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# THE SECOND FOUNDING AND SELF-INCRIMINATION

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**ABSTRACT**—The privilege against self-incrimination is one of the most fundamental constitutional rights. Protection against coerced or involuntary self-incrimination safeguards individual dignity and autonomy, preserves the nature of our adversary system of justice, helps to deter abusive police practices, and enhances the likelihood that confessions will be truthful and reliable. Rooted in the common law, the privilege against self-incrimination is guaranteed by the Fifth Amendment's Self-Incrimination and Due Process Clauses. Although the Supreme Court's self-incrimination cases have examined the privilege's historical roots in British and early American common law, the Court's jurisprudence has overlooked an important source of historical evidence: the long history of coerced and involuntary confessions extracted from enslaved persons by both governmental and private actors.

The Article sheds new light upon this history by examining the privilege against self-incrimination from the perspective of enslaved persons and through the lens of the nation's Second Founding following the Civil War. Enslaved persons' understandings and experiences informed the Second Founding, which was intended to have a transformative effect upon the Constitution as a whole. This Article is the first to extensively examine first-person slave narratives in order to draw upon enslaved persons' experiences for insights into self-incrimination doctrine.

This Article first provides an overview of the theories underlying the privilege against self-incrimination, the background of the Self-Incrimination Clause, and the Supreme Court's self-incrimination jurisprudence. The Article next discusses the nation's Second Founding and the ways in which it changed our constitutional regime, both substantively and in principles of constitutional interpretation. The Article then examines enslaved persons' views and experiences regarding self-incrimination, both through antebellum judicial decisions involving enslaved persons and through enslaved persons' own first-person narratives. This evidence reveals that the Supreme Court's cramped and formalistic approach to self-incrimination is inconsistent with the post-Civil War Constitution's purposes and values. The Article concludes that our constitutional jurisprudence

misses a great deal by failing to include in constitutional analysis evidence from the Second Founding and the experiences of enslaved persons and calls upon courts to take such evidence into account in interpreting the privilege against self-incrimination.

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INTRODUCTION .....928
I. THE SELF-INCRIMINATION CLAUSE: HISTORY, PURPOSES, AND JURISPRUDENCE .....933
*A. The Background and Goals of the Self-Incrimination Clause* .....933
*B. The Protection Against Self-Incrimination at the First Founding* .....936
*C. The Supreme Court's Self-Incrimination Jurisprudence* .....937
II. THE "SECOND FOUNDING": THE POST-CIVIL WAR CONSTITUTION'S HISTORY AND GOALS .....953
*A. The Second Founding's Role in Constitutional Interpretation* .....954
*B. The Absence of the Second Founding from the Fifth Amendment* .....959
III. SELF-INCRIMINATION AND THE SECOND FOUNDING .....960
*A. "Voluntariness" in a System of Structural Domination* .....960
*B. Self-Incrimination from Enslaved Persons' Perspectives* .....968
CONCLUSION .....983

## INTRODUCTION

The Fifth Amendment's privilege against self-incrimination[1] is one of the bedrock principles of American law. The Supreme Court has characterized the privilege as the "essential mainstay"[2] of the criminal prosecution system. Coerced or involuntary confessions, the Court stated in *Brown v. Mississippi*, were "the chief iniquity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The Constitution recognized the evils that lay behind these practices and prohibited them in this country."[3] The privilege against self-incrimination,

[1] U.S. CONST. amend. V.

[2] Malloy v. Hogan, 378 U.S. 1, 7 (1964).

[3] 297 U.S. 278, 287 (1936).

the Court has noted, was "fixed in our Constitution only after centuries of persecution and struggle."[4]

The Supreme Court's Fifth Amendment jurisprudence, however, largely overlooks the centuries of persecution and struggle endured by enslaved persons who were subjected to coerced self-incrimination, which was a key aspect of the American system of slavery and the brutal system of racialized injustice arising therefrom. Due to its formalism and selective historicism, the Court's doctrine fails to acknowledge the complexity of circumstances that may undermine a person's free choice of whether to reveal self-incriminating information. Drawing upon slave narratives can help to illuminate these issues. In one of many examples, Charles Ball's slave narrative describes the discovery of a murder on a neighboring plantation. The alleged perpetrators, along with an enslaved man named Billy, "were all tried before some gentlemen of the neighborhood."[5] According to Ball, "there was no evidence, nor cause of suspicion [against Billy], except that he was in the kitchen at the time of the murder."[6] The vigilante "jury" found that Billy had no personal involvement with the murder. Nonetheless, Ball continued, "a consultation was held among the gentlemen as to the future disposition of Billy, who, having been in the house when his master was murdered and not having given immediate information of the fact, was held to be guilty of concealing the death, and was accordingly sentenced to receive five hundred lashes."[7] Ball describes Billy's torture as the worst he had ever seen inflicted upon an enslaved person.[8]

Neither the Fifth Amendment's Self-Incrimination Clause nor its Due Process Clause were applicable to Billy. The prevailing view at the time was that the Bill of Rights itself applied only against the federal government,[9] and the Fourteenth Amendment did not yet exist. More fundamentally, enslaved persons were deemed to have no federal constitutional rights enforceable in

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[4] Miranda v. Arizona, 384 U.S. 436, 442 (1966).

[5] CHARLES BALL, FIFTY YEARS IN CHAINS; OR, THE LIFE OF AN AMERICAN SLAVE 291, 294 (1859).

[6] *Id.* at 293.

[7] *Id.* at 295.

[8] *Id.* at 295–96. Following Billy's torture, Ball notes that "[t]he gentlemen who had done the whipping . . . [were] joined by their friends, then came under [a] tree and drank punch until their dinner was made ready." *Id.* at 296.

[9] *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247, 250 (1833) ("The [C]onstitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. . . . [The Bill of Rights] contain[s] no expression indicating an intention to apply [it] to the state governments.").

court against whites.[10] Indeed, even in the adjudication of claims for the return of an alleged slave, where a judgment in the claimant's favor could sentence a Black person to lifetime bondage, the Fugitive Slave Act of 1793 "gave the alleged fugitive no protection against self-incrimination."[11] Clearly, the privilege was generally understood as not extending to enslaved persons. Yet Billy's refusal to volunteer potentially incriminating information—given his presence in the slave owner's house at the time of the murder and the fact that Blackness itself in antebellum law and culture was treated as an independent cause for criminal suspicion[12]—would seem to be the paradigmatic situation in which the privilege against self-incrimination should apply.

Innumerable stories similar to Billy's demonstrate the selective and often racialized application of fundamental rights, especially in criminal law. They also demonstrate problems of constitutional interpretation. The risk of omitting, whether intentionally or by oversight, the history of slavery as a

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[10] *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393, 407 (1857) (stating that at the time of the First Founding, it was commonly understood by the white public that Blacks "had no rights which the white man was bound to respect"). Enslaved persons' general lack of legally enforceable rights operated at the state level as well as with regard to federal constitutional rights. *See, e.g.*, Alfredo Garcia, *The Fifth Amendment: A Comprehensive and Historical Approach*, 29 U. TOL. L. REV. 209, 213–14 (1998) ("[B]y the time of the [American] Revolution, and in the period immediately following it, state constitutions prominently featured individual rights . . . [;] [but] [e]ven at the state level, individual rights only protected those members of the new American polity who were not subjugated under the yoke of slavery."); David C. Hardy, Simon, A Slave v. The State of Florida*: The Precedent-Setting Decision Establishing Confessions Extracted by Threats or Promises Are Inadmissible at Trial*, 93 FLA. BAR J., Sept./Oct. 2019, at 9, 15 ("Antebellum Florida jurisprudence considered the enslaved to be chattel, and Florida courts did not cloak property with constitutional rights [under the state constitution]."). Enslaved persons were, however, incrementally granted some procedural protections in certain states by legislative grace or judicial decisions. For example, by the 1850s, several Southern states did extend protection against self-incrimination to enslaved persons as a matter of state law, at least in theory. Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, 68 CHI.-KENT L. REV. 1209, 1235 (1993) (noting in an 1853 Tennessee case against an enslaved person that "[s]laves possessed a right against self-incrimination, and were to be warned by . . . magistrate of this right"). Even when state law in theory provided enslaved persons with protection against self-incrimination, the rigor with which it was applied varied greatly in practice. *See, e.g.*, *id.* (noting an 1856 Georgia case in which the court found an enslaved person's confession to be admissible at trial despite the fact that the sheriff told him during interrogation that "if he did do it he had better acknowledge it, but if he did not do it not to acknowledge it; that if he lied, it would be adding sin to sin; that the people of Liberty were so satisfied he did it they would hang him any how [sic] [regardless of how he answered]").

[11] Ariela Gross & David R. Upham, *Article IV, Section 2: Movement of Persons Throughout the Union*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/articles/article-iv/clauses/37 [https://perma.cc/3SGF-W2XF].

[12] *See, e.g.*, William M. Carter Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 58 (2004) (reviewing historical evidence and stating that "[t]he stigmatization of African Americans as congenital criminals has been continuous throughout American history . . . . Because of the social structures that developed to support slavery, and have since been used to maintain social control over African Americans, blacks are defined as criminals and crime is defined as what black people do." (internal quotation marks omitted)).

source of constitutional meaning is that the post-Civil War Constitution is abstracted and stripped of any potential substantive effect on contemporary constitutional doctrine.

Even if Billy's case occurred today, nearly sixty years after the Supreme Court held that the privilege against self-incrimination was applicable to the states via the Fourteenth Amendment, the privilege would still provide scant protection for at least four reasons. First, Billy's torturers were private individuals. Under the Supreme Court's formalistic state action doctrine, constitutional protections generally do not apply unless a government official engaged in the conduct alleged to violate the Constitution.[13] Second, even if an exception to the state action requirement applied in Billy's case, the Court's cases can be read to require that the interrogators must be not only state actors but specifically that they be police officers for the privilege to apply.[14] Third, the Court's recent Fifth Amendment cases generally allow defendants' noncustodial silence to be used against them unless they expressly and specifically invoked the privilege against self-incrimination during interrogation.[15] Finally, although the current Fifth Amendment doctrine takes some account of the context of an interrogation and the characteristics of the detainee in determining whether an interrogation was coercive,[16] the doctrine likely would not consider "structural compulsion." That is, whether structural power imbalances can be so severe as to render a category of interrogations inherently coercive—as was the case for a Black slave seized for questioning by white men whom he surely knew could torture him with impunity.

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[13] *See, e.g.*, United States v. Stanley (*The Civil Rights Cases*), 109 U.S. 3, 11 (1883) (holding that a finding of state action is necessary in order to establish a Fourteenth Amendment violation).

[14] *See, e.g.*, Colorado v. Connelly, 479 U.S. 157, 163 (1986) (holding that "police overreaching" is the "crucial element" of an involuntary or coerced confession claim). *Connelly* is discussed in greater detail in Section III.B.3.

[15] *See, e.g.*, Salinas v. Texas, 570 U.S. 178, 186–87 (2013) ("Our cases establish that a defendant normally does not invoke the privilege by remaining silent. . . . A witness does not expressly invoke the privilege by standing mute.").

[16] In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Supreme Court, reviewing the voluntariness standard as applied in its cases involving confessions, stated that "[i]n determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Id.* at 226. The Court noted that some of the factors considered in the totality of the circumstances analysis were

> the youth of the accused; his lack of education or his low intelligence; the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep.

*Id.* (citations omitted). Considering such factors, these cases then proceeded to "determine[] the factual circumstances surrounding the confession, assess[] the psychological impact on the accused, and evaluate[] the legal significance of how the accused reacted." *Id.*

This Article breaks new ground by centering the experiences of enslaved persons with self-incrimination through an extensive examination of slave narratives. This Article contends that any analysis that purports to ascertain the meaning of a constitutional provision but omits an examination of slavery and the Second Founding[17] is at best historically incomplete and analytically suspect. The Reconstruction Amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments) and the constitutional moment that produced them not only created new constitutional rights but also embodied new constitutional principles meant to affect the Constitution as a whole, including the provisions adopted as part of the First Founding. By examining slave narratives, this Article brings to the fore previously ignored evidence regarding the meaning of the post-Civil War Constitution's protections against self-incrimination. In light of this evidence, the Article draws lessons for two aspects of self-incrimination doctrine: the state action requirement and the express invocation rule.

To be clear, this Article does not contend that persons facing potential self-incrimination today are in a position analogous to enslaved persons, nor that modern interrogation and trial practices are equivalent to the systemic brutality of the slave regime. Moreover, this Article does not attempt to offer an encyclopedic accounting of all the possible implications of the Second Founding for self-incrimination doctrine. Rather, this Article is part of a larger project examining enslaved persons' views and experiences for the insights they provide into various constitutional provisions.[18] As such, the Article examines only a few specific areas where our understanding of self-incrimination doctrine should change in light of the evidence from the Second Founding and leaves other doctrinal implications open for future exploration.

Part I discusses the theories underlying the privilege against self-incrimination and the background of the Self-Incrimination Clause. It also provides an overview of the Supreme Court's self-incrimination jurisprudence. Part II describes the nation's Second Founding following the

[17] *See, e.g.*, ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION, at xix (2019) ("The Civil War and the Reconstruction period that followed form the pivotal era of American history."); Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 257 n.12 (2010) ("[T]he Reconstruction Era was as significant to our constitutional development as the framing of the original Constitution. The members of Congress responsible for the Reconstruction Amendments enacted such momentous change to our constitutional structure that the Reconstruction Era is sometimes referred to as the 'Second Founding.'").

[18] In prior works, I have explored the implications of enslaved persons' experiences and perspectives for First Amendment doctrine, including compelled speech, incitement, and viewpoint discrimination. *See* William M. Carter Jr., *The Second Founding and the First Amendment*, 99 TEX. L. REV. 1065 (2021). Planned future works in this project will examine enslaved persons' perspectives for insights on the Free Exercise Clause, the state action doctrine, federalism, and international law.

Civil War and the constitutional changes that it wrought. Part III situates the privilege against self-incrimination within the context of the Second Founding. In particular, Part III examines the views and experiences of enslaved persons as expressed both through top-down sources, such as antebellum judicial decisions, and through enslaved persons' own narratives. This examination reveals that by ignoring these sources of constitutional meaning, the Supreme Court has adopted a cramped and formalistic view of self-incrimination that is inconsistent with the post-Civil War Constitution's purposes and values. The Article concludes that our constitutional history and jurisprudence miss a great deal by failing to include evidence from the Second Founding and the experiences of enslaved persons in constitutional analysis and calls for courts to account for such evidence in interpreting the privilege against self-incrimination. If we are to remain true to our full constitutional heritage, the experiences and voices of enslaved persons must be included as a source of constitutional meaning.

## I. THE SELF-INCRIMINATION CLAUSE: HISTORY, PURPOSES, AND JURISPRUDENCE

The Fifth Amendment's Self-Incrimination Clause provides that "no person . . . shall be compelled in any criminal case to be a witness against himself."[19] Despite its brief text, the Clause has spawned a vast jurisprudence of constitutional criminal procedure.[20] This Part first examines the background of, and values embodied in, the Self-Incrimination Clause. It then provides an overview of the Supreme Court's self-incrimination jurisprudence.

### *A. The Background and Goals of the Self-Incrimination Clause*

The privilege against self-incrimination serves several fundamental purposes. The Supreme Court has stated that the privilege "reflects many of our fundamental values and most noble aspirations," namely

> our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating

[19] U.S. CONST. amend V.

[20] *See, e.g.*, Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 859–60 (1995) ("[A]n enormous amount of modern criminal law enforcement has been shaped by the Self-Incrimination Clause . . . ."); Paul Cassell & Kate Stith, *The Fifth Amendment Criminal Procedure Clauses*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-v/clauses/632 [https://perma.cc/ND7G-UWPL] ("[O]ver the years, the [Supreme] Court has read into [the text of the Clause] many additional rights, both inside the criminal courtroom and in settings far removed from criminal court.").

> statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load"; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life"; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."[21]

One purpose of the privilege is to advance the search for truth. Maximizing the likelihood that confessions or otherwise incriminating statements are reliable and truthful is thought to require that such statements be voluntarily made.[22] A second purpose is avoiding perversion of the adversarial ideal of the criminal justice system, under which the government is required to prove its case through its own efforts rather than by conscripting the defendant into the government's service by coercing a confession or otherwise incriminating statements from them.[23] As the Court stated in *Miranda v. Arizona*:

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[21] Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964) (citations omitted).

