Paradoxes of Constitutional Faith: Federalism, Emancipation, and the Original Thirteenth Amendment

Norman W. Spaulding*

Abstract

This essay explores the paradoxical circumstances of emancipation and constitutional reform during the Civil War and Reconstruction in light of Lincoln’s role in sponsoring and endorsing an unamendable constitutional amendment in 1861 to avert the war. That amendment, the original thirteenth amendment, would have protected slavery where it then existed. Historians, the Supreme Court, and constitutional theorists have generally resisted interpreting the original thirteenth amendment in order to avoid the constitutional paradoxes it raises, paradoxes both for those who consider the period a “refounding” and for those who seek to render the dramatic legal, social and political upheavals of the period continuous with the Constitution of 1787. This essay places the proposed amendment at the center of structural constitutional analysis and asks what kind of constitutional republic Lincoln can be said to have “saved” through the war and emancipation, and if the Constitution was not in fact saved with the Union, how one might theorize a refounding grounded in democratic paradox rather than heroism and hagiography.

If occasionally there is any response at all these days with regard to the paradox, it is likely to be: One judges it by the result. . . . [W]e are curious about the result . . . . We do not want to know anything about the anxiety, the distress, the paradox. We carry on an esthetic flirtation with the result.¹

During the secession crisis in early 1861 a one-sentence constitutional amendment passed both houses of Congress and was on the way to ratification in the states when the attack on Fort Sumter turned the nation to civil war. The sentence read:

No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or services by the laws of said State.²

* Sweitzer Professor of Law, Stanford Law School. The essay that follows is a meditation on Sanford Levinson’s observations that Lincoln was “incompletely ‘attached’ to the . . . Constitution of 1787” and that so “[f]ew of us seem happy to join in honoring him if he in fact behaved ‘unconstitutionally.’” Sanford Levinson, Constitutional Faith 140-41 (1988). I am grateful to many readers—Ticien Sassoubre, Ian Haney Lopez, the amazing JurisDictions law and humanities reading group, and especially to Markus Dubber and Simon Stern—and beg their forgiveness for the respects in which the essay remains unequal to their wonderful comments.

¹ Fear and Trembling 62-63 (Howard V. Hong & Edna H. Hong eds. & trans., 1983) (1843).
This is the original thirteenth amendment. President Lincoln explicitly endorsed it in his First Inaugural just weeks before the war began. “[H]olding [the proposed amendment] to now be implied constitutional law,” he said, “I have no objection to its being made express, and irrevocable.” If this seems a tepid, legalistic endorsement, it is worth remembering that Lincoln began the speech by quoting his repeated assurances on the campaign trail that there is no federal constitutional power to interfere with slavery in the southern states:

Apprehension seems to exist among the people of the Southern States that by the accession of a Republican Administration their property and their peace and personal security are to be endangered. There has never been any reasonable cause for such apprehension. Indeed, the most ample evidence to the contrary has all the while existed and been open to their inspection. It is found in nearly all the public speeches of him who now addresses you. I do but quote one of these speeches when I declare that . . . . I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.

He went on to quote at length a “clear and emphatic” resolution to the same effect included in the platform adopted by the Republican Party at its 1860 nominating convention.

The security of slavery where it then existed, more precisely the disability of the federal government to interfere with it, was taken for granted not only by Lincoln, but by almost all northerners. Even radical abolitionists who sought the immediate abolition of slavery were critical of the Constitution precisely because it disabled the federal government from interfering with slavery in the states. More than that, as their opposition to the Fugitive Slave Act of 1850 made painfully clear, the Constitution rendered the federal government complicit in the practice. It was, as William Lloyd Garrison famously charged, “a covenant with DEATH and with HELL.”

Strangely, histories of the Civil War and biographies of Lincoln have little if anything to say about the original thirteenth amendment, Lincoln’s public endorsement of it, or the prevailing regime of constitutional thought his endorsement expressed. When the proposed amendment is not ignored altogether it is treated superficially.

This incurious attitude is particularly evident in the burgeoning genre of Lincoln hagiography. His endorsement of an amendment barring any future amendment interfering with slavery is, to say the least, difficult to square with the myth of “the Great Emancipator,” the morally upright rail splitter destined to “free the slaves.” The more one examines the original thirteenth amendment, the harder it is to square the Lincoln of 1861 with the mythology that surrounds his conduct of the war. As Daniel Crofts’s detailed new book on the original thirteenth amendment makes clear for the first time, however, Lincoln not only endorsed the constitutional amendment, he was very likely responsible for its genesis and was an active proponent of its adoption by Congress on the eve of his

4 Id. at 215.
5 William Lloyd Garrison, 12 The Liberator 71, May 6, 1842.
inauguration. So while the amendment has commonly been referred to by the name of its House sponsor, Representative Thomas Corwin of Ohio, we now know that it was President Lincoln’s in every material sense. To avoid the war that ended slavery the great emancipator would have permanently disabled the federal government from interfering with slavery.

Crofts contends that even among historians who are not committed to the myth of the great emancipator, neglect of the original thirteenth amendment remains pervasive. This is true not only of political, military, and social histories of the war, but of important recent work focusing on the role of African Americans in resisting slavery and helping to bring about emancipation. And neglect passes into dismissiveness in legal treatments of

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6 Daniel W. Crofts, Lincoln and the Politics of Slavery: The Other Thirteenth Amendment and the Struggle to Save the Union 212, 231-32 (2016).

7 For a concise summary of the literature, see Crofts’s detailed “Bibliographical Postscript.” Id. at 271 (“The other thirteenth amendment lurks hidden in the shadows of Civil War-era historiography.”). I have written about this and other “dissociative impulses” in histories of the relationship between slavery and secession. See Norman W. Spaulding, Remembering Our Second Revolution: Sesquicentennial Reflections on Civil War Historiography, in Union and States’ Rights: A History and Interpretation of Interposition, Nullification, and Secession 150 Years After Sumter 260 (Neil H. Cogan ed., 2014).

8 This new literature on emancipation makes two important contributions: first, it broadens our understanding of the forces responsible for emancipation beyond the White House to Congress, the Republican Party, abolitionists, and above all, enslaved people; second, it reveals the breadth of agency exercised by African Americans in resisting conditions of social, legal, and political subordination. But emphasizing the agency of other actors in emancipation quite often entails assuming that the war would come, occasionally even assuming that emancipation was inevitable once the war came. The original thirteenth amendment is as inconvenient a fact in these histories as it is in hagiographies of Lincoln.

Like other histories of the period, these new histories either treat the proposed amendment cursorily or disregard it. See, e.g., David Williams, I Freed Myself: African American Self-Emancipation During the Civil War Era 3, 6 (2014) (“Desperate to appease slaveholders, Lincoln even supported a thirteenth amendment . . . which would have guaranteed slavery forever . . . . Nevertheless, enslaved men and women escaped to Union lines by the tens of thousands and could not or would not be forced back into slavery.”); “Every refugee who entered federal camps, by the act of escape and refusal to be enslaved, issued a personal statement that slavery was over. Arriving in such numbers that they could hardly be ignored, the government had little choice but to recognize their claim to freedom.”); James Oakes, Reluctant to Emancipate? Another Look at the First Confiscation Act, 3 J. Civil War Era 458, 464-65 (2013) (arguing in an otherwise brilliant reassessment of the First Confiscation Act that Republicans “were never reluctant to attack slavery as a means of suppressing the rebellion . . . [and] had never been reluctant emancipators,” without discussing the original thirteenth amendment or Republican support for it); see also Williams, supra, at 60.

The effort to recognize African American agency is of paramount historiographic importance given that it has so long been denied or diminished. So too is the effort to reframe our understanding of the role of Radical Republicans. James McPherson’s infamous critique of social historians for launching these revisionist projects was quite irresponsible. See Ira Berlin, Who Freed the Slaves: Emancipation and Its Meaning, in Union and Emancipation: Essays on Politics and Race in the Civil War Era 105, 105-09, 116 (David W. Blight & Brooks D. Simpson eds., 1997) (citing McPherson’s critique and summarizing the historiographic debate).

On the other hand, framing agency and periodizing analysis on terms that suppress the contingencies surrounding the war and emancipation are themselves forms of “aesthetic flirtation with the result.” The insights of social and political history do not, in my view, reduce to either/or propositions—the agency of ordinary people can be affirmed while also recognizing the distinctive role of a commander-in-chief in time of war and the profound contingencies of the period. Cf. Oakes, supra, at 464-65 (arguing that neither “self-emancipation” nor “military emancipation” was “enough to destroy slavery”). Moreover, arguments over agency and causation, valuable as they are, are a disservice to the mission of history if they distract us from the complexities of the choices ordinary people and political leaders faced. See id. at 114-20.
the Civil War and Reconstruction. Over the course of a single paragraph, for example, Harold Hyman and William Wiecek’s seminal book on American constitutional history brushes aside the proposed amendment as a “bona fide” but “misguided effort to reassure slaveholders of the Republicans’ fundamental constitutional and social conservatism” that was quickly “overtaken by events.”

