

MENDING HOLES IN THE RULE OF (ADMINISTRATIVE) LAW

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The past decade has witnessed a surge of interest in Carl Schmitt's controversial assertion that the rule of law inevitably bends under the demands of state necessity during national emergencies. According to Schmitt, legal norms cannot constrain sovereign discretion during emergencies because "the precise details of an emergency cannot be anticipated" in advance.¹ The sovereign must therefore possess unfettered discretion to determine both "whether there is an extreme emergency" and "what must be done to eliminate it."²

Few legal scholars have embraced Schmitt's theory of emergencies with the enthusiasm and sophistication of Adrian Vermeule, the John H. Watson, Jr. Professor of Law at Harvard Law School. In an article published recently in the *Harvard Law Review*, Vermeule argues that American administrative law is fundamentally "Schmittian" in the sense that it permits federal agencies to operate outside the constraints of administrative procedure and meaningful judicial review during emergencies.³ Vermeule contends that the federal Administrative Procedure Act (APA) is replete with procedural exceptions, which generate "black holes"—zones where federal agencies are free to act outside the constraints of legal order.⁴ In addition, he suggests that federal courts manipulate flexible legal standards to accord heightened deference to federal agencies during national crises, transforming standards such as "reasonableness"⁵ and "good cause"⁶ into "grey holes"—legal devices which preserve the façade, but not the reality,

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¹ CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 6 (George Schwab trans., University of Chicago Press 2005) (rev. ed. 1934) (link).

² *Id.* at 7.

³ Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096 (2009) (link).

⁴ *Id.*

⁵ *See, e.g.*, *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (holding that courts interpreting ambiguous federal statutes "may not substitute [their] own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency") (link).

⁶ *See, e.g.*, 5 U.S.C. § 553(b)(3)(B) (providing that agencies need not comply with the APA's provisions for informal rulemaking where "the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest") (link).

of the rule of law.⁷ Far from criticizing these gaps in federal administrative law, Vermeule accepts black and grey holes as institutional inevitabilities, and dismisses proposals to extend the rule of law to all administrative action as a “hopeless fantasy.”⁸

Vermeule makes a compelling case for his observation that statutory loopholes and anemic judicial review have diminished administrative law’s salience during national emergencies. But his broader argument, that black holes and grey holes cannot be eradicated, is unpersuasive and deeply troubling. In reality, Congress could eliminate the APA’s procedural loopholes without compromising agencies’ capacity to act during emergencies if it would simply discard the APA’s rule-based categorical exceptions in favor of a more nuanced, standard-based derogation regime. Likewise, federal courts could easily eliminate grey holes by treating legal standards in administrative law as vehicles for promoting robust public justification of administrative action. The primary obstacle to these reforms is not “institutional,” as Vermeule asserts, but rather cultural: too many legislators and judges view administrative law in static positivist terms as a means for allocating decision making authority among public institutions, rather than in dynamic relational terms as establishing a regime in which public officials must justify all exercises of administrative powers according to public-regarding factors.

To show how our administrative law might be reformed to promote a “culture of justification,”⁹ this essay advances a relational theory of the rule of law based on the principle that public officials and agencies serve as fiduciaries for the public. Whereas Vermeule’s article explores the current limits of our administrative law, the relational theory suggests practical steps for refining our legal system to ground emergency administration more firmly in the rule of law.

I. IS SCHMITTIAN ADMINISTRATIVE LAW INEVITABLE?

In defending his Schmittian theory of administrative law, Vermeule takes aim at legal scholars such as David Dyzenhaus who “praise the rule of law and aspire to extend law’s empire to encompass even emergency policymaking by the executive.”¹⁰ The aspiration to apply administrative law in emergencies is “hopelessly utopian,” Vermeule argues, because Congress and the courts lack the institutional resolve necessary to subject the Execu-

⁷ Vermeule, *supra* note 3, at 1096.

⁸ *Id.* at 1105.

⁹ See Etienne Mureinik, *Emerging from Emergency: Human Rights in South Africa*, 92 MICH. L. REV. 1977, 1986 (1994) (book review) (characterizing South African law in the early 1990s as “a struggle between a culture of authority and a culture of justification”) (link).

