NOTES

"FROM STANDING ROCK TO THE SWAMP": A THIRTEENTH AMENDMENT APPROACH TO SPEECH SUPPRESSION IN SACRIFICE ZONES

CHLOE M. BARTHOLOMEW*

In the past ten years, jurisdictions across the United States have witnessed an explosion of fossil-fuel-industry-backed laws targeting anti-pipeline and anti-critical infrastructure protestors. In passing these laws, state legislators throughout the country have sought to criminally punish activists who dissent against the construction of infrastructure sites atop their homes and in their neighborhoods. These activists resist a trend in which local governments designate their communities as "sacrifice zones." In these areas, local governments allow companies to build polluting industries and facilities that subject residents to severe health and safety risks. Because these infrastructure sites disproportionately displace and harm communities of color, some have deemed this practice "the new Jim Crow" and have argued that it functions as a relic of slavery. In cracking down on these communities' opposition to the creation of sacrifice zones, state legislatures and the oil and gas industry silence Black- and Indigenous-led racial justice movements across the country.

 J.D., 2025, New York University School of Law; B.A., 2022, University of Chicago. The title of this Note honors the L'Eau Est La Vie resistance camp. L'Eau Est La Vie's 2019 documentary, entitled *L'Eau Est La Vie (Water Is Life): From Standing Rock to the Swamp*, uplifts their fight to protect sacred waters and lands in Louisiana.

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Using dissent in sacrifice zones as an example, this Note argues that modern suppression of racial justice advocacy hearkens back to a long tradition of silencing movements that promote racial equality. This repressive practice traces its roots back to pre-abolition times. As this Note explicates, the Framers of the Thirteenth Amendment (which formally abolished slavery) sought to curtail such speech-silencing efforts. Thus, suppression of racial justice advocacy—and specifically, suppression of anti-sacrifice zone advocacy—should be considered a "badge and incident of slavery" violative of the Thirteenth Amendment.

This Note offers two Thirteenth Amendment avenues for challenging what this Note calls "sacrifice zone speech suppression," a subset of anti-protest speech suppression aimed at silencing dissent in sacrifice zones specifically. First and foremost, this Note proposes a litigation pathway, and second, it proposes a legislative pathway. In proposing these solutions, this Note shares the hope of the many activists who have spent years, decades, and centuries fighting for an end to the legacies of slavery: the conviction that, in the words of Bill Quigley, "justice is possible."

Introduction

"[W]e refuse to be silent. . . . We demand the right to protect our land, our water, and our future. . . . We won't stop fighting. We can guarantee you this. We will not stop fighting. From Standing Rock to the bayou, our resistance continues."

—Anne White Hat, 2025[1]

"NOLA STANDS WITH STANDING ROCK: STOP THE BAYOU BRIDGE PIPELINE," proclaimed a banner held by Cherri Foytlin at a 2017 protest.[2] Foytlin, an Afro-Indigenous Din'e activist,[3] stood on the frontlines that day.[4] Just under a year later, law enforcement officers moonlighting for a private security company[5] arrested sixteen Water Protectors (and a journalist) protesting the very same pipeline.[6]

Since 2017, the members of the L'Eau Est La Vie resistance camp—known as "Water Protectors"—have fought the construction of the Bayou Bridge Pipeline in Louisiana's Cancer Alley,[7]

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[1] Ctr. for Const. Rts., White Hat v. Murrill*: Challenging Louisiana's Critical Infrastructure Law*, at 02:56–03:55 (YouTube, Feb. 24, 2025), https://www.youtube.com/watch?v=fUkmrNlueME (on file with the New York University Law Review).

[2] Steve Hardy, *Environmentalists See Proposed Louisiana Law to Protect Pipelines and Penalize Protestors as Overreach*, The Advocate (Mar. 31, 2018), https://www.theadvocate.com/baton_rouge/news/crime_police/environmentalists-see-proposed-louisiana-law-to-protect-pipelines-and-penalize-protesters-as-overreach/article_1b087942-34ee-11e8-8dcb-2b3538173f63.html [https://perma.cc/5MNR-2ERB].

[3] Keynotes, N. Am. Forest & Climate Movement Convergence, https://forestclimateconvergence.org/speaker-bios [https://perma.cc/X324-QX7C] (last visited July 19, 2025).

[4] *See* Hardy, *supra* note 2.

[5] *See* Nicholas Kusnetz, *Harsh New Anti-Protest Laws Restrict Freedom of Speech, Advocates Say*, Wash. Post (Aug. 22, 2018), https://www.washingtonpost.com/energy-environment/2018/08/22/environmentalists-say-new-pipeline-protest-laws-restrict-their-freedom-speech [https://perma.cc/J4WZ-LBRS] (noting that a "private company had apparently ordered the arrests").

[6] *Bayou Bridge Pipeline Protestors, Journalist Celebrate Victory for Free Speech*, Ctr. for Const. Rts. (July 13, 2021) [hereinafter *Bayou Bridge Pipeline Protestors*], https://ccrjustice.org/home/press-center/press-releases/bayou-bridge-pipeline-protesters-journalist-celebrate-victory-free [https://perma.cc/Y2Y6-VYYT].

[7] According to the documentary L'Eau Est La Vie, "[t]he L'Eau Est La Vie (Water Is Life) camp continues to be a place of active resistance against corporate water polluters, as well as a source of regenerative agricultural, disaster mutual aid efforts, Indigenous cultural & knowledge sharing." Melissa Cox, L'Eau Est La Vie (Water Is Life): From Standing Rock to the Swamp, at 22:25 (2019) [hereinafter L'Eau Est La Vie], https://www.mutualaidmedia.com/water-is-life-film (on file with the New York University Law Review); *see* Julie Dermansky, *Pastor Leads Lawsuit Opposing Bayou Bridge Pipeline to Protect Louisiana Cancer Alley Community*, DeSmog (June 26, 2017, at 18:16 PT), https://www.desmog.com/2017/06/26/pastor-leads-lawsuit-opposing-bayou-bridge-pipeline-protect-louisiana-cancer-alley-community [https://perma.cc/P6WM-MCYJ] (referencing local pastor Harry Joseph's fight alongside protestors to stop construction of the pipeline).

an eighty-five-mile stretch of land between Baton Rouge and New Orleans.[8] As explained in the documentary *L'Eau Est La Vie (Water Is Life): From Standing Rock to the Swamp*, the pipeline completes the tail end of the Dakota Access Pipeline and "choke[s] the life out of [the] community."[9] It crosses traditional Atakapa-Ishak land,[10] threatens the United Houma Nation's water supply,[11] and ends in the majority-Black community of St. James Parish.[12] It also continues a trend that started at least six decades ago,[13] in which the petrochemical and fossil fuel industries have subjected the communities in Cancer Alley to extreme pollution, environmental costs, and health risks, the burdens of which fall with tremendous asymmetry on Black[14] and Indigenous[15] residents.

This fight has increasingly moved to legislatures across the country. In the past ten years, jurisdictions across the United States, including Louisiana,[16] have witnessed an explosion of fossil-fuel-industry-backed

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8 *US: Louisiana's 'Cancer Alley*,*'* Hum. Rts. Watch (Jan. 25, 2024, at 00:00 ET), https://www.hrw.org/news/2024/01/25/us-louisianas-cancer-alley [https://perma.cc/2JB3-Y94N].

9 L'Eau Est La Vie, *supra* note 7, at 13:02.

10 Julie Dermansky, *With Tribal Blessing, Louisiana Activist Buys Land in Path of Proposed Bayou Bridge Pipeline*, Truthout (Dec. 21, 2017), https://truthout.org/articles/with-tribal-blessing-louisiana-activist-buys-land-in-path-of-proposed-bayou-bridge-pipeline/?amp [https://perma.cc/M3LU-34H9].

11 *Indigenous, Environmental Justice Advocates Hold Ceremony; Peacefully Disrupt Bayou Bridge Pipeline Construction*, Recordnet.com (Feb. 21, 2018, at 02:45 PT), https://www.recordnet.com/story/news/crime/2018/02/21/indigenous-environmental-justice-advocates-hold/14217298007 [https://perma.cc/5PWS-4UQG].

12 Lauren Zanolli, *'They're Billin' Us for Killin' Us': Activists Fight Dakota Pipeline's Final Stretch*, The Guardian (Oct. 16, 2018, at 20:58 ET), https://www.theguardian.com/environment/2018/oct/16/dakota-access-pipeline-bayou-bridge-protest-activism [https://perma.cc/X4HS-QCDQ].

13 *See In Landmark Case, St. James Parish Residents Sue Parish Council to Protect Black Neighborhoods with a Moratorium on Hazardous Petrochemical Plants*, Ctr. for Const. Rts. (Mar. 21, 2023) [hereinafter *In Landmark Case*], https://ccrjustice.org/home/press-center/press-releases/landmark-case-st-james-parish-residents-sue-parish-council-protect [https://perma.cc/6233-69BZ] (noting "[o]ver 60 years" of pollution into St. James Parish).

14 *US: Louisiana's 'Cancer Alley*,*' supra* note 8.

15 *See* Alycee Lane, *The Bayou Bridge Pipeline's Entangled Hierarchies of Power*, CounterPunch (Aug. 23, 2018, at 00:00 ET), https://www.counterpunch.org/2018/08/23/the-bayou-bridge-pipelines-entangled-hierarchies-of-power [https://perma.cc/2AVF-D5MN] (stating that the pipeline will disproportionately burden communities of color, including the United Houma Nation); Jen Marlowe, *Water Protectors Take Action to Keep Pipeline Out of Black and Indigenous Communities*, Yes! (Aug. 14, 2018), https://www.yesmagazine.org/environment/2018/08/14/water-protectors-take-action-to-keep-pipeline-out-of-black-and-indigenous-communities [https://perma.cc/8QXW-VVQ2] (arguing that the struggle against the pipeline is connected to other movements for Native rights).

16 *See Bayou Bridge Pipeline Protestors*, *supra* note 6; Mike Ludwig, *Pipeline Activists Challenge Louisiana Law that Criminalizes Protest*, Truthout (May 24, 2019), https://truthout.org/articles/pipeline-activists-challenge-louisiana-law-that-criminalizes-protest [https://perma.cc/DW49-ETA7].

laws targeting anti-pipeline and anti-critical infrastructure protestors.[17] The oil and gas industry's concentrated effort at silencing dissent nationwide has escalated since 2016, when Indigenous Water Protectors began leading the Dakota Access Pipeline demonstrations at Standing Rock.[18] In passing these laws, state legislators have sought to criminally punish activists who voice dissent against the siting of infrastructure in their communities.[19]

By speaking out against the disruptive construction of pipelines, petrochemical plants, and other so-called critical infrastructure, activists resist a long trend in which local governments designate these regions as "sacrifice zones."[20] In these areas, local governments allow companies to build polluting industries and facilities that subject residents to severe health and safety risks, including respiratory illness, cancer, and organ damage.[21] Residents face an impossible choice: uproot their lives and leave their (sometimes ancestral) homes, or stay and risk the severe harms that industrial plants inflict by churning out plastics and chemicals into the air.[22]

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[17] *Protecting Americans' Right to Peaceful Assembly from "Critical Infrastructure" and Other Anti-Protest Laws: Before the H. Oversight Subcomm. on C.R. & C.L.*, 117th Cong. 2 (2022) [hereinafter Int'l Ctr. for Not-for-Profit L. Testimony] (written testimony of Elly Page, Senior Legal Advisor, Int'l Ctr. for Not-for-Profit L.), https://docs.house.gov/meetings/GO/GO02/20220914/115106/HHRG-117-GO02-Wstate-PageE-20220914.pdf [https://perma.cc/ZG5V-WX67] (noting that at least seventeen states over seven years adopted laws targeting pipeline protestors); *see, e.g.*, *Bayou Bridge Pipeline Protestors*, *supra* note 6; Ludwig, *supra* note 16.

[18] Shelia Hu, *The Dakota Access Pipeline: What You Need to Know*, NRDC (June 12, 2024), https://www.nrdc.org/stories/dakota-access-pipeline-what-you-need-know [https://perma.cc/E5EJ-3XTX]; Hilary Beaumont & Nina Lakhani, *Revealed: How the Fossil Fuel Industry Helps Spread Anti-Protest Laws Across the US*, The Guardian (Sep. 26, 2024, at 06:00 ET), https://www.theguardian.com/us-news/2024/sep/26/anti-protest-laws-fossil-fuel-lobby [https://perma.cc/S57V-4WKW]; Kaylana Mueller-Hsia, *Anti-Protest Laws Threaten Indigenous and Climate Movements*, Brennan Ctr. for Just. (Mar. 17, 2021), https://www.brennancenter.org/our-work/analysis-opinion/anti-protest-laws-threaten-indigenous-and-climate-movements [https://perma.cc/EHJ7-9AXE] ("Since 2016, 13 states have quietly enacted laws that increase criminal penalties for trespassing, damage, and interference with infrastructure sites such as oil refineries and pipelines. . . . [T]hese laws clearly target environmental and Indigenous activists . . . .").

[19] Ludwig, *supra* note 16 ("Environmental activists say flatly that oil and gas companies have teamed up with pro-industry politicians to put a chill on protests against new fossil fuel projects. . . .").

[20] Robert D. Bullard, *Sacrifice Zones: The Front Lines of Toxic Chemical Exposure in the United States*, 119 Env't Health Persps. A266, A266 (2011) [hereinafter *Sacrifice Zones*] (reviewing Steve Lerner, Sacrifice Zones: The Front Lines of Toxic Chemical Exposure in the United States (2010)).

[21] *Sacrifice Zones 101*, Climate Reality Project, https://www.climaterealityproject.org/sacrifice-zones [https://perma.cc/F49K-U9PZ] (last visited July 19, 2025).

[22] *See In Landmark Case*, *supra* note 13; *"We're Dying Here": The Fight for Life in a Louisiana Fossil Fuel Sacrifice Zone*, Hum. Rts. Watch 61 (Jan. 25, 2024) [hereinafter *Fight*

Moreover, critical infrastructure sites disproportionately displace and harm communities of color,[23] thus reproducing racial violence[24] and deepening racial inequality.[25] Robert Bullard, the father of environmental justice, once said: "[S]ome people and some neighborhoods have the wrong complexion for protection."[26] Recently, some have deemed such environmental racism "the new Jim Crow."[27] Indeed, activists in Louisiana's Cancer Alley have argued that the discriminatory placement of petrochemical facilities in predominantly Black communities constitutes a relic of slavery.[28] In cracking down on these communities' opposition to the creation of sacrifice zones atop

for Life], https://www.hrw.org/report/2024/01/25/were-dying-here/fight-life-louisiana-fossil-fuel-sacrifice-zone [https://perma.cc/JF65-39Y7].

[23] *See, e.g.*, Deborah N. Archer, *"White Men's Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1259–60 (2020) [hereinafter Archer, *"White Men's Roads"*]; Candice Norwood, *How Infrastructure Has Historically Promoted Inequality*, PBS NEWS (Apr. 23, 2021, at 13:31 ET), https://www.pbs.org/newshour/politics/how-infrastructure-has-historically-promoted-inequality [https://perma.cc/Z2CQ-CHL3]. *See generally* DEBORAH N. ARCHER, DIVIDING LINES: HOW TRANSPORTATION INFRASTRUCTURE REINFORCES RACIAL INEQUALITY (2025) [hereinafter ARCHER, DIVIDING LINES] (analyzing how America's transportation infrastructure system functions as a manifestation of racial inequality, in large part through decisions to develop highways and other infrastructure projects in Black communities).

[24] *See* Deborah N. Archer, *Reparations and the Right to Return*, 45 N.Y.U. REV. L. & SOC. CHANGE 343, 347 (2021) [hereinafter Archer, *Reparations*] ("The . . . violent acts of 'racial cleansing' throughout the 19th and early 20th centuries are . . . part of white America's . . . efforts to exile and exclude Black people in order to claim communities and property as their own. Sometimes these efforts focused on destroying thriving Black communities or stealing sources of Black wealth."); Deborah N. Archer & Joseph R. Schottenfeld, *Defending Home: Toward a Theory of Community Equity*, 92 U. CHI. L. REV. 2199, 2212, 2216 (2025) (describing how "the effects of spatial racism . . . began with slavery" and how "[w]ith segregation locked in, government officials could go about the work of tearing apart and destroying Black communities," such as Sandridge, South Carolina); Ryan Juskus, *Sacrifice Zones: A Genealogy and Analysis of an Environmental Justice Concept*, 15 ENV'T HUMANS. 3, 21 (2023) (analyzing Rob Nixon's theory of "slow violence," which "suggests that environmental injustice is primarily analogous to doing violence").

[25] *See, e.g.*, Deborah N. Archer, *Transportation Policy and the Underdevelopment of Black Communities*, 106 IOWA L. REV. 2125, 2134 (2021) [hereinafter Archer, *Transportation Policy*] ("Our nation's highways were built through and around Black communities to physically entrench racial inequality . . . ."); ARCHER, DIVIDING LINES, *supra* note 23, at 7 ("In the twentieth century . . . officials used transportation infrastructure to enforce white supremacy. . . . [P]redominantly Black neighborhoods were systematically sequestered because they lacked the power to effectively fight back, or because they were perceived as having *too much* power. . . . White supremacy depends on Black people knowing 'their place' . . . and staying there.").

[26] Robert D. Bullard, *Bullard: Much of America Has Wrong Complexion for Protection*, ENV'T HEALTH NEWS (June 20, 2012), https://www.ehn.org/bullard-much-of-america-has-wrong-complexion-for-protection-2645575025.html [https://perma.cc/62E3-5HQB].

[27] Aneesh Patnaik, Jiahn Son, Alice Feng & Crystal Ade, *Racial Disparities and Climate Change*, PRINCETON STUDENT CLIMATE INITIATIVE (Aug. 15, 2020), https://psci.princeton.edu/tips/2020/8/15/racial-disparities-and-climate-change [https://perma.cc/3EQJ-6STU].

[28] *In Landmark Case*, *supra* note 13.

their homes and in their neighborhoods, state legislatures and the oil and gas industry silence Black- and Indigenous-led racial justice movements across the country.[29] Private actors fortify these silencing efforts by playing an outsized role in introducing legislation, initiating lawsuits against protestors, and even surveilling protestors and having them arrested.[30]

Using dissent in sacrifice zones as an example, this Note argues that modern suppression of racial justice protest hearkens back to speech suppression practices with deep ties to slavery.[31] From "slave codes" in the 1600s to the Black Codes in the Reconstruction era to Jim Crow laws in the 1960s to white supremacist violence throughout American history, methods of silencing pro-equality speech have morphed over time and survive in many forms.[32] A long tradition thus connects racial oppression and speech suppression.[33]

As such, suppression of anti-sacrifice zone speech should be considered a "badge and incident of slavery" violative of the Thirteenth Amendment to the U.S. Constitution. In 1865, the Thirteenth Amendment formally abolished slavery in the United States.[34] Later, in the *Civil Rights Cases*, the Supreme Court held that the Thirteenth Amendment also bequeathed to Congress the power to legislate against the "badges and incidents" of slavery.[35] Since 1865, when

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[29] *See* Nina Lakhani & Hilary Beaumont, *'Fear and Intimidation': How Peaceful Anti-Pipeline Protesters Were Hit with Criminal and Civil Charges*, The Guardian (Sep. 27, 2024, at 06:00 ET), https://www.theguardian.com/us-news/2024/sep/27/mountain-valley-pipeline-protest [https://perma.cc/B72E-SZDY] (describing how criminal liability and civil lawsuits by oil and gas companies attempt to "dismantle broader movements" that focus on climate, democracy, and racial justice).

