Constitutional Emergencies in Argentina: The Romans (not the Judges) Have the Solution

Carlos Rosenkrantz*

I. Introduction

In a constitutional emergency, protecting the aspirations of the constitution may require either public decisions that restrict personal constitutional rights or temporary suspension of constitutional procedures in favor of more expedient alternatives. Constitutional emergencies pose practical problems that are difficult to resolve. Indeed, constitutional emergencies require us to think about the institutional mechanisms that allow us to gain expediency without irreversibly risking arbitrariness or power concentration. But constitutional emergencies are also interesting theoretically. Constitutional emergencies defy liberal notions that power appropriately derives not from force or threats but from predetermined rules to which the *demos* consents.¹ The expediency we need at times of crisis suggests that the derivation of power from prior consent should be reversed. The first thing we seem to need during emergencies is to have a decision made, and this requires power more than anything else. During emergencies, authority cannot be the source of power, as liberals would like it to be. Rather, power is the source of authority.

Few contemporary authors have attempted to provide responses to practical and theoretical problems posed by constitutional emergencies. Some have suggested that, when the executive declares a state of emergency, we can prevent the executive from acting arbitrarily and assure the priority of law over power only if judges resist any attempt by the executive to restrict individual rights or to circumvent the normal procedures of lawmaking.² I dissent. We should solve the challenges of constitutional emergencies through crafty institutional designs that (1) provide adequate incentives for the executive to refrain from capricious use of emergency powers and to use emergency powers only when strictly necessary for the common good and

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1. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 278 (Peter Laslett ed., Cambridge Univ. Press ed. 1988) (1690) (“[A]ll Men are naturally in [a] State [of nature], and remain so, till by their own Consents they make themselves Members of some Politick Society.”).

2. See infra Part IV.
(2) protect the value of law *qua* law for society. In Part II, I will review the Argentinian judicial record to show that, at least in Argentina, judges have been unable to restrain the executive’s use of emergency powers adequately or consistently. In Part III, I will try to explain this judicial record to show that certain attributes of the judiciary will always make it very difficult for judges to police the executive’s use of emergency powers. In Part IV, I will present my view of the value of law *qua* law to demonstrate why the institutional proposal I offer in Part V does not make law subservient to power. In Part VI, I will show that my proposal does not undermine the value of law and, therefore, should not be rejected out of respect for the value of law. Finally, in Part VII, I will offer succinct concluding remarks.

II. The Judicial Record

A. The State of Siege

Many Latin American constitutional drafters were heavily influenced by liberal thinkers and therefore rejected provisions for the regulation of emergencies. In Argentina, the power of the government to suspend individual rights and liberties was explicitly included in almost all of the state’s fundamental texts. The constitutions of 1819 and 1826 allowed the government to take emergency measures restricting rights. The 1853 constitution was influenced by the experience of anarchy in the preceding thirty years and by the Chilean constitution of 1833, which was one of the first Latin American constitutions to provide for a congressional proclamation of a state of siege. The 1853 constitution allowed congress, in case of internal commotion, and the senate, in case of foreign attack, to declare a state of siege and to suspend individual rights provided that the constitution or authorities created thereby were in danger.

From 1854 until 2001, the state of siege was declared fifty-seven times. During the first decades of institutional history, the Argentinian courts...
managed to monitor the government and restricted the list of rights that could be suspended during states of siege. In 1893, for instance, in *Alem*, the supreme court decided that the president could not issue an order to detain a recently elected senator because the senator’s congressional immunities protected him even after the state of siege was declared. The court reasoned that the state of siege was aimed at sustaining the constitutional system. Incarceration of a senator would change the balance of power in the senate and could never be conceived of as a measure in favor of the constitution. In *Alvear*, the supreme court stated that the powers granted to the executive should be interpreted restrictively because the state of siege was always regarded as an exceptional measure.

In 1931, the restrictive trend changed. That year, in *Bertotto*, decided only a couple of months after the first *coup d’état* in Argentinian history, the supreme court held that, in addition to physical liberty, freedom of the press could also be restricted. In 1959, in *Sofía*, a case initiated when the police prohibited a political rally concerning the situation of political detainees in Paraguay, the supreme court held that the right to make political assembly was also subject to suspension during an emergency. It added that courts cannot review the factual assertions made by the executive to justify the declaration of the emergency itself. In 1970, in *Primera Plana*, the court upheld a government ruling that executive decrees and institutional acts adopted during states of siege were constitutional if a true state of emergency existed. In March 1976, the military overthrew the democratic government led by Peron’s widow. In 1977, the military government claimed that the guerrilla movement, whose strength was cited as the most important reason

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10. *Id.* at 463.
11. *Id.* at 455–56.
12. *Id.* at 455–56.
14. *Id.* at 317.
16. *Id.* at 113.
18. *Id.* at 520.
19. *Id.*
21. *Id.* at 82.
for the coup, had lost its steam and was, according to the government, totally destroyed.23

In 1978, at the peak of military political power, and in response to prior cases of intrusions upon liberty, the supreme court changed its doctrinal line again. Thus, in Zumano,24 the supreme court ruled against the government’s decision to keep a detainee under house arrest and upheld his constitutional right to leave the country, as mandated by article 23 of the constitution.25 The court stated that the actions of government during states of siege were always reviewable, that the reasons offered by the executive in ordering a detention were subject to strict scrutiny by courts, and finally that the government should provide detailed reasoning to justify its actions during states of siege.26 Further, the supreme court stated that the mere invocation of general statements about states of emergency (i.e., that an association for the purpose of organizing nonviolent opposition to an official policy may facilitate the mobilization of revolutionary violence) would be insufficient.27

Further, in 1979, the supreme court decided Timerman,28 where it determined that the detention of a world-famous journalist was clearly arbitrary since there was no relationship whatsoever between the causes of the state of siege and the government’s reasoning justifying Timerman’s detention.29 Finally, in 1985, the supreme court decided Granada,30 ruling that during an emergency the executive could curtail liberties in a limited way for a short period of time.31 The court also noted in a very strong tone that emergency measures restricting personal liberty were always constitutionally suspect and their validity was entirely conditioned upon their brevity.32

B. The Power of Congress

Parallel to the augmentation of the power of the president during the state of siege—notwithstanding the progressively stronger opposition of the supreme court, especially in cases where personal liberty was involved—the supreme court incrementally expanded the ability of congress to infringe economic rights during constitutional emergencies even without declaring a state of siege.

25. Id. at 443, 445–46.
26. Id. at 444–45.
27. Id. at 445.
29. Id. at 781–83.
31. Id. at 2311–12.
32. Id. at 2309.
Until 1922, Argentinian courts endorsed a libertarian *Lochner*\textsuperscript{33}-type approach. In 1903, the supreme court decided *Hileret & Rodríguez c. Provincia de Tucumán*,\textsuperscript{34} where it rejected a statute approved by a provincial legislature aimed at regulating the price and production of sugar.\textsuperscript{35} The court held that regulating production would lead to regulating all industrial activity of the nation, undermining individual rights and making government “the regent of industry and commerce, [and] the umpire of capital and private property.”\textsuperscript{36} In *Ercolano c. Lanteri Renshaw*,\textsuperscript{37} the supreme court, invoking the social function of property, validated a law that established maximum prices for urban leases.\textsuperscript{38} However, in *Horta c. Harguindeguy*,\textsuperscript{39} the court rejected the possibility of retroactive application of the law,\textsuperscript{40} and in *Mango c. Traba*\textsuperscript{41} explicitly rejected the setting of maximum prices, arguing that a restriction on property rights could only be justified during moments of dire necessity.\textsuperscript{42}

This somewhat restricted view of emergency powers changed when the country confronted its first great systemic economic crisis after the economic collapse of 1930. In 1934, the supreme court changed its precedent and decided *Avico c. de la Pesa*,\textsuperscript{43} in which, citing the American case of *Home Building & Loan Association v. Blaisdell*,\textsuperscript{44} it held that a statute that imposed upon mortgages a three-year moratorium on payments and foreclosures and capped interest rates at 6% per year was perfectly constitutional.\textsuperscript{45} The court found that the statute was constitutional because (1) there was an emergency, (2) the rights in question were restricted by a valid law, (3) there was proportionality between the emergency and the measures taken to overcome it, (4) the restriction was momentary, and (5) the restriction did not attack property itself but only delayed the enforcement of the remedies available to its holder.\textsuperscript{46}