¹⁰ Vermeule, *supra* note 3, at 1101.

tive Branch to the “thick” rule of law.¹¹ Although Vermeule concedes that “one could imagine a system of administrative law that is minimally Schmittian or even not Schmittian at all,”¹² he contends that such a system is not feasible in practice because Congress will never agree to close the APA’s procedural loopholes and because courts will inevitably dial down the APA’s flexible standards to maximize executive discretion in emergencies.¹³ For these reasons, “[t]he exception cannot, realistically, be banished from administrative law; exceptions are necessarily built into its fabric.”¹⁴

Few would dispute Vermeule’s observation that the APA’s procedural provisions are littered with loopholes, and I will not belabor this point.¹⁵ To the extent that the APA’s categorical exceptions and definitional quirks punch holes in administrative law’s fabric, thereby allowing public officials to operate outside the constraints of ordinary administrative procedure, Vermeule might be right to characterize our administrative law as Schmittian in a minimalist sense.¹⁶

Vermeule’s more ambitious claim that black holes cannot be purged from our administrative law is less persuasive. Even if we accept Vermeule’s assertion that Congress lacks the requisite institutional incentives to impose ordinary procedural requirements on agencies during emergencies, it does not follow that Congress could not redesign the APA’s emergency regime to eliminate black holes. If ordinary administrative law is too burdensome, Congress could design malleable procedural requirements to accommodate agencies’ legitimate concerns for speed and efficiency without abandoning procedural restraints altogether during national crises. Or Congress could require agencies to develop their own ad hoc administrative procedures for emergencies, subject to broad congressional standards and judicial review. Such measures would eliminate the procedural loopholes Vermeule identifies without sacrificing agencies’ operational flexibility. The fact that such procedures do not currently exist reflects a lack of initia-

¹¹ *Id.* at 1097. Vermeule defines “‘rule by law’ (or the thin rule of law)” as “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.” *Id.* at 1101.

¹² *Id.* at 1105.

¹³ *Id.* at 1132–33.

¹⁴ *Id.* at 1104.

¹⁵ In most contexts, of course, federal agencies will be subject to constitutional constraints such as the Fifth Amendment Due Process Clause—and thus will not fall entirely outside the rule of law—even when they operate within one of the APA’s statutory loopholes. Recognizing this fact, Vermeule does not argue that black holes are common, only that they exist, and that their existence is inevitable. *Id.* at 1117–18.

¹⁶ Schmitt himself defends a much more aggressive theory of emergency administration, arguing that during emergencies the Executive is sovereign and thus wields “the highest, legally independent, undervived power.” SCHMITT, *supra* note 1, at 17; *see also id.* at 9–12 (linking the concept of sovereignty to article 48 of the German constitution of 1919, which granted emergency powers to the president).

tive and imagination within the broader legal community rather than a fatal flaw in Congress's institutional structure.

Just as Vermeule fails to demonstrate that Congress lacks the institutional capacity to eliminate the APA's black holes, he does not make a persuasive case that federal courts are institutionally predestined to convert the APA's flexible standards into grey holes. To be sure, experience suggests that federal judges on both sides of the political spectrum tend to accord administrative agencies heightened deference when applying flexible legal standards during emergencies.¹⁷ In most cases, however, heightened deference to public officials during national emergencies is consistent with the application of substantive legal standards such as "reasonableness" and "good cause." If the Executive provides a reasonable justification for its approach to a crisis, judicial deference to that choice of approach is a far cry from the type of *de facto* abstention that would render judicial review a farce.

While this distinction between heightened judicial deference and *de facto* abstention is admittedly slippery, it is remarkable that virtually every case Vermeule cites in his discussion of grey holes follows a path of reasoned deference rather than *de facto* abstention. Far from simply taking agencies' legal and factual assessments at face value, lower courts in the post-9/11 cases Vermeule identifies undertook a robust review of agency actions, identifying substantial evidence supporting the agency's position and articulating a detailed explanation for upholding the agency's decision.¹⁸ None of these courts withheld meaningful review, generating the type of invidious grey holes that Dyzenhaus and others have criticized as anathema to the rule of law.

Of course, one need not accept Vermeule's characterization of particular judicial decisions as "grey holes" to appreciate the intense political pressures federal judges experience as guardians of legal order during emergencies. As long as our administrative law depends upon flexible legal standards, courts will be tempted to distort those standards during emergencies in deference to the Executive Branch. Eliminating black holes and placing greater reliance upon broad legal standards might only increase the opportunities and political pressures for judicial abstention, an insight Vermeule attributes to Schmitt.¹⁹ In this respect, the Schmittian challenge to our administrative law will always be with us. Yet numerous post-9/11 decisions suggest that rigorous judicial review of agency action is not "in-

¹⁷ See, e.g., *Hohri v. United States*, 793 F.2d 304, 306 (D.C. Cir. 1986) ("Surely we must recognize that courts are likely to accord a claim of military necessity greater deference during a major war than would be proper years later when the emergency is long past . . .") (link).

