Summary

Despite scholarly disagreements over the meanings of both the rule of law and emergency, there is broad agreement that emergencies often invite and justify departures from the formal requirements and substantive values identified with the rule of law as a normative ideal. It is often argued that strict adherence to existing laws, which are typically enacted during periods of normalcy in order to prevent arbitrary forms of rule associated with tyranny, could inhibit the government’s ability to respond quickly and effectively to the often unexpected and extraordinary challenges posed by an emergency such as war or natural disaster. Consequently, the temporary use of extraordinary measures outside the law has been widely accepted both in theory and in practice as long as such measures aim to restore the normal legal and political order. However, understandings of the tension between emergency and the rule of law have undergone a significant shift during the 20th century as emergency powers increasingly get codified into law. The use of extralegal measures that violate the formal and procedural requirements of the rule of law is still considered a dangerous possibility. However, as governments have come to rely increasingly on expansions of power that technically comport with standards of legality to deal with a growing list of situations characterized as emergencies, there is concern that extraordinary exercises of power intended to be temporary are becoming part of the permanent legal and political order.

Keywords: emergency, rule of law, legality, dictatorship, Carl Schmitt, norm, exception

Subjects: Governance/Political Change, History and Politics

Introduction

The rule of law has become a nearly universal standard of political legitimacy. The basic principle that the power of the state ought to be exercised in accordance with relatively stable and general rules has become so widely accepted that even authoritarian regimes often pay lip service to this ideal (Tamanaha, 2004, pp. 2–3). However, the requirement that the government’s powers be defined and constrained by law tends to yield in times of emergency to calls for government to respond in ways that exceed its regular legal powers. Whether
those powers are exercised through laws that would not apply in ordinary circumstances or without formal legal authorization altogether, emergencies test commitments to the rule of law at all levels of government and society.

The question that has dominated both empirical and normative scholarship is whether the rule of law must give way, in whole or in part, to the exigencies of an emergency. What makes emergencies so dangerous to the rule of law is they appear to invite and justify departures not just from the formal requirements of legality basic to any conception of the rule of law but from the substantive ideals and values expressed in those formal requirements, as well. Suspensions and violations of domestic and international law, including ordinary statutes, constitutional provisions, and treaty obligations, have long been perceived as the most direct and obvious threats to the rule of law. However, as governments have come to rely increasingly on various legal tools to handle emergencies, scholars have devoted more attention to the ways that lawful but extraordinary exercises of power also threaten the rule of law.

**The Rule of Law Ideal**

Despite widespread acceptance of the normative desirability of the rule of law, there is no consensus on its precise meaning, constitutive elements, and practical requirements. Over the course of the 20th century, the rule of law has come to be associated—and occasionally identified—with a diverse range of values, including individual rights, social justice, democratic self-determination, free markets, judicial independence, and good governance. One indication of how much disagreement exists over the basic meaning and entailments of the rule of law is that organizations such as Freedom House, Global Integrity, and others that monitor its implementation around the globe employ such different measures that there is little to no correlation between some of their estimates of how well countries live up to this ideal (Skaaning, 2010).

Disagreement about how to define and measure the rule of law should not obscure the fact that there is broad agreement that its essential function is to guard against tyranny. From its earliest articulations by the ancients to its most recent conceptualizations by scholars, public officials, and non-governmental organizations, the rule of law has served as a normative ideal opposed to arbitrary forms of rule. It seeks to substitute the potentially volatile and capricious rule of individuals with the supposed predictability and regularity of impersonal rules, or what John Adams proclaimed “an empire of laws, and not of men” (Adams, 2000, p. 288).

This depiction of law as a constraint on power has not gone unchallenged. Critical legal theorists, postcolonial scholars, and legal realists have contested the assumption that the rule of law is necessarily antithetical to discretionary power or the so-called rule of men. In addition to various leftist critiques of law as an instrument of power that reflects and promotes the interests of the privileged, scholars have noted that the ideology of the rule of law has been used as an instrument of imperial power in colonial settings (Unger, 1976, pp. 176–181). Nasser Hussain points out that the rule of law has been used to legitimize despotic forms of rule in Jamaica, India, and other former British colonies. Indeed, the establishment of the rule of law in British colonies often went hand in hand with the exercise of extraordinary emergency powers understood to be in tension with that ideal (Hussain, 2003).
Despite such criticisms, scholarly and political discourse on the rule of law is dominated by the notion that it is an indispensable check against abuses of power. It stipulates that “government shall be ruled by the law and subject to it” (Raz, 1979, p. 212). The idea that government must operate according to legal rules is opposed to rule by fiat, diktat, ukase, and other ad hoc modes of discretionary action that expose individuals to arbitrary exercises of power. Although it is impossible to eliminate discretion altogether, the aim is to ensure that any discretion that is exercised is not “legally unfettered” (Bingham, 2011, p. 54).

Friedrich Hayek draws a particularly sharp distinction between law and command to underscore the distinctive virtues of the rule of law. In contrast to “commands,” which are typically directed to particular individuals and oriented toward the achievement of specific goals in concrete circumstances, laws establish general and abstract rules that anonymous individuals can apply in an unforeseeable range of circumstances. “Stripped of all technicalities,” Hayek contends, “this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge” (Hayek, 1944, p. 72).

**Formalistic and Substantive Conceptions of the Rule of Law**

Beyond the rather abstract stipulation that government act according to or through established law, theories of the rule of law can generally be divided into thin conceptions, which hold that laws must exhibit certain formal qualities, and thick conceptions, which maintain that law must also embody or uphold certain substantive values (Craig, 1997).