\textsuperscript{33.} Lochner v. New York, 198 U.S. 45 (1905).
\textsuperscript{34.} CSJN, 5/9/1903, “Hileret y Rodríguez c. la Provincia de Tucumán / inconstitucionalidad de la ley provincial,” Fallos (1907-98-20).
\textsuperscript{35.} Id. at 25–26, 31, 35–36.
\textsuperscript{36.} Id. at 51.
\textsuperscript{38.} Id. at 170.
\textsuperscript{40.} Id. at 61.
\textsuperscript{42.} Id. at 223–24.
\textsuperscript{43.} CSJN, 7/12/1934, “Avico, Oscar Agustín c. de la Pesa, Saúl C. / recurso extraordinario,” Fallos (1935-172-21).
\textsuperscript{44.} 290 U.S. 398 (1934).
\textsuperscript{45.} Avico, Fallos (1935-172-21, 41, 77).
Notwithstanding the previous cases, the judiciary reversed course in the 1980s and put limits on emergency measures adopted by congress. In 1986, the supreme court decided *Rolón Zappa*,\(^{47}\) a case in which a teacher claimed that Laws 18,037 and 21,864, which devised a system to protect pensions against inflation, violated the Teacher’s Act and articles 14 *bis* and 17 of the constitution.\(^{48}\) The government agency in charge of administering pensions argued that the pension system was under an emergency, such that if the pensions accrued as plaintiff argued, the pension system itself would become bankrupt, thereby affecting all other pensioners.\(^{49}\) The supreme court held that it was a congressional responsibility to adopt remedies to prevent the bankruptcy of the pension system, and that the court could not adopt a decision restricting the rights of pensioners.\(^{50}\)

In 2003, Hugo Ávalos sued Alejandro Czumadewski for damages resulting from a car accident that had caused the death of Ávalos’s father.\(^{51}\) Ávalos also sued the defendant’s insurer, the Caja Nacional de Ahorro y Seguro (CNAS), a state-owned insurance company in liquidation under the terms of an emergency regime approved by congress that protected the company’s assets and imposed restrictions on its creditors.\(^{52}\) The appellate court decided for the plaintiff.\(^{53}\) Czumadewski then appealed to the supreme court, arguing that article 61 of Law 25,565 had extended the protection previously approved by congress to those who, like himself, had bought insurance policies with the CNAS.\(^{54}\) In 2007, the supreme court affirmed.\(^{55}\) The supreme court expressly adopted the opinion of the attorney general, which stated that even when emergency considerations related to the circumstances of the financial constraints of the state may justify restrictions upon creditors of the CNAS, it was not apparent that said considerations should

\(^{35}\) adopted by *Avico*, Fallos (1935-172-21, 77–78); see also Horacio Spector, *Constitutional Transplants and the Mutation Effect*, 83 CHI.-KENT L. REV. 129, 135 (2008) (discussing *Avico* as a “constitutional transplant” of *Blaisdell*, and laying out the *Blaisdell* requirements for a moratorium to be constitutional).


\(^{48}\) *Id.* at 1850–51, 1853.

\(^{49}\) *Id.* at 1853. The claim was real. A couple of days after the decision, the president issued an emergency decree temporarily suspending the execution of decisions against the pension system. Decree No. 2196/86, Nov. 28, 1986 [26041] B.O. 5.

\(^{50}\) *Rolón Zappa*, Fallos (1986-308-1848, 1855–56).


\(^{52}\) *Id.* pts. I, II, IV.

\(^{53}\) *Id.* pt. I.

\(^{54}\) *Id.* pt. II.

\(^{55}\) *Ávalos*, Fallos (2007-330-2981), slip op. at 1.
also apply to the plaintiff. The court reasoned that the invocation by congress of emergency considerations was not enough to justify the release of the defendant’s obligations, when the benefits of said release would not accrue to the general public but rather to a particular subgroup of it.

C. Emergency Decrees

Finally, the third area in which constitutional emergencies had a great impact was the power of the president to enact decrees with legislative content. The 1853 Argentinian constitution, even though it provides for a very strong presidency, was emphatic in the division of powers, and it did not allow the president to overcome the jurisdiction of congress other than in those circumstances in which the state of siege was declared. For some time, courts were strong defenders of the principle of division of powers. For instance, in 1863, in Ramon Rios, the supreme court ruled that a decree issued by the executive that overtook faculties of congress was constitutionally invalid since each one of the three departments of government is “independent and sovereign” in its sphere, and therefore its powers are “peculiar and exclusive.”

During the following years, the supreme court transitioned away from the requirements imposed by the division-of-powers model to a rather lax authorization to the president to surpass congress in cases of emergency. Some scholars were strongly opposed to the constitutionality of emergency decrees, but others, based upon an interpretation of article 23 of the constitution, argued that the president, as the chief of the administration and the government, had the power to issue emergency decrees when that was required to preserve the “survival of the state.” In 1990, the supreme court had the opportunity to decide a case where an emergency decree was challenged. During President Menem’s tenure, amidst a terrible economic
crisis, the supreme court in *Peralta*\(^6\) validated Decree 36/90 that altered payments on deposit certificates.\(^6\) The supreme court ruled that Decree 36/90, even when intruding upon the jurisdiction of congress, was constitutional because (1) there was a real and grave risk that jeopardized the survival of the state, (2) there was an urgent need to take measures to counteract that risk that required a celerity difficult to obtain in a complex and divisive body like congress, and (3) congress had not legislated otherwise.\(^5\)

In 2000, there was a move away from *Peralta* and other cases that had allowed the president to issue decrees based upon emergency considerations. Early that year, the supreme court decided *Risolía de Ocampo c. Rojas*,\(^6\) in which it found unconstitutional an emergency decree designed to protect the system of public transportation of Buenos Aires.\(^7\) The decree suspended the execution of courts’ decisions against bus companies and their insurers, and determined that the amounts owed to plaintiffs for tort cases should be paid in sixty monthly installments.\(^8\) The supreme court recognized that it was true that the public transportation system and the insurance market were in crisis, that the breakdown of the public transportation system would negatively impact the general welfare, and therefore that the immediate adoption of extraordinary measures was required and justified.\(^9\) However, the supreme court held that the economic crisis, by itself, did not justify the restriction of the constitutional rights of plaintiffs because there was no risk of a general economic disarray or danger to the survival of the nation.\(^10\)

By the end of 2001, the supreme court changed direction again. Argentina faced a catastrophic economic crisis with interest rates in pesos spiraling beyond 600%, and a run on deposits almost crumbled the financial system.\(^7\) The president issued Decree 1570/01 to reorder the economy, avoid the collapse of the financial system, and pacify the country ravaged by a deep social crisis.\(^2\) Later, in January 2002, congress approved Law 25,561, declaring a public emergency in “social, economic, administrative,

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64. *Id.* at 1521, 1556; *see* Spector, *supra* note 46, at 136 (noting that Decree 36/90 “converted time deposits into public bonds” in order to reduce public debt).


67. *Id.* at 5–6.


70. *Id.*


financial and currency exchange matters.” Congress ended the convertibility of the peso, which from 1991 had guaranteed to every holder of Argentinian currency its conversion into dollars on a one-to-one basis. Shortly thereafter, the president issued Decree 214/02, which adopted measures to address the emergency. It was ordered that, among other things, deposits in banks and all other dollar-denominated debts be “pesified” and paid at maturity in pesos at an exchange rate of 1.40 pesos per dollar deposited or owed (plus an inflationary correction depending on whether the debtor was a financial institution or an individual). At that time, the exchange rate was floating around 2.80 pesos per dollar, which meant that the pesification of debts cost many creditors (most of the nation, given that most long-term economic transactions were denominated in dollars) half to two-thirds of their financial wealth.

