

## EMERGENCY POWER AND TWO-TIERED LEGALITY

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Commentators have long debated how to think about the relationship between law and presidential power during emergencies. Three distinct positions have emerged in that debate. First is the *strict approach*: that the president is subject to the normal constitutional and statutory laws even during emergencies. Second is the *accommodation approach*: that constitutional and statutory law should be interpreted to allow for more expansive presidential power during time of emergency. Third is the *extralegal approach*: that exercises of emergency authority should be understood as operating outside the law, potentially with some sort of after-the-fact evaluation of whether the exercise was functionally or morally justified.<sup>1</sup>

Each of these approaches has potential drawbacks. The strict approach's denial that the interpretation of constitutional and statutory authority changes during times of emergency seems naïve and threatens to make the law either too restrictive or too disconnected from actual practice. The accommodation approach, by

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1. For discussions of these three perspectives, using somewhat varying labels, see generally Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989); and Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, in THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 39 (Mark Tushnet ed., 2005).

allowing governmental authority to expand during time of perceived emergency, may allow the government to opportunistically ratchet up its power and may create precedent that could distort the law during more normal times. The extralegal approach, by placing exercises of emergency authority outside the law, may leave these actions unregulated and undermine the rule of law, and it may be unrealistic if it depends on an acknowledgment by public officials of illegality.

In his thoughtful essay, Richard Fallon has added to this debate by suggesting an approach that attempts to keep emergency power within the domain of law while reducing the danger that exercises of this power will corrupt the rest of the law.<sup>2</sup> Analogizing from “threshold deontology” in moral theory, Fallon suggests a distinction between the rules of constitutional and statutory interpretation that apply during normal times and those that apply during emergencies. Citing Justice Holmes’s observation that “[g]reat cases . . . make bad law,”<sup>3</sup> Fallon’s chief concern is the “problem of normalization: powers created for emergencies spill over their originally intended banks and become the norm.”<sup>4</sup> His approach, he suggests, addresses this concern while retaining the rule of law. It also “fits our historical and contemporary practices for gauging the scope of executive authority.”<sup>5</sup>

At first glance, Fallon’s approach may seem to be a restatement of the accommodation approach. After all, his claim that “[w]hen consequence-based imperatives possess sufficient urgency, it is right to conclude, as a matter of law, that the president can do some things that would be flatly illegal or unconstitutional under the ordinarily applicable rules,”<sup>6</sup> is precisely the claim made by accommodationists. But Fallon’s position is potentially distinguishable in two respects. First, Fallon hypothesizes a two-tiered model that involves both normal law, akin to what is envisioned by the strict approach, as well as a category of emergency law, with the latter limited to “highly exigent cases.”<sup>7</sup> Second, Fallon suggests that presidential actions that can be legally justified only in the emergency category “should be regarded as lesser legal evils that are regrettably in breach of,” and

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2. See Richard H. Fallon, Jr., *Interpreting Presidential Powers*, 63 DUKE L.J. 347 (2013).

3. *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

4. Fallon, *supra* note 2, at 367.

5. *Id.* at 352.

6. *Id.* at 351.

7. *Id.*

not wholly reconcilable with, “ordinary legal and constitutional ideals that emergency does not eradicate.”<sup>8</sup> By having the emergency category conceptualized as narrow and as tainted, the hope is that it will be sufficiently cabined to avoid corrupting the rest of the law.

Fallon’s analogy to threshold deontology is useful in highlighting some of the dilemmas that emergency power can pose for the law. Nevertheless, I have doubts about the need for, or usefulness of, two-tiered legality. As an initial matter, it is not clear that the idea of a regrettable lesser evil has broad relevance to real-world issues of statutory and constitutional law relating to presidential power. In addition, I question whether Fallon’s central concern—that the accommodation approach will lead to the creation of precedent that will corrupt the rest of the law—is borne out by practice. Nevertheless, I understand Fallon’s anxiety about the danger that the executive branch might extend its authority by tendentiously relying on past practices. This anxiety, I would suggest, relates to the general role of historical practice in informing presidential authority rather than anything specific to the emergency power context, and I therefore question whether a two-tiered legality approach would do much to address it.

