A Lost Theory of American Emergency Constitutionalism

JOHN FABIAN WITT

The historical literature on emergency powers in American constitutional law is, in part, a product of the process by which Americans in the century after the Civil War crafted a national narrative.[1] In the conventional story, cases such as *Ex Parte Milligan* established the importance of civil liberties in crisis times.[2] As recent work has begun to point out, powerful historical forces supported the *Milligan* consensus. The case established itself as a symbol of civil libertarian values while simultaneously limiting the

1. David Blight, *Race and Reunion: The Civil War in American Memory* (Cambridge: Belknap Press, 2001); Eric Foner, *Reconstruction: America's Unfinished Revolution 1863–1879* (New York: Harper & Row, 1989); Aziz Rana, "Freedom Struggles and the Limits of Constitutional Continuity," *Maryland Law Review* 71 (2012); and William E. Forbath, "The Ambiguities of Free Labor," *Wisconsin Law Review* (1985) (arguing that the Reconstruction Supreme Court exhumed the legacy of John Calhoun).

2. *Ex Parte Milligan*, 71 U.S. 2 (1866); see also *Ex Parte McCardle*, 74 U.S. 506 (1869); and *Ex Parte Yerger*, 75 U.S. 85 (1869).

John Fabian Witt is Allen H. Duffy Class of 1960 Professor of Law, Professor of History, and Head of Davenport College, Yale University < john.witt@yale.edu>.
He thanks Gary Gerstle, Joel Isaac, David Dyzenhaus, and the participants in the States of Emergency Conference at Clare College, Cambridge, as well as Scott Shapiro, Will Smiley, and the members of the Yale Law School American Constitution Society Reading Group for reactions and helpful conversations. The reader reports for this article were uncommonly thoughtful; the author thanks the anonymous readers and Elizabeth Dale and Gautham Rao for shepherding them to him. He received indispensable research assistance on this project from students Michael Cotter, Berit Fitzsimmons, David Miller, Lauren Miller, Rob Nelson, Gabriel Perlman, Todd Spencer, and Brandon Thompson, and from John Nann and Michael VanderHeijden at the Yale Library.

Law and History Review August 2018, Vol. 36, No. 3

doi:10.1017/S0738248018000317

authority of federal power on behalf of the formerly enslaved in the South.[3] For generations, the *Milligan* story thus appealed to civil libertarians and apologists for Jim Crow alike. It gathered together a wide array of constituencies in American politics. It still does today.[4]

Yet the emergence of the *Milligan* story as the conventional wisdom in American emergency constitutionalism was also contingent and accidental. Americans constructed a story of emergency powers and their civil libertarian constitutional limits at least in part around a very practical loss: a prominent author's sudden death followed by the posthumous misfiling of a manuscript buried in his disorganized papers. The author was Francis Lieber: Prussian immigrant, Columbia University professor of law, and one of the founders of American political science. Lieber was the author of the Union's influential 1863 restatement of the laws of war, and a man whose remarkable life experience from Berlin to Waterloo to the Lincoln White House afforded him an unparalleled window onto the emergency moments of nineteenth-century states.[5] At the time of his death, Lieber was working on a manuscript that he hoped would serve as a capstone for a series of great American debates around emergencies and slavery that had taken place across nearly a half-century.

Scholars have long known that Lieber was working on such a text. He described the manuscript in correspondence on a number of occasions.[6] Moreover, his son, Guido Norman Lieber, who served as judge advocate general in the last two decades of the nineteenth century, published fragments from the manuscript in 1877 and again in 1896.[7] Now, the

3. John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012); and Rana, "Freedom Struggles."

4. The crucial text is James Randall, *Constitutional Problems Under Lincoln* (Urbana, IL: University of Illinois Press, rev. ed. 1951), which adopted the view that the Civil War was a needless and wasteful conflict. Randall's book played a large role in constructing the historical memory of the Civil War era's emergency constitutionalism. On the political compromises entailed in Milligan, see Witt, *Lincoln's Code*; Gregory Downs, *After Appomattox* (Cambridge, MA: Harvard University Press, 2015); and Rana, "Freedom Struggles."

5. See Witt, *Lincoln's Code*; Frank Freidel, *Francis Lieber: Nineteenth-Century Liberal* (Baton Rouge: Louisiana State University Press, 1947); Paul Finkelman, "Francis Lieber and the Modern Laws of War," *University of Chicago Law Review* 80 (2013): 2017–132; and Paul Finkelman, "Lieber, Slavery, and the Problem of Free Thought in Antebellum South Carolina," in *Francis Lieber and the Culture of the Mind*, ed. Charles R. Mack and Henry H. Lesesne (Columbia, SC: University of South Carolina Press, 2005), 11–22.

6. Francis Lieber to Henry Halleck, June 2, 1863, Francis Lieber Papers, Huntington Library, San Marino, California (hereafter Huntington Lieber Papers); and Francis Lieber to Charles Sumner, May 24, 1863, Huntington Lieber Papers.

7. G. Norman Lieber, *Meaning of the Term Martial Law as Used in the Petition of Right and the Preamble to the Mutiny Act 2–3 & n*. (1877); G. Norman Lieber, "Martial Law During the Revolution," *The Magazine of American History with Notes and Queries*

manuscript has come to light, hidden deep in the judge advocate general's papers in the National Archives in Washington, probably placed there by the younger Lieber and forgotten for more than a century. In it lie the elder Lieber's meditations on the problem of emergency constitutionalism in democratic systems. Expanded by his son after his death, but never completed, the Liebers' lost manuscript is disorganized and eclectic. At its heart, it summarizes a fierce yet recognizably liberal strand of thinking about constitutional emergencies that first emerged in the controversies before the Civil War and then animated the legal strategy of the Lincoln White House before eventually facing mounting opposition in the postwar backlash signaled by the Supreme Court's *Milligan* decision in 1866. The manuscript defends the suspension of habeas corpus, the Emancipation Proclamation, and the use of military commissions as all part of the righteous promotion of just ends.[8]

If all the manuscript did was set out the Lieber view of Civil War controversies, it would be important as a historical document, shedding light on the ideas of a man who was one of the legal architects of the Lincoln Union war effort. But the Lieber manuscript goes further. Along the way, the Liebers' manuscript connects the world of emergency constitutionalism thinking a century and a half ago to the long history of thinking about emergency powers and sovereign prerogative stretching back into early modern Europe. In particular, the Liebers offer a theory of emergency constitutionalism and of the dangerous but enduring principle that lies at its core: the principle of necessity. Francis was fiercely uncompromising in his thinking on necessity in the laws of war. Necessity stood as the organizing principle of his 1863 instructions for the Union Army. "To save the country," Lieber wrote in those instructions, "is paramount to all other considerations."[9] Few constraints seemed to stand in the way of necessity's

(New York: A.S. Barnes & Company, 1877), 1:538–41; and G. Norman Lieber, "What is the Justification for Martial Law," *North American Review* 163 (1896): 558.

8. Francis Lieber and G. Norman Lieber, *Martial Law Treatise* (ms.), Guido Norman Lieber Collection, Judge Advocate General Papers, Record Group 153, National Archives and Records Administration. For the forthcoming published version of the manuscript, see Francis Lieber and G. Norman Lieber, *To Save the Country: A Lost Treatise on Martial Law*, eds. Will Smiley & John Fabian Witt (New Haven: Yale University Press, 2019).

9. General Orders, No. 100, Instructions for the Government of Armies of the United States in the Field, reprinted in Witt, *Lincoln's Code*, 375–76. This version of Lieber's instructions corrects errors (most of them relatively minor) that appear in the most commonly cited versions. Such errors have appeared in reprints of the instructions ever since the first commercially printed version appeared in 1863.

dictate. At the very least, Lieber's wartime writings left them essentially unexplored.

The Liebers' unpublished postwar manuscript sets out a theory of the basic conundrum of necessity in a constitutional republic, and proposes a resolution. The Liebers' manuscript grasps the deep difficulty of any effort to mobilize the necessity principle. The standard of necessity purports to license conduct that is required in the defense of the state. But to ask what is necessary to save the state begs the question of what the state is. Reasoning about the means necessary in an emergency situation requires a conception of the ends to which those means are directed. Emergencies are therefore occasions, or at least potential occasions, for altering the constitutive features of the state, and indeed for redefining its very identity.[10] And where the state is a creature of its laws—where, as in the United States, collective identity arises out of the law rather than prior to it—departing from or altering the law out of necessity poses a special risk of transforming that identity by altering its basic constitutive features.[11]

In developing such ideas, the Liebers drew on a generation of debates over slavery and martial law. Moreover, they articulated an answer to the conundrum that the necessity power seemed to present. They proposed that invocations of the necessity power were always themselves shaped by existing institutions, values, and culture. Not even an emergency, they argued, offered a moment of pure power in which to redefine the constitutional order as if on a blank slate. To the contrary, they insisted, the collective public reason of a given constitutional regime created continuing constraints on emergency action, even as it authorized more aggressive

10. Carl Schmitt, *Political Theology*, trans. George Schwab (Chicago, IL: University of Chicago Press, 2005); Carl Schmitt, *Dictatorship*, trans. M. Hoelzl & G. Ward (Cambridge: Polity Press, 2014); Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford, CA: Stanford University Press, 1998); see also Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago, IL: University of Chicago Press, 2005). It is worth noting that the idea of necessity substantially predates the idea of the state; a more precise formulation might be that necessity purports to license conduct that is required in the defense of the relevant political unit, which happens in the modern era to be the state. On necessity before the state, see Benjamin Strauman, *Crisis and Constitutionalism: Roman Thought from the Fall of the Republic to the Age of Revolution* (New York: Oxford University Press, 2016).

11. On the United States as a legally constructed community, see, among many others, Akhil Reed Amar, "A Few Thoughts on Constitutionalism," *Fordham Law Review* 65 (1997): 1657–58; Laurence H. Tribe, "America's Constitutional Narrative," *Daedalus* 141 (2012): 18, 34; and Aziz Rana, "Constitutionalism and the Foundations of the Security State," *California Law Review* 103 (2015): 335, 337; see also John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* (Cambridge, MA: Harvard University Press, 2007).

pursuit of government power than the Supreme Court's *Milligan* decision seemed to allow.

The pages that follow aim to reconstruct the lost Lieber manuscript and the forgotten American debates over emergency constitutionalism that it embodies. Part I. describes the raucous antebellum contest over martial law. It documents the roots of that contest in the special problem of constitutional democracy in a slave society, and it argues that the participants in the controversies grasped all too clearly the insight that the very identity of their republic was at stake in the moment of emergency. Part II turns to Francis Lieber's engagement with the antebellum debates and to his encounter with the Civil War debates over habeas corpus and emancipation. Part III characterizes two competing accounts of those values and commitments offered by jurists thinking about emergency and Anglo-American constitutionalism in the 1860s and 1870s. Part IV turns to the Lieber manuscript. The Liebers' lost manuscript develops a third way of thinking about martial law, one that consolidated lessons from the debates of the previous half century.

I. Martial Law in a Slave Society

In the decades before the Civil War, Americans engaged in a running argument over constitutional law in emergencies. As scholars such as Daniel Hulsebosch and Kim Scheppele remind us, the conversation went back to the War of Independence, when the British had instituted martial law in occupied territory such as New York. Indeed, the controversy went back still further, to at least the end of the Seven Years War, when the Mutiny Act for North America prohibited military jurisdiction over civilians.[12] Martial law persisted across the British Empire as a push for order and control by the crown in what Lauren Benton and Lisa Ford

12. Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World* (Chapel Hill: University of North Carolina Press, 2008), 157–69; and Kim Lane Scheppele, "North American Emergencies: The Use of Emergency Powers in Canada and the United States," *International Journal of Constitutional Law* 4 (2006): 213, 215–18; see also Frederick B. Wiener, *Civilians Under Military Justice: The British Practice Since 1689 Especially in North America* (Chicago, IL: University of Chicago Press, 1967); Saikrishna Bangalore Prakash, "Sweeping Domestic War Powers of Congress," *Michigan Law Review* 113 (2015): 1337, 1351–63; George M. Dennison, "Martial Law: The Development of a Theory of Emergency Powers, 1776–1861," *American Journal of Legal History* 18 (1974): 52–74; and Harold Relyea, "A Brief History of Emergency Powers in the United States: A Working Paper Prepared for the Special Committee on National Emergencies and Delegated Emergency Powers" (U.S. Sen., 93d Cong., 2nd sess., July 1974), 4–9.

have recently described as arguments over the basic "architecture" of the British Empire's "constitutional framework."[13] And during the framing of the U.S. Constitution in 1787, the problem of emergency powers may principally have been about modifying republican theory so as to enable the federal government to combat insurrections like Shays' Rebellion.[14] But like so many episodes of American history, debate over martial law in antebellum America quickly became an argument about slavery.

