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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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DOI

[10.4324/9781351103480-7](https://doi.org/10.4324/9781351103480-7)

Publication date

2018

Document Version

Final published version

Published in

Temporal Boundaries of Law and Politics

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Citation for published version (APA):

de Wilde, M. (2018). Uncertain Futures and the Problem of Constraining Emergency Powers: Temporal Dimensions of Carl Schmitt's Theory of the State of Exception. In L. Corrias, & L. Francot (Eds.), *Temporal Boundaries of Law and Politics: Time Out of Joint* (pp. 107-125). (Law and politics: continental perspectives). Routledge.
<https://doi.org/10.4324/9781351103480-7>

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Temporal Boundaries of Law and Politics

Time Out of Joint

Edited by
Luigi Corrias and Lyana Francot

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

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

Marc de Wilde

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.¹ 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.²

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

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 Guantánamo 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).

2 On 7 June 2013, *The Guardian* and *The Washington Post* published documents from Edward Snowden which revealed that the American and British intelligence agencies NSA and GCHQ had systematically intercepted phone, e-mail and video communications. Barton Gellmann and Laura Poitras, 'US and British Intelligence Mining Data From Nine US Internet Companies in Broad Secret Program', *The Washington Post*, June 7, 2013; Glenn Greenwald and Ewan MacAskill, 'NSA PRISM Program Taps into User Data of Apple, Google, and Others', *The Guardian*, June 7, 2013.

of the nation are at stake, there is a tendency to 'rally behind the flag' and to unconditionally support executive emergency measures.³ 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.⁴ 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.

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

4 Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford: Oxford University Press, 2010), 11.

The belief in the unpredictability of emergencies – the belief that they occur in an *exceptional time* which cannot be anticipated – is expressed in contemporary discourses of emergency powers. Current crises are thus often claimed to be 'unprecedented' and in need of unprecedented emergency responses. These crises are said to be unique and unforeseen, without history or precedent. They are believed to arrive unannounced, disrupting the existing legal order unexpectedly. Thus, after 9/11, it was claimed that the threat of terrorism was 'unprecedented' and that the existing laws were insufficient to understand and cope with this threat. More specifically, it was claimed that the laws of war and criminal law did not apply to suspects of terrorism, as the legislator had not foreseen, and could not have foreseen, this unprecedented threat.⁵ Likewise, the 2008 financial crisis was said to be 'unprecedented' and in need of 'unprecedented' emergency responses.⁶ More particularly, it was emphasized that the sudden failure of banks could not have been foreseen or anticipated by the legislator. Hence, governments were tacitly allowed to act without prior legal authorization and nationalize banks and financial institutions which were considered too big to fail.

From a rule of law perspective it is important to tackle the general belief that emergencies are inherently unpredictable, such that emergency responses cannot be subject to *ex ante* legal constraints. This belief is based on the assumption that in emergencies, the regularity of law, i.e., the temporal continuity between *ex ante* legislation and *ex post* adjudication, has been interrupted and become dysfunctional. In the literature, this belief is often attributed to the German constitutional lawyer Carl Schmitt. In the 1920s and 30s, Schmitt advocated exceptionally wide and, indeed, extra-legal emergency powers. He justified these powers by pointing at the inherent unpredictability of emergencies. He thus claimed that each crisis could unexpectedly develop into an extreme emergency, a threat to the state and its constitution. In view of these existential threats, it was justified to proclaim a 'state of exception', which led to the temporary suspension of the laws. For Schmitt, it was the very exceptional and inherently unpredictable nature of emergencies that justified the categorical suspension of the laws. If the state itself was imperiled, there could be no legal obstacles to executive emergency responses. After 1933, Schmitt would collaborate with the National Socialists and use his theory of emergency powers, amongst other things, to justify the extra-legal

5 In speeches and press statements, members of the US government often referred to the 'unprecedented threat of terrorism' to justify exemptions 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.

execution of Hitler's political opponents.⁷ 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.⁸ 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,⁹ 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.¹⁰ 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.

