The law of the exception: A typology of emergency powers

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1. Introduction

Constitutions are often designed to check the exercise of power, employing such devices as bicameralism, executive veto power, special majorities, and, nowadays, constitutional adjudication. To an extent, these checks reflect a kind of distrust of those who wield the authority of the state, at least with respect to the protection of individual rights, and that distrust is at its greatest when it comes to the exercise of executive power. Even British constitutional arrangements permit judges to interfere with the executive if they can be persuaded that an administrative action is not authorized by a parliamentary statute. But insofar as modern constitutional governments are limited in this way, they may be somewhat disabled in dealing with emergencies. When the public safety is seriously threatened, there may be a need for quick and decisive action that cannot, perhaps, wait for the deliberate pace of ordinary constitutional rule. This, indeed, is a central dilemma of a liberal constitutional government. The rights and protections it provides and preserves can prevent the government from responding efficiently and energetically to enemies that would destroy those rights and, perhaps, even the constitutional order itself.

As a result, modern constitutions often have special provisions for dealing with emergency situations.¹ In cases of an urgent threat to the state or regime, constitutions sometimes permit the delegation of powers to a president, or to some other constitutional authority, to issue decrees, to censor information, and to suspend legal processes and rights. The purpose for which this special authority is granted is fundamentally conservative: it is aimed at resolving the threat to the system in such a way that the legal/constitutional system is restored to its previous state. Rights are to be restored, legal processes resumed,
and ordinary life taken up again. This conservative purpose is reflected in the fact that the executive is not permitted to use emergency powers to make any permanent changes in the legal/constitutional system. Emergency powers, exercised in this conservative way, have long been thought to be a vital and, perhaps, even an essential component of a liberal constitutional—

that is, a rights-protecting—government. They are the key to resolving the dilemma faced by such governments when they are under either external or internal attack.

2. Models of emergency power

Modern emergency powers are, to a greater or lesser extent, modeled on the ancient model of the Roman dictatorship. The Roman Constitution was exceptionally complex and contained a very elaborate system of checks on the exercise of executive authority. Each of the executive offices was, in effect, collegial: there were two consuls who shared the highest executive authority.

2 Machiavelli's defense of Roman dictatorship puts its conservative purpose very well:

As is seen ensued in Rome where in so much passage of time no Dictator did anything that was not good for the Republic. . . . A dictator was made for a (limited) time and not in perpetuity, and only to remove the cause for which he was created; and his authority extended only in being able to decide by himself the ways of meeting that urgent peril, (and) to do things without consultation, and to punish anyone without appeal; but he could do nothing to diminish (the power) of the State, such as would have been the taking away of authority from the Senate or the people, to destroy the ancient institutions of the City and the making of new ones. So that taking together the short time of the Dictatorship and the limited authority that he had, and the Roman People uncorrupted, it was impossible that he should exceed his limits and harm the City; but from experience it is seen that it (City) always benefited by him.


3 The influence of the Roman model of emergency powers—specifically constitutional dictatorship—on modern constitutional thought is complex but travels through the development of republican thinking. Particularly important is Polybius's reconstruction of the Roman Constitution, together with writings of Livy and other historians, that eventually led to the "rediscovery" of Roman constitutional practices by Machiavelli, Montesquieu, and Rousseau in developing modern republican ideas. In turn, the drafters of the Weimar Constitution, the German Basic Law of 1919, and of the French 1958 Constitution were convinced of the importance of creating a constitutional capacity to cope with urgent threats to the regime or the nation.

4 We may consider executive officials as those who bear the imperium—the power to conduct military operations outside of the city, and particularly to kill without any legal process those who opposed those operations. These included the consuls, proconsuls, praetors, and a few others. Each of these officials was always accompanied by bodyguards bearing the symbols of imperium—a bundle of rods (fasces), which would include an axe if he were outside the city. Inside the city, the axe is removed and his orders are subject to a right of due process, the provocatio. The dictator, when one was in place, not only possessed the imperium but also possessed that power inside of Rome (domi). The axe was not removed from his fasces when he was within the city.
and also commanded the armies.\footnote{The sharing of executive powers sometimes worked through alternation and sometimes by giving each consul an area where he would rule. But there were ambiguous areas where either consul could claim authority and how rule was handled in these areas was worked out through negotiation.} There were numerous other subordinate executive officials who shared some of these powers as well. The Roman Senate, which was at least as much an executive as a legislative body, could issue edicts and decrees, and it effectively governed Rome when the consuls were away from the city. But the Senate was usually very large and often internally divided. And from quite early, there were ten tribunes who were responsible to the popular assemblies, each of whom had veto power over the actions of the Senate or the consuls. The effect of this elaborate system of checks was to maintain the complex system of rights to which Roman citizens had become accustomed, but this complex division of authority produced a government that was unwieldy in times of crisis.\footnote{There is some dispute among historians as to whether the “purpose” of executive collegiality was to protect rights or if this was merely a side effect of that arrangement. \textsc{Andrew Lintott, The Constitution of the Roman Republic 100–1} (Clarendon Press 1999). Lintott argues, for example, that the reason for collegial executives was as a precaution against the death or unavailability of one or more of the officials. It is hard to know the purpose of a constitutional arrangement whose origins are unrecorded so we remain agnostic about such claims.}

In cases of emergency the Roman Senate could direct the consuls to appoint a dictator for a period of up to six months.\footnote{Originally, the dictator was to have served previously as a consul though with time this restriction fell away. He was also restricted to dealing with affairs in Italy, a restriction that was honored until the Second Punic War, after which the dictatorship fell into disuse. \textsc{See Wilfried Nippel, Emergency Powers in the Roman Republic, in \textit{La théorie politico-constitutionnelle du gouvernement d’exception} 5–23 (Pasquale Paquino & Bernard Manin eds., Les Cahiers du CREA 2000).}}\footnote{Technically, the consuls could exercise full \textit{imperium} only outside the city (\textit{militiae}). Inside of Rome (\textit{domi}), the consuls’ orders could be appealed to the courts. The dictator, however, had the \textit{imperium} inside the city as well and his decisions were not subject to appeal.} The dictator was authorized to suspend rights and legal processes and to marshal military and other forces to deal with the threat of invasion or insurrection for the purpose of resolving the threat to the republic.\footnote{And originally, the dictator was to have served previously as a consul though with time this restriction fell away. He was also restricted to dealing with affairs in Italy, a restriction that was honored until the Second Punic War, after which the dictatorship fell into disuse. \textsc{See Wilfried Nippel, Emergency Powers in the Roman Republic, in \textit{La théorie politico-constitutionnelle du gouvernement d’exception} 5–23 (Pasquale Paquino & Bernard Manin eds., Les Cahiers du CREA 2000).}} When he finished this job he was expected to step down, his orders were terminated and their legal effects ended, and the status quo ante was to be restored. In these respects the purpose of the dictator was fundamentally conservative. In the same way, modern constitutional emergency powers are supposed to be conservative as well. Emergency powers in modern constitutions are to be employed to deal with temporary situations and are aimed at restoring the conditions to a state in which the ordinary constitutional system of rights and procedures can resume operation. Typically, the holder of emergency powers is not permitted to make law but is restricted to issuing temporary decrees. And of course, the constitution itself is not to be changed in such periods.
The Roman dictatorship was rediscovered by Machiavelli and described by Harrington and Rousseau as a necessary component of a well-functioning republic.\(^9\) We can see those writers as a kind of bridge between the Roman model of dictatorship and the modern idea of constitutional emergency powers, which we will call the “neo-Roman model.” Modern constitutions do not invest special powers in a person outside of government but many vest emergency powers in an elected president. The Constitution of the Weimar Republic and the 1958 French Constitution are exemplary in this regard.\(^10\) An important distinction between the classical and neo-Roman model is that, while the Roman dictator was chosen from among men of special virtues and abilities, in the newer scheme of things the person who is to wield emergency powers enjoys a kind of popular or democratic mandate.

