

Plenary Session I

Liberal Democracy in State of Emergency: Seen by Standing on the Shoulders of Carl Schmitt

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ABSTRACT

This essay aims to assess the vitality of liberal democracy by subjecting it to the acid test of Carl Schmitt's critique against liberalism. In emergency situation, someone, the president, the court, or whoever the case may be, has to take decisive action to cope with the emergency. There is an inherent risk that any such exercise of sovereign power may lead to its abuse. However, it is impossible to put in place a rule to address such abuse in advance due to the unpredictability of emergencies. The author rejects Schmitt's democratic mysticism, which argues for popular government based solely on the people's will for remedying the deficiencies of liberal democracy. Instead, the author argues that the key to resolving the problem of indeterminacy in rule of law in states of emergency should be building the conventions, whether legislative or judicial, necessary to control the sovereign's exercise of emergency power, although it may take much time for such conventions to be widely established in the society. This stands whether one takes Wittgenstein's view that indeterminacy can be seen as inherent in the concept of rule of law itself or Hayek's functionalist definition of rule of law.

Keywords: *Liberal Democracy, Emergency, Sovereign Power, Rule of Law, Carl Schmitt, Convention*

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CONTENTS

I. THE CURRENT GLOBAL FINANCIAL CRISIS AND KOREA'S RESPONSE...	57
II. WHY CARL SCHMITT IN THE STATE OF CRISIS?	60
III. SCHMITT'S DIAGNOSIS OF LIBERAL DEMOCRACY'S WEAKNESS	61
IV. SCHMITT'S PRESCRIPTION IN TIMES OF CRISIS AS AGAINST THE RULE OF LAW: EMERGENCY POWER WITHOUT CHECK.....	70
V. CONCLUDING REMARKS	80
REFERENCES	82

In the realm of ends everything has either a *price* or a *dignity*. Whatever has a price can be replaced by something else as its equivalent; on the other hand, whatever is above all price, and therefore admits of no equivalent, has a dignity.

~~Immanuel Kant~~

I. THE CURRENT GLOBAL FINANCIAL CRISIS AND KOREA'S RESPONSE

Contrary to some countries in the world, no extraordinary legal measures have been undertaken in Korea to overcome the current global economic crisis. Just as no one should doubt that the worldwide depression of the 1930s was viewed as an emergency, the current global financial crisis should leave little doubt that it should also be deemed as such. Basic constitutional norms presuppose a background of social and political stability. If so, they are subject to suspension whenever these background conditions dissolve into sufficient instability to be labeled an emergency.¹ Emergency is not limited to “military exigencies in the theater of war, or extraordinary requirements of some great public calamity,” but it also includes “less grave, but unusual and urgent conditions.”² The U.S. court in *Blaisdell* identified worldwide business and financial crisis to a “flood, earthquake, or disturbance,” depriving “millions of persons in this nation of their employment and means of earning a living for themselves and their families” and generating “widespread want and suffering among our people.”³ The Constitution of Korea, in cases of emergency, broadens presidential powers in a much broader manner than e.g. the U.S. Constitution. Article 76 of the Constitution of Korea (“Constitution”) provides that in time of a grave financial or economic crisis, the President may take the minimum necessary financial and economic action or issue orders that have the effect of an Act when, and only when there is an urgent need to take measures for the maintenance of national security or public peace and order, and there is no time to await the convocation of the National Assembly.⁴ However, the President has not yet taken any such *extralegal* actions and orders both of which are deemed to be legally

1. Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GEO. L.J. 699, 721 (2006).

2. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 222-23 (1928).

3. *Blaisdell v. Home Bldg.*, 249 N.W. 334, 340 (Olsen, J., concurring) (Minn. 1933).

4. Constitution art. 76(1). In case that actions are taken or orders are issued, the President should promptly notify it to the National Assembly and obtain its approval, see art. 76(3). In case the President fails to obtain approval from the National Assembly, the actions or orders lose their effect, see art. 76(4). Furthermore the Constitutional Court declared that the President's decision to initiate emergency power issuing economic orders provided in art. 76(1) is subject to judicial review of Constitutional Court in case it infringes upon constitutional right of individuals even if it is of nature of political judgment. Constitutional Court Judgment of Feb. 29, 1996, 96 Hun-ma 186.

available to the President in the current financial crisis. Simply, the responses by the Korean Government to the current financial crisis are not what one would typically expect in case of a true emergency. The Korean government has been responding to the ongoing economic crisis with normal government policies. I would say that the Korean government has since outbreak of the financial crisis responded with much constitutional care and fully aware of the temptation of over-reactions.

This does not mean, though, that the government has not taken any measure. Korea, like many other countries in the world, has been drawn into a global financial crisis of U.S. origin that began with the subprime mortgage market. The government did take every means, but never departing in any fundamental way from established principles. Simply put, the government has tried to boost the nation's growth potential by increasing expenditure on research and development.⁵ Therefore, one would say that there is sufficient due process in the government's efforts to cope with the crisis. To shore up not just the financial industry but the real economy, i.e. growth, manufacturing, and job creating, Korean government has offered a number of legislative bills and taken a full variety of administrative options, all of which are taken as a normal exertion of government power. The government provided liquidity sufficiently, preemptively and decisively, and executed budget earlier than scheduled, all of which are some typical examples of those measures taken by the government.⁶

One would agree that such actions are within the scope of administrative discretion with which the President can legitimately run his government. With respect to legislative bills offered by the government, however, the Korean Assembly is now being criticized by the general public for impeding governmental efforts by not timely resolving them. Currently, the ruling and opposing parties quarrel each other over media bills that have controversial political issues, political freedom of speech in particular as well as redistribution issues concerning media industries.⁷ Due to the deadlock

5. According to a daily newspaper report about 2009 budget, while R&D investment is geared to a long-term growth plan, an increase in spending on infrastructure is apparently designed to spur immediate growth. The administration plans to spend 21.1 trillion won on new roads, railroads and other infrastructure, up 7.9% from this year. The rate compares with an annual average of 2.5% during the past five years, see Korea Herald, *Unrealistic Budget*, KOREA HERALD, Oct. 2, 2008, http://www.koreaherald.co.kr/archives/result_contents.asp (last visited Dec. 6 2009).

6. See Korea Herald, *Putting End to Panic*, KOREA HERALD, Oct. 20, 2008, http://www.koreaherald.co.kr/NEWKHSITE/data/html_dir/2008/10/20/200810200032.asp (last visited Dec. 6 2009); KOREA HERALD, Nov. 13, 2008, *Preemptive Bailout*, KOREA HERALD, http://www.koreaherald.co.kr/NEWKHSITE/data/html_dir/2008/11/13/200811130056.asp (last visited Dec. 6 2009).

7. The media bills permit cross-ownership of print media and broadcast stations. The opposition party had argued that the bills reflect the desire of President Lee Myung-bak and his Grand National Party ("GNP") to control the media market and will only benefit major conservative dailies and large businesses, see Cho Ji-hyun, *DP Leader Quits Parliamentary Seat*, KOREA HERALD, Jul. 25, 2009,

surrounding media bills, the Assembly can not focus on bills which affect the daily lives of people such as a bill aimed at reviving small-scale shops. In spite of apparent lack of sense of responsibility on the side of the political leaders, however, Korea's economy is regaining its vitality to get back on track. Nowadays, people suspect that the current situation can be deemed as the "worst" financial crisis since the Great Depression. Perhaps many of them may think that they were misguided by economists' exaggerating warning.

