

2012

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Recommended Citation

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FREEDOM STRUGGLES AND THE LIMITS OF CONSTITUTIONAL CONTINUITY

AZIZ RANA*

I. INTRODUCTION: CONSTITUTIONAL OR POLITICAL REDEMPTION?

In the dying days of Hosni Mubarak's rule in Egypt, regime opponents, American officials, and academic commentators began debating how best to transition to a new political era. One argument that gained momentum was the view that regime change would only be legitimate if it remained faithful to principles of constitutionalism.¹ This meant that the removal of Mubarak should follow the procedural mechanisms for succession established by Egypt's existing 1971 Constitution. In the words of two outspoken and respected critics of Mubarak, Hossam Bahgat and Soha Abdelaty, "real transition to democracy" required fidelity to the Constitution as the privileged instrument for change.² Thus, Mubarak should not resign from power until he issued a series of decrees transferring authority, decrees that under the 1971 Constitution only the president could sign. These decrees would "delegat[e] all of his authorities to his vice president until their current terms end[ed]" and lift the state of emergency that had been in place since Anwar Sadat's assassination in 1981.³ For Bahgat and Abdelaty, following the constitutionally sanctioned process was "not

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* Assistant Professor of Law, Cornell University Law School; A.B., Harvard College; J.D., Yale Law School; Ph.D., Harvard University. For discussion and extremely helpful comments, I would like to thank all of the participants in the University of Texas School of Law Conference on Constitutional Faith & Constitutional Redemption, especially Jack Balkin and Sandy Levinson. I also received very valuable feedback from Bruce Ackerman, Asli Bali, Josh Chafetz, Michael Dorf, Jason Frank, Gil Gott, Alex Gourevitch, Daniel Kato, Darryl Li, Odette Lienau, Karuna Mantena, Bernie Meyler, Sid Tarrow, and John Witt. For excellent research assistance, I am especially indebted to Amy Emerson, Natalie Blanc, and Olesia Zakon. Finally, I would also like to thank Natalie Waryck and the rest of the *Maryland Law Review* editorial team for their invaluable work on this Essay.

1. Hossam Bahgat & Soha Abdelaty, Op-Ed., *What Mubarak Must Do Before He Resigns*, WASH. POST, Feb. 5, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/04/AR2011020404123.html>. Bahgat and Abdelaty were the executive director and deputy director of the Egyptian Initiative for Personal Rights, a domestic human rights organization that had long been a thorn in the regime's side.

2. *Id.*

3. *Id.*

simply a legal technicality” but rather “the only way out of our nation’s political crisis.”⁴

At the heart of this argument was a narrative about the 1971 Egyptian Constitution that emphasized its pluralistic and liberal dimensions.⁵ According to this narrative, when Sadat succeeded Gamal Abdel Nasser as president, he attempted to shift Egypt’s ideological orientation away from Nasserite authoritarianism. As political scientist Nathan Brown writes, “Sadat convened a large and remarkably diverse committee: feminists, Islamic legal scholars, liberals, socialists, nationalists, and representatives of the Christian church were all represented.”⁶ The result was a document that “contained guarantees for individual freedoms, democratic procedures, and judicial independence.”⁷ It promised to weaken the most entrenched institutions of Nasser’s regime, particularly Egypt’s sole political party and its security apparatus. In the decades since—so the narrative goes—there has been backsliding on the promises embedded in the Constitution, the worst example being the 2007 textual amendments pressed through by Mubarak.⁸ These amendments undermined the independence of election monitoring, limited who could run for president, prohibited the Muslim Brotherhood from establishing a political party, and constitutionalized coercive emergency measures (such as the presidential use of reliable military courts to convict regime opponents).⁹ Despite this backsliding, the Constitution nonetheless embodies those basic liberal principles expressed during its genesis. As one noted scholar of Egypt reminded anti-Mubarak activists, “out of its 211 articles, only about a dozen are fundamentally illiberal and each of these is easily identified. . . . [T]he pro-democracy movement should not lose sight of the fact that the current constitution contains most of the liberties and protections that they currently seek.”¹⁰

4. *Id.*

5. Nathan J. Brown, *Egypt’s Constitutional Ghosts: Deciding the Terms of Cairo’s Democratic Transition*, FOREIGN AFF. (Feb. 15, 2011), <http://www.foreignaffairs.com/articles/67453/nathan-j-brown/egypts-constitutional-ghosts?page=show>.

6. *Id.*

7. *Id.*

8. See Nathan J. Brown, Michele Dunne & Amr Hamzawy, *Egypt’s Controversial Constitutional Amendments*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE 1 (Mar. 23, 2007), http://carnegieendowment.org/files/egypt_constitution_webcommentary01.pdf.

9. See generally Dina Bishara, *Egyptian Constitutional Amendments Passed on March 19, 2007: Translated Excerpts*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE; <http://carnegieendowment.org/files/appendix.pdf> (last visited Apr. 13, 2012).

10. Hussein Agrama et al., *Anti-Authoritarian Revolution and Law Reform in Egypt: A Jadalyya E-Roundtable*, JADALIYYA (Feb. 24, 2011), <http://www.jadaliyya.com/pages/index/714/anti-authoritarian-revolution-and-law-reform-in-eg> (quoting Tamir Moustafa).

Indeed, for Bahgat and Abdelaty, textual rupture at the moment of Mubarak's resignation was not simply extra-legal. It disregarded the liberating tools available within the established constitutional framework for navigating the process of transition.¹¹ Rupture abandoned the rule-of-law benefits of constitutional continuity in favor of pure popular (or even military) discretion, in which decision making would occur independently of any previously agreed upon or specified process.¹² And above all, it ignored how political redemption in Egypt (the fulfillment of those long deferred liberal ambitions) could be facilitated through faith in a shared constitutional text.

But this narrative, emphasizing the redemptive possibilities of the 1971 Constitution, faced its own powerful counter-narrative. For many engaged in mass protest against the regime, the existing Constitution did not embody a flickering liberal promise but rather a very real infrastructure of authoritarianism and emergency. Since the 1980s, the Mubarak regime had passed a series of oppressive laws, aimed at strangling internal dissent and expanding the coercive power of the security state.¹³ Such legislation placed profound restrictions on freedom of the press, the right of assembly, the independence of non-governmental organizations, procedural due process, civilian court jurisdiction, labor protections and collective bargaining, the organization of political parties, and the convening of elections.¹⁴ In the words of an outside observer, although these measures ultimately derived from the 1981 state of emergency, "the permissive condition for this legislation has been a constitution that does not protect against . . . far-reaching assertions of police powers and which, since 2007, has constitutionalized the infrastructure for normalizing the emergency decrees through new counterterrorism laws."¹⁵ In a sense, regardless of the niceties contained in the document, the everyday meaning of the constitutional system had been the increased centralization of presidential power, the dismantling of judicial independence, and the systematic infringement of basic rights.¹⁶ Assuming

11. Bahgat & Abdelaty, *supra* note 1.

12. *Id.*

13. Charles Robert Davidson, *Reform and Repression in Mubarak's Egypt*, 24 FLETCHER F. OF WORLD AFF. 75, 89–91 (2000); Jeff Martini & Julie Taylor, *Comamanding Democracy in Egypt*, FOREIGN AFF., Sept.–Oct. 2011, at 127–28.

14. See Agrama, *supra* note 10 (including the comments of legal scholar Asli Bali on the effects of Mubarak's repressive regulations).

15. *Id.* (quoting Asli Bali).

16. As Nathan J. Brown remarked at the time of the 1971 constitution, "for every commitment, there was also a trap door; for every liberty, there was a loophole that ulti-

that faith in this system could be the basis for building a durable anti-authoritarian regime would be naïve at best. Rather than a dangerous step into the darkness, the counter-narrative presented conscious constitutional rupture as a necessary prerequisite for meaningful change.

One should note that the disagreement between the liberal and authoritarian narratives of the Constitution was not fundamentally a disagreement about the ultimate objectives of transition. As described above, both sides were regime dissidents and both were committed to the creation in Egypt of what Jack Balkin might call “a *democratic culture*: a culture in which all citizens can participate and feel they have a stake, a culture in which unjust social privileges and hierarchies have been disestablished.”¹⁷ Such a culture “include[s] both legal rights and institutions as well as cultural predicates for the exercise of those rights and institutions.”¹⁸ Where they broke ranks decisively was over whether the country’s shared post-Nasser constitutional project could serve as the mechanism for producing this outcome. Opponents of constitutional continuity believed that regardless of the liberal narrative of the 1971 document, the existing constitution-in-practice fundamentally constrained the normative and institutional tools available for transformation.¹⁹ For them constitutional faith meant subordinating the end of a democratic culture to the faulty discursive and structural means offered by the prevailing constitutional system. The true goal was *political* redemption, in which out of the ashes of Mubarak’s regime would emerge a new transcendent and liberated community. And such transcendence required abandoning the hope of *constitutional* redemption—that is, fulfilling the deferred promise of the 1971 text.

These recent Egyptian debates speak directly to the themes raised eloquently by Jack Balkin’s recent book, *Constitutional Redemption: Political Faith in an Unjust World*. For Balkin, the American Constitution similarly has its oppressive and emancipatory narratives. But in his view, citizens committed to building a democratic American culture should maintain faith in a collective “story about progress within the constitutional system.”²⁰ Balkin willingly admits that all

mately did little to rein in the power of the president or the country’s determined security apparatus.” Brown, *supra* note 5.

17. JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 23 (2011).

18. *Id.* at 24.

