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Economic Emergency and the Rule of Law

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ECONOMIC EMERGENCY AND THE RULE OF LAW

Bernadette Meyler

INTRODUCTION

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

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

While the economic development and state of emergency contexts for rule of law discussions appear quite distinct, they do converge in at least one situation, that of economic emergency. Paradigmatic cases of economic emergency include the Great Depression, the Argentine fiscal crisis of 2001, and the East Asian currency crisis of the late 1990s. Arguably more marginal instances might comprehend the economic consequences of Hurricane Katrina,

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[1] Both conceptions of the rule of law appeared in this Symposium. *Compare* Gillian Hadfield, *Don't Forget the Lawyers: The Role of Lawyers in Promoting the Rule of Law in Emerging Market Democracies*, 4 AM. LAW & ECON. ASS'N ANNUAL MTG. 1 (2006), *with* Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception & the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004). For further treatments of their contours and genealogies, see *infra* notes 58–59.

the economic dimensions of a potential bird flu pandemic, or the threatened financial chaos of the Y2K computer crisis. Either the economic development or emergency-oriented approach to the rule of law could lead to the conclusion that none of these situations justify abrogation of core rule of law values—but this, of course, puts aside the question of which values *do* lie at the center of the rule of law.

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

Although recent scholarship has focused on the effect of states of emergency within various constitutional orders, little attention has been devoted to differentiating the sources of emergency and the kinds of rights that emergencies affect. While commentators pay lip service to the idea that emergencies come in three varieties—political, economic, and natural—most devote their attention solely to the first of these categories, focusing upon the situations of war and other violent conflict.[3] Such neglect obscures certain important distinctions between the

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[2] For a sweeping history of economic theory from Smith to Keynes, and the various schools of economic thought that developed over that period with respect to state management of the economy, see generally MARK BLAUG, ECONOMIC THEORY IN RETROSPECT (5th ed. 1997).

[3] For these categories, see Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1025 n.44 ("Emergencies have been traditionally classified into three major categories: grave political crises (including international

types of infringements upon constitutional rights that emergencies may spawn. As a result, those who have recently begun to discuss measures abridging economic rights during emergency have insisted that such encroachments should be considered just as anathema as—or even more anathema than—steps restricting other kinds of rights.[4] Two contrasting solutions emerge out of this line of scholarship—whereas one insists that economic and other rights should be preserved regardless of the surrounding circumstances, the other maintains that infringements upon personal and political freedoms should instead be considered just as permissible as those upon economic rights and that such infringements should simply be compensable after the fact.[5]

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

To the extent that fixed resources might be available during a particular economic emergency, insisting upon an absolutist interpretation of a constitutional right to property or freedom of contract could result in the utter collapse of the economic and political system. Nor

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armed conflicts, terrorist attacks, riots, and rebellions), economic crises such as the Great Depression, and natural disasters and force majeure events.").

[4] *See infra* note 32 and accompanying text.

[5] For those who take the first position, see *infra* note 32 and accompanying text. For those who adopt the second stance, see Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755, 792 (2004) (suggesting that certain constitutional rights, including those of habeas corpus, would better be protected by liability than property rules in cases of emergency and basing this model in the one currently employed under the Takings Clause).

[6] *See* Erwin Chemerinsky, *Wartime Security and Constitutional Liberty: Detainees*, 68 ALB. L. REV. 1119, 1126 (2005) (quoting Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, R., dissenting)).

are courts necessarily more capable of evaluating the extent of a threat posed by potential terrorists than that presented by a posited economic crisis.[7] In both instances, the possibilities of harm arising out of particular kinds of emergencies may be quite substantial, and, at the same time, the validity of the government's claims that individual rights must be curtailed in order to preserve the polity may not be readily ascertainable by the courts.

Rather than attempting to distinguish the situations by appealing to the greater necessity, or lack thereof, of governmental action in one sphere or the other, this Article insists that a difference may exist between infringing during emergency upon economic rights, on the one hand, and liberty or political rights, on the other. Whether these areas can, in fact, be separated depends ultimately upon the kind of democracy envisioned as undergirding the constitutional system.[8] In the United States context, many agree, following John Hart Ely's influential argument in *Democracy and Distrust*, that, at a minimum, judicial review under the Constitution should protect access to participation in the political process.[9] A necessary entailment of this minimum standard for our constitutional democracy is that rights like those of habeas corpus,

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[7] In both cases, expert information may be required. This problem has surfaced in relation to the War on Terror, during the conduct of which the Bush Administration has often alleged that it must act on the basis of intelligence data that it cannot risk making public by producing it in court and which the judiciary is therefore not placed in a position to evaluate. *See* N. Jersey Media Group v. Ashcroft, 308 F.3d 198, 227 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (U.S. May 27, 2003) (discussing the "mosaic theory," by which terrorists might put together certain pieces of information that appear innocuous individually, and that judges would not be able to differentiate from other, less sensitive, materials). Various scholars have also noted that courts may not be the governmental institutions best suited to making judgments about economic strategies. *See* Wayne McCormack, *Property and Liberty—Institutional Competence and the Functions of Rights*, 51 WASH. & LEE L. REV. 1, 55–56 (1994).

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

[9] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

freedom of speech and assembly, and voting should not be suspended or otherwise abridged during emergency beyond what the text of the Constitution permits, at the risk of the failure of our democratic system.[10] No similar degree of significance attaches to economic rights within our constitutional order, or so this Article contends.

The United States Constitution itself and adjudication under it provide further support for distinguishing among the categories of rights during emergency. One of the primary passages protecting economic rights, the Takings Clause, specifies "nor shall private property be taken for public use without just compensation," a phrasing that envisions the possibility that the government *will* deprive individuals of their property, as long as it provides "just compensation."[11] This is consistent with the Court's interpretation of the Contract Clause in the leading case in that area, *Home Building & Loan Association v. Blaisdell*, which allows for delay in the realization of economic rights.[12] The manner in which the Court has construed the Contract Clause, as well as the history behind that provision, suggests a notion of economic interdependence that should permit modification of property rights in service of the health of the overall economic order.

This flexible notion of the contours of economic rights during emergency does, of course, affect the rule of law, at least as this is conceived by the economic development literature, which

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[10] This is not to say that such rights should be construed as absolutely protecting individual liberty. On the contrary, it is commonly acknowledged that, in the context of the First Amendment, time, place, and manner restrictions can be placed upon speech. *See* Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1356-60 (2006). Likewise, the writ of habeas corpus would not be available if Congress suspended it under the right circumstances. U.S. CONST. art I, § 9, cl. 2. *See also infra* note 41 and accompanying text.

[11] U.S. CONST. amend. V.

[12] 290 U.S. 398 (1933); *see also infra* notes 110–114 and accompanying text.

draws heavily upon Friedrich Hayek's classic text *The Concept of Liberty*.[13] Nor does it represent the only alternative—the Argentine Supreme Court, for instance, took a rather different tack in addressing the measures that then-President Fernando de la Rua adopted in response to the fiscal crisis of 2001, invalidating measures like the restriction on removing more than $250 per week from savings accounts.[14]

This Article simply contends that a particular vision of democracy—one that has historically been associated with our constitutional system—supports a more flexible interpretation of the effects of emergency upon economic than personal liberty and political participation rights. For those rights exercised against the backdrop of economic regulation, the constitution may remain strict during emergency, continuing to tie Ulysses to his mast, without refusing to accommodate governmental interests in economic stability; for other kinds of personal liberty or political participation claims, such accommodation remains more problematic, and more likely to result in deformations of the protections that the Constitution provides.

