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CAN CONSTITUTIONAL DEMOCRACIES AND EMERGENCY POWERS COEXIST?

Gordon Silverstein*

Emergencies and the Limits of Legality (Victor V. Ramraj ed., Cambridge U. Press 2008). Pp. 415. \$109.00.

Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (Cambridge U. Press 2009). Pp. 179. \$56.00.

The World Trade Center towers are long gone, but their shadow looms over constitutional democracies across the globe, and nowhere more ominously than in the United States. How can liberal, constitutional democracies cope with modern emergencies without sacrificing the values, institutions, and processes that constitute the very definition of their polities?

September 11, 2001, ostensibly made this question urgent, even critical. But nine years have now passed since those attacks. And though the George W. Bush administration aggressively insisted on the need to compromise many long-standing commitments to privacy and due process, it is still very much an open question of how much of this they actually did, and just what difference those choices may or may not have made.

Were the basic legal and political structures that were in place on September 11, 2001, adequate? Perhaps we have been extraordinarily fortunate – can we count on good fortune? Or should we use this time, this opportunity to prepare for the next crisis, the next emergency, or even to construct fundamentally different institutions to cope with what Nomi Lazar insists is now a part of ordinary political life. Indeed, she seeks to “undermine the norm/exception perspective,”¹ arguing that exceptionalism is precisely what leads to the great dilemmas we face when a society faces extreme or urgent challenges.

Lazar is absolutely right to remind us that the concept of emergency as temporary exception is increasingly unrealistic. The Cold War lasted for more than forty years; the War on Terror could last for many decades if not forever. “The contemporary perception that states of exception are ‘normally’ time bound has led to a critique that complains of

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1. Nomi Claire Lazar, *States of Emergency in Liberal Democracies 4* (Cambridge U. Press 2009).

states of exception,” she writes.² She argues that instead of thinking about emergency and normal times, we ought to think about the conditions of crisis in terms of scale and urgency – relative terms – instead of the absolutes of crisis and non-crisis.

Lazar’s is one of a number of important and deeply thoughtful responses to the challenge that emergency and crisis seems to pose for liberal democracy. The argument fully developed in her book, *States of Emergency in Liberal Democracies* is relied upon in a separate chapter she wrote for an unusually coherent and provocative collection edited by Victor Ramraj.

The Ramraj volume is the product of what must have been a truly engaging conference held at the National University of Singapore. Built on a core of two rather dramatically conflicting answers to the question of how liberal constitutional democracies can manage, or even survive, shattering emergencies, the Ramraj volume goes far beyond merely supporting one or another of the two dominant positions, but instead uses that debate to build out in many directions the sorts of questions and arguments that must be considered in the interregnum before urgency swamps consideration, persuasion, and rational reason.

There are really four broad responses represented in these two books, with variations of each added on. At a danger of over simplification, we might perform the classic social science trick of wedging these choices into what we sometimes call a two-by-two matrix: the two key variables are temporal (are we to do what we will do before the emergency or after – *ex ante* or *ex post*); and will the effort be focused on political and institutional efforts, or will it be focused on legal and statutory provisions? This is oversimplifying to be sure, and a number of the authors in the Ramraj volume might need more than one box, or might bridge more than one box, but these are at least baselines from which we might begin.

At one extreme we find what might be called business-as-usual, or perhaps business-as-usual plus. Tom Campbell’s contribution argues that while some adjustments might be needed to deal with technological changes such as the internet and the role of satellites and electronic data transmission, that by and large Western, liberal constitutional democracies are quite capable of handling emergency.³ Kent Roach also argues that the wide array of existing institutions, rules, and provisions, particularly existing framework emergency laws such as the National Emergencies Act or the International Economic Emergency Powers Act in the United States already provide a solid set of rules and institutional practices to deal with most events. Roach goes a step past Campbell (and enters our two-by-two matrix in the *ex ante* – political realm) by arguing that there might need to be a provision or process for the formal and *ex ante* derogation of rights, one that would secure political support rather than simply be triggered by executive order.⁴

At the other extreme, in a sense, we find Nomi Lazar’s argument that we really

2. *Id.* at 19.

