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The Unbearable License of Being the Executive: A Response to Stacey's Permanent Environmental Emergency

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Abstract:
This article responds to Jocelyn Stacey's "The Environmental Emergency and the Legality of Discretion in Environmental Law". In her article, Stacey attempts to establish the legitimacy of unfettered executive discretion to deal with environmental issues, but the justification that she provides is not up to the task. She asserts that all environmental issues are emergencies but she does not explain why they are so. She proposes to resolve the problem of executive discretion by redefining the rule of law, thereby rendering it an empty shell. Environmental protection and the rule of law do not push in opposite directions. Instead, it is the loss of the rule of law that allows governments to pick and choose the environmental conditions that they wish to alternatively save and sacrifice. The solution to environmental issues that the rule of law demands is not unfettered discretion but better abstraction in rules of general application. Boundless authority to respond to "environmental emergency" is an unbearable licence to make things up on the go.

Keywords:
Environmental law, rule of law, discretion, emergency, separation of powers, ecosystems, ecosystem management, adaptive management, Crown prerogative.

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THE UNBEARABLE LICENCE OF BEING THE EXECUTIVE

A RESPONSE TO STACEY'S PERMANENT ENVIRONMENTAL EMERGENCY

Bruce Pardy·

In every age the men who want us under their thumb, if they have any sense, will put forward the particular pretension which the hopes and fears of that age render most potent. . . . It has been magic, it has been Christianity. Now it will certainly be science. . . . Let us not be deceived by phrases about 'Man taking charge of his own destiny.' All that can really happen is that some men will take charge of the destiny of others. . . . The more completely we are planned the more powerful they will be. . . . .

—C. S. Lewis, God in the Dock[1]

Introduction

It is 800 years since the Magna Carta, and one of the main projects of environmental law academics seems to be to tear down the concept that it helped establish. That concept is the rule of law: the proposition that no office or officers are above the law and are not empowered to make it up as they go. In her article "The Environmental Emergency and

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[1] Cited at <http://blog.independent.org/2009/01/29/tyranny-for-the-good-of-its-victims/>.

the Legality of Discretion in Environmental Law",[2] Jocelyn Stacey joins the chorus proposing to throw out rule of law norms in the name of environmental protection. She advocates carte blanche for government officials dealing with environmental issues – and assumes that they will act for the purposes that she has in mind.

In a nutshell, Stacey makes two main arguments. First, she says that all environmental issues are emergencies, and therefore the executive branch of government should have free rein to deal with them. Second, she argues that unfettered executive discretion does not violate the rule of law because the rule of law can be redefined.

Stacey's underlying theme is well-trodden: variability and unpredictability in ecosystems pose challenges to environmental governance. These challenges are said to require "adaptive management", which consists of particularized, context specific measures. Environmental managers use their unfettered discretion to craft trial and error prescriptions on an ongoing basis in each specific ecosystem context. These managers are government officials and thus members of the executive branch exercising the authority of the Crown. Executive discretion is necessary because the public good depends on it; and the public good depends on it because it is necessary.

I have argued elsewhere that this reasoning is flawed.[3] I will not repeat these objections here other than in the course of commenting on Stacey's two main propositions, namely that discretion is justified because environmental issues are emergencies and that such discretion is consistent with a reconceived rule of law. Stacey tries to make her case in part by contrasting it with the "environmental reform position" which objects to the discretionary nature of environmental law. I am one of the reformers that Stacey quotes

[2] The preceding article in this issue of the Osgoode Hall Law Journal [Stacey].

[3] B. Pardy, "In Search of the Holy Grail of Environmental Law: A Rule to Solve the Problem" (2005) 1 International Journal of Sustainable Development Law and Policy 29; B Pardy,"Ecosystem Management in Question: A Reply to Ruhl" (2006) Pace Environmental Law Review 209; B Pardy,"The Pardy-Ruhl Dialogue on Ecosystem Management, Part V: Discretion, Complex-Adaptive Problem Solving, and the Rule of Law" (2008) 25 Pace Environmental Law Review 341.

in her article (although there is no such singular position or school of thought and I would not have used that label).

Stacey, to her credit, at least acknowledges that unsupervised, discretionary executive power requires justification. Indeed, that is the purpose of her article, whose thesis is directed at establishing its legitimacy. However the justification that she actually provides is not up to the task. She asserts that environmental problems are emergencies but she does not explain why they are so. She argues that the conflict between executive discretion and the rule of law can be resolved by redefining the rule of law, thus removing the essence of what it means and rendering it an empty shell.