[30] *Id.* (discussing lawsuits by private actors against protesters); *see* Andres Chang, *Fossil Fuel Anti-Protest Bills in Montana, Virginia, and Illinois Threaten Climate Activism*, Greenpeace (Feb. 13, 2025), https://www.greenpeace.org/usa/fossil-fuel-anti-protest-bills-in-montana-virginia-and-illinois-threaten-free-speech-and-climate-advocacy [https://perma.cc/4VBJ-EVX4] (discussing laws targeting environmental activists); *About Us*, Greenpeace, https://www.greenpeace.org/usa/about [https://perma.cc/CH4W-SH8A] (last visited July 24, 2025).

[31] This Note defines "speech suppression" broadly, using the term to refer to any efforts aimed at silencing protest, dissent, or other forms of political expression—whether those efforts come from private actors or the government. Although this Note focuses on speech suppression in sacrifice zones, the broader term encompasses other speech suppression efforts as well.

[32] *See infra* Part II.

[33] *See infra* Part II.

[34] U.S. Const. amend. XIII, §§ 1–2.

[35] The Civil Rights Cases, 109 U.S. 3, 21 (1883); *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440–41 (1968) ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. Nor can we say that the determination Congress has made is an irrational one.").

Congress passed the Thirteenth Amendment and the states ratified it,[36] jurisprudence around this Reconstruction Amendment has evolved. For example, it has expanded to empower Congress to legislate against racially motivated violence[37] and racially restrictive covenants[38] as "badges and incidents."[39] Speech suppression efforts also fall under this "badges and incidents" category because, throughout American history, federal and state governments—as well as private actors—have endeavored to stifle, punish, and criminalize the voices of Black people advocating for freedom and equality.[40]

As sacrifice zones themselves often function as a legacy of slavery,[41] suppressing dissent against them should be considered part of the "afterlife of slavery."[42] Therefore, not only does Congress have the power to legislate against this speech suppression as a "badge and incident" of slavery, but, perhaps more importantly, private litigants also have the right to sue under

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[36] *13th Amendment to the U.S. Constitution: Abolition of Slavery (1865)*, Nat'l Archives (May 10, 2022), https://www.archives.gov/milestone-documents/13th-amendment [https://perma.cc/CPB4-3GXK].

[37] *See, e.g.*, United States v. Diggins, 36 F.4th 302, 311 (1st Cir. 2022); United States v. Nelson, 277 F.3d 164, 190–91 (2d Cir. 2002); United States v. Roof, 10 F.4th 314, 392 (4th Cir. 2021); United States v. Cannon, 750 F.3d 492, 502 (5th Cir. 2014); United States v. Metcalf, 881 F.3d 641, 645 (8th Cir. 2018); United States v. Hougen, 76 F.4th 805, 814 (9th Cir. 2023); United States v. Hatch, 722 F.3d 1193, 1200–06 (10th Cir. 2013).

[38] *See Jones*, 392 U.S. at 413.

[39] *The Civil Rights Cases*, 109 U.S. at 21.

[40] *See, e.g.*, William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 Tex. L. Rev. 1065, 1083–85 (2021) [hereinafter Carter, *The Second Founding*] (examining denials of free speech to Black people before and after the Civil War); William M. Carter, Jr., *The Thirteenth Amendment and Pro-Equality Speech*, 112 Colum. L. Rev. 1855, 1858–64 (2012) [hereinafter Carter, *The Thirteenth Amendment and Pro-Equality Speech*] (describing how the system of slavery depended on silencing abolitionist and pro-equality speech).

[41] *See In Landmark Case*, *supra* note 13 (discussing Thirteenth Amendment lawsuit challenging construction of petrochemical plants that have contributed to public health emergency in Cancer Alley); Press Release, Office of the High Commissioner, United Nations, The Global Climate Crisis Is a Racial Justice Crisis: UN Expert (Oct. 31, 2022), https://www.ohchr.org/en/press-releases/2022/11/global-climate-crisis-racial-justice-crisis-un-expert [https://perma.cc/R666-RFYD] (noting that addressing sacrifice zones entails addressing the legacies of slavery); Timothy Q. Donaghy, Noel Healy, Charles Y. Jiang & Colette Pichon Battle, *Fossil Fuel Racism in the United States: How Phasing Out Coal, Oil, and Gas Can Protect Communities*, 100 Energy Rsch. & Soc. Sci., no. 103104, 2023, at 3; Liz Theoharis, *No, America Doesn't Actually Need "Sacrifice Zones,"* The Nation (Sep. 22, 2022), https://www.thenation.com/article/society/america-sacrifice-zones-inflation [https://perma.cc/7YPV-V7X6]; The Descendants Project, Inclusive La., Concerned Citizens of St. John Parish & Ctr. for Const. Rts., The Afterlife of Black Enslavement: Environmental Racism and the Desecration of Black History in Louisiana (2022), https://ccrjustice.org/sites/default/files/attach/2022/07/ENVIRONMENTAL%20RACISM%20CERD%20SHADOW%20REPORT%202022.7.18%20%5BFINAL%5D_0.pdf [https://perma.cc/XDW2-JL5G].

[42] Saidiyah Hartman coined this term to describe the ways in which slavery continues to leave an imprint on today's society. *See* Saidiyah Hartman, Lose Your Mother: A Journey Along the Atlantic Slave Route 6 (2008).

the Thirteenth Amendment to stop or at least limit speech suppression.[43] This solution places power in the hands of people directly impacted by speech suppression laws by permitting them to bring enforcement actions rather than waiting on Congress to legislate.

In a post-*Students for Fair Admissions*[44] landscape where the Supreme Court of the United States has called into question race-based claims and the Fourteenth Amendment's efficacy in blunting the legacies of slavery,[45] the Thirteenth Amendment holds important promise.[46] To borrow a phrase from Kenji Yoshino, "[s]queezing law is often like squeezing a balloon."[47] That is, when the courts shut down one area of doctrine, the commitments expressed there often shift into another area of doctrine, rather than squeezing out of constitutional jurisprudence altogether.[48] As Fourteenth Amendment-based opportunities to address racial harms shrink, Thirteenth Amendment-based opportunities are expanding.

Thirteenth Amendment arguments can attack the legacies of slavery, including suppression of racial justice advocacy, and protect Black and non-Black speakers resisting racial inequality.[49] As an additional benefit, the Thirteenth Amendment—unlike the Fourteenth Amendment—can address actions taken by private actors, rather than only state actors.[50] The Supreme Court may even be more open to Thirteenth Amendment claims than to Fourteenth Amendment claims. Indeed, during oral argument in *Students for Fair Admissions*—which struck down Harvard University's and the University of North Carolina's

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43 *See infra* Sections I.B, V.A.

44 Students for Fair Admissions v. President & Fellows of Harv. Coll., 600 U.S. 181 (2023).

45 *See* Karen Thompson, *The End of Affirmative Action Is as American as Chattel Slavery*, ACLU N.J. (July 13, 2023, at 09:15 ET), https://www.aclu-nj.org/en/news/end-affirmative-action-american-chattel-slavery [https://perma.cc/T4XU-JGEB] ("This outcome [of striking down affirmative action and ending educational institutions' ability to consider an applicant's race] . . . confirmed that the current Supreme Court majority has . . . a complete willingness to detach constitutional promises of equal protection from the legacy of slavery . . . ."); Archer, Dividing Lines, *supra* note 23, at 184 ("The . . . Supreme Court has made a long-standing, though historically misguided, reading of the Equal Protection Clause as requiring colorblindness. . . . [The Clause was] designed to eradicate slavery and its vestiges and challenge . . . racial subjugation. The Court has also restricted efforts to redress what it has called societal discrimination.").

46 *See generally* Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 748 (2011) ("Over the past decades, the Court has systematically denied constitutional protection . . . . These cases signal the end of equality doctrine as we have known it. [H]owever, [this] should not be conflated with the end of protection for subordinated groups.").

47 *Id.*

48 *Id.*

49 *See infra* Section I.B (explaining that the Thirteenth Amendment addresses the legacies of slavery in its many forms, and as such its protections extend to both Black and non-Black people).

50 *See infra* Part I.

affirmative action programs as Fourteenth Amendment violations[51]—Justice Brett Kavanaugh delineated between using impermissible *race-based categorizations* versus *status of (former) enslavement*.[52] He then suggested that "a benefit to descendants of" enslaved people would not arise to an unconstitutional "race-based" effort, unlike the affirmative action programs at issue.[53] Of course, practically, the institution of slavery depended upon a "racialized caste system . . . centrally tied to race."[54] Given, however, the Court's hostility to addressing *race*-based harms against people of color—but a corresponding openness to approving "benefit[s]" based on the effects of *enslavement*—attacking racialized speech suppression efforts as a Thirteenth Amendment badge and incident of slavery may prove a more viable legal tactic than a Fourteenth Amendment racial discrimination claim.

Academics have previously examined how the Reconstruction period informs First Amendment interpretations[55] and have discussed the long history of racist censorship efforts.[56] They have argued for expanding the Thirteenth Amendment to regulate new contexts such as gang statutes,[57] limitations on labor organizing,[58] retaliation against pro-equality speakers in the workplace,[59] and more.[60] Mainstream legal academia, however, has yet to draw a direct connection between the Thirteenth Amendment and what this Note calls "sacrifice zone speech suppression" (including "sacrifice zone speech laws"), a subset of anti-protest efforts and laws aimed at silencing dissent in sacrifice zones specifically.

This Note aims to fill that gap. It does so by providing two solutions under the Thirteenth Amendment. First and foremost, this Note offers as its main prescription a litigation pathway: Under Section 1 of the Thirteenth Amendment, *private litigants* can challenge sacrifice zone speech

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51 Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 230 (2023).

52 *See* David Leonhardt, *The Hard Question of Affirmative Action and Slavery*, N.Y. Times (May 1, 2023), https://www.nytimes.com/2023/05/01/briefing/supreme-court.html [https://perma.cc/8K9G-6597].

53 *Id.*

54 Equal Just. Initiative, Slavery in America: The Montgomery Slave Trade (2018), https://eji.org/report/slavery-in-america [https://perma.cc/RSG7-ERNF].

55 *See, e.g.*, Carter, *The Second Founding*, *supra* note 40.

56 *See, e.g.*, Katherine Hessler, *Early Efforts to Suppress Protest: Unwanted Abolitionist Speech*, 7 B.U. Pub. Int. L.J. 186, 194–97, 205–07, 209–15 (1998).

57 *See* Fareed Nassor Hayat, *Abolish Gang Statutes with the Power of the Thirteenth Amendment: Reparations for the People*, 70 UCLA L. Rev. 1120, 1120 (2023).

58 James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 Rutgers L. Rev. 941, 961 (1999).

59 *See* Carter, *The Thirteenth Amendment and Pro-Equality Speech*, *supra* note 40, at 1855.

60 *See, e.g.*, Neal Kumar Katyal, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 Yale L.J. 791, 792 (1993) (arguing that forced prostitution violates the Thirteenth Amendment's prohibition against slavery and involuntary servitude).

suppression as a badge, incident, or relic of slavery, even in the absence of congressional legislation. Second, this Note offers a legislative fix: Under Section 2 of the Thirteenth Amendment, *Congress* can legislate against sacrifice zone speech suppression as a badge, incident, or relic of slavery.

The Note proceeds in four parts. Part I surveys Thirteenth Amendment jurisprudence. Part II traces the relationship between current speech suppression efforts and their forebears—specifically, speech suppression efforts aimed at Black communities and abolitionists before and after the Civil War. Part II thus excavates a historical link between the silencing of abolitionists and the silencing of racial justice activists today. Part III then describes the phenomenon of sacrifice zones, examples of community pushback against their proliferation, and current efforts to squash opposition to this dissent. Part IV explicates why existing First Amendment and Fourteenth Amendment doctrines do not adequately protect against this encroachment on speech—in large part because neither Amendment reaches private conduct and because neither sufficiently guards against discriminatory impact on pro-racial justice speech or speakers. These shortcomings in the existing doctrine make a new solution paramount. Finally, Part V concludes by arguing that the Thirteenth Amendment can serve as this new solution by barring sacrifice zone speech suppression—including recent anti-protest laws, private silencing efforts, and related endeavors to suppress speech.

I
Thirteenth Amendment Jurisprudence

> *"One hundred and sixty years after its ratification, we are invoking the [Thirteenth] [A]mendment . . . . Our ancestors cannot rest, and neither will we until our rights as living descendants and the rights of our deceased ancestors are finally granted."*
>
> —Joy Banner, 2025[61]

This Section lays out the basic doctrinal tenets governing the Thirteenth Amendment to the Constitution, which—although seminal—has seen limited use.[62] Ratified on December 6, 1865, the Thirteenth Amendment formally abolished slavery in the United States and became the first of the three "Reconstruction Amendments."[63]

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[61] Joy Banner, *160 Years After the Ratification of the 13th Amendment, We Are Suing to Free Our Ancestors.*, LinkedIn (July 11, 2025), https://www.linkedin.com/pulse/160-years-after-ratification-13th-amendment-we-suing-banner-ph-d--obx5c [https://perma.cc/N8BW-ZFWG].

[62] *See* Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 Colum. L. Rev. 1459, 1460–70 (2012).

[63] *See 13th Amendment to the U.S. Constitution: Abolition of Slavery (1865)*, *supra* note 36. The phrase "Reconstruction Amendments" refers to the Thirteenth, Fourteenth,

A. Passage of the Thirteenth Amendment

The Thirteenth Amendment provides:

> *Section 1.* Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> *Section 2.* Congress shall have power to enforce this article by appropriate legislation.[64]

The text of Section 1 outlaws involuntary labor by its own force without need for additional congressional action, with one major loophole.[65] Section 2 grants Congress the power to enforce Section 1 through additional legislation.[66] Moreover, the Supreme Court explained in the *Civil Rights Cases* in 1883 that Congress has the authority not only to legislate against slavery or involuntary servitude itself but also to "pass all laws necessary and proper for abolishing *all badges and incidents of slavery* in the United States."[67] How closely the Thirteenth Amendment's self-executing provision—Section 1—aligns with the badges-and-incidents interpretation of the congressional enforcement provision—Section 2—has engendered much debate.[68] What, precisely, constitutes a badge or incident of slavery has also spawned intense contestation.[69]

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and Fifteenth Amendment to the U.S. Constitution, which the states ratified after the Civil War. *See Civil Rights and Reconstruction*, HIST. SOC'Y OF THE N.Y. CTS., https://history.nycourts.gov/democracy-teacher-toolkit/civil-rights-and-reconstruction [https://perma.cc/BQ8T-ZEP3].

64 U.S. CONST. amend. XIII.

65 *See* Deborah N. Archer, *It's Been 50 Years Since America's Last Real Update to Its Constitution. We Asked Seven Writers and Legal Scholars What They Think Needs Amending Next.*, N.Y. TIMES (Aug. 4, 2021), https://www.nytimes.com/interactive/2021/08/04/opinion/us-constitution-amendments.html [https://perma.cc/56XL-8LBF] ("[T]he 13th Amendment outlawed slavery with one critical exception: as 'a punishment for crime.' In the constitutional amendment that finally freed enslaved people and recognized their full humanity, there should have been no exceptions.").

66 U.S. CONST. amend. XIII, § 2.

67 The Civil Rights Cases, 109 U.S. 3, 28 (1883) (emphasis added); *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) ("[T]he Enabling Clause . . . clothed 'Congress with the power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.'" (quoting *The Civil Rights Cases*, 109 U.S. at 28)).

68 *See infra* Section I.B.

69 *See infra* Section I.C.

B. Judicial Interpretation of the Thirteenth Amendment's Two Provisions

In the *Civil Rights Cases*, the Supreme Court narrowly construed the Thirteenth Amendment. While holding that Congress's power under Section 2 extended to legislation addressing slavery *and* its badges and incidents, it also ruled that neither segregation nor race-based denials of access to public accommodations arose to such a badge or incident.[70] In subsequent cases, the Court decreed that the Thirteenth Amendment only abolished chattel slavery or literal involuntary servitude.[71] Because of these aggressive early efforts to inhibit rights expansion after the Civil War, for the first century of its existence, the Thirteenth Amendment "largely lay dormant."[72]

Then, in 1968, the Supreme Court reversed course on nearly a century of judicial complicity in undercutting the Thirteenth Amendment's reach.[73] It announced in *Jones v. Alfred H. Mayer Co.* that, pursuant to the Thirteenth Amendment, "Congress has the power . . . rationally to determine what are the badges and the incidents of slavery, and the authority to" legislate against these badges and incidents.[74] With these words, the Court overturned the *Civil Rights Cases*' strict Thirteenth Amendment interpretation and effectively handed Congress the responsibility of defining what it could legislate against under Section 2. Accordingly, the Court approved Congress's enactment of 42 U.S.C. § 1982, which applied to both state governments and private individuals and sought to "eliminate all racial barriers to the acquisition of . . . property."[75] After all, the Court acknowledged, "racial discrimination . . . is a relic of slavery" when it "herds men into ghettos and makes their ability to buy property turn on the color of

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[70] *The Civil Rights Cases*, 109 U.S. at 21.

[71] *See, e.g.*, United States v. Harris, 106 U.S. 629, 641 (1883) (determining that the Thirteenth Amendment "simply prohibits slavery and involuntary servitude"); Plessy v. Ferguson, 163 U.S. 537, 542 (1896) (holding that "separate but equal" doctrine did not violate the Thirteenth Amendment); Corrigan v. Buckley, 271 U.S. 323, 330 (1926) (emphasizing that the Thirteenth Amendment only reaches "condition[s] of enforced compulsory service of one to another [and] does not in other matters protect . . . individual rights").

[72] William M. Carter, Jr., *The Thirteenth Amendment and Constitutional Change*, 38 N.Y.U. Rev. L. & Soc. Change 583, 587–88 (2014) [hereinafter Carter, *The Thirteenth Amendment and Constitutional Change*] ("Notwithstanding these broad proclamations of purpose . . . for nearly a century, the Supreme Court treated the Amendment . . . with little contemporary effect . . . . *Jones* seemed to open the door to an expansive vision of constitutional authority to redress the . . . vestiges of slavery . . . . The Supreme Court . . . moved quickly to close that door.").

[73] *See* Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 J. Const. L. 1337, 1338 (2009).

[74] 392 U.S. 409, 441 (1968).

