Uncertain Futures and the Problem of Constraining Emergency Powers
Temporal Dimensions of Carl Schmitt's Theory of the State of Exception

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Uncertain futures and the problem of constraining emergency powers: temporal dimensions of Carl Schmitt's theory of the state of exception

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Introduction

In the past decade or so, a succession of crises has led governments across the globe to take refuge in their emergency powers. Examples include the use of emergency powers in the so-called ‘war on terror’ and the emergency measures taken in response to the recent financial crisis. As these examples suggest, it has proved to be difficult to effectively constrain executive uses of emergency powers and to prevent their abuse. Indeed, in several cases, uses of emergency powers have led to arbitrary exercises of power that undermined democracy and the rule of law. A notorious example is the practice of indefinite detention and enhanced interrogation of suspects of terrorism adopted by the United States and other countries after 9/11, which largely escaped judicial and parliamentary control. More recent examples include the way in which American and British intelligence agencies used their emergency powers to justify practices of enhanced surveillance as well as massive and systematic interception of phone and e-mail communication.

In the literature, the failure to effectively constrain executive uses of emergency powers has been explained by various causes. For instance, it has been pointed out that there has generally been wide democratic support for the use of emergency powers, even in spite of frequent violations of the rights of individuals and minorities. This has been explained by the fact that in emergencies, when vital interests

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1 Judicial control was gradually restored in a series of landmark decisions by the US Supreme Court, in which it held that suspects of terrorism detained at Guantanamo Bay had the right to challenge their detention before an impartial court under habeas corpus. The first of these decisions was Rasul v. Bush, 542 US 466 (2004).
of the nation are at stake, there is a tendency to ‘rally behind the flag’ and to unconditionally support executive emergency measures. In those instances, it may be difficult for majorities to identify with the interests of individuals and minorities whose rights are violated, especially if a rhetoric of fear frames these others as an existential threat to the majority’s way of life. For instance, it is striking that in the United States, it is Congress, not the President, which prevents the closing down of Guantánamo Bay, arguing that the detention of suspects of terrorism on American soil would constitute a major threat to the people’s vital security interests.

Others have explained the failure to effectively constrain executive exercises of emergency powers by pointing at structural causes. It has thus been argued that the need for secrecy in matters of national security, the complexity of policy problems especially in the economic domain, and the sheer speed of responses required in emergencies combine to make meaningful legislative and judicial oversight virtually impossible. This explains why it is generally left to the executive to decide whether there is an emergency at all, because, contrary to parliament and judges, only the executive is believed to have the means and expertise necessary to adequately assess the crisis as well as the emergency measures it requires. This is especially true if the identification of the crisis depends on information that is secret because of national security interests. Here, claims to secrecy and national security may prevent parliaments and judges from effectively controlling executive exercises of emergency powers.

Although these structural causes are certainly important, I believe they are not sufficient for explaining the failure to effectively constrain executive uses of emergency powers. In brief, what I will argue in this chapter is that the failure to constrain emergency powers can only be adequately explained if its temporal assumptions are taken into account. Emergencies are thus often believed to be inherently unpredictable. They are believed to unexpectedly disrupt the normal legal order and its regular temporality, putting the law out of joint. Therefore, the legislator cannot determine in advance what the nature of future crises will be, nor what measures they will require. Hence, the legislator cannot set strict ex ante limitations to emergency powers, for it may cause these powers to become insufficiently flexible to cope with the crisis. Instead, it is largely left to the executive to decide whether there is an emergency at all and what measures it requires. It is thus the belief that future emergencies are inherently unpredictable which explains why legislators have generally produced very broad delegations of emergency powers: in an emergency, the executive may take all the measures he deems necessary, and even act without prior legal authorization, because it is impossible to determine in advance what the nature of the crisis will be and what measures it requires.

5 In speeches and press statements, members of the US government often referred to the ‘unprecedented threat of terrorism’ to justify exceptions from the law. Compare, for instance, President George Bush’s speech on terrorism of 6 September 2006: ‘We had to wage an unprecedented war against an enemy unlike any we had fought before. We had to find the terrorists hiding in America and across the world before they were able to strike our country again’ (italics MdW). A transcript of this speech can be found at http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all.

6 Compare, for instance, the press release of the President of the European Commission José Manuel Barroso issued on 14 October 2008: ‘This is an unprecedented crisis. This is precisely why it requires unprecedented EU action’ (italics MdW). The statement can be found at http://europa.eu/rapid/press-release_SPEECH-08-524_en.htm?locale=en.