Supreme Court opinions on the Thirteenth Amendment ratified in 1865 may be searched in vain for reference to the original thirteenth amendment of 1861; so too structural constitutional cases purporting to interpret “Our Federalism.” And in the vast legal scholarship plumbing the possible meanings of the Reconstruction Amendments, the original thirteenth amendment remains an obscurity. What matters, it would seem, is what came after. We take for granted that the Constitution of 1789 must be interpreted in light of the Articles of Confederation, and the Bill of Rights in light of the ratification controversy over the Constitution, but no one dares to suggest that the Reconstruction Amendments, let alone the Constitution as a whole, must be interpreted in light of the original thirteenth amendment.

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9 Harold M. Hyman & William M. Wiecek, Equal Justice Under Law: Constitutional Development, 1835-1875, at 233 (1982); cf. Harold Hyman, A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution 46-47 (1975) (framing the proposed amendment as Seward’s and suggesting that Lincoln’s endorsement was grudging); id. at 41 (describing the concept of an unamendable amendment as a “measure of how low secession had brought the constitutional ethics of many Americans, and of how frightened the country was”). A recent, sustained legal treatment of the proposed amendment concentrates, as Crofts does, on the history of its passage in Congress, and dismisses it as unconstitutional on the ground that Article V, by its terms, provides that only two issues shall be immune from future amendment. A. Christopher Bryant, Stopping Time: The Pro-Slavery and “Irrevocable” Thirteenth Amendment, 26 Harv. J.L. Pub. Pol’y 501, 537-40 (2003); but see Mark E. Brandon, The “Original” Thirteenth Amendment and the Limits to Formal Constitutional Change, in Responding to Imperfection: The Theory and Practice of Constitutional Amendment 215, 231 (Sanford Levinson ed., 1995) (examining as a matter of political and constitutional theory whether the original thirteenth amendment, if ratified, should have been considered constitutional; noting that although it is inconsistent with some theories of constitutional legitimacy, the proposed amendment “does not seem to have rendered the Constitution incoherent, at least not in 1861”); Gary J. Jacobsohn, Constitutional Identity 36 (2010) (citing the original thirteenth amendment in a comparative assessment of constitutional crises). In other treatments, even those concentrating on the Constitution and emancipation, discussion of the original thirteenth amendment is entirely absent. See Herman Belz, Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era (1978).

10 See infra Section V.

11 A growing literature insists that the Civil War and Reconstruction Amendments constitute a refounding. However, this literature emphasizes the revolutionary social, economic, and military consequences of the period. See Richard Slotkin, The Long Road to Antietam: How the Civil War Became a Revolution (2012); Eric Foner, Reconstruction: America’s Unfinished Revolution, 1863-1877 (2011) [hereinafter Foner, Reconstruction]; Eric Foner, The Fiery Trial: Abraham Lincoln and American Slavery (2011) (dismissing the original thirteenth amendment as “hardly sufficient to settle the secession crisis”); James McPherson, Abraham Lincoln and the Second American Revolution (1990); Spaulding, supra note 7, at 272-76. The finest legal treatment of the paradoxes posed by the Reconstruction Amendments, a subject I take up in Section III, infra, is Bruce Ackerman’s provocative book We the People: Transformations. 2 We the People: Transformations 110-16 (2000); see also id. at 131 (noting that “for most Americans, the proclamation is a symbol comparable to the Constitution itself as a landmark of American liberty. But for most lawyers, it has no similar significance.”). Ackerman finds readier solutions to the paradoxes than I do, and the original thirteenth amendment is taken up in a footnote restating the conventional view that Lincoln had little to do with it and that its ratification was overtaken by events. I am otherwise in agreement with Ackerman’s
How should we understand this mixture of silence and resistance to interpretation? Does the war that followed secession winter diminish the significance of last-minute conciliatory gestures? This was literally a last-minute gesture. By the time the proposed amendment passed both houses of Congress on March 2, 1861, just two days before Lincoln took office, seven states in the Deep South had already seceded. None were moved to return by it, and with the firing on Fort Sumter a few weeks later, four border states joined the Confederacy. The South had wanted more than federal non-interference with slavery where it then existed; it wanted the federal government to affirmatively protect its “domestic institution” (at a bare minimum by rigorously enforcing the Fugitive Slave Act), it saw John Brown’s raid and the northern reaction to it as baleful signs of things to come, and it wanted to see slavery expand into the territories.

The latter issue loomed large, it is worth remembering, not just because the admission of new states affected the balance of power in Congress. Control over the power to amend the Constitution under Article V on matters concerning slavery (and to prevent unwelcome amendments) depended on the ratio of slave to free states. By 1860, free states outnumbered slave states eighteen to fifteen, and with rapid territorial expansion in the West, the number of free states was certain to rise.12 It might take decades for free states to become three-fourths of the total number of states, the number necessary to ratify new amendments. But as Article V provides, only two-thirds of the Congress needs to approve an amendment to initiate the ratification process in the states, and a constitutional convention for proposing amendments can be called by two-thirds of the legislatures of the states. Four new free states in the 1860s would thus have been sufficient to draw into doubt the security of slavery where it then existed.13

We know that the war came despite efforts at conciliation. And Lincoln’s decision to order partial emancipation during the war, indeed, as a war measure, almost immediately reduced the original thirteenth amendment to a kind of anachronism—decidedly out of place in relation to the emergent possibilities of the war and the events that appear to have led inexorably to it. On this view, the original thirteenth amendment has justly been dismissed as an irrelevant coda to a secession crisis defined by failed efforts at conciliation and recrimination against those who sought compromise. If the outbreak of the Civil War did not end constitutional debate on the issues dividing the sections, it altered the terms

12 Crofts, supra note 6, at 138, 189.

13 Given the proportion of free to slave states in 1861, it is worth noting that the only other conciliatory initiative to pass both houses of Congress was a bill for the federal recognition and organization of three territories (Nevada, Colorado, and Dakota). As Crofts details, although Republicans held decisive majorities in both houses once the Deep South seceded, and although Republicans surged to power in the 1860 elections on their categorical opposition to slavery in the territories, the bill organizing these three territories was dead silent on the question of slavery. Under Dred Scott, that meant slavery could expand to these territories. Crofts, supra note 6, at 193-94. Read together with the original thirteenth amendment, it is clear that Congress was more willing to compromise than has traditionally been assumed.
of that debate, “forever eclips[ing] the House and Senate’s last-minute approval of the would-be thirteenth amendment—and Lincoln’s acceptance of it.”

Crofts rejects this view as a dangerous oversimplification. His account of the intricate political process that led to the passage of the amendment shows that historians in general, and especially Lincoln’s biographers, have elided the president’s role in seeking sectional reconciliation. It is a most welcome, well executed, and long overdue revisionist project taking us into the heart of secession winter and reminding us how desperately we want Lincoln, Radical Republicans, abolitionists, and enslaved people who resisted slavery to be great. We want the violence and bloodshed of the period to signify noble sacrifice, to be a vindication of democratic principles, perhaps even a kind of redemption of the nation, if not the Constitution itself. Accordingly, what matters is what came after the original thirteenth amendment—emancipation . . . the Reconstruction Amendments . . . the Civil Rights Movement. And because what came after is what matters, the most relevant details about what preceded these events are the heroic ones that explain how and why we arrived at the result, not the ones that suggest it might have been otherwise. Certainly not the ones that suggest we might well have arrived at unthinkable results. If these terrifying details are taken up at all, if attendant contingencies are recognized, it is almost always in the service of heightening dramatic tension before the result, proving the genius (however flawed or partial) and the heroism (however reluctant) of those who brought about the results we celebrate.

In an epilogue, Crofts notes that these powerful mnemonic forces were at work almost from the moment the results of the war were known. “Once the war ended and slavery with it, the participants themselves found it difficult to recapture accurately their outlook in the years leading up to the war.” In particular, many moderate Republicans and other “cautious constitutional opponents of slavery typically remembered themselves as having stood taller before the war than they actually did.” And for twenty-first-century Americans, “the abolition of slavery and the enactment of the Thirteenth Amendment appear to be such overwhelming necessities that we find it difficult to imagine a time when anyone might have judged otherwise.”

Crofts does not linger over these “difficulties,” nor does he address the profound constitutional questions the proposed amendment raised. Indeed, for all the towering stacks of scholarship on this crucial constitutional period, we have steadfastly resisted thinking some of the darkest thoughts it presents. As Johannes de Silentio, the pseudonymous author of *Fear and Trembling* insisted regarding the story of another Abraham, we

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14 Id. at 242.
15 Id. at 264.
16 Id.
17 Id. at 262.
18 Id. at 134-35 (noting in passing that modern constitutional experts treat the original thirteenth amendment as “an oxymoron”). And even Crofts cannot resist, in a second epilogue, casting his reader forward reassuringly to the twentieth-century Civil Rights Movement. Id. at 270.
have been “unwilling to work, and yet we want to understand the story. We glorify Abraham, but how? We recite the whole story in clichés.”

But if the proposed amendment represented a distillation of the governing regimes of antebellum racial and constitutional thought, and if those regimes gave shape to the revolutionary and counter-revolutionary violence that followed, we cannot understand the nature of the Constitution or the Union that survived the war if we remain unwilling to think these thoughts.

