FREEDOM STRUGGLES AND THE LIMITS OF CONSTITUTIONAL CONTINUITY

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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. 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.[1] 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. Above all, 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.[2] For Bahgat and Abdelaty, following the constitutionally sanctioned process was not simply "a legal technicality" but rather "the only way out of our nation's political crisis."[3]

At the heart of this argument was a narrative about the 1971 Egyptian Constitution, one that emphasized its pluralistic and liberal dimensions. According to this narrative, when Sadat

[1] See Hossam Bahgat & Soha Abdelaty, *What Mubarak Must Do Before He Resigns*, WASH. POST, Feb. 5, 201, 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*.

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."[4] The result was a document that "contained guarantees for individual freedoms, democratic procedures, and judicial independence."[5] Above all, 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 promise embedded in the Constitution, the worst example being the 2007 textual amendments pressed through by Mubarak. 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).[6] But 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."[7]

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[4] Nathan 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.

[5] *Id*.

[6] *See generally Egyptian Constitutional Amendments Passed on March 19, 2007*, trans. Dina Bishara, http://carnegieendowment.org/files/appendix.pdf.

[7] Tamir Moustafa quoted in *Anti-Authoritarian Revolution and Law Reform in Egypt: A Jadaliyya E-Roundtable*, JADALIYYA, Feb. 24, 2011, http://www.jadaliyya.com/pages/index/714/anti-authoritarian-revolution-and-law-reform-in-eg.

Indeed, for Bahgat and Abdelaty – those voices in February 2011 calling for a transitional process that remained faithful to the existing Constitution – 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. 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. 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. 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.[8] 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

[8] See especially legal scholar Asli Bali's comments as part of the roundtable discussion. *Id*.

infrastructure for normalizing the emergency decrees through new counterterrorism laws."[9] 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.[10] Assuming 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."[11] Such a culture "include[s] both the legal rights and institutions as well as cultural predicates for the exercise of those rights and institutions."[12] Where they broke ranks decisively was over whether the country's shared post-Nasser constitutional project could serve as the mechanism for producing such a culture. 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. For them constitutional faith meant subordinating the end of a democratic culture to the faulty discursive and structural means offered by the prevailing

[9] Asli Bali quoted in *id*.
[10] As Nathan 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 ultimately did little to rein in the power of the president or the country's determined security apparatus." Brown, *supra* note 4.
[11] JACK BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 23 (2011).
[12] *Id*. at 24.

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 – i.e. 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* (2011). For Balkin, the American constitution similarly has its oppressive and emancipatory narratives. But in his view, citizens committed to a building a democratic American culture should maintain faith in a collective story "about progress within the constitutional system."[13] Balkin willingly admits that all constitutions – American as well as Egyptian – "are agreements with hell, at least to somebody."[14] 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."[15] Balkin's advice to those that 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.

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

[13] *Id*. at 49.
[14] *Id*. at 48.
[15] *Id*. at 49.

effect, my view is that the American constitutional predicament historically has not been that distinct from the predicament today facing Egyptian activists. I begin in section two 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 sections three and four, 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* (1863) and *Ex parte Milligan* (1866), 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, self-avowed progressives should be much more willing in American political life 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; they seek to reshape a community's institutions by reference to shared traditions, histories, and values.[16] For Balkin, the Constitution is the premier American site for such immanent critique. It is the imaginative tradition in the U.S. 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."[17] In this section, however, I plan to highlight potential drawbacks of immanent critique in the American context, especially when it privileges above all constitutional traditions.

As even Walzer notes, connected criticism is not without its limitations. He reminds us that this mode of critique ultimately "appeal[s] . . . to local or localized principles."[18] The power of the critic's arguments rests on her ability to "connect them to the local culture,"[19] to maintain contact with the dominant vision of political life and communal institutions. By linking the

[16] *See* MICHAEL WALZER, INTERPRETATION AND SOCIAL CRITICISM 39 (1985).
[17] BALKIN, *supra* note 11, at 232.
[18] WALZER, *supra* note 16, at 39.
[19] *Id*.

critic's arguments to the pervasive culture, the critic gains the ability to make members of a society recognize *as their own* seemingly radical possibilities and aspirations. Yet, at the same time, he or 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. 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.

