

The Second Founding and the First Amendment

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Introduction

The nation's founding compromise with slavery resulted in a Constitution that proclaimed universal liberty in theory while protecting human enslavement in practice.¹ After centuries of struggle and a cataclysmic Civil War, a new constitutional order emerged: A Second Founding of the nation that sought to dismantle the legacies of slavery and turn American law away from nearly two hundred fifty years of race-based enslavement and discrimination. In order to remedy the First Founding's defects, the Second Founding amended the Constitution to prohibit slavery and empower Congress to remediate slavery's lingering effects; to recognize Black citizenship and protect rights to due process and equal protection for all; and to enfranchise African-Americans on a national basis.

These specific constitutional changes, while monumental, do not fully capture the scope of the Second Founding's constitutional moment as envisioned by its Framers. The post-Civil War Constitution also addressed the systemic legacy of the system of enslavement upon our constitutional order. No more would the Constitution, in the words of Senator Charles Sumner, be interpreted as it had been previously: that is, "in every clause and line and word, [in favor of] Human Slavery."² Rather, there would be a new mandate to constitutional interpretation, whereby the Constitution would be "interpreted uniformly and thoroughly for human rights."³

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1. See David Brion Davis, *Foreword: The Rocky Road to Freedom, Crucial Barriers to Abolition in the Antebellum Years*, in *THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT*, at xi, xvi (Alexander Tsesis ed., Columbia Univ. Press 2010) (noting that by the mid-nineteenth century, the United States, "a nation conceived in liberty and dedicated to equal rights," held "the largest number of slaves in the Western Hemisphere," and that Southern slaves "equaled 80 percent of the gross national product," or what would be \$9.75 trillion in 2010 dollars—\$11.92 trillion in 2021 dollars).

2. 14 CHARLES SUMNER, *THE WORKS OF CHARLES SUMNER* 424 (1883) [hereinafter *WORKS OF CHARLES SUMNER*].

3. *Id.*; see also Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 *ALA. L. REV.* 483, 491–92 (2003) (arguing that "[t]he radical abolitionists' ideology [gave] birth to the idea [of] reinterpreting the Constitution as a means of transforming America from a slave-holding nation to a humanity-upholding nation for the betterment of all").

Notwithstanding the clear break from the prior constitutional order that the Civil War Era represented, the Supreme Court's cases interpreting pre-Civil War constitutional provisions generally treat the Second Founding as merely a continuation of the First Founding. Nowhere is that truer than in the Court's cases interpreting the First Amendment's guarantee of freedom of speech. This Article takes the Second Founding seriously by examining the many denials of free speech inflicted upon enslaved persons and their allies during the Pre-Civil War Era; the expressed views of the post-Civil War Framers regarding freedom of speech and the promise of full and equal protection of Black and antiracist speech henceforth; and, most importantly, the views of enslaved persons regarding freedom of speech.

This Article contends that evidence from the constitutional moment culminating in the Second Founding is an overlooked source of meaning in interpreting the First Amendment. Specifically, this Article is the first to extensively examine slave narratives as a body of relevant evidence for interpreting the meaning of freedom of speech under the post-Civil War Constitution. The experiences and views of enslaved persons regarding freedom of speech provide valuable insights into the Second Founding's First Amendment. Moreover, by listening to enslaved persons' voices, we credit them as part of the contemporaneous polity whose understandings should matter in constitutional interpretation, rather than merely as passive beneficiaries to, or forgotten members of, the Second Founding.

Part I of this Article elaborates upon the reasons why the constitutional moment culminating in the post-Civil War Constitution should truly be viewed as a Second Founding of the nation and discusses how the Supreme Court's First Amendment jurisprudence has neglected to do so. Part II explores the nature of freedom of speech under the First Founding's Constitution of Enslavement and the many denials thereof experienced by enslaved persons and their abolitionist allies. Part II also examines the views of abolitionists and the Second Founding's Framers regarding what the freedom of speech should entail under a Constitution of Freedom. Part II then provides detailed evidence from slave narratives wherein enslaved persons discussed their experiences with and hopes regarding freedom of speech. This Part compares their views on a variety of matters relating to freedom of speech to the Supreme Court's First Amendment doctrinal categories and draws lessons for those categories. Specifically, this Part categorizes accounts from slave narratives by their relevance to First Amendment doctrines regarding coerced speech and coerced silence; nongovernmental suppression of speech; governmental viewpoint discrimination in speech protection; and incitement. The conclusion of this Article calls for this evidence to inform First Amendment interpretation.

I. The Weight of the Second Founding in Constitutional Interpretation

It is universally recognized that the constitutional moment embodied in the Declaration of Independence, the Constitution, and the Bill of Rights provides uniquely powerful guidance in constitutional interpretation.⁴ The constitutional moment embodied in the nation's Second Founding similarly provides unique insights into constitutional meaning, not only with regard to the meaning of the Reconstruction Amendments themselves, but also about the new constitutional order established thereby. This Section first discusses the similarities between the First and Second Foundings and then describes how, notwithstanding these similarities, courts have generally ignored the Second Founding in interpreting the First Amendment.

A. *The Second Founding as a Unique Constitutional Moment*

There are several aspects of founding moments that are unique for purposes of constitutional interpretation. First, the original Founding moment and the original Constitution literally constituted a new nation from the remnants of the Articles of Confederation.⁵ The meaning and intent imbued in the act of national creation provide unique insights into the nature of the nation created thereby, insights that are different in kind from incremental elaboration upon an extant entity.⁶ Second, the original Founding entailed an atypically high degree of extended public engagement—ranging from high government officials to ordinary persons—in momentous constitutional questions, thereby leading to a greater quantity of available evidence regarding intended and perceived constitutional meaning; a broader range of opinion regarding such questions; and a deeper public investment in fundamental questions regarding the very nature of the nation to be created.⁷

4. See, e.g., Sonu Bedi & Elvin Lim, *The Two-Foundings Thesis: The Puzzle of Constitutional Interpretation*, 66 UCLA L. REV. DISCOURSE 110, 117–19 (2018) [hereinafter Bedi & Lim, *The Two-Foundings Thesis*] (arguing that how one views events like the Founding has great impact on one's constitutional theories).

5. *Id.* at 124–25.

6. This is not to suggest that contemporary constitutional meaning should be limited to the meaning intended by the Framers or understood by the general public at the time of ratification. Rather, I posit here only that roughly contemporaneous sources provide unique insights that are different in kind from sources that are significantly prior or subsequent thereto. Cf. Ruth Colker, *The Supreme Court's Historical Errors in City of Boerne v. Flores*, 43 B.C. L. REV. 783, 790 (2002) (“We should rarely look at statements made after the ratification of a constitutional provision. The important temporal period is the moment (or the immediate moment before) the ratification of constitutional language.”). While I do not necessarily agree that we should only “rarely” look to noncontemporaneous statements, I do agree that such statements generally should be weighed differently than contemporaneous statements and understandings.

7. See, e.g., Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 488–89 (1989) [hereinafter Ackerman, *Constitutional Politics/Constitutional Law*] (stating that “the [First] Founding, Reconstruction, and New Deal each inaugurated a distinctive *constitutional regime* of public values and institutional relationships that maintain[ed] a basic continuity until the next regime change” and that while various other interstitial constitutional moments “made enduring

The Reconstruction Amendments re-constituted a nation torn apart by legal, ideological, and military conflict over the issue of slavery. Like the First Founding, the Second Founding involved unusually deep, intense, and sustained engagement by the public in questions of constitutional values. The Reverend James Pennington—a former slave who later became an abolitionist leader and the first African-American to attend Yale⁸—noted in 1861 in his Introduction to Jourden Banks’s slave narrative⁹ that:

Since the establishment of the Republic . . . many disturbing causes have at times entered into its politics[,] [b]ut for the last thirty years slavery has, with few exceptions, been the exciting topic at every session of Congress. It has entered into every general election; and has obtruded itself into the press, the pulpit, the church, the courts of law and of justice, into colleges, schools, and seminaries of learning.¹⁰

Noted abolitionist Wendell Phillips similarly remarked in his *Philosophy of the Abolitionist Movement* speech to the Massachusetts Anti-Slavery Society in 1853, “no question has ever, since Revolutionary days, been so thoroughly investigated or argued here, as that of slavery.”¹¹

Moreover, like the First Founding’s Constitution, the Second Founding’s constitutional amendments “[did] not contemplate a change in a few higher-law rules; they [were] the product of a generation’s principled critique of the constitutional status quo—a critique that finally gain[ed] the considered support of a mobilized majority of the American people.”¹² And like the First Founding, the post-Civil War Framers and general public understood the Reconstruction Amendments as an act of creation: in President Lincoln’s words, a “new birth of freedom.”¹³

The common judicial understanding of the Reconstruction Amendments as largely being form without substance vis-à-vis the protections in the original Bill of Rights cannot be squared with the history and context of the Second Founding. Consistent with many prior works of scholarship, this Article contends that the Civil War and the Second Founding are best seen as a break with the past so monumental as to amount to a Second Founding of

contributions to modern constitutional law, [they were not] quite of the same pervasive and deep-cutting type” as those three key founding moments).

8. Mike Cummings, *In the Shadows No More: Divinity School Honors Minister James W.C. Pennington*, YALENEWS (Sept. 30, 2016), <https://news.yale.edu/2016/09/30/shadows-no-more-yds-honors-minister-james-wc-pennington> [<https://perma.cc/LQU4-M2WH>].

9. J.W.C. PENNINGTON, A NARRATIVE OF EVENTS OF THE LIFE OF J.H. BANKS, AN ESCAPED SLAVE, FROM THE COTTON STATE, ALABAMA, IN AMERICA (1861) [hereinafter THE LIFE OF J.H. BANKS], <https://docsouth.unc.edu/neh/penning/penning.html> [<https://perma.cc/9DQH-9NWM>].

10. *Id.* at 3.

11. WENDELL PHILLIPS, SPEECHES, LECTURES, AND LETTERS 110–11 (reprinted by Negro Univ. Press 1968) [hereinafter PHILLIPS, SPEECHES AND LECTURES].

12. Ackerman, *Constitutional Politics/Constitutional Law*, *supra* note 7, at 524.

13. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

the nation.¹⁴ To be sure, the Second Founding did not reject all of the First Founding's principles, just as the First Founding did not reject all of the principles of the previous Articles of Confederation government.¹⁵ But the Second Founding's substantive changes to the prior foundational assumptions regarding liberty, equality, and federalism should not be underestimated in their significance.

To highlight just a few of the monumental contrasts between the principles of the First and Second Foundings, consider the following changes wrought by the Reconstruction Amendments and statutes enacted pursuant thereto:

- The end of enslavement and the permanent outlawry of property interests in human beings, in contrast with nearly two hundred and fifty years of race-based enslavement;
- Civil equality before the law, including the guarantee of due process, the right to make and enforce voluntary contracts on racially equal footing, the right of access to and equal

14. See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 360 (2005) (arguing that "the bare [constitutional] text does not show . . . the jagged gash between Amendments Twelve and Thirteen—a gash reflecting the fact that the Founders' Constitution *failed* in 1861–65 [and that] [t]he system almost died, and more than half a million people did die."); JAMES M. MCPHERSON, *ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION* 3–22 (1990) (describing in detail how persons living during the Civil War and Reconstruction and subsequent historians characterized that historical moment as a second American revolution in light of the magnitude of the military conflict and the resulting legal, political, and economic changes); David A.J. Richards, *Revolution and Constitutionalism in America*, 14 *CARDOZO L. REV.* 577, 590–91 (1993) ("The Civil War, the 'Second American Revolution,' was, like the First American Revolution, a revolution over constitutional and moral ideals. Like its predecessor, it required a constitutional order that would conserve its astonishing accomplishments in a legacy of principle for posterity."); Michael Kent Curtis, *The 1859 Crisis over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 *CHI.-KENT L. REV.* 1113, 1172 (1993) [hereinafter Curtis, *The 1859 Crisis*] ("If the Civil War was the second American Revolution, the Thirteenth and Fourteenth Amendments gave birth to a transformed Constitution and Bill of Rights."); Ackerman, *Constitutional Politics/Constitutional Law*, *supra* note 7, at 517 ("[T]he People of the nineteenth century broke decisively with Founding premises—importing new nationalistic, egalitarian, and libertarian strains into our higher law.").

15. See Bedi & Lim, *The Two-Foundings Thesis*, *supra* note 4, at 123–24. Writing on the relationship between the Articles of Confederation and the Constitution, Bedi & Lim observe:

[The Articles of Confederation] created a league of nations that assiduously guarded the sovereignty of states. . . . [The Constitution] radically overhauled this older conception of union as merely a compact among thirteen sovereign states[;] [c]rucially, however, elements of the [Articles of Confederation's principles], such as the commitment to states' rights in the composition of the U.S. Senate and the Tenth Amendment, were incorporated in the text of the Constitution.

Id.; see also Ackerman, *Constitutional Politics/Constitutional Law*, *supra* note 7, at 459–60 ("[The Reconstruction Amendments] destroyed a host of eighteenth-century premises concerning slavery, federalism, and citizenship. . . . [But] which fragments of the Founding order were now inconsistent with the new Republican constitution? Which aspects might be saved if they were reinterpreted in the light of the new Republican affirmations?").

treatment by the courts,¹⁶ in contrast with the “civil death” previously imposed on slaves and their descendants;

- Freedom of movement and security of person, in contrast to the prior regime of arbitrary and warrantless race-based searches and seizures that were previously permitted (and often required) by law;¹⁷
- Full citizenship and the rights pertaining thereto,¹⁸ regardless of one’s race, state of residence, or previous condition of servitude, thereby overturning the constitutional understanding embodied by *Dred Scott v. Sandford*;¹⁹
- Constitutional protection of the right to vote,²⁰ after centuries in which millions of Americans were denied the franchise based upon their race;
- Protection against terroristic and other subordinating private violence aimed at depriving civil rights,²¹ in contrast with the prior regime wherein whites could with de jure or de facto impunity exercise dominion over black bodies;²² and

16. U.S. CONST. amend. XIV, § 1 (providing for equal protection and due process); Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2012)). The Civil Rights Act of 1866 provides:

[All citizens], of every race and color . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Civil Rights Act of 1866 § 1.

17. See generally ANDREW TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868 (NYU Press 2006) [hereinafter TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT] (discussing extensively how the pre-Civil War Constitution offered no legal protections for enslaved persons’ property and privacy rights).

18. U.S. CONST. amend. XIV, § 1.

19. 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. Many Reconstruction Republicans stated that the Thirteenth Amendment and the Civil Rights Act of 1866 had already made Blacks full citizens. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess., 2890 (1866) (statement of Sen. Howard) (stating that the Fourteenth Amendment’s Citizenship Clause was “simply declaratory of what I regard as the law of the land already” in light of the Thirteenth Amendment and the Civil Rights Act of 1866).

20. U.S. CONST. amend. XV.

21. See Ku Klux Klan Act of 1871, ch. 22, § 2, 17 Stat. 13, 13–14 (1871) (codified at 42 U.S.C. § 1985, 18 U.S.C. § 241 (2012)) (prohibiting various forms of conspiracies against the United States and its citizens, including conspiracies to deny citizens equal protection of the laws); Enforcement Act of 1870, ch. 114, §§ 4–6, 16–18, 16 Stat. 140, 141, 144 (1870) (prohibiting groups from banding together to violate citizens’ constitutional rights, as well as other forms of intimidation and conspiracy).

22. To be sure, the Second Founding’s Framers abhorred the centuries-long prior history of state-sanctioned violence against enslaved persons and free blacks during slavery. See, e.g.,

- Clear federal authority to protect all individuals' fundamental rights, thereby eliminating the First Founding's fundamental compromise that most such matters would be left to the vagaries of each State.²³

This partial litany demonstrates how interwoven the Slave Power was with the political and legal system established by the First Founding,²⁴ and therefore how monumental were the changes wrought by the Second Founding.

The Reconstruction Framers' most urgent and specific concerns were to constitutionalize the end of slavery and to prevent the vestiges thereof from being inflicted upon Blacks.²⁵ The Reconstruction Amendments and statutes enacted pursuant thereto were also intended to dismantle the overarching Slave Power that the Second Founding's Framers believed had perverted the

KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 141–70 (Knopf 1961) (describing the widespread use of violence and coercion by whites—slaveowners and non-slave owners alike—as a means extra-legal of control over Blacks during slavery). In the immediate aftermath of the Civil War, they were specifically concerned with rampant white mob violence against blacks and Unionists in the South following the end of the slave system. Indeed, the Report of the Joint Committee on Reconstruction “focused particularly on the lack of legal protection [against such violence] for blacks in the South. The majority of the injustices reported were examples of private violence and the failure of states to protect blacks and white unionists from this violence.” Jack Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1847 (2010).

