

THE UNIVERSITY OF HULL

***Taming Black Swans:
A Schmittian Perspective on State-led Crisis Management.***

Being a Thesis submitted for the Degree of

Ph.D Politics

in the University of Hull

by

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September 2023

“[Freya] slumped back in her chair with a sigh. Portraits of earlier margravines gazed down kindly at her... and she wondered what they would have done in a situation like this. But of course, there had never been a situation like this before. For them the ancient traditions of the city had always worked, providing a simple, infallible guide to what could and could not be done... Just my luck to be left in charge... to be left with a load of rules and traditions that don't quite fit anymore. But she knew that if she took off the armour of tradition she would have to face all sorts of new problems. The people who had stayed aboard her city after the plague had done so only because they revered the margravine. If Freya stopped behaving like a margravine, would they still be prepared to go along with her plans?”

(Philip Reeve, *Predator's Gold*, New York: Scholastic, 2003, pg. 102-103.)

Abstract.

Using a design-thinking approach to state-led crisis management, this thesis seeks to resolve the contemporary problem of Black Swans; that is, crises that are unprecedented, unexpected, unpredictable, and uncertain.

Due to their nature and composition, Black Swans cause a significant increase in state fragility (*Introduction*). Despite this, Black Swans remain understudied within existing literature on crisis management (*Chapter One*). This thesis argues that Black Swans cause a significant increase in state fragility because the strategies governments and leaders currently use to recognise and contain them are sub-optimal (*Chapter Two*). A resolution is found by drawing resources from the legal-political theory that Carl Schmitt (1888-1985) developed between 1918 and 1933 (*Chapter Three*). In particular, Schmitt's concepts of "the exception" and "sovereign dictatorship" are used to devise new strategies that enable governments and leaders to recognise and contain Black Swans optimally (*Chapter Four & Chapter Five*).

This thesis articulates and defends a new way for constitutional states to manage Black Swans. It achieves this end by engaging in an innovative and revealing dialogue between crisis management studies and Schmittian studies (*Conclusion*). Unlike previous analyses, this thesis establishes that: (i) detailed strategies can be prescribed to manage Black Swans; and (ii) Carl Schmitt's legal-political theory can be used to resolve problems at the forefront of contemporary crisis management.

Table of Contents.

<u>Abstract</u>	3
<u>Table of Contents</u>	4
<u>Dedication & Acknowledgements</u>	7
<u>Introduction: Crisis and Opportunity</u>	8
(i) Overview: Black Swans	8
(ii) Research Claim and Questions	12
(iii) Approach: (Democratic) Design-Thinking	13
(iv) Chapter Summaries and Key Concepts	15
(v) Originality of the Research	25
<u>Chapter One: Crisis Management and Black Swans</u>	30
Introduction	30
1.1. Crisis Management Fundamentals	32
(i) <i>Defining a Crisis</i>	32
(ii) <i>The Role of Crisis Managers</i>	37
(iii) <i>Black Swans</i>	39
1.2. Crisis Management Studies	46
(i) <i>A Vast and “Fragmented” Field</i>	46
(ii) <i>Established Sub-Fields</i>	49
(a) Sub-Field (1): Organisational Crisis Management.....	51
▪ Case Analysis Approach.....	51
▪ Crisis Prescriptions Approach.....	52
▪ Crisis Management Models (Crises-as-Processes).....	53
(b) Sub-Field (2): Global Crisis Management.....	56
▪ Crises-as-Events.....	57
▪ Unconventional Crises.....	59
1.3. Black Swans: Substance and Limitations	60
(i) <i>Black Swans as Crisis Events</i>	62
(a) Crises that are “Novel or unprecedented.. ”.....	62
(b) Crises of “Unexpectedly large scale...” and exist trans-	
boundary”.....	67
(c) Crises that have “Consequences which stir... ”.....	70
(ii) <i>“Known-Unknowns”</i>	73
(iii) <i>OECD Strategy Recommendations: All Style, No Substance</i>	75

Conclusion	80
Chapter Two: Problems of Recognition and Containment	81
Introduction	81
2.1. Constitutional States as Crisis Management Actors	83
(i) <i>Governments and Leaders as Crisis Managers</i>	83
(ii) <i>Crisis “Recognition” and Crisis “Containment”</i>	90
(a) “Recognition”.....	93
▪ Uncertainty.....	94
▪ Sensemaking.....	94
▪ Labelling.....	95
(b) “Containment”.....	96
▪ Speed.....	97
▪ Performance.....	98
(iii) <i>Managing Crises</i>	100
(a) Recognition: Use of Precedent and Reliance on Data... 101	
▪ Precedent.....	101
▪ Data.....	102
(b) Containment: Emergency Powers..... 104	
▪ Legislative Emergency Powers.....	105
▪ State of Emergency Powers.....	108
(c) Strategies.....	112
2.2. The Problem of Recognition	113
(i) <i>“Platonicity”</i>	113
(ii) <i>“Narrowed Perception”</i>	115
(iii) <i>“Bounded Rationality”</i>	121
2.3. The Problem of Containment	126
(i) Expansionism.....	126
(ii) Permanence.....	134
Conclusion	141
Chapter Three: Carl Schmitt’s Legal-Political Theory	142
Introduction	142
3.1. Crisis Management and Carl Schmitt	144
(i) <i>Using Schmitt: Interpretation and Reconstruction</i>	144
(ii) <i>Context: The Weimar Republic (1918-1933)</i>	146
(iii) <i>“Fragility” and “Resilience”: Liberalism and Article 48</i>	150
3.2. Constitutional Theory (of the State)	157
(i) <i>“Positive” Constitution</i>	159
(ii) <i>“Ideal” Constitution</i>	163

(iii) <i>“Relative” Constitution</i>	167
3.3. The “Exception”	169
(i) <i>Overview</i>	169
(ii) <i>Dominant Interpretation: Decisionism</i>	173
3.4. “Sovereign Dictatorship”	175
(i) <i>Overview</i>	175
(ii) <i>Dominant Interpretation: Monarchical Rule</i>	177
Conclusion	178
<u>Chapter Four: Recognising Black Swans: Schmitt’s “Exception”</u>	180
Introduction	180
4.1. Recap: The Problem of Recognition	181
4.2. The Exception: An Alternative Interpretation	183
4.3. Black Swans as Schmittian Exceptions	189
(i) <i>The Strategy</i>	189
(a) <i>Overview</i>	189
(b) <i>Instructions for Implementation</i>	193
(ii) <i>Fragility and Dynamic Resilience</i>	198
4.4. Resolving the Problem of Recognition	201
Conclusion	203
<u>Chapter Five: Containing Black Swans: Schmitt’s “Sovereign Dictatorship”</u>	204
Introduction	204
5.1. Recap: The Problem of Containment	205
5.2. Sovereign Dictatorship: An Alternative Interpretation	207
5.3. Rule by Acclamation	215
(i) <i>The Strategy</i>	215
(a) <i>Overview</i>	215
(b) <i>Instructions for Implementation</i>	218
(ii) <i>Fragility and Dynamic Resilience</i>	221
5.4. Resolving the Problem of Containment	223
Conclusion	225
<u>Conclusion</u>	226
(i) Research Claims and Answers	226
(ii) Originality of the Research;	229
<u>Bibliography</u>	230

Dedication.

This thesis is dedicated to the victims of the Russo-Ukrainian war.

“All war is a symptom of man’s failure as a thinking animal.”

(John Steinbeck, *Once There Was a War*, London: Penguin, 2000, pg. xx.)

Acknowledgements.

First and foremost, I would like to thank my supervisors, Prof. James Connelly (Ret.), Prof. Colin Tyler, and Dr. Christopher Fear, for putting up with me for so long. Needless to say, this thesis would not have been possible without your guidance, support, and patience.

We got there in the end.

I would also like to thank my dear friend Aruni, of Sri Lanka. Your positivity has helped me through many months of despair. You have taught me how to be a (better?) feminist.

I am glad that we met.

Introduction

Crisis and Opportunity

“‘Unbelievable,’ ‘unthinkable,’ ‘inconceivable’:
the twenty-first century opens a new era
in the field of risk and crisis management.”¹

(i) **Overview: Black Swans**

Since 2020 numerous inquiries have been commissioned to investigate national and international responses to the COVID-19 pandemic (2020-2023).² The central objectives of these inquiries are: (i) to scrutinise crisis preparedness and planning; (ii) to evaluate crisis management strategies employed by governments and leaders; and (iii) to establish lessons learned for future crises.³ Evidence given so far at these inquiries by politicians, civil

¹ Patrick Lagadec, “Crisis Management in the Twenty-First Century: ‘Unthinkable’ Events in ‘Inconceivable’ Contexts,” in *The Handbook of Disaster Research*, eds. Havidán Rodríguez, Enrico L. Quarantelli, and Russell R. Dynes (New York: Springer, 2007), 489.

² The duration of the COVID-19 pandemic is determined from the following statements by the World Health Organisation (WHO): “Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-mCov),” WHO, 30th January 2023, accessed March 12, 2021, [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)); “Statement on the fifteenth meeting of the IHR (2005) Emergency Committee on the COVID-19 pandemic,” WHO, 5th May, 2023, accessed June 15, 2023, [https://www.who.int/news/item/05-05-2023-statement-on-the-fifteenth-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-coronavirus-disease-\(covid-19\)-pandemic](https://www.who.int/news/item/05-05-2023-statement-on-the-fifteenth-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-coronavirus-disease-(covid-19)-pandemic)

³ For example, see: UK Covid-19 Inquiry (<https://covid19.public-inquiry.uk/>, accessed July 2, 2023); Sweden’s Corona Commission (<https://coronakommissionen.com.translate.google/? x tr sl=sv& x tr tl=en& x tr hl=en& x tr pt=sc> [translated using Google

servants, scientists, and medical experts (among others) has painted a bleak picture of the state of contemporary crisis management. There have been few success stories and a multitude of failures.⁴ The ongoing consensus is that most national and international responses to the COVID-19 pandemic were slow, confused, and sub-optimal.

In a similar vein to national and international inquiries into the COVID-19 pandemic, this research examines and evaluates strategies employed by constitutional states to manage “‘black swan’ events”.⁵ Originally conceived by Nassim Nicholas Taleb to describe events that are “highly improbable”,⁶ the concept of the “Black Swan” has been used by the

translate], accessed July 2 2023); Norway’s Corona Commission (<https://www.koronakommisjonen-no.translate.goog/? x tr sl=no& x tr tl=en& x tr hl=en& x tr pto=sc> [translated using Google translate], accessed July 2, 2023); “First lessons from government evaluations of COVID-19 responses: A synthesis,” Organisation for Economic Co-operation and Development (OECD), 21st January, 2021, accessed July 2, 2023, <https://www.oecd.org/coronavirus/policy-responses/first-lessons-from-government-evaluations-of-covid-19-responses-a-synthesis-483507d6/>; Jeffrey D Sachs et al., “The Lancet Commission on lessons for the future from the COVID-19 pandemic,” *The Lancet* 400(10359) (2022): 1224-1280, doi: [https://doi.org/10.1016/S0140-6736\(22\)01585-9](https://doi.org/10.1016/S0140-6736(22)01585-9).

⁴ One success story is Sweden. Between 2020 and 2021 Sweden had one of the lowest excess mortality rates of any European country. This is commonly attributed to the Swedish Governments’ unconventional, albeit controversial, approach to crisis management during the early stages of the COVID-19 pandemic. For a comprehensive discussion, see: Jonas F. Ludvigsson, “How Sweden approached the COVID-19 pandemic: Summary and commentary on the National Commission Inquiry,” *Acta Paediatrica* 112(2) (2022): 19-33, doi: <https://doi.org/10.1111/apa.16535>. For failures, see the sources cited in footnote 3. Additionally, see: “Main Report and accompanying work,” *The Independent Panel For Pandemic Preparedness and Response*, accessed June 2, 2023, <https://theindependentpanel.org/mainreport/>.

⁵ OECD Reviews of Risk Management Policies, *The Changing Face of Strategic Crisis Management* (Paris: OECD Publishing, 2015), 16, doi: <https://doi.org/10.1787/9789264249127-en>.

⁶ Nassim Nicholas Taleb, *The Black Swan: The Impact of the Highly Improbable* (London: Penguin Books, 2010); Terje Aven, *Risk, Surprises and Black Swans: Fundamental Ideas and Concepts in Risk Assessment and Risk Management* (London: Routledge, 2014), doi: <https://doi.org/10.4324/9781315755175>.

Organisation for Economic Co-operation and Development (OECD) to define a new type of crisis with the following characteristics: (a) it is “novel or unprecedented... in human or crisis managers’ memories”; (b) it has an “unexpectedly large scale or geographic distribution”; (c) its effects cross boundaries (that is, it is “trans-boundary”); and (d) it has “consequences, which stir deep uncertainties in the minds of the public [and] challenge government structures”.⁷ Hereafter referred to as Black Swans, examples of this type of crisis include: the 9/11 terrorist attacks in New York; the Asian SARS outbreak of 2003; the Indian Ocean Boxing Day Tsunami of 2004; Hurricane Katrina in south-eastern United States in 2005; the Tōhoku (Japan) earthquake and tsunami in 2011; global climate change; and the global COVID-19 pandemic.⁸

The primary significance of Black Swans is the collective impact they have on individuals and communities across the globe. Although the OECD has claimed that “Many governments have tried to better anticipate and prepare for increasingly uncertain risks and ‘black swan’ events... ,”⁹ the COVID-19 pandemic and climate change demonstrate that governments have been far less successful than had been hoped. People continue to suffer from the short-term and long-term effects of Black Swans.¹⁰ Along with other emerging

⁷ OECD, *Changing Face*, 18-19; Charles Baubion, *OECD Risk Management: Strategic Crisis Management* (Paris: OECD Publishing, 2013), doi: <https://doi.org/10.1787/5k41rbd1lzt7-en>; OECD, *Emerging Risks in the 21st Century: An Agenda For Action* (Paris: OECD Publishing, 2003), doi: <https://doi.org/10.1787/9789264101227-en>; Ibid (Taleb), xvii-xix; Arjen Boin and Patrick Lagadec, “Preparing for the Future: Critical Challenges in Crisis Management,” *Journal of Contingencies and Crisis Management* 8(4) (2000): 186 (Table 2).

⁸ Ibid (OECD); Ibid (Taleb), xix-xx; Aven, *Risk, Surprises and Black Swans*, 13 (Table 1.1)

⁹ Ibid (OECD), 43.

¹⁰ (COVID-19 pandemic) For evidence relating to the UK, see: “Coronavirus and the social impacts on Great Britain: 1 April 2022,” Office for National Statistics, accessed July 16, 2023,

<https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/healthandwellbeing/bull>

[etins/coronavirusandthesocialimpactsongreatbritain/1april2022](https://post.parliament.uk/economic-inequality-and-recovery/); “Economic inequality and recovery,” UK Parliament, 29th April, 2021, accessed March 6, 2022, <https://post.parliament.uk/economic-inequality-and-recovery/>; “Covid-19: impact on child poverty and on young people’s education, health and wellbeing,” UK Parliament, House of Lords, 10th June, 2021, accessed March 6, 2022, <https://lordslibrary.parliament.uk/covid-19-impact-on-child-poverty-and-on-young-peoples-education-health-and-wellbeing/>; Richard Blundell et al., *Inequalities in education, skills, and incomes in the UK: The implications of the COVID-19 pandemic* (Institute for Fiscal Studies, 2021), 23rd March, 2021, accessed March 29, 2022, <https://ifs.org.uk/publications/15380>; OECD, *OECD Economic Surveys: United Kingdom*, OECD iLibrary, accessed June 16, 2023, doi: <https://doi.org/10.1787/19990502>. (Climate change) For example, see: Matt McGrath, “Climate change: Huge toll of extreme weather disasters in 2020,” *BBC News*, 27th December, 2021, accessed April 17, 2022, <https://www.bbc.co.uk/news/science-environment-59761839>; Rhys Blakely, “Heatwaves getting more extreme ‘because of climate change’,” *The Times*, 28th June, 2022, accessed June 30, 2022, <https://www.thetimes.co.uk/article/c88d4fee-f6e0-11ec-ad14-7b04276f4c1f?shareToken=69259bac0c949e96bc98545cac0ffc10>; Damian Carrington, “Climate crisis made deadly German floods ‘up to nine times more likely’,” *The Guardian*, 23rd August, 2021, accessed October 12, 2021, <https://www.theguardian.com/environment/2021/aug/23/climate-crisis-made-deadly-german-floods-up-to-nine-times-more-likely>; “China floods: Nearly 2 million displaced in Shanxi province,” *BBC News*, 11th October, 2021, accessed October 12, 2021, <https://www.bbc.co.uk/news/world-asia-china-58866854>. For scientific evidence and commentary, see ongoing work by the Intergovernmental Panel on Climate Change (IPCC): “Reports,” IPCC, accessed July 16, 2023, <https://www.ipcc.ch/reports/>; Luke Kemp et al., “Climate Endgame: Exploring catastrophic climate change scenarios,” *Perspective: Earth, Atmospheric, and Planetary Sciences* 119(34) (2022), doi: <https://doi.org/10.1073/pnas.2108146119>; David Spratt and Philip Sutton, *Climate Code Red: The Case for Emergency Action* (United States: Scribe Publications, 2008).

crisis types, Black Swans represent the greatest challenge facing contemporary crisis management.¹¹ Going forward, scholars and practitioners must find optimal ways to reckon with what the OECD has dubbed “the changing face of strategic crisis management”.¹²

(ii) **Research Claim and Questions**

The critical claim of this thesis is that strategies currently employed by the governments and leaders of constitutional states to manage Black Swans are sub-optimal. It is argued that the work Carl Schmitt produced between 1918 and 1933 can be used to devise specific crisis management strategies for Black Swans. These strategies can be employed by the governments and leaders of constitutional states to manage Black Swans optimally. Therefore, the thesis’ core research question is:

How can Carl Schmitt’s legal-political theory improve the state-led crisis management of Black Swans?

It is broken-down into the following research sub-questions:

1. In what ways is existing crisis management literature on Black Swans inadequate?;

¹¹ For discussion of other new types of crisis, see: Arjen Boin, Magnus Ekengren, and Mark Rhinard, *Understanding the Creeping Crisis* (Switzerland: Palgrave Macmillan, 2021), doi: <https://doi.org/10.1007/978-3-030-70692-0>; Gianluca Pescaroli, Michael Nones, Luca Galbusera, and David Alexander, “Understanding and mitigating cascading crises in the global interconnected system,” *International Journal of Disaster Risk Reduction* 30(B) (2018): 159-163, doi: <https://doi.org/10.1016/j.ijdrr.2018.07.004>.

¹² OECD, *Changing Face*.

2. In what ways are the strategies constitutional states currently use to manage Black Swans sub-optimal?;
3. What concepts does Carl Schmitt's legal-political theory contain that can be used to improve how constitutional states manage Black Swans?;
4. How can Carl Schmitt's concept of the "exception" be employed within a strategy designed to recognise Black Swans optimally?;¹³
5. How can Carl Schmitt's concept of "sovereign dictatorship" be employed within a strategy designed to contain Black Swans optimally?¹⁴

My answer to the thesis' core research question is that Carl Schmitt's legal-political theory can improve the state-led crisis management of Black Swans by enabling governments and leaders to manage Black Swans in a way that reduces fragility and demonstrates resilience. It is by using "the exception" to recognise a Black Swan and "sovereign dictatorship" to contain a Black Swan that optimal crisis management can be achieved.

(iii) **Approach: (Democratic) Design-Thinking**

This research adopts a 'design-thinking' approach in its attempt to resolve the problem of Black Swans. As Juergen Erbeldinger, Thomas Ramage, and Erik Spiekermann have explained, "Design Thinking... is innovative thinking with a radical, user-orient[ated] [approach]. It is

¹³ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1922), trans. George Schwab (Chicago: Chicago University Press, 2005).

¹⁴ Carl Schmitt, *Dictatorship* (1921), trans. Michael Hoetzl and Graham Ward (Cambridge: Polity Press, 2014).

based on the interdisciplinary principle and connects the attitude of openness with the need of results”.¹⁵ The nature of design-thinking means that it can, and has, been applied in a variety of disciplines – from public policymaking to software engineering.¹⁶

Significantly, design-thinking has also been applied in the context of democratic governance. Michael Saward has formulated a design-thinking approach where the aim is “understanding today’s and creating tomorrow’s democratic governance”.¹⁷ As Saward explains:

“Building on recent influential ideas of democracy, it [the democratic design-thinking approach] focuses on democracy as something designed, and open to redesign, using methods that a wide range of people interested in democracy can embrace. The framework is *both* tightly drawn *and* open to a wide range of creative visions for different contexts, fostering a clear-minded approach to focusing on our potential political futures.”¹⁸

¹⁵ Juergen Erbeldinger, Thomas Ramge, and Erik Spiekermann, *Durch die Decke denken: Design Thinking in der Praxis* (Germany: Redline Verlag, 2013), as translated by and cited in: Daniel Schallmo, Christopher A. Williams, and Klaus Lang, “An Integrated Design Thinking Approach – Literature Review, Basic Principles and Roadmap for Design Thinking” (paper presented at The ISPIM Innovation Conference – Innovation, The Name of the Game, Stockholm, Sweden, June 17-20, 2018, pg. 3. See also: Jeanne Liedtka, “Why Design Thinking Works,” *Harvard Business Review*, September-October 2018, accessed July 3, 2023, <https://hbr.org/2018/09/why-design-thinking-works>.

¹⁶ For example, see: Jenny M Lewis, Michael McGann, and Emma Blomkamp, “When design meets power: design thinking, public sector innovation and the politics of policymaking,” *Policy & Politics* 48(1) (2013): 111-130, doi: <https://doi.org/10.1332/030557319X15579230420081>; Franziska Dobrigkeit and Danielly de Paula, “Design thinking in practice: undertaking manifestations of design thinking in software engineering,” *ESEC/FSE 2019: Proceedings of the 2019 27th ACM Joint Meeting on European Software Engineering Conference and Symposium on the Foundations of Software Engineering* (August 2019): 1059-1069, doi: <https://doi.org/10.1145/3338906.3340451>.

¹⁷ Michael Saward, *Democratic Design* (Oxford: Oxford University Press, 2021), xiv.

¹⁸ *Ibid.*

This thesis uses Saward’s design-thinking approach to democratic governance to diagnose and resolve the contemporary crisis management problem of Black Swans. In this regard, democratic design-thinking acts as the primary research method of the thesis.

(iv) **Chapter Summaries and Key Concepts**

The thesis is divided into this Introduction, four substantive chapters, and a Conclusion. A summary of each chapter, including an overview of key concepts, is provided below.

Chapter One answers the first research sub-question: “In what ways is existing crisis management literature on Black Swans inadequate?”.

The first part of the chapter discusses three aspects of crisis management that are fundamental to the present research: (i) the definition of “a crisis”; (ii) the role of crisis managers; and (iii) the nature and composition of Black Swans. The numerous definitions of “a crisis” within the literature are synthesised to provide a working definition for the thesis discussion. The role of crisis managers is described using the key concepts of “fragility” and “resilience”.¹⁹ This thesis adopts the OECD definition of “fragility” as “the combination of exposure to risk and insufficient coping capacity of the state, systems and/or communities to manage, absorb or mitigate those risks... across six dimensions: economic,

¹⁹ Together, fragility and resilience form part of of “the OECD multidimensional fragility framework”, which “captures the intersection of fragility, risk, and resilience”. See: “Executive Summary” in OECD, *States of Fragility 2020* (Paris: OECD Publishing, 2020), doi: <https://doi.org/10.1787/ba7c22e7-en>. The importance of both concepts is made clear in the remaining chapters.

environmental, political, security, societal and human.”²⁰ Similarly, the thesis adopts the OECD definition of “resilience” as “the ability of a system, community or society exposed to hazards to resist, absorb, accommodate and recover from the effects of a hazard in a timely and efficient manner.”²¹ Christopher Ansell and Jarle Trondal highlight two types of resilience involved in crisis management. The first, “static resilience”, is concerned with “maintain[ing] and restor[ing] equilibrium conditions [and] encourages institutional-path dependence”. The second, “dynamic resilience”, is concerned with “building flexibility into... institutional arrangements by... maintaining multiple repertoires that can be flexibly redeployed to meet changing circumstances.”²² The nature and composition of Black Swans is explained using these concepts to provide greater nuance to the contemporary literature on crisis management.

The second part of Chapter One reviews the field of crisis management studies. Following a brief, but critical, overview of this field, the sub-fields of organisational crisis management and global crisis management are examined. Each of these literature sub-fields provides a different way to interpret crises: as processes (organisational) or as events

²⁰ “Executive Summary” in OECD, *States of Fragility 2022* (Paris: OECD Publishing, 2022), doi: <https://doi.org/10.1787/c7fedf5e-en>.

²¹ OECD, *Changing Face*, 18; United Nations (UN) *UNISDR terminology on disaster risk reduction 2009* (United Nations, 2009), 6; “What is resilience?” *Resilience First*, accessed August 2, 2023, <https://resiliencefirst.org/resilience/what-resilience>. As David Chandler has noted: “discourses of resilience – the science of turning crises into assets and opportunities that enable governing – are now central to every international and domestic policy concern”: “Crises are the new normal: Governing through resilience,” in *The Pedagogy of Economic, Political and Social Crises: Dynamics, Construals and Lessons*, ed. Bob Jessop and Karim Knio (London: Routledge, 2019), 65.

²² Christopher Ansell and Jarle Trondal, “Governing Turbulence: An Organizational-Institutional Agenda,” *Perspectives on Public Management and Governance* (2018) 1(1) (2018): 50, doi: <https://doi.org/10.1093/ppmgov/gvx013>.

(global). While the organisational literature addresses many of the nuts-and-bolts issues of crisis management, the global literature contains substantive work on unconventional crisis types. Both sub-fields are necessary to respond to the problem of Black Swans and are used to substantiate and develop the thesis argument in the remaining chapters of this research.

The third and final part of Chapter One establishes two limitations of existing crisis management literature on Black Swans. The first limitation concerns how Black Swans are currently commonly researched as crisis events that display only one or two of the four defining characteristics outlined above, as opposed to all four collectively. This is despite the fact that Black Swans are a recognised type of crisis – a so-called “known-unknown”.²³ The second limitation concerns how strategies that have been put forward to improve how constitutional states manage Black Swans lack substantive instructions regarding implementation. This is despite the fact that prescriptive approaches to crises are standard practice in the field of crisis management studies.

The conclusion reached by this chapter is that what makes existing crisis management literature on Black Swans inadequate is: (i) the relatively narrow approach taken by scholars when studying Black Swans; and (ii) a lack of substantive instructions relating to the implementation of strategies designed to improve how Black Swans are managed. Without making improvements to the literature in these areas, Black Swans cannot be managed optimally.

²³ The term “known-unknown” is commonly attributed to former U.S Secretary of Defense Donald Rumsfeld: “DoD News Briefing – Secretary Rumsfeld and Gen. Myers”, February 12, 2002, U.S Department of Defense, <https://archive.ph/20180320091111/http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636>. However, as Aven has noted, usage of the term pre-dates Rumsfeld: Aven, *Risk, Surprises and Black Swans*, 12.

Chapter Two answers the second research sub-question: “In what ways are the strategies constitutional states currently use to manage Black Swans sub-optimal?”.

The first part of the chapter determines the role of constitutional states in crisis management. This includes: (i) a discussion of governments and leaders as crisis managers; (ii) an explanation of the key crisis management functions of “recognition” and “containment”;²⁴ and (iii) a detailed overview of four elements constitutional states currently use to manage crises: precedent, data, legislative emergency powers, and state of emergency powers.²⁵ Given noted definitional ambiguity surrounding the concept of “a state”,²⁶ this research adopts Christopher Pierson’s interpretation as a working definition. For Pierson, a state has nine constitutive features: (i) “(monopoly) control of the means of violence”; (ii) “territoriality”; (iii) “sovereignty”; (iv) “constitutionality”; (v) “impersonal power”; (vi) “the public bureaucracy”; (vii) “authority/legitimacy”; (viii) “citizenship”; and

²⁴ W. Timothy Coombs, *Ongoing Crisis Communication: Planning, Managing, and Responding*, 6th edn. (London: SAGE, 2022), 11-12; Sarah Kooor-Mistra, *Crisis Management: Resilience and Change* (London: SAGE, 2020), Chapter 8; Harvard Business School, *Crisis Management: Master the Skills to Prevent Disasters* (Boston, MA: Harvard Business School Press, 2004), Chapters 4 & 5.

²⁵ Admittedly, there are many more elements that constitutional states use to manage crises. However, this research focuses on four of the most conventional. These elements are used to manage the majority of crisis events that impact on constitutional states and feature prominently within existing literature on crisis management.

²⁶ For insight and discussion, see: Christopher Pierson, *The Modern State*, 3rd edn. (New York: Routledge, 2011), Chapter 1; Erika Cudworth and John McGovern, “Introduction,” in *The Modern State: Theories and Ideologies*, eds. Erika Cudworth, Tim Hall, and John McGovern (Edinburgh: Edinburgh University Press, 2007), 1-2; Clyde W. Barrow, *Critical Theories of the State: Marxist, Neo-Marxist, Post-Marxist* (Wisconsin, MA: University of Wisconsin Press, 1993), 9-12.

(ix) “taxation”.²⁷ Where a certain feature, or a combination of features, becomes salient to the thesis argument, it is/they are explained in detail.

The second part Chapter Two demonstrates that “precedent” and “data” are sub-optimal when it comes to recognising Black Swans. This is done using another of Nicholas Nassim Taleb’s concepts: “platonicity”. Platonicity refers to “our [humans’] tendency... to focus on pure and well-defined ‘forms’ [and] privilege them over other less elegant objects, those with messier and less tractable structures”.²⁸ Given the abstract nature of platonicity, the concept is applied in the context of crisis recognition using Alan Watts’ notion of “narrowed perception” and H.A. Simon’s work on “bounded rationality”.²⁹ Both narrowed perception and bounded rationality help to illuminate what this thesis calls ‘The Problem of Recognition’.

The third and final part of Chapter Two demonstrates that the strategies of legislative emergency powers and state of emergency powers are sub-optimal when it comes to containing Black Swans. This is done by drawing attention to the processes of expansionism and permanence. Together, these processes increase executive power in times of crisis and contribute to what this thesis calls ‘The Problem of Containment’.

The conclusion reached by this chapter is that what makes the strategies constitutional states currently use to manage Black Swans sub-optimal is the inability of

²⁷ Ibid (Pierson), 6; Walter Scheidel, “Studying the State,” in *The Oxford Handbook of the State in the Ancient Near East and Mediterranean*, ed. Peter Fibiger Band and Walter Scheidel (Oxford: Oxford University Press, 2013): 5-58, doi: <https://doi.org/10.1093/oxfordhb/9780195188318.013.0002>.

²⁸ Taleb, *Black Swan*, xxv.

²⁹ Alan Watts, *The Book On The Taboo Against Knowing Who You Are*, 1966 (London: Souvenir Press, 2009); Herbert A. Simon, *Models of Bounded Rationality, Volume 2: Behavioural Economics and Business Organization* (London: MIT Press, 1982).

these strategies to reduce fragility and demonstrate dynamic resilience. Although current strategies are able to prevent a catastrophic increase in fragility, they are unable to prevent a proliferation of “negative outcomes” because the type of resilience demonstrated is decidedly static.³⁰ Until the governments and leaders of constitutional states are able to implement a strategy capable of demonstrating dynamic resilience, the management of Black Swans will remain sub-optimal.

Chapter Three answers the third research sub-question: “What concepts does Carl Schmitt’s legal-political theory contain that can be used to improve how constitutional states manage Black Swans?”.

The first part of the chapter examines the relationship between crisis management and the work of Carl Schmitt. This includes: (i) an explanation of how this thesis uses Schmitt’s work, citing recent commentary by Adrian Blau to distinguish between textual interpretation and textual reconstruction;³¹ (ii) an overview of the turbulence of Germany’s Weimar Republic (1918-1933), which acts as the context for Schmitt’s work on crisis; and (iii) a discussion concerning what Schmitt had to say on the concepts of what would now be called “fragility” and “resilience”.

The second part of Chapter Three provides a critical reconstruction of Schmitt’s constitutional theory, focusing on his three “senses” of constitution: “positive,” “ideal,” and

³⁰ OECD, *States of Fragility 2022*.

³¹ Adrian Blau, “Interpreting Texts,” in *Methods in Analytical Political Theory*, ed. Adrian Blau (Cambridge: Cambridge University Press, 2017), 243-270.

“relative”.³² In lieu of a formal theory of the state, these “senses” establish Schmitt’s understanding of the nature, composition, and functionality of constitutional states. As such, they provide a legal-political framework for Schmitt’s concepts of the “exception” and “sovereign dictatorship”. The thesis argues that these two concepts in particular can be used to improve how constitutional states manage Black Swans.

The third and fourth parts of Chapter Three, respectively, give a detailed overview of the exception and sovereign dictatorship. This includes a description of key features and core characteristics, followed by a discussion of how each concept is viewed critically within the literature. Here, the dominant interpretation of the exception and sovereign dictatorship is established.

The conclusion reached by this chapter is that Schmitt concepts of “the exception” and “sovereign dictatorship” can be used to improve how constitutional states manage Black Swans. Indeed, respectively, these concepts provide the basis for a new strategy of recognition and a new strategy of containment.

Chapter Four answers the fourth research sub-question: “How can Carl Schmitt’s concept of the “exception” be employed within a strategy designed to recognise Black Swans optimally?”.

The first part of the chapter recap’s the Problem of Recognition that was established in Chapter Two. The second part of the chapter provides an alternative interpretation of Schmitt’s concept of the exception. This interpretation posits that the exception is not a

³² Carl Schmitt, *Constitutional Theory* (1928), trans./ed. Jeffrey Seitzer (London: Duke University Press, 2008), 59 (senses of constitution); 75-88 (positive constitution); 89-93 (ideal constitution); 67-74 (relative constitution).

product of sovereign decisionism, as the dominant interpretation suggests, but instead corresponds to a situation that originates independently of sovereign decisionism.³³ The sovereign's job is to recognise these phenomena – these *exceptions* – and make sense of them viz-à-viz the state. It is argued that this is what Schmitt meant by the infamous “sovereign is he who decides on the exception”.³⁴

The third part of Chapter Four uses the thesis' alternative interpretation of the exception to devise a strategy that can be used by constitutional states to recognise Black Swans optimally. Following a detailed overview of the strategy, including instructions regarding how it should be implemented by the leaders and governments of constitutional states, an explanation of how the strategy demonstrates dynamic resilience is provided. The fourth and final part of Chapter Four then evaluates how this new strategy resolves the Problem of Recognition.

The conclusion reached by this chapter is that interpreting Schmitt's concept of “the exception” as corresponding to situations that originate independently of sovereign decisionism enables the concept to be used to formulate a new strategy of recognition. This strategy is capable of reducing fragility and demonstrating dynamic resilience. By resolving the Problem of Recognition, the strategy provides governments and leaders with a way to recognise Black Swans optimally.

³³ As Monerrat Herrero has argued: “Exception exists.”: *The Political Discourse of Carl Schmitt: A Mystic of Order* (London: Rowman & Littlefield, 2015), 88.

³⁴ Schmitt, *Political Theology*, 5.

Chapter Five answers the fifth research sub-question: “How can Carl Schmitt’s concept of “sovereign dictatorship” be employed within a strategy designed to contain Black Swans optimally?”.

The first part of the chapter recaps the Problem of Containment established in Chapter Two. The second part of the chapter provides a new interpretation of Schmitt’s concept of sovereign dictatorship. This interpretation posits that Schmitt’s sovereign dictator does not embody “monarchical” sovereignty,³⁵ as the dominant interpretation suggests, but instead embodies democratic sovereignty.³⁶ Here, the fundamental distinction between power and authority in Schmitt’s work is emphasised.

The third part Chapter Five uses the thesis’ alternative interpretation of the exception to devise a strategy that can be used by constitutional states to contain Black Swans optimally. Following a detailed overview of the strategy, including instructions regarding how it should be implemented by the leaders and governments of constitutional

³⁵ Proponents of this view include: Renato Cristi, John P. McCormick, Lars Vinx, and William E. Scheuerman. See, for example: Renato Cristi, “Schmitt on Constituent Power and the Monarchical Principle,” *Constellations* 18(3) (2011): 352-364; John P. McCormick, “From Constitutional Technique to Caesarist Ploy: Carl Schmitt on Dictatorship, Liberalism, and Emergency Powers,” in *Dictatorship in History and Theory: Bonapartism, Caesarism, and Totalitarianism*, eds. Peter Baehr and Melvin Richter (Cambridge: Cambridge University Press, 2004), 187-220; Lars Vinx, “Carl Schmitt on the Limits of Direct Democracy,” *History of Political Thought* 42(1) (2021): 157-183; William E. Scheuerman, *The End of Law: Car Schmitt in the Twenty-First Century*, 2nd edn (London: Rowman & Littlefield, 2020).

³⁶ Proponents of this view include: Andreas Kalyvas, William Rasche, and Benjamin A. Schupmann. See, for example: Andreas Kalyvas, “Carl Schmitt and Three Moments of Democracy,” *Cardozo Law Review* 21(5-6) (2000): 1525-1566; William Rasch, “Carl Schmitt’s Defense of Democracy,” in *The Oxford Handbook of Carl Schmitt*, eds. Jens Meierhenrich and Oliver Simons (Oxford: Oxford Academic, 2013 online edn), 312-332, doi: <https://doi.org/10.1093/oxfordhb/9780199916931.013.32>; Benjamin A. Schupmann, *Carl Schmitt’s State and Constitutional Theory: A Critical Analysis* (Oxford: Oxford University Press, 2018).

states, an explanation of how the strategy demonstrates dynamic resilience is provided. The fourth and final part of Chapter Five then evaluates how this new strategy resolves the Problem of Containment.

The conclusion reached by this chapter is that interpreting Schmitt concept of “sovereign dictatorship” as essentially democratic enables it to be used to formulate a new strategy of containment. This strategy is capable of reducing fragility and demonstrating dynamic resilience. By resolving the Problem of Containment the strategy provides governments and leaders with a way to contain Black Swans optimally.

To summarise: Chapters One and Two justify the claim that Black Swans are a problem for contemporary crisis management; Chapter Three identifies Carl Schmitt’s work as a way to address the problem; and Chapters Four and Five use concepts from Schmitt’s work to resolve the problem.

The conclusion of the thesis summarises how the research sub-questions have been answered. On this basis, it answers the thesis’ core research question: “How can Carl Schmitt’s legal-political theory improve the state-led crisis management of Black Swans?”.

To reiterate, my answer to this question is that Schmitt’s concepts of the “the exception” and “sovereign dictatorship” can be used to devise strategies that recognise and contain Black Swans optimally: in a way that reduces fragility and demonstrates dynamic resilience.

The originality and significance of this research (stated below) is also emphasised in the thesis conclusion.

(v) **Originality of the Research**

This research demonstrates originality in two ways.

The first way is by using the COVID-19 pandemic to devise a set of strategies that can be used by constitutional states to manage Black Swans optimally.

There is a sustained level of agreement among scholars and practitioners of crisis management that crises represent an opportunity for change and improvement.³⁷ As Uriel Rosenthal and Alexander Kouzmin have remarked: “Crises provide a unique laboratory of social and political life [and] perfect ground for multidisciplinary and interdisciplinary efforts”.³⁸ There is also ample evidence that current strategies used by constitutional states

³⁷ For example, see: Kooor-Mistra, *Crisis Management*, 6; Steven Fink *Crisis Management: Planning for the Inevitable* (United States: American Management Association, 1986), 221; John M Penrose, “The role of perception in crisis planning,” *Public Relations Review* 26(2) (2000): 156, doi: [https://doi.org/10.1016/S0363-8111\(00\)00038-2](https://doi.org/10.1016/S0363-8111(00)00038-2); Arjen Boin and Paul ‘t Hart, “The Crisis Approach,” in *Handbook of Disaster Research*, 43; “The COVID-19 crisis is an opportunity to reimagine human mobility,” United Nations (UN), 3rd June, 2020, accessed July 17, 2023, <https://www.un.org/en/coronavirus/covid-19-crisis-opportunity-reimagine-human-mobility>; OECD, *Tourism Policy Responses to the coronavirus (COVID-19)* (Paris: OECD Publishing, 2020), accessed July 17, 2023, <https://www.oecd.org/coronavirus/policy-responses/tourism-policy-responses-to-the-coronavirus-covid-19-6466aa20/>. CF: Paul ‘t Hart, Liesbet Heyse, and Arjen Boin, “New Trends in Crisis Management Practice and Crisis Management Research,” *Journal of Contingencies and Crisis Management* 9(4) (2002): 184, doi: <http://dx.doi.org/10.1111/1468-5973.00168>; Christophe Roux-Dufort, “Why Organizations Don’t Learn from Crises: The Perverse Power of Normalization,” *Review of Business* 21(3/4) (2000): 25-30.

³⁸ Uriel Rosenthal and Alexander Kouzmin, “Globalizing an Agenda for Contingencies and Crisis Management: An Editorial Statement,” *The Journal of Contingencies and Crisis Management* 1(1) (1993): 3 & 8; Jeroen Wolbers, Sanneke Kuipers, and Arjen Boin, “A systematic review of 20 years of crisis and

to manage Black Swans are sub-optimal (see Chapter Two). Yet, despite this evidence, research into Black Swans has stagnated. There has been no major contribution to the study of Black Swans since the 2015 report by the OECD.³⁹ While this lack of contribution may be because of a notable absence of Black Swans in the years immediately following the OECD report, this is no excuse for scholarly complacency. The impact and effects of the COVID-19 pandemic are a warning against crisis management complacency of any kind. Hence, by using the COVID-19 pandemic as an opportunity to resolve this lacuna in the scholarship, this research makes an original contribution to existing literature on crisis management.

The second way this research demonstrates originality is by using the legal-political theory of Carl Schmitt to resolve the problem of Black Swans.

Described by Jens Meierhenrich and Oliver Simons as the “most hyped thinker of the twentieth century”,⁴⁰ the resurgence of interest in Schmitt’s work post-9/11 resulted in many of his ideas being used to engage constructively with the subject of crisis management.⁴¹ However, over the past two decades, there has been a shift away from using Schmitt’s work in this manner.⁴² A likely reason for this is Schmitt’s involvement with

disasters research: Trends and progress,” *Risk, Hazards & Crisis in Public Policy* 12(4) (2021): 347-392, doi: <https://doi.org/10.1002/rhc3.12244>

³⁹ OECD, *Changing Face*.

⁴⁰ Jens Meierhenrich and Oliver Simons, “‘A Fanatic of Order in an Epoch of Confusing Turmoil’: The Political, Legal, and Cultural Thought of Carl Schmitt,” in *The Oxford Handbook of Carl Schmitt*, 4.

⁴¹ For a critical account of post-9/11 uses of Schmitt’s work, see: Scheuerman, *End of Law*, 295-302. On the post-9/11 resurgence of interest in Schmitt’s work and its impact on legal-political discourse, see: Jason Ralph, *America’s War on Terror: The State of the 9/11 Exception from Bush to Obama* (Oxford: Oxford University Press, 2013), doi: <https://doi.org/10.1093/acprof:oso/9780199652358.001.0001>.

⁴² David Dyzenhaus, for example, has condemned scholars use of Schmitt’s work as “depressing”: *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006), 40.

German National Socialism (NSDAP/Nazism).⁴³ As Scheuerman has remarked, between 1933 and 1945 Schmitt “aspired to formulate the outlines of an identifiably National Socialist system of law” centred on the *Führerprinzip* (leader principle).⁴⁴ Knowledge of Schmitt’s involvement with Nazism has caused scholars to question not only the relationship between Schmitt’s post-1933 activities and his pre-1933 work, but the implications of attempting to use his work in any way.⁴⁵

Similarly, Oren Gross and Fionnuala Ní Aoláin have made reference to Schmitt’s “dark shadow” when discussing these uses: *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006), 162-170. More recently, Jonathan White has argued that although “Schmittian themes of sovereign exceptionalism have had a recent renaissance... Emergency rule should be decoupled from its associations with the sovereign figure, reversing the Schmittian move”: *Politics of Last Resort: Governing by Emergency in the European Union* (Oxford: Oxford University Press, 2020), 3 & 18.

⁴³ Hannah Arendt referred to Schmitt as another “Nazi crackpot”: *The Origins of Totalitarianism* (Orlando: Harcourt, Inc, 1973), 339, footnote 65. For an overview of Schmitt’s involvement with Nazism, see: Renato Cristi, *Carl Schmitt and Authoritarian Liberalism* (Cardiff: University of Wales Press, 1998), Chapter 1; George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936*, 2nd edn (New York: Greenwood Press, 1989), Chapter VI. For a biographical account see: Reinhard Mehring, *Carl Schmitt: A Biography* (Cambridge: Polity Press, 2014), Part III: In the Belly of the Leviathan: Schmitt’s Involvement in National Socialism.

⁴⁴ Scheuerman, *The End of Law*, 1. The clearest example of Schmitt’s endorsement of *Führerprinzip* is his essay/ speech entitled “The Führer Protects/Defends the Law”, in which Schmitt defends Hitler’s actions during the Night of the Long Knives (1934). Translation available at: <https://arplan.org/2019/06/15/schmitt-fuhrer-law/>, accessed September 10, 2021. For a critical discussion of the relationship between Schmitt’s work and National Socialism, see: David Ohana, “Carl Schmitt’s Legal Fascism,” *Politics, Religion & Ideology* 20(3) (2019): 273-300, doi: <https://doi.org/10.1080/21567689.2019.1656073> . .

⁴⁵ For insight and discussion, see: Richard Wolin, “Carl Schmitt, Political Existentialism, and the Total State,” *Theory and Society* 19(4) (1990): 189-416; John H. Herz, “Looking at Carl Schmitt from the Vantage Point of the 1990s,” *Interpretation Journal* 19(3) (1992): 308-314; Benno Teschke, “Decisions and Indecisions: Political and Intellectual Receptions of Carl Schmitt,” *New Left Review* 67 (2011): 61-95;

In the context of the present research, the shift away from using Schmitt's work means that his ideas have yet to be considered in relation to Black Swans. However, it is the contention of this thesis that Schmitt has much to say on the subject of contemporary crisis management and Black Swans (see Chapter Three). Combined with the fact that scholars of crisis management continue to reference Schmitt's work, it is argued that there is a degree of kinship between Schmitt's ideas and the subject of crisis management. The thesis uses this notion of kinship to establish, what can be termed, a "fruitful dialogue" between Schmittian studies and crisis management studies.⁴⁶ This dialogue puts Schmitt's involvement with Nazism to one side, steering clear of what Ingeborg Maus has called "biographical reductionism".⁴⁷ Instead, Schmitt's work is viewed as a source from which scholars and practitioners of crisis management can "profit intellectually" (Balakrishnan).⁴⁸

While Schmitt's work cannot provide a definitive solution to the problem of Black

Raphael Gross, "The 'True Enemy': Antisemitism in Carl Schmitt's Life and Work," in *The Handbook of Carl Schmitt*, 96-116.

