

THE ECONOMIC STATE OF EMERGENCY

*William E. Scheuerman**

Carl Schmitt's critique of liberal political *theory* is generally misleading, his analysis of contemporary liberal political *reality* typically depends on historical myth and shoddy empirical analysis, and his own preference for a fascist alternative to liberal democracy derives from an indefensible brand of political existentialism.¹ Nonetheless, Schmitt occasionally did succeed in bringing attention to some of the real failings of capitalist liberal democracy. For example, as early as 1931, Schmitt identified the widespread tendency within twentieth-century liberal democracy to equate economic and financial crises with military attacks and armed insurrections, thereby justifying executive recourse to sweeping emergency powers as a means of undertaking ambitious forms of economic management. Schmitt was not only probably the first political and legal theorist of rank to identify the emergence and proliferation of what he described as the "economic-financial state of emergency" in contemporary liberal democracy, but his analysis also remains one of the most noteworthy attempts to underline its challenges to liberal theory and practice. Schmitt placed the problem of the economic emergency at the center of his reflections in a number of important writings between the early 1930s and the immediate postwar era.² In contrast, liberal legal and political analysts have too often ignored the seriousness of the normative and

* William E. Scheuerman is Associate Professor of Political Science at the University of Pittsburgh. He is author of *BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW* (1994), and *CARL SCHMITT: THE END OF LAW* (1999); editor of *THE RULE OF LAW UNDER SIEGE* (1996); and co-editor of *FROM LIBERAL DEMOCRACY TO FASCISM: POLITICAL & LEGAL THOUGHT IN THE WEIMAR REPUBLIC* (2000).

¹ See WILLIAM E. SCHEUERMAN, *CARL SCHMITT: THE END OF LAW* (1999) (developing these criticisms further).

² Interestingly, Schmitt was a prominent advisor to the quasi-constitutional executive regimes that ruled Weimar Germany during 1930-33. These governments (under Brüning and then Papen) relied on the emergency clauses of the Weimar Constitution (Article 48) to undertake far-reaching forms of economic and social regulation. Also striking is that Schmitt clearly influenced—most importantly, Friedrich A. Hayek and Franz L. Neumann—more recent political theorists who dealt seriously with the problem of the economic emergency. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 63-96 (1944); FRANZ L. NEUMANN, *THE DEMOCRATIC AND THE AUTHORITARIAN STATE* (1957). In the discussion that follows, I comment on the theorists' competing analyses of the economic emergency problem.

institutional problems posed by the surprisingly pervasive reliance on emergency devices to grapple with the exigencies of economic affairs. Most recent studies on the use of emergency powers in economic matters are relatively narrow in scope, and prominent voices within contemporary political and legal theory seem altogether uninterested in the problem of the economic state of emergency.³

I begin with a preliminary historical-sociological survey of the origins and development of the economic state of emergency. Although the empirical story obviously is a complicated one, substantial evidence suggests that the *scope* of economic emergency powers has increased significantly in most liberal democracies since the nineteenth century. Initially a mere supplement to *wartime* emergency powers, executive-dominated emergency economic regulation now represents a more or less *permanent* feature of political life in many liberal democracies. I then examine Schmitt's contribution, in many ways unsurpassed, to a theory of the economic emergency. Schmitt was right to try to trace the proliferation of emergency economic authority in our century to fundamental changes in the nature of legislative activity. However, he failed to provide an adequate empirical explanation for those changes. In my alternative account, the "motorization of the lawmaker" accurately described by Schmitt is best explained with reference to a *compression of time* that some contemporary social theorists see as essential to ongoing changes in the capitalist economy.

I. THE PROLIFERATION OF ECONOMIC EMERGENCY POWERS

Let me start with some general observations about the economic state of emergency. First, the phenomenon of liberal democratic regimes relying on emergency institutions and procedures to undertake economic regulation is far more common than is generally acknowledged. Although virtually unknown before the twentieth century, the practice rapidly became a ubiquitous facet

³ Even the most important recent study of emergency powers within the American context barely mentions their use as an instrument of economic regulation. See DANIEL P. FRANKLIN, *EXTRAORDINARY MEASURES: THE EXERCISE OF PREROGATIVE POWERS IN THE UNITED STATES* (1991). A recent "rational choice" analysis of emergency power in the United States fails to consider the history of emergency economic authority. See Brian R. Sala, *In Search of the Administrative President: Presidential 'Decree' Powers and Policy Implementation in the United States*, in *EXECUTIVE DECREE AUTHORITY* 254-73 (John M. Carey & Matthew Soberg Shugart eds., 1998). In contrast, previous generations of political theorists rightly addressed the many issues that the employment of emergency authority for economic affairs raised. For an example, see the classic studies by CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* (1963), and WINIFRIED DALLMAYR & ROBERT S. RANKIN, *FREEDOM AND EMERGENCY POWERS IN THE COLD WAR* (1964).

of political life during the interwar years in stable democracies like Great Britain and the United States, as well as in Weimar Germany, France, and many other ill-fated European democracies.⁴ Politicians have probably always relied on the *rhetoric of crisis* to initiate legislative changes. In our century, however, they often have done so in order to abrogate, or even abandon, normal legislative procedures. Particularly during the darkest days of the economic depression, it became commonplace to associate economic crises with traditional justifications for outfitting the executive with special powers. Franklin D. Roosevelt was only one of many elected leaders during this period to demand and gain “broad Executive power to wage a war against the emergency, as great as the power that would be given to [him] if we were in fact invaded by a foreign foe.”⁵ Throughout this period, liberal democratic states “waged war” against the capitalist economic crisis, by means of generous grants of discretionary authority to the executive in important ways, similar to those previously tolerated only during war or civil insurrection. In some polities, reliance on such devices proved effective, while in others (notably France and Weimar Germany), “the unlimited decree-rule of a constitutional government with a dubious popular or parliamentary basis serve[d] only as an intermediate station on the road to complete authoritarianism.”⁶

Notwithstanding this mixed record, the stabilization of liberal democracy in the postwar years in Western Europe and North America hardly resulted in a cessation of all economic states of emergency. Even in the United States, American presidents since 1945 have relied on a broad range of emergency delegations of impressive power to conclude strikes, control international trade,

⁴ For details, see ROSSITER, *supra* note 3, at 29-61, 91-103, 151-83, 240-65.

⁵ See Roosevelt’s 1933 inaugural address, cited in *A Brief History of Emergency Powers in the United States: A Working Paper* 55-56 [hereinafter *A Brief History*] (prepared for the Special Committee on National Emergencies and Delegated Emergency Powers, United States Senate 1974). An excellent exegesis of its wartime rhetoric is found in MICHAEL S. SHERRY, *IN THE SHADOW OF WAR: THE UNITED STATES SINCE THE 1930S*, at 14-19 (1995). But much more than wartime symbolism was at work here. Roosevelt *was* able to gain impressive grants of discretionary executive power akin to those traditionally given liberal executives during wartime or rebellion. As Rossiter notes,

[t]he tangible results of the Hundred Days were a group of emergency statutes delegating the President unprecedented power to wage war on the economic front. Taken as a whole, the dozen or so important statutes enacted in the special session constitute the largest single instance of delegated power in American history.

ROSSITER, *supra* note 3, at 260. Although the Supreme Court soon declared parts of this original New Deal legislation unconstitutional, some of it survived the New Deal itself.