23. See, e.g., *Ex parte Virginia*, 100 U.S. 339, 345–46 (1880) (stating that the Reconstruction Amendments are “limitations of the power of the States and enlargements of the power of Congress. . . . Nor does it make any difference that [legislation pursuant to the Reconstruction Amendments] is restrictive of what the State might have done before the constitutional amendment was adopted”). In addition to changing de jure the primary locus for protection of fundamental rights, the Second Founding also de facto changed the ability of states to forestall such changes by virtue of unprecedented federal pressure upon states to ratify the Thirteenth and Fourteenth Amendments. See also Ackerman, *Constitutional Politics/Constitutional Law*, supra note 7, at 503. Here, Ackerman argues that Reconstruction Republicans

constitutionalized their initiatives in a more nationalistic way than that contemplated by the Federalists' Article Five [i.e., the constitutional amendment process]. The rules laid down in 1787 envisioned an equal partnership between the national government and the states in the process of higher lawmaking. . . . During the 1860's, the Republicans used national institutions to call into question, ever more profoundly, the equal status of the states in our higher lawmaking system.

Id.

24. Cf. Balkin, *The Reconstruction Power*, supra note 22, at 1840 (“In construing the Reconstruction Power[,] a good rule of thumb is that its scope must be at least as great as the power to protect the rights of slaveholders before the Civil War.”).

25. See, e.g., CONG. GLOBE, 38th Cong., 2d Sess. 155 (1865) (quoting statement of Rep. Davis that the Thirteenth Amendment would “remov[e] every vestige of African slavery from the American Republic”); CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864), cited in Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 177 (1951) (quoting statements of Sen. Wilson of Massachusetts that the Thirteenth Amendment was designed to “obliterate the last lingering vestiges of the slave system; its chattelizing [sic], degrading and bloody codes; its dark, malignant barbarizing spirit; all it was and is, everything connected with it or pertaining to it”).

nation since the First Founding.²⁶ One incident of the Slave Power was the denial of freedom of speech, conscience, and assembly to enslaved and free Blacks and their abolitionist allies.

To be clear, this Article does not contend that the Second Founding disregarded the First Founding's freedom of speech principles. Rather, this Article makes the more modest claim that the Reconstruction vision of freedom of speech differed in significant ways from that of the First Founding, and that it is worth examining and taking those differences seriously in our First Amendment doctrine.

B. The Invisibility of the Second Founding in First Amendment Doctrine

The Supreme Court has paid relatively little attention to the substantive meaning of the Second Founding in interpreting the Bill of Rights generally and the First Amendment specifically.²⁷ Given that the Court has now held that nearly all of the rights protected by the Bill of Rights are incorporated into the Fourteenth Amendment's Due Process Clause and therefore applicable to the states,²⁸ the Court's relative inattention to the Second Founding as it may relate to the substantive interpretation of those incorporated rights is especially peculiar. This is in part because the Reconstruction Amendments have become invisible by virtue of the incorporation doctrine's very nature.²⁹ The Supreme Court speaks of incorporated Bill of Rights provisions as if the Fourteenth Amendment was designed solely as a procedural device for projecting those rights onto the

26. Senator Henry Wilson of Massachusetts, for example, argued during the Thirteenth Amendment debates that slavery had become "the master of the Government and the people," CONG. GLOBE, 38th Cong., 1st Sess. 1199, 1323 (1864), and that the "death of slavery [would be] the life of the Nation." *Id.* at 1319 (1864); see also Guyora Binder, *Did the Slaves Author the Thirteenth Amendment? An Essay in Redemptive History*, 5 YALE J.L. & HUMAN. 471, 478 (1993) [hereinafter Binder, *Did the Slaves Author the Thirteenth Amendment?*] (noting that President Lincoln believed that in order to remedy the First Founding's compromise with slavery, "the Nation [would have to be] redeemed—reborn with a new heritage. Against the background of this imperative to redeem the past, the abolition of slavery becomes something more than a constitutional amendment—it becomes fundamentally reconstitutive").

27. Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. St. Paul*, 106 HARV. L. REV. 124, 152 (1992) (commenting upon "the [Thirteenth and] Fourteenth Amendments' general invisibility in First Amendment discourse").

28. See *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (stating that "[w]ith only a handful of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States" (citations omitted)).

29. Under the selective incorporation approach, "the Court [has incrementally decided] that the [Fourteenth Amendment's] Due Process Clause fully incorporates particular rights contained in the first eight Amendments" rather than incorporating the totality of all such rights wholesale. *McDonald v. City of Chicago*, 561 U.S. 742, 763 (2010).

states.³⁰ The Reconstruction Amendments certainly were designed and understood to deracialize and nationalize the specific rights thought to be inherent in a state of freedom,³¹ but their additional systemic effects are too often left unexplored.

The Court's First Amendment cases especially display this tendency. It was not until nearly sixty years after the Second Founding that the Supreme Court held that the constitutional guarantee of free speech was also applicable to the states as part of the Fourteenth Amendment's guarantee of due process. Moreover, even once it did so, the Court did not consider whether the Reconstruction understanding of freedom of speech differed from the understanding at the time of the original Bill of Rights.

*Gitlow v. New York*³² is the first major case in which the Supreme Court found the First Amendment's protection of freedom of speech applicable to the states through the Fourteenth Amendment's Due Process Clause. In *Gitlow*, the Court stated that "[f]or present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States."³³ In its application of free speech principles, however, *Gitlow* devoted no attention to history of the Fourteenth Amendment. Rather, the *Gitlow* Court assumed that the constitutional guarantee of freedom of speech, if made applicable to the states, would carry precisely the same meaning as that to be derived from the First Founding: i.e., that the First Amendment's meaning remained entirely unaltered by the Fourteenth.³⁴ The *Gitlow* Court's inattention to the Second Founding's potential relevance in interpreting the First Amendment contrasts

30. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1136–37 (1991) (“Like people with spectacles who often forget they are wearing them, most lawyers read the Bill of Rights through the lens of the Fourteenth Amendment without realizing how powerfully that lens has refracted what they see.”).

31. MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 357 (2000) [hereinafter CURTIS, THE PEOPLE’S DARLING PRIVILEGE] (surveying the ratification debates and other historical evidence and finding that the Reconstruction Framers intended “to make guarantees of free speech national and to require states to respect the rights set out in the First Amendment”).

32. 268 U.S. 652 (1925).

33. *Id.* at 666. Technically, *Gitlow*’s stated assumption that the First Amendment’s free speech guarantee was applicable to the States via the Fourteenth Amendment was dicta. *Id.* Given *Gitlow*’s actual holding that the speech at issue was unprotected under the then-prevailing freedom of speech tests, the Court’s statement that the Free Speech Clause was assumed to be applicable to the States was unnecessary to its decision.

34. *See id.* (“It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish . . .”). Subsequent cases, discussed below, also implicitly assume that the meaning of the Free Speech Clause, as applicable to the federal government, remained entirely untouched by the Second Founding. This Article argues that this assumption is similarly underexamined.

with its awareness of the potential interpretive relevance of other important constitutional moments. For example, the *Gitlow* Court acknowledged “the English common law rule of seditious libel or the Federal Sedition Act of 1798” as potentially relevant interpretive sources, even though it found it unnecessary to resort to those sources in order to decide the case before it.³⁵ While the *Gitlow* Court considered but rejected these other potential interpretive sources, it made no mention whatsoever of the Reconstruction Amendments.³⁶

A similar analytical blind spot to *Gitlow* appears in *Patterson v. Colorado*,³⁷ wherein the Court had previously stated that:

We leave undecided the question whether there is to be found in the 14th Amendment a prohibition similar to that in the [First]. But even if we were to assume that freedom of speech and freedom of the press were protected from abridgments [by the states as well as the federal government] . . . , the main purpose of such constitutional provisions is [only] to prevent all such *previous restraints* upon publications as had been [practiced] by other governments, and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.³⁸

Patterson, like *Gitlow*, therefore assumed that if the Fourteenth Amendment made free speech guarantees applicable to the states, it did only that and no more; that is, that the Fourteenth Amendment specifically and the Second Founding more generally had no potentially relevant substantive insights to offer regarding the meaning of freedom of speech.

Patterson is especially instructive of one premise of this Article: namely, that one should not lightly assume that the constitutional understandings of the First Founding were left untouched by the Second Founding. *Patterson*, like other cases of the early 1900s, took it as a given based upon First Founding-era evidence³⁹ that the primary purpose of the First Amendment’s Press Clause was to prohibit a system of prior restraints such as that which had existed in England.⁴⁰ Even assuming *arguendo* that

35. *Id.* at 672.

36. It is possible that the *Gitlow* Court’s reference to English common law and the American debates about the Sedition Act arose only because they were contained in the parties’ briefings. However, even if that were true in *Gitlow* itself, the Court’s inattention to the Second Founding in its First Amendment cases both preceded and followed *Gitlow*.

37. 205 U.S. 454 (1907).

38. *Id.* at 462 (citations omitted).

39. See, e.g., Curtis, *The 1859 Crisis*, *supra* note 14, at 1122 (noting that “Blackstone’s *Commentaries*, the leading English text, defended . . . the idea that freedom of the press was limited to a protection against prior restraint . . .”).

40. See, e.g., *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) (explaining that “liberty of the press, historically considered and [as] taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship”); Schenck

the prohibition of prior restraints was the original Framers' primary purpose, however, the evidence is overwhelming that the Reconstruction Republicans who drafted and supported the post-Civil War constitutional amendments did not share this narrow view. The ratification debates for the Thirteenth and Fourteenth Amendments reveal that they were at least as—and likely more—concerned with ensuring that the new constitutional order would protect against the lynchings, murders, and prosecutions inflicted post hoc upon abolitionists and slaves in retaliation for their speech and expressive activities denouncing slavery or resisting the slave regime as they were concerned that it would prohibit prior restraints upon such speech.⁴¹ This obvious oversight raises the question: what else, perhaps more subtle but equally important, has been overlooked by the failure of our jurisprudence to take the Second Founding seriously?

The Supreme Court's inattention to the Second Founding in interpreting the meaning of freedom of speech has largely carried forward in its contemporary flagship First Amendment cases.⁴² The Court has most

v. United States, 249 U.S. 47, 51–52 (1919) (“It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . .”).

41. See, e.g., JAMES BREWER STEWART, *HOLY WARRIORS: THE ABOLITIONISTS AND AMERICAN SLAVERY* 69–73 (Hill & Wang eds., 1986) [hereinafter STEWART, *HOLY WARRIORS*] (describing the “wave of terrorism” by private mobs throughout the North and the South in response to abolitionists’ postal campaign in the mid 1830s); Curtis, *The 1859 Crisis*, *supra* note 14, at 1175 (noting that the framing debates regarding the Reconstruction Amendments reveal that the Congressional Republicans were largely concerned with “subsequent punishment, not prior restraint” of Black and abolitionist speech, given that such speech was far more often subject to the former than the latter).

42. This Article does not present litany of all the cases in which the Court did not examine the substantive effect of the Second Founding on First Amendment jurisprudence because such a list would be comprised of most of the Court’s First Amendment cases. In addition to the cases discussed in this Part, however, a few notable examples are as follows: *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (finding unconstitutional on First Amendment grounds a statute prohibiting the public display of hate symbols without examining evidence from the Second Founding regarding racial equality principles in the Reconstruction Constitution); *Walker v. Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015) (upholding on grounds of the government speech doctrine Texas’s refusal to allow a Confederate flag design on a custom license plate but without discussing slavery or the Confederate rebellion’s stated goal of preserving slavery); *Street v. New York*, 394 U.S. 576 (1969) (striking down, on First Amendment grounds, a flag-burning prosecution brought against an African-American veteran who burned an American flag to protest the shooting of civil rights leader James Meredith, without discussing the history of punishing Black and abolitionist speech during the time of slavery or the evidence from the Second Founding era that such speech would be protected under the Reconstruction Constitution); and *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (reversing on First Amendment grounds an incitement prosecution in a cross-burning case but without discussing white-vigilante violence during and following the end of slavery and the Reconstruction Framers’ description of such violence as a vestige of slavery). *Brandenburg* was, however, a short per curiam opinion, so the omission is perhaps more understandable than in other cases. There are, of course, exceptions to this general trend. In *Virginia v. Black*, 538 U.S. 343 (2003), for example, the Court, in its interpretation of the “true threats” category of unprotected speech as encompassing cross burnings directed at specific individuals, expressly relied upon the

recently continued its tendency to disappear the history and substance of the Reconstruction Amendments in *Manhattan Community Access Corp. v. Halleck*.⁴³ *Halleck* involved the question of whether a privately operated public-access cable channel was subject to the First Amendment. The Court's entire analysis of the relevance of the Reconstruction Amendments to the meaning of the Free Speech Clause consists of the following:

Ratified in 1791, the First Amendment provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech." Ratified in 1868, the Fourteenth Amendment makes the First Amendment's Free Speech Clause applicable against the States: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law. . . ." The text and original meaning of those Amendments, as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech.⁴⁴

This portion of *Halleck* demonstrates several problems in the Court's free speech jurisprudence that are relevant to this Article. The first, and most directly pertinent, is the Court's move from the premise that the Fourteenth Amendment makes the Free Speech Clause applicable to the States (which is clearly true) to the proposition that *all* that the Fourteenth Amendment did was to make the Free Speech Clause—carrying exactly its original 1791 meaning—applicable to the States, which is both an under-examined and contestable conclusion. The flaws of this analytical shortcut are revealed by the second portion of *Halleck* quoted above, wherein the Court concludes that the "original meaning" of these *Amendments* (plural) unambiguously establishes that the guarantee of free speech protects only against governmental abridgments of speech. As is discussed in greater detail in Part II, *infra*, this proposition is far from clear when considering evidence from the Second Founding's "original meaning." Evidence from the

history of the immediate post-Civil War period during which the Ku Klux Klan used cross burnings as a precursor to racist violence. *Id.* at 360. Additionally, in *Beauharnais v. Illinois*, 343 U.S. 250 (1951), the Supreme Court explicitly (albeit briefly) referenced the history of slavery, abolition, and Reconstruction as influencing its holding that the First Amendment did not prohibit a state from punishing "group libel":

Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful [sic] purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community.

Id. at 258–59. The Court cited "the murder of the abolitionist [Elijah] Lovejoy in 1837" in Illinois as an example of such racial strife. *Id.* Examples such as *Beauharnais* and *Black* are, however, rare in the Supreme Court's cases.

43. 139 S. Ct. 1921 (2019).

44. *Id.* at 1928.

ratification debates for the Thirteenth and Fourteenth Amendments, the understanding of the general public, and the understanding of enslaved persons all show substantial concern about the states' failure to protect rights from infringement by non-state actors as well as the entwinement of state action and private action in supporting the slave system's entrenchment of racialized subordination generally. Specifically, this evidence shows grave concern about the largely unchecked ability of private individuals and organized mobs to suppress the freedom of speech, conscience, and assembly of enslaved persons and their allies. Indeed, as this Article will demonstrate, enslaved persons and the Reconstruction Framers were *at least* as concerned with private actors' suppression of slaves' and abolitionists' speech as they were with governmental abridgment thereof.

The Supreme Court has in recent years begun to explore the Second Founding in more depth in its constitutional cases, specifically with regard to the Second and Eighth Amendments. In *McDonald v. City of Chicago*,⁴⁵ the Court, in holding that the Fourteenth Amendment makes the right to bear arms applicable to the states, extensively discussed the denial of this right to slaves and free Blacks during the pre-Civil War period and examined the Civil Rights Act of 1866 and statements of the Fourteenth Amendment's Framers that this right would be equally protected henceforth.⁴⁶ More recently, in *Timbs v. Indiana*,⁴⁷ the Court considered evidence from the Second Founding in holding that the Fourteenth Amendment incorporates the prohibition on excessive fines found in the Eighth Amendment. The Court noted that after the Civil War, "Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy. Among these laws' provisions were draconian fines for violating broad proscriptions on 'vagrancy' and other dubious offenses. . . . When newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead."⁴⁸ However, in neither *McDonald* nor *Timbs* did the Court seriously examine whether the Second Founding might affect the substantive interpretation of the rights originally articulated in the Second or Eighth Amendments. While the Court used historical evidence from the Second Founding period to buttress its conclusion that those Amendments' substantive rights applied to the States through the Fourteenth Amendment, it did not pause to consider whether the Second Founding may have modified the underlying meaning of those rights.⁴⁹

45. 561 U.S. 742 (2010).