1. Everything is an Emergency

(a) The Executive's Emergency Prerogative

Before considering Stacey's proposition that all environmental events are emergencies, it is first necessary to provide some context. Emergency is a legal term of art and carries legal consequences. At common law, the Crown has the prerogative to act in times of emergency where the existence or sovereignty of the country is threatened.[4] In Canada, federal statutes such as the *National Defence Act*[5] and the *Emergencies Act*[6] now regulate matters that might have fallen within such a Crown prerogative.[7] Where the matter is dealt with by statute, it displaces the prerogative and the executive must act in

[4] "... the Crown enjoys the right to take actions in an emergency that are necessary in order to defend the sovereignty of the country." Patrick Monahan and Byron Shaw, *Constitutional Law* 4th ed (Irwin Law, 2013) at 60 citing *Burmah Oil Co (Burmah Trading) Ltd v Lord Advocate* (1964), [1965] AC 75 at 99 (HL); Peter Hogg, *Constitutional Law of Canada* 5th ed supp (Carswell, 2007) at 1-18 to 1-21.
[5] RSC 1985, c N-5
[6] RSC 1985, c 22 (4th Supp).
[7] Monahan and Shaw, *supra* note 4.

accordance with the statute.[8] In either case, whether there is a statute providing for the power or whether the Crown is exercising its common law prerogative in the absence of a statute, courts may determine whether such an emergency exists; and thus have jurisdiction to determine whether the power applies in particular situations and whether the Crown has acted within those powers.[9] As Peter Hogg points out, the prerogative is a creature of the common law because "it is the decisions of the courts which have determined its existence and extent."[10]

Stacey relies in her article on Carl Schmitt's concept of an emergency. In Schmitt's view, the sovereign has the power not merely to act in times of emergency, but to decide when an emergency exists and the extent of the powers it may exercise to respond to it. In his book *Political Theology* written in 1922, he wrote:

> For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists. … He has the monopoly over this last decision. Therein resides the essence of the state's sovereignty, which must be juristically defined correctly, not as the monopoly to coerce or to rule, but as the monopoly to decide. The exception reveals most clearly the essence of the state's authority. The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law.[11]

This power lies outside the law, and is not subject to review in the courts. It is not compliant with rule of law norms but does not need to be, according to Schmitt, since it is prior to or external to the existing legal order.

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[8] The courts have held that where a prerogative power has been regulated or defined by statute, statute displaces the prerogative and the Crown must act on the basis of the statutorily defined powers." Monahan and Shaw, *ibid*; Hogg, *supra* note 4 at 1-20.

[9] *Case of Proclamations* (1611) 12 Co Rep 74, 77 ER 1352 KB); *Auckland Harbour Bd v The King* [1924] AC 318 (PC NZ); *Entick v Carrington* (1765) 95 ER 807 (KB).

[10] Hogg, supra note 4 at 1-18, quoting *Case of Proclamations, ibid,* "the King hath no prerogative, but that which the law of the land allows him."

[11] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1922) (George Schwab trans, MIT Press, 1985) 13 [Schmitt], quoted by David Dyzenhaus, "Schmitt v Dicey: Are States of Emergency Inside or Outside the Legal Order?" (2006) 27 Cardozo LR 2005 at 2005 [Schmitt v Dicey].

Schmitt's view of sovereign power in an emergency is more extreme than Canadian law presently reflects. David Dyzenhaus is one of Schmitt's critics. He has challenged Schmitt's proposition that the executive can be said to have a monopoly over emergencies,[12] with the power not merely to act but also to decide when an emergency exists and the boundaries of the powers that the emergency justifies. Dyzenhaus writes:

> … there is no prerogative attaching to an institution of state to act outside of the law … if the executive is given the equivalent of such a prerogative either by the constitution or by statute, it is the duty of judges to try to understand that delegation of power as constrained by the rule of law. … Not only is it the case that it is for the court to decide whether the government has a justified claim that there is an emergency—the first limb—but the courts must assess whether the actual responses to the emergency are legal—the second limb.[13]

(b) The Meaning of Emergency

An emergency in the Schmitt sense is an unanticipated existential threat or a threat to the sovereignty of the country.[14] Stacey acknowledges this, but suggests that threats need not be so extreme, and maintains that constitutional law scholars have relaxed the

[12] "Is there a "strength inherent within"' the rule of law such that emergencies do not require that we make exceptions to it? I like to think that the answer to this question is "yes."" David Dyzenhaus, "Introduction: Legality in a Time of Emergency" (2008) 24 Windsor Rev Legal & Soc Issues 1 at 1 [Introduction].

[13] Schmitt v Dicey, *supra* note 11 at 2009-2011. Also see Introduction, *ibid* at 3, where he writes, "The view for which I argue takes its cue from the dissents in the infamous cases. It insists that the long term interests of the rule of law require judges to uphold a robust set of principles during an emergency, principles which do not allow judges to abdicate responsibility. This view does seem to have some support in the recent judicial record, in such United States Supreme Court's decisions as *Hamdan v Rumsfeld* [126 S. Ct. 2749 (2006), 165 L. Ed. 2d 723 (2006)], in the *Belmarsh* decision of the House of Lords [*A. v. Secretary of State for the Home Department*, 2004 UKHL 56, [2005] 2 AC 68], and in the Canadian Supreme Court's decision in *Charkaoui v. Canada* [2007 SCC 9, [2007] 1 S.C.R. 350].

