neagle* and *Debs* were viewed as hard cases: Of course U.S. marshals can stop an assassin from murdering a federal judge! Of course the federal

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26. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 160, at 92 (Thomas P. Peardon ed., 1952). Locke continues: “[F]or since in some governments the lawmaking power is not always in being, and is usually too numerous and so too slow for the dispatch requisite to execution, and because also it is impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public, or to make such laws as will do no harm if they are executed with an inflexible rigor on all occasions and upon all persons that may come in their way, therefore there is a latitude left to the executive power to do many things of choice which the laws do not prescribe.” *Id.*

27. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

28. *In re Neagle*, 135 U.S. 1, 5–6 (1890).

29. *In re Debs*, 158 U.S. 564, 566–67, 578 (1895).

government can sue the perpetrators of illegal activity! But the errand boy concept of the executive clarifies the difficulty. In each case, the executive sought to take action without specific and concrete authorization to do *that particular thing*. For an errand boy executive, such activity is simply off the table; in an era where ultra-Whiggism played a far larger role in the popular imagination than it does today, *Neagle* and *Debs* presented wrenching constitutional dilemmas.<sup>30</sup> Without law affirmatively granting power to the errand boy, he lacks a legitimate basis to act.<sup>31</sup>

Now let's move to Zone 3. Imagine the President knows that a terrorist is driving to New York City with a nuclear bomb, which the terrorist intends to set off at 4:00 a.m. At five till the hour, drone surveillance finds the terrorist's van racing south on a deserted Seventh Avenue. The nearest police car is ten blocks away, and in any event the terrorist would detonate the bomb as soon as he saw someone in pursuit. The only chance of stopping the terrorist is to fire a missile from the drone that spotted him. But just last week, in the face of widespread outrage about federal drone strikes on methamphetamine labs in rural Ohio, Congress enacted a hasty prohibition on firing drone-based missiles at any target on American soil. The statutory text even specifies that "there are absolutely no exceptions to this ban." Should the President order the drone to launch its missile and kill the terrorist? It seems safe to predict that most of us would say, fire away. And if that's right, then in addition to Zone 2 authority (at least sometimes) to act without authorization, the Anticipation Problem also necessitates Zone 3 executive authority (at least sometimes) to defy the law.

Note that these two problems actually present the same legislative failure in different guises. In both cases, a reasonable legislature—at least if good faith compliance with its mandate could be assumed—would surely have written the law so as to enable the necessary action, if only the legislators had anticipated the circumstances. The difference is largely technical: in Zone 2, the legislature didn't think to add the full range of authority that everyone would agree is appropriate, and in Zone 3, the legislature didn't think to add an exception that everyone would agree is

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30. Modern commentators thus stumble when they cite language from *Neagle*, *Debs*, and other Zone 2 controversies in support of assertions about presidential power in Zone 3. See, e.g., Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1, 12–16 (2004). The former has nothing to do with the latter.

31. This discussion of the Anticipation Problem proceeds as though no legislative fix is possible. In principle, it is of course technically feasible to draft statutory language covering many such problems. But unless those delegations are couched in terms so broad as to vitiate the rule of law itself, the Anticipation Problem can, almost by definition, never be resolved perfectly by the laws themselves.

appropriate.<sup>32</sup> In both cases, the legislature didn't realize that its drafting choices would produce awful results: in the first case, the legislature didn't realize that it was failing to grant a specific *power* whose absence would cause big problems; and in the second case, the legislature didn't realize that it was failing to create an *exception* whose absence would cause big problems. Despite the structural similarity of these problems—and stipulating that it can sometimes be difficult to decide which zone applies to a given scenario—Zone 3 activity is treated as something especially serious by both Jackson (who said that the president's power is here at its “lowest ebb”)<sup>33</sup> and Locke (who placed particular emphasis on acting “even against” the laws).<sup>34</sup>

### 3. The Clean Hands Problem: Blinding the Law

At least one other kind of legal insufficiency may also necessitate an executive function: when the legislature purposely prohibits something that it actually hopes will be done, at least in certain circumstances. This is the Clean Hands Problem: not the inevitable though accidental insufficiency of the laws, but their *intentional* insufficiency despite the full foreseeability of the relevant problem. On this view, the executive is a fixer, ready to work “sort of [on] the dark side, if you will”<sup>35</sup>—and therefore perhaps of particular interest to contemporary thought.

This one is unpleasant. Imagine that a sociopath has locked a dozen elementary school children in a basement. The basement contains a hydrogen cyanide pump set to go off at noon, at which time it will kill the children. The police find the sociopath hiding in a park at 11:45, but he refuses to say where the children are. The only way to save the children is to torture the sociopath for the information. But the criminal law prohibits torture and expressly precludes a necessity defense. Even if most

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32. Perhaps you wouldn't kill the conceded perpetrator (who is going to die anyway) when the author of the hypo has told you it is the only way to save millions of innocents. But I doubt you'd have much company in that view.

33. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

34. There are various reasons this might be so. Perhaps the likeliest is that we are more inclined to infer an *actual* failure of anticipation in the face of “true” silence on an entire subject than in the face of statutory text that tries to tackle the kind of problem at issue.

35. See Interview by Tim Russert with Dick Cheney, Vice President of the United States, in *Meet the Press* (MSNBC television broadcast Sept. 16, 2001). In naming this problem, I am borrowing from Michael Walzer, who uses this idea for a different but closely related concept. Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160 (1973). Cf. Max Weber, *Politics as a Vocation*, in THE VOCATION LECTURES 32 (David Owen & Tracy B. Strong eds., Rodney Livingstone, trans., 2004). Note that we could imagine a version of the nuclear terrorist hypothetical that was likewise premised on a Clean Hands problem rather than on a genuine Anticipation Problem.

legislators, presented with this precise scenario, would want the executive to do whatever it takes,<sup>36</sup> it's hard to point to the Anticipation Problem as the justification for executive action. It seems extremely unlikely that something like this didn't occur to the legislature: ticking time bombs are where most discussions about torture begin.

So if most legislators would want the executive to resort to torture, and if the law's failure to reflect that agreement isn't grounded in a failure to anticipate the situation, then what should we make of the categorical formulation as a matter of political design? Perhaps the reason is that we don't want to sully our laws with even the implicit contemplation of such things. We don't actually need to agree why the idea makes us queasy. Maybe our reasons are moral: torture is a categorical wrong that cannot be recognized by the laws, which by their nature must reside on a plane of right. Maybe our reasons are instrumental: recognizing an exception will predictably increase the incidence of unjustified torture. Or maybe we're just hypocritical: Pilate washing his hands of the whole bloody business. The point is that, on this view, some potentially desirable actions should not be contemplated by law. If you buy that, the executive offers a neat solution for institutionalizing the free-standing discretion to engage in such activity—at least sometimes.

#### 4. How Can the Executive Solve These Problems?

In the abstract, there are three options for handling the Anticipation and Clean Hands Problems. First, we could embed executive discretion in ordinary legislation—the meat and potatoes of administrative law, which delegates authority to deal with the complicated and unpredictable requirements of governance.<sup>37</sup> The broader the explicit delegation, the smaller the Anticipation Problem (and not incidentally, at least past some inflection point, the more serious the damage to the rule of law). Second, we could locate executive discretion in the Constitution, constitutionalizing

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36. Some might not. *E.g.*, CHARLES FRIED & GREGORY FRIED, *BECAUSE IT IS WRONG: TORTURE, PRIVACY AND PRESIDENTIAL POWER IN THE AGE OF TERROR* 29–30 (2010); IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* § 34, at 231–33 (Thomas E. Hill, Jr. & Arnulf Zweig eds., Arnulf Zweig trans., 2002) (discussing the humanity formula).

37. *See, e.g.*, National Environmental Policy Act, 42 U.S.C. §§ 4321–4370h (2012) (delegating environmental governance powers); International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–07 (2006) (delegating powers in a national emergency); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (delegating powers to respond to the threat of international terrorism); Defence of the Realm Act, 1914, 4 & 5 Geo. 5, c. 29 (Eng.) (repealed) (delegating powers for purposes of wartime defense).

the lawbreaking privilege as an Article II override.<sup>38</sup> The republic's organic document could thus itself be construed to contain an implicit Mr. Fix-It provision, at least in some cases. Third, we could refuse to extend legal authority and instead count on the executive simply to exercise its power as necessary when the situation truly requires it, whether for the sake of humanity, glory, pride, or some other motivation.<sup>39</sup> We could simply accept, in other words, that law sometimes gets in the way, and that we can't completely avoid that problem without sacrificing the social virtues that the rule of law is meant to instantiate.

So much for abstractions. What about the American system that actually exists? Well, as for the first option, appropriate statutory authority will often be available for an emergency, either by virtue of framework statutes passed in anticipation of a future crisis or by ad hoc authorizations passed immediately after the crisis appears. But what if it isn't? On virtually anyone's account of Article II, the executive has to be entitled to ignore duly enacted law at least sometimes—just imagine a statute that prohibits the President from receiving ambassadors and other public ministers. The problem with extending that constitutional principle much past the easy textual cases, however, is that on a conventional understanding of constitutional meaning, it is hard to make a legally adequate historical case for an Article II power to defy substantive legislative prohibitions.<sup>40</sup>

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38. See, e.g., Memorandum from John C. Yoo, Deputy Assistant Attorney General, U.S. Dep't of Justice, to William J. Haynes II, General Counsel, Dep't of Def., Military Interrogation of Alien Unlawful Combatants Held Outside the United States 18–19 (Mar. 14, 2003) (asserting Article II override for interrogation) (on file with the author); Memorandum from Patrick Philbin, Deputy Assistant Attorney General, U.S. Dep't of Justice, to Daniel J. Bryant, Assistant Attorney General, U.S. Dep't of Justice, Swift Justice Authorization Act 2 (Apr. 8, 2002) (asserting Article II override for combatant detention and military commissions). See also Heidi Kitrosser, *National Security and the Article II Shell Game*, 26 CONST. COMMENT. 483, 483 (2010) (describing claims regarding the President's Article II power "to override statutory limits that he believes interfere with his ability to protect national security").

39. Note that the scope of extralegal prerogative would seem to have an inverse relationship with the scope of the statutory and constitutional powers available to the executive. This is just the old idea of hydraulic pressure in a closed system: the more legal power we recognize for the President, the less appropriate a broad executive prerogative would seem to be, and vice versa. Importantly, this dynamic is likely to operate as between all elements of the three-tier system of presidential empowerment. In particular, broadening statutory emergency powers will reduce the need for extensive executive reliance on prerogative. See *infra* Part III.B (discussing positive effects of broad delegations).

40. See Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377, 382–83 (2011). See generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) (arguing that there is no established tradition of the executive having preclusive constitutional power over the command of forces or conducting campaigns in wartime). This is not necessarily fatal to Article II claims, since there

But it can't be right that we would *never* want the executive to violate substantive restrictions that don't squarely conflict with constitutional text—just think of the terrorist driving a nuclear bomb into New York City. And yet we might well have some preliminary misgivings about the second option, of lodging a nontextual emergency privilege in the Constitution. Simply as a prudential matter, formalizing a security exception to the Take Care Clause risks its exploitation to stamp any apparently important action with the uniquely emboldening imprimatur of law. Recent experience should leave us less than fully comfortable with that prospect, even if we are indifferent to the fact that as an originalist matter Article II seems to have foreclosed anything resembling the royal powers of suspension and dispensation.<sup>41</sup> And we might worry more generally about the corrosiveness to legislative democracy about legalizing a practice of disregarding the law on the basis of open-ended provisions from a founding document. On that view, keeping this kind of lawbreaking extraconstitutional under the third option might better cultivate the moral belief from which it originally emerged: that the laws established by our elected representatives are something to cherish.

However you come out on the separate legal question of constitutional meaning though, Part II establishes descriptively that an important strain of intellectual tradition *has* thought about certain kinds of executive lawbreaking in terms of a wholly extraconstitutional and strictly non-constitutional prerogative.<sup>42</sup> For those disinclined (for whatever reason) to embed an open-ended emergency power in the Constitution itself, this prerogative tradition offers another option. That option is the focus of this

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are certainly other forms of constitutional argument. But it's a pretty big problem in a system whose political starting point is a commitment to the rule of law.

41. See, e.g., GENOVESE, *supra* note 13, at 52–80; CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF “UNCONSTITUTIONAL” LAWS: REVIVING THE ROYAL PREROGATIVE 9–38 (1998); David Gray Adler, *The Framers and Executive Prerogative: A Constitutional and Historical Rebuke*, 42 PRESIDENTIAL STUDS. Q. 376, 378–80 (2012).

42. It's worth noting that this distinction has emerged in other high stakes contexts as well. Andrew Jackson and Abraham Lincoln have both agreed, for example, that while oppression might give rise to an extralegal “revolutionary right” of secession, no such entitlement could ever become legally available under the Constitution itself. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) (“Whenever they shall grow weary of the existing government, they can exercise their *constitutional* right of amending it, or their *revolutionary* right to dismember or overthrow it.”), in 4 WORKS OF LINCOLN, *supra* note 2, at 249, 260; Andrew Jackson, Proclamation No. 26, Respecting the Nullifying Laws of South Carolina (Dec. 10, 1832) (“Secession, like any other revolutionary act, may be morally justified by the extremity of oppression; but to call it a constitutional right, is confounding the meaning of terms . . .”), in 11 THE STATUTES AT LARGE AND TREATISES OF THE UNITED STATES OF AMERICA 776 (George Minot and George P. Sanger eds., 1859), available at <http://memory.loc.gov/ammem/amlaw/lwslink.html> (follow links under Volume 11).

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Article, and it is the version of executive lawbreaking to which we now turn.