3 Compare, for instance, Mark Tushnet, ‘Controlling Executive Power in the War on Terrorism’, Harvard Law Review 118, no. 8 (2005), 2678.

execution of Hitler’s political opponents. Indeed, by advocating a theory of extra-legal emergency powers Schmitt actively contributed to legitimizing the transition towards Hitler’s dictatorship.

Notwithstanding Schmitt’s collaboration with the Nazis, his theory has proved to be immensely influential in the contemporary debate on emergency powers. This is especially true of his claim that emergencies are inherently unpredictable, so that emergency powers cannot be subject to ex ante legislative constraints. It is invoked by scholars like Oren Gross, Eric Posner and Adrian Vermeule, who advocate extra-legal responses to emergencies, but also by David Dyzenhaus and Mark Tushnet, who propose rule of law restrictions on emergency powers, while rejecting the possibility of ex ante legislative constraints. Although these scholars are very critical about the illiberal implications of Schmitt’s theory, they share his assumption that executive emergency powers cannot be subject to ex ante legislative constraints, as neither the nature of the emergency itself, nor the measures it requires can be anticipated by the legislator.

In what follows, I will try to tackle the general belief that there can be no ex ante legislative restrictions on executive emergency powers by tracing it back to its source. More particularly, I will offer a genealogical critique of Schmitt’s theory of extra-legal emergency powers and its underlying temporal assumptions. I will demonstrate that Schmitt’s claim that emergency powers are essentially extra-legal depends on a notion of exceptional time, which is highly problematic from a rule of law perspective. More particularly, I will contest Schmitt’s thesis about the extra-legality of emergency powers by criticizing its underlying assumption that emergencies are inherently exceptional and unpredictable, such that they cannot be anticipated by the legislator, nor subjected to ex ante rule of law-constraints.


11 These feelings of disorientation are, for instance, expressed by Walter Benjamin: ‘[a] generation that had gone to school on a horse-drawn street car now stood under the open sky in a countryside in which nothing had remained unchanged but the clouds, and beneath these clouds, in a field of force of destructive torrents and explosions, was the tiny, fragile human body’ Walter Benjamin, The Storyteller’, in Illuminations, trans. Harry Zohn (New York: Schocken, 2007), 84.

12 Reinhart Kosseleck argues that modernity, in the sense of `Neuezeit’, can be defined as the condition in which ‘expectations have distanced themselves evermore from all previous experience.’ However, in this modern: condition, the concept of ‘progress’ could still bridge the gap between expectations with regard to the future and experiences from the past. By contrast, we may add, the catastrophic experience of the Great War undermined the belief in progress itself, causing the gap between expectations and experience to become unbridgeable. Reinhart Kosseleck, Futures Past: On the Semantics of Historical Time, trans. Keith Tribe (New York: Columbia University Press, 2004), 263.

13 In her contribution to this volume, Nomi Claire Lazar argues that modern constitutions seek to establish a radical rupture with the past. The promulgation of these constitutions is framed as a turning point, joining past event series to a projected future and thereby changing expectations of a state’s trajectory. According to Lazar, these constitutional time frames serve to control an otherwise uncertain future. However, as Lazar rightly emphasizes, the capacity of modern constitutions to effectively control uncertain futures is dependent on the continuity of the political climate. The constitution of the Weimar Republic failed in this respect, because it depended on an unstable
Emergency, unpredictability, sovereignty: legal dimensions

Schmitt first presented his theory of emergency powers in his influential 1922 essay Political Theology. Here he distinguishes between the 'state of necessity [Notstand]' and the 'state of exception [Ausnahmezustand]'\(^\text{17}\). The concept of the 'state of necessity' refers to more or less regular emergencies, such as local disturbances of public order or natural disasters, which occur every once in a while and can thus be foreseen by the legislator. As Schmitt explains, executive responses to such emergencies can be subjected to rule of law restrictions. By contrast, the concept of the 'state of exception' refers to more extreme and exceptional emergencies, in which the survival of the political community itself is at stake. In Schmitt's view, such exceptional situations cannot be anticipated by the legislator. Indeed, if the legislator would set strict ex ante limitations to executive emergency responses, these would be ignored at the very first occasion, because the community's survival depends on it. Hence, Schmitt argues that in a 'state of exception', when the survival of the political community is at stake, there can be no legal restrictions whatsoever on executive emergency powers.

