

ACCOMMODATING EMERGENCIES

Eric A. Posner* & Adrian Vermeule**

I. TWO VIEWS	605
II. RATCHETS	610
A. <i>Ratchets, In General</i>	611
B. <i>The Statist Ratchet</i>	612
1. <i>Conceptual problems</i>	613
2. <i>Institutional problems: Is there a mechanism?</i>	614
3. <i>Psychological problems: Adaptive preferences?</i>	619
4. <i>Normative problems: Is the statist ratchet bad?</i>	620
C. <i>The Libertarian Ratchet</i>	622
D. <i>Government Without Ratchets</i>	625
III. FEAR	626
A. <i>Preliminaries</i>	626
B. <i>Two Views of Fear</i>	628
C. <i>The Influence of Fear During Emergencies</i>	631
D. <i>A Note on Cognitive Panics</i>	634
E. <i>Institutional Problems</i>	635
1. <i>Intrapersonal self-restraint</i>	636
2. <i>Rules</i>	637
3. <i>Insulation of decisionmakers</i>	639
F. <i>Strict Enforcement as a Precommitment Device</i>	642
CONCLUSION	643

I. TWO VIEWS

Events since September 11, 2001 have produced a new round of debate about law and the emergency powers of government. Citing the need for swift and resolute action in a national emergency, the government has both sought

* Kirkland & Ellis Professor of Law, The University of Chicago.

** Professor of Law, The University of Chicago. Thanks to Craig Bradley, Carolyn Frantz, Jake Gersen, Jack Goldsmith, Richard Posner, Eric Rasmusen, Cass Sunstein, and John Yoo for comments and to Carli Spina and Mike Vermylen for comments and research assistance. We also benefited from the comments of participants at workshops at the University of Chicago and the University of Indiana, Bloomington. Posner thanks the John M. Olin Foundation and the Russell Baker Scholars Fund for financial support. Vermeule thanks the Russell J. Parsons Faculty Research Fund for the same.

new legal authority to combat terrorism and has suggested, in various spheres, that some emergency powers are inherent in executive authority. On these bases the Bush administration has secured the enactment of the Patriot Act, expanding law enforcement's powers to fight terrorism; ordered the detention of both foreign nationals and American citizens as unlawful enemy combatants; proposed a system of military tribunals for such cases; and increased security at a range of public facilities. Yet the legality of all these policies is contested; even the proper analytic framework itself is hotly disputed. Does constitutional law—either in the sense of constitutional rules or of constitutional outcomes—change in “emergencies,” or is the law constant over time? Is there even an emergency in the first place? Which institution or institutional process is authorized to determine whether there is? In what follows we aim to cut through these tangled debates to focus on the underlying concern about emergency powers.

There are two main views about the proper role of the Constitution during national emergencies. We label them the “accommodation” view and the “strict enforcement” view. The accommodation view is that the Constitution should be relaxed or suspended during an emergency.¹ During an emergency, it is important that power be concentrated. Power should move up from the states to the federal government, and, within the federal government, from the legislature and the judiciary to the executive. Constitutional rights should be relaxed, so that the executive can move forcefully against the threat. If dissent weakens resolve, then dissent should be curtailed. If domestic security is at

1. The view that the Constitution accommodates, or should accommodate, special restrictions on civil liberties during emergencies comes in three flavors. One is that the Constitution itself provides, implicitly or explicitly, for greater executive power during emergencies, and that this power is widely understood and accepted. Another is that the expansion of executive power is accepted but not explicitly acknowledged, and courts (for example) do and should exercise deference surreptitiously, by ducking legal challenges with the help of the copious procedural mechanisms at their disposal—standing doctrine, denial of certiorari, delay, and so forth. Bickel's passive virtues expand during emergencies. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 111-98 (1962) (arguing that the Court should temper principle with prudence by sometimes disposing of politically sensitive cases on procedural grounds). A third is that the Constitution does not explicitly or implicitly expand executive powers during emergencies but that government officials do, and should, violate the Constitution when justified by emergency conditions. See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1023 (2003). These variants are of little interest: The second is a version of the debate on judicial candor, an issue that is orthogonal to the question of emergency powers. As for the third argument, it is always open to a public official to argue that obeying or enforcing the law is immoral, and such an official may or may not succeed in persuading the public or other officials who have the electoral or legal discretion to excuse him from liability. This phenomenon is not particular to emergency. For a discussion of this argument in connection with judicial enforcement of the fugitive slave law, see ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975). For these reasons, we will henceforth refer to the accommodation view generally and not distinguish among its variants.

risk, then intrusive searches should be tolerated. There is no reason to think that the constitutional rights and powers appropriate for an emergency are the same as those that prevail during times of normalcy. The reason for relaxing constitutional norms during emergencies is that the risks to civil liberties inherent in expansive executive power—the misuse of the power for political gain—are justified by the national security benefits.²

Many constitutions have had provisions that enhance executive powers during times of emergency. The most famous example is also the most unfortunate: the Weimar Constitution's provision granting dictatorial powers to the executive in case of emergency.³ But this is just one example among many.⁴ In American constitutional law, Article I, Section 9 of the U.S. Constitution authorizes Congress to suspend the privilege of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it."⁵ Although this emergency power was pointedly vested in the legislative branch rather than the executive,⁶ a more important constitutional rule is implicit but widely recognized: During most major wars involving the United States, Congress and the judiciary have deferred to the executive more than they have during peacetime.⁷

2. See, e.g., ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS* 11-12 (2002); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 292-308 (2003); WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 218-25 (1998). This is the conventional wisdom about the behavior of courts; and it has recently received empirical support from a study of Supreme Court opinions. See Lee Epstein, Daniel E. Ho, Gary King & Jeffrey Segal, *The Supreme Silence During War* (2003) (unpublished manuscript, on file with authors). For a qualitative study reaching the same conclusion, see John C. Yoo, *Judicial Review and the War on Terrorism*, 71 *GEO. WASH. L. REV.* (forthcoming 2003) (manuscript at 7, on file with authors) ("[Federal courts in wartime] have adopted a more flexible, deferential standard of review than would apply to normal, peacetime governmental actions."). For a striking declaration to the same effect by a sitting Justice, see Stephen G. Breyer, *Liberty, Security and the Courts*, Speech to the Association of the Bar of the City of New York (Apr. 14, 2003) (remarking that in wartime, "circumstances change, thereby shifting the point at which a proper balance [between liberty and security] is struck").

3. GERM. FED. CONST., (Weimar Constitution, 1919) pt. I, § 3, art. 48.

4. For a description of the provisions in France, Britain, and ancient Rome, as well as those of the German Republic and the United States, see CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* (Transaction Publishers 2002) (1948).

5. U.S. CONST. art. I, § 9, cl. 2.

6. Historical evidence suggests that the Framers vested the Suspension Clause in Congress, rather than the President, to diminish the risk of executive overreaching. See WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 145 (1980); cf. U.S. CONST. amend. III (in wartime, soldiers may be quartered in houses without the owner's consent, but only in a "manner to be prescribed by law"—that is, by statute). With respect to habeas corpus, as in other matters, the executive has accreted more power than the original understanding might be understood to permit; Lincoln famously suspended the writ during the Civil War. See DANIEL FARBER, *LINCOLN'S CONSTITUTION* (2003); J.G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (Peter Smith ed., 1963) (1926).

7. See sources cited *supra* note 2. The International Covenant on Civil and Political

The second major view about emergencies, the strict enforcement view, is that constitutional rules are not, and should not be, relaxed during an emergency.⁸ This view starts from the observation that the Constitution already provides that the level of protection for civil liberties depends on the interest of the government. Consider, for example, “compelling interest” standards used to evaluate laws that discriminate against protected classes. When an emergency exists, the government has a “compelling interest” in responding to it in a vigorous and effective way. Thus, laws that would not be tolerated during normal times are constitutionally permissible during emergencies. Racial or ethnic profiling, for example, is likely to be seen as less objectionable when used to prevent a terrorist attack than when used to interdict the distribution of illegal drugs.⁹ The Constitution should be enforced “strictly”—that is, the rules should be the same during emergencies as during normal times, even if outcomes differ—so that both civil liberties and government interests such as national security can be appropriately balanced, as they always need to be.

Although the strict enforcement view and the accommodation view can be given different doctrinal formulations, what interests us is the degree of deference that courts give the executive during an emergency. Stipulate that judges could provide “high” or “low” deference during emergencies, where high deference permits some aggressive executive actions that are prohibited by low deference. High deference could be implemented through a threshold test: Courts will apply strict scrutiny unless they first find that an emergency exists, in which case they will permit any executive action that has a rational basis. High deference could also be implemented through a relaxed version of the ordinary compelling interest test, where judges find that the government interest becomes more compelling whenever an emergency occurs, whether or not there is a formal declaration (by courts or other officials) that an emergency exists. Correlatively, low deference could result from the refusal to treat constitutional rights differently during emergencies and normal times, or it could result from the use of a strict compelling interest test. We do not take a

Rights similarly permits states to derogate from their obligations under that instrument “[i]n time of public emergency which threatens the life of the nation.” International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 4, S. EXEC. DOC. No. E, 95-2, 23, 24 (1978), 999 U.N.T.S. 171, 174 (entered into force Mar. 23, 1976).

8. See, e.g., David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 28-30 (2003); Norman Dorsen, *Here and There: Foreign Affairs and Civil Liberties*, 83 AM. J. INT’L L. 840, 845 (1989) (arguing that civil liberties can be judicially protected without necessarily resulting in a negative impact on national security). Below we discuss other authors who hold this view.

9. For completeness, we should mention a variant of the second view, which holds that not only rules but outcomes should remain the same during emergencies and normal times. On this view, emergency measures are permissible only if they would be permissible if taken during normal times. Racial profiling, for example, if not permitted for drug interdiction, is also not permissible for deterring terrorism. Although we do not know of anyone who clearly endorses this view, it approximates the position of those who are most hostile to the Bush Administration’s post-9/11 antiterrorism policies. See, e.g., Cole, *supra* note 8.

position on these issues; the public and scholarly debate is not, for the most part, about doctrinal formulations but about the degree to which judges should defer to the executive.

Whatever the doctrinal formulation, during normal times the accommodation and strict enforcement view permit the same kinds of executive action, and during war or other emergency the accommodation view permits more aggressive executive action than the strict enforcement view does. We assume that courts provide extra deference during an emergency or war because they believe that deference enables the executive to act quickly and decisively. Although deference also permits the executive to violate rights, violations that are intolerable during normal times become tolerable when the stakes are higher. Now, one could criticize courts for getting the liberty-security tradeoff wrong during emergencies, just as one could criticize courts for getting the liberty-security tradeoff wrong during normal times. But in the current debate civil libertarians make a more ambitious claim: That executive action is more likely to be worse during emergencies than during normal times—and that therefore the accommodation position taken by judges is a mistake.

On what grounds could one argue that judges have erred at the wholesale level? Civil libertarians argue that even if judges are right that the benefits from decisive executive action rise during emergencies, judges systematically overlook two costs or risks that are special to emergency. The first overlooked cost is the long-term, postemergency institutional damage from accommodating aggressive executive action during an emergency. The second is the risk that during an emergency fear leads to bad policy.

The institutional argument is that emergencies work like a ratchet: With every emergency, constitutional protections are reduced, and after the emergency is over, enhancement of constitutional powers is either maintained or not fully eliminated, so that the executive ends up with more power after the emergency than it had before the emergency. With each successive emergency, the executive's power is ratcheted up.