¹⁸ See, e.g., *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728 (D.C. Cir. 2007) (link); *Jifry v. Fed. Aviation Admin.* 370 F.3d 1174 (D.C. Cir. 2004) (link); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003) (link).

¹⁹ Vermeule, *supra* note 3, at 1135.

stitutionally impossible”²⁰ and that the public need not necessarily resign itself to the inevitability of executive and judicial lawlessness during national crises. The critical question is not whether black holes or grey holes are unavoidable (they are not), but rather how administrative law can best advance the rule of law project prospectively.

While Vermeule endeavors to map the institutional limits of administrative law, in the end his article speaks most forcefully to the limits of positivist accounts of the rule of law. For lawyers like Schmitt and Vermeule, who view administrative law in purely positivist terms, black and grey holes serve primarily to allocate legal authority among governmental institutions and are jurisprudentially problematic only insofar as their mechanics and systemic repercussions are poorly understood.²¹ This impoverished conception of administrative law lacks the resources necessary to explain what the rule of law is, or should be, in our republic. To answer this question, we need a more robust vision of the rule of law than Vermeule’s Schmittian theory can supply.

II. COMMON-LAW CONSTITUTIONALISM REVISTED

Vermeule properly identifies Dyzenhaus’s account of “common-law constitutionalism” as the most rigorous alternative to Schmitt’s emergency theory.²² Dyzenhaus argues that law should govern emergency administration, and that the rule of law should be understood as “a rule of fundamental constitutional principles which protect individuals from arbitrary action by the state.”²³ These principles include both procedural norms, such as the right to notice and a hearing before public power is wielded to affect private interests and substantive values such as non-arbitrariness. Such principles are “constitutional” in the sense that they are constitutive of legal order itself, and are thus necessary for any legal system that claims to satisfy the rule of law. Public officials and institutions cannot violate the rule of law’s constitutive principles in emergencies without undermining their own claim to moral and legal authority.²⁴ Authority might make law, as positivists assert, but the rule of law’s constraints make authority.²⁵

Public justification plays a central role in Dyzenhaus’s common-law constitutionalism. Building on the work of the late South African jurist Etienne Mureinik, Dyzenhaus argues that the “the constraints of legality are

²⁰ *Id.* Curiously, Vermeule dismisses the jurisprudence of both the U.S. Supreme Court and the Ninth Circuit as aberrational without seriously considering whether the more robust review performed in these courts undercuts the Schmittian account or might serve as a model for other federal courts in emergencies. *Id.* at 1126, 1133-34.

²¹ *Id.* at 1143-49.

²² See DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* (2006).

²³ *Id.* at 2.

²⁴ See *id.* at 4-5.

²⁵ *Id.* at 12.

the constraints of adequate justification.”²⁶ The rule of law dictates that public officials must provide reasons for their actions during emergencies, and these reasons must be consistent with the fundamental principles of legal order.

On this account, administrative law serves as the rule of law’s handmaid, laying the groundwork for meaningful public justification by cultivating governmental deliberation, transparency, fairness, reasonableness, and integrity. Traditional administrative procedures such as notice-and-comment rulemaking facilitate public justification by compelling agencies to articulate objectively reasonable, public-regarding justifications for their policy choices.²⁷ Upon judicial review, agencies must also persuade courts that their actions have a reasonable legal and factual basis, and courts, in turn, must publicly justify their own rulings based on relevant legal principles. By ensuring that those who exercise public powers satisfy the rule of law’s constraints, the practice of public justification serves as both the currency of public legitimacy and the guardian of legality within the administrative state.

Critics have argued that Dyzenhaus’s conception of the rule of law is too nebulous to guide public officials during emergencies. In one recent article, for instance, Thomas Poole has rejected Dyzenhaus’s project as an “exercise in wish fulfillment.”²⁸ Although Poole admits feeling drawn to the idea that the common law contains “deep, transcendental values,” he laments that “when we look for [these values], we do not quite know where to find them.”²⁹ The common law tradition is a poor foundation for the rule of law, Poole argues, because “[i]t is the capaciousness of common law, its normative ‘give,’ that is paradigmatic, not the solid core of relatively unchanged normativity the common law constitutionalists imagine.”³⁰ In short, even if we accept Dyzenhaus’s conception of the rule of law as a rule of reasons, the common law tradition arguably lacks the normative clarity needed to specify which reasons are adequate to justify state action.