A. The Slaveholder's Problem

In the spring of 1836, aging congressman John Quincy Adams, not yet a decade removed from his one term in the White House, thrust antebellum debates over emergency constitutionalism to the fore when he took to the floor of the House of Representatives.[15]

Early in his career, Adams's political ambitions had led him to defend the interests of American slaveholders. As American minister to London at the end of the War of 1812, Adams negotiated for a provision in the Treaty of Ghent guaranteeing compensation to American slaveholders for slaves carried off in the war.[16] The Jay Treaty of the 1790s had famously failed to gain such a provision for slaves carried off after the Revolution; the slave-owning South had never forgiven John Jay for sacrificing their interests.[17] But a politically ambitious Adams made no such mistake. When the British disputed the United States's interpretation of the clause that Adams had insisted be included in the treaty, Adams carried on the fight.[18] As secretary of state under President James Monroe, Adams argued tirelessly that the treaty terms codified a pre-existing principle in the laws of war prohibiting civilized states from seizing enemy slaves in

13. Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (Cambridge, MA: Harvard Press, 2016).

14. See Sveinn Johannesson, "'Securing the State': James Madison, Federal Emergency Powers, and the Rise of the Liberal State in Post-Revolutionary America," *Journal of American History* 104 (2017): 363–85.

15. Cong. Globe, 24th Cong., 1st sess., appendix at 433–34.

16. Worthington Chauncey Ford, *The Writings of John Adams* (New York: The Macmillan Company, 1915), 5:125–26; see also Samuel Flagg Bemis, *A Diplomatic History of the United States*, 4th ed. (New York: Holt, Rinehart & Winston, 1955), 175–176 n.2.

17. John Bassett Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party* (Washington, DC: Government Printing Office, 1898), 1:352 n.1.

18. See, for example, Charles Francis Adams, ed., *Memoirs of John Quincy Adams* (Freeport, NY: Books for Libraries Press, 1969), 3:256–57.

wartime.[19] (Whether any such principle existed was a good deal less clear than Adams cared to admit.[20]) Adams persuaded the British to enter into an arbitration of the dispute before the Russian Czar in 1822: an arbitration that the United States won, at least in part.[21] The struggle over slaves in the War of 1812 even followed Adams into the White House, where as president in 1826, he ultimately won a substantial cash settlement from the British.[22]

As a result of Adams's indefatigable efforts, Southern slaveholders ultimately won more than $1,00,000 in compensation.[23] As Adams's biographer Samuel Flagg Bemis would state with more than a little irony, the statesman had "secur[ed] 'justice' for the slave-owners."[24]

In the 1830s, however, Adams was an embittered former one-term president like his father before him. The aging Adams now dropped his support for the slaveholders' interests and gave voice to his long-standing antislavery views.[25] (There is little doubt that Adams was, in his own mind, opposed to slavery.[26]) Adams's colleagues in the House insisted that the federal government lacked the power to regulate slavery.[27] But Adams offered a startling response that reverberated through the American constitutional order. It was true, Adams conceded, that in peacetime the

19. See *American State Papers: Foreign Relations* (Washington, DC: Government Printing Office, 1834), 4:106–125.

20. Compare Witt, *Lincoln's Code*, 73–77, with James Oakes, *The Scorpion's Sting* (New York: W.W. Norton & Co., 2014).

21. Gene Allen Smith, *The Slaves' Gamble: Choosing Sides in the War of 1812* (New York: St. Martin's Press, 2013); and Samuel Flagg Bemis, *John Quincy Adams and the Foundations of American Foreign Policy* (New York: Alfred A. Knopf, 1949), 293. The question of whether the United States won has long been answered by American historians in the affirmative. Adams himself thought the United States had won. See Charles Francis Adams, *Memoirs of John Quincy Adams*, 6:45. But James Oakes has recently argued that the better reading would hold that the British won. See Oakes, *Scorpion's Sting*.

22. Bemis, *John Quincy Adams and the Foundations of American Foreign Policy*, 293

23. Smith, *The Slaves' Gamble*. The sum was based on paying slave owners either $280, $390, or $580 for each slave, depending on where they were taken from. The two governments agreed that 3,582 slaves had been taken from the American coast: 1,721 from Virginia; 714 from Maryland; 833 from Georgia; 259 from Louisiana; 22 from Mississippi; 18 from Alabama; 10 from South Carolina; 3 from Washington, DC; and 2 from Delaware. Ibid.

24. Bemis, *John Quincy Adams and the Foundations of American Foreign Policy*, 293.

25. See William Lee Miller, *Arguing About Slavery: The Great Battle in the United States Congress* (New York: Vintage Books: 1996).

26. See William W. Freehling, *The Road to Disunion* (Oxford: Oxford University Press, 1991), 1:260; and Allan Nevins, *The Diary of John Quincy Adams, 1794–1845* (New York: Charles Scribner's Sons, 1928), 226–32; see also William Jerry MacLean, "Othello Scorned: The Racial Thought of John Quincy Adams," *Journal of the Early Republic* 4 (1984): 143–60.

27. Cong. Globe, 24th Cong., 1st sess., appendix at 433.

Constitution protected slavery from congressional interference; indeed, the Constitution may even have required congressional support of the peculiar institution. But Adams insisted that there was at least one situation in which the Congress could abolish slavery. That situation was wartime.[28]

"From the instant that your slave-holding States become the theatre of war, civil, servile, or foreign," Adams thundered, "from that instant the war powers of Congress extend to interference with the institution of slavery."[29] How could it be otherwise? Could it really be that the crisis of wartime would require Northerners to help put down a slave insurrection at the cost of their own blood and property, but not permit the Congress from sacrificing Southern property in the form of the slaves themselves? In a wartime emergency, Adams told a friend, Congress would have "complete, unlimited control over the whole subject of slavery, even to the emancipation of all the slaves."[30]

Adams repeated the same ideas again in the 1840s in support of repealing the so-called Gag Rule that prohibited antislavery speech on the House floor. If Congress had the authority to regulate or even repeal slavery in the event of war, then surely debate over the institution must necessarily be permitted among its members. If war ever came to American shores, Adams continued, martial law would supersede domestic laws and substitute a sweeping federal power in place of the crabbed enumerated powers offered in the Constitution. The ordinary laws preventing the federal government from interfering in slavery would thus cease to operate. "By the laws of war an invaded country has all its laws and municipal institutions swept by the board, and martial law takes the place of them."[31]

Decades later, in 1860, Frederick Douglass would take up Adams's argument in his famous Glasgow speech on whether the U.S. Constitution was pro-slavery or anti-slavery. The clause giving Congress the power to suppress insurrections, Douglass observed, under certain circumstances might "be best obeyed" simply "by putting an end to slavery."

28. Ibid., appendix at 433–34; see also Witt, *Lincoln's Code*; Miller, *Arguing About Slavery*; Freehling, *Road to Disunion*; Oakes, *Scorpion's Sting*; Leonard L. Richards, *The Life and Times of Congressman John Quincy Adams* (New York: Oxford University Press, 1986); Richard H. Sewell, *Ballots for Freedom: Antislavery Politics in the United States, 1837–1860* (New York: W.W. Norton & Co., 1980).

29. 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), 75–76.

30. Ibid., 73.

31. Ford and Adams, *John Quincy Adams*, 77; and "The Beginning of the End," *Harper's Weekly*, Sep. 14, 1861, at 578 (describing John Quincy Adams's April 14, 1842 speech on slavery and the war power).

Two years later, President Lincoln would embrace Adams's and Douglass's logic as the operative theory of the Emancipation Proclamation.[32]

For Southern slaveholding interests and their allies, Adams's contention about martial law and slavery betrayed the basic founding commitments of the republic. For support, they looked no further than the Declaration of Independence, in which Jefferson had condemned the king for having "excited domestic insurrections amongst us." The passage was a thinly veiled reference to the despised Lord Dunmore, the last royal governor of Virginia, who had issued a proclamation in 1775 freeing the slaves of rebellious Virginians.[33] And, therefore, it was no surprise that men such as Congressman Charles J. Ingersoll, a Democrat from Pennsylvania, recoiled with what he called "astonishment and horror" at Adams's arguments. The conventional wisdom of the major political parties had long been that the federal government possessed no authority over slavery in the states. Now Adams seemed to revive an idea that many had thought utterly defeated in the Revolution, an idea that threatened to transform the essential compromise on which the American constitutional order rested. Did Adams really mean, Ingersoll asked, that a war in the South would be "the end of the constitution"?[34]

Samuel Smith Nicholas, a lawyer and judge from Kentucky, elaborated on Ingersoll's critique in a long 1842 essay published under the pen name "Kentuckian."[35] Nicholas expressed shock at the broad martial law arguments of Adams: "I have not the language to express the surprise, not to say horror, with which I have witnessed the promulgation of these opinions," Nicholas began.[36] Adams's notion that martial law swept away the Constitution, Nicholas insisted, was "sheer madness."[37] In his view, the whole point of the constitutional compact was to commit the republic to a set of principles. To throw those principles aside for the broad powers of the international laws of war when danger arose was to misunderstand

32. Frederick Douglass, *The Constitution of the United States: is it pro-slavery or anti-slavery? by Frederick Douglass; a speech delivered in Glasgow, March 26, 1860, in reply to an attack made upon his views by Mr. George Thompson* (Halifax: T. & W. Birtwhistle, Printers, 1860), 10. Many thanks to Matt Steilen for pointing me to the Douglass passage.

33. Maya Jasanoff, *Liberty's Exiles: American Loyalists in the Revolutionary World* (New York: Knopf, 2011), 47–49; and Proclamation, Nov. 7, 1775, By His Excellency the Right Honourable John Earl of Dunmore, Evans Early American Imprint no. 14592.

34. Cong. Globe, 27th Cong., 1st sess., p. 38 (Wednesday, June 9, 1841); Adams, *Emancipation Under Martial Law*.

35. *Martial Law by a Kentuckian* (Louisville: Louisville Journal, 1842).

36. Ibid., 6.

37. Ibid.

https://doi.org/10.1017/S0738248018000317 Published online by Cambridge University Press

the project of the Constitution. Even if the laws of war were relevant, it simply could not be that "a foreign invader can strike dead in the hands of its owners four hundred millions' worth of property by his mere proclamation."[38] Nicholas insisted that Adams was "so engrossed with his animosity to negro slavery, as to forget himself."[39] Adams's "zeal for his black fellow-citizens" had led him to "advocate principles that would inevitably lead to the enslaving of his white fellow-citizens."[40] As Nicholas well understood, Adams was proposing to seize on an emergency not to restore the constitutional status quo ante, but to transform the basic identity of the state.

Adams's basic claim was that once martial law was in effect, only necessity restrained its operation. No domestic law or constitutional restriction could stand in the way of a power that was necessary to the preservation of the republic.

But Nicholas had a powerful objection. To destroy slavery, he argued, would be to destroy the United States just as surely as successful foreign invasion, because the United States was not merely a collection of self-governing individuals, it was a collection of people organized around a set of constitutional commitments.