The other argument is psychological: During an emergency, people panic, and when they panic they support policies that are unwise and excessive.¹⁰ Relaxation of constitutional protections would give free rein to the panicked reaction when what is needed is constraint. Normal constitutional protections

10. *Id.* at 2-3 (emphasizing the role of "mass fear"); Gross, *supra* note 1 (attributing government responses to fear); Geoffrey R. Stone, Civil Liberties in Wartime 38 (Jan. 15, 2003) (unpublished manuscript, on file with authors) ("Time after time, we have allowed our fears to get the better of us."). For an example from the popular press, see Editorial, *A Panicky Bill*, WASH. POST, Oct. 26, 2001, at A34 (calling the Patriot Act "panicky legislation"). For a general discussion, see JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 129-41, 157-61 (2000) (discussing the use of constitutions to prevent majorities from acting in the heat of passions; Elster does not limit himself to emergencies).

hinder the enactment of bad laws during emergencies. To the critic who argues that normal constitutional protections also prevent needed concentration of power in the executive, the defender of strict enforcement argues that any hindrances on forceful executive action would be justified by the benefits, the avoided laws and acts that reflect fear rather than reason.

The ratchet theory and the panic theory have become fixed points in the debate about emergency powers yet have escaped rigorous analysis. As we will show, both theories have conceptual, normative, and empirical difficulties. The ratchet theory lacks a mechanism that permits constitutional powers to rise and prevents them from falling and makes implausible assumptions about the rationality of individuals who consent to constitutional changes during emergencies. Those who fear the ratchet's power point to constitutional trends—such as the rise of executive power—that are more plausibly the result of long-term technological and demographic changes, not of recurrent emergencies; they ignore the possibility of constitutional trends in the opposite direction, such as the rise of individual rights. (If there is such a trend, it is not a ratchet process either; we include a critique of an optimistic variant of the emergency ratchet, in which a succession of emergencies causes government to display ever-increasing respect for civil liberties.) As for the panic theory, it relies on a psychologically unrealistic conception of fear and on dubious empirical assumptions about the influence of fear on public policy. Finally, defenders of either theory do not examine their normative premises sufficiently: It is not clear that panics and ratchets, if they occur, are bad things. Fear is often the correct response to a threat; panics can shatter constitutional structures, but sometimes constitutional structures should be shattered. Ratchets put the status quo out of reach, but sometimes that is where it should be.

II. RATCHETS

In this Part we critique accounts of emergency that posit a ratchet effect, in which a succession of emergencies produce a unidirectional, and irreversible, increase in some legal or political variable. Part II.A provides a brief overview of ratchet accounts in legal theory, questioning their general utility. Part II.B critiques the most common version of the emergency ratchet account, which holds that emergencies produce a *statist ratchet*: an irreversible trend towards increased state power and official suppression of civil liberties, free speech, and political association. We suggest that the statist ratchet account is implausible on conceptual, institutional, psychological, and normative grounds. Part II.C critiques the opposite account, which holds that emergencies produce a *libertarian ratchet* in the form of ever-increasing governmental respect for civil liberties. Part II.D suggests that the ratchet idea has little utility for positive or normative argument about emergencies, principally because ratchet accounts posit an implausible amount of friction in the lawmaking system. In our picture, by contrast, the lawmaking system adjusts fluidly, if unpredictably, to

emergencies, exogenous shocks, and other changes in the political and social environment; few changes are unidirectional and irreversible in the strong sense that ratchet accounts suppose.

A. Ratchets, In General

The “ratchet” (or, redundantly, the “one-way ratchet”) is a favored analytic tool of legal theorists. Too much so, in fact. Ratchet accounts are invoked in a bewildering array of settings, ranging from the theory of regulation and bureaucratic behavior¹¹ to racial profiling¹² and sexual mores.¹³ For a genuine ratchet to occur, however, highly specialized conditions must obtain. The essential features of a ratchet are *unidirectional* and *entrenched* change in some legal variable. First, the policy space in which the ratchet occurs is assumed to be one-dimensional, so that the ratchet produces ever-increasing values of a variable—more and more and more of something. Second, the incremental increases are fixed once they occur. Note that the change need not be literally irreversible; although strong ratchet accounts posit irreversibility, weak ratchet accounts merely posit that change is sticky, because more or less costly to undo. Weak ratchet accounts seem more plausible than strong ones, but they also pack less punch: The less costly it is to undo a given change, the less important is that change.

Putting these conditions together, a well-formed ratchet account must have something like the following shape: At Time 1, some legal rule or practice emerges endogenously from political processes, including the legal system; at Time 2, the rule or practice is cemented by some mechanism and has become an exogenous constraint; at Time 3, some dimension of the rule increases endogenously; at Time 4, the increase is cemented into place; and the process repeats indefinitely. These conditions are rare, perhaps even nonexistent. The danger here is that the “ratchet” label is being bandied about too freely and is often confused with a simple trend that happens to extend over time or with endogenous but reversible change in some variable that would quickly revert to its original value if other legal or social conditions changed.

Despite the ubiquity of ratchet accounts, few such accounts are fully specified, and often there is no plausible way to cash them out. Take a popular idea, or intuition, in constitutional theory: If conservative judges respect precedent while liberal judges freely overrule precedents, and conservative

11. Larry F. Darby & Joseph Fuhr, *Investment Incentives and Local Competition at the FCC*, 9 MEDIA L. & POL’Y 1, 18 (2000); Bruce Yandle & Andrew P. Morriss, *The Technologies of Property Rights: Choice Among Alternative Solutions to Tragedies of the Commons*, 28 ECOLOGY L.Q. 123, 148 (2001).

12. Bernard E. Harcourt, *The Shaping of Chance: Actuarial Models and Criminal Profiling at the Turn of the Twenty-First Century*, 70 U. CHI. L. REV. 105, 124-25 (2003).

13. Amy L. Wax, *Against Nature—On Robert Wright’s The Moral Animal*, 63 U. CHI. L. REV. 307, 340-41 (1996).

courts alternate with liberal ones, then a ratchet effect is created, whereby the existing stock of precedents becomes increasingly liberal over time. But this account is either out of equilibrium or arbitrarily assumes that the two camps have wildly disparate preferences. If the implicit picture is that both liberal and conservative judges are political, seeking to embody their preferences and attitudes in legal decisions, then conservative judges are myopic in refusing to overrule liberal decisions; they are repeatedly, and inexplicably, duped by the equally unprincipled but more cunning liberals. So the picture must instead be that liberal judges are political while conservative judges have a strong and principled preference for adhering to any past decision, whatever its political valence; but this seems arbitrary.

Perhaps history contains a few genuine ratchet processes. The continual, and doubtless irreversible, expansion of the political franchise in liberal democracies over the course of the nineteenth and twentieth centuries might qualify. But even here there are problems; although it seems intuitive that voting rights, once granted, are difficult to revoke (assuming the recently enfranchised may themselves vote on any revocation proposal), it is not obvious why enfranchised groups would continually admit politically powerless groups into the political system. In general, ratchet arguments are methodologically suspect and are invoked with far greater frequency than is warranted by theory or evidence. This pattern holds true for ratchet arguments about emergency powers, to which we now turn.

B. *The Statist Ratchet*

The statist ratchet identifies a putative tendency of emergency policies to “become entrenched over time and thus normalized and made routine The maintenance of emergency powers may be accompanied by expansion over time of the scope of such powers. At the same time, built-in limitations on the exercise of emergency authority and powers tend to wither away.”¹⁴

As it turns out, however, the statist ratchet account has only a surface sheen of plausibility, and no core. It assumes that emergencies produce unidirectional and irreversible change in the direction of official intrusion on civil liberties. But there is no obvious reason to think that any such process occurs; the statist

14. Gross, *supra* note 1, at 1090; see also JOHN E. FINN, CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW 54 (1991) (“[D]esperate measures have a way of enduring beyond the life of the situations that give rise to them”); George J. Alexander, *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 5 HUM. RTS. L.J. 1, 26-27 (1984) (emergency decisions may “infest law long after the emergency has passed”); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1397-1421 (1989) (attempting to show that successive wars and crises have steadily expanded executive authority at the expense of civil liberties); Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 157 (1999) (analyzing “the ratchet effect of expansion of accepted authority in the office of the president with each new emergency”).

ratchet fails to supply a mechanism that would explain such a process if it were to occur; and, if there is such a mechanism, it is not clear that the resulting ratchet process is bad. We will organize these points into four critiques of the statist ratchet: conceptual, institutional, psychological, and normative.

1. *Conceptual problems.*

The statist ratchet, like all ratchet accounts, assumes a finite, one-dimensional policy space. In this space, government policies vary from minimally to maximally intrusive; the statist ratchet assumes that emergencies produce a continual increase that is unidirectional on this dimension, moving steadily from less official oppression to more.

But this picture is too crude. The policy space is not one-dimensional but multidimensional: Official policies, whether instituted during an emergency or not, can intrude more (or less) on some margins while intruding less (or more) on others. At Time T the government policy for airport security is to search passengers who fit a given ethnic and religious profile. At Time $T+1$ the policy changes to random searches; the new policy, let us say, imposes a cost (at least in an expected sense) on a greater number of people but reduces the stigma of being searched. Here it is senseless to ask whether liberty has been increased or decreased; instead it has been redistributed, by imposing a smaller deprivation more widely. In addition, there is the standard problem of conflicts or tensions between and among libertarian rights, arising from budget constraints on the government that funds the institutions needed to protect those rights.¹⁵ More money for airport searches may reduce the need for ethnic profiling, but it may mean less money for public defenders or a longer court queue for citizens asserting constitutional liberties against government.

These two problems—controversial choices about the distributive profile of libertarian rights and the interdependence of budgeting choices that affect rights—mean that officials face the difficult problem of aggregating incompatible liberties across different individuals. In rare cases, Pareto-improving moves will enable greater security at a given level of official intrusion or less intrusion with a constant level of security;¹⁶ but in most cases more liberty for some means less liberty for others. Because aggregative judgments are inescapable, it is not so much wrong as incoherent to speak generally of “society” having “more” or “less” liberty.

To be sure, these conceptual problems are not dispositive in and of themselves. We might discover, empirically, a decrease of liberty on all

15. See generally STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS* (1999) (explaining that rights are implemented by affirmative government decisions to fund protection for those rights).

16. Pareto improvement is usually defined over utility rather than liberty, but the latter idea is perfectly coherent. See AMARTYA SEN, *INEQUALITY REEXAMINED* 25-26 (1992).

dimensions or on some suitably weighted or aggregated combination of dimensions. What is true, however, is that ratchet arguments must carefully specify the relevant dimensions and examine their interaction. The simple picture of unidimensional, unidirectional change embodied in the most common versions of the statist ratchet does not begin to engage these conceptual problems.

Finally, the boundaries of the policy space themselves change over time. Exogenous shocks arising from technological, economic, and social change can transform the policy arenas in which the balance between security and liberty is played out. Governments that had managed to assert some level of control over traditional media must cope with the arrival of the Internet; by the time the law surrounding cross-border policing has been adjusted to the Internet,¹⁷ perhaps personal teleporters will have come into use, and the traditional customs post will seem irrelevant for people as well as for information. Unanticipated change undermines government's ability to control liberties. In place of the menacing picture drawn by the statist ratchet, envisaging a continuous increase of official power over information and personal conduct, we might imagine government as a rat on a treadmill, constantly struggling to keep pace with new forms of technology and new modes of citizen behavior.

2. Institutional problems: Is there a mechanism?

Statist ratchet accounts fail to specify any institutional mechanism by which legal and political measures intended to combat emergencies become irreversible. Why, exactly, do temporary measures stick after the emergency has passed? Although statist ratchet accounts usually gloss over this point, we can imagine several related mechanisms. First, judicial precedent developed in times of emergency might distend or spill over into the ordinary legal system, and precedent will be costly to overrule. Second, legal rules developed in times of emergency may be protected by the status quo bias built into the legislative system or by the formation of bureaucracies and interest groups that coalesce around the new measures and block subsequent efforts to repeal them. We critique these ideas in turn.