3. Tom Campbell, *Emergency Strategies for Prescriptive Legal Positivists: Anti-terrorist Law and Legal Theory*, in *Emergencies and the Limits of Legality* 201 (Victor V. Ramraj ed., Cambridge U. Press 2008).

4. Kent Roach, *Ordinary Laws for Emergencies and Democratic Derogations from Rights*, in *Emergencies and the Limits of Legality*, *supra* n. 3, at 234.

need a fundamentally different set of institutions, a set that is designed to cope with the full range of challenges, and makes no temporal distinction between the emergency exception and ordinary governance. Hers is an *ex ante* proposition, and one that spans the political as well as the legal categories of our typology. I will return to her arguments below.

Most lawyers, and indeed most politicians in liberal democracies, were chastened by 9/11 (not to mention July 7, 2005, when bombs ripped through the London transportation system, or the 2008 attacks in Mumbai, India) and began to wonder, as Victor Ramraj puts it in his introduction, “can liberalism survive an emergency?”⁵

The debate that sparked the Ramraj volume was joined by David Dyzenhaus and Oren Gross. Dyzenhaus insists on formal, explicit, legal limits, understanding as he does that law, to be law, must abide by hard moral limits and barriers that cannot be compromised. While one might set up a wide variety of regimes within that moral boundary (and therefore might construct a less solicitous regime for emergencies than that for dealing with ordinary times) one might never cross the line from the legal to the illegal. Courts, he assumes (or hopes), will patrol and enforce that line.

Gross has no confidence that such barriers will hold. Confronted with dramatic emergencies and crisis conditions, people will abandon the formal barriers constructed in less challenging times. If we build these exceptions into the law *ex ante*, he worries we will all too quickly wind up with the sorts of solutions proposed by Carl Schmitt, whose looming presence haunts almost every page of both of these books.⁶

Better to invite political leaders to do what they believe they must, turning to post-hoc “ratification” or exoneration rather than to allocate and formally delegate special extraordinary emergency powers *ex ante*. Gross argues that such moves will be *ad hoc*, and that leaders will have to carefully consider whether or not they likely can receive post-hoc ratification before acting. This uncertainty, he insists, will be the essential restraint against the abuse of power.

Dyzenhaus is not persuaded. To legalize the unlegalizable is a contradiction for Dyzenhaus who insists that the legal and the moral are and must be the same. The rule of law is not a simple set of rules, but rather the expression of a noncompromisable set of moral commitments. Dyzenhaus is convinced that judges can and will patrol and protect these legal and moral borders and while he is quite willing to accept *ex ante* emergency provisions, such provisions cannot cross these hard legal-moral lines.

Around these two dominant arguments, other chapters in the Ramraj volume consider the problem from the perspective of non-Western democracies (Rueban Balasubramaniam focuses on the question of indefinite detention, using the very important and instructive examples of Malaysia and Singapore,⁷ while Johan Geertsema

5. Victor Ramraj, *No Doctrine More Pernicious? Emergencies and the Limits of Legality*, in *Emergencies and the Limits of Legality*, *supra* n. 3, at 6.

6. Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer trans., Duke U. Press 2007); Carl Schmitt, *The Crisis of Parliamentary Democracy* (Ellen Kennedy, trans., MIT Press 1988).

7. Rueban Balasubramaniam, *Indefinite Detention: Rule by Law or Rule of Law*, in *Emergencies and the Limits of Legality*, *supra* n. 3, at 119-141. For related argument concerning Singapore, Hong Kong, and China and the rule of law, see Gordon Silverstein, *Globalization and the Rule of Law: A Machine That Runs of Itself?*, 1 *ICON: Intl. J. Const. L.* 427 (2003), and Gordon Silverstein, *Singapore: The Exception That Proves Rules Matter*, in *Rule by Law: The Politics of Courts in Authoritarian Regimes* 73 (Tom Ginsburg & Tamir Moustafa

considers the lasting impact of colonialism in the development of emergency power regimes, and Kanishka Jayasuriya examines the problem from the transnational and international perspective).⁸

Others consider the problem from a more institutional perspective, with William Scheuerman arguing that the elephant in the room – the United States – is in a particularly awkward position thanks to its nearly unique, and uniquely unsuited, version of presidentialism, where a chief executive serves a four-year term, faces only one possibility of reelection, and functions atop a stunningly fragmented political system of separated powers and checks and balances. These institutional constraints lead Scheuerman to embrace *ex ante* framework legislation which, though it cannot prevent abuse, might at least cabin its range and damage.