Nicholas reasoned that the collective "We the People" of the Constitution's preamble existed by virtue of the Constitution, and *only* by virtue of the Constitution. There was no collective American identity worth saving if it came at the cost of ending slavery, because without a commitment to protect slavery there was no republic on which men in the North and South alike agreed. The United States, Nicholas insisted, was not a collection of individuals conceptually independent from the constitutional regime that Adams proposed to throw over in the emergency. In Nicholas's view, the thing to be saved from destruction had not been *found* by the Constitution. It had been *made* by the Constitution. The Constitution's destruction would destroy the collective identity of the people thus made just as surely as any successful foreign invasion. To tear up key constitutional commitments would not be to rescue the community that the Constitution had called into being, it would be to destroy the old republic and build a new one.[41]

Nicholas and his fellow antebellum critics had a long history of British authorities to rely on in their critique of martial law. Sir Matthew Hale's

38. Ibid.

39. Ibid., 7.

40. Ibid.

41. 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* 79 (2004): 1299, 1302–9.

History of the Common Law of England, published in 1713, had announced that martial law "is not a law, but something indulged rather than allowed as a law."[42] It had, Hale wrote, no application to those outside the military and "may not be permitted in time of peace, when the king's courts are open."[43] A half century later, William Blackstone had followed Hale, citing the Petition of Right's limits on the prerogatives of the crown. Martial law, Blackstone contended, was "entirely arbitrary," unconstrained, and utterly inapplicable except within the ranks of the military or in wartime.[44]

What Nicholas and his distinguished British predecessors meant was that martial law posed a distinctive threat to the basic character of the constitutional order. Jefferson Davis, who would serve as president of the Confederate States of America during the Civil War, grasped precisely this point. During debates over the Compromise of 1850, Davis asked hypothetically what would happen if during a "period of invasion" or other grave danger, "martial law should be declared over the whole of the United States." "Suppose, in that case, that the Executive of the United States, vested with extraordinary power, should decree that slavery was abolished throughout the United States by virtue of the powers which he held under martial law, does any body believe it would be submitted to? Will any man contend that such a decree would have the validity of law in this Union?"[45]

For Nicholas and Davis, the regime that abolished slavery to save itself in time of emergency had not saved itself at all. Instead such a regime had destroyed itself by adopting means to meet the emergency that were constitutive of a very different kind of state.

B. The Hidden Logic of Antebellum Controversies

Twentieth- and twenty-first-century observers have not entirely ignored antebellum debates over martial law.[46] Two episodes in particular have

42. Sir Matthew Hale, *History and Analysis of the Common Law of England* (London: J. Nutt, 1713), 40.

43. Ibid., 41.

44. William Blackstone, *Commentaries on the Laws of England* (Chicago, IL: University of Chicago Press, 1979 [originally published 1765–176]), 1:400. The annually re-enacted Mutiny Act (annually re-enacted after the Glorious Revolution) authorized the application of military law within the ranks in times of peace inside the realm. See Francis Lieber and G. Norman Lieber, *To Save the Country: A Lost Theory of Martial Law*, eds. Will Smiley and John Fabian Witt (New Haven: Yale University Press, 2019).

45. "Speech of Mr. Davis," *Daily National Intelligencer*, February 19, 1850, 1.

46. On the history of nineteenth-century martial law episodes in the United States, see Downs, *After Appomattox;* Matthew Warshauer, *Andrew Jackson and the Politics of*

long featured in the historical memory. Neither was explicitly about slavery, but in hidden ways, both were powerfully shaped by the logic of martial law and slavery.

In December 1814, in the waning days of the War of 1812, General Andrew Jackson declared martial law in New Orleans. The entire episode soon became a set piece in the career of the future president. In January, only weeks after diplomats in Belgium (unbeknownst to Jackson) had inked the Treaty of Ghent to end the war, Jackson defeated the British forces assaulting the city. Yet martial law remained in force after the victory, and over the subsequent 2 months, Jackson's forces arrested scores of New Orleans citizens who fell under suspicion of opposition to his authority. In early March, even after he learned of the peace treaty, Jackson ordered Federal District Judge Dominick Augustin Hall arrested and held after the judge issued a writ of habeas corpus on behalf of a Louisiana state legislator whom Jackson had arrested after the man wrote critically of Jackson's continued regime of martial law. Shortly after peace had been officially restored and Jackson had lifted martial law, Judge Hall fined the general $1000 for contempt of court.[47]

Twenty-seven years later, after Jackson's presidency, the Democratic Party revived the legend of Jackson's New Orleans adventures, aiming to get the Congress to reimburse Jackson for the costs of his contempt fine. It was brilliant politics; the Democrats had found a way to put the great populist politician at the center of American politics once again. Not coincidentally, the Democrats retook the White House in 1844.[48]

Jackson's political charisma had scrambled the usual politics sufficiently so as to obscure the underlying politics of slavery and martial law. Jackson's declaration in 1814 was not a threat to slavery; on the contrary, it was part of an effort to secure slavery in the face of British threat. British raiding parties had carried off thousands of American slaves in the course of the war; they continued to do so in and around New Orleans in late 1814 and early 1815.[49] Jackson was slave owner himself with a position on

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Martial Law (Knoxville: University of Tennessee Press, 2006); Dennison, "Martial Law," 53–79; Abraham D. Sofaer, "Emergency Power and the Hero of New Orleans," *Cardozo Law Review* 2 (1981): 233, 238–52; Saikrishna Prakash, "The Sweeping Domestic War Powers of Congress," *Michigan Law Review* 113 (2015): 1337; and James MacDonald, "Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundation of American Constitutionalism," *Virginia Law Review* 96 (2010): 1361.

47. Warshauer, *Andrew Jackson*; and Dennison, "Martial Law," 61–65.

48. Ibid.

49. Mary R. Bullard, *Black Liberation on Cumberland Island in 1815* (DeLeon Springs, FL: E.O. Painter Printing Co., 1983); Frank A Cassell, "Slaves of the Chesapeake Bay Area and the War of 1812," *Journal of Negro History* 57 (1972): 144; George T. Christopher,

slavery that was unambiguous. And in this context, martial law declared by a son of the South came as a welcome way to resist the threat to the republic.

Even as debates about indemnifying Jackson were getting underway in the Congress, a similar episode of state martial law arose in Rhode Island. In 1842, the long-standing charter government of the state declared martial law to suppress a challenge by a contender government operating under a controverted new state constitution.[50] Dorr's Rebellion, as the controversy has come to be known, reached the United States Supreme Court in in 1849 in the case of *Luther v. Borden*, in which Chief Justice Roger Taney, a slaveholder from Maryland, upheld the invocation of martial law in an action for damages by a member of the challenger government. Taney, as if channeling John Quincy Adams, reasoned that martial law "was a state of war" that entitled an "established government" to resort "to the rights and usages of war to maintain itself." Absent the power to do what was necessary to defend itself, Taney insisted, "martial law and the military array of the government would be mere parade."[51]

The case of Dorr's Rebellion came out of New England rather than the South. Even so, the role of slavery in arguments over martial law could not be suppressed. Writing in dissent, Justice Levi Woodbury pointed to the grave danger of martial law for the system of slavery. Chief among the outrages of martial law, Woodbury wrote, was Lord Dunmore's tyrannical martial law proclamation in 1775, because, Woodbury reminded his readers, not only had Dunmore established martial law, he had also declared the slaves of all rebels to be free.[52]

Taney of Maryland, however, was considerably closer to the slavery problem than Woodbury of New Hampshire. Taney grasped that martial law was not always a threat to slavery; sometimes, as in Jackson's New Orleans during the War of 1812, it could be a critical tool in slavery's defense. In 1844, Taney had supported Congress's indemnification of his political patron Jackson. Writing to the former president—the man who had nominated him to the chief justiceship—Taney defended his patron's declaration of martial law in New Orleans in the fight against British raiding parties. Judge Hall's conduct, Taney wrote, had been "unjust."

"Mirage of Freedom: African Americans in the War of 1812," *Maryland Historical Magazine* 91 (1996): 427; and Alan Taylor, *The Internal Enemy: Slavery and War in Virginia, 1772–1832* (New York: W.W. Norton, 2013).

50. Erik J. Chaput, *The People's Martyr: Thomas Wilson Dorr and His 1842 Rhode Island Rebellion* (Lawrence: University Press of Kansas, 2013).

51. *Luther v. Borden*, 48 U.S. 1 (1849).

52. Ibid., at 40 (Woodbury, J., dissenting).

"A grosser act of injustice," he told Jackson, "was never perpetrated by any court, than the infliction of that fine upon you."[53]

Five years later, in *Luther v. Borden*, the key for Taney was that Dorr's Rebellion had involved a *state* government's rather than the *federal* government's declaration of martial law. Uses of federal troops to prevent rumored slave revolts were few and far between.[54] At the state and local level, by contrast, the slave patrol and the state militia were central to the maintenance of slavery.[55] At the state level, martial law might be necessary to defend slavery against servile insurrection, as it had been repeatedly in the British Empire. The British had relied on martial law to protect slavery in Barbados in 1816,[56] in Demerara (now Guyana) on the north coast of South America in 1823,[57] and in Jamaica in 1831.[58] The idea that martial law might be a threat to slavery was, therefore, a peculiar artifact of the Constitution of 1787 and its distinctive allocation of authority. Elsewhere—whether in the states or in the British Empire—martial law served as a critical support for Anglo-American slavery.[59] Taney's *Luther v. Borden* opinion ensured that martial law power would be available in the states of the South should slave insurrection so require.

The Battle of New Orleans and *Luther v. Borden* showed that the politics of martial law and slavery could flip. Indeed, depending on the political context, they could have reversed themselves entirely. Nicholas's "Kentuckian" objections might become the objections of slavery's critics if the federal government forced slavery on them. As the 1840s and

53. Warshauer, *Andrew Jackson*, 210.

54. There had been occasional mobilizations of federal troops: in Richmond in 1800, in Mississippi in 1807, and in New Orleans in 1826, 1831, 1837, and again in 1840. See David Adams, "Internal Military Intervention in the United States," *Journal of Peace Research* 32 (1995): 197, 199.

55. Sally Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* (Cambridge, MA: Harvard University Press, 2001); and John Hope Franklin, "Slavery and the Martial South," *Journal of Negro History* 37 (1952): 36, 43–44.

56. See Lieber and Lieber, *Treatise on Martial Law*.

57. Ibid.

58. See Rande W. Kostal, *Jurisprudence of Power: Victorian Empire and the Rule of Law* (New York: Oxford University Press, 2008).

59. See Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003); see also "Alarm at Jamaica," *American Herald*, February 6, 1800, 3; "Insurrection of the Slaves in Jamaica," *The Liberator*, January 28, 1832, 2; "A Letter from Montego Bay," *The Liberator*, February 18, 1832, 2; "Gentlemen," *City Gazette*, November 28, 1817, 2. On martial law as a force both for emancipation and for the defense of slavery in Latin America, see Peter Blanchard, "Slave Soldiers of Spanish South America: From Independence to Abolition," in *Arming Slaves: From Classical Times to the Modern Age*, ed. Christopher Leslie Brown and Philip D. Morgan (New Haven: Yale University Press, 2013).