### I. THE IDEA OF LEGAL REGRET

Perhaps the most novel contribution of Fallon’s approach is to introduce the element of legal regret. As he explains,

[B]y analogy to the moral wrongs that threshold deontology sometimes regards as lesser evils, some presidential actions that are justified only pursuant to the second-tier principles governing exigent cases should be regarded as lesser legal evils that are regrettably in breach of ordinary legal and constitutional ideals that emergency does not eradicate.<sup>9</sup>

Regarding “even justified invocations of emergency interpretive principles as inherently regrettable or even dirty-handed,” he contends, can help prevent “the spread of principles framed for great cases to more ordinary ones, even in the field of national security.”<sup>10</sup>

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8. *Id.* (emphasis omitted).

9. *Id.*

10. *Id.* at 352.

I am sympathetic to the idea of regrettable lesser evils as a matter of moral theory.<sup>11</sup> It is not clear to me, however, that this idea has much applicability to debates over the scope of presidential authority. As an initial matter, there is some ambiguity in Fallon's essay about what he means by regret. Presidents, like anyone else, could regret finding themselves in circumstances that require extraordinary action. That sort of regret could presumably apply any time that a president decides that he or she needs to take action that involves a reduction in liberty. We regret that we need to imprison criminal offenders or shoot enemy soldiers.<sup>12</sup> But that sort of regret is not regret about the legal basis for the action, which is what Fallon appears to have in mind when he refers to "the legal equivalent of morally dirty hands."<sup>13</sup> Under Fallon's conception of regret, presidents should understand that there is something legally problematic about what they are doing—a "lesser legal evil"—even if they determine that it is the best course of action.

Most exercises of presidential emergency authority, I would suggest, are not understood as occasions for the sort of legal regret that Fallon has in mind, and it is not obvious that we should expect them to be understood that way. When Lincoln stretched the law to save the Union, or Roosevelt stretched the law save Great Britain from the Nazis—Fallon's most prominent examples—the presidents were not acting with anything analogous to moral regret. They regretted that circumstances led them to do what they did, but those circumstances were not their fault. And those are the most extreme examples. In other emergency situations, like President Carter's (and President Reagan's) response to the Iran hostage crisis—another of Fallon's examples—it is even more difficult to discern the ostensible basis for legal regret.

The best example for what I think Fallon has in mind is torture. Many of us think that torture should be categorically unlawful and that the functional need for torture should not be balanced against its

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11. For a defense of threshold deontology, see generally EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* (2010). For criticism, see generally Larry Alexander, *Deontological Constraints in a Consequentialist World: A Comment on Law, Economics, and Morality*, JERUSALEM REV. LEGAL STUD., Aug. 2011, at 75, and Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893 (2000).

12. Cf. MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* 17 (2004) ("It is necessary that criminals be punished, but the suffering that punishment causes remains an evil nonetheless.").

13. Fallon, *supra* note 2, at 372.

unlawfulness. Nevertheless, we might be willing to acknowledge that in an extreme situation, the best course of action is to engage in torture—for example, when there is a very high likelihood of saving innocent lives. In that situation, one can imagine that the person ordering the torture would feel personally tainted by the decision, even though he or she decided it was the right thing to do. Moreover, we might want an interpretive system that encouraged such taint, on the theory that it would make torture unlikely to occur except in truly extreme circumstances.