Moving firmly to the political and institutional box in the matrix, Mark Tushnet argues that the proper debate should not be over “*how* law should regulate the exercise of emergency powers,” but rather, should acknowledge the possibility that the real solution will lie in ordinary politics, that “the institutions of ordinary politics can be the vehicle for normative regulation of the exercise of emergency powers.”⁹ Tushnet insists that formal legal rules and rulings are limited in their ability to restrain abuse of power – that any restraint will have to be the product not of new statutes, but of old and deeply ingrained practices, professional norms, bureaucratic routines, and the far deeper commitments to shared values and norms that cannot be imposed by framework laws, but must be learned and absorbed over time.

Indeed, Tushnet notes that realists understand that the only effective “constraints on the exercise of power result from sociology and politics.”¹⁰ This is, I think, something that Oren Gross understands, but is reluctant to fully embrace and instead develops a model that is far more legalistic in its sensibilities and language. It is, I think, precisely because Gross is so deeply tied to a classical legal framework that he opens himself to some of the deeper and more troubling critiques posed by some of the other authors in the Ramraj volume.

Indeed, Gross points to a classic, political model in searching for a way to maintain a commitment to hard and explicit constitutional and legal barriers and limits, and yet finds a way to make it possible for societies to confront and manage fundamental crisis and emergency.

The model Gross points to is Cicero who foiled a conspiracy that would have led to the invasion of Rome. Having successfully foiled the conspiracy, Cicero argued vehemently for the summary execution of the conspirators – something that was beyond his legal right, indeed, something beyond the legal rights of the Senate since those to be executed were Roman citizens and could not be executed without a full trial. Cicero nevertheless ordered the executions, and suffered the consequences: He was condemned

eds., Cambridge U. Press 2008).

8. John Geertsema, *Exceptions, Bare Life, and Colonialism*, and Kanishka Jayasuriya, *Struggle over Legality in the Midnight Hour: Governing the International State of Emergency in Emergencies and the Limits of Legality*, *supra* n. 3, at 337 & 360.

9. Mark Tushnet, *The Political Constitution of Emergency Powers: Some Conceptual Issues*, in *Emergencies and the Limits of Legality*, *supra* n. 3, at 145-146.

10. *Id.* at 150.

by the Senate, and escaped from Rome into exile, his “house was demolished and his property confiscated.”¹¹ Ultimately, Cicero was allowed to return to Rome to some measure of public acclaim. But, as Gross notes, Cicero may have been allowed to return to Rome, but this did not “expunge that earlier experience nor did it act to legalise his earlier actions.”¹² In short, Cicero did what he felt he had to do, and suffered the consequences. And, Gross insists, the Cicero model is one that maintains a critical degree of uncertainty – leaders might have to embrace what he calls “extra-legal” policies, but they will be restrained by genuine uncertainty about whether or not their actions will be ratified and exonerated after the fact. Uncertainty, ambiguity, would be the key to making this a last resort and one that presidents would be exceedingly cautious in exercising.

Law is about formality, precision, definitions, borders, and boundaries. But laws ultimately are only effective if people follow them and abide by them. Without that, they are little more than what James Madison called “parchment barriers.”¹³ Merely writing these things down would do little good. Formal lines between the branches of government would mean little if the “interests of the man” were not “connected with the constitutional” power and rights of each of the institutions or branches involved. Yes, leaders need to have “the necessary constitutional means” to keep the others at bay, but at least equally important was the need to be confident that they would also have the “personal motives to resist encroachments of the others.”¹⁴