Thin or formalistic conceptions of the rule of law require political power to be exercised in accordance with positive laws that exhibit certain rule-like qualities. According to H. L. A. Hart, this reflects the basic understanding of law as a system of rules (Hart, 1961). It is not sufficient, according to this conception, for the coercive powers of the state to be exercised through laws duly enacted by proper lawmaking institutions and procedures. Those laws must also conform to certain formal requirements or internal criteria (Raz, 1979, pp. 210–229).

Three formal qualities are singled out as minimal criteria in virtually every theory of the rule of law, thin and thick alike. First, law must be promulgated. That is, legal enactments must be made public and knowable to their addressees. Laws made in secret or difficult to access by those concerned can make it impossible for them to refrain from prohibited activities or fulfill their legal duties. Second, law must be prospective (at least as far as criminal law is concerned). A retroactive or ex post facto law is considered “truly a monstrosity” because it exposes individuals to punishments for actions that were lawful at the time they were committed (Fuller, 1969, p. 53). Third, law must be general. The requirement of generality prohibits legal enactments that make distinctions between or discriminate on the basis of arbitrary personal characteristics such as race, class, sex, and religion. No individual or group is to be singled out for special or exceptional treatment—positive or negative. From at least the time of the ancient Greeks, this requirement has been understood as a demand for equality under the law that is applicable to rulers and ruled alike.\(^1\)
Some legal and political theorists have identified additional formal qualities that law must possess if arbitrariness is to be avoided. One of the most comprehensive and influential accounts of the formal features necessary for the rule of law is offered by Lon Fuller, who identified five additional requirements that constitute what he calls the “inner morality of law”: clarity (the law must be intelligible), non-contradiction (a system of rules must not contain contradictory requirements), possibility of compliance (the law may not demand performance of the impossible), constancy (the law should be relatively stable over time), and congruence between declared rule and official action (public officials must actually enforce the law on the books). According to Fuller, a system of rules that lacks any one of these features or fails substantially to live up to several of them does not count as a legal system at all (Fuller, 1969).

Regardless of any particular enumeration of formal features a legal system must possess to satisfy the demands of the rule of law, these features are not pursued for their own sake. They are championed on the grounds that they help the law achieve justice, freedom, or some other significant substantive ideal. However, many argue that adherence to legal forms is insufficient to satisfy the demands of the rule of law or to achieve its goals. Scholars who advocate thick or substantive conceptions of the rule of law contend that legal enactments must also conform to an external standard of legitimacy. In their view, law must express a particular content, such as the ideals contained in some conception of natural law, human rights, or personal dignity. Several scholars have gone as far as to proclaim that protection of human rights is one of the core principles of the rule of law (Bingham, 2011, pp. 66–84; Tamanaha, 2004, pp. 102–113). The tendency of governments to use measures that employ legal forms to deal with emergencies has led many critics to emphasize these and other substantive ideals when warning about threats to the rule of law.

Scholars and watchdog groups have also identified a number of institutional and procedural guarantees as essential to the preservation and enforcement of the rule of law. Chief among these is access to an independent judiciary. At a minimum, there must be impartial judicial bodies responsible for interpreting and applying the law without intimidation or interference either from the government or outside groups. Another important requirement is meaningful access to independent courts (see, e.g., Raz, 1979, pp. 216–217; Bingham, 2011, pp. 25, 91–92). Related to this is access to independent legal counsel and “the presence of a well-established legal profession” committed to upholding legality (Tamanaha, 2004, pp. 58–59). Although such procedural and institutional requirements are singled out by many scholars and organizations as independent criteria, it might be best to think of these as logical entailments of the formal qualities essential to the rule of law, rather than external criteria.

Regardless of which conception of the rule of law is used, no political system ever fully lives up to this ideal. If for no other reason than that some degree of vagueness and indeterminacy in the law is “inescapable,” scholars have argued that it is unrealistic to expect “complete conformity” to the rule of law (Raz, 1979, p. 222; see also Tamanaha, 2004, pp. 86–90). A legal system could satisfy some requirements of the rule of law ideal but fall short on other dimensions. Some scholars have also argued that the distinction between the rule of law and the so-called rule of men is “overdrawn and misleading” inasmuch as any legal system depends on discretionary exercises of “judicial and administrative power” that require acts of individual judgment, interpretation, and application (Honig, 2009, p. 84). For these reasons, it
is better to think of the rule of law as a political ideal achieved by degrees along a continuum rather than a categorical standard a government either does or does not meet (Raz, 1979, p. 211).

Despite the insistence that adherence to the rule of law is an essential condition of legitimacy and is necessary (if not sufficient) to prevent tyranny, there is broad acceptance both in theory and in practice that some deviation from the law is permissible in times of emergency. In fact, it is often argued that strict adherence to existing laws, which are typically enacted during periods of calm and designed to deal with regular or ordinary occurrences, could inhibit the government’s ability to deal capably with the often unexpected and extraordinary challenges posed by an emergency. Exactly how much deviation, what kind, and for how long, though, depends on how both the rule of law and emergency are understood.

