The informed, extensive scholarship and moral enthusiasm that marks this book is remarkable. It offers hope that embedded within all of the world's civilizations are sources of creativity, culture, cosmopolitan democracy, and global cooperation. Having finished reading this book, one may remain skeptical about Dallmayr's dialogues because of the manner in which many citizens of these civilizations legitimate politicians who countenance widespread poverty, sanction violent political change, perpetuate ecological destruction, and promote intolerance. But that would miss the point of this book, which is just one of Fred Dallmayr's many salutary contributions to both the discourse of political theory and the well-being of the world.

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***The Constitution in Wartime: Beyond Alarmism and Complacency*. Edited by Mark Tushnet. (Durham, NC: Duke University Press, 2005).**

The terrorist attacks of September 11, 2001 prompted swift responses from the political branches of American government to the perceived existential crisis, and at the same time reinvigorated a longstanding debate among American jurists over what role, if any, the Constitution and courts should play in restraining and policing government actions during times of war and emergency. In the immediate aftermath of the attacks, defenders of Bush Administration actions such as the mandatory registration of immigrants from certain Asian countries and the establishment of a detention center at Guantánamo Bay (whom Tushnet dubs "executive unilateralists" or "shills") were vigorously opposed by civil libertarians, often in near-hysterical terms that diminished their credibility (leading Tushnet to dub them "alarmists"). With this anthology of articles by legal scholars and political scientists, Tushnet looks to move beyond this debate into a "second generation" discussion that takes a fresh look at the interaction of American institutions in times of war and emergency and the effects of this interaction on the country's broader constitutional culture.

The anthology begins with an impressive essay by Mark E. Brandon, which subverts traditional narratives by emphasizing that, "[f]rom the Revolution to the present, armed forces of the United States have participated in eighty-four distinct, significant engagements" – including six declared and ten undeclared wars – which, by Brandon's calculation, have occupied "80 percent of the life of the nation" (11). Yet even of military force has been used regularly throughout American history, normative commitments underlying a liberal-democratic constitutional order presuppose peace as the "normal" condition in order to make possible democratic deliberation and the state's predictable adherence to the rule of law.

How, then, can American constitutional culture reconcile this near-constant state of conflict with the liberal-democratic ideal of peaceful normality? In a theoretical turn that recalls Erich Fromm, Brandon posits that a collective-psychological construct, the "patriotic personality," has allowed conflict to be pushed to the margins of American consciousness. Embracing the patriotic personality, which has cultural roots in the Puritan idea of a covenantal relationship between the political community and God, allows Americans to construct a political worldview wherein "our" normal state is peacefulness and conflict is justified as defense against an enemy Other. Although the patriotic personality in some sense and to some degree allows for the possibility of democratic deliberation, and thus is "useful for

creating and maintaining constitutionalist institutions," it simultaneously "can weaken the constitutionalist character of those institutions" by "mak[ing] the citizenry incapable of judging possible deviations from the image of peacefulness" (16). In other words, Brandon argues, because patriotism is fundamentally constitutive of American political discourse, it is all but impossible for the American people to evaluate critically their government's actions toward non-citizens.

Brandon's essay is also the first of several pieces in the anthology to poke holes in the conventional wisdom that individual rights tend to give way to power during times of war and emergency. As Brandon points out, this is an empirical claim, yet one rarely tested by its proponents. Brandon identifies two possible theoretical approaches to the proper role of constitutional law in policing wartime state actions that restrict individual rights: 1) that the same constitutional rules should always apply with the same force, although during wartime a court may balance state interests and individual rights differently, in deference to claims by the state of compelling need for rights-restricting policies; and 2) that categorically different constitutional rules (perhaps amounting to no rules at all, on the maxim *inter arma silent leges*) should apply in wartime, accommodating the state's need to respond to wartime exigencies without diluting peacetime constitutional rules.

Both approaches have their dangers. The idea that courts are competent to extend the reach of the rule of law to cover even wartime executive actions is appealing, but perhaps the starkest example of this approach is the deference shown by the Supreme Court to the World War II policy of Japanese internment in *Korematsu* over Justice Jackson's ringing dissent that "once a judicial opinion rationalizes [an emergency] order to show that it conforms to the Constitution or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated . . . [a] principle [that] lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of urgent need" (60-61). The second approach, however, is equally unsatisfying. Although "it sensibly acknowledges that judges are not competent to domesticate all problems, that even law has its limits" (17), this approach would require courts to answer a problematic set of second-order questions such as how to determine when a genuine emergency exists and define when it has ended.