This same concern about mere parchment barriers came up as well in an exchange of letters between Madison and Jefferson over the efficacy of adding a bill of rights to the Constitution. Written bills of rights, Madison wrote in 1788, prove least effective “on those occasions when its controul [sic] is most needed.”¹⁵ But in the end, Madison conceded that written provisions might be useful if by doing so it would help embed those principles in the hearts and minds of American citizens. “The political truths declared in that solemn manner, acquire by degrees the character of fundamental maxims of free Government,” Madison wrote, “and as they become incorporated with the National sentiment, counteract the impulses of interest and passion.”¹⁶ Indeed, they might also be available as something of a touchstone, something that might serve as “a good ground for an appeal to the sense of the community” in those instances when the abuse of rights would stem not from its most likely source (tyranny of the majority), but rather at the hands of government officials, and a popular resistance was needed to blunt or end those abuses.

This then might blend well with some version of the Gross project: the idea being that while the executive ultimately will do what he feels he must to fulfill his oath of

11. Oren Gross, *Extra-legality and the Ethic of Political Responsibility in Emergencies and the Limits of Legality*, *supra* n. 3, at 70.

12. *Id.* at 71.

13. James Madison, *The Federalist Papers: The Federalist No. 48* (Feb. 1, 1788) (available at <http://www.foundingfathers.info/federalistpapers/fedindex.htm>).

14. James Madison, *The Federalist Papers: The Federalist No. 51* (Feb. 8, 1788) (available at <http://www.foundingfathers.info/federalistpapers/fedindex.htm>).

15. Ltr. from James Madison to Thomas Jefferson (Oct. 17, 1788) (available at <http://www.revolutionary-war-and-beyond.com/james-madison-letter-to-thomas-jefferson-october-17-1788.html>).

16. *Id.*

office, and preserve, protect, and defend the nation as well as its constitution, he or she will, it is hoped, exercise self-restraint not only because future ratification or vindication is uncertain, but also because leaders (and their constituents) who hold deeply engrained beliefs and values will be loath to violate those concepts and commitments.

Tushnet attributes a great deal of importance to what he calls “bureaucratic constraints” – what, for example, has kept American troops in their barracks all these decades? Why is it that despite vicious political campaigns, the United States has never failed to successfully (and peacefully) transition from one presidential regime to another: John Adams stepped aside for Thomas Jefferson; Herbert Hoover for Franklin Roosevelt; Lyndon Johnson for Richard Nixon; George H.W. Bush for William Jefferson Clinton, and he for George W. Bush who, in turn, left the White House in the hands of Barack Obama. While the “American Creed” has been sorely tested, and contains within it stunning examples of cognitive dissonance, it is this creed which is the ultimate safeguard and only reliably effective restraint against the abuse of power and the wholesale violation of rights in the face of crisis and emergency.¹⁷ Bureaucrats, judges, and politicians alike – as do most professionals – “define their roles with reference to norms they have internalized.”¹⁸

This seems the missing element in these and, frankly, almost all of the work on emergency powers that has been generated since September 2001. How can we inculcate and more deeply embed these values and norms and professional standards and how can we fashion institutions that will make it less and not more likely that leaders and government officials will violate those norms, values, and commitments?

Taking the second challenge first, Gross is, I think, onto something when he talks about uncertainty or perhaps ambiguity, a term which may more fully cover the political as well as the legal terrain. Ambiguity is a lynchpin of Madison’s mechanical separation of powers, or, more accurately, as Richard Neustadt would have it, a system of “separate institutions sharing power.”¹⁹ To make this work there had to be ambiguity – it had to be unclear where the power of one branch ended and the power of another began. Ambiguity would generate struggle, and, as long as there was a tug-of-war for power, each branch – ambitious to maximize its own power – would check the ambitions of the others.

Ambiguity is particularly important for the Madisonian constitution when it comes to war and foreign policy. This is well captured in Justice Robert Jackson’s concurrence in the *Steel Seizure Case*,²⁰ where he outlined three zones that had no clear boundaries between them. While there would be cases where the president’s actions, fully supported by Congress, were on the strongest constitutional footing and, at the other extreme, where a president, acting against the will of Congress, would be on the thinnest of ice, there would be cases in between, cases in what Jackson called the “zone of twilight.” Here presidents would have to tread exceedingly cautiously, for their authority was

17. See Samuel Huntington, *American Politics: The Promise of Disharmony* (Harv. U. Press 1984).

18. Tushnet, *supra* n. 9, at 155.

19. Richard Neustadt, *Presidential Power: The Politics of Leadership with Reflections on Johnson and Nixon* 12 (John Wiley 1976).

20. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

ambiguous, as were the boundaries on either side. Ambiguity might not prevent a president from overreaching (as, indeed, Harry Truman did in the *Steel Case* itself), but ambiguity would make sure the president would reach without confidence, and in that lack of confidence would reside a great deal of protection against abuse of power. As long as this zone remains ambiguous, indeed, the more ambiguous it might be, the more the president would be forced to clearly and explicitly take responsibility for his or her actions. The more we define the boundaries and borders of power, the more we construct and develop explicit frameworks, allocations, definitions, and provisions for emergency, the less cautious the president will likely become. If there are statutes, provisions, rules, and exceptions, then the president will find lawyers capable of navigating those provisions, capable of finding and articulating arguments that will legalize what the president chooses to do. In a world of statutes, rules, and parchment barriers in what Jack Goldsmith called the “post-Watergate hyper-legalization of warfare,”²¹ the Bush administration actually could at least attempt to construct legal arguments to support their actions – there were all sorts of statutes and provisions to interpret and reconstruct: far from limiting any abuse or overreach, these laws and rules meant that the president would “do what he had to do to protect the country. And the lawyers had to find some way to make what he did legal.”²² Would it have been any better had the field not been so littered with these provisions? That is a counterfactual that is impossible to test, but we might well have had a far healthier debate had the president been forced to accept full, personal responsibility for his actions, and not have a complex and overlapping set of statutes to provide legal cover.

Mark Tushnet is an exception among legal writers – he understands that politics and the structure of institutions are the far more promising means of managing unexpected emergencies. For most, the lack of legal structures is distinctly worrisome. They insist on *ex ante* rules and statutes.²³ And when these fail as did the War Powers Resolution of 1973, the answer tends to be that we need more law, better law, rather than that perhaps we need to actually force all three branches to take political responsibility for war policies.²⁴ Ours is a political culture in which “social problems increasingly are approached as problems to be solved through comprehensive legal strategies.”²⁵ When these comprehensive approaches fail to work, rather than questioning these legalistic efforts, the failure often “is attributed to poor drafting and not enough law; typically the solution is ‘smarter’ legal interventions.”²⁶ As Karl Llewellyn reminds novice law students, in America there is “no cure for law but more law.”²⁷

21. Jack Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* 81 (W.W. Norton 2007).

22. *Id.*

23. See generally Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale U. Press 2007).

24. See generally Gordon Silverstein, *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy* (Oxford U. Press 1996).

25. Katy Harriger, *The Special Prosecutor in American Politics* 12 (2d ed., U. Press Kan. 2000) (quoting Frank Anichiarico & James Jacob, *The Pursuit of Absolute Integrity: How Corruption Control Makes Government Ineffective* (U. Chi. Press 1996)).

26. *Id.* at 12.

27. Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study* 102-108 (Oceana Publications 1960).

Law, of course, facilitates a role for judges, and it is independent judges in whom David Dyzenhaus places his confidence. And, indeed, judges are more insulated and more likely to be able to resist some of the pressure to trade liberty for security in time of crisis. But while their institutional isolation and professional norms and training all suggest reasons to believe they might be less likely to give in, or slower or more resistant, there is no reason to believe they are utterly immune to the same pressures, biases and fears of other leaders and other citizens. Faced with what they are convinced is a society-threatening crisis, why would we really expect them to stand against an overwhelming tide? Indeed, it is precisely the difficulty of such a situation that Justice Jackson so cogently addressed in his dissent in *Korematsu*. At the end of the day, he did as Dyzenhaus would expect Supreme Court Justices to do, and voted to uphold the underlying moral and normative values of American law – but his was, let us remember, a dissent. The majority voted to allow the government’s relocation of Japanese Americans without even the most rudimentary wave at due process.