⁴⁶ A dialogue of this kind, involving Schmitt's work and contemporary political theory, has been attempted by scholars such as Chantal Mouffe. See: Chantal Mouffe, *The Return of the Political* (London: Verso, 1993); Matthew G. Specter, "What's 'Left' in Schmitt? From Aversion to Appropriation in Contemporary Political Theory," in *The Oxford Handbook of Carl Schmitt*, 426-456.

⁴⁷ Ingeborg Maus, "The 1933 'Break' in Carl Schmitt's Theory," in *Law as Politics: Carl Schmitt's Critique of Liberalism*, ed. David Dyzenhaus (United States: Duke University Press, 1998), 196; Paul W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011), 5-6. As Chantal Mouffe has remarked, "it would be a great mistake to dismiss [Schmitt's work] merely because of his support for Hitler in 1933...": "Introduction: Schmitt's Challenge," in *The Challenge of Carl Schmitt*, ed. Chantal Mouffe (London: Verso, 1999), 1; William Rasche, "Carl Schmitt's Defense of Democracy," in *The Oxford Handbook of Carl Schmitt*, 331.

⁴⁸ Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (London: Verso, 2000), 9. As Andreas Kalyvas has otherwise put it, the goal is "to distinguish what remains positive from what is problematic, even repulsive in Schmitt's theory": *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (Cambridge: Cambridge University Press, 2008), 81

Swans and constitutional states, his work does contain ideas and concepts that can be employed to address and resolve it. Indeed, using the concepts of “the exception” and “sovereign dictatorship” to devise new strategies of crisis recognition and crisis containment helps to improve our current understanding of Black Swans by demonstrating optimal ways in which they can be managed.

Hence, by using the legal-political theory of Carl Schmitt to improve how constitutional states manage Black Swans, this research makes an original contribution to existing literature on crisis management.

Chapter One

Crisis Management and Black Swans

“We cannot anticipate every threat,
yet it’s often these unforeseen threats
that do the greatest damage”.⁴⁹

Introduction

This chapter begins to justify the claim made in the thesis Introduction: viz., that Black Swans are a significant problem for contemporary crisis management. It does so by demonstrating that existing crisis management literature on Black Swans is inadequate and cannot be used to improve how constitutional states manage Black Swans.

As a reminder, Black Swans are crises that: (a) are “novel or unprecedented... in human or crisis managers’ memories”; (b) have “unexpectedly large scale or geographic distribution”; (c) have effects that cross-boundaries (i.e. are “trans-boundary”); and (d) have “consequences, which stir deep uncertainties in the minds of the public [and] challenge government structures”.⁵⁰

Following a discussion regarding how this research defines “a crisis”; an explanation of the role of crisis managers; and an analysis of the nature and composition of Black Swans, the chapter reviews the field of crisis managements studies. Here, the sub-fields of organisational crisis management and global crisis management are examined. The foci of

⁴⁹ Harvard Business School, *Crisis Management*, 46.

⁵⁰ OECD, *Changing Face*, 18-19.

the examination are two critical approaches to interpreting crises: as *processes* (organisational) or as *events* (global). While the organisational literature provides a way to determine and analyse crisis management activities, the global literature contains substantive literature on unconventional crisis types. The final part of the chapter establishes the limitations of this literature when it comes to Black Swans. It is argued that: (i) despite being a recognised type of crisis, Black Swans are currently commonly researched as crisis events that display only one or two defining characteristics, as opposed to all four collectively; and (ii) despite prescriptive approaches to crisis management being standard practice, strategies put forward to improve how constitutional states manage Black Swans are vague and lack substantive instructions regarding implementation.

Together, these limitations demonstrate that existing crisis management literature on Black Swans is inadequate and cannot be used improve how constitutional states to manage Black Swans. In this regard, the chapter answers the first research sub-question: “In what ways is existing crisis management literature on Black Swans inadequate?”.

Looking forward, Chapter Two demonstrates that the strategies constitutional states currently use to manage Black Swans are sub-optimal. Chapter Three considers what concepts Carl Schmitt’s legal-political theory contains that can be used to improve how constitutional states manage Black Swans. Chapter Four and Chapter Five, respectively, explain how Schmitt’s concepts of the exception and sovereign dictatorship can be employed within strategies designed to recognise and contain Black Swans optimally.

1.1. Crisis Management Fundamentals

(i) Defining “a crisis”

The word “crisis” is often used interchangeably with terms such as “emergency”, “disaster”, and “catastrophe”.⁵¹ As such, “a crisis” can refer to events ranging from flat tires, broken limbs, and lawsuits, to hurricanes, heatwaves, and tsunamis. This wide and varied attribution has generated significant ambiguity over the definition of “a crisis” within the field of crisis management studies. As W. Timothy Coombs has observed, currently “there is no one accepted definition of a crisis” within this field.⁵² Rather, there is a multitude of definitions.⁵³ However, as we will see now, the definitions of “a crisis” are generally compatible and can be synthesized to provide a working definition for the thesis discussion.

⁵¹ Srdan Milašinović and Želimir Kešetović, “Crisis and Crisis Management – A Contribution to a Conceptual & Terminological Delimitation,” *Megatrend Review* 5(1) (2008): 172; William Rick Crandall, John A. Parnell, and John E. Spillan, *Crisis Management: Leading in the New Strategy Landscape*, 2nd edn. (London: SAGE, 2014), 3; Brahim Herbane, “Small business research: Time for a crisis-based view,” *International Small Business Journal* 28(1) (2012): 43-64, doi: <https://doi.org/10.1177/0266242609350804>; Hayer Al-Dahash, Menaha Thayaparan, and Udayangani Kultunga, “Understanding the Terminologies: Disaster, Crisis and Emergency,” in P W Chan and C J Neilson (eds.) *Proceedings of the 32nd Annual ARCOM Conference*, 5-7th September, Manchester, UK, *Association of Researchers in Construction Management* 2 (2016): 1191-1200.

⁵² Coombs, *Ongoing Crisis*, 3.

⁵³ For a compilation of “major definitions of crisis in the literature”, see: Yuen Lam Wu, Bo Shao, Alexander Newman, and Gary Schwarz, “Crisis leadership: A review and future research agenda,” *The Leadership Quarterly* 32(6) (2012), ‘Table 2: A summary of the definitions of crisis in the literature’, doi: <https://doi.org/10.1016/j.leaqua.2021.101518>.

For example, “a crisis” has been defined by Steven Fink as “a fluid, unstable, dynamic situation – just like an illness”;⁵⁴ by Coombs as “[a] situation[] that test[s] resilience and the ability of people and organizations to bounce back from adversity”;⁵⁵ by William et al. as “a process of weakening or degeneration that can culminate in a disruption event to the actor’s... normal functioning”;⁵⁶ by E.L. Quarantelli, Patrick Lagadec, and Arjen Boin as “an urgent threat to the core functions of a social system”;⁵⁷ by Jonathan White as “a moment in which the limits of a system are exposed, generating functional pressures for adaptation and innovation”;⁵⁸ and by the UK government as “an event or series of events that represents a critical threat to the health, safety, security, or well-being of a community or other large group of people usually over a wider area”.⁵⁹

Aside from the fact that each of these definitions uses different terminology and phrasing, no one definition substantively excludes any other. This reinforces current consensus among scholars that definitions of “a crisis” share common features and are thus

⁵⁴ Steven Fink, *Crisis Management: Planning for the Inevitable* (United States: Amacom, 1986), 20. It is worth noting that the word “crisis” was first used in English to refer to “a decisive turning point between recovering and continued illness or death”: “Crisis-noun,” Oxford English Dictionary,” accessed July 20, 2023, https://www.oed.com/dictionary/crisis_n.

⁵⁵ Coombs, *Ongoing Crisis*, 1.

⁵⁶ T.A. Williams, D.A. Gruber, K.M. Sutcliffe, D.A. Shepherd, and E.Y. Zhao, “Organizational response to adversity: Fusing crisis management and resilience research streams,” *Academy of Management Annals* 11(2) (2017): 739; David Alexander, “Towards the development of a standard in emergency planning,” *Disaster Prevention and Management* 14(2) (2005): 157-175, doi: <https://doi.org/10.1108/09653560510595164>.

⁵⁷ E.L. Quarantelli, Patrick Lagadec, and Arjen Boin, “A Heuristic Approach to Future Disasters and Crises,” in *Handbook of Disaster Research*, 23.

⁵⁸ White, *Politics of Last Resort*, 4.

⁵⁹ United Kingdom, *The National Resilience Strategy: A Call for Evidence* (London: Cabinet Office, 2021), 42.

compatible.⁶⁰ Differences in terminology and phrasing can be attributed to authors' attempts to explain these features and capture "the complexity, uniqueness, ambiguity and uncertainty that characterise many modern crises" (OECD).⁶¹

Therefore, as it stands, the absence of an accepted definition of "a crisis" within the field of crisis management is remedied by the existence of many compatible definitions. "A crisis" can be any or all of the things described by Fink, Coombs, Quarantelli et al., Williams et al., White, and the UK Government – and more. However, the subject matter of the present research makes it essential to stipulate how "a crisis" is defined in this thesis.

Synthesising the numerous definitions of "a crisis" outlined above, one more-or-less arrives at Rosenthal et al.'s widely-cited definition of "a crisis" as: "a serious threat to the basic structures or the fundamental values and norms of a social system [which] under time pressure and highly uncertain circumstances necessitates making critical decisions".⁶²

⁶⁰ For example, see: Tony Jaques, "Issue management and crisis management: An integrated, non-linear, relational construct," *Public Relations Review* 33 (2007): 147, doi:[10.1016/j.pubrev.2007.02.001](https://doi.org/10.1016/j.pubrev.2007.02.001); Jonathan Bundy, Michael D. Pfarrer, Cole E. Short, and W. Timothy Coombs, "Crises and Crisis Management: Integration, Interpretation, and Research Development," 43(6) (2016): 1661-1692, doi: <https://doi.org/10.1177/0149206316680030>; Quarantelli et al., "A Heuristic Approach," 37.

⁶¹ OECD, *Changing Face*, 13.

⁶² Uriel Rosenthal, Michael T. Charles, and Paul 't Hart, *Coping with Crises: The Management of Disasters, Riots, and Terrorism* (United States: Charles C Thomas Publishing Ltd., 1989), 10; Phillip Y. Lipsky, "COVID-19 and the Politics of Crisis," *International Organization* 74(S1) (2020), doi:10.1017/S0020818320000375; Eric K. Stern, "Crisis Studies and Foreign Policy Analysis: Insights, Synergies, and Challenges," *International Studies Review* 5 (2003): 183-205; Arjen Boin, Paul 't Hart, and Bengt Sundelius, *The Politics of Crisis Management: Public Leadership Under Pressure*, 2nd edn. (Cambridge: Cambridge University Press, 2017); Kooor-Mista, *Crisis Management*, 5-6; OECD, *Changing Face*, 45.

Notably, this definition consists of two parts. The first, “a serious threat to the basic structures or the fundamental values and norms of a social system”, emphasises the idea that a crisis is an event that has the potential to aggravate key political, economic, and cultural factors. As Thierry C. Pauchant and Ian I. Mitroff have explained, a crisis can “threaten[] its [a system’s] basic assumptions, its subjective sense of self, its existential core”.⁶³

For example, the rapid increase in legal immigration to the UK since 2018 has put immense pressure on the country’s immigration system (i.e. “basic structures”).⁶⁴ It has also aggravated key political, economic, and cultural factors (i.e. “fundamental values and norms”), which, arguably, form an integral part of the UK’s sense of identity (i.e. “subjective sense of self”).⁶⁵ In other words, a crisis is an event that exacerbates fragility “across the

⁶³ Thierry C. Pauchant and Ian I. Mitroff, *Transforming the Crisis-Prone Organization: Preventing Individual, Organizational and Environmental Tragedies* (United States: Jossey-Bass, 1992).

⁶⁴See: “Irregular migration to the UK statistics,” UK Government (Home Office), 26th May, 2022, accessed April 27, 2023, <https://www.gov.uk/government/collections/irregular-migration-to-the-uk-statistics>; Matt Dathan, “Small boats crisis: Just 13% of migrant asylum claims dealt with in five years,” *The Times*, April 19, 2023, accessed September 16, 2023, <https://www.thetimes.co.uk/article/small-boats-crisis-just-13-of-migrant-asylum-claims-dealt-with-in-five-years-3xnlxxtgt>; “Manston migrant centre: What were the problems?” *BBC News*, 21 December, 2022, accessed April 28, 2023, <https://www.bbc.co.uk/news/explainers-63456015>.

⁶⁵ See: Matt Dathan, “Channel migrants threaten cultural cohesiveness, says Robert Jenrick,” *The Times*, April 25, 2023, accessed April 27, 2023, <https://www.thetimes.co.uk/article/1dc29a6e-e39e-11ed-9d9d-927ca944996b?shareToken=2949d54fb2ea0b2cf024f48346a4d954>; Matt Dathan, “Channel migrants at odds with British values, Suella Braverman claims,” *The Times*, April 26, 2023, accessed April 27, 2023, <https://www.thetimes.co.uk/article/2658eb9e-e414-11ed-9d9d-927ca944996b?shareToken=2d1cac3695a0174dd5a572b9e87d7a52>.

economic, environmental, political, security, societal, and human [dimensions]" of a state or organisation (OECD).⁶⁶

The second part of Rosenthal et al.'s definition, "under time pressure and highly uncertain circumstances necessitates making critical decisions", emphasises the importance of decision-making when fragility is increasing and "negative outcomes" are proliferating (OECD).⁶⁷ Decisions are "critical" because they relate to the aforementioned economic, environmental, political, security, societal, and human dimensions of a particular state or organisation, at a time when these dimensions are subject to high levels of uncertainty.

For example, with the aforementioned UK migrant crisis, there has been increasing uncertainty regarding how to manage high levels of illegal immigration. This uncertainty has further aggravated "fundamental values and norms", increased fragility, and piled pressure on the government to act quickly to resolve the situation.⁶⁸ This build-up has necessitated critical decision-making in the form of the Illegal Migration Act 2023,⁶⁹ which the UK government has introduced to try to reduce fragility and prevent a proliferation of "negative outcomes" (OECD).⁷⁰ In other words, a crisis is an event that requires resilience: "the ability

⁶⁶ OECD, *States of Fragility 2022*.

⁶⁷ Ibid.

⁶⁸ See: Amy Gibbons, "Braverman under pressure to fix migrant crisis as legal threat looms," *Independent*, 3rd November, 2022, accessed May 2, 2023, <https://www.independent.co.uk/news/uk/robert-jenrick-government-suella-braverman-manston-kent-b2216493.html>.

⁶⁹ "Illegal Migration Act 2023," UK Government, accessed July 30, 2023, <https://www.gov.uk/government/collections/illegal-migration-bill>; "Illegal Migration Act 2023," UK Parliament, accessed July 30, 2023, <https://bills.parliament.uk/bills/3429>.

⁷⁰ OECD *States of Fragility 2022*.

of a system, community or society exposed to hazards to resist, absorb, accommodate and recover from the effects of a hazard in a timely and efficient manner” (OECD).⁷¹

Given that Rosenthal et al.’s definition of “a crisis” is: (i) compatible with most other definitions of “a crisis” present within the field of crisis management studies; and (ii) relates to key concepts, such as fragility and resilience, it can be considered suitable enough to act as a working definition for the thesis discussion.

(ii) *The Role of Crisis Managers*

As Coombs has explained “Crisis management represents a set of factors designed to combat crises, to lessen the actual damage inflicted, and to facilitate resilience. Put another way, it seeks to prevent or lessen the negative outcomes of a crisis... while facilitating a positive response to the situation”.⁷² Simply put, crisis management is a process designed to reduce fragility and increase resilience. Optimal crisis management occurs when resilience leads to a reduction in fragility.

The role of crisis managers can be described by combining this research’s definition of “a crisis” with the definitions of fragility and resilience provided in the thesis Introduction. As a reminder, “fragility” is “the combination of exposure to risk and insufficient coping capacity of the state, systems and/or communities to manage, absorb or mitigate those risks... across six dimensions: economic, environmental, political, security, societal and human” (OECD).⁷³ “Resilience” is “the ability of a system, community or society exposed to

⁷¹ OECD, *Changing Face*, 18; UNISDR, *2009 UNISDR terminology on disaster risk reduction*, 6.

⁷² Coombs, *Ongoing Crisis Communication*, 8.

⁷³ “Executive Summary” in OECD, *States of Fragility 2022*.

hazards to resist, absorb, accommodate and recover from the effects of a hazard in a timely and efficient manner.”⁷⁴

Crisis managers must ensure that there is “[s]ufficient coping capacity... to manage, absorb or mitigate those risks” (OECD) associated with “a serious threat to the basic structures or the fundamental values and norms of a social system” (Rosenthal et al.).⁷⁵ To do this, they must “resist, absorb, accommodate and recover from the effects of a hazard” (OECD), “under time pressure and highly uncertain circumstances”, by “making critical decisions” (Rosenthal et al.).⁷⁶

The kind of resilience demonstrated by crisis managers is usually that of “static resilience”. To recap, static resilience is concerned with “maintain[ing] and restor[ing] equilibrium conditions”. As Ansell and Trondal have explained, here the “logic is... to strive to get back to basics or ‘stick to the knitting’ – reducing uncertainty and complexity to achieve order and stability”. Essentially, “because this is a strategy of resisting change, incremental change that enhances or supports, or at least does not threaten equilibrium conditions, will be prioritized. Hence this strategy encourages institutional path-dependence”.⁷⁷ The reason crisis managers demonstrate this type of resilience, other than the fact that it does not “threaten equilibrium conditions”, is because fragility is typically reduced when normal conditions are restored. A resumption of normality is seen as the

⁷⁴ OECD, *Changing Face*, 18; United Nations (UN) *UNISDR terminology on disaster risk reduction 2009* (United Nations, 2009), 6.

⁷⁵ OECD *States of Fragility 2022*; Rosenthal et al., *Coping with Crises*, 10.

⁷⁶ OECD, *Changing Face*, 18; UNISDR, *2009 UNISDR terminology on disaster risk reduction*, 6; *Ibid* (Rosenthal et al.).

⁷⁷ Ansell and Trondal, “Governing Turbulence”: 50.

ultimate “positive response” to managing a crisis (Coombs).⁷⁸ Indeed, evidence of this can be seen in the UK’s eagerness to secure an exit strategy out of the COVID-19 pandemic.⁷⁹ Here, the number one goal for both the government and general public was normality – to return to a way of life that did not involve social distancing and the constant threat of lockdowns.⁸⁰

(iii) *Black Swans*

As a reminder, Black Swans are crises that: (a) are “novel or unprecedented... in human or crisis managers’ memories”; (b) have “unexpectedly large scale or geographic distribution”; (c) have effects that cross-boundaries (i.e. are “trans-boundary”); and (d) have “consequences, which stir deep uncertainties in the minds of the public [and] challenge government structures”.⁸¹ Together, these characteristics define Black Swans. However, it is necessary to clarify: (i) what these characteristics mean and correspond to in reality; and (ii)

⁷⁸ Coombs, *Ongoing Crisis Communication*, 8.

⁷⁹ Sebastian Payne, Jim Pickard, and Laura Hughes, “Conservative MPs voice disquiet over lockdown exit strategy,” *Financial Times*, 23rd April, 2020, accessed June 20, 2022, <https://www.ft.com/content/2ceb0b19-5a0c-4bac-90eb-1afd7c5d86af>; “Coronavirus: Stop treating public ‘like children’ and reveal exit strategy, say senior MPs,” *Sky News*, April 18, 2020, accessed June 20, 2022, <https://news.sky.com/story/coronavirus-stop-treating-public-like-children-and-reveal-exit-strategy-say-senior-mps-11975154>.

⁸⁰ For example, see: “PM statement to the House of Commons on roadmap for easing lockdown restrictions in England: 22 February, 2021,” accessed June 20, 2022, <https://www.gov.uk/government/speeches/pm-statement-to-the-house-of-commons-on-roadmap-for-easing-lockdown-restrictions-in-england-22-february-2021>.

⁸¹ OECD, *Changing Face* 18-19.

how these characteristics distinguish Black Swans from conventional crises, as defined above.

Regarding the first characteristic, “novel or unprecedented... in human or crisis managers’ memories”, this refers to the fact that Black Swans are both unforeseeable and extreme.⁸² This is because these events have no reliable comparator that can be used by crisis managers today. For example, although the COVID-19 pandemic shares many similarities with the Spanish Flu pandemic (1918-20),⁸³ the latter cannot be used to as a reliable guide to manage the former because there is no crisis manager alive today who experienced the Spanish Flu pandemic. Furthermore, today’s infrastructure (i.e. domestic, regional and international institutions, technical and medical options), transmission environment (i.e. extent of international travel, rapidity of global movement), and customs are profoundly different from what they were in 1918-20. In this sense, as Taleb has explained, Black Swans are “outliers”: events that constitute “large deviations” from the norm and exist “outside the realm of expectations”, where “nothing in the past can convincingly point to their possibility”.⁸⁴ Therefore, not only are Black Swans defined by the absence of an identifiable comparator, but they are also defined by the absence of

⁸² Aven, *Risk, Surprises and Black Swans*, 1.

⁸³ For commentary, see: “The covid-19 pandemic one year on: parallels and lessons from Spanish flu,” *BMJ (British Medical Journal) Opinion*, accessed June 23, 2023, <https://blogs.bmj.com/bmj/2021/03/11/the-covid-19-pandemic-one-year-on-parallels-and-lessons-from-spanish-flu/>; Stephen Dowling, “Coronavirus: What can we learn from the Spanish Flu,” *BBC*, March 3, 2020, accessed June 23, 2023, <https://www.bbc.com/future/article/20200302-coronavirus-what-can-we-learn-from-the-spanish-flu>.

⁸⁴ Taleb, *The Black Swan*, xvii-xix.

knowledge. In Taleb's words, Black Swans "make what you don't know [i.e. anti-knowledge] more relevant than what you do know".⁸⁵

Regarding the second and third characteristics, "unexpectedly large scale or geographic distribution" and "trans-boundary", these refer to the fact that Black Swans cross both geographic and administrative boundaries. The impact and effects of Black Swans are not limited to one country, and multiple authorities – regional, national, and international – are involved in their management. The Tōhoku (Japan) earthquake and tsunami in 2011, for example, affected countries such as Russia and the US.⁸⁶ As such, not only were multiple regional and national governments involved, but the United Nations (UN) also provided assistance and expertise to manage the crisis.⁸⁷ In Taleb's words, Black Swans have "extreme impact" and produce "significant shocks".⁸⁸

Regarding the fourth characteristic, "consequences, which stir deep uncertainties in the minds of the public [and] challenge government structures", this refers to the fact that Black Swans create and expose vulnerability. How people live and how the state is governed are brought into question and subject to drastic change. For example, social distancing and lockdown restrictions during the COVID-19 pandemic prohibited what, arguably, is a core tenet of human civilisation: social interaction. Not only was there widespread and deep

⁸⁵ Ibid, xix.

⁸⁶ See, for example: Seattle Times staff, "11,000 evacuated in Russia after Japanese quake," *The Seattle Times*, March 11, 2011, accessed July 23, 2023, <https://www.seattletimes.com/nation-world/11000-evacuated-in-russia-after-japanese-quake/>; "Man swept to death by tsunami wave in Calif[ornia]," *NCB News*, March 11, 2023, accessed July 23, 2023, <https://www.nbcnews.com/id/wbna42024659>.

⁸⁷ "Japan: UN stepping up assistance in wake of quake and tsunami," United Nations, accessed July 23, 2023, <https://news.un.org/en/story/2011/03/368932>.

⁸⁸ Taleb, *The Black Swan*, xix. See also: Ulrich Beck, *World at Risk* (Cambridge: Polity Press, 2009), 8 & 52.

uncertainty over the immediate future (i.e. day-to-day, week-to-week),⁸⁹ but questions regarding how COVID-19 would permanently change the world stirred in peoples' minds.⁹⁰ Additionally, in countries such as the UK, parliamentary oversight was significantly eroded and governments were allowed to rule by executive decree.⁹¹ The fundamental system of checks and balances that is designed to protect individuals from abuses of state power was severely curtailed or effectively suspended. Here, the normal structure and functioning of liberal democracy was challenged.

⁸⁹ For example, in the UK it was unclear when lockdown restrictions would be lifted and what life would look like post-lockdown: Robin McKie, "When will Britain's lockdown be lifted? Three scenarios," *The Guardian*, February 7, 2021, accessed July 23, 2023, <https://www.theguardian.com/world/2021/feb/07/when-will-britains-covid-lockdown-be-lifted-three-scenarios>; Various contributors, "Will our day-to-day life ever be the same?" *BBC*, accessed July 23, 2023, <https://www.bbc.com/worklife/article/20201109-coronavirus-how-cities-travel-and-family-life-will-change>.

⁹⁰ For example, see: Nick Routley, "5 major trends that are being accelerated by the COVID-19 pandemic," *World Economic Forum* (WEF), December 7, 2020, accessed July 23, 2023, <https://www.weforum.org/agenda/2020/12/covid19-trends-rapid-acceleration-digital-ecommerce/>; Daniel Susskind, "Six prominent thinkers reflect on how the pandemic has changed the world," *International Monetary Fund* (IMF), June 2020, accessed July 23, 2023, <https://www.imf.org/en/Publications/fandd/issues/2020/06/how-will-the-world-be-different-after-COVID-19>.

⁹¹ On this, see: United Kingdom, Parliament (House of Lords: Select Committee on the Constitution), *COVID-19 and the use and scrutiny of emergency powers*, HL Paper 15 (2021) accessed: July 23, 2023, <https://publications.parliament.uk/pa/ld5802/ldselect/ldconst/15/1502.htm>; Jonathan Sumption, *Law in a Time of Crisis* (London: Profile Books, 2021), Chapter 12: Government by Decree: Covid-19 and the British Constitution; European Parliament, European Parliamentary Research Service, *Parliamentary oversight of governments' response to the COVID-19 pandemic: Literature Review*, PE 740.217 (2023) accessed: July 23, 2023, [https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU\(2023\)740217](https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2023)740217).

Having briefly elaborated upon the meaning and applicability of the four characteristics that define Black Swans, the relationship between conventional crises and Black Swans can be distinguished. This can be done by amalgamating this thesis' definition of "a crisis" with the four characteristics of Black Swans. Black Swans are a type of crisis that gives rise to "a serious threat", where this threat is of a "novel or unprecedented nature in human or crisis managers' memories".⁹² This threat affects "the basic structures or the fundamental values and norms of a social system" on an "unexpectedly large scale or geographic distribution", occurring "trans-boundary".⁹³ The "consequences" of the threat "stir deep uncertainties in the minds of the public [and] challenge government structures", which "under time pressure and highly uncertain circumstances necessitates making critical decisions".⁹⁴

To explain the difference between conventional crises and Black Swans more concretely, compare the UK migrant crisis (2016-present) to the COVID-19 pandemic.⁹⁵ The migrant crisis was unforeseeable, but, unlike the COVID-19 pandemic, it was not "novel unprecedented... in human or crisis managers' memories".⁹⁶ The 2015 European migrant

⁹² Rosenthal et al., *Coping With Crises*, 10; OECD, *Changing Face*, 18-19.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ For a discussion of the apparent causes of the UK migrant crisis, see: United Kingdom, House of Commons Home Affairs Committee, *Migration Crisis*, Seventh Report of Session 2016-17, HC 24 (London: House of Commons, 2016).

⁹⁶ Although the COVID-19 pandemic can be (and has been) compared to Spanish Flu Pandemic (1918-20), the latter falls firmly outside the scope of memory for the purposes of crisis management. Moreover, there are notable differences between COVID-19 and the Spanish Flu. See: Shu Ting Liang, Lin Ting Liang, and Joseph M Rosen, "COVID-19: a comparison to the 1918 influenza and how we can defeat it," *Postgraduate Medical Journal* 97(1147) (2021), doi: <https://doi.org/10.1136%2Fpostgradmedj-2020-139070>.

crisis presented similar challenges.⁹⁷ The UK migrant crisis is also not of “unexpectedly large scale or geographic distribution”. Although the number of immigrants reaching UK shores is higher than it has ever been,⁹⁸ the scale of the crisis remains small compared to the how many people and countries were affected by COVID-19.⁹⁹ The migrant crisis is “trans-boundary” like the COVID-19 pandemic,¹⁰⁰ however the latter can be considered *more* trans-boundary on the basis that it involved not only the “cross[ing] [of] physical borders, but also the involvement of public authorities from national and sub-national levels, relevance of several policy fields, and mobilisation of different sectors (public, private, non-governmental etc.)” (OECD).¹⁰¹ There are highly uncertain circumstances surrounding the migrant crisis, however this does not extend to “consequences, which stir deep uncertainties in the minds of the public [and] challenge government structures” – a key attribute of the COVID-19 pandemic. While the former relates to pressures on the UK immigration system and questions over government policy, the latter relates to how COVID-19 curtailed individual liberty and expanded the reaches of executive power on a scale hitherto unseen in modern times.

This comparison between the UK migrant crisis and the COVID-19 pandemic demonstrate the difference between conventional crises, as defined by Rosenthal et al., and

⁹⁷ For information on the 2015 European Migrant Crisis, see: “Europe’s Migration Crisis,” Council on Foreign Relations, September 25, 2015, accessed May 5, 2023, <https://www.cfr.org/backgrounder/europes-migration-crisis>.

⁹⁸ See: “Migration statistics,” UK Government, accessed May 5, 2023, <https://www.gov.uk/government/collections/migration-statistics>.

⁹⁹ See: “WHO Coronavirus (COVID-19) Dashboard,” accessed May 5, 2023, <https://covid19.who.int/>.

¹⁰⁰ See: Fulvio Attinà, “Migration Drivers, the EU External Migration Policy and Crisis Management,” *Romanian Journal of European Affairs* 16(4) (2016): 15-31.

¹⁰¹ OECD, *Changing Face*, 19.

Black Swans, as defined by the OECD. To situate these differences in the context of crisis management, it can be said that Black Swans increase fragility more than conventional crises. As such, more is required of crisis managers when it comes to demonstrating resilience. In the words of the OECD, “The more unexpected and novel the event, the greater the uncertainty and the more ill-structured the domain in which crisis managers must operate”.¹⁰² Here, static resilience is often not enough to reduce fragility. Instead, crisis managers must demonstrate “dynamic resilience”. To recap, dynamic resilience “emphasizes the importance of building flexibility into organizational and institutional arrangements by absorbing complexity and incorporating requisite variety”. As Ansell and Trondal have explained, here the focus is on “maintaining multiple repertoires that can be flexibly redeployed to meet changing circumstances”.¹⁰³ The importance of dynamic resilience has been acknowledged in the wake of the COVID-19 pandemic, albeit in very limited circumstances.¹⁰⁴ As is made clear in the remainder of the thesis, dynamic resilience is necessary for optimal crisis management of Black Swans.

This sub-section has discussed three aspects of crisis management that are fundamental to the present research: (i) the definition of “a crisis”; (ii) the role of crisis managers; and (iii)

¹⁰² Ibid, 45.

¹⁰³ Ansell and Trondal, “Governing Turbulence”: 8.

¹⁰⁴ In evidence given to the UK COVID-19 Inquiry, civil servant Sir Christopher Wormald stated: “Our thinking now is much more in terms of: what are the flexible capabilities that allow you to put together the correct type of response...[and what is the underlying resilience of your system?]... As opposed to: can we write a plan for s specific outcome and then identify it?”: UK Covid-19 Inquiry, *Transcript of Module 1 Public Hearing, dated 19 June 2023* (2023), pg. 125-126: accessed July 24, 2023, <https://covid19.public-inquiry.uk/documents/transcript-of-module-1-public-hearing-on-19-june-2023/>.

the nature and composition of Black Swans. Now that these fundamentals have been established, the field of crisis management studies can be reviewed.

1.2. Crisis Management Studies

(i) A Vast and “Fragmented” Field

Crisis management represents a vast area of study.¹⁰⁵ It is a hot-topic in subjects ranging from self-help to parenting,¹⁰⁶ gardening to modern art.¹⁰⁷ A recent political memoir on crisis management even served as an inspiration for a hit Hollywood film.¹⁰⁸ In academia, discourse on crisis management has been spurred by events such as the 9/11 terrorist attacks in New York;¹⁰⁹ the 2008 global financial crash,¹¹⁰ the 2015 European refugee

¹⁰⁵ Arjen Boin, Paul ‘t Hart, and Bengt Sundelius, *The Politics of Crisis Management: Public Leadership Under Pressure*, 2nd edn. (Cambridge: Cambridge University Press, 2017), 2. John J. Burnett is correct that “crisis management has become a booming industry”: “A Strategic Approach to Managing Crises,” *Public Relations Review* 24(4) (1998): 475.

¹⁰⁶ See, for example: Jule Hannan, *The Midlife Crisis Handbook: Finding Direction in the Second Half of Life* (Dudley: Morency Publishing, 2023); Barbara Coloroso, *Parenting Through Crisis: Helping Kids in Times of Loss, Grief, and Change* (New York: HarperCollins, 2000).

¹⁰⁷ See, for example: Kimberly M. Hartfield, *Living on the Wild Side: Crisis Gardening and Survival Scavenging in the South* (USA: Go Fish Ministries, Inc: 2012); Julian Spalding, *The Eclipse of Art: Tackling the Crisis in Art Today* (London: Prestel Publishing, 2003).

¹⁰⁸ J.D. Vance, *Hillbilly Elegy: A Memoir of a Family and Culture in Crisis* (New York: Harper, 2016); *Hillbilly Elegy*, directed by Ron Howard (2020; Netflix, 2020), Digital/Streaming.

¹⁰⁹ For example, see: Thomas Graham Jr., *Unending Crisis: National Security Policy After 9/11* (United States: University of Washington Press, 2012).

¹¹⁰ For example, see: Phillip A. Wallach, *To the Edge: Legality, Legitimacy, and the Responses to the 2008 Financial Crisis* (Washington DC: Brookings Institution Press, 2015).

crisis;¹¹¹ crises within the European Union;¹¹² global climate change;¹¹³ and the global COVID-19 pandemic.¹¹⁴ The result is a body of literature that Karim Knio and Bob Jessop have aptly described as “mosaic”.¹¹⁵ Although crisis management is a recognisable field of study, the growing number of sub-fields within the literature make it difficult to navigate.¹¹⁶

Paul Shrivastava has argued, quite rightly, that the “highly fragmented” nature of crisis management studies is because of: (i) “adhocacy”, where scholars “strike out into new areas, study new topics, build new vocabularies and frameworks” without attempting to “build systematic connections with past research”; and (ii) “idiosyncrasy”, where “there is no single paradigm guiding research” because of “many different disciplinary voices, talking in different languages to different issues and audiences”.¹¹⁷ When combined, adhocacy and idiosyncrasy reduce the cohesiveness of crisis management and make it more difficult to

¹¹¹ For example, see: Boštjan Nedoh, “Mass Migrations as a Messianic Event? Rereading Agamben’s State of Exception in Light of the Refugee Crisis in Europe,” *Law, Culture and the Humanities* 0(0) (2017): 1-18, doi: 10.1177/1743872117703717.

¹¹² For example, see: Jonathan White, “Emergency Europe,” *Political Studies* 63(2) (2015), doi: 10.1111/1467-9248.12072.

¹¹³ For example, see: Joel Wainwright and Geoff Mann, *Climate Leviathan: A Political Theory of Our Planetary Future* (London: Verso, 2020).

¹¹⁴ For example, see: Jan Nederveen Pieterse, Haeran Lim, and Habibul Khondker (eds.), *COVID-19 and Governance: Crisis Reveals* (Oxon: Routledge, 2021).

¹¹⁵ Karim Knio and Bob Jessop, “Organizational perspectives on crisiology and learning,” in Bob Jessop and Karim Knio (eds.), *The Pedagogy of Economic, Political, and Social Crises: Dynamics, Construals, and Lessons* (London: Routledge, 2019), 14-15.

¹¹⁶ For a systematic review and presentation of academic literature on crisis management, see: Bundy et al., “Crisis and Crisis Management”: ‘Table 1: Summary of the Crisis and Crisis Management Literature’.

¹¹⁷ Paul Shrivastava, “Crisis theory/practice: towards a sustainable future,” *Industrial & Environmental Crisis Quarterly* 7(1): (1993): 33, accessed July 22, 2023, <https://www.jstor.org/stable/26162560>; Bernard Forgues and Christophe Roux-Dufort, “Crises: Events or Processes?” (Paper presented at the Hazards and Sustainability Conference, Durham, UK, 26-27 May, 1998).

recognise as a field of study. As Shrivastava has concluded, “There is much that is intellectually new and creative, but it does not all add up to more sophisticated understanding of crises”.¹¹⁸ More recently, claims of fragmentation have been made by Jonathan Bundy et al. and Erika Hayes James et al..¹¹⁹ Like Shrivastava, they are of the view that fragmentation makes it “difficult for scholars to understand the [crisis management] literature’s core conclusions, recognize unsolved problems, and navigate paths forward”.¹²⁰

However, as valid as claims of fragmentation are, fragmented growth is to be expected and, to an extent, should be encouraged in a field such as crisis management studies. After all, it must be remembered that crisis management is a relatively new discipline.¹²¹ Anglophone scholars only started to produce serious, critical, literature on crisis management in the 1980s,¹²² as a response to the 1982 U.S Tylenol tampering incident.¹²³ Therefore, Coombs is correct that “we have only just begun to scratch the surface in our understanding” when it comes crisis and crisis management.¹²⁴ As a field,

¹¹⁸ Ibid.

¹¹⁹ Bundy et al., “Crises and Crisis Management”; Erika Hayes James, Lynn Perry Wooten, and Kelly Dushek, “Crisis Management: Informing a New Leadership Research Agenda,” *Academy of Management Annals* 5(1) (2011), doi: <https://doi.org/10.5465/19416520.2011.589594>.

¹²⁰ Bundy et al., “Crises and Crisis Management”.

¹²¹ As Knio and Jessop have noted, crises have only been studied academically “for at least 150 years”: “Organizational perspectives”: 13.

¹²² Steven Fink’s seminal work *Crisis Management: Planning for the Inevitable* (1986) is considered the first systematic study of crisis management in the Anglophone.

¹²³ Lagadec, ‘Crisis Management in the Twenty-First Century,’ 489. For background and analysis on the Tylenol tampering incident, see: Ibid (Fink), 203-219.

¹²⁴ W. Timothy Coombs, ‘Crisis Communication: A Developing Field,’ in *The SAGE Handbook of Public Relations*, ed. Robert L. Heath (London: SAGE, 2010), 479. Coombs and Daniel Laufer identify numerous areas in need of further research: W. Timothy Coombs and Daniel Laufer, “Global Crisis Management –

crisis management studies is bound to be fragmented because it is still in relatively early stages of development. Scholarly focus is torn between ironing out ambiguities, so that a set of basic crisis management principles can be established, and keeping pace with evermore and everchanging manifestations of crisis, so that opportunities to demonstrate contemporary relevance are not missed.

This thesis agrees with scholars such as Boin and Hart, who contend that “a rich and fruitful mix of perspectives [is] exactly what is needed to understand the complexities and dynamics of crises and crisis management”.¹²⁵ Just as there are many compatible ways to define “a crisis”, there are many compatible ways to navigate the field of management studies. Any research difficulties wrought by fragmentation can be overcome in one way or another.

(ii) *Established Sub-Fields*

The way in which the present research overcomes difficulties wrought by fragmentation is by focusing on the sub-fields of (1) organisational crisis management and (2) global crisis management. The former sub-field approaches crises as processes and addresses many of the nuts-and-bolts issues of crisis management; the latter sub-field approaches crises as events and contains substantive work on unconventional crisis types. As we will see now,

Current and Future Directions,” *Journal of International Management* (24) (2018), doi:

<https://doi.org/10.1016/j.intman.2017.12.003>.

¹²⁵ Boin and Hart, “The Crisis Approach” in *Handbook of Disaster Research*, 44; Knio and Jessop, “Organizational perspectives”: 13.

both sub-fields are well-established within crisis management studies. They therefore provide a reliable way to substantiate and develop the thesis argument.

(a) Sub-Field (1): Organisational Crisis Management

The primary focus of organisational crisis management are crises in the context of businesses – i.e. companies and corporations. Examples of organisational crises include: the WannaCry ransomware attack on the UK's National Health Service (NHS) (2017);¹²⁶ the multitude of cancer lawsuits filed against Johnson & Johnson (2009 to present);¹²⁷ and recent furore in the UK over suspected political “de-banking”.¹²⁸ Scholars of organisational crisis management contribute to knowledge on a wide range of subjects. They include: the importance of crisis communication;¹²⁹ the effectiveness crisis leadership;¹³⁰ protecting

¹²⁶ Gordon Corera, “NHS cyber-attack was ‘launched from North Korea,’” *BBC News*, 16 June, 2017, accessed March 3, 2022, <https://www.bbc.co.uk/news/technology-40297493>.

¹²⁷ Alex Ralph, “Money for Baby Powder cancer lawsuits wipes out Johnson and Johnson profits,” *The Times*, April 19, 2023, accessed April 19, 2023, <https://www.thetimes.co.uk/article/0f32e3d8-de16-11ed-9cc2-0f7e26ed83eb?shareToken=b26f5283f28ccf99d3187239d47f7c4b>.

¹²⁸ Anna Gross and Siddharth Venkatatamakrishnan, “Treasury to summon bank chiefs to address ‘de-banking’ after Farage furore,” *Financial Times*, July 23, 2023, accessed July 24, 2023, <https://www.ft.com/content/ea05c9f2-52c5-405d-9af4-b4cb66b6f157>; Ben Martin, “FCA gives banks two weeks to explain account closures,” August 9, 2023, *The Times*, accessed August 9, 2023, <https://www.thetimes.co.uk/article/2af60ec4-3690-11ee-8810-d3022cd752ba?shareToken=2b8498e50bd62c359ada7f9f643ca4b6>.

For a list of generic organisational crises, see: Christine M. Pearson and Judith A. Clair, “Reframing Crisis Management,” *The Academy of Management Review* 23(1) (1998): 60, accessed September 19, 2022, <https://www.jstor.org/stable/259099>.

¹²⁹ See, for example, the work of numerous scholars in W. Timothy Coombs and Sherry J. Holladay (eds.), *The Handbook of Crisis Communication* (United Kingdom: Blackwell Publishing, 2010).

¹³⁰ For a comprehensive review of the scholarship on crisis leadership, see: Wu et al., “Crisis leadership: A review and future research agenda”.

reputation during a crisis;¹³¹ repairing trust after a crisis has passed;¹³² and the impact of crises on shareholders.¹³³

Organisational scholars have also developed three conventional approaches to studying crisis management. They are commonly referred to as: (i) the “case analysis” approach; (ii) the “crises prescriptions” approach; (ii) and the “crisis management models” approach.¹³⁴

- Case Analysis Approach

As John J. Burnett has explained, the purpose of the case analysis approach is to show “how specific companies [and states] resolve their crisis”.¹³⁵ By examining successes and failures in one case, it is hoped that lessons can be learned and applied in future cases.¹³⁶ This approach is particularly useful when it comes natural disasters. As an example, for the

¹³¹ For example, see: W. Timothy Coombs, “Protecting Organization Reputations During a Crisis: The Development and Application of Situational Crisis Communication Theory,” *Corporate Reputation Review* 10 (2007): 163-176.

¹³² For example, see: Nicole Gillespie and Graham Dietz, “Trust Repair After an Organization-Level Failure,” *Academy of Management Review* 34(1) (2009): 127-145.

¹³³ For example, see: Alfred A. Marcus and Robert S. Goodman, “Victims and Shareholders: The Dilemmas of Presenting Corporate Policy During a Crisis,” *Academy of Management Journal* 34(2): 281-305 (1991).

¹³⁴ John J. Burnett, “A Strategic Approach to Managing Crises,” *Public Relations Review* 24(4): 467-477.

¹³⁵ Ibid, 477

¹³⁶ For representative examples of the case analysis approach, see: Robin A. Weiss and Angela R. McLean, “What Have We Learnt from SARS?” *Philosophical Transactions: Biological Sciences* 359(1447): 1137-40, accessed July 28, 2023, <https://www.jstor.org/stable/4142249>; Amal Amin, “7 lessons leaders should take from the COVID-19 crisis,” *World Economic Forum* (WEF), January 5, 2023, accessed July 28, 2023, <https://www.weforum.org/agenda/2021/01/7-things-leaders-can-learn-from-the-covid-19-crisis/>.

Cuban government Hurricane Dennis (2005) would have been a case to analyse at the outset of Hurricane Ike (2008). This is because both of these hurricanes were similar in size and scale (both were Category 4).¹³⁷ As such, lessons learnt during the management of Dennis could have applied to during the management of Ike to reduce its impact.

However, the case analysis approach fails to take an important factor into consideration. Focusing on singular crisis events overlooks the fact that no two crises are identical. Although similarity between crises may help orientate crisis managers, it cannot be used to ensure the likelihood of crisis management success – a point emphasised in Chapter Two. As Burnett has remarked: “not all crises are alike. And the same response to different crises is not appropriate”.¹³⁸ Applying lessons learned in one crisis in the context of another fails to take the aforementioned “complexity, uniqueness, ambiguity and uncertainty that characterise many modern crises” into consideration. (OECD).

- Crisis Prescriptions Approach

To quote Burnett, the crisis prescriptions approach focuses on “delineating prescriptions for crisis identification and resolution” which “have both general and industry-specific applicability”.¹³⁹ In other words, unlike the case analysis approach, which focuses on what has been done in a similar situation, the crisis prescriptions approach focuses on what should be done when a particular type of crisis strikes. For instance, in a health and safety

¹³⁷ For information on categories of hurricanes (according to the Saffir-Simpson Hurricane Wind Scale), see: “Measuring tropical cyclones,” Met Office, accessed August 22, 2023, <https://www.metoffice.gov.uk/weather/learn-about/weather/types-of-weather/hurricanes/measuring>.

¹³⁸ Burnett, “A Strategic Approach”: 476

¹³⁹ Ibid: 477.

crisis the concern is not what the health and safety issue is, per se, but what crisis management procedures should be followed given that there is a health and safety crisis. Crisis prescriptions are general in applicability but precise in application.¹⁴⁰

However, a problem with the crisis prescriptions approach is that it raises more questions than it answers. Even though crisis prescriptions provide potential ways to resolve a crisis, they often lack detail regarding implementation. Burnett is correct in his assessment that crisis prescriptions “are simple extensions of the basic functions of management... and [typically] do not lead to comprehensive [crisis management] strategies”.¹⁴¹ This point is developed further in the final part of this chapter.

