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The Role of Constitutions in Dealing with Crises

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Introduction: Liberal Constitutions During Financial Crises

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The constitutions of most liberal democracies contain provisions that constrain governmental action in relation to economic policy. Some provisions grant citizens rights: For example, Americans enjoy a right under the US constitution's Contract Clause, prohibiting states from impairing the obligation of contracts. Most constitutions also provide individual rights protections against uncompensated and arbitrary taking of property. Structural provisions of constitutions also affect economic policy, sometimes by limiting government action directly, rather than through the claims of citizens. For example, balanced-budget rules constrain fiscal decision-making, as do legislative supermajorities required by some constitutions for financial decisions. Such structural provisions have spread in recent years, especially in response to the great recession of 2007 and 2008.

The presence of constitutional provisions that limit the discretion of governments in economic policy – as for constitutional constraints more generally – raises significant normative and positive questions in times of crisis. As has long been noted, constitutions serve two separate, though inter-related purposes. On the one hand, they establish a political process for collective decision-making, thus "constituting" political power. On the other hand, they define, and thereby limit, the scope of collective decisions, thus constraining political power. Normatively, these twin purposes raise immediate questions: Are political procedures that are appropriate to ordinary political life also appropriate in times of crisis? And do crisis times require a different (presumably enlarged) scope for political action? Many constitutions explicitly answer these questions in the affirmative – for example, by the inclusion of emergency powers, or the possibility of suspending certain civil liberties during crises. At the same time, some constitutional provisions are intended by constitutional drafters to constrain governments precisely when extraordinary times tempt them to engage in extraordinary action – suggesting that some constraints should be binding even in these circumstances. Crisis times also raise positive questions for constitutionalism. How well can different constitutional orders cope with crisis? How do constitutional provisions that are intended to be effective in crisis times fare

when put to the test? And do moments of crisis have long-term repercussions for constitutional order once a crisis has passed?

This volume of essays wrestles with all of these questions by considering the role of constitutional provisions that constrain economic policy during times of severe financial crisis. A distinctive mark of this collection is that it represents a multidisciplinary approach to understanding the theoretical and practical implications of the constitutionalization of economic policy, bringing together perspectives of political scientists, economists, political theorists, and legal experts. The volume's multiple theoretical perspectives are supplemented by case studies from various regions that test propositions and illustrate themes. In so doing, the volume provides an overview of an increasingly important topic in constitutional design, expanding the literature on constitutions and crises beyond the conventional understanding of states of emergency. Given that for many countries, the economy is now more likely to generate stresses on constitutional systems than are military threats, we think this is a particularly timely contribution.

In this Introduction, we first provide an overview of the ways in which constitutions can interact with financial crisis. With this taxonomy in hand, we then introduce and summarize each of the volume's chapters. The final section identifies some broad recurring themes, lays out some disagreements among contributors, and describes avenues for future research.

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One of the enduring debates in constitutionalism is how to grapple with unanticipated crises that test the limits of normal powers.[1] A common solution, going back to the Roman dictatorship, is to transfer powers to the executive for a discrete and limited period, after which governance will resume to the "normal" state of affairs. Emergency provisions have become quite common, being found in more than 90 percent of constitutions currently in force.[2] For the most part, these provisions anticipate an emergency in the form of manmade violence, such as wars or civil unrest, or else natural disasters. Fewer than 10 percent of constitutions with emergency provisions mention economic crises or the equivalent.[3]

This means that, confronted with a financial crisis, the constituted powers will have to either limit themselves to powers that have been granted in advance, or else improvise to try to claim new powers that are necessary.[4] This can generate pushback. One way to frame the threshold question is: How do constitutional provisions "perform" under crisis conditions? Do the pressures that come with crisis affect

[1] Oren Gross, *Law in Times of Crisis*. New York: Cambridge University Press, 2006.
[2] Comparative Constitutions Project data on file with authors; Christian Bjørnskov and Stefan Voigt, "The Architecture of Emergency Constitutions." *International Journal of Constitutional Law* 16(1): 101–27 (2018).
[3] Comparative Constitutions Project, note 2. Most of these are found in Middle Income Countries, such as Malaysia, Thailand, Colombia, and Turkey.
[4] Eric Posner, *Bailout*. Chicago: University of Chicago Press, 2018.

constitutional enforcement, or how constitutional provisions are understood? Do periods of crisis prompt constitutional changes or revisions?

