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EXCEPTION AND EMERGENCY POWERS: LIBERALISM AND EMERGENCY POWERS IN LATIN AMERICA: REFLECTIONS ON CARL SCHMITT AND THE THEORY OF CONSTITUTIONAL DICTATORSHIP

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SUMMARY:
... One of these legacies seems to be the maintenance of broad emergency provisions that all too often have provided a legal basis for the construction of dictatorial regimes in moments of exception. ... The Roman dictatorship, which implied only a temporary suspension of normal procedures, was based on a division of authority between the organ that declares the emergency (the Senate) and the one that appoints the dictator (the Consulate). ... As a response to the long silence of liberal theory about the problem of emergency, Carl Schmitt revived, in the early 1920s, the republican theory of constitutional dictatorship, in order to then apply its logic to the emergency provisions of the then recently created Weimar Constitution. ... As Clinton Rossiter points out, only the urgency of the moment could explain why a democratic constitution included an emergency provision whose model was the autocratic institution of the "state of war" of the late German Empire. ... While independent from the assembly and invested with powers that went beyond those of a constitutional monarch in a parliamentary government, the president of the Reich was not intended to play the role of the executive in a presidentialist government. ... Without fully abandoning the notion of commissarial dictatorship, Schmitt analyzed the problem of emergency powers during the last years of the Weimar Republic from a different perspective. ...

HIGHLIGHT: The practice of the freest nation that ever existed induces me to think that there are cases in which a veil should be drawn for a while over liberty, as it was customary to cover the statues of the gods. n1

TEXT:
[*1797]

Introduction

The ongoing process of democratization in Latin America has made scholars acutely aware of the impact of certain institutional designs on political stability. What constitutional arrangements are likely to foster or hinder democratic rule? Well-established political traditions of these countries are now being called into question. Some observers, for instance, claim that the presidentialist scheme that prevails in all of the Latin American countries is an obstacle to democratic stability. For others, the long history of authoritarianism has left its entrenched legacy in Latin American constitutions. One of these legacies seems to be the maintenance of broad emergency provisions that all too often have provided a legal basis for the construction of dictatorial regimes in moments of exception.

In this paper, we analyze the different ideological and institutional factors involved in the design and implementation of emergency provisions. We argue, following Carl Schmitt, that liberalism - the political theory that informed Spanish American **[*1798]** constitution-makers - traditionally lacked an adequate theoretical framework to address the problem of emergencies in political life. Following the model of European and Anglo-American liberalism, Latin American constitution-makers initially rejected the necessity or convenience of discretionary powers to deal with emergencies. However, under the intermittent occurrence of internal conflict, the lack of emergency provisions left authorities with no choice but to act against the constitutions they were supposed to defend. In this context, emergency provisions were later included in most constitutions. But in the absence of a valid model, an improper design led to abuse and usurpation. Presidents were usually invested with the authority to declare emergencies without temporal restrictions, and to determine the extension of their own powers with few checks from other government branches of government.

Although critiquing the liberal rejection of discretionary powers and advocating the republican tradition of emergency government, we argue that Schmitt's own view on the problem of emergency does not really solve the deficiencies of liberal theory. His contribution to the debate surrounding the application and interpretation of Article 48 of the Weimar Constitution is highly illustrative in this respect. We will focus on two aspects of this debate: the type of institutional checks placed upon the use of emergency powers by the president and the role of the president within the structure of the Weimar Constitution. While valuable in different aspects, we argue that Schmitt's interpretation of constitutional dictatorship as an unlimited commission of action, along with his view of the president as the sole defender of the constitution, validated a practice of emergency powers that subverted the original meaning and purpose of the Weimar Constitution.

This essay is divided into three parts. Part I presents an assessment of the liberal view of emergencies, particularly that of Benjamin Constant, the most influential political theorist in early nineteenth-century Spanish America. Part II analyzes the impact of the liberal rejection of emergency provisions on the making of the first Spanish-American constitutions and the reasons that later led to ill-advised designs of emergency powers. Parts III and IV discuss two aspects of Schmitt's theory of emergency rule relevant to the discussion of emergency powers in Latin America: the theory of commissarial dictatorship and the theory of the president as the guardian of the constitution. We conclude by assessing the lessons of the Weimar experience in comparative perspective.

[*1799]

I. Liberalism and emergency powers

According to Carl Schmitt, it has been a typical trait of liberal thinking to ignore the problem of emergency. n2 This criticism, perhaps, is not valid against John Locke, who recognized in the prerogative of the king the possibility of dealing with the exception "without the prescription of the Law, and sometimes even against it." n3 Schmitt's criticism, however, is on the mark when directed against the mainstream of liberal-constitutional theory since the eighteenth century. Starting with Montesquieu, liberal theory rejected Locke's idea of discretionary power, as well as the convenience of general constitutional provisions to deal with emergencies by extraordinary means. From this perspective, only the rule created by standing universal laws could be accepted as a standard of legitimate government.

Against the view of republican thinkers, such as Machiavelli or Rousseau, Montesquieu saw in the precedent of the Roman dictatorship a door open to arbitrary power, an instrument of abuse rather than an exceptional mechanism to rescue republican institutions in moments of danger. n4 The Roman dictatorship, which implied only a temporary suspension of normal procedures, was based on a division of authority between the organ that declares the emergency (the Senate) and the one that appoints the dictator (the Consulate). However, Montesquieu could not help but see in the late dictatorships of Sulla and Caesar the inevitable destiny of this institution. n5 It is for this reason that, looking at the example of liberal nations like England (later followed by the American Framers), he only viewed a temporal suspension of the writ of habeas corpus in cases of emergency as acceptably safe for public liberties. n6 This is as far as he would go. However, and almost as an afterthought, he also wrote that, under certain circumstances, "a veil should be drawn for a while over liberty, as it was **[*1800]** customary to cover the statues of the gods." n7

During the nineteenth century, the rejection of emergency provisions became closely associated with the work of Benjamin Constant. Among liberals, the French Revolution produced a deep distrust of political power, particularly of unlimited political power. Constant always thought that one of the most dangerous maxims ever coined was the ancient dictum, "Salus populi suprema lex esto." n8 The logic underpinning this distrust was that, "the constitutional powers existing only under the constitution cannot suspend it... Every time constitutions have been violated it is not the constitutions that are saved but the governments." n9

In Constant's work, the rejection of emergency powers was based on what might be called the theory of "self-defeating dictatorships." Constant rejected the view of a "dualistic" mode of operation of the constitution - that is, the separation between constitutional provisions for normal and extraordinary circumstances. Constant contended that there was one, and only one, mode of operation. No right granted by the constitution to individuals could be legally suspended for any length of time. Constant criticized extraordinary measures as myopic, short-term responses to political upheaval. Eventually, Constant asserted that these actions would only make things worse than they initially were.