[14] Schmitt, *supra* note 11 at 6.

threshold for what constitutes an emergency in the post-9/11 era.[15] Instead, Stacey says, merely serious threats will suffice as emergencies. She reasons:

> Where the state faces a truly existential threat, Schmitt argues that the sovereign (or the modern day executive) may need to suspend legal order altogether, but the fact that the sovereign is so empowered reveals that it is in the position to respond the most expeditiously to serious, though not existential threats.[16]

If Schmitt is right that the sovereign has the power to define when an emergency exists, which is a power that lies outside the law and is not subject to review by the courts, then an emergency exists whenever the sovereign says that it does, even if the threat is not actually existential or extreme. Stacey says that therefore merely serious threats will suffice as emergencies. If the sovereign has the power that Schmitt describes, then Stacey must surely be correct. But the logic does not draw a line at serious threats. If the sovereign has the power to define emergency, then it is not even necessary that the situation be serious. Indeed, there is no point in establishing criteria at all. Under Schmitt's logic, any situation declared by the sovereign to be an emergency will indeed be an emergency since the sovereign's decision lies outside the law and is not reviewable. If you are Henry VIII, the inability to obtain a divorce will be an emergency. Off with her head.

If one accepts Schmitt's core proposition, the rest of Stacey's argument is unnecessary. If the executive stands outside the law in an emergency, and can define when the emergency exists without accountability, then there is no useful purpose to be served by defining or describing the law of emergencies, including whether environmental issues fall within the legal definition. There is no role for a legal definition, since the

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[15] Stacey, *supra* note 2 at 9. "If anything constitutional law scholars have relaxed the threshold for what constitutes an emergency. Schmitt focused on a truly existential threat, but the prevalence of Schmitt's challenge in the post-9/11 literature suggests that something less than an existential threat can constitute an emergency, given that, as dramatic as terror attacks of the last two decades have been, they have not been existential threats."

[16] Stacey, *ibid* at 8-9.

power lies outside the law. Environmental issues are emergencies if the executive says so; if it does not, they are not.

On the other hand, if one accepts Dyzenhaus' proposition that the Crown's prerogative must be subject to judicial review, then there are legal issues to discuss. What is the legal meaning of emergency? Is it wide enough to include all environmental issues?

(c) All environmental issues are emergencies?

Stacey says all environmental events should be viewed as emergencies, and therefore they justify unfettered discretion. All environmental issues are emergencies because:

> Our understanding of ecological systems as complex, adaptive systems means that the epistemic features of emergencies are inherent within all environmental issues. While it is certainly not the case that all environmental issues contain the possibility of an extreme event, or catastrophe, our inability to distinguish in advance the ones that contain this possibility from the ones that do not justifies viewing all environmental issues from this perspective. It is not possible to "carve out irreversible or catastrophic risks for special treatment," since … we cannot reliably identify these in advance. ... each environmental issue can be understood as an 'emergency in miniature' … It is our epistemic inability to distinguish benign from catastrophic policy choices that justifies viewing all relevant events and policies through the prism of the emergency paradigm.[17]

In essence, Stacey invokes the "butterfly effect": we cannot know the causal chain to which a butterfly's wings contribute. The consequences are probably benign, but they might be catastrophic. Therefore a butterfly flapping its wings must be seen through the prism of the emergency paradigm. Stacey insists that all environmental events and policies should be viewed in this way. That means that the very existence of ecosystems must be seen as having the epistemic features of an emergency. Essentially she argues that the state of the natural world is incompatible with the rule of law.

[17] Stacey, *ibid* at 6 and 15, notes omitted.

Ecosystems are patterns of interactions between organisms and their non-living environment. They do not exist independently of those interactions. Each interaction contributes to the dynamics that make the system what it is. Ecosystems change through time as a result of the cumulative effects of the interactions in the system. The rate of change is usually slow but sometimes dramatic; sometimes human activities influence it but change also occurs in the absence of human effects. The mere occurrence of change in an ecosystem is not evidence of something "wrong".

The unpredictability of ecosystems is not a threat to ecosystems. If the objective of environmental law was to let ecosystems be ecosystems, then change in ecosystems would not be necessarily perceived as problematic. However, ecosystem management is the prevailing ideology in environmental law. The objective of ecosystem management is to control and manage ecosystems to produce desirable outcomes. Variability and unpredictability in ecosystems stand in the way of such management. If your mandate is to manage ecosystems and they cannot be managed, that will seem like an emergency. The nature of ecosystems is incompatible with the aspirations of those who wish to manage them, but it is not incompatible with the requirements of the rule of law. The management imperative does not arise from variability and unpredictability in ecosystems but from the culture of the administrative state, which exists to manage, facilitate and control the attributes of modern civilization.

