
OUR SCHMITTIAN ADMINISTRATIVE LAW

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OUR SCHMITTIAN ADMINISTRATIVE LAW

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Our administrative law contains, built right into its structure, a series of legal “black holes” and “grey holes” — domains in which statutes, judicial decisions and institutional practice either explicitly or implicitly exempt the executive from legal constraints. Legal black holes and grey holes are best understood by drawing upon the thought of Carl Schmitt, in particular his account of the relationship between legality and emergencies. In this sense, American administrative law is Schmittian. Moreover, it is inevitably so. Extending legality to eliminate these black and grey holes is impracticable; any aspiration to eliminate the Schmittian elements of our administrative law is utopian.

How do the Administrative Procedure Act¹ (APA) and the larger body of administrative law respond to real or perceived emergencies? I suggest that our administrative law contains, built right into its structure, a series of legal “black holes” and “grey holes.”² Legal black holes arise when statutes or legal rules “either explicitly exempt[] the executive from the requirements of the rule of law or explicitly exclude[] judicial review of executive action.”³ Grey holes, which are “disguised black holes,”⁴ arise when “there are some legal constraints on executive action — it is not a lawless void — but the constraints are so insubstantial that they pretty well permit government to do as it pleases.”⁵ Grey holes thus present “the façade or form of the rule of law rather than any substantive protections.”⁶

David Dyzenhaus and other theorists of the rule of law show that black holes and grey holes are best understood by drawing upon the thought of Carl Schmitt, in particular his account of the relationship between legality and emergencies. If this is so, and in this sense, my claim is that the administrative law of emergencies just is Schmittian.⁷

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¹ 5 U.S.C. §§ 551–559, 701–706 (2006).

² Law Lord Johan Steyn coined the term “legal black hole,” Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1, 1 (2004), and David Dyzenhaus coined the term legal “grey hole,” DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 3 (2006).

³ DYZENHAUS, *supra* note 2, at 3.

⁴ *Id.*

⁵ *Id.* at 42.

⁶ *Id.* at 3.

⁷ By “administrative law,” I mean the administrative law of the federal government of the United States. I focus on the post-9/11 period and on emergencies implicating national security,

Moreover, the existence of these black and grey holes is inevitable. The aspiration to extend legality everywhere, so as to eliminate the Schmittian elements of our administrative law, is hopelessly utopian.

Although I will examine both the black and grey holes of our administrative law, I will focus especially on the latter. Administrative law is built around a series of open-ended standards or adjustable parameters — for example, what counts as “arbitrary” or “unreasonable,” whether evidence is “substantial,” whether a statute is or is not “clear” — that courts can and do adjust during perceived emergencies to increase deference to administrative agencies. When the intensity of judicial review is reduced sufficiently far, it becomes effectively a sham, and a grey hole arises. This process requires no change in any of the nominal legal rules, and is difficult even to specify in the abstract, let alone to monitor or check. Importantly, these grey holes are a product both of legislative action in the text of the APA, and of judicial action in subsequent cases. As we will see, rule-of-law theorists find grey holes more objectionable than black holes, because the latter are at least openly lawless, whereas the former present a façade of law; but as we will also see, grey holes are unavoidable in administrative law, so decrying their existence is pointless.

I explain these claims through an overview of the APA and surrounding legal doctrine. My focus is on administrative law in the trenches — in the federal courts of appeal — rather than on the Supreme Court’s administrative law. The former is the terrain in which administrative law actually operates, and I will attempt to show that lower courts after 9/11 have applied the adjustable parameters of the APA — “arbitrariness,” “reasonableness,” and so on — in quite deferential ways, creating grey holes in which judicial review of agency action is more apparent than real.

Part I briefly introduces Schmitt’s thought on emergencies and the critiques offered by theorists committed to a strong version of the rule of law. Against this backdrop, I state my main theses and clarify my limited ambitions. Part II documents the black and grey holes of administrative law. Part III argues that the black and grey holes are unavoidable, for practical and institutional reasons; that contrary to the suggestions of several scholars, there is no such thing as “ordinary” administrative law, conceived as an alternative to exceptional defer-

rather than on economic emergencies or on emergencies arising from natural disasters or environmental change. (By “emergencies,” then, I mean security emergencies unless otherwise specified.) Many of the points I will make apply in those other settings as well, although some do not. For an account of Schmitt’s thinking about economic emergencies, see William E. Scheuerman, *The Economic State of Emergency*, 21 *CARDOZO L. REV.* 1869, 1882–91 (2000); for some similarities and differences between security emergencies and economic emergencies, see Bernadette Meyler, *Economic Emergency and the Rule of Law*, 56 *DEPAUL L. REV.* 539, 546–52 (2007).

ence to the executive during emergencies; and that proposals to handle executive emergency powers through an “institutional process” approach that focuses on congressional authorization are largely futile, because vague statutory authorizations just create grey holes in any event.

So much for the main argument and its implications. Part IV speculates about some possible extensions. I suggest that the so-called “new legal realism,” a body of political science work on the determinants of judging, should examine judicial perceptions of emergency and whether the lower federal courts have shown increased deference to administrative agencies after 9/11 in cases related to national security; that emergencies are a partial cure for the ossification of administrative policymaking; and that the Supreme Court’s attempts to ensure judicial review of executive action after 9/11 cannot prevent lower courts from paying more deference to executive and administrative national security decisions than the Court might like — a situation that is the mirror image of the famous clash between the Court and the D.C. Circuit before and after *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*⁸

I. CARL SCHMITT VERSUS THE RULE OF LAW

I will begin by providing necessary background and by stating my theses and their limits. Section A introduces Schmitt’s thought, while section B introduces the critiques I will examine. Section C explains my aims and clarifies some terms.

A. *Schmitt’s Account of Emergencies*

Carl Schmitt was a Weimar and Nazi jurist,⁹ and a searching critic of the constitutional and legal commitments of liberal democracies.¹⁰

⁸ 435 U.S. 519 (1978) (rebuking the D.C. Circuit for imposing heightened procedural requirements on agencies without statutory warrant).

⁹ Schmitt was a prominent legal theorist and public intellectual of the Weimar Republic, and did most of his important work between 1918 and 1933. During the Weimar period he was an ally of conservative forces opposed to the more radical Nazis, but he joined the Nazi party when it came to power in 1933 and became for a time one of its leading jurists. He fell from grace in 1936, after elements of the party accused him (quite plausibly) of opportunism. See generally JOSEPH W. BENDERSKY, *CARL SCHMITT: THEORIST FOR THE REICH* 222–42 (1983); ELLEN KENNEDY, *CONSTITUTIONAL FAILURE: CARL SCHMITT IN WEIMAR* 11–37 (2004). Schmitt’s writings that I cite and draw upon here all predate his switch to Nazism, but in any case, his ideas must be judged on their intellectual merits.

¹⁰ For useful introductions to and perspectives on Schmitt, see generally KENNEDY, *supra* note 9; LAW AS POLITICS: CARL SCHMITT’S CRITIQUE OF LIBERALISM (David Dyzenhaus ed., 1998) [hereinafter *LAW AS POLITICS*]; and WILLIAM E. SCHEUERMAN, *CARL SCHMITT: THE END OF LAW* (1999).

Schmitt's general constitutional theory¹¹ has long been a major influence on continental legal theorists, and his scathing critique of parliamentary democracy is also famous.¹² For present purposes, however, we need only examine what is arguably Schmitt's most famous contribution: his claim that emergencies — what Schmitt called “the exception”¹³ — pose an insuperable problem for the aspiration of liberal democracies to govern through the rule of law. What follows is a thumbnail sketch of Schmitt's views, largely drawn from secondary sources and aiming to track the scholarly consensus. For my purposes here, nothing more sophisticated is necessary.¹⁴

In a 1921 work on Roman dictatorship, Schmitt distinguished between “commissarial” and “sovereign” dictatorship.¹⁵ The former he saw as a legally regulated form of dictatorship that temporarily suspends the ordinary law in order to take emergency measures aimed at restoring the status quo ante the emergency; the latter he saw as a type of dictatorship, exemplified by the Bolshevik dictatorship of the proletariat, that aims to remake the legal and social order according to some master plan.¹⁶ Schmitt thought that the former type of dictatorship could be subjected to the rule of law, in the sense that law could specify, in advance, the powers of the commissarial dictator and the mode of his appointment.¹⁷

A year later, however, Schmitt broke with his own earlier view and sharpened his critique of the rule of law.¹⁸ In a work entitled *Political Theology*, Schmitt offered a more radical account of emergencies, arguing that liberal democracies committed to the rule of law have no theory of exceptional states and that “[s]overeign is he who decides on the exception.”¹⁹ The many interpretive ambiguities surrounding this work should not obscure its main import. The legal systems of liberal

¹¹ Schmitt lays out his theory in CARL SCHMITT, *VERFASSUNGSLEHRE* (1928), recently translated by Jeffrey Seitzer, see CARL SCHMITT, *CONSTITUTIONAL THEORY* (Jeffrey Seitzer ed. & trans., 2008) (1928).

¹² See CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* (Ellen Kennedy trans., MIT Press 1985) (2d ed. 1934).

¹³ CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., MIT Press 1985) (1922).

¹⁴ For present purposes I take what follows as a fair reading of Schmitt, although it may owe more to the larger body of post-9/11 commentary that has extrapolated from and (no doubt) modified Schmitt's ideas.

¹⁵ See Richard Wolin, *Carl Schmitt, Political Existentialism, and the Total State*, 19 *THEORY & SOC'Y* 389, 396–97 (1990). See generally CARL SCHMITT, *DIE DIKTATUR: VON DEN ANFÄNGEN DES MODERNEN SOUVERÄNITÄTSGEDANKENS BIS ZUM PROLETARISCHEN KLASSENKAMPF* (1921).

¹⁶ John P. McCormick, *The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers*, in *LAW AS POLITICS*, *supra* note 10, at 217, 220.

¹⁷ *Id.* at 218–19.

¹⁸ *Id.* at 223–24.

¹⁹ SCHMITT, *supra* note 13, at 5.

democracies cannot hope to specify either the substantive conditions that will count as an emergency, because emergencies are by their nature unanticipated, or even the procedures that will be used to trigger and allocate emergency powers, because those procedures will themselves be vulnerable to being discarded when an emergency so requires.²⁰ In general, according to one rendition of Schmitt, “[o]ne cannot use law to determine when legality should be suspended.”²¹ At most, Schmitt thought, liberal legalism can specify *who* has the power to determine whether there is an emergency,²² but not the procedures or substantive conditions by which and under which emergency powers are triggered.

Schmitt’s complex thought has given rise to an ever-growing body of commentary, especially after 9/11 restored the topic of emergency powers to prominence.²³ A great deal of this work is jargon-laden, excessively conceptual, and obscure, as is indeed a great deal of Schmitt’s own work. Moreover, it can plausibly be argued that Schmitt’s main claims are not wrong, but overstated:

[Schmitt] focuses on valuable but limited facets of the rule of law — the aspirations for clarity and prospectiveness — to pursue the extreme conclusion that law *never* constrains emergency power. Schmitt is probably beating a straw man, however. In fact, *no* legal norm can ever fully capture all future cases which potentially fall under it.²⁴

While this point is convincing, nothing in the argument I present here requires that the strongest versions of Schmitt’s thesis be correct. I require only a modest version of Schmitt, quite compatible with the criticism that less modest versions of Schmitt are unconvincing.

In the modest version, once the layers of interpretive dross and continental conceptualisms are cleaned off of Schmitt’s thinking, what remains are several important mid-sized and largely institutional or

²⁰ Schmitt focused on the fundamental absence of constraints on executive power, but it is only a short extension of his thought to find procedural constraints on executive power to be infirm. See Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* 39, 48–49 (Mark Tushnet ed., 2005). But cf. William E. Scheuerman, *Emergency Powers and the Rule of Law After 9/11*, 14 J. POL. PHIL. 61, 65–66 (2006) (arguing that, while a determinative substantive definition of emergency could be impossible, procedures for deciding the existence of an emergency may be successful and sustainable).

²¹ Tushnet, *supra* note 20, at 47 (citing Louis M. Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441 (2004)). For the suggestion that this rendition is actually more radical than Schmitt’s own view, see Scheuerman, *supra* note 20, at 73 n.52. I state these views for completeness, but nothing on my thesis turns on how exactly this exegetical disagreement should be resolved.

²² See SCHMITT, *supra* note 13, at 7.

²³ See, e.g., GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., Univ. of Chi. Press 2005) (2003); William E. Scheuerman, *Carl Schmitt and the Road to Abu Ghraib*, 13 CONSTITUTIONS 108 (2006); Scheuerman, *supra* note 20.

²⁴ Scheuerman, *supra* note 20, at 65.

empirical insights. Emergencies cannot realistically be governed by ex ante, highly specified rules, but at most by vague ex post standards; it is beyond the institutional capacity of lawmakers to specify and allocate emergency powers in all future contingencies; practically speaking, legislators in particular will feel enormous pressure to create vague standards and escape hatches — for emergencies and otherwise — in the code of legal procedure that governs the mine run of ordinary cases in the administrative state, because legislators know they cannot subject the massively diverse body of administrative entities to tightly specified rules, and because they fear the consequences of lashing the executive too tightly to the mast in future emergencies. As we will see, all of these institutional features are central to our administrative law, and they create the preconditions for the emergence of the legal black holes and legal grey holes that are integral to its structure.

B. The Rule of (Administrative) Law

Schmittian ideas have come in for important criticism after 9/11. Here I will highlight two strands of this criticism that are relevant for administrative law: theories that praise the rule of law and aspire to extend law's empire to encompass even emergency policymaking by the executive; and theories urging that emergency action by the executive should be subjected to ordinary administrative law, rather than remaining as a separate sphere governed at most by military rules and practices. Although the latter theories are pitched at a more institutional level than the former, we will see that from a certain perspective the two strands of theory are complementary, indeed identical. And I shall suggest that both rest on the same false premise and can be undermined by the same line of argument.

For concreteness, I will focus on a recent book by David Dyzenhaus that offers a powerful critique of Schmitt and related views. Dyzenhaus distinguishes between the “rule of law” and “rule by law,”²⁵ a distinction that is roughly equivalent to the jurisprudential distinction between the “thick” and “thin” versions of the rule of law. “Rule by law” (or the thin rule of law) is compliance with whatever duly enacted positive laws there happen to be. By contrast, the “rule of law” (or the thick rule of law) requires more than compliance with whatever duly enacted laws there happen to be; it also requires adherence to a broader set of principles of legality, most famously expressed by Lon Fuller.²⁶ Rule by law lacks content, whereas the rule of law adds a broad set of procedural and substantive norms associated with liberal legalism and, in America and the Commonwealth countries, the com-

²⁵ See, e.g., DYZENHAUS, *supra* note 2, at 18.

²⁶ See generally LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969) (1964).

mon law. In this sort of schema, “rule by law” authorizes legislators or other lawmakers to create legal black holes — law-free zones that are themselves created by law. Lawmakers may also create grey holes, which appear to comport with the rule of law but really do not. Imagine a statute or other legal rule specifying that notice will be given of new executive rules, except when the executive deems it a bad idea to do so.

Against this backdrop, critics such as Dyzenhaus urge the elimination of legal black holes and (especially) grey holes.²⁷ They say that a body of law containing black holes and grey holes is inconsistent with the rule of law, by which they mean the thick rule of law. They worry that rule by law is a bad approach to regulating executive action during actual or perceived emergencies, because excluding the rule of law will end up giving away even rule by law, resulting in a law-free zone of unfettered executive discretion. Dyzenhaus suggests that the appropriate lens for understanding these issues is the thought of Schmitt.²⁸ On Dyzenhaus’s rendition, “[i]f we are to answer Schmitt’s challenge, we have to be able to show that, contrary to his claims, the exception can be banished from legal order.”²⁹

Other critics suggest that executive action arising from war or emergency should be governed by “ordinary” administrative law, as opposed to some extraordinary law applicable during emergencies.³⁰ In one sense, this view is the opposite of Dyzenhaus’s, because it supposes that administrative law contains no black or grey holes at all. Dyzenhaus, by contrast, thinks that the actual record of administrative law, at least judge-made administrative law, is rather depressing; judges have usually abandoned the thick rule of administrative law during emergencies. (As I will discuss in Part III, Dyzenhaus also believes that legislators can do better, and will do so once they have the right jurisprudential views.)