46. *Id.* at 770–78.

47. 139 S. Ct. 682 (2019).

48. *Id.* at 688–89 (citation omitted).

49. For example, although beyond the scope of this Article, one could imagine evidence from the Second Founding leading to an interpretation of the right to bear arms not as a generalized abstract right to self-defense in the home, but rather as a specific right to bear arms in circumstances

The Court in *District of Columbia v. Heller*⁵⁰ gestured toward the methodology suggested by this Article in its consideration of the effect of the Reconstruction Era upon the Second Amendment's original meaning. *Heller* involved gun control laws in the District of Columbia, a federal territory; hence, the Court's task was to interpret the meaning of the Second Amendment that was ratified in 1791 rather than the Fourteenth Amendment's Due Process Clause (as was the case in *McDonald*). Although it was therefore the meaning of the First Founding provision that was at issue, the *Heller* Court nonetheless indicated that the Second Founding understanding thereof should also be considered in its interpretation:

In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves. . . . Since those discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources. Yet those born and educated in the early 19th century faced a widespread effort to limit arms ownership by a large number of citizens; *their understanding of the origins and continuing significance of the Amendment is instructive*.⁵¹

Cases like *Heller*, *McDonald*, and *Timbs* suggest that the Supreme Court may be receptive to considering evidence from the Second Founding in its interpretation of certain pre-Civil War constitutional provisions. The time may therefore be ripe for it to do the same regarding the First Amendment. As discussed below, however, for the Court to take the Second Founding seriously, it must first reexamine the implicit assumption that there is always a single unchanging through line of constitutional meaning running directly from the First Founding to today.

where the putative rights-holder claims such a right as a member of a vulnerable group effectively unprotected by the government from race- or class-based terroristic violence (as was the case for slaves and free Blacks). I.e., the argument would be that while the First Founding's Framers and ratifying public were primarily concerned with the possibility of a tyrannical federal government oppressing the states by disarming the people, the Second Founding's Framers and ratifying public were primarily concerned with the inability of Blacks to protect themselves from white terrorists and the states' unwillingness to do so.

50. 554 U.S. 570 (2008).

51. *Id.* at 614 (emphasis added) (citation omitted). To be clear, this Article does not defend *Heller*'s overall reasoning, with which there are numerous flaws. The proposition for which *Heller* is cited here is only that the understandings of the Second Founding era regarding the meaning of the pre-Civil War Constitution are a proper source of interpretive evidence (especially, in the Author's view, given the constitutional schism that the Second Founding represented).

C. *Constitutional Synthesis and Change*

The Second Founding may have differing effects on First Founding constitutional provisions depending upon the provision at issue. The Fourteenth Amendment's Citizenship Clause,⁵² for example, by virtue of its text, its Framers' stated intent, and the general public understanding, clearly rendered null and void the First Founding understanding embraced by *Dred Scott* that Blacks could not be considered citizens under the pre-Civil War Constitution.⁵³ Similarly, the Thirteenth Amendment⁵⁴ clearly rendered enslavement unconstitutional, thereby displacing the First Founding's overall understanding that slavery was legal under the original Constitution as well as the numerous specific constitutional provisions that enabled it.⁵⁵

In addition to granting new rights and overriding specific constitutional provisions, the Second Founding also redressed more systemic failures of the prior constitutional order. Enslaved Blacks, abolitionists, and the Reconstruction Framers believed that the First Founding's constitutional order would have to be changed in order to eliminate slavery. They also believed that the end of slavery would and should represent a new constitutional order, not merely a continuation of the existing order minus only property rights in human beings.⁵⁶

Many abolitionists grappled explicitly in their writings with the contradiction between the First Founding's professed egalitarian principles

52. U.S. CONST. amend. XIV, § 1.

53. For discussion of the understanding that the Citizenship Clause overrode *Dred Scott*, see *supra* text accompanying note 19. The *Dred Scott* Court's understanding of the original Constitution's meaning on this question was, of course, widely derided at the time and has also subsequently been criticized by generations of scholars. I believe that *Dred Scott* was poorly reasoned and wrongly decided, but the point for present purposes is that it remained the law until superseded by the Citizenship Clause.

54. U.S. CONST. amend. XIII, § 1.

55. See, e.g., *id.* art. I, § 2, cl. 3 (the Three-Fifths Clause); *id.* art. I, § 9, cl. 1 (the Slave Trade Clause); *id.* art. IV, § 2, cl. 3 (the Fugitive Slave Clause).

56. See, e.g., William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1322–25, 1330–35 (2007) (discussing in detail the transformative vision of the Thirteenth Amendment's framers). Indeed, at the congressional level, even opponents of the Reconstruction Amendments argued that those amendments would fundamentally change our constitutional regime, and many opposed the amendments on precisely that ground. See, e.g., William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 49–50 (2004) [hereinafter Carter, *A Thirteenth Amendment Framework*] (quoting relevant statements from supporters and opponents of the Thirteenth Amendment during the congressional debates leading to its passage). We should, of course, “consider carefully whatever tactical motives might be at work” in the statements of congressional supporters and opponents of the Reconstruction Amendments. Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867–1873*, 18 J. CONTEMP. LEGAL ISSUES 153, 160 (2009). The near-unanimity of contemporaneous congressional opinion that the Reconstruction Amendments would (for better or worse, depending upon the particular congressperson's views) fundamentally change the American constitutional order is nonetheless persuasive.

and the nation's acceptance of racial enslavement. They concluded that either the First Founding's principles had been corrupted by slavery and needed to be redeemed by a revolutionary change or that the First Founding's allowance of slavery rendered it inherently corrupt and therefore in need of revolutionary rejection.

The slave narrative *The Light and Truth of Slavery: Aaron's History*⁵⁷ provides an abolitionist's view on these issues:

[P]roperty in human beings is immeasurably more tyrannous and oppressive than that usurpation against which our fathers took arms in [1776]. Therefore, [slavery] ought to be abolished and put a stop to by universal acclamation. This should be done if [slavery] is not supported by the Constitution, and much more if it is. For in the latter case we need to be relieved from the double disgrace of its existence and its constitutionality.

. . . .

. . . Construed so as to enforce the restoration of fugitives escaped from slavery, and the re-imposition of chains, . . . the Constitution is an inconsistency, a contradiction; It is made to stab that very liberty which it was designed to shield. It becomes a reproach, a piece of hypocrisy, an abomination.⁵⁸

This portion of *Aaron's History* captures the range of views in the larger debates between radical Garrisonian abolitionists, who believed that the original Constitution was proslavery and therefore fundamentally corrupt,⁵⁹ and somewhat more moderate constitutionalists such as Frederick Douglass, who ultimately concluded that the Constitution itself did not authorize slavery but had instead been corrupted by proslavery forces and needed to be redeemed.⁶⁰

57. AARON, THE LIGHT AND TRUTH OF SLAVERY: AARON'S HISTORY 9–10 (Univ. of N.C. at Chapel Hill electronic ed. 2000), <https://docsouth.unc.edu/neh/aaron/aaron.html> [<https://perma.cc/3LSY-G7HB>]. Most of *Aaron's History* is devoted to making a case in favor of the Liberty Party of the 1840s, a precursor to the Republican Party that emerged in the 1850s. As such, it contains fewer biographical details than most slave narratives and instead devotes most of its pages to antislavery theory and politics. See *id.* at 9–12 (extolling the Liberty Party's antislavery platform).

58. *Id.* at 9–10.

59. See, e.g., Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J.L. & HUMAN. 413, 445 (2001) (stating that Garrison's view was that the Constitution protected slavery and was a "terrible bargain between slavery and freedom").

60. See, e.g., Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery? (1860)*, reprinted in ANTISLAVERY POLITICAL WRITINGS, 1833–1860, at 144, 145 (C. Bradley Thompson ed., Routledge 2015) (2004) (criticizing Garrisonians who "hold the Constitution to be a slaveholding instrument . . . and denounce all who vote or hold office, no matter how faithfully such persons labour to promote the abolition of slavery"). Douglass's alternative to the Garrisonian view was to "deny that the Constitution guarantees the right to hold property in man, and believe that the way to abolish slavery in America is to vote such men into power as will use their powers for the abolition of slavery." *Id.* Douglass also argued that antislavery Northerners had wrongly allowed themselves to be convinced "of the pro-slavery character of the Constitution."

To be sure, various stakeholders differed about the degree and nature of the necessary constitutional transformation. On one end of the spectrum were those like Senator Charles Sumner (one of the Thirteenth Amendment's primary Framers), who argued at length that the post-Civil War constitutional regime dictated radically different substantive understandings and interpretive principles than the pre-Civil War Constitution. During the congressional debates regarding the Civil Rights Act of 1875, which prohibited discrimination in places of public accommodation, even in the absence of state action, Sumner responded as follows to a colleague's concerns that the Act exceeded Congress's Thirteenth and Fourteenth Amendment Enforcement Clause powers:

I say [there is] a new rule of interpretation for the National Constitution, according to which, in every clause and every line and every word, it is to be interpreted uniformly and thoroughly for human rights. Before the [Civil War,] the rule was precisely opposite. The Constitution was interpreted always, in every clause and line and word, [in favor of] Human Slavery. Thank God, it is all changed now! There is [now] another rule, and the National Constitution [now], from beginning to end, speaks always for the Rights of Man.⁶¹

The prior "system of [constitutional] interpretation born of slavery,"⁶² Sumner argued, had been "conquered at Appomattox."⁶³ Sumner's argument, then, was not only that the Reconstruction Amendments themselves created new rights and granted new federal powers to protect those rights. This was certainly true, but Sumner further argued that the constitutional moment embodied in the end of slavery and the adoption of the Reconstruction Amendments also affected the interpretive approach and proper meaning to be given to the *entire* Constitution.

The new system of constitutional interpretation, in Sumner's view, should be grounded in two aspects of the new constitutional regime. The first was the meaning and legal effect of the Thirteenth Amendment. Sumner argued that by abolishing slavery, the Amendment abolished it in its entirety, including with regard to the anti-equality and proslavery rules and norms of constitutional interpretation that had previously been applied to limit the full and equal legal protection of Black citizens.⁶⁴ The second was both legal and

Frederick Douglass, *The Meaning of July Fourth for the Negro* 16 (1852) [hereinafter Douglass, *What to the Slave Is the Fourth of July?*], https://masshumanities.org/wp-content/uploads/2019/10/speech_complete.pdf [<https://perma.cc/W4WZ-PX6Y>] ("In that instrument I hold there is neither warrant, license, nor sanction of [slavery]; but interpreted, as it ought to be interpreted, the Constitution is a glorious liberty document.").

61. WORKS OF CHARLES SUMNER, *supra* note 2, at 424.

62. *Id.* at 425.

63. *Id.* at 424.

64. For example: during the debates regarding the Civil Rights Act of 1875, Senator Hill argued that even under the post-Civil War Constitution, Congress was not empowered to outlaw

political: the “new force [of the] colored people of the United States counted by the million[s]”⁶⁵ who were now constitutionally recognized as full citizens by the Fourteenth Amendment; and who were, by virtue of the Fifteenth Amendment, now constitutionally entitled to exert equal influence on the political process. These constitutional actors’ voices had previously been unacknowledged as a source of constitutional meaning but, in Sumner’s view, were now properly to be considered in how the entire Constitution should be interpreted. This was the case in part because Blacks were now enfranchised as members of the American polity and therefore able to exercise direct power over their representatives pursuant to the Fifteenth Amendment. More fundamentally, Sumner believed that these millions represented “a new aspect of our sociological structure. Society had changed . . . and this [should therefore] be recognized by the lawmakers when considering the constitutionality of their acts.”⁶⁶

On the other end of the Republican spectrum were those like Representative Daniel Somes, for example, who argued in 1861 for a theory of constitutional continuity and redemption, but one that nonetheless rendered suppression of Blacks’ and abolitionists’ freedom of speech unconstitutional:

When the fathers framed the Government, they were [by necessity] compelled to tolerate slavery; but, at the same time, they adopted the theory of equality among men, and provided in the Constitution the means [of] its ultimate triumph, namely, free speech and a free press. They did not fear error so long as truth was left free to combat it.⁶⁷

Notwithstanding the range of constitutional thought on these issues, one point of agreement among abolitionists and Reconstruction Republicans is clear: namely, that the First Founding’s racialized constitutional principles—whether as originally intended or as applied through the corrupting influence of slavery—could not stand unchanged and would therefore have to be repudiated, redeemed, or transformed by a new constitutional order.

segregation in privately operated places of public accommodation such as hotels and railways because “it is no denial of a[ny] right [that Congress was empowered to vindicate], provided all the comfort and security be furnished to [all] passengers alike.” WORKS OF CHARLES SUMNER, *supra* note 2, at 361. To Hill’s constitutional theory that the reach of Congress’s power was limited to enforcing access and formal “equal” treatment, Sumner retorted that although freedom of association protected the right to discriminate in truly personal matters, the reconstructed Constitution permitted Congress to reach any discrimination carrying any government imprimatur whatsoever, even if only tacit: “Show me [any] legal institution, anything created *or regulated* by law, and I show you what must be opened equally to all without distinction of color. [A hotel] is a legal institution . . . subject to minute provisions and regulations; [railways] are common carriers subject to [similar regulations]. . . .” *Id.* (emphasis added).

65. *Id.* at 436.

66. Ronald B. Jager, *Charles Sumner, the Constitution, and the Civil Rights Act of 1875*, 42 NEW ENG. Q. 350, 366 (1969).

67. CONG. GLOBE, 36th Cong., 2d Sess. 967, 967 (1861).

II. The Slave Power and Freedom of Speech

The active denial of, and lack of effective protection for, enslaved persons' and abolitionists' rights of freedom of speech, conscience, and assembly was one of the primary legacies of the First Founding's constitutional order that the Second Founding was designed to eliminate. Subpart II(A) first briefly describes the many racially and ideologically motivated restrictions upon freedom of speech that slaveholders and their allies employed as a tool to limit Black freedom and dignity and to defend the institution of slavery against the rising abolitionist movement by silencing abolitionist ideas. This subpart next discusses the Reconstruction Framers' expressed intentions that the post-Civil War Constitution would end this vestige of the slave system by providing robust protection to Black and antiracist speech. Finally, and most importantly for purposes of this Article, subpart II(B) provides extensive discussion of enslaved persons' views regarding freedom of speech and contends that such evidence of their experiences and understandings can and should help to guide our interpretation of the First Amendment.

A. *Historical Background*

The Sedition Act of 1798 sparked the nation's first sustained controversy regarding the First Amendment's guarantee of freedom of speech.⁶⁸ The national controversy over slavery presented the second such major free speech moment.⁶⁹ Legislators and judges, public intellectuals, the popular press, and ordinary citizens discussed and debated whether abolitionist speech represented such a danger that it could be suppressed consistent with state and national⁷⁰ guarantees of free speech.⁷¹ Prior works

68. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964) (“[T]he great controversy over the Sedition Act of 1798 . . . first crystallized a national awareness of the central meaning of the First Amendment” (internal citations omitted)); see also Curtis, *The 1859 Crisis*, *supra* note 14, at 1121 (noting that “[t]he Sedition Act of 1798 put the Bill of Rights to its first major test” and describing the national controversy regarding the Act).

69. See, e.g., RUSSEL B. NYE, *FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 1830–1860*, at 137 (1949) [hereinafter NYE, *FETTERED FREEDOM*] (stating that the question of whether abolitionist speech should be suppressed “was, except for the alien and sedition laws, the first really important issue in the struggle for freedom of the press that the nation had encountered since the founding of the republic”).

70. Most mainstream antebellum judges and scholars believed that the First Amendment itself only applied to abridgments of speech by Congress (or, at most, by the federal government), as reflected by *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247, 250 (1833) (holding that “[t]he Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. . . . [The Bill of Rights] contain[s] no expression indicating an intention to apply [it] to the State governments.”).

71. See generally Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 NW. U. L. REV. 785 (1995) (discussing the conflict in the 1830s between public safety concerns around antislavery speech and upholding freedom of expression).

have recounted this history in great detail.⁷² This Article therefore does not attempt to recount every aspect of the debates regarding freedom of speech on the subject of slavery. Rather, in this subpart, I synthesize the broader themes regarding slavery and free speech with an eye toward ascertaining the Second Founding's First Amendment values.

