Economic Emergency and the Rule of Law

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Answering the question of whether the rule of law is waxing or waning might depend on which vision of the rule of law is under consideration. Academic work extolling the merits of the rule of law both domestically and internationally abounds today, yet the meanings of the phrase itself seem to proliferate. Two of the most prominent contexts in which rule of law rhetoric appears are "economic development" and "states of emergency."1

In the area of private law, dissemination of the rule of law across the globe and, in particular, among emerging market countries is often deemed a prerequisite for enhancing economic development, because it ensures that foreign investments will not be summarily expropriated and contractual rights will not be frustrated by governmental interference. Much of public law scholarship has, in turn, examined whether and in what form the rule of law, which is often seen as a basic requirement for a liberal political order, can be retained during times of emergency.

While the economic development and state of emergency contexts for rule of law discussions appear quite distinct, they converge in at least one situation—economic emergency. Paradigmatic cases of economic emergency include the Great Depression, the Argentine fiscal crisis of 2001, and the East Asian currency crisis of the late 1990s. Arguably more marginal instances might comprehend the economic consequences of Hurricane Katrina, the economic dimensions of a potential bird flu pandemic, or the threatened financial chaos of the Y2K
computer crisis. Either the economic development approach or the state of emergency approach could lead to the conclusion that none of these situations justify an abrogation of core rule of law values, but this puts aside the question of which values do lie at the center of the rule of law.

This Article contends that the rule of law should be conceived flexibly enough to permit governmental intervention that may temporarily disrupt the economic rights—but not the personal liberty or political participation rights—of individuals during economic emergencies. Without addressing whether and to what extent the government should interfere in the economic sphere, this Article argues that several justifications based on the democratic vision underlying our constitutional system warrant treating the suspension of economic rights differently from the suspension of rights such as habeas corpus or the vote.²

Although recent scholarship has focused on the effect of states of emergency on various constitutional orders, little attention has been devoted to differentiating the sources of the emergency and the kinds of rights that emergencies affect. While commentators pay lip service to the idea that emergencies come in three varieties—political, economic, and natural—most devote their attention solely to the first of these categories, focusing on situations of war and other violent conflict.³ This obscures important distinctions between the types of infringements upon constitutional rights that emergencies may generate. As a result, those who have recently begun to discuss measures abridging economic rights during emergencies have insisted that such encroachments should be considered anathema to us—just as steps restricting other kinds of rights are.⁴ Two contrasting solutions emerge out of this line of scholarship. While one insists that economic and other rights should be preserved regardless of the surrounding circumstances, the other maintains that infringements upon personal and political freedoms should instead be considered just as permissi-

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² For a sweeping history of economic theory from Smith to Keynes, and the various schools of economic thought that developed over that period with respect to state management of the economy, see generally Mark Blaug, Economic Theory in Retrospect (5th ed. 1997).

³ Oren Gross, Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?, 112 Yale L.J. 1011, 1025 n.44 (2003) (“Emergencies have been traditionally classified into three major categories: grave political crises (including international armed conflicts, terrorist attacks, riots, and rebellions), economic crises such as the Great Depression, and natural disasters and force majeure events.”).

⁴ See infra note 33 and accompanying text.
ble as those upon economic rights, and that these infringements should simply be compensable after the fact.\(^5\)

This Article does not argue that the respective natures of political and economic emergencies render one more compelling as a source of extraordinary governmental action than the other. Each may result in devastating harm. The oft-repeated mantra after the events of 9/11 that "the Constitution is not a suicide pact,"\(^6\) which reminds us that constitutional guarantees to liberties like due process should not override the necessity of preserving the social order itself, could be applied equally to the economic arena.

To the extent that fixed resources might be available during a particular economic emergency, insisting on an absolutist interpretation of the constitutional right to property or freedom of contract could result in the utter collapse of the economic and political systems. Nor are courts necessarily more capable of evaluating the extent of a threat posed by a posited economic crisis than one presented by potential terrorists.\(^7\) In both instances, the possibility of harm arising out of particular kinds of emergencies may be quite substantial, and at the same time, the validity of the government's claims that individual rights must be curtailed in order to preserve the polity may not be readily ascertainable by the courts.

Rather than attempting to distinguish the situations by appealing to the greater necessity, or lack thereof, of governmental action in one sphere or the other, this Article insists that, during emergencies, a difference may exist between infringing upon economic rights, on the one hand, and liberty or political rights, on the other. Whether these areas can, in fact, be separated depends ultimately upon the kind of

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5. Compare infra note 33 and accompanying text (taking the first position), with Eugene Kontorovich, Liability Rules for Constitutional Rights: The Case of Mass Detentions, 56 STAN. L. REV. 755, 792 (2004) (adopting the second position and suggesting that certain constitutional rights, including those of habeas corpus, would be better protected by liability rules than by property rules in cases of emergency, and basing this model on the one currently employed under the Takings Clause).


7. In both cases, expert information may be required. This problem has surfaced in relation to the war on terror. The Bush Administration has often alleged that it must act on the basis of intelligence data that it cannot risk making public by producing it in court, and which the judiciary is therefore not able to evaluate. See N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 227 (3d Cir. 2002) (discussing the "mosaic theory," by which terrorists might put together certain pieces of information that appear innocuous individually, and that judges would not be able to differentiate from other, less sensitive, materials), cert. denied, 538 U.S. 1056 (2003). Various scholars have also noted that courts may not be the government institutions best suited for making judgments about economic strategies. See Wayne McCormack, Property and Liberty—Institutional Competence and the Functions of Rights, 51 WASH. & LEE L. REV. 1, 55–56 (1994).
democracy envisioned as undergirding the constitutional system. In the United States, following John Hart Ely’s influential argument in *Democracy and Distrust*, many agree that judicial review under the Constitution should, at a minimum, protect access to participation in the political process. A necessary entailment of this minimum standard for our constitutional democracy is that rights like habeas corpus, freedom of speech and assembly, and voting should not be suspended or otherwise abridged during an emergency beyond what the text of the Constitution permits, at the risk of the failure of our democratic system. No similar degree of significance attaches to economic rights within our constitutional order, or so this Article contends.

The text of the Constitution and constitutional jurisprudence provide further support for distinguishing among the categories of rights infringed during an emergency. One of the primary passages protecting economic rights, the Takings Clause, specifies “nor shall private property be taken for public use, without just compensation.” This language envisions the possibility that the government will deprive individuals of their property, as long as it provides “just compensation.”

The manner in which the Court has construed the Contract Clause and the history behind that provision suggest a notion of economic interdependence that should permit modification of property rights to promote the health of the overall economic order.

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8. Professor Jeremy Waldron has recently argued, along similar lines, that certain aspects of our law, like the ban on torture, furnish “archetypes,” which “sum[] up or make[] vivid to us the point, purpose, principle, or policy of a whole area of law.” Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 Colum. L. Rev. 1681, 1723 (2005).


10. This is not to say that such rights should be construed as absolutely protecting individual liberty. On the contrary, in the context of the First Amendment, it is commonly acknowledged that time, place, and manner restrictions can be placed upon speech. See Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 Notre Dame L. Rev. 1347, 1355–60 (2006). Likewise, the writ of habeas corpus would not be available if Congress suspended it under the right circumstances. U.S. Const. art I, § 9, cl. 2; see also infra note 42 and accompanying text.