### B. WHEN MAY THE EXECUTIVE BREAK THE LAW?

This section draws on the preceding discussion to identify the principal understandings of wholly extralegal prerogative and organize them into a coherent conceptual framework. In doing so, it seeks to discipline the underdeveloped thinking about the substantive contours of prerogative, imposing some structure on the scattered and unsystematic glimpses that have emerged from our intellectual tradition.

Here's the question: once we have identified "the law"—as defined by all applicable norms including the Constitution itself—when may the executive break it? The section will begin by surveying three possible answers and suggesting that none of them seem especially attractive. It will then briefly identify a fourth view that is plausible in principle but likely to be contentious in application. The groundwork will thereby be laid for Part II, which will then specify and synthesize as "republican prerogative" a fifth strain of these historical discussions that seems likely to have broader appeal and that has not previously been recognized for what it is.

#### 1. Some False Starts

Three initial possibilities proceed from simple premises. None seem plausible. The first takes law too seriously, and the second and third don't take law seriously enough.

*Legal Absolutism:* When, precisely, may the executive break the law? A view that I will call legal absolutism offers a simple answer: never.<sup>43</sup> The strict form of legal absolutism is grounded in a categorical presumption—at least as a matter of public rhetoric—that government actors are under an unvarying obligation to comply with all constitutionally enacted laws. On this view of the executive's role, the concept of prerogative is offensive, and extralegal action is a void within which we can speak only of power. So the executive has no more right to subvert the rule of law in crisis than he does in a moment of purest calm.<sup>44</sup> Many of us, however, will find

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43. At least, not in any country that respects basic political freedoms and basic rule-of-law requirements.

44. E.g., DYZENHAUS, *supra* note 21, at 2, 4 (“[R]esponse to emergencies, real or alleged, should be governed by the rule of law,” and the executive has the “same duty to uphold the rule of law in emergency times no less than in ordinary times.”); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1073 (2004) (“Without the effective constraint of the rule of law, it is simply too easy for the emergency regime to degenerate into a full-blown police state.”).

implausible the suggestion that there is *no* circumstance in which the executive may break the law without a constitutional privilege to do so. So if we want to make sense of Lincoln's habeas suspension, we need to keep looking.

*Legal Nihilism:* For legal nihilism, the motivating question is nonsensical. That is because, on the strict form of this view, the law itself imposes no objective constraints on the President in crisis—not as a matter of practical enforceability or constitutional hierarchy, but as an intrinsic conceptual feature of legal reasoning. The executive therefore need not invoke a privilege to break the laws, because law as such is incapable of specifying interpretive constraint.<sup>45</sup>

This is the sharpest form of an old challenge levied by critical legal studies and to a lesser extent by legal realism: every text contains the seeds of its own deconstruction, and so good lawyers can find valid legal arguments for any outcome they want.<sup>46</sup> That's why prerogative is conceptually irrelevant: we don't have to figure out when the executive may break the law, because the question simply doesn't arise. The problem with this view is not that it doesn't hold up on its own terms—it does—but that for most it is likely to seem even more implausible than legal absolutism.<sup>47</sup> People who think the law can identify at least some wrong

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45. POSNER & VERMEULE, *supra* note 14, at 33 (suggesting that the pliability of law during emergency “merely reveal[s] the underlying dynamics that operate de facto in all periods”). See also SCHMITT, *supra* note 12, at 12 (“What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order.”). Note that this argument is actually a mirror image of the way that legal absolutism approaches the problem, in that neither position sees a difference between emergency and normalcy. The difference for legal absolutists is that they conclude that the world of emergency must bow to the framework of normalcy, rather than vice versa.

46. Joseph William Singer, *The Players and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 7 (1984) (“If legal reasoning is internally contradictory and therefore indeterminate, there are no objective limits on what judges or other governmental officials can do.”). See also, e.g., ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 10 (1986) (“It is always possible to find in actual legal materials radically inconsistent clues about the range of application . . . .”); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1766 (1976) (“[T]here is no core.”); Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869, 870–71 (1988) (“[L]egal argument is open . . . because ‘one can argue either way. . . .’”).

47. John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 332 n.2 (1986) (“Nihilism is too strong a skeptical theory to be held consistently at all times. Every author who uses nihilist criticisms against others at times makes definite statements about law and so falls out of nihilism.”). A more measured version of this critique might claim that the particular rules governing our actual society, in most cases, are susceptible to wildly different interpretations depending on political orientation of the interpreter. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* 84–92, 160–65 (1997); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 3–4, 45 (1987). For present purposes, the more measured version falls in the broad middle ground between legal absolutism and legal nihilism, to the extent that it grants that law constrains at least sometimes.

answers must therefore look elsewhere for guidance.

*General Welfare Prerogative—Permissive Form:* There is a wide stretch between the two polar extremes we have just discussed: strict legal nihilism's view that law is incapable of specifying constraint and strict legal absolutism's view that law not only constrains but also should command utterly categorical obedience. The basic problem for people in the middle—and that's almost everyone—is this. We believe that law is not infinitely malleable as to all conceivable controversies, and that it can and does specify meaningful constraints on the executive, even in crisis. But we also know that rigid adherence to those constraints could conceivably cause such terrible outcomes that abiding by them would be unjustifiable. And so, presented with the question of when the executive may break the law, we must give some answer other than “never” or “always.”

The first voice in that middle ground says, essentially: “Sometimes—if it seems like a good idea.” The most latitudinarian version of this view seems prepared to contemplate the exercise of prerogative any time the executive thinks the legal rules don't make sense. The historical exemplar, for American purposes, is Thomas Jefferson. His Whiggish insistence on weak constitutional powers for the executive was more than offset by his rhetorical eagerness to burst constitutional bounds should circumstances demand it. So, for example, Jefferson claimed to be quite ready to violate the laws on the possibility of “hav[ing] the Floridas for a reasonable sum,” for “public advantage,” or simply to “secure[] the good to his country.”<sup>48</sup> Whether framed as avoiding harm or securing benefit, the only *ex ante* requirement on this view is that the exercise of prerogative should be used “for the good of the people” and be “employed for the benefit of the community.”<sup>49</sup> From this perspective, what Jefferson himself thought of as the illegal purchase of the Louisiana Territory from France in 1803 would be an easy call.

Legalists are often attracted to the Jeffersonian prerogative as a way of

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48. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in 9 THE WRITINGS OF THOMAS JEFFERSON 279, 280 (Paul Leicester Ford ed., 1898).

49. LOCKE, *supra* note 26, § 161, at 92 (conditioning the validity of prerogative on “the tendency of the exercise of such prerogative to the good or hurt”). Note that some have read Locke to suggest that prerogative power is a *legal* power of the King. *E.g.*, EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 80–81 (8th ed. 1946). In the context of Locke's political agenda and of his earlier discussion of the legislative power as defining “the law,” however, his discussion of the subject seems clearly to describe an extraconstitutional power in the modern sense of that term. In any event, that appears to be the dominant view. *See, e.g.*, Ross J. Corbett, *The Extraconstitutionality of Lockean Prerogative*, 68 REV. POL. 428, 436 (2006) (asserting that Locke redefined the term such that now, “what *is* prerogative *is* essential and legitimate and unmistakably extralegal”).

dealing with the debater's ticking-time-bomb hypothetical. But in its permissive form, it has some serious problems. Practically speaking, the notion that "public benefit" simpliciter can justify lawbreaking is tantamount to turning our backs on the rule of law. Specifically, if we are comfortable with the executive deciding what's best without regard to the rules that purport to govern that decision, we might as well not have rules—at least not when it comes to the executive,<sup>50</sup> and certainly not in crisis. The whole thing collapses into a subjective cost-benefit analysis of every decision, perhaps checked at the back end by public approval. Far from cohering with the separation of powers and the rule of law, the Jeffersonian prerogative thus converts the rule of law into the plebiscitary presidency. Indeed, there is a good argument that this is exactly what Jefferson intended.<sup>51</sup>

## 2. General Welfare Prerogative—Restrictive Form

A stricter form of the Jeffersonian prerogative—and one arguably more in line with Jefferson's actual practice—requires more than a *de novo* reweighing of harms. Instead, this approach demands not just that the laws force a bad result, but that they force a *seriously*<sup>52</sup> and perhaps also

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50. Cf. HENRY FINCH, A DESCRIPTION OF THE COMMON LAWS OF ENGLAND 57 (3rd ed. 1759) ("Prerogatives which the law gives unto [the king, he has] in Things not injurious to his subjects.").

51. See, e.g., Letter from Thomas Jefferson to John C. Breckenridge (Aug. 12, 1803) ("[Do] what we know [the people] would have done for themselves had they been in a situation to do it."), quoted in 8 THE WRITINGS OF THOMAS JEFFERSON 244 n.1 (Paul Leicester Ford ed., 1897). Jeremy Bailey makes a strong case that this theme in Jefferson's thought—consistent in both his theoretical writings and his political acts from the Revolutionary period onward—is a necessary concomitant of his ultra-democratic tendencies. Jefferson famously thought that "every constitution . . . and every law, naturally expires at the end of nineteen years. If it be enforced longer, it is an act of force and not of right." Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in SAMUEL EAGLE FORMAN, THE LIFE AND WRITINGS OF THOMAS JEFFERSON 175 (1900). Painstakingly tracing Jefferson's explorations of this view, Bailey concludes that Jefferson argued for a maximally Whiggish inflexibility of the laws precisely so as to *subvert* popular respect for those laws. Jefferson thus argued for prerogative, not reluctantly as a mournful concession to the reality that his precious rule of law may sometimes be inadequate, but zealously as an opportunity for frequent, popularly ratified constitutional change, led by the President as the tribune of the people. JEREMY D. BAILEY, THOMAS JEFFERSON AND EXECUTIVE POWER 20 (2007). The dead hand of the law would thus be balanced by a vigorous and very much alive engagement with the will of the people, as focused by and reflected in the acts of the executive.

52. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 48, at 279, 281 ("... on great occasions, when the safety of the nation, or some of its very high interests are at stake . . ."); GROSS & NÍ AOLÁIN, *supra* note 13, at 112, 123 ("extremely grave national dangers" and "extreme cases"); FATOVIC, *supra* note 13, at 254, 256 ("life-threatening events," "extreme events," and "urgent threats to life or well-being"); NICCOLÒ MACHIAVELLI, DISCOURSES ON LIVY § I:34, at 75 (Harvey C. Mansfield & Nathan Tarcov trans., 1998) ("grave accidents"); FRANCIS D. WORMUTH, THE ROYAL PREROGATIVE 1603–1649, at 113 (1939) (speech in Parliament arguing that a burning house may be demolished when it would put a whole

obviously<sup>53</sup> bad result, including potentially in the sense of forcing the nation to forego an extraordinary opportunity. The restrictive welfare prerogative is much more compatible with a background social commitment to legality. That's because the seriousness and obviousness requirements function as a kind of safeguard—in effect, a presumption against lawbreaking. However you slice it, and on whatever basis you justify it,<sup>54</sup> the threshold requirements of the strict form make it harder to exercise prerogative and therefore less likely for prerogative to unwind the rule of law.

Some version of this view is morally plausible, but the devil is in the details. Calibrating its particulars requires empirical and ethical judgments that are familiar from the philosophical literature on threshold deontology,<sup>55</sup> rule utilitarianism,<sup>56</sup> and the prima facie obligation to obey the law.<sup>57</sup> Rather than rehearsing such well-worn material, this Article aims to synthesize a distinct thread of prerogative tradition that transcends

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street—“or more”—at risk); Francis Bacon, *Essay of Judicature* (1612) (“... whatsoever introduceth any great alteration or dangerous precedent; or concerneth manifestly any great portion of people . . .”), in *THE ESSAYS OF FRANCIS BACON* 165, 170 (Clark Sutherland Northrup ed., 1908).

53. LOCKE, *supra* note 26, § 158, at 90 (“... whatsoever shall be done *manifestly* for the good of the people . . .” (emphasis added)).

54. There are various ways to make sense of that presumption, which finds obvious philosophical analogies in threshold deontology and rule utilitarianism. One defense would rely on the fallibility of individual risk perception, drawing on an empirical assumption that laws representing accumulated social wisdom tend better to avoid the heuristic biases of individual decisionmakers facing on-the-spot judgments. Another justification would look to the institutional settlement function of the legislature, akin to clear error in criminal law, where a basic finality value attaches once the front-line decisionmaker has made a choice. Either view might be supplemented by the belief that relaxing a social norm of law obedience—eliminating a cultural taboo on law violation—is sufficiently troubling that we should require officials to take a long, hard look before deciding to ignore their legal obligations.

55. *E.g.*, MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 719–24 (1997); Larry Alexander, *Deontology at the Threshold*, 37 *SAN DIEGO L. REV.* 893, 897–905 (2000).

56. *E.g.*, Richard B. Brandt, *Toward a Credible Form of Utilitarianism*, in *MORALITY AND THE LANGUAGE OF CONDUCT* 107, 123–26 (Hector-Neri Castañeda & George Nakhnikian eds., 1963); John C. Harsanyi, *Rule Utilitarianism and Decision Theory*, 11 *ERKENNTNIS* 25, 30–33 (1977). *Cf.* FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND LIFE* 203 (Tony Honoré & Joseph Raz eds., 1991) (discussing “presumptive positivism”).

57. *E.g.*, JOSEPH RAZ, *THE MORALITY OF FREEDOM* 101–05 (1986); H.L.A. Hart, *Legal and Moral Obligation*, in *ESSAYS IN MORAL PHILOSOPHY* 82 (A.I. Melden ed., 1958); John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY: A SYMPOSIUM* 3 (Sidney Hook ed., 1964). *Cf.* M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 *YALE L.J.* 950 (1973).

“mere” concern for the general welfare.<sup>58</sup> For present purposes, I therefore emphasize that some form of the restrictive welfare prerogative is likely to be attractive even within a liberal order,<sup>59</sup> and turn our attention to the distinct form of lawbreaking identified here as republican prerogative.