The American slave regime severely punished Blacks' freedom of speech and speech about Black freedom. Provisions of various states' slave codes expressly targeted freedom of speech.⁷³ Mississippi's Slave Code, for example, authorized a sentence ranging from imprisonment at hard labor for up to twenty-one years to the death penalty for "using language having a tendency to promote discontent among free colored people, or insubordination among slaves."⁷⁴ Mississippi's Slave Code also provided that "[a]ny negro or mulatto [whether slave or free], for using abusive language . . . [shall] receive such punishment as a justice of the peace may order, not exceeding [thirty-nine] lashes."⁷⁵ Georgia's Slave Code forbade "the assembling of negroes under pretense of divine worship"⁷⁶ and provided that "any justice of the peace may dispense any assembly of slaves which may endanger the peace; and every slave found at such meeting shall receive, without trial" twenty-five lashes.⁷⁷ In addition to such formal legal measures, private mobs suppressed and retaliated against Black and antislavery speech

72. See, e.g., Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109 (1993) [hereinafter Curtis, *The 1837 Killing of Elijah Lovejoy*] (discussing the murder of an abolitionist newspaper editor and free speech debates in the 1830s); CURTIS, *THE PEOPLE'S DARLING PRIVILEGE*, *supra* note 31 (noting the Fourteenth Amendment's roots in antebellum free speech debates); NYE, *FETTERED FREEDOM*, *supra* note 69 (exploring the importance of abolitionism in influencing antebellum free speech debates).

73. See NYE, *FETTERED FREEDOM*, *supra* note 69, at 140 (noting that "with the exception of Kentucky, every Southern state eventually passed laws exercising loose to rigid control of speech, press, and discussion").

74. J. Clay Smith, Jr., *Justice and Jurisprudence and the Black Lawyer*, 69 NOTRE DAME L. REV. 1077, 1107 (1994).

75. *Id.*

76. *Id.* at 1108.

77. *Id.* at 1108-09.

through violence and other extralegal means.⁷⁸ While the law could be slow and uncertain, private mobs faced no such constraints.⁷⁹

The organized abolitionist movement asserted that full and equal freedom of speech was essential to the fight against slavery. The American Anti-Slavery Society, the major national abolitionist organization in the early-to-mid-1800s,⁸⁰ issued its “Declaration of Sentiments and Constitution” in 1835. Its official statement of principles prominently stated that “[w]e believe that American citizens have the right to express and

78. See, e.g., David Brion Davis, *Should You Have Been an Abolitionist?*, N.Y. REV. (June 21, 2012), <https://www.nybooks.com/articles/2012/06/21/should-you-have-been-abolitionist/> [<https://perma.cc/TQU6-39AY>] (noting that “the defenders of slavery . . . led countless mobs attacking and stoning the abolitionists, burning their literature, and destroying their printing presses”); see also William M. Carter, Jr., *The Thirteenth Amendment and Pro-Equality Speech*, 112 COLUM. L. REV. 1855, 1859–64 (2012) (describing the history of laws and private action restricting slaves’ speech and punishing antislavery speech). In *The South Since the War*, journalist Sidney Andrews, who reported extensively from several Southern states shortly after the end of the Civil War, found that notwithstanding the Confederacy’s defeat,

[i]t cannot be said that freedom of speech has been fully secured in [any] of the three States which I have visited . . . It follows, of course, that safety of person is not assured[:] any man holding and openly advocating even moderately radical sentiments on the negro question[] stands an excellent chance, in many counties of Georgia and South Carolina, of being found dead some morning.

SIDNEY ANDREWS, *THE SOUTH SINCE THE WAR* 189 (2004).

79. NYE, *FETTERED FREEDOM*, *supra* note 69, at 141 (“Legal processes [for suppressing speech] were often slow and unsatisfactory; loopholes could be found in the statutes. To remedy these defects and to provide swifter and more effective punishment, the South turned to the device of the citizen-mob, long known on the frontier as ‘lynch law.’”). Indeed, the citizen-mob’s extralegal actions were often extolled by proslavery forces precisely because they were not subject to the constraints of the rule of law. “[T]he mobs [were embraced] as a tool of popular democracy. Many whites . . . argued that mobs preserved popular rule by stopping insidious groups that the duly appointed authorities were ‘powerless to restrain’ because authorities were ‘hamstrung by legal formalities.’” TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT*, *supra* note 17, at 202; see also STEWART, *HOLY WARRIORS*, *supra* note 41, at 64 (“The tenor of Jacksonian society invited Americans to vigilantism. . . . [M]any antebellum Americans came to believe that man standing above the law was not to be a threat to society but, its fulfillment.”).

80. See NYE, *FETTERED FREEDOM*, *supra* note 69, at 6–8 (describing how the “powerful” American Anti-Slavery Society was formed from a coalition of regional antislavery societies); see also *American Anti-Slavery Society*, OHIO HIST. CENT., https://ohiohistorycentral.org/w/American_Anti-Slavery_Society [<https://perma.cc/5NX4-2W2L>] (“The American Anti-Slavery Society was one of the most prominent abolitionist organizations in the United States of America during the early nineteenth century . . .,” eventually attracting over 150,000 members). Given the racial prejudices of the time, it is notable that six African-Americans served on the Society’s first Board of Managers; prominent former slaves, such as Frederick Douglass and William Wells Brown, were often its featured speakers; and free Blacks who were members of the general public participated in the Society alongside their white counterparts. *THE AMERICAN CIVIL WAR AND RECONSTRUCTION* 39 (Jeff Wallenfeldt ed., 2010). It must also be noted, however, that both the abolitionist movement generally and the Society specifically had their own issues with internal racial and class hierarchies. See STEWART, *HOLY WARRIORS*, *supra* note 41, at 128–29 (noting that “black and white abolitionists constantly found themselves driven apart by the forces of race and class. Initial appreciation of the white immediatists for attacking colonization soon diminished among black abolitionists as they began to notice how underrepresented they were in the antislavery societies”).

publish their opinions of the constitutions, laws, and institutions of any and every State and nation under heaven; and we mean never to surrender the liberty of speech, of the press, and of conscience”⁸¹ Its Declaration further reprinted at length “all Federal and state constitutional guarantees of free speech and press.”⁸²

Noted abolitionist Wendell Phillips tied his demands for equal protection of abolitionist and Black speech directly to constitutional theory. Phillips argued that the original Framers specifically contemplated that the founding compromise with slavery would ultimately be resolved by the people with the benefit of unfettered free discussion. In an 1863 speech in New York, Phillips (citing, among other sources, Senator Seward’s *Irrepressible Conflict* speech⁸³) argued that the original Framers not only foresaw that the nation would ultimately have to resolve the tension between the existence of slavery and the ideals of freedom, but that the original Constitution initiated this conflict and provided the desired means of resolution. Phillips stated that “[the original Framers] knew that these two systems would fight. But they thought under [the Constitution] they could discuss it to a peaceful solution: ballots and parties, types [i.e., printing presses] and free speech, would make brother States and sister States . . . settle the conflict between two irreconcilable civilizations.”⁸⁴ Phillips further argued that by agreeing to a Constitution that both tolerated slavery and that contained the First Amendment’s guarantee of freedom of speech, the slave states and free states each agreed to meet upon the ideological battlefield on equal terms whereby the merits of slavery and freedom would be freely debated, without coercion or suppression:

[The slave states said,] “I agreed at the outset to abide the issue of free discussion and put my system on trial against [free states].” The North [then] flung down the gauntlet of the printing press and said, “I will prove that my system—freedom—is the best.” [When, however, the South saw that] slavery was sinking . . . she said: “I know I made the bargain, but I cannot abide it.”⁸⁵

Because the South could not abide losing the battle of ideas when fought on equal ground, Phillips argued, it had turned to the dual tools of suppressing abolitionist speech and protecting proslavery speech.⁸⁶ Thus, as discussed in

81. NYE, FETTERED FREEDOM, *supra* note 69, at 99.

82. *Id.*

83. William H. Seward, *The Irrepressible Conflict* (Oct. 25, 1858).

84. PHILLIPS, SPEECHES AND LECTURES, *supra* note 11, at 536.

85. *Id.* at 536–37.

86. Some Republican congressmen expressed similar constitutional theories. *See, e.g.*, CONG. GLOBE, 36th Cong., 2d Sess. 967 (1861) (speech of Rep. Daniel Somes) (arguing that the original Framers contemplated that protecting freedom of speech would provide the tool by which later

subpart II(B), as abolitionist sentiment entered a more aggressive phase in the 1830s, proslavery forces responded with increasingly draconian legal measures as well as private violence and coercion aimed at suppressing Black and abolitionist speech.

The congressional Republicans who drafted the Reconstruction Amendments and accompanying civil rights statutes viewed slavery as having corrupted and undermined the nation's founding ideals, including the freedom of speech. These Framers were intimately familiar with the suppression of the constitutional right of free speech as a tool to maintain slavery and racial subjugation. Senator Charles Sumner, for example, arguing in 1860 for the admission of Kansas to the Union as a free state, noted that preventing the spread of slavery to new territories would not only stop the expansion of enslavement but also prevent the concomitant erosion of freedom of speech wherever slavery existed. Sumner asserted that:

Looking now at [the places where slavery currently exists,] we shall find its spirit actively manifest in the suppression of all freedom of speech or of the press Nobody in the Slave States can speak or print against Slavery, except at the peril of life or liberty. . . . We condemn the Inquisition, which subject[ed] all within its influence to censorship and secret judgment; but this tyranny is repeated in American Slave-masters.⁸⁷

Sumner himself was a dramatic example of slavery's threat to freedom of speech: He had returned to the Senate just a year earlier, following an absence of several years due to being beaten nearly to death in the Senate chamber by Representative Preston Brooks in response to Sumner's 1856 "Crime Against Kansas" speech denouncing slavery and its allies.⁸⁸

generations could undo the founding compromise with slavery); *supra* note 67 and accompanying text.

87. CONG. GLOBE, 36th Cong., 1st Sess. 2597 (1860) (statement of Sen. Charles Sumner during the debates on the bill of admission of Kansas to the Union as a free state). Sumner supported his argument with numerous examples, including, *inter alia*: South Carolina's prosecution and jailing of a book agent seeking to sell a book about West Indian emancipation; the subsequent submission of that same agent to a prior restraint for approval to sell a different book in South Carolina, lest he again be prosecuted; numerous acts of violence by private individuals and organized mobs (i.e., the slave states' "Vigilance Committees") against actual or suspected abolitionists; and the public burning in Alabama of the writings of British abolitionist minister Charles Haddon Spurgeon, which a local newspaper article gleefully recounted, along with its threat that if Spurgeon "should ever show himself in these parts, we trust that a stout cord may speedily find its way around his eloquent throat." *Id.*

88. See INVESTIGATION OF THE ASSAULT ON SENATOR CHARLES SUMNER, S. DOC. NO. 191 (1st Sess. 1856), <https://www.senate.gov/artandhistory/history/common/image/SumnerInvestigation1856.htm> [<https://perma.cc/JT8E-QZBA>] (reporting that Sen. Brooks assaulted Sen. Sumner with a cane because he considered Sen. Sumner's speech to be "libellous of the State of South Carolina, and slanderous of his near kinsman"); see also WILLIAMJAMES HULL HOFFER, THE CANING OF CHARLES SUMNER: HONOR, IDEALISM, AND THE ORIGINS OF THE CIVIL

On the opposite end of the ideological spectrum, proslavery congressmen expressly sought to limit free speech as a means of preserving slavery. For example, in 1860, then-Senator (and later President of the Confederacy) Jefferson Davis put forward several resolutions on the subject of slavery. One such resolution aimed squarely at abolitionist speech, stating that “open or covert attacks [on slavery] with a view to its overthrow” were unjustifiable in light of the Constitution’s allowance of slavery.⁸⁹ Senator James Harlan, who would later become one of the Thirteenth Amendment’s primary architects, proposed the following freedom of speech amendment to Senator Davis’s resolution:

But free discussion of the morality and expediency of slavery should never be interfered with by the laws of any State, or of the United States; and the freedom of speech and of the press, on this and every other subject of domestic and national policy, should be maintained inviolate in all the States.⁹⁰

Although the amendment ultimately failed, it received the votes of every Republican senator who voted on it. As Michael Kent Curtis has noted, it is therefore “strong evidence that Republicans were calling for free speech on all issues of policy,”⁹¹ notwithstanding the fact that antislavery advocacy was tremendously controversial (and, indeed, was outlawed entirely in many southern states at the time).⁹²

WAR 1–4 (2010) (describing Sumner’s speech and Brooks’s retaliatory attack). In the introduction to his 1860 speech, Sumner referred obliquely to these earlier events:

Mr. President, undertaking now, after a silence of more than four years, to address the Senate on this important subject, I should suppress the emotions natural to such an occasion, if I did not declare on the threshold my gratitude to that Supreme Being, through whose benign care I am enabled, after much suffering and many changes, once again to resume my duties here and to speak for the cause which is so near my heart.

CONG. GLOBE, 36th Cong., 1st Sess. 2590.

89. See Curtis, *The 1859 Crisis*, *supra* note 14, at 1157 (quoting CONG. GLOBE, 36th Cong., 1st Sess. 2321 (1859–60)) (statement of Senator Davis of Mississippi).

90. *Id.* at 1157–58.

91. *Id.* at 1158.

92. In addition to being illegal throughout much of the South, abolitionist advocacy also was not particularly welcome in the North, at least not until the immediate pre-Civil War period. See NYE, FETTERED FREEDOM, *supra* note 69, at 97 (noting that “the growth of the abolitionist press [did not] find favor with many Northerners”); STEWART, HOLY WARRIORS, *supra* note 41, at 61 (noting that opposition to abolitionism from Northerners was predictable because “slavery had become by the 1830s interwoven with nearly all American institutions, [such that] Northern politicians, ministers, and businessmen all could find ample motives for opposing the immediatists. Race prejudice also continued to permeate white culture in the North”). But see TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 17, at 12 (noting that “[a]lthough the abolitionists were unpopular in the North, many Northerners were nevertheless outraged by Southern and federal efforts to silence these dissenters”). While some Northerners’ defense of free speech rights for Blacks and abolitionists arose from their agreement with the underlying cause, many others defended freedom of speech on principle or from self-interest even if they disagreed with the cause of immediate abolition. See *id.* at 13 (“Many Northerners, despite their racism, thus

B. The Slaves' Understanding of the First Amendment and Freedom of Speech

The meaning of a constitutional provision can be drawn from many sources. Although there is significant disagreement among judges and legal scholars regarding the proper methods to be used and sources to be considered in constitutional interpretation,⁹³ it is generally agreed that Framing-era sources are to be considered.⁹⁴ It is further generally agreed that relevant Framing-era sources include the text of the provision, its history and context, the stated intentions of its Framers, the expressed views of those who voted on the provision, and the understandings of the ratifying public regarding the provision.⁹⁵

The views and understandings of enslaved persons⁹⁶ would not at first blush appear to qualify for inclusion on this list of canonical sources of originally intended constitutional meaning of either the First Amendment as ratified in 1791 or of the Reconstruction Amendments ratified in 1865–1870. As a matter of formal logic, this would perhaps be sensible: we would not, for example, likely use the views of non-parties to a contract in determining

came to fear that an aristocratic ‘Slave Power’ enriched by human bondage threatened white civil liberties.”).

93. See generally BRANDON J. MURRILL, CONG. RESEARCH SERV., R45129, *Modes of Constitutional Interpretation* (2018) (discussing different interpretive approaches and the justifications for and arguments against each); Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 *HASTINGS L.J.* 707 (2011) (same).

94. For some, Framing-era sources are relevant; for others, they are dispositive. Most originalists, for example, believe that “the meaning of a provision of the Constitution was *fixed* at the time it was enacted . . . and . . . that fixed meaning ought to *constrain* constitutional decisionmakers today” Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 *GEO. L. REV.* 1, 3 (2018) [hereinafter *Barnette & Bernick, The Letter and the Spirit*]. Most non-originalists, by contrast, “deny that this backward-looking interpretive exercise is the alpha and omega of judicial method. Instead, advocates of the ‘living constitution’ assert that the Court legitimately supplements backward-looking interpretations with a self-conscious effort to express the moral aspirations of *today’s* Americans.” Ackerman, *Constitutional Politics/Constitutional Law*, *supra* note 7, at 526.