According to Constant, no coup d'etat had ever preserved a people or a family from ruin: "The execution of the accomplices of Catiline without a judgment was the coup d'etat of Cicero, who saw the fall of the Republic which he wanted to save." n10 Constant asserted that it is easy, in the midst of a political crisis, to "talk about the usefulness of illegal measures and of extra-judicial expedition which, by leaving no time for the seditious to rally, reestablishes order and maintains peace." n11 In Constant's view, the classical examples had to be revisited:

The Gracchi, we are told, put the Roman republic in jeopardy. All legal procedures were impotent against them. The Senate resorted twice to the terrible law of necessity and the republic was saved! That is to say: it is from that time that we can date **[*1801]** its fall. All rights were disregarded, every form of constitution subverted. The people had merely demanded equal rights: it swore to punish the murderers of its defenders, and the ferocious Marius came to preside over its revenge. n12

In The Spirit of Conquest and Usurpation and their Relation to European Civilization, Constant states that when governments employ emergency provisions to prevent a conspiracy from breaking out:

The evil which has been postponed for a few hours returns more terrible, aggravated by the evil which has now been committed. There are no justifications for those means that serve equally for all intentions and all aims and that advocated by honest men against brigands, reappear in the mouths of brigands with the authority of honest men, with the same apology of necessity, the same pretext of public safety. n13

The idea that the delayed consequences of emergency measures only aggravate the initial conditions of crisis, is central

to Constant's fatalistic theory of self-defeating dictatorships. On numerous occasions he insisted on the "perverse" effect of emergency measures:

Liberty, [the governments] argued, had to be postponed until factions died down; but factions only die down when liberty is no longer postponed. Violent measures, adopted dictatorially in advance of a public spirit, prevent that spirit from coming into being. It is a vicious circle. n14

This argument bears some similarity to the Tocquevillian idea that the evils of democracy can only be cured with more democracy. n15 Constant explicitly acknowledged the existence of **[*1802]** emergencies. His quarrel, however, was with the responses that governments gave to these events:

There are, no doubt, for political societies, moments of danger that human prudence can hardly conjure away. But it is not by means of violence, through the suppression of justice, that such dangers may be averted. It is on the contrary by adhering, more scrupulously than ever, to the established laws, to tutelary procedures, to preserving safeguards. Two advantages result from such courageous persistence in the path of legality: governments leave to their enemies the odium of violating the most sacred of laws, and the more they win by the calm and assurance that they display, the trust of that timid mass that would remain at least uncertain, if extraordinary measures were to betray, in the custodians of authority, a pressing sense of danger. Any moderate government, any government resting upon regularity and justice, is ruined by every interruption of Justice, by every deviation from regularity. As it is in its nature to soften sooner or later, its enemies wait until then to take advantage of memories armed against it. Violence seemed for a moment to come to its rescue, instead it has made its fall the more inevitable, since, by delivering it from some of its opponents, it has generalized the hatred that these opponents felt for it. n16

According to this view, dictatorial measures will inevitably cause, in the long run, the downfall of republican regimes. It is only living in liberty that citizens can learn to make good use of political freedom. According to Constant:

[It is only when] a constitution is old, observed for a long time, known, respected and cherished that it can be suspended for an instant, if a great emergency requires it. But, if a constitution is new and not in practice nor identified with the habit of a people, then every suspension, either partial or temporary, is the end of that constitution. Habeas corpus can be suspended in England because in that country the institutions, the corps, the prerogatives, the rights have a stability guaranteed by 150 years of existence. n17

[*1803] In sum, Constant sees in emergency government a self-defeating institution that should only be accepted for constitutions that have proved to be stable for a long time. This position is questionable. On one hand, the proposition that emergency provisions aggravate the problems they intend to resolve cannot be tested: any present event could be explained as the result of some delayed backlash of a past occurrence. On the other hand, it is implicit in his view that what really prevents the abuse of emergency powers is not a wise institutional procedure, but a well-entrenched belief about the value of constitutions. We can read between the lines, that Constant believed society's true safeguards against tyranny were Tocquevillian "mores," not institutions per se. However, this theory does not address the problem of how constitutions become stable in the first place. If the initial establishment of constitutions were affected by permanent crises, would the absence of emergency provisions make them more legitimate and accepted? The experience of early constitutions in Latin America, which explicitly adopted Constant's views, seems to provide a negative answer to this question.

II. The legacy of liberalism in Latin America

The liberal rejection of emergency powers was a critical juncture in the evolution of constitutional political theory. Until the seventeenth century, it was part of traditional constitutional thinking to admit either a sphere of prudential and discretionary power among regularly constituted authorities, or the need to create an extraordinary magistracy to cope with emergencies. But, except for the suspension of the writ of habeas corpus, no provision for emergencies was accepted as part of liberal constitutions by the early nineteenth century. It was precisely at this point that the American colonies of Spain gained their independence.

Within two decades, more than twenty constitutions were written, most of them following the scheme of representative government that Constant and other liberal thinkers had laid down. Accordingly, the 1811 Venezuelan constitution, the 1815 Argentinean charter, the 1818 Colombian constitution, and the 1824 Mexican charter did not include broad emergency powers. The latter did not even have the liberal suspension of habeas **[*1804]** corpus. n18 Our claim is that the application of the monistic model of operation in Spanish America made evident that the absence of emergency powers was a flaw in the edifice of liberal constitutionalism.

Unlike the relatively fast and peaceful process of institutional consolidation that followed the creation of the American Constitution, the aftermath of independence in Latin America led to a protracted process of factional struggle, in which the legitimacy of newly established regimes was constantly challenged by warring elite. In this context, the use of exceptional measures was a permanent necessity. However, in the absence of adequate legal mechanisms, governments were usually forced to act beyond or against the constitution, hoping that they could later justify these measures, given the constraints of the situation. n19 This was a dangerous expedient. Given the chronic character of emergencies, their resolution by extralegal measures not only undermined the legitimacy of the same constitution that was supposed to be preserved, but also provided authoritarian leaders with an opportunity to do away with the legal order altogether.

In some cases, it was not until the mid-nineteenth century that emergency provisions were regularly included in Latin American constitutions. Still, their inclusion was less the reflection of an ideological shift among the elite than a desperate response to an urgent need. Instead of an intellectual debate about the best way to face emergencies without suppressing the constitution, constitution-makers usually delegated the capacity to suspend constitutional rights in times of crises to the executive. This particular design, in the context of a presidentialist system, was an important factor in explaining why emergency powers were later abused. n20 While provisions for legislative control were adopted, most of the time the executive was invested with authority to take the initiative in declaring the emergency, and in determining the **[*1805]** extent of the measures to be taken. The intervention of the legislative assembly was usually required only after the emergency was declared or, if initial authorization by the legislature was necessary, the executive was entitled to act alone during the long periods in which the assembly was in recess. n21

The Chilean constitution of 1833 provided for a congressional proclamation of a state of siege (one of the first provisions of this type in Spanish America) and the suspension of civil liberties and rights. It also allowed Congress to delegate extraordinary powers to the president. However, the president could declare the state of siege in cases of external aggression on his own authority; if Congress was not in session, and with the approval of a council of state (appointed by the president), he could also do so in the cases of internal disorder. Since Congress was in ordinary session for only three months, the president had exclusive authority to decide on emergencies during nine months of the year. No provision required the immediate convocation of Congress in the case of an emergency. Although emergency powers were widely abused during the nineteenth century, a similar design, allowing for executive dominance in emergencies, persisted well into this century, both in the democratic constitution of 1925 and in the authoritarian constitution of 1980. n22

