

# To Save the Country: Reason and Necessity in Constitutional Emergencies

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Debate over emergency powers today bears the legacy of a 150-year-old death – and an accidental loss in the century thereafter. In the wake of the American Civil War, Lincoln administration insider and political theorist Francis Lieber turned to draft a manuscript that would, he hoped, serve as a defense of the legal positions Lincoln took and Lieber defended during four years of conflict. Lieber died with the manuscript still in progress. His accomplished son Norman took over. But neither man finished the book, and it lies forgotten and ignored deep in the National Archives, until now. In their defense of martial law, the two Liebers defend Lincoln's forceful actions against a surging post-war civil libertarian critique embodied in the Supreme Court's 1866 decision in *Ex Parte Milligan*. They do so in a way that holds off frighteningly lawless accounts of emergency power that anticipates the ideas of twentieth-century theorists like Carl Schmitt. The Liebers identified a middle path – one that embraces a fierce necessity standard in defense of the state, while nonetheless identifying the reason and values of the state as a source of inescapable constitutional constraint.

One hundred and fifty years ago, the United States was a world leader in emergency constitutionalism. Americans remember Lincoln's suspension of the writ of habeas corpus and his Emancipation Proclamation; some remember his great speech to the Congress on July 4, 1861. Indeed, the American Civil War has become a classic case study for theorists of emergency, from Carl Schmitt a century ago, to Clinton Rossiter in the 1940s, to theorists from left to right today.<sup>1</sup>

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<sup>1</sup> Emergency theorists who dwell on the American Civil War include: Edward S. Corwin, *The President: Office and Powers, 1787-1957*, 4th ed. (New York: New York University Press, 1957); James G. Randall, *Constitutional Problems Under Lincoln* (New York: D. Appleton & Co., 1926; rev. ed. 1956); William Rehnquist, *All the Laws But One* (New York: Knopf, 1998); Clinton Rossiter, *Constitutional Dictatorship* (Abingdon: Routledge, 2002); Trevor Morrison, "Suspension and the Extra Judicial Constitution," *Columbia Law Review* 107, no. 7 (2007): 1533–1616; Michael Stokes Paulsen, "The Constitution of

Yet debates over emergency constitutionalism in the American Civil War have been missing a key piece of the story. For more than a century, scholars have known that Francis Lieber – the prominent publicist, political theorist, and Lincoln administration insider – wrote a manuscript about emergency constitutionalism after the war ended.<sup>2</sup> When Lieber died unexpectedly, however, the manuscript went missing. It was not to be found in the papers Lieber’s family deposited at the Huntington Library. It did not appear in the Lieber manuscripts at Johns Hopkins. And it did not turn up in the Judge Advocate General’s collection of Lieber books, now at the Library of Congress.

In the course of research on Lieber, however, I found the manuscript, buried deep in the official archives of his son, G. Norman Lieber, who served as Judge Advocate General of the United States in the closing years of the nineteenth century. The lost Lieber manuscript, as begun by Francis and developed by Norman, summarizes a fierce strand of thinking about constitutional emergencies, one rooted in controversies from the decades-long struggles that led to the Civil War and its aftermath. Its conception of emergency powers is striking. In keeping with Lieber’s famously tough code for the laws of war in 1863, the manuscript on martial law and emergencies defends the Lincoln administration’s most controversial assertions of power. It supports the suspensions of habeas corpus, the Emancipation Proclamation, and the use of military commissions.<sup>3</sup>

The Lieber manuscript and the controversies out of which it arose anticipated some of the most daunting features of the Weimar and Nazi jurist Carl Schmitt’s work on the same subject. Schmitt famously contended that law gives way to sovereign power in the moment of emergency. As one of the twentieth-century’s most bitter critics of liberal

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Necessity,” *Notre Dame Law Review* 79, no. 4 (2004): 1257–97; Kim Lane Scheppele, “North American Emergencies,” *International Journal of Constitutional Law* 4, no. 2 (April 2006): 213–43; Brook Thomas, “Reconstructing the Limits of Schmitt’s Theory of Sovereignty: A Case for Law as Rhetoric, not as Political Theology,” *U.C. Irvine Law Review* 4, no. 1 (2014): 254–60; Stephen I. Vladeck, “The *Field* Theory: Martial Law, the Suspension Power, and the Insurrection Act,” *Temple Law Review* 80, no. 2 (2007): 391–439; Stephen I. Vladeck, “Emergency Power and the Militia Acts,” *Yale Law Journal* 114, no. 1 (2004): 149–94; Samuel Issacharoff and Richard Pildes, “Between Civil Libertarianism and Executive Unilateralism,” in *The Constitution in Wartime*, ed. Mark Tushnet (Durham, NC: Duke University Press, 2005), 161–97; Daniel A. Farber, “Lincoln, Presidential Power, and the Rule of Law” (University of California at Berkeley Public Law Research Paper, March 2018).

<sup>2</sup> For published fragments of the underlying manuscript, see G. Norman Lieber, *Meaning of the Term Martial Law as Used in the Petition of Right and the Preamble to the Mutiny Act* (1877), 2-3 and note; G. Norman Lieber, “Martial Law During the Revolution,” *The Magazine of American History with Notes and Queries* (New York: A.S. Barnes, 1877), 1:538-541; and G. Norman Lieber, “What is the Justification for Martial Law,” *North American Review* 163, no. 480 (1896): 558. Francis Lieber also described his plans for the manuscript in correspondence during the second half of the Civil War. See Francis Lieber to Henry Halleck, 2 June 1863, Francis Lieber Papers, Huntington Library, San Marino, California [hereinafter Huntington Lieber Papers]; Francis Lieber to Charles Sumner, 24 May 1863, Huntington Lieber Papers.

<sup>3</sup> Francis Lieber and G. Norman Lieber, *Martial Law Treatise* (unpublished manuscript), Guido Norman Lieber Collection, Judge Advocate General Papers, Record Group 153, National Archives and Records Administration; see generally Will Smiley and John Fabian Witt, eds., *To Save the Country: A Lost Manuscript of the Civil War* (New Haven, CT: Yale University Press, forthcoming 2019); John Fabian Witt, “A Lost Theory of American Emergency Constitutionalism,” *Law and History Review* 36, no. 3 (2018): 551 (2018).

legal systems, Schmitt insisted that the moment of exception revealed the illiberal truth about the supposed sanctity of the law. In the moment of crisis, the hypocrisy of liberal legal order falls away, exposing the brute inescapable power of the sovereign to remake the state.<sup>4</sup>

The two Liebers (father and son) did not shrink from awesome powers in emergency moments. The elder Lieber grew up in Prussia and celebrated the forcible overthrow of Napoleon as a great moment in world history. The younger man served as a judge advocate in the U.S. Army during the Civil War, trying Confederate bushwackers. Neither shrunk from the use of power. But where Schmitt insisted that emergency powers in the moment of crisis revealed the inevitability of dictatorial authority, the Liebers developed an equally iron-willed, but nonetheless deeply liberal, theory of constitutions in crisis. Emergency, they argued, does not and can not throw us back into a nasty and brutish state of nature. With a decade's experience in the very problem about which they were writing, the Liebers contended that a community's most basic values inevitably travel into the very depths of the crisis. In cultures of democratic reason, the Liebers insisted, institutions and cultures matter, even in extremis.

## I. Emergencies in the republic of slavery

The logic of the Lieber manuscript is rooted in the Civil War – but not only in the Civil War. Antebellum Americans participated in a now-long-forgotten controversy over martial law and slavery, one that set the context for the Civil War crisis that followed. In a real way, the story of the Lieber manuscript began in the spring of 1836, when an aging John Quincy Adams took to the floor of the House of Representatives to make a startling argument about Congress and slavery.

Adams's southern colleagues insisted that the federal government lacked the power to reach slavery in the states. Adams had catered to such ideas back when he needed southern votes, but then again, virtually everyone in American politics agreed that Congress lacked authority over slavery in the states. As James Oakes has recently observed, the consensus on this question was the lynchpin of the antebellum political order. But in 1836 Adams gave voice to a dissenting view, articulating an idea that charted a path to the Emancipation Proclamation, still a quarter century in the future. The Constitution, Adams conceded, might protect slavery from congressional interference in times of peace. But in wartime, he asserted, the Congress could interfere with slavery. Congress could even abolish slavery.<sup>5</sup>

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<sup>4</sup> Carl Schmitt, *Political Theology*, trans. George Schwab (Chicago: University of Chicago Press, 2005); Carl Schmitt, *Dictatorship*, trans. M. Hoelzl and G. Ward (Cambridge: Polity Press, 2014); see also Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Palo Alto, CA: Stanford University Press, 1998); Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005).

<sup>5</sup> John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Simon & Schuster, 2012); William W. Freehling, *Road to Disunion*, 2 vols. (Oxford: Oxford University Press, 1991-2008);

“From the instant that your slave-holding States become the theatre of war, civil, servile, or foreign,” Adams said, “from that instant the war powers of Congress extend to interference with the institution of slavery.” In a wartime emergency, Adams later explained, Congress would have “complete, unlimited control over the whole subject of slavery, even to the emancipation of all the slaves.”<sup>6</sup>

During the Gag Rule controversies of the 1840s over antislavery speech on the House floor, Adams repeated the idea again. If Congress could repeal slavery in the event of war, he reasoned, then Congress could hardly forbid debate on the subject. In the event of foreign invasion, for example, the laws of war authorized martial law; all the “laws and municipal institutions” would be “swept by the board,” and the martial law that took their place would authorize the federal government, if necessary, to emancipate slaves.<sup>7</sup>

Adams did not invent the idea from whole cloth. Americans had long worried about the special threat war posed in a slave society. In 1775, the reviled Lord Dunmore, the last royal Governor of Virginia, had issued a proclamation freeing slaves of rebellious Virginians. Ever since, planters and their families worried that an attack on the United States by a European power might take advantage of the presence of several million slaves in the American South.<sup>8</sup>

Unsurprisingly, southern slaveholders rejected Adams’s subversive views. In the process, they joined issue in one of the first great debates over emergency constitutionalism in American law.