In 2002, the attorney general disclosed that more than 200,000 injunctions had been filed against the emergency measures taken by the government. Lower courts were generally opposed to the constitutionality of Decree 214/02 and therefore ordered banks to pay creditors in dollars. However, the supreme court in Bustos c. Estado Nacional, after some of its members had been replaced, recognized that the economic emergency justified the costs imposed upon creditors and decided that the decree was not constitutionally prohibited, even though the decree restricted remedies for vindicating property rights—which was the outer limit of previous emergency regulation—and the nature of those rights.

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74. See Spector, supra note 71, at 778 (explaining that the Argentinian congress enacted the Public Emergency and Exchange Regulations Reform Law 25,561 to remedy the economic crisis and end the convertibility system).
76. Id. arts. 2–3.
77. Spector, supra note 71, at 778–79.
78. Id. at 773.
Curiously, in 2008, the supreme court in *Benedetti c. P.E.N.* turned away from *Bustos.* The plaintiff’s husband had bought a pension plan denominated in dollars, and, after his death, the plaintiff, the only heir, asked the insurance company to pay the pension in dollars. The insurance company argued that Decree 214/02 had pesified all debts and therefore the pension should be paid in pesos, which represented a substantial cut in the pension. The supreme court held that insurance companies were heavily regulated, that the right to cash the pension was protected by article 14 bis of the constitution, that the pensioner had denominated the pension plan in dollars to protect its purchasing power, and that it was not possible to transfer the costs of the pesification from the insurance company, which would need more pesos to pay the dollar-denominated pension to the pensioner because the insurance company had willingly assumed the risks of a long-term contract. The court sided with the plaintiff and declared Decree 214/02 unconstitutional.

In March 2009, along the lines of *Benedetti,* the supreme court decided *Álvarez c. Siembra Seguros.* Plaintiff had bought a private retirement plan denominated in dollars and asked the insurance company for payment in said


Sebastian Elias, in probably the best article ever written about the financial crisis in Argentina and the way the judiciary reacted to it, argues that *Bustos* was overturned in *Massa.* José S. Elias, “*Massa*” y la saga de la pesificación: lo bueno, lo malo y lo feo (“*Massa*” and the Pesification Saga: The Good, the Bad and the Ugly], Jurisprudencia Argentina [J.A.] (2008-II-1326) (citing CSJN, 27/12/2006 “Massa, Juan Agustín c. Poder Ejecutivo Nacional – dto. 1570/01 y otro / amparo ley 16.986,” Fallos, (2006-329-5913)). Elias’s view is that even when in *Massa* the supreme court did not explicitly declare Decree 214/02 unconstitutional, that unconstitutionality was necessarily implied since the holding of *Massa*—according to Elias the court ordered the financial institution to pay its depositors something close to the full amount deposited—contradicted the holding in *Bustos.* Id. at 1330, 1339, 1346–47. I disagree. My view is that *Massa* does not contradict *Bustos* since both *Massa* and *Bustos* made it possible for the financial institution to pay substantially less than it was contractually owed (and for that matter much less than the supreme court had allowed the debtor to pay in *Avico*). As Elias admits, however, even in *Massa* the defendant did not have to pay the full amount of the deposit (although it was ordered to pay the plaintiff something close to that) because the contractual interests accrued during the intervening years were not taken into account for the calculation of the debt. Id. at 1339, 1346–47. Failing to award the plaintiff the interest payments, which by that time were probably as large as the principal itself, could only be explained if we assumed that Decree 214/02 was constitutional. 82. CSJN, 16/9/2008, “Benedetti, Estela Sara c. Poder Ejecutivo Nacional / amparo,” Fallos (2008-331-2006), slip op., available at http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=294135&fori=REB01694-391.

83. See id. at 10 (declaring Decree 214/02 unconstitutional).

84. Id. at 1–2.

85. Id. at 2.

86. Id. at 2, 10.

87. Id. at 10.

denomination once he reached retirement age. The insurance company, as in Benedetti, argued that Decree 214/02 had “pesified” all debts and therefore that payment was complete if made in pesos. The supreme court found that there was no difference between a pension plan and a private retirement plan, and therefore, it did not find reasons to depart from its precedent in Benedetti declaring Decree 214/02 unconstitutional and ordering defendant to pay the retirement plan in full in dollars.

III. The Explanation of the Judicial Record

A. The Three Lines

What are the lines or directions, if any, of the rather inconsistent record of Argentinian courts with respect to cases in which the government has tried to restrict individual rights or circumvent constitutional procedures? Is it possible to make sense of this apparently contradictory story? These are important questions in themselves, but they are particularly important for us because their answers will help us understand what we can expect from judges and whether judges may be the solution to the empirical and theoretical problems that constitutional emergencies introduce.

We can group decisions made by courts into three different lines of rationales that could sustain the decisions as good law in years to come. These three lines were never explicitly stated by any intervening court. Instead, they emerge as guiding principles in various decisions. The three lines are the following:

1. More deference should be granted to the government in economic emergencies than in security emergencies.
2. More deference should be granted to the government when the emergency is systemic than when the emergency is local.
3. More deference should be granted to the government when the emergency has just started than when the emergency has been ongoing for a significant period of time.

The First Line is nothing but a compact way of expressing the diverse treatments that judges and the supreme court have given to emergencies caused by security reasons vis-à-vis emergencies caused by economic ones. As I mentioned in subpart II(B), in Avico, the supreme court validated a three-year mortgage-payment moratorium and a ceiling of 6% for interest rates. In Peralta, the supreme court found constitutionally permissible a restructuring of all financial credits for up to ten years and a substitution of

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89. Id. at 20 (Fayt, J., concurring).
90. Id. at 20 (Fayt, J., concurring).
91. Id. at 1; see also id. at 20 (Fayt, J., concurring).
92. I deliberately speak of “lines” here because the decisions taken by the supreme court lack the required specificity to constitute juridical doctrines in the strictest sense.
93. See supra notes 45–46 and accompanying text.
the original financial debtor for the state.94 And, finally, in Bustos, the court upheld (by way of pesifying all credits) a straight reduction of the capital owed.95

In each of these three cases, the background circumstances, at least as described by the supreme court, were increasingly problematic, thereby justifying increasingly heavier restrictions. The court determined that the emergency measures in Avico were required to prevent “disastrous consequences for the economy and its financial stability.”96 In Peralta, the court suggested that the emergency measures were necessary not only for the needs of the economy but also in order to “prevent a situation that presented a grave social risk.”97 The Bustos court warned against a future of “primitivism and rusticity” in the country if the banks were allowed to go bankrupt.98 The use of emergency economic powers have come to constitute a rather permanent governmental device, not only in third-world countries but also in already developed ones.99 Big losses for creditors are tolerated by countries with a strong tradition of respect for property rights,100 but beyond that, the progeny of economic-emergency cases in Argentina show that the supreme court progressively legalized deeper encroachments on property rights during economic emergencies. This is a rather curious result because in the realm of emergencies due to security concerns, courts have been moving in the direction of fewer infringements on liberty.101 Indeed, from Granada on, it seems clear that the court will not allow restrictions on liberty that do not satisfy the “brevity” requirement.102 From Bustos on, it is also

94. See supra notes 63–65 and accompanying text.
95. See supra notes 75–81 and accompanying text.
101. See, e.g., supra notes 30–32 and accompanying text.
102. See CSJN, 3/12/1985, “Granada, Jorge Horacio / recurso de hábeas corpus en su favor,” Fallos (1985-307-2284, 2309) (declaring that in order to be valid, an act providing for the suspension of rights requires that the suspension be brief).
clear that if the circumstances are hard enough, the court may allow property owners to endure uncompensated losses.\footnote{103}{See supra notes 79–81.}

As to the Second Line, the holdings of cases like Rolón Zappa, Risolía de Ocampo, and Ávalos show that for the supreme court, considerations of economic emergencies have less bite when they are invoked to cure damages that are local as opposed to systemic. Indeed, in Rolón Zappa, Risolía de Ocampo, and Ávalos, the supreme court invalidated laws that were beneficial only to certain individuals or groups but not to the general public.\footnote{104}{The Rolón Zappa court invalidated Laws 18,037 and 21,864 because the rationale of these laws was to preserve the teachers’ pension system as opposed to, for instance, the general functioning of the economic system. See supra notes 47–50 and accompanying text. Similarly, the Ávalos court invalidated article 61 of Law 25,565 because its protection of an insured party did not provide the public benefits that justified protecting the insurer. See supra notes 51–57 and accompanying text. The Risolía de Ocampo court rejected Decree 260/97 because the emergency that it addressed did not threaten to cause general economic disarray. See supra notes 66–70 and accompanying text.}

The Third Line explains Benedetti and Alvarez. Benedetti and Alvarez were both decisions in clear tension with Bustos. In these three cases, the defendants were financial institutions—banks in Bustos and insurance companies in Benedetti and Alvarez—and therefore the rationale invoked by the court to sustain Decree 214/02 in Bustos should have been used to decide for the defendants in Benedetti and Alvarez as well.