The Expanding Concept of Emergency

There is no widely accepted definition of emergency either in theory or in law, but there is a common and long-standing assumption that it is categorically distinct from a “normal” situation. Whatever specific criteria are used to define a state of emergency, the prevailing view of legal and political scholars is that an emergency is a significant departure from a state of normalcy, triggered by an extreme event that is highly disruptive or threatening to the established order. For example, Edward S. Corwin defined emergency in terms of conditions that “have not attained enough of stability or recurrency to admit of their being dealt with according to rule” (Corwin, 1957, p. 3). The aberrational quality of emergency is also emphasized in the International Law Association’s definition of an emergency as “an exceptional situation of crisis or public danger, actual or imminent” (quoted in Chowdhury, 1989, p. 11). In theory, an emergency also differs from the norm in terms of its duration: it is a temporary disruption of the status quo that arises from some triggering event and is expected to come to a definite end. In addition, an emergency is generally distinguished by its scale. As the International Law Association claims, an emergency “affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed” (quoted in Chowdhury, 1989, p. 11).

What counts as an emergency is largely in the eye of the beholder. Whether a situation is classified as an emergency, and the specific kind of emergency it is considered to be, frequently dictates how government responds—and whether it follows ordinary laws. For instance, in the view of many U.S. officials, the drop in the stock market during the financial crisis that erupted in 2008 was an emergency that justified the use of extraordinary measures, but the collapse in housing prices that affected millions of ordinary mortgage holders was not. Similarly, some chronic and persistent challenges, such as the threat of terrorism, are treated as emergencies, whereas others, including poverty and homelessness, generally are not. Whether an event or a condition is framed as an emergency can also have profound consequences for how—or even if—government responds; levels of public support for any measures it takes; whether courts approve; and which laws, if any, are applicable.
Emergencies are usually classified in scholarship and in law under three broad headings: violent situations, natural disasters, and economic crises. Emergencies arising from violence include wars (whether from foreign invasion or civil war), terrorism, domestic insurrections or rebellions, and civil strife. Natural disasters include hurricanes, tornadoes, tsunamis, earthquakes, landslides, volcanic eruptions, and other extreme events covered in municipal and international law by the concept of force majeure (Chowdhury, 1989, p. 16). (Famines, pandemics, and related threats to public health are usually treated like natural disasters.) Economic crises include the collapse of the financial system, hyperinflation, and economic depressions. Although there are no neat lines around these categories, and nothing necessarily prevents one kind of emergency from turning into (or taking on the characteristics of) another kind of emergency, there is a common assumption that violent emergencies (like one resulting from a terrorist attack) require and justify different sorts of responses than those appropriate for nonviolent emergencies (such as severe food shortages).

Despite the expanding conceptual elasticity of emergency, the state of war continues to serve as the prototypical example of emergency, exerting a profound influence on thinking about the urgency, legality, and legitimacy of government’s response. The notion that the law must give way before the exigencies of war is best captured in an aphorism attributed to Cicero: “Silent leges inter arma” (“In times of war, the law falls silent”). The association of emergency with the existential threat posed by large-scale military conflict serves to mobilize public support for the government’s response and justify the use of otherwise prohibited measures.

### Tensions Between Emergencies and the Rule of Law

Perceived emergencies threaten rule of law values most directly by serving as a pretext for governments to ignore or circumvent constraints that ordinarily prevent or minimize arbitrary exercises of power. Institutions charged with upholding the rule of law may see their powers weakened or displaced; regular processes of lawmaking may be bypassed; and ordinary protections for civil liberties and civil rights may be suspended. In the most extreme cases, individuals are subjected to summary judgments—including executions—by military commanders and security forces. Emergency governments sometimes try to maintain a veneer of legality by setting up exceptional adjudicative bodies such as military tribunals and military commissions that operate according to relaxed standards. But even when regular courts continue to operate, they tend to show unusual deference to government. Just as courts tend to “rally ’round the flag” in times of war, they are also prone to side with government in times of emergency. Among other things, they may decline to review government actions by claiming that certain matters are non-justiciable; give governments that invoke state secrets doctrines the benefit of the doubt; and accept claims of national security as valid reasons to circumvent the separation of powers, exceed legal restrictions, and curtail the rights and liberties of citizens. The historical pattern of judicial deference to government in times of crisis has led many scholars to conclude that courts cannot be counted on to protect basic human rights during an emergency (Alexander, 1984).

Emergencies have been cited to justify a wide variety of actions that would be legally prohibited and morally intolerable during periods of normalcy. Even many of those who consider respect for human rights one of the core principles of the rule of law concede that emergencies of sufficient gravity may justify the temporary abridgment of some rights—a practice permitted by the International Covenant on Civil and Political Rights as long as states
do not discriminate on certain grounds (Ignatieff, 2004, pp. 49–50). However, there is a crucial distinction between derogable rights (such as the right to be free from forced labor, which often gives way to wartime necessities for compulsory military service), which may be suspended in times of great emergency, and non-derogable rights (such as the right to be free from torture), which must be respected in all circumstances. In addition to violations of basic human rights, such as the right to life, the Belgrade Report of the International Law Association issued in 1980 identified seven persistent patterns of abuse during states of emergency, including the overthrow or replacement of existing governments, the arbitrary use of detention, the suspension of civil and political liberties such as freedom of expression, the use of ex post facto laws to punish newly created crimes, the debilitation of the judiciary, and the prolongation of emergency even after the conditions that prompted the initial declaration of emergency ceased to exist (Chowdhury, 1989, pp. 4–6). In response to the threat of terrorism, nominally liberal democratic countries have resorted to censorship of media, new and enhanced forms of surveillance, curfews, indefinite detention, and other measures that would be difficult to justify under normal conditions. The potential for such abuses is precisely what prompts some to insist on forms of “constitutional absolutism” that commit government to follow the exact same rules in emergencies that apply in normal circumstances (Gross & Aoláin, 2006, pp. 86–109).