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."[20] 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 [were] created equal"[21] and thus equally worthy of freedom. Under this account of political origin, the Constitution and its discursive framings enjoy as elevated standing because, as Balkin writes, it provided "legal and political" mechanisms through which the Declaration's promise of equal liberty could "be redeemed in history."[22]

[20] BALKIN, *supra* note 11, at 21.
[21] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
[22] BALKIN, *supra* note 11, at 19.

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 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. 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. This colonial infrastructure – 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. This 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. Such 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 slaves, these requirements entailed the denial of any meaningful protections. As for free blacks and nonwhite Mexicans, such groups may have enjoyed technical 'citizenship,' but were excluded from the political and economic conditions essential for full membership. And with respect to Indian tribes, the reservation system limited federal responsibility for their welfare, while ensuring that settler's possessed an overriding authority to claim indigenous land or to reconstruct tribal institutions if necessary.[23]

For Du Bois and others, while the reality of American life was one of settler colonization, the anti-imperial narrative of the Revolution meant that those ethnically-included did not see themselves as colonizers. In fact, most Americans viewed the very purpose of founding as a

[23] For a more comprehensive account of the settler foundations of American constitutional life as well as black intellectual critiques of 'internal colonialism', see generally AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM (2010).

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 of 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."[24] Moreover, this was despite the fact that the Declaration's very text spoke to the U.S.'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."[25]

In Du Bois's reading, this 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 U.S. as an incomplete liberal society. As Balkin might argue, the U.S. was founded in an "ideal of social equality," but "previous generations . . . had realized [this idea] only partially."[26] 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

[24] *See* W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 13 (1989) (1903).
[25] THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776).
[26] BALKIN, *supra* note 11, at 23.

inclusion for some into arenas of corporate and political power, but it left prevailing socio-economic hierarchies largely intact.

Thus, 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 anti-colonial efforts. It also downplayed the systematic forms of economic and political subordination, which marked the pervasive experience of most blacks (as well as most nonwhites generally). In Martin Luther King's words, such subordination produced the nonwhite reality of "poverty amid plenty,"[27] in which the condition for those excluded was one of "educational castration and economic exploitation."[28] Therefore, overcoming racism required more than elite black advancement, it entailed "a radical restructuring of the architecture of American society."[29] 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."[30]

The driving logic of Du Bois's position was that, given its colonial foundations, the constitutional tradition was an inappropriate 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. Du Bois was hardly alone in questioning the value of constitutional continuity. In many ways, his thoughts mirrored arguments being 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

[27] MARTIN LUTHER KING, WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 112 (1967).
[28] *Id*.
[29] *Id*.
[30] W.E.B. DU BOIS, THE EDUCATION OF BLACK PEOPLE: TEN CRITIQUES, 1906-1960 149 (1973).

rupture as the precondition for true liberation. Perhaps no figure more systematically articulated these views 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* (1938), James sought to use a reinterpretation of the 1791-1804 Haitian slave revolt to present his own redemptive narrative of anti-colonial emancipation. For James, unlike the American settler revolt against the British, the Haitian uprising was a truly anti-imperial revolution and one premised on eliminating root and branch the colonial dynamics of extractive plantation labor and racial bondage in the Indies. 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."[31] This template rejected decolonization efforts that sustained in place 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 that 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 the previous order and underscores its central mission as broad-ranging socio-economic 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

[31] C.L.R. JAMES, THE BLACK JACOBINS: TOUSSAINT L'OUVERTURE AND THE SAN DOMINGO REVOLUTION 375 (1963) (1938).

diversity."[32] It then continues by declaring the purpose of the Constitution to "establish a society based on democratic values, social justice and fundamental human rights."[33]

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 U.S.? In the following sections, I plan to 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 of 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 not yet subject to union control. As Sandy Levinson reminds us, the Proclamation was "a most peculiar

[32] S. AFR. CONST. preamble (1996).
[33] *Id*.

document,"[34] leaving the institution untouched in union slave states and some parts of secessionist territory then occupied by the federal government (such as New Orleans). Yet, 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 among newly freed slaves in the South. If the 1776 Declaration of Independence has listed as one of its grievances the decision by Virginia Governor Dunmore to emancipate slaves willing to join British forces, now Lincoln 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 that fought on the Union side would be incorporated as social members regardless of race.[35]

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.[36] 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, it also entailed a theory of presidential war power so capacious as to suggest no meaningful limits: "If the President . . . may by an executive

[34] *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 (2001).
[35] 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. *See* Plessy v. Ferguson, 163 U.S. 537, 561 (1896) (J. Harlan, dissenting).
[36] *See* Levinson, *supra* note 34, at 1144-1145.

decree, exercise this power to abolish slavery in the States, because he is of the opinion that he may thus 'best subdue the enemy,' what other power . . . may not be exercised by the President."[37] 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"[38] merely through presidential fiat.