11. U.S. Const. amend. V.

12. 290 U.S. 398 (1934); see also infra notes 109–113 and accompanying text. At a late stage in the editing process for this Article, a fascinating piece by Professor Sanford Levinson appeared. In that work, Levinson relates the opinion in *Blaisdell* to theories about emergency and the rule of law to the writings of Carl Schmitt in a way that overlaps in several respects with this Article. Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 Ga. L. Rev. 699 (2006); see also Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 Ga. L. Rev. 807 (2006) (responding to Levinson).
This flexible notion of the contours of economic rights during emergencies affects the rule of law, at least as it is conceived by the economic development literature, which draws heavily on Friedrich Hayek's classic text *The Constitution of Liberty*.\(^\text{13}\) It does not, however, represent the only alternative. The Argentine Supreme Court, for instance, took a rather different tack in addressing the measures that then-President Fernando de la Rúa adopted in response to the fiscal crisis of 2001, invalidating measures like the restriction on removing more than $250 per week from savings accounts.\(^\text{14}\)

This Article simply contends that a particular vision of democracy—one that has historically been associated with our constitutional system—supports a more flexible interpretation of the effects of emergency on economic rights than on personal liberty and political participation rights. For those rights exercised against the backdrop of economic regulation, the Constitution may remain strict during emergencies—continuing to tie Ulysses to his mast—while accommodating governmental interests in economic stability.\(^\text{15}\) For other kinds of personal liberty or political participation claims, such accommodation is more problematic, and more likely to result in deformations of the protections that the Constitution provides.

Part II delineates the varieties of emergency and suggests several means of distinguishing among those that are political, natural, and economic. Part III examines the potential intersection of the two dominant strands of rule of law scholarship in the context of economic emergency, a context that illuminates how analysis under these disparate rule of law strands may reach divergent results. The subject of economic emergency has remained relatively unexamined by either branch of rule of law work, because the economic development line does not focus on emergencies at all, and the emergency line largely avoids treating economic emergencies. Part IV argues that both a particular version of democratic theory and the history and interpretation of the economic rights clauses of the U.S. Constitution support differentiating between infringements of economic and other rights during emergency—regardless of what occasioned the emergency situ-

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\(^{13}\) F.A. Hayek, *The Constitution of Liberty* (1960); see also infra notes 68–77 and accompanying text.


ation. Reference will be made to the Argentine Constitution and its interpretation by the Argentine Supreme Court as illustrating a constitutional system that rests on somewhat distinct norms.

II. THE VARIETIES OF EMERGENCY

In its classic contours, an emergency calls for rapid and decisive action by the executive branch, including the act of designating the situation an emergency or a "state of exception." According to German jurist Carl Schmitt, sometimes dubbed the legal theorist of the Third Reich, "Sovereign is he who decides on the exception."16 Justice Harlan Fiske Stone, concurring in Duncan v. Kahanamoku, a case invalidating two convictions by military tribunal in Hawaii, similarly explained that "[t]he Executive has broad discretion in determining when the public emergency is such as to give rise to the necessity of martial law, and in adapting it to the need."17 According to this conventional account, the rest of government will find itself stymied by the emergency, either because the situation requires a rapid response that demands circumventing deliberative democratic processes, or because the emergency has already undermined the operations of the other branches themselves: "[T]here is a] power which resides in the executive branch of the Government to preserve order and insure the public safety in times of emergency, when other branches of the Government are unable to function, or their functioning would itself threaten the public safety."18

Declaring an emergency means setting aside a normal state of affairs or acknowledging that such a departure has already occurred. The Executive's principal concern in an emergency is to preserve a nation whose survival is somehow imperiled. The juridical concept of the emergency is thus connected with the notion of raison d'état, identified as "the doctrine that whatever is required to insure the survival of the state must be done by the individuals responsible for it, no matter how repugnant such an act may be to them in their private capacity as decent and moral men."19

18. Id. at 335. For a discussion of the temporal rationale for suspending deliberative democracy during an emergency and the flaws in this reasoning, see generally ELAINE SCARRY, WHO Defended the Country? (Joshua Cohen & Joel Rogers eds., 2003).
Emergencies have been rendered notorious, not only by the experience of the Third Reich and Hitler's ascent to power on the basis of Article 48 of the Weimar Constitution, but also by the deleterious consequences in India and South Africa of making emergencies semi-permanent. Based on these infamous histories, recent constitutional efforts in Eastern Europe, Latin America, and elsewhere have attempted to curb abuses by explicitly granting the legislature the power to declare or ratify an emergency or limit its duration. Following the events of 9/11 in the United States—and the rapid legislative response represented by the USA PATRIOT ACT—many have suggested explicitly permitting emergency constitutionalism, but simultaneously limiting the scope of executive action during emergencies. Along these lines, Professor Bruce Ackerman has proposed a "supermajoritarian escalator," under which the President would "be given the power to act unilaterally only for the briefest period—long enough for the legislature to convene and consider the matter, but no


20. Article 48 of the Weimar Constitution, the emergency provision, delegated powers and military capacity to the President when "the public safety and order of the German Reich is seriously disturbed or endangered," and also permitted the suspension of civil liberties through presidential fiat. David Dyzenhaus, Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar 33 (1997). In fact, when Article 48 was implemented in 1932, it signaled the commencement of Hitler's rise to power. Field Marshal von Hindenburg, the Reichspräsident, issued a decree allowing the Chancellor of the Reich, Franz von Papen, to be the Commissioner for Prussia, thus effectively suppressing the SPD, the main socialist party and the principal vehicle of resistance to the Nazis. Id. The Prussian government did not resort to violence:

[It] chose to challenge the constitutional validity of the decree before the Staatsgerichtshof—the court set up by the Weimar Constitution to resolve constitutional disputes between the Federal Government and the Länder. The court by and large upheld the decree in late October, by which time the SPD was no longer an effective force. Id. at 3 (citations omitted).

21. See infra notes 62–63 and accompanying text.

22. See, e.g., Const. Est. arts. 65, 129 (granting Parliament the power to declare an emergency on the proposal of the president or government); see also John Ferejohn & Pasquale Pasquino, The Law of the Exception: A Typology of Emergency Powers, 2 Int'l. J. Const. L. 210, 216–17 (2004) (maintaining that "[a] new model of emergency powers . . . has evolved over the past half century, at least for the advanced or stable democracies," one that relies on legislative action to delegate emergency powers to the executive branch).

23. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001); see also Susan Freiwald, Online Surveillance: Remembering the Lessons of the Wiretap Act, 56 Ala. L. Rev. 9, 75 (2004) ("The USA PATRIOT Act was passed just six weeks after the September 11 attacks, during a period in which legislators were literally shut out of their offices due to anthrax attacks. Commentators have complained about the limited deliberation that preceded the USA PATRIOT Act, which was passed despite the fact that members of Congress did not have a chance to view the actual text." (citations omitted)).
longer." Subsequent action would be approved only by increasing congressional supermajorities.

Despite these recent attempts to bring U.S. constitutional treatments of emergency into some conformity with the approaches of other nations, a crucial distinction remains: the U.S. Constitution lacks any explicit provision for states of emergency. The most relevant constitutional clauses include those articulating Congress's power to declare war, to call forth the militia, and to suspend the writ of habeas corpus. Although these powers all seemingly accrue to Congress, during emergencies the President has often issued an executive order or simply taken what he asserts is necessary action. Furthermore, the absence of an emergency clause in the Constitution has left elaboration of the Constitution's fate during such situations to the Supreme Court's interpretation of the nature and extent of the political branches' powers.

