Liberation Constitutionalism

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To get an idea of what I mean by liberation constitutionalism, we need to start with some history.

In 1838, a group of Black Pennsylvanians published an essay entitled "Appeal of Forty Thousand Citizens, Threatened with Disenfranchisement." As its title suggests, the Appeal was a protest against an impending constitutional revision which would confirm what the Pennsylvania Supreme Court had recently and controversially ruled, namely, that the electoral franchise in the state would be limited to whites. The authors make many arguments—textual, about the meaning of the words "citizen" and "freeman" in the state's prior constitution and in daily life, a meaning that included Black people; economic, contending that Black people were property owners and were actually receiving poor relief from the state at a lower rate than their proportion of the population; social and moral, about their church membership and education; and historical, about their roles in the Revolutionary War as soldiers and other civic services they had provided. At bottom, however, the argument of the Appeal is that there are only two legal statuses for members of Pennsylvania's political community: slave and citizen. Since Pennsylvania had no slaves, Black Pennsylvanians must be citizens just the same as whites.

This is a position that Black Americans maintained after the Civil War. In 1865, that is, three years before the Fourteenth Amendment was ratified and five years before the Fifteenth Amendment was ratified, a convention of Black Virginians in Norfolk published an address called "Equal Suffrage" which contended that Black Americans had been "recognized voters in every state but South Carolina" at the time of the Constitution's ratification; and therefore, the only bar against their already having a right to full citizenship, including the right to vote, was the state of slavery. The state of slavery having been abolished in fact by the Civil War, in law at least provisionally by the Emancipation Proclamation, and by the end of that year in legally unimpeachable terms by Thirteenth Amendment, it stood to reason that Black Virginians were *already* citizens, and *already* entitled to the vote and to freedom from the other civil disabilities associated with slave status.

Andrew Johnson disagreed. In February 1866, Johnson met with a delegation

of Black Americans led by George Downing and Frederick Douglass.[1] In that meeting, Johnson insisted that the federal government had no business establishing Black suffrage. His unwillingness was rooted in a notion of consent and of a preexisting political community. Johnson insisted that it would be unreasonable and indeed *undemocratic* to force an entirely new class of voters on "the people" of a state, whether that state was Ohio or South Carolina, without their consent.[2]

What Johnson didn't get was that his interlocutors were claiming, and had been claiming all along, that they were already part of the people whose consent provided democratic legitimation. Downing and Douglass weren't asking Johnson to force their membership on the people of the states; they were claiming to already be part of the people of the states, and hence merely asking Johnson to enforce the rights which they already had had on that basis.

Andrew Johnson's mistake is also American constitutional theory's original sin: to imagine a political community of founders and ratifiers that is entirely white, and hence to begin the constitutional analysis from the white standpoint. We see that in many of the worst cases of the constitutional law anticanon—in Dred Scott, of course, which outright supposes that the government is a government of and for whites alone; more subtly in the Civil Rights Cases, which suppose that citizenship was extended by white people to Black people as a gesture of benevolence and casually adopts the white view on what such citizenship entailed—that is, no right to equal access to the economy. But it also can be found reflected, I shall suggest, in our contemporary constitutional law.

"Liberation Constitutionalism" captures the idea of correcting this sin. It could also perhaps have been called "Liberation Originalism," for it focuses on authorship, approval, and membership, that is, on the idea that the original meaning of the Constitution can be read differently if we read it with reference to a group of authors and a group of readers and ratifiers who include more than just white people. If, for example, we respect the Constitutional authorship of the thousands and thousands of Black soldiers who fought in the Civil War and then organized to vote in Reconstruction to bring the second founding home; if we respect the Constitutional authorship of the women who fought for suffrage, of the civil rights activists who fought to make the promise of the Reconstruction Amendments real, the meaning of our constitution looks very different.

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[1] As published in a D.C. newspaper, the "National Intelligencer," on February 18, 1866 http://www2.vcdh.virginia.edu/saxon/servlet/SaxonServlet?source=/xml_docs/valley_news/newspaper_catalog.xml&style=/xml_docs/

[2] In that conversation, Johnson said a lot of other loathsome things too. Perhaps the worst was his trotting out of the "white working class" trope that we saw over and over again in which he asserted that: "[t]he poor white man, on the other hand, was opposed to the slave and his master; for the colored man and his master combined and kept him in slavery, by depriving him of a fair participation in the labor and productions of the rich land of the country"—much the same kind of blaming of the victims of exploited labor for the consequences to third parties of their exploitation that we see in contemporary claims that acting less brutish toward immigrants will cost Americans their jobs.

