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# REPLY

## EMERGENCIES AND POLITICAL CHANGE: A REPLY TO TUSHNET

Eric A. Posner\* & Adrian Vermeule\*\*

Mark Tushnet's Response to *Accommodating Emergencies*<sup>1</sup> is characteristically thoughtful and sophisticated, and we have no quarrel with his main conclusions.<sup>2</sup> In what follows, we will confine ourselves to briefly amplifying one of Tushnet's most important themes: the idea that emergencies can enlarge the scope of the politically possible. This is clearly correct, but the harder question is what to make of it. Tushnet emphasizes that new possibilities can be bad possibilities; we wish to round out the picture by emphasizing the good that can flow from political upheaval. Emergencies can, and often have, liberated regimes from a sclerotic status quo, enabling political leaders to enact newer and more progressive laws and policies.

Tushnet usefully points out two distinct ways in which emergencies might matter. First, "they provide new information relevant to the assessment of the costs and benefits of some policies."<sup>3</sup> The 9/11 attacks, for example, revealed that various airline security procedures were less effective than thought because they assumed that hijackers were not willing to undertake suicide missions and not able to pilot an aircraft. The attack also revealed that superior security procedures would generate benefits far greater than earlier believed: thousands of lives saved rather than hundreds, billions of dollars of damage averted rather than millions. Mainstream support for policies that increase security at moderate cost to civil liberties may be traced to a simple recalculation of costs

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1. Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003).

2. Mark Tushnet, *Issues of Method in Analyzing the Policy Response to Emergencies*, 56 STAN. L. REV. 1581 (2004).

3. *Id.* at 1589.

and benefits in light of superior information.

Second, “emergencies may matter because they alter the constraints under which decisionmakers operate.”<sup>4</sup> Here, Tushnet argues that the emergency alters political constraints but not necessarily the preferences or evaluations of decisionmakers, or the amount of information at their disposal. Consider again the 9/11 attacks. Prior to that attack, most decisionmakers knew that foreign terrorists posed a threat to Americans on American soil, and, although they did not anticipate the form of the 9/11 attacks, they did have equally horrific, indeed more horrific, possibilities in mind, such as the use of biological and chemical weapons, which could kill tens of thousands of people. At the same time, these decisionmakers also might have valued civil liberties less than most Americans did. Prior to 9/11, they could not implement their policy preferences because many or most Americans would not tolerate them, and it is always hard to change the status quo. After 9/11, they took advantage of the more fluid political environment in order to enact their preferences as law.

It seems right that during emergencies the boundaries of the politically possible change. Are the changes for good or for ill? Tushnet emphasizes the downside risks, suggesting that in the more fluid environment created by an emergency, politicians will exploit cognitive biases among the populace (such as anchoring) in order to “achieve their policy goals in the face of opposition.”<sup>5</sup> Tushnet does not explicitly say that these policy goals are bad, as do the theorists of panic we critiqued in our opening contribution, but his emphasis on the cognitively disreputable genesis of the new policies, and on rhetoric and political tactics rather than deliberation, suggests that he is suspicious of their merits. Tushnet, that is, shares with the panic theorists an ingrained pessimism about politics during times of emergency.

But consider now the following counternarrative: Emergency and war spur nations to high achievements and progressive social change. The two greatest emergencies in American history were the Civil War and the period extending from 1929 to 1945, encompassing the Great Depression and World War II. To the emergency policies implemented during the Civil War, we owe the emancipation of the slaves and the Civil War amendments to which it led, the modernization of the U.S. army, the beginnings of centralized monetary policy, and the first glimmer of federally operated social welfare agencies (the Freedmen’s bureau, civil war pensions, and so forth). To the Great Depression, we owe social security, labor regulation, and the administrative state. We could also add the creation of the income tax during World War I and the enfranchisement of women in its wake. We might even call the founding period an emergency and attribute all our constitutional institutions to policies created while the nation was in political crisis.