The situation in the U.S. is complex. The framers were certainly aware of the Roman model: “Every man the least conversant in Roman history, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.”\(^11\) Indeed, the experience of the Revolution itself would have been fresh: George Washington functioned essentially as a congressionally appointed dictator for seven years and then returned to his farm. But, by 1787 the framers seemed to think that a unified, energetic, and

\(^9\) Niccolo Machiavelli, Discourses on Livy ch. 34; James Harrington, The Commonwealth of Oceana 88 (1656), available at http://www.constitution.org/jh/oceana.htm (“But whereas it is incident to commonwealths, upon emergencies requiring extraordinary speed or secrecy, either through their natural delays or unnatural haste, to incur equal danger, while holding to the slow pace of their orders, they come not in time to defend themselves from some sudden blow; or breaking them for the greater speed, they but haste to their own destruction; if the Senate shall at any time make election of nine knights-extraordinary, to be added to the Council of War, as a juncta for the term of three months, the Council of War with the juncta so added, is for the term of the same Dictator of Oceana, having power to levy men and money, to make war and peace, as also to enact laws, which shall be good for the space of one year (if they be not sooner repealed by the Senate and the people) and for no longer time, except they be confirmed by the Senate and the people. And the whole administration of the commonwealth for the term of the said three months shall be in the Dictator, provided that the Dictator shall have no power to do anything that tends not to his proper end and institution, but all to the preservation of the commonwealth as it is established, and for the sudden restitution of the same to the natural channel and common course of government. And all acts, orders, decrees, or laws of the Council of War with the junota being thus created, shall be signed, ‘DICTATOR OCEANAE.’ ”); Jean-Jacques Rousseau, The Social Contract and Discourses 293 (1762) (G. D. H. Cole trans., J. M. Dent & Sons Ltd. 1973) (“The dictatorship”).

\(^10\) See Weimar Const. art. 48; Fr. Const. art. 16.

independent executive would obviate the need for such a special office. Thus, the U.S. Constitution provides only a limited grant of explicit emergency powers in article I, which permits suspensions of habeas corpus in some circumstances (though this is often thought to be a power controlled by Congress rather than the president), while article II contains or suggests an array of implied powers that may authorize presidential emergency rule (such as the president’s powers as commander in chief of the armed forces). So, American law on this issue remains an ambiguous example, but it does seem clear that an American president has some constitutionally delegated powers to deal with emergencies. If that is so, the U.S. case resembles the situation in the Weimar Republic and France, in that the Constitution explicitly delegates to the president certain special powers to deal with emergencies.

12 Alexander Hamilton wrote:

The experience of other nations will afford little instruction on this head. As far, however, as it teaches anything, it teaches us not to be enamoured of plurality in the executive. We have seen that the AchaeanS, on an experiment of two Praetors, were induced to abolish one. The Roman history records many instances of mischiefs to the republic from the dissensions between the consuls, and between the military tribunes, who were at times substituted for the consuls. But it gives us no specimens of any peculiar advantages derived to the state from the circumstance of the plurality of those magistrates. That the dissensions between them were not more frequent or more fatal is matter of astonishment, until we advert to the singular position in which the republic was almost continually placed, and to the prudent policy pointed out by the circumstances of the state, and pursued by the consuls, of making a division of the government between them. The patricians engaged in a perpetual struggle with the plebeians for the preservation of their ancient authorities and dignities; the consuls, who were generally chosen out of the former body, were commonly united by the personal interest they had in the defense of the privileges of their order. In addition to this motive of union, after the arms of the republic had considerably expanded the bounds of its empire, it became an established custom with the consuls to divide the administration between themselves by lot—one of them remaining at Rome to govern the city and its environs, the other taking the command in the more distant provinces. This expedient must no doubt have had great influence in preventing those collisions and rivalships which might otherwise have embroiled the peace of the republic.

Id. at 393.

13 U.S. Const. art. I, § 9, cl. 2.

14 Id. art. II, § 2, cl. 1.

15 The complex ways in which republican, specifically Roman, ideas influenced the structure of the American Constitution is a large and controversial topic. There is little doubt, from what they wrote in many places and which authors they cited and used as rhetorical models, that many of the framers and their opponents were directly familiar with Roman histories produced by Livy, Tacitus, and Sallust as well as Polybius and that they would also have learned of the ideas of the separation of powers and checks and balances in republican Rome through Montesquieu’s influential writings. Hence, there would have been some knowledge of the Roman dictator and of particular dictators, such as the legendary Cincinnatus and Fabius Maximus, and perhaps the constitutional framers might have seen a need for dealing with emergencies as a requisite for a stable republic. But,
Advanced democracies do not necessarily need to use constitutional powers when confronting emergencies. They often prefer to deal with emergencies through ordinary legislation. Such legislation may delegate a great deal of authority to the executive and may be enacted for temporary periods. And there may be a sense that the legislation is in some ways exceptional. But, however unusual it may be, emergency legislation remains ordinary within the framework of the constitutional system: it is an act of the legislature working within its normal competence. Such legislation is, in the postwar constitutional systems, reviewable by the constitutional court (if there is one) and is regulated in exactly the same manner as any other legislative act. For example, in Britain we see the succession of Defense Against Terrorism acts and the United States has the PATRIOT Act. Each is ordinary though time-limited legislation. Many antiterrorist laws have been passed in the same way by the German and Italian parliaments in the 1970s and the 1980s.

In fact, not all advanced democracies actually have constitutional provisions for the exercise of emergency powers. While the 1958 French Constitution has article 16, and the German Basic law has article 115a, British constitutional arrangements do not recognize any source of executive authority that is not delegated to it by an act of Parliament. At least since the decline of royal prerogative, Great Britain has only one legal way to deal with emergencies: to enact ordinary laws that delegate special authority to the government or its agencies.

In any case, it is a striking fact that, even in those advanced democracies whose constitutions contain provisions for emergency powers, these powers are not used. There seem to be two possible reasons for this. First, it may be that there have not been emergencies of sufficient magnitude to warrant the invocation of emergency powers. It is plausible that elected officials are cautious in triggering the use of exceptional powers and, indeed, that caution is probably of course, they would also have been acquainted with the perversion of the institution by Sulla and Caesar, and so would have seen the dangers of emergency rule as well. As far as we can tell, the provision for suspending habeas corpus in article I probably owes more to English experience with the Habeas Corpus Acts, which permitted the suspension of the privilege by statute, than to an attempt to implement Roman emergency laws. The president’s commander-in-chief powers seem a more likely place to look for the republican influence on the structure of emergency powers.


17 Compare FR. CONST. art. 16, with GG art. 115a (F.R.G.). This long article was passed by a constitutional amendment in 1968. It copes essentially with what Germans call Verteidigungsfall, state of defense, having in mind the invasion of the country by nothing less than the Red Army!
to be applauded. Perhaps, in view of the historical abuses of such powers (for example, the extensive use of such powers by Indira Gandhi in the 1970s, 18 tyrannical misrule under the guise of emergency rule in various Latin American countries, and, perhaps, the experience of the end of the Weimar government), political officials have generally decided that the dangers carried by the exercise of emergency authority are too great to be used in any but the most dire circumstances. Second, it is possible because of the advance of state-controlled technology for dealing with disorder, that most emergencies can be successfully managed by the operation of the ordinary legal-constitutional system. That is, an emergency that might have required the invocation of emergency powers a century ago, can now be handled effectively by more or less ordinary policing techniques, beefed up with a few extra powers permitting the detention of suspects without charges, and perhaps suspending their access to lawyers. And these extra powers can be supplied by statutes.

Either of these possibilities may explain why, among the advanced democracies, only France has employed such powers in the recent past (in 1961) and that was to deal with the Algerian situation. The Algerian crisis may well have threatened the French state in some fundamental way; it certainly had undermined the previous regime. It may, in that sense, have been analogous to the traditional triggers of emergency power: invasion, revolution, or catastrophic military defeat. By contrast, Germany, Italy, Spain, Great Britain, and the U.S. all chose to deal with domestic and international terrorism by delegating powers to executives by ordinary legislative means. Terrorists in those states were, on these views, more of a nuisance to public order than a profound threat to the legal-constitutional order.

One may object, of course, that the countries spoken of here are very stable and entrenched democracies that have little need to invoke extreme constitutional measures to protect their regimes. None is plagued by such deep internal rifts as to be at risk of internal insurrection much less civil war. Moreover, the international borders surrounding these countries are stable and uncontested and there has been little risk of external invasion. The political disturbances they face from terrorism may be frightening to many people, but they offer no deep threat to the existence of the nation, or the constitution, or even to the political regime; perhaps nothing to warrant testing new constitutional waters by investing the executive or the security apparatus with vast and possibly dangerous new powers.