In this regard, it is useful to distinguish among five potential outcomes:

1. Constitutional limits that constrain crisis responses by governments are simply ignored.
2. Ordinary constitutional restrictions are suspended during severe crisis, giving government wider latitude to act than under normal times.[5]
3. The internal resources of liberal constitutionalism, understood as the result of both formal constitutional language and the practices that give effect to constitutions, afford governments sufficient space to address financial crises while maintaining their constitutional and rule-of-law commitments.
4. A crisis spotlights deficiencies in current constitutions and/or practices, leading to alterations in the constitutional order. Such changes might for the better; for instance, they might enable liberal constitutional regimes to navigate in both crisis and non-crisis times. Or the changes conceivably could be for the worse.
5. Inflexible constitutional limits flatly disable governments from effectively responding to crisis.

The analysis in most of the chapters collected in this volume suggests that constitutional provisions governing economic policy are rarely simply ignored during severe financial crisis. Nor, it would seem, have constitutional provisions flatly disabled governments from addressing such crises. In other words, most chapters' analyses suggest that the experiences of liberal constitutional states do not fall under Categories One or Five. At the same time, a specific polity's experience is often not located exclusively in one of the remaining categories. In part, this is a function of the fact that none of the constitutions explored in this volume are among those that contain an express emergency provision that triggers special constitutional powers in times of economic crisis. Moreover, the categories are not mutually exclusive, because different constitutional provisions may be treated differently. Finally, the practices of constitutionalism that give effect to constitutions are diverse and complex, giving rise to potential interactions among our categories. Among other things, constitutional language frequently is not given literal effect even in non-crisis situations. And liberal constitutions sometimes seem to allow de facto constitutional changes to occur without formal amendment of a constitution's text.

These features imply that elements of multiple categories can be present when we consider the experiences of a particular polity in light of our

[5] In other words, this category is a form of Carl Schmitt's emergency constitutionalism, albeit in the context of financial rather than military crisis. See Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* 14. George Schwab trans., MIT Press, 1985 (1922); David Dyzenhaus, "Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?" 27 Cardozo L. Rev. 2005 (2006).

taxonomy. For example, the practice of constitutionalism (Category Three) might encompass informal remediation of textual deficiencies (Category Four) so that, in times of crisis, government is allowed to exercise special powers unavailable in ordinary times, and/or be shielded from ordinarily applicable limitations (Category Two), even though the constitutional text does not so provide. Alternatively, depending upon a constitution's language and a polity's constitutional practices, added flexibility during crises may fit exclusively within Category Three.

While the taxonomy does not – nor is it intended to – provide a mutually exclusive scheme that locates the crisis response of a particular constitutional order in one category, it is nonetheless a useful indicator of the range of possibilities. As such, it provides interpretive guidance as we try to make sense of how countries have, and should, react to severe financial crises. The taxonomy also highlights both the anxieties and promises that give rise to each category. Fueling Category Two's emergency constitutionalism is the concern that special rules may be necessary for the unusual circumstances of a severe crisis, without which a regime literally may be unable to meet the challenge. Put this way, emergency constitutionalism may be the constitutional analogue to Aristotle's equitable override of rules; just as equity takes account of considerations appropriately ignored by legislation as regards the general case, but that justice demands be taken account of in the unusual circumstance,[6] emergency constitutionalism may be necessary for the extraordinary circumstances for which ordinary constitutionalism's general rules are inapt. Category Two also addresses the converse concern that, even without a recognized category of emergency constitutionalism, governments will exercise the powers necessary to meet the crisis (in a Category One fashion), but that without emergency constitutionalism's resources for containing such episodes, the exercised powers will outlast the crisis, ultimately imperiling constitutionalism and the rule-of-law.

But Category Two's emergency constitutionalism is no simple panacea. Suspension of the ordinary constitutional order requires a determination that a crisis sufficient to invoke the exceptional regime exists – raising difficult questions about the mechanism by which such a determination can be made. More fundamentally, the largely unconstrained powers of emergency rule risk undermining constitutionalism and the rule of law. Categories Three and Four respond to these concerns, as they assume that there is (or at least can be) a set of constitutional provisions and practices that allow government the powers necessary to meet exigent circumstances while still instantiating constitutional and rule-of-law commitments. Category Two rejects these hopes as Pollyannaish: the exceptionalism mandated by emergency constitutionalism assumes that there is no institutional arrangement that can operate in ordinary times and also

[6] Aristotle, Nichomachean Ethics, ch. 10.

adequately respond to the unusual and unforeseeable circumstances brought by crises.

