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The Emancipation Proclamation as a Constitutional Document: Why it is and Why it Matters

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THE EMANCIPATION PROCLAMATION AS A CONSTITUTIONAL DOCUMENT:
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ABSTRACT

Few scholars question the historical importance of the Emancipation Proclamation. However, unlike the Declaration of Independence or the Northwest Ordinance of 1787, no scholar has argued that the Emancipation Proclamation ought to be recognized as a constitutional document, nor offered systematic answers to important questions such an argument would raise: What does it mean to say that something is a "constitutional document"? How can we identify such documents? And, finally, why should we care either way? This paper not only argues that the Proclamation ought to be recognized as a constitutional document, but also attempts coherent and cohesive answers to these questions and, in the process, hopefully provide a new perspective on what the Proclamation's broader role in the American constitutional tradition is, or ought to be. I argue that constitutional documents are transformative historical documents that express foundational principles which have, at some point and in some way, been endorsed formally or informally by the People. Constitutional documents thus play a role in expressing and preserving a kind of American constitutional ethos*, and can carry out that role in a concrete way as principled guides for constitutional interpretation and amendment-making. The Emancipation Proclamation possesses each of these criteria, including a special constitutional status and authority derived from its constitution-like ratification by loyal state governors at the rarely discussed Altoona Conference of September, 1862, and adopting, in principle, in the Thirteenth and Fourteenth Amendments.*

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WHY IT IS AND WHY IT MATTERS

By: Jonathon W. Penney

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I. INTRODUCTION

The editors of the 2008 pocket-sized edition of the "U.S. Constitution"[1] included, in addition to the text of the Constitution itself, copies of the Articles of Confederation and the Declaration of Independence. This made sense. These are important, even foundational, legal texts. But where was President Abraham Lincoln's fabled Emancipation Proclamation? Issued on January 1, 1863, after a preliminary statement in September of the previous year, it pronounced the freedom of all slaves held in rebel states and changed the course of both the Civil War and American history.[2] Was it not a document worthy of inclusion?

[1] THE U.S. CONSTITUTION: AND FASCINATING FACTS ABOUT IT 3 (Terry Jordan, ed., 2008).

[2] Harold Holzer, Edna Greene Medford, & Frank J. Williams, *Introduction*, *in* THE EMANCIPATION PROCLAMATION: THREE VIEWS xi (2006) ("Few historians

Few scholars, legal or otherwise, question the transformative importance of the Emancipation Proclamation ("the Proclamation").[3]

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question that the Emancipation Proclamation changed the Civil War, and changed America").

[3] *See e.g.*, Holzer, Medford, & Williams, *Introduction*, *Id.*; JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 380 (1951) ("The Emancipation Proclamation is commonly regarded as a measure which marked a distinct change in the purpose of the [Civil] war…"); JOHN HOPE FRANKLIN, THE EMANCIPATION PROCLAMATION (1963)(calling it a "great American document of freedom" and noting that "The ramifications as well as the implications of the Emancipation Proclamation seem endless…"); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863-1877 35 (1988) ("The Emancipation Proclamation permanently transformed not only the character of the Civil War, but the problem of Reconstruction."); MARK E. NEELY, JR., ABRAHAM LINCOLN AND CIVIL LIBERTIES 167 (1991) ("Despite the numbingly legalistic style of the Emancipation Proclamation, its practical workings, when enforced by the Republicans in Washington who formulated policy, were revolutionary…"); GEORGE ANASTAPLO, ABRAHAM LINCOLN: A CONSTITUTIONAL BIOGRAPHY 197 (1999) (describing the Emancipation Proclamation as one of the greatest tributes to the "Constitution of 1787"); MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 1 (2001); ALLEN C. GUELZO, LINCOLN'S EMANCIPATION PROCLAMATION: THE END OF SLAVERY IN AMERICA 1 (2004) ("The Emancipation Proclamation was the most revolutionary pronouncement ever signed by an American president…); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 356 (2005) ("With a stroke of the pen, Lincoln changed the meaning of the war and the course of American history"); John Hope Franklin, *Forward*, *in* THE EMANCIPATION PROCLAMATION: THREE VIEWS vii (2006) (Writing of the Proclamation's "significance for the four million men, women and children held in bondage" during the Civil War and the "universality of the proclamation's appeal…"); Harold Holzer, *Picturing Freedom: The Emancipation Proclamation in Art, Iconography, and Memory*, *in* THE EMANCIPATION PROCLAMATION: THREE VIEWS 83, 87 (2006) ("Painters and sculptors also labored on the emancipation subject— their work crafted occasionally from precious life sittings— and often their efforts, too, were in turn adapted in other media… This emerging tradition of interlocking, interdependent art and commerce produced an avalanche of reverential portraiture that fixed in history the image of Lincoln as the Great Emancipator. Journalists, biographers, historians, and preachers offered tributes of their own, but in art, perhaps more vividly and indelibly of all, Lincoln and his Emancipation Proclamation lived on in family albums, on parlor walls, in public spaces, and in public memory."); Edna Greene Medford, *Imagined Promises, Bitter Realities: African Americans and the Meaning of the Emancipation Proclamation*, *in* THE EMANCIPATION PROCLAMATION: THREE VIEWS 1, 46 (2006) ("The proclamation's significance in the first one hundred years was that it reinforced the democratic and egalitarian foundation upon which the nation was supposedly established."); BURRUS M. CARNAHAN, ACT OF JUSTICE: LINCOLN'S EMANCIPATION PROCLAMATION AND THE LAW OF WAR 142 (2007) (Noting that the Proclamation was an "important precedent" that found "many echoes in the conflicts of the twentieth century."); Frank J. Williams, *The End of the Beginning: Abraham Lincoln and the Fourteenth and Fifteenth Amendments*, *in* LINCOLN AND FREEDOM: SLAVERY, EMANCIPATION, AND THE THIRTEENTH AMENDMENTS 212, 229 (2007)("The Emancipation Proclamation… opened the door to substantial reconfiguration of national policy on equal rights."); *Compare with* LERONE BENNETT, JR., FORCED INTO GLORY: ABRAHAM LINCOLN'S WHITE DREAM 9, 15 (2000) (arguing that the Proclamation was "a ploy designed not to emancipate the slaves but to keep as many slaves as possible in slavery" and that Lincoln was "shockingly indifferent and insensitive to the plight of slaves in particular and

But the vast majority of work on the Proclamation by lawyers, judges or legal scholars has focused primarily on whether it was legally valid, leaving much of its legal and constitutional context "largely uncharted".[4] Perhaps its questionable legality has deterred scholars from exploring the Proclamation's broader place in the American constitutional tradition. Yet, the question as to the proper constitutional role for the Declaration of Independence, despite being "neither a statute nor a constitution" that was "never intended to become a document of constitutional law",[5] has received, at least more recently, much greater scrutiny from scholars.[6] Among these works, some have argued that the Declaration ought to be understood as "a

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African-Americans in general"); MICHAEL LIND, WHAT LINCOLN BELIEVED: THE VALUES AND CONVICTIONS OF AMERICA'S GREATEST PRESIDENT (2005).

[4] BURRUS M. CARNAHAN, ACT OF JUSTICE: LINCOLN'S EMANCIPATION PROCLAMATION AND THE LAW OF WAR 2 (2007) ("Although there have been many thoughtful efforts to explore the constitutional context of the Emancipation Proclamation, the rest of the proclamation's legal context remains largely uncharted territory."). *See for example* JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 378-385 (1951) (inquiring "as to [the Emancipation Proclamation's] legal effects and validity…"); *Youngstown Sheet & Tube Co. Sawyer v. Sawyer*, 343 U.S. 579, 599 (1952) (*see e.g.*, Frankfurter J.: "It would pursue the irrelevant to reopen the controversy over the constitutionality of some acts of Lincoln during the Civil War…" and Vinson C.J., "[t]he most striking action of President Lincoln was the Emancipation Proclamation, issued in aid of the successful prosecution of the War Between the States but wholly without statutory authority."); HARRY V. JAFFA, THE CRISIS OF THE HOUSE DIVIDED CH.14 (1982); Sanford Levinson, *The David C. Baum Memorial Lecture: Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?*, 2001 U. ILL. L. REV. 1135 (2001) (exploring whether the Emancipation Proclamation was constitutional and arguing, among other things, that the question is both important and relevant to modern constitutional debates); PAUL FINKELMAN, SLAVERY AND THE LAW 104-106 (2001) (comparing Lincoln and Justice Benjamin Curtis' views on the Proclamation's legality); Paul Brest, Sanford Levinson, Jack Balkin, & Akhil Reed Amar, *Processes of Constitutional Decisionmaking: Cases and Materials* (2006) (exploring the Proclamation's validity, including its critics like the late Justice Benjamin Curtis); DANIEL FARBER, LINCOLN'S CONSTITUTION 152-157 (2006) (exploring the legality of the Proclamation within the President's war powers).

[5] David Armitage, *The Declaration of Independence and International Law*, 1 WM. & MARY Q. 39, 39 (2002).

[6] Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?* 111 PENN. ST. L. REV. 413, 414 (2006) (arguing that the Declaration has no "unique role" but ought to be understood as just "one of many sources of the Constitution's original meaning"); Tim Sandefur, *Liberal Originalism: A Past for the Future*, 27 Harv. J.L. & Pub. Pol'y 489 (2004) ("What role ought the Declaration of Independence play in interpreting the Constitution? Average Americans would probably be surprised that the subject has received relatively little scholarly attention. But in recent years, some writers, led particularly by Scott Douglas Gerber, have begun to devote serious consideration to the Declaration's constitutional role."); SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION (1995); Jason F. Robinson, *Book Note, Gerber's To Secure These Rights*, 12 J.L. & POL. 123, 130-32 (1996). *Compare with* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 134 (1997) ("If you want aspirations, you can read the Declaration of Independence… There is no such philosophizing in our Constitution, which unlike the Declaration of Independence… is a practical and pragmatic charter of government…").

constitutional document".[7] Moreover, at least one scholar has even argued outright that the 1787 Northwest Ordinance, an act of the Continental Congress without even the force of statute, is likewise "constitutional".[8] In stark contrast, while some, like Bruce Ackerman, recognize that the Emancipation Proclamation has "profound constitutional meaning"[9] no one has likewise argued that it ought to be understood as a constitutional document. I do so in this paper.

But this raises other important questions: What does it mean to say that something is a "constitutional document"? How can we identify such documents? And, finally, why should we care either way? Unlike others who have taken up similar projects,[10] this paper will attempt coherent and cohesive answers to these questions and, in the process, hopefully provide a new perspective on what the Emancipation Proclamation's broader role in the American constitutional tradition is, or ought to be. These questions are taken up in Part II, where I set out to define both what constitutional documents are and the special role they should play. I argue that constitutional documents play a role in expressing and preserving a kind of American constitutional *ethos*, and can carry out that role in a concrete way as principled guides for constitutional interpretation and amendment-making. Having set this out in Part II, the Paper argues in Part III why the Emancipation Proclamation, for reasons based on law, theory, and history, ought to be recognized as a constitutional document.