One can quibble with whether this example fully works for Fallon, but that is not my concern. Instead, my concern is that, although Fallon purports to be building a theory for the general problem of emergencies, the theory will not help with many real-world examples. Perhaps the use of nuclear weapons to save a state's existence might be one, although thankfully the world has not seen any such use in war since 1945. What torture and perhaps the use of nuclear weapons have in common is that, at least for some people, they should be subject to a categorical legal ban, and yet there might be an acknowledgment that in an extreme case the ban should be violated or should not apply. Importantly, most real-world reductions in civil liberty associated with assertions of emergency power do not have this character. In thinking about whether the government is going too far with electronic surveillance, for example, no one thinks that there should be a categorical ban on reductions in privacy.<sup>14</sup> Even for something like seizing the steel mills in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>15</sup> it is not generally thought that a presidential seizure of private property could never be legally appropriate, just that it was not warranted in that case. In a case in which it would be warranted, the exercise of this authority would not be an occasion for legal regret.

If I am right, then Fallon's approach may not have the descriptive fit that he cites as one of the justifications for his approach. The rarity of legal regret's applicability also raises questions about the usefulness of the approach going forward. If the idea of legal regret is implicated only in very occasional situations in which there is a categorical ban on action—situations in which there

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14. See generally, e.g., CHARLES FRIED & GREGORY FRIED, *BECAUSE IT IS WRONG: TORTURE, PRIVACY AND PRESIDENTIAL POWER IN THE AGE OF TERROR* (2010) (distinguishing between torture and surveillance).

15. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

will typically be a strong overlap between moral concerns and the law, thus making the analogy to moral theory especially apt—then it might be better to address that concern by leaving those occasional situations as outside the law (as some have proposed with respect to torture). Such an extralegal approach may actually do a better job than two-tiered legality of ensuring regret. As Mark Tushnet has explained, “If emergency powers are extra-constitutional, decision makers can then understand that they should regret to find themselves compelled to invoke emergency powers.”<sup>16</sup>

## II. THE DANGER OF PRECEDENT

Fallon’s proposal of two-tiered legality is motivated by his concern that judicial or nonjudicial precedents developed in emergency situations will “contaminate the resolution of future, more ordinary cases.”<sup>17</sup> Fallon is vague, however, about the mechanism through which such contamination will occur.

Let us consider first judicial precedent. Fallon mentions *Korematsu v. United States*,<sup>18</sup> in which the Supreme Court infamously upheld the forced expulsion of Japanese Americans from certain areas on the West Coast during World War II, and he quotes Justice Jackson’s concern in that case that a rule created for an emergency situation may “lie[] about like a loaded weapon.”<sup>19</sup> An immediate problem for Fallon is that Jackson turned out to be wrong about *Korematsu*. Instead of lying around like a loaded weapon, *Korematsu* has been thoroughly repudiated and is not something that either a president or the courts would likely feel comfortable citing as precedent.

In situations like *Korematsu*, when hindsight suggests that the invocation of emergency power was unjustified, we might actually see the opposite of what Fallon fears. Instead of becoming a dangerous precedent, it may cause interpreters and the public to be more wary about similar-sounding claims because they will have had the

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16. Tushnet, *supra* note 1, at 50; *cf.* Curtis A. Bradley, *Judicial Oversight, Justice, and Executive Discretion Bounded by Law*, in *GETTING TO THE RULE OF LAW* 135, 140 (James Fleming ed., 2011) (“[W]e should hesitate before developing a general theory of constitutional law based on an event as unique as the Civil War . . . [and] we should hesitate before developing a general theory based on the ticking time bomb scenario.”).

17. Fallon, *supra* note 2, at 348–49.

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

19. *Id.* at 246 (Jackson, J., dissenting).

experience of an unfounded one. Perhaps the more recent controversy over waterboarding, and the Justice Department's related "torture memos," now have this character.