Part II delineates the varieties of emergency and suggests several means of distinguishing among political, natural, and economic kinds. Part III then examines the potential intersection of the two dominant strands of rule of law scholarship in the context of economic emergency, a context that illuminates how analysis under these disparate rule of law strains may reach divergent results. The subject of economic emergency has heretofore remained relatively unexamined by either branch of rule of law work, because the economic development line does not focus on emergencies at all, and the emergency line largely avoids treating economic emergencies. Part IV argues that both particular version of democratic theory and the history

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[13] F.A. HAYEK, THE CONSTITUTION OF LIBERTY (1960); *see also infra* notes 70–77 and accompanying text.

[14] ANGEL R. OQUENDO, LATIN AMERICAN LAW 169 (2006).

and interpretation of the economic rights clauses of the United States Constitution support differentiating between infringements of economic and other rights during emergency, regardless of what occasioned the emergency situation. Reference will be made throughout to the Argentine Constitution and the Argentine Supreme Court's interpretations of it as illustrating a constitutional system that rests on somewhat distinct norms.

II. THE VARIETIES OF EMERGENCY

In its classic contours, an emergency calls for rapid and decisive action by the executive branch, including even the act of designating the situation an emergency or a "state of exception."[15] According to German jurist Carl Schmitt, sometimes dubbed the legal theorist of the Third Reich, "Sovereign is he who decides on the exception."[16] Justice Stone, concurring in *Duncan v. Kahanamoku*, a case invalidating two convictions by military tribunal in Hawaii, similarly explained that "[t]he Executive has broad discretion in determining when the public emergency is such as to give rise to the necessity of martial law, and in adapting it to the need."[17] According to this conventional account, the rest of government will find itself stymied by the emergency, either because the situation requires a rapid response that demands circumventing deliberative democratic processes or because the emergency has already undermined the operations of the other branches themselves: "[There is a] power which resides in the executive branch of the government to preserve order and insure the public safety in times of emergency,

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[15] *See infra* notes 15 and 16 and accompanying text.
[16] CARL SCHMITT, POLITICAL THEOLOGY 5 (George Schwab trans., 1985); *see generally* JOSEPH BENDERESKY, CARL SCHMITT: THEORIST FOR THE REICH (1983).
[17] 327 U.S. 304, 336 (1946) (Stone, J., concurring).

when other branches of the government are unable to function, or their functioning would itself threaten the public safety."[18]

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

Emergencies have been rendered notorious not only by the experience of the Third Reich and Hitler's ascent to power on the basis of Article 48 of the Weimar Constitution,[20] but also by

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[18] *Id.* at 335 (Stone, J., concurring). For a discussion of the temporal rationale for suspending deliberative democracy during emergency and the flaws in this reasoning, see generally ELAINE SCARRY, WHO DEFENDED THE COUNTRY? A NEW DEMOCRACY FORUM ON AUTHORITARIAN VERSUS DEMOCRATIC APPROACHES TO NATIONAL DEFENSE ON 9/11 (2003).

[19] CARL FRIEDRICH, CONSTITUTIONAL REASON OF STATE: THE SURVIVAL OF THE CONSTITUTIONAL ORDER 5 (1957). Although initially derived from Italian political theory, this concept also found expression in John Locke's discussion of prerogative in the *Second Treatise of Government*. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 374–75 (Peter Laslett ed., 1988).

[20] Article 48 of the Weimar Constitution, its provision for emergency, delegated powers—and military capacity—to the President when "the public safety and order of the German *Reich* is seriously disturbed or endangered," and also permitted the suspension of civil liberties through presidential fiat. DAVID DYZENHAUS, *supra* note **Error! Bookmark not defined.**Legality AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR 33 (1997). In fact, when Article 48 was implemented in 1932, it signaled the commencement of Hitler's rise to power. Field Marshal von Hindenburg, the *Reichspräsident*, issued a decree allowing the Chancellor of the Reich, Franz von Papen, to be the Commissioner for Prussia, thus effectively suppressing the SPD, the main socialist party and the principal vehicle of resistance to the Nazis. Instead of resorting to violence, the Prussian government "chose to challenge the constitutional validity of the decree before the *Staatsgerichtshof*—the court set up by the Weimar Constitution to resolve constitutional disputes between the Federal Government and the *Länder*. The court by and large upheld the decree in late October, by which time the SPD was no longer an effective force." *Id.* at 3. *See also infra* notes 63-65.

the deleterious consequences in India and South Africa of rendering emergencies semi-permanent.[21] Based upon these infamous histories, recent constitutional efforts in Eastern Europe, Latin America, and elsewhere, have attempted to curb abuses by explicitly granting the legislature the power to declare or ratify an emergency or limit its duration.[22] Following the events of September 11th, 2001 in the United States—and the rapid legislative response represented by the USA PATRIOT Act,[23]—many have suggested explicitly permitting an emergency constitutionalism but simultaneously limiting the scope of executive action during emergency in similar ways. Along these lines, Bruce Ackerman has proposed a "supermajoritarian escalator," under which the President would be given "the power to act unilaterally only for the briefest period, long enough for the legislature to convene and consider the matter, but no longer," and subsequent action would be approved only by increasing congressional supermajorities.[24]

Despite these recent attempts to bring United States constitutional treatments of emergency into some conformity with the approaches of other nations, a crucial distinction

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[21] *See infra* notes 61-62 and accompanying text.

[22] *See, e.g.*, CONST. EST. arts. 65, 129 (1992) (granting Parliament the power to declare an emergency on proposal of the president or government); *see also* John Ferejohn and Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 217 (2004) (maintaining that "a new model of emergency powers has evolved over the past half century, at least for the advanced or stable democracies," one that relies on legislative action to delegate emergency powers to the executive branch).

[23] Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Supp. 2001). *See also* Susan Freiwald, *Online Surveillance: Remembering the Lessons of the Wiretap Act*, 56 Ala. L. Rev. 9, 75 (2004) ("The USA PATRIOT Act was passed just six weeks after the September 11 attacks, during a period in which legislators were literally shut out of their offices due to anthrax attacks. Commentators have complained about the limited deliberations that preceded the USA PATRIOT Act, which was passed despite the fact that members of Congress did not have a chance to view the actual text.")

[24] Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1047 (2005).

remains—the United States Constitution lacks any explicit provision for states of emergency.[25] The most relevant constitutional clauses include those articulating Congress's power to declare war,[26] to call forth the militia,[27] and to suspend the writ of habeas corpus.[28] Although these powers all seemingly accrue to Congress, the President has, in emergency situations, often issued an executive order concerning the emergency or simply taken what he asserts is necessary action.[29] Furthermore, the absence of an emergency clause in the Constitution has left elaboration of the Constitution's fate during such situations to the Supreme Court's judicial construction of the nature and extent of the political branches' powers.

In both the United States and international contexts, commentators have largely neglected the various forms that emergencies adopt, whether political, economic, or natural.[30] The most prevalent associations with emergency today involve the imminent threat of a violence that places the continuation of the state itself in jeopardy. This has not, however, always been the case. Economic emergencies have sometimes swept the United States—most notably during the Great Depression.[31] Schmitt himself even emphasized the twentieth-century tendency towards

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[25] This contrasts with the practice of many twentieth-century constitutions internationally, including that of Argentina. *See, e.g.,* CONST. ARG., sect. 23 (1853, amended 1994) (English translation available at http://pdba.georgetown.edu/Constitutions/Argentina/argen94_e.html) ("In the event of domestic disorder or foreign attack endangering the full enforcement of this Constitution, . . . the province or territory which is in a turmoil shall be declared in a state of siege and the constitutional guarantees shall be suspended therein."); *see also id.* sect. 76 (providing for the delegation of legislative power to the executive during emergency for a period of time to be specified by Congress); POL. CONST. art. 228 (1997).

[26] U.S. CONST. art I, § 8, cl. 11.

[27] U.S. CONST. art I, § 8, cl. 15.

[28] U.S. CONST. art I, § 9, cl. 2.