Ultimately, Brandon concludes that "[i]t would be a mistake . . . to make too much of these worries" (19). According to Brandon, American constitutional history does not support the conventional wisdom of "a general or unavoidable antagonism between war and liberty" (19). This argument is expanded in a piece by Mark A. Graber, who presents a series of "counter-stories" from American history showing that some civil rights and liberties have been expanded or unaffected by war. Indeed, Graber argues, wartime administrations often see the advancing of civil rights and liberties as an important means of either distinguishing the United States from its enemies (as in *Brown v. Board of Education*, which was decided against a Cold War backdrop, or the World War II cases recognizing the right of Jehovah's Witnesses not to salute the flag) or providing material support to the war effort (as in twentieth-century advances in racial and gender equality that expanded the country's pool of soldiers and laborers). According to Graber, "[f]or every Japanese-American sent to an internment camp, there is an African-American freed from Jim Crow" (114). Further, Graber argues persuasively that which particular rights are restricted during wartime and which are expanded is principally determined by the ideological orientation of the administration in power. For example, in the current "war on terror," the Bush Administration has engaged in ethnic profiling, detained persons without trial, and removed restrictions on methods available to intelligence and law enforcement, but at the same time it has sought expanded

recognition of Second Amendment rights for gunowners and argued in favor of affirmative action in part because of its asserted benefits to the military. These decisions to restrict some rights while preserving or promoting others are subjective, value-driven political choices, unsupported by any uncontroversial claim of objective necessity.

Like Graber's piece, an essay by Eric A. Posner and Adrian Vermeule argues against the inevitability of restrictions on individual rights during wartime. According to Posner and Vermeule, not only is there no *a priori* reason why rights-restricting policies adopted in response to emergencies will have lasting effects once the emergency passes, but also the complexity of ever-changing events and policy responses means that past rights-restricting precedents are likely to have little to no direct applicability to future emergencies. Consequently, they argue, executive action in response to emergencies should not be unduly restrained out fear of their potentially "systematic and irreversible effects": "The better question is just whether, given the circumstances as we know them to be at present, the policies that government pursues are good ones, in light of whatever substantive theory of rights we hold, and in light of the costs and benefits of alternative courses of action" (72).

Unlike Graber, however, Posner and Vermeule argue against conventional wisdom to support an "accommodationist" approach to the constitutionality of executive action in wartime (identified above as Brandon's second possibility). At its base, Posner and Vermeule's accommodationism rests "on an empirical assumption about institutional competence" (74): that courts are ill-equipped to evaluate executive actions during emergencies, when speed, secrecy, and uniformity of purpose may be essential to a successful policy response. If one credits Graber's account of wartime executive actions as inherently subjective and ideological, however, then Posner and Vermeule's faith in executive expertise becomes highly problematic. If a wartime administration is likely to pursue a premeditated ideological agenda in response to a crisis, then there is no *a priori* reason for courts to give that agenda the extraordinary deference that Posner and Vermeule propose. Indeed, it would seem that the need for constitutional checks on executive policy initiatives would be just as acute (if not more so) when the constitutional stakes are raised by war or emergency.

Another problem with Posner and Vermeule's analysis is demonstrated by comparison with a piece by Samuel Issacharoff and Richard H. Pildes. These authors argue that courts have predominantly taken an institutionally cautious, "process-based approach" to judicial review of wartime policies, focusing on whether the executive has been faithful to legislative directives rather than whether the combined executive/legislative policy unduly burdens individual rights. There are notable exceptions that do attempt to balance government policies against individual rights, such as *Ex Parte Milligan* and *Korematsu*, but Issacharoff and Pildes argue that these exceptions prove the rule, because each of these cases provoked public outcry that chastened courts to conduct more limited, judicially modest inquiries. The paradigmatic example of the process-based approach is Justice Jackson's influential concurrence in the *Steel Seizure Case*, where he determined that President Truman's seizure of steel mills to prevent a labor stoppage during the Korean War conflicted with legislative policy set by the Taft-Hartley Act, causing Truman's power to be "at its lowest ebb" (180).

The clear implication of Issacharoff and Pildes' argument is that it is possible for courts to conduct effective judicial review of government emergency actions as a referee between the legislature and the executive, while deferring to those wartime policies that have the institutional endorsement of both political branches. The process-based approach represents a kind of middle ground between Brandon's two theoretical approaches, demonstrating how courts have developed pragmatic doctrinal solutions to wartime judicial review while not accommodating the executive to such an extent that they effectively remain silent. One

negative consequence of this process-based approach, however, as noted both by Brandon and in a piece by William Michael Treanor, is that it has made courts complicit in increasing congressional acquiescence of federal war power to the executive over the last century, including the hollowing out of the Declare War Clause such that legislative control over whether and when military conflicts are commenced is now practically non-existent. The Rehnquist Court's decision in *Hamdi*, however, suggested that the Justices were aware of the need to reassert themselves in this area, with Justice O'Connor's plurality opinion declaring that "a state of war is not a blank check for the President when it comes to the rights of the nation's citizens" (254). It remains to be seen whether the Roberts Court will take any further steps in this direction.

In his own contributions to the anthology, Tushnet offers an alternative theoretical approach to the relationship between constitutional law and wartime executive action. With a nod to German theorist Carl Schmitt, Tushnet argues that wartime exigencies may justify "extra-constitutional" executive actions that, while perhaps done behind a "fig leaf" of constitutionality (such as the now-boilerplate invocation by American presidents of the Commander-in-Chief Clause), actually require the executive to "step outside" of the constitutional order and claim expansive emergency powers to defeat existential threats to the state, "an understandable departure from the norms of legality" (49).