Emergency decrees sanctioned in 2001 and 2002 had pesified not only the debts but also the credits of the financial system in what was known as “asymmetric pesification.”\footnote{105}{See Spector, supra note 71, at 778 (describing the rate system as “asymmetric pesification” because restricting the exchange rate to well below the free-market exchange rate was a bane to banks, but a boon to local and foreign corporations).}

Since the financial system’s credits had been pesified, the government argued that the pesification of debts was the only way to prevent the collapse of the entire financial system.\footnote{106}{See supra notes 75–76 and accompanying text.} In Bustos, the supreme court accepted the argument and reckoned that if the debts of the financial system were not pesified as mandated by Decree 214/02, banks would go bankrupt, provoking a future of “primitivism and rusticity.”\footnote{107}{See supra notes 79–81, 98 and accompanying text.} Now, insurance companies, like banks, were mere financial intermediaries: they could only pay their debts provided that they could collect their credits. Furthermore, the supreme court in Rinaldi c. Guzmán Toledo\footnote{108}{CSJN, 15/03/2007, “Rinaldi, Francisco Augusto y otro c. Guzmán Toledo, Ronal Constante y otra / ejecución hipotecaria,” Fallos (2007-330-855), slip op., available at http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=251060&fori=RHR00320-420.} pesified a private debt, even when the systemic reasons favoring the pesification of credit did not apply.\footnote{109}{Id. at 1–2, 25. In Rinaldi, the supreme court reasoned that the lender would have unfairly enriched itself if paid in dollars. Id. at 20. The argument is both factually and normatively problematic since, as a result of the declining purchasing power of pesos, many assets like real...} Notwithstanding the powerful similarities among...
Bustos, Rinaldi, Benedetti, and Alvarez, the court declared Decree 214/02 unconstitutional. Although the court did not admit as much, I suggest that it was motivated by the fact that the crises in question were seven years past and the economy had been growing solidly for over five years in a row. The supreme court did not side with defendants simply because the emergency had been declared many years ago and the collapse of the financial system feared in 2002 did not occur.

B. Can Legal Theory Explain These Decisions?

The three lines are the directions taken by judges in their rulings. But beyond the way judges have decided, what can explain their decisions? Why have courts, as a general tendency, deferred to the government in the way they did in the many cases presented in the previous subpart? What explains the cases where courts held against the government?

David Dyzenhaus attributes it to “constitutional positivism,” as he dubs the view according to which the only source of law is the legislature, because it is in the legislature where collective judgments about the common good are best made. The resistance to identifying what is binding as law by reference to wider considerations than those that could be acceptable to the authors of the norms in question is, according to Dyzenhaus, a core positivist idea that one is forced to maintain if, as positivism claims, legal rules can only be recognized by their source.

In a thorough study of the judiciary during the dark years of military rule in Argentina and of the way in which the judiciary reacted to the emergency justifications the military juntas invoked to restrict rights and liberties, Mark Osiel argued that judges (in particular supreme court judges) were

declaration. See id. at 45 (Argibay, J., dissenting) (noting that the mortgage at issue was negotiated in dollars). Further, there was no indication that the enrichment of the lender would have been unfair since there was a market for loans denominated in pesos, and thus if the parties had agreed upon a loan in dollars, the risk of devaluation of the peso was a risk assumed by the debtor. See id. at 45 (Argibay, J., dissenting) (asserting that the loan agreement contained clauses showing that the debtor had knowledge of the possibility of devaluation of the peso).


111. In addition to the legislature, we could add the constitutional convention as another source of law without betraying Dyzenhaus’s ideas.


inspired by legal realism. He claimed that even when it was true that the
court expressed its views with positivist rhetoric, it did so in order to some-
how favor liberty simply because such rhetoric allowed the court to uphold
preexisting rights under positivist Argentinian law. Osiel claims that while
the judiciary had some small victories, it eventually failed precisely because
its decisions were couched in positivist rhetoric that deprived them of the
theoretical basis to build resilience against executive intimidation. Additionally, Osiel argues that positivism reduced the scope of the regime’s
misconduct and made it “appear much narrower than the natural law critique
[would have] permit[ted].” If resistance to oppressive law was to have any
significant effect, Osiel argues, it was necessary for the court to favor “a
more thoroughgoing critique of the regime’s first principles[, which] . . .
would have required an invocation of general moral principles, of natural
law.”

It is logically possible that sometimes positivist ideas may explain
judicial capitulation to wicked legal regimes. Robert Cover may have been
right when he blamed legal positivism for making it possible for northern
judges to refrain from enforcing the Fugitive Slave Acts, and it may be the
case that in Argentina positivist rhetoric limited the efficacy of the courts.
However, it is also logically possible that, as argued by many legal
philosophers, positivism in the long run may better serve the cause of
democracy and human rights than its philosophical contenders, since
dissociating law from any moral connection may prevent rulers from

114. See Osiel, supra note 23, at 519 (“[T]he most significant feature of this judicial
recalcitrance is the extent to which it operated almost entirely within the regime’s own preferred
jurisprudential form—legal realism.”).
115. See id. at 523 (“[T]he Court was led to uphold the rights of citizens under sources of
positive law that antedated the military seizure of power, even when the apparent purpose of a
military measure was precisely to eliminate such rights.”).
116. See id. at 524–26 (noting that the judiciary framed its decisions against the junta in light of
positivist law rather than natural law, leading to narrower criticisms and outcomes that were more
palatable to the junta). Lon Fuller also claims that it is reasonable to suggest that positivism was
helpful to the Nazi Party’s drive toward dictatorship in Germany. Lon L. Fuller, Positivism and
Osiel, historians have repeatedly shown the suggestion that particular legal philosophies are more or
less prone to support authoritarian governments to be “empirically false.” Osiel, supra note 23, at
495.
117. Osiel, supra note 23, at 525.
118. Id. at 551–52.
119. See Robert M. Cover, Justice Accused: Antislavery and the Judicial Process
121–22 (1975) (describing how the prevalence of positivist legal thinking in the United States
restricted the possibilities for a liberal judicial response to the Fugitive Slave Act of 1850).
120. See, e.g., Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175,
1180 (1989) (asserting that establishing a firm rule of decision can embolden judges to protect
individual rights); Frederick Schauer, Rules and the Rule of Law, 14 HARV. J.L. & PUB. POL’Y 645,
688–91 (1991) (arguing that rules and rule following suppress authoritarian impulses and are
significant for maintaining separation of powers).
justifying their actions by reference to the laws they themselves enact and, in this way, make it more difficult for them to narcotize their people.\textsuperscript{121}

C. Can Facts About the Judiciary Explain These Decisions?

From the discussion of the Argentinian cases above, it follows rather obviously that Argentinian jurisprudence has not comported with the conceptual underpinnings of positivism. Neither Dyzenhaus’s nor Osiel’s explanations are sufficiently nuanced to provide an account of the judicial record in emergency situations. This is no wonder since it seems very unlikely that a complex reality could be explained merely by juridical ideals.