In Argentina, the 1853 constitution, which followed the example of the Chilean constitution of 1833, suffered from similar flaws. According to Article 23, while the president was authorized to declare a state of siege in case of foreign invasion, Congress was the authority in charge of declaring it "in the case of internal commotion" throughout "the province or territory in which order is disturbed." n23 However, similar to the Chilean constitution, the president could

act alone during the recess of Congress (also for nine months) and no provision required its immediate convocation. The declaration of a state of siege required no limit for its duration and established no restrictions as to the type of rights that could be suspended during the emergency. The only limitation was the prohibition on executive determination of criminal culpability and the imposition of penalties. In implementing this provision, presidents often declared emergencies during the recess of Congress and placed no temporal **[*1806]** limits on the duration of emergency measures. n24 In addition, judicial interpretations considering the declaration of emergency a "political question" left unrestrained the authority of the president to decide the proportionality between the measures adopted and the nature of the emergency. n25

According to the Mexican constitution of 1857 (Article 29), while Congress had to approve the suspension of guarantees and grant the executive extraordinary faculties, the president was vested with the power to declare the existence of an emergency and to suspend guarantees. Obviously enough, the president had a strong incentive to declare emergencies and decree suspensions, since his powers were significantly broadened during critical situations. Under this design, the executive also had a powerful incentive to put pressure on Congress to ratify the suspension of guarantees or to grant him extraordinary faculties. Since no term limit was provided, the return to normalcy was extremely difficult. The president could always force Congress to renew his extraordinary powers ad infinitum, as often happened, in fact, during Juarez's rule. n26 The emergency provisions of the 1857 constitution informed the 1917 charter, which still governs the country. Emergency powers were used to sidestep ordinary legislative procedures during the 1920s and the 1930s, and then fell into discredit. n27

Finally, we should consider the extreme form of emergency powers adopted in Colombia. Under the 1886 constitution, the military was authorized to "inflict immediate punishment in order to subdue a military insubordination or mutiny or to maintain discipline in the face of the enemy." n28 The government could **[*1807]** "order the arrest or detention of persons seriously suspected of having committed a crime against public peace." n29 The charter provided for broad and unqualified emergency powers. Congress was authorized to invest "the president of the republic temporarily with such extraordinary powers as necessity may require or the public convenience demand." n30 Article 121 authorized the executive to declare "the public order disturbed and that a state of siege prevails throughout the republic or a part thereof." n31 Also, that Article established that "the extraordinary measures or decrees of a provisional nature within the same limits which the president may take shall be binding." n32 By the terms of this clause, Colombia was ruled under emergency provisions for almost three-fourths of the time between 1958 and 1988. n33

In light of this evidence, Brian Loveman asserts that the nineteenth-century provisions for emergencies in Spanish American constitutions provided the legal basis for the later emergence of populist and military authoritarian regimes in the region. n34 It is his contention that emergency provisions allowed liberalism and authoritarianism to merge: "dictators and constitutional presidents executed opponents, sent adversaries into exile, censored the press, jailed and abused authors and publishers, and confiscated property." n35 According to his view, however, governments did this in accordance with the constitutions that "purportedly guaranteed civil liberties, civil rights and popular sovereignty." n36

For Loveman, the nineteenth-century solutions of Spanish America to the problem of political and social instability "molded twentieth-century patterns of civil military relations and political tyranny from Mexico to the strait of Magellan." n37 He claims that incorporating provisions for regimes of exception in the legal and political culture of Spanish America made them invisible, yet hegemonic, premises of political life. Loveman concludes that the acceptance of regimes of exception as a basic principle "was a political threshold that, once crossed, made the subsequent **[*1808]** protection of civil liberties and rights extraordinarily difficult." n38

The advice that Loveman gives is unambiguous: "No elections, no delicately orchestrated set of presidentialist musical chairs, and no transitions from authoritarian to elected governments will succeed in consolidating constitutional democracy without drastic reform of these constitutional foundations of tyranny." n39 Procedural constraints would not suffice, since "judges depended on the executive for appointments and faced intimidation when they were not

creatures of the president." n40 In the same fashion, "legislative control over executive power proved largely illusory." n41 According to Loveman, there is no good evidence from Spanish America to support the idea that constitutional design can effectively restrain gross abuse once regimes of exception are accepted as part of the constitutional framework. n42

Loveman's interpretation leaves us wanting in several ways. He is right to argue, that since the nineteenth century (though not always or to the same degree), emergency powers have been grossly abused in Latin America. However, he does not provide a good account of causality. Emergency provisions were a necessity in Latin America, and part of the failure of early liberal constitutions in the region can be traced to their lack of legal instruments to deal with exceptional situations. Would repression and abuse have been less if emergency powers had never been included in the constitutions? We doubt it. It is certainly true that emergency provisions were abused, but Loveman does not explain exactly why or if the reason for this abuse in all cases stemmed from the same causes.

Loveman does not recognize the existence of a critical juncture in the history of emergency powers. For him, emergency powers existed, in one form or another, in all political traditions. The author lumps together, under the label "regimes of **[*1809]** exception," all kinds of measures: suspension of the writ of habeus corpus, state of siege, martial laws, sedition laws, etc. Hence, the seeds of "tyranny" existed in parliamentary England (and the United States), as well as in authoritarian Spain and revolutionary France; it was just a matter of degree. From Europe, Loveman asserts, this authoritarian strain of political thought traveled to Spanish America, where it found a particularly fertile land, due to the prominent role that the military and populist leaders played in a predominantly nondemocratic culture. Therefore, this conclusion is not far from the liberal thinking of Constant: in the absence of strong constitutionalist values, emergency provisions only provide legal foundations for the construction of dictatorial regimes.

We argue against this view that a poorly conceived institutional design was one of the major causes for the abuse of emergency powers in Latin America. As noted above, our assumption is that there was a clear discontinuity between the republican tradition and liberal constitutional thought regarding emergency powers. By initially rejecting the Roman precedent of constitutional emergency rule, the liberal framework was hardly adequate for the new states. The new nations suffered from political dissolution, economic stagnation, and many other problems, making the rule of law problematic from the beginning. Liberal thought, however, had no answers about how to deal with emergencies. In those countries where social and political conditions were generally stable, as in the United States, this omission went unnoticed (or at least this was so until the Civil War era). Spanish America, however, proved to be a litmus test for liberal constitutionalism. The fact that Spanish America did not live up to liberal expectations attests not only to the presence of powerful centrifugal forces in that part of the world, but also to the existence of a flaw in liberal theory.