Given the constitutional uncertainty, Lincoln very well could have responded to these critics by embracing the extra-legality of his decision. 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.[39] 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.[40] Locke saw the use of prerogative as a decidedly political rather than constitutional act; its legitimacy came only 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 solely be authorized by post-fact popular acceptance. In his words, "The Executive . . . [has] done an act beyond the Constitution. The legislature, in . . .

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[37] Quoted in PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 281 (5th ed. 2006).
[38] *Id*. at 280.
[39] *See* Levinson, *supra* note 34, at 1150-1152.
[40] "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." *See* JOHN LOCKE, THE SECOND TREATISE ON GOVERNMENT AND A LETTER CONCERNING TOLERATION, sect. 160 (J.W. Gough ed., 1946). 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).

risking themselves like faithful servants, must . . . throw themselves on their country for doing for them unauthorized, what we know [the people] would have done for themselves had they been in a situation to do it."[41]

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. Above all, 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. 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 anti-slavery 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.[42]

In response to another skeptical unionist, 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. 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

[41] Thomas Jefferson, Letter to John Breckinridge (Aug. 12, 1803), http://www.teachingamericanhistory.org/library/index.asp?document=1915.

[42] Abraham Lincoln, Letter to Albert Hodges (Apr. 4, 1864), http://showcase.netins.net/web/creative/lincoln/speeches/hodges.htm.

> abolitionism, or with the republican party politics; but who held them purely as military opinions.[43]

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. 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 Emancipation – as well as the arming of freed blacks – embodied a fundamental transformation from preexisting structures. 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.

Both consequences are exemplified by *The Prize Cases* (1863), the Supreme Court decision that in effect addressed the constitutionality of the Proclamation. There, a 5-4 Court upheld the legality of Lincoln's decision during the early days of the Civil War to pursue unilaterally a blockage of Confederate ports.[44] Justice Robert Grier's opinion for the majority presented a sweeping theory of presidential authority, stating that the determination of how much force was required to "suppress[] an insurrection . . . is a question to be decided *by him* [the

[43] Abraham Lincoln, Letter to James Conkling (Aug. 26, 1863), http://www.learner.org/workshops/primarysources/emancipation/docs/lin_conkling.html.
[44] *See* The Prize Cases, 67 U.S. (2 Black) 635 (1863).

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."[45]

One should note that such an argument was hardly necessary for reaching a conclusion that the blockade alone was legal. The Court had many potential theories at its disposal. It could have contended that the Congress was in recess during the attack on Fort Sumter and so presidential action was necessary in such circumstances to repel an invasion. Conversely, it could have argued that since Congress eventually ratified the blockade, this post-fact ratification legally validated the executive decision. Yet the majority was not interested in a narrow holding, one that while sanctioning the blockade presented the likelihood of future piece by piece struggles over the legality of Lincoln's wartime policies. Three of the five justices (Samuel Miller, David Davis, and Noah Swayne) were recent Lincoln appointees and Republican Party stalwarts.[46] They sought an opinion that was expansive enough to constitutionalize the broad range of Lincoln's actions, none more prominent than the Emancipation Proclamation.

What is remarkable about the case (especially the sweeping language of presidential authority) is that while the constitutionality of unilateral executive emancipation hung over the decision, the Court never referenced the Proclamation at all. In a sense, the dominant framing of the Proclamation as a question of constitutional war powers allowed the legality of black freedom to be decided in a case about the seizure of foreign vessels. Here, the discourse of constitutionalism, rather than making explicit questions of racial subordination, operated to cloak from view the very politics of race. Indeed, today, this contested backdrop for the decision is almost never raised by legal scholars or practitioners when discussing the decision. If anything, by obscuring the racial import of *The Prize Cases*, constitutional narratives have had the

[45] *Id*. at 670.
[46] *See* DAVID SILVER, LINCOLN'S SUPREME COURT 114 (1956).