[22] *See, e.g.*, Withrow v. Williams, 507 U.S. 680, 692 (1993) ("[T]he Fifth Amendment 'trial right' protected by *Miranda* [serves to advance] the correct ascertainment of guilt. A system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system relying on independent investigation. By bracing against the possibility of unreliable statements in every instance of in-custody interrogation, *Miranda* serves to guard against the use of unreliable statements at trial." (citations and internal quotation marks omitted)); Blackburn v. Alabama, 361 U.S. 199, 207 (1960) (stating that "the likelihood that the confession is untrue" is one of the interests warranting a rule against admitting coerced confessions in evidence at trial); *see also* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1109 (2010) (noting that "[t]he concern with the possible unreliability of coerced confessions has ancient roots" dating back to Roman and medieval law). The Supreme Court's more recent Fifth Amendment cases have deemphasized reliability concerns to focus on the voluntariness of the statement (separate and apart from the statement's reliability). *See id.* at 1058 ("Beginning in the 1960s, the Supreme Court's Fifth and Fourteenth Amendment jurisprudence shifted. The Court abandoned its decades-long focus on reliability of confessions."). *But see* Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 9 (2015) (noting that "many scholars have argued that [recent] Supreme Court decisions . . . removed any concern about reliability from the voluntariness analysis," and arguing that that view is misguided as a doctrinal and practical matter).

[23] *See, e.g.*, Ashcraft v. Tennessee, 322 U.S. 143 (1944) ("[I]n reaching our conclusion as to the validity of [defendant's] confession we do not resolve any of the disputed questions of fact relating to the details of what transpired within the confession chamber of the jail or whether [defendant] actually did confess. Such disputes, we may say, are an inescapable consequence of secret inquisitorial practices. And always evidence concerning the inner details of secret inquisitions is weighted against an accused . . . ."); *see also* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1066 (1994) (reviewing the historical evidence and contending that "the privilege against self-incrimination is an artifact of the adversary system of criminal procedure. Only when the modern 'testing the prosecution' theory of the criminal trial displaced the older 'accused speaks'

> To maintain a fair state-individual balance, to require the government to shoulder the entire load . . . , our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.[24]

A third purpose, which is closely related to the adversary system, is to protect the presumption of innocence and prevent wrongful convictions. Innocent persons can and do make false confessions and untrue incriminating statements under the pressure of coercive or exploitative interrogation tactics.[25] A fourth purpose is deterring police conduct that is offensive to society's sense of fairness and justice.[26] A fifth purpose is protecting human dignity and individual autonomy. Under this view, the Self-Incrimination Clause embodies a constitutional value of "noninstrumentalization," or "the notion that the government impermissibly disrespects a person when it uses him as the means of his own destruction."[27] This latter purpose, although given relatively little emphasis in the Supreme Court's contemporary self-incrimination jurisprudence, is of central importance in the views and experiences of enslaved persons.

These purposes have waxed and waned in emphasis in the Court's jurisprudence as a result of its implicit or explicit value judgments about the privilege against self-incrimination. Evidence from the Second Founding calls into question the hierarchy of such value judgments and also reveals significant gaps in protection against coerced or involuntary self-incrimination.

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theory did the criminal defendant acquire an effective right to decline to speak to the charges against him").

[24] 384 U.S. 436, 460 (1966).

[25] *See, e.g.*, Garrett, *supra* note 22, at 1054 (finding, based upon a study of forty false confessions, that "innocent people not only falsely confessed, but they also offered surprisingly rich, detailed, and accurate information. Exonerees told police much more than just 'I did it.' In all [of the cases studied] but two, police reported that suspects confessed to a series of specific details concerning how the crime occurred [despite their innocence and despite not being at the crime scene]"). The Supreme Court's cases have also recognized the risk of false confessions. *See, e.g.*, *Miranda*, 384 U.S. at 455 n.24 (discussing a 1964 case in which a Black man "of limited intelligence confessed to two brutal murders and a rape which he had not committed. When this was discovered, the prosecutor was reported as saying: 'Call it what you want – brain-washing, hypnosis, fright. They made him give an untrue confession' [even if physical force was not used to do so]").

[26] *See* Primus, *supra* note 22, at 25 (summarizing relevant Supreme Court Due Process cases (decided prior to the Fifth Amendment being made applicable to the states via the Fourteenth Amendment) that "prohibited [interrogation] tactics that 'shock the conscience,' are 'offensive to a civilized system,' [or] are 'revolting to the sense of justice.' Even when the resulting confession is factually reliable and essential to the prosecution's case, certain tactics are so 'tyrannical' in nature and so inconsistent 'with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' that they violate the Due Process Clause").

[27] Amar & Lettow, *supra* note 20, at 892.

### *B. The Protection Against Self-Incrimination at the First Founding*

The historical record contains scant information about the Framers' views on the Self-Incrimination Clause. Adopted by Congress in 1789 as part of the Bill of Rights, the Self-Incrimination Clause arose from analogous principles in English common law.[28] The common law privilege against self-incrimination was tied to the development of adversarial criminal proceedings and the key role of defense counsel in them[29] (in contrast to the inquisitorial model, under which, among other things, the accused persons themselves were required to testify truthfully under oath and lacked defense counsel to speak on their behalf).[30] The common law maxim *nemo tenetur seipsum accusare* succinctly stated the principle embodied in the privilege: "[N]o one is bound to accuse himself."[31] The evidence is inconclusive, however, as to whether the Framers intended the Self-Incrimination Clause to mirror exactly the then-existing English common law privilege. Professor Leonard Levy, for example, contended that "[w]hether the framers of the Fifth Amendment intended it to be fully co-extensive with the common law cannot be proved—or disproved. . . . The difficulty is that [the Framers] left too few clues."[32]

The historical record does make clear that the Framers intended for the Self-Incrimination Clause to bar the use of evidence obtained by torturing the defendant.[33] Some Framing-era congressmen also spoke of the autonomy rationale for prohibiting compelled self-incrimination, with Senator William Maclay of Pennsylvania going so far as to describe compelled self-

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[28] *Id.* at 895–98 (providing an overview of the relevant medieval and common law principles); *see also* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 333 (2d ed. 1986) ("The right against self-incrimination had been, of course, a common-law right since the middle of the seventeenth century. As such it was part of the common-law inheritance.").

[29] Garcia, *supra* note 10, at 221.

[30] There is significant historical debate about whether the privilege was truly a common law invention that sprung whole cloth from the adversary system or whether aspects of the privilege existed even under the inquisitorial model. *See, e.g.*, Langbein, *supra* note 23, at 1072 (arguing that "[t]he concept that underlies the English privilege against self-incrimination originated within the European tradition, as a subprinciple of inquisitorial procedure, centuries before the integration of lawyers into the criminal trial made possible the development of the distinctive Anglo-American adversary system of criminal procedure in the later eighteenth century"). Such debates, however, are beyond the scope of this Article.

[31] Garcia, *supra* note 10, at 224.

[32] LEVY, *supra* note 28, at 429–30; *see also* John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791–1903*, 77 TEX. L. REV. 825, 832 (1999) ("The process by which the [Fifth Amendment's] provisions were drafted . . . appears to have been remarkably haphazard. At the very least, it was accompanied by startlingly little debate.").

[33] Garcia, *supra* note 10, at 226 (stating that "[w]hat can be discerned from the sparse historical record is that the Framers and those who ratified the self-incrimination clause believed torture was an unacceptable way of 'extorting' a confession from a criminal suspect").

incrimination as a form of torture, even if it was not accomplished through physical violence. During the debates regarding a proposed provision of the Judiciary Act of 1789 that would have allowed a plaintiff to compel the defendant to disclose under oath information that supported the plaintiff's cause of action, Maclay stated:

> [E]xtorting evidence from any person was a species of torture . . . . Here was an attempt to exercise a tyranny of the same kind over the mind. The conscience was to be put on the rack; that forcing oaths or evidence from men, I consider equally as tyrannical as extorting evidence by torture.[34]

This concern about the coercion inherent in requiring potentially incriminating testimony to be made under oath was not an aberration: both English and American common law authorities stated similar concerns. For example, an English manual for Justices of the Peace published in 1745 stated:

> The Law of England is a Law of Mercy, and does not use the Rack or Torture to compel Criminals to accuse themselves . . . . [F]or the same Reason, . . . [the law] does not call upon the Criminal to answer upon Oath[,] . . . [because] this might serve instead of the Rack, to the Consciences of some Men . . . .[35]

Similarly, an 1826 American treatise noted: "The prisoner is not to be examined on oath, for this would be a species of duress, and a violation of the maxim [that] no one is bound to criminate himself."[36]

Given the sparsity of evidence from the original Founding and the multiplicity of circumstances in which concerns about coerced or involuntary self-incrimination can arise, courts have largely relied upon evolving notions of policy and fundamental rights to develop constitutional rules regarding self-incrimination. The next Section reviews the evolution of the Supreme Court's self-incrimination jurisprudence.

### *C. The Supreme Court's Self-Incrimination Jurisprudence*

Among other protections, the Fifth Amendment provides that a defendant's compelled statements may not be used against her. A cognizable Self-Incrimination Clause claim, at a minimum, "must contain three elements: compulsion, incrimination, and testimony."[37] Elaborating upon these basic requirements derived from the Clause's text, the Supreme Court

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[34] LEVY, *supra* note 28, at 426.

[35] Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, *in* THE PRIVILEGE AGAINST SELF-INCRIMINATION 181, 190 (R.H. Helmholz ed., 1997).

[36] *Id.* at 191.

[37] Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 246 (2004).

has developed a series of rules and doctrines that have varied over time depending upon the context of specific cases and the relative emphasis given to the various constitutional values underlying the privilege against self-incrimination. This Section provides an overview of the Supreme Court's Self-Incrimination Clause jurisprudence, highlighting the major doctrines and connecting themes that have emerged from the cases.

*1. The Early Due Process Approach to Coerced Confessions*

The Supreme Court initially held that Fifth Amendment rights only applied against the federal government.[38] In *Twining v. New Jersey*, the Court held that "an exemption from compulsory self-incrimination is [not] included in the conception of due process of law [applicable to the states via the Fourteenth Amendment]."[39] The Court recognized that the privilege was "salutary," but concluded that it was not essential to a fair system of justice.[40] The Court, therefore, concluded that the constitutional privilege against self-incrimination had no applicability to the actions of the states.

The *Twining* Court's reasoning was consistent with other Supreme Court decisions of the same era, which largely waved away the Second Founding as limited in scope and effect. With few and limited exceptions, the nation's legal principles were presumed to be the same as before the Civil War.[41] The imperative of the Court's jurisprudence from the end of Reconstruction through the Jim Crow era was to allow states free rein to

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[38] Twining v. New Jersey, 211 U.S. 78, 87–88 (1908).

[39] *Id.* at 112.

[40] *Id.* at 113.

[41] For example, in the *Slaughter-House Cases*, the Court stated that prior to "the adoption of the [Thirteenth, Fourteenth, and Fifteenth] amendments, no claim or pretence was set up that [civil] rights depended on the Federal government for their existence or protection, beyond [a few narrow exceptions.]" 83 U.S. 36, 77 (1873). Hence, the Court noted, the dominant legal view prior to the Civil War was that "the entire domain of the privileges and immunities of citizens of the States . . . lay within the constitutional and legislative power of the States, and without that of the Federal government." *Id.* The Court continued:

> Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government?

*Id.* The Court answered its own rhetorical question in the negative because, among other things, finding otherwise would

> fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to [the states] . . . [and] radically change the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people.

*Id.* at 78. The Court therefore held that the scope of the Fourteenth Amendment's Privileges or Immunities Clause was extremely narrow and did not encompass most fundamental civil rights matters. *Id.* at 77–78.

"guard[] [constitutional principles] [only] to the satisfaction of their own people"—the dominant white class.[42] The Court thus wrongly assumed that the Reconstruction Amendments left the pre-Civil War balance between the states and federal government regarding the protection of civil rights largely undisturbed. By minimizing the "revolution in federalism"[43] that the Second Founding created, the Court also minimized the legal impact of the Second Founding's primary revolutionary goal of nationalizing civil rights and securing Black freedom, dignity, and autonomy. It was not until the 1960s that the Court held that the privilege against self-incrimination was applicable to the states.

In the interim, the Court did hold that due process placed some limits upon the methods by which states may coerce information from persons suspected of crimes. In *Brown v. Mississippi*, three African American men were convicted of murder based "solely upon confessions shown to have been extorted by officers of the state by brutality and violence."[44] After discovering the murder, a police officer took one of the defendants, Arthur Ellington, to the victim's residence, where a group of angry white men were gathered.[45] The men accused Ellington of the murder; when he denied it, they—with the police officer's participation—repeatedly hung him from a tree and repeatedly beat him.[46] Ellington continued to profess his innocence and was eventually released, only to be formally arrested days later by the same police officer.[47] On the way to the jail, the deputy severely whipped Ellington, telling him that he would continue to do so until he confessed.[48] Ellington, under this repeated torture, eventually agreed to confess in a statement dictated by the police officer.[49] The two other defendants, Ed Brown and Henry Shields, were subjected to similar torture after being arrested. All three defendants were subsequently forced to repeat their confessions in front of witnesses, who testified to them in court and openly admitted that the confessions were secured by torture.[50]

The Supreme Court reversed the convictions. The Court declined to reexamine its prior holding in *Twining* that the Fifth Amendment's "exemption from compulsory self-incrimination in the courts of the states is

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[42] *Twining*, 211 U.S. at 113–14.

[43] Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 174 (1951).

[44] 297 U.S. 278, 279 (1936).

[45] *Id.* at 281.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 281–82.

[49] *Id.* at 282.

[50] *Id.* at 282–85.

not secured by any part of the Federal Constitution."[51] Rather, the Court reasoned that while "[t]he State is free to regulate the procedure of its courts in accordance with its own conceptions of policy,"[52] the Fourteenth Amendment's Due Process Clause nonetheless forbade the states from using certain methods, such as torture to elicit confessions, that are "revolting to the sense of justice"[53] because they render the entire adversarial process a sham. Importantly, this decision paved the way for the Court's eventual retreat from *Twining*.

Following *Brown*, the Court's due process inquiry focused on whether a confession was voluntarily made. The Court "adopted a generalized due process standard under which only confessions that were given 'voluntarily' would be admissible."[54] The Court's standard for voluntariness was sufficiently vague that it still allowed for a range of coercive interrogation tactics to be utilized but for the resulting confessions and incriminating statements to be deemed "voluntary" nonetheless. From the time *Brown* was decided in the 1930s to the 1960s, the lower courts applied the standard for voluntariness with varying levels of rigor.[55] Yet, the courts consistently upheld the actions of the police, even with the widespread knowledge that the police used violent tactics to get suspects—particularly African American men—to confess.[56]

The Supreme Court eventually found the Self-Incrimination Clause to be applicable to the states through the Fourteenth Amendment. Soon after, the Court adopted specific constitutional rules alongside the general requirement of voluntariness to deter abusive police practices and protect the rights of persons accused of crimes. Section I.C.2 first discusses the Court's decision in *Malloy v. Hogan*[57] to incorporate the privilege against self-incrimination into the Fourteenth Amendment's Due Process Clause. Section I.C.3 then discusses some of the specific constitutional rules that the Court developed to protect the right against self-incrimination, as well as the Court's subsequent retreat from vigorous enforcement of the privilege.

*2. Fifth Amendment Incorporation*

In *Malloy v. Hogan*, the Court overruled *Twining* and its progeny that had found the Self-Incrimination Clause to be inapplicable to the states.[58]

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[51] *Id.* at 285 (quoting Twining v. New Jersey, 211 U.S. 78, 114 (1908)).

[52] *Id.*

[53] *Id.* at 286.

[54] Primus, *supra* note 22, at 6.

[55] *Id.*

[56] *Id.*

[57] 378 U.S. 1 (1964).

[58] *Id.* at 6.

*Malloy* involved a defendant who had been convicted of illegal gambling.[59] The defendant was subsequently called to testify in a state court proceeding regarding illegal gambling and was asked various questions about his own gambling activities and resulting conviction.[60] The defendant refused to answer such questions on the ground that his answers might tend to incriminate him.[61] The court held him in contempt for his refusal to answer and rejected his Fifth Amendment challenge as inapplicable to state proceedings.[62]

The Supreme Court reversed, holding that the Fourteenth Amendment incorporated the privilege against self-incrimination and made it applicable to the states. In holding that the privilege was a fundamental right guaranteed by the Due Process Clause, the Court reasoned that its more recent decisions in the 1950s and 1960s had recognized that "the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay."[63] Both the state and federal government, the Court held, "are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth."[64] The Court therefore concluded that the Fourteenth Amendment, like the Fifth, "secures against state invasion . . . the right of a person to remain silent unless he choose to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."[65]

Incorporation of the privilege into the Fourteenth Amendment led to a robust body of Self-Incrimination Clause and related Due Process Clause jurisprudence that has spanned many decades. This Article will not attempt to summarize the entirety of the Court's post-*Malloy* doctrine; rather, Section I.C.3 below briefly discusses the major highlights, including *Miranda v. Arizona*.[66]

*3. Expansion of Constitutional Protection Against Self-Incrimination*

The Supreme Court's eventual recognition of broader protections against self-incrimination was part of the larger civil rights revolution that expanded the reach and scope of constitutional protections of individual rights. The Court's interpretive approach in these cases was largely premised

[59] *Id.* at 3.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 7.
[64] *Id.* at 8.
[65] *Id.*
[66] 384 U.S. 436 (1966).

upon "living constitutionalism," which involves interpreting the Constitution's text and history in light of contemporary circumstances and values.[67] Living constitutionalism, like originalism, takes account of historical meaning; whatever the merits of the broader debate between originalism (at least as predominantly currently practiced by judges and scholars) and living constitutionalism, however, both approaches often fall short in their examination of historical evidence. Both methods generally only consider top-down historical evidence—i.e., the views of elites (such as the lawmakers who drafted a constitutional provision and contemporaneous public figures who expounded upon its meaning in treatises and mainstream press) and the fully enfranchised (such as evidence of the meaning ascribed to a constitutional provision by those members of the general public eligible to vote upon its ratification). Accordingly, both methods generally fail to take into account "bottom-up" evidence of enslaved persons' views and experiences for the light it may shed upon constitutional meaning.