Samuel Smith Nicholas, a lawyer and judge of Kentucky, issued the most extensive response to Adams. In an 1842 article written under the pseudonym “Kentuckian,” Nicholas took on the elder statesman Adams. “I have not the language to express the

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James Oakes, *The Scorpion’s Sting: Antislavery and the Coming of the Civil War* (New York: W. W. Norton, 2015); Leonard L. Richards, *The Life and Times of Congressman John Quincy Adams* (Oxford: Oxford University Press, 1988); Richard H. Sewell, *Ballots for Freedom: Antislavery Politics in the United States, 1837-1860* (New York: W. W. Norton, 1980); Worthington Chauncey Ford, *The Writings of John Adams* (New York: Macmillan, 1915), 5:125-26; Samuel Flagg Bemis, *A Diplomatic History of the United States*, 4th ed. (New York: Holt, Rinehart & Winston, 1955), 175n.

<sup>6</sup> Worthington Chauncey Ford and Charles Francis Adams, *John Quincy Adams, His Connection with the Monroe Doctrine (1823) by Worthington Chauncey Ford, and with Emancipation under Martial Law (1819-1842) by Charles Francis Adams* (Cambridge: John Wilson & Son, 1902), 73, 75-76; see also Cong. Globe, 24th Cong., 1st Sess., appendix at 433 (1836).

<sup>7</sup> Ford and Adams, *John Quincy Adams*, 77; “The Beginning of the End,” *Harper’s Weekly*, Sep. 14, 1861, at 578; William Lee Miller, *Arguing About Slavery: John Quincy Adams and the Great Battle in the United States Congress* (New York: Vintage, 1998).

<sup>8</sup> Proclamation, Nov. 7, 1775, By His Excellency the Right Honourable John Earl of Dunmore, Evans Early American Imprint no. 14592; Maya Jasanoff, *Liberty’s Exiles: American Loyalists in the Revolutionary World* (New York: Knopf, 2011), 47-49; Alan Taylor, *The Internal Enemy: Slavery and War in Virginia, 1772-1832* (W. W. Norton, 2013); Witt, *Lincoln’s Code*.

surprise, not to say horror,” Nicholas wrote, “with which I have witnessed the promulgation of these opinions.” Adams’s ideas, Nicholas insisted, were “sheer madness.” It was outrageous, Nicholas asserted, to suggest that “a foreign invader” could create a situation under which either the invader or the United States would be able to do what Congress in peacetime could not do. To think otherwise, Nicholas continued, would be to give a leader in wartime the power to “strike dead in the hands of its owners four hundred millions worth of property,” and to do so “by his mere proclamation.” In Nicholas’s view, the Constitution had created a republic organized around a set of core principles – principles that Adams, with his “zeal for his black fellow-citizens,” seemed to have forgotten. What Adams proposed, Nicholas objected, would entail nothing short of a complete transformation of the basic identity of the republic. Indeed, Nicholas worried that such a transformation might radically invert the basic structure of American social life. Adams’s ideas about martial law, he asserted, would “inevitably lead to the enslaving of his white fellow-citizens.”<sup>9</sup>

Taken to this extreme, Nicholas’s nightmare fantasies were far fetched. (White slavery in mid-nineteenth-century America?) But his argument carried a nugget of truth. Nicholas contended that to destroy slavery would be to destroy the United States – or at least to destroy the United States as it was then defined. A republic was not merely an aggregation of individuals. It was a creature of its own, constituted by a set of constitutional commitments, one of which was the constitutional protection of slavery. Nicholas knew that altering the constitutional commitment would not rescue the republic, even in extremis. Abolishing slavery, by its very nature, could not save the republic. To the contrary, abolishing slavery would destroy the republic, or at least transform it into something other than what it had been. The identity of the United States could not survive a martial law that destroyed slavery. Or so Nicholas contended.<sup>10</sup>

In making this argument, Nicholas drew on a long tradition of Anglo-American hostility to martial law. In 1713, Sir Matthew Hale’s *History of the Common Law of England* had described martial law as “not a law” at all, but rather “something indulged rather than allowed.” Hale denied that martial law applied outside the military; even more, he insisted that its authority “may not be permitted in time of peace, when the king’s courts are open.” William Blackstone, writing later in the century, contended that martial law was “entirely arbitrary,” and therefore utterly inapplicable at common law except inside the military during wartime.<sup>11</sup>

With such great eminences of the English legal tradition as Hale and Blackstone

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<sup>9</sup> *Martial Law by a Kentuckian* (Louisville: Louisville Journal, 1842), 6-7.

<sup>10</sup> Nicholas’s objection was a reprise of the fundamentally conservative tradition of Roman dictatorship – conservative in the sense that it aimed above all to restore the status quo ante. See John Ferejohn and Pasquale Pasquino, “The Law of the Exception: A Typology of Emergency Powers,” *I.CON* 2, no. 2 (2004): 210-39. For a contemporary echo of the resistance to a necessity power that would transform the nation at the expense of the constitution, see Saikrishna Prakash, “The Constitution as Suicide Pact,” *Notre Dame Law Review* 74, no. 4 (2004): 1302-09.

<sup>11</sup> Sir Matthew Hale, *History and Analysis of the Common Law of England* (London: J. Nutt, 1713), 40; William Blackstone, *Commentaries on the Laws of England*, ed. Wilfrid Prest, vol. 1, *Of the Rights of Persons*, ed. David Lemmings (New York: Oxford University Press, 2016), 265.

behind them, Nicholas and his fellow critics of emergency authority successfully initiated what would soon become an American tradition. For a half-century and more, slaveowning southerners and their heirs would insist that the core commitments of Anglo-American constitutionalism were deeply opposed to martial law and broad emergency authority. In the 1830s and 1840s their efforts would hold off abolitionist petitions in the Congress. In early 1850, as controversy over the admission of California and a new fugitive slave law raged in Congress, a Senator from Mississippi named Jefferson Davis condemned the notion that the President of the United States could “decree that slavery was abolished . . . by virtue of the powers which he held under martial law.” (“Does anybody believe it would be submitted to,” Davis asked?) In the Civil War itself, such arguments would underwrite opposition to the Lincoln administration’s Emancipation Proclamation. In the war’s aftermath it would help explain the Supreme Court’s decision to block the authority of military tribunals in *Ex Parte Milligan*. In the century thereafter, the arguments against federal military authority that had begun in the defense of slavery would show up in the Posse Comitatus Act of 1878 limiting federal military authority in the southern states; in a riot against black soldiers stationed in Texas during World War I; and in massive resistance to the 101st Airborne’s deployment to enforce desegregation of the schools in Little Rock, Arkansas in 1957. In episode after episode, the special regime of white supremacist authority of the American South sought shelter in a long tradition of Anglo-American liberty.<sup>12</sup>

## II. Emergencies and Civil War

If Nicholas and his British predecessors had identified an important truth about constitutions. They believed that martial law posed a threat to the basic character of a regime. And they were right. Changes or exceptions in the law for the purpose of weathering a crisis inevitably threaten to alter the identity of the republic those changes aim to protect. How could it be otherwise? Rational means are instrumentally suited to ends. But they alter those ends, too.

The effects of altered laws on the ends of the state are all the more significant in a republic self-consciously constituted around those very laws. The slavery controversy of the 1830s and 1840s taught Kentuckian that the very identity of the United States was at stake in the decision of what means were appropriate to rescue the country. If taken too

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<sup>12</sup> Miller, *Arguing About Slavery*; *Daily National Intelligencer*, February 19, 1850; “The Rightful Power of Congress to Confiscate and Emancipate,” *Monthly Law Reporter* 24 (1862): 27; Aziz Rana, “Freedom Struggles and the Limits of Constitutional Continuity,” *Maryland Law Review* 71, no 4 (2012); Steven G. Calabresi and Christopher S. Yoo, “The Unitary Executive During the Second Half-Century,” *Harvard Journal of Law and Public Policy* 26, no. 3 (2003): 720; Chad L. Williams, *Torchbearers of Democracy: African American Soldiers in the World War I Era* (Chapel Hill: University of North Carolina Press, 2010); Robert Haynes, “The Houston Mutiny and Riot of 1917,” *Southwestern Historical Quarterly* 76, no. 4 (1973); Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton: Princeton University Press, 2000), 115-51.

far, such means would undo the very thing that they had been intended to protect.<sup>13</sup>

In the twentieth century, the controversial point of reference for this same basic idea about emergencies and constitutionalism has been Carl Schmitt, the fierce German critic of liberal democratic constitutionalism. Schmitt famously distinguished between commissary dictatorship and sovereign dictatorship. The former deploys dictatorial power to preserve the state as it is. But the latter uses the sovereign power to redefine the state altogether. And this idea, that emergencies present a radically transformative moment, would have been entirely familiar to the Civil War generation. Americans had been explicitly arguing about it at least since Adams spoke out in the House of Representatives and Nicholas responded. Schmitt's "sovereign dictator" was the transformative leader of Adams's dreams -- and of Nicholas's nightmares.<sup>14</sup>

Francis Lieber's role in emergency thinking was to take up the ideas circulating in the antebellum debates and to turn them in a new and distinctive direction, one that would prove to be unstinting in its fierce defense of the state in moments of danger, and yet would also pursue a very different path than the one taken by Schmitt.