According to Stacey, what are the criteria for catastrophic environmental situations? When does an actual emergency occur? She uses the mountain pine beetle epidemic in Western Canada as her main example. I will reproduce her description of the epidemic at length because what she says is important, and what she does not say is even more important.

> One example of the complex, adaptive nature of ecosystems and their potential for an unknown, extreme event is the ongoing unprecedented

> mountain pine beetle epidemic in western Canada. It is the second largest insect epidemic in North American history. The beetle has decimated the lodgepole pine population across the province of British Columbia. At times the beetles travelled in such density that they could be seen as a light drizzle on weather radar, and "fell like rain out of the sky." The mountain pine beetle now covers an unprecedented range, extending well into the neighbouring province of Alberta. Moreover, having overrun its historic host, the beetle has begun to attack new species which, for the first time, makes the entire pan-Canadian boreal forest susceptible to attack. The epidemic is a natural disaster, albeit not a conventional one, analogized by one author to a slow-moving tsunami. … The epidemic will wreck havoc on the British Columbia forest industry, the province's primary natural resource industry. It has killed vast areas of forest in the interior of British Columbia, turning the landscape red, then grey as the attacked trees die. The result has been a short-term boom of available timber which needs to be logged before it rots. Even still, the beetle is out-logging the loggers, meaning that around half of all lodgepole pine, deliberately managed for long-term harvesting, will not be available for harvest in 10 to 50 years time. … Mountain pine beetle outbreaks are a regular occurrence in forests dominated by lodgepole pine, to be sure. But not on this scale. Although we now know that the combination of fire suppression and climate change were the main drivers of the epidemic, the complexity of ecological relationships makes it extremely difficult to know in advance how disparate forest management decisions may impact the beetle's long-term population dynamics, let alone predict how those decisions may intersect with the yet-to-be-discovered phenomenon of climate change. Moreover, the ongoing dynamics of the beetle continue to defy prediction. "[T]he pine beetle did everything the experts said it couldn't do: it flew over mountains, it invaded northern forests, it attacked spruce trees, and it wiped out pine plantations not much thicker in diameter than baseball bats.[18]

The solution to environmental issues that the rule of law demands is not unfettered discretion but better abstraction in rules of general application. Stacey says the pine beetle is an environmental problem and therefore an emergency, but only with reference to facts specific to the situation. What she does not do, and what the rule of law requires, is an explanation of ***why*** it constitutes a problem in abstract legal terms. Why is the presence of the beetle an environmental problem? Why is it "wrong"? Stacey's tale of the beetle alludes to multiple rationales all jumbled together, without

[18] Stacey, *ibid* at 11-13.

identifying what those rationales are or upon which she is basing her conclusion. Stacey needs to finish this sentence:

"The mountain pine beetle is an environmental problem because ... ."

The first step in answering this question is to choose between the following options, which rely on different values, premises and reasoning:

1. ***Because it is consuming a resource that is valuable to humans.*** ("The epidemic will wreck havoc on the British Columbia forest industry, the province's primary natural resource industry. It has killed vast areas of forest in the interior of British Columbia, turning the landscape red, then grey as the attacked trees die. The result has been a short-term boom of available timber which needs to be logged before it rots. Even still, the beetle is out-logging the loggers, meaning that around half of all lodgepole pine, deliberately managed for long-term harvesting, will not be available for harvest in 10 to 50 years time.")

2. ***Because it is "abnormal"; that is, not in accordance with recorded events over time in that ecosystem. The beetles are an invasive species that does not "belong" in this ecosystem.*** ("The mountain pine beetle now covers an unprecedented range, extending well into the neighbouring province of Alberta. … Moreover, the ongoing dynamics of the beetle continue to defy prediction. '[T]he pine beetle did everything the experts said it couldn't do: it flew over mountains, it invaded northern forests…') ***On the other hand, insect infestations sometimes happen in ecosystems. They can be "natural".*** ("Mountain pine beetle outbreaks are a regular occurrence in forests dominated by lodgepole pine.")