95. See, e.g., *Barnette & Bernick, The Letter and the Spirit*, *supra* note 94, at 3–4; see also *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (stating that “a critical tool of constitutional interpretation” is “the examination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification” (emphasis omitted)).

96. Of course, not all Blacks were in fact excluded from the ratification process for the Reconstruction Amendments (for that matter, not all Blacks were excluded from the ratification process for the original framing). As Justice Curtis noted in dissent in *Dred Scott*, free Blacks in several states were enfranchised and therefore could vote on the ratification of the original Constitution and Bill of Rights even though they were descended from African slaves. See *Dred Scott v. Sandford*, 60 U.S. 393, 576 (1857) (Curtis J., dissenting), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (“[I]n at least five of the states [free Blacks] had the power to act, and doubtless did, by their suffrages, upon the question of [the Constitution’s] adoption.”). Hence, the question discussed in this Part is not whether the expressed views of any African-Americans at the First and Second Founding should be considered legally relevant to constitutional meaning, but rather whether the expressed views of those who were enslaved should be.

what the contracting parties intended or understood the contract to mean. This formal logic, however, does not account for the many reasons why, as a matter of constitutional analysis, the views of the enslaved are highly relevant to construing the meaning of the freedom of speech guarantee as implemented through the Reconstruction Amendments. This subpart first explains those reasons and then explores in detail the views of enslaved persons regarding freedom of speech in the immediate antebellum and Reconstruction periods.

1. Why Enslaved Persons' Views Should Matter in Interpreting the Meaning of Freedom of Speech.—This Article argues that, in interpreting and applying the First Amendment, serious consideration should be given to enslaved persons' views regarding freedom of speech that were expressed contemporaneously with the Second Founding. This Article takes no position regarding the merits of originalism generally as a method of constitutional interpretation. Rather, the claim in this regard is more modest:

- a. The contemporaneous understandings and expressed views of those who drafted, debated, and ratified a constitutional provision are relevant to a proper understanding of that provision's meaning.
- b. Also relevant are the contemporaneous understandings and expressed views of those who were members of the general public at the time the provision was debated and ratified.
- c. Persons who were enslaved, although not part of the formal ratifying polity by virtue of their disenfranchisement, should be considered part of the relevant general public for interpretive purposes notwithstanding their disenfranchisement.
- d. This is especially true given that (i) the Reconstruction Amendments were most directly concerned with the rights and role of the newly freed slaves in American society, and (ii) those who lived under the yoke of slavery and suffered its deprivations (including, but not limited to, denial of freedom of speech, conscience, and assembly) have unique insights regarding those deprivations.

For these reasons, this section contends that we can—and therefore should—garner unique insights on the meaning of the constitutional amendments designed to eliminate and remedy those deprivations.

To be sure, originalist intentionalism⁹⁷ might reject the premise of this Article, to the extent that intentionalism limits the sources of constitutional

97. Originalist intentionalism has been defined as construing the meaning of a constitutional provision so as “to ascertain and give effect to the intent of its framers and the people who adopted

meaning to the subjective views of those who proposed, debated, and voted upon the relevant constitutional provision (which enslaved persons obviously did not do). Intentionalism, however, is not the only form of originalism. For example, the “original public meaning” strand of originalism is more concerned with what the constitutional provision would have been understood by the general public at the time to mean than solely with what its drafters intended for it to mean.⁹⁸ And while different from the various strands of originalism in rejecting the notion that constitutional meaning is ineluctably fixed in time, “popular constitutionalism” also contends that constitutional meaning should be determined with reference to sources beyond the elite legislators who wrote a constitutional provision, seeking to imbue constitutional meaning with the goals and understandings of the lay public.⁹⁹ In any method of constitutional interpretation that accounts for sources beyond the bare text and its drafters’ statements, surely the expressed views of the enslaved should be considered in the search for that meaning,¹⁰⁰ notwithstanding that enslaved persons were legally disenfranchised from participating in the ratification process.¹⁰¹ Moreover, I do not believe that

it.” Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980) (quoting *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting)); cf. Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937, 1941 (1995) [hereinafter McConnell, *The Originalist Justification for Brown*] (positing that “actual arguments made by opponents and proponents regarding the meaning” of a constitutional amendment provide “a more reliable guide to legal meaning than either popular opinion or actual practice”).

98. In rejecting drafter’s intent as a criterion for interpretation of the Constitution, Justice Antonin Scalia explains:

I will consult the writings of some men who happened to be delegates to the Constitutional Convention I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.

Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 38 (Amy Gutmann ed., 1997).

99. See, e.g., Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 959 (2004) (“In a system of popular constitutionalism, the role of the people is not confined to occasional acts of constitution making, but includes active and *ongoing* control over the interpretation and enforcement of constitutional law.” (emphasis added)).

100. See generally Binder, *Did the Slaves Author the Thirteenth Amendment?*, *supra* note 26 (arguing that our understanding of the Thirteenth Amendment changes when we recognize the slaves as its framers also).

101. Slaves were not the only persons legally disenfranchised from participating in the ratification process. In fact, a wide swath of the general public was excluded from participating directly in the Second Founding’s ratification process: i.e., the free *white* population in the defeated rebellious states also could not participate through their chosen representatives in the process of ratifying those Amendments because the state legislatures themselves were either non-functional or dismantled and replaced by loyalist governments. See John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 376 (2001) (stating that “[m]uch of the country was not represented in the Congress that proposed the Thirteenth and Fourteenth

originalism (whether intentionalism, original public meaning, or otherwise) is the only defensible approach to constitutional interpretation or the sole analytical tool for deriving constitutional meaning.

Most importantly, this Article seeks to ascertain and illuminate the views of the enslaved and the disenfranchised in order to make visible their role in both securing and defining their own freedom.¹⁰² As Guyora Binder has argued, “we may give new credit to slave testimony not [only] because of its privileged access to descriptive or normative truth, but simply to correct its previous suppression[;] [w]e might conclude that unless we recover slave experience and knit it into the nation’s constitutive heritage, we perpetuate an important aspect of slavery.”¹⁰³ The following section therefore explores the views of slaves and free Blacks regarding freedom of speech and the lack thereof during the slave regime; and, by extension, what free speech rights they would have expected the Second Founding to provide.

2. *Enslaved Persons’ Views and Experiences Regarding Freedom of Speech.*—This Article contends that evidence regarding slaves’ views on freedom of speech and their experiences with the many denials thereof have largely been overlooked in constitutional interpretation, and that examining it provides heretofore unrealized insights into the meaning of the post-Civil War Constitution’s guarantee of freedom of speech. This section presents such evidence, drawn from first-person slave narratives. To properly contextualize that evidence, a few brief methodological notes are in order.

First, this section does not purport to be a rigorous work of history: the Author is not an historian and therefore did not attempt to apply formal historiographic methods to this research.¹⁰⁴ Rather, this section presents this

Amendments” because Southern governments “were being made . . . through extraordinary processes . . . [thereby creating] doubts as to whether [Southern State representatives] were truly empowered to speak for their states in ratification”); McConnell, *The Originalist Justification for Brown*, *supra* note 97, at 1939 (noting that the Reconstruction Amendments were adopted at “a time when a political minority, armed with the prestige of victory in the Civil War and with military control over the political apparatus of the rebel states, imposed constitutional change on the Nation as the price of reunion, with little regard for popular opinion”); Binder, *Did the Slaves Author the Thirteenth Amendment?*, *supra* note 26, at 484 (explaining that “[t]he Thirteenth Amendment could not have passed without the support of at least two of [the] Southern states [excluded from Congress], and actually relied on passage by eight [such states, which were also] under federal military occupation at the time of their ratification”). And yet, original public meaning originalists would likely consider the expressed views of the general public in the conquered states as a piece of evidence of the original public meaning. So too should original public meaning methodology—or any methodology not cabined to the expressed intentions of the provision’s drafters—consider the expressed views of the enslaved, given that they were similarly formally disenfranchised (albeit for very different reasons) from participating in ratification.

102. Binder, *Did the Slaves Author the Thirteenth Amendment?*, *supra* note 26, at 483.

103. *Id.*

104. Moreover, there are limits to the utility of history in legal analysis in any event. *See, e.g.*, Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and*

historical evidence as a source to be considered in the legal interpretation of the free speech guarantee as it now exists following the Second Founding. Second, this Article recognizes that enslaved persons were not monolithic, either in general or with regard to their views on constitutional rights and the abridgments thereof.¹⁰⁵ The impressions of slaves recounted in this section therefore cannot be taken as representative of all who were enslaved, nor of all Blacks in America during the pre-Civil War and immediate post-Civil War period. Third, this Article recognizes that the slave narratives and accounts discussed below are to some extent likely biased toward the views of the relative “elite” among slaves and former slaves, i.e., those who could read and write slave narratives themselves or whose accounts were thought by white abolitionists or researchers to be sufficiently important to document them for posterity. Last, this Article is alert to the risks of “presentism,” that is, “the tendency to look at the past through contemporary eyes.”¹⁰⁶ The legal, moral, and popular culture of the mid-1800s differed significantly from our own, and attitudinal biases from each era about the meaning and purposes of freedom of speech call for appropriate modesty in such “cross-cultural” translation.¹⁰⁷ For all of these reasons, this section purposefully resists drawing sweeping conclusions about what “the slaves” believed the constitutional right of freedom of speech should entail under the post-Civil War Constitution. Rather, this section provides evidence of what *some* slaves

Legal Scholarship, 67 U. CHI. L. REV. 573, 594 (2000). Reflecting on history’s theoretical limits in legal analysis, Professor Posner contends:

History in the narrow sense of what happened does not reveal meaning. It might tell us what certain words in the U.S. Constitution meant in the 1780s, or what the provenance of certain constitutional provisions was, or what someone said about their meaning at the time; but . . . [t]he sorts of claims that judges and law professors like to make about history are simply not verifiable, because they depend not on facts but on disagreements about the interpretive process itself.

Id. (footnote omitted).

105. Cf. ANDREW WARD, *THE SLAVES’ WAR* 30 (2008) [hereinafter WARD, *THE SLAVES’ WAR*]. On slaves’ differing views on freedom, Ward observes:

[D]ivergent hopes and fears [regarding the Civil War and the prospect of freedom] were to be expected of people who came from a wide range of backgrounds. To the white observation that blacks “seemed divided in sentiment,” James Thomas[, a slave,] pointed out that “Negroes were not all alike [in their circumstances and places of birth] . . . [s]o it is not to be wondered that they should have different ideas,” even about freedom and war and slavery itself.

Id.

106. V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 992 n.191 (2009).

107. See Binder, *Did the Slaves Author the Thirteenth Amendment?*, *supra* note 26, at 502 (cautioning that “exponents of slave tradition must apply it today in a different society, with different valences of power, to problems then unforeseen”). Mindful of these cautions, the evidence presented in this Article is therefore best considered as “evidence” in the legal sense of that term, i.e., as information that is probative of a factual matter. To wit: what did the enslaved persons whose recorded accounts discuss the issue believe that the freedom of speech should entail?

believed regarding *some* aspects of freedom of speech as it had been denied to them under the First Founding's Constitution; what they believed that freedom should entail under the Second Founding's Constitution; and why freedom of speech mattered to them.

Antislavery activist David Walker published *Walker's Appeal* in 1829.¹⁰⁸ Walker's father was enslaved, but his mother was not. Walker was therefore born free,¹⁰⁹ but with an intimate understanding of the slave system. In *Walker's Appeal*, Walker calculates the cost likely to be exacted for his outspokenness in favor of abolition and Black rights and explains why he took the risk of speaking out against the slave system notwithstanding the grave dangers that doing so entailed:

I am fully aware, in making this appeal to my much afflicted and suffering brethren, that I [will] . . . be assailed by those whose greatest earthly desires are, to keep us in abject ignorance and wretchedness, and who are of the firm conviction that Heaven has designed us and our children to be slaves and beasts of burden to them and their children. . . . [I] expect to be held up to the public as an ignorant, impudent and restless disturber of the public peace, by such avaricious creatures, as well as a mover of insubordination—and perhaps put in prison or to death, for giving a superficial exposition of our miseries, and exposing tyrants. . . . [M]y motive in writing . . . [is] to awaken in the breasts of my afflicted, degraded and slumbering brethren[] a spirit of inquiry and investigation respecting our miseries and wretchedness in this Republican Land of Liberty.¹¹⁰

Later in his *Appeal*, Walker recites some of the many cruelties of slavery: brandings, physical torture, agonizing working conditions, denial of freedom of religion, and the forced expatriation movement, among others. What is striking for purposes of this Article is that *Walker's Appeal* finds the suppression of slaves' freedom of thought and access to information to be sufficiently cruel to include it prominently in the litany of injustice he provides:

I will give here a very imperfect list of the cruelties inflicted on us . . . If they find us with a book of any description in our hand, they will beat us nearly to death—they are so afraid we will learn to read, and enlighten our dark and benighted minds. . . . They keep us in the most

108. DAVID WALKER, WALKER'S APPEAL IN FOUR ARTICLES; TOGETHER WITH A PREAMBLE, TO THE COLOURED CITIZENS OF THE WORLD, BUT IN PARTICULAR, AND VERY EXPRESSLY, TO THOSE OF THE UNITED STATES OF AMERICA, WRITTEN IN BOSTON, STATE OF MASSACHUSETTS, SEPTEMBER 28, 1829 (3d ed. 1830) [hereinafter WALKER'S APPEAL], <https://docsouth.unc.edu/nc/walker/walker.html> [<https://perma.cc/H3XY-67YX>].

109. The legal doctrine of *partus sequitur ventrem* ("the child inherits the condition of the mother") meant that slave status in the United States followed matrilineal descent. STAMPP, *supra* note 22, at 193.

110. WALKER'S APPEAL, *supra* note 108, at 4–5.

death-like ignorance by keeping us from all source[s] of information.”¹¹¹

Walker’s Appeal is evidence of sentiment among the enslaved and others with first-hand knowledge of slavery that the denial of freedom of expression, freedom of thought, and of access to information were perceived as key aspects of the slave system.

Frederick Douglass—the famed abolitionist and himself a former slave—similarly characterized the denial of slaves’ individual autonomy in matters relating to freedom of speech as a key aspect of the slave system. In an 1845 speech, Douglass stated that the slave

had no power to exercise his will—his master decided for him not only what he should eat and what he should drink, what he should wear, *when and to whom he should speak*, how much he should work, how much and by whom he is to be punished—he not only decided all these things, *but [also] what is morally right and wrong*.¹¹²

These and other contemporaneous works are also notable in that they did not limit their condemnation of such abridgments of free speech to those carried out by the government or with the government’s imprimatur; they equally feared and condemned such suppression both by the slavemaster and by terrorist mobs.¹¹³

In sum, individual slaves and the organized abolitionist movement gave great thought to and placed much weight upon the right to freedom of speech. The subsections that follow explore enslaved persons’ views regarding free speech, organizing them by themes in their accounts that overlap with several

111. *Id.* at 73–74; see also HENRY CLAY BRUCE, *THE NEW MAN: TWENTY-NINE YEARS A SLAVE, TWENTY-NINE YEARS A FREE MAN* 108 (1895) [hereinafter BRUCE, *THE NEW MAN*], <https://docsouth.unc.edu/fpn/bruce/bruce.html> [<https://perma.cc/L8JN-88VD>] (“I was engaged to marry a girl belonging to a man named Allen Farmer, who was opposed to it on the ground, as I was afterwards informed, that he did not want a Negro to visit his farm who could read, because [a literate slave] would spoil his slaves.”).

112. Frederick Douglass, *Slavery and America’s Bastard Republicanism: An Address Delivered in Limerick, Ireland, on 10 November 1845*, in *THE FREDERICK DOUGLASS SPEECHES, 1841–1846*, cited in Seth Davis, *The Thirteenth Amendment and Self-Determination*, 104 *CORNELL L. REV. ONLINE* 88, 103 n.89 (2019) (emphases added). Many Black abolitionists similarly viewed the denial of freedom of speech as an inherent aspect of a state of slavery, and ideological splits and class-based hierarchies within the abolitionist movement sometimes even led them to express similar sentiments to and about their white abolitionist peers. For example, Henry Highland Garnet (a former slave and radical abolitionist leader), “once exploded at a patronizing white abolitionist who criticized his espousals of armed resistance and black self-assertion in politics: ‘It astonish[es] me to think that you should desire to sink me again *to the condition of a slave* by forcing me to think as you do.’” STEWART, *HOLY WARRIORS*, *supra* note 41, at 127 (emphasis added).