One promising approach for shoring up the normative foundations of common-law constitutionalism focuses on the fiduciary character of public administration.³¹ By virtue of their legally entrusted authority, all public

²⁶ David Dyzenhaus, *Law as Justification: Etienne Mureinik’s Conception of Legal Culture*, 14 S. AFR. J. ON HUM. RTS. 11, 30 (1998); see also Mureinik, *supra* note 9, at 1986 (describing “the central aspiration of law” as the pursuit of “ever-better justification of decisions”).

²⁷ See Dyzenhaus, *supra* note 26, at 35.

²⁸ Thomas Poole, *Constitutional Exceptionalism and the Common Law*, 7 INT’L J. CONST. L. 247, 266 (2009).

²⁹ *Id.*

³⁰ *Id.* at 268.

³¹ See Evan Fox-Decent, *Democratizing Common-Law Constitutionalism*, 55 MCGILL L.J. (forthcoming 2010) (link). For an argument that U.S. administrative law reflects a fiduciary model of state legal authority, see Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006) (link). For a general discussion of the fiduciary character of state legal authority, see Evan

agencies and officials stand in a trust-like relationship toward persons subject to their administrative powers. Just as the common law places trustees and other fiduciaries under legal obligations to honor their beneficiaries' legitimate interests, those who wield powers of public administration likewise bear fiduciary obligations to treat their subjects fairly, reasonably, and non-arbitrarily for public-regarding purposes.³² Where feasible, public administrators must also engage in deliberative decision-making, and they must be ready to provide reasons for their actions that are consistent with their fiduciary role.³³ These basic fiduciary obligations of public service are legal obligations because they are rooted in and constitutive of the state-subject fiduciary relation, and because fiduciary duties are legal duties.

Fiduciary duties are legal duties within the common law not by historical accident but instead because, in Kantian terms, they embody persons' moral capacity to place state actors under legal obligations. Evan Fox-Decent and I have argued that Kant's legal conception of fiduciary relations offers a sound theoretical foundation for attributing fiduciary obligations to state actors.³⁴ According to Kant, when parents unilaterally create a person utterly dependent upon them for survival, they also assume fiduciary obligations to protect and care for their children. Recognition of a child's equal freedom as a "citizen of the world," coupled with the child's practical or legal inability to consent to the relationship of dependence, places parents under moral and legal duties to provide for their child's basic security by making "the child content with his condition so far as they can."³⁵ By the same reasoning, public officials bear fiduciary duties toward persons subject to their administrative powers because public powers are entrusted solely to the state by law, leaving the public vulnerable to the abuse of administrative power. To ensure that such persons are not subject to domination or instrumentalization, the fiduciary principle dictates that all agents and instrumentalities of the state bear legal obligations to discharge their responsibilities fairly and reasonably in the public interest.³⁶

This relational account of common-law constitutionalism explains why the rule of law is a rule of reasons, and it clarifies what kinds of reasons count in public justification. To satisfy their demands of legality on Kant's theory—establishing a regime of secure and equal freedom for all persons—public officials must demonstrate that their actions are consistent

Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEEN'S L.J. 259 (2005) [hereinafter Fox-Decent, *State Legal Authority*].

³² See Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010) (link).

³³ *Id.*

³⁴ See *id.*; Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331 (2009) (link); Evan Fox-Decent, *Is the Rule of Law Really Indifferent to Human Rights?*, 27 LAW & PHIL. 533 (2008) (link); Fox-Decent, *State Legal Authority*, *supra* note 31.

³⁵ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 98–99 (Mary Gregor trans., 1991) (1797).

³⁶ See Criddle & Fox-Decent, *supra* note 34, at 347.

with their fiduciary obligations and are not reflective of domination or instrumentalization. Where practicable, administrative agencies should employ deliberative decision-making procedures to minimize the risk of arbitrariness, and they should open their decisions to public contestation. Even when such measures are not practical due to circumstances of extreme exigency, administrative agencies should justify their actions to the public and the courts, explaining how their actions are consistent with the fiduciary obligations of purposefulness, integrity, solicitude, fairness, reasonableness, and transparency. All public officials must satisfy these principles if persons subject to their administrative powers are to be taken seriously as free and equal autonomous agents, not merely as objects of state domination or instrumentalization. The relational fiduciary theory thus disarms Schmitt's critique of legal liberalism and Poole's critique of common-law constitutionalism and offers a blueprint for promoting the rule of law in emergencies.

III. MENDING HOLES IN THE RULE OF (ADMINISTRATIVE) LAW

By cataloguing the various Schmittian features of our administrative law, Vermeule indirectly outlines an agenda for common-law constitutionalism in the twenty-first century. To establish the rule of law, legislators and judges must work together to mend the black holes and grey holes Vermeule identifies, developing new strategies to reconcile the demands of state necessity with the rule of law in emergencies.