paradoxical (even perverse) effect of casting slavery's defenders as model civil libertarians. While Grier's majority opinion has been employed by government lawyers in the post-9/11 context to defend a notion of the Constitution as legitimating nearly any act of presidential judgment, it is the dissent that today appears respectful of constitutional principles and rule of law values.[47]

To appreciate this last point, it is useful to explore Justice Samuel Nelson's dissent more closely. All four justices who signed the opinion were Democrats, three of whom (Roger Taney, John Catron, and Nelson) had been part of the *Dred Scott* majority[48] and the fourth (Nathan Clifford) was a pro-slavery politician who had previously served as James Polk's Attorney General. If the majority opinion embraced unchecked executive action, the dissent spoke instead about the separation of powers and the liberty of citizens. Discussing wartime curtailments of property rights, Nelson declared that:

> This great power . . . is reserved to the legislative department by the express words of the Constitution. It cannot be delegated or surrendered to the Executive. 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.[49]

Yet, the implicit and practical consequence of such constitutional limitation on executive authority was to challenge the legality of black emancipation. Congress had no doubt passed two

[47] *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 executive action).

[48] Although a Pennsylvania native and generally not considered pro-slavery by abolitionists and the Republican press, Robert Grier too joined the majority in *Dred Scott*. Yet, the onset of the civil war led him to view secessionists in a harsh light, declaring them nothing less than "insane." *See* Frank Otto Gatell, *Robert C. Grier*, *in* THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS (eds. Leon Friedman & Fred Israel eds., 1997). Riding in circuit, as early as October 1861, Grier made clear that he would look dimly on arguments about the constitutional rights of members of the Confederacy and their supporters, stating that, "[T]his 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*. quoting United States v. William Smith, 27 Fed. Cas. 1134 (No. 16, 318) (C.C.E.D. Pa. 1861).

[49] *The Prize Cases*, 67 U.S. at 693 (J. Nelson, dissenting).

confiscation acts under its Article I war powers to "make rules concerning captures on land and water."[50] But whiles these acts liberated some slaves, they were far more limited than the Proclamation. Congressional measures were understood as punishment for treason and emancipated only the slaves of Confederate officials, rather than all slaves in Confederate territory.[51] In essence, Nelson's stirring arguments about checks and balances served the very real purpose of protecting the property rights and colonial status of thousands of slaveholders.

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 present-day purposes to which these arguments have been employed. 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. None of this is to suggest that Lincoln or his Republican supporters on the Court did not firmly believe in the justice 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

[50] U.S. CONSTITUTION, art. I, § 8, cl. 11.
[51] *See* DAVID HERBERT DONALD, LINCOLN 365 (1996).

section 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* 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."[52] 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 rights protection. The case itself concerned Lambdin Milligan, a prominent Indiana Democratic critic of the war effort. 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. The tribunal found him guilty and sentenced Milligan to hang. But on appeal to the Supreme Court, the Court unanimous ruled in favor of Milligan, declaring that the military tribunal did not have the jurisdiction to prosecute him.[53]

The Justices however differed internally and dramatically over the actual rationale for the ruling. Both the five person majority, authored by Justice David Davis, and the four person concurrence, written by Justice Salmon Chase, agreed that the Milligan's military tribunal had exceeded the bounds of what Congress authorized. As Davis maintained, Congress indeed passed a statute in March 1863 partially suspending habeas corpus. This partial suspension

[52] *See* 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 427 (1947).
[53] Ex parte Milligan, 71 U.S. (1 Wall.) 2 (1866).

allowed the President to arrest a "suspected person" and to detain that person militarily for "a certain fixed period."[54] 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.[55]

For 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. 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 district 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."[56] At root, as Samuel Issacharoff and Richard Pildes have highlighted, the constitutional problem for Chase was the fact that the executive was operating unilaterally, rather than on the basis of clear congressional support.[57]

Yet, Davis's majority opinion fundamentally rejected this focus in the concurrence on inter-branch cooperation; it went much further, arguing that even Congress was constrained in its ability to curtail the due process rights of civilians. 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 "actually

[54] *Id* at 115.
[55] *Id*. at 116.
[56] *Id*. at 140 (J. Chase, concurring).
[57] *See* Samuel Issacharoff & Richard Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, 5 THEORETICAL INQ. L. 1, 9-16 (2004).