In Schmitt's theory, there is a direct link between the claim that emergency powers must remain legally unlimited and the belief that emergencies are inherently exceptional and unpredictable. Thus Schmitt emphatically claims that it is impossible for the legislator to specify in advance what kinds of emergencies constitute a 'state of exception'. 'The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated.'\(^\text{18}\) As the actual manifestation of future emergencies cannot be anticipated, 'the precondition as well as the content of the competence in such a case must necessarily be unlimited.'\(^\text{19}\) The legislator can define the state of exception only in the most general terms, as a potential of extreme peril, a danger to the existence of the state, or the like.\(^\text{20}\) Yet, he cannot specify in advance what cases constitute a 'state of exception'; due to its exceptional nature, the emergency itself must remain legally unspecified. Nor is it possible to predict what kinds of responses these future emergencies will require. This implies that it is ultimately left to the executive to decide whether there is an emergency at all and what measures should be taken to respond to it. This competence – if it can still be called a competence\(^\text{21}\) – must necessarily be unlimited, as neither the emergency itself nor the measures it requires, can be specified in advance.


\(^\text{21}\) Cf. Schmitt, *Politische Theologie*, 14, trans., 7; 'From the liberal constitutional point of view, there would be no competence at all' (trans. modified).

study of the Weimar Republic, [d]emocracy needs democratic convictions and a democratic culture that ripple through all the institutions of a society, not just the formal political ones. That was hard to find in many of the key institutions of the [R]epublic.\(^\text{14}\) More particularly, the legitimacy of the Republic was continuously contested by political movements at both the radical left and extreme right. Thus, from the outset, the Republic faced a succession of grave political crises, which caused its government to take refuge in emergency powers on an almost daily basis. In the first five years of its existence, a state of emergency was proclaimed on no less than 135 occasions.\(^\text{15}\) Especially in 1919 and 1920, emergency powers were frequently deployed to put down a series of communist uprisings and right wing putsch attempts. At one of these occasions, Carl Schmitt, who at the time worked as a legal councilor at the Bavarian Ministry of Defence, witnessed the summary execution of one of his colleagues by revolutionaries: his colleague was shot through the head behind the desk opposite to him.\(^\text{16}\)

Schmitt’s theory about the necessity of extra-legal responses to emergencies should be seen against this historical background: it is haunted by the spectre of revolutionary violence. At the time Schmitt first developed his theory, the threat to the Republic was real and, indeed, existential: it was far from certain whether the Republic would survive. Moreover, the revolutionary violence Schmitt had witnessed in Bavaria did indeed seem to call for strong governmental responses. Hence, in a series of books and articles, published between 1922 and 1932, Schmitt rejected the limited, rule of law responses to emergencies proposed by liberal lawyers. He criticized these liberal lawyers for failing to understand the political dilemmas inherent in emergencies. Thus, in his view, in an extreme emergency, when the survival of the political community was at stake, the laws could not be an obstacle to governmental emergency responses. In such cases, formal legal restrictions could not prevent the executive from effectively protecting the Republic. Instead, the executive was allowed to do everything in its power to prevent the collapse of the existing order, even if it required a transgression of the laws. By contrast, liberal lawyers wished to maintain the rule of law even in emergencies. According to Schmitt, they did not realize that by doing so, they jeopardized the very constitutional order which made the rule of law possible in the first place.

and polarized political climate: even among the governing elites, there were very few willing to actively support its liberal values.


The unpredictability of emergencies and the unlimited competence that follows from it allow Schmitt to relate the state of exception to the concept of sovereignty. As we have seen, the legislator cannot anticipate the emergency or the measures it requires. At best, Schmitt argues, the legislator can determine who has the authority to act: 'The most guidance the constitution may provide is to indicate who can act in such a case.' This is important, for, as the emergency powers must remain legally unlimited, the authority invested with those powers can be identified as the sovereign ruler. It is the sovereign who determines whether a particular emergency constitutes an existential threat to the state that justifies the suspension of the laws. Indeed, in Schmitt’s view, by proclaiming a ‘state of exception’, the sovereign may potentially suspend the entire legal order: he may decide whether ‘the constitution needs to be suspended in its entirety.’ Thus, the belief in the exceptionality and unpredictability of extreme emergencies leads Schmitt to conclude that the authority invested with emergency powers must be sovereign, that is, no longer bound by the laws.