But at a deeper level there is common ground between these two strands of theory, between the rule-of-law critique and the administrative law critique. Together, the two strands argue for the rule of administrative law. The difference is just that one presupposes that black and grey holes exist in administrative law, but that they can and should be eliminated, while the other presupposes that they do not ex-

²⁷ See David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005, 2026 (2006) (“[G]rey holes are more harmful to the rule of law than black holes.”).

²⁸ See generally *id.*

²⁹ *Id.* at 2029.

³⁰ See, e.g., Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 519–21 (2005); Peter Raven-Hansen, *Detaining Combatants by Law or by Order? The Rule of Lawmaking in the War on Terrorists*, 64 LA. L. REV. 831, 843–50 (2004).

ist at all. On either view, however, the desired end state is a legal regime for regulating executive action during emergencies that does not contain either black or grey holes. Against both views, I will argue in Part III that black and grey holes are inevitably integral to administrative law, and that because their presence is inevitable, there is no point in condemning them. To do so is quixotic.

C. *Two Claims*

In Parts II and III, respectively, I will offer two basic claims. Part II suggests that administrative law is Schmittian, in the sense that it is built around a series of black holes and grey holes that are integral to its structure. Part III suggests that for practical and institutional reasons, administrative law cannot realistically be otherwise. These claims require clarification.

1. *Schmittian Administrative Law.* — My largest claim is that American administrative law is itself Schmittian. What can this claim mean? How can a body of law be described as Schmittian? After all, as we have seen, Schmitt's most famous claim is that liberal legalism cannot, even in principle, specify rules that govern all future contingencies.³¹ The exception, the unforeseen circumstance that creates an emergency, will always overhang the system of liberal legalism and potentially disrupt it. At most, Schmitt argued, a liberal legalist system can specify who will have the power to act during an emergency, but not what counts as a valid exception.³² In this sense, it seems oxymoronic to describe an elaborate system of rules, like American administrative law, as Schmittian.

But here is a thought experiment. Imagine a legal rule — embodied in a constitution or in a framework statute like the APA — specifying that executive action will always be reviewable in court for conformity with law, except when legislators or the judges decide that an exception is warranted (that is, the action is “committed to agency discretion by law,” where “law” is understood in a loose sense). Or, alternatively, that executive action is always reviewable for failure to conform to the dictates of reason (that is, for “arbitrariness”). Or, the statute might specify that agencies must follow an elaborate set of procedures, but also specify that agencies can dispense with those procedures when they have reason (“good cause”) to do so.

This legal scheme itself sets up black holes and grey holes, at least potentially. The rules it specifies seem lawlike, and in the thin sense are lawlike; but in the thick sense they are not lawlike at all, or need not be anyway. They are just a delegation to legislators and judges to

³¹ See *supra* p. 1100.

³² See Scheuerman, *supra* note 20, at 65.

decide, in the future, whether to follow and enforce the underlying legal rules against the executive, and there are no specified standards for making that decision. The relevant actors might apply the rules in relatively thick ways in one period — dialing the adjustable parameters of review upwards — but in thin or even façade-like ways in other periods. Such a “law” comports entirely with Schmitt’s idea that the liberal lawmaker might specify, in advance, who is to exercise judgment over the exception, but that lawmakers cannot specify what will count as an exception itself; everything is left to the judgment of future actors in future circumstances. At the heart of the system of administrative rules are law-free zones and open-ended standards. When the intensity of review under these standards becomes sufficiently low, grey holes arise.

I want to call a legal scheme like the one I have imagined a “Schmittian law,” and to say that a lawmaker who would create it is usefully described as a “Schmittian lawmaker.” And then my claim is that American administrative law quite closely resembles this law, and that the legislators, presidents, judges, and other actors who created the structure of American administrative law acted (jointly) as Schmittian lawmakers.³³ Of course they did not know they were doing so, as such. Doubtless none or few of them had ever heard of Schmitt. But that is what they did nonetheless.

So although there is a sense in which “Schmittian law” is an oxymoron, there is another sense in which it is not. As I understand it, this latter sense fits with Dyzenhaus’s understanding of Schmitt, and with his view that “[i]f we are to answer Schmitt’s challenge, we have to be able to show that, contrary to his claims, the exception can be banished from legal order.”³⁴ This is the key point, I will suggest, that makes our administrative law Schmittian. The exception cannot, realistically, be banished from administrative law; exceptions are necessarily built into its fabric.

³³ As Bernadette Meyler rightly pointed out to me, Schmitt tends to write as though exceptions are determined by a single sovereign, rather than jointly by a system composed of multiple actors. Whatever Schmitt’s assumptions, however, I do not see that such a restriction is integral to the logic of his views. Everything that Schmitt says about emergencies, exceptions, and sovereignty could apply just as well to, say, a triumvirate or a small ruling junta. If so, then the further extension to a complex administrative state is unobjectionable, although the difference in institutions will of course create pragmatic differences. As I discuss in Part III, moreover, the pragmatic circumstances of the modern administrative state actually strengthen Schmitt’s argument. For an overview of attempts by German legal theorists of the 1930s and 1940s to reconcile the administrative or welfare state with a strong commitment to the rule of law, see WILLIAM E. SCHEUERMAN, *BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW* (1994). My argument in Part III is that any project of subjecting the administrative state to full legality is doomed to fail, at least in the American case, and probably more generally.

³⁴ Dyzenhaus, *supra* note 27, at 2029.

2. *Schmittianism As a Matter of Degree.* — The claim is not that our system of administrative law is maximally Schmittian. One could easily imagine a system whose black holes and grey holes are far larger than in our system. In this counterfactual system of administrative law, there would be a presumption against judicial review of executive action, unless Congress clearly indicated otherwise; stringent requirements for access to courts, including narrow doctrines of constitutional and statutory standing; and aggressively broad construction of the APA's various exceptions for administrative action relating to military and foreign affairs and for emergency administrative action, all of which are explained in detail in Part II. Of course our system is not like that, not always anyway.

At the other end of the continuum, however, one could imagine a system of administrative law that is minimally Schmittian or even not Schmittian at all. In this sort of system, all administrative action would be subject to review under "ordinary" legal tests for statutory authority, procedural validity, and reasoned decisionmaking. There would be no categorical exclusions of executive action, no exceptions for military or diplomatic functions or for emergencies, and perhaps not even any special "deference" to executive decisionmaking on the merits. Rather, judges would quite simply decide whether, in their view, executive action comports with relevant statutes and constitutional rules, and would take a hard look at the reasonableness of agency policy choices. Crucially, in answering those questions, judges would draw upon thick background principles of legality of the sort that Fuller describes, principles of procedural regularity and fairness.

This system, too, is a hopeless fantasy. Our administrative law is not like that either, and it never will be, or so I will suggest. Rather our system has substantial black holes and grey holes, and it will inevitably continue to do so. That the black holes and grey holes could be still larger is, for my purposes, neither here nor there.

3. *Emergencies and Exemptions.* — Of course not all the black and grey holes are automatically triggered during "emergencies," if these are understood as extreme crises, with 9/11 as the paradigmatic security emergency. However, all of the black and grey holes *can* become relevant to emergencies. As we will see, administrative law exempts military functions and uniquely presidential functions from its purview, and these exemptions will often be implicated by security emergencies. Although many of the other black holes and grey holes are seemingly more mundane, they too can become relevant to an emergency at any time. Where administrative law says that agencies can dispense with procedural requirements if they have "good cause" to do so, the good cause standard is an adjustable parameter that can be invoked by an agency, and interpreted broadly by a court, in circumstances of perceived emergency. Black and grey holes need not address, on their face, matters of military exigency or emergency power

in order to be central components of administrative law's treatment of emergencies.

4. *Standards Versus Grey Holes.* — A particular clarification about grey holes is also necessary. A conventional legal perspective would hold that administrative law is, of course, composed of both "rules" and "standards" in the sense in which these terms are used in legal theory.³⁵ And on this perspective, it is unsurprising that where the relevant law creates standards, judges will increase deference to the executive when administrative action touches on sensitive matters of national security and foreign relations, or as emergencies arise. No one thinks that liberal legalism is inconsistent with standards, as opposed to rules, or that it prohibits all judicial deference to the executive, or that it requires judges to redecide all administrative decisions. Is the claim that our administrative law is Schmittian just a claim that it contains standards, or that judges sometimes defer to agencies?

No. A "standard" in the legal theorist's sense is merely a potential grey hole, and the sort of deference that liberal-legalist judges are usually willing to afford is not enough to bring a grey hole into being either. My suggestion is that the standards inherent in administrative law are best understood as adjustable parameters, in which the intensity of review can be dialed up or down. When (and only when) it is dialed down far enough, the apparent availability of judicial review becomes a sham or façade, and a grey hole arises. It is hard to specify, in the abstract, when exactly this occurs, or how deferential review must be to create a grey hole. But it is not necessary to specify that in the abstract. If the examples in Part II are convincing — the proof must be in the pudding — then the reality is that in certain domains, and with respect to certain questions, it is an inescapable fact that judges applying the adjustable parameters of our administrative law have upheld executive or administrative action on such deferential terms as to make legality a pretense. In such cases, judicial review is itself a kind of legal fiction and the outcome of judicial review is a foregone conclusion — not something that is compatible, even in theory, with the banal liberal-legalist observations that administrative law contains standards and permits deference.

II. THE BLACK AND GREY HOLES OF ADMINISTRATIVE LAW

I will lay the groundwork for the later theoretical discussion with an overview of decisions by the federal courts of appeals in cases at the intersection of administrative law and national security, especially after 9/11. It is important to be clear about what this overview is in-

³⁵ See generally, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

tended to show. I do not attempt to prove an empirical hypothesis to the effect that administrative law in the courts of appeals has become more deferential after 9/11, although that may well be true. The examples of law-free zones and sham review I will examine are not evidence of some further hypothesis; rather they are themselves the facts to be established. They show that administrative law in operation contains substantial black and grey holes built into its working structure — that our administrative law is in this sense substantially Schmittian. Not as Schmittian as possible, but much more so than the various camps of rule-of-law theorists and administrative law theorists think is true or desirable.

Section A surveys the black holes of administrative law, while section B surveys the grey holes.

A. *Black Holes*

I will begin by reviewing the many situations in which, expressly or by implication, executive or administrative action relating to war and emergencies is excluded from the reach of the APA. Of course this exclusion, by itself, does not create a legal black hole, for other statutes may supply special avenues of review. In some cases there may also be an avenue of so-called “nonstatutory review.” I return to this point below. However, the existence of an APA exclusion is a necessary and important first step in creating a legal black hole. Because the APA is the only general waiver of federal sovereign immunity in actions seeking nonmonetary relief³⁶ — in other words, the only general charter for judicial review of administrative action — exclusion from the APA means that a black hole will arise unless some special avenue of review is present. In some cases it will be present; in others it will not.

1. *The Definition of “Agency.”* — One of the main functions of administrative law is to regulate the powers and duties of administrative agencies and the processes by which they act. The APA covers “agencies” and “agency action.” But what is an “agency” anyway? The APA initially says that “agency” means “each authority of the Government of the United States, whether or not it is within or subject to review by another agency,”³⁷ unless an exclusion applies, and then gives a detailed list of eight specific exclusions.³⁸ This definition is sweeping, and its structure strongly implies that any federal governmental body not expressly excluded is covered. Can there be federal government bodies that do not fall within one of the listed exceptions

³⁶ See 5 U.S.C. § 702 (2006).

³⁷ *Id.* § 551(1); see also *id.* § 701(b)(1) (providing a nearly identical definition of “agency” for purposes of the APA’s judicial review provisions).

³⁸ See *id.* § 551(1).

yet are not “agencies,” and are therefore excluded from the whole structure of legal regulation of the administrative state?

There can be and are such bodies. Wholesale exclusion from the definition of agency is especially likely for executive bodies with responsibilities related to national security; courts have read the APA to exclude many organizations and institutional forms with critical functions in handling wars and emergencies. Some of these exclusions are explicit, but some are not. As we will see both here and elsewhere, the staggering variety of governmental bodies, and the extreme heterogeneity of the circumstances in which they operate, have made it pragmatically impossible for courts to adhere strictly to the restrictive structure of the APA’s definition of “agency,” or to many of the APA’s other strictures. This illustrates a core Schmittian theme: the administrative state is too varied and complex to be regulated by crisp legal standards formulated in advance.

First and most importantly, the Supreme Court has twice stated that the President is not an agency.³⁹ That proposition is not obvious from the text of the APA’s definition, which as we have seen covers “each authority of the Government of the United States” unless excluded, and which does explicitly exclude “Congress” and “the courts of the United States,” but which says nothing about the President as such. One might well think that by a powerful negative implication the President must be covered. However, in both cases, the Court invoked the opposite default rule: because of the President’s special status and responsibilities, he is not covered by the APA absent a clear statement to that effect.⁴⁰ These holdings exclude from the scope of the APA highly consequential presidential action, such as the questions whether to accept a proposed census count⁴¹ or to accept or reject the recommendations of a base-closing commission.⁴² In these cases, no other statutes or common law rules provided review either; the relevant presidential actions were left unreviewable. The actions themselves did not, of course, concern emergencies or war in any direct way, but the base-closing opinion involved military affairs and was larded with references to the President’s special responsibilities in military and foreign policy.

³⁹ *Dalton v. Specter*, 511 U.S. 462, 470 (1994); *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

⁴⁰ *See, e.g., Franklin*, 505 U.S. at 800–01 (“Out of respect for the separation of powers and the unique constitutional position of the President, . . . [w]e would require an express statement by Congress before assuming it intended the President’s performance of his statutory duties to be reviewed for abuse of discretion.”).

⁴¹ *See id.*

⁴² *Dalton*, 511 U.S. 462.

Second, various types of military tribunals may not be “agencies,” either because they are expressly excluded, or because they do not fall within the definition in the first place. The APA expressly excludes from the definition of agency “courts martial and military commissions” and “military authority exercised in the field in time of war or in occupied territory.”⁴³ These exclusions are infrequently litigated,⁴⁴ but became indirectly relevant in *Bismullah v. Gates*,⁴⁵ a D.C. Circuit opinion about procedural requirements for the Combatant Status Review Tribunals (CSRTs) that the Department of Defense set up to review whether detainees in Guantánamo Bay are enemy combatants. In opinions concerning the denial of a petition for rehearing en banc, one group of judges would have held that the Guantánamo CSRTs count either as “military commissions”⁴⁶ or as a “military authority exercised . . . in occupied territory.”⁴⁷ Another group of judges joined a remarkable opinion stating that CSRTs neither count as “agencies” nor fall within the exclusions for courts martial and military commissions or military authority. On this view, CSRTs are “*sui generis* and outside the contemplation of the APA.”⁴⁸ Notably, neither opinion indicated that the CSRTs counted as “agencies,” despite the breadth of the statutory definition, which as we have seen purports to include everything not falling within a listed exclusion.

2. *What Is “Agency Action”?* — Suppose that a given governmental body does count as an “agency,” and that no explicit or implicit exclusion applies. The next question is whether the agency has engaged in “action” reviewable under the APA. On one possible view, anything that an agency does is “agency action.” The APA (on this account) sorts everything agencies do into one of two bins, “rules” and “orders.” Rules are defined, whereas orders are a catch-all category that includes anything “other than rule making.”⁴⁹

This reading is, however, emphatically not the reading given to the APA by the Supreme Court. In an environmental case decided in

⁴³ 5 U.S.C. §§ 551(1)(F)–(G).