For years, Spanish Americans refused to include broad emergency provisions in their constitutions, but when the necessity for those provisions was finally accepted, constitution-makers had no institutional model to which they could resort. A void existed in liberal constitutional theory. There was no self-evident answer to the question of how safe mechanisms were to be devised. What seemed to be the obvious answer was also a dangerous expedient: empowering the ordinary magistrates during critical situations. Once broad emergency provisions are included in the constitution, institutional design becomes a key issue. Certain arrangements are more vulnerable to abuse than others. For instance, the model of the Roman dictatorship created a structure of incentives that **[*1810]** discouraged usurpation. The body responsible for determining that an emergency existed was the Senate. But once the declaration was made, the powers of the Senate eclipsed. Senators had no incentives to invent or exaggerate threats, since they did not exercise the extraordinary authority during critical situations. Once an emergency was declared, the consuls were charged with appointing a dictator, usually a prominent citizen of Rome. The key point is that acting consuls could not become dictators, and once a dictator was appointed, consuls also eclipsed from the scene.

A selective incentive operated here. Since consuls wanted their normal powers to be restored as soon as possible, they sought to appoint a person not likely, ex ante, to usurp their authority. Moreover, dictators faced important limitations. The extraordinary magistrate could not change the constitution, nor was he allowed to make new laws. He was appointed to accomplish a specific task, for a limited time; as soon as the situation that gave rise to the emergency

was remedied, dictatorial authority ceased. In any case, a dictator could not exceed the term of six months. Likewise, the ordinary magistrates, while deprived of their power during the emergency, were protected from dictatorial acts. n43

Due to the long hegemony of liberalism, and its rejection of constitutional emergency rule, the complex mechanism of the Roman dictatorship remained unknown to, or was neglected by, nineteenth-century Spanish Americans. Most Latin American constitutions either allowed, or put few restrictions on, the possibility of accumulating in a single agent - the president - the authority to both decide and act on the emergency. This fusion of authority not only paved the way for possible abuses, but also deprived the measures undertaken in emergencies of the impartiality necessary to make them acceptable to different political actors.

While initially helpful during the period of state-building, emergency provisions in Latin America soon became, in many cases, an instrument to prevent the emergence of opposition movements, to restrict the levels of political competition, and to curtail civil liberties. Sometimes, with perfect legal bases, presidents claimed full authority to decide on emergencies and challenged any form of judicial or legislative restriction on the extension of the rights to be suspended, or the temporal limits of the measures adopted. However, when real emergencies occurred, **[*1811]** the president was usually unable to act as a neutral and impartial agent. As chief of state and chief of government, the president was vulnerable to criticism as a partisan actor who attempted to destroy civil liberties and to construct just another form of dictatorship. Under these conditions, antidemocratic forces typically resorted to the support of the military as a "neutral" power that would suspend the legal order, only to make its restoration possible in a more-or-less distant future. n44

III. Carl Schmitt and the theory of commissarial dictatorship

As a response to the long silence of liberal theory about the problem of emergency, Carl Schmitt revived, in the early 1920s, the republican theory of constitutional dictatorship, in order to then apply its logic to the emergency provisions of the then recently created Weimar Constitution. How much did his theory help to create a model of emergency government compatible with a liberal-democratic regime? Let us start by reproducing Article 48 of the Weimar Constitution:

If the public safety and order of the German Reich are seriously disturbed or endangered, the President of the Reich may take the measures necessary for the restoration of the public safety and order, and may if necessary intervene with the armed forces. To this end he may temporarily suspend in whole or in part the fundamental rights established in articles 114 (inviolability of person), 115 (inviolability of domicile), 117 (secrecy of communication), 118 (freedom of opinion and expression thereof), 123 (freedom of assembly), 124 (freedom of association), and 153 (inviolability of property). The President of the Reich must immediately inform the Reichtag of all measures taken in conformity with sections 1 or 2 of this article. The measures are to be revoked upon the demand of the Reichtag... A national law shall prescribe the details. n45

There is a curious parallel between the story just told about the final incorporation of emergency powers in Latin America and the origins of Article 48. Just like emergency provisions in Latin America, this Article was not as much the product of the theoretical and ideological conviction of the liberal and democratic **[*1812]** framers of the Weimar Constitution, as it was a reflective response to the state of social and political upheaval that affected Germany at that time. As Clinton Rossiter points out, only the urgency of the moment could explain why a democratic constitution included an emergency provision whose model was the autocratic institution of the "state of war" of the late German Empire. n46 However, as a hypothesis, we might add another factor to explain the use of this precedent: the absence of other valid models.

The most significant element of Article 48 was the authorization it gave to the president to both declare the emergency and determine the necessary measures to restore public order without specific time limits. As we argued in

the case of similar provisions in Latin America, a fusion between the agent who decides and the agent who acts on the emergency was certainly a dangerous mechanism. Nonetheless, the framers intended to limit its possible abuse by surrounding it with certain controls. From Article 48 we obtain the intention to limit the suspension of constitutional guarantees to certain enumerated rights, the obligation of the president to inform the Reichtag, and the authority of the Reichtag to revoke emergency powers and regulate the use of emergency powers through a federal law. Other limitations emerged from the general logic of the design of the Weimar Constitution.

While independent from the assembly and invested with powers that went beyond those of a constitutional monarch in a parliamentary government, the president of the Reich was not intended to play the role of the executive in a presidentialist government. He was a chief of state, with certain powers of government formation, such as the appointment and dismissal of the chancellor and ministers of the Reich. According to Article 54, however, this appointment was supposed to rely on the support of the majority of the Reichtag, which could always remove any minister by a vote of no confidence. It is in this sense that the countersignature of the chancellor, required for all presidential decisions (including Article 48), could be considered a true limit on the powers of the president.

In sum, unlike the executive in a presidentialist constitution, who appoints and dismisses cabinet ministers by his sole authority, the president of the Reich could be regarded as an independent institution whose main role was that of mediating between government and parliament. He shared with the chancellor the direction of the government, but the survival of the government **[*1813]** itself depended on the confidence of the parliamentary majority. However, one power of the president of the Reich had the potential to change the whole constitutional structure: the power of dissolution. Given the absence of restrictions on the power of the president to dissolve the Reichtag, this instrument could be used as a threat to discipline the legislative majority, or even to bypass legislative controls. For instance, could the power of dissolution be used to prevent parliamentary control over the use of emergency powers?

Given the ambiguity of the constitution itself, it is clear that the actual implementation and interpretation of the powers of the president would be crucial to determine the way in which the emergency provisions of Article 48 could be used. During the early years of the Republic, Article 48 provided an indispensable instrument for the successful resolution of insurrections aimed at destroying the democratically elected government. President Ebert effectively used Article 48 to quell the Kapp Putsch of March, 1920 and Hitler's Beer hall fiasco of November, 1923. No law was enacted at that time to regulate emergency powers, but the whole system worked according to the parliamentary logic intended in the original design of the constitution. In no case was the president openly acting against the will of the parliamentary majority. The only cause for concern was an expansive interpretation and use of Article 48 that included among emergency measures enacting decrees of legislative content in its cases of economic crisis.

According to Carl Schmitt, Article 48 instituted what he called a "commissarial" form of dictatorship, whose remote precedent was to be found in the extraordinary magistracy of the Roman Republic. The essential trait of this institution, in his view, was its pure technical nature. The commissarial dictator acts upon a commission of the constituted powers to adopt the measures that are necessary to restore a normal situation. Schmitt writes that in fulfilling this instrumental function, the dictator cannot claim to represent or incarnate any sovereign power. In this sense, the dictator cannot abrogate the existing constitution, abolish the constituted authorities, or even create or modify laws. n47 Dictatorial measures are factual and provisional in nature, and must expire with the resolution of the crisis.