Once released from our “aesthetic flirtation with the result,” however, the thoughts are truly bleak. To begin with, there is the possibility that America might have remained a nation committed to the practice of slavery. Stephen Douglas insisted in his famous 1858 debates with Lincoln that “this Republic can exist forever divided into free and slave States, as our fathers made it and the people of each State have decided.” If he was wrong about that, the proposed amendment suggests it was not because people disputed that the “house” had been designed, from its very foundation up, to endure divided. The speech given by Lincoln, to which Douglas was responding, is the one we remember. But when confronted with the fact of secession in 1861, both Lincoln and Douglas would have irrevocably insulated slavery from the national democratic process. And if ratified, the amendment would have divided the house in perpetuity. By eliminating legal paths to emancipation at the national level, abolitionists would have been left principally to moral suasion and civil disobedience, enslaved people to flight and insurrection. Can we celebrate the prescience of Lincoln’s “house divided” speech without taking stock of a formal constitutional amendment, the passage of which Lincoln not only endorsed but orchestrated?

“Rarely does anyone tell what happened as it deserves to be told. . . . There were countless generations who knew the story of Abraham by heart, word for word, but how many did it render sleepless?”

The question whether and for how long the nation might have tolerated slavery if war had not come is the subject of more than a few disturbing apologias for the South.

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19 Kierkegaard, supra note 1, at 28.


21 And we simply misremember the 1858 “house divided” speech if we assume it unequivocally expressed Lincoln’s commitment to abolition. After quoting the biblical phrase “a house divided cannot stand,” he said, “I do not expect the house to fall—but I do expect it will cease to be divided. It will become all one thing, or all the other. Either the opponents of slavery, will . . . place it where the public mind shall rest in the belief that it is in the course of ultimate extinction; or its advocates will put it forward, till it shall become alike lawful in all the States, old as well as new—North as well as South.” David Herbert Donald, Lincoln 206 (1995). On whether the antebellum constitution was doomed to failure because of divisions over slavery, see Mark E. Brandon, Free in the World: American Slavery and Constitutional Failure 171-72 (1998) (discussing southern perspectives on the Corwin Amendment).

22 Kierkegaard, supra note 1, at 22, 28.

But perhaps it is not the one over which we should lose sleep. Even darker is the thought that we remain governed by the very regimes of thought we take not to have survived the war.

I. Preliminary Expectoration

I cannot think myself into Abraham; when I reach that eminence, I sink down, for what is offered me is a paradox. . . . I cannot make the movement of faith, I cannot shut my eyes and plunge confidently into the absurd.

Our moral integrity and legitimacy as a republic are bound up with the belief that we arrived at emancipation by choice rather than chance. This is the lingering appeal of the expressions “the Great Emancipator” and “Lincoln freed the slaves.” It is also part of the appeal of recent research insisting upon the many ways in which enslaved people resisted slavery before and during the war. Like the honorifics bestowed upon Lincoln, they connect the blood spilled in resistance to slavery to the Declaration of Independence, binding the nation that survived the war to the moral and political authority of the “truths” declared “self-evident” in that founding instrument. This is precisely what Crofts means by the “overwhelming necessities” that surround modern reflection on the abolition of slavery and the enactment of the 1865 Thirteenth Amendment.

But if we did not arrive at emancipation by choice, if it came by chance and was something most Americans had no interest in pursuing, if we stumbled into emancipation and many opposed it once it came, if white supremacy not only survived but flourished after emancipation and Reconstruction, must we not search for other meanings in the bloodletting of slavery, resistance to it, and the Civil War?

The original thirteenth amendment is among the clearest pieces of evidence that the nation stumbled. Centrist northern and border state politicians were willing explicitly and irrevocably to prohibit federal interference with slavery where it then existed in order to draw the southern states back into the Union. And enough Republicans who initially opposed the amendment on principle changed their votes in exchange for mere political favors to ensure its passage. Even after the war began, and abolitionists and congressional Republicans pressed Lincoln to use his war powers to order emancipation, profound doubts about his constitutional authority to do so persisted. Many feared that emancipation would spark violent insurrections on the part of newly liberated blacks, but the principal objection was that a war to save the Union simply could not be conducted on terms that irrevocably altered the property rights of southern slaveholders.

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24 Expectoration, “from the Latin ex + pectus (from + heart, breast), an outpouring from the heart.” Kierkegaard, supra note 1, at 343 n.2.
25 Id. at 34.
26 Something like this question has been posed before, though the emphasis there was on condemning Lincoln’s hagiographers, not probing the paradoxes raised by the constitutional crisis of the period. See Lerone Bennett, Jr., Forced into Glory: Abraham Lincoln’s White Dream (2000).
27 Crofts, supra note 6, at 219-21.
At every moment, Abraham can stop; he can repent of the whole thing as a spiritual trial; then he can speak out, and everybody will be able to understand him—but then he is no longer Abraham.29

Lincoln himself equivocated.30 And he was severely rebuked for abusing his war powers when he finally issued the Emancipation Proclamation. The sense of constitutional crisis among northern conservatives and moderates (Peace Democrats, War Democrats, and centrist Republicans) is captured by Adelbert Johann Volck’s famous 1864 etching. Lincoln is shown drafting the proclamation with a pen dipped in the devil’s ink, his foot resting on a copy of the Constitution dropped to the floor, and two incendiary images on the wall behind him—one depicting John Brown as a saint, the other depicting a massacre of whites during the Haitian Revolution.

John Fabian Witt has labored to rescue Lincoln from this critique, arguing that Lincoln and his legal advisors connected the proclamation to “a millennium of moral and legal reasoning” on the law of war.31 The argument is compelling, nuanced, and beautifully drawn. But because it ignores the original thirteenth amendment, Witt’s account is structured in a way that diminishes the contingencies that surrounded Lincoln’s choice,

29 Kierkegaard, supra note 1, at 115.
31 Witt, supra note 28, at 219.
particularly contingencies that might have deprived him of the opportunity to make the choice we think matters the most. If we are inclined to forget or minimize those contingencies, Lincoln was not. As Crofts reports,

In October 1864, Lincoln was visited by Sojourner Truth, the legendary black preacher, feminist, and abolitionist. She commended him for being the only president who had done anything for her people. Lincoln countered that “he was the only one who had ever had such an opportunity.” He then tersely summarized what made the difference: “Had our friends in the South behaved themselves, I could have done nothing whatever.”

Lincoln was acutely aware that he might have passed his time in office without doing anything for enslaved people, indeed, that he might have spent it making compromises that would guarantee their continued suffering.

He knew this not only because he remembered the concessions he was willing to make during secession winter, and not only because he initially included the deportation of blacks in his emancipation policy. Rather, as military historians have shown, deliberations on the feasibility of emancipation and public sentiment about it were tied closely to profound uncertainty surrounding outcomes on the battlefield. The best recent account is given by Richard Slotkin, who shows that when General Lee launched his daring military campaign in northern Virginia and Maryland in the summer of 1862, Lincoln lost all initiative and was forced to withhold the Emancipation Proclamation. Lee won a series of major battles, exposed the incompetence of Union generals, and brought the North to the brink of complete demoralization.

At the very same time, the most popular high-ranking northern general, George B. McClellan, was flirting with a coup after being demoted from commander of the Union Army in the spring of 1862. Slotkin is quick to insist that “although [McClellan] often spoke of marching on Washington, he made no plans for a military putsch.” McClellan nevertheless rejoiced in the hope that an army of the nation he serve[d] [led by a competing general] will be destroyed . . . [and he went] so far as to declare that the legitimate heads of the government he has sworn to serve loyally are dolts and traitors, hardly fit to live . . . [H]is ultimate goal was to force [Secretary of War Edwin] Stanton’s resignation and recover his lost position as the dominant voice on military policy. The campaign was waged through his political supporters in Washington and his allies in the press.

McClellan’s pride had been injured by defeat and demotion, but he also objected to what appeared to be a significant legal and policy shift on Lincoln’s part away from giving “as much protection [of] the ‘constitutional, civil, and political rights’ of rebel civilians as mili-

32 Crofts, supra note 6, at 264.
33 Donald, supra note 21, at 364.
34 Slotkin, supra note 11, at 85-89 (“Lincoln knew the political and operational aspects of this strategy were inextricably linked, and the key decisions in each area were nearly simultaneous.”); id. at 107 (Lincoln was “helpless to act until someone . . . won a military victory”).
35 Id. at 102.
36 Id. at 104.
tary necessity would allow. Above all,” he insisted, “‘the question of slavery should not enter this war . . . we should avoid any proclamation of general emancipation.’” 37 So in the heat of the summer defeats of 1862 McClellan “declared his intention to defy Lincoln’s order promulgating the Second Confiscation Act.” 38

As long as this internecine conflict boiled within the administration and among northern military and political elites, “Lincoln could do nothing to openly advance the strategic and political transformation embodied in the Emancipation Proclamation.” 39 This was so even though Lincoln’s private equivocations on emancipation had supposedly ended. By July, as Slotkin puts it,

Lincoln had abandoned the hope that a quick series of impressive victories could demoralize the South into negotiation. Instead he was now ready to commit the nation to a war of subjugation, aimed at destroying the South’s ability to resist and uprooting its fundamental institution. In Lincoln’s mind, the Civil War had already passed the point of no return. The Proclamation made compromise impossible and guaranteed that even if the Union were restored it would not be “the Union as it was.” 40

But having suffered a series of embarrassing defeats on the battlefield culminating in the spectacular failure of the Union advance on Richmond in the Seven Days’ Battles at the end of June, Lincoln’s cabinet wisely urged him to secure a Union victory before making the policy public. Otherwise it might be received as a sign of desperation, and backfire. 41

Lincoln also had to neutralize the threat posed by McClellan and his many supporters, who would have been happy to capitalize on public opposition to the proclamation. So he temporized, he publicly dissimulated—insisting that the war was to “save the Union, and . . . not either to save or to destroy slavery” 42—and he made arrangements to definitively expose McClellan’s reluctance to fight. Meanwhile, after winning the second Battle of Bull Run in late August, Lee crossed the Potomac into Maryland, thirty-five miles north of Washington, D.C. The cascade of Union defeats and Lee’s dramatic shift of the theater of war, from the edge of Richmond to northern soil, alarmed northerners and amplified criticism of the commander-in-chief.