1850s progressed, Southern slaveholders and the jurists who defended them matched Adams's audacious martial law stratagem with bold moves of their own. Where once they had insisted that the federal government lacked authority to interfere with slavery within the states, now some began saying that territories lacked authority to ban slave ownership rights guaranteed by the federal Constitution.[60] Chief Justice Taney agreed. In 1857, a Supreme Court dominated by slaveholder justices and fellow travelers adopted precisely this argument in the *Dred Scott* case.[61] Some slaveholder jurists went even further. Perhaps states, like territories, lacked the authority to interfere with slaveholders and slaves. The Fugitive Slave Act had already created obligations on the part of Northern free states to return slaves who had made it into free territory. The federal Constitution, properly understood, might also obligate free states to tolerate the master–slave relations of those claiming title in other human beings under the law of a slave state.[62]

Consider the *Lemmon v. New York*, which presented precisely such a challenge. In 1841, the New York State Legislature had passed a law rendering free any person formerly held as a slave and brought into the state by the voluntary act of his or her master. Nine years later, in November 1852, Jonathan and Juliet Lemmon of Virginia entered New York harbor by sea, on a roundabout trip from their home state to Texas. The Lemmons brought with them eight "colored persons" whom Juliet considered to be her household slaves and who were by all accounts deemed by the laws of Virginia to be her slaves.[63] When free black New Yorker Louis Napoleon applied for a writ of habeas corpus on behalf of the eight people, the lower courts of New York granted the writ and ruled them free. In 1860, after the United States Supreme Court had decided *Scott v. Sandford*, the state's high court, the New York Court of Appeals, affirmed the lower courts. The eight colored persons were free, at least as far as New York law was concerned.[64]

60. Don Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978); Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Union, NJ: The Lawbook Exchange, 2000); and Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835–1875* (New York: Harper & Row, 1982).

61. *Scott v. Sandford*, 60 U.S. 393 (1857).

62. Fehrenbacher, *The Dred Scott Case*.

63. John D. Gordan, III, "The Lemmon Slave Case," *Judicial Notice* 4 (2006): 1, 8.

64. *Lemmon v. New York*, 20 N.Y. 562 (1860); Finkelman, *An Imperfect Union*, 290–98; and William E. Nelson, "The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth-Century America," *Harvard Law Review* 87 (1974): 546–47.

But the case was not over. The Lemmons appealed to United States Supreme Court, relying on the *Dred Scott* decision.[65] After all, Chief Justice Taney's opinion in *Dred Scott* had hinted that the federal constitution might protect the property rights in slaves of a citizen of one state traveling into other parts of the United States. The "right of property in a slave," he had written, "is distinctly and expressly affirmed in the Constitution."[66] Justice Nelson's concurring opinion in *Dred Scott* was more explicit. "A question has been alluded to," Nelson observed, about "the right of the master with his slave of transit into or through a free State."[67] In theory, the question had been resolved decisively by the principle of *Barron v. Baltimore*, which had ruled in 1833 that the Bill of Rights did not apply to the states.[68] But now Nelson suggested that the answer might be otherwise. "When that question arises," he said, "we shall be prepared to decide it."[69]

In *Lemmon*, the United States Supreme Court seemed poised to hold that the free state of New York would have to recognize slaves held in bondage by the law of another state, even when those slaves had been brought voluntarily into New York's free territory by their ostensible owner.[70] Had Chief Justice Roger Taney's Supreme Court decided *Lemmon* in this way, the threat of federal court orders would suddenly have loomed over every ostensibly free state in the country: federal court orders enforceable by military force, if it came to that.[71]

The Court never did decide the *Lemmon* case. Shooting broke out at Fort Sumter before it had the chance.[72] But in the process of debating martial law and slavery from 1836 to 1861, abolitionists and slaveholders alike

65. William M. Wiecek, "Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American Word," *University of Chicago Law Review* 42 (1974): 136–37; see also Charles Warren, *The Supreme Court in United States History* (Boston: Little, Brown, 1922), 3:82–83.

66. *Dred Scott,* 60 U.S. at 450–51.

67. Ibid., at 468 (Nelson, J., concurring).

68. *Barron v. Baltimore*, 32 U.S. 243 (1833).

69. *Dred Scott*, 60 U.S. at 468 (Nelson, J., concurring).

70. See Finkelman, *An Imperfect Union*, 285–338.

71. Some historians contend that this reading of Lemmon is too strong. See, for example, James W. Ely, Jr.'s review of Finkelman's *An Imperfect Union*: "Book Review," *California Law Review* 69 (1981): 1759–63. Critics such as Ely may be right that the Court of 1861 was not prepared to extend slaveholders' rights to relocating their slave property to ostensibly free states. But had the Civil War not intervened, a court in subsequent years might well have considered doing so. For one thing, arguments that deprecate the risk that the court would extend the Dred Scott principle from territories to states underestimate the significance of the new scientific racism spreading through the United States in the second half of the nineteenth century. See David Brion Davis, *The Problem of Slavery in the Age of Emancipation* (New York: Alfred A. Knopf, 2014), 328.

72. Wiecek, "Somerset," 137.

had learned something of emergency constitutionalism. They learned that martial law's emergency was always on the verge of reconstituting the republic, whether by making the nation an antislavery republic, or to the contrary by imposing slavery in every last corner of the regime.[73]

II. The Liebers and the Emergency Power Controversies

The idea that emergencies created crises of identity for states was readily familiar to members of the Civil War generation. They had been arguing about this point since John Quincy Adams took to the floor of the House in 1836. One American in particular was well placed to think about the significance of revolutionary transformations in the constitutional order.

A. Francis Lieber and the Antebellum Debates

Francis Lieber harbored a deep suspicion of transformative revolutionary regimes. Born in Berlin at the turn of the nineteenth century, Lieber grew up in a Prussia galvanized by the figure of Napoleon. He fought against the much-reviled Emperor in the Waterloo campaign of 1815. He was badly wounded by a musket ball through his neck as he chased the French back to Paris. Running into political difficulties because of his liberal predilections in reactionary postwar Prussia, Lieber traveled to Greece, where he fought for Greek independence against the Turks. After a brief imprisonment back in his native Prussia, Lieber fled as a political refugee, landing in England in 1826. A year later he traveled to the United States.[74]

In the United States, Lieber first ran a gymnasium in Boston, taking advantage of a fad for German-style physical education. But it was not too long before Lieber's German education and wide-ranging reading helped him become a leading public intellectual of his day. Despite repeated (and often awkwardly self-aggrandizing) efforts to create a place for himself at Harvard, Lieber was unable to land a teaching post

73. This is why firing on Fort Sumter was such a notorious blunder. By turning to armed insurrection, the eleven states of the Confederacy brought into existence the only plausible conditions—martial law and emergency powers—under which Northern opponents could bring slavery to a forcible and sudden end. Jefferson Davis created the very emergency that John Quincy Adams, approximately 20 years before, had correctly predicted would transform the constitutional identity of the country.

74. Freidel, *Francis Lieber*; see also Mack and Lesesne, eds., *Francis Lieber and the Culture of the Mind*.

https://doi.org/10.1017/S0738248018000317 Published online by Cambridge University Press

in the North. And therefore, in 1835, he took a position at the College of South Carolina in the state's capital, Columbia.[75]

Lieber's two decades in South Carolina may explain, at least in part, his early positions on the martial law debates that Adams had touched off. Like virtually every Southern commenter on the controversy, Lieber took a version of the traditionalist argument articulated by men such as Nicholas. "Martial law," he wrote in his wildly successful *Encyclopaedia Americana*, was exclusively a set of rules for soldiers, not an authorization for open-ended government power.[76] Lieber's view aimed to deny the state the capacity to remake itself in the moment of emergency. Twenty years later, in 1851, Lieber's two volume *On Civil Liberty and Self-Government* deepened his affiliation with the views articulated by English jurists going back to Hale and Blackstone. *Civil Liberty* denied that presidents had the authority to suspend the writ of habeas corpus. It "need hardly be mentioned," he wrote, that suspension "cannot be done by the president alone, but by Congress only."[77] As Lieber saw it, only despots invoked the apparatus of exceptional government: extraordinary courts and military commissions. In Anglo-American law, by contrast, "every officer, however high or low," remained "personally answerable" for the "legality" of his acts.[78]

Yet there were strands in Lieber's antebellum thinking and writing suggesting that if freed from the constraining conditions of South Carolina, he might tilt the other way and embrace the kinds of robust state authority to which John Quincy Adams gave voice. Lieber had long respected Adams, whom he had met soon after immigrating to the United States. (The sitting president swam in Lieber's gymnasium.[79]) More importantly, Lieber's Prussian upbringing in the crucible of Napoleonic Berlin had left its mark. From early in his life, he admired Carl von Clausewitz's idea that war was the application of pure military force. Clausewitz's ideas captured the spirit of an entire generation of German military men who, like Lieber, had chafed under the yoke of Napoleon and scoffed at the idea that law might constrain the kind of righteous force they planned to unleash against

75. Ibid.

76. Francis Lieber, "Martial Law," in *Encyclopaedia Americana* (Philadelphia: Carey & Lea, 1831), 8:308–9. Lieber cited Matthew Hale's argument that martial law was not part of the common law, but only "indulged by the law rather than constituting a part of it." See Hale, *History and Analysis of the Common Law.*

77. Francis Lieber, *On Civil Liberty and Self-Government* (Philadelphia: Lippincott, Grambo & Co., 1853), 1:131.

78. Ibid.

79. Mack and Lesesne, eds., *Francis Lieber and the Culture of the Mind.*

the Napoleonic regime.[80] For Lieber, warfare and great battles marked the great triumphs of civilization; constitutions were the way men recognized outcomes decided on the field.[81] War making was state making, as the political scientist Charles Tilly would put it a century later, and state making was war making.[82]

When Lieber moved from South Carolina to New York City to join the faculty at Columbia College in 1857, his break from the slave regime freed him to give voice to this recessive thread in his thinking on constitutions in crisis.[83]

B. The Habeas Crisis

Lieber's first engagement with the Civil War's crisis of emergency constitutionalism came in April 1861 when Lincoln began issuing orders suspending the writ of habeas corpus. The habeas controversy is one of the most storied legal controversies of the war. What has gone missing from the commentary on the episode is that the habeas controversy recapitulated basic arguments from the antebellum martial law debates. Lieber contributed a new and important twist.

When the habeas controversy broke out, opponents and proponents alike had ready-made playbooks close at hand. Drawing on the arguments of men such as Nicholas in the antebellum controversies, the opponents bitterly resisted the expansion of military authority. The judge advocate of the United States (who happened to be Robert E. Lee's cousin) agreed wholeheartedly and denied that military authorities had the power to try before a military commission anyone other than an enlisted soldier. When John Merryman, a Confederate sympathizer from Maryland, challenged the president's habeas suspensions, Chief Justice Roger Taney concurred with the spirit of Lee's objection and wrote an opinion denying that the president had the authority to suspend the writ unilaterally—an opinion Lincoln famously ignored.[84]

80. Carl von Clausewitz, *On War*, trans. Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1978); and Michael Howard, *Clausewitz: A Very Short Introduction* (Oxford: Oxford University Press, 2002).

81. See Witt, *Lincoln's Code*, 177–79; see also Francis Lieber, *Manual of Political Ethics* (Boston: Charles C. Little & James Brown, 1839), 2:632–33; Francis Lieber, Law and Usages of War, No. II, October 29, 1861 (Notebook No. 2), box 2, Francis Lieber Papers, Johns Hopkins University.

82. Charles Tilly, *The Formation of National States in Western Europe* (Princeton, NJ: Princeton University Press, 1975).

