“EXIGENCIES,” “EMERGENCIES,” AND ADHERENCE TO CONSTITUTIONAL NORMS (AND SETTLEMENTS)

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A central theme of this book is the important (and sometimes unfortunate) role played by constitutional “settlements,” rules clearly laid down that become accepted as “meaning what they say” and thus impervious to litigation; the difficulties of amendment, particularly at the national level, provide their own impervious to change. But one should be under no illusions that even the most rule-like norms will necessarily prevail. The acid test for any constitutional order arises during perceived “emergencies,” when the costs of adhering to such rules may seem to be extremely high indeed and the tensions posed by potential “ungovernability” especially great. Any readers of this book are certainly familiar with the reality of “exceptional” circumstances, whether the September 11, 2001 attack on the World Trade Center, hurricane Katrina’s attack on New Orleans, the near-collapse of the American (and world) economy in 2008, or fears of a swine-flu pandemic in 2009, not to mention the nuclear catastrophe in Japan (as a result of an exceptional earthquake that in turn triggered an exceptional tsunami). But the Constitution itself was drafted under the perception of what 18th century writers described as political “exigencies,” and it is well worth looking at some of their justifications for seeming indifference to legal norms before turning to the more contemporary debates.

I. DID THE FRAMERS ADHERE TO THE “RULES SET DOWN” (AND DO WE CARE WHAT THE ANSWER IS?)

Few Americans are aware of the deep uncertainties surrounding the conduct of those who framed and adopted our Constitution. The Constitution was conceived and given life in a process that required a self-conscious decision to go well beyond either the mandate given delegates to the Philadelphia Convention by the Congress that authorized the Convention (upon
the plea of most of the states) and, far more importantly, the explicit rules set down in the Articles of Confederation—which was, after all, America’s first, albeit now forgotten, constitution. So what?

Proponents of the 1787 constitutional convention, at least in private letters with one another, freely conceded its “questionable” constitutionality. Madison confronts these problems head on in Federalist #40, and the nature of his responses is also useful with regard to one of the basic structures of analysis set out throughout this book, the difference between the “Constitution of Conversation” and the “Constitution of Settlement.” After all, among the most important things that should be settled, one might believe, is the mechanism dealing with changing the text of the constitution, the topic of the previous chapter. With rare exceptions, those who engage in negotiations about drafting new constitutions often elicit guarantees against change, at least without going through procedures considerably more difficult than is necessary to pass ordinary legislation. A danger is that a given constitution might require a too-arduous process for change. What then?

Madison and his colleagues in Philadelphia offer illuminating, albeit perhaps troublesome, answers. These answers also relate to the ability of constitutions to be self-enforcing documents through their ability to create incentives (or loyalties) that will lead members of the polity to adhere to the rules set down without litigation or resort to more ominous coercive measures. Recall that there is nothing automatic about such self-enforcement, even when the language is “absolutely clear,” inasmuch as enough persons might view acquiescence as presenting far more risks than disobedience. No one, for example, will feel obligated to obey speed limits or to stop at all red lights when rushing someone to a hospital.

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Indeed, we would probably regard someone who would be meticulously “law-abiding” in such a situation as something of a fanatic. It is one thing to say “let justice be done though the heavens fall”; it is quite different to say “let every law be followed though the heavens fall.” Only a truly crazed “legalist” would find this remotely plausible, even if “the law” in question is found in a constitution itself.

If an existing constitution seems significantly out of phase with the values and desires of those with significant power within a polity, then radical transformation may appear far preferable to meek submission. So we must ask about the degree to which Madison and his associates “played by the rules” that presumably faced them as they arrived in Philadelphia in May 1787. Any conclusions that they did play fast and loose with regard to “the rules” triggers an accompanying normative question. Did Madison really care about what might be termed legal fidelity; more to the point, should we? So let us look more deeply at the two central criticisms that were leveled at Madison and his colleagues and his responses thereto.

A. **What kind of convention did Congress authorize?**

The first criticism involves the specifics of the congressional mandate given the members of the Philadelphia convention by Congress, which issued invitations to all of the thirteen states to send delegates to Philadelphia in May 1787 “for the sole and express purposes of revising the Articles of Confederation and provisions therein, as shall, when agreed to in Congress, and confirmed by the States [presumably under the procedures set down in the Articles, but more on that later] render the federal Constitution adequate to the exigencies of government and the preservation of the Union” (emphasis added).

Did the Convention adhere to these instructions? One state, Rhode Island, sent no delegates at all, because it correctly feared that the gathering would turn into a “runaway
convention” that would basically do in the Articles and replace them with something far worse, at least from the perspective of Rhode Islanders. Moreover, two of the three New York delegates walked out of the Convention when they, again accurately, perceived that their colleagues were going well beyond their instructions.

How does Madison respond to such criticisms? To some extent, he engages in the rhetorical maneuvering associated with “constitutions of conversation.” That is, although Madison was not a lawyer himself, he does exactly what one expects lawyers to do, which is to argue that what might appear relatively clear on the surface is in fact open to legitimate differences of interpretation and, therefore, varied meanings. It thus turns out that “revision,” under careful examination, means tearing the governmental house down and starting all over again. It is as if you hire a contractor to repair a house that you recognize as having defects and discover, on your return home from a vacation, that the contractor has in fact leveled it to the ground because of deep foundational problems that make what one ordinarily thinks of as “repair” impossible. Moreoever, you’re told that it would simply be impossible to replace the colonial-style home you had; instead, you were offered the plans for an ultra-modern home designed by Frank Gehry. So here, at least “repair” means “demolition and replacement” by a significantly different design that will presumably avoid the problems that doomed the original home. Is it relevant that your expectations have been violated—i.e., that you assumed a more modest outcome when you left for vacation? Or is the point that the contractor in fact was correct in believing both that repair was impossible and that a truly radical substitution for the initial house was necessary to meet the basic need for secure shelter.

Madison suggested in the 37th Federalist that “the existing Confederation is founded on principles which are fallacious; [] we must consequently change this first foundation, and with it
the superstructure resting upon it.” The purpose of the convention was to create a truly functioning government adequate to the needs of the country created by the American Revolution, and the system created by the Articles of Confederation simply could not do that. Interestingly enough, Madison and other adherents of a convention had scarcely used such language, at least in public, before Congress issued its call for a convention? But so what? Note also that Madison never says in so many words that he and his colleagues “defied” Congress; instead, he offers a capacious “interpretation” of Congress’s mandate that legitimizes what the convention did, even if some of those who voted for the initial authorization might be shocked at what then took place. Without tracing the particularities of his argument, let us assume agreement with Madison, that “revision” can be made to cover what the Convention did to the Articles.

B. When “Settlements” become too costly: What is there to say about Article XIII?

For better or worse, the congressional mandate, and the meaning we attach to “revision” pose only one problem. The heart of the matter, in terms of legal “fidelity,” is the thirteenth Article of Confederation, which very clearly sets out a procedure by which amendments to the Articles take place: The procedure requires that all of the legislatures of the then-thirteen existing states agree to any proposals for change. The veto of even one state is therefore enough to doom any proposed amendment. That’s just what the text says; it really doesn’t lend itself to fancy arguments about interpretation or meaning. Madison doesn’t deny that this is the meaning of Article XIII. He seems to recognize that one purpose of the Articles was to “settle” how changes would take place, with no ambiguities. If any part of the Articles illustrated the “constitution of settlement,” one might think it was Article XIII.
Moreover, consider in this context the closing paragraph of the Articles of Confederation, which came into force in 1781 upon ratification by the last state, Maryland (and which was signed by no fewer than six of the Philadelphia delegates):  

And Whereas it hath pleased the Great Governor of the World to incline the hearts of the legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. Know Ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained: And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the united States in congress assembled, on all questions, which by the said confederation are submitted to them. And that the articles thereof shall be inviolably observed by the States we respectively represent, and that the union shall be perpetual. (emphasis added)

In addition to the six signatories of the Articles, a full 41 of the 55 delegates were or had been members of the Continental Congress. So the question for (at least) these delegates was whether they—or the states they represented, whether in Congress or at the Convention—had a duty of “inviolabl[e]” observance. Or did they indeed have a “higher loyalty” that justifiably took precedence over whatever commitments had been made when signing and ratifying the Articles?