On the relational theory of common-law constitutionalism, federal agencies must satisfy the rule of law in emergencies because arbitrary state action in emergencies undermines the fiduciary character of state legal authority. This does not necessarily mean that Congress and the courts must fill black holes with ordinary administrative procedure, as some commentators have suggested.³⁷ Far from promoting the rule of law, slavish adherence to ordinary administrative procedures could compromise the state-subject fiduciary relation by preventing agencies from acting swiftly and effectively to safeguard subjects' secure and equal freedom. What the relational account of the rule of law does require, on the other hand, is that Congress and the courts establish a legal regime for emergencies that compels federal agencies to justify their derogations from ordinary administrative law—not by reference to crude categorical rules, but instead by reference to relational principles such as necessity, proportionality, fairness, reasonableness, and transparency. Such an approach would preserve administrative flexibility during national crises while holding agencies to account for their fundamental fiduciary obligations.

³⁷ See Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Defiance*, 56 HASTINGS L.J. 441 (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 (2004).

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The APA's "good cause" exception for notice-and-comment rulemaking provides a rudimentary model for the relational approach to administrative procedure, but Congress and the courts should specify the principles that govern derogation from ordinary administrative procedure more clearly. For example, when agencies elect to abandon traditional notice-and-comment rulemaking procedures, the APA could require that they give the public contemporaneous notice, explaining why procedural derogation is necessary and why their preferred decision making procedure is narrowly tailored to the perceived emergency. Emergency regulations should also be accompanied by a public statement explaining how the agency's substantive regulation satisfies existing law, is proportional to the perceived emergency, and promotes the public interest. Congress should also require agencies to subject emergency regulations to more robust deliberative procedures as soon as practicable after the crisis has passed, ensuring that emergency regulations adopted under conditions of uncertainty do not become ossified in ordinary administrative law. In addition, Congress should expand federal courts' jurisdiction to ensure that they are able to consider whether agencies have satisfied their fiduciary obligations at each stage of the decision making process. Within this new regime, courts could still accord substantial deference to an agency's assessment of an emergency and the agency's choice of means to address it, but the courts would nonetheless consider whether the agency's explanations are objectively reasonable and consistent with the state's fiduciary role. Measures such as these would preserve the Executive Branch's ability to respond to emergencies quickly and effectively, without entrenching emergency regulations in ordinary administrative law or sacrificing the rule of law on the altar of state necessity. Equally important, these reforms are fully within Congress's institutional capacity.

The relational approach to emergency administration carries its own risks, of course. If Congress were to develop a more sophisticated standard-based derogation regime for administrative procedure, it might eliminate black holes only to find that judges distort those standards to create a new generation of grey holes. To the extent that our administrative law draws on common-law constitutionalism to reconcile emergency administration with the rule of law, courts may be tempted to subvert the rule of law by refusing to hold public officials accountable for their abuse of power.

Although grey holes are neither conceptually unavoidable nor institutionally inevitable, they may be difficult to eradicate in practice because they reflect a powerful tradition within our legal culture that emphasizes the thin "rule by law" rather than the thick "rule of law." Efforts to mend these holes expose a deep tension within our legal culture "between lawyers who think that the job of law is done when decisions are made by officials wielding authority and lawyers who think that the law should strive for de-

cisions that are justified.”³⁸ While positivist accounts of administrative law such as Vermeule’s Schmittian theory permit the Executive Branch to take extra-legal action during emergencies, the relational account espoused by Dyzenhaus, Mureinik, and other common-law constitutionalists “lead[s] to a culture of justification—a culture in which every exercise of power is expected to be justified.”³⁹ The black and grey holes Vermeule identifies thus require more than technocratic legal reform; they call for a fundamental reorientation of our legal culture away from a focus on formal authority and toward a more vigorous practice of public justification.

To be sure, the relational theory of common-law constitutionalism is aspirational insofar as it relies on federal judges to apply legal standards as vehicles for promoting public justification. Vermeule goes too far, however, when he characterizes the aspiration toward a culture of justification as “fantas[tical]” or “hopelessly utopian.”⁴⁰ Guided by the fiduciary character of public administration, common-law constitutionalism offers a practical, realistic roadmap for overcoming Vermeule’s Schmittian challenge and establishing the rule of (administrative) law during emergencies.

³⁸ Mureinik, *supra* note 9, at 1983.

³⁹ Dyzenhaus, *supra* note 26, at 11 (quoting Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. ON HUM. RTS. 31, 32 (1994)).

⁴⁰ Vermeule, *supra* note 3, at 1097, 1105.