83. Freidel, *Francis Lieber*; and Witt, *Lincoln's Code*, 180–183.

84. Mark Neely, *Lincoln and the Triumph of the Nation* (Chapel Hill: University of North Carolina Press, 2011); Mark Neely, *The Fate of Liberty* (New York: Oxford University Press, 1992); James Randall, *Constitutional Problems under Lincoln* (Urbana, IL:

Supporters of Lincoln's habeas suspension, in turn, drew on the kinds of arguments that Adams had offered in the 1830s and 1840s. Lieber's writings from the 1850s endorsing the proposition that only Congress could suspend the writ had become a central point of reference for Lincoln's critics. But an embarrassed Lieber awkwardly reversed course. His remarks on the topic, he said, had been the result of an undue reliance on the work of others; he had not given the subject serious analysis.[85] On full consideration, Lieber now saw things differently. Writing in the *New York Times* under the pseudonym "Observer," Lieber now leaned heavily on the arguments from necessity and state preservation that had guided Adams. The power "to lay aside ordinary legal forms and ordinary legal guarantees of individual freedom," he now wrote, "is simply the right of self-preservation." The erstwhile defender of Anglo-American liberty and critic of martial law found himself insisting that "martial law is a tremendous engine of government, essential to its existence." In the face of a "revolutionary faction," martial law might be the only thing standing between government and a "state of anarchy."[86]

Most importantly, Lieber brought to public attention a powerful defense of Lincoln's suspension, one that pressed in a new direction. Attorney General Edward Bates's defense of the administration's suspension of the writ had satisfied few critics; the official defense rested on the wordplay of distinguishing suspending the writ generally (which Bates said was Congress's prerogative) from suspending the writ only for people who were in rebellion (which Bates insisted was open to the president).[87]

University of Illinois Press, rev. ed. 1951); Daniel A. Farber, *Lincoln's Constitution* (Chicago, IL: University of Chicago Press, 2003); Amanda L. Tyler, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay* (New York: Oxford University Press, 2017), 159–84; Michael Stokes Paulsen, "The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation," *Cardozo Law Review* 15 (1993): 81; and Seth Barrett Tillman, "Ex Parte Merryman: Myth, History, and Scholarship," *Military Law Review* 224 (2016): 481.

85. Francis Lieber, "Dr. Lieber on the Writ of Habeas Corpus," *The New York Times*, April 6, 1862, 3.

86. Observer, "The Rebellion and the Constitution," *The New York Times*, November 30, 1861, 3.

87. Bates argued as follows: "If by the phrase the suspension of the privilege of the writ of habeas corpus, we must understand a repeal of all power to issue the writ, then I freely admit that none but Congress can do it. But if we are at liberty to understand the phrase to mean, that, in case of a great and dangerous rebellion, like the present, the public safety requires the arrest and confinement of persons implicated in that rebellion, I as freely declare the opinion, that the President has lawful power to suspend the privilege of persons arrested under such circumstances. For he is especially charged by the Constitution with the 'public safety,' and he is the sole judge of the emergency which requires his prompt action." Edward Bates, "Suspension of the Privilege of the Writ of Habeas Corpus," 10 *Op. Att'y Gen*. 74

But Philadelphia lawyer Horace Binney, an old friend of Lieber's from the 1830s, advanced a different justification for the president's suspension of the writ, one that contained a powerful and distinctively American theory of emergency constitutionalism. Binney rooted his argument in the same English materials that Lincoln's critics had cited and that an entire generation of martial law critics had relied on in their disputes over slavery and martial law. In the English tradition, Binney conceded, a statute in the reign of Charles II had made the writ generally available.[88] And as under the English constitution Parliament was the final authority on the nature of the British Constitution, only parliamentary action could authorize a suspension of the writ. As a policy matter, Binney criticized the English approach as both too narrow and too broad. The English approach was too narrow because it ruled out suspension of the writ by the crown even when necessity required suspension. The English approach was too broad because it permitted suspension at Parliament's whim, even when unnecessary. As Binney saw it, the United States Constitution adopted a radically different approach. In Article I, Section 9, the American people established that "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." This text, as Binney read it, was a limit on the power to suspend the writ that necessarily implied an otherwise unspecified suspension power. It followed for Binney that the American constitution—unlike its British counterpart—had already established the authority to suspend. "The Constitution is itself the authority," Binney wrote, and, therefore, Congress need not do as Parliament had done and authorize suspension of the writ. The Constitution established the authority to suspend on its own, "and all that remains is to execute it in the conditioned case."[89]

Lieber publicized Binney's arguments; Binney, in turn, credited Lieber as the interlocutor responsible for some of the ideas. But no matter whose idea it was, Binney's theory of the president's power to suspend the writ brought out the distinctive necessity feature of emergency powers.[90]

(1861); see also Stephen Vladeck, "Field Theory: Martial Law, the Suspension Power, and the Insurrection Act," *Temple Law Review* 80 (2007): 406–7.

88. Paul D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge: Belknap Press, 2010).

89. Horace Binney, *The Privilege of the Writ of Habeas Corpus under the Constitution* (Philadelphia: C. Sherman & Son, 1862); see also Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2012); and William Baude, "The Judgment Power," *Georgetown Law Journal* 96 (2008): 1854.

90. Francis Lieber to Henry Halleck, January 30, 1862, Huntington Lieber Papers; Binney, *The Privilege*, 3; and Francis Lieber, "Dr. Lieber on the Writ of Habeas Corpus," *The New York Times,* April 6, 1862, 3.

C. Emancipation and the Necessity Power

The habeas controversy helped prepare Lieber for the moment in which Lincoln finally moved to implement John Quincy Adams's wartime emancipation ideas.

Lieber's long-time friend Senator Charles Sumner of Massachusetts was among the first to resurrect Adams's emergency emancipation idea. Emancipation by "martial law," Sumner contended, was permissible because martial law was at once under the constitution and above it. It arose out of the constitution's war power, Sumner noted, but nonetheless "when set in motion, like necessity, it knows no other law."[91]

Sumner's contentions about the extent of the martial law power touched off another round of the debates that had been going on since the 1830s. A publisher reissued Nicholas's Kentuckian pamphlet, now updated to follow the story up to the Civil War. Critics insisted that the president had no emergency powers outside those provided by the Constitution; "the Constitution," they protested, "confers upon the [President] all the powers he has."[92] Congressman George Yeaman of Kentucky objected that emancipation would be the end of the Constitution. "Any such destruction," he said, "is, *pro tanto*, a destruction of the Government, or such a revolution in its principles as that it does not remain the same." Yeaman linked emancipation with the suspension of habeas corpus and imagined a project to completely invert the structure of the country. Combined with "martial law, military arrests, trials, and executions," he warned, freeing "four millions of the black race" might "succeed in enslaving twenty millions of the white race."[93]

Despite the controversy, or perhaps because of it, Lincoln took up Sumner's idea about martial law and emancipation sometime in the summer or early fall of 1862. The preliminary Emancipation Proclamation, issued on September 22, 1862, famously invoked military necessity to

91. Charles Sumner, "Emancipation Our Best Weapon," in *The Works of Charles Sumner* (Boston: Lee & Shepard, 1874), 6:18.

92. *Cong. Globe*, 37th Cong., 3d Sess. 1421 (1863) (statement of Rep. Johnson) ("[The President] limits his proclamation of freedom to such slaves as were wholly beyond his reach . . .This proclamation was followed two days after by another suspending the writ of habeas corpus, declaring martial law in the loyal and peaceful States, and practically and substantially enslaving the free white men of the North. Sir, if these two proclamations are to be taken and construed together as the objects and purposes of this war . . . then I do not wonder at the intense alarm which pervaded the whole North . . . I think the people were right in withdrawing their confidence from this Administration.").

93. *Cong. Globe*, 37th Cong., 3d Sess. 133 (1863) (statement of Rep. Yeaman).

emancipate slaves,[94] but the fact that emancipation came in the form of an executive order limited its reach. It could not, Lincoln thought, reach places to which military necessity did not extend. The border states, and indeed all territory already firmly in Union control, therefore lay beyond the scope of the emancipation order.[95]

Even this limited power to emancipate the slaves produced controversy, however. And therein lay the roots of Francis Lieber's involvement in the proclamation.

Many Americans denied that a civilized state had the power to free slaves in wartime. Nicholas had said as much in his 1842 Kentuckian essay.[96] Opponents of emancipation liked nothing better than to observe that during the War of 1812 even John Quincy Adams had contended that emancipation was a violation of the laws of war.[97]

And therefore, as the Emancipation Proclamation deadline of January 1, 1863 approached, Lincoln's general in chief, Henry Halleck, commissioned Lieber to draft a restatement of the laws of armed conflict. Lieber's code, issued by the Union Army over Lincoln's signature in April 1863, aimed to vindicate the president's view of slavery in the laws of war. A dozen of its 157 articles were either expressly or implicitly about slavery.[98] Indeed, the code announced a breathtakingly broad conception of the military necessity idea on which Lincoln's Proclamation rested. "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, and which are lawful according to the modern law and usages of war."[99] Necessity, he continued, permitted

94. Lincoln nested the preliminary proclamation in an executive order authorized by Congress's Second Confiscation Act of the previous summer. To this extent, he bowed to congressional authority See James Oakes, *Freedom National: The Destruction of Slavery in the United States, 1861–1865* (New York: W.W. Norton & Co., 2012). But the Proclamation took a different form than either the 1862 act or its predecessor, the First Confiscation Act of August 1861. Indeed, Lincoln was skeptical of Congress's capacity to deliver a general freedom to slaves, because in his view it was the president who had the authority to issue military orders. And, therefore, Lincoln's Emancipation Proclamation stood on its own as an executive order justified by military necessity and warranted to the extent that the emergency made emancipation a necessary step for the preservation of the republic.

95. See Allen C. Guelzo, *Lincoln's Emancipation Proclamation: The End of Slavery in America* (New York: Simon & Schuster, 2004).

96. *Martial Law by a Kentuckian*, 6–7.

97. "The Rightful Power of Congress to Confiscate and Emancipate," *Monthly Law Report* 24 (1862): 27.

98. Witt, *Lincoln's Code,* 240.; see also Matthew Mancini, "Francis Lieber, Slavery, and the 'Genesis' of the Laws of War," *Journal of Southern History* 77 (2011).

99. General Orders, No. 100, art. 14, in Witt, *Lincoln's Code*, 377

https://doi.org/10.1017/S0738248018000317 Published online by Cambridge University Press

"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."[100] It permitted "all destruction of property," obstruction "of the ways and channels of traffic," the "withholding of sustenance or means of life from the enemy," and much more.[101]

Lieber's awesome war power was nothing less than the power to rise to the occasion, whatever that might be. "To save the country," he wrote plainly, "is paramount to all other considerations."[102] But what could Lieber possibly have meant by this? Some have been tempted to interpret his words as license for the most terrible acts.[103] Lieber himself sometimes gave his readers reason to think that he adopted precisely such an interpretation.[104]

Yet for all the authority he granted to save the republic, Lieber denied that necessity could legitimately transform it. Indeed, this limit lay at the conceptual core of his restatement of the laws of war. The code presupposed that for the duration of the conflict, the president might treat the Confederate States of America as an independent state, with all of the powers and responsibilities that attached to independent states. The president could do so for the purpose of regulating the conflict itself; he could, for example, enter into prisoner exchanges,[105] recognize truce flags,[106] and try law of war violators by military commission.[107] But the president's decision to adopt such a posture could not alter the fundamental constitutive unity of North and South in one union. That was a matter of constitutional identity beyond the power of any president to change. And, therefore, it was a matter of great importance that the closing articles of Lieber's code observe that nothing in the president's decision could irrevocably preclude subsequent treatment of the rebels as traitors. As the code made clear, the rebels would be soldiers for purposes of the war, but they would be subject to criminal trial and punishment after the close of the conflict.[108]

100. Ibid., art. 15.
101. Ibid.
102. Ibid., 376, art. 5.
103. See, for example, James F. Childress, "Francis Lieber's Interpretation of the Laws of War," *American Journal of Jurisprudence* 21 (1976).
104. See, for example, General Orders, No. 100, art. 15, in Witt, *Lincoln's Code*, 377.
105. General Orders, No. 100, art. 105, in Witt, *Lincoln's Code*, 388.
106. Ibid., 386, art. 86.
107. Ibid., 377, arts. 12–13.
108. Ibid., 394, art. 157.

III. Necessity in Crisis

Emancipation revealed that the debate over necessity was inevitably a debate about the kind of republic that was worth protecting. In the years immediately following the end of the American Civil War, contemporaries of Lieber and Lincoln developed two competing and influential answers to the question.

A. The Milligan Answer

The outlines of the first are familiar to students of Reconstruction, and especially students of the United States Supreme Court's efforts to rein in the war powers asserted by the Lincoln administration and later the Republican Congress. Reconstruction was a self-conscious effort by the Republican Party to remake the identity of the republic with the same emergency military power that had justified the suspension of the writ of habeas corpus and emancipation.[109] The crucial question for the nation was this: How far would necessity's warrant reach?

