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Book Review

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TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS. By Eric A. Posner and Adrian Vermeule. New York, NY: Oxford University Press, 2007. Pp. 328. $29.95.

NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY. By Richard A. Posner. New York, NY: Oxford University Press, 2006. Pp. 208. $18.95.

Reviewed by Thomas P. Crocker*

Torture has become a topic of pressing national concern.[1] The specter of torture haunts both popular culture and policy debates over how best to

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1. *See, e.g.*, Jonathan Alter, *Time to Think About Torture*, NEWSWEEK, Nov. 5, 2001, at 45, 45 ("We can't legalize physical torture; it's contrary to American values. But . . . we need to keep an open mind about certain measures to fight terrorism, like court-sanctioned psychological interrogation. . . . Nobody said this was going to be pretty."); Alan M. Dershowitz, *Is There a Torturous Road to Justice?*, L.A. TIMES, Nov. 8, 2001, at 19 ("When, if ever, is it justified to resort to unconventional techniques such as truth serum, moderate physical pressure and outright torture?"); Michael Hirsh & Mark Hosenball, *The Politics of Torture*, NEWSWEEK, Sept. 25, 2006, at 32, 32 ("The question is whether waterboarding, however effective, is torture—and whether Americans ought to be doing such things at all."); Anthony Lewis, *The U.S. Case for Torture*, N.Y. REV. BOOKS, July 15, 2004, at 4, 4 ("Reading through the memoranda written by Bush administration lawyers on how prisoners of the 'war on terror' can be treated is a strange experience. The memos read like the advice of a mob lawyer to a mafia don on how to skirt the law and stay out of prison."); Jane Mayer, *The Black Sites*, NEW YORKER, Aug. 13, 2007, at 46, 56 ("Among the few C.I.A. officials who knew of the details of the detention and interrogation program, there was a tense debate about where to draw the line in terms of treatment."); Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14 & 21, 2005, at 106, 108 ("By holding detainees indefinitely, without counsel, without charges of wrongdoing, and under circumstances that could, in legal parlance, 'shock the conscience' of a court, the [Bush] Administration has jeopardized its chances of convicting hundreds of suspected terrorists, or even of using them as witnesses in almost any court in the world."); *Ends, Means and Barbarity*, ECONOMIST, Jan. 11, 2003, at 18, 18 ("If, in their efforts to defeat al-Qaeda, American officials are moving towards a policy of using torture on a systematic basis . . . this would be a remarkable and ominous reversal of policy."); *Is Torture Ever Justified?*, ECONOMIST, Jan. 11, 2003, at 9, 9 ("How can democratic governments best fight an enemy like al-Qaeda . . . ? In ways that uphold the values democracies stand for, is the answer one would like to give. Yet faced with the sort of threat al-Qaeda poses, this line is not always so easy to draw.").

provide for national security under threat of potential terrorist attacks.[2] In the eyes of many, the practice of torture stands as an exemplar of official abuse. Legal and moral prohibitions against torture focus attention on institutional commitments to fundamental human dignity and liberty. In the eyes of others, engaging in torture, and its descriptively milder forms of cruel, inhuman, and degrading treatment, would be justified under conditions of national necessity. In the choice between adhering to principle in the face of a potential loss of many thousands of innocent lives or resorting to torture, the tough-minded pragmatist claims that torture is the lesser evil.[3] In the hands of those who prize consequences over principles, "ticking-bomb" hypotheticals—imagining officials confronting a suspect they know can reveal the location of a large bomb about to detonate in a crowded city—are designed to wrench from even the most ardent opponent of torture a reluctant admission that the practice would be justified under such exceptional circumstances.[4] Moreover, among those who prize principle over consequences, under extreme, ticking-bomb scenarios, many would nonetheless defend the actions of a public official who would be willing to act outside the law to do whatever is necessary, including torturing suspects, to protect national security.[5]

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2. The television show *24* is perhaps the most relevant example of how the threat of terrorism has been represented in popular culture. *See* Jane Mayer, *Whatever It Takes: The Politics of the Man Behind "24,"* NEW YORKER, Feb. 19 & 26, 2007, at 66, 68 (discussing how the television show *24* "sends a political message" and makes viewers confront threats to American national security by playing off "the anxieties that have beset the country since September 11th"); Teresa Wilz, *Torture's Tortured Cultural Roots*, WASH. POST, May 3, 2005, at C1 ("If you're addicted to Fox's '24,' you probably cheered on Jack Bauer when, in a recent episode, he snapped the fingers of a suspect who was, shall we say, reluctant to talk.... Torture's a no-brainer here. Jack's got to save us all from imminent thermonuclear annihilation.").

3. Indeed, with regard to the issue of brutality and torture, Eric Posner and Adrian Vermeule claim that "[w]here coercive interrogation can save lives, *not* engaging in it might seem the more brutal choice, especially to those whose lives are at stake." ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 205 (2007); *see also* MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR 18 (2004) ("In the war on terror, I would argue, the issue is not whether we can avoid evil acts altogether, but whether we can succeed in choosing lesser evils...."); Jean Bethke Elshtain, *Reflection on the Problem of Dirty Hands*, *in* TORTURE: A COLLECTION 77, 87 (Sanford Levinson ed., 2004) ("Far greater moral guilt falls on a person in authority who permits the deaths of hundreds of innocents rather than choosing to 'torture' one guilty or complicit person.").

4. *See* David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1440 (2005) ("The ticking time bomb is proffered against liberals who believe in an absolute prohibition against torture. The idea is to force the liberal prohibitionist to admit that yes, even he or even she would agree to torture in at least this one situation.").

5. *See* Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1528, 1526–34 (2004) (proposing "an absolute legal ban on torture while, at the same time, recognizing the possibility... of state agents acting extralegally... and seeking *ex post* ratification of their conduct"); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1023 (2003) [hereinafter Gross, *Chaos and Rules*] ("This Extra-Legal Measures model... informs public officials that they may act extralegally when they believe that such action is necessary for protecting the nation and the public in the face of calamity, provided that they openly and publicly acknowledge the nature of their

A choice therefore seems to be unavoidable once the topic of torture is introduced: adhere to a principle prohibiting the practice of torture in the face of potentially dire risks or admit that circumstances and consequences matter to one's assessment of the legitimacy of torture. Two recent contributions to the growing literature on the purported clash between civil liberties and national security, Eric Posner and Adrian Vermeule's *Terror in the Balance* and Richard Posner's *Not a Suicide Pact*,[6] eschew the practice of principle, articulating instead consequentialist apologies on behalf of official actions ranging from the suppression of dissent to the practice of torture.[7] In their hands, constitutionally protected civil liberties become luxuries to be upheld only when conditions are thought normal but are to be substantially ignored when seeurity thrcats are perceived as high.

Both projccts maintain the proposition that "[a] national emergency, such as a war, creates a disequilibrium in the existing system of constitutional rights,"[8] requiring that the balance between civil liberties and national security be recalibrated in a way that favors security over liberty. Because, on their view, civil liberties impede effective security policy, "[t]here is a straightforward tradeoff between liberty and security."[9] Indeed, Posner and Vermeule claim that "[t]here is no reason to think that the constitutional rights and powers appropriate for an emergency are the same as those that prevail during times of normalcy,"[10] whercas there is ample reason to think that increased national-security benefits justify relaxing constitutional norms. Given the background practice of balancing rights against governmental needs, a second issue arises regarding which institution is best situated to make judgments about the optimal balance of security and liberty. Both projects adopt the view that judges should defer to executive decisions and "that judicial review of governmental action, in the name of the Constitution, should be relaxed or suspended during an emergency."[11] According to Richard Posner, "That is the pragmatic response, and pragmatism is a

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actions."); Sanford Levinson, *"Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11*, 81 TEXAS L. REV. 2013, 2053 (2003) ("[A]nyone who accepts the necessity of line-drawing . . . must then, presumably, be willing to defend, both as citizens and as potential lawyers for the state, quite awful conduct that comes right up to the line.").

6. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006).

7. Posner and Vermeule claim: "If dissent weakens resolve, then dissent should be curtailed. If domestic security is at risk, then intrusive searches should be tolerated." POSNER & VERMEULE, *supra* note 3, at 16. Richard Posner similarly claims: "Even torture may sometimes be justified in the struggle against terrorism . . . ." POSNER, *supra* note 6, at 12.

8. POSNER, *supra* note 6, at 147; *accord* POSNER & VERMEULE, *supra* note 3, at 16 ("The reason for relaxing constitutional norms during emergencies is that the risks to civil liberties inherent in expansive executive power—the misuse of the power for political gain—are justified by the national security benefits.").

9. POSNER & VERMEULE, *supra* note 3, at 12.

10. *Id.* at 16.

11. *Id.* at 15.

dominant feature not only of American culture at large but also of the American judicial culture."[12]

It may well be the case that pragmatism is embedded in both American legal and cultural practices.[13] It is far from clear, however, that pragmatism or American culture at large ever requires abandoning deeply held commitments to principles, such as the prohibition against torture, in order to pursue consequentialist aims.[14] Undoubtedly, not all constitutionally protected rights are absolute. The state may constrain the exercise of some rights, such as the right to free speech or the right to personal liberty, by providing appropriate justifications and by acting within carefully circumscribed limits. Courts review government actions that infringe on the absolute enjoyment of some rights through a method of tiered scrutiny under which the more an action invades core values protected by a right the greater its justification and narrower the infringement must be.[15] By contrast, other rights, such as the right not to be enslaved, admit of no justified derogations. Any attempt to balance state need against asserted rights must therefore take place against a background of prior judgments about what kinds of specific rights and liberties are in fact appropriately subject to balance.

In the post-World War II era, a growing consensus has developed that some state actions, such as torture, are simply inconsistent with civilized society and broader principles of human rights.[16] Through what Harold Koh calls a process of transnational legal process, human-rights norms, including the norm prohibiting torture, have taken root not only in international instruments but also in domestic law.[17] Federal courts, addressing claims brought under the Alien Tort Claims Act, have stated that the prohibition against

12. POSNER, *supra* note 6, at 147.

13. Richard Posner wears the mantle of the modern pragmatist, claiming that "pragmatism is the best description of the American judicial ethos and also the best guide to the improvement of judicial performance—and thus, the best normative as well as positive theory of the judicial role." RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 1 (2003).

14. For an excellent criticism of Posner's brand of pragmatism, see Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687 (2003).

15. *See* United States v. Virginia, 518 U.S. 515 (1996) (reviewing gender-based government action under intermediate scrutiny); Romer v. Evans, 517 U.S. 620 (1996) (reviewing sexual-orientation-based government action under rational basis); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (reviewing racial classifications under strict scrutiny). *See generally* G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1 (2005).

16. International treaties to which the United States is a siguatory, such as the International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (approvcd by the United States Senate on Apr. 2, 1992), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 113, and the Geneva Conventions, *see, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3517, 75 U.N.T.S. 287, all prohibit the use of torture. Domestic implementation of the Convention Against Torture includes the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 (2000).

17. Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1502 (2003).

torture is a *jus cogens* norm under which the "torturer has become—like the pirate and the slave trader before him—*hostis humani generis*, an enemy of all mankind."[18] Yet in the years immediately following the events of September 11, 2001, this trend towards greater respect for human rights, which included a near-universal consensus on the prohibitory norm against torture, has been subject to question as a matter of state policy in the face of terrorist threat. Although officials have both defended and committed acts of torture,[19] at least in official declarations, "[f]reedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law."[20]

Despite official commitments to the prohibition against torture, both projects take a tough-minded pragmatist approach and conclude that official state torture is permissible under appropriate circumstances.[21] Such circumstances are determined by balancing civil liberties against national security. Their version of pragmatism becomes an apology on behalf of tough security measures, including official use of torture. If torture works to provide greater security benefits, on the apologists' view, torture is justified by employing a simple calculation weighing security gains against losses to liberty. In such situations, "[c]onstitutional rules do no good, and some harm, if they block government's attempts to adjust the balance as threats wax and wane."[22]

A primary goal of Posner and Vermeule's book is to "restrain" civil libertarians, philosophers, and other lawyers from "shackling" the government in its pursuit of the proper balance of liberty and security.[23] With regard to the prospect of "transferring large chunks of power to the executive during emergencies[,] . . . [t]he real risk is that civil libertarian panic about the specter of authoritarianism will constrain government's ability to

18. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980); *see also* Kadic v. Karadžić, 70 F.3d 232, 243 (2d Cir. 1995) (restating *Filartiga*'s holding that "*official* torture is prohibited by universally accepted norms of international law"); *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994) (stating that the right to be free from torture is a *jus cogens* norm); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992) ("Given this extraordinary consensus, we conclude that the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*."). The Supreme Court affirmed the narrower approach taken by *Filartiga* to private rights of action for claims involving piracy or torture under the Alien Tort Statute in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

19. *See* Mark Mazzetti & Margot Williams, *In Tribunal Statement, Confessed Plotter of Sept. 11 Burnishes Image as a Soldier*, N.Y. TIMES, Mar. 16, 2007, at A15 ("The Bush administration has long denied that any of the harsh techniques it used on high-value detainees could be considered torture. But some of the techniques used on Mr. Mohammed, including 'waterboarding,' . . . have since been abandoned by the C.I.A.").

20. Statement on United Nations International Day in Support of Victims of Torture, 41 WEEKLY COMP. PRES. DOC. 1074, 1074 (June 26, 2005).

