

CONSTITUTIONAL LITERACY

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1

¹ Samuel A. Cooley, *Freedmen's School, Edisto Island, S.C.* (Library of Congress) (between 1862 and 1865).

If a house burns down, it's gone, but the place—the picture of it—stays, and not just in my memory, but out there, in the world. . . . Someday you be walking down the road and you hear something or see something going on. . . . It's when you bump into a rememory . . . [I]f you go there and stand in the place where it was, it will happen again; it will be there for you, waiting for you.²

In this sense, not only is the Civil War not over; it can still be lost.³

*There are words like Freedom
Sweet and wonderful to say.
On my heartstrings freedom sings
All day everyday.*

*There are words like liberty
That almost make me cry.
If you had known what I know
You would know why.⁴*

I. INTRODUCTION

This essay envisions an affirmative, constitutional right to an adequate education flowing from the Privileges and Immunities Clause of the Fourteenth Amendment. **[Is education the right or is education a prophylactic remedy to ensure the right?]** Commentators often turn to the Due Process Clause to locate such a right, but substantive due process jurisprudence is notoriously shallow water.⁵ I also? suggest a bottom-up theory for arriving at such a right that focuses on the demand-side of constitutional theory to rescue? recover? the hopes and dreams of the Freepeople⁶ from the jurisprudential backwaters of constitutional reconstruction. [. . .]

² TONI MORRISON, *BELOVED* 36 (Vintage Int. 2004) (1984).

³ David W. Blight, *The Civil War Isn't Over*, ATLANTIC (Apr. 8, 2015, 12:07 PM), <http://www.theatlantic.com/politics/archive/2015/04/the-civil-war-isnt-over/389847>.

⁴ *Words Like Liberty*, in LANGSTON HUGHES, *COLLECTED POEMS* 269 (Arnold Rampersad & David Roessel eds., 1994).

⁵ See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937) (“Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.” (quoting *Chicago, B. & Q.R. Co. v. McGuire*, 219 U.S. 549, 566 (1911))). **[cite to other SDP cases] What point do you want to make here?**

⁶ I chose to refer to free and freed black Americans as the Freepeople. Though a subtle difference from the more conventional Freedpeople, I do so to shift the narrative of former slaves being freed by executive action or



7

constitutional amendment, which of course are matters of legal fact. Guyora Binder, *Did the Slaves Author the Thirteenth Amendment? An Essay in Redemptive History*, 5 YALE J.L. & HUMAN. 471, 473 (1993) (arguing that the received narrative, that “Northern whites receive status as constitutional authors in return for the freedom they supposedly conferred on Southern blacks. . . symbolically dispossesses the slaves”).

to one wherein the free and freed, through their dogged effort to become self-taught and in turn to advocate for universal education as a fundamental right, created their freedom and prefigured a new national? (needs explanation) identity sounded in constitutional personhood.

⁷ M.H. Kimball, *Isaac & Rosa, Slave Children From New Orleans*, LIBRARY OF CONG. (1863).

II. LITERACY AND FREEDOM⁸

Isaac and Rosa were born into slavery not long before they found themselves in a photographer's studio in New York City in 1863. The opposite side of the *carte de visite* reads: "The nett [sic] proceeds from the sale of these photographs will be devoted exclusively to the education of colored people in the Department of the Gulf, now under the command of Major-General-Banks."⁹ By 1863, the Union army occupied southern Louisiana,¹⁰ and in 1864 Major General N. P. Banks issued an order establishing a system of schools for free and freed children of Louisiana, Mississippi, Alabama, and Texas.¹¹ [expand and move note text?]

Despite their tender years, these children of freedom are poised for the future, having cast off any mark of beginning life as constitutional property.¹² Undoubtedly, the *carte de visite* was

⁸ This section draws heavily from narratives of slavery told by the free and freed. Nineteenth-century African American vernacular was distinctive in its structure and sound, but much of the language quoted herein is not the language actually spoken by black Americans but rather is a representation of that language recorded by observers (many of whom were white) and invariably reflects how the auditor thought blacks spoke.

⁹ *Id.*?

¹⁰ MARY NIAL MITCHELL, *RAISING FREEDOM'S CHILD: BLACK CHILDREN AND VISIONS OF THE FUTURE AFTER SLAVERY* 1 (2008). Regarding depictions of black freedom, such as Isaac and Rosa, historian Mary Niall Mitchell says, "[a]s members of the first generation of African Americans to grow up in the former slaveholding republic, the black child—freedom's child—represented the possibility of a future dramatically different from the past, a future in which black Americans might have access to the same privileges as whites." *Id.* at 5.

¹¹ *Id.* at 194. By September 1864, the *New Orleans Tribune* reported that the efforts of the Board of Education (established in March 1864 by Banks) had resulted in the opening of 60 schools with 8000 students and more than 100 teachers. *Id.* By 1865, when the Freedmen's Bureau took control of the school system, it included 126 schools, 19,000 students, and 100 teachers. *Id.* The broader Freepeople's school movement, however, cannot be attributed solely to federal largesse and northern beneficence. See *infra* notes [—](#) and accompanying text.

¹² Property is defined as "[t]he right to possess, use, and enjoy a determinate thing (either a tract of land or chattel)," or equally relevant to this essay, "[a]ny external thing over which the rights of possession, use, and enjoyment are exercised." BLACK'S LAW DICTIONARY, 1135–36 (9th ed. 2009). While neither the U.S. Constitution, nor its antecedent Articles of Confederation, expressly provided for slavery, the institution is imported into these constitutional instruments by implication. See ARTICLES OF CONFEDERATION (leaving, by omission, the regulation of slaves to the states??); U.S. Const. art. 1, § 2, cl. 3 (providing that representatives to the House shall be apportioned according to the respective populations of the several states, "determined by adding to the whole number of free persons . . . *three fifths of all other Persons*") (emphasis added); *id.* art. 1, § 9, cl. 1 (providing that the "migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person"); *id.* art. 4, § 2, cl. 3 ("No person held to service or labor in

meant as entreaty to a host of audiences, in particular sympathetic Northerners, but this Part takes as its subject how the Freepeople envisioned and experienced freedom through the process of becoming learned and in turn advocating for universal education. The photographic image, in particular, and its commercialization in the mid-twentieth century played a central role, much like education, in allowing the free and freed to imagine what the future would hold. Of the photographic image, Frederick Douglass once wrote, “[t]he servant girl can now see a likeness of herself.”¹³ He continued, “[f]ormerly, the luxury of a likeness was the exclusive privilege of the rich and great. But now, like education and a thousand other blessings brought to us by the advancing march of civilization, such pictures, are placed within easy reach of the humblest members of society.”¹⁴

one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.”); Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (giving effect to Article 4, Section 2 of the Constitution, the Act provided for interstate extradition of runaway slaves and imposed a \$500 fine on any person who “knowingly and willingly” obstructed the attainment of such a fugitive); Fugitive Slave Law of 1850, ch. 60, 9 Stat. 462 (amending the 1793 Act to, *inter alia*, increase the fine to \$1000, provide civil damages, and criminal liability for same); *Dred Scott v. Sanford* (*Dred Scott*), 60 U.S. (19 How.) 393, 407 (1856) (declaring that the “unfortunate race,” was “justly and lawfully reduced to slavery” because they had no rights which the white man was bound to respect” either in “social or political relations”).

Isaac and Rosa, while representing the education of the Freepeople, were striking for another reason. Their difference in skin tone represented the porousness of racial boundaries in southern society and the deep anxiety this triggered among the planter class and across the nation. *See supra* notes — and accompanying text; *see also* Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1893 (1995) (arguing that “nobody” thought the purpose of the Fourteenth Amendment was to integrate the public schools). Assuming, *arguendo*, that *nobody* at the time of the ratification of the Fourteenth Amendment understood it to mandate integrated schools, the Freepeople’s movement for universal education and the political savvy necessary to institute such a regime alone stood to destabilize reified notions of racial inferiority that prevailed across much of the country.

¹³ Frederick Douglass, *Pictures in Progress*, in 3 THE FREDERICK DOUGLASS PAPERS: SERIES ONE, SPEECHES, DEBATES, AND INTERVIEWS (John W. Blassingame ed. 1979).

¹⁴ *Id.* *See* DEBORAH WILLIS & BARBARA KRAUTHAMER, ENVISIONING EMANCIPATION: BLACK AMERICANS AND THE END OF SLAVERY (2013), for a beautiful text on how the concept of emancipation can be documented through the medium of photography.

Though complex and freighted with many at times conflicting meanings,¹⁵ this Part will further? address how literacy and education were foundational to the constitutional personhood¹⁶ of the Freepeople and inextricably married to their understanding of national citizenship. Much has been said about Reconstruction, but this essay is an “an effort to avert the critical gaze from the racial subject to the racial object; from the described and imagined to the describers and the imaginers; from being served to the served.”¹⁷ Put differently, this essay seeks to recover the political imagination of the Freepeople and their, habits of mind, deep pride, and critical patriotism¹⁸ as national citizens, not to displace but to compliment scholarship on the original public understanding of the Reconstruction Amendments.

But it goes further still, for originalism only carries the analysis so far. The antislavery tradition and its manifestation in the ebullience with which the Freepeople sought schooling gives new content and meaning to the open texture of the Fourteenth Amendment with particular emphasis on the Citizenship Clause.¹⁹ This is not to argue for analytical stasis, but instead to conceptualize the Amendments as a mutually reinforcing charter of liberty, from which we can

¹⁵ [cite to sources re education as social control]

¹⁶ Constitutional personhood, here, is defined as the inverse of constitutional property. *See supra* note 12.

¹⁷ TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* 90 (Vintage Books 1993) (1992).

¹⁸ While allegiance and “inflexible attachment” to ideations of the country are the normative thrust of patriotism, dissent and dissidence are key components of, what Professor Salamishah Tillet terms “critical patriotism.” SALAMISHAH TILLET, *SITES OF SLAVERY: CITIZENSHIP AND RACIAL DEMOCRACY IN THE POST-CIVIL RIGHTS IMAGINATION* 11 (2012). Explain this point in text.

¹⁹ U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States . . . are citizens of the United States and of the state wherein they reside.”).

discern a thick notion of freedom meant to deliver all persons from the “badges and incidents of slavery” in all their forms.²⁰

Similarly, rather than arguing for racial particularity, this essay strategically intervenes in the prevailing myth²¹ of slavery that arose in the wake of war and was? saliently captured by the Court in *The Civil Rights Cases*. A mere two decades after the formal end of chattel slavery in the United States, the Court held that the enforcement powers of the Thirteenth and Fourteenth Amendments did not properly support sections of the Civil Rights Act of 1875.²² In declaring the Act ultra vires, the Court created out of whole cloth the state action doctrine.²³ As a substantive limitation on the Fourteenth Amendment’s enforcement powers, the doctrine operated in

²⁰ *United States v. Stanley (The Civil Rights Cases)*, 109 U.S. 3, 20 (1883). The constitutional negative-rights framework, at least with respect to the Reconstruction Amendments, represents a thin conceptualization of freedom. Compare *id.* at 11 (holding that Section 1 of the Fourteenth Amendment “is prohibitory in its character, and prohibitory upon the States,” and construing Congress’s enforcement power as applicable to only the Section’s prohibitions upon the states), with *id.* at 48 (Harlan, J. dissenting) (arguing that “freedom necessarily involve[s] immunity from, and protection against, all discrimination against [the Freepeople], because of their race, in respect of such civil rights as belong to freemen of other races”). Professor Jennifer Mason McAward argues that, in light of the original public understanding of the “badges and incidents of slavery,” Is there something you should say in text about this phrase? terms of art as they are, the best understanding refers to “public or widespread private conduct, based on race or the previous condition of servitude, that mimics the law of slavery and that has significant potential to lead to the *de facto* reenslavement or legal subjugation of the targeted group.” Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 561 U. PA. J. CONST. L. 561, 569 (2012) (emphasis added). McAward’s conceptualization represents a principled limitation on Thirteenth Amendment optimism HOW SO? but it is not obvious how instructive this limitation is absent consideration of the antislavery tradition of a thick reconstructed freedom.

²¹ Theorist Roland Barthes defines myth as “constituted by the loss of the historical quality of things The function of myth is to empty reality: it is, literally, a ceaseless flowing out, a hemorrhage, or perhaps an evaporation.” Roland Barthes, *Myth Today*, in MYTHOLOGIES 142–43 (Annette Lavers ed., trans., Noonday Press, 1972) (1957).