But first some clarification is necessary. Though more on this will be said later, legal texts like the Declaration of Independence, the

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[7] *See e.g.*, George A. Billias, *The Declaration of Independence: A Constitutional Document*, *in* THIS CONSTITUTION (Spring 1985); Dennis J. Mahoney, *The Declaration of Independence as a Constitutional Document*, in Leonard W. Levy and Dennis J. Mahoney, eds., THE FRAMING AND RATIFICATION OF THE CONSTITUTION (1987). *Compare with*: GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 362 (1978).

[8] Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUMBIA L. R. 929 (1995).

[9] BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 131 (1998).

[10] Duffey, for example, offers no coherent theory as to what a constitutional document is, or how we might identify one, but instead draws on a number of different aspects of constitutional theory— which, at times, are contradictory— to make his case for the Northwest Ordinance. *See* Duffey, *supra* note 8, at 941 ("While theories of constitutional authority are numerous, no one theory captures all the features of the Ordinance that indicate its constitutional nature… Thus, this Part relies on a number of different conceptions of constitutional authority to argue that the Ordinance is constitutional by virtue of several of its characteristic… While perhaps none of these characteristics would, in itself, justify considering the Ordinance to be a constitutional document, taken together they establish the constitutional authority of the Ordinance"). Scholars arguing that the Declaration of Independence should be recognized as a "constitutional document" have likewise been variable and vague on these questions. *See e.g.,* Mahoney, *supra* note 7 (offering some reasons for the Declaration's importance and constitutional meaning, but no overarching framework for what exactly it means to be a constitutional document); Billias, *supra* note 7 (advancing four arguments for why the Declaration ought to be understood as a constitutional document, but again, no overarching framework).

Northwest Ordinance and, as will be argued here, the Emancipation Proclamation, are the kinds of legal texts or documents I have in mind when I say "constitutional documents". However, as others have pointed out,[11] saying the Emancipation Proclamation is a "constitutional document" is not to suggest it is a *constitution* in the formal or traditional sense; that it is supreme law and that judges ought to enforce its provisions in courts of law.[12] The only constitution in this formal sense discussed will be the U.S. Constitution ratified in 1787 and amended twenty seven times.[13] Constitutional documents, I will argue, are a special class of documents, usually legal, with a unique status in relation to the U.S. Constitution, but are not themselves constitutions and should not be so confused.

II. THE NATURE AND ROLE OF CONSTITUTIONAL DOCUMENTS

A. The People's Ongoing Constitutional Project

The role I envision for constitutional documents, as we will see, is very much tied to their nature. But we need to first canvas some aspects of constitutionalism generally, and the U.S. Constitution ("the Constitution") in particular. A constitution, after all, must be more than mere words scrawled on a parchment. Those words may set rules to guide the conduct of the state and citizens, but unless the constitution is seen as legitimate, no one will follow the rules, or even care what they say. What renders a constitution worthy of our fidelity and, as Jack Balkin might say, our faith in its project, is its legitimacy.[14] Carl

[11] See Duffey, *supra* note 5, at 932 (noting that the Northwest Ordinance is not a "constitution", being neither supreme law, or the source for the establishment of "institutions, structure, and powers of government").

[12] Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152, 153 (Larry Alexander ed., 1998) (describing a constitution in the formal or "thick" sense, as being the "superior law" which sets rules for the branches of government, procedures for amendments, and (often) incorporates some form of judicial enforcement.). *See also* HANS KELSEN, PURE THEORY OF LAW 222 (trans. Max Knight, 2002) (describing a "constitution in the formal sense" which is a "written constitution" that covers "general norms" for legislation but also more specific "politically important subjects"); Richard S. Kay, *American Constitutionalism*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 16, 16 (Larry Alexander ed., 1998)(writing of the influence of American constitutionalism abroad, a model that includes a "written constitution" that controls the "organs of state" with "courts holding acts of the state invalid because inconsistent with the constitution…").

[13] U.S. CONST.

[14] Kay, *supra* note 12, at 30 ("We can describe the quality that makes a constitution (or law) seem worthy of being obeyed as 'legitimacy.'); Jack Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENTARY 427, 436 (2007) ("Beyond the arguments I have just offered for adhering to the original meaning of the Constitutional text lie deeper issues: the legitimacy of the Constitution and faith in the constitutional project."). Raz calls this constitution's "moral authority". Raz, *supra* note 12, at 159. *See also* Randy Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 110, 110 (2003) ("But few [constitutional scholars] stop to consider whether the Constitution is legitimate. This is unfortunate because if the Constitution is not legitimate, then it is not clear why we should care what it

Schmitt notably identified two sources of constitutional legitimacy most apparent in world history: dynastic and democratic.[15] Though theorists have filled libraries writing on such things,[16] fortunately there is consensus, at least broadly speaking, among American lawyers, scholars and judges that the Constitution's source of legitimacy is the democratic kind— "We the People".[17] It derives its legitimacy and authority through popular sovereignty, that is, as an act of the People Themselves.

The painstaking historical work of scholars like Gordon Wood, Donald Lutz and Akhil Reed Amar has demonstrated the importance of popular sovereignty to the American Founding.[18] Needless to say, the idea was reflected in the state constitutions before ratification[19] and found numerous expressions in *The Federalist Papers*. Hamilton wrote of the People as "the pure original fountain of all legitimate authority"[20] and Madison, that "ultimate authority, wherever the derivative may be found, resides in the people alone."[21] And not to be outdone, James Wilson, the Federalists' "preeminent popular sovereignty theorist",[22] proclaimed the people's right "to mould, to preserve, to improve, to refine, and to finish" the Constitution, "as they

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means."); Frederick Schauer, *Amending the Presuppositions of a Constitution*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 145, 149 (Sanford Levinson ed., 1995) ("…constitutions need grounding as much as they supply it.").

[15] CARL SCHMITT, CONSTITUTIONAL THEORY§9 (Jeffrey Seitzer, trans., 1928).

[16] American theorists are no different from those of other countries whose work, apparently, likewise "fill" dusty library spires. *See* Raz,, *supra* note 12, at 152 .

[17] U.S. CONST., PREAMBLE; Kay, *supra* note 12, at 30 ("The constituent authority in the United States in the constitution-making period, as far as its exact features are concerned, was, and no doubt still is, a highly controvertible matter. Nevertheless, its broad character has been shown. The Constitution took its authority as the act of the 'people'").

[18] GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 289-293, 600-5 (1969) (detailing the rise of popular sovereignty in the period before and during the Founding,); DONALD S. LUTZ, ORIGINS OF AMERICAN CONSTITUTIONALISM (1988); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 175-176 (1967); AMAR, BIOGRAPHY, *supra* note 3. *See also* EDWARD S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988).

[19] Kay, *supra* note 12, at 30 ("This understanding [that the people had the authority to form governments] is reflected in the declarations of rights of the earliest state constitutions…"). *See generally,* DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS (1980); THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (Francis Newton Thorpe, ed., 1909).

[20] THE FEDERALIST NO. 22, at 148 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[21] THE FEDERALIST NO. 46, at 291 (James Madison) (Clinton Rossiter ed., 1961).

[22] Akhil R. Amar*, The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 474 (1994).

please."[23] As a result, writers from across the constitutional spectrum draw on notions of popular sovereignty to ground their work, from so-called scholars of the "right" like Justices Scalia and McConnell to those like Bruce Ackerman and Larry Kramer on the "left".[24]

But the Constitution is not static. It is, as Professor Amar has reminded, more than just a text, but "an act, a deed". And the People did not act only once in 1787, never to return. Rather, the Constitution's story is not only one of constitutional evolution, but revolution and redemption.[25] It has no "final resting place".[26] So the question of constitutional legitimacy, too, must remain an ongoing project, without rest. The legitimacy of the 1787 scheme may have been secured by a great act of democratic ratification by the People, but that legitimacy can, and has, been challenged at different times since, as it was, for example, in the Civil War period, when its sanction of slavery ran counter to large currents of public sentiment,[27] and

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[23] James Wilson, *Lectures on Law*, *in* THE WORKS OF JAMES WILSON 304 (1967).

[24] Randy Barnett, *Scalia's Infidelity: A Critique of"Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 9 (2006-2007) ("Why be bound by the past? For that, Justice Scalia and other originalists had to develop a theory of constitutional legitimacy. Most originalists stressed the theory of popular sovereignty. They contended that the Constitution is an authoritative expression of the will of the People, which judges are duty-bound to follow. The theory that constitutions obtain their legitimacy from the consent of the governed is widely held. It is favored by most on the left as well as the right."); Kurt T. Lash, *The Original Meaning of Omission: The Tenth Amendment, Popular Sovereignty, and "Expressly" Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1897n25, 1898n28 (2008) ("Although all contemporary originalists seek to identify the original understanding of the ratifiers, the effort is particularly important for popular sovereignty–based originalism… Once associated with the political goals of the right, the originalist enterprise has come to be embraced by a wide spectrum of constitutional theorists."). *See e.g.*, Michael McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1291 (1997) ("…the people's representatives have a right to govern, so long as they do not transgress limits on their authority that are fairly traceable to the constitutional precommitments of the people themselves..."); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (anchoring originalist constitutional interpretation to original public meaning, that is, how the People would have understood constitutional provisions at the Founding); 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2006). *See also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); AMAR, BIOGRAPHY, *supra* note 22.

[25] *See* AMAR, BIOGRAPHY, *supra* note 3, at 468 ("My *constitutional* story has been redemptive even if my *Founding* story was less so."). *See also* ACKERMAN, FOUNDATIONS, *id.*; ACKERMAN, TRANSFORMATIONS, *id.*

[26] AMAR, BIOGRAPHY, *id.* at 458.

[27] *See* DAVID MORRIS POTTER & DON EDWARD FEHRENBACHER, THE IMPENDING CRISIS 1848-1861 44-45 (1976) ("The problem for Americans who, in the age of Lincoln, wanted slaves to be free was not simply that southerners wanted the opposite, but that they themselves cherished a conflicting value: they wanted the Constitution, which protected slavery, to be honored, and the Union, which was a fellowship with slaveholders, to be preserved. Thus they were committed to values that could not logically be reconciled."); Arthur Bestor, *The Civil War as a*

certainly to the views of the country's elected President Lincoln.[28] The Reconstruction, as redemption of the Founders' failures on slavery, was necessary to re-establish the Constitution's legitimacy and popular faith in its project.[29] Eternal vigilance, as it turns out, is as much the price of constitutional legitimacy, as liberty.