In his early years in the United States, Lieber adopted Southern critics' suspicion of martial law. Born in Berlin in 1798, Lieber came of age in a Prussia under the heel of Napoleon. He battled the dictator at Waterloo in 1815. (He was wounded in the neck and left for dead as the Prussians chased the French back to Paris.) After encountering political difficulties arising out of his liberal views in post-Napoleonic Prussia, Lieber made a pilgrimage to Greece to fight for Greek independence. Eventually he made his way to the United States, arriving in 1827.<sup>15</sup>

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<sup>13</sup> On the United States as a legally constructed community, see Akhil Reed Amar, "A Few Thoughts on Constitutionalism, Textualism, and Populism," *Fordham Law Review* 65, no. 4 (1997): 1658; Laurence H. Tribe, "America's Constitutional Narrative," 141 *Daedalus*, Winter 2012, 34; Aziz Rana, "Constitutionalism and the Foundations of the Security State," *California Law Review* 103, no. 2 (2015): 337; see also John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* (Cambridge, MA: Harvard University Press, 2007).

<sup>14</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. and ed. George Schwab (Chicago: University of Chicago Press, 1985); see also David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford: Clarendon Press, 1997); David Dyzenhaus, ed., *Law as Politics: Carl Schmitt's Critique of Liberalism* (Durham, NC: Duke University Press, 1998); Oona Hathaway and Scott Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon & Schuster, 2017); Paul W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2012); Jan-Werner Müller, *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven, CT: Yale University Press, 2003); Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (New York: Oxford University Press, 2007); Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2011); Sanford Levinson, "Preserving Constitutional Norms in Times of Permanent Emergencies," *Constellations* 13, no. 1 (2006): 59.

<sup>15</sup> Frank Freidel, *Francis Lieber: Nineteenth-Century Liberal* (Baton Rouge, LA: Louisiana University Press, 1947); Witt, *Lincoln's Code*; Charles R. Mack and Henry H. Lesesne, eds., *Francis Lieber and the Culture of the Mind* (Columbia, SC: University of South Carolina Press, 2005); David Bosco, "Moral

Before long, Lieber's first-rate German education, his wide learning, and his irrepressible demeanor helped make him a leading American public intellectual. He had the barely-controlled megalomania still characteristic of such figures two centuries later. Yet Lieber was unable to find a teaching position in the North, at least at first. Perhaps it was his Germanic habits that turned off the Harvard crowd. His self-aggrandizing personality probably did not help matters. For one reason or another, the only position he was able to find came at the College of South Carolina. In 1835 he and his family moved to the state's capital, Columbia.<sup>16</sup>

In the slave society of South Carolina, Lieber expressed sympathy with the Kentuckian position of Samuel Nicholas. Perhaps it was his long experience with centralized and repressive European states. Or perhaps it had something to do with the fact that Lieber became a slaveowner himself, owning a small number of domestic slaves. Whatever the reason, Lieber adopted the slaveholders' view of martial law. "Martial law," Lieber wrote in the successful *Encyclopaedia Americana* he edited in the 1830s, was made up of rules exclusively for soldiers. It was not an open-ended source of government authority, he wrote; instead it was another word for the systems of military law that governed within the command structure of the military.<sup>17</sup> Lieber's two-volume *On Civil Liberty and Self-Government*, published in 1853, also limited the authority of the executive in emergencies. The book asserted that only Congress could suspend the writ of habeas corpus. (It "need hardly be mentioned," he argued, that suspension "cannot be done by the president alone, but by Congress only.") Lieber described the apparatus of exceptional government – extraordinary courts and military commissions – as the work of dictators and tyrants. In a regime of liberty, he insisted, "every officer, however high or low," was "personally answerable" for the lawfulness of his conduct.<sup>18</sup>

Elements in Lieber's thought tilted away from the Kentuckian tradition. Lieber purported to dislike slavery, notwithstanding that he owned several. He respected John Quincy Adams, whom he had met briefly soon after his arrival in the United States, while Adams was still the president. More importantly, Lieber's Prussian upbringing had left a complex legacy. He despised Napoleon's dictatorial rule, to be sure. But he also thrilled to the ideas of his fellow Prussian, Carl von Clausewitz. Clausewitz's writings on war represented the thinking of many Prussians who had chafed under Napoleon's authority. Clausewitz central idea was that war was the application of pure military force, unconstrained by conventions or laws; such obstacles to force were mere ancillary considerations, insignificant in the scheme of things. And Lieber – who was one of very

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Principle vs. Military Necessity," *The American Scholar*, Winter 2008; Paul Finkelman, "Francis Lieber and the Modern Law of War," *University of Chicago Law Review* 80, no. 4 (2013): 2071-2132.

<sup>16</sup> Freidel, *Francis Lieber*; Witt, *Lincoln's Code*; Mack and Lesesne, *Francis Lieber*.

<sup>17</sup> Francis Lieber, "Martial Law," in *Encyclopaedia Americana* (Philadelphia: Carey & Lea, 1831), 8:308-09. Lieber cited Matthew Hale's argument that martial law was no part of the common law, but only "indulged by the law rather than constituting a part of it."

<sup>18</sup> Francis Lieber, *On Civil Liberty and Self-Government* (Philadelphia: Carey & Lea, 1853), 1:131.



few Americans to read Clausewitz in the original German -- agreed. Warfare and great battles represented the great triumphs of civilization.<sup>19</sup>

After nearly twenty years in South Carolina, Lieber took a new post at Columbia College and moved to New York City. With his move to the North, Lieber's attachment to the idea of limits on government authority waned. The Clausewitzian strands in his thinking became more pronounced.<sup>20</sup> Indeed, after war broke out in early 1861, he forged a remarkable connection between two different traditions of thought on state power in the modern world. In what is perhaps Francis Lieber's most original breakthrough as a political theorist, he began to connect Clausewitz's fierce teachings about war with John Quincy Adams's ideas about slavery.

The first opportunity for such a connection between Prussian and American ideas arose in the habeas corpus controversy that arose in April 1861 when Abraham Lincoln began to issue orders suspending the writ of habeas corpus without Congressional authorization. Opponents of the suspension orders bitterly resisted the orders, decrying them as an unconstitutional expansion of military authority. One such opponent, Chief Justice Roger Taney, famously ordered the president to recognize the writ – an order that Lincoln just as famously ignored.<sup>21</sup>

Lieber's earlier writings served as a rallying point for Taney's allies. Lieber had endorsed the proposition that only Congress could suspend the writ. But an embarrassed Lieber now changed his position.<sup>22</sup> Writing in the *New York Times* under the pen name "Observer," Lieber explained that the authority "to lay aside ordinary legal forms and ordinary legal guarantees of individual freedom, is simply the right of self-preservation." Where once he had criticized martial law as at odds with Anglo-American liberty, now he insisted that "martial law is a tremendous engine of government, essential to its

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<sup>19</sup> Witt, *Lincoln's Code*; Carl von Clausewitz, *On War*, trans. and ed. Michael Howard and Peter Paret (Princeton: Princeton University Press, 1989); Michael Howard, *Clausewitz: A Very Short Introduction* (New York: Oxford University Press, 2002).

<sup>20</sup> Freidel, *Francis Lieber*; Witt, *Lincoln's Code*.

<sup>21</sup> Amanda L. Tyler, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo* (New York: Oxford University Press, 2017), 159-66; see also Mark Neely, *Lincoln and the Triumph of the Nation: Constitutional Conflict in the American Civil War* (Chapel Hill, NC: University of North Carolina Press, 2011); Mark Neely, *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (Oxford: Oxford University Press, 1992); Randall, *Constitutional Problems*; Daniel A. Farber, *Lincoln's Constitution* (Chicago: University of Chicago Press, 2003); Michael Stokes Paulsen, "The *Merryman* Power and the Dilemma of Autonomous Executive Branch Interpretation," *Cardozo Law Review* 15, nos. 1-2 (1993): 81-111; Seth Barrett Tillman, "Ex Parte *Merryman*: Myth, History, and Scholarship," *Military Law Review* 224, no. 2 (2016): 481-540.