Precedent. The locus classicus for the argument from precedent is Justice Jackson's dissent in *Korematsu v. United States*, with its famous claim:

[O]nce 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 an urgent

17. See Jack L. Goldsmith, *The Internet and the Legitimacy of Remote Cross-Border Searches*, 2001 U. CHI. LEGAL F. 103.

need.¹⁸

Jackson's preferred course of action was not to invalidate the order but to treat it as nonjusticiable—a version of the political question doctrine. Expanding upon (and modifying) Jackson's dissent, commentators such as Gross and Tushnet argue that “it is better to have emergency powers exercised in an extraconstitutional way, so that everyone understands that the actions are extraordinary, than to have the actions rationalized away as consistent with the Constitution and thereby normalized.”¹⁹

Jackson's idea is obscure, and the position commentators have derived from it is implausible. Suppose that, contra Jackson, judicial precedents explicitly uphold government actions in a time of crisis on the ground that the emergency justifies the order, even if a similar order would be invalid in ordinary times. Why must the precedent both (1) spill over into ordinary law and (2) remain entrenched “for all time,” as Jackson puts it? As for the first condition, the precedent will itself have a built-in limitation to emergency circumstances. Presumably the idea is that precedents are extremely malleable, and the category of “emergency” is a fluid and unstable one. But if this is so it is so in both directions; later judges may either distend the precedent to accommodate government power or else contract the precedent to constrain it. Jackson's exegetes need to supply an independent account to explain why the former possibility is more likely, and more harmful, than the latter; and they have not done so.

The best stab at an account of this sort appears in another Jackson opinion. Institutional incentives will cause the executive to press the boundaries of the “emergency” category to ever-broader extremes, and that will be possible because the category of “emergency” is extraordinarily nebulous and difficult to specify through legal formulations. Cognitive limitations will induce the courts to acquiesce in this expansion. Because the courts will be aware of the limits of their information and of the high risks of error if they frustrate executive action in a genuine emergency, they will adopt a deferential stance.²⁰ This reconstructed argument seems plausible as far as it goes, but rational judges who are aware of their cognitive limitations—and this account assumes self-awareness—can anticipate the slippage and forestall it, by *initially* defining

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

19. Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 306. For Gross' similar view, see *supra* note 1, at 1125. Tushnet is quite explicit that Jackson “does not quite make the point I extract from his opinion.” Tushnet, *supra*, at 306.

20. See *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 146 (1948) (Jackson, J., concurring) (describing the federal government's war power as “dangerous” because “[i]t usually is invoked in haste and excitement [and] . . . is interpreted by judges under the influence of the same passions and pressures. Always . . . the Government urges hasty decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed.”).

the category of emergency more narrowly than they otherwise would. The eventual expansion of the category will simply reinstate its optimal scope, rather than exceed it.²¹

At bottom, the Jackson view must rest on a simple empirical conjecture: The expansion of emergency powers, once begun, will inevitably culminate in total executive domination. But this seems hysterical; there is no evidence for it in the study of comparative politics. Many constitutions contain explicit provisions for emergency powers, either in text or in judicial doctrine.²² Sometimes executive domination has overtaken the relevant politics, sometimes it has not; other variables probably dominate, such as the nation's stage of development, or its susceptibility to economic shocks, or the design of legislative and judicial institutions. Recall the status quo position: Judges typically defer to the executive in war and other emergencies, as we have emphasized.²³ Jackson's exegetes seek to change this status quo and thus bear the burden of proof. They need to show that recognizing a legal category of emergency powers, or increasing the level of deference during judicially identified emergencies, will risk pushing the Constitution to the bottom of the slippery slope. A casual citation to a few salient examples, typically the emergency provisions of the Weimar Constitution, will not carry their intellectual burden.

As for the second condition, it is hard to see why precedents granting government emergency powers should be irreversibly entrenched, at least if precedents denying the government emergency powers are not. *Stare decisis* will be either strong or weak. If it is weak, then past precedents granting emergency powers can be overruled, even if they cannot be cabined to emergency situations. If *stare decisis* is strong, then courts will be unable to overrule precedents that previously denied government emergency powers in particular settings, or that strongly entrenched liberties, as well as precedents that granted emergency powers. Here too the argument from precedent cuts in both directions. There is no ratchet mechanism that uniquely applies to precedents upholding government claims of emergency power; the general stickiness of precedent is a far broader point.

Legislation (and constitutional amendment). The argument from precedent points to the inertia built into the judicial system; there is a similar argument that points to the inertia of the lawmaking system, embodied in the costly

21. For an account of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) that explains Black's opinion as an example of this strategy, see Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 404-05 (2001).

22. See COPING WITH CRISES: HOW GOVERNMENTS DEAL WITH EMERGENCIES (Shao-chuan Leng ed., 1990) (providing detailed case studies of emergency law from Israel, Northern Ireland, Italy, South Korea, and Taiwan); EUROPEAN COMM'N FOR DEMOCRACY THROUGH LAW, EMERGENCY POWERS (1995) (providing an overview of legal provisions on emergency powers from 32 nations).

23. See *supra* note 2.

procedures for statutory enactment and constitutional amendment. These design features partially entrench the legal status quo; the statist ratchet account might implicitly suppose that temporary legislation or constitutional provisions, enacted during emergencies, will thus stick after the emergency has passed. But rational and well-motivated legislators can anticipate this by inserting sunset provisions in emergency legislation (as Congress did in the Patriot Act); rational and well-motivated constitutional drafters can insert sunset provisions in constitutional rules.²⁴ Gross argues that “[t]ime-bound emergency legislation is often the subject of future extensions and renewals,”²⁵ and there are current proposals to extend the Patriot Act or repeal its sunset clause, but the existence of the sunset clause alters the status quo point: Unless proponents of extension can surmount the costly hurdles to legislative action, the statute will lapse automatically. Thus libertarian opponents of renewal still enjoy the advantage of legislative inertia.

The statist ratchet account must suppose that legislators either irrationally fail to anticipate the future termination of the emergency, perhaps because they are gripped by “panic,” or else that legislators are motivated to use any and every emergency as a means to expand the permanent powers of government. We address “panic” at length in Part III below. As for motivations, the idea that legislators desire to maximize permanent state power as against the individual is vivid, but it lacks microfoundations in the behavior of the individuals who occupy the legislature. Why, exactly, does it benefit legislators to expand the powers of government? As individuals, they may or may not benefit; even if legislators have an individual stake in the power of Congress as an institution, expanding government power in times of emergency usually benefits the executive most of all, and the executive is Congress’ principal institutional rival. The statist ratchet fails to offer a plausible account of legislators’ maximands. We might posit that legislators strictly maximize their chances of reelection, but then the question just becomes why constituents demand legislation that (for lack of sunset) will outlive the emergency, and the picture must be that during emergencies constituents *irrationally* demand permanent legislation; so we are back to the “panic” idea again.

Even accepting the premise that legislators are frequently irrational or ill motivated, pointing to the status quo bias built into the lawmaking system proves too much. The status quo bias operates neutrally across different types of statutes and constitutional provisions. It not only (1) entrenches liberty-restricting laws (the only case the statist ratchet acknowledges) but equally (2) prevents enactment of liberty-restricting laws, and (3) entrenches liberty-protecting ones. As for case (2), the high costs of statutory enactment can weed out the most draconian proposals for controlling sedition and terrorism; an example is Senator Chamberlin’s 1918 proposal to enact legislation that would

24. See, e.g., U.S. CONST. art. I, § 9, cl. 1; *id.* at art. V.

25. Gross, *supra* note 1, at 1090.

allow the government to punish spies by court-martial, which was killed by Wilson's opposition.²⁶ As for case (3), the costs of enactment protect from repeal any laws that protect liberties from infringement by later legislatures or the executive. Consider the Posse Comitatus Act,²⁷ which blocks the executive from using regular armed forces for domestic law enforcement and thus embodies a traditional libertarian anxiety. The Act is just as entrenched by the lawmaking process as the Patriot Act would be, had Congress not provided a sunset.

Bureaucracies and interest groups. A related mechanism might posit that emergency policies generate bureaucracies that block the repeal of those policies. On this view, creating new agencies to cope with an emergency, perhaps by consolidation of old agencies (as with the Department of Homeland Security), creates a cadre of officials with vested interests in prolonging the new bureaucracy for as long as possible, even after the emergency has petered out. Those officials will use their influence, in Congress and with client interest groups, to block repeal of the agency's organic statute or diminution of the agency's power.

It is hardly clear that bureaucratic immortality is a real phenomenon; that sort of talk had more resonance before Congress abolished the Interstate Commerce Commission, deregulated the airlines, and reorganized and streamlined the security agencies. The same problems we have discussed—the underdeveloped account of officials' maximands and the mismatch between the scope of the mechanism and the scope of the argument—persist here as well. It is unclear why rational legislators would fail to anticipate and block the future bureaucrats' strategy by inserting a sunset termination provision, a periodic review process, or some other device. And if bureaucratic inertia is a real phenomenon, it operates equally to block moves that would expand government power, restrict liberty, or permanently institutionalize a state of emergency. If an inefficient welter of competing security agencies hampers government's efforts to extend control over unpopular social groups,²⁸ then those agencies will attempt to block congressional attempts to reorganize them into a more efficient, and more menacing, centralized department. If Congress nonetheless succeeds in doing so, as it recently has, why cannot a future Congress succeed in abolishing or curtailing the agency created to meet the emergency? The dilemma for the statist ratchet account is that either bureaucratic inertia is real, in which case it will block liberty-infringing moves as well as liberty-expanding ones, or it is not real, in which case liberty-infringing moves will not become entrenched.

26. Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 285-86 (2002); Arthur Krock, *When Martial Law Was Proposed for Everybody*, N.Y. TIMES, July 14, 1942, at 18.

27. 18 U.S.C. § 1385 (2003).

28. For an example, see Tushnet, *supra* note 19, at 289.

Generally speaking, there is no reason to suppose that laws, policies, and bureaucratic institutions created during an emergency (1) systematically fail to change, or change back, after a crisis has passed (2) because of institutional inertia and interest group pressure. World War I produced a large new cadre of regulatory agencies that persisted into the New Deal and beyond.²⁹ But a plausible view is that the national economy was previously underregulated, and that the new institutions satisfied social demand; so this example does not clearly satisfy condition (2). The quasiwar with France in 1798 produced the Alien and Sedition Acts, but the former expired in 1800 and the latter in 1801,³⁰ in violation of condition (1); why did the statist ratchet not operate there? A similar example involves Lincoln's notorious suspension of habeas corpus—an action that was undone after the Civil War's end.³¹ Why no statist ratchet?

These examples are impressionistic but not more so than the examples adduced by proponents of the statist ratchet. Indeed, preliminary empirical work has now examined the ratchet thesis and finds that “contrary to widespread fear and speculation that doctrine created during wartime ‘lingers’ on in peacetime, the rights jurisprudence appears to ‘bounce back’ during peacetime.”³² As we discuss at the end of this Part, the best working presumption for constitutional law follows this finding. We should presume that no ratchet effects operate, in any direction; institutional change displays no consistent trend or mechanism and is determined differently in different contexts by a complex mix of political, economic, and technological forces.

3. *Psychological problems: Adaptive preferences?*

We will briefly look at the idea that the statist ratchet operates by virtue of a psychological mechanism. Proponents of the statist ratchet account say, rather vaguely, that government's emergency measures have “[a] tranquilizing effect . . . on the general public's critical approach toward emergency regimes.”³³ The underlying picture here must be some sort of endogenous preference formation, which causes social preferences to conform to government policies, or the related idea of adaptive preferences, in which individuals limit their aspirations, not merely their actions, by reference to the set of feasible policies. Somehow, the intuition runs, society gets used to the postcrisis baseline of expanded governmental power; the ratchet operates not because temporary emergency

29. Larry D. Kramer, *But When Exactly Was Judicially Enforced Federalism “Born” in the First Place?*, 22 HARV. J.L. & PUB. POL’Y 123, 132 (1998).