Less than a year after Appomattox, the Supreme Court answered the question when it reversed the military commission conviction of Indiana resident Lambdin Milligan, a member of a shadowy pro-Confederacy group known as the "Sons of Liberty." In the *Milligan* opinion, which followed the court's decision by nearly 8 months, the court applied hard and fast constraints to the power of military necessity that the "laws and usages of war" had conferred on the federal government. Justice David Davis wrote for the court that the war power "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[110]

Davis was hardly alone. Many in the war's aftermath sought to revive the traditional limits on martial law and necessity. President Andrew Johnson decried military law and tribunals as "arbitrary tribunals"

109. Michael Les Benedict, "Preserving the Constitution: The Conservative Basis of Radical Reconstruction," *Journal of American History* 61 (1974), 65–90; Michael Les Benedict, *A Compromise of Principle: Congressional Republicans and Reconstruction, 1863–1869* (New York: Norton, 1974); Akhil Reed Amar, *America's Unwritten Constitution* (New York: Basic Books, 2012), 49–95; Bruce Ackerman, *We the People: Volume 2: Transformations* (Cambridge: Belknap Press, 2000), 99–120.

110. *Ex Parte Milligan,* 71 U.S. 2 (1866); see also Mark Neely, *The Fate of Liberty*; Charles Fairman, *Reconstruction and Reunion, 1864–1888: The History of the Supreme Court of the United States*, 2 vols. (New York: Macmillan, 1971–1987); Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (New York: Cambridge University Press, 2006), 86–98.

"incompatible with the individual rights of the citizens, contrary to the genius and spirit of our free institutions." And when the Congress re-enacted military commissions in the face of executive and judicial condemnation, Attorney General Henry Stanbery denounced military rule as anathema, opining that the "plea of necessity" could not establish the requisite military authority for special tribunals. Even in the Congress, where Radical Republicans controlled the floor, members showed an increasingly strong desire to get beyond the emergency of war; martial law debates began to veer away from the strongest claims of a broad necessity power.[111]

B. An Answer from the British Empire

A second answer to the question of necessity's reach emerged not in the United States but in the British Empire, and this answer embraced necessity's power rather than trying to confine it.

As Reconstruction was just beginning in the United States, tensions reached a breaking point in a small Jamaican town known as Morant Bay. Slaves in British Jamaica had been free for approximately 30 years, ever since slavery was abolished throughout the British Empire in the 1830s. High hopes for emancipation, however, had led to disillusionment on all sides; British planters bemoaned the sharp drops in agricultural productivity, while the freedpeople resented the steady drumbeat of evictions that had followed hard on emancipation.

In Morant Bay, in particular, the local British magistrate was notorious for evicting blacks from their farms. In October 1865, hundreds of fed-up

111. James D. Richardson ed., *A Compilation of the Messages and Papers of the Presidents, 1789–1897* (New York: Bureau of National Literature, Inc., 1902), 6:312–14, 432; and Henry Stanberry, "The Reconstruction Acts," 12 *Op. Att'y Gen.* 182, 199 (1867). See, for example, *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."); and *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?").

Jamaicans assaulted the courthouse. When the magistrate mustered the colonial militia to fight back against the crowd, fierce battles broke out. The militia fared poorly. Seven members of the militia were killed, along with twenty-two civilians. Governor Edward Jonathan Eyre declared martial law in the region around Morant Bay. For a week, British forces restored law and order in a brutal campaign of violence that virtually destroyed the entire community. Under the authority of Eyre's martial law, the British shot and killed nearly 500 Jamaicans, many by summary execution.[112]

A furious and many-sided debate over martial law followed. Back in London, a hastily formed Jamaica Committee, whose members included such leading lights as John Stuart Mill and Charles Darwin, sharply criticized Eyre's declaration of martial law. The episode revealed a complex array of British views on questions of martial law in the Empire. But one voice stood out for the sharpness of its views. None of Eyre's defenders offered as breathtakingly broad a conception of necessity as British barrister William F. Finlason.[113]

Finlason was a fascinating character in his own right. He was a member of Middle Temple, one of the exclusive British Inns of Court, but he never did more than the low-level work of drafting pleadings as a junior (or "stuff-gown") barrister. Not long after being admitted to the bar, Finlason shifted from pleading cases to writing about them as the chief legal reporter for *The Times* of London: the Adam Liptak or Linda Greenhouse of his time and place. For nearly 50 years, Finlason wrote *The Times*'s legal coverage.[114] And in 1866, in the wake of Morant Bay, he made the question of martial law in the empire one of his central preoccupations, publishing no fewer than five treatises on the subject over the subsequent few years.[115]

112. Rande W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (New York: Oxford University Press, 2005); Gad Heuman, "*The Killing Time": Morant Bay Rebellion in Jamaica* (Austin: University of Texas Press, 1995); and John Fabian Witt, "Anglo-American Empire and the Crisis of the Legal Frame," *Harvard Law Review* 120 (2007).

113. Witt, "Anglo-American Empire," 787.

114. Michael Lobban, "William Francis Finlason (1818–1895)," in *Oxford Dictionary of National Biography*. http://www.oxforddnb.com/view/article/9462 (June 27, 2018).

115. 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); and William Francis Finlason, *The History of the Jamaican Case* (London: Chapman & Hall, 1869).

The British jurist offered a stunningly fierce account of necessity and martial law. As he saw it, martial law was the equivalent of "a declaration of a state of war," which "suspends the common law."[116] It was a kind of "arbitrary military power."[117] Indeed, not even necessity could constrain it, strictly speaking. "For what is necessity," Finlason asked, "and who is to judge of it?"[118] Even more importantly, Finlason stated the key question as crisply as it could be put: necessity with respect to what? It mattered immensely whether necessity was measured by "reference to the instant exigencies of the particular time or place," or instead with respect to "larger considerations" and the strategic goals of the state.[119] And here Finlason came to a forceful answer. The common law, he contended, had all the requisite authority for dealing with "actual outrage or insurrection."[120] The common law had been built, after all, to remedy acts of violence. The distinctive feature of martial law, however, was that it dealt in measures that were "repressive, aggressive, or deterrent."[121]

In Finlason's mind, preventing uprisings in the empire required a regime of terror. Indeed, terror was Finlson's watchword. As in Jamaica, where Eyre's badly outnumbered forces had turned in desperation to a brutal martial law, only forceful deterrence would ultimately allow "an inadequate force to cope with, and keep under, a much larger one."[122] And, therefore, Finlason's martial law aimed by "summary executions, according to the stern severity of military law," to "inspire a terror" in rebels.[123] Martial law would strike "the rebellious masses with a terror inspired by the stern and summary severities of military law."[124] Terror was "the very nature of martial law," and "measures deterrent by means of terror," including what Finlason called "great severities," were martial law's "very essence."[125] And, therefore, in Jamaica, as elsewhere in the empire, the common law simply gave way to "the necessity for keeping up the terror."[126]

116. Finlason, *A Treatise on Martial Law*, xxvi.
117. Ibid., xiv.
118. Ibid., xi.
119. Ibid.
120. Ibid., xxxi.
121. Ibid., xiv; see also David Dyzenhaus, "The Puzzle of Martial Law," *University of Toronto Law Journal* 59 (2009): 17–19.
122. Finlason, *A Treatise on Martial Law*, xxxi.
123. Ibid., xxxii.
124. Ibid.
125. Ibid.
126. Ibid., xxxv. For a general argument about the role of empire in the elaboration of legal regimes for emergency, see Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003).

Finlason even suggested that in the long run, such harsh measures "might be not only necessary," but "merciful and humane," as they would deter the suffering that inevitably accompanied insurrections in the empire.[127] And because no one was better positioned than the executive and the military to know whether martial law was indeed the more humane regime under the given circumstances, the decision to invoke martial law could not be reviewed by the courts. Actions under martial law came with a powerful presumption of legality. "So far as regards measures so taken, it is not material to their legality, that they turn out in the event to have been excessive."[128] "Persons cannot be criminal," he insisted, "for directing or carrying them out honestly, however erroneously, in obedience to orders, and under martial law."[129]

Finlason's martial law could not be limited or contained. No power could review it. In Finlason's martial law there was only the arbitrary power of the sovereign commander. Here, then, was a conception of necessity and of emergency constitutionalism so broad as to authorize and underwrite a reign of terror. But was it the only alternative to the constrained vision of *Milligan*? Were these the only two paths for understanding the necessity power in modern constitutional orders? In one, the necessity power had been so stripped of its energy as to be complicit in the reimposition of an unjust racial hierarchy in the ashes of emancipation. In the other, the necessity warrant seemed so strong that it might permit anything. Did late nineteenth-century jurists have to choose between them?

IV. The Lost Lieber Theory

When Francis Lieber began to draft a new manuscript on the problem of emergency constitutionalism and martial law, he aimed to identify a third way, one that would draw on a half century of American history and thread the needle between Justice Davis's *Milligan* approach and Finlason's jurisprudence of empire.

A. The Lieber Manuscript

The *Milligan* case and Finlason's writings were the context in which Francis Lieber turned to his own work on the emergency constitution. Already in 1863, Lieber had begun to compile an expanded and annotated

127. Finlason, *A Treatise on Martial Law*, xxxiii.
128. Ibid., xvi.
129. Ibid.

https://doi.org/10.1017/S0738248018000317 Published online by Cambridge University Press

version of the instructions on the laws of war that he had provided to the Union army earlier that same year.[130] As active fighting gave way to military occupation of the South, the martial law sections of that code must have had much greater salience; Lieber's editor, General-in-Chief Henry Halleck, had concentrated on these sections before issuing the instructions to the Union armies as General Orders, No. 100.[131]

However, Lieber was never a disciplined writer. And, therefore, when he died suddenly in 1872, the manuscript remained scattered and unfinished. His son, Guido Norman Lieber, was already on his way to becoming an important figure in American law in his own right. After graduating from Harvard Law School in 1859, Norman had served in a cohort of first-rate judge advocates in the Union Army, implementing the code that his father had written. After April 1865, most judge advocates were mustered out. But Norman remained in the army, eventually becoming acting judge advocate general and then, beginning in 1895, judge advocate general.[132]

Norman may have discovered his father's unfinished manuscript while working alongside the older man; father and son led the Union's postwar investigation into possible war crimes by members of the Confederate leadership. Or perhaps Norman learned of the manuscript when his mother sold many of her late husband's books to the University of California, where they filled the library shelves at the still-new campus in Berkeley.[133] Either way, Norman published a small piece of the manuscript in 1877 as an excerpt in an essay of his own on the meaning of the term "martial law."[134] Over the subsequent decades, Norman expanded on the foundations his father had created, turning the notes and scattered passages drafted by Francis into a coherent intervention into the debates on emergency constitutionalism among Justice Davis, Andrew Johnson, and British jurists such as Finlason.[135]

130. Francis Lieber to Henry Halleck, June 2, 1863, Huntington Lieber Papers; and Francis Lieber to Charles Sumner, May 24, 1863, Huntington Lieber Papers.

131. Code for the Government of Armies in the Field (register no. 243077), Huntington Library, San Marino, California.

132. Elizabeth D. Leonard, *Lincoln's Avengers: Justice, Revenge, and Reunion after the Civil War* (New York: W.W. Norton & Co., 2004); Elizabeth D. Leonard, *Lincoln's Forgotten Ally: Judge Advocate General Joseph Holt of Kentucky* (Chapel Hill: University of North Carolina Press, 2011); Joshua E. Kastenberg, *The Blackstone of Military Law: Colonel William Winthrop* (Lanham, MD: The Scarecrow Press, 2009); and Witt, *Lincoln's Code*.

133. Norman Lieber took a large part of his father's book collection, which eventually made its way into the collection of the judge advocate general of the United States and then to the library of the Judge Advocates' School in Charlottesville, Virginia. The collection can now be found in the Library of Congress.