19. Agrama, *supra* note 10.

20. BALKIN, *supra* note 17, at 49.

constitutions—American as well as Egyptian—“are agreements with hell, at least to somebody.”²¹ Yet he believes that the U.S. constitutional project has resources embedded within it that justify an optimistic orientation, an orientation that suggests “that however bad things are in the present” the prevailing system has the internal capacity “to get better in the future.”²² Balkin’s advice to those who consider themselves political “progressives” is to embrace this constitutional promise as the discursive and ideological means for attaining substantive equality and effective freedom. Although the actual and everyday constitution may be riddled with real injustices, progressives must hold firm to faith in an idealized document and should see the shared language of constitutionalism as the privileged instrument for redeeming political life.²³

Over the following pages, I plan to challenge the wisdom of remaining ever-faithful to constitutional continuity, especially for Americans explicitly committed to political change. In effect, my view is that the American constitutional predicament historically has not been that distinct from the predicament facing Egyptian activists today. I begin in Part II by sketching a counter-story of American constitutionalism to stand alongside Balkin’s account. Where Balkin sees the text as embodying an unfulfilled aspiration toward universal equality and a democratic culture, the structure of the Constitution also highlights a very different historic narrative: one of colonial rule not unlike that present in Asia and Africa throughout much of the nineteenth and twentieth centuries. This framework systematically separated between free European citizens (who enjoyed the benefits of full membership) and ethnically defined imperial subjects (who faced intricate systems of control and supervision). In Asia and Africa, those involved in anti-colonial and independence movements believed that, given such colonial reality, political redemption *required* an explicit and formal constitutional rupture from dominant structures of authority.

In Parts III and IV, I will develop this reflection by exploring a key era in the American past: the Civil War and the initial months of Reconstruction. My argument is that the American failure to similarly embrace rupture and to break from constitutional faith played a critical role in sustaining practices of subordination. Through an analysis of two seminal Supreme Court decisions, the *Prize Cases*²⁴ and *Ex parte*

21. *Id.* at 48.

22. *Id.* at 49.

23. *Id.* at 25.

24. 67 U.S. (2 Black) 635 (1862).

Milligan,²⁵ I argue that the commitment to constitutional continuity actually undermined—rather than facilitated—the possibility of a truly emancipatory and anti-colonial politics. By way of a conclusion, I then indicate what legal and political implications we should draw today from both global anti-colonial efforts and our own Reconstruction past. In particular, I argue that such experiences raise profound questions about the utility at all of a redemptive narrative framework (whether political or constitutional) and highlight the extent to which narratives of tragedy are better contemporary tools for confronting injustice. Moreover, these historic moments also underscore how, depending on the circumstances, constitutionalism may be just as likely to inhibit transformative change as to foster it. Indeed, despite fears of illiberality and unchecked power, Americans who are self-avowed progressives should be much more willing to challenge constitutional faith and, at times, even to advocate popular discretion and legal rupture.

II. OUR COLONIAL CONSTITUTION AND THE REDEMPTIVE POLITICS OF ANTI-COLONIALISM

Balkin's call for progressives to remain faithful to the Constitution is bound to a particular vision of social criticism. He implicitly embraces what Michael Walzer has called "connected criticism," or an orientation in which critics see their own views as part of an internal argument within the practices of a given society. The critics seek to reshape a community's institutions by reference to shared traditions, histories, and values.²⁶ For Balkin, the Constitution is the premier American site for such immanent critique. It is the imaginative tradition in the United States with the deepest communal resources for pursuing emancipatory ends. As he declares, "the text provides a common framework for constitutional construction that offers the possibility of constitutional redemption."²⁷ In this Part, however, I will highlight potential drawbacks of immanent critique in the American context, especially when it privileges constitutional traditions above all else.

As even Walzer notes, connected criticism is not without its limitations.²⁸ He reminds us that this mode of critique ultimately "ap-

25. 71 U.S. (4 Wall.) 2 (1866).

26. MICHAEL WALZER, INTERPRETATION AND SOCIAL CRITICISM 39 (1993).

27. BALKIN, *supra* note 17, at 232.

28. See WALZER, *supra* note 26, at 38–40 (discussing connected critics and "two legitimate worries about the connected critic").

peal[s] . . . to local or localized principles.”²⁹ The power of the critic’s arguments rests on her ability to “connect them to the local culture.”³⁰ By linking the critic’s arguments to the pervasive culture, the critic gains the ability to make members of a society recognize seemingly radical possibilities and aspirations *as their own*.³¹

Yet, at the same time, she is nonetheless constrained by the discursive framings that strike social members as consistent with their actual self-understanding. Since traditions—even quite flexible ones—are not absolutely open, projects of connected criticism must accommodate local presumptions about a community’s basic character.³² But what if a society is riddled with forms of subordination that its privileged members simply do not perceive (or do not recognize as key political and legal features)? In this circumstance, the accommodationist posture of connected criticism can have the tendency to occlude, or even to erase, modes of hierarchy that—although real—fail to resonate with local self-perception.³³

Indeed, one can argue that this erasure has been a classic problem in dominant narratives of American constitutionalism. These narratives often begin from a presumption that the American Revolution should be conceived of as an anti-imperial break, which rejected not only monarchical power but an entire “system of social hierarchy.”³⁴ In Balkin’s telling, this anti-imperial and egalitarian project was the animating purpose behind the 1776 Declaration of Independence, whose governing proposition was the belief “that all men are created equal”³⁵ and thus equally worthy of freedom.³⁶ Under this

29. *Id.* at 39.

30. *Id.*

31. *See id.* at 44–45 (“[A]fter the new ideas have been naturalized in their new setting . . . native critics . . . can put them to use.”). In fact, this radical discursive potential is why, depending on the circumstances and the specific tradition being valorized, I too have been willing to embrace connected criticism as a rhetorical strategy for making normative arguments. *See* AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 17–19, 18 (2010) (defending connected criticism as a powerful tool for highlighting the diversity of American political thought as well as “how apparently marginal views of freedom and social membership are themselves foundational aspects of our identity”).

32. WALZER, *supra* note 26, at 52.

33. For related concerns with erasure in national identity, see Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 *COLUM. L. REV.* 1992, 1993 (2003) (arguing for “countermemory” as a tool in American constitutional practice to address issues of “forgetting,” particularly in the context of race and Reconstruction).

34. *See* BALKIN, *supra* note 17, at 20–21.

35. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

account of political origin, the Constitution and its discursive framings enjoy an elevated standing because, as Balkin writes, the Constitution provided “legal and political” mechanisms through which the Declaration’s promise of equal liberty could “be redeemed in history.”³⁷

But for an entire twentieth-century black political tradition, from W.E.B. Du Bois to Paul Robeson to Malcolm X, such a focus on the American Revolution’s anti-imperial dimension undermined the ability of most Americans to appreciate the extent to which the constitution-in-practice was a continuation of European projects of empire.³⁸ Indeed, the governing origin story obscured the real persistence of a colonial system in North America, organized around a fundamental racial dichotomy between settlers and nonsettlers.³⁹ As Du Bois remarked to an audience in Haiti in 1944, colonial circumstances were not only those in which one “country belong[ed] to another country.”⁴⁰ They also included “groups, like the Negroes of the United States, who do not form a separate nation and yet who resemble in their economic and political condition a distinctly colonial status.”⁴¹ This status—familiar to indigenous societies in Asia and Africa—assumed a constitutional politics built on two distinct accounts of sovereign power: one of democratic consent and internal checks, and another of external and coercive discretion. In the United States, such a dual sovereign framework served to separate free settler insiders from a patchwork of ethnically excluded groups, who found themselves subject to a complicated structure of overlapping hierarchies. These hierarchies provided each colonized community distinct modes of governance and levels of rights, depending on internal economic needs and the dictates of political order. For instance, free blacks and nonwhite Mexicans were formally granted citizenship but were over-

36. See BALKIN, *supra* note 17, at 18 (“Our country sprang forth from a revolution in political and social structure. The Declaration explains the point of that revolution, and hence the point of our constitutional enterprise.”).

37. *Id.* at 19.

38. See RANA, *supra* note 31, at 329–36 (“Du Bois understood the black experience in the United States as a particular variant of Europe’s larger colonial legacy and thus believed that any meaningful commitment to eliminating the vestiges of colonialism meant supporting its elimination everywhere.”).

39. See *id.* at 114–20 (discussing how the colonial rubric “presented nonsettler populations as conquered and imperial subjects, appropriately ruled through pre-political and immutable forms of authority”).

40. W.E.B. Du Bois, *The Colonial Groups in the Postwar World*, in *AGAINST RACISM: UNPUBLISHED ESSAYS, PAPERS, ADDRESSES, 1887–1961*, at 229, 229 (Herbert Aptheker ed., 1985).

41. *Id.*

whelmingly denied the basic economic and political conditions (like voting rights and easy land access) essential for republican liberty. For Native Americans, the reservation system mimicked structures of indirect rule emerging in parts of Asia and Africa. As with some overseas European colonies, federal courts and administrators sought on the one hand to limit federal responsibility for Indian welfare while on the other hand ensuring that settlers possessed an overriding authority to claim indigenous land or to reconstruct tribal institutions if necessary. And with respect to slaves, settler requirements entailed the wholesale rejection of any meaningful rights.⁴²

For Du Bois and others, while the reality of American life was one of settler colonization, the anti-imperial narrative of the American Revolution meant that those ethnically included did not see themselves as colonizers. In fact, most Americans viewed the very purpose of “founding” as a repudiation of European imperial hegemony. If anything, the dominant discursive narratives made it nearly impossible for social insiders to recognize their own constitutional order as part of a global history, one that (regardless of British imperial rupture) remained legally akin to European settler societies in South Africa, Algeria, and elsewhere.

In effect, American constitutional identity helped to hide from popular self-perception the basic nature of the political community. A significant consequence was that insiders, who enjoyed the privileges of racial hierarchy, never perceived how domestic histories of unequal membership were only one piece of the international “problem of the . . . color-line,—the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea.”⁴³ Moreover, this perceptual blindness persisted despite the fact that the Declaration’s very text spoke to the United States’s colonial underpinnings, as it castigated the King for “excit[ing] domestic insurrections amongst us, and . . . endeavor[ing] to bring on the inhabitants of our frontiers, the merciless Indian Savages.”⁴⁴

In Du Bois’s view, the failure of U.S. constitutionalism to see the nation in colonial terms meant that it fundamentally truncated the dilemma of race in America. Although dominant legal narratives in the twentieth century accepted the sinfulness of slavery, they essentially viewed the United States as an incomplete liberal society. As Balkin might argue, the United States was founded in an “ideal of so-

42. *Id.* at 119–20.

43. W.E.B. DU BOIS, *Of the Dawn of Freedom, in THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES* 23, 23 (Fawcett Pub. 1961) (1953).

44. THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776).

cial equality," but "previous generations . . . had realized [this idea] only partially."⁴⁵

According to Du Bois, the result was a vision of black equality—prevalent in mainstream politics—that focused primarily on ending formal discrimination and on providing worthy elements within the black community with an equal opportunity to achieve professional and middle-class respectability. This vision emphasized social mobility for black elites and inclusion for some into arenas of corporate and political power, but it left prevailing socio-economic hierarchies largely intact.⁴⁶ As noted biographer Manning Marable writes of Du Bois's view, the mainstream civil-rights approach failed fundamentally to connect racial and class dynamics and thus inadequately perceived how "the Color Problem and the Labor Problem [were] to so great an extent two sides of the same human tangle."⁴⁷

For Du Bois, by ignoring the deep colonial infrastructure of American life, such an approach not only transformed civil rights into a solely domestic project disconnected from global anticolonial efforts, it also downplayed the systematic forms of economic and political subordination that marked the pervasive experience of most blacks (as well as most nonwhites generally). In Martin Luther King, Jr.'s words, such subordination produced the nonwhite reality of "poverty amid plenty," in which the condition for those excluded was one of "educational castration and economic exploitation."⁴⁸ Therefore, overcoming racism required more than elite black advancement, it entailed "a radical restructuring of the architecture of American society."⁴⁹ As Du Bois told a college audience in North Carolina shortly before leaving for exile in newly independent Ghana, although the United States was "definitely approaching . . . a time when the American Negro will become in law equal in citizenship to other Americans," this represented only "a beginning of even more difficult problems of race and culture."⁵⁰

45. BALKIN, *supra* note 17, at 23.

46. See, e.g., W.E.B. Du Bois, *Whither Now and Why*, in *THE EDUCATION OF BLACK PEOPLE: TEN CRITIQUES 1906–1960*, at 149, 149–58 (Herbert Aptheker ed., 1973) (warning civil rights leaders in 1960 about the limitations of liberal integration, particularly as a solution to the persistent economic marginalization experienced by the bulk of the black community).

47. MANNING MARABLE, *W.E.B. DU BOIS: BLACK RADICAL DEMOCRAT* 107 (1986).

48. MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* 112 (1967).

49. *Id.* at 133.

50. W.E.B. Du Bois, *supra* note 46, at 149.

The driving logic of Du Bois's position was that, given its colonial foundations, the constitutional tradition was a limited site to locate a racially redemptive politics in America. If anything, constitutionalism and its story of origin obscured the essential characteristics of the American republic.⁵¹ Du Bois was hardly alone in questioning the value of constitutional continuity or criticizing the "metaphysical . . . fetich-worship [sic]"⁵² of the text that dominated so much of U.S. constitutional discourse. In many ways, his thoughts mirrored arguments developed at the time by anti-colonial intellectuals abroad, who asserted that the best way to challenge colonialism was to engage in an explicit institutional and imaginative break: to embrace legal rupture as the precondition for true liberation.

Perhaps no figure articulated these views more systematically than C.L.R. James, the seminal West Indian social critic and historian. In *The Black Jacobins: Toussaint L'Ouverture and the San Domingo Revolution*, James sought to use a reinterpretation of the 1791–1804 Haitian slave revolt to present his own redemptive narrative of anticolonial emancipation.⁵³ For James, unlike the American settler revolt against the British, the Haitian uprising was a truly anti-imperial revolution premised on eliminating root and branch the colonial dynamics of extractive plantation-labor and racial bondage in the Indies.⁵⁴ Moreover, James, writing on the eve of decolonization in Asia and Africa, saw the Haitian Revolution as providing a political template for independence struggles in the mid-twentieth century. In James's own words, "those black Haitian labourers and the Mulattoes have given us an example to study."⁵⁵ This template rejected decolonization efforts that sustained the existing legal infrastructure of the colonial state. Instead, it called for the creation of new constitutional orders that repudiated any identitarian link with the colonial past and explicitly embraced comprehensive social transformation.

In recent years, the closest exemplar of James's vision of redemption through constitutional rupture has been the adoption of an explicitly post-apartheid South African constitutional text. The text's preamble highlights the fundamental nature of the legal break with

51. See *supra* text accompanying notes 38–42.

52. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA 1860-1880*, at 336 (1998) (1935) [hereinafter DU BOIS, *BLACK RECONSTRUCTION*].

53. C.L.R. JAMES, *THE BLACK JACOBINS: TOUSSAINT L'OUVERTURE AND THE SAN DOMINGO REVOLUTION*, at ix–xi (2d. ed. 1963) (1938).

54. See, e.g., *id.* at 375 ("Those who knew San Domingo, however, knew that there would never be any more slavery for the blacks there . . .").

55. *Id.* at 375.

the previous order and underscores its central mission as broad-ranging socioeconomic change. It begins, "We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity."⁵⁶ It then continues by declaring the purpose of the Constitution to "establish a society based on democratic values, social justice and fundamental human rights."⁵⁷

The South African experience raises a basic question for Americans committed to constitutional continuity: whether Du Bois and others may have been correct. Would there have been an earlier and to date more complete elimination of colonial and racial subordination if a similarly explicit constitutional rupture occurred in the United States? In the following Parts, I will return to the Civil War and Reconstruction period to argue that faith in our constitutional tradition has historically embodied one important roadblock to a more thoroughgoing redemptive politics. This argument, and indeed the invocation of Du Bois and James, is about more than antiquarian curiosity. It suggests that if the commitment to constitutional continuity has at key moments undermined progressive political principles, we today should be wary of seeing constitutionalism as *the* privileged path to redemption. Indeed, the lesson for progressives might be to deemphasize constitutional faith and to develop more politically instrumental approaches to the value of constitutionalism.

III. THE EMANCIPATION PROCLAMATION AND THE *PRIZE CASES*

In thinking historically about the practical consequences of constitutional continuity, it is worthwhile to assess those points in American life when colonial practices of subordination faced profound internal pressure. Perhaps the greatest such moment in the early republic occurred during the Civil War and concerned Abraham Lincoln's Emancipation Proclamation, which on January 1, 1863, unilaterally freed all slaves in secessionist territory still in rebellion. As Sandy Levinson reminds us, "the Proclamation is a most peculiar document," leaving the institution untouched in Union slave states and "parts of the ostensibly secessionist states that had been brought

56. S. AFR. CONST. pmb1., 1996.

57. *Id.*

under Union control.”⁵⁸ Despite its limitations, the Proclamation nonetheless spoke to the collapsing nature of the institution of slavery. Moreover, the Proclamation occurred alongside growing efforts to recruit black soldiers, including newly freed slaves in the South. If the 1776 Declaration of Independence listed as one of its grievances the decision by Virginia Governor Dunmore to emancipate slaves willing to join British forces,⁵⁹ then Lincoln now was engaged in precisely the same practice—one long perceived as a threat to the safety and internal identity of the republic. Taken together, the freeing and arming of the black population directly challenged the settler basis of American society. These wartime practices also implicitly raised questions concerning the future status of freed blacks, namely the extent to which individuals who fought on the Union side would be incorporated as social members regardless of race.⁶⁰

Among the most compelling features of the decision to pursue emancipation was the issue of its constitutionality. As Levinson has discussed, the legality of the Proclamation was deeply questioned at the time, with none other than Benjamin Curtis—the former Supreme Court Justice who dissented in *Dred Scott*—issuing a pamphlet condemning it as an overreach of executive power.⁶¹ According to Curtis, whose stand against Roger Taney garnered him the esteem of many in Republican circles, the Proclamation not only failed to adequately distinguish loyal from disloyal citizens in the seceding states, but also entailed a theory of presidential war power so capacious as to suggest no meaningful limits: “If the President . . . may by an executive decree, exercise this power to abolish slavery in the States, because he is of the opinion that he may thus ‘best subdue the enemy,’

58. See Sanford Levinson, *The David C. Baum Memorial Lecture: Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?*, 2001 U. ILL. L. REV. 1135, 1139. In the Union, the Proclamation did not affect slaveholding in Maryland, Delaware, Kentucky, and Missouri. As for secessionist territory now occupied by the federal government, it also exempted recaptured cities such as New Orleans in Louisiana as well as Norfolk and Portsmouth in Virginia. *Id.*

59. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776) (“He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.”).

60. In fact, thirty years later, Justice Harlan in *Plessy v. Ferguson* argued that given the centrality of military service to social membership it was a profound injustice that blacks, who “risked their lives for the preservation of the Union,” would be barred from riding in coach cars in segregated southern communities with whites. 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

61. See Levinson, *supra* note 58, at 1144–45 (“It has never been doubted that the power to abolish slavery within the States was not delegated to the United States by the Constitution, but was reserved to the States.” (citation omitted)).

what other power . . . may not be exercised by the President.”⁶² In fact, for Curtis, since Lincoln himself rejected the idea that the rebellion was legal, the domestic laws of those states remained valid and its citizens still enjoyed their constitutional rights. These laws and rights could not be made “null and void” merely through presidential fiat.⁶³

Given the constitutional uncertainty, Lincoln very well could have responded to these critics by embracing the extra-legality of his decision, which he explicitly did on occasion during the Civil War.⁶⁴ Certainly, in Levinson’s view, the legitimacy of the Proclamation today ultimately rests not on constitutional fidelity but on its substantive justice—the manner in which the Proclamation signalled an institutional rupture from existing modes of racial bondage.⁶⁵ In fact, in the mid-nineteenth century, there existed a longstanding political tradition of what John Locke had called “prerogative power,” in which the executive in extraordinary times contravened the law in the name of necessity or justice and then accepted the political consequences of such illegality.⁶⁶ Locke saw the use of prerogative as a decidedly political rather than a constitutional act; its legitimacy came from a public judgment after the fact that such pure discretion was warranted. In discussing the Louisiana Purchase, Thomas Jefferson similarly invoked this vision of extra-legal and discretionary political action, one that could only be authorized by post-fact popular acceptance. In his words, “The Executive . . . [has] done an act beyond the Constitution. The Legislature in . . . risking themselves like faithful servants, must . . . throw themselves on their country for doing for them unau-

62. PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 281 (5th ed. 2006) (quoting Curtis).

63. *Id.* at 280.