In this interpretation, commissarial dictatorship was sharply different from the modern notion of a "sovereign" dictatorship that emerged by the late eighteenth century. This dictatorship **[*1814]** "does not merely suspend an existing constitution ... but attempts to create a condition in which it can establish a constitution." n48 In this sense, while "the commissarial dictator acts pursuant to an unconditional commission of action emanated from a pouvoir constitue, the sovereign dictatorship entails an unconditional commission of action that emanated from a pouvoir constituant." n49 In Schmitt's view, the French National Convention of 1793, as well as the communist-type dictatorship, represent the typical fusion of emergency powers and sovereignty that the traditional figure of commissarial dictatorship kept separate.

According to Schmitt, the powers of the president of the Reich should be considered to be limited both by the specificity of the task to be accomplished - the removal of obstacles that make impossible the normal application of the law - and by the essential features of the existing constitutional order. Regarding the first restriction, Schmitt was particularly opposed to the emergent practice (validated by many liberal jurists of his time) of including decrees of legislative content among the measures that could be adopted during an emergency. n50 With respect to the features of the constitution that could not be altered during emergencies, Schmitt maintained in a 1924 lecture that, just as the president could not abrogate the constitution, neither could he suspend nor suppress the "institutional minimum" of constituted authorities presupposed by the constitution. n51 This meant, for instance, that the president could not extend his period in office or change the nature of his office in any way, eliminate the authority of the government (bypassing, say, its countersignature) or affect the immunities of the Reichtag. n52

While it is clear that Schmitt advocated a form of emergency government aimed at the preservation of the existing constitution, some aspects of his interpretation of commissarial dictatorship are particularly problematic. Since his 1921 work, Die Diktatur, n53 Schmitt sustained the position that a commissarial dictatorship entails an "unconditional" commission of action, a type of **[*1815]** authority with no specific juridical limits except those determined by the factual and technical nature of the function. This meant that no limits could be placed on the authority of the president to determine what measures are necessary to restore public order.

According to Schmitt, following the authorization of Article 48, the president could even "cover cities with poison gas if in a concrete case this is the necessary measure to restore order and security." n54 Given this ample interpretation of the powers of the president in emergencies, Schmitt maintained that the enumeration of rights that could be suspended according to the second part of Article 48 was merely illustrative, not exhaustive. Any right, not just those explicitly listed in the provision, could be suspended. In his 1924 lecture, he opposed the convenience of passing a federal law regulating the powers of the president during emergencies, n55 which was consistent with the idea that emergency rule has no legal limits.

Schmitt was right in pointing out that Article 48 itself was contradictory when it declared that the president could adopt all necessary measures, and at the same time tried to limit these measures to the suspension of specific rights. However, the interpretation that the president was invested with an "unconditional" commission of action did nothing to solve that contradiction in a way favorable to the principles of a constitutional state. By listing the rights that could be suspended, Article 48 created the possibility of challenging emergency measures when they affected rights not explicitly enumerated. In such a situation, it would be up to the president to demonstrate before the courts or the parliament what circumstances necessitated suspending those rights.

Schmitt's interpretation of constitutional dictatorship was highly selective. He retained an idea from the Roman type of dictatorship - namely, that while the dictator is in power the most essential constitutional guarantees can be suspended. This is historically correct. As Franz Neumann points out, within the limits of his commission, the Roman dictator concentrated enormous power: the tribunician power of intercession did not apply against his acts, nor could a citizen condemned in a criminal trial invoke the normal right of appeal against him. n56 The problem, however, is that this is precisely one aspect of the Roman **[*1816]** Dictatorship that cannot be applied to the conditions of a democratic constitutional state, where the rights of the people must be protected under all circumstances against arbitrary acts.

It appears ironic that Schmitt neglected other central aspects of the Roman institution, like the logic of mutual checks that surrounded emergency government according to traditional republican theory. Article 48 reduced the intervention of Parliament to an ex post control that left unchecked the authority of the president to decide whether an emergency existed and what type of measures should be adopted in the situation. One way to solve this deficiency, if only partially, was to admit that parliamentary regulation of emergency powers was necessary to prevent the abuse of Article 48. However, Schmitt rejected this possibility by arguing that a parliamentary law regulating presidential emergency powers was against the rationale of Article 48.

As he writes in Political Theology: "If measures undertaken in an exception could be circumscribed by mutual

control, by imposing time limit, or finally, as in the liberal constitutional procedure governing a state of siege, by enumerating extraordinary powers, the question of sovereignty would then be considered less significant but would certainly not be eliminated." n57 Curiously enough, Schmitt seems to abandon the separation between sovereign and dictatorial authority that, in his own view, was so essential to conceptualizing commissarial dictatorship. n58 This is a very risky step to take, particularly when the dictator, by virtue of his mode of election, can claim to have a popular mandate to defend a democratic constitution even beyond its formal rules. It is to this particular issue within Schmitt's theory that we would now like to turn.

IV. The President as a Defender of the Constitution

Without fully abandoning the notion of commissarial dictatorship, Schmitt analyzed the problem of emergency powers **[*1817]** during the last years of the Weimar Republic from a different perspective. The central theme now was not so much the exact interpretation of the logic of Article 48, but the role played by the president of the Reich within the structure of the Weimar Constitution. We must first consider the political background against which this debate took place.

After a period of relative ease for the Republic, the late 1920s inaugurated a process of growing polarization between parties on the extreme left and the extreme right, a severe fragmentation of the party system, encouraged by a strictly proportional electoral system, and a deep economic crisis. It was also the beginning of an informal constitutional change. As a response to the inability of Parliament to support stable governing coalitions and the presence of antisystem parties exclusively interested in joining "negative" majorities, President Hindenburg and his aides decided to transform the parliamentary constitution into a fully presidentialist system. The plan was to appoint governments based on the exclusive confidence of the president, to impose legislation by emergency decrees in the absence of parliamentary support, and to use the power of dissolution in case Parliament used its right to revoke emergency measures. n59

This transformation was put into effect with the appointment of Chancellor Bruning, without parliamentary support, on March 30, 1930. In the following months, a financial program rejected by Parliament was enacted by emergency decree, and, when the Reichstag insisted that the measures be revoked, President Hindenburg proceeded to dissolve the Parliament. n60 Since then, and until its final demise, legislation by presidential decree became the standard form of law making in the Weimar Republic. However, the Weimar Constitution was working not merely as a presidentialist, but as a "hyperpresidentialist," system in this new dynamic. While presidentialism is predicated upon the mutual independence and balance between the president and the legislative assembly, the use of the power of dissolution to rule by emergency decrees transformed the president of the Reich into the only active legislative power of the constitution.

It is in the context of this constitutional change that Schmitt's opinions (at this time very influential in presidential circles) are relevant to understanding the dilemmas of emergency powers in systems where the authority designated to decide and act on the emergency is able to claim a monopoly of power. While still maintaining that a commissarial dictator should enact only **[*1818]** provisional measures and not permanent laws, by the 1930s, Schmitt endorsed the use of presidential legislative decrees as an entrenched practice that became part of the material constitution. n61 At the same time, Schmitt advocated the interpretation of the role of the president of the Reich as the sole "defender" of the constitution.