21. POSNER, *supra* note 6, at 81–86, 152; POSNER & VERMEULE, *supra* note 3, at 191.

22. POSNER & VERMEULE, *supra* note 3, at 31.

23. *Id.* at 275.

adopt cost-justified security measures."[24] Although ours is a government of enumerated powers designed to restrain and channel the exercise of national powers to avoid any prospect of tyranny, according to Posner and Vermeule, under emergency conditions, it is a composite creature, the "civil libertarian," that must be feared and restrained.[25] Tough-minded consequentialists stay focused on the goal of protecting national security, while the supposed more tender-minded civil libertarians place principled impediments in the pragmatist's path.

Each of these projects provides apologies on behalf of torture. Each of these projects also presents powerful arguments in favor of unilateral executive action in the face of national-security emergencies, but neither reflects the considered judgments of our constitutional tradition, which views with suspicion unchecked and unbalanced exercises of power. Moreover, their proposals are deeply problematic, not merely because of panic or democratic failure, or the fear that officials will ratchet up their intrusions on civil liberties,[26] but also because the pragmatist tradition requires intelligent policy proposals, which under our constitutional tradition means policies made with broad deliberative participation under conditions of checks and balances among institutions.

Traditions may be slow to change, and new directions may be difficult to achieve. In the face of new security challenges, Posner and Vermeule as well as Richard Posner each provide powerful arguments for meeting these challenges by balancing security and liberty free from principled constraints. Their arguments for abandoning principle in favor of consequences, however, are misguided, and their proposed renewed emphasis on executive balancing has all the dangers of authoritarianism with none of the advantages of pragmatic institutional design. What is presented as a fair-minded act of balancing, designed to provide an optimal equilibrium of liberty and security, under closer scrutiny becomes a rhetorical trope that obscures the underlying purpose of advancing security interests at the expense not only of civil rights and liberties, but our constitutional tradition. I argue that we should abandon the image of balancing security against something so broad as "civil liberties," take seriously our constitutional tradition's institutional design of checks, balances, and suspicion of unilateral action, and encourage the widest possible discussion of ways to harness both our pragmatist and constitutional

24. *Id.* at 39.

25. Posner and Vermeule write:

> Consider the public letter signed by over 700 law professors on December 13, 2001, just three months after the 9/11 attacks, that criticized an executive order establishing rules for military tribunals in terrorism cases. This sort of civil-libertarianism, which applies even when the emergency is red-hot and indisputable, is our principal target.

Id. at 44 (footnote omitted).

26. These are all arguments Posner and Vermeule attribute to civil libertarians who oppose unilateral executive decisions that diminish or violate civil liberties. *Id.* at 6.

traditions in order to create lasting structural solutions to the twin goals of fostering liberty and providing security.

I. Recalibrating the Scales: Is Trade-off Necessary?

Justifications for the use of torture, or more euphemistically, "coercive interrogation,"[27] depend on accepting the principle that there is an appropriate balance between liberty and security that may include depriving individuals of their human dignity by subjecting them to torture or cruel, inhumane, or degrading treatment. Posner and Vermeule claim that "the *tradeoff thesis* holds that governments should, and do, balance civil liberties and security at all times" and that "[d]uring emergencies, when new threats appear, the balance shifts" to favor security over liberty.[28] Accordingly, much turns on the legitimacy and the scope of the trade-off thesis.

Posner and Vermeule offer no argument to justify the necessity of the trade-off. They believe it is unlikely that in a modern liberal democracy, governments will have failed to identify ways of increasing security without burdening liberty.[29] Thus, there will be an unavoidable need to balance the two in the form of a trade-off. Richard Posner presents a theory of judging, at least at the constitutional level, in which judging proceeds "by balancing the anticipated consequences of alternative outcomes and picking the one that creates the greatest preponderance of good over bad effects."[30] One reason for thinking that liberty and security must be traded "is that without physical security there is likely to be very little liberty."[31] This is undoubtedly true but perhaps proves too much. For of course, without existential security there can be no commerce, no contracts to enforce, no exercisable property rights, or quite simply, no life itself. But just because security is a necessary condition for the operation of civil society does not in itself show why it is the collection of rights called civil liberties that must unavoidably be traded off to ensure that security.

A. Trade-offs Are Not Inevitable

Neither project proffers arguments explaining why, after an increase in security risk, redoubled efforts to use existing methods will not work just as well as the automatic resort to a liberty–security trade-off. Posner and Vermeule dismiss this consideration because they believe it implausible that we are not ordinarily operating at a "Pareto frontier" with regard to the

27. Posner and Vermeule are interested in defending "coercive interrogation that (by virtue of its severity) counts as torture or as cruel, inhuman, and degrading treatment." *Id.* at 184.

28. *Id.* at 5.

29. *Id.* at 26.

30. POSNER, *supra* note 6, at 24.

31. *Id.* at 47. Posner and Vermeule also write that "[l]iberty cannot be enjoyed without security, and security is not worth enjoying without liberty." POSNER & VERMEULE, *supra* note 3, at 26.

balance of security and liberty—that is, operating at a position in which further gains in one value cannot be achieved without costs to the other.[32] This belief ignores the fact that a Pareto frontier assumes a certain set of background conditions that under conditions of emergency, as opposed to times of normalcy, will change. Changed background conditions may alter the relationship between security and liberty, thereby altering the shape of the Pareto frontier and potentially providing new ways to improve both security and liberty without trade-offs. For example, background budget restraints may be loosened as a result of a new political environment in the wake of an emergency event. Moreover, because security can be purchased at the expense of other goods, it is not clear why, in the aftermath of a terrorist attack, additional security must be purchased at the expense of liberty alone.

Before an emergency develops, it may be infeasible to spend more on airport security; after the emergency, greater expenditures may become not only politically feasible but actually demanded by popular pressure. An easy example of such changes in politics and opinion occurred after September 11, 2001, when increased funding for airport security became a budgetary reality.[33] The tendency for events to alter budget priorities is a common feature of political life, illustrated also in the increased willingness of Congress to allocate funds for New Orleans's levees after Hurricane Katrina.[34] Posner and Vermeule argue that inflexible and principled protection for civil liberties will lead to less security than is optimal, but they assume in the process that events do not alter the political calculus. It is more plausible, however, to think that given an inflexible background rule prohibiting further erosions of civil liberties, even if the cost of providing an optimal level of security increases, political flexibility will prove at least as efficacious at meeting the security needs as will seeking exceptions to the rule of law. In fact, in most situations it is implausible to think otherwise. No doubt it will often be cheaper and easier to diminish liberty to increase security, and thus as a contingent matter "[a]s threats increase, the value of security increases," and "government will then trade off some losses in liberty for greater gains in increased security."[35] But this trade-off depends on background rules, political will, and the fact that shortcuts through liberty are usually cheaper than more costly redoubled efforts that continue to respect existing levels of liberty.

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32. POSNER & VERMEULE, *supra* note 3, at 26–27.

33. *See, e.g.*, Dean E. Murphy & Joel Brinkley, *Rethinking the Security at Airports*, N.Y. TIMES, Sept. 19, 2001, at B1 (reporting on the environment in which airport security budgets were increased significantly).

34. *See, e.g.*, Edmund L. Andrews, *Emergency Spending as a Way of Life*, N.Y. TIMES, Oct. 2, 2005, § 3, at 4 (reporting on the $51.8 billion in emergency assistance appropriated following Hurricane Katrina).

35. POSNER & VERMEULE, *supra* note 3, at 27.

It is unlikely, however, that the costs of national security are unique in this respect. Adhering to constitutional principles is often more expensive than employing incommunicado coercive interrogation on criminal suspects[36] or conducting random searches for contraband on mere hunches.[37] Indeed, when considering the forcible removal of evidence from a suspect's stomach by the police, Justice Frankfurter stated that "[n]othing would be more calculated to discredit law and thereby to brutalize the temper of a society."[38] "They are methods too close to the rack and the screw . . . ."[39] Such is the general price of constitutional commitments to principles over consequences. Though from a consequence-only orientation, the rack and the screw may in fact be far easier and more efficient.

Moreover, with regard to the necessity of balancing security and liberty, both projects beg the central question. If one simply assumes that security and liberty *must* be balanced, then it would seem to follow that they *ought* to be balanced in order to maximize social welfare. After all, one ought to do whatever one must to protect security. Two considerations undermine the necessity of balance as each project presents it.

First, the real issues are about the nature and degree to which trade-offs are appropriate under a constitutional commitment to the rule of law. Merely asserting necessity does not make everything possible.[40] Constitutional government must always act within constraints, whether the constraints are constitutional, institutional, political, or practical. It is true that we make many decisions under conditions of uncertainty. Though by contrast, government does not ordinarily derogate from constitutional rights without articulating specific reasons for doing so. One feature of judicially recognized derogations from constitutional rights is that the government be able to justify its specific need along a continuum from rational reasons to compelling reasons and within limits in relation to the end sought on a continuum

36. *See* Miranda v. Arizona, 384 U.S. 436, 461 (1966) ("An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak."). Even if some methods produce useful confessions more quickly, constitutional constraints remove them as options for police. *See* Chavez v. Martinez, 538 U.S. 760, 783–84 (2003) (Stevens, J., concurring in part and dissenting in part) ("[A] functional equivalent of an attempt to obtain an involuntary confession from a prisoner by torturous methods . . . [is the] type of brutal police conduct [that] constitutes an immediate deprivation of the prisoner's constitutionally protected interest in liberty.").

37. In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the Court held that city roadblocks for narcotics searches were unconstitutional because the Fourth Amendment requires individualized suspicion under these circumstances, reasoning that "[w]e cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." *Id.* at 44.

38. Rochin v. California, 342 U.S. 165, 173–74 (1952).

39. *Id.* at 172.

40. Richard Posner, by contrast, claims that "law must adjust to necessity born of emergency." POSNER, *supra* note 6, at 158.

from reasonably related to narrowly tailored.[41] Even if constitutional law has a specifically "dynamic character," as Richard Posner suggests,[42] especially on the margins or in the "penumbra" of a constitutional right, it does not follow that there are not relatively fixed points of reference—core meanings—regarding the scope of constitutional rights. Aggressive questioning is one thing; torture is quite another. In light of a strong tradition that views rights as constraints not susceptible to utilitarian balancing, neither project provides substantive arguments for why we should reject accounts of civil liberties and rights as trumps[43] or side constraints that do not (always) answer to consequentialist values, such as efficiency or necessity.

Second, as both projects admit, it is not clear how to calculate the trade-offs,[44] and it is unclear what counts as maximizing social welfare in this context. The "emergency" conditions that have given rise to the renewed debate about emergency powers do not present an existential threat[45]—a security threat, no doubt, but not a threat to our very existence as a people and a nation. Attacks of the kind we experienced on September 11th are not precursors to a potential invasion, as Pearl Harbor might have been, nor harbingers of potential annihilation, as the Cold War threatened. So if one is in the messy world of marginal increases in security against nonexistential threats, it becomes particularly unclear how trade-offs are to be calculated. Apart from the assumption that security and liberty must be balanced, Posner and Vermeule provide no arguments in support of standards of measurement or means of calibrating the scales.[46] Richard Posner admits that "the 'weighing' is usually metaphorical. The consequences judges consider are

41. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631–36 (1996) (employing rational basis review); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 201–02 (1995) (employing strict scrutiny); Craig v. Boren, 429 U.S. 190, 197–99 (1976) (developing intermediate scrutiny).

42. POSNER, *supra* note 6, at 40 ("The balancing approach that I am advocating to determining the scope of constitutional rights in emergency circumstances highlights the *dynamic* character of constitutional law . . . .").

43. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, at xi (1977) ("Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.").

44. Richard Posner writes, "It is true that in the present setting [the risks and harms] cannot be quantified." POSNER, *supra* note 6, at 41. Posner and Vermeule are more cavalier: "An assumption of the tradeoff thesis is that security and liberty are comparable . . . ." POSNER & VERMEULE, *supra* note 3, at 28.

45. Bruce Ackerman is right to argue that war rhetoric in the "war on terror" tends to obscure the fact that unlike the U.S. Civil War or the threat of nuclear annihilation, which did present existential threats, occasional, yet devastating and traumatic, attacks do not present a threat to our existence as a nation: "We must distinguish, in short, between *existential struggles*, which threaten utterly to destroy the polity, and *momentary affronts to effective sovereignty*, which don't." BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 170–71 (2006).

46. Posner and Vermeule simply state: "The claim that security and liberty trade off against one another implies that respecting civil liberties often has real costs in the form of reduced security." POSNER & VERMEULE, *supra* note 3, at 24.

imponderables, and the weights assigned to them are therefore inescapably subjective."[47] I would argue that lack of clarity undermines the assumption that liberty and security necessarily must be balanced, particularly since Posner and Vermeule's method places a thumb on the side of security, arguing as they do that in times of emergency, liberty must be diminished and security augmented.

In short, neither project demonstrates why increased security threats cannot be addressed through means that respect existing commitments to principles of liberty and dignity. Resorting to an assumed necessity that liberty must be traded away in exchange for security obscures the more difficult policy questions of how we might—through changed circumstances, political will, and a sense of commitment—preserve existing liberty while increasing security.