⁶ OTTO KIRCHHEIMER, *Decree Powers and Constitutional Law in France Under the Third Republic*, in *POLITICS, LAW, AND SOCIAL CHANGE: SELECTED ESSAYS OF OTTO KIRCHHEIMER* 130 (Frederic S. Burin & Kurt L. Shell eds., 1969).

and even reshuffle the rules of the international monetary system.⁷ In this vein, President Richard Nixon declared a national emergency in order to end the postal strike in 1970, and his successors have repeatedly relied on the broad authority granted the executive by the International Emergency Economic Powers Act⁸ to limit business conducted with Cuba, Libya, and Iran.⁹ Most recently, emergency authority has served as an instrument for implementing controversial neoliberal economic policies and so-called “shock therapy” in many newly democratized countries in Latin America and Eastern Europe. Argentine legislators have outfitted President Carlos Menem with awesome exceptional powers to undertake “emergency regulatory power to overcome the present situation of collective risk caused by the serious economic and social circumstances the nation is undergoing,”¹⁰ while former Russian President Boris Yeltsin was similarly empowered by the Duma to issue any decree necessary for the protection of “social security.” Neoliberalism and relatively open-ended delegations of exceptional legislative authority to the executive, justified by reference to the spectre of economic instability, are now political bedfellows in fledgling liberal democracies from Moscow to Buenos Aires.¹¹

Second, traditional emergency legal institutions and practices obviously vary from country to country. However, such institutional and legal differences have had, at most, a limited impact on the real-life practices of the economic state of emergency. Despite legal and institutional variations (for example, Anglo-American models of martial law versus French-inspired conceptions of a state of siege), virtually all twentieth-century liberal democratic polities have been willing to declare economic emergencies before delegating generous (and oftentimes poorly defined) discretionary authority to the executive for the sake of tackling economic problems. The alleged superiority of traditional Anglo-American constitutionalist notions failed to prevent President Nixon from declaring a “national emergency” resulting in the imposition of supplemental duties to deal with a balance-of-payments crisis, or the United States Congress from authorizing him “to issue such orders and regulations

⁷ See *A Brief History*, *supra* note 5, at 87-118.

⁸ 50 U.S.C. § 1702 (1994).

⁹ See Joel B. Harris & Jeffrey P. Bialos, *The Strange New World of United States Export Controls Under the International Emergency Economic Powers Act*, 18 VAND. J. TRANSNAT'L L. 71-108 (1985); Harold H. Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L. J. 1263-65 (1988).

¹⁰ Delia Ferreria Rubio & Matteo Goretti, *When the President Governs Alone: The Decretazo in Argentina, 1989-93*, in EXECUTIVE DECREE AUTHORITY, *supra* note 3, at 33.

¹¹ See EXECUTIVE DECREE AUTHORITY, *supra* note 3 (containing articles on Argentina, Brazil, Peru, Russia, and Venezuela).

as he may deem appropriate to stabilize prices, rents, wages, and salaries,” by delegating “the performance of any function under this title to such officers, departments, and agencies of the United States as he may deem appropriate.”¹² Too often, arcane squabbles about the pros and cons of competing legal instruments of emergency power obscure the strikingly *similar* manner in which liberal polities in our century have expanded the definition of an emergency situation to include economic instability, in order to legitimize far-reaching forms of executive-dominated economic management.

Third, it is striking that *both* left- and right-wing governments have made use of emergency economic powers, and a surprising diversity of economic policies has been pursued under their auspices. During the interwar years in Germany, France, and Britain, and again during recent years in Eastern Europe and Latin America, balanced budgets, dramatic cuts in the salaries of public employees, and many other deflationary policies have been aggressively undertaken by orthodox-minded governments making use of emergency economic powers; both the relatively cautious welfare state policies of Franklin D. Roosevelt and more ambitious pro-labor policies of Scandinavian social democracy were also advanced by emergency economic instruments.¹³ Pace Friedrich A. Hayek, only limited empirical evidence can be adduced to support the thesis that an inexorable movement towards an “economic dictatorship”—Hayek’s polemical expression for the growth of emergency economic authority—is inextricably linked to the expansion of the welfare state and the appearance of proto-socialist economic policies.¹⁴ On the contrary, emergency economic powers entailing generous executive discretion in fact *often* have served as a powerful weapon for those, like Hayek, hoping to slash the welfare state and maintain fidelity to the principles of nineteenth-century economic liberalism.

Indeed, the pervasiveness of emergency economic power makes

¹² The first example refers to a 1971 presidential proclamation. See *Summary of Emergency Power Statutes: A Working Paper* 74 (1973) [hereinafter *Summary of Emergency Power Statutes*]. The second refers to a 1970 congressional enabling law. See Joel L. Fleishman & Arthur H. Auses, *Law and Orders: The Problem of Presidential Legislation*, 40 *LAW & CONTEMP. PROBS.* 26-27 (1976).

¹³ See ROSSITER, *supra* note 3, at 51-53, 122-24, 179 (discussing “conservative” economic policies pursued in the interwar years by means of emergency authority in Germany, France, and Britain); see also Francis Sejersted, *From Liberal Constitutionalism to Corporate Pluralism: the Conflict Over the Enabling Acts in Norway After the Second World War and the Subsequent Constitutional Development*, in *CONSTITUTIONALISM AND DEMOCRACY* 275-303 (Jon Elster & Rune Slagstad eds., 1989) (discussing the importance of the alliance of contemporary neoliberalism with emergency government and its significance to postwar Norwegian social democracy).

¹⁴ HAYEK, *supra* note 2, at 63-96; see also SCHEUERMAN, *supra* note 1, at 209-24 (discussing Hayek’s surprising intellectual debts to Schmitt).

it difficult to draw any easy causal links between it and a host of other conceivable factors. It is true that emergency delegations of economic policymaking to the executive have been generated by highly fragmented legislatures, in which hostile social and class groupings face off in an explosive manner, thereby paralyzing legislative decision making and paving the way for executive dominance (most infamously, Weimar Germany between 1930 and 1933).¹⁵ Yet extensive emergency economic powers also have been delegated to executives enjoying strong support within the legislature and the political community at large (for example, Franklin D. Roosevelt in 1933). Both parliamentary systems (for example, Italy in recent decades) and many presidential systems (France or present-day Russia) rely on enabling laws and emergency authority within the economic realm.¹⁶ Nor is it clear that one can link dependence on emergency economic authority to a country's position within either the international economy or the international state system. Rich and powerful states (the United States, Great Britain) have made ample use of the legal paraphernalia of the economic state of emergency, as have poor and relatively weak states (Bolivia, Peru, Uruguay).

Admittedly, the fact that emergency economic power was so rare in the nineteenth century, but so common in our own century, *might* lend support to a more general interpretative scheme, according to which the ascent of such power can be traced to the decline of economic laissez faire, or (in the Marxist rendition of the same argument) the displacement of "competitive capitalism" by "monopoly" or "organized capitalism."¹⁷ Later in this essay, I hope to show that ongoing structural changes in the capitalist economy *do* play a pivotal role in the dramatic recent growth of emergency economic power. Yet any argument that underlines broader

¹⁵ This is an important theme in Franz L. Neumann's account of declining traditional forms of liberal legislation. Franz L. Neumann, *The Change in the Function of Law in Modern Society*, in *THE RULE OF LAW UNDER SIEGE* 122-32 (William E. Scheuerman ed., 1996). Evidence for this is also located in other accounts. See Scott Parish, *Presidential Decree Authority in Russia, 1991-95*, in *EXECUTIVE DECREE AUTHORITY*, *supra* note 3, at 72-73, 88, 99; Gregory Schmidt, *Presidential Usurpation or Congressional Preference? The Evolution of Executive Decree Authority in Peru*, in *EXECUTIVE DECREE AUTHORITY*, *supra* note 3, at 124.

¹⁶ See Vincent Della Sala & Annie Kreppel, *Dancing Without a Lead: Legislative Decrees in Italy*, in *EXECUTIVE DECREE AUTHORITY*, *supra* note 3, at 175-96 (noting recent developments in Italy); John D. Huber, *Executive Decree Authority in France*, in *EXECUTIVE DECREE AUTHORITY*, *supra* note 3, at 233-53.