²² *The Civil Rights Cases*, 109 U.S. at 25; see also Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (“An act to protect all citizens in their civil and legal rights.”). A precursor to the Civil Rights Act of 1964, the 1875 Act provided that “all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement.” *Id.* § 1. Section 2 of the Act provided penal sanction for denying access to public accommodations on account of race. *Id.*

²³ *The Civil Rights Cases*, 109 U.S. 3, 17 (1883) (“In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings.”).

lockstep with a narrative framing of the Act, and by implication the Reconstruction Amendments more broadly, as class legislation, the very evil that the Fourteenth Amendment was meant to tamp out. Justice Bradley wrote: “When a man has emerged from slavery, . . . there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws.”²⁴ Under this view, the Civil Rights Act, although a law of general application, was contrary to “ordinary” legislation “by which other men’s rights are protected,” suggesting that to the extent the Freepeople continued to suffer a disability related to being descendants of slaves, it was a social matter to which the Constitution must remain impervious.²⁵ Under cover of remedying legislative overreach, the Court cleaves into two the realm of national citizenship, leaving us with civil rights as distinct from social rights.²⁶

Moving forward, at least as a historical matter, the Court and commentators delineate and limit the privileged status of constitutional rights by segregating the constitutional realm of civil (and political rights) from the inferior, at least constitutionally speaking, realm of social rights.²⁷

²⁴ *Id.* at 25.

²⁵ *Id.*

²⁶ *See, e.g., id.* at 24–25 (“It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.”).

²⁷ There is a message in this footnote that should be articulated (in your own words) in text. *See id.*; *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (“The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but . . . it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality”); Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1416 (2002) (“[W]hen passed, the Fourteenth Amendment provided equality only with respect to a narrow set of legal rights, and did not provide political rights, such as voting rights, or social rights.” (internal citations omitted)); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1016 (1995) (arguing that the “social rights” argument in defense of racial segregation in schools rested on a “tripartite” division of rights—between civil, political, and social rights—that was universally accepted during the framing of the Fourteenth Amendment); Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1242 (1998) (arguing that the Fourteenth Amendment in its original context was designed to secure “limited absolute equality” with regard to “civil rights, but not political or social rights”). *But cf.* *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational

The civil/social right distinction in constitution law serves to maintain the illusion that the Fourteenth Amendment was originally understood as being and should continue to be interpreted in perfect congruence with the negative rights framed in the Bill of Rights and thus in accord with the “pure” constitutional values of the Framers. Yet, Reconstruction was a radical break from the past, “a stunning and unprecedented experiment” in interracial democracy.²⁸ As I set out below, buoyed by the Thirteenth and Fourteenth Amendments, for the Freepeople, universal education provided a foundation for a new “collective national identity.”²⁹

This social/civil rights binary is fundamental to the effective propagation of a constitutional narrative that, as early as Appomattox, sought to rewrite the story of Reconstruction as recklessly out of step with our constitutional order; that the national power inherent in the Reconstruction Amendments needed to revert back to the states.³⁰ In recovering

facilities are inherently unequal.”); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”); *Bell v. State of Md.*, 378 U.S. 226, 293 (1964) (noting the legislative history “reveals that . . . the Fourteenth Amendment encompassed the right to equal treatment in public places—a right explicitly recognized to be a ‘civil’ rather than a ‘social’ right” but in other areas the distinction was “misty”); James W. Fox Jr., *Democratic Citizenship and Congressional Reconstruction: Defining and Implementing the Privileges and Immunities of Citizenship*, 13 TEMP. POL. & CIV. RTS. L. REV. 453 (2004) (“[C]ommon historical interpretation that actors during Reconstruction viewed rights as sharply divided into three tiers of civil, political, and social rights too often omits and ignores alternative visions of rights as more interrelated under a developing conception of democratic citizenship.”); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129 (1997) (“The civil-political-social rights distinction thus offered a framework within which white Americans could disestablish slavery, guarantee the emancipated slaves equality at law, and yet continue to justify policies and practices that perpetuated the racial stratification of American society.”). On the tripartite notion of rights—civil, political, and social—even John Bingham, the framer of the Privileges and Immunities Clause of the Fourteenth Amendment, recognized the illusory nature of the civil/social distinction in an 1866 speech on the Civil Rights Act, stating, “the term ‘political rights’ is only a limitation of the term ‘civil rights,’ and by general acceptance signifies that class of civil rights which are more directly exercised by the citizen in connection with the government of his country.” CONG. GLOBE, 19th Cong., 1st Sess. 1291 (1866) (statement of Rep. Bingham). Ergo, “are not political rights all embraced in the term ‘civil rights,’ and must it not of necessity be so interpreted?” *Id.* [Add Lash citation]

²⁸ ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1887, at 278 (1988).

²⁹ *Id.*

³⁰ See Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1588 (2012) (noting the convergence of ideas of “reverse discrimination” with “localist” and laissez-faire ideology resulted in the a sense that the federal government had grown too powerful and, critically, that southern

the “neglected stories”³¹ of the Freepeople’s élan for literacy as making a particular claim on citizenship, however, the qualitative distinction between civil and social rights blurs, or even dissolves. For free and freed African Americans, civil and social rights, at least with respect to literacy, national citizenship, and constitutional personhood were interdependent and inextricably intertwined.

a. *THE MEANING OF FREEDOM*

“Neither slavery nor involuntary servitude . . . shall exist within the United States, . . .”³²

The Thirteenth amendment may have been unilateral in effect, but in practice freedom was

Reconstruction governments, in which African Americans played a central role for the first time in United States history, “upended the ‘natural’ order of things”); DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* 3 (2002) (“For many whites, especially veterans and their family members, healing from the war was simply not the same proposition as doing justice to the four million emancipated slaves and their descendants.”); Ariela Gross, *When is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CAL. L. REV. 283, 287 (2008) (“[C]o-opting colorblindness as a conservative slogan against liberal, race-based remediation was part of a neo-conservative transformation of the ‘slavery to freedom’ story as an argument against, rather than in favor of racial redress.”); David W. Blight, *The Civil War Isn’t Over*, ATLANTIC (Apr. 8, 2015, 12:07 PM), <http://www.theatlantic.com/politics/archive/2015/04/the-civil-war-isnt-over/389847/> (“[I]n America, . . . the defeated in this civil war eventually came to control large elements of the event’s meaning, legacies, and policy implications, a reality wracked with irony and driven by the nation’s persistence? racism.”); Gregory P. Downs, *The Dangerous Myth of Appomattox*, N.Y. TIMES, Apr. 12, 2015, at SR12 (“By severing the war’s conflict from the Reconstruction that followed, it drains meaning from the Civil War and turns it into a family feud, a fight ended with regional reconciliation.”); cf. Fox, *supra*, note 27 at 459 (arguing that inuring too close to the civil/political/social distinction risks assimilating the arguments of the “victors of Reconstruction” who “rejected social rights and federal authority to enforce them,” a position best exemplified by *The Civil Rights Cases*). There is an important and growing literature on the way the war has been remembered and commemorated through often-contradictory narratives in the nineteenth and twentieth centuries. See, e.g., DAVID W. BLIGHT, *AMERICAN ORACLE: THE CIVIL WAR IN THE CIVIL RIGHTS ERA* (2013); DAVID W. BLIGHT, *BEYOND THE BATTLEFIELD: RACE, MEMORY, AND THE AMERICAN CIVIL WAR* (2002); PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997); *THE MEMORY OF THE CIVIL WAR IN AMERICAN CULTURE* (Alice Fahs & Joan Waugh eds., 2004); Foner, *supra*; Gross, *supra*.

³¹ DAVIS, *supra* note 30.

³² U.S. CONST. amend. XIII, § 1. Of course, there is the intermediate clause, “except as a punishment for crime whereof the party shall have been duly convicted,” which cries out for scrutiny but bears little relation to this essay’s purpose and thus will remain fodder for future investigation. *Id.*

episodic.³³ That the Amendment abolished chattel slavery is beyond dispute,³⁴ but where precisely does the outer boundary lie? And what are appropriate sources for constitutional construction to give meaning to and apply the Amendment’s prohibition on “slavery” to the extent that its meaning is “abstract, vague, or indeterminate?”³⁵

The language of Section 1 is taken from the Northwest Ordinance of 1787,³⁶ and Congress used similar language in the 1862 acts ending slavery in the District of Columbia³⁷ and federal territories.³⁸ While congressional debate on the Thirteenth Amendment demonstrates discord as to the scope of the text, the Amendment that came into force reflected familiar language, and while perhaps not perfect to all parties, reflected the exigency of the time: the Emancipation Proclamation, issued under President Lincoln’s war-time powers, threatened to

³³ See Emancipation Proclamation, Exec. Order No. 17, 12 Stat. 1268 (applying only to the “states and parts of states” in rebellion); *infra* notes 37–38; FONER, *supra* note 28, at 77 (“Freedom came in different ways to different parts of the South. In large areas, slavery had disintegrated long before Lee’s surrender, but elsewhere, far from the presence of federal troops, blacks did not learn of its irrevocable end until the spring of 1865.”); Downs, *supra* note 30 at SR12 (“[F]ighting continued in pockets for weeks, but in other ways the United States extended the war for more than five years after Appomattox. . . . [T]he federal government fought against white Southern insurgency that relied on murder and intimidation to undo the gains of the war.”).

³⁴ *Butchers’ Benevolent Assoc. v. Crescent City Live-Stock Landing and Slaughter-House Co. (The Slaughter-House Cases)*, 83 U.S. 36, 51 (1872).

³⁵ Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1480 (2012).

³⁶ See Northwest Ordinance of 1787, ch. 8, art. VI, 1 Stat. 50, 53 (“There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted . . .”).

³⁷ An Act for the Release of Certain Persons held to Service or Labor in the District of Columbia, ch. 54, 12 Stat. 376, 376 (1862) (declaring “neither slavery nor involuntary servitude” shall exist in the District).

³⁸ An Act to Secure Freedom to All Persons within the Territories of the United States, ch. 111, 12 Stat. 432, 432 (1862) (“[T]here shall be neither slavery nor involuntary servitude in any of the Territories of the United States now existing . . .”).

expire as of the end of war and with it the legal status of the people it had freed would return to the status quo ante.³⁹

While history need not be a dead hand in constitutional construction, it can serve as a lodestar for understanding and furthering “a transgenerational project of self-governance.”⁴⁰ Given that the phrasing Section 1 was grafted from the pre-constitutional era, Professors Balkin and Levinson suggest that evidence about the meaning of slavery at the time of the Founding may be probative with regard to understanding a text from 1865.⁴¹ After all, proponents of the Amendment referred as a matter of course to it as incorporating the “Jeffersonian ordinance.”⁴²

³⁹ Balkin & Levinson, *supra* note 35, at 1478–79. The language of the 1878 Ordinance had the benefit of being drafted by Thomas Jefferson, author of the Declaration of Independence, and founder of the precursor to the Democratic Party. *Id.* Perhaps this would and did buy some political capital with “War Democrats,” including Vice President Andrew Johnson, *id.*; the Declaration also held a peculiar place in the black political imagination. In 1776, Lemuel Haynes, a newly freed indentured servant and the illegitimate son of a black father and white mother, composed an addendum to the Declaration of Independence, a document he entitled “Liberty Further Extended.” LEMUEL HAYNES, LIBERTY FURTHER EXTENDED, *reprinted in* BLACK PREACHER TO WHITE AMERICA xi, 17 (Richard Newman ed., 1990). Opening his manuscript with the Declaration of Independence, which had been issued earlier that summer, he then declared “it cannot Be tho’t impertinent for us to turn an eye into our own Breast, for a little moment, and See, whether thro some inadvertency, or a self-contradicted Spirit, we Do not find the monster Lurking in our own Bosom.” *Id.* He observed, a much “greater oppression” than the injustices that spurred the colonists into dissent: “the practice of *Slave-keeping*.” *Id.* Similarly, Frederick Douglass, when speaking on July 5, 1852, queried his northern white audience whether they mocked him in extending an invitation to an ex-slave and non-citizen to speak in honor of the Declaration of Independence. TILLET, *supra* note 18, at 11. Deep was the irony of the democratic ideal enshrined in the Declaration and the stubborn refusal of the Republic to live up to it.

⁴⁰ Balkin & Levinson, *supra* note 35, at 1480 (citing JACK M. BALKIN, LIVING ORIGINALISM 23, 199–200, 228–29, 256–58, 268–70, 333, 342 n.2 (2011) (showing use of history for purposes of construction)).