B. Preserving Liberties Does No Harm

At the extreme, as the increasingly old saw would have it, one must preserve existence in order to have liberty. After all, as Richard Posner makes clear in his book's subtitle, "While the Constitution protects against invasions of individual rights, it is not a suicide pact."[48] Even if this claim is true, it does not follow that the Constitution is simply a guide to making "pragmatic utility-maximizing decisions," as Posner would have it.[49] Although the methodology of balancing remains opaque, Posner and Vermeule assert that "[i]t is clear, however, that sometimes tangible security harms do in fact occur when claims of civil liberties are respected."[50]

On inspection, the evidence to support such a proposition, that respecting civil liberties leads to actual security harms, is either thin and speculative or not relevant to any actual claim about civil liberties. First, as evidence of harmful civil-liberties protections, Posner and Vermeule assert that judicial implementation of the Foreign Intelligence Surveillance Act created a "wall" between intelligence and law enforcement in order to protect civil liberties.[51] If it were not for that wall, they believe that "it is plausible that" the 9/11 attacks would have been prevented.[52] Of course, this is pure speculation and ignores the causal role of other pathologies and operational

47. POSNER, *supra* note 6, at 24.

48. *See* POSNER, *supra* note 6, at v (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963)); *see also* Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

49. POSNER, *supra* note 6, at 41.

50. POSNER & VERMEULE, *supra* note 3, at 24. It may also be equally clear in some situations, such as Japanese internment, that tangible harms to human dignity and liberty do in fact occur when security claims are followed. Neither of these propositions tells us which value, security or liberty, is more important in a given circumstance nor how we might decide the question of priority.

51. *Id.*

52. *Id.* at 25.

problems. Second, Posner and Vermeule speculate that use of torture has saved lives, though the specifics are quite slim.[53] It may often be the case that torture is a shortcut to results that can be achieved through other means more respectful of human dignity and the rule of law. But the faet that shortcuts around the rule of law might produce desirable results does not demonstrate that adherence to civil liberties produces actual security harms, as Posner and Vermeule suggest. In addition, they assert that better screening techniques at airports might have impacted the 9/11 hijackers' plans.[54] This conclusion, which was made by the 9/11 Commission,[55] has in fact wrought many significant changes in airport screening.[56] It is not at all clear, however, why Posner and Vermeule would think that the ineffective airport screening procedures that produced real security harms on 9/11 were caused by excessive concern for civil liberties, rather than concern for economic costs, or simply produced by human and institutional error and incompetence.[57]

Finally, in the most strained example meant to support the claim that civil liberties protections cause security harms, Posner and Vermeule claim that the general existence of free speech and press is "positively correlated with greater transnational terrorism."[58] No doubt, it is a likely truism that more open societies are more vulnerable to attack by outsiders than are closed, authoritarian societies.[59] But as an example of how civil liberties trade off against security harms, citing the generalized freedom of speech is unhelpful in the same way as citing the freedom of association and public

53. For example, Posner and Vermeule cite to an aecount of comments made by CIA Director Porter Goss in testimony before the Senate Armed Services Committee. *Id.* at 25 & n.25. The account noted that Director Goss "vigorously defended 'profcssional interrogation' as an important tool in efforts against terrorism, saying that it had resulted in 'documented successes' in averting attacks and capturing important suspects." Douglas Jehl, *Questions Left by C.I.A. Chief on Torture Use*, N.Y. TIMES, Mar. 18, 2005, at A1. That "professional interrogation" has been a useful tool in averting attacks does not establish that those attacks eould not have otherwise been prevented if CIA officers had not engaged in torture.

54. POSNER & VERMEULE, *supra* note 3, at 25.

55. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 392–98 (2004) (making recommendations for improvements in airport screening).

56. *See, e.g.*, Eric Lipton & Christine Hauser, *Screeners to Be Changed at U.S. Airports*, N.Y. TIMES, Aug. 14, 2006, at A18 (reporting that the Department of Homeland Security intended to replace contractors who inspect passenger identification at airports with Transportation Security Administration employees who would be trained in psychological profiling); Eric Lipton, *U.S. to Spend Billions More to Alter Security Systems*, N.Y. TIMES, May 8, 2005, § 1, at 1 (indicating that the federal government has spent $15 billion on airport screening since 2001 and will spend an estimated $7 billion to upgrade screening equipment at airports and borders).

57. POSNER & VERMEULE, *supra* note 3, at 25.

58. *Id.* at 26.

59. Although research by Gary LaFree and Laura Dugan suggests that in recent years, mixed regimes and partially democratic states have a higher risk of terrorist attacks and fatal terrorist attacks than both authoritarian regimes and full democracies. Gary LaFree & Laura Dugan, Global Terrorism and Democracy (Apr. 2007) (unpublished manuscript, on file with the Texas Law Review).

gathering—were it not for the existence of these freedoms, terrorists would have no collective publics to target. Authoritarianism may always provide for greater physical security than open societies. Such a claim is hardly a reason to prefer authoritarian regimes and hardly evidence that protecting civil liberties produces tangible security harms.

When thinking about the relation between security policy and civil liberties, these kinds of vulnerabilities, stated in terms of generalized features of the very existence of our civil society, are not the relevant kinds of considerations for the proposition that "security harms do in fact occur when claims of civil liberties are respected."[60] Stated at this level of generality, it is likely that "We the People" do suffer security harms through the very nature of who we are as a people, but this does not present an opportunity for balancing away our constitutive civil liberties because who we are as "We the People" is not available for trade.

C. *The Rhetoric of Balance*

Because it goes to the heart of both projects, the image of balance is worth returning to. The rhetoric of balance itself is a source of much confusion.[61] At first glance, the familiar image of Justitia, the ancient goddess of justice, holding paired scales seems to indicate that balancing interests and arguments is inseparable from the rule of law.[62] The image of Justitia is the image of weighing the relative merits of two sides of a single issue. On balance, the arguments or evidence may weigh more on one side of a single issue, providing a reason for rendering justice for that side. As a result, balancing has the ring of familiarity. Courts frequently employ balancing tests when there are two competing interests, construed as a conflict between individual right and state need.[63] In cases like *Mathews v. Eldridge*,[64] the Court has regularly resorted to balancing tests in order to give

60. POSNER & VERMEULE, *supra* note 3, at 24.

61. *See* Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 J. POL. PHIL. 191, 203 (2003) ("[W]hat I am trying to establish is the need for care with the idea of balancing.").

62. *See* Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U. L. REV. 1, 27 (2007) ("Like the mechanics of paired scales, procedure provides the mechanics for fair outcomes through the blind weighing of competing claims."); Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 YALE L.J. 1727, 1729, 1729–33 (1987) (describing the relationship of the "imagery of Justice" to the problems of exercising judicial power); Thomas R. Kearns & Austin Sarat, *Legal Justice and Injustice: Toward a Situated Perspective*, *in* JUSTICE AND INJUSTICE IN LAW AND LEGAL THEORY 1, 6, 6–7 (Austin Sarat & Thomas R. Kearns eds., 1996) (noting that Justitia, "the universal icon of justice[,] . . . is invariably associated with law").

63. For example, in upholding the Minnesota Mortgage Moratorium Law, the Court noted that "there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare." Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442 (1934).

64. 424 U.S. 319 (1976).

effect to perceived competing interests.[65] Most recently, the Court in *Hamdi v. Rumsfeld*[66] turned to the familiar balancing test to establish limits to the President's power to detain individuals on the strength of his unilateral declaration that they are enemy combatants.[67]

States exercise power to provide security and pursue other policies within constraints. Even authoritarian dictatorships must operate within some forms of political, cultural, geographic, and geopolitical constraints. In liberal democracies some of these constraints take the form of constitutional precommitments to preserve and protect particular core rights and liberties. These rights and liberties limit the domain over which officials may legitimately exercise power in pursuit of governmental policies. Some liberties are subject to override on the state's showing of a compelling interest. For example, the state can deviate from absolute protection of a right to equal protection of the laws on the basis of race by demonstrating that its action is narrowly tailored to achieve a compelling interest.[68] With regard to other rights as dear as free speech, there are situations in which the government is justified in placing limits on the exercise of the right.[69] But other liberties are not subject to override. As punishment for a crime, an individual cannot be drawn and quartered, no matter how compelling the state's argument in support of imposing such punishment. If a punishment is cruel and unusual under the Eighth Amendment, that is the end of the story.[70] So we might say

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65. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 1004 (1987) (discussing the history and theory behind balancing, and concluding that "[s]evere problems beset balancing approaches to constitutional law").

66. 542 U.S. 507 (2004).

67. The Court simply assumed the need to balance interests:

> Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

Id. at 532 (plurality opinion). Of course, it remains utterly unclear what "our calculus" is or how to employ it.

68. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 333–34 (2003) (holding that race-conscious admissions plans are narrowly tailored when race is used as a plus factor but not in the context of admissions quotas).

69. Although individuals have a right to speak in public, the government may enact reasonable time, place, and manner restrictions on that speech. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech . . . ."); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.").

70. *See* Hope v. Pelzer, 536 U.S. 730, 737 (2002) (holding unconstitutional the shackling of a person to a "hitching post" because "[t]he unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment" (omission in original) (internal quotation marks omitted) (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986)); Estelle v. Gamble, 429 U.S. 97, 102 (1976) ("[T]he primary concern of the drafters was to proscribe 'torture[s]' and other 'barbar[ous]' methods of punishment." (alteration in original) (quoting Anthony F. Granucci,

that state power expands and contracts in relation to individual liberties. But does that mean that state power over security hangs in a balance opposite liberties?

Similarly, the exercise of individual liberty is subject to expansion and contraction as well. Conditions exist under which we do not recognize a rights claim as legitimate. For example, we do not recognize the right of free speech when it is exercised by picketing a private residence.[71] Moreover, specific rights claims can apply to a greater or lesser extent depending upon background conditions and circumstances. Particularly when we discuss the nature of political and civil liberty, the notion of "liberty" can apply as a matter of more or less. Having abandoned the state of nature, human liberty is always constrained by limits imposed by the protections of and participation in civil society. How much liberty we give up from this hypothetical state of pure liberty depends on the collective needs of civil society in providing order and stability. Liberty exists in relation to other values and applies in situations where it is capable of diminishment.

Having recognized the two different ways in which the scope of state power and individual liberty may coincide or alter in relation to each other, it is not at all clear in what sense liberty in general ever hangs in the balance against other specific values, such as security. That either liberty or state power occupies all of the operational space in which policy objectives may be pursued does not entail that liberty and the specific value of security are in a relation of balance. And if they were, neither project has articulated what is the common metric by which to measure their relative weight. It is more accurate to say that there is a somewhat indefinite initial constitutional baseline of minimal levels of liberty and enumerated state power. This initial position can be altered through the operation of normal politics, by supplying reasons to a neutral arbiter, or through moments of profound constitutional change.[72] The Supreme Court's tiered scrutiny reflects the differing degrees to which the Court, acting as the presumed neutral arbiter between state power and individual liberty, subjects proffered reasons to critical examination. Protecting national security is merely one reason the state might advance to justify an expanded exercise of power. In the face of sufficient justification, particular liberties may give way. But notice, in the national-security context, our Fourth Amendment-protected right to be free from unreasonable searches and seizures itself already contemplates that

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"Nor Cruel and Unusual Punishment Inflicted:" The Original Meaning, 57 CAL. L. REV. 839, 842 (1969))).

71. Frisby v. Schultz, 487 U.S. 474, 488 (1988) (upholding a regulation on picketing near a private residence). We limit speech in other ways to avoid excess noise or invasion of the free enjoyment of public places by others. *See, e.g.*, *Rock Against Racism*, 491 U.S. at 803 (upholding a noise restriction).

72. *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 15–25 (1998) (describing Reconstruction and the New Deal as fundamentally transformative moments in American constitutional development).

some kinds of searches and seizures will be necessary—namely, those that are reasonable. In contrast, derogations from freedom of speech and assembly, rights not already framed in terms of reasonableness, often require a much stronger showing of governmental need and a narrow range of application to be justified. In the name of security, some speech—that which is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"[73]—may be proscribed. That specific kinds of speech can be proscribed in order to provide security does not entail that something so general as civil liberties must be balanced against the particular value of security.

Balance is familiar, yet misleading. Although some rights may properly be balanced against government need, some civil liberties are so fundamental that it is simply inappropriate to balance them against state interests. My right to my own life and person may make it inappropriate for the state to balance my claim to life against social welfare or my right to bodily integrity against particular invasive acts for purposes of obtaining information. Although it may be appropriate to balance some aspects of some particular civil liberties (free speech and incitement to imminent lawless action), it is inappropriate to balance others (right to life and a purported need to engage in extrajudicial killing). Accordingly, the devil is in the details as to whether, when, and to what degree it is appropriate to balance specific liberties against security. Beyond unsupported generalizations, inapposite examples, and rank speculation, Posner and Vermeule's project in particular is short on these important details.[74]

Richard Posner recognizes that "the balance between liberty and safety must be struck at the margin."[75] More importantly, Posner recognizes that marginal values depend upon the total value we afford to civil liberties.[76] When those values are great, as the civil libertarian suggests, then it should require a large change at the margin to effect a change in the overall structure and application of the right. It is both a conceptual and an empirical matter

73. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

74. Posner and Vermeule supply no argument to support their proposition that "[c]onstitutional rules do no good, and some harm, if they block government's attempts to adjust the balance as threats wax and wane." POSNER & VERMEULE, *supra* note 3, at 31. As a general proposition, this must be clearly false. Constitutional rules providing judicial review of unilateral executive action, as in the case of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring), further the good of constraining the Executive within constitutional limits, especially when the Executive is acting within the domestic sphere when claiming national emergency. Moreover, other, nonsecurity-related constitutional rules, such as the requirement of bicameralism and presentment for war funding, even if they block the Executive's "attempts to adjust the balance," do no harm and in fact do much good in providing a check against unilateral overreaching. To claim otherwise, Posner and Vermeule would have to convert counterfactual hypotheticals about how the Executive might have acted if free from any constraint into positive harms in the real world of action within constraint. As we will see *infra*, by contrast, harm occurs when the Executive acts unilaterally outside of constitutional constraints.