## II. REPUBLICAN PREROGATIVE

At bottom, the republican prerogative involves extraconstitutional action to preserve the constitutional republic when legal authorities are insufficient to the task. In extracting this form of prerogative from historical discussions and specifying its elements, I draw inchoate expressions of the instinct from widely varying contexts and impose a structure on them consistent with the inner logic of the commitments they seem to reveal. Even more so than with the first four views, my reflective historical approach to the republican prerogative draws on a wide range of emergency power theorists, necessarily glossing over important differences among some of the original conceptual frameworks and drawing on the writers’ felt impulses for my purposes rather than confining them within the analytical structures through which they were originally expressed.<sup>60</sup>

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58. In principle, there is no reason not to consider the possibility of a nonwelfarist prerogative. With the apparent exception of the republican prerogative described below, however, Anglo-American discussions of this concept have not done so.

59. For examples that I suspect many readers will see as satisfying its requirements, see, for instance *supra* Part I.A.3 (sociopath’s cyanide death trap), and *infra* Part II.C.3 (September 11 shootdown order).

60. One methodological choice in this part deserves special attention. While I rely principally on American sources, I also engage with English discussions of royal prerogative from both before and after the Glorious Revolution. Bear in mind for the English evidence that royal prerogative’s precise legal status was unsettled in the seventeenth century. This is true not only in the sense that the question was politically contested, but also in the sense that—disagreements between King and Parliament aside—our modern categories of legality and jurisdiction do not map perfectly onto the (sometimes muddled) way seventeenth-century British thinkers thought about this problem. See M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 1–118 (1967), for one classic discussion of the evolution of British thought. It is clear that at least some royalists (though not all of them) argued that the royal prerogative was a strictly legal entitlement. See, e.g., Francis Bacon, *Act of Council Giving the Substance of the Charge, Sentence, and Order of the Court Against Mr. James Whitlocke* (June 12, 1613) (“his Majesty’s prerogative and his absolute power incident to his sovereignty is also *lex terrae*, and is invested and exercised by the law of the land, and is part thereof”), reprinted in 4 *THE LETTERS AND THE LIFE OF FRANCIS BACON* 348, 350 (James Spedding ed., 1868). That view would not make the British evidence about royal prerogative entirely off point, but it would render that evidence more of a usefully analogous comparison than a direct precedent for the discussion here.

An alternate view, however, saw royal prerogative as something transcendent that had nothing to do with law of any sort, common or otherwise. GLENN BURGESS, *THE POLITICS OF THE ANCIENT CONSTITUTION: AN INTRODUCTION TO ENGLISH POLITICAL THOUGHT, 1603–1642*, at 154 (1992) (“[K]ings did have an absolute power, essentially mysterious, that was not legal in nature.”); W. HARRISON MOORE, *ACT OF STATE IN ENGLISH LAW* 1–2 (1906) (identifying “matter of state” with modern international law claims of self-defense that “connote[] that the relation to which it applies is

That methodological point is worth emphasis. This Article does not attempt to establish that any particular approach to prerogative was viewed as the exclusively acceptable framework among any particular audience. Indeed, it is a foundational assumption here that political and intellectual figures have *always* talked in different registers—practically in different voices—about justifiable lawbreaking. Far from being pushed to one side, the inescapable fact of competing narratives is a crucial predicate of this analysis. Nor does this refer only to competition among different individual thinkers. In many cases, the same single human being played out—in his own person and throughout his own writings—those competing narratives in real time. Thomas Jefferson, for example, sometimes articulated relaxed conditions for prerogative and at other times suggested extremely stringent ones—sometimes even in the same document.<sup>61</sup> So too, as the Civil War developed, did Abraham Lincoln (who gestured at this view to explain his archetypally justifiable violations of the Constitution at the beginning of the Civil War) sound seriously variant notes about legal restraints on the executive.

This Article thus proceeds from the view that there is something interesting and important about how the most stringent republican vision of prerogative keeps surfacing, even among those who are attracted to other versions of justified extraconstitutional lawbreaking as well. If that's right, then it seems well worth unpacking, systematizing, and trying to understand those inchoate expressions on their own terms—even (or

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not one of law, or, at any rate, of municipal law"). Cf. ERNST H. KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY* 193–272 (1957) (surveying medieval understanding on which this mystical understanding of prerogative drew). On this latter view, a proper exercise of the King's absolute prerogative was politically legitimate in the same sense that I will argue a proper exercise of republican prerogative is politically legitimate. But its legitimacy was simply orthogonal to its legal validity as such, again in much the same fashion as republican prerogative is orthogonal to constitutionality. The English discussions of absolute royal prerogative—however contested and even internally inconsistent they may have been—therefore seem fair game for the Restatement-style enterprise of this Article.

61. Jefferson's thinking was of course embedded in the natural law framework so common to his time. From a semantic perspective, this introduces a problem roughly analogous to the British sources on royal prerogative discussed *supra* note 60—about which a debate regarding prerogative's relationship to "law proper" parallels similar debates during Jefferson's era about natural law (in *Calder v. Bull*, 3 U.S. 386 (1798), for example). But I join the modern scholarly consensus in seeing Jeffersonian prerogative as located entirely outside the *Constitution*, which is the critical point for the purpose of this paper. See, e.g., BAILEY, *supra* note 51, at 25 (Jefferson's "extraconstitutional explanation"); KLEINERMAN, *supra* note 13, at 149 ("Jefferson insists that it does not follow from the Constitution itself."). See also Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in 9 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 48, at 279, 280 (describing prerogative as applicable to an act that cannot be "legally accomplished," that must instead be done by "transgress[ing]" or "transcending the law," and indeed that would hurt popular "reverence for law").

especially) when they are expressed by people who simultaneously feel other instincts about when law may justifiably be broken. It therefore does not compromise the descriptive conclusions here when competing or even inconsistent concepts appear elsewhere in a given writer's thought—though I try to flag places where they do. Because, again, the methodology here is premised precisely on these multiple and even conflicting threads of prerogative theory, often as experienced and expressed by individual thinkers, sometimes even in the same document.

#### A. THE REPUBLICAN ETHIC

The toughest challenge for any theory of extralegal prerogative—certainly including the republican version identified in this Article—is the following dilemma. Prerogative theory must both identify substantive limits on the executive's power to break the laws and account for the normative source of those limits. But the answer to the second problem cannot be lodged in law. That's because if the limits are imposed by law, then what we are talking about is not prerogative at all, but either a constitutional power to override the law or a legislative dispensation to tweak it.<sup>62</sup> Before turning to the substantive details of republican prerogative, we therefore need first to explore its grounding.<sup>63</sup>

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62. Again, this is not to preclude the possibility of developing a case for Article II override substantially along the lines of the republican prerogative. But it is most certainly to say that the historical materials engaged by this Article frame prerogative as an *extraconstitutional* privilege. As Francis Lieber described the requirements of Civil War: “The whole rebellion is beyond the Constitution. The Constitution was not made for such a state of things.” Letter from Francis Lieber to Martin Russell Thayer (Feb. 3, 1864), *quoted in* PHILLIP S. PALUDAN, *A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA* 89 (1975). *See also, e.g.*, Letter from Thomas Jefferson to John C. Breckenridge (Aug. 12, 1803), *quoted in* 8 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 51, at 244 n.1 (“an action beyond the Constitution”); Abraham Lincoln, Message to Congress in Special Session (July 4, 1861) (making extralegal argument about the consequences of recognizing the obligations of habeas review), *in* 4 *WORKS OF LINCOLN*, *supra* note 2, at 421, 429–32; THEOPHILUS PARSONS, *THE CONSTITUTION, ITS ORIGIN, FUNCTION, AND AUTHORITY* 15–22 (1861) (discussing the “difficulty presented by this question of appeal from the Constitution and the law of the land to a ‘higher law’”); BROWNSON, *supra* note 21, at 331–32 (approving Lincoln’s violate-and-ratify strategy and noting that “there are many things very proper, and even necessary to be done, which are high crimes when done by an improper person or agent”); ELISHA MULFORD, *THE NATION: THE FOUNDATION OF CIVIL ORDER AND POLITICAL LIFE IN THE UNITED STATES* 153 (1887) (“The nation thus may be the stronger in the crisis in which its Constitution is swept away . . .”). *Cf.* JEAN-JACQUES ROUSSEAU, *The Social Contract*, *in* *THE SOCIAL CONTRACT AND DISCOURSES* 3, 124 (G.D.H. Cole trans., 1950) (1762) (“silence all the laws”).

63. Note that one view of executive lawbreaking is uninterested in justification, treating it as the raw fact of power acting to save itself. *See* AGAMBEN, *supra* note 12, § 1.1, at 1 (“[J]urists and theorists of public law seem to regard the problem more as a *quaestio facti* than as a genuine juridical problem.”); GROSS & NÍ AOLÁIN, *supra* note 13, at 111 (noting the “political realist argument . . . that there exists no room for any kind of ‘legalistic-moralistic’ approach in dealing with emergencies”);

Civil disobedience theory offers a promising start: the idea that some extralegal acts may be grounded in the intuitive distinction between law and morality. This idea is familiar: some laws are simply immoral. And that view that points us toward a vision of prerogative as civil disobedience—the President as Martin Luther King, Jr.<sup>64</sup> In the abstract, this source of entitlement to break the law makes sense. If a private citizen has the moral privilege of civil disobedience in some circumstances, then she might well claim the same privilege even after getting elected or appointed.<sup>65</sup>

The particular dimensions of republican prerogative, however, demand more than an invocation of morality in the abstract. And as it turns out, the details of republican prerogative appear in fact to be grounded in something much more specific: a particularized belief in the intrinsic moral value of our republic, in the specific form in which it currently exists. On this account, lawbreaking under the republican prerogative is grounded in the moral instinct that our constitutional order as a collective social enterprise under the rule of law is worth much more than the sum of its parts.<sup>66</sup> This commitment to the moral worth of the collective entity in which we all participate parallels modern notions of communitarian

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Sydney G. Fisher, *The Suspension of Habeas Corpus During the War of the Rebellion*, 3 POL. SCI. Q. 454, 484–85 (1888) (“So every government, when driven to the wall by a rebellion, will trample down a constitution before it will allow itself to be destroyed. This may not be constitutional law, but it is fact.”). Carl Schmitt and his modern successors Eric Posner and Adrian Vermeule best exemplify a positive view of this “theory”—Posner and Vermeule with their observation that constitutional showdowns are nothing more than a new political hierarchy working itself out, and Schmitt with his idea of “the decision in absolute purity” breaking from any normative framework and reducing to the radically contingent will of the sovereign. POSNER & VERMEULE, *supra* note 14, at 62–83; SCHMITT, *supra* note 12, at 13.

64. For a thoughtful example of this perspective, see Michael Stokes Paulsen, *Hell, Handbaskets, and Government Lawyers: The Duty of Loyalty and Its Limits*, 61 L. & CONTEMP. PROBS. 83, 83 (1998) (expressing regret for Paulsen’s refusal to break the law by leaking details of David Souter’s judicial record to advocacy groups prior to his nomination to the Supreme Court, which in Paulsen’s view left Paulsen partially “responsible . . . for the deaths of one and a half million innocent unborn children per year” after *Roe v. Wade* was reaffirmed).

65. An analogous presumption (drawing on legal rather than solely moral entitlement) justifies the British system of martial law, on the account of that government power as a simple extension of the officials’ *individual* right to meet force with force in the case of necessity. DICEY, *supra* note 21, at 539–44.

66. It is important to define precisely the scope of inquiry here. Part II.A seeks to identify the moral commitment that explains the particular parameters of republican prerogative as described in Part II.B. Part II.A does not attempt to build a systematic normative account that *defends* that underlying first-order commitment, but rather simply to *identify* that commitment, explore its apparent dimensions, and flesh out some of its implications.

justice,<sup>67</sup> with the crucial specification that our particular community is defined in significant part by its relationship to law.

This notion of the constitutional republic of laws as a moral end in itself is no post facto justification. To the contrary, it has a long heritage: veneration of the laws—a cultural commitment to the rule of law as a precious heritage—has long been seen as a part of who we are, or at least of who we want to be.<sup>68</sup> Think of Hamilton’s reliance on the “sacred reverence which ought to be maintained in the breast of rulers toward the constitution”<sup>69</sup> or Madison’s description of the Constitution in terms that are at once collective and personally possessive: “[E]very public usurpation is an encroachment on the private right, not of one, but of all.”<sup>70</sup> Abraham Lincoln elaborated on this theme at even greater length. “Let reverence for the laws,” he said as a young man, “be breathed by every American mother, to the lisping babe, that prattles on her lap . . . let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of

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67. *E.g.*, MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 173–74 (1982); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 397 (1989); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 33 (1983).

68. *See, e.g.*, WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* 4 (1885) (“undiscriminating and almost blind worship of its principles”); SIDNEY GEORGE FISHER, *THE TRIAL OF THE CONSTITUTION* 18–98 (1862) (criticizing excessive reverence for Constitution); Edward S. Corwin, *The Worship of the Constitution*, 4 *CONST. REV.* 3, 3 (1920) (describing Americans’ “devotion” to the Constitution); Sanford Levinson, “*The Constitution*” in *American Civil Religion*, 1979 *SUP. CT. REV.* 123, 123–24 (describing the Constitution’s role in American “civil religion”); ROSSITER, *supra* note 13, at 211 (noting the Constitution’s “tradition of perfection” and “the psychology of constitutionalism it has created in the American people”). *Cf.* EDMUND BURKE, *Reflections on the Revolution in France* (1790) (“[A] jealous, ever-waking vigilance to guard the treasure of our liberty, not only from invasion, but from decay and corruption, was our best wisdom and our first duty.”), in 3 *THE WORKS OF EDMUND BURKE* 21, 74 (Charles C. Little & James Brown eds., 1839); MILTON, *supra* note 22, at 240 (contrasting English “reverence of laws” with a “Prince, who has been so instructed from his cradle, as to think Laws, Religion, nay, and Oaths themselves, ought to be subject to his Will and Pleasure”). For a general discussion of the nineteenth-century views that framed Lincoln’s actions during the Civil War, see PALUDAN, *supra* note 62, at 27–60, 28 (“Decades of oratory had forged an ill-defined bond between union and the nation’s fundamental law.”).