The Bush administration has not used the 9/11 emergency as an excuse for

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4. *Id.*

5. *Id.* at 1591.

implementing progressive domestic policies, but, as many commentators have noticed, the administration's *foreign* policy falls within the progressive tradition of Theodore Roosevelt and especially Woodrow Wilson. An uneasy combination of Roosevelt's muscular civilize-the-heathens imperialism and Wilson's democratic idealism, Bush's foreign policy, like those of his predecessors, calls on American citizens to make sacrifices on behalf of great ideals. Bush found himself drawn to this mission after the 9/11 emergency forced him to suppress his isolationist impulses. In this way did an emergency yet again force a political establishment to reassess its values and aims, whether for good or for ill.

What mechanisms could explain how emergencies might alter the political environment? In our earlier Article, we discussed the possible role of fear. Against the civil libertarians' argument that fear causes citizens and decisionmakers to exaggerate the magnitude of a threat, we argued that it is just as likely that fear causes people to attend to dangers that they had previously ignored and motivates them to act. When an emergency throws the public into a state of fear, government officials sometimes find themselves able to accomplish valuable reforms that had previously escaped their grasp.

Emergencies may also force governments to adopt policies that unsettle an entrenched status quo or that liberate citizens from adaptive preferences; where the status quo was unjust, or harmful to a broad class of citizens, the disruption produced by emergencies is good. Consider the need to staff crucial industries during World War II, leading government to encourage the entry of women into the labor force and resulting in massive consequences for gender relations in the postwar period. It is commonplace in comparative history and politics that war has a democratizing effect. The franchise frequently expands during or after wars, in response to soldiers' unanswerable claim that they ought to be able to vote if they are expected to fight for the nation. Similarly, decolonization has often followed wars, during which subject peoples demanded autonomy in return for their contribution to a war effort undertaken by the colonial power. And elites who need a broad base of taxation and public support to fight other elites are repeatedly forced to make political concessions to the populace. The overall picture is that, during wars and other emergencies, the interests of elites and populations converge or overlap far more than in normal times. The result is often a common concern for common interests, or even for the common good. Emergencies can even produce something like a constitutional moment, in which collective deliberation about the overall good of the polity temporarily replaces, or at least supplements, ordinary distributive politics.

Tushnet suggests the opposite: that emergencies allow politicians to exploit cognitive biases in order to seize partisan or ideological objectives. Politicians do use tricks of all kinds in order to accomplish their ends, but they use these tricks both during emergencies and during normal times, and their tricks are used for good purposes as well as bad. The fluidity of politics during an

emergency might make political tricks more effective than in ordinary times, but there is no reason to think they are used for worse reasons. Surely that depends on the motives of the politicians, and what reasons do we have for thinking that politicians will be even more cynical and venal, or, if you want, less idealistic and public-spirited, during emergencies than during normal times? And if people pay more attention to public affairs during emergencies and are more willing to deliberate about ends, then political trickery will have limited impact in any event.

Second-order arguments about emergency policies typically claim that because of the emergency, policies and laws proposed by the government are more likely to be bad than during normal times. As we have argued, this is a mistake. At a minimum, we think that the policies are not likely to be worse, and we also suggest that in a broad range of cases the policies are likely to be better because emergencies tend to unsettle an unjust or harmful status quo ante and because individuals are more likely to attend to the common good. To be sure, disagreements about policy will persist; indeed, these disagreements will be heightened because so much more is at stake during an emergency.

These considerations suggest a novel reason why courts are deferential during emergencies. The reason is not only (as we argued in our earlier Article) that courts believe that the executive branch has more information than they do about the nature of the threat. The reason is also that they think that the public is unified behind their political leaders, that the political failures against which courts can usefully guard are not as likely to happen as they are during normal times, and that the change resulting from extraordinary political mobilization will often be beneficial. This is our modified version of Tushnet's second point. Emergencies expand the boundaries of political possibility, often for better, not worse. Judges know they should not stand in the way.