Judges are trained and expected to adjudicate claims between the state and its subjects when the state aims to carry out decisions that seem to violate individual rights or, conversely, not to carry on policies that seem to be required by individual rights. Judges are also trained and expected to adjudicate claims between individuals whose rights conflict with one another in particular circumstances. As a consequence of their institutional training, judges develop a certain viewpoint, which for simplicity I will call the “View from Rights.” The main tenet of the View from Rights is that all judicial conflicts can be successfully adjudicated on the basis of rights. This tenet rests on two assumptions. The first is that each individual right may be successfully interpreted, using the tools of textual analysis, drafter’s intent, and traditional forms of interpretation. The second is that these rights may be ordered into a coherent whole on the grounds of their relative importance.

Now, a constitutional emergency is a circumstance in which the very nature of the problem we confront seems to displace the View from Rights. We are in an emergency precisely when we find that reasoning confined by the View from Rights may jeopardize, if not the rights themselves, other important explicit or underlying aspirations of the constitutional text. Obviously, there are cases in which the claim that we are in a constitutional emergency may be fraudulent or an attempt to legitimize sheer power. Moreover, one may think that constitutional emergencies are an empty category. But, if one believes, as I do, that constitutional emergencies exist,\textsuperscript{122} it is because one suspects that the View from Rights is not fertile

\textsuperscript{121} See, e.g., Liam Murphy, \textit{The Political Question of the Concept of Law}, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO \textit{THE CONCEPT OF LAW} 371, 389–92 (Jules Coleman ed., 2001) (arguing that citizens living under a legal system in which law is overtly coupled to morality are more likely to acquiesce to any enacted rules, even rules that are actually immoral).

\textsuperscript{122} Sanford Levinson and Jack Balkin share this view, going so far as to identify three types of constitutional crises:

Type one crises arise when political leaders believe that exigencies require public violation of the Constitution. Type two crises are situations where fidelity to constitutional forms leads to ruin or disaster. Type three crises involve situations where publicly articulated disagreements about the Constitution lead political actors to engage in extraordinary forms of protest beyond mere legal disagreements and political protests: people take to the streets, armies mobilize, and brute force is used or threatened in order to prevail.
enough to solve all the problems we may face or that the explicit or underlying aspirations of a constitution might be at stake in some situations.

The judiciary is not the place to find dexterity. Judges are not prone to view the conflicts they have to adjudicate from what we may call a “Foundational Point of View.” The Foundational Point of View is more encompassing than the View from Rights since, in addition to a view of the underlying purpose of each of the individual rights involved and the rules that either order rights according to their relative importance or accommodate them into a coherent whole, it provides us with the highest visibility to the foundational aspiration of the constitution—more precisely, the aspiration to constitute a demos committed to the realization of its defining common ends (which in the Argentinian case are enshrined in the constitution’s preamble). The difficulty for judges operating under the Foundational Point of View is the product of neither judges’ deficient legal philosophy nor of their own personal weaknesses or limitations. Rather, it is a by-product of deep institutional factors related to the way in which courts are equipped and the mold in which they have functioned so far.

The judges’ epistemic constraints are among the most prominent difficulties that affect the judiciary. Indeed, in most cases, judges simply lack the information or the time required to make an educated judgment from a point of view wider than the one they usually occupy in their day-to-day job. Judges are, as recognized by the dissent in Provincia de San Luis, unable to do justice in cases requiring great “technical and factual complexity” or to handle “the examination of intricate financial and banking problems” required by cases like Bustos. Furthermore, and connected with judges’ epistemic restrictions, judges typically adjudicate cases that are canonically binary, in which a plaintiff sues a defendant for a solution to his claims and wants to obtain a remedy entirely from the defendant himself. This binary mode of functioning ill prepares judges to deal with situations in which the very nature of the problem prevents the defendant from providing the solution entirely by himself. Indeed, in cases like Bustos, where the cause of plaintiff’s inability to honor its obligation “transcended the particular economic situation of each . . . [bank and] acquire[d] the dimension of a systemic crisis,” judges find it very difficult to find the right solution since it really depends on a change of background.


123. See Osiel, supra note 23, at 547 n.238 (“Because he has limited time, energy, and imagination, the average judge is simply unable to derive a good-faith argument of rule, principle, or social policy for every conceivable result in most disputes that come before him.”).


circumstances or the administration of all-encompassing solutions that are well beyond the reach of any given defendant.126

Judges are aware of the impediments created by their epistemic and functional predicament. Thus, the Argentinian supreme court said in *Peralta*, echoing Holmes in *Lochner*, that judges are called to adjudicate, not to administer or to fix the economic policies of the public powers.127 Judges also know that when the government invokes emergency considerations, a lot turns on the outcome.128 In an emergency, as the supreme court has said, judges have to decide in an “extraordinary situation that hovers over the economic social order, with its burden of accumulated troubles, in the form of scarcity, poverty, penury or indigence, and creates a state of necessity that must be put to an end.”129 Indeed, in emergency cases, judges suffer an additional pressure to decide given the magnitude of the questions involved. This was recognized in *Galli*,130 in which it was decided that pesification of the public debt was constitutional.131 In *Galli*, Justice Zaffaroni and Justice Lorenzetti, in a joint decision, argued that the emergency decree “weakens the commitment to law and contracts” and “destroys every calculation of risks and restricts economic functioning.”132 Nevertheless, they sustained the pesification emergency decrees, arguing that “prudence prevents the revision of the rationale offered by the government.”133

The third fact is more parochial than the previous two. Judges in Argentina lack a supporting legal culture that could serve as an Archimedean


127. See CSJN 27/12/1990, “Peralta, Luis Arcenio y otro c. Estado Nacional (Mrio. de Economia - B.C.R.A.) / amparo,” Fallos (1990-313-1513, 1552) (recognizing that there was a need for government action to address the economic condition, but stating that the court’s function was not to decide on the remedy but rather to determine the necessity and reasonableness thereof); accord *Lochner* v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) (“[A] constitution is not intended to embody a particular economic theory . . . . [T]he accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution . . . .”).


129. Spector, *supra* note 46, at 137 (quoting *Peralta*, Fallos (1990-313-1513, 1549)).


133. *Id.* at 28.
point to sustain their resistance to the government.\textsuperscript{134} Further, in Argentinian history there are not many instances of judges who successfully managed to convince other judges that their views are constitutionally correct and that those views therefore deserve to be adopted as sound precedent.\textsuperscript{135} We certainly have some great dissents,\textsuperscript{136} but (unfortunately) dissents rarely manage to become the official narrative of what our law is. In short, judges lack the incentives to adopt the hard alternative of resistance to the government.

Finally, judges know that they are incapable of solving systemic problems. The most that courts can do is prevent the government from doing whatever it wants or exhort the government to take some measures that courts find legally required. Generally, however, courts lack the resources and the authority required to organize courses of public action. Indeed, as shown in Verbitsky,\textsuperscript{137} courts cannot require the government to use “specific strategies” to solve the problem at hand but may only require that the government take certain needs into account or to design some mechanism to protect certain individual rights affected by government action. In Verbitsky, the plaintiff brought a habeas corpus claim on behalf of all those detained in the overpopulated provincial commissaries and asked the court to take measures to ease detention conditions.\textsuperscript{138} The supreme court ordered the province of Buenos Aires to inform the supreme court of any measures taken to ease the detention conditions.\textsuperscript{139} The court further exhorted the province to conduct a dialogue where all those involved in the case could cooperate in the search for a solution respecting the rights of the detainees.\textsuperscript{140}


\textsuperscript{138} Id. at 1.

\textsuperscript{139} Id. at 54.

\textsuperscript{140} Id.
These four facts about the judiciary explain the three lines courts have adopted in cases in which the government invoked emergency considerations to restrict rights or circumvent constitutional procedures. Obviously, we should not expect to find pieces of judicial discourses to confirm this claim since judicial reasoning is often left unstated. However, it is not difficult to show that these four facts explain the way judges have decided. Judges will be more deferential to the government during economic emergencies than during security emergencies simply because economic emergencies (1) pose conflicts with rights granted for the greater good—property, for instance—that are less tractable from the View from Rights, 141 (2) open up problems of wider scope than those opened up by security emergencies, and thereby, more turns on the outcome in economic emergency cases, (3) have a weaker line of precedent with which to restrain the power of government, and (4) require the organization of immediate alternatives to prevent the frustration of the constitutional ideals at stake that judges are incapacitated to provide for.