Emergency as Exception

A staple of scholarship on emergency is the idea that there is a fundamental ontological divide between a state of normalcy and a state of emergency. The notion of an insuperable divide between normal situations and emergencies has powerfully informed understandings of the proper role of law when an emergency strikes.

The most outspoken proponent of this understanding of the tension between the rule of law and emergency is Carl Schmitt, a German legal and political theorist-turned-Nazi whose Weimar-era writings received renewed interest following the September 11, 2001, terrorist attacks (see, e.g., Agamben, 2005; Lazar, 2009; Posner & Vermeule, 2011). Schmitt drew a sharp contrast between the “norm” and the “exception” to justify departures from ordinary law in times of emergency. Law, he argued, prescribes general rules designed to deal with the normal situation, which is routine and calculable. However, the world is susceptible to the eruption of extraordinary events that cannot be foreseen and therefore cannot be provided for in advance by law. “The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, and the like” (Schmitt, 2005, pp. 6–7). Because an emergency is by definition not a “normal” situation, legal norms do not apply. In Schmitt’s view, the inability to foresee every situation that may arise means that the rule of law has to submit to the use of extra-legal ad hoc measures, or “decisions,” by the sovereign. According to Schmitt, the only entity capable of responding effectively and expeditiously to such a threat is “the sheer executive, which is not conditioned in advance by any norm in the legal sense” (Schmitt, 2014, p. 8). Insistence on following the law—specifically, the demand for prior legal authorization to take any action—is not only naive, it is dangerous, Schmitt argued. Rigid adherence to the rule of law would impede the government’s ability to deal with extraordinary circumstances that require maximum flexibility.
Although Schmitt’s theory was part of a much broader polemic against the shortcomings of liberal democracy, it expresses (albeit in particularly stark form) ideas that have been endorsed by many champions of the rule of law, including some of the liberal thinkers Schmitt excoriated. John Locke defended the use of extra-legal action by the executive, or what he called “prerogative,” in order to serve the public welfare when strict adherence to the law would do more harm than good. Locke’s theory, which has exerted a strong influence on liberal political thought regarding emergency, states that “this power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it,” is justified by the fact that “many accidents may happen, wherein a strict and rigid observation of the Laws may do harm” (Locke, 1988; on Locke’s influence on liberal political thought concerning emergency powers, see Fatovic, 2009).

Lockean reasoning on this score has been echoed by generations of American statesmen. Reflecting on the duties of a high officer, Thomas Jefferson wrote:

> A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the ends to the means.

(Jefferson, 1984, pp. 1231–1232)

The dilemma facing government officials who find that strict adherence to legal rules imperils not only public safety but the preservation of the rule of law itself was most famously expressed in Abraham Lincoln’s defense of his unilateral decision to suspend the writ of habeas corpus during the early stages of the Civil War: “are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?” (Lincoln, 1989, p. 253; emphasis in original).

The idea that there is an essential divide between the normal situation and times of emergency that justifies departures from ordinary law has informed practical responses to emergency for centuries. This is the assumption underlying the institution of the dictatorship in republican Rome (as well as modern “models of accommodation” to emergency such as the state of siege and martial law) (Gross & Aoláin, 2006, pp. 17–35; Rossiter, 2002). The office of dictator was designed to deal with extraordinary circumstances beyond the competence of ordinary magistrates, including, most commonly, external military threats and domestic uprisings. The dictator possessed enormous authority to do almost anything he thought necessary to bring about an end to the emergency, including issuing new laws, ruling by decree, commanding other magistrates, and putting citizens to death without trial (Lazar, 2009; Nicolet, 2004; Schmitt, 2014).

Despite the dictator’s broad discretionary authority to employ extra-legal measures, the norms surrounding the Roman dictatorship belie the notion that responses to emergency stand wholly outside the law. It was a constitutional, hence legal, office structured by rules that determined how it came into being (the dictator was nominated by either of two consuls after a recommendation by the Senate), specified its maximum duration (six months or until
the crisis passed, whichever came first), and imposed some inviolable restrictions on the otherwise vast powers of the office (the dictator could not unilaterally impose new taxes). Perhaps the most important norm governing the behavior of dictators in republican Rome was the expectation that the officeholder would serve in what Schmitt described as a “commissarial” capacity to restore the status quo ante in its entirety and refrain from introducing permanent changes into the legal order (on Schmitt’s distinction between “commissarial” and “sovereign” dictatorship, see Schmitt, 2014).

These features suggest that law continues to structure and condition the use of power even in arrangements that permit the use of extra-legal measures. Scholars have pointed to Roman dictatorship and especially to modern practices to argue that the norm-exception dichotomy fails to take into account the multifarious ways the normal situation already makes allowances for the use of extraordinary powers and also ignores all the ways that the exceptional case is always infused with law. As Nomi Claire Lazar argues, there are significant continuities between states of emergency and states of normalcy that challenge facile dichotomies like those between norm and decision. It is not simply a choice between law and discretion, but between different kinds of law and different degrees of discretion. Lazar contends that there are always moments of discretion and decision even in the most placid periods of normalcy, and that legal norms continue to structure life even in the most extreme emergencies. If nothing else, law continues to inform ideas about what is permissible in times of emergency. In addition, law structures how emergencies get defined, when they can be declared, what powers the state may use, and when they come to an end (Lazar, 2009).