69. *THE FEDERALIST* NO. 25, at 167 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton’s gesture toward a secular state religion was well in step with his times: think of the French revolutionaries rededicating Notre Dame as a “temple of Reason.” MONA OZOUF, *FESTIVALS AND THE FRENCH REVOLUTION* 97–102 (Alan Sheridan trans., 1988).

70. JAMES MADISON, *Charters* (Jan. 18, 1792), in 4 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 467, 468 (1865). *Cf.* LOCKE, *supra* note 26, § 230, at 129 (“[F]or till the mischief be grown general, and the ill designs of the rulers become visible, or their attempts sensible to the greater part, the people, who are more disposed to suffer than right themselves by resistance, are not apt to stir. The examples of particular injustice, or oppression of here and there an unfortunate man moves them not.”). *See also* KLEINERMAN, *supra* note 13, at 129.

justice. And, in short, let it become the *political religion* of the nation.”<sup>71</sup> Nor did hard experience lead him to abandon this theme: during the Civil War, his repeated invocation of the sacral elements of Union, heritage, and law was perhaps the dominant theme of his public advocacy for the national cause.<sup>72</sup>

It is precisely because the republican prerogative is so wholly rooted in a republican ethic that it so totally disregards a host of other moral values. Because if mere considerations of human life cannot authorize republican prerogative, nor do they factor into it as a constitutive limitation. The logic of prerogative on this theory operates in service of the (right kind of) state, of the (right kind of) culture, and of the (right kind of) collective; and not, ultimately, of the individual people who make it up. The internal logic of that perspective not only permits but apparently demands that the executive valorize the republic over at least some competing humanitarian considerations—in full recognition of the profoundly unsettling risk that this principle could well be abused.

For better or for worse, it was this moral instinct that motivated Lincoln’s central analogy for what he saw as his *legal* emancipation of the slaves during the Civil War—and which, not incidentally, helps us make sense of his decision to preserve the Union at the cost of millions of human lives:

Was it possible to lose the nation, and yet preserve the constitution? By general law life *and* limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.<sup>73</sup>

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71. Abraham Lincoln, Address to the Young Men’s Lyceum of Springfield, Illinois (Jan. 27, 1838), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858, *supra* note 1, at 28, 32.

72. Most famously, see, for instance, Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 WORKS OF LINCOLN, *supra* note 2, at 249; Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), in 7 WORKS OF LINCOLN, *supra* note 2, at 17; Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in 8 WORKS OF LINCOLN, *supra* note 2, at 332–33.

73. Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), in 7 WORKS OF LINCOLN, *supra* note 2, at 281, 281. Lincoln repeatedly returned to this organic metaphor for our state in the context of lawbreaking. See, e.g., Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863) (stating that it is no more likely that wartime powers will entrench themselves than “that a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthful life”), in 6 WORKS OF LINCOLN, *supra* note 2, at 260, 267. See also Letter from Francis Lieber to Martin Russell Thayer (Dec. 29, 1863), quoted in PALUDAN, *supra* note 62, at 90 (“[T]he nation is the preexisting condition of the Constitution itself, and to thwart the salvation of the country in the Constitution is very much as though a Catholic priest were losing time on some points of canon law when the overwhelming question is to save the soul from perdition.”).

For present purposes, it would be a mistake to focus on Lincoln's view that Emancipation was "lawful"; the point is the larger gist of the metaphor and what it tells us about the emotional relationship between Lincoln and the state as an object of moral concern. Lincoln speaks of cutting off a limb to save the body from death.<sup>74</sup> If what he really broke was a law, then what does the metaphor tell us he had in mind as the motivating concern? *Precisely the larger body of laws of which the particular law was but a constituent part.* Not the saving of lives, but the saving of laws—a view of our republic of laws as an entity worthy of care, which might sometimes need to be harmed for its own good. And this in turn helps illuminate the thread of regret that tinges so many discussions of prerogative: When the President violates the laws he was charged to protect, he is harming something precious and beautiful; indeed, he is violating something existential about who we are.

#### B. CONDITIONS ON THE USE OF REPUBLICAN PREROGATIVE

Now, to the thing itself. As its component parts have emerged from historical discussion, the republican prerogative has three elements: (1) it is triggered by a sudden, irregular, and existential threat; (2) it authorizes only those actions that are necessary to re-enable the ordinary legal order to deal with that threat; and (3) it obliges the lawbreaker to disclose her action, in principle with something like a sense of sorrow. Each of these requirements flows from the republican ethic. You must obey the law until the last exigency makes it impossible either to use or reform the existing legal framework to save the constitutional order. You must focus your sorrowful use of prerogative solely on the goal of promoting a return to the legal system that you have been forced temporarily to abandon. And you must then submit to judgment through the ordinary constitutional regime at the

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74. Lincoln's use of the word "lawful" here has been seen as a development in his thought that occurred later in the war. *See, e.g.,* GOLDSMITH, *supra* note 14, at 31; KLEINERMAN, *supra* note 13, at 115–16, 189; ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 176–80 (2007); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 58–60 (1973). It is instructive to compare Lincoln's evolving description of his own actions with Martin Luther King Jr., whose advocacy of civil disobedience was paired with natural law claims about the "legality" of resistance under higher law. *Cf.* MARTIN LUTHER KING, JR., *Letter from Birmingham City Jail* (urging men "to disobey segregation ordinances because they are morally wrong"), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 289, 294 (James Melvin Washington ed., 1986) (1963). In either case, the point is the underlying moral metaphor rather than the legality *vel non* of Lincoln's shifting claims in 1861 and 1864.

It is also notable that the discussion in this letter is directed at the legality of the Emancipation Proclamation, not at Lincoln's more legally tenuous actions at the beginning of the war. For a good summary of the case for the legality of the Emancipation Proclamation, see Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 SUP. CT. REV. 349.

hands of your fellow citizens, on whose behalf you have acted to save the precious project that you are all in a continual and collective process of creating. That is what it means to be moved by the republican ethic, and that is what it means to exercise republican prerogative.

It is crucial to bear in mind that these elements are collectively *sufficient* to justify lawbreaking under the prerogative tradition. But it is not my claim that they are *necessary*, either individually or collectively, before the law may be broken. Indeed, as noted above, it is likely that other forms of extralegal prerogative are also defensible. The claim is thus not that the requirements of republican prerogative are necessary predicates for any extralegal act, but that they constitute “necessary elements of a sufficient set”<sup>75</sup> that can justify lawbreaking by the executive.

### 1. Sudden, Irregular, Existential threat

As a historical matter, the substantive trigger for republican prerogative has three elements: irregularity, suddenness, and existential severity. The first element—*irregularity*—is a straightforward extrapolation of the fact that even the most comprehensive statutory framework cannot anticipate all future exigencies.<sup>76</sup> Thus, a prominent strain in prerogative thought requires that the emergency be of a nature that has not already been contemplated by the legal process.<sup>77</sup> (That is certainly not to say that it will always be easy to decide whether the legal structure

75. For a discussion of this concept, see Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1788–91 (1985) (citing H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 111–17, 122–25, 128–29, 235–53 (2d ed. 1985)).

76. Note (as a matter of logical inference rather than as a descriptive reflection of the historical discussions) that there might be an exception to the irregularity requirement if the relevant prohibition is plausibly attributed to the Clean Hands Problem. See *supra* Part I.A.3. Contrast, for example, the 2011 refusal to authorize hostilities in Libya with the absence of a ticking time bomb exception to the torture ban. In the latter case, the logic of Part I might suggest relaxing the irregularity requirement. In either event, the guiding principles would be those enunciated in Part I—the prerogative is activated when limitations intrinsic to the liberal order prevent the legislature from adequately providing for the specific emergency that has arisen.

77. 1 BLACKSTONE, *supra* note 25, at \*252 (“... how impossible it is, in any practical system of laws, to point out beforehand those eccentric remedies, which the sudden emergence of national distress may dictate, and which that alone can justify...”); LOCKE, *supra* note 26, § 159, at 91 (describing action “where the municipal law has given no direction”); Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 48, at 279, 281–82 (“An officer is bound to obey orders; yet he would be a bad one who should do it in cases for which they were not intended, and which involved the most important consequences.”); FATOVIC, *supra* note 13, at 55 (“Prerogative is restricted to sudden and life-threatening emergencies that exceed the competence of the law.”); RICHARD M. PIOUS, *THE AMERICAN PRESIDENCY* 84 (1979) (Prerogative “is instituted in times of grave danger . . . only when crisis has reached such proportions that the very life of the nation is at stake.”); SCHLESINGER, *supra* note 74, at 62–63 (similar).

has failed to consider a particular problem.) This requirement seeks to conform the exercise of prerogative with the Anticipation Problem, connecting prerogative to the longstanding view of the executive as a residual force obligated to handle those situations for which the law has failed adequately to provide. On this view, without a plausible showing that the current legal structure is incapable of addressing the problem, the case for prerogative is badly compromised.

The second element—*suddenness*—is bound up with the first. Advocates of prerogative often describe it in the context of sudden emergencies that burst rapidly onto the scene and require urgent attention from the most flexible institutional actor in government.<sup>78</sup> Like the irregularity requirement, the suddenness requirement lashes prerogative to a core function of the executive office and an inherent limitation of legislative operations alike. Any exercise of prerogative must thus be directed at problems that are irregular not only in the sense of being beyond the scope of the existing laws, but also in the sense of being incapable of timely resolution by legal amendment—and I think implicitly of not being intentionally caused by the executive so as to justify emergency action.<sup>79</sup> The latter requirements extend republican prerogative's apparently paradoxical commitment to the rule of law from the primary level of complying with existing restrictions to the secondary level of honoring the legislature's centrality in revising the rules. Thus, if the legislature rejects a proposal in the midst of emergency with full knowledge of the risks, the republican prerogative is unavailable. There is no Anticipation Problem there; there is only a set of differing opinions on how to deal with an urgent dilemma. (That implication may have important consequences in a political system like our own that is biased toward inertia, but I will save those for Part III.)

The third element—*existential severity*—is the defining feature of

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78. *E.g.*, SIR JOHN ELIOT, 1 DE JURE MAIESTATIS 15 (Alexander B. Grosart ed., 1882) (1629) (The supreme power is "a fulness of power subject to noe necessitie, limited within no rules of publicke Law"); MULFORD, *supra* note 62, at 186 ("... imminent or immediate peril . . ."); FATOVIC, *supra* note 13, at 55 ("The event must happen quickly, coming as something of a surprise."); PIOUS, *supra* note 77, at 84; SCHLESINGER, *supra* note 74, at 112, 323 ("... when time was of the essence . . ."). *Cf.* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 22, at 318 (Aug. 17, 1787) (discussing executive's constitutional power to "repel sudden attacks"); MACHIAVELLI, *supra* note 52, § 1:34, at 74–75 ("... in urgent needs can decide . . . without further consultation . . .").

79. LOCKE, *supra* note 26, § 159, at 91 ("where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it"); Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 WORKS OF LINCOLN, *supra* note 2, at 421, 429–32; BROWNSON, *supra* note 21, at 331–32 (The President's duty when action is necessary in normal times is, "if Congress is not in session, to call it together at the earliest practicable moment . . .").

republican prerogative. To qualify for the republican prerogative, the threat must be not merely grave, but so existentially grave as to threaten the existence of our republic either in the sovereign form that we know it or as defined by the constitutional commitments that give it meaning. It seems only appropriate that Jefferson, perhaps our most maddeningly inconsistent Founder, should have articulated the basic intuition here as well: “To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property, and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.”<sup>80</sup> Madison echoed this idea too,<sup>81</sup> but probably no one expressed it better than Abraham Lincoln, who said that unconstitutional action could clearly be justified if “the government itself” would otherwise “go to pieces” or be “overthrown.”<sup>82</sup> Not mere benefit, in other words, nor even avoidance of

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80. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 48, at 279, 279. When writing in this vein, Jefferson expressed the trigger condition in the strongest of terms: prerogative action can properly be taken for “self-preservation”—for “saving our country when in danger.” *Id.* Machiavelli likewise straddled the line between the general welfare prerogative (though in its restrictive form) and the existential harm contemplated here, speaking sometimes of “extraordinary accidents” and at other times of the prospect of “ruin[ing]” the republic. MACHIAVELLI, *supra* note 52, § I:34, at 74–75.

81. *Resolutions Censuring the Secretary of the Treasury, [1 March] 1793*, FOUNDERS ONLINE, NAT’L ARCHIVES, <http://founders.archives.gov/documents/Madison/01-14-02-0412> (last visited Sept. 22, 2014) [hereinafter Madison on Censure] (“[T]here might be emergencies, in the course of human affairs, of so extraordinary and pressing a nature, as to absolve the executive from an inflexible conformity to the injunctions of the law.”) So long as the “necessity” was “palpable,” Madison suggested, prerogative could appropriately be exercised. *Id.* But in the context he was addressing (of small-scale financial improprieties by Alexander Hamilton), Madison could not find even a colorable extralegal basis for “absolv[ing] the executive from an inflexible conformity to the injunctions of the law.” *Id.*

82. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 WORKS OF LINCOLN, *supra* note 2, at 421, 430. The treatment of the relationship between law and necessity in Lincoln’s July 4th speech is sufficiently complex to be worth careful exegesis. In it, he defends the aggressive actions that he took in the wake of Sumter before a Congress that was gathering for the first time since that attack. At issue were the call for militia; the proclamation of a naval blockade; the extension of volunteer terms; the addition of new forces to the regular Army and Navy; and the suspension of habeas corpus in certain areas. For reasons already rehearsed at length in the literature, some of this activity was plainly illegal under then-existing constitutional and statutory law. His discussion was divided by paragraph into three categories.