<sup>22</sup> "Dr. Lieber on the Writ of Habeas Corpus," *New York Times*, April 6, 1862, <https://www.nytimes.com/1862/04/06/news/dr-lieber-on-the-writ-of-habeas-corpus.html>.

existence.” Indeed, martial law seemed to Lieber be the only thing government could invoke against the “revolutionary faction” that had produced a “state of anarchy.”<sup>23</sup>

Lieber’s major contribution to the debate was to bring to public attention to the most elaborate defense of Lincoln’s unilateral suspension orders. Philadelphia lawyer Horace Binney, an old friend of Lieber’s from the 1830s, advanced a novel American theory of emergency constitutionalism. Binney conceded that, in the British tradition, only parliamentary action could authorize the Crown to suspend the writ. But the Philadelphian argued that this approach was badly flawed. The British model permitted arbitrary suspension of the writ for no good reason, and even for no reason at all; all that mattered under the British constitution was that Parliament decide to suspend the writ. At the same time, he continued, the British approach prohibited unilateral suspension by the Crown – even in the event that such action proved indispensable in a moment of crisis. The British approach to the great writ of habeas corpus was both overinclusive and underinclusive. It authorized unjustified suspensions and prohibited suspensions that were imperative to save the state.<sup>24</sup>

By contrast, Binney celebrated what he saw as the very different approach adopted by the United States Constitution. For the framers of the Constitution had grasped the errors of the British model of suspension. Article I, section 9 prohibited suspension of the writ except when the necessity of the circumstances so required: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Unlike the British constitution, the U.S. approach authorized suspension only when the necessities of the moment so required. But that was not all. The constraint on suspension in Article I section 9 was the Constitution’s only reference to habeas corpus, and that fact contained a further clue to the structure of the suspension power. A constraint on the suspension power necessarily implied a prior power to suspend. It followed for Binney that the U.S. Constitution – unlike its British forerunner – contained an unwritten authority to suspend, one that naturally fell on the president as the government’s chief executive officer, vested by the Constitution with the responsibility “to take Care that the Laws be faithfully executed.” “The Constitution is itself the authority,” Binney concluded, “and all that remains is to execute it in the conditioned case.”<sup>25</sup>

Binney offered a nested cluster of ideas in support of his habeas theory. His textual argument rested on the idea that constitutional limits implied prior unwritten powers. The Philadelphia lawyer called on the logic of constitutional democracy, too. As he saw it, the president was the proper location for the power to suspend because the president was uniquely accountable to the people. Congressional authorization of a

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<sup>23</sup> Observer, “The Rebellion and the Constitution,” *New York Times*, Nov. 30, 1861, <https://www.nytimes.com/1861/11/30/news/rebellion-constitution-free-constitution-not-incompatible-with-state-war-habeas.html?pagewanted=1>.

<sup>24</sup> Horace Binney, *The Privilege of the Writ of Habeas Corpus under the Constitution*, 2nd ed. (Philadelphia: C. Sherman & Son, 1862).

<sup>25</sup> Binney, *Privilege of the Writ*; see Akhil Reed Amar, *America’s Constitution: A Biography* (New York: Random House, 2005), 122; William Baude, “The Judgment Power,” *Georgetown Law Journal* 96, no. 6 (2008): 1854.

suspension of the writ would diffuse responsibility across the Congress's two chambers and the president, who would of course be required to enforce any congressional suspension. Authority over the writ, Binney wrote, "should obviously be with that department of the government which is the least able to abuse the power, and is the most easily and directly made amenable to responsibility and correction for abuse."<sup>26</sup> And as Binney and Lieber saw it, that department was undoubtedly the executive department, which would be subject to constraints by both the legislative and the judicial branches.

A third idea behind Binney's suspension power theory was particularly attractive to Lieber. For Lieber believed that no nation could alienate the authority to defend itself. The executive necessarily possessed a suspension power because no constitutional arrangement could strip the authority to protect a state from its empowered officers. A right to self-defense was simply in the nature of what it is to be a state, and if necessity so required, then the relevant power necessarily followed.

Of course, taken one extreme, this conception of state power seemed to contradict the entire liberal constitutional project. Constitutional regimes might seem to have little or no significance in moments of crisis. Lieber would be an advocate of the kinds of illimitable state authority later associated with Schmitt.

The fierce strand in Lieber's thinking emerged in the war's second year, as Lincoln began to act on John Quincy Adams's wartime emancipation ideas. Writing in the *New York Times* in April, Lieber asserted that "nations in utmost need are never saved by legal formulas." If the "fundamental law of a nation omits to provide for these exceptional cases," Lieber warned his readers, the people would inevitably seize the power to answer the crisis; "power will be arrogated," he concluded, "as people arrogate power in cases of shipwreck."<sup>27</sup>

Here was Binney's idea of an inalienable right of self-defense and necessity, one that no law could alienate. And in the United States, with its precarious balance of state and federal authority, the necessity power of the federal government inevitably implicated slavery in the states. The war thus touched off another round of the emancipation debates that Adams and his critics had first taken up two decades before. Senator Charles Sumner of Massachusetts exhumed Adams's emergency emancipation idea; at the very start of the conflict, he urged Lincoln to end slavery as a war measure.<sup>28</sup> On the other side, publishers reissued Nicholas's Kentuckian pamphlet. The Constitution, protested Lincoln's critics, "confers upon the [President] all the powers he

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<sup>26</sup> Interestingly, this is the opposite of the phenomenon described by Prakash in the early republic state constitutions that allocated emergency authority to legislatures in the first instance and to executives only derivatively. See Saikrishna Prakash, "The Sweeping Domestic War Powers of Congress," *Michigan Law Review* 113, no. 8 (2015): 1352-53. The view Binney held looks more like the presidentialist view articulated by Michael Paulsen. See Paulsen, "The Constitution of Necessity," 1257-97.

<sup>27</sup> "Dr. Lieber on the Writ of Habeas Corpus," *New York Times*, April 6, 1862; see also Richard Salomon, "The Unsuspected Francis Lieber" (master's thesis, City University of New York, 2018), 14-15.

<sup>28</sup> David Donald, *Charles Sumner and the Rights of Man* (New York: Knopf, 1970), 16-17, 54.

has.”<sup>29</sup> Emancipation would be the end of the republic – “a destruction of the Government, or such a revolution in its principles as that it does not remain the same.” Combined with “martial law, military arrests, trials, and executions,” emancipation seemed to promise an end to the antebellum American constitution altogether. One congressman from Kentucky recalled Nicholas’s fevered nightmare from two decades before. Freeing “four millions of the black race,” said Congressman George Yeaman, would “succeed in enslaving twenty millions of the white race.”<sup>30</sup>

Late in the summer of 1862, Lincoln moved decisively toward Emancipation. On September 22, after the bloody stalemate at Antietam, Lincoln announced the Emancipation Proclamation, promising to emancipate slaves in rebel states on January 1. The coming of Emancipation, in turn, prompted the Lincoln administration to revisit the laws of war and the martial law tradition. Lincoln’s general in chief, Henry Halleck, commissioned Lieber to draft a code restating the basic laws of armed conflict. The code Lieber produced took up and defended the Adams position on slavery in the laws of war. In particular, Lieber enthusiastically embraced the basic logic that lay beneath Adams’s 1830s speeches and that Lincoln had invoked in defense of Emancipation. “Military necessity, as understood by modern civilized nations,” Lieber wrote, “consists in the necessity of those measures which are indispensable for securing the ends of the war.” Necessity, he explained further, permitted “all direct destruction of life and limb of armed enemies, and of the persons whose destruction is incidentally unavoidable in the armed contests of the war.”<sup>31</sup>

Lieber’s awesome war power was nothing less than the power to rise to the occasion, whatever that might be. “To save the country,” Lieber wrote plainly, “is paramount to all other considerations.”<sup>32</sup>

Here, surely, was a dangerously illiberal juncture. Like Schmitt decades later, Lieber seemed to contemplate an emergency power that promised to break through all constraints.

But did it? One of the canonical episodes from the Civil War suggests otherwise. When Lincoln called a special session of Congress on July 4, 1861, he famously put to the assembled members his dilemma in deciding whether to suspend the writ of habeas

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<sup>29</sup> Cong. Globe, 37th Cong., 3d Sess. 1421 (1863) (statement of Rep. Johnson).

<sup>30</sup> Cong. Globe, 37th Cong., 3d Sess. 133 (1863) (statement of Rep. Yeaman).

<sup>31</sup> Witt, *Lincoln’s Code*, 220-49; Matthew J. Mancini, “Francis Lieber, Slavery, and the ‘Genesis’ of the Laws of War,” *Journal of Southern History* 77, no. 2 (2011): 325-48; James F. Childress, “Francis Lieber’s Interpretation of the Laws of War: General Orders No. 100 in the Context of His Life and Thought,” *American Journal of Jurisprudence* 21, no. 1 (1976): 34-70. The quotation comes from Article 15 of the Lieber Code, reprinted at Witt, *Lincoln’s Code*, appendix, 377. All citations to the Lieber Code are to the version reprinted as an appendix to Witt, *Lincoln’s Code*. The appendix version corrects errors that have crept into copies of the code over the years beginning with a private printing in 1863 and restores the official version published by the Union in the spring of 1863.

<sup>32</sup> Witt, *Lincoln’s Code*, app. 376 art. 5.

corpus. He did not believe, he made clear, that he had broken any law in suspending the writ. But what if he had crossed over the legal limits on his office? What if Binney's defense proved wrong and his suspension of the writ had indeed run afoul of the Constitution? What if Chief Justice Taney were right? "Are all the laws, but one," Lincoln asked, "to go unexecuted, and the government itself go to pieces, lest that one be violated"?"<sup>33</sup>

Observers today usually read the passage as a justification for overriding legal protections in emergency moments. Lincoln's formulation comes down to Americans as the quintessential wisdom of a practical Lincoln engaged in common-sense reasoning. Pragmatic leaders, goes the idea, test the means at issue by holding them up to the ends at stake and take steps when the ends justify the means. ("If the ends don't justify the means, I'd like to know what in the hell does," goes the quip of one quintessentially practical American official.)<sup>34</sup>

Yet properly understood, Lincoln's famous "all the laws but one" passage stands for more than the reductionist pragmatic idea of instrumental reason in the service of the state. When Lincoln asked about all the laws but one, he was also observing that the necessity power and the means-ends relationship between emergency measures and the identity of a state entails a deeper problem than the pragmatic conception allows. For the measures a state takes to rescue itself – the laws it bends or breaks to save itself – redefine the thing being saved. The problem is more acute for collectivities organized neither around some supposed racial or ethnic identity, nor around simple geographical borders, but around a constitutional and legal commitment to certain values. The problem, as Lincoln may have understood, is that a government constituted by law inevitably transforms its own identity when it sacrifices some of those laws to rescue others. The government that comes out the other side is different for having abandoned some of its tenets.