[75] *Id.* at 439.

their skin."[76] Today, appellate courts continue to rely on *Jones* as an authoritative interpretation of the Thirteenth Amendment.[77]

The *Jones* Court left as an open question whether the self-executing provision of Section 1 also abolishes the badges and incidents of slavery, rather than strictly slavery and involuntary servitude.[78] Unfortunately, post-*Jones*, lower courts have cabined Section 1 of the Thirteenth Amendment to literal slavery and involuntary servitude.[79] Lower courts have thus abandoned litigants seeking Thirteenth Amendment rights vindication through a judicial badges-and-incidents route via Section 1, despite "le[aving] the door open to appropriate congressional action" under Section 2.[80] This narrow interpretation effectively blocks plaintiffs from using the Thirteenth Amendment to litigate against badges or incidents of slavery unless Congress first gives the green light by legislating against that badge or incident.[81]

Scholars have vigorously dissented against this ungenerous reading of Section 1, citing the Amendment's text and history to argue that Section 1 outlaws slavery *and* its badges and incidents.[82] Baher Azmy, for one, has argued that "the relatively broad powers of enforcement in [S]ection 2 point to the relatively broad scope of protection afforded by [S]ection 1."[83] Some litigators have also pounced on this interpretation, bringing Thirteenth Amendment claims even in the absence of congressional legislation.[84] Although the Supreme Court itself has yet

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76 *Id.* at 442–43.

77 *See, e.g.*, United States v. Roof, 10 F.4th 314, 392 (4th Cir. 2021) ("In light of *Jones*, it is abundantly clear that the HCPA is appropriate legislation."); United States v. Hougen, 76 F.4th 805, 814 (9th Cir. 2023) ("We have no trouble concluding that [the legislation] . . . passes the deferential *Jones* test.").

78 James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. Rev. 426, 428 (2018); Carter, *The Thirteenth Amendment and Constitutional Change*, *supra* note 72, at 588; *see also* City of Memphis v. Greene, 451 U.S. 100, 125–26 (1981) ("In Jones, the Court left open the question whether § 1 of the Amendment by its own terms did anything more than abolish slavery. It is also appropriate today to leave that question open . . . .").

79 *See* Lauren Kares, Note, *The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, 80 Corn. L. Rev. 372, 380–81 (1995).

80 Carter, *The Thirteenth Amendment and Constitutional Change*, *supra* note 72, at 589.

81 *See* Kares, *supra* note 79, at 380.

82 *See, e.g.*, William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. Davis L. Rev. 1311, 1331–35, 1339, 1343–55, 1366 (2007) [hereinafter Carter, *Race, Rights, and the Thirteenth Amendment*].

83 Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 Fordham L. Rev. 981, 1017 (2002).

84 *See, e.g.*, Complaint at 134–36, Inclusive La. v. St. James Par., No. 2:23-cv-00987 (E.D. La. Mar. 21, 2023) [hereinafter *Inclusive La.* Complaint]. For disclosure, the author of this Note worked on this case as a legal intern at the Center for Constitutional Rights.

to clarify the full scope of Section 1,[85] this Note uses as a springboard the scholarship arguing for a more expansive Section 1 interpretation.

Under this view, private litigants can sue to enforce the Thirteenth Amendment, even without prior congressional approval. Such an approach allows directly impacted individuals to sue on their own without waiting for Congress to acknowledge the continuing effects of slavery. For example, just as Congress can legislate against speech suppression as a badge or incident of slavery under Section 2,[86] the jurisprudence should *also* adapt to open a private cause of action to litigants, who could then sue under Section 1 to challenge speech suppression efforts as a badge or incident of slavery. Rights extension could thus occur not only through the political process of Congress but also through private litigants' decisions to enforce the Thirteenth Amendment via the courts. This dual mechanism potentially creates misalignment by empowering both Congress to act as a democratic force and the courts to act as a counter-majoritarian force to vindicate rights; in doing so, however, the dual mechanism envisions Section 1 and Section 2 working together to fulfill as robust a vision of the Thirteenth Amendment as possible.

Adding to this vision of the Thirteenth Amendment, William Carter, Jr., has argued that "the Thirteenth Amendment also reaches beyond the descendants of the enslaved and extends . . . to eliminating the badges and incidents of slavery wherever and in whatever form they be found, even if the victim is not African-American."[87] That is, although the legacies of slavery primarily harm Black people and the descendants of enslaved people, non-Black people may also feel some of these effects, in part because "[s]lavery . . . demanded the acquiescence" of non-Black people in "[B]lack subordination."[88] The laws and customs of slavery thus punished anyone "who stood in favor of [B]lack liberty" by, for instance, limiting abolitionists' anti-slavery speech, anti-slavery religious beliefs, and anti-slavery assembly or gatherings.[89] In the context of this Note's argument, the Thirteenth Amendment therefore protects both the descendants of formerly enslaved people and others protesting against sacrifice zone creation.

Finally, the Supreme Court has not foreclosed the possibility that a disparate impact cause of action may lie under the Thirteenth

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[85] Pope, *supra* note 78, at 485 ("Today, more than a century and a half since the ratification of the Thirteenth Amendment, its meaning remains a mystery. The Supreme Court has no current position on some of the most important, first-level interpretive issues raised by the text . . . .").

[86] *See infra* Part V.

[87] Carter, *The Thirteenth Amendment and Constitutional Change*, *supra* note 72, at 585.

[88] *Id.* at 593.

[89] *Id.*

Amendment,[90] whereas other possibilities for redressing sacrifice zone speech suppression focus on more deliberate or facially obvious discrimination.[91] Indeed, scholars have argued that, because the Thirteenth Amendment serves anti-subordination principles, the Thirteenth Amendment necessitates recognizing disparate impacts.[92] Therefore, an action violates the Thirteenth Amendment when it furthers subordination and the legacies of slavery, whether intentionally or not.[93]

C. Meaning of "Badges and Incidents" of Slavery

As unclear as the sweep of Section 1 remains, the precise meaning of "badges and incidents" or "relics" of slavery—which courts have recognized *at least* Section 2 encompasses—stands on perhaps equally unsure footing.

While the *Civil Rights Cases* Court introduced the phrase "badges and incidents of slavery" to Thirteenth Amendment doctrine, the ideas of "badges of slavery" and "incidents of slavery" predate this judicial decision.[94] One scholar has explained that "incident of slavery" developed before the Thirteenth Amendment's passage as a legal term of art referring to "any legal right or restriction that necessarily accompanied the institution of slavery," including "public laws that applied in . . . states" that legalized slavery.[95]

Meanwhile, "badge of slavery" appeared in common usage before 1883 as a rhetorical and imprecise term that "refers to indicators, physical or otherwise," of enslaved or subordinated status.[96] Before the Thirteenth Amendment's passage, the phrase most often referred to skin color; after, it evolved into a term of art also encompassing the legal

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[90] *Id.* at 591–92 (first citing Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 390 & n.17 (1982) ("We need not decide [as a general matter] whether the Thirteenth Amendment itself reaches practices with a disproportionate effect as well as those motivated by discriminatory purpose . . . ."); and then citing City of Memphis v. Greene, 451 U.S. 100, 128–29 (1981) ("To decide the narrow constitutional question presented by this record we need not speculate about the sort of impact on a racial group that might be prohibited by the [Thirteenth] Amendment itself. We merely hold that the impact [in this case] . . . does not reflect a violation of the Thirteenth Amendment.")).

[91] *See infra* Section V.C.

[92] *See* Mahmet K. Konar-Steenberg, *Root and Branch: The Thirteenth Amendment and Environmental Justice*, 19 NEV. L.J. 509, 529 (2018).

[93] *Id.*; Bruce D. Pernell, *The Thirteenth Amendment and Equal Educational Opportunity*, 39 YALE L. & POL'Y REV. 420, 475–76 (2021); *see also* Carter, *Race, Rights, and the Thirteenth Amendment*, *supra* note 82, at 1328–29.

[94] Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 J. CONST. L. 561, 570 (2012).

[95] *Id.* at 575.

[96] *Id.*

restrictions states imposed on freedpeople[97]—including the deprivation of civil rights—and other political or civil disadvantages that states rolled out to continue oppressing Black people.[98] The meaning of the term thus shifted over time to adapt to states' changing tactics, which included the Black Codes, Jim Crow laws, and racial violence and discrimination.[99] Thus, while Reconstruction-era usages of "incidents of slavery" largely cabin that term to legal restrictions related to slavery, "badges of slavery" encompasses not only legal disadvantages but also political, civil, or social disadvantages that derive from the institution of slavery.

Additionally, the *Jones* Court used the term "relic" of slavery to refer to the racial discrimination at play in private covenants.[100] Scholars have argued that custom guides what constitutes a relic of slavery; relics, therefore, "are manifestations of slavery's structural imprint on the nation's laws, institutions, and collective American consciousness."[101] Together, the existence of badges, incidents, and relics express a commitment—legally or socially—to the institution of slavery.[102]

Though courts have not yet articulated the full scope of the badges, incidents, and relics of slavery, consistent with historical usage, the Thirteenth Amendment's Framers viewed slavery as including forms of white-supremacist-driven racial oppression that "enabled the system of slavery to prosper and persist."[103] In the debates culminating in the Thirteenth Amendment's passage, senators discussed "disenfranchisement from the civil court system, the inability to serve on criminal juries, the inability to own property, and the violation of conjugal and familial relationships" as badges and incidents of slavery.[104] They also believed that the Amendment protected "broad, natural rights that would evolve as needed to eliminate the legacy of slavery entirely."[105] Pertinent here, scholars have separately argued that freedom of speech constitutes such a natural right, at least as understood by the

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97 *Id.* at 581.

98 *Id.* at 578.

99 *Id.* at 581–82.

100 *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 442–43 (1968).

101 Darrell A.H. Miller, *The Thirteenth Amendment and the Regulation of Custom*, 112 Colum. L. Rev. 1811, 1846 (2012).

102 *Id.*

103 Carter, *The Thirteenth Amendment and Constitutional Change*, *supra* note 72, at 584; *see also* Patricia Okonta, *Race-Based Political Exclusion and Social Subjugation: Racial Gerrymandering as a Badge of Slavery*, Colum. Hum. Rts. L. Rev. 254, 260–61 (2018) ("[The Framers] understood that the system of slavery also included the foundation of customs, practices, and systemic forms of subordination that allowed white supremacy to persist and enabled slavery to flourish for centuries.").

104 Carter, *The Thirteenth Amendment and Constitutional Change*, *supra* note 72, at 586.

105 *Id.*

Framers of the Constitution.[106] Under this interpretation, the badges, incidents, and relics of slavery include anti-speech efforts—whether legislative or vigilante—that have evolved to thwart those advocating against slavery's legacies.

In contrast to this expansive historical reading of what constitutes badges, incidents, and relics of slavery, for the first century of the Thirteenth Amendment's existence, the Supreme Court severely curtailed its reach.[107] Then, in 1968, when the Supreme Court handed down its decision in *Jones*, it finally gravitated away from its rights retrenchment era, instead acknowledging Congress's authority "*rationally to determine* what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."[108] This language directs courts to scrutinize Congress's Section 2 legislation using a deferential "minimum rationality standard," in contrast to the onerous burdens courts have placed on Section 1 claims.[109] Thus, while Congress has great leeway to determine what constitutes a badge or incident of slavery, courts have constructed "a considerable barrier to plaintiffs seeking to vindicate Thirteenth Amendment-based rights . . . in the absence of specific congressional authorization."[110] While aggrandizing congressional power, courts have diminished the power of private litigants to seek redress and to use the judicial system to shape a national legal understanding of slavery's badges and incidents.

This concern becomes especially pertinent considering that Congress has seldom exercised its Thirteenth Amendment authority,[111] despite its "almost unlimited power to protect individual rights" under Section 2.[112] This Thirteenth Amendment power includes congressional authority to regulate the badges and incidents of slavery that private actors reproduce.[113] Still, despite a troubling overall lack of Section 2 legislation, Congress has recently relied on the Thirteenth Amendment in several recent significant acts: the Church Arson Prevention Act of 1996[114] and

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106 *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 269 (2017).

107 *See* Carter, *The Thirteenth Amendment and Constitutional Change*, *supra* note 72, at 587.

108 *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) (emphasis added).

109 Kares, *supra* note 79, at 378.

110 *Id.* at 380.

111 Carter, *The Thirteenth Amendment and Constitutional Change*, *supra* note 72, at 589.

112 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-15, at 926 (3d ed. 2000).

113 *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 (1968).

114 Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392 (invoking Thirteenth Amendment power to prohibit racially motivated attacks on religious institutions).

the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009.[115]

In passing the Church Arson Prevention Act, Congress indicated that it was exercising its powers under both the Commerce Clause and Section 2 of the Thirteenth Amendment: "Congress has authority, *pursuant to [S]ection 2 of the 13th [A]mendment* to the Constitution, *to make actions of private citizens* motivated by race, color, or ethnicity that interfere with the ability of citizens to hold or use religious property without fear of attack, *violations of Federal criminal law*."[116] Although litigation efforts defending the Church Arson Prevention Act lack robust Thirteenth Amendment analysis—focusing instead on Congress's Commerce Clause powers[117]—Congress has at least indicated a willingness to flex its Thirteenth Amendment muscles.

Meanwhile, litigation over the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act *has* generated vigorous Thirteenth Amendment discussion in the federal courts of appeals.[118] Section 249(a)(1) of this legislation provides for federal criminal prosecution of hate crimes based on race, color, religion, or national origin.[119] In passing section 249(a)(1), Congress declared that "the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage . . . [and] were enforced . . . through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry."[120] Accordingly, "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude."[121] All seven federal appellate courts to address this legislation (including

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115 Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, div. E, 123 Stat. 2835 (relying on Thirteenth Amendment enforcement power to expand federal hate crimes protection).

116 Church Arson Prevention Act of 1996 § 2(6), 110 Stat. at 1392 (emphasis added).

117 *See, e.g.*, United States v. Grassie, 237 F.3d 1199, 1208 (10th Cir. 2001) (upholding Church Arson Prevention Act under the Commerce Clause and declining to justify it under the Thirteenth Amendment); United States v. Corum, 362 F.3d 489 (8th Cir. 2004) (stating that even if the Act was motivated by religious purposes, it has, and should be reviewed for, a secular purpose).

118 *See, e.g.*, United States v. Diggins, 36 F.4th 302, 306–11, 313–15 (1st Cir. 2022); United States v. Nelson, 277 F.3d 164, 180–86, 189–91 (2d Cir. 2002); United States v. Roof, 10 F.4th 314, 390–95 (4th Cir. 2021); United States v. Cannon, 750 F.3d 492, 499–505 (5th Cir. 2014); United States v. Metcalf, 881 F.3d 641, 644–45 (8th Cir. 2018); United States v. Hougen, 76 F.4th 805, 814–16 (9th Cir. 2023); United States v. Hatch, 722 F.3d 1193, 1197–206 (10th Cir. 2013).

119 Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009, sec. 4707, § 249(a)(1), 123 Stat. at 2838–39 (creating 18 U.S.C. § 249(a)(1)).

120 *Id.* § 4702(7), 123 Stat. at 2836 (codified at 34 U.S.C. § 30501(7)).

121 *Id.*

the First,[122] Second,[123] Fourth,[124] Fifth,[125] Eighth,[126] Ninth,[127] and Tenth Circuits[128]) have reaffirmed a judicial commitment to *Jones*'s broader Thirteenth Amendment interpretation and have upheld the legislation under Congress's Thirteenth Amendment powers.

In *United States v. Cannon*, for example, the Fifth Circuit—today recognized as likely the most conservative federal appellate court in the country[129]—observed that "[u]nder our Thirteenth Amendment jurisprudence, we must respect Congress's determination unless it lacks a rational basis," particularly because "the definition of badge has broadened over time."[130] In representative reasoning that the Fifth Circuit quoted,[131] the Tenth Circuit has explained:

> *Congress could rationally conclude* that physically attacking a person of a particular race because of animus toward or a desire to assert superiority over that race is a badge or incident of slavery. . . . *Congress could conceive* that modern racially motivated violence communicates to the victim that he or she must remain in a subservient position, unworthy of the decency afforded to other races.[132]

Other federal courts have employed similar reasoning in upholding the Shepard-Byrd Act, confirming the federal judiciary's willingness to give Congress great deference in determining what falls under the category of badges and incidents.[133]

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122 *Diggins*, 36 F.4th at 306–11.

123 *Nelson*, 277 F.3d at 183–86, 190–91.

124 United States v. Roof, 10 F.4th 314, 391–92 (4th Cir. 2021).

125 United States v. Cannon, 750 F.3d 492, 500–02, 505 (5th Cir. 2014).

126 United States v. Metcalf, 881 F.3d 641, 644–45 (8th Cir. 2018).

127 United States v. Hougen, 76 F.4th 805, 814–15 (9th Cir. 2023).

128 United States v. Hatch, 722 F.3d 1193, 1195 (10th Cir. 2013).

129 Kimberly Strawbridge Robinson, *Conservative Fifth Circuit Is an Outlier for Supreme Court*, Bloomberg L. (Jan. 20, 2025, at 04:45 ET), https://news.bloomberglaw.com/us-law-week/conservative-fifth-circuit-is-an-outlier-for-supreme-court [https://perma.cc/VV6V-H9ZQ] (calling the Fifth Circuit "the nation's most conservative appeals court," "the source of some of the most conservative judicial outcomes," "the go-to court for conservatives seeking friendly judges," and "a magnet for judge shopping").

130 *Cannon*, 750 F.3d at 501 (alteration in original).

131 *Id.* at 501–02.

132 *Hatch*, 722 F.3d at 1206 (emphasis added).

133 *See, e.g.*, United States v. Diggins, 36 F.4th 302, 309 (1st Cir. 2022) ("Racial subjugation through physical violence was indispensable to maintaining slavery."); United States v. Nelson, 277 F.3d 164, 190 (2d Cir. 2002) (recognizing the connections "between American slavery and private violence and . . . between post-Civil War efforts to return freed slaves to a subjugated status and private violence directed at interfering with and discouraging the freed slaves' exercise of civil rights in public places" and concluding that "[the legislation] falls comfortably within Congress's [Thirteenth Amendment powers]" (alteration in original)); United States v. Roof, 10 F.4th 314, 392 (4th Cir. 2021) ("In light of *Jones*, . . . the HCPA is appropriate legislation. To prove otherwise, Roof would need to show that Congress acted

Furthermore, this congressional leeway "delegate[s] the determination of constitutional rights to the shifting political process."[134] This delegation implies not only that Congress has broad powers under the Thirteenth Amendment but also that the content of badges and incidents may change with time as racism adapts and manifests in new ways. Arguably, under the view that Section 1 permits litigants to challenge the badges and incidents of slavery,[135] courts should recognize a shifting view of badges and incidents when litigants sue under that provision.

Indeed, despite Congress's so-far limited use of the Thirteenth Amendment, along with an overall lack of successful affirmative claims under Section 1,[136] academics and advocates have pushed for its extension into a variety of contexts.[137] For example, scholars have argued that badges and incidents of slavery include racial gerrymandering,[138] racial profiling,[139] gang statutes,[140] the modern institution of policing,[141] constraints on labor organizing,[142] laws prohibiting offensive speech,[143] governmentally approved symbols

irrationally in deeming racially motivated violence a badge or incident of slavery, but over a century of sad history puts the lie to any such effort."); United States v. Metcalf, 881 F.3d 641, 645 (8th Cir. 2018) ("As did the Tenth Circuit . . . we too conclude that Congress rationally determined that racially motivated violence constitutes a badge and incident of slavery." (citing *Hatch*, 722 F.3d at 1201, 1206)); United States v. Hougen, 76 F.4th 805, 814 (9th Cir. 2023) ("We have no trouble concluding that [the legislation] . . . passes the deferential *Jones* test.") (alteration in original)).