64. For instance, Lincoln admitted in his July 4, 1861, address to Congress that his unilateral enlargement of the army and the navy were likely unconstitutional, even though in his view absolutely necessary: “These measures, whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity; trusting, then as now, that Congress would readily ratify them.” He continued by underscoring the legitimacy of extra-legal action in moments of crisis, by famously demanding, “are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?” Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), available at <http://teachingamericanhistory.org/library/index.asp?document=1063>.

65. See Levinson, *supra* note 58, at 1150–52 (“If we applaud Lincoln, it is . . . because we applaud his values and his political vision, not because we venerate him for any particular devotion to the idea of fidelity to law as a primary norm.”).

66. See JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION*, § 160 (J.W. Gough ed., 1946) (“This power to act according to discretion for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative.”). For more on the idea of prerogative and its approach to liberal legality, see generally Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 *YALE L.J.* 1385 (1989).

thorized what we know [the people] would have done for themselves had they been in a situation to do it."⁶⁷

Lincoln, however, made a conscious choice to avoid justifying the Proclamation as a discretionary act of extra-legal justice, whose legitimacy was not bound to constitutionalism *per se*. He sought instead to read the Proclamation as consistent with a project of constitutional continuity. This meant arguing that the President's commander-in-chief authority (as well as powers implied by the executive oath) sanctioned emancipation as an expedient of military emergency.⁶⁸ In a letter to Albert Hodges, a Kentucky journalist who opposed both the Proclamation and the arming of freed blacks, Lincoln emphasized that he was not motivated by antislavery ideology and acted in accordance with constitutional fidelity:

I aver that, to this day, I have done no official act in mere deference to my abstract judgment and feeling on slavery. I did understand however, that my oath to preserve the Constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that Constitution was the organic law.⁶⁹

In response to other potential skeptics, Lincoln reiterated how both emancipation and the arming of freed slaves were matters of military judgment, constitutionally justified by the executive's commander-in-chief powers. In a letter to be read on his behalf at a public rally in Lincoln's hometown of Springfield, Illinois, he wrote of these policies:

I know . . . that some of the commanders of our armies in the field who have given us our most important successes, believe the emancipation policy and the use of the colored troops constitute the heaviest blow yet dealt to the Rebellion, and that at least one of these important successes could not have been achieved when it was, but for the aid of black soldiers. Among the commanders holding these views are some who have never had any affinity with what is called Ab-

67. Letter from Thomas Jefferson to John Breckinridge (Aug. 12, 1803), *available at* <http://www.teachingamericanhistory.org/library/index.asp?document=1915>.

68. *See* Levinson, *supra* note 58, at 1142 (discussing Lincoln's constitutional justifications for the Emancipation Proclamation).

69. Letter from Abraham Lincoln to Albert G. Hodges (April 4, 1864), *in* LINCOLN: ADDRESSES AND LETTERS 204, 205 (Charles W. Moore ed., 1914).

olitionism or with the Republican party politics but who held them purely as military opinions.⁷⁰

In many ways, Lincoln's arguments on behalf of the constitutionality of the Proclamation were among the best that could be marshaled from within the constitutional tradition. In Balkin's language, they spoke to an effort (however halting) to make a redemptive political enterprise consistent with faith in the Constitution, especially faith in its discursive capacity to serve as a language for emancipation.⁷¹ Yet, with the benefit of hindsight, one might well argue that the decision to tie the Proclamation to a commitment to constitutional continuity came at its own real cost. First, by focusing on military necessity, it deemphasized the radical significance of Lincoln's policies and the extent to which the Proclamation—as well as the arming of freed blacks—embodied a fundamental transformation from preexisting structures.⁷² And second, by framing the legitimacy of emancipation in terms of presidential emergency power, the practical legal precedent of Lincoln's approach was to embed within the constitutional system justifications for unchecked executive authority.⁷³

Both consequences are exemplified by the *Prize Cases*,⁷⁴ the Supreme Court decision that—while not directly addressing the Proclamation—profoundly impacted its perceived constitutionality for the remainder of the conflict.⁷⁵ In the *Prize Cases*, the Court assessed the legality of Lincoln's decision, in the days following the attack on Fort Sumter, to pursue a naval blockade of the South even though Congress remained in recess. As a textual matter, Lincoln's unilateral action appeared to violate the express language of the Constitution, which gave to Congress alone the power both to "declare war" and to "make rules concerning captures on land and water" during war-time.⁷⁶ Yet, not only did a sharply divided five-to-four Court uphold

70. Letter from Abraham Lincoln to James C. Conkling (Aug. 26, 1863), in LINCOLN, *supra* note 69, at 195, 198.

71. See *supra* text accompanying notes 17–18 (discussing Balkin's views on the U.S. Constitution).

72. See *supra* text accompanying note 70.

73. See generally Levinson, *supra* note 58 (discussing the constitutional ramifications of the Emancipation Proclamation).

74. 67 U.S. (2 Black) 635 (1862).

75. In the words of seminal political scientist Clinton Rossiter, "the *Prize Cases* went far to discourage determined assaults on the validity of the . . . Emancipation Proclamation The decision . . . was a welcome addition to the arguments of the Union men, and Lincoln fought his war with no more thought about the Supreme Court than was necessary in making his five appointments." CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 75 (Richard P. Longaker ed., 1976) (footnote omitted).

76. U.S. CONST. art. I, § 8, cl. 11.

the blockade, it went further and presented a sweeping theory of presidential authority.⁷⁷

According to Justice Robert Grier's majority opinion, the executive enjoyed a unilateral emergency power "to resist force by force."⁷⁸ This meant that even if Congress had not provided legislative sanction to presidential action, in times of invasion or attack inherent authority existed within the presidency "to meet the [emergency] in the shape it presented itself, without waiting for Congress to baptize it with a name."⁷⁹ Furthermore, whether to use force in the face of "armed hostile resistance" and how much force to employ were executive judgments solely. Such questions were questions "to be decided by *him* [the President], and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. 'He must determine what degree of force the crisis demands.'"⁸⁰

What also made the *Prize Cases* significant for Lincoln's broader wartime policies was a connected argument about the very nature of the Civil War. Justice Grier asserted that while Congress "alone has the power to declare a national or foreign war," no clause in the Constitution gave it the authority to "declare war against a State, or any number of States."⁸¹ This was critical because ordinarily the President's war powers (such as under the commander-in-chief clause) were only triggered once Congress had sanctioned the use of force, legally initiating the start of armed hostilities. But in this context, following the attack on Fort Sumter, the Union clearly found itself facing a massive insurrection and thus a *de facto* state of war. Moreover, Congress did not have the constitutional authority to declare war against rebelling states and thereby give the conflict its *de jure* legislative approval. Justice Grier concluded that although this Civil War could not be "declared" through traditional means, as a matter of common sense a war still existed and still triggered the full panoply of the President's Article II powers:

The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States He does not initiate the war,

77. 67 U.S. (2 Black) at 680.

78. *Id.* at 668.

79. *Id.* at 669.

80. *Id.* at 670.

81. *Id.* at 668.

but is bound to accept the challenge without waiting for any special legislative authority.⁸²

In effect, the President enjoyed independent constitutional authority to employ military action to defeat the rebellion, even if Congress could not declare war in the normal manner. This focus on the unusual legal status of the Civil War was quite suggestive, especially for how to view presidential power after Congress finally met in session on July 4, 1861. Although Grier never addressed the issue, his reasoning raised the possibility that the President may still have had a legitimate constitutional basis—grounded in defensive emergency powers—to pursue unilateral action throughout the conflict, given its insurrectionary and undeclared character.

One should note that these arguments, with their focus on inherent and broad presidential authority, were hardly necessary for reaching a conclusion that the blockade alone was legal. The Court had many potential theories at its disposal. For example, the Court could have conceded that Congress's power to declare war operated even in a conflict with seceding states and that the President could not act in the absence of explicit legislative authorization.⁸³ Nonetheless, Justice Grier might have contended that the blockade was justified due to the truly unprecedented nature of the particular factual circumstances. As Congress had been in recess during the attack on Fort Sumter, it was unable to provide *ex ante* legislative sanction and the executive had no choice but to act unilaterally in order to put down a surprise rebellion.⁸⁴ Additionally, the Court could have centered its ruling on the argument that because Congress eventually ratified the blockade, this *post hoc* ratification legally validated the executive decision.⁸⁵

Yet the majority did not appear interested in a narrow holding, one that while justifying the blockade presented the likelihood of future piece by piece struggles over the legality of Lincoln's wartime policies.⁸⁶ Three of the five Justices (Samuel Miller, David Davis, and

82. *Id.*

83. U.S. CONST. art. I, § 8, cl. 12 ("The Congress shall have Power [t]o . . . declare War . . .").

84. Thomas H. Lee & Michael D. Ramsey, *The Story of the Prize Cases: Executive Action and Judicial Review in Wartime*, in PRESIDENTIAL POWER STORIES 53, 56–57 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

85. Justice Grier raised this latter point in passing, but went out of his way to state that such ratification after the fact was not "necessary under the circumstances" for the blockade's constitutionality. *Prize Cases*, 67 U.S. at 671.

86. See DAVID M. SILVER, LINCOLN'S SUPREME COURT 105–06 (University of Illinois Press 1998) (1956) (noting that the decision in the *Prize Cases* "would reflect upon all acts

Noah Swayne) were recent Lincoln appointees and Republican Party stalwarts.⁸⁷ And, in effect, the Grier majority produced an opinion expansive enough to provide discursive cover to the broad range of Lincoln's practices, perhaps none more symbolically prominent than the recent Emancipation Proclamation.⁸⁸ Indeed, the status of the proclamation had hung heavy over the case, with oral arguments occurring only six weeks after Lincoln had issued the emancipation order. Given the fact that both the blockade and emancipation were unilateral acts that denied southerners their property rights, as legal scholars Thomas Lee and Michael Ramsay note, "[e]ven a narrow ruling against the President . . . might [have] call[ed] into question the constitutional basis of emancipation."⁸⁹

As a purely legal matter, a competent lawyer could still distinguish between the facts surrounding the *Prize Cases* and those of the Proclamation. The issue posed by the former was whether seizures taken before Congress sat in special session and asserted its legislative war power were valid prizes.⁹⁰ The problem of how far the President's unilateral authority extended, and thus whether Lincoln could on his own initiative pursue a blockade or emancipate slaves even after Congress passed relevant legislation, was not directly at stake. In fact, in oral arguments before the Court, U.S. Attorney Richard Henry Dana, Jr., consciously sought to limit the scope of the government's position, maintaining that the only subject concerned "the power of the President before Congress shall have acted, in case of a war actually existing."⁹¹ Nonetheless, the decision's language—with its vision of an assertive commander-in-chief, its rejection of Congress's ability to declare war on states, and its interpretative space for a broader reading of unilateral executive action throughout the entirety of the Civil War—made clear to observers the likely fate of any future challenge to Lincoln's emancipation.⁹² For the *New York Times*, Justice Grier's

Lincoln had taken before the assembling of Congress on July 4 and upon Lincoln's concept of executive powers in wartime").