Lincoln reserved the first category for actions he viewed as clearly legal—in particular, his call-up of the militia and proclamation of a blockade. About these, and only about these, he asserted that “[s]o far all was believed to be strictly legal.” *Id.* at 428. He offered no exigency-based extralegal justification; he simply asserted that these actions were “strictly” legal and left it at that.

The second category applied in particular to his expansions of the regular army and navy. It is pretty clear that Lincoln conceded the actions in this second category to be of dubious legality. In stark contrast to his description two sentences earlier of the first set of measures as “strictly legal,” he described the second set as follows: “These measures, *whether strictly legal or not*, were ventured upon, under what appeared to be a popular demand, and a public necessity; trusting, then as now, that

profound social harm, but the very existence of our constitutional republic in the form that we know it, with a direct equivalence—as Lincoln later put it in a legalized context—between “the preservation of the constitution” and “the preservation of the nation.”<sup>83</sup> It is remarkable how often this theme arises among those who write sympathetically about the existence of prerogative in a constitutional republic.<sup>84</sup>

Republican prerogative thus entails action that is in service of the laws

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Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress.” *Id.* at 429 (emphasis added).

In the third category, Lincoln turned to habeas corpus. He began the substantive defense of suspension by seamlessly continuing his theme from the second paragraph: an exploration of the circumstances in which illegal action might be necessary and even justified, albeit not by law. He noted first that “the legality and propriety of what has been done under [the habeas suspension] are questioned.” *Id.* He began his response to that challenge by observing that—legality as yet unaddressed—as a matter of “power[] and propriety,” it cannot be the case that “all the laws, but one, [are] to go unexecuted, and the government itself go to pieces, lest that one be violated.” *Id.* at 430. Only after lengthy exploration of this extralegal defense to illegality does Lincoln finally turn to the legal question, thus: “But it was not believed that this question was presented. It was not believed that any law was violated.” *Id.* Thus at last engaging with legal arguments, he then raises and explains his famously implausible—and expositionally separate—constitutional suggestion that the President is authorized to invoke the Suspension Clause. *Id.* at 430–31.

83. Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), in 7 WORKS OF LINCOLN, *supra* note 2, at 281, 281. Cf. 1 BLACKSTONE, *supra* note 25, at \*251 (noting in a different context that obligation to obey law crumbles and allows “extraordinary recourses to first principles . . . when the contracts of society are in danger of dissolution”); *id.* at \*252 (“[R]esistance is [morally] justifiable . . . when the being of the state is endangered.”).

84. *E.g.*, Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 48, at 279, 281 (explaining that putting down a rebellion in New Orleans was a question of national “necessity and self-preservation” and that the military’s response was aimed at the “salvation of the city, and of the Union itself, which would have been convulsed to its centre, had that conspiracy succeeded”); MULFORD, *supra* note 62, at 159–60 (“[T]he sovereignty of the nation involves the right to [defend] its own existence” in a way that extends “no [legal] right to interrupt the process of laws.”); DANIEL P. FRANKLIN, EXTRAORDINARY MEASURES: THE EXERCISE OF PREROGATIVE POWERS IN THE UNITED STATES 3 (1991) (“ . . . for the sake of [national] survival . . .”); KAHN, *supra* note 12, at 44, 50, 57 (“[W]hat is really at stake is the character of the polity as a certain kind of order”—in service “not [of] the application of a particular [moral] norm but the entire legal order” when the community imagines that the “existence of the state as an organized entity with a jurisdictional reach and a continuous history . . . will come to an end.”); KLEINERMAN, *supra* note 13, at 184 (“when the constitutional Union itself is at risk”).

The same instinct is expressed in the context of a legal override as well. *E.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 708–09 (1952) (Vinson, C.J., dissenting) (advocating presidential power “to preserve legislative programs from destruction, so that Congress will have something left to act upon”); *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (rejecting a “suicide pact” understanding of the Constitution); Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864) (“the wreck of government, country, and Constitution altogether”), in 7 WORKS OF LINCOLN, *supra* note 2, at 281, 281; ACKERMAN, *supra* note 13, at 21 (recommending emergency laws for “political threat[s] to our constitutional system” or “existential threat[s] to the nation,” but “not to reduce the tragic loss of life”); ROSSITER, *supra* note 13, at 298 (“necessary or even indispensable to the preservation of the state and its constitutional order”).

in the sense that it aims to save them, but that is not authorized by law and that in fact violates it. Such violations are not “constitutional” in any legal sense, but they are surely in service of our Union as a constitutional construct that bears a distinct moral value.<sup>85</sup> Indeed, the Oath Clause is best understood as imposing an obligation that transcends constitutional legality in precisely this sense. When Presidents swear to “preserve, protect and defend the Constitution,” their oath does not purport to *authorize* action as a legal matter, but to *obligate* action as a matter of conscience—as a matter of sworn duty imposed by the extralegal power of oath to bind the oathgiver morally.<sup>86</sup>

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85. *E.g.*, MULFORD, *supra* note 62, at 159–60 (“[I]t is not [simply] the negation of rights and laws, but in the deeper sense and sequence their maintenance” in service of “the being of the nation as a moral person, to whom is given a vocation in the moral order of the world.”). I don’t think it is necessary to stake out a position here about whether the constitutional order is itself the end point or is rather a passthrough proxy for deeper social values. On the latter view, the focus on constitutional order could be something like a rule utilitarian shorthand that functions as a proxy for the deeper interests that constitutionalism protects—constitutionalism, in short, solely as a means rather than even partly as an end. Compare, for example, the understanding of certain natural law theorists who believe in something comparable to prerogative, albeit for very different reasons. From this perspective, the constitution is created to serve certain ends of social welfare and human justice. Whenever the legal forms fail to serve the higher order requirement they are meant to serve, then it becomes “constitutional” in this sense for the executive to step out of the boundaries of law and serve the higher order ends which the constitution is actually meant to serve. *See, e.g.*, THOMAS AQUINAS, *SUMMA THEOLOGICA*, Q. 96 Art. 6, at 73, 74 (J.W. Edwards ed., 1946) (1518) (“[T]he lawgiver . . . shapes the law . . . by directing his attention to the common good. Wherefore if a case arise wherein the observance of that law would be hurtful to the general welfare, it should not be observed.”); CHRISTOPHER ST. GERMAIN, *THE DOCTOR AND STUDENT*, Dialogue 1, ch. 4 (reprint 1531) (1518) (“For lawes of man not contrary to the lawe of god, nor to the lawe of reason, muste be observed in the lawe of the soule . . .”). *Cf.* *Bonham’s Case*, [1610] 77 Eng. Rep. 638, 652 (“[W]hen an Act of Parliament is against common right and reason . . . the common law will controul it, and adjudge such Act to be void . . .”).

86. Commentary on this point from the Founding and early Republic is notably on point. *E.g.*, George Washington, Second Inaugural Address (Mar. 4, 1793) (“I may (besides incurring constitutional punishment) be subject to the upbraidings of all who are now witnesses of the present solemn ceremony.”), in *INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES* 6 (1989); James Madison, Second Inaugural Address (Mar. 4, 1813) (“About to add the solemnity of an oath to the obligations imposed by a second call to the station in which my country heretofore placed me . . .”), in *id.* 29. *Cf.* 1 BLACKSTONE, *supra* note 25, at \*369 (“The sanction of an oath . . . strengthens the *social* tie by uniting it with that of *religion*.”). This theme continues through American history. *E.g.*, Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 *WORKS OF LINCOLN*, *supra* note 2, at 249, 261 (“*You* have no oath registered in Heaven to destroy the government, while *I* shall have the most solemn one to ‘preserve, protect and defend’ it.”); JOSEPH STORY, 3 *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*, § 1838, at 702 (1833) (“Oaths have a solemn obligation upon the minds of all reflecting men, and especially upon those, who feel a deep sense of accountability to a Supreme being.”); John F. Kennedy, Inaugural Address (Jan. 20, 1961), in *INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES* 305 (1989) (“I have sworn before you and Almighty God the same solemn oath our forebears prescribed . . .”). For a succinct treatment of the issue, see Steve Sheppard, *What Oaths Meant to the Framers’ Generation: A Preliminary Sketch*, 2009 *CARDOZO L. REV. DE NOVO* 273.

The easiest cases of existential severity would typically entail civil war or foreign invasion—with a serious threat either of the physical dissolution of our republic or of its total subjugation to another sovereign. But Lincoln’s equation of the nation with its legal structure points to a third form of existential risk as well: a threat to the constitutional order that is at the beating heart of who we are.<sup>87</sup> This is not to suggest that every detail of our current legal structure must be preserved in amber as a museum piece. But it is not hard to imagine catastrophic events predictably triggering such a radical restructuring of our system (say nuclear strikes in a major city, or the physical destruction of our central institutions of government) that the resulting legal reform might actually satisfy the severity requirement—not because the legal changes would threaten the physical integrity or sovereign independence of the United States, but because they would threaten the end of the American experiment *as we know it*.<sup>88</sup>

There will be disagreement, to put it mildly, about the amount of legal change it would take to shift the terms of our political coexistence so radically as to make us something “different” from what we currently are.<sup>89</sup>

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Note that the Article IV Republican Guarantee Clause sets up a similar structure, noting in obligatory terms that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . .” U.S. CONST. art. IV, § 4. Contrast that formulation with provisions of Article IV and Article I that are phrased in terms of legal authorization. *Cf.* U.S. CONST. art. IV, § 3 (“Congress shall have Power to . . . make all needful Rules and Regulations” respecting United States territories.); U.S. CONST. art. I, § 8 (“The Congress shall have power . . . To establish Post Offices . . .”).

87. Some might see this step as a contradiction in terms—mixing a rational Enlightenment concern for human rights with an irrational Romantic attachment to community. *E.g.*, KAHN, *supra* note 12, at 121–22. I see no contradiction between recognizing a transcendent sense of community and recognizing that a commitment to the rule of law is a central element of our self-definition.

88. HOMELAND SEC. COUNCIL, NATIONAL PLANNING SCENARIOS, VERSION 23.1, at 1-9 (Mar. 2006), available at <https://www.llis.dhs.gov/sites/default/files/NPS-LLIS.pdf> (noting that after a “nuclear detonation,” there “will certainly be economic, political, law enforcement, civil liberty, and military consequences that will likely change the very nature of the country”); J. PETER SCOBLC, U.S. VS. THEM: CONSERVATISM IN THE AGE OF NUCLEAR TERROR, at xii (2008) (“A nuclear 9/11 could be a catastrophe so great as to render the postattack United States unrecognizable—politically, economically, sociologically, and psychologically. In that sense, a nuclear terrorist attack is an *existential threat*—the only immediate one we face.”).

89. This will depend in part on what the evaluator thinks is permissible as the Constitution stands now. Compare, *e.g.*, Jeffrey T. Kuhner, *End of the Constitution*, WASH. TIMES (Feb. 10, 2012), <http://www.washingtontimes.com/news/2012/feb/10/end-of-the-constitution> (“Obama’s presidency” is bringing “the destruction of our constitutional republic.”), and Brian Leiter, *A Pretty Good Statement by Obama on the Trayvon Martin Case* . . . , LEITER REPS.: A PHIL. BLOG (July 20, 2013), <http://leiterreports.typepad.com/blog/2013/07/a-pretty-good-statement-by-obama-on-the-trayvor-martin-case.html> (Obama “has laid the foundation for the fascist state of tomorrow.”) with, *e.g.*, Interview by David Frost with Richard Nixon (May 19, 1977) (“Well, when the President does it, that means it is not illegal.”), available at <http://www.theguardian.com/theguardian/2007/sep/07/greatinterviews1>.

And on anyone's account there will be genuine catastrophes that cannot satisfy even this version of existential risk. It's hard to see how the sociopath's cyanide death trap could qualify, for example, and I suppose it might even be argued that the nuclear destruction of New York City would be more likely to prompt a defiant embrace of our constitutional rights than a panicked Article V deletion of the Fourth, Fifth, and Sixth Amendments. But it does not seem like a dodge to suggest that these are problems of application rather than a conceptual flaw with the theory as it has emerged from historical discussions.<sup>90</sup>

## 2. Actions Limited by Necessity

In sum, the crisis that triggers republican prerogative must be sudden, irregular, and existential. But that does not end the inquiry. Discussions in this tradition further suggest a limitation on the scope of the executive's response that has the flavor of a necessity or narrow tailoring requirement. Prerogative advocates often urge that "it is temporary and self-destructive. . . . [I]ts purpose is to dispense with the crisis; when the crisis goes, it goes."<sup>91</sup> And necessity appears to be measured in particular with reference to what must by definition be the goal of stabilizing the situation sufficiently to allow the legislature to consider and adopt what it views as an appropriate response.<sup>92</sup> On that view, any action that is *not* necessary to

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90. Even stipulating the evaluative criteria, deciding whether any particular threat meets them in practice must necessarily be filtered through veils of uncertainty. In the best of circumstances, the executive can't know with any certainty what will happen tomorrow. And this fog obviously becomes thicker still in the midst of a sudden and irregular crisis. In making this assessment, it may help to consider two different problems: mistake and uncertainty. With respect to mistake, or the chance that the executive might erroneously misunderstand the facts then in existence, one might look once again to ordinary tort and criminal law, evaluating executive action on the basis of the facts as the executive understood them. With respect to the executive's conscious recognition that either the facts on the ground or their future implications are unknown, one might think instead of some form of probabilistic discounting, along the lines of the Learned Hand formula in tort law. Cf. Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365, 1369 (2012) ("[F]or targeting or detection to be justifiable, the security benefits must outweigh the costs to individual liberty."); Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1390 (2008) (asserting that a "reasonable care" standard should be applied in the targeting context). In either event, it would seem logical to judge an exercise of prerogative by the information subjectively available *ex ante*, as opposed to the information available with perfect hindsight.