134. G. Norman Lieber, *Meaning of the Term Martial Law*.

135. Lieber and Lieber, *Treatise on Martial Law*.

In the end, Norman left the manuscript disorganized as well. He gave it an unassuming title: "Martial Law Treatise,"[136] and he shaped it nearly to the point of publication, complete with some printers' instructions.[137] But for reasons we cannot really know, he never published it. Perhaps his obligations as judge advocate general were too pressing for him to finish working on a piece of constitutional theory. Or perhaps the urgency of emergency constitutionalism in the Civil War and Reconstruction moment passed too soon. The manuscript ended up in the papers of the judge advocate general when Norman died. It remains there today.[138]

The Lieber manuscript started with some conceptual distinctions. Military law, the Liebers wrote, was not the same as martial law—or at least not the same as *martial law proper*—no matter how many times early-modern and eighteenth-century writers such as Hale and Blackstone, or nineteenth-century soldiers such as the Duke of Wellington, had insisted otherwise.[139] Military law, as Wellington had once said, might be "neither more nor less than the will of the general."[140] It might be the despotic control of the officer over the men in his command. But military law was a regime for the governance of the army. Martial law was something broader.

Nor was martial law coterminous with the kind of military authority that applied in occupied enemy territory. This too often went by the name of martial law. But properly understood, this form of martial law was a branch of the laws of war that applied between sovereign states in wartime. It sprang "from the necessity of substituting in the occupied territory some government and authority for those displaced."

The heart of martial law, or *martial law proper*, as Chief Justice Chase had described it in his concurring *Milligan* opinion, dealt with the problem of emergency law at home.[141] Distinguishing military law and the laws of war from martial law proper revealed an important feature of English constitutional history. The concept of martial law in the modern sense was quite new. It was a legal regime known only since the end of the eighteenth century, because it was a distinctive product of modern constitutional systems.[142] Only modern constitutional systems had developed a sufficiently

136. Ibid.

137. See, for example, ibid.

138. Guido Norman Lieber Collection, Judge Advocate General Papers, Record Group 153, National Archives and Records Administration.

139. Recall here that Lieber himself had associated martial law and military law in his *Encyclopedia Americana* entry on martial law.

140. Lieber and Lieber, *Treatise on Martial Law.*

141. Ibid.

142. Ibid.

regular and stable set of institutions for exceptions from those institutions to be especially salient. Indeed, the invention of the distinction between soldier and citizen for domestic constitutional purposes was the invention of modern Anglo-American freedom.[143]

What was the system of martial law that modern constitutionalism had brought into being? It was "the necessity of employing the means which will render the resort to force effective"[144] in those instances in which, as Alexander Hamilton had written in Federalist 28, "seditions and insurrections" had become "maladies as inseparable from the body politic, as tumors and eruptions from the natural body."[145] Martial law, the Liebers wrote simply, was "the law of necessity applied at home."[146]

So defined, the law of necessity came with awesome powers. When the senior Lieber wrote in his 1863 code that "To save the country" was "paramount to all other considerations," he made no idiosyncratic assertion. Lieber's contemporary, the American jurist Joel Prentiss Bishop, exhorted that "self-preservation is the first duty" of governments as well as of individuals, one that took "precedence of all other duties."[147] Similar ideas could be found running through early modern political theory going back at least to Grotius and Hobbes.[148] As the Liebers elaborated it, this duty of self-preservation was "a principle inherent in all politics." The United States Constitution, it was true, expressly accommodated certain emergencies. It made arrangements for the declaration of war, for example, and for the suspension of the privilege of the writ of habeas corpus. But such constitutional provisions, the Liebers contended, were merely evidence of a powerful background principle of necessity. Even had there been no internal express evidence, necessity was the inescapable inherent power of all modern states, just as self-defense was an ineradicable privilege for individuals. The power to meet emergencies was "an attribute of sovereignty inherent in all polities" and, therefore, a power necessarily delegated by the Constitution to actors in a position to act on them. Indeed, the emergency powers enumerated in the Constitution were exemplary of the

143. Ibid. Compare Samuel P. Huntington, *The Soldier and the State* (Cambridge: Belknap Press, 1981).

144. Ibid.

145. Ibid. (quoting *The Federalist*, No. 28).

146. Ibid. Note that Lieber did not treat necessity and martial law as two different powers, the former extraconstitutional the latter not. For this approach, see Vladeck, "Field Theory," 391.

147. 1 Joel Prentiss Bishop, *Commentaries on the Criminal Law*, 3rd ed., 506, s. 910 (Boston: Little, Brown, 1865).

148. Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005); Thomas Hobbes, *Leviathan*, ed. Richard Tuck (New York: Cambridge University Press, 1996).

state's authority in moments of crisis, but not exhaustive of it, because as the Liebers explained "the law of necessity can be limited neither by statute, nor by judicial decision." Even if the Constitution had aimed to prevent the exercise of a necessity power, such a power "would nonetheless exist, for the law of necessity cannot be controlled."[149]

The notion of an illimitable power of self-preservation showed the problem with the Supreme Court's most important decision in the area: *Ex Parte Milligan*. The Liebers observed that the Court in *Milligan* had tried to confine martial rule "to the locality of actual war."[150] Justice Davis had relied on Sir Matthew Hale's old common law idea of a hard-and-fast ban on martial law when the "King's courts are open for all persons."[151] But in saying this, the Liebers insisted, Hale had not had *martial* law in mind but *military* law: the law governing authority within the armed forces.[152] A state could choose to bind itself against the application of its military law in certain contexts. But the inherent emergency power of self-defense could not be so limited. It could not be "restrained within territorial limits."[153] If "martial law proper is a law of necessity," the Liebers reasoned, "its jurisdiction must extend wherever the necessity exists."[154] In determining whether an emergency warranted extreme measures, the question of whether the courts were open or not might be a useful guide, but it could not, as Justice Davis's *Milligan* decision suggested, substitute for the determination itself.[155]

If the Liebers believed *Milligan* to be wrongheaded, however, they did not actually advocate a limitless power, either, although their language sometimes suggested as much. That was essentially the position that Finlason defended,[156] the view that Clausewitz espoused,[157] and what Carl Schmitt and theorists such as Giorgio Agamben would later see in the unregulable power of emergencies.[158] The Liebers' view was importantly different. The Liebers believed that the emergency power ruled out a priori limits set out in advance. No constitutional regime could predict all the facts and circumstances that would attend to future crises, and, therefore, no constitutional rules could absolutely preclude particular

149. The Liebers observed that even the Milligan majority conceded as much.
150. Lieber and Lieber, *Treatise on Martial Law*.
151. Ibid.
152. Ibid.
153. Ibid.
154. Ibid.
155. See, ibid.
156. See text at notes 116–29 above.
157. Clausewitz, *On War*, 75.
158. Schmitt, *Political Theology*; and Agamben, *State of Exception*.

courses of action. But the Liebers were convinced that the same necessity principle that authorized emergency powers nonetheless also built in limits to its exercise. The true limits on the necessity power, the Liebers wrote, were those that arose organically out of "the necessity which is looked to for its justification."[159]

Indeed, the Liebers' manuscript was full of historical and hypothetical instances of excessive force not warranted by the necessity power: instances going as far back as the irregular trial and execution of the Earl of Lancaster by Edward II in the fourteenth century.[160] More modern examples of lawless and unnecessary violence included the fatal flogging of a soldier off the coast of Senegal in 1782,[161] or the military tribunals that dealt out punishments after the slave rebellion in Demerara on the coast of South America in 1823,[162] or the executions after unrest at Ceylon (now Sri Lanka) in 1848.[163] Governor Eyre's execution of one of the leaders of the Jamaican political opposition at Morant Bay in 1865 provided another example. And closer to home, the Liebers observed that under the circumstances of the post-Civil War period, military tribunal prosecutions of Confederate leaders such as Jefferson Davis for treason would not have been warranted by necessity. The civil courts, they insisted, had been readily available alternatives to prosecute those accused of the same offense.[164]

Necessity could not admit of hard-and-fast prohibitions. Trying enemy leaders by military commission might under some circumstances be permitted or perhaps even required by the necessity principle. So too might necessity provide a legal basis for the punishment or execution of rebels in colonial outposts. The permissibility of these actions would depend on the specific circumstances involved. This was not to say that necessity imposed no limits; necessity could provide a subtle standard for distinguishing between permissible and impermissible acts of state. But

159. Lieber and Lieber, *Treatise on Martial Law*.

160. Ibid.

161. Ibid., see also *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, 1782).

162. Lieber and Lieber, *Treatise on Martial Law*; see also Joshua Bryant, *Account of the Insurrection in Demerara* (Demerara: A. Stevenson, 1824), 60–61.

163. Lieber and Lieber, *Treatise on Martial Law*; Jonathan Forbes, *Recent Disturbances and Military Executions in Ceylon* (Edinburgh: William Blackwood and Sons, 1850), 18–22.

164. A Memorandum: Reasons Why Jefferson Davis Ought Not To Be Tried by Military Commission for Complicity in the Unlawful Raiding, Burning, Etc. (July 1865), folder 33, box 2, FLP, JHU.

necessity seemed unable to generate one-size-fits all rules, except, as it turned out, in one especially important area.

B. The Torture Example

The Liebers' absolute prohibition on torture got to the very heart of their theory of emergency constitutionalism.

There was no doubt about where the Liebers stood on the torture question. Francis Lieber's war code prohibited "torture to extort confessions" and instructed that "the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information."[165] Prisoners, the code continued, were "subject to no punishment for being a public enemy"; nor was "any revenge wreaked upon him by the intentional infliction of any suffering."[166]

Nearly 40 years later, Norman was involved in extending the code to the Philippines, where its violation produced court-martial convictions for torture.[167] The punishments dealt out in those cases were trivial; however, the principle was established. The rule against torture, as the Liebers saw it, was hard and fast, even in the moment of emergency. It did not bend in the face of necessity.

There were very few other such rules in Lieber's code. The rule against the use of poisons was one.[168] But we know that Francis Lieber privately disavowed the poisons prohibition. Who was to say, he asked his students rhetorically, that a state could never permissibly deploy poison as a weapon? What if such a weapon, terrible though it might be, would allow a small and virtuous republic to resist destruction at the hands of a terrible empire?[169]

The difficult question for the Liebers was: Why did the same logic not apply to torture? Surely there might be occasions in which torture, too, might be required to rescue a republic from destruction. Leading philosophers working broadly in the Lieber tradition have reluctantly concluded as

165. General Orders, No. 100, art. 80, in Witt, *Lincoln's Code*, 385.

166. Ibid., 383, art. 56.

167. Paul Kramer, *The Blood of Government: Race, Empire, the United States, and the Philippines* (Chapel Hill: University of North Carolina Press, 2006); Witt, *Lincoln's Code*, 353–65; Paul Kramer, "The Water Cure," *The New Yorker*, February 25, 2008, 38–43; Trials or Court-Martial in the Philippine Islands in Consequence of Certain Instructions, Senate Doc. No.213, 57th Cong., 2nd sess. (1903) at 26.

168. General Orders No. 100, art. 70, in Witt, *Lincoln's Code*, 384.

169. See Francis Lieber, Law and Usages of War, No. IV, December 17, 1861 (Notebook No. 4), box 2, Francis Lieber Papers, Johns Hopkins University.

much.[170] Why, then, was torture categorically different from poisons, according to the Liebers?

The puzzle is to identify the source of such limits in the Liebers' thinking. Some have argued that the source of these limits was Kantian ethics: necessity, in this view, was for Lieber a license to violence, but one confined "inside a Kantian collar."[171] Necessity, Lieber wrote in his 1863 code, permitted those means that were necessary, but only if they were also "lawful according to the modern law and usages of war."[172] But Lieber had little patience for Kant, and indeed blamed him for much that had gone awry (as Lieber saw it) with the laws of war.[173] And yet Lieber self-consciously insisted on a limit to necessity's elasticity. From whence came those limits of lawfulness if not from some Kantian categorical? As it turned out, the history of emergency constitutionalism since the 1830s seemed to offer an answer.