87. *Id.* at 114.

88. *See id.* at 117 ("The decision gave promise that any future challenge of Lincoln's powers would be similarly pushed aside.").

89. Lee & Ramsey, *supra* note 84, at 66.

90. SILVER, *supra* note 86, at 104, 107.

91. *The Prize Cases*, 67 U.S. (2 Black) 635, 660 (1862).

92. Lee & Ramsey, *supra* note 84, at 83. In explaining how the ruling "took the wind out of the sails of potential challenges," Lee and Ramsey write: "If the President's wartime powers allowed him to confiscate the property of citizens of seceded or soon-to-secede states—and even of neutrals trading with those states—through a blockade at sea, it seemed also to encompass the power to declare the forfeiture of enemy property on land." *Id.*

claim that the President had the right under the laws of war “not only to coerce the [enemy belligerent] by direct force, but also to cripple his resources by the seizure or destruction of his property”⁹³ settled the question—if not as a legally dispositive matter certainly for all practical purposes. In its editorial on the ruling, the pro-war *Times* declared:

It is very difficult to see why the very broad language of the Court in respect to the proclamation of the blockade does not involve the constitutional validity of the proclamation against slave property. . . . It is our firm conviction that the Supreme Court would indorse . . . every important act of the Executive or of Congress thus far in the rebellion.⁹⁴

Although the constitutionality of unilateral executive emancipation may have provided a central backdrop for the decision, it is not surprising that the Court never referenced the Proclamation. Due to the legal posture of the *Prize Cases*, as Dana remarked in oral arguments, all that needed to be discussed directly was the legality of presidential actions during the congressional recess. Still, this silence underscores a key dimension of constitutional discourse—its capacity at times to obscure real political stakes. In a sense, the dominant framing of the Proclamation as a question of constitutional war powers allowed the practical legality of black freedom to be answered, albeit implicitly, in a case about the seizure of foreign vessels.⁹⁵ Here, the language of constitutionalism, rather than making explicit questions of racial subordination, operated to conceal from view the very politics of race. Indeed, today, this contested backdrop for the ruling is almost never raised by legal scholars or practitioners when discussing the decision. If anything, by cloaking the racial implications of the *Prize Cases*, constitutional narratives have had the paradoxical (even perverse) effect of casting slavery’s defenders as model civil libertarians. While Justice Grier’s majority opinion has been employed by government lawyers in the post-9/11 context to defend a notion of the Constitution as legitimizing nearly any act of presidential judgment, it is the dissent that appears respectful of constitutional principles and rule of law values.⁹⁶

93. *Prize Cases*, 67 U.S. at 671.

94. Lee & Ramsey, *supra* note 84, at 83 (internal quotation marks omitted) (alterations in original) (quoting *The Copperheads and the Courts*, N.Y. TIMES, March 13, 1863).

95. *Id.*

96. See Louis Fisher, *The Law: John Yoo and the Republic*, 41 PRES. STUD. Q. 177, 189 (2011) (describing the persistent invocation by John Yoo and other lawyers in the Bush-era Office of Legal Counsel of the *Prize Cases* as precedent for wide-ranging unilateral execu-

To appreciate this last point, it is useful to explore Justice Samuel Nelson's dissent as well as the members of the dissenting faction more closely. If the majority opinion embraced expansive executive authority, Justice Nelson's opinion spoke instead about the separation of powers and the liberty of citizens.⁹⁷ For those in the dissent, allowing the President the unilateral power to initiate a blockade prior to a congressional declaration of war fundamentally imperiled the rights of free citizens and inverted the Framers' original constitutional vision for governing warfare and emergency. The majority's holding opened the door to future Presidents invoking claims of crisis or threat in order to gain wartime authorities and thus subject political opponents to abuse and infringements of their rights.⁹⁸

However prescient the sentiment, one should still note precisely which Justices signed onto Nelson's dissent. All four men were Democrats, three of whom (Roger Taney, John Catron, and Nelson) had been part of the *Dred Scott* majority⁹⁹ and the fourth (Nathan Clifford) was a proslavery politician who had previously served as James Polk's attorney general. Each was also widely believed to be suspicious of Lincoln's emancipation, and indeed some worried, as hinted above, that if Chief Justice Taney could gain a fifth vote against the legality of the blockade it may well signal judicial defeat in the future for the Proclamation. As Taney biographer Carl Brent Swisher writes, the Chief Justice certainly rejected the Proclamation's constitutionality

tive action, including post-9/11 global detention schemes and military strikes abroad against suspected terrorists—all regardless of existing congressional authorization).

97. See *Prize Cases*, 67 U.S. at 693 (Nelson, J., dissenting).

98. *Id.* ("This great power over the business and property of the citizen is reserved to the legislative department by the express words of the Constitution. . . . Congress alone can determine whether war exists or should be declared; and until they have acted, no citizen of the State can be punished in his person or property, unless he has committed some offense against a law of Congress passed before the act was committed, which made it a crime, and defined the punishment.").

99. Although a Pennsylvania native and generally not considered pro-slavery by abolitionists and the Republican press, Frank Otto Gatell, *Robert C. Grier*, in 2 *THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS* 435, 435, 439–40 (Leon Friedman & Fred L. Israel eds., 1969), Robert Grier too joined the majority in *Dred Scott*. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 399 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; Gatell, *supra*, at 441. Yet, the onset of the civil war led Justice Grier to view secessionists in a harsh light, declaring them nothing less than "insane." Gatell, *supra*, at 442. Riding in circuit, as early as October 1861, Justice Grier made clear that he would look dimly on arguments about the constitutional rights of members of the Confederacy and their supporters, stating that "this court . . . can view those in rebellion . . . in no other light than as traitors to their country and those who assume by their authority a right to plunder the property of our citizens on the high seas as pirates and robbers." *Id.* (alteration in original) (quoting *United States v. Smith*, 27 F. Cas. 1134, 1136 (C.C.E.D. Pa. 1861 (No. 16,318))).

and many suspected that if he could muster the votes he would press “the Supreme Court [to] declare the proclamation unconstitutional at the first opportunity.”¹⁰⁰

For abolitionists, the stirring arguments about checks and balances by the Taney faction on the Court served the very real purpose of protecting the property rights and colonial status of thousands of slaveholders. According to one Washington newspaper, in a column published a few months after the decision in the *Prize Cases*, it was absolutely unacceptable for “[t]he proclamation of 1863 . . . to be filtered through the secession heart of a man whose body was in Baltimore and whose soul was in Richmond. . . . God help the negro who depended on Roger B. Taney for his liberty.”¹⁰¹ According to such abolitionists, Nelson’s and Taney’s calls for presidential constraint during wartime functioned in practice to undermine federal efforts to challenge the institution of slavery and to alter the racial structure of American life. They sought to remove from the Union’s toolkit a key mechanism for ending black servitude—a strong and unitary executive.

The foregoing discussion clearly affirms Levinson’s view that the moral power of the Proclamation rests on its substantive justice rather than the arguments for legality suggested by Lincoln or Grier—particularly given the post-9/11 purposes to which these arguments have been employed.¹⁰² But beyond this, it also highlights how the redemptive political meaning of the Proclamation persists not because of—but truly *in spite of*—its attachment during the Civil War to a language of constitutional continuity. The discourse of constitutionalism in practice operated to occlude the anti-colonial power of emancipation and to promote arguments about executive power that in our own time have justified profoundly coercive measures.¹⁰³ None of this is to suggest that Lincoln or his Republican supporters on the

100. CARL BRENT SWISHER, *ROGER B. TANEY* 571–72 (Archon Books 1961) (1935).

101. *Id.* at 572 (internal quotation marks and citation omitted).

102. Although the exact number of individuals liberated by the Proclamation is difficult to establish, at least one scholar has placed that number in the neighborhood of 400,000. See ALLEN C. GUELZO, *LINCOLN’S EMANCIPATION PROCLAMATION: THE END OF SLAVERY IN AMERICA* 214, 309–10 n.13 (2004). It is true that Congress’s two confiscation acts had already freed the slaves of anyone participating in secession (or giving aid and comfort to the rebellion) who were able to reach union lines; however, these measures did not include slave owners in confederate territory who remained faithful during the war. See DAVID HERBERT DONALD, *LINCOLN* 364–66 (1995). As historian Allen Guelzo writes, before the Proclamation, “[e]scape from bondage was temporary and could disappear the moment a master showed up with paperwork in his hand, demonstrating loyalty to the federal government and ownership of a slave.” GUELZO, *supra*, at 213.

103. See Fisher, *supra* note 96, at 189.

Court did not firmly believe in the moral rightness of presidentially directed emancipation or in its compatibility with constitutional values and fidelity. Yet it does underline the real tensions between a self-consciously redemptive political agenda and the desire to speak in constitutionally respectful terms. During perhaps the first great American period of fundamental colonial rupture, the constitutional tradition did not act to heighten the transformative potential of the political moment. Its primary effect was to rearticulate questions of racial bondage as those of presidential power and to re-present the proponents of slavery as civil libertarian defenders of limited government. And as the next Part explores, at a decisive time of potential re-founding—early Reconstruction—the invocation of a shared constitutional tradition did more than merely occlude redemptive possibilities, it actually directly impeded change.

IV. *MILLIGAN*: REDEMPTION OR CONSTITUTIONAL FAITH?

Today, the Supreme Court's 1866 decision in *Ex parte Milligan*¹⁰⁴ is embraced as a powerful vindication by the judicial branch of civil libertarian values and constitutional constraints on wartime excess. As famed Court historian Charles Warren once wrote, the case "has been long recognized as one of the bulwarks of American liberty."¹⁰⁵ According to current civil libertarians, where the *Prize Cases* suggested a Court far too deferential to executive say-so, *Milligan* indicates the heroic capacity of the judiciary to serve as a check on the political branches and as a voice for the protection of individual rights.