⁴⁴ See, e.g., *McKinney v. White*, 291 F.3d 851, 854–55 (D.C. Cir. 2002) (reading the exclusion of “courts martial and military commissions” from the definition of “agency” in the APA’s judicial review provisions, 5 U.S.C. § 701(b)(1)(F), to preclude judicial review of Judge Advocate General’s denial of request to set aside the verdict of a court martial); *Doe v. Sullivan*, 938 F.2d 1370, 1380 (D.C. Cir. 1991) (holding that the “military authority” exception to agency review did not apply where a claim “entail[ed] no judicial interference with the relationship between soldiers and their military superiors”).

⁴⁵ 501 F.3d 178 (D.C. Cir. 2007), *reh’g en banc denied*, 514 F.3d 1291 (D.C. Cir. 2008).

⁴⁶ See *Bismullah*, 514 F.3d at 1303 n.3 (Randolph, J., dissenting from denial of rehearing en banc) (joined by Judges Sentelle, Henderson, and Kavanaugh).

⁴⁷ See *id.* at 1305–06 (Randolph, J., addendum to dissent).

⁴⁸ *Id.* at 1294 (Ginsburg, C.J., concurring in denial of rehearing en banc) (joined by Judges Rogers, Tatel, and Griffith); see also *id.* at 1294 n.3.

⁴⁹ 5 U.S.C. § 551(6).

2004, *Norton v. Southern Utah Wilderness Alliance*⁵⁰ (*SUWA*), the issue was whether the plaintiffs could force a federal land-management agency to take regulatory action alleged to be required by law. Justice Antonin Scalia, writing for the Court, pointed to the APA's definition of "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*."⁵¹ The definition, Justice Scalia suggested, creates two requirements: to be obligated to engage in "agency action" for purposes of the APA, agencies must be legally obliged to do something that (1) is "discrete" and (2) falls into one of the listed categories ("rule, order, license, sanction [or] relief") or is the equivalent thereof.⁵² Significantly, given Justice Scalia's restrictive view of standing to challenge agencies, his opinion for the Court noted that "[t]he limitation to discrete agency action precludes the kind of broad programmatic attack" the Court had rejected in an earlier environmental case.⁵³

SUWA did not attract much notice at the time, but it was more consequential than first appeared. Although the facts of the case involved a petition to compel agency action said to be required by law, the opinion was explicitly written more broadly, to cover both things that agencies have failed to do and things that agencies have done.⁵⁴ It implied that there are things agencies can do — indeed whole agency programs — that do not count as "action" and thus are not covered at all by the APA. On this view, it may be correct that *if* something is agency "action," then it must fall either into the bin labeled "rulemaking" or the residual bin labeled "adjudication"; some lower courts and other authorities have said something like that.⁵⁵ However, even if that is so, *SUWA* implies there are things agencies do that do not count as "action" in the first place.

SUWA's potential importance became apparent when the plaintiffs in *ACLU v. NSA*⁵⁶ challenged the National Security Agency's program(s) for warrantless electronic surveillance of suspected terrorists. A Sixth Circuit panel dismissed the case on standing grounds, but the lead opinion, presumably in dictum, discussed the APA as well, stating that the terrorist surveillance program was not "agency action" cov-

⁵⁰ 542 U.S. 55 (2004).

⁵¹ *Id.* at 62 (quoting 5 U.S.C. § 551(13) (emphasis added)) (internal quotation marks omitted).

⁵² *See id.*

⁵³ *Id.* at 64 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990)).

⁵⁴ *See id.* at 62 ("[The relevant APA provisions] all insist upon an 'agency action,' either as the action complained of . . . or as the action to be compelled . . ."). This point is not affected by the Court's brief gesture toward a distinction between agency "denial" of requested action and agency "failure to act." *See id.* at 63.

⁵⁵ *See, e.g.,* *Jean v. Nelson*, 711 F.2d 1455, 1475 (11th Cir. 1983), *vacated and rev'd on other grounds*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985).

⁵⁶ 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008).

ered by the APA.⁵⁷ Applying *SUWA*, the opinion seemed to say that the program neither was discrete nor fell into any of the listed categories in the definition of agency action: it was not a rule, order, license, sanction, or relief, or their equivalents. On this view, the program was “generalized conduct,”⁵⁸ not agency action, and moreover it was a type of conduct falling outside the APA’s list.⁵⁹

This analysis is plausible, at least given *SUWA*. Some forms of counterterrorism surveillance, which may use data-mining or random sampling rather than targeted surveillance of individuals, seem a perfect fit for the *SUWA* idea of a general program rather than discrete action. If this sort of program counts as discrete, then *SUWA* is itself mistaken, and its discreteness requirement should be abandoned. The second point — that the program, even if discrete, might not count as agency action because it does not fall into one of the listed bins (“rule, order, license, sanction [or] relief”) — is dubious but not crazy. What makes it dubious is that the structure of the APA’s definition does seem to make “order” a catch-all category for actions that do not count as rules or licenses. However, one might understand “order” as implicitly requiring the application of law to fact, whether or not formal procedures are used in the application. This requirement ties the definition of an order to the notion of adjudication; much of the structure of the APA, and its tacit postulates, treats an order as something that results from adjudication (formal or informal).⁶⁰ On this account, the counterterrorism surveillance program would not count as an “order” — it involved no application of law to fact, but rather just an attempt to find out facts — and would fail *SUWA*’s second prong, the requirement that agency action, even if discrete, must fall within one of the listed categories in § 551(13).

For present purposes, the correctness of *SUWA* or of the lead opinion in *ACLU v. NSA* is beside the point. What is significant is that both opinions contemplate that some agency “conduct” or “practice” will fall beyond the APA’s coverage, which is restricted to “agency action.” On the reading of *ACLU v. NSA* that I have offered, whole programs will do so, if they do not eventuate in discrete action that makes rules, applies law to fact, or licenses private action. A great deal of ex-

⁵⁷ *Id.* at 678.

⁵⁸ *Id.*

⁵⁹ *See id.* at 678–79.

⁶⁰ The definition of “order” as “the whole or a part of a final *disposition*,” 5 U.S.C. § 551(6) (2006) (emphasis added), suggests that orders require adjudication, and the definition of “adjudication” as “agency process for the formulation of an order,” *id.* § 551(7), similarly suggests that orders are the products of adjudication. *See also* Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts — Except When They’re Not*, 59 ADMIN. L. REV. 79, 98 (2007) (“[U]nless the final product of an agency action is a rule, it must be an order, which is the product of an adjudication.”).

ecutive and administrative action relating to wars and emergencies fails one or the other requirement and thus will not be covered by the APA, even if no other exclusion applies.

3. *Exception(s) for "Military or Foreign Affairs Functions."* — Even if there is an "agency" in the picture that has engaged in "agency action," the APA explicitly excludes "military or foreign affairs" functions from its procedural requirements for both rulemaking and adjudication.⁶¹ This means that even where a military or foreign affairs function otherwise falls within the definition of rulemaking or adjudication, there are no applicable procedural requirements under the APA (although of course other constraints, such as due process, may apply). The question is what counts as a military or foreign affairs function.

The legislative history of the APA and the Attorney General's Manual both suggested that the exception should be fairly narrowly construed.⁶² What exactly this meant was deeply unclear, as the exceptions were rarely litigated. Where cases did arise, they seemed inconsistent, varying with some vague judicial impression of the strength of government interests and how central foreign policy was to the administrative action. In litigation over the Haitian refugee crisis of the early 1980s, one court held that a program of administrative detention for refugees did not fall within the exception.⁶³ On the other hand, courts in the same period invoked the exception to immunize from APA review administrative programs for the "voluntary" departure of Iranian nationals during the hostage crisis.⁶⁴ Finally, in *Independent Guard Ass'n of Nevada, Local No. 1 v. O'Leary*,⁶⁵ a Ninth Circuit case from 1995, the exception was held not to cover a Department of Energy personnel regulation governing security guards, who were civilian contractors, at militarily sensitive facilities.⁶⁶

A possible reading of the latter case was that the military functions exception could not apply to agency policies that regulate the behavior of civilians. This reading was, however, expressly rejected by the First Circuit in a post-9/11 case, *United States v. Ventura-Melendez*,⁶⁷ which

⁶¹ 5 U.S.C. § 553(a)(1) (2006) (rulemaking); *id.* § 554(a)(4) (adjudication).

⁶² See S. REP. NO. 79-752, at 13 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 1944-46, at 185, 199 (1946); U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 26-27 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL] (rulemaking); *id.* at 45 (adjudication).

⁶³ *Jean v. Nelson*, 711 F.2d 1455, 1477-78 (11th Cir. 1983), *vacated and rev'd on other grounds*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985).

⁶⁴ See *Nademi v. INS*, 679 F.2d 811, 814 (10th Cir. 1982); *Malek-Marzban v. INS*, 653 F.2d 113, 115-16 (4th Cir. 1981); *Yassini v. Crosland*, 618 F.2d 1356, 1360 (9th Cir. 1980).

⁶⁵ 57 F.3d 766 (9th Cir. 1995).

⁶⁶ *Id.* at 770.

⁶⁷ 321 F.3d 230 (1st Cir. 2003).

interpreted the military functions exception in expansive terms.⁶⁸ The Coast Guard established, by regulation, a temporary security zone around a Navy firing range in waters near the island of Vieques, Puerto Rico. The defendants entered the zone and were detained, and they were later convicted of violating a statute that made it a crime to enter into a naval or Coast Guard facility in violation of a “lawful regulation.” The defendants, however, argued that there was no lawful regulation (for purposes of the criminal statute) because the regulation that established the zone had not been promulgated in accordance with APA procedure. In this indirect fashion, the APA question would control the outcome of a criminal case. Even so, the court issued a capacious reading of the “military functions” exception, holding that a rule regulating civilians — even one that indirectly triggered criminal penalties — could fulfill a military function. In particular, the court said, “[a] rule designed to render safe and feasible the performance of a military function by preventing interference on the part of civilians necessarily serves a military function as well as a civilian one.”⁶⁹ Right or wrong, this is hard to describe as a narrow construction of the military functions exception.

4. “*Committed to Agency Discretion by Law.*” — Even if the relevant governmental body is an “agency,” even if the agency has engaged in “action,” and even if there is no exclusion for a military or foreign affairs function, courts may still decline to review the agency action for conformity with APA requirements. The main mechanism for doing so is the pair of exclusions in sections 701(a)(1) and (2) of the APA, which overcome the APA’s background presumption of reviewability for final agency action where “statutes preclude judicial review”⁷⁰ or where “agency action is committed to agency discretion by law.”⁷¹ In the foundational case, *Citizens To Preserve Overton Park, Inc. v. Volpe*,⁷² the Court read the latter exclusion narrowly, saying it is triggered only when there is “no law to apply.”⁷³ But in subsequent cases, most famously a case involving the dismissal of a CIA employee for homosexuality,⁷⁴ the Court issued decisions precluding review of statutory

⁶⁸ See *id.* at 233 (explaining that a rule establishing a temporary security zone was “well within the concept of military function”). But see *United States v. Mulero-Joubert*, 289 F.3d 168, 171 (1st Cir. 2002) (assuming *arguendo* that the military or “good cause” exceptions applied in a similar case, but reversing conviction on other grounds).

⁶⁹ *Ventura-Melendez*, 321 F.3d at 233.

⁷⁰ 5 U.S.C. § 701(a)(1) (2006).

⁷¹ *Id.* § 701(a)(2).

⁷² 401 U.S. 402 (1971).

⁷³ *Id.* at 410 (quoting S. REP. NO. 79-752, at 26 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 1944-46, *supra* note 62, at 185, 212) (internal quotation mark omitted).

⁷⁴ *Webster v. Doe*, 486 U.S. 592 (1988).

and abuse of discretion claims that were very hard to square with the “no law to apply” test. These cases seemed instead to rest on an implicit assessment of the weight of national security interests.⁷⁵

After 9/11, lower courts have sometimes applied the “committed to agency discretion” exception quite capaciously in national security contexts. In *Riverkeeper, Inc. v. Collins*,⁷⁶ the petitioner requested that the license for two nuclear plants be conditioned on the creation of a no-fly zone and defense measures to protect against terrorist attacks.⁷⁷ The Second Circuit held that such issues are committed to the discretion of the Nuclear Regulatory Commission.⁷⁸ A striking example in which agency action directly impinged on individual interests, yet was held unreviewable as to the important claims, was the Tenth Circuit’s decision in *Merida Delgado v. Gonzales*.⁷⁹ A citizen of Panama received flight training at a federally regulated school in Oklahoma, where one of his fellow students was Zacarias Moussaoui, a co-conspirator in the 9/11 attacks.⁸⁰ Under a federal statute enacted after 9/11, the Aviation and Transportation Security Act, the Attorney General could direct the school not to provide the requested training “because the Attorney General has determined that the individual presents a risk to aviation or national security.”⁸¹ The Attorney General so determined, and Merida Delgado was excluded from further flight training.

The Tenth Circuit found Merida Delgado’s nonconstitutional claims — which were much more plausible than his nearly frivolous constitutional ones — barred under the “committed to agency discretion by law” exception, holding that “the statute gives no basis on which to assess the [Attorney General’s] decision.”⁸² But of course the court might have undertaken garden-variety review for arbitrariness, both of the Attorney General’s factfinding and to ascertain whether the Attorney General had offered a rational connection between the facts found and the choice made.⁸³ The real driver of the decision seems to have been a more general principle that “[i]t is rarely appro-

⁷⁵ Cf., e.g., *Dep’t of Navy v. Egan*, 484 U.S. 518 (1988).

⁷⁶ 359 F.3d 156 (2d Cir. 2004).

⁷⁷ *Id.* at 158.

⁷⁸ *Id.* at 158, 171.

⁷⁹ 428 F.3d 916 (10th Cir. 2005).

⁸⁰ *Id.* at 918.

⁸¹ Aviation and Transportation Security Act, Pub. L. No. 107-71, § 113(a), 115 Stat. 597, 622 (2001).

⁸² *Merida Delgado*, 428 F.3d at 920. For another application of this exception, see *Steenholdt v. FAA*, 314 F.3d 633 (D.C. Cir. 2003), which found that an FAA decision to renew an inspector’s license was committed to agency discretion.

⁸³ See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

priate for courts to intervene in matters closely related to national security.”⁸⁴

This is a perfect example of a generality that contains an adjustable parameter. How rarely is rarely? How much weight is the national security context to be given, and when? Under tests like this it is easy for courts to adjust the parameter implicitly, as the security environment changes and circumstances vary, while adhering in every case to the nominal rules. As we will see, this is the hallmark of a grey hole, rather than a black one; the caselaw concerning agency action “committed to agency discretion by law” thus straddles the two major threats to the thick rule of law.

5. *Other Statutes, Nonstatutory Review, and the Constitution.* — Suppose that one of the foregoing exclusions applies. A black hole may arise, but need not. Judicial review can of course be obtained under other statutes, and judicial review is especially likely, under current doctrine, for constitutional claims. The Court has implied causes of action under constitutional provisions,⁸⁵ and even in cases where agency action is otherwise committed to agency discretion by law as to statutory claims, the Court has allowed review of constitutional claims, professedly in order to avoid the serious constitutional questions that would arise if judicial review of constitutional claims were unavailable.⁸⁶

Finally, there is a diffuse but persistent strand of caselaw that recognizes a form of so-called “nonstatutory review” of administrative and even presidential action. Nonstatutory review is a rather vague doctrine, by no means squarely endorsed by the current Court, that enables judicial review of executive and even presidential action even where no waiver of sovereign immunity applies (and such review itself draws on statutory grants of jurisdiction, remedies, and forms of relief, so “nonstatutory review” is something of a misnomer).⁸⁷ As such, nonstatutory review stands in severe tension with the background principle of sovereign immunity, which the Court has repeatedly endorsed. And as some recent cases suggest, the D.C. Circuit’s caselaw is consid-

⁸⁴ *Merida Delgado*, 428 F.3d at 920.