However, Schmitt does not claim that the sovereign may use his emergency powers arbitrarily: the right to sovereign discretion is not a licence to arbitrary decision. Instead, the sovereign remains bound by his task: to protect the existing order and restore the situation of normality, in which the laws can once again be applied. As Schmitt explains: ‘there exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist.’ In Schmitt’s view, it is this situation of normality which makes the application of the laws possible in the first place. The normal situation is suddenly disrupted by the emergency: it is interrupted by the threat of anxiety and chaos that the extreme emergency embodies. Hence, in the state of exception, it is the sovereign’s task to effectively respond to the emergency and restore the situation of normality, so that legal norms can once again be applied. Although no longer bound by rule of law restrictions, the sovereign remains bound by his task, i.e., he remains responsible for restoring the situation of normality on which the applicability of the laws and, indeed, the rule of law itself depends.

It is at this point that Schmitt blames his liberal colleagues for advocating a naïve and even dangerous understanding of emergency powers. He criticizes liberal scholars like Hugo Krabbé and Hans Kelsen for denying the reality of the exception and stressing the importance of maintaining rule of law restrictions even in extreme emergencies. By binding the sovereign to legal restrictions, they prevent him from responding quickly and effectively to the threat. They do not realize that by doing so, they prevent him from restoring the very situation of normality on which the validity of the laws and the rule of law itself depends. For if the sovereign proves incapable of restoring the normal situation, chaos and anxiety will rule, and the preconditions for the law’s validity and for the rule of law will no longer be fulfilled. In other words: by subjecting the sovereign in the state of exception to rule of law restrictions, liberal layers risk jeopardizing the very conditions of the rule of law, for they hamper the sovereign’s capability to restore the situation of normality which makes the application of the laws possible in the first place.

For Schmitt, the question of sovereignty and the state of exception is related to what we may call the ‘life of the law.’ Indeed, as Schmitt himself suggests, it is in the exception that the ‘power of real life’ suddenly and unexpectedly announces itself:

[...]the exception is more interesting than the rule. The rule proves nothing; the exception proves everything: it confirms not only the rule but also its existence, which derives only from the exception. In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition [In der Ausnahme durchbreicht die Kraft des wirklichen Lebens die Kruste einer in Wiederholung erstarrten Mechanik].

Schmitt’s existentialist rhetoric is problematic as it tends to overemphasize the importance of the exception at the expense of the rule. In doing so, it risks denying the very conditions of normality (i.e., the self-evident, everyday application of legal rules), on which the effectiveness of the laws and the rule of law depend. However, Schmitt’s main concern appears to be that the liberal conception of the legal order which denies the reality of both sovereign decisions and extreme exceptions risks making that legal order defenseless in the face of existential threats. It is this aspect of his theory that Schmitt develops in his later texts, notably in his famous essay on *The Concept of the Political* (1927/1932), to which we will now turn.

**Emergency powers and the substance of the constitution: political dimensions**

In his later texts Schmitt adopts an anti-postivist approach to the state of exception and emergency powers by highlighting their political and existential dimensions. Contrary to the view of legal positivists like Kelsen, Schmitt emphasizes that the question of how to respond to emergencies should not be considered as a merely technical juristic question. Instead, he believes it is an intensely political question. In his *Concept of the Political*, Schmitt famously defines the political as being

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25 As Ellen Kennedy points out, hostile readers have criticized Schmitt for his ‘determination to destroy the normative and with it the rule of law’. However, Kennedy criticizes this ‘misreading’: she argues that, on Schmitt’s view, the rule of law presupposes a normal situation, which the sovereign decision first produces and guarantees. Hence, the sovereign decision is not independent of legal norms, even if they do not determine its outcome. Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Durham: Duke University Press, 2004), 85–86.
Yet, he also protests against the manner in which, in the summer of 1932, the Prussian government had prevented the National Socialists from taking power by changing the rules of parliamentary elections. His main argument seems to be that it is the President’s prerogative, rather than the right of state governments, to declare anti-constitutional parties ‘illegal’:

[It] belongs to the dangers of a pluralist party state that all the means of the state and all the possibilities of interpreting the constitution and law become tactical instruments in the hands of parties. The enemy of the [e] party will then be declared ‘illegal’ to deprive him of an equal chance. The foundation of every parliamentary state, which grants all parties an equal chance, is thereby undermined. However, on the other hand, it would of course be completely impossible to grant parties truly equal rights to the state an equal chance, and to hand over to them the legal possibilities of the state’s will formation as weapons.30

In this context, Schmitt argues that the President as an ‘authority standing above the parties’ has the exclusive right to declare anti-constitutional parties ‘illegal’. He may thus use his emergency powers to intervene in a state like Prussia and protect its constitutional integrity.