⁴¹ *Id.* at 1480. They also suggest that such a temporal disjunction is idiosyncratic and strains any reasonable concept of original public meaning, but it is hardly unprecedented. *See id.* at 1479 (highlighting the “interesting interpretive question” it presents); *see, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 608 (2008) (turning to the 1688 English Bill of Rights for guidance on whether, in 1791, the public understanding of the right to bear arms encompassed an individual right of self defense); *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2751–53 (2011) (Thomas, J., dissenting) (looking at Puritan parental practices from the turn of the eighteenth century to understand whether, as originally understood, the First Amendment’s protection against laws “abridging the freedom of speech” extended to all speech); *cf.* KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP xii (noting that important to an understanding of the Privileges and Immunities Clause of the Fourteenth Amendment is that it is based on not the Comity Clause in Article IV of the Constitution but the Louisiana Cession Act of 1803 and the understanding of the privileges of citizenship at the turn of the nineteenth century).

⁴² *Id.* at 1479; *see, e.g.*, Cong. Globe, 38th Cong. 1st Sess. 1488 (1864) (statement of Sen. James R. Doolittle) (“They are both in the Jeffersonian ordinance.”); *cf.* Cong. Globe, 37th Cong. 2d Sess. 2942 (1862) (statement of

In turning to the Founding, one discovers the word “slavery,” as a legal matter, had a dramatic sweep, reaching far beyond the racialized regime of chattel slavery the Reconstruction Era framers sought to vitiate.⁴³ Professors Jack Balkin and Sanford Levinson argue that “[c]hattel slavery’ was only the most extreme and visible example of ‘slavery,’ which meant illegitimate domination, political subordination, and the absence of republican government.”⁴⁴ While it perhaps feels grotesque from a contemporary viewpoint to conceptualize of the difference between bondage and civil disfranchisement as a difference in degree rather than a difference in kind, the despotism of the latter registered so strongly among the colonists that they chose to break with England’s colonial power. A young soldier in New York wrote to his father: “I most heartily congratulate you on the Declaration of Independence, a Declaration which happily dissolves our Connexions with the Kingdom where the Name of King is synonymous to that of

Sen. Charles Sumner) (moving to add the “Jeffersonian ordinance” as a condition for West Virginia’s admission to the Union).

⁴³ Balkin & Levinson, *supra* note 35, at 1481.

⁴⁴ *Id.* at 1462; 1481–86. Although he was the keeper of enslaved persons, within the deep logic of the Declaration, it would have been internally consistent for Jefferson, as he did, to propose a clause “reprobating the enslaving of the inhabitants of Africa.” ALEXANDER TESIS, *FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE* 18 (2012). Of greater moment than Jefferson’s consternation at the “pusillanimous idea” of striking passages upbraiding the English people was Congress’s willingness to eliminate the passage to placate South Carolina and Georgia slave importers. *Id.*

While Jefferson thought that slavery had a deleterious moral impact for whites, he believed that blacks, *inter alia*, lacked rational forethought, self control, and a communitarian ethic, partly due to their nature and partly due to their experience as chattel, and these deficits rendered them disloyal to the nation. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 144–51, 169–71 (Boston, Lilly and Wait 1832) (1785). Jefferson is widely known, however, as the patron saint of federalism, believing that whatever government action necessary to “close the circle of our facilities” could be effectively addressed by the states. Jeff Powell, *The Complete Jeffersonian: Justice Rehnquist and Federalism*, 91 *Yale L.J.* 1317, 1365 (citing *Inaugural Address by President Jefferson* (1801), reprinted in DUMAS MALONE, *THOMAS JEFFERSON AS POLITICAL LEADER* 22 (1970). In contrast to Justice Rehnquist, whose focus is almost always on the value of federalism *per se*, Jefferson’s interest in federalism, however, was primarily instrumentalist. *Id.* at 1365 n.288; Christopher J. Parosa, *Federalism: Finding Meaning Through Historical Analysis*, 82 *OR. L. REV.* 119, 120 (2003). “For Jefferson, the defense of state autonomy and opposition to federal power is always linked to the substantive goals of Jeffersonian republicanism.” Power, *supra*, *id.* **[develop this discussion; is the Jeffersonian ordinance argument still helpful?] Not clear to me where the ordinance references take you.**

Tyrant, and the name of Subjects to that of Slaves.”⁴⁵ His faith in the Revolution bonded with his faith that it would deliver the colonists from civil bondage.⁴⁶

The soldier’s faith, however, would not have seemed anachronistic to enslaved African Americans in antebellum America. Recognizing the possible strain on credulity, historian Leon Litwack writes, “[t]o describe the significance of freedom to four million black slaves of the South is to test severely our historical imagination.”⁴⁷ When freedom arrived for enslaved African Americans, its meaning registered as the hue? of revolution enshrined in the Declaration of Independence. The most egalitarian of abolitionists assumed that the Freedpeople would stand with equal posture to all other citizens in the civic community of the republic.⁴⁸

“As friends of the freedmen,” *The American Freedman* proclaimed,

we demand for them no special immunities or privileges. We demand the recognition of their manhood, and the accord to them of equal rights; nothing more, nothing less. Friends, not only of the freedman, but of the Republic of humanity, recognizing the issue of the future, and unhesitantly meeting it, we

⁴⁵ *Extract of a Letter From a Young Man in the Army at New York, to His Father in Town*, AM. GAZETTE, OR, CONST. J. (Salem, Mass.), July 23, 1776, at 24.

⁴⁶ While Balkin suggests that the capaciousness of slavery’s meaning may have been what Reconstruction Republicans saw as the intent of the Thirteenth Amendment, textual analysis supports the theory. While the Fifteenth Amendment and most of the Fourteenth Amendment are written as restraining state action, Section 1 of the Thirteenth Amendment and the first clause of the Fourteenth Amendments are constructed differently. Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1816 (2010). The two are linked in the sense that the Thirteenth Amendment was an affirmative grant of freedom; the Citizenship Clause was an affirmative grant of citizenship for those born in the United States. *Id.*; see also Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L. J. 330, 335 (arguing that the Citizenship Clause “affirmatively declare[s]” a duty for the national government to secure the “full membership, effective participation, and equal dignity” of all citizens); [add additional authority] The Republicans understood that together, once African Americans became free, they assumed all the rights of citizens. Balkin, *supra*, at 1816 (citing Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull)); use these ideas to link 13A and Citizenship/P&I clause arguments??

⁴⁷ LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* xii (1979).

⁴⁸ RONALD E. BUTCHART, *NORTHERN SCHOOLS, SOUTHERN BLACKS, AND RECONSTRUCTION, FREEDMEN’S EDUCATION, 1862–1875*, at 15 (1980).

proclaim as the motto of our movement: “No distinction of race, caste, or color in the Republic.”⁴⁹

Hardly a passing reference to gender, as has perhaps always been the case,?? black manhood (and womanhood) in the nineteenth century lexicon of race was politically freighted.⁵⁰ Edmonia G. Highgate, a black teacher, spoke of her work as “hastening the equalization of political and social recognition of manhood irrespective of color.”⁵¹ Speaking in similarly political language, Robert Martin expected that education of the Freepeople would prepare them “for the duties that seem to await us,” and Robert Harris understood that teaching the free and freed “promises so much for the elevation of our race and the good of the State.”⁵² For black teachers and in turn their pupils, education was intended to secure emancipation and conscript them into the political family of citizenship to which they had previously been denied.⁵³

“‘Freedom,’ said a black minister, ‘burned in the black heart long before freedom was born,’”⁵⁴ and the antislavery tradition of educational self-help in African American communities was the actualization of a thick freedom of Jeffersonian pedigree. Perhaps in recognition of the commodious possibilities of freedom, many Southern whites assumed that freed blacks were

⁴⁹ 1 AMERICAN FREEDMAN 3 (N.Y.C. American Freedman’s Union Commission, Apr. 1866).

⁵⁰ BUTCHART, *supra* note 48, at 44, 209 n. 108 (2010); *see also* SALMON P. CHASE, ET AL., THE RESULTS OF EMANCIPATION IN THE UNITED STATES OF AMERICA 12 (N.Y.C., Am. Freedman’s Union Comm’n 1867) (describing the Freepeople as having “few, if any, friends in the South to advocate their elevation to the rank of citizenship, or their education into the fullness of manhood.”).

⁵¹ *Id.* at 44.

⁵² *Id.*

⁵³ *Id.*; *contra Dred Scott*, 60 U.S. (19 How.) 393, 406 (1857) (holding that no State, “by any act or law of its own,” passed since the adoption of the Constitution, could introduce a free or non-free black into the “political community” created by the Constitution).

⁵⁴ FONER, *supra* note 28, at 77.

unprepared for the solemn responsibilities of freedom and self-governance.⁵⁵ But it was precisely the sociopolitical arrangement of slavery that gave shape to the Freepeople's sense of constitutional personhood. For in bondage the perspicacious slave observed that power in southern society was associated with literacy⁵⁶; an educated class of wealthy whites monopolized this power.⁵⁷

The Freepeople's understanding of literacy as a particular expression of freedom was an autochthonous consolidation of their political imagination. "Emerging from their bondage, the negroes in the very beginning manifested the utmost eagerness for instruction, . . ."⁵⁸ But the postbellum yearning of the Freepeople for knowledge through literacy, was prefigured in the hopes, aspirations, and transgressions of enslaved blacks long before the War. "I was a slave," wrote Thomas Jones.

I knew that the whole community was in league to keep the poor slave in ignorance and chains. Yet I longed to be free, and to be able to move the minds of

⁵⁵ *Id.* On July 22, 1862, three months after the end of the Civil War, South Carolinian Julius J. Fleming, a white public figure wrote: "The negroes are to be pitied. The new order of things has burst upon them too suddenly. They were not prepared for it. They do not understand the liberty which has been conferred upon them." THE JUHL LETTERS TO THE "CHARLESTON COURIER": A VIEW OF THE SOUTH, 1865–1871, at 20 (John Hammond Moore ed., 1974); *see also id.* ("They [the freedmen] certainly need guides and instructors; we might use a stronger word and say that, like minors, they need guardians. If left to themselves, uncontrolled, uninstructed, uncared for, we cannot indulge in a very hopeful view of their future.").

These same sentiments, that freed African Americans were ill-suited for freedom, were carried forward in early historiography of the Civil War. *See, e.g.,* WALTER L. FLEMING, CIVIL WAR AND RECONSTRUCTION IN ALABAMA 270 (1905) (describing the Freepeople as bright-eyed with child-like naïveté, Walter wrote: "The negro believed, when he became free, that he had entered Paradise, that he never again would be cold or hungry, that he never would have to work unless he chose to, and that he never would have to obey a master," and he could "live the remainder of his life under the tender care of the government that had freed him"); HOWARD K. BEALE, THE CRITICAL YEAR: A STUDY OF ANDREW JOHNSON AND RECONSTRUCTION 188–89 (1930); WILLIAM C. HARRIS, PRESIDENTIAL RECONSTRUCTION IN MISSISSIPPI 80–81 (1967) ("The irresponsible practices and behaviors of the Negroes at the first flush of freedom suggested that their adjustment to postwar conditions would be difficult . . .").

⁵⁶ *See* JOHN W. BLASSINGAME, SLAVE TESTIMONY 174 (1977); ELIZABETH HYDE BOTUME, FIRST DAYS AMONGST CONTRABANDS 259 (Boston, Lee and Shepard Publishers 1893) ("My Lord, m'am, what a great thing larning is! In course white folks can do what they likes, for they know so much more'na we.").

⁵⁷ LITWACK, *supra* note 47, at 473.

⁵⁸ CHASE, ET AL., *supra* note 50, at 28.

other men by my thoughts. It seemed to me now, that, if I could learn to read and write, this learning might—nay, I really thought it would, point out to me the way to freedom, influence, and real, secure happiness.⁵⁹

“Dat is one thing I surely do want to do,” asserted Mary Ella Grandberry, “and dat was to learn to read and write.”⁶⁰ Henry Moorehood noted: “The time is now, when the colored men being to see that it is the want of education which has kept them in bondage so long.”⁶¹ “[W]hat little knowledge I have, has just made me hungry for more,” declared Mrs. Henry Gowens. It was her own nascent knowledge that drove wanting all of her children to have a “good education.”⁶² Another former slave shared with journalist Octavia V. Rogers Albert, herself a former slave, the urgency she felt in learning to cipher: “It is true that slaves were not permitted to learn how to read; but I was determined to learn if it was any way possible to do so.”⁶³

b. *THE BLACK POLITICAL IMAGINATION*

⁵⁹ THOMAS JONES, *THE EXPERIENCE OF THOMAS JONES, WHO WAS A SLAVE FOR FORTY-THREE YEARS* 15 (Boston, Daniel Laing, Jr. 1850).

⁶⁰ NORMAN R. YETMAN, *LIFE UNDER THE “PECULIAR INSTITUTION”* 145 (1970).