The Second Line, according to which more deference should be granted to the government when the emergency is systemic and less when the emergency is local, is also explainable by the facts about the judiciary mentioned above. Local emergencies open up problems of narrower scope than those opened up by systemic emergencies, and therefore, intervention in local emergencies is less taxing for judges than intervention in systemic ones. Moreover, given the narrower scope of local emergencies, less turns on the outcome of the ways in which judges decide.

Finally, the Third Line, according to which more deference should be granted to the government when the emergency has just started than when the emergency is about to end, seems to be a natural corollary of the way in which courts are structured and the way in which judges perform their jobs. Indeed, recent emergencies open up problems of wider scope with higher epistemic uncertainties and impose heavier burdens on judges because more turns on the outcome.

IV. The Point of Law

If the only point of law was its contribution to individual rights, the above explanations for why judges uphold emergency decisions would be rather discomforting. A judicial record determined by structural

141. I am presupposing the plausibility of the explicating power of a distinction between rights that are granted entirely or almost entirely for the sake of the individual—liberty and the right of personal freedom, for instance—and rights that are granted to the individual for the sake of the greater good—property, for instance. One may resist the idea that property rights are granted to the individual for the sake of the greater good. You may argue that the right to property is a natural right. I am inclined to think such a claim can only be true in cases of personal property, but I find it difficult to reckon that the right to the use of our financial wealth, for instance, is categorically identical to our right to participate in the election of our government, to publish our ideas in the press, or to assemble.
considerations will make law’s contribution to justice less significant than it could be otherwise since, it seems, judges and courts are the best forum for the realization of rights.142 Indeed, if judges’ decisions were the causal consequences of the way in which the judiciary works, it would not be very realistic to expect judges to be more militant in their defense of individual rights where emergency considerations are invoked, at least when the emergencies in question are economic, systemic, and new.

Dyzenhaus, the author with whom I take issue in this Article, thinks that law’s worth is subservient to the value of rights and justice. He claims that the “rule of law,” understood as the “rule of substantive principles,” has normative priority over the “rule by law,” understood as the view that government action is “in compliance with the rule of law” so long as there is “legal warrant” for the action.143 Dyzenhaus accepts Hobbes’s dictum that authority, not truth, makes law.144 Therefore, he may feel improperly described as someone whose conception of law’s worth is reduced to its contribution to the realization of rights and justice. Dyzenhaus claims that, on the one hand, legal authority, to be such, has to accept the moral and constitutive constraints of the rule of law, and on the other, the content of the rule of law has to be capable of being enforced respecting, among other things, “the equality of all of those who are subject to the law.”145 Both views are clear symptoms that, for Dyzenhaus, the ideal embodied in law, “legality” as he calls it, is substantive in nature (as opposed to procedural) and as such presupposes that law’s value is primarily connected with rights and justice.146

Is the value of law exhausted by its contingent contribution to rights and justice and, therefore, should we be concerned by the resistance of judges to stopping the government from infringing upon our rights? Or, given that law is also valuable because it allows us to attain other important desiderata, should we not be dismayed at the lack of resistance by judges if we can find alternative institutional arrangements that also contribute to the realization of


144. DYZENHAUS, supra note 112, at 12.

145. Id. at 12–13.

146. See id. at 7, 12–14 (“[A]ny plausible conception of the rule of law is one that both links procedural constraints to substantive values and requires that all three branches of government regard themselves as participating in a common project of realizing those values.”).
said valuable desiderata? If this is the case, which other desiderata does law help us obtain? I have elsewhere defended the idea that law’s value is associative. That is, we value law (and we grant to it normative authority qua law somehow independent from its contingent contribution to rights and justice) because we value the particular kind of relationship that emerges among those that are bound by the law.148

The relationship among those bound by law that confers value to the law could be procedural; more precisely, it is the relationship that exists among subjects of the law when they are able to cooperate together in the common enterprise of collective self-government. Others may defend the idea that the relationship in question is substantive and may assert that it exists among those that are bound by the law if their interests count equally under law. I have suggested that both views, the first entirely procedural and the second entirely substantive, are somehow lacking and need to be complemented by one another. Since a legal community is a particular association tied together both by the aspiration to build a common destiny, as the first view presupposes, and by the aspiration to provide for the interests of all of its members, as the second view suggests, the kind of relationship that should sustain the value of law should not be just procedural or just substantive, but a principled mix of both. Law’s value should reside in its ability to create the relationship that exists among those that are bound by the law when they manage to count twice—first, as “makers” or authors of the law and second as “matter” or beneficiaries of it.

One should not despair, as Dyzenhaus does,152 if judges defer to political authorities in emergency cases. Whatever the risk to rights and justice that less militant judges may create—which is debatable—there may be institutional arrangements different from courts that allow us to increment


148. Id.

149. See Jürgen Habermas, Multiculturalism and the Liberal State, 47 STAN. L. REV. 849, 852 (1995) (emphasizing the priority of popular sovereignty over individual substantive rights since “addressees of law must be in a position to see themselves at the same time as authors of those laws to which they are subject”).

150. See, e.g., Philip Soper, The Moral Value of Law, 84 MICH. L. REV. 63, 64 (1985) (characterizing legal systems as involving a “good faith attempt” by lawmakers “to issue laws they believe to be just or in the common good”).

151. See Rosenkrantz, supra note 147, at 36 (theorizing that a political community results from a combination of the procedural desire to shape a common destiny together and the conviction that community more easily provides substantive satisfaction of individual interests).

152. David Dyzenhaus, The Puzzle of Martial Law, 59 U. TORONTO L.J., 1, 56–57, 61 (2009) (arguing that since the point of a state is the dignified treatment of individuals subject to the law, judges who in times of emergency minimize the protection of substantive rights while emphasizing empty procedural formalities engage in “legitimizing a sham”).
law’s value *qua* law, help us gain expediency (something of great importance in constitutional emergencies), and protect rights as much as possible. With all the preceding in mind, I turn from legal theory to institutional and political design.

V. The Romans Had the Solution

Bruce Ackerman has offered an ingenious institutional mechanism of checks and balances for times of crisis that does not depend on the activism of judges to work. His basic idea is to strengthen the legislative supervision of the president’s inherent emergency powers (outside of some insulated zones of protected liberties—torture is a taboo, he claims—where the president cannot act no matter what), requiring that the emergency measures be endorsed at incrementally shorter times by an escalating cascade of supermajorities in congress. The “supermajoritarian escalator” seems to avert the danger of excessive decisionism, since it disaggregates the hurdles that the American President has to pass in order to have his views of how to solve the constitutional emergency enacted into valid law.

Whatever its merits for the United States, the supermajoritarian escalator is not a good recipe for a country like Argentina. Ackerman’s proposal has a very dysfunctional aspect since it attempts to reduce arbitrariness at the cost of offering minorities opportunities for strategic conduct. Indeed, the supermajoritarian escalator allows minorities to block the president, even when animated by disreputable reasons: for example, the inability of the president and the party in office to solve the constitutional emergency could improve a minority’s chances of a better electoral performance.