91. ROSSITER, *supra* note 13, at 8.

92. E.g., MOORE, *supra* note 60, at 48 ("limited by the necessities of the case"); ROSSITER, *supra* note 13, at 7, 297–98; SCHLESINGER, *supra* note 74, at 295–307; PIOUS, *supra* note 77, at 84; FATOVIC, *supra* note 13, at 260 ("as temporary and narrow as possible"). This view is most expansively discussed in parallel debates about the legalized martial law regime. See, e.g., DICEY, *supra* note 21, at 541 ("The only principle on which the law of England tolerates what is called Martial Law is necessity; its introduction can be justified only by necessity; its continuance requires precisely the same justification

stabilize the crisis—whether because alternative legal means are (or could be made) available or because the crisis is already over—is out of bounds. Like the triggering conditions, this limitation thus keeps republican prerogative bounded by the particular failure of liberal constitutionalism that validated its exercise in the first place.

### 3. Disclosure and Public Judgment

The final requirement is a disclosure obligation—no different in practice from that proposed by Jefferson—that both ensures a kind of procedural safeguard and reflects an expectation about the mindset that should accompany any exercise of republican prerogative. The obligation part is straightforward: officials must disclose any action that violated the law.<sup>93</sup> Even if the demanding substantive criteria of prerogative have been met, in other words, the executive must additionally elect to undergo public evaluation of the illegal action after the fact—with civil or even criminal sanctions at stake essentially by definition.<sup>94</sup> Those who exercise prerogative must thus “risk[] themselves like faithful servants . . . and throw themselves on their country for doing for them unauthorized what [they] know [the people] would have done for themselves had they been in a situation to do it.”<sup>95</sup> While the reaction of other political actors may

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of necessity; and if it survives the necessity on which it alone it rests for a single minute, it becomes instantly a mere exercise of lawless violence.”). *Cf. Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866) (“As necessity creates the rule, so it limits its duration . . .”).

93. Note that there are two questions embedded here: just how public must the disclosure be, and just how detailed a form must it take. The latter question may not be straightforward, particularly when validly classified operations are involved. But discussions of disclosure in the prerogative context seem at least to require the executive to reveal enough information for other actors to meaningfully judge whether the substantive conditions were actually met. *Cf. David E. Pozen, Deep Secrecy*, 62 STAN. L. REV. 257, 273–75 (2010). Whether this obligation could be satisfied by two levels of disclosure—one for public consumption; another for limited circulation to some independent political actor—is a question worth exploring, but not one engaged with by historical discussions of prerogative. It’s also worth noting that simply engaging in sufficiently obvious illegal action—of the sort that announces its own existence and illegality—would presumably moot the obligation to disclose, which is not understood as a sort of box-checking exercise.

94. Political evaluation might occur through electoral recall, impeachment proceedings, official condemnation—or in the alternative, through the relevant political actors’ discretionary choice not to pursue any of those penalties. Without some form of jurisdictional immunity, official lawbreaking also runs the risk of judicial sanctions, whether criminal or civil—again, unless some discretionary political intervention stays the hand of justice. Political interventions along these lines include legislative indemnities, prosecutorial discretion, executive pardons, and jury nullification. For a good survey of the options, see GROSS & NÍ AOLÁIN, *supra* note 13, at 131–39.

95. Letter from Thomas Jefferson to John C. Breckenridge (Aug. 12, 1803), *quoted in* 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 51, at 244 n.1 (discussing action in violation of the Constitution). Note that Jefferson was here describing the requirements of prerogative as applied not only to the President, but also to members of Congress. *Id.* (“The Executive . . . have done an act beyond the Constitution. The Legislature in casting behind them metaphysical subtleties, and risking

depend on whether they agree that the trigger conditions were satisfied, the *result* of their assessment is irrelevant to the objective republican validity of the underlying violation. Public approval might well legitimate the executive's action in a political sense, but *ex post* approval is not a constituent requirement of prerogative as such.

Note that, in one sense, the disclosure requirement is a logical extension of the suddenness and irregularity requirements: as soon as the practical barriers to legislative action vanish, the Anticipation Problem is no longer in play and—not unlike the guardian model invoked so often in this context<sup>96</sup>—the political entity on whose behalf the executive acted must be given the opportunity to assess that choice.<sup>97</sup> In this way, the disclosure obligation functions to communicate and reinforce the violator's respect for the ordinary legal process. Disclosure also suggests another, related theme of the republican prerogative. Throughout discussions of lawbreaking in the republican vein, the decision to violate the laws is described as hesitant, regretful, and even painful—not because of the fear of personal consequences, but because of the harm that the perpetrator has

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themselves like faithful servants, must ratify & pay for it . . .”). *See also* Madison on Censure, *supra* note 81 (“[T]he first opportunity should be seized for communicating to the legislature the measures pursued, with the reasons explaining the necessity of them.”); BROWNSON, *supra* note 21, at 331–32 (arguing that where it is necessary to do things “which are high crimes” under most circumstances, the President must, “if Congress is not in session, . . . call it together at the earliest practicable moment, and submit the matter to its wisdom and discretion”). Note that the Brownson observation quoted here could in isolation be misread to reject prerogative entirely and require Congress to bless all action by the President in advance, regardless of the circumstances. In a context where Brownson celebrates Lincoln for saving the Union, *id.* at 359–60, and describes in detail the illegal means by which he did it, *id.* at 311–30, it seems clear that he is actually referring to the violate-and-ratify dynamic that Lincoln's July 4, 1861 speech and Congress's response represent.

96. *See, e.g.*, Letter from Thomas Jefferson to John C. Breckenridge (Aug. 12, 1803), *quoted in* 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 51, at 244 n.1 (offering an analogy to “the case of a guardian”); LOCKE, *supra* note 26, § 65, at 36–37. *Cf.* THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 388–89 (1913) (describing the stewardship model of legal powers); Hendrik Hartog, *The Constitution of Aspiration and “The Rights That Belong to Us All,”* in THE CONSTITUTION AND AMERICAN LIFE 353, 354 (David Thelen ed., 1988) (noting Lincoln's “conception of the Constitution as an estate to be husbanded”).

97. *Cf.* Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 WORKS OF LINCOLN, *supra* note 2, at 421, 430–31; *The Prize Cases*, 67 U.S. 635, 671 (1863) (“[I]f the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress,” then congressional “ratification has operated to perfectly cure the defect.”). In this way the prerogative is brought back within a constitutional orbit, not in the sense of itself being legally defensible under the Constitution, but in the sense of subjecting itself to constitutional processes that will determine whether the requirements for extralegal action were satisfied. Compare Henry Thoreau and Martin Luther King's view that civil disobedience requires the violator to suffer the consequences as a way to convey a general respect for the laws. *See infra* note 99.

done by violating the laws, however justified that choice may seem.<sup>98</sup> Disclosure can thus be understood to represent a recognition that even justified harm requires some kind of confession before the lawbreaker can earn meaningful absolution.<sup>99</sup>

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With that, the sketch of republican prerogative—as it has been sensed in inchoate form throughout our history and as it has been systematized and elaborated here—is complete. Republican prerogative may only be invoked in the face of a sudden, irregular, and existential threat to the survival of our republic in the form that we know it. Even when the invocation of prerogative is justified, that justification remains in effect only so long as the emergency continues, and only for the purpose of stabilizing the crisis with a view to restoring the ordinary constitutional order. And it requires the executive to disclose its actions after the fact, with something like a sense of sorrow about what had to be done.

### C. TEST CASES

Let us conclude Part II by considering four members of the executive branch who faced sharp conflicts between law and expediency.

#### 1. Abraham Lincoln and the Suspension of Habeas Corpus

First, let's return to President Abraham Lincoln and one of the diciest moments in our country's history: when he suspended habeas corpus in the Maryland-D.C. railway corridor during the opening days of the Civil War. Some of Lincoln's other legally questionable actions would be difficult to justify under the republican prerogative. It might be hard to claim, for

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98. I note without exploring here the possibility that there might be a continuum of republican harm. All unconstitutional legal violations require some kind of extralegal defense. But perhaps the violation of mere "technicalities" should imply a less sorrowful posture than incursions on weightier legal restrictions.

99. The disclosure requirement would be hard to explain as a function of ordinary civil disobedience theory. Some models of civil disobedience do require violations to be made public. MARTIN LUTHER KING, JR., *Letter from Birmingham City Jail* ("One who breaks an unjust law must do it *openly, lovingly, . . .* and with a willingness to accept the penalty."), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.*, *supra* note 74, at 289, 294 (1963); HENRY DAVID THOREAU, *WALDEN & ON THE DUTY OF CIVIL DISOBEDIENCE* 281, 289–90 (1948) (urging public resistance of unjust laws). But that requirement and its essentially communicative logic seem to presume that the laws in question are systematically unjust. It is harder to see why that requirement would apply to the kind of *situationally* immoral law (think of the prohibition on drone strikes in the nuclear terrorism example, *supra* Part I.A.2) more typically contemplated by the republican prerogative. Indeed, if we worry about the cultural toll of open and notorious lawbreaking, officials might even think it morally obligatory to *hide* their ad hoc violations of situationally immoral laws.

example, that the survival of the country turned imminently on an unauthorized two million dollar advance from the Treasury to a group of New York financiers, much less on the Union blockade of the South Carolina coastline.<sup>100</sup> Perhaps more to the point, even in those transportation-challenged times, Congress could have convened quickly enough for the existing legal structure to adopt these latter elements of the President's crisis policy.

But suspending habeas in Maryland was a different story. Unlike Lincoln's other actions, this decision really was in response to a sudden, irregular, and existential threat to the Union. Had Maryland fallen either to chaos or the Confederacy, the outcome could have fatal consequences for the Union, cutting off Washington, the President, and the basic organs of government from the rest of the Union. Armies out of Virginia would have been in a position not only to physically occupy the capital but quite possibly to decapitate the national government.<sup>101</sup> The speed with which events were transpiring was nothing short of breathtaking, and if anything was ever beyond the capacity of the existing statutory structure to handle, it was the Civil War. Nor was it reasonable to expect Congress (which was out of session) to arrive in time to deal with Maryland—the problem was precisely that transportation to Washington was cut off even for trainloads of armed Union soldiers.

So even if we follow virtually all scholars in rejecting Lincoln's weak constitutional defense of the habeas suspension,<sup>102</sup> not even the most committed constitutional republicans have to condemn his decision—at least not in the first weeks of the war, and at least not if we accept the concept of republican prerogative as it has been sketched here.

## 2. Fawn Hall and the Iran-Contra Scandal

Second, consider National Security Council employee Fawn Hall. Her boss, Oliver North, thought it was a vital security interest of the United States to prop up the Nicaraguan insurrectionary movement known as the Contras. But the Boland Amendment prohibited the government from sending the Nicaraguan rebels any assistance. So North organized an illegal

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100. *E.g.*, JAMES G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 36–38 (1926); FARBER, *supra* note 4, at 17–18; PALUDAN, *supra* note 5, at 70–71, 89–90.

101. *See, e.g.*, NEELY, *supra* note 4, at 6 (describing letters to Lincoln from Senators, Congressmen, and Cabinet members telling him that without military intervention in Maryland, the “fall of Washington would be most disasterous [*sic*]”); DAVID HERBERT DONALD, *LINCOLN* 297–99 (1995) (discussing the heightened tensions in Washington).

102. *E.g.*, Saikrishna Bangalore Prakash, *The Great Suspender's Unconstitutional Suspension of the Great Writ*, 3 *ALB. GOV'T L. REV.* 575, 602–09 (2010).

scheme to sell arms to the Iranian government and funnel profits to the Contras through private corporate intermediaries in the United States. After Congress announced an investigation into the illegal scheme, North told Hall to shred boxes of papers that would have revealed the scope of his wrongdoing. Knowing full well that she was breaking the law, Hall did so, even sneaking out of the building with classified documents wadded down her boots. As she later put it with disarming candor, “I believed in [Colonel] North and there was a very solid and very valid reason that he must have been doing this. And sometimes you have to go above the written law, I believe.”<sup>103</sup>

Despite Hall’s strikingly explicit invocation of an extralegal privilege, there is simply no case that either North’s activities or Hall’s coverup satisfied the requirements of republican prerogative.<sup>104</sup> The lawbreaking Hall sought to protect had not responded to a swiftly developing threat: no sudden developments had taken place in Nicaragua requiring urgent reevaluation of the American legal structure, and it would take an implausibly aggressive theory of existential risk to believe that even the total collapse of the Contras would have risked our republic. Moreover, Hall’s violations were intended to *hide* lawbreaking from hostile scrutiny—the very opposite of disclosure and public evaluation. Under the republican ethic, that’s why we view Hall stuffing papers into her boots as a grubby act of illegality rather than an intelligibly moral act within our constitutional order.

### 3. Dick Cheney and the September 11 Shootdown Order<sup>105</sup>

Third, Vice President Dick Cheney. On September 11, 2001, the first plane smashed into the North Tower at 8:46 am. Confusion reigned. Then came the second plane. It brought clarity, followed by a different kind of

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103. Dan Morgan & Walter Pincus, *Hall Testifies of Necessity “To Go Above Written Law,”* WASH. POST, June 10, 1987, at A1. This account also draws on the following sources: JOHN TOWER ET AL., REPORT OF THE PRESIDENT’S SPECIAL REVIEW BOARD, at B-107 to B-110 (Feb. 26, 1987); THE IRAN-CONTRA SCANDAL: THE DECLASSIFIED HISTORY 329–31 (Peter Kornbluh & Malcolm Byrne eds., 1993); Frederick Schauer, *Official Obedience and the Politics of Defining ‘Law’* 1–4 (Va. Pub. Law and Legal Theory Research Paper No. 2013-11), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2220923](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220923).