⁶¹ BENJAMIN DREW, *THE REFUGEE: OR NARRATIVES OF FUGITIVE SLAVES IN CANADA* 180 (Bos., John P. Jewett and Co. 1856).

⁶² YETMAN, *supra* note 60, at 145. The colony of Freepeople in Elgin Settlement, or, as it was more commonly known, King’s Settlement, population of 800, all of whom were once slaves, was located in Buxton in Ontario Canada. A former slave owner named William King in 1849 started the settlement. King had owned slaves in Louisiana, but not being “to the manner born,” he manumitted his slaves and brought them north to Buxton with him where he settled them on land he purchased from the government. DREW, *supra* note 61, at 291. Records show that in 1854, 147 residents were on the role for the community’s two schools. *Id.* at 295–96. The second of the two schools along with the teacher for that school, who was on the payroll for at least six months of the year, were financed at the community’s own expense. *Id.*

⁶³ OCTAVIA V. ROGERS ALBERT, *THE HOUSE OF BONDAGE* xiv, 123 (New York, Hunt & Eaton 1891). Literacy, or being denied it, was a leitmotif in the narratives of free persons who escaped slavery. *See, e.g., id.*; GUSTAVUS D. PIKE, *THE SINGING CAMPAIGN FOR TEN THOUSAND POUNDS* (London, Hodder and Soughton 1874); WILLIAM STILL, *THE UNDERGROUND RAILROAD* (Phila., Porter & Coates 1872). *See* JANET DUTSMAN CORNELIUS, *WHEN I CAN READ MY TITLE CLEAR: LITERACY, SLAVERY, AND RELIGION IN THE ANTEBELLUM SOUTH* 163 n.7 (1991), for a listing of individual biographies which include accounts by former slaves of how they learned to read during the time of slavery.

Almost without exception, slaves were de jure prohibited from learning to read and write.⁶⁴ There were examples of slave owners who taught their slaves to read or do arithmetic for religious purposes or personal gain,⁶⁵ but for most slaves, their sole education was in subordination. “[W]hite people never teach colored people nothing, but to be good to de Master and Mistress,” acknowledged Louisa Gause, a slave from North Carolina.⁶⁶ A small percentage of slaves, however, managed through “ingenuity and will” to acquire rudimentary ciphering skills; as Gause phrased it: “What learning dey would get in dem days, day been get it at night. Taught demselves.”⁶⁷ Placing antiliteracy laws in dialog with the experience of Gause and her brothers and sisters in bondage highlights the mischief slave literacy provoked between the owned and owner.⁶⁸ The ambition to be self taught necessarily unfolded surreptitiously, because learning to read provided to the un-free the ability to imagine a world of moral self-determination and political freedom. “The alphabet is an abolitionist,” declared *Harper’s Weekly*.

If you would keep a people enslaved, refused?? to teach them to read. . . . The despotic spirit which instinctively disliked free schools also sought to exclude books and newspapers except for the aristocracy. . . . It struck also at the tongue.

⁶⁴ See HEATHER ANDREA WILLIAMS, SELF-TAUGHT: AFRICAN AMERICAN EDUCATION IN SLAVERY AND FREEDOM app. at 203–13 (2005) [hereinafter SELF-TAUGHT], for a comprehensive list of laws regulating the teaching of slaves and free blacks to read and write. William Still, a freedman born into slavery, interviewed hundreds of slaves who sought his help in Philadelphia via the Underground Railroad. See generally STILL, *supra* note 63. Still recounts the story of Charles Congo and his wife Margaret, who had escaped slavery in Maryland: “No education for the freeman of color, much less for the slave. The order of the day was literally, as far as colored men were concerned: ‘No rights which white men were bound to respect.’” *Id.* at 138.

⁶⁵ See, e.g., WILLIAMS, SELF-TAUGHT, *supra* note 64, at 15 (describing how North Carolina’s antiliteracy law permitted the teaching of arithmetic, likely because numbers were key to certain trades such as carpentry and would thus inure to the benefit of slave owners); Janet Cornelius, “We Slipped and Learned to Read:” *Slave Accounts of the Literacy Process, 1830–1865*, 44 PHYLON 171, 171 (1983) (noting that some slave owners offered literacy “to increase their control”).

⁶⁶ WILLIAMS, SELF-TAUGHT, *supra* note 64, at 6.

⁶⁷ *Id.*; see also *id.* (“I have seen the Negroes up in the country going away under the large oaks, and in secret places, sitting in the woods with spelling books.”).

⁶⁸ *Id.*

It abhorred free speech. It knew that knowledge is power, and it trembled.⁶⁹

Gause's observation also demonstrates that the states' antiliteracy acts were part and parcel to a broader scheme of surveillance and subordination. Slaves who endeavored to learn understood the stakes and adopted clandestine practices of learning and mastered the art of dissembling.⁷⁰ Alice Green recalled how her mother, a cook at the "big house," learned to read and write by asking the white kids returning from school "to show her how to read a little book what she carried 'round her bosom all de time, and to tell her de other things dey had larn't in school dat day. . . . [A]tter de War was over Mammy teached school" ⁷¹ Seeking literacy was often dangerous. Tom Hawkins relayed, "Dere warn't no schools whar slaves could git book larnin' in dem days. Dey warn't even 'lowed to read and write." When his master discovered his carriage diver "had larned to read and write whilst he was takin' de doctor's chillun to and f'um school, he had dat

⁶⁹ *Education in the Southern States*, 11 HARPER'S WEEKLY 705, 706–07 (1867).

⁷⁰ See, e.g., JAMES D. ANDERSON, *THE EDUCATION OF BLACKS IN THE SOUTH, 1860–1935*, at 17 (1988) (describing secret meetings, known among slaves as "stealin' a meetin'," where free blacks taught slaves to read); *id.* at 16 (describing how Thomas H. Jones, a slave from North Carolina, learned to read while in the back of his master's store); FREDERICK DOUGLASS, *LIFE AND TIMES OF FREDERICK DOUGLASS* 171 (Hartford, Conn. 1881) ("All were impressed with the necessity of keeping the matter as private as possible"); *Bondage Was a Great Burden: John McGuire*, in *WORKS PROGRESS ADMINISTRATION*, 4 BORN IN SLAVERY: SLAVE NARRATIVES FROM THE FEDERAL WRITER'S PROJECT, 1936–1938 pt. 2, 238, 239–40 (1941) [hereinafter BORN IN SLAVERY] (describing learning to read in the mines); Levi D. Shelby, Jr., *Jeff David Used to Camouflage His Horse*, in 1 BORN IN SLAVERY, *supra*, at 238, 417 (1941) ("His young marsa taught him to read an' write unbeknowance to his father an' de res' of de slaves."); *supra* notes 66–67 and accompanying text. Eavesdropping and acuity of memory played a key role in literacy but also the maintenance of intelligence networks in and across slave communities. WILLIAMS, *SELF-TAUGHT*, *supra* note 64, at 9. Those who had access to white people's conversations were able to keep their community informed of news beyond the plantation, and once rebellion broke out, the "grape-vine telegraph" kept slaves abreast of the Union army's incursions into the South. *Id.* at 9–10 (describing newly arrived Union soldiers tossing newspapers over the property's fence that were largely propaganda for white people, but slaves would appropriate them as both tools of learning and information about the developing war).

⁷¹ Sadie B. Hornsby, *Plantation Life*, Interview with: Alice Green, in 4 BORN IN SLAVERY, *supra* note 70, at pt. 2, 28, 42 (1941).

Niggers thumbs cut off”⁷² Former slave Ferebe Rogers was married by a slave, Enoch Goldern, who spend his life teaching other slaves to read.⁷³ “On his dyin’ bed he said he been de death o’ many a nigger ’cause he taught so many to read and write,” he told Rogers.⁷⁴ On a separate occasion, a slave named Scipio was put to death for teaching a slave child to read and write; the child was beaten to make him “forget what he had learned.”⁷⁵ Many paid a heavy price to learn to read.⁷⁶

State imposed illiteracy was an attempt to impose “mental darkness.”⁷⁷

Salmon Chase, who would become the Chief Justice of the United States Supreme Court, described the condition of the Freepeople upon emancipation as “virtually a state of serfdom,” under which enslaved persons had been “subject to heavy legal and social disabilities; a state in which they were without civil or political rights, and with few, if any, friends in the South to advocate their elevation to the rank of citizenship, or their education into the fullness of manhood.”⁷⁸ What Chase perhaps was not able to see, however, is that for blacks in bondage literacy allowed for the creation of a private life

⁷² Sadie B. Hornsby, *Plantation Life as Viewed by Ex-Slave*, Tom Hawkins, *in id.* at pt. 2, 126, 130–31.

⁷³ ANDERSON, *supra* note 70, at 17.

⁷⁴ *Id.*

⁷⁵ *Id.*; *see also* YETMAN, *supra* note 60, at 145 (“De white folks didn’t allow us to even look at a book. Dey would scold and sometimes whip us iffen dey caught us with our head in a book.”).

⁷⁶ The danger of literacy sometimes had the unintended effect of deepening the resolve of slaves to learn letters. Booker T. Washington wrote, “From the moment that it was made clear to me that I was not to go to school, that it was dangerous for me to learn to read, from that moment, I resolved that I should never be satisfied until I learned what this dangerous practice was like.” BOOKER T. WASHINGTON, *UP FROM SLAVERY* 7 (New York, Viking Penguin Inc. 1986) (1901). Washington had a hunch that literacy “would be about the same as getting into paradise.” *Id.*

⁷⁷ WILLIAMS, *SELF-TAUGHT*, *supra* note 64, at 25.

⁷⁸ CHASE, *supra* note 50, at 12.

and visions of self definition untethered from their owner.⁷⁹ For example, Mattie Jackson told the story of her mother, Ellen Turner, a slave from Missouri, who had posted a newspaper photo of Abraham Lincoln on the wall of her room.⁸⁰ When the master of the house found it and demanded an explanation, Turner, in a moment of defiance, or, perhaps a lapse of judgment, said she had hung the picture because she liked it, for which her apoplectic master knocked her to the ground three times and sent her to the trader's yard for a month as punishment.⁸¹ The politics of Turner's gesture were self-evident; it was an assertion of moral, self-actualization, her adumbration of the civil freedom that would attend emancipation.⁸² Like Turner's moment of agency, the acquisition of a learned mind was "tantamount to a declaration of domestic civil war,"⁸³ for it threatened assault "on the political community formed and brought into existence by the Constitution of the United States."⁸⁴

⁷⁹ WILLIAMS, SELF-TAUGHT, *supra* note 64, at 7 ("Access to the written word, whether scriptural or political, revealed a world beyond bondage in which African Americans could imagine themselves free to think and behave as they chose.").

⁸⁰ MATTIE K. JACKSON, THE STORY OF MATTIE K. JACKSON, *reprinted in* SPEAKING LIVES, AUTHORIZING TEXTS: THREE AFRICAN AMERICAN WOMEN'S ORAL SLAVE NARRATIVES 108–109 (DoVeanna S. Fulton & Reginald H. Pitts eds., 2010) (1866).

⁸¹ *Id.* at 109.

⁸² *Id.* at 23 (noting how Literacy imbued enslaved persons with the ability to articulate intellectual and moral objections to the degradation of slavery).

⁸³ *Id.* at 12.

⁸⁴ *Dred Scott*, 60 U.S. (19 How.) 393, 403 (1856). Writing for the Court, Chief Justice Taney, spelled out in a manner not required by the issue at bar—essentially whether the Circuit Court has jurisdiction to adjudicate Dred Scott's challenge to his status as a slave—that because persons of African decent—*whether enslaved or free*—"were a subordinate and inferior class of beings . . . and had no rights or privileges but such as those that held the power and the Government might choose to grant them," and therefore were not part of the sovereign "people of the United States." *Id.* at 404–05. Moreover, the Chief Justice understood the decedents of Africa as lacking legal personality as *fait accompli*: "It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belongs to the political or law-making power; to those who formed the sovereignty and framed the Constitution." *Id.* at 405. Like a father protects his family and castle against intrusion, the Court sought to defend the "political family" envisioned by the framers from black's claims of freedom that howled from the peripheries. *Id.* at 206. It is precisely this threat—black's demand for constitutional personhood and

Centering the interior lives and struggles of enslaved African Americans brings into focus the inescapable truth that slavery, whether as chattel or of the Jeffersonian variety, was a fundamental degradation of personhood. William Still, an African American born into slavery, recounted the story of Julius Smith, who in 1858 escaped bondage in Bellaeair, Virginia.