The Supreme Court's recognition of broader criminal procedure protections included cases invigorating Fourth Amendment[68] and Sixth Amendment rights,[69] as well as cases broadening various aspects of the Fifth Amendment. As to the Fifth Amendment's Self-Incrimination Clause, the Court, soon after holding that its protections were applicable to the states, also recognized that specific rules were necessary to deter violations before they occurred.

The Court's initial efforts to develop bright-line constitutional rules regarding the use of a person's incriminating statements against them involved the Sixth Amendment rather than the Fifth. In *Massiah v. United States*, the Court extended the Sixth Amendment right to counsel to the pretrial stage, holding that once a person has been charged with a crime, they are entitled to have counsel present at all critical stages of the process,

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[67] *See, e.g.*, William J. Brennan Jr., *The Constitution of the United States: Contemporary Ratification*, *in* JUDGES ON JUDGING: VIEWS FROM THE BENCH 230, 234 (David M. O'Brien ed., 2017) ("To remain faithful to the content of the Constitution . . . an approach to interpreting the text must account for the existence of . . . substantive value choices and must accept the ambiguity inherent in the effort to apply them to modern circumstances. . . . We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: what do the words of the text mean in our time?").

[68] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that the Fourteenth Amendment's Due Process Clause incorporates the Fourth Amendment's protections against searches and seizures).

[69] *See, e.g.*, Massiah v. United States, 377 U.S. 201, 205 (1964) (discussed in this Section); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (holding that indigent defendants in criminal cases are constitutionally entitled to appointed counsel pursuant to the Fourteenth Amendment's Due Process Clause, which incorporates the Sixth Amendment's right to counsel).

including any police interrogations.[70] *Escobedo v. Illinois*, decided in the same term as *Massiah*, held that the right to counsel applies even prior to a person being formally charged with a crime, as long as the person is functionally considered to be "the accused," and "the purpose of the interrogation was to get him to confess his guilt despite his constitutional right not to do so."[71] Extending the Sixth Amendment's right to counsel to these stages of the process was thought to protect against compelled self-incrimination by ensuring that a person accused of a crime has the opportunity to consult with a lawyer in making a decision regarding whether and how to respond during interrogation and because the presence of counsel during interrogation would tend to deter abusive practices.[72]

The Supreme Court's quest to develop readily administrable constitutional rules regarding self-incrimination shifted focus to the Fifth Amendment in *Miranda v. Arizona*.[73] *Miranda* was a consolidated case regarding the circumstances in which incriminating statements obtained during a custodial interrogation could be admissible in evidence against the defendants. The defendants in each case were questioned in isolation from anyone other than their interrogators (who were variously police officers, detectives, or prosecuting attorneys). No warning of the defendants' rights was given at the start of the interrogations. The questioning resulted in oral admissions and, in three cases, signed statements which were admitted into evidence at trial.[74]

The resulting confessions might not have been considered involuntary in a due process sense under cases like *Brown*. They did not, for example, involve confessions extracted by physical torture. The *Miranda* Court nonetheless found that the inherently coercive circumstances of the custodial interrogations rendered the interrogations constitutionally suspect. The Court's specific concern was that the statements could not be considered the product of free choice since appropriate safeguards were not provided at the outset of the interrogation.[75]

Because of the importance of the privilege against self-incrimination and the inherent pressures of custodial interrogation,[76] the *Miranda* Court held that specific rules and procedures were constitutionally necessary and

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[70] 377 U.S. 201, 205–06 (1964); Primus, *supra* note 22, at 12.

[71] Escobedo v. Illinois, 378 U.S. 478, 485 (1964).

[72] *Id.* at 488–90. *Miranda*, decided two years later, largely displaced *Escobedo*, since the *Miranda* rules also require that a detainee be apprised of their right to have counsel present during interrogation. Primus, *supra* note 22, at 12 n.71.

[73] 384 U.S. 436 (1966).

[74] *Id.* at 445.

[75] *Id.* at 457.

[76] *Id.* at 467.

that the government may not use a person's statements against him without demonstrating that those rules and procedures were followed prior to questioning. Most notably, the Court delineated the now-iconic "*Miranda* warnings" that must be given in advance of questioning: the person must have been warned "in clear and unequivocal terms that he has the right to remain silent,"[77] told that "anything said can and will be used against the individual in court,"[78] and "clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation."[79] The *Miranda* Court further held that all three of these required warnings are an "absolute prerequisite to interrogation."[80] In other words, no amount of circumstantial evidence of the person's awareness of their rights will substitute for the required explicit warnings.[81]

*Massiah*, *Escobedo*, and *Miranda* ushered in a new era of more robust constitutional doctrines protecting the privilege against self-incrimination, in addition to the due process requirement of voluntariness, which remained applicable. The Court's decisions in these cases were extensively praised, both at the time and thereafter.[82] The decisions were also subject to equally

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[77] *Id.* at 467–68.

[78] *Id.* at 469.

[79] *Id.* at 471. The right-to-counsel warning must also notify the person that "if he is indigent[,] a lawyer will be appointed to represent him." *Id.* at 473.

[80] *Id.* at 471.

[81] *Id.* at 471–72. The Court held that the *Miranda* warnings are required in the absence of a demonstrated alternative that would be equally effective in protecting the privilege against self-incrimination:

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted . . . . However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the [*Miranda*] safeguards must be observed.

*Id.* at 467.

[82] *See, e.g.*, James J. Tomkovicz, *Sacrificing* Massiah*: Confusion over Exclusion and Erosion of the Right to Counsel*, 16 LEWIS & CLARK L. REV. 1, 67 (2012) ("The social costs that *Massiah* imposes are the price paid for a right deemed essential to adversary-system fairness. They are a price the Framers of our Constitution chose to pay for the invaluable, if somewhat intangible, benefits counsel affords."); Welsh S. White, *Defending* Miranda*: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 21 (1986) ("*Miranda* [has] value as a symbol of our commitment to maintaining a fair system of criminal procedure that seeks to implement the protections embodied in the federal constitution[;] not only has [it] produced a better atmosphere for people who come in contact with the police but [it] also may have made a tangible contribution toward curbing abusive police practices."); Yale Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the 'New' Fifth Amendment and the Old 'Voluntariness' Test*, 65 MICH. L. REV. 59, 65 (1966) (defending the *Miranda* rules as consistent with the history and purposes of the privilege and arguing that "[t]he prize for ingenuity [in legal reasoning] goes not to the Supreme Court

extensive criticism, particularly in the case of *Miranda*, from dissenting Justices, lawmakers, law enforcement officials, and legal scholars.[83]

Both the praise and the criticism in time proved to be overstated. From the beginning, the Court's cases did less than they could have. The newly announced rules for protecting the privilege against self-incrimination were watered down almost as soon as they were developed, first in fact and then in law. Section I.C.4 provides an overview of the Court's revisions and narrowing of the protections against self-incrimination, beginning almost immediately following *Miranda* and continuing most recently in *Salinas v. Texas*[84] and *Vega v. Tekoh*.[85]

*4. Revision and Retrenchment*

In a series of decisions from 1971 to 1977, the Supreme Court issued eleven rulings on *Miranda* issues. As Professor Geoffrey Stone has noted, "[i]n ten of [those] cases, the Court interpreted *Miranda* so as not to exclude the challenged evidence. In the remaining case, the Court avoided a direct ruling on the *Miranda* issue, holding the evidence inadmissible on other grounds."[86] Thus, shortly after issuing its decision in *Miranda*, the Court began walking away from *Miranda*'s broad promises. While the Warren Court's previous expansion of criminal procedure protections had been part of a broader social and judicial trend toward expanding civil rights protections generally, the subsequent retrenchment in the Court's criminal procedure cases under the Burger Court was part of the opposite trend. With increasing vigor in the late 1960s, political actors both stoked and reflected hostile public sentiment toward cases protecting the rights of persons

for finally applying the privilege to the police station but to those who managed to devise rationales for excluding it from the stationhouse all these years").

[83] *See, e.g.*, Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1419 (1985) ("*Miranda* was not a wise or necessary decision, nor has *Miranda* proved to be, as is generally contended, a harmless one. It sent our jurisprudence on a hazardous detour by introducing novel conceptions of the proper relationship between the suspect and authority."). Professor Caplan further contended that *Miranda* "accentuated just those features of our system that manifest the least regard for truthseeking, that imagine the criminal trial as a game of chance in which the offender should always have some prospect of victory, and that ultimately reflect doubt on the rectitude of our laws and institutions." *Id.*; *see also* Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 539 ("The decision in *Miranda* evoked a chorus of criticism of the Court, ranging from the excited to the psychotic. Congress responded with the Omnibus Crime Control and Safe Streets Act of 1968, some provisions of which were obviously retaliatory. These events combined to create an atmosphere that, to say the least, was unfavorable to the continued vitality of the Warren Court's mission in criminal cases.").

[84] 570 U.S. 178 (2013).

[85] 142 S. Ct. 2095 (2022).

[86] Geoffrey R. Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 100.

accused of crimes.[87] During this same era, an ascendant conservative legal movement became increasingly critical of Supreme Court decisions expanding individual rights,[88] invoking arguments of precedent, policy, history, and judicial restraint. The report of a prominent Presidential Commission reflected these trends and arguments, particularly in a supplemental statement joined by future Supreme Court Justice Lewis F. Powell Jr.:

> There is real reason for the concern, expressed by dissenting justices, that *Miranda* in effect proscribes the use of all confessions. This would be the most far-reaching departure from precedent and established practice in the history of our criminal law . . . . The question is now being increasingly asked whether the full scope of the privilege [against self-incrimination], as recently construed and enlarged, is justified either by its long and tangled history or by any genuine need in a criminal trial . . . . [T]he historic origin and purpose of the privilege was primarily to protect against the evil of government suppression of ideas. But it is doubtful that when the Fifth Amendment was adopted it was conceived that its major beneficiaries would be those accused of crimes against person and property.[89]

This view of the history and purposes of the Fifth Amendment is dubious even on its own terms, given that the original Framers unquestionably intended the privilege to do more than protect against "government suppression of ideas."[90] More importantly for purposes of this

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[87] *See, e.g.*, William J. Chambliss, *Crime Control and Ethnic Minorities: Legitimizing Racial Oppression by Creating Moral Panic*, *in* ETHNICITY, RACE, AND CRIME 235, 245 (Darnell F. Hawkins ed., 1995) (noting how Barry Goldwater's 1964 presidential campaign nationalized fear of urban street crime as a political issue); Yale Kamisar, *The* Miranda *Case Fifty Years Later*, 97 B.U. L. REV. 1293 n.5 (2017) ("[T]he most fundamental reasons for the [Warren] Court's loss of impetus lies in the social and political context of the Court in the late 1960's. That period was a time of social upheaval, violence in the ghettos, and disorder on the campuses. Fears of the breakdown of public order were widespread. Inevitably, the issue of law and order were [sic] politically exploited." (alterations in original) (quoting Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 538–39)).

[88] *See, e.g.*, Kamisar, *supra* note 87, at 1294 ("Before being appointed Chief Justice of the Supreme Court, then-Judge Burger of the Court of Appeals for the District of Columbia Circuit left no doubt, both in his dissenting opinions and in public speeches, that he was extremely unhappy with the Warren Court's criminal procedure cases."). Kamisar further notes that "Chief Justice Burger may have been the most police-friendly Supreme Court Justice of all time—only with the possible exception of another Nixon appointee, William Rehnquist," who, as the head of the DOJ's Office of Legal Counsel, "urged the President to appoint a commission to consider whether such cases as *Miranda* needed to be corrected by a constitutional amendment." *Id.* at 1294–95.

[89] PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 305–06 (1967) (supplemental statement by individual commission members).

[90] *See infra* Section II.B for further discussion of Colonial Era evidence regarding the purposes for the privilege against self-incrimination. Indeed, if the primary purpose of the privilege was to protect

Article, the selective originalism which looks solely to the Framing era to discern the Fifth Amendment's "historic origin and purpose" ignores that the Second Founding's constitutional vision changed the intended scope of the Fifth Amendment's "major beneficiaries." As discussed in more detail in Part II, both the Second Founding's Framers and enslaved persons unquestionably believed that persons accused of crimes would and should be protected against coercive methods of interrogation. Such methods were regularly inflicted with impunity upon enslaved persons, and the resulting evidence was routinely admitted into evidence against them. As such, they were among the vestiges of the slave system that the Second Founding was intended to dismantle.

As part of its curtailment of civil rights protections, the Supreme Court began taking firm doctrinal steps away from *Miranda* in 1974 in *Michigan v. Tucker*.[91] In *Tucker*, the defendant had been questioned by police without being warned of his right to have counsel appointed if he could not afford private counsel.[92] During questioning, the defendant, by way of an alibi, provided the name of a person whom he stated he had been with elsewhere at the time of the crime.[93] The police later questioned that person, who undermined the defendant's alibi and recounted several incriminating statements that the defendant had allegedly made to him.[94] At trial, the defendant objected to admission of this witness's statements on the ground that the police would not have learned of the witness were it not for the defendant's statements during the questioning wherein he had not been warned of his right to counsel.[95]

The Court characterized the issue presented as whether the witness's testimony "must be excluded simply because police had learned the identity of the witness by questioning respondent at a time when he was in custody as a suspect, but had not been advised that counsel would be appointed for him if he was indigent."[96] The Court held that the testimony was properly admitted.

The Court drew a sharp distinction between the privilege against self-incrimination and the *Miranda* framework designed to protect that privilege, stating that the Court's analysis would first consider "whether the police

against government suppression of ideas, the overlap with the First Amendment's Speech Clause would be so substantial as to border on redundancy.

[91] Michigan v. Tucker, 417 U.S. 433 (1974).

[92] *Id.* at 436.

[93] *Id.*

[94] *Id.* at 436–37.

[95] *Id.* at 437.

[96] *Id.* at 435.

conduct complained of directly infringed upon respondent's right against compulsory self-incrimination or whether it instead violated only the prophylactic rules developed to protect that right."[97] The Court drew a further distinction between rights and remedies, noting that "whether the evidence derived from this interrogation must be excluded"[98] would be a subsequent and independent analysis.

But *Miranda* did not present either of these bright-line distinctions in such stark relief. The *Tucker* Court, discussing the first distinction, stated that the "historical circumstances" of the privilege against self-incrimination[99] indicate that the privilege provides protection only against statements that are involuntary, and that the safeguards mandated by *Miranda* were designed to protect that right. The *Tucker* Court reasoned that the respondent was not deprived of the privilege against coerced self-incrimination but merely of the procedural safeguards instituted by *Miranda*, and that the circumstances of the interrogation bore no resemblance to the practices which the *Tucker* Court believed the privilege aimed to protect.[100] Because there was no indication that defendant's statements were involuntary, the Court reasoned, the police had violated only *Miranda*'s "recommended 'procedural safeguards'" rather than the underlying right itself.[101]

Since *Tucker*, the Supreme Court has generally applied its self-incrimination doctrine grudgingly. Two recent cases—*Salinas v. Texas*[102] and *Vega v. Tekoh*[103]—have continued this trend. In *Salinas*, police officers found shotgun shell casings at the scene of a murder.[104] An investigation led the police to suspect the defendant of the crime.[105] Officers went to the defendant's home where they requested that he provide his shotgun for ballistics testing and accompany them to the police station.[106] The defendant agreed to do so and was interviewed by the police at the station.[107] The one-hour interview was noncustodial, and the police did not read the *Miranda* warnings to the defendant.[108] The defendant answered most of the questions

[97] *Id.* at 439.
[98] *Id.*
[99] *Id.* at 444.
[100] *Id.*
[101] *Id.* at 443.
[102] 570 U.S. 178 (2013).
[103] 142 S. Ct. 2095 (2022).
[104] *Salinas*, 570 U.S. at 181.
[105] *Id.* at 181–82.
[106] *Id.* at 182.
[107] *Id.*
[108] *Id.* at 181–82.

posed during the interview, but remained silent when asked whether his shotgun would match the shells found at the scene of the murder.[109] The defendant allegedly "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up."[110] The police concluded that there was insufficient evidence at that time to charge him with the murders and let him go.[111] Based on subsequent information from a witness stating that defendant had confessed the crime to him, however, the police ultimately charged the defendant with the murders. Evidence of defendant's silence and demeanor in response to the question regarding the shotgun shells was introduced at trial over the defendant's objection.[112] The defendant was convicted, and ultimately appealed to the Supreme Court.