“Demands rose for a complete reorganization of the administration.” 43 A New York diarist wrote, “‘The nation is rapidly sinking now. . . . Stonewall Jackson (our national bugaboo) about to invade Maryland, 40,000 strong. General advance of the rebel line threatening our hold on Missouri and Kentucky. Cincinnati in danger. . . . Disgust

37 Id. at 101.
38 Id. at 104. On Lincoln’s concerns about the Second Confiscation Act, see Donald, supra note 21, at 364-65.
39 Slotkin, supra note 11, at 105.
40 Id. at 88. McClellan’s suspicions about the shift in war objectives were therefore correct.
41 Id. at 89.
42 Id. at 106.
43 Donald, supra note 21, at 371.
with our present government is certainly universal.’”44 Lincoln himself “fell into a deep depression. Once again, his plans had all failed. The strenuous, aggressive war that, in theory, should have resulted in the defeat of Lee’s army . . . had aborted. With its failure disappeared Lincoln’s opportunity to issue a proclamation abolishing slavery, the cause of the war.”45 In a note to himself Lincoln confessed, “‘I am almost ready to say that God . . . wills this contest and wills that it should not end yet.’ . . . After all, God could ‘have either saved or destroyed the union without a human contest . . . and . . . [h]e could give the final victory to either side any day.’”46

Lincoln returned the military to a more “defensive posture” and, without seeking the advice of his cabinet, unilaterally decided to reinstate McClellan in command of the army.47 McClellan had already refused to follow Lincoln’s orders, and he had repeatedly hesitated when circumstances required initiative on the field of battle, but if the Union army would have to play defense Lincoln hoped McClellan could restore morale because of his popularity with the rank and file and his renowned organizational skills.48

Lee’s northern campaign would be arrested by McClellan on September 17 at Antietam Creek outside Sharpsburg, a battle during which casualties on both sides “numbered four times the total suffered by American soldiers at the Normandy beaches on June 6, 1944. More than twice as many Americans lost their lives in one day . . . as fell in combat in the War of 1812, the Mexican War, and the Spanish-American war combined.”49 The defeat would prevent the British from recognizing the Confederacy, and it provided the victory Lincoln needed to issue the Emancipation Proclamation.50 Still, it was not the victory he had hoped for. McClellan, true to form, had refused to press the advantage, allowing Lee to retreat to Virginia and thereby missing the chance to deliver a decisive blow to the Confederacy. Navy Secretary Welles lamented that “‘instead of following up the victory, attacking and capturing the Rebels, they . . . are rapidly escaping across the [Potomac]. . . . Oh Dear!’”51 Lincoln issued the proclamation anyway. As he later told his cabinet, “if God gave us victory [at Antietam, it was] an indication of Divine will and . . . his duty to move forward in the cause of emancipation.”52

Even Slotkin’s brilliant account of the contingencies that surrounded the issuance of the Emancipation Proclamation slides into hagiography on the crucial question of

45 Donald, supra note 21, at 371.
46 Id.
47 Id.
48 Id.
49 McPherson, supra note 44, at 544.
50 Id. at 545, 556.
51 Id. at 545.
52 Donald, supra note 21, at 374.
whether Lincoln was irretrievably committed to emancipation. Although the proclamation was explicitly framed as an ultimatum to the South to surrender on pain of losing its most cherished domestic institution, Slotkin contends that it was “not an ultimatum at all” because Lincoln had already made up his mind to “commit the nation to a war of subjugation.” The implication is that Lincoln’s moral fortitude was decisive in the face of uncertainty, demoralization, and treasonous scheming against his administration. But this reads history backwards (from what we know about Antietam and the result of the long war of attrition that followed), not forwards (as the participants experienced the contingencies of the summer of 1862).

My soul balks at doing what is so often done—talking inhumanly about the great . . . . I prefer to speak humanly about it, as if it happened yesterday, and let only the greatness itself be the distance that either elevates or judges.

If McClellan had routed Lee’s army at Antietam, as Lincoln had explicitly instructed him to do, a prolonged war aimed at subjugation of the South might have been unnecessary. It might not have been feasible, either. McClellan would have been more popular and difficult to replace than ever, and northerners’ “desire to punish slaveholders by attacking their property interest” might never have overcome their commitment to saving the Union as it was. Alternatively, McClellan’s treasonous machinations may appear je-june or toothless in retrospect, but northern morale sank low enough that Lincoln’s administration could have disintegrated as the embarrassing defeats mounted during the summer of 1862.

If we take these military and political contingencies seriously, if we do not forget all this as soon as we learn the result of the battle at Antietam, then there are no grounds to celebrate emancipation as a redemptive link between the nation that emerged through the sacrifice of the Civil War and the Declaration of Independence. As late as August and early September of 1862, on the very eve of Antietam, Lincoln might have traded emancipation for peace, or lost the chance to issue the proclamation at all. Lincoln fell into anxiety and depression over the setbacks, both questioning the will of God and surrendering his judgment to providential signs.

Peace did not come. But that only proves that fortune does not always favor the bold—it occasionally smiles upon the meeker sentiments of self-doubt and equivocation. If we remember too that by its very terms the proclamation would have traded emancipation for peace, what is there to boast about? A truth is either self-evident or it is not. Why should any person, let alone a nation, be feted for arriving so late and haphazardly at a

53 Slotkin, supra note 11, at 88.
54 Kierkegaard, supra note 1, at 34.
55 McPherson, supra note 44, at 544.
56 Slotkin, supra note 11, at 91.
self-evident truth? If you become lost, map in hand, and stumble on a log, fall off a precipice and roll fortuitously down to the path from which you had strayed, map in hand, you can of course throw a grand party in honor of the log and cover your bruises with shiny medals. Or you can inquire why you got so lost in the first place, map in hand. Not as grand a party would follow. Surely no medals would be awarded. But if the path was wide and clear, the map delivered by the hand of providence itself, isn’t this the better question?

Answers cannot be found if we start the story at the end.

If someone deludes himself into thinking he may be moved to have faith by pondering the outcome of that story, he cheats himself and cheats God out of the first movement of faith—he wants to suck worldly wisdom out of the paradox. . . . [T]he movement of faith must continually be made by virtue of the absurd. 57

If we are to have constitutional faith, we must not cheat ourselves. We must start at the beginning, with the original thirteenth amendment.

II. “Prodigious Paradox”

I am constantly aware of the prodigious paradox that is the content of Abraham’s life, I am constantly repelled, and despite all its passion, I cannot penetrate it . . . . I stretch every muscle to get a perspective, and at the very same instant I become paralyzed. 58

But if we start there, with the original thirteenth amendment, it is hard to see how the Emancipation Proclamation is constitutional. The proclamation is, at a minimum, a betrayal of nearly every public utterance on the Constitution and slavery made by Lincoln from his oath of office and First Inaugural to the very eve of Antietam. 59 In the First Inaugural, when Lincoln said the sanctity of each state’s domestic institutions was implied constitutional law, the reference to implication was no slight to the underlying principle. Implication did not open the principle to doubt. Nor did it mean that the principle occupied a subordinate constitutional status. On the contrary, the reference to implication reflected the fact that the principle animated the entire structure of the document. It was “implied” constitutional law in the way that a home implies shelter, a coliseum spectacle, a windmill wind, railroad tracks locomotion—all things that give evidence of their animating principles in their very structure. So too the principle of federalism in a founding document delegating limited powers to the national government from the people, acting through the various states. 60 The structure of the instrument gives evidence of the principle.

57 Kierkegaard, supra note 1, at 37.
58 Id. at 33.
59 Cf. Belz, supra note 9, at 40 (describing limited, failed measures Lincoln supported in December 1861—“voluntary state emancipation”—and March 1862—“gradual, compensated emancipation”—even as he countermanded emancipation orders issued by the military in his capacity as commander-in-chief).
60 The federalism principle to which I refer here is the ground norm of state sovereignty, particularly in matters traditionally within the police powers of the states, such as slavery. There were of course wide
The proposed amendment was offered not to settle a dispute about what the Constitution meant, but rather, by making implied constitutional law explicit and irrevocable, to allay southern concerns that Republicans intended any revolution in the legal order.