So far as his personal relations were concerned, he acknowledged that a man named Mr. Robert Hollan, had assumed to impose himself upon him as master, and that this same man had also wrongfully claimed all his time, denied him all common and special privileges; besides he had deprived him of an education, etc., which looked badly enough before he left Maryland, but in the light of freedom, and from a free State stand-point, the idea that ‘man’s inhumanity to man’ should assume such gigantic proportions as to cause him to seize his fellow-man and hold him in perpetual bondage, was marvellous in the extreme.⁸⁵

Smith’s political life had “merged” with his master.⁸⁶ Professor Peggy Cooper Davis contents that, “[s]lavemasters had—and slaves lacked—political and moral autonomy: the ability to construct a system of values, to act according to that chosen system of values, and to advocate those chosen values in the political fora.”⁸⁷ The maintenance of

its effects—that was cause for a circling of the wagons. Cf. WILLIAMS, SELF-TAUGHT, *supra* note 64, at 22 (“Whites feared that literacy would render slaves unmanageable. Blacks wanted access to reading and writing as a way to attain the very information and power that whites strove to withhold from them.”). At base, black literacy, 1) challenged notions of black intellectual inferiority by showing that blacks were educable; 2) rejected notions of black depravity in that it demonstrated a yearning for enlightenment; and 3) undermined the assumption of exceptionalism. *See id.* at 29.

The psychic lives and political sensibilities of enslaved African Americans was also manifest in the African American struggle to maintain family and communal bonds notwithstanding failure of the law to recognize black social constellations, whether connubial or platonic. *See generally* HEATHER ANDREA WILLIAMS, HELP ME TO FIND MY PEOPLE: THE AFRICAN AMERICAN SEARCH FOR FAMILY LOST IN SLAVERY (2003) [hereinafter FIND MY PEOPLE].

⁸⁵ STILL, *supra* note 63, at 454.

⁸⁶ Peggy Cooper Davis, *Contested Images of Family Values*, 107 HARV. L. REV. 1348, 1362 (1994).

⁸⁷ *Id.*

white supremacy generated a sustained cultural and legal scheme of civil death⁸⁸—*mors civilis*—that fixed the legal status of African Americans.⁸⁹ Justice Lumpkin, writing for the Supreme Court of Georgia, noted the absurdity of the idea that “the mere act of manumission” of a slave could “invest with all the attributes of manhood in a free state, a being who had no head or name or title, in the State before; who was held, *pro nullis*, *pro mortuis*, and for some, yea many purposes, *pro quadrupedibus*.”⁹⁰ In the language of legal positivism, *Bryan* and *Dred Scott*’s codification of slavery as a sortal status constituted a civil burial.⁹¹ But, for those enslaved, acquiring literacy in conjunction with freedom promised to open access to democratic political activity, and that in turn held a promise of enabling African Americans to participate in shaping the civil society—a

⁸⁸ See EDUARDO COKE, 1 THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, OR, A COMMENTARY UPON LITTLETON § 200 (Philadelphia, Robert H. Small 1853) (1628) (“There is a death in deede, and there is a civil death, or a death in law, *mors civilis* and *mors naturalis* . . .”).

⁸⁹ Cf. Rebecca McLennan, *The Convict’s Two Lives: Civil and Natural Death in the American Prison*, in AMERICA’S DEATH PENALTY 193 (David Garland et al., eds., 2011) (describing civil death as marking the status of prisoners and convicts). Although, McLennan is writing on the technology of penal involuntary servitude as criminal punishment, her observations bear an uncanny resemblance to that of the experiences of enslaved blacks. Compare *id.* (“In the course of the nineteenth century convicts’ separate status was constituted and elaborated in voting, administrative, employment, constitutional, and educational laws that, together, ensnared the convict in a dense thicket of civil penalties . . .”), with *supra* notes 84–88 and accompanying text (discussing enslaved African American’s demand for civic personhood).

⁹⁰ *Bryan v. Walton*, 14 Ga. 185, 204 (1853) (referencing JOHN TAYLOR, ELEMENTS OF CIVIL LAW 249 (London, 3d ed. 1769) (“They were held *pro nullis*, *pro mortuis*, *pro quadrupedibus*; nay, were in a much worse state, than any *cattle* whatsoever . . . They had no State, no Name, Tribe or Register: They were not capable of being injured . . .”).

⁹¹ Professor Jeremy Waldron defines sortal status as categorizing, as a matter of law, subjects on the basis of *the sort of person* they are or are perceived as being. JEREMY WALDRON, DIGNITY, RANKS, AND RIGHTS 58–59 (Meir Dan-Cohen ed., 2012). “Sortal status represents a person’s permanent situation and destiny so far as the law is concerned. It is not acquired or lost depending on actions, growth, circumstances, or vicissitudes.” *Id.* at 59. Sortal status is a baseline relative to the conditional status, which are legal statuses that apply to subjects “in virtue of certain conditions they are in, that they may not be in forever, or that they may have fallen into by choice or happenstance,”—they embody legal consequences that attend stages of human life, choices people make, or poor management of relation with others e.g., infancy, felony, or bankruptcy. *Id.* at 58. Their significance, as a conceptual matter, is that they tell us nothing about the underlying personhood of the person described by them. *Id.*

“dignitarian society”⁹² of equal status—and welcoming them into the constitutional “political family”⁹³ in which they had hitherto been constitutional chattel—“insurgent chattel, but chattel just the same.”⁹⁴ John Henry Hill, an escaped slave from Richmond, Virginia, wrote about literacy:

I say give me freedom, and the United States may have all her money and her Luxtures, yeas give Liberty or Death. I’m in America, but not under Such a Government that I cannot express myself, speak, think or write So as I am able, and if my master had allowed me to have an education I would make them American Slave-holders feel me, Yeas I would make

⁹² *Id.*

⁹³ *Dred Scott*, 60 U.S. (19 How.) 393, 406, (1856).

⁹⁴ WILLIAMS, *supra* note 64, at 69. Williams continues:

Freedpeople wanted to ensure that they counted as voters and as legislators who could govern their own futures. Illiteracy, they knew, would impede their ambition for full participation in this public, political sphere. Therefore, alongside traditionally defined civil rights of suffrage and jury service, freedpeople propounded a new right: the right to attend school.

Theorist Loïc Wacquant has argued that “[r]acial difference was a consequence, not a precondition, of US slavery.” Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the “Race Question” in the US*, 13 NEW LEFT REV. 41, 45 (2002); *see, e.g.*, JEFFERSON, *supra* note 44, at 150 (“[W]hether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind.”). The African American unitary vision of rights embodies a broader vision of freedom as *sui juris*, of a people who no longer need someone to speak for them, of bearing “an imposing array of rights.” WALDRON, *supra* note 91, at 59. It is a vision of the undoing of race as a sortal status, a unilateral leveling up. This high status—wherein each individual is a “self-originating source of legal and moral claims,” *id.* at 60—however, sought to cut across the grain of a deeply-seated American tradition of the redistribution of status that has pushed in a downward direction. Professor James Whitman, who has studied the comparative legal and intellectual histories of continental Europe and the United States, argues that the United States, France, and Germany have all had status revolutions. JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 195–96 (2003). Alluding to our war of independence, Whitman writes: “But the revolution in the United States has been very much one against social honor, against high status; whereas in continental Europe it has been a revolution in favor of social honor, in favor of generalizing high status.” *Id.* Another key to understanding the civic/social dichotomy? It is no surprise then that the Third Congress would pass a naturalization act, under which the only white male unable to claim American citizenship was he unwilling to renounce hereditary titles of nobility. An Act to Establish an Uniform Rule of Naturalization, ch. 20, 1 stat. 414 (1795) (providing that the alien must establish his bona fides to become a U.S. citizen by “renounce[ing] forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty”). Yet, high status—the universal entitlement of Jeffersonian freedom—has anchored the aspirations of blacks since at least the time of the Founding. *See* ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 35 (1998) (describing how blacks invoked the Revolution’s ideology of liberty in demanding their own rights).

them tremble when I spoke, and when I take my Pen in hand their knees
smote together.⁹⁵

Notwithstanding evidence of Hill being able to aptly read and write, he speaks of a deep yearning for education and its insurgent potential. Hill also demonstrates that for enslaved persons, education was not merely learning to read and write one's name.⁹⁶ It was about embodying the personhood of someone who can demand to be heard and taken into account—someone who issues commands rather than merely obeying them.⁹⁷

⁹⁵ STILL, *supra* note , at 193–94 (Phila., Porter & Coates 1872).

⁹⁶ See BURCHART, *supra* note 48, at 15 (“Education . . . was intended to liberate. . . . Schooling would ‘do something to destroy the effects of their long and bitters years of oppression and bondage fastened upon them by unholy legislation.’”).

⁹⁷ WALDRON, *supra* note 91, at 60.

c. *THE ARRIVAL OF FREEDOM*



98

As freedom arrived in the South, African American enthusiasm for becoming learned reflected a burgeoning if not a fully ripened sense of community and racial pride.”⁹⁹ There was a deep conviction that citizenship would require self-recognition as a

⁹⁸ Timothy H. O’Sullivan, *Large Group of Slaves(?) Standing in Front of Buildings on Smith’s Plantation, Beaufort, South Carolina* (1862), available at <http://www.loc.gov/pictures/item/98504440>.

⁹⁹ LITWACK, *supra* note 47, at 500. This recognition illuminates the political imagination of the Freepeople as rich but overlooked source material that should inform constitutional theory. Importantly, African American novelist Ralph Ellison once queried whether African Americans could “live and develop for over three hundred years simply by reacting?” RALPH ELLISON, *SHADOW AND ACT* 315 (N.Y.C. Quality Paperback Club 1994) (1953). Ellison continued, “[a]re American Negroes simply the creation of white men, or have they at least helped to create themselves out of what they found around them?” *Id.*; cf. BUTCHART, *supra* note 48, at 18 (“The language that scholars employ to describe southern black schooling in the 1860s and 1870s—freedmen’s education—often implies a passive process, something done to and for the freed people.”). The epistemological thrust of Ellison’s question is important for purposes of this essay in at least two ways. First, canonical understandings of the Reconstruction Amendments have overlooked the political ambitions of the Freepeople and their descendants as rich source materials that open new interpretive possibilities. Would like to see this discussed in text. And earlier. Key to explaining why black political imagination and black assertions of freedom are relevant to constitutional interpretation. *See* _____. Second, challenging these canonical understandings necessarily require a more nuanced

people and willingness to act on that consciousness.¹⁰⁰ Universal literacy would take time, but even the poor and illiterate bared? the right and could seek protection in order to give effect to that right. An elderly and illiterate freeman suggested that “book larnin” could not be the end in and of itself.¹⁰¹ Education was a source of political strength and insurance against the intractable desires of the planter class to reinstate the subordination of the Freepeople.¹⁰² A Louisiana freedman put it this way: “What made the difference between a white man and a black man? Knowledge and wisdom.”¹⁰³ He continued:

Education was the thing. . . . Leaving learning to your children was better than leaving them a fortune; because if you left them even five hundred

understanding of slavery and those who lived under its regime, for whom civil and social rights often merged. [See](#) [\[redacted\]](#).

¹⁰⁰ The collective consciousness of enslaved blacks was rooted in antislavery traditions of finding strength in bonds of reciprocity. *See* Herbert G. Gutman, *Afro-American Kinship Before and After Emancipation in North America*, in *INTEREST AND EMOTION: ESSAYS ON THE STUDY OF FAMILY AND KINSHIP* 247 (Hans Medick & David Warren Sabean eds., 1984) (“Fictive, or quasi-, kin played yet other roles in developing slave communities, binding unrelated slave adults to one another and thereby infusing these groups with conceptions of reciprocity and obligation that had initially flowed from kin obligations.”); *see also* WILLIAMS, *FIND MY PEOPLE*, *supra* note 84, at 40 (discussing the role of “surrogate caregivers” in slave communities given the disrespect the system of slavery accorded black families); *cf.* CAROL STACK, *ALL OUR KIN* 30 (N.Y.C., Basic Books 1997) (1970) (“Children may be cared for by their parents or by other participants in their parents’ domestic network The residence patterns of children . . . raises questions about the distribution of rights for children, the criteria by which persons are entitled to assume parental roles, and how to define ‘family’”). For a classic history of the development of black cultural consciousness during slavery, *see* LAWRENCE W. LEVINE, *BLACK CULTURE AND BLACK CONSCIOUSNESS: AFRO-AMERICAN FOLK THOUGHT FROM SLAVERY TO FREEDOM* (1977).

¹⁰¹ LITWACK, *supra* note 47, at 500–01 (“But we’s a down trodden people. . . . We has bin kep down a *hundred years* and *I* think it will take a *hundred years* to get us back agin. Derefo’ . . . I tink we better not wait for education.”).