30. See Wayne D. Moore, *Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions*, 11 CONST. COMMENT. 315, 323 (1994).

31. For a discussion of Lincoln's constitutional legacy, see FARBER, *supra* note 6.

32. See Epstein et al., *supra* note 2, at 53.

33. Gross, *supra* note 1, at 1093-94.

measures block society's capacity to return to the status quo ante, but because society no longer desires to do so.

The implicit assumption here is that the postcrisis baseline is bad. If it is good—if the precrisis baseline represented a society underprepared for emergencies, in which law and institutions were supplying too much liberty and not enough order—then the endogenous formation of preferences for the postcrisis baseline would help to stabilize the new regime and would thus be good as well. At the very least we would need a very strong account (welfarist or nonwelfarist) of the value of autonomous preference formation to say that the public's adaptation to the new social state is bad; the statist ratchet offers no such account. So the preference-based version of the statist ratchet is, like the institutional version, parasitic on a suppressed and wholly independent judgment that the status quo ante represents the correct balance between liberty and order; more on this below.

In fact, however, the evidence that endogenous or adaptive preference formation operates in this way is scant indeed. As we also discuss below, another view paints just the opposite picture of political and social psychology: In the postcrisis state, a widespread revulsion against the prevailing liberty-infringing policies sets in, and society judges, in hindsight, that the emergency measures were unnecessary. The stock example is the World War II era internment of Japanese-American citizens, which is now widely described as an egregious mistake that inflicted unnecessary deprivations of liberty, due in part to racial animus. If this sort of post hoc revulsion operates consistently, then the right account would emphasize contrarian preference formation and hindsight bias, rather than the endogenous preference formation and confirmation bias posited by the statist ratchet. But we will claim that a third account—no ratchets operate systematically, in either a liberty-restricting or a liberty-expanding direction—is the most convincing of all.

4. Normative problems: Is the statist ratchet bad?

Normatively, the statist ratchet account simply assumes that the status quo ante—the legal baseline prior to the emergency that produces an irreversible expansion of state control—already embodies the optimal balance between liberty and security. So the statist ratchet in effect makes two normative assertions: (1) The precrisis legal rules were optimally balanced for the precrisis state; and (2) the postcrisis rules are too restrictive for the postcrisis state.

Yet in some settings either or both of these assertions will fail to hold. We might deny (2) while affirming (1), if we think *both* that the precrisis rules were optimal for the precrisis state *and* that the postcrisis rules are optimal for the postcrisis state. If, for example, the crisis is the product of a permanent change in the polity's political circumstances, such that the value of security is higher after the crisis than before it, then the balance should be recalibrated after the

crisis; failing to do so would constitute social paralysis, rather than a laudable respect for traditional liberties.

More interestingly, we might deny both (1) and (2), if we think that before the emergency society was, in some sense, unprepared for the emergency, underregulated, or excessively liberty-protecting, while after the emergency society has attained the optimal balance. We might believe, for example, that as of September 10, 2001, American governmental institutions were supplying too much liberty and not enough security. Well-documented turf battles between uncoordinated, and arguably inefficient, security and intelligence agencies meant that government failed to anticipate and forestall a major terrorist attack, or even to plan sensibly for its aftermath.³⁴ On this sort of view, the institutional puzzle would be to explain why government underreacted to the terrorist threat—the opposite of the puzzle for the statist ratchet account, which is to explain why government overreacts to threats. The point here is not to endorse this view of post-9/11 security reorganization, on the merits. But the possibility cannot be assumed away, *a priori*.

Proponents of the statist ratchet rarely consider these possibilities. Consider Dermot Walsh's argument that the expansion of law enforcement powers in the Republic of Ireland, from about 1970 to the present, has created a legal regime in which official powers to investigate and detain both suspected terrorists and ordinary criminals systematically trumps civil liberties.³⁵ Walsh's account suggests that legal rules initially formulated to cope with terrorist campaigns and other security emergencies bled over into ordinary policing, resulting in a harsh regime of criminal procedure. Walsh disclaims any substantive evaluation of these developments, confining himself to the procedural objection that the developments never received adequate legislative deliberation. Oren Gross, however, cites Walsh's history in an argument that emergency powers of the sort initially granted to Irish officials will produce "insidious changes" by spilling over into nonemergency settings.³⁶

But nothing in Walsh's history suggests any reason to condemn, on substantive civil-libertarian grounds, the result of the developments he describes. Walsh notes that the initial impetus for expanded law enforcement authority was "[t]he escalation of subversive activity associated with Northern Ireland" (although he tendentiously calls this a "pretext"), and acknowledges that the preexisting law was "so heavily biased in favour of the freedom of the

34. See U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, COMBATING TERRORISM 10-17 (2001) (giving government preparedness a mixed review—prepared before 9/11 and released afterwards—and also finding important failures of accountability and of coordination, both among federal agencies and between the federal government and the states).

35. Dermot P.J. Walsh, *The Impact of the Antisubversive Laws on Police Powers and Practices in Ireland: The Silent Erosion of Individual Freedom*, 62 TEMP. L. REV. 1099, 1102 (1989).

36. Gross, *supra* note 1, at 1072.

individual that the task facing the prosecution could be described fairly as a very tricky obstacle course.”³⁷ So an obvious alternative view is that in Ireland, circa 1970, the law of criminal procedure was too lax for an increasingly complex and heterogeneous society—perhaps because the relevant law was initially impressed with the libertarian mold of nineteenth-century British procedure and had never been updated. The expansion of police powers after 1970, on this view, would just represent a belated adjustment towards the optimum balance of liberty and security, not a lamentable departure from that balance.

In like vein, Gross says that, “emergencies have led to quantum leaps” in a process of “aggrandizement” of executive powers in America, France, and Great Britain after the two world wars.³⁸ Aggrandizement is meant to sound bad, but Gross never actually gives a straightforward normative argument to that effect. It is equally possible that quantum leaps occurred because war or emergency liberated the polity from some institutional sclerosis, or entrenched equilibrium, that had held government power at an inadequately low level. Gross acknowledges that “[t]he growing complexity of modern society and the needs of its members have played an important role in the expansion of executive authority”;³⁹ but this may be the whole story, not just part of it.

Why, exactly, is it bad if emergency or temporary measures spill over into the ordinary legal system? Spillover of this sort is, in itself, neither good nor bad. The only question is whether the new state of affairs is an improvement on the status quo ante or not; if it is an improvement, then the spillover was a benign event. Perhaps the war or emergency stimulated legal experimentation, spurred the development of new technology or produced ingenious policy mechanisms; in any of these cases it might be wise, not foolish, to incorporate the new information or innovation into the ordinary law after the emergency has passed. The statist ratchet suffers from a virulent strain of the naturalistic fallacy: Whatever complex of legal rules happens to exist, at some status quo point, is taken to be good, and any shift in the direction of greater security is taken to be bad. But if the status quo can embody too much liberty, rather than just the right amount, that picture is arbitrary.

C. *The Libertarian Ratchet*

If the statist ratchet identifies a sustained and irreversible decline of civil liberties, a mirror-image position—the libertarian ratchet—identifies a progressive and optimistic trend. In this camp are Chief Justice Rehnquist’s claim to discern a “generally ameliorative trend” in government’s treatment of

37. Walsh, *supra* note 35, at 1128-29.

38. Gross, *supra* note 1, at 1095-96.

39. *Id.* at 1095.

civil liberties during wartime;⁴⁰ an argument by Jack Goldsmith and Cass Sunstein that social evaluation, in hindsight, of government performance during wars and other crises produces a “trend toward greater protection for civil liberties in wartime”;⁴¹ and a similar argument by Mark Tushnet.⁴² Of these, Rehnquist and Tushnet seem to view the libertarian ratchet as good, while Goldsmith and Sunstein focus on explanation rather than normative assessment. Many of the preceding objections to the statist ratchet apply equally against the libertarian ratchet, *mutatis mutandis*; we will confine ourselves to a few additional points.

The first is that the libertarian ratchet, like the statist ratchet, extrapolates a trend from an impoverished data set containing too few observations. Proponents of the libertarian ratchet have little to work with: the Civil War, World Wars I and II, the armed conflicts in Korea and Vietnam, and perhaps the “red scares” of the 1950s if “war” is defined capaciously. Many curves can be drawn through such a small set of points.

Goldsmith and Sunstein claim that: “compared to past wars led by Lincoln, Wilson, and Roosevelt, the Bush administration has, thus far, diminished relatively few civil liberties. Even a conservative Executive branch, it seems, is influenced by the general trend towards protections of civil liberty during wartime.”⁴³ Although the first point is indisputable—the Bush administration has not suspended the writ of habeas corpus, punished harmless dissenters, or interned large numbers of American citizens—the second point does not follow from the first and is methodologically infirm. To know whether the Bush administration would behave with greater respect for civil liberties than the administrations of Lincoln, Wilson, or Roosevelt, we would have to observe similar conditions, and we do not. Would the Bush administration show as much restraint if enemy troops were within a short train ride of Washington (Lincoln), if Europe exploded in armed struggle (Wilson), or if an American fleet had been wiped out by the surprise attack of a foreign state (Roosevelt)? It is not hard to imagine, even today, that civil liberties would be extensively abridged in such circumstances. These are counterfactual speculations, but the libertarian ratchet itself rests on a counterfactual speculation—that current administrations would behave with more restraint than past ones, given like conditions.

The general claim is that a series of wars⁴⁴ produce an ever-greater respect

40. REHNQUIST, *supra* note 2, at 221.

41. Goldsmith & Sunstein, *supra* note 26, at 262.

42. Tushnet, *supra* note 19, at 294-95.

43. Goldsmith & Sunstein, *supra* note 26, at 288.

44. Or, at least, successful wars. Goldsmith and Sunstein say that “there is nothing inevitable” about the ratchet effect they identify; it is a product of America’s “remarkable record of military success . . .” *Id.* at 285. (But what about the War of 1812, Pearl Harbor, and the Vietnam War?) In this sense, Goldsmith and Sunstein suggest that the libertarian ratchet is contingent—“an accident of America’s distinctive history.” *Id.* at 262. If this

for civil liberties, but it is hardly obvious that the independent variable and the dependent one are correlated, let alone causally linked. In many countries, casual empiricism suggests that a series of wars and crises have not produced ever-increasing respect for civil liberties; consider the history of Prussia, and Germany as a whole, between 1871 and 1945. And in other countries civil liberties have increased over time periods when no wars occurred; Europe after World War II is a large example. In the European case, and in other cases, national wealth is a major confounding variable, one that Goldsmith and Sunstein say little about. A plausible hypothesis is that wealthier countries, whatever their military history, show greater respect for civil liberties than poorer ones do.⁴⁵

To establish the libertarian ratchet, a much larger comparative study would be necessary; confining the inquiry to one nation (America) and a few wars tells us little. This is so even if there has been a constantly increasing respect for civil liberties in America. To generate the general claim solely from the American case is to commit the methodological mistake of selecting cases on the dependent variable.⁴⁶ The claim that spring will come early whenever the groundhog sees his shadow cannot be proved by looking solely at years in which, in fact, spring came early.