In both domestic and international contexts, commentators have largely neglected to examine the various forms that emergencies take, whether political, economic, or natural. The most prevalent associations with emergency today involve the imminent threat of violence that places the continuation of the state in jeopardy. This has not, however, always been the case. Economic emergencies have sometimes swept the United States—most notably during the Great Depression. Schmitt emphasized the twentieth-century tendency toward declarations of economic emergency, identifying it as omni-

25. Id.
26. This contrasts with the practice of many twentieth-century constitutions internationally, including that of Argentina. Const. Arg. § 23, available at http://pdba.georgetown.edu/Constitutions/Argentina/argen94_e.html ("In the event of domestic disorder or foreign attack endangering the full enforcement of this Constitution . . . the province or territory which is in a turmoil shall be declared in [a] state of siege and the constitutional guarantees shall be suspended therein."); see also Const. Arg. § 76 (providing for the delegation of legislative power to the Executive during emergencies for a period of time to be specified by Congress); Const. Pol. art. 228.
27. U.S. Const. art I, § 8, cl. 11.
29. U.S. Const. art I, § 9, cl. 2.
31. See supra note 3 and accompanying text.
present and incompatible with liberal democracy. Likewise, the extent of the devastation caused by Hurricane Katrina in 2005 and the Asian Tsunami of 2004 suggests that emergency theory may be relevant to natural disasters.

Labeling emergencies political, economic, or natural raises questions as to which aspect of the emergency is designated. Are all emergencies that begin in financial crisis—like the Great Depression or the Argentine fiscal crisis of 2001—economic in nature? What if natural emergencies like Hurricane Katrina or the Asian Tsunami have profound political and economic consequences? And what if the kinds of individual rights affected by an economic or natural emergency are ones connected with individual liberty or the political process? Our Constitution—to the extent that it concedes the possibility of something like an emergency at all—seems to privilege political emergencies over other forms. Nevertheless, even within the United States, there may be rhetorical advantages that accrue to the government upon labeling an emergency natural or economic as opposed to political. No clear justification for placing priority upon either form of emergency has, however, emerged. Indeed, to the extent that the potential consequences of each remain equally dire, action taken to address the emergency might be thought to be similarly justified. What the government must show in each instance—and what is most difficult for courts to assess—is that the emergency actually requires the steps that are being taken, and that a compelling necessity does in fact exist. The greater rhetorical power of invoking natural or economic emergency—despite the lack of constitutional concern with these situations—may stem precisely from the popular view that these varieties of emergency represent ineluctable forces to which the government can only react and with which it is not capable of negotiating.

33. William E. Scheuerman, The Economic State of Emergency, 21 CARDozo L. Rev. 1869, 1883–85 (2000) (analyzing Schmitt's discussions of economic emergencies). There may be a very recent resurgence of interest in the phenomenon. See Rebecca M. Kahan, Comment, Constitutional Stretch, Snap-Back, and Sag: Why Blaisdell Was a Harsher Blow to Liberty than Korematsu, 99 Nw. U. L. Rev. 1279 (2005). Those commentators who have analyzed declarations of economic emergency have generally condemned them alongside, or even more than, militaristic ones. See id. at 1311 (contending that “though both violent and economic emergencies stretch the fabric of constitutional limitations with the sheer force of necessity, the nature of circumstances surrounding either executive or legislative response limiting economic liberty causes its effect to linger long past the time when a similar limitation on civil liberty will have expired”); see also Scheuerman, supra, at 1869–70 (“[L]iberal legal and political analysts have too often ignored the seriousness of the normative and institutional problems posed by the surprisingly pervasive reliance on emergency devices to grapple with the exigencies of economic affairs.”).

34. See infra notes 47–49 and accompanying text.
Although philosopher Giorgio Agamben's writings on the state of exception generally devote little attention to the question of how an emergency arises, his discussion of "necessity" in *State of Exception*\(^\text{35}\) suggests why the rhetoric of natural emergency is so powerful. In analyzing the state of necessity, Agamben turns to the work of Santi Romano and, in particular, his response "on the occasion of the earthquake of Messina and Reggio Calabria on December 28, 1908."\(^\text{36}\) Although Agamben himself insists that the state of siege brought about by the earthquake "is only apparently a different situation" than a political disturbance, and that "a state of siege [was] ultimately proclaimed for reasons of public order—that is, to suppress the robberies and looting provoked by the disaster,"\(^\text{37}\) the fact that natural disaster could be posited as the originary spark bringing about the necessity retains a rhetorical significance. Indeed, it is precisely this aspect that accords with what Agamben identifies as "the extreme aporia against which the entire theory of the state of necessity ultimately runs aground," and which "concerns the very nature of necessity, which writers continue more or less unconsciously to think of as an objective situation."\(^\text{38}\) Although Agamben endorses the stance of "those jurists who show that, far from occurring as an objective given, necessity clearly entails a subjective judgment, and that obviously the only circumstances that are necessary and objective are those that are declared to be so,"\(^\text{39}\) he neglects the role of the natural emergency in facilitating the naïve view of necessity.

Several examples from the United States demonstrate the perplexing interaction between the constitutional justifications for government action in situations of political emergency and the popular acceptance of emergency measures taken during natural disasters or economic crises. For example, the executive and legislative branches claim greater scope for the exercise of their power during times of war. After 9/11, the executive branch argued that Article II grants the President something like a penumbra of powers greater than those specifically enumerated in the Constitution. Thus, in *Hamdi v. Rumsfeld*, the Government asserted that "the Executive possesses plenary authority to detain [citizens considered 'enemy combatants'] pursuant
The Court has declined to adopt this broad vision of presidential authority during emergencies, but the extent of the power that the Executive does enjoy remains in dispute. Likewise, it is only in light of rebellion or invasion that the Constitution contemplates suspending the writ of habeas corpus.

Other countries' constitutions, and even the individual states in the United States, are less categorical about the effects of the source of an emergency upon the powers the government may exercise. Section 23 of the Argentine Constitution, for example, treating the "state of siege," refers to "domestic disorder" and "foreign attack" as justifications for suspending constitutional guarantees, but the emphasis still falls upon man-made crises. Section 76, which has often provided the basis for the Argentine Congress to delegate emergency economic powers to the President, including in the wake of the fiscal crisis of 2001, speaks in even more open-ended terms. According to this provision, any delegation of legislative power to the Executive is prohibited, "save for issues concerning administration and public emergency, with a specified term for their exercise and according to the delegating conditions established by Congress."