Such being the case, no concern of "legitimacy" has been raised during the process of governmental reaction to the crisis. The courts, including the Supreme Court and the Constitutional Court have never had any opportunity to intervene the process by judicial review. If there is any governmental measure with some impact on individual rights, equal distribution, or even redistributive justice, it has something to do with the conservative policy of the incumbent government. As opposed to the former president Noh, the new president Lee Myong-bak has claimed to take on "small government" posture allegedly following the path of *neo-liberalism*. His government has curbed welfare spending and is currently criticized for giving a tax favor to the rich.⁸

With respect to court records, there is a handful of the Constitutional Court cases that dealt with the "IMF bailout crisis."⁹ To Korean people, IMF

http://www.koreaherald.co.kr/archives/result_contents.asp (last visited Dec. 6, 2009). In August, 2009, the ruling party GNP rammed through the controversial media bills with its lawmakers seizing the Assembly speaker's podium. Vice Speaker with the right to preside a plenary session delegated to him by Speaker put the bills to a floor vote despite fierce objection from opposition parties. Although physical clashes were spotted throughout the main chamber, the GNP was able to block the opposition Democratic Party ("DP") lawmakers from nearing the podium as the GNP lawmakers had already secured the area. As a result of the GNP's move, a number of DP lawmakers announced their resignation, see Cho Ji-hyun, *Parties Blame Each Other for Deadlock*, KOREA HERALD, Jul. 24, 2009, http://www.koreaherald.co.kr/archives/result_contents.asp (last visited Dec. 6 2009). In the wake of the ruling party's unilateral passage of the contentious media bills, DP leaders claimed that the passage of the media bills was invalid, saying "The legislation through illegal voting and violence cannot be justified." The DP filed petitions to the Constitutional Court, calling for the nullification of the revised media law. The ongoing dispute over the legitimacy of the legislation revolves around the allegations that some of the ballots cast during voting were submitted not by GNP legislators but by their aides or colleagues. The moves by DP lawmakers escalated bipartisan confrontation with the GNP to such an extent that the Assembly's regular plenary session cannot not be held.

8. See Editorial, *Bold Tax Reform*, KOREA HERALD, Sept. 3, 2008, http://www.koreaherald.co.kr/NEWKHSITE/data/html_dir/2008/09/03/200809030039.asp.

9. For example, see Constitutional Court Judgment of Jan. 18, 2001, 2000 Hun-ma 7, where Constitutional Court declared repeal of Interest Rate Restriction Act constitutional on the ground that whether to implement direct restriction on interest rate or to leave it to the contract of the concerned parties is subject to the discretion of the Legislative branch. See also Constitutional Court Judgment of Nov. 27, 2003, 2001 Hun-ba 35, where the Constitutional Court ruled art. 12 of the Banking Structure Improvement Act constitutional, a statute that conferred the Government authority to redeem stocks from certain shareholders of troubled financial institutions with or without compensation when necessary. The Banking Structure Improvement Act constitutional, a statute that conferred the Government authority to redeem stocks from certain shareholders of troubled financial institutions

crisis was much far severer than the current economic crisis in many aspects. Therefore, much more swift and radical measures were taken by the government during the IMF crisis. However, none of them took on the *extralegal form* of actions and orders, either. As a result, none of them were declared unconstitutional by either the Constitutional or Supreme Court. Those decisions should be understood against cultural background that Korean people unite relatively easily and come to a national consensus in times of crisis, which is well epitomized by the “gold collection movement” that swept over every corner of Korean peninsula.¹⁰

As mentioned above, there is no significant action that can be considered as *extralegal form* of actions by the Korean government to address the current financial crisis. Therefore, I will address a few general issues related to emergency power from theoretical perspectives.

II. WHY CARL SCHMITT IN THE STATE OF CRISIS?

September 11 has brought out many new phenomena all around the world. One of the most interesting phenomena that one can find in the field of political science and constitutional law is recognizing Carl Schmitt anew in the United States. Carl Schmitt is known for his charge that liberalism is nothing but one ideology among others, each seeking to impose upon the whole its own partial conception of the good life. Leaving aside Schmitt’s academic legacy, he was unfortunately notorious for his later-days association with the Nazis.¹¹ However, Schmitt exerts, still to this day, an enormous influence on German political and legal thought. Surprisingly, the English-speaking world has recently had “a renaissance of interest” in his work.¹²

There may be a spectrum of evaluations with Schmitt’s constitutional jurisprudence.¹³ For now, suffice it to say that one can learn from one of liberalism’s most irreconcilable enemies whether or not one agrees with him. Seemingly, Schmitt’s critique captures better than contemporary critics the

with or without compensation when necessary.

10. See Shin Hye-son, *Campaigns Highlights Koreans’ Solidarity*, KOREA HERALD, Feb. 24, 1998, <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=100&oid=044&aid=0000001220> (last visited Dec. 10, 2009).

11. For a concise biography of Schmitt’s life, see Manfred H. Wiegandt, *The Alleged Unaccountability of the Academic: A Biographical Sketch of Carl Schmitt*, 16 CARDOZO L. REV. 1569 (1995).

12. David Dyzenhaus, *Introduction: Carl Schmitt’s Challenge to Liberalism*, 10 CAN. J.L. & JURIS. 3, 3 (1997). For a relatively early treatment of Schmitt in U.S. constitutional theory, see also Symposium, John P. McCormick, *Schmittian Positions on Law and Politics?: CLS and Derrida*, 21 CARDOZO L. REV. 1693 (2000).

13. For more discussion, see, for example, the articles collected in Canadian Journal of Law and Jurisprudence vol. 10, no. 1 (Jan. 1997).

problematic nature of liberalism at least in some aspects. I do not pretend to be Schmitt expert; rather, my attempt is to examine Schmitt's well known insights and highlight some lessons for times of crisis by offering my own response to what I regard to be Schmitt's points.

Why does Schmitt's perspective grab the attention of constitutional theorists especially since the September 11 disaster?¹⁴ Crisis can get liberal democracy to hobble and sometimes to fall in shambles. Emergency easily pulls out unfounded ideas. In times of emergencies people think in such way as to say, to borrow a polemic's expression, "No sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself." Therefore, Schmitt's critique of liberalism may get more relevant in times of crisis. Furthermore, as Mark Tushnet notes, Schmitt's antiliberalism seems to have bite in crisis situations of a sort that constitutional theorists thought the United States had not experienced, and was unlikely to experience.¹⁵ According to Schmitt, the stupidity of parliaments provides the occasions for executives to exercise the sovereign power that always resides in the executive. By making this point, he seems to purport to draw a lesson for broad institutional design questions from the particular parliamentary experiences in early twentieth century Germany. As Sanford Levinson points out, former U.S. President Bush's response to the September 11 attacks presents constitutional theorists with the kind of problem Schmitt seems to have addressed. In this sense one can take note of lessons from Schmitt.

III. SCHMITT'S DIAGNOSIS OF LIBERAL DEMOCRACY'S WEAKNESS

Schmitt's authoritarian theory of law and politics can be summarized as follows:

Constitutional democracy is self-contradictory and illusionary, which is revealed in case of crisis. To overcome crisis the constitutional principle should give way to unconstrained political sovereignty so that the sovereign can follow the collective will of the people without any constraint.

Even though Schmitt's prescriptive program of constitutional democracy must be utterly rejected, Schmitt has a point as far as his diagnosis of liberalism is concerned. Schmitt's critical attacks against liberalism focus mainly on the liberal principle of neutrality. Schmitt wants

14. For example, even Sanford Levinson, one of big names among the United States Constitutional law scholars did yeoman work in bringing Schmitt's perspective to the attention of constitutional theorists. Levinson, *supra* note 1.

15. Mark Tushnet, *Meditations on Carl Schmitt*, 40 GA. L. REV. 877, 888 (2006).

to replace it by an authoritarian version of democracy, a political regime based upon authority embodying strong democratic support which I will address in the next section.