The opportunities for strategic conduct that the supermajoritarian escalator affords different groups may be of no relevance in a country with a strong consensual political culture where every important political actor prioritizes compromise above her own political aspirations or ideals. But strategic conduct is very significant in a divisive country like Argentina, where there are very confrontational political parties and a wide and deep programmatic disagreement, which makes it difficult for political actors to join in a common course of action. Indeed, we should try, as the Romans did, to reduce the incentives to abuse emergency powers by creating

154. *Id.* at 1073.
155. *Id.* at 1047–53.
156. *See id.* at 1048 (describing how the requirement for escalating legislative supermajorities would prevent a bare majority from normalizing emergency powers).
institutions that impose costly ex post controls on the official allowed to wield emergency powers.\textsuperscript{158}

In contemporary debate about emergency powers, many have paid close attention to the figure of the Roman dictator. Dictators were appointed by a consul provided that the senate had already recognized the need to appoint a dictator, and the dictator’s authority ended when he fulfilled his task or the time fixed in his appointment had elapsed.\textsuperscript{159} The dictator did not have the power to change the constitution.\textsuperscript{160} Dictators were used by the Roman republic to combat external enemies, to put down civil insurrections, and, from 376 BCE onwards, to fulfill a number of functions when the accustomed remedies were insufficient.\textsuperscript{161} For example, dictators took over some consular duties, like holding elections and ceremonial games, reading the auspices, and so on.\textsuperscript{162} In general, the dictator could not pass legislation, though there were some dictators that did so.\textsuperscript{163}

Much less attention has been paid to another Roman practice, the senatus consultum ultimum. Machiavelli and Rousseau both mentioned it in their studies of dictatorship\textsuperscript{164} but few other authors interested in the study of emergency have paused to investigate the pros and cons of this institution. The senatus consultum ultimum was a decision by the senate to authorize the consul to do whatever he deemed necessary to protect the republic and to eradicate the threat that menaced it.\textsuperscript{165} The consul, then, would have ample power to solve the emergency, but he would be subjected to an ex post facto evaluation of his performance\textsuperscript{166} that, in some cases, ended with criminal charges, such as when Cicero was found guilty for violating due process in ordering the execution of some of the Catilinarias conspirators.\textsuperscript{167}

The Roman way of dealing with emergencies—both the dictator and the senatus consultum ultimum—has been praised for reducing the incentives of those officials with the power to declare emergencies to abuse the emergency

\begin{itemize}
  \item 158. See, e.g., Ackerman, supra note 153, at 1046 (noting that Roman consuls entrusted with appointing a temporary dictator in times of crisis were not allowed to select themselves as dictator).
  \item 159. See NOMI CLAIRE LAZAR, STATES OF EMERGENCY IN LIBERAL DEMOCRACIES 125–26 (2009) (explaining the process of appointing the Roman dictator).
  \item 160. See id. at 120–21, 126–27 (indicating that the Roman dictator was not historically understood to have the power to change the constitution).
  \item 161. See id. at 124–25 (describing the various roles of the Roman dictator).
  \item 162. Id. at 125.
  \item 163. See id. at 120–21, 126–27 (elucidating the historical understanding of the scope of the Roman dictator’s power and citing examples of dictators who passed legislation).
  \item 164. See NICCOLO MACHIAVELLI, Discourses on the First Ten Books of Titus Livius, in THE PRINCE AND THE DISCOURSES 99, 204 (Christian E. Detmold trans., Random House 1950) (c. 1517) (describing the Roman practice of granting emergency power to the consuls instead of a dictator); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 171, 173 (Maurice Cranston trans., Penguin Books 1968) (1762) (noting that giving emergency powers to the consul was one of the methods of dictatorship in Rome, and providing the example of when Cicero was granted such powers).
  \item 165. LAZAR, supra note 159, at 147.
  \item 166. Id. at 148.
  \item 167. Id.
\end{itemize}
powers for their own benefit. Indeed, what Ferejohn and Pasquino have called the “heteroinvestiture”—that is, the fact that the official in charge of the emergency could not declare the emergency himself and that he was appointed by someone else—prevented the self-serving declaration of an emergency. But the institution of the *senatus consultum ultimum* had an additional virtue because subjecting the consul to an ex post evaluation of his job reduced the risk that the dictator would act arbitrarily without affording strategic political actors the ability to interfere with the solution to the crisis.

Let us return to Argentina. The current Argentinian constitution allows the president to issue emergency decrees during exceptional circumstances if it is impossible for congress to comply with the established procedure for enacting laws, provided that the president does not issue decrees regulating political parties or criminal, tax, or electoral matters. Article 99(3) requires that emergency decrees be signed by all the members of the cabinet and by the chief of cabinet, a non-elected official appointed by the president and removable by the joint decision of the majority of both houses of congress. In addition, the constitution requires the chief of cabinet to send to the Permanent Joint Congressional Committee the emergency decrees issued by the president for consideration. The Joint Congressional Committee, in turn, is required to submit the decrees to both houses of congress within ten days for discussions and vote.

The way in which the Argentinian constitution regulates emergency decrees is probably one of the worst in Latin America. Like the supermajoritarian escalator, the Argentinian regulation has the potential to create deadlocks since, according to article 99(3), emergency decrees cannot survive without the cooperation of congress. Moreover, article 99(3) does not even have the positive aspects of the supermajoritarian escalator since it does not in any way prevent the president from using the emergency powers capriciously. Indeed, nothing in the constitution deters the president from using emergency powers in an unjustified way if he has the required majorities in one of the houses of congress.

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168. See *id.* at 128–29 (“In a different vein, the structure of informal incentives heavily favored good behavior on the part of dictators.”).


170. Art. 99(3), CONST. NAC.

171. Id.

172. Id. arts. 99(7), 101.

173. Id. arts. 99(3), 100(13).

174. Id. art. 99(3).

175. See *supra* notes 153–56 and accompanying text.

176. Art. 99.3, CONST. NAC.

177. Compare *id.* (codifying a procedure for the president to issue emergency decrees that lacks ex post incentives to encourage good behavior by the president in issuing emergency decrees), with LAZAR, *supra* note 159, at 147–48 (describing the *senatus consultum ultimum* and concluding that the device “relic[d] on . . . accountability after the fact”).
Furthermore, the Argentinian regulation is particularly myopic because, in Argentina, congress has had to control the president. Due to particular features of Argentinian politics, congress had enormous difficulties in making the president comply with the law.178 Given the strong party discipline that characterizes Argentinian politics and the robust political and institutional power of the presidency in our constitutional regime, it is illusory to think that the president will be controlled by his own political allies in congress.

There is much to learn from the Roman way to deal with emergencies. Indeed, inspired by the Romans, we could offer an institutional design that prevents, or at least minimizes, arbitrariness and decisionism without opening new opportunities for strategic action by political parties. Consider the following variant of article 99(3): the chief of cabinet, who according to the Argentinian constitution has to sign all emergency decrees issued by the president, could be censured and replaced by a new nominee appointed by the majority of the lower house with a tenure equal to the duration of the emergency decree or up to the next general election, whichever is shorter. This proposal would subject the president to a costly ex post facto control. Indeed, the president would pay a rather high price if she were deprived of the chief of cabinet she chose. Given the constitutional responsibilities of the chief of cabinet from then on, the president would have to negotiate all her major political decisions, including the budget, with someone that most likely does not share her political agenda.

Now, the ex post facto control I propose here—which should minimize the risk of arbitrariness and decisionism—does not come with the problems of the supermajoritarian escalator. My proposal clearly deters strategic behavior by the opposition. Indeed, the majority of the lower house, the group that according to my proposal has the ability to censure the chief of cabinet, only has the right to censure the chief of cabinet if it proposes a replacement. This “constructive veto” of the chief of cabinet has a great disciplinary aspect, since it forces the majority of the lower house to become part of the government and, with it, to take governmental responsibilities and to share in the fate of the government and the president. The majority of the lower house will govern through the chief of cabinet appointed by them, and it will have stronger incentives to reach productive agreements with the president and her party—at least stronger incentives than those it has under a supermajoritarian escalator where congress could just veto all presidential initiatives without paying any price for doing so. The constructive veto will make it very unlikely that the majority of the lower house will act only

178. See Carlos Santiago Nino, Hyperpresidentialism and Constitutional Reform in Argentina, in INSTITUTIONAL DESIGN IN NEW DEMOCRACIES: EASTERN EUROPE AND LATIN AMERICA 161, 165–66 (Arend Lijphart & Carlos H. Waisman eds., 1996) (explaining that because the Argentinian presidents do not need legislative confirmation of appointments and can enact decrees unilaterally, among other things, the legislature’s power is limited).
guided by its more sinister purposes, since if it does so it runs the risk of dying by its own medicine.