134 Kares, *supra* note 79, at 380.

135 *See supra* Section I.A.

136 *See* William M. Carter, Jr., *The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery*, 71 Md. L. Rev. 21, 26 (2011) ("[T]here have been very few cases where courts have accepted the badges and incidents of slavery theory of the Thirteenth Amendment.").

137 *See, e.g.*, *id.* at 21 ("The Thirteenth Amendment was intended to eliminate the institution and legacy of slavery. Having accomplished the former, the Amendment has rarely been extended to the latter. The Thirteenth Amendment's full scope therefore remains unrealized."); Carter, *The Thirteenth Amendment and Constitutional Change*, *supra* note 72, at 593 ("I believe that a robust Thirteenth Amendment jurisprudence directly furthers Professor [Derrick] Bell's legacy by bringing to light uncomfortable truths about lingering systemic subordination and forcing us to address them.").

138 *See* Okonta, *supra* note 103, at 257, 259, 295.

139 *See* William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 Harv. C.R.-C.L. L. Rev. 17, 20–22 (2004).

140 *See* Hayat, *supra* note 57, at 1129–31.

141 *See* Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. Rev. 1108, 1110–11 (2020).

142 *See* Pope, *supra* note 58, at 961–63.

143 *See* Michael A. Cullers, *Limits on Speech and Mental Slavery: A Thirteenth Amendment Defense Against Speech Codes*, 45 Case W. Rsrv. L. Rev. 641, 654–57 (1995).

of racial superiority,[144] forced prostitution,[145] and—perhaps most importantly for this Note's purposes—retaliation against pro-equality speech in the workplace.[146] This Note builds on that scholarship by proposing another extension of the meaning of badges and incidents: suppression of speech in sacrifice zones.

II
Tracing the Roots of Racialized Speech Suppression

"The more they said there was no hope, the more something in me riled up. . . . The people in the community spoke up. That was victory to me."

—Sharon Lavigne, 2021[147]

Freedom of speech has long enjoyed a close correlation with the advancement of human rights, civil rights, and equality.[148] Conversely,

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144 *See* Edward H. Kyle, *Symbolism and the Thirteenth Amendment: The Injury of Exposure to Governmentally Endorsed Symbols of Racial Superiority*, 25 Mich. J. Race & L. 77, 84, 107–08 (2019).

145 Katyal, *supra* note 60, at 792.

146 *See* Carter, *The Thirteenth Amendment and Pro-Equality Speech*, *supra* note 40, at 1856–57.

147 Goldman Environmental Prize, *Sharon Lavigne, 2021 Goldman Environmental Prize, United States*, at 01:52–01:56, 02:44–02:48 (YouTube, June 15, 2021), https://youtube/Fua8lwqYByQ?si=Sle6uy9D6VvWQdwi&t=112 (on file with the New York University Law Review) (discussing environmental justice advocate Sharon Lavigne's fight to stop the construction of a plastics manufacturing plant in St. James Parish, Louisiana).

148 *See, e.g.*, Emerson Sykes, *Free Speech, Academic Freedom, and Racial Justice: An ACLU Lawyer's Perspective*, 20 Hastings Race & Poverty L.J. 3, 16 (2023) ("I, for one, do this [free speech and First Amendment] work . . . because . . . I've seen that the only way to bring about change is if you protect space for people to voice their concerns and you limit the government's ability to silence and censor them."); Carter, *The Second Founding*, *supra* note 40, at 1085 ("The organized abolitionist movement asserted that full and equal freedom of speech was essential to the fight against slavery."); Nadine Strossen, *The Interdependence of Racial Justice and Free Speech for Racists*, 1 J. Free Speech L. 51, 53 (2021) ("On the other hand, equal liberty and justice for all cannot be fully realized without robust free speech rights, which are especially essential for advocating the rights of racial, ethnic, and other minority groups, including political dissidents."); Ta-Nehisi Coates, The Message 82 (2024) ("[V]iolence redounded to the benefit of the protestors because it confirmed their critique. . . . White supremacists . . . had learned a lesson: The war might be raging in the streets, but it could never be defeated there, because what they were ultimately fighting was the word."); Baher Azmy, *Five Key Ways a Legal Strategy Can Help a Movement*, *in* The Revolution Will Not Be Litigated 81, 81 (Katie Redford & Mark Gevisser eds., 2023) ("[S]ocial change . . . comes from social and political movements that center communities most impacted by an injustice as the agents of the change they demand."); Arthur Kinoy, Rights on Trial: The Odyssey of a People's Lawyer 153 (1983) ("[W]ithout the willingness of people to stand up and fight, there can be no successful struggle to enforce the constitutional guarantees of equality and justice."). *But cf.* Mary Anne Franks, Fearless Speech: Breaking Free from the First Amendment 13 (2024) ("[I]n practice, [the First Amendment] has been

a perennial and storied connection exists between racial oppression and speech suppression.[149] Today, the high-profile nature of recent anti-critical infrastructure protests has snowballed into increased media attention on and criticism of efforts to quash anti-sacrifice zone dissent.[150] These modern silencing tactics spring from a long lineage of racialized speech suppression in the United States.[151] Parallel to how advocates have explained that "the location of sacrifice zones in Black, Brown, Indigenous and poor communities is a direct consequence of the nation's history of the theft of Indigenous land, slavery, Jim Crow segregation, and racial capitalism,"[152] so, too, do today's silencing campaigns in sacrifice zones connect with a lengthy legacy of stifling anti-slavery and anti-racial subordination speech.

This Part traces those roots. Section II.A first discusses pre-abolition tactics that the federal government, state legislatures, and private actors employed to smother the speech of those agitating for the abolition of slavery. Section II.B recounts the history of anti-speech efforts aimed particularly at Black people during the Reconstruction era, which lasted from the end of the Civil War in 1865 until 1877, when federal troops withdrew from the Southern states.[153] This history reveals that the drafters of the Thirteenth Amendment understood the perils of censorship and recognized the ways in which speech suppression connected directly to slavery. Finally, Section II.C delves briefly into

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deployed most visibly and effectively in the service of powerful antidemocratic interests: misogyny, racism, religious fundamentalism, and corporate self-interest."); Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 YALE L.J.F. 685, 691–700 (2018) (arguing that the First Amendment has "not provide[d] as much protection to racial dissent as it [has] to white supremacist gatherings" and that "civil rights speech has always been chilled by authorities more than white supremacist speech, with only short intervals of interest convergence providing an occasional exception").

149 *See* Heeba Momen, *Dean's Lecture Series on Race and Discrimination Closes School Year with Discussion on Free Speech and Equality Featuring Jacob Mchangama*, VAND. UNIV. L. SCH. (Apr. 24, 2024, at 09:06 ET), https://law.vanderbilt.edu/deans-lecture-series-on-race-and-discrimination-closes-school-year-with-discussion-on-free-speech-and-equality-featuring-jacob-mchangama [https://perma.cc/HD22-9ESB] ("As the 19th century progressed, the contradiction between slavery and the ideals of free speech became increasingly evident . . . . In response, legislative efforts aimed at stifling dissent emerged, exemplified by Andrew Jackson and John C. Calhoun's attempts to pass laws restricting speech to shield White slave owners from criticism.").

150 *See, e.g.*, *infra* Section III (referencing and discussing media reporting on sacrifice zones).

151 *See infra* Sections II.A–C.

152 Donaghy et al., *supra* note 41, at 3.

153 *Reconstruction*, HISTORY.COM (May 28, 2025), https://www.history.com/articles/reconstruction [https://perma.cc/WWK5-LNB8]; Sarah Pruitt, *How the 1876 Election Tested the Constitution and Effectively Ended Reconstruction*, HISTORY.COM (May 28, 2025), https://www.history.com/articles/reconstruction-1876-election-rutherford-hayes [https://perma.cc/A9LD-9GC5].

the post-Reconstruction period, tracing an uninterrupted history of racialized speech suppression from before abolition until today.

A. Pre-Abolition Period

Efforts to suppress dissent against racial oppression have plagued American history.[154] For example, in 1860, Frederick Douglass delivered a speech six days after a mob disrupted an abolitionist meeting; in his oration, Douglass proclaimed, "The law of free speech . . . they trampled under foot, while they greatly magnified the law of slavery. . . . No right was deemed by the fathers of the Government more sacred than the right of speech."[155] Douglass endorsed the view that free speech functions as "the great moral renovator of society and government. . . . That, of all rights, is the dread of tyrants. It is the right which they first of all strike down. They know its power."[156]

Indeed, before the Civil War and the passage of the Thirteenth Amendment, state and local governments passed a multitude of laws aimed at curbing abolitionist speech.[157] For instance, states passed "slave codes" as early as the 1600s to "stifle the ever-present fear of an uprising" by banning enslaved people's ability to congregate.[158] Then, after Nat Turner led a rebellion of enslaved people in 1831, states passed a flurry of laws prohibiting Black people from owning books,[159] attending gatherings,[160] holding religious meetings,[161] preaching to crowds of more than five people,[162] learning to read or write,[163] and even living in the state if they were free.[164] Another paradigmatic "slave code" in Mississippi imposed sentences of "imprisonment at hard labor for up to twenty-one

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154 *See, e.g.*, Hessler, *supra* note 56, at 186, 210 (describing early abolitionist activism and governmental efforts to suppress protest).

155 Frederick Douglass, *A Plea for Free Speech in Boston (1860)*, Nat'l Const. Ctr., https://constitutioncenter.org/the-constitution/historic-document-library/detail/frederick-douglass-a-plea-for-free-speech-in-boston-1860 [https://perma.cc/B2FW-SWSR] (last visited July 24, 2025).

156 *Id.*

157 *See* Hessler, *supra* note 56, at 185–86 ("The state and federal governments went to great lengths to restrict the message of the abolitionists. Abolitionist speech, political speech which would receive First Amendment protection today, was first restricted and later prohibited by the Southern states. Similar attempts . . . were made by [Northern] states and by the federal government.").

158 Hansford, *supra* note 148, at 692.

159 *Id.*

160 *Id.*

161 *Id.*

162 *Nat Turner Hanged; Hundreds of Black People Killed by White Mobs Angry About Revolt Against Slavery*, Equal Just. Initiative, https://calendar.eji.org/racial-injustice/nov/11 [https://perma.cc/ESY2-UXKK] (last visited July 24, 2025).

163 *Id.*

164 *Id.*

years to the death penalty" for "using language having a tendency to promote discontent" among freedpeople or "insubordination" among enslaved people.[165] Meanwhile, local governments in Southern cities such as Montgomery and Raleigh, criminalized "disrespect[ing] white people."[166]

The federal government also played an active and complicit role in muting abolitionist speech. In 1835, for example, then-President Andrew Jackson voiced support for a federal postal suppression law restricting the circulation of abolitionist literature from the North to the South; meanwhile, Southern states proposed that Northern states censor abolitionist literature "within their own borders."[167] Just a year later, in 1836, Congress imposed a rule preventing legislators from raising or receiving petitions about slavery and abolition, in the hopes of preventing abolitionist ideas from achieving prominence on the national stage.[168]

Private actors, too, silenced Black people's speech and other abolitionist speech through vigilante violence.[169] Enslavers "plundered" enslaved people "of their 'bodies and minds, their time and liberty and earnings, *their free speech and rights of conscience*, *their right to acquire knowledge*, and property, and reputation.'"[170] Speech suppression extended to not only enslaved people but also others—including non-Black people—who supported abolition.[171] Indeed,

> [s]lavery infringed abolitionists' freedom of speech in opposition to slavery, freedom of worship when support of abolition was based on religious principles, freedom of assembly to gather in opposition to [B]lack enslavement, and freedom of travel to places where support of abolition was punished by law and by private action, and endangered their economic liberty and personal safety.[172]

Enslaved people themselves considered speech suppression a crucial part of enslavement and the perpetuation of slavery.[173] For example, Frederick Douglass called the denial of free speech a core component

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165 Carter, *The Second Founding*, *supra* note 40, at 1084 (quoting J. Clay Smith, Jr., *Justice and Jurisprudence and the Black Lawyer*, 69 Notre Dame L. Rev. 1077, 1107 (1994)).

166 Archer, Dividing Lines, *supra* note 23, at 130.

167 *See* Hessler, *supra* note 56, at 205–06.

168 *Id.* at 186.

169 *See* Carter, *The Second Founding*, *supra* note 40, at 1084–85.

170 Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. Rev. 307, 324 (2004) (emphasis added).

171 *See* Carter, *The Thirteenth Amendment and Constitutional Change*, *supra* note 72, at 593.

172 *Id.*

173 *See* Carter, *The Second Founding*, *supra* note 40, at 1094–95.

of the slave system.[174] Additionally, the abolitionist David Walker's 1829 work *Walker's Appeal* shows how enslaved people viewed the denial of free speech as a fundamental part of the slave system,[175] by including in the "list of the cruelties inflicted on us" the fact that "[t]hey . . . keep[] us [enslaved people] from all source[s] of information."[176] Indeed, in 1829, when Walker mailed his pamphlet to states in the South, Georgia's legislature responded by imposing the death penalty for the "circulation of pamphlets of evil tendency among our domestics,"[177] revealing how states strove to silence abolitionist sentiments.

As such, the federal government, state governments, and private actors employed speech suppression tactics to stymie the fight for abolition, freedom, and racial equality.

B. Reconstruction Era

The trend of speech suppression continued through the passage of the Thirteenth Amendment and the Reconstruction Era, a legacy of the anti-abolition movement that blunted the ambitions of the Thirteenth Amendment's Framers. As Carter has argued, the Thirteenth Amendment's Framers "repeatedly identified the private suppression of abolitionist speech as one of the evils of the slave system."[178] During the debates over the Reconstruction Amendments, Senator James Harlan also expressed his view that "another incident of [slavery] is the suppression of the freedom of speech and of the press . . . ."[179]

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[174] *Id.* at 1095 (highlighting that Douglass said an enslaved person "had no power to exercise his will—his master decided for him . . . *when and to whom he should speak*" (quoting *Slavery and America's Bastard Republicanism: An Address Delivered in Limerick, Ireland, on 10 November 1845*, Limerick Rep., Nov. 11, 1845, *reprinted by* Frederick Douglass Papers Project, https://frederickdouglasspapersproject.com/s/digitaledition/item/7954 [https://perma.cc/YX6J-7U25]).

[175] *See id.*

[176] *See id.* at 1094 (quoting David Walker, Walker's Appeal in Four Articles; Together with a Preamble, to the Coloured Citizens of the World, but in Particular, and Very Expressly, to Those of the United States of America, Written in Boston, State of Massachusetts, September 28, 1829 (3d ed. 1830), *reprinted by* Documenting the Am. S., https://docsouth.unc.edu/nc/walker/walker.html [https://perma.cc/H3XY-67YX]).

[177] Jacob Mchangama, *White Man's Burden*, *in* Free Speech: A History from Socrates to Social Media 233, 235 (2022) (quoting Michael Kent Curtis, Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History 121 (2000)).

[178] *See* Carter, *The Thirteenth Amendment and Pro-Equality Speech*, *supra* note 40, at 1862.

[179] *Id.* at 1863 (alteration in original) (citing Cong. Globe, 38th Cong., 1st Sess. 1439 (1864) (statement of Sen. James Harlan)).

Nevertheless, during the Reconstruction Era, states continued to pass laws criminalizing and targeting the speech of Black individuals and others advocating for equality, and private actors persisted in their own (related) efforts to suppress speech. Groups such as the Ku Klux Klan used violence to silence Black people and non-Black abolitionists,[180] and white mobs' racial violence against Black people left many too fearful to report racially motivated attacks.[181]

Additionally, the Black Codes—which most Southern states enacted following Reconstruction[182]—instituted formalized oppressive restrictions on Black people's speech. For instance, the Mississippi Black Codes punished Black people for "assembling themselves together, either in the day or night,"[183] "seditious speeches, insulting gestures, language, or acts," "disturbance of the peace," preaching "without a license from some regularly organized church," and "lewd, wanton, or lascivious persons, in conduct or speech."[184] When someone could not pay the fines the Black Codes imposed, state authorities often forced that person into labor, keeping alive a system of involuntary servitude despite the Thirteenth Amendment's passage.[185]

In response to the Black Codes, Congress passed legislation striking at these attempts to maintain a racial caste system, presumably including attempts to stifle speech. Congress enacted the Civil Rights Act of 1866 under Section 2 of the Thirteenth Amendment, designating such laws badges of slavery[186] and declaring all people born in the United States to be citizens possessing certain rights.[187] During the debates over the Act, members of Congress indicated their intent to "destroy all these discriminations" that manifested

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180 *See Southern Violence During Reconstruction*, PBS, https://www.pbs.org/wgbh/americanexperience/features/reconstruction-southern-violence-during-reconstruction [https://perma.cc/L53Y-9TQ7].

181 *Reconstruction in America Chapter 3: Documenting Reconstruction Violence*, Equal Just. Initiative, https://eji.org/report/reconstruction-in-america/documenting-reconstruction-violence/#34-documented-mass-lynchings-during-the-reconstruction-era [https://perma.cc/9YM5-E6Z6] (last visited July 23, 2025).

182 *Black Codes*, History.com (Mar. 28, 2025), https://www.history.com/topics/black-history/black-codes [https://perma.cc/UUG4-UV4B].

183 *Black Codes*, Miss. Encyclopedia, https://mississippiencyclopedia.org/entries/black-codes [https://perma.cc/QZS9-FF5D] (last visited July 23, 2025).

184 *Black Codes of Mississippi*, Teaching Am. Hist., https://teachingamericanhistory.org/document/black-codes-of-mississippi [https://perma.cc/W953-G28D] (last visited July 23, 2025).

185 *See* Nusrat Choudhury & Orion Danjuma, *The Supreme Court Rightly Cited the Black Codes in Ruling Against Excessive Fines, Fees, and Forfeitures*, ACLU (Feb. 25, 2019), https://www.aclu.org/news/racial-justice/supreme-court-rightly-cited-black-codes-ruling-against [https://perma.cc/5DGX-8AMD].

186 *See* Kares, *supra* note 79, at 377 & n.20.

187 *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

through the Black Codes in order give effect to the Thirteenth Amendment.[188] Although then-President Andrew Johnson vetoed the Act, Congress overrode the veto[189] by a 33–15 vote in the Senate and a 122–41 vote in the House.[190] In response to "private gangs" that tried to prevent Black people and their allies from exercising their rights to vote, assemble, and speak, Congress also passed the Enforcement Acts of 1870 and the Ku Klux Klan Act of 1871, criminalizing private conspiracies to violate rights guaranteed under the Thirteenth, Fourteenth, and Fifteenth Amendments.[191] With this legislation, Congress implicitly indicated that it considered speech suppression laws as badges, incidents, or relics of slavery.

Thus, during the Reconstruction period, governments and private actors continued to deploy silencing tactics to maintain a status quo of racial subjugation—a trend that carried over from before abolition and the end of formal slavery in the United States.