The issue presented to the Court was "whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief."[113] The Court chose to resolve the case on a different ground: namely, that the defendant had not affirmatively and specifically invoked the privilege against self-incrimination.

The Court's plurality opinion held that the privilege against self-incrimination must be expressly invoked.[114] The plurality further found that none of the exceptions to this "express invocation" rule were applicable to the facts at hand. One such exception is that a person's "failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary."[115] Due to the "uniquely coercive nature" of custodial interrogation, for example, a person in custody "cannot be said to have voluntarily forgone the privilege unless he fails to claim it after being suitably warned."[116] This exception to the express invocation rule, the plurality held, was inapplicable because it was "undisputed that [defendant's] interview with police was voluntary. As [defendant] himself acknowledges, he agreed to accompany the officers to the station and was free to leave at any time during the interview."[117] Hence, the plurality

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[109] *Id.* at 182.

[110] *Id.*

[111] *Id.* Following the interview regarding the murders but while still at the police station, the defendant was arrested for outstanding traffic warrants. He was therefore briefly in custody, but not during the time of the interview regarding the murders.

[112] *Id.*

[113] *Id.* at 183.

[114] *Id.*

[115] *Id.* at 184.

[116] *Id.* at 184–85.

[117] *Id.* at 185 (internal quotation marks omitted).

reasoned, "it would have been a simple matter for [defendant] to say that he was not answering the officer's question on Fifth Amendment grounds. Because he failed to do so, the prosecution's use of his noncustodial silence did not violate the Fifth Amendment."[118]

Under *Salinas*, the Fifth Amendment does not protect a right to remain silent per se. Indeed, the plurality explicitly stated that "a defendant normally does not invoke the privilege by remaining silent."[119] The plurality therefore rejected the defendant's argument that there should be an exception to the express invocation requirement in cases where, although not formally in custody, a person "stands mute and thereby declines to give an answer that officials suspect would be incriminating."[120] *Salinas* thus allows the admission at trial of the fact of silence during official but noncustodial questioning as evidence from which an inference of guilt may be drawn.[121] Indeed, despite its ubiquity in popular discourse, "the 'right to remain silent' that most Americans think they possess does not exist."[122]

Protecting an accused person's unfettered right to remain silent during an interrogation without requiring legalistic express invocation of the constitutional right to do so is a core value of the Second Founding. Enslaved persons were required to speak when questioned by white persons, both as a matter of law and social custom.[123] As discussed in greater detail in Part III, their choice to remain silent was a legal nullity that interrogators were free to ignore and persist in their questioning. Further, if the questioning was conducted via extralegal means, such as by private white individuals or mobs, refusing to speak often led to brutal reprisals or torture. Such disregard of a person's dignity and autonomy was among the vestiges of slavery that the Second Founding squarely repudiated.

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[118] *Id.* at 186.

[119] *Id.*

[120] *Id.*

[121] Justices Clarence Thomas and Antonin Scalia concurred in the judgment, but on separate grounds. They would have found that the defendant's "claim would fail even if he had invoked the privilege[,] because the prosecutor's comments regarding his precustodial silence did not compel him to give self-incriminating testimony." *Id.* at 192 (Thomas, J., concurring). Hence, the *Salinas* plurality's treatment of the express invocation rule did not garner a majority of the Court. The plurality's cramped application of the privilege against self-incrimination is nonetheless cause for concern in terms of the scope of the privilege.

[122] Tracey Maclin, *The Right to Silence v. the Fifth Amendment*, 2016 U. CHI. LEGAL F. 255, 260 (discussing *Salinas* as well as the Court's earlier decisions in *Chavez v. Martinez*, 538 U.S. 760 (2003), and *Berghuis v. Thompkins*, 560 U.S. 370 (2010), which both similarly undermine the notion of an actual protected constitutional right to silence under government interrogation).

[123] *See generally* Carter, *supra* note 18 (providing examples of the various denials of enslaved persons' First Amendment rights, including the right to be free from compelled speech).

The plurality opinion in *Salinas* creates significant uncertainty about whether self-incrimination doctrine protects a true right to remain silent; the Court's more recent decision in *Vega v. Tekoh*[124] calls into question whether the Court considers *Miranda* rights to be constitutional rights at all. *Tekoh* involved an un-*Mirandized* interrogation. In *Tekoh*, a police officer questioned the defendant at his workplace regarding a sexual assault.[125] The officer did not inform the defendant of his *Miranda* rights, and the defendant alleged that the officer used coercive methods during the lengthy interrogation.[126] Following the interrogation, the defendant eventually produced an incriminating written statement, after which he was arrested and charged with the crime.[127] At trial, the incriminating statement was admitted over the defendant's objection.[128] He was nonetheless acquitted, and subsequently sued the interrogating officer and other officials under 42 U.S.C. § 1983, alleging a violation of his rights under the Fifth Amendment's Self-Incrimination Clause.[129]

The Court framed the issue as "whether a violation of the *Miranda* rules provides a basis for a claim under § 1983."[130] The underlying question was whether a violation of *Miranda* is a violation of the Fifth Amendment. The Court held that it is not.[131] Rather, the Court treated the *Miranda* rules merely as "prophylactic" standards designed to deter and prevent Fifth Amendment violations rather than as Fifth Amendment rights themselves.[132] The Court acknowledged that the *Miranda* rules were "constitutionally based," but stated that "they are prophylactic rules nonetheless," which was reinforced by *Miranda* itself as well as the post-*Miranda* cases.[133] The Court concluded

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[124] 142 S. Ct. 2095, 2095 (2022).

[125] *Id.* at 2099.

[126] *Id.* ("The parties dispute whether [Officer] Vega used coercive investigatory techniques to extract the statement, but it is undisputed that he never informed [defendant] Tekoh of his rights under [*Miranda*].").

[127] *Id.* at 2099–100.

[128] *Id.* at 2100.

[129] *Id.*

[130] *Id.* at 2101.

[131] *Id.* at 2099.

[132] *Id.* at 2101.

[133] *Id.* The *Tekoh* Court's characterization of the *Miranda* line of cases (and especially of *Miranda* itself) in this regard is highly questionable. As to *Miranda* itself, "the majority opinion [in *Miranda*] is replete with statements indicating that the majority thought it was announcing a constitutional rule." *Dickerson v. United States*, 530 U.S. 428, 439 (2000). More fundamentally, as *Dickerson* further noted, *Miranda* must be a constitutional decision because

> *Miranda* and two of its companion cases applied the rule to proceedings in state courts[, and] [s]ince that time, we have consistently applied *Miranda*'s rule to prosecutions arising in state

that "a violation of *Miranda* does not necessarily constitute a violation of the Constitution, and therefore such a violation does not constitute 'the deprivation of [a] right . . . secured by the Constitution'"[134] actionable under § 1983.

The reasoning ultimately rested upon the view that the only interrogation practices that the Self-Incrimination Clause reaches are those entailing compulsion. As the dissent noted, "[t]he majority's argument is that 'a violation of *Miranda* does not necessarily constitute a violation of the Constitution,' because *Miranda*'s rules are 'prophylactic.' The idea is that the Fifth Amendment prohibits the use only of statements obtained by compulsion, whereas *Miranda* excludes non-compelled statements too."[135] For the *Tekoh* Court, the *Miranda* rules necessarily represented "*additional* procedural protections"[136] beyond those required by the Constitution itself. Hence, in the *Tekoh* Court's view, the *Miranda* rules amount to "*new* rules"[137] created out of whole cloth by the *Miranda* Court with no grounding in history or prior practice.

There are two problems with this reasoning. First, even if the *Miranda* rules were "merely" prophylactic and therefore separate from the Fifth Amendment, *Miranda*

> remains a constitutional rule, [as the majority agrees]. And it grants the defendant a legally enforceable entitlement—in a word, a right—to have his confession excluded. . . . Whether that right to have evidence excluded safeguards a yet deeper constitutional commitment [under the Fifth Amendment] makes no difference to § 1983.[138]

Second, underlying the *Tekoh* Court's reasoning is the unstated assumption that the requirement of pre-interrogation warnings was invented de novo by the Court in *Miranda*—"that *Miranda* was 'a decision without a past' having

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> courts. It is beyond dispute that we do not hold a supervisory power over the courts of the several States. With respect to proceedings in state courts, our authority is limited to enforcing the *commands* of the United States Constitution.

*Id.* at 438 (emphasis added) (citations omitted). It is particularly noteworthy that the majority opinion in *Dickerson* was written by Justice William H. Rehnquist, who was highly skeptical of the *Miranda* decision on the merits. *See* Kamisar, *supra* note 87, at 1294–95 (describing his efforts as a DOJ lawyer to persuade the President to appoint a commission to consider proposing a constitutional amendment overturning *Miranda*).

134 *Tekoh*, 142 S. Ct. at 2106.

135 *Id.* at 2110 (Kagan, J., dissenting).

136 *Id.* at 2101 (emphasis added).

137 *Id.* (emphasis added).

138 *Id*. at 2110 (Kagan, J., dissenting).

'no basis in history or precedent'"[139]—and that such required warnings therefore stand separate and apart from the Fifth Amendment itself. By the late 1700s, however, such warnings were regularly given in England and the British North American colonies. Legal historians have convincingly demonstrated that "a scheme of warning suspects about the right to silence—and the consequences of waiving that right—was very much a part of the Anglo-American legal tradition of which the Framers would have been aware."[140] At the time of the Fifth Amendment's ratification, interrogators were regularly giving such warnings because doing so assured the courts of the voluntariness of incriminating statements that the government sought to introduce into evidence at trial.[141]

As illustrated above, the Supreme Court's current Self-Incrimination Clause doctrine has become increasingly cramped, grudgingly applied, and riddled with exceptions. Part I of this Article has discussed the Court's current doctrinal framework. Part II will discuss what the doctrine could be if it considered the values of the post-Civil War Constitution and evidence of the views and experiences of enslaved persons.

## II. THE "SECOND FOUNDING": THE POST-CIVIL WAR CONSTITUTION'S HISTORY AND GOALS

The Supreme Court has considered several sources in developing its Self-Incrimination Clause jurisprudence: the policy goals underlying the protection against self-incrimination; the Court's precedent; and the Clause's text, history, and background. In terms of history and background, the Court has looked to English common law, the legal practices in colonial America prior to the Revolution Era, the statements of the Framers during the drafting of the Constitution and Bill of Rights and the debates regarding their adoption, and the legal practices and public understandings during the ratification period of the Constitution and Bill of Rights from 1787 to 1791. The Court, however, has seldom looked to the period of the nation's "Second Founding" following the Civil War in interpreting the meaning of the Constitution generally or the Self-Incrimination Clause specifically.

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[139] Brief of Historians of Criminal Procedure as Amici Curiae Supporting Respondent at 1, *Tekoh*, 142 S. Ct. 2095 (quoting DOJ, REPORT TO THE ATTORNEY GENERAL: THE LAW OF PRE-TRIAL INTERROGATION 118 (1986), https://www.ojp.gov/pdffiles1/Digitization/104975NCJRS.pdf [https://perma.cc/R4ZB-3M6M]).

[140] *Id.* at 1–2.

[141] *Id.* at 4 ("Interrogators were giving these warnings at the time the Fifth Amendment to the United States Constitution was adopted and were doing so because of a voluntariness rule that was then applied in a very strict manner that readily excluded confessions. The [practice gradually] disappeared only as the Framing Era voluntariness rule was relaxed to make confessions more readily admissible.").

Part II of this Article discusses why the constitutional moment culminating in the post-Civil War Constitution should truly be viewed as a second founding of the nation. The Supreme Court's failure to take account of evidence from the Second Founding has led to a Self-Incrimination Clause jurisprudence that fails to fulfill the promise of the Constitution for which enslaved persons and abolitionists fought, suffered, and died.

### *A. The Second Founding's Role in Constitutional Interpretation*

A generally accepted principle of constitutional interpretation is that the historical moment culminating in the Declaration of Independence, the Constitution, and the Bill of Rights is a unique source for understanding the purpose and effect of those documents.[142] This principle is sensible for several reasons. First, the original Founding and the 1787 Constitution created a new nation, different in kind, structure, and fundamental tenets from the Articles of Confederation government that preceded it and the British government from which it descended.[143] The act of national creation provides unique insights into the nation created thereby. These insights are considered to be different in kind from those that can be gleaned from acts of evolutionary or incremental elaboration.[144] Furthermore, the original Founding period entailed unusually robust and extended public engagement in the constitutional questions necessary to the project of national creation. This public engagement, representing a deep investment in fundamental questions regarding the very nature of the nation to be created, ran the gamut from the largely wealthy elites who drafted the Founding documents, to the popular press, to ordinary individuals. It accordingly left behind a large body of evidence to draw upon in interpreting constitutional meaning.[145]

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[142] *See, e.g.*, Sonu Bedi & Elvin Lim, *The Two-Foundings Thesis: The Puzzle of Constitutional Interpretation*, 66 UCLA L. REV. DISCOURSE 110, 117–19 (2018) (discussing originalists' emphasis on history and tradition in interpreting the scope of constitutional rights).

[143] *Id.* at 124–25.

[144] Whether constitutional provisions should be interpreted as limited to the Framers' specific intentions or to the general public's understanding at the time of ratification is a broader question beyond the scope of this Article. Here, I contend only that historical evidence that is roughly contemporaneous with the enactment of the provision being interpreted provides insights that are different from evidence significantly prior or subsequent to such enactments. *Cf.* Ruth Colker, *The Supreme Court's Historical Errors in* City of Boerne v. Flores, 43 B.C. L. REV. 783, 790 (2002) ("We should rarely look at statements made *after* the ratification of a constitutional provision. The important temporal period is the moment (or the immediate moment before) the ratification of constitutional language."). It is debatable whether we should only "rarely look" at post-ratification statements and understandings; that is a value judgment as much as a legal question.

[145] *See, e.g.*, Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 488–89 (1989) (stating that "the [First] Founding, Reconstruction, and New Deal each inaugurated a distinctive *constitutional regime* of public values and institutional relationships that maintain[ed] a basic continuity

The nation's First Founding ultimately failed. The cause of that failure and the resulting war of disunion was slavery. Scholars have debated whether the original Constitution and subsequent legislation were affirmatively proslavery. It is generally accepted, however, that the American legal order at a minimum treated the protection of the institution of slavery as an acceptable cost for establishing and maintaining the American colonies and the nation they became.[146] This Founding compromise with slavery could not, and ultimately did not, hold. A permanent social compromise on the issue of slavery in the end proved impossible due to, among other things, aggressive moves by proslavery forces to expand slavery beyond the areas where it already existed,[147] countervailing abolitionist sentiment in the

until the next regime change" and that while various other interstitial constitutional moments "made enduring contributions to modern constitutional law, [they were not] quite of the same pervasive and deep-cutting type" as those three key founding moments).

[146] *See, e.g.*, Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1885–86 (2019) ("Slavery was, and had always been, woven tightly into the fabric of the American legal system . . . . Slavery was recognized and validated by colonial statute, imperial policy, the United States Constitution, state statute, state courts, federal statutes, and federal courts."); DAVID BRION DAVIS, INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD 273 (2006) (stating that "[f]rom the time of the Continental Congress, American leaders had recognized that a serious dispute over slavery could jeopardize their bold experiment in self-government," and that they thus repeatedly endeavored to defer direct disputes over the issue of slavery); CONG. GLOBE, 36th Cong., 2d Sess. 967, 967 (1861) (statement of Rep. Daniel Somes) ("When the fathers framed the Government, they were [by necessity] compelled to tolerate slavery; but, at the same time, they adopted the theory of equality among men, and provided in the Constitution the means of its ultimate triumph, namely[:] free speech and a free press."); Guyora Binder, *Did the Slaves Author the Thirteenth Amendment? An Essay in Redemptive History*, 5 YALE J.L. & HUMAN. 471, 477–78 (1993) (noting that President Abraham Lincoln believed that in order to remedy the First Founding's compromise with slavery, "the Nation [would have to be] redeemed—reborn with a new heritage").

[147] Among many other matters, those aggressive moves included the Supreme Court's decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), holding, among other things, that Blacks could not be considered "citizens" for purposes of the Constitution and that the Missouri Compromise (which attempted a détente on the issue of slavery by rendering slavery legal in some territories but illegal and others) was unconstitutional due to the Court's finding that the Constitution conferred an unqualified right of a slaveowner in his "property," even if the putative slave were in a free state or territory. Although the Supreme Court may have thought that its decision in *Dred Scott* would settle the conflict over slavery and Black rights, the case instead "fanned the flames of abolitionist fervor and contributed to the tension over slavery that exploded into the Civil War." Rebecca E. Zietlow, *Congressional Enforcement of the Rights of Citizenship*, 56 DRAKE L. REV. 1015, 1023–24 (2008).