⁸⁵ See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

⁸⁶ See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 297–98 (2001) (finding statute that repealed judicial review over certain INS actions insufficient to withdraw habeas corpus jurisdiction); *Webster v. Doe*, 486 U.S. 592, 603 (1988).

⁸⁷ Jack M. Beermann, *Common Law and Statute Law in U.S. Federal Administrative Law*, in *ADMINISTRATIVE LAW IN A CHANGING STATE: ESSAYS IN HONOR OF MARK ARONSON* 45 (Linda Pearson, Carol Harlow & Michael Taggart eds., 2008); see also, e.g., 5 U.S.C. § 703 (2006) (providing that if no action is available under the APA, the challenger may employ “any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction”).

erably more hospitable to nonstatutory review than is the Court's own caselaw.

Begin with review of presidential action. In *Dalton v. Specter*,⁸⁸ the Court faced a challenge to presidential action that could not be litigated under the APA (which, as we have seen, does not cover the President). The Court implied that nonstatutory review of presidential action would not lie if relevant statutes "commit[] the decision to the discretion of the President."⁸⁹ The D.C. Circuit has given *Dalton* a rather narrow reading in cases not involving national security, allowing review of highly discretionary presidential action for conformity with statutes.⁹⁰ There are thus real questions about whether the D.C. Circuit's caselaw in this area is compatible with the Supreme Court's. By contrast, in a recent trade case touching upon foreign relations, the Federal Circuit gave *Dalton* a broader reading and denied nonstatutory review of similarly discretionary presidential action.⁹¹

What about nonstatutory review of the actions of subordinate executive officers? Here there is a complex body of lower-court doctrine that defies summary. In broad outline, the D.C. Circuit and other courts following its lead have held that the APA's waiver of sovereign immunity for suits requesting injunctive relief applies, quite counterintuitively, even to suits not brought under the APA.⁹² In such cases, judicial review of administrative action is available. However, where statutes expressly preclude jurisdiction,⁹³ or in suits against government actors that are not "agencies" for purposes of the APA,⁹⁴ plaintiffs may only prevail if they can show that the government actor acted *ultra vires* — a more difficult showing than a simple claim that the actor exceeded its statutory authority.⁹⁵ Nonstatutory review is not al-

⁸⁸ 511 U.S. 462 (1994).

⁸⁹ *Id.* at 474.

⁹⁰ See, e.g., *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002) (reviewing dismissal of challenge to presidential designations of national monuments under the Antiquities Act); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002) (same); *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (allowing review of executive order governing federal contracting).

⁹¹ See *Motion Sys. Corp. v. Bush*, 437 F.3d 1356, 1359 (Fed. Cir. 2006) (rejecting challenge to presidential determination not to grant import relief to domestic industry under U.S.-China Relations Act).

⁹² See *Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006) ("We have previously, and repeatedly . . . [held] that the 'APA's waiver of sovereign immunity applies to any suit whether under the APA or not.'" (quoting *Chamber of Commerce*, 74 F.3d at 1328)).

⁹³ See *Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 492–93 (D.C. Cir. 1988) (citing *Leedom v. Kyne*, 358 U.S. 184 (1958), and describing the "*Leedom v. Kyne*" exception).

⁹⁴ See *Clark v. Library of Cong.*, 750 F.2d 89, 102 (D.C. Cir. 1984) (applying *ultra vires* standard because Library of Congress is not an "agency" under the APA).

⁹⁵ For the Supreme Court jurisprudence on which this kind of nonstatutory review is based — which predates the APA's waiver of sovereign immunity, 5 U.S.C. § 702 (2006) — see *Leedom*, 358 U.S. at 188, which provided limited review where an agency acts "contrary to a specific prohibi-

ways available, even in suits against subordinate executive officers and even under the lower courts' rather expansive caselaw. Moreover, it is by no means clear that the lower courts' law would be fully endorsed by the Supreme Court.

Overall, the scope of nonstatutory review, like the scope of the exception for questions committed to agency discretion, depends upon what the relevant statutes are read to say and upon the scope of discretion they are interpreted to provide. But it is safe to say that where statutes confer discretion directly on the President, *Dalton* is a real obstacle to obtaining nonstatutory review of presidential action. Where plaintiffs challenge the action of lower executive officials, much depends upon the details of the statutory scheme; here generalizations are especially difficult, beyond saying that nonstatutory review is often available but sometimes is not.

Nothing in the claims I advance depends upon the precise scope or justification of either sovereign immunity or nonstatutory review. The overall point is just that exclusion of review under the APA is always an important step toward the creation of a legal black hole, especially for statutory claims. Because the APA is the only general review mechanism in the administrative state, exclusion from its coverage remits the party challenging administrative programs or conduct to finding some special review mechanism, which may or may not exist in particular cases.

Suppose, for example, that there is no detention of a person, so that the writ of habeas corpus cannot be invoked; no constitutional claim, so that the special concerns articulated in *Webster v. Doe*⁹⁶ are inapposite; no other, special statute in the picture provides for review; and the administrative action is discretionary or at least not clearly ultra vires, so that nonstatutory review will not lie (under at least some conceptions of that doctrine's scope). The case, in short, is like *Merida Delgado*, the Tenth Circuit case in which the court found unreviewable the Attorney General's decision to deny flight training to a person deemed a security risk. In such cases, no judicial review is available, and there is no obvious means of nonjudicial recourse. In Dyzenhaus's terms, a legal black hole of emergency discretion has arisen, in large part because of the court's reading of the APA.

Whether such black holes are common is a different question, one that I have not tried to answer. Most agency action is formally reviewable (although judicial review may be quite pro forma, even fictional, as I shall discuss shortly). But neither is it accurate to say that

tion" that is "clear and mandatory", and *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690-91 (1949).

⁹⁶ 486 U.S. 592 (1988).

black holes are nonexistent, or freakishly rare, or that black holes are anomalies in the system for judicial review of agency action. Rather, they are an integral part of that system, the predictable resultant of a background commitment to sovereign immunity combined with APA provisions that immunize the President and executive officials from review in a range of circumstances bearing on national security.

B. Grey Holes

I now turn to the grey holes. For two reasons, the rules in this category are theoretically even more consequential than the rules that create black holes. First, critics like Dyzenhaus find the grey holes more objectionable.⁹⁷ The problem with grey holes, they suggest, is that the apparent constraints on executive action mask the lack of actual constraints; better to expose the lack of constraint on the executive for all to see. Second, and conversely, some critics overlook the pervasive character of the grey holes; these critics suggest that there is such a thing as “ordinary” administrative law that could be used to constrain executive action during emergencies.⁹⁸ The following survey of the grey holes of administrative law will enable me, in Part III, to respond to both sets of critics.

My basic positive claim is that quite ordinary administrative law doctrines, such as “arbitrary and capricious” review of agency policy choices and factual findings, function as grey holes during times of war and real or perceived emergency. By their nature, these doctrines are not, of course, explicitly tied to emergency circumstances (with the partial exception of the “good cause” exception to the main requirements of notice-and-comment rulemaking, discussed below). Rather, these doctrines represent adjustable parameters that courts can and do use to dial up or dial down the intensity of judicial review, as wars, security threats, and emergencies come and go. What makes these doctrines potential grey holes is that even when the parameter is adjusted down to near zero — even when the intensity of review is very weak — the façade of lawlikeness is preserved.

Here too, I focus on court of appeals cases decided after 9/11 and involving some administrative law issue directly or indirectly related to national security, especially counterterrorism. Again, I am not engaged in providing evidence for a hypothesis that the federal courts of appeals have become more deferential to national security claims after 9/11 (though quite possibly they have). For my theoretical purposes, all that needs to be established is that after 9/11, administrative law has incorporated substantial grey holes that are integral to its struc-

⁹⁷ See Dyzenhaus, *supra* note 27, at 2026.

⁹⁸ See, e.g., Masur, *supra* note 30, at 519–21; Raven-Hansen, *supra* note 30, at 843–50.

ture. These grey holes arise when courts applying the standards or adjustable parameters of the APA have dialed down the intensity of judicial review of executive action to the point where review is more apparent than real. The cases in which they have done so are not offered as evidence of some further hypothesis; they are themselves actual examples of grey holes.

1. “Soft Look” Review.⁹⁹ — One of the main adjustable parameters of administrative law involves arbitrary and capricious review under § 706(2)(a) of the APA. The arbitrary and capricious standard governs judicial review of agency policy choices and, with respect to informal proceedings, of agency factfinding. The convention among administrative lawyers of a certain generation is to call this “hard look” review, because of language in the major Supreme Court cases, *Overton Park* and *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*,¹⁰⁰ the high level of scrutiny evident in those decisions, and the searching scrutiny the D.C. Circuit and other appellate courts have often applied to agency policy choices. In at least a substantial set of national security cases after 9/11, however, “hard look” is a misnomer; rather, the cases offer a kind of “soft look” review, under which courts accept looser reasoning in support of agency policies and looser factfinding than would usually be accepted.

Importantly, nothing in the post-9/11 soft look cases changes the nominal legal rules in any way. Rather, courts simply adjust the intensity of scrutiny in ways that are entirely consistent with the linguistic formulas in the governing caselaw. In *State Farm*, in an often quoted formulation, the Court said that “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. . . . [The reviewing court] must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”¹⁰¹ These tests themselves build in a series of adjustable parameters: How rational is rational? How arbitrary is arbitrary? When has adequate consideration been given to relevant factors, and when is an error of judgment clear? Courts at different times can give more or less intense scrutiny to government action while reciting and applying these tests in all good faith. The more subterranean deference courts give to administrative action, the

⁹⁹ The term “soft look” first appeared in a judicial opinion in 1983. See *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1200 (D.C. Cir. 1983) (Scalia, J., dissenting).

¹⁰⁰ 463 U.S. 29 (1983).

¹⁰¹ *Id.* at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)) (citations and internal quotation marks omitted).

softer the look, and the more the arbitrary and capricious test starts to resemble a grey hole — a façade of lawfulness.

To illustrate these points, I begin with a series of cases from the D.C. Circuit in which the court has reviewed decisions by the Treasury Department's Office of Foreign Assets Control (OFAC). OFAC has become an important counterterrorism agency by virtue of its powers to block the assets of "Specially Designated Global Terrorist" organizations (SDGTs), which might otherwise give financial assistance to terrorism. OFAC derives its powers from an executive order issued after 9/11, an order authorized in turn by the International Economic Emergency Powers Act.¹⁰²

The D.C. Circuit has considered and rejected several challenges to OFAC blocking orders, brought by Islamic charities. In *Holy Land Foundation for Relief and Development v. Ashcroft*,¹⁰³ the petition for review was brought by one of the largest Muslim charities in the United States. Finding that the charity was closely linked to Hamas, OFAC blocked all of the charity's assets. The D.C. Circuit considered and rejected challenges based upon the organic statutes, the APA, and due process. Here I consider only the APA challenges; the other statutory issues are taken up below.

Describing the "arbitrary and capricious" standard as "highly deferential" — signaling soft rather than hard look review — the D.C. Circuit briskly found the designation decision and the blocking order nonarbitrary and also supported by "substantial evidence."¹⁰⁴ (This is an example of a common, largely harmless, but technically inaccurate use of the substantial evidence standard in judicial review of informal factfinding, an issue I explain shortly). Moreover, the court also said that the core question was whether the agency's decision was "supported by a rational basis."¹⁰⁵ This formulation often signals a permissive application of the arbitrary and capricious standard. By contrast, where courts adjust the parameter upwards, increasing the intensity of review, they tend to emphasize the Supreme Court's pronouncement that arbitrary and capricious review is more stringent than rational basis review under the constitutional law of due process.¹⁰⁶

The parameter was adjusted downwards even further in a later case, *Islamic American Relief Agency (IARA-USA) v. Gonzales*.¹⁰⁷ The D.C. Circuit upheld OFAC's blocking order under the arbitrary and capricious standard and the substantial evidence standard. (Be-

¹⁰² 50 U.S.C.A. §§ 1701–1707 (West 2003 & Supp. 2008).

¹⁰³ 333 F.3d 156 (D.C. Cir. 2003).

¹⁰⁴ *Id.* at 162.

¹⁰⁵ *Id.*

¹⁰⁶ *See State Farm*, 463 U.S. at 43 n.9.

¹⁰⁷ 477 F.3d 728 (D.C. Cir. 2007).

low, I will explain the relationship between these; for now, let us assume they are the same.) Acknowledging that “the unclassified record evidence is not overwhelming,” the court “reiterate[d] that our review — in an area at the intersection of national security, foreign policy, and administrative law — is extremely deferential.”¹⁰⁸ The court purports to be applying regular legal standards. It is just that those standards are applied with an additional large, but unquantifiable, measure of deference.

Holy Land Foundation and *IARA-USA v. Gonzales* exemplify arbitrary and capricious review whose intensity has been dialed down to a minimum. Where this occurs, bare rationality is all that is required, whereas it is conventional to observe that on more familiar regulatory issues in normal times, arbitrary and capricious review often becomes a searching inquiry that threatens to cause “ossification” of the regulatory process. I take up the connection between ossification and perceived emergencies in Part IV. Here I suggest only that there is a continuum that runs from hard look review to soft look review to a legal grey hole — arbitrary and capricious review that lacks all substance, although it retains the form of law. After 9/11, cases like the D.C. Circuit’s decisions reviewing OFAC orders move a long way toward the latter pole.

2. “*Substantial Evidence*” Review and the Rule of Prejudicial Error. — A similar analysis holds for substantial evidence review of agency factfinding. Here there is a possible source of confusion. According to the APA’s text, the substantial evidence test applies only where courts exercise review “on the record of an agency hearing provided by statute,” meaning formal proceedings (unless, of course, the substantive statutes at issue provide otherwise).¹⁰⁹ In *Overton Park*, the Court said that review of agency factfinding in informal proceedings would occur under the “arbitrary and capricious” rubric.¹¹⁰ The confusion arises when, as is rather common, lower courts use “arbitrary and capricious” and “substantial evidence” interchangeably, saying for example that courts should uphold agency factfinding in informal adjudication so long as there is substantial evidence (even when the relevant statutes do not alter the usual APA rules). Happily, however, the confusion is not very great, because there is not much difference between the two standards. As many have pointed out, it is hard to understand what it would mean to say that factfinding passes one

¹⁰⁸ *Id.* at 734.

¹⁰⁹ 5 U.S.C. § 706(2)(E) (2006).

¹¹⁰ See *Citizens To Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416–17 (1971).

test but not the other. Thus it is rather conventional wisdom that the two standards tend to converge, and some courts have so held.¹¹¹

After 9/11, lower courts reviewing agency factfinding in cases touching on national security, war, and foreign relations have been exceedingly deferential. An example is *Karpova v. Snow*,¹¹² decided by the Second Circuit in 2007. A peace protestor traveled to Iraq, before the 2003 U.S. invasion, with the intention of acting as a human shield.¹¹³ The travel and some accompanying activities violated Treasury regulations put into place to implement an executive order that imposed economic sanctions on Iraq; the executive orders were themselves authorized by the Iraqi Sanctions Act of 1990.¹¹⁴ OFAC imposed a civil penalty of \$6,700, and the plaintiff challenged OFAC's informal factfinding under the APA.¹¹⁵

The court rejected the plaintiff's challenges, using a very forgiving version of judicial review. OFAC's notices to the plaintiff about what exactly she was being fined for were unclear. Some of the possible grounds OFAC mentioned were factually supported by the record (such as engaging in prohibited commercial transactions), but some were not (such as offering to serve the Iraqi government as a freelance journalist).¹¹⁶ The court avoided the problem by noting that "[OFAC] could have fined her \$6,700 for committing any one of the six alleged acts,"¹¹⁷ and that even if OFAC erred, remand would be an "idle and useless formality."¹¹⁸ This illustrates one of the crucial, but low-visibility, adjustable parameters of the APA: when does erroneous or ill-specified factfinding count as material error, and when is it instead harmless? The APA specifies that "due account shall be taken of the rule of prejudicial error,"¹¹⁹ and courts have developed various verbal formulae to implement this language. Yet, ultimately, judicial judgments of harmlessness will vary with circumstances. Where national security, foreign relations, war, and emergencies are at issue, judicial judgments on questions of this sort become far less rigorous.