75. POSNER, *supra* note 6, at 31.

76. *Id.* at 31–33.

as to how we assess the core value of civil liberties in relation to public safety, one that depends upon our overall commitments as a political body to specific constitutional rights as background constraints. The apologists place their finger on the scale supporting security, while the civil libertarians place theirs on the side of rights and liberties. Who is right? Who is to decide? Assuming that some more specific form of balancing or trade-off may be required at the margin, what are the appropriate limits or restraints to making the trade-off? These questions introduce the second thesis of both projects: courts and Congress should defer to the policy choices of executive officials.

II. Deference and the Two-Legged Stool

Both projects argue that because the judiciary is institutionally ill suited to decide the questions of emergency and balance, we all (judiciary and informed publics) should defer to cooperative executive–legislative decision making when available, and otherwise, we should defer to unilateral executive decisions. "[T]he *deference thesis* holds that the executive branch, not Congress or the judicial branch, should make the tradeoff between security and liberty."[77] Because judges have limited institutional capacity and knowledge, Posner and Vermeule claim that "[i]n times of emergency, judges should get out of the government's way," and if government chooses badly, "judicial intervention may only make things worse, not better."[78]

To understand the radical nature of this thesis—that complete deference is owed to the Executive during periods of claimed emergency—it is useful to review some basic propositions about our constitutional structure. To have a divided government of enumerated and limited powers means that each division of governmental powers properly functions within limited, albeit flexible and sometimes overlapping, spheres. In order to "secure the Blessings of Liberty,"[79] constitutional structure was designed in order to prevent the concentration of power within any one department of government.[80] Constitutional design embeds the belief that the surest route to tyranny is the concentration of powers within a single branch of government. James Madison's solution to the specter of concentrated government is our system of separated powers, each operating to check and balance the other. As the Court has noted many times, "[T]he Framers 'built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or

77. POSNER & VERMEULE, *supra* note 3, at 5.

78. *Id.* at 12.

79. U.S. CONST. pmbl.

80. As the Court noted in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam):

> The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.

Id. at 121.

aggrandizement of one branch at the expense of the other.'"[81] Moreover, Madison reasoned that an additional facet of that "self-executing safeguard" is that the interests of the person occupying the office should be isomorphic with the interests of the office itself, thereby creating incentives to "resist encroachments of the others."[82] We cannot always rely on wise leadership because as Madison cautioned, "[e]nlightened statesmen will not always be at the helm."[83] Efforts to prevent the possibility of tyranny through structural solutions have not been interpreted by the Court to eliminate the flexible organization of government designed to serve the needs of the people.[84] Structural flexibility, however, is not boundless.[85] It has a breaking point. Both Richard Posner and Posner and Vermeule push the theme of governmental adaptability to security risks past the breaking point by advocating absolute trust in executive-branch security policy, free from judicial review.

"The deferential view is that judicial review of governmental action, in the name of the Constitution, should be relaxed or suspended during an emergency."[86] Moreover, Posner and Vermeule claim that federal judges "are amateurs playing at security policy, and there is no reason to expect that courts can improve upon the government's emergency policies in any systematic way."[87] Richard Posner, perhaps as a sitting judge himself, is more circumspect about judicial review, though ultimately inclined to grant great deference to executive action. Posner recognizes the limitations of institutional competence that judges face by not being national-security experts.[88] When there exist different views of a given policy, Posner suggests that "it is

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81. Mistretta v. United States, 488 U.S. 361, 382 (1989) (quoting *Buckley*, 424 U.S. at 122).

82. THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.").

83. THE FEDERALIST NO. 10 (James Madison), *supra* note 82, at 80.

84. As Justice Jackson noted in concurrence in the *Steel Seizure* case, "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

85. Considering emergeney-power claims in a very different context, the Court explained:

> Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the spherc of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 528–29 (1935) (footnote omitted).

86. POSNER & VERMEULE, *supra* note 3, at 15 (emphasis omitted).

87. *Id.* at 31.

88. Posner states that a reason for a "light judicial hand" is that "[j]udges aren't *supposed* to know much about national security; at least they don't think they are supposed to know much about it." POSNER, *supra* note 6, at 37.

unclear why a judicial perspective should rule, especially since judicially defined rights are only one check on executive overreaching."[89] Moreover, focusing on the potential consequences of a decision, Posner concludes that "when in doubt about the actual or likely consequences of a measure, the pragmatic, empiricist judge will be inclined to give the other branches of government their head."[90]

Posner and Vermeule's thesis retains a veneer of plausibility only because they redescribe the purpose of judicial review. They repeatedly claim that judicial review cannot improve upon national-security policy.[91] This claim may be true—although nowhere do they empirically support the claim—but it is most certainly irrelevant to all but the most ardent defenders of legal realism. Unless one is willing to claim that constitutional decisions are always, or at least almost always, disguised policy preferences, then no other theory of judicial review argues that it is a court's purpose to improve upon the underlying governmental policy choices. Rather, as the Court likes to remind us, "It is emphatically the province and duty of the judicial department to say what the law is."[92] Judicial review, in its most lofty manifestation, translates constitutional text into constitutional law, policing the boundaries of enumerated power in order to safeguard liberty.[93] If by "improving upon national security policy," Posner and Vermeule mean that courts would attempt to improve the efficiency and effectiveness of that policy, nothing could be further from judicial purpose. In fact, it might be fair to assume that constitutional constraints on government action designed to protect civil rights and liberties are always less efficient and effective than unconstrained action.[94] Constitutional protections for rights and liberties exist to channel government action, even to "stifle[] a social experiment" as Richard Posner suggests,[95] within constitutional boundaries. Courts do not aim to help or hinder efficiency or effectiveness, but rather to articulate the

89. *Id.* at 36.

90. *Id.* at 27.

91. *See, e.g.*, POSNER & VERMEULE, *supra* note 3, at 89, 89–90 (arguing that during times of emergency, the judiciary lacks the information with which to conduct detailed security-policy review and the time in which to do so, and that the consequences of judicial invalidation of national-security policy may be "disastrous").

92. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (characterizing *Marbury* as having "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system").

93. Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165, 1173 (1993) ("The translator's task is always to determine how to change one text into another text, while preserving the original text's meaning.").

94. *See, e.g.*, Davis v. Mississippi, 394 U.S. 721, 726–27 (1969) ("Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'").

95. POSNER, *supra* note 6, at 27.

background, and bedrock, constitutional constraints within which government must operate.

Of course, a tremendous amount of debate and disagreement exists over precisely how the Court determines, or should determine, what constitutional law is.[96] Judge Posner takes as an initial premise "that constitutional theory is deeply subjective, providing therefore no solid guidance to Supreme Court Justices and so leaving them to make up constitutional law as they go along."[97] If Justices simply make things up, then perhaps we should downgrade their participation in government, especially in times of emergency. After all, why should the subjective impressions of Supreme Court Justices be allowed to stand in the way of the tough, consequence-minded, and results-oriented decisions of the President? According to Posner, the "pragmatic" judge will not stand in the way, at least "when in doubt about the actual or likely consequences of a measure."[98] Pragmatic judges, among whom Posner includes most of the current Justices, "base their decisions on a balancing of anticipated consequences,"[99] and by implication not solely on what constitutional principle requires, regardless of the particular social or political consequences.

These are radical suggestions and revisions of the institutional role of the courts as guardians of liberty and constitutional structure. According to more robust notions of judicial review of legislative action, judicial review protects fundamental rights and liberties from unwarranted governmental encroachment. Judicial review also patrols the separation of powers among the branches of government and between the federal government and the states. In the post-*Carolene Products*[100] era, the Court has been particularly keen to protect the rights of discrete and insular minority groups against the encroachments of the majority, while giving a wide berth to legislative decisions that do not entrench such democratic failures.[101] This view of judicial role has been central to a particular model of the development of rights-protecting jurisprudence in equal-protection, due-process, and First

96. On the Court itself, two competing views are offered in STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 7–12 (2005) and ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37–38 (1997).

97. POSNER, *supra* note 6, at 26.

98. *Id.* at 27.

99. *Id.* at 28.

100. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

101. *See, e.g.*, J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 298 (1989) (noting that by protecting democracy "the judiciary properly may subject legislation to a higher level of scrutiny, not because it is authorized to impose its value choices upon the majority, but because the process itself is defective, undemocratic, impure"). *But see* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978) (opinion of Powell, J.) (describing footnote four's rationale of protecting discrete and insular minorities as having "never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny").

Amendment areas.[102] But this view of judicial review has also been highly deferential, in particular to legislative action absent any democratic failure of the kind that leads to the imposition of social costs and constraints on minorities. Under this approach, the Court looks primarily to patrol the broad boundaries of civil liberties and rights against unwarranted encroachments by the Legislative or Executive Branches. Even when such review employs notions of balance, as it did in *Hamdi v. Rumsfeld*,[103] constitutional principles and constraints play a fundamental role in limiting what constitutes acceptable forms of policy choices. Upholding principled limitations, however, is a far cry from substituting judicial policy choices for executive or legislative ones, which Posner and Vermeule suggest is the result of judicial review.

Posner and Vermeule reject the *Carolene Products* version of judicial review, claiming it "comes unglued during times of emergency."[104] The risk of error is high because "[i]n times of emergency, the judges' information is especially poor, their ability to sort justified from unjustified policies especially limited, and the cost of erroneously blocking necessary security measures may be disastrous."[105] In their view, judges should defer to executive decisions because the delay and uncertainty that would result from judicial review produces untenable costs to executive power. Thus, they conclude that "[i]n times of emergency, judicial deference is both desirable and predictable, given the high stakes and the judges' limited information and competence."[106] The virulence of their criticism of judicial review seems to stem from their conclusion that the risks and costs of mistakes are much higher during emergencies than in normal times.

First, it is useful to note that Posner and Vermeule frequently fault civil-libertarian arguments for being overly speculative when they are concerned about democratic failure or the possibility that unfettered executive officials will use emergencies as ways to garner greater power. It is difficult to see

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102. *See* 2 ACKERMAN, *supra* note 72, at 368–75 (discussing the role of *Carolene Products* in initiating an alternative organizing framework for future legal development, including more exacting judicial scrutiny of statutes denying basic political rights or exhibiting prejudice against discreet and insular minorities). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (arguing for a robust view of the judiciary's role, including the protection of minority rights). Ackerman has also been a critic of the narrow focus of protecting only discrete minorities from legislative discrimination. Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 745 (1985) ("[T]o remain faithful to *Carolene*'s concern with the fairness of pluralist politics, we must . . . [attend to] the anonymous and diffuse victims of poverty and sexual discrimination who find it most difficult to protect their fundamental interests through effective political organization."); *see also* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979) (observing the limit of the footnote's view of judicial review to "two instances of legislative failure: abridgement of the right to vote and victimization of a discrete and insular minority").

103. 542 U.S. 507, 529 (2004) (plurality opinion).

104. POSNER & VERMEULE, *supra* note 3, at 90.

105. *Id.* at 91.

106. *Id.*

their claim that a judicial decision upholding a constitutional limit on unilateral executive action is potentially "disastrous"[107] as itself anything but wildly speculative. As a matter of unilateral policy, the Bush Administration has claimed the authority to detain U.S. citizens indefinitely without trial or access to federal courts on the strength of its declaration that an individual is an enemy combatant.[108] When the Supreme Court held that unilateral power to detain U.S. citizens indefinitely in this manner is antithetical to our system of government, nothing potentially "disastrous" loomed on the horizon. Nor were any disasters imminent when the Supreme Court held that the Executive could not act outside of the Geneva Conventions in subjecting detainees to military commissions it unilaterally established, operated, and reviewed.[109] Upholding constitutional rights to minimal due process is hardly the stuff supporting Posner and Vermeule's overwrought alarm and speculation concerning the prospect that judicial review of executive action will cause security harms.

Second, Posner and Vermeule write that "[j]udges are generalists, and the political insulation that protects them from current politics also deprives them of information, especially information about novel security threats and necessary responses to those threats,"[110] and when judges or scholars criticize executive policy, "they are amateurs playing at security policy, and there is no reason to expect that courts can improve upon government's emergency policies."[111] In sum, "the problem is that the judges lack the competence to evaluate those policies."[112] This claim proves too much. One could substitute "national industrial policy," for example, for "emergency policy" in their sentence, and the same claim—that politics deprives courts of information leading to a lack of institutional competence—would lead to their conclusion that there is "no reason to expect that courts can improve upon government's" national industrial policies. This is a thesis broadly about the role of judicial review packaged as a specific claim about judicial review of executive action under claimed emergency.[113] I say "claimed emergency," for Posner and Vermeule allow no room for judicial review of the basis for the Executive's claimed necessity to act on emergency powers. Despite reasonable fears that an unchecked Executive would use emergency situations to

107. *Id.*

108. *Hamdi*, 542 U.S. at 512 (relying on a declaration provided to the Court by the Special Advisor to the Under Secretary of Defense for Policy to support the enemy-combatant designation).

109. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

110. POSNER & VERMEULE, *supra* note 3, at 31 (footnote omitted).

111. *Id.*

112. *Id.* at 49.