According to his famous work of 1931, The Guardian of the Constitution, n62 the preservation of any constitution requires the existence of a neutral power able to realize the political unity of the state in cases where this unity is in danger of dissolution. In the specific case of a democratic constitution, he thought that the role of the defender is to preserve the unitary will of the people in the face of partial and antagonistic interests that attempt to control the state. Who could play this role under the social and political conditions of Germany in the 1930s? In Schmitt's view, it would not be the Supreme Court because, although it represents a neutral instance, its neutrality consists precisely of its dependence on the law and its inability to take concrete political decisions. Neither could this role be performed by the parliament. Despite its capacity to adopt political decisions and contribute to the process of state will formation, at that

time it was fragmented by a plurality of antagonistic party interests. n63

Following this analysis, Schmitt concludes that only the president of the Reich has the attributes of independence and neutrality necessary to qualify as a true defender of the constitution. Schmitt argues that this position is guaranteed to the president by the distribution of powers established in the constitution. In the first place, the permanence of the president in office is independent from parliamentary support. He remains in power for a fixed term and, unlike the chancellor and the cabinet ministers, the president cannot be removed by Parliament. In addition, the president has a set of powers, such as the powers of dissolution and referendum and emergency powers, that make him an authority with the capacity to adopt effective decisions in defense of the constitution. From Schmitt's perspective, a final and crucial point is that the president can claim independence and neutrality from the particularistic party interests represented in the assembly, because of his direct election by the German people. n64

It is interesting to note that Schmitt is not arguing that the president is a neutral third party located above other institutions. **[*1819]** This, in his view, would transform him into a sovereign of the state, not a defender of the constitution. n65 For Schmitt, the president is a pouvoir neutre located at the same level as the other governmental powers. In this role, the permanent function of the president is that of a mediator among the other branches of government, and only occasionally, in cases of necessity, does he play a more active role. According to Schmitt, this equilibrium is necessary because the president "should not compete with the other powers by expanding his own power." n66

This interpretation seems consistent with the original design of checks and balances intended by the framers of the Weimar Constitution: a government subject to parliamentary responsibility and a presidential office with sufficient independence from Parliament, playing a stabilizing role in cases of conflicts between government and Parliament. It is also consistent with Schmitt's previous views about the role of the president as a commissarial, not a sovereign, dictator. However, the problem is that this interpretation no longer applied to the actual practice of the Weimar Constitution. By the 1930s the president of the Reich was not simply a chief of state, acting as a pouvoir neutre et intermediarie between Parliament and government, but was a chief of government claiming the right to rule without the support or collaboration of the legislative assembly. At the same time, with the regular use of Article 48 to legislate by emergency decrees, one of the few elements that remained to interpret the role of the president as a commissarial dictator disappeared.

From the functional perspective of the Weimar Constitution, Kelsen had a point when he argued that Schmitt's theory of the president as a neutral third party was highly fictitious. n67 As part of the government, the president was acting as a judge in his own cause when deciding controversies between Parliament and the government. n68 Moreover, the partisan position of the president is not changed by the fact that he is elected by the whole people. In a society as deeply divided by antagonistic interests as Germany was at the time, the president, no less than Parliament, was subject to the pressure and influence of different political forces. Only the fiction that the German people formed a "homogenous and indivisible unit" could overcome this obstacle. n69

[*1820] One could argue that, in the difficult situation of the 1930s, Schmitt was trying to adhere as much as possible to the original meaning of the Weimar Constitution. This goal would be consistent with Schmitt's concept of the constitution as a decision of the constituent power about the form and manner of the political unity. n70 From this perspective, the defense of the Weimar Constitution could mean the preservation of the original decision of the German people in favor of a republic where Parliament and the president would act as representatives of the popular will in performing the legislative and governmental functions. However, Schmitt's own interpretation contradicted this understanding of the Weimar Constitution.

At one level, Schmitt's argument in support of the president as the sole defender of the constitution is based on the factual reality of the parliament's inability to act as the center of national will formation. In principle, he does not deny the right of the parliament to control the use of emergency powers by the president. Schmitt argued that, in a context of extreme fragmentation and polarization, the incapacity of the parliament to act should not impede the president from

taking the measures necessary to resolve a crisis situation. n71 This is a reasonable and acceptable position.

At another level, however, Schmitt's preference for the president as the sole defender of the constitution is based on normative grounds. In his view, it is the plebiscitary form of legitimacy that the president incarnates, not parliamentary legality, that constitutes the core of the democratic content of the Weimar Constitution. Accordingly, the intervention of the president in emergencies has a privileged position compared to other powers. As he argues:

The Reich president is elected by the German people as a whole, and his political powers vis-a-vis the legislature (in particular, [his power] to dissolve the Reichtag and call for a referendum) are, by nature, an "appeal to the people." By placing the Reich president at the center of a system of plebiscitarian powers, neutral with respect to party politics, the Reich constitution, drawing on democratic principles, seeks to create a counterbalance to the pluralism of social and economic constellations of power and to preserve the unity of the people as a political whole. n72

This kind of foundation for the role of the president could **[*1821]** easily destroy the parliamentary elements of the constitution. If the ultimate justification for the president to act alone in emergencies is his position as the true representative of the popular will, then he can permanently suspend parliamentary controls by using the power of dissolution and referendum as an "appeal to the people" to legislate over the parliament. We do not think that Schmitt really intended to justify the emergence of a sovereign dictatorship entitled to abrogate the entire constitutional order on a permanent basis. But neither would the idea that the president of the Reich could use his plebiscitary legitimacy to act as the sole defender of the constitution prevent such an occurrence. At any rate, Schmitt's interpretation favored the construction of a hyperpresidentialist constitution that only aggravated the original defective design of emergency powers in Article 48.

Conclusion

Schmitt's critique about the insufficient attention of liberal theory to the problem of emergency is a sound one. As the early experience of Latin America may show, liberal constitutions with no (or very restricted) provisions for emergencies were ill equipped to survive in a context of an extreme crisis. In the end, the liberal rejection of emergency powers did not prevent the inclusion of emergency provisions under the pressure of the circumstances. But what perhaps might have been a useful institutional model - the Roman dictatorship - was cloaked by liberal theory. In the context of a presidentialist system, liberal constitutions in Latin America delegated to the executive discretionary powers to both decide and act on emergencies, with so few restrictions that dictatorships could easily become the norm, rather than the exception.

However, Schmitt's own contribution to the problem of emergency powers does not solve the deficiencies of liberal theory. The Weimar Constitution provided the president of the Republic with the initiative to declare and act on emergencies on his own authority, restricted only by the possibility of an ex post control of a Parliament on whose confidence the government depended. Given this design, Schmitt's interpretations of constitutional dictatorship as a legally unrestrained commission of action and of the role of the president as the sole defender of the constitution in emergency situations, could only aggravate the risks of abuse that were already present in Article 48. While the idea of an "unconditional" commission of action restricted the possible regulation of emergencies by the legislative assembly, the **[*1822]** construction of the authority of the president as a plebiscitary dictator validated the transformation of an originally parliamentary constitution into a hyperpresidentialist one.