[29] For example, during the Civil War, President Lincoln took it upon himself to suspend the writ of habeas corpus. *See* Kim Lane Scheppele, *North American Emergencies: The Use of Emergency Powers in Canada and the United States*, 4 INT'L J. CONST. L. 213, 218-19 (2006).

[30] *Cf.* Gross, *supra* note 3 and accompanying text.

[31] *See generally* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1933) (considering the effect of economic emergency on construction and application of the Contract Clause); Michele

declarations of economic emergency, identifying it as omnipresent and incompatible with liberal democracy.[32] Likewise, the extent of the devastation caused by Hurricane Katrina in 2005 and the Asian Tsunami of 2004 suggests the relevance of emergency theory to natural disaster.

Labeling emergencies political, economic, or natural raises questions, however, as to what aspect of the emergency one is designating. Are all emergencies that begin in financial crisis, like the Great Depression or the Argentine fiscal crisis of 2001, economic in nature? What if natural emergencies like Hurricane Katrina or the Asian Tsunami themselves have profound political and economic consequences? And what if the kinds of individual rights affected by an economic or natural emergency are ones connected with individual liberty or the political process? Our Constitution—to the extent that it concedes the possibility of something like an emergency at all—seems to privilege political emergencies over other forms. Nevertheless, even within the United States polity, there may be rhetorical advantages that accrue to the government upon denominating an emergency natural or economic as opposed to political. No clear justification for placing priority upon either form of emergency has, however, emerged; indeed,

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Landis Dauber, *The Sympathetic State*, 23 LAW & HIST. REV. 387 (2005) (identifying federal disaster relief efforts in the late nineteenth and early twentieth centuries as furnishing a foundation for the more expansive view of Congress's power reached during the New Deal).

[32] *See generally* William E. Scheuerman, *The Economic State of Emergency*, 21 CARDOZO L. REV. 1869, 1883–85 (2000) (analyzing Schmitt's discussions of economic emergencies). There may be a very recent resurgence of interest in the phenomenon as well. *See* Rebecca M. Kahan, Comment, *Constitutional Stretch, Snap-Back, and Sag: Why* Blaisdell *Was a Harsher Blow to Liberty than* Korematsu, 99 NW. U. L. REV. 1279 (2005). Those commentators who have treated declarations of economic emergency have generally joined in condemning them alongside, or even more than, militaristic ones. *See* Kahan, *supra*, at 1311 (contending that "[t]hough both violent and economic emergencies stretch the fabric of constitutional limitations with the sheer force of necessity, the nature of circumstances surrounding either executive or legislative response limiting economic liberty causes its effect to linger long past the time when a similar limitation on civil liberty will have expired"); Scheuerman, *supra* note 32, at 1869–70 ("[L]iberal legal and political analysts have too often ignored the seriousness of the normative and institutional problems posed by the surprisingly pervasive reliance on emergency devices to grapple with the exigencies of economic affairs.").

to the extent that the potential consequences of each remain equally dire, action taken to address the emergency might be thought similarly justified. What the government must show in each instance—and what it is most difficult for courts to assess—is that the emergency actually requires the steps that are being taken, and that a compelling necessity does, in fact, exist. The greater rhetorical power of invoking natural or economic emergency—despite the lack of constitutional concern with these situations—may stem precisely from the popular view that these varieties of emergency represent ineluctable forces to which government can only react and with which it is not capable of negotiating.[33]

Although philosopher Giorgio Agamben's writings on the state of exception generally devote little attention to the question of how an emergency arises, his discussion of "necessity" in *The State of Exception*[34] suggests the rhetorical power of the natural emergency. In analyzing the state of necessity, Agamben turns to the work of Santi Romano, and, in particular, his response "on the occasion of the earthquake of Messina and Reggio Calabria on December 28, 1908."[35] Although Agamben himself insists that the state of siege brought about by the earthquake "is only apparently a different situation" from the variety involving political disturbances, and that, in the case of the earthquake, "the state of siege [was] ultimately proclaimed for reasons of public order—that is, to suppress the robberies and looting provoked by the disaster,"[36] the fact that natural disaster could be posited as the originary spark bringing about the necessity retains a rhetorical significance. Indeed, it is precisely this aspect that accords with what Agamben identifies as "the extreme aporia against which the entire theory of the state of necessity ultimately runs aground," and which "concerns the very nature of necessity,

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[33] *See infra* notes 46-49 and accompanying text.
[34] GIORGIO AGAMBEN, THE STATE OF EXCEPTION (Kevin Attell trans., 2005).
[35] *Id.* at 17.
[36] *Id.*

which writers continue more or less unconsciously to think of as an objective situation."[37] Although Agamben endorses instead the stance of "those jurists who show that, far from occurring as an objective given, necessity clearly entails a subjective judgment, and that obviously the only circumstances that are necessary and objective are those that are declared to be so,"[38] he neglects the role of the natural emergency in facilitating the naïve view of necessity.

Several examples from the United States demonstrate the perplexing interaction between the constitutional justifications for governmental action in situations verging on political emergency and the popular acceptance of emergency measures taken during natural disaster or economic crisis. For example, the executive and legislative branches claim greater scope for the exercise of their power during times of war. After the events of September 11, 2001, the executive branch argued that Article II grants the President something like a penumbra of powers greater than those specifically enumerated in the Constitution. Thus, in the case of *Hamdi v. Rumsfeld*, the government asserted that "the Executive possesses plenary authority to detain [citizens considered 'enemy combatants'] pursuant to Article II of the Constitution."[39] Although the Court as a whole has declined to adopt this broad vision of the authority that the Constitution accords the President during emergency, the extent of the capacities that the executive branch enjoys remains in dispute.[40] Likewise, it is only in light of rebellion or invasion that the Constitution contemplates suspending the writ of habeas corpus.[41]

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[37] *Id.* at 29.
[38] *Id.* at 30.
[39] 542 U.S. 507, 516–17 (2004) (O'Connor, J., plurality opinion) (involving a U.S. citizen captured during hostilities in Afghanistan and held in a South Carolina naval brig).
[40] *Hamdi*, 542 U.S. at 517.
[41] *See* U.S. CONST. art I, § 9, cl. 2. Although the phrasing of the Suspension Clause appears to prescribe a textually specific limitation, ensuring that Congress will only be able to use its power in cases of "Rebellion or Invasion," commentators disagree about whether courts would or

Other countries' constitutions and even the individual states in the United States are somewhat less categorical about the effects of the source of an emergency upon the powers government may exercise. Section 23 of the Argentine Constitution, for example, treating the "state of siege," refers to "domestic disorder" as well as "foreign attack" as justifications for suspending constitutional guarantees, but the emphasis still falls upon manmade crises.[42] Section 76, which has often provided the basis for the Argentine Congress to delegate emergency economic powers to the President, including in the wake of the fiscal crisis of 2001,[43] speaks in even more open-ended terms. According to this provision, "[t]he legislative powers shall not be delegated to the Executive Power save for issues concerning administration and public emergency, with a specified term for their exercise and according to the delegating conditions established by Congress."[44]

On the level of the states, the political branches' capacity during emergency stems from the broader notion of the "police power" reserved to them through the federalist structure of the Constitution.[45] The concept of the state's "police power" is famously broad and equally famously vague. As a scholar recently noted, "despite the centrality of the police power . . . an observation made nearly one hundred years ago still holds true today: 'No phrase is more frequently used and at the same time less understood.'"[46] Through its comprehensive scope, the "police power" comprehends measures arising out of natural or economic disaster as well as

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should deem the existence of rebellion or invasion justiciable. *See generally* Amanda Tyler, *Is Suspension a Political Question?*, Stanford L. Rev. (forthcoming 2006).

[42] ARG. CONST. art. 23.

[43] *See, e.g.*, Argentine Law No. 25561, Jan. 6, 2002, B.O. (declaring a public emergency in the terms specified by Section 76 and modifying the exchange rate).

[44] ARG. CONST. art. 76.