113. Adrian Vermeule has defended a broader thesis about the limits of judicial review elsewhere. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 230, 230–31 (2006) ("Judges should thus defer to legislatures on the interpretation of constitutional texts that are ambignous, can be read at multiple levels of generality, or embody aspirational norms whose content changes over time with shifting public values.").

aggrandize power,[114] Posner and Vermeule propose allowing the Executive Branch to declare emergencies and to expand its power while shrinking constitutional protections for civil rights and liberties by removing judicial review. Nothing could be further from our pragmatic constitutional tradition than to trust one branch with such unrestrained conviction.

In a similar vein, Posner and Vermeule write: "The decision to infringe on civil liberties for security purposes may be right or wrong, but it is no more likely to be right or wrong than the quotidian decision to construct a highway or to reduce funding for education."[115] First, there is evidence to suggest that emergency pressure to act makes mistakes more likely. Japanese internment as well as the suppression of speech during both World War I and the Red Scare have all been widely seen as mistakes after the fact.[116] Second, Posner and Vermeule do not provide an empirical basis for this assumption that the Executive is no more likely to get things wrong during an emergency than during normal times. Notice, however, that their claim once again proves too much. If an executive decision to build a highway is equally likely to be wrong as a decision about security policy, then isn't the usefulness of judicial review the same for the latter as it is for the former? Posner and Vermeule respond that the cost of judges getting decisions wrong is much higher during emergencies than during normal times, and therefore the role of judicial review is not the same. During normal times we might get a wasteful highway project, or fail to get a needed highway, if judges make wrong decisions, but matters could be far worse in terms of loss of lives if judges err when reviewing security policy. While this claim may be true, it is similarly true that individuals indefinitely detained, tortured, or even killed, as well as governmental eavesdropping on millions of citizens are huge costs if unchecked executive decisions lead to the wrong policies. So Posner and Vermeule's "no more likely" claim seems to be at best a wash. We thus return to their unwarranted assumption that the Executive, without structural ehecks and acting unilaterally, will get things right when acting under pressure of emergency situations.

Unilateral action under our constitutional system is an outlier. What the apologists advocate is abandoning the conversational aspect of American Constitutionalism in favor of the univocal voice of supposed executive

114. Bruce Ackerman expresses the concern in these terms: "If left to their own devices, presidents will predictably exploit future terrorist attacks by calling on us to sacrifice more and more of our freedom if we ever hope to win this 'war.'" ACKERMAN, *supra* note 45, at 6.

115. POSNER & VERMEULE, *supra* note 3, at 30.

116. *See generally* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 228, 228–29 (2003) (stating that governments overreact in times of crisis and that "at some point after—and often long after—the emergency has passed, thc government's conduct is widely acknowledged to have been an overreaction"); GEOFFREY STONE, PERILOUS TIMES: FREE SPEECH DURING WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 307 (2004) ("Over the years, *Korematsu* has become a constitutional pariah.").

necessity during times of emergency.[117] More than achieving some desirable policy outcome, the conversational aspect of our constitutional tradition is important to achieving enduring wisdom in constitutional decisions and interpretations.[118] The pace or content of the conversation will undoubtedly shift during emergencies or when considering issues of national security, but that does not mean that there is, or should be, no conversation at all. Without the process of questioning and criticism that occurs through conversation, we are left with doubt about the results, and when it comes to higher lawmaking functions, there is less legitimacy when there is a paucity of participation.

A conversation that includes dissenting voices is likely to lead to greater decisional accuracy, avoiding the pitfalls of conformity and social cascades in which similar voices reinforce a prevailing view.[119] I don't mean to imply that judicial review is the equivalent of dissent. When, however, the Executive is allowed to act with knowledge that it is free from any external check, there will be a greater likelihood of mistakes born of too little information and too restrained a conversation over the best course of action. Judicial review, in normal times no less than during times of national-security threat, functions as a check against extreme views becoming prevailing orthodoxy. Especially during emotionally charged times, prizing loyalty over competence and agreement over dissent leads one to doubt the empirical accuracy of the claim that the Executive unilaterally knows best.[120] Our constitutional culture is one that profoundly distrusts unilateral policies.

What is most troubling about the deference thesis is that it proposes to defer to the balancing decisions made by the very officials who have the greatest interest in weighing matters heavily in favor of security over liberty. Executive officials under public pressure to act to alleviate fears of additional attacks have a tremendous incentive to develop new policies and practices that at least have the appearance of increasing security; they have far less incentive to promote civil liberties. Recall that the image of balancing is most closely associated with the symbol of justice as a blind and neutral arbiter of eompeting claims. The Executive Branch is neither blind nor neutral

117. On reading the Constitution as a conversation, see LAWRENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 31 (1991).

118. Sometimes this conversation is one carried on not only within but between generations. *See* 2 ACKERMAN, *supra* note 72, at 383–84 (describing an intergenerational conversation concerning constitutional meaning and transformation); Bruce Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 13 (1989) (arguing for a discursive political theory and engagement in a dialogue with the history of liberal thought).

119. CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 210–11 (2003) ("Organizations and nations are far more likely to prosper if they welcome dissent and promote openness.").

120. Cass Sunstein claims "that the probability of harm is often neglected when people's emotions are activated, especially if people are thinking about the worst-case scenario." Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 105 (2002). It is the Executive's job to think about the worst-case scenario, often in an emotionally charged atmosphere. Without wider consultations and institutional checks, especially when suppressing civil rights and liberties, executive decisions risk getting policy wrong.

when it comes to balancing security and liberty. Justice Souter in his concurrence in *Hamdi v. Rumsfeld* makes a similar point in terms of separated powers:

> In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.[121]

If the image of balance is to be taken seriously at all, the deference thesis must be abandoned. As the plurality in *Hamdi* made clear, "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[122]

Deference to unilateral executive decisions affecting constitutional rights and liberties, endorsed through legislative silence or acquiescence, produces the instability of a two-legged stool, the structural defects of which should by now be obvious.

III. The Only Thing We Have to Fear Is . . .

According to Posner and Vermeule, any claim by civil libertarians that government functions worse during an emergency depends on variations of three different theories: (1) the "panic theory," which suggests that during emergencies executive officials will overestimate the security threat, excessively impose costs on liberty, and act irrationally;[123] (2) the "democratic failure theory," which presents an account of a government that seeks to achieve gains in security for a majority at the expense of political or

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121. Hamdi v. Rumsfeld, 542 U.S. 507, 545 (2004) (Souter, J., concurring). Justice Jackson artieulated the problem in this way:

> But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uneontrolled, and often cvcn is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.

Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 642 (1952) (Jackson, J., coneurring).

122. *Hamdi*, 542 U.S. at 536 (plurality opinion); *see also* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934) ("[The war power] permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.").

123. POSNER & VERMEULE, *supra* note 3, at 59.

ethnic minorities;[124] and (3) the "ratchet theory," which observes that once government succeeds at aggrandizing power during emergencies, it will retain large vestiges of that power when the situation normalizes, leading over time to ever-increasing centralized authoritarian power.[125] Posner and Vermeule spend much of their book rejecting all three theories of governmental malfunction during emergencies. Moreover, Posner and Vermeule argue that civil libertarians appeal to these arguments because of the weakness of straightforward rights arguments.[126] In short, because it is constitutionally acceptable in some cases to balance rights claims against governmental needs, civil libertarians cannot rely on arguments seeking absolute protection of rights, especially not rights against torture under potentially "catastrophic" conditions. What unites these arguments is the common speculative inversion of our constitutional tradition in which civil libertarians, not authoritarian government or even terrorists, become the real threat to the nation.

A. Panic and Democratic Failure

One argument often made against unilateral executive action is that executive officials not only have incentive to overreact but have the cognitive tendency to do so. The fear of additional attacks, the fear of public reprisal, and the need to assuage public fears all lead to strong motivations to provide security with little regard for liberty. Thus, as Justice Souter's *Hamdi* concurrence suggests, to place responsibility for balancing liberty and security in the biased hands of executive officials who have the strongest motive to promote security policy without regard to civil liberties is perverse at best.[127]

Yet Richard Posner finds little to recommend such arguments, and Posner and Vermeule not only reject the very basis for such concerns but argue that even if true, there is nothing courts could do to improve the situation.[128] Under their argument, even if abuses happen, they are inevitable, and courts should not intervene because they risk making matters worse. In full, Posner and Vermeule's argument is that fear does not distort emergency decision making, at least no more so than normal decision making, but even if fear did have greater effects during emergencies, courts cannot help the situation because among other problems, it is unclear whether fear would lead to measures designed to increase security or to protect liberty.

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124. *Id.* at 87.

125. *Id.* at 131–32.

126. *See id.* at 40 ("Few civil libertarians really want to defend an absolutist view of rights as side constraints . . . .").

127. *Hamdi*, 542 U.S. at 545 (Souter, J., concurring).

128. *See* POSNER AND VERMEULE, *supra* note 3, at 94 ("Courts cannot systematically improve upon government's first-order balancing of security and liberty.").

Where civil libertarians point to security panics, Posner and Vermeule note that civil libertarians are just as prone to panics over lost liberty.[129] Moreover, liberty panics have the vice of potentially leaving us in a vulnerable security position by depriving executive officials of the freedom from constitutional constraint they need in order to provide pragmatic solutions to dynamic security threats. Thus, on their view, we should really fear civil-libertarian panic because it might leave us vulnerable to attack. Moreover, according to Posner and Vermeule, progressive social change is at least as likely to occur during emergencies as is democratic failure.[130] Unchecked authoritarian action can actually be the engine of progressive social change.

The contrast between these two ways of seeing—the civil libertarian and the apologist—is most stark in this discussion. Where civil libertarians see serious problems with executive abuse, the apologists either see no abuse or see any abuse as a necessary complement to emergencies that should be optimized.[131] Where civil libertarians point to historic abuses, such as Japanese internment, the apologists see potentially justified actions, and where there is disagreement, "both the civil libertarian commentators and the judges lack the necessary expertise"[132] to determine whether the decision was necessary for security. Where civil libertarians find examples of social oppression of minorities and dissenters, upheld by the Court in cases like *Debs*[133] and *Korematsu*,[134] the apologists find engines of progressive social change during emergencies, such as the Emancipation Proclamation during the Civil War and desegregation during the Cold War.[135] The apologists find reasons to doubt the existence of any democratic-failure effects and then conclude that there is no evidence that democratic failure occurs more often during emergencies or that minorities will be more likely to be targeted during emergencies than during nonemergencies.[136] They simply shift the burden of persuasion onto the civil libertarian and then positively conclude that there is no reason to think there is a potential problem of democratic failure.

As it turns out, civil-libertarian constitutional constraint is just as much an object of fear as the security threats themselves, at least for those who think that "[c]onstitutional law is especially plastic."[137] Fear becomes a repeating motif in both projects. Posner and Vermeule recite a parade of

129. *See id.* at 77 ("Nothing in the mechanisms of panic suggests any systematic tilt toward security panics, as opposed to libertarian panics.").

130. *Id.* at 108.

131. *Id.*

132. *Id.* at 113.

133. Debs v. United States, 249 U.S. 211 (1919).

134. Korematsu v. United States, 323 U.S. 214 (1944).

135. POSNER & VERMEULE, *supra* note 3, at 114.

136. *Id.* at 114–15.

137. POSNER, *supra* note 6, at 151.

potential horribles if judges were to intervene to uphold constitutional constraints on executive decision making.[138] Richard Posner argues that terrorist threats require unfettered flexibility in responsive measures because "terrorist leaders may even now be regrouping, and preparing an attack that will produce destruction on a scale to dwarf 9/11."[139] In the apologists' hands, "[f]ear, though, plays a valuable role,"[140] one that is meant to displace a traditional fear of authoritarian assaults on liberty with a new fear of the tender-minded civil libertarian.

B. Ratchets

One issue regarding increasing the Executive's emergency powers is that power once granted may become difficult to relinquish. Emergency measures adopted to deal with exceptional circumstances may become normalized in everyday domestic law.[141] Moreover, if we imagine a series of emergencies, each one requiring ever-more repressive responses from government officials, we can tell a bleak story of shrinking civil liberties in the face of ever-increasing authoritarian power.[142] As Justice Jackson forcefully noted, in the extreme, emergency decisions granted the imprimatur of a constitutional ruling will become normalized and remain "like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes."[143]

There are two related concerns here. One is that with each new attack, new repressive measures will be enacted before the old ones expire, creating a ratchet effect of ever-increasing and ever-more-intrusive security measures. A second is that through this process emergency conditions will become normalized. Yesterday's emergency measure will become tomorrow's normal procedure, especially when tomorrow brings new emergency measures designed to counteract the latest terrorist threat.

One example of the process of building upon prior emergency powers, stemming from Supreme Court decisions, is the use the Bush Administration

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138. POSNER & VERMEULE, *supra* note 3, at 88–89.

139. POSNER, *supra* note 6, at 148.

140. POSNER & VERMEULE, *supra* note 3, at 76.

141. *See* Gross, *Chaos and Rules*, *supra* note 5, at 1092, 1090–95 ("The farther we get from the original situation that precipitated its enactment, the greater are the chances that the norms and rules incorporated therein will be applied in contexts not originally intended.").

142. Bruce Ackerman tells the story well:

> A downward cycle threatens: After each successful attack, politicians will come up with a new raft of repressive laws that ease our anxiety by promising greater security—only to find that a different terrorist band manages to strike a few years later. This new disaster, in turn, will create a demand for more repression, and on and on. Even if the next half-century sees only three or four attacks on a scale that dwarf September 11, the pathological political cycle will prove devastating to civil liberties by 2050.