- Crisis Management Models (Crisis-as-Processes) Approach

The crisis management models approach interprets crises as processes – as events that can be broken down into multiple stages, phases, steps, or elements.¹⁴² Here, as Bernard

¹⁴⁰ An example of the crisis prescriptions approach is the UK’s Influenza Pandemic Strategy 2011 (accessed July 20, 2023, <https://www.gov.uk/government/publications/responding-to-a-uk-flu-pandemic>). This strategy prescribes suggestions on what to do in a pandemic caused by a strain of influenza (A, B, C, or D).

¹⁴¹ Burnett, “A Strategic Approach”: 478

¹⁴² Ibid: 479; Knio and Jessop, “Organizational perspectives”: 16; Christophe Roux-Dufort, “A passion for imperfections: Revisiting crisis management,” in *International Handbook of Organizational Crisis Management*, eds. Christine M. Pearson, Christophe Roux-Dufort, and Judith A. Clair (United States: SAGE, 2005), 221-252; Uriel Rosenthal and Alexander Kouzmin, “Crises and Crisis Management: Toward Comprehensive Government Decision Making,” *Journal of Public Administration Research and Theory* 2 (1997): 299 ;Christine M. Pearson and Ian I, Mitroff, “From Crisis Prone to Crisis Prepared: A Framework for Crisis Management,” *Academy of Management Executive* 7(1) (1993): 52; Alfonso González-Herrero and Cornelius B. Pratt, “An Integrated Symmetrical Model for Crisis-Communications Management,”

Forgues and Christophe Roux-Durfort have argued, “crises are... seen as phenomenon extended in time and space...”.¹⁴³ This period of time and space is commonly referred to as the “life-cycle” of a crisis.¹⁴⁴ Scholars agree that all crises have at least three stages in their life-cycle:

- (i) The *precrisis* stage, which “entails actions to be performed before a crisis is encountered”, including signal detection, prevention, and crisis preparation;
- (ii) The *crisis event* stage, where “people in an organization must realize that a crisis exists and respond to the event as a crisis”. This stage includes crisis “recognition” and crisis “containment”;
- (iii) The *postcrisis* stage, where “an organization must consider what to do next”, including learning and preparing for future crises.¹⁴⁵

As Coombs has noted, these stages can be used to “provide[] an analytical framework for the study of crisis management efforts”.¹⁴⁶ In other words, they can be used to *model* a

Journal of Public Relations Research 8(2) (1996): 89; Jaques, “Issue management and crisis management”: 148.

¹⁴³ Forgues and Roux-Durfort, “Crises: Events or Processes?”: 5;

¹⁴⁴ Coombs, *Ongoing Crisis Communication*, 9; Ibid (Jaques); Ibid (Pearson and Mitroff); Ibid (González-Herrero and Pratt): 81.

¹⁴⁵ Coombs, *Ongoing Crisis Communication*, 11-12; Kooovor-Mistra, *Crisis Management*, 19-20; Fink, *Crisis Management*, 20; Roux-Durfort, “A passion for imperfections”; Ibid (González-Herrero and Pratt); Ibid (Pearson and Mitroff).

¹⁴⁶ Ibid (Coombs), 1. As William A. Kahn, Michelle A. Barton, and Steven Fellows have argued, “models of crisis management are rooted in a classic engineering mandate: identify and fix the problems in inputs and operations that lead to ineffective outputs”: “Organizational Crises and the Disturbance of Relational Systems,” *Academy of Management Review* 38(3) (2013): 377, doi:

<http://dx.doi.org/10.5465/amr.2011.0363>.

crisis. Scholars use these phases as a blueprint to create crisis management models, which are employed to enhance crisis management practices in the real world

The crisis management models approach, however, has been subject to criticism. Tony Jaques, for instance, has argued that “A key weakness of life cycle models is that they are linear, suggesting that activities take place in a sequential fashion, leading to some form of resolution... [when] In reality issue management is inherently not a linear process”.¹⁴⁷ Jaques make a valid point here. Real life crises are inherently unpredictable and, as such, it can be difficult to determine when one crisis stage ends and another begins. As John Penrose has pointed out, crisis management activities “cluster together and should be considered in aggregate rather than as separate sets of activities”.¹⁴⁸

The literature on organisational crisis management provides three ways to study crises. Although each approach has shortcomings, it is conventional for scholars to use a combination of approaches when undertaking research in the field of crisis management studies. Indeed, it is not difficult to see how the approaches interlink and complement one another. Following convention, all three approaches are used to develop and substantiate the thesis argument in the remaining chapters.

¹⁴⁷ Jaques, “Issue management and crisis management”: 148; Barbara Bigelow, Liam Fehey, and John Mahon, “A Typology of Issue Evolution,” *Business & Society* 32(1) (1993), 29, doi: <https://doi.org/10.1177/000765039303200104>.

¹⁴⁸ John M. Penrose, “The role of perception in crisis planning,” *Public Relations Review* 26(2) (2000): 166.

(b) Sub-Field (2): Global Crisis Management

The primary focus of global crisis management are crises in the context of states and the international community. Examples of recent global crises include the COVID-19 pandemic and the Russo-Ukrainian war (2014-present). The primary interlocutors of global crisis management are international bodies such as the OECD and United Nations (UN), which frequently produce reports and issue recommendations on optimal crisis management strategy.¹⁴⁹

The impact of crises such as the COVID-19 pandemic has also increased engagement with global crisis management among scholars from different academic disciplines. For example, a recent publication entitled *COVID-19 and Governance: Crisis Reveals* contains work produced by social scientists, political theorists, medical professionals, and economists.¹⁵⁰ Similarly, climate change has precipitated works such as *Climate Leviathan: A Political Theory for our Planetary Future*. Here, authors Geoff Mann and Joel Wainwright use elements from the political thought of Thomas Hobbes and Carl Schmitt, among others, to determine the future shape of global order.¹⁵¹ This interaction between non-crisis management scholars and global crisis management demonstrates that this sub-field of the

¹⁴⁹ For examples of these reports, see: “Strategic Crisis Management,” OECD, accessed November 5, 2022, <https://www.oecd.org/gov/risk/crisis-management.htm>; “Global Crisis Response Group,” UN, accessed November 5, 2022, <https://news.un.org/pages/global-crisis-response-group/>.

¹⁵⁰ Jan Nederveen Pieterse, Haeran Lim, and Habibul Khondker (eds.), *COVID-19 and Governance: Crisis Reveals* (Oxon: Routledge, 2021), xii-xx (‘Contributors’).

¹⁵¹ Joel Wainwright and Geoff Mann, *Climate Leviathan: A Political Theory of our Planetary Future* (London: Verso, 2018).

literature is becoming increasingly important. It also draws attention to the way in which those researching global crisis management interpret crises: namely, as *events*.

- Crises-as-Events

Unlike the crises-as-processes interpretation outlined above, the crises-as-events interpretation does not view crises as consisting of distinct stages. Rather, as Knio and Jessop have explained, the crises-as-events interpretation views crises as “irregularities or accidents that stand out in relation to the normal state of affairs”.¹⁵² In this sense, crises are viewed as disruptions – as bumps in the road, so-to-speak – that cause a sudden increase in fragility. Here, as Forgues and Roux-Dufort have argued, crises are “isolated [as oppose to extended] in space and time... and ha[ve] often quite distinguishable origins”.¹⁵³

Although the crisis-as-events interpretation represents how most people view crises, it very much remains the case that “while most of us appear to agree on the fact that crises are processes, we nevertheless often treat them as events” (Forgues and Roux-Dufort).¹⁵⁴ This can be seen in relation to the COVID-19 pandemic. The multitude of inquiries into how COVID-19 was managed all treat the pandemic as a crisis event – as something “isolated in space and time” (i.e. occurring between 2020 and 2023). Yet, the way in which these inquiries are structured indicates that the pandemic is a process – a “phenomenon

¹⁵² Knio and Jessop, “Organizational perspectives”: 15; Forgues and Roux-Dufort, “Crises: Events or Processes?”.

¹⁵³ Ibid (Forgues and Roux-Dufort), 5.

¹⁵⁴ Ibid, 3; Roux-Dufort, “A passion for imperfections”; Tony Jaques, “Embedding issue management as a strategic element of crisis prevention,” *Disaster Prevention and Management* 19(4) (2010) : 470

extended in time and space". The UK COVID-19 Inquiry, for example, is divided into modules, the first two of which are "Resilience and preparedness" and "Core UK decision-making and political governance".¹⁵⁵ Both of these modules are indicative of a process. They reflect the life-cycle of the COVID-19 crisis and, arguably, are modelled on the aforementioned precrisis and crisis event stages. The same applies in relation to Sweden's and Norway's inquiries.¹⁵⁶

The prominence of the crisis-as-events interpretation can be attributed to two factors: (i) the aforementioned slew of global crises that have punctuated discourse on crisis management since the turn of the century; and (ii) the conformist nature of the crisis-as-processes interpretation, which has been challenged by new types of crises that do not typically conform to crisis management conventions. Prima facie, the prominence of the crises-as-events interpretation does not place limitations on the field of crisis management studies. On the contrary, it enables scholars to produce substantive literature on certain types of crisis events. These include: natural disasters,¹⁵⁷ financial crises,¹⁵⁸ and

¹⁵⁵ "Structure of the Inquiry," *UK COVID-19 Inquiry*, accessed July 30, 2023, <https://covid19.public-inquiry.uk/structure-of-the-inquiry/>.

¹⁵⁶ See: Sweden's Corona Commission, Final report SOU 2022:10, *Summary in English*, 18-29: accessed July 29, 2023, https://coronakommissionen-com.translate.goog/publikationer/slutbetankande-sou-2022-10/? x tr sl=sv& x tr tl=en& x tr hl=en& x tr_pto=sc [translated using Google translate]; Norway's Corona Commission, "Mandate in English", accessed July 29, 2023, https://www.koronakommisjonen-no.translate.goog/mandate-in-english/? x tr sl=no& x tr tl=en& x tr hl=en& x tr_pto=sc [translated using Google translate].

¹⁵⁷ See, for example: Taha Chaiechi (ed.), *Economic Effects of Natural Disasters: Theoretical Foundations, Methods, and Tools* (London: Academic Press, 2021).

¹⁵⁸ See, for example, see: Franklin Allen and Douglas Gale, *Understanding Financial Crises* (Oxford: Oxford University Press, 2007).

technological crises.¹⁵⁹ However, as we will see, when it comes to Black Swans the crises-as-events interpretation is problematic.

- Unconventional Crises

As mentioned in the thesis Introduction, research into Black Swans has stagnated since they were characterised as a type of crisis by the OECD in 2015. There is little-to-no literature that explicitly and substantively addresses Black Swans. However, a topic within the global crisis management literature that is relevant to the study of Black Swans concerns “unconventional crises”. As Patrick Lagadec has explained, unconventional crises “are increasingly global, intertwined, and ‘non-textbook’ events”. They create “a schism with past type of crises, be it in the field of environment, global climate, public health, technological risk, social dynamics, international relations, or violence”. As such, unconventional crises represent “a global mutation in our emerging world where crises must be anticipated, prepared for, prevented as far as possible”.¹⁶⁰

The literature on unconventional crises contains substantive commentary on each of the four defining characteristics of Black Swans. To recap, these are: (a) “novel or unprecedented... in human or crisis managers’ memories”; (b) “unexpectedly large scale or geographic distribution”; (c) “trans-boundary”; and (d) “consequences, which stir deep uncertainties in the minds of the public [and] challenge government structures”.¹⁶¹ The

¹⁵⁹ See, for example: Keith Roland Skene, *Artificial Intelligence and the Environmental Crisis: Can Technology Really Save the World?* (Oxon: Routledge, 2020).

¹⁶⁰ Lagadec, “Crisis Management in the Twenty-First Century,” 489-490.

¹⁶¹ OECD, *Changing Face*, 18-19. .

literature on unconventional crisis has been produced by a relatively small group of scholars and, as such, can be considered a niche in the field of crisis management studies. This substantive commentary will be incorporated into the following discussion regarding Black Swans.

Together, the sub-fields of organisational crisis management and global crisis management provide a way for this thesis to navigate the vast and “fragmented” field of crisis management studies. The former sub-field posits various ways in which crises can be approached, interpreted, and studied, while the latter contains literature that is relevant to the study of Black Swans.

1.3. Black Swans: Substance and Limitations

The first part of the chapter has discussed three aspects of crisis management that are fundamental to the present research. The concept of “a crisis” has been defined, the role of crisis managers was explained, and the nature and composition of Black Swans was analysed. The second part of the chapter has reviewed the field of crisis management studies. Here, the sub-fields of organisational crisis management and global crisis management were examined. In what follows, two limitations of existing crisis management literature on Black Swans are established.

The first of these limitations concerns how Black Swans are currently commonly researched as crisis events that display only one or two of the defining characteristics of a Black Swan, as opposed to all four collectively. Existing literature on Black Swans is contained in siloes, each relating to a separate and distinct unconventional crisis event. As

mentioned, although the literature on unconventional crises provides Black Swans with some much needed substance, its fragmented nature is problematic. By treating the four defining characteristics of Black Swans as individual crisis events, the collective significance of these characteristics is overlooked. By overlooking the relationship between, and significance of, the four defining characteristics of Black Swans, crisis managers are unable to formulate strategies that reduce state fragility. Put another way, scholars' focus is on Black Swan-*types* of crisis, as oppose to Black Swans *as a type* of crisis. This is despite the OECD having recognised that together the four characteristics constitute a type of crisis.

The second limitation of existing crisis management literature concerns how strategies that have been put forward to improve how constitutional states manage Black Swans lack substantive instructions regarding implementation. Although many of these strategies have potential, they are vague and imprecise when it comes to the practicalities of crisis management. Again, this prevents the formulation of strategies that reduce state fragility. The vagueness of the current strategies is despite the fact that prescriptive approaches to crises are widespread and considered conventional in the field of crisis management studies – as explained above.

The thesis argues that these limitations make existing crisis management literature on Black Swans inadequate. In its current form, the literature cannot be used to improve how constitutional states manage Black Swans. That is, it cannot be used to devise strategies that reduce fragility and demonstrate dynamic resilience.

(i) *Black Swans as Crisis Events*

(a) Crises that are “Novel or unprecedented...”

As a reminder, the first defining characteristic of Black Swans is that they are “novel or unprecedented... in human or crisis managers’ memories” (OECD).¹⁶² Existing literature on this type of crisis tends to focus on typologies – specifically, on trying to distinguish unconventional crises from more conventional ones. Scholars’ emphasise what can be referred to as degrees of unconventionality.

Two attempts to distinguish crisis events that could otherwise be called “novel or unprecedented... in human or crisis managers’ memories” are discussed below. They have been developed by Quarantelli et al. and by Stephan Gundel.¹⁶³ To clarify and explain certain points, these attempts are supplemented by the work of other crisis management scholars and organisations.

Quarantelli et al. have drawn attention to the fact that there is a new type of crisis event.¹⁶⁴

They have described these so-called “crises of the future” in the following way:

“In the future, we will concurrently see new types of... crises, along with continuing manifestations of old ones, as well as mixed forms that in some respects have characteristics of older types mixed in with newer elements. In short, as we move further into the 21st century, risks and hazards will have more heterogeneity than ever before... This

¹⁶² OECD, *Changing Face*, 18-19.

¹⁶³ Quarantelli et al., ‘A Heuristic Approach’; Stephan Gundel, “Towards a New Typology of Crises,” *Journal of Contingencies and Crisis Management* 13(3) (2005): 106-115.

¹⁶⁴ Ibid (Quarantelli et al.), 16.

differentiation will present very complicated and challenging problems in planning for and managing such negative occurrences.”¹⁶⁵

This description posits three types of “crises of the future”. The first type are those crisis events that occur frequently, but take on a slightly different form each time that they do. An example is seasonal flu. While the flu virus spreads at a similar time and pace each year, putting pressure on healthcare systems, it exists as a variation of previous flu viruses.¹⁶⁶ Despite this difference, the manifestation of the crisis remains generally the same.

The second type are crisis events that resemble previous crises, but contain notable differences. An example are terrorist attacks. These attacks are often conducted in similar ways, using explosives (i.e. suicide bombings), but differ in terms of the location and targeting. The UK Manchester Arena Bombing (2017), for instance, was unique in the sense that, while terrorists had undertaken attacks in the UK before, they had never targeted an *arena*. As the OECD has noted, with this type of crisis “familiar hazards have manifested themselves in unexpected ways”.¹⁶⁷

The third, and final, type are crisis events that, as Lagadec has remarked, go “beyond usual [crisis] typologies”.¹⁶⁸ These crisis are “new” in the sense that their manifestation is different from previous crisis events. For example, although the COVID-19 pandemic can be grouped with the SARS outbreak of 2003 under the heading ‘pandemic types’, the impact and effects of the former were of unprecedented size and scale.

¹⁶⁵ Ibid.

¹⁶⁶ On this point, see: “How Flu Viruses Can Change,” Centre for Disease Control and Prevention (CDC), accessed July 30, 2023, <https://www.cdc.gov/flu/about/viruses/change.htm>.

¹⁶⁷ OECD, *Changing Face*, 43.

¹⁶⁸ Patrick Lagadec, ‘Crisis Management in the Twenty-First Century’, 491.

In a similar vein to Quarantelli et al., Stephan Gundel has distinguished four types of crisis events in an effort to “shoot[] at [the] moving target” of new and emerging crisis phenomena.¹⁶⁹ Through the use of a classification matrix, Gundel has identified crises that are: (i) “conventional”; (ii) “unexpected”; (iii) “intractable”; and (iv) “fundamental”.¹⁷⁰

Gundel has stated that conventional crises “are predictable and influence possibilities are well known...”. As such, conventional crises “are regarded as manageable by the staff and societies affected”.¹⁷¹ In this sense, Gundel’s “conventional” crises are reminiscent of what Quarantelli et al. label as crisis that are “continuing manifestations of old ones”.

Compared to conventional crises, “unexpected” crises “are rare... [but] more menacing”. The reason for this, Gundel has argued, is “that the manner of their occurrence [is] not predictable and therefore prevention [cannot be] carried out”. The possibility of their occurrence cannot be anticipated.¹⁷² An example of this type of crisis would be the Grenfell Tower fire (2017). Here, although the type of cladding used during construction of the Tower was known to be combustible, the possibility that it would one day cause such a large scale fire could not reasonably have been anticipated. As the Grenfell Tower Inquiry (2019) report states: “although *not unprecedented*, fires of the kind that occurred at Grenfell Tower are *rare*”.¹⁷³

¹⁶⁹ Gundel, “Towards a New Typology of Crises”: 106.

¹⁷⁰ Ibid, 110.

¹⁷¹ Ibid.

¹⁷² Ibid, 111.

¹⁷³ United Kingdom, Grenfell Tower Inquiry, Executive Summary, *Grenfell Tower Inquiry: Phase 1 Report Overview* (UK: APS Group), 12, paras. 33.5, 33.6. (emphasis added).

“Intractable” crises, Gundel has noted, “can be anticipated sufficiently but interference is almost impossible due to the attributes of the systems concerned”. This type of crisis “often bring up a degree of damage far beyond unexpected disasters, so that they are apparently more dangerous... the danger in principle is well known and often easy to locate in time, space and kind, but as mechanism of action are not explored in detail on account of the complexity, encroachments are hard to carry out into execution”.¹⁷⁴ An example of an intractable crisis would be the Chernobyl nuclear disaster (1986). As Gundel has remarked, “since the risks associated with nuclear power plants and the fact that Soviet plants were in a bad state were well-known but once the series of reactions at the reactor started, interference for the operators or later on the environmentalists was impossible”.¹⁷⁵

Gundel’s final type of crisis, “fundamental”, is “the most dangerous... due to the fact that they are neither predictable or susceptible to risk. Responses are unknown or not sufficient and, since fundamental crises appear surprisingly or are even beyond comprehension, preparedness cannot be achieved”. In addition to the “absent predictability” that characterises fundamental crises, there is “an enormous potential of destruction”.¹⁷⁶ As Boin and Lagadec have emphasised, this is because such crises usually have “a long duration with threats transforming over time”.¹⁷⁷ An example of a fundamental crisis is the 9/11 terrorist attacks. As Gundel has pointed out, the events of 9/11 were “hard

¹⁷⁴ Gundel, “Towards a New Typology”: 111.

¹⁷⁵ Ibid (original sentence structure/punctuation).

¹⁷⁶ Ibid, 112.

¹⁷⁷ Boin and Lagadec, “Preparing for the Future”: 186 (‘Table 2: Characteristics of Modern Crises’); Gundel, “Towards a New Typology”: 112.

to predict [and] almost impossible to influence because of the irreversible consequences of the attacks”.¹⁷⁸ Another example would be the COVID-19 pandemic.

According to Gundel, “A future fundamental crisis could result from the application of gene technology, a domain relatively unknown but bearing hazardous risk of inexplicable new developments”.¹⁷⁹ Another example of a future fundamental crisis is the threat posed by growing capabilities in the field of Artificial Intelligence (AI).¹⁸⁰

Both Quarantelli et al.’s and Stephan Gundel’s attempts to distinguish crisis events that could otherwise be called “novel or unprecedented... in human or crisis managers’ memories” are commendable. Quarantelli et al.’s identification of “future crisis” and Gundel’s commentary on “fundamental” crises help to substantiate this defining characteristic of Black Swans. However, this is all that they do. Ultimately, Quarantelli et al.’s and Gundel’s attempts amount to a one-dimensional extension of existing crisis typologies, rather than concerted attempts to develop comprehensive responses to Black Swans per se.

¹⁷⁸ Ibid (Gundel).

¹⁷⁹ For recent commentary on Gundel’s suggestion, see: “Gene-edited animals could intensify the climate crisis,” *Friends of the Earth*, September 17, 2019, accessed January 26, 2023, <https://foe.org/news/gene-edited-animals-harm-human-climate/>; Pallab Ghosh, “Commercial development of gene-edited food not legal in England,” *BBC News*, accessed February 2, 2023, <https://www.bbc.co.uk/news/science-environment-64596453>.

¹⁸⁰ Tom Whipple, “AI poses same threat as nuclear wars and pandemics, experts say,” *The Times*, May 31, 2023, accessed May 30, 2023, <https://www.thetimes.co.uk/article/330e3ed2-ff00-11ed-be2d-6982544ae552?shareToken=20dfbe2471f52c8ef7cb9e45eeab079e>; Mark Sellman, “Elon Musk warns: Rein in AI before it outsmarts us all,” *The Times*, March 29, 2023, accessed May 13, 2023, <https://www.thetimes.co.uk/article/febf4042-ce1a-11ed-9a00-73fd2b90e22e?shareToken=f1a8e5f3fcc85bc5e1b08b1d3efb0ccc>.

(b) Crises that have “unexpectedly large scale...” and exist “transboundary”

As a reminder, the second and third defining characteristics of Black Swans are that they are “unexpectedly large scale or geographic distribution” and have effects that cross boundaries (i.e. they are “trans-boundary”) (OECD).¹⁸¹ Within existing literature on crisis management, these characteristics typically form part of the same discussion. For example, Boin and Lagadec have remarked that trans-boundary crises tend to have “large impacts” where “large populations [are] affected”.¹⁸² The literature on crises that are “unexpectedly large scale...” and exist “transboundary” is extensive. Notable contributions to this literature are examined below.

Scholars have long recognised, in the words of Boin and Lagadec, that “Crises are becoming more complex in nature [and] are increasingly transboundary and interconnected”.¹⁸³ As Chris Ansell, Arjen Boin, and Ann Keller have argued, because transboundary crises “spread[] across geographical borders and policy boundaries” they “create a need for extreme adaptation and unprecedented cooperation under conditions in which these are most difficult to achieve”.¹⁸⁴ Indeed, the OECD has noted that “trans-boundary effects can

¹⁸¹ OECD, *Changing Face*, 18-19.

¹⁸² Boin and Lagadec, “Preparing for the Future”: 186 (‘Table 2’).

¹⁸³ *Ibid*, 185.

¹⁸⁴ Chris Ansell, Arjen Boin, and Ann Keller, “Managing Transboundary Crises: Identifying the Building Blocks of an Effective Response System” *Journal of Contingencies and Crisis Management* 18(4) (2010): 195, 204; Margaret G. Hermann and Bruce W. Dayton, “Transboundary Crises through the Eyes of Policymakers: Sense Making and Crisis Management,” *Journal of Contingencies and Crisis Management* 17(4) (2009): 233; Arjen Boin and Mark Rhinard, “Managing Transboundary Crises: What Role for the European Union?” *International Studies Review* 10 (2008): 1.

expand to become what the OECD has [previously] characterised as a “global shock”¹⁸⁵

Defined in 2011 report on “Future Global Shocks”, the OECD has defined a “global shock” as “a rapid onset event with severely disruptive consequences covering at least two continents”¹⁸⁶ The extreme and unpredictable impact of transboundary crisis is perhaps why Wolbers et al. have designated them “future challenges” for crisis management.¹⁸⁷

More substantively, Ansell et al. have identified “three dimensions” of transboundary crises:

- (i) “The first dimension refers to political boundaries. Many crises fall within a geographically bounded political jurisdiction, such as a town (a factory explosion) or a country (a political crisis). Some crises cross-territorial boundaries and threaten multiple cities, regions, countries or even continents. A financial crisis and a pandemic are textbook examples of crises that do not respect national borders and wreak havoc across the world;
- (ii) The second dimension is functional. A crisis can fall neatly within a policy area (think of a prison riot). Many crises, however, jump functional boundaries, threatening multiple life-sustaining systems, functions or infra-structures. For instance, crises cross from a financial system into an industrial system (the credit crunch putting US car makers under siege), from private to public (the BP oil spill), from one sector of industry to another (a crisis in the car industry affects the steel industry);
- (iii) The third dimension is time. Some crisis events are clearly demarcated in time: they have a defined beginning and ending. Many crises, however, transcend such time

¹⁸⁵ OECD, *Changing Face*, 19.

¹⁸⁶ OECD, OECD Reviews of Risk Management Policies, *Future Global Shocks: Improving Risk Governance* (Paris: OECD Publishing, 2011), 12, doi: <http://dx.doi.org/10.1787/9789264114586-en>.

¹⁸⁷ Wolbers et al., “A systematic review of 20 years of crisis and disaster research”.

boundaries. Their roots run deep (like in the 9/11 crisis) and their effects are felt years down the road (the financial crisis, global climate change)".¹⁸⁸

All three dimensions (political, functional, temporal) emphasise the idea that transboundary crises are unexpectedly large and transgress not just physical, geographic boundaries, but institutional, social, and cultural ones. Indeed, in a similar vein to Ansell et al., Quarantelli et al. have identified a new crisis phenomena they call "trans-system social ruptures (TSSRs)". These phenomena: (i) "jump across many international and national/political governmental boundaries...[and] functional boundaries, jumping from one sector to another... crossing from the private into public sectors (and sometimes back)"; and (ii) "spread very fast".¹⁸⁹

The work of scholars on the subject of large scale, transboundary crises does much to develop two characteristics of Black Swans. The fact that scholars have studied these characteristics together represents a step forward in the literature on Black Swans. A reduction in the number of research silos on unconventional crises creates a more comprehensive understanding of Black Swans. However, the problem with existing literature on crises that have "unexpectedly large scale or geographic distribution" and exist "trans-boundary" is that it does not go far enough. It remains highly descriptive and elaborative, and does not sufficiently consider the relationship between, and significance of, all four of the defining characteristics of Black Swans. The failure of scholars to consider this matters because there are additional, practical, crisis management considerations that must be taken into account when, for example, a crisis is trans-boundary *and* unprecedented *and*

¹⁸⁸ Ansell et al., "Managing Transboundary Crises": 196-197 (emphasis added). See also, Donald Blondin and Arjen Boin, "Cooperation in the Face of Transboundary Crisis: A Framework for Analysis" *Perspectives on Public Management and Governance* 3(3) (2020), doi. <https://doi.org/10.1093/ppmgov/gvz031>.

¹⁸⁹ Quarantelli et al., 'A Heuristic Approach', 27.

has uncertain consequences. Indeed, the COVID-19 pandemic has demonstrated that a failure to consider these factors together can cause high levels of fragility. It is therefore imperative for future research into crisis management and Black Swans to explicitly consider the relationship between, and significance of, all four of the defining characteristics of Black Swans.

(c) Crises that have “Consequences which stir deep uncertainties...”

As a reminder, the fourth defining characteristic of Black Swans is that they have “consequences which stir deep uncertainties in the minds of the public [and] challenge government structures” (OECD).¹⁹⁰ The literature on this type of unconventional crisis exists in two parts. The first part focuses on crises that “stir deep uncertainties in the minds of the public”; the second on “consequences which... challenge government structures”.

The idea that crises have consequences that can stir deep uncertainty in the mind of the public has been highlighted in research examining the relationship between crisis and identity. For example, Uriel Rosenthal, Arjen Boin, and Celesta J. Bos have drawn attention to the fact that “crises are among the most important hallmarks in our individual and collective memory. Traumatic events help us demarcate periods of time. They determine our cognitive as well as affective frame of reference... When crises strike, their most

¹⁹⁰ OECD, *Changing Face*, 18-19.

compelling features are uncertainty, ambiguity, anxiety, and, all too often, sorrow”.¹⁹¹

Similarly, Paul ‘t Hart, Liesbet Heyse, and Arjen Boin have observed that:

“Today victims [of crisis] tend to have stronger voices... They are quite likely to organise and mobilise media attention, and join in coalitions with political entrepreneurs seeking to ‘re-open’ the crisis. Since they are up against authority that has already been shaken during the crisis period, they stand a good chance of putting their traumas high on the public agenda, forcing authorities to endure another round of critical scrutiny and calls for urgent remedial action”.¹⁹²

While Rosenthal et al. emphasise a more negative aspect of uncertainty, focusing on the emotional and mental impacts, ‘t Hart et al. emphasise a more positive aspect of uncertainty, focusing on accountability and change. This latter aspect relates to the idea that crises can be viewed as opportunities – as discussed in the thesis Introduction. The aspect can be seen in the formation of groups such as UK COVID-19 Bereaved Families for Justice, along with the multitude of public inquiries that have been/are being undertaken into the COVID-19 pandemic.¹⁹³ In both cases, the public want to resolve uncertainties regarding excess deaths, lockdown restrictions, and care home guidance, for example, by holding governments to account for the consequences of their crisis management actions.

¹⁹¹ Uriel Rosenthal, Arjen Boin, and Celesta J. Bos, ‘Shifting Identities: The Reconstructive Mode of the Bijlmer Plane Crash,’ in Uriel Rosenthal, R. Arjen Boin, and Louise K. Comfort (eds.), *Managing Crisis: Threats, Dilemmas, Opportunities* (United States: Charles C Thomas Publishing Ltd., 2001), 200.

¹⁹² Paul ‘t Hart, Liesbet Heyse, and Arjen Boin, “New Trends in Crisis Management Practice and Crisis Management Research: Setting the Agenda,” *Journal of Contingencies and Crisis Management* 9(4) (2002): 184.

¹⁹³ Covid-19 Bereaved Families for Justice, accessed July 31, 2023, <https://covidfamiliesforjustice.org/>.

The idea that crises have consequences that challenge government structures has been highlighted in research undertaken by the OECD. Indeed, this is a primary concern of the literature on the concepts of fragility and resilience. It is by looking at “the combination of exposure to risk and insufficient coping capacity of the state... across six dimensions: economic, environmental, political, security, societal and human” that the OECD is able to identify and assess challenges to government structures (OECD).¹⁹⁴

Existing literature on crises that have “consequences which stir deep uncertainties in the minds of the public [and] challenge government structures” is relatively one-dimensional. Although scholars’ work on this type of unconventional crisis helps to develop our understanding of the substantive nature of Black Swans, it fails to consider the relationship between this characteristic and the other characteristics.

This examination of existing crisis management literature on Black Swans has shown how Black Swans are currently commonly researched as crisis events that display only one or two defining characteristics, as opposed to all four collectively. The focus on separate unconventional crises provides a better understanding of the nature and composition of Black Swans, but that is all it does. Significantly, there is no consideration of all four defining characteristics together. As such, there is no discussion of how the characteristics complement and relate to one another and what this means in the context of fragility and resilience.

¹⁹⁴ OECD, *States of Fragility*; OECD, *Changing Face*; UN, *UNISDR terminology on disaster risk reduction 2009*.

(ii) “Known-Unknowns”

The fact that scholars’ focus is on Black Swan-*types* of crisis, as oppose to Black Swans *as a type* of crisis, is perplexing given that Black Swans are established as a recognised type of crisis within the field of crisis management studies. Indeed, not only have Black Swans been recognised by the OECD, but they have also been recognised by scholars.

As Donald Blondin and Arjen Boin have observed, there is now an “often-made key distinction” within existing crisis management literature “between ‘known’ and ‘unknown’ crises”, or “routine incidents v. Black Swans”.¹⁹⁵ Although Blondin and Boin do not define their own use of these terms, from a review of the literature it can be discerned that “routine incidents” refer to conventional crises (i.e. known crises) and “Black Swans” refer to exceptional crises (i.e. unknown crises). Indeed, taking this further, the OECD has referred to Black Swans as “unknown unknowns”.¹⁹⁶

According to Boin et al., unknown unknowns are crises that “surprise in various ways; they are fundamentally ambiguous, even messy. So much happens in such a short time, so many problems appear simultaneously or in rapid succession, so many people do not know what to think and whom or what to trust, that a generalized sense of uncertainty emerges”.¹⁹⁷ An example of this type of crisis would be the COVID-19 pandemic.

Importantly, “unknown unknowns” are distinguished from “known unknowns”.

¹⁹⁵ Blondin and Boin, “Cooperation in the Face of Transboundary Crisis”: 199.

¹⁹⁶ OECD, *Changing Face*, 43; “DoD News Briefing – Secretary Rumsfeld and Gen. Myers”, February 12, 2002, U.S Department of Defense, <https://archive.ph/20180320091111/http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636>.

¹⁹⁷ Boin et al., *The Politics of Crisis Management*, 8.

Crises that are “known unknowns” are characterised by the fact, to quote Boin and Lagadec, that “you know that you will not know”.¹⁹⁸ For example, although seasonal hurricanes are occur at certain times of year, governments and organisations *know* that the destructive potential of each individual hurricane is *unknown*. In contrast, a hurricane that occurs outside of seasonal periods and has unprecedented destructive potential would be an “unknown unknown”. The crucial difference is that whereas “known unknowns” represent *foreseeable* unpredictability, “unknown unknowns” represent *unforeseeable* unpredictability.

Although the OECD were justified referring to Black Swans as “unknown unknowns” in their 2015 report, arguably the work they undertook within this report transformed Black Swans into “known unknowns” in the field of crisis management studies. By prescribing a set of defining characteristics, the OECD established Black Swans as recognisable type of crisis. We know that this type of crisis will occur, but we do not know when or how it will manifest.

It is the recognised status of Black Swans that, arguably, makes it necessary to study them as a type of crisis with *no less* than four defining characteristics. As we will see now, a reluctance to do this (as has just been detailed) has so far prevented the emergence of detailed crisis management strategies designed to improve how constitutional states manage Black Swans.

¹⁹⁸ Boin and Lagadec, “Preparing for the Future”: 188.

(iii) *OECD Strategy Recommendations: All Style, No Substance*

Since the publication of the OECD's 2015 report, there has been no attempt by scholars to devise set of crisis management strategies that can be used by constitutional states to manage Black Swan. This is despite the fact, as noted in the second part of this chapter, that crisis management prescriptions are conventionally and frequently employed in the field of crisis management studies. It is frustrating that, at present, all that exists are a set of OECD strategy recommendations. These recommendations are general in applicability, but lack precision when it comes to application. More specifically, they are vague and lack necessary substantive instructions regarding implementation. As such, the recommendations cannot be used effectively to devise strategies that reduce state fragility.

To manage Black Swans, the OECD has stated that “governments need to adapt their crisis management capacities to the characteristics of novel crises through developing new doctrines and tools”.¹⁹⁹ The OECD has recommended that governments and leaders “consider the following actions”:

- **“A national crisis governance framework should be set up to ensure appropriate structures and institutional frameworks are in place that can deal with... unprecedented crises... [including] developing adaptable and flexible capacities for new crises (preparing for the unknown...)... ”;**
- **“Multi-disciplinary expertise should be organised to help understand crises (“sense-making”) before and during their occurrence... Novel crises require the capacity to**

¹⁹⁹ OECD, *Changing Face*, 35.

understand and untangle the complexities of an event into knowable and manageable elements... ”;

- **“Leadership during a crisis is fundamental for restoring public trust...** Clarity regarding the respective leadership roles of... political leaders facilitate crisis management... ”;
- **“The ability to manage large multi-stakeholders and multi-form public/private/NGO response networks is a new capability that central government should invest in to strengthen crisis responses... ”;**
- **“International co-operation and partnerships can support many functions of crisis management and should be further strengthened.** International and regional co-operation can help national crisis management through exchanging good practices and/or defining common standards... ”.²⁰⁰

Prima facie, these recommendations are a useful starting point for devising crisis management strategies. Mention of “adaptable and flexible capacities”, in particular, speaks to the need for dynamic resilience when managing Black Swans. That is, there is awareness of the need to “build[] flexibility into... institutional arrangements by... maintaining multiple repertoires that can be flexibly redeployed to meet changing circumstances”.²⁰¹

However, the problem with the OECD’s recommendations is that they are extremely vague. Many fundamental issues regarding the practicalities of crisis management go unanswered. For instance: how can constitutional states “develop[] adaptable and flexible capacities”?; what are the necessary “appropriate structures and institutional frameworks”?; how are “multi-disciplinary expertise” to be organised?; and what “common

²⁰⁰ Ibid, 36-37 (original emphasis). Similar recommendations have been made by Patrick Lagadec: ‘Crisis Management in the Twenty-First Century’, 500-503.

²⁰¹ Ansell and Trondal, “Governing Turbulence”: 50.

standards”, if any, are applicable to Black Swan? Of course, “a national crisis framework” is a good idea, but, if this framework is based solely on precedent, how will it account for crises of an unprecedented nature? The answers to such questions are fundamental to the optimal crisis management of Black Swans.

There are two possible explanations why scholars and organisations appear reluctant to prescribe detailed crisis management strategies for Black Swans. Both explanations are unconvincing. The first explanation concerns the role of the OECD as an international organisation. The OECD’s self-defined role is to “shape policies... to prepare the world of tomorrow”.²⁰² As such, arguably, it is not the job of the OECD to tell the governments and leaders of states what to do in certain situations. Doing so would likely appear political and infringe upon internationally accepted principles, such as self-determination, non-interference, and sovereign equality.²⁰³ Indeed, the OECD seems to have been conscious of this fact in their 2015 report. This report is styled as a “review”, which makes recommendations that “*should be considered*”.²⁰⁴ However, while this may get the OECD ‘off-the-hook’, so to speak, the same cannot be said for crisis management scholars. Unlike the OECD, they are not (normally) restricted by politics or international principles. Indeed, the importance of, and need for, academic freedom is well recognised in most countries.²⁰⁵

²⁰² “Who we are,” OECD, accessed January 3, 2023, <https://www.oecd.org/about/>.

²⁰³ See: “UN Charter,” United Nations, accessed April 20, 2023, <https://www.un.org/en/about-us/un-charter/full-text>.

²⁰⁴ OECD, *Changing Face*, 36 (emphasis added).

²⁰⁵ For information and analysis, see: Friedrich-Alexander-Universität Institute of Political Science, V-Dem Institute, *Academic Freedom Index: Update 2023*, available at: <https://academic-freedom-index.net/>, accessed September 16, 2023.

Therefore, there is no excuse for scholars' reluctance to prescribe detailed crisis management strategies that constitutional states can use to manage Black Swans.

The second possible explanation for reluctance concerns the unpredictable nature of crises in general. As UK Chancellor Jeremy Hunt stated in testimony to the (UK) Covid-19 Inquiry on 21 June 2023: "You can't, as a government, prepare for every single scenario exhaustively".²⁰⁶ This is particularly relevant to crises such as Black Swans due to their unprecedented nature. Planning for this type of crisis appears futile, given that it cannot reasonably be known when, how, or even if, they will occur.

Although the thesis agrees that Black Swans cannot be planned for in advance, this does not mean that they cannot be *prepared for strategically*. Plans are definitive and require a commitment to certain courses of action, whereas strategies do not. Strategies are much more flexible. They act as a blueprint for action – a tool that can be used to instruct and guide crisis managers. As such, it does not matter that Black Swans cannot be prepared for. It is enough to know (i) that Black Swans *are* a type of crisis, and (ii) *what* type of crisis they are. The characteristics Black Swans inhabit enable crisis management strategies to be devised. Indeed, this point was implicitly acknowledged by the UK's Director of the Civil Contingencies Secretariat, Roger Hargreaves, in testimony to the (UK) Covid-19 Inquiry on 22 June 2023: "A catastrophic emergency like Covid, and there are other emergencies that fall into this category, require a different kind of management".²⁰⁷ This idea of "a different

²⁰⁶ UK Covid-19 Inquiry, *Transcript of Module 1 Public Hearing, dated 21 June 2023* (2023), pg. 167: accessed July 24, 2023, <https://covid19.public-inquiry.uk/documents/transcript-of-module-1-public-hearing-on-21-june-2023/>; Gundel, "Towards a New Typology": 112.

²⁰⁷ UK Covid-19 Inquiry, *Transcript of Module 1 Public Hearing, dated 22 June 2023* (2023), pg. 8: accessed July 24, 2023, <https://covid19.public-inquiry.uk/documents/transcript-of-module-1-public-hearing-on-22-june-2023/>.

kind of management” is suggestive of the need for new approaches to a certain type, or “category”, of crisis. Therefore, once again, there is no reason for scholars to be reluctant over prescribing crisis management strategies for constitutional states to use when managing Black Swans.

The final part of this chapter has demonstrated that existing crisis management literature on Black Swans is limited. The current way in which scholars undertake research into Black Swans is unsystematic. There is a failure to consider the relationship between, and significance of, all four of the defining characteristics of Black Swans. This is despite the fact that Black Swans have been established as a recognised type of crisis in the field of crisis management studies. Furthermore, the strategy recommendations that have been proposed by the OECD to enable constitutional states to manage Black Swans optimally are vague. Many fundamental questions regarding the practicalities of crisis management go unanswered and there is a notable absence of instructions for strategy implementation.

Together, these limitations make existing crisis management literature on Black Swans inadequate. In its current form, this literature cannot be used to improve how constitutional states manage Black Swans. It cannot be used to devise optimal crisis management strategies – i.e. strategies that reduce fragility and demonstrate dynamic resilience. What is needed are new, dynamic crisis management strategies that: (i) take the four defining characteristics of Black Swans into account; and (ii) contain substantive instructions regarding implementation for constitutional states as crisis management actors.

Conclusion

This chapter has begun to justify the claim made in the thesis introduction: *viz.*, that Black Swans are a significant problem for contemporary crisis management. It has done so by demonstrating that existing crisis management literature on Black Swans is inadequate and cannot be used to improve how constitutional states manage Black Swans.

In answer to the first research sub-question, “In what ways is existing crisis management literature on Black Swans inadequate?”, it is argued that this literature is inadequate because scholars and organisations: (i) have failed to fully take into account the nature, composition, and significance of Black Swans as a type of crisis; and (ii) have not provided a sufficient level of detail, or prescribed substantive instructions, when it comes to strategies designed to improve how constitutional states manage Black Swans.

The next step in the thesis argument is to finish justifying the claim made in the thesis introduction by demonstrating that the strategies constitutional states currently use to manage Black Swans are sub-optimal (Chapter Two).

Chapter Two

Problems of Recognition and Containment

“In emergencies...
all men turn to their leaders...
and look to them for salvation.”²⁰⁸

Introduction

Chapter One began to justify the claim made in the thesis Introduction: *viz.*, that Black Swans are a significant problem for contemporary crisis management. It did so by demonstrating that existing crisis management literature on Black Swans is inadequate and cannot be used to improve how constitutional states manage Black Swans. This chapter finishes justifying the claim made in the thesis Introduction by demonstrating that the strategies constitutional states currently use to manage Black Swans are sub-optimal.

It should be noted that while the thesis refers to particular constitutional states when giving examples in support of general points, this thesis is concerned with a particular type of state in general (i.e. contemporary constitutional ones), rather than any particular state (the UK, US, France, etc.). As a reminder, this research adopts Christopher Pierson’s interpretation of “as state” as its working definition. According to Pierson, a state has nine constitutive features: (i) “(monopoly) control of the means of violence”; (ii) “territoriality”; (iii) “sovereignty”; (iv) “constitutionality”; (v) “impersonal power”; (vi) “the public bureaucracy”; (vii) “authority/legitimacy”; (viii) “citizenship”; and (ix) “taxation”.²⁰⁹ Where a

²⁰⁸ Plato, *Theaetetus* in *Plato: Complete Works*, ed. John M. Cooper (Indianapolis: Hackett, 1997), 170a-b.

²⁰⁹ Pierson, *The Modern State*, 6.

certain feature, or a combination of features, becomes salient to the thesis argument, it is/ they are explained in detail.

The chapter begins by reviewing relevant literature on constitutional states as crisis management actors. This includes a discussion on the role of governments and leaders as crisis managers; an explanation of the core crisis management functions of “recognition” and “containment”;²¹⁰ and a detailed overview of four elements constitutional states currently use to manage crises: precedent, data, legislative emergency powers, and state of emergency powers. The purpose of this review is to set out an analytical framework for the remainder of the thesis.

The chapter then critically examines the current strategies constitutional states use to manage Black Swans. Here, it is demonstrated that “data” and “precedent” are sub-optimal when it comes to recognising Black Swans. This is done using Nicholas Nassim Taleb’s concept of “Platonicity”;²¹¹ Alan Watts’ notion of “narrowed perception”;²¹² and H.A. Simon’s work on “bounded rationality”,²¹³ to explain what this thesis calls ‘The Problem of Recognition’. The final part of the chapter continues this critical examination by demonstrating that legislative emergency powers and state of emergency powers are sub-optimal when it comes to containing Black Swans. This is done by analysing the processes of expansionism and permanence, which form what this thesis calls ‘The Problem of Containment’.

²¹⁰ Coombs, *Ongoing Crisis*, 11-23; Kooor-Mistra, *Crisis Management*, Chapter 8; Harvard Business School, *Crisis Management*, Chapters 4 & 5.

²¹¹ Taleb, *Black Swan*, xxv.

²¹² Watts, *The Book On The Taboo*.

²¹³ Simon, *Models of Bounded Rationality*.