[45] *See Blaisdell*, 290 U.S. at 440.

[46] D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 471–72 (2004) (quoting Walter Wheller Cook, *What is the Police Power?*, 7 COLUM. L. REV. 322, 322 (1907)).

those stemming from political emergencies. As the United States Supreme Court explained, emphasizing the police power's connection with health, morals, and safety:

> That there is a power, sometimes called the police power, which has never been surrendered by the States, in virtue of which they may, within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety, is conceded in all the cases. In its broadest sense, as sometimes defined, it includes all legislation and almost every function of civil government.[47]

Although, according to some commentators, co-extensive with the states' sovereignty at the time of the Founding, the police power is limited by, on the one hand, the federal government's constitutional supremacy and, on the other, individual rights.[48]

Even in the United States, despite the fact that the text of the Constitution appears to contemplate granting emergency powers only in the case of political crisis, if at all, the rhetoric of natural disaster has proved more compelling in justifying particular kinds of action, especially when taken in the name of the states' police powers. One dramatic example involves the detention of numerous individuals in New Orleans following Hurricane Katrina and their deprivation of the right to counsel, speedy trial, and habeas corpus guarantees.[49] A less visible, but still important, deviation from the usual constitutional order has been permitted when states claim that strict adherence to the dictates of the Dormant Commerce Clause and the prohibition it

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[47] New Orleans Gas Co. v. La. Light Co., 115 U.S. 650, 661 (1885) (citations omitted).

[48] *See* Barros, *supra* note 46, at 497–98; *see also* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) ("The term 'police power' connotes the time-tested conceptual limit of public encroachment upon private interests."); *New Orleans Gas Co.*, 115 U.S. at 661 ("Definitions of the police power must, however, be taken subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.").

[49] *See* Leslie Eaton, *Judge Steps In for Poor Inmates Without Justice Since Hurricane*, N.Y. TIMES, May 23, 2006, at A1. For an eloquent narrative description of the series of events leading to these egregiously long detentions, see Brandon L. Garrett & Tania Tetlow, *Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 DUKE L.J. 1, 1–25 (2006).

places on discriminating against interstate commerce will jeopardize the health of the people or other life forms in the jurisdiction by importing pestilence or disease. Thus in *Maine v. Taylor*, the Court upheld a conviction under a Maine statute prohibiting the importation of out-of-state baitfish, weighing heavily the expert testimony that the importation of these live baitfish would place "Maine's population of wild fish . . . at risk by three types of parasites prevalent in out-of-state baitfish, but not common to wild fish in Maine."[50] Justice Stevens' dissent in *Taylor* suggests that the Court may have been too quick to believe the state's invocation of environmental necessity and the prospect of resulting natural disaster; as he insisted, "[t]he invocation of environmental protection or public health has never been thought to confer some kind of special dispensation from the general principle of nondiscrimination in interstate commerce. . . . If Maine wishes to rely on its interest in ecological preservation, it must show that interest, and the infeasibility of other alternatives, with far greater specificity."[51]

Justice Stevens' counterstory in *Taylor* indicates both one of the sources of the persuasiveness of the rhetoric of natural emergency and one of its central problems: the language of natural emergency suggests that government is faced with an exigency that permits only one means of stopping disaster, rather than leaving open several alternative approaches. Furthermore, it tends—often erroneously—to divest government of perceived responsibility for the onset of the emergency in the first place, attributing to nature what may, in fact, result largely from human intervention.[52]

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[50] Maine v. Taylor, 477 U.S. 131, 141 (1986). Emergencies affecting the public health might be treated similarly. *See* Lawrence O. Gostin, *The Model State Emergency Health Powers Act: Public Health and Civil Liberties in a Time of Terrorism*, 13 HEALTH MATRIX 3, 10–14 (2003).
[51] *Taylor*, 477 U.S. at 153 (Stevens, J., dissenting).
[52] In the immediate aftermath of Hurricane Katrina, for instance, political officials attempted to place all the blame on nature. As one person in the White House insisted, "[n]ormal people at home understand that it's not the president who's responsible for this, it's the hurricane."

The inadequacy of these reasons for granting government greater authority during natural emergency does not, however, mean that superior rationales exist in cases of political emergency. The United States Constitution does appear to distinguish between the reasons for the exercise of emergency powers, placing somewhat more emphasis on political than natural or economic triggers. This distinction, however, lacks any self-evident normative justification. If one followed the philosopher Thomas Hobbes, one might opine that the very source of government consists in man's fear of death by the hands of another man,,[53] and that, therefore, the sovereign body should be permitted greater latitude in curtailing the consequences of violent emergencies.[54] Because natural and financial disasters may also result in scarcity of resources and ensuing violence, however, this rationale is not entirely persuasive. A more attractive approach is, instead, to contemplate the sources for exercise of emergency power as equally compelling, whether military, economic, or natural.

Economic emergencies occupy a space of indistinction between human-generated and natural disasters. While the Supreme Court, in the 1934 Contract Clause case *Home Building and Loan Association v. Blaisdell*, approvingly quoted a passage that provided a lengthy analogy between financial and natural disorder,[55] President Franklin D. Roosevelt's inaugural address of

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Elisabeth Bumiller, Democrats and Others Criticize White House's Response to Disaster, N.Y. TIMES, Sept. 2, 2005, at A16. Douglas Kysar and Thomas McGarity have demonstrated some of the ways in which the disastrous results of Katrina were, however, far from natural. Douglas A. Kysar & Thomas O. McGarity, *Did NEPA Drown New Orleans? The Levees, the Blame Game, and the Hazards of Hindsight*, 56 DUKE L.J. (forthcoming 2006); *see also* Center for Progressive Reform, *An Unnatural Disaster: The Aftermath of Hurricane Katrina*, at 12–16, 23–34 (2005), *available at* http://www.progressivereform.org/articles/Unnatural_Disaster_512.pdf.

[53] *See* THOMAS HOBBES, LEVIATHAN 71 (J.M. Dent ed., 1994)) (1651) (observing that the worst aspect of the state of nature consists in the individual's "continuall feare, and danger of violent death").

[54] *See id.*

[55] In *Blaisdell*, the Court insisted that:

1933 instead emphasized the relationship between war and economic distress, insisting that he needed "broad Executive power to wage a war against the emergency, as great as the power that would be given . . . if we were in fact invaded by a foreign foe."[56] It is, in one respect, appealing to compare economic with natural disaster because the seemingly ineluctable character of the latter endows the former with the appearance of cause-less inevitability and removes the issue of who is responsible for the crisis from consideration. In another respect, however, from the vantage point of the constitutional schema, as F.D.R. realized, such a comparison would diminish the potential for presidential exercise of extraordinary powers along the lines employed during war or other military emergency.[57]

III. TWO APPROACHES TO THE RULE OF LAW

Economic emergency seems to represent the logical point of contact between two strands of scholarship on the rule of law—that arising in the economic development context (hereinafter "economic development rule of law") and that responding to the political turmoil ensuing from

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> The present nation wide and world wide business and financial crisis has the same results as if it were caused by flood, earthquake, or disturbance in nature. It has deprived millions of persons in this nation of their employment and means of earning a living for themselves and their families; it has destroyed the value of and the income from all property on which thousands of people depended for a living; it actually has resulted in the loss of their homes by a number of our people and threatens to result in the loss of their homes by many other people in this state.

Blaisdell, 290 U.S. at 423 (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 189 Minn. 422, 437 (1933) (Olsen, J., concurring)).

[56] Scheuerman, *supra* note 32, at 1871 (quoting F.D.R.'s 1933 inaugural address).