ACKERMAN, *supra* note 45, at 2.

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

has made of the World War II-era holding in *Ex parte Quirin*.[144] There the Court upheld the detention and trial before military commissions of six Nazi saboteurs as enemy combatants, one of whom, Herbert Haupt, was a U.S. citizen.[145] The Court reasoned that the President was acting within his constitutional powers and under the direction of Congress in trying the saboteurs as enemy combatants before military tribunals.[146] Having decided to detain hundreds of individuals in indefinite detention at Guantanamo Bay and having designated those individuals "enemy combatants," the Bush Administration, using this precedent,[147] argued to near success that the Executive has unchecked unilateral authority to detain individuals, including U.S. citizens, he deems "enemy combatants" in the war on terror. In *Hamdi*, the Court upheld this authority, subjecting it only to the limited judicial check of providing detained individuals access to some due process to contest their status.[148]

In holding that the President's action was lawful, however, the Court in *Ex parte Quirin* made clear that the "President, like the courts, possess[es] no power not derived from the Constitution."[149] One implication of this cautionary note is that the President cannot conduct free-wheeling balancing of security and liberty interests unmoored from congressional authorization or constitutional authority. Moreover, the Court in *Hamdi* emphasized the fact that "[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[150] Despite these judicially enforced limitations on executive power, by declaring national necessity under emergency conditions, the Executive was able to use old precedents to extend its power to detain U.S. citizens indefinitely by providing some minimal opportunity for the individual to contest his designation as an enemy combatant.

Although the factual circumstances recited several times by the plurality in *Hamdi* concerned individuals detained on the battlefield in Afghanistan,[151] the President's authority has not been limited to those circumstances. Regarding Jose Padilla, a U.S. citizen detained at Chicago's O'Hare airport under a material-witness warrant and later designated an enemy combatant, the Fourth Circuit held that the President had authority under both the

144. 317 U.S. 1 (1942).

145. *Id.* at 20, 48.

146. *Id.* at 41–45.

147. Hamdi v. Rumsfeld, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting).

148. *Id.* at 536–38 (plurality opinion). The Administration had argued that the Court lacked jurisdiction to consider habeas petitions from Guantanamo detainees. The Court rejected this position, holding that federal courts had jurisdiction pursuant to 28 U.S.C. § 2241 to hear the detainees' claims. Rasul v. Bush, 542 U.S. 466, 484 (2004) (plurality opinion).

149. *Ex parte Quirin*, 317 U.S. at 25.

150. *Hamdi*, 542 U.S. at 536.

151. *Id.* at 523.

Authorization for Use of Military Force (AUMF) and *Hamdi* to so designate and detain Padilla.[152]

Even if the holdings of these cases are highly deferential to the Executive, Posner and Vermeule nonetheless argue that the judiciary should not be in the business of reviewing executive decisions concerning national-security policy.[153] One thing to note, however, is that even if the civil libertarian is inclined to disagree with the deferential holdings of *Hamdi* and *Padilla*, the Executive's actions have greater legitimacy because of the presence of judicial review. Moreover, judicial review remains available to check executive abuse, which has plausibly occurred in the case of Ali Saleh Kahlah al-Marri, who was taken from his home in Peoria, Illinois, and has been held as an enemy combatant on the President's order since June 2003. In this case, where there is an absence of any stated connection whatsoever to the battlefield or having taken up arms against the United States, the Fourth Circuit held that "the President lacks power to order the military to seize and indefinitely detain al-Marri."[154] Thus, an acceptance of executive power in one situation occasions further assertions of that power in other situations. With each successive assertion, we experience the accretive creep of an ever-widening exercise of executive power and the prospect of an ever-decreasing realm of personal liberty. That prospect is checked only by civil-libertarian concerns and judicial review—two participants in our constitutional culture that the apologists seek to eliminate from national-security considerations.[155]

A further example stemming from Supreme Court decisions illustrates the accretive process by which principles that grant power in one situation have a tendency to spread to other situations. What has become known as the special-needs exception to the ordinary warrant-and-probable-cause requirements of the Fourth Amendment[156] began with the special situation of border-patrol agents conducting searches of cars for illegal aliens near the border with Mexico.[157] That special circumstance has now spread to include highway sobriety checkpoints,[158] checkpoints for information gathering,[159] drug testing of student athletes,[160] and most recently, random searches of

152. Padilla v. Hanft, 423 F.3d 386, 397 (4th Cir. 2005).

153. POSNER & VERMEULE, *supra* note 3, at 18.

154. Al-Marri v. Wright, 487 F.3d 160, 164 (4th Cir. 2007).

155. *See generally* Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235, 235 (2006) (describing how the Supreme Court's rulings in three cases regarding detainment of individuals for years without charging them with a crime "badly compromised" basic constitutional principles).

156. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.").

157. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 562, 566 (1976).

158. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).

159. Illinois v. Lidster, 540 U.S. 419, 426–28 (2004).

160. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653–54, 664–65 (1995).

bags in the New York subway system.[161] In each case, the special need is justified by circumstances that purport to make necessary the searches and temporary seizures employed by state officials. In the New York-subway context, the court engaged in a balancing test in which the liberty interest never made an appearance.[162] Rather the court reasoned by analogy from existing practices of airport searches, accepting without question the assertions made by law-enforcement officials concerning the need for random searches. The court stated, "We have no doubt that concealed explosives are a hidden hazard, that the Program's purpose is prophylactic, and that the nation's busiest subway system implicates the public's safety. Accordingly, preventing a terrorist from bombing the subways constitutes a special need"[163] justifying the program of random searches.

It is only one more step to allow for random searches of individuals on the nation's busy sidewalks as pedestrians or the nation's busy streets as drivers.[164] Under this rubric, in which law-enforcement claims are not subject to question, and when there may always be a potential security threat from concealed explosives (especially if we imagine a series of additional terrorist attacks over a number of years), then random searches would be justified as part of our everyday public lives. We move from a point of specific special need in a limited context by accretive creep to a special need in a general context. What was special becomes normalized. The argument here is not constructed to run headlong into the slippery-slope fallacy. Distinctions can be made between public transport and public sidewalks. But the problem is that distinctions will *not* be made in order to protect specific liberty interests if the act of balancing always presupposes that liberty must give way to relatively unquestioned assertions of executive officials concerning necessity and special need. The apologists make this presupposition.

In contrast to these kinds of actual and potential abuses arising from deference to the Executive during purported emergency situations, Posner and Vermeule boldly transpose the source of potential danger. Contrary to the traditional supposition, unilateral authoritarian executive action is not a concern.[165] Rather, civil-libertarian constraints create the real danger of creating undesirable ratchets. "Civil libertarians are the ratcheters, insisting that every increase in civil liberties should be treated as a platform for further

161. MacWade v. Kelly, 460 F.3d 260, 263 (2d Cir. 2006).

162. *Id.* at 271–73.

163. *Id.* at 271.

164. So far, the Court has rejected the practice of random automobile searches on ordinary streets. *See* City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (affirming a decision by Judge Posner who concluded the practice was unreasonable under the Fourth Amendment); *see also* Edmond v. Goldsmith, 183 F.3d 659, 663 (7th Cir. 1999) ("When urgent considerations of the public safety require compromise with the normal principles constraining law enforcement, the normal principles may have to bend. The Constitution is not a suicide pact. But no such urgency has been shown here.").

165. In fact, Posner and Vermeule claim that Justice Jackson's *Korematsu* dissent rests "on a simple empirical conjecture" that "seems hysterical." POSNER & VERMEULE, *supra* note 3, at 137.

increases."[166] On this view, if courts were to follow the directions of civil libertarians, we would have increased protection for civil liberties at the expense of security. Moreover, because "the balance between security and liberty is constantly readjusted as circumstances change," Posner and Vermeule conclude that "a government that refuses to adjust its policies has simply frozen in the face of the threat. It is pathologically rigid, not enlightened, and that rigidity is at least as great a threat to national values or to the nation's existence."[167] The civil-libertarian pathology gets even more bizarre under Posner and Vermeule's account, as they declare that "[n]o nation preserves liberty atop a stack of its own citizens' corpses, but if one did, it would not be worth defending."[168] By valuing civil rights and liberties, and by sometimes providing structural limitations on the methods and options government has in implementing policies, even security policies, the civil libertarian has become the real danger to the state, pathologically rigid and unenlightened, and willing to stand on principle atop a stack of corpses.

Whatever else one might say for Posner and Vermeule's line of reasoning here, it is most surely fantastic.[169] It is also revealing. For in this discussion, the image of balance becomes a rhetorical trope to mask a deeper commitment of their project: to push normative justifications for providing ever-greater security measures while limiting and displacing protections for civil rights and liberties. There is no choice among weights and measures in this balancing, only normative justifications for security policies, such as torture, indefinite detentions, and warrantless wiretapping, that infringe on our commitments to civil rights and liberties. If one has an active agenda in promoting unilateral executive power to pursue national-security measures under the rubric of "necessity," only then does it become possible to see civil libertarians as threats to the achievement of a desired end, rather than as interlocutors in a constitutional conversation that truly seeks to optimize both liberty and security.

Here we see the limitation of these projects, both with regard to premises and conclusion. If one is inclined to take a principled position regarding civil liberties, then from the outset neither project presents persuasive arguments, certainly not for the presumed validity of balancing civil liberties against national security.[170] In defending their project, and in criticizing civil libertarians, Posner and Vermeule's arguments rely on

166. POSNER, *supra* note 6, at 45.

167. POSNER & VERMEULE, *supra* note 3, at 155.

168. *Id.*

169. As if to highlight the inverted nature of their project, the civil libertarian becomes the threat, figuratively displacing the terrorist threat. The terrorist harm is held as a constant value, and when the terrorist strikes, the changing variable that represents the most harm becomes the civil libertarian.

170. For example, if security is a social good, then if one accepts John Rawls's theory of justice, the lexical priority of liberty "means that liberty can be restricted only for the sake of liberty itself." JOHN RAWLS, A THEORY OF JUSTICE 214 (rev. ed. 1999).

burden-shifting strategies and frequently replace argument with statements that "there is no reason to think" the oppositional claim has any merit. For example, regarding judicial review of executive action during emergencies, they assert that "there is no general reason to think that judges can do better than government at balancing security and liberty during emergencies."[171] Of course, as a semantic matter, that is clearly false in every instance in which purported civil libertarians have advanced any reason to think their position is correct. As a rhetorical matter, it supplants the argumentative burden Posner and Vermeule's project bears with mere aspersion. Presumably, the goal is to leave the impression that civil libertarians are simply unreasonable. Indeed, in their hands, civil-libertarian positions are "ignorant; many are also irrational, even hysterical."[172] Other civil libertarians have a "cartoonish vision,"[173] propose "gimmicky and infeasible"[174] solutions to balancing problems, make "delusion[al]" claims,[175] and present "mystifying" theories.[176]

Through the dichotomy of values they construct—the supposed opposition between civil liberties and national security, which forms the basis for the necessity of balancing—they figure an opposition between civil libertarians and executive officials acting as national-security experts. When the theory gets embodied, we learn that their project does not entail an open dialogue between civil libertarians and national-security experts (as if these are necessarily different kinds of persons) on the model of genuine balancing. Rather, the one figure, the civil libertarian, is cast as the genuine threat to national security, prone to panic and ripe for creating dangerous ratchets. In the end, they reveal a jolting authoritarian sympathy, at home with the suppression of dissenting speech and at odds with a constitutional culture of inclusive pragmatic participation.

IV. Torture, Trade-offs, and Deference in Practice

When it comes to practical application of the trade-off-and-deference methodology, the results are straightforward, and the discussion is sustained only through the caricature of civil-libertarian positions. Both projects

171. POSNER & VERMEULE, *supra* note 3, at 31; *see also, e.g.*, *id.* at 30 ("There is no reason to think that the government will systematically undervalue civil liberties or overvalue security during emergencies nor that it will systematically overestimate the magnitude of a threat, compared to its bebavior during non-emergencies."); *id.* at 60 ("There is no reason to think that the government will systematically undervalue civil liberties . . . ."); *id.* at 88 ("[There is] no theoretical reason to believe[] that democratic failure is more likely in emergencies."); *id.* at 159 ("Courts have no reason to demand a more elaborate statutory mechanism governing emergency powers . . . ."); *id.* at 274 ("There is no reason for officials or interested publics to afford their arguments special weight as philosophical argumentation . . . .").

172. *Id.* at 79.

173. *Id.* at 202, 201–02.

174. *Id.* at 274.

175. *Id.* at 195.