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2 http://www.archives.gov/exhibits/charters/constitution_founding_fathers_overview.html
So what does Madison say in response to such questions, since, as a pragmatic matter, he certainly cannot initiate a conversation about the “true meaning” of Article XIII? Federalist 37 offers us a key clue, for Madison has already announced that there are “fallacious” principles, and the principle of unanimity is one such “fallacy.” He makes an unabashedly normative argument that even if it is a rule, which can scarcely be denied, then it is one of those rules in effect made to be broken when the costs of adherence are simply too high. To adhere to it would be disastrous; therefore, the right thing to do is basically to ignore it, which is exactly what the Framers did in what is perhaps the most important single article of the 1787 Constitution, Article VII. That article specifies that the Constitution comes into being when ratified by the conventions (not the state legislatures) of nine (not all) of the states. This is why there were only eleven states in the Union when George Washington was inaugurated on April 30, 1789. It did not matter, under the terms of the new Constitution, that North Carolina and Rhode Island had not ratified. If, on the other hand, one had taken the Articles of Confederation seriously, the failure of even one of those states to ratify would have doomed the entire enterprise (which would almost certainly have delighted Rhode Islanders).

Was Madison correct in describing the unanimity principle as “fallacious”? Although some political theorists can be read as suggesting that the best political principles deserve unanimous consent—at least if we define these as principles that any “rational person” would agree to, since it is untenable to require agreement as well from those who are “irrational”—no serious political theorist has ever defended the actuality of unanimous agreement in order to legitimize political activity. There is a very good reason for this. A requirement of actual unanimity will, by definition, place a veto power in the most extreme member of any given group, even if one stops short of regarding these people as “irrational.” They may, after all,
simply be more zealously committed to one particular principle that you yourself recognize as “reasonable,” but are, at the same time, more than willing to “balance” against other equally compelling principles. This obviously involves the political logic of “compromise,” the subject of an early chapter.

Unanimity requirements mean, by definition, that one will be forced either to submit to the extortionate demands of the recalcitrant holdout or to accept the defeat of the desired proposal. These are not merely abstract observations. We saw this played out when the framers of what many termed a draft “constitution” for the European Union decided to require the unanimous assent of all 26 member states of the EU in order to declare it ratified. There may be a defense for that decision, but it surely had nothing to do with smoothing the actual passage of the treaty, and one might well have predicted that it would in fact never bear fruit. Indeed, the initial draft was defeated when it failed to receive approval in referenda held in France and the Netherlands. Although that draft was then modified in light of the defeats, the subsequent “Lisbon draft” still required unanimous approval. So countries like Ireland continued to exercise an exaggerated role in determining the fate of the entire Union, similar to the role that Rhode Island might have played had the Philadelphians honored the rule set down in Article XIII of Confederation.

In theory, the new United States Constitution was given life when New Hampshire became the ninth state to ratify on June 21, 1788. Virginia ratified four days later, followed by New York’s ratification, by a vote of 32-29, on July 26. North Carolina did not ratify the Constitution until well over a year later, November 21, 1789, and Rhode Island submitted to the new order only on March 28, 1790. It really didn’t matter, frankly, that North Carolina and Rhode Island were absent from early meetings of the new Congress. Would we have said the
same, though, if it had been the extremely important states of Virginia or New York that adopted the posture of the militant holdout? It would be illusory to believe that Article VII was truly “self-enforcing” independent of the identity of the states that acquiesced to the new Constitution. Had two New York “anti-Federalists” stuck to their original principles—or, indeed, had the New York Convention met and voted earlier, well before New Hampshire’s ratification made the new Constitution a fait accompli—one can easily imagine a dramatically different rendering of American history (assuming that we even had that concept available to us had, for example, the failure of the “constitutional project” led to three independent countries in the newly independent region of North America).³

So what does this show? One lesson is that “constitutions of settlement” do not necessarily settle, once and for all, the issue under examination. They cannot, in fact, foreclose all conversation. But Madison demonstrates that ensuing conversation will go directly to considerations of principle, wisdom, or empirical consequences, because clever legal arguments as to “meaning” or “interpretation” are unavailable. Thus, in Federalist 40, he invites us to join him in recognizing “the absurdity of subjecting the fate of twelve States to the perverseness or corruption of a thirteenth.” That possibility that the ability to exercise such a veto was part of the original bargain by which Rhode Island (and perhaps other states) agreed to accept the Articles of Confederation in the first place is totally irrelevant to Madison.

C. The centrality of “crisis”

Key to understanding Madison’s all-important argument for ignoring the limits posed by Article XIII is his invocation in Federalist 40 of the presence of “crisis” and “exigency.” The fate of the country is at stake, and one should hardly feel obliged to conform to a provision of the

³ See, generally, Pauline Maier, Ratification: The People Debate the Constitution, 1787-1788 (Simon & Schuster, 2010).
existing constitution that, if followed in its clear, unequivocal, and semantically undeniable meaning, would doom the enterprise of what Madison and others viewed as absolutely necessary constitutional revision.

It is well worth considering parts of at least three speeches made at the Philadelphia Convention about the limits of fidelity to “the rules laid down.” Virginia’s Governor Edmund Randolph, who became the first attorney general under George Washington, told his colleagues that “[t]here are great seasons when persons with limited powers are justified in exceeding them, and a person would be contemptible not to risk it”; his fellow Virginian, George Mason, who ultimately refused to sign the Constitution because it didn’t include a Bill of Rights, told the Convention that “In certain seasons of public danger it is commendable to exceed power.” And then there is New York’s Alexander Hamilton, who would become not only the chief co-author, with Madison, of The Federalist, but also George Washington’s secretary of the treasury, from which position he helped to shape the American state. On June 18, 1787, Hamilton insisted that “[t]o rely on & propose any plan not adequate to these exigencies, merely because it was not clearly within our powers, would be to sacrifice the means to the end.” Consider especially the meaning of “merely” in this sentence.

But this is not all. Madison in Federalist 40 also hearkens back to the lessons taught a decade earlier during the American Revolution, which obviously involved a “great change[] of established government[].” What justified the Revolution, according to Madison, and what made it a useful precedent for those gathered in Philadelphia and then for those called upon to ratify what happened there, was the fundamental liberty of “the people” to “abolish or alter their governments as to them shall seem most likely to effect their safety and happiness.” Constitutions, then, are never “settled” in the face of plausible argument that they rest on
fundamentally “fallacious” premises and generate seriously adverse consequences. (Would one really recommend otherwise?) Their “unsettlement,” however, necessarily takes the form of what may well be called defiance rather than clever interpretations that are ostensibly part of ordinary legal conversation.

As Professor Christian Fritz notes in an important article on American constitutional theory in the 18th and 19th centuries, Madison was not simply evoking the Declaration of Independence and its justification of revolution in light of the “long train of abuses” visited upon the hapless colonists by King George III and his minions. There was no serious argument, for example, that the government of the United States of America established by the Articles of Confederation was oppressing the citizenry. Rather, the argument was that it was grievously ineffectual, in large part because the Articles created too weak a central government. As Fritz notes, several early American state constitutions drafted in the years prior to the 1787 Convention included “alter or abolish” clauses that evoked the theory of “sovereignty of the people” presumably announced by the very first words of the Preamble to the new Constitution.

One can find the most notable articulation of such a theory in what for some Americans of the time was the truly primary source of John Locke’s Second Treatise of Government. As Madison told his colleagues in Philadelphia, “The people were in fact, the fountain of all power, and resorting to them, all difficulties” relating to the legitimacy of Convention’s decisions would be resolved. 4 One need not demonstrate that doom was threatening; it might well be enough that change might better enable the people to “pursue their own happiness,” a powerful notion from the Declaration. The Massachusetts constitution of 1780, drafted in large measure by John Adams, had specified the right of the people “to reform, alter, or totally change” their

4 Fritz at 290, quoting Madison’s speech of August 31, 1787.
government whenever their “happiness require[d] it,” perhaps with regard to their legitimate wishes for “protection, safety, [or] prosperity.” Such a right to “alter or abolish” existing forms of government meant, by definition, the ability to ignore existing procedural rules that, if followed, would make such alteration or abolition impossible. Lest one think, incidentally, that such views are entirely limited to our long-past history, it is worth noting that the Kentucky Constitution of 1966, whose provenance was challenged by some lawyers, was declared legitimate by that state’s Supreme Court on the basis of the people’s sovereignty, which was demonstrated by the popular ratification of the proposals made by a “Constitutional Revision Assembly.”