The chapter answers the second research sub-question: “In what ways are the strategies constitutional states currently use to manage Black Swans sub-optimal?”. Taken together, the Problem of Recognition and the Problem of Containment demonstrate how the strategies constitutional states currently use to manage Black Swans are sub-optimal. It is argued that current crisis management strategies are sub-optimal because they fail to reduce fragility and demonstrate dynamic resilience. Although these strategies are able to prevent a catastrophic increase in fragility, they are unable to prevent a proliferation of “negative outcomes” because the type of resilience demonstrated is decidedly static.²¹⁴

Looking forward, Chapter Three considers what concepts Carl Schmitt’s legal-political theory contains that can be used to improve how constitutional states manage Black Swans. Chapter Four and Chapter Five, respectively, explain how Schmitt’s concepts of the exception and sovereign dictatorship can be employed within strategies designed to recognise and contain Black Swans optimally.

2.1. Constitutional States as Crisis Management Actors

(i) Governments and Leaders as Crisis Managers

As stated Chapter One, the purpose of crisis management is “to prevent or lessen the negative outcomes of a crisis... while facilitating a positive response to the situation” (Coombs).²¹⁵ Crisis managers must reduce fragility by preventing a proliferation of “negative

²¹⁴ OECD, *States of Fragility 2022*.

²¹⁵ Coombs, *Ongoing Crisis Communication*, 8.

outcomes” (OECD),²¹⁶ and demonstrate resilience – static or dynamic – by securing a positive outcome to the situation. As a reminder, fragility refers to “the combination of exposure to risk and insufficient coping capacity of the state, systems and/or communities to manage, absorb or mitigate those risks... across six dimensions: economic, environmental, political, security, societal and human.”²¹⁷ Resilience is “the ability of a system, community or society exposed to hazards to resist, absorb, accommodate and recover from the effects of a hazard in a timely and efficient manner.”²¹⁸

In the context of constitutional states, crisis management is primarily undertaken by governments and leaders – those who inhabit the executive branches of the state – such as Prime Ministers, Presidents, Cabinet Ministers, and top civil servants.²¹⁹ While Prime Ministers and Presidents are often the ones who make the final decision, cabinet ministers and top civil servants contribute to and facilitate the process of state-led crisis management by offering advice and experience, conducting research and consultations, and providing the necessary bureaucratic know-how to implement policy.²²⁰ In this regard, these actors inhabit the “the public bureaucracy” feature of modern constitutional states (Pierson).²²¹

Collectively, the role of these actors in state-led crisis management is to prevent the

²¹⁶ OECD, *States of Fragility 2022*.

²¹⁷ Ibid.

²¹⁸ OECD, *Changing Face*, 18.

²¹⁹ Ibid, 11; Gundel, “Towards a New Typology of Crises”: 106.

²²⁰ See: “How Cabinet works,” The National Archives (UK), accessed September 15, 2023, <https://www.nationalarchives.gov.uk/cabinetpapers/cabinet-gov/default.htm>; “The Cabinet,” The White House, accessed September 15, 2023, <https://www.whitehouse.gov/administration/cabinet/>; “About Us [UK Civil Service],” UK Government, accessed September 15, 2023, <https://www.gov.uk/government/organisations/civil-service/about>,

²²¹ Pierson, *The Modern State*, 6.

emergence of what scholars have referred to as “fragile states”, “failed states”, and “weak states”. As Seth D. Kaplan has explained:

“Scholars and practitioners use terms such as “fragile states,” “failed states,” and “weak states” to describe countries unable to administer their territories effectively. While there is no set definition for these expressions... most experts agree that any country where the government is unable to deliver even the most basic public services – such as territorial control and security to a significant proportion of the population is *failing*... . *Fragile*, or *weak*, states, however, encompass a much wide group of territories where the national government operates, but has institutions so dysfunctional that they perform their tasks badly – or not at all”.²²²

To prevent these situations from emerging, governments and leaders must manage crises in ways that ensure the continued functionality of the state. These functions can be understood as those outlined by Pierson: (i) “(monopoly) control of the means of violence”; (ii) “territoriality”; (iii) “sovereignty”; (iv) “constitutionality”; (v) “impersonal power”; (vi) “the public bureaucracy”; (vii) “authority/legitimacy”; (viii) “citizenship”; and (ix) “taxation”.²²³ Fragility and resilience are ways to measure the maintenance of these functions – both in times of crisis and non-crisis. When a state struggles to perform these functions, it becomes “fragile”. When it cannot perform them, it “fails”. While state failure

²²² Seth D. Kaplan, *Fixing Fragile States: A New Paradigm for Development* (United States: Greenwood Publishing, 2008), 5 (original emphasis).

²²³ Pierson, *The Modern State*, 6.

is rare, particularly in the West,²²⁴ all states are considered to be fragile.²²⁵ During a crisis, this fragility becomes more intense and the risk of state failure is higher.²²⁶ As such, it can be argued that the primary goal of governments and leaders in times of crisis is to avoid state failure – i.e. a catastrophic increase in state fragility – by increasing state resilience.

Of course, it is important to recognise that the executive branches do not operate in a vacuum. In addition to those mentioned above, there are numerous other players involved in state-led crisis management, including: legislators, private enterprise, non-governmental organisations (NGOs), experts, and the population at large.²²⁷ However, when it comes to crisis management decision-making, typically government leaders are the ones in charge.²²⁸ That is, they are the ones who determine the direction of travel, so-to-speak, by making decisions on what action (if any) to take. As Boin et al. have explained:

“In times of crisis, citizens look at their leaders: presidents and mayors, local politicians and elected administrators, public managers and top civil servants. We expect these policy makers to avert the threat or at least minimize the damage of the crisis at hand... [Yet] In most if not all crises, the moment arrives when a single man or woman must make faithful choices about the government’s course of action. They may seek and obtain

²²⁴ “State Failure 2023,” *World Population Review*, accessed August 6, 2023, <https://worldpopulationreview.com/country-rankings/failed-states>.

²²⁵ “Fragile States Index,” *The Fund for Peace*, accessed August 6, 2023, <https://fragilestatesindex.org/>.

²²⁶ OECD, *States of Fragility 2020*: “every country, state or territory” experiences “fragility” across “a spectrum of intensity”.

²²⁷ Boin et al., *The Politics of Crisis Management*, 43; Rosenthal and Kouzmin, “Crises and Crisis Management”: 287; Tonje Grunnan and Håvard Fridheim, “Planning and conducting crisis management exercises for decision-making: the do’s and don’ts,” *EURO Journal on Decision Process* 5(1-4) (2017), 80, doi: <https://doi.org/10.1007/s40070-017-0065-0>.

²²⁸ OECD, *Changing Face*, 11.

counsel from others, such as professional advisors, political associates, spouses, friends, and academic experts. But in the end, the leader must decide.”²²⁹

An example of what Boin et al. are discussing can be seen in the UK’s response to the COVID-19 pandemic. The notion that “citizens look to their leaders” was demonstrated in March 2020, when just under half of the UK population tuned in to watch then-Prime Minister (PM) Boris Johnson announce the first nation-wide lockdown.²³⁰ The expectation was for the executive branch to take charge and facilitate state-led crisis management. Although the government was supported by Parliament, the civil service, local authorities, leading scientists, and NGOs, when it came to choosing what crisis management strategies to pursue, implement, and administer, it was the PM who made the final decision. It is no coincidence that in his address announcing the first nationwide lockdown, PM Boris Johnson uttered phrases such as “I must give the British people a very simple instruction...” and “No Prime Minister wants to enact measures like this”.²³¹

Although the role leaders play in state-led crisis management is large, these individuals cannot exercise total control. That is to say, the governments and leaders of constitutional states are, at all times, “institutionally embedded rulers” (Boin et al.).²³² During crises, their discretion remains limited by the constitutional framework of the state. As Pierson has explained, “constitutionality” corresponds to “The idea that the state

²²⁹ Boin et al., *The Politics of Crisis Management*, 1 & 43.

²³⁰ “Coronavirus: 27.1 million watch PM Boris Johnson’s TV address,” *BBC News*, 24 March, 2023, accessed May 3, 2023, <https://www.bbc.co.uk/news/entertainment-arts-52018502>.

²³¹ “Prime Minister’s statement on coronavirus (COVID-19): 23 March 2020,” UK Government, accessed February 12, 2022, <https://www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-23-march-2020> (emphasis added).

²³² Boin et al., *The Politics of Crisis Management*, 144.

constitutes a distinct and rule-governed domain with powers which are (at least formally) distanced from society and the economy...”.²³³ Typically, this “rule-governed domain” is achieved by adherence to three principles: (i) the rule of law, whereby law is considered the supreme determinate authority;²³⁴ (ii) democratic accountability, whereby those affected by the exercise of state power can sanction its use;²³⁵ and (iii) a separation of powers, whereby the executive legislative, and judicial branches are kept apart, but exist in a complementary alliance.²³⁶

Together, these principles not only distinguish constitutional states as a type of state, but they also act a guardrail against the abuse of what Pierson calls “impersonal power”.²³⁷ Simply put, impersonal power refers to the official (i.e. non-personal) use of state power by ministers of state. As will be discussed, it can often be the case that in times of crisis officials abuse state power by using it for personal and/or political gain. This can increase fragility by challenging the idea of the state as a “rule-governed domain”.²³⁸ In this regard, the rule of law, democratic accountability, and a separation of powers help to reduce fragility by maintaining balance between two important features: “authority” and

²³³ Pierson, *The Modern State*, 15.

²³⁴ A.V. Dicey, *Introduction to the Study of the Constitution* (10th edn. Palgrave MacMillan, 1961), 42; Jonathan Rose, “The Rule of Law in the Western World,” *Journal of Social Philosophy* 35(4) (2004).

²³⁵ Mark E. Warren, “Accountability and Democracy,” in *The Oxford Handbook of Public Accountability*, ed. Mark Bovens et al. (2014), doi: 10.1093/oxfordhb/9780199641253.001.0001.

²³⁶ John Locke, *Two Treatises of Government* (1689), Chapter XII: The Legislative, Executive, and Federative Power of the Common Wealth; Baron de Montesquieu, *The Spirit of the Laws* (1748), Book XI: Of the Laws Which Establish Political Liberty, with Regard to the Constitution, Chapter 6; Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (Oxford: Oxford University Press, 2008), 240.

²³⁷ Pierson, *The Modern State*, 6 & 15-16.

²³⁸ *Ibid*, 15.

“legitimacy”. Together, as Pierson has noted, “authority and legitimacy imply that, under normal circumstances and for most people, the actions of the state and its demands upon its population will be accepted or, at least, not actively resisted”.²³⁹ It is worth remembering that, as extreme and abnormal as some crises are, crisis events are normal and expected occurrences. Therefore, they fall under what Pierson means by “normal circumstances”. Like any decision made by the government and/or leader of a constitutional state, crisis management decisions have to be: (i) capable of gaining popular support; and (ii) consistent with the best available evidence. Otherwise, the balance between authority and legitimacy could be upended, causing an increase in fragility. In the context the UK’s response to the COVID-19 pandemic, the PM had to ensure that the Cabinet, Parliament, and the general public were willing to support and accommodate the crisis management strategies being implemented, in order for them to be effective.

To summarise, the role of governments and leaders as crisis managers is to reduce state fragility by demonstrating resilience – static or dynamic. Although state-led crisis management is a collective endeavour, involving many players, it is often heads of government and leaders – i.e. individuals – who make the final crisis management decisions. Yet, the importance of this role is tempered by constitutional restraints on the exercise of state power, which help to reduce fragility in times of crisis.

²³⁹ Ibid, 18.

(ii) *Crisis “Recognition” and Crisis “Containment”*

Having established the role governments and leaders play in state-led crisis management, the practicalities of state-led crisis management can be explained. To do this, it is necessary to adopt a “crises-as-processes” interpretation. As explained in Chapter One (s.1.2(ii)(a)), this interpretation posits that crises are “understood to be manifest in phases” (Knio and Jessop).²⁴⁰ Over time, scholars have come to agree that there are three phases involved in the life-cycle of all crises. To recap from Chapter One (s.1.2(ii)(a)), these are: (i) precrisis; (ii) crisis event; and (iii) postcrisis.²⁴¹ Scholars use these phases as a blueprint to create crisis management models, which are employed to enhance crisis management practices in the real world.

Using Coombs’ conceptualisation of the three main phases,²⁴² it is possible to determine the sorts of crisis management activities that are undertaken by the governments and leaders of constitutional states. Although, as stated in Chapter One (s.1.2(ii)(a)), the crisis management models approach has been criticised for being linear, there is still a strong preference for this approach among scholars of crisis management. Given the understudied nature of Black Swans, it would be unwise to depart from this

²⁴⁰ Knio and Jessop, ‘Organizational perspectives’: 16; Burnett, “A Strategic Approach”: 479; Roux-Dufort, “A passion for imperfections”, 221-252; Rosenthal and Kouzmin, “Crises and Crisis Management”: 299; Pearson and Mitroff, “From Crisis Prone to Crisis Prepared”: 52; González-Herrero and Pratt, “An Integrated Symmetrical Model”: 89; Jaques, “Issue management and crisis management”: 148.

²⁴¹ Coombs, *Ongoing Crisis Communication*, 11-12; Kooor-Mistra, *Crisis Management*, 19-20; Fink, *Crisis Management*, 20; (Ibid) Roux-Dufort; Ibid (Pearson and Mitroff); Ibid (González-Herrero and Pratt);

²⁴² Ibid (Coombs).

approach within the present research. Prior to examining what Coombs' has to say on the three phases of crisis, however, several issues must be addressed.

The first issue concerns the fact that the crises-as-processes interpretation (and, by extension, the three phases of crisis) are products of the literature on organisational crisis management. This makes their primary subject crises in the context of business, not constitutional states; executives and CEOs, not Prime Ministers and Presidents. However, this does not necessarily create a barrier to using these elements to establish what is involved in crisis management for the governments and leaders of constitutional states. Many of the considerations contained within the three phases remain relevant and applicable. This is because, as explained in Chapter One, crises share similar characteristics and are generic in the sense that they threaten and aggravate the same factors (economic, political, etc.), no matter context – business, state, or other. The only difference is how characteristics such as 'uncertainty' and 'threat' manifest. Therefore, as we will see, whether the crisis manager is a CEO or state leader, the same type of considerations form part of the crisis management process.

The second issue to address is the relevance of the precrisis, crisis event, and postcrisis phases when it comes to Black Swans. While each phase plays an important role in the life-cycle of conventional crises, the same cannot be said for Black Swans. To begin with, any form of precrisis phase is irrelevant due to the fact that Black Swans cannot be planned for in advance. Strategic preparations can be devised, but preparation in the sense of planning for a specific event is not possible. All that crisis managers know in regard to Black Swans is that a *known unknown* type of crisis will happen at some point in the future. Certain issues, such as Artificial Intelligence (AI), may have the potential to become a Black

Swans, but there is no guarantee that they will – even if governments and leaders seem to think so.²⁴³

In addition to the irrelevance of any precrisis phase, any form of postcrisis phase should be considered less relevant. While a postcrisis phase does manifest in relation to every Black Swan, considering that crisis managers are plunged straight into the crisis event phase, this is where the focus must be. To recap, the crisis event phase is where “people in an organization must realize that a crisis exists and respond to the event as a crisis”. This phase includes crisis “recognition” and crisis “containment” (Coombs).²⁴⁴ It is the activities associated with crisis recognition and crisis containment that form the basis of the discussion going forward.

The third issue to address concerns the notable absence of detail and critical analysis within Coombs’ explanations. The likely reason for this is because Coombs presents his explanations in textbook format, where the intended audience is “crisis managers..., those interested in research [and] those involved in teaching”.²⁴⁵ Naturally, this limits the usefulness of Coombs’ work in the context of this doctoral research. The most effective way to resolve this issue is to supplement Coombs’ explanations with those of other crisis

²⁴³ Henry Zeffman, “Rishi Sunak considers AI watchdog to monitor global threats,” *The Times*, June 2, 2023, accessed June 2, 2023, <https://www.thetimes.co.uk/article/318bdccc-0180-11ee-96f6-54413087455a?shareToken=3e1f10736c5791e7c6b221b4147c494e>; Nandita Bose and David Shepardson, “Biden meets Microsoft, Google CEOs on AI dangers,” Reuters, May 9, 2023, accessed May 13, 2023, <https://www.reuters.com/technology/white-house-meet-microsoft-google-ceos-ai-dangers-2023-05-04/>; “Blueprint For An AI Bill of Rights,” The White House, accessed May 13, 2023, <https://www.whitehouse.gov/ostp/ai-bill-of-rights/>.

²⁴⁴ Coombs, *Ongoing Crisis Communication*, 11-12.

²⁴⁵ Ibid.

management organisations and scholars. Doing so has the benefit of maintaining a relatively straightforward approach, while ensuring adequate amounts of detail and critical analysis.

It is important to note that what is presented below is not presumptive of how Coombs himself would develop the three phases of crisis. Rather, it should be seen as plausible way to resolve a lack of detail and critical analysis for the purposes of thesis discussion.

(a) “Recognition”

For Coombs, crisis recognition “includes an understanding of how events get labelled and accepted as a crisis...”.²⁴⁶ As such, the primary concern of crisis recognition is identification. As Fink has contended, crisis must be identified because: (1) “Only by identifying a crisis will you be able to manage it”; and (2) “After identifying a crisis, you will have a better idea of whether or not you can exert any degree of influence over the desired outcome”.²⁴⁷

The starting point for identifying any crisis is making sense of what is going on, usually by trying to reduce uncertainty.²⁴⁸ Crisis managers must process raw information and assess the significance of an event vis-à-vis their organisation or state. It is at this point, as Coombs has noted, that “an organization’s [or state’s] crisis preparation and resilience [is put] to the test”.²⁴⁹ This is because, usually, fragility has already begun to increase.

²⁴⁶ Ibid, 12.

²⁴⁷ Fink, *Crisis Management*, 72-73.

²⁴⁸ Coombs, *Ongoing Crisis*, 142.

²⁴⁹ Ibid, 131.

- Reducing Uncertainty

As Coombs has explained, “Crises can be regarded as information-poor and knowledge-poor situations. A crisis begins as an unknown and becomes a known”.²⁵⁰ Therefore, the need to reduce uncertainty is a natural one.²⁵¹ What crisis managers want to avoid are so-called “information voids”, where an absence of information can hinder crisis management efforts.²⁵² Not only that, but information voids often act as magnets for misinformation.²⁵³ Thus, details are important when it comes to reducing uncertainty and recognising a crisis. In Coombs; words: “A crisis cannot be managed effectively if an organization is blind to its details”.²⁵⁴ The trajectory, size, and speed of a hurricane, for example, is essential to those responsible for mitigating and managing its impact. As we will see, less accurate information can cause significant problems when governments and leaders attempt to recognise Black Swan.

- Sensemaking

The concept of “sensemaking” is well-established within the field of crisis management studies. As Sally Maitlis and Marlys Christianson have explained, “Sensemaking is the

²⁵⁰ Ibid, 141.

²⁵¹ Ibid 142.

²⁵² Ibid, 157.

²⁵³ On this, see: Hendrick Bruns, François J. Dessart, and Myrto Pantazi, *Covid-19 misinformation: Preparing for future crises* (Luxembourg: Publications Office of the European Union, 2022), doi: <https://dx.doi.org/10.2760/41905>.

²⁵⁴ Coombs, *Ongoing Crisis*, 154.

process through which people work to understand issues or events that are novel, ambiguous, or confusing, or in some other way violate expectations”.²⁵⁵ Sensemaking is an essential part of crisis recognition for constitutional states. It is particularly important in the management of Black Swans, which “Due to their unprecedented nature...[,] cannot be monitored” (OECD).²⁵⁶ As the OECD has further noted, “Coping with novel contingencies... makes the already difficult challenges of crisis sense- and decision-making even more demanding”.²⁵⁷

Ultimately, when it comes to crisis recognition, crisis managers must answer the fundamental question: “What the hell is going on?” (Boin et al.).²⁵⁸ Usually, as González-Herrero and Pratt have remarked, it is “at this point... [that crisis managers have] lost all proactive initiatives” and the focus becomes “improv[ing] the crisis plan and integrat[ing] new data”.²⁵⁹ As such, sense-making can be understood as an ongoing process during the management of any crisis.

- Labelling

While Coombs is correct that “people can disagree on whether a situation is a crisis”, he is also right to note that “it is foolish arrogance to believe that the organization can place the

²⁵⁵ Sally Maitlis and Marlys Christianson, “Sensemaking in Organizations: Taking Stock and Moving Forward.” *The Academy of Management Annals* 8(1) (2014): 57, doi: <http://dx.doi.org/10.1080/19416520.2014.873177>; Kooor-Mistra, *Crisis Management*, 165-168.

²⁵⁶ OECD *Changing Face*, 32.

²⁵⁷ Ibid, 45.

²⁵⁸ Boin et al., *The Politics of Crisis Management*, 18.

²⁵⁹ González-Herrero and Pratt, “An Integrated Symmetrical Model”: 97.

crisis label on a situation. Crisis interpretations are socially co-created by primary stakeholders... If primary stakeholders believe a crisis exists, it does".²⁶⁰ As such, it is essential during the crisis recognition phase that those making crisis management decisions pay close attention to those who are being directly affected by the crisis itself.

In the context of constitutional states, as Rosenthal and Kouzmin have remarked, "governments often misperceive the gravity or specific nature of threat. 'Autistic' administrators fail to react to clear-cut warning signs of impending danger."²⁶¹ For instance, while it may not be obvious to regional or national authorities that a hurricane is going to move in a particular direction and affect a certain area, observations of bird movements in that area by local inhabitants may indicate that impact is highly likely.²⁶² For these inhabitants, a crisis exists and it is the responsibility of the authorities to recognise this.

(b) "Containment"

For Coombs, when it comes to crisis containment, the "focus[] [is] on... the importance and context of the initial response" and the how "to demonstrate resilience".²⁶³ In the words of the Harvard Business School, "crisis containment [is concerned with] the decisions and

²⁶⁰ Ibid, 131, 139.

²⁶¹ Rosenthal and Kouzmin, "Crises and Crisis Management": 289.

²⁶² On this, see: Christopher M. Heckscher, "A Nearctic-Neotropical Migratory Songbird's Nesting Phenology and Clutch Size are Predictors of Accumulated Cyclone Energy," *Scientific Reports* 8(9899) (2018), doi: <https://doi.org/10.1038/s41598-018-28302-3>; Paul Simons, "The bird that can predict severe hurricanes," *The Times*, May 26, 2022, accessed November 12, 2022, <https://www.thetimes.co.uk/article/the-bird-that-can-predict-severe-hurricanes-j0d9f8ncd>.

²⁶³ Coombs, *Ongoing Crisis*, 12.

actions that aim to keep a crisis from growing worse”.²⁶⁴ Crisis managers must quickly respond to a crisis by taking control to ensure that “negative outcomes” do not proliferate (OECD).²⁶⁵

More than this, crisis containment measures must be *visible*. The aforementioned focus on leaders in a time of crisis – whether President, Prime Minister, or CEO – puts pressure on them to perform effectively. If leaders give the show that they are not serious about containing the crisis, this can reduce their authority in the eyes of the public and undermine the legitimacy of any decisions that they make. As mentioned, “authority and legitimacy imply that, under normal circumstances and for most people, the actions of the state and its demands upon its population will be accepted or, at least, not actively resisted” (Pierson).²⁶⁶ Therefore, any reduction in authority has the potential to expose the state to unnecessary fragility. If people refuse to recognise and accept the legitimacy of crisis containment measures, then the ability to demonstrate resilience is impeded.

- Speed

It is often the case, as The Harvard Business School has observed, that “Time is not your friend during a crisis”.²⁶⁷ Crises tend to emerge and develop rapidly, requiring crisis managers to respond even more rapidly to try and get ahead of – or at least keep up with – these developments.

²⁶⁴ Harvard Business School, *Crisis Management*, 66.

²⁶⁵ OECD, *States of Fragility 2022*; Pearson and Mitroff, “From Crisis Prone to Crisis Prepared”: 53; Fink, *Crisis Management*, 22.

²⁶⁶ Pierson, *The Modern State*, 18.

²⁶⁷ Harvard Business School, *Crisis Management*, 78.

Coombs has drawn attention to a key distinction between “responding quickly” and “resolving quickly” when it comes to crisis management. As he has remarked, “responding quickly to a crisis should not be confused with resolving a crisis quickly. Response time is a tactical element of the crisis response, while resolving a crisis is a strategic element”.²⁶⁸

What Coombs means by this is that, whereas responding quickly is a function undertaken to contain a crisis, resolving a crisis quickly forms part of a separate management phase. For example, the introduction of lockdowns to stop the spread of COVID-19 was a tactic employed to contain the growth of the crisis (the pandemic). Therefore, lockdowns were designed to demonstrate resilience during the crisis event stage. On the other hand, the introduction of vaccines to build immunity was a strategy designed to resolve the crisis quickly – primarily by allowing society to return to normal. As such, vaccines were designed to try to move from the *crisis event* stage to the *postcrisis* stage of crisis management.

- Performance

The need to quickly respond and contain a crisis is pressing because it happens in full view of the public. Crisis containment is a performance, watched and scrutinised by people from every part of society.²⁶⁹ Even those who do not usually take an interest in issues of government and state become engaged in what is going on – likely because it has a direct effect on their way of life. The aforementioned example of just under half of the UK population tuning in to watch Boris Johnson announce the first nation-wide lockdown demonstrated this well. Large numbers of people became political engaged, which put

²⁶⁸ Coombs, *Ongoing Crisis*, 156-159 (original emphasis).

²⁶⁹ Ibid, 155.

pressure on the government and the PM to contain the crisis as quickly and as effectively as possible.

As the OECD has noted, in the context of constitutional states, “Citizens require governments to provide robust leadership in crisis management or they may be held accountable”.²⁷⁰ Here, “robust leadership” means leadership that does not contravene the rule of law, democratic accountability, and a separation of powers. An example of the failure to provide robust leadership can be seen in the UK government’s management of COVID-19. The so called ‘Partygate’ scandal, in which the Prime Minister and other senior officials broke lockdown regulations in 2020 and 2021, resulted in: fixed penalty notices being issued by the police;²⁷¹ the publication of a highly critical public report;²⁷² and an investigation by the House of Commons Privileges Committee.²⁷³ Here, those responsible for crisis management were held accountable – legally and publicly – for a failure to provide robust leadership.

²⁷⁰ OECD, *Changing Face*, 11.

²⁷¹ Andrew Woodcock, “Boris Johnson resists calls to quit after becoming first UK prime minister to be punished for breaking law,” *Independent*, April 12, 2022, accessed May 11, 2023, <https://www.independent.co.uk/news/uk/politics/boris-johnson-sunak-partygate-fines-b2056339.html>.

²⁷² United Kingdom, *Findings of Second Permanent Secretary’s Investigation into Alleged Gatherings On Government Premises During Covid Restrictions* (London: Cabinet Office, 25 May 2022).

²⁷³ “Votes and Proceedings: Thursday 21 April 2022,” UK Parliament, accessed May 11, 2023, <https://commonsbusiness.parliament.uk/Document/56399/Html?subType=Standard#anchor-3>; “Matter referred on 21 April 2022: conduct of Rt. Hon Boris Johnson MP,” UK Parliament, accessed May 11, 2023, <https://committees.parliament.uk/work/6812/matter-referred-on-21-april-2022-conduct-of-rt-hon-boris-johnson-mp/>. The Committee’s final report can be found at: <https://publications.parliament.uk/pa/cm5803/cmselect/cmprivi/564/summary.html>, accessed June 2, 2023.

To summarise, during state-led crisis management governments and leaders must recognise and contain a crisis event. *Recognition* involves reducing uncertainty by making sense of a situation, so that it can be labelled as a crisis (or not). *Containment* involves quickly responding to a crisis and stopping its spread, in a way that demonstrates robust leadership in the eyes of the public.

(iii) *Managing Crises*

Having established what is involved in state-led crisis management for the governments and leaders of constitutional states, four elements that are currently typically employed to recognise and contain crises can be examined. They are: (i) use of precedent; (ii) reliance on data; (iii) legislative emergency powers; and (iv) state of emergency powers. The thesis refers to these as 'elements' because they are typically employed to formulate crisis management strategies – they are not strategies in and of themselves. The elements are grouped, or situated, as follows: *recognition* (use of precedent, reliance on data); *containment* (legislative emergency powers, state of emergency powers).

In what follows, the form and functionality of each element is explained. The way in which each element seeks to reduce fragility and demonstrate resilience is also explained. Before doing so, it is worth emphasising that, as Oren Gross and Fionnuala Ní Aoláin have noted, the strategies constitutional states employ to manage crises are designed to “countenance a certain degree of accommodation for the pressures exerted on the state... while, at the same time, maintaining normal legal principles and rules as much as possible”. As such, the strategies seek to create “compromise... [which] enables continued adherence to the

principles of the rule of law and faithfulness to fundamental democratic values, while providing the state with adequate measures to withstand the storm wrought by the crisis”.²⁷⁴ In other words, the strategies aim to strike a balance between legitimacy on the one hand and effectiveness on the other.

(a) Recognition: Use of Precedent and Reliance on Data

- Precedent

“Precedent” is defined by the *Oxford English Dictionary* (OED) as “A previous instance taken as an example or rule by which to be guided in similar cases or circumstances”.²⁷⁵ In the context of crisis management, precedent refers to the use of previous crisis management experiences to help make sense of a current crisis, by reducing uncertainty.

In many ways, the case analysis approach described in Chapter One is an embodiment of using precedent to formulate crisis management strategy. By looking at past crisis events to inform decision-making, crisis managers can better get-to-grips with what they *think* is going on. They can begin to process raw information and attempt to accommodate and resolve ambiguities by trying to recognise what they see. For instance, the lessons learned in one crisis may serve as a warning to leaders, or they may provide instructions as to what to do to successfully resolve a crisis. In terms of the latter, because certain management actions have led to a successful outcome before, leaders may assume

²⁷⁴ Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University press, 2006), 17.

²⁷⁵ “Precedent,” OED, accessed May 12, 2023,

<https://www.oed.com/view/Entry/149572?rskey=byMezz&result=1#eid>

that the same actions can be employed again, without having to worry about whether or not they will be accepted by legislators and the general public. Therefore, not only is use of precedent low risk, but it is a potentially quick and reliable way to reduce fragility and prevent the proliferation of “negative outcomes” (OECD).²⁷⁶

For example, consider how Singapore, Taiwan, Hong Kong, and South Korea managed the COVID-19 pandemic. In early 2020, when the COVID-19 virus began spreading rapidly across the globe, these countries experienced fewer infections and deaths than their Western counterparts.²⁷⁷ Arguably, this is because the leaders of these constitutional states recognised similarities between COVID-19 and the 2002-2004 SARS outbreak. These similarities were then used to make sense of COVID-19 and inform crisis decision-making. Tried and tested methods, such as quarantine and mask wearing, could be implemented rapidly and were accepted without hesitation.²⁷⁸ Here, the use of precedent proved a vital strategy when it came to reducing fragility.

- Data

As the OECD has observed: “decision-makers that require timely, reliable, relevant technical expertise and authoritative scientific advice during a crisis include not only crisis managers,

²⁷⁶ OECD, *States of Fragility 2022*.

²⁷⁷ For data and statistics, see: “Coronavirus Resource Center,” John Hopkins University & Medicine, accessed April 11, 2023, <https://coronavirus.jhu.edu/data>.

²⁷⁸ See: Wang Hwi Lee, “South Korea, Taiwan, Hong Kong, Singapore and COVID-19,” in *Crisis Reveals*, 29-40; Laignee Barron, “What We Can Learn From Singapore, Taiwan and Hong Kong About Handling Coronavirus,” *Time*, March 13, 2022, accessed April 3, 2021, <https://time.com/5802293/coronavirus-covid19-singapore-hong-kong-taiwan/>.

but also politicians, governmental bodies, and transnational organisations...”.²⁷⁹ Reliance on data as a crisis management strategy was recently demonstrated during the COVID-19 pandemic.²⁸⁰ The UK government adopted a “data-driven” approach throughout the pandemic, emphasising “data not dates” and a commitment to “follow the science” when it came to lifting lockdown restrictions and returning to ‘normality’.²⁸¹ Here, leaders used scientific data to better accommodate the crisis and inform decision-making.²⁸² To quote the OECD more fully:

“During a crisis, reliable and appropriately presented data and scientific knowledge is important... to inform the immediate situation analysis of the crisis... Given the rapidly-evolving and non-linear nature of major crises, real-time data collection, analysis and interpretation can contribute to making sense of the evolution and ramifications of a crisis, as well as the impact of potential responses.”²⁸³

²⁷⁹ OECD, *Scientific Advice During Crises: Facilitating Transnational Co-operation and Exchange of Information* (Paris: OECD Publishing, 2018), 3.1.2, doi: <https://doi.org/10.1787/9789264304413-en>.

²⁸⁰ For a comprehensive discussion, see: Shuo Yu, Qing Qing, Chen Zang, Ashan Shehzad, Gles Oatley, and Feng Xia, “Data-Driven Decision-Making in COVID-19 Response: A Survey,” *IEEE Transactions on Computational Social Systems* 8(5) (2021): 1016-1029, doi: 10.1109/TCSS.2021.3075955.

²⁸¹ See: “Covid: Boris Johnson to focus on ‘data, not dates’ for lockdown easing,” *BBC News*, 17 February, 2021, accessed May 5, 2023, <https://www.bbc.co.uk/news/uk-56095552>; “COVID-19 Response: Living with COVID-19,” UK Government (Cabinet Office), accessed May 5, 2023, <https://www.gov.uk/government/publications/covid-19-response-living-with-covid-19/covid-19-response-living-with-covid-19#covid-19-data-and-impacts>.

²⁸² See: United Kingdom, *The Government’s Response to the Science and Technology Committee report: The UK Response to Covid-19: Use of Scientific Advice*, CP 432 (London: The Cabinet Office, May 2021) accessed: May 22, 2023, <https://www.gov.uk/government/publications/use-of-scientific-advice-in-the-uk-response-to-covid-19-government-response-to-science-and-technology-committee-report>.

²⁸³ OECD, *Scientific Advice During Crises* 3.1.1.

As such, data is primarily relied on to reduce uncertainty by providing much needed detail. Such detail helps avoid the emergence of information vacuums, which have the potential to paralyse leaders during the decision-making process. Data also help to prevent rumour and the spread of misinformation. By enabling leaders to make sense of raw information and recognise what is going on, they are able to communicate this to the general public and keep them on-side.

As part of the UK's response to COVID-19, data was relied upon to construct models that were designed to predict how the virus would spread.²⁸⁴ These models helped the government to keep the public informed and, more importantly, to decide if and when to introduce or relax containment measures. By using data to formulate crisis management strategy, the UK government prevented the National Health Service (NHS) from being overwhelmed by infected patients.²⁸⁵ A catastrophic increase in fragility was avoided. State failure was prevented.

(b) Containment: Emergency Powers

Generally-speaking, 'emergency powers' are "power[s] granted to or used or taken by a public authority to meet the exigencies of a particular emergency (as of war or disaster [or

²⁸⁴ See: "Scientific evidence supporting the government response to coronavirus," UK Government, accessed May 14, 2023, <https://www.gov.uk/government/collections/scientific-evidence-supporting-the-government-response-to-coronavirus-covid-19>.

²⁸⁵ See: Sarah Neville, "English hospitals were at risk of being overwhelmed," *Financial Times*, November 1, 2020, accessed May 14, 2023, <https://www.ft.com/content/edc950e8-922e-498c-b814-d7b4d9e402e2>.

crisis]) whether within or outside a constitutional frame of reference”.²⁸⁶ For the purposes of the current discussion, these powers can be divided into two categories: ‘legislative emergency powers’ and ‘state of emergency powers’.

- Legislative Emergency Powers

As the UK House of Lords has explained, “The need for emergency legislation may arise when a serious and urgent crisis occurs, requiring the Government to enact legislation at an accelerated pace... Emergency legislation may be necessary in exceptional circumstances, but its use should be limited given its significant constitutional consequences”.²⁸⁷ Importantly, legislative emergency powers are powers that “are lent, not granted, by the legislature to the executive...”.²⁸⁸

Emergency legislation and, by extension, legislative emergency powers can be enacted in two ways: (i) as amendments to existing legislation; and/or (ii) as new pieces of legislation. In relation to the former, as Gross and Aoláin have explained, “the normal legal system is maintained intact as much as possible... However, in order to facilitate the needs of security and the state’s safety, certain modifications are introduced into that ordinary system... the legal framework used for applying emergency measures is the ordinary one as so modified”.²⁸⁹ Conversely, in relation to the latter, “ordinary legal norms [are deemed]

²⁸⁶ “Emergency power,” Merriam-Webster (Dictionary), accessed June 10, 2023, <https://www.merriam-webster.com/dictionary/emergency%20power>.

²⁸⁷ House of Lords Select Committee on the Constitution, *COVID-19 and the use and scrutiny of emergency powers*, [19] & [20].

²⁸⁸ *Ibid*, [21].

²⁸⁹ Gross and Aoláin, *Law in Times of Crisis*, 66-67.

inadequate for the pressing needs emanating from specific emergencies... the effort is directed at creating replacement or supplementary emergency norms that pertain to the particular exigency”.²⁹⁰ In both cases, legislation is usually enacted and/or amended at speed, but subject to strict limitations – procedural and substantive.

Examples of both types of legislative emergency powers were present in the UK’s response to the COVID-19 pandemic. During 2020 and 2021 the government introduced a plethora of amendments to existing legislation to accommodate the impact of COVID-19. These included: the Contingencies Fund Act 2020, which amended the Contingencies Fund Act of 1974; and the Stamp Duty Land Tax (Temporary Relief) Act 2020, which amended the Finance Act of 2003.²⁹¹ These amendments were limited substantively on the basis that they changed only minor aspects of the original legislation. The Contingencies Fund Act 2020, for instance, altered section 1 of the original 1974 Act by increasing the contingency fund limit from 2% to 50%. An example of new legislation was the Coronavirus Act 2020, which, among other things, enabled the government to detain those suspected of carrying the SARS-CoV-2 virus on grounds of public health and safety.²⁹² This legislation was enacted in the space of six days,²⁹³ but was procedurally limited to six-monthly reviews by

²⁹⁰ Ibid, 67.

²⁹¹ For a comprehensive list of amendments, see: “United Kingdom legislation connected with the COVID-19 pandemic,” Wikipedia, accessed May 19, 2023, https://en.wikipedia.org/wiki/United_Kingdom_legislation_connected_with_the_COVID-19_pandemic.

²⁹² Coronavirus Act (2020), Section 51 and Schedule 21.

²⁹³ See: “Coronavirus Act 2020: Government Bill,” UK Parliament, accessed May 12, 2023, <https://bills.parliament.uk/bills/2731/stages>.

Parliament.²⁹⁴ This is because, in normal circumstances, detaining individuals in this manner would be illegitimate (and illegal).²⁹⁵ It would lead to what the House of Lords called “significant constitutional consequences”.²⁹⁶

In both instances, the legislative emergency powers described above were designed to contain the spread of COVID-19 by loosening legal constraints on the UK Government’s exercise of state power. They were designed to *narrow* the gap between the separation of powers, so that the Government could establish a sense of control without having to resort to arbitrary (illegal) methods. This is why legislative emergency powers are otherwise referred to as ‘discretionary’ powers.²⁹⁷ These powers enable governments and leaders to act according to their own judgement within prescribed limits.

Fundamentally, the *raison d’être* of legislative emergency powers is that there can never be law in place to account for every possible crisis situation. As Alexander Hamilton remarked,

²⁹⁴ Coronavirus Act 2020, Section 98. Another example is the US War Powers Act 1973. This act provides the President with the power to commit US forces to war, but only for a period of up to 60 days. To extend this period, the President must seek authorisation from Congress.

²⁹⁵ For an interesting discussion on emergency legislation and the COVID-19 pandemic in the UK, see: “The history of emergency legislation and the COVID-19 crisis,” Bennett Institute for Public Policy, accessed May 16, 2023, <https://www.bennettinstitute.cam.ac.uk/blog/history-emergency-legislation-and-covid-19-crisis/>.

²⁹⁶ House of Lords Select Committee on the Constitution, *COVID-19 and the use and scrutiny of emergency powers*, [20].

²⁹⁷ For a comprehensive discussion, see: D.J. Gilligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Oxford University Press, 1990), doi: <https://doi.org/10.1093/acprof:oso/9780198256526.001.0001>.

“The circumstances that endanger the safety of nations are infinite”.²⁹⁸ In other words, “No two crises are the same” (OECD).²⁹⁹ No leader, legislator, or crisis manager – however skilled – can peer into the future. Legislative emergency powers are a way for constitutional states to accommodate this fact and manage it in reality, without having to undertake “a complete overhaul of the existing system” (Gross and Aolián).³⁰⁰ Empowering the executive to act with discretion, essentially by filling ‘gaps’ within the legislative framework on a temporary basis, enables leaders to respond quickly and prevent a catastrophic increase in fragility. Legislative emergency powers are precise and methodical way to contain a crisis.

It is the perhaps legal nature of legislative emergency powers that makes them a conventional measure for constitutional states when attempting to contain a crisis. Not only do legislative emergency powers enable resilience to be demonstrated at speed, but they do so in ways that can be considered legitimate. The guardrail principles of the rule of law and democratic accountability remain in place.

- State of Emergency Powers

Andrej Zwitter has observed that:

“The terms that refer to states of emergency are in practice rather unclear... different legalisations use different terms (e.g. states of emergency, states of exception, states of

²⁹⁸ Alexander Hamilton, John Jay, and James Madison, *The Federalist Papers* (Originally published 1787-1788), accessed May 18, 2023. <https://www.gutenberg.org/files/1404/1404-h/1404-h.htm>, Federalist 23 (Alexander Hamilton).

²⁹⁹ OECD, *Scientific Advice During Crises*.

³⁰⁰ Gross and Aolián, *Law in Times of Crisis*, 66.

siege, *et cetera paribus*)... [However] States of emergency have a common characteristic: they deal with cases where the nature of a situation requires the restructuring of state functions in order to mitigate the situation's negative effects... to ensure the survival of a state and its citizenry and to bring the situation back to normal by temporarily changing the structure of state functions...³⁰¹

Although these powers are typically embedded within the written constitutions of constitutional states, they can also be found within primary legislation.³⁰² State of emergency powers are a strategy designed to contain crises by empowering governments and leaders to take necessary measures to prevent catastrophic increases in fragility. They are what most people think of when they hear the term “emergency powers”.

For example, Article 16 of the French Constitution (1958) enables the President to “take measures” “Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious or immediate threat, and where the proper functioning of the constitutional public authorities is interrupted”.³⁰³ Similarly, Article 86 of the Spanish Constitution (1978) enables the government “In cases of extraordinary and urgent need... [to] issue temporary

³⁰¹ Andrej Zwitter, “The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in Liberal Democracy,” *Archives for Philosophy of Law and Social Philosophy* 98(1) (2012): 86-87, accessed May 20, 2023, <https://www.jstor.org/stable/24769102>. For information these terms, along with additional iterations of ‘state of exception’, see: Gross and Aoláin, *Law in Times of Crisis*, 41-45; European Commission For Democracy Through Law (Venice Commission), *Emergency Powers*, CDL-STD (1995) 012.

³⁰² See: Christian Bjørnskov and Stefan Voigt, “The Architecture of Emergency Constitutions,” *International Journal of Constitutional Law* 16 (1) (2018): 101-127, doi: <https://doi.org/10.1093/icon/moy012>.

³⁰³ French Constitution (1958), Article 16, text available at: <https://www2.assemblee-nationale.fr/langues/welcome-to-the-english-website-of-the-french-national-assembly>, accessed August 6, 2023.

legislative provisions which shall take the form of decree-laws...”.³⁰⁴ An example of primary legislation is the UK Civil Contingencies Act 2004. Under Section 20, this law “allows the Government to make emergency regulations if it is satisfied that: (a) An emergency has occurred, is occurring, or is about to occur; (b) It is necessary to make provisions for the purpose of preventing, controlling, or mitigating an aspects or effect of the emergency; and (c) the need for the provision is urgent”.³⁰⁵

State of emergency powers are, therefore, similar in form and function to legislative emergency powers. The key difference is that state of emergency powers are broad. Express legislative enactment and/or amendment is not required to make new law. In the case of the UK Civil Contingencies Act, emergency regulations (a form of secondary legislation) and amendments to primary legislation can be introduced without parliamentary approval.³⁰⁶ The broadness of such powers is a consequence of the fact, as Mark Tushnet and Bojan Bugarič have remarked, that these powers “don’t come directly from the legislature the way statutes do. Instead, they come from the legislature indirectly”.³⁰⁷ That is, these powers either: (i) originate in the constitution, as what can be described as an ultimate contingency measure agreed upon by the people – by those who constituted, and constitute, the state;³⁰⁸ or (ii) have already been agreed upon by the state’s representative body.

³⁰⁴ Spanish Constitution (1978), Part III The Cortes Generales, Article 86, text available at: https://www.lamoncloa.gob.es/lang/en/espana/leyfundamental/Paginas/titulo_tercero.aspx, accessed August 6, 2023.

³⁰⁵ UK Civil Contingencies Act 2004, Section 20: Power to make emergency regulations.

³⁰⁶ This is known as a ‘Henry VIII power’. See: “Henry VIII clauses,” UK Parliament, accessed June 17, 2023, <https://www.parliament.uk/site-information/glossary/henry-viii-clauses/>.

³⁰⁷ Mark Tushnet and Bojan Bugarič, *Power to the People: Constitutionalism in the Age of Populism* (New York: Oxford Academic Online, 2022), 196, doi: <https://doi.org/10.1093/oso/9780197606711.001.0001>.

³⁰⁸ The topic of state constitution is discussed in detail in Chapter Three.

No matter how they are manifested, state of emergency powers effectively allow governments and leaders to rule by executive decision – what is often called “rule by decree”.³⁰⁹ Rather than empowering leaders/governments to do certain things in a certain way, these powers fundamentally alter the operational dynamics of governing. They allow for “a complete overhaul of the existing system” (Gross and Aolián). As Christian Bjørnskov and Stefan Voigt have noted, “States of emergency... imply a significant change in the balance of powers between the three branches of government...”.³¹⁰ Usually, this involves the executive assuming some degree of law-making power, thus further narrowing the gap between the separation of powers.³¹¹

Nevertheless, the broadness of state of emergency powers does not translate into *carte blanche* for governments and leaders. Similar to legislative emergency powers, the legislature retains a supervisory role, ensuring that state power is not used arbitrarily or otherwise abused. There are procedural and substantive limitations in place and it is often the case that the legislature cannot be dissolved when state of emergency powers are active. While the guardrails of the rule of law and democratic accountability may be less visible, they remain in place.