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A related set of questions concerns the effects of financial crises on subsequent constitutional government. Of course, financial crises have an effect on the balance of power among governmental institutions that may endure post-crisis. Several scholars have noted the strengthening of the executive branch relative to the legislature as a steady trend. Executives often have a powerful role with regard to formation of the budget, and during crises they are often called on to exercise powers through decrees, sometimes stretching or going beyond the formal powers delegated ex ante. An additional twist is that executives are the ones that represent countries at the international negotiation that sometimes determine the levels of austerity that must be adopted or whether a bailout is forthcoming at all. Parliaments, by contrast, frequently lack the capacity to research and analyze the information necessary to respond effectively to crisis, and are often reduced to a passive role of approving measures adopted by the executive. A crisis, and even the anticipation of crisis, can play a role in shifting de facto power to the executive.

Where does judicial power fit in? There are powerful forces, epistemic, jurisprudential and prudential, that lead courts to defer to political branches. Courts are not particularly strong in reacting to financial crises, but are often called on nevertheless, as some of our case studies demonstrate. In the 1990s, some scholars talked about constitutional courts as being a kind of barrier against the erosion of socio economic rights.[7] The evidence from the latest round suggests more deference on the part of the constitutional courts. The Spanish constitutional courts upheld Decree law 16/2012, which introduced co-payments into the national health system and reduced coverage for certain immigrants, as well as a statute introducing flexibility of the rental market.[8]

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The book's first part, The Role of Constitutions in Dealing with Crises, consists of four chapters. The first two chapters, John Ferejohn's "Financial Emergencies" and Eric A. Posner's "Rule-of-Law Objections to the Lender of Last Resort," primarily devote attention to the prospects and pitfalls of Category One (ignoring constitutional limitations) and Category Two (emergency constitutionalism). Ferejohn explores the ways in which financial emergencies have been dealt with by modern governments, which he views as political/legal systems that constitutionally protect

[7] Kim Lane Scheppele, "Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic than Parliaments)." In Wojciech Sadurski, Martin Krygier and Adam Czarnota (eds.), *Rethinking the Rule of Law in Post-Communist Europe: Past Legacies, Institutional Innovations, and Constitutional Discourses*. Central European University Press, 2005.

[8] Angel Janday Imenez-Aleman and Carmen Montesinos Padilla, "The Protection of Social Rights in Spain after the Constitutionalization of the Budgetary Discipline," paper at World Conference of Constitutional Law, Seoul Korea, June 20, 2018.

rights and privileges. Ferejohn defines a financial emergency as a financial event that is difficult or impossible to anticipate, moves so quickly that institutions have little capacity to defend against its consequences using ordinary legal procedures, and involves high stakes, such as potentially destabilizing the economy, the financial system, or the political system. The chapter examines several classic cases of financial emergencies, in which governments had to take extraordinary measures either by using constitutional emergency powers, inherent executive powers, or legislation. The cases demonstrate the potential that emergencies, as well as governments responses to them, can spill over into violence, and undermine the constitutional regime itself. Some of Ferejohn's historical examples fall close to, if not into, Category One.

Eric A. Posner's chapter asks whether a liberal democratic system can handle financial crises in the context of United States governance. One view is that it cannot. If the political system provides a crisis-response agency with the vast discretion needed to resolve the crisis, then the system loses its liberal democratic character. If the system does not, and instead relies on the legislature to resolve the crisis, the legislature will fail, resulting in recurrent crises that may undermine public support for the constitutional system itself. In contrast, Posner argues that the United States has avoided both extremes by endowing crisis-response agencies with intermediate powers. At the same time, the neither-fish-nor-fowl approach has put stresses on the system, as Posner's examination of the Savings and Loan crisis of the 1980s and the financial crisis of 2007–08 illustrates. The chapter contends that excessive legal constraints hampered the government's response to the Savings and Loan crisis, while the discretionary authority that enabled the government to resolve the second crisis weakened public support for the political system. Gesturing toward Category One, he concludes that "[d]uring the 2008 financial crisis, constitutional constraints played a limited role, possibly none at all." Posner ultimately advocates a form of Category Two emergency constitutionalism, arguing that "the government must be given more, not less, power to rescue firms" by serving as a lender-of-last-resort in times of financial crisis, and that this power must reside specifically in the executive branch because only it can act with the speed, decisiveness, and discretion that is necessary to address such crises.