104. As we will see in Part III.A, however, even low-ranking officials are *not* precluded from access to republican prerogative.

105. See generally NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., A NEW TYPE OF WAR: THE STORY OF THE FAA AND NORAD RESPONSE TO THE SEPTEMBER 11, 2011 ATTACKS (unpublished manuscript), available at <http://www.rutgerslawreview.com/2011/a-new-type-of-war/> (explaining the development of the shoot-down order); CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3610.01A, AIRCRAFT PIRACY (HIJACKING) AND DESTRUCTION OF DERELICT AIRBORNE OBJECTS (June 1, 2001) (instructions for military personnel in the event of an aircraft hijacking).

confusion. The FAA and NORAD hijacking protocols were time-intensive—so demanding, in fact, that they were unworkable as a template for action that morning. Even after fighter jets around the country scrambled in response to an order that was itself issued outside the chain of command, the pilots' mandate was unclear. Lethal action was prohibited without direct approval from the President or the Secretary of Defense, but neither of them could be reached. Panic rose in the White House, in the Capitol, and at the Supreme Court as evacuation notices went out. Finally, as Flight 93 headed toward Washington, Cheney simply ordered the Air Force to shoot down any plane that came near the nation's capital. His chief of staff later said Cheney made the call "in about the time it takes a batter to decide to swing."<sup>106</sup>

Cheney's command violated the law. It never had to be tested; indeed it is not clear that it would have been followed. But had it come to that, his decision might well have saved the Capitol from destruction—and as far as he then knew, other crucial centers of national government as well. But can it be seen as an exercise of republican prerogative? Cheney's attitude may have been in tension with the sense of tragic responsibility that characterizes many discussions of republican prerogative—perhaps because, although even the strongest Article II theorists typically vest a constitutional override in the President alone,<sup>107</sup> Cheney may have believed his order was legal.<sup>108</sup> But in many other respects, the shutdown order satisfied the requirements of republican prerogative. September 11 came suddenly. The form of attack was entirely unexpected, and the rules in

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106. Final Report of the National Commission on Terrorist Attacks upon the United States (THE 9/11 COMMISSION REPORT) 41 (2004).

107. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 580–88 (2004) (Thomas, J., dissenting) (emphasizing the special constitutional role of the President); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1173 (1992) ("[T]he Constitution vests all of the executive power in the President and gives Congress no authority to vest executive power in anyone else."). See also Memorandum from Nicholas deB. Katzenbach, Assistant Attorney General, to Lyndon B. Johnson, Constitutionality of the Vice President's Service as Chairman of the National Aeronautics and Space Council 4 (Apr. 18, 1961) ("[T]he Vice President belongs neither to the Executive nor to the Legislative Branch . . ."); Peter Baker, *White House Defends Cheney's Refusal of Oversight*, WASH. POST (June 23, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/22/AR2007062201809.html> (reporting the Bush Administration's argument that the Vice President was not a member of the executive branch).

108. One way to square Cheney's apparent lack of concern about his decision with the expectations of republican prerogative would be by further developing the possibility that not all laws are created equal. See *supra* Part I.A. On that view, ignoring the hypertechnical formalities of administrative operating procedures might not prompt the same angst as violating obvious constitutional limits. See *supra* note 79. It might also be unrealistic to expect a sense of regret from someone who believes in good faith—even if wrongly—that the rule prohibiting the action is itself unconstitutional.

place were badly suited to the emergency. The order Cheney issued was limited to the precise threat that was playing out over the Eastern seaboard, and it had operational force only until the instant threat was fully in hand.

In the final analysis, evaluating Cheney's shutdown order as an exercise of republican prerogative turns mainly on whether the crisis was sufficiently severe. In practical terms, the United States would hardly have come to an end even if the September 11 plotters had managed to destroy the White House, the Capitol building, or even (from Cheney's perspective at the time) any number of other discrete targets. On the other hand, as with Maryland in 1861, it matters that the terrorist attacks were so obviously framed as a decapitation strike. In the same way that we might expect the nuclear destruction of New York City to prompt radical amendment of the constitutional order, similar degradation of the constitutional fabric might well be expected to result from the systematic destruction of major government centers in Washington. I find myself torn on the question, and it is certainly a closer case than that of Oliver North or Fawn Hall. But applying my own, necessarily intuitive sense of how the counterfactual would have played out in a country that has seen symbolic destruction before—including, in 1814, the partial sack of Washington and burning of the White House—it seems hard to understand the risk presented as rising to an existential level, even in the sense of risking a radical revision of our constitutional order. The demands of republican prerogative are just too strict.

#### 4. John Ashcroft and the Terrorist Surveillance Program

Finally, Attorney General John Ashcroft. Bedridden and floating in and out of a morphine haze, he was recovering from emergency surgery and an agonizing illness. The day after his surgery, Ashcroft woke up to see a group of men at his bedside. At first, some of them thought the ashen and semi-delirious Attorney General couldn't comprehend what was going on around him. But he had to. The President's office had dispatched the Chief of Staff and White House Counsel to pressure Ashcroft into breaking the law. Speaking urgently, they told him that people would die if he didn't authorize a terrorist surveillance program that he believed was illegal. Rousing himself for a moment of focus, the frail patient refused to capitulate. "Demonstrat[ing] a strength I had never seen before," his chief deputy later recalled, Ashcroft "lifted his head off the pillow and, in very strong terms, expressed his view of the matter, rich in both substance and fact, which stunned me, drawn from the hour-long meeting we had had a week earlier, . . . and then laid his head back down on the

pillow, . . . spent.”<sup>109</sup> The White House emissaries left the room, defeated. Another government official said that watching Ashcroft go “from seeming near death to having this amazing moment of clarity” was “one of the most extraordinary events I’ve ever seen in my life.”<sup>110</sup>

Did Ashcroft interfere with a valid presidential exercise of republican prerogative? The answer has to be no. As with the Iran-Contra affair, the terrorist threat that motivated the terrorist surveillance program was neither sudden nor swiftly developing in any tactical sense. Not only was it well within the competence of legislative reform, but there is not even any indication that the existential threat required by republican prerogative was in play. On an account defined by the republican ethic, that’s why we talk about Ashcroft’s decision to protect the laws as “amazing,” “extraordinary,” and perhaps even heroic: because the illegal activities he opposed could not even colorably be seen as republican prerogative.

In fact, by resisting enormous pressure at a vulnerable time, Ashcroft was actually *defending* the republican ethic—serving the Constitution and the rule of law at potentially devastating cost to a career he had spent his entire life building. It’s worth noting that this interpretation is in keeping with other hints of the man’s values that emerge from his public record. Because Ashcroft was not only the law-and-order prosecutor and fervent supporter of the Patriot Act; he was also the member of the Singing Senators, the deeply religious host of weekly prayer breakfasts at Main Justice, and the composer-performer of “Let the Eagle Soar.”<sup>111</sup> His hospital bed fortitude (which had the practical effect of securing certain *legalized* civil liberties that he might not have been disposed to advocate as a policy matter) may well have come from the same place as his unabashed embrace of our country and its hard-won legal tradition.

### III. SOME PROBLEMS

This basic sketch of republican prerogative leaves open some

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109. Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 215–24 (2007) (statement of James B. Comey, former Deputy Att’y Gen. of the United States).

110. Jack Goldsmith, Frontline appearance (2007), *available at* <http://www.pbs.org/wgbh/pages/frontline/chenev/interviews/goldsmith.html#3>. This account also draws from Dan Eggen & Paul Kane, *Gonzales Hospital Episode Detailed*, WASH. POST (May 16, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/15/AR2007051500864.html>; David Johnston & Scott Shane, *Notes Detail Visit to Ashcroft’s Hospital Room*, N.Y. TIMES (Aug. 16, 2007), <http://www.nytimes.com/2007/08/16/washington/16cnd-inquiries.html?hp>.

111. *John Ashcroft (Let the Eagle Soar)*, YOUTUBE (uploaded Mar. 29, 2006), <http://www.youtube.com/watch?v=woLQI8X2R6Y>.

important questions. I do not propose to resolve them conclusively here, but they are worth flagging.

#### A. WHO POSSESSES PREROGATIVE?

Some writers have suggested that only the President or high executive officials may exercise prerogative.<sup>112</sup> This appears to be a legacy of the fact that English royal prerogative—which included a discretionary power to set aside the application of inconvenient statutes<sup>113</sup>—was a non-delegable power of the king alone.<sup>114</sup> The question is whether an analogous limitation—to one official, or perhaps a class of officials—ought to restrict republican prerogative too. I am skeptical. It was a view of royal prerogative as a creature of law that eventually rendered it vulnerable first to review by the English courts<sup>115</sup> and then to its subjugation to parliamentary control.<sup>116</sup> The *moral* claims of the republican ethic, by

112. See, e.g., Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 48, at 279, 279 (recognizing “a duty in officers of high trust, to assume some authorities beyond the law”); Madison on Censure, *supra* note 81 (“[E]xecutive sanction [for an illegal act] should flow from the supreme source.”). *But see* Letter from Thomas Jefferson to John C. Breckenridge (Aug. 12, 1803), *quoted in* 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 51, at 244 n.1 (describing the requirements for legislative prerogative).

113. Even the most aggressive royalists never quite reached the point of *qui veut le roi, si veut la loi*. But in some cases the implications of the dispensing power and absolute royal prerogative reached pretty far. See, e.g., JAMES I, BASILIKON DORON 27–120 (1599); ROBERT FILMER, PATRIARCHA: OR THE NATURAL POWER OF KINGS, at ch. III, pt. 1, at 77–80 (1680); JOHN COWELL, THE INSTITUTES OF THE LAWS OF ENGLAND tit. II, para. 5, at 5 (1651); WORMUTH, *supra* note 52, at 55 (describing claims of “absolute prerogative . . . to act outside the common law for reason of state”).

114. See JOHN ALLEN, INQUIRY INTO THE RISE AND GROWTH OF THE ROYAL PREROGATIVE IN ENGLAND 1 (B. Thorpe ed., 1849) (describing prerogative as part of the “transcendent attributes ascribed to the King”); FRANCIS BACON, AN ESSAY OF A KING 5 (1642) (“cannot be executed by any Subject, neither is it possible [for the king] to give such power by Commission”) (1642); 1 BLACKSTONE, *supra* note 25, at \*239 (defining prerogative as that power which “can only be applied to those rights and capacities which the king enjoys alone”).

115. See Case of Proclamations, [1610] 77 Eng. Rep. 1352 (K.B.), 1354 (“[T]he King hath no prerogative, but that which the law of the land allows him.”); Darnel’s Case, [1627] 3 How. St. Tr. 1 (evaluating the Crown’s claim to detain “by his majesty’s special commandment” to determine “whether this be good in law”), *reprinted in* 3 COBETT’S COLLECTION OF STATE TRIALS 1, 60 (1809). *See also, e.g.,* MILTON, *supra* note 22, at 20 (“[A] king ought to observe the Laws, as well as any other man.”). For a summary of the royalist position on the question, see Bates’s Case, [1606] 2 St. Tr. 371 (“The kings power is double, ordinary and absolute . . . . That of the ordinary is for . . . the execution of civil justice . . . [and] cannot be changed, without parliament . . . . The absolute power of the king . . . [varies only] according to the wisdom of the king, for the common good . . . .”), *reprinted in* 2 COBETT’S COLLECTION OF STATE TRIALS 371, 389 (1809).

116. An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crowne, 1 Gul. & Mar., c.2 (1689) (“[T]he pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authority as it hath beene assumed and exercised of late is illegall”), *reprinted in* 6 THE STATUTES OF THE REALM 143 (1685–1694) (John Raithby ed., 1819). *See also* DICEY, *supra* note 21, at 60–62 (noting that “though certain powers . . . are now left by law in the hands of the

contrast, would seem available to anyone in a position to serve the common republican purpose at which it is directed. If that is right, then not only could any other federal officer invoke the prerogative,<sup>117</sup> but so too could state officials and even private parties in the unlikely case that they were in a position to respond to an existential threat with a response tailored as the prerogative requires.

The best case for presidential exclusivity (though I find it unconvincing) would rely on the Oath Clause of the Constitution. That argument would stem from a claim that the nation has designated its President—not in a legal sense, but through some extralegal recognition as a moral agent for the republic—to decide when the constitutional order is at stake. (A more flexible version might recognize a prerogative privilege for other federal officials who currently swear a similar oath,<sup>118</sup> while refusing to do so for any state officials or private citizens who do not.<sup>119</sup>) The problem with that claim is that it reads these obligatory mandates to preclude anyone else's entitlement to the underlying moral claim. That

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Crown, . . . no modern lawyer [in 1915] would maintain that these powers or any other branch of royal authority could not be regulated or abolished by Act of Parliament"); F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 416–21 (1926) (discussing—in a lecture delivered in 1888—the difficulty of identifying which elements of legalized royal prerogative still remained by that time); ALLEN, *supra* note 114, at 9–11 (“[H]owever the monarchical theory may have been proclaimed in law books and magnified by churchmen, it was never reduced, strictly and completely, to practice; nor was it ever recognized or quietly submitted to by the people . . .”). For a concise overview of Parliamentary disputes on this issue, see BURGESS, *supra* note 60, at 139–42.

117. It would be exceedingly rare for any anyone other than the President to be faced with a decision of this magnitude without an opportunity to pass it up the line. But it's at least theoretically possible. And there is no reason in principle that this shouldn't apply to federal officers outside the executive. Ellen Katz points out that *Bush v. Gore* has sometimes been defended as an essentially lawless action in the Schmittian sense, taken in order to avert a threat to fundamental political stability in response to a sudden crisis on a question that the legal rules were poorly suited to handle. See Ellen D. Katz, *From Bush v. Gore to NAMUDNO: A Response to Professor Amar*, 61 FLA. L. REV. 991, 996–97 (2009) (arguing that the Justices in *Bush v. Gore* “step[ped] into the shoes” of the Florida Supreme Court to right what they perceived as an incorrect and damaging decision). Cf. Richard A. Posner, *Bush v. Gore as Pragmatic Adjudication*, in *A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY* 187, 208–13 (Ronald Dworkin ed., 2002).