³⁰⁹ Note on terminology. ‘Decree’ is usually used in civil law systems, such as France, Spain, etc.. In the UK the terms ‘secondary legislation’ and ‘regulations’ are used. In the US, ‘regulations’ is considered standard terminology. For the purposes of present discussion, each of these terms can be understood to mean the same thing.

³¹⁰ Bjørnskov and Voigt, ““The Architecture of Emergency Constitutions””.

³¹¹ This is perhaps why states of emergency powers are so popular – particularly among autocrats. On this, see: Christian Bjørnskov and Stefan Voigt, “Why do governments call a state of emergency? On the determinants of using emergency constitutions,” *European Journal of Political Economy* 54 (2018): 110-123, doi: <https://doi.org/10.1016/j.ejpoleco.2018.01.002>.

For example, using powers conferred under Article 86, in October 2020 the Spanish government decreed a state of emergency in response to the COVID-19 pandemic (Article 116).³¹² This enabled the Government to rapidly demonstrate resilience by imposing an overnight curfew in certain regions of the country without the need for emergency legislation or amendments to existing legislation.³¹³ However, as stated above, the ability to rule by decree is substantively limited by Article 86 to “cases of extraordinary and urgent need”. Any state of emergency is also procedurally limited to a period of fifteen days, after which Congressional authorisation was needed to secure an extension (116(2)). During the time state of emergency powers are active, Congress cannot be dissolved (116(5)).

(c) Strategies

The four elements described above are currently typically employed by the leaders and governments of constitutional states to formulate crisis management strategies. Each element is designed to reduce fragility in a way that is both effective and legitimate.

However, it is the contention of this thesis that these elements are sub-optimal when it comes to recognising and containing Black Swans. When used to formulate strategies, they lead to what this thesis calls ‘The Problem of Recognition’ and ‘The Problem of Containment’.

³¹² “Council of Ministers decrees state of emergency to control pandemic in worst affected regions,” La Moncloa (Spanish Government), accessed May 19, 2023, <https://www.lamoncloa.gob.es/lang/en/gobierno/councilministers/paginas/2020/20201009council.aspx>;

³¹³ “Covid: Spain imposes national night-time curfew to curb infections,” *BBC News*, 25 October, 2020, accessed May 19, 2023, <https://www.bbc.co.uk/news/world-europe-54682222>.

As a reminder, Black Swans are crises that: (a) are “novel or unprecedented... in human or crisis managers’ memories”; (b) have “unexpectedly large scale or geographic distribution”; (c) have effects that cross-boundaries (i.e. are “trans-boundary”); and (d) have “consequences, which stir deep uncertainties in the minds of the public [and] challenge government structures”.³¹⁴

2.2. The Problem of Recognition

(i) “Platonicity”

In addition to having coined and conceptualised the term “Black Swan”, Taleb has also coined and conceptualised the terms “Platonicity” and “Platonic fold”. Platonicity relates to a “tendency to mistake the map for the territory, to focus on pure and well-defined ‘forms’, whether objects, like triangles, or social notions, like utopias” and “privilege them over other less elegant objects, those with messier and less tractable structures”. There exists “the desire to cut reality into crisp shapes”.³¹⁵ In this sense, “Platonicity” encourages an attitude of static resilience: the “logic is... to strive to get back to basics or ‘stick to the knitting’ – reducing uncertainty and complexity to achieve order and stability”.³¹⁶

Taleb argues that “‘Platonicity’ makes us think that we understand more than we actually do”. The “difficulty” to which Platonicity gives rise “is that *a*) you do not know

³¹⁴ OECD, *Changing Face*, 18-19.

³¹⁵ Taleb, *The Black Swan*, xxv.

³¹⁶ Ansell and Trondal, “Governing Turbulence”: 50.

beforehand (only after the fact) *where* the map will be wrong, and *b*) the mistakes can lead to severe consequences". This boundary, between what is known and what is unknown, is "the *Platonic fold*". It is here, Taleb notes, that "the gap between what you know and what you think you know becomes dangerously wide."³¹⁷

Taleb's concepts of "Platonicity" and "Platonic fold" form the basis of 'The Problem of Recognition'. This problem has never been formulated before. It therefore represents an original contribution to existing literature on crisis management.

It is the focus on "pure and well defined 'forms'" – on historical fact and scientific proof – that causes precedent and data to be problematic in the context of Black Swans. Both elements allow governments and leaders to hit-the-ground-running when it comes to crisis management. However, because data and precedent "privilege... [pure and well defined 'forms'] over other less elegant objects, those with messier and less tractable structures", they equip leaders with what is best described as a faulty sense of direction.³¹⁸ Here, similarity is mistaken for identity. As stated Chapter One, Black Swans "make what you don't know [anti-knowledge] more relevant than what you do know" (Taleb).³¹⁹

It is the failure to account for so-called "anti-knowledge" during the crisis recognition phase that renders precedent and data strategically impotent when dealing with Black Swans. Here, "The gap between what [governments and leaders] know and what [government and leaders] think [they] know becomes dangerously wide". An overreliance on precedent and data, fuelled by the rational need to "cut reality into crisp shapes", causes

³¹⁷ Taleb, *The Black Swan*, xxv, (original emphasis)

³¹⁸ Ibid.

³¹⁹ Taleb, *The Black Swan*, xix.

governments and leaders to manage Black Swans sub-optimally. As will be explained, these elements increase fragility rather than reduce it.³²⁰

In what follows, the problem of recognition is explained more fully using Alan Watts' notion of "narrowed perception" and H.A. Simon's work on "bounded rationality".³²¹ While the former develops what it means to focus on "pure and well defined forms", the latter elaborates upon the overriding need governments have to hit-the-ground-running during crisis management. As such, the concepts of "narrowed perception" and "bounded rationality" help to make the problem of recognition less abstract, and examples including the COVID-19 pandemic and climate change are used to demonstrate it concretely. Given that nothing similar to the problem of recognition has been formulated by scholars of crisis management, it is afforded more space in the thesis discussion relative to the problem of containment.

(ii) *"Narrowed Perception"*

The way in which constitutional states currently recognise Black Swans is reminiscent of what philosopher Alan Watts has described as "life by conscious attention":

"The narrow slit in the fence is much like the way in which we look at life by conscious attention, for when we attend to something we ignore everything else. Attention is

³²⁰ Ibid.

³²¹ Watts, *The Book On The Taboo*; Simon, *Models of Bounded Rationality*.

narrowed perception. It is a way of looking at life bit by bit, using memory to string the bits together – as when examining a dark room with a flashlight having a very narrow beam.”³²²

Here, Watts is drawing attention to the idea that, by being attentive to that which is in front of us, we often lose sight of the bigger picture – of aspects that are of equal or more consequentiality and significance. The concept of “narrowed perception” highlights how using precedent and relying on data to make sense of a crisis, to “string the bits together”, inevitably means that factors, or “bits”, outside the remit of precedent and data are left unattended. The result is that Black Swans are recognised on the basis of what they are according to precedent and data. The narrow beam cast by precedent and data reveals only parts of the dark room when it comes to Black Swans – the parts that can be recognised by using precedent and by relying on data. The beam passes over those aspects that cannot be recognised using precedent and by relying on data. This results in Black Swans becoming a subject of misrecognition.

To explain in context of the COVID-19 pandemic, when data was collected the focus was on variables that could be proven scientifically – variables, such as infection and death rates, that are typically measured during pandemic situations.³²³ Similarly, the precedents employed were based on past pandemics such as Swine Flu (2009) and SARS (2002-2004) – on historical fact.³²⁴ As such, the question being asked to try and recognise COVID-19 was:

³²² Ibid (Watts), 31.

³²³ See, for example: “England Summary,” UK Government, accessed May 22, 2023, <https://coronavirus.data.gov.uk/>; “Situation by Region, Country Territory & Area,” WHO, accessed May 22, 2023, <https://covid19.who.int/table>.

³²⁴ See, for example: “UK preparedness for Covid-19: Lords scrutiny of the 2009 swine flu pandemic,” UK Parliament (House of Lords), accessed May 22, 2023, <https://lordslibrary.parliament.uk/uk-preparedness-for-covid-19-lords-scrutiny-of-the-2009-swine-flu-pandemic/>; “Remarks by President Trump, Vice

“What the hell is going on [according to *these* historical precedents and *these* scientific variables]?” (Boin et al.).³²⁵ While this approach does appear pragmatic, on the basis that it focuses on facts and does not indulge in speculation, it is ultimately a form of confirmation bias that mistakes the map for the territory. As Taleb has noted, “We focus on preselected segments of the seen [i.e. historical fact and scientific proof] and generalize from it to the unseen: the error of confirmation”.³²⁶ In this regard, “narrowed perception” is a symptom of static resilience because it “encourages institutional path-dependence”.³²⁷

For instance, COVID-19 may have *seemed* similar to Swine Flu and SARS according to precedent and data, but it is not identical. There are many differences between them, both in terms of virology and mode of transmission.³²⁸ These differences mean that no two crises are the same, even if they share similarities – i.e. they are pandemics caused by a respiratory virus. By privileging the strategies of precedent and data, the significance of this fact was overlooked during the crisis recognition phase. As UK Health Secretary Jeremy Hunt stated in testimony to the UK COVID-19 Inquiry on 21 June 2023: “there was clearly a

President Pence, and Members of the Coronavirus Task Force in Press Conference,” The White House, February 26, 2020, accessed January 16, 2022, <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference/>.

³²⁵ Boin et al., *The Politics of Crisis Management*, 18.

³²⁶ Taleb, *The Black Swan*, 50.

³²⁷ Ansell and Trondal, “Governing Turbulence”: 50.

³²⁸ On this, see: Ahmed S. Keshta et al., “COVID-19 versus SARS: A comparative review,” *Journal of Infection and Public Health* 14(7): 967-977, doi: <https://doi.org/10.1016/j.jiph.2021.04.007>; “COVID-19 and Swine Flu: What makes them so different from each other?” November 2, 2020, *Times of India*, November 2, 2020, accessed August 9, 2023, <https://timesofindia.indiatimes.com/life-style/health-fitness/health-news/covid-19-and-swine-flu-what-makes-them-so-different-from-each-other/photostory/78982487.cms>

narrowness of thinking” during the early stages of the COVID-19 pandemic.³²⁹ Indeed, this is why, despite their initial success in recognising the COVID-19 using the 2002-2004 SARS outbreak as reference point, Singapore, Taiwan, Hong Kong, and South Korea all eventually experienced similar rates of infection and death to their Western counterparts.³³⁰ Here, precedent and data acted as a narrow beam, akin to tunnel-vision, providing a seemingly reliable, but effectively limited, blinkered, recognition of COVID-19. The fact that COVID-19 was not the same as SARS caused crisis managers to adopt a false of direction that, ultimately, caused them to veer off course. Fragility began to increase because the way in which COVID-19 was recognised was sub-optimal. There was no attempt to demonstrate dynamic resilience by “absorbing complexity”. Rather, the priority, it seemed, was to try and “stick to the knitting’ – reducing uncertainty and complexity to achieve order and stability”.³³¹

Of course, leaders may subconsciously be aware that no two crises are, or can be, same, but seldom does this consciously form part of crisis management strategy. For instance, a 2016 UK National Risk Assessment stated that: “Each pandemic is different and

³²⁹ UK Covid-19 Inquiry, *Transcript of Module 1 Public Hearing on 21 June 2023*, pg. 169, line 24 (emphasis added), available at: <https://covid19.public-inquiry.uk/documents/transcript-of-module-1-public-hearing-on-21-june-2023/>..

³³⁰ See: “COVID-19 Data Explorer,” Our World in Data, accessed May 27, 2023, <https://ourworldindata.org/explorers/coronavirus-data-explorer?zoomToSelection=true&time=2020-03-01..latest&facet=none&country=USA~GBR~CAN~DEU~ITA~IND&pickerSort=asc&pickerMetric=location&Metric=Confirmed+cases&Interval=7-day+rolling+average&Relative+to+Population=true&Color+by+test+positivity=false>.

³³¹ Ansell and Trondal, “Governing Turbulence”: 8 & 50.

the nature of the virus and its impacts cannot be known in detail in advance”.³³² Yet, this uncertainty does not seem to have been taken seriously when the UK government attempted to recognise COVID-19 in early 2020. Questions such as: ‘what do data and precedent *not* tell us?’; ‘what is the crisis *unlike*?’; ‘what things do *not* make sense?’, do not appear to have explicitly been asked or considered. This was a fatal mistake because it meant that the possibility COVID-19 was a Black Swan was not taken into account. Fortunately, the UK has recently taken steps to prevent this mistake from happening again – at least in the context of a pandemic-type crisis.³³³ However, the concern that the governments and leaders of constitutional states will fall back into the habit of relying on precedent and using data is very real, given the narrow focus on one type of unconventional crisis event.³³⁴

When it comes to Black Swans, treating the map as conclusive of the wider territory has severe implications for fragility and resilience. Indeed, as Taleb has argued: “Any reduction of the world around us can have explosive consequences, since it rules out some sources of uncertainty; it drives us to a misunderstanding of the fabric of the world”.³³⁵ No clearer can

³³² United Kingdom, Extract from 2016 National Risk Assessment, dated 01/01/2016, accessed June 22, 2023. Available at: https://covid19.public-inquiry.uk/documents/inq000147769_0047-0048-extract-from-2016-national-risk-assessment-dated-01-01-2016/.

³³³ UK Government, Press Release, *UKHSA unveils VDEC in ‘step change’ for UK’ growing vaccine capabilities*, August 7, 2023, accessed August 8, 2023, <https://www.gov.uk/government/news/ukhsa-unveils-vdec-in-step-change-for-uks-growing-vaccine-capabilities>.

³³⁴ Ben Spencer, “Disease X is coming: Are we ready for the next pandemic?”, *The Times*, March 19 2023, accessed August 7, 2023, <https://www.thetimes.co.uk/article/disease-x-is-coming-are-we-ready-for-the-next-pandemic-ck29hmx7>.

³³⁵ Taleb, *The Black Swan*, 16.

this be seen than in the way countries such as the UK and US initially recognised COVID-19 as something akin to influenza. The narrow focus on precedent and data suggested that COVID-19 would take the form of an influenza pandemic and therefore should be managed in a certain way. That is, the emphasis was on static resilience, on “maintain[ing] and restor[ing] equilibrium conditions” so that “institutional path-dependence” could be maintained.³³⁶ Yet, while COVID-19 and influenza are similar in terms of virology, it does not follow that they will affect human beings and, by extension, society in the same way.³³⁷ In the words of former UK Health Secretary Matt Hancock, “What matters is the *characteristic* of the novel virus”.³³⁸ That is, how it behaves in real time, in the real world, given its unique qualities. It is these character differences, or nuances, that matter most when it comes to crisis recognition because, ultimately, it is these differences that highlight the significance of the unknown and helps crisis managers work out which strategies are likely to reduce fragility and which are not.

As such, it is imperative that the leaders of constitutional states consider anti-knowledge during crisis recognition. Similarity cannot be treated as a substitute, and thereby mistaken, for sameness – for identity. Leaders must widen their perception to avoid

³³⁶ Ansell and Trondal, “Governing Turbulence”: 50.

³³⁷ See: “Coronavirus disease (COVID-19): Similarities and differences between COVID-19 and Influenza,” WHO, 20 September 2021, accessed May 21, 2023, <https://www.who.int/news-room/questions-and-answers/item/coronavirus-disease-covid-19-similarities-and-differences-with-influenza>; “WHO warns against treating Covid-19 like flu,” *Reuters*, January 11, 2022, accessed May 21, 2023, <https://www.reuters.com/business/healthcare-pharmaceuticals/who-warns-against-treating-covid-19-like-flu-2022-01-11/>

³³⁸ UK Covid-19 Inquiry, *Transcript of Module 1 Public Hearing on 27 June 2023*, pg. 78, line 4-5 (emphasis added), available at: <https://covid19.public-inquiry.uk/documents/transcript-of-module-1-public-hearing-on-27-june-2023/>.

a catastrophic increase in fragility. In other words, when it comes to recognising Black Swans, the focus must be on dynamic resilience, where “the importance of building flexibility into organizational and institutional arrangements by absorbing complexity and incorporating requisite variety” is emphasised.³³⁹

(iii) “Bounded Rationality”

The reason why anti-knowledge is not usually taken seriously by the leaders of constitutional states during crisis recognition can be explained using psychologist H.A. Simon’s concept of “bounded rationality”. As Simon has explained: “In a broad sense, *rationality* denotes a style of behaviour (A) that is appropriate to the achievement of given goals, (B) within the limits imposed by given conditions and constraints”. Bounded rationality occurs when these conditions and constraints are interpreted by decision-makers (what Simon calls “the choosing organism”) to be “fixed and not subject to its own control” – i.e. bound.³⁴⁰

The consequence of rationality that is bounded, as Esther-Mirjam Sent has noted, is that “decision makers may rationally take decisions based on incomplete information, rather than incurring the cost to get complete information”.³⁴¹ In a crisis, decision-makers’

³³⁹ Ansell and Trondal, “Governing Turbulence”: 8

³⁴⁰ Simon, *Models of Bounded Rationality*, 405 (original emphasis).

³⁴¹ Esther-Mirjam Sent, “Rationality and bounded rationality: you can’t have one without the other,” *European Journal of the History of Economic Thought* 25(6) (2018): 1379, doi: <https://doi.org/10.1080/09672567.2018.1523206>; Christopher A. Sims, “Implications of Rational Inattention,” *Journal of Monetary Economics* 50(3) (2003): 655-690, doi: [https://doi.org/10.1016/S0304-3932\(03\)00029-1](https://doi.org/10.1016/S0304-3932(03)00029-1).

rationality is bounded by the need to make effective decisions quickly – to hit-the-ground running as quickly as possible. As such, they opt for a satisfactory, as opposed to an optimal, way to recognise a crisis – something Simon called “satisficing”.³⁴² Here, static resilience is the priority: “maintain[ing] and restor[ing] equilibrium conditions” to “encourage[] institutional path-dependence”.³⁴³

In the context of Black Swans, leaders satisficing occurs when similarity is considered good enough – i.e. satisfactory and sufficient – for the purposes of crisis recognition. The aforementioned example of recognising COVID-19 as influenza demonstrates this well. Here, COVID-19 was recognised according to precedent and data *so that* leaders could make crisis management decisions. Returning to Taleb’s concept of “Platonicity”, precedent and data were used to quench “our [i.e. governments’ and leaders’] Platonic thirst for distinct patterns” – for tangibility, for rationality, for “crisp shapes”.³⁴⁴ While recognising COVID-19 in this way did help to prevent the emergence of information vacuums, the need to circumscribe and determine COVID-19 quickly came at the expense of accuracy. This is why Boin et al. are correct to have noted that “In a crisis past experience provides policymakers with *little* guidance”.³⁴⁵ In the context of COVID-19, as Adam Kucharski has remarked, “If you’ve seen one pandemic, you’ve seen... one pandemic... one outbreak won’t necessarily look like another”, even if it appears to do so initially.³⁴⁶

³⁴² Herbert A. Simon, “Rational choice and the structure of the environment,” *Psychological Review* 63(2) (1956): 129, doi: <https://psycnet.apa.org/doi/10.1037/h0042769>.

³⁴³ Ansell and Trondal, “Governing Turbulence”: 50.

³⁴⁴ Taleb, *The Black Swan*, 50.

³⁴⁵ Boin et al., *The Politics of Crisis Management* (emphasis added).

³⁴⁶ Adam Kucharski, *The Rules of Contagion: Why Things Spread – and Why They Stop* (London: Profile Books, 2020), 3. See also: UK Covid-19 Inquiry, *Transcript of Module 1 Public Hearing on 27 June 2023*, pg. 31, lines 12-13: “any pandemic, by its nature, is a novel disease” (Matt Hancock).

In other words, plugging gaps in knowledge with knowledge of a similar kind may seem rational in the first instance, but the bounded nature of this rationality soon starts to cause problems because, ultimately, the information used to recognise the crisis is inaccurate. Fundamentally, as Masha Gessen has explained:

“if we use the wrong language, we cannot describe what we are seeing. If we use language developed for describing fish, we cannot very well describe an elephant: words like “gills,” “scales,” and “fins” will not get us very far”.³⁴⁷

Although Gessen is not discussing crisis management, the point they make is important.³⁴⁸ While substituting similarity for sameness helps to jump-start the sense-making process, it ultimately creates a barrier to comprehensively understanding that which is in front of us. In the context of crisis recognition, the failure to explicitly take anti-knowledge into account leads to misrecognition: COVID-19 is influenza, or SARS, or Swine Flu.³⁴⁹ Of course, governments and leaders are typically aware that there are gaps in knowledge when it comes to any crisis, however rather than question the substance and significance of this, similarity is considered a sufficient enough basis for crisis management action.³⁵⁰

³⁴⁷ Masha Gessen, *Surviving Autocracy* (New York: Riverhead Books, 2020), 5.

³⁴⁸ Stylistic note: Gessen’s choice of pronoun is ‘they/ them’. See: Masha Gessen, Twitter post, June 23, 2020, 9:42 p.m., <https://twitter.com/mashagessen/status/1275529665466302466?lang=en>.

³⁴⁹ Taleb, *The Black Swan*, 50.

³⁵⁰ In this sense, governments and leaders seem to think that “More is lost by indecision than wrong decision”: Marcus Tullius Cicero. Common attribution, for example: “Decision Paralysis,” *marketoonist*, March 29, 2020, accessed August 8, 2023, <https://marketoonist.com/2020/03/decision-paralysis.html>.

At present, governments and leaders arguably opt for speed over accuracy, mistaking similarly for identity, because there is no way to use anti-knowledge strategically for crisis recognition. The question whether a crisis is a Black Swan can be asked outright, using the four defining characteristics as a check-list. However, currently, there are no strategies to implement when the answer is 'yes'. As such, leaders view anti-knowledge as "fixed and not subject to [their] own control" (Simon).³⁵¹ Therefore, the existence of known-unknowns is treated as nothing more than an expected inconvenience in any crisis situation. To try to address known-unknowns strategically would be irrational. Indeed, it would contradict the notion of static resilience, where the "logic is... to strive to get back to basics or 'stick to the knitting' – reducing uncertainty and complexity to achieve order and stability".³⁵² Known-unknowns are not "appropriate to the achievement of [the] given goals [of crisis management]" because they cannot provide answers to reduce uncertainty (Simon).³⁵³

In other words, the possibility of a crisis being a Black Swan is not taken into account because, as Lagadec puts it, these crises "do not fit into normal statistics nor any common frameworks" and, as such, "take on the character of strange 'unidentified flying objects'".³⁵⁴ Anti-knowledge exacerbates strategic uncertainty and, as the World Health Organisation (WHO) has noted: "Uncertainty leads to fear, panic and loss of trust among people".³⁵⁵ The cost of accuracy appears high. As such, it is no surprise that the leaders of constitutional states currently reduce uncertainty by satisficing.

³⁵¹ Simon, *Models of Bounded Rationality*, 405.

³⁵² Ansell and Trondal, "Governing Turbulence": 50.

³⁵³ Simon, *Models of Bounded Rationality*, 405.

³⁵⁴ Lagadec, 'Crisis Management in the Twenty-First Century', 506.

³⁵⁵ WHO, 'Communicating and Managing Uncertainty in the COVID-19 Pandemic: A quick guide,' May 2020.

Arguably, however, the current impact of Black Swans outweighs the risk of leaders exacerbating uncertainty by taking anti-knowledge into account. If anything, deeper uncertainty is created by the current failure to take Black Swans into account at all – by opting for a satisfactory and sufficient, as opposed to an optimal and therefore effective, way to recognise their possibility. Furthermore, as is demonstrated in Chapter Four, a strategy can be developed that takes anti-knowledge into account during the crisis recognition phase. As such, there is no reason for the leaders of constitutional states to resort to satisficing in times of crisis.

The Problem of Recognition can be summarised as follows.

An overreliance on the elements of precedent and data cause Black Swans to be misrecognised. This is because, ultimately, these elements lead to strategies that “focus on pure and well-defined ‘forms’” and “privilege them over other less elegant objects, those with messier and less tractable structures” (Taleb).³⁵⁶ The perception of leaders is narrowed to focus on historical fact and scientific proof – on “pure and well defined ‘forms’”- which are used to provide a rational basis for crisis management decision-making.³⁵⁷ Here, similarity is mistaken for identity. While factually circumscribing crises in this way allows crisis management to be undertaken quickly, “messier and less tractable structures” are not taken into account.³⁵⁸ The bounded nature of rationality – of satisficing – results in a failure to take the possibility that a crisis is a Black Swan into account. The consequence is increased fragility and static resilience.

³⁵⁶ Taleb, *The Black Swan*, xix

³⁵⁷ Ibid.

³⁵⁸ Ibid.

2.3. The Problem of Containment

Broadly defined, the “Problem of Containment” concerns how state power burgeons when trying to contain a Black Swan. Executive power in particular is strengthened and fundamental rights and freedoms are threatened. Naturally, this increases state fragility because there is a heightened risk of leaders abusing state power.

This thesis views the Problem of Containment as consisting of two aspects: ‘expansionism’ and ‘permanence’. While expansionism and permanence are a subject of discussion within academic discourse, they have yet to be examined together as part of the same problem. Therefore, the problem of containment as it is presented here represents an original contribution to existing literature on crisis management.

(i) *Expansionism*

Expansionism occurs when legislative emergency powers and states of emergency powers lead to the proliferation of law in an effort to contain a Black Swan. Here, aforementioned rule by decree goes into overdrive. This happens as a result of the combination of two factors.

The first factor is the misrecognition of a Black Swans, as described above. The second factor is the substance and structure of legislative emergency powers and state of emergency powers. These powers are either: (i) relatively *broad*, as in the case of Spain’s Article 86 and Section 20 of the UK’s Civil Contingencies Act, which can be used in any situation that the relevant government or leader identifies as urgent enough to necessitate a response; or (ii) relatively *precise*, as in the case of France’s Article 16, which can be used

only when certain factors and functions are threatened and interrupted. When these two factors combine, the result is increased fragility and a proliferation of “negative outcomes” (OECD).³⁵⁹

In the case of relatively broad powers, misidentification leads to what can be described as a reactionary ‘whack-a-mole’ approach to crisis containment. Here, because the possibility that a crisis is a Black Swan has not been taken into account, crisis managers constantly have to compensate for this fact – for the lack of accuracy of the initial recognition. This results in a plethora of decrees (the hammer is used to whack whichever mole rears its head). Constantly having to play catch-up in this way, constantly having to recalibrate, creates an ever expanding patchwork of decrees that expand the reach of the executive in all-manner of directions. Static resilience is demonstrated because efforts to “reduce uncertainty and complexity” are the result of “institutional path-dependence”.³⁶⁰ An example can be seen in the UK’s approach to COVID-19, where a multitude of secondary legislation was introduced in rapid succession to mitigate the impact of the crisis.³⁶¹ While it can be argued that this legislation was simply rushed legislation, it was introduced in a relatively short space of time, thus making it reminiscent of rule of by decree.

Although, *prima facie*, using decrees in a targeted manner to contain a crisis as it evolves seems practical and safe, given that legality provides legitimacy, this does not necessarily guard against arbitrariness and abuse. The fact that state of emergency powers

³⁵⁹ OECD, *States of Fragility 2022*.

³⁶⁰ Ansell and Trondal, “Governing Turbulence”: 50.

³⁶¹ For a comprehensive list, see: “United Kingdom legislation connected with the COVID-19 pandemic,” Wikipedia, accessed June 19, 2023, https://en.wikipedia.org/wiki/United_Kingdom_legislation_connected_with_the_COVID-19_pandemic.

require little-to-no approval by the legislative body, being viewed as permissible in their own right, enables governments and leaders to expand state power as they deem fit. There is an abuse of what Pierson has called “impersonal power”, mentioned above.³⁶² State power is expanded in a seemingly legitimate way, using legality as a guise, to affect areas that do not relate to the crisis. The guardrails of the rule of law and democratic accountability are treated as *invisible* because they are less visible. Here, what takes place is an insidious abuse of state power based on political preference and/or individual desire.

There are numerous examples of broad states of emergency powers being used to expand state power in questionable ways. A recent example is The (UK) Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020, which prohibited gatherings of more than thirty people. While this power was introduced to contain an aspect of the crisis, there was no exception for protests. As such, the power infringed on the right to freedom of assembly and the right to the freedom of expression— both of which are enshrined in UK and international law.³⁶³ Although it could be argued that this regulation was necessary and proportionate in the context of COVID-19, a blanket ban on all forms of protest represented a significant expansion of state power by the executive.³⁶⁴

³⁶² Pierson, *The Modern State*, 6 & 15-16.

³⁶³ European Convention on Human Rights (ECHR), Article 10 (expression) and Article 11 (assembly); UK Human Rights Act 1998.

³⁶⁴ For insight and discussion, see: “Coronavirus: Protests should be allowed during lockdown, say 60 MPs and peers,” *BBC News*, 20 March, 2021, accessed June 20, 2023, <https://www.bbc.co.uk/news/uk-56466291>; “Covid-19 Triggers Wave of Free Speech Abuse: Scores of Countries Target Media, Activists, Medics, Political Opponents,” *Human Rights Watch*, February 11, 2021, accessed June 20, 2023, <https://www.hrw.org/news/2021/02/11/covid-19-triggers-wave-free-speech-abuse>.

A more clear-cut example is the Trump Administration's (2017-2021) use of coronavirus legislation to suspend environmental and immigration laws.³⁶⁵ Here, state of emergency powers were used to provide cover for the US government to advance its political agenda, thus expanding the reaches of executive power under what, arguably, are false pretences. At the time, the agenda of the US government included reducing immigration and slashing environmental (i.e. bureaucratic) red-tape.³⁶⁶

A well-known example from history where state of emergency powers were used to expand state power occurred in Germany in 1933. Acting on the advice of Chancellor Adolf Hitler, President Paul von Hindenburg used Article 48 of the Weimar Constitution to enact the Reichstag Fire Decree. This decree suspended fundamental constitutional rights and led to the passage of the 1933 Enabling Act. This act enabled the government to bypass the Reichstag and rule by decree. In this instance, state of emergency powers were used to extend the reaches of executive power and provide legal cover for the government to transform Germany from a fledgling liberal democracy (Weimar Republic) into a tyrannical,

³⁶⁵ Rebecca Beitsch, "EPA suspends enforcement of environmental laws amid coronavirus," *The Hill*, March 23, 2023, accessed June 20, 2023, <https://thehill.com/policy/energy-environment/489753-epa-suspends-enforcement-of-environmental-laws-amid-coronavirus/>; Arelis R. Hernández and Nick Miroff, "Facing coronavirus pandemic, Trump suspends immigration laws and showcases vision for locked-down border," *The Washington Post*, April 3, 2020, accessed June 20, 2023, https://www.washingtonpost.com/national/coronavirus-trump-immigration-border/2020/04/03/23cb025a-74f9-11ea-ae50-7148009252e3_story.html.

³⁶⁶ For evidence and insight, see: "Executive Order Protecting The Nation From Foreign Terrorist Entry Into The United States," The White House, March 6, 2017, accessed June 20, 2023, <https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/>; "President Trump Announces U.S. Withdrawal From the Paris Climate Accord," The White House, June 1, 2017, accessed June 20, 2023, <https://trumpwhitehouse.archives.gov/articles/president-trump-announces-u-s-withdrawal-paris-climate-accord/>.

one-party dictatorship (Third Reich). Although this is an extreme example, the transformation of Germany under Adolf Hitler was done in a seemingly legitimate manner, using a guise of legality afforded by Article 48 and the Enabling Act.³⁶⁷

In the case of relatively precise powers, misidentification – or *misrecognition* – creates additional uncertainty when it comes to crisis containment. Here, the substantive limitations placed on leaders by these powers give rise to the possibility that a crisis will be recognised too late because it does not satisfy particular conditions. In this situation, an expansion of state power occurs when crisis managers have to: (i) compensate for a lack of urgency; and (ii) try to compensate for the lack of accuracy of the initial recognition, as above. The notion of playing of catch-up is thus exacerbated, leading to a more intense proliferation of decree legislation. Again, static resilience becomes the norm.

An iteration of this argument has recently been made by Tushnet and Bugarič in the context of COVID-19 and of France’s Article 16. To recap, this Article enables the President to take emergency measures “[w]here the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious or immediate threat, and where the proper functioning of the constitutional public authorities is interrupted”. Tushnet and Bugarič have argued that:

³⁶⁷ It is worth noting that Hitler never formally abolished the Weimar Constitution. Rather, its core provisions were suspended indefinitely using Article 48. The remaining provisions were then subverted using the 1933 Enabling Act. For a discussion, see: “Germany 1933: From democracy to dictatorship,” Anne Frank House, accessed June 24, 2023, <https://www.annefrank.org/en/anne-frank/go-in-depth/germany-1933-democracy-dictatorship/>.

“Maybe you can say that the conditions created by the [COVID-19] pandemic interrupt the functioning of the public authorities. Unfortunately, as a matter of ordinary constitutional interpretation, that’s only one of two requirements. The interruption has to occur because of one of the previously listed conditions has occurred. The second refers to national independence, the third to territorial integrity, and the fourth to France’s international obligations. These capture ideas about traditional national security—war, terrorism, and the like—and standard approaches to constitutional interpretation would lead you to think that the first condition, a threat to “the institutions of the Republic,” had to fall into the same rough category.”³⁶⁸

The point being made here is that precise states of emergency powers can delay crisis containment measures because the crisis in question is not clearly conventional. That is, the crisis does not fall into pre-established categories relating to “traditional national security” concerns. There is something distinctly ‘off’ about the crisis (it is a Black Swan), but this is interpreted by leaders as: the crisis is *not* conventional, so containment measures cannot be implemented. The typical response to this situation is to assume that there is no crisis. Indeed, despite the fact COVID-19 was spreading across the globe and causing significant crisis management problems in China between January and March 2020, most Western governments dismissed its significance. As Italian Health Minister Sandra Zampa has remarked, COVID-19 was treated as “a science fiction movie that had nothing to do with us”.³⁶⁹ However, once it becomes apparent that there is a crisis, when the situation escalates unexpectedly and begins to violate expectations, there are two ways leaders can

³⁶⁸ Tushnet and Bugarič, *Power to the People*, 201.

³⁶⁹ As quoted in: Jason Horowitz, Emma Bubola, and Elisabetta Povoledo, “Italy, Pandemic’s New Epicentre, Has Lessons for the World,” *The New York Times*, March 21, 2020, accessed April 4, 2022, <https://www.nytimes.com/2020/03/21/world/europe/italy-coronavirus-center-lessons.html>.

(and do) overcome the limitations of precise states of emergency powers – both of which lead to expansionism.

The first way is by satisficing: purposefully misrecognising the crisis as conventional in order to initiate crisis containment. Here, the fact that something is ‘off’ is ignored. The significance of the crisis is recognised, but downplayed.³⁷⁰ The danger here is that, by containing the crisis as if it something else – something similar – containment measures will be less effective. Combined with the need for urgency in having to catch-up with the crisis, leaders hit the ground running but inevitably veer off in the wrong direction. In this situation, rule by decree goes into overdrive: legislation expands more rapidly and state power increases exponentially.

The second way leaders overcome the limitations of precise states of emergency powers is by attempting to enact primary legislation. As Tushnet and Bugarič have remarked, “If the constitution doesn’t let the executive rule by decree when some unanticipated problem creates an emergency, no big deal. All the executive has to do is go to the legislature to get authorization for what it wants to do”.³⁷¹ However, one has to agree that this “turns out to be a truly terrible way of governing. The dramatic version has terrorists blowing up the parliament building and killing half of its members; the less dramatic version is that the problem arises while parliament is out of session and something needs to be done before it can come back to meet.”³⁷² There is also the possibility that a

³⁷⁰ Rachel Wearmouth, “Boris Johnson ‘Dismissed Covid As Swine Flu and Joked He Would Be Injected Live On TV’,” *Huffpost*, 26 May, 2021, accessed May 21, 2023,

https://www.huffingtonpost.co.uk/entry/cummings-boris-injected-covid_uk_60ae0424e4b019ef10e12d5e

³⁷¹ Tushnet and Bugarič, *Power to the People*, 201.

³⁷² *Ibid.*

government with a large legislative majority passes a broad emergency law, reminiscent of a broad state of emergency power. Arguably, the UK's Coronavirus Act 2020 is an example of such a law. Among other things, as mentioned, the Act gave officials the power to detain "potentially infectious persons" on grounds of public health and safety. Here state power was expanded on the basis of a potentiality, to be decided upon through the use of discretion during a time of unprecedented crisis. Similarly, there is also the possibility that the legislative body refuses to bestow the government with emergency powers – either because they do not think: (i) a crisis exists; (ii) the crisis is not serious enough to warrant emergency powers; and/or (iii) for party-political reasons.³⁷³ Indeed, the latter two considerations played a part in Spain's management of COVID-19. Each time the Government sought an extension to its state of emergency, as required by Article 116 of the Spanish Constitution, the majority of legislators voting in favour diminished.³⁷⁴ This occurred at a time when the crisis in Spain was gradually becoming more intense, thus increasing fragility by weakening the authority of the Spanish Government.³⁷⁵ As mentioned, any reduction in authority has the potential to expose the state to unnecessary fragility by fostering active resistance among the population. Here, the legitimacy of crisis containment measures is brought into question and the ability to demonstrate resilience is impeded.

³⁷³ Ibid, 202.

³⁷⁴ See: "Spain extends state of emergency over virus to May 24," *Bernama*, May 7 2020, accessed June 19, 2023, https://bernama.com/en/general/news_covid-19.php?id=1839305; Carlos E. Cué, "Spain's prime minister gears up for fight to extend state of alarm," *El País*, May 4, 2020, accessed June 19, 2023, https://english.elpais.com/spanish_news/2020-05-04/spains-pm-gears-up-for-fight-to-extend-state-of-alarm.html; Sebastián Royo, "Responding to COVID-19: The Case of Spain," *European Policy Analysis* 6(2) (2020): 180-190, doi: <https://doi.org/10.1002%2Fepa2.1099>.

³⁷⁵ For data, see: "Coronavirus Pandemic (COVID-19)," Our World in Data, accessed June 19, 2023, <https://ourworldindata.org/coronavirus>.

In both cases, overcoming the limitations of precise states of emergency powers gives rise to expansionism. State power is increased in a multitude of directions on the basis of misrecognition. As consequence, fragility is increased because containment is sub-optimal.

(ii) *Permanence*

Permanence occurs when legislative emergency powers and state of emergency powers are retained – either in part or in full – once a crisis has passed. In the words of the UK House of Lords, emergency powers “spill over into permanence” and seep into the ordinary legislative framework.³⁷⁶ In the context of Black Swans this is more likely to occur due to the severity of this type of crisis and the realisation that, in the future, crisis containment must be undertaken with speed. Permanent extensions to executive power are rationalised as contingency measures for future threats.³⁷⁷ Here, static resilience is demonstrated because making emergency powers permanent “encourages institutional path-dependence” in both the short- and long-term.³⁷⁸

Recent examples of emergency powers being retained are the Coronavirus (Recovery and Reform) (Scotland) Act 2022, which made permanent certain powers introduced in the Coronavirus (Scotland) Act 2020 and Coronavirus (Scotland) (No.2) Act

³⁷⁶ House of Lords Select Committee on the Constitution, *COVID-19 and the use and scrutiny of emergency powers*, pg. 2.

³⁷⁷ For example, see: “MSPs back making emergency Covid powers permanent,” *BBC News*, 18 June, 2020, accessed June 27, 2023, <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-61969639>.

³⁷⁸ Ansell and Trondal, “Governing Turbulence”: 50.

2020 by creating “new” powers to tackle future health pandemics.³⁷⁹ Such powers include enabling the Scottish government to restrict the movement of people and impose lockdowns. Similarly, the UK Police, Crime, Sentencing and Courts Act 2022 and UK Public Order Act 2023 together made permanent aspects of emergency coronavirus laws which restricted protest activity.³⁸⁰ In both cases, as William E. Scheuerman has explained, “ordinary law... has been polluted by emergency-era statutes and precedents which extend the scope of executive prerogative and are allowed to remain on the books well after the crisis which generated them subsides”.³⁸¹ In other words, a ‘power grab’ has taken place. The executive has been emboldened by their recent use of emergency power to a point where measures that were once unthinkable now appear justifiable. This is because these measures have been used in the context of a crisis without considerable resistance from the legislature or widespread backlash from the general public.

Although making permanent certain emergency powers provisions may appear pragmatic from the perspective of crisis management (a form of crisis-proofing), it effectively normalises using these powers in times of non-emergency. That is, it “encourages institutional path-dependence”.³⁸² Indeed, the notion that emergency powers

³⁷⁹ For an overview of the Coronavirus (Recovery and Reform) (Scotland) Act 2022, see: “Coronavirus (Recovery and Reform) (Scotland) Bill,” The Scottish Parliament, accessed June 27, 2023, <https://www.parliament.scot/bills-and-laws/bills/coronavirus-recovery-and-reform-scotland-bill/overview#topOfNav>.

³⁸⁰ Mark Townsend, “Government seeks to retain lockdown limits on protests,” *The Guardian*, 28 February, 2021, accessed April 3, 2021, <https://www.theguardian.com/politics/2021/feb/28/government-seeks-to-retain-lockdown-limits-on-protests>.

³⁸¹ William E. Scheuerman, “Survey Article: Emergency Powers and the Rule of Law After 9/11,” *The Journal of Political Philosophy* 14(1) (2006): 70.

³⁸² Ansell and Trondal, “Governing Turbulence”: 50.

will be applied after a crisis has passed, in situations for which they were not intended, has already been realised. As Jonathan (Lord) Sumption has observed:

“The Scott Inquiry into the Matrix Churchill scandal which reported in 1996, drew attention to a broad class of emergency powers which had been conferred on the government at the outset of the Second World War... These had been kept in force... They were still being used in the 1970s and 1980s... for purposes quite different from those originally envisaged. Likewise, the powers conferred on ministers and the police by the Terrorism Acts of 2000 and 2006 have been employed... for a variety of other purposes, including the control of peaceful demonstrations, the enlargement of police stop and search powers to deal with ordinary non-terrorist offences, and the freezing of assets of an Icelandic bank for the protection of their UK depositors.”³⁸³

Indeed, recent use of Schedule 7 of the UK Terrorism Act 2000 to detain a French book publisher at the behest of the French authorities demonstrates the normalisation of emergency powers.³⁸⁴ The problem in the context of the present argument is that, because the kind of emergency powers introduced to contain a Black Swan infringe upon fundamental rights and freedoms to a great extent, their seepage into the ordinary legal system has the potential to create profound levels of fragility. Such fragility could become catastrophic when a significant majority of the population realise that they have fallen into

³⁸³ Jonathan Sumption, *Law in a Time of Crisis* (London: Profile Books, 2021), 235. For background, see: Paul Vallely, “Scott Report: the essential guide,” *Independent*, 15 February, 1996, accessed June 28, 2023, <https://www.independent.co.uk/news/uk/scott-report-the-essential-guide-1319094.html>.

For commentary on Lord Sumption’s final remark regarding the Icelandic bank asset freeze, see: “Landsbanki Freezing Order 2008,” UK Parliament (House of Commons), accessed June 17, 2023, <https://publications.parliament.uk/pa/cm200708/cmgeneral/deleg2/081027/81027s01.htm>.

³⁸⁴ David Sanderson, “‘Scandalous abuse’ of anti-terror law as French publisher questioned,” *The Times*, April 19, 2023, accessed August 9, 2023, <https://www.thetimes.co.uk/article/scandalous-abuse-of-anti-terror-law-as-french-publisher-questioned-5wqmcdv98>.

the trap of accepting executive overreach as normal, when in fact it represents an insidious abuse of state power. In the past, realisations of this kind have led to civil unrest, revolt, and revolution.³⁸⁵ Therefore, it is not inconceivable that catastrophic increases in fragility of this kind will occur.

Making emergency powers permanent also has ramifications for the containment of future crises. The legal entrenchment of emergency powers creates what is here termed an “acceptability threshold” for crisis managers. As Oren Gross has articulated:

“... government will take as its starting point the experience of extraordinary powers and authority granted and exercised during previous emergencies. What might have been seen as sufficient “emergency” measures in the past (judged against the ordinary situation) may not be deemed enough for further crises as they arise. Much like the need to gradually increase the dosage of a heavily used medication in order to experience the same level of relief, so too with respect to emergency powers: The perception may be that new, more radical powers are needed to fight impending crises... What were deemed exceptional emergency actions in the past may now come to be regarded as normal, routine, and ordinary, in light of more recent and more dramatic emergency powers”.³⁸⁶

³⁸⁵ A recent, representative example is the 2011 Egyptian revolution. For background and analysis, see: Bahgat Korany and Rabab El-Mahdi, eds., *Arab Spring in Egypt: Revolution and Beyond* (American University in Cairo Press, 2012), accessed June 28, 2023, <https://www.jstor.org/stable/j.ctt15m7mbm>, particularly chapters 2-4. Notable historical examples include the French Revolution (1789) and Russian Revolution (1917).

³⁸⁶ Oren Gross, “Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?” *The Yale Law Journal* 112:1011 (2002): 1090-1091.

In other words, permanence leads to the creation of more heavy-handed emergency powers. Both current and past iterations of emergency power are seen as a foundation upon which to build during times of crisis.

Among legal scholars, this process has been referred to as “ratcheting”.³⁸⁷ Although there is scepticism over the existence and observability of ratcheting during a crisis,³⁸⁸ the concept can be used to explain how permanence works. As the ratchet is turned, as new emergency powers are created, this leads to an incremental increase – a tightening – in the restrictiveness of emergency power in general. Here, static resilience is demonstrated because, essentially, ratcheting “is a strategy of resisting change” because “incremental change[s] that enhance[] or support[], or at least do[] not threaten equilibrium conditions, [are] prioritized”.³⁸⁹

Of course, the nature of ratcheting means that there can be no movement in the opposite direction: hence, present forms of emergency power are normalised and lose their exceptional character, especially as new emergency powers are introduced. The increase, therefore, is permanent in the sense that it would require repeal by the legislative body.

³⁸⁷ See: *Ibid* (Gross); Cass Sunstein and Jack Goldsmith, “Military tribunals and legal culture: what a difference sixty years makes,” *Constitutional Commentary* 19 (2002): 261-189; Mark V. Tushnet, “Defending Korematsu?: Reflections on Civil Liberties in Wartime,” *Wisconsin Law Review* 246 (2003): 273-307; Eric A. Posner and Adrian Vermeule, “Accommodating Emergencies,” *Stanford Law Review* 56 (2003): 605-644.

³⁸⁸ For example, Posner and Vermeule have argued that ratcheting is a “rare, perhaps even non-existent” phenomenon (*Ibid*, 611). On the other hand, Sunstein and Goldsmith are of the view that ratcheting can be observed – for instance, in the case of the detention of Japanese American citizens during World War Two by the US government. This, they have argued, was a ratcheting up of executive power because the threat from Japanese American citizens was exaggerated (*Ibid*).