While we accept these points, we think that an explanation for the disuse of constitutional emergency powers must lie, in part, in the development of a new legal model for dealing with emergencies. A new model of emergency powers—the legislative model—has evolved over the past half century, at least

18 See Burt Neuborne, Supreme Court of India, 1 INT’L J. CONST. L. (I·CON) 476 (2003).
for the advanced or stable democracies.\textsuperscript{19} The legislative model handles emergencies by enacting ordinary statutes that delegate special and temporary powers to the executive. This practice implies that emergency powers are to be understood as exceptional to the ordinary operation of the legal system and that, once the emergency subsides, there will be a return to ordinary legal and political processes. In principle, therefore, legislative emergency powers are temporary. They are also aimed at restoring the prior legal constitutional status quo and so, in that sense, are conservative, as is the neo-Roman model. Whoever has had their rights suspended will regain them and normal life will resume. Moreover, because emergency powers are provided in the ordinary legislative process, that process remains in place to regulate the use of the granted powers. The legislature is expected to monitor the use of the emergency powers, to investigate abuses, to extend these powers if necessary, and perhaps to suspend them if the emergency ends.\textsuperscript{20}

Another feature of the legislative model is that the legislature plays a fundamental role both in recognizing an emergency and in creating the powers to deal with it. As we shall see, this combination of functions is quite different from the Roman model. The Roman Senate, of course, did play an epistemic role in recognizing the fact of an emergency, but the powers given to the dictator, and the limits of those powers, were determined constitutionally, prior to any particular emergency, and not by the Senate. In recognizing a state of emergency, in fact, the Senate effectively suspended its own operations and permitted the dictator to assume the constitutional duty of resolving the emergency. In the legislative model, the epistemic and power-creating functions are combined.\textsuperscript{21} This is, therefore, a partial departure from the Roman practice of

\textsuperscript{19} It is important to note that the use of constitutional emergency powers remains common in newer and more fragile democracies: Latin America, Africa, and southern Asia have seen repeated uses of such constitutional powers. Some of these uses might be judged successful, others less so. But the important empirical observation is that emergency powers remain alive and well in less stable democracies.

\textsuperscript{20} In many modern constitutions, the legislature retains a role even in constitutional emergencies. Under article 16 of the French Constitution, the legislature remains in session, and it is able to impeach the president if it thinks he has exceeded his authority. \textit{Fr. Const.} art. 16.

\textsuperscript{21} Indeed, congressional recognition of the need to deal with emergencies was apparent in the early years of the American republic. For example, in view of doubts as to whether the Constitution provided sufficient authorization to the president, Congress enacted legislation permitting the commandeering of the state militias in 1792. Two years later President Washington personally led these troops into action. Washington’s proclamation, calling for the use of state militias to suppress the Whiskey Rebellion, reads as follows:

\begin{quote}
And whereas, by a law of the United States entitled “An act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions,” it is enacted that whenever the laws of the United States shall be opposed or the execution thereof obstructed in any state by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshals by that act, the
“heteroinvestiture,” where the party declaring an emergency is completely separated from the one that exercises that authority.\footnote{This paragraph is speaking of the ordinary or paradigmatic use of the legislative model in which the legislature creates a new statute authorizing and defining executive action after the emergency. There is another case that is common in which the executive bases his actions in emergency periods on old emergency statutes that were never repealed.}

The attractiveness of the legislative model relative to the constitutional (or neo-Roman) model rests on a combination of normative and positive judgments. Constitutional emergency powers are thought to be especially dangerous in that they give the executive special and difficult-to-control new powers; to undertake this danger is warranted only in dire circumstances. And, precisely because the circumstances are so dire, the executive will be very hard to manage or check should he abuse the trust the constitution has placed in him. The legislative model permits closer legislative supervision of the executive’s use of legislatively created authority, and it provides for the timely ending of that delegation whenever the legislature thinks the emergency is finished or if the executive has proven untrustworthy. Thus, legislative delegation seems more flexible. This virtue seems more real in a separation-of-powers system in which the executive and legislative branches are independent of one another; but even where a parliamentary system is in place, as in the U.K., the legislature may choose to establish independent commissions to monitor the execution of these new powers.

A second condition for the use of the legislative model is that, in circumstances of emergency, the legislature is actually willing to enact statutes conceding new, if temporary, powers to the executive. That is to say, it must be believed generally that the “normal” circumstances of jealousy or rivalry between governmental departments will be overridden during emergencies. At least with same being notified by an associate justice or the district judge, it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations and to cause the laws to be duly executed. And if the militia of a state, when such combinations may happen, shall refuse or be insufficient to suppress the same, it shall be lawful for the President, if the legislature of the United States shall not be in session, to call forth and employ such numbers of the militia of any other state or states most convenient thereto as may be necessary; and the use of the militia so to be called forth may be continued, if necessary, until the expiration of thirty days after the commencement of the ensuing session: Provided always, that, whenever it may be necessary in the judgment of the President to use the military force hereby directed to be called forth, the President shall forthwith, and previous thereto, by proclamation, command such insurgents to disperse and retire peaceably to their respective abodes within a limited time:

The law of the exception: A typology of emergency powers

respect to external emergencies—wars, epidemics, and the like—the forces of public opinion in modern democracies seem to ensure that this condition will hold. It is less clear that internally generated emergencies can be reliably dealt with in this way, unless the rebellious group is a relatively small minority (as in Northern Ireland).

Even when the normative and positive conditions for employing the legislative model are fully satisfied, the model poses its own risks. For one thing, the legislature may be unready or unwilling to act in a timely fashion. Second, even if the legislature is willing to enact emergencies laws, that very action may implicate it in the conduct of emergency rule and eliminate a valuable check or monitor on the executive. And finally, the laws made to deal with the emergency may become embedded in the normal legal system, essentially enacting permanent changes in that system under color of the emergency. Liberties won slowly over long periods of time may be subject to rapid erosion in emergencies and these new restrictions, if they are embedded in law, may not be rapidly restored if they are restored at all.

Thus, the new model of legislative emergency powers seems to rest on two beliefs—one negative and one positive. The negative belief is that the temporary nature of emergency legislation will prevent it from corrupting the normal legal system. The use of these powers will take place behind a prophylactic barrier that will permit the restoration of the ordinary legal system when the emergency has passed. This may not be true, of course. Temporary legislation may become permanent, as happened in Great Britain with respect to the Defense Against Terrorism Acts and as may well happen in the United States if the PATRIOT Act is extended. If this happens, the conservative nature of emergency legislation will be lost: a permanent change in the legal system will have occurred in circumstances of emergency. This possibility is reminiscent of Carl Schmitt’s constitutional dictator, but now it would be a legislative dictator.23

The positive belief is that because the legislature—the part of government closest to the people—actively delegates authority to the executive, the exercise of that power is more constrained and legitimate and is even, indeed, amplified and made more efficient by the fact that this exercise is supported by the legislature and, presumably, by the people.

In important ways, then, the apparently democratic notion of legislative emergency powers is a significant departure from the classical republican theory of emergency powers. The republican model envisions a virtuous executor of emergency powers—Cincinnatus called away from his plow—who steps forward for a sharply defined period of time to defend the institutions of the republic, and then returns to his farm. In the republican model, the executor is

23 See Carl Schmitt, Die Diktatur (Duncker & Humblot 1921). Schmitt distinguished between kommissarische and souveräne Diktatur. Only the first one has the conservative function typical of the Roman magistracy. The latter is tantamount to the “constituent power” and is actually the negation of true emergency powers.
called by others (a senate) to the special position of dictator, which is dormant within the constitution, and is automatically dismissed when the emergency ends. He needs no more authority than his own (republican) virtue. He is not suspected of any other motive than pursuit of public safety; his disinterestedness and impartiality are assured.24

The new model of legislative emergency powers does not have these advantages. Legislative emergency powers rest on the idea that the executive needs an explicit expression of popular support in order to take extreme measures in defense of the government. At least if the executive is not a De Gaulle or a Washington, he has a need for popular support and legitimation and cannot count solely on public recognition of his republican virtue. In other words, he needs democratic in addition to republican support. We think that this need for legitimation is chronic in modern democracies, and that it helps explain the emergence of legislative emergency powers, whereby the legislature provides a measure of democratic support for the executive’s actions. It is possible, of course, that were any of these democracies to face an emergency of great magnitude—or one that deeply divided the country—the executive would be forced, as Lincoln was, to invoke extraordinary constitutional authority and not to wait on legislative delegation that may be slow in coming. But if parliament can be called upon, if it is in session, or can be summoned quickly, the logic of enlisting its support is hard for a modern executive to resist.

In the next two sections of the paper we develop a theory for analyzing the models of emergency power discussed above. First, we will lay out a framework for understanding constitutions as systems of norms that must operate in a wide variety of circumstances. Here, the idea is that a constitution is constructed to deal with a range of more or less normal circumstances and may produce bad results if it is applied outside of those conditions. So there is a need to recognize exceptional circumstances: wars, invasions, rebellions, and so forth. And given those circumstances, some or all of the operation of constitutional norms might be suspended. But to make sense of this we must give concrete meaning to the notion of “suspension.” This we do by developing the notion of “derogation” from a norm, as opposed to abrogation of a norm. We argue in the next section that derogation has the appropriate “conservative” form to serve as a basis of emergency powers that fits with each of our models. What makes a circumstance exceptional? Sometimes there is a special need for speed or decisional efficiency. Armies need to be created and supplied and moved rapidly from place to place. Some areas of the country might need to be abandoned, and there may be little time to listen to objections from the residents. Or, there may be special needs for secrecy so that opponents will be unable to learn of the nation’s aims or plans. Or, there may be a need to

stabilize the constitutional system against the nefarious efforts of its enemies. Each of these needs might be met by suspending rights of speech, assembly, and notice that are normally protected constitutionally.