C. The Standard of Reason

The Liebers' "Martial Law Treatise" offered a vital further idea about the source of constraints on the necessity power, one that did not appear in the 1863 code.

Since at least the seventeenth century, as Benjamin Straumann and others have shown, going back into antiquity, political thinkers had attempted to articulate principled limits on the necessity power of the state.[174] When Cicero invoked the *salus populi suprema lex est*o, his argument was not that the biological survival of the people was above all else, nor that the laws fell aside in the face of emergency. To the contrary, the Ciceronian

170. See, for example, Jeff McMahan, "Torture, Morality, and Law," *Case Western Reserve Journal of International Law* 37 (2006): 241. For a contrasting perspective, 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 & Co., 2010).

171. See Scott Horton, "Kriegsraison or Military Necessity? The Bush Administration's Wilhelmine Attitude Towards the Conduct of War," *Fordham International Law Journal* 30 (2007): 586; cf. Theodore Meron, "Francis Lieber's Code and Principles of Humanity," *Columbia Journal of Transnational Law 36* (1997): 281.

172. General Orders No. 100, art. 14, in Witt, *Lincoln's Code*, 377.

173. See Francis Lieber, Law and Usages of War, No. IV, December 17, 1861 (Notebook No. 4), box 16, Francis Lieber Papers, Johns Hopkins University

174. See Benjamin Strauman, *Crisis and Constitutionalism* (New York: Oxford University Press, 2016) 42–43; see also Clement Fatovic, *Outside the Law: Emergency and Executive Power* (Baltimore: Johns Hopkins University Press, 2009); Carl Joachim Friedrich, *Constitutional Reasons of State* (Providence, RI: Brown University Press, 1957); Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (New York: Cambridge University Press, 2009); and Thomas Poole, *Reason of State: Law, Prerogative, Empire* (New York: Cambridge University Press, 2015).

idea of *salus populi* incorporated the legal values of the regime. As David Dyzenhaus puts it, *salus populi* was a "quintessentially juridical concept."[175] John Locke carried the idea forward when he identified a prerogative power to act "without the prescription of the Law," and "sometimes even against it."[176] The Lockean prerogative was a power to act exclusively "for the publick good."[177] It thus came with a constraint on its exercise. An impermissible use of the prerogative power was one that advanced the interest of the prince but redounded to "prejudice or hinder the publick good."[178]

As Locke saw it, the constraint of the public good contained serious limits, even for what went by the label of "absolute power." Because "where it is necessary," absolute power was "not arbitrary by being absolute, but is still limited by that reason, and confined to those ends, which required it in some cases to be absolute."[179]

What the Lockean constraint of the "publick good" lacked was an institutional remedy. It was never to be supposed, Locke conceded, that a prince held "a distinct and separate interest from the good of the community," as no rational people would consent to enter into the authority of such a prince.[180] And, therefore, the prince had the final say; if the question ever arose as to whether the prerogative had been rightly used, Locke conceded that "there can be no Judge on Earth," but only an "appeal to Heaven."[181]

The Liebers offered an answer to the institutional problem that Locke had left open: an earthly alternative to the appeal to heaven. In deciding how far necessity might go, they rejected Locke's entrustment of the decision to the prince or executive official. It was not enough that such an agent of the state proceeded on the basis of a good faith belief in the necessity of his actions. Such a standard gave far too much authority to the executive, because no matter how genuine such an actual belief might be, the subjective standard took the collective authority to redefine the identity of the state and vested it in the hands of a single actor.

The appropriate question to ask, continued the Liebers, was whether the act of the state official in question was necessary as measured by the

175. David Dyzenhaus, "The Safety of the People is the Supreme Law," *The New Rambler*, October 25, 2016.

176. John Locke, *Two Treatises on Government*, ed. Peter Laslett (New York: Cambridge University Press, 1960 [originally published 1690]), 2:160

177. Ibid..

178. Ibid., sec. 163

179. Locke, *Two Treatises*, sec.139.

180. Ibid.

181. Ibid., sec. 168.

common sense judgment of a reasonable citizen. The acts of officials in moments of emergency, they wrote, "should be adjudged to be necessary in the judgment of a moderate and reasonable man." As they saw it, "reason and common sense must approve the particular act." And "if these conditions are not fulfilled, the act becomes unlawful, with all the consequences attending to illegality."[182]

Invoking the reasonable person at this stage of the argument was a deceptively powerful move that connected the Liebers' treatment of the problem to a long history of thinking about emergencies. Reasonableness in this view not only created a standard for deciding whether the means chosen were permissible or not. It also implicitly shaped the ends toward which necessary means might be deployed. The ends invoked by the reasonable citizen analysis were not merely the biological survival of the group. Instead, the reasonableness standard brought with it the values of the collectivity: the entire cluster of practices and principles drawn from the constitutive commitments of the republic.[183] Locke's standard of the "publick good" had similarly been drawn from the internal resources of the relevant political community; it drew its content from the consent of the community.[184] But the Liebers identified the reasonable person, constructed in and by the community and its values, as a persistent constraint on the prerogative of the executive. The reasonable person would substitute a judge on earth for Locke's appeal to Heaven. Here was a way in which political communities might draw the relevant values from the collectivity itself, rather than relying on the prince or the executive. For the Liebers, the ends toward which permissible or necessary means might be directed therefore included the public values of the regime, embodied in the perspective of the reasonable citizen.[185]

182. Lieber and Lieber, *Treatise on Martial Law.*

183. See See Robert Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort," *California Law Review* 77 (1989): 957; and Robert Post, "Defending the Life World: Substantive Due Process in the Taft Court Era," *Boston University Law Review* 78 (1998): 1489.

184. Locke, *Two Treatises*, sec. 164–65. For a sample of works in the contemporary debate over whether Locke is properly read as an internalist or an externalist, compare Gross and Aolain, *Law in Times of Crisis*, 121–22 (externalist), with David Dyzenhaus, "The State of Emergency in Legal Theory," in *Global Anti-Terrorism Law and Policy,* ed. Victor Ramraj, Michael Hor, Kent Roach, and George Williams (New York: Cambridge University Press, 2005) (internalist); Fatovic, *Outside the Law*, 55–56 (internalist); and Lazar, *States of Emergency*, 67–80 (internalist).

185. Political theorist Clement Fatovic argues that David Hume's account of public opinion's role as the ultimate foundation of government offers a similar theory of constraint on abuses of extralegal power in times of emergency. See Fatovic, *Outside the Law*, 121–22. Hume himself does not seem to make the connection, but Fatovic's extension of Hume

V. Conclusion: The Force of Reason

The Lieber manuscript drew on decades of controversy over slavery in the United States and over the governance of empire in the broader Anglo-American world. Building on these controversies, the Liebers advanced a fierce but liberal theory of constitutional authority in extremis. The two authors recognized the ways in which the moment of emergency could undermine the values of the state, because that had been the central theme of antebellum controversies over martial law in the slaveholding republic. They contrasted their theory with the harshest views emerging in the context of the British Empire. But their alternative to the harshest regimes of imperial control was no utopian idea, because it emerged from a description of the way American institutions had actually organized and conditioned the emergencies of the Civil War era.

Consider the way in which courts in the Liebers' time entertained claims arising out of the war. A decade before the conflict, in the case of *Mitchell v. Harmony*, Chief Justice Taney had held that "[nothing] short of an immediate and impending danger from the public enemy or an urgent necessity for the public service can justify the taking of private property by a military commander."[186] In the aftermath of the war, an avalanche of cases tested Taney's standard in places where Union troops had lived and found the need for supplies. In Kentucky, the Court of Appeals reversed a judgment for Union soldiers who had been ordered to consume a civilian's store of corn and hay, holding that while "necessity could have excused the forcible use of the appellant's private property, the record in this case discloses no such necessity."[187] The Supreme Courts of Georgia and North Carolina affirmed judgments for owners of horses taken by Union soldiers without proper showing of necessity.[188]

Such cases restated a commonplace about public officials' accountability in the era before the twentieth century. Executive officials who overstepped the bounds of necessity were subject to judicial review. As the Liebers had

seems a natural reading of the Humean theory's implications. As Fatovic puts it, "the informal normativity of public opinion" in Hume's account might be thought to serve as "the ultimate check against abuses." Ibid., 121. Neither Hume nor the Liebers are sufficiently concrete or detailed in their treatments of the constraining effects of public reason and public opinion to be sure how their theories might play out in comparison with one another.

186. 54 U.S. 115, 134 (1851).

187. *Hogue v. Penn*, 66 Ky. 663, 665 (1868)

188. *Worthy v. Kinamon*, 44 Ga. 297 (1871); and *Wilson v. Franklin*, 63 N.C. 259 (1869).

https://doi.org/10.1017/S0738248018000317 Published online by Cambridge University Press

put it, an act afterward deemed unnecessary from the perspective of a reasonable citizen became unlawful, with all the attendant consequences.[189]

Military officers who were found liable despite acting under orders or in good faith fulfillment of their duties were not necessarily left in the difficult position of paying for their patriotism. This was because Congress regularly passed special private acts to indemnify such officers. The *Mitchell* Court anticipated this practice, stating, "it is not for the court to say what protection or indemnity is due from the public to an officer who [has] trespassed on private rights. That question belongs to the political department of the government."[190] Indeed, after *Mitchell* itself, Congress passed an act to "liquidate and satisfy" the judgment against the officer.[191] The key point here is that Congress's ability to indemnify officers on a case-by-case basis did not undo ex post facto review of acts said to have been warranted by the principle of necessity. Instead, indemnification gave both the courts and Congress shared responsibility in determining the propriety of the executive acts in any given emergency setting.

A similar regime existed in the law of war at sea. Federal courts sitting as prize courts adjudicated the lawfulness of naval vessels' captures on the high seas. During the Civil War, the Supreme Court carved out new authority for the Union navy. But that did not prevent courts from ruling against naval officers in any number of cases during the period.[192]

The Liebers' account of emergency measures during the Civil War and its aftermath arose out of the world in which such cases reviewing the use of force were standard operating procedure. The Liebers were thus able to propound a fierce executive emergency power appropriate for the emergency at hand, while nonetheless insisting on actually existing and

189. Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* (New Haven: Yale University Press, 1997); and Akhil Reed Amar, "Of Sovereignty and Federalism," *Yale Law Journal* 96 (1987): 1487–92; see also Lieber and Lieber, *Treatise on Martial Law*.

190. 54 U.S. at 135.

191. *Cong. Globe,* 32nd Cong., 1st Sess. 44 (1852)

192. See Craig Symonds, *Lincoln and His Admirals* (New York: Oxford University Press, 2008); Witt, *Lincoln's Code*, 147; David Sloss, Michael D. Ramsey, and William S. Dodge, "International Law in the Supreme Court to 1860," in *International Law in the U.S. Supreme Court: Continuity and Change* (New York: Cambridge University Press, 2011), 25 (noting that from the Marshall era to the Taney years, the Supreme Court "directly applied the law of nations without controversy to the conduct of both foreigners and Americans [including American naval officers] in admiralty disputes"); see also David Sloss, "Polymorphous Public Law Litigation: The Forgotten History of Nineteenth Century Public Law Litigation," *Washington & Lee Law Review* 71 (2014): 1801–3.

institutionally enforceable limits.[193] Their standard of reasonableness invited courts to participate in the elaboration of those limits, but to do so in a way that respected the role of the executive in responding to the crisis of the moment. It was a vision informed simultaneously by an acute awareness of the gains achieved by executive power during the Civil War, and of the importance and the inevitability of limits.

193. For an extension of this point, see Trevor Morrison, "Suspension and the Extrajudicial Constitution," *Columbia Law Review* 107 (2007): 1533.

https://doi.org/10.1017/S0738248018000317 Published online by Cambridge University Press