3. *The "Good Cause" Exception.* — Informal notice-and-comment rulemaking is a central administrative instrument; the APA's procedural requirements for notice-and-comment rulemaking, and also the

¹¹¹ See, e.g., *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors*, 745 F.2d 677, 683–84 (D.C. Cir. 1984).

¹¹² 497 F.3d 262 (2d Cir. 2007).

¹¹³ *Id.* at 266.

¹¹⁴ *Id.* at 265–66.

¹¹⁵ *Id.* at 267.

¹¹⁶ *Id.* at 268.

¹¹⁷ *Id.* at 269.

¹¹⁸ *Id.* (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969)) (internal quotation marks omitted).

¹¹⁹ 5 U.S.C. § 706 (2006).

exceptions to those requirements, are a critical testing ground for the administrative law of emergencies. And right at the heart of this set of requirements is an adjustable parameter that creates a potential grey hole. The parameter involves the APA's exemption from procedural requirements for informal rules "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."¹²⁰ What does this mean?

The legislative history of the APA expressly anticipated that this language — especially a finding that the usual procedure is "impracticable" — would cover administrative action in emergencies. As the Attorney General's Manual put it, impracticability would arise where "an agency finds that due and timely execution of its functions would be impeded" by compliance with notice-and-comment procedures.¹²¹ The legislative history did caution that "[t]he exemption of situations of emergency or necessity is not an 'escape clause' in the sense that any agency has discretion to disregard its terms or the facts. A true and supported or supportable finding of necessity or emergency must be made and published."¹²² But what exactly are the "terms" that the agency must obey? The APA's text is largely vacuous on this point; "good cause" is an open-ended standard that essentially delegates the issue to future decisions of agencies and judges. Here is a prime example of one of Schmitt's major points: legal standards are unable to define, in advance, the precise nature of emergencies that will arise in the future and that will require a suspension of standard legal procedure.

By contrast to the exceptions for "military and foreign affairs functions," the exception for "good cause" has often been litigated. However, the cases are exceedingly factbound. In one illuminating sequence, in the wake of the Arab oil embargo and the gasoline crisis of 1973, agencies invoked the good cause exception to make emergency price-control rules and rules designed to increase supply. The Temporary Emergency Court of Appeals, set up under the Economic Stabilization Act of 1970¹²³ and the Emergency Petroleum Allocation Act of 1973,¹²⁴ initially upheld the emergency regulations.¹²⁵ However, in 1979 the emergency court "distinguished between the initial start-up phase and later phases of both the price control and energy regulation

¹²⁰ *Id.* § 553(b)(3)(B).

¹²¹ ATTORNEY GENERAL'S MANUAL, *supra* note 62, at 30.

¹²² S. REP. NO. 79-752, at 14 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 1944-46, *supra* note 62, at 200.

¹²³ Pub. L. No. 91-379, 84 Stat. 799 (lapsed 1974).

¹²⁴ Pub. L. No. 93-159, 87 Stat. 627.

¹²⁵ *See, e.g.,* Reeves v. Simon, 507 F.2d 455 (Temp. Emer. Ct. App. 1974).

programs, invalidating several later regulations for failure to provide notice and comment.”¹²⁶ By 1979, of course, the oil embargo had ended and the crisis had eased. The episode suggests that courts adjust the “good cause” parameter in accordance with their changing perceptions of emergency.

After 9/11, the major case about emergencies and “good cause” is *Jifry v. FAA*,¹²⁷ a D.C. Circuit opinion from 2004.¹²⁸ The Federal Aviation Administration (FAA) revoked the airmen certificates — licenses to operate commercial airliners — from a group of airline pilots who were aliens. The relevant FAA regulation had been published without notice and comment in January 2003; it provided that the FAA would automatically suspend certificates upon a finding by the Transportation Security Administration (TSA) that a pilot posed a security threat. If, after a further round of TSA review, the finding was confirmed, the FAA would permanently revoke the previously suspended certificate.¹²⁹

The court held the regulation to fall within the “good cause” exception. It found that the necessary “emergency situation” or “serious harm” from delay arose because, as the TSA said, immediate promulgation of the regulation was “necessary to prevent a possible imminent hazard to aircraft, persons, and property within the United States.”¹³⁰ This declaration by the agency created or at least reflected, in the court’s words, a “legitimate concern over the threat of further terrorist acts involving aircraft.”¹³¹ Although the court failed to note this, the Attorney General’s Manual on the APA had used a threat to aviation safety as its only example of permissible emergency regulation.¹³²

Both the holding and result in *Jifry* seem inevitable, in the circumstances in which the court ruled. In the post-9/11 climate, it is hard to imagine a different ruling in the very security sector whose vulnerability had been exposed by the 9/11 attacks. The court’s opinion endorsed a kind of precautionary principle¹³³ for airline security, noting that “[t]he TSA and FAA deemed such regulations necessary in order

¹²⁶ Ellen R. Jordan, *The Administrative Procedure Act’s “Good Cause” Exemption*, 36 ADMIN. L. REV. 113, 121 (1984) (footnotes omitted); see also *Mobil Oil Corp. v. Dep’t of Energy*, 610 F.2d 796 (Temp. Emer. Ct. App. 1979).

¹²⁷ 370 F.3d 1174 (D.C. Cir. 2004).

¹²⁸ See also *Fed. Express Corp. v. Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004) (upholding final Department of Transportation rules, promulgated with only partial notice-and-comment procedures, regarding compensation to air carriers that had incurred losses resulting from the 9/11 attacks).

¹²⁹ *Jifry*, 370 F.3d at 1177.

¹³⁰ *Id.* at 1179 (quoting TSA determination) (internal quotation marks omitted).

¹³¹ *Id.*

¹³² See ATTORNEY GENERAL’S MANUAL, *supra* note 62, at 30–31.

¹³³ See generally CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005).

to minimize security threats and potential security vulnerabilities to the fullest extent possible.”¹³⁴ The idea that what relevant administrators “deem necessary” counts as a valid basis for applying the good cause exception is a remarkable interpretation of the exception, one that will probably not last, or have much carrying power outside the circumstances that gave rise to it. But that is the point about adjustable parameters: dialed down in times of perceived crisis, they are dialed up again when the crisis has passed, just as in the sequence of cases decided by the Temporary Emergency Court of Appeals.

It is hard to overemphasize the importance of the “good cause” exception. Notice-and-comment rulemaking is central to modern administrative law and practice, and at the center of the statutory procedures for notice-and-comment rulemaking is an open-ended override for emergency situations. Such overrides are paradigmatically Schmittian. Moreover, the “good cause” exception is an adjustable parameter that, in cases like *Jifry*, has been dialed down to the point where it has temporarily become as capacious as administrators “deem necessary.” It has, in other words, temporarily become a legal grey hole.

4. *Statutory Interpretation: Chevron and Chevron Avoidance.* —

(a) *Chevron: Issues and Applications.* — Under the current case-law, where courts review agency decisions on questions of law, the *Chevron*¹³⁵ test provides the relevant framework, instructing courts to uphold the agency interpretation unless the statute clearly prohibits it or the agency’s interpretation is unreasonable. *Chevron* itself applies when an analysis of “*Chevron* Step Zero” indicates a congressional intention — perhaps quite fictional — to delegate law-interpreting power to the agency.¹³⁶ Here, there is a burgeoning and rather messy body of law, stemming from *United States v. Mead Corp.*¹³⁷ and successor cases.¹³⁸ Roughly speaking, the requisite congressional intent to delegate law-interpreting power to the agency can be evidenced by the agency’s authorized use of formal proceedings, although procedural formality is arguably neither necessary nor sufficient for finding a congressional intent to delegate.¹³⁹

The *Chevron* framework supplies several examples of adjustable parameters. How clear must the statute be, to count as “clear” for purposes of *Chevron* Step One? What is a “reasonable” interpretation,

¹³⁴ *Jifry*, 370 F.3d at 1179 (quoting respondents) (internal quotation marks omitted).

¹³⁵ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹³⁶ Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

¹³⁷ 533 U.S. 218 (2001).

¹³⁸ See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).

¹³⁹ See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Breyer, J., concurring).

for purposes of *Chevron* Step Two? No form of words can make much progress on these questions in the abstract; different judges will carry in their heads different thresholds of clarity and of reasonableness, and those thresholds will vary with circumstances. Unsurprisingly, empirical studies of judicial decisionmaking in *Chevron* cases in the lower courts have found solid evidence of ideological and (especially) panel influences.¹⁴⁰ I return to this issue in Part IV.

Before 9/11, courts frequently invoked *Chevron* to uphold administrative interpretations in cases bearing on national security and foreign relations. A famous example is *Doe v. Sullivan*,¹⁴¹ a 1991 case decided by the D.C. Circuit, in which the issue was the statutory and constitutional validity of a Food and Drug Administration regulation that permitted the Defense Department to experiment with novel drugs on servicemen in the field (here, the Gulf War), without obtaining the informed consent of the subjects. Then-Judge Ruth Bader Ginsburg, writing for the court, ruled that the “military authority” exception to the APA’s coverage did not apply,¹⁴² but upheld the regulation on the merits after a *Chevron* Step Two analysis, informed by what the court called the “urgent circumstances” of the case.¹⁴³ Interestingly, the court did not mention the possibility of construing the statute’s authority narrowly to avoid constitutional questions; rather, the court addressed those questions and decided them in the government’s favor. As I mention below, this use of interpretive deference to trump the canon of constitutional avoidance appears in more recent lower court cases as well.

After 9/11, likewise, a number of cases have invoked *Chevron* in review of agency decisions touching on national security, and the results strongly favor the government — at least outside the Ninth Circuit, an apparent outlier in this as in other respects.¹⁴⁴ Examples are the D.C. Circuit’s important 2007 decision upholding, at *Chevron* Step One, the Department of Defense’s massive new “National Security Personnel System” covering some 350,000 defense employees;¹⁴⁵ a Third Circuit decision holding, under *Chevron* Step Two, that the

¹⁴⁰ See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006); cf., e.g., Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997) (asserting an impact of ideology on the outcomes of D.C. Circuit cases).

¹⁴¹ 938 F.2d 1370 (D.C. Cir. 1991).

¹⁴² *Id.* at 1381.

¹⁴³ *Id.* at 1382.

¹⁴⁴ See, e.g., *Natural Res. Def. Council v. Winter*, 518 F.3d 658 (9th Cir. 2008) (holding that the Navy’s need to continue routine exercises did not constitute “emergency circumstances”), *rev’d*, 129 S. Ct. 365 (2008); *Nelson v. NASA*, 512 F.3d 1134, 1143–44 (9th Cir. 2008) (rejecting the government’s broad reading of a provision authorizing actions “deemed in the interest of national security”).

¹⁴⁵ *Am. Fed’n of Gov’t Employees v. Gates*, 486 F.3d 1316 (D.C. Cir. 2007).

Board of Immigration Appeals had reasonably interpreted the definition of “terrorist activity” in relevant immigration statutes to cover violence directed solely against foreign armed forces;¹⁴⁶ a Sixth Circuit decision that applied *Chevron* Step Two to uphold an FAA order denying a waiver for the conduct of an air show in a “no fly zone” surrounding a major league baseball stadium, a zone established by Congress to reduce the risk of terrorist attack;¹⁴⁷ and a Tenth Circuit decision construing statutes to deny the National Transportation Safety Board the authority to review a decision by the Utah Air National Guard that revoked an air traffic controller’s license on security grounds.¹⁴⁸ Of course the *Chevron* standard is always deferential to some degree, and one might or might not think that deference was legally warranted in such cases, after detailed scrutiny of the facts and relevant law. However, examples such as these suggest that the inquiries at *Chevron* Steps One and Two at least sometimes function as adjustable parameters, whose intensity is dialed up or down as perceived emergencies come and go. Unless all of these examples would have been decided in the same way before 9/11, then in some nontrivial set of cases, judges purporting to review agency action for conformity with statutes adjust the intensity of review sharply downwards in times of perceived emergency, creating cases in which apparent judicial oversight becomes insubstantial.

(b) *Chevron Avoidance*. — Although it is not directly relevant to my claims, there is a major complication that should be mentioned: the phenomenon of *Chevron* avoidance. “*Chevron*’s domain” is unclear,¹⁴⁹ even or especially after *Mead*’s attempts to clarify that domain. In particular, despite the cases described above, other courts say that it is unsettled whether and when *Chevron* supplies the relevant framework for presidential and administrative interpretations of statutes bearing on national security and foreign relations. There are two separate issues here: (1) whether *Chevron* applies to interpretations by the President, as opposed to interpretations by subordinate executive officials and independent agencies; and (2) whether *Chevron* applies to foreign relations law,¹⁵⁰ including statutes, treaties, statutory authorizations to

¹⁴⁶ *McAllister v. Att’y Gen.*, 444 F.3d 178, 187 (3d Cir. 2006).

¹⁴⁷ *Cleveland Nat’l Air Show, Inc. v. U.S. Dep’t of Transp.*, 430 F.3d 757 (6th Cir. 2005). *Compare id.*, with *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 166 (2d Cir. 2004) (dismissing petition by plaintiffs seeking to force the Nuclear Regulatory Commission to create a no-fly zone around nuclear plants, on the ground that the issue is “committed to agency discretion by law” (internal quotation mark omitted)).

¹⁴⁸ *Newton v. FAA*, 457 F.3d 1133 (10th Cir. 2006).

¹⁴⁹ See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001) (identifying many unresolved questions about the *Chevron* doctrine).

¹⁵⁰ See Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000).

use military force,¹⁵¹ and other legal instruments. Because many statutes touching on national security and foreign relations delegate authority directly to the President, however, these issues are intertwined in practice.

Proposals that *Chevron's* logic applies to some or all such cases¹⁵² have been met with an uncertain reception among commentators¹⁵³ and courts. In 2004 and 2006, the Supreme Court ducked the issue in *Hamdi v. Rumsfeld*¹⁵⁴ and *Hamdan v. Rumsfeld*,¹⁵⁵ deciding issues of statutory authorization (in *Hamdi*) and statutory prohibition (in *Hamdan*) without offering direct instruction on the relevance of *Chevron*. Many lower courts have followed the Court's lead in this respect, deciding cases after 9/11 that raise questions of statutory interpretation in settings of national security, foreign relations, and emergencies without directly advertent to *Chevron*.¹⁵⁶ In 2004, the D.C. Circuit decided a messy case, *Acree v. Republic of Iraq*,¹⁵⁷ that denied Americans captured by Iraq during the 1991 Gulf War a cause of action against the government of Iraq, and that overturned a presidential interpretation of relevant statutes — all without mentioning *Chevron*. Then-Judge John Roberts wrote separately and observed that “[t]he applicability of *Chevron* to presidential interpretations is apparently unsettled,” although Judge Roberts also made his view of the proper answer clear by observing that *Chevron* deference would be owed to the Secretary of State, and “[i]t is puzzling why the case should be so much harder when the authority is given to the Secretary's boss.”¹⁵⁸

In general, courts often claim that the statute, correctly read, supports the government's view, leaving unclear or undecided whether the government's view would prevail if the statute were unclear. Implicitly, many of these cases might be described as *Chevron* Step One cases in which the court simply held that the government's view was clearly correct. But it is significant that the courts do not describe the cases in

¹⁵¹ See Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005); Daniel J. Freeman, Note, *The Canons of War*, 117 YALE L.J. 280 (2007).