At the state level, the power of the political branches during an emergency stems from the broader notion of the "police power" reserved to the states through the federalist structure of the Constitution. The concept of the state's police power is famously broad and famously vague. As one scholar recently noted, "[D]espite the centrality of the police power . . . an observation made nearly one hundred years ago still holds true today: 'No phrase is more frequently used and at the same time less understood.'" Through its comprehensive scope, the police power includes measures arising out of natural or economic disasters as well as those stemming from political

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41. Id. at 517.
42. U.S. CONST. art I, § 9, cl. 2. Although the language of the Suspension Clause appears to prescribe a textually specific limitation, ensuring that Congress will be able to use its power only in cases of "Rebellion or Invasion," commentators disagree about whether courts would, or should, deem the existence of rebellion or invasion justiciable. See generally Amanda L. Tyler, Is Suspension a Political Question?, 59 STAN. L. REV. 333 (2006).
43. CONSR. ARO. § 23.
44. See e.g., Law No. 25561, Jan. 6, 2002, B.O. (declaring a public emergency in the terms specified by Section 76 and modifying the exchange rate).
45. CONST. ARG. § 76.
emergencies. The Court emphasized the police power's connection to health, morals, and safety:

That there is a power, sometimes called the police power, which has never been surrendered by the States, in virtue of which they may, within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety, is conceded in all the cases. In its broadest sense, as sometimes defined, it includes all legislation and almost every function of civil government.\(^48\)

Although, according to some commentators, the police power was co-extensive with state sovereignty at the time of the founding, it is limited both by the federal government’s constitutional supremacy and by individual rights.\(^49\)

Even in the United States, although the text of the Constitution appears to contemplate granting emergency powers only in the case of political crisis, if at all, the rhetoric of natural disaster has proved more compelling in justifying particular kinds of action, especially when taken in the name of the states' police powers. One dramatic example involves the detention of numerous individuals in New Orleans following Hurricane Katrina and their deprivation of the right to counsel, speedy trial, and habeas corpus guarantees.\(^50\) A less visible, but still important, deviation from the usual constitutional order has been permitted when states claim that strict adherence to the dictates of the Dormant Commerce Clause, and the prohibition it places on discriminating against interstate commerce, will jeopardize the health of the people or other life forms in the jurisdiction by importing pestilence or disease. Thus, in \textit{Maine v. Taylor}, the Court upheld a conviction under a Maine statute prohibiting the importation of out-of-state baitfish, weighing heavily the expert testimony that the importation of these live baitfish would place "Maine's population of wild fish ... at risk by three types of parasites prevalent in out-of-state baitfish, ...\)

\(^{48}\) New Orleans Gas Co. v. La. Light Co., 115 U.S. 650, 661 (1885) (citations omitted).

\(^{49}\) See Barros, \textit{supra} note 47, at 497–98; see also Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) ("The term 'police power' connotes the time-tested conceptual limit of public encroachment upon private interests."); \textit{New Orleans Gas Co.}, 115 U.S. at 661 ("Definitions of the police power must, however, be taken, subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.").

but not common to wild fish in Maine." Justice John Paul Stevens's dissent in *Maine v. Taylor* suggests that the Court may have been too quick to accept the state's claims of environmental necessity and impending natural disaster:

> [T]he invocation of environmental protection or public health has never been thought to confer some kind of special dispensation from the general principle of nondiscrimination in interstate commerce. . . . If Maine wishes to rely on its interest in ecological preservation, it must show that interest, and the infeasibility of other alternatives, with far greater specificity.

Justice Stevens's counterstory indicates both one of the sources of the persuasiveness of the rhetoric of natural emergency and one of its central problems: the language of natural emergency suggests that the government is faced with an exigency that permits only one means of stopping disaster, rather than leaving open several alternative approaches. Furthermore, it tends—often erroneously—to divest the government of responsibility for the onset of the emergency, attributing to nature what may in fact result largely from human intervention.

The inadequacy of these justifications for granting the government greater authority during natural emergencies does not, however, mean that superior rationales exist in cases of political emergency. The Constitution appears to distinguish between the different reasons for the exercise of emergency powers, placing somewhat more emphasis on political than on natural or economic triggers. This distinction, however, lacks any self-evident normative justification. If one followed the philosopher Thomas Hobbes, one might opine that the very origin of government consists in man's fear of death by the hands of

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another man, and that the sovereign body should therefore be permitted greater latitude in curtailing the consequences of violent emergencies. Because natural and financial disasters may, however, also result in a scarcity of resources and ensuing violence, this rationale is not entirely persuasive. A more attractive approach is to recognize the sources for the exercise of emergency power as equally compelling, whether military, economic, or natural.

Economic emergencies occupy a space of indistinction between human-generated and natural disasters. While in Blaisdell the Court approvingly quoted a passage that provided a lengthy analogy between financial and natural disorder, President Franklin Roosevelt's inaugural address of 1933 instead emphasized the relationship between war and economic distress, insisting that he needed "broad Executive power to wage a war against the emergency, as great as the power that would be given . . . if we were in fact invaded by a foreign foe." It is, in one respect, appealing to compare economic emergency with natural disaster because the seemingly ineluctable character of the latter endows the former with the appearance of inevitability and removes the issue of responsibility for the crisis from consideration. But from the vantage point of the constitutional schema, as Roosevelt realized, such a comparison would diminish the potential for the President to exercise extraordinary powers along the lines of those employed during war or other military emergencies.

54. THOMAS HOBBES, LEVIATHAN 104 (E.P. Dutton & Co. 1950) (1651) (observing that the worst aspect of the state of nature consists in the individual's "continuall feare, and danger of violent death").

55. See id.

56. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 423 (1934) ("The present nation wide and world wide business and financial crisis has the same results as if it were caused by flood, earthquake, or disturbance in nature. It has deprived millions of persons in this nation of their employment and means of earning a living for themselves and their families; it has destroyed the value of and the income from all property on which thousands of people depended for a living; it actually has resulted in the loss of their homes by a number of our people and threatens to result in the loss of their homes by many other people, in this state . . ." (quoting Blaisdell v. Home Bldg. & Loan Ass'n, 249 N.W. 334, 340 (Minn. 1933) (Olsen, J., concurring))).

57. Scheuerman, supra note 33, at 1871 (quoting Roosevelt's 1933 inaugural address).

58. Agamben notes Roosevelt's strategic invocation of the metaphor of war and how he "was able to assume extraordinary powers to cope with the Great Depression by presenting his actions as those of a commander during a military campaign." AGAMBEN, supra note 35, at 21. He concludes from this situation that military and economic emergency cannot be differentiated within the history of the twentieth century:

[F]rom the constitutional standpoint, the New Deal was realized by delegating to the president an unlimited power to regulate and control every aspect of the economic life of the country—a fact that is in perfect conformity with the already mentioned parallelism between military and economic emergencies that characterizes the politics of the twentieth century.

Id. at 22.
III. Two Approaches to the Rule of Law

Economic emergency is located at the logical intersection of two different strands of scholarship on the rule of law—one arising in the economic development context (economic development rule of law) and one responding to the political turmoil ensuing from twentieth-century declarations of states of emergency (emergency rule of law). So far, however, economic emergency has largely fallen in the gap between the two approaches. The economic development literature demonstrates little concern with states of emergency, and the emergency rule of law approach largely neglects the problems posed by economic emergency.