The Legalization of Emergency Powers

Whether they approve or disapprove of temporary deviations from existing laws in times of emergency, scholars have devoted more attention to extra-legal responses than to formally legal responses. However, recent scholarship has begun to challenge the dominance of the extra-legal framework on normative and empirical grounds. This work, which tends to be more historically informed than earlier scholarship that generally took its cues from political and legal theory, has shown that real-world responses to emergency involve not just the violation or suspension of law, but its expansion and proliferation as well. Emergencies are not always or only antithetical to law; they are also “jurisgenerative,” stimulating the development of new and different law (Sarat, 2010, p. 4).

Since the 19th century, there has been a general trend toward the ever-more detailed juridification of emergency powers. Governments today seldom have to resort to extra-legal measures like those employed by Roman dictators because public laws themselves now authorize governments to take a variety of extraordinary—but technically not extra-legal—actions (Schmitt, 2014, p. 221). In fact, most constitutions now contain provisions that stipulate the conditions under which an emergency may be declared, identify the proper officers or institutions authorized to issue such a proclamation, specify the powers that may be activated, indicate the rights that may (or may not) be derogated, and limit the time period during which emergency measures may be employed. Contrary to Schmitt’s claim that modern constitutions seek to “delimit the extraordinary functions as precisely as possible,” some constitutions provide breathtaking grants of authority that confer legality on almost any conceivable action.
The increasing reliance on legal measures to deal with emergencies does not necessarily alleviate concerns about the rule of law. Whether it ignores the requirement of generality in law by singling out some individuals or groups for different treatment or modifies normal protections for human rights, the juridification of emergency power presents challenges for both formal and substantive conceptions of the rule of law. The danger today is not (only) that governments dealing with emergency will operate in a lawless manner, but that they will receive all the legal cover they need from compliant legislatures and feckless courts to take actions that technically comport with the letter of the law but violate its spirit, thereby eroding respect for the rule of law.

Scholars point to the use of enabling statutes that confer new powers on government and sometimes permit it to sidestep ordinary constraints as the most significant threat to the rule of law in times of emergency. The most infamous example of an enabling provision is Article 48 of the Weimar Constitution, which ended up giving the German president largely undefined authority to promulgate emergency decrees and contributed to the collapse of the Weimar Republic (Rossiter, 2002, pp. 31–73).

Enabling legislation that supplies the executive with additional discretionary powers or confers extraordinary powers on security forces has been a feature of both authoritarian regimes and constitutional democracies. For instance, emergency laws in Egypt have permitted the president to restrict freedom of movement and assembly, censor the media, inspect private communications, regulate hours of operation for businesses, and confiscate property, among other things (Reza, 2007, p. 539). Countries held up as exemplars of the rule of law are no exception to this trend. In the United States, the powers available to the executive since the 19th century have “come to be increasingly rooted in statutory law,” thereby obviating the need for the use of extra-legal action of the sort defended by Jefferson and Lincoln (Relyea, 2007, p. 18). Legal accommodation of emergency government in the United States accelerated during the New Deal and World War II. In addition to actions President Franklin Delano Roosevelt took on his own authority to deal with the Great Depression, he relied on a variety of new powers granted by recently enacted statutes. In some cases, legislation was passed to ratify legally questionable actions he had already taken. For instance, a few days after Roosevelt became president, Congress passed the Emergency Banking Act, which gave him statutory authority to declare a bank holiday—something he had done on his own authority within 48 hours of assuming office (Relyea, 2007, p. 7).

**Emergency Law in the United States**

Partially in response to abuses of presidential power stemming from the Vietnam War and the Watergate scandal, the U.S. Congress took steps to curb the statutory growth in emergency powers. When the Special Committee on the Termination of the National Emergency looked into the matter, it found that there were four separate proclamations of emergency simultaneously in effect (Relyea, 2007, p. 9). A subsequent panel found that there were “470 provisions of federal law which delegated extraordinary authority to the executive in time of national emergency” (Relyea, 2007, p. 10). Attempts to reform this situation resulted in the passage of new legislation designed to establish formal procedures regulating the declaration of and responses to emergency.
Whatever the intentions of lawmakers, one of the major effects of much legislation pertaining to emergencies since the 1970s has been to augment the powers of the executive.\footnote{Scheppele, 2006, p. 856} The result, according to Kim Scheppele, is that “national emergencies have been declared far more often after the reforms of the 1970s than before that date because presidential declarations of emergency have been regularized, routinized, and taken into normal constitutional practice. Emergencies have become so common that hardly anyone notices them” (Scheppele, 2006, p. 856). Even though there are constraints built into some of this legislation (such as the sunset provisions contained in the Economic Stabilization Act of 1970, which authorizes the president to impose wage and price controls), much of the legislation presidents have invoked in recent years is on permanent standby—“dormant until activated by the President” (Relyea, 2007, p. 6).