176. *Id.* at 256.

advance apologies on behalf of practices such as coercive interrogation and torture, indefinite detention and trials by military commissions, as well as domestic surveillance and suppression of dissent.[177] Although neither project purports to provide apologies on behalf of specific Bush Administration policies, as it turns out, both do. Posner and Vermeule explicitly disavow any expertise: "We should be clear that we do not endorse or criticize any particular counterterrorism measure used by the Bush administration. One of our central points is that we, as lawyers, do not know enough about the underlying variables to be able to express an informed opinion . . . ."[178] Such demurrals aside, they proceed to express many opinions. Posner is more explicit in endorsing specific Bush Administration policies, such as indefinite detention, warrantless domestic wiretaps, and coercive interrogation.[179] He concludes "that the measures taken in the wake of the 9/11 attacks to combat the terrorist threat do not violate the Constitution."[180]

A. Torture

Both projects endorse the practice of coercive interrogation. Posner and Vermeule endorse both cruel, inhuman, and degrading treatment, as well as torture.[181] Posner endorses both as well but prefers to have torture practiced outside of any formal legal regime, as an exceptional practice warranted by

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177. *See* POSNER, *supra* note 6, at 65 (arguing that there is constitutional support for the indefinite detention of suspected terrorists, who should be treated as prisoners of war, not criminals entitled to habeas corpus rights); *id.* at 74–75 (concluding that habeas corpus is not offended if a suspected terrorist is tried before a military tribunal, so long as the right to challenge one's status as a terrorist is allowed to be made before a civilian court); *id.* at 80 (stating that there is no constitutional prohibition on the use of coercive interrogations and supporting the proposition that as the value of the information sought increases, so should the level of coercion allowed in interrogation); *id.* at 99–100 (asserting that if the information gathered in the course of surveillance could only be used in the national-security context, then the government could constitutionally intercept all electronic communications regardless of the citizenship of the individuals involved or the domestic or international nature of the transmission); *id.* at 113, 113–14 (arguing for intensive surveillance, including the physical presence of government operatives, of "radical imams"); POSNER & VERMEULE, *supra* note 3, at 16, 15–16 (explaining that the "deferential view" of constitutional law in national emergencies includes curtailing dissent if dissent would "weaken[] resolve"); *id.* at 81, 80–81 (asserting that it is "hardly clear" the National Security Agency's monitoring of international communication is "illegal at all"); *id.* at 214–15 (suggesting the need for a legal framework that would allow for coercive interrogations in some circumstances and provide for oversight); *id.* at 254–56 (criticizing the plurality in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), for its unwarranted concern with the issue of whether or not Hamdi's detention as a suspected terrorist would last for his entire life); *id.* at 257 (hypothesizing that in giving the Executive its proper deference in handling emergency situations, the U.S. Supreme Court may hold that military tribunals of enemy combatants fully satisfy due-process requirements).

178. POSNER & VERMEULE, *supra* note 3, at 158.

179. *See* POSNER sources cited *supra* note 177.

180. POSNER, *supra* note 6, at 151.

181. *See* POSNER & VERMEULE, *supra* note 3, at 207–15 (discussing a legal framework for torture). Under their deferential approach to unreviewable executive action, it appears that "the Constitution licenses the President to be 'torturer in chief.'" Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1151 (2006).

exceptional circumstances.[182] Both projects thus stand opposed to a growing chorus criticizing coercive interrogation practices, at home and abroad.[183]

Posner analyzes the constitutional implications of torture in terms of Fifth Amendment-due-process jurisprudence.[184] Under this approach, one cannot be deprived of life, liberty, or property without due process of law. Abusive practices such as torture would constitute deprivations of liberty without due process of law.[185] Using a 1952 Supreme Court decision involving the involuntary pumping of a criminal suspect's stomach in which the Court concluded that such a practice "shocks the conscience,"[186] Posner suggests that whether a practice would undermine our conception of ordered liberty sufficient to create a violation of due process depends on the circumstance.[187] It is a quick route to imagine the ticking-bomb scenario. A bomb set to go off in a city where it will undoubtedly kill thousands; a suspect in custody who knows where the bomb is located. Time is ticking. What do you do? Do you respect the suspect's civil liberties or resort to any means necessary to obtain the information? Posner concludes that "[i]f it is dire enough and the value of the information great enough, only a die-hard civil libertarian will deny the propriety of using a high degree of coercion to elicit the information."[188]

Eschewing the need to resort to ticking-time-bomb hypotheticals, Posner and Vermeule conclude that coercive interrogation is no different

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182. *See* POSNER, *supra* note 6, at 85 (favoring the continuation of the ban on torture and relying on its use only where "public officers . . . perceive and act on a moral duty that is higher than their legal duty").

183. *See, e.g.*, MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 22 (2004) (reporting on official decisions that had the effect of transforming "the United States from a nation that did not torture to one that did"); Koh, *supra* note 181, at 1167 (concluding that the president cannot authorize torture in violation of congressional statutes or *jus cogens* international norms, even "in the gravest national circumstances"); Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 294–95 (2003) ("Torture is alien to our Constitution both because it impinges on bodily integrity, and because it assaults the autonomy and dignity of the victim."); Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CAL. L. REV. 235, 275 (2007) (arguing that attempts to justify torture confuse different definitions of necessity and ignore long-standing human rights that predate modern governmental institutions); David Sussman, *What's Wrong with Torture?*, 33 PHIL. & PUB. AFF. 1, 3 (2005) (arguing that a unique moral aspect of torture separates torture from other types of violence and causes it to always be "morally objectionable"); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1717 (2005) ("[T]he rule against torture plays an important emblematic role so far as the spirit of our law is concerned."); David Cole, *How to Skip the Constitution*, N.Y. REV. BOOKS, Nov. 16, 2006, at 20, 21 (criticizing Posner and arguing that "[c]onstitutional theory . . . demands more than mere ad hoc balancing").

184. POSNER, *supra* note 6, at 80–85.

185. *Id.* at 80.

186. Rochin v. California, 342 U.S. 165, 172 (1952).

187. *See* POSNER, *supra* note 6, at 85 ("What shocks the conscience depends on circumstances. In life-and-death situations the use of even highly coercive methods of interrogation is unlikely to shock the conscience of most people, even thoughtful and humane ones.").

188. *Id.* at 81.

from other practices that require first-order balancing of costs and benefits, whether one is thinking in terms of catastrophic circumstances or other potentially harmful ones. Coercive interrogation "is not special at all" because it is no different than other kinds of harms that executive officials are allowed to inflict, such as the use of deadly force.[189] Richard Posner broadly agrees with this point, noting that it is odd that we would allow executions but seek to forbid the lesser harm of mere torture.[190] Accordingly, "the legal system should authorize coercive interrogation in some narrow range of circumstances, suitably defined and regulated ex ante."[191]

What justifies such a cavalier conclusion, given that torture violates domestic, international, and U.S. constitutional law?[192] The short answer is "simple application of the tradeoff thesis."[193] During emergencies, the moral harms of torture decline as the informational benefits rise. As the benefits increase, the justifications for the practice increase as well.

Having divided the moral landscape between absolutists and consequentialists, the apologists are not concerned with any of the moral details that remain unresolved, even assuming a consequentialist moral theory. Chief among the unresolved matters is any account for why security should so consistently have a value greater than that of liberty or other civil rights. Civil libertarians can tell a story about the intrinsic worth of protecting human dignity and liberty in the face of state power and can also tell a story about the consequences of failing to protect these values. Part of the latter story is embedded in our constitutional tradition, which seeks to limit and check unilateral exercises of power. This is a tradition each of these projects rejects. Moreover, the civil libertarian can point to lessons of history, whether it be the overreaction and racism that led to Japanese internment or to the ways Posner and Vermeule's national-security necessity arguments were once used in support of the Nazi regime, lessons which the apologists dismiss as irrelevant.

In one of the odder sections of Posner and Vermeule's project, they take up the relevance of Carl Schmitt, a Weimar Republic-era political theorist turned Nazi academic.[194] In a series of books, Schmitt argued that the

189. POSNER & VERMEULE, *supra* note 3, at 185.

190. POSNER, *supra* note 6, at 82.

191. POSNER & VERMEULE, *supra* note 3, at 191.

192. *See* 18 U.S.C. §§ 2340–2340A (2000) (outlawing torture); Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003, 119 Stat. 2739, 2739 (prohibiting cruel, inhuman, or degrading treatment or punishment of persons under custody or control of the United States government); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 16 (requiring signatory states to criminalize all acts of torture and take effective measures to prevent acts of torture in all territories under its jurisdiction); Brown v. Mississippi, 297 U.S. 278, 285–86 (1936) (concluding that under due process "[t]he rack and torture chamber may not be substituted for the witness stand"); Kadic v. Karadžić, 70 F.3d 232, 243 (2d Cir. 1995) ("[T]orture is prohibited by universally accepted norms of international law . . . .").

193. POSNER & VERMEULE, *supra* note 3, at 215.

194. *Id.* at 38–45.

sovereign was the entity who had the power to declare a state of emergency.[195] In academic circles, Schmitt's theories have become relevant because of their systemic treatment of the notion of a state of emergency and the role of executive and sovereign power.[196] With the air of certitude, Posner and Vermeule dismiss history's relevance as "low" and "not obvious."[197] Their position is that it "will not" happen here.[198] But why not? This question is particularly relevant given the trust they place in unchecked executive power. They say that our present situation is not like that of the Weimar Republic, but this is a claim that depends on contingent circumstances and assumes the route to despotism that the Weimar Republic followed is the only path a nation might take.

In light of the apologists' deafness to history and blindness to constitutional tradition, one point to make is that the trade-off thesis unravels the tension between rights from which derogations are permitted and those rights from which none are allowed. For example, the state can justify restrictions on speech by showing a compelling need and narrow tailoring.[199] This confines any attempt by the state to justify regulations of speech into an already-existing script, a public narrative in which particular kinds of reasons must be provided and particular kinds of public acceptances become possible.[200] We understand that to avoid cacophony in the public sphere the state can regulate the time and place of speech by appealing to the need to maintain public order, but not by appealing to disapproval of message and viewpoint. By contrast, no amount of compelling need can justify, after the ratification of the Thirteenth Amendment, the imposition of slavery. Nor can

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195. *See* CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 13 (George Schwab trans., Univ. of Chi. Press 2005) (1922) ("For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists.").

196. *See, e.g.*, GIORGIO AGAMBEN, STATE OF EXCEPTION 10 (Kevin Attell trans., Univ. of Chi. Press 2005) (2003) (citing Carl Schmitt as foremost among authors in favor of constitutional or legislative provisions legitimizing the state of exception); Sanford Levinson, *Preserving Constitutional Norms in Times of Permanent Emergencies*, 13 CONSTELLATIONS 59, 59 (2006) ("The single legal philosopher who provides the best understanding of the legal theory of the Bush Administration is Carl Schmitt . . . ."); Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1009 (2004) ("[T]he place to start in thinking about theoretical justifications for states of emergency . . . is with Carl Schmitt, who not only attempted to justify the state of exception in a constitutional democracy but who, in the end, played a role in the demise of the Weimar Constitution itself.").

197. POSNER & VERMEULE, *supra* note 3, at 39.

198. *Id.*

199. *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

200. Justifications for regulating speech also depend on the circumstances, as the Supreme Court has regularly been more solicitous of speech regulations during times of emergency. Justice Holmes makes the point clear: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." Schenck v. United States, 249 U.S. 47, 52 (1919).

the state violate bodily integrity in particular kinds of ways, such as seizing body parts, no matter the supposed compelling need.[201]

It is not just that the prohibition against torture is emblematic of the spirit of a whole body of laws,[202] it is the fact that the arguments used to justify the use of torture know no boundaries—they are equally applicable to justify the derogation of any number of other rights, emblematic or not. If torture is necessary, then how much easier it would be to justify the suppression of dissent. After all, no one gets physically harmed by being compelled to be silent. Moreover, if contingent circumstances give rise to "states of exception"[203] permitting the use of torture, then other circumstances might also justify a host of other horribles. History has already shown such horribles to be possible—also justified by appeals to national necessity on behalf of state security—including, in the United States, such actions as Japanese internment.[204] It is entirely unclear what principle would hold the line against the growth of necessity and trade-offs, especially once the additional topics—mass detention, mass killing, etc.—get introduced as legitimate topics of debate under the rubric of national necessity.

B. Temperament

The American philosopher William James published his lectures on Pragmatism in 1907, claiming that "[t]he history of philosophy is to a great extent that of a certain clash of human temperaments."[205] Moreover, when engaging in discussion, philosophers seek to hide this first premise of temperament. "Temperament is no conventionally recognized reason, so [the philosopher] urges impersonal reasons only for his conclusions. Yet his temperament really gives him a stronger bias than any of his more strictly objective premises."[206] Richard Posner begins his apology from the same first premise:

> Each judge brings to the balancing process preconceptions that may incline him to give more weight to inroads on personal liberty than to threats to public safety, while another judge, bringing different preconceptions to the case, would reverse the weights. The weights are influenced by personal factors, such as temperament (whether

201. Recall Justice Frankfurter commenting on police forcible seizure of evidence from a suspect's stomach: "Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society." Rochin v. California, 342 U.S. 165, 173–74 (1952).

202. *See* Waldron, *supra* note 183, at 1723 (arguing that the prohibition against torture "sums up or makes vivid to us the point, purpose, principle, or policy of a whole area of law").

203. *See* AGAMBEN, *supra* note 196, at 8.

204. Korematsu v. United States, 323 U.S. 214, 219–20 (1944) ("Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.").

205. WILLIAM JAMES, PRAGMATISM 8 (Bruce Kuklick ed., Hackett Publ'g 1982) (1907).

206. *Id.*

> authoritarian or permissive), moral and religious values, life experiences that may have shaped those values and been shaped by temperament, and sensitivities and revulsions of which the judge may be quite unaware.[207]

The apologist's temperament is decidedly authoritarian, as both projects advocate unfettered executive power to confront emergency situations by curtailing civil liberties in pursuit of national-security goals.