Schmitt's critiques against liberalism are two-fold.¹⁶ Firstly, liberalism is illusory: neutrality, the rule of law, and even constitutional democracy rest upon contradictory premises and hence finally result in a self-conceit. Secondly, liberalism is hypocritical: liberals hide their particular purposes and selfish economic goals by invoking nonexistent universality. In a sense, Schmitt's critiques seem to resonant with the well-known critiques made by communitarian critics such as Michael J. Sandel. It is because the communitarian critiques of liberalism focus on a bourgeois attitude of "possessive individualism" and "empty proceduralism."

Constitutional democracy is, for Schmitt, a mere amalgam of two components which contradict with each other: the liberal component of constitutionalism and the political component of democracy. While democracy entails the political substance of a particular people, constitutional legality is an instrument to "safeguard private and economic interests of the liberal bourgeois."¹⁷

Schmitt thinks that what ultimately counts in a genuine democracy is the sovereign authority of the collective unity of the people. A unity of the people is facilitated by, and resting upon, some sort of "substantial homogeneity." Substantial homogeneity consists of common tradition, language, ethnic origin, religion, or ideology. This homogeneity is a medium through which a people can distinguish itself from other peoples and thus find its specific identity. For Schmitt, politics rests on membership in a particular people with substantial homogeneity as opposed to the universality of all human beings. Schmitt regards democracy as the unconstrained political expression of a particular people's collective identity.

In contrast with democracy, constitutionalism does not concretize any political substance in Schmittian sense. The problem with this purported neutrality is, for Schmitt, that constitutionalism is used as an instrument of the liberal bourgeoisie to defend its private and economic interests by setting up a bill of individual rights and a separation of powers. By insisting neutrality, constitutionalism in effect safeguards a given list of individual rights, and prevents a particular people from exercising political sovereignty. According to Schmitt, the individualism inherent in individual human rights can be reduced to the selfish goals of the bourgeois. By separation of powers, an offshoot organizing principle of liberal constitutionalism that combines and balances different constitutional institutions, liberal

16. See Heiner Bielefeldt, *Carl Schmitt's Critique of Liberalism: Systematic Reconstruction and Countercriticism*, 10 CAN. J.L. & JURIS. 65, 66-70 (1997). The following heavily relies on this essay.

17. *Id.* at 68.

constitutionalism seeks to tame political power. Consequently, none of any institutions is allowed to exercise sovereign authority in Schmittian sense. In constitutional democracy, therefore, a pure democracy cannot exist where people express and accomplish their collective will. What's the result? Liberal constitutionalism results in strengthening the liberal bourgeoisie.

As with Schmitt, one may think that democracy and constitutionalism cannot form one whole. However, it does not necessarily mean that one should choose either political democracy or the normative requirements of constitutionalism. It is both practically and conceptually possible to establish a government with two components together. For instance, the people, the ultimate sovereign in Schmitt's constitutional theory,¹⁸ can also make *precommitments* that will constrain its own decisionmaking in the future.¹⁹ Moreover, liberalism, specifically Kantian liberalism is a political ideology that fights all kinds of oppression and discrimination.²⁰ Discrimination and bias is the first and foremost enemy of a liberal community where people respect each other's dignity and freedom on the basis of equality. In this sense, liberalism is not devoid of political substance.

Having told this, there is still something worth noting in Schmitt's critiques of liberalism. Even though Schmitt raises some disturbing questions liberals like to avoid, they need not only to confront them, but to learn from them at least to provide convincing arguments in favor of a just constitutional democracy. I think that it would be shortsighted to dismiss significance of his critiques for other reasons than the defect of his theory itself. My point here is that by scrutinizing his critiques one could acknowledge and finally overcome a paradox inscribed in the very nature of liberal democracy. In other words, one needs to "use the insights of his critique[s] of liberalism in order to consolidate liberalism."²¹ It is my contention that, interpreted in a right way, even his provocative thesis may help us to recognize a disturbing aspect of liberalism as evidenced in the current global financial crisis.

The first step would be to grasp what Schmitt means by "the political." For Schmitt, there can never be a democracy of mankind. In contrast with liberals emphasizing the universal aspect all human beings share in common, Schmitt argues that "[i]n the domain of the political, people do not face each

18. Schmitt says: "In a democracy the people is the sovereign; it can break through the entire system of constitutional norms and decide a court case, like the prince in an absolute monarchy could decide cases. It is supreme judge as well as supreme legislator." CARL SCHMITT, *VERFASSUNGSLEHRE* 275 (Dunker und Humblot 1993) (1928); Bielefeldt, *supra* note 16, at 70.

19. For reference of precommitment, see also JON ELSTER, *ULYSSES AND THE SIREN* (Press Syndicate of the University of Cambridge 1984) (1979); Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 *TEX. L. REV.* 1751 (2003).

20. Bielefeldt, *supra* note 16, at 72.

21. Chantal Mouffe, *Carl Schmitt and the Paradox of Liberal Democracy*, 10 *CAN. J.L. & JURIS.* 21, 33 (1997).

other as abstraction but as politically interested and politically determined persons, as citizens, governors or governed, politically allied or opponents.”²² Even in modern democratic states where universal human equality has been established, there is no absolute equality of persons because there is a category of foreigner or aliens. Even if a state would seek to realize the universal equality of individuals without concern for nationality, it would not necessarily mean the disappearance of substantive inequalities. As Schmitt points out, inequality would likely shift in the economic sphere so that this area would “take on a new, disproportionately decisive importance.”²³ Schmitt warned that “[u]nder the conditions of superficial political equality, another sphere in which substantial inequalities prevail (today for example the economic sphere) will dominate politics.”²⁴ Schmitt tells both the historical cause and effect of liberals’ neutrality as follows:

In the wake of the early modern religious wars, theological questions were gradually replaced by metaphysical questions which themselves later gave way to humanitarian concerns. In the age of liberalism, even humanitarian morality has become a merely private matter. What remains is *economic issues* which [. . .] make up the core of modern liberalism.²⁵

I think that Schmitt’s critiques provide a significant insight for understanding “the current dominance of economics over politics.”²⁶ Although its main concern is to emphasize a radical democratic politics which sounds like a synonym of populism to liberals, Schmitt’s reflection sends a wake-up call for those who believe in “rational individualism”²⁷ with its moral discourse centered around individuals’ universality and rationality. Rational individualism apparently puts too much emphasis upon rationality by failing to give appropriate consideration to political legitimacy. For instance, people in “cost-benefit state”²⁸ might as well lose the possibility of exercising their democratic rights of lawmaking. Put exaggeratingly, they would be left, at best, with their liberal rights of

22. CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* 11 (the Mass. Inst. of Tech. trans., 1985) (1985).

23. *Id.* at 12-13.

24. *Id.* at 13.

25. Bielefeldt, *supra* note 16, at 66.

26. Mouffe, *supra* note 21, at 24. The following heavily relies on this essay.

27. For an extreme position of this sort, see e.g., MICHAEL A. BEITLER, *RATIONAL INDIVIDUALISM: A MORAL ARGUMENT FOR LIMITED GOVERNMENT AND CAPITALISM* (2008).

28. See generally, Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247 (1996); see also Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7 (1998).

appealing to the courts to defend their individual rights only when they are violated. One can also find too much emphasis on rationality in the concept of political equilibrium grounded upon interest-based conception of democracy, inspired by economics, and skeptical of the virtues of public participation. It is through political discourse in public sphere that democratic citizens (rather than rational consumers) can introduce questions of values into deliberation.²⁹

As Chantal Mouffe rightly points out, politics is not a static, but a dynamic concept. Political action is an action through which political agents create a common value to pursue by committing themselves to that value. Through political action, a value is constituted for the first time. If the liberal model of politics is understood just as Schmitt understands, there is no place there for political articulation of values. Without a plurality of competing forces who attempt to define the common good and aim at constituting identity of the community, politics is displaced by mere trade between selfish interest groups or rational calculation by technocrats.