But deep popular division over constitutional sanction of evils like slavery is not the only potential threat to the Constitution's stability and legitimacy.[30] There is a second form or dimension to what Jack Balkin and Mark Graber call the "problem of constitutional evil".[31] Rather than a change in public sentiment over formerly tolerated constitutional evil causing a crisis, this form arises when state actors with interpretive authority— namely courts— interpret the

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Constitutional Crisis, 69 AMERICAN HISTORICAL REVIEW 327, 327 (1964) ("From 1845 on, for some fifteen years, a constitutional dispute over the expansion of slavery into the western territories grew increasingly tense until a paralysis of normal constitutional functioning set in. Abruptly, in 1860-1861, this particular constitutional crisis was transformed into another: namely, that of secession. Though the new crisis was intimately linked with the old, its constitutional character was fundamentally different. The question of how the Constitution ought to operate as a piece of working machinery was superseded by the question of whether it might and should be dismantled."); AMAR, BIOGRAPHY, *supra* note 3, at 360 ("What the bare text [of the Constitution] does not show is the jagged gash between Amendments Twelve and Thirteen— a gash reflecting the fact that the Founders' Constitution failed in 1861-1865. The system almost died, and more than half a million people did. Without these deaths, the Thirteenth Amendment's new birth of freedom could never have occurred as it did.").

[28]Abraham Lincoln, *Letter to A.G. Hodges, Washington, 4 April 1864, in* LETTERS AND ADDRESSES OF ABRAHAM LINCOLN 293 (1908) ("I am naturally antislavery. If slavery is not wrong, nothing is wrong.").

[29]AMAR, BIOGRAPHY, *supra* note 3, at 468 ("Even if an adventurous historian takes the constitutional story up through the Bill of Rights or the entire Washington Administration, the curtain then typically comes down. What happened later is 'not my period,' the historian tells himself. But what happened later is the reason so many people today look to the Founding with reverence rather than revulsion. What happened later to emphasize just how central slavery was in the 1789 document is to tell a dark tale about the Founding— to leave the ultimate story of redemption to some historian of a later period… The Founding regime was proslavery, although many in the 1780s may not have foreseen the full extent of this bias. The Reconstruction broke sharply with the antebellum system and did so only because of the cataclysm of the Civil War. Before that, slavocrats had come to dominate antebellum America, thanks to the compound-interest effect of the three-fifths clause… My constitutional story has been redemptive even if my Founding story was less so.").

[30]MARK GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 7 (2006) ("Problems caused by the failure of constitutional institutions to perform as expected have haunted American constitutionalism for more than two centuries. Unforeseen political and social changes continually wreak havoc with constitutional orders.").

[31]Jack Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1706 (1996-1997) ("The problem of constitutional evil is the possibility that the Constitution is responsible, directly or indirectly, for serious injustices. The argument from constitutional evil against constitutional fidelity is that the Constitution does not deserve our fidelity because the constitution is unjust or permits or gives legal sanction to serious injustices."); GRABER, CONSTITUTIONAL EVIL, *id.* 7 (2006).

Constitution to require serious injustices or evils (such as slavery[32] or race-based internment[33]). Again, the injustices may be such that the Constitution may no longer be seen as legitimate and worthy of the People's fidelity.[34] Each of these "constitutional evils" concern constitutionally sanctioned injustice and the crisis of legitimacy it may cause, with the first, perhaps to over simplify, arising from changes in popular sentiment about the Constitution, and the second from changes in institutionally authoritative interpretations of it, like those of the United States Supreme Court.

The already mentioned popular division over slavery during the Civil War is an example of the first form. A classic case of the second form is Chief Justice Roger Taney's *Dred Scott* decision. Taney held not only that the federal government had no power under the Constitution to outlaw slavery, but that blacks could never be citizens anyways, as they "had no rights which the white man was bound to respect".[35] Scholars have since spent much ink showing why the opinion was an indefensible interpretation of the Constitution,[36] with *Dred Scott* often seen a litmus test for the prudence of any theory of constitutional interpretation.[37] To be clear, however, the problem of constitutional evil concerns more than obviously repugnant practices like slavery, but can include constitutional stupidities and tragedies, that is, patently stupid, absurd, or tragically wrong constitutional provisions, amendments, and interpretations.[38] Constitutional tragedy and stupidity, like evil and injustice, can also cause a crisis in constitutional legitimacy, if enough citizens feel it is intolerable.

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[32] Scott v. Sandford (*Dred Scott*), 60 U.S. (19 How.) 393 (1857).

[33] Korematsu v. United States (*Korematsu*), 323 U.S. 214 (1944).

[34] The amount of injustice and "evil" that is tolerable is ultimately a decision for each citizen to make. *See* GRABER, CONSTITUTIONAL EVIL, *supra* note 30, at 8 ("Because all constitutions remain compromises as long as citizens cannot agree on the qualities of the good society, most persons are likely to think that their present constitution provides too much or too little protection for state and local interests, property, privacy, religion, racial equality, and other liberties and rights. When considering how much evil they would interpret their constitution as permitting, members of all constitutional communities must consult their constitutional aspirations and consider how much evil they will tolerate as the price for enjoying the continued benefits of constitutional union.").

[35] *Dred Scott*, 60 U.S. (19 How.) at 407, 450. *See also* AMAR, BIOGRAPHY, *supra* note 3, at 264.

[36] *See e.g.*, Frederick Douglass, *The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?*, *in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 467-80 (1950); DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); EARL M. MALTZ, DRED SCOTT AND THE POLITICS OF SLAVERY (2007); AMAR, BIOGRAPHY, *supra* note 3, at 264-265. *Cf.* GRABER, CONSTITUTIONAL EVIL, *supra* note 30 (Mark Graber proclaims slavery an "evil", but finds nothing in the 1789 Constitution that rendered Taney's decision in *Dred Scott* constitutionally untenable).

[37] Balkin, *Agreements from Hell*, *supra* note 31, at 1710-1711 (describing a "cottage industry" of constitutional work attempting to reconcile the Constitution with unjust interpretations like *Dred Scott*).

[38] WILLIAM N. ESKRIDGE, JR. & SANFORD LEVINSON, CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (1998) (compiling "nominations" from numerous scholar for most stupid and tragic constitutional provisions and decisions).

But what, the reader queries, does any of this have to do with *constitutional documents*? I believe constitutional documents can act as principled guides to help ward off constitutional crisis like the aforementioned constitutional evils. This needs explanation.

B. How and Why Constitutional Documents Matter

The legal philosophers tell us to distinguish between a constitution's *legality*, or legal force, and its moral or normative character, or *legitimacy*.[39] The U.S. Constitution, obviously, has both of these, and I have already said some things about the popular basis of the Constitution's legitimacy— its historic popular origins give it the legitimacy and authority to ensure fidelity. But that legitimacy also confers expressive and symbolic power on the Constitution. As a grand and continuing act of the People, it is, as Jack Balkin would say, not only a form of "higher law", being a "source of inspiration and aspiration, a repository of values and principles", but it is *our* higher law— the Peoples'.[40] This is, as political economists say, the notion of constitutions as expressive and symbolic documents.[41]

Constitutional documents likewise have important expressive and symbolic meaning.[42] They are different from constitutions because

[39] Schauer, *supra* note 14, at 150 (explaining how legality, which is often determined by pre-existing legal processes or what H.L.A. Hart famously called rules of recognition in a legal system, must be distinguished from the normative foundation for the ultimate rule of recognition— the Constitution itself— which is not legal, but social and historical: "The ultimate rule of recognition is a matter of social fact, and so determining it is for empirical investigation rather than legal analysis."); Kay, *supra* note 12, at 30 ("A constitution…usually is legitimized not by promulgation according to preexisting law, but by a widely shared political consensus as to the nature of the constituent authority in a polity."); Salmond recognized long before either Hans Kelsen or H.L.A. Hart, that the ultimate rule of law was "historical only, not legal." J. SALMOND, JURISPRUDENCE 125 (1907).

[40] Balkin, *Original Meaning*, *supra* note 14, at 462 ("…the Constitution trumps ordinary law not simply because it is legally or procedurally prior to it, but because it represents important values that should trump ordinary law, supervise quotidian acts of governmental power, and hold both law and power to account. Thus, we say that the Constitution is not merely basic law, it is also *higher law*; that is, it is a source of inspiration and aspiration, a repository of values and principles... Finally, it is not enough that the Constitution serve as basic law—a framework for governance, or as higher law—a source of aspirational standards and values. It must also be our law. The people who live under it—the American people—must understand the Constitution as their law…").

[41] G. Brennan & Alan Hamlin, *Constitutions as Expressive Documents*, *in* OXFORD COMPANION TO POLITICAL ECONOMY 329, 336-337 (2006) ("…written constitutions, we argue, are often best seen as symbolic and expressive statements of the political mindset of the time and place…" also noting, "The claim that written constitutions are to be understood as largely symbolic and expressive will hardly be controversial in many circles…").

[42] Professor Amar uses "Symbolic constitution" to describe similarly important constitutional documents in his forthcoming text on American's unwritten constitution. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: BETWEEN THE LINES AND BEYOND THE TEXT ch. 7 (forthcoming, 2009). As will be

they lack the aforementioned *legality*; as they are most often legally spent forces[43] and certainly lack the pedigree of formal constitutions that have been ratified and enacted under formalized processes. Still, they are a source of inspirational "values and principles". Since the Founding, important events in American history have evolved the Constitution's story, sometimes for the better, other times for the worse, and sometimes even challenging the very legitimacy of the Constitution's project and ideals. Along the way, certain legal texts and documents stand out because they have come to embody, express or exemplify important and foundational principles of the People. This is what confers on these legal texts and documents, or as I call them, constitutional documents, special status. Like the Constitution to which they are bound, constitutional documents embody, express or exemplify important and foundational principles of the American constitutional tradition, which have been endorsed or accepted, some formal or informal way, by the People in the midst of these historic constitutional events or changes. Though constitutional documents lack formal legality, because of their pedigree they nevertheless have expressive and symbolic constitutional meaning as "higher law" that is "ours", the Peoples.

Two legal texts I would readily regard as constitutional documents are the Declaration of Independence and the 1787 Northwest Ordinance. The Declaration surely embodies important principles of both the Founding and the American Revolution, embodying a model for Americans, and peoples around the world, "by which to measure constitutional government based upon the principles of popular consent and fundamental rights."[44] Similarly, the Northwest Ordinance, though not even a statute at issuance, too, embodies important principles, like the importance of territorial equality in the midst of expansionism.[45] The principles and ideas these constitutional documents stand for each tell us something foundational about the American constitutional tradition and the People that forged it.

Because of their special pedigree, constitutional documents have an essential role that I hinted at earlier— as guides for the unfolding of the Constitution's story to which they are bound: first, as

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seen, however, because my criteria for constitutional documents gravitate toward more *legal* texts, my definition might exclude some of the documents that he includes, such as the *Brown v. Board of Education* or Lincoln's *Gettysburg Address*.