As my continual references to references to abolition and Reconstruction and Civil Rights might suggest, my Liberation Constitutionalism might also be called "Black Liberation Constitutionalism," for I shall focus on the distinctive Black constitutional experience and the constitutional claims made since the founding by Black liberation activists. In doing so, I recognize that the picture is incomplete and that activists from many other groups outside the imagined constitutional people of white men have made similar claims.

But in mitigation of that incompleteness, I offer that one of the things that Black Liberation Constitutionalism helps us learn is that there is a substantial overlap between the legal strategies that have facilitated Black oppression and those that have facilitated the oppression of others; for that reason, the attack on the legal structures of oppression which I shall argue Liberation Constitutionalism entails transcends the Black experience. Consider the attack on birthright citizenship during the Trump administration: while this was primarily intended as an attack on second-generation immigrant communities, many of whom are non-Black, its intellectual and legal foundations were rooted in anti-Blackness. The constitutional provision of Birthright citizenship itself arises, of course, from the Fourteenth Amendment, which was enacted as a way to adjudicate in favor of Douglass and Downing and the 40,000 Pennsylvanians against Johnson, that is, to make clear that Black people are citizens. On the other side, the theoretical basis of the proposition that Congress—or, on some particularly ridiculous versions of the view, the President, by executive order—can abolish birthright citizenship, in the works of people like disgraced former Chapman University law professor John Eastman, rests on the notion that the people of the United States cannot have the citizenship of others foisted on them without their consent—that is, precisely the same bad argument Andrew Johnson made. The Johnson-Eastman consent argument is wrong for the same reason in both cases: it ignores the prior claim of both the formerly enslaved and second-generation immigrants to already have had constitutional membership by law, and hence to already be among the people to whose consent appeal is supposedly made.

The example of birthright citizenship suggests that Black Liberation Constitutionalism can stand in, at least in part and provisionally, for Liberation Constitutionalism more generally. Or at least that Black Liberation Constitutionalism stands in solidarity with other versions of Liberation Constitutionalism developed to reflect the authorial role of other groups of people other than property-owning Christian white men. Justice Thurgood Marshall exemplified that solidarity in his dissent in Jean v. Nelson, an immigration case in which he criticized a bunch of cases about the plenary power doctrine that immigrants have lesser constitutional rights by emphasizing that "the Fourteenth Amendment was specifically intended to overrule a legal fiction similar to that undergirding [those cases], that freed slaves were not 'people of the United States.'"

So in essence liberation constitutionalism asks: if we, in our constitutional doctrine, took the Constitutional authorship of Black people as our interpretive

guide, what would follow?

The heart of the idea is that when we do constitutional law, we should do it from the standpoint of those who have fought for their own liberation and inclusion. We should ask, for example, not merely what James Madison or the average white-man on the street thought about the meaning of a constitutional provision, but also what Frederick Douglass thought of it, what Ida Wells thought of it. And we should ask: what were those who were fighting for their own liberation trying to *do*? What was the vision of a constitutional state for which they were fighting? What relationships between citizens, their government, and one another did they have in mind when they were carrying out their acts of constitutional founding and refounding? And what do the lessons of the victories and the defeats of these liberation struggles tell us about what kinds of constitutional institutions actually serve the cause of freedom and inclusion?

Black intellectual history can help us carry out these tasks. While liberation activists have never been monolithic, and certainly many in Black freedom movements have rejected the United States Constitution altogether, we can still identify at least three core characteristics of those activists who have appealed directly to the Constitution. And out of those three characteristics we can build Liberation Constitutionalism.