The next two chapters, Tom Ginsburg's "Balanced Budget Provisions in Constitutions" and Mark D. Rosen's "Legislatures and Constitutions in Times of Severe Financial Crisis," begin the volume's deep dives into Categories Three and Four. The two chapters also exemplify an important theme that is amplified by many other of the volume's contributions: any assessment of the effects of constitutions in times of financial crisis cannot only consider courts, but must account for how constitutional provisions affect non-judicial institutions such as legislatures and executives.

Ginsburg's contribution looks at the prevalence of balanced budget provisions in constitutions over time, and provides a preliminary analysis of their efficacy. Such

requirements tend to be adopted in the wake of financial crises. A cross-sectional analysis shows that they tend to be associated with lower levels of deficit spending after their adoption, but also that more serious forms of commitment do not lead to additional reductions. While the analysis is not definitive, it tends to provide support for the idea that constitutions can "work" in this area to constrain fiscal decision-making, even in crisis conditions.

Rosen's chapter takes a normative approach by considering how constitutional provisions designed to constrain economic policy should affect a legislator's decision-making during times of severe financial crisis. Rosen focuses on rights-granting constitutional provisions, though he also briefly considers the implications of the analysis for structural provisions. The chapter explains why unqualified constitutional language, which may appear to absolutely bar the legislature from undertaking a certain course of action, need not always be, and in fact is not always, given literal effect. This means that legislatures have some leeway to infringe constitutional rights. But there is a cost to this degree of freedom: when legislators contemplate infringing a constitutional right, they should not act as they are permitted to in the course of ordinary politics. Rosen argues that legislators should undertake their constitutional decision-making pursuant to a set of "Special Norms" that complement, but do not displace, whatever doctrinal test a country's courts use to adjudicate the constitutionality of legislation, such as proportionality analysis or tiered scrutiny. The chapter illustrates its argument with a pressing financial challenge presently confronting many state and local governments in the United States: massively unfunded pension liabilities for public workers. Rosen thus aims to refine, if not reform, the practices of constitutionalism so legislators can simultaneously cope with crisis and uphold foundational constitutional commitments. In so doing, the chapter reminds us that there is no reason to assume that we have reached the end-of-history as concerns the practices of constitutionalism. The chapter's claim regarding the practices' potential malleability parallels Category Four's understanding that substantive constitutional provisions are susceptible to continuing evolutionary development.

The second part of the book, Courts and Crises, comprises four chapters. While the focus is primarily on courts, each chapter's analysis also illustrates the necessity of taking account of non-judicial institutions when assessing a constitution's role during financial crisis, and determining what role courts do, and should, play. Barry Cushman's chapter, "The Place of Economic Crisis in American Constitutional Law: The Great Depression as a Case Study," considers the role that conditions of economic crisis might have played in cases involving judicial review of economic regulation in the years following the Wall Street Crash of 1929. The cases decided by the Hughes Court between March of 1932 and June of 1937 provide fertile ground for such analysis, because the Supreme Court of the United States consisted of the same nine justices during that time period. Cushman first critically examines the possibility – indeed, it is a standard argument in the academic literature – that

contemporary economic conditions operated as a variable exogenous to legal doctrine that induced the justices to uphold challenged regulations. The standard account thus belongs to Category One, as it claims that the Supreme Court allowed the legislative and executive branches to ignore constitutional limits on account of financial exigencies. Cushman challenges the standard account by showing that even as the Justices upheld some legislative and executive actions during the crisis, they found others to be unconstitutional. In rejecting the view that a "crisis-constitution" overwhelmed the "normal" constitution during the American Great Depression, Cushman argues that the Court upheld legislation and executive action only when the Court regarded economic considerations to be relevant to legal doctrines. In claiming that the Hughes Court resisted claims to economic emergency powers, Cushman in effect situates the Supreme Court's approach during the Great Depression within Category Three. And in arguing that the legislative and executive branches over time conformed their actions to the constitutional limitations the Court had identified, Cushman's analysis suggests that the political branches' crisis responses also ultimately belonged to Category Three.