Lincoln changed his mind, we are repeatedly told, because his longstanding personal opposition to slavery finally found an avenue for expression in the imperatives of war. As Slotkin puts it, “In moving toward a stronger stance on emancipation, Lincoln was reverting to values and positions he had long espoused, acting on a hatred of slavery that was visceral as well as principled.”61 Emancipation is constitutional on this view because, in time of war, both implicit and explicit principles of limitation must give way to the war powers of the commander-in-chief. He must be free to take steps necessary to win as long as those steps are consistent with the laws of war and provisions of the Constitution that remain operative during war. But we have just observed that it was the Union army that failed to secure a decisive victory in the major engagements on the eastern front before Antietam. That failure was largely due to incompetence and internecine conflict among Union generals, not because Confederate military power was superior. Even Antietam was a rather strange “victory” given that McClellan’s excessive caution (and defiance of orders) allowed Lee to slip back into Virginia with the remainder of his army. It could just as accurately be remembered as the battle that should have ended the war.

So what “necessities” of the war called for emancipation? Lee had invaded a northern state in the summer of 1862. But it was Maryland, a border slave state that had “eagerly” ratified the original thirteenth amendment just six months before Lee crossed the Potomac.62 General emancipation would scarcely have ended Lee’s incursion there or bolstered the state’s resistance to Lee. Quite the contrary. Nor would it have aided the war effort and Union sentiment in other border states. There were, to be sure, profound questions about how northern generals should deal with African Americans who had escaped slavery or were captured by Union troops in battle. But the North had yet to win many significant battles on Confederate soil, and, abhorrent as the thoughts are to contemplate, there were options other than emancipation (most obviously, detention), certainly options other than a general order of emancipation.63

ranging antebellum debates about just how far the ground norm extended, how to manage areas of overlapping state and federal concern, and a range of positions on how federalism applied to specific cases. See id. at xiv-xvi.

61 Slotkin, supra note 11, at 90. Slotkin adds that coming fully to grips with Southern intransigence and the frustrations of war triggered in Lincoln a new, volatile mix of sentiments. Slotkin presents these sentiments (“a new strain of anger in the feelings that drove him, a rising sense that vindication of the rule of law, and the principles of justice, required that unjust rebellion be punished, not merely suppressed,” id.) as more coherent and contained than they could possibly have been under the circumstances.


63 See Oakes, supra note 8, at 465 (“Only a fraction of the slaves were ever able to ‘come within’ Union lines” and thus become eligible for military emancipation); McPherson, supra note 44, at 497-500 (describing humanitarian and inhumane treatment of African Americans held under the northern military’s various policies for handling “contraband”; noting that until March of 1862, Union army officers were not
From this perspective, the Emancipation Proclamation scarcely appears to have been a “fit and necessary war measure” in any conventional sense. The only necessity it responded to was the likely future circumstance that would arise if the North were to prevail in a war of subjugation, successfully seizing and holding vast areas of Confederate land.

Who strengthened Abraham’s arm, who braced up his right arm so that it did not sink down powerless!
Anyone who looks upon the scene is paralyzed.64

But perhaps the war power cannot be so narrowly construed. Surely a commander-in-chief must have discretion to select among a range of plausible steps to win a war, not just the steps he is forced by circumstance to take. Lincoln, on this view, was entitled to exercise discretion about what was fit and necessary. And if Witt’s account of the development of Lincoln’s thought is correct, that discretion was not without limits. For even if general emancipation would contradict the “establishment orthodoxy on the law of war” (according to which “civilized nations sheltered slavery from war’s destruction”) and even if it could provoke “servile insurrection,” Lincoln and his legal advisors did not believe emancipation would “entail the elimination of restraints.”65 Theirs was not, Witt insists, “a lawless vision of war.”66 That is because emancipation “pressed humanitarian limits and justice back together by measuring the limits on conduct by reference to the justice of its ends. . . . The military necessity test tethered the means allowed to the justice of the end in view. Justice—God’s justice—was precisely what Lincoln had in mind.”67 In the service of a truly just end, then, extraordinary means (calibrated precisely to those ends?) might justifiably be employed.

Now we are face to face with the paradox. Either the single individual as the single individual can stand in an absolute relation to the absolute, and consequently the ethical is not the highest, or Abraham is lost.68

Witt sees Lincoln’s legal decision as a crisis of faith, both about the will of God and the risk of servile insurrection. And rightly so. But unless Lincoln’s support for the original thirteenth amendment was a mere subterfuge, unless he bore false witness in taking the oath of office, in delivering his First Inaugural, and in his repeated assurances about the constitutional purposes of the war after the firing on Fort Sumter, the crisis was deeper than Witt allows. It is not enough to resolve the constitutional crisis to show that Lincoln

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64 Kierkegaard, supra note 1, at 22.
65 Witt, supra note 28, at 204, 211, 218.
66 Id. at 218 (emphasis added).
67 Id.
68 Kierkegaard, supra note 1, at 113.
finally concluded (from the blood spilled at Antietam?) that God’s justice was on his side. That is because the enforcement of a general order of emancipation would undermine, more directly than any ordinary war measure, the structural principle of federalism (which is to say, restraint on the part of the national government, especially in relation to the domestic institutions traditionally regulated by the states) that the original thirteenth amendment would have made irrevocable. A general order of emancipation was the very antithesis of the implied constitutional law that defined antebellum legal thought on the question of slavery—the precise regime of thought Lincoln endorsed in his First Inaugural and pledged to uphold when he placed his hand on the Bible at his inauguration and took the oath to “faithfully execute the Office of President of the United States, and . . . preserve, protect and defend the Constitution of the United States.”69 God’s justice and Lincoln’s honor were already on the side of the Constitution, as it was. It is one thing to do whatever is necessary to win a war; it is quite another to preserve a constitutional Union.

Witt is right that Lincoln continued to speak the language of saving the “Union” after he issued the Emancipation Proclamation. In his annual message to Congress in December 1862, after Republicans suffered severe losses in the November elections,70 Lincoln steadfastly proclaimed: “We say we are for the Union. The world will not forget that we say this. We know how to save the Union. . . . We shall nobly save, or meanly lose, the last, best hope of earth. . . . The way is plain, peaceful, generous, just . . . .”71 Witt, stirred by this, yokes military necessity to sacred purpose in equally alluring rhetoric: “Lincoln had not chosen war lightly. Rescuing the Union was his sacred cause, and if there were means available, it was imperative that he exercise them.”72

The demonic has the same quality as the divine, namely, that the single individual is able to enter into an absolute relation to it. This is the analogy, the counterpart to that paradox of which we speak. It has, therefore, a certain similarity that can be misleading.73

But if the North’s purpose remained to save the Union, it simply could not have been the Union as it was. And if the cause remained constitutionally sacred, it was also an apostasy—an apostasy no theory of the laws of war can redeem. For the Union, if it was not dissolved by the very words of the Emancipation Proclamation (or saved by prompt southern compliance), would have to be destroyed, as it was, in a war of subjugation—a war predicated on massive, extended exertions of federal military power into the southern

69 U.S. Const. art. II, § 1, cl. 8—until the twentieth century the oath was taken by affirmation.
70 Donald, supra note 21, at 380.
71 Witt, supra note 28, at 215.
72 Id.
73 Kierkegaard, supra note 1, at 97.
As Slotkin pointedly concludes, the significance of Antietam—the most deadly battle of the war to that point, still the bloodiest single day of battle in American history—is that together with the proclamation whose issuance it precipitated, it transformed the war into a genuinely revolutionary conflict. Secession was not simply to be rejected; the house divided would have to be dismantled along with the constitutional compromises at its foundation, the doctrine of state sovereignty, and the key domestic institution it sheltered.

If we are to celebrate this constitutional revolution and the version of the thirteenth amendment that marked its success in 1865, we need new language for the proclamation that eclipsed the original thirteenth amendment. If it was not a divine apostasy—a grave breach of constitutional faith that simultaneously and proleptically expressed faith in a new, but absent, constitutional order—it was at least the greatest act of civil disobedience by a sitting President. Except that disobedients usually submit humbly to legal process after committing their illegal acts. What Lincoln did next, a day later, was to declare martial law and unilaterally suspend the writ of habeas corpus in the North, causing arbitrary arrests, detentions, and in some cases trials by military commission. Arrests occurred primarily in border states; the most common targets were Copperhead journalists and political leaders, suspected deserters, dissidents, “poor refugees, and suspected bushwhackers.” If necessity demanded this further incursion upon the constitutional rights of the people, wasn’t that necessity at least in part caused by their objection to the apostasy? Their utter inability to see either justice or the hand of providence in the actions of the federal government? More than a few targets were traitors to the Constitution themselves, inciting violence and conspiring with the Confederacy, but many were Unionists who recoiled at the ends and means Lincoln had chosen for the conduct of the war. Senator James Bayard, a Democrat from Delaware, was not alone in charging that the president was “‘declaring himself a Dictator.’”

Like any head of state, Lincoln had to answer most immediately to the contingencies of war for these decisions—less immediately, to the electorate. That he answered in the end with his life only makes the paradox more prodigious.

One could say that he became the ram.

And he was not the only one. As revolution gave way to counter-revolution, newly freed African Americans who had survived and resisted and even revolted against slavery suffered the consequences of the nation’s inability to complete the movement of constitutional faith.

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74 At the very same time, it must be emphasized, leaders of the Confederacy were learning that the war could not be conducted effectively while preserving, in practice, the strict principles of states’ rights federalism that had seemed to justify secession. Slotkin, supra note 11, at 63-65.