¹⁰² *See* FREEDMEN’S BUREAU, LETTER FROM THE SECRETARY OF WAR, IN ANSWER TO A RESOLUTION OF THE HOUSE OF MARCH 8, TRANSMITTING A REPORT, BY THE COMMISSIONER OF THE FREEDMEN’S BUREAU, OF ALL ORDERS ISSUED BY HIM OR ANY ASSISTANT COMMISSION, 39th Cong., 1st Sess. H.R. EXEC. DOC. 70, at 2 (1866) (“Your freedom will expose you to some new troubles. Bad men will take advantage of your ignorance and impose upon you. Some will try to defraud you of your wages, and a few may be wicked and cowardly enough to revenge their losses upon you by violence.”); BOTUME, *supra* note 56, at 259 (Boston, Lee and Shepard Publishers 1893); (“The poor negroes became more than ever eager to ‘get book-larning,’ realizing that designing people took advantage of their ignorance.”); LITWACK, *supra* note 47, at 473 (“The practical value of education never seemed clearer than in the aftermath of emancipation, when illiterate black laborers learned from bitter experience, especially on payday and at contract time, how white people used ‘book-larnin’ to take advantage of them.”); MITCHELL, *supra* note 10, at 200 (noting the “devious nature of planters”).

¹⁰³ JOHN RICHARD DENNETT, *THE SOUTH AS IT IS, 1865–1866*, at 322 (Univ. of Ala. Press, 2010) (1965).

dollars, some man having more education than they had would come along and cheat them out of it all; but learning they could keep.¹⁰⁴

Postbellum efforts of the Freepeople to set up schools provided an opportunity to define themselves as a people; blacks across the ex-Confederate states began to organize.¹⁰⁵ The Freepeople gathered together, often in schoolhouses, to discuss their condition and to frame an agenda moving forward.¹⁰⁶ Once proscribed at law, these meetings took on additional significance as they set the stage for entry into the political arena and for the fullest expression of their new status as national citizens.¹⁰⁷ Historian Steven Hahn argues that the onset of war, “by its very nature, thus provided the sort of basic political education that enslaved people had found almost impossible to come by.”¹⁰⁸ Enslaved persons, often for the first time, met free and freed African Americans from the North and South, and sympathetic white officers.¹⁰⁹ In the wartime military, refugee blacks became conversant in federal policy, discovered forms of authority and loyalty other than those prescribed by the planter class, and, discussed their previous

¹⁰⁴ *Id.* see also *State Convention, Reconstruction Begun*, S.C. LEADER, Oct. 28, 1865, at 2 (“Knowledge is power, and an educated and intelligent people can neither be held in, nor reduced to, bondage”); **LOYAL GEORGIAN, Jan 20, 1866 [available at Schomburg]**.

¹⁰⁵ LITWACK, *supra* note 47, at 501.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; see also MITCHELL, *supra* note 10, at 191 (“Freedpeople, formerly free people, and their allies viewed education as fundamental to the political and economic future of all people of color after emancipation.”). See **JULIE SAVILLE, THE WORK OF RECONSTRUCTION: FROM SLAVE TO WAGE LABOR IN SOUTH CAROLINA 1860–1870, at 160–70 (1994)** for a discussion of the Freepeople’s communal political activism.

¹⁰⁸ STEVEN HAHN, *A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION* 97 (2003). While Hahn links the political awakening of the slaves to the arrival of Union troops, it is possible to understand slave politics in a broader way. See *supra* notes 77–97 and accompanying text (discussing the moral foundation of black antebellum politics).

¹⁰⁹ HAHN, *supra* note 108, at 97.

experiences and future prospects in terms both secular and religious.¹¹⁰ Union Soldier and historian Joseph T. Wilson, himself black, observed

Generally there was one of three things the negro soldiers could be found doing when at leisure: discussing religion, cleaning his musket and accouterments, or trying to read. His zeal frequently led him to neglect to eat for the latter. Every camp had a teacher, in fact every company had some one to instruct the soldiers in reading, if nothing more. Since the war I have known of more than one who have taken up the profession of preaching and law making, whose first letter was learned in camp¹¹¹

“So ardent were they,” noted Colonel G.M. Arnold, “that they formed squads and hired teachers, paying them out of their pittance of seven dollars per month, or out of the bounty paid to them by the State”¹¹² After battles were won or lost, spelling books and bibles were often found upon the bodies of black soldiers.¹¹³

But even outside of the military context, the collective political imagination of enslaved blacks was far from a tabula rasa before the arrival of Union troops. In 1860, when the “Black Republican” Abraham Lincoln was elected President, enslaved blacks both passed the word and pondered its meaning.¹¹⁴ Some fled and sought protection from the Union Armies as they made their way into Confederate territory, while others

¹¹⁰ *Id.*

¹¹¹ JOSEPH T. WILSON, *THE BLACK PHALANX: A HISTORY OF THE NEGRO SOLDIERS OF THE UNITED STATES IN THE WARS OF 1775–1812, 1861–’65*, at 504 (Hartford, Conn. 1890). Hahn notes that service in “people’s armies” has historically proven a politicizing experience for the previously disenfranchised. HAHN, *supra* note 108, at 97, 501–02 n.60.

¹¹² WILSON, *supra* note 111, at 504–05; *accord* HAHN, *supra* note 108, at 97.

¹¹³ HAHN, *supra* note 108, at 98. While perfect numbers are elusive, Hahn estimates that by the close of war, one-quarter of the privates and nearly of all noncommissioned officers in northern regiments of mostly free blacks and “substantially fewer” in regiments raised in the Mississippi Valley and Deep South of mostly enslaved men claimed some level of ability to read and write. *Id.* [number of black soldiers?]

¹¹⁴ *Id.* at 13.

remained on their holdings and engaged in collective actions to “rearrange the balances of power and authority”; “[t]hey slowed the pace of work, devoted more time to their provision crops, ignored the master’s commands, moved about as they wished or could, and generally tried to tend to their own affairs.”¹¹⁵

d. *THE VANGUARD OF THE FREE SCHOOL*

Since the Founding, approaches to public education have varied widely from state to state. Ten of the twenty-three states in the Union in 1820 made no mention of education in their constitutions.¹¹⁶ Six of the remaining thirteen—Massachusetts, New Hampshire, Vermont, Maine, Ohio, and Indiana—required education.¹¹⁷ Alabama, Delaware, Georgia, and Mississippi had less directive provisions in their constitutions, and North Carolina, Pennsylvania, and Vermont provided for public instruction “at low prices.”¹¹⁸ The evolution of educational funding was similarly dissimilar, but there were general patterns, first with modest state funding to private, parochial, and philanthropic organizations; then local communities were conferred authority to levy a property tax to fund schools; requiring minimum rates of taxation with “rate bills” making up any deficit in school budgets; and lastly, the requirement of a free public education and establishment of enforcement mechanisms.¹¹⁹ In the immediate postbellum years, with

¹¹⁵ *Id.* at 14.

¹¹⁶ Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2052 (2006).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2053.

the exception of parts of New England and the upper Midwest, racial segregation in schools was the norm, with a mix of de jure and voluntary segregation.¹²⁰

Before the Civil War, education stood sentinel at two distinct but related social boundaries in slaveholding states.¹²¹ One was the “heavily fortified” boundary between white and black learners.¹²² The other was a more pervious but still unmistakable palisade between different white social classes.¹²³ The debate over the education of free and freed children in the South turned in significant part on the neglected opportunity of poor white children. Formal education was the purview of the planter class and achieved almost solely through private means.¹²⁴ Southern elites tolerated “pauper education” as a philanthropic endeavor, but the idea of state sanctioned education and in turn intervention in the socio-political worldview of southern aristocratic order was met with often-violent hostility.¹²⁵ Education en masse violated the “natural evolution of society,” and threatened patriarchal authority over children and to upset the reciprocal relations of owners and laborers.¹²⁶ Whites lower in the social order showed little appetite for

¹²⁰ Klarman, *supra* note 12, at 81.

¹²¹ BUTCHART, *supra* note 48, at 14.

¹²² *Id.*

¹²³ *Id.* at 14–15.

¹²⁴ ANDERSON, *supra* note 70, at 4. As a theoretical matter, the vaulted social position of southern whites rested on their innate racial superiority, not on acquired characteristics such as education or virtue; in a fascinating turn of racial alchemy, poor southern whites were needed to uphold the racial hegemony of chattel slavery, though they themselves were too “black” to be accorded full membership in the “ruling race.” Harry L. Watson, *The Man with the Dirty Black Beard: Race, Class, and Schools in the Antebellum South*, 32 J. OF THE EARLY REPUBLIC 1, 3 (2012); see also *supra* notes 121–123. For an informative ethnography of the enduring legacy of a complex and well-entrenched class system among white southerners, see ALLISON DAVIS ET AL., DEEP SOUTH: A SOCIAL ANTHROPOLOGICAL STUDY OF CASE AND CLASS 59–83 (Univ. of S.C. 2009) (1941).

¹²⁵ ANDERSON, *supra* note 70, at 4.

¹²⁶ *Id.*

challenging the planter regime.¹²⁷ “Indeed, established economic, political, social, and psychological relationships bound southern whites to the ideological position of the planter regime.”¹²⁸ The result being that prior to the Thirteenth Amendment, there were no public education systems in the South, with the exceptions of in Louisiana, North Carolina, Alabama, and Kentucky.¹²⁹ Even where there was some semblance of publicly available education, the idea of publicly financed common schools remained anathema across the South until after the Civil War.¹³⁰

In this light, Federally sponsored education for free and freed blacks of the type ordered by General Banks threatened to unseat white supremacy in the South.¹³¹ On behalf of his constituents in Lafourche Parish, Louisiana, Representative C. Henry Gruneberg lamented that “the orders of the commanding general [Banks], which provided for the education of the colored before the white ones, might be followed up by laws from this assembly that would destroy the birth-right of the white man.”¹³² The

¹²⁷ *Id.*; MITCHELL, *supra* note 10, at 196.

¹²⁸ ANDERSON, *supra* note 70, at 4.

¹²⁹ MITCHELL, *supra* note 10, at 196. *But see* CHASE, ET AL., *supra* note 50, 28 (noting that only North Carolina had a public education system before the end of the War). In some urban centers, there were free schools, and some localities had academies and colleges, but for all intents and purposes no provision was made for the education of African Americans and poor whites. *Id.* at 12.

¹³⁰ MITCHELL, *supra* note 10, 196.

¹³¹ In southern vernacular “Nigger teacher” was one of the most opprobrious. CHASE, ET AL., *supra* note 50, at 29.

¹³² DEBATES IN THE CONVENTION FOR THE REVISION AND AMENDMENT OF THE CONSTITUTION OF THE STATE OF LOUISIANA 197–98 (New Orleans, W.R. Fish 1864); *see also id.* at 161 (assenting to the emancipation of the slaves “in every State of this rebellious country” for the purpose of “crushing out this odious rebellion,” R. King Cutler also stated his disfavor for “positively imposing upon any Legislature the unqualified and imperative duty of educating any but the superior race of man—the white race”); *id.* at 476 (“I will never tax white men to educate negro children.”) (statement of Rep. John Sullivan). The final amendment was conspicuously vague with regard to the funding of the state’s public school system—“[t]he legislature shall provide for the education of all children . . . by maintenance of free public schools by taxation or otherwise”—but it nonetheless provided for the education of *all children*. LA. CONST. of 1864, art. 141, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL

Freepeople dramatically parted ways with Southern hostility toward public education. In 1865, the *New Orleans Black Republic* published a statement signed by black leaders in New Orleans that read: “Freedom and school books and newspapers, go hand in hand. Let us secure the freedom we have received by the intelligence that can maintain it.”¹³³

“Few People who were not right in the midst of the scenes can form any exact idea of the intense desire which the people of my race showed for education,” wrote Booker T. Washington. “It was a whole race trying to go to school. Few were too young, and none too old, to make the attempt to learn.”¹³⁴ Mary McLeod Bethune fittingly noted: “The whole world opened to me when I learned to read.”¹³⁵ For African Americans, literacy worked in tandem with emancipation; literacy merged with the experience of freedom. For the Freepeople there was a sense of righteousness about themselves as rightholders. “If I nebber does nothing more while I live,” a Mississippi freedman vowed, “I shall give my children a chance to go to school, for I considers education next best ting to liberty.”¹³⁶ For black teachers and pupils, education embodied the radical potential of Jeffersonian freedom, lifting them not only out of bondage but also providing moral self-

CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1429, 1446 (Francis Newton Thorpe ed., 1906).