The case itself concerned Lambdin Milligan, a prominent Indiana Democratic critic of the war effort.¹⁰⁶ In late 1864, Milligan was arrested by military officials and brought before a military tribunal in Indianapolis where he was tried on charges of planning to lead an armed uprising in Indiana to seize weapons, liberate Confederate soldiers, and kidnap the state's governor.¹⁰⁷ The tribunal found him guilty and sentenced Milligan to hang.¹⁰⁸ But on appeal to the Supreme Court, the Court unanimously ruled in favor of Milligan, declaring that the military tribunal did not have the jurisdiction to prosecute him.¹⁰⁹

104. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 6 (1866).

105. 3 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 149 (1922).

106. *Milligan*, 71 U.S. at 6.

107. *Id.*

108. *Id.* at 12.

109. *Id.* at 106–07.

The Justices, however, differed internally and dramatically over the actual rationale for the ruling. Both the five-person majority opinion, authored by Justice David Davis, and the four-person concurrence, written by Chief Justice Salmon Chase, agreed that Milligan's military tribunal had exceeded the bounds of what Congress authorized.¹¹⁰ As Justice Davis maintained, Congress indeed passed a statute in March 1863 partially suspending habeas corpus. This partial suspension allowed the President to arrest a "suspected person" and to detain that person militarily for "a certain fixed period."¹¹¹ This period, however, lasted only until an actual grand jury indicted the individual on criminal charges in civil court or terminated its session without an indictment. At that point, the President enjoyed no further statutory authorization to hold the detainee in military custody, let alone to try him or her by a military tribunal.¹¹²

For Chief Justice Chase, in concurrence, the lack of authorization in this case did not mean that Congress had no power to provide for the military trial of American civilians.¹¹³ Congress, depending on the circumstances, could well issue a more comprehensive suspension of the writ. As he declared, "it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety."¹¹⁴ At its root, as Samuel Issacharoff and Richard Pildes have highlighted, the constitutional problem for Chief Justice Chase was the fact that the executive was operating unilaterally, rather than on the basis of clear congressional support.¹¹⁵

Yet Justice Davis's majority opinion fundamentally rejected this focus in the concurrence on inter-branch cooperation. The majority went much further, arguing that even Congress was constrained in its ability to curtail the due process rights of civilians.¹¹⁶ According to the decision, regardless of congressional authorization, it was unconstitutional for civilians to be tried by a military court unless the locale was a "theatre of active military operations" *and* the civil courts were

110. *Id.* at 108.

111. *Id.* at 114–15.

112. *Id.*

113. *Id.* at 140–41 (Chase, C.J., concurring).

114. *Id.* at 140.

115. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 9–14 (2004).

116. *Milligan*, 71 U.S. at 127 (majority opinion).

“actually closed.”¹¹⁷ For Justice Davis, efforts to depart from the due process guarantees of the Constitution transformed a republic of limited government into nothing less than military despotism: “Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.”¹¹⁸ In sweeping civil libertarian language that is often quoted to this day, Justice Davis concluded that “[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”¹¹⁹

Issacharoff and Pildes correctly read the disagreement between Justice Davis and Chief Justice Chase as one concerning whether the Court should emphasize a rights-based or “institutional-process oriented view” of the Constitution during an emergency.¹²⁰ But they never fully locate this debate in Reconstruction politics¹²¹ and so miss the heat that made the disagreement (and especially Justice Davis’s internal victory on the Court) so critical. Just as the colonial backdrop to the *Prize Cases* is today largely unacknowledged, so too have we lost sight of *Milligan’s* significance for the very real post-Civil War possibility of comprehensive anti-colonial rupture.¹²² Even more directly than with the *Prize Cases*, the *Milligan* decision embodies a moment in which the language of a shared constitutional tradition and the commitment to legal continuity were employed to stymie a redemptive agenda.

In order to appreciate this point, it is necessary to see the decision through the eyes of the most intensely egalitarian among the Radical Republicans, Pennsylvania Congressman Thaddeus Stevens. For Stevens, the end of the Civil War was only the beginning of what he hoped would be a comprehensive social transformation, one that re-founded the republic on principles that uprooted wholesale all the settler exclusivities of American life.¹²³ In his view, such a redemptive aspiration entailed more than simply the abolition of slavery, it also required a long-term project of federal supervision to eliminate those existing modes of socio-economic subordination that sustained racial

117. *Id.*

118. *Id.*

119. *Id.* at 120–21.

120. Issacharoff & Pildes, *supra* note 115, at 13.

121. One legal scholar who does so is Gil Gott in his article, *The Devil We Know: Racial Subordination and National Security Law*, 50 VILL. L. REV. 1073, 1085 n.34 (2005).

122. See *supra* Part II.

123. HANS L. TREFOUSSE, THADDEUS STEVENS: NINETEENTH CENTURY EGALITARIAN 172, 245 (1997) (discussing Stevens’s views on reshaping southern society after the Civil War).

domination in the South (and indeed across the country).¹²⁴ Stevens envisioned a new collective order that extended beyond providing formal legal protections and voting rights to former slaves.¹²⁵ His plan went so far as to redistribute slave plantation land among freed blacks and poor whites, providing historically marginalized communities with the economic independence and material power to enjoy meaningful self-rule.¹²⁶ According to Du Bois, writing decades later in *Black Reconstruction in America*, figures like Stevens and Senator Charles Sumner of Massachusetts understood that creating a truly democratic system required “land and education for black and white labor.”¹²⁷ Stevens himself remarked of newly freed slaves in December 1865, “This Congress is bound to provide for them until they can take care of themselves. If we do not furnish them with homesteads, and hedge them around with protective laws; if we leave them to the legislation of their late masters, we had better have left them in bondage.”¹²⁸

For Stevens, the commitment to universal equality and the goal of complete anti-colonial rupture were not simply desirable, they were matters of essential justice dictated by God.¹²⁹ Indeed, Stevens took these beliefs so seriously that he chose to be buried in a black cemetery in Lancaster as a statement of principle given the segregated character of all the white cemeteries.¹³⁰ For him, Reconstruction offered a revolutionary opportunity in which, through concerted political action, the sins of American life could be extirpated and the country redeemed.¹³¹ Moreover, such redemption entailed not only a total

124. *Id.* at 166 (discussing Stevens’s efforts to push expanding voting rights and congressional supervision over Reconstruction).

125. *Id.* at 168.

126. *Id.*

127. DU BOIS, *BLACK RECONSTRUCTION*, *supra* note 52, at 336.

128. See Thaddeus Stevens, “Reconstruction,” *December 18, 1865, in Congress*, in 2 *THE SELECTED PAPERS OF THADDEUS STEVENS* 52 (Beverly Wilson Palmer & Holly Byers Ochoa eds., 1998).

129. See TREFOUSSE, *supra* note 123, at 81 (noting Stevens’s view that “God had made of one blood all the nations of man”).

130. *Id.* at xi. He wrote as his tombstone inscription:

I repose in this quiet and secluded spot / Not from any natural preference for solitude / But, finding other Cemeteries limited as to Race / by Charter Rules, / I have chosen this that I might illustrate / in my death / The Principles which I advocated / Through a long life / EQUALITY OF MAN BEFORE HIS CREATOR.

Id.

131. See Thaddeus Stevens, *Speech on the Fourteenth Amendment, May 8, 1866, in Congress*, in 2 *THE SELECTED PAPERS OF THADDEUS STEVENS*, *supra* note 128, at 132 (discussing the need to “clear away the rotten and defective portions of the old foundations” of the country).

anti-colonial break, but a break from both the existing legal framework and, if need be, the very values of constitutionalism. In Stevens's view, in moments of tension, faith in the American constitutional tradition had to give way to a deeper political one. Stevens expressed this sentiment by calling for the long-term application of martial law in the South and by defending the employment of the federal military even in non-secessionist land. According to him, Reconstruction, precisely as an epochal moment of re-founding on egalitarian economic and political grounds, required the congressional use of discretionary power—enforced coercively by the strong arm of the military—in the service of political justice.¹³² Once more capturing the essence of Stevens's approach, Du Bois wrote of this need to privilege racial transformation over constitutional continuity: "Rule-following, legal precedence and political consistency are not more important than right, justice and plain commonsense. Through the cobwebs of such political subtlety, Stevens crashed and said that military rule must continue in the South until order was restored, democracy established, and the political power built on slavery smashed."¹³³

In many ways, *Milligan* highlighted the fractured nature of the Republican Party, which as early as 1866 was increasingly hesitant to pursue fundamental social change as comprehensively as Stevens desired.¹³⁴ Justice Davis and Chief Justice Chase were both close allies of Lincoln (the former his 1860 presidential campaign manager, the latter his Treasury Secretary).¹³⁵ Justice Davis's sweeping civil libertarian language and curtailment of congressional authority were understood by Radical Republicans as a direct assault, by a member of their own party no less, on the federal government's capacity to pursue racially emancipatory ends.¹³⁶ Stevens excoriated the *Milligan* majority, declaring:

That decision, although in terms perhaps not as infamous as the Dred Scott decision, is yet far more dangerous in its operation upon the lives and liberties of the loyal men of this country. That decision has taken away every protection in

132. See TREFOUSSE, *supra* note 123, at 174 (describing Stevens's policies of seizing "insurgent property" and "treating the former Confederate States as conquered provinces").

133. DU BOIS, BLACK RECONSTRUCTION, *supra* note 52, at 336.

134. *Id.* (noting that the more radical of Stevens's policies "were not popular with most Republicans").