Akhil Reed Amar has asked us to imagine the possibility of Congress creating such an Assembly, which then submits its own proposals, however radical, to the general national electorate for ratification—and not, as seemingly required by Article V, to the legislatures of the various states or to conventions elected by each state. Amar suggests that such popular approval would render the new Constitution perfectly legitimate. This is, he argues, just what it means to base our system of government on “We the People.” Others disagree, but it is not clear how one can defeat Amar’s argument if one is genuinely committed to “popular sovereignty.” To be sure, one might be frightened by this vision of decisionmaking by a genuinely active “We the People,” but that is just to suggest that close analysis of the Constitution—or, at least, the political theory underlying the opening words and justifying actions taken in Philadelphia—might generate deep challenges to our complacent understandings.

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5 Id. At 276. Similarly, thus the Pennsylvania Constitution of 1790, itself the product of irregular procedures, spoke of the inherent right of the people “at all times [to] alter, form, or abolish their government, in such manner as they may think proper.” And the Connecticut Constitution of 1818, which replaced its colonial charter, spoke of the people’s inherent right “at all times . . . to alter their form of government in such a manner as they may think expedient.”
6 Id. at 290-91.
So return to Madison’s argument in Federalist 40, where he discusses the Revolution and its awesome reality of joining together to overthrow by violence the governments established by Great Britain. He almost contemptuously refers to those with “ill-timed scruples” or “zeal for adhering to ordinary form”; they were likely to become “unpatriotic” Loyalists instead of joining in the revolutionary venture. Article XIII is precisely such an “ordinary form,” and only someone with “ill-timed scruples” would really feel bound by it. So what, beyond the force of argument that Article XIII was “fallacious” justifies the actions taken in Philadelphia?

He offers three justifications, the first being the sheer importance of the crisis facing the new nation and the need to act accordingly. So maybe it does not suffice to say that we could be “happier” under a new system of government; rather, one has to argue that we are faced with a certain degree of misery if we stick with the status quo. But he goes on to emphasize as well the trustworthiness of those proposing such radical transformation. Madison describes them (and himself) as “patriotic and respectable citizens” devoted to the public good. We have seen throughout this book the reliance that Madison and others of his generation placed on civic virtue for the effective operation of our political system. But, finally, the handiwork of these worthies “was to be submitted to the people themselves” (emphasis Madison’s).7 Had it been rejected, as

7 It is worth digressing for an additional moment to note the perhaps obvious fact that “the people” is scarcely a self-evident term. We might refer to the fact that many, almost certainly most, individuals living in the new country simply had no right to participate in the deliberations over the Constitution. The most important examples are all slaves, almost all “free blacks,” almost all women, and all American Indians. But even if we confine ourselves to those who were given participatory rights—and Akhil Amar correctly argues that the electorate was the broadest that had in fact been allowed in any country in the world up to that time—we note that the Constitution was not ratified by a popular referendum, but, rather, by conventions of delegates chosen in popular elections. One can well wonder—and doubt—whether the Constitution would have been ratified had it been submitted to such referenda rather than to the state conventions. So what? Is it relevant that almost all new constitutions today, whether in Iraq, Kyrgyzstan, or Kenya, require popular ratification, as is true of the adoption of new constitutions by states within the United States.
it almost was in several of the ratifying states, then the work in Philadelphia would have been for naught, as appeared to be the case with the Brussels draft of the European constitution. However, and this is the more important point, popular approbation would serve to “blot out antecedent errors and irregularities.” Indeed we would even build monuments to the heroes who knew when to ignore “forms” or legalistic “scruples” and, instead, to do what was necessary to serve (or save) the country.

D. Can/should constitutions ever be treated as once-and-for-all settlements?

There is nothing “innocent” about any of these arguments. What Madison is suggesting, at bottom, is that constitutions can never truly “settle” basic issues forever and ever. And Professor Fritz argues powerfully that the history of American state constitutions offers powerful evidence that these arguments are not merely “theoretical” in a pejorative sense. “[T]he exercise of the people’s right to bring about constitutional change,” he writes, “even if contrary to established constitutional procedures—is one of the hallmarks of American constitutionalism.”

Before 1851 constitutional conventions took place in no fewer than eleven states without clear warrant for them in the existing state constitutions. Some were “successful” in achieving basic changes; others were not, but that is almost beside the point. Rather, the question involves what might be called “constitutional imagination” and the working out of the relationship between sovereignty of “the people” and an existing constitutional order that is perceived, by significant elements of the public, to no longer serve their needs.

The basic problem is that changing the Constitution of Settlement, almost by definition, requires a different politics than changing those parts of the Constitution that are recognized as falling within the Constitution of Conversation. The latter can be addressed, usually, by

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8 Id. at 262.
9 Id. at 281 n. 84.
innovative legislation and consequent interpretations. But the Constitution of Settlement is almost always thought to require formal amendment, which may, as with the Articles of Confederation, be as a practical matter impossible. This may be the case today with regard to amending the United States Constitution through Article V, though not with regard to changing especially those state constitutions that allow for “initiative and referendum” by popular petition and vote.

If we conclude that the presuppositions underlying any given “settlement” are so fallacious as to threaten the basic foundations of our common political enterprise, then is the proper path to emulate the Madison of Federalist 40—and many citizens of many states—and to do whatever we can to rectify the situation regardless of whatever the Constitution itself might say about the “ordinary forms” to be followed? Or does legal fidelity, especially if based on an oath, required by the Constitution itself, at least of all public officials, to be faithful to “this Constitution,” require scrupulous adherence to all of its forms?

II. Machiavelli and Locke.

Madison and his contemporaries were speaking and writing against a background of well-developed political theory that addressed similar questions. They could write with greater candor, and sometimes use more pointed language, than Madison felt free to do. He was, after all, most concerned, when writing his contributions to The Federalist, to appear sufficiently unthreatening to garner support for the new Constitution from potential opponents. It is illuminating, therefore, to look briefly at both Niccolo Machiavelli and John Locke, who spoke to the concerns raised by Madison. Locke is often regarded as a seminal figure in the tradition of Anglo-American political thought, whereas Machiavelli is probably more of an “underground” figure because of the accusations by his adversaries that he was “unchristian” and “immoral,”
even “Satanic.” But both of these philosophers help us to understand what is at stake not only in Madison’s arguments, but also in those of his successors up to our own time.

A. Machiavelli

Although Machiavelli is undoubtedly best known for his brief book *The Prince*, far more important for our purposes is his discourse on ancient Rome as described by the historian Livy. These *Discourses on Livy* are devoted to articulating the bases for a truly republican political order. Indeed, in his recent book *Machiavellian Democracy*, John McCormick argues that Machiavelli was actually a progenitor of a truly democratic vision of government going well beyond the forms of minimally democratic *representative government* that Madison defended. One need not confront these fine points of how best to interpret Machiavelli. For purposes of this chapter, what is crucial is his praise of the Romans for including the institution of “dictator” as part of its basic constitutional structure for hundreds of years before the procedures undergirding the Roman dictatorship degenerated and were supplanted by Julius Caesar, the last of the (initially) constitutional dictators.

Perhaps the most succinct presentation of what is at stake was a conversation in *The Dark Knight*, between Harvey Dent, the crusading District Attorney of Gotham City in the struggle against the truly nihilistic Joker, and his girlfriend Rachel (who is, unknown to him, also involved with Bruce Wayne/Batman). 10 “When their enemies were at the gates,” Dent tells Rachel, “the Romans would suspend democracy and appoint one man to protect the city. It wasn't considered an honor; it was considered a public service.” To which she responds: "Harvey, the last man they appointed to protect the republic was [Julius] Caesar ... and he never gave up his power." Does Rachel deliver a knock-out blow to Harvey’s argument, or does she

simply remind us, yet once more, that there are no perfect constitutional designs and that we must always be attendant to strengths and weaknesses, costs and benefits, risks and opportunities? Machiavelli presents a fascinating perspective on the Roman dictatorship.

“Among all the other Roman institutions,” Machiavelli argued, the dictatorship “truly deserves to be considered and numbered among those which were the source of the greatness of such an empire, because without a similar system cities survive extraordinary circumstances only with difficulty.” Dictatorship was central to Rome’s success because “[t]he usual institutions in republics are slow to move . . . and, since time is wasted in coming to an agreement, the remedies for republics are very dangerous when they must find one for a problem that cannot wait.” When emergency—or the appearance of emergency—strikes, there must be political leadership to recognize the situation and make immediate decisions, without fear of bureaucratic hindrances, the need for time-consuming attempts at consensus building and all the various veto points characteristic of representative government. In an important essay in the Wall Street Journal defending some of the actions of the Bush Administration, Harvey Mansfield cites Machiavelli (and not, say, Madison). One of Mansfield’s most important books is Taming the Prince, about the nature of executive power even in a presumptively constitutional system. “No law or system can actually ensure the behavior it summons,’ he concludes, “without depending on an executive who is at least in part outside the law and not explained by the system.’” There is, therefore, a crucial difference between what might be termed a “Machiavellian Republic” and what Mansfield calls, somewhat dismissively, a “little r-republic” that fails to recognize Machiavelli’s insights.