3. ***Because it is causing the forest ecosystems to undergo transformative change.*** ("Extreme events – such as large hurricanes, earthquakes or pest outbreaks ***[all natural***

phenomena] – occur with surprising frequency and can disrupt the system such that it does not return to its prior state."[19]) ***This conclusion implies that the only non-emergency state is ecosystems in a steady state, which is a state that does not exist in nature.***

4. ***Because the presence of the beetles is a product of human action.*** ("… the combination of fire suppression and climate change were the main drivers of the epidemic ...") ***If this is the rationale, then the same event without human cause would lead to a different conclusion, and would be neither an environmental problem nor an emergency.***

5. ***Because the infestation is contrary to human aesthetic sensibilities.*** ("At times the beetles travelled in such density that they could be seen as a light drizzle on weather radar, and "fell like rain out of the sky.") ***If so, the definition of environmental problem has nothing to do with ecosystem function or economic or natural resources.***

6. ***Because the infestation constitutes an existential threat.*** [***But to what does it represent an existential threat? Not to the sovereign state. Not to the ecosystem.]***

Which of these features of the beetle infestation is Stacey concerned about? She does not say. Identifying one of them is the first step in a process of reasoning and abstraction that would explain the conclusion. What will not do is a blanket conclusion that the presence of the pine beetle is simply "undesirable". Undesirability is not a basis for the exercise of executive discretion, and is certainly not a justification for emergency powers. Stacey declines to do what environmental managers generally decline to do: to define in abstract legal terms her definition of an environmental problem that would constitute an emergency. She can provide any criteria she wishes, as long as those criteria govern all abstractly similar situations. Characterizing environmental problems

[19] Stacey, *ibid* at 11.

as emergencies without providing binding criteria allows different values to be applied to different scenarios at different times by different officials. In short, it provides licence for arbitrary governance.

Ecosystems are wild. They are unpredictable. Managing them changes them from what they are and what they would have become had they not been managed. If wildfires threaten the lives of people, call it an emergency and bring out the troops. But natural phenomena that have unpredictable effects on ecosystems are not emergencies for ecosystems. The beetle is only an emergency if one has already accepted the premise of ecosystem management, namely that it is the role of government to oversee the state of ecosystems. That premise stands in opposition to what ecosystems are and how they work.

Stacey objects to the concept of rules because language contains inherent ambiguities. She dismisses my argument from an earlier article[20] that environmental law should consist of generally applicable abstract rules:

> Pardy's proposal, while considerably more elegant than the current tangle of prohibitions, qualifiers and exemptions found in Canadian environmental law, simply embeds discretionary judgment calls within its open-textured language. What constitutes 'non-natural,' or 'permanent,' or even an 'ecosystem' is a highly contextual and often contentious determination. Under a general environmental rule, discretion would not be eliminated nor minimized, merely shuffled around. Schmitt's challenge cannot be met by simply making fewer, simpler or better *ex ante* rules. But to see that this solution is inadequate, environmental law has to own up its unavoidable subjection to Schmitt's challenge in the first place."[21]

This is a cop-out. For a time one of my colleagues had a cartoon on her door that showed a professor lying on a psychiatrist's couch with the shrink sitting nearby taking notes. The caption read, "I think I've lost the will to footnote." Stacey has lost the will to

[20] B Pardy,"In Search of the Holy Grail of Environmental Law: A Rule to Solve the Problem" (2005) 1 International Journal of Sustainable Development Law and Policy 29.
[21] Stacey, *supra* note 2 at 38, footnotes omitted.

abstract. Abstraction means finding the rule, principle or reason that is broader than the specific case. If Kate pushes Gary out of the way to get the last seat on the bus, Kate commits the tort of battery. If Hugh throws a rock at Joan and hits her in the head, Hugh commits a battery. In both situations the same abstract action has occurred: both Kate and Hugh made intentional contact with another in the absence of consent.

Language does contain inherent ambiguities, but making this objection to avoid abstract rules is to throw the baby out with the bathwater. It may not be possible to articulate a rule that always clearly resolves all sets of facts.[22] However, it is eminently possible to define rules that resolve the vast majority of applicable cases and provide bright line boundaries that remove the ability of officials to make things up as they go. Language can contain ambiguities, but it can also contain meaning. Because courts have defined battery as an intentional contact without consent, we know that Hugh commits a battery when he throws a rock at Joan and hits her in the head. We also know that if Raffi trips over a briefcase that Kate accidently left under the chair, Kate has not committed a battery.

Statutes contain rules expressed in words. The meaning of those words may not be completely clear when a court applies them to the case before it. However, a court's interpretation of those words gives them meaning. Because the court functions within a system of precedent, the words are less ambiguous after the case than they were before it. It is not correct to say that the next court has unbridled discretion to decide the outcome of the next case. In contrast, executive officials are not bound by other decisions of other officials. Their decisions do not define anything for the purpose of the next decision. If all that exists is discretion, it is impossible to know where you stand until the bureaucrat exercises her fiat.

[22] "... no set of rules will be perfect in its application; indeed, knowing when to quit is one of the driving forces behind a set of simple rules." Richard Epstein, *Simple Rules for a Complex World* (Harvard Univ Press, 1995) 53.