Furthermore, my proposal of costly ex post facto control could be supplemented so as to obtain the most important aspiration behind Ackerman’s supermajoritarian escalator. Indeed, the attractiveness of the supermajoritarian escalator is that by progressively granting to fewer people the power to evaluate the use of the emergency powers, more minorities will be protected against exploitation. This is not a negligible feature. Indeed, the protection of minorities is one of many reasons for having a constitutional democracy. My proposal provides for a superminoritarian escalator: when the emergency measures adopted by the president and the chief of cabinet last more than a given amount of time, at incrementally shorter times and each time a smaller minority—provided that it had opposed the use of the emergency powers from the start—could censure the chief of cabinet and appoint a replacement up to the duration of the emergency measures or the next general election. This addition, I think, gives my version of article 99(3) the ability to minimize the arbitrariness in which the president and the majorities may feel tempted to indulge in circumstances of dire need. The superminoritarian escalator empowers those who are more in need of power—the smaller minorities—and works as a shield that protects them from the tyranny of the majority.

This ex post facto control mechanism has many interesting advantages and fares better than alternative proposals. To start with, it is better than Dyzenhaus’s dependence on judges—remember that Dyzenhaus insists that judges should always be able to review emergency decisions. The ex post facto control mechanism does not require that judges do something that, at least in Argentina, they have not been able to do in the past. Judges have only a minor role in the scheme I suggest. Their role is limited to enforcing the provisions of the constitution that allow the appointment of the chief of cabinet, first by the majority of the lower house and then by smaller minorities each time if the emergency measures last.

Further, my proposal would relieve us of the problem of policing the declaration of emergencies. Indeed, most modern proposals—for instance, the idea of having an emergency board that declares the emergency—have

179. See DYZENHAUS, supra note 112, at 4 (proposing that “judges have a constitutional duty to uphold the rule of law,” even in emergency times when there “seem to be legislative or executive indications to the contrary”).

the problem of ensuring that the declared emergency is a real one. My proposal would not create that problem because it would deter the president from declaring an emergency that is not real since, by doing so, she could pay the high price of having to share her government with a chief of cabinet she might not like.

Finally, the ex post facto control mechanism I suggest here could contribute to the relationship whose existence makes law valuable. It would empower the opposition to the president to share with her in the government, establish an institutional structure that makes the existence of consent among political actors more likely, and involve more people in making the law.

VI. The Theoretical Problems Resolved

As I said in the Introduction, constitutional emergencies are interesting because they challenge our theoretical convictions—more precisely, they force us to rethink deeply held liberal beliefs. Constitutional emergencies seem to show that only power, not law and justice, makes our political communities able to endure moments of deep crisis. Therefore, power, not law and justice, the critics of liberalism would argue, should be granted the central place in the pantheon of our political virtues. This is, I think, the core of Schmitt’s view, and its importance lies in the fact that, if pre- and super-legal power are the ultimate sources of authority (rather than legal authority the ultimate source of power), the liberal view of the community as an association tied together by the aspiration to build a common destiny and to provide in common for the interests of all is doomed. We would be ultimately justified in, as Kant would have put it, taking the law into our own hands to do what each one of us thinks best meets our own understanding of what our political community happens to need.

There is an obvious way in which liberalism could try to countenance Schmitt’s challenge, and it is by arguing that during emergencies law still rules, since the power exercised by constitutional authorities during crises also derives its authority from law itself. It is law that enables the president or congress to adopt emergency measures that differ in procedure and substance from those that may be adopted by them during normal times. Constituted authorities are enabled by law to act, as it is best to obtain the expediency required to respond to emergencies. This being so, the only distinction between decisions adopted at normal times and those adopted at times of crisis is that the latter may go through, so to speak, short-cut procedures and may vary in substance. Notwithstanding these two differences, both types of decisions are equal, legally speaking, and could

181. See, e.g., Dyzenhaus, supra note 143, at 2006 (contrasting Carl Schmitt’s view that “[a] state of emergency is a lawless void . . . in which the state acts unconstrained by law” with the liberal view that desires “a world where all political authority is subject to law”).

182. See Daniel M. Crone, Historical Attitudes Toward Suicide, 35 DUQ. L. REV. 7, 27 (1996) (summarizing three formulations of Kant’s “categorical imperative”).
thereby aspire to the same authoritativeness, since both are authored by the *demos* aiming at the realization of justice.

The dualist response, following Ferejohn and Pasquino, which suggests that there are two tracks of lawmaking—one for normal times and the other for emergencies—and that emergency laws authorized by the legal system are still valid, seems to be especially convincing where emergency measures are, as in Argentina, authorized explicitly by the constitution. When included in the constitutional text, emergency measures cannot undermine the liberal project because, after all, they are legally authorized. However, the idea that a constitutional provision “legalizes” emergency measures cannot by itself be a devastating argument for Schmitt’s challenge, since it is not altogether clear that a legal authorization by itself can make what is authorized legal in something more than a merely formal sense.

This is precisely Dyzenhaus’s view. He thinks that to legally authorize the executive, or congress for that matter, to exercise discretion during emergencies is not enough to protect the priority of law over power; therefore, it is not enough to save the liberal project from Schmitt. A legal authorization of this sort will be merely a veneer of control on the political, a facade of legal priority, because what the executive or congress may approve will not necessarily be law but only an expression of executive (or congressional) will.

Dyzenhaus sees Schmitt’s challenge as particularly poignant because, for him, law’s value is about substance. If one sees law’s only point as its contribution to the realization of rights and justice, one will find it very difficult, as Dyzenhaus does, to accept the relaxation of the constraints and safeguards that we usually allow during constitutional emergencies—especially the relaxation of judicial review. In addition, one will encounter great difficulty reconciling law’s aim with the idea of dual tracks of lawmaking. Said relaxation and dual tracking for legislation may prevent law from contributing as much as it could to the realization of justice and rights. But if we were to move away from the idea that law’s worth is entirely conditioned upon its instrumentality in the realization of rights and justice and accept that law also has an associative value for its contribution to the particular relationship that exists among those bound by law, we could accept the dualist response. Dualism does not necessarily represent a smoke screen that covers the abdication of law to power but instead the recognition that the lawmaking process may need to adapt itself to the surrounding

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183. See Dyzenhaus, supra note 143, at 2025 (“[A] clear statement rule is normatively vacuous unless judges presume that until the legislature tells them otherwise, the rule of law is fully operative. . . . [Judges must] reach conclusions that preserve the rule of law to the greatest extent possible . . . to avoid permitting the executive to operate with the form and thus legitimacy of the rule of law without being constrained by its substance.”)

184. See id. (expressing concern with “permitting the executive to operate with the form and thus legitimacy of the rule of law without being constrained by its substance”).
circumstances and that it may do so without losing what makes it a valuable way of organizing our communal life.

VII. Conclusion

There is an alternative approach to constitutional emergencies to that advanced by Dyzenhaus. Under this alternative approach, which is sometimes called “extralegalism” and which some authors attribute back to Locke, emergency powers should be left “extralegal,” so to speak, without constitutional or legal regulation and only subject to the control of the people. Obviously, a concluding Part is not the proper place to do justice to views on complex constitutional matters. However, here I do want to emphasize something about my own approach, for which extralegalism serves as an enlightening counterpoint. I have argued that the best way to respond to constitutional emergencies is through institutional arrangements like the senatus consultus ultimum that deter politicians from using emergency powers unless absolutely necessary. One of the arguments in support of my proposal lies in part in the recognition that other proposals for regulating the use of emergency powers expect too much from judges. Extralegalism, however, does not expect too much from judges, and extralegalists support the idea that emergency powers should be reviewed not by judges but instead by a mobilized citizenry. Given that extralegalism does not trust judges, more needs to be said for one to accept my version of article 99(3) rather than simply leave emergency powers unregulated in order to prevent their misuse. The hedge that my version of article 99(3) provides over extralegalism, and over proposals of judicial intervention for that matter, is that, while extralegalism relies on citizens in circumstances in which it is quite unlikely that they would have the information required to make an educated decision, my version grants the decision-making power to the one most qualified to know what to do in the dire circumstances of constitutional emergencies—more precisely, the president.