113. See, e.g., PHILLIPS, *SPEECHES AND LECTURES*, *supra* note 11, at 534 (characterizing the suppression of abolitionist speech in the South as akin to “the days of Queen Mary and the Inquisition, [which] cannot tolerate free speech, and punishes it with the stake”); see also Curtis, *The 1837 Killing of Elijah Lovejoy*, *supra* note 72, at 1110–11 (recounting the mob murder of abolitionist publisher Elijah Lovejoy).

now-familiar First Amendment doctrines: chilling effects, the state action doctrine, compelled speech, viewpoint discrimination, and incitement. In some cases, the views of enslaved persons on these issues mirror the traditional jurisprudential understanding of these aspects of freedom of speech; in others, they differ significantly in substance or perspective. In all events, whether they align with, contradict, or complicate settled doctrinal understandings, these accounts provide valuable insights into how enslaved persons regarded their lack of freedom of speech under the original Constitution of Enslavement and what they expected their rights would be in this respect under the new Constitution of Freedom.

a. The “Chilling Effect”: Lessons from the Enslaved for the State Action Doctrine Under the First Amendment.—First Amendment doctrine recognizes that freedom of speech is fragile. Even absent or prior to actual punishment, the threat or fear of punishment may lead to self-censorship. First Amendment doctrine is therefore greatly concerned with the potential chilling effect of government action on free speech rights. The Supreme Court’s overbreadth doctrine, for example, “has the redeeming virtue of attempting to avoid the chilling of protected expression”¹¹⁴ since “persons whose expression is constitutionally protected may well refrain from exercising their right for fear of criminal sanctions provided by a[n] [overbroad] statute.”¹¹⁵ Vagueness doctrine is similarly concerned with the risk that statutes that are ambiguous with regard to what speech is proscribed will deter constitutionally protected expression. The Court has noted that “[First Amendment] freedoms are delicate and vulnerable The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”¹¹⁶

First Amendment constraints upon common law defamation actions also arise largely from concerns about self-censorship. *New York Times v. Sullivan*¹¹⁷ held that public officials bringing defamation actions arising from statements regarding their official conduct must prove actual malice.¹¹⁸ In justifying its holding, the Court reasoned that absent such a rule,

would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of

114. *R.A.V. v. St. Paul*, 505 U.S. 377, 402 (1992) (White, J., concurring in judgment).

115. *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 38 (1999) (quoting *Gooding v. Wilson*, 405 U.S. 518, 520–21 (1972)).

116. *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963) (citations omitted).

117. 376 U.S. 254 (1964).

118. *Id.* at 283.

the expense of having to do so. They tend to make only statements which “steer far wider of the unlawful zone.” The rule thus dampens the vigor and limits the variety of public debate.¹¹⁹

For these reasons, free speech doctrine is highly attuned to possible chilling effects on speech; pursuant to the state action doctrine, however, it only takes cognizance of such concerns when they arise from governmental action. The First Amendment’s text, of course, references only governmental action.¹²⁰ Moreover, the Supreme Court has held that the Fourteenth Amendment’s Due Process Clause, through which equivalent free speech guarantees are applicable to the states, is also limited to the protection of those guarantees against governmental infringement.¹²¹ The formulistic state action doctrine, however, inadequately accounts for the lived reality, as noted in the slave narratives discussed below, that vulnerable persons’ free speech rights can be chilled as effectively by private violence, threats, and coercion as by government action. A free speech doctrine that takes account of the views of the enslaved would therefore call into question the Court’s bright-line state action doctrine.¹²²

For example, in his first-person slave narrative,¹²³ Henry Clay Bruce recounted a relevant incident during his time in slavery. Bruce had been given a horse to pick up supplies for the plantation and had been cautioned not to ride the horse too hard. On his way back, he encountered a white laborer named Sam Hawkins. Bruce noted that poor whites such as Hawkins often sought to ingratiate themselves with the southern slaveholding aristocracy: “to please their masters[—]for such they were to these poor whites almost as much as to [Black] slaves[—]they told everything they had seen the slaves

119. *Id.* at 279 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

120. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” (emphasis added)).

121. *See* *United States v. Stanley (The Civil Rights Cases)*, 109 U.S. 3, 11 (1883) (“Individual invasion of individual rights is not the subject-matter of the [A]mendment . . . Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges . . .”).

122. There are, of course, many other reasons to be skeptical that the Supreme Court’s rigid state action doctrine is substantively correct as a matter of constitutional interpretation. *See, e.g.*, *Deshaney v. Winnebago Cty. Dept. of Social Servs.*, 489 U.S. 189, 212 (1989) (Blackmun, J., dissenting) (stating that “a sharp and rigid line between [state] action and inaction . . . has no place in the interpretation of the broad and stirring Clauses of the Fourteenth Amendment. Indeed, I submit that these Clauses were designed, at least in part, to undo the formalistic legal reasoning that infected antebellum jurisprudence . . .”); Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1774–85 (2010) (summarizing the primary scholarly criticisms of the state action doctrine).

123. BRUCE, *THE NEW MAN*, *supra* note 111.

do” and often fabricated accounts of wrongdoing by the slaves.¹²⁴ Bruce continued:

[Hawkins] was invited to supper, and while at the table told my master that I had the mare in a gallop when he met me. . . .

After supper that evening my master sent for me. When I came, he had a switch in his hand and proceeded to explain why he was going to whip me. I pleaded innocence and . . . disputed the charge [regarding the horse]. At this[,] he then became angry and whipped me. When he stopped[,] he said it was not so much for the fast riding that he had punished me as it was for disputing a white man’s word. Fool that I was then, for I would not have received any more whipping at that time, but knowing that I was not guilty[,] I said so again and he immediately flogged me again. When he stopped, he asked me in a loud tone of voice, “Will you have the impudence to dispute a white man’s word again?” My answer was “No sir.”

Other ex-slaves can relate many such cases as the Hawkins’ case.¹²⁵

Many slaves learned from such instances (that they either had experienced themselves or knew of through others) to refrain from speaking their minds or to be silent in the face of whites’ accusations. For example, in his first-person slave narrative titled *Fifty Years in Chains*,¹²⁶ Charles Ball recounts the discovery of a murder on a neighboring plantation. Ball noted his thoughts as white slaveowners began questioning slaves in the area about the murder: “From the moment I heard of the murder, I had no doubt of [the perpetrator]. [But] [s]ilence is a great virtue when it is dangerous to speak; and I had long since determined never to advance opinions, uncalled for, in controversies between the white people and the slaves.”¹²⁷

Those slaves who did not self-censor had no effective protections against retaliation. Samuel Ward provided one dramatic example in his slave

124. *Id.* at 28–29. Bruce later notes poor whites’ role in enforcing the slave regime in other ways: “Patrol duty [i.e., looking for slaves who were away from their masters’ premises without a pass] was always performed by the poor whites, who took great pride in the whipping of a slave, just as they do now in lynching a Negro.” *Id.* at 96. It should be noted that many portions of THE NEW MAN concerning white immigrant laborers reflect Bruce’s prejudices and stereotypes regarding those groups.

125. *Id.* at 29–30; *see also id.* at 114 (stating, in describing his dealings with whites in the North after his escape from slavery, that “I had been reared where it was a crime for me to dispute a white man’s word, and that idea was so well and thoroughly grounded in me that it took time and great effort to eradicate it”).

126. CHARLES BALL, FIFTY YEARS IN CHAINS; OR, THE LIFE OF AN AMERICAN SLAVE 290–91 (1859) [hereinafter BALL, FIFTY YEARS IN CHAINS], <https://docsouth.unc.edu/fpn/ball/ball.html> [<https://perma.cc/6GRU-SM78>].

127. *Id.* at 291. Ultimately, Ball was not able to remain silent about the incident: He was eventually compelled to testify before a justice of the peace. *Id.* at 291–92.

narrative.¹²⁸ Ward recounted how, after his father had been beaten by their owner, his mother Anne “put forth her sentiments, in pretty strong language” objecting to her husband’s treatment.¹²⁹ The owner considered beating her as well, believing that such “[i]nsolence in a [slave] could not be endured [since tolerating it] would breed more and greater mischief of a like kind.”¹³⁰ This was ultimately deemed unwise in light of Anne’s physical stature, “strength of will [and] mind,” and the fact that she “gave most unmistakable evidences of [putting up] ‘rather tall resistance,’ in case of an attack [upon her].”¹³¹ Hence, to punish her, the owner decided to separate her from her family by selling her in retaliation for her speech. According to Ward, the only thing that temporarily prevented the sale of his mother was his own bout of sickness at the time as a young child: not out of humanitarian motives, but from a “business point of view,” because the slavemaster did not want to be deprived of the potentially valuable commodity of the slave child given that he likely would not thrive if his family were separated.¹³² Once young Ward recovered, however, the plan to sell Anne in retaliation for her outspokenness resumed—at which point, the family fled the plantation together.¹³³

Enslaved persons’ knowledge that disputing a white person’s word or otherwise appearing to be “insolent” could expose them to potentially deadly danger was well grounded in fact, given that enslavers and their allies were quite clear on the point. Typical of the sentiment was Landon Carter, a slaveowner from an aristocratic colonial American family, who wrote in his published diary: “Do not bring your negro[] to contradict me! A negro[] and a passionate woman are equal as to truth or falsehood; for neither thinks of what they say.”¹³⁴ Similarly, in his slave narrative,¹³⁵ James Pennington recounts as a child watching a dispute between his father and their owner arising from the owner’s ranting about the slaves’ seeming lack of productivity. Pennington recalled the incident:

128. SAMUEL RINGGOLD WARD, *AUTOBIOGRAPHY OF A FUGITIVE NEGRO: HIS ANTI-SLAVERY LABOURS IN THE UNITED STATES, CANADA, & ENGLAND* (1855) [hereinafter WARD, *AUTOBIOGRAPHY OF A FUGITIVE NEGRO*], <https://docsouth.unc.edu/neh/wards/ward.html> [https://perma.cc/S3KW-32FG].

129. *Id.* at 15.

130. *Id.*

131. *Id.* at 16–17.

132. *Id.* at 17–19.

133. *Id.* at 19–23.

134. Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, 68 CHI.-KENT L. REV. 1209, 1214 (1993) [hereinafter Morris, *Slaves and the Rules of Evidence*] (citing THE DIARY OF COLONEL LANDON CARTER OF SABINE HALL 1752–1778, at 1107 (Jack P. Greene ed., 1965)).

135. JAMES W. C. PENNINGTON, *THE FUGITIVE BLACKSMITH; OR, EVENTS IN THE HISTORY OF JAMES W. C. PENNINGTON, PASTOR OF A PRESBYTERIAN CHURCH, NEW YORK, FORMERLY A SLAVE IN THE STATE OF MARYLAND, UNITED STATES* (2d ed. 1849), <https://docsouth.unc.edu/neh/penning49/penning49.html> [https://perma.cc/RV7A-9J4Q].

[The owner said,] “I shall have to sell some of you; and then the rest will have enough to do”

All this was said in an angry, threatening, and exceedingly insulting tone. My father [replied,] “If I am one too many, sir, give me a chance to get a purchaser, and I am willing to be sold when it may suit you.”

[The owner then] drew forth the cowhide from under his arm, fell upon [my father] with most savage cruelty, and inflicted fifteen or twenty severe stripes with all his strength, over his shoulders and the small of his back. As he raised himself upon his toes, and gave the last stripe, he said, “By the [Lord,] I will make you know that *I am master of your tongue as well as of your time!*”¹³⁶

Enslaved persons’ experiences in this regard were not monolithic, of course. For example, Jourden Banks described in his slave narrative¹³⁷ an incident wherein he and his father argued at length with their owner about the recent sale of Banks’s sister Charlotte. Both Jourden and his father asked the owner not to sell any other members of their family or, if other family members were to be sold, that they be sold instead. To the father, the owner replied, “Well, if you will not be pacified, you can talk as you please, and I will do as I like [i.e., sell further family members].”¹³⁸ Jourden reiterated the same sentiments as his father, and further threatened to run away if such sales continued. The owner became enraged, but “he did not seem disposed to pursue the conversation any further [and] with a significant shake of the head[,] he walked away.”¹³⁹ Recalling the incident, Jourden noted that:

[In] this protracted conversation between my father, master, and myself[,] [e]ach party expressed himself with freedom and boldness[,] and [though none were satisfied, we parted] yet better acquainted than before. Master[] now knew that he had a man and his son who would speak of their wrongs, and we knew that we had nothing better to look for at his hands.¹⁴⁰

Although no immediate retaliation was inflicted upon the Banks family for their outspokenness in this instance, such appears to be the exception rather than the rule regarding similar incidents recounted in slave narratives. In any event, the ever-present threat of such retaliation still remained; and chilling effect doctrine, as explained above, is as concerned that the threat of punishment may lead to self-censorship as with the actuality of punishment for speech. Moreover, subsequent events recounted in Banks’s narrative leave the reader (and Banks) far less sanguine that the Bankses’ “freedom

136. *Id.* at 6–7 (alteration in original) (emphasis added).

137. THE LIFE OF J.H. BANKS, *supra* note 9. As it happens, James Pennington, whose slave narrative is discussed earlier in this section, also edited and published Banks’s slave narrative.

138. *Id.* at 21.

139. *Id.* at 23–24.

140. *Id.* at 24.

and boldness” in speaking actually went unpunished. At least in Banks’s view, retaliatory punishment for his and his father’s outspokenness did in fact occur when their owner later sold yet another of Banks’s sisters. Banks subsequently noted that:

My dear sister Martha, and two other young female friends[,] were taken away from us; . . . not by the officer who punishes for crime, . . . but by the very man who told my father eight months prior that he would do as he liked, and sell to the best advantage. This was keeping his promise with a vengeance; so we felt it to be at the time, and so I feel at this moment.¹⁴¹

Numerous slave accounts reinforce the notion that for a slave, the chilling effects upon their speech need not have arisen from government action in order for self-censorship to have occurred.¹⁴² Slaves’ accounts indicate that they believed that whites’ violence and threats, inflicted with legal impunity, were at least as effective in chilling their speech as were laws and government action formally punishing it. While this evidence may not necessarily call for a wholesale reconsideration of the state action doctrine, it does warrant reexamining whether the current bright-line distinction between government action and private action is justified in the free speech context from a perspective that takes account of the views of enslaved persons.

As a leading study of Black abolitionism noted, legal bright-lines and fixed abstractions regarding constitutional rights were largely held by whites (including white abolitionists) as a result of worldviews shaped by their lived experiences, experiences that Blacks, whether slave or free, generally did not share:

[For Blacks and whites in the abolitionist movement,] slavery and freedom had very different meanings. Whites . . . [generally] understood slavery and freedom as polar absolutes. Individual liberty, enshrined in the Declaration of Independence and fought for in the American Revolution, was their goodly heritage and present reality. At the other extreme stood slavery, an absolute evil, the negation of freedom

Blacks, however, defined the term more complexly. Both experience and history told them that slavery and freedom were not mutually exclusive They were rather terminal points on a continuous spectrum. . . .

141. *Id.* at 26.

142. *See, e.g.*, TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 17, at 194 (noting, based upon enslaved persons’ accounts, that “[t]he [slave] community’s survival depended on a code of silence and secrecy as a way to reduce the unpredictability of whites’ interference with blacks’ lives”).

. . . Between them lay a vast and variegated spectrum. . . . [T]he alternative was . . . between more or less freedom and more or less slavery.¹⁴³

At minimum, then, it is reasonable to conclude that from a slave's perspective, government action was not seen as the *sine qua non* for their freedom of speech to be threatened. Rather, it appears that enslaved persons, given their subordinated position and the lack of legal protection for their speech, were led to self-censor due to the ever-present threat of physical or economic retaliation by empowered white mobs and individuals who could inflict such punishments with impunity.

b. Compelled Speech.—As described above, one lesson that enslaved persons drew from their lived experience was that their speech could subject them to great danger. Silence, however, could be equally dangerous for slaves when whites demanded that they speak. Enslaved persons' accounts in this regard can provide insights into the scope and applicability of the First Amendment compelled speech doctrine.