But what if the earlier exercise of emergency power is thought, even in hindsight, to have been justified? Will those precedents at least present a danger of corruption? Even for this situation, I am skeptical because it is not clear to me why subsequent audiences (judicial or nonjudicial) would be led to ignore the circumstances that made the earlier exercises of power justified. Fallon mentions as an example Lincoln's actions at the outset of the Civil War, including his unilateral suspension of the writ of habeas corpus. Importantly, however, no president has attempted a unilateral suspension of habeas corpus since Lincoln, and that includes President Bush after the September 11 attacks. Again, the danger of corruption does not appear to have materialized even when the earlier exercise of emergency power has been blessed in hindsight. Instead, the Lincoln precedent is understood narrowly.

In the context of judicial review, it is easy to see how there is a check on the corrupting influence of precedent: the courts will decide whether a new case falls within the parameters of the precedent, and in doing so they can evaluate whether there is an equivalent emergency. If Bush had tried to unilaterally suspend the writ of habeas corpus within the United States after September 11, he likely would have lost in the courts, regardless of the precedent of Lincoln's actions.<sup>20</sup> To take another example that Fallon mentions, consider *Dames & Moore v. Regan*,<sup>21</sup> in which Presidents Carter and Reagan required that billions of dollars in claims pending in U.S. courts be litigated before a new tribunal in The Hague, as part of their resolution of the Iranian hostages crisis. In upholding this exercise of presidential authority, the Court emphasized the "narrowness" of its decision and made clear that it was not attempting to lay down any general guidelines "covering other situations not involved here."<sup>22</sup> If a president attempted such a dramatic limitation on private rights in a

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20. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), all nine Justices appeared to assume that only Congress may suspend the writ. *See, e.g., id.* at 536 (plurality opinion) ("[W]e have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions.").

21. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

22. *Id.* at 661, 688.

situation not presenting such unique facts, he would likely lose, as did President Truman in *Youngstown*. Assuming this is correct, then *Dames & Moore* is not a loaded weapon that threatens to corrupt the law concerning more normal exercises of presidential authority.<sup>23</sup>

What must most concern Fallon, therefore, are situations in which judicial review is unlikely. As he notes, “[B]ecause disputes about the outer limits of presidential power to keep the nation safe and to manage international affairs seldom ripen into justiciable controversies, the president—aided by a team of lawyers—frequently functions as the principal precedent-setter in these areas.”<sup>24</sup> In those situations, Fallon observes that there is a danger that the executive branch will invoke precedents from emergency situations and seek to extend them to situations that do not genuinely involve an emergency. I have no doubt that this phenomenon occurs. What is less clear to me is how such tendentious invocation of precedent will make a meaningful difference in the exercise of presidential power.

As a background matter, there is a general question of what constraints presidents face in the absence of judicial review.<sup>25</sup> Whatever the answer to that question, it is not clear, precisely, how invocations of precedent by the executive branch reduce those constraints. If the constraints are predominately political, then those constraints should be unaffected. If President Bush was politically constrained from invading Iraq in 2003 without congressional authorization, that would not change if he tried to cite the Korean War (or the Kosovo bombing campaign) as precedent. If the constraints also have a legal component, then it is unclear why audiences that care about that component would be moved by problematic invocations of precedent.

Fallon discusses at some length the U.S. military intervention in Libya in 2011, but that example does not provide direct support for

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23. For additional criticism of the claim that emergency-power precedent will carry over into nonemergency situations, see ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 136–38 (2007). To be clear, the relative ease with which the Court in *Dames & Moore* found congressional support for the presidential action may constitute an important precedent in discerning whether presidents are acting with statutory authorization, but that point is not specific to the emergency-power issue.

24. Fallon, *supra* note 2, at 349; see also *id.* at 362 (“The cause for concern may be especially acute, moreover, when the president and lawyers in the executive branch not only establish, but also apply, the central precedents.”).