¹⁷ Hayek advanced an influential version of the former, while the Frankfurt School jurists, Otto Kirchheimer and Franz L. Neumann, as well as the German social democratic thinker, Ernst Fraenkel, advanced versions of the latter. See WILLIAM E. SCHEUERMAN, *BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW* (1994).

economic trends obviously needs to avoid two familiar failings. First, this kind of argument too often relies on an idealized, and even mythical, picture of the nineteenth-century liberal past; second, its implicit attempt to categorize social and economic development into distinct stages (for example, “competitive” or “laissez faire” capitalism versus “monopoly” capitalism) risks obscuring the far messier realities of social and economic development.

For now, we would do well to avoid forcing the problem of emergency economic power into any predetermined conceptual or ideological scheme. Before trying to develop a general explanation of its origins and subsequent development, we need to take a closer look at the underlying dynamics of its evolution within modern liberal democracy. At the obvious risk of historical simplification, let me try to take a preliminary stab at that indisputably complex task. If I am not mistaken, the story of emergency economic power exhibits a surprising pattern. Emergency economic powers initially functioned as a weapon employed widely against one of the most immediate offshoots of a crisis-ridden modern capitalist economy, the workers’ movement (1), before evolving into an instrument for the direct management of the economic crisis itself (2). Later, emergency economic authority became a device for preempting or preventing the reemergence of economic instability (3). Most recently, emergency economic powers have come to constitute a more-or-less permanent instrument of economic management in countries struggling to make the transition from dictatorship to liberal democracy (4).

A.

Before the twentieth century, emergency intervention in the economy was relatively commonplace during wartime or rebellion. Even during the American Revolution, the colonists justified a vast range of otherwise unconventional forms of state economic coordination with reference to the exceptional conditions of revolutionary politics; the Civil War provides many similar examples of exceptional wartime economic regulation.¹⁸ Nevertheless, the exercise of emergency authority for the sake of overcoming an economic crisis *per se* seems to have been virtually unheard of. For most of the nineteenth century, the use of emergency powers (in the Anglo-American legal tradition,

¹⁸ See J. REUBEN CLARK, JR., EMERGENCY LEGISLATION PASSED PRIOR TO DECEMBER, 1917 DEALING WITH THE CONTROL AND TAKING OF PRIVATE PROPERTY FOR THE PUBLIC USE, BENEFIT, OR WELFARE (1918) (introducing many examples collected in a report put together by the attorney general of the United States in 1918).

especially martial law) was generally limited to situations in which the polity faced a relatively direct physical threat—for example, invasion, rebellion, or civil war.¹⁹ The story is complicated, however, by the fact that emergency authority soon widely served, both in Europe and the United States, as a powerful weapon against labor and socialist unrest.²⁰ Karl Marx famously described how constitutional emergency clauses from the French Revolution were transformed into a weapon of reactionary politics and bourgeois class privilege in nineteenth-century France.²¹ A perceptive contemporary analyst of parallel early trends in the United States pointed out that, by the end of the nineteenth century, martial law's main purpose was to function as a "household remedy" in the battle to squelch an incipient labor movement.²² Typically employed on the state level by eager governors anxious to assure a healthy business climate, while simultaneously demonstrating their fidelity to "law and order," martial law was widely used in the United States to smash unions and strikes during the seventy-five years between the Civil War and the New Deal.²³

In my view, this more-or-less universal tendency among elites to ward off challenges to their economic and political privilege by recourse to emergency power, proved far more decisive to twentieth-century developments than has been generally recognized. Discussions of the problem of the economic state of emergency typically portray vast delegations of emergency economic authority to the executive during World War I as the immediate driving force behind the innumerable peacetime declarations of an economic emergency in the 1920s and 1930s. For example, many commentators point out that Franklin D. Roosevelt, as a former assistant secretary of the Navy, was himself a veteran of the economic mobilization of World War I.²⁴ Now, there is no question that wartime experiences of economic coordination played a major

¹⁹ See *A Brief History*, *supra* note 5, at 1-40; George M. Dennison, *Martial Law: The Development of a Theory of Emergency Powers, 1776-1861*, 18 AM. J. LEGAL HIST. 52-79 (1974).

²⁰ See Hans Boldt, *Ausnahmezustand*, in *GESCHICHTLICHE GRUNDBEGRIFFE* 355-56, 369, 373 (Otto Brunner et al. eds., 1972).

²¹ KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* 30, 34-35 (1963).

²² See Charles Fairman, *Martial Rule, In the Light of Sterling v. Constantin*, 19 CORNELL L.Q. 29 (1934).

²³ See Ernst Fraenkel, '*Martial Law*' und *Staatsnotstand in England und USA*, in *DER STAATSNOTSTAND* 138-64 (Ernst Fraenkel ed., 1964) (containing a survey of the development). Martial law was employed against the labor movement in the United States well after the end of World War II. See DALLMAYR & RANKIN, *supra* note 3, at 172-87.

²⁴ See SHERRY, *supra* note 5, at 19-20 (discussing the New Deal and its ideological ties to the experience of economic planning in World War I).

role in the proliferation of economic states of emergency both in Europe and North America. From a broader historical perspective, however, this interpretation risks *overstating* the novelty of *wartime* emergency economic power in the twentieth century, while *understating* the manner in which emergency power as a weapon against the labor movement anticipated crucial features of subsequent developments. On one hand, the use of emergency power to squelch labor or socialist unrest built, albeit tenuously, on an earlier, more limited understanding of an emergency situation: labor disputes and unrest often involved *violent* conflict, even if a main cause of the bloodletting too often was the employment of emergency power itself. Especially from the perspective of privileged economic and political elites, labor and socialist unrest always smacked of civil insurrection. At the same time, emergency authority as a political instrument against the laboring classes foreshadowed the open employment of emergency power *during peacetime*, for the sake of grappling with the crisis-tendencies of a modern capitalist economy. After all, the appearance of class-based labor radicalism represented an unambiguous challenge to early liberal visions of a harmonious market economy predicated on the promise of prosperity and well-being for all, and the emergence of militant labor movements virtually everywhere constituted the most immediate real-life manifestation of industrial capitalism's underlying limitations and pathologies. Even if we ignore the many direct links between the emergence of the workers' movement and the first great economic crises of industrial capitalism in the 1840s and 1870s, emergency power as an instrument for "cracking down" on the labor movement clearly anticipated future use of emergency authority as a tool for tackling, in a relatively *unmediated* way, one of the more familiar failings of modern capitalism—namely, its tendency to suffer from periodic economic crises.²⁵

From this perspective, the British Emergency Powers Act of 1920 is especially illuminating. With the remembrance of wartime emergency provisions fresh in mind, Lloyd George's postwar cabinet succeeded in pushing through regulations granting it substantial exceptional authority to limit strike activity interfering "with the supply and distribution of food, water, fuel, or light, or with the means of locomotion."²⁶ By combining the three "moments" in the historical story just recounted, the Act provides a microcosm of the

²⁵ Of course, this does *not* mean that emergency economic regulation in our century exclusively reproduces the class-disciplinary character of emergency power as an open instrument of class domination. Obviously, the social ramifications of twentieth-century emergency economic power are far more complex and multifaceted.

²⁶ ROSSITER, *supra* note 3, at 172.

entire history of economic emergency power between the mid-nineteenth and mid-twentieth centuries: its proximity to the wartime context linked it to an earlier tradition in which emergency power chiefly functioned as a tool against violent uprisings and foreign invasions; its anti-strike thrust tied it closely to the widespread tendency to rely on emergency authority against the labor movement; and finally, the Act's forthright concern with guaranteeing the "supply and distribution of food, water, fuel, or light" clearly pointed the way towards the employment of emergency authority for peacetime economic coordination.