7 See, in particular, Carl Schmitt, 'Der Führer schützt das Recht', *Deutsche Juristen-Zeitung* 39, no. 15 (August 1, 1934), 945–950. Schmitt's collaboration with National Socialism is discussed in Dirk Blasius, *Carl Schmitt: Preussischer Staatsrat in Hitlers Reich* (Göttingen: Vandenhoeck und Ruprecht, 2001). For an analysis of Schmitt's Anti-Semitism: Raphael Gross, *Carl Schmitt und die Juden: Eine deutsche Rechtslehre* (Frankfurt am Main: Suhrkamp, 2005).

8 For an overview of Schmitt's influence on the contemporary debate about emergency powers see: William E. Scheuermann, 'Emergency Powers and the Rule of Law after 9/11', *The Journal of Political Philosophy* 14, no. 1 (2006), 61–84.

9 Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?', *The Yale Law Journal* 112, no. 5 (2003), 1120–1121 and Posner and Vermeule, *The Executive Unbound*, 4–5, 32–34, 42.

10 Mark Tushnet, 'Emergencies and the Idea of Constitutionalism', in *The Constitution in Wartime: Beyond Alarmism and Complacency*, ed. M. Tushnet (Durham: Duke University Press, 2005), 39–54 and David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006), 34–54. Compare also Dyzenhaus's excellent analysis of Schmitt's legal theory in *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Oxford University Press, 2003), 38–101.

Coping with an uncertain future: Carl Schmitt in Weimar

To grasp the stakes of Schmitt's theory of emergency powers we need to understand it in its historical context. Schmitt first developed his ideas about emergency powers in the early 1920s, during the so-called Weimar Republic. This was a time when the future seemed highly uncertain. World War I had resulted in the sudden collapse not only of states and empires, but of an entire world order with its traditional ways of life and horizons of meaning. Thus, the world in which Schmitt's generation had grown up, in which emperor, church and nation had embodied shared values, no longer existed. In the course of a single generation, this world had disappeared. In the Weimar Republic, this led to feelings of cultural and political disorientation.¹¹ Expectations with regard to the future could no longer be predicted on the basis of past experiences. Indeed, the gap between present and past seemed to have become unbridgeable.¹² In a world, in which the tradition had suddenly lost its normative force, everything seemed to have become possible: the future appeared to be radically open, and nobody could predict what it held in store.

This was also true of the Republic itself: in the early 1920s, the future of the young Republic was still highly uncertain. The Republic had literally been founded on the ruins of the Great War: it was thus narrowly associated with Germany's military defeat and many considered it an illegitimate, foreign imposition. More importantly, in spite of its modern, democratic constitution, a genuinely democratic tradition and culture were lacking.¹³ As Eric Weitz observes in a recent

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 Koselleck argues that modernity, in the sense of *Neuzeit*, 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 Koselleck, *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

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.'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.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 counselor 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.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.

14 Eric D. Weitz, *Weimar Germany: Promises and Tragedy* (Princeton: Princeton University Press, 2007), 366. For an extensive analysis of the 'antidemocratic spirit' of Weimar's political elites, see: Kurt Sontheimer, *Antidemokratisches Denken in der Weimarer Republik* (München: Deutscher Taschenbuch Verlag, 1994).

15 Fritz Poetzsch-Heffter, 'Vom Staatsleben unter der Weimarer Verfassung: Erster Bericht, vom 1. Januar 1920 bis zum 31. Dezember 1924', *Jahrbuch des öffentlichen Rechts* 13 (1925), 141ff.

16 Joseph Bendersky, *Carl Schmitt: Theorist for the Reich* (Princeton: Princeton University Press, 1983), 22.

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*]'.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.'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.'¹⁹ The legislator can define the state of exception only in the most general terms, as a 'case of extreme peril, a danger to the existence of the state, or the like.'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 competence²¹ – must necessarily be unlimited, as neither the emergency itself, nor the measures it requires, can be specified in advance.

17 Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* (Berlin: Duncker und Humblot, 1996 [1922]), 13–14 and 18. Translated as Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. Georg Schwab (Chicago: Chicago University Press, 2005), 6 and 12.