118. The current statutory oath for federal officers is “I, [state your name], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.” 5 U.S.C. § 3331 (2012). State officers take a shorter oath, stating that “I, [state your name], do solemnly swear that I will support the Constitution of the United States.” 4 U.S.C. § 101 (2012).

119. As a matter of federal law, State officers swear only to “support the Constitution of the United States.” 4 U.S.C. § 101. State practice presumably varies.

would be reading an awful lot into very few words.<sup>120</sup> And the constitutional version in particular would require us to deal with the vexing question of how, since even the President must rely on the cooperation of others, anyone could effectuate an illegal course of action if those who must execute it on his behalf are not understood to have a comparable moral claim to violate the law.

#### B. DOES PREROGATIVE MEAN EMERGENCY STATUTES ARE UNNECESSARY?

Debates about the relationship between law and emergency persistently focus on whether to extend legal grants of open-ended crisis powers—and if so, how. A superficial reading of the republican prerogative might imply that it renders legal delegations of emergency power unnecessary and therefore unwise. That view would be mistaken.

The problem is that illegality taxes any executive action to which it applies. So if we're certain that some specific set of identifiable circumstances would require a departure from the ordinary legal framework, then economists would tell us that our failure to provide the requisite contingent legal authority may predictably undersupply necessary action by risk-averse actors who are unable to internalize all its benefits.

More fundamentally, the fact that all legislators necessarily face the Anticipation Problem doesn't mean that they shouldn't try to anticipate problems. In fact, one implication of the republican ethic might actually be that muscular delegations of emergency power are vital to contemporary liberal legalism, at least if structured so as to keep their exercise meaningfully accountable. Contrary to a frequent refrain of "errand boy" theorists that this sort of delegation corrodes the culture of legality, a smart, targeted delegation (perhaps even drafted to follow the lines of the republican prerogative, although there would be no need to stop there) might actually bolster the most important bulwark against executive tyranny: a culture of respect for the principle that the executive is a creature of the laws and the ordinary legal process.<sup>121</sup>

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120. Cf. Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 239 n.76 (2002) ("The Presidential Oath Clause does not appear, at least in form, to be a *grant* of power to the President."); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 122 (1993) ("An oath is limiting, not empowering.").

121. More generally, there is substantial debate on the viability and desirability of institutional and political checks on executive action. *E.g.*, Julian Davis Mortenson, *Law Matters, Even to the Executive*, 112 MICH. L. REV. 1015, 1023 (2014). Some expect the serious consequences of criminality, the uncertainty of ex post approval, and a certain amount of innate human risk aversion to provide just about the right level of disincentive for lawbreaking. Others worry that any form of external review may

If that's right, then we might want to invert Jefferson's strategy of rendering the laws so stiff and so parsimonious that the people would lose respect for them. Instead, precisely by creating significant statutory authorization subject to careful institutional checks (which we might expect to extend a fair amount of deference in the face of genuine emergency), we can cultivate precisely the veneration of laws which is both the basis for and the restraint on prerogative. This is a golden mean problem: too much legal discretion and we abandon the rule of law; too little and we may regularize the social practice of lawbreaking. But even if the solution can only come in the doing, recognizing the project as a balancing act is a crucial first step.

### C. WHAT ABOUT OTHER MORAL GROUNDS TO DISOBEY THE LAW?

My skepticism that Cheney properly exercised republican prerogative with his shutdown order brings us back to a point made earlier. This Article does not claim that republican prerogative is the *only* moral ground

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over-deter necessary action. But the most common concern is a fear that vigorous and forthright law violation by the executive is unlikely to be punished very often. As Locke put it, "the people are very seldom or never scrupulous or nice in the point; they are far from examining prerogative while it is in any tolerable degree employed for the use it was meant." LOCKE, *supra* note 26, § 161, at 92. Cf. DYZENHAUS, *supra* note 21, at 98–99 & n.76 (predicting that illegality may have low political cost). Part of the dynamic here surely inheres in the awe that glittering acts of political courage are thought to inspire. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE FOURTH act 4, sc. 5, reprinted in SHAKESPEARE: THE COMPLETE WORKS 687, 689 (G.B. Harrison ed., 1952) ("Be it thy course to busy giddy minds [w]ith foreign quarrels . . ."); NICCOLÒ MACHIAVELLI, THE PRINCE 87–91 (Harvey C. Mansfield trans., 1998) (similar). Another part comes from what we might call the Dilution Problem: many Obama supporters who viewed his military actions in Libya as illegal, for example, nonetheless voted for him because in a binary aggregation of preferences they gave his domestic policies much greater weight.

Either way, many worry that insupportable invocations of prerogative will escape sanction. One set of safeguards against this are institutional. From the start, Madison understood that divided power would channel the impure motives of public officials into mutually offsetting checks. This dynamic can play out even within the executive branch, which is not a monolithic entity that operates robotically on the basis of commands from a unitary control center. *E.g.*, Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1564–66 (2007); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1036–41 (2011); Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a 'They,' Not an 'It,'* 96 MINN. L. REV. 194, 228–51 (2011). But the most relevant safeguard for present purposes is that the "we" at which republican prerogative is directed is a people that cares about its laws. Cf. BURKE, *Reflections on the Revolution in France*, in 3 THE WORKS OF EDMUND BURKE, *supra* note 68, at 21, 74 ("[A] jealous, ever-waking vigilance, to guard the treasure of our liberty, not only from invasion, but from decay and corruption, was our best wisdom and our first duty."). That is not to say that our respect for law is any more inflexible than the republican prerogative itself; anyone who has flashed high beams at oncoming traffic on the far side of a speed trap can tell you that. But it is to say that this relationship to law accounts for part of how we view the world, and that meaningful evaluation of executive action relies heavily on that fact.

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on which the executive may break the law. There is still room for a general theory of civil disobedience in the executive branch—even when the threat prompting it, for example, is insufficiently sudden, irregular, or existentially severe to qualify as republican prerogative proper. And perhaps such a theory could defend Cheney’s order—or, if you prefer, Edward Snowden’s violation of general legal prohibitions and his own official duties in defense of his understanding of liberty and the public good.

But that leaves us with a question: what reason is there for talking about the republican prerogative at all? If there are other circumstances in which public officials might claim a moral right to violate the law, why should we care about this particular form of morally justifiable lawbreaking?

There are several answers. First, there is a longstanding tradition of talking this way about what the executive can do. Purely as a historical matter, this Article identifies one important thread of our intellectual tradition and grapples with its implications, which are not so straightforward. And if you think social practices and cultural understandings carry normative weight—for whatever reason—then the tradition so identified must be reckoned with even as we address new problems in new settings. Second, the fact that other moral privileges to break the law may also exist does not mean that making a case for them is easy: if we can identify one version of moral prerogative that appears defensible, internally coherent, and consistent with our values, that is well worth doing.

Third, and most speculatively, republican morality might actually be an especially privileged basis for executive lawbreaking. The argument for that position would start with the premise that public service is a sacred trust, which presents a countervailing moral duty that complicates the ability of public officials to invoke the immorality of a particular legal restriction as a reason for ignoring it. Our system is dedicated not just to the principle of lawfulness generally, but to the particular expectation that public officials will take care of the laws that we trust them to protect. Indeed, assuming some minimum level of government power, the rule of law probably depends more on the law-abidingness of public officials than that of private citizens.

On this view of government service, there is a special moral cost to the infidelity of illegally coopting public power to advance your own moral views. By voluntarily electing to serve the public, officials incur a special,

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relational moral obligation that complicates their ability to act on other moral commitments.<sup>122</sup> Privileging other moral commitments over the demands of law might therefore be inconsistent with the special obligations of public service to a degree that simply isn't true for a private citizen.<sup>123</sup> This in turn would mean that a public official's decision to break the law in service of our collective republican ethic might be easier to defend than her decision to do so on the basis of other moral considerations.

#### D. WHAT IF PREROGATIVE REQUIRES SELF-DESTRUCTION?

Before closing, we should consider the most powerful normative challenge to the republican prerogative. That challenge is unlikely to arise in the archetypal prerogative scenario, where the executive is forced to act without any opportunity for the legislature to assess things first. Rather, the challenge arises where there is sufficient time for legislative assessment before the fact, and the legislature—with full awareness of the contours of the specific threat that has just arisen—expressly prohibits the very thing the executive wants to do. Rather than questioning the severity requirement, in other words, this challenge targets the moral coherence of the irregularity and suddenness requirements: if we stipulate that the executive perceives an existentially severe threat to the republic, then how can it make the slightest difference whether that threat is sudden or irregular? Why should the moral authority to preserve our constitutional order dissipate simply because the legislature has had time to deliberate?

Consider first a legislature that in the utmost good faith rejects the executive's plea for permission to take an otherwise prohibited act: the

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122. This is distinct from other reasons that might convince officials not to use their official roles to impose moral views, such as either a belief in value pluralism or an epistemic moral humility—both of which would seem to apply to officials and private citizens alike. To see that point, imagine that Congress passes the Free Contraception for Everyone Act of 2015. The new Secretary of Health and Human Services is utterly certain that contraception is a categorical moral wrong. But the Secretary also believes that her agreement to serve the public imposes a distinct moral obligation (because of the relational trust she freely elected to assume) to implement the Act despite her minoritarian moral views. Under those circumstances, even the Secretary might well conclude that the wrong of violating the public trust trumps the wrong of distributing birth control.

123. This suggests that the relational obligation of public service complicates the invocation of other moral considerations. That problem appears simply to vanish under the republican prerogative, which is by hypothesis directed at precisely the collective public trust of which official service obliges one to take care. For those concerned about epistemic moral uncertainty or value pluralism, we might also expect republican prerogative to be especially likely to command a broad and considered public acceptance. Contrast, for example, the gunman at the abortion clinic or striking employees storming the shop floor—each might be able to make a coherent argument based on their individual moral values that what they have done is morally acceptable, but it is not likely that either will be able to claim the kind of broad approbation that I suspect republican prerogative can.

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legislators look at the same facts as the executive does, but they do not see any emergency that justifies the executive's proposed course of action. A pragmatic defense of republican prerogative's limitations in this setting might easily be grounded in an epistemic assumption that, given the legislative tendency to defer to the executive in crisis, the unusual fact of legislative opposition would strongly suggest that the circumstances do not warrant the measures requested. But there is a deeper point to make here, grounded in the choices Americans have made about who we are. And that, once again, is a society defined by its commitment to the general primacy of law. For us, this means that official authority must be grounded first and foremost in a duly enacted source of law. A considered, focused legislative decision in the very face of a crisis ought to be understood, on this view, as the final word of our society on whether the prohibited action would in fact serve the republic.

Now consider a more pathological situation, in which cynically obstructionist minorities prevent executive action, not because they actually think it unwarranted, but because they expect to capitalize on the political fallout or perhaps to extract more concessions.<sup>124</sup> This latter case is much harder. Indeed, it would present a potentially devastating challenge to the fine generalities of our republican ethic: What moral value could there be the sclerotic pathologies of such an outmoded system? As with the first scenario, one answer might rely on the prediction that, given the low likelihood of this sort of legislative malfeasance in the face of an existential crisis, the republican prerogative's commitment to suddenness and irregularity is morally justified in the long run as a pragmatic safeguard against error by an over-eager executive or manipulations by a bad one. But as with the first example, this scenario may also illuminate a more profound implication of the republican ethic. If our system is so broken as to be non-functional, then the correspondingly diminished appeal of republican prerogative comes about because our constitutional republic has itself ceased being something worth either defending *or* following. In other words, if it is impossible to embrace a rotting version of "us" as a value of surpassing importance, then maybe that has to imply the dissolution of any moral obligation to be bound by the law that "we" make in the first place.

But that would be a choice that itself decides who we are. So at that moment, in deciding whether to follow the laws and ordinary legal process, both the executive and the people have to decide: whether the nation that

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124. All legislators appearing in this hypothetical are fictitious. Any resemblance to real legislators, living or dead, is entirely coincidental.

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we have constituted continues to be worth the candle, or whether it is time for us to be something else.<sup>125</sup>

#### IV. CONCLUSION

This Article responds to a shared intuition that not all lawless action is created equal. It implies three nested modes of legitimating executive action in crisis: (1) the acceptance—and indeed encouragement—of thoughtfully drafted and procedurally checked emergency delegation; (2) the recognition of a highly limited Article II override; and (3) the acknowledgement that there are some things for which our law cannot provide, but to which a sufficiently grave crisis may force us to resort. To that end, the Article has synthesized a set of inchoate historical instincts about prerogative and explained how the limits suggested by that account could plausibly restrict an extralegal claim of right. The resulting theory suggests a form of prerogative that is available in the face of an emergency characterized by radical irregularity, abrupt suddenness, and existential severity. The lawbreaking privilege must be employed only to the extent necessary to stabilize the crisis for legislative review, and the fact of its exercise must be disclosed as soon as practicable.

Ultimately, the republican prerogative is a violation of the law committed in service of the law. It reflects a possessive embrace of law as an essential component of what makes the American project worthwhile. The same possessive embrace of law that Abraham Lincoln celebrated at the Lyceum. The same possessive embrace of law that made John Ashcroft rise up from his hospital bed. And the same possessive embrace of law that some have always sought to subvert. Long may it live.

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125. See KAHN, *supra* note 12, at 50 (“The sovereign decision at that point exists for the sake of the entire system. The sovereign decides outside of law for the sake of law. The sovereign decision, accordingly, is the act of the state willing its own existence. . . . When we ask what is the content of the self that is affirmed in the exception, we begin the process of specifying the content of law.”).