[57] Agamben too notes Roosevelt's strategic invocation of the metaphor of war and how he "was able to assume extraordinary powers to cope with the Great Depression by presenting his actions as those of a commander during a military campaign." AGAMBEN, *supra* note 34, at 21. What he concludes from this situation, however, is that military and economic emergency cannot be differentiated within the history of the twentieth century; Agamben observes that, "from the constitutional standpoint, the New Deal was realized by delegating to the president an unlimited power to regulate and control every aspect of the economic life of the country—a fact that is in perfect conformity with the already mentioned parallelism between military and economic emergencies that characterizes the politics of the twentieth century." *Id.* at 22.

twentieth-century declarations of states of emergency (hereinafter "emergency rule of law").[58] So far, however, it has largely fallen in the gap between the two approaches; the economic development literature demonstrates little concern in general with states of emergency whereas the emergency-based rule of law approach largely neglects the problems posed by economic emergency.

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[58] For treatments of the rule of law in the economic development context, see BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Erik G. Jensen & Thomas C. Heller eds., 2003) (empirically assessing, among other things, the role of courts in promoting economic development); Joel M. Ngugi, *Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse*, 26 U. PA. J. INT'L EC. ON L. 513, 514–15 (2005) (observing that contemporary law and development projects are "characterized by attempts to reform the laws of developing countries" and that "[t]hese reform projects are often justified as, and incorporated into the general rubric of, 'Rule of Law projects'").

For discussions of the rule of law in the context of emergency, see DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY (2006); David Dyzenhaus, Schmitt v. Dicey*: Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005, 2005–11 (2006) (deriving from Albert Venn Dicey's late nineteenth-century account of the relationship between the rule of law and what we would designate an emergency the idea that there can be no "legal black hole, in which the state acts unconstrained by law," and instead that, even during emergency, "there is no prerogative attaching to any institution of state to act outside of the law"); Antoine Garapon, *The Oak and the Reed: Counter-Terrorism Mechanisms in France and the United States of America*, 27 CARDOZO L. REV. 2043, 2046 (2006) (criticizing those who simply oppose the normal state of affairs to that of emergency and maintaining that "couching the debate in terms of a confrontation between Rule of Law and state of emergency is too abstract"); Kim Lane Scheppele, *Law in a time of Emergency: States of Exception and the Temptations of 9/11*, 6 U PA. J. CONST. L. 1001, 1009–12 (2004) (explaining Carl Schmitt's account of the sovereign's responsibility during the "state of exception" as that of operating outside the liberal legal order precisely in order to restore the rule of law through addressing the emergency and returning the polity to a normal state of affairs); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the Whitehouse*, 105 COLUM. L. REV. 1681, 1741–43 (2005) (contending that, even in the emergency context, "it is the prohibition on torture, not the existence of a system for the legal authorization of torture, which is . . . archetypal of the rule of law"); Martin Loughlin, *Constitutional Theory: A 25th Anniversary Essay*, 25 OXFORD J. LEGAL STUD. 183, 194–97 (2005) (describing the difficulties that the liberal state encounters in emergency as involving a challenge to one conception of the rule of law).

Economic development rule of law emerges in its contemporary incarnation largely out of Friedrich Hayek's classic genealogy of the rule of law in *The Constitution of Liberty*.[59] Emergency rule of law addresses the disastrous results of the deployment of Article 48 of the Weimar Constitution[60] and the abuses of states of emergency in countries like South Africa[61] and India,[62] or in the former Soviet bloc.[63] Whereas the former insists upon the desirability of safeguarding private property against various contingencies, the latter focuses more on the abuses of preventive detention and the abrogation of normal democratic processes. Although both strains of rule of law work emphasize the importance of placing limitations upon the

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[59] *See* Rafael LaPorta, Florencio López-de-Silanes, Cristian Pop-Eleches & Andrei Schleifer, *Judicial Checks and Balances*, 112 J. OF POL. ECON. 445, 468 (2004) (finding an empirical correlation between two of the criteria for the rule of law that F.A. Hayek articulated in *The Constitution of Liberty*—those of judicial independence and constitutional review—and economic freedom); Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 SUP. CT. ECON. REV. 1, 4–5 (2003) (relying on Hayek's work as most forcefully articulating the "constitutionalism" version of the rule of law and insisting that "[t]he rule of law is . . . inherently a classical liberal concept that presupposes the need and desirability to constrain governmental actors and maximize the sphere of liberty for private ordering, both in economic exchange as well as in the voluntary institutions that comprise civil society"); Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 508–11 (2001) (arguing that the empirical evidence that common law-based systems favor economic growth can be explained by a particular structure of government—an English rule of law system that favored individual property rights over royal power).

[60] *See* DYZENHAUS, *supra* note **Error! Bookmark not defined.**, at 15–32 (detailing the instrumental role of Article 48 of the Weimar Constitution in enabling the Nazi party's rise to power and Schmitt's influential interpretation of the provision).

Some late twentieth-century critics of Latin American constitutions traced their flaws in dealing with emergency situations back to Schmitt and the Weimar Constitution, either articulating an explicit genealogy or observing certain structural similarities. *See* Renato Cristi, *The Metaphysics of Constituent Power: Schmitt and the Genesis of Chile's 1980 Constitution*, 21 CARDOZO L. REV. 1749 (2000); Gabriel L. Negretto & José Antonio Aguilar Rivera, *Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship*, 21 CARDOZO L. REV. 1797 (2000).

[61] *See generally* STEPHEN ELLMANN, IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY (1992) (detailing the ineffectiveness of South African courts in upholding the rule of law by constraining the political use of emergency powers).

[62] Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950–2000)*, 14 AM. U. INT'L L. REV. 413 (1998).

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executive and retaining basic judicial processes at all times, the result of the logic of the economic development movement is to privilege economic and property rights whereas that of the emergency branch is to place priority on the continued viability of the democratic system and some of the basic pre-requisites necessary for individuals' participation in it, such as those of personal liberty.[64] The emergency approach to the rule of law may thus entail fewer conflicts than the economic development one between insisting upon liberal rights and maintaining the basis of a democratic system.

Those endorsing the emergency rule of law approach have achieved significant international success. In the attempt to cabin emergencies and minimize the possibility that they will imperil the very basis of a state's legitimacy, some constitutions and international human rights documents have included provisions designed to preserve particular liberties as non-derogable during emergency.[65] The liberties protected vary across these documents—whereas countries like Russia may enumerate particular economic or property rights among those that are

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[64] *See infra* notes 65-81 and accompanying text.

[65] *See* SUBRATA ROY CHOWDHURY, RULE OF LAW IN A STATE OF EMERGENCY: THE PARIS MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EMERGENCY 4–5 (1989) (elaborating some of the most critical problems spawned by an emergency situation: (1) "the government . . . is replaced by an authoritarian regime through a *coup*;" (2) the right to life is imperiled; 3) preventive detention laws are implemented (includes the suspension of habeas corpus and amparo, loss of right to counsel, loss of right to a review of the detention order; "keeping the detainee incommunicado;" prolonged period without accusation); 4) freedom of association and expression are also suspended; 5) crimes are created *ex post facto*; 6) the judiciary is emasculated; 7) the state of emergency is continued for "prolonged periods even after the circumstances which initially prompted the authority to proclaim it cease to exist"). *See also* Venelin I. Ganev, *Emergency Powers and the New East European Constitutions*, 45 AM. J. COMP. L. 585 (1997) (elaborating how some of the post-communist constitutions of Eastern Europe attempt to avoid the greatest dangers posed by states of emergency through removing the possibility that the executive will exercise emergency powers exclusively or suspend the continued activity of the legislature).

nonderogable,[66] agreements like the American Convention on Human Rights specify only personal or associational liberty rights.[67] Many constitutions also constrain the extent to which an emergency can alter the political order, sometimes by prohibiting constitutional amendment during emergency, or by outlining other limits on the extent to which the mode of government can be modified under such circumstances.[68] At the core of these guarantees seems to lie a norm of preserving those subject to the particular governmental regime while also maintaining the viability of the political system as a whole.