[43] For example, though the Declaration of Independence and Northwest Ordinance may have had some legal force at some point, that legality is long since passed. *See* Billias, *Declaration*, *supra* note 7 (noting that for most historians, political scientists, and legal scholars, the Declaration "lacks the force of a legal instrument normally associated with a written constitution"); Duffey, *supra* note 5, at 940 (noting that the Northwest Ordinance's "formal legal authority has long since been extinguished.").

[44] Billias, *Declaration*, *supra* note 7.

[45] AMAR, BIOGRAPHY, *supra* note 3, at 433 273 ("Having themselves been mistreated as colonists, Americans in the Northwest Ordinance solemnly vowed not to mistreat their own new colonies."). *See also* Duffey, *supra* note 5, at 953-955 (also discussing the "principle" of expansionism expressed by the Ordinance).

bulwarks against constitutional evil and, second, as principled guides, especially through periods of constitutional crisis, failure and (if it becomes necessary) reconstruction.[46] Now, others before me have said that constitutional documents, like those named here, can serve as important constitutional guides. David Duffey, for example, says in his insightful work on the Northwest Ordinance that such constitutional documents can provide guidance to the national polity.[47] All of that sounds nice, and is probably right, but I am thinking of something much more concrete. In fact, constitutional documents have a practical role to play beyond being nice things you might frame and put on your wall for inspirational guidance.

Constitutional documents can act as principled bulwarks and guides against constitutional evils in two ways. First, any court confronted with a vague provision of the Constitution— where text, history, structure, and the usual "modalities"[48] offer no clear direction— should never offer an interpretation that plainly conflict with principles expressed in constitutional documents.[49] How would this work in practice? Take *Dred Scott*. No honest judge taking seriously the Declaration of Independence and its stated principle of equality could come to the same conclusions about the Constitution as Taney. His finding that blacks "had no rights which the white man was bound to respect"[50] required him to disingenuously splice, or as Lincoln put it, do "obvious violence" to, the "plain unmistakable language of the Declaration."[51] Even John C. Calhoun, who spent his career heaping "scorn" on the Declaration, thought it more credible to renounce it than pervert its plain language.[52] Mark Graber may claim there was nothing in the Constitution that rendered Taney's opinion

[46] I do not capitalize "reconstruction" here as I want to signify more than, say, the Reconstruction amendments, but other periods of important constitutional redemption. *See* AMAR, BIOGRAPHY, *supra* note 3, at 433 (noting the difference between the First Reconstruction and the Second Reconstruction in American history, the latter being a redemption of the failure of the former).

[47] See Duffey, *supra* note 5, at 933 (explaining how constitutional documents provide guidance for "national political action" or the national "political entity").

[48] PHILLIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991) ("modalities of argument"). *See Also* PHILLIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

[49] This is not a hypothetical concern. *See* AMAR, BIOGRAPHY, *supra* note 3, at 477 (noting that often text points "outward" and "beyond" the text to "unenumerated rights" and interests). Professor Amar appears to express a similar idea in his approach to the Symbolic Constitution in his forthcoming book on America's "unwritten constitution". AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: BETWEEN THE LINES AND BEYOND THE TEXT ch. 7 (forthcoming, 2009).

[50] *Dred Scott*, 60 U.S. (19 How.) at 407, 450. *See also* AMAR, BIOGRAPHY, *supra* note 3, at 264.

[51] Abraham Lincoln, *From a speech at Springfield, Illinnois, 26, June, 1857, in* LETTERS AND ADDRESSES OF ABRAHAM LINCOLN 96, 99 (1908).

[52] HARRY V. JAFFA, A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING CIVIL WAR 221 (2004); Mahoney, *supra* note 7 ("Even John C. Calhoun had not stooped to [Taney's distortions], choosing rather to denounce the Declaration than to pervert its meaning").

implausible,[53] but *Dred Scott was* implausible in light of the Declaration. And that was Lincoln's point. Today, courts using constitutional documents as guides may prevent, or deter, similar constitutional evils or stupidities.[54]

A second role for constitutional documents arises in the midst of constitutional crisis and failure, when the text of the Constitution itself might be the very problem, and Americans must look elsewhere for guidance. Here, constitutional documents act as principled guides such that no new constitutional amendment should be proposed that would constitute a clear and plain conflict with the principles of constitutional documents. Often, those working within the schisms of constitutional division, crisis, or failure need guidance to avoid unforeseeable constitutional evils. In fact, scholars have noted that, historically, the Declaration has often been referred to during periods of important constitutional conflict and change.[55] Constitutional documents, with their principled symbolism, offer principled guidance for cases when, as after the Civil War, the very text, history and structure of the Constitution itself is subject to radical reconstruction.

Constitutional evils are often the product of accommodations of evil in the compromises necessary to forge a constitution.[56] The *Dred Scott* decision, though arguably a gross misinterpretation of the Founders' Constitution, was very much a product – and only made possible – by the accommodation of the evil of slavery at the Founding.[57] Constitutional documents, in contrast to the Constitution proper, often embody or state uncompromised principles, free of the compromises, confines and imperfections necessary to ensure the actual Constitution works. The important role for constitutional documents derives at least in part, from the very fact they are *not* formalized constitutions. They are important reminders of idealized principles inherent in the Constitution's project, a reminder to the

[53] GRABER, CONSTITUTIONAL EVIL, *supra* note 30 (Mark Graber proclaims slavery an "evil", but finds nothing in the 1789 Constitution that rendered Taney's decision in *Dred Scott* constitutionally untenable).

[54] I acknowledge, of course, that Roger Taney would likely still find as he did in *Dred Scott* even if my case for a special role for constitutional documents in interpretation is accepted. We should assume, however, that current judges would approach the interpretive task more seriously and honestly than some of their past counterpart.

[55] Strang, *supra* note 6, at 417-431 (detailing how the Declaration was appealed to by abolitionists before and during the Civil War to justify new constitutional amendments outlawing slavery, in the midst of abolitionist, suffrage, civil rights and pro-life movements).

[56] GRABER, CONSTITUTIONAL EVIL, *supra* note 30, at 9 ("Constitutional accommodation for evil begets constitutional accommodation of evil. Past compromises generate legal and political support for subsequent constitutional decisions mandating injustices.").

[57] AMAR, BIOGRAPHY, *supra* note 3, at 97 (noting that Taney would never have been chief justice if not for the corrosive effects of the Constitution's radically pro-slavery three-fifths apportionment scheme).

People of their constitutional commitments the need to continue to work towards a more Perfect Union.

Another way of understanding this role for constitutional documents is that they provide a principled source for what Phillip Bobbitt calls ethical constitutional argument.[58] Constitutional documents, and the foundational principles they embody, give shape, definition, and expression to aspects of the American constitutional *ethos*. Constitutional interpretations that fundamentally contradict that *ethos* ought to be rejected, at least when other modalities of the Constitution itself are unhelpful. Constitutional documents are concerned not with marginal cases of textual disagreement, but expressing and preserving the foundational *ethos* of American Constitutional institutions.[59] Following their spirit, if not their letter, preserves that *ethos*, whilst fundamentally contradictory interpretations or amendments constitute a radical break with it.[60]

C. Identifying Constitutional Documents

Having offered some account of their special nature and role, it is worthwhile to also set out some specific criteria for constitutional documents inherently tied to that role, to allow us to identify others, beyond the Declaration and the Northwest Ordinance. First, as principled guides, they must obviously state, express, or embody transformative or foundational constitutional principles. This gives them their prominence as "higher law", in Balkin's terms. But not every glossy parchment stating principles is a constitutional document.

So, secondly, there must also be evidence that the constitutional document, or the principles embodied therein, were endorsed in some way by the People. The Constitution's own legitimacy and authority was born of an act or *constituting* by the People. The special constitutional authority and pedigree of a constitutional document arises in a similar fashion. This makes constitutional documents "ours" and provides a basis for saying that the principles they state or embody help constitute the American constitutional tradition or *ethos*, including the constitutional commitments of the People. Of course, constitutional documents are not constitutions so such "endorsement" would not be a formal constitutional ratification. But, as we will see, such endorsement may be an informal but certainly *constitution like*.

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[58] BOBBITT, CONSTITUTIONAL, *supra* note 48, at 93-119.

[59] Balkin might say, rather, they are concerned with the "basic justice" of Constitutional institutions. See Balkin, *Agreements from Hell*, *supra* note 31, at 1707.

[60] Put this way, we might also look to constitutional documents as a means to determine what kind of change to a constitution constitutes simply an amendment to it and what constitutes a radical break, a repudiation of the former constitution and an ordainment and establishment of a new one. A constitutional amendment that contradicts much of the principles and *ethos* expressed by constitutional documents could be said to constitute such a radical break. *See* AMAR, BIOGRAPHY, *supra* note 3, at 462 (posing questions about what limits are on We the People's power to amend the Constitution).

A third requirement is a matter of history. Saying a document or legal text has symbolic importance is empty if, as a matter of history or fact, it is simply not true. There must be evidence that the constitutional document not only has transformative historical and constitutional importance, but that citizens have, perhaps in confirmation of their importance as saying something about the American constitutional *ethos*, themselves returned to the documents in subsequent struggles for guidance as to how to redeem both the principles therein, as well as the promise of the Constitution itself.

Both the Declaration and Northwest Ordinance fit these descriptions. First, the Declaration, as already noted, embodies important principles of both the Founding and the American Revolution.[61] The Northwest Ordinance likewise articulated foundational principles about equality and territorial expansion.[62] Second, clearly the Declaration, as the document that commenced the American Revolution, had transformative historical importance on the American constitutional tradition. Likewise, the Northwest Ordinance was an important historic landmark as the foundational document that both initiated and codified the process of territorial expansion.[63] Finally, scholars have convincingly argued that both constitutional documents enjoyed extraordinary, even constitution-like endorsement by the People: The Declaration, both by its explicit endorsement with signatures from the leaders of the Revolution and, of course, the Revolution itself, wherein the People fought to achieve the principles set out in the Declaration and won. The Northwest Ordinance is likewise persuasively shown by Duffey to be a product of constitutional-moment-like "higher-lawmaking" in the great constitutional debates of 1787.[64]

III. THE PROCLAMATION AS A CONSTITUTIONAL DOCUMENT

Having set criteria for constitutional documents, I set out in this section to show how the Emancipation Proclamation meets each: stating and embodying important foundational principles, being endorsed by the People themselves, in some informal but authoritative way, and finally have transformative historical and symbolic importance. It thus, like the Declaration and Northwest Ordinance, ought to be considered a constitutional document, with the special role that this status entails.

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[61] Billias, *Declaration*, *supra* note 7.

[62] Duffey, *supra* note 5, at 953-955 (also discussing the "principle" of expansionism expressed by the Ordinance).

[63] Duffey, *supra* note 5, at 949 ("The Ordinance not only began the process of American territorial expansion, but it also codified the idea of 'perennial rebirth' by establishing a governmental scheme dependent on maturation.").