76 Slotkin, supra note 11, at xv.


78 Donald, supra note 21, at 380.
III. States of Exception

We don’t celebrate the Emancipation Proclamation as anything like divine constitutional apostasy. Even reading it as an act of civil disobedience is anathema. We want Lincoln to be great by virtue of his obedience to higher law, so we strain to reconcile the proclamation with the law of war and the Constitution. And all the while we avoid the more obvious and troubling example of obedience in his earlier endorsement of the original thirteenth amendment.

In truth, we don’t really celebrate the Emancipation Proclamation at all—and perhaps with good reason. It freed no one by its terms because it left slavery in the northern border states untouched and it had no application in areas of the Confederacy already subject to northern military control. It also left the formal legal architecture of slavery in place, pending the outcome of the war. And as Lincoln’s failed effort to talk black leaders into accepting resettlement in another country as a part of emancipation suggests, the policy had little to do with undercutting the ideology of white supremacy. On the contrary, Lincoln’s support for emancipation grew over the summer of 1862 as he returned to the view that black freedom would require exodus, not integration. In mid-August 1862, just weeks before announcing the proclamation, he told the black leaders he had invited to the White House, “You and we are difference races. . . . We have between us a broader difference than exists between almost any other two races. . . . It is better for us both, therefore, to be separated.”

Illogical and unfair as Mr. Lincoln’s statements are, they are nevertheless quite in keeping with his whole course from the beginning of his administration up to this day, and confirm the painful conviction that though elected as an anti-slavery man by Republican and Abolition voters, Mr. Lincoln is quite a genuine representative of American prejudice and Negro hatred . . . . He is scrupulous to the very letter of the law in favor of slavery, and a perfect latitudinarian as to the discharge of his duties under a law favoring freedom.

The final version of the Emancipation Proclamation dropped the controversial policy of forced emigration and permitted African Americans to serve in the Union army. But its text and the vexatious conditions of its issuance make it at best an awkward object of commemoration.

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79 The strain is particularly evident in Herman Belz’s effort to reconcile the Proclamation, and what he concedes was the “legal fiction” of military necessity, with “traditional federalism” and commitment to what he calls “principles of republicanism underlying both Unionism and emancipation.” See Belz, supra note 9, at 44-45. The paradox is hinted at only in order to brush it aside.

80 Id. at 367.

81 Id.; see also Williams, supra note 8, at 111.

82 Frederick Douglass, The President and His Speeches, 5 Douglass’ Monthly 707, 707-08 (Sept. 1862).

83 Williams, supra note 8, at 5 (reporting that “[r]oughly 200,000 blacks, most of them refugees from slavery, served in the Union armed forces” and “[h]undreds of thousands more were employed as laborers”).

84 There is a suggestion that Lincoln’s dissimulation and vacillations on emancipation in the summer of 1862 were all brilliantly plotted political maneuvers to prepare a reluctant public for a course of action he was
In African American churches, “Watch Night” services occasionally take place on New Year’s Eve, as they did in free black and abolitionist churches in 1862. But these are not events of unalloyed jubilation. More broadly, no one has ever suggested relocating the Liberty Bell from Independence Hall to the Antietam National Battlefield,85 and no one, least of all the Supreme Court, would dare to tell the story of “Our Federalism” from the starting point of the relationship between the original thirteenth amendment, the Emancipation Proclamation, and the declaration of martial law in the North. Democratic revolutions—revolutions grounded in the sovereignty of the people—do not generally begin with massive, arguably unconstitutional exertions of executive and military power. If they do begin in this way, it is precisely the people’s resistance to such measures that sets them in motion.

So there is not only the paradox of a divine constitutional apostasy, but the fact that it was instantiated by the chief executive in time of war through military power, and the further paradox that democratic revolution arrives in and through, rather than against, this extraordinary, arguably extralegal, executive action.

But I come back to Abraham. During the time before the result, Abraham was a murderer every minute or we stand before a paradox that is higher than all mediations. The story of Abraham contains, then, a teleological suspension of the ethical. As the single individual he became higher than the universal. This is the paradox, which cannot be mediated.86

Seductive as the thought may be, ratification of the Reconstruction Amendments cannot mediate the paradoxes of emancipation. After all, the Thirteenth Amendment was drafted and debated, passed both houses of Congress, and was sent to the states for ratification before the South’s surrender at Appomattox. Twenty of the twenty-seven states necessary for ratification voted before that surrender. More importantly, Lincoln had made clear that the federal government would not readmit any defeated southern states to the Union unless they held state constitutional conventions to dissolve their Confederate govern-

determined to take. See Donald, supra note 21, at 368 (describing Lincoln’s support for colonization as “a shrewd political move”); Slotkin, supra note 11, at 105 (describing Lincoln’s broader secret strategy once he had settled on emancipation). But on the point of colonization at least, Lincoln had previously supported the idea, and there is no doubt that, while he abhorred slavery, Lincoln held racist views of African Americans. He also supported colonization as part of a suite of constitutional amendments he proposed in December 1862. See Williams, supra note 8, at 110.

85 Until 2014, more than 150 years after its issuance, the Emancipation Proclamation was rarely shown at the National Archives, ostensibly because the copy we have (the original was lost to a fire in 1871) “is very fragile.” Emancipation Proclamation Is Rarely on Display, Wash. Post. Feb. 22, 2013, https://www.washingtonpost.com/lifestyle/kidspost/emancipation-proclamation-is-rarely-on-display/2013/02/21/c119eb78-7145-11e2-a050-b83a7b35e4b5_story.html; Michael Vorenberg, Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment 1 (2001). On the ambivalence of earlier commemorations, see Berlin, supra note 8, at 105-07; Martha S. Jones, History and Commemoration: The Emancipation Proclamation at 150, 3 J. Civil War Era 452 (2013).

86 Kierkegaard, supra note 1, at 66.
ments, renounce secession, and recognize emancipation. Compliance with the final demand was essential to ratification because northern states did not, in 1865, amount to three-fourths of the United States.

Put simply, there could be no constitutional abolition of slavery and federal congressional power to enforce it—no Thirteenth Amendment—without at least some states that had seceded “ratifying” it. But the approval of those states (Virginia, Louisiana, Arkansas, South Carolina, North Carolina, Alabama, and Georgia all ratified the Amendment) would not have been forthcoming in the absence of continued northern military control.

The North could scarcely have done otherwise. All occupying powers must reconstitute defeated states on terms that eliminate, or at least create the legal and social conditions to end, the most obvious sources of the conflict. The regime must change. Otherwise the war, if it ends at all, ends in name only. But reconstructing states in a republic founded on the principle of popular sovereignty, and certainly reconstituting the republic itself (the task presented at the end of a civil war to the side that rejects secession) requires something more than consent given under duress. Fulsome consent may be too much to expect in the absence of genuine contrition, and genuine contrition may be too much to expect at the end of any war of subjugation. But no social contract theory, however parsimonious, recognizes consent for the making of higher law secured at the tip of a bayonet.

So if the Thirteenth Amendment of 1865 retroactively legitimates emancipation and rejection of the original thirteenth amendment, it does so according to a paradoxical doctrine of necessity, executive mandate, and proleptic constitutional faith identical in every material respect to that which underlies the Emancipation Proclamation. And if the Thirteenth Amendment cannot give the blessing of popular sovereignty to emancipation, what is there to celebrate in it? The paradox of emancipation is not mediated, it is repeated.

One cannot weep over Abraham. One approaches him with a horror religiosus . . . . What if he himself . . . made a mistake . . . ?

Whether the South might have been moved to genuine contrition by the war and a policy of reconstruction can never be answered with certainty. What we do know is that almost immediately after Lincoln was assassinated, Andrew Johnson set about to disman-

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87 Hyman & Wiecek, supra note 9, at 268. The most comprehensive recent account of the contingencies surrounding the drafting and ratification of the Thirteenth Amendment is Michael Vorenberg’s Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment (2001).

88 Proclamation of Dec. 18, 1865, Appendix No. 52, 13 Stat. 774, 775 (declaration by Secretary of State William H. Seward that the Thirteenth Amendment has been ratified by twenty-seven of the thirty-six states). Lincoln’s position, from the start of the war, was that the Confederate states never legally exited the Union. See Donald, supra note 21, at 303. But it would have been no easier to treat the Confederate states as territories outside the Union and ratify the Thirteenth Amendment in the North only. Federal readmission through territorial organization and state constitutional convention would surely have required acceptance of the Thirteenth Amendment as an explicit condition.