In short, a right to defend the state is not self-defining, because the means adopted to do so make and remake the basic identity and values of the state itself. Means and ends are recursive; they have feedback effects on one another. A result is that the necessity power is not self-defining. It entails value judgments and excruciatingly difficult choices.

Lincoln knew this when Lincoln asked the Congress in July 1861 whether the republic ought to be allowed to fail so that one of its laws might be saved. And the events of the subsequent four years would remind him of the same point time and again. He agonized over difficult judgments and acted with care and attention precisely because he understood that his conduct as president would reshape the nation for which he cared so deeply. No wall sealed off the ends of the republic from the means it adopted in its

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<sup>33</sup> "Message to Congress in Special Session, July 4, 1861," in *Collected Works of Abraham Lincoln*, ed. Roy Basler (New Brunswick, NJ: Rutgers University Press, 1953), 4:421, 430.

<sup>34</sup> Rehnquist, *All the Laws But One*; Neely, *Lincoln and the Triumph*; Farber, *Lincoln's Constitution*; Randall, *Constitutional Problems*; Philip Bobbitt, *Terror and Consent: The Wars of the Twenty-First Century* (New York: Anchor Books, 2009), 351.

defense. The means employed by a regime would help to construct the character of the regime itself. And the pervasive fact of feedback loops between means and ends also powerfully shaped Francis Lieber's distinctive approach to emergencies.

### III. Milligan, Finlason, and Lieber

Lieber sat down to develop a theory of emergency powers just as pitched battles gave way to the less salient violence of Reconstruction. From the start, a crucial question for the nation was how far into the post-war world the necessity power would reach. Two influential accounts of the question of necessity developed in 1860s Anglo-American constitutionalism.<sup>35</sup>

The first emerged out of Reconstruction itself and found its most prominent voice in the U.S. Supreme Court's decision in *Ex Parte Milligan*. Indiana resident Lambdin Milligan was a wartime leader of the "Sons of Liberty," a notorious pro-Confederate group operating in the Midwest. In 1864, the United States captured him and charged him in a military commission in Indiana with attempting to deliver guns to Confederate prisoners in prison camps near Chicago and along Lake Erie. Milligan had tried to do this while dressed as a civilian, wearing none of the formal insignia of a legitimate combatant. His conduct therefore constituted a law of war offense, which ordinarily would have sufficed to sustain the jurisdiction of a military commission. But the Union declined to press the law of war basis for the commission's authority. Instead, lawyers for the United States aimed to get a ruling that would permit the continued use of commissions to maintain order more generally in the Reconstruction South. In its *Milligan* decision, however, the Supreme Court imposed new sharp limitson the emergency authority that came with war. The Court ruled that the war power could "never be applied" in instances "where the courts are open and their process unobstructed."<sup>36</sup>

The Court was not alone. Leading figures soon joined the Court in reviving limits on martial law and necessity. President Andrew Johnson denounced military tribunals as "arbitrary" and "incompatible" with "the genius and spirit" of "free institutions." Johnson's attorney general, Henry Stanbery, condemned military tribunals and opined that necessity no longer supplied the grounds for their authority. In the Congress, where

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<sup>35</sup> Gregory P. Downs, *After Appomattox: Military Occupation and the Ends of War* (Cambridge, MA: Harvard University Press, 2015); Chandra Manning, *Troubled Refuge: Struggling for Freedom in the Civil War* (New York: Knopf, 2016); Gregory P. Downs and Kate Masur, "Echoes of War: Rethinking Post-Civil War Governance and Politics," in *The World the Civil War Made*, ed. Gregory P. Downs and Kate Masur (Chapel Hill, NC: University of North Carolina Press, 2015).

<sup>36</sup> *Ex Parte Milligan*, 71 U.S. 2 (1866); see Neely, *The Fate of Liberty*; Charles Fairman, *Reconstruction and Reunion, 1864-88*, 2 vols. (New York: Macmillan, 1971); Rehnquist, *All the Laws But One*.

Republicans controlled the agenda, floor debates moved away from the idea of a broad war power in conquered territories.<sup>37</sup>

In the century and a half since Reconstruction, civil libertarians have celebrated these post-war positions as marking the restoration of civil liberty after the war's end.<sup>38</sup> There is much to be said for this view. But few have paid much attention to the decision's terrible downsides. *Milligan* badly undermined the power of the federal government to deliver on the promises of Emancipation and the Thirteenth Amendment. In cutting back the jurisdiction of the military commissions, the Court was exhuming the legacy of Samuel Smith Nicholas, whose Kentuckian essay from 1842 pitted the South's regime of racial authority against the federal government's martial law power. If the ghost of John Calhoun haunted the Court's subsequent decision in the *Slaughterhouse Cases*, the specter of Nicholas loomed over *Milligan*.<sup>39</sup>

A second theory of necessity's reach emerged at more or less the same time the Court was deciding *Milligan*. But this one, which arose most clearly on the other side of the Atlantic, pressed in the opposite direction. For if *Milligan* restricted the necessity power that the Lincoln administration had developed during the war, jurists in the British empire aimed to expand it to terrifying lengths.<sup>40</sup>

A key figure in the British debates was the barrister William F. Finlason, a member of Middle Temple. Finlason argued few cases; instead, for nearly the entire

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<sup>37</sup> James D. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897* (Washington, DC: Government Printing Office, 1897), 6:312-14, 432; Henry Stanbery, "The Reconstruction Acts," in *Official Opinions of the Attorneys General of the United States* (Washington, DC: W. H. & O. H. Morrison, 1870) 12:182-206, esp. 199-200. See also Lisset Pino and John Fabian Witt, "The Fourteenth Amendment as an Ending" (paper, Conference on the Many Fourteenth Amendments, Miami, FL, February 2018); Cong. Globe, 40th Cong., 3rd Sess. 121 (1869) (statement of Sen. Doolittle) ("No plea of 'war necessity,' no 'logic of events,' nothing in the war on in the purpose of the war, can lead me to think for one moment that I am not bound by the Constitution as a Senator upon my oath and upon my conscience."); Cong. Globe, 40th Cong., 2nd Sess. 775 (1868) (statement of Sen. Johnson) ("[I]n the vocabulary of the Constitution there is no such word as 'necessity.'"); Cong. Globe, 40th Cong., 1st Sess. 3 (1867) (statement of Rep. Chanler) ("For a military commander, created under a past special necessity, to be allowed...to hold within his grasp the rights and destinies of the people whom he may be sent to rule over is inconsistent with the principles of the Declaration of Independence."); Cong. Globe, 39th Cong., 2nd Sess. 167 (1867) (statement of Rep. Wright) ("If the Congress of the United States can place military governors over ten States of this Union in the absence of any constitutional right to do so, why may they not place a military governor over every other State, until at last we shall be merged into an absolute monarchy or a military despotism?").

<sup>38</sup> Charles Warren, *The Supreme Court in United States History* (Boston: Little, Brown, 1922), vol. 3; Neely, *Fate of Liberty*; Randall, *Constitutional Problems*.

<sup>39</sup> The *Slaughterhouse Cases*, 83 U.S. 36, 94 (1873). For *The Slaughterhouse Cases* and Calhoun, see Charles Black, Jr., *A New Birth of Freedom: Human Rights, Named and Unnamed* (New Haven, CT: Yale University Press, 1997), 72; William E. Forbath, "Lincoln, the Declaration, and the 'Grisly, Undying Corpse of States' Rights": History, Memory, and Imagination in the Constitution of a Southern Liberal," *Georgetown Law Journal* 92, no. 4 (2004): 747.

<sup>40</sup> Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800-1850* (Cambridge, MA: Harvard University Press, 2016); Mark Condos, "Licence to Kill: The Murderous Outrages Act and the Rule of Law in Colonial India, 1867-1925," *Modern Asian Studies* 50, no. 2 (2016): 479-517.

second half of the nineteenth century, he wrote about the law as the chief legal reporter for *The Times of London*.<sup>41</sup> Most of all, he wrote about martial law. For in 1866, in the wake of an uprising in Jamaica at a place called Morant Bay, Finlason turned his attention to martial law in the British empire. It soon became his central preoccupation.<sup>42</sup>

Finlason's account of necessity power turned law into a ferocious regime of racial domination. Martial law, he wrote, was the equivalent of "a declaration of a state of war." It suspended the common law and substituted an "arbitrary military power." Not even necessity could constrain it, Finlason insisted. "For what is necessity," Finlason asked with a flourish, "and who is to judge of it?" What mattered, Finlason understood, was the end to which necessary measures were put. Necessary for with respect to what? Was necessity to be measured by "reference to the instant exigencies of the particular time or place"? Or was it instead to be determined by reference to "larger considerations" such as the strategic goals of the state? Finlason's answer was clear. The common law, he argued, had been built to keep the peace. It sufficed to address "actual outrage or insurrection." Martial law, by contrast, dealt not with events from the past; martial law was a system of "measures preventative or deterrent."<sup>43</sup>

Preventing uprisings around the British empire necessitated nothing less than a regime of terror – a word that quickly became a key term for Finlason. In Jamaica, for example, Governor Edward Jonathan Eyre's forces had turned to martial law because only forceful deterrence would permit Eyre's "inadequate force" to handle and suppress the much larger population of the island colony. Finlason contended that only martial law would allow the colonial regime to employ the kinds of "summary executions" that would "inspire a terror" into would-be rebels. Martial authority could instill in the "rebellious masses" a "terror inspired by the stern and summary severities of military law." Terror was martial law's "very essence." Indeed, in the long run, the terror of martial law was "merciful and humane." By deterring insurrection, martial law would prevent suffering.<sup>44</sup>

For Finlason, only the executive and the military could decide whether martial law was appropriate in the circumstances, and no other body or branch of government could hold the executive accountable. No court could possibly possess the information necessary to review such decisions, and so martial law had a presumption of legality.