The routinization of emergency powers has advanced so far that U.S. presidents have been able to argue that even the most extraordinary and controversial measures are solidly grounded in law. The prosecution of the so-called War on Terror by the George W. Bush administration provoked fierce criticism that its surveillance policies, use of “enhanced interrogation techniques” against suspected terrorists, indefinite detention of enemy combatants, and many other counterterrorism actions violated the rule of law, but attorneys working for the administration steadfastly maintained that its actions were lawful. In addition to citing the president’s inherent constitutional authority under Article II of the U.S. Constitution, administration officials claimed that various federal statutes give the president legal authority to carry out every one of his national security policies (see, e.g., Yoo, 2003, 2006). For instance, President Bush found all the legal authorization he needed for extraordinary measures, such as freezing the assets of suspected terrorists, in decades-old statutes such as the National Emergencies Act and the International Economic Emergency Powers Act (Scheppele, 2006, p. 857).

In addition to relying on grants of authority from legislation already on the books, governments also pressure lawmakers to pass new laws empowering them to deal with emergencies after they arise. Statutes passed shortly after the September 11 attacks, including the Authorization for Use of Military Force and the USA PATRIOT Act, gave the government new or enhanced powers to use military force against suspected terrorists, engage in expanded surveillance and wiretapping operations, and search banking and business records, among other things (see Yoo, 2006; Goldsmith, 2007, 2012). Many U.S. allies followed suit. The United Kingdom passed new counterterrorism laws such as the Anti-Terrorism, Crime and Security Act 2001, which gave government the power to detain indefinitely non-nationals determined to be a national security risk (Dyzenhaus, 2006, pp. 175–176).

Scholarship on emergency powers after 9/11 has generally focused on the dangers posed to the rule of law from expansions of the executive’s powers to confront perceived threats to national security, but open-ended grants of authority have not been limited to putative emergencies arising from acts of terrorism. For instance, Secretary of the Treasury Hank Paulson sought nearly unfettered authority from Congress to deal with the financial upheaval resulting from the subprime mortgage crisis in the fall of 2008. The original three-page proposal submitted to Congress sought authorization to spend up to $700 billion to buy and sell distressed assets without any restrictions or oversight other than periodic reports (Herszenhorn, 2008). Although Congress balked at the idea of giving the Treasury secretary the authority to purchase mortgage-related assets “without limitation,” the Troubled Asset...
Relief Program established by the Emergency Economic Stabilization Act of 2008 gave the Treasury Department broad authority to purchase or insure so-called toxic assets from financial institutions (Text of draft proposal, 2008).

**Legal Threats to the Rule of Law**

Critics have argued that the current practice of ruling by law in times of emergency is troubling because it relies on “the legal form to cloak arbitrary power” (Balasubramaniam, 2008). Legality, they argue, provides little more than a “fig leaf” for the very practices that the rule of law is meant to prevent. Whether governments make use of capacious constructions of constitutional powers, “tendentious” readings of existing law, or delegations of power from newly enacted statutes, critics have argued that such uses of law achieve only a façade of legality and fail to live up to the promise of the rule of law (on tendentious uses of existing law, see Bruff, 2009). The danger in the long run is that respect for the rule of law and the values it is supposed to uphold gets eroded. Related to this is what David Dyzenhaus describes as “the problem of seepage of the exceptional into the ordinary which affects all attempts to adapt the rule of law” (Dyzenhaus, 2008, p. 55). Once they receive the imprimatur of law, extraordinary measures that were supposed to be only temporary come to be seen as normal and have a tendency to become permanent.

This line of argumentation tends to draw attention to the shortcomings of formalistic conceptions of the rule of law, emphasizing instead the importance of substantive values to any meaningful and effective realization of that idea. Those who advocate a more substantive understanding of the rule of law contend that some measures are impermissible no matter what their formally legal basis is. Not only does a substantive view of the rule of law militate against resorting to certain actions (such as the suspension of certain civil liberties and rights) that should never be permissible, but it also impedes consolidations of power likely to pave the way for tyranny. One of the reasons for this, as Dyzenhaus has argued, is that a substantive conception of the rule of law commits all branches of government—especially the judiciary—to the maintenance “of fundamental constitutional principles which protect individuals from arbitrary action by the state” (Dyzenhaus, 2006, p. 2).

**Spatial and Temporal Bounds of Emergencies**

Much of the scholarship and law on emergency has been predicated on two assumptions about the temporal and spatial boundaries of emergencies. The first is that an emergency is a temporally discrete phenomenon: it has a more or less definite beginning and end. The second is that an emergency has a long geographical reach: it is more or less national in scope. Recent scholarship has challenged both of these assumptions on theoretical and empirical grounds.

**Permanent Emergency and the New Normal**

The prevailing expectation is that the end of an emergency brings a return to normalcy, or at least something closely approximating the conditions that existed prior to an emergency. However, many measures—both legal and extra-legal—that would not have been accepted...
before an emergency tend to linger long after the perceived danger has passed. In the most extreme cases, governments have declared indefinite states of emergency that have resulted in permanent rule by emergency measures. For instance, Egypt has been in an almost continuous state of emergency for almost one hundred years, dating back to British imperial rule, which has allowed the government to consolidate power and suppress both violent and nonviolent political opposition. Emergency powers in Egypt have been used to carry out mass arrests, detain suspects indefinitely, and hold them incommunicado (Reza, 2007, p. 540). Since achieving independence in 1961, Cameroon has also experienced frequent and extended periods of emergency rule that have enabled various presidents to silence political opposition and consolidate power (Fombad, 2004). Throughout much of the apartheid era, South Africa was under a state of emergency that subjected black citizens to restrictions on public gatherings, strict curfews, warrantless searches, and detention without trial, to name just a few measures adopted in the name of security (Chowdhury, 1989, pp. 47–48; for other examples of permanent or prolonged states of emergency around the globe, see Chowdhury, 1989, pp. 45–54).