25. See generally Curtis A. Bradley & Trevor W. Morrison, Essay, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013).

his argument. In reasoning that President Obama had the legal authority to initiate military operations in Libya, the Office of Legal Counsel (OLC) cited to past precedent, but the precedent cited involved relatively small-scale interventions rather than protracted conflicts like the Korean War (although the Korean War was mentioned as an example of how it is in the interest of the United States to support the United Nations).<sup>26</sup> This reasoning therefore is not an example of emergency precedent being used as authority for more normal exercises of authority. Moreover, OLC specifically acknowledged that the president might need congressional authorization before initiating “prolonged and substantial military engagements . . . involving exposure of U.S. military personnel to significant risk over a substantial period.”<sup>27</sup> Fallon does not take issue with OLC’s analysis of the issue.<sup>28</sup>

What Fallon understandably finds problematic is the subsequent claim by Obama administration lawyers (but not OLC) that the Libya operation was not subject to the terms of the War Powers Resolution because U.S. forces were not engaged in “hostilities” for purposes of the Resolution.<sup>29</sup> Fallon expresses particular concern about the Obama administration’s reliance on past tendentious interpretations by the executive branch of the term “hostilities,” observing that “[a]n executive branch unbounded in national security matters by any legal limits that it has not chosen to acknowledge would deviate sharply from traditional notions of constitutional legality and the ideal of the

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26. See Memorandum from Caroline D. Krass, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to Eric Holder, Att’y Gen., Authority To Use Military Force in Libya, 35 Op. O.L.C. 1, 7, 12 (Apr. 1, 2011), available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf> (“[I]nstances of such presidential initiative have only multiplied, with Presidents ordering, to give just a few examples, bombing in Libya (1986), an intervention in Panama (1989), troop deployments in Somalia (1992), Bosnia (1995), and Haiti (twice, 1994 and 2004), air patrols and airstrikes in Bosnia (1993-1995), and a bombing campaign in Yugoslavia (1999) . . .”).

27. *Id.* at 8. For an argument that the historical precedent cited by OLC did not support the Libya action, see Michael J. Glennon, *The Cost of “Empty Words”: A Comment on the Justice Department’s Libya Opinion*, HARV. NAT’L SEC. J.F. 1, 3–4 (2011), available at [http://harvardnsj.org/wp-content/uploads/2011/04/Forum\\_Glennon\\_Final-Version.pdf](http://harvardnsj.org/wp-content/uploads/2011/04/Forum_Glennon_Final-Version.pdf).

28. See Fallon, *supra* note 2, at 388–89.

29. See *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 8–9 (June 28, 2011) (statement of Harold Hongju Koh, Legal Adviser, Dep’t of State) (“[A] combination of four factors present in Libya suggests that the current situation does not constitute the kind of ‘hostilities’ envisioned by the War Powers Resolution’s 60-day automatic pullout provision.”).

rule of law.”<sup>30</sup> This is surely correct, but it is worth noting that the Obama administration was not specifically invoking emergency precedent and seeking to extend it to a non-emergency; instead, it was simply continuing a pattern of tendentious interpretation. Two-tiered legality is not particularly responsive to this phenomenon.

### III. HISTORICAL GLOSS

Arguments based on historical practice are a common feature of debates and decisions relating to the constitutional separation of powers. This is especially true in debates and decisions relating to the scope of presidential power. Unlike the extensive list of powers granted to Congress, the text of the Constitution says relatively little about the scope of presidential authority. Responding in part to this limited textual guidance, Justice Frankfurter emphasized the importance of historical practice to the interpretation of presidential power in his concurrence in the *Youngstown* steel seizure case. In his view, “[I]t is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”<sup>31</sup> With some variations, the Supreme Court, executive-branch lawyers, and academic commentators have all endorsed the significance of such practice-based “gloss.”

Many of Fallon’s concerns relate not to the divide between emergencies and nonemergencies but rather to the potential for abuse of the historical-gloss approach to interpreting presidential power, especially in the absence of judicial review. This is an entirely fair concern, and Trevor Morrison and I have outlined some reasons for interpreters to be cautious before crediting such gloss.<sup>32</sup> As we have discussed, the executive branch is structurally better suited than Congress to engage in unilateral action that can lead to an accretion

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30. Fallon, *supra* note 2, at 365.

31. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (Frankfurter, J., concurring); *see also id.* (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”).

32. *See generally* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

of practice, and there are reasons to doubt Congress's ability and willingness to resist such accretions of authority.<sup>33</sup>

Importantly, however, nothing in Fallon's two-tiered legality approach will prevent this phenomenon, since the accretion of authority can occur entirely within the first of Fallon's two categories. For example, if President Obama had initiated the use of force against Syria in 2013 (as he initially planned to do), his reliance on the precedent from 2011 with respect to using force against Libya would arguably have involved an extension of the precedent, but it would not have involved an effort to invoke a "loaded weapon" developed in an emergency. Instead, it would have simply been an example of more commonplace legal argumentation about how historical practice informs the scope of presidential authority. Presidents do not need an emergency (whatever that means) to be opportunistic about that dynamic.

Even for those situations in which a president is specifically trying to extend emergency-power precedent, the two-tiered system may not offer much protection. Fallon wants to set the threshold for an emergency high, but he also wants the emergency category to be sufficiently capacious that it will be relevant in practice. The result is a standard for emergency that is fairly vague: Fallon proposes distinguishing between "ordinary" and "extraordinary" claims of presidential power and "limit[ing] extraordinary claims to truly extraordinary cases."<sup>34</sup> But what constitutes extraordinary is left to interpretation and debate.<sup>35</sup> Moreover, Fallon says little about what presidential power should cover within the emergency category, or whether or to what extent that power should vary depending on the nature of the emergency.<sup>36</sup> As a result, one should expect to see the same tendentious dynamic in this category that we can expect to see under Fallon's first category.

Ultimately, I would suggest, the checks on the abuse of nonjudicial precedent will come either from the courts, in situations

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33. *See id.* at 438–47.

34. Fallon, *supra* note 2, at 351.

35. *Cf. Gross, supra* note 1, at 1070 ("Unfortunately, bright-line distinctions between normalcy and emergency are frequently untenable, as they are constantly blurred and made increasingly meaningless.").

36. *See Fallon, supra* note 2, at 390 ("Acknowledging the scope that two-tiered theory leaves for disagreement, especially insofar as it fails to prescribe a full set of first-tier interpretive principles, I would insist only that two-tier theory frames the right issues for debate.").

in which judicial review is available, or from nonjudicial audiences (Congress, elites, and the public, among others), not from creating additional categories. In determining the weight to accord historical practice, courts could take into account some of the institutional realities about congressional-executive relations. For example, in determining whether Congress has acquiesced in an executive-branch practice, courts should probably be wary of making inferences from mere congressional inaction. They might also want to pay more attention to various forms of congressional “soft law” such as House and Senate resolutions.<sup>37</sup> Moreover, when courts credit historical practice, it may make sense for them to describe their holdings in minimalist terms (as the Court did in *Dames & Moore*) to help reduce the danger that the precedent will be relied upon out of context.<sup>38</sup> For historical practice that is unlikely to be subject to judicial review, audiences are obviously not required to credit tendentious invocations of practice by the executive branch, especially where the executive branch is simply relying self-referentially on its own prior views (such as in connection with the “hostilities” issue relating to Libya).<sup>39</sup> There might also be ways for Congress to reduce the likelihood of executive-branch misuse of emergency precedent, through framework statutes, statutory sunset provisions, and the like.

Not only would a two-tiered legality approach add little to these checks, it would introduce a distinction that would likely prove artificial in practice. As Fallon acknowledges, statutory and constitutional interpretation is already affected by consequentialist considerations, and presidential power therefore varies depending on the level of functional necessity.<sup>40</sup> If that is correct, then it is probably too simplistic to hypothesize two states of interpretation—“ordinary” and “extraordinary.” Instead, it seems more accurate to hypothesize presidential power as operating along a spectrum. Of course, we do

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37. For discussion of congressional soft law, see generally Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715 (2012), and Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573 (2008).