Perhaps we should understand the libertarian ratchet not as advancing a fully specified hypothesis of this sort but simply as describing a causal mechanism that operates *ceteris paribus*: After a series of wars, hindsight tends to produce social judgments that past suspensions of civil liberties were unnecessary. But our second point is that the hindsight-bias mechanism is underspecified; the level of generality at which hindsight operates makes a critical difference. Goldsmith and Sunstein seem to assume that the hindsight judgment operates to bar “unnecessary” future invasions of civil liberties, as a general class,⁴⁷ but it may equally be true that hindsight condemns only the *specific* policies or programs instituted in past crises. New policies or programs will be categorized differently in the social cognition and will be assessed strictly *ex ante*. As Tushnet puts it (in acknowledged tension with his own argument):

means that the ratchet need never have occurred, it is unexceptionable. If it means that, having occurred, the trend of increasing respect for civil liberties would be reversed by future military defeats, then the qualification undermines Goldsmith and Sunstein’s claim to having identified a ratchet effect in the first place. As explained in this text, irreversibility is the *sine qua non* of any ratchet account.

45. For discussions of the evidence, see Steven C. Poe & C. Neal Tate, *Repression of Human Rights to Personal Integrity in the 1980s: A Global Analysis*, 88 AM. POL. SCI. REV. 853 (1994); Steven C. Poe, C. Neal Tate & Linda Camp Keith, *Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976-1993*, 43 INT’L STUD. Q. 291 (1999).

46. GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 129 (1994).

47. Goldsmith & Sunstein, *supra* note 26, at 262.

Judges and scholars develop doctrines and approaches that preclude the repetition of the last generation's mistakes. Unfortunately, each new threat generates new policy responses, which are—almost by definition—not precluded by the doctrines designed to make it impossible to adopt the policies used last time. And yet, the next generation again concludes that the new policy responses were mistaken. We learn from our mistakes to the extent that we do not repeat precisely the same errors, but it seems that we do not learn enough to keep us from making new and different mistakes.⁴⁸

This is a version of the conceptual point we advanced against the statist ratchet: Because the policy space changes over time, it is simplistic to ask whether wars or other emergencies cause an “increase” or “decrease” in governmental respect for civil liberties. As old forms of governmental control become disreputable and disappear (suspension of judicial process, suppression of political speech, and internment), new forms become technologically feasible and normatively freighted (consider sophisticated government monitoring of private communications, including Internet use, or of lawyers' conversations with clients). Here again, there just is no single dimension of greater or lesser respect for civil liberties—and thus no predicate for the unidirectional trend line that both the libertarian and statist ratchets assume, albeit in different directions.

D. *Government Without Ratchets*

The last point emphasizes the common premise of the libertarian and statist ratchets: Both accounts assume that the history of civil liberties in America shows a constant trend, or at least that war and other emergencies have a constant, unidirectional ratchet effect on civil liberties. The two accounts simply disagree about the direction of the trend.

We favor a third view: There just are no systematic trends in the history of civil liberties, no important ratchet-like mechanisms that cause repeated wars or emergencies to push civil liberties in one direction or another in any sustained fashion. Wars, crises, and emergencies come in a range of shapes and sizes; the categories themselves are just methodological conveniences, dichotomous cuts in continuous phenomena. It is unclear, given the current state of the empirical work, whether wars and emergencies have any effect on civil liberties; if they do, the effects may be complex and multiple, not simple and unidirectional. Especially absent is any convincing reason to think that any political, social, or psychological ratchet, under which wars and emergencies have irreversible effects on future policies, operates. The best available empirical work finds no ratchet effects, in either direction,⁴⁹ and the mechanisms said to create a ratchet are implausible or underspecified.

48. Tushnet, *supra* note 19, at 292.

49. See Epstein et al., *supra* note 2, at 53-54; see also POSNER, *supra* note 2, at 304.

As a working presumption, then, we should approach each new social state—whether labeled war, emergency, or anything else—without worrying or hoping that our present choices will have systematic and irreversible effects on the choices made by future generations in unforeseeable future emergencies. 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. This formulation is deliberately banal. What it rejects is any attempt to structure the inquiry into the merits of particular policies by worrying about the precedential effects of current policies, or in some other way speculating on the irreversible system-level effects of those policies, over time, on future emergencies that future versions of our own society will face. That additional question is a strange attempt, as it were, to get beyond or outside our own historical circumstances; and there is no reason to think that there are any such effects anyway.

III. FEAR

In this Part we criticize accounts of emergency that emphasize the Constitution's role in limiting the impact of fear on government policy. The panic thesis argues that because fear causes decisionmakers to exaggerate threats and neglect civil liberties and similar values, expanding decisionmakers' constitutional powers will result in bad policy. Any gains to national security would be minimal, and the losses to civil liberties would be great. Thus, enforcing the Constitution to the same extent as during periods of normalcy would protect civil liberties at little cost.

We argue that the panic thesis is wrong and does not support the strict enforcement position. We make three points. First, fear does not play an unambiguously negative role in decisionmaking. Against the standard view that fear interferes with decisionmaking, we argue that fear has both cognitive and motivational benefits. Second, even if fear did play a negative role, it is doubtful that fear, so understood, has much influence on policy during emergencies or that it has more influence on policy during emergencies than it does during normal times. Third, even if fear did play a negative role in decisionmaking and played a greater role during emergencies than during normal times, it is doubtful that these bad effects can be avoided through the enforcement of the Constitution or other institutional devices, at acceptable cost to national security. All three of these points suggest that strict enforcement of the Constitution during emergencies will not improve policy choices by restricting the influence of fear.

A. Preliminaries

Fear can influence government action in two ways. First, government

officials might feel fear. Second, even if government officials do not feel fear, the public might feel fear, and government officials might feel compelled to act on the public's fears, lest they be turned out of office for being insufficiently responsive to the public's concerns. In the second case, it is a useful simplification to assume that government officials, by acting as honest agents, act as if they were themselves afraid; thus, the two cases can be treated as though they were the same. In Part III.E, we consider the case where only the public feels fear and government officials are insulated from popular pressure.

To understand how fearful government officials might make decisions, one can profitably begin by considering the rational actor model as a baseline. The rational actor model assumes that people implicitly use accurate probability distributions to estimate the likelihood of uncertain outcomes. The methodological assumption is obviously strong; the justification is that errors are symmetrical and wash out, so that aggregate behavior obeys accurate probability distributions at a statistically significant level even if individual behavior deviates in both directions. If this assumption is true, then governments act as rationally during emergencies as during normal times. The decision to infringe civil liberties for security purposes may be right or wrong, but it is no more likely right or wrong than the quotidian decision to construct a highway or reduce funding for education. There is no reason to think that the government will systematically undervalue civil liberties or overvalue security during emergencies or that it will systematically overestimate the magnitude of a threat, compared to its behavior during nonemergencies. Instead, the government will attach the same weights to these goods as it does during normal times; it will also on average accurately estimate the magnitude of the threat.

The rational actor model does not clearly support either the accommodation position or the strict enforcement position. The critic of accommodation can argue that a rational executive will disregard civil liberties the same during emergencies as during normal times; therefore, constitutional enforcement should be the same as well. Courts can protect civil liberties while permitting emergency measures by requiring that the government show that infringements on civil liberties serve the compelling interest in national security. The defense of accommodation rests not on the rational actor model but on an empirical assumption about relative institutional competence: Courts are in a bad position to evaluate the executive's emergency measures. Secrecy is more important than during normal times—so are speed, vigor, and enthusiasm. The characteristics of judicial review—deliberation, openness, independence, distance, slowness—may be minor costs, and sometimes virtues, during normal times; but during emergencies they can be intolerable.

The panic thesis argues that the problem with emergency measures is not that they may be rational but objectionable infringements on civil liberties but that they are frequently irrational and thus infringe civil liberties without also creating sufficient national security benefits. During emergencies, panic

interferes with rational assessment of risks. The distortion can take a number of forms: exaggeration of the probability or magnitude of the threatened harm, or, what amounts to nearly the same thing, neglect of competing values such as privacy and equality. As a result, government interests will not usually be as compelling as everyone thinks they are, and government policy, if not constrained, will unnecessarily interfere with civil liberties. Although this argument is conventionally advanced by civil libertarians concerned by wartime restrictions, it also underlies a popular view about the effectiveness of terrorism: that it “trap[s] the authorities into brutal repression and overreaction which then alienates the public and drives them into tacit or active collaboration with the terrorists.”⁵⁰ The claim is not that the government rationally curtails civil liberties in order to combat the terrorist threat, but that the government overreacts, and that the public tolerates a rational response but not an overreaction. The source of overreaction could only be fear or some other emotion such as anger or outrage.⁵¹ On this view, strict enforcement of the Constitution has two virtues: preservation of civil liberties, a good in itself, and preservation of the government against its own bad judgment.

This argument, at base, holds that the government’s policy will not reflect accurate probability distributions or else that a rational government will take advantage of the public’s inaccurate probability distributions so that it can accomplish ends denied to it during normal times. Fear displaces rational assessment of the risks at one level or the other.

B. *Two Views of Fear*

The strict enforcement view depends heavily on a particular theory of fear, a theory that implies that fear interferes with cognition and judgment. However, fear is a complex phenomenon, and generalizing about its relationship to cognition is hazardous.

Fear is in part a purely physiological response to a threat, a response that is

50. PAUL WILKINSON, *TERRORISM AND THE LIBERAL STATE* 81 (1977) (discussing the ideas of Carlos Marighela).

51. Parenthetically, we find this view, which has made its way into the legal literature (see Cole, *supra* note 8; Oren Gross, *Cutting Down Trees: Law-Making Under the Shadow of Great Calamities*, in *THE SECURITY OF FREEDOM: ESSAYS ON CANADA’S ANTI-TERRORISM BILL* 39, 43 (Ronald J. Daniels, Patrick Macklem & Kent Roach eds., 2001)) unconvincing. It might be an ancillary benefit for terrorists that the government’s repressive tactics make it unpopular. But in the normal course of things the government will choose appropriate measures, and the public will blame the terrorists for the government’s repression. Terrorist tactics reflect the methods that are available, and terrorists succeed or not in obtaining public support to the extent that the public prefers the terrorists’ goals to the government’s. Liberals who object to their own government’s use of repressive tactics are hardly likely to switch their allegiance to the terrorists who deliberately provoked them. For a more measured discussion, see CLIVE WALKER, *THE PREVENTION OF TERRORISM IN BRITISH LAW* 1-3 (1986).

outside of conscious control.⁵² When a person comes upon a tiger in a jungle, he undergoes certain physiological changes—the chemistry of his blood changes, his heartbeat increases, certain areas of his brain are stimulated—that result in an urge to flee that can be overcome only with difficulty. One interesting aspect of this phenomenon is that panic responses appear to be asymmetrically distributed: False positives are more likely than false negatives. A person is more likely to flee from a shadow that looks like a tiger than to fail to run from a tiger that looks like a shadow.⁵³ Evolutionary psychologists argue that the asymmetry of responses is the result of an asymmetry in the payoffs. A person who is devoured by a tiger is worse off than a person who unnecessarily runs away from a shadow. Thus, the noncognitive aspect of fear has two immediate implications: that people do not think about threats and react to them “rationally”; and that the automatic reaction to threats reflects long gone evolutionary pressures rather than the needs of an agent in modern society.