³⁸⁹ Ansell and Trondal, “Governing Turbulence”: 50.

Given the purpose of crisis management combined with the threat posed by crises in general, one must ask whether this would be considered a rational course of action to take.

An example of attempted ratcheting can be seen in relation to UK terrorism legislation. The Terrorism Act 2000 gave officials the power to detain UK nationals suspected of terrorism for up to seven days without charge.³⁹⁰ Following the events of 9/11, the Anti-terrorism, Crime and Security Act 2001 took this provision a step further by enabling officials to detain foreign nationals suspected of terrorism indefinitely.³⁹¹ The Terrorism Act 2006, which was introduced in response to the 7/7 London Bombings, then extended the period for which UK nationals suspected of terrorism could be detained to twenty-eight days.³⁹² In each case, the emergency powers granted to the executive have become increasingly more restrictive, relative to those that preceded them. There has been a permanent ratcheting up of executive power in response to successive crises.

Although the reason for ratcheting up emergency powers is to demonstrate dynamic resilience by “absorbing complexity and incorporating requisite variety” as crises evolve, in the context of crisis containment it has the opposite effect.³⁹³ Permanently increasing the restrictiveness of certain emergency powers provisions merely compensates for a lack of effectiveness because it is an attempt “to maintain and restore equilibrium conditions” - i.e. demonstrate static resilience.³⁹⁴ There is no change of approach or

³⁹⁰ Terrorism Act 2000, Schedule 8, Part III, s. 29.

³⁹¹ Anti-terrorism, Crime and Security Act 2001, Part 4, s. 23.

³⁹² Terrorism Act 2006, Part II, s. 23.

³⁹³ Ansell and Trondal, “Governing Turbulence”: 8 & 50.

³⁹⁴ Ibid.

attempt to implement alternative strategies, or “repertoires”, which may increase the effectiveness of crisis containment.³⁹⁵

The Problem of Containment can be summarised as follows.

During crisis containment, the initial misrecognition of a Black Swan causes a rapid, multidirectional expansion of emergency power. This occurs because the possibility that a crisis is a Black Swan has not been taken into account, and this fact must constantly be compensated for by the leaders of constitutional states. Here, rule by decree goes into overdrive and legislation proliferates. Using legislative emergency powers and state of emergency powers to contain a Black Swans also causes emergency power to be retained – either in part or in full. Here, emergency powers provisions become part of the ordinary legal framework and are used to contain non-crisis events. When a genuine crisis does arise, these emergency powers provide a foundation upon which to construct more extensive emergency powers. This ultimately leads to a ratcheting up of executive power at the expense of fundamental rights and values. The consequence is increased fragility and a proliferation of “negative outcomes” (OECD).³⁹⁶

Together, the Problem Recognition and the Problem of Containment, demonstrate that the elements of precedent, data, legislative emergency powers, and states of emergency powers are sub-optimal when it comes to the crisis management of Black Swans. This is because narrowed perception, bounded rationality, expansionism, and permanence demonstrate static resilience and cause constitutional states to experience increased

³⁹⁵ Ibid.

³⁹⁶ OECD, *States of Fragility 2022*.

fragility. What is needed are new, dynamic crisis management strategies that: (i) take the four defining characteristics of Black Swans into account; and (ii) contain substantive instructions regarding implementation for constitutional states as crisis management actors.

Conclusion

This chapter has finished justifying the claim made in the thesis introduction: *viz.*, that Black Swans are a significant problem for contemporary crisis management. It has done so by demonstrating that the strategies constitutional states currently use to manage Black Swans are sub-optimal.

In answer to the second research sub-question, “In what ways are the strategies constitutional states currently use to manage Black Swans sub-optimal?”, it is argued that these strategies are sub-optimal because, although they can prevent catastrophic increases in fragility, they ultimately: (i) increase, rather than decrease, state fragility; and (ii) generally only allow for static resilience to be demonstrated.

The next step in the thesis argument is to consider what concepts Carl Schmitt’s legal-political theory contains that can be used to improve how constitutional states manage Black Swans (Chapter Three).

Chapter Three

Carl Schmitt's Legal-Political Theory

“I love the great despisers,
because they are the great adorers,
and arrows of longing for the other shore.”³⁹⁷

Introduction

Together, Chapter One and Chapter Two have justified the claim made in the thesis Introduction: *viz.*, that Black Swans are a significant problem for contemporary crisis management. They have done so by demonstrating, respectively, that: (i) the existing crisis management literature on Black Swans is inadequate; and (ii) the strategies constitutional states currently use to manage Black Swans are sub-optimal.

As a reminder, Black Swans are crises that: (a) are “novel or unprecedented... in human or crisis managers’ memories”; (b) have “unexpectedly large scale or geographic distribution”; (c) have effects that cross boundaries (i.e. are “trans-boundary”); and (d) have “consequences, which stir deep uncertainties in the minds of the public [and] challenge government structures”.³⁹⁸

It was indicated in Chapter One and Chapter Two that what is needed to resolve the problems associated with managing Black Swans are new, dynamic strategies that: (i) take

³⁹⁷ Friedrich Nietzsche, *Thus Spoke Zarathustra* (1883), trans. Graham Parkes (Oxford: Oxford University Press, 2005), 13.

³⁹⁸ OECD, *Changing Face* 18-19.

the four defining characteristics of Black Swans into account; and (ii) contain substantive instructions regarding implementation for constitutional states as crisis management actors. This chapter begins to develop this claim by considering the work Carl Schmitt produced between 1918 and 1933. It is argued that Schmitt's concepts of the "exception" and "sovereign dictatorship", in particular, can be used to devise new, dynamic crisis management strategies for Black Swans. In this regard, the chapter answers the third research sub-question: "What concepts does Carl Schmitt's legal-political theory contain that can be used to improve how constitutional states manage Black Swans?".

The chapter begins by examining the relationship between Carl Schmitt and crisis management. This includes: (i) an explanation of how the thesis uses Schmitt's work, drawing on recent work by Adrian Blau; (ii) a contextual overview of the Germany's Weimar Republic (1918–1933); and (iii) a discussion concerning what Schmitt had to say on the concepts of what would now be called "fragility" and "resilience". Following this, the chapter critically reconstructs Schmitt's constitutional theory by focusing on his three "senses" of constitution: "positive," "ideal," and "relative".³⁹⁹ Together, these "senses" provide a legal-political framework for the exception and sovereign dictatorship. The final two parts of the chapter provide a detailed overview of the core characteristics of the exception and sovereign dictatorship. Here, the dominant interpretation of these concepts within the literature is established.

Looking forward, Chapter Four and Chapter Five, respectively, explain how Schmitt's concepts of the exception and sovereign dictatorship can be employed within strategies designed to recognise and contain Black Swans more optimally.

³⁹⁹ Carl Schmitt, *Constitutional Theory*, 59 (senses of constitution); 75-88 (positive constitution); 89-93 (ideal constitution); 67-74 (relative constitution).

3.1. Carl Schmitt and Crisis Management

(i) *Using Schmitt: Interpretation and Reconstruction*

According to Adrian Blau, “There are three main ways of interpreting texts, based on three kinds of understanding and three equivalent kinds of meaning: (1) what authors mean, which is empirical; (2) what ideas mean, which is philosophical; and (3) what one or both of these mean to the reader... which is aesthetic.”⁴⁰⁰ While the aesthetic approach is irrelevant in the context of this doctoral research, both the empirical and philosophical methods Blau describes are of central importance to the thesis discussion. This is because the thesis uses and applies concepts from Schmitt’s legal-political theory to resolve the contemporary problem of Black Swans.

Treating Schmitt’s work empirically and philosophically means examining both what he meant and what his ideas mean. However, as Blau has explained, when it comes to reading theoretical texts “contextual analysis usually helps, but... is often insufficient”.⁴⁰¹ This is because the range of philosophical ambiguities that are present within these texts give rise to a plethora of “interpretative possibilities”.⁴⁰² To decide which interpretation(s) is reliable, and to iron-out ambiguities, it is necessary to assess and evaluate the different possibilities. To do this effectively, Blau suggests that two factors should be taken into consideration.

⁴⁰⁰ Adrian Blau, “Interpreting Texts,” 243.

⁴⁰¹ Ibid, 248.

⁴⁰² Ibid, 256.

Firstly, it is important to “accept that we cannot understand authors without altering what they said, that we must sometimes make choices when authors are inconsistent, and that we often want to impose more clarity on authors than they themselves managed”.⁴⁰³ Secondly, it is vital to appreciate that “it is intellectually interesting and important to see how well authors’ arguments work, to what extent they were on the right track and how fundamental their problems are”.⁴⁰⁴

In other words, while it is impossible to know exactly Schmitt meant, the best way to acquire a reliable interpretation of his ideas is to assess and evaluate his work by critically reconstructing it. As Blau has explained, reconstruction involves “testing and potentially supplying, supplementing, modifying or removing presuppositions, definitions, links between comments/ideas and steps in arguments”.⁴⁰⁵ Indeed, as we will see, many elements of Schmitt’s work are ambiguous and/or “cryptic” in the sense that they give rise to numerous – often competing – interpretations (Bernstein).⁴⁰⁶ To make sense of these elements, one has to establish substantive connections between multiple of Schmitt’s texts.

To provide a reliable understanding of Schmitt’s work, this thesis engages in an act of critical reconstruction. Following Blau, this involves using empirical evidence and philosophical enquiry to evaluate and modify Schmitt’s ideas where necessary. As such, the thesis adheres to what, arguably, is the purpose of political theory: “to theorize, critique, and diagnose the

⁴⁰³ Ibid, 257.

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid, 251.

⁴⁰⁶ Richard J. Bernstein, “The Aporias of Carl Schmitt” *Constellations* 18(3) (2011): 407.

norms, practices, and organization of political action in the past and present, in our own place and elsewhere” (Dryzek et al.).⁴⁰⁷

Specifically, Schmitt’s ideas are critically reconstructed in the context of his constitutional theory, which sets out his understanding of the nature, composition, and functionality of constitutional states (s.3.2). However, prior to critically reconstructing Schmitt’s work, it is necessary to examine the context of the Weimer Republic along with what Schmitt had to say regarding “fragility” and “resilience”

(ii) *Context: The Weimar Republic (1918–1933)*

Context plays an important role when it comes to understanding the legal-political theory of Carl Schmitt.⁴⁰⁸ As Monserrat Herrero has remarked, Schmitt wrote with “the thread of historical events in mind”.⁴⁰⁹ The events in question are those that occurred during the 1920s and early 1930s in the Weimar Republic.⁴¹⁰ During this time, the German state, or Reich, experienced a slew of extraordinary crises, including: hyperinflation (1920–1923); the Wall Street Crash (1929); and political violence between communist and nationalist groups (1920–1923, 1930–1933). These crises caused high levels of fragility within the German

⁴⁰⁷ John S. Dryzek, Bonnie Honig, and Anne Phillips, “Introduction”, in John S. Dryzek, Bonnie Honig, and Anne Phillips (eds.), *The Oxford Handbook of Political Theory* (Oxford: Oxford University Press, 2008), 4.

⁴⁰⁸ Federico Finchelstein, “Carl Schmitt: Between History and Myth,” *History & Theory* 56(3) (2017): 362. Cf: Kahn, *Political Theology*, 5.

⁴⁰⁹ Montserrat Herrero, *The Political Discourse of Carl Schmitt: A Mystic of Order* (London: Rowman and Littlefield, 2015), 51.

⁴¹⁰ For a comprehensive discussion of the relationship between Schmitt and the Weimar Republic, see: Ulrich K. Preuß, “Carl Schmitt and the Weimar Constitution,” in *The Oxford Handbook of Carl Schmitt*, 471-490.

state.⁴¹¹ That is to say, “the combination of exposure to risk” was high and the institutions of the Weimar Republic had “insufficient coping capacity... to manage, absorb or mitigate those risks... across six dimensions: economic, environmental, political, security, societal and human.”⁴¹²

Indeed, much of the fragility experienced by the German state was caused by the inability of the Reichstag to reach any kind of agreement.⁴¹³ Successive governments struggled to secure the passage of legislation that would enable them to manage crises optimally. To break the impasse, the Chancellor, as head of the executive, had to invoke emergency rule under Article 48 of the Weimar Constitution. This article enabled a form of constitutional dictatorship,⁴¹⁴ in which the President of the Reich, as head of state, could intervene and “take the measures necessary for [the restoration of public order and security], intervening, if necessary, with the aid of the armed forces. For this purpose he

⁴¹¹ For a detailed overview of this period, see: Frank McDonough, *The Weimar Years: Rise and Fall 1918-1933* (London: Apollo, 2023).

⁴¹² “Executive Summary” in OECD, *States of Fragility 2022* (Paris: OECD Publishing, 2022), doi: <https://doi.org/10.1787/c7fedf5e-en>.

⁴¹³ The inability to reach agreement can be blamed on the plurality of parties and a lack of common ground between the two largest political factions: Social Democratic and Nationalist. See: McDonough, *The Weimar Years*; Eric Solsten, *Germany: A Country Study* (Washington, DC: Library of Congress), accessed August 13, 2023. <https://countrystudies.us/germany/>, Problems of Parliamentary Politics.

⁴¹⁴ For a detailed examination of the concept of “constitutional dictatorship”, including an excellent treatment of Article 48, see Clinton L. Rossiter’s seminal work: *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948), 3-15 (*Preface*) and 29-61 (*Constitutional Dictatorship in the German Republic*). For an interesting contemporary discussion, see: Jens Meierhenrich, “Constitutional Dictatorships, from Colonialism to COVID-19,” *Annual Review of Law and Social Science* 17 (2021), 411-439, doi: <https://doi.org/10.1146/annurev-lawsocsci-040721-102430>.

may temporarily suspend, wholly or in part, [] basic rights...”.⁴¹⁵ It can be presumed that the intention of Article 48 was to address the concern, expressed by Jean-Jacques Rousseau, regarding “the inflexibility of the laws”.⁴¹⁶ Rousseau’s contention was that this inflexibility “may in certain cases render them pernicious, and thereby cause the ruin of the state in times of crisis”.⁴¹⁷ By providing a way to essentially bypass inflexible laws, Article 48 helped to avert catastrophic increases in fragility (i.e. state failure) by allowing the Chancellor and government of the day to rule by decree as part of the Presidential cabinet: that is, Article 48 enabled the Chancellor to influence the use of Presidential power.

However, when the National Socialist German Workers’ Party (Nazi party) assumed power in 1932,⁴¹⁸ the Nazi leadership used the idea of fragility to justify continued use of Article 48. That is, they used the impact and effects of crises such as the 1929 economic crash to appeal to, exacerbate, and exploit underlying fears and insecurities present within the German population.⁴¹⁹ By promising stability and emphasising resilience during a time of fragility, the Nazi party was able to expand executive power legally and legitimately in all

⁴¹⁵ Constitution of the German Reich (Weimar Constitution), Article 48(1), text available at <https://alphahistory.com/weimarrepublic/weimar-constitution-1919/>, accessed August 14, 2023.

⁴¹⁶ Jean-Jaques Rousseau, *The Social Contract* (1762), trans. H. J. Tozer (Hertfordshire: Wordsworth Editions, 1998), 124. See also: John Locke, *Two Treatises of Government* (1689), ed. Peter Laslett (Cambridge: Cambridge University Press, 2008), 374-375.

⁴¹⁷ Ibid (Rousseau).

⁴¹⁸ “Election Results in Germany 1924-1933,” Marxists.org, accessed August 13, 2023, <https://www.marxists.org/archive/trotsky/germany/elect.htm>.

⁴¹⁹ On this, see: “The Nazi Rise to Power,” Holocaust Encyclopaedia, accessed August 14, 2023, <https://encyclopedia.ushmm.org/content/en/article/the-nazi-rise-to-power>. For an interesting comparative discussion, see: Tor K. Kristiansen, “Populism in the Weimar Republic and in the USA today with a focus on Adolf Hitler and Donald Trump,” (MA diss., University of Stavanger, Norway, 2020), accessed September 16, 2023, <https://uis.brage.unit.no/uis-xmlui/handle/11250/2670947>.

manner or directions. The dictatorship afforded to the President under Article 48 was, to use Rousseau's terminology, "degrad[ed]".⁴²⁰ Rule by decree became the norm and the Weimar Republic was transformed from a fledgling liberal democracy into a totalitarian behemoth.⁴²¹

These events are as the backdrop for Schmitt's work on crisis and crisis management. Schmitt was concerned with the inability of the German Reich to manage crisis optimally. Although he did not explicitly advocate totalitarianism,⁴²² Schmitt did think Article 48 provided a legitimate way to recognise and contain crises.⁴²³

Indeed, investing Presidential powers in the hand of the Chancellor was a feature of what Schmitt called the "total state".⁴²⁴ According to Schmitt, in the "total state" every

⁴²⁰ Rousseau, *The Social Contract*, 125.

⁴²¹ As already mentioned, it is worth noting that Hitler never formally abolished the Weimar Constitution. Rather, its core provisions were suspended indefinitely using Article 48. The remaining provisions were then subverted using the 1933 Enabling Act. For a discussion, see: "Germany 1933: From democracy to dictatorship," Anne Frank House, accessed June 24, 2023, <https://www.annefrank.org/en/anne-frank/go-in-depth/germany-1933-democracy-dictatorship/>.

⁴²² In *The Concept of the Political* Schmitt writes: "sovereignty... do[es] not imply that a political entity [i.e. the state] must necessarily determine every aspect of a person's life": Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 2007), 38. He also wrote that the sovereign "has the monopoly over [the] last decision", not a monopoly over the use of force and/or coercion à la Max Weber (*Politics as Vocation* (1918)): Schmitt, *Political Theology*, 13. For additional evidence and analysis, see: Schwab, *The Challenge of the Exception*, 147-148; Herrero, *The Political Discourse*, 13.

⁴²³ Schmitt, *Dictatorship*, 180-226 (Appendix: Weimar Constitution, Article 48); Carl Schmitt, *Legality and Legitimacy* (1932), trans./ed. Jeffrey Seitzer (Durham: Duke University Press, 2004). See also: Lars Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge: Cambridge University Press, 2015), 125-173, doi: <https://doi.org/10.1017/CBO9781316136256>.

⁴²⁴ Schmitt, *The Concept of the Political*, 69.

exceptional situation can be reduced to a singular a political distinction between who is “friend” and who is “enemy”, and it is the sovereign’s job (i.e. the Chancellor’s job) to decide on this distinction.⁴²⁵ That is, the Chancellor must decide on questions concerning the political identity of the state when this identity becomes a subject of disagreement and conflict.⁴²⁶ In this sense, it is more accurate to claim that what Schmitt advocated was closer to authoritarianism: “the will to preserve the *status quo* and prevent change by keeping all political dynamics under close control by a strong central power”.⁴²⁷

The contention that Schmitt advocated authoritarianism, not totalitarianism, is reinforced by what Schmitt argued in relation to the concepts of what would now be called “fragility” and “resilience”.

(iii) *Fragility and Resilience: Liberalism and Article 48*

The concepts of “fragility” and “resilience”, as they are understood now, are invoked at various points in Schmitt’s Weimar work. Although Schmitt does not refer to the concepts explicitly, they are implicit in many of his formulations. As we will see now, the concepts of “static resilience” and “dynamic resilience”, in particular, are present in Schmitt’s discussions of liberalism and Article 48.

⁴²⁵ Ibid, 26 & 39; Schmitt, *Political Theology*, 5.

⁴²⁶ Schmitt, *The Concept of the Political*, 33: “the real possibility of physical killing” must exist. See also: Richard Wolin, “Carl Schmitt, Political Existentialism, and the Total State”; Schupmann, *Carl Schmitt’s State and Constitutional Theory*, Chapter 3: The Absolute State.

⁴²⁷ Furio Cerutti, *Conceptualizing Politics: An Introduction to Political Philosophy* (London: Routledge, 2017), 17; Ibid (Wolin); Cristi, *Carl Schmitt and Authoritarian Liberalism*.

As a reminder, “static resilience”, is concerned with “maintain[ing] and restor[ing] equilibrium conditions [and] encourages institutional-path dependence”. “Dynamic resilience” is concerned with “building flexibility into... institutional arrangements by... maintaining multiple repertoires that can be flexibly redeployed to meet changing circumstances” (Ansell and Trondal).⁴²⁸

(a) Liberalism

For Schmitt, the cause of fragility within the Weimar Republic was liberalism.⁴²⁹ More specifically, Schmitt was concerned with what William Rasch has called “the liberal modification – or mollification – of democracy”.⁴³⁰ In Schmitt’s view, liberalism was anti-political because it restricted the effective use of state power. The Weimar Constitution prioritised the social needs of individuals over the political needs of the state. As Schmitt writes, “For the purpose of protecting individual freedom and private property, liberalism provides a series of methods for hindering and controlling the state’s and government’s power”.⁴³¹

In other words, the liberal nature of the Weimar Constitution prevented the emergence and functioning of the aforementioned “total state”. As David Boucher has

⁴²⁸ Ansell and Trondal, “Governing Turbulence”: 50.

⁴²⁹ Schmitt, *The Concept of the Political*, Chapter 8; Carl Schmitt, *The Crisis of Parliamentary Democracy* (1923), trans. Ellen Kennedy (Cambridge: MIT Press, 1988), Preface to the Second Edition (1926) & Chapter 2.

⁴³⁰ Rasch, “Carl Schmitt’s Defense of Democracy,” in *The Oxford Handbook*, 315.

⁴³¹ Schmitt, *The Concept of the Political*, 70-71. See also: Schmitt, *The Crisis of Parliamentary Democracy*, 33-50; Schmitt, *Constitutional Theory*, 93.

explained, “The problem with Weimar and liberal democracies in general was their heterogeneity. They were socially divided by class, culture, race and religion and were inconsistent with a political state because of their inability to distinguish between friend and enemy”.⁴³² Indeed, Schmitt’s view is that liberalism transforms conflict into competition by neutralising and depoliticising the concepts of “friend” and “enemy”.⁴³³ In this regard, liberalism mollifies democracy in an attempt to “escape the logic of the political”.⁴³⁴

The issue at stake for Schmitt was the state’s inability to distinguish between “friend” and “enemy” during times of crisis, when the political identity of the state was threatened. It was during these times that fragility would increase and the risk of state failure was at its highest. Indeed, this was why Article 48 was so important to Schmitt. In his view, the only way to overcome the anti-political nature of the Weimar Constitution in a time crisis was to reanimate sovereign power.⁴³⁵

Of course, it is important to acknowledge that liberalism exists differently today. It is more accommodating to the needs of the state than in Weimar Germany.⁴³⁶ Recent crises, such as

⁴³² David Boucher, “Schmitt, Oakeshott and the Hobbesian legacy in the crisis of our time,” in *Law, Liberty and State: Oakeshott, Hayek, and Schmitt on the Rule of Law*, ed. David Dyzenhaus and Thomas Poole (Cambridge: Cambridge University Press, 2015), 128.

⁴³³ Schmitt, *The Concept of the Political*, 69-72.

⁴³⁴ *Ibid*, 79 & 70.

⁴³⁵ George Schwab, “Introduction”, in Schmitt, *Political Theology*, xlv.

⁴³⁶ Of course, it must be remembered that liberalism was new to Germany in 1918. The German people had to understand liberalism, so-to-speak, and make it their own. The significance of this should not be overlooked by scholars who paint Schmitt as a vehement anti-liberal. Schmitt was not someone who “hated liberal democracy”, but rather saw liberalism as placing unnecessary limits on exercise of state power: Nomi Claire Lazar, *States of Emergency* (Cambridge: Cambridge University Press, 2009), 38. For a brief, up to date discussion on Schmitt and liberalism, see: Pedro T. Magalhães, *The Legitimacy of Modern*

the COVID-19 pandemic, have demonstrated the inherent flexibility of liberalism: governments and leaders are able to prioritise the needs of the state, without encountering debilitating levels of resistance from the people (i.e. individuals) and/or the legislative body.⁴³⁷

Effectively, the Weimar Constitution restricted and diffused state power in a way that meant the Reich government could only demonstrate static resilience: that is, it could only “maintain and restore equilibrium conditions [and] encourage[] institutional-path dependence”.⁴³⁸ The priority was to ensure that Weimar expressed and upheld a liberal constitutional ideal. Indeed, this was one of the conditions imposed on Germany by the victorious powers in the aftermath of the First World War.⁴³⁹ Article 48 was supposed to be a measure of last resort, to be used infrequently – if at all.

Yet, the Reichstag’s inability to pass legislation meant that Article 48 was invoked excessively.⁴⁴⁰ As such, although Article 48 did help the Reich government to prevent any

Democracy: A Study on the Political Thought of Max Weber, Carl Schmitt and Hans Kelsen (New York: Routledge, 2021), 65-66 (Kindle edn.).

⁴³⁷ An example is lockdowns. Most governments and leaders were able to put a pause on the normal functioning of state and society. In the most part, people acquiesced and legislative bodies provided laws to provide legitimacy. For an interesting discussion, see: Reed Wood, Gina Yannitell Reinhardt, Babak RezaeeDaryakenari, and Leah C Windsor, “Resisting Lockdown: The Influence of COVID-19 Restrictions on Social Unrest,” *International Studies Quarterly* 66(2) (2022), <https://doi.org/10.1093/isq/sqac015>.

⁴³⁸ Ansell and Trondal, “Governing Turbulence”: 50.

⁴³⁹ For insight and discussion, see: Bernadotte E. Schmitt, “The Peace Treaties of 1919-1920,” *Proceedings of the American Philosophical Society* 104(1) (1960): 101-110, accessed August 18, 2023, <https://www.jstor.org/stable/985606>; “President Woodrow Wilson’s 14 Points (1918),” *National Archives*, accessed August 18, 2023, <https://www.archives.gov/milestone-documents/president-woodrow-wilsons-14-points>.

⁴⁴⁰ Between 1921 and 1925 alone, Article 48 was invoked 136 times: Richard J. Evans, *The Coming of the Third Reich* (New York: Penguin Press, 2004), 8.

catastrophic increases in fragility from occurring, it did not reduce fragility in any meaningful way. The fact remained that Germany's institutions had "insufficient coping capacity" to manage crises.⁴⁴¹ Much like letting air out of a balloon to stop it from exploding, Article 48 reduced the level of anger and frustration among the German people by providing only temporary relief from the effects of a crisis. As such, Article 48 was incapable of providing optimal crisis management – at least in its current form.

(b) Article 48

For Schmitt, Article 48 resolved the problems created by liberalism in the context of the Weimar Republic. Constitutional dictatorship under Article 48 enabled the Reich government to recognise the distinction between "friend" and "enemy". As mentioned, this helped to prevent any catastrophic increases in state fragility by temporarily allowing the political needs of the state to take precedence over the social needs of individuals. Article 48 thus provided a way for the so-call "total state" to emerge.

However, Schmitt did not see Article 48 as a long-term solution to the anti-political nature of the Weimar Republic. This was because of the restrictions contained within the latter part of Article 48. According to these restrictions, the Reich President could only "suspend, wholly, or in part, the basic rights laid down in Articles 114, 115, 117, 118, 123, 124, and 153" (Article 48). In this respect, Article 48 was very much *restrained* by liberalism, even if it was not *constrained* by it.

⁴⁴¹ OECD, *States of Fragility 2022*.

The impact of these limitations on the President's use of emergency powers under Article 48 meant that he could only demonstrate static resilience. This is because, by having to seek out additional legislative approval to act beyond the remit of certain constitutional articles, the President was effectively encouraged down a path of "institutional[] dependence".⁴⁴² Limiting the powers of the President ensured the "maintain[ence] and restor[ation] of equilibrium conditions".⁴⁴³ Schmitt characterised this situation as one of tension, between legality (the law of the Constitution) and legitimacy (the President's authority).⁴⁴⁴

Schmitt's proposed resolution was an alternative, more expansive reading of Article 48 that emphasised legitimacy *over* legality. His argument was that there could no formal and substantive limits on what the President could do under Article 48. Schmitt's reasoning is as follows. Article 48 states that the President can "take the measures necessary for [the restoration of public order and security]". It then qualifies this claim by stating that and "*For this purpose he may temporarily suspend, wholly or in part, [certain] basic rights...*". As such, it seems that suspending rights is one thing the President can do, not everything he is able to do. Schmitt thought that the President had the power to act in any way he saw fit. He could act extra-legally and extra-constitutionally. To reinforce his argument, Schmitt drew attention to the fact that the President's authority is derived from the democratic legitimacy of the German people. As Article 1 of the Weimar Constitution states: "Political authority emanates from the people". Schmitt therefore thought that plebiscitary legitimacy

⁴⁴² Ansell and Trondal, "Governing Turbulence": 50.

⁴⁴³ Ibid.

⁴⁴⁴ Schmitt, *Legality and Legitimacy* (full text); Schmitt, *Dictatorship*, 180-226 (Appendix: Weimar Constitution, Article 48); Schwab, *The Challenge of Carl Schmitt*, 38-42.

trumped legal and constitutional restrictions on the use of state power. This was because the President's power was a product of popular sovereignty, not legal provision. In short, Schmitt thought, because the President was democratically elected by the people - the source of the state's political authority - he was acting on their behalf *directly*. This enabled the President to bypass Reich laws and articles of the Weimar Constitution. It also made any and all of his actions legitimate.⁴⁴⁵

Schmitt's interpretation of Article 48 is certainly contentious. Although it does allow for a more dynamic type of resilience to be demonstrated, *prima facie* Schmitt had little regard for the rule of law, democratic accountability, and a separation of powers under emergency conditions. The alternative interpretation he posited reinforces claims made by scholars including John P. McCormick, that Schmitt formulated concepts that "serve as the occasion for Caesarist coups against constitutional orders".⁴⁴⁶

However, the present thesis does not share this view. There is historical and textual evidence that casts doubt on claims like McCormick's.⁴⁴⁷ In addition, as we will see in the

⁴⁴⁵ Ibid (*Legality and Legitimacy*), 67-83; Ibid (*Dictatorship*), Appendix: Article 48; Vinx, *The Guardian of the Constitution*; Schupmann, *Carl Schmitt's State and Constitutional Theory*, 166-171; Marc de Wilde, "The state of emergency in the Weimar Republic Legal disputes over Article 48 of the Weimar Constitution," *The Legal History Review* 78(1-2) (2010): 135-158, doi: <https://doi.org/10.1163/157181910X487341>.

⁴⁴⁶ McCormick, "From Constitutional Technique to Caesarist Ploy," 218; John P. McCormick, "The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers" *Canadian Journal of Law and Jurisprudence* 10(163) (1997): 163-187; Vinx, "Carl Schmitt on the Limits of Direct Democracy"; Scheuerman, *The End of Law*.

⁴⁴⁷ There is evidence to suggest that Schmitt was unhappy with Hitler's was appointment as Chancellor in 1933. See: Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Durham: Duke University Press, 2004), 6; Lazar, *States of Emergency*, 38. Furthermore, Schmitt remarked in the 1957 *Afterword to 1932's Legality and Legitimacy*: "[This] essay was a despairing attempt to safeguard the last hope of the Weimar Constitution, the presidential system..." (95). Whether or not Schmitt is to be believed is another

remainder of the thesis, there is a depth and substance to Schmitt's work that provides a basis for more constructive readings and interpretations of his concepts.

The discussion so far in this chapter has examined the relationship between Carl Schmitt and crisis management. The thesis' approach to using Schmitt's work has been explained; a contextual overview of the Weimar Republic has been provided; and what Schmitt had to say on the concepts of what would now be called "fragility" and "resilience" has been discussed. Indeed, the principal reason why this research draws on the legal-political theory Schmitt produced between 1918 and 1933 in particular, is that its substance concerns the management of extraordinary events in the context of a constitutional state (the Weimar Republic).

The chapter now attempts to critically reconstruct the legal-political theory Schmitt produced between 1918 and 1933 by focusing on his constitutional theory.

3.2. Constitutional Theory (of the state)

As Benjamin Schupmann has correctly pointed out, although Schmitt did not produce a state theory, "there are reasons to believe Schmitt had developed at least a framework for a general theory of the state".⁴⁴⁸ Generally-speaking, state theories describe how the state

question. However, see also: Schmitt, *The Concept of the Political*: "The endeavour of a normal state consist above all in assuring total peace within the state and its territory. To create tranquillity, security, and order..." (46); Herrero, *The Political Discourse*; Kalyvas, *Democracy and the Politics of the Extraordinary*, 143.

⁴⁴⁸ Schupmann, *Carl Schmitt's State and Constitutional Theory*, 107. Indeed, Schmitt has been referred to as a "state theorist": Reinhard Mehring *Carl Schmitt: A Biography* (London: Polity Press, 2014), xv.

can be understood as a subject of study (for example, Marxist, pluralist, feminism).⁴⁴⁹ On the other hand, a general theory of the state describes, evaluates, and recommends how existing state functions can be changed and/or improved.

The reasons Schupmann provides to support his claim, both of which are convincing, are: (i) evidence that Schmitt's 1928 text *Constitutional Theory* – his magnum opus – was originally conceived as a theory of the state;⁴⁵⁰ and (ii) the complementary nature of many of Schmitt's texts,⁴⁵¹ which Ernst-Wolfgang Böckenförde has argued demonstrates "systematic coherence of his [Schmitt's] concepts".⁴⁵²

In what follows, a critical reconstruction of Schmitt's theory of the state is provided. The focus of this account are three "senses" of constitution that Schmitt described in *Constitutional Theory*: "positive" constitution, "ideal" constitution, and "relative" constitution.⁴⁵³ Together, these "senses" establish Schmitt's understanding of the nature, composition, and functionality of constitutional states. As such, they provide a legal-political framework for Schmitt's concepts of the exception and sovereign dictatorship. It is also the view of this thesis that Schmitt's three senses of constitution provide a level of substantive cohesion for his Weimar work in general.

⁴⁴⁹ See: Colin Hay, Michael Lister, and David Marsh (eds.), *The State: Theories and Issues* (London: Bloomsbury, 2022).

⁴⁵⁰ Schupmann, *Carl Schmitt's State and Constitutional Theory*, see the evidence cited in footnotes 2 and 3.

⁴⁵¹ In particular, *The Concept of the Political* and *Political Theology* (Schwab, "Introduction," in Schmitt, *Political Theology*, xli); and *Constitutional Theory* and *The Concept of the Political* (Kennedy, *Constitutional Failure*, 12).

⁴⁵² Ernst-Wolfgang Böckenförde, "The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory," in David Dyzenhaus (ed.), *Law as Politics*, 41.

⁴⁵³ Schmitt, *Constitutional Theory*, 59 (senses of constitution); 75-88 (positive constitution); 89-93 (ideal constitution); 67-74 (relative constitution).

Two things must be noted at the outset. Firstly, Schmitt's understanding of the concept of "the state" is that it corresponds to "a certain status of a people, specifically, the political unity".⁴⁵⁴ Secondly, for Schmitt "constitution" means something different from "a constitution". While the latter typically corresponds to documents that describe how a state is organised, such as in the case of the US Constitution (1789), the former corresponds to the idea of unity and togetherness – i.e. the process of how people chose to be (and are) associated.

(i) "Positive" Constitution

For Schmitt, constitution in the *positive* sense corresponds to "The Constitution as the Complete Decision over the Type and Form of the Political Unity".⁴⁵⁵ As he elaborates:

"Political unity and social order is part of any state. It [positive constitution] is, in other words, some principle of unity and order, some decision-making authority that is definitive in critical cases of conflicts of interest and power".⁴⁵⁶

Positive constitution is, therefore:

"not a system or a series of legal principles and norms... [but] an actually present condition, a *status* of unity and order. The state would cease to exist if this constitution, more specifically, this unity and order, ceased to exist. The constitution is its "soul", its concrete life, and its individual existence".⁴⁵⁷

⁴⁵⁴ Ibid, 239.

⁴⁵⁵ Ibid, 75.

⁴⁵⁶ Ibid, 59.

⁴⁵⁷ Ibid, 59-60 (original emphasis).

For Schmitt, “decision-making authority” resides with the “constitution-making power”, which is “capable of making the concrete, comprehensive decision over the type and form of its [the state’s] own political existence”.⁴⁵⁸ Typically, the constitution-making power is either an absolute monarch or a people (*demos*).⁴⁵⁹ As such, state legitimacy is either dynastic or democratic.⁴⁶⁰ Either way, Schmitt remarks, “constitution in the positive sense originates from an *act of the constitution-making power*”. When it comes to “conflicts of interest and power”, decisions made by the constitution-making power are “definitive” because these decisions are made using *constituent power*.⁴⁶¹ As Antonio Negri has explained, for Schmitt constituent power equates to “originary power” in the sense that “it is the source of production of constitutional norms – that is, the power to make a constitution and therefore to dictate the fundamental norms that organize the powers of the State”.⁴⁶² In other words, constituent power is the power of self-determination.

Concerning the “principle of [political] unity and order”, in *The Concept of the Political* Schmitt argues that this principle derives from the aforementioned fundamental distinction between “friend” and “enemy”.⁴⁶³ Substantively, this distinction “can derive its energy from the most varied human endeavours, from the religious, economic, moral, and

⁴⁵⁸ Ibid, 125 (original emphasis removed); Chapter 8.

⁴⁵⁹ Ibid, 140: “whether it is of the king of the people”.

⁴⁶⁰ Ibid, 138.

⁴⁶¹ Ibid, 75; Herrero, *The Political Discourse*, 78.

⁴⁶² Antonio Negri, *Insurgencies: Constituent Power and the Modern State*, trans Maurizia Boscagli (Minneapolis: University of Minnesota Press, 1999), 8 & 2.

⁴⁶³ Schmitt, *The Concept of the Political*. It is important be aware that *The Concept of the Political* (1932) was originally conceived as lecture, given by Schmitt in 1927.

other antitheses”.⁴⁶⁴ As such, a state can be constituted positively in different ways. However it is constituted, the “principle of [political] unity and order” provides a state with “substantial homogeneity” – a core sense of identity, of political sameness – that serves as an irreducible “minimum” of constitution which, in Schmitt’s view, must be defended.⁴⁶⁵ As he writes in *The Crisis of Parliamentary Democracy*: “A democracy demonstrates its political power by knowing how to refuse or keep at bay something foreign and unequal that threatens its homogeneity”.⁴⁶⁶ For Schmitt, it is only when the “principle of unity and order” is threatened during “critical cases of conflicts of interest and power” that the “friend-enemy” dichotomy becomes significant.⁴⁶⁷ That is, it is only when a religious, economic, moral, or other antitheses has become so “intense and extreme” and there is “the real possibility of physical killing”.⁴⁶⁸ In other words, there is a possibility that the current constitution-making power will be destroyed or, as Schmitt puts it, “annihilated”.⁴⁶⁹

Although in his discussion of the “friend-enemy” dialectic, Schmitt defines “enemy” as “the other, the stranger”,⁴⁷⁰ it is notable that he does not define “friend”, or “friendship”, anywhere.⁴⁷¹ This absence, combined with the vague terms that Schmitt uses to define

⁴⁶⁴ Ibid, 38.

⁴⁶⁵ Schmitt, *Constitutional Theory*, 140.

⁴⁶⁶ Schmitt, *The Crisis of Parliamentary Democracy*, 9.

⁴⁶⁷ Schmitt, *Constitutional Theory*, 125;

⁴⁶⁸ Schmitt, *The Concept of the Political*, 29 & 46.

⁴⁶⁹ Schmitt, *Constitutional Theory*, 147.

⁴⁷⁰ Schmitt, *The Concept of the Political*, 27.

⁴⁷¹ The absence of definition has been also been noticed by Gabriella Slomp: “Carl Schmitt on Friendship: Polemics and Diagnostics, *Critical Review of International Social and Political Philosophy*,” 10:2 (2007): 199-213, doi: [10.1080/13698230701207972](https://doi.org/10.1080/13698230701207972).

“enemy”, has led Richard Wolin to interpret the “friend-enemy” dichotomy as an endorsement for violent political relations.⁴⁷² Indeed, Schmitt does focus on conflict and enmity more than anything else in his descriptions

However, what Wolin overlooks is the fact that the “friend-enemy” dichotomy is concerned with the “possibility” of conflict, which does not ‘signif[y] nothing but devastating war’.⁴⁷³ As mentioned there is an intensity threshold to reach prior to the emergence of politically significant “friend-enemy” dichotomy. Therefore, violent political relations may never emerge and, as such, it cannot be claimed outright that Schmitt endorsed them.

Concerning Schmitt’s concept of “friend”, an absence of definition does not mean that there can be no definition. For Schmitt, “friend” is the counter-point of “enemy”. As such, “friend” can be defined negatively, in relation to what it is *not*. Indeed, without “friends”, logically there can be no such thing as “enemies”: everyone would an “enemy” and this would contradict the idea of exceptions to the political order, which Schmitt states “are different from anarchy and chaos”.⁴⁷⁴ An approach to defining “friend” in this manner has been advocated by Jacques Derrida. Referred to as “oppositional logic”, Jacques has argued that “the signification of ‘friend’ can be determined only from *within* the friend/enemy opposition”.⁴⁷⁵ That is, by knowing what Schmitt means by “enemy”, we can

⁴⁷² Richard Wolin, “Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror,” *Political Theory* 20(3)3 (August 1992): 424-447, doi: <https://doi.org/10.1177/0090591792020003003>.

⁴⁷³ Schmitt, *Concept of the Political*, 33.

⁴⁷⁴ Schmitt, *Political Theology*, 12.

⁴⁷⁵ Jacques Derrida, *The Politics of Friendship*, trans. George Collins (London: Verso, 2005), 246 (emphasis added).

discern what he means by “friend”. Using oppositional logic in the way Derrida suggests, if “enemy” corresponds to “the other, the stranger” who “intends to negate his opponent’s way of life”,⁴⁷⁶ then “friend” corresponds to the non-other, the non-stranger who wants to share their way of life. Indeed, as Andrew Norris has defined it, “friend”, or “friendship”, in Schmitt’s work corresponds to “a particular form of life, one in which the group identity is valued above physical existence”.⁴⁷⁷

Considering that “friendship”, logically, is the only thing capable of creating “political unity” and establishing “substantial homogeneity” in Schmitt’s theory of the state, this definition fits well with what Schmitt seems to mean by the “friend-enemy” dichotomy.⁴⁷⁸ Not only does this weaken Wolin’s claim regarding Schmitt’s endorsement of violent political relations, but it also enhances our understanding of Schmitt’s concept of positive constitution.

(ii) “Ideal” Constitution

For Schmitt, constitution in the *ideal* sense corresponds to “‘Constitution’ in an exemplary sense, thus named because of a certain content”.⁴⁷⁹ As he explains:

“constitution = a special type of political and social order... a special form of rule...
Constitution is the equivalent of *state form*... the state *is* a constitution. It *is* a monarchy,

⁴⁷⁶ Schmitt, *The Concept of the Political*, 27.

⁴⁷⁷ Andrew Norris, “Carl Schmitt on Friends, Enemies and the Political,” *Telos* 30(2) (1998): 71.

⁴⁷⁸ Herrero, *The Political Discourse*, 107: “The counterpoint of the political enemy is political unity”.

⁴⁷⁹ Schmitt, *Constitutional Theory*, 89.

aristocracy, democracy, council republic, and does not *have* merely a monarchical or other type of constitution".⁴⁸⁰

In other words, although constitution in the ideal sense can "designate a unity" in the same way as constitution in the positive sense, it can only designate what Schmitt calls a "reflective, *ideal one*".⁴⁸¹ What Schmitt means by this is that ideal constitution does not correspond to the constitution-making power's decision regarding the *actual* political identity of a state (i.e. its order and status), but a subsequent decision regarding the *aspirational* political identity of the state (i.e. what type and form the state should adopt in order to maintain this order and status). Here, the question essentially being asked is 'what kind of friendship are we going to have?'.⁴⁸²

To explain, it is worth considering "ideal" constitution in the context of modern constitutional states. Just like the Weimar Republic, modern constitutional states tend to aspire to a liberal democratic ideal. To fulfil this aspiration, these states attempt to establish and maintain a democratic "type of political and social order" that is usually expressed in writing.⁴⁸² This order revolves around the aforementioned features of the rule of law, democratic accountability, and a separation of powers (Ch.2, s.2.1(i)). As a reminder, these features, or principles, aim to protect against the abuse of what Pierson has called "impersonal power".⁴⁸³ That is, the official (i.e. non-personal) use of state power by ministers of state.

⁴⁸⁰ Ibid, 60 (original emphasis).

⁴⁸¹ Ibid, 59 (original emphasis).

⁴⁸² Ibid, 92. Schmitt refers to the "modern practice of the written constitution".

⁴⁸³ Pierson, *The Modern State*, 6 & 15-16.

Taking each principle in turn, the practicalities of how they guard against an abuse of “impersonal power” can be explained. Regarding the rule of law, this means that legislation applies equally to everyone - even lawmakers. Public decisions can be subject to judicial review and the government can be taken court.⁴⁸⁴ The judiciary can even go so far as to declare laws “incompatible” with individual rights and freedoms.⁴⁸⁵ As such, it is difficult for ministers of state use their official powers in untoward ways.

Regarding democratic accountability, this means that the peoples’ representatives, members of Parliament (MPs), have a right to scrutinise government actions. This is typically done through questions, debates, and committee hearings.⁴⁸⁶ The purpose of this scrutiny is to ensure that the government is acting in the best interests of the people. As such, the likelihood of being able to abuse “impersonal power” is low.

Regarding the separation of the powers, this means that one branch of the state often requires the approval of another to act.⁴⁸⁷ As an example, in the US, Article II(2) of the US Constitution states that “He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of Senators present concur”.⁴⁸⁸ Here, the executive branch can only enter into treaties with the agreement of

⁴⁸⁴ See: UK Judicial Review and Courts Act 2022; Joelle Grogan, “Rwanda policy unlawful: unpacking the Court of Appeal’s decision,” UK In A Changing Europe, 29 June, 2023, accessed August 22, 2023, <https://ukandeu.ac.uk/rwanda-policy-unlawful-unpacking-the-court-of-appeals-decision/>; R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5.

⁴⁸⁵ UK Human Rights Act (1998), Section 4.

⁴⁸⁶ “Checking the work of Government,” UK Parliament, accessed August 22, 2023, <https://www.parliament.uk/about/how/role/scrutiny/>.

⁴⁸⁷ US Constitution (1787), Article I (Legislative, Congress); Article II (Executive, President); and Article III (Judicial, Courts).

⁴⁸⁸ Ibid, Article II(2).

the legislative branch. This is to try to ensure that the President does not abuse his executive (i.e. impersonal, official) powers.