38. See generally, e.g., Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006).

39. This is not to suggest that a longstanding executive branch position is entitled to no weight by external audiences. See Bradley & Morrison, *supra* note 32, at 460 (explaining that there are “plausible grounds for even nonexecutive actors to credit patterns of executive practice, at least in some circumstances”).

40. See Fallon, *supra* note 2, at 370 (noting that “nearly any theory of statutory or constitutional interpretation is likely to be applied in practice in a way that is context-sensitive”).

already use one type of categorization in this area: the three categories suggested by Justice Jackson in his concurrence in *Youngstown* for assessing the relationship between congressional and executive power.<sup>41</sup> But it is worth recalling that Jackson described this as “a somewhat over-simplified grouping,”<sup>42</sup> and that the Supreme Court has since observed that “it is doubtless the case that executive action in any particular instance falls not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.”<sup>43</sup> In any event, the Jackson framework, like the influence of consequentialism, already allows for a lot of interpretive flexibility, reducing the need for a special interpretive regime for emergencies.

The example that Fallon invokes as most reflective of two-tiered reasoning is Lincoln’s explanation for his actions at the outset of the Civil War, including his suspension of the writ of habeas corpus. Lincoln famously asked in a speech to Congress, “[A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?”<sup>44</sup> He also noted that there was no question that many of his actions were “strictly legal,”<sup>45</sup> thereby perhaps suggesting that some of his actions might not have been defensible under ordinary principles of legality. It is easy to forget, however, that Lincoln’s “all the laws but one” statement was a backup argument, and that he said that “it was not believed that this question was presented.”<sup>46</sup> His main argument was that he had not violated any provision of the Constitution. With respect to the suspension of habeas corpus, he explained that

the Constitution itself, is silent as to which, or who, is to exercise the [suspension] power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling

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

42. *Id.* at 635.

43. *Dames & Moore v. Regan*, 435 U.S. 654, 669 (1981).

44. President Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953).

45. *Id.* at 428.

46. *Id.* at 430.

of which might be prevented, as was intended in this case, by the rebellion.<sup>47</sup>

This strikes me as a strong interpretive argument in light of the circumstances that Lincoln faced rather than some sort of lesser legal evil.<sup>48</sup>

### CONCLUSION

Because my focus has been critical, I should emphasize two points. First, it is much easier to critique a theory, as I am doing here, than to develop a new theory, as Fallon is attempting to do. Fallon deserves great credit for suggesting and defending a new approach to such a difficult topic. Second, Fallon's analysis is quite nuanced and insightful—more so than I have probably been able to convey—and, as a result, it is an important contribution to the debate over emergency power even if one is not ultimately persuaded by Fallon's proposed approach. Among other things, the analogy that Fallon offers to threshold deontology provides a useful reminder that legal analysis, like moral analysis, cannot always be expected to produce “algorithmically correct answers” and that it ultimately requires “a faculty of judgment that is not itself rule-governed.”<sup>49</sup> In this respect, although Fallon begins his essay with the quote from Holmes about how great cases make bad law, the Holmes aphorism that may be more apt is the one about how “[t]he life of the law has not been logic: it has been experience.”<sup>50</sup>

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47. *Id.* at 430–31.

48. *See also* DANIEL FARBER, *LINCOLN'S CONSTITUTION* 163 (2003) (“[A]lthough the constitutional issue can hardly be considered free from doubt, on balance Lincoln's use of habeas in areas of insurrection or actual war should be considered constitutionally appropriate, at least in the absence of any contrary action by Congress.”).

49. Fallon, *supra* note 2, at 377.

50. O.W. HOLMES, JR., *THE COMMON LAW* 1 (Boston, Little, Brown & Co. 1881). Holmes continued: “The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.” *Id.*