North,[148] the Southern economic dependence on slave property and slave labor,[149] and anti-Black racism.[150]

As with the First Founding, the history and background of the nation's Second Founding provides unique insights into the meaning of the new constitutional order the Second Founding established. The post-Civil War constitutional amendments reconstructed a nation that had functionally ceased to exist—one torn apart by the ideological, regional, and military conflicts over the issue of slavery. Like the First Founding, the Second Founding entailed atypically intense and sustained engagement by the general public in questions of constitutional values.[151] Further, as was the case with the original Founding's Constitution, the Reconstruction

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[148] William M. Carter Jr., *The Thirteenth Amendment and Constitutional Change*, 38 N.Y.U. REV. L. & SOC. CHANGE 583, 585 (2014) ("The predominant view of antislavery whites . . . in the antebellum period was that slavery should not be extended beyond the places where it already existed and would eventually wither on the vine in those places where it did exist. The center of gravity in anti-slavery dialogue and action subsequently shifted toward full and immediate abolition, however, in reaction to a series of events in the decades immediately preceding the Civil War.").

[149] Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT L. REV. 1009, 1025, 1032 (1993) (noting that slavery was "the defining economic and social institution of the South" and that "[s]ince the founding, slaves had constituted the second most valuable form of privately held property in the Nation, after real estate").

[150] Race was the "the central reality of slavery." David Brion Davis, *Slavery and the American Mind*, *in* PERSPECTIVES AND IRONY IN AMERICAN SLAVERY 59 (Harry P. Owens ed., 1976). Economic factors were certainly a major driver of slavery and the slave trade, but it was racism that shaped the ultimate nature of American slavery as an institution of inheritable, perpetual, race-based servitude. As such, the stereotypes and stigmatization that supported slavery also created powerful resistance to its abolition above and beyond fear of the economic changes that would be associated with the end of slavery. Enslaved Africans and their descendants (even if born free) were stigmatized as being intellectually, socially, and religiously unfit for a state of freedom; proslavery advocates therefore characterized the perpetuation of slavery as a positive force for enslaved persons due to its alleged "Christianizing, civilizing and humanitarian" effect upon them. tenBroek, *supra* note 43, at 174.

[151] For example, Reverend James Pennington, a Black abolitionist leader who had himself been enslaved, remarked in 1861 that

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

Reverend Pennington's remarks appear in the introduction to Jourden Banks's slave narrative, JOURDEN H. BANKS, A NARRATIVE OF EVENTS OF THE LIFE OF J.H. BANKS, AN ESCAPED SLAVE, FROM THE COTTON STATE, ALABAMA, IN AMERICA 3 (1861), https://docsouth.unc.edu/neh/penning/penning.html [https://perma.cc/Y5AR-4Q3P]; *see also* JAMES W.C. PENNINGTON, THE FUGITIVE BLACKSMITH; OR, EVENTS IN THE HISTORY OF JAMES W. C. PENNINGTON, PASTOR OF A PRESBYTERIAN CHURCH, NEW YORK, FORMERLY A SLAVE IN THE STATE OF MARYLAND, UNITED STATES, at iv (2d ed. 1849), https://docsouth.unc.edu/neh/penning49/penning49.html [https://perma.cc/5HN9-P6L8]. Similarly, the famed abolitionist Wendell Phillips stated in an 1853 speech that "no question has ever, since Revolutionary days, been so thoroughly investigated or argued here, as that of slavery." WENDELL PHILLIPS, SPEECHES, LECTURES, AND LETTERS 110–11 (1863).

Amendments were intended and understood to be a revolutionary act of creation—a "new birth of freedom."[152]

The most urgent and immediate tasks of the Second Founding were to constitutionalize the elimination of slavery and remedy the badges and incidents of slavery that were inflicted upon Black people.[153] In discussing the purpose of the Thirteenth Amendment, Senator Henry Wilson of Massachusetts stated during the debates leading to its adoption that the Thirteenth Amendment was designed to "obliterate the last lingering vestiges of the slave system; its chattelizing [sic], degrading and bloody codes; its dark, malignant barbarizing spirit; all it was and is, everything connected with it or pertaining to it."[154] The Reconstruction Amendments were also aimed at dismantling the overarching "Slave Power,"[155] which the Second Founding's Framers believed had perverted the nation as a whole since the First Founding.[156]

Two overarching principles of constitutional interpretation emerge from an examination of the Second Founding's history and context. First, the Second Founding transformed the Constitution from a document that protected slavery and a racial oligarchy into a document that protects freedom and "rights of belonging" for all members of the American

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[152] Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), https://www.loc.gov/resource/rbpe.24404500 [https://perma.cc/B49L-N5FL]. The Second Founding, of course, did not reject all of the First Founding's principles (just as the First Founding did not reject all of the principles of the Articles of Confederation). *See* Bedi & Lim, *supra* note 142, at 123–24 ("[The Articles of Confederation] created a league of nations that assiduously guarded the sovereignty of states . . . . [The Constitution] radically overhauled this older conception of union as merely a compact among thirteen sovereign states . . . . Crucially, however, elements of the [Articles of Confederation's principles], such as the commitment to states' rights in the composition of the U.S. Senate and the Tenth Amendment, were incorporated in the text of the Constitution."); Ackerman, *supra* note 145, at 459–60, 521–22 (arguing that it is clear that the Reconstruction Amendments "destroyed a host of eighteenth-century premises concerning slavery, federalism, and citizenship . . . . [But] which fragments of the Founding order were now inconsistent with the new Republican constitution? Which aspects might be saved if they were reinterpreted in the light of the new Republican affirmations?"). Nonetheless, we should not overlook or fail to examine whether and how the Second Founding's changes to prior constitutional assumptions may affect constitutional meaning.

[153] *See, e.g.*, CONG. GLOBE, 38th Cong., 2d Sess. 155 (1865) (quoting statement of Rep. Davis that the Thirteenth Amendment would "remov[e] every vestige of African slavery from the American Republic").

[154] tenBroek, *supra* note 43, at 177 (citing CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864)).

[155] *See* Sandra L. Rierson, *The Thirteenth Amendment as a Model for Revolution*, 35 VT. L. REV. 765, 801–02 (2011) ("The idea of a southern 'Slave Power' that dominated national politics . . . emerged in the 1830's and became part of the nation's political discourse in the years leading up to the Civil War.").

[156] Senator Henry Wilson, for example, stated during the Thirteenth Amendment debates that slavery had become "the master of the Government and the people," and that the "death of slavery [would be] the life of the Nation." CONG. GLOBE, 38th Cong., 1st Sess. 1199, 1320, 1323 (1864).

community.[157] Hence, the working presumption in constitutional interpretation must be rights-protection rather than rights-restriction. The second principle is a corollary of the first. In applying this presumption to interpret specific constitutional provisions, due regard must be given to all relevant evidence of constitutional meaning, including the expressed views of those persons who had been excluded from the polity under the First Founding's Constitution, such as enslaved persons and their allies. This method of "inclusive interpretation" is supported by the Second Founding's framing history.

In speaking of how the Reconstructed Constitution should be interpreted, Senator Charles Sumner—one of the primary architects of the Thirteenth Amendment—stated:

> I say [there is] a new rule of interpretation for the National Constitution, according to which, in every clause and every line and every word, it is to be interpreted uniformly and thoroughly for human rights. Before the [Civil War], the rule was precisely opposite. The Constitution was interpreted always, in every clause and line and word, [in favor of] human slavery. Thank God, it is all changed now! There is [now] another rule, and the National Constitution [now], from beginning to end, speaks always for the Rights of Man.[158]

The previous "system of [constitutional] interpretation born of slavery,"[159] Sumner argued, had been "conquered at Appomattox."[160] Sumner's reasoning was that, in addition to the specific new rights and new powers granted by the Reconstruction Amendments, those Amendments and the constitutional moment embodied in the Civil War and the end of slavery also affected the interpretive approach and proper meaning to be given to the *entire* Constitution.

In Sumner's view, two aspects of the new constitutional regime warranted this "new rule of interpretation." The first aspect was the Thirteenth Amendment. Along with his fellow Radical Republicans who shaped the Second Founding, Sumner believed that by abolishing slavery, the Thirteenth Amendment also abolished all of the legal structures supporting slavery, including the anti-equality and proslavery rules of

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[157] *See* REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 6–8 (2006); *cf.* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1840 (2010) (arguing that in interpreting the reach of Congress's enforcement powers under the Reconstruction Amendments, "a good rule of thumb is that its scope must be at least as great as the power to protect the rights of slaveholders before the Civil War"); Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1125 (2012).

[158] 14 Charles Sumner, The Works of Charles Sumner 424 (1883).

[159] *Id.* at 425.

[160] *Id.* at 424.

constitutional interpretation that had previously been applied to limit the full and equal legal protection of Black citizens.[161] The second aspect was both legal and political: the "new force [of] . . . the colored people of the United States counted by the million[s]"[162] who were now constitutionally recognized as full citizens by the Fourteenth Amendment and who were, by virtue of the Fifteenth Amendment, now constitutionally entitled to participate directly in the political process. These constitutional actors' voices had previously been unacknowledged as a source of constitutional meaning. In Sumner's view, however, their voices must henceforth be considered. Sumner believed that these new millions of persons made full members of the constitutional polity represented "a new aspect of our sociological structure. . . . Society had changed . . . and this [should therefore] be recognized by the lawmakers when considering the constitutionality of their acts."[163]

The Supreme Court, however, has seldom drawn upon the history and context of slavery and the Second Founding in its constitutional interpretation. Rather than analyzing whether and how the Second Founding might have changed prior constitutional meanings, the Court has treated the Second Founding as a freestanding event whose effect was limited to the three new constitutional amendments adopted in the immediate wake of the Civil War. The next Section illustrates how the Second Founding has been almost entirely absent from the Court's Fifth Amendment jurisprudence.

### *B. The Absence of the Second Founding from the Fifth Amendment*

Courts and scholars have drawn upon multiple historical sources of authority in interpreting the Self-Incrimination Clause. The Supreme Court has often cited the English common law as a precursor to the American privilege against self-incrimination and drawn guidance from English law in interpreting the privilege in due process and Self-Incrimination Clause cases. In *Brown v. Walker*, for example, an early case involving testimony before a federal grand jury, the Court considered English common law extensively in

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[161] Sumner argued that the Thirteenth Amendment "abolishes slavery entirely. . . . It abolishes its root and branch. It abolishes it in the general and the particular. It abolishes it in length and breadth and then in every detail. . . . Any other interpretation belittles the great amendment and allows slavery still to linger among us in some of its insufferable pretensions." CONG. GLOBE, 42d Cong., 2d Sess. 728 (1872), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS 597 (Alfred Avins ed., 1967).

[162] SUMNER, *supra* note 158, at 436.

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

discussing the purposes and scope of the Self-Incrimination Clause.[164] The Court especially noted that protection against compelled self-incrimination was so "firmly embedded" in English and American jurisprudence that the states made it "a part of their fundamental law."[165] Scholars have likewise looked to historical evidence of the influence of English common law on colonial legal practices for guidance on the meaning of the Self-Incrimination Clause.[166]

Even when courts and scholars have extended their examination of the common law privilege to encompass the time period of the Second Founding, they have generally assumed a continuous throughline from the First Founding, disregarding evidence from the Second Founding and the experiences of enslaved persons with compelled self-incrimination. Our current doctrinal and scholarly frameworks are therefore incomplete. Part III examines evidence from the Second Founding regarding issues of compelled self-incrimination.

## III. SELF-INCRIMINATION AND THE SECOND FOUNDING

### *A. "Voluntariness" in a System of Structural Domination*

Antebellum law generally provided enslaved persons with few protections against compelled speech and coerced self-incrimination. Antebellum jurists and scholars, however, did occasionally grapple with whether the statements of enslaved persons should be deemed coerced due to either the particular circumstances in which they were made or their enslaved status.

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[164] 161 U.S. 591, 596–97, 609 (1896).

[165] *Id.* at 596–97; *see also* Twining v. New Jersey, 211 U.S. 78, 113 (1908) (declining to hold the Self-Incrimination Clause applicable to the states, but characterizing the privilege against self-incrimination as uniquely part of the common law tradition); Brown v. Mississippi, 297 U.S. 278, 287 (looking to the development of the English common law in noting the English "Star Chamber" as the kind of proceedings that the protection against coerced confessions exists to protect against); Malloy v. Hogan, 378 U.S. 1, 9 & n.7 (1964) (finding the privilege against self-incrimination to be "one of the 'principles of a free government'" applicable to the states via the Fourteenth Amendment, referencing an earlier decision stating that "compulsory discovery by extorting the party's oath . . . to convict him of crime . . . is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American." (quoting Boyd v. United States, 116 U.S. 616, 631–32 (1886))).

[166] *See, e.g.*, LEVY, *supra* note 28, at 428 (concluding that the history of the right against self-incrimination was "not bound by rigid definition" in either England or America); Alschuler, *supra* note 35, at 190 ("The privilege against self-incrimination that the framers included in the Bill of Rights of 1791 differed from the privilege that the English common law courts enforced against the High Commission."); Brief of Historians of Criminal Procedure as Amici Curiae Supporting Respondent, *supra* note 139, at 17–18 (discussing scholarly analyses of British cases relating to coerced confessions).

White dominion over enslaved persons was both categorical and hierarchical. Categorically, the default rule in the slaveholding states was that all enslaved persons were subject to the dominion of all white persons.[167] That rule was limited to the extent that the exercise of such dominion could not conflict with the rights of an enslaved person's legal owner.[168] Hence, hierarchically, a slave's owner's legal rights superseded the legal rights of other whites.

In terms of enslaved persons' relationship to the legal system, however, the intragroup white hierarchy regarding who could dominate the enslaved person—and the details of when, how, and in what circumstances—mattered little. A violation of that white hierarchy would be a violation of the owner's rights, not the enslaved person's rights. As the abolitionist scholar William Goodell noted, under the slave system, the slave was "under the control of law, though unprotected by law, and [could] know law only as an enemy, and not as a friend."[169] Goodell's slight exaggeration notwithstanding,[170] the point was well enough established in American legal culture as to be cited as axiomatic by the Supreme Court. The Court in *Dred Scott*, speaking of public opinion at the time of the First Founding, stated that all Blacks—including not only those who were enslaved but also their descendants—were considered to have "been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them."[171]

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[167] As just one example: South Carolina's slave code forbade slaves from leaving the owner's plantation without a pass from the owner unless they were accompanied by some white person who could vouch for them. The code allowed—indeed, required—any and every white person to whip enslaved persons found traveling in violation of the pass system. The code further authorized whites to "beat, maim[,] or assault" the enslaved person, or even to kill him, if he refused to show his pass and could not be captured alive. A. LEON HIGGINBOTHAM JR., IN THE MATTER OF COLOR, RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 171 (1978).

[168] *See, e.g.*, Farbman, *supra* note 146, at 1889 ("[T]he legal logic of slavery rested on the recognition that slave owners had the right to property in their slaves that the law would respect and enforce."); HIGGINBOTHAM, *supra* note 167, at 255 (noting that although beating an enslaved person without the owner's authorization was punishable by a fine under Georgia's slave code, the owner (not the enslaved person) was entitled to compensation, thereby demonstrating that "the determining factor [under Georgia's slave code] was not the slave's well-being, but solely whether an outsider was damaging the master's economic interest in the slave").

[169] WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS 309 (1853).

[170] *See supra* note 10 and accompanying text (noting that some limited legal protections were in fact afforded to enslaved persons, albeit most often in service of slaveowners' interests).

[171] Dred Scott v. Sandford, 60 U.S. 393, 404–05 (1857). The Court in *Dred Scott* engaged in exaggeration of its own. As has been convincingly demonstrated—first in the dissent in *Dred Scott*, and then by later generations of scholars—the history with regard to free Blacks was far more complicated

The legal recognition of white over Black domination raised serious issues regarding the admissibility of enslaved persons' testimony—especially their self-incriminating testimony—at trial. The issues existed at the level of theory—how to reconcile the common law requirement of voluntariness with the reality of categorical white domination? They also existed in individual cases, even absent overt torture or other expressly coercive methods, in terms of ensuring that an enslaved person's testimony was not the result of implicit structural compulsion by virtue of their enslaved status.

During slavery, the legal system employed various approaches to dealing with the issue of voluntariness of enslaved persons' testimony. As discussed below, one approach that at least in theory reconciled both the theoretical and as-applied problems with the inherent coercion that accompanied slave status was simply to bar the admission of enslaved persons' testimony completely. If such testimony could never be used at trial, then it never needed to be assessed for its voluntariness.