First: Liberation Constitutionalism is *reconstructive*: by this, I mean that Black Liberation movements have historically focused not on the Constitution as it is interpreted, but on the Constitution as it could be, if it were interpreted in light of the vision of equal freedom expressed by the Declaration of Independence and by America's public political rhetoric. A biographer of Pauli Murray, the great civil rights lawyer who pioneered legal strategies of liberation for women as well as Black Americans, described her approach to the movement as "democratic eschatology"—that is, much as Christians seek to build the Kingdom of Heaven, Murray, in legal terms, called upon Americans to focus on not the Constitution that was but the Constitution to come. The Black abolitionist James McCune Smith took a similar approach in his 1843 essay "The Destiny of the People of Color," in which he argued that Black Americans, by winning their freedom, would purify the Constitution and bring it to the principles expounded by the Declaration. In his words, "We will save the form of government and convert it into a substance."[3]

Second, Liberation Constitutionalism is *inclusive*. It carries a strong bias toward an expansive vision of the political community. This inclusivity both arises from and informs the reconstructive character of the project: the values against which the Constitution is interpreted are those captured by the statements of universal right expressed in the Declaration of Independence and which the United States

[3] In the terms of academic legal theory, I read these and similar statements as a version of Ronald Dworkin's idea that legal interpretation is about both fit and justification—that is, that the task involves reading our legal materials, in this case our constitutional text, in the context of the normative ideas that best justify them. Although I think that activists like Murray and Smith would lean rather more heavily on the justification side than Dworkin might.

claims to follow. It is also informed by the recognition that I earlier called solidarity: that the techniques and the ideas of oppression and exclusion are not limited merely to Black Americans. We have seen the same arguments and the same institutions across history used to oppress others. So it is strategically wise to focus on those ideas and institutions—to attack the techniques of oppression wherever they may be found, and to recruit allies from other liberation movements to defend their shared goals.[4] It is no coincidence that Frederick Douglass supported women's suffrage—as he said in a speech before the International Council of Women in 1888, "all good causes are mutually helpful,"—and it is no coincidence that civil rights leaders were consciously internationalist and anti-colonial in their struggle against white supremacy wherever it may be found.[5]

Third, Liberation Constitutionalism is *ongoing and unfinished*, perhaps permanently. There is no fixed end-state, in which we imagine that the goals of constitutional reconstruction have been achieved, for the simple reason that the powerful will always look to hoard and consolidate their power, and so the work of liberation must be ever-vigilant. Not for the Liberation Constitutionalist is the notion expressed by Justice O'Connor in Grutter v. Bollinger that racial inequality will be done, and affirmative action not necessary, in 25 years. While that hope is always present, the cynicism borne of experience within Black liberation movements entails a refusal to promise "at this point, the work of constitutional reconstruction will be done, and our fundamental law will have reached the promised land."

Those three properties are what I see as the core of Liberation Constitutionalism. An ongoing reconstruction of the Constitution toward the ideals of equal freedom and inclusion that it can be read, in its best form, to support.

Now I'd like to sketch out a couple of concrete ways that the Liberation approach can shed light on our constitutional thinking. Let's start with what I just mentioned: affirmative action. It will surprise nobody that I think that liberation constitutionalism entails an approving position on affirmative action, but I think

[4]Liberation Constitutionalism also is self-consciously strategic in this sense. Those elements of American public culture that express the value of inclusion have been chosen for emphasis *because* they are a useful strategic resource for liberation. And this is not objectionable; rather, it's the characteristic stance of the excluded and the oppressed. As Douglass most famously articulated in his Fourth of July speech, the excluded and the oppressed have no reason to align with the country and with the legal system that carries out that exclusion and oppression unless there is some concrete progress to be gained by it. We can also see this in what scholars like Dorothy Roberts have called the "cynical legalism" of organizations like the Black Panthers, who recognized that the constitution and the law were a thing that other Americans valued, and demanded that they be operated honestly, to recognize that they, too, had constitutional rights.

[5]As Patricia Williams said about rights: (Alchemical Notes, p. 433): "society must give them away. Unlock them from reification by giving them to slaves. Give them to trees. Give them to cows. Give them to history. Give them to rivers and rocks. Give to all of society's objects and untouchables the rights of privacy, integrity, and self-assertion; give them distance and respect. Flood them with the animating spirit which rights mythology fires in this country's most oppressed psyches, and wash away the shrouds of inanimate object status…"

it gets to that position in a different way from how most advocates of affirmative action would proceed.

If I you will tolerate me caricaturing the intellectual environment a little, I think we can describe two basic contrasting cases in favor of race-based affirmative action in schools and workplaces that might be termed the institutional case and the persistence of racism case. The first is the view that the Supreme Court accepted—that in at least some institutions, like public higher education, affirmative action is good with respect to the social purposes of those institutions, i.e., to achieve things like educational diversity. We could also, following Derrick Bell, call that the "interest convergence" case. The second view is associated with intellectual movements like Critical Race Theory and suggests that affirmative action is necessary because people of color still are subject to unjust exclusion rooted in systemic racism. We could call that the "do you really think Brown v. Board of Education worked?" case.