In his Constitutional Theory (1928), Schmitt attempts to specify in more detail the nature and scope of Presidential emergency powers. He claims that in the state of exception, the President’s task is to protect the political substance of the constitution. In this context, he distinguishes between ‘the constitutional law [der Verfassungsgesetz]’ and ‘the constitution [die Verfassung]’ itself.31 The concept of the constitutional law refers to the law, in which the specific tasks and competences of state institutions and the rights of citizens are laid down. By contrast, the concept of the constitution itself refers to the fundamental political decisions on which the constitutional law is founded. According to Schmitt, it consists of the decisions by which a people defines itself as a particular political community. Thus, in Schmitt’s view, the constitution of the Weimar Republic consists of the fundamental political decisions of the German people for a democracy, a republic, a federally structured state, a parliamentarily-representative form of legislative authority and government, and a bourgeois Rechtsstaat with its principles, fundamental rights and the separation of powers.32 Schmitt believes that, compared to these fundamental political decisions, the ‘constitutional law’ of the Republic is of secondary importance.

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28 Schmitt, Der Begriff des Politischen, 35, trans., 35.

29 Carl Schmitt, Legalität und Legitimität (Berlin: Duncker und Humbolt, 2005 [1932]), 35. Interestingly, the prepuplication of this essay contained an editorial remark stating that ‘Whoever grants the National Socialists a majority on 31 July 1932, the day of the Reichstag elections, leaves Germany entirely at the mercy of this group.’ Carl Schmitt, ‘Der Missbrauch der Legalität’, in Tägliche Rundschau 167 (July 19, 1932), 2. Whether this editorial remark had been proposed by, or discussed with, Schmitt himself remains unclear. Reinhard Mehring, Carl Schmitt: Aufstieg und Fall: Eine Biographie (Munich: Beck, 2009), 680, n. 36.


32 Schmitt, Verfassungsgesetz, 23–24; trans., 77–78.
quickly and effectively and restore the conditions of normality on which the rule of law depends.

By contrast, Schmitt criticizes liberal lawyers for advocating rule of law-responses to emergencies and claiming that the constitution must remain inviolable even in extreme emergencies. According to Schmitt, this ‘doctrine of inviolability’ is not only theoretically problematic, but politically dangerous. It is theoretically problematic, because it fails to distinguish between the political substance of the constitution and the constitutional law in which it is laid down. It thus implies that every single constitutional law must remain inviolable in public emergencies. This implication is politically dangerous, for it hampers the President’s ability to effectively respond to public emergencies. On Schmitt’s understanding, the liberal argument implies that in an emergency, every single constitutional provision must become an insurmountable obstacle to the protection of the constitution in general. This rule of law-approach to the state of exception is politically dangerous, for it boils down to sacrificing the substance of the constitution to its individual provisions, which are declared inviolable. In Schmitt’s view, this would mean ‘nothing other than placing the individual statute above the entirety of the legal form of existence and to twist the meaning and purpose of the state of exception into its opposite.’

Schmitt first developed his critique of the doctrine of inviolability in 1924, in a lecture presented at a meeting of the Association of German Constitutional Lawyers in Jena. Here he analysed in detail the scope of the President’s emergency powers. He argued that, under Article 48 of the Constitution, the President had in fact two different competences: a general competence to take all the measures necessary for restoring public security and order and a specific competence to suspend certain fundamental rights. While his specific competence was limited to the rights mentioned in Article 48: 2, Schmitt argued that this limitation did not apply to his general competence: hence, on Schmitt’s interpretation, the President was allowed to derogate from other constitutional provisions than those enumerated in Article 48, as long as he did not suspend those provisions. At the same time, however, he suggested that there were several limitations to the President’s emergency powers. Most importantly, the President was not allowed to violate the ‘organizational minimum’ that was presupposed by Article 48 itself. Among other things, this implied that his emergency measures should not prevent the ‘normal