This story yields two opposing approaches to the role of fear in decisionmaking. The first, simple view is that fear interferes with cognition: The person who feels fear reacts to the threat instinctively rather than deliberately and in a way that is biased rather than neutral. Fear of air travel causes people to drive, which is riskier; fear of pesticides, toxic waste, and genetic engineering causes people to endorse expensive and ineffective policies that cause more harm than good.⁵⁴ This fear-interferes-with-cognition view has deep roots in the Western philosophical tradition, a long-running theme of which is the opposition of reason and passion.⁵⁵ Passions interfere with reason,

52. For a survey of the psychology literature on fear, see Arne Ohman, *Fear and Anxiety as Emotional Phenomena: Clinical Phenomenology, Evolutionary Perspectives, and Information-Processing Mechanisms*, in HANDBOOK OF EMOTIONS 520 (Michael Lewis & Jeannette M. Haviland eds., 1993); for discussions of the psychology literature on emotion and its relation to legal regulation, see Jeremy A. Blumenthal, *Law and Social Science in the Twenty-First Century*, 12 S. CAL. INTERDISC. L.J. 1 (2002) (criticizing legal scholars for misunderstanding emotion); Ward Farnsworth, *The Economics of Enmity*, 69 U. CHI. L. REV. 211 (2002) (discussing the role of hatred in law and policy); Dan M. Kahan & Martha C. Nussbaum, *Two Concepts of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996) (contrasting the influence of cognitive and noncognitive theories of emotion in criminal law); Eric A. Posner, *Fear and the Regulatory Model of Counterterrorism*, 25 HARV. J.L. & PUB. POL'Y 681 (2002) (discussing how counterterrorism policy can respond to fear); Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977 (2001) (discussing the role of emotion in legal theory) [hereinafter Posner, *Law and the Emotions*]. There is not much other work on this relationship. Kuran and Sunstein's examination of the legal response to environmental panics, for example, treats these panics as though they were purely cognitive phenomena. See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999). For criticisms of this approach, see Rachel F. Moran, *Fear Unbound: A Reply to Professor Sunstein*, 42 WASHBURN L.J. 1, 1-8, 27-28 (2002); Posner, *Law and the Emotions*, *supra*, at 2002-06.

53. Ohman, *supra* note 52, at 520.

54. Kuran & Sunstein, *supra* note 52, at 698, 700-03, 742.

55. See ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* (20th anniversary ed. 1997).

and the rational person attempts to suppress them. When a person is motivated by passion, it means that his choices are unlikely to be good ones.

The second view is that fear does not interfere with cognition, or if it does, the interference contributes to good action.⁵⁶ There are two related points here. First, fear enhances the senses: The person who feels fear is attuned to the threat and alert to every nuance of the environment. Fear powers a searchlight that highlights some features of the landscape even as it obscures others. Second, fear provides motivation. Where a fully rational person spends time deliberating, the fearful person acts quickly. Both of these factors suggest that fear can play a constructive role during national emergencies.

How does fear enhance the senses? Although the fearful person may make the characteristic mistake of seeing a tiger in a shadow, the other side of this error is the sensory arousal that allows the person to pick out in the environment threats that would otherwise be invisible. It has been said that after 9/11, airplane passengers and security officials paid much more attention to other passengers and were more ready to alert authorities or intervene personally if they saw something suspicious. This alertness resulted in many false positives: Conversations were misinterpreted, conclusions were drawn from swarthy complexions, and harmless objects were confiscated as weapons. But in a few cases, hijackings or bombings were, or may have been, prevented. Do the lives saved justify the inconvenience to all passengers and Arabs and Muslims in particular? Civil libertarians might say yes or no, but one's position on this question is not the issue. What recent experience has shown is that fear has generated cognitive gains as well as losses, and part of the reason is that the asymmetry between gains and losses that underlie the evolutionary story may apply to a world threatened by terrorism as well, however imperfectly. The simple story—that fear means error—is too simple.

The motivational benefit of fear for individuals is that it enables a rapid response to a possible threat that, if real, would not give individuals time to deliberate about available options. To the drafter of a rule that constrains the curtailment of civil liberties, or to the judge who seeks to enforce that rule or the general strict enforcement position, the decisionmaker always has a powerful argument:

Your rational assessments—even if they are not clouded by your remoteness from the current emergency—may have resulted from a kind of clear thinking but are fatally compromised by your motivational remoteness. If you did not feel fear, then you cannot have put in the necessary effort to make the right decision.

Fear compels people to devote resources to solving a problem that for a dispassionate and uninvolved person may be interesting but is not compelling. In this way, fear motivates not only action but deliberation. Having perceived a

56. See ANTHONY R. DAMASIO, *DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (1994); RONALD DE SOUSA, *THE RATIONALITY OF EMOTION* (1987).

threat, and felt fear, people will work hard to think of ways to address it. They are more likely to discard old assumptions and complacent ways of thinking, and to address problems with new vigor.

The second, complex view of fear does not deny the insights of the first view; it incorporates them into a more nuanced account. Fear will produce choices that are different from those that will be made by a person who does not feel fear, but these choices may be better or worse, depending on context. The argument here mirrors an increasingly influential psychological and philosophical literature on the passions, a literature that stresses the constructive role of the passions in judgment.⁵⁷ “Emotions provide the animal [including the human] with a sense of how the world relates to its own set of goals and projects. Without that sense, decisionmaking and action are derailed.”⁵⁸ Disgust involves a form of magical thinking that causes people to avoid objects or persons who are harmless; but it also reflects moral judgments and motivates condemnation of morally offensive behavior.⁵⁹ Anger can magnify slights and provoke violence; but it is also a response to an offense against one’s dignity and can motivate legitimate protest.⁶⁰ The passions do not always inhibit reason; they also inform reason and provide the motivation for necessary action.

Against the view that panicked government officials overreact to an emergency and unnecessarily curtail civil liberties, we suggest a more constructive theory of the role of fear. Before the emergency, government officials are complacent. They do not think clearly or vigorously about the potential threats faced by the nation. After the terrorist attack or military intervention, their complacency is replaced by fear. Fear stimulates them to action. Action may be based on good decisions or bad: Fear might cause officials to exaggerate future threats, but it also might arouse them to threats that they would otherwise not perceive. It is impossible to say in the abstract whether decisions and actions provoked by fear are likely to be better than decisions and actions made in a state of calm. But our limited point is that there is no reason to think that the fear-inspired decisions are likely to be worse. For that reason, the existence of fear during emergencies does not support the strict enforcement theory that the Constitution should be enforced as strictly during emergencies as during normal times.

C. The Influence of Fear During Emergencies

Suppose now that the simple view of fear is correct and that it is an unambiguously negative influence on government decisionmaking. Critics of

57. See, e.g., DAMASIO, *supra* note 56.

58. MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT 117 (2001).

59. See WILLIAM IAN MILLER, THE ANATOMY OF DISGUST (1997).

60. NUSSBAUM, *supra* note 58, at 394.

accommodation argue that this negative influence of fear justifies both skepticism about emergency policies and strict enforcement of the Constitution. However, this argument is implausible. It is doubtful that fear, so understood, has more influence on decisionmaking during emergencies than on decisionmaking during normal times.

The panic thesis holds that citizens and officials respond to terrorism and war in the same way that an individual in the jungle responds to a tiger or snake. The national response to emergency, because it is a standard fear response, is characterized by the same circumvention of ordinary deliberative processes: Thus, (1) the response is instinctive rather than reasoned, and thus subject to error; and (2) the error will be biased in the direction of overreaction. While the flight reaction was a good evolutionary strategy on the savannah, in a complex modern society the flight response is not suitable and can only interfere with judgment. Its advantage—speed—has minimal value for social decisionmaking. No national emergency requires an *immediate* reaction—except by trained professionals who execute policies established earlier—but instead over days, months, or years people make complex judgments about the appropriate institutional response. And the asymmetrical nature of fear guarantees that people will, during a national emergency, overweigh the threat and underweigh other things that people value, such as civil liberties.

But if decisionmakers rarely act immediately, then the tiger story cannot bear the metaphoric weight that is placed on it. Indeed, the flight response has nothing to do with the political response to the bombing of Pearl Harbor or the attack on September 11. The people who were there—the citizens and soldiers beneath the bombs, the office workers in the World Trade Center—no doubt felt fear, and most of them probably responded in the classic way. They experienced the standard physiological effects, and (with the exception of trained soldiers and security officials) fled without stopping to think. It is also true that in the days and weeks after the attacks, many people felt fear, although not the sort that produces an irresistible urge to flee. But this kind of fear is not the kind in which cognition shuts down. Some people did have more severe mental reactions and, for example, shut themselves in their houses, but these reactions were rare. The fear is probably better described as a general anxiety or jumpiness, an anxiety that was probably shared by government officials as well as ordinary citizens.⁶¹

While, as we have noted, there is psychological research suggesting that normal cognition partly shuts down in response to an immediate threat, we are aware of no research suggesting that people who feel anxious about a non-

61. Moran argues that psychologists distinguish these phenomena. See Moran, *supra* note 52, at 10-11. Ohman, however, does not distinguish these phenomena. See Ohman, *supra* note 52. One might distinguish the classic flight response associated with fear and say that an anxious person is primed to have that response. But the special cognitive and motivational characteristics of fear seem to carry over to the analysis of anxiety.

immediate threat are incapable of thinking, or thinking properly, or systematically overweigh the threat relative to other values. Indeed, it would be surprising to find research that clearly distinguished “anxious thinking” and “calm thinking,” given that anxiety is a pervasive aspect of life. People are anxious about their children, about their health, about their job prospects, about their vacation arrangements, about walking home at night. No one argues that people’s anxiety about their health causes them to take too many precautions—to get too much exercise, to diet too aggressively, to go to the doctor too frequently—and to undervalue other things like leisure. So it is hard to see why anxiety about more remote threats, from terrorists or unfriendly countries with nuclear weapons, should cause the public, or elected officials, to place more emphasis on security than is justified and to sacrifice civil liberties unnecessarily.

Fear generated by immediate threats, then, causes instinctive responses that are not rational in the cognitive sense, not always desirable, and not a good basis for public policy, but it is not this kind of fear that leads to restrictions of civil liberties during wartime. The internment of Japanese Americans during World War II may have been due to racial animus or to a mistaken assessment of the risks; it was not the direct result of panic; indeed there was a delay of weeks before the policy was seriously considered.⁶² The civil libertarians’ argument that fear produces bad policy trades on the ambiguity of the word “panic,” which refers both to real fear that undermines rationality and to collectively harmful outcomes that are driven by rational decisions, such as a bank panic, where it is rational for all depositors to withdraw funds if they believe that enough other depositors are withdrawing funds. Once we eliminate the false concern about fear, it becomes clear that the panic thesis is indistinguishable from the argument that during an emergency people are likely to make mistakes. But if the only concern is that during emergencies people make mistakes, there would be no reason for demanding that the Constitution be enforced normally during emergencies. Political errors occur during emergencies and during normal times, but the stakes are higher during emergencies and that is the conventional reason why constitutional constraints should be relaxed.

In sum, the panic thesis envisions decisionmakers acting immediately when in fact government policymaking moves slowly even during emergencies. Government is organized so that general policy decisions about responses to emergencies are made in advance, and the implementation of policy during an emergency is trusted to security officials who have been trained to resist the impulse to panic. The notion of fear causing an irresistible urge to flee is a bad metaphor for an undeniable truth: that during an emergency the government does not have as much time as it usually does and as a result will make more

62. GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* 75 (2001).

errors than it usually does. But these errors will be driven by ordinary cognitive limitations and not the pressure of fear: Thus, the errors will be normally distributed. It is as likely that the government will curtail civil liberties too little as too much.

D. A Note on Cognitive Panics

It is possible that civil libertarians' worry about the influence of fear is not based on any assumption about emotions per se but is based on concerns about cognition. Their theory might be that during emergencies, individuals, whether as voters or as decisionmakers, are more likely to make cognitive errors than during normal times. Something about emergencies causes cognition to falter. This view, by itself, would not justify strict enforcement. If individuals make more errors during emergencies than during normal times, they are just as likely to err in favor of too much liberty as to err in favor of too much security. Strict enforcement would, by reducing only the errors in favor of security, create an overall policy bias against security. Strict enforcement would be justified only if errors are biased in favor of security in the first place.

Clearly, this is what civil libertarians must think. People worry that after a terrorist attack the public will overreact and demand unnecessary restrictions on civil liberties. No one seems to worry that after abuses by the police come to light the public will overreact and demand unnecessary restrictions on policing. But no one has explained why cognitive error would be biased against civil liberties in this way. The public cares about national security and civil liberties; why should its errors be biased against only the latter?