135. See DONALD, *supra* note 102, at 242, 281.

136. See Thaddeus Stevens, "Reconstruction," January 3, 1867, in Congress, in 2 THE SELECTED PAPERS OF THADDEUS STEVENS, *supra* note 128, at 212 [hereinafter STEVENS, "Reconstruction," January 3, 1867].

every one of these rebel States from every loyal man, black or white, who resides there.¹³⁷

Shortly after Stevens's speech, the Republican magazine *Harper's Weekly* further underscored the perceived connection between *Milligan* and Taney's infamous ruling, headlining its piece on *Milligan, The New Dred Scott*.¹³⁸ Elaborating the parallel, the article declared, "The Dred Scott decision was meant to deprive slaves taken into a Territory of the chances of liberty under the United States Constitution. The Indiana decision operates to deprive the freedmen, in the late rebel States whose laws grievously outrage them, of the protection of the freedmen's Courts . . ." ¹³⁹ These "freedmen's Courts," referred to in the article, embodied a separate court system established by the Freedmen's Bureau during the early days of Reconstruction to address white crimes against blacks. Such courts were seen by Radical Republicans as necessary due to the overwhelming prevalence of racial animus in ordinary civil proceedings in the South.¹⁴⁰ The article's author worried that since the regular courts were open and functioning, *Milligan* would operate to undermine the legality of the Bureau's courts and to condemn former slaves to the vagaries of a legal system controlled by their ex-masters.

Indeed, for Stevens and others, the embrace of martial law was not simply a defense of political discretion over rule-of-law principles for its own sake. According to Radical Republicans, the problem in the South was that an entire colonial infrastructure still existed, one that sustained racial subordination and related economic hierarchies.¹⁴¹ This infrastructure was epitomized by the traditional legal system, whose purpose—in Stevens's mind—was to preserve a framework of white supremacy.¹⁴² Moreover, ex-masters were now innovating new non-slave methods for maintaining a coerced labor supply, through laws like the Black Codes, and for rehabilitating the structure of colonial domination shaken by the Civil War. Part of this process of innovation was the use of extreme violence by white supremacists as a tool of black intimidation and control—violence that the regular

137. *Id.*

138. See WARREN, *supra* note 105, at 154 (citing *The New Dred Scott*, HARPER'S WEEKLY, Jan. 19, 1867).

139. *Id.* (internal quotation marks and citation omitted).

140. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, 142 (1988).

141. See TREFOUSSE, *supra* note 123, at 172.

142. See, e.g., Stevens, "Reconstruction," *January 3, 1867*, *supra* note 136, at 212-13 (discussing the reluctance of the legal system to punish a white man who had brazenly murdered a black man in front of the community).

courts, for obvious reasons, were uninterested in addressing. In such circumstances, extra-legal discretion and federal military imposition, in the name of political justice, were essential for the fulfillment of equal freedom for all. In effect, political necessity suggested that, at this moment of historical upheaval, substantive commitments to egalitarian redemption on the one hand, and commitments to a discourse of constitutionalism on the other, were conflicting ends in which one could be achieved, but not both simultaneously.

Today's historians often argue that Justice Davis's majority opinion in *Milligan* ultimately had minimal long-term impact on Reconstruction.¹⁴³ Congress moved quickly to pass legislation that both reaffirmed the legality of military tribunals and that curtailed "the Court's jurisdiction to hear cases involving military law."¹⁴⁴ Moreover, rather than heighten the confrontation with Congress, the Supreme Court in *Ex parte McCardle*, an opinion this time authored by Chief Justice Chase, retreated from Justice Davis's judicial assertiveness and validated Congress's act of jurisdiction stripping.¹⁴⁵ As a result, military tribunals remained commonplace during Reconstruction with upwards of 1,400 such trials between 1865 and 1870.¹⁴⁶

Still, the immediate consequences of the *Milligan* decision should not be ignored. In fact, they were not far off from Radical Republican fears or, for that matter, the hopes of status quo Democrats. Referring to Stevens and others as possessed by "fanaticism," the *Baltimore Sun* crowed that such individuals were "feeling the sting of death in the decision."¹⁴⁷ Employing the *Milligan* ruling as precedent, President Andrew Johnson declared a complete halt to any trial in either military or Freedmen's Bureau courts of civilians.¹⁴⁸ In the process, *Milligan* and Johnson's use of the case ushered in the initial stages of legal impunity for white violence against blacks in the South, and thus the reformation of white supremacy under new institutional conditions. November 1866 saw the admitted murder by a white Virginia doctor of a local African American man for accidentally causing fifty

143. See, e.g., MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 176 (1991) (arguing that *Milligan* had little lasting effect on the protection of civil liberties or the construction of emergency power).

144. LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 59 (2005).

145. 74 U.S. (7 Wall.) 506, 513–14 (1869).

146. FISHER, *supra* note 144, at 59–60.

147. See WARREN, *supra* note 105, at 160 (quoting *The Baltimore Sun* newspaper).

148. HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875*, at 326 (1982).

cents-worth of damage to the doctor's carriage.¹⁴⁹ After the doctor was acquitted by the local civil court, the general in charge of the area used pre-existing congressional authorization for "military jurisdiction over a variety of cases involving freedmen"¹⁵⁰ to order a military trial. Although this trial produced a murder conviction, Johnson, again citing *Milligan*, stepped in to dissolve the commission and to release the prisoner—taking the local court acquittal as the final word.¹⁵¹ For Radical Republicans, in the face of such impunity and the rebirth of white supremacy in the South, the only response to *Milligan* was the swift passage of legislation that reaffirmed military rule and, to the greatest extent possible, repudiated the Davis opinion.¹⁵²

In a sense, the *Milligan* saga reminds us how the American commitment to constitutional faith actually functioned at a time of real potential redemption. Justice Davis was not a pro-slavery fire breather. He had been a member of the majority in the *Prize Cases*, the very decision that for practical purposes secured the constitutional status of the Emancipation Proclamation.¹⁵³ In fact, Justice Davis, like other Republicans, sought a meaningful alteration in American society along tracks more racially egalitarian than that of the antebellum order.¹⁵⁴ What he argued was that any politics of change should maintain faith in the Constitution and in its discursive capacities to fulfill even radical aspirations. In his view, congressional Republicans had to reject the drift toward discretionary action and to abide by "principles of the Constitution."¹⁵⁵ Explaining his opposition to the use of military tribunals, Justice Davis wrote in *Milligan*, "Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded . . . the dangers to human liberty are frightful to contemplate."¹⁵⁶

149. ERIC L. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* 458 (1960).

150. *Id.* at 458–59.

151. *Id.*

152. For a broader account of the relationship between race, martial law, and emergency in the legal imagination during Reconstruction, see generally Daniel Kato, *The Legal Exceptionality of Racial Violence: Reconstruction, Race, and Emergency* (unpublished manuscript) (on file with author); JOHN WITT, *LINCOLN'S CODE: WAR AND HUMANITY IN AMERICA* (forthcoming 2012).

153. See *supra* text accompanying notes 83–88.

154. See SILVER, *supra* note 86, at 2 (describing Justice Davis's hope, expressed during Lincoln's presidential campaign, that his victory would bring about a change in the composition of the Court enabling reversal of the *Dred Scott* decision).

155. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 124–25 (1866).

156. *Id.* at 125.

For all the wisdom such words denoted, their political effect, not unlike Taney's arguments during the Civil War, was to provide a strait-jacket for social transformation. Stevens's ultimately revolutionary embrace of discretion did not embody a "hatred of liberty" or a desire for ambition, but instead articulated a pragmatic calculation that the best—and perhaps only—means to redemption was through discretionary and, if need be, extra-legal political action. For him, at least in this context, the commitment to transformation required pursuing actual constitutional rupture in ways that no doubt challenged the very legitimacy of the Constitution and its narrative framings.¹⁵⁷ In the end, one might well ask whether the victory of continuity over an explicit discourse of political justice and constitutional break helped discursively to suppress more wide-ranging social change. As Reconstruction receded and political "fanaticism" declined, frameworks of constitutional construction provided a critical means for suggesting egalitarian progress while substantively cloaking the reality of persistent and systematic subordination.

In many ways, the *Milligan* case is a perfect mirror to the *Prize Cases*. Today the two majority opinions are a constantly referenced legal pair: the one providing a precedent for executive unilateralism and the other an equally powerful precedent for civil libertarian principles. But these decisions are mirror images in more ways than is commonly appreciated. In *Milligan*, even more so than the *Prize Cases*, an issue ostensibly about white constitutional protection—in which the implications for freed blacks were never discussed—actually served to shift meaningfully black social reality and collective possibility.¹⁵⁸ And again like the *Prize Cases*, the language of constitutionalism in *Milligan* has had the long-term effect of erasing the case's fundamental (and racial) political meaning from the collective memory.¹⁵⁹ If both cases highlight the tensions between political justice and constitutional faith, then in their own way they each also bring home perhaps an uncomfortable fact for today's progressives. In some political circumstances, projects of social transformation may well require progressives to choose between principles of effective freedom and discourses of constitutionalism. In the final pages, I plan to explore what to make of this tension and what conclusions to draw from the broader account of the Civil War and early Reconstruction.

157. See *supra* text accompanying notes 123–124.

158. See *supra* Part IV.

159. See *supra* Part II.

V. CONCLUSION: DEMOCRATIC DISCRETION AND NARRATIVES OF TRAGEDY

The preceding Parts have sought to highlight two claims about the ties between freedom struggles and constitutional discourses in America. First, they attempted to remind readers that a long black political tradition, consciously linked to global independence movements, questioned the very compatibility between redemptive anti-colonial aspirations and either constitutional faith or continuity. Second, such discussions emphasized that at two decisive moments of potential anti-colonial rupture in the United States, the resort to frameworks of constitutional construction hindered as much as they assisted meaningful change. These two claims suggest a lesson and a caution for contemporary progressives committed to fulfilling goals of equal and effective freedom. The lesson is that progressives should be less afraid of political discretion and more instrumental in their endorsement of constitutional principles and languages. The caution is that the repeated historic inadequacies of redemptive enterprises—whether here at home or as part of Third World anti-colonial projects abroad—raise doubts about the continuing utility of such narratives of redemption (be they political or constitutional).