This really should not surprise us. As Lee Epstein and her colleagues demonstrate, Supreme Court rulings in civil liberties cases during formal periods of wartime tend to be less favorable to individual rights than in non-war circumstances.²⁸ Together with John Hanley, I have argued that in crisis times (periods more broadly defined than when the nation is formally at war) the Justices of the Supreme Court (rather unsurprisingly) tend to rule in a way that is more or less consistent with public opinion. When emergency power claims arise at the peak of presidential popularity (as happened with *Korematsu*), the Court is loathe to stand in the way; where cases arise concerning highly unpopular claims to power (as was the case with Truman and the steel seizure), the Court has sided with individual rights and against the president. This is not a causal claim – but more a recognition that judges are people too, and while they may lead public opinion, in the midst of crisis, they are not often likely to stand in direct opposition to it.²⁹

This is not to say that Courts cannot play a vitally important role, but we might want to think about the courts *ex ante* role in building and fortifying the norms and values of our society in advance such that they are more likely to be able to withstand cross pressures in a future crisis. But the time and place for the Court to play its most important role might well not be in the midst of a genuine (or perceived) threat to national survival.

Call this the *Milligan* model, named after *Ex parte Milligan*,³⁰ a Civil War case that did not reach the Circuit Court of Appeals until the war had ended. *Milligan* is remembered as one of the most soaring and uncompromising Court statements on the sanctity of individual rights, even in time of war. And, if you believe in the importance of embedded commitments and deeply rooted norms and beliefs, then indeed these words that are so deeply etched in our collective conscience have no doubt raised the costs and lowered the possibility of similar abuses in the future. “The Constitution,” Justice Davis

28. Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, *The Effect of War on the Supreme Court*, 8 N.Y.U. L. Rev. 1 (2005).

29. Gordon Silverstein & John Hanley, *The Supreme Court and Public Opinion in Times of War and Crisis*, 61 Hastings L.J. 1453 (2010).

30. *Ex parte Milligan*, 71 U.S. 2 (1866).

wrote in *Milligan*,

is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.³¹

Could those words have been written in the midst of the Civil War? And if not, how much worse would it have been had the Court not simply ignored *Milligan* and others who had been sentenced by military commissions despite the fact that the federal courts were open and functioning at the time, but ruled that the president had the authority to bypass Article III on the claim of military necessity? This is precisely what Justice Jackson worried about in his dissent in the *Korematsu* case, where he indicated that it would have been a far better thing for the Court to have sidestepped this case in the midst of a war, rather than doing what most of them felt could not be avoided (allowing the government to act in the face of crisis). Instead of waiting until the war had ended, a ruling that actually provided constitutional sanction for the racial segregation of citizens on the West Coast without even rudimentary due process was now and continues to be a precedent available for some future crisis. The principle that “racial discrimination in criminal procedure” is constitutionally permissible, now “lies about like a loaded weapon” and every repetition of that principle imbeds it “more deeply in our law and thinking and expands it to new purposes.”³²

Thus law and judges can play a vital role in advancing the sort of thick version of the rule of law advocated by David Dyzenhaus – but to rely exclusively on judges, statutes, and formal parchment barriers may be unrealistic. Our attention really needs to shift to how we might more deeply embed these values and ideals ahead of time, as well as how we might design institutions that will make this more, rather than less, likely.

Nomi Lazar is particularly concerned with institutional design, but her concern is that we reorder our priorities away from fetishizing the institutions as they have evolved and focus instead on whether or not the institutions are well designed to maximize our shared values and our shared objectives of a good and moral life.

In *States of Emergency*, Lazar starts with a simple and powerful assertion: liberty requires order. Empirically, this is hard to refute. And, even if it could be refuted, people believe it to be true and therefore, whether empirically true or not, it will shape and guide behavior. What that means is that given the choice (even a false choice) between a sacrifice of liberty and a sacrifice of safety, most people, most of the time, choose safety, or the promise of safety.