I absolutely think there are truths to be found in both of those cases. Diversity is a good for its own sake; and systemic racism is real and does lead to continuing unjust exclusion of people of color. But there's a different, and, I think, stronger argument to be found in the history of Black Liberation. And it goes a little something like this:

When freed slaves demanded Forty Acres and a mule, it wasn't to promote diversity in landownership. And it wasn't simply on the basis of a claim of unjust exclusion—though that certainly was there. Rather, it was rooted in an understanding of the political meaning of economic inclusion. In early America, landownership was closely associated with citizenship itself—many states restricted landownership to citizens, and much of the early framework of America's political laws, from property qualifications for suffrage to the justification for institutions like legislative upper houses—was rooted in the idea that propertyholders had a greater stake in the polity and with that a greater entitlement to participate in its governance. At the same time, landowners were less vulnerable to economic coercion—and hence both better, more free-thinking, citizens, and also more secure citizens, because landowners could not easily be forced back into exploitative labor relationships characteristic of slavery. In short, the demand for land redistribution was a demand for access to full-fledged citizenship.

The connection between property and citizenship is visible well into the 20th century. By converting welfare benefits into property interests, Goldberg v. Kelly made it harder for government officials to use those benefits as a tool of arbitrary power to regulate the lives of recipients, especially recipients of color. A welfare official with total discretion over whether to grant or deny benefits that someone needs to live can use that authority to degrade and regulate its recipients, to demand deference and subordination inconsistent with a relationship of equal citizenship. By deciding that such benefits are property, the Supreme Court decided that the relationship between welfare officials and welfare recipients

would henceforth be regulated by law rather than by power.[6]

Today, human capital is perhaps an equally important form of property. So many decent jobs require higher education, and, increasingly, prestigious higher education in the right fields, that a reasonable degree of access to and independence in the labor market—the ability to avoid being in an oppressive job where one is treated with disrespect, or even the ability to avoid poverty itself and hence the wide variety of degradations from full citizenship that come with poverty—depends on human capital accumulation. In this context, the demand that the law recognize the permissibility of affirmative action in both higher education and in employment itself can be understood as analogous to the demand for forty acres and a mule and the demand for treating welfare benefits as property; that is, as rooted in the recognition that these things are the preconditions for access to the economy, and that access to the economy is in turn a precondition for full citizenship.

With that background, it should not be surprising that the earliest argument for affirmative action of which I'm aware was made by Martin Delany, the great abolitionist and Black Nationalist. In 1852, Delany scolded white abolitionists for failing to promote Black people to high positions in the economic side of the movement—for example, for relegating Black abolitionists to low-level jobs in their newspapers.[7] Delany argued that white abolitionists had an obligation, rooted in their commitment to remedying one of the core wrongs of slavery, namely, quote, "that we were proscribed, debarred, and shut out from every respectable position, occupying the places of inferiors and menials," to secure both training and high-ranking jobs for free Black people. To carry out affirmative action was necessary to correct the subordinating association between race and menial work.

Hence, today, I think that we should deploy a Liberation Constitutionalist argument for the permissibility of race-based affirmative action—one that acknowledges that that the Fourteenth Amendment, as understood by its Black framers, permits the government to secure for its people the economic preconditions of their inclusion in the polity. It's like Martin Delany meets John Hart Ely.

I've already hinted at a second area that seems particularly suited for a Liberation approach to constitutional law too: immigration. The solidaristic tradition in Black Liberation constitutional thought can identify that much of American immigration law is a reprise of techniques of oppression used against Black Americans as well as against Native Americans and others; accordingly, we should understand the legacy of America's Black constitutional framers to in part demand

[6]The work of constitutionalizing welfare is, of course, still incomplete, as welfare rules are still used for oppressive purposes, such as by subjecting residents of public housing to intrusive regulation from which others are free.

[7]Martin R. Delany, "The Condition, elevation, emigration, and destiny of the colored people of the United States Politically Considered" (1852), pp. 26-9.

that those techniques be dismantled wherever they are found.