The current global financial crisis appears a dramatic example of the dangerous consequences that too much emphasis on rationality can bring up. In his speech delivered to investment bankers on September 15, 2009, President Obama made remarks about the need for regulatory reform of America's financial markets.³⁰ He marked the first anniversary of the collapse of Lehman Brothers by declaring the worst of the crisis over, and then prodded bankers to check their "reckless behavior." Mr. Obama said, "Hear my words: We will not go back to the days of reckless behavior and unchecked excess at the heart of this crisis, where too many were motivated only by the appetite for quick kills and bloated bonuses," I am pretty sure that the "reckless behavior and unchecked excess" had undertaken a thorough "rational" analysis in every aspect. However, those on Wall Street who took risks without regard for consequences were either too irresponsible or too naïve to give second-thought to their rationality. The problem here is neither the data that the purported rational analysis was based on nor the method of the rational analysis itself. Mr. Obama diagnosed that "[i]t was a collective failure of responsibility in Washington, on Wall Street, and across America." More likely, Schmitt would argue that the problem here is the concept of *rationality* itself. Myopic rationality rewarded "those who try to game the system," instead of "those who compete honestly and vigorously

29. On the other hand, Schmitt also has critical attitude against ethics: "In a very systematic fashion liberal thought evades or ignores state and politics and moves instead in a typical always recurring polarity of two heterogeneous spheres, namely ethics and economics, intellect and trade, education and property." CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 70 (George Schwab trans., The University of Chicago Press 2007) (1976).

30. Elizabeth Williamson, *Obama Urges Bankers to Back Financial Overhaul*, WALL ST. J., Sept. 15, 2009, at A4.

within the system.” As Mr. Obama notes, “that’s why we need strong rules of the road to guard against the kind of *systemic* risks we have seen.”

I think that Schmitt successfully shows the dangers that the dominance of the rational individualism bring to the democracy. Understood as a *regime* (a political form of society), liberal democracy—whether one calls it constitutional democracy, representative democracy, parliamentary democracy, or modern democracy—concerns the conceptual ordering of social relations. It is much more than a mere form of government.³¹ Then, the crucial difference between ancient and liberal democracy resides in the acceptance of *pluralism*. Pluralism means the dissolution of one and only idea of the good life. Once pluralism is recognized as the defining feature of liberal democracy, it transforms profoundly the ordering of social relations. Pluralism not only secures individual equal liberty for all, but also legitimates conflict and division.

Apparently, however, rational individualism overlooks that the essence of pluralism consists in recognizing that there must be a wide variety of *perspectives concerning* values, and thereby sees “objectivity” as belonging to the “things themselves.” If that is the case with rational individualism, it would necessarily lead to the reduction of plurality and to its ultimate negation. Pluralism is more than the recognition of the fact that there are many conceptions of the good. Pluralism is, as Mouffe notes, an axiological principle that constitutes the very nature of modern democracy at the *conceptual* level. If one would deem the difference as a mere given fact, one would search for a common denominator to overcome it. (I find this move in too much emphasis put on rationality and neutrality by some liberals. What else is there except rationality as the common denominator?) However, this move would “make those differences irrelevant [to politics] and thus relegate pluralism to the sphere of the private.”³²

I am concerned that too much emphasis on rationality would make rationalism dominate modern democracy. Excessive trust in rationality was born against the background of the illusion that one could free oneself completely from power politics. If one would take an anti-rationalist perspective, one could begin to understand that, “for democracy to exist, no social agent should be able to claim any mastery of the foundation of society.”³³ It is not until social agents accept the particularity and the limitation of their claims that the relation between them does become more

31. As Mouffe notes, liberal democracy is a specific form of organizing politically human coexistence resulting from the joining together of two different traditions: on one side, political liberalism (rule of law, separation of powers, and individual rights), and on the other, the democratic tradition of popular sovereignty. Chantal Mouffe, *Democracy and Pluralism: A Critique of the Rationalist Approach*, 16 CARDOZO L. REV. 1533, 1534 (1995).

32. *Id.* at 1535.

33. *Id.* at 1536.

democratic. The democratic society cannot be conceived any more as a society that has realized the dream of a perfect harmony in social relations. It is because one cherishes one's own values, and values are constituted (rather than perceived) by one's commitment to them. Moreover, it is an act of committing oneself to a value that constitutes one's identity. Many liberal theorists seem to presuppose that political actors are only driven by what they see as their rational self-advantage. What characterizes a democratic society then? Any single social actor cannot possibly attribute the representation of the totality to herself. Then the essential question for democratic politics becomes how to constitute forms of power which are compatible with democratic values. From this perspective, the real threat to democracy might be negating the inevitable conflict of values and aiming at a universal rational consensus. As Mouffe argues, this may lead to "unrecognized violence hidden behind appeals to rationality."³⁴

Be that as it may, I do not advocate an unconstrained extreme pluralism that emphasizes extreme incommensurability of values. If one takes on such value relativism, there will be only a multiplicity of identities without any common denominator. Even though it should be recognized that certain differences are constructed as relations of subordination, value relativism does not find a way to distinguish between differences that should not exist and differences that should.

Is there any other way to make whole our liberal democracy project than to resort to rationality? Once one recognizes that there are different conceptions of the good, one seeks to specify the terms under which people with different conceptions of the good can live together in political association.

The first option is to find procedures to deal with the differences. However, the creation of a *modus vivendi* that regulates the conflict among different views is not enough. In *modus vivendi*, democracy as a procedural form, neutral with respect to any particular set of values, is a mere method for making public decisions. Moreover, agreement on mere procedures that liberal model of interest group pluralism postulates cannot assure the cohesion of a liberal society. Politics cannot be reduced to a mere process of negotiation among interests. If so, politics would be degraded into the "*modus-vivendi*" of constitutional democracy John Rawls rejected in his *Political Liberalism*. If so, the state might be weakened to such an extent that it reduces to a referee with a purely instrumental function. The unity the model creates is insufficient for the proper form of unity of a plural society because it is a mere convergence of interests.

The second option would be emphasis upon priority of the right over the

34. *Id.* at 1537.

good. Seeking more than a simple *modus vivendi*, Rawls affirms that a liberal democratic society needs a *moral* type of consensus around its fundamental institutions. In his *Political Liberalism*, he describes the basic principles of political morality that can specify the terms establishing peaceful coexistence among people with different conceptions of the good. Given that free and equal citizens are divided by reasonable though incompatible religious, philosophical, and moral doctrines, Rawls's solution is the establishment of fair terms of social cooperation between citizens. Rawls's point is that citizens not only have different ideas of the good, but are equipped with public reason. Rawls tries to show a conception of political justice that all "reasonable" citizens would support despite their deep doctrinal disagreement on other matters.³⁵ Rawls insists that the "overlapping consensus" must not be confused with a simple *modus vivendi*. According to Rawls, it is not merely a consensus on a set of institutional arrangements based on self-interest, but rather a moral affirmation of principles of justice that have themselves a moral character.³⁶ According to Rawls, rational agreement among comprehensive moral, religious, and philosophical doctrines is impossible, but that in the political domain such an agreement can be reached. Once the controversial doctrines have been relegated to the private sphere, it is possible to establish in the public sphere a type of consensus grounded on public reason.