Returning to Machiavelli, we read that “Republics must therefore have among their laws a procedure . . . [that] reserve[s] to a small number of citizens the authority to deliberate on
matters of urgent need without consulting anyone else, if they are in complete agreement. When a republic lacks such a procedure, it must necessarily come to ruin.” Like Hamilton, especially, in *Federalist #70*, Machiavelli emphasizes the desirability, at least under some circumstances, of what is basically one-person rule.

What is the cause of this “ruin” in the absence of adequate procedures to establish such rule? Machiavelli identifies two possibilities. First, republics can come to ruin by stubbornly “obeying their own laws” even when these laws prevent measures necessary to save the country. Isn’t this the “ill-timed zeal” to obey the law that Madison criticizes in *Federalist 40*? Such excess fidelity to the law means, presumably, that political leaders will choose to follow the law (as they understand it) strictly, even if it involves driving the political order over a cliff. It is not even adherence to the principle “let justice be done though the heavens fall,” which is defensible even if there may be all-too-few people whose commitment to justice or morality would prevail even in the face of falling heavens. Rather, it is “let the law be followed though the heavens fall,” which raises all the questions alluded to earlier about the nature of the connection, if any, between law, including constitutional law, and justice.

Political leaders, faced with exigent circumstances, might well publicly announce that they must break the law in order to save the republic. But Machiavelli identifies this as the second cause of ruin: “break[ing laws] in order to avoid” disastrous consequences. The problem is that if one is willing to break laws in urgent circumstances, this creates a precedent for breaking them again where the urgency is more controversial (or nonexistent); moreover it encourages political leaders to retain unconstitutional norms even after the emergency has passed. What start as emergency measures may become normalized, and that might well spell the death of a vision of constitutional government as including due respect for its own limits.
Ultimately, recourse to suspending the laws eats away at the foundations of republican government. That is why Machiavelli argues, “in a republic, it is not good for anything to happen which requires governing by extraordinary measures.” We must, Machiavelli teaches, be aware of the possibility of crises and exigent circumstances when we design a constitution, and include ways of responding to emergencies that do not require political leaders to choose between Scylla and Charybdis: the disaster caused by hyperfidelity to legal constraints or the destruction of republican government by recourse to out-and-out illegality. Once again we are presented with the Goldilocks problem of the too hot form of government, in which leaders feel free to engage in illegal conduct in the name of defending vital public interests, and the too cold form, in which an unimaginative leader takes pride in his devotion to legal norms even if that is leading to all-too-predictable disaster.

B. Locke

John Locke was far better known to most 18th-century Americans than Machiavelli. His *Second Treatise on Government* was widely read and discussed (even if, as a matter of fact, Montisquieu’s *The Spirit of the Laws* was more frequently cited by the Framers). Although Locke developed the basic theories of limited government based on popular consent (in the form of the “social contract” metaphor), he also included an extremely important discussion of what he called “prerogative” power within a monarchical system. Like Machiavelli (and, later Hamilton), Locke recognizes the problem presented by a “too numerous” group of decisionmakers, which may, among other things, generate a structure of governance that is “too slow, for the dispatch requisite to execution.” Thus, according to Locke, the king always retained the prerogative power to suspend the law more or less by fiat whenever he thought it in the public interest. “This power to act according to discretion, for the public good, without the
prescription of the law, and sometimes even against it, is that which is called prerogative.” To be sure, one can offer a relatively moderate reading of Locke’s argument, for he seems to emphasize the practical contingency that “in some governments the lawmaking power is not always in being.” That is, parliament may be in recess or, to move to America, we can imagine circumstances where Congress is dispersed and where re-convening, before the age of modern transportation, would be time consuming indeed. This, from Lincoln’s perspective, was the situation he faced upon his inauguration on March 4, 1861 and, especially, after the attack on Fort Sumter a month later. But, obviously, even the “moderate” argument gives executives great power to act, legally or otherwise, before the legislature reconvenes.

But Locke presents no truly institutional theory or what might be called “constitutional design,” perhaps becomes he was handcuffed, as a political theorist, by the reality that England did have a monarch. It would have been tactless indeed to suggest that someone else than the presumptively “sovereign” monarch should exercise the kinds of extraordinary powers linked with “prerogative.” Machiavelli is a far more sophisticated analyst of institutions. What concerned Machiavelli the republican theorist was the rise of an extraconstitutional dictatorship in cases where the constitution lacked a procedure for appointing a dictator and ending the dictator’s reign. The Roman dictatorship was institutionalized, requiring a particular process in order to name the dictator and ending the dictatorship at a specified time, usually no longer than six months. Naming a dictator might signal an emergency, but, by definition, it did not constitute a “constitutional crisis,” precisely because the Roman constitution provided for the institution. Moreover, it wisely separated the institution with the power to identify an emergency and call for emergency powers from the person who executed those powers, the better to prevent the dictator from trying to extend his rule by recharacterizing the situation to his advantage.
One could treat these discussions, like those of Madison, as simple historical relics if the last time “exigency” raised its head was the Philadelphia Convention. But that is clearly not the case, and the issues raised by these political philosophers and by those who devised the Constitution have presented themselves throughout American history.

III. “[A] constitution intended to endure”

One of the most important passages in the history of the American Supreme Court, which can be found in *McCulloch v. Maryland* (1819), where John Marshall declared, “We must never forget that it is a constitution we are expounding.” You might well ask what is so amazing about this sentence, which seems glaringly obvious. What makes the sentence worthy of comment is what follows, when Marshall sets out what is most important about legal documents that we call “constitutions.” Thus, he emphasizes that the United States Constitution is “intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” Interestingly enough, he italicizes “crises,” though one might believe that the term “to be adapted” is equally worthy of emphasis. An analogous quotation, perhaps, is from a famous opinion by Justice Oliver Wendell Holmes, which upheld the conviction in a federal court of someone viewed as advocating draft resistance during World War I, over objections that the clear language of the First Amendment prevented any such punishment. “When a nation is at war,” Holmes wrote for a unanimous Supreme Court, “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.”

11 Schenck v. U.S., 249 U.S. 47 (1919). Holmes seemingly had no trouble writing a similar opinion a week later upholding the ten-year prison sentence of Eugene V. Debs, the most important socialist leader of the age who received almost a million votes for the presidency, for advocating similar resistance to the War.
We return, then, to the topic of the last chapter. To what extent do we want a truly “unchanging”—or, at least, very-hard-to-change—Constitution? Or, on the contrary, do we wish a more “flexible” constitution that can indeed easily be adapted to the exigencies of the day, especially when we describe those exigencies as “crises” or “emergencies,” as wars almost always are? James Boyd White has described Marshall’s opinion in *McCulloch* as basically “amendatory” in its sweep, and it is clear that White does not mean to be critical. Many such opinions—especially, it is important to add, those *upholding* actions taken by Congress or by Presidents—have been described that way. Marshall also suggests what may even seem to be a paradox: It is *only* through adaptation that the Constitution—or, perhaps more to the point, the United States as a political entity—will in fact endure. Rigidity, one might argue, is fatal to the constitutional enterprise, precisely because it will prevent constitutions from changing as times change.

But one might argue with equal confidence that too much flexibility destroys what is thought to be the strongest promise of constitutionalism. After all, Marshall had written in another famous decision, *Marbury v. Madison*, that “all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation.” “The powers of the legislature are defined, and limited: and that those limits may not be mistaken, or forgotten, the constitution is written. To what purposes are powers limited, and to what purpose is that limitation committed to writing, if the limits may, at any time, be passed by those intended to be restrained?” This serves as Marshall’s foundational argument for judicial review, but it should be clear that his basic premise can as easily be adopted by institutional “protestants” like Andrew Jackson or Lincoln. Even if they rejected *judicial supremacy*, the
premise that the Supreme Court is the “ultimate interpreter” of the Constitution, they most certainly did not reject constitutional supremacy.