89 Kierkegaard, supra note 1, at 61.
tle Lincoln’s military policy of reconstruction. He amnestied, pardoned, and promoted unreconstructed Confederate soldiers and political leaders indiscriminately, and he “left virtually all determination of state residents’ political and civil status in the hands of southern whites whom he had amnestied or pardoned.”90 Further, on April 2, 1866, against all the evidence, “he proclaimed that the rebellion was entirely suppressed” and he ordered “the southern states fully restored” to the Union.91 There would be no treason trials of Confederate leaders—“even Jefferson Davis was to escape such a prosecution”—nor any other federal policy of punishment as a part of a process of transitional justice.92

Southern resistance to the Thirteenth Amendment and to the 1866 Civil Rights Act designed to enforce it surged, finding legal expression in the Black Codes and extralegal expression in widespread private and state-sponsored terrorism against newly freed African Americans and carpetbaggers.93 Republicans in Congress responded to this new constitutional crisis by impeaching Johnson (failing to secure conviction in the Senate by just one vote) and sending the Fourteenth Amendment to the states for ratification over Johnson’s objections. But the Amendment initially failed of ratification in 1866 because, with the exception of Tennessee, “every former seceded state rejected the Fourteenth Amendment.”94

To guarantee ratification, Congress mandated federal military intervention in the South. Over Johnson’s veto, Congress passed the Military Reconstruction Act of 1867, a statute that dissolved the existing state governments, divided the region into five federal military districts, required that delegates to new state constitutional conventions be elected by “all otherwise qualified male citizens ‘of whatever race, color, or previous condition’” while expressly disenfranchising “past rebels,” and conditioned congressional recognition of the state governments emerging from those conventions on their ratification of the Fourteenth Amendment.95 On both sides, the war was continuing by other means.

Johnson’s opposition was neutralized not only because Republicans held a veto-proof majority in Congress, but also because Union generals loyal to the Republican Party anticipated the election of General Grant in November 1868 and were willing to enforce the statute. As with the Thirteenth Amendment, then, we have a Fourteenth Amendment because the necessary consent was secured at the tip of federal bayonets.96 And with

90 Hyman & Wieck, supra note 9, at 313-14.
91 Id. at 326.
92 Id. at 334. On the measures for prosecuting treason contemplated by Congress during the war, see Belz, supra note 9, at 34.
93 Id. at 295-334 (passim).
94 Id. at 423.
95 Id. at 442; see also Ackerman, supra note 11, 110-16.
96 The point is not the one apologists for slavery and Jim Crow segregation have delighted in raising—that the Reconstruction Amendments are invalid. See David Lawrence, There Is No “Fourteenth Amendment”, U.S. News & World Rep., Sept. 27, 1957. It is instead that the circumstances of ratification are relevant to any discussion of their meaning and to the meaning of “Our Federalism.”
Grant in the White House, the new state governments formed by enfranchised blacks ensured ratification of the Fifteenth Amendment a year and a half later. The paradoxes of emancipation were thus repeated, not overcome, in the ratification of the Reconstruction Amendments.

IV. Counter-Revolutionary Disaggregations

Northern conservatives generally supported the South’s counter-revolutionary opposition to Reconstruction, arguing alongside their unreconstructed southern colleagues that because Lincoln had indeed saved the Union, “Our Federalism” survived the war and reconstruction intact. They were soon joined by moderate Republicans who declared paradoxically that the Reconstruction Amendments were “self-executing,” completed the work of reconstruction, and were grounded in the regime of constitutional thought underlying the original thirteenth amendment.97 As Hyman and Wiecek summarize:

Sometime in the mid-1870s, the Republicans, as though frightened by the grandeur of their own turns toward equality, lost both their vision and constituent support. They fell back in loose disaggregation, finding comfort and justification in their retreat in a stress on new kind of liberty, deriving from prewar constitutional traditions, from postwar legal doctrines, and from innovative notions about science and society. This retreat left southern blacks exposed to discriminations and assaults sanctioned in state laws and customs.98

Indeed, all blacks would be left exposed to the effects of white supremacy.99

Even Radical Republicans and abolitionists came to accept and in some instances aid the retreat from Reconstruction. Two former radicals, Carl Schurz and Horace Greeley, launched the breakaway Liberal Republican Party to challenge Grant in 1872. The splinter party was committed to eliminating corruption and patronage in public office and ending federal intervention in the South. In the spring of 1872, Anna Dickinson, a former abolitionist and advocate of reconstruction, gave a speech in New York City to promote Greeley’s presidential campaign. To a cheering crowd, Dickinson criticized federal reconstruction policy for corruption and “‘rapine’” in southern states. She added that if newly freed and enfranchised blacks in the South “‘cannot defend themselves and exercise their right at the polls, [and] if . . . republican law and the forms of our old legislation . . . are to be destroyed to help them in fighting, we might as well confess that the experiment of

97 Hyman & Wiecek, supra note 9, at 71; see also Senator Lyman Trumbull’s statements in the floor debate over the Ku Klux Klan Act of 1871, Cong. Globe, 42d Cong., 1st Sess. 575-81 (1871) (the Senator claimed he supported the Thirteenth Amendment exclusively as a war measure, forgot that the consent of the Southern states was essential, and had to be reminded of the circumstances of ratification by a colleague).

98 Hyman & Wiecek, supra note 9, at 398.

No amount of federal intervention, military or legal, could guarantee that southerners would observe the new rights of freedmen. “The law is a dead letter,” she continued, “until public opinion blows into it and inspires it with the spirit of life.” Only by promoting sectional reconciliation and full amnesty for southern leaders could order be restored to the South. “Trust to these men, trust to public opinion, and you will see that it will work out the benefit of the Republic by working out their own self-interest.”

Long before Dickinson’s speech, William Lloyd Garrison split abolitionists by offering a resolution in May 1865 to dissolve the American Anti-Slavery Society because he viewed the organization’s work as complete. The resolution failed after a bruising debate, but Garrison resigned the presidency and following the ratification of the Thirteenth Amendment in December he ended publication of The Liberator, the abolitionist magazine he had launched in 1831. In the last issue of the famous paper he pled fatigue “[a]fter having gone through with such a struggle as has never been paralleled in duration in the life of any reformer.” He insisted that although African Americans had “yet to be vindicated in regard to the full possession of the equal civil and political rights . . . [and although] the old slaveholding spirit is showing itself in every available form,”

[the object for which the Liberator was commenced—the extermination of chattel slavery—having been gloriously consummated, it seems to me specially appropriate to let its existence cover the historic period of the great struggle, leaving what remains to be done to complete the work of emancipation to other instrumentalities.]

Garrison hinted that he might participate in that work “under new auspices” after having effectively converted The Liberator into a monument to abolition, but he turned his attention to other reform movements, most prominently women’s suffrage. Wendell Phillips led the Society another five years until the Fifteenth Amendment was ratified.

Greeley was routed in the election of 1872. But the ideas that crystallized in the Liberal Republican movement influenced the nation’s retreat from reconstruction in the years that followed. In 1876, the Supreme Court struck down one of the most significant of the enforcement statutes for the Reconstruction Amendments on the theory that the federal government had exceeded its powers vis-à-vis the states. And following an
election marred by violence and contested electoral votes in southern states in 1876, Republicans secured Hayes’s presidency by promising to permanently withdraw federal troops from the South. The nation was by then as “eager” as Greeley had prematurely hoped it would be in 1872 “‘to clasp hands across the bloody chasm which had too long divided’” North and South. Nicholas Guyatt has written that abolitionists and northerners who had supported the war succumbed not only to fatigue with the work of emancipation, but to a kind of “providential escapism.” The widely accepted view that the war was an expression of divine wrath for the sin of slavery, and that God intended abolition, had the paradoxical effect of both “insulating the past from critique and of limiting God’s involvement to emancipation.”

A series of political, moral, and legal disaggregations accompanied these profound counter-revolutionary shifts in the historical consciousness of white Americans regarding the war, emancipation, and reconstruction. At the level of collective memory, commemoration of the war increasingly concentrated on the military valor of Union and Confederate troops, to the almost complete exclusion of slavery and the constitutional implications of the war. Even exceptions to this rule tended to occur on terms that neutralized the revolutionary implications of the war. At the dedication of the 34th New York Infantry’s monument at Antietam National Battlefield in 1902, for example, Major Wells Sponable insisted that “[t]here are no better teachers for those who come after us than the silent monuments on the battlefields, marking the places where men died for principle they believed right, whether they wore the blue or the gray uniform.” The blood sacrifice of the war was thus framed not in terms of its transformative consequences, nor the triumph of one side’s moral and legal position regarding slavery, states’ rights, and secession, but instead as vindication of the “house divided”—now reunified in its divisions by the recognition of “home rule” in the South.

At the political level some Republicans continued to wave the “bloody shirt” for electoral advantage, but without any accompanying policy commitment to the plight of African Americans. As importantly, at the moral level, slavery was disaggregated from its social and constitutional integuments (white supremacy and the regime of legal thought reflected in the original thirteenth amendment). Several powerful ideas flowed from this moral separation. The first is that the nation’s principal moral debt for slavery was paid by formal legal abolition and the blood sacrifice of the war that made it possible. Abolition thus ended rather than began the work of emancipation. Liberals and conservatives divide (to this day) over the question whether any consequences of slavery persist and who is

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108 McPherson, supra note 100, at 51; see also William Gillette, Retreat from Reconstruction: 1869-1879 (1980); Foner, Reconstruction, supra note 11, at 524.