33 Schmitt, Verfasungslehre, 27; trans., 80 (trans. modified).
34 Schmitt, Verfasungslehre, 109; trans., 156: ‘The temporal setting aside of individual or of all constitutional provisions is often imprecisely designated as the putting out of force or suspension of “the constitution.” The constitution in the actual sense, the fundamental political decisions over a people’s form of existence, obviously cannot be set aside temporarily, but certainly the general constitutional norms established for their execution can be precisely when it is in the interest of the preservation of these political decisions.’
35 Schmitt refers to ‘the norms for the protection of bourgeois freedom which are typical for the Rechtsstaat [die typisch rechtsstaatlichen Normierungen zum Schutz der bürgerlichen Freiheit].’ Schmitt, Verfasungslehre, 109–110; trans., 156 (trans. modified).
36 Schmitt, Verfasungslehre, 110; trans., 156.
37 Schmitt, Verfasungslehre, 110; trans., 156 (italics in the original).
38 Schmitt, Verfasungslehre, 111–112; trans., 158.
39 Schmitt, Verfasungslehre, 112; trans., 158.
40 Schmitt, Verfasungslehre, 27; trans., 80.
41 Schmitt, Verfasungslehre, 27; trans., 80.
43 Schmitt, Die Diktatur, 227.
functioning’ of the presidency, the government and the Reichstag. Moreover, the concept of emergency ‘measures’ (as opposed to laws) implied that the President’s emergency competences were limited to regulating specific cases, such that he was not allowed to issue legal norms that were generally binding (which had to remain a prerogative of the Reichstag). 44

In spite of these limitations, Schmitt’s criticism of the doctrine of inviolability in effect contributed to justifying exceptionally wide grants of emergency power. In the Spring of 1930, Weimar’s last majority government (a broad coalition led by the Social Democrats) resigned due to internal disagreements about how to cope with the effects of the financial crisis which had broken out in the previous year. Thereupon, the President of the Republic, Paul von Hindenburg, appointed a minority cabinet under the Catholic politician Heinrich Brüning. It soon became clear that Brüning lacked the necessary political support in the Reichstag. This led Hindenburg to take a decision with far-reaching consequences: instead of dismissing Brüning and his cabinet, he proclaimed a state of exception and dissolved the Reichstag. 45 In the following elections, the National Socialists surged ahead, winning 18.3 per cent of the vote. Together with other antidemocratic parties, such as the Communists and Völkischer Nationalists, they obtained almost half of the seats of the Reichstag. In the next two and a half years, the President’s emergency powers gradually became a regular means of governance as the Reichstag was paralysed by political polarization and no longer able to agree on anything substantial. This normalization of emergency powers contributed to the gradual erosion of Weimar’s parliamentary system. The Republic remained a parliamentary democracy in name only, and had essentially become a Presidential dictatorship. 46

As a legal advisor to President Hindenburg’s staff, Schmitt publically endorsed the practice of Presidential government. In 1931, he published an essay in which he defended Hindenburg’s decision, arguing that the President had acted as a ‘guardian of the constitution’ by preventing the constitutional order from falling prey to narrow and conflicting party interests. 47 Applying the criteria of his Jena lecture, he claimed that the President’s emergency powers were limited by the constitution’s organizational minimum, which implied that they remained subject to parliamentary control, rather than by ‘legally formed barriers’. However, now that the Reichstag was politically divided and failed to take its legislative responsibilities, the President had to take his own responsibility and govern without parliament instead. 48 Indeed, in the following year, Schmitt published an essay in which he openly acknowledged that in practice, Presidential emergency measures had violated even the organizational provisions of the constitution (notably, the competences of the Reichstag and the Länder). Moreover, he now suggested that the very distinction between emergency measures and laws had become obsolete, as the President had been tacitly allowed by the Reichstag and Courts to issue generally binding norms. Instead of criticizing these developments, Schmitt suggested they had to be accepted as practical realities. 49