Economic development rule of law, in its contemporary incarnation, emerges largely out of Hayek’s classic genealogy of the rule of law in *The Constitution of Liberty.* Emergency rule of law addresses

59. See *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Erik G. Jensen & Thomas C. Heller eds., 2003) (empirically assessing, among other things, the role of courts in promoting economic development); Joel M. Ngugi, *Policing Neo-liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse,* 26 U. PA. J. INT'L ECON. L. 513, 514–15 (2005) (observing that contemporary law and development projects are “characterized by attempts to reform the laws of developing countries” and that “[t]hese reform projects are often justified as, and incorporated into the general rubric of, ‘Rule of Law projects’”). For discussions of the rule of law in the context of emergency, see David Dyzenhaus, *The Constitution of Law: Legality in A Time of Emergency* (2006); David Dyzenhaus, Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?, 27 CARDOZO L. REV. 2005, 2005–11 (2006) (deriving from Albert Venn Dicey’s late nineteenth-century account of the relationship between the rule of law and what we would designate an emergency the idea that there can be no “legal black hole, in which the state acts unconstrained by law,” and instead that, even during emergency, “there is no prerogative attaching to any institution of state to act outside of the law”); Antoine Garapon, The Oak and the Reed: Counter-terrorism Mechanisms in France and the United States of America, 27 CARDOZO L. REV. 2041, 2043–46 (2006) (criticizing those who simply oppose the normal state of affairs to that of emergency, and maintaining that “couching the debate in terms of a confrontation between Rule of Law and state of emergency is too abstract”); Martin Loughlin, Constitutional Theory: A 25th Anniversary Essay, 25 OXFORD J. LEGAL STUD. 183, 194–97 (2005) (describing the difficulties that the liberal state encounters in emergency as involving a challenge to one conception of the rule of law); Scheppele, supra note 1, at 1009–13 (explaining Carl Schmitt’s account of the sovereign’s responsibility during the “state of exception” as that of operating outside the liberal legal order precisely in order to restore the rule of law through addressing the emergency and returning the polity to a normal state of affairs); Waldron, supra note 8, at 1741–43 (contending that, even in the emergency context, “it is the prohibition on torture, not the existence of a system for the legal authorization of torture, which is . . . archetypal of the rule of law”).

60. See Rafael La Porta et al., Judicial Checks and Balances, 112 J. POL. ECON. 445, 468 (2004) (finding an empirical correlation between two of the criteria for the rule of law that Hayek articulated in *The Constitution of Liberty*—judicial independence and constitutional review—and economic freedom); Paul G. Mahoney, The Common Law and Economic Growth: Hayek Might Be Right, 30 J. LEGAL STUD. 503, 508–11 (2001) (arguing that the empirical evidence that systems based in the common law favor economic growth can be explained by a particular structure of government—an English rule of law system that favored individual property rights over royal power); Todd J. Zywicki, The Rule of Law, Freedom, and Prosperity, 10 Sup. Ct. Econ.
the disastrous results of the deployment of Article 48 of the Weimar Constitution\(^61\) and the abuses of states of emergency in South Africa,\(^62\) India,\(^63\) and the former Soviet bloc.\(^64\) Whereas the former insists upon the desirability of safeguarding private property against various contingencies, the latter focuses more on the abuses of preventive detention and the abrogation of normal democratic processes. Although both strands of rule of law scholarship emphasize the importance of limiting executive power and retaining basic judicial processes at all times, the result of the economic development movement logic is to privilege economic and property rights, whereas that of the emergency strand is to place priority on the continued viability of the democratic system and the basic prerequisites for participation in it.\(^65\) Thus, the emergency approach to the rule of law may entail fewer conflicts between insisting upon liberal rights and maintaining the basis of a democratic system than the economic development one.

Those endorsing the emergency rule of law approach have achieved significant international success. In the attempt to cabin emergencies and minimize the possibility that they will imperil the very basis of a state's legitimacy, some constitutions and international human rights documents have included provisions designed to preserve particular

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\(^{61}\) See Dyzenhaus, supra note 20, at 15, 28–37 (detailing the instrumental role of Article 48 of the Weimar Constitution in enabling the Nazi party's rise to power and Schmitt's influential interpretation of the provision).


\(^{64}\) See generally Wiktor Osiatynski, Rights in New Constitutions of East Central Europe, 26 COLUM. HUM. RTS. L. REV. 111 (1994) (discussing the way in which the newer constitutions of Eastern Europe deal with the threat of declarations of emergency in light of the history of such declarations under Communism).

\(^{65}\) See infra notes 66–81 and accompanying text.
liberties as nonderogable during emergency.\textsuperscript{66} The liberties protected vary across these documents. Whereas countries like Russia enumerate particular economic or property rights among those that are nonderogable,\textsuperscript{67} agreements like the American Convention on Human Rights specify only personal or associational liberty rights.\textsuperscript{68} Many constitutions also constrain the extent to which an emergency can alter the political order, sometimes by prohibiting constitutional amendment during emergency, and sometimes by outlining other limits on the extent to which the mode of government can be modified. At the core of these guarantees lies a norm of preserving those subject

\textsuperscript{66} See Subrata Roy Chowdhury, Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency 4–5 (1989) (elaborating some of the most critical problems spawned by an emergency situation: (1) “the government . . . is replaced by an authoritarian regime through a coup d’etat”; (2) the “right to life” is “imperilled”; (3) “preventative detention laws” are implemented (includes the suspension of “habeas corpus and amparo,” loss of right to counsel, loss of right to “a periodic review of the detention order,” “keeping the detainee incommunicado,” and prolonged period without accusation); (4) “freedom of association and . . . expression” are also suspended; (5) crimes are created ex post facto; (6) the judiciary is “emasculated”; and (7) the state of emergency is continued for “prolonged periods even after the circumstances which initially prompted the authority to proclaim it cease to exist”); Venelin I. Ganev, Emergency Powers and the New East European Constitutions, 45 AM. J. COMP. L. 585 (1997) (discussing how some of the post-Communist constitutions of Eastern Europe attempt to avoid the greatest dangers posed by states of emergency by removing the possibility that the Executive will exercise emergency powers exclusively or suspend the continued activity of the legislature).

\textsuperscript{67} Konstitutsiia Rossiiskoi Federatsii [Konst. RF] art. 56; see also Konstitutsiia Rossiiskoi Federatsii [Konst. RF] art. 34 (specifying “the right to freely use his or her abilities and property for entrepreneurial” or “any other economic activity not prohibited by law”); Konstitutsiia Rossiiskoi Federatsii [Konst. RF] art. 40 (stating that “the right to a home” may not be restricted during a state of emergency); A MAGYAR KOZTARSASÁG ALOKTMÁNYA art. 8 (including the right to social security as nonderogable during emergency). But see CONST. VENEZ. art. 337 (stating that, when a “state of exception” has been decreed, “the guarantees consecrated by this Constitution can be temporarily restricted, except those referring to the rights of life, prohibition of isolation . . . or torture, the right to due process, the right to information and the other intangible human rights”).

\textsuperscript{68} The Convention states the following with regard to emergencies:

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to juridical personality), Article 4 (Right to life), Article 5 (Right to humane treatment), Article 6 (Freedom from slavery), Article 9 (Freedom from ex post facto laws), Article 12 (Freedom of conscience and religion), Article 17 (Rights of the family), Article 18 (Right to a name), Article 19 (Rights of the child), Article 20 (Right to nationality), and Article 23 (Right to participate in government), or of the judicial guarantees essential for the protection of such rights.

to the particular governmental regime while also maintaining the viability of the political system as a whole.