On the economic development side, Hayek's classic genealogy of the rule of law and explanation of its significance in *The Constitution of Liberty* couches itself as a general defense

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[66] Kostitutsiia Rossiiskoi Federatsii [KONST. RF], art. 56 (1993) (Russia) (specifying "the right to freely use his or her abilities and property for entrepreneurial," art. 38, "or any other economic activity not prohibited by law," art. 34, and "the right to a home," art. 40, may not be restricted during a state of emergency); *see also* A Magyar Köztársaśág Aloktmánya, art. 8 (1949) (Hungary) (including the right to social security as nonderogable during emergency). *But see* CONST. VENEZ., art. 337 (1999) (stating that, when a "state of exception" has been decreed, "the guarantees consecrated by this Constitution can be temporarily restricted, except those referring to the rights of life, prohibition of isolation or torture, the right to due process, the right to information and the other intangible human rights").

[67] *See* American Convention on Human Rights and Protocols: Pact of San José, Costa Rica, art. 27, Nov. 22, 2969, 1144 U.N.T.S. 123:

> SUSPENSION OF GUARANTEES: 1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.; 2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from *Ex Post Facto* Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

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of individual liberty,[69] and alludes at various points to the horrors of Nazi Germany, atrocities partially enabled by the emergency provisions of the Weimar Constitution.[70] These representations mask, as William Scheuerman has shown, Hayek's debt to Schmitt himself, and his critique of the democratic welfare state.[71] Indeed, *The Constitution of Liberty* largely focuses upon freedom within the economic sphere rather than endorsing a more expansive vision of liberty.[72] Not quite advocating that the state refrain from assuming any role at all in the economic arena, Hayek instead insists that "it is the character rather than the volume of government activity that is important."[73] While objecting to certain specific types of governmental action, including state monopolies and price and quantity controls, Hayek goes beyond these particulars in the attempt to establish a conceptual underpinning for the concept of the rule of law. As he maintains, adherence to the rule of law necessitates that "all coercive action of government . . . be unambiguously determined by a permanent legal framework which enables the individual to plan with a degree of confidence and which reduces human uncertainty as much as possible."[74] This definition, as he elaborates it, entails that laws should be general, rather than aimed at particular individuals or interests, and that discretionary administrative action should be limited in scope.[75] Those who fall within Hayek's heritage today emphasize

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[69] *See generally* HAYEK, *supra* note 13.
[70] *See generally id*.
[71] *See* WILLIAM E. SCHEUERMAN, CARL SCHMITT: THE END OF LAW 209–24 (1999).
[72] *See generally* HAYEK, *supra* note 13.
[73] *Id.* at 222.
[74] *Id*.
[75] *Id.* at 226 ("Regulations drawn up by the administrative authority itself but duly published in advance and strictly adhered to will be more in conformity with the rule of law than will vague discretionary powers conferred on the administrative organs by legislative action."); *id*. at 230 ("Freedom of contract, like freedom in all other fields, really means that the permissibility of a particular act depends only on general rules and not on its specific approval by authority.").

constitutionalism and judicial review as well as a strong conception of the property rights of individuals.[76]

Hayek's specifications that law be general and discretionary administrative action limited in scope, which are followed by many more recent commentators on the rule of law, including those approaching the project from the emergency side,[77] tend to run counter to the nature of governmental action in emergencies arising out of economic conditions and those calling for economic remedies. In the U.S. context, the International Economic Emergency Powers Act ("IEEPA"), for example, endows the President with substantial powers over foreign economic exchange and the assets of foreign countries over which the United States exercises

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[76] *See supra* note 59.

[77] *See, e.g.*, Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1313 (2001). According to Rosenfeld:

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

Id. *But see* Kim Lane Scheppele, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361, 1375-76 (2001). Scheppele explains that:

> The new rule of law in constitutional regimes . . . takes the legal security of the legal subject to be a primary aim of a constitutional order" and in doing so, "takes the point of view of the legal subject and asks what effect the law has on her, what legal surprises she can reasonably be expected to bear, and what legitimate expectations the legal subject has to use in her own defense against the abusive operation of law itself.

Id.

jurisdiction.[78] Although IEEPA grants Congress some scope for consulting with and overseeing the President's administration of such an emergency, the President retains a significant amount of discretion in implementing the powers that IEEPA confers upon him.[79] The Supreme Court's most involved foray into elaborating the constitutional consequences of economic emergency, *Blaisdell*, likewise emphasizes the specificity of the inquiry that must be made in emergency situations, a specificity that contravenes Hayek's insistence on the general and nondiscretionary; according to Chief Justice Hughes's opinion for the five-justice majority, "[t]he constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions."[80]

The tension between rule of law principles and legislation directed towards stemming economic emergency manifests itself perhaps most starkly in the not infrequent accusation that the government has taken such measures with special interests in mind. This was the Supreme Court's concern in *Allied Structural Steel Co. v. Spannaus*, a Contract Clause case invalidating application of the Minnesota Private Pension Benefits Act to a particular employer partly on the ground that the target of the legislation was too narrowly circumscribed.[81]

The extent to which an economic development rule of law approach appears incompatible with steps that have been taken in the United States to address economic emergency might

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[78] International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1707 (2000).

[79] 50 U.S.C. § 1702(a)(1); *see also* Smith *ex rel.* Estate of Smith v. Fed. Reserve Bank of N.Y., 346 F.3d 264, 267–68 (2d Cir. 2003) (explaining the President's power under IEEPA to seize Iraqi assets).

[80] *Blaisdell*, 329 U.S. at 426.

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

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

IV. CONSTITUTIONAL RIGHTS IN EMERGENCY

Whatever the underlying nature of the emergency—political, economic, or natural—it may and often will involve governmental action that affects particular constitutionally protected rights.[82] The measures deployed in dealing with emergencies of every variety often infringe on—or verge on infringing on—constitutionally protected liberty, political, or economic rights, from those of due process, to speech, to association, to freedom from unreasonable search and seizure, to liberty in contract, to property rights.[83] In the United States, the judiciary has tended

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[82] The kinds of rights affected by the emergency may not always correspond with the underlying sources of the emergency. A brief glance at the United States constitutional context demonstrates that the origins of the emergency are not ineluctably tied to particular actions taken to stem its progress. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), for example, the Court considered the constitutionality of President Truman's seizure of the steel mills, a seizure justified by the context of the Korean War, and yet domestically implemented in a manner that at least one justice deemed a taking of property without just compensation. *Id*. at 630–32 (Douglas, J., concurring). While the source of the emergency powers claimed were linked with military exigency, the steps taken and the consequences for the targets of governmental action were economic in nature. *Id*. at 586. It is also possible that economic emergency might generate responses that would restrict other kinds of liberties as well.

[83] *See* Bernadette Meyler, *Entry on Civil Liberties in Emergency*, ROUTLEDGE ENCYCLOPEDIA OF CIVIL LIBERTIES (forthcoming 2006) (detailing how First Amendment freedoms of speech and

to accede to executive or legislative action limiting individual liberties during emergency, either by postponing decision until after a crisis has concluded, or by affirming the necessity of the government's actions.[84] Commentators have disagreed about which approach is preferable. Certain critics, like Kathleen M. Sullivan, argue that constitutional norms should be followed inflexibly during emergency.[85] Others, like Mark Tushnet and Oren Gross, prefer accommodation, either by having the Supreme Court distinguish definitively between normal and emergency situations or by permitting public officials to take measures during emergency that will only subsequently be subject to legal scrutiny.[86]

This Part argues that it would be normatively justifiable within the United States constitutional system for the rigorous position that constitutional norms should be followed inflexibly during emergency to coexist with malleability in the area of economic rights. The history and tradition of the Takings, Contract, and Dormant Commerce Clauses suggest reasons why the United States' constitutional schema might treat these rights differently than certain other kinds. Constitutional systems that enumerate particular rights that will not be derogable even during emergency tend to select ones that are central to the preservation of the polity and the individuals who comprise it—whether citizens or not.[87] To the extent that two of the

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association were curtailed by statute during World War I and the subsequent Red Scar, as well as during the Cold War; elaborating upon relaxation of the Fourth Amendment's prohibition against unlawful searches and seizures during times of emergency; and describing the use of military tribunals and the deprivation of normal trial procedures during the Civil War and World War II).