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<sup>41</sup> Rande W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford: Oxford University Press, 2008); Gad Heuman, *The Killing Time: The Morant Bay Rebellion in Jamaica* (Knoxville, TN: University of Tennessee Press, 1994); John Fabian Witt, "Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Please Stand Up)," *Harvard Law Review* 120, no. 3 (2007): 787-91; Michael Lobban, "William Francis Finlason (1818-1895)," in *Oxford Dictionary of National Biography* (2004), <https://doi.org/10.1093/ref:odnb/9462>.

<sup>42</sup> William Francis Finlason, *A Treatise on Martial Law: As Allowed by the Law of England: In Time of Rebellion* (London: Stevens & Sons, 1866); William Francis Finlason, *Commentaries Upon Martial Law With Special Reference to Its Regulation and Restraint* (London: Stevens & Sons, 1867); William Francis Finlason, *A Review of the Authorities as to the Repression of Riot or Rebellion* (London: Stevens & Sons, 1868); William Francis Finlason, *The History of the Jamaican Case* (London: Chapman & Hall, 1869).

<sup>43</sup> Finlason, *A Treatise on Martial Law*, xi - xxxi; see also David Dyzenhaus, "The Puzzle of Martial Law," *University of Toronto Law Journal* 59, no. 1 (2009): 17-19.

<sup>44</sup> Finlason, *A Treatise on Martial Law*, xxxi; see also Heuman, *Killing Time*.



“Persons cannot be criminal,” he insisted, for making or following orders, so long as those orders were made “honestly, however erroneously” and “under martial law.”<sup>45</sup>

The Liebers offered a third way, between the *Milligan* case’s hard-and-fast limits on emergency authority and brutal martial law power of Finlason. Instead, the Liebers offered a tough and uncompromising but nonetheless liberal account of government power in the state of exception.

The elder Lieber began to write an expanded and annotated version of his famous code for the laws of war within weeks of its publication in 1863.<sup>46</sup> In the next two years, as active fighting gave way to military occupation of the South, the martial law sections of the code took on ever greater salience. But when he died in 1872, the manuscript lay unfinished. His son, Guido Norman Lieber, took up the project, apparently aiming to finish what his father had begun. In the end, however, he left the manuscript unfinished and disorganized, filed deep in his official Judge Advocate General papers and buried alongside material relating to the Spanish-American War in the Philippines. The manuscript, with the unassuming title “Martial Law Treatise,” has lain there unnoticed since the Judge Advocate General transferred its files to the National Archives and Records Administration in the middle of the twentieth century.<sup>47</sup>

The Lieber manuscript’s starting point is a distinction between military law and martial law. Military law was, as Wellington had said, “neither more nor less than the will of the general.” It was a kind of tyrannical power, conditioned by the imperatives of battle. Earlier writers such as Blackstone and Hale, as well as later military men like the Duke of Wellington, had assimilated the two forms of authority. Lieber himself, back in the 1830s, had repeated this idea in his *Encyclopaedia Americana* entry on martial law, where he described martial law as a body of law exclusively for soldiers.<sup>48</sup>

But as the Liebers’ saw it after the war, military law and martial law were importantly different. The former was the law for soldiers in peace and war alike. But Martial law, or “*martial law proper*,” as Chief Justice Chase called it in his concurring opinion in *Milligan*, took up the question of executive and military authority in crisis settings more generally. The key difference between the two regimes was simple. Military law was governed by nothing more than the will of the ruler; the imperatives of order and command in the military setting were such that the will of the command structure was the only possible source of authority. Martial law, by contrast, was subject

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<sup>45</sup> Finlason, *A Treatise on Martial Law*, xvi.

<sup>46</sup> See Francis Lieber to Henry Halleck, 2 June 1863, Huntington Lieber Papers; Francis Lieber to Charles Sumner, 24 May 1863, Huntington Lieber Papers.

<sup>47</sup> Francis Lieber and G. Norman Lieber, “Martial Law Treatise” (unpublished manuscript), Guido Norman Lieber Collection, Judge Advocate General Papers, Record Group 153, National Archives and Records Administration.

<sup>48</sup> Lieber and Lieber, “Martial Law Treatise,” in Smiley and Witt, *To Save the Country*.

to principled limits. In particular, martial law was governed by the same principle of necessity that had governed the suspension of habeas corpus in Binney's account. Martial law, the Liebers explained, was simply "the law of necessity applied at home."<sup>49</sup>

Necessity offered vast powers, to be sure. The elder Lieber had written that saving the country was "paramount to all other considerations." The duty of self-preservation, the Liebers said in their manuscript, was "a principle inherent in all politics." Like self-defense for individuals, necessity was a power intrinsic in what it was to be a modern state: "an attribute of sovereignty inherent in all polities." As the Liebers saw it, "the law of necessity can be limited neither by statute, nor by judicial decision." Even if the Constitution itself had aimed to prevent the exercise of the necessity power, such constraints would be ineffective. The necessity power "would nonetheless exist," they concluded, "for the law of necessity cannot be controlled."<sup>50</sup>

But what the Liebers meant by a limitless power of necessity was not, we shall soon see, a power without limits. We will return to this point shortly. For now, we can see the character of the Liebers' necessity power by focusing on the critique they offered of the *Milligan* decision in the Supreme Court.

The Court in *Milligan* purported to confine martial rule "to the locality of actual war," relying on Sir Matthew Hale's old doctrine of a per se bar on martial law whenever the "King's courts are open for all persons." The difficulty with this approach, the Liebers insisted, was that Hale had meant his open-courts rule to apply to military law -- the law applicable to the armed forces -- not to *martial* law. A state was free to commit itself not to apply its military law in certain contexts. That was a matter of pure discretion, to be decided as prudence and politics dictated. But the inherent emergency power of self-defense was altogether a different beast. As a logical or conceptual matter, it simply could not be "restrained within territorial limits." To try to do so would be a contradiction in terms. If "martial law proper is a law of necessity," the Liebers contended, "its jurisdiction must extend wherever the necessity exists." The fact that courts were open (or not) might serve as a useful proxy for the extent of the emergency. But that fact could not take the place of the underlying determination itself.<sup>51</sup>

The Liebers, in short, contended that nations came with an infeasible power and right of self-defense, one that could not be alienated or disowned. But it was not a limitless power. It did not authorize mere revenge or capricious actions. Finlason came close to suggesting as much. Schmitt imagined that the will of the sovereign is unbounded; indeed, this very unboundedness is the core of what it means to be a

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<sup>49</sup> Lieber and Lieber, "Martial Law Treatise," in Smiley and Witt, *To Save the Country*. Note that Lieber did not treat necessity and martial law as two different powers, the former extraconstitutional the latter not. For this latter approach, see Stephen I. Vlodeck, "The *Field* Theory: Martial Law, the Suspension Power, and the Insurrection Act," *Temple Law Review* 80, no. 2 (2007): 391-439.

<sup>50</sup> Witt, *Lincoln's Code*, app. 376 art. 5; Lieber and Lieber, "Martial Law Treatise," in Smiley and Witt, *To Save the Country*. See also Joel Prentiss Bishop, *Commentaries on the Criminal Law*, 3d ed. (Boston: Little, Brown, 1865), 1:506, s. 910. The Liebers observed that even the *Milligan* majority conceded as much.

<sup>51</sup> Lieber and Lieber, "Martial Law Treatise," in Smiley and Witt, *To Save the Country*.

sovereign in his account. The Liebers, by contrast, excluded only per se or a priori limits. Necessity was a license for action. But it was also and always its own constraint. It licensed only those courses of conduct that were necessary. Or, as the Liebers put it in their manuscript, the constraint on the necessity power arose out of the particular “necessity which is looked to for its justification.”<sup>52</sup>

Looked at this way, the Liebers were able to identify any number of historical instances of undue force not warranted by the necessity power. They listed the fatal flogging of a British soldier in colonial Senegal in 1782; the military tribunals after the end of a slave rebellion in Demerara on the coast of South America in 1823; and executions after the close unrest at Ceylon (now Sri Lanka) in 1848. The execution of a leader of the Jamaican political opposition at Morant Bay in 1865 offered another such instance.<sup>53</sup> In the United States, the Liebers held that necessity would not have warranted military tribunal prosecutions of Confederate leaders such as Jefferson Davis for treason. The Constitution purported to require federal courts for such charges. But even if necessity could have overridden such provisions, they observed, the civil court had been available to hear such charges. There had been no necessity. And that was the overriding question.<sup>54</sup>

Necessity, of course, is both a warrant and a constraint, a license and a limit. A critical question for any necessity rule is how its license dimension interacts with the limits it imposes. Do the latter give way to the former? Most of all, the necessity standard begs the question whether any measure can be definitively ruled out. *Milligan*'s error, as the Liebers saw it, was to imagine that the defense of the republic could be managed by hard and fast rules.<sup>55</sup> But if necessity's adaptability to circumstance meant that military commissions could not truly be ruled out a priori, could anything be prohibited in advance? Were there ways for a constitutional republic to tie itself to the mast and fore swear certain means of self-defense? Or did the inalienable right of self-preservation require a state to push past any such hard-and-fast limit?