110 Id. at 257-61; see also id. at 277, 283, 295.


responsible for them, but both sides generally agree that justice consists in this movement toward closure, toward a time that is definitively beyond slavery and its consequences. Whatever the moral debt is, both sides insist that it can be (or has been) paid, rather than beginning from the proposition that the nation’s moral accountability for slavery and its consequences is collective and unpurgeable, a permanent condition of what it means to be American.\(^{113}\)

The second is the idea that white supremacy, as a belief system, is less pernicious than the practice of slavery it justified, or, for that matter, the post-emancipation practices of subordination it continues to cause. This idea can be traced not only to dissociative antebellum defenses of slavery but to the efforts of abolitionists to force the nation to confront the evil of slavery. As Frederick Douglass wrote just before the Emancipation Proclamation issued, “Negro hatred and prejudice of color are neither original nor invincible vices, but merely the offshoots of that root of all crimes and evils—slavery.”\(^{114}\) That of course invited the claim that once the root was torn out, the plant’s poisonous “offshoots” would wither. Douglass himself identified the fallacy in this view after taking stock of the breadth of counter-revolutionary resistance to Reconstruction. As he insisted in 1872,

> Freedom from the auction block and from legal claim as property is of no benefit to the colored man without the means of protecting his rights. . . . We cannot be asking too much when we ask . . . Congress to carry out the intention of this Nation as expressed in the thirteenth, fourteenth, and fifteenth amendments. We are not free. We cannot be free without the appropriate legislation provided for in the above amendments. . . . [I]t is idle to point us to the amendments and ask us to be satisfied with them and wait until the nation is educated up . . . . The result intended to be reached by the nation has not been reached. Congress has neglected to do its full duty.\(^{115}\)

But even among Radical Republicans, the argument increasingly fell on deaf ears.

The third idea is that there is no necessary moral relationship between slavery and the regime of constitutional thought reflected in the original thirteenth amendment.\(^{116}\) This is the line of thought reflected in Dickinson’s speech—treating the continuity of the

\(^{113}\) Here American responses to slavery, Jim Crow segregation, and racism contrast sharply with concepts of collective guilt in post-war Germany. See James W. Booth, Communities of Memory: On Witness, Identity, and Justice 181 (2006) (“[I]n the German case, the struggle to recognize the persistence of the weight of the Holocaust has been a central part of establishing a postwar democratic German identity.”). On the contests over German collective memory and guilt, see Wulf Kansteiner, In Pursuit of German Memory: History, Television, and Politics After Auschwitz (2006); Richard J. Evans, In Hitler’s Shadow: West German Historians and the Attempt to Escape From the Nazi Past (1989).

\(^{114}\) Douglass, supra note 82, at 707.

\(^{115}\) Frederick Douglass, Give Us the Freedom Intended for Us, The New National Era (December 5, 1872), reprinted in Frederick Douglass: Selected Speeches and Writings 612, 613 (Philip S. Foner ed., 1999). Douglass expressed similar views in 1863. Our Work is Not Done, Speech delivered at the Annual Meeting of the Anti-Slavery Society, Philadelphia, December 3-4, 1863, reprinted in Frederick Douglass: Selected Speeches and Writings, supra, at 546-53.

\(^{116}\) Even before the war, it should be noted, most Republicans and abolitionists were white supremacists. The objection to slavery was not that it expressed white supremacy but that the specific institution was inconsistent with political ideas about free labor and the religious doctrine—deeply controversial in the antebellum period—that slavery was a sin. See Eric Foner, Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War 261 (1995); Guyatt, supra note 109, at 232, 235.
Union, the preservation of the Union as it was, as morally prior to and distinct from the legacy of slavery. Neither states’ rights nor white supremacy was responsible for the war, on this view; only the sin of slavery. Thus any solutions to the enduring consequences of slavery should not alter the terms of the great “experiment of republican Union.”

Similarly dissociative ideas were reflected in constitutional theory and doctrine. The Court was dominated in the 1870s and 1880s by Justices who supported the retreat from Reconstruction. As Hyman and Wieck summarize, “State-centered nationalism suffused the Supreme Court as well as the legal profession.”117 Thus the Court scrutinized congressional debates concerning the drafting of the Reconstruction Amendments for evidence of intent to limit their effect on state sovereignty while the paradoxical circumstances of ratification were ignored. The Court blinked at the complicity of state actors and state legal systems in widespread “private” violence, intimidation, and discrimination against African Americans.118 And the Court dismissed claims for equal treatment as unjustified pleas for special treatment.119 Legal debate about “Our Federalism” was thus quickly sanitized of the blood in African Americans’ resistance to slavery, in the war, in emancipation, and in the process of ratifying the Reconstruction Amendments. It also was sanitized of the democratic paradox that these Amendments, which purportedly secure our legitimacy as a free society, derive from a state of exception. The overall effect is that the Reconstruction Amendments were interpretively quarantined by the very counter-revolution they were enacted to put down. The quarantine remains in effect.120 It is so strict that federalism doctrine is routinely elaborated from the Founding as if the incursions on states’ rights during the war and reconstruction, incursions responsible for emancipation and the ratification of the Reconstruction Amendments, never occurred.121

V. Conclusion

You are the children of Abraham Lincoln. We are at best only his stepchildren; children by adoption, children by forces of circumstances and necessity.122

Douglass offered this biblical double entendre on April 14, 1876, at a dedication ceremony for the Freedmen’s Monument in Memory of Abraham Lincoln. The monument was

117 Hyman & Wieck, supra note 9, at 473.
120 I have discussed the modern Supreme Court’s interpretation of the Reconstruction Amendments at length in Norman W. Spaulding, Constitution as Counter-Monument: Federalism, Reconstruction and the Problem of Collective Memory, 103 Colum. L. Rev. 1992 (2003).
121 This is evident in a wide range of modern Supreme Court cases, perhaps most prominently Younger v. Harris, 401 U.S. 36, 42-43 (1971). The point is not that Younger is wrongly decided, but rather that the Court’s analysis of federalism draws an unbroken interpretive line between the Framers’ structural constitutional commitments and the present.
122 Frederick Douglass, Oration in Memory of Abraham Lincoln, delivered at the unveiling of the Freedman’s Monument in Memory of Abraham Lincoln, Lincoln Park, Washington, D.C., April 14, 1876, reprinted in Frederick Douglass: Selected Speeches and Writings, supra note 115, at 616, 618.
funded by former slaves, commissioned by a white war relief agency, and designed and sculpted by the famous New England sculptor Thomas Ball. It depicts Lincoln standing with his right hand on the Emancipation Proclamation and his left hand extended paternally over a kneeling, shackled African American man wearing only a loincloth. Dougray spoke before an audience that included President Grant, distinguished members of Congress, and Chief Justice Waite. Reconstruction had all but ended—the contested Hayes-Tilden election leading to the return of “home rule” in the South was six months away, but the nation, the Republican Party, and the Supreme Court had already cleared the path.

Douglass was there to pay homage to Lincoln, but he steadfastly refused to participate in hagiography and he challenged the condescending design of the memorial.

It must be admitted, truth compels me to admit, even here in the presence of the monument we have erected to his memory, Abraham Lincoln was not, in the fullest sense of the word, either our man or our model. In his interests, in his associations, in his habits of thought, and in his prejudices, he was a white man. He was preeminently the white man’s President.

The first argument Douglass gave in support of this claim was Lincoln’s commitment to the regime of thought reflected in the original thirteenth amendment: that Lincoln “was ready and willing at any time during the first years of his administration to deny, postpone, and sacrifice the rights of humanity in the colored people to promote the welfare of the white people of this country.” Offering this painful example of Lincoln’s racism and constitutional conservatism in 1861 and early 1862 set up the compliment to his “success in organizing the loyal American people for the tremendous conflict before them . . . and . . . free[ing] his country from the great crime of slavery.” It also provided a brilliant, implicit rebuke of the audience before whom he spoke, responsible as its distinguished members were for the retreat from Reconstruction on the very terms that Lincoln had sought to avoid the war in the first place.

Insofar as the universal was present, it was cryptically in Isaac, hidden, so to speak, in Isaac’s loins, and must cry out with Isaac’s mouth, Do not do this, you are destroying everything.

If Douglass believed the nation could complete the movement of constitutional faith, there is no evidence of it in the speech he gave that day. The only clear reference to

124 Douglass, supra note 122, at 618; see also Martha S. Jones, Emancipation’s Encounters: The Meaning of Freedom from the Pages of Civil War Sketchbooks, 3 J. Civil War Era 533, 535 (2013) (“No figure gave more express thought to the link between the politics of emancipation and the image than did Frederick Douglass.”).
125 Id.
126 Id. at 621.
127 Hyman & Wiececk, supra note 9, at 488 (“[L]eadership in the judicial retreat from Reconstruction should be assigned to [Chief Justice] Waite’s term. For during his years on the Court (1874-88) the justices accelerated relegation of the Thirteenth Amendment almost to invisibility and the Fourteenth to state-action-only futility.”).
128 Kierkegaard, supra note 1, at 59.
the future is the safekeeping of memory. The memory of Lincoln, he insisted, “would be precious forever” for African Americans.\textsuperscript{129} One hundred and fifty years after emancipation, we wince at the Freedmen’s Monument,\textsuperscript{130} as Douglass surely winced. But if there is a higher expression of the universal hidden cryptically in the constitutional sacrifices of the Civil War and Reconstruction, we have yet to find it. We are no more willing than Douglass’s audience to plunge confidently into the absurd—to interrogate the paradoxes that surround emancipation and make of it the refounding it has always been. The nation capable of confronting these paradoxes squarely, of making the movement of constitutional faith necessary to vindicate the choices of those who died for emancipation, does not yet exist.

\textsuperscript{129} Douglass, supra note 122, at 624.