C. Post-Reconstruction Period Until the Present

Following Reconstruction, individual white supremacists and state governments continued to limit the speech of Black people and racial justice advocates. For example, in 1892 when Ida B. Wells wrote a newspaper article about the lynching of her friend Thomas Moss and racial discrimination in Memphis, a white mob set fire to the newspaper's office.[192] Although Wells continued to speak out about lynchings,[193] this incident underscores how private actors played a pivotal role in stifling pro-equality speech, especially as the Ku Klux Klan "operated with impunity."[194]

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188 Kares, *supra* note 79, at 377 n.20 (quoting Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 387 (1982)).

189 *See Civil Rights Act of 1866, "An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication*," Nat'l Const. Ctr., https://constitutioncenter.org/the-constitution/historic-document-library/detail/civil-rights-act-of-1866-april-9-1866-an-act-to-protect-all-persons-in-the-united-states-in-their-civil-rights-and-furnish-the-means-of-their-vindication [https://perma.cc/V78P-J3GQ] (last visited July 23, 2025).

190 *Civil Rights Act of 1866*, Ballotpedia, https://ballotpedia.org/Civil_Rights_Act_of_1866 [https://perma.cc/MN6D-4D8M] (last visited July 23, 2025).

191 *See* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801, 1841 & n.149 (2010).

192 Arlisha R. Norwood, *Ida B. Wells-Barnett*, Nat'l Women's Hist. Museum (2017), https://www.womenshistory.org/education-resources/biographies/ida-b-wells-barnett [https://perma.cc/A2VX-8R3K].

193 *See* John R. Vile, *Ida B. Wells*, Free Speech Ctr. (July 2, 2024), https://firstamendment.mtsu.edu/article/ida-b-wells [https://perma.cc/Y4UD-AJN4].

194 Mchangama, *supra* note 177, at 243.

During this time, "the First Amendment long remained a dead letter" in regulating state and local laws that curtailed free speech.[195] Indeed, Southern states maintained Jim Crow laws from the late 1800s until the 1960s.[196] These laws formalized racial apartheid and segregation,[197] and they included restrictions on pro-equality speech. Mississippi, for one, criminalized "printing, publishing or circulating matter urging or presenting arguments in favor of social equality or intermarriage."[198] Moreover, while official law enforcement enforced Jim Crow segregation, "armed white mobs" and "vigilantes" simultaneously policed the system.[199]

After the end of Jim Crow, federal and state governments continued to silence racial justice-oriented speech. In 1968, Congress passed the Anti-Riot Act after the protests following Martin Luther King, Jr.'s assassination, and state and local governments followed suit in efforts to silence Black activists.[200] The Anti-Riot Act, co-sponsored by segregationist Senator Strom Thurmond, targeted Black and Communist leaders.[201]

At least one scholar has drawn a direct connection between speech suppression efforts before the Civil War and those in the mid-twentieth century, noting that in the 1960s, "the spiritual descendants of the abolitionists" faced "state efforts to suppress them—efforts Southern states used with such success before the Civil War."[202] Although the tactics of suppressing pro-equality speech have adapted over time, they continue to manifest today in restrictions on and criminalization of anti-sacrifice zone speech and demonstrations, which Black, Indigenous, and other people of color often lead.[203] American Civil Liberties Union

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195 *Id.*

196 *See Jim Crow and Segregation*, Libr. of Cong., https://www.loc.gov/classroom-materials/jim-crow-segregation [https://perma.cc/8ZEQ-5UD6] (last visited July 23, 2025).

197 *See Jim Crow Laws*, PBS, https://www.pbs.org/wgbh/americanexperience/features/freedom-riders-jim-crow-laws [https://perma.cc/QWT3-LXDT] (last visited July 23, 2025).

198 *Legislating Jim Crow*, Am. Fed'n of Tchrs., https://www.aft.org/ae/summer2004/cottrol_diamond_ware_sb1 [https://perma.cc/SLH7-QUD2] (last visited July 23, 2025).

199 *See Jim Crow and Segregation*, *supra* note 196.

200 Sravya Tadepalli, *Anti-Riot Laws Aren't About Curbing Violence—They're About Stifling Civil Dissent*, Prism (Oct. 18, 2021), https://prismreports.org/2021/10/18/anti-riot-laws-arent-about-curbing-violence-theyre-about-stifling-civil-dissent [https://perma.cc/ZF3S-V5J8].

201 *See* Recent Case, 134 Harv. L. Rev. 2614, 2619 (2021).

202 Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 Nw. U. L. Rev. 785, 870 (1995).

203 *See* Courtney Lindwall, *The Environmental Justice Movement*, NRDC (Aug. 22, 2023), https://www.nrdc.org/stories/environmental-justice-movement [https://perma.cc/58TJ-PE3K] (describing the history of protests by Black and Indigenous activists against the

(ACLU) attorney Vera Eidelman has observed, "This isn't a new phenomenon . . . . Legislators and government actors have always tried to miscast protesters as rioters, or terrorists, or saboteurs. Rather than listen to the messages of their constituents, they try to clamp down."[204] Squashing dissent and racial-justice-oriented speech thus carries a long legacy, one that traces back to the American institution of slavery and efforts to prolong it.

III
"Sacrifice Zones" and Speech Suppression Today

> *"Freedom of speech is in jeopardy—not just in Louisiana, not just in North Dakota. It's straight across this nation. And we need every person available—mind, body, and soul—to stand up for basic human rights."*
>
> —Waniya Locke, 2025[205]

The pattern has become all too familiar: Communities of color across the country fall prey to the greed of the fossil fuel industry,[206] the ambitions of the prison industrial complex,[207] or the prospect of economic returns for others.[208] Thus, the continuous creation of sacrifice zones persists. The "father of environmental justice" Robert

disproportionate placement of waste infrastructure and environmental toxins in their communities).

204 Jeremy Miller, *Republicans Want to Make Protesting a Crime*, Sierra (May 25, 2021), https://www.sierraclub.org/sierra/republicans-want-make-protesting-crime [https://perma.cc/R7HE-DREX].

205 Ctr. for Const. Rts., *supra* note 1, at 36:06–36:21.

206 *See, e.g.*, Dermansky, *supra* note 7.

207 *See, e.g.*, Julian Rose, *Making State Enemies*, Scalawag, https://scalawagmagazine.org/2023/05/state-enemies-cop-city [https://perma.cc/8LBF-DG2X] (last visited Aug. 3, 2025); Eva Dickerson & Rehana Lerandeau, *"The Atlanta Way": Driving Ecological Destruction & Expanding the Prison Industrial Complex*, Critical Resistance (Aug. 1, 2024), https://criticalresistance.org/resources/the-atl-way-issue-41 [https://perma.cc/V679-TKD6].

208 *See, e.g.*, Archer & Schottenfeld, *supra* note 24 (manuscript at 5) ("Predominantly Black communities have long been systematically segregated and sequestered, then intentionally sacrificed, to feed America's growth and expansion."); Reynard Loki, *Sacrifice Zones': The New 'Jim Crow' That's Sickening and Killing People of Color*, resilience (Oct. 13, 2023), https://www.resilience.org/stories/2023-10-13/sacrifice-zones-the-new-jim-crow-thats-sickening-and-killing-people-of-color [https://perma.cc/R6ST-9VTQ].

Bullard[209] describes sacrifice zones as "often 'fenceline communities' of low-income and people of color, or 'hot spots' of chemical pollution where residents live immediately adjacent to" polluting industries or military bases and operations.[210] In its best light, creating sacrifice zones entails a balancing of interests where the "health and safety of people in these communities is . . . effectively sacrificed" for other purposes.[211] More bluntly, sacrifice zones emerge when racist practices, such as redlining, corral people of color into one area; "[t]hen when corporations are looking for places to site facilities, they go to where people lack the political power to stop them," which usually means those same communities of color and low-income communities,[212] given that "decades of voting rights discrimination, political marginalization, and systematic disinvestment [have now] made them the path of least resistance."[213] Today, leaders and activists are speaking out to halt these destructive operations.[214]

In response to this outcry, since 2017, twenty-one states[215]—often in collaboration with the fossil fuel industry[216]—have enacted draconian laws designed to deter protests,[217] heightening the importance of an effective legal response to sacrifice zone speech suppression, including sacrifice zone anti-protest laws. This Part provides background on sacrifice zones in the United States and describes the recent outpouring of laws and other efforts targeting anti-critical infrastructure protestors.

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209 *See Dr. Robert D. Bullard: Father of Environmental Justice*, Dr. Robert D. Bullard, https://drrobertbullard.com [https://perma.cc/3FJP-XT9T] (last visited July 23, 2025).

210 *See Sacrifice Zones*, *supra* note 20 (quoting Lerner, *supra* note 20, at 3).

211 *Sacrifice Zones 101*, *supra* note 21.

212 *Id.*; *see also* Archer, Dividing Lines, *supra* note 23, at 34 (describing how policies such as redlining allowed highway builders to "target[] neighborhoods with less political power to fight eminent domain and challenge the destruction of their homes, businesses, and communities").

213 Archer & Schottenfeld, *supra* note 24 (manuscript at 5).

214 *See infra* Section III.A.

215 *See US Protest Law Tracker*, Int'l Ctr. for Not-for-Profit L., https://www.icnl.org/usprotestlawtracker/?location=&status=enacted,enacted_with_improvements&issue=6&date=&type=legislative [https://perma.cc/2XFP-X6ZX] (last visited July 24, 2025).

216 *See* Beaumont & Lakhani, *supra* note 18.

217 *See* Mueller-Hsia, *supra* note 18.

A. Sacrifice Zones in the United States

Cancer Alley.[218] Cop City.[219] Standing Rock.[220] The Alabama Black Belt.[221] Maunakea.[222] Across the country, Black communities, Indigenous communities, and other communities of color are told they must bear the burdens of pollution,[223] cancer,[224] increased mortality rates,[225] disease,[226]

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218 *Fight for Life*, *supra* note 22 ("In 2022, the UN Special Rapporteur on Human Rights and the Environment identified Cancer Alley as one of several global 'sacrifice zones,' among the most polluted and hazardous places on earth, illustrating egregious human rights violations.").

219 Hannah Love & Manann Donoghoe, *Atlanta's 'Cop City' and the Relationship Between Place, Policing, and Climate*, Brookings (Sep. 21, 2023), https://www.brookings.edu/articles/atlantas-cop-city-and-the-relationship-between-place-policing-and-climate [https://perma.cc/38ES-6GVS] (describing Cop City in Atlanta as a sacrifice zone); *see also* Brandi Collins-Calhoun & Senowa Mize-Fox, *A Dual Threat: Cop City's Danger to Both Climate and Reproductive Justice*, NCRP (Apr. 11, 2024), https://ncrp.org/2024/04/a-dual-threat-cop-citys-danger-to-both-climate-and-reproductive-justice [https://perma.cc/W3FJ-DADF] ("Cop City is but one example of sacrifice zone.").

220 *See* Kate Aronoff, *Standing Rock Celebrates as Army Halts Construction of the Dakota Access Pipeline*, In These Times (Dec. 4, 2016), https://inthesetimes.com/article/a-peoples-victory-at-standing-rock [https://perma.cc/PQM6-QAML] (quoting Honor the Earth National Campaigns Director Tara Houska's comment on the halted construction of the Dakota Access Pipeline: "Let this send a message around the world: we are still here. We are empowered. We are not sacrifice zones.").

221 *See* Sarah Whites-Koditschek, Bennet Goldstein & Dennis Pillon, *Dumping in Alabama: Wisconsin Cleanup Shifts Toxic PFAS Burden to Alabama Black Belt*, AL.com (Oct. 29, 2023), https://www.al.com/news/2023/10/wisconsin-cleanup-shifts-toxic-pfas-burden-to-alabama-black-belt.html [https://perma.cc/6UE9-98BN] (quoting community leader Linda Munoz as saying, "We have one of the poorest counties in Alabama and probably in the United States. So it just isn't fair for us to be the sacrifice zone.").

222 *See* Nikki Sanchez, *A Guide to Mauna Kea: What It Is, Why It's Happening, and Why We Should All Be Paying Attention*, Photographers Without Borders (Oct. 20, 2019), https://www.photographerswithoutborders.org/online-magazine/a-guide-to-mauna-kea-what-it-is-why-its-happening-and-why-we-should-all-be-paying-attentionnbsp [https://perma.cc/KV5V-8RUY] (describing the proposed construction of the Thirty Meter Telescope at Maunakea as part of the "overdevelopment, ecological mismanagement and use of the territory as a military testing sacrifice zone").

223 *See* Ben Jealous, *Highway Robbery and Environmental Injustice in Alabama*, Sierra (Mar. 17, 2024), https://www.sierraclub.org/sierra/highway-robbery-and-environmental-injustice-alabama [https://perma.cc/C4JV-N2Z2].

224 *See Sacrifice Zones 101*, *supra* note 21 ("No surprise, individuals who live constantly exposed to high levels of pollution often end up facing worse health outcomes and long-term ailments. Especially if they're children, with Black children particularly vulnerable . . . [a]nd groundwater contamination can result in diseases including cancer and organ damage.").

225 *See* Damien Gayle, *Millions Suffering in Deadly Pollution 'Sacrifice Zones', Warns UN Expert*, The Guardian (Mar. 10, 2022, at 10:30 ET), https://www.theguardian.com/environment/2022/mar/10/millions-suffering-in-deadly-pollution-sacrifice-zones-warns-un-expert [https://perma.cc/7M36-VCW8].

226 *See* Norma Jean Schue Kreilein, *Sacrifice Zones—A Personal and Cultural Perspective*, AAP Voices Blog (Dec. 20, 2024), https://www.aap.org/en/news-room/aap-voices/sacrifice-zonesa-personal-and-cultural-perspective [https://perma.cc/XUP8-498B] ("Because of

and displacement[227]—that their lives and homes will be sacrificed[228] and destroyed[229] in favor of industrial development,[230] resource extraction,[231] or increased militarization,[232] all of which contribute to sacrifice zone creation.[233] Often, the resulting disparate effects amount to environmental racism.[234] As Reverend Dr. William J. Barber II once said of Louisiana's Cancer Alley: "The same land that held people captive through slavery is now holding people captive through this environmental injustice and devastation."[235]

Community members, activists, and academics have documented the connection between racial injustice and sacrifice zone creation.[236] They

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pollution and environmental hazards in sacrifice zones, infants living there have an increased incidence of . . . asthma and respiratory illness.").

227 *See* Archer, Dividing Lines, *supra* note 23, at 55 ("[P]eople who were forced to leave their homes and communities were not the only ones displaced. . . . [M]any more were left to live in their shadow. They, too, were displaced, living in a community that was . . . now dominated by a highway. . . . [T]hey were left feeling isolated, unmoored, and discarded."); *see also* Archer & Schottenfeld, *supra* note 24 (manuscript at 1–2) (describing how the "burdens of development . . . all fall disproportionately on Black communities" and how "the law typically fails to recognize the loss of home and community—experienced both by those forced to relocate but also by those who remain in hollowed-out communities"); Marcelo Lopes de Souza, *'Sacrifice Zone': The Environment-Territory-Place of Disposable Lives*, 56 Cmty. Dev. J. 220, 224 (2021) ("But capitalist enterprises, particularly those that see those spaces as potential sacrifice zones, also exert territoriality; moreover, their pressures (pollution, threats, etc.) can contribute to de-territorialize people.").

228 *See, e.g.*, Archer, *Transportation Policy*, *supra* note 25, at 2126 ("Black people have been intentionally sacrificed to feed America's growth and expansion.").

229 *See* Dermansky, *supra* note 7 ("The pipeline is one more risk to our community that we really don't need. . . . My prayer is that they look at the situation the community is facing—and not just how much money the state is making, but instead, look at how many people are being destroyed.").

230 *See* Samantha Layden, *Land of the Free? Environmental Racism and Its Impact on Cancer Alley, Louisiana*, Keele Univ., https://www.keele.ac.uk/extinction/controversy/canceralley [https://perma.cc/48Q5-CD7X] (last visited July 19, 2025) (describing how petrochemical companies purposely seek out Black communities to construct toxic facilities).

231 *See Protections and Investments for Sacrifice Zones and Environmental Justice Communities*, Climate Just. All., https://climatejusticealliance.org/protections-and-investments-for-sacrifice-zones [https://perma.cc/6D26-C6UW] (last visited July 19, 2025) ("The extractive economy has sacrificed communities in exchange for accumulating wealth, resources, and power.").

232 *See Sacrifice Zones*, *supra* note 20.

233 *Id.*

234 *Id.*

235 Clint Smith, How the Word Is Passed 58 (2021).

236 *See, e.g.*, Archer, *"White Men's Roads," supra* note 23, at 1265 ("Often under the guise of 'slum removal,' federal and state officials purposely targeted Black communities to make way for massive highway projects. In states around the country, highways disproportionately displaced Black households and cut the heart and soul out of thriving Black communities . . . ."); Archer & Schottenfeld, *supra* note 24 (manuscript at 7); *Sacrifice Zones 101*, *supra* note 21 ("[S]acrifice zones arise due to racist practices like redlining . . . [which] limit families of color from living outside of limited areas . . . . [W]hen corporations [seek facility sites], they go . . . where people lack the political power to stop them – which more often than not

have also stated that, in the United States, sacrifice zones often function as a legacy of slavery.[237] For example, Deborah Archer's work uncovers how new discriminatory tools—often wielded by the state—have replaced formal slavery, a "system of theft";[238] these tools include "the theft of Black land and property."[239] Other scholars describe the "location of sacrifice zones in Black, Brown, Indigenous and poor communities" as "a direct consequence of the nation's history of the theft of Indigenous land, slavery, Jim Crow segregation, and racial capitalism."[240]

The history of planting sacrifice zones in majority-Black communities or other communities of color traces back at least to the Jim Crow era.[241] A Human Rights Watch report about Cancer Alley—in which many interviewees identified as direct descendants of enslaved people—articulates how, during Jim Crow, "'Free Towns' founded by formerly enslaved people . . . were taken over by industry, their residents pushed or forced out, and largely erased."[242] Fossil fuel and petrochemical operations went "largely unregulated" in spewing carcinogens, pollutants, and toxins.[243]

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are home to racial minority groups . . . ."); Collins-Calhoun & Mize-Fox, *supra* note 219 ("[W]here the training facility is being built, '71–88% of the population is Black . . . .' Removal of the forested land . . . means removal of one more sanctuary for populations already pushed to the margins . . . ."); Reynard Loki, *'Sacrifice Zones': How People of Color Are Targets of Environmental Racism*, Yale F. Religion & Ecology (Apr. 7, 2021), https://fore.yale.edu/news/%E2%80%98Sacrifice-zones%E2%80%99-How-people-of-color-are-targets-of-environmental-racism [https://perma.cc/7XLU-YKQL] ("One harsh reality of this systemic racism is the existence of 'sacrifice zones' . . . . Designated by corporations and policymakers, these areas are a product of environmental racism, the systemic social, economic and political structures . . . that place disproportionate environmental health burdens on specific communities based on race and ethnicity."); Layden, *supra* note 230 ("Many [petrochemical plants] have been [in Cancer Alley] since the 1940s, purposely seeking out [B]lack communities to move into. A 1987 study by Benjamin Chavis found that race was the most powerful factor for where toxic facilities would be located.").