Consider the problem of torture under a necessity standard. How can a necessity standard rule out torture, or at least rule it out altogether? Surely there must be occasions,

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<sup>52</sup> Lieber and Lieber, “Martial Law Treatise,” in Smiley and Witt, *To Save the Country*.

<sup>53</sup> Lieber and Lieber, “Martial Law Treatise,” in Smiley and Witt, *To Save the Country*; J. R. Maddicott, “Thomas of Lancaster, second earl of Lancaster, second earl of Leicester, and earl of Lincoln (c. 1278-1322),” in *Oxford Dictionary of National Biography* (2008), <https://doi.org/10.1093/ref:odnb/27195> (describing the “show” trial and execution of Thomas of Lancaster); *The Trial of Lieutenant-Colonel Joseph Wall, Late Governor of Goree, at The Old Bailey, On Wednesday, January 20, 1802; for the Wilful Murder of Benjamin Armstrong, A Serjeant of the African Corps, July 10, 1782* (London: Sabine & Son, [1802]); Joshua Bryant, *Account of an Insurrection of the Negro Slaves in the Colony of Demerara, Which Broke Out on the 18th of August, 1823* (Georgetown, Demerara: Printed by A. Stevenson at the Guinea Chronicle Office, 1824), 60-61; J. Forbes, *Recent Disturbances and Military Executions in Ceylon* (Edinburgh: William Blackwood and Sons, 1850), 18-22; William Nassau Molesworth, *The History of England from the Year 1830* (1873), 3:400-01.

<sup>54</sup> Witt, *Lincoln's Code*.

<sup>55</sup> Lieber and Lieber, “Martial Law Treatise,” in Smiley and Witt, *To Save the Country*.

even if only hypothetical for the moment, in which torture's use would be required to rescue a republic from destruction. That some philosophers have concluded as much should hardly be surprising,<sup>56</sup> for torture is not categorically different from other domains of necessity reasoning. The logic of necessity rules out per se or a priori prohibitions; no regime of necessity seems to be able to put torture (or anything else, for that matter) utterly and definitively beyond the pale.

Yet the 1863 code of the elder Lieber purported to bar torture in all circumstances while nonetheless adopting the philosophy of necessity. The Lieber Code banned "torture to extort confessions." It instructed that "the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information." Prisoners, the code explained, were "subject to no punishment for being a public enemy"; nor was "any revenge wreaked upon him by the intentional infliction of any suffering."<sup>57</sup> Most of the provisions in Lieber's 1863 code contained exceptions and caveats for when necessity so required. Armies could not execute prisoners of war – unless an army's "own salvation" so required in circumstances of "great straits." War was not to touch works of art, libraries, and cultural institutions – so long as the damage was "avoidable." Private property was inviolate – except when "military necessity" so required. And so on.<sup>58</sup>

But no such carve-out haunted the Lieber Code's provisions on torture. And Lieber's hard-and-fast Civil War-era rule persisted for decades. In the Philippines, nearly forty years later, violation of the torture rule in the 1863 code produced convictions in courts-martial. The punishments dealt out in those cases were trivial, but they established the principle. Here was a hard-and-fast proposition of law, one that would not bend even in the moment of emergency.<sup>59</sup>

The torture rule's rigidity contains a clue to the deep structure of the Liebers' theory of emergency powers – and to the critical difference that separated it from the contemporary thinking of Finlason, from the historical ideas of Clausewitz, and from the ideas still to come from legal theorists like Schmitt.

The problem with torture was that even where it might *seem* tactically warranted by some necessity calculus, its use in fact would alter the structure and values of the

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<sup>56</sup> See, for example, Jeff McMahan, "Torture, Morality, and Law," *Case Western Reserve Journal of International Law* 37, no. 2 (2006): 241-48. Some, but hardly all philosophers: see Charles Fried and Gregory Fried, *Because It Is Wrong: Torture, Privacy and Presidential Power in the Age of Terror* (New York: W. W. Norton, 2010); Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (New York: Oxford University Press, 2010).

<sup>57</sup> Witt, *Lincoln's Code*, app. 377 art. 16; 385 art. 80; 383 art. 56.

<sup>58</sup> Witt, *Lincoln's Code*, app. 383 art. 60 ("great straits"); 380 arts. 35, 36, 38 (art, libraries, and private property).

<sup>59</sup> Witt, *Lincoln's Code*, 327-65; Paul A. Kramer, *The Blood of Government: Race, Empire, the United States, and the Philippines* (Chapel Hill, NC: University of North Carolina Press, 2006); Paul Kramer, "The Water Cure," *The New Yorker*, Feb. 25, 2008, <https://www.newyorker.com/magazine/2008/02/25/the-water-cure>; Trials or Court-Martial in the Philippine Islands in Consequence of Certain Instructions, S. Doc. No. 57-213, at 26 (2d Sess. 1903).

American republic. Emergency tactics, as Ferejohn and Pasquino put it, threaten to “spill over into the operation of the ordinary legal system.”<sup>60</sup>

A favorite example of the elder Lieber’s involving Indian tribes illustrated the point. Lieber told his students that Native Americans in wartime slowly roasted their prisoners alive. Now as it happens, Lieber badly misunderstood the ritual and functional value of Indian prisoner of war practices. But regardless, Lieber insisted that a civilized state could not retaliate in kind when at war with Indians. The reason was that a republic like the United States could not simultaneously retain its basic identity and values, on the one hand, and engage in torture, on the other. For a republic to practice torture would alter its identity. Such a republic became something other than the republic it had been at the beginning of the conflict -- something more like the Indian tribes against which it fought and against which it defined itself. A state that fought like “savages” became savage itself.<sup>61</sup>

Of course, Lieber’s reasoning was full of the usual hypocrisy that attended to most Anglo-American thinking about combat with Native Americans. But accepting that as true, the important point is that the Liebers believed that to resort to torture was irreversibly to alter the identity of the torturer.<sup>62</sup>

At this juncture in the argument, a difficult truth arises. The post-war civil libertarians, like the antebellum critics of martial law before them, understood the risk of a necessity standard as a mode of self-preservation. Former Attorney General Jeremiah S. Black grasped the point in arguing the *Milligan* case before the Supreme Court. “A violation of law on pretense of saving a government such as ours,” he asserted, “is not self-preservation, but suicide.”<sup>63</sup> Justice David Davis’s opinion in the *Milligan* case affirmed the same risk. If martial law justified military commissions when the courts were open, Davis contended, then “a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation.”<sup>64</sup>

It is a noteworthy feature of American history that from the 1830s onward, the nineteenth century’s great critiques of martial law and necessity advanced their arguments on behalf of slavery and against the interests of the freedpeople in Reconstruction. There is an important point in this for the history of emergency powers in the United States. Those powers have been a source of great danger to civil liberties, to be sure. They have underwritten some of our least attractive moments. Just think of Japanese internment during World War Two, or the red scare panic in the aftermath of World War One. But emergency powers and the necessity principle have also sustained some of the United States’s best moments, too. As John Quincy Adams grasped in the 1830s, emergency powers and the necessity principle would be the source for the

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<sup>60</sup> Ferejohn and Pasquino, “Law of the Exception,” 235.

<sup>61</sup> Witt, *Lincoln’s Code*, 184, 236.

<sup>62</sup> Francis Lieber, *Law and Usages of War*, No. IV, 17 December 1861 [Notebook No. 4], box 2, Francis Lieber Papers, Johns Hopkins University; compare Ferejohn and Pasquino, “Law of the Exception,” 223.

<sup>63</sup> *Ex Parte Milligan*, 71 U.S. 2, 81 (1866).

<sup>64</sup> *Ibid.*, 126.

Emancipation Proclamation. They would sustain federal power in Reconstruction. And their slow diminution in the 1870s helped undo the new liberty of the free people.<sup>65</sup>

Regardless the context, however, Buchanan and Davis left unmentioned that in a true crisis, the risk to the values and identity of the republic is on both sides. That's what a crisis is. For if necessity truly seems to demand recourse to some terrible tactic, it follows that *not* engaging in that conduct will also have grave consequences. Not acting in such circumstances inevitably reshapes a republic, too. Feedback loops and recursive redefinitions of the community will take place, whether or not the community takes action inconsistent with its initial values in order to preserve itself. That is precisely why the crisis is a crisis. But this is not so much a critique of the Lieber perspective as it is a deeper understanding of it. For the moment of crisis demands complex judgments that weigh competing and incommensurable values against one another. Lincoln's crisis moment of all-the-laws-but-one yields no clear answer in the abstract, only hard all-things-considered answers in particular contexts. So too with the Liebers' manuscript.

The most remarkable piece of the lost Lieber manuscript is the solution it offers for the dilemma of the republic in the moment of crisis, best on all sides by risks to its fundamental commitments and principles. The Liebers understood full well that moments of necessity were junctures of radical instability. To decide on the steps to be taken in a moment of crisis is to redefine the identity and values of the community, since there is no acoustic separation walling off the identity of the regime from the tactics adopted to protect it. A republic's laws, institutions, and practices, constitute its identity. The Liebers were in a position to see as much thanks to debates over slavery and martial law from the 1830s and 1840s onward.