Infringements of economic rights are discussed in more detail *infra* notes 96–115 and accompanying text.

[84] *See* Korematsu v. United States, 323 U.S. 214, 215-16 (1944). *But see Ex parte* Milligan, 71 U.S. 2, 127 (1866).

[85] Christopher Reed, *Are American Liberties At Risk?*, HARV. MAG., Jan.-Feb. 2002 (summarizing Kathleen M. Sullivan's Tanner Lecture on "War, Peace, and Civil Liberties").

[86] *See generally* Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 Wis. L. Rev. 273 (2003); Gross, *supra* note 3.

[87] *See supra* notes 66–68 and accompanying text.

foremost principles that the U.S. Constitution enshrines are a respect for the integrity of the political process and the preservation of the possibility of democratic decisionmaking, special protections for the associated rights may be justified during emergency.[88] The margins of the precise catalogue of such rights may be debatable, but the core would include freedom from imprisonment without due process, without which individuals could not even begin to exercise other political liberties, the freedoms of speech and association, and voting rights.

While constitutionalism and judicial review are not isomorphic with the economic development vision of the rule of law, constitutional protections for particular rights overlap to a significant extent with economic development rule of law guarantees. Among these are numbered, in the United States context, the Due Process Clause, the Contract Clause, and the Takings Clause, or, in settings like the Argentine, the principles that "property may not be violated" and that "expropriation for reasons of public interest must be authorized by law and previously compensated"[89] To the extent that provisions for states of emergency within certain constitutions permit abrogation of these constitutions' own guarantees, they may serve to undermine the economic development conception of the rule of law.[90] In terms both of the powers exercised and the rights undermined, emergencies thus stretch the boundaries of this version of the rule of law, if not exceeding them altogether.

The right of habeas corpus is the only one that the United States Constitution explicitly contemplates suspending under certain circumstances.[91] The constitutions of other countries that

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[88] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
[89] ARG. CONST. art. 17.
[90]

[91] U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it."). For a thorough treatment of several aspects of habeas corpus, see the Symposium Issue on "The

textually allow for states of emergency tend to permit more expansive intrusions on individual liberties, yet often specify particular nonderogable rights. Under the Argentine Constitution, for example, constitutional guarantees may be suspended during the state of siege, but the President is not authorized to "pronounce judgment or apply penalties on his own"[92]; furthermore, "his power shall be limited, with respect to persons, to their arrest or transfer from one place of the Nation to another, should they not prefer to leave the Argentine territory."[93] In addition, provisions of particular treaties, such as the American Convention on Human Rights, insist on the nonderogability of rights like that of habeas corpus during times of emergency.[94]

Great Writ: Developments in the Law of Habeas Corpus," CORNELL L. REV., vol. 91, issue 3 (Jan. 2006).

[92] ARG. CONST. art. 23.

[93] *Id.*; *see also* ALB. CONST. art. 175 (1998) (containing a specific list of nonderogable rights and stating that "[t]he acts for declaring the state of war, emergency or natural disaster must specify the rights and freedoms which are limited"). *See also* Tim Dockery, Note, *The Rule of Law over the Law of Rulers: The Treatment of De Facto Laws in Argentina*, 19 FORDHAM INT'L L.J. 1578, 1592–93 (1996). As Dockery observes:

> The Federal Government may not intrude upon liberties guaranteed by the Argentine Constitution. Amongst these liberties are freedom of the press, the right to unionize and strike, the inviolability of the home, the right to trial in front of a judge, and the right to property, including vested rights. The State, however, may temporarily suspended [sic] some of these constitutional guarantees during a state of siege.

Id.

[94] Although Article 27 the American Convention on Human Rights explicitly allows for derogation from the Convention's guarantees, it simultaneously specifies particular rights that are nonderogable, including the right to juridical personality (art. 3), the right to life (art. 4), the right to human treatment (art. 5), the freedom of conscience and religion (art. 12), the right to participate in government (art. 23), and "the judicial guarantees essential for the protection of such rights." American Convention on Human Rights art. 27, Nov. 7–22, 2969. Interpreting this article, the Inter-American Court of Human Rights determined, in the *Castillo Petruzzi* case, that the judicial guarantees of habeas corpus and *amparo* could not be eliminated during times of emergency. *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987) ("*Castillo Petruzzi*" case). Even though the emergency might justify placing restrictions on the right to individual liberty, the court deemed it necessary, "in a system governed by the rule of law . . . for an autonomous and independent judicial order to

During emergencies, the government may infringe upon economic rights. In the United States context, this has occurred most prominently with respect to the Takings and Contract Clauses. The phrasing of the Takings Clause itself permits the government some latitude; rather than mandating that private property remain inviolate, it instead specifies "nor shall private property be taken for public use, without just compensation."[95] Although Justice Jackson's concurrence in *Youngstown Sheet & Tube Co.*—the opinion that has subsequently proved the most influential—emphases the extent and limits of presidential power during emergencies, Justice Douglas's concurrence insisted instead that, although war or other crisis situations might authorize a more expansive deployment of federal governmental power, this enhanced capacity could not extend so far as to undermine constitutionally protected rights, like that of property.[96] Because not contemplated by Congress, the branch entitled to raise revenues, President Truman's seizure of the steel mills was likely to remain uncompensated, and therefore constituted an illegitimate implementation of emergency powers.[97] This view was not, however, adopted by a majority of the Court,[98] and the Court's Contract Clause jurisprudence indicates that, to the contrary, Justice Douglas's reasoning might not hold sway more generally.

Both at the Philadelphia Convention and elsewhere, opponents of the Contract and Ex Post Facto Clauses raised the specter of situations requiring emergency economic action by the government; if included, these Clauses, they imagined, would be strictly construed, and thereby

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exercise control over the lawfulness of [emergency] measures by verifying, for example, whether a detention based on the suspension of personal freedom complies with the legislation authorized by the state of emergency. In this context, habeas corpus acquires a new dimension of fundamental importance." *Castillo Petruzzi*, para. 40.

[95] U.S. CONST. amend. V.

[96] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629–34 (1952) (Douglas, J., concurring).

[97] *Id*.

[98] *Id*. at 582-89.

prevent the states or the political branches of the federal government from taking the requisite measures. Thus George Mason argued at the Convention that

> Both the general legislature and the State legislature are expressly prohibited from making *ex post facto* laws; though there never was nor can be a legislature but must and will make such laws, when necessity and the public safety require them; which will hereafter be a breach of all the constitutions in the Union, and afford precedents for other innovations.[99]

Similarly, Luther Martin contended that:

> [T]here might be times of such *great public calamities* and *distress*, and of such *extreme scarcity* of *specie* as should render it the *duty* of a government, for the *preservation* of even the *most valuable part* of its citizens in some measure to interfere in their favour, by passing laws . . . or authorising the debtor to pay by *instalments*, or by delivering up his property to his creditors at a *reasonable* and *honest* valuation . . . .[100]

Adjudication under the Ex Post Facto and Contract Clauses have not, however, brought these concerns to fruition. Anxieties along the lines that Mason expressed were settled by the Supreme Court's 1798 decision in *Calder v. Bull*, in which Justice Chase determined that the Ex Post Facto Clause applied only to retroactive criminal laws, not those affecting property.[101] Providing support for this outcome, Justice Iredell reasoned:

> The policy, the reason and humanity of the prohibition [on *ex post facto* laws] do not, I repeat, extend to civil cases, to cases that merely affect the private property of citizens. Some of the most necessary and important acts of legislation are, on the contrary, founded upon the principle, that private rights must yield to public exigencies.[102]

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[99] Records of the Federal Convention 2:640 (Sept. 15, 1787).
[100] Luther Martin, *Genuine Information*, *in* SECRET PROCEEDINGS AND DEBATES OF THE CONVENTION 3, 70 (1788) (emphasis added).
[101] 3 U.S. (3 Dall.) 386, 394 (1798).
[102] *Id.* at 400 (Iredell, J., concurring).