¹⁵² See Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007); Sunstein, *supra* note 151.

¹⁵³ See Curtis A. Bradley & Jack L. Goldsmith, *The War on Terrorism: International Law, Clear Statement Requirements, and Constitutional Design*, 118 HARV. L. REV. 2683, 2692–94 (2005); Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007).

¹⁵⁴ 542 U.S. 507 (2004).

¹⁵⁵ 126 S. Ct. 2749 (2006).

¹⁵⁶ See, e.g., *Morley v. CIA*, 508 F.3d 1108 (D.C. Cir. 2007); *Berman v. CIA*, 501 F.3d 1136 (9th Cir. 2007); *Karpova v. Snow*, 497 F.3d 262 (2d Cir. 2007).

¹⁵⁷ 370 F.3d 41 (D.C. Cir. 2004).

¹⁵⁸ *Id.* at 64 n.2 (Roberts, J., concurring in part and concurring in the judgment). But see Jinks & Katyal, *supra* note 153 (arguing that *Chevron* deference should apply to agencies but not the President).

those terms, and often do not so much as advert to *Chevron* itself. By avoiding the whole *Chevron* issue through a holding that the statute's clear meaning supports the government's position, courts pretermite the theoretical question of *Chevron*'s scope.

This combination — *Chevron* avoidance plus statutory interpretation favoring the government position — is exemplified by *Global Relief Foundation, Inc. v. O'Neill*,¹⁵⁹ a Seventh Circuit case from 2002. The plaintiff was a major Islamic charity, chartered in Illinois, whose assets had been blocked by OFAC, which subsequently listed the charity as a Specially Designated Global Terrorist organization.¹⁶⁰ The statutory issue was whether the charity's assets counted as "property in which any foreign country or a national thereof has any interest."¹⁶¹ The problem was that the charity was, under background corporate law, a U.S. citizen, which meant that the corporation's property was legally owned by a U.S. citizen rather than by "a foreign country or a national thereof."¹⁶²

Judge Frank Easterbrook, writing for the court, upheld OFAC's action by invoking purposive statutory interpretation, of which Judge Easterbrook is a leading critic.¹⁶³ The issue, the opinion said, was whether the statutory term "interest" should be read to cover only legal interests, such as the corporation's legal ownership of its property, or also beneficial interests, such as an interest in a trust.¹⁶⁴ Purposivism indicated that the latter should be included. "The function of the IEEPA [(International Emergency Economic Powers Act)]," the court said, "strongly suggests that beneficial rather than legal interests matter. The statute is designed to give the President means to control assets that could be used by enemy aliens."¹⁶⁵ In the later *Holy Land Foundation* case, discussed above, the D.C. Circuit followed this reasoning,¹⁶⁶ which has now become the prevailing law.

Cases like *Global Relief Foundation* illustrate that deference to administrators in times of perceived emergency, or in domains of national security and foreign relations, works as a sort of dark matter¹⁶⁷ that affects judicial interpretation in ways difficult to detect or prove

¹⁵⁹ 315 F.3d 748 (7th Cir. 2002).

¹⁶⁰ *Id.* at 750.

¹⁶¹ *Id.* (quoting International Emergency Economic Powers Act, 50 U.S.C. § 1702(a)(1)(B) (2000 & Supp. V 2005)).

¹⁶² *Id.* at 752–53.

¹⁶³ See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 539 (1983) ("To delve into the structure, purpose, and legislative history of the original statute is to engage in a sort of creation . . . [for which] the court has no authority . . .").

¹⁶⁴ *Global Relief*, 315 F.3d at 753.

¹⁶⁵ *Id.*

¹⁶⁶ See *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162–63 (D.C. Cir. 2003).

¹⁶⁷ See Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427 (1997).

with ordinary instruments. In such cases, the *Chevron* framework is not even mentioned, and deference is implicit, but still very real. Under the pressure of circumstances, ordinary principles of interpretation are bent or mutated in ways that favor upholding administrative decisions. Judicial review on questions of law becomes less and less demanding, a process that taken to its limit produces a legal grey hole. This process can happen under *Chevron*, or without *Chevron*, as we have seen, so the distinction is not directly material to my claims. Nonetheless, it is striking that implicit deference can become as strong as it was in *Global Relief Foundation*, even under a framework in which judges interpret the statute without explicitly mentioning deference at all.

(c) *Chevron and Constitutional Questions*. — In this respect, an important minor motif is that some of the relevant statutes touch on individual liberty interests or other arguable constitutional entitlements. In such cases, expansive administrative interpretations may implicate the canon that statutes should be construed, where fairly possible, to avoid constitutional questions. Academic commentators have urged that the canon of avoidance should trump *Chevron*, and some have also claimed that it does trump *Chevron*.¹⁶⁸ Whatever the merit in the former argument, the latter claim is not so clear, at least in lower courts deciding national security cases after 9/11. Some cases have applied just the priority rules that the commentators recommend, but some have not.

In *Tabbaa v. Chertoff*,¹⁶⁹ decided in 2007, the Second Circuit held that the Bureau of Customs and Border Protection (CBP) had statutory authority to detain and search a group of Muslim plaintiffs, who were U.S. citizens, returning from an Islamic conference in Toronto.¹⁷⁰ The statutory issue was whether CBP could detain and search only for immigration and customs violations, as the plaintiffs contended, or also for evidence of terrorist activity.¹⁷¹ The court upheld the broader construal of CBP's statutory authority, although doing so required an extended discussion and resolution of constitutional claims. The relevant statutory authority was hardly explicit; the court inferred it from general statutory provisions, enacted when CBP was created within the Department of Homeland Security, stating that the CBP and its officials have an antiterrorism mission.¹⁷² While the court did not ex-

¹⁶⁸ For an overview of the issues and literature, see Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64 (2008).

¹⁶⁹ 509 F.3d 89 (2d Cir. 2007).

¹⁷⁰ *Id.* at 92.

¹⁷¹ *See id.* at 96–97.

¹⁷² *Id.* at 97 (“A crucial aspect of the new ‘primary mission’ of CBP is to ‘prevent terrorist attacks within the United States’ . . .” (quoting 6 U.S.C. § 111(b)(1) (2006))).

explicitly cite *Chevron*, its statutory holding was that the searches were “entirely consistent with the CBP’s statutory mandate”;¹⁷³ the court did not claim that the relevant statutes were perfectly clear in granting CBP the authority it claimed, only that the statutes could sensibly be construed to do so. Applying the canon of constitutional avoidance would have required a more pointed grant of statutory authority to CBP.

(d) *Interpretation As an Adjustable Parameter.* — The largest point here is that the intensity of review of legal questions is as easy for courts to adjust as the intensity of review of agency policy choices or of agency factfinding. Justice Antonin Scalia once famously remarked that the rule of lenity, a canon instructing courts to construe ambiguous penal statutes in favor of the defendant, “provides little more than atmospheric, since it leaves open the crucial question — almost invariably present — of how much ambiguousness constitutes an ambiguity.”¹⁷⁴ The same can be said of *Chevron*.¹⁷⁵

The point is not that courts applying *Chevron* always defer to administrative decisions; of course they do not. But the tests of clarity (at *Chevron* Step One) and reasonableness (at *Chevron* Step Two) are open-ended, and this is what creates proven scope for various ideological influences in *Chevron*’s application.¹⁷⁶ I add that in times of perceived emergency, the intensity of judicial review of legal questions has been dialed down in the cases I have discussed. When the intensity of review is dialed down far enough, judicial review of agency interpretations is more apparent than real. In times of perceived emergency the *Chevron* framework can itself function as a kind of legal grey hole.

III. WHY SCHMITTIAN ADMINISTRATIVE LAW IS INEVITABLE

I have suggested, and tried to show, that black holes and grey holes are integral to the structure of American administrative law. What follows from this? Here I will elicit some of the major implications for debates in legal theory and administrative law. Section A suggests that black and grey holes are inevitable in administrative law. Section B suggests that they are as much the product of legislative as of judicial action, and that the drafters and enactors of the APA are best understood as Schmittian lawmakers. Section C elicits a corollary, that there

¹⁷³ *Id.* (quoting *Tabbaa v. Chertoff*, No. 05-CV-582S, 2005 WL 3531828, at *16 (W.D.N.Y. Dec. 22, 2005)) (internal quotation marks omitted).

¹⁷⁴ *United States v. Hansen*, 772 F.2d 940, 948 (D.C. Cir. 1985) (Scalia, J.). I take this quote from John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1556 n.48 (2008).

¹⁷⁵ See generally Jacob E. Gersen & Adrian Vermeule, *Chevron As a Voting Rule*, 116 YALE L.J. 676 (2007); Manning, *supra* note 174, at 1562–66.

¹⁷⁶ See sources cited *supra* note 140.

is no such thing as “ordinary” administrative law. Another corollary, discussed in section D, is that an “institutional process” approach to emergency powers — one that emphasizes requirements of statutory authorization for emergency executive action — promises more than it can possibly deliver.

A. *The Inevitability of Black and Grey Holes*

For many rule of law theorists, black holes are objectionable. The term was originally coined to describe Guantánamo Bay,¹⁷⁷ by an English judge who saw the existence of this black hole as a “monstrous” failure of both legality and justice.¹⁷⁸ For some theorists, however, grey holes are even more objectionable than black holes. We have seen that legal theorists like Dyzenhaus decry the existence of grey holes on the ground that preserving a façade of lawfulness is worse than outright violation of (thick) rule-of-law norms.¹⁷⁹ An open violation of those norms may mobilize backlash or resistance, whereas grey holes may fool at least some of the people, some of the time.¹⁸⁰

However, it is not at all clear that grey holes really are worse, even from the standpoint of liberal-legalist values. Candor is not always desirable, and hypocritical lip-service to the rule of law may even be best for the (thick) rule of law in the long run; Dyzenhaus overlooks the many virtues of preserving façades. Open creation of legal black holes may not cause backlash, but instead simply undermine norms or values that underpin the thick rule of law, where it exists. The best way to preserve those norms or values may be to draw a veil of decency over behavior that everyone knows is going on.¹⁸¹

Relatedly, the judges who cooperate in the creation of administrative law’s grey holes may be doing so because they think that is the best strategy for preserving or promoting the thick rule of law, at least under nonideal political conditions. By bringing emergency administrative action within the tent, they may hope to avoid the humiliating consequences that they fear will ensue if the executive is left outside the tent altogether — primarily that the executive will more or less ignore what the judges say. Better to preserve the façade of law so that one day, when the crisis has passed, a real building may be constructed

¹⁷⁷ See Steyn, *supra* note 2.

¹⁷⁸ See *id.* at 11.

¹⁷⁹ See *supra* p. 1102.

¹⁸⁰ A related point, which I owe to Jack Beermann (and which Dyzenhaus does not make), is that grey holes conceal judicial discretion behind a façade of formalism, understanding formalism in terms of Karl Llewellyn’s distinction between the “grand style” and the “formal style” of judicial opinion-writing. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 396 (1950).

¹⁸¹ A subtle exploration of these issues is David A. Strauss, *Do It But Don’t Tell Me* (Sept. 15, 2008) (unpublished manuscript, on file with the Harvard Law School Library).

behind it — an option that may be lost forever if the façade is knocked down in the name of candor, or in a kind of tantrum about a temporary thinning of the rule of law.

However, the main point I want to suggest is not that black and grey holes are desirable; it is that they are inevitable. Black holes arise because legislators and executive officials will never agree to subject all executive action to thick legal standards, because the inevitability of changing circumstances and unforeseen circumstances means they could not do so even if they tried — one of Schmitt's points¹⁸² — and because the judges would not want them to do so in any event. There are too many domains affecting national security in which official opinion holds unanimously, across institutions and partisan lines and throughout the modern era, that executive action must proceed untrammelled by even the threat of legal regulation and judicial review, no matter how deferential that review might be on the merits.

The APA's black holes — its general exclusion of uniquely presidential functions and its exceptions for military authorities and functions — are rough attempts to capture this longstanding consensus. Their content changes over time, but only within certain margins of adjustment; the black holes will never be entirely eliminated. Nor do judges of any party or ideological bent want to extend legality so far, partly because they fear the responsibility of doing so, partly because they understand the limits of their own competence and fear that uninformed judicial meddling with the executive will have harmful consequences where national security is at stake, and partly because it has simply never been done before.

The story of the original legal black hole at Guantánamo Bay illustrates these points. That black hole has now been closed — the Supreme Court has held that judicial review through the writ of habeas corpus is available for detainees there¹⁸³ — but this just means that attention has shifted to the base at Bagram, in Afghanistan, and to other less famous sites at which purported enemy combatants are detained. Importantly, only a handful of academic theorists takes seriously a model of “global due process”¹⁸⁴ in which judicial review would extend to the “four corners of the earth.”¹⁸⁵ At every step in the legalization of Guantánamo Bay, the Court's dominant civil-libertarian coalition, or at least its key member Justice Kennedy, has refused to bind itself to a global vision of the availability of judicial review,¹⁸⁶ because it

¹⁸² See *supra* pp. 1099–1100.

¹⁸³ See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Rasul v. Bush*, 542 U.S. 466 (2004).

¹⁸⁴ Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 919–20 (1991).

¹⁸⁵ *Rasul*, 542 U.S. at 498 (Scalia, J., dissenting).

¹⁸⁶ See *Boumediene*, 128 S. Ct. at 2240 (Kennedy, J.) (reserving questions about the reach of habeas); *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring in the judgment) (advocating an ap-

would be impracticable to do so, and because the consequences of doing so would be unclear and possibly grave.¹⁸⁷

As for grey holes, they arise precisely because of how administrative law is structured for ordinary cases. Grey holes arise because administrative law in any modern regulatory state cannot get by without adjustable parameters. Such parameters are the lawmakers' pragmatic response to the sheer size of the administrative state, the heterogeneity of the bodies covered by the APA, the complexity and diversity of the problems that agencies face and of the modes of administrative action, and (related to all these) the lawmakers' inability and unwillingness to specify in advance legal rules or institutional forms that will create a thick rule of law in all future contingencies, a core Schmittian theme.

This approach by the lawmakers is not a matter of logic — despite Schmitt's conceptual style of argument — but a matter of institutional capacities. Garden-variety administrative law, far removed from national security or security emergencies, recognizes that the APA's central legal standards for judicial review of administrative action — the arbitrary and capricious test, substantial evidence, reasonableness, and so on — are open-ended standards that the judges can and do adjust to make review more or less intense according to circumstances. This is conventional wisdom, as a leading commentator explains:

Two prominent administrative law scholars once famously observed, “[T]he rules governing judicial review have no more substance at the core than a seedless grape.” . . . The vagueness of the APA's standards governing the scope of substantive judicial review may be linked, at least in part, to the number and variety of federal agencies and administrative programs that come before the courts. The diversity of administrative action subject to substantive judicial review virtually rules out concrete APA standards. But something else is at work here as well. The APA's indeterminate standards of substantive review reflect Congress's recognition that it is undesirable, and perhaps impossible, to reduce this crucial judicial function to words.¹⁸⁸

The final point in this passage is critical: it is inevitable, given the background conditions of the administrative state, that the norms governing judicial review of agency action will be embodied as loose standards or adjustable parameters. And those standards will be applied during perceived emergencies by judges who will defer heavily — even to the point of creating grey holes — while maintaining intact the

proach that “would avoid creating automatic statutory authority to adjudicate the claims of persons located outside the United States”).