Anyone committed to such supremacy might well be tempted to quote a key sentence from a dissenting opinion written by Justice George Sutherland in an important 1934 case in which the majority upheld the power of the Minnesota legislature to suspend the operation of mortgage contracts, lest too many people lose their homes in the midst of the Great Depression. The “problem” is the Contracts Clause of the Constitution, which forbids states from “impairing” the obligations of contract. The majority emphasized the dire emergency facing the people of Minnesota and, therefore, the reasonableness of the legislature’s de facto impairment. It turned out that “no law” in the Contracts Clause of Article I, Section 10, did not settle the issue of Minnesota’s powers to pass debtor-relief legislation. One might say the same thing about the inability of the words “no law” in the First Amendment to protect Schenck and Debs from being jailed for what the Wilson Administration deemed seditious speech. Whatever the language might have suggested, that is, they did not constitute the Constitution of Settlement, as do the clauses emphasized in this book. They turn out to be part of the Constitution of Conversation, which means, as a practical matter, that they are subject to necessarily conflicting interpretations. Justice Sutherland, for a minority of four, instead emphasized what he thought was the clear text plus the original understanding of the Framers that the Constitution would prevent states from emulating Rhode Island by passing such debtor relief laws. “If the provisions of the Constitution be not upheld when they pinch as well as when they comfort,” Sutherland wrote, “they may as well be abandoned.”

Similarly, the greatest defender of civil liberties in the mid-20th century, Justice Hugo Black, always carried a copy of the Constitution in his pocket and asked his

colleagues, in effect, to explain what part of “no law” they did not understand when reading the First Amendment.

One might ask if the two visions of the Constitution originally enunciated by Marshall are truly consistent. One could offer a confident “yes” if one believed that the written Constitution, even prior to any given amendment, does authorize our leaders, whether Congress or the President, to take effective measures to counter perceived emergencies and resolve any given “crisis.” Perhaps this is what Hamilton is arguing in Federalist #23, where he states that the powers “essential to the care of the common defense . . . ought to exist without limitation.” And then he adds his own italicized gloss: “because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.” If one accepts Hamilton’s rather dour reminder that “[t]he circumstances that endanger the safety of nations are infinite,” then it is easy enough to agree with him as well that “no constitutional shackles can wisely be imposed on the power to which the care of it is committed.” An obvious question is whether this counts as the best understanding of the Constitution. To explore this at sufficient length would take us deep into the Constitution of Conversation.

But our current task is somewhat different. We should ask ourselves what we would want the Constitution to say about such exigencies. We might well believe that the extent of governmental power during times of crisis is precisely the sort of issue that should be settled and not open to acrimonious controversy, which might only inflame a given crisis (and perhaps generate ever-diminishing capacity to govern). But can any settled notion of “limited government” co-exist with Hamilton’s argument? The same question can easily be asked with regard to Madison’s chilling statement in Federalist 41 that “It is in vain to oppose
Constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions.” Are all supposed limitations mere “parchment barriers” that will inevitably be broken through if a given “crisis of human affairs” is perceived to be threatening enough?

One of the most famous discussions of the problem of legal fidelity occurred in an 1810 letter by Thomas Jefferson. It is famous in part because of Jefferson’s almost ostentatious commitment to limited government he had also written in his Notes on Virginia a well-known denunciation of those who suggested that the situation in Virginia during the Revolutionary War, where he was serving as a not very successful governor, called for a dictatorship. The experience of having been President and, among other things, doubling the size of the United States through what he himself believed was the constitutionally dubious Louisiana Purchase, seems to have changed his mind in important respects. “On great occasion,” he wrote in 1807, “every good officer must be ready to risk himself in going beyond the strict line of the law, when the public preservation requires it.” These constituted what he called the “extreme cases where the laws become inadequate to their own preservations, and where the universal recourse is a dictator, or martial law.”

The fullest explication of his mature view occurred in an 1810 letter to one John Colvin, where he rejected a “scrupulous adherence to written law” when such fidelity “would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.” It’s worth reading his entire argument with great care:

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13 Quoted in Arthur M. Schlesinger, Jr. p. 153
The question you propose, whether circumstances do not sometimes occur, which make it a duty in officers of high trust, to assume authorities beyond the law, is easy of solution in principle, but sometimes embarrassing in practice. A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means. When, in the battle of Germantown, General Washington's army was annoyed from Chew's house, he did not hesitate to plant his cannon against it, although the property of a citizen. . . . In [this and other] cases, the unwritten laws of necessity, of self-preservation, and of the public safety, control the written laws of [private property].

Further to exemplify the principle, I will state an hypothetical case. Suppose it had been made known to the Executive of the Union in the autumn of 1805, that we might have the Floridas for a reasonable sum, that that sum had not indeed been so appropriated by law, but that Congress were to meet within three weeks, and might appropriate it on the first or second day of their session. Ought he, for so great an advantage to his country, to have risked himself by transcending the law and making the purchase? The public advantage offered, in this supposed case, was indeed immense; but a reverence for law, and the probability that the advantage might still be legally accomplished by a delay of only three weeks, were powerful reasons against hazarding the act. But suppose it foreseen that a [political enemy] would find means to protract the proceeding on it by Congress, until the ensuing spring, by which time new circumstances would change the mind of the other party.

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Ought the Executive, in that case, and with that foreknowledge, to have secured the good to his country, and to have trusted to their justice for the transgression of the law? I think he ought, and that the act would have been approved….

From these examples and principles you may see what I think on the question proposed. They do not go to the case of persons charged with petty duties, where consequences are trifling, and time allowed for a legal course, nor to authorize them to take such cases out of the written law. In these, the example of overleaping the law is of greater evil than a strict adherence to its imperfect provisions. It is incumbent on those only who accept of great charges, to risk themselves on great occasions, when the safety of the nation, or some of its very high interests are at stake….

Whatever else may be said about Jefferson’s argument, it should be clear that he, like Madison in *Federalist* #40, ultimately seems to rely on the good faith and integrity of high-level decisionmakers, particularly presidents, to know when to go beyond the law. He might have regretted that the Constitution, in his view, did not really allow him to authorize the purchase of Louisiana from Napoleon. But that was not the end of the matter for him. What he perceived as the national interest took precedence over what Madison earlier dismissed, at the Convention, as “ill-timed scruples” or undue “zeal for adhering to ordinary form.” It is easy to believe that he was grateful for Locke’s argument on prerogative even if, perhaps for reasons of prudence, he chose not to mention it.

It is worth noting that the Constitution itself is largely silent with regard to the possibilities that generate calls for the kind of actions that might be termed dictatorial. There is, to be sure, a “war power” given to Congress, and, as a matter of fact, some awful invasions of individual rights have been upheld under that power. And there is the explicit
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authority, in Article I, Section 9, to suspend the right of habeas corpus, which in many ways is the most important of all rights inasmuch as it requires the state to justify its detention of persons before a court. As a matter of fact, the most controversial of the very few actual suspensions of habeas corpus was Abraham Lincoln’s suspension in 1861, on his own authority as President. John Merryman, a Marylander suspected of sympathy with the secessionists who were trying to take control of the state and thus isolate our nation’s capital, was seized by the army. Chief Justice Roger Taney, acting in one of his other capacities, issued a writ of habeas corpus, which Lincoln ordered the relevant military officials to ignore. He denounced Lincoln as claiming more authority than King George III.

Lincoln famously defended his actions in a message to Congress on its return on July 4, 1861, the date that Lincoln chose for the reconvening of Congress:

Of course some consideration was given to the questions of power, and propriety, before this matter was acted upon. The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen’s liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?
As it happens, Lincoln denied that he had in fact “disregarded” the Constitution, for he claimed that the proper interpretation of the Constitution was that he did indeed have the power to suspend habeas corpus, that it was not a power assigned exclusively to Congress. Many, if not most, constitutional lawyers tend to disagree with Lincoln, but the central question is whether anyone really cares whether Lincoln was “faithful” to the text of the constitution or not. One may ask the same questions, incidentally, about the Emancipation Proclamation, which is also constitutionally controversial as an exercise of a basically unlimited and unilateral presidential “war power.” Does one really care about its constitutionality, though, given its purpose of ending slavery?

Both Jefferson and Lincoln might well have been grateful for Locke’s arguments on “prerogative.” But is it clear that Locke should prevail over Machiavelli, or should we think more deeply about what form we might want our constitutional dictatorship to take on occasions when it seems appropriate (or do you believe that it is never appropriate, so there is literally nothing to think about)?