237 *See, e.g.*, Loki, *supra* note 208 ("Ayana Byrd wrote that environmental racism 'has been called the new Jim Crow and continues to target Black, Latinx, Native, Asian, and other communities of color, subjecting them to generations of poor health outcomes.'").

238 Archer, *Reparations*, *supra* note 24, at 344.

239 Deborah N. Archer, *Classic Revisited: How Racism Persists in Its Power*, 120 Mich. L. Rev. 957, 958 (2022).

240 Donaghy et al., *supra* note 41, at 3 ("In the U.S. context, the location of sacrifice zones in Black, Brown, Indigenous and poor communities is a direct consequence of the nation's history of the theft of Indigenous land, slavery, Jim Crow segregation, and racial capitalism.").

241 *See, e.g.*, *Inclusive La.* Complaint, *supra* note 84, at 41–58; *see also* Archer, *"White Men's Roads," supra* note 23, at 1269 ("The officials who built the interstate highway system in the 1950s and 1960s were often motivated explicitly by racism and placed little value on Black lives, Black families, and Black communities.").

242 *Fight for Life*, *supra* note 22.

243 *Id.*

For instance, Mossville, Louisiana, stood as one of the first communities of free Black people in the South and persisted as a safe haven for Black families during Reconstruction and through the 1960s.[244] Post-World War II, however, the petrochemical industry moved into a nearby area.[245] Once a "rich community" of over five hundred families, only fifty families remain in Mossville because of the carcinogenic chemicals that petrochemical giants pump into the air, soil, and water.[246] These staggeringly high toxic emissions, combined with one company's home buyout program that residents have described as "forced displacement,"[247] have pushed the community to the brink of erasure.[248] Today, Concerned Citizens of Mossville resists this "[a]partheid legacy of displacing [B]lack communities and poisoning those who remain."[249] Similarly, in West Virginia's Chemical Valley, the town of Institute began as a Free Town and served as a refuge for freedpeople in West Virginia.[250] In the mid-1900s, though, chemical plants crept into the area and subjected Black residents to pollution, leaks, and explosions.[251] In South Carolina, the impending construction of the Conway Perimeter Road threatens the predominantly Black community of Sandridge, which freedpeople founded after the Civil War "as a close-knit community for people who had been enslaved."[252] Cancer Alley, Mossville, Chemical Valley, and Sandridge demonstrate how sacrifice zones function as part of slavery's afterlife.

Most importantly, directly impacted residents have shed light on how sacrifice zones operate as part of slavery's afterlife today. Residents of Cancer Alley, for instance, have said that "'a legacy of slavery and white supremacy in Louisiana and St. James Parish specifically' forced 'plaintiffs' members [to] reside in some of the most

244 Heather Rogers, *Erasing Mossville: How Pollution Killed a Louisiana Town*, The Intercept (Nov. 4, 2015, at 14:50 ET), https://theintercept.com/2015/11/04/erasing-mossville-how-pollution-killed-a-louisiana-town [https://perma.cc/B9JF-H2M6].

245 *Id.*

246 Maryum Jordan, *The World Is Watching How a Petrochemical Giant Denies Its Neighbors Justice*, EarthRights Int'l (Dec. 14, 2023), https://earthrights.org/blog/the-world-is-watching-how-a-petrochemical-giant-denies-its-neighbors-justice [https://perma.cc/MEL2-U7YK].

247 *Id.*

248 Rogers, *supra* note 244.

249 Jordan, *supra* note 246.

250 Ken Ward, Jr., *How Black Communities Become "Sacrifice Zones" for Industrial Air Pollution*, ProPublica (Dec. 21, 2021, at 05:00 ET), https://www.propublica.org/article/how-black-communities-become-sacrifice-zones-for-industrial-air-pollution [https://perma.cc/SVH5-GVGB].

251 *Id.*

252 Archer, Dividing Lines, *supra* note 23, at 98.

polluted, toxic—and lethal—census tracts in the country.'"[253] Those same residents—members of RISE St. James, Inclusive Louisiana, and Mount Triumph Baptist Church—have sued their parish council, alleging Thirteenth Amendment, Fourteenth Amendment, and federal and state law violations.[254] Myrtle Felton, a community leader and co-founder of Inclusive Louisiana along with Gail LeBoeuf and Barbara Washington,[255] has emphasized, "It's time to end this discriminatory and harmful land use system in St. James Parish that has roots in slavery and its afterlife, and is now the cause of public health emergencies."[256] In 2022, Louisiana organizations the Descendants Project, Inclusive Louisiana, and Concerned Citizens of St. John Parish—along with the Center for Constitutional Rights—submitted a report to the United Nations Committee on the Elimination of Racial Discrimination, affirming that the treatment of Cancer Alley as a sacrifice zone constitutes a "symptom[] of a society that has intentionally failed to acknowledge and repair the historic injustice of slavery, settler colonialism, and genocide."[257] The report also asserts that "[t]he political decisions to deliberately target historic Black communities for the siting of toxic industry facilities and to destroy the burial grounds of enslaved people are the 'afterlife' of chattel slavery and the continued systemic dehumanization of people of African descent."[258] This lived experience underscores how the institution of slavery continues to manifest in the racially discriminatory land use decisions of today. Accordingly, dissent against sacrifice zones amounts to dissent against the legacies of slavery.

B. Dissent Against Sacrifice Zone Creation

For decades now, targeted communities, grassroots organizations, and civil rights advocates have organized together and joined forces against sacrifice zone creation.[259] Today, communities across the country continue to demand justice and accountability. Recent years have witnessed an explosion of protests nationwide as activists marshal

253 *Fight for Life*, *supra* note 22 (alteration in original).

254 *See Inclusive La.* Complaint, *supra* note 84, at 134–35.

255 Amanda Heckert, *Champions of Conservation: A Grassroots Force*, Garden & Gun, Oct./Nov. 2022, https://gardenandgun.com/articles/a-grassroots-force [https://perma.cc/YQA2-M3JP].

256 *In Landmark Case*, *supra* note 13.

257 The Descendants Project et al., *supra* note 41, at 2.

258 *Id.*

259 Yessenia Funes, *The Father of Environmental Justice Exposes the Geography of Inequity*, Sci. Am. (Sep. 19, 2023), https://www.scientificamerican.com/article/the-father-of-environmental-justice-exposes-the-geography-of-inequity [https://perma.cc/R8PW-MFDM].

the power of collective dissent to advocate for the health and safety of their communities.

Recent examples of community resistance to sacrifice zone creation abound. In Cancer Alley, Louisiana, residents and environmental justice groups such as RISE St. James, the Louisiana Bucket Brigade, the Descendants Project, Concerned Citizens of St. John Parish, and 350 New Orleans have engaged in countless demonstrations against the siting of heavy industry in their parishes.[260] Additionally, protestors in Louisiana—led in large part by Anne White Hat (a Sicangu Lakota Water Protector),[261] Cherri Foytlin (a Black Indigenous Din'e frontline activist),[262] and the Indigenous-led L'Eau Est La Vie Camp[263]—have organized for years against the Bayou Bridge Pipeline, which runs through Cancer Alley.[264] In the early 2010s, Indigenous leaders protested in front of the White House to stop the construction of the Keystone XL pipeline from Canada to the Gulf Coast.[265] From 2014 to 2019, Native Hawaiian "protectors," or "kia'i,"[266] opposed the Thirty Meter Telescope, a $1.4 billion scientific project planned for construction

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260 *See, e.g.*, Nicole Greenfield, *Advocates Are Sparking a Revolution in Louisiana's "Cancer Alley"*, NRDC (Nov. 10, 2022), https://www.nrdc.org/stories/advocates-are-sparking-revolution-louisianas-cancer-alley [https://perma.cc/DG5C-66SN]; Kayla Benjamin, *'Our Lives Are at Stake': Protestors from Louisiana's Cancer Alley March to the White House*, Wash. Informer (Oct. 26, 2022), https://www.washingtoninformer.com/our-lives-are-at-stake-protesters-from-louisianas-cancer-alley-march-to-the-white-house [https://perma.cc/4KLD-6ZG8]; Sharon Johnson & Stephen Smith, *Historically Black Town in Louisiana's Cancer Alley Is Divided Over a Planned Grain Terminal*, AP News (July 13, 2024, at 16:39 ET), https://apnews.com/article/historic-black-town-louisiana-grain-cancer-alley-8b456dcadb08d1335bc26d044952f291 [https://perma.cc/H8XW-FMY6]; Tegan Wendland, *Coalition Marches from New Orleans to Baton Rouge to Protest Industry*, WWNO (Oct. 15, 2019, at 15:11 CT), https://www.wwno.org/2019-10-15/coalition-marches-from-new-orleans-to-baton-rouge-to-protest-industry [https://perma.cc/53QZ-UL3F].

261 *See Anne White Hat*, Ctr. for Const. Rts., https://ccrjustice.org/Anne%20White%20Hat [https://perma.cc/2GQC-Y5TQ] (last visited July 20, 2025).

262 *Keynotes*, *supra* note 3.

263 *See* L'Eau Est La Vie, *supra* note 7.

264 *See Bayou Bridge Pipeline Protestors*, *supra* note 6.

265 *First Nations and American Indian Leaders Arrested in Front of White House to Protest Keystone XL Pipeline*, Lakota Times (Sep. 21, 2011), https://www.lakotatimes.com/articles/first-nations-and-american-indian-leaders-arrested-in-front-of-white-house-to-protest-keystone-xl-pipeline [https://perma.cc/KB22-FBVP]; *see also* Dallas Goldtooth, *Keystone XL Would Destroy Our Native Lands. This Is Why We Fight*, Guardian (Jan. 9, 2015, at 11:43 ET), https://www.theguardian.com/commentisfree/2015/jan/09/keystone-xl-would-destroy-native-lands-we-fight [https://perma.cc/ZJ7B-6PGT] (explaining Indigenous resistance to the Keystone XL pipeline).

266 *See* Trisha Kehaulani Watson-Sproat, *Why Native Hawaiians Are Fighting to Protect Maunakea from a Telescope*, Vox (July 24, 2019, at 12:30 ET), https://www.vox.com/identities/2019/7/24/20706930/mauna-kea-hawaii [https://perma.cc/RU5W-WH6P].

on the sacred site of Maunakea mountain,[267] the surrounding area, and nearby islands, which some have described as a "military testing sacrifice zone."[268] Since 2016, Water Protectors—led by the Anishinaabe people, Indigenous women, and Two-Spirit leaders—have marched and rallied to "Stop Line 3," a pipeline project in Minnesota that threatens Anishinaabe homelands and sacred waterways.[269] Virginia and West Virginia saw massive actions of civil disobedience in 2023 against the Mountain Valley pipeline and its attendant harms.[270] Since 2023, forest defenders, Indigenous leaders, and the Stop Cop City movement, alongside the displaced Muscogee Creek Tribe,[271] have protested the construction of Cop City in Atlanta—a new training center for police and firefighters—on top of the sacred Weelaunee Forest.[272] And, in North Dakota, Indigenous Water Protectors and thousands of others in the Sacred Stone Camp have dissented against the construction of the North Dakota Access Pipeline near the Standing Rock Sioux Reservation.[273]

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267 Meghan Miner Murray, *Why Are Native Hawaiians Protesting Against a Telescope?*, N.Y. Times (July 22, 2019), https://www.nytimes.com/2019/07/22/us/hawaii-telescope-protest.html [https://perma.cc/5JH9-FQ7Q]; Guillermo Molero, *On a Stunning Hawaiian Mountain, the Fight over Telescopes Is Nearing a Peaceful End*, NPR (July 31, 2022, 05:00 ET), https://www.npr.org/2022/07/31/1114314076/hawaii-mauna-kea-telescope-space-observatory [https://perma.cc/DV3A-TBET].

268 *See, e.g.*, Sanchez, *supra* note 222.

269 Nicole Greenfield, *The Future Has Spoken: It's Time to Shut Down DAPL and Stop Line 3*, NRDC (May 24, 2021), https://www.nrdc.org/stories/future-has-spoken-its-time-shut-down-dapl-and-stop-line-3 [https://perma.cc/MW6G-ERQX]; Osprey Orielle Lake & Katherine Quaid, *Indigenous Women Lead the Movement to Stop Line 3 Pipeline: "This Is Everything We Have"*, Ms. Mag. (May 24, 2021), https://msmagazine.com/2021/05/24/indigenous-women-stop-line-3-pipeline-enbridge [https://perma.cc/S2BE-W5XP].

270 Lakhani & Beaumont, *supra* note 29.

271 *See* Dickerson & Lerandeau, *supra* note 207.

272 *See* William Brangham, Shoshana Dubnow & Courtney Norris, *Protests Against Atlanta's 'Cop City' Continue Despite Crackdown Demonstrations*, PBS News (Nov. 17, 2023, at 18:45 ET), https://www.pbs.org/newshour/show/protests-against-atlantas-cop-city-continue-despite-crackdown-demonstrations [https://perma.cc/EDD5-GXHA]; Defend the Atlanta Forest, https://defendtheatlantaforest.org [https://perma.cc/46Q2-Q5ZA] (last visited July 20, 2025); Cara Tabachnick, *What We Know About Atlanta's "Cop City" and the Standoff Between Police and Protestors*, CBS News (Mar. 6, 2023, at 10:44 ET), https://www.cbsnews.com/news/atlanta-protests-cop-city-georgia-state-of-emergency-forest-defenders [https://perma.cc/2BMP-A3V2]; *Supporting the Movement to Stop Cop City*, Ctr. for Const. Rts. (Aug. 21, 2023), https://ccrjustice.org/supporting-movement-stop-cop-city [https://perma.cc/8HTB-SVM8].

273 *See* Greenfield, *supra* note 269; Jack Healy, *North Dakota Oil Pipeline Battle: Who's Fighting and Why*, N.Y. Times (Aug. 26, 2016), https://www.nytimes.com/2016/11/02/us/north-dakota-oil-pipeline-battle-whos-fighting-and-why.html [https://perma.cc/H4ZY-WRJ8]; *Stand with Standing Rock*, ACLU (Oct. 30, 2024), https://www.aclu.org/campaigns-initiatives/stand-with-standing-rock [https://perma.cc/V938-QRCA]; Rebecca Hersher, *Key Moments in the Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017, at 16:28 ET), https://www.

These powerful examples of protest—which have seen many forms of success[274]—highlight the importance of free speech in advancing racial justice efforts to end sacrifice zone creation, a phenomenon that often functions as part of slavery's afterlife[275] and as part of the ongoing effects of settler colonialism.[276] Evidence of this activism's power has manifested in the strength of the governmental backlash to it.[277]

C. Recent Proliferation of Efforts Targeting Anti-Critical Infrastructure Protestors

Since May 2017, at least twenty-one states have passed "critical infrastructure" laws or amendments to critical infrastructure laws targeting protests near oil and gas pipelines.[278] At first glance, these laws may not seem concerning. For instance, North Dakota's critical infrastructure law bans "caus[ing] a substantial interruption or impairment of a critical infrastructure facility" by "[i]nterfering, inhibiting, impeding, or preventing the construction or repair of a critical infrastructure facility."[279] Louisiana's critical infrastructure law,

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npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight [https://perma.cc/REY6-LSGF].

274 *See, e.g.*, *Bayou Bridge Pipeline Protestors*, *supra* note 6 (discussing how a district attorney in Louisiana declined to prosecute pipeline protestors following a lawsuit and community outrage); Seth Freed Wessler, *Developers Halt Louisiana Grain Elevator Project That Would Disrupt Black Historic Sites*, ProPublica (Aug. 9, 2024, at 10:30 ET), https://www.propublica.org/article/wallace-louisiana-greenfield-grain-elevator-black-history [https://perma.cc/P7DV-4C5Q] (reporting that a development company halted plans for a grain export facility in Louisiana after a three-year campaign led by Black community groups and quoting Joy Banner, co-founder of the Descendants Project along with her sister Jo Banner, as saying, "It is an unbelievable victory, and it shows what happens when communities fight"); Molero, *supra* note 267 (describing a state law that will transfer management authority of Maunakea to a new stewardship authority that includes local community members following years of protests).

275 *See supra* notes 237–58 and accompanying text.

276 *See, e.g.*, Rosalyn LaPier, *The Legacy of Colonialism on Public Lands Created the Mauna Kea Conflict*, High Country News (Aug. 6, 2019), https://www.hcn.org/issues/51-15/tribal-affairs-the-legacy-of-colonialism-on-public-lands-created-the-mauna-kea-conflict [https://perma.cc/D4TJ-HAFJ] ("Hawai'ian leaders have consistently stated that the demonstration at Mauna Kea . . . is about development on public lands and the Native people's right to steward those lands."); Maia Wikler & Mary Lovell, *Bayou Bridge Pipeline Meets Resistance from the L'eau Est La Vie Camp*, Teen Vogue (Oct. 16, 2018), https://www.teenvogue.com/story/bayou-bridge-pipeline-meets-resistance [https://perma.cc/T886-4UBQ] ("The industry is another incarnation of colonialism; they are cutting down trees and stealing land at the expense of life while polluting low-income, marginalized communities."); Kyle Powys Whyte (Potawatomi), *The Dakota Access Pipeline, Environmental Injustice, and U.S. Colonialism*, 19 Red Ink 154, 158 (2017) (arguing how the Dakota Access Pipeline "is an injustice of a certain settler colonial type").

277 *See infra* Section III.B.

278 *US Protest Law Tracker*, *supra* note 215; *see also* Lakhani & Beaumont, *supra* note 29.

279 N.D. Cent. Code § 12.1-21-06 (2019).

updated in 2018, similarly deems "unauthorized entry" of a critical infrastructure and "[r]emaining upon or in the premises of a critical infrastructure after having been forbidden" a felony.[280]

In theory, these laws protect critical infrastructure—such as water treatment plants, power stations, pipelines, and oil and gas facilities and equipment—from damage or trespass.[281] In practice, they impinge on speech by constraining where people can protest, immunizing motorists who injure protestors, imposing exorbitant fees on organizers of demonstrations for any costs of the protest, and defining "riot" in an overly broad fashion to criminalize greater swaths of protest activity.[282] Additionally, such legislation is "specifically designed to silence people who are poor and people who are Black or from other marginalized communities."[283]

For example, in Oklahoma, after protestors resisted the construction of the Diamond Pipeline, state legislators enacted increased penalties, including up to ten years in prison, for interfering with critical infrastructure or even "[m]erely stepping onto a pipeline easement."[284] In Georgia, the state reacted to the #StopCopCity movement by expanding which actions the state's domestic terrorism law encompasses.[285] In West Virginia, after the state passed a new critical infrastructure law designed to "punish people protesting against oil rigs, gas pipelines, dams, and other so-called critical infrastructure," law enforcement arrested and charged eight people—including six senior citizens—with misdemeanors for their participation in a river crossing demonstration.[286] And in Louisiana, the legislature amended the state's critical infrastructure law such that, arguably, people protesting near *any* pipeline could face up to five years in prison at hard labor—an ominous threat given that Louisiana possesses over 125,000 miles of oil and gas pipelines alone.[287] Indeed, a mere week after Louisiana passed these amendments, law enforcement and the Bayou Bridge Pipeline's

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280 La. Stat. Ann. § 14:61 (2024).