Here my lodestar example is the pernicious intermingling of legally subordinate status and the judicial procedures used to determine that status. One of the most vivid wrongs of the era of slavery was that under the Fugitive Slave Acts of 1793 and especially of 1850, even Black Northerners were treated as presumptively enslaved. This is so because the process for adjudicating whether or not someone was actually an escaped slave was so vigorously biased as to effectively deny a person accused of being a fugitive of any real opportunity to defend themselves—for example, it permitted testimony of a person claiming to own an alleged fugitive to be given ex parte in the South, and then to count as proof of the enslaved status of a victim in the North; the so-called "commissioners" who adjudicated the kidnappings were, I kid you not, paid twice as much to rule in favor of slavery as in favor of freedom. Leaders such as Delany and Charles Langston recognized that they had been utterly deprived of the protections of law, even in the North, and declared that their only viable option was to resist kidnappers with force.

I say that this treated them as presumptively enslaved because if they were free, then they should have been granted the protections of the Due Process Clause of the Fifth Amendment: they should have had the opportunity to contest the deprivation of their liberty. Only if they were already property rather than persons could they have been disposed of through such kangaroo-court processes. Actually, the treatment as property was in some ways even more literal: the Fugitive Slave Act adjudication process bore a striking resemblance to procedure in the English vice-admiralty courts which were a major complaint of the revolutionary generation; many of those procedural forms persist today in civil asset forfeiture law. And the same idea was prominent in Dred Scott: the jurisdictional issue on which the case actually resolved, recall, was that Scott could not have access to the Federal Courts to prove his freedom, and hence his civic membership, because he was by racial definition a nonmember.

Unsurprisingly, one of the core goals of the freedpeople was access to fair judicial proceedings. During Reconstruction, the Freedmen's Bureau established its own military courts to adjudicate claims involving the freed, to preempt Southern courts that would not accept Black testimony. Fast-forwarding into the Twentieth century, scholars such as Michael Klarman and Megan Ming Francis have shown that the Warren Court's criminal justice revolution was largely kicked off by NAACP efforts to resist judicial lynchings during Jim Crow—that is, criminal trials conducted in an egregiously unfair fashion for the purpose of providing a judicial gloss to the presumption of guilt against Black Southerners accused of certain crimes that was often enforced by a lynch mob waiting outside the courthouse door.

Now rotate around to immigration. Around the same time as Black Americans in the South were being judicially lynched, our current era of immigration restrictionism was beginning with the Chinese Exclusion laws. In 1905, in a case called United States v. Ju Toy, the Supreme Court upheld the deportation of a native-

born Chinese-American citizen via administrative proceedings which considered him an alien. This was so notwithstanding the fact that a federal district court had ruled that he was a citizen, and notwithstanding the fact that the administrative hearing was so unfair that the dissent described it as "a star-chamber proceeding of the most stringent sort."

The basis of the Supreme Court's decision to overturn the District Court's habeas proceeding ruling that he was a was a citizen, in favor of the administrative ruling that he wasn't, was a regulation providing that any "Chinese person" was required to go through the administrative process. But note how this assumes the case away: Ju Toy was claiming that he wasn't a "Chinese person," except by ethnicity, but an American person. Effectively, the administrative process presumed his lack of citizenship in virtue of his race, and then deprived him, on the basis of that presumption, of the opportunity for a fair hearing to establish his citizenship. It's exactly the same technique as that used by the Fugitive Slave Acts.

Nor am I the first person to identify this similarity. In 1921, a racist historian named Allen Johnson published a paper in the Yale Law Journal where he argued from cases like Ju Toy to the constitutionality of the Fugitive Slave Act—reasoning, correctly, that the two served basically the same function at an abstract level, and concluding from the Supreme Court's acceptance of the presumptive alienage in the one to the constitutionality of the presumptive enslavement of the other.[8]

In contemporary immigration law, we have the process of expedited removal. Certain categories of immigrants can be immediately deported, either at the border or even in the interior under some conditions that shift by ever-changing regulations, without any judicial process or even quasi-judicial immigration court process at all. If, for example, some person with a valid visa for a short-term stay shows up at the border, a Customs officer can unilaterally decide "actually, that person really intends to stay, and therefore, they don't have the proper papers, and therefore, they're removable" and immediately shove them on a plane away without any opportunity at all to contest their status as a so-called "intending immigrant."[9] Again, this is a process that presumes its own outcome: expedited removal applies only to people without the proper papers; but the determination of whether or not someone has proper papers, that whether or not they really intend to be in the U.S. for the purposes and over the duration specified by their visa, is the core legal conclusion that renders them removable. So the same status is also the precondition for getting into expedited removal and the outcome of the expedited removal determination. It's just like the Fugitive Slave Act and Ju Toy.