B.

Whatever its precise sources, by the 1920s and 1930s the notion of the emergency situation was increasingly separated from any evidence of military conflict or armed rebellion whatsoever. The dire economic abnormalities of the 1920s and 1930s were placed, virtually everywhere, on the same par with invasions and insurrections, and Roosevelt's famous 1933 equation of the exigencies of the economic depression with an attack "by a foreign foe" merely gave express form to a trend already at work in other liberal democracies. As early as 1923 and 1924, the Stresemann and Marx governments in Weimar Germany relied on the emergency clauses of Article 48, and on a series of open-ended enabling laws to deal with the economic cataclysms facing their country; in 1924 the Poincare government in France tried to use emergency laws, to prevent the imminent collapse of the franc, but was thrown out of office before succeeding in doing so.²⁷ Within a few years, such practices became a part of "normal" political life throughout a crisis-torn Europe. In line with this novel view of the legitimacy of far-reaching forms of peacetime emergency power as an instrument of economic management, important early New Deal legislation was passed by means of the Trading with the Enemy Act of 1917—an emergency provision, left over from World War I, providing substantial room for executive prerogative in the economy, yet unrelated to the purposes for which Roosevelt and his congressional allies employed it. Anticipating a pattern repeatedly imitated since the 1930s, a piece of emergency economic legislation dating from *wartime* functioned as a convenient statutory basis for vast *peacetime* exercises of exceptional economic authority which its authors clearly did not have in mind.²⁸ This step was in part eased in many settings

²⁷ See *id.* at 45-49, 120-21.

²⁸ For example, Roosevelt's emergency banking regulations of 1933 were passed under the rubric of the Trading With the Enemy Act. See *Summary of Emergency Power Statutes*, *supra* note 12, at 4-5.

by characterizations of the economic crisis as deriving, to some extent, from *foreign* sources. In a back-handed way, the global character of the economic crisis was thereby acknowledged, but chiefly for the sake of providing the executive with authority traditionally enjoyed only in foreign and military affairs.²⁹

C.

Since mid-century, an additional trend can be identified. Both in the United States and elsewhere, some forms of emergency economic regulation stemming from the depression and World War II became virtually *permanent* after 1945. Continued reliance on exceptional powers within the economic realm typically was legitimized in the postwar years as a way of *warding off* a repeat of the disastrous capitalist crisis of 1929, and the extension of emergency economic programs was conceived of as essential to the *prevention* of future economic crises.³⁰ Here as well, the empirical story is obviously a complex one, but at least two of its features require clarification.

First, the cold war clearly played a pivotal role, though more in some national settings than in others, in perpetuating emergency policies and programs conceived in the dark days of the 1930s. The widespread perception in the 1950s and 1960s that superpower rivalry and the spectre of nuclear holocaust had blurred the traditional distinction between peace and war functioned to legitimize continued reliance on emergency economic powers, along with the creation of a vast range of new forms of emergency cold war economic regulation. Many of these programs, like their predecessors from an earlier era, granted far-reaching discretionary authority to the executive.³¹ Even during the interwar years, the

²⁹ See SHERRY, *supra* note 5, at 15-63. In this context, it is also revealing that the earlier use of martial law against the labor movement was often justified in the United States by reference to the “foreign” or “alien” character of labor radicalism. Furthermore, in many liberal democracies, rule of law standards typically have been relaxed in the spheres of foreign and military policy, while executive discretion has typically been greatest in them. See THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992).

³⁰ See *A Brief History*, *supra* note 5, at 40-94, 87, 90-91, 106-07 (discussing the American case further); see also Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 *YALE L.J.* 1400-21 (1989); Arthur S. Miller, *Constitutional Law: Crisis Government Becomes the Norm*, 39 *OHIO ST. L.J.* 736-51 (1978). In the 1950s, the right-wing authoritarian German political thinker, Ernst Forsthoff, similarly described the blurring of the traditional distinction between legal normalcy and crisis as linked, in part, to the welfare state’s (*Sozialstaat*) drive to ward off social and economic crises. Although Forsthoff’s own normative and political preferences remain indefensible, some features of his empirical diagnosis need to be addressed. ERNST FORSTHOFF, *RECHTSSTAAT IM WANDEL. VERFASSUNGSRECHTLICHE ABHANDLUNGEN*, 1954-73, at 12-13, 21-42 (1976).

³¹ See DALLMAYR & RANKIN, *supra* note 3.

international character of capitalist economic instability occasionally was emphasized in order to expand the sphere of executive prerogative. The cold war built on this legacy as well: from the perspective of elite groups in many countries, it intimately bound together the tasks of warding off foreign enemies (especially Soviet communists) and demonstrating the superiority of capitalist liberal democracy, by avoiding in part an economic crisis along the scale of 1929.

Second, it would be a mistake to ignore the innumerable ways in which postwar democracies tried to “regularize” emergency economic powers, by subjecting them to a host of novel legal and institutional controls. The “permanent emergency” institutionalized in some of the richest and most stable democracies after 1945 was always hemmed in by a more-or-less effective range of institutional mechanisms; those living in the relatively robust liberal democracies of Western Europe and North America did *not* come to reside in the “economic dictatorship” described by Hayek. In an important discussion of the Norwegian Labor Party’s reliance on sweeping enabling acts during the late 1940s and early 1950s, Francis Sejersted notes that their acceptance ultimately was predicated on “better and ‘safer’ procedures for decision-making in the public administration,” including the establishment of the much-imitated *ombudsman* and an Administrative Procedures Act.³² In many other settings as well, stable postwar liberal democracies strove to contain the potential dangers of generous delegations of emergency power by initiating new forms of executive and administrative oversight.

Nonetheless, the widespread quest to tame emergency economic authority has generated mixed results, at best, even in the most stable of liberal democracies. One only needs to turn to a revealing 1974 report by the United States Senate to gain a sense of the depth of the dilemma at hand. As two of the Senators anxiously noted in their introductory comments, as of 1974 the United States had:

On the books at least 470 significant emergency statutes without time limitations delegating to the Executive extensive discretionary powers, ordinarily exercised by the Legislature, which affect the lives of American citizens in a host of all-encompassing ways. This vast range of powers, taken together, confer enough authority to rule this country without reference to normal constitutional processes.³³

³² Sejersted, *supra* note 13, at 298. Similarly, the Constitutional Council in France has played an important role in restraining executive decree authority. See Huber, *supra* note 16, at 241.

³³ *A Brief History*, *supra* note 5, at vi.

As the report outlines, delegations of emergency power to the executive concerned not only war preparation and natural disasters, but many facets of economic life. Notwithstanding their own admirable reform efforts, recent decades have hardly witnessed a reversal of those trends that led Senators Frank Church and Charles Matthias to conclude their 1974 report with the observation that “[e]mergency government has become the norm within the United States.”³⁴ More recent commentators have simply confirmed many of the anxieties that led liberal-minded American politicians in the 1970s to launch a short-lived and ultimately ineffective battle against the proliferation of emergency powers concerning “the lives of American citizens in a host of all-encompassing ways.”³⁵

D.

The ills of emergency economic authority in stable liberal democracies like Norway or the United States pale in comparison to the problems posed by its spread within the newly democratized postcommunist and Latin American countries. As Guillermo O’Donnell pointed out in a recent essay, typical for many of these countries is a style of rule based “on the premise that whoever wins election to the presidency is thereby entitled to govern as he or she sees fit, constrained only by the hard facts of existing power relations and by a constitutionally limited term of office.”³⁶ Part and parcel of this system of “delegative democracy” is the permanent use of a broad array of sweeping delegations of economic authority to the executive that typically are poorly defined and even more poorly restrained by legislatures or courts. As O’Donnell correctly points out, democratizing postcommunist and Latin American countries confront economic problems rivaling those faced by the rich democracies in the 1930s: “Very high inflation, economic stagnation, a severe financial crisis of the state, a huge foreign and domestic public debt, increased inequality, and a sharp deterioration of social policies and welfare provisions are all aspects of this crisis.”³⁷ Moreover, international economic integration means that the “foreign” sources of economic instability are more real than ever before.³⁸ Hence, executive requests for discretionary powers to fight what even Roosevelt characterized in 1933 in terms of a “foreign foe” are likely to seem even more plausible than during the global

³⁴ *Id.*

³⁵ Lobel, *supra* note 30, at 1412-21.