It was at this point that the Liebers made the most analytically interesting move in the manuscript. Their account offered an idea about necessity that did not appear in the 1863 code, but that supplied an account of why permitting torture would differ from other alterations of the laws in moments of crisis.

As the Liebers put it, the way to determine whether an act was permitted under martial law's necessity standard was to ask not whether an act of the state official in question was necessary, nor whether it was required as judged by the common sense of a reasonable citizen. No, the critical feature of the law of necessity was that "reason and common sense must approve the particular act" in question. The acts of officials in moments of crisis, the Liebers wrote, "should be adjudged to be necessary in the judgment of a moderate and reasonable man."<sup>66</sup>

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<sup>65</sup> Witt, *Lincoln's Code*; Downs, *After Appomattox*; Manning, *Troubled Refuge*; Downs and Masur, "Echoes of War."

<sup>66</sup> Lieber and Lieber, "Martial Law Treatise," in Smiley and Witt, *To Save the Country*.

Here was a vitally important addition to the analysis: the “*moderate and reasonable man*.” In 1863, when the elder Lieber drafted his fierce code, he left the standard of necessity underspecified. The Lieber Code offered precious few resources for evaluating whether necessity warranted a proposed course of action, or whether instead the proposed course of action would itself undermine the republic. How was one to tell whether some course of conduct was self-preservation or suicide? The great difficulty was that the necessity standard alone does not supply a definition of the ends to which means may be put. And so long as there are no limits on the ends to which means may be applied – so long as the identity of the state may be radically remade in the process of the evaluating the means necessary to rescue it – then there will be no limit on the means that will prove necessary.

The torture example made clear that the Liebers rejected the illimitable power approach to necessity – and the standard of a reasonable and moderate man explained how. The Liebers identified limits on the means that necessity might warrant because (and only because) they believed the republic to be constituted around an identifiable set of values – values that together formed a standard of temperate reasonableness. For Schmitt, the sovereign dictator exercised a kind of radical freedom in the moment of exception precisely because that moment offered an opportunity to reinvent the ends of the state. But for the Liebers, the ends of the republic were limited; they were constrained by the the public values of the regime, embodied in the perspective of the moderate and reasonable citizen.

The Lieber’s reasonable citizen was not merely a self-interested rational actor. The Liebers filled in the reasonable man with substantive values such as an opposition to torture and a commitment to moderation. Doing this gave determinacy to the necessity inquiry; it offered the resources for distinguishing self-preservation from suicide and thereby allowed a republic to rule out certain courses of conduct.

By the same token, she was no sovereign dictator; she did not choose in an act of pure will from outside the institutions, practices, and norms of the social formations in which she was embedded. (If she did, there would be no grounds for excluding torture a priori.) Nor was she merely a biological creature programmed for survival alone. (Once again, the torture bar would make no sense if she were.) No, the Liebers’ citizen was a different kind of subject altogether, one shaped and molded by the values of the community – what legal theorist David Dyzenhaus recently has called the “political culture” that exerts itself even in moments of emergency. The Liebers posited that even the moment of crisis is saturated by a system of norms and principles. The Liebers, father and son, articulated a view like that of political philosopher Nomi Lazar, when she argues that “normal ethics do not cease to function” during moments of emergency. The Liebers shared Lazar’s basic view that the basic logic of the republic travels into the moment of crisis and exerts influence over events. And as they saw it, the carrier of that logic was the reasonable citizen, whose basic values draw from the constitutive

commitments of the republic – commitments whose basic character define the scope of what is reasonably necessary under even the most difficult of circumstances.<sup>67</sup>

Put this way, the Lieber manuscript reached both backward and forward. Looking back, the Lieber text tweaked the seventeenth-century prerogative power idea associated with John Locke. Locke asserted that the prerogative was restricted to the advancement of “publick good and advantage”; Locke’s executive power authorized the executive to act without or against the law so long as those actions promoted “the preservation of all.” In the Liebers’ theory, by contrast, the reasonable citizen principle connected the necessity standard not to the preservation of the citizen’s life, but to the preservation of the collective values and constitutive commitments of the republic.<sup>68</sup>

At the same time, the manuscript anticipates a central thread in the twenty-first-century emergency literature. It rebuts the bitter nihilism of Finlason’s state of terror and anticipates the critique of Schmitt’s state of exception offered by scholars like Dyzenhaus, Lazar, Benjamin Straumann, and others.<sup>69</sup> And it foreshadows the contention of British legal theorist Thomas Poole, echoing the American lawyer Philip Bobbitt, that the logic of *raison d’etat* is inescapably contingent on the particular kind of regime in which the claim of necessity arises.

## Conclusion: Between Self-Preservation and Suicide

Would arguments about emergency constitutionalism look different today if the Liebers’ manuscript had not been lost? What if a generation and more of American experience with emergency constitutionalism had been remembered through Lieber alongside Lincoln, rather than in the strains of Samuel Nicholas’s Kentuckian essay, refracted through Justice Davis’s opinion in *Milligan*?

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<sup>67</sup> David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006), 212; Nomi Lazar, *States of Emergency in Liberal Democracies* (New York: Cambridge University Press, 2013). A lawyer’s version of Lazar’s thesis emerges in Trevor Morrison, “Suspension and the Extra Judicial Constitution,” *Columbia Law Review* 107, no. 7 (2007): 1533-1616. On the ways in which the standard of reason invokes the values of the relevant community, see Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge, MA: Harvard University Press, 1995); Robert C. Post, “The Social Foundations of Privacy: Community and Self in the Common Law Tort,” *77 Cal. L. Rev.* 957 (1989); Robert C. Post, “Federalism, Positive Law, and the Emergence of the Administrative State,” *William and Mary Law Review* 48, no. 1 (2006): 1-183.

<sup>68</sup> John Locke, “The Second Treatise of Government,” in *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960), 375, ¶ 159.

<sup>69</sup> Benjamin Straumann, *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution* (Oxford: Oxford University Press, 2016), 42-43; David Dyzenhaus, “The Safety of the People is the Supreme Law,” *The New Rambler*, Oct. 25, 2016.



Many an informed observer has been tempted to say that the lasting contribution of American debates on the problem of emergency constitutionalism is Justice Robert Jackson's ringing dictum from the era of the Second World War. The Constitution, Jackson wrote in his *Terminiello v. City of Chicago* dissent in 1949, "is not a suicide pact." Assistant Secretary of War John J. McCloy said much the same thing a few years earlier about the internment of Japanese-Americans along the West Coast. "If it is a question of the safety of the country [and] the Constitution," he wrote, "why the Constitution is just a scrap of paper to me."<sup>70</sup>

Jackson's suicide pact and McCloy's scrap of paper have been the American short form for the ideas of Continental theorists led by Schmitt. On this view, leaders will set the law aside to reveal naked power in the moment of emergency. Recent commentators such as Eric Posner and Adrian Vermeule argue that we ought not expect anything different.<sup>71</sup> But the nineteenth-century tradition embodied in the Lieber manuscript offered a further insight. The suicide pact conception of the emergency asks us to imagine some unconstructed collectivity conceptually prior to the Constitution such that setting norms aside for the purpose of saving the collectivity might be coherent thing to do. It contemplates a collectivity that has some brute existence outside of shared language, values, institutions, and commitments. Such a collectivity might – in principle – be able to step outside its practices, since those practices would by hypothesis be contingent rather than constitutive.

What the Lieber manuscript grasps, and what an increasingly powerful strand of the emergency literature contends, is that this way of thinking about the problem of emergency has the problem backward. Our imagined communities are constituted by law, and this makes the project of saving the country (as the elder Lieber put it in 1863) radically more complex. Saving the country may indeed be paramount. But deciding what it means to save the country – deciding which courses of conduct effectively destroy it in the name of saving it – entails an excruciating exercise of judgment about the character of the country. The Liebers' insight is to see that the practices of the country itself already supply the ingredients of that difficult judgment. Decision in the moment of emergency is an act of judgment from within the regime, not from without. How could it be otherwise?

Commentators have long associated Lincoln's alternative dictum – "all the laws but one" – with the suicide pact concept.<sup>72</sup> But Lincoln came closer than either Jackson and McCloy, on the one hand, or Schmitt, on the other, to capturing the distinctive dilemma of emergencies in a republic of laws. Lincoln's formulation asks us to figure out what it would mean to save a *constitutional* community. The Liebers saw that this special problem in the theory of emergencies highlighted the prescriptive limits a constitutional order must establish to preserve itself, even in the midst of the exception.

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<sup>70</sup> *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) (Jackson, J., dissenting); Roger Daniels, *The Japanese American Cases: The Rule of Law in Time of War* (Lawrence, KS: University Press Kansas, 2013), 9; Greg Robinson, *By Order of the President* (Cambridge, MA: Harvard University Press, 2003).

<sup>71</sup> Posner and Vermeule, *Terror in the Balance*.

<sup>72</sup> See, for example, Rehnquist, *All the Laws but One*.

They saw, too, that as a descriptive matter, the constitutional values of the regime could not help but condition and shape the course of the emergency.

The persistence of values and traditions, of course, does not mean there will be easy answers when emergency looms. But to derive answers one needs to have the questions right. Before the twentieth century took hold, in an era when the constructedness of American national identity was still clear, the two Liebers developed a theory of the republic in existential crisis – a theory that, like its flawed but endearing authors, was fiercely uncompromising and deeply humane.