Moreover, the constitutional justification of expedited removal has to go through

[8] Johnson, Allen. 1921. "The Constitutionality of the Fugitive Slave Acts." YALE LAW JOURNAL 31:2: 161-182. See discussion in Alfred L Brophy, "Jim Crow in the Yale Law Journal," Connecticut Law Review Conntemplations (Online) 49 (2017): 1–18.

[9] Khan v. Holder, 608 F.3d 325, 329-330 (7th Cir. 2010).

the plenary power doctrine—a rule of constitutional law which essentially says that procedural due process doesn't apply at the border who aren't citizens or residents. The plenary power doctrine doesn't only show up in immigration law. It also exists in Federal Indian law and in the law arising from the Insular Cases concerning foreign colonial possessions, such as America's brutal occupation of the Philippines after the Spanish-American War. In other words, any time the U.S. exercises authority over a group of people defined as nonmembers and hence without rights, there's the idea of plenary power to make sure no nasty courts get their noses into it.

Hence, once again, I think that our Black constitutional framers can be understood to ground a rejection of such techniques. The legacy of the Fugitive Slave Act and Dred Scott, and then of the freedpeople in Reconstruction and the activists of the efforts of the civil rights movement to secure genuine access to adjudication before being subjected to a status below full legal civic membership suggests that procedures that rest on a presumption of nonmembership, and hence of lack of fair access to adjudication, cannot be consistent with the Fourteenth Amendment's due process clause—and its Bolling v. Sharpe-style reverse incorporation into the Fifth. Expedited removal and the plenary power doctrine on which it rests must go on the ash heap.

Of course, this is just a loose sketch of the argument, and there's a lot of controversial stuff that requires defense buried in there. But I think the general point is clear.

It's not coincidence that I've spent a lot of time talking about immigration in this talk. As we in the law continue to pick up the pieces of the Trump regime's abusive immigration policies, it's incumbent on us to start thinking about more robust strategies to change that area of law. I claim that Liberation Constitutionalism can offer a framework to attack it at its roots, including directly in the courts.

Liberation constitutionalism is accessible to the courts through classical common law methods of judicial resistance. In 1860, Douglass invoked the legal maxim that when a law purports to enact a "wicked purpose," when "the fundamental principles of the law are overthrown" by some enactment, the enactment must be strictly construed. Thus, Douglass argued, the Constitution should not be read to endorse slavery. After all, the Constitution never specifically says that slavery is permissible in as many words, and so, under this common law rule of legislative interpretation, we ought not to read it that way.

In making this claim, Douglass was invoking a tradition of judicial resistance to deep injustice, one that has long been understood to have particular application to "privative clauses"—laws insulating government action from judicial review. And, hopefully, in recent years, the Supreme Court has at least once participated in that tradition. In INS v. St Cyr., the Supreme Court applied this principle via the canon of constitutional avoidance to hold that Congress had insufficiently

articulated its intent to revoke the privilege of habeas corpus in immigration a statute section entitled—and I swear I am not making this up—"ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS."[10]

Because our courts are sometimes just as horrified as are scholars by the astonishing abuses of executive power in immigration law, I offer it as the first and most urgent application of liberation constitutionalism. Once we recognize that the plenary power at the constitutional core of immigration law is a direct descendant of America's system of racialized oppression, which was first applied in the removal and genocide of Native Americans and then was applied in the brutal colonial rule of the Philippines—that its process of implementation shares tactics with the Fugitive Slave Act—and that it also became a template for the human rights abuses of the war on terror; that Guantanamo Bay was used as a lawless site to detain Haitian refugees without due process before the same tool was turned against accused members of Al Qaeda—we can see that the lessons of American liberation movements can ground the project of tearing it up by its roots.

Because no oppressive system is a one-off—because state brutality tends to be applied in the context of and as a consequence of conditions themselves caused by predecessor forms of state brutality, and tends to borrow techniques from those predecessors, we must operate constitutional theory that recognizes this continuity and recognizes that the lessons of resistance and liberation can and must be incorporated into our law.

[10] 533 U.S. 289 (2001).