³⁶ Guillermo O’Donnell, *Delegative Democracy*, 5 J. DEMOCRACY 59 (1994).

³⁷ *Id.* at 63.

³⁸ See PAUL HIRST & GRAHAME THOMPSON, *GLOBALIZATION IN QUESTION* (1996) (noting the balanced treatment and discussing the economic characteristics of “globalization”).

crisis of the 1930s, especially in those countries dependent on the fate of decisions made by the International Monetary Fund or the World Trade Organization. Not surprisingly, such regimes have rushed to make use of emergency economic devices like those embraced by France, Great Britain, Weimar Germany, and the United States during the 1920s and 1930s. Yet a decisive difference is that the exercise of emergency economic power in the new democracies is rarely effectively constrained by the legal and institutional checks that have generally conditioned the exercise of emergency authority in the stable, rich democracies of Western Europe and North America; weak judiciaries in Russia and Latin America typically fail, for example, to rein in the more egregious abuses of executive prerogative in the economic realm.³⁹ Moreover, the scenario is exacerbated by the existence of significant present-day international *and* domestic pressures on political leaders in the new democracies to pursue *neoliberal* policies destined to generate economic discomfort among substantial segments of the populace. Needless to say, policies of this type hardly make it easy for fledgling democracies to develop a reservoir of democratic legitimacy. Continued dependence on emergency economic power, by means of which executive discretion is maximized, and meaningful public debate minimized, seems to provide a short-term political solution for leaders seeking to pursue painful or unpopular policies.⁴⁰ Whether or not this risky course of action will work in the long run to stabilize liberal democracy, or instead serve “as an intermediate station on the road to complete authoritarianism”⁴¹ as it did in many parts of Europe between the wars, remains an unanswered question.

II. CARL SCHMITT AND THE ECONOMIC STATE OF EMERGENCY

Between 1931 and 1950, Carl Schmitt devoted a considerable portion of his intellectual energy to the task of analyzing the proliferation of emergency economic authority in our century. In fact, this feature of Schmitt's theory played a pivotal role in his

³⁹ See Brian F. Crisp, *Presidential Decree Authority in Venezuela*, in EXECUTIVE DECREE AUTHORITY, *supra* note 3, at 142-74 (discussing the matter in Venezuela); Parish, *supra* note 15, at 81, 91-95 (discussing the weakness of Russian courts); Rubio & Goretti, *supra* note 10, at 55-56 (discussing weak courts in Argentina); Schmidt, *supra* note 15, at 104-42) (discussing the situation in Peru).

⁴⁰ See Catherine Conaghan et al., *Business and the 'Boys': The Politics of Neoliberalism in the Central Andes*, 25 LATIN AM. RES. REV. 3-29 (1990) (providing an excellent analysis of the nexus between the domestic political sources of neoliberalism and executive-based emergency rule); see also ADAM PRZEWORSKI, DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA 183-87 (1991) (discussing the troubling implications of rule by emergency decree in the new democracies).

⁴¹ Kirchheimer, *supra* note 6, at 130.

defense of an authoritarian alternative to the Weimar Republic. For Schmitt, the imperatives of emergency economic power ultimately demonstrated the fundamental bankruptcy of liberal democracy. Liberalism's preference for the supremacy of elected legislatures, the separation of powers, and the rule of law allegedly rendered it incapable of dealing with the exigencies of the economic state of emergency. Too often, liberal democracies responded to the necessity of enormous grants of delegated economic authority with halfway measures and bad faith institutional compromises inconsistent with liberal principles. By 1933 Schmitt openly argued that only a National Socialist alternative to liberal democracy was up to the tasks of the economic state of emergency: National Socialism alone could guarantee a system of flexible, situation-specific rule, in accordance with the requirements of economic crisis management.⁴²

Elsewhere I have examined Schmitt's horrible Nazi-era jurisprudential writings and tried to underscore their many conceptual and normative failings. Here, for the most part, my interest lies elsewhere. Although we can never ignore the ways in which Schmitt's ideas about legal development in our century led him to embrace Nazism, it would also be a mistake to ignore the *diagnostic* strengths of that account. In fact, only by taking the strong points of Schmitt's account seriously can we succeed in proving why Schmitt was wrong to become a Nazi enthusiast. As I hope to suggest in this section, Schmitt on occasion accurately described the real problems posed by emergency economic powers for liberal democracy. Nonetheless, his intense hostility to liberalism—in particular, twentieth-century positivist jurisprudence—ultimately prevented him from formulating a plausible explanation of its sources.

Schmitt recognized that emergency economic power had become ubiquitous in the liberal democratic political universe, observing that its expansion had occurred in many different countries during periods of both war and peace, and under the auspices of left-wing as well as right-wing governments.⁴³ Already in

⁴² See SCHEUERMAN, *supra* note 1, at 85-140. The best work on the economic and social implications of Schmitt's theory remains Ingeborg Maus's *Bürgerliche Rechtstheorie und Faschismus. Zur sozialen Funktion und aktuellen Wirkung der Theorie Carl Schmitts* (1980).

⁴³ The pervasiveness of emergency economic power is described in CARL SCHMITT, *Vergleichender Überblick ueber die neueste Entwicklung des Problems der gesetzgeberischen Ermächtigungen; Legislative Delegationen*, in SCHMITT, *POSITIONEN UND BEGRIFFE IM KAMPF MIT WEIMAR-GENF-VERSAILLES* [POSITIONS AND CONCEPTS IN THE STRUGGLE WITH WEIMAR-GENF-VERSAILLES] 214 (1940) [hereinafter SCHMITT, *POSITIONS AND CONCEPTS*]; CARL SCHMITT, *DIE LAGE DER EUROPÄISCHEN RECHTSWISSENSCHAFT* [THE SITUATION OF EUROPEAN JURISPRUDENCE] 18-21 (1950) [hereinafter SCHMITT, *SITUATION OF EUROPEAN JURISPRUDENCE*]. Much of the latter work seems to have been written before 1944. Although neglecting Schmitt's interest in the *economic* state of emergency, a reliable

the 1931 *Guardian of the Constitution*, Schmitt accurately identified the most likely institutional implications of this trend—the growth of far-reaching discretionary executive power and the concomitant decline of elected legislatures.⁴⁴ As we saw above, this trend has also been described by many, more recent commentators (for example, liberal-minded senators in the United States in the 1970s) who by no means share Schmitt's antiliberalism. Schmitt also rightly noted that this trend raises some real problems for classical liberal conceptions of representative government, while recognizing that certain traditional liberal reservations about the growth of executive power no longer obtain under the changed conditions of the twentieth century. Liberal criticism of the rise of the executive-dominated state too often ignores the *democratization* of executive authority experienced by many political systems in our century. Implicitly relying on a nineteenth-century model of the executive, in which the executive remains dominated by traditional political and social forces hostile to an increasingly popular elected parliament, liberals sometimes criticize economic emergency powers by anachronistically assuming that executive discretion necessarily constitutes an antidemocratic development.⁴⁵ In the age of the mass-based plebiscitary executive, however, emergency economic power hardly constitutes, a priori, an attack on the fundamentals of democratic government. Finally, Schmitt foresaw the possibility that emergency economic powers might also lead to a dramatic strengthening of the judiciary, along lines problematic from the perspective of classical formalist jurisprudence.⁴⁶ As he noted in a 1936 discussion of emergency economic powers in Britain, France, Germany, and the United States, liberal governments would likely deal with unprecedented delegations of legislative authority to the executive and administration by initiating, in the spirit of the traditional ideal of the liberal law-based state, new judicial controls over executive activity. Anticipating one of the most striking institutional trends

introduction to Schmitt's views on the general problem of emergency powers is provided by John P. McCormick, *The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers*, in *LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM* 217-51 (David Dyzenhaus ed., 1998).