18 Schmitt, *Politische Theologie*, 13; trans., 6–7.

19 Schmitt, *Politische Theologie*, 13; trans., 6–7 (trans. modified).

20 Schmitt, *Politische Theologie*, 13; trans., 6.

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

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.'²² 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.'²³ 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.'²⁴ 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 anarchy 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.²⁵

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 Krabbe 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 anarchy 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:

[t]he 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 durchbricht die Kraft des wirklichen Lebens die Kruste einer in Wiederholung erstarrten Mechanik*].²⁶

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 defenceless 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-positivist 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

22 Schmitt, *Politische Theologie*, 14; trans., 7.

23 Schmitt, *Politische Theologie*, 14; trans., 7.

24 Schmitt, *Politische Theologie*, 19; trans., 13.

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.

26 Schmitt, *Politische Theologie*, 21; trans., 15.

constituted by the friend/enemy distinction. It is this friend/enemy distinction which allows us to identify a certain human practice as a *political* practice.²⁷ Schmitt understands the friend/enemy distinction in existential terms: the enemy is defined by the fact that he constitutes a threat to our existence, to our way of life. This implies that a violent conflict with the enemy is a 'real possibility.' By relating his notion of the political to the 'exceptional case' of violent conflict, Schmitt suggests that a state of exception may only be proclaimed if a nation is facing an enemy that constitutes a direct threat to its way of life, that is, if violent conflict with the enemy has become a 'real possibility'.²⁸ According to Schmitt, it is only in this extreme situation that the state of exception and the suspension of the laws it entails are justified.

By highlighting the political and existential dimensions of the state of exception and emergency powers Schmitt turns against the positivist tendency to *neutralize* the domain of the state and constitutional law. In his view, legal positivists fail to see that emergencies involve existential struggles which are in fact highly political. Here, Schmitt probably had in mind contemporary examples. Thus, at the time he wrote his essay, even outright anti-constitutional parties such as the Communists and National Socialists were permitted to use their constitutional rights and to participate actively in the parliamentary system. These parties strategically used the neutrality of constitutional rights and procedures to gain power for the very purpose of destroying that same constitution. By contrast, Schmitt believes that a state cannot afford to remain neutral *vis-à-vis* parties that deny its legitimacy and reject its constitutional values. In this existential struggle, the state and, more particularly, the President, needs to be prepared to temporarily suspend the laws and limit the rights of anti-constitutional parties. Hence, in Schmitt's view, the President is authorized, and indeed has the duty, to temporarily suspend the laws to protect the constitution itself.

However, in the early 1930s, Schmitt's position towards National Socialism becomes more ambivalent. He still argues that the President may use his emergency powers to limit the rights of anti-constitutional parties and prevent such parties from obtaining a position of power that allows them to 'close the door behind [themselves], thus shoving aside the principle of legality by legal means.'²⁹

27 Carl Schmitt, *Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Corollarien* (Berlin: Duncker und Humblot, 2002 [1932]), 26. Translated as: Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: Chicago University Press, 2007), 26.

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

29 Carl Schmitt, *Legalität und Legitimität* (Berlin: Duncker und Humblot, 2005 [1932]), 35. Interestingly, the prepublication 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), 650, n. 36.

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':

[i]t 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[se] parties 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 inimical 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 parliamentary-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.

30 Carl Schmitt, 'Die Verfassungsmässigkeit der Bestellung eines Reichskommissars für das Land Preussen', *Deutsche Juristen-Zeitung* 37, no. 15 (1 August 1932), 958.

31 Carl Schmitt, *Verfassungslehre* (Berlin: Duncker und Humblot, 1993 [1928]), 22. Translated as: Carl Schmitt, *Constitutional Theory*, trans. and ed. Jeffrey Seitzer, foreword by Ellen Kennedy (Durham: Duke University Press, 2008), 76.