281 *See* Int'l Ctr. for Not-for-Profit L. Testimony, *supra* note 17, at 2 (describing how these laws often define "critical infrastructure" broadly).

282 Ashley K. Shelton, *Anti-Protest Laws Are Not About Safety, They Are About Silencing Dissent*, Truthout (Apr. 9, 2023), https://truthout.org/articles/anti-protest-laws-are-not-about-safety-they-are-about-silencing-dissent [https://perma.cc/ST7R-BC8J].

283 *Id.*

284 Kusnetz, *supra* note 5.

285 Alexander C. Kaufman, *Citing Neo-Nazi Plots Against the Grid, States Pass Laws Meant to Thwart Climate Protests*, HuffPost (Apr. 19, 2023, at 19:06 ET), https://www.huffpost.com/entry/critical-infrastructure-laws_n_643ef3f6e4b0408f3e4f73fa [https://perma.cc/B6VQ-RJ9F].

286 Lakhani & Beaumont, *supra* note 29.

287 Rachel Mipro, *Charges Dropped Against Activists Protesting Louisiana Pipeline*, La. Illuminator (July 13, 2021, at 19:14 ET), https://lailluminator.com/2021/07/13/

private security forces arrested community members boating in a public navigable waterway near a pipeline easement; law enforcement then charged the arrestees under the new law.[288] These states provide just a few of the many examples of anti-protest laws taking the nation by storm.[289]

What's more: Private companies have played an outsized role in suppressing anti-sacrifice zone speech and in trying to shut down anti-sacrifice zone movements. The American Legislative Exchange Council (ALEC)—a group whose members draft and propose legislation benefitting corporate interests[290]—has provided the model for many anti-protest laws as a response to dissent against pipelines.[291] Other private actors also often assume at least partial responsibility for passing these bills. In West Virginia, lobbyists from the oil and gas industry worked with lawmakers to draft and introduce a critical infrastructure bill in 2020.[292] Fossil fuel lobbyists exchanged similar emails with legislators in at least Utah, Idaho, Ohio, Wisconsin, and Oklahoma as part of a "nationwide strategy to deter people" from peacefully protesting against increased fossil fuel facilities in their communities.[293] In Louisiana, the president and general counsel of the Louisiana Mid-Continent Oil and Gas Association drafted amendments to the state's

charges-dropped-against-activists-protesting-louisiana-pipeline [https://perma.cc/Q2MA-AXQ7]; *see also supra* note 280 and accompanying text.

288 Mueller-Hsia, *supra* note 18.

289 *See, e.g.*, Naveena Sadasivam, *Montana, Kansas, and Arkansas Enter the Arms Race to Criminalize Protest*, Grist (May 3, 2021), https://grist.org/protest/pipeline-protest-laws-montana-kansas-arkansas [https://perma.cc/LD3H-8BK2].

290 Ctr. for Const. Rts., Dream Defs., Palestine Legal, The Red Nation & US Campaign for Palestinian Rts., ALEC Attacks 6 (2019), https://www.alecattacks.org [https://perma.cc/WP9X-H7WU].

291 *See* Int'l Ctr. for Not-for-Profit L. Testimony, *supra* note 17, at 1–2 (stating that "[t]wenty-four states have considered at least 43" industry-backed bills, and "[m]any of the bills resemble a model promulgated by" ALEC).

292 Beaumont & Lakhani, *supra* note 18.

293 *Id.*; *see also* Jamie Corey, *Fossil Fuel Industry Pushed Legislation Criminalizing Pipeline Protestors, Emails Show*, Documented (Aug. 20, 2019), https://documented.net/reporting/fossil-fuel-industry-pushed-legislation-criminalizing-pipeline-protestors-emails-show [https://perma.cc/B5VP-DGTS] (documenting communication by Valero Energy with Oklahoma's Governor's office in 2017 urging adoption of an ALEC model bill); Lee Fang, *Oil Lobbyist Touts Success in Effort to Criminalize Pipeline Protests, Leaked Recording Shows*, The Intercept (Aug. 19, 2019, at 11:50 ET), https://theintercept.com/2019/08/19/oil-lobby-pipeline-protests [https://perma.cc/6QF2-6BCJ] ("Emails . . . show efforts by the oil and gas lobby to pressure Oklahoma's governor to sign the pipeline protest legislation."); David Armiak, *Wisconsin Legislators Seek to Criminalize Climate, Environmental Protests with Latest Bill*, Exposed by CMD (Sep. 16, 2019, at 14:22 CT), https://www.exposedbycmd.org/2019/09/16/wisconsin-legislators-seek-criminalize-climate-environmental-protests-latest-bill [https://perma.cc/YNN6-4T5Y] (describing emails sent between lobbyist and a staffer for a lead sponsor of an ALEC bill in Wisconsin).

anti-protest law during construction of and concurrent backlash to the Bayou Bridge Pipeline.[294]

In addition to lobbying for and designing anti-protest bills, fossil fuel companies have initiated lawsuits against countless activists, organizations, and journalists, in what some have criticized as endeavors to censor and harass critics.[295] Protestors keenly feel these "strategic lawsuits against public participation," or SLAPP suits, which the oil and gas industry use to intimidate activists into silence.[296] For example, Energy Transfer—the owner of the controversial Dakota Access Pipeline—brought a SLAPP suit against Greenpeace,[297] a network of environmental justice organizations;[298] the trial resulted in a $660 million verdict against Greenpeace in March 2025.[299] In some cases, lobbying groups have found ways to restrict law school clinics' ability to represent clients fighting the oil and gas industry.[300]

Finally, private companies also surveil and even order the arrests of protestors.[301] During the Bayou Bridge Pipeline protests, journalist Karen Savage (who was arrested and charged under Louisiana's critical infrastructure law while reporting on the protests) documented how law enforcement officers moonlighting for private security companies arrested activists.[302] At Standing Rock, pipeline companies' private

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294 *See* Alleen Brown, *Pipeline Opponents Strike Back Against Anti-Protest Laws*, The Intercept (May 23, 2019, at 09:00 ET), https://theintercept.com/2019/05/23/pipeline-protest-laws-louisiana-south-dakota [https://perma.cc/XTL4-ADWR] ("Two lawsuits in Louisiana and South Dakota . . . are the first signs of a concerted pushback against a nationwide, industry-led effort to halt the most confrontational arm of the climate movement.").

295 Lakhani & Beaumont, *supra* note 29.

296 *Id.*

297 *See* Chang, *supra* note 30.

298 *About Us*, Greenpeace, *supra* note 30.

299 Karen Zraick, *Jury Orders Greenpeace to Pay Pipeline Company More Than $660 Million*, N.Y. Times (Mar. 19, 2025), https://www.nytimes.com/2025/03/19/climate/greenpeace-energy-transfer-dakota-access-verdict.html [https://perma.cc/9CM8-4YAV].

300 *See, e.g.*, Sara Sneath, *How Louisiana Lawmakers Stop Residents' Efforts to Fight Big Oil and Gas*, ProPublica (Feb. 7, 2020, at 14:00 ET), https://www.propublica.org/article/how-louisiana-lawmakers-stop-residents-efforts-to-fight-big-oil-and-gas [https://perma.cc/Q56W-LRDF] (detailing how Louisiana's "love affair" with industry allowed industry lobbying groups to urge the Louisiana Supreme Court to investigate the Tulane Environmental Law Clinic for representing clients who opposed industry and even convince the Louisiana Supreme Court to pass new rules restricting law student assistance to certain groups).

301 *See, e.g.*, Kusnetz, *supra* note 5.

302 *See* Karen Savage, *Louisiana Law Enforcement Officers Are Moonlighting for a Controversial Pipeline Company*, The Appeal (Aug. 28, 2018), https://theappeal.org/louisiana-police-arrest-bayou-bridge-pipeline-protesters [https://perma.cc/YG3Z-LTAA]; *see also* Kusnetz, *supra* note 5 (noting that a "private company had apparently ordered the arrests"); Mipro, *supra* note 287 (reporting that, after the Louisiana Legislature amended state law to include pipelines as critical infrastructure, some "arrests were made by law enforcement officers moonlighting for a private security company hired by Bayou Bridge Pipeline"); Miller, *supra* note 204 (citing Indigenous activist Anne White Hat as also

security forces, including TigerSwan, worked hand-in-hand with law enforcement to "terrorize water protectors"[303] and "violently crack down on a historic [I]ndigenous-led movement."[304] TigerSwan—a private military and security contractor that works in armed conflict zones—has deployed "militaristic counterterrorism tactics" against anti-pipeline protestors in North Dakota, South Dakota, Illinois, Iowa, and Texas.[305] Troublingly, TigerSwan justified these extreme measures in part by pointing to the presence of Palestinian Americans in the camp.[306] One activist surveilled by TigerSwan explained,

> As indigenous people, Palestinians stand in solidarity with other indigenous people and their right to land, water, and sovereignty. . . . To insinuate that our assumed faith is a red flag for terrorist tactics is another example of willful ignorance and the establishment's continued attempts to criminalize nonviolent protest and justify violence against it.[307]

Furthermore, at the Stop Line 3 protests, the pipeline company Enbridge paid Minnesota police $2.4 million to arrest and surveil demonstrators,[308] after lobbying for the very critical infrastructure laws police could use to arrest protestors in the first place.[309] As such, both state and private actors have attempted to sharply restrict the speech of

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attesting to officers moonlighting as private security); Complaint at 10, 23–24, White Hat v. Landry, No. 3:19-cv-00322 (M.D. La. May 22, 2019), 2019 WL 2209382 [hereinafter *White Hat* Complaint] (alleging various instances of law enforcement officers moonlighting as private security and conducting arrests in that capacity).

303 Savage, *supra* note 302; *see also* Mueller-Hsia, *supra* note 18 (stating that at Standing Rock, a private security firm consistently referred to protestors as terrorists, and law enforcement has aggressively pursued protestors, whereas the significant presence of far-right militant group provoked little reaction from law enforcement).

304 Jamil Dakwar, *Why Did a Private Security Contractor Treat Standing Rock Protestors Like 'Jihadists'?*, ACLU (June 2, 2017), https://www.aclu.org/news/free-speech/why-did-private-security-contractor-treat-standing-rock [https://perma.cc/SRR7-EMV3].

305 *Id.*

306 *Id.*

307 Alleen Brown, Will Parrish & Alice Speri, *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to "Defeat Pipeline Insurgencies,"* The Intercept (May 27, 2017, at 08:04 ET), https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies [https://perma.cc/3EUN-83S4].

308 Hilary Beaumont, *Revealed: Pipeline Company Paid Minnesota Police for Arresting and Surveilling Protestors*, The Guardian (Oct. 5, 2021, at 07:00 ET), https://www.theguardian.com/uk-news/2021/oct/05/line-3-pipeline-enbridge-paid-police-arrest-protesters [https://perma.cc/7X9X-3XD8].

309 *See* Kaylana Mueller-Hsia, *How an Oil Company Pays Police to Target Pipeline Protestors*, Brennan Ctr. for Just. (Oct. 7, 2021), https://www.brennancenter.org/our-work/analysis-opinion/how-oil-company-pays-police-target-pipeline-protesters [https://perma.cc/MC3Z-4TVD].

anti-sacrifice zone protestors, employing a variety of methods to silence those speaking out for racial justice.

IV
Shortcomings of Other Constitutional Challenges to Anti-Speech Efforts in Sacrifice Zones

> *"[W]e were David, and the companies are Goliath . . . . [T]hey're taking away our stones. . . . [O]ur chance to say that we matter. . . . We're gonna battle on . . . . I'm gonna make sure [my children] get every rock in their arsenal that's possible."*
>
> —Cherri Foytlin, 2025[310]

Existing constitutional legal avenues fail to provide a fully satisfying remedy to this sacrifice zone speech suppression, elevating the urgent need for a new cause of action. This Section discusses major challenges to pursuing relief via the First and Fourteenth Amendments, the most common avenues for challenging anti-protest laws targeting speakers who dissent against sacrifice zone creation.[311] The Thirteenth Amendment can help fill the gaps that the First and Fourteenth Amendments leave behind.[312]

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310 Ctr. for Const. Rts., *supra* note 1, at 07:27–08:47.

311 *See, e.g.*, Brown, *supra* note 294 ("Two lawsuits in Louisiana and South Dakota [whose complaints list First and Fourteenth Amendment causes of action] . . . are the first signs of a concerted pushback against a nationwide, industry-led effort to halt the most confrontational arm of the climate movement."); *Litigation Challenging New Anti-Protest Laws*, Int'l Ctr. for Not-for-Profit L. (July 2023), https://www.icnl.org/post/assessment-and-monitoring/litigation-challenging-new-anti-protest-laws [https://perma.cc/GSL5-YQ3Y] (listing six lawsuits in Florida, Louisiana, Mississippi, North Carolina, Oklahoma, and South Dakota, which challenge their respective state's law under the First and Fourteenth Amendments); *Florida Supreme Court Issues Decision Confirming that Anti-Protest Law Cannot Be Used to Prosecute Non-Violent Protestors or Bystanders*, Legal Def. Fund (June 20, 2024) [hereinafter *Anti-Protest Law Decision*], https://www.naacpldf.org/press-release/florida-supreme-court-issues-decision-confirming-that-anti-protest-law-cannot-be-used-to-prosecute-non-violent-protestors-or-bystanders [https://perma.cc/YF6K-CH3A] (describing First and Fourteenth Amendment lawsuit challenging anti-protest law in Florida); Gary D. Robertson, *Judge Upholds North Carolina's Anti-Rioting Law, Dismisses Civil Liberties Suit*, AP News (June 26, 2024), https://apnews.com/article/north-carolina-legislature-riot-lawsuit-cd525121c4a56ff846ae53835bd9849b [https://perma.cc/2SM8-S5CP] (describing dismissal of First and Fourteenth Amendment challenge to anti-protest law in North Carolina); Ken Miller, *Lawsuits Challenge Oklahoma Anti-Protest Law; Riot Charges*, AP News (June 24, 2022, at 14:01 ET), https://apnews.com/article/arrests-lawsuits-riots-oklahoma-city-0aa5c584185013df052c15a3b32c0931 [https://perma.cc/TJ7B-KDRY] (describing six Oklahomans' federal lawsuits bringing, among others, First Amendment claims).

312 *See infra* Sections IV.A–C.

A. First Amendment Shortcomings

The First Amendment provides a powerful shield for those seeking to reshape the world according to a bolder vision of justice. Indeed, it "remains the best protection for those who lack power, and for those pressing for equal treatment. It protects our ability to speak out, to organize, to associate with like-minded others, to march in the streets, and to demand change from our government."[313] Accordingly, advocates have challenged the spate of recent laws criminalizing protest under the First Amendment, often citing concerns that such laws constitute "overbroad" regulations[314]—meaning they regulate "substantial amounts of constitutionally protected speech or expression."[315]

As potent as it may be, though, the First Amendment falls short in protecting protest against critical infrastructure laws for two main reasons. First, despite the overbreadth doctrine's availability, the First Amendment does not adequately address these laws' disparate impact on certain forms of speech or on certain speakers; and second, the Amendment does not reach private actors.

The First Amendment does not sufficiently guard against seemingly innocuous laws that purport to regulate damage, trespass, or riots. The Supreme Court has "interpreted the First Amendment to prohibit—and, for the most part, to prohibit only—government actions that treat some speakers differently because of the *viewpoint* or *subject matter* of their speech, or because of other *'suspect' characteristics*, such as their institutional identity or their wealth."[316] That is, the First Amendment generally does not vigorously address disparate impact on certain speech or speakers without more.[317] Therefore, unless a court deems a law purposefully or facially discriminatory on the basis of viewpoint or content, courts will not subject the law to a demanding strict scrutiny analysis.[318] Because state legislatures style critical infrastructure laws as trespass laws that do not implicate speech at all, much less specifically target certain viewpoints or topics, these laws too often skirt

313 David D. Cole, *The ACLU Never Stopped Defending Free Speech*, The Nation (May 31, 2022), https://www.thenation.com/article/activism/aclu-free-speech [https://perma.cc/XZS6-XKJW].

314 *See* Rachel F. Moran, *Overbroad Protest Laws*, 125 Colum. L. Rev. 1197, 1255–61 (2025) (describing First Amendment overbreadth challenges to recent anti-protest laws).

315 *Id.* at 1204.

316 Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 Colum. L. Rev. 2117, 2127 (2018) [hereinafter Lakier, *Imagining an Antisubordinating First Amendment*] (emphasis added).

317 *Id.* (explaining that the Supreme Court has "insist[ed] . . . that the First Amendment poses little bar to well-intentioned government actions that have a disparate impact on the ability of some to communicate").

318 *See* Moran, *supra* note 314, at 1209.

appropriately demanding scrutiny under the First Amendment.[319] The laws, however, still serve legislatures' purposes by disproportionately impacting speech and protest.[320]

The overbreadth doctrine purports to fill this gap by striking down anti-speech laws if "a substantial number of [the statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep,"[321] regardless of whether the law also singles out particular viewpoints or topics for censorship. Many overbreadth challenges to critical infrastructure laws, however, "face[] an uphill battle, in that . . . [the laws] do[] not explicitly target speech or expressive conduct but simply regulate[] presence on specific property,"[322] at least purportedly. In these cases, even the overbreadth doctrine fails to recognize the disparate impact the law has on anti-sacrifice zone speech, lumping the law's chilling effects on speech into the category of permissible applications to conduct—which courts then deem to pass constitutional muster. Courts have thus declined to sustain overbreadth challenges in cases "involving 'ordinary criminal laws,' such as trespass,"[323] undermining the efficacy of overbreadth challenges to the many anti-protest laws masquerading as trespass, damage, or riot-boosting statutes.[324] To make matters worse, the overbreadth doctrine fails to be "a model of clarity,"[325] with the result that these First Amendment challenges have "long rested on the periphery of First Amendment law" anyway.[326]

For example, in 2021, Florida passed a riot-boosting statute that plaintiffs challenged under the First Amendment's overbreadth doctrine; the plaintiffs contended that the statute "chills protected speech and criminalizes protest activity" by punishing nonviolent protestors merely present near riots.[327] In 2024, despite acknowledging that Florida had passed the law to target "widespread protests opposing

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319 *See id.* at 1225–33 (detailing this dissonance and its consequences in the context of unlawful assembly statutes).

320 *See supra* Part III.

321 United States v. Stevens, 559 U.S. 460, 473 (2010).

322 Moran, *supra* note 314, at 1254.

323 Jenna Ruddock, *Coming Down the Pipeline: First Amendment Challenges to State-Level "Critical Infrastructure" Trespass Laws*, 69 Am. U. L. Rev. 665, 688 (2019) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

324 *See* Moran, *supra* note 314, at 1200 ("Many of the laws that police officers and prosecutors rely on to arrest and charge protesters, which outlaw behavior like riot, civil disorder, interference, disorderly conduct, trespass, participation in or presence at an unlawful assembly, and more, are so broadly written as to include constitutional behavior.").