⁴⁴ CARL SCHMITT, *DIR HÜTER DER VERFASSUNG* [GUARDIAN OF THE CONSTITUTION] 131 (1931) [hereinafter SCHMITT, GUARDIAN OF THE CONSTITUTION].

⁴⁵ *See id.* at 128-30. Of course, Schmitt's own model of the "democratic plebiscitary executive" is inconsistent with liberal democratic ideals. As Otto Kirchheimer rightly noted, Schmitt reduced popular political action to "an unorganized answer which the people, characterized as a mass, gives to a question which may be posed only by an authority whose existence is assumed," and probably unquestioned as well. KIRCHHEIMER, *supra* note 6, at 78.

⁴⁶ Many early liberal legal thinkers were adamantly hostile to judicial discretion; Montesquieu and Bentham should come immediately to mind.

within liberal democracy during the last half-century, Schmitt suggested that this would probably augment the political influence of the judiciary: given the vague, open-ended character of so many emergency delegations of economic authority, courts would likely gain in power as they were called on to determine the exact limits of delegated legislative authority left undetermined by elected representative bodies.⁴⁷

What *drives* the growth of emergency economic power in our century? Unfortunately, Schmitt's favorite explanation is also his weakest. Liberal jurisprudence culminates in the virtual hegemony of *legal positivism*, as represented most clearly by Schmitt's main intellectual rival, Hans Kelsen.⁴⁸ Positivism prepares the way for the acceptance of vast delegations of emergency economic authority to the executive. *Guardian of the Constitution*⁴⁹ argues that positivists sacrifice the emphasis of traditional liberal jurisprudence on the *semantic* generality of the legal norm, thereby paving the way for non-traditional legal forms. Poorly-defined grants of exceptional economic authority represent a natural outgrowth of this dramatic shift in liberal legal thinking. In addition, positivists like Kelsen try to discredit traditional conceptions of state sovereignty. In the process, they legitimize a parceling out of state authority to huge agglomerations of hostile political and social constituencies. The resulting "pluralist party-state" contributes to the decline of parliament as an effective lawmaking body and its replacement by a system in which the executive rules by means of sweeping grants of delegated authority.⁵⁰ The postwar *Situation of European Jurisprudence*⁵¹ develops this line of inquiry in an even more pointed fashion. The rise of legal positivism, dating from the revolutionary

⁴⁷ SCHMITT, POSITIONS AND CONCEPTS, *supra* note 43, at 212, 224-25. His *Hüter der Verfassung* is also critical of attempts to tame Weimar's emergency governments of 1930-33 by means of a strengthened judiciary. See SCHMITT, SITUATION OF EUROPEAN JURISPRUDENCE, *supra* note 43, at 12-70. Since 1945, the place of courts arguably has increased dramatically in the decision making apparatus of many liberal democracies. For example, generous powers of judicial review over parliamentary legislation are now commonplace in Western Europe and North America. Interestingly, the scenario in many of the new democracies of Eastern Europe and Latin America parallels the first possibility that Schmitt described. He described an executive-dominated state relying, in a more or less permanent manner, on emergency economic authority, while the situation in the United States, France, and many other stable liberal democracies mixes elements of the second option (what Schmitt described as a *Justizstaat*) with elements of the former.

⁴⁸ See DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR 58-70 (1997) (explaining this element of Schmitt's argument).

⁴⁹ See SCHMITT, GUARDIAN OF THE CONSTITUTION, *supra* note 44.

⁵⁰ See SCHMITT, SITUATION OF EUROPEAN JURISPRUDENCE, *supra* note 43, at 63; see also SCHMITT, DIE VERFASSUNGSLEHRE 143-57 (1928).

⁵¹ See SCHMITT, SITUATION OF EUROPEAN JURISPRUDENCE, *supra* note 43.

upheavals of 1848, unavoidably generates a “crisis of legality.” Positivism’s preference for statutory *legislation*, hostility to natural law, and aversion to judicial interpretation and creativity means that it tends to reduce jurists and legal experts to the passive playthings of an unrestrained legislative demiurge permitted to issue “constantly changing, positive instructions.”⁵² By undermining the legitimacy of an autonomous legal “estate” possessing a meaningful role within the legal order, positivism destroys the preconditions of legal learning and expertise on which the achievements of Western legal development rest. Simultaneously, positivism’s weakness for parliamentary lawmaking leaves it unprepared to ward off the dangers posed to its own existence by omnipotent legislative bodies now free to delegate their authority elsewhere. Legal positivism is fundamentally nihilistic: it sets into motion a process destined to extinguish the centerpiece of its own model of law, the legislative statute, by encouraging the legislature to abandon the functions of traditional lawmaking in favor of broad delegations of decision making power to administrative bodies.⁵³

Whatever its merits as a contribution to the history of legal *ideas*, Schmitt’s critique of legal positivism hardly suffices as an *empirical* explanation for the emergence and growth of emergency economic powers. It is hardly self-evident that positivism has been as intellectually hegemonic or practically influential as Schmitt would have us believe. Even if we *were* to accept the gist of Schmitt’s tendentious characterization of it, positivism’s real-life impact has been far more limited than he tends to suggest. Moreover, any attempt to *deduce* complex, real-life *institutional* trends from the alleged contradictions of a particular intellectual system should meet with a healthy dose of skepticism. Far too often, Schmitt assumes that history accords with political and legal theory: the internal conceptual limits of liberal theory can explain liberalism’s real-life political ills. Just as parliament’s real-world ills allegedly can be traced to the built-in intellectual failings of liberal views of parliament,⁵⁴ so, too, is the proliferation of emergency economic authority in our century supposedly based in the ills of liberal legal thinking. Needless to say, this idiosyncratic brand of conceptual realism is methodologically suspect. History rarely comports with the conceptual underpinnings of political or legal theory.

To his credit, Schmitt tentatively points to competing

⁵² *Id.* at 15.

⁵³ *See id.* at 14-18.

⁵⁴ CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* (Ellen Kennedy trans., 1985).

explanations for the rise of emergency economic powers. Beginning in the 1930s, for example, Schmitt sketches a provocative account of why the interventionist welfare state seems intimately linked to liberal democracy's growing dependence on exceptional economic authority. Contra economic liberalism, Schmitt argues, far-reaching intervention in the contemporary capitalist economy is essential if political stability is to be assured. By necessity, effective economic management is now an indispensable feature of successful political statesmanship. Not surprisingly, modern liberal democracy has come to associate economic crises with military attacks and armed insurrections; dire economic crises *do* constitute a profound threat to political stability in our century.⁵⁵

But why must economic crisis management necessarily entail open-ended delegations of exceptional power to the executive? And why does the practice of emergency crisis management tend to become permanent in character? Schmitt argues that the preference of liberal jurisprudence for fixed, codified general norms, along with a strict separation of powers, exacerbates the problem of a *time lag* within the structure of political and legal decision-making. Liberals separate the practices of law-making and law application; the former involves the generation of fixed, general norms, and the latter entails their subsequent application to complex individual situations. For liberal jurisprudence, statutes always represent a static "fixation" of a legislative act that, by necessity, occurred well before a judicial or administrative actor subsequently applies it. Although liberal legal praxis is thereby "oriented to the past" (*vergangenheitsbezogen*), the dictates of modern interventionist politics cry out for a legal system conducive to a present- and future-oriented *steering* of complex, ever-changing economic scenarios. Liberal statutes "freeze" *past* experience by making it the basis for the general statute, whereas intervention in the economy means that state actors now face the tasks of: (1) coordinating *contemporary* economic trends; and (2) guiding the *future* course of economic life. Unfortunately, the temporal gap separating law generation and law application means that judges and administrators are always a step removed from the original experience which inspired legislators to come up with a particular statute in the first place. This means that liberal judges and administrators "always come too late"—they always base decisions about the complex, ever-changing dynamics of contemporary economic conditions on legal relics from an oftentimes distant past.⁵⁶

⁵⁵ See SCHMITT, SITUATION OF EUROPEAN JURISPRUDENCE, *supra* note 43, at 81, 127.