Let me begin by developing what I take to be the lesson of the historical examples. In many ways, Stevens and the most egalitarian among the Radical Republicans were generating in the first months of Reconstruction a vision of Congress as an instrument for exercising what Emmanuel Sieyès famously described as “constituent power.”¹⁶⁰ By this, Sieyès had in mind the sovereign authority that creates and thus precedes any instituted government. Such power was both democratic and legitimate because it expressed the national will of the people as a whole. In his view, government and its constituted powers were justified only to the extent that they remained “faithful to the laws imposed upon [them]. The national will, on the other hand, simply needs the reality of its existence to be legal. It is the origin of all legality.”¹⁶¹ At a moment of collective re-founding, Stevens sought to employ congressional discretion and military authority as constituent tools for transforming the basic character of American life—to act outside the bounds of ordinary legality in order to regenerate legal norms.¹⁶²

160. See Emmanuel Joseph Sieyès, *What is the Third Estate?*, in *POLITICAL WRITINGS* 93, 136 (Michael Sonenscher ed., 2003).

161. *Id.* at 137.

162. See *supra* text accompanying notes 123–124.

Ultimately, one could argue that the failure of Radical Reconstruction derived from the inability of Stevens and his allies to build a large enough popular base for these goals. Radical Republicans had hoped that by extending political and economic power to freed slaves in the South (their natural allies in the former Confederacy) they would be able to create an interracial and truly national Republican majority. But unfortunately, Stevens's vision of an anti-colonial and racially egalitarian republic remained a minority perspective in the North as much as in the South. Stevens's assertion of constituent power therefore carried with it for many white Americans (who remained committed to a racially defined republic) the taint of political vanguardism. Nonetheless, his efforts and those of other Republicans during Reconstruction offer a powerful contemporary lesson. They suggest how political discretion—if exercised on behalf of a broad constituency, one able to provide such practices with widespread popular legitimacy—has the potential to be both transformative and democratic.

Today, for many progressives (inside and outside of the legal community) discretionary authority is almost always associated with concerns about a usurpatory and “imperial”¹⁶³ presidency, while its democratic potential is hardly ever defended. Not unlike those Egyptian activists who called for fidelity to the existing 1971 Constitution—regardless of its limitations—the thought is that constitutionalism protects the rights of the weak and that discretion enhances the power of despots.¹⁶⁴ Given the legal specter of Schmittian dictatorship and the historical experience of totalitarianism, these fears are not to be taken lightly. In the words of one such progressive scholar, “the arbitrary character . . . of constituent power” must be avoided because it “is where the law ends, and pure politics (or war) begins.”¹⁶⁵ At the same time, however, the Egyptian example also indicates that the progressive embrace of constitutional fidelity, as well as related discourses of shared tradition, may have their own pathologies. As the Mubarak regime exposed, instituted processes can themselves be deeply oppressive and, by contrast, the popular and extra-legal discre-

163. The term itself was famously coined by Arthur Schlesinger to describe presidential leadership during the era of Watergate and Vietnam. Writing of executive authority in 1973, he concluded that: “in our own time it has produced a conception of presidential power so spacious and peremptory as to imply a radical transformation of the traditional polity. . . . The constitutional Presidency . . . has become the imperial Presidency and threatens to be the revolutionary Presidency.” ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY*, at viii (1973).

164. See *supra* text accompanying notes 1–12.

165. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 11 (1998).

tion of mass constituents can serve anti-authoritarian ends.¹⁶⁶ In other words, depending on the political conditions, constituent power may well be generative and democratic rather than despotic. At the same time, constitutionalism and frameworks of constitutional construction can simply promote a coercive rule-by-law.

More relevantly for the American case, the story of Thaddeus Stevens and David Davis indicates that progressive orientations to constitutional faith should be assessed pragmatically.¹⁶⁷ Not only has the constitution-in-practice been riddled with injustice, as Balkin powerfully illuminates, but the Constitution's discursive structures have not been an unalloyed blessing for the freedom struggles of the past.¹⁶⁸ Indeed, there is no reason to believe that although the radical potential of previous movements may have been hindered—at the most crucial moments—by the focus on constitutional narrative, similar fates will not befall future efforts. If the goal of progressives is a transformative and ultimately political one, faith should reside in the ideal of effective and equal freedom alone. This preeminent commitment may require both a politics of constitutional construction as well as one of constitutional rupture (the latter through democratic discretion). In a sense, progressive political faith should view its relationship to traditions, including constitutional ones, strategically—to be asserted when it serves emancipatory purposes and questioned or even rejected when it does not.

Such a call for progressives to be less tradition-bound and more willing to embrace constituent power (not to mention its very real political dangers) comes with a final note of caution. Twentieth century projects of redemption, both revolutionary anti-colonial ones and those grounded in constitutional faith, have all participated in a particular type of emancipatory history. As theorist David Scott writes, these redemptive accounts embrace a narrative structure of “romance.”¹⁶⁹ They have presented “narratives of overcoming, often narratives of vindication; they have tended to enact a distinctive rhythm and pacing, a distinctive direction, and to tell stories of salvation.”¹⁷⁰ Above all, they have posited a future in which individuals can transcend oppression and unshackle freedom from existing modes of subordination once and for all.

166. *See supra* text accompanying notes 13–14.

167. *See supra* Part IV.

168. *See supra* text accompanying notes 17–23.

169. DAVID SCOTT, *CONSCRIPTS OF MODERNITY: THE TRAGEDY OF COLONIAL ENLIGHTENMENT* 7 (2004).

170. *Id.* at 7–8.

Still, the contemporary moment, both in the United States and in the wider postcolonial world, has been marked by far greater historical complication. Post-apartheid South Africa offers just one telling illustration. The South African struggle embodied a classic story of anti-colonial redemption, complete with a revolutionary re-founding and a fundamental constitutional rupture.¹⁷¹ Yet, the postcolonial present in South Africa is much more equivocal than straightforwardly redemptive. Although constitutionally premised on racial equality, the country remains riddled with extreme economic hierarchies that are the persistent legacy of apartheid.¹⁷² In fact, the National Party's willingness in the early 1990s to relinquish political authority was tied to key compromises made by the African National Congress, particularly to refrain from expropriating or dramatically curtailing white economic power in the country.¹⁷³ In a sense, the South African redemptive narrative of revolutionary change and salvation—highlighted by a glowing preamble—belies a more uncertain story of both rupture and structural continuity, in which even explicit constitutional rejection has hardly assured a future of meaningful racial equality. Similarly, in the United States, the twentieth century's great redemptive social movements—on behalf of organized labor, black freedom, and women's equality—have transformed the political terrain but have also either receded in social power or left us with complex presents, marked by the overlap between formal equalities and substantive injustices. As Scott suggests, the twentieth century romance of redemption and untainted emancipation is now in many ways “a superseded future, one of our futures past.”¹⁷⁴

The response among progressives should not be to give up generally on a utopian imagination. But it does suggest the value of binding this imagination to historical narratives of tragedy rather than to those of redemption or romance. By tragedy, I do not mean the notion that “due to some flaw or defect” our political and constitutional frameworks will necessarily commit us “to a disastrous course of ac-

171. See Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 65–66 (1997) (describing South Africa's new constitutional order post-apartheid).

172. *Id.* at 68.

173. For more on the persistence of the old social order in post-apartheid South Africa, see GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* 123 (2010) (describing the constitution-making process in South Africa as a way to achieve democratic rule while also “assuring the white minority that democratic rule would not simply be an invitation to majoritarian retribution”); Mutua, *supra* note 171, at 81 (noting “that the [National Party] got the better of the deal as it was protected against the will of the majority to substantially transform the state”).

174. SCOTT, *supra* note 169, at 210.

tion” that produces “great suffering and severe punishment.”¹⁷⁵ Instead, I mean the idea, certainly embedded in the concept of a tragic flaw, that historical moments are marked by linked and mutually constitutive relationships of freedom and subordination. In describing the tragedy in the postcolonial predicament, Scott writes:

[T]ragedy sets before us the image of a man or woman obliged to act in a world in which values are unstable and ambiguous. . . . [F]or tragedy the relation between past, present, and future is . . . a broken series of paradoxes and reversals in which human action is ever open to unaccountable contingencies—and luck.¹⁷⁶

Thus, every political period, be it the Civil War, Reconstruction, or the current-day, presents its own hierarchies and dependencies. The goal of progressive action is to uncover those forms of dependence and to strive for liberation from them. But even successful projects of emancipation will produce their own “unaccountable contingencies” and generate new legal and political orders that knit together secured freedoms with emerging hierarchies, as post-apartheid South Africa and contemporary America suggest. This is the paradox of tragedy. It offers a narrative in which the struggle for emancipation is a ceaseless one, requiring an aspiration to utopia but never capable of being completely redeemed in history—as total emancipation is always and permanently beyond reach.

Besides speaking to the complexity of our postcolonial and post-civil rights times, such a narrative of tragedy better addresses the current moment in two ways. First, unlike stories of redemption, it provides a greater bulwark against the inclination to rationalize the injustices of the present, especially by acceding to a Whiggish faith in progress. Redemption stories, as Balkin himself recognizes and critiques,¹⁷⁷ have the tendency to read history as a long-term trend toward justice, albeit halting and uneven. At a time when old forms of subordination persist in the United States and yet we see sustained backsliding from the very achievements of previous eras, a tragic narrative frontally challenges the complacent willingness to believe that conditions are “good enough.” It does so by reminding us to be on continuous guard against the hidden and unwitting forms of domination

175. BALKIN, *supra* note 17, at 81.

176. SCOTT, *supra* note 169, at 13.

177. As he writes self-critically of constitutional redemption, “The first danger of faith is the danger of apology or theodicy.” BALKIN, *supra* note 17, at 83.

embedded in our social practices, even in those practices—like constitutional construction and veneration—that we collectively esteem.

Second, and finally, an adequately tragic sensibility helps progressives to reclaim a space in their political imagination for democratic discretion. The grave problem of past revolutionary agendas (anti-colonial or otherwise) was a failure to appreciate fully the destructive violence generated by radical change. But if constitutional rupture must still be part of the progressive toolkit, an awareness of the tragic has the potential to cabin the worst consequences of discretion. Tragic discourse, by emphasizing the ambiguous nature of any transformative project, suggests its own ethic of political responsibility. Such a narrative makes ever-present the potential costs wrought by legal rupture and compels progressive actors to appreciate the political stakes when breaking from constitutional fidelity. A tragic sensibility demands of progressives both that they aggressively assert emancipatory commitments and that they embrace judicious political ethics. Ultimately, it imagines an orientation to collective life animated by justice but tempered by the recognition of indissoluble paradox.