However, Rawls's conception of justice appeals to an individual's idea of rational advantage though it is constrained by the public reason.³⁷ It is the same with the case of the social contract metaphor because it appeals to the motive of self-preservation. As if to prove this, Rawls argues that once the just answer to the problem of distribution of those primary goods has been found, the rivalry that previously existed in the political domain disappears. In addition, if one would put too much emphasis on universal morality, as Schmitt points out, it would be "to place oneself in the field of . . . ethics but not in the field of politics."³⁸ As a matter of fact, there are power relations and antagonism in human society because each one pursues one's own

35. For Rawls, reasonable citizens are persons "who have realized their two moral powers to a degree sufficient to be free and equal citizens in a constitutional regime, and who have an enduring desire to honor fair terms of cooperation and to be fully cooperating members of society." JOHN RAWLS, *POLITICAL LIBERALISM* 55 (1993).

36. *Id.* at 147. By the way, the overlapping consensus also differs, for Rawls, from a constitutional form of consensus in that the latter is not deep or wide enough to secure justice and stability. *Id.* at 159.

37. This idea is also evidenced by his theory of allocation of goods. Rawls says that citizens need, as free and equal persons, the same goods because their conceptions of the good—however distinct their content—"require for their advancement roughly the same primary goods, that is, the same basic rights, liberties, and opportunities, and the same all-purpose means such as income and wealth, with all of these supported by the same social bases of self-respect." *Id.* at 180.

38. Mouffe, *supra* note 21, at 33.

values. Schmitt disdainfully argues that “He who invokes humankind is about to cheat.”³⁹ If one would remain blind to dynamic interactions among members surrounding values they commit themselves to respectively, one would deny the need to constitute collective identities. Then, one would conceive democratic politics exclusively in terms of a struggle by multiple interest groups or by minorities for the assertion of their rights.

The third option is to shed a new light on politics. Seemingly, some of liberal theories of a well-ordered society presuppose that political actors are only driven by what they see as their rational self-advantage. In their theories, passions seem to be erased from the realm of politics, which is finally reduced to a neutral field of competing interests. However, completely missing from such an approach is “the political” in its dimension of power, antagonism, and relationships of forces. Because *Political Liberalism* does not give worthy attention to “the political,” it cannot catch the element of indeterminacy which is present in human relations. Rawls’s idea of a well-ordered society, though allegedly based on rational agreement on justice, is devoid of people with passion to always make political articulations. Relying on rationality and morality, Rawls seeks to detour the paradox of liberalism successfully: how to eliminate its adversaries while remaining neutral.

However, it would carry a danger to postulate that there could be a rational definite solution to the issue of justice in a democratic society. There must be a gap between justice and political decision that will constitute concrete content of democracy. Is it possible to fill up that gap in advance? Can a rational political consensus fill the gap forever? Because the liberalism has created a framework where dynamics of politics cannot be grasped, the political becomes latent. It remains inactive until the crisis take place where the political come to the fore. In times of crisis, however, the claim of neutrality does not stand. In any serious political crisis, liberal neutrality is doomed to break down. It is because there cannot be neutrality in “the political.” For Schmitt, the political is drawing a clear line between friend and enemy. Given the concept of the political, Schmitt is convinced that liberals will ultimately face the political reality and thus abandon their claim of neutrality.

While consensus in a liberal democratic society may be made of public reason as Rawls argues, it may be also considered as “the expression of an hegemony and the crystallization of relations of power.” If one would overlook conflict of values (to borrow Schmitt’s term, the frontier between friends and foes), and focus only on consensus, universality, and rationality

39. Carl Schmitt, *Staatsethik und pluralistischer Staat*, 35 KANT-STUDIEN 28, 39 (1930); Bielefeldt, *supra* note 16, at 67 n7.

(common denominator), the result would be “to reify the identity of the people by reducing it to one of its many possible forms of identifications.”⁴⁰ As Mouffe argues, it might then result in another form of subordination.

The identity of a people is not given. The unity of a people must be seen the result of the political process of hegemonic articulation. The essential part of the concept of the *political* is such that people constitute their values through political articulation, which in turn constructs the identity of the people. Such an identity, however, can never be fully constituted at a given time. It can only exist through the very struggle about the multiple and competing identifications of the people. Liberal democracy precisely recognizes this “constitutive gap between the people and its various identifications.” Therefore, as Mouffe notes, it would be wise to “leav[e] this space of contestation forever open.” One should not “tr[y] to fill this gap through the establishment of a supposedly ‘rational’ consensus.”⁴¹ Without a plurality of competing forces who attempt to define the common good and aim at fixing the identity of the community, one cannot say there is politics at all. Without politics where we can constitute our identity, we would be “in the field either of the aggregation of interests, or of a process of deliberation which evacuates the moment of decision.” As Schmitt points out, this is “to place oneself in the field of economics or of ethics but not in the field of politics.”⁴² The best way to keep liberal democracy alive might be to get people to make value articulations. It might be also the best way to keep alive values enshrined in the constitution.

The recognition of dynamic aspect of politics, that is, variability is the condition of existence of democratic politics. For politics to work, it is crucial to provide the platform necessary for the democratic project. Otherwise, merely seeking a final rational resolution of conflicts puts the democratic project at risk. Recognition of the difference and passionate struggle constitute an important guarantee that the dynamics of the democratic process will be kept alive. In a democratic polity, conflicts and confrontations, far from being a sign of imperfection, indicate that democracy is alive and inhabited by pluralism.

IV. SCHMITT’S PRESCRIPTION IN TIMES OF CRISIS AS AGAINST THE RULE OF LAW: EMERGENCY POWER WITHOUT CHECK

The question of crisis for legal scholars is how to cope with a shock to a political system that is so great that normal rules seem no longer applicable. Swift, immediate and exceptional responses that violate the constitutional

40. Mouffe, *supra* note 21, at 28.

41. *Id.* at 28.

42. *Id.* at 33.

order followed by a progressive normalization is what one would typically expect in case of an emergency. Throughout the history of political thought, theorists have argued that such an idea is a solution to protect a state at a time of crisis, but also have argued that it is a clear road to dictatorship. Exceptional measures for exceptional times are usually deemed to have the effect of undermining both separation of powers and individual rights.

However, Schmitt claims that the ability of a ruler to suspend the rule of law is the ultimate act of sovereignty. *Political Theology*, a book representing his thought, begins with the following sentence: "Sovereign is he who decides on the state of exception."⁴³ I will call this statement as Schmitt's "sovereign thesis." In state of exception where the entire legal order is at stake, a sovereign decision is not constrained by any normative principles. There can be "states of exception," in which the rule of law is simply inoperative. For example, crisis can conceivably result in a "state of exception," that is, a situation requiring unusual political decisions which themselves do not fit into any given set of legal and constitutional norms. In short, states of exception to law are "states in which politics rather than law properly governs outcomes."⁴⁴ There is always an unbridgeable gap between abstract legal norms on the one hand and the particular situation on the other. Schmitt derived the concept of "state of exception" from his analysis of the liberal rule of law, which led him to identify as a problem of that concept its indeterminacy in a real world situation. To Schmitt, the liberal rule of law means that liberal or constitutional states are always in the state of exception. This fact goes unnoticed until crises occur.

The extraordinary powers afforded to the President in times of crisis, coupled with the power to recognize such a crisis essentially by executive fiat, has led to a shocking proliferation of executive orders declaring a "state of emergency" whose reality has little to do with the original conception of the term. In Weimar Germany, for instance, executives gained great powers through declarations of states of emergency.⁴⁵ The state of emergency was not confined to the area which had originally triggered its application. In Weimar, states of emergency generally spread from the reasonably perceived threat to a wider sphere of potential dangers with a smaller evidentiary base for expansion of the threat. Each new threat, however slight, justified changing what had been the normal rules of procedure to cope with the new

43 . CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., 1985).

44. Tushnet, *supra* note 15, at 882.

45. For more detailed reference, see PETER C. CALDWELL, *POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW: THE THEORY & PRACTICE OF WEIMAR CONSTITUTIONALISM* (1997); ELLEN KENNEDY, *CONSTITUTIONAL FAILURE: SCHMITT IN WEIMAR* (2004); Kim Lane Scheppele, *Law in Time of Emergency: States of Exception and Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2003).

form of danger.