¹³³ NEW ORLEANS BLACK REPUBLICAN, Apr. 29, 1865, at ___; see also LEON F. LITWACK, *supra* note 47, at 472 (“If they looked to any panacea (outside of land) to free them from mental and physical dependency, they fastened their hopes on the schoolhouse.”). Many black leaders (and educators) of the postbellum years first became literate under slavery. ANDERSON, *supra* note 70, at 17.

¹³⁴ DU BOIS, BLACK RECONSTRUCTION, *supra* note 142, at 641.

¹³⁵ Mary McLeod Bethune, “Faith That Moved a Dump Heap,” *republished in* BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 136 (Gerda Lerner ed. 1972).

¹³⁶ LITWACK, *supra* note 47, at 472.

possession and political personhood.¹³⁷ Seeking to “unshackle his mind,” James W.C. Pennington sought education.¹³⁸ “There is one sin that slavery committed against me, which I will never forgive. It robbed me of my education; the injury is irreparable”¹³⁹

For the Freepeople, deprivation of the right to literacy was tantamount to slavery. Adding a gloss to a Jeffersonian notion of slavery, slavery had denied black people the right to control their persons and progeny; as free persons, they demanded to be able to organize their lives in accordance with their own sense of propriety,¹⁴⁰ and illiteracy smudged their status as *sui juris*. In describing the Black Codes that were passed in almost every Southern state after the Civil War was won “to put the state much in the place of the former master,”¹⁴¹ a former slave described the laws as making “the condition of the freed Negro worse than when he had a master before the war.”¹⁴² From the floor of the

¹³⁷ See W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 7 (Rockville, Maryland, Arc Manor 2008) (1903) (“The teachers in these institutions came not to keep the Negroes in their place, but to raise them out of the defilement of the places where slavery had wallowed them.”).

¹³⁸ JAMES W.C. PENNINGTON, *THE FUGITIVE BLACKSMITH* 56 (London, Charles Gilpin 3d ed. 1850).

¹³⁹ *Id.*

¹⁴⁰ 3 *FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION*, 1861–1867, at 7 (Ira Berlin et al. eds. 1991).

¹⁴¹ FONER, *supra* note 28, at 198. From the moment the Civil War ended, southern states passed laws intended to define the new rights and responsibilities of the Freepeople while stabilizing the black workforce so as to maximally inure to the benefit of plantation owners by limiting economic opportunities for blacks apart from plantation labor. *Id.* Under these laws, states would enforce labor agreements and plantation discipline, including by legally binding freed black children to their former masters, punish blacks who refused to contract, prevent whites for competing among themselves for black workers thus driving down the cost of labor, and enforce with impunity vagrancy laws. *Id.* at 198–205; see generally DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME* (2008).

¹⁴² ALBERT, *supra* note 63, at 140; see also FONER, *supra* note 28, at 244 (“If states could deny blacks rights, . . . then I demand to know, of what practical value is the amendment abolishing slavery?” (internal quotation marks omitted)); LITWACK, *supra* note 47, at 472 (“Charles, you is a free man you say, but Ah tells you now, you is still a slave and if you lives to be a hundred, you’ll STILL be a slave, cause you got no education, and education is what makes a man free!”). W.E.B. Du Bois famously commented on the fall of Congressional Reconstruction: W.E.B. Du Bois: “The slave went free; stood a brief moment in the sun; then moved back again toward slavery.” W.E.B. DU

House of Representatives, African American members of the Reconstruction Congress strenuously argued that Section 5 of the Fourteenth Amendment provided the constitutional authority if not duty for Congress to guarantee that the Freedpeople were not to be deprived education and the freedom of which it is foundational.¹⁴³

Given the political universe that grew up around the experience of slavery, it is no wonder that, as W.E.B. Du Bois famously declared, “[t]he first great mass movement for public education at the expense of the state, in the South, came from Negroes.”¹⁴⁴ The antislavery tradition of educational self-help, along with the work of black political leadership, propelled forward the movement for universal public education in the South.¹⁴⁵ Exogenous factors supported the movement—most notably federal power¹⁴⁶—

BOIS, BLACK RECONSTRUCTION IN AMERICA at 30 (Touchstone 1995) (1935) [hereinafter BLACK RECONSTRUCTION].

¹⁴³ See, e.g., 43 CONG. REC. 344 (1873) (statement of Rep. Joseph H. Rainey) (discussing the violent reprisals African Americans faced for seeking to “enter [the] free school,” declared: “if [white citizens of the South] will not obey the Constitution, then the power is given by that Constitution for the enactment of such a law as will have a tendency to enforce the provisions thereof.”); 43 CONG. REC. 1311 (1874) (statement of Rep. Alonzo J. Ransier) (arguing: “While we have, as a body, contributed our labor in the past to enhance the wealth and promote the welfare of the community, we have, as a class, been deprived of one of the chief benefits to be derived from industry, namely, the acquisition of education”); 43 CONG. REC. 409 (1873) (statement of Rep. Robert B. Elliott) (commenting, inter alia, on the right to “education in public schools,” Representative Elliott declared “all discrimination, all denial of equality before the law, all denial of the equal protection of the laws, whether State or national laws, is forbidden”); 43 CONG. REC. 566 (1873) (statement of Richard H. Cain) (“the education of the race, the education of the nation, is paramount to all other considerations”); see also *The Civil Rights Cases*, 109 U.S. 3, 53 (1883) too big a leap to go unexplained: (Harlan, J., dissenting) (“I insist that the national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the masters of fugitive slaves.”).

¹⁴⁴ DU BOIS, BLACK RECONSTRUCTION, *supra* note 142, at 638; see also ANDERSON, *supra* note 70, at 4 (“Former slaves were the first among native southerners to depart from the planters’ ideology of education and society and to campaign for universal, state-supported public education.”); FONER, *supra* note 28, at 97 (“Northern Benevolent societies, the Freedman’s Bureau, and, after 1868, state governments, provided most of the funding for black education during Reconstruction. But the initiative often lay with blacks themselves, a pattern established in the early days of the war.”).

¹⁴⁵ ANDERSON, *supra* note 70, at 19.

¹⁴⁶ See *infra* ____.

but the campaign was rooted in resistance to slavery and the Freepeople's unyielding desire for self-determination.¹⁴⁷

Notwithstanding political rhetoric in opposition to black education, by 1870 every southern state constitution had a provision for state-funded public education for the benefit of *all* children in the South.¹⁴⁸ The Freepeople, however, were not inclined to wait for the benevolence of the political elite. In 1865, when the school board in Louisiana established by military order¹⁴⁹ voted to suspend collection of the five percent school tax, a harbinger for the closing of schools for Freechildren, Major General E.R.S. Canby received a petition signed by ten-thousand Freedpeople demanding the tax be reinstated.¹⁵⁰ While attending a mass meeting on the school tax, the superintendent of schools in Baton Rouge spoke of the Freepeople's imperturbable commitment to black education. "I requested that all who were in favor of supporting the school for their children by a system of 'taxation' . . . to stand on their feet. The house was crowded to overflowing, probably 1,000 were present, and *every man and woman* stood erect. I say ERECT and I mean it too, for the motion was received without a shout, and the house fairly trembled."¹⁵¹ In response to President Andrew Johnson's refusal to reinstate the school tax, thus cutting off the largest source of funding for schools for the Freedpeople

¹⁴⁷ ANDERSON, *supra* note 70, at 19. Anderson continues: "Such a view of postbellum southern education acknowledges the important contribution of northerners but recognizes the ex-slaves as the principal challenge to the region's longstanding resistance to free schooling." *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ MITCHELL, *supra* note 10, at 194 and accompanying text.

¹⁵⁰ *Id.* at 198.

¹⁵¹ *Id.* at 199.

in Louisiana, the Freedpeople set up associations, e.g. the Louisiana Education Relief Association, to help poorer families pay to have their children educated.¹⁵² While sure to recognize the support of the Freedman's Bureau and northern benevolence, J. Willis Menard, secretary of the Association maintained that the Freepeople's stating their claim to national citizenship rested in large part on their shoulders: "the colored people are called today to mark out on the map of life with their *own hands* their future course or locality in the great national body politic." Menard recognized that literacy and the civil rights of the Freepeople were inalienable.¹⁵³

The Freepeople's élan to be self-taught is also demonstrated by the fact that between 1861 and 1876, black teachers outnumbered white teachers from the North four to three.¹⁵⁴ In January 1866, in his first semi-annual report on the Freedmen's Bureau schools, John Alvord, who had been appointed inspector of schools (his title was later changed to general superintendent of schools) for the Bureau, noted the Freepeople's practice of "self-teaching" and the establishment of "native schools" across the South that operated independently of Bureau-supported schools and Northern benevolent societies.¹⁵⁵ Importantly, Alvord observed, "this

¹⁵² *Id.* Even where the federal government, by way of the Union Army or Freedmen's Bureau, was involved in ensuring the refugees and freed blacks were able to receive an education in the near term, the long-term success of these efforts depended mainly on African Americans. ANDERSON, *supra* note 70, at 9.

¹⁵³ It was a system of "communal values and sanctions"—indeed a political consciousness—that grew up under the yoke of slavery that made the education of their children possible. Gutman, *supra* note 100, at 254; *accord* MITCHELL, *supra* note 10, at 199. In South Carolina, "[h]e who makes himself prominent in opposing the establishment of a school . . . is looked upon as an enemy to the *race*, and worthy of suspicion, or 'to be let alone' when contracting is called for." Gutman, *supra* note 100, at 254.

¹⁵⁴ BUTCHART, *supra* note 48, at 19.

¹⁵⁵ J.W. ALVORD, FIRST SEMI-ANNUAL REPORT ON SCHOOLS AND FINANCES OF FREEDMEN 9–10 (1866), *reprinted in* 1 FREEDMEN'S SCHOOLS AND TEXTBOOKS (Robert C. Morris ed., 1980) [hereinafter SEMI-ANNUAL REPORT] ("Throughout the entire south an effort is being made by the colored people to educate themselves. In the absence of other teaching they are determined to be self-taught; and everywhere some elementary text-book, or the fragment of one, may be seen in the hands of negroes.").

educational movement among the freedmen has in it a self-sustaining element.”¹⁵⁶ The self-sustaining dimension of the Freepeople’s educational self-help, and the concomitant “ambition” to bear the financial costs of schooling,¹⁵⁷ bespoke customs that have deep roots in the experience of slavery.¹⁵⁸ In 1867, more than half of schools in the South were financially supported in part by the Freedpeople.¹⁵⁹ Of the 78,000 black students, fifteen thousand paid some tuition, amounting to \$11,377.03 per month total.¹⁶⁰ From the Freedpeople, Alvord reported hearing: “[W]e want to show how much we can do *ourselves*, if you will only give us a chance.”¹⁶¹ This plea illustrates the salient relationship between the Freepeople’s self-efflorescence as citizens and the federal government’s role in allowing the Freepeople to take the rank of citizen.¹⁶²

¹⁵⁶ *Id.* at 10.

¹⁵⁷ J.W. ALVORD, FIRST SEMI-ANNUAL REPORT *supra* note 155, at 9.

¹⁵⁸ See *supra* note __, at __.

¹⁵⁹ CHASE, ET AL., *supra* note 50, at 31.

¹⁶⁰ *Id.*

¹⁶¹ J.W. ALVORD, FIRST SEMI-ANNUAL REPORT *supra* note 155, at 9. The plea for self-actualization of which Alvord gives account also demonstrates the inalienability of the political franchise from the constitutional personhood of the Freepeople. In 1867, the black Equal Rights Association of Macon, Georgia, declared: “That a Free school system is a great need of our state, and that we will do all in our power by voice and by vote to secure adoption of a system.” THE LOYAL GEORGIAN, May 16, 1867, at 19. There was also no easy division between enfranchisement and the Freepeople’s impulse to gain literacy. ANDERSON, *supra* note 70, at 18. Alvord reported, “At the place of voting they look at the ballot-box and then at the printed ticket in their hands, wishing they could read it.” ALVORD, FOURTH SEMI-ANNUAL REPORT *supra* note 155, at 79; see also MITCHELL, *supra* note 10, at 201 (noting that white people, regardless of class, united in opposition to the education of the black child and the freeman’s vote to prevent black equality from becoming reality). Against this backdrop, Justice Marshall, dissenting in *Rodriguez*, recognized the convergence of civil, political, and social rights as mutually reinforcing of bedrock principles of the reconstructed Constitution. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 102-03 (1973) (Marshall, J., dissenting) (“As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.”).

¹⁶² Cf. *The Civil Rights Cases*, 109 U.S. 3, 61 (1883) (Harlan, J., dissenting) (“The difficulty has been to compel a recognition of the legal right of the black race to take that rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them . . .”).