An instructive analogy is Kuran and Sunstein's argument that environmental disasters distort regulation because of their "availability." Because environmental disasters are salient, they engage the availability heuristic, which causes people to overestimate the probability of recurrence and demand regulation that is not cost-justified.⁶³ Unfortunately, the evidence for this argument is only anecdotal. We know that many environmental regulations are not cost-justified, but we do not have enough data to subject the Kuran/Sunstein hypothesis to a statistical test.

But even if Kuran and Sunstein are correct about environmental regulation, there is an important difference between environmental regulation and security policy. If environmental disasters are salient, the cost from overregulation—lost consumer surplus resulting from inflated production costs—does not have salience. This asymmetry in the availability of the costs of underregulation and overregulation could result in overregulation, as Kuran and Sunstein argue. By contrast, government violation of civil liberties—mass internments, torture, and so forth—are just as salient as the terrorist attacks that provoke them. The

63. See Kuran & Sunstein, *supra* note 52.

availability heuristic therefore can work its ill effects on both sides of the problem: Terrorist attacks cause people to overestimate the probability of further terrorist attacks, but civil rights violations also cause people to overestimate the probability of further civil rights violations. Strict enforcement would prevent the first error from leading to overregulation, but it would not prevent the second error from leading to underregulation. Therefore, strict enforcement would bias policy against security.

One might argue that this balancing of availability problems has an air of unreality. The real problem here is that the availability heuristic is poorly understood. No one knows what makes one event psychologically salient and another event psychologically inert, and for that reason it is hard to talk productively about the extent to which availability on one side of an issue can cancel the effects of availability on the other side of the issue. We agree; but this just shows that the availability heuristic provides a flimsy basis for departing from the accommodation view, which assumes that errors occur but are unbiased.

E. Institutional Problems

Having registered our skepticism that citizens and officials are less capable of judgment during emergencies than during normal times, we now consider the panic thesis on its own terms, and assume for the sake of argument that people predictably panic during national emergencies while remaining calm at other times and that the panic has unambiguously negative consequences for decisionmaking. Recall the panic thesis—that because of the danger of panic, constitutional constraints should not be relaxed during emergencies. Higher stakes do not justify relaxation of constitutional constraints because with the higher stakes comes the danger of panic, and constitutional constraints are needed to prevent fear from generating bad political outcomes such as unnecessary restriction of civil liberties.

We now examine the question how those constitutional constraints could be enforced. The strict enforcement view—that the Constitution be enforced as strictly during an emergency as during a nonemergency—depends on citizens, executive officials, or judges having the ability to enforce the Constitution strictly despite their own fear-addled judgment that a policy is justified by a threat to security. Is this assumption realistic? How can a person bind himself against his own bad judgment? We examine three mechanisms: (1) intrapersonal self-restraint; (2) reliance on rules; and (3) insulation of decisionmakers. Each mechanism reflects a different tradeoff between discretion, which results in cognitive errors, and constraint, which prevents needed action. None provides reason for endorsing the panic thesis.

1. *Intrapersonal self-restraint.*

The panic theory, which assumes that fearful officials make worse judgments than calm officials, is not the same as the strict enforcement view. The panic theory is just one rationale; the ratchet theory, as we saw, is another. Indeed, the panic theory is broader than the strict enforcement view: It holds that officials in a state of fear should always discount their own risk assessments, whereas the strict enforcement view refers to one particular circumstance, that of emergency. We might therefore ask, if the panic justification for the strict enforcement view is correct, why not constrain policy choices whenever officials are panicked, not just when there is an emergency; and give calm officials free rein, even if there is an emergency? Officials could be made to understand that whenever they feel fear, they are likely to discount civil liberties and exaggerate the threat.⁶⁴ When they know themselves to be afraid, they should engage in a kind of intrapersonal overcompensation and assume that their own estimate of the threat is too high. Having pushed down a risk assessment that they know to be high, they can make a rational decision even when afraid.

This “panic rule,” as we will call it—discount your own estimate of a threat if you feel fear—captures the panic theory more precisely than the strict enforcement view does. The panic rule is, in legal parlance, a standard: Its contours are those of the underlying normative goal—that of preventing fear from interfering with decisionmaking. Thus, the panic rule tells officials to discount their risk assessments if and only if they feel fear. The strict enforcement position is a rule: It tells officials to discount their risk assessments if and only if there is an emergency. The fact of emergency serves as a proxy for the normative concern, that of fear.

The benefit of the panic rule is that it allows the Constitution to accommodate calm officials and requires strict enforcement only against those who panic. The problem is its psychological unrealism. To see this problem, suppose that third party enforcement of the Constitution is not feasible: The officials who determine policy or law in a state of fear are the same as the officials charged with enforcing or respecting the Constitution. Executives who know that judges will defer to their foreign policy are nonetheless expected to obey the Constitution. And judges themselves may feel fear to the same degree as the decisionmakers whose laws are being reviewed in court. The panic rule asks these officials to discount their own threat assessments whenever they feel

64. An intrapersonal analogy can be found in a favored technique of anger management: When one feels angry, one should take a deep breath and count to ten before acting. If one trains oneself to respond in a Pavlovian fashion to an event or condition, and the response is likely to restore or improve judgment, then anger-inspired actions can be avoided. Note, however, that this outcome is achieved through the use of a technique by which one's judgment can return to normal; no one thinks that fear can go away after a deep breath.

fear.

The problem with this rule is that it assumes that decisionmakers can accurately determine the conditions under which they should not trust their own judgment. Suppose that some event such as a terrorist attack occurs, and then the question facing decisionmakers is whether to use ethnic profiling in order to prevent further attacks. If, as we must assume, the decisionmakers are afraid, then they will overestimate the probability of another terrorist attack, and thus be more likely to infringe civil liberties than they would if they were calm. Self-restraint could occur only if decisionmakers could also realize that they overestimate the risk because they are afraid. But this is psychologically unrealistic: Either decisionmakers are afraid and exaggerate the risk, or are not afraid and assess the risk accurately or with normal, unbiased error.⁶⁵

The contrary view would have one think that officials could both believe that a threat exists and, knowing that they are afraid, doubt their own belief. But if officials take the existence of fear as an indication that they should discount their own beliefs, then why should they credit the belief that there is a threat in the first place?⁶⁶ People feel fear because they perceive a threat; they cannot step outside of themselves and doubt their own beliefs because they know that fear can interfere with cognition.

2. Rules.

The psychological unrealism of the panic rule might be avoided through the use of a more rule-like rule, one that does not require a decisionmaker to hold incompatible beliefs. People have foresight and can design rules and institutions that will dampen the influence of panic on political outcomes. People might be able to design a rule that provides that when some event associated with a panic occurs, decisionmakers should be cautious about passing laws or engaging in other political actions. The mechanism involves a distinction between the identification of conditions that can be accurately perceived and acted upon even when the subject is emotionally aroused and the exercise of judgment that the emotional state precludes. People would, even in their fear-clouded minds, realize that they are afraid because a significant event has occurred and thus that they should discount their own judgments or at least

65. We have not found in the psychology literature any studies on whether fearful individuals can mentally compensate for biases introduced into their judgment by their own fear. The cognitive psychology literature suggests that individuals can avoid the effect of their own cognitive biases or their reliance on misleading heuristics in limited cases: For example, their judgments can improve through unbiased feedback and they can choose to rely on outside experts. However, there are severe cognitive and motivational impediments to learning. See Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1211-24 (2003).

66. Cf. Thomas Schelling, *Epilogue: Rationally Coping with Lapses from Rationality*, in GETTING HOOKED: RATIONALITY AND ADDICTION (Jon Elster & Ole-Jorgen eds., 1999).

delay acting on them.

The condition or proxy could be an emergency described in relatively clear terms: an invasion or attack by foreign soldiers, a natural disaster, a spike in the death rate, a decline in the GDP. When these events occur, people could—in a Pavlovian fashion?—feel themselves committed to discounting their own assessments of risk. The rule might say that after a terrorist attack, one should divide one's updated probability assessments by two. If people think that a subsequent attack is certain, they should discount that to fifty percent; if they think the second attack will kill millions, they should cut the estimate in half. As a result, people will be less willing to permit police to single out Arabs or Muslims for suspicion, shut down the airports, and eavesdrop on the mails.

The argument depends on several assumptions, all of them troublesome. First, it must be the case that people can, while panicking, accurately identify the conditions under which they panic: That is, they must be able to determine that their current probability estimates are made under the relevant conditions and not independently of these conditions. People must think, "Because there was a terrorist attack six months ago, my current predictions are inaccurate;" and not, "The terrorist attack occurred long enough ago for me to recover my cognitive abilities." Second, the conditions must actually be correlated with panic. If the rule is "discount one's assessment of the risks if a terrorist attack occurred within two (four?, ten?) years," then it must be the case that people's assessments are exaggerated within that time frame, and to a sufficient extent, and not reasonably accurate in a substantial portion of the cases. Third, the conditions must be capable of being specified in advance with reasonable accuracy and must in fact generate more benefits than costs. People must be able to know what kind of events are likely to generate fear and thus interfere with probability estimates, as well as the time frame during which the effect lasts: airplane crashes, terrorist attacks, military interventions, and the like, all with their own associated time frames. If the conditions are incorrectly specified, then the rule will result in people discounting their own beliefs when they are accurate and thus failing to deliver an adequate response to an authentic emergency. But because we have so little information about how people exaggerate risks when afraid and how much of a discount is appropriate, it is hard to believe that any rule would improve behavior.

Critics of accommodation do not typically argue that detailed rules such as these should be institutionalized. Instead, they attempt to evade the difficult calculus illustrated by the discussion so far by flatly asserting that, whatever the optimal rule, emergency policies will be better if they comply with normal constitutional restrictions than if they do not.

There are two problems with this argument. The first is that it does not fully escape the psychological unrealism of intrapersonal self-restraint. People in the grip of fear will rationalize their decisions on the basis of their exaggerated assessment of the threat. Because they think that the threat is significant, they think that a compelling government interest justifies intrusions

on civil liberties. Although it is possible that they choose less restrictive laws than they would under the accommodation view, we doubt that officials in the grip of fear are capable of making such fine distinctions. Fear, according to the simple view endorsed by the panic thesis, focuses attention on the threat and away from civil liberties. Officials will reach for any policy that addresses the threat and are likely to find a compelling government interest in the fact of the emergency. This is the lesson of history. One can say in favor of the strict enforcement rule that it is, with respect to psychological realism, superior to intrapersonal self-restraint. Intrapersonal self-restraint requires people to discount their own judgments, whereas the strict enforcement rule appears to tell them to act the same during emergencies as otherwise, or not too differently. But it is not much of an improvement.

The second objection is even more important. Like all rules, the strict enforcement view reduces decision costs through overinclusion. The strict enforcement rule applies to officials who remain calm despite the emergency and prevents them from implementing rational policies. It also applies to fearful officials whose policies might be based on exaggerated notions of risk but still be better policies than those available under the Constitution strictly construed. A policy of detaining immigrants for example, may be based on an exaggerated notion of the threat, but still be preferable to no policy at all. If unconstrained officials choose policies that are biased against civil liberties, it remains unlikely that strictly enforcing the Constitution rather than making accommodations, will ensure that policies that reflect the optimal balancing of liberty and security will be chosen.

The panic rule and the strict enforcement rule reflect different tradeoffs between discretion and overinclusion, but neither is satisfactory. The strict enforcement rule does not, in the end, escape the charge of psychological unrealism. Both rules require people to act as if they did not believe their own judgments—the first, by recognizing that fear may hamper their judgments; the second, by recognizing relatively objective conditions associated with fear that may hamper their judgments. The first vests too much discretion in the person who, by hypothesis, cannot trust his own judgment. The second reduces discretion but then relies on the wholly unsupported claim that the objective conditions can be identified and specified in advance and are sufficiently correlated with periods of public and official fear.