On the economic development side, Hayek's genealogy of the rule of law couches itself as a general defense of individual liberty, and alludes to the horrors of Nazi Germany, atrocities partially enabled by the emergency provisions of the Weimar Constitution. As Professor William Scheuerman has shown, these representations mask Hayek's debt to Schmitt's critique of the democratic welfare state. Indeed, *The Constitution of Liberty* largely focuses upon freedom within the economic sphere rather than endorsing a more expansive vision of liberty. Not quite advocating that the state refrain from assuming any role at all in the economic arena, Hayek instead insists that "it is the character rather than the volume of government activity that is important." While objecting to certain types of government action, including state monopolies and price and quantity controls, Hayek goes beyond these particulars in the attempt to establish a conceptual underpinning for the concept of the rule of law. Adherence to the rule of law, he maintains, necessitates that "all coercive action of government . . . be unambiguously determined by a permanent legal framework which enables the individual to plan with a degree of confidence and which reduces human uncertainty as much as possible." This definition requires that laws should be general, rather than aimed at particular individuals or interests, and that discretionary administrative action should be limited in scope. Those who fall within Hayek's heritage today emphasize constitutionalism, judicial review, and a strong conception of the property rights of individuals.

Hayek's specifications that law be general and discretionary and administrative action limited in scope, which are followed by many recent commentators, including those who approach the project from

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70. *Id.*
73. *Id.* at 222.
74. *Id.*
75. *Id.* at 226 ("Regulations drawn up by the administrative authority itself but duly published in advance and strictly adhered to will be more in conformity with the rule of law than will vague discretionary powers conferred on the administrative organs by legislative action."); *Id.* at 230 ("Freedom of contract, like freedom in all other fields, really means that the permissibility of a particular act depends only on general rules and not on its specific approval by authority.").
76. See supra note 60.
the emergency side,\textsuperscript{77} tend to run counter to the nature of government action in emergencies that arise out of economic conditions and that call for economic remedies. In the United States, the International Emergency Economic Powers Act (IEEPA) endows the President with substantial powers over foreign economic exchange and the assets of foreign countries under U.S. jurisdiction.\textsuperscript{78} Although the IEEPA grants Congress some authority to consult with and oversee the President's administration of such an emergency, the President retains a significant amount of discretion in implementing the powers conferred by the IEEPA.\textsuperscript{79} *Blaisdell*, the Court's most involved elaboration of the constitutional consequences of economic emergency, also emphasizes the specificity of the inquiry that must be made in emergency situations—a specificity that contravenes Hayek's insistence on the general and nondiscretionary. According to Chief Justice Charles Evans Hughes's opinion for the five-justice majority, "The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions."\textsuperscript{80}

The tension between rule of law principles and legislation directed towards stemming economic emergencies manifests itself most starkly

\begin{footnotes}
\item[77] See, e.g., Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1313 (2001). Professor Rosenfeld explained his view of the rule of law:

The "rule of law" is often contrasted to the "rule of men." In some cases, the "rule of men" (or, as we might say today, "the rule of individual persons") generally connotes unrestrained and potentially arbitrary personal rule by an unconstrained and perhaps unpredictable ruler. For present purposes, however, even rule through law amounts to the "rule of men," if the law can be changed unilaterally and arbitrarily, if it is largely ignored, or if the ruler and his or her associates consistently remain above the law. At a minimum, therefore, the rule of law requires fairly generalized rule through law; a substantial amount of legal predictability (through generally applicable, published, and largely prospective laws); a significant separation between the legislative and the adjudicative function; and widespread adherence to the principle that no one is above the law. Consistent with this, any legal regime that meets these minimal requirements will be considered to satisfy the prescriptions of the rule of law in the "narrow sense."

*Id.* (citations omitted). But see Kim Lane Scheppele, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361, 1375–76 (2001) ("The new rule of law [in constitutional regimes] takes the legal security of the legal subject to be a primary aim of a constitutional order. The new rule of law, therefore, takes the point of view of the legal subject and asks what effect the law has on her, what legal surprises she can reasonably be expected to bear, and what legitimate expectations the legal subject has to use in her own defense against the abusive operation of law itself.").


\item[79] *Id.* § 1702(a)(1); *see also* Smith ex rel. Estate of Smith v. Fed. Reserve Bank of N.Y., 346 F.3d 264, 267–68 (2d Cir. 2003) (explaining the President's power under the IEEPA to seize Iraqi assets).

\item[80] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934).
\end{footnotes}
in the not infrequent accusation that the government has acted with special interests in mind. This was the Court's concern in Allied Structural Steel Co. v. Spannaus, a Contract Clause case invalidating the application of the Minnesota Private Pension Benefits Protection Act to an employer, partly on the ground that the target of the legislation was too narrowly circumscribed.81

The extent to which an economic development rule of law approach appears incompatible with actions taken in the United States to address economic emergency might suggest that constitutional adjudication should be modified to bring it into conformity with the treatment of the rule of law in the economic development context. As Part IV contends, however, there may be normative reasons why the emergency rule of law approach leads to different consequences in particular constitutional systems than the economic development one. Because the effort to promote the rule of law in the face of emergency situations involves the attempt to preserve the conditions essential to the survival and reproduction of the particular political system at issue, the kinds of rights that remain inviolable during an emergency reflect the polity's basic agreement on the kind of system it has established and wishes to maintain.

IV. CONSTITUTIONAL RIGHTS IN EMERGENCY

Whatever the underlying nature of the emergency—political, economic, or natural—it may and often will involve government action that affects constitutionally protected rights.82 The measures deployed in dealing with emergencies of every variety may infringe on

81. 438 U.S. 234, 250 (1978) (observing that the "narrow aim [of the statute] was leveled, not at every Minnesota employer, not even at every Minnesota employer who left the State, but only at those who had in the past been sufficiently enlightened as voluntarily to agree to establish pension plans for their employees"); see also Energy Reserves Group, Inc. v. Kan. Power & Light Co., 459 U.S. 400, 412 (1983) ("The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.").

82. The kinds of rights affected by the emergency may not always correspond with the underlying sources of the emergency. A brief glance at the U.S. constitutional context demonstrates that the origins of the emergency are not ineluctably tied to particular actions taken to stem its progress. For example, in Youngstown Sheet & Tube Co. v. Sawyer, the Court considered the constitutionality of President Harry Truman's seizure of the steel mills, a seizure justified by the context of the Korean War, and yet domestically implemented in a manner that at least one Justice deemed a taking of property without just compensation. 343 U.S. 579, 630-32 (1952) (Douglas, J., concurring). While the source of the asserted emergency powers was linked with military exigency, the steps taken and the consequences for the targets of governmental action were economic. Id. at 586 (majority opinion). It is also possible that an economic emergency might generate responses that would restrict other kinds of liberties as well.
constitutionally protected liberty, political, or economic rights. In the United States, the judiciary has tended to accede to executive or legislative action limiting individual liberties during emergency, either by postponing decision until after a crisis has concluded, or by affirming the necessity of the government’s actions. Commentators have disagreed about which approach is preferable. Certain critics, like Professor Kathleen Sullivan, argue that we should continue to follow constitutional norms during emergencies. Others, like Professors Mark Tushnet and Oren Gross, prefer accommodation, either by having the Supreme Court definitively distinguish between normal and emergency situations or by permitting public officials to take measures during emergencies that will only subsequently be subject to legal scrutiny.