IV. **What is a constitutional dictatorship?**

With this in mind, we might define a constitutional dictatorship as a system (or subsystem) of constitutional government that bestows on a certain individual or institution the right to make binding rules, directives, and decisions at their discretion and apply them to concrete circumstances unhindered by timely legal checks to their authority. When they act according to this right, they act clothed with all of the authority of the state. This person or institution, however, is subject to various procedural and substantive limitations that are set forth

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in advance. These may include the time and or circumstances in which they may exercise authority, the subjects over which they may exercise their authority, and specific means for implementing their rules.

The constitutional dictatorship is a *dictatorship* because the power conferred on the dictator combines elements of judicial, legislative, and executive power. This combination is a dangerous brew: indeed, in Federalist 47 Madison argued that “[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.” It is worth noting that Madison hedges his definition by speaking of the accumulation of *all* powers. The negative pregnant is that if the accumulation is only temporary, or only over certain subject matters, or may only be exercised using certain specified means, it becomes something less than tyranny.

For example, if we assumed that the president has the power to initiate war, commandeer funds and resources for war, and conduct it at any time for any reason in any manner he pleases, he would be a constitutional dictator with respect to war and all matters related to war. That is because he would combine the right to assess the need for military action with the power to carry it out and with the sole right to judge whether what he did was lawful. To the extent that the president may create rules, apply them and execute them on his own without the ability of anyone else in the system to check him, he is a law unto him or herself.

A constitutional dictatorship is *constitutional* because it comes with various limits prescribed by law and by institutional structures. The dictator exercises power according to constitutional procedures that bring the dictatorship into being, end it, and structure its scope and reach. For example, the President might have complete discretion to gather foreign intelligence
surveillance directed at persons outside the United States, but not within. (The difficulty arises when, as in the digital world, the distinction between foreign and domestic surveillance threatens to evaporate.)

Whether paradoxically or not, many elements of republican government could be seen as “dictatorial” to the extent that they endow government actors with essentially unreviewable discretion to set policy and execute it immediately with the force of law. Again, it is this endowment or delegation of power that is essential to the notion of constitutional dictatorship, for it differentiates it from the sheer usurpation of power (often by way of military coups) that we tend to associate with contemporary dictatorships.

Moreover, a full analysis of the concept should lead us to realize that those who exercise “prerogative” or “dictatorial” powers need not the President alone (or, some instances, at all). Consider the joint decision made by Chair of the Federal Reserve Board Ben Bernanke and Secretary of the Treasury Henry Paulson to bail out troubled financial institutions, or the authority of the Centers for Disease Control to institute a quarantine. It may be a fundamental mistake to presume that “constitutional dictators” are always synonymous with “presidents” or “prime ministers.” One of the important realities of the Federal Reserve, for example, is that it is, in some very important ways, “independent” of the Administration even though its members are appointed by the President and confirmed by the Senate. But this is the case, too, of the judiciary. What is crucial for both judges and Federal Reserve officials is that they cannot be fired in the way, say, that cabinet officials can be fired. Their tenure in office is not because of the Constitution, as is the case with federal judges, but, rather, because of congressional statutes establishing so-called “independent agencies.” As noted earlier, some lawyers believe that such independence in the case of executive branch agencies, including the Federal Reserve, violates
the Constitution, but they are in a minority. Most lawyers and political elites accept the desirability of cordonning off at least some executive agencies, including the one responsible for setting basic monetary policy, from presidential influence. The reason is very simple: Presidents might find it irresistible to adopt economic policies that would have predictable short-run advantages (i.e., help win the next election), but just as likely lead to long-term disaster.

*The New York Times* on March 16, 2008, published a story tellingly headlined "Fed Chief Shifts Path, Inventing Policy in Crisis." It led off as follows:

> As chairman of the Federal Reserve, Ben S. Bernanke has long argued that a central bank should base its policies as much as possible on consistent principles rather than seat-of-the-pants judgment.

> But now, as the meltdown in credit markets threatens major institutions on Wall Street and a recession appears inevitable, Mr. Bernanke is inventing policy on the fly.

> “Modern monetary policy-making puts a lot of weight on rules, but there is no rule book for an economic crisis,” said Douglas W. Elmendorf, a senior fellow at the Brookings Institution and a former Fed economist.

> Is it true, then, that “all rules are made to be broken,” and that at some level we trust those in high positions of leadership to know when those occasions arise? After all, one could imagine similar articles about response to the next great pandemic, where the focus would be not on Mr. Bernanke but, instead, the head of the Center for Disease Control or the Secretary of Health and Human Services. Section 361 of the Public Health Service Act, for example, gives the Secretary of Health and Human Services the authority “to make and

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enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.” These regulations may include, “inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.” They may even include “apprehension, detention, or conditional release of individuals” if necessary “for the purpose of preventing the introduction, transmission, or spread of such communicable diseases as may be specified from time to time in Executive orders of the President upon the recommendation of the Secretary, in consultation with the Surgeon General.” To be sure, it would be the President issuing the order, but can one seriously imagine the President rejecting the advice of the Surgeon General of the United States, presumably backed by the head of the Center for Disease Control, that draconian measures were necessary to prevent a pandemic from sweeping through the United States?

And the President would not have to claim extra\textit{ordinary} authority precisely because Congress has delegated to the executive the powers to require such measures. Many opponents of the New Deal denounced Congress for engaging in what they called “delegation run riot.” As a matter of fact, one cannot possibly understand contemporary American government without recognizing the vast amounts of authority that has been delegated by Congress to the executive branch and its administrative agencies. The judiciary has long since given up on any attempt to control such delegations, and there are many good reasons to support that judicial withdrawal. But we should not kid ourselves
about some of its implications, including the possibility that “governability” is purchased only by giving what are in effect multiple “blank checks” by the President and other executive branch officials that can be filled in whenever they deem it to be necessary to do so. And, all the while, they can quote Douglas Elmendorf’s observations that “there is no rule book for an economic crisis” or, perhaps, for any other kind of crisis.

Does this mean that there is no difference, at the end of the day, between the United States President, the head of the Federal Reserve Board, or the head of the Center for Disease Control, on the one hand, and Adolf Hitler or Josef Stalin, the quintessential 20th century dictators? Perhaps some more paranoid elements of the public might think it so. But this confuses the diminishing winter sunlight of four in the afternoon with the pitch darkness of four in the morning. No system of government, no matter how well prepared in advance, can do without discretion. This is particularly true of a modern administrative state, which, from its formation, has been in tension with traditional rule of law notions. With respect to thousands of minute individual decisions, ranging from the allocation of resources in a public hospital to a police officer’s decision to stop and seriously inconvenience a motorist or pedestrian, this discretion may be effectively unreviewable. In fact, however, the hallmark of a constitutional system is that it reins in discretion in various ways without ever fully eliminating it. In most cases a constitutional system bounds discretion through statutory restrictions on the exercise of power, through reporting and oversight mechanisms, and through judicial review. We can nevertheless imagine a continuum of possibilities running from the relatively minimal discretion that always exists in the interstices of an administrative state to very broad and effectively unreviewable delegations of discretionary power over fundamental issues of life and death. The existence
of substantial patches of practically unreviewable discretion with respect to issues of far-reaching importance becomes a criterion of “constitutional dictatorship.”

There is an important relationship between constitutional dictatorship and declarations of emergency. Emergency is the standard justification for dictatorship. Nevertheless, dictatorial powers may not be connected to any real crisis or emergency. Even if dictatorship is initially justified by emergency, it may continue after the emergency is over. In this way dictatorial powers may become normalized. Executive officials, noting the ability of emergency to focus the public’s attention, to route around the unusual impediments to reform, may find themselves in quest of new emergencies to justify their continuation. This can lead to a policy of government through emergency, which normalizes dictatorial powers in a different way. Moreover, dictatorial powers may be granted because of the fear of an emergency, even if it has not yet materialized. This gives incentives to magnify both the probability and the dangers of possible scenarios. Finally, by declaring an emergency, and bestowing dictatorial powers, a government may create a self-fulfilling prophecy. The executive judges the situation as an emergency deserving of dictatorial powers, makes rules that frame the situation in this way, and then acts on that framing, confirming it. In this way dictatorship constructs reality according to its own vision and perpetuates the society’s need for its continuation.

A vital question is how best to design a system of emergency powers and, if you wish, “constitutional dictatorship.” Again, the central question is a comparative one, and in this instance the most valuable comparisons will be provided by other national constitutions rather than the constitutions of the American states. But this requires to return as well to the questions raised particularly by Machiavelli, which is how we might best design a
constitution that includes a self-conscious recognition that it might be necessary at times to suspend ordinary constitutional norms and even to accept the desirability of a temporary dictatorship.

