Political Rights under Stress in 21st Century Europe (Book Review)

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As the title implies, this book addresses the issue of political rights in Europe. The introduction to the book, prepared by the editor, Wajciech Sadurski, provides a very useful discussion regarding the difficult, and at times controversial, issue of defining what rights are political rights. While Sadurski initially asserts that to some degree "[a]ll rights are political," he acknowledges the need to define political rights in a "more precise way." Political rights are thus defined as "the rights that are instrumental, and perhaps indispensable, to the participation of citizens in the exercise of political power in their society."

Writing that "[e]ach historical moment imparts upon the discussion of those rights it own special concern," Sadurski notes that context influences the discussion of political rights. It is this discussion that provides a more generous view into the actual content of the book. While most readers would expect the book to address the stress placed on political rights as political institutions respond to terrorism, Sadurski notes that the "much happier phenomenon" of a significant number of previously authoritarian states transitioning to more democratic systems must also influence a discussion of political rights.

Six quality essays addressing the theme of defining political rights in times of stress follow Sadurski's excellent introduction. The contributors of these essays are all legally trained academics, who in addition to their training in law have expertise in areas such as comparative studies, human rights, and philosophy.

In the first essay, Michel Rosenfeld, Professor of Human Rights at the Cardozo School of Law, furthers the discussion, begun in the introduction, that context must influence political rights. Rosenfeld concentrates on the idea that pluralism provides "a logic and dialectic that allow for a determination of the particular political rights that are best suited for a given circumstance." The circumstances Rosenfeld discusses include ordinary times, times of stress and time of crisis. He differentiates between times of stress, and time of crisis based on factors such as the "severity, intensity, and duration" of the threat to which the "polity" is reacting. Thus, he concludes that a military invasion or widespread civil insurrection would likely lead to a crisis while the response to a limited terrorist attack has created times of stress. Through examples including responses to hate speech and terrorism, Rosenfeld illustrates that in times of stress restrictions on political rights may be more or less "extensive" depending on whether there is a need to
strengthen the "polity" or to prevent conflict between groups from degrading to such an extent that crisis occurs.

The Rosenfeld essay is followed by a discussion of political rights within the European Union by Damian Chalmers, Professor of European Union Law at the London School of Economics and Political Science. Chalmers emphasizes the fact that while the EU has some attributes of a state, it is primarily a market based society. As a result, the "political reason" of the EU is the protection of the market society. The essay sets forth three principles on which this political reason is based: "pourousness, regulatory authorship, and mutual public-private accountability." While Chalmers recognizes that the market society may be "vulnerable to a wide range of forms of stress" that may necessitate EU responses, he dedicates a significant portion of the essay to explaining how the stress resulting from terrorism evidences the existence of three counter principles: "suspicion, public-private police and collective victimhood." It is in the section on victimhood that Chalmers most poignantly makes the argument that in response to terrorism, the EU has implemented policies that impose a burden on the rights of minority groups, such as immigrants and asylum seekers. The burden on these groups is justified, under the "political reason" of the EU, because these groups are seen as potential threats to the market society.

The third essay, by Victor Comella, Professor of Constitutional Law at Pompeu Fabra University, explores the "doctrinal framework" of the European protection of free speech through an examination of the decisions of the European Court of Human Rights (ECHR). The essay begins by examining the contrast between the "legal regime" set forth by the United States Supreme Court's decisions on free speech with that followed by the ECHR. Comella then explores the question of whether "introduction of some of the American rules would be beneficial" to the protection of free speech. Finally, the essay discusses "whether it is justified for the law to introduce exceptions to the general principle that all speakers should be subjected to the same legal restrictions." This discussion considers two particular situations: speech by members of Parliament and speech by and regarding judges.

Party closures is the subject of the fourth essay by Eva Brems, Professor of Human Rights and Non-Western Law at Ghent University. As Brems defines the phrase, "party closures" refers to "the prohibition or forced dissolution of a political party by a government authority." Brems acknowledges that forced dissolution of a political party is a "far-reaching" restriction on the freedom of political association. Notwithstanding the serious nature of such a restriction, Brems' essay explores whether party closure may be justified if a party's programs and activities threaten human rights or promotes and incites racial discrimination. Such a situation, according to Brems, produces a "democratic dilemma" whether "paradoxically"
fundamental rights should be restricted "for the purpose of protecting fundamental rights." Brems uses decisions of the ECHR, with particular attention given to 2003 case of Rafah Partisi (the Welfare Party) and others v. Turkey, as well as national court decisions and other sources to present situations that have given rise to dilemmas regarding party closure, and to illustrate the variance in criteria that have been advocated to resolve these democratic dilemmas.