This Part argues that it would be normatively justifiable within the U.S. constitutional system for the rigorous position that constitutional norms should be followed during an emergency to coexist with malleability in the area of economic rights. The history of the Takings Clause, the Contract Clause, and the Dormant Commerce Clause suggests reasons why the U.S. constitutional schema might treat these rights differently than certain other kinds. Constitutional systems that enumerate rights that are nonderogable during emergency tend to select rights that are central to the preservation of the polity and the individuals who comprise it—whether citizens or not. To the extent that two of the foremost principles that the U.S. Constitution enshrines are a respect for the integrity of the political process and the preservation of the possibility of democratic decisionmaking, special protections for the rights associated with those principles may be justified during emergency. The margins of the precise catalogue of such rights may be debatable, but the core would include freedom from

83. See Bernadette Meyler, Civil Liberties in Emergency, I Encyclopedia of American Civil Liberties 494 (Paul Finkelman ed., 2006) (detailing how First Amendment freedoms of speech and association were curtailed by statute during World War I and the subsequent Red Scare, as well as during the Cold War, elaborating upon relaxation of the Fourth Amendment’s prohibition against unlawful searches and seizures during times of emergency, and describing the use of military tribunals and the deprivation of normal trial procedures during the Civil War and World War II). For a more detailed discussion of infringements of economic rights, see infra notes 94–114 and accompanying text.
87. See supra notes 67–68 and accompanying text.
88. See generally Ely, supra note 9.
imprisonment without due process, without which individuals could not even begin to exercise their political liberties.

While constitutionalism and judicial review are not synonymous with the economic development vision of the rule of law, constitutional protections for particular rights overlap to a significant extent with economic development rule of law guarantees. In the United States, these include the Due Process Clause, the Contract Clause, and the Takings Clause, or in settings like the Argentine, the principles that "[p]roperty may not be violated" and that "[e]xpropriation for reasons of public interest must be authorized by law and previously compensated." To the extent that provisions for states of emergency within certain constitutions permit the abrogation of their own guarantees, they may serve to undermine the economic development conception of the rule of law. Thus, in terms of the powers exercised and the rights undermined, emergencies stretch this version of the rule of law to its limits, if they do not exceed them altogether.

The right of habeas corpus is the only right that the U.S. Constitution explicitly contemplates suspending under certain circumstances. The constitutions of other countries that textually allow for states of emergency tend to permit more expansive intrusions on individual liberties, yet they specify particular nonderogable rights. Under the Argentine Constitution, for example, constitutional guarantees may be suspended during a state of siege, but the President is not authorized to "pronounce judgment or apply penalties." Furthermore, "his power shall be limited, with respect to persons, to their arrest or transfer from one place of the Nation to another, should they not prefer to leave the Argentine territory." In addition, provisions of the Ameri-

89. CONST. ARG. § 17.
91. CONST. ARG. § 23.
92. CONST. ARG. § 23; see also CONST. ALB. art. 175 (containing a specific list of nonderogable rights and stating that "[t]he acts for declaring the state of war, emergency or natural disaster must specify the rights and freedoms which are limited"); Tim Dockery, Note, The Rule of Law over the Law of Rulers: The Treatment of De Facto Laws in Argentina, 19 FORDHAM INT'L L.J. 1578, 1592-93 (1996) ("The Federal Government may not intrude upon liberties guaranteed by the Argentine Constitution. Amongst these liberties are freedom of the press, the right to unionize and strike, the inviolability of the home, the right to trial in front of a judge, and the right to property, including vested rights. The State, however, may temporarily suspended [sic] some of these constitutional guarantees during a state of siege." (citations omitted)).
can Convention on Human Rights insist on the nonderogability of rights like habeas corpus during times of emergency.\(^{93}\)

During emergencies, the government may infringe upon economic rights. In the United States, this has occurred most prominently with respect to the Takings Clause and the Contract Clause. The language of the Takings Clause itself permits the government some latitude; rather than mandating that private property remain inviolate, it instead specifies "nor shall private property be taken for public use, without just compensation."\(^{94}\) Although Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube Co.*—the opinion that has subsequently proved the most influential—emphasized the scope of presidential power during emergencies, Justice William Douglas's concurrence insisted that, although war or other crisis situations might authorize a more expansive deployment of federal power, this enhanced capacity could not extend so far as to undermine constitutionally protected rights like that of property.\(^{95}\) Because it was not contemplated by Congress, the branch entitled to raise revenues, President Truman's seizure of the steel mills was likely to remain uncompensated and therefore constituted an illegitimate implementation of emergency powers.\(^{96}\) Justice Douglas's view was not, however, adopted by a majority of the Court, and subsequent Contract Clause jurisprudence indicates that his reasoning might not hold sway.

Both at the Philadelphia Convention and elsewhere, opponents of the Contract Clause and the Ex Post Facto Clause raised the specter of situations requiring emergency action by the government. They imagined that these clauses would be strictly construed, and thereby prevent the states or the political branches of the federal government

\(^{93}\) Although Article 27 of the American Convention on Human Rights explicitly allows for derogation from the Convention's guarantees, it simultaneously specifies particular rights that are nonderogable. See *supra* note 68. When interpreting this article in the *Castillo Petruzzi* case, the Inter-American Court of Human Rights determined that the judicial guarantees of habeas corpus and *amparo* could not be eliminated during times of emergency. Castillo Petruzzi Case, Advisory Opinion OC-8/87, Inter-Am. C.H.R., Judgment of January 30, 1987, Ser. A, No. 8. Even though the emergency might justify placing restrictions on the right to individual liberty, the court insisted on the inviolability of habeas corpus:

[I]n a system governed by the rule of law [it is necessary] for an autonomous and independent judicial order to exercise control over the lawfulness of [emergency] measures by verifying, for example, whether a detention based on the suspension of personal freedom complies with the legislation authorized by the state of emergency. In this context, habeas corpus acquires a new dimension of fundamental importance.

*Id.* \(\S\) 40.

\(^{94}\) U.S. CONST. amend. V.


\(^{96}\) *Id.*
from taking the requisite measures. George Mason made this argument at the Convention:

Both the general legislature and the State legislature are expressly prohibited [from] making *ex post facto* laws; though there never was nor can be a legislature but must and will make such laws, when necessity and the public safety require them; which will hereafter be a breach of all the constitutions in the Union, and afford precedents for other innovations.\(^97\)

Luther Martin expressed similar fears:

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\text{[T]here might be times of such great public calamities and distress, and of such extreme scarcity of specie, as should render it the duty of a government, for the preservation of even the most valuable part of its citizens, in some measure to interfere in their favor, by passing laws . . . or authorizing the debtor to pay by instalments, or by delivering up his property to his creditors at a reasonable and honest valuation.}^{98}
\]

Adjudication under the Ex Post Facto Clause and the Contract Clause has not, however, brought these concerns to fruition. Anxieties along the lines that Mason articulated were settled by the Supreme Court's 1798 decision in *Calder v. Bull*, in which Justice Samuel Chase determined that the Ex Post Facto Clause applied only to retroactive criminal laws, not those affecting property.\(^99\) Justice James Iredell provided support for this outcome: "The policy, the reason and humanity, of the prohibition [on ex post facto laws], do not, I repeat, extend to civil cases. . . . Some of the most necessary and important acts of Legislation are, on the contrary, founded upon the principle, that private rights must yield to public exigencies."\(^100\)

In *Blaisdell*, the case that considered the effect of a governmentally posited emergency on the extent of a state's power over private contracts, and which the Court recently cited in *Hamdi v. Rumsfeld*,\(^101\) the Court upheld a section of the Minnesota Mortgage Moratorium Law extending the period during which a mortgagor could redeem property after foreclosure against a Contract Clause challenge.\(^102\) The ma-


\(^{99}\) 3 U.S. (3 Dall.) 386, 394 (1798).

\(^{100}\) Id. at 400 (Iredell, J., concurring).


