

# Panel III: The First Amendment and Incorporation

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## Reconstruction & the Making of the First Amendment

The constitutional provision that is most often heralded as the guardian of our democracy, the First Amendment, was born in one of the darkest moments in American democracy—in the early twentieth century, during the full realization of Jim Crow, the entrenchment of post-slavery racialized economic exploitation, and the reassertion of White political dominance. Modern speech law was developed in the ashes of the Reconstruction Amendments and the foreclosure of Reconstruction's promise of an egalitarian restructuring of Southern society. It has since adopted many of the ideas and doctrinal devices used by the courts to limit the reach and potential of the Reconstruction amendments. While *Gitlow v. New York* incorporated the First Amendment against the states by way of the Fourteenth, the Second Founding's profound reimagining of the meaning of American democracy has not seriously informed the interpretation of the freedom of speech.

This failure has become more pressing over the last half century, as the First Amendment has largely displaced the Reconstruction Amendments as the center of gravity for defining the substance of constitutional freedom and democracy. For roughly a century, the Reconstruction Amendments were the central site of conflict over issues of constitutional freedom, economic participation, and self-determination. This included struggles over rights to own, control, and reap the benefits of one's own labor; to possess and transfer land; to be served by businesses open to the public; and to participate freely in labor, housing, and credit markets. Those issues are now litigated as matters of First Amendment concern, as a large body of scholarship on First Amendment Lochnerism has documented.

Despite these developments, the stories of the First and Reconstruction Amendments have largely been told separately. To tell the legal history of the First Amendment independent of the history of Reconstruction and its Amendments is to ignore the many ways that fights to expand, contract, and redefine American democracy have shaped the current meaning of the First Amendment. It is to ignore the way that fights over racial equality have become imbedded in modern speech doctrine, stripped of any trace of that racial history.

It is time to stitch these stories together. This article offers a revisionist and intratextual account of the freedom of speech. This account allows us to see that the modern First Amendment has been shaped by backlash against Reconstruction's promise of a multiracial democracy and post-*Brown* efforts to fulfill that promise. Drawing these histories together also illuminates how the constitutional visions that framed and fomented the passage of the Reconstruction Amendments can inform contemporary debates about the meaning of the First Amendment and its future. Lessons of Reconstruction, in other words, can serve as a paradigm for First Amendment law.

The article is divided into four parts. First, it situates the birth of the First Amendment—often described as the constitutional guardian of our democracy—in its deeply antidemocratic moment. The Court had spurned the Reconstruction Amendments, including in decisions such as *Dred Scott* and the *Civil Rights Cases*. As president, Andrew Johnson had

extended blanket pardons to former Confederate rebels, which permitted former rebels to reclaim land and resources that the Union Army had seized, some of which had been redistributed to formerly enslaved people. It was in the aftermath of these actions—which significantly foreclosed the egalitarian restructuring Reconstruction promised and reinstated prior Southern power structures that exploited formerly enslaved people—that the modern First Amendment was born.

Second, the article sketches the intertwined history of the First and Reconstruction Amendments. It shows how the central concepts and doctrinal devices that modern courts have used to elaborate each of them—namely an anticlassificatory understanding of rights against government action—reflect backlash against both Reconstruction and, later, *Brown v. Board of Education*.

The article then turns to constitutional ideas that produced and emerged from the end of chattel slavery, including the views of formerly enslaved people, Black leaders, and abolitionist social movements. Those thinkers and social movements sought to define the meaning of constitutional freedom as the apotheosis of slavery. Three themes emerge from their accounts: (1) constitutional freedom is material and entails the forms action and participation necessary for self-determination; (2) the political branches are the key institutional protectors and implementers of those constitutional rights; (3) constitutional freedom, and the participation and self-determination they protect, is forward, not backward-looking. Revisiting early debates about the Reconstruction Amendments allows us to better see the values and ideas of democratic society that have shaped the evolution of and struggles under both the Reconstruction and First Amendments. It also reveals Reconstruction as a font of ideas for contemporary First Amendment contests.

Finally, the article outlines the implications of Reconstruction for the First Amendment. It offers a way to reorient our constitutional language and reconceive who must be responsive to constitutional demands. Reconstruction-era ideas, it argues, can inform a modern First Amendment that protects a more capacious and material understanding of participatory democracy and self-determination; that focuses its constitutional demands principally at the political branches rather than the courts; and that is animated by more egalitarian understandings of history itself. Reconstruction era ideas can provide the resources to build a First Amendment future that more faithfully actualizes its core democratic commitments.