Together, these features fulfil a liberal democratic ideal by maintaining a democratic “type of political and social order”.⁴⁸⁹ Of course, because liberal democracy is an *ideal*, attempts to realise it can, and do, fail. Humanity’s constant desire for growth and progress means that there will always what Schmitt has called “gaps” in constitution – differences between positive constitution and the ideal constitution.⁴⁹⁰ As he remarks, “The people... expresses itself in continually new forms, producing itself these ever renewing forms and organizations”.⁴⁹¹ The danger is that these new forms create gaps that become too wide and transform into exceptions that give rise to political (“friend-enemy”) conflict.

Therefore, as Alain de Benoist has noted, it is important to bear in mind that “a constitution remains... always incomplete”.⁴⁹² Even where constitution in the ideal sense is codified (e.g. the US Constitution), this ideal is always in flux and constantly has to be reinterpreted. An example of reinterpretation is the ongoing debate in the US over the right to bear arms, as contained in Second Amendment to the US Constitution. On one side there are those who advocate restrictions on who can bear arms for reasons of public safety, while on the other there are those who condemn restrictions as a violation of their constitution rights. The ideal (a right to bear arms) is in flux: a gap exists between the

⁴⁸⁹ Schmitt, *Constitutional Theory*, 60.

⁴⁹⁰ Ibid, 107.

⁴⁹¹ Ibid, 128.

⁴⁹² Alain de Benoist, *Carl Schmitt Today: Terrorism, ‘Just’ War, and the State of Emergency* (London: Artkos, 2013), 77.

positive and ideal constitution.⁴⁹³ While constitutional reinterpretation is often undertaken by the judiciary, it can also be undertaken by the legislature in the form of constitutional amendment. Either way, the goal is to try and synchronise positive constitution with ideal constitution.

(iii) “Relative” Constitution

For Schmitt, constitution in the *relative* sense corresponds to “Constitution as a Multitude of Individual Laws”.⁴⁹⁴ As he explains

“Every *individual* constitutional law can appear as a constitution, so the concept becomes *relative*. It no longer concerns an entirety, an order and a unity. It involves, rather, a few, several, or many individual statutory provisions constituted in a particular way”.⁴⁹⁵

Relative constitution is reminiscent of how most modern states determine social and political order: in the form of written articles (e.g. United States) or a mixture of “statutes, conventions, judicial decisions and treaties” (e.g. United Kingdom).⁴⁹⁶ As such, Schmitt states, constitution in the relative sense equates to “the principle of the *dynamic emergence* of political unity, of the process of constantly renewed *formation* and *emergence* of this

⁴⁹³ For insight and discussion, see: Katherine Schaeffer, “Key Facts about Americans and guns,” Pew Research Center, September 13, 2023, accessed September 14, 2023, <https://www.pewresearch.org/short-reads/2021/09/13/key-facts-about-americans-and-guns/>.

⁴⁹⁴ Schmitt, *Constitutional Theory*, 67 (original emphasis).

⁴⁹⁵ *Ibid*,

⁴⁹⁶ “Glossary: Constitution,” UK Parliament, accessed August 12, 2023, <https://www.parliament.uk/site-information/glossary/constitution/>.

unity”.⁴⁹⁷ In other words, the concern is how to get from the kind of friendship we share now (positive constitution), to kind of friendship we want to share from hereon (ideal constitution).

Relative constitution is the way in which aforementioned “gaps” between positive and ideal constitution are prevented from becoming too wide. The goal is to try and synchronise positive constitution with ideal constitution, so as to maintain the state as a “political unity”. This is usually achieved by filling these “gaps” through legislative enactment or constitutional amendment. This filling helps the state to keep pace with the new and unique ways in which the constitution-making power (i.e. the people) expresses itself.

Schmitt’s three “senses” of constitution can be summarised as follows.

Constitution in the *positive* sense corresponds to the “status of unity and order” of the state according to the “friend-enemy” dichotomy. It corresponds to how the state formed, or constituted, in basic, political terms.

Constitution in the *ideal* sense corresponds to the “special type of social and political order” of the state: the reflective, aspirational form it strives to fulfil and maintain.

Constitution in the *relative* sense corresponds to how the state manages changes to the constitutional order. The purpose of relative constitution is to fill “gaps” between positive constitution and ideal constitution before they become exceptions to the norm.⁴⁹⁸

Together, these three senses establish Schmitt’s understanding of the nature, composition, and functionality of constitutional states. As we will see now, they also provide

⁴⁹⁷ Schmitt, *Constitutional Theory*, 61 (original emphasis).

⁴⁹⁸ Schmitt, *Constitutional Theory*, 59-60 & 67.

a legal-political framework for Schmitt's concepts of the exception and sovereign dictatorship. It will be argued that these concepts, in particular, can be used to devise new strategies that enable constitution states to recognise and contain Black Swans optimally.

3.3. The "Exception"

(i) Overview

The concept of "the exception" was defined by Schmitt in *Political Theology* (1922). It exists as a conception of the concept of "a crisis". In Schmitt's own words:

"The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. It cannot be circumscribed factually and made to conform to preformed law."⁴⁹⁹

These lines represent the extent of Schmitt's definition of "the exception". Nowhere else in his Weimar work did Schmitt explicitly or substantively develop the concept. Rather, as Herrero has observed, when it comes to the exception Schmitt "dedicated considerable space to showing it".⁵⁰⁰ What Herrero means by this is that Schmitt used the concept to accentuate certain of his ideas. For example, as we will see below, the exception is used to define and explain what Schmitt means by "sovereignty".

For the purposes of the present discussion, it is argued that Schmitt's definition of the exception consists of three defining characteristics: (i) it is "not codified in the existing

⁴⁹⁹ Schmitt, *Political Theology*, 6.

⁵⁰⁰ Herrero, *The Political Discourse*, 89; Andrew W. Neal, *Exceptionalism and the Politics of Counter-Terrorism: Liberty, security and the War on Terror* (Oxon: Routledge, 2010), 72.

legal order”; (ii) it is “a case of extreme peril, a danger to the existence of the state”; and (iii) it is incapable of “be[ing] circumscribed factually and made to conform to preformed law”. Given the vagueness of these elements, it is necessary to elaborate upon each one in turn. This will help to situate Schmitt’s conception of “the exception” in the context of his constitutional theory.

- “Not Codified in the Existing Legal Order”

The idea that the exception is not codified in the legal order corresponds to its status as extra-legal. There are no provisions, written or unwritten, that are capable of defining the exception because its existence is defined by an absence of legal provision. Whatever the exception is, however it manifests vis-à-vis the state, it is always outside of the legal order. This does not mean that the exception cannot be foreseen: exceptions to the norm are common occurrence. However, to quote Schmitt, “the precise details... cannot be anticipated, nor can one spell out what takes place in such a case...”.⁵⁰¹ The exception, by its very nature, “confounds... unity and order”.⁵⁰²

As Herrero has remarked, Schmitt’s exception “gives way to the consideration of a new area of nature that is different from that of law, namely, the political sphere”.⁵⁰³ As such, the exception is not outside the jurisdiction of the state – it does not represent anarchy or chaos – but, rather, falls into the realm of political decision-making.⁵⁰⁴ The exception represents a “gap” between positive constitution and ideal constitution.

⁵⁰¹ Schmitt, *Political Theology*, 6.

⁵⁰² Ibid, 14.

⁵⁰³ Herrero, *The Political Discourse*, 88.

⁵⁰⁴ Schmitt, *Political Theology*, 12.

Indeed, in *The Concept of the Political* Schmitt uses the exception to accentuate the “friend-enemy” dichotomy. He states: “that the extreme case appears to be an exception does not negate its decisive character but confirms it all the more... One can say that the exceptional case has an especially decisive meaning which exposes the core of the matter”.⁵⁰⁵ This is because the exception challenges the identity of the state. That is, it tests the strength of political unity, or friendship.

- “A Case of Extreme Peril, A Danger to the Existence of the State”

The idea that the exception represents a case of extreme peril and is a danger to the existence of the state can be explained as follows. It is because the exception is defined by an absence of law and order that it is extremely perilous and constitutes an existential threat to the state. The conventional tools used by governments and leaders to manage crises are rendered insufficient and political decision-making is required. Danger arises from the fact that governments and leaders must veer from the rule-based order to respond to a crisis.

As Schmitt explains, rather cryptically: “In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition”.⁵⁰⁶ The power of real life to which Schmitt is referring is the political identity of the state (i.e. positive constitution), which has been exposed and brought into question by the exception. The current rules-based order is ruptured – it has been broken through by the exception – and a “friend-enemy” dichotomy has emerged. Here, a decision must be made on how to manage

⁵⁰⁵ Schmitt, *The Concept of the Political*, 35.

⁵⁰⁶ Schmitt, *Political Theology*, 15.

the exception: does it complement the state's political identity (is it "friend"), or does it challenge the state's political identity (is it "enemy")?

- "Incapable of Being Circumscribed Factually or Made to Conform to Preformed Law"

The idea that the exception is incapable of being circumscribed factually corresponds to the notion that not everything is, or can be, known about the exception. However the exception manifests, it consists of unknown elements. This is perhaps why Schmitt compared the exception to a "miracle"⁵⁰⁷. Like a miracle, the exception happens without much explanation and is exceptional in nature. It is surrounded by an air of mystery – the absence of fact.

The unknown quality of the exception may also explain why Schmitt did not attempt to define it more substantively. Although there is no explicit evidence to support this suggestion, it does fit with the way Schmitt treated the concept of the exception in his Weimar work. As mentioned, the exception was primarily used by Schmitt to accentuate certain aspects of his legal-political theory.

The idea that the exception cannot be made to conform to preformed law can be explained as follows. The exception cannot be recognised as something else – something similar – so that current laws can be applied. It cannot be made the subject of existing legislation. As Schmitt remarks, "a general norm represented by an ordinary legal prescription can never encompass a total exception".⁵⁰⁸ This is because, as mentioned, the exception exists outside of the legal framework of the state.

⁵⁰⁷ Ibid, 36-17.

⁵⁰⁸ Schmitt, *Political Theology*, 6.

(ii) *Dominant Interpretation: Decisionism*

Although the concept of the exception is defined vaguely by Schmitt, a dominant interpretation does exist within the literature. This interpretation is relatively straightforward and relies on the fact that the exception is intertwined with Schmitt's understanding of sovereignty. As Schmitt states: "Sovereign is he who decides on the exception".⁵⁰⁹

Read literally, the exception appears to be a product of sovereign decision. Those who exercise sovereignty – i.e. the legislative and the executive – create the exception: "He [the sovereign] decides whether there is an extreme emergency as well as what must be done to eliminate it".⁵¹⁰ Here, the view is that "the exception" is, in effect, conceptually redundant. As Nomi Lazar has observed:

"Because the exception concerns the subject, and not its predicates, it has no determine metaphysical reality. It can have an infinite number of concrete manifestations. The exception has no characteristics. One cannot tell in advance what circumstances might arise... It is constituted through a decision, and not according to criteria."⁵¹¹

Indeed, even though Schmitt furnishes the exception with characteristics, these characteristics can manifest in any number of ways at any given time. More than that, as mentioned, the characteristics are vague. It is difficult to comprehend what an event that exists outside the legal order and is incapable of being fully understood could or would look like. As such, it can be argued that the exception is nothing but a conceptual ploy, designed

⁵⁰⁹ Ibid, 5.

⁵¹⁰ Ibid, 7.

⁵¹¹ Lazar, *States of Emergency*, 39.

by Schmitt to manufacture “friend-enemy” relations. Indeed, it is curious – one could even argue suspicious –, as Oren Gross has noted, that “For all its centrality and significance [in Schmitt’s Weimar work], no exhaustive and comprehensive definition can be attached to the ‘exception’”.⁵¹²

In a similar vein to Gross and Lazar, Andrew Neal has seized on the lack of detail surround Schmitt’s concept of “the exception” to pose the following questions:

“What is to say that the sovereign is *telling the truth* when he declares an exception? What is to prevent the sovereign from *falsely* or *arbitrarily* declaring an exception for political gain, especially when unlimited exceptional powers follow from such a declaration?”⁵¹³

Admittedly, there is no convincing response to these questions, given that Schmitt places no explicit requirements sovereign decision-making. In this regard, Neal is correct to conclude that, essentially, “What Schmitt constructs as an ‘objective’ problem of independently occurring exceptional events or situations actually depends on ‘subjective’ sovereign judgement”.⁵¹⁴

What these arguments establish is an interpretation of Schmitt’s concept of “the exception” that posits it as a product of decisionism. Put simply, the sovereign creates the exception, determines its significance, and decides how it should be managed.

⁵¹² Oren Gross, “The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and the “Norm-Exception” Dichotomy,” *Cardozo Law Review* 21 (1999-2000): 1832.

⁵¹³ Neal, *Exceptionalism and the Politics of Counter-Terrorism*, 74-75 (original emphasis).

⁵¹⁴ *Ibid*, 73.

Despite the influential nature of this interpretation of “the exception”, however, it will argued in Chapter Four (s.4.2) that it cannot be regarded as definitive. There is additional evidence contained within Schmitt’s Weimar work that both undermines and contradicts the decisionism point of view.

3.4. “Sovereign Dictatorship”

(i) Overview

The concept of “sovereign dictatorship” was defined by Schmitt in *Dictatorship* (1921). It exists as a fusion between dictatorship on the one hand, and sovereignty on the other. To fully understand the nature and functionality of sovereign dictatorship, it is first necessary to explain what Schmitt understood by “dictatorship” and “sovereignty”.

For Schmitt, dictatorship was not a “political catchword” or a “devious tactic” reminiscent of tyranny, but “a wise invention of the Roman Republic”.⁵¹⁵ Schmitt understood dictatorship in the classic, constitutional sense à la Article 48 (original interpretation). The dictator was a constitutionally embedded ruler who was bound by the laws of the state. When exceptional circumstances arose, the dictator was commissioned to fulfil a certain task (i.e. “wage war”, “squash an uproar”), in a specified manner.⁵¹⁶ Typically, “The dictator [could not] change the laws; neither [could] he suspend the constitution...; and he [could not] make new

⁵¹⁵ Schmitt, *Dictatorship*, xxxv & 1 & 4 & 20; Norberto Bobbio, *Democracy and Dictatorship: The Nature and Limits of State Power*, trans. Peter Kennealy (Cambridge: Polity Press, 2006), 158-161.

⁵¹⁶ Ibid (*Dictatorship*), 1.

laws”.⁵¹⁷ As Benjamin Schupmann has explained: “Schmitt conceived of dictatorship as an institution bound to realize and defend the underlying political status of a political order when exceptional circumstances rendered normal institutions incapable of doing so”.⁵¹⁸ In this regard, for Schmitt the dictator was an individual tasked with making decisions with the view of *restoring* the normal order. His was “the dictatorship of reformatations”.⁵¹⁹

For Schmitt, sovereignty was “the highest, legally independent, underived power” in the state.⁵²⁰ As he otherwise described it, sovereignty is “basically unlimited power that remain[s] above all the functions limited by rules”.⁵²¹ Drawing on the work of Thomas Hobbes and Jean Bodin, Schmitt conceptualised sovereignty as absolute and indivisible.⁵²² The sovereign has “monopoly over the last decision”.⁵²³ What Schmitt meant by this, as Böckenförde has explained, is that there exists the ability to make “a decision beyond further appeal”.⁵²⁴ The ability of the sovereign to make decisions of this nature arises out the fact that, for Schmitt, “Sovereignty emerges from a constitutive act of absolute power, made through the people”.⁵²⁵ That is, acts of sovereignty represent expressions of “originary power” (Negri).⁵²⁶

⁵¹⁷ Ibid, 4.

⁵¹⁸ Schupmann, *Carl Schmitt's State and Constitutional Theory*, 153.

⁵¹⁹ Schmitt, *Dictatorship*, xlv.

⁵²⁰ Schmitt, *Political Theology*, 17 & 6.

⁵²¹ Schmitt, *Dictatorship*, 115.

⁵²² Schmitt, *Dictatorship*, 17 & 21;

⁵²³ Schmitt, *Political Theology*, 13.

⁵²⁴ Böckenförde, “The Concept of the Political”, 42.

⁵²⁵ Schmitt, *Dictatorship*, 18.

⁵²⁶ Negri, *Insurgencies*, 8.

As mentioned, Schmitt's concept of "sovereign dictatorship" is a fusion of dictatorship and sovereignty. Unlike the classical, constitutional dictatorships of the Roman Republic, sovereign dictatorship does not seek to reform the state by restoring the normal order. Rather, sovereign dictatorship "seeks to create conditions in which a constitution – a constitution that it regards as the true one – is made possible".⁵²⁷ The sovereign dictator is able to do this because they are not restricted by law or the constitution. He can suspend and make law in the fulfilment of his duty because he is exercising the "originary power" of the state – i.e. the state's constitution-making power. Schmitt does not explain sovereign dictatorship in a great amount of detail, but he does refer to it as "the dictatorship of revolutions".⁵²⁸

(ii) *Dominant Interpretation: Monarchical Rule*

Within the contemporary literature there exists a dominant interpretation of Schmitt's concept of "sovereign dictatorship". This interpretation posits sovereign dictatorship as a mechanism that enables leaders to assume monarchical power.

The basis for this interpretation is the fact that the sovereign dictator has unrestricted extra-legal and extra-constitutional power at their disposal, akin to a monarch. As such, wielding this power – even responsibly – represents what Carl J. Friedrich has called a "disguised assumption of monarchical power".⁵²⁹ The concern among scholars, such as McCormick, is that, because the sovereign dictator is simultaneously able to make and

⁵²⁷ Schmitt, *Dictatorship*, 119.

⁵²⁸ *Ibid*, xlv.

⁵²⁹ Carl J. Friedrich, *Constitutional Government and Democracy*, 4th edn (Massachusetts: Blaisdell Publishing, 1967), 560.

suspend law, he effectively has “power to perpetually suspend and change political order”.⁵³⁰ Of course, this is entirely possible. The fusion of sovereignty and dictatorship, which is essentially a fusion of the power of creation and the power of decision, means that there is nothing to stop the sovereign dictator from attempting to “justify indefinite dictatorship”.⁵³¹ That is, there is nothing to stop him from constantly creating and suspending law because, not only does the sovereign dictator have “monopoly over the last decision”, but he essentially has a monopoly over every decision.

Despite the influential and, indeed, convincing nature of this interpretation of “sovereign dictatorship”, however, it will argued in Chapter Five (s.5.2) that it cannot be regarded as definitive. There is addition evidence contained within Schmitt’s Weimar work that both undermines and contradicts the monarchical interpretation.

Conclusion

This chapter has begun to develop the claim that what is needed to resolve the problems associated with managing Black Swans are new, dynamic strategies that: (i) take the four defining characteristics of Black Swans into account; and (ii) contain substantive instructions regarding implementation for constitutional states as crisis management actors. It has done so by considering the work Carl Schmitt produced between 1918 and 1933.

In answer to the third research sub-question, “What concepts does Carl Schmitt’s legal-political theory contain that can be used to improve how constitutional states manage

⁵³⁰ McCormick, “The Dilemmas of Dictatorship”: 169.

⁵³¹ Michael Head, *Emergency Powers in Theory and Practice: The Long Shadow of Carl Schmitt* (London: Routledge, 2016), 122; Scheuerman, *The End of Law*, 36; Lazar, *State of Emergency*, 41; Lars Vinx, “Carl Schmitt on the Limits of Direct Democracy”: 159.

Black Swans?”, it is argued that Schmitt’s concepts of “the exception” and “sovereign dictatorship”, in particular, can be used to devise new, dynamic strategies to manage Black Swans. More specifically, these concepts can be used to resolve both the Problem of Recognition and the Problem of Containment analysed in Chapter Two (s2.2 & s.2.3)

The next step in the thesis argument is to determine how Schmitt’s concept of the exception can be employed within a strategy designed to recognise Black Swans optimally (Chapter Four).

Chapter Four

Recognising Black Swans: Schmitt's "Exception"

“Many errors, in truth, can be traced to this...
that we do not apply names to things rightly.”⁵³²

Introduction

Chapter Three began to develop the claim made in Chapter One and Chapter Two: *viz.*, that what is needed to resolve the problems associated with managing Black Swans are new, dynamic strategies that: (i) take the four defining characteristics of Black Swans into account; and (ii) contain substantive instructions regarding implementation for constitutional states as crisis management actors. It did so by considering the work Carl Schmitt produced between 1918 and 1933, in particular his concepts of “the exception” and “sovereign dictatorship”. This chapter continues to develop this claim by explaining how Schmitt’s concept of the exception can be employed within a strategy designed to recognise Black Swans more optimally.

The chapter begins by recapping the Problem of Recognition (Ch.2, s.2.2). Following this, the chapter provides an alternative interpretation Schmitt’s conception of “the exception”. Contrary to the dominant interpretation, in which the exception is held to be product of sovereign decisionism (Ch. 3, s.3.3(ii)), this interpretation posits the exception as corresponding to a situation that originates independently of sovereign decisionism. The

⁵³² Benedict de Spinoza, *Ethics*, trans. R.H.M Elwes (Digireads.com Publishing: 2018), Part II: On the Origin and Nature of the Mind, pg. 45, Kindle.

primary basis for this interpretation is ambiguity surrounding translation of the word “on” in Schmitt’s statement: “Sovereign is he who decides on the exception”.⁵³³ Using this unconventional interpretation of the exception, a strategy is devised that enables constitutional states to recognise Black Swans optimally. To explain the nature of the strategy, the following are provided: (i) an overview of Black Swans as Schmittian exceptions; (ii) an explanation of how the strategy reduces fragility and demonstrates dynamic resilience; and (iii) instructions regarding implementation for constitutional states as crisis management actors. The final part of the chapter evaluates how the strategy resolves the Problem of Recognition that was analysed in Chapter Two (s.2.2). In this regard, the present chapter answers the fourth research sub-question: “How can Carl Schmitt’s concept of the “exception” be employed within a strategy designed to recognise Black Swans optimally?”.

Looking forward, Chapter Five explains how Schmitt’s concepts of sovereign dictatorship can be employed within a strategy designed to contain Black Swans optimally.

4.1. Recap: The Problem of Recognition

The Problem of Recognition is concerned with the ways in which the governments and leaders of constitutional states currently recognise Black Swans. As a reminder of what was argued in Chapter Two, the aim of crisis recognition is to reduce uncertainty by making sense of a situation, so that it can be labelled as a crisis or not. To do this, constitutional states typically use the elements of precedent and data to formulate strategies of

⁵³³ Schmitt, *Political Theology*, 5.

recognition. Precedent is concerned with previous crisis management experiences, and data focuses on details and facts.

It was argued in Chapter Two that precedent and data are sub-optimal when it comes to recognising Black Swans. This is because these elements lead to strategies that “focus on pure and well-defined ‘forms’” and “privilege them over other less elegant objects, those with messier and less tractable structures” (Taleb).⁵³⁴ That is, precedent and data lead to strategies that mistake similarity for identity, causing Black Swans to be recognised as something that they are not. The inherent bounded rationality of this approach results in a failure to take the possibility that a crisis is a Black Swan into account. Here, fragility increases and negative outcomes proliferate because of misrecognition.

Given the nature of the Problem of Recognition, what is required is a strategy that enables the governments and leaders of constitutional states to account for the possibility that a crisis is a Black Swan. To do this, there needs to be a way to recognise crises that: (a) are “novel or unprecedented... in human or crisis managers’ memories”; (b) have “unexpectedly large scale or geographic distribution”; (c) have effects that cross boundaries (i.e. are “trans-boundary”); and (d) have “consequences, which stir deep uncertainties in the minds of the public [and] challenge government structures”.⁵³⁵

This thesis argues that a strategy for recognising Black Swans can be devised using Schmitt’s conception of the exception. As a reminder, the exception consists of three defining characteristics: it is a situation that is (i) “not codified in the existing legal order”; (ii) “a case of extreme peril, a danger to the existence of the state”; and (iii) incapable of

⁵³⁴ Taleb, *The Black Swan*, xix

⁵³⁵ OECD, *Changing Face* 18-19.

“be[ing] circumscribed factually and made to conform to preformed law”.⁵³⁶ However, in order to prevent this strategy from falling into the trap of decisionism (Ch.3, s.3.3(ii)), it is necessary to re-interpret Schmitt’s concept of the exception.

4.2. The Exception: An Alternative Interpretation

The dominant interpretation of the exception within the contemporary literature posits it as a product of sovereign decision. However, despite evidence cited by scholars in support of decisionism, this interpretation of the exception cannot be regarded as definitive. The basis for this claim is translation.

In the original (German) version of *Political Theology* (*Politische Theologie*), Schmitt writes: “Souverän ist, wer über den Ausnahmezustand entscheidet”.⁵³⁷ Today, it is George Schwab’s 1985 English-language translation that is relied upon by the majority of Anglophone scholars: “Sovereign is he who decides on the exception”.⁵³⁸ However, the problem with Schwab’s translation is that it: (i) overlooks the ambiguity of the word “über”; and (ii) misinterprets the phrase “Ausnahmezustand”.⁵³⁹

In addition to being translated to mean ‘on’, “über” can also be translated to mean ‘over’ and ‘above’.⁵⁴⁰ Although some scholars, such as John P. McCormick, have chosen to

⁵³⁶ Schmitt, *Political Theology*, 6.

⁵³⁷ Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*, Zehnte Auflage (Berlin: Duncker & Humblot, 2015), 13.

⁵³⁸ Schmitt, *Political Theology*, 5.

⁵³⁹ Tracey B. Strong has drawn attention to similar issues with Schwab’s translation: Tracey B. Strong, “Foreword,” in Schmitt *Political Theology*, xiii.

⁵⁴⁰ See: “über”, Cambridge Dictionary, accessed August 17, 2023, <https://dictionary.cambridge.org/dictionary/german-english/uber>.

overlook the significance of these additional meanings,⁵⁴¹ others, such as Rachel MagShamhráin, have rightly drawn attention to them. As MagShamhráin has recently remarked:

“Also lost in the translation of Schmitt is the over or ‘über’ of his opening pronouncement: ‘Souverän ist, wer über den Ausnahmezustand entscheidet’ means literally ‘sovereign is whoever decides *over* the State of Exception... The idea of above, over, is certainly evident in idea of monarchical sovereignty, but is deliberately foreclosed in legal expressions of sovereignty in modern constitutional democracies with their apparently flattened hierarchies and distributed decision-making.”⁵⁴²

Incidentally, MagShamhráin also draws attention to the second inconsistency in Schwab’s translation.⁵⁴³ The phrase “‘Ausnahmezustand’ in fact means “state of exception”, not merely “the exception” [Ausnahme]. Indeed, on this point it is worth noting that the German construction of “Ausnahme” can be equated with the English (Latin) for “exception” [exception]. Here, *ex* = out, *ceptio* = taken; *aus* = out, *nehmen* = taken. Therefore, it follows that “Ausnahme” literally means something “taken out”.

The implication of interpreting Schmitt’s statement as “Sovereign is whoever decides *over* the *state of exception*” is that it renders the exception as a situation that originates

⁵⁴¹ McCormick, “The Dilemmas of Dictatorship”: 169.

⁵⁴² Rachel MagShamhráin, “The State of Exception Between Schmitt and Agamben: On Topographies of Exceptionalism and the Constitutionality of COVID Quarantine Measures (with Examples from the Irish Context),” *Society* 60(1): 93-105 (2023), doi: <https://doi.org/10.1007%2Fs12115-022-00766-0> (original emphasis and grammar).

⁵⁴³ In his 1970 work, *The Challenge of the Exception*, Schwab translated “Ausnahmezustand” as “State of Exception” (pg. 44). It is unclear why he changed this to “the exception” in the 1985 translation of *Political Theology*.

independently of sovereign decisionism. Indeed, the thesis argues that this is a more accurate representation of what Schmitt meant. Under this interpretation, the exception itself is not a product of sovereign decision. Rather, the state of exception is a product of sovereign decision. The sovereign uses the exception to confirm the need for a state of exception. If a situation is: (i) “not codified in the existing legal order”; (ii) “a case of extreme peril, a danger to the existence of the state”; and (iii) incapable of “be[ing] circumscribed factually and made to conform to preformed law”, then the sovereign recognises it as exceptional and a state of exception is implemented to manage it.

Evidence to support this unconventional interpretation can be found throughout Schmitt’s Weimar work. To begin with, it must be remembered that “In the exception [Ausnahme] the power of real life breaks through the crust of a mechanism that has become torpid by repetition”.⁵⁴⁴ Here, Schmitt gives the exception agency: it “breaks through” and disturbs the normal order. It is afterwards that the sovereign must decide “whether there is an extreme emergency [i.e. a state of exception] as well as what must be done to eliminate it”.⁵⁴⁵ That is, the sovereign must decide on the significance of a situation vis-à-vis the state: whether there is actually an exception to the norm – an extreme situation – or whether the situation is merely something that challenges the norm. The sovereign is the one who decides “whether [a] normal situation actually exists”.⁵⁴⁶ Schmitt also gives the exception agency when he states that “the exception *reveals* most clearly the essence of the state’s authority”.⁵⁴⁷ It is the exception that is causing something – a

⁵⁴⁴ Schmitt, *Political Theology*, 15; *Politische Theologie*, 21.

⁵⁴⁵ Ibid, 7.

⁵⁴⁶ Ibid, 13.

⁵⁴⁷ Ibid.

revelation – to happen. Therefore, it seems as if the exception corresponds to situation that originates independently of sovereign decisionism.

The distinction between extreme and non-extreme situations is important in Schmitt's thought. He is particular about whether a situation is politically intense enough to warrant intervention, writing that "not every extraordinary measure, not every police emergency measure or emergency decree, is necessarily an exception".⁵⁴⁸ What is required is a situation where "law recedes" (i.e. no longer applies) and a state of exception is required to maintain order.⁵⁴⁹ As an illustrative example, a Category 6 hurricane would be an exception, whereas a Category 5 hurricane would not.⁵⁵⁰ This is because the wind speed intensity of a Category 5 hurricane has been codified (i.e. it forms part of existing knowledge), whereas the wind speed intensity of a Category 6 hurricane has not.⁵⁵¹ As such, this type of hurricane would likely fulfil the three defining characteristics of a Schmittian exception. To begin with, as mentioned, Category 6 hurricanes do not form part of existing knowledge: they are not codified in the existing order. The impact of a Category 6 hurricane can also only be subject to speculation – it is not known. Therefore, this type of hurricane represents a danger to the existence of the state. Relatedly, Category 6 hurricanes are cannot be circumscribed factually because they are defined by an absence of knowledge and experience.

⁵⁴⁸ Ibid, 12 & 5.

⁵⁴⁹ Ibid, 12.

⁵⁵⁰ As a reminder, for information on categories of hurricanes (according to the Saffir-Simpson Hurricane Wind Scale), see: "Measuring tropical cyclones," Met Office, accessed August 22, 2023, <https://www.metoffice.gov.uk/weather/learn-about/weather/types-of-weather/hurricanes/measuring>.

⁵⁵¹ On this, see: Jeff Masters, "Hurricane Dorian Was Worthy of a Category 6 Rating," *Scientific American*, October 3, 2019, accessed August 13, 2023, <https://blogs.scientificamerican.com/eye-of-the-storm/hurricane-dorian-was-worthy-of-a-category-6-rating/>.

Ultimately for Schmitt, the sovereign's job is to "determin[e] when they [public order and security] are disturbed", not merely disrupted.⁵⁵² In other words, returning to Schmitt's constitutional theory, the sovereign must decide whether the situation in question has reached the level of intensity required to pose the "friend-enemy" question.⁵⁵³ If it has not, the situation is not an exception because there is no disruption to the normal order – to the political unity, or "friendship", of the state. In this regard, the sovereign recognises or determines the *presence* of an exception. They do not create one. As Schmitt writes, "the circumstance that requires a decision remains an independently determining moment".⁵⁵⁴

A possible objection here is, of course, the fact that sovereignty for Schmitt is "the highest, legally independent, underived power" (Ch.3, s.3.4(i)).⁵⁵⁵ As such, in theory, there would be nothing to stop the sovereign creating an exception and manufacturing an enemy. Indeed, this is what scholars who endorse decisionism contend (Ch.3, s.3.3(ii)). However, this line of argument is inconsistent with Schmitt's overall constitutional theory. If the sovereign had totally unlimited (i.e. extra-legal, extra-constitutional) power, then the exception would be a pointless concept in Schmitt's thought, as would the distinction between "friend" and "enemy". It would not matter what the sovereign did or how they decided, because they could do and decide anything. However, it must be remembered that Schmitt argues "the exception [Ausnahmestand] is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind".⁵⁵⁶ Just because sovereignty for Schmitt is non-derivative and does not depend upon law, this does not mean

⁵⁵² Schmitt, *Political Theology*, 9.

⁵⁵³ Schmitt, *The Concept of the Political*, 37-38.

⁵⁵⁴ *Ibid*, 30.

⁵⁵⁵ *Ibid*, 17.

⁵⁵⁶ *Ibid*, 12; *Politische Theologie*, 18.

that the sovereign has arbitrary and unlimited power at their disposal. Lawlessness, or extra-legality, does not mean the absence of order, but a different state of being: the state of exception. In addition, Schmitt states what characterises sovereignty in relation to the exception is “*principally unlimited authority*”, not totally unlimited power, as scholars who endorse decisionism like to think.⁵⁵⁷

In addition to evidence within Schmitt’s work, the context of the Weimar Republic also reinforces the interpretation of the exception as a concept that corresponds to situations that originate independently of sovereign decisionism. As was discussed in Chapter Three, exceptional situations were readily observable to Schmitt. Therefore, his designing of the concept of the exception was likely influenced by real-world events. For example, the 1929 economic crash was certainly a situation that: (i) could not be defined by existing legal provisions; (ii) was an existential threat to the state; and (iii) could not be factually determined or fully encompassed by existing legislation. The same can be said of hyperinflation (1920-1923) and political violence (1920-1923, 1930-1933). All of these situations were quintessential Schmittian exceptions. The point is that, like any author, Schmitt was responding to the events going on around him. Indeed, Schmitt’s critique of the nature and use of Article 48 demonstrates that he was concerned with how crises of an exceptional nature could be recognised and contained through the introduction of a state of exception (Ch.3, s.3.1(ii) & (iii)).

Following MagShamhráin’s approach and interpreting Schmitt’s statement as “Sovereign is whoever decides *over the state of exception*” renders the exception as a situation that

⁵⁵⁷ Ibid.

originates independently of sovereign decisionism. What this unconventional interpretation does is significantly weaken the claim that the exception is nothing more than a product of sovereign decisionism.

As we will see, it is possible to use MagShamhráin's interpretation of Schmitt's exception to formulate a strategy that enables the governments and leaders of constitutional states to recognise Black Swans optimally.

4.3. Black Swans as Schmittian Exceptions

(i) *The Strategy*

(a) Overview

To recognise Black Swans in an optimal manner, Schmitt's concept of the exception – read as corresponding to situation of independent origin – can be used to consider whether or not a crisis is a Black Swan. More specifically, the three defining characteristics of the exception can be used to judge if a crisis fulfils the four defining characteristics of Black Swans, as put forward by the OECD.

The benefit of using Schmitt's exception to recognise Black Swans, as opposed to relying solely on the OECD's characterisation as a check-list, is that the exception's three defining characteristics have applicability in the context of constitutional states. That is, these characteristics are not merely descriptive, but relate to the practical considerations of governments and leaders during crisis management. They can therefore be used to inform how the crisis is subsequently managed. To explain, it is necessary to demonstrate what this

thesis understands to be the relationship between the three defining characteristics of the exception and the four defining characteristics of Black Swans.

Considering the *first* defining characteristic of Black Swans: “novel or unprecedented... in human or crisis managers’ memories”.

As described in Chapter One (s.1.1(iii)), Black Swans are both unforeseeable and extreme. This relates to the idea, as Taleb has explained, that Black Swans are “outliers”: situations that constitute “large deviations” from the norm and exist “outside the realm of expectations”, where “nothing in the past can convincingly point to their possibility”.⁵⁵⁸ Here, what crisis managers do *not* know becomes more important than what they do know.⁵⁵⁹ As such, crisis managers must recognise the significance of unknowns. They must reduce uncertainty by avoiding so-called “information voids”,⁵⁶⁰ and they must undertake sense-making so that the question “What the hell is going on?” can be answered reliably.⁵⁶¹

An optimal way to assess whether a crisis is “novel or unprecedented” is by asking whether the crisis is “not codified in the existing legal order”. The idea that a situation falls outside of the legal order can be used to recognise whether or not a crisis is a Black Swan. This is because, for governments and leaders, the legal order represents the normal state of things – it is a codification of precedent, of convention, of routine. More precisely, the legal order forms part of a state’s “constitutionality” (Pierson).⁵⁶² As explained in Chapter Two, constitutionality corresponds to “The idea that the state constitutes a distinct and rule-

⁵⁵⁸ Taleb, *The Black Swan*, xvii-xix.

⁵⁵⁹ *Ibid*, xix.

⁵⁶⁰ Coombs, *Ongoing Crisis*, 157.

⁵⁶¹ Boin et al., *The Politics of Crisis Management*, 18.

⁵⁶² Pierson, *The Modern State*, 15.

governed domain... ”.⁵⁶³ As such, the legal order provides a reliable standard against which to judge when it comes to state-led crisis management. Anything outside of the state’s legal order would likely be “novel or unprecedented... in human or crisis managers’ memories”. Therefore the possibility that a crisis is a Black Swan could be taken into account. Not only this, but the legal order also determines what can and cannot be done in terms of crisis management. As such, managers would be able to assess (i) whether or not a crisis is a Black Swan, and (ii) whether or not they have the tools to manage the situation in question.

Considering the *second* and *third* defining characteristics of Black Swans: “unexpectedly large scale or geographic distribution” and “trans-boundary”.

As described in Chapter One (s.1.1(iii)), Black Swans cross both geographic and administrative boundaries. This means that regional, national, and international authorities often need to work together to manage them. Here, again, governments and leaders must reduce uncertainty.

An optimal way to assess whether a crisis is of “unexpectedly large scale or geographic distribution” and exist “trans-boundary” is to ask whether the situation can be “circumscribed factually and made to conform to preformed law”. If more is unknown about the situation than is known about the situation, and if current legal provisions cannot be applied to manage it, then there is a possibility that the crisis is a Black Swan. This is because these considerations suggest that the situation in question cannot be determined factually, akin to most other crises. National laws are insufficient because they do not and cannot be

⁵⁶³ Ibid.

applied internationally. Rather, collaboration between states and international organisations is required to make sense of a crisis.

Of course, it would be reasonable to claim that a crisis be confirmed as “unexpectedly large scale” and “trans-boundary” visually, simply by observing it, without the need to employ Schmitt’s concept of the exception. However, it must be remembered that governments and leaders are prone to “satisficing” when it comes to crisis recognition (Ch.2, s.2.2(iii)).⁵⁶⁴ That is, they prioritise what they see, in order of when they see it, so that crisis management can be undertaken as quickly as possible. As such, while there is a possibility of noticing that a crisis is large scale and affecting multiple countries, there is also a possibility of failing to recognise that a crisis is of unexpected scale and is crossing not just national (geographical) boundaries, but administrative ones also. Indeed, as discussed in previous chapters, it was a failure to recognise the unexpected and global scale of COVID-19 that caused it to be treated as medically and socially akin to influenza.

Considering the *fourth* defining characteristic of Black Swans: “consequences, which stir deep uncertainties in the minds of the public [and] challenge government structures”.

As described in Chapter One (s.1.1(iii)), Black Swans create fragility by exposing vulnerability within the state. They affect how people live and drastically alter how the state is led. This creates high levels of uncertainty, and, once again, governments and leaders must reduce uncertainty.

An optimal way to assess whether a crisis “has [or could have] consequences, which stir deep uncertainties in the minds of the public [and] challenge government structures” is

⁵⁶⁴ Simon, “Rational choice and the structure of the environment”: 129.

to ask whether or not it represents “a case of extreme peril, a danger to the existence of the state”. If the crisis in question requires governments and leaders to diverge from the rule-based order, because current legal provisions cannot be applied, then there is a possibility that the crisis is a Black Swan. This is because diverging from the rules-based order is not normally permissible. Government structures have been challenged and there is deep uncertainty about what is going on and how the crisis could and should be managed.

This explanation has demonstrated what this thesis understands to be the relationship between the three defining characteristics of the exception and the four defining characteristics of Black Swans. The former three characteristics can be used to assess whether or not the latter four are present, thereby enabling government and leaders to recognise whether or not a crisis is a Black Swan.

This strategy moves beyond the descriptive nature of existing literature on Black Swans by incorporating substantive and practical aspects of state-led crisis management. As we will see now, this enables the exception strategy to be implemented in a fairly straightforward manner.

(b) Instructions for Implementation

It was demonstrated in Chapter One that existing literature on Black Swans lacks substantive instructions for constitutional states as crisis management actors. Currently, there are no instructions to give prescriptive guidance to governments and leaders on how to recognise this type of crisis.

To address this limitation of the existing literature and drawing on Schmitt's conception of the state of exception, this thesis provides explicit instructions for governments and leaders on how to implement the strategy of recognition outlined above. In a similar vein to the crisis prescriptions approach, they are general in applicability but precise in application (Ch.1, s.1.2(ii)(a)).

To implement the exception strategy, governments and leaders should ask the following three questions at the beginning of any crisis, during the sense-making process, and at any moment when new uncertainties arise or existing uncertainties intensify:

1. Is the situation in question (i.e. the crisis) codified in the existing legal order?;
2. Can the situation in question (i.e. the crisis) be circumscribed factually and made to conform to preformed law?;
3. Does the situation in question (i.e. the crisis) represent a case of extreme peril: is it a danger to the existence of the state?

If the answer to questions one and two is 'no' and question three 'yes', then the crisis is a Black Swan. Should the answer to either question one and two be 'yes' and/or three 'no', then it is unlikely that a crisis is a Black Swan.

Importantly, there are three caveats. First of all, even when it is unlikely that a crisis is a Black Swan, this does not mean that it will not become a Black Swan subsequently. Crises are unpredictable and this is why, as mentioned, the three questions should be asked continually, whenever new uncertainties arise or existing uncertainties intensify. Second of all, although these questions do not need to be asked in any particular order, they should always be asked together. Only this way can the governments and leaders of constitutional

states accurately evaluate whether or not a crisis is a Black Swan. Third of all, these questions do not represent an infallible guide to determining the presence of a Black Swan. Rather, they provide reference points for government and leaders (i.e. sovereigns) to use during the crisis recognition phase of crisis management.

Used in conjunction with existing crisis management strategies, these questions minimise the possibility of a Black Swan being overlooked. They do so by helping to ensure that, at any given moment, more is known about a crisis than is unknown about a crisis. As Coombs has remarked, “A crisis cannot be managed effectively if an organization is blind to its details”.⁵⁶⁵ In this regard, the questions act as a safety net to prevent unknown aspects from leading to a proliferation of “negative outcomes” (OECD).⁵⁶⁶

Of course, there is always the possibility that governments and leaders make a mistake when answering one or more of these questions. Question three is particularly susceptible to this. Given the complexity of crises in general, it may be difficult to discern whether or not the situation in question represent an extreme threat to the existence of the state. However, when it comes to Black Swans, arguably it is better to take the possibility that a crisis is a Black Swan into account imperfectly, than to not take it into account at all.

To demonstrate how the exception strategy could be used to recognise a Black Swan, the three questions noted above will be applied now to the UK’s management of the COVID-19 pandemic.

⁵⁶⁵ Coombs, *Ongoing Crisis*, 154.

⁵⁶⁶ OECD, *States of Fragility 2022*.

The first confirmed cases of COVID-19 infection were detected in the UK on 29th January 2020.⁵⁶⁷ At this point in time, the answer to the three questions, in order, was: Yes, COVID-19 was codified in the existing legal order because it was being recognised as influenza;⁵⁶⁸ Yes, the number of confirmed cases in the UK could be factually determined and quarantine measures were introduced under the Public Health (Control of Diseases) Act 1984;⁵⁶⁹ and No, the situation was, it seemed, under control. COVID-19 did not represent a case of extreme peril: it was not a danger of the existence of the state. Therefore, it was unlikely that COVID-19 was a Black Swan.

On March 16th, estimated daily infections had reached 64,498.⁵⁷⁰ At this point in time, the answer to the three questions, in order, was: No, COVID-19 was not codified in the existing legal order because UK PM Boris Johnson had taken the unprecedented step of telling the British public to avoid all non-essential contact;⁵⁷¹ No, the number of cases could

⁵⁶⁷ Evie Aspinall, "COVID-19 Timeline," British Foreign Policy Group (BFPG), accessed August 22, 2023, <https://bfpfg.co.uk/2020/04/covid-19-timeline/>.

⁵⁶⁸ Rachel Wearmouth, "Boris Johnson 'Dismissed Covid As Swine Flu and Joked He Would Be Injected Live On TV'," *Huffpost*, 26th May, 2021, accessed May 21, 2023, https://www.huffingtonpost.co.uk/entry/cummings-boris-injected-covid_uk_60ae0424e4b019ef10e12d5e.

⁵⁶⁹ "Coronavirus: Britons evacuated from Wuhan arrive at quarantine facility," *BBC News*, 31st January, 2020, accessed August 13, 2023, <https://www.bbc.co.uk/news/uk-51318691>.

⁵⁷⁰ Jonathan Calvert, George Arbuthnott, Jonathan Leake, and Dipesh Gadher, "22 days of dither and delay on coronavirus that cost thousands of British lives," *The Times*, May 23, 2022, accessed August 23, 2023, <https://www.thetimes.co.uk/article/three-weeks-of-dither-and-delay-on-coronavirus-that-cost-thousands-of-british-lives-05sjvwv7g>.

⁵⁷¹ "Prime Minister's statement on coronavirus (COVID-19): 16 March 2020," UK Government, accessed August 23, 2023, <https://www.gov.uk/government/speeches/pm-statement-on-coronavirus-16-march-2020>.

not be factually determined due to a lack of testing;⁵⁷² secondary legislation had to be introduced to address the crisis;⁵⁷³ and No, although cases had begun to surge, arguably the situation was still under control. COVID-19 did not represent a case of extreme peril and/or a danger to the existence of the state because normal life continued. Therefore, it was still unlikely that COVID-19 was a Black Swan.

On March 23rd, estimated daily infections had reached 286,527.⁵⁷⁴ At this point in time, the answer to the three questions, in order, was: No, COVID-19 was not codified in the existing legal order because UK PM Boris Johnson had had announce a nation-wide lockdown;⁵⁷⁵ No, the number of cases could not be determined, still because of a lack of testing; Yes, more legislation had been introduced and was going to be introduced to manage the crisis, including the Coronavirus Act 2020 (March 25th, 2020).⁵⁷⁶ The situation was no longer under control. COVID-19 did now represent an extreme threat to the

⁵⁷² Gareth Lacobucci, "Covid-19: Lack of capacity led to halting of community testing in March, admits deputy chief medical office," *British Medical Journal* 369 (2020), doi: <https://doi.org/10.1136/bmj.m1845>.