¹⁸⁷ See *Boumediene*, 128 S. Ct. at 2275.

¹⁸⁸ KEITH WERHAN, *PRINCIPLES OF ADMINISTRATIVE LAW* 310 (2008) (first alteration in original) (footnotes omitted).

nominal legal norms. Of course, emergencies are not the only condition that produces this effect; other factors or circumstances might cause judicial review to be dialed down so far as to create grey holes. But perceived emergencies are one of those conditions.

Again, the mechanisms that create this judicial deference in emergencies are pragmatic rather than conceptual. It is logically possible that judges might exercise vigorous review during perceived emergencies, but it is institutionally impossible for them to do so. Judges defer because they think the executive has better information than they do, and because this informational asymmetry or gap increases during emergencies. Even if the judges are skeptical that the executive's information really is superior, or if they are skeptical of executive motivations, they are aware of their own fallibility and fear the harms to national security that might arise if they erroneously override executive policies. They also fear the delay and ossification that may arise from judicial review, and that might be especially harmful where time is of the essence. I return to this last point below.¹⁸⁹

Schmitt sometimes argued that the administrative state would actually increase the power of judges, because liberal legislatures would attempt to compensate for broad delegations to the executive by creating broad rights of judicial review.¹⁹⁰ It is entirely consistent with the overall thrust of Schmitt's thought, however, to observe that the very political forces that constrain legislatures to enact broad delegations — most notably the variety and complexity of problems that administrators face and the variety and complexity of the administrative apparatus itself — also constrain legislatures to build flexible standards and potential grey holes into general framework statutes that provide for judicial review, such as the APA. Moreover, those same political forces also directly constrain the judges themselves when they engage in APA-style review. Even when their nominal power of review is broad, the judges cannot exercise it to the fullest.

This overall picture reverses a stock claim in the theory of emergency powers, that legal norms or innovations introduced during and for emergencies will spill over into the law applicable in normal times. Rather, the claim here is that a type of reverse spillover, from ordinary to extraordinary times, is inevitable in a complex administrative state. Because open-ended standards will inevitably be integral to any general framework for judicial review in such a state, adjustable parameters will arise, and these parameters will then function as grey holes when judges perceive a heightened threat and reduce the intensity of their review to a sufficiently low level. In such circumstances, the

¹⁸⁹ See *infra* section IV.B.

¹⁹⁰ See Scheuerman, *supra* note 7, at 1884–85.

forms of judicial oversight will be retained but the substance will be drained away.

This dynamic is not unique to emergencies; other factors can bring it into being as well. All I need to suggest is that it does and inevitably will occur during emergencies. Is the dynamic unique to American administrative law? I do not know, but I doubt it. It rests upon general structural features of legal oversight of administrative action in a complex regulatory state, and those features do not vary much across nations. It is certainly possible that in other nations, one might not observe as much deference by judges to administrative agencies, in cases touching on national security, as one observes in America after 9/11. But that might be entirely consistent with my claims, depending upon what the facts show; it might just mean that the perceived exigency is less, or that the deference occurs in subtle ways that are difficult for the outside observer to detect. All that is requisite to make an adjustable parameter into a grey hole is that the parameter *can* be adjusted to reduce judicial oversight to minimal levels whenever perceived exigency arises; where there is no such exigency, the parameter will be dialed up and will have all the appearance of thick law. In any event, whatever the proper scope of the claim from some omniscient perspective, I do not extend the claim beyond American administrative law, just because I lack the competence to do so.

Finally, nothing here implies that the precise black and grey holes we have now are inevitable, precisely at their current scope. There is a margin within which adjustment is possible, and indeed adjustments and fluctuations do constantly occur. The Schmittianism of our administrative law is a matter of degree; we might have black and grey holes of greater or lesser scope than we have now. Moreover, from the lawmakers' standpoint, both black holes and grey holes have a mix of costs and benefits. Black holes are more explicit, and thus produce increased legal certainty for executive officials, but they create a more obvious offense to the rule of law, whereas grey holes can accomplish some of the same ends with less visibility (as Dyzenhaus observes). Because the value of these costs and benefits will change over time, no particular set of black and grey holes is preordained.

What I do claim is that the existence of some robust set of black and grey holes is inevitable. The very structure of the administrative state is such that full, thick legality is infeasible. I do not mean that it is conceptually impossible; nothing in the nature of lawmaking prevents legislators from specifying a code that purports to provide specific rules for all future contingencies, or prevents judges from exercising real review during perceived emergencies. But for the reasons I have tried to indicate, it is not in the nature of real-world institutions that they should do these things.

B. Of Legislators and Aspirations

The structure of the administrative state is of course statutory, not just precedent-based, as the famous *Vermont Yankee* decision underscored.¹⁹¹ This is an important point because Dyzenhaus's anti-Schmittian aspiration is addressed to legislators as much as, or more than, to judges. Dyzenhaus acknowledges the poor record of judicial review of emergency executive action, so far as Commonwealth-style public law is concerned, and as far as American-style constitutional law is concerned;¹⁹² I add that American-style administrative law is the same.

Dyzenhaus acknowledges the possibility that judges can do no better, by his lights, than they have.¹⁹³ But he wants legislatures to do much better than they have, internalizing the norms of the thick rule of law. And on one reading, he thinks that this is possible because "legislators and executive officials have erroneously accepted the judges' constitutional positivism as expressed in their decisions validating grey holes. Clear away the conceptual confusion, and legislators and executive officials might accept the responsibility they have in the aspirational theory of law."¹⁹⁴ One more focused hope is that legislatures will promote the thick rule of law through "creative institutional design" — oversight structures internal to the legislative and executive branches, such as Canada's Security Intelligence Review Committee.¹⁹⁵

I suggest, to the contrary, that the inevitability of black holes and grey holes applies just as much to legislatively formulated administrative law as it does to judge-made administrative law; and that the reasons why legislators structuring the administrative state create black and grey holes are quite practical, rather than resulting from some jurisprudential confusion or other high-level conceptual mistake.¹⁹⁶ The black holes and grey holes of the APA are not, for the most part, interpolated into its text, as if the judges had implied a "good cause" exception for emergencies into facially mandatory administrative procedures. Rather, the black holes and the adjustable parameters that turn into grey holes during emergencies are themselves textual. And

¹⁹¹ *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519 (1978). See generally Beermann, *supra* note 87 (noting that U.S. federal administrative law combines pockets of judge-made law with pockets of statutory law).

¹⁹² See, e.g., DYZENHAUS, *supra* note 2, at 47–48.

¹⁹³ *Id.* at 61–62.

¹⁹⁴ Mark Tushnet, Book Review, 2007 PUB. L. 604, 605 (reviewing DYZENHAUS, *supra* note 2).

¹⁹⁵ See *Charkaoui v. Canada*, [2007] 1 S.C.R. 350, 392–95, 2007 SCC 9 (Can.) (praising the SIRC).

¹⁹⁶ For other criticisms of this part of Dyzenhaus's account, see Scheuerman, *supra* note 20, at 64 n.13 (citing sources).

perhaps it is not so surprising, as a historical matter, that the APA's drafters and enactors created those exceptions. Consider that the drafters of the APA had just lived through a global hot war and were on the verge of a global cold one. Executive power was, perhaps, near a kind of local maximum, which would decline through the Truman administration until the Supreme Court, scenting weakness, moved in for the kill in the *Youngstown* case.¹⁹⁷

To be sure, a major purpose of the APA was to retrench the administrative state and to reassert legislative and judicial control over administrative action.¹⁹⁸ Its framers and enactors professed reverence for the rule of law, understood partly as judicial review of administrative action,¹⁹⁹ and thus can only have been reluctant Schmittians (who would of course not have identified themselves as such in any event). But as is also quite clear, no one purpose entirely prevailed in the APA's drafting; rather, as Justice Jackson put it, the Act "enacts a formula upon which opposing social and political forces have come to rest."²⁰⁰ The framers of the APA quite deliberately left escape hatches from the administrative code of legal liberalism, recognizing that unforeseen and emergency circumstances would inevitably arise, and that no code of administrative law and procedure could hope to specify, in advance, what to do about those circumstances. Stray passages in the APA's legislative history warned against letting these escape hatches become too large. But neither did anyone think they could be eliminated. That even the APA's framers were reluctant Schmittians just underscores the practical problems: even legislators attempting to promote (one vision of) thick legality will find a degree of Schmittianism inescapable.

So there is no useful or important distinction, in this area, between judicially enforceable legal standards and legal standards that, although not judicially enforceable, are nonetheless binding on nonjudicial actors. Some of the legal rules and practices discussed in Part II are judicially self-imposed rules of administration or abstention, motivated by concerns about institutional competence similar to those that cause courts to underenforce constitutional rules.²⁰¹ Most, however, are not like that. Rather they are legal rules, written by legislators into the text of the APA, that exempt nonjudicial officials from legal con-

¹⁹⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁹⁸ See Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, in *TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II*, at 185, 196–201 (Daniel R. Ernst & Victor Jew eds., 2002).

¹⁹⁹ See *id.*

²⁰⁰ *Wong Yang Sun v. McGrath*, 339 U.S. 33, 40 (1950).

²⁰¹ Cf. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

straints. Those legal rules not only eliminate judicial review of administrative action or create adjustable parameters and (hence) potential grey holes; they also eliminate substantive or procedural obligations that would otherwise apply, even if there were no judges in the picture. It is not just that judges cannot enforce procedural requirements on administrative action that carries out “military or foreign affairs” functions, for example; rather it is that such actions are themselves exempt from the procedural requirements of the APA.

The reasons that the APA’s enactors created the black and grey holes were quite pragmatic, including the inability to formulate comprehensive and precise rules that would apply to the sprawling diversity of the administrative state and its problems, and a lively appreciation of the inevitability of emergencies and unforeseen circumstances. It is hard to imagine the enactors doing otherwise, in the circumstances in which they acted; and those circumstances are if anything all the more strongly present today, as the size and diversity of the administrative state have increased and as the paradoxical inevitability of the unforeseen has become salient after 9/11. In this respect, it is worth remembering that the APA itself represented creative institutional design when enacted. It is not as though creative institutional design has not been tried; it has been, but the practical pressures for leaving escape hatches and adjustable parameters that turn into grey holes proved insurmountable.

If the reasons for creating black and grey holes were practical, they were also Schmittian reasons, in the broad sense I have identified. Given these powerful practical foundations for a Schmittian stance, the anti-Schmittian aspiration to purge administrative law of black and grey holes looks hopelessly utopian. If we understand a “Schmittian lawmaker” as a lawmaker who quite deliberately builds black and (potential) grey holes into the structure of law that is created, then the architects of our administrative state were and are Schmittian lawmakers.

C. The Convergence of Ordinary and Extraordinary Law

A corollary of the foregoing is that there is no such thing as “ordinary” administrative law. Some accounts of counterterrorism law and policy after 9/11 decry the use of “extraordinary” military institutional forms and devices, such as military commissions and Combatant Status Review Tribunals, and argue that executive and administrative counterterrorism actions should be channeled through the ordinary administrative law. It is sometimes implicit, and sometimes explicit, in these accounts that the ordinary administrative law is less deferential to executive and administrative bodies. For some civil libertarians, military processes operate largely in a legal black hole, while ordinary administrative law embodies the thick rule of law.

But these accounts rest on a mistaken premise — that the ordinary administrative law is indeed relatively less deferential to executive or administrative action. That is a plausible view about normal times, when judges reviewing the EPA’s latest technical rulemaking or what-not dial up the intensity of arbitrary and capricious review, review under *Chevron* and *Mead*, and so forth. But where judges perceive an emergency, or merely fear thwarting administrative action that might be necessary in an emergency (even if the judges are skeptical that an emergency really exists), the parameters are adjusted downwards; standards of rationality, statutory clarity, evidence, and reasonableness all become more capacious and forgiving. If administrative law itself contains a series of potential grey holes, the operational differences between the military model and the administrative law model are at least smaller than the critics assume, and in times of perceived emergency will tend not to exist at all.

There is a parallel here to the stock claim that counterterrorism policy should be channeled through the ordinary criminal law. As commentators have pointed out, however, in times of perceived emergency the criminal law also flexes, accommodating more capacious definitions of conspiracy and other group-based crimes, dialing down procedural rights, and tolerating less searching review of jury verdicts and discretionary rulings by lower courts. Criminal law thus tends to “converge” with the supposedly extraordinary military-based model.²⁰²

The union of these points is that the choice among competing “models” for counterterrorism policy — the war model, the criminal law model, and the administrative law model — may not be a choice with very high stakes. If the judges and other actors who oversee both criminal law and administrative law adjust the relevant parameters in times of emergency, making the relevant rules in both domains more deferential to the executive, then outcomes will converge. The remaining difference is only that channeling those outcomes through criminal law or administrative law will preserve the grey holes — will preserve the form, although little of the content, of judicial oversight.

D. Statutory Authorization and Emergency Powers

A final implication involves constitutional law. Although my focus here is squarely on administrative law, there is an important idea relevant to my thesis that sits right on the boundary line between the two areas, so I will mention it briefly. The idea, which is widely popular among legal theorists in America and elsewhere, is that judges should cabin the emergency powers of the executive by requiring statutory au-

²⁰² See generally Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008).

thorization for the exercise of those powers. This argument is associated with Justice Jackson's famous concurrence in the *Youngstown* case, which set out a three-part framework for evaluating executive power (according to whether Congress has authorized, taken no position about, or prohibited the claimed executive power).²⁰³

On this "institutional process" view,²⁰⁴ placing substantive constitutional restrictions on executive emergency powers through civil-libertarian judicial rulings is an unpromising approach, because of the documented tendency of judges to defer to the executive in constitutional cases decided during times of perceived emergency.²⁰⁵ But what courts can successfully do, the argument runs, is to require congressional authorization for executive emergency powers, and to enforce statutory restrictions against the executive.²⁰⁶ And in fact, the process theorists add, courts have done both of these things, even in emergencies.²⁰⁷ Requiring statutory authorization (and enforcing statutory prohibitions) ensures a legislative check on the executive and makes emergency policies more deliberative and democratically legitimate, or so the claim runs.

The suggestion that this is what courts have in fact done is dubious. The process theorists overlook that a judicial finding of statutory authorization (or for that matter statutory prohibition) is often a conclusion rather than a premise: the judges find authorization because they wish to uphold the executive action, rather than uphold the action because they have found authorization.²⁰⁸ In a world of multiple and very vague statutory delegations bearing on national security, foreign relations, and emergency powers, judges have a great deal of freedom — not infinite freedom, of course — to assign *Youngstown* categories to support the decisions they want to reach, rather than reach decisions

²⁰³ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–39 (1952) (Jackson, J., concurring).

²⁰⁴ Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004). For a related view, see Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47.

²⁰⁵ See ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 15–18 (2007). But see Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005).

²⁰⁶ On statutory prohibitions bearing on the President's power as Commander in Chief, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008).

²⁰⁷ For example, Issacharoff and Pildes cite *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867), and *Dames & Moore v. Regan*, 453 U.S. 654 (1981), as examples of the Supreme Court requiring congressional approval of executive action in wartime. See Issacharoff & Pildes, *supra* note 204, at 18, 26.

²⁰⁸ POSNER & VERMEULE, *supra* note 205, at 48–53.

based on the *Youngstown* categories.²⁰⁹ The institutional process framework is only as strong as the prevailing methods of statutory interpretation, and in most of the hard cases that tend to reach the federal appellate courts, the prevailing methods will enable judges to write a straight-faced opinion putting the case in any of the *Youngstown* categories.

The problem is not or not solely that the interpretive methods available to judges are only partially determinate, and are least determinate in the skewed subset of cases that reach appellate courts. The (other) precondition for the problem to arise is that the statutory landscape bearing on war, foreign relations, national security, and emergencies is itself full of highly general and vague statutory delegations, many of which contain escape hatches or emergency exceptions. The institutional process approach implicitly imagines a highly determinate set of statutory authorizations and prohibitions covering most or all future contingencies — an un-Schmittian code of executive emergency powers.