It is one thing to note the challenges posed by the ambiguity of language. It is quite another to wildly extrapolate from that modest proposition to abandon the enterprise of expressing rules and reasons that limit the power of those who govern. By that reasoning, no rules of any kind are possible, no laws exist and *everything in the world* is an emergency and subject to unfettered executive discretion.

Creating sound abstract rules is hard work. They need to be sufficiently abstract to apply to a wide range of circumstances and sufficiently concrete to define the line between legal and illegal. Such rules are challenging to draft. Legislatures require political courage to enact them because they state the rule ahead of time, committing the executive to a course of action before anyone knows the political context of disputes that have not yet arisen.

2. Unfettered discretion and the rule of law

(a) Having it both ways

Stacey's second main argument is puzzling and seems like an afterthought. After spending three-quarters of her article arguing that environmental issues require unfettered discretion, she then proposes that a different conception of the rule of law can and should constrain that discretion. These two arguments conflict. Stacey makes her first claim emphatically: the nature of environmental events requires discretion that is unconstrained, a term she uses repeatedly, emphasizing the necessity for, well, lack of constraint. She then maintains that unfettered executive discretion does not violate the rule of law if the rule of law is redefined – because her reconstituted rule of law meaningfully constrains executive discretion.

Both claims cannot be satisfied. If her new rule of law does constrain the exercise of discretion, then that discretion is not unconstrained, as she claims it needs to be. If her new rule of law does not constrain that discretion, then discretion is not constrained as she claims it would be. Essentially she argues that unconstrained executive discretion is legitimate because it is constrained. Yet she does not want the now-constrained unconstrained discretion to be subject to a formal rule of law because that would actually constrain it. By the end of the piece it is difficult to discern whether Stacey believes in constraint or not.

Furthermore, by the conclusion Stacey has left the realm of emergency. She began with Schmitt but seems to have abandoned him. Schmitt maintained that emergency executive powers stand outside the law and are not subject to supervision from either legislature or courts. In contrast, Stacey ends up addressing a far more ordinary question: where a statute authorizes administrative discretion, to what extent do courts limit that discretion upon judicial review? It is not clear in what way Schmitt is a necessary element of Stacey's thesis.

(b) Black is white

Stacey acknowledges the conflict between the rule of law and the broad licence she proposes to grant to the executive: "[E]nvironmental issues pose a fundamental challenge for the rule of law: they reveal the necessity of unconstrained executive discretion."[23] Black is not white.

But then she suggests that the conflict can be resolved simply by redefining what the rule of law means. She proposes:

> … an alternative understanding of the rule of law, one that accounts for the inevitability and the desirability of administrative discretion … significant

[23] Stacey, *supra* note 2 at 1 (abstract).

> institutional innovation across a broad range of administrative contexts to ensure that the requirement of public justification can be fulfilled …"[24]

Black could be white after all. Stacey engages in a process of doublethink that would make George Orwell spin in his grave.[25] Rather than confront the problem that unfettered executive discretion poses to a system of law built on separation of powers and legislative supervision of the executive branch, Stacey dismisses these norms as part of an old-fashioned, formalistic rule of law and declares the problem solved. She says that "an alternative conception of the rule of law can both constitute and constrain the state's regulative authority over the environment"[26] She refers to both common law reasoning[27] and common law constitutionalism[28] as the source of these restraints. However, the article is bereft of explanation as to how either or both mean that unconstrained executive discretion is consistent with the rule of law. It is not even clear whether she means the same thing or different things when she refers to "common law reasoning" and "common law constitutionalism".

Common law reasoning is based on precedent. A system of precedent means that reasons in previous cases must be honoured in the next case; otherwise there is no law, but merely random decisions by isolated judges. A system of precedent requires

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[24] Stacey, *ibid* at 42, 43.

[25] "To know and not to know, to be conscious of complete truthfulness while telling carefully constructed lies, to hold simultaneously two opinions which cancelled out, knowing them to be contradictory and believing in both of them; to use logic against logic, to repudiate morality while laying claim to it, to believe that democracy was impossible and that the Party was the guardian of democracy; to forget whatever it was necessary to forget, then to draw it back into memory again at the moment when it was needed, and then promptly to forget it again: and above all, to apply the same process to the process itself. That was the ultimate subtlety: consciously to induce unconsciousness, and then, once again, to become unconscious of the act of hypnosis you had just performed. Even to understand the word 'doublethink' involved the use of doublethink." George Orwell, *Nineteen Eighty-Four* (Penguin Books, 1949) at 32.

[26] Stacey, *supra* note 2 at 1 (abstract).

[27] "This paper advances an understanding of the rule of law – one built on common law reasoning – that is capable of providing meaningful legal constraints on environmental decision-making." Stacey, *ibid* at 4.