The tendency of the extraordinary to become or redefine the ordinary has received increased scholarly attention in the wake of the U.S. War on Terror following the 9/11 attacks. Numerous scholars have argued that the exception has become the norm during the global war on terror (Agamben, 2005; Hardt & Negri, 2004, p. 7; Panitch, 2002). Because terrorism, as opposed to individual terrorists or terrorist organizations, is a technique that can never be eradicated, there is potentially no end to the supposed emergency and therefore potentially no end to emergency government (Ackerman, 2006). But whether a formal state of emergency has been terminated or not, Kim Scheppele contends that the normal situation is hardly ever the same after an emergency because the baseline tends to shift (Scheppele, 2006, p. 840). The most drastic and controversial practices may be terminated once the emergency passes, but many others (such as expanded surveillance of all or parts of the population and increased security measures at airports) remain intact. In addition, laws passed with built-in sunset provisions sometimes get renewed and extended indefinitely as the public grows accustomed to new exercises of power and new constraints on individual liberty. For instance, many provisions of the USA PATRIOT Act that were supposed to expire have been reauthorized and extended. However, some scholars have contested the claim that developments after 9/11 represent a radical break with some normal situation, arguing that emergency powers have been integral to the development of the state in the 20th century, especially in the area of economic regulation (Neocleous, 2006). Indeed, historical institutionalist research demonstrates the extent to which emergency powers have been vital to state-building projects in the United States since the beginning of the 20th century (Curley, 2015).

There is another aspect to the temporality of emergency that poses a threat to the rule of law. If expansions in discretionary power constitute the gravest threat to the rule of law during an emergency, instability, or what Fuller calls inconstancy, in the law is perhaps the most serious threat to the rule of law in the immediate aftermath of an emergency. Before conditions can return to normal, some governments have taken advantage of the upheaval created by an emergency to carry out policy experiments that were not politically feasible before emergency struck. Since the final decades of the 20th century, many governments have exploited the instability following an emergency to implement unpopular neoliberal reforms, including the privatization of public services and public lands, cutbacks in spending on social services, the deregulation of business, and the transfer of property rights. As one proponent of neoliberal
reforms noted, “These worst of times give rise to the best of opportunities for those who understand the need for fundamental economic reform” (John Williamson quoted in Klein, 2007, p. 213). Some of the most radical changes have involved substantial redistributions of wealth—but not in the direction that rule of law theorists such as A. V. Dicey, Hayek, and Milton Friedman feared. Although these theorists looked to the rule of law as a bulwark against a downward redistribution of wealth from rich to poor that may be favored by democratic majorities, recent examples illustrate that emergencies often provide elites opportunities to redistribute wealth upward from poor to rich.⁹

Naomi Klein documents numerous instances in which governments have exploited crises to carry out drastic economic changes that were not politically possible in normal circumstances. After Hurricane Mitch tore through the Caribbean in October 1998, the governments of Honduras, Guatemala, and Nicaragua implemented a variety of economic reforms that included the privatization of state-owned companies, reductions in environmental standards, the abolition of land-reform laws, and other changes that made it easier to relocate residents who stood in the way of powerful economic interests (Klein, 2007, p. 500). What happened in the aftermath of the cataclysmic 2004 Indian Ocean tsunami that killed nearly 230,000 in 14 countries and displaced millions provides an even starker example. In Sri Lanka, hundreds of thousands of villagers who for generations had lived near the coastline, earning a living from small-scale fishing, were prevented from returning to the land where their homes once stood. Public officials claimed that it was necessary to create a “buffer zone” near coastal regions for reasons of safety, yet large businesses involved in the tourist industry were exempt from these restrictions. The land once occupied by fishing people was handed over to foreign investors and entrepreneurs so they could build world-class hotels and tourist resorts (Klein, 2007, pp. 9, 487–492). The governments of Thailand and the Maldives undertook similar changes that displaced thousands in the name of economic development (Klein, 2007, pp. 504–507).

Public officials in the U.S. have also used emergencies as opportunities to pursue neoliberal reforms. Only days after Hurricane Katrina made landfall in New Orleans in 2005, President Bush issued a proclamation suspending portions of the Davis-Bacon Act, which mandates that firms contracted to work on public projects pay local prevailing wages (Relyea, 2007, p. 19). Residents of public housing in New Orleans who were displaced by Hurricane Katrina have seen their former neighborhoods turned over to private development (Klein, 2007, pp. 519–524).

Uneven Impacts of Emergency Powers

The notion that an emergency or the measures adopted to deal with it apply to the entire population has also come under increasing scrutiny. In practice, the dangers commonly associated with a state of emergency tend to be localized. Even during a state of war, which is often used as a template for thinking about a state of emergency, disruptions to everyday life and the ordinary functioning of government can be limited to very specific geographic locations. Though the sense of fear and feelings of insecurity are often widespread in times of emergency, actual threats to life and property tend to be localized. Rarely do emergencies actually rise to the level of existential threats to the nation as a whole. Most could be classified as “small emergencies”: problems that require exceptional solutions, but not so grave or extreme as to “be seen as fundamentally disruptive of the overall order of things, or
of the prospects for realization of a constitutional ideal” (Scheppele, 2006, p. 836). Even during the Civil War, which is arguably the single greatest emergency the United States has ever confronted, armed hostilities in the North were generally confined to border states. But as the concept of emergency has been stretched to include violent situations short of war and other kinds of crises directly affecting only small segments of the population, small-scale emergencies have become so common that “America is now—and has been since the First World War—virtually always in a state of emergency, one way or another” (Scheppele, 2006, p. 836). In the fall of 2005 alone, “nearly every American state was in a separate, presidentially declared state of emergency” (Scheppele, 2006, p. 841).