But this is a fantasy. As elsewhere in the administrative state, the diversity and sheer scale of the problems that Congress confronts, the highly constricted legislative agenda, the executive's proclivity to argue that it possesses unique expertise and capacity for action in emergencies and so should be given a free hand (whether such arguments are right or wrong in particular cases), all cause legislators to delegate broadly and to leave the executive, the judges, and themselves ample wiggle room for unforeseen circumstances. And legislators can foresee that the unforeseen will necessarily occur, although they cannot guess what shape it will take. All this is unavoidable, and its unavoidable consequence is that appellate judges will have great freedom to categorize statutes under *Youngstown* as necessary to justify a decision reached on other grounds. A central question, for both administrative law and the constitutional law of executive emergency powers, is statutory authorization; and in both domains, the work product of de facto Schmittian lawmakers ensures that statutory authorization is at best a loose requirement.

IV. EXTENSIONS AND SPECULATIONS

Here I examine some possible extensions of my claims. These are frankly speculative. My aim is just to suggest some empirical hypotheses and fruitful directions for further inquiry; I make no attempt to actually demonstrate the truth or validity of the speculations.

²⁰⁹ See Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132 (1999).

A. Emergencies and the New Legal Realism

A wave of recent findings about the determinants of judicial behavior has been dubbed “the New Legal Realism.”²¹⁰ Some of the central findings are that judicial review of administrative action is heavily affected by (1) political ideology and by (2) social influence among judges sitting on multi-judge panels.²¹¹ The former finding means that how judges vote in administrative law cases is affected by their general political commitments. The latter finding means that how they vote in administrative law cases is affected by the political commitments of the other judges with whom they sit. Where two conservative judges sit with a liberal judge, the liberal judge votes much like a conservative judge; and a corresponding shift occurs where a conservative judge sits with two liberal judges.²¹²

How do perceived emergencies fit into this picture? The cases accumulated in Part II might be extended into a testable hypothesis: as judicial perception of a threat increases, deference to agencies increases. This is an additional factor, one that might operate in addition to or in tandem with the other nonlegal factors identified by the new legal realism. Where present, this factor will cut across political ideology or panel influences or at least interact with those other factors in complex ways. Both conservative and liberal judges, the hypothesis might run, will tend to defer more in times of perceived emergency. One might discover that liberal judges, although deferring more than in normal times, do not react to emergencies as strongly as do conservative judges; one might also discover that panel effects amplify deference (where two of three judges are especially worried about the security threat that an agency is attempting to address) or reduce deference (where two of three judges are especially skeptical of the agency’s rationale). But here we have passed into the realm of pure speculation.

I do not know whether any of these hypotheses are testable through large-number methods, because the number of national security cases in the courts of appeals is not large, even after 9/11, and because of the usual problems that face all such studies.²¹³ It is not clear

²¹⁰ Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008).

²¹¹ *Id.*

²¹² See, e.g., Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, Essay, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004).

²¹³ In preliminary work, Professor Cass Sunstein has made several tentative findings, based on a modest sample of 110 federal appellate cases involving national security decided after 9/11. The sample includes criminal as well as administrative cases, so it is not directly on point for my discussion, but it is sufficiently close to be worth mentioning. The findings relevant here are as follows: First, Democratic and Republican judges are both highly deferential to the executive in such cases; the rate of invalidation of government action is “lower . . . than in almost all other domains of federal law.” Cass R. Sunstein, *Judging National Security Post-9/11: An Empirical Investiga-*

whether these problems are insurmountable. If they are, it means that large-number methods cannot be used, but we might still make progress through detailed case studies. Here, I suggest only that the hypotheses are plausible and worthy of further investigation; I make no claim that they are finally confirmed.

B. Soft Look Review: Emergencies and Ossification

Another possible extension involves a standard debate in the theory of administrative law about the ossification of agency policymaking. In this debate, proponents of relatively intensive hard look review praise it as an indispensable means for promoting both public participation and the rationality of agency policymaking.²¹⁴ Opponents point out the opportunity costs of hard look review, suggesting that clogging the pipeline of agency policymaking ossifies regulatory law. The lower rate of regulatory updating means that more extant regulations are old regulations, which in turn ensures that a higher proportion of regulations are obsolete.²¹⁵

The common ground here is that hard look review does indeed have a significant effect on the introduction and revision of agency rules and thus on the pace of regulatory change. It is not clear that the premise of this debate is correct; it is not clear how much hard look review really matters. A few studies suggest that its effects are not large. In one study of D.C. Circuit cases in which the court remanded to the agency after finding arbitrary or capricious policymaking, the agency was able, in eighty percent of cases, to reinstate the original rule or a close substitute, and to do so with an average delay of less than two years.²¹⁶

Whatever the truth of these matters, viewing the ossification debate through the lens of emergencies opens up a new perspective. We may

tion, 2009 SUP. CT. REV. (forthcoming 2009) (manuscript at 2, on file with the Harvard Law School Library). Second, Republican judges are more likely to defer to the government in national security cases than are Democratic judges; there is a discernible partisan difference, comparable to other areas of law. *See id.* at 7. Third, there is no evidence that the rate of deference in these cases has decreased as time has passed since 9/11. *Id.*

²¹⁴ *See, e.g.,* Lisa Schultz Bressman, *Procedures As Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1761 (2007) ("In addition to promoting rationality, the hard look doctrine promoted participation by encouraging agencies to respond to criticisms and show why they had rejected alternative solutions.").

²¹⁵ *See* Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997).

²¹⁶ William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability To Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 440 & n.277 (2000). For studies of the possible ossification effect of internal Office of Management and Budget review, generally finding that the effect is small, see MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 84–85 (2006).

distinguish here between “slowing-down” mechanisms and “speeding-up” mechanisms in the design of legal and institutional responses to perceived emergency.²¹⁷ Soft look review of agency rulemaking bearing on national security has the effect of a speeding-up mechanism, an institutional device that reduces institutional sclerosis. Courts that temporarily adjust the parameters of arbitrary and capricious review, even to the point of creating a grey hole, liberate agencies to engage in policy experiments and to test out novel approaches to regulation.

The initial experiments will be ham-handed, by their nature. In general, as to security policy and in other domains, agencies learn by doing; their information is endogenous to their practice.²¹⁸ It is therefore off the mark to point out that after 9/11, agencies or sub-agencies that were previously geared to other tasks have been drafted into counterterrorism work, despite having little experience in such matters.²¹⁹ Critics point out that OFAC, for example, was “a minor Treasury Department bureau” before it became the front-line agency for the financial war on terrorism.²²⁰ But this line of criticism overlooks that during emergencies and wars old institutional forms are always adapted to new purposes, sometimes quite abruptly. OFAC’s expertise in financial counterterrorism will increase over time, and in comparative institutional terms, the courts are even more at sea.²²¹

The broadest point here is that emergencies can liberate policymaking from ossified and stultified routines. In normal times, agencies and courts function partially on autopilot, applying familiar ideas to familiar problems. Emergencies, by contrast, put a premium on creativity and fresh solutions. Many striking innovations in policy and regulation owe their existence to the pressure for improved performance that emergencies and war produce. As Schmitt said, albeit in a different theoretical context, “[i]n the exception [that is, the exceptional situation] the power of real life breaks through the crust of a mechanism that has become torpid by repetition.”²²²

²¹⁷ See Jon Elster, *Comments on the Paper by Ferejohn and Pasquino*, 2 INT’L J. CONST. L. 240 (2004).

²¹⁸ See Matthew Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J.L. ECON. & ORG. 469 (2007).

²¹⁹ For an example of this argument, see David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359 (2007).

²²⁰ *Id.* at 1399 n.167 (quoting *Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 876 (D.C. Cir. 1984) (Greene, J., concurring)) (internal quotation marks omitted); *accord id.* at 1399–403.

²²¹ See generally POSNER & VERMEULE, *supra* note 205.

²²² SCHMITT, *supra* note 13, at 15.

C. *Reverse Vermont Yankee? The Supreme Court
and the Lower Courts*

In the famous *Vermont Yankee*²²³ decision, the Supreme Court squelched a body of caselaw developed by the D.C. Circuit, partly in the context of judicial review of nuclear licensing and other domains of environmental law, that encouraged agencies to engage in “hybrid rulemaking.” The point of this caselaw was to push agencies to use more elaborate procedures than required by the APA or organic statutes; as such the caselaw created a kind of common law of administrative procedure. The Court, in administrative law’s analogue to *Erie Railroad Co. v. Tompkins*,²²⁴ rejected this common law approach, holding that courts may only require agencies to use administrative procedures themselves required by enacted law — the Constitution, statutes, or the agency’s own regulations.²²⁵

A major motif of *Vermont Yankee* was the apparent perception, on the part of a majority of Justices, that the D.C. Circuit had required additional rulemaking procedures because of an ideological commitment to a certain conception of environmentalism, and out of hostility to the licensing of nuclear plants. Strong language in the Court’s opinion warned the lower courts against excessive intrusion into regulatory domains in which judges lack expertise, and against importing the judges’ policy preferences into administrative law.²²⁶ *Vermont Yankee*, however, left open the possibility of stringent “hard look” review of agency action for rationality; such review is traceable to the “arbitrary and capricious” language of § 702 of the APA, and thus in nominal terms does not represent the sort of common law improvisation that the Court warned against.

Some commentators immediately suggested that the Court had left too large a loophole.²²⁷ On this account, hard look review, while nominally rooted in the APA, was actually common law-like and unpredictable, and lower courts would use hard look review to ossify nuclear licensing and other ideologically sensitive domains.²²⁸ There is a plausible case to be made that that is exactly what occurred, although as we have seen the actual extent of ossification is unclear on the cur-

²²³ *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

²²⁴ 304 U.S. 64 (1938).

²²⁵ See *Vermont Yankee*, 435 U.S. at 543, 548.

²²⁶ See *id.* at 525 (“[The lower court] seriously misread or misapplied this statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress.”).

²²⁷ See Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418 (1981).

²²⁸ See Stephen Breyer, *Vermont Yankee and the Courts’ Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978).

rent evidence. It is clear that hard look review persisted and was both unpredictable and occasionally stringent; the lower courts were encouraged, in this respect, by the later decision of a different majority in the *State Farm* case, which employed a searching version of hard look review.²²⁹ Moreover, as we have seen, the new legal realism has shown that hard look review has a pronounced ideological inflection.

The *Vermont Yankee* episode underscores the limits of the Court's ability to control lower courts through doctrinal formulations. *Vermont Yankee* clarified the legal framework for judicial review of agency action, including both the procedures agencies used and the substance of agency decisions. To the extent that the Justices aimed merely to stamp out administrative law not traceable, in principle, to the APA or other statutes, they succeeded. But the language of the opinion went much farther, clearly suggesting that the D.C. Circuit was out of step with the Court on the question of how intrusive judicial review of the rationality of agency decisionmaking should be.²³⁰ In the long run, it is not at all obvious how much the Court can do to control lower courts with divergent preferences; the basic lesson of *Vermont Yankee* is that clarifying the formal legal framework may not do much to control lower-court decisionmaking, if that framework contains adjustable parameters that lower courts can dial up or down depending upon circumstances, subject matter, and ideological valence. In such cases, the lower court may diverge substantially from the higher court's preferences by adjusting the parameter too far, yet so long as the lower court announces the correct doctrinal formula there is no clearly identifiable legal error.²³¹ Constraints on the time and resources of the higher court will make control through case-by-case review and reversal impracticable.

I want to suggest the quite speculative hypothesis that a kind of reverse-*Vermont Yankee* situation now exists at the intersection of administrative law and national security. On this account, the lower

²²⁹ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-44 (1983). But see *Balt. Gas & Elec. Co v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97-98 (1983).

²³⁰ See *Vermont Yankee*, 435 U.S. at 549 ("The court should engage in this kind of review and not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good.").

²³¹ Compare the idea that "the existence of indeterminate review doctrines, particularly the requirement of 'adequate reasons,' facilitates activist review in administrative law. When an indeterminate review doctrine is used, the judge is less susceptible to criticism that he or she has acted in a result-oriented manner." Sidney A. Shapiro, *Substantive Reform, Judicial Review, and Agency Resources: OSHA as a Case Study*, 49 ADMIN. L. REV. 645, 656 (1997) (footnote omitted). The idea is consistent with — indeed it is the flip side of — my suggestion here. The parameters of administrative law can be dialed up (as in hard look review after *Vermont Yankee*) or dialed down, and in either case it is difficult for reviewing courts and outside monitors to pinpoint a legal error.

courts are systematically more deferential to executive and administrative claims than is the governing majority on the Court, in part because lower-court judges are systematically more reluctant to invalidate presidential decisions.²³² Whatever the merits of this disagreement, there are real limits to the Court's ability to control the situation as a practical matter.

The Court's current majority on these issues reflects Justice Kennedy's civil-libertarian instincts. Justice Kennedy combined with Justice Stevens and others in the *Hamdan* case to hold military commissions prohibited by statute, a decision that could easily have been written in terms of *Chevron* Step One. In so doing the winning coalition on the Court reversed the D.C. Circuit, which has been rather consistently hospitable to claims of executive power in cases relating to counterterrorism.²³³ In the recent *Boumediene*²³⁴ case, the same pattern held: the Court reviewed a D.C. Circuit opinion in the government's favor — one that was not easy to square with the Court's earlier instructions in a related case, *Rasul v. Bush*²³⁵ — and reversed. Beyond the D.C. Circuit, one suspects that the same majority that decided *Hamdan* and *Boumediene* would look askance at more than a few of the lower-court decisions described in Part II.

The problem is that the Court cannot review everything, even if it were to operate at or near its peak modern capacity of about 150 cases per year. There are simply too many statutory and administrative law cases in the lower courts that bear on some aspect of national security and emergency. What the Court can do is what it did in *Vermont Yankee*, which is to clarify the governing legal tests. But then it faces the same problem as the *Vermont Yankee* Court, which is that the tests will themselves inevitably be standards rather than rules, and will contain adjustable parameters (“arbitrary and capricious,” “clear,” “reasonable”) that lower courts will apply in a manner influenced by circumstances, including their perceptions of emergency. The reverse-*Vermont Yankee* problem, if it is one, is hard to control through legal doctrine or case-by-case review by the Court, whose ability to enforce its preferences is necessarily constrained. Rather the problem will persist, in greater or lesser degree, until judicial preferences in the lower

²³² See Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693, 707 (2005) (“If federal judges are going to reject a presidential decision in the name of liberty, they will have to demonstrate a great deal of courage. Lower courts, precisely because they are lower, are less likely to show that courage.”).

²³³ See, e.g., *Bismullah v. Gates*, 514 F.3d 1291 (D.C. Cir. 2008) (per curiam) (5–5 split on whether to grant rehearing en banc); *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006).

²³⁴ *Boumediene v. Bush*, 128 S. Ct. 2229.

²³⁵ 542 U.S. 466 (2004).

and higher courts are aligned by new appointments and other political trends.

CONCLUSION

Legal black holes and legal grey holes are not confined to Guantánamo Bay, or to Kafkaesque literary nightmares about sham adjudication. They are integral to the administrative state, and can be observed on location in the federal courts of appeals after 9/11. Indeed they are inevitable; no legal order governing a massive and massively diverse administrative state can hope to dispense with them, although their scope will wax and wane as time and circumstances dictate. Theorists of the thick rule of law are entirely correct that legal black holes and grey holes are best understood through the lens of Carl Schmitt's view of emergencies, law, and the state. They are only wrong in thinking that anything can be done about this state of affairs. In this sense we should recognize that the APA and its accumulated doctrines and practices are, and always will be, our Schmittian administrative law.