[28] "... common law constitutionalism ... understands rule of law constraints as "the constraints of adequate justification." We will see that common law constitutionalism suggests that creative institutional design can allow all public decisions to be subject to meaningful rule-of-law constraints, even in the highly complex and unpredictable context of the environmental emergency." Stacey, *ibid* at 7, notes omitted.

abstraction. When Oliver Wendel Holmes famously said that the life of the common law has not been logic but experience,[29] he did not mean that that it is devoid of abstract reasoning, or that each case is an isolated event. The common law judge must apply the law, and the law is determined by interpreting previous cases to discern the abstract rules and principles that the results and reasons in those cases express. Common law reasoning is incompatible with unrestrained discretion.

Stacey suggests that the theory of common law constitutionalism interprets legal constraints as constraints of "adequate justification"[30] and requires that public officials "justify their decisions on the basis of fundamental constitutional principles."[31] She provides little else to explain what that means, other than to seize upon the idea of public justification, which she equates with the production of reasons. However, administrative officials give reasons only in extremely limited circumstances such as when they are adjudicating rights.[32] Within the vast institutional machinery of environmental and land-use administration at multiple levels of government, reasons are rare. Even when officials provide them, they do not do so within a system of precedent. Stacey's statement that reasons "ensure that the individual knows that she or he has not been treated arbitrarily by the state"[33] is an odd claim which would only be true if those reasons were binding. Since administrative officers are not bound in this way, reasons are as likely to show that the decision was inconsistent with previous decisions made by other officers, and therefore arbitrary. In other words, even in the rare situation where reasons are forthcoming, they provide little protection from arbitrary measures if they do not constitute law that must be applied to the next case.

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[29] OW Holmes, *The Common Law* (Little Brown and Co, 1881) 1.
[30] Stacey, *supra* note 2 at 43.
[31] *Ibid.*
[32] As in the Supreme Court of Canada case of *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817, to which Stacey refers.
[33] Stacey, *supra* note 2 at 45.

This version of "public justification" bears little resemblance to common law reasoning or common law constitutionalism.[34]

(c) Separation of powers

Stacey rejects the notion of separation of powers since it gets in the way of officials seeking to achieve higher goals. "Like any institutional design", she writes, separation of powers "is only useful to the extent that it enables the realization of foundational constitutional principles."[35] The statement is almost amusing, since there are few legal principles more foundational than the separation of powers. The Supreme Court of Canada has observed that the separation of powers is a fundamental principle of the Canadian Constitution.[36] In *Ontario v. Criminal Lawyers' Association of Ontario*, the Court stated:

> Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch

[34] Indeed, common law constitutionalism supports the position Stacey dismisses. She rejects features of the environmental reform position that are congruent with three of Lon Fuller's eight "principles of legality" – generality, promulgation and congruence between official action and declared rule. See Lon Fuller, *The Morality of Law* Rev Ed (Yale Univ Press, 1969). Stacey cites David Dyzenhaus extensively in her article yet Dyzenhaus approves of Fuller's approach. See eg David Dyzenhaus, "The Legitimacy of Legality" (1996) 46 U Toronto LJ 129.

[35] Stacey, *ibid* at 49.

[36] *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 at paras 138-139; *Wells v. Newfoundland*, [1999] 3 SCR 199 at para 52 [*Wells*]; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 SCR 3 at para 33 and 107; and *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly),* [1993] 1 SCR 319 at para 141. James Johnson observes that "The constitutional coherence of the [Supreme Courts jurisprudence on separation of powers] ultimately comes from the fact that it energizes the fundamental constitutional principles of democracy and the rule of law. It encourages and fosters a responsibility for law-making and policy-making in the most representative institution of government, the legislature. The executive branch, meanwhile, is given public standards to guide its activities, and the judiciary has access to a set of legislated norms against which to judge executive action." James Johnson, "The Separation of Powers and the Delegation of Legislative Power: Charting Unstable Terrain at the Supreme Court of Canada" in *Toward a Canadian Non-Delegation Doctrine*, PhD Thesis (in progress, unpublished) at 40.

> makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the Charter. … All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others.[37]

Even with the Court's qualifications that the separation of powers is not strict[38] or absolute[39] under the Canadian Constitution, unfettered executive authority is its antithesis. It is not clear to what other principles Stacey ascribes a higher priority.

(d) The wrong straw man

Stacey argues for her alternative conception of the rule of law by contrasting it with the status quo – the current conception of the rule of law as applied by courts (which Stacey refers to as the "formal" rule of law). In so doing, she purports to respond to arguments of environmental law reformers who decry the dominance of discretion in environmental law.