3. Insulation of decisionmakers.

The third mechanism is to vest emotionally disciplined people with political authority and insulate them from popular opinion. Emotionally disciplined people are less likely to panic than are normal people and thus more likely to choose good policies if unconstrained by popular opinion; but they might rationally implement policies demanded by a panicking citizenry if the alternative is ejection from office. There are two versions of this argument. One

possibility is to reduce popular accountability at all times, so that political leaders will be insulated when an emergency occurs. The other possibility is to vest authority in particular individuals when an emergency is identified or declared; for example, the president could declare an emergency and the military would then have temporary police powers.⁶⁷ Both versions assume that the people with leadership positions will actually be calmer during an emergency than the public: ordinary politicians in the first case, and the president (at the point of declaring the emergency) and military officials (after the emergency is declared) in the second case. Both versions also assume that the insulation materials cannot be pierced by public sentiment.

These assumptions are all questionable. The U.S. Constitution already insulates political officials from popular pressures to some extent—more so than a direct democracy, for example—and it is probable that executive officials, who are constantly exposed to crises large and small, do not panic as frequently as ordinary people do. But the usual fears about relaxing constitutional protections during emergencies are based on the assumption that elected officials do panic sometimes; so the fact that they are insulated already is no comfort. Insulating them further would be perverse: It would make officials less accountable during normal times so that they would be less likely to be influenced by panicking citizens during emergencies. But that just means that civil liberties will be violated more often during times of calm. Civil libertarians don't want to reduce civil liberties during times of calm; they want government officials to respect normal constitutional barriers during emergencies. If government officials are not willing to do that—either because they are panicking or because they need to respond rationally to a threat—then giving them greater insulation against popular fears will not improve their decisions.

It also is questionable whether elected officials can resist political pressures when citizens panic. A large part of dealing with a national emergency is to calm the fears of citizens. Government's usual response is to channel and dam up these fears rather than dismiss them as irrational. If the public believes that a threat exists, official assurances to the contrary do no good—instead, it is evidence to the public that the government is unprepared and insufficiently vigorous—and waving the Constitution at the public will not help when the public believes that the Constitution itself is being threatened.

Finally, people do not usually choose officials on the basis of their ability to stay calm during emergencies. There are too many other relevant considerations. Most politicians are elected on the basis of their ability to deliver the goods during ordinary times. Although sometimes a politician's background contains indications of emotional discipline, the latter is not a salient issue in political contests.

67. See ROSSITER, *supra* note 4, at 39, 139-50, 215-17 (describing historical examples).

What can be said for the insulation method is that it is psychologically realistic. If emotionally disciplined people can be identified in advance and given positions of authority, then it is not psychologically unrealistic to assume that they will make decisions in a calm way. Strict enforcement of the Constitution, then, will ensure that they do not violate civil liberties for rational but impermissible reasons, such as political advantage; but the compelling interest standard will give them the freedom to make proper responses to the emergency. Along the dimension of psychological realism, then, the insulation method dominates the other two rules. But the insulation method does much worse on the cost-benefit dimension. Insulated officials are not democratically responsive. This means that they are not likely to make good policy choices and that the public will not trust them with significant power.

Federal judges are highly insulated officials in the American constitutional system. For this reason, civil libertarians argue that judges are well positioned to guard civil liberties against the excesses of panic during wartime and other emergency periods. Yet judges themselves do not appear to share this view. American judges have almost always deferred to the executive during emergencies.⁶⁸ The reason is apparently that the judges have done the cost-benefit balancing that the civil libertarians have neglected and found themselves wanting.⁶⁹ If insulation gives them the advantage of calm, the price is lack of information and lack of power.⁷⁰ Judges do not have the information that executives have and are reluctant to second guess them.⁷¹ They also do not have access to the levers of power, so they can only delay a response to emergency by entertaining legal objections to it. They do not have such access because such power cannot be given to people who are not politically accountable. Finally, the assumption that judges are less swayed by passion

68. Issacharoff and Pildes argue that judges are less deferential during emergencies than is commonly thought; but their examination of the cases shows that judges *are* deferential during emergencies; it is just that they are more deferential when the executive and legislature speak with one voice than when the executive acts alone. See Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime* (July 18, 2003) (unpublished manuscript, on file with authors). An empirical study supports the conventional wisdom; see Epstein, et al., *supra* note 2 (finding that during war the probability that the Supreme Court finds for a defendant in a civil rights or liberties case falls by fifteen percent).

69. For explicit discussions, by judges, of their own lack of information in wartime cases, see, for example, *Korematsu v. United States*, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting); *Hamdi v. Rumsfeld*, 337 F.3d 335, 343 (4th Cir. 2003) (Wilkinson, J., concurring in the denial of rehearing en banc); *Hamdi v. Rumsfeld*, 316 F.3d 450, 471-74 (4th Cir. 2003).

70. Thus, the calmness/information tradeoff mirrors the much more frequently discussed neutrality/information tradeoff. See, e.g., NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994). Independence allows judges to be calm and neutral but deprives them of information they need to evaluate the actions of the other branches.

71. DAVID BONNER, *EMERGENCY POWERS IN PEACETIME* 286 (1985).

than elected officials is not obviously correct; Justice Jackson appears to have thought that judges are equally vulnerable.⁷² All of this explains why during emergencies judges rarely feel that they have their ordinary peacetime authority to interfere with executive decisionmaking.

Indeed, the champions of civil liberties during emergencies in American history have usually been officials in the executive or legislative branches, not the justices of the Supreme Court. During the Palmer raids, the Attorney General's attempt to exploit public fears for political gain was resisted by the acting Secretary of Labor, whose approval was needed for deportations.⁷³ The Labor Department, unlike the Supreme Court, had the political power to block or delay deportations because its expertise about, and authority over, the regulation of immigration, gave it legitimacy. During World War II, many members of the Roosevelt Administration opposed the internment of Japanese-Americans, and though they could not prevent the military's decision, they ensured that the interment would be carried out in as humane a fashion as possible;⁷⁴ it was also the Justice Department that opposed Roosevelt's schemes to squelch dissent.⁷⁵ During the Cold War, although neither Truman nor Eisenhower took brave public stands against McCarthy, they criticized his methods and tried to undermine his influence, and he was eventually defeated by opposition from high level appointees in the executive branch and elected officials in the legislative branch. The Supreme Court was, throughout these events, largely passive. It did not have the political authority to oppose the executive (or legislative) branch during emergencies, and so it did not act. The justices could not have made the case that they understood the nature of the emergency better than executive officials did. Only officials within the political branches, who could make a credible case that they had better information and better motives than the opponents of civil liberties, and had the proper institutional responsibility for handling the emergency, had the necessary public legitimacy.

F. *Strict Enforcement as a Precommitment Device*

The strict enforcement view relies on a simple and much criticized theory that constitutional or other rules can be properly thought of as rational (good) precommitments against emotional (bad) decisions. The old metaphor is that of Ulysses being tied to the mast so that he would not yield to the songs of the sirens. But the analogy is false, as a recent literature has emphasized.⁷⁶ Because

72. See the quotation from *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 146 (1948), *supra* note 20.

73. See Tushnet, *supra* note 19, at 289.

74. ROBINSON, *supra* note 62, at 99-100, 102-03.

75. Issacharoff & Pildes, *supra* note 68, at 53.

76. This appears to be the general conclusion of Elster, who expresses skepticism about

the sirens were both irresistible and unambiguously bad, prior commitment to stay on the ship was an unambiguously good choice. In addition, Ulysses could trust his crew. Fear, though, plays a valuable role as well as negative role; and no commitment device can be designed in advance to prevent fear from influencing behavior, nor is there reason to think that broad constitutional restrictions on executive power would produce good outcomes by reducing the influence of fear. It is perverse for a government to commit itself not to respond vigorously to emergencies. A purely rational response to a crisis sounds good in the abstract, but some motivational oomph is necessary as well, and when fear is needed to supply that motivation, constitutional restrictions on its influence can do much harm.

Legal scholars dwell on the many historical events in which fear appeared to produce bad policy choices. These are the Red Scares, the Banking Panics, and so forth. Fears about Hitler may have resulted in appeasement rather than resistance. But there are as many cases where the absence of fear may have resulted in policies that were weak when they should have been vigorous. Here we count the failed Weimar Government before Hitler⁷⁷ and the Kerensky Government before Lenin. Conventional wisdom blames unpreparedness for the 9/11 attacks not on lack of information but on bureaucratic inertia. Leading officials assessed the risks correctly but could not summon the necessary political will. Fear changed this instantly. In the United States before World War II, public complacency about American security behind two oceans hamstrung public officials who were better informed. Roosevelt sought to stir up fear so as to motivate the war effort, in contrast to his effort to suppress fear during the early years of the Great Depression. His contrary actions just show how fear has both good and bad effects, and fear that can be disabling in one context may provide needed motivation in another.

CONCLUSION

The purpose of this paper has been to criticize two common arguments against the longstanding judicial practice of deferring to the political branches, and especially to the executive branch, during wartime and other emergencies. We have shown that the ratchet argument and the panic argument depend on inadequately justified conceptual, empirical, and normative premises. In advancing our critique we have assumed that the current level of deference is appropriate, but we have not tried to defend this current level. Our point is that

the claim that constitutional constraints can be relied on to counteract popular passions. See ELSTER, *supra* note 10, at 157-61. In this book, Elster repudiates some of the optimism of his earlier work. See JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (rev. ed. 1984); see also JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999) (criticizing the commitment argument).

77. The Weimar government had strong emergency powers, but they were used more against the left than against the right. See ROSSITER, *supra* note 4, at 39-41.

if one wants to criticize the current level of deference, one ought to depend on arguments different from the ratchet and panic arguments.

What would these arguments be? As courts have long recognized, they face a tradeoff between two considerations. On the one hand, the executive branch has advantages that courts lack: information about current threats to national security, and control over the military, police, and other institutions that can meet a threat. In order to counter threats to national security, the executive must be able to act on its information swiftly, without having to defend its sources (and thereby risk compromising them), rely on its own accumulated experience, and issue orders that will be obeyed with no delay. Judicial scrutiny can only interfere with forceful executive action. On the other hand, the officials who hold executive power for the time being may attempt to extend their power or to squash political opponents. Judicial deference would permit these abuses to occur. So a potential cost of deference is executive (or congressional-executive, as the case may be) abuse, and the benefit of deference is the reduction, as a result of noninterference by judges, of risks to national security and to other goods protected by the executive.

Constitutional practice during normal times reflects one possible tradeoff between these considerations. Police must obtain warrants but not if they are in hot pursuit; the press can be made to pay damages for disclosing government secrets but not usually enjoined; and so forth. Strict enforcement of constitutional rights, rather than deference to the executive, is justified in normal times because the cost of deference exceeds the benefit. In the case of emergency, however, the relevant benefit from deference is forceful executive action against a threat to national security; this benefit is higher than the benefit of reducing crime. By contrast, the cost of deference during emergencies and during normal times remains constant: this is the cost of abuse of executive power for political ends. Because the cost of deference remains constant, while the benefit of deference rises during an emergency, judges should be more deferential during emergencies than during normal times. And they are. However, there is a difference between saying that deference should be higher during emergencies and saying that the current level of judicial deference—what we have called “accommodation”—is correct. To show that the latter proposition is true, one would have to describe in more detail the relative institutional capacities of the executive and the judiciary. If, for example, courts can process national security information securely, rapidly, and accurately, then judicial deference need not be as high as otherwise. All we have before us is evidence about what judges think, and judges appear to have doubts about whether they can do this.