Schmitt had emphasized, for Weimar, the need for the executive to act unilaterally because parliamentary democracy could not sustain the decisiveness necessary to cope with a mortal threat to the state. According to Schmitt, successful democratic government required an illiberal core that could be exposed when the state was endangered. In Schmitt's idea, the sovereign had ultimate responsibility for the continuing existence of the state, and this was ultimately what gave the sovereign permission to set aside constitutional rules to act directly to cope with the threat. In Schmitt's view, this would occur because the law would simply fail to cover these actions and the sovereign would then have to step outside the law. As a result, unfortunately, the Weimar Constitution had broken under emergency government.

Is there any way for Schmitt's sovereign thesis to reconcile with the concept of the rule of law? For now, suffice it to say that the rule of law is opposed to "rule of man." A few options are possible. Firstly, one can claim that the sovereign thesis has its own immanent restraint. Because Schmitt's regime is grounded on popular support of homogeneous "demo," sovereign will not keep its power unless it successfully secures homogeneity in substance with the demo. However, the immanent restraint does not keep the sovereign thesis from being the seed of dictatorship because, even though a sovereign is dethroned, another sovereign of the *same* nature will accede to the throne. As long as emphasis is put on sovereignty rather than its limit, arbitrariness of sovereigns will likely be repeated. Conceptually, there is no controlling mechanism against the sovereign's arbitrary exercise of power in Schmitt's theory.

Not surprisingly since the September 11 attacks, one can find the Schmittian tint in some of the contemporary constitutional theories even in the United States. This position takes the departmentalist position that the Constitution entitles the President to disregard different constitutional construction suggested by the courts.⁴⁶ Michael Stokes Paulson is arguably taken as a scholar taking this position.⁴⁷ However, Paulsen withdraws from the implications of his departmentalism by attempting to defuse concerns about the "President is sovereign" position by proffering the possibility that the President's power can still be limited. He claims that the risk of the

46. Departmentalism reminds me of Schmitt's determinism. According to Schmitt, the gap between abstract norm and the particular situation is concealed under normal circumstances, in the state of exception, however, the gap suddenly becomes patent and thus leads to open "decisionism." For departmentalism, see George Thomas, Ronald Reagan and the Constitution (Feb. 6, 2005), <http://claremont.org/writings/050207thomas.html> (detailing academic resurgence of departmentalism) (last visited Dec. 6 2009). See Tushnet, *supra* note 15, at 880.

47. Michael Stokes Paulson, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1296-97 (2004); Levinson, *supra* note 1, at 717.

President's arbitrary exercise of power would still be hedged because Congress could impeach him. This is the second option.

However, I believe that Paulsen's idea is too optimistic to accept. As Tushnet argues, Paulsen's response is unavailing against Schmitt's point because Paulsen's position has "no conceptual resources with which to challenge a decision by the President, anticipating impeachment, to use his power as Sovereign as the basis for directing military officials to deploy troops to prevent Congress from meeting."⁴⁸ Furthermore, the true Schmitt's position would occur when the Constitution properly construed does not allow the President to take actions that he believes to be essential to the state's survival, but the President takes such actions nonetheless.⁴⁹ As a matter of concept, therefore, Schmitt's sovereign thesis obviously contradicts with the rule of law.

Thirdly, the sovereign thesis itself can be constitutionalized.⁵⁰ This option tries to normalize exceptionality. For example, the Constitution can be construed such that the President has the power to disregard a judicial order in case of an emergency even if the courts provide a different construction.⁵¹ However, it is "naive to regard the Constitution as speaking clearly to the resolution."⁵² The rule of law, the core principle of liberal constitutionalism suggests the primacy of abstract normative principles over concrete political decisions. For Schmitt, however, the opposite is true. "Normative principles cannot have an effect on human society unless they are interpreted by particular agents and applied to particular circumstances. Particular perspectives are thus always involved in the implementation of normative principles and undermine their claim to universal validity."⁵³

Instead of the President, one can substitute courts as sovereign.⁵⁴

48. Mark Tushnet, *Our Perfect Constitution' Revisited*, in *TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES* 131, 156 n.80 (Peter Berkowitz ed., 2005).

49. I do not believe that any President, no matter how he is naked and outspoken, has taken this position. Dictatorial leaders know it more rational to insist that their exercise of power devotes to salvation of nation and that Constitution orders him to do so.

50. According to Clinton Rossiter, this idea goes back at least to ancient Rome, which institutionalized the role of a "dictator" who could safeguard the constitutional order in a time of emergency. CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 16 (1948).

51. In addition to the Korean Constitution, art. 76 quoted above, the U.S. and France have also emergency provisions in their Constitutions. U.S. CONST. art. I, § 9, cl. 2. provides as the precondition required to declare a state of emergency, that "when in Cases of Rebellion or Invasion the public Safety may require it." The French CONST. of 1958, art. 16(1) also provides as the precondition that "[w]hen the institutions of the Republic, the independence of the nation, the integrity of its territory, or the fulfillment of its international commitments are under grave and immediate threat and when the proper functioning of the constitutional governmental authorities is disrupted."

52. Levinson, *supra* note 1, at 748.

53. Bielefeldt, *supra* note 16, at 67.

54. At the time of crises, it appears that judicial branch not to mention legislative and executive branches has their own occasions for engaging in "prerogative" decisions that have, at best, an uneasy

However, it is obviously true that the courts acting as sovereign would *not* automatically guarantee the rule of law at work.⁵⁵ It is because judges can also make arbitrary decisions even though the rule of law demands that in making judgment judges should abide by relevant rules.⁵⁶ Even if not arbitrary decisions, most constitutional terms that purport to regulate states of exception will be open to interpretation. The contour of the terms is subject to expansion or contraction by the courts. Ordinary processes of “judge-made law” evolution could develop standards by which the courts could decide whether a crisis at hand satisfied the previously established standards. However, there is too few, if any, of precedents that it is unrealistic to expect the courts to establish the standards by relying on them. Schmitt declares: “What characterizes the state of exception is principally unlimited authority, which means the suspension of the entire existing order.”⁵⁷

Furthermore, as the Legal Realist/Critical Legal Studies properly point out, the interpretation given to such terms might be determined by politics.⁵⁸ As a matter of concept, moreover, emergency cannot be, by definition, defined in advance, which means that there is no applicable rules by which to determine whether crisis takes place.⁵⁹ Conceptually, therefore, the unanticipated nature of the emergency calls for the Schmittian sovereign.⁶⁰ If this is true, then there is no difference in terms of the rule of law between “president is sovereign” and “courts are sovereign” positions. Given the undefinability of emergency, all the law can do is to designate who has the power to act to address the emergency. In Schmitt’s account, the person with the power is the sovereign. If this point is taken seriously, one cannot say that constitutionalization of sovereign thesis means anything more than

relationship with conventional legal norms. For example of such a judicial decision, see *Bush v. Gore*, 531 U.S. 98, 105-06 (2000). In a sense, our constitution may be destined to be “adapted to the various crises of human affairs.” See *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

55. Cf. Tushnet, *supra* note 15, at 879.

56. Charles Evans Hughes once notably stated that “We are under a Constitution, but the Constitution is what the judges say it is.” Charles Evans Hughes, Speech in Elmira, N.Y. (May 3, 1907), in *THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS* 216 (Fred R. Shapiro ed., 1993).

57. SCHMITT, *supra* note 29, at 10.

58. Tushnet, *supra* note 15, at 886. It states that adherents to LR/CLS understands that not to mention states of exception, the normal state of affairs is one in which politics displaces law, understood in the right way. Therefore, put in another way, “there are no ‘states of exception.’”