closed."[58] For Davis, efforts to depart from the due process guarantees of the Constitution transformed a republic of limited government into nothing less than military despotism: "[m]artial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."[59] In sweeping civil libertarian language, oft-quoted to this day, Davis concluded that, "The 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."[60]

Issacharoff, Pildes, and others correctly read the disagreement between Davis and Chase as one concerning whether the Court should emphasize a rights-based or "institutional-process oriented view"[61] of the constitution during emergency. But such scholars never locate this debate in Reconstruction politics and so miss the heat that made their disagreement (and especially Davis's internal victory on the Court) so momentous. Just as the colonial backdrop to *The Prize Cases* is today lost from sight, so too has the significance of *Milligan* to the very real post-Civil War possibility of comprehensive anti-colonial rupture. 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, 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

[58] *Milligan*, 71 U.S. at 127.
[59] *Id*.
[60] *Id*. at 120.
[61] Issacharoff & Pildes, *supra* note 57, at 13.

uprooted wholesale all the settler exclusivities of American life. 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 domination in the South (and indeed across the country). Not unlike Du Bois, Stevens envisioned a new collective order that extended beyond providing formal legal protections and voting rights to former slaves. It 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. As he remarked 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 had left them in bondage."[62]

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. Indeed, Stevens took these beliefs so seriously that he chose to be buried in a black cemetery in Lancaster as a statement of principle. He wrote as the inscription for his tombstone: "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."[63] For Stevens, Reconstruction offered a revolutionary opportunity in which through concerted political action the sins of American life could be extirpated and the country

[62] *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).
[63] Quoted in HANS TREFOUSSE, THADDEUS STEVENS: NINETEENTH CENTURY EGALITARIAN xi (1997).

redeemed. Moreover, such redemption required not only a total anti-colonial break, but a break from both the existing legal framework and – if need be – the very values of constitutionalism; in moments of tension, faith in the American constitutional tradition had to give way a deeper political one. Stevens expressed this sentiment by calling for twenty five years of martial law in the South and by defending the use of the federal military even in non-secessionist land. In his view, 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.

In many ways, *Milligan* highlighted the fractured nature of the Republican Party, which as early as 1866 was increasingly hesitant to pursue as comprehensively Stevens' ideal of fundamental social change. Davis and Chase were both close allies of Lincoln (the former his 1860 presidential campaign manager, the latter his Treasury Secretary). 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. 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 every one of these rebel States from every local man, black or white, who resides there.[64]

Shortly after Stevens' speech, the Republican magazine *Harper's Weekly* further underscored the perceived connection between *Milligan* and Taney's infamous ruling, headlining its piece on

[64] *See* THADDEUS STEVENS, *"Reconstruction," January 3, 1865 , in Congress*, *in* 2 SELECTED PAPERS, *supra* note 61, at 212.

Milligan, "The New *Dred Scott*."[65] Elaborating the parallel, the article declared, "The *Dred Scott* decision was meant to deprive slaves taken into a Territory of the chance of liberty under the United States of the Constitution. The Indiana decision operates to deprive freedman in the late rebel States, whose laws grievously outrage them, of the protection of the freedman's courts."[66] What the article referred to was the fact that during the early days of Reconstruction the Freedman's Bureau – due to the overwhelming prevalence of racial animus in civil courts in the South – had established its own separate court system meant to address white crimes against blacks. The magazine 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. This infrastructure was epitomized by the traditional legal system, whose purpose – in Stevens' mind – was to preserve a framework of white supremacy. 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 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

[65] *See The New Dred Scott*, HARPER'S WEEKLY, Jan. 19, 1867, at 34.
[66] *Id*.

all. In effect, political necessity suggested that, at this moment of historical upheaval, substantive commitments to egalitarian redemption on the one hand and to a discourse of constitutionalism on the other were opposed ends – in which one could be achieved but not both simultaneously.