⁵⁶ See Carl Schmitt, *Die Rechtswissenschaft im Führerstaat*, 7 ZEITSCHRIFT DER AKADEMIE FÜR DEUTSCHES RECHT 438-39 (1935).

How then can this dilemma be solved? Schmitt argues that we need to abandon the traditional liberal conception of the fixed, general statute, as well as liberalism's strict delineation of law-making versus law application; only then can the temporal distance between legislation and legal application be reduced and the enigma of a time lag minimized. One initial step taken by liberal states in this direction entails delegating broad decision-making authority to administrative bodies. For Schmitt, emergency economic powers are a particularly dramatic example of this trend. In his view, this increasingly common practice points the way towards a long-overdue abrogation of those elements of liberal legalism that render it excessively "oriented to the past." Liberalism is unlikely to accomplish the tasks at hand, however. Writing in 1935, Schmitt asserts that no better example of the liberal refusal to deal with the legal imperatives of the modern interventionist state can be identified than the United States Supreme Court's hostility to the New Deal. In Schmitt's interpretation, Franklin D. Roosevelt's conservative opponents on the Court were correct to see the open-ended, highly discretionary legislative products of Roosevelt's declaration of an economic emergency as inconsistent with the fundamentals of liberal jurisprudence. At the same time, Roosevelt was right to demand economic emergency powers. For Schmitt, the New Deal constitutional conflicts underline the impossibility of synthesizing liberalism and emergency economic power. We must choose one over the other, and Schmitt believes that political "realism" in the age of the interventionist state requires us to surrender the intellectual core of legal liberalism.⁵⁷

In this spirit, the Nazis are praised for finally "crossing the Rubicon" by totally sacrificing outdated liberal conceptions of the legal statute and separation of powers. Allegedly, National Socialism is most likely to prove adept at grappling with the exigencies of economic management because "law for us is no longer an abstract norm referring to a past act of volition [*auf einen vergangenen Willen bezogene Norm*], but instead the [immediate] volition and plan of the *Führer*."⁵⁸ By getting rid of the distinction between law-making and law application, National Socialism allegedly overcomes the problem of a time lag that plagues liberal democratic forms of political and legal decision-making. Alas, no evidence is produced to support the implausible built-in assumption in Schmitt's argument, that Hitler necessarily possesses the awesome

⁵⁷ *Id.* at 439; see also SCHMITT, POSITIONS AND CONCEPTS, *supra* note 43, at 219-20.

⁵⁸ SCHMITT, *supra* note 54, at 439-40; see also SCHMITT, POSITIONS AND CONCEPTS, *supra* note 43, at 227 (praising the Nazis for moving beyond the inconsistencies of twentieth-century liberal democracy).

wisdom required by the enormous tasks of contemporary economic and social regulation; Schmitt simply assumes this. The fact that National Socialism is no longer “past-oriented” suffices to render Hitler a “better legislator” than any ever known to liberal democracy.⁵⁹ The argument also relies on a generous portion of intellectual caricature. Of course, liberal democratic states have rarely accepted an *absolute* distinction between, say, the legislature and executive; the American Federalists famously pointed to the impossibility of achieving such a distinction. For that matter, it is unclear whether modern liberal states have relied extensively on the idea of an airtight legal code, consisting of perfectly transparent, fixed general norms, as Schmitt implies. At least in the United States, this model has had only a limited impact on legal thought and praxis in our century.⁶⁰ Revealingly, Schmitt attributes the liberal ideals criticized by him to Locke, Montesquieu, and Sieyès—each obviously a vital influence on liberal legal jurisprudence, but by no means exclusive intellectual representatives of a richer and more complex intellectual tradition.⁶¹

Notwithstanding the political propaganda and intellectual caricature constitutive of his thinking from the 1930s, Schmitt still manages to underscore a potential problem for liberal jurisprudence. Recent liberal theorists have analogously noted that clear, general legal rules necessarily “force the future into the categories of the past” in a way that may soon render them inappropriate.⁶² Every legal rule codifies a series of expectations drawn from the experiences of legislators, and past history is necessarily used to draw up general norms intended to function as a guide to the future. Yet previous experience is a poor guide when political and legal actors confront novel problems, and the complexity of modern social and economic life means that legislators, judges, and administrators always face new, even unprecedented, scenarios. Moreover, the proliferation of relatively open-ended delegations of exceptional authority lends some empirical plausibility to the claim that the problem of a time lag diagnosed by Schmitt has proven more troublesome in our century than many liberal jurists have been willing to admit. How might the contemporary “steering” of economic life exacerbate liberal legalism’s built-in time lag? Relatively far-reaching intervention in economic and social affairs was commonplace even in the nineteenth century; *laissez faire* is an

⁵⁹ See SCHMITT, *supra* note 54, at 439.

⁶⁰ See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 65-203 (1995).

⁶¹ SCHMITT, *supra* note 54, at 439; see also SCHMITT, POSITIONS AND CONCEPTS, *supra* note 43, at 217, 227-28.

⁶² Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 542 (1988).

historical myth.⁶³ Nonetheless, the growth of emergency economic powers, as noted above, is fundamentally a twentieth-century phenomenon. By itself, the appearance of state economic intervention does not suffice as an explanation for the rapid growth of emergency economic authority. So what is it about *contemporary* economic and social life that seems to make the problem of a time lag so pervasive, thus driving liberal states everywhere to delegate emergency economic authority to executive and administrative bodies?

Schmitt tentatively alludes to one source of this development. By 1950, he seems to have decided that vast delegations of exceptional power to the executive represent the most obvious consequence of a “motorization of the legislator” that has taken place in our century. The problem at hand is not the interventionist state *per se*; instead, it stems from an interventionist state driven to engage in *rapid-fire* regulation. Speed is at a premium in the contemporary world, and one immediate consequence is that state economic intervention is forced to take an ever faster, “accelerated” (*beschleunigt*) form.⁶⁴ Liberalism promises legal stability and aspires for relatively *stable* general norms, whereas the dictates of contemporary “motorization” entail constant legal change and dynamism. The problem of a time lag within liberal law becomes endemic because ours is a universe in which the time horizons of human activity are incessantly revolutionized. Even liberal states have responded to this trend by embracing novel legal forms—for example, emergency economic authority—providing heightened flexibility to decision-makers.

Unfortunately, Schmitt’s lifelong obsession with combating legal positivism ultimately forecloses an adequate elaboration of this alternative, potentially more fruitful account of the structural roots of the proliferation of emergency economic power. Just when he begins to hint at features of contemporary social and economic life arguably responsible for generating unforeseen problems for liberal jurisprudence, he short-circuits his inquiry by again returning to his (tired) polemics against legal positivism; Schmitt makes legal positivism responsible, in the final instance, for the “motorization” and “technization” of legislative activity that culminates in a ubiquitous recourse to emergency power as an instrument of economic regulation.⁶⁵

But might not the source of this problem lie elsewhere than

⁶³ See Lawrence M. Friedman, *THE HISTORY OF AMERICAN LAW* 177-78, 192-93 (2d ed. 1985) (discussing the American case further).