[64] Duffey, *supra* note 5, at 943-947.

A. Foundational and Transformative Principles

i. Freedom: Uncompensated and Uncompromised

Constitutional documents, as principled guides, must state, express, or symbolize important foundational or transformative principles. The Emancipation Proclamation clearly does so. First, the Proclamation, in granting emancipation to slaves without compromise or compensation, stood for a transformative, even uncompromised, principle of freedom. But this was never a sure thing. Before its issuance on January 1, 1863, federal acquiescence and compromise on the question of slavery had been the name of the game since the Founding.[65] Indeed, Lincoln believed slavery was wrong, but even as of 1864, felt the need to separate his personal views from any presidential responsibility to the Constitution, which had sanctioned slavery since 1787.[66] That is likely one reason why there was no suggestion of federal abolition in the Republican Party platform of 1860.[67] Another reason was that Lincoln knew abolition could not be achieved overnight.[68] He thus declared in his inaugural address that he had no purpose "directly or indirectly, to interfere with the institution of slavery where it exists."[69] Lincoln proposed banning slavery in the new territories, while achieving general emancipation elsewhere with a policy involving more carrot than stick— gradually and with compensation. But at no point did he campaign for abolition.[70]

When seven states seceded with Lincoln's election as president in 1861, Congress' first move was again compromise. A constitutional amendment to protect slavery was proposed to appease the seceding

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[65] FRANKLIN, EMANCIPATION, *supra* note 3, at 10 ("Once the Northwest Ordinance was passed and the Northern states had enacted their emancipation laws, there was not further large-scale emancipation of slaves before the Civil War.").

[66] Abraham Lincoln, *Letter to A.G. Hodges, Washington, 4 April 1864, in* LETTERS AND ADDRESSES OF ABRAHAM LINCOLN 293 (1908) ("I am naturally antislavery. If slavery is not wrong, nothing is wrong. I cannot remember when I did not so think and feel, and yet, I have never understood that the presidency conferred upon me an unrestricted right to act officially upon this judgment and feeling.").

[67] AMAR, BIOGRAPHY, *supra* note 3, at 352.

[68] AMAR, BIOGRAPHY, *supra* note 3, at 353; Allen G. Guelzo, *"Sublime in its Magnitude": The Emancipation Proclamation*, *in* LINCOLN AND FREEDOM: SLAVERY, EMANCIPATION, AND THE THIRTEENTH AMENDMENTS 65, 69 (2007).

[69] Abraham Lincoln, *First inaugural address, Washington, 4 March 1861*, *in* LETTERS AND ADDRESSES OF ABRAHAM LINCOLN 188 (1908).

[70] AMAR, BIOGRAPHY, *supra* note 3, at 353 (Noting Lincoln's proposal to achieve general emancipation gradually by first outlawing it in new states and, offering other measures to squeeze it as it weakened: "Once slavery stopped growing and instead began to shrink, the state-led emancipation process might spread southward and accelerate…"); Guelzo, *Sublime*, *supra* note 69, at 69 ("At no point, significantly, did Lincoln campaign to abolish slavery; he was perfectly willing to work for its containment, but abolition posed all the old questions of who had the authority to do the abolishing, what would happen to the newly freed slaves, and what would they do once freed… The best path Lincoln could imagine was a movement that involved 'three main features—gradual—compensated—and [the] vote of the people.'").

states, passing even before Lincoln took office.[71] It was of no moment. When the rebels descended on Fort Sumter that April, the constitutional compromise was a dead letter.[72] Yet, even at war, the Republicans retained their policy of compromise on slavery to lure the rebel states back into the Union.[73] Lincoln even supported a kind of colonized settlement for freed slaves as a form of compromise.[74]

But as Union hold over border states strengthened and hope for quick victory faded, the needs of the army intensified and "pressure mounted" for emancipation.[75] Congress reacted in 1861, and again in 1862, issuing various emancipation resolutions and enactments. These included the first and second Confiscation Acts—allowing federal officials to either confiscate slaves used for military purposes or emancipating slaves of certain rebel slave owners.[76] Abolition in the District of Columbia was also legislated.[77] And in December 1862, Lincoln offered a constitutional package of possible amendments that would achieve emancipation.[78] Yet these enactments (which had limited effects), as well as Lincoln's constitutional proposals, all contained forms of compromise: compensation for slave owners and colonization for slaves.[79] In fact, even the "Preliminary Emancipation Proclamation" issued by Lincoln on September 22, 1862, essentially announcing the coming of the Emancipation Proclamation itself on New Years of 1863, also spoke of "compensation" for "loss of slaves".[80]

So, after a Constitution that had sanctioned slavery since 1787, the abomination of *Dred Scott*, and decades of federal acquiescence and compromise on slavery, Lincoln's Emancipation Proclamation, announced in September of 1862, and issued on the New Year of 1863, offered an unprecedented and uncompromised freedom:

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[71] VORENBERG, FINAL FREEDOM, *supra* note 3, at 23 ("On March 4, 1861, the day after Congress passed the Corwin amendment, the new president took office."); AMAR, BIOGRAPHY, *supra* note 3, at 354.

[72] VORENBERG, FINAL FREEDOM, *supra* note 3, at 22.

[73] FONER, RECONSTRUCTION, *supra* note 3, at 6.

[74] FONER, RECONSTRUCTION, *supra* note 3, at 6 ("In a widely publicized conference, Lincoln urged Northern black leaders to support the colonization of freedmen in Central America or the Caribbean, insisting 'there is an unwillingness on the part of our people, harsh as it may be for you colored people to remain with us'").

[75] FONER, RECONSTRUCTION, *supra* note 3, at 5-6; FRANKLIN, EMANCIPATION, *supra* note 3, at 17.

[76] VORENBERG, FINAL FREEDOM, *supra* note 3, at 24-25; FRANKLIN, EMANCIPATION, *supra* note 3, at 18-20.

[77] VORENBERG, FINAL FREEDOM, *supra* note 3, at 25; FRANKLIN, EMANCIPATION, *supra* note 3, at 19.

[78] AMAR, BIOGRAPHY, *supra* note 3, at 357; FONER, RECONSTRUCTION, *supra* note 3, at 6..

[79] VORENBERG, FINAL FREEDOM, *supra* note 3, at 24-25; FRANKLIN, EMANCIPATION, *supra* note 3, at 18-20; AMAR, BIOGRAPHY, *supra* note 3, at 356-357.

[80] FRANKLIN, EMANCIPATION, *supra* note 3, at 48.

> And by virtue of the power, and for the purpose aforesaid, I do order and declare that all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free…[81]

Freedom was not gradual and there would be no time limit on it. It was immediate and forever: slaves "are, and henceforward shall be free". And most importantly, the freedom was uncompromised. There was no grandfathering, no colonization, and no compensating. These were mainstays of federal proposals on slavery until this point. The Proclamation was a profound "turning point in national policy", wedding Northern success to abolition while "ignoring entirely both compensation and colonization".[82] For the first time, any freedom granted by the Proclamation would require no such compromise.

Here, the critic rejoins: but freedom *was* compromised and qualified, as the Proclamation exempted Union occupied territories and loyal slave states. True enough— the Proclamation was not universal, but could *any* proclamation be truly universal in the midst of war, with occupied and unoccupied territories, alliances and enemies? And even if the Proclamation was not universal, where freedom *was* granted— and this was in the no small grant or territory— it was still immediate and uncompromised, requiring no compensation or colonization. The Emancipation Proclamation would thus stand for a new principle of freedom now and forever, but the "everywhere" part would have to wait until end of the war.

Indeed, these textual concerns are less pertinent to the Proclamation's inherent principle of freedom if we understand its historical context. From a different angle of view, these exceptions were not necessarily a qualification on the broad principle of freedom embodied in the Proclamation, but a means to guarantee its vindication. First, they illustrated Lincoln's need to make the Proclamation "legally unassailable".[83] If drafted only in airy moral language, without regard to federalism, legal effect, or military realities, there was a risk that few would take it seriously as an actual legal grant of freedom, but instead a hollow gesture, "like the Pope's bull against the comet", as Lincoln remarked in September of 1862.[84]

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[81] *The Emancipation Proclamation*, *as reprinted in* FRANKLIN, EMANCIPATION, *supra* note 3, at 97.

[82] FONER, RECONSTRUCTION, *supra* note 3, at 7.

[83] FONER, RECONSTRUCTION, *supra* note 3, at 7.

[84] Lincoln understood the need for the Proclamation to be taken seriously and not inoperative at issuance. Thus he tellingly remarked on September 13, 1862, only weeks before announcing the Proclamation, that "What good would a proclamation of emancipation from me do, especially as we are now situated? I do not want to issue a document that the whole world will see must necessarily be inoperative, like the Pope's bull against the comet". Abraham Lincoln, *Reply to a committee from the religious denominations of Chicago, asking the president to issue a proclamation of emancipation, 13 September, 1862*, *in* LETTERS AND ADDRESSES OF ABRAHAM LINCOLN 250, 251 (1908). *See also* GUELZO, *supra* note 3, at 8-9 ("Why is the

Second, Lincoln needed to shore up support of Northerners and loyal states, which saw military victory, rather than abolition, as the Civil War's primary goal.[85] Such support was also essential to ensure this new principle of freedom would not be hollow or useless.[86] Emancipation could never be achieved without public support and military victory. That was the fact of the Emancipation Proclamation, reflected in its text, while a greater, more uncompromising freedom was its inherent principle. History perhaps bears this out as no slave freed by the Proclamation was "ever returned to slavery once he or she had made it to the safety of Union-held territory".[87]

ii. Federalism: Expanded Federal Responsibility for Fundamental Freedoms

A second transformative principle in the Emancipation Proclamation was its recognition of federal responsibility to enforce and protect fundamental rights and freedoms. The Proclamation ordered, among other things, the following:

> …all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free; and that the Executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons.[88]

Here, the text clearly provides that the newly declared freedom of slaves would "henceforward" not only be immediate and forever, but also tied to the authority of the "Executive government of the United States, including the military and naval authorities", with a new responsibility to "recognize and maintain" that freedom.

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language of the Proclamation so bland and legalistic? …Very simply: The Proclamation is a legal document, and legal documents cannot afford much in the way of flourishes. They have work to do. In this instance, we are dealing with a document with a very great deal of it to do, and one which had to be composed with the understanding that every syllable was liable to the most concentrated legal parsing by the federal court system.").

[85] FONER, RECONSTRUCTION, *supra* note 3, at 5-6; FRANKLIN, EMANCIPATION, *supra* note 3, at 17.

[86] This is consistent with Lincoln's long term strategy to shore up greater public support in any campaign against slavery. *See* Williams, *The End of the Beginning*, *supra* note 3, at 215 ("By allowing border slave states to maintain the status quo until he secured their loyalty to the Union and by prohibiting the expansion of the institution into the territories, Lincoln believed that the ultimate result would be the extinction of slavery.")