> … the environmental emergency reveals both the necessity and desirability of discretion, but that the formal conception of the rule of law is incapable of providing meaningful constraints on the exercise of that discretion. In other words, the environmental reform position is right to call our attention to the pervasive problem of discretion in Canadian environmental law, since the courts seem beholden to the formal conception which leads judges to create legal black and grey holes.[40]

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[37] *Ontario v Criminal Lawyers' Association of Ontario* [2013] 3 SCR 3 at paras 28-29 [*Criminal Lawyers'*]. Also see *Fraser v PSSRB* [1985] 2 SCR 455 at para 39; and *Reference re Remuneration of Judges of the Provincial Court (PEI)* [1997] 3 SCR 3 at paras 125, 139.
[38] *Reference re Secession of Quebec* [1998] 2 SCR 217 at para 15.
[39] *Wells, supra* note 36 at para 54.
[40] Stacey, *supra* note 2 at 36.

But Stacey's argument does not respond to the reform position because the reform position supports reform, not the status quo. My position is not that the present state of the "formal" rule of law as observed by legislatures and courts is adequate. Legislatures do a poor job of reflecting rule of law standards in environmental statutes[41] and courts enforce requirements of the rule of law only partially and inconsistently. The Supreme Court of Canada has found that some rule of law norms form part of the Canadian constitution but not others.[42] Dyzenhaus laments that courts create a facade of the rule of law when they approve of executive action unrestrained by broad statutes, creating "grey holes".[43] Stacey agrees, and I do too. Black holes and grey holes are not features of a system based upon a rigorous rule of law. The status quo version of the formal rule of law is inadequate. Stacey challenges the wrong straw man.

Finally, there is one other matter on which Stacey and I concur. Some in the "reform" camp recommend that independent experts should make environmental decisions.

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[41] "What was once generally justified only in time of war or other emergencies has become increasingly common: the enactment of legislation with very little opportunity for parliamentary debate and with both the principles and the detail left initially for the executive to work out and also subject to change at the executive's whim." D Mullan, *Administrative Law* (Irwin Law, 2001) at 135.

[42] See eg *Criminal Lawyers', supra* note 37; *Babcock v Canada (Attorney General)*, [2002] 3 SCR 3 at para 54; *Authorson v Canada (Attorney General)*, [2003] 2 SCR 40; *British Columbia v Imperial Tobacco Canada Ltd*, [2005] 2 SCR 473, in which the court stated at paras 58, 59, 63, 64 (Major J), "This Court has described the rule of law as embracing three principles. The first recognizes that "the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power ... The second "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order" ... The third requires that "the relationship between the state and the individual ... be regulated by law"... So understood, it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation. ... The [appellants] submit that the rule of law requires that legislation (1) be prospective; (2) be general in character; (3) not confer special privileges on the government, except where necessary for effective governance; and (4) ensure a fair civil trial. And they argue that the Act breaches each of these requirements, rendering it invalid. ... A brief review of this Court's jurisprudence will reveal that none of these requirements enjoy constitutional protection in Canada."

[43] "A grey hole is a legal space in which 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. And since such grey holes permit government to have its cake and eat it too, to seem to be governing not only by law but in accordance with the rule of law, they and their endorsement by judges and academics might be even more dangerous from the perspective of the substantive conception of the rule of law than true black holes." Schmitt v Dicey, *supra* note 11 at 14.

Stacey condemns this idea and rightly so. It is at odds with rule of law norms[44] and would increase rather than diminish the role of unaccountable discretion in environmental law.

3. Conclusion

The imperative to manage environmental conditions comes not from the nature of ecosystems but from the ethos of the administrative state. Variability and unpredictability in ecosystems are obstacles to management, and that must seem like an emergency to those who are committed to fashioning the most "desirable" environmental outcomes. But that does not mean that ecosystems actually exist in a state of emergency.

Environmental issues are conflicts between people. Legal rules tell people how those conflicts will be resolved. Laws govern the behavior of people; it cannot control the behavior of ecosystems or the actions of butterflies and beetles. It can govern only the actions of foresters in response to the beetles. Should foresters chop down dead trees? Because ecosystems, like markets, are systems of interactions, the role of the state should be limited to setting generally applicable rules for the behaviour of people as they interact in those systems, and then to let the systems run.

The rule of law is inconvenient. It gets in the way of officials crafting solutions to problems they perceive as important. That is not its downside. That is its purpose. If the modern administrative state is incompatible with a formal conception of the rule of law, then it is the modern administrative state that must adapt. If the choice was between environmental decline and a dictatorial executive, better that the country go to hell in a hand basket than be subject to the permanent tyranny of unfettered discretion.

[44] "…there could hardly be a more unbearable – and more irrational – world than one in which the most eminent specialists in each field were allowed to proceed unchecked with the realization of their ideals." FA Hayek, *The Road to Serfdom* (University of Chicago Press, 1944) at 55.

Fortunately, those are not the options. Environmental protection and the rule of law do not push in opposite directions. Instead, it is the loss of the rule of law that allows governments to pick and choose the environmental conditions that they wish to alternatively save and sacrifice. Boundless authority to respond to "environmental emergency" is an unbearable licence to make things up on the go.