⁶⁴ See SCHMITT, *SITUATION OF EUROPEAN JURISPRUDENCE*, *supra* note 43, at 18-21.

⁶⁵ See *id.* at 14-18, 30.

legal positivism? At one point, Schmitt himself observes that “[n]ew accelerations [of law-making] derived from the order of a market economy and state coordination of the economy.”⁶⁶ So why not consider the possibility that recent changes in the basic contours of economic life are, in part, responsible for the motorization of legislative activity? Chiefly concerned with discrediting liberalism rather than engaging in a critical-minded examination of contemporary economic and social conditions, Schmitt never takes this interpretive option seriously.

If we are to avoid the common mistake of maligning liberalism for problems whose primary sources lie elsewhere, however, we will have to do better.

III. GLOBALIZATION AND ECONOMIC EMERGENCY AUTHORITY

Although space limitations prevent me from elaborating this point with sufficient care, let me conclude by noting that some contemporary reflections about the changing contours of economic life in our century may provide an answer to the pivotal question left unexamined by Schmitt. In this vein, David Harvey reminds us that capitalism is:

[A] revolutionary mode of production, always searching out new organizational forms, new technologies, new lifestyles, new modalities of production and exploitation and, therefore, new objective social definitions of . . . time The capacity to measure and divide time had been revolutionized, first through production and the diffusion of increasingly accurate time pieces and subsequently through close attention to the speed and coordinating mechanisms of production (automation, robotization) and the speed of movements of goods, people, information, messages, and the like.⁶⁷

For Harvey, capitalism’s underlying structural imperatives constantly alter the time horizons of economic activity: “the history of capitalism has been characterized by a speed-up in the pace of life.”⁶⁸ The reduction of turnover time (in both production and distribution) is a pivotal means by which capitalists improve their profitability. Particularly during moments of intense competition or crisis, those capitalists able to take advantage of faster turnover times are likely to outrace their rivals. The resulting technological innovations—most recently, the possibility of rapid-fire computerized business communication—means that simultaneity

⁶⁶ *Id.* at 20.

⁶⁷ DAVID HARVEY, *JUSTICE, NATURE AND THE GEOGRAPHY OF DIFFERENCE* 240-41 (1996).

⁶⁸ DAVID HARVEY, *THE CONDITION OF POSTMODERNITY* 240 (1989).

and instantaneousness become essential to economic activity to a degree that surely would have astonished our historical predecessors. Modern capitalism has *always* functioned to reduce turnover time, and thereby accelerate the course of economic life in many different ways; earlier generations marveled at—and sometimes worried about—the “shrinkage of the world” generated by railroads, automobiles, airplanes, and wireless telegraphs and telephones.⁶⁹ Yet a recent bout of innovation in information, communication, and transportation technologies seems to have produced a special emphasis “on ‘smart’ and innovative entrepreneurship, aided and abetted by all the accoutrements of swift, decisive, and well-informed decision-making,”⁷⁰ resulting in “greatly intensified rates of commercial, technological, and organizational innovation”⁷¹ in the last twenty years. Not surprisingly, the “compression of time” has seemed especially intense in recent years, and many popular commentators have offered diagnoses of our era in which the “acceleration” of everyday life takes a central place.⁷²

In Harvey’s account, Heidegger captured a constitutive feature of twentieth-century experience when he noted that:

[T]he furthest corner of the globe has been conquered by technology and opened to economic exploitation; when any incident whatsoever, regardless of where and when it occurs, can be communicated to the rest of the world at any desired speed; when the assassination of a King in France and a symphony in Tokyo can be “experienced” simultaneously; when time has ceased to be anything other than velocity, instantaneousness and simultaneity.⁷³

But the importance of instantaneousness and simultaneity to our present-day phenomenological horizons must be linked to the underlying structural dynamics of modern capitalism, which Heidegger never took seriously enough as a source of Western modernity’s failings. For now, I leave it to others to examine the empirical merits of Harvey’s attempt to relate capitalism to the widespread present-day sense of an ongoing “speed-up” of everyday life.⁷⁴ Its significance here lies exclusively in pointing to the

⁶⁹ See STEPHEN KERN, *THE CULTURE OF TIME AND SPACE, 1880-1918* (1983) (describing a study that the author conducted).

⁷⁰ HARVEY, *supra* note 67, at 157.

⁷¹ *Id.* at 147.

⁷² See FRITZ REHEIS, *DIE KREATIVITÄT DER LANGSAMKEIT: NEUER WOHLSTAND DURCH ENTSCHEUNIGUNG* (1998) (describing the economic speed-up of contemporary capitalism as pivotal to a host of societal ills, and garnering positive reviews in prominent newspapers like *Die Zeit* and *Frankfurter Rundschau*).

⁷³ HARVEY, *supra* note 67, at 208.

⁷⁴ Though in different ways, the idea of a compression of time also plays a role in the works of other social theorists, including ANTHONY GIDDENS, *THE CONSEQUENCES OF*

possibility of providing an explanation for the “motorization” of the lawmaker described by Schmitt. If Harvey is correct, it becomes easy to see why liberal legislatures increasingly have been overwhelmed by the tasks of economic management in our century. Given the demands of a capitalist economy that, to an ever greater extent, requires fast, constantly changing forms of state intervention in accordance with the rapid-fire dictates of economic life, it is no surprise that even liberal polities tend to delegate vast discretionary authority to executive and administrative bodies typically seen as being better suited to the tasks of quick, flexible forms of action (recall that even in the more rationalistic versions of liberal theory, the executive was typically characterized by *agere*—that is, rapid action attuned to the special requirements of the individual situation at hand). In addition, an explanation that takes the dynamism of modern capitalism seriously possesses the immediate virtue of helping to explain the pervasiveness of emergency economic authority. Although it would be a mistake to obscure the role played by individual factors within particular political systems in generating an increased dependence on emergency economic power,⁷⁵ the ubiquity of emergency economic authority needs to be taken seriously. An analysis that places some weight on general structural trends in contemporary society can succeed in doing so.

Carl Schmitt surely would have resisted a reworking of his picture of a “motorized” legislature along these lines. But it potentially provides a more fruitful conceptual and normative starting point for those of us rightly hesitant about scrapping liberal jurisprudence. It also generates a series of unanswered questions whose significance is badly obscured by Schmitt’s obsession with discrediting legal positivism and, more generally, liberal jurisprudence. Can we develop legal forms better suited than emergency economic authority to the arduous task of regulating a high-speed capitalist economy? How might such legal forms, in contrast to those proposed by Schmitt during the 1930s, preserve the lasting achievements of traditional liberal jurisprudence? We may also need to weigh the possibility of

MODERNITY (1990), and THE NATION-STATE AND VIOLENCE (1987); and PAUL VIRILIO, SPEED AND POLITICS (1986). Both Giddens and Virilio see modern capitalism as a driving force behind the compression of time; both plausibly suggest that it is not the only driving force.

⁷⁵ For example, Michael Sherry’s account of the militarization of American politics, economics, and culture since the 1930s helps explain our political system’s pathological insistence on picturing every conceivable task in military terms (“the war on poverty,” for example, or “war on drugs”). SHERRY, *supra* note 5. Sherry’s study suggests that a full account of economic emergency powers in the United States cannot legitimately ignore the role of interstate military competition and the emergence of the United States as a world power.

opting to preserve modes of liberal law while radically altering our economic system. Can we assure material well-being without forcing economic production into the straightjacket of an economic system driven by necessity to unsettle and accelerate economic life? If so, can we also salvage liberal law?