[87] GUELZO, *supra* note 3, at 9 ("No slave declared free by the Proclamation was ever returned to slavery once he or she had made it to the safety of Union-held territory").

[88] *The Emancipation Proclamation*, *as reprinted in* FRANKLIN, EMANCIPATION, *supra* note 3, at 97.

Earlier, I suggested that Lincoln was concerned that the Proclamation would be received as a hollow gesture. He thus shored up its legal language for greater effect. We again see a working out of this concern in the text. The new principle of freedom inherent in the Proclamation would be worthless if unenforced, and hollow, if unprotected. Thus, the Proclamation explicitly charged the Union military and navy with the responsibility to protect and enforce that new freedom. From now on, the principled new freedom of slaves, its protection and its enforcement, would be tied to the power, authority, and, fortunes of the federal government and its Union armies.

This principle was likewise transformative if understood in light of the Founders' Constitution. The first eleven amendments to that document, as Professor Amar notes, had "all aimed to limit the federal government".[89] Indeed, the First Amendment explicitly aimed to prevent federal meddling with pretty much every basic and foundational right and freedom imaginable: religion, speech, free press, peaceable assembly, and the right to seek redress for wrongs.[90] Yet, here, the Emancipation Proclamation clearly placed the responsibility to protect and enforce perhaps the *most* basic of rights— freedom from bondage— in the hands of the federal government. Easily forgotten in the fog of war or the celebrations of emancipation, is the fact that the Emancipation Proclamation stood for a great expansion of federal responsibility in the domain of basic freedoms.

iii. Equality: Redeeming the Founders' Promise

A third principle inherent in the Proclamation is equality. This principle is less often associated with the Emancipation Proclamation than notions of freedom from slavery, but I believe it is there nonetheless, impliedly and, possibly, textually. Near the end of the Proclamation, after announcing the freedom of slaves in designated territories, Lincoln provided:

> And upon this act, sincerely believed to be an act of justice, warranted by the Constitution, upon military necessity, I invoke the considerate judgment of mankind, and the gracious favor of Almighty God.[91]

After much legalistic language this last substantive passage in the Proclamation appears to invoke an important higher moral foundation for the document. That is certainly right, but I believe on closer look, there is an even more important reference here— the Declaration of Independence. Indeed, an early draft of this particular passage, which Lincoln heartily accepted, was offered by Salmon P. Chase, Lincoln's

[89] AMAR, BIOGRAPHY, *supra* note 3, at 361.
[90] AMAR, BIOGRAPHY, *supra* note 3, at 361.
[91] *The Emancipation Proclamation*, *as reprinted in* FRANKLIN, EMANCIPATION, *supra* note 3, at 96-98.

secretary of the treasury.[92] Chase was known as a man who "sought to reconcile moral appeals with legal ones"[93] and, as a former lawyer, had offered "natural-law arguments" against slavery, including explicit appeal to the "law of creation" and the Declaration of Independence.[94]

There is also textual support for this suggestion. In its opening preamble, the Declaration invokes the "decent Respect to the Opinions of Mankind", while citing "God", the "Creator", as the foundation of "equality".[95] Additionally, it speaks of "Men, deriving their just Powers from the Consent of the Governed…"[96] All of these key terms are echoed in the language of this passage which similarly invokes the "judgment of mankind", "Almighty God", and proclaims itself an "act of justice" (which can be read as invoking the Declaration's call for "*just* Powers" founded on the "Consent of the Governed").

Or is this all mere coincidence? Would Lincoln reference the Declaration in a Proclamation on slavery? He did, after all, once remark that he "never had a feeling, politically, that did not spring from the sentiments embodied in the Declaration of Independence."[97] And his writings, including those as a young lawyer, demonstrated he understood that the Declaration was a "promise" that "rang hollow" for millions of slaves still in bondage.[98] Lincoln, moreover, maintained that the Declaration of Independence was part of the Constitution[99] and believed its plain language expressed important foundational principles about the nation and, indeed, the problem slavery posed for those ideals: "As a nation we began" he wrote in a letter in 1855, "by declaring that 'all men are created equal'… We now practically read it 'all men are created equal, except negroes'".[100]

But Lincoln's most compelling statement on the Declaration may have come in his repudiation of *Dred Scott*. After saying the Declaration's "plain unmistakable language" was intended to "include all men", he went on:

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[92] FRANKLIN, EMANCIPATION, *supra* note 3, at 92.

[93] ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT 166 (2006).

[94] *Id.*

[95] *The Declaration of Independence*, *as reprinted in* THE U.S. CONSTITUTION: AND FASCINATING FACTS ABOUT IT 59, 59 (Terry Jordan, ed., 2008).

[96] *Id*.

[97] Abraham Lincoln, *Address in Independence Hall, Philadelphia, 22 February, 1861*, *in* LETTERS AND ADDRESSES OF ABRAHAM LINCOLN 187, 187 (1908).

[98] Williams, *The End of the Beginning*, *supra* note 3, at 215 (details early personal writings of Lincoln noting: "Even as a young lawyer in this country's heartland, Abraham Lincoln knew that the promise of the Declaration rang hollow for the millions of blacks held in slavery....")

[99] HAROLD M. HYMAN & WILLIAM WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875 (1982).

[100] Abraham Lincoln, *From a letter to Joshua Speed, 24, August, 1855*, *in* LETTERS AND ADDRESSES OF ABRAHAM LINCOLN 87, 91 (1908).

> [The Framers] meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit… The assertion that "all men are created equal" was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration, not for that, but for future use. Its authors meant it to be, thank God, it is now proving itself, a stumbling block to those who in after times might seek to turn a free people back into the hateful paths of despotism. [101]

For Lincoln, the Declaration's promise for freedom and equality was an ideal never "perfectly attained", but something to which the country must constantly strive for, to deepen and augment, for the betterment of all: "people of all colors everywhere". Also intriguing is the idea of future "enforcement"— Lincoln here suggests the Founders declared and affirmed a foundational principle of equality and, knowing they were doing so in a slave society, intended, and hoped, that the principle would be fully attained at a later time. Lincoln may have understood his Emancipation Proclamation this way. It was, in his mind, the first steps of *enforcement* of this foundational principle of equality through uncompensated and immediate freedom, though it was not yet a universal freedom. And perhaps this, again, is another explanation for the Proclamation's legalisms and exceptions. Like the Declaration, which embodied an idealized equality that its Framers knew would not be attained for some time— so too did the Proclamation hold out a greater principles of equality and uncompromised freedom to be declared and given some legal effect now, with the principles more fully attained at a future time, both on the battlefields and then later on the amendment drafting table for the Constitution.

Whether intentionally invoking the Declaration or not, the Proclamation, in granting freedom to over 3 million slaves[102] and laying foundations for the destruction of slavery,[103] nevertheless

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[101] Abraham Lincoln, *From a speech at Springfield, Illinois, 26, June, 1857, in* LETTERS AND ADDRESSES OF ABRAHAM LINCOLN 96, 99-100 (1908).

[102] FONER, RECONSTRUCTION, *supra* note 3, at 1.

[103] FONER, RECONSTRUCTION, *supra* note 3, at 2-3 ("…the Emancipation Proclamation not only culminated decades of struggle but evoked Christian visions of resurrection and redemption… The demise of slavery inevitable threw open the most basic questions of the polity, economy, and society."); AMAR, BIOGRAPHY, *supra* note 3, at 356 ("With a stroke of the pen, Lincoln changed the meaning of the war and the course of American history"); GUELZO, *supra* note 3, at 9 ("Without the legal freedom conferred by the Emancipation Proclamation, no runaway [slave] would

embodies and symbolizes a principle of a free society *for all*, not just whites, thus moving the country towards greater fulfillment and redemption of the Founders' promise of a perfect equality in the Declaration of Independence.

B. Constitutional Authority: Endorsement by the People

Constitutional documents purport to embody or express important principles about the American constitutional *ethos*, including the constitutional commitments of the People. There must therefore be some evidence the document's principles have been adopted, endorsed or constituted by the People, formally or informally, conferring a higher symbolic and expressive constitutional status than any regular document or legal text. I will argue that the Emancipation Proclamation was so endorsed in two ways: first in a constitution-like state endorsement and ratification by Governors of the Northern states at the Altoona Conference; and second, when the Proclamation's three principles of uncompensated and uncompromised freedom, broader federal responsibility for basic rights, and equality, were effectively codified and adopted by the People in the Thirteenth and Fourteenth Amendments to the Constitution.

i. Altoona: The Proclamation's Constitution-Like State Ratification

The Constitution's legitimacy, as noted earlier, was founded on its being great democratic act of the People. But it was not enough that the Constitution's draft was adopted by the various state delegates to the federal convention in the summer of 1787. The Constitution had to be ratified on a state level to obtain its constitutional authority and force. Separate special state ratifying conventions were thus convened so that the People of the various states might pass judgment on the document that would forge a new Union.[104] Of course, this was not a national referendum where each citizen could pass individual judgment on the draft document, but as Professor Amar has noted, the state conventions *did* aim to represent "the People".[105]

The Emancipation Proclamation, though certainly not the product of formal federal and state conventions, was likewise "ratified" by elected state officials, perhaps the most important state officials—governors of several loyal states at an often overlooked Conference in Altoona, Pennsylvania. Before issuing the Emancipation Proclamation itself, Lincoln first announced his intent to do so on September 22,

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have remained [free] for very long… No slave declared free by the Proclamation was ever returned to slavery once he or she had made it to the safety of Union-held territory").

[104] AMAR, BIOGRAPHY, *supra* note 3, at 6.

[105] AMAR, BIOGRAPHY, *supra* note 3, at 6. *See also* Kay, *supra* note 12, at 30-31 ("Ratification was committed to separate conventions called for the purpose in the original thirteen states… Still, whatever the reality of their representative capacity, the conventions were, at the time, understood to be a proper way, perhaps the only way, that 'the people' could express their constituent power.").

1862 with what is commonly known as the "Preliminary Emancipation Proclamation".[106] The Preliminary Proclamation essentially announced the coming Emancipation Proclamation on January 1, 1863, indicating that would declare, among other things, that slaves would be "thenceforward" and "forever free".[107]

Two days after the Preliminary Proclamation was issued— and its foreshadowing of a new freedom "forever" for slaves— the governors of thirteen loyal northern states convened in Altoona, Pennsylvania.[108] There, just as the delegates to the Constitution's state ratification conventions had, the governors debated the merits of the Emancipation Proclamation.[109] Indeed, the Altoona Conference itself was specially formed for this purpose, recommended by Pennsylvania Governor Andrew G. Curtin to Lincoln as a means to "crystallize loyal sentiment of the country" in support of the new Emancipation policy, though at least one account has Lincoln suggesting it as a means for Governors to discuss and possibly "ratify" it.[110]

But endorsement by the state governors was anything but a foregone conclusion. As of early 1862, Lincoln was "at swords' point"

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[106] FRANKLIN, EMANCIPATION, *supra* note 3, at 48.