32 Schmitt, *Verfassungslehre*, 23–24; trans., 77–78.

Schmitt's distinction between the constitutional law and the constitution itself turns out to be of decisive importance for determining the nature and scope of executive emergency powers: Schmitt argues that in a state of exception, the *constitutional law* is temporarily suspended, while the executive remains bound by the *constitution* itself. For instance, Article 48 of the Weimar Constitution authorizes the President to proclaim a state of exception and to temporarily suspend several rights of citizens, including the inviolability of person, domicile and property, and the freedom of speech, association and assembly. Yet, in doing so, the President remains bound by the constitution itself: in suspending these rights, he must respect the political decisions underlying the constitution, including the decision for a *Rechtsstaat* based on fundamental rights. Indeed, as Schmitt explains, the temporary suspension of these rights 'stands precisely in the service of the constitution's preservation and restoration.'³³ In other words: it is to protect the *political* substance of the constitution, that the President is authorized to temporarily suspend the constitutional law and its individual provisions.³⁴

More particularly, Schmitt argues that in the state of exception, the President is temporarily allowed to derogate from the 'rule of law-provisions of the constitution' to protect the constitution itself.³⁵ Schmitt seems to associate the rule of law-provisions of the constitution with a negative form of freedom; they serve as 'limits to the state's political action'.³⁶ However, in a public emergency, these rule of law-provisions threaten to become obstacles to the effective defence of the state. Hence, in a public emergency, when quick and resolute emergency responses are required, the President is temporarily released from the rule of law-restrictions on his power. According to Schmitt, these restrictions are temporarily suspended to enable the executive to effectively protect the constitution itself: 'In instances of the endangerment of the *political* form of existence, they must appear as a hindrance to state self-defence. During disturbances of public safety and order, in dangerous times like war and domestic unrest, constitutional limitations such as these are suspended.'³⁷ On Schmitt's understanding, even the rule of law can only be effectively protected by temporarily releasing the President from the individual rule of law-restrictions on his power, so that he can respond to the emergency

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.³⁸ 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.³⁹ 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'.⁴⁰ 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 political form of existence and to twist the meaning and purpose of the state of exception into its opposite.'⁴¹

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.⁴² 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.⁴³ 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, *Verfassungslehre*, 27; trans., 80 (trans. modified).

34 Schmitt, *Verfassungslehre*, 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, *Verfassungslehre*, 109–110; trans., 156 (trans. modified).

36 Schmitt, *Verfassungslehre*, 110; trans., 156.

37 Schmitt, *Verfassungslehre*, 110; trans., 156 (italics in the original).

38 Schmitt, *Verfassungslehre*, 111–112; trans., 158.

39 Schmitt, *Verfassungslehre*, 112; trans., 158.

40 Schmitt, *Verfassungslehre*, 27; trans., 80.

41 Schmitt, *Verfassungslehre*, 27; trans., 80.

42 Carl Schmitt, 'Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung' [1924], in Schmitt, *Die Diktatur* (Berlin: Duncker und Humblot, 1994 [1921]), 209–257. On this debate see my 'The State of Emergency in the Weimar Republic: Legal Disputes over Article 48 of the Weimar Constitution', *The Legal History Review* 78 (2010), 135–158.

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 emergency 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,⁵⁰ 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.

45 Heinrich August Winkler, *Weimar, 1918–1933: Die Geschichte der ersten deutschen Demokratie* (CH Beck, 1993), 379–80.

46 See my 'Just Trust Us: A Short History of Emergency Powers and Constitutional Change', *Comparative Legal History* 3, no. 1 (2015), 14.

47 Carl Schmitt, *Der Hüter der Verfassung* (Berlin: Duncker und Humblot, 1969 [1931]), 131.

48 Schmitt, *Der Hüter der Verfassung*, 131.

49 Schmitt, *Legalität und Legitimität*, 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: Stenogrammbereich der Verhandlungen vor dem Staatsgerichtshof in Leipzig vom 10 bis 14 Oktober 1932* (Berlin, 1933), 39–40. Cf. Peter 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 *ex ante* legal constraints. As we have seen, this interpretation depends on particular historical experiences and, more specifically, experiences of cultural and political disorientation 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 *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 *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 *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 *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 *ex ante* legislation and *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.

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