As in other cases of past and present democratic breakdown, it is likely that no institutional design could have prevented the final demise of German democracy in the 1930s. In the context of an extreme polarization and fragmentation of the party system, the solution of emergencies by means of collaboration and mutual control between the president and the Parliament was, in itself, too difficult to accomplish. However, to argue in favor of the exclusionary rule of the president in those circumstances does not seem to be an adequate solution to keep emergency

rule within constitutional limits.

There are some lessons to be learned from both the Latin American experience and the downfall of the Weimar Republic. It is clear that the principle of "external authorization" of the Roman dictatorship must govern the exercise of emergency powers. With few exceptions, Latin American presidents usually have been invested with the authority to declare emergencies, and suspend constitutional guarantees with no temporal limits. Similarly, under the Weimar Constitution, the president had the authority to both declare the emergency and determine the extension of emergency measures.

Constitutional rules, of course, only create sets of opportunities and constraints. They do not determine political behavior. However, under conditions of political polarization, rules that make possible the concentration of power in one actor or institution are likely to have a deleterious effect on democratic stability. The Latin American and Weimar experiences indicate that a popularly elected president authorized to act alone in emergencies can always use his "appeal to the people" in order to marginalize political opposition and subdue other institutions.

We can also conclude that ex post checks given to legislatures are not enough to prevent the abuse of emergency powers, particularly when the executive, as in a presidentialist system, is independent from the legislative assembly. In this case, the assembly must not only be the authorizing body, but must also have unrestricted authority to revoke emergency measures. The institution that is naturally positioned to intervene ex post must be the judiciary, with authority to determine the extent to which the suspension of rights was justifiable in a concrete case. The judiciary, as Schmitt pointed out, might not have authority to decide on emergencies. Nevertheless, it must be in charge of protecting individual and collective rights when they have been **[*1823]** arbitrarily restricted beyond the demands of the situation. Finally, as the Weimar case makes clear, emergency powers should not encompass the authority to rule by decree. In this respect, Schmitt's position about the factual and provisional nature of emergency measures is correct: constitutional dictators should have no authority to create general and permanent rules. At the same time, the authority empowered by emergency provisions should never be authorized to persecute ordinary magistrates or to suspend the regular functioning of constituted powers.

Some of these lessons have been learned by contemporary constitution-makers. The Bonn Constitution of 1949 moved toward a more clearly parliamentary form of government, in which emergency powers could only be exercised by the Chancellor upon previous consultation or authorization by Parliament. The French constitution of 1958, the one that most closely approximates the mixture of presidentialism and parliamentarism of the Weimar Constitution, has also looked backward to learn from the fate of Article 48. While the president of the republic is entitled to declare emergencies, subject to previous consultation with government and Parliament, he is explicitly prevented from exercising the right of dissolution during emergencies.

It is surprising, however, that after almost two centuries of experience with emergency rule, almost no constitution in Latin America has attempted a regulation of emergency powers less vulnerable to abuse by the executive. To the best of our knowledge, the constitution of Costa Rica is the only one in the region to provide the legislative assembly with exclusive authority to suspend individual rights during states of exception. Moreover, since the last decade, several constitutions in Latin America incorporated the formal power of the president to legislate by decree in situations of economic crisis. It seems clear that under this institutional framework the memories of Weimar will remain alive in this part of the world.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityPolitical QuestionsGeneral OverviewConstitutional LawCongressional Duties & PowersGeneral OverviewGovernmentsFederal GovernmentExecutive Offices

FOOTNOTES:

n1. Baron de Montesquieu, The Spirit of the Laws 199 (Thomas Nugent trans., 1975).

n2. Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty 14 (George Schwab trans., MIT Press 1985) (1922).

n3. John Locke, Two Treatises of Government 393 (Peter Lasslett ed., Cambridge Univ. Press 2d ed. 1993) (1690). For the interpretation of Locke's doctrine of the prerogative as an original theory of the exception that stands between absolutist decisionism and liberal rationalism, see Pasquale Pasquino, Locke on King's Prerogative, in 2 Political Theory 198-208 (1998).

n4. For Machiavelli's and Rousseau's views on dictatorship, see Niccolo Machiavelli, Discourses on Livy 94 (Julia Conaway Bondanella & Peter Bondanella trans., Oxford Univ. Press 1997) (1519); Jean Jacques Rousseau, The Social Contract 110 (Hafner Press 1947) (1762).

n5. Charles de Secondat, Baron de la Brede et de Montesquieu, Considerations sur les causes de la grandeur des Romaines et leur decadence (Garnier 1954) (1734).

n6. Montesquieu, supra note 1, at 151-62.

n7. Id. at 199.

n8. Guy Howard Dodge, Benjamin Constant's Philosophy of Liberalism: A Study in Politics and Religion 103 (1980).

n9. Id. at 101-02 (quoting Benjamin Constant, De la suspension et de la violation des constitutions, in Reflexions sur les constitutions, la distribution des pouvoirs et les garanties dans une monarchie constitutionelle 372-80 (1814)).

n10. Id. at 102 (quoting Benjamin Constant, Coups d'etat, in Le Temps (1830)).

n11. Benjamin Constant, The Spirit of Conquest and Usurpation and Their Relation to European Civilization, in Political Writings 133 (Biancamaria Fontana ed. & trans., 1993).

n12. Id.

n13. Id. Constant elaborates:

During crises of this nature, the culprits who are punished are always a small number. Others remain silent, conceal themselves, and wait. They take advantage of the indignation that violence has aroused in men's spirits. They take advantage of the consternation that the appearance of injustice arouses in the minds of men of scruples. Power, by emancipating itself from the laws, has lost its distinctive character and its happy pre-eminence. When the factions attack it, with weapons like its own, the mass of the citizens may be divided, since it seems to them that they only have a choice between two factions.

We will be challenged by citing the interest of the state, the danger of tardy procedures, public safety. Have we not heard these expressions often enough under the most execrable of regimes? Will they never be exhausted? If you admit these imposing pretexts, these specious words, every party will identify the interest of the state with the destruction of its enemies, see the dangers of delay in an hour's work of inquiry, and public safety in a condemnation pronounced without judgment and without proofs.

Id. at 136.

n14. Id. at 111.

n15. Alexis de Tocqueville, Democracy in America 195 (George Lawrence trans., Harper & Row 1969) (1840) ("In the immense complication of human laws it sometimes comes about that extreme freedom corrects the abuse of freedom, and extreme democracy forestalls the dangers of democracy."). Stephen Holmes has explored this assertion. Stephen Holmes, Tocqueville and Democracy (unpublished manuscript) (on file at the University of Chicago).

n16. Constant, supra note 11, at 136. The word "it" refers to the government that has deviated from the path of regularity.

n17. Dodge, supra note 8, at 101 (quoting Benjamin Constant, De la liberte des brochures, des pamphlets et des journaux considerees sous le rapport de l* interet du gouvernement 471 (1814)). But, in general, Constant asserts:

Presented initially as a last resort, to be used only in infinitely rare circumstances, arbitrary power becomes the solution to all problems and an everyday expedient. At that point, not only does the number of the enemies of authority increase along with that of its victims, but its distrust also grows out of all proportion to the number of its enemies.