V. Designing a “constitutional dictatorship”

The central question is whether there might be helpful rules for planning for the eventuality of inevitable crises, even if one concedes that when the moment comes one might have to place great discretion in the person or persons confronting the particularities of the crisis. So is there a way of combining what might be thought to be the advantages of de facto dictatorial decisionmaking in crisis situations while minimizing, even if not completely eliminating, the risks that those granted dictatorial authority would indeed become tyrants?

Clinton Rossiter, concludes his fascinating—and troublesome—1948 book, Constitutional Dictatorship, by asserting “[t]hat constitutional dictatorship does have a future in the United States is hardly a matter for discussion.”16 What must be discussed, he suggested, was our structuring of future such moments—he was writing in 1948, and his primary examples at that point were Lincoln, Woodrow Wilson, and Franklin Delano Roosevelt, our three primary “war presidents”—in a way that would guard the United States, as much as possible, against emulating distinctly less happy examples of dictatorship that could be found in Europe in the early 20th century.

He offered eleven suggestions, some of them fairly obvious such as the true necessity or “indispensab[ility] to the preservation of the state and its constitutional order.” Though this seems almost banal, this suggestion is more difficult to implement than it first appears:

Everything depends on how many forms of executive discretion in the modern administrative

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and national security state we wish to label examples of “constitutional dictatorship.” Many different agencies and individuals may have basically unreviewable discretion, ranging from the head of the Federal Reserve to the Center for Disease Control. Jack Balkin and I use the term “distributed dictatorships” to refer to this modern phenomenon, where it is a mistake to believe that one person has an unlimited domain to exercise dictatorial authority. No rational system would allow for such a possibility, precisely because we would want someone with specific skills and expertise appropriate to the occasion. Our presidents are, at best, gifted amateurs, and we would often want skilled professionals to lead the response to a given crisis, whether it be military, economic, or public health.

Rossiter’s second suggestion for a well-designed institution of constitutional dictatorship is adopted from ancient Rome: “[T]he decision to institute a constitutional dictatorship should never be in the hands of the man or men who will constitute the dictator.” As we have seen, the American system flunks this essential test. To the extent that the American—or any other—constitution seemingly allows a president both to declare the existence of an emergency and to engage in extraordinary action that may well skirt the boundaries of the law, then one moves far closer to the possibility of tyrannical dictatorship. And, recall, it may not really matter if the President can claim constitutional or statutory authority. Such authority does establish the constitutional nature of the dictatorship, but a badly designed constitution may place insufficient limits even on what we are willing to call “dictatorship.”

One possibility, suggested by the South African Constitution, is to require the legislature to vote to activate the executive’s emergency powers for each particular emergency rather than to write blank checks to be cashed later at the president’s sole discretion. Indeed, it is worth quoting the South African Article 37 at length in order to get a sense of how those concerned
with writing a new constitution to overcome a discredited South African past confronted the issue of “states of emergency.” The first thing one notices is that only Parliament is given the authority to declare a state of emergency “only when -

a. the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency; and
b. the declaration is necessary to restore peace and order.

Any such declaration initially takes effect “for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration.” Any such extensions are limited to three months at a time. What is especially interesting, though, is the adoption of a special supermajority procedure for any extensions beyond the first one. Any further extensions must be “supported by at least 60 per cent of the members of the Assembly . . . following a public debate in the Assembly.” Such a procedure could be especially important if the dominant political party or party coalition has fewer than 60 percent of the seats in Parliament, as it assures that the “opposition” parties must acquiesce to the extension.

Even more striking is the assignment to the judiciary of a role in determining the “validity” of a state of emergency and any “action taken in consequence of a declaration of a state of emergency.” This seemingly authorizes a court to state that the circumstances are not such to justify the extraordinary declaration of a state of emergency, in spite of a parliamentary declaration to the contrary. Finally, the Constitution includes a “Table of Non-Derogable Rights” limiting the powers of Parliament even in times of acknowledged emergencies with regard to basic protections of “human dignity” or “life” or the norms of racial and gender equality. In the nature of the case, one cannot know for sure whether these constitute mere “parchment barriers” or, on the contrary, will serve as genuine limitations
even when political elites—perhaps backed by public opinion—believe that the country faces an “existential crisis” that requires doing “whatever is necessary.” What one can say, though, is that the South African Constitution does a better job than United States counterpart in at least addressing the possibilities of emergency governance. Indeed, one might say this of most constitutions drafted after World War II.

One could spend an entire chapter—indeed, book—analyzing all of these various sections. Consider, for example, the implications that courts are apparently given the authority to assess the validity of a declaration of a state of emergency. The Columbian Supreme Court has invalidated such declarations by the Columbian authorities on the ground that the objective situation did not warrant the extreme response attached to declarations of emergency and the suspension of ordinary constitutional rights. An American analogue would be the Supreme Court refusing to countenance the suspension of habeas corpus on the grounds that the Constitution allows suspension only in cases of “insurrection” and “invasion” and that the “war on terror” simply doesn’t fulfill these constitutional prerequisites. At the American state level, a number of governors and legislatures claim special authority upon the enunciation of an “emergency.” In Texas, for example, ordinary legislative rules can be suspended if the Governor describes legislation as linked to an emergency. One might well
doubt the accuracy of such proclamations by Governor Rick Perry in 2011 as to the
“emergency” status of bills requiring enhanced identification by would-be voters or women
seeking an abortion to first watch a sonogram—both bills were passed—but it was
presumably unthinkable that a Texas court would subject gubernatorial descriptions to further
analysis.

The protections offered by the South African Constitution against the suspension of
certain rights even in dire circumstances can be analogized to Article 2 of the United Nations
Convention on Torture, which explicitly makes the prohibition of torture absolute: “No
exceptional circumstances whatsoever, whether a state of war or a threat or war, internal
political instability or any other public emergency, may be invoked as a justification of
torture.” Nor might one claim that a superior authority, including even the President, has
ordered one to ignore the prohibition: “An order from a superior officer or a public authority
may not be invoked as a justification of torture.” Given that the United States clearly did
engage in torture during the Bush Administration’s “Global War on Terror,” with the
encouragement and approval of the President and Vice President, one can wonder whether the
Convention, which was ratified by the United States, is just another example of a “parchment
barrier.”

In any event, Congress has created a series of framework statutes that bestow emergency
powers on the President or some other executive official, including the power to declare an
emergency in the first place. So although Congress has technically authorized these powers,
it may be a Congress that sat long ago. The Militia Act of 1792 and the Insurrection act of
1807 are both exemplary in this regard. Moreover, an obscure 1932 banking act, passed over
President Hoover’s veto, was viewed 75 years later as empowering Ben Bernanke in 2008.
There is no contemporaneous Congressional vote on whether an emergency exists; instead the framework statute leaves that question to the executive, thus doing an end run around the South African (and Roman) model. The closest that the American system comes to this model is the declaration of war, which activates the President’s war powers, or, following World War II (the last declared war), authorizations for the use of military force, which however, never seem to be repealed.

There are two problems with the South African and Roman model, which requires the legislature to declare emergencies and activate special powers each time. The first arises when we are indeed faced with a crisis that demands functionally immediate decisionmaking, when there simply isn’t enough time to gain legislative authorization. Although the most obvious examples may involve military attack, certain kinds of economic emergencies or health emergencies may also occur suddenly and call for the political equivalent of instantaneous decisionmaking.

The second problem may be even more basic. It operates even when time is not of the essence. In his classic book on the American presidency, Clinton Rossiter emphasized that one of the six “hats” worn by the President is that of “party leader.” Richard Pildes and Daryl Levinson have argued that legislative oversight of an aggressive president, even in a presidential system, may not operate adequately when the legislature is dominated by the political party of which the president is the leader. To the contrary, it may be in the electoral interest of the President’s party to join in suggesting that the country faces a particularly fearful situation, which demands the kind of radical action that can be provided only by the President and members of his party. For many people, the Bush Administration’s War on Terror is a recent example.
Pildes and Levinson call for emulating the German practice and guaranteeing that certain important committees in the legislature are in the hands of the opposition party, precisely to assure some measure of significant oversight. Similarly, Professor David Fontana has also addressed how to constitutionalize the role of the “party in opposition” in a modern party system. But even these proposals may not respond adequately to the possibility that a legislature controlled by the executive’s own party will be more than happy to delegate to the Maximum Leader all sorts of discretionary powers associated with constitutional dictatorship.