Several of the slave states took this approach via two aspects of their rules of evidence. First, the slave states' laws forbade entirely the admission of the testimony of enslaved persons against whites.[172] Second, some slave states' early laws during the colonial period also barred the testimony of enslaved persons in cases in which their testimony would be used against other enslaved persons. For example, a Virginia statute enacted in 1692, which established procedures for capital trials against enslaved persons, required that all testimony be under a Christian oath, consistent with the

than the Court's simplistic recounting acknowledges. *See, e.g.*, *id.* at 572–76 (Curtis, J., dissenting) (noting, among other things, that "[a]t the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens"); MARK GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 47–57 (2006) (stating, based upon the historical evidence, that the majority opinion in *Dred Scott* "was wrong when [it] asserted that free blacks had 'never been regarded as a part of the people or citizens of the State' according to 'the public opinion and laws which universally pervaded in the Colonies when the Declaration of Independence was framed and when the Constitution was adopted,'" but also noting that the historical question was more complex than portrayed by the dissenting Justices in *Dred Scott*). Whatever the complexities regarding free Blacks, however, enslaved Blacks were not treated as rights-holders except by legislative grace.

[172] Morris, *supra* note 10, at 1209 ("Slaves could not testify against whites."); Andrew E. Taslitz, *The Slave Power Undead: Criminal Justice Successes and Failures of the Thirteenth Amendment*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 245, 247 (Alexander Tsesis ed., 2010) ("Even when the law criminalized slave abuse, however, prohibitions outlawing slaves' testifying against whites made conviction difficult."); Robert J. Kaczorowski, *The Enduring Legacy of the Thirteenth Amendment*, *in* THE PROMISES OF LIBERTY 300, 311 (noting that until 1871, Kentucky's "rules of evidence prohibited blacks from testifying in any case in which a white person was a party.").

then-prevailing English common law.[173] Because "the overwhelming majority of slaves at that time were non-Christians[,] [t]hey could take no oath in an English court;"[174] therefore, their testimony was categorically inadmissible. The only notable exception to this exclusion was that enslaved persons' testimony *was* admissible when it was a confession[175]—until 1723, slaves in Virginia courts could testify only to confess.[176]

In addition to the inherent moral problems in devaluing the testimonial voices of enslaved persons,[177] the slave states soon realized that, although categorically excluding such testimony solved one problem, it raised numerous others for the white supremacist regime. Namely, the exclusion of the testimony of enslaved persons (except for confessions) made prosecuting alleged and actual slave insurrections, as well as common crimes, much more difficult, given that the details and evidence thereof would most often only be known to enslaved persons themselves.[178] Of course, this was only an issue when the rule of law was followed and punishment was sought through the formal justice system rather than the mob or informal plantation "justice."[179] But on those occasions when the formal justice system was invoked, there was often insufficient evidence to secure a conviction since crucial evidence—the testimony of enslaved persons who may have witnessed or had knowledge of the alleged crime—was categorically inadmissible.[180] The slave states' rules of evidence therefore evolved to allow for the admission of enslaved persons' testimony in cases against other enslaved persons, free Blacks, and Native Americans—but never against whites.[181]

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[173] Morris, *supra* note 10, at 1213–14.

[174] *Id.* at 1214.

[175] *Id.* at 1213.

[176] *Id.* at 1215.

[177] *See generally* William M. Carter Jr., *Outsider Speech: The PLRA, AEDPA, and Adjudicative Expression*, 72 CASE W. RES. L. REV. 643, 652–57 (2022) (noting how procedural and substantive legal rules excluding enslaved persons from utilizing the judicial system to their advantage left them "at the mercy of their enslavers" and warranted moral concern).

[178] Morris, *supra* note 10, at 1215.

[179] *See id.* at 1210 (explaining that when an enslaved person was accused of committing a crime, "[i]n many cases . . . the person never reached the courts at all," but was instead beaten or killed by white mobs or disciplined via the slaveowners' informal system of punishment); *see also* Daniel Farbman, *Reconstructing Local Government*, 70 VAND. L. REV. 413, 426, 427–28 (2017) ("[S]een through the eyes of the slave, there can be no doubt that planters had the powers of government . . . . The private and public lives of those who lived on and around plantations were governed through formal or informal institutional arrangements under the control of the planter. Crimes were punished, benefits were allocated, labor was taxed, infrastructure was built.").

[180] Morris, *supra* note 10, at 1210.

[181] *Id.* at 1209–10 ("From the Revolution down to the 1820s the evidence of slaves began to be admitted against such people of color in capital as well as non-capital cases.").

Once enslaved persons' testimony was deemed admissible, it raised the question of how to assess voluntariness in a system where, both by law and custom, the person's will was not their own. "American slavery was a system of violent and racist subordination, supported by laws concerning property and personhood, that treated slaves as instruments of slaveowners' wills."[182] The slave system thus depended upon the allowance of complete domination over the person enslaved, such that, as stated by Frederick Douglass:

> [The slave] had no power to exercise his will—his master decided for him not only what he should eat and what he should drink, what he should wear, when and to whom he should speak, how much he should work, how much and by whom he is to be punished—he not only decided all these things, but [also] what is morally right and wrong.[183]

Enslaved persons and their enslavers both understood structural subordination and domination, enshrined by law, to be the key aspect of the slave system. For example, James Pennington's slave narrative describes witnessing the slave master haranguing James's father over what he perceived as a lack of sufficient work effort by the enslaved persons on his plantation.[184] As Pennington recounted:

> [The owner said,] "I shall have to sell some of you; and then the rest will have enough to do . . . ." All this was said in an angry, threatening, and exceedingly insulting tone. My father [replied,] "If I am one too many, sir, give me a chance to get a purchaser, and I am willing to be sold when it may suit you." [The owner then] drew forth the "cowhide" from under his arm, fell upon [my father] with most savage cruelty, and inflicted fifteen or twenty severe stripes with all his strength, over his shoulders and the small of his back. As he raised himself upon his toes, and gave the last stripe, he said, "By the [Lord,] I will make you know that *I am master of your tongue as well as of your time*!"[185]

The slave system was thus understood by all involved as entailing not only the right of enslavers to extract uncompensated labor but also the right of all whites to dominate the will of the enslaved. At the same time, the legal system's rules increasingly emphasized that in-court testimony and out-of-court statements must be deemed voluntary to be admitted into evidence at

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[182] Seth Davis, *The Thirteenth Amendment and Self-Determination*, 104 CORNELL L. REV. ONLINE 88, 98 (2019).

[183] Frederick Douglass, Slavery and America's Bastard Republicanism: An Address Delivered in Limerick, Ireland (Nov. 10, 1845) (transcript available at https://glc.yale.edu/slavery-and-americas-bastard-republicanism [https://perma.cc/5RGC-NDUF]).

[184] PENNINGTON, *supra* note 151, iv

[185] *Id.* at 6–7 (emphasis added).

trial.[186] How, then, could the legal system reconcile the reality of slavery's coercive nature with the requirement of testimonial voluntariness, particularly regarding confessions or other self-incriminating evidence?

Some scholars and jurists expressed reservations regarding the voluntariness of enslaved persons' confessions, which had been admissible in the slave states. At a minimum, the question was "[i]f slaves were [considered to be] without wills of their own, how could their confessions ever be voluntary, and therefore admissible?"[187] For the purposes of this Article, it is particularly important to note that this question "arose within the context of both judicial *and* extra-judicial confessions" made by enslaved persons.[188] Public power and private action were central to the slave system's domination over the enslaved. Because both of them acting together *or* each of them standing alone could functionally accomplish that domination, a finding of state action was not essential to concerns about the voluntariness of enslaved persons' confessions.

Even Thomas Cobb, "the author of the leading proslavery legal treatise"[189] and far from a paragon of enlightenment on racial issues,[190] argued that enslaved persons' confessions should not be admissible when made to their owners, despite being noncustodial. Cobb argued that because enslaved persons were "bound, and habituated to obey every command and wish"[191] of their enslavers, such confessions were inherently suspect both as to their voluntariness and their reliability. The Southern jurisprudence did not embrace this position as a formal doctrine, but individual judges expressed similar concerns. For example, in an 1830 case about whether an owner's testimony regarding an enslaved person's confession should be admitted into evidence, the opinion of the chief justice of the North Carolina Supreme Court—though it ultimately did not carry the day—made clear that he "believed that the confessions of slaves to masters ought always to be excluded from evidence."[192]

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[186] For example, in a case decided in 1854, the Alabama Supreme Court stated as a generally accepted principle that "[b]efore confessions can be received in evidence, it is necessary for the State to show that they were *voluntary*." Alan Hirsch, *Threats, Promises, and False Confessions: Lessons of Slavery*, 49 HOW. L.J. 31, 36–37 (2005) (citing Wyatt v. State, 25 Ala. 9, 12 (1854)); *see also id.* at 39 (noting the Supreme Court's statement in *Bram v. United States*, 168 U.S. 532, 565 (1897), that "any doubt as to whether the confession was voluntary must be determined in favor of the accused").

[187] Morris, *supra* note 10, at 1231.

[188] *Id.* at 1231 (emphasis added).

[189] *Id.* at 1212.

[190] Cobb argued, for example, that "the negro, as a general rule, is mendacious, [which] is a fact too well established to require the production of proof, either from history, travels or craniology." *Id.* at 1214–15.

[191] *Id.* at 1231.

[192] *Id.* at 1232.

In *State v. Nelson*, an 1848 Louisiana case, the court overturned a guilty verdict in an enslaved person's murder trial due to similar concerns about the voluntariness of the defendant's confession.[193] Notwithstanding the finding that the defendant's confession was not the result of violence or threats, the court concluded that the enslaved person's confession should have been excluded because it was made to his overseer. The court reasoned:

> [The confession] was made to his young master, who was also his overseer, to whose authority he habitually submitted, to whom he would naturally look for protection, and upon being advised "that it would be better for him to tell what he had done." The admonition coming from such a source was well calculated to inspire the slave with the hope of protection from the consequences of his act if fully confessed, and his confession made under that impression should have been rejected.[194]

Notably, the reasoning of the judges and scholars discussed above neither turned upon whether the person to whom the confession was made was a state actor, nor upon whether the confessor was in custody at the time of the confession.[195]

Contrary to the authorities discussed above, at least one major antebellum case raised concerns about excluding confessions that enslaved persons had made to their owners. In *Sam v. State*, the court stated that, at least in the case of confessions to serious crimes:

> It is not to be presumed that the master exercises an undue influence over his slave to induce him to make confessions tending to convict him of a capital offence, . . . [since] it would be against the interest of the master that the slave should make confessions which would forfeit his life; for he would thereby sustain a loss [of the value of the enslaved person].[196]

This reasoning, of course, only views the issue through the lens of the owner's actions and intentions as a rational economic actor pursuing his own self-interest. From an enslaved person's perspective—an economic subject who neither reaped the benefit of their labor nor stood to lose such a benefit—however, it would be quite reasonable to assume that, if you believed that the person with absolute power over you wanted a response, declining to speak could be a mortal threat.

A related issue of how to assess the voluntariness of an enslaved person's confession dealt with confessions made to whites who were not the

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[193] 3 La. Ann. 497, 500 (1848).

[194] *Id.*

[195] For a description of additional similar cases, see Morris, *supra* note 10, at 1233–35. *See also* Hirsch, *supra* note 186, at 36–38, 48–50, 57–58 (discussing additional such cases).

[196] 33 Miss. 347, 351 (Ct. Err. & App. 1857).

slave owner, but who nonetheless operated within a structure that expected and enforced Black subservience. The Mississippi Supreme Court considered this issue in 1856.[197] In *Dick v. State*, the defendants had confessed to, and had been found guilty of, murdering their owner. The defendants' attorney argued that the confessions should have been excluded at trial due to the manner in which they were obtained. Defendants alleged that they had made their confessions only after having been detained all day by a mob of white men, ultimately chained and surrounded by them, and told that it would be best for them to confess.[198] Counsel argued that the confessions were coerced, both structurally and in the context in which they were made:

> The man who is born a slave, raised a slave, and knows, and feels his destiny and lot is to die a slave; always under a superior, controlling his actions and his will, cannot be supposed to act or speak voluntarily and of his free will, while surrounded by fifteen or twenty of those to whom he knows he is subservient, and by the law bound to obey . . . . Place man physically and morally, in perpetual slavery, and how, I ask, can the intellectual man be free? Perpetual slavery and free will are incompatible with each other.[199]

The court disagreed, rejecting both the structural and contextual arguments and holding that the confessions were properly admitted at trial. The court did note that "[n]o warning of any kind whatever, was given to the prisoners of their rights,—and that they were not bound to make any confession, by which they would criminate themselves."[200] But this alone did not render the confessions inadmissible because they were made to private individuals. Second, notwithstanding the dramatic circumstances that the defendants alleged—being detained by white men for hours on end and later surrounded, put in chains, and told to confess—the court found that the confessions "appear[] to have been perfectly voluntary."[201] According to the court:

> No effort was made, by the witness or any one else, by threats or promises to induce these parties to confess. . . . Under these circumstances, it was not necessary, in order to render their confessions [admissible] . . . that [the defendants] should have been informed of their rights, or warned that they were not bound to make any statement which would tend to inculpate themselves. As

[197] Dick v. State, 30 Miss. 593 (1856).
[198] *Id.* at 595.
[199] *Id.*
[200] *Id.* at 598.
[201] *Id.*

> evidence, therefore, against the [defendants], these confessions were clearly competent.[202]

Notwithstanding societal awareness of the slave system's inherent structural power dynamics and the occasional judicial and scholarly examination thereof, the general rule in the slaveholding South was that "[s]ubordination, even to all whites, did not preclude 'voluntariness' in Southern courts."[203]

It is unsurprising that a legal system dedicated to the maintenance of slavery and white supremacy would fail to recognize structural subordination. This Article contends, however, that our post-Civil War Constitution demands more. The next Section elaborates upon the reasons why the experiences and views of enslaved persons should be looked to as a source of constitutional meaning, and then brings to the forefront the voices of enslaved persons for their contribution to our understanding of the privilege against self-incrimination.

### *B. Self-Incrimination from Enslaved Persons' Perspectives*

Constitutional interpretation can draw upon a variety of sources. Prior to discussing the views and experiences of enslaved persons related to self-incrimination, this Section briefly discusses why their views and experiences should be among the sources considered in constitutional interpretation.

#### *1. Enslaved Persons' Experiences and Understandings as a Legitimate Source of Constitutional Meaning*

The contemporaneous understandings and expressed views of constitutional drafters and ratifiers are commonly agreed to be relevant sources of evidence in constitutional interpretation.[204] The contemporaneous general public's understanding is also widely agreed to be a proper source of

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[202] *Id.*

[203] Morris, *supra* note 10, at 1237.

[204] Other sources that are widely considered by originalists and nonoriginalists alike include the provision's text, its background and context, its drafters' intentions, and the stated views of legislators who opposed or supported the provision. Some judges and scholars consider such Framing-era sources to be dispositive of constitutional meaning. Most originalists, for example, believe that "the meaning of a provision of the Constitution was *fixed* at the time it was enacted . . . [and] that fixed meaning ought to *constrain* constitutional decisionmakers today." Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L. REV. 1, 3–4 (2018). Most nonoriginalists, by contrast, believe Framing-era sources to be relevant but not dispositive: while consulting contemporaneous sources, nonoriginalists "deny that this backward-looking interpretive exercise is the alpha and omega of judicial method. Instead, advocates of the 'living constitution' assert that the Court legitimately supplements backward-looking interpretations with a self-conscious effort to express the moral aspirations of *today's* Americans." Ackerman, *supra* note 145, at 526.

interpretive evidence.[205] Enslaved persons were part of the contemporaneous general public and their views and understandings are therefore part of the body of evidence of constitutional meaning. Indeed, because the Second Founding was most directly concerned with the rights and role of the newly freed slaves in American society, evidence of enslaved persons' views and experiences provides unique insights into the nature of the First Founding's slave system and into the Second Founding that abolished it. The instrumental case for considering this evidence is straightforward: the evidence is available, and constitutional interpreters should utilize it.

Beyond the instrumental case for considering the views and experiences of enslaved persons in constitutional interpretation, examining and crediting such evidence is important for its own sake. Doing so makes visible enslaved persons' roles in both securing and defining their own freedom. Our constitutional lore has largely cut the experience of slavery from our constitutional fabric, "such that today, slavery—[in] its historical facts and its badges and incidents—does not play a meaningful role in the constitutional stories we tell."[206] Thus, to counter this erasure, "we may give new credit to slave testimony . . . to correct its previous suppression[;] . . .