Next, we consider, in section 4, two kinds of constitutional system: a monistic system that insists that the normative ordering remains invariant at all times, and a dualistic system that, essentially, creates two separate constitutional normative orders, each operating in its own circumstance. For a monistic system, emergencies are dealt with from within the normative order. For a dualist system, there is a regulator that switches between the two orders. This regulator may have a regular institutional existence, but its metaconstitutional role is separate from its normal functioning. The Roman Senate’s role in recognizing an emergency was distinct from its normal functioning.

3. Norm and exception: The structure of emergency power

We want to pause briefly to elaborate the conceptual structure of emergency powers. We start with a conceptual analysis of the notions of “norm” and “exception.” By “norm” we mean, first of all, an empirical regularity in the natural world or in the society. The norm is more or less strict (it is absolute, in some natural cases, as with the law of gravity, or simply statistical, as when we speak of the average temperature of New York City in January). By “more or less strict” we mean that the empirical reality might display exceptions, differences, deviations vis-à-vis the norm (for instance, it might exceptionally be 55 degrees in New York City in January), or, on the contrary, show no exceptions (in its field of application, there is no exception to the law of gravity). In society we can think of the norm as consisting, say, in arriving on time at a meeting and not leaving before the end of it—it can be remarked that a deviation vis-à-vis this norm, if it only happens exceptionally, demands a justification. The absence of this justification being a deviation vis-à-vis the deviation!

By norm we mean also “a command, a prescription, an order.”25 In public law, the (written or unwritten) constitution represents a set of norms addressing the government or public authorities, which those officials must respect. There is a question, which we will not pursue here—asking how it happens that norms, in the sense that Kelsen gives to this term, are able to become a material source of obligation? Constitutional norms have specific characters, from a formal and material point of view. Formally, they are norms that regulate and restrict the principle of majority rule, which means that, in general (there are few exceptional cases here also), they can be modified only by special procedures or special majorities. Materially, they mostly concern the separation of powers, i.e., the competences of the branches of the government and citizens’ rights.

We want to stress that our conceptual analysis concerns the notion of emergency powers as an *exception* or *derogation* vis-à-vis the constitutional government, meaning here normal or ordinary government. As to *derogation*, it involves two different issues: the government derogating from its regular form, on the one hand, and the justification of the deviation from the norm, on the other. We will come back to this later.

Before that, however, a short remark on the word “derogation.” Hans Kelsen, in his opus posthumous, *Die Allgemeine Theorie der Normen*, devotes an entire chapter to the notion of derogation/abrogation.\footnote{Id. at 106–14.} We are not going to comment here on Kelsen’s text. It would be interesting, certainly, but it is not our purpose. It is enough to say this: Robert, in his dictionary of the French language, defines “derogation” as the antonym of “conformity, observance” (to a juridical norm, we may add).\footnote{LE PETIT ROBERT, Dictionnaire de la langue française 668 (1993).} Derogation would be a *deviation* from normal behavior, allowed under certain circumstances, justified, and in any event in need of a justification.

Now the sense of the Latin word is somewhat different. *Derogare*\footnote{To repeal part of a law; to enforce it only in part. The Oxford English Dictionary gives the same definition of the word *derogation*: “partial abrogation or repeal of a law.” OXFORD ENGLISH DICTIONARY 504 (2d ed. 1989).} is opposed to, and has to be distinguished from, *abrogare*\footnote{To repeal a law in its entirety.} and from *obrogare*,\footnote{To abrogate a law replacing it with a new one; to propose a law in opposition to an existing law.} as we can see in a canonical text by Cicero: “huic legi nec obrogari fas est, neque derogari aliquid ex hac licet, neque tota abrogari potest,”\footnote{CICERO, De Repubica, De Legibus III 22 (Clinton Walker Keyes trans., Harvard Univ. Press 1943).} which may be translated as “it is not allowed to replace this law with a new one, neither to cancel part of it, nor to abrogate it in its entirety.” In this idea of partial non-application there is something very important concerning the constitutional derogation, which has an affinity with Carl Schmitt’s distinction between *Verfassung* (the constitution) and *Verfassungsgesetze* (constitutional norms), where the latter can be suspended in order to protect and stabilize the first.\footnote{This is actually one of the main theses of his chief work. CARL SCHMITT, VERFASSUNGSLEHRE (Duncker & Humblot 1928).}

So, we have, conceptually:

1. the norm (in public law: the constitution or, more exactly, the regular government);
2. the derogation (the emergency powers); and
3. the justification of the derogation.

(1) the norm (in public law: the constitution or, more exactly, the regular government);
(2) the derogation (the emergency powers); and
(3) the justification of the derogation.
These three elements are connected, moreover, with:

a) the emergency, or, the special circumstances, that must justify the deroga-
tion, or the “partial deviation/suspension”; and
b) the higher principle that one may want to shield, protect, or safeguard
under extraordinary circumstances.

Thus, emergency powers exhibit, conceptually as well as normatively, a con-
servative aspect. If the exercise of emergency powers undercuts or substan-
tially modifies the legal order or the constitution itself it is not only a
violation of norms regulating these powers, it is no longer properly an exercise
of an emergency power at all but is an exercise of constituent power. It is
an abrogation or transformation of the constitution and is not functioning to
preserve it.33

Of course, such an action is normatively proscribed. In this respect, a con-
stitution that has provisions for emergency power already exhibits a dualistic
element: there are two distinct normative systems, insulated from one another:
the normal system of rights and procedures and the normative system operat-
ing in the state of emergency. This point applies, as well, to the legislative emer-
gency model. There is still a distinction between emergency and constitutive
powers, and effecting permanent changes in the legal system under legislative
emergency powers is an exercise in constituent authority. Normally such
action would be proscribed: in exercising legislative emergency powers, the
executive is supposed, normatively, to be acting only to resolve the emergency
and restore the normal legal order.

4. Legal dualism and a typology

Now let’s consider the following dichotomy:

(1) Regular government, and
(2) Exceptional government.

Some doctrines (we will call them “monist”) claim that there is no difference
between (1) and (2), either because of the possibility of reducing everything to
the rule of law (the regular government, as is the case with Leibniz and
Condorcet) or because of the identity between government as such and the

33 Of course, this is a conceptual analysis and has nothing to say about whether or when the
exercise of such constituent powers may be justified. Indeed, it is a common observation that
serious constitutional reforms can only occur in circumstances of emergency. This may imply,
depending on who is saying it, a kind of justification of the permanent changes in the U.S.
Constitution that were instituted at such times as, for example, the end of the Civil War or during
the New Deal. We have nothing to say on this point.
principle “salus populi suprema—et sola—lex esto” (as with Hobbes and most of the absolutist doctrines). 34

Thomas Hobbes, in chapter 30 of his Leviathan wrote: “Summi imperantis officia . . . manifeste indicat institutionis finis nimium salus populi.” 35 Here “salus populi” is the norm of the government, not the principle that justifies a derogation vis-à-vis a regular government. “Salus populi” is, instead, the very principle leading the ordinary government. 36

The dualists (among whom we will include Romans, neo-Romans, or republicans) believe normally that (1) is characterized by the existence of individual rights and by a polyarchy in the structure of the government. The minimalist form of (1) is the Roman Constitution, as Polybius presents it in the book VI of his Histories: its polyarchic structure is a form of what the Greeks called “mixed regime or mixed constitution.” 37 It is characterized by the existence of a plurality of magistracies: consuls, senate, tribunes, comitia, and by the provocatio ad populum, the possibility for the Roman citizens to undergo a due process in a case of possible conviction under the death penalty. One sees that in this context the Roman liberty, contrary to what Constant used to think, 38 cannot be reduced to the political participation (the so-called positive liberty).