Georg Vanberg and Mitu Gulati's chapter, "Financial Crises and Constitutional Compromise," observes that constitutional constraints are often designed with crisis in mind: Framers wish to constrain the exercise of power precisely in those circumstances in which policymakers will be tempted to violate underlying normative commitments. They argue that these constraints, however, are only as strong as the willingness and ability of courts to enforce them, and that because judges care about both themselves and policy outcomes, they are sometimes less than willing to enforce constitutional constraints. Existing scholarship has explored this phenomenon, focusing primarily on the possibility that the weakness of courts may prevent them from effectively policing constitutional boundaries in the face of governments determined to deal with a crisis. Using a formal model, Vanberg and Gulati suggest that such strategic judicial retreat may also result from judicial strength. In times of crisis, courts that command significant authority, and are likely to garner compliance with their rulings, confront a quandary that weaker courts can escape: the enforcement of constitutional boundaries may prevent an effective governmental response to a crisis. If judges are sufficiently concerned about the practical consequences of hamstringing a government under these circumstances, they may engage in judicial self-censorship not because they are weak, but because they are strong. Vanberg and Gulati's analysis inclines toward Category One insofar as they suggest that strong courts might be unwilling to police unconstitutional-but-necessary legislative and executive actions, though their model also might be characterized as describing a constitutional practice (and hence belonging to Category Three). The chapter includes brief case studies of the United States Supreme Court's "gold clause" cases in the aftermath of the Great Depression, as well as the German Constitutional Court's decisions on the EU's "outright monetary policy" during the Greek bail-out in the aftermath of the 2008 financial crisis.

R. Daniel Kelemen's "Commitment for Cowards: Why the Judicialization of Austerity Is Bad Policy and Even Worse Politics," analyzes the EU's response to the eurozone crisis. The chapter traces EU fiscal regulation from the Maastricht Treaty to the judicialization of austerity. Kelemen argues there are essentially two strategies to credibly discourage member states from taking on unsustainable deficits: tough love and rules. The EU employed both strategies through the Maastricht Treaty. First, the Treaty established the euro as the common currency and imposed a set of fiscal rules. Second, the Treaty promised tough love in the form of a "no bailout" clause, which stipulated that neither the EU nor any Member State could bailout another Member State. However, when faced with the 2010 Greek debt crisis, the EU violated its own fiscal commitments (à la Category One) and provided Greece with a bailout. Having cast aside the Maastricht regime, the EU turned to a judicialization strategy, relying on national and European courts to enforce budget requirements that were embedded in the bailouts – what in effect might be conceptualized as a Category Four attempt to reform a flawed initial rule that absolutely forbade bailouts.

Kelemen contends that the judicialization of austerity is both bad policy and bad politics. In the realm of policy, Kelemen argues that courts are unable to enforce budget requirements when they must be balanced against competing constitutional values, and that the financial differences between the EU and Member States do not allow for credible budget enforcement. In the realm of politics, Kelemen argues that shifting fiscal policy to the courts alienates voters from mainstream politicians and further disillusions voters by suggesting the impotence of institutions (such as legislatures) that are more directly accountable to citizens. In short, Kelemen's analysis seems to suggest that the EU's quasi-constitutional limits are best enforced by its political institutions, not courts.

Eva Brems' chapter, "Protecting Fundamental Rights During Financial Crisis: Supranational Adjudication in the Council of Europe Context," turns toward human rights considerations as Europe manages the financial crises it confronts. In Europe, the ultimate guarantors of fundamental rights are situated at the supranational level. Individuals and legal persons who have failed to obtain a remedy at the domestic level can address a complaint to the European Court of Human Rights (ECtHR) concerning violations of the European Convention on Human Rights (ECHR) and its additional protocols. This Convention and its additional protocols protect mainly civil and political rights. If, however, the alleged human rights violation concerns social rights, the remedy is a collective complaint before the European Committee of Social Rights (ECSR) based on the European Social Charter (ESC). Both the ECtHR and the ECSR have addressed several cases concerning austerity measures adopted during the recent financial crisis in Europe. The chapter analyzes this case law, and assesses the role that these supranational human rights monitoring bodies are playing, or may play, in the context of financial crisis. Brems deploys comparative institutional analysis between the two