The Supreme Court's cases consider compelled speech to be especially offensive to First Amendment values. As Justice Jackson famously wrote in *West Virginia State Board of Education v. Barnette*,¹⁴⁴ “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹⁴⁵ The Court has held “time and again that freedom of speech ‘includes both the right to speak freely and the right to refrain from speaking at all.’”¹⁴⁶ Indeed, the Court has suggested—albeit never squarely held—that compelled speech may be subject to an even higher standard of First Amendment scrutiny than the strict scrutiny applicable to content-based restrictions of speech.¹⁴⁷

The same incident in Charles Ball's slave narrative discussed above also shows a dramatic instance of compelled speech. In the case of the murder described in Ball's narrative, the two alleged perpetrators as well as a slave named Billy “were all tried before some gentlemen of the neighborhood.”¹⁴⁸ Billy, according to Ball, “against whom there was no evidence, nor cause of

143. JANE H. PEASE & WILLIAM H. PEASE, *THEY WHO WOULD BE FREE: BLACKS' SEARCH FOR FREEDOM, 1830-1861*, at 3–4 (Univ. of Ill. Press Illini Books ed. 1990) (1974).

144. 319 U.S. 624 (1943).

145. *Id.* at 642.

146. *Janus v. Am. Fed. of State, Cty., & Mun. Emps., Council*, 138 S. Ct. 2448, 2463 (2018).

147. *See id.* at 2464 (“Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, [*Barnette*] said that a law commanding ‘involuntary affirmation’ of objected-to beliefs would require ‘even more immediate and urgent grounds’ than a law demanding silence.”)

148. BALL, *FIFTY YEARS IN CHAINS*, *supra* note 126, at 294.

suspicion, except that he was in the kitchen at the time of the murder,” was found by the vigilante “jury” to have had no involvement with the murder.¹⁴⁹ Nonetheless, Ball continued, “a consultation was held among the gentlemen as to the future disposition of Billy, who, having been in the house when his master was murdered, and not having given immediate information of the fact, was held to be guilty of concealing the death, and was accordingly sentenced to receive five hundred lashes.”¹⁵⁰ Ball describes Billy’s extrajudicial torture as the worst among the many he had seen inflicted upon any enslaved person.¹⁵¹ Ball eloquently closed this portion of his narrative as follows:

[I]t was a very arbitrary exercise of power to whip a man until he was insensible[] because he did not prevent a murder which was committed without his knowledge . . . [or] because he was so weak or timorous as to refrain from the disclosure of the crime the moment it came to his knowledge.¹⁵²

In his slave narrative, Henry Bibb also recounted the existential necessity of speaking whenever and however his white interlocutors preferred rather than speaking truthfully or remaining silent. Bibb, whenever questioned by whites during his early attempts to escape from slavery, stated that

the only weapon of self defence [sic] that I could use successfully, was that of deception. It is useless for a poor helpless slave, to resist a white man in a slaveholding State. Public opinion and the law is against him; and resistance in many cases is death to the slave, [because] the law declares that he shall submit or die.¹⁵³

149. *Id.* at 293.

150. *Id.* at 295.

151. Ball notes that afterwards, “[t]he gentlemen who had done the whipping [were] joined by their friends, then came under [a] tree and drank punch until their dinner was made ready . . .” *Id.* at 296.

152. *Id.* at 298.

153. HENRY BIBB, NARRATIVE OF THE LIFE AND ADVENTURES OF HENRY BIBB, AN AMERICAN SLAVE, WRITTEN BY HIMSELF 17 (1849), <https://docsouth.unc.edu/neh/bibb/bibb.html> [<https://perma.cc/5XTL-UDHG>]. Antebellum jurists wrestled in particular with the issue of compelled speech as it related to confessions by slaves accused of crimes. Although sounding more in Fifth Amendment self-incrimination terms than in First Amendment terms, several cases and legal treatises suggested that courts should be very cautious regarding the admissibility of slave confessions in criminal trials when made to their owners or to whites under circumstances of express threat or implied coercion, given concerns about voluntariness of such confessions. See generally Morris, *Slaves and the Rules of Evidence*, *supra* note 134, at 1230–38 (analyzing several Southern antebellum court decisions regarding the admissibility of slave confessions). Some (even including proslavery scholars and judges) went so far as to argue that slaves’ confessions made to their owners should never be admissible because they could never be wholly voluntary due to the complete dominion of the owner over the enslaved. See *id.* at 1231–32 (comparing the opinions of select antebellum courts regarding the inadmissibility of slave confessions).

In addition to being forced to speak factual information,¹⁵⁴ slaves were also subject to compelled speech by being forced to utter untruthful messages or the message preferred by whites. For example, in his slave narrative, Charles Ball recounted being asked by a person interested in buying him whether he would like to have him as his master:

In my heart I detested him; but a slave is often afraid to speak the truth, and divulge all he feels; so with myself in this instance, as it was doubtful whether I might not fall into his hands, and be subject to the violence of his temper, I told him that if he was a good master, as every gentleman ought to be, I [w]ould be willing to live with him.¹⁵⁵

In a similar vein, during the early days of the Civil War, a white preacher cautioned a congregation of slaves in Texas against hoping for a Union victory—and therefore for their freedom—asking “[d]o you want to keep your homes [on the plantations] where you all get to eat, and raise your children[?] If you want to keep your homes, you’d better pray for the South to win. All that want to pray for the South to win,’ he commanded, ‘raise your hands.’”¹⁵⁶ A slave named John Adams recalled that “[w]e all raised our hands because we were scared not to . . . but we sure didn’t want the South to win.”¹⁵⁷

James Watkins’s slave narrative¹⁵⁸ also described coerced speech as being a key incident of the master-slave relation. Watkins commented:

The slave is trained to answer his master[] to suit his [(the master’s)] purposes. [For example:] A gentleman is brought by the master to see the slaves . . . The gentleman asks, “Would you like to be free?” “No, sir-r-r,” is the answer. He asks you, “Does your master ever flog you?” “Yes, sir-r-r, when I deserve it,” is the reply. But is this the truth? No. They dare not answer any other way, as they know that if they did, as soon as ever the gentleman was gone, they would be unmercifully flogged for daring to tell the truth.¹⁵⁹

154. While the most familiar cases of compelled speech involve requirements to profess a message contrary to one’s beliefs, see *Barnette*, 319 U.S. 624 (involving mandatory flag salutes and the Pledge of Allegiance), the Court has held that being compelled to convey purely factual information also offends the First Amendment, at least in some circumstances. See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995) (stating that “an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment”).

155. BALL, FIFTY YEARS IN CHAINS, *supra* note 126, at 70.

156. WARD, THE SLAVES’ WAR, *supra* note 105, at 25.

157. *Id.*

158. JAMES WATKINS, STRUGGLES FOR FREEDOM; OR THE LIFE OF JAMES WATKINS, FORMERLY A SLAVE IN MARYLAND, U. S.; IN WHICH IS DETAILED A GRAPHIC ACCOUNT OF HIS EXTRAORDINARY ESCAPE FROM SLAVERY, NOTICES OF THE FUGITIVE SLAVE LAW, THE SENTIMENTS OF AMERICAN DIVINES ON THE SUBJECT OF SLAVERY (1860), <https://docsouth.unc.edu/neh/watkins/watkins.html> [<https://perma.cc/69CR-5ETN>].

159. *Id.* at 13.

The evidence of enslaved persons' views discussed in this subsection largely aligns with classic compelled speech doctrine, with two notable exceptions. The first (as discussed above regarding chilling effects and again below regarding other First Amendment doctrines) is that enslaved persons did not seem to draw a sharp line between governmental versus private compulsion of their speech: both were deemed equally offensive to their expressive dignity and autonomy. The second is that the Supreme Court's more recent compelled speech cases diverge substantially from what the slaves likely would have understood as "compulsion" of speech. Judging from the available evidence, enslaved persons would have recognized a case like *Barnette*¹⁶⁰ as involving compelled speech. Being forced upon pain of punishment to profess allegiance to an idea in which one may not believe is quite similar conceptually to the incidents recounted in Charles Ball's and John Adams's slave narratives discussed above. They likely would not, however, have recognized a case like *Janus*¹⁶¹ as involving the same issue.

Janus held that mandatory union fees imposed upon public employees, even when limited to only the amount needed for providing services directly inuring to the employees' benefit, violated the First Amendment because such fees amounted to compelled speech and compelled association. The Supreme Court reasoned that "the right to refrain from speaking"¹⁶² includes "[t]he right to eschew association for expressive purposes,"¹⁶³ and therefore that "[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns"¹⁶⁴ to those in cases like *Barnette*.

An interpretation of freedom of speech that takes the slaves' views into account calls into question the last step in the *Janus* syllogism. There is no evidence in the slave narratives reviewed for this Article that enslaved persons were subject to compelled financial subsidies of others' speech;¹⁶⁵ but even if there were, it is unlikely from the available evidence that they would have considered it to be equivalent in kind to the forms of speech

160. 319 U.S. 624 (1943).

161. 138 S. Ct. 2448 (2018).

162. *Id.* at 2463.

163. *Id.*

164. *Id.* at 2464.

165. Given that persons who were enslaved under American law did not receive wages for their labor, it is unsurprising that the precise issue in *Janus* did not arise for the slaves. My point here, however, is not that that precise issue is not discussed in slave narratives; rather, it is that there is no discussion of any equivalent issue. Slaves' property was certainly routinely seized without their consent. See generally TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 17 (noting that seizures of slaves' property were routine and often state-initiated or state-sanctioned). One would therefore suppose, for example, that although slaves did not receive wages and generally could not legally own property, there would be discussion in slave narratives or scholarly research of equivalent issues, e.g., instances where a portion of slaves' belongings were seized and sold in order to support other persons' speech. My research revealed no such discussions in the slave narratives reviewed for this Article.

coercion about which they did express dismay.¹⁶⁶ The slave narratives discussed in this subsection describe speech coercion via threats, violence, and pressure of a kind sufficient to override the individual's expressive autonomy. To be sure, this subsection does not contend that expansions of First Amendment rights beyond what they would have been understood to entail at the time of the Second (or First) Founding are normatively undesirable. Rather, this subsection contends only that from an original understanding perspective, the evidence indicates that enslaved persons likely would not have viewed a situation like *Janus* as involving "compelled" speech.

c. Viewpoint Discrimination: Unequal Protection of Speech.—First Amendment jurisprudence has long considered viewpoint discrimination to be one of the most pernicious violations of freedom of speech, one which (like compelled speech) is subject to a de facto standard of judicial skepticism even higher than strict scrutiny.¹⁶⁷ The Supreme Court has characterized governmental suppression of or favoritism toward speech because of its viewpoint as a particularly "egregious form of content discrimination."¹⁶⁸ Viewpoint discrimination is considered especially offensive to free speech values because, as Geoffrey Stone has explained, "the [F]irst [A]mendment is concerned, not only with the extent to which a law reduces the total quantity of communication, but also—and perhaps even more

166. Because enslaved persons were persons of their time and legal culture, the explanation for their expressed views regarding compelled speech could, in theory, merely be that they shared the common understandings of the time and that those understandings did not include situations like *Janus*. While certainly possible, that explanation seems unlikely. As noted in *Janus*, the view that compelled association via mandatory extractions of money is constitutionally suspect even when divorced from threat or coercion was not unknown (albeit perhaps not widely shared) in antebellum legal thought and culture. See *Janus*, 138 S. Ct. 2448, 2464 (2018) (quoting *A Bill for Establishing Religious Freedom*, in 2 PAPERS OF THOMAS JEFFERSON 545 (J. Boyd ed., 1950)) (stating that "[a]s Jefferson famously put it, 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical'"). But it is unsurprising that the enslaved and disenfranchised perhaps may have had a different view of this issue than the more libertarian view of landed gentry like Jefferson.

167. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 444 (1996) (reviewing cases and explaining that "the [Supreme] Court often differentiates between viewpoint-based restrictions and all other content-based restrictions It is not so much that the Court formally uses two different standards for subject matter and viewpoint regulation" but that in practice, "the Court almost always rigorously reviews and then [simply] invalidates regulations based on viewpoint" rather than applying strict scrutiny to them).

168. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); see also *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992) (stating that "[the government] has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules").

fundamentally—with the extent to which the law distorts public debate.”¹⁶⁹ Speech restrictions that are based upon the speaker’s point of view distort public debate because they reduce the amount of information available to the public regarding only one side of a given public debate and therefore interfere with “the thinking process of the community.”¹⁷⁰

Slaves’ narratives reveal that they understood freedom of speech to have instrumental as well as inherent value. In addition to its value as part of the individual’s expressive autonomy and dignity, enslaved persons and abolitionists thought unfettered freedom of speech to be essential in combatting domestic and international propaganda by those seeking to preserve slavery.¹⁷¹ Enslaved persons and their allies believed that proslavery forces could not ultimately win an unfettered ideological debate about slavery and freedom on the merits at a national level.¹⁷² Enslaved persons and their allies therefore condemned the fact that the Slave Power had tipped the scales in order to prevent a fair fight between proslavery and antislavery advocacy.

Former slave William Brown (who, after gaining his freedom, became a prominent abolitionist orator in the United States and Great Britain)¹⁷³ expressly framed the publication of his slave narrative as being part of the battle of ideas regarding slavery:

[T]he slaveholder, crafty and politic, as deliberate tyrants generally are, rarely leaves the shores of Europe without attempting at least to assuage the prevalent hostility against his beloved “peculiar institution.” The influence of the Southern States of America is mainly directed to the maintenance and propagation of the system of slavery in their own and in other countries It is my desire, in common with every abolitionist, to diminish their influence, and this can only

169. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 198 (1983).

170. *Id.* (quoting ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 27 (1960)).

171. *See, e.g.*, Carter, *The Thirteenth Amendment and Pro-Equality Speech*, *supra* note 78, at 1860 (stating that “[a]bolitionists and antislavery Republicans were well aware that the battle against racial subjugation would be in large part a war of ideas[,] even though it was ultimately force of arms that proved decisive in bringing about the immediate end of slavery”).

172. For example, during the Thirteenth Amendment debates, Senator James Harlan of Iowa characterized the unequal protection given to Black and abolitionist speech on the one hand and to proslavery speech on the other as a badge or incident of slavery that the Thirteenth Amendment would henceforth present, stating that “another incident of [slavery] is the suppression of the freedom of speech and of the press, not only among those down-trodden people themselves but among the white race. Slavery cannot exist when its merits can be freely discussed” CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864) (statement of Sen. James Harlan).

173. *Abolitionists by Profession*, AMERICAN ABOLITIONISTS AND ANTISLAVERY ACTIVISTS: CONSCIENCE OF THE NATION, <http://www.americanabolitionists.com/abolitionists-by-profession.html> [<https://perma.cc/R5DR-2Z5M>] (listing Brown as an author, lecturer, and abolitionist leader); *William Wells Brown*, DOCUMENTING THE AM. SOUTH, <https://docsouth.unc.edu/fpn/brownw/bio.html> [<https://perma.cc/6QQF-BA9Z>] (describing Brown’s abolitionist career and reputation).

be effected by the promulgation of truth, and the cultivation of a correct public sentiment at home and abroad.¹⁷⁴

From Brown's perspective, the most crucial way to combat proslavery speech was to counter it with detailed arguments disproving it. Such "counter-speech" could, of course, only be effective if it were protected equally to proslavery speech.

Frederick Douglass, in his seminal speech *What to the Slave Is the Fourth of July?*,¹⁷⁵ similarly noted how slaveholders and their allies suppressed freedom of speech in order to silence protest against slavery and thereby avoid public debate regarding it. Douglass, addressing white American society as his rhetorical listener, stated that "in regard to the ten thousand wrongs [against] the American slave, you would enforce the strictest silence, and would hail him as an enemy of the nation who dares to make those wrongs the subject of public discourse!"¹⁷⁶

In addition to valuing equal freedom of speech as a crucial tool in the larger battle of ideas regarding slavery, enslaved persons also noted its utility in bringing about individual justice. In *What to the Slave Is the Fourth of July?*, Frederick Douglass also specifically called out the viewpoint discrimination in the adjudication of Fugitive Slave Act claims. Douglass noted that under the Act:

The oath of any two villains is sufficient . . . to send the most pious and exemplary black man into the remorseless jaws of slavery! His own testimony is nothing. He can bring no witnesses for himself. The minister of American justice is bound by the law to hear but one side; and that side is the side of the oppressor.¹⁷⁷

Along with condemning governmental viewpoint discrimination on the subject of slavery, enslaved persons also criticized the lack of free and equal channels in the private press for speech countering racist aspersions cast upon Blacks as a race (what would become known as "group libel" in modern First Amendment parlance¹⁷⁸). For example, Henry Clay Bruce, in his slave narrative *The New Man*, contended that:

174. WILLIAM W. BROWN, THE NARRATIVE OF WILLIAM W. BROWN, AN AMERICAN SLAVE, at iv (1849), <https://docsouth.unc.edu/fpn/brownw/brown.html> [<https://perma.cc/27C6-2K59>]; see also PHILLIPS, SPEECHES AND LECTURES, *supra* note 11, at 110 (stating in an 1853 speech to the Massachusetts Anti-Slavery Society that "[o]ur aim is to alter public opinion[; and] to change public opinion, we use the very tools by which it was formed").