[Insert tables re black schools and enrollment.]

e. *FEDERAL POWERS*

Notwithstanding the trenchant desire for self-activity among the Freepeople, given the hostility of the southern political elite to universal education,¹⁶³ the free and the freed understood that realization of their constitutional personhood would languish absent federal intervention. In December 1864, a delegation of black leaders in Savannah met with Secretary of War Edwin M. Stanton and General William Tecumseh Sherman to seek their support in establishing a system of free schools in Georgia. “For the first time in the history of the commonwealth, colored men, as freemen, met with white men to plan unmolested for the intellectual development of their race.”¹⁶⁴ From this conference emerged plans for establishing free schools for the Freepeople.¹⁶⁵ In early 1865, James Lynch, an African American who would become the Secretary of State for Mississippi, and John Alvord of the Freedman’s Bureau partnered to examine teachers; “[i]t was the first time in the history of the state that a colored man and a white man had examined teachers with reference to their ability to teach.”¹⁶⁶ African American leaders also formed the Savanna Educational Association to promulgate school policy and underwrite the

¹⁶³ RICHARD R. WRIGHT, *A BRIEF HISTORICAL SKETCH OF NEGRO EDUCATION IN GEORGIA* 16 (Savannah, Ga., 1894) (“Considered by many as property illegally taken from those among whom his lot was to be cast hereafter as a citizen, he was looked upon as an intruder in the body politic.”); BUTCHART, *supra* note 48, at 177 (noting the stubborn southern worldview and its vehement opposition to “Negro Rule.”).

¹⁶⁴ WRIGHT, *supra* note 163, at 16.

¹⁶⁵ C.T. Wright, *The Development of Education for Blacks in Georgia, 1865–1900*, at 71 (1977) (unpublished Ph.D., Boston University) (on file with the author).

¹⁶⁶ WRIGHT, *supra* note 163, at 18.

funding of the free schools.¹⁶⁷ Officials from the Freedman's Bureau described the structure of the association:

To associate the efforts of the people, the prominent educators in the State, the agents of northern societies, and such officers of the [federal] government as are authorized to aid the work, and to unite in such a manner as shall exclude any subject at all likely to divide their efforts or direct them from their one great and desirable object.¹⁶⁸

While the Association sustained in full or in part the day-to-day operation of more than two-thirds of schools,¹⁶⁹ federal "aid" played a key role in facilitating the birth of the free school system in Georgia.¹⁷⁰ The insistence of the Freepeople on being self-taught was less a rebuke of federal contribution, but as Anderson posits, "[t]he ex-slave's education movement became a test of their capacity to restructure their lives, to establish their freedom."¹⁷¹ One of the first schools established, perhaps ironically, was in the "old Bryan Slave Market," from which the ancestors of the future beneficiaries of the school had been sold at market.¹⁷²

While it is true that by 1870 every southern state had adopted a constitutional provision establishing a public education system funded by a state fund, it was federal power that created an opening in which black political leaders could advance education

¹⁶⁷ C.T. Wright, *The Development of Education for Blacks in Georgia, 1865–1900*, at 71 (1977) (unpublished Ph.D., Boston University) (on file with the author). The Savanna Educational Association was also known as the Georgia Educational Association. ANDERSON, *supra* note 70, at 11.

¹⁶⁸ ALVORD, FIFTH SEMI-ANNUAL REPORT *supra* note 155, at 28.

¹⁶⁹ ANDERSON, *supra* note 70, at 11. In autumn of 1866, the Association financed entirely or in part, 96 of the 123 day schools (for children) and evening schools (for adults) and owned outright 57 of the school buildings. *Id.*

¹⁷⁰ ALVORD, FIFTH SEMI-ANNUAL REPORT *supra* note 155, at 28.

¹⁷¹ ANDERSON, *supra* note 70, at 12.

¹⁷² WRIGHT, *supra* note 163, at 18.

as a fundamental right. Congress, by way of the Reconstruction Acts, empowered the occupying armies to call constitutional conventions to which delegates would be elected by male citizens, “whatever race, color, or previous condition.”¹⁷³ Clothed in federal power, black politicians joined with Republicans to, for the first time, establish universal public education in the South. So influential was black political leadership under the cover of political power, that as part of the white South’s efforts to “restore home rule,” the political coalition of “bourbon democrats, also known as the “Redeemers,” promised black voters that they would not abolish universal education under their rule.¹⁷⁴

[transition]

¹⁷³ Reconstruction Acts, ch. 152, sec. 5, 14 Stat. 428, 429 (Mar. 2, 1867); *see also* ch. 6, 15 Stat. 2 (Mar. 23, 1867); ch. 30, 15 Stat. 14 (July 19, 1867); ch. 25, 15 Stat. 41 (Mar. 11, 1868); ch. 3, 16 Stat. 59 (Dec. 22, 1869). The Enforcement Acts, while mainly aimed at the waxing influence of the Ku Klux Klan, further protected the enfranchisement of the Freepeople by providing for criminal liability for any person, who “by force, bribery, threats, intimidation, or other unlawful means,” deprives a person of their ability to vote. Enforcement Act of 1870, ch. 114, sec. 4, 16 Stat. 140; *see also* Enforcement Act of 1871, ch. 99, 16 Stat. 433; Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871).

¹⁷⁴ BUTCHART, *supra* note 48, at 154 (2010). Once in power, the Redeemers, unilaterally slashed state funding for public schools across black and white schools though maintained some semblance of public funding, thus honoring the letter of their promise, but they nearly dismantled the bureaucratic bodies created under Reconstruction to administer public education. *Id.* Only after the birth of Jim Crow disfranchisement campaigns of the 1880s and 1890s did southern Legislatures devise means to tip the balance in favor of white schools. *Id.*; *see also* ANDERSON, *supra* note 70, at 23 (describing how planters, with state authority and extralegal means, “though unable to eradicate earlier gains, kept universal schooling underdeveloped”). It is important to note, however, that the political difficulties of Reconstruction existed in the long shadow of economic devastation in the South. With the Thirteenth Amendment, overnight the South lost one of its principal financial assets—slaves—and years of war had wiped out bank stocks and railroads in which school funds had been invested, at least with respect to areas that had publically funded education in the antebellum world. Liu, *supra* note 116, at 2056; *see also* ELLWOOD P. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES: A STUDY AND INTERPRETATION OF AMERICAN EDUCATIONAL HISTORY 97 (1934) (providing a comparative analysis of conditions in the south vis-à-vis the rest of country in 1900). While school finance is beyond the scope of this essay, some data points are helpful to illustrate the point. Twenty years after the end of the Civil War, the comparative value of taxable property per student was stark, with Western states spending \$3446, Northern states spending \$3382, North Central states spending \$1803, South Atlantic states spending \$1037, and South Central states spending a mere \$605. Liu, *supra* note 116, at 2056 (citing DAVID TYACK ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1957, at 60 tbl.2.3). “[T]he South was so poor, and with so many children in proportion to productive adults, that with the best of legal frameworks for schooling and without the curse of racial supremacy, it would still have lagged far behind the rest of the country.” *Id.* at 2057 (internal quotation marks omitted). Regional disparities in tax capacity with respect to public education persist to the present day. *See* Liu, *supra* note 116, at 2062 (noting that current interstate disparities in education resources are more strongly associated with capacity of states to finance education rather than effort to do so).

In 1866, the Freepeople of Liberty County, Georgia, submitted a petition to the federal authorities:

We the People of Liberty County . . . appeal to you asking aid and counsel in this our *distressed condition*. We learned from the Address of *general Howard* that We Were to *Return* to the *Plantation* and *Work for our Former owners* at a *Reasonable contract as Freeman*, and find a *Home and Labor, Provided we can agree*. . . . *We cannot Labor for the Land owners* . . . [while] *our Infirm and children are not provided for, and are not allowed to educate or learn* *We are a Working Class of People* and We are *Willing and Anxious* to worke for a *Fair Compensation*; But to *return to work upon the Terms that are at Present offered to us, Would Be We Think going Backe into the state of slavery that We have just to some extent Been Delivered from*.

We Appeal to you Sir and through you to the Rulers of the Country in our *Distressed State* *We feel, unsettled as Sheep Without a Shepard, and beg your advise and Assistance, and Believe that this is an Earnest Appeal from A Poor But Loyal Earnest People*.¹⁷⁵

William L. Coan, in response to the intimidation and harassment educators of the Freepeople faced, commented, “[t]he presence of the ‘military’ *alone* makes it *safe* or *possible* to prosecute our work.”¹⁷⁶ Octavia V. Rogers Albert, commenting on the assassination of President Lincoln, noted, “God reigns, and the government at Washington still lives.”¹⁷⁷ Albert’s further observations are worthy of a lengthy quotation.

It did live, and, notwithstanding Andrew Johnson, it lived under the divine supervision which would not and did not allow the Southern States to reconstruct upon any such dishonorable, unjust plan to the two hundred thousand negro soldiers who offered their lives upon the altar for the perpetuation of the Union and the freedom of their country. And the whole matter was repudiated by Congress, and the States were reconstructed upon the plan of equal rights to every citizen, of whatever race or previous condition. It was then declared that, whereas the stars on our national flag

¹⁷⁵ HERBERT G. GUTMAN, *SLAVERY AND THE NUMBERS GAME* 171–73 (1975).

¹⁷⁶ BUTCHART, *supra* note 48, at 162.

¹⁷⁷ ALBERT, *supra* note 63, at 140.

had been the property of only the white race and the stripes for only the colored, now the stars should forever be the common property of both . . .
.¹⁷⁸

In the immediate wake of the War, Freepeople, assisted by Union troops, were able to leverage their power as laborers to actualize their educational demands.¹⁷⁹

For the Freepeople, literacy was a civil right. Between 1866 and 1867, officials from the Freedmen’s Bureau noted widespread use of the “educational clause” in contracts for labor between planters and the Freepeople.¹⁸⁰ In January 1866, Alvord reported:

If they are to be retained as laborers in the rural districts, similar [educational] opportunities must be furnished on the plantations. More than one instance could be already given where a school in the interior has been started from this motive. This is now being stipulated in their contracts. . . . The head of one of the largest of the timber and turpentine enterprises in South Carolina . . . told me that he formerly had hired only men, but he had now learned that he must have their families too, and that this could only be done by . . . giving them schools.¹⁸¹

Measured by Freepeople’s dreams of universal education as a prophylactic to ensure their right of equal citizenship, Reconstruction ended in heartbreak.

“Reconstruction failed, and that for blacks its failure was a disaster whose magnitude

¹⁷⁸ *Id.* at 140–41; *see also* Davis, *supra* note 87, at 1348–49 (arguing that the U.S. constitutional system, as amended during Reconstruction, is grounded in antislavery traditions of human dignity that informed the conceptions of liberty and citizenship enshrined in the Fourteenth Amendment); Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387, 394 (1967) (“Anything less [than national citizenship] was not the status of freedom and equality enacted by the constitutional amendments to replace the ante-bellum status of slavery and inferiority.”).**[Cite other’s who write about national citizenship.]**

¹⁷⁹ ANDERSON, *supra* note 70, at 21.

¹⁸⁰ **[Alvord?]**

¹⁸¹ J.W. ALVORD, INSPECTOR’S REPORT (1966), *reprinted in* 1 FREEMEN’S SCHOOLS AND TEXTBOOKS 13 (Robert C. Morris ed., 1980); J.W. ALVORD, FOURTH SEMI-ANNUAL REPORT *supra* note 155, at 49 (“Many of the freedmen made it a special clause of their contract this year, that they should have the benefit of schools”); *id.* at 83 (“The idea of good crops . . . greatly favors the educational clause in the contracts, and its insertion is rapidly becoming universal. . . . [T]hus schools are everywhere springing up from the soil itself at the demand of those who till it . . .”).

cannot be obscured by the genuine accomplishments that did endure.”¹⁸² One thing is certain; the Reconstruction Amendments abrogated the teachings of *Dred Scott*.¹⁸³ How we choose to exercise these teachings as a matter of law, nowhere does the Constitution tell us. The antislavery tradition of literacy makes manifest that there is choice in how we choose to interpret the Reconstruction Amendments, and how, as a nation, we reconcile ourselves with the enduring legacy of slavery. The open textured language of Section 1 of Fourteenth Amendment was framed, and had always been interpreted and made meaningful in a broader economic and sociopolitical context in which race matters.¹⁸⁴ The choice about which narrative we embrace and how that informs how we chose to give effect to the Amendment is ours to make.

¹⁸² ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877, at 604 (Perennial Classics 2002) (1988).

¹⁸³ See *Washington v. Glucksberg*, 521 U.S. 702, 758 (1997); see also U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”).

¹⁸⁴ Cf. KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 277 (2010) (making an analogous argument about the interpretation of crime statistics).