Although governments have used emergency conditions confined to a specific location to justify the imposition of emergency measures affecting the entire population, it has become increasingly common for them to apply different sets of laws and measures to different parts of the population under their jurisdiction. Many emergency measures that get adopted or activated—such as laws against price gouging—are applied only in directly affected areas (Dillbary, 2010). Michael Ignatieff has proposed a tripartite spatial scheme for the classification of emergency measures: (a) national emergencies, which result in measures affecting an entire country, such as a nationwide state of martial law; (b) “territorial” emergencies, which are “confined to special zones of the country,” such as zones of occupation and areas with active combat operations; and (c) “selective” emergencies, which subject particular individuals, such as suspected terrorists, to exceptional forms of state power and diminished or suspended privileges, immunities, and rights (Ignatieff, 2004, pp. 25–26).

Scholars and journalists have also drawn attention to the ways that the burdens of some emergency measures tend to fall most heavily or exclusively on members of certain ethnic, religious, or national groups—particularly those who have been perceived as Muslims or of Middle Eastern descent during the War on Terror—but far less attention has been given to class as a factor in making individuals subject to or exempt from extraordinary exercises of power. For example, despite government claims that enhanced surveillance and security measures at airports are critical to preventing another 9/11-style attack, those who can pass a background check and afford the annual fee are eligible for a pass that grants them expedited and reduced screening at airport security check-ins (Honig, 2009, p. 155).

Conclusion

The trend toward the legalization of extraordinary powers in times of emergency, along with the increasing normalization of emergency powers in ordinary circumstances, reveals challenges to the rule of law that are arguably every bit as worrisome as the lawless exercises of power that have alarmed thinkers for millennia. Each involves concentrations and expansions of discretionary power with the potential for abuse. But unlike those extralegal exercises of power that have always represented the antithesis of the rule of law, lawful exercises of emergency power may be more insidious because their inconsistency with rule of law values is more difficult to identify—and therefore more difficult to resist.

It remains an open question whether respect for the rule of law over the long run is better preserved by an open acknowledgment that temporary departures from ordinary legal rules are sometimes necessary in times of emergency or by modifications to the form and content of
existing laws. Each approach poses risks to the rule of law. However, it is worth recalling that law does not simply enable or constrain power. As Aristotle pointed out over two millennia ago, the efficacy of law depends almost as much on its didactic function as it does on its regulative functions: “Law trains the holders of office expressly in its own spirit, and then sets them to decide and settle those residuary issues which it cannot regulate” (Aristotle, 1995, p. 128). If existing laws must give way, somehow or other, in times of emergency, then it becomes all the more important that those who make and administer the law remain committed to its best ideals.

References


**Notes**

1. The ideal of equality under the law can be traced back to the Greek notion of *isonomia*, which initially referred to the political equality of magistrates but eventually came to express the political and legal equality of citizens. On the development of this concept in ancient Athens, see Ostwald (1986). On the influence of this idea in the development of rule of law thinking, see Hayek (1960), pp. 162–175.

2. However, as Michele Dauber notes, the use of a “disaster narrative” to frame those suffering from hunger and poverty during the Great Depression as blameless victims of circumstances beyond their control enabled President Franklin D. Roosevelt to argue successfully for an expanded federal role in the economy that exceeded what many believed was compatible with the rule of law and constitutional government (Dauber, 2013).

3. On the potential risks involved in labeling a situation as an emergency, see Holder & Martin (2009), pp. 53–60.

4. War is sometimes treated as a distinct category unto itself in theory and practice.

5. The distinction between the “natural” and the “human-made,” or “technologically driven,” is a slippery one. Experts on disaster management and risk mitigation note that many so-called natural disasters become emergencies only as a result of human action or inaction (see Olson, 2000, pp. 265–287).


7. The Constitution of Cameroon provides a striking example of this trend: “In the event of a serious threat to the nation’s territorial integrity or to its existence, its independence or institutions, the President of the Republic may declare a state of siege by decree and take any such measures as he may deem necessary” (Cameroon Constitution, Article 9, Section 2, quoted in Fombad, 2004, pp. 62–81; emphasis added).

8. One example is the Disaster Relief and Emergency Assistance Act of 1974, which grants the president the power to make a unilateral declaration of emergency, to determine when and where public funds will be spent, and to override procedures established in other laws regarding the administration of funds, and also establishes procedures enabling the president to violate or suspend other laws. The National Emergencies Act of 1976 establishes procedures regulating the activation and use of emergency powers authorized in other statutes, including the requirement that...
the president make a formal declaration of emergency and cite the specific statutory authority that will be used. The International Emergency Economic Powers Act of 1977 authorizes the president to issue commercial regulations after a declaration of an emergency originating “in whole or substantial part outside the United States” (International Emergency Economic Powers Act of 1977, 50 U.S.C. §1701(a)).

9. This does not even include states of exception declared in response to economic underdevelopment, which often result in measures that fail to produce promised improvements in economic development, but do deliver particularized benefits that “accrue to privileged groups rather than to the bulk of the population” (Chowdhury, 1989, p. 21).

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