Constant, supra note 11, at 135.

n18. See generally Jose Antonio Aguilar Rivera, El manto liberal: emergencias y constituciones, in 2 Politica y Gobierno 327 (1996).

n19. The experience of Abraham Lincoln during the Civil War is very illustrative. Facing the option of observing a Constitution that only allowed for the suspension of habeas corpus or using the measures that he considered necessary to finish the war, Lincoln took the second option. Had the United States been affected by

civil wars as many times as were Latin American countries, the American Constitution might not have survived for a long time.

n20. A presidentialist system is defined by three institutional features: (1) the election of the chief of government (or president) by popular vote, either directly or by an electoral college; (2) the permanence of the head of the government in office for a fixed term; and (3) the power of the head of the government to appoint and dismiss the cabinet without requiring support from the legislative majority. See Giovani Sartori, Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes 81 (1994).

n21. For a review of emergency provisions in Latin America, see generally Brian Loveman, The Constitution of Tyranny: Regimes of Exception in Spanish America (1993), and Diego Valades, La Dictadura Constitucional en America Latina (1974).

n22. See Loveman, supra note 21, at 333-35.

n23. Argentine Const. art 23 (1853).

n24. See generally Guillermo M. Molinelli, Presidentes y Congresos en Argentina: Mitos y Realidades (1991).

n25. See generally Gabriel Negretto, El Problema de la Emergencia en el Sistema Constitucional (1994).

n26. See generally Jose Antonio Aguilar Rivera, The Liberal Cloak: Emergency Powers in Nineteenth-century Mexico (1996) (Ph.D. Dissertation, University of Chicago).

n27. Much of the institution-building performed in the 1920s and the 1930s was conducted under the authority of Article 29. The misuse was so gross that, in the 1940s, the Supreme Court felt compelled to amend the wording of such constitutional Article to prevent the use of emergency powers for purposes other than facing serious political crises. For a discussion on emergency powers in Latin America and Mexico, see Ignacio Burgoa, Las garantias individuales 209-11 (1988); Felipe Tena Ramirez, Derecho constitucional mexicano 226-28 (1987); La suspension de garantias y las facultades extraordinarias en el derecho mexicano, in 7 Revista de la Escuela Nacional de Jurisprudencia. Cursos de Invierno de la Escuela Nacional de Jurisprudencia. Curso Colectivo sobre Suspension de Garantias y Legislacion de Emergencia 117-23 (1945).

n28. Colombia Const. art 27.

n29. Id. art. 28.

n30. Id. art. 76, 10.

n31. Id. art. 121.

n32. Id.

n33. See Ronald P. Archer & Marc W. Chernick, El Presidente frente a las instituciones nacionales, in La Democracia en Blanco y Negro: Colombia en los A<tild n>os Ochenta (1988).

n34. Loveman, supra note 21, at 173-75.

n35. Id. at 6.

n36. Id.

n37. Id. at 7.

n38. Id. In practice, Loveman claims:

No matter what constitutional limitations were put on government authority during regimes of exception, legislatures and courts found it extremely difficult to overturn decisions made for reasons of state while regimes of exception prevailed and even more difficult to constrain executive and military actions while the "emergency" persisted or was declared to exist.

Id. at 392.

n39. Id. at 9.

n40. Id. at 393.

n41. Id.

n42. Id. at 395. Loveman writes: "Once provisions for constitutional regimes of exception exist, the difficulties in limiting government action under such provisions makes [sic] allocating authority to determine that an "emergency' exists and the authority to implement, revoke, and terminate a regime of exception a critical constitutional design problem." Id. at 395-96.

n43. See Clinton Rossiter, Constitutional Dictatorship 15-28 (1948).

n44. As Juan Linz points out, one of the characteristics of presidentialist systems, as opposed to parliamentary ones, is that they lack a moderating power to act in cases of emergency. This is one of the reasons why the military, sometimes legitimated by constitutional provisions, intervenes in cases of crisis claiming to represent the role of a neutral and moderating power. Juan Linz & Alfred Stepan, The Breakdown of Democratic Regimes: Crisis, Breakdown and Reequilibration 74 (1978).

n45. German Const. art. 48 (1919).

n46. Rossiter, supra note 43, at 33.

n47. See Carl Schmitt, La Dictadura 37 (1985).

n48. Id. at 182-83.

n49. Id. at 193.

n50. For a discussion about the legislative powers of the president during emergencies, see Frederick Mundell Watkins, The Failure of Constitutional Emergency Powers Under the German Republic 19 (1939).

n51. See Joseph W. Bendersky, Carl Schmitt: Theorist of the Reich 76 (1983).

n52. See Stanley Paulson, Aspects of the Schmitt-Kelsen Dispute on the Guardian of the Constitution (Sept. 1995) (paper delivered at the 1995 Chicago APSA meeting) (on file with author).

n53. Carl Schmitt, Die Diktatur: Von den Anf<um a>ngen des modernen Souveranit<um a>tsgedankens bis zum proletarischen Klassenkampf XV-XVI, at 147-48 (6th ed. 1994).

n54. Schmitt, supra note 47, at 258.

n55. See Bendersky, supra note 51, at 75.

n56. Franz Neumann, Notes on the Theory of Dictatorship, in The Democratic and The Authoritarian State: Essays in Political and Legal Theory 233-34 (1957).

n57. Schmitt, supra note 2, at 12.

n58. According to John McComick, this is not so much a contradiction as a fundamental shift in the thought of Carl Schmitt from Die Diktatur, written in 1921, to Politische Theologie, written in 1922. In the latter work, according to McCormick, Schmitt would abandon the distinction between commissarial and sovereign dictatorship. John McComick, The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers, 1 Canadian J.L. & Jurisprudence 163 (1997). However, we should note that after this work, particularly in the 1924 lecture on emergency powers, and even later, Schmitt was still attached to the distinction. In our view, the source of this seeming contradiction resides in the fact that, from the very beginning, Schmitt's interpretation of commissarial dictatorship as an unlimited commission of action made very difficult the maintenance of a sharp distinction between dictatorship and sovereignty.

n59. See Bendersky, supra note 51, at 117.

n60. See Paulson, supra note 52, at 34.

n61. Carl Schmitt, Legalidad y Legitimidad 87-88 (1994).

n62. Carl Schmitt, H<um u>ter der Verfassung: T<um u>bingen (1931).

n63. See Carl Schmitt, La Defensa de la Constitucion 125-211 (1981).

n64. Id. at 250-51.

n65. Id. at 215.

n66. Id. at 220.

n67. Hans Kelsen, <qmarkx>Quien debe ser el defensor de la constitucion? 53-54 (1995).

n68. See id. at 54.

n69. Id. at 59-60.

n70. Carl Schmitt, Teoria de la Constitucion 45-46 (1982).

n71. Schmitt, supra note 63, at 210.

n72. Id. at 250.