325 *Id.* at 1201.

326 Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 Harv. C.R.-C.L. L. Rev. 31, 31 (2003).

327 *Anti-Protest Law Decision*, *supra* note 311.

police violence against people of color in the summer of 2020,"[328] the Eleventh Circuit dismissed the plaintiffs' overbreadth challenge because it determined that the statute only reached intentional violence, declining to acknowledge the statute's disparate effect on nonviolent protestors.[329] As the ACLU has argued, although these bills purport to address public safety, in actuality they chill protected protest.[330] Thus, the First Amendment too often fails to fully vindicate speech rights.

The Thirteenth Amendment may be able to overcome this shortcoming. Unlike in the First Amendment context, the Supreme Court has left open the possibility that a robust disparate impact cause of action may lie under the Thirteenth Amendment.[331] Thus, disparate impact on speech that challenges legacies of slavery—like sacrifice zone speech—may constitute a Thirteenth Amendment violation, even if not a First Amendment violation. The Thirteenth Amendment could thus serve as a much more comprehensive weapon against unjust state legislation impacting certain communities than the First Amendment currently allows.

Moreover, under the public forum doctrine, the First Amendment reserves its most expansive protections only for laws that regulate speech in "public fora," meaning traditional sites for speech and expression, such as sidewalks, streets, and parks.[332] Meanwhile, restrictions applying to other forum types, called limited public fora and non-public fora, draw

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328 Dream Defs. v. Governor of Fla., 119 F.4th 872, 875 (11th Cir. 2024).

329 *Id*. at 879–80. *But cf.* Dakota Rural Action v. Noem, 416 F. Supp. 3d 874 (D.S.D. 2019) (finding South Dakota's riot-boosting statute to be a First Amendment violation where it explicitly provided for transferring damages into the "pipeline engagement activity coordination expenses fund" and where the state's governor "clearly stated" that the law intended to target efforts that "aim to slow down the pipeline build" and finding the law overbroad because it imposed liability on "any person who . . . advises, encourages, or solicits other persons participating in the riot to acts of force or violence," even if the speech did not incite unlawful activity).

330 *See* Lee Rowland & Vera Eidelman, *Where Protests Flourish, Anti-Protest Bills Follow*, ACLU (Feb. 17, 2017), https://www.aclu.org/news/free-speech/where-protests-flourish-anti-protest-bills-follow [https://perma.cc/4W99-PM9U].

331 Carter, *The Thirteenth Amendment and Constitutional Change*, *supra* note 72, at 591–92 (first citing Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 390 n.17 (1982) ("We need not decide [as a general matter] whether the Thirteenth Amendment itself reaches practices with a disproportionate effect as well as those motivated by discriminatory purpose."); and then citing City of Memphis v. Greene, 451 U.S. 100, 128–29 (1981) ("To decide the narrow constitutional question . . . we need not speculate about the sort of impact on a racial group that might be prohibited by [the Thirteenth Amendment] itself. We merely hold that the impact [in this case] . . . does not reflect a violation of the Thirteenth Amendment.")); *see supra* Section I.B.

332 *See* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. 2299, 2366 n.337 (2021) [hereinafter Lakier, *The Non-First Amendment Law of Freedom of Speech*]; Lakier, *Imagining an Antisubordinating First Amendment*, *supra* note 316, at 2138, 2141.

more government deference and fewer free speech protections.[333] The First Amendment also only protects speakers against state action—that is, in cases where the *government* has violated someone's rights.[334] Thus, the First Amendment will rarely affirmatively address wrongdoing by private actors—such as when oil or gas companies hire private security forces to arrest protestors—without overcoming the notoriously difficult state action barrier.[335] True, the First Amendment may provide a *defense* to prosecution after private security companies arrest protestors and prosecution has commenced, but as the Supreme Court has emphasized, speakers should not have to wait for the government to prosecute them to vindicate their rights.[336] Additionally, raising First Amendment defenses against local government-run prosecutions will not proactively or sufficiently deter private companies from making arrests that chill speech.

The Thirteenth Amendment could provide a supplement that makes up for these limitations. After all, the Thirteenth Amendment applies regardless of forum type, and "'[i]t has never been doubted' that the Thirteenth Amendment 'includes the power to enact laws . . . operating upon the acts of [private] individuals.'"[337] Indeed, under the Thirteenth Amendment, Congress may enact laws "direct and primary, operating upon the acts of individuals, *whether sanctioned by state legislation or not*."[338] The Supreme Court has held that that power includes the authority to regulate private actors' contracts regarding real

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333 *See* Moran, *supra* note 314, at 1210.

334 *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972) ("[T]he First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property . . . .").

335 *See generally* Lakier, *The Non-First Amendment Law of Freedom of Speech*, *supra* note 332, at 2363 (describing the Supreme Court's "strict state action requirement" in First Amendment cases). Although circuit courts have found state action in narrow circumstances when private security guards have plenary policy authority, courts have generally found no state action when private security forces have mere police-like powers. David M. Howard, *Rethinking State Inaction: An In-Depth Look at the State Action Doctrine in State and Lower Federal Courts*, 16 Conn. Pub. Int. L.J. 221, 234 (2017).

336 *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479, 486–87 (1965) ("The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded . . . . The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."); Perez v. Ledesma, 401 U.S. 82, 118 (1971) (Brennan, J., concurring in part) (quoting *Dombrowski*, 380 U.S. at 485) ("[T]he bringing of the prosecution or the threat is itself a constitutional deprivation since it subjects a person to a burden of criminal defense which he should not have to bear, and then . . . 'defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights.'").

337 Carter, *The Thirteenth Amendment and Constitutional Change*, *supra* note 72, at 591 n.47 (quoting Runyon v. McCrary, 427 U.S. 160, 179 (1976)).

338 Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438 (1968) (emphasis added) (quoting The Civil Rights Cases, 109 U.S. 3, 23 (1883)).

and personal property.[339] Thus, Section 1 of the Thirteenth Amendment could provide a private cause of action for protestors to sue private actors for encroaching on their rights, along with potentially more expansive protections against state actors. Congress could also prospectively pass legislation under Section 2 of the Thirteenth Amendment to bar private actors from encroaching on protest rights.

B. Fourteenth Amendment Shortcomings

Challenges to anti-protest laws have generally asserted two species of Fourteenth Amendment claims: claims based on the Equal Protection Clause of the Fourteenth Amendment[340] and claims based on the Due Process Clause of the Fourteenth Amendment.[341] Both species fall short of adequately protecting against sacrifice zone speech suppression. As with the First Amendment and unlike the Thirteenth Amendment, the Fourteenth Amendment carries a state action requirement and thus cannot address conduct by private actors regardless of whether a plaintiff alleges a Due Process or Equal Protection violation.[342]

Equal Protection claims in the context of sacrifice zone speech litigation have alleged, for example, that state legislatures have enacted anti-protest laws to target Black or other communities of color and "deter[] demonstrations advocating on behalf of racial justice" or "suppress the viewpoints of Black-led organizations and their allies."[343] Unfortunately, while Congress may use Section 2 of the Thirteenth Amendment to pass broad legislation "ranging far beyond the self-executing rights of Section 1," the Court has imposed much stricter guardrails on Congress's Fourteenth Amendment Equal Protection Clause authority.[344] Despite the fact that the Fourteenth Amendment has a Section 5 enforcement provision analogous to that found in Section 2 of the Thirteenth Amendment, the Court has not interpreted the two enforcement provisions in lockstep.[345] Although Congress

339 *Id.* at 439 ("Does the authority of Congress to enforce the Thirteenth Amendment 'by appropriate legislation' include the power to eliminate all racial barriers to the acquisition of real and personal property? We think the answer to that question is plainly yes.").

340 Complaint at 46–51, Dream Defs. v. DeSantis, 559 F. Supp. 3d 1238 (N.D. Fla. 2021) (No. 4:21-cv-00191), 2021 WL 1920235 [hereinafter *Dream Defs.* Complaint].

341 *See, e.g.*, *id.* at 58–60.

342 *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972) ("[T]he First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property . . . .").

343 *See, e.g.*, *Dream Defs.* Complaint, *supra* note 340, at 48, 50.

344 Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 823 (1999).

345 *See id.* (stating that the Court constrained the enforcement clause of the Fourteenth Amendment to serve a remedial function without applying the same standard to the enforcement clause of the Thirteenth Amendment).

enjoyed broad leeway to legislate under the Fourteenth Amendment in the 1960s, the Rehnquist Court of the 1990s constrained its powers.[346] In *City of Boerne v. Flores*, the Court held that "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' *not the power to determine* what constitutes a constitutional violation."[347] Conversely, the Thirteenth Amendment grants Congress significant discretion to determine what constitutes a Thirteenth Amendment violation.[348] As Akhil Amar puts it, "[the Court] is reading Section 5 of the Fourteenth and does not even see Section 2 of the Thirteenth."[349] Thus, today, the Supreme Court has given Congress a much shorter leash to eradicate racial discrimination when it legislates under the Fourteenth Amendment than when it legislates under the Thirteenth Amendment.

Moreover, to successfully make out a claim under the Equal Protection Clause of the Fourteenth Amendment, a plaintiff cannot simply demonstrate discriminatory or disproportionate impact on certain groups; to draw strict scrutiny of the discriminatory act, rather than a lower standard of review, a plaintiff must prove the defendant's discriminatory intent.[350] This bar proves nearly impossible to clear. As William Carter, Jr. has asserted, under the Fourteenth Amendment, "forms of systemic and structural subordination . . . are effectively immunized from serious equal protection review."[351] In contrast, "the

346 Yoshino, *supra* note 46, at 768–72 (describing the Supreme Court's Fourteenth Amendment jurisprudence and how it has changed over time).

347 City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (emphasis added); *see also* Joseph W. Mark, Comment, United States v. Hatch*: The Significance of the Thirteenth Amendment in Contemporary American Jurisprudence*, 91 DENV. U. L. REV. 693, 711 (2014) ("In *City of Boerne* . . . the Court held that the enforcement provision of the Fourteenth Amendment provided Congress only with the power to enforce, not the power to determine what amounts to a constitutional violation.").

348 *See supra* Section I.B.

349 Amar, *supra* note 344, at 823.

350 *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (stating the Supreme Court's cases "have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact"); Yoshino, *supra* note 46, at 763–68 (describing how, as a consequence of "pluralism anxiety," the Supreme Court's equal protection jurisprudence has foreclosed disparate impact as a way to prove equal protection violations, thus "significantly set[ting] back constitutional civil rights" and "uphold[ing] second-generation discrimination that continues to subordinate [historically disadvantaged] groups" because "state action that perpetuates the subordination of historically disadvantaged groups will tend to express itself in facially neutral terms"). In this sense, Equal Protection Clause jurisprudence shares a shortcoming with the First Amendment, which also fails to leave appropriate space for disparate impact claims. *See supra* Section IV.A.

351 Carter, *The Thirteenth Amendment and Constitutional Change*, *supra* note 72, at 592.

Supreme Court has . . . left open the possibility that the Thirteenth Amendment embraces disparate impact discrimination."[352]

Due Process claims challenging these anti-protest laws have alleged that the law violates the plaintiffs' right to due process because the law is vague, fails to "provide sufficient notice of what conduct is prohibited," and "invite[s] discretion and arbitrary enforcement."[353] Because the Due Process Clause in this context protects only against vagueness, however, clearly written laws with discriminatory effect still pass muster when suing under this provision. Finally, as discussed below, Due Process Clause challenges lack the normative value of Thirteenth Amendment claims.[354]

C. Other Considerations

Thirteenth Amendment litigation and congressional legislation can provide distinct value because such solutions name the connection between speech suppression and the afterlife of slavery.[355] In comparison, First Amendment doctrine "is surprisingly silent on racially targeted infringement of freedom of speech" and on "the disproportionate racial impact of the law."[356] Similarly, the relevant Fourteenth Amendment Due Process claims by their nature usually do not explain how race figures into speech suppression.[357] While the Fourteenth Amendment's Equal Protection Clause could provide a litigation pathway that explicitly names the connection between *race* and speech suppression, unlike the Thirteenth Amendment, it would not directly criticize sacrifice zone speech suppression as part of *slavery*'s afterlife. By more boldly calling out how today's speech suppression efforts descend from historical attempts to prolong slavery, a Thirteenth Amendment approach could provide a powerful movement-building tool for organizations fighting against those who would turn their communities into sacrifice zones.

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352 *Id.* at 591–92 (first citing Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 390 n.17 (1982); and then citing City of Memphis v. Greene, 451 U.S. 100, 128–29 (1981) ("To decide the narrow constitutional question . . . we need not speculate about the sort of impact on a racial group that might be prohibited by [the Thirteenth Amendment] itself. We merely hold that the impact [in this case] . . . does not reflect a violation of the Thirteenth Amendment.")); *see supra* Section I.B.

353 *See, e.g.*, *White Hat* Complaint, *supra* note 302, at 30 (arguing that the new laws violate Fourteenth Amendment due process rights, but not discussing the role of race in speech suppression).

354 *See supra* Section IV.A.

355 *See generally* Azmy, *supra* note 83, at 1047–49 (explicating the importance of the Thirteenth Amendment as an "expressive" legal remedy, rather than a remedy with merely "utilitarian or instrumental value").

356 Bridgett Cecilia McCoy, Note, *Critical Infrastructure, Environmental Racism, and Protest: A Case Study in Cancer Alley, Louisiana*, 53 Colum. Hum. Rts. L. Rev. 582, 609 (2022).

357 *See, e.g.*, *Dream Defs.* Complaint, *supra* note 340.

V
Speech Suppression in Sacrifice Zones as a Badge and Incident of Slavery

> *"We are fighting a toxic combination of corporate greed and environmental racism. We will not stop until . . . our community is free from the bonds of [this] injustice that has held it hostage."*
>
> —Jo Banner, 2021[358]

The explosion of laws targeting sacrifice zone protests should sound the alarm bells, particularly given the close historical connection between speech suppression and the tactics white supremacists employed before and after abolition to perpetuate slavery. Because the creation of sacrifice zones itself functions as part of slavery's afterlife,[359] silencing those who speak out against this racially discriminatory erasure of communities *also* necessarily elongates slavery's afterlife, by preventing activists from building the collective power and political pressure necessary to challenge unwanted critical infrastructure from destroying their homes and lands.[360] Moreover, the racially targeted siting of critical infrastructure may itself constitute an independent Thirteenth Amendment violation;[361] but even without proving an underlying Thirteenth Amendment violation, silencing dissent against sacrifice zones functions as a Thirteenth Amendment violation because of the historical connections that mark such silencing as a badge, incident, and relic of slavery.

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358 *Descendants Can Pursue Challenge to Illegal Rezoning in Environmental Racism Case, Louisiana Court Rules*, Ctr. for Const. Rts. (Dec. 16, 2021), https://ccrjustice.org/home/press-center/press-releases/descendants-can-pursue-challenge-illegal-rezoning-environmental [https://perma.cc/H3RZ-YYDL].

359 *See supra* Part II; Robert Taylor, *Robert Taylor: "We Have Been Designated a Sacrifice Zone*," Poor People's Campaign, https://www.poorpeoplescampaign.org/we-cry-power/robert-taylor [https://perma.cc/N6J9-NTCP] (last visited July 19, 2025) ("It is clear to me that a genocide is being perpetrated against the [B]lack people of Cancer Alley."); *see, e.g.*, Loki, *supra* note 208 ("[Environmental racism] has been called the new Jim Crow and continues to target Black, Latinx, Native, Asian, and other communities of color, subjecting them to generations of poor health outcomes.") (quoting Ayana Byrd).

360 *See, e.g.*, Shelton, *supra* note 282 ("[W]e will see escalating campaigns to silence Black people, people of color, religious minorities and other marginalized groups. Once that happens, our communities will have no way to challenge laws that regulate many to second-class status."); Sravya Tadepalli, *Anti-Protest Laws Stifle Free Expression and Threaten Democracy*, Prism (Dec. 20, 2022), https://prismreports.org/2022/12/20/anti-protest-laws-stifle-free-expression-democracy [https://perma.cc/29PW-G4BG] ("Article 19 [an international human rights organization] notes the right to peaceful assembly is 'foundational to all other rights,' largely because of its effectiveness as a tool to create change successfully, particularly for marginalized groups.").

361 *See, e.g.*, *Inclusive La.* Complaint, *supra* note 84, at 134–36.

Accounting for these throughlines from before abolition to today, Section 1 of the Thirteenth Amendment bars sacrifice zone speech suppression (even without any congressional action), and Section 2 allows Congress to actively legislate against it,[362] under either an intentional discrimination or disparate impact theory.[363] This Part relies and builds upon the scholarship of formidable civil rights practitioners and scholars who have argued for "unshackl[ing]" Section 1 of the Thirteenth Amendment from too limited a view.[364] Indeed, this Note views the Section 1 avenue as the primary mechanism of addressing sacrifice zone speech suppression, given that this route places more power in the hands of directly impacted people as private litigants. This contention carries significant consequences for community members organizing against sacrifice zone-creating projects across the country, from the Bayou Bridge Pipeline in Louisiana's river parishes to Cop City in Weelaunee Forest, Atlanta.[365]

A. Applying Thirteenth Amendment Jurisprudence to Speech Suppression in Sacrifice Zones

Throughout time, racial justice activists have relied on the power of speech, protest, and expression,[366] which Frederick Douglass deemed the "great moral renovator of society."[367] Because of enslavers' desire to prevent this "moral renovat[ion]," the "legally sanctioned silencing of opposition to slavery and racial subordination was a central feature of the slave system."[368]

The Thirteenth Amendment's Framers sought to extinguish this feature.[369] Indeed, the Framers considered the Thirteenth

362 *See infra* Section V.B.

363 *See supra* Section I.B.

364 *See* Azmy, *supra* note 83, at 1060 (proposing a direct Thirteenth Amendment cause of action against private actors for modern survivors of slavery and involuntary servitude); Carter, *Race, Rights, and the Thirteenth Amendment*, *supra* note 82, at 1331–35, 1339, 1343–55, 1366.

365 *See infra* Section V.B.

366 *See, e.g.*, Tadepalli, *supra* note 360 ("[T]he right to peaceful assembly is 'foundational to all other rights,' largely because of its effectiveness as a tool to create change successfully, particularly for marginalized groups. The number of laws that aim to curtail advocates' ability to protest only underscores this point . . . ."). Civil rights leader John Lewis also once said, "Without freedom of speech and the right to dissent, the civil rights movement would have been a bird without wings." Momen, *supra* note 149.

367 *See* Douglass, *supra* note 155.

368 *See* Carter, *The Thirteenth Amendment and Pro-Equality Speech*, *supra* note 40, at 1856.

369 *Id.*

Amendment a bulwark against encroachment on natural rights,[370] including free speech rights.[371] This vision for a speech-protective Thirteenth Amendment also safeguarded speech by people who were not themselves enslaved.[372] During the debates over the Reconstruction Amendments, Senator James Harlan explicitly asserted that the "necessary incident[s] of slavery" included the "suppression of the freedom of speech and of the press,"[373] including among both Black and non-Black people.[374]

Yet, despite the formal abolition of slavery, oppressive