Bruce Ackerman has endorsed taking a leaf from the South African book by requiring supermajorities for the declaration of emergencies and/or the delegation of emergency powers. His particular twist is to require ever larger majorities to keep emergency powers in place after specified time limits. This, he argues, will make dictatorial powers increasingly difficult to obtain and to keep.

Finally, one might imagine taking the decision away from the process of ordinary politics completely. The model might be the Federal Reserve Board, which is relatively independent from the President and Congress, and uses its expertise to manage the money supply in the public interest. Imagine the creation of a Council of Elders who would be required to declare the existence of a state of emergency that would presumably trigger the exercise of extraordinarily powers. In the United States, such a Council might consist, say, of all former presidents, vice presidents, or retired Secretaries of State, former heads of the Joint Chiefs of Staff, former heads of the Federal Reserve Board, and the like, including, if one wishes, significant leaders from the private sector who have demonstrated good judgment in times of stress and challenge. Some members of the Council, like former presidents, might serve ex
officio, while others might be nominated by the President and confirmed by the Senate (perhaps by a two-thirds vote).

Moreover, we might doubt that a given President, however attractive he or she might be in many respects, would be just the right person to serve as the “constitutional dictator” for a particular kind of emergency. If the problem is staving off a threatened military invasion, one might prefer someone with demonstrated military experience. If, on the other hand, the threat is imminent economic collapse, military experience would presumably be irrelevant, and a senior economist with wide ranging government experience might be just the person desired. Rossiter and other admirers of ancient Rome have noted that the Roman consuls could not select themselves for the office of dictator; hence they had incentives to ensure that the person they chose for the office had the character, skills, and judgment needed for the particular task. Just as in the Roman context, the term of emergency power would be limited.

The United States Constitution seems to recognize only two possible emergencies, “insurrection” and “invasion,” and it provides for one particular response, which is the suspension of habeas corpus (though it does not clearly specify who can suspend habeas, or for how long). But it should be glaringly obvious that there are many other possible emergencies, which are recognized in most modern constitutions, including natural disasters, economic crises, and public health threats, among others. Suspending habeas corpus is literally irrelevant with regard to a mortgage crisis, though it might be very useful to suspend for a limited time the contractual duty to meet the monthly payments even in the face of the Contract Clause of Article I, Section 10, which seems explicitly to invalidate such “impairments of contracts.” As with so many other issues, the question is whether we in the United States have anything to learn from the rich body of materials provided by the now
literally dozens of constitutions drafted in the past 60 years that take account of the multitude of threats that might be presented to constitutional orders and attempt to provide modes of response.

I. Emergency and the problem of continuity in government

Understandably, the events of September 11, 2001, triggered many reflections on emergency powers and even constitutional dictatorship, and we have been living with the consequences since then. But consider that an apparent purpose of Flight 93, which went down in Pennsylvania, was to destroy either the Capitol or the White House and generate additional havoc for our political system precisely by calling its basic continuity into question. Who would, after all, take the reins of government if the President and Vice President were both killed or otherwise incapacitated? And what would be the consequences of the multiple deaths or incapacitations of representatives or senators, not only as a matter of public psychology and confidence, but even legally in terms of the ability of Congress to meet the quorum rules set out in the Constitution itself as necessary conditions for passing legislation.

I addressed this subject in *Our Undemocratic Constitution*, but there has been (at least) one important development since I wrote, which is worth examining as a model example of how even intelligent people can be remarkably obtuse when they do not take a sufficiently broad view of what one should think about when designing a constitution. The very smart person I am referring to is former senator Russell Feingold. He was so furious in 2009 at the baseness of Illinois politics, which manifested itself in the appointment by the soon-to-be-impeached Gov. Rod Blagojevich of Roland Burris to the Senate, to succeed former Sen. Barack Obama, that he proposed a new amendment to the Constitution. It would amend the 17th Amendment by eliminating the ability of governors to fill vacancies in the Senate. It would make the Senate like
the House of Representatives—i.e., all members would be elected, none would be appointed. The Amendment has been endorsed by, among others, the editorial board of the New York Times.

It is difficult indeed to defend the procedures by which Sen. Burris was appointed. But remedies for such actions that what might make sense at the “retail level,” when one is thinking of only one or two vacancies in the Senate or the House, may make little sense at the “wholesale level,” when there might be multiple vacancies in either body. But consider now the problems posed by “wholesale” vacancies, of the type that might follow an attack on Washington. Would we necessarily have the same preferences concerning elected versus appointed members of Congress in that instance as for the “retail” situation? Or would we want the House and the Senate to be “replenished” as soon as humanly possible, which would, almost certainly, mean some version of gubernatorial appointment? To be sure, one can imagine a number of ways of limiting gubernatorial power. Wyoming, for example, requires that if the governor is not of the same political party as the senator whose death or resignation created the vacancy, then he or she must fill the vacancy from a list of three possibilities selected by the state committee of that particular party. Other suggestions have included voting for an “alternate” at the time of the general election who could automatically succeed the elected representative or senator should a vacancy occur. This would prevent having to wait for an election.

A proposed 28th Amendment to the Constitution, based on a the findings of a study group organized by the conservative American Enterprise Institute and the liberal Brookings Institution, would establish procedures for such filling vacancies in case of dire national emergencies, defined as the demise or disability of 25% of either chamber. Note, incidentally, that dead senators do not present the same problem that dead representatives do, since the former can be replaced immediately, assuming that states have exercised the 17th Amendment authority.
to empower their governors to name new senators. But a multitude of only disabled senators could present their own threat to governability, which is why it would be desirable to provide a method for their at least temporary replacement.

So what explains the fact that Congress has made no serious move toward proposing such an amendment in the decade since 2001? Perhaps one believes that it is a bad idea, deservedly assigned to the scrap heap. But if that’s not the case, then Congress’s failure to address it—or to propose a presumptively even better amendment, might tell us something more ominous about the (in)ability of Congress to respond even to the most basic kind of foreseeable, even if relatively low probability, threat to our constitutional order?

II. “Deconstructing” the Constitution of Settlement?

This book has emphasized the critical difference between the Constitution of Conversation, which encourages expansive debate about the meaning of constitutional terms, and the Constitution of Settlement, which rests on the notion of stable, even rigid, meaning, so that any debate can be only about wisdom. Moreover, as suggested especially in the previous chapter, formal amendment is far more important with regard to the Constitution of Settlement, and the absence of such amendment requires us to stick with the status quo, however unattractive it may be. But this chapter, which has focused on “exigencies” and “emergencies,” suggests that the reality is more complicated. Perhaps the Constitution of Settlement can itself become unsettled, as it were, when it is viewed as leading to what Machiavelli so tellingly described as the “ruin” of the republic.

What constitutes the Constitution of Settlement, then, is not particular linguistic properties, even if it is certainly the case that one can hardly ignore the texts in question. Yet we must ask ourselves why “what part of ‘no law’ do you not understand” has not prevailed with
regard to either the First Amendment or the Contract Clause, whereas the text seems dispositive with regard to Inauguration Day, the length of the presidential term, and the other foci of this book. Imagine, for example, that we are in the midst of war, with a President who possesses truly unusual talents as both Commander-in-Chief and what might be termed “Diplomat-in-Chief” when conferring with both allies and even enemies with whom some kind of acceptable peace is the goal. But the President is deep into her second term, and the 22nd Amendment, of course, explicitly bars her from serving a third term. Might we not wish to “suspend” the Amendment, either by allowing her to run again or even by suspending the election itself and, as sometimes occurs in legislative sessions, symbolically “stopping the clock” and allowing a given “legislative day” to last considerably longer than 24 hours?

To be sure, as Charles de Gaulle once remarked, graveyards are filled with purportedly indispensable men, and it would be quite frightening to believe that any given individual is truly “indispensable, so that the consequence of losing his or her talents would be a descent into chaos. Still, it seems easy enough to believe that some individuals are particularly gifted and that we would be taking a genuine risk in depriving them of a public office they were filling with special skills. So we must still ask whether insistence on fidelity to the 22nd Amendment—or the fixed four-year term—in certain circumstances is admirable or simply fetishistic. Given what we have learned about the Philadelphia Convention, not to mention subsequent American history, we can scarcely be confident that we know exactly how committed even the Framers would have been to the Constitution of Settlement in times of emergency.