\(^{102}\) Blaisdell, 290 U.S. at 416–18, 446–48. Professor James Henretta has insightfully situated the *Blaisdell* decision within the context of Chief Justice Hughes's jurisprudence, arguing that "Hughes's support for rights—economic or personal—was always qualified by his respect for the legitimately imposed demands of the community" and that "Hughes's communitarian side came to the fore in the controversial *Minnesota Moratorium Cases* (1934)." James A. Henretta,
Majority's analysis in *Blaisdell* can be extended to the broader context of economic rights, and demonstrates potential distinctions between these and other constitutionally protected rights.103

In its treatment of the emergency context, the *Blaisdell* Court refused to assume that the emergency grants the state additional power or authorizes the temporary abrogation of constitutionally guaranteed rights—as might be the case with habeas corpus, in the context of an adequate congressional suspension—and instead maintained that the Contract Clause remains constant during normal and emergency situations: "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved."104 *Blaisdell* thus fits more within a Sullivan rather than a Tushnet or Gross paradigm of constitutional emergency.105

At the same time, *Blaisdell* does not suggest a completely inflexible constitutional order. Rather, analogizing the Minnesota legislation in the case to the historical role of courts of equity to modulate the rigidity of common-law principles, *Blaisdell* insists that "[t]he constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions."106 In more concrete terms, the Court opined that the generality of the Contract Clause's terms permits contextual interpretation of its meaning: "[W]here constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details."107 Although the Court did not distinguish between economic and other kinds of rights, its reasoning is particularly compelling with respect to the former. Indeed, one can deduce from *Blaisdell* a constitutional regime for emergency in which noneconomic rights are subject to in-


103. A subsequent case explained the procedures for analysis under the Contract Clause that *Blaisdell* set forth: "The Court balanced the language of the Contract Clause against the State's interest in exercising its police power, and concluded that the statute was justified." Energy Reserves Group Inc. v. Kan. Power & Light Co., 459 U.S. 400, 410 & n.11 (1983) ("The Court listed five factors that were then deemed to be significant in its analysis: whether the Act (1) was an emergency measure; (2) was one to protect a basic societal interest, rather than particular individuals; (3) was tailored appropriately to its purpose; (4) imposed reasonable conditions; and (5) was limited to the duration of the emergency." (citing *Blaisdell*, 290 U.S. at 444–47)).


105. See supra notes 85–86 and accompanying text.


107. *Id.*
flexible application while the Constitution's restrictions on economic measures are more liberally construed.

The two principal bases for separating economic rights from other constitutional rights are the disparate effects of delay in the respective spheres and the substrate out of which the respective rights are exercised. The duration of emergencies has been a central concern for critics of emergency regimes. A declaration of emergency posits an exception to the normal regime, but the danger is that, as in South Africa under Apartheid, the emergency will be normalized and become permanent. Many constitutions therefore prescribe temporal limits for declared emergencies. To the extent that emergency does, in fact, represent a departure from a normal order to which the polity will subsequently return, it stands in a complex relation to delay. It could be argued that the enforcement of rights that would not be entirely vitiated by delay should be susceptible to postponement during emergency.

As Blaisdell emphasized, the emergency measures that the Court approves do not deprive parties of their overarching contractual rights, but merely postpone the realization of these rights through particular remedies. One might analogize such a postponement to the effects of the suspension of habeas corpus, which Professor Trevor Morrison has recently argued defers a remedy but does not dissipate the underlying rights. It is due to a different relationship to temporal delay that rights like access to habeas corpus remain during emergency, in the absence of a constitutional provision like the Suspension Clause that allows them to be placed on hold, while exercise of rights protected by clauses like the Contract Clause may be subject to postponement without such constitutional specification. The Court in Blaisdell discussed the principle underlying the Contract Clause:

This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community.

108. See, e.g., Const. Alb. art. 173 (limiting the duration of states of emergency to sixty days). See generally Ellmann, supra note 62.
111. Blaisdell, 290 U.S. at 439.
In general, economic loss is compensable, as the unfavorable treatment of suits seeking injunctive relief for simple economic harm suggests. Although substantial detriment may accrue to an individual or collectivity that is unable to realize the value of its assets for a particular period of time, it is possible that violations of economic rights could be remedied by payment at a later time. This is not the case with rights like habeas corpus, which from its initial inception in English statutes was aimed at undoing the harms caused by delays in bringing detained individuals to court.112 Furthermore, many measures taken during economic emergencies and directed at stabilizing the economy are precisely those of postponement, or involve other attempts to manipulate the timing of inflation or deflation, or coordinate price alterations in accordance with a national or global trend.113

Another, broader rationale also underlies the Blaisdell decision and suggests that, even where economic rights, and not simply their timely realization, are substantially affected by emergency measures, these rights should not be interpreted with the same inflexibility as other individual or political rights. Because the economic sphere is fundamentally one of interdependence, in which the values of contract and property are contingent on the state of the underlying economy, it may not even be possible for courts to enforce economic rights in the face of fiscal crisis. It is partly in this connection that the Blaisdell Court analogized economic crisis with natural disaster—although arising from different sources, both kinds of emergency may present impossibilities of performance:

The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual re-

112. The preamble to the English Habeas Corpus Act of 1679 states the justification for the statute:

Whereas great delays have been used by sheriffs, gaolers and other officers, to whose custody any of the king's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of habeas corpus to them directed by standing out an alias and pluries habeas corpus and sometimes more, and by other shifts to avoid their yielding obedience to such writs, contrary to their duty, and the known laws of the land, whereby many of the king's subjects have been and hereafter may be long detained in prison in such cases where by law they are bailable, to their great charge and vexation.

Habeas Corpus Act of 1679, 31 Car. 2, ch. 2 (Eng.). The Act itself provides stringent time limits within which those to whom writs of habeas corpus are addressed must act. Id. But see Kontorovich, supra note 5 and accompanying text.

lations are worth while,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.\textsuperscript{114}

Likewise, even if technically possible, the strict enforcement of particular economic rights may not be desirable in light of the damage that this will cause elsewhere in the economy. Just as economic benefits arise out of the interdependent structure of the economy, economic ills must also be shared:

The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.\textsuperscript{115}

These two sets of reasons help to distinguish economic from other individual and political rights, and suggest why balancing a state’s emergency interests against the nature of its infringement upon contract rights might supply an appropriate method of adjudication in the Contract Clause context, but not in that of habeas corpus. They also indicate that the insistence upon enforcing economic rights equally with other rights even during emergency—as the Argentine Supreme Court did in declaring a 2001 reduction in pension benefits unconstitutional\textsuperscript{116}—may not be the only principled position for a constitutional court to take, and that the rule of law may be maintained alongside a flexible interpretation of economic rights.

V. Conclusion

The convergence of economic development and emergency rule of law approaches upon the situation of economic emergency might suggest that it is precisely at moments of economic crisis that we should adhere most rigorously to the rule of law. As this Article has

\textsuperscript{114} Blaisdell, 290 U.S. at 435.
\textsuperscript{115} Id. at 442.
argued, however, the U.S. constitutional system has historically treated economic rights as malleable during emergency, a stance that is normatively defensible within the context of the United States. Furthermore, rather than envisioning the rule of law as abrogated at such moments, the Court has suggested that a flexible view of economic rights can coexist harmoniously with the rule of law. When economic emergencies threaten, Ulysses’ mast may bend, but neither release him from its mooring nor itself snap.