⁵⁷³ In particular: Health Protection (Coronavirus) Regulations (10th February, 2020); Health Protection (Notification) (Amendment) Regulations 2020 (6th March, 2020); The Employment and Support Allowance and Universal Credit (Coronavirus Disease) Regulations 2020 (12th March, 2020); The Statutory Sick Pay (General) (Coronavirus Amendment) (No.2) Regulations 2020 (16th March 2020).

⁵⁷⁴ Calvert et.al, "22 days of dither and delay".

⁵⁷⁵ "Prime Minister's statement on coronavirus (COVID-19): 23 March 2020," UK Government, accessed February 12, 2022, <https://www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-23-march-2020>.

⁵⁷⁶ In particular: The Single Use Carrier Bags Charges (England) (Amendment) Order 2020 (20th March, 2020); The Financial Services and Markets Act 2000 (Exemption) (Amendment) Order 2020 (20th March, 2020); Health Protection (Coronavirus Business Closure) (England) Regulations 2020 (23rd March, 2020); The Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2020 (23rd March, 2020); The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (26th March, 2020).

existence of the state because normal life was severely disrupted and the government had resorted to ruling by decree. Here there was enough certainty to recognise COVID-19 as a Black Swan. Indeed, such a high degree of certainty was arguably present between March 16th and March 23rd, when estimated infections were rising exponentially. If the three questions had been asked during this time of increasing uncertainty, crisis containment could have been undertaken earlier and thousands of lives may have been saved.⁵⁷⁷

Using the COVID-19 pandemic to demonstrate how the exception strategy could be used to recognise a Black Swan has revealed how relatively straightforward the strategy would be to implement. The governments and leaders of constitutional states could follow the instructions outlined above to ensure that the possibility a crisis is a Black Swan is taken into account.

(ii) *Fragility and Dynamic Resilience*

In Chapter Two it was explained that the current way in which the governments and leaders of constitutional states recognise Black Swans is sub-optimal. This is primarily because the strategies of recognition that they employ fail to reduce fragility and are only capable of demonstrating static resilience, where the focus is on “maintain[ing] and restor[ing] equilibrium conditions [and] encourage[ing] institutional-path dependence”.⁵⁷⁸

⁵⁷⁷ Calvert et.al, “22 days of dither and delay”; Heather Steward and Ian Sample, “Coronavirus: enforcing UK lockdown one week earlier ‘could have saved 20,000 lives,” *The Guardian*, June 11th, 2020, accessed August 24, 2023, <https://www.theguardian.com/world/2020/jun/10/uk-coronavirus-lockdown-20000-lives-boris-johnson-neil-ferguson>.

⁵⁷⁸ Ansell and Trondal, “Governing Turbulence”: 50.

It has been argued that what is needed to manage Black Swans optimally are strategies that are capable of demonstrating dynamic resilience. To recap, dynamic resilience is concerned with “building flexibility into... institutional arrangements by... maintaining multiple repertoires that can be flexibly redeployed to meet changing circumstances”.⁵⁷⁹ Indeed, the distinguishing feature of dynamic resilience is flexibility. Black Swans require flexibility because their impact is extreme and current institutional responses are problematic (Ch.2). It is by providing governments and leaders with flexibility that dynamic resilience reduces fragility.

The strategy of recognition described above is capable of reducing fragility and demonstrating dynamic resilience. This is because this strategy enables the governments and leaders of constitutional states to recognise whether or not a crisis is a Black Swan. Here, “the combination of exposure to risk” that defines “fragility” is lowered (OECD).⁵⁸⁰ This is because the potential for “anti-knowledge” is taken into account (Taleb).⁵⁸¹ That is, the presence of known-unknowns is explicitly factored in to the crisis recognition process. As a result, potential “information voids” are avoided and the question “What the hell is going on?” can be answered more reliably. In other words, the “coping capacity of the state” is increased by the ability of government and leaders to check whether or not a crisis is a Black Swan (OECD).⁵⁸²

⁵⁷⁹ Ibid.

⁵⁸⁰ OECD, *States of Fragility 2022*.

⁵⁸¹ Taleb, *The Black Swan*, xvii-xix.

⁵⁸² OECD, *States of Fragility 2022*.

The resilience demonstrated by the exception strategy is dynamic because it introduces flexibility into the crisis recognition process. Rather than relying solely on the elements of precedent and data, which concentrate on what is *known* (i.e. historical fact and scientific proof), the exception strategy seeks to uncover the presence of what is *not known*: what is exceptional in the context of crisis recognition. By enabling governments and leaders to determine the limits of their knowledge, they are better placed to “absorb or mitigate those risks” associated with fragility (OECD).⁵⁸³ In this regard, the exception strategy is an addition to constitutional states’ current crisis management strategies: “repertoires that can be flexibly redeployed to meet changing circumstances.”⁵⁸⁴

Like any crisis management strategy the exception strategy is not meant to act as a catch-all provision. It cannot guarantee the recognition of a Black Swan. However, what it can do is provide an optimal way for governments and leaders to take the four defining characteristics of Black Swans into account during the crisis recognition phase. As discussed in Chapter One and Chapter Two, this is something that is missing from: (i) strategies proposed within the existing literature (s.1.3); and (ii) strategies currently used by constitutional states (s2.1(iii)). The exception strategy is therefore an improvement to discourses on, and practices relating to, the management of Black Swans.

⁵⁸³ Ibid.

⁵⁸⁴ Ansell and Trondal, “Governing Turbulence”: 50.

4.1. Resolving the Problem of Recognition

It has been established so far in this chapter that the exception strategy (i) addresses the four defining characteristics of Black Swans; (ii) can be implemented in a relatively straightforward manner by constitutional states as crisis management actors; and (iii) is capable of reducing fragility and demonstrating dynamic resilience. In this respect, the exception strategy can be considered optimal when it comes to recognising Black Swans.

However, it must still be shown that the exception strategy resolves ‘The Problem of Recognition’. That is, the strategy must be able to overcome problems associated with “Platonicity” (Ch.2, s.2.2)). After all, it is these problems that render precedent and data sub-optimal when it comes to crisis recognition.

As a reminder, Platonicity relates to a “tendency to mistake the map for the territory, to focus on pure and well-defined ‘forms’, whether objects, like triangles, or social notions, like utopias” and “privilege them over other less elegant objects, those with messier and less tractable structures” (Taleb).⁵⁸⁵ In the context of crisis recognition, it is the focus on “pure and well defined ‘forms’” – on historical fact and scientific proof – that causes precedent and data to be problematic. The “narrowed perception” (Watts) that results from Platonicity causes governments and leaders to overlook the significance of anti-knowledge.⁵⁸⁶ Here, similarities between crises are used as a basis for identification. It has been argued that this occurs because decision-makers’ rationality is bounded by the need to make decisions quickly during a crisis (Ch.2, s. 2.2(iii)). In other words, governments and leaders plug

⁵⁸⁵ Taleb, *The Black Swan*, xxv.

⁵⁸⁶ Watts, *The Book On The Taboo*, 31.

information voids by “satisficing” (Simon): they opt for a satisfactory, as opposed to an optimal, way to recognise a crisis.⁵⁸⁷ When a crisis is a Black Swan, satisficing leads to an increase in fragility because, ultimately, a crisis is recognised as something that it is not.

The exception strategy can resolve the problem of Platonicity because it enables governments and leaders to focus on those “less elegant objects... with messier and less tractable structures”. That is, by asking the three questions outlined above, governments and leaders can use anti-knowledge strategically during crisis recognition. Their perception is widened so that what is not known is treated with the same significance as what is known. Here, rationality is unbounded because historical fact and scientific proof are not exclusively relied upon to recognise a crisis. In theory, this has the potential to reduce “satisficing” because the criteria for what can be considered satisfactory is more substantive. That is, it would be more difficult to misrecognise a Black Swan because the possibility that a crisis is a Black Swan is explicitly being taken into account.

Of course, the need for governments and leaders to make decisions quickly during a crisis remains constant. However, as has been explained above, the exception strategy is relatively straightforward to implement and follow. Asking the three questions when a crisis emerges and again when new uncertainties arise or existing uncertainties intensify is not particularly time consuming. Indeed, it is the potential of this strategy to reduce fragility in such a quick and straightforward manner that makes it optimal for constitutional states as crisis management actors.

⁵⁸⁷ Simon, “Rational choice and the structure of the environment”: 129.

Conclusion

This chapter has continued to develop the claim made in Chapter One and Chapter Two: *viz.*, that what is needed to resolve the problems associated with managing Black Swans are new strategies that: (i) take the four defining characteristics of Black Swans into account; and (ii) contain substantive instructions regarding implementation for constitutional states as crisis management actors. It has done so by explaining how Schmitt's concept of the exception can be employed within a strategy designed to recognise Black Swans optimally.

In answer to the fourth research sub-question, "How can Carl Schmitt's concept of the "exception" be employed within a strategy designed to recognise Black Swans optimally?", it is argued that interpreting the exception as a situation that originates independently of sovereign decisionism enables governments and leaders to use it as a way of assessing whether or not a crisis is a Black Swan. In this regard, the strategy resolves the Problem of Recognition explained in Chapter Two by providing a way for constitution states to reduce fragility and demonstrate dynamic resilience.

The next step in the thesis argument is to determine how Schmitt's concept of the sovereign dictatorship can be employed within a strategy designed to contain Black Swans optimally (Chapter Five).

Chapter Five

Containing Black Swans: Schmitt's "Sovereign Dictatorship"

“No policy that does not rest upon some philosophical public opinion
can be permanently maintained.”⁵⁸⁸

Introduction

Chapter Four continued to develop the claim made in Chapter One and Chapter Two: *viz.*, that what is needed to resolve the problems associated with managing Black Swans are new, dynamic strategies that: (i) take the four defining characteristics of Black Swans into account; and (ii) contain substantive instructions regarding implementation for constitutional states as crisis management actors. It did so by using Schmitt's concept of “the exception” to devise a new strategy that enables constitutional states to recognise Black Swans optimally. This chapter finishes developing this claim by explaining how Schmitt's concept of “sovereign dictatorship” can be employed within a strategy designed to contain Black Swans optimally.

The chapter begins by recapping the Problem of Containment (Ch.2, s.2.3). Following this, the chapter provides an alternative interpretation of Schmitt's concept of “sovereign dictatorship”. Contrary to the dominant interpretation, in which sovereign dictatorship is viewed as mechanism for monarchical rule, this interpretation posits sovereign dictatorship

⁵⁸⁸ Abraham Lincoln. *Speech at New Haven* (1860), available at:
<https://www.historyplace.com/lincoln/haven.htm>, accessed July 7, 2022.

as a mechanism for democratic acclamation. The basis for this interpretation is the distinction between power and authority, which is often overlooked by those studying Schmitt's work. Using this unconventional interpretation of sovereign dictatorship, a strategy is devised that enables constitutional states to contain Black Swans optimally. To explain the nature of the strategy, the following are provided: (i) an overview of rule by acclamation; (ii) an explanation of how the strategy reduces fragility and demonstrates dynamic resilience; and (iii) instructions regarding implementation for constitutional states as crisis management actors. The final part of the chapter evaluates how the strategy resolves the Problem of Containment that was analysed in Chapter Two (s.2.3). In this regard, the present Chapter answers the fifth and final research sub-question: "How can Carl Schmitt's concept of "sovereign dictatorship" be employed within a strategy designed to contain Black Swans optimally?"

5.1. Recap: The Problem of Containment

The problem of Containment concerns the ways in which the governments and leaders of constitutional states currently contain Black Swans. As a reminder of what was explained in Chapter Two, the aim of crisis containment is to quickly respond to a crisis and stop it spreading. This is to be done in a way that demonstrates robust leadership in the eyes of the public. That is, in a way that does not contravene the rule of law, democratic accountability, and a separation of powers. To do this, constitutional states typically employ legislative emergency powers and state of emergency powers to formulate strategies of containment.

It was argued in Chapter Two that both kinds of emergency powers are sub-optimal when it comes to containing Black Swans. This is because they lead to: (i) expansionism,

where legislative and state of emergency powers cause a proliferation of law and rule by decree becomes the norm; and (ii) permanence, where legislative and state of emergency powers are retained – either in part or in full – once a crisis has passed, to the detriment of fundamental rights and freedoms. In both cases, fragility increases and negative outcomes proliferate because executive power is aggrandised legitimately, under the guise of legality. Here, governments and leaders are emboldened to abuse state power for personal and/or political gain (Ch.2, s.2.1(i)).

What is required to resolve the Problem of Containment is a strategy that enables the governments and leaders of constitutional states to contain Black Swans without engaging in expansionism and permanence – whether intentionally or unintentionally. As a reminder, Black Swans are crises that are: (a) “novel or unprecedented... in human or crisis managers’ memories”; (b) have “unexpectedly large scale or geographic distribution”; (c) have effects that cross-boundaries (i.e. exists “trans-boundary”); and (d) have “consequences, which stir deep uncertainties in the minds of the public [and] challenge government structures”.⁵⁸⁹

This thesis argues that a strategy for containing Black Swans can be devised using Schmitt’s concept of sovereign dictatorship. As was explained in Chapter Three, sovereign dictatorship is a mechanism for exercising popular sovereignty in times of crisis. A sovereign dictator can resolve the state’s entire existing order by assuming its constituent power.⁵⁹⁰ Therefore, unlike the constitutional dictators of Ancient Rome, the sovereign dictator is not constrained by a state’s legal or constitutional order. However, in order to prevent this

⁵⁸⁹ OECD, *Changing Face* 18-19.

⁵⁹⁰ Schmitt, *Dictatorship*, 119; Bobbio, *Democracy and Dictatorship*, 162.

strategy from falling into the trap of monarchical rule (Ch.3, s.3.4(ii)), it is necessary to endorse an alternative interpretation of Schmitt's concept of sovereign dictatorship.

5.2. Sovereign Dictatorship: An Alternative Interpretation

As explained in Chapter Three, sovereign dictatorship is a complex and ambiguous concept in Schmitt's legal-political theory. The dominant interpretation of sovereign dictatorship that has emerged within the contemporary literature posits it as a mechanism that enables leaders to assume monarchical power. Most Schmittian scholars regard the sovereign dictator as someone who is able to exercise extra-legal, extra-constitutional powers in an arbitrary manner. However, not all Schmittian scholars share this view and, as such, the dominant interpretation cannot be regarded as definitive.

For instance, Andreas Kalyvas has argued that sovereign dictatorship is an instrument of popular sovereignty. By drawing attention to what Schmitt calls "apocryphal" acts of sovereignty,⁵⁹¹ Kalyvas notes that "even under conditions of normal politics the people need, for reasons of democratic legitimacy, to periodically rise from within the constituted powers".⁵⁹² That is, the people need to exercise free will and express ideals outside of normal procedural-institutional channels on issues relating the political identity of the state.⁵⁹³ Such issues may be social, cultural, legal, or party-political in nature. Whatever they are, expressing concern over these issues represents a passive demonstration of constituting, or constituent, power (i.e. people power). In Kalyvas' words:

⁵⁹¹ Schmitt, *Constitutional Theory*, 55; 155-156; 190; 215-216.

⁵⁹² Kalyvas, *Politics of the Extraordinary*, 176. See also, more generally: Kalyvas, "Carl Schmitt and Three Moments of Democracy"; Rasch, "Carl Schmitt's Defense of Democracy".

⁵⁹³ Schmitt, *Constitutional Theory*, 138.

“people... voice their sovereign will and recover parts of their constituent power”.⁵⁹⁴ Indeed, this is why Schmitt calls these expressions of constituent power “apocryphal”. Although they occur extra-institutionally, at what Renato Cristi has called “the margins of normal constitutional life,”⁵⁹⁵ these expressions relate directly to the political identity of the state. They are “tiny but important manifestations of democratic resistance to and within proceduralism” (Kalyvas).⁵⁹⁶ As such, apocryphal acts are to be taken seriously. As explained in Chapter Three (s.3.2), any kind of friction within the state has the potential to intensify and transform into a conflict between “friend” and “enemy”. A protest, for example, can quickly turn into a riot, leading to civil unrest and potential revolution.⁵⁹⁷

Under this ‘democratic interpretation’, the power exercised by the sovereign dictator appears arbitrary because his task is to use constituent power to recognise and respond to what are essentially sporadic, extra-institutional eruptions of constituent power that have the potential to fracture the “political unity and social order” of the state.⁵⁹⁸ As Schmitt puts it, the purpose of sovereign dictatorship is to “resolve” the existing order by “creat[ing] conditions in which a constitution – a constitution that it regards as the true one – is made possible”.⁵⁹⁹ Simply put, the sovereign dictator’s task is to align positive constitution and ideal constitution so that the state does not fail. In this regard, the

⁵⁹⁴ Kalyvas, *Politics of the Extraordinary*, 177.

⁵⁹⁵ Cristi, *Carl Schmitt and Authoritarian Liberalism*, 115.

⁵⁹⁶ Kalyvas, *Politics of the Extraordinary*, 176-177.

⁵⁹⁷ An example is the Arab Spring (2010-2013). See: “Arab Spring,” *Britannica*, accessed 13th September, 2023, <https://www.britannica.com/event/Arab-Spring>.

⁵⁹⁸ Schmitt, *Constitutional Theory*, 59-60.

⁵⁹⁹ Schmitt, *Dictatorship*, 119.

sovereign dictator engages in what can be termed 'rule by acclamation' in response to fluctuations of popular will.

Additional material that explains and reinforces the democratic interpretation of sovereign dictatorship can be found throughout Schmitt's Weimar work. To begin with, it is notable that at various points Schmitt explicitly identifies democracy, rather than monarchy, as the basis for legitimacy in modern states. This is important because, as Pierson observes, legitimacy "impl[ies] that, under normal circumstances and for most people, the actions of the state and its demands upon its population will be accepted or, at least, not actively resisted" (Pierson).⁶⁰⁰ For example, in *Political Theology* Schmitt writes that "If viewed from [the] perspective of the history of ideas... the idea that all power resides in the *pouvoir constituant* [constituent power] of the people [means] that the democratic notion of legitimacy has replaced the monarchical".⁶⁰¹ Similarly, in *The Crisis of Parliamentary Democracy* he writes that "Neither could the theory nor the practice of constitutional and international law could get along without a concept of *legitimacy* and for that reason it is important that the dominant concept of legitimacy today is in fact democratic".⁶⁰² These comments suggest that Schmitt understood the relationship between the sovereign and the people as reciprocal, as opposed to autocratic. This renders the interpretation of sovereign dictatorship as a mechanism that enables leaders to assume monarchical power both inconsistent and contradictory. This is because it makes no sense to frame a concept in monarchical terms and at the same time admit that democracy is the basis for legitimacy in modern states. Indeed, the inconsistency of the monarchical interpretation becomes more

⁶⁰⁰ Pierson, *The Modern State*, 18.

⁶⁰¹ Schmitt, *Political Theology*, 51.

⁶⁰² Schmitt, *The Crisis of Parliamentary Democracy*, 30 (original emphasis).

pronounced when one analyses Schmitt's understanding of the relationship between a people, democracy, constitutionalism, and constituent power.

For Schmitt, a people exists (i) "above" the constitution; (ii) "within" the constitution; and (iii) "anterior to" (or alongside) the constitution.⁶⁰³ As Kalyvas has explained, clarifying Schmitt, a people "above" the constitution relates to "the extraordinary, instituting moment of democratic founding... the normative content of political self-determination".⁶⁰⁴ This corresponds to constitution in the positive sense (Ch.3, s.3.2(i)). A people "within" the constitution relates to "normal, procedural, every day, institutionalized politics... integrated in a self-sustained political system".⁶⁰⁵ This corresponds to constitution in the relative sense (Ch.3, s.2.3(ii)). A people "alongside" the constitution relates to "undertaking 'moment[s] of spontaneous forms of popular mobilization and informal direct participatory intervention".⁶⁰⁶ This corresponds to constitution in the ideal sense (Ch.3, s.2.3(iii)). Each of these relationships, or "moments of democracy" as Kalyvas calls them,⁶⁰⁷ represent an expression of constituent power. They are how a people expresses its will and demonstrates sovereignty.

It is the notion of a people "alongside" the constitution that is relevant to the present discussion. This is because it is here that Schmitt demonstrates the link between "apocryphal" acts of sovereignty and acclamation. Schmitt states that "[The people] can *acclaim* in that they express their consent or disapproval by a simple calling out, calling higher or lower, celebrating a leader or a suggestion... or denying the acclamation by silence

⁶⁰³ Schmitt, *Constitutional Theory*, Chapter 18.

⁶⁰⁴ Kalyvas, "Three Moments of Democracy": 1530; Schmitt, *Constitutional Theory*, Chapter 8.

⁶⁰⁵ Ibid (Kalyvas); Ibid (Schmitt), 269.

⁶⁰⁶ Ibid (Kalyvas); Ibid (Schmitt), Chapter 18.

⁶⁰⁷ Ibid (Kalyvas),

or complaining”.⁶⁰⁸ However, they can only do this when “genuinely assembled”, by which Schmitt means that they “do not *only* appear as an organized interest group, for example, during street demonstrations and public festivals, in theatres, on the running track, or in the stadium”.⁶⁰⁹ This is because only in this form can the people be “at least potentially, a political entity”.⁶¹⁰ What Schmitt is referring to here are physical protests, which would have been the common way to undertake apocryphal acts of sovereignty in the 1920s. As Mitchell Dean has explained, “chants, hand gestures, and the waving of flags and handkerchiefs” would have been the common mode of acclamation.⁶¹¹ Today, however, acclamation also takes the form of: (i) “public opinion formed through the mass media”; and (ii) “social media” where it is possible to ‘follow’ and be followed, to ‘friend’ and ‘unfriend’, like and dislike and express opinions in a virtual public domain at almost any time and anywhere” (Dean).⁶¹²

What Schmitt’s discussion of “apocryphal” acts of sovereignty and acclamation shows is that a democratic interpretation of sovereign dictatorship is certainly viable. Schmitt spends a lot of time developing concepts and ideas that enable sovereign dictatorship to be understood as a tool of popular sovereignty, as opposed to a mechanism that enables leaders to assume monarchical power.

⁶⁰⁸ Schmitt, *Constitutional Theory*, 272 (original emphasis).

⁶⁰⁹ *Ibid* (emphasis added).

⁶¹⁰ *Ibid*.

⁶¹¹ Mitchell Dean, “Three Forms of Democratic Political Acclamation,” *Telos* 179 (2017): 9, doi: <http://dx.doi.org/10.3817/0617179009>.

⁶¹² *Ibid*.

Another piece of evidence that supports the alternative (democratic) interpretation of sovereign dictatorship concerns the distinction between power and authority. This distinction is often overlooked in Schmitt work,⁶¹³ yet it has significant implications for the present discussion.

According to Bertrand de Jouvenel, power is concerned with forcible relations between members of a group, whereas authority is concerned assent between members of a group. Authority is “the efficient cause of voluntary relations”.⁶¹⁴ As explained in Chapter Three (s.3.4), under the dominant interpretation the sovereign dictator is posited as all powerful because he is exercising “the highest, legally independent, underived power”.⁶¹⁵ As such, it would seem that the sovereign dictator is indeed akin to a monarch: he can force his will onto members of a group and is not subject to the normal constraints of the constitutional or legal order.

However, this reading overlooks the fact that Schmitt regards sovereign dictatorship as a commissarial enterprise.⁶¹⁶ According to Schmitt, the sovereign dictator, like any other dictator, is commissioned in his role by the constituent power (i.e. the people).⁶¹⁷ As such, “the power assumed [by the sovereign dictator] is one that, without being itself constitutionally established, nevertheless is associated with any existing constitution in such a way that it appears to be foundational to it”.⁶¹⁸ Effectively what Schmitt is talking about

⁶¹³ A notable exception is David Boucher, “Schmitt, Oakeshott and the Hobbesian legacy”, 123-152.

⁶¹⁴ Bertrand de Jouvenel, *Sovereignty: An Inquiry into the Political Good*, trans. J.F. Huntington (Chicago: Chicago University Press, 1997), 35.

⁶¹⁵ Schmitt, *The Concept of the Political*, 17 & 6.

⁶¹⁶ Schmitt, *Dictatorship*, 119-120.

⁶¹⁷ *Ibid*, 119.

⁶¹⁸ *Ibid*.

here is authority. The sovereign dictator exercises “principally unlimited authority”.⁶¹⁹ It is authority because the sovereign dictator is exercising the constituting power of the people. The authority is *principally* unlimited because it is being exercised in relation to a specific task: “resolv[ing]” the existing order through the management of an exception. As Schmitt remarks, “there is an absolute balance between the task and the authorisation, discretion and empowerment, commission and authority”.⁶²⁰

In this regard, the commissarial nature of sovereign dictatorship represents a relationship of reciprocity, being essentially democratic in nature. Indeed, Benjamin Schupmann has gone so far as to argue that the commissarial relationship provides the people with “veto” power over the sovereign dictator’s actions.⁶²¹ This certainty fits with the aforementioned discussion on acclamation. If the people can “express their consent or disapproval” by assembling together in public, then it follows that a large enough gathering has the potential to put pressure on the sovereign dictator and force him to abandon a certain course of action. That is, the people can withdraw their support and undermine his sense of authority. This refutes the claim made by John P. McCormick that the sovereign dictator is able to “*perpetually* suspend and change political order”.⁶²²

Two real-life examples of “veto” power in action were protests in China against the Zero-Covid strategy and initial protests in Israel over reforms to the judiciary.⁶²³ In both

⁶¹⁹ Schmitt, *Political Theology*, 12.

⁶²⁰ Schmitt, *Dictatorship*, xliii.

⁶²¹ Schupmann, *State and Constitutional*, 164-165. Cf: Duncan Kelly, *The State of the Political: Conceptions of Politics and the State in the Thought of Max Weber, Carl Schmitt, and Franz Neumann* (Oxford: Oxford University Press, 2003).

⁶²² McCormick, “The Dilemmas of Dictatorship”: 169 (emphasis added).

⁶²³ Wendy Tang, “China signals easing of zero-Covid strategy after protests,” *The Times*, December 1st, 2020, accessed July 6, 2023, <https://www.thetimes.co.uk/article/aac20bf4-715f-11ed-8a5b->

cases, the respective governments were forced to pause and reconsider their plans. Their authority had been undermined, if only temporarily, by the people.

Schmittian scholars who endorse the monarchical interpretation of sovereign dictatorship often fail to take its commissarial character into account. For example, to support his claim that “The sovereign dictator enjoys unlimited power”, Oren Gross cites Schmitt’s statement “What characterizes the [state of] exception is principally unlimited authority”.⁶²⁴ Here, the concepts of power and authority are conflated and the commissarial character of sovereign dictatorship is ignored. By overlooking the distinction between power and authority, Gross’s understanding of the sovereign dictator is rendered incorrect. Indeed, Schmitt’s insistence that “to every dictatorship there is a commission” considerably weakens claims that sovereign dictatorship is mechanism that enables leaders to assume monarchical power.⁶²⁵

Taken together, this evidence makes a democratic interpretation of Schmitt’s concept of sovereign dictatorship a viable alternative. There are reasons to think that Schmitt did not intend for sovereign dictatorship to be read as a vehicle for the monarchical abuse of state power, as many Schmittian scholars have argued.

As we will see, it possible to use Schmitt’s sovereign dictatorship to formulate a strategy that enables the governments and leaders of constitutional states to contain Black Swans optimally.

[f385de7508fe?shareToken=19bce418fa4b4cc36360229bcb86fe0a](https://www.bbc.com/news/health-67508fe?shareToken=19bce418fa4b4cc36360229bcb86fe0a); Anna Foster and Marita Moloney, “Israel protests: PM Netanyahu delays legal reforms after day of strikes,” *BBC News*, 27th March, 2023, accessed July 6, 2023.

⁶²⁴ Gross, “The Normless and Exceptionless Exception”: 1844.

⁶²⁵ Schmitt, *Dictatorship*, 119. See also: Rousseau, *The Social Contract*, 124.

5.3. Rule by Acclamation

(i) *The Strategy*

(a) Overview

To contain Black Swans in an optimal manner, Schmitt's concept of sovereign dictatorship – read, following Kalyvas, as a tool of popular sovereignty – can be used to respond quickly and prevent any negative outcomes from proliferating. Specifically, sovereign dictatorship can do this by enabling governments and leaders to rule by acclamation.

The benefit of using Schmitt's sovereign dictatorship to contain Black Swans, as opposed to relying on solely on legislative emergency powers and state of emergency powers, is that it allows government and leaders to be more responsive to changes in public mood. That is, to fluctuations in the popular will (i.e. constituent power) which, as mentioned, have the potential to intensify and transform into a conflict between “friend” and “enemy”. Arguably, being more attuned to how a crisis is affecting people makes it easier to determine what actually needs to be done to contain it. It is by keeping their finger on pulse of the state, so-to-speak, that governments and leaders can use acclamation as a way to maintain and stabilise the political unity of the people during in times of uncertainty. In this respect, rule by acclamation is more optimal than rule by (emergency) law because the risk of expanding and entrenching executive power can be avoided.

Of course, as mentioned, crisis containment must be undertaken in a way that demonstrates robust leadership in the eyes of the public. That is, strategies of crisis containment must not contravene the rule of law, democratic accountability, and a separation of powers. Together, these principles act a guardrail against the unofficial use of

state power – what Pierson calls “impersonal power” – by governments and leaders.⁶²⁶ They do this, primarily, by maintaining balance between authority and legitimacy. Therefore, prior to discussing instructions for implementation, it is necessary to explain how sovereign dictatorship enables the governments and leaders of constitutional states to demonstrate robust leadership.

- Rule of Law

As explained in Chapter Two (s.2.1(i)), the rule of law is where law is considered to be the supreme, determinate authority within constitutional states. Legislation applies equally to everyone - even lawmakers - and public decisions can be subject to judicial review

When discussing sovereign dictatorship, Schmitt contends that “The dictator’s actions should create a condition in which law can be realised, because every legal norm presupposes a normal condition as a homogenous medium in which it is valid”.⁶²⁷ Schmitt views law as a homogenous medium for norms. These norms represent agreements between members of the political community on what constitutes normal order. For example, in the UK, the political community has agreed that treason is wrong. This norm has been homogenised: it is a feature of normal order because treason has been transposed into law (Treason Act 1351).

As mentioned already in this chapter, the sovereign dictator’s job is to “resolve” the existing order by “creat[ing] conditions in which a constitution – a constitution that it

⁶²⁶ Pierson, *The Modern State*, 6 & 15-16.

⁶²⁷ Schmitt, *Dictatorship*, 118; Schmitt, *Political Theology*, 13.

regards as the true one – is made possible”.⁶²⁸ Doing this may require laws to be suspended, or even created, but the goal remains same: re-establishing a sense of normal order by stabilising and maintaining political unity, to prevent state failure. Indeed, as Schmitt remarks: “To create tranquillity, security, and order and thereby establish the normal situation is the prerequisite for legal norms to be valid”.⁶²⁹

Given the role law plays in Schmitt’s legal-political theory, as a guarantor of political unity and order, sovereign dictatorship is able to adhere to the principle of rule of law in a fairly straightforward manner.

- Democratic Accountability

As explained in Chapter Two (s.2.1(i)), democratic accountability is where those affected by the exercise of state power can sanction its use.

It is commissarial nature of sovereign dictatorship that enables it to adhere to this principle. In particular, the aforementioned power of “veto” that the people can exercise to essentially check and challenge (acclaim or disclaim) the actions of the sovereign dictator.

- Separation of Powers

As explained in Chapter Two (s.2.1(ii)), a separation of powers is where the executive legislative, and judicial branches are kept apart, but exist in a complementary alliance.

⁶²⁸ Schmitt, *Dictatorship*, 119.

⁶²⁹ Schmitt, *The Concept of the Political*, 46.

This principle is perhaps the most difficult for sovereign dictatorship to adhere to. This is because the sovereign dictator is someone who is able to act in an executive capacity, as decision-maker, and in legislative capacity, as a lawmaker. However, the way in which executive and legislative powers are fused under sovereign dictatorship is not dissimilar to how they are fused under legislative emergency powers and state of emergency powers. In the case of the latter, the ability of governments and leaders to rule by decree constitutes a fusion of legislative and executive power. In the case of the former, the sovereign dictator can decide on the state of exception and create law to resolve the normal order.

This similarity makes it possible to argue that sovereign dictatorship can adhere to the principle of a separation of powers.

This explanation has demonstrated that sovereign dictatorship enables the governments and leaders of constitutional states to demonstrate robust leadership in the eyes of the public. It does not contravene the rule of law, democratic accountability, or a separation of powers and, as such, the guardrail against “impersonal power” remains in place.

Having satisfied the requirement of robust leadership, instructions can be provided on how to implement this new strategy of containment (hereafter the ‘sovereign dictator strategy’) for constitutional states as crisis management actors to follow.

(b) Instructions for Implementation

It was demonstrated in Chapter One that existing literature on Black Swans lacks substantive instructions for constitutional states as crisis management actors. Currently,

there are no instructions to give prescriptive guidance to governments and leaders on how to contain this type of crisis.

To address this limitation of the existing literature and drawing on Schmitt's conception of sovereign dictatorship, this thesis provides explicit instructions for governments and leaders on how to implement the strategy of containment outlined above. In a similar vein to the crisis prescriptions approach, they are general in applicability but precise in application (Ch.1, s.1.2(ii)(a)).

To implement the sovereign dictator strategy, government and leaders should refrain from immediately enacting and/or using legislative emergency powers and/or state of emergency powers. Prima facie, this is counterintuitive given that: (i) emergency powers are considered a conventional element of crisis containment; and (ii) the primary aim of crisis containment is to quickly respond to a crisis and stop it spreading. However, as argued in Chapter Two, emergency powers are sub-optimal when it comes to Black Swans because they lead to a significant expansion and entrenchment of executive power. Therefore, arguably, it would be optimal to take a different approach.

Under this approach, governments and leaders should first check the pulse of the state once a Black Swan has been recognised. They should monitor for signs of acclamation to determine: (i) how exactly the crisis is affecting people; and (ii) what kind of response the people think is required - what is a subject of popular acclaim. In practice this could be done by watching for public protests, being alert to representations of public opinion in the media, and/or perusing social media. Each of these arenas of acclamation has the potential to offer clues that can be used inform decision making and issue recommendations along the lines of: "the public should do X, Y, and Z to avoid harm".

Of course, an immediate counter-point is that governments and leaders have access to more comprehensive information than the people. As such, monitoring for signs of acclamation is a waste of time – an unnecessary delay to crisis containment. However, first of all it must be remembered that Black Swans are defined by a relative absence of knowledge. Therefore, any information that can be used to manage a Black Swan is of value. Second of all, the people are the ones experiencing the effects of a Black Swan first hand and so they are likely to have access to information that leaders and government do not. This has the potential to prevent expansionism and permanence from occurring as a result of misrecognition.

A second counter-point concerns the fact that the sovereign dictator can legislate. This raises the question as to why they would they issue recommendations as opposed to laws, given that the latter can be enforced and are ipso facto more effective? The obvious answer to this question is that, although law may seem like a more effective tool, as mentioned, it is susceptible expansionism and permanence. The less obvious answer to the question is that, in theory, sovereign dictator would not need to legislate. This is because positive and ideal constitution would be in alignment. Therefore “resolving” the current order would not require the threat of legal force.

The existential threat posed by Black Swans causes a narrowing and strengthening of the nexus between governments and leaders and the people. This is because Black Swans threaten the state, which all parties rely upon for their continued existence. As a result, the need for direct democracy increases; that is, people care more about what it happening to them and so want to be involved in the decision-making process. As was noted in Chapter Two (s2.1(i)), people look to their leaders in times of crisis. At the same time, leaders cannot lead if people are unwilling to follow them. The relationship of reciprocity that emerges

means that legislation would not be required. Indeed, there are many codes of conduct that exist to which the majority of people adhere without the threat of legal sanction. An example is the UK Highway Code.⁶³⁰ The Highway Code contains “rules” that *should* be followed to “fulfil a responsibility [that] we all share”.⁶³¹ It is this notion of shared responsibility that underlies the sovereign dictator strategy.

The governments and leaders of constitutional states could follow the instructions outlined above to implement the sovereign dictator strategy. The strategy is designed to enable a strategy of containment that is more attuned and responsive to the needs of the people during a Black Swan. As we will see now, rule by acclamation allows this strategy to reduce fragility and demonstrate dynamic resilience.

(ii) *Fragility and Dynamic Resilience*

In Chapter Two it was explained that the current ways in which the governments and leaders of constitutional states contain Black Swans are sub-optimal. This is primarily because the strategies of containment that they employ fail to reduce fragility and are only capable of demonstrating static resilience, where the focus is on “maintain[ing] and restor[ing] equilibrium conditions [and] encourage[ing] institutional-path dependence”.⁶³²

⁶³⁰ “The Highway Code,” UK Government, accessed September 17, 2023, <https://www.gov.uk/guidance/the-highway-code>.

⁶³¹ Ibid, “Introduction”.

⁶³² Ansell and Trondal, “Governing Turbulence”: 50.

It has been argued that what is needed to manage Black Swans optimally are strategies that are capable of demonstrating dynamic resilience. To recap, dynamic resilience is concerned with “building flexibility into... institutional arrangements by... maintaining multiple repertoires that can be flexibly redeployed to meet changing circumstances”.⁶³³ It is by providing governments and leaders with additional flexibility that dynamic resilience reduces fragility.

The strategy of containment described above is capable of reducing fragility and demonstrating dynamic resilience. This is because strategy enables governments and leaders to avoid the pitfalls of rushing to enact emergency powers and implement a state of emergency. Here, “the combination of exposure to risk” that defines “fragility” is lowered (OECD).⁶³⁴ This is because, by checking the pulse of the nation, so-to-speak, governments and leaders can get a better idea of what crisis containment measures need to be introduced. When something is ‘off’, they are more likely to know about it. In other words, the “coping capacity of the state” is increased through the ability of government and leaders to more accurately judge the public mood (OECD).⁶³⁵

The resilience demonstrated by the sovereign dictator strategy is dynamic because it introduces flexibility into the crisis containment process. Rather than relying solely on the elements of legislative emergency powers and state of emergency powers, which often cause an expansion and an entrenchment of executive power, the sovereign dictator strategy adds an additional way to implement crisis containment measures. Acclamation

⁶³³ Ibid.

⁶³⁴ OECD, *States of Fragility 2022*.

⁶³⁵ OECD, *States of Fragility 2022*.

avoids expanding and entrenching executive power because of its commissarial nature. Indeed, the ability to stop the spread of a crisis by responding to fluctuations in public mood has the potential to increase the speed of crisis containment. In this regard, the sovereign dictator strategy is an addition to constitutional states' current crisis management strategies: "repertoires that can be flexibly redeployed to meet changing circumstances."⁶³⁶

Like any crisis management strategy the sovereign dictator strategy is not meant to be perfect. Indeed, the strategy relies on public acquiesce and trust – two things that are not easy to locate and secure. However, at the very least, the strategy can provide an optimal way for governments and leaders to contain Black Swans on the basis that it has the potential to reduce fragility and does demonstrate dynamic resilience. The sovereign dictator strategy is therefore an improvement to discourses on, and practices relating to, the management of Black Swans.

5.4. Resolving the Problem of Containment

It has been established in this chapter that the sovereign dictator strategy is: (i) capable of adhering the requirements of robust leadership: the rule of law, democratic accountability, and a separation of powers; (ii) can be implemented by constitutional states as crisis management actors; and (iii) is capable of reducing fragility and demonstrating dynamic resilience. In this respect, the sovereign dictator strategy can be considered optimal when it comes to recognising Black Swans

⁶³⁶ Ansell and Trondal, "Governing Turbulence": 50.

However, it remains to be shown that the sovereign dictator strategy resolves ‘The Problem of Containment’. That is, the strategy must be able to overcome the problems of ‘expansionism’ and ‘permanence’ (Ch.2, s.2.3)). After all, it is these problems that render legislative emergency powers and state of emergency powers sub-optimal when it comes to crisis containment.

As a reminder, ‘expansionism’ occurs when legislative emergency powers and states of emergency powers lead to the proliferation of law in an effort to contain a Black Swan. Here, aforementioned rule by decree goes into overdrive. ‘Permanence’ occurs when legislative emergency powers and state of emergency powers are retained – either in part or in full – once a crisis has passed. This can lead to a “ratcheting” up of executive power on a legal level, to the detriment of fundamental human rights and freedoms.⁶³⁷

The sovereign dictator strategy resolves this problem in a fairly straightforward manner by avoiding recourse to law, at least in the first instance, to contain a Black Swan. As such, expansionism and permanence cannot occur. In this regard, the sovereign dictator strategy resolves the Problem of Recognition by avoiding expansionism and permanence. As such, it can be considered an optimal crisis containment strategy for the governments and leaders of constitutional states.

⁶³⁷ Gross, “Chaos and Rules”; Sunstein and Goldsmith, “Military tribunals and legal culture”; Tushnet, “Defending Korematsu?”; Posner and Vermeule, “Accommodating Emergencies”.

Conclusion

This chapter has finished developing the claim made in Chapter One and Chapter Two: *viz.*, that what is needed to resolve the problems associated with managing Black Swans are new strategies that: (i) take the four defining characteristics of Black Swans into account; and (ii) contain substantive instructions regarding implementation for constitutional states as crisis management actors. It has done so by explaining how Schmitt's concept of sovereign dictatorship can be employed within a strategy designed to contain Black Swans optimally.

In answer to the fifth and final research sub question, "How can Carl Schmitt's concept of "sovereign dictatorship" be employed within a strategy designed to contain Black Swans optimally?", it is argued that interpreting sovereign dictatorship as an instrument of popular sovereignty enables governments and leaders to use it to rule by acclamation. In this regard, the strategy resolves the Problem of Containment explained in Chapter Two by providing a way for constitution states to reduce fragility and demonstrate dynamic resilience.

Conclusion

Seizing Crisis Opportunity

“The unthinkable is here to stay.
We must address it.”⁶³⁸

(i) **Research Claims and Answers**

Using a democratic design-approach, this thesis has provided a Schmittian perspective on the state-led crisis management of Black Swans. As a final reminder, Black Swans are crises that are: (a) “novel or unprecedented... in human or crisis managers’ memories”; (b) have “unexpectedly large scale or geographic distribution”; (c) have effects that cross-boundaries (i.e. they are “trans-boundary”); and (d) have “consequences, which stir deep uncertainties in the minds of the public [and] challenge government structures”.⁶³⁹ The thesis has done so by answering the following core research question:

How can Carl Schmitt’s legal-political theory improve the state-led crisis management of Black Swans?

Chapter One answered the first-research sub-question: “In what ways is existing crisis management literature on Black Swans inadequate?” It did so by demonstrating that the existing literature: (i) fails to fully take into account the nature, composition, and

⁶³⁸ Lagadec, “Crisis Management in the Twenty-First Century”, 507.

⁶³⁹ OECD, *Changing Face*, 18-19.

significance of Black Swans as a type of crisis; and (ii) does not provided a sufficient level of detail, or prescribe substantive instructions, when it comes to strategies designed to improve how constitutional states manage Black Swans. As a consequence, the existing literature cannot be used to improve the current state-led crisis management of Black Swans.

Chapter Two answered the second research sub-question: “In what ways are the strategies constitutional states currently use to manage Black Swans sub-optimal? It did so by demonstrating that these strategies: (i) increase, rather than decrease, state fragility; and (ii) generally only allow for static resilience to be demonstrated. As a consequence, even though current strategies are able to prevent catastrophic increases in fragility, new strategies are needed to manage Black Swans.

Chapter Three answered the third research-sub-question: “What concepts does Carl Schmitt’s legal-political theory contain that can be used to improve how constitutional states manage Black Swans?” It did so by arguing that Schmitt’s concepts of “the exception” and “sovereign dictatorship”, in particular, can be used to devise new, dynamic strategies to manage Black Swans. As a consequence, the Problem of Recognition and the Problem of Containment can be resolved.

Chapter Four answered the fourth research sub-question: “How can Carl Schmitt’s concept of the “exception” be employed within a strategy designed to recognise Black Swans optimally?” It did so by arguing that interpreting the exception as a situation that originates independently of sovereign decisionism enables governments and leaders to use it to assess

whether or not a crisis is a Black Swan. As a consequence, the Problem of Recognition was resolved.

Chapter Five answered the fifth research sub-question: “How can Carl Schmitt’s concept of “sovereign dictatorship” be employed within a strategy designed to contain Black Swans optimally?” It did so by arguing that interpreting sovereign dictatorship as an instrument of popular sovereignty enables governments and leaders to use it to rule by acclamation. As a consequence the Problem of Containment was resolved.

Given these answers to the research sub-questions, the **core research question** is answered as follows.

Carl Schmitt’s legal-political theory can improve the state-led crisis management of Black Swans through the concepts the “exception” and “sovereign dictatorship”. Using these concepts to devise new crisis management strategies that are specifically tailored to recognise and contain Black Swans does two things. Firstly, it fills the lacuna present within the existing crisis management literature. Now there are strategies that: (i) take the four defining characteristics of Black Swans into account; and (ii) contain substantive instructions regarding implementation for constitutional states as crisis management actors. Secondly, it solves the current problem regarding sub-optimal crisis management. Now there is at least one strategy of recognition and one strategy of containment that is capable of reducing fragility and demonstrating dynamic resilience during the state-led crisis management of Black Swans.

(ii) **Originality of the Research**

This research has demonstrated originality in two ways.

The first way is by using the COVID-19 pandemic as an opportunity to make a much needed contribution to existing crisis management literature on Black Swans. Since the publication of the OECD's 2015 report on *The Changing Face of Strategic Crisis Management*, there has been no major contribution to the study of Black Swans in the field of crisis management studies. This is despite the impact and effects of the COVID-19 pandemic. This thesis has addressed this lacuna in the scholarship by presenting two crisis management strategies that intersect with the OECD's concepts of "fragility" and "resilience". The significance of this contribution lies in its moving of the literature forward and bringing scholars' and practitioners' attention back to the subject and significance of Black Swans.

The second way in which this research has demonstrated originality is through its use of concepts from the legal-political Carl Schmitt (1888-1985) produced between 1918 and 1933. Despite Schmitt's work having been used to enhance aspects of crisis management in the past, the implications of his personal and professional affiliations with Nazism have led to this work being side-lined. This is despite the inherent potential many of Schmitt's theories and ideas possess in relation to crisis management. This thesis has seized on Schmitt's concepts of the "exception" and "sovereign dictatorship" to utilise their potential in the context of Black Swans. The significance of this contribution lies in its uniting of two areas of scholarship for the very first time: Schmittian studies and Black Swan crisis management studies.

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