It was essentially Schmitt’s anti-positivist approach that allowed him to downplay the importance of legal limitations to the President’s emergency powers. In this unprecedented crisis, Schmitt claimed, the President’s first responsibility was to protect the political substance of the Constitution. There could thus be no formal limitations to his emergency powers. Instead, the President was allowed to derogate from the rule of law provisions of the Constitution and even from its organizational provisions, if other organs of the state such as the Reichstag and the Länder failed to take their responsibility. However, by downplaying the importance of these constitutional restrictions on Presidential emergency powers Schmitt in effect contributed to justifying the transition towards a more authoritarian form of government. If the President was allowed to use his emergency powers to derogate from the rule of law provisions of the Constitution, if he was allowed to govern without the Reichstag and issue generally binding norms, and if he had the authority to intervene in the Länder by depositing state governments, then it no longer made sense to speak of a constitutional system based on parliamentary democracy, the rule of law, federalism and the separation of powers. Indeed, then the practice of Presidential emergency government had implicitly transformed the political substance of the constitution itself. In the end, then, it was Schmitt’s anti-positivist approach, his focus on extreme, unprecedented and exceptional emergencies to which formal rules could no longer apply, that led him to justifying the transition towards a Presidential dictatorship.

44 Schmitt, Die Diktatur, 243–244 and 247.
47 Carl Schmitt, Der Hütter der Verfassung (Berlin: Duncker und Humbior, 1969 [1931]), 131.
48 Schmitt, Der Hütter der Verfassung, 131.
49 Schmitt, Legalität und Legalität, 73.
50 On 20 July 1932, Chancellor Franz von Papen forced the Prussian State government to resign, installing himself as a Reich Commissioner for Prussia on the basis of a Presidential emergency decree. By doing so, the Chancellor not only destroyed one of the last bastions of democratic opposition in the Weimar Republic, but also acquired control over the powerful Prussian police force. In the following trial, Schmitt led the defence of the Reich. In his opening statement, he reaffirmed his anti-positivist interpretation of Article 48: he argued that Article 48 granted the President the authority to directly intervene in the Länder if the state government had failed in its responsibility for maintaining public order. More particularly, he claimed that under conditions of threatening civil war, the President had the duty to protect the constitution against a violent take-over by ‘illegal’ political parties. Moreover, he argued that in a state of exception, ‘illegal’ meant not merely the lack of correspondence to positive legal norms, but the factual condition of being an enemy of the state. Preussen contra Reich: Staatsgraumachen der Verhandlungen vor dem Staatsggerichtshof in Leipzig vom 10 bis 14. Oktober 1932 (Berlin, 1933), 39–40. Cf. "Nec Caldwell, Popular Sovereignty and the Crisis of German Constitutional Law: Theory and Practice of Weimar Constitutionalism (Durham: Duke University Press, 1997), 171–172 and Blasius, Carl Schmitt, 40–50."
Evaluating Schmitt's theory

As we have seen, Schmitt’s theory about the extra-legality of emergency responses is based on temporal assumptions that are in fact deeply problematic. First, Schmitt assumes that emergencies are inherently exceptional and unpredictable, such that executive emergency responses cannot be subject to \textit{ex ante} legal constraints. As we have seen, this interpretation depends on particular historical experiences and, more specifically, experiences of cultural and political disorder in the wake of World War I. Hence, we should be careful not to uncritically project Schmitt’s theory about the extra-legality of emergency powers onto our own present-day context, and keep in mind that Schmitt’s theory was informed by fears and concerns that were specifically related to the crisis of Weimar. This is especially true of Schmitt’s claim that emergencies are inherently exceptional and unpredictable: it expresses a temporal experience that was characteristic of the post-WWI generation, for whom the gap between present and past had become unbridgeable and traditional sources of legitimacy had lost their meaning. For this generation, it no longer seemed possible to predict what the future held in store, and it was therefore understandable (if not excusable) that Schmitt emphasized the belief that emergencies were inherently unpredictable, such that they could not be anticipated by the legislator.

By contrast, in our own present-day context, it is not self-evident that emergencies are inherently unpredictable. Instead, even extreme emergencies have their histories: they are preceded by similar ones and can be explained by historical causes. For instance, the 2008 financial crisis has been called ‘unprecedented’, yet there have been similar and even worse crises before – the financial crisis of 1929 comes to mind (which heralded the end of the Weimar Republic). There is thus no reason to assume that the legislator cannot anticipate such crises. Hence, Schmitt’s claim that emergency responses cannot be subject to \textit{ex ante} legal constraints is based on the incorrect assumption that emergencies cannot be anticipated: though unusual, emergencies are historical events, the effect of historical causes that can be recognized and explained. There is thus no reason to assume that emergency responses cannot be anticipated by the legislator and subjected to \textit{ex ante} legal constraints.