[107] *Preliminary Emancipation Proclamation*, *as reprinted in* FRANKLIN, EMANCIPATION, *supra* note 3, at 50.

[108] A.K. MCCLURE, ABRAHAM LINCOLN AND THE MEN OF WAR TIMES: SOME PERSONAL RECOLLECTIONS OF WAR AND POLITICS DURING THE LINCOLN ADMINISTRATION 269 (1892); HENRY WHARTON SHOEMAKER, THE LAST OF THE WAR GOVERNORS 15 (1916)("The inception of the Loyal War Governors' Conference held at the Logan house at Altoona, Pennsylvania, September 24, 1862, was probably the result of a visit which Governor Sprague paid to President Lincoln at the White House several weeks before..."); William B. Hesseltine & Hazel C. Wolf, *The Altoona Conference and the Emancipation Proclamation*, 7 THE PENNSYLVANIA MAGAZINE OF HISTORY AND BIOGRAPHY 195, 196 (July 1947); 1 GIDEON WELLES, THE DIARY OF GIDEON WELLES, SECRETARY OF THE NAVY UNDER LINCOLN AND JOHNSON 156 (1864) (Welles' diary entry for September 30, 1862 noted that Lincoln presented the Governors' address from the conference before cabinet.); ELIAKIM LITTELL & ROBERT S. LITTELL, LITTELL'S LIVING AGE 631 (1867) (noting the Altoona conference of 1863); WILLIAM WEEDEN, WAR GOVERNMENT, FEDERAL AND STATE 326 (1906)("All this agitation came to the surface in the conference of loyal governors at Altoona, Pa., in September… Governor Curtin made the first formal suggestion for such a meeting …"); HENRY G PEARSON, THE LIFE OF JOHN A. ANDREW 1861-1865 48-51 (1904) (discussing Andrew's role at the conference).

[109] MCCLURE, *supra* note 108, at 269.

[110] SHOEMAKER, *supra* note 108, at 15 (noting the words of Governor Sprague of Rhode Island, who attended the Conference himself: "The President was desirous of having his action officially approved in the north, for if the leading men went on record for it the rest of the people were apt to follow…"). *Cf* MCCLURE, *supra* note 108, at 269. (Noting that the Conference was in fact recommended by Curtin to Lincoln as a means to "crystallize loyal sentiment of the country" in support of the new Emancipation policy); Hesseltine, *supra* note 108, at 200 ("The pressure was growing stronger, and a conference of governors, under radical auspices, was in the air. Even Pennsylvania's Curtin felt it, and consulted Lincoln about a countermove…"); WEEDEN, *supra* note 108, at 326 ("All this agitation came to the surface in the conference of loyal governors at Altoona, Pa., in September… Governor Curtin made the first formal suggestion for such a meeting …).

with radical governors like John Andrew of Massachusetts[111] and throughout the year, the northern governors often showed reluctance to meet Lincoln's demands, or even "frantic" calls, for more troops.[112] Moreover, the conference would be attended by a diverse group of governors that would include both moderates, especially those of Border States, as well as more radical abolitionists.[113] All had different ideas about emancipation, and how to prosecute the war effort. Still, the fact that these governors had agreed at least to meet and discuss on invitation showed promise.

Despite heated debates between moderates and radicals over several meetings during the Conference the governors nonetheless produced a formal address to speak as a "united voice of the loyal States through their Governors".[114] Indeed, like the Constitution's state ratification conventions, the Governors purported, and were believed, to speak for the People. The opening preamble to the formulated, adopted and issued "Address of Loyal Governors to the President" spoke of the "duty and purpose of the loyal States and people" to "restore and perpetuate the authority of this Government and the life of the nation".[115]

The address strongly adopted and endorsed the coming Emancipation Proclamation and, following the belief of the Governors that they spoke for the People, did so rife with populist language. The address spoke of the Governors' "heartfelt" endorsement of the Proclamation, the "hearts" of "the people" and the necessity of preserving the "constitutional rights and liberties" of "the people themselves".[116] In fact, the "people" were cited a full seven times in the span of the brief statement.[117] The address appropriately concluded with a reference to the "fidelity and zeal of the loyal States and people" in support of Lincoln's war effort.[118] Some of the Governors even

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[111] Hesseltine, *supra* note 108, at 196. *See also* THOMAS H. WILLIAMS, LINCOLN AND THE RADICALS 185 (Noting that radical Republicans in the fall of 1862 were deeply discontent with General McClelland, but Lincoln refused to move: "The angry growling of the radicals apparently made no impression upon Lincoln, who seemed resolved to stand pat on McClelland and cabinet.").

[112] Hesseltine, *supra* note 108, at 197.

[113] Hesseltine, *supra* note 108, at 197.

[114] MCLURE, *supra* note 108, a 269-270. The evidence suggests that Governor Andrew of Massachusetts authored the thing. SHOEMAKER, *supra* note 108, at 18 ("When Andrew with a final flourish of his pen finished the document, he read it hastily to the assembled Governors. They were adopted unanimously…"); ELIAKIM LITTELL & ROBERT S. LITTELL, LITTLE'S LIVING AGE 631 (1867) (say of Andrew that "there was no more untiring and efficient soldier of the Union and of liberty than he…There were good and able men in the executive chairs of the loyal States during the war. But it was a just instinct upon their part which selected Governor Andrew to write the address of the loyal Governors at Altoona).

[115] MCLURE, *supra* note 108, a 269-270.

[116] *Address of Loyal Governors to the President*, *in* THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE GREAT REBELLION FROM NOVEMBER 6, 1860, TO JULY 4, 1864 232 (1864).

[117] *Id.*

[118] *Id.*

made the journey to Washington to sign and present the document to Lincoln in person.[119] A total of seventeen governors of loyal northern states would eventually sign the Address strongly endorsing the coming Emancipation Proclamation. The first twelve attended the Conference— Massachusetts, New Hampshire, Michigan, Pennsylvania, Iowa, Indiana, Virginia (loyal), Wisconsin, Rhode Island, Ohio, Maine, and Illinois (Maryland's Bradford was the only Governor in attendance who did not sign).[120] Governor Andrew, as drafter of the Address, thereafter solicited the signatures of Governors Holbrook (Vermont), Ramsey (Minnesota), Robinson (Kansas), Gibbs (Oregon) and Stanford (California).[121] These seventeen states constituted a clear majority of the twenty-three states remaining loyal to the Union in 1863, both by state and by population.[122] The Proclamation, a federal executive act, had received a strong endorsement from the People— in states that remained loyal— through their elected governors. Indeed, Governor William Sprague, one of the Conference attendees, remarked later of Altoona:

> It was a great idea, and in my opinion was the pivotal point of the Civil war. The Emancipation Proclamation was sent out on September 22, the Loyal Governors ratified it on September 24, the people of the north then fell in line as a unit, and the President with a united people back of him, pushed the war to a successful conclusion.[123]

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[119] Hesseltine, *supra* note 108, at 202, 205.

[120] Hesseltine, *supra* note 108, at 203 (listing the attendees); SHOEMAKER, *supra* note 108, at 18 ("When Andrew with a final flourish of his pen finished the document, he read it hastily to the assembled Governors. They were adopted unanimously…"). Governor Bradford of Maryland attended but did not sign, though there is some evidence that he supported the document but failed to sign possibly for personal reasons— his son being a Rebel officer at the time. *See* 1 GIDEON WELLES, THE DIARY OF GIDEON WELLES, SECRETARY OF THE NAVY UNDER LINCOLN AND JOHNSON 156 (1864) (Entry for September 30, 1862: "Little of importance at the cabinet meeting. The President laid before us the address of the Loyal Governors who lately met at Altoona. Its publication had been delayed in expectation that the Governor of Maryland would sign it, but nothing has been heard from him. His wife was here yesterday to get a pass to visit her son, who is a Rebel officer and cannot come to her. She therefore desires to go to him. Seward kindly procured the document for her. I am exercising the gentle virtues when it can consistently and properly be done, but favor no social visitations like this. Let the Rebel perish away from the parents whom he has abandoned by deserting his country and fighting against his government.").

[121] Hesseltine, *supra* note 108, at 203-205 (noting Andrew, as sponsor, felt the need to gain as much support as possible).

[122] *United States Census, 1860*, *discussed in* JAMES GARFIELD RANDALL & DAVID HERBERT DONALD, THE CIVIL WAR AND RECONSTRUCTION 598-599 (1969).

[123] *Correspondence of William Sprague*, *quoted in* SHOEMAKER, *supra* note 108, at 17.

Today, the Altoona Conference, if it is mentioned at all, receives only passing reference in Proclamation scholarship.[124] But in my view, the strong endorsement of the Emancipation Proclamation by the several loyal state governors, in the name of the People, conferred a compelling constitutional authority and legitimacy on the document. Indeed, on its 50th anniversary in 1912, the *New York Times* described the Altoona Conference as the "scene of the most important civic event of the civil war", where the actions of the "Loyal Governors" enabled Lincoln to "prosecute the war for the preservation of the Union."[125] It seems that the importance of the event has passed somewhat from collective memory of Americans, and scholars. Why this is so is difficult to say. One reason may be because there is no official record of the Conference.[126] Another might be that scholars, so preoccupied with the Proclamation's legality, have, as Burrus Carnohan recently suggested, neglected the broader constitutional and legal context of the document, of which the Conference is part.[127] Whatever the reason, it must change. For, just as the state ratification conventions— where delegates spoke for the People— conferred constitutional legitimacy and authority on the Constitution as the People's, so too did Altoona confer an important legitimacy on the Emancipation Proclamation.

ii. The Thirteenth Amendment and the Proclamation

A further development that confers special constitutional legitimacy and authority on the Emancipation Proclamation —and thus status as a constitutional document— was the ratification of both the Thirteenth and Fourteenth Amendments to the Constitution. These amendments, ratified and adopted by the People (particularly the Thirteenth), effectively incorporated each of the principles inherent in the Emancipation Proclamation earlier discussed. The Thirteenth Amendment provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime where of the party

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[124] *See e.g.* Guelzo, in his well argued defense of Lincoln and the Emancipation Proclamation, devotes a mere few lines to the Conference, mainly to quote one of its participants: GUELZO, *supra* note 3, at 178, 180. Similarly, in their recent text dedicated entirely to the Emancipation Proclamation, Harold Holzer, Edna Greene Medford and Frank J. Williams, altogether among them, offer a single line noting Altoona in passing. *See* THE EMANCIPATION PROCLAMATION: THREE VIEWS, *supra* note 3. And historian Michael Vorenberg, a prominent Reconstruction and Proclamation scholar, omits any reference at all: *See generally* VORENBERG, FINAL FREEDOM, *supra* note 3.