In *Blaisdell*, the case that most explicitly considers the effect of a governmentally posited emergency upon the extent of a state's power over private contracts, and which the Court recently cited in *Hamdi v. Rumsfeld*, the Court upheld the section of the Minnesota Mortgage Moratorium Law extending the period during which a mortgagor could redeem her property after foreclosure as against a Contract Clause challenge.[103] The majority's analysis in *Blaisdell* can be extrapolated to the broader context of economic rights generally and demonstrates on that level certain potential distinctions between these and other constitutionally protected rights.[104]

In its treatment of the emergency context, *Blaisdell* refuses to assume that the emergency grants the state additional power or authorizes the temporary abrogation of constitutionally guaranteed rights—as might be the case with habeas corpus, in the context of an adequate congressional suspension—and instead maintains that the Contract Clause remains the same during normal and emergency situations. According to the Court, "[e]mergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved."[105] *Blaisdell* thus fits more within a Sullivan than Tushnet or Gross paradigm of constitutional emergency.[106]

At the same time, *Blaisdell* does not suggest a completely inflexible constitutional order. Rather, analogizing the Minnesota legislation in the case with the historical operations of the

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[103] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 416–18, 446–47 (1933); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004) (citing *Blaisdell*).

[104] As a subsequent case applying *Blaisdell* explained the procedures for analysis under the Contract Clause that the opinion set forth, "[t]he Court balanced the language of the Contract Clause against the State's interest in exercising its police power, and concluded that the statute was justified." Energy Reserves Group, Inc. v. Kan. Power & Light Co., 459 U.S. 400, 410 (1983). In doing so, "[t]he Court listed five factors that were then deemed to be significant in its analysis: whether the act (1) was an emergency measure; (2) was one to protect a basic societal interest, rather than particular individuals; (3) was tailored appropriately to its purpose; (4) imposed reasonable conditions; and (5) was limited to the duration of the emergency." *Id.* at n.11.

[105] *Blaisdell*, 290 U.S. at 425.

[106] *See supra* notes 85-86 and accompanying text.

courts of equity to modulate the rigidity of particular common law principles, *Blaisdell* insists that "[t]he constitutional questions presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions."[107] In more concrete terms, the Court opines, the generality of the Contract Clause's terms permits contextual interpretation of its meaning: "[W]here constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details."[108] Although the Court does not here distinguish broadly between economic and other kinds of rights, its reasoning is particularly compelling with respect to former rather than the latter. Indeed, one can deduce from *Blaisdell* a constitutional regime for emergency in which noneconomic rights are subject to inflexible application while the Constitution's restrictions on economic measures are somewhat more liberally construed.

The two principal bases for separating economic from other constitutional rights consist in the disparate effects of delay in the several spheres and the substrate out of which the respective rights are exercised. The duration and time frame of emergencies have furnished a central concern for critics of emergency regimes. The nature of the declaration of emergency is to posit an exception to the normal regime, but the danger is that, as occurred in South Africa under Apartheid, the emergency will be normalized, and become semi-permanent or permanent. Many countries' constitutions therefore prescribe temporal limits for declared emergencies.[109] To the extent that emergency does, in fact, represent a departure from a normal order to which the polity will subsequently return, it stands in a complex relation to delay. It could be argued

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[107] *Blaisdell*, 290 U.S. at 426, 446–47.
[108] *Id.* at 426.
[109] *See, e.g.*, CONST. ALB. art. 173 (1998) (limiting the duration of states of emergency to sixty days). *See generally* ELLMANN, *supra* note 61.

that enforcement of those rights that would not be entirely vitiated by delay should be susceptible to postponement during emergency.

As *Blaisdell* emphasizes, the emergency measures that the Court approves do not deprive parties of their overarching contractual rights, but merely postpone the realization of these rights through particular remedies.[110] One might analogize such a postponement to the effects of the suspension of habeas corpus, which Trevor Morrison has recently argued defers a remedy but does not dissipate the underlying rights.[111] It is on account of a different relation to temporal delay that rights like those of access to habeas corpus remain during emergency, in the absence of a constitutional provision like the Suspension Clause that allows them to be placed on hold, while exercise of rights protected by clauses like the Contract Clause may be subject to postponement without such constitutional specification. As the Court in *Blaisdell* observed, the principle underlying the Contract Clause "precludes a construction which would permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the state to protect the vital interests of the community."[112]

In general, economic loss is compensable, as the unfavorable treatment of suits seeking injunctive relief for simply economic harm suggests. Although substantial detriment may accrue to an individual or collectivity that is unable to realize the value of their assets for a particular

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[110] *Blaisdell*, 290 U.S. at 398.
[111] *See generally* Trevor W. Morrison, Hamdi's *Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411 (2006).
[112] *Blaisdell*, 290 U.S. at 439.

period of time, it is possible that violations of economic rights could be remedied by payment at a later time. This is not the case with rights like that of habeas corpus, which, from its initial inception in English statutes, was directly addressed at undoing the harms caused by delays in bringing detained individuals to court.[113] Furthermore, many measures taken during economic emergency and directed at stabilizing the economy are precisely those of postponement, or involve other kinds of attempts to manipulate the timing of inflation or deflation, or coordinate price alterations in accordance with a national or global trend.[114]

Another, broader rationale also underlies the *Blaisdell* decision and suggests that, even where economic rights, and not simply their timely realization, are substantially affected by emergency measures, these rights should not be interpreted with the same inflexibility as other individual or political rights. Because the economic sphere is fundamentally one of interdependence, in which the values of contract and property are contingent on the state of the underlying economy, it may not even be possible for courts to enforce economic rights in the

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[113] The preamble to the English Habeas Corpus Act of 1679 states the justification for the statute:

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

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

[114] *See*, *e.g.*, Energy Reserves Group, Inc. v. Kan. Power & Light Co., 459 U.S. 400, 416–17 (1983) (explaining Kansas' interest in ensuring that the timing of deregulation of interstate and intrastate natural gas markets would coincide); United Steelworkers of Am. v. United States, 361 U.S. 39, 57 (1959) (describing the manner in which the Labor Management Relations Act attempts to stem emergency by inserting delay).

face of fiscal crisis. It is partly in this connection that the *Blaisdell* Court analogizes economic crisis with natural disaster—although arising from different sources, both kinds of emergency may present impossibilities of performance. As the Court explained in *Blaisdell*:

> The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.[115]

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

> The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably lead to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the state itself were touched only remotely, it has later been found that the fundamental interests of the state are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.[116]

These two sets of reasons help to distinguish economic from other individual and political rights, and suggest why balancing a state's emergency interests against the nature of its infringement upon contract might supply an appropriate method of adjudication in the Contract Clause context but not in that of habeas corpus. They also indicate that the insistence upon enforcing economic rights equally with other rights even during emergency—as the Argentine

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[115] *Blaisdell*, 290 U.S. at 435.
[116] *Id.* at 442.

Supreme Court did in declaring a 2001 reduction in pension benefits unconstitutional[117]—may not be the only principled position for a constitutional court to take, and that the rule of law may be maintained alongside a flexible interpretation of economic rights.

[117] Tobar, Leonidas c/E.N. Mo Defensa—Contaduria general del Ejercito—Ley 25,453 s/amparo.