A similar criticism applies to Schmitt’s claim that extreme emergencies necessarily involve an existential threat to the survival of the state. As we have seen, Schmitt believes that emergency powers cannot be subject to legal restrictions, because in extreme emergencies, when the survival of the state is at stake, there can be no legal obstacles to executive emergency responses. More particularly, Schmitt claims that in such exceptional cases, those invested with emergency powers cannot be bound by the rule of law-provisions of the constitution, for their task is to protect the constitution’s political substance, on which the rule of law depends. As we have seen, in the early 1920s, when Schmitt first developed this theory of extra-legal emergency powers, the threat to the Weimar Republic was real and, indeed, existential: the legitimacy of the Republic was contested by parties of both the radical left and the extreme right. It was far from certain whether the Republic would survive the many violent uprisings of communist revolutionaries and right-wing putsch attempts. A decade later, when Schmitt developed his theory about the President as a ‘guardian of the constitution’, the Republic had once again plunged into a deep political crisis, with the National Socialists threatening to take to power and overturn the republican constitution. In this context, it was understandable that Schmitt claimed that the President had to do anything in his power to protect the existing constitution, even if it required a violation of the rule of law restrictions on his power.

However, although it is certainly true that in the 1930s, the Weimar Republic was facing an existential crisis, as it was confronted with the rise of anti-constitutional parties that openly called for its destruction, we should be careful not to project Schmitt’s existentialist discourses onto our present-day context. For instance, the 9/11 terrorist attacks have been called an ‘attack on the American way of life’. Indeed, this rhetoric was actively used by the US government to justify the indefinite suspension of the laws and the enhanced interrogation – or to put it more straightforwardly: torture – of suspects of terrorism. Yet, at no point did these attacks constitute a real threat to the survival of the American republic. Of course, they threatened the life of the population, which was a sufficient justification for temporarily restricting the rights of suspects of terrorism. But, it is important to distinguish the physical threat to the population from a political threat to the existing constitution: terrorism threatened the lives of thousands, but it did not pose an existential threat to the state or its republican constitution.51 Indeed, ultimately, the suspension of habeas corpus and other constitutional rights of suspects of terrorism (including the right not to be tortured) did more damage to the constitution than the threat of terrorism itself. There is thus no reason to assume that the prolonged, categorical suspension of rule of law-provisions of the constitution was necessary at all.

As we have seen, Schmitt’s theory of extra-legal emergency responses appears to be premised on the notion of \textit{exceptional time}: it tends to frame emergencies as ‘unprecedented’ events which arrive suddenly and unexpectedly, such that they cannot be anticipated by the legislator, nor subjected to \textit{ex ante} rule of law constraints. On Schmitt’s view, emergencies are essentially without history: they interrupt the normal course of events and are therefore unsuitable to be governed by law. The temporal continuity of law – connecting \textit{ex ante} legislation and \textit{ex post} adjudication – is suddenly disconnected by an exceptional event, which cannot be foreseen and therefore cannot be adjudicated on the basis of pre-existing norms. This implies that in emergencies, the laws are temporarily suspended: the executive

51 Bruce Ackerman argues that it is crucial to distinguish between ‘two different dangers posed by terrorism: the physical threat to the population and the political threat to the existing regime. Future attacks undoubtedly pose a severe physical threat: The next major strike may kill hundreds of thousands, or even millions. But they do not pose a clear and present danger to the existing regime.’ Bruce Ackerman, 'The Emergency Constitution', The Yale Law Journal 113 (2004), 1039.
is temporarily exempted from rule of law-constraints on his power. According to Schmitt, in the exceptional time of emergency, the logic of law can no longer be valid: it is replaced by the logic of the political, an existential struggle to save the existing constitutional order at any price. This temporality of the exception serves as the tacit assumption of Schmitt’s theory of extra-legal emergency responses. However, as I have tried to show, we should be careful not to uncritically project Schmitt’s theory onto our own present-day context, because present-day emergencies – whether they be terrorist attacks or financial melt-downs – are rarely existential in the Schmittian sense: they rarely involve a threat to the state or the existing constitution (even if they may involve a threat to life). Indeed, as I have suggested, extra-legal emergency responses may constitute a more direct threat to the existing constitution than the emergencies they are intended to meet. Hence, there is no reason to assume with Schmitt that executive emergency responses cannot be subject to ex ante rule of law-constraints.

Bibliography