The editor of the book co-authors the fifth essay along with Jiří Přibáň, Professor of Law at Cardiff University and Visiting Professor of Legal Philosophy and Sociology at Charles University. The essay discusses the role of political rights in the context of the stress resulting from the transition of previously authoritarian regimes to democratic governments. Přibáň and Sadurski divide the Central and Eastern European (CEE) states into two groups. Poland and Hungary are included in the group of states which underwent democratization through processes in which the government negotiated with opposing political forces and used existing procedures to accommodate change. The other group of states includes those states whose governments continued to resist and addressed matters only after "revolutionary crowds" challenged the government. It was these different environments that influenced "alternative interpretations of basic and political rights." Yet, the authors conclude,

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\text{a}t \text{the level of the organization of state institution standards achieved in the building of such institutions safeguarding political rights have been quite impressive in the CEE states overall. However, the robustness of political rights depends on the institutions of civil society ... with incentives, capacities, and the necessary resources to claim their political rights.}
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The sixth and final essay in the book logically follows the previous chapter in that it addresses the political rights of a specific group, national minorities, in the context of democratic expansion. Gwendolyn Sasse, a senior lecturer in Comparative European Politics at the London School of Economics and Political Science, divides her essay into two parts, promising in part one to "place the issue of minority rights in the wider legal and theoretical context." In considering context, she notes that in the EU "the traditional link between citizenship and political rights has become more tenuous" in part because of the "elaboration of EU citizenship and a wider range of forms of political participation." Further, while she concludes that minority rights should be classified as political rights, she recognizes that social and economic rights have been emphasized in dealings with "new minorities" while cultural identity and political representation have been de-
emphasized. In the second portion of the essay, Sasse states that she will "draw on the experience of Central and Eastern Europe to analyse the politics of minority rights." Perhaps more descriptively, a significant portion of the second part of the essay is dedicated to an assessment of "the contribution of the European Union and its agenda of 'conditionality' to securing" minority rights. Concluding that while the EU has perhaps brought minority rights into the "political rhetoric," it has been the efforts of the Council of Europe, the Organization for Security and Cooperation in Europe (OSCE), and nongovernmental organizations that have contributed to minority rights and protections being "translated" into "domestic Political context."

I concur with the opinion of another reviewer that "the volume is invaluable as a source book on the problems of implementing political rights not just under conditions of transition to democracy, but more generally in the 'stressful' conditions of pluralist societies divided, sometimes bitterly, by cultural, political and philosophical differences." However, perhaps because I am trained in law rather than political science, I do not concur with the criticism that the "thorough use of legal sources" adversely affects the readability. However, there are a few references scattered throughout essays to European programs or terms of Greek origin that might cause confusion to some readers. Nor do I, with limited exception, "regret the absence of more direct and fuller analysis of the concepts of 'stress' and of 'militant democracy'." It is only in the third essay that I found myself desiring that the author would more fully analyze how times of stress had influenced the development of free expression protections. Despite this unfulfilled

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6 Id.
7 Id.
8 For example, Přibáň and Sadurski make reference to "the assistance program, PHARE". Přibáň and Sadurski, supra note 18, at 207. Established in 1989, PHARE was the Poland Hungary Assistance for Restructuring their Economies. PHARE was later expanded to include assistance to other nations. In 2007, IPA, the Instrument for Pre-accession Assistance, replaced other forms of pre-accession assistance including PHARE. European Union, Instrument for Pre-accession Assistance, http://ec.europa.eu/regional_policy/funds/ipa/index_en.htm
9 Schwarzmantel, supra note 26.
expectation, the third essay is a work of excellent quality and the book as a whole should be added to any library desiring to have a collection that addresses the contextual nature of human rights.

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How should the Constitution be read? What are the main arguments supporting different approaches to interpreting the Constitution? Does the plain text of the Constitution speak for itself? What was the intent of the framers when they drafted the Constitution? Do the Constitution’s structural principles or Supreme Court’s prior cases provide sufficient information for interpretation? Can the Constitution be fully understood without looking beyond its boundaries? These are some of the questions posed in Sotirios A. Barber and James E. Fleming’s Constitutional Interpretation: The Basic Questions. However, the baseline question asked is “which approach to the meaning of the Constitution is best.” In trying to determine how to properly answer this question, the authors review and discuss different theories of interpretation by noted constitutional scholars and jurists.

In the first chapter, Mr. Barber and Mr. Fleming begin with a comparison of two approaches to understanding the Constitution: William Reinquist’s “fidelity to the framers’ intent” and Ronald Dworkin’s “fusion of constitutional law and moral philosophy.” Using articles written by Reinquist and Dworkin, the chapter sets out these opposing theories, which provides a backdrop for the material presented in the rest of the book. It is clear that the authors favor Dworkin’s theory. Dworkin’s “moral reading” is what the authors discuss as the philosophic approach and is the interpretative method advocated by them throughout the book.

Subsequent chapters proceed to assess critically a number of different interpretative theories: textualism, consensualism, narrow originalism/intentionalism, broad originalism, structuralism, doctrinalism, minimalism, and pragmatism. In each chapter, Mr. Barber and Mr. Fleming cite to the noted advocates of the particular theory. As examples, in reviewing textualism, Justice Hugo Black’s dissent in Griswold v.