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[205] Barnett & Bernick, *supra* note 204, at 4; *see also* District of Columbia v. Heller, 554 U.S. 570, 605 (2008) (stating that "a critical tool of constitutional interpretation" is "the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification"). To be sure, not all strains of originalist thought would accept this premise. "Intentionalism," for example, entails interpreting a constitutional provision "to ascertain and give effect to the intent of its framers and the people who adopted it." Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980) (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting)). Because it focuses solely upon the subjective intentions of those congresspersons who proposed, debated, and voted upon the relevant constitutional provision, intentionalist methodology likely would not consider the views of the contemporaneous general public, whether enslaved or free. By contrast, "original public meaning" originalism focuses largely upon what the contemporaneous general public would have understood the constitutional provision to mean than solely with what its drafters intended for it to mean. *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutman ed., 1997) ("I will consult the writings of some men who happened to be delegates to the Constitutional Convention . . . . I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood."). And although "popular constitutionalism" is, unlike originalism, not time-bound, it also takes account of historical evidence and posits that the sources of constitutional interpretation should include the goals and understandings of the lay public, not merely those of the elite legislators who drafted a constitutional provision. *See, e.g.*, Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 959 (2004) ("In a system of popular constitutionalism, the role of the people is not confined to occasional acts of constitution making, but includes active and *ongoing* control over the interpretation and enforcement of constitutional law." (emphasis added)).

[206] Aderson Bellegarde François, *A Lost World: Sallie Robinson, the* Civil Rights Cases, *and Missing Narratives of Slavery in the Supreme Court's Reconstruction Jurisprudence*, 109 GEO. L.J. 1015, 1024 (2021).

[w]e might conclude that unless we recover slave experience and knit it into the nation's constitutive heritage, we perpetuate an important aspect of slavery."[207]

Since enslaved persons were formally disenfranchised,[208] one might argue from a formalist perspective that their views should not inform our understanding of the Fifth Amendment as ratified in 1791. Formally, they did not participate in ratification of the Bill of Rights, either directly or through elected representatives. One might further argue that the views of the newly freed slaves similarly should not inform our understanding of the original meaning of the Reconstruction Amendments ratified in 1865–1870, since the newly freed slaves did not have a constitutional right to vote until *after* the ratification of the Fifteenth Amendment in 1870. Despite their formal logic, however, such arguments neither account for nor outweigh the many reasons discussed above about why, as a matter of constitutional analysis and the post-Civil War constitutional order, the views of the enslaved are highly relevant to construing the meaning of the privilege against self-incrimination as implemented through the Reconstruction Amendments.[209] This Section explores the views of enslaved persons for both

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[207] Binder, *supra* note 146, at 483.

[208] The point made here is specifically with regard to Black persons who were enslaved, not all Black people. Not all Black persons were formally excluded from the ratification process for the Reconstruction Amendments (similarly, not all Blacks were formally excluded from the ratification process for the original Framing). In several states, free Blacks were legally enfranchised and therefore could vote on the ratification of the original Constitution and Bill of Rights. *See* Dred Scott v. Sandford, 60 U.S. 393, 537 (Curtis, J., dissenting). Hence, the question discussed in this Section is not whether the expressed views of any African Americans at the First and Second Foundings should be considered in interpreting "original meaning," but only whether the views of those who were enslaved should be considered.

[209] Indeed, beyond the reasons described above for why the views and experiences of enslaved persons are part of the body of evidence of constitutional meaning, the formalist argument proves too much. Enslaved persons were not the only persons legally excluded from the process of ratifying the post-Civil War Amendments. A significant portion of the general public was also excluded from participating directly in the ratification process for the Reconstruction Amendments—i.e., the free *white* population in the defeated Confederacy also were not represented in the process of ratifying those Amendments, because the state legislatures of the seceding states were either replaced by loyalist governments (which obviously were not representative of those states' prior treasonous stances) or effectively were no longer capable of functioning after the war. *See* John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 376 (2001) ("Much of the country was not represented in the Congress that proposed the Thirteenth and Fourteenth Amendments. State governments in the South were being made, unmade, and remade through extraordinary processes in which the federal government took the lead. These convulsions created doubts as to whether the resulting political organizations were truly empowered to speak for their states in ratification."); Michael W. McConnell, *The Originalist Justification for* Brown*: A Reply to Professor Klarman*, 81 VA. L. REV. 1937, 1939 (1995) (noting that the Reconstruction Amendments were adopted at "a time when a political minority, armed with the prestige of victory in the Civil War and with military control over the political apparatus of the rebel states, imposed constitutional change on the Nation as the price of reunion, with little regard for popular

the instrumental value they provide in interpreting the privilege against self-incrimination, as well as the normative purpose of restoring this largely ignored aspect of our constitutional history.

This Article takes no position on the broader debate regarding various methods of constitutional interpretation or the relative weight that should be given to the various possible sources of constitutional meaning. Rather, this Article takes it as a given that judges will, to a greater or lesser extent, turn to historical evidence in interpreting the Constitution. The Article further contends that any method of constitutional interpretation that looks to historical evidence beyond the provision's text and the statements of its drafters should include the understandings, experiences, and expressed views of enslaved persons.

*2. Structural Compulsion and Self-Incrimination*

From the perspective of an enslaved person, the issue of self-incrimination was situated within the context of structural power dynamics. As James Watkins's slave narrative noted, "[t]he slave is trained to answer his master, to suit [the master's] purposes."[210] Enslaved persons clearly understood from their personal and communal experience that if a white person "suggested" they make a confession or asked, "What happened?," remaining silent was a gamble with potentially deadly consequences. Henry Bibb's slave narrative describes his understanding that, as an enslaved person, he was required to speak in the manner that he perceived a white person desired rather than remaining silent or speaking truthfully. Bibb noted that whenever he was questioned by whites during his attempts to escape from slavery, he was keenly aware that

> the only weapon of self defence [sic] that I could use successfully, was that of deception. It is useless for a poor helpless slave, to resist a white man in a slaveholding State. Public opinion and the law is against him; and resistance in

opinion"); Binder, *supra* note 146, at 484 ("The Thirteenth Amendment could not have passed without the support of at least two of [the] Southern states [excluded from Congress], and actually relied on passage by eight [such states]. Not only were these ratifying states excluded from representation during the Amendment's framing, they were under federal military occupation at the time of their ratification."). Hence, excluding the views of enslaved persons on formalist grounds would logically also result in excluding the views of free persons in the rebelling states; yet original public meaning originalists would likely take account of the expressed views of the general public in the defeated states as evidence of the original public meaning.

[210] JAMES WATKINS, STRUGGLES FOR FREEDOM; OR THE LIFE OF JAMES WATKINS, FORMERLY A SLAVE IN MARYLAND, U.S.; IN WHICH IS DETAILED A GRAPHIC ACCOUNT OF HIS EXTRAORDINARY ESCAPE FROM SLAVERY, NOTICES OF THE FUGITIVE SLAVE LAW, THE SENTIMENTS OF AMERICAN DIVINES ON THE SUBJECT OF SLAVERY, ETC., ETC. 13 (1860), https://docsouth.unc.edu/neh/watkins/watkins.html [https://perma.cc/XD4J-JFTB].

> many cases is death to the slave, [because] the law declares, that he shall submit or die.[211]

The traditional doctrinal indicia of voluntariness—the absence of actual or specifically threatened force or promises and inducements; the lack of government custody and state action; the provision of warnings—did not fully account for the structural forces that might have produced in an enslaved person a felt compulsion to speak. This is not to suggest that enslaved persons entirely lacked agency. To the contrary, the history of slavery is replete with examples of enslaved persons' acts of resistance,[212] which are far too often overlooked in a self-congratulatory narrative of an altruistic white society's self-redemption.[213] And certainly, enslaved individuals' behavior—like that of all individuals, including those accused of crimes—could range from sophisticated to uninformed and from defiant to compliant in the face of interrogation.[214] One can recognize these nuances while also recognizing that not all forces that may constrain a person's unfettered will are equally visible through a single lens—namely, the lens of those persons whose will is not similarly constrained by such forces. Nor would a felt compulsion to speak necessarily mean that the privilege against self-incrimination had been violated. But neither should the law, through the application of bright-line formulaic rules, ignore the possibility of this kind of "structural compulsion."

As a leading study of Black abolitionism noted, legal bright-lines and abstracted notions of constitutional rights were, because of worldviews shaped by their lived experiences, largely the province of whites. Blacks—enslaved or free—generally did not share this worldview to the same degree, given their very different lived experiences:

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[211] HENRY BIBB, NARRATIVE OF THE LIFE AND ADVENTURES OF HENRY BIBB, AN AMERICAN SLAVE, WRITTEN BY HIMSELF 17 (1849), https://docsouth.unc.edu/neh/bibb/bibb.html [https://perma.cc/XKK8-MA34].

[212] *See, e.g.*, MANNING MARABLE & LEITH MULLINGS, LET NOBODY TURN US AROUND: VOICES OF RESISTANCE, REFORM, AND RENEWAL, at xviii (2000) ("Resistance [to slavery and white supremacy] was found in the various degrees of opposition to institutional racism: from day-to-day sabotage (disruption, noncompliance, refusals to work, running away) to overt rebellion (the murder of slaveholders, flight to the North, the underground railroad, joining forces with American Indian tribes to combat the U.S. army, the creation of maroon communities, and the slave uprisings of Nat Turner, Denmark Vesey, Gabriel Prosser, and Cinque).").

[213] *See, e.g.*, François, *supra* note 206, at 1024 (arguing that the history of slavery is little noted in our constitutional history "except when remembrance of its abolition serves to reaffirm the righteousness of the nation's rebirth after the Civil War"). To be sure, white allies did play a key role in the abolition of slavery and the securing of Black freedom. *See generally* William M. Carter Jr., *The Thirteenth Amendment and Pro-Equality Speech*, 112 COLUM. L. REV. 1855 (2012) (discussing the contributions of white abolitionists as well as contemporary white allies).

[214] Hirsch, *supra* note 186, at 53.

> [For Blacks and whites in the abolitionist movement,] slavery and freedom had very different meanings. Whites [generally] understood slavery and freedom as polar absolutes. Individual liberty, enshrined in the Declaration of Independence and fought for in the American Revolution, was their goodly heritage and present reality. At the other extreme stood slavery, an absolute evil, the negation of freedom . . . . Blacks, however, defined the terms more complexly. Both experience and history told them that slavery and freedom were not mutually exclusive[:] . . . [t]hey were rather terminal points on a continuous spectrum . . . . Between them lay a vast and variegated spectrum [of] . . . more or less freedom and more or less slavery.[215]

By that same token, an enslaved person likely would have experienced a spectrum from more or less coercion to more or less free choice regarding the decision to withhold potentially self-incriminating information.

*3. Self-Incrimination and the State Action Doctrine*

Supreme Court doctrine requires a showing of state action in order to state a claim under the Fifth Amendment. Slave narratives illuminate the hollowness of the state action requirement. Stephen, an enslaved man, was confronted by his owner regarding counterfeit passes and freedom papers that Stephen had forged for himself and other enslaved persons.[216] Recounting the incident, Stephen noted:

> I tried to answer, but he was in such a rage he would hear nothing. I thought he would kill me every minute. Finally he said: 'Who taught you how to write? I did not know you were educated. Here you are, better educated than any white man around here. An educated [slave] is a dangerous thing, and the best place for him is six feet under the ground, buried face foremost. Ah, sir, your end is come, and you will not have use for papers, books, and pens any longer.'
>
> I tell you, madam, I just made up my mind that my time had come and I would surely die.[217]

Stephen ultimately gave his owner a partial confession, admitting that he had forged such papers for himself but denying that he had done so for others.[218]

Although his owner decided to resolve the incident by selling Stephen, rather than beating or killing him as Stephen feared, Stephen also could have been prosecuted for any number of offenses under the slave codes, ranging

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

[216] OCTAVIA V. ROGERS ALBERT, THE HOUSE OF BONDAGE OR CHARLOTTE BROOKS AND OTHER SLAVES 109–11 (Hunt & Eaton 1890), https://docsouth.unc.edu/neh/albert/albert.html#albert138 [https://perma.cc/EK2B-JG8M].

[217] *Id.* at 111–12.

[218] *Id.* at 112–13.

from forgery to seeking to escape from his lawful enslavement.[219] Had he been prosecuted, the absence of state action and the corresponding fact that the interrogation was noncustodial would have had little practical relevance—especially to Stephen—to whether his confession had in fact been made voluntarily. Faced with a mortal threat from a person whom all parties knew could carry it out with impunity, Stephen's confession was not voluntary in any meaningful sense of the word. Yet, the Supreme Court's self-incrimination jurisprudence would reject such a claim out of hand due to the absence of state action.

The Supreme Court has held that constitutional rights in general are only protected from affirmative government infringement.[220] Hence, absent some form of active government involvement, the Fifth Amendment privilege against self-incrimination is inapplicable.[221] There are, of course, many trenchant theoretical and historical critiques of the state action doctrine.[222] Even setting those broader critiques aside, however, a particularly strong case exists in the Fifth Amendment context that, even if government actors did not coerce the incriminating statements, a police officer's referral of such statements to a prosecutor's office, a prosecutor's use of those statements at trial, or a trial judge's admission of those statements into evidence should satisfy the state action doctrine. A police

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[219] *Id.*

[220] *See* United States v. Stanley (*The Civil Rights Cases*), 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited [by the Fourteenth Amendment]. Individual invasion of individual rights is not the subject-matter of the [A]mendment . . . . Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges . . . ."). Thirteenth Amendment claims are an exception to the state action doctrine. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438 (1968) (stating that "[i]t has never been doubted" that the Thirteenth Amendment "includes the power to enact laws . . . operating upon the acts of individuals"); Runyon v. McCrary, 427 U.S. 160, 179 (1976) (same); United States v. Nelson, 277 F.3d 164, 175 (2d Cir. 2002) ("The Thirteenth Amendment, unlike the Fourteenth, in and of itself reaches purely private conduct.").

[221] The government's failure to protect a private person from even a known or anticipated harm is not, under the Supreme Court's jurisprudence, sufficient to amount to state action. *See, e.g.*, DeShaney v. Winnebago Cnty. Dep't of Social Servs., 489 U.S. 189, 195 (1989) ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.").

[222] *See, e.g.*, *id.* at 212 (Blackmun, J., dissenting) ("[A] sharp and rigid line between [state] action and inaction . . . has no place in the interpretation of the broad and stirring Clauses of the Fourteenth Amendment. Indeed, I submit that these Clauses were designed, at least in part, to undo the formalistic legal reasoning that infected antebellum jurisprudence . . . ."); Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1774–85 (2010) (summarizing the primary scholarly criticisms of the state action doctrine).

officer, prosecutor, and judge are all unquestionably state actors; moreover, their use of allegedly coerced or involuntary self-incriminating statements at trial against the defendant is affirmative rather than merely passive.

The Supreme Court, however, squarely rejected this approach in *Colorado v. Connelly*.[223] In *Connelly*, the defendant had approached a uniformed on-duty police officer and stated, unprompted, "that he had murdered someone and wanted to talk about it."[224] The officer immediately gave *Miranda* warnings to the defendant, who received *Miranda* warnings again when homicide detectives arrived.[225] The defendant indicated that he understood these warnings but nonetheless wanted to speak with the police. During the ensuing discussions, the defendant confessed to a murder and subsequently led police to the crime scene.[226] The defendant was detained overnight; the next morning, he began showing signs of disorientation, confusion, and delusion, stating that he had been hearing "voices" that told him to confess. After a period of evaluation, the defendant was found competent to stand trial.[227]

The defendant moved to suppress his statements to the police. At the hearing on the motion to suppress, a state-employed psychiatrist testified that the defendant had been suffering from chronic schizophrenia and was in a psychotic state at least as of the day before his confession to the police.[228] The psychiatrist also testified that, in his expert opinion, the defendant's conditions "did not significantly impair his cognitive abilities" and that he therefore would have been able to understand the *Miranda* warnings that he was given.[229] Crucially, however, the psychiatrist testified that the defendant had been suffering from "command hallucinations" that "interfered with respondent's 'volitional abilities; that is, his ability to make free and rational choices.'"[230]

The Colorado Supreme Court found the statements to be involuntary and thus inadmissible, notwithstanding that they did not result from coercive state action. The court articulated the test for admissibility as "whether the statements are 'the product of a rational intellect and a free will'" and concluded that "the absence of police coercion or duress does not foreclose

[223] 479 U.S. 157 (1986).
[224] *Id.* at 160.
[225] *Id.*
[226] *Id.* at 160–61.
[227] *Id.* at 161.
[228] *Id.*
[229] *Id.* at 161–62.
[230] *Id.* at 161.

a finding of involuntariness."[231] The court reasoned that "[o]ne's capacity for rational judgment and free choice may be overborne as much by certain forms of severe mental illness as by external pressure."[232] The court further held that "the very admission of the evidence in a court of law was sufficient state action to implicate the Due Process Clause."[233] Quoting its earlier decision in *Hunter v. People*, which involved a confession to a private individual—a store security guard who would not let the defendant leave unless he signed a confession to theft[234]—the court reasoned:

> Clearly, no state action is involved in the accused's making an admission of guilt to a private citizen. State action enters the picture, however, when a trial court permits the prosecution at a jury trial to utilize as evidence of guilt a confession which is extracted under circumstances that so overbear the individual's will as to render the statement involuntary, that is, "not the product of a rational intellect and a free will."[235]

The Supreme Court nonetheless reversed, overruling the Colorado Court's decision in *Connelly*, and, functionally, its decision in *Hunter*. The Court reasoned:

> [Although] certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that [admitting the resulting statements into evidence violates due process] . . . . [a]bsent police conduct causally related to *the confession*, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law.[236]

Hence, under *Connelly*, "[t]he sole concern of the Fifth Amendment . . . is governmental coercion."[237] Thus, the state action entailed in a prosecutor's advocating to admit an involuntary self-incriminating statement into evidence and the judge's actions in allowing it is insufficient; rather, the confession itself must have been caused by governmental conduct. The Court held that even "[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause."[238] Pursuant to *Connelly*,

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[231] *Id.* at 162 (quoting People v. Connelly, 702 P.2d 722, 728 (Colo. 1985)).

