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BOOK REVIEWS

Constitutionalism Under Extreme Conditions: Law, Emergency, Exception, by Richard Albert and Yaniv Roznai (eds.). Cham, Switzerland: Springer, 2020, pp. 452.

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Constitutionalism Under Extreme Conditions is the product of a 2020 conference on the subject by scholars from fields ranging from law, politics, and economics. The work sets out to clarify the importance as well as the many pressures that confront the rule of law in moments of crisis. On such occasions, a constitution's purpose in guaranteeing civil liberties is perhaps most important; on the other hand, legal limitations on political discretion may hinder the efforts of the political branches to defend national security. How do we achieve a sensible balance between liberty and security in these fraught moments? This volume tries to answer this question, and in doing so is an important contribution to our understanding of constitutional government under extreme pressure.

The book is divided into three sections detailing the pressures on constitutionalism in the twenty-first century: the malleability of emergency declarations, the amorphous threat of global terrorism, and the challenge any universal legal system

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confronts in ethnically divided states. An impressive number of case studies flesh out these main dilemmas, including ongoing constitutional crises in Tunisia, Spain, Egypt, Cyprus, and the Philippines. The predicaments posed by these three foci and their illustration through the case studies show how discretionary power entailed by emergencies “stretch our commitment to generality, publicity, and the stability of legal norms” (p. 3).

As Ming-Sung Kuo points out in his opening chapter of the volume, a lack of precision when it comes to articulating times of emergency can lead to an indefinite stage of constitutional emergency, such as the global War on Terror, where civil liberties are circumscribed on behalf of combating an open-ended national security threat. As history attests, the normalization of emergency conditions is often a useful lever for political power to take actions that press and in many instances undo unrelated restrictions imposed by the rule of law. This danger is underscored by the sheer number of actual or potential emergency situations the twenty-first century poses, from climate change to cyberwarfare to domestic terrorism.

Yet even as citizens should be cautious about how we define the term “emergency,” political officials should also be granted the constitutional authority to respond to these instances in an effective if legally circumscribed manner. Published during the COVID-19 global health pandemic, the volume is a timely contribution about emergency powers, arriving as many governments have adopted (or not adopted) measures of debatable constitutionality in order to stem the spread of the coronavirus. Together, these arguments succeed in showing that the survival of a constitution is ultimately tied to its ability to flexibly respond to these urgencies. As Chief Justice John Marshall of the United States wrote in 1819, a constitution is “in-

tended to endure ... and, consequently, [is] to be adapted to the various crises of human affairs.”

In addition to the tension between discretion and constitutionalism, there exists the similarly challenging problem of creating constitutions in times of civil unrest. A major problem for establishing a durable constitution is that posed by the temporal context in which they are drafted. At a moment that calls for clear, sober, long-term thinking, the exigencies of the nation make quick, short-term therapeutics attractive. The drafting and ratification of the American Constitution, which was undertaken in a relatively deliberative manner, seems to be a historical exception to the rule of modern constitution making. More might be said about the mechanisms available for promoting forethought at this critical stage, particularly in divided societies, and what trade-offs those mechanisms inevitably entail for the document’s legitimacy. For instance, would secrecy promote candor and foresight or corruption and public cynicism?

A bigger oversight in the authors’ arguments concerns how emergencies arise in the first place. Many of the contributors rely on the political thought of Carl Schmitt and his idea of the “state of exception” wherein the genuine sovereign power becomes visible as that which names and confronts the enemy that poses an existential threat to that political community. Schmitt’s theory lends itself to defining emergencies in dramatic, adversarial, and dichotomous terms that make sense in the often xenophobic rhetoric used in the Western fight against Islamist terrorism. Yet confining our definitions of emergency to spectacular and confrontational terms risks omitting accumulative emergencies that may emerge subtly but are no less threatening to human rights. Encroachments on privacy seem to fit these more

slow-burning, accumulative emergencies that raise serious questions about constitutional protections concerning freedom of expression and security of property.

Ultimately, this text is both a thoughtful contribution to understanding the global spread of constitutionalism as well as a warning against overreliance on paper documents alone for purposes of standing regimes in good stead in times of upheaval. While the threats to constitutional government may appear in new forms, the necessity for civic vigilance to defend rights and liberties from encroaching power remains a constant. We can better discharge that duty, however partially, by refining our own constitutional thinking based on the arguments offered in these pages.

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