President Lincoln's executive orders suspending habeas corpus and imposing a naval blockade on the Confederacy at the outset of the Civil War provide a historical illustration of Tushnet's approach. Although Lincoln claimed that he had legal authority to issue the orders, his claim was chiefly based on necessity, not constitutional reasoning. Lincoln exercised these extraordinary powers openly and publicly, stating that he would abide by any subsequent congressional decision with respect to his actions (Lincoln did not, however, take any special steps to reconvene Congress with great haste). Congress ultimately ratified Lincoln's actions. The Supreme Court upheld the legitimacy of Lincoln's blockade order in the *Prize Cases*, and, despite some judicial resistance (such as Justice Taney's circuit opinion in *Ex Parte Merryman*), the suspension of habeas corpus remained in effect until the war ended and the Union was saved.

An essay by Sotirios A. Barber and James E. Fleming takes Tushnet's idea further. According to Barber and Fleming, Lincoln's actions may have been extra-constitutional in that they circumvented constitutional means, but they were also pro-constitutional in that they were done in service of constitutional ends such as union and equal opportunity. Lincoln, they argue, recognized that "securing the conditions of constitutional governance mean securing the conditions for the rule of the Constitution's friends, not for the rule of those willing to put the Constitution at risk" (239). By contrast, Barber and Fleming condemn the Supreme Court's 5-4 decision in *Bush v. Gore* as a similarly extra-constitutional action that may have diffused a potential constitutional crisis, but only by assisting those who provoked the crisis in the first place (Republicans willing to use any partisan advantage to press their claim to the presidency). Barber and Fleming argue that liberal democrats should recognize in pro-constitutional actions that the Constitution is an aspirational document with positive ends, not merely a charter of negative liberties. Although, unlike Tushnet, Barber and Fleming articulate criteria by which the legitimacy of extra-constitutional actions might be evaluated, their account still hopefully relies on constraints on governmental emergency powers that are exogenous to the formal constitutional order, such as a mobilized citizenry.

A further constraint on governmental emergency powers is emphasized in an essay by Peter J. Spiro: the pressure placed on the United States by other countries to act consistently with the norms of international law. Spiro's surprisingly optimistic account focuses on how

the United States' need for cooperation in counter-terrorism operations and the reputational costs of openly defying human rights conventions have led the United States to moderate its behavior in areas such as the use of military tribunals at Guantánamo Bay. In presenting his account as a tale of modest success, however, Spiro seemingly falls victim to the discourse of "patriotic personality" identified by Brandon, in that he seems to minimize the tremendous human cost of Bush Administration policies that has been borne almost entirely by non-citizens.

An essay by David Luban, however, brings this cost into plain view. Luban explores the implications of the hybrid war-law approach to counter-terrorism adopted by the Bush Administration after 9/11. Under this approach, a terrorist is an enemy in the military sense: his mere association with terrorist groups makes him a legitimate target for overwhelming force regardless of what specific acts he has committed and, if captured, his status as an enemy foot soldier means that he is not entitled to a hearing on the legitimacy of his detention. At the same time, however, the terrorist is also treated as a criminal or "unlawful combatant," depriving him of the rights of a prisoner of war and justifying further punishment beyond mere detention until the war is over. Although this approach has proven expedient for the United States, Luban argues persuasively that it is unprincipled. Captured soldiers ought to be immune from further punishment, as they should not held to the norms of political communities which they have never willingly entered. Criminals, who stand accused of having violated those norms, ought to receive a full and fair opportunity to contest the accusations against them. Combining the two categories in an expedient way places accused terrorists in a "limbo of rightlessness" (221) that could potentially continue indefinitely, for as long as the United States pursues its "war on terror." In so doing, the United States sets a dangerous precedent that is already being relied on to justify human rights abuses in other countries.

This anthology presents a compelling cross-section of the second-generation discussion about constitutional law and war powers after 9/11, but a third-generation discussion is already underway. The articles in this anthology were written before Abu Ghraib and the still-widening torture scandal, before the Supreme Court decided *Hamdi*, *Padilla*, and *Rasul*, and before the *New York Times* revealed that the Administration had secretly claimed authority to circumvent the Foreign Intelligence Surveillance Act. As this third-generation discussion gets underway, however, this anthology should help establish the theoretical terms of the debate.

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***Karl Jaspers: A Biography – Navigations in Truth*. By Suzanne Kirkbright. (New Haven: Yale University Press, 2004).**

> We can ask primal questions, but we can never stand near the beginning. Our questions and answers are in part determined by the historical tradition in which we find ourselves.
>
> Karl Jaspers, *On My Philosophy*

Our life story and its grounding in a particular cultural tradition were for Karl Jaspers the stuff philosophy is made of. One of his major insights was that the effort at comprehending