59. Carl Schmitt wrote that “[t]here exists no norm that is applicable to chaos,” or, perhaps even “crisis.” SCHMITT, *supra* note 43, at 13. By the way, the chaos that pervaded Germany was economic.

60. Schmitt claims that liberal constitutions fool their people as if these constitutions could account for everything. According to Schmitt: The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited. From a liberal constitutional point of view, there would be no jurisdictional competence at all. The most guidance the constitution can provide is to indicate who can act in such a case. SCHMITT, *supra* note 43, at 6-7.

providing that constitution determines who can act in emergency situations.⁶¹ Then, simple institutionalization, whether constitutional or statutory, cannot reconcile between the sovereign thesis and the rule of law as long as the rule of law is understood as a way of limiting sovereign power. There must necessarily be gap of legality in emergency situation. This is, I suppose, the situation for which Schmitt propose his sovereign thesis. This is why one cannot ignore Schmitt at all.

To sum up, there is no way to conceptually reconcile between the sovereign thesis and the rule of law. Such being the case, I come to the following conclusion: to resolve the dilemma, one must find a *practical* way to tame the Schmittian sovereign. In practice, no one cannot negate the possibility of emergencies taking place even in the regime where the rule of law is observed as such in ordinary times. Then, Schmittian sovereign' birth cannot be evaded even in such liberal states as the United States.⁶² Hence, the question now is how to survive even exceptional situations without abandoning its liberal constitution.

A few options are considerable. The first option is to rely on "high politics." Before the discussion of this option, one needs to look at and accept as such the reality involved in the collective resolution of emergency. If a President seeks to suspend the ordinary guarantees of legality by claiming that national security depends on doing so, it is unlikely that anyone will effectively resist him. The courts are also unlikely to provide effective resistance.⁶³ Without effective resistance, a President is in practice sovereign at least in that the President can implement policies with less guarantees of legality. In that case, only politics rather than law can control the exercise of excessive power. In states of exception, indeed, law appears to be displaced by power exercised through politics.

One may have a conception of politics as no more than the exercise of sheer power. However, it is not always wrong to displace law by politics because politics (as well as law) does constrain exercise of power successfully. Here is the place where the point of Legal Realist/Critical Legal Studies becomes relevant. Those views argue that the interpretation of

61. Carl Schmitt links this implication to the nature of emergency. *See* SCHMITT, *supra* note 43, at 13. ("The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited. From the liberal constitutional point of view, there would be no jurisdictional competence at all. The most guidance the constitution can provide is to indicate who can act in such a case.")

62. In fact, "examples of the use of emergency powers and the full-throated defense of the need to do so are alarmingly common throughout American history." Kim Lane Scheppele, *Small Emergencies*, 40 GA. L. REV. 835, 838 (2006).

63. This is an opinion that William Rehnquist, the former Chief Justice of the United States also has. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 224 (1998).

legal terms is determined by *politics*, understood in the right way. In other words, politics replaces law not only in states of exception, but in the normal state of affairs as well. As Tushnet argues, “[e]mergencies [may] merely surface the usually hidden role of politics in determining the content of law.” Then, “to the extent that we are untroubled by the role of law—that is, politics understood in the right way—in regulating society in ordinary times, [one] should not be troubled by the role of politics during states of exception.”⁶⁴

Levinson’s emphasis on “high politics” seems to me to be resonant in a sense with Tushnet’s point. After pointing out difficulties in finding sources of law applicable to the issues of presidential authority in times of emergencies, Levinson confessed that “our resolution to issues of presidential authority in times of emergencies is a matter not of ‘law’ in any standard-model sense, but rather of . . . ‘high politics.’”⁶⁵ As compared to the public choice idea of politics as the vehicle for advancing self-interest narrowly understood, and partisan politician’s idea of politics as a war of tug over offices, high politics should be understood as involving fundamental political vision about the proper way to organize and steer society.⁶⁶ More importantly, high politics should be distinguished from Schmitt’s understanding of politics as the “friend-foe” distinction as well. As Tushnet points out, as long as we are able to develop a politics that is “high” when it matters, the impossibility of constitutionalism should not trouble us. (Here, the point of constitutionalism is to ensure that the people’s liberty will be secured by institutional arrangements, not by the personal characteristics of those holding power.)

The second option is that the precedents set through such high politics can finally build a normative structure which can ultimately constrain the sovereign over time.⁶⁷ Even though a precedent occurs in a particular situation, it transcends the very particularity of that situation because it carries an underlying rationale with a certain degree of normative power. By looking to the concept of a precedent, therefore one can find a way to overcome Schmittian decisionism, even in states of exception.

As noted above, politics, high politics in particular can constrain the sovereign even in states of exception. Nevertheless, however, there are

64. Tushnet, *supra* note 15, at 886.

65. Levinson, *supra* note 1, at 750. According to Levinson, “high politics,” means “an elaboration for our most fundamental political visions for the collective enterprise in self-government.” *Id.* at 887. For more detailed exposition, see Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1062-63 (2001).

66. *Id.*

67. Just as they can work as a mediating link between general norms and the particular situation, precedents can bridge the gap between emergency and normalcy. For reference of precedents as a mediating link, see Bielefeldt, *supra* note 16, at 73.

occasions where states of exception as controlled by politics are problematic. If the matters at hand implicate the most fundamental values that are embedded in fundamental rights in law, one is troubled with the displacement of law by politics.⁶⁸ The reason why fundamental rights are entrenched in the Constitution is exactly because people suspect that ordinary processes of political decisionmaking will fail to respect those rights adequately. Moreover, the time one would like law to exert the most control is especially when the imperatives of national survival in the long run may conflict with the requirements of the fundamental rights in the immediate situation. The issue here is about whether law can control the declaration of a state of exception. I already noted in the above that the purported legal control will be ineffective because, even if emergency is constitutionalized, the interpretation given to such open-ended terms will be determined by politics, understood in the right way.

However, the recognition of this reality should not mean that one should give up making efforts to *judicialize* politics in declaring a state of emergency. No one can negate the possibility that even apparently open-ended constitutional terms can be given concrete content by the courts as a case follows another over time. My point here is that the constraints provided by the Constitution must not be characterized only as *political* even though the interpretation of constitutional terms is realistically of political nature. As cases are accumulated over time, the web of cases will fix the contour to such a large extent that the declaration of an emergency is regulated in a legally meaningful way as well.

As Heiner Bielefeldt notes, the courts should deal with the state of exception, a situation out of the reach of constitutional provisions “in such an attitude as if [they] were setting up a new precedent.”⁶⁹ In other words, the decision coping with the new situation of emergency should “transcend mere arbitrariness in order to do justice at least to the *normative idea* underlying the rule of law.”⁷⁰ The essential element that distinguishes judicial judgment from political decision is that the former takes a form of argumentation. In addition, the principle of equal treatment demands that one should refer to a precedent in every comparable situation. Through the judicial process, the liberal logic forms a basis on which one can challenge sovereign’s decisions.

In this sense, one cannot overemphasize the need to retain the possibility to subject the sovereign’s decision to *ex post facto* review. The Court should retain the authority at least to determine whether the exigency still exists that justifies the deviation from ordinary constitutional norms, however it is

68. Tushnet, *supra* note 15, at 882-83.

69. Bielefeldt, *supra* note 16, at 73.

70. *Id.*

described.⁷¹ It would be abandoning the Constitution if the courts would rubber-stamp sovereign's action allegedly based upon emergency power. If, and only if the practice of such review is settled down, Schmittian sovereign's monstrosity can be meaningfully constrained. It should be noted that "what begins as 'the exception' can, quite easily, be redefined as the new 'normal' over time."⁷² Emergency power first arises when law is indeterminate.⁷³ If the courts give up the judicial authority, however, legal exceptionalism will arise even when law, at least on its face, is most determinate. Without judicial and/or legislative check, dubious legality of policy never becomes the subject of significant public debate. Basic lack of concern on the part of the legislature and the general public in responding to the important issues about the sovereign's prerogatives will mean the permanent emergency, and thus equally permanent sovereign's prerogatives.