William James characterizes two dominant temperaments in the history of philosophy, both of which are applicable to the present topic: the tough- and the tender-minded.[208] The tough-minded person is the person of decisive action and empirical facts, whereas the tender-minded person is the person of thoughtful action and abstract principle. Torture apologists are tough-minded persons who seek to achieve security ends by whatever means necessary, whereas civil libertarians, at least as constructed by Posner and Vermeule, are tender-minded persons, concerned more with protecting abstract liberties and human dignity than achieving measurable security benefits. Jay Bybee and John Yoo's Department of Justice memo, the now-infamous "torture memo," illustrates the tough-minded approach to expanding the permissible realm of executive action.[209] Speaking on behalf of the Administration, Vice President Cheney exemplifies the tough-minded approach in official rhetoric:

> Now, you can get into a debate about what shocks the conscience and what is cruel and inhuman. And to some extent, I suppose, that's in the eye of the beholder. But I believe, and we think it's important to remember, that we are in a war against a group of individuals and terrorist organizations that did, in fact, slaughter 3,000 innocent Americans on 9/11, that it's important for us to be able to have effective interrogation of these people when we capture them.[210]

More generally, tough talk has been the hallmark of the Bush Administration's response to the events of 9/11—witness the 2004 State of the Union Address: "After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got."[211]

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207. POSNER, *supra* note 6, at 24–25.

208. JAMES, *supra* note 205, at 10.

209. Jay S. Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), *in* THE TORTURE PAPERS 172, 200 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

210. *Nightline* (ABC television broadcast Dec. 19, 2005), *excerpt available at* http://abcnews.go.com/Nightline/IraqCoverage/story?id=1419206; *see also* Dan Eggen, *Cheney's Remarks Fuel Torture Debate*, WASH. POST, Oct. 27, 2006, at A9 (discussing the Vice President's remarks that a "dunk in water" is a no-brainer).

211. President George W. Bush, State of the Union Address (Jan. 20, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/01/print/20040120-7.html.

Following William James, I would like to suggest that the dichotomy between the tough- and tender-minded is unsustainable. Going forward, challenges exist for both security and liberty that will require cooperative engagement among all affected parties and interests. When it comes to the image of balancing, a more useful project is one that calls on civil libertarians and security experts to work together to fashion policies that respect liberties while achieving security results. Recall that the easy path will usually be the one that ignores the rule of law, that seeks consequences by the most expedient means. The hard work is fashioning a workable balance of concern for specific liberties and protection of particular national-security interests. Examples of this hard work are found in Bruce Ackerman's proposal for a framework statute, allowing the Executive to take extraordinary actions in the immediate aftermath of a major terrorist attack but requiring a swift return to complete normalcy.[212] Posner and Vermeule dismiss this proposal as "gimmicky and infeasible."[213] Of course, it is tempting to talk tough, to make apologies for taking the easy route, and to avoid the hard work of thinking of creative ways to balance specific liberty and security values. We should resist the temptation to foster an extreme version of one temperament over another and strive instead to obtain a pragmatic balance that draws on the strengths of both.

V. Silencing Civil Libertarians?

A final aspect of Posner and Vermeule's project is perhaps its most interesting. Posner and Vermeule confront the role played by public and academic discussion over the limits and legitimacy of executive emergency powers. Ordinarily, we might expect public debate to contribute to government policy decisions over the appropriate way to conceptualize and implement constitutional commitments to liberty while pursuing security. Posner and Vermeule do not write for ordinary times, however. Because civil libertarians are not national-security experts, Posner and Vermeule claim that they have nothing to offer through public discussion and should be restrained in their efforts to influence public policy.[214]

Ironically, in the end Posner and Vermeule largely agree with Slavoj Žižek, a critical theorist of left-leaning political persuasion, that academics and officials should not be discussing the legitimacy of torture, though to be sure, their agreement is based on very different reasons.[215] Žižek argues that

212. *See* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1047 (2004) (proposing a "supermajoritarian escalator," where continued executive emergency power requires increasingly greater support over time).

213. POSNER & VERMEULE, *supra* note 3, at 274.

214. *Id.* at 274–75.

215. Žižek argues that commentaries that "do not advocate torture outright, [but] simply introduce it as a legitimate topic of debate, are even more dangerous than an explicit endorsement of torture." SLAVOJ ŽIŽEK, WELCOME TO THE DESERT OF THE REAL!: FIVE ESSAYS ON SEPTEMBER 11 AND RELATED DATES 103 (2002).

we should not be talking about torture because to do so introduces torture "as a legitimate topic of debate."[216] We do not talk about the prospect of committing genocide, for example. We do not think about whether other values might give way at the threshold under emergency conditions, nor do we pause to consider imaginary sets of circumstances that might make the systematic murder of a few hundred thousand seem necessary to preserve the security of the nation, and we do not do so for good reasons. But if we were to introduce the topic and begin to worry about hypothetical ticking-bomb scenarios involving killing hundreds of thousands to save hundreds of millions, we would have introduced genocide as a legitimate topic of debate. After all, as Posner and Vermeule argue, we do weigh the costs and benefits of permitting police killings and military killings of civilians for appropriate purposes,[217] and mass killings of some people, if done to promote national security, are presumably no different. "[I]t is fanatical," Posner and Vermeule write, to deny "that there can ever be such a thing as a justified violation of rights, or a necessary evil."[218] In contrast to our collective, perhaps fanatical, refusal to contemplate genocide, the clamor of discussion over torture and moral thresholds, consequentialism and practical necessity, has given the practice of torture a renewed sense of legitimacy.

The very rejection by Posner and Vermeule of protecting absolute rights against torture relies on the acceptance that at some threshold, even ardent civil libertarians are willing to forego their commitments for the sake of avoiding dire consequences.[219] Having admitted that, the jape is up, and all that is left is haggling over the details.[220] Or so the argument goes. But we do not make similar arguments about even selective mass killing, although the same argumentative structure and the same focus on overall social welfare exists. To introduce such topics into serious debate would be beastly. Indeed, Žižek argues that commentaries that "do not advocate torture outright, [but] simply introduce it as a legitimate topic of debate, are even more dangerous than an explicit endorsement of torture."[221] Why? Because "the mere introduction of torture as a legitimate topic allows us to entertain the idea while retaining a pure conscience."[222] We should simply stop talking about torture.

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216. *Id.*

217. POSNER & VERMEULE, *supra* note 3, at 184–85.

218. *Id.* at 187.

219. *See* Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893, 896 (2000) (noting that civil libertarians, such as Michael Moore and Robert Nozick, "concede[] the possibility of a threshold at which consequentialist considerations could override deontological prohibitions").

220. *See* Luban, *supra* note 4, at 1440 (regarding a ticking bomb, "[n]ow that the prohibitionist has admitted that her moral principles can be breached, all that is left is haggling about the price").

221. ŽIŽEK, *supra* note 215, at 103.

222. *Id.* at 104.

With regard to philosophers, civil libertarians, and lawyers more generally, as opposed to national-security experts and executive officials, Posner and Vermeule couldn't agree with Žižek more. The goal of their book:

> is to restrain other lawyers and their philosophical allies from shackling the government's response to emergencies with intrusive judicial review and amorphous worries about the second-order effects of sensible first-order policies. We hope merely to clear the ground for government to react to emergencies . . . . [I]n any case nothing in the lawyer's expertise supplies the necessary tools for improving on the government's choices.[223]

Moreover, Posner and Vermeule write that with regard to philosophers engaged in discussion of the moral implications of public policy involving torture, "[t]here is no reason for officials or interested publics to afford their arguments special weight as philosophical argumentation, rather than the weight that the opinion of any person in the street deserves on matters of emergency policy."[224] Richard Posner also takes up this theme, writing that "[c]ivil libertarians tend to exaggerate the costs . . . and to ignore or slight the benefits" of security policy.[225] They do this because they are merely lawyers. In the end, Posner and Vermeule's book boils down to the deflationary claim that those of us who are philosophers, constitutional scholars, or other concerned lawyers who are not national-security experts or executive officials, don't know anything relevant, cannot contribute anything relevant, and should simply cease talking about torture and other security-related matters.

This conclusion raises an interesting question for the Posner and Vermeule project, written by two law professors who are neither philosophers nor national-security experts: what expertise must one have to advance a deflationary, normative metaprinciple about which conversations we should have and what their content should be? In addressing and purporting to resolve the questions of what conversation and which interlocutors, as a conceptual and normative matter, should continue, Posner and Vermeule seem to have circled back into the domain of the philosopher. It would seem that the consequence of their "hope merely to clear the ground"[226] for others to act is normative and conceptual. In their view, we adopt a particular normative position about what we should do in response to perceived emergencies based on conceptual understandings of what kinds of matters are most relevant and what kinds of expertise we have to offer.

Here's the conundrum for the reader contemplating Posner and Vermeule's conclusion. Since they are nonphilosophers and nonexperts on security raising conceptual and normative questions with significant

223. POSNER & VERMEULE, *supra* note 3, at 275.

224. *Id.* at 274.

225. POSNER, *supra* note 6, at 51.

226. POSNER & VERMEULE, *supra* note 3, at 275.

consequences for human dignity and liberty, then readers are left to wonder why we should give their arguments any more "weight [than] the opinion of any person in the street deserves."[227] They attempt to say what they claim they have no expertise to say—something about the proper way to conduct security policy. In so doing they want civil libertarians to be silent, while allowing apologists to speak. Without a criterion to distinguish some nonexperts from others, then either all nonexperts—the apologists and civil libertarians—have something to say, or none do. The self-referential trap is therefore sprung.

There is an additional consequence of their desire to restrain and silence civil libertarians. If we are to take seriously both claims to balancing, a proposition this Review calls into doubt at the general and abstract level, then it is unclear why those who speak on behalf of national security are the only ones allowed to contribute to policy decisions. Recall that the image of balance imbedded in Justitia is that there is a single issue to be resolved, and the goddess must weigh the relative merits of arguments for each opposing side of that issue. The presumption is that there really are two robust sides to weigh. Balancing, in the hands of the apologists, has only one side—national security. If national-security experts speak on behalf of both security and liberty, there is no real sense of balancing and no real sense of paired advocacy. Of course, this is precisely what Posner and Vermeule seem to want to eliminate—strong voices speaking on behalf of civil liberties when specific liberties come into conflict with specific security policies.

Posner and Vermeule state that "[w]hat we do believe is that the government must make tradeoffs, that policy should become less libertarian during emergencies, and that courts should stay out of the way."[228] The problem with this claim is that if we take their premise that the trade-off between liberty and security is a highly circumstantial balancing decision, which requires deference to the decisions of the Executive, we cannot say ex ante that a policy should be less libertarian. To say that policy should be less libertarian during emergencies is to shed deference to the Executive, to reveal a weighted bias in favor of security in the act of balancing, and to contradict their demurral that they "do not know enough about the underlying variables to be able to express an informed opinion."[229]

VI. Conclusion

If one is inclined to take a strong, absolutist position regarding civil liberties, then neither project will prove persuasive. For nonabsolutists, both projects advance sustained arguments defending the necessity of trade-offs between civil liberties and national security and defending deference to

227. *Id.* at 274.
228. *Id.* at 158.
229. *Id.*

executive-branch decisions, which even if not ultimately successful, make important contributions to the debate. The problem, as Posner and Vermeule note, is that almost all those who consider moral dilemmas at the limit are willing to admit that in some extreme circumstances, even rights against torture might be balanced against national-security interests. Both projects take this general practice of balancing an asserted right against governmental need as their initial premise. From a state of balance, both projects conclude that executive practices such as torture can be justified in some circumstances in order to protect national security. The practice of torture has many detractors who believe, in the words of President George W. Bush, that "[t]orture anywhere is an affront to human dignity everywhere,"[230] but torture has few apologists.

Both projects explore the grounds upon which such apologies can be made, in the process advocating deference to executive officials acting to protect national security and in turn enriching the content of the debate. Posner and Vermeule claim that a majority of academic lawyers "are reflexively hostile to executive power in matters of national security."[231] This claim is clearly unsustainable. It seems an easy retort to say that if academic lawyers tend to be hostile to anything, they are hostile to unconstrained executive action. In the history of nations and governments, examples are all too plenty of governmental use of blunt force and brute tactics to secure protection from real or perceived threats. Taking the Ronald Reagan rhetoric of a "shining city upon a hill"[232] seriously, together with the entire movement of international human rights over the last half century, liberal democracies have endeavored to conduct the exercise of governmental powers differently. Liberal democracies have committed to acting within certain broad constitutional constraints that respect human dignity and promote liberty, even if in so doing achieving some policy objectives is made more difficult. What liberal democracies really trade off is the easy resort to torture for the more difficult path of intelligence gathering free from such abuse. What liberal democracies really trade off is the easy unilateral ability to detain individuals indefinitely, without charges, for the more troublesome requirements of due process and access to independent courts. The trade-off is not merely the abstract formula of balancing liberty and security.

What the American constitutional and pragmatist tradition says to the world is that although national security is a paramount concern, as it presumably is for every nation, we can achieve security while preserving liberty and respecting human dignity. In the end, it is the apologist, concerned only

230. *See, e.g.*, Statement on the United Nations International Day in Support of Victims of Torture, 1 PUB. PAPERS 701, 701 (June 26, 2003).

231. POSNER & VERMEULE, *supra* note 3, at 274.

232. Ronald Reagan, Farewell Address to the Nation (Jan. 11, 1989), *in* ACTOR, IDEOLOGUE, POLITICIAN: THE PUBLIC SPEECHES OF RONALD REAGAN 322, 326 (Davis W. Houck & Amos Kiewe eds., 1993).

for consequences, and not for moral and constitutional principle, who is reflexively hostile—hostile, not to executive action, but executive action under constitutional constraint. For all their tough talk, the apologists prefer the ease of unfettered action, while the supposed tender-minded civil libertarian would undertake the struggle on behalf of principled action. The choice among temperaments remains ours to make.

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