[232] *Id.* (quoting *Connelly*, 702 P.2d at 728).

[233] *Id.*

[234] 655 P.2d 374, 375 (Colo. 1982).

[235] *Connelly*, 702 P.2d at 728 (quoting *Hunter*, 655 P.2d at 375–76).

[236] *Connelly*, 479 U.S. at 163–64 (emphasis added).

[237] *Id.* at 170.

[238] *Id.* at 166. In *Connelly*, the U.S. Supreme Court analyzed the issue of voluntariness largely through the lens of the Due Process Clause rather than the Self-Incrimination Clause. As it noted: "The

evidence so secured remains admissible regardless of whether the defendant confesses to a private third party under duress (as in *Hunter*) or the defendant himself acts in a manner that government officials, at the time they seek to make use of the statements, know was involuntary (as in *Connelly*).

*Connelly* has been criticized for "restrict[ing] the application of the term 'involuntary' to those confessions obtained by police coercion."[239] Among the problems with *Connelly*, as the dissent stated, is the Court's "refusal to acknowledge free will as a value of constitutional consequence," evident in its "failure to recognize all forms of involuntariness or coercion as antithetical to due process."[240] Due process, the dissent continued, "derives much of its meaning from a conception of fundamental fairness that emphasizes the right to make vital choices voluntarily."[241] As to the state action requirement, the dissent noted that under the *Connelly* majority's narrow conception, "only confessions rendered involuntary by some state action are inadmissible, and [the] only relevant form of state action is police conduct."[242] But the issue is that "even if state action is required, police overreaching is not its only relevant form."[243]

*Connelly*'s approach illustrates the dangers and analytical flaws that can arise from failure to examine our full constitutional history. Interpreted through the prism of the Second Founding and the experiences of enslaved persons as recounted in this Article, the flaws in the *Connelly* approach become even more apparent. *Connelly* essentially stands for two blanket propositions: first, that only those self-incriminating statements produced by state action can be considered involuntary for constitutional purposes; and second, that the only form of state action that qualifies is the active involvement of law enforcement officials in coercing such statements. The case of Stephen discussed above and numerous other instances like it illustrate the flaws with the first proposition. The experiences of enslaved persons recounted in their narratives demonstrate that private action can be at least as effective as state action in extracting involuntary self-incriminating statements.

As to the second proposition, the 1853 case of *Simon v. State*[244] illustrates that, even within the state action framework, law enforcement

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Court has retained [a] due process focus [regarding allegedly involuntary or coerced confessions], even after holding, in *Malloy v. Hogan*, that the Fifth Amendment privilege against compulsory self-incrimination applies to the States." *Id.* at 163 (citations omitted).

239 *Id.* at 176 (Brennan, J., dissenting).

240 *Id.*

241 *Id.*

242 *Id.* at 179–80.

243 *Id.* at 180.

244 5 Fla. 285 (1853) (discussed in Hardy, *supra* note 10, at 9).

officials are far from the only state actors with the de facto power to compel a person to incriminate themselves. *Simon* arose from a series of fires in Pensacola, Florida in 1852. One of the fires was at the home of slaveowner Alex McVoy. A few days after the fires, the mayor ordered the arrest of the defendant, Simon, who was one of the persons McVoy held in slavery.[245] The mayor interrogated Simon at the mayor's office. During the mayor's questioning of Simon, "there was a great crowd just outside the mayor's office calling for Simon to be hanged."[246] At trial, the mayor testified that "if not for the protection he gave Simon, 'the people would have taken [Simon] into their own hands.'"[247]

The mayor further testified that he told Simon that if he confessed to one of the arsons, "he would be tried and certainly hung," but that if he gave information regarding any accomplices, "his accomplices would be put on trial rather than him."[248] Simon, after remaining silent for a time, requested that his owner McVoy come to the mayor's office and that he would confess once McVoy arrived. When McVoy arrived, he "reiterated to Simon the warnings and promises that the mayor had already made."[249] Simon then admitted to starting one of the fires, and stated that he acted alone by starting the fire at a ground-floor window. After Simon was taken to jail, the mayor questioned him again, seeking information about any accomplices; this time, Simon told him that a certain boy had been his accomplice. When the mayor had the boy arrested and brought to Simon to confirm, however, Simon stated that the boy was not his accomplice.[250]

Simon's confession was contradicted at trial by witnesses called by Simon's counsel. The first witness testified that he was one of the first people to arrive at the scene of the fire and that the fire started on the roof, not the ground floor. The second witness testified that the fire started in the attic and that he would have noticed had the ground floor been on fire, given that he tried to break the front door down upon seeing the fire. Further, on cross-examination, McVoy stated that when Simon confessed in the mayor's office, he was "laboring under great terror, and that he never saw anyone more terrified."[251]

Given such evidence, Simon's counsel moved to exclude the confession. The trial court denied the motion, and the jury found Simon

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[245] Hardy, *supra* note 10, at 9.
[246] *Id.* at 11.
[247] *Id.* at 10–12.
[248] *Id.* at 12.
[249] *Id.*
[250] *Id.*
[251] *Id.*

guilty. At the sentencing hearing, the trial judge asked Simon "if there was any reason why he should not proceed with sentencing. Simon responded that he was not guilty of the crime."[252] The judge nonetheless sentenced Simon to death by hanging.[253]

On appeal, the Florida Supreme Court reversed. Although the court's decision was based on common law principles rather than the constitutional privilege against self-incrimination (because the privilege was not yet applicable to the states),[254] its reasoning remains instructive given that the common law privilege formed the background of the Fifth Amendment privilege.[255] The court stated that there were "few cases to be found in the books where stronger influences were brought to bear on the mind of the prisoner to extort a confession than the one before us. That it was made under the influence of fear or apprehension of personal violence, can scarce be doubted."[256] The court reasoned that "if Simon maintained his innocence, he risked alienating [the mayor], which could have resulted in the mayor abandoning him to the crowd;" hence, to Simon, a confession was "the only immediate security for his person and his life."[257] The court further noted that Simon made his confession at his owner's urging—a fact that gave additional reason to suspect that an enslaved person's confession may not have been a product of their own independent free choice. The court counseled that "the almost absolute control which the owner does involuntarily exercise over the will of the slave should induce the courts at all times to receive their confessions with the utmost caution and distrust."[258]

The mayor in *Simon*, of course, was not a police officer or law enforcement official. Hence, Simon's case lacked the "crucial element of police overreaching"[259] that *Connelly* requires. Yet the Florida Supreme Court—even though comprised entirely of justices who were slaveholders[260]—nonetheless found Simon's confession inadmissible.

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[252] *Id.*

[253] *Id.* at 12, 14.

[254] *See supra* Section II.B (discussing Twining v. New Jersey, 211 U.S. 78 (1908) (holding that the privilege against self-incrimination was not applicable to the states via the Fourteenth Amendment), and Malloy v. Hogan, 378 U.S. 1 (1964) (overruling *Twining*)).

[255] *See supra* notes 28–32 and accompanying text (explaining that the Fifth Amendment privilege against self-incrimination arose from the background of the common law privilege).

[256] Hardy, *supra* note 10, at 15.

[257] *Id.* (quoting Simon v. State, 5 Fla. 285, 297 (1853)).

[258] *Id.* at 15 (quoting *Simon*, 5 Fla. at 298). For further discussion of this issue, see *supra* Section III.A.

[259] Colorado v. Connelly, 479 U.S. 157, 163 (1986).

[260] Hardy, *supra* note 10, at 14.

The experiences of enslaved persons discussed throughout this Section make clear that private action could be at least as coercive as state action in overcoming a person's free will; and that, when state actors were involved, a law enforcement role was not a prerequisite to their coercive power in a system of structural compulsion. Only by ignoring the history of slavery and the experience of enslaved persons, such as those discussed earlier in this Section, could the Supreme Court "refus[e] to acknowledge free will as [itself] a value of constitutional consequence."[261] To be sure, the constraints upon an enslaved person's free will are qualitatively different from those of persons who are not enslaved. But that does not mean that the lessons of slavery lack continuing relevance. Examining the experiences of enslaved persons teaches that the state action doctrine should not be applied in a rigid and formalistic fashion in self-incrimination cases. The use against a defendant of self-incriminating statements secured by compulsion of any kind is destructive of individual dignity and autonomy. A key value of the Second Founding's Constitution was to ensure that the kind of structural domination that hampered the exercise of free choice regarding self-incriminating speech would, as a badge or incident of slavery, be dismantled along with slavery itself.

*4. The Express Invocation Requirement*

As discussed in detail in Section II.B, the plurality opinion in *Salinas v. Texas* held that "a witness who desires the protection of the privilege [against self-incrimination] must claim it at the time he relies on it."[262] In *Salinas*, the plurality held that the defendant's decision to remain silent in the face of official, albeit noncustodial, interrogation was insufficient to invoke the privilege.[263] That remains true, the plurality stated, even when "the Fifth Amendment privilege is the most likely explanation for [the defendant's] silence"[264] and the context of the questioning or the questions themselves are such that "an official has reason to suspect that the answer to his question would incriminate the witness."[265]

The *Salinas* plurality did recognize one exception to the express invocation requirement, however: in circumstances where governmental coercion renders forfeiting the privilege involuntary.[266] For example, due to

[261] *Connelly*, 479 U.S. at 176 (Brennan, J., dissenting).

[262] 570 U.S. 178, 183 (2013) (internal quotation marks omitted).

[263] *Id.* at 186–87.

[264] *Id.* at 189.

[265] *Id.* at 187.

[266] *Id.* at 184. Although beyond the scope of this Article, the plurality also recognized another exception to the express invocation requirement: "[A] criminal defendant need not take the stand and assert the privilege at his own trial." *Id.*

the inherently coercive nature of custodial interrogation, "a suspect in custody cannot be said to have voluntarily forgone the privilege unless [he] fails to claim [it] after being suitably warned."[267] Similarly, threatening the defendant with consequences for invoking the privilege can sometimes excuse the defendant's failure to affirmatively do so.[268] Likewise, in circumstances where expressly asserting the privilege would itself be incriminating, the defendant need not expressly invoke it.[269] The unifying principle behind these exceptions is that "a witness need not expressly invoke the privilege where some form of official compulsion denies him a free choice to admit, to deny, or to refuse to answer."[270] Absent such circumstances, however, a person must affirmatively assert the privilege in order to claim its protection.

But with the exception for cases of governmental coercion, the plurality opinion in *Salinas* expects one to know and assert the specific constitutional right—the Fifth Amendment—in interrogations.[271] The assumption of knowledge is debatable. How many nonlawyers know—and would be able to recall under the pressure of an interrogation—that the specific constitutional provision to invoke is the Fifth Amendment? The behavioral assumption is even more questionable. "[W]hen police control the atmosphere and surroundings, and can manipulate the dialogue of a voluntary interrogation session,"[272] it is expecting a great deal of an ordinary person who intends to rely upon the privilege to be able to assert it affirmatively and unambiguously—even in the best of circumstances.[273]

From the perspective of the Constitution transformed by the Second Founding, and informed by the experiences of enslaved persons, the *Salinas* plurality's behavioral assumptions are even more troubling. During slavery, an enslaved person's affirmative insistence upon their rights tended to lead to one of two outcomes: either their demands would be ignored or, worse, they would be noticed. The former lead to a learned helplessness; the latter could often lead to brutal violence.

Structural power dynamics arising from a legacy of subordination, the history of racialized law enforcement violence, and contemporary concerns about bias in law enforcement at best lead to a sense of futility regarding asserting one's constitutional rights. Even worse, they may lead to a fear of

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[267] *Id.* at 184–85 (internal quotation marks omitted).

[268] *Id.* at 185.

[269] *Id.*

[270] *Id.* (internal quotation marks omitted).

[271] Maclin, *supra* note 122, at 279.

[272] *Id.* at 280.

[273] *See id.* at 289–90.

legal or extralegal reprisals for attempts to assert those rights.[274] Again, this Article does not intend to compare the position of enslaved persons to that of persons who are suspected of crimes. It nonetheless remains the case that the inherent power dynamics of official interrogation—especially when the legacies of status-based subordination and violence are at play—can create a dynamic wherein direct and firm assertions of one's rights may carry costs that are unaccounted for by the express invocation rule.

Enslaved persons asserting their rights or proclaiming their innocence were routinely punished for their perceived "insolence." Disputing a white person's accusations, slaveowners made clear, would not be tolerated. Samuel Ward's slave narrative[275] recounted slaveowners' attitudes in this regard, stating that they believed "[i]nsolence in a [slave] could not be endured [since tolerating it] would breed more and greater mischief of a like kind."[276]

As the final example of an illuminating slave narrative, Henry Clay Bruce describes a relevant incident.[277] Bruce was sent to pick up supplies for the plantation on horseback and had been told not to ride the horse too hard. When returning to the plantation, he came across Sam Hawkins, a local white laborer. Working-class whites like Hawkins, Bruce noted, would often seek the favor of slave-owning planters by telling them "everything they saw [the slaves] do," even to the point of fabricating accounts of wrongdoing by enslaved persons.[278]

That evening, Hawkins falsely told Bruce's owner that Bruce had been galloping the horse. When the owner summoned Bruce:

> [H]e had a switch in his hand and proceeded to explain why he was going to whip me. I pleaded innocence and [disputed] the charge [regarding the horse]. At this, he then became angry and whipped me. When he stopped, he said it was not so much for the fast riding that he had punished me as it was for disputing a white man's word. Fool that I was then (for I would not have received any more whipping at that time), but knowing that I was not guilty, I said so again and he immediately flogged me again. When he stopped, he asked me in a loud

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[274] Hirsch, *supra* note 186, at 51–52.

[275] SAMUEL RINGGOLD WARD, AUTOBIOGRAPHY OF A FUGITIVE NEGRO: HIS ANTI-SLAVERY LABOURS IN THE UNITED STATES, CANADA, & ENGLAND (1855), https://docsouth.unc.edu/neh/wards/ward.html [https://perma.cc/A6NW-JM5Z].

[276] *Id*. at 15.

[277] HENRY CLAY BRUCE, THE NEW MAN: TWENTY-NINE YEARS A SLAVE, TWENTY-NINE YEARS A FREE MAN 28–30 (P. Anstadt & Sons 1895), https://docsouth.unc.edu/fpn/bruce/bruce.html [https://perma.cc/5ZWH-TZK9].

[278] *Id*. at 28.

> tone of voice, "Will you have the impudence to dispute a white man's word again?" My answer was "No sir."
>
> Other ex-slaves can relate many such cases as the Hawkins' case . . . .[279]

Bruce remained acutely aware of the potential costs of disputing a white person's accusations even after he escaped from enslavement. In describing his interactions with Northern whites, Bruce stated that "[he] had been reared where it was a crime for [him] to dispute a white man's word, and that idea was so well and thoroughly grounded in [him] that it took time and great effort to eradicate it."[280]

The express invocation requirement assumes a world in which all persons feel equally empowered to assert their rights in the face of official interrogations. The lesson of enslaved persons' experiences is that a nuanced, case-by-case analysis is necessary to understand whether the failure to expressly invoke the privilege against self-incrimination is truly a result of the person's "free choice to admit, to deny, or to refuse to answer"[281] or whether structural or individual circumstances impeded the person's ability to do so.

## CONCLUSION

Our nation's Second Founding created a new constitutional order. By far too often looking only at evidence from the original Founding period, our contemporary constitutional jurisprudence misses the transformative effect of the Reconstruction Amendments upon the Constitution as a whole. The privilege against self-incrimination, interpreted through the lens of the Second Founding, need not and should not be accorded the narrow and grudging interpretation embodied by the Supreme Court's contemporary doctrine. Consistent with the values of the Second Founding, the privilege should be interpreted to protect the dignity interest in being free from all forms of coerced or involuntary self-incriminating speech, whether caused by state action, private action, or structural compulsion; and should truly protect a person's choice to remain silent in the face of official questioning, regardless of whether the person recites the Fifth Amendment as grounds for that silence.

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[279] *Id.* at 29–30.

[280] *Id.* at 114.

[281] Salinas v. Texas, 570 U.S. 178, 185 (2013).