The consequence of the *Milligan* decision was 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."[67] To begin with, *Milligan* placed Ulysses Grant's General Orders 3 and 44 – which had been key instruments for protecting black physical security and legal rights – in constitutional doubt. These military orders authorized the army and the Freedman's Bureau to arrest individuals and to hold them for trial by military tribunal when local state authorities refused to act. Employing the case as precedent, President Andrew Johnson declared a complete halt not only to all such practices, but also to any trial in either military or Freedman's Bureau courts.[68] More ominously, *Milligan* 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 cents' worth of damage to the doctor's carriage. 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 freedman"[69] to order a military trial. Although this trial produced a murder

[67] Quoted in WARREN, *supra* note 51, at 438.
[68] *See generally* HAROLD HYMAN & WILLIAM WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875 325-327 (1982)
[69] *See* ERIC MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 458-459 (1960).

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.[70]

In a sense, the *Milligan* saga reminds us how the American commitment to constitutional faith actually operated 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 implicitly constitutionalized the Emancipation Proclamation. In fact, Davis, like other Republicans, sought a meaningful alteration in American society along tracks more racially egalitarian than that of the antebellum order. 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."[71] Explaining his opposition to the use of military tribunals, Davis wrote in *Milligan*, "Wicked men, ambitious of power, with hatred of liberty and contempt for 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."[72]

Yet, for all the wisdom such words denoted, its political effect, not unlike the dissent in *The Prize Cases*, was to provide a straitjacket for social transformation. Stevens' 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 case, the commitment to transformation required pursuing actual constitutional rupture in ways that no doubt challenged the very legitimacy of the Constitution and its narrative

[70] For more on similar incidents see *id*.
[71] *Milligan*, 71 U.S. at 125.
[72] *Id*.

framings. 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 both 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*. Indeed, 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*, like *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. 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. If both cases highlight the tensions between political justice and constitutional faith, 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.

V. Conclusion: Democratic Discretion and Narratives of Tragedy

The preceding sections 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. And second, such discussions emphasized that at two decisive moments of potential anti-colonial rupture in the U.S. 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 actualizing 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 global anti-colonial projects abroad – raise doubts about the continuing utility as such of 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."[73] 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, the people as a whole. In his view, government and its constituted powers were justified only to extent that they remained "faithful to the laws imposed upon [them]. The national will, on the other hand, simply needs the

[73] *See* EMMANUEL SIEYÈS, "What is the Third Estate?," in POLITICAL WRITINGS 136 (Michael Sonenscher ed., 2003). .

reality of its existence to be legal. It is the origin of all legality."[74] 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.

Today, among many progressives (inside and outside of the legal community) the exercise of such discretion is almost always associated with concerns about a usurpatory and "imperial"[75] presidency. 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. 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."[76] 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 discretion of mass constituents can serve anti-authoritarian ends. 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.

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[74] *Id*. at 137.

[75] 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, "[I]n 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 SCHLESINGER, JR., THE IMPERIAL PRESIDENCY viii (1973).

[76] 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 11 (1998).

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. Not only has the constitution-in-practice been riddled with injustice, as Balkin eloquently illuminates, the Constitution's discursive structures have not been an unalloyed blessing for the freedom struggles of the past. 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."[77] 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."[78] 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. Yet,

[77] *See* DAVID SCOTT, CONSCRIPTS OF MODERNITY: THE TRAGEDY OF COLONIAL ENLIGHTENMENT 7 (2004).
[78] *Id*.

the contemporary moment, both in the U.S. and in the postcolonial world writ large, 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. 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. In a sense, even total revolution and explicit constitutional rejection has not assured a future of salvation. Similarly, here in the U.S., the twentieth century's great redemptive social movements – on behalf of organized labor, civil rights, 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."[79]

The response among progressive 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 action," one that produces "great suffering and severe punishment."[80] Instead, I mean the idea, certainly embedded in the concept of a tragic flaw, that

[79] *Id*. at 210.
[80] *See* BALKIN, *supra* note 11, at 81. For more on this account of tragedy see also SANFORD LEVINSON, CONSTITUTIONAL FAITH 59 (1988).

historical moments are marked by linked and mutually constitutive relationships of freedom and subordination. In describing the tragic 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.[81]

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,[82] 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 U.S. 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

[81] SCOTT, *supra* note 77, at 13.
[82] As he writes self-critically of constitutional redemption, "The first danger of faith is the danger of apology or theodicy." BALKIN, *supra* note 11, at 83.

'good enough.' It does so by reminding us to be on continuous guard against the hidden and unwitting forms of domination 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 a judicious political ethics. Ultimately, it imagines an orientation to collective life animated by justice but tempered by the recognition of indissoluble paradox.