175. Douglass, *What to the Slave is the Fourth of July?*, *supra* note 60.

176. *Id.* at 15.

177. *Id.* at 12.

178. See *Beauharnais v. Illinois*, 343 U.S. 250, 251, 258 (1952) (stating, in rejecting First Amendment challenge to Illinois statute punishing speech that "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion," that "if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group"). While *Beauharnais* has

One great injustice the Colored people are forced to suffer, without the means of redress, is at the hands of the press. . . [They] allow any writer who may wish to attack the Colored people[] space to vent his spleen, . . . [but] whether true or false, the publishers will not allow the Colored writer space to reply. . . . [T]hese publishers [, however,] will promptly refuse to publish articles reflecting upon the moral habits and character of any other distinct class of people in this country. Then why treat the Colored people differently? Fair play and a fair show are all [we] ask, and this [we] will ever ask, and as Americans this [we] have a right to ask.¹⁷⁹

The views of enslaved persons regarding freedom of speech that were examined for this Article seem to largely conform to the current doctrinal understanding of viewpoint discrimination as an especially pernicious threat to freedom of speech. The difference, however, is with regard to why this is the case. Classic viewpoint discrimination theory is largely premised upon two rationales: (1) that the government’s lack of neutrality among viewpoints is a harm in and of itself; and (2) by choosing among viewpoints, the government reduces the total amount of speech in the “marketplace.” Both views were indeed expressed by slaves as harms arising from the suppression of Black and abolitionist speech. Their objections, however, went beyond these abstractions to encompass a more functional concern: namely, that the unequal protection of their speech perpetuated the subordinating system of slavery. Freedom of speech was seen as not only an end worth protecting for its own sake, but also worth protecting as a means to achieving a goal; the end of slavery and the formation of a constitutional order wherein Blacks would be full participants, and freedom rather than subjugation would be the default state. Viewed through that prism, government failure to protect antiracist speech with equal vigor as the protection given to subordinating speech would be treated as an equally and especially harmful form of free speech injury as the government’s active favor or disfavor of private speakers’ viewpoints.¹⁸⁰

never been formally overruled, it is generally accepted that “it has been thoroughly undermined by subsequent decisions” of the Supreme Court. Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 *CARDOZO L. REV.* 1523, 1536 (2003). Whether *Beauharnais* should be revived, which has long been debated, is largely beyond the scope of this Article.

179. BRUCE, *THE NEW MAN*, *supra* note 111, at 134–35.

180. This “failure to protect” school of thought regarding freedom of speech was widely, albeit not universally, shared among Reconstruction Republicans. For example, Representative James Wilson of Iowa argued during the Thirteenth Amendment debates that “[free speech] could be enjoyed only when debased to the uses of slavery. Slaveholders and their supporters alone were free to think and print, to do and say what seemed to them best” *CONG. GLOBE*, 38th Cong., 1st Sess. 1202–03 (1864) (statement of Rep. James F. Wilson). Senator William Seward of New York—a moderate who supported Black civil rights but whose record on the full and immediate abolition of slavery was mixed at best—likewise lamented in an 1860 speech that “in every Slave State that

d. Speech Having a “Pernicious Influence”: Incitement.—The Supreme Court’s First Amendment cases have long attempted to draw a line between incendiary but protected speech versus unprotected incitement.¹⁸¹ Too broad of a rule in this regard runs the risk of allowing the government, due to the pretext or reality that the speaker’s views were expressed in an intemperate manner, to censor views or topics that are unpopular or deemed subversive but that present no real danger of actual harm. Too narrow of a rule poses a countervailing risk: to wit, that speech encouraging listeners to commit unlawful acts will in fact lead to such acts occurring. Although the Court’s doctrine has over time oscillated between these two poles, *Brandenburg v. Ohio*¹⁸² has now for over fifty years been the standard for when speech advocating illegality may be punished as unprotected incitement under the First Amendment. *Brandenburg*’s test for incitement provides that

the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.¹⁸³

The perceived dangerousness of Black and abolitionist speech was the primary justification offered by proslavery forces for restricting such speech through legal and extralegal means. The slave system’s restrictions upon enslaved persons’ freedom of speech in terms of access to information had always been severe, of course.¹⁸⁴ The more general purpose of such

has ever been founded in this country, a policy is established which suppresses freedom of speech and freedom of debate [by antislavery voices] . . . while it extends the largest license of debate to those who advocate the interests of Slavery.” William H. Seward, Senator Seward’s Western Tour: Speech by William H. Seward at Chicago, October 3, 1860, 12 EVENING J. 25, 28 (1860), reprinted in THE CAMPAIGN OF 1860, COMPRISING THE SPEECHES OF ABRAHAM LINCOLN, WILLIAM H. SEWARD, HENRY WILSON, BENJAMIN F. WADE, CARL SCHURZ, CHARLES SUMNER, WILLIAM M. EVARTS, & C. 25, 28 (Weed, Parsons, and Co., 1860).

181. *E.g.*, *Whitney v. California*, 274 U.S. 357, 371 (1927) (“[A] State in the exercise of its police power may punish those who abuse [freedom of speech] by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means . . .”); *Frohwerk v. United States*, 249 U.S. 204, 206, 209 (1919) (stating that the First Amendment did not protect “every possible use of language” and that it was enough that “the circulation of the [anti-war paper at issue] was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out”); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”).

182. 395 U.S. 444 (1969).

183. *Id.* at 447.

184. See WILLIAM GOODSELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS 319–23 (Negro Universities Press 1969) (1853) (discussing the penalties for violating the Slave Codes’ prohibitions against educating enslaved persons).

restrictions was to keep enslaved persons in ignorance by prohibiting their formal education.¹⁸⁵ Slaveowners and their allies then used the slaves' lack of formal education as proof that enslavement was beneficial because the slaves were so uneducated as to be unsuited to a state of freedom.¹⁸⁶

As discussed in this subsection and subpart II(A), however, an additional and more specific purpose of tightly controlling the information slaves received or transmitted was to prevent actual or feared escape plans or to prevent the fomentation of slave rebellions via communication among the slaves or by exposure to “dangerous” ideas about liberty and freedom. During times of actual or perceived threat to the slave regime (particularly in the wake of slave uprisings and during the Civil War), such restrictions reached a fever pitch:

Fearful of “pernicious influences” among their slaves, Mississippi whites [during the Civil War] hanged dozens of blacks and their white allies on suspicion of plotting insurrections . . . Georgia imprisoned eighteen slaves for fomenting rebellion, and hanged one white and two black plotters . . . How many of the plots for which slaves were hanged were real or imagined is difficult to establish, for as the war ground on, slaveholders and patrollers grew ever more vigilant and precipitous, arresting slaves at the slightest hint of defiance.¹⁸⁷

As abolitionists became increasingly vocal in the 1830s, Southern states, fearful of potential insurrections or even “discontent” among enslaved persons, banned “virtually all anti-slavery expression addressed to white voters. . . . [Such bans were enforced] by searches and seizures for anti-slavery books and pamphlets and cruel punishments.”¹⁸⁸ Nor was the North free from similar measures. Given that slavery no longer existed in the North during the antebellum period and northerners therefore had less to fear personally from potential slave escapes or uprisings, Northern states generally did not adopt pervasive laws banning antislavery speech. Several Northern legislatures and officials were, however, sympathetic to pleas from

185. Samuel Ward noted in his slave narrative that “among the heaviest of my maledictions against slavery is that which it deserves for keeping my poor father—and millions like him—in . . . the grossest ignorance. Cowardly system as it is, it does not dare to allow the slave access to the commonest sources of light and learning.” WARD, *AUTOBIOGRAPHY OF A FUGITIVE NEGRO*, *supra* note 128, at 6. Former slave Sylvia Floyd similarly recalled that “[s]laves weren’t allowed to know or hear any more than could be helped . . . The slaves couldn’t read nor write, and what few of them that could wasn’t allowed to read [anything] that was writ on a piece of paper.” WARD, *THE SLAVES’ WAR*, *supra* note 105, at 25 (internal quotation marks omitted).

186. *See, e.g.*, NYE, *FETTERED FREEDOM*, *supra* note 69, at 19 (describing how proslavery forces argued that slavery was “the best and safest way of life for the childlike and irresponsible Negro [because] it provided for him greater protection than any other system”).

187. WARD, *THE SLAVES’ WAR*, *supra* note 105, at 162–63.

188. Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism, a Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381, 1385 (2009).

their Southern counterparts to limit the circulation of antislavery materials in their states and in the federal mail lest they ultimately reach Southern slaves and sympathetic whites who might act upon them.¹⁸⁹ And in any event, white mobs and riots in the North achieved similar results even absent formal legislative action:

A substantial number of the mobs in the North were directed against abolitionist editors or motivated in part by popular opposition to their activities [Moreover,] a good many citizens in the North favored some legal control of the abolitionist press, and the attempt in 1836 to impose restrictions upon it had surprisingly powerful backing.¹⁹⁰

The movement to silence abolitionist speech ultimately reached the halls of Congress and resulted in a congressional “gag rule” that forbade discussion of abolition or debate on antislavery petitions in the House of Representatives.¹⁹¹

At the individual level, enslaved persons’ narratives show how slaveowners and their allies restricted and punished slaves’ speech due to fear that it might lead to escape, rebellion, or even mere discontent with their lot as slaves. For example, Charles Ball in his slave narrative described restrictions on slaves’ communications during a journey with his owner:

Throughout the whole journey, until after we were released from our irons, he had forbidden us to converse together beyond a few words in relation to our temporary condition and wants, [and] he rigidly enforced his edict of silence. I presume that the reason of this

189. At the urging of Southern legislatures, Connecticut did in fact adopt a law in 1836 banning abolitionist speakers. TASILTZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 17, at 202. While “no other Northern legislature complied[,] their own denunciations of abolitionism encourage the ‘gentlemen of property and standing’ to take action” to suppress abolitionist speech through extra-legal means. STEWART, HOLY WARRIORS, *supra* note 41, at 71.

190. NYE, FETTERED FREEDOM, *supra* note 69, at 97; *see also* STEWART, HOLY WARRIORS, *supra* note 41, at 71–73 (describing pervasive violence against Blacks and abolitionist speakers in the North in the 1830s). By the 1840s, active suppression of abolitionist speech began to ebb in the North, largely because of what contemporary critical race theorists would characterize as an instance of “interest convergence”: to wit, the insight that advances in Black civil rights tend to come about not due to altruism, idealism, or the correct application of abstract legal doctrine, but rather that “the interest of blacks in achieving racial equality [are] accommodated only when it converges with the interests of whites.” Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). In the case of abolitionist speech in the North, interest convergence manifested at the point when Northern elites began to fear that suppression of speech they disliked could eventually lead to threats to their own speech. *See* NYE, FETTERED FREEDOM, *supra* note 69, at 98–100 (stating that the most important reason “for the removal of threat to the abolitionist press in the North [by virtue of legislative and mob action] was the fact that Northern opinion . . . saw in such events a definite danger to the traditional liberty of the press”).

191. *See* NYE, FETTERED FREEDOM, *supra* note 69, at 35–36 (describing debates leading to adoption of congressional gag rule).

prohibition of all conversation was to prevent us from devising plans of escape.¹⁹²

Similarly, William Robinson recounted traveling with his owner on the morning of April 12, 1861, when they heard of the first shots fired at Fort Sumter, marking the beginning of the Civil War. Robinson noted that one of his owner's first acts that same morning was immediately to take steps to limit communications by and with the persons whom he held in slavery. In a note that Robinson was sent to deliver, the slaveowner asked his wife "to tell their overseer to keep a very close watch on the Negroes and see that there's no private talk among them, and to give two local whites suspected of abolitionist tendencies no opportunity to talk with the Negroes."¹⁹³

The *Brandenburg* understanding of proscribable incitement largely accords with the experiences of slaves and abolitionists in that punishing speech merely because it is incendiary or deemed to have "pernicious tendencies," i.e., simply because of the possibility that listeners might be persuaded by it, was seen as violating the right to free speech.¹⁹⁴ The converse—that is, the failure to punish speech actually aimed at inciting imminent lawless action intended to silence pro-equality speech—has received much less attention in the Court's post-*Brandenburg* cases, but was of great concern to slaves and abolitionists. The overenforcement of speech-restrictive laws and norms against Black and abolitionist speech was one side of a coin; the purposeful underenforcement of such laws and norms against speech clearly intended to incite racial violence was the other side, and it left Blacks and abolitionists vulnerable to private action suppressing their speech.¹⁹⁵

192. BALL, FIFTY YEARS IN CHAINS, *supra* note 126, at 59.

193. WARD, THE SLAVES' WAR, *supra* note 105, at 4 (internal quotation marks omitted). Prohibitions of this sort extended not only to whites suspected of having abolitionist leanings, but also to any whites sharing any information with slaves about the war. Harry Smith recalled that while he was enslaved in Kentucky, "some of the lower classes of whites used to steal into the slave quarters, and with a person watching to see if Master was coming, would read [news to the slaves] about the coming war. . . . [Smith noted that] if any [whites] were caught reading to the slaves, or giving them any information, they were tied and received fifty lashes." *Id.* at 28 (internal quotation marks omitted).

194. See *Brandenburg*, 395 U.S. 444, 448 (1969) (per curiam). The Court explained:

The mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments.

Id. (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961) (citation omitted)).

195. Andrew Taslitz called such actions "expressive violence." TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 17, at 203 ("The wave of violence and threatened violence against abolitionists was expressive of fundamental social values. The antiabolition violence was meant to silence abolitionists, but it also affirmed and supported an existing order of racial, gender, and class hierarchies . . ."). One stark example of such expressive violence is described in Curtis's *The People's Darling Privilege*. CURTIS, THE PEOPLE'S DARLING PRIVILEGE, *supra* note 31, at

Conclusion

The Second Founding's aim was to create a new constitutional order that dismantled slavery in all of its aspects. A key aspect of slavery involved pervasive legal and extralegal restrictions on and punishment of Black and antiracist speech. Constitutional jurisprudence and public discourse in general downplay the transformative nature of the Second Founding; First Amendment doctrine specifically has overlooked important evidence regarding the meaning of freedom of speech under the post-Civil War Constitution. Understanding the nature of free speech deprivations suffered by enslaved persons and their allies makes clear the nature of the First Founding's Constitution of Enslavement regarding freedom of speech; and conversely, listening to enslaved persons' voices helps to illuminate the role they played in giving meaning to the post-Civil War Constitution of Freedom. Enslaved persons' understandings of freedom of speech in some cases accord with and in others diverge from the First Founding's conception of freedom of speech and the current doctrinal understandings thereof. But whatever the case, the Second Founding made them part of our constitutional order; and history demands that we listen.

144–51. In July 1836, a white mob in Cincinnati destroyed an abolitionist printing press. *Id.* at 146. The next day, placards appeared throughout the city stating that the destruction of the press should be taken as a warning of further violence should publication resume. *Id.* No known prosecutions arose from either the destruction of the press nor the threats issued thereafter. The press was repaired, and publication was planned to resume. *See id.* at 147. A public meeting of the citizenry was called to discuss whether the abolitionist paper should be allowed to publish, in which participants noted that since the paper could not legally be suppressed (given state and federal speech protections), those opposing it were left with “but one channel through which we can rid our land of its withering influence.” *Id.* at 147–48. Once again, there is no record of any action being taken against such threats and incitement to violence. Subsequent to the meeting, publication of the abolitionist paper resumed; thereafter, the *Cincinnati Whig* newspaper advised its readers to “Lay on M’Duff”—a colloquialism drawn from Shakespeare’s *Macbeth*, meaning “proceed to attack”—and also published the name and address of the paper’s publishers. *See id.* at 149. Predictably, a mob again destroyed the press and attempted to find and attack the publishers. *Id.* There is no indication that those who destroyed the press on this second occasion faced prosecution nor that the newspaper that incited the citizenry to do so faced any punishment.