[125] *Lincoln Freed Slaves 50 Years Ago*, NEW YORK TIMES 36 (September 22, 1912)

[126] SHOEMAKER, *supra* note 108, at 59-60 ("…as has been stated, there is no official record of the proceedings of that conference.").

[127] CARNAHAN, *supra* note 4, at 2 ("Although there have been many thoughtful efforts to explore the constitutional context of the Emancipation Proclamation, the rest of the proclamation's legal context remains largely uncharted territory.")

> shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have the power to enforce this article by appropriate legislation.[128]

Immediately, we can see that the Emancipation Proclamation's first principle of uncompensated and uncompromised freedom through emancipation of slaves is incorporated in Section 1. This was not a foregone conclusion. Lincoln's constitutional plan of late 1862, as previously noted, contained proposals for compensation to any state outlawing slavery before 1900.[129] And even the "Preliminary Emancipation Proclamation" itself likewise spoke of "compensation" for "loss of slaves".[130] It was, interestingly, the success of the Emancipation Proclamation itself that may have guaranteed its codification in the Thirteenth Amendment. With roughly 180,000 blacks serving in the Union army by the end of the war— many of which had gained both their freedom and entrance into the Union army by the Proclamation's grant— abolition without compensation or qualification was likely inevitable.[131]

The second transformative principle of the Emancipation Proclamation— expanded federal responsibility to enforce and protect basic and fundamental rights and freedoms— is clearly apparent in Section 2, which provides Congress with authority to "enforce this article by appropriate legislation". Just like the Emancipation Proclamation's inherent principle before it, Section 2 was an important change from the Founders' 1789 document, which aimed to limit federal encroachment in this very domain. Indeed, the Reconstruction framers believed Section 2 not only conferred authority to outlaw slavery, but obliterate all traces of its existence in the states, including racial discrimination.[132] This broad federal power unheard before the Civil War[133] was preceded by the Emancipation Proclamation that first embodied and proclaimed this revolutionary federal principle.

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[128] U.S. CONST.

[129] AMAR, BIOGRAPHY, *supra* note 3, at 358.

[130] FRANKLIN, EMANCIPATION, *supra* note 3, at 48.

[131] FONER, RECONSTRUCTION, *supra* note 3, at 7 ("The reservoir of black manpower could not be ignored, but it was only with the Emancipation Proclamation that the enlistment of blacks began in earnest… By the war's end, some 180,000 blacks had served in the Union Army… The 'logical result' of their military service, one Senator observed in 1864, was that the 'black man is henceforth to assume a new status among us.'"); AMAR, BIOGRAPHY, *supra* note 3, at 357.

[132] AMAR, BIOGRAPHY, *supra* note 3, at 362; FONER, RECONSTRUCTION, *supra* note 3, at 244 ("Again and again during the debate on Trumbull's bills, Congressmen spoke of the national government's responsibility to protect the 'fundamental rights' of American citizens.").

[133] This is likely why critics, including President Johnson, maintained the Civil Rights Act was unconstitutional even after its passage over Johnson's veto. *See* AMAR, BIOGRAPHY, *supra* note 3, at 362 ("Critics objected that Congress lacked authority to intrude so deeply into traditionally state-law issues, and Andrew Johnson

Finally, the Emancipation Proclamation's inherent principle of equality likewise saw constitutional codification by the People not only in the Thirteenth Amendment's banishment of slavery conferring freedom on blacks as it had been on whites, but also in the Fourteenth Amendment's revolutionary principle of equality of citizenship. Blacks had fought for and saved the country. They would be recognized as equal citizens from then on.[134]

In the end, each transformative principle of the Emancipation Proclamation was adopted, ratified and declared by the People in Constitution itself. This, along with the People's endorsement at the Altoona Conference, confers special constitutional meaning, legitimacy and authority on the document.

C. Symbolic Importance: Historical and Constitutional

The Emancipation Proclamation, it is often said, did not free "a single slave" when issued on January 1, 1863.[135] That is not quite true. Though the Proclamation excluded Union-occupied territory and presumably had no effective authority in rebel lands, it did not exempt the Sea Islands of South Carolina, which had been occupied by Union forces since 1861.[136] So, on that day, over ten thousand slaves, in fact, tasted freedom.[137] They would not be the last.

But its grant of immediate freedom is not the only transformative historical and constitutional importance of the Emancipation Proclamation.[138] Its legacies are many. Among other things, first, it turned the tide of the Civil War, making the Union army, with black soldiers newly enlisted, an "army of liberation".[139] Without the Proclamation, there may not have been victory, and without victory no Thirteenth, Fourteenth, or Fifteenth Amendments, nor perhaps any Constitution or country at all. Moreover, as we have already discussed, its issuance helped guarantee "freedom now,

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vetoed the bill… Johnson and his allies persisted in labeling [it] unconstitutional even after its passage in April.").

[134] AMAR, BIOGRAPHY, *supra* note 3, at 381.

[135] VORENBERG, FINAL FREEDOM, *supra* note 3, at 1 ("By itself, the Emancipation Proclamation did not free a single slave. That fact, well known by generations of historians, does not demean the proclamation.").

[136] ERIC FONER, FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION 50-51 (2005).

[137] *Id.*

[138] On this, it would seem scholars of all stripes are in agreement. *See generally supra* note 3.

[139] FONER, RECONSTRUCTION, *supra* note 3, at 10 (Emancipation Proclamation and the presence of black troops ensured that, in the last two years of the war, Union soldiers acted as an army of liberation.").

forever, and everywhere", that is, uncompromised and uncompensated abolition everywhere in the country in the Thirteenth Amendment.[140]

But is there evidence of its expressive and symbolic importance? First, it is widely recognized and popularly understood. The Emancipation Proclamation is a legal document familiar to most Americans, even if many have not read it. As historian Michael Vorenberg notes, most would name it as the "most important result" of the Civil War and, if not destroyed by fire in 1871, would likely be on display as a "national treasure" with the Declaration of Independence and Constitution.[141] Second, just like the Declaration of Independence, Americans have returned to the Emancipation Proclamation in subsequent struggles to seek guidance in attaining the promise of the People's commitments to freedom and equality.[142] It is no coincidence that John Franklin's landmark work on the Proclamation, after decades of scholarly silence, was published in 1963 at the height of the great struggles of the Civil Rights movement.[143] Indeed, the Proclamation's new principles of broader freedom and equality "echoed" not only in the Civil Rights Movement and "Second Reconstruction", but many struggles in the modern period that would each strive to fulfill – just as the Emancipation Proclamation had of the Declaration[144] – the promises and ideals of both the Founding, and even the Reconstruction itself.[145] I could go on. The point is that the Emancipation

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[140] AMAR, BIOGRAPHY, *supra* note 3, at 357, 357; FONER, RECONSTRUCTION, *supra* note 3, at 7 ("The reservoir of black manpower could not be ignored, but it was only with the Emancipation Proclamation that the enlistment of blacks began in earnest… By the war's end, some 180,000 blacks had served in the Union Army… The 'logical result' of their military service, one Senator observed in 1864, was that the 'black man is henceforth to assume a new status among us.'").

[141] VORENBERG, FINAL FREEDOM, *supra* note 3, at 1 ("Most Americans today would name the proclamation as the most important result of the war. Had the original document not been destroyed by fire in 1871, it would no doubt reside alongside the Declaration of Independence and the Constitution as one of our national treasures.").

[142] ELLEN DUBOIS, FEMINISM AND THE SUFFRAGE 53 (1999) (noting that the Emancipation Proclamation inspired the leaders of the women's suffrage movement to action); GUELZO, *supra* note 3, at 246 ("…the Civil Rights Movement would still invoke the name of Lincoln…"); Medford, *supra* note 3, at 46 (after discussing the ways that the Proclamation's centennial was honoured on many local levels in the Civil Rights movement, notwithstanding lackluster federal support, Medford concludes: "The proclamation's significance in the first one hundred years was that it reinforced the democratic and egalitarian foundation upon which the nation was supposedly established.");

[143] FRANKLIN, EMANCIPATION, *supra* note 3. Notably, on August 28, 1963, Martin Luther King Jr., gave his famous "I Have a Dream" speech in the Lincoln Memorial before 200,000. *See* Medford, *supra* note 3, at 45-46.

[144] FRANKLIN, EMANCIPATION, *supra* note 3, at 154 ("The tragedy of this republic [America] was that as long as slavery existed its base had a fallacy that made it both incongruous and species. The great value of the Emancipation Proclamation was that in its first century it provided the base with a reinforcement that made it at long last valid and worthy. Perhaps in its second century it would give real meaning and purpose to the Declaration of Independence.").

[145] CARNAHAN, supra note 3, at 142 (2007) (Noting that the Proclamation was an "important precedent" that found "many echoes in the conflicts of the twentieth century."); Williams, *The End of the Beginning*, *supra* note 3 at 229 ("The Emancipation Proclamation… opened the door to substantial reconfiguration of

Proclamation had transformative constitutional and historical importance and, with its principles and special constitution-like endorsement, should be recognized as a constitutional document.

III. CONCLUSION

So that is my approach to constitutional documents. In linking their special status both to the Constitution's *ethos* and its ongoing legitimacy in the eyes of the People, it is one that, as Professor Amar recommends, tries to come to grips with "issues of popular sovereignty and self-government over time."[146] Moreover, it is one that has attempted, hopefully better than previous accounts, to provide a concrete role for constitutional documents and their symbolic and expressive constitutional meaning and authority, as principled guides for interpretation and amendments-making. Constitutional documents *do* matter, and not only in an inspirational way.

In like fashion, I have attempted to show why the Emancipation Proclamation matters for American constitutionalism, or at least matters in an additional way than previously thought. In arguing that it should be seen as constitutional document, with the special role that this status confers, I hope to have persuaded, or at least begun the debate, that it has importance beyond being a brilliant military act, a valuable historical artifact, or a turning point in the country's history. Rather, with its transformative and redemptive principles and special constitutional authority and meaning, the Emancipation Proclamation deserves a place beside the great foundational legal texts that the American constitutional tradition has produced.

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national policy on equal rights."); Medford, *Imagined Promises*, *supra* note 3, at 46 (2006) ("The proclamation's significance in the first one hundred years was that it reinforced the democratic and egalitarian foundation upon which the nation was supposedly established; Frank J. Williams, *The End of the Beginning: Abraham Lincoln and the Fourteenth and Fifteenth Amendments*, *in* LINCOLN AND FREEDOM: SLAVERY, EMANCIPATION, AND THE THIRTEENTH AMENDMENTS 212, 229 (2007)("The Emancipation Proclamation… opened the door to substantial reconfiguration of national policy on equal rights.")

[146] Akhil Reed Amar, *Some Thoughts on Constitutionalism*, *Textualism, and Populism*, 65 FORDHAM L. REV. 1657, 1658 (1996-1997).