Up to now, our tendency has been to believe we could limit this temptation to periods of crisis, to emergencies, with the unspoken assumption that these are by definition temporary, and indeed, relatively short periods. We might tolerate these excesses precisely because we expect to return to ordinary times, and full protections for rights in short order. But Lazar insists it is time for us to recognize the risks inherent in this distinction. It is, she writes, time to rethink government power in a way that might

31. *Id.* at 76.

32. *Korematsu v. U.S.*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

“undermine the norm/exception perspective.”³³

Lazar is absolutely right to remind us that the concept of emergency as temporary exception is increasingly unrealistic. The Cold War lasted for more than forty years; the War on Terror could last for many decades yet to come. “[T]he contemporary perception that states of exception are ‘normally’ time bound has led to a critique that complains of states of exception,” she writes.³⁴ And exceptions are dangerous things, made all the more dangerous when there really is no outer limit on when the need for that exception might end. And so she argues that we need a regime designed to manage all circumstances, urgent and not urgent, catastrophic and ordinary. If this means we need new and different institutions we should embrace that challenge as an opportunity. After all, she writes in the Ramraj volume, institutions are and should be “means to normative ends.”³⁵ Institutions, which are the means to the ends of an Aristotelian good life in the work of John Locke, Lazar argues, become the “embodiments of first principles,” in Kantian liberalism, the “instantiations of ends” rather than as a means to those ends.³⁶

If emergencies lead to exceptions, and if we are unwilling to redesign our institutions to manage emergencies as a regular part of liberal democracy, then Lazar worries that we really are setting ourselves up to confirm Schmitt’s charge “that liberalism cannot confront emergencies without collapsing.”³⁷ This then suggests that flexibility in institutional design may actually be morally required if this is the only way to move us closer to a moral and just life.

Lazar is certainly right to think that emergencies are no longer likely to be easily cabined periods of exception. Madison certainly would have no quarrel with tinkering with institutional design to respond to changing demands and incentives in a very different era. But there is, I think, a missing element. This is not simply a question of ends and institutional means to those ends. There is a third element which, for many, may be even more central that either the normative ends or the institutional means – and that is the process by which we construct institutions, arrive at, agree upon, and renegotiate those ends.

In his closing statement after Lt. Colonel Oliver North’s testimony before the Select Committee of the House and Senate investigating the Iran-Contra affairs in 1987, Chairman Lee Hamilton insisted that the means are at least as important as the ends. “A democratic government, as I understand it,” Hamilton said, “is not a solution, but it’s a way of seeking solutions. It’s not a government devoted to a particular objective, but a form of government which specifies means and methods of achieving objectives. Methods and means,” he added, “are what this country are [sic] all about.”³⁸

Lazar argues that “a liberal democracy can remain liberal democratic even while

33. Lazar, *supra* n. 1, at 4.

34. *Id.* at 19.

35. Nomi Claire Lazar, *A Topography of Emergency Power in Emergencies and the Limits of Legality*, *supra* n. 3, at 157.

36. *Id.* at 159.

37. *Id.* at 160.

38. *Taking the Stand: The Testimony of Oliver L. North 744* (Pocket Publishers 1987) (statement of Representative Lee Hamilton).

concentrating power and derogating rights.”³⁹ I am not sure I agree. But even if we could write an optimal piece of framework legislation that could do this, humans being humans, the risk for abuse would simply magnify. If we really are in an age of permanent emergency, and if we really must fundamentally sacrifice some measure of our complex, inefficient participatory process, then I find Lazar’s a thoughtful and compelling argument, and perhaps a direction we might have to consider, but it does make me nervous.

Indeed, both of these volumes make me very nervous indeed. While I am confident that we can design more effective institutions, and we can sketch out wonderful framework legislation on paper, ultimately, none of this will do much good – and by providing formal sanctions, rules, and regulations may even do some real harm. Frankly, I would prefer to be in a system where if anyone is going to be nervous it is the leaders and not the led. Leaving some measure of ambiguity will help, and paying attention to fortifying the inculcation of values and norms will, I think, help a lot.

These volumes go a very long way to pushing us to think through these most important challenges, and precisely because they address the deeper questions involved here, they will (and should) have a long shelf-life.

39. Lazar, *supra* n. 1, at 136.