Let's think of the example of Abraham Lincoln, widely accepted as one of the three unequivocally greatest presidents in the United States. His unilateral suspension of habeas corpus in the time of Civil War, though he was not impeached, may be seemingly transgressive of what one likes to think of as the basic constitutional order.⁷⁴ Fortunately, however, Lincoln later sought and got retrospective approval from the Congress.⁷⁵ Likewise, a large number of political leaders' decisions seemingly redefining troublesome legal norms underwent at least ex post reviews and were approved by the legislature or the Court in the United States.⁷⁶ By doing this, emergencies are absorbed and rationalized within the system of public law.

One might be concerned that this practice results in "permanent emergency."⁷⁷ However, it seems to me better to normalize emergencies rather than to keep them outside normal governance. If this practice is accepted, emergencies will feature "standardized procedures that regularize

71. The U.S. Supreme Court in *Blaisdell* decides that "[i]t is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends." *Home Building v. Blaisdell*, 290 U.S. 398, 442 (1934).

72. Levinson, *supra* note 1, at 739. Rossiter also stated that "a great emergency in the life of a constitutional democracy will be more easily mastered by the government if dictatorial forms are to some degree substituted for democratic, and if the executive branch is empowered to take strong action without an excess of deliberation and compromise." ROSSITER, *supra* note 50, at 288.

73. WILLIAM SCHEUERMAN, CARL SCHMITT: THE END OF LAW (1999), links Schmitt's theory to the critique of legal indeterminacy.

74. His action was found unconstitutional by Chief Justice Roger Taney in *Ex parte Merryman* 17 F. Cas. 144, 148-49 (C.C.D. Md. 1861) (finding that only Congress can suspend the privilege of the writ). For a recent review of Lincoln's decision, see Paulson, *supra* note 47, at 1257.

75. This is the case with Franklin Roosevelt as well. See Scheppele, *supra* note 62, at 849.

76. For more detailed reference to such examples, see generally Levinson, *supra* note 1; Scheppele, *supra* note 62.

77. See Scheppele, *supra* note 62, at 837-38. For the historical evidences of the use of emergency powers, see Levinson, *supra* note 1, at 703-27.

and contain them,” and these procedures can be “specified in ordinary and not extraordinary law.”⁷⁸ In the beginning, judges will be surprised at the lack of unambiguous authority to resolve issues of presidential authority in times of emergencies. Moreover, courts are usually indecisive “because of the judicial practice of dealing with the largest questions in the most narrow way.”⁷⁹ Nevertheless, judicial efforts should not be abandoned. Without judicial check, exception will be the norm, and emergency government will replace normal constitutionalism. Retaining judicial review is the only way to prevent the bypassing of constitution in cases of crisis. The normalization of emergencies may be rather seen as the exceptionalization of normalcies.⁸⁰ However, it is only a byproduct. I believe that one would prefer normalization of emergencies (even with the byproduct) rather than the Schmittian model, (i.e. suspending normal law and invoking sovereign prerogative by declaring emergencies). In short, bending of the constitutional framework would be preferred over its breaking.

Let me finish this chapter with a Korean case. Korea has undergone political change over the past 20 years. The most dramatic event may be the prosecution of former presidents, Chun Doo-hwan and Roh Tae-woo in 1995.⁸¹ The then-incumbent President Kim Young-sam directed his ruling party to enact a law to prosecute Chun and Roh for their respective roles in 1979 coup d’etat and 1980 bloody crackdown on Korean citizens in Kwangju. This law, “Special Act Concerning the May 18th Democratization Movement” (“the Act”) was mainly enacted to seek retribution for the past acts of bloodshed and military usurpation. However, because the law authorizes prosecution of a past act for which the statute of limitation has already run, it raises, with many other, issues about its retroactivity, and whether it is a violation of the Korean Constitution’s prohibition against ex post facto laws. Although these challenges to the Act were formidable, “few Korean people, if any, felt much sympathy for the accused, whose acts showed total disregard for the Constitution which they now seek to hide behind.”⁸² Against the background, the Constitutional Court’s decision was announced in 1996.⁸³ My point here is not about the constitutionality of the

78. Scheppelle, *supra* note 62, at 839.

79. *Youngstown Sheet v. Sawyer (Steel Seizure)*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

80. See Scheppelle, *supra* note 62, at 839.

81. The following heavily relies on David M. Waters, *Korean Constitutionalism and the ‘Special Act’ to Prosecute Former Presidents Chun Doo-Hwan and Roh Tae-Woo*, 10 COLUM. J. ASIAN L. 461 (1996).

82. *Id.* at 462.

83. On the issue of whether the Act constitutes an unconstitutional retroactive law, five of the nine Justices declared the Act was unconstitutional. On the other hand, the four remaining Justices agreed that though the Act may be retroactive, it is not unconstitutional because retroactive laws may be acceptable under the particular circumstances of the case. However, the Act was not struck down

Act, but about the fact that both the coup d'état and the enactment of the Act were reviewed in a judicial manner by the Court.

V. CONCLUDING REMARKS

Liberal democracy has its own deficiencies. In emergency situations someone, the president, the court or whoever the case may be, has to take decisive action to cope with the emergency. As discussed above, there is inherent risk that any such exercise of sovereign power may lead to its abuse. However, it is impossible to put in place a rule to address such abuse in advance because of the unpredictability of emergencies. For example, it is impossible for one to address all the possible eventualities in a given contract because of the difficulty in predicting the differing possibilities. Therefore, to a certain extent, one has to rely on both parties' good faith and fair dealing to resolve situations not specifically addressed in contract.

This example reminds me of Wittgenstein's insightful statement: "no course of action could be determined by a rule, because every course of action can be made out to accord with the rule."⁸⁴ If one would accept Wittgenstein's view, one would find that indeterminacy can be seen as inherent in the concept of rule of law itself.⁸⁵ Wittgenstein, however, provides an exit out of this paradox: "there is a way of grasping a rule which is not an interpretation."⁸⁶ Quite often, indeed, one can grasp the meaning of a rule right away without recourse to any interpretation. In this case, the meaning of a rule is determined by conventions widely established in society. In short, Wittgenstein's point is that interpretation is required only when established linguistic rules and conventions underdetermine the meaning of an expression.⁸⁷ I think that Wittgenstein's view implicates a lot for the question this essay seeks to answer. The key to resolving the problem of indeterminacy in rule of law in states of emergency would be to build up conventions, whether legislative or judicial, necessary to control sovereign's exercise of emergency power.

On the other hand, if one would take a functionalist definition of the rule of law, one would draw the same conclusion. For example, Friedrich A. Hayek understands the rule of law such that it "make[s] it possible to foresee

because in Korea a legislative act will not be deemed unconstitutional unless at least six of the nine Justices declare it to be unconstitutional. Constitution of the Republic of Korea art. 113(1). For more detailed information, see *id.* at 469-76.

84. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 69 (3d ed., 2001).

85. Yasuo Hasebe, *The Rule of Law and Its Predicament*, 17 *RATIO JURIS* 489 (2004).

86. WITTGENSTEIN, *supra* note 84.

87. For more detailed reference, see ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY*, ch. 2 "Meaning and Interpretation" (Hart Publishing 2d ed. 2005); Hasebe, *supra* note 85, at 494.

with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge."⁸⁸ If the goal is to reach the state of Hayekian legal system, I would say that politics as constrained by appropriate political practices could accomplish the goal as well.

88. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 54 (1944).

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