Conversely, (2) is represented by the dictatorship that consists in the temporary suspension of the right of the provocatio and of the polyarchic structure of the republican government in favor of a monocratic power superior to the individual rights. We have, therefore, the following dichotomies: polyarchy versus dictatorship, due process versus conviction without trial. Inside the

34 On Leibnitz, see ALFRED BÄUMLER, DAS IRATIONALITÄTSPROBLEM IN DER ÄSTHETIK UND LOGIK DES 18. JAHRRUNDERTS (1923) (Darmstadt 1981); on Condorcet, see FRANCK ALENGRY, CONDORCET (F. Alcan 1904); and on Hobbes’s usage of Salus populi, see THOMAS HOBBES, LEVIATHAN ch. 30 (Richard Tuck ed., Cambridge Univ. Press 1991) (in English). Not the doctrines of the raison d’état. On these doctrines, see F. SAIT-BONNET, L’ÉTAT D’EXCEPTION 205–24 (Presses Universitaires de France 2001).
35 We quote the Latin version where one finds the formula: “salus populi.” H OBBES, supra note 34, at 231 (“The office of the soveraign . . . consisteth in the end, for which he was trusted with the soveraign power, namely the procuratio of the safety of the people.”).
36 We may remark that in the Hobbesian conceptual universe there is just no room for an emergency government since in it norm and exception coincide. The extreme nature of the conflict and the threat that characterizes his conception of social relations allows this reductio ad unum of rule and exception. We should bear in mind that Hobbes lived in a society plagued by the overwhelming violence of the religious civil wars. His state of nature is only the abstract and stylized version of this irreducible type of conflict—and Leviathan (the absolute state) only the political answer to the state of nature.
Republican tradition this model survived, quite unnoticed (most notably by recent scholars), through Machiavelli, Harrington, and Rousseau and took a special form (the collegial and accountable dictatorship of the Comité de Salut Public) under the French Revolution. It survived, moreover, as we noticed, in the public law culture of the European continent in, for example, article 48 of the Weimar Constitution (Diktaturgewalt des Reichspräsident) and article 16 of the French Constitution of 1958. The characteristic element of the neo-Roman tradition is seen in the fact that it gives a specific place to emergency powers inside the constitution; they are, so to speak, “constitutionalized.”

There is another model that can be considered dualist. We find it in English classical constitutional theory in connection with the doctrine of the king’s prerogative (praerogativa regia). As it appears in John Locke’s Second Treatise, it seems to contemplate derogation from the regular government based on the separation of powers and the subordination of the executive power to the legislative one. The king’s prerogative is a monocratic power “contra et extra legem” (contrary and beyond the law) in order to protect the salus populi and the constitutional order. It is worth noticing that this doctrine has a democratic or, rather, “monarchomachic” dimension, since the people are the final judge of the abuses of prerogative.

It seems that, during the evolution of the English Constitution, the system moved from the polyarchic structure (king in Parliament) to a monocratic one (absolute parliamentary sovereignty—where the Parliament is reduced to a single assembly) so that the U.K. would represent, nowadays, a rare case of democratic/elective form of absolutism (where strictly speaking there is no room and no necessity for (2)). We saw, nonetheless, that when the British Parliament passes laws, which derogate the ordinary rights of citizens, as occurred during the long crisis in Northern Ireland, the Parliament is keen to qualify these statutes as “temporary” acts. True, those laws have been reenacted repeatedly, after each deadline, for more than twenty years. Even so, at each occasion the law was time limited. In the end, however, the terrorism law was made permanent, showing, perhaps, the difficulty of keeping separate the

59 It is important to stress that we speak here of model also in the sense of an idealization. This starts with Livy and the Annalists and was revived by Machiavelli. As to the historical analysis of the dictatorial magistracy during the Roman Republic it would demand a much more nuanced analysis, which should take into account the works of Theodor Mommsen and Arnaldo Momigliano, André Magdelain and Claude Nicolet. See 2 Theodor Mommsen, Romisches Staatsrecht (Sonderausgabe der wissenschaftlichen Buchgemeinschaft, 9th ed. 1903); Arnaldo Momigliano, Ricerche sulle magistrature romane, reprinted in Quarto contributo alla storia degli studi classici e del mondo antico 273–83 (1969); André Magdelain, Jus Imperium Authoritas: Etudes de droit romain 567–88 (École française de Rome 1990); and Claude Nicolet, La dictature à Rome, in Dictatures et légitimité 69–84 (Maurice Duverger ed., 1982).

40 Locke’s prerogative has a much larger scope, actually. It goes from the Aristotelian epieikeia (the doctrine of justice) to the emergency government. See Pasquale Pasquino, Locke on King’s Prerogative, 26 Pol. Theory 198–208 (1998).
normal and exceptional legal systems within a legal system based on a principle of parliamentary sovereignty, or more precisely, on a *gouvernement d’assemblée*.

A dualistic theory of government assumes that “there are exceptional circumstances,” which means circumstances that cannot be governed by regular means. We think that it is useful to distinguish between an ontological and an epistemological dimension of the *Ausnahmezustand* (the exception). From the ontological point of view, dualists claim that norm and exception are two different states of the world. Some (let’s call them “realists”) claim that this ontological difference is objective and evident, that everybody can recognize its existence or supervenience; as a result, a neutral, involuntary mechanism can be established in order to detect its appearing or disappearing as a state of the world. An analogy would be as when the level of a river goes over a given threshold and an automatic mechanism systematically triggers an alarm or some other action or performance. Some other thinkers (let’s call them “skeptics,” or we may call them Schmittians) claim that there is no absolute evidence of the existence of an exceptional situation, that people will inevitably disagree about its existence, and thus we need to attribute to some agency (organ or institution) the epistemic authority to declare the exception. The skeptics believe in the epistemic dimension and are reserved concerning the ontological one.

From the point of view of political and constitutional theory, the exception takes the form of a special threat to the political order. It is the declared existence of an exceptional threat vis-à-vis the Roman republican system or the constitutional democratic order of a given political community that triggers and justifies (2)—the emergency regime. The logic of (2) is *conservative* or *preservative* (in Schmitt’s language we have here a *kommissarische Diktatur*). The function of (2) is to reestablish (1) in its integrity, and as soon as possible.

### 5. Controlling emergency powers

The Roman dictatorship was in regular use for three hundred years: from the establishment of the republic until the defeat of Hannibal. According to Nippel, it was used ninety-five times in this period, and its restrictions were generally honored. No dictator served more than six months, and until the war with Hannibal dragged on, none led armies outside of Italy. Part of the reason for this success was that, until the wars with Carthage, the structure of emergencies facing the Romans fit very well with the institution of the dictator. The fighting season in Italy was roughly from March to late October, so a six-month term was appropriate. Threats sufficient to invoke a dictatorship

41 SCHMITT, *supra* note 23.

generally arose from Rome’s neighbors or from an invasion of the area around Rome itself.\textsuperscript{43} And, if the crisis arose from internal turmoil, it could usually be resolved in a short space of time, or at least, the acute aspects of it could be.

The control of the dictatorship was a complex mix of ex ante, interim, and ex post mechanism. Ex ante controls were the heteroinvestiture: the fact that the entity (the Senate) that declared an emergency requiring a dictator was separate from the one exercising choice of the dictator; the prespecified six-month term; the prohibition on leading armies outside of Italy. Interim controls were more nebulous. The dictator could, after all, exercise absolute authority, and his commands could not be appealed and were subject to no interference from either the tribunes or the Senate. The Senate, nonetheless, had the control of the budget during the dictatorship. But, in practice, the dictators were chosen largely from among those who had held the consulship or perhaps from others with acknowledged military prowess and civic concern and would likely have had no higher ambition than to resolve the crisis facing their city. The constitutional norms were, moreover, “bright lines,” so that it would be clear when a course of action was a constitutional violation. But this mechanism of control depends on the political morality of the person occupying the dictatorship and could not be relied on to control a dictator who failed to respect constitutional morality. Thus, there would be a need for ex post modes of control of the kind the Greeks would exercise over their military and political leaders. But in Rome these modes were very weak. In principle, a violation might trigger a popular or political reaction against the dictator or his policies. In 217 B.C., for example, according to Livy, the Romans rejected Fabius’s policy of pursuing and harassing Hannibal rather than attacking him in force and elected a plebeian consul who promised to be more aggressive.\textsuperscript{44} However, that popular decision resulted in the disaster at Cannae, and, later on, Fabius was elected consul two more times. In any case, from the evidence available for this period, dictators did not disappoint the normative expectations of those who appointed them.

There was, however, a kind of constitutional check on dictatorship as opposed to the dictator. The body that declared the emergency (the Senate) and the body that named the dictator (the consuls) were not the same person as the one who exercised the dictatorial powers. From a constitutional viewpoint, therefore, there was a kind of ex ante control of the invocation of the

\textsuperscript{43} By the time of Hannibal, Rome’s situation had changed materially. Hannibal stayed a very long time in Italy and the six-month model was not well suited to deal with the threat he posed to Rome. Moreover, it became clear that the solution to this problem required Roman armies to fight outside of Italy and, increasingly, to stay away from the city for years at a time. The norms of dictatorship did not provide for these eventualities and the dictatorship was not again used until the irregular appointments of Sulla and, finally, Julius Caesar.

\textsuperscript{44} 22 Livy, Roman History 8, 5–6.
dictatorship. Still, once a dictator assumed the office, the only control that could be exercised over him involved an appeal to his honor or to his generosity.45

5.1. Modern emergencies

Modern circumstances of emergency are very much different from those faced by Rome, and this seems especially true after the events of September 11. We are faced, nowadays, with serious threats to the public safety that can occur anywhere and that cannot terminate definitively.46 International terrorism represents a form of emergency so unlike any Roman circumstance that it is necessary to reexamine the Roman model to see if it retains lessons for how a democratic political system should be organized. If we think that the capacity to deal effectively with emergencies is a precondition for republican government, then it is necessary to ask how emergency powers can be controlled in modern circumstances.

There are at least two characteristic features of the problem of emergencies in modern times; first, as mentioned above, contemporary emergencies cannot easily be limited in time or space. This raises the specter of needing a permanent emergency regime and, in such a circumstance, the Roman practice of either being in a state of emergency or not may be too rigid. We may need to develop an emergency regime that operates alongside the normal regime. That is, it may be necessary to create legal boundaries around emergencies to substitute for the geographic and temporal ones that no longer exist. Second, it is no longer clear prior to an emergency what powers are needed to cope with it. The Romans simply gave the dictator absolute power for a certain period of time to solve the problem. We may not need to or wish to go that far. We may insist, indeed, that the emergency legal system actually be a kind of legal system in which there are rules, rights, and procedures, however limited these may be in its operation.

Modern democratic regimes may demand more interim and ex post control on the exercise of emergency powers. In American history we can see this demand expressed in two ways. The courts have been willing to play, or at least to consider playing, a somewhat more active role in monitoring the suspension of rights during emergencies.47 Even if civil libertarians complain that the

45 Livy provides an account of an attempt to prevent a dictator from condemning his second in command. The supporters of the condemned man appealed to the tribunes to veto the dictator’s command. After an appeal to the popular assembly by the dictator, none of the tribunes were willing to take this step. In the end, the dictator relented as a matter of discretion. 8 Livy, supra note 44, at 33–35.

46 There is another question of how serious these modern emergencies are compared with those that threatened Rome, or Weimar Germany, or even the French Fifth Republic in its early years. It is hard to say that international terrorism poses any serious threat to the existence of a modern democratic state. But there are worries that terrorism might escalate technologically to the point that the threat could become more profound.

47 Ex parte Vallandigham, 68 U.S. 243 (1863); Ex parte Milligan, 71 U.S. 2 (1866); Ex parte Quirin, 317 U.S. 1 (1942).
courts remain too passive in the face of executive assertions of the need for secrecy, many courts have been open at least to hearing complaints and arguments in favor of a judicial role. Even when the courts refuse to intervene, there is usually sufficient dissent from the bench to encourage continued attempts at litigation.

But the second response is, perhaps, more interesting in the terms of this paper. The nature of modern emergencies may make a more flexible model attractive, one in which the appropriate legal instruments can be tailored to the actual circumstances. This may be a reason for the more extensive use of the legislative model. Again, the movement toward the legislative model is not unequivocal, and some writers think that, in many circumstances, the executive has adequate constitutional options. Among modern thinkers who support constitutional emergency powers, we can make out two distinct positions: (1) those who claim that “necessitas non habet legem” (for example, Chief Justice Rehnquist) and (2) those, on the contrary, who claim that there are or should be legal and even constitutional norms that regulate the emergency government. Among the latter we may want to distinguish: (a) the neo-Romans, who claim that exceptional government has to be regulated ex ante by constitutional ad hoc provisions, and (b) those who believe that laws, special laws, or executive measures are better able to confront the crisis.

It seems that the different positions come both from different legal traditions and different normative worries. As for (a), it seems to be supported by “classical republicans” and the exponents of European continental doctrine. Both are particularly aware of the fragility of the constitutional order, because of its polyarchic structure, and believe that the constitutional regulation of exceptional powers can help a nation face not only an emergency but the abuse of emergency powers. The argument goes as follows: if some special type of government is activated to face an exceptional threat, the attention of the citizens and of the regular branches of the government are constantly alert and can monitor possible abuses of emergency powers. We can call this the “argument of salience.” How it is that the public can be made to pay attention to possible abuses is an interesting question of institutional design. Committees may be put in place to monitor the use of executive powers or, perhaps, ordinary courts could play a role. The British have employed special commissions to monitor the executive in the Defense against Terrorism legislation.

Those who espouse the second alternative (b) seem less worried about the exercise of emergency powers and its possible abuse by the regular branches of government. They seem to be more satisfied with ex post control by the judiciary on the measures taken to face the emergency, and this seems to be the choice of the American constitutional system. As we saw, a sort of emergency government is spelled out by the U.S. Constitution going under the name of “suspension of habeas corpus,” but this exceptional regime has never been

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48 William Rehnquist. All the Laws But One: Civil Liberties in Wartime (Knopf 1998).
applied after Abraham Lincoln and the Civil War, and it seems now to be essentially an object for American constitutional history, rather than practice.

There are perhaps no clear criteria for preferring (a) to (b), or vice versa. From the point of view of constitutional engineering much depends on the specific political context. General recipes are probably not what we would suggest from an armchair. If we consider the dangers inherent to both (a) and (b), we can offer a couple of observations.

5.2. Constitutional mechanisms for controlling emergency powers

There are, speaking from the point of view of historical experience, two kinds of mechanisms with which to check emergency powers (EP).

On the one side, one can use the Roman model of disjunction between the agency declaring the emergency and the agency exercising emergency powers (the Senate and the dictator, or, in a contemporary context, a Constitutional or Supreme Court and the president or the prime minister). And make the agency exercising EP unaccountable—legally and politically. On the other side, one can accept that the same agency declares the emergency and exercises EP but make the decisions taken accountable to courts or some other instance. The first alternative is a mechanism of ex ante control of abuse, designed to ensure that the agency declaring the emergency has no institutional or private incentive to do so. The second is a mechanism of ex post control (somehow exemplified by the Supreme Court decisions Milligan and Korematsu).

Once we have distinguished constitutionalized and nonconstitutionalized EP, we may want to turn to some other relevant aspects of our topic.

But first, let us sum up what we have been saying in a diagram.

Constitutional provisions concerning EP

- qua declaration (1)
- qua exercise (2)
- qua reestablishment of normality (3)
- qua control on the effects of the emergency measures (4)

49 Milligan, 71 U.S. 2 (1866); Korematsu v. United States, 323 U.S. 214 (1944).

50 The point here is that when we study and try to classify EP provisions we have to consider four dimensions: (1) who declares emergency; (2) who exercises these powers; (3) who declares the end of the emergency; and (4) who can interfere with or adjudicate legal questions connected with the decisions made under EP. For instance, under the Roman republican customary constitution the Senate does (1), the dictator does (2), the constitution stipulates (3) (six months), and nobody does (4) since there are no legal consequences surviving the dictatorship (some citizens were killed by the dictator but there is nothing to do about that and the dictator is not politically accountable—he does not even exist anymore when his mandate is finished). Think, on the other hand, of the legislative model. The parliament does (1) and (3). The executive does (2) on the basis of the legislative delegation, and the courts do (4).
For example, in the Roman model, according to the scheme above, the Senate controls the declaration of emergency (1), the dictator exercises the EP (2), the constitution itself governs the ending of the EP (3), and there is no body that can interfere with the exercise of EP (4). We can see that there are four independent dimensions of EP that permit the classification of constitutions in this respect.

Notice that concerning (2) some constitutions (the present German one, for instance) exclude the suspension of some fundamental rights, while others exclude the possibility of enacting “laws” (the French president under article 16 can only take “measures”).\textsuperscript{51} Notice, moreover, concerning (3) that with nonconstitutionalized EP, laws can have sunset clauses. And that constitutions allowing for regulation of EP by other bodies, such as courts or legislatures (4), permit ex post control over the one who exercises EP (2).

5.3. The nature of the threat. Or what to qualify as an emergency

In the political system we define as a “liberal democratic order,” conflicts are of two types: (1) among citizens qua private individuals (private conflicts); and (2) among citizens qua political actors in competition for public offices (constitutional conflicts). The legal system is set up to regulate the first type of conflict: defining breaches, punishments, and the institutions (the judiciary) in charge of conflict resolution and of retributive justice.

The rules of the political system, instead, regulate the competition for public offices—namely, the second type, or constitutional conflict.\textit{Emergency} may be defined as a situation that produces a grave disturbance of the political system or order, threatening its survival. The emergency can have an \textit{exogenous or/and endogenous} origin. The most obvious case of an exogenous threat is a war or invasion: the attempt by “enemies” to destroy, occupy, or somehow take control over a country (see, for example, article 115 of the German Constitution). Special measures are justified in order to protect the integrity of the territory and the very nature of the liberal democratic order. More problematic are two other cases: \textit{terrorism} and \textit{civil war}. By civil war we mean the attempt by internal political actors to destroy the constitutional order (for instance, the Kapp putsch at the beginning of the Weimar Republic; the OAS during the Algerian war in France). Terrorism (internal terrorism, such as that of the Italian Red Brigades or the German RAF or the French Action directe) seems to be part of the same family. International terrorism may be somewhere between the two—war and civil war.

In these three cases the political order is challenged by enemies who explicitly want to destroy it, or to modify its nature, so that it seems legitimate to do \textit{whatever is possible} in order to render the enemies incapable of representing a threat to the status quo. However, this becomes more problematic when, in order to prosecute this conflict, our governments suspend our own citizens’

\textsuperscript{51} See GG art. 81(4) (F.R.G.); Fr. \textsc{Const.} art. 16.
Enacting laws introducing crimes like “guilt by association” (see the 2001 American PATRIOT Act)\textsuperscript{52} reminds Italians of the infamous “associazione sovversiva” introduced in the 1930s by the fascist criminal code written by Alfredo Rocco and adopted by the Stalinist regime and by the authoritarian government in Cuba between the two World Wars.\textsuperscript{53} Secrecy of criminal procedures is also worrisome. One understands pretty well that a government struggling with enemies has good reason to keep secret information that could help the enemy or hinder it, if made public. Nonetheless, one may wonder if secrecy is not an instrument to protect the government from the criticism of inefficaciousness in the very same fight (this is what some tend to believe regarding John Ashcroft’s mania for secrecy—the beauty of it is that because of the secrecy one cannot prove such a hypothesis and nobody can disprove it, either). If too much is secret, we are in a very poor position to evaluate or judge our government. In this kind of situation, we are moving slowly toward a despotic regime (in the Montesquieuian sense of this word). More generally, there is reason to worry that the government may use EP or laws tantamount to EP in order to defeat not enemies but legitimate competitors for office (as the Indian experience under Indira Gandhi shows, in an exemplary way).

A liberal democratic regime can be threatened by a different kind of emergency: for example, an economic emergency that, in conjunction with a legislative gridlock, triggers urgent and exceptional measures. In this special case the executive power has to act in the absence of an explicit legislative delegation. Ex post approval can be considered, in these circumstances, as the way to reestablish, if possible, the regular pattern of government.

A more acute emergency is that which the Weimar Republic had to face at the end of its brief life. After 1928 there was no longer in the Reichstag (the lower house of the parliament) any majority support for the constitutional order established by the Weimar Constitution of 1919. The liberal democratic order inscribed in the Constitution simply had no “democratic,” meaning majoritarian, support. This tragic conundrum probably has no solution; in other words, there is probably no means, in such a situation, for rescuing a liberal democratic order. Democratically minded citizens could try to engage in a civil war against their enemies. But like in the Lockean “appeal to heaven” this is a challenge and a decision that only each person can take in her/his own conscience.\textsuperscript{54}

A perhaps less dramatic emergency lies in the unprecedented case of a threat that seems so dangerous nobody can say how long it will last, or how


it can be dealt with effectively, but is taken seriously enough so that our fundamental rights are perhaps permanently curtailed. Is international terrorism such a threat? We do not know. We will see in the next few years. It seems quite possible that international terrorism will become a more or less permanent part of our future life and will have to be reduced, somehow, to a nonemergency phenomenon. Obviously, this implies somehow a permanent change in the constitutional system of rights and procedures.

The extreme case is represented by what we may call the possibility of using emergency powers to institute a “regime change.” To use, in our own way, Carl Schmitt’s language, the enemy is no longer an actor threatening the political order but a political order itself that has become incompatible with the (new) rule one wants to establish.\textsuperscript{55} Then the emergency is not a conservative form of temporary government, but the starting point of a new political order. This is largely tantamount to Schmitt’s souveräne Diktatur. One thinks, too, of the Jacobins’ project for the regeneration of mankind or of the Leninist dictatorship of the proletariat, which is provisional only in the sense that it represents a transition to a (brave) new world.

6. Conclusions

There are two main justifications for having constitutional provisions for emergency powers: one is that standard republican institutions suitable for protecting liberty are too cumbersome to use in emergency situations and so special institutions are needed to preserve the republic itself. Machiavelli stated this justification elegantly in the Discourses:

And truly, among the other Roman institutions, [the dictatorship] is one that merits to be considered and counted among those which were the cause of the greatness of so great an Empire: For without a similar institution, the Cities would have avoided such extraordinary hazards only with difficulty: for the customary orders of the Republic move to slowly (no council or Magistrate being able by himself to do anything, but in many cases having to act together) that the assembling together of opinions takes so much time; and remedies are most dangerous when they have to apply to some situation which cannot await time. And therefore Republics ought to have a similar method among their institutions. And the Venetian Republic (which among modern Republics is excellent) has reserved authority to a small group (few) of citizens so that in urgent necessities they can decide on all matters without wider consultation.\textsuperscript{56}

\textsuperscript{55} SCHMITT, supra note 23.

\textsuperscript{56} MACHIAVELLI, supra note 2.
But Machiavelli also emphasized that the way that a republic defends itself ought to be regulated constitutionally and not merely improvised.

For when a similar method is lacking in a Republic, either observing the institutions (strictly) will ruin her, or in order not to ruin her, it will be necessary to break them. And in a Republic, it should never happen that it be governed by extraordinary methods. For although the extraordinary method would do well at that time, none the less the example does evil, for if a usage is established of breaking institutions for good objectives, then under that pretext they will be broken for evil ones. So that no Republic will be perfect, unless it has provided for everything with laws [constitutional laws in this context], and provided a remedy for every incident, and fixed the method of governing it. And therefore concluding I say, that those Republics which in urgent perils do not have resort either to a Dictatorship or a similar authority, will always be ruined in grave incidents.\textsuperscript{57}

The second justification for constitutional emergency powers, and the one we have stressed here, is to protect or insulate the regular operations of the legal system from what takes place in emergency circumstances. This is the argument in favor of constitutional dualism: the notion that there should be provisions for two legal systems, one that operates in normal circumstances to protect rights and liberties, and another that is suited to dealing with emergency circumstances. We think that this second legal system ought to be “legal” in a significant sense and that it ought to be regulated constitutionally. To some extent this regulation may need to rely on something like constitutional “morality” or trust of the kind that the Romans evidently had for the institution of the dictator, at least for the three hundred years during which that institution flourished. But, modern republicans must insist on other forms of protection as well, perhaps by devising special emergency roles for the judiciary or the legislature. Indeed, the American experience in wartime—from the Civil War cases through Korematsu and Quirin—can be seen as experiments in the constitutional regulation of emergency powers.\textsuperscript{58}

But nowadays, we face a somewhat different problem in that nations are finding other ways to handle emergencies. Even those nations that have constitutional emergency powers usually have chosen to employ legislative emergency powers instead. They choose to handle emergencies, that is, in much the same way that nations without such constitutional provisions do. These “dualist” regimes have done this repeatedly despite the apparent alterations that such legislative exercises have introduced into their permanent legal orders. Perhaps, someone will respond, alterations in rights are an

\textsuperscript{57} Id.

\textsuperscript{58} Korematsu v. United States, 323 U.S. 214 (1944); Ex parte Quirin, 317 U.S. 1 (1942).
inevitable result of technical changes and that such alterations would have had to occur even if constitutional emergency powers had been employed. Opponents of liberal democracies have so many more vulnerable “soft” targets and points of potential obstruction and sabotage that the old constitutional order has already become anachronistic. Perhaps. But we think that technical change is only a partial explanation, and that it is not at all clear that such change gives the advantage to the opponents rather than the defenders of liberal regimes. We think that the deeper explanation for the resort to legislative emergency powers is democracy itself: elected officials in every constitutional system need popular legitimacy to engage in the extraordinary legislative projects of the kind required to deal with terrorism. If governments are going to suspend rights and invade privacy, they need to be able to claim that there is widespread popular support for such actions. And because those who exercise emergency powers are elected professional politicians, they are not above suspicion regarding their private motives. It is easy to employ emergency powers to suppress legitimate opposition and to increase electoral security.

Moreover, there is a constant temptation to permit emergency legislation to spill over into the operation of the ordinary legal system. Rights and liberties may be permanently transformed under the threat—real or exaggerated—of terrorist acts. This is much less possible in the classical regime: constitutional dictators lack the authority to change the legal system directly. We have argued that the new dangers arise from the growing demand for democracy or democratic legitimation. Perhaps the powers made available in this new model are more adequate to the task of managing emergencies. Perhaps the older, republican model is no longer even available to us. But we think it worth trying to envision some possible alterations in modern constitutionalism that would permit a closer approximation to the neo-Roman model.

The critical features of the neo-Roman model are these: first, the aim of the executor of emergency powers is conservative. The wielder of these powers is to aim to restore the constitutional status quo ante and not to impose any permanent change on the legal ordering. In principle, and in fact in some modern constitutions, he is forbidden to do so. He does not possess ordinary legislative authority but can issue only ordinances and those ordinances have the force but not the permanence of laws. Second, the recognition of the emergency is separated from the creation of the specific powers employed to deal with it. The constitutional powers that can be called up during an emergency are fixed in advance of the emergency itself. The Roman model itself again is exemplary: the powers of the dictator, the length of his tenure, and the places that he might lead an army are fixed in advance of his appointment. Finally, the regulation of the emergency powers is fixed constitutionally and operates before or after the exercise of emergency power itself. In Rome, regulation was automatic—in separating the agency declaring the emergency from the one invested with the emergency powers (heteroinvestiture), in limiting an emergency to an arbitrary time period, and in various other constitutional prohibitions. At most, the dictator might be held responsible, politically if not
legally, for the conduct of his office after the lapse of the emergency, as when the Romans rejected the cautious policy of Fabius Maximus in refusing to engage Hannibal’s army.

Some of these features are available for the legislative model, too. We think that it is normally assumed that the American president’s aims properly are to deal with an emergency without fundamentally altering the constitutional system. If Congress enacts temporary legislation authorizing special presidential powers, the president can then issue administrative orders authorized by the temporary legislation, and these orders expire with the legislation. He is, thereby, prevented from enacting permanent legislative changes on his own (though he can, of course, issue executive orders). The special danger of the legislative model is that the authority by which the president takes action is an ordinary statute, and statutes have, intrinsically, the potential to change the legal system in some permanent way. There is nothing to prevent the formation of an alliance with a congressional majority to make permanent changes in the law. And, if the justices on the Supreme Court are willing, this possibility of permanent transformation is even more likely.

Second, within the legislative model, Congress can still play a formal role in recognizing emergencies, even those that fall short of a constitutionally recognized state of war. It has become common for Congress to enact resolutions recognizing a state of conflict or justified response—as in the Gulf of Tonkin Resolution. The fact is that such acts do not so much trigger a constitutional transition as signal a congressional willingness to further authorize and support presidential action. And, of course, the willingness of Congress to provide (or to refuse) funds for actions taken by the president or to engage in intrusive oversight are still other modes of regulating and perhaps legitimizing or checking emergency rule. Additionally, within the legislative model, Congress can establish institutional limits on how far the executive may go in employing congressional authorization, as it has attempted to do in the War Powers Act. While no one thinks that this attempt at regulation is fully successful it stands as an example of how the legislative model might develop in the future. It must be realized, however, that if Congress has already recognized an emergency and authorized executive action to deal with it, then attempting to temper executive actions within the bounds of the legislative model will be politically difficult. Furthermore, interfering with an ongoing military operation could expose congressmen, at a minimum, to charges of hypocrisy and irresponsibility. Better perhaps, in this case, to expect regulation from courts.

The courts, after all, can exercise either ex post or continuing control over the conduct of emergencies. They can enforce the terms of congressional statutes in ways that limit the executive’s conduct of emergency operations. They can choose (or refuse) to hear habeas petitions and grant such relief in

wider or narrower sets of circumstances. They can hold officials responsible for how they conduct emergency operations under either constitutional or statutory standards. And, finally, they can refuse to enforce unlawful or unconstitutional orders.

Appendix 1

On emergency powers and constitutional architecture

We believe that it is important to insist on the difference between (1) monistic parliamentarism (parliamentary sovereignty) that presently characterizes the U.K. and (2) separation-of-powers systems (Rome and U.S.). But there are some questions we need to clarify. The world according to Hobbes and the U.K.’s legal order are both monistic, but for Hobbes it does not make sense to speak of emergency power (the *salus populi*, as we saw, is the only and constant function of the government); conversely, the U.K. Parliament always stressed, explicitly, that the antiterrorist laws were special. It is true that it renewed them for more than twenty years, but it never made them normal. An emergency can last twenty, thirty, or forty years without ceasing to be perceived as an emergency by the legislators. The point here is probably that if there is a prime minister controlling the parliament, the system is not characterized by “slow motion” [“il moto tardo”], as Machiavelli might say. So the system does not need a dictator or a president with special powers in emergency cases. If there is an American-like system of separation of powers, or French (or Weimar) semipresidentialism, the system needs a speeding-up mechanism. Sometimes this is explicit and constitutionalized (in the neo-Roman regimes); sometimes not, as in the United States, where the Constitution is mixed (like the old English one, but without the lords and with an implicit prerogative attributed to the president). In a sense, the prerogative slowly died in England and moved to the U.S., where it survived in its tamed, republican form. If, in Locke, abuses of the king’s prerogative are checked by the people’s “appealing to God.” in the democratic American version of the old English Constitution the abuses of presidential prerogative are checked by public opinion (polls and elections) and ratified, so to speak, by the Supreme Court. This is the story told by the democratic popular opposition as compared with the pure constitutional engineering model of the Romans.

Appendix 2

Note on emergency powers and A. V. Dicey

“[O]n what *principle*, and within what *limits* . . . afford a *legal justification* for acts . . . which . . . would be *breaches of law*”


2 Id. at 396–97 (emphasis added).
We want to use Dicey’s text to show that a dualistic doctrine of emergency powers does exist not only in the neo-Roman legal and constitutional tradition but also in the British constitutional system.

The fact that England became, at the end of the nineteenth century, a quasi-monocratic system based on a unicameral parliamentary sovereignty (which is clearly an overstatement, since the House of the Lords is still there, with some small but effective powers) does not prevent its being a dualistic regime, in the sense specified above in Dicey’s text.

For surely the dualism takes, in this context, a special and specific form. First, we are (as in Rome, by the way) under a “customary constitution.” Nothing is actually written down into the constitutional “text,” which—nevertheless—does not mean that the constitution is empty and that we cannot speak of it. Aristotle did, for the Athenian Constitution; Polybius, for the Roman one. Second, the switch from polyarchy to monocracy that characterizes the neo-Roman dualism is here absent.

But one has to bear in mind that this dichotomy (polyarchy/monocracy) is only one element of the dualistic regime—at least in our definition.

A second aspect, no less crucial, is the suspension/curtailment of individual fundamental rights. We remember that dictatorship is defined by Livy, Machiavelli, and the classical neo-Romans as suspension of both collegiality and the provocatio ad populum: the Roman liberty.3

Dicey claims that “we must constantly bear in mind the broad and fundamental principle of English law that a British subject must be presumed to possess at all times in England his ordinary common-law rights, and especially his right to personal freedom.”4

Now the question is: How can we justify depriving Englishmen of any of their common-law rights, e.g., by establishing a state of martial law—the equivalent of emergency powers?

Here we see that the English legal system is perfectly aware of dual legal-constitutional conditions. I suggest calling these the normal and the exceptional regimes, the latter being characterized by the provisional/temporary suspension of fundamental individual rights.

Defining martial law, Dicey insists upon the circumstance that the duty of the government is to maintain public order (“the King’s peace”). Now “martial law comes to existence in times of invasion or insurrection5 when, where, and in so far as the King’s peace cannot be maintained by ordinary means . . . [because of] urgent and paramount necessity.”6 And Dicey adds, “This power

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3 On this point, see 1 FRANCESCO DE MARTINO, Storia della costituzione romana 312. 438 (Jovine, 2nd ed. 1972).
4 DICEY, supra note 1, at 397 (emphasis added).
5 Compare the text of the American Constitution concerning the suspension of habeas corpus.
6 DICEY, supra note 1, at 398 (emphasis added).
to maintain the peace by the exertion of any amount of force strictly necessary for the purpose [principle of proportionality] is sometimes defined as the prerogative of the Crown."7

Here we see a clear connection between three elements: (1) necessity; (2) martial law (special temporary regime); (3) suspension of individual rights, notably property and personal freedom. "The fact [is] that necessity is the sole justification for martial law or, in other words, for a temporary suspension of the ordinary rights of English citizens."8

Thus we see that the English legal/constitutional system also is aware of two regimes: the standard one and martial law. The second triggered by “necessity” is nothing but a temporary suspension of ordinary rights.

That makes martial law similar to the legal condition we qualify in other context as dictatorship, état d’exception, Ausnahmezustand, Notfall, Belagerungszustand. Certainly, we have to take into account the differences among these different types of legal dualisms: their (strictly speaking) constitutional status, or, alternatively, their “conventional” status. Moreover, we have to consider and distinguish the organs declaring the emergency (necessity) and exercising the EP. But we think that the universality of dualism, at least so far as it concerns the nonabsolutist western legal tradition, should be beyond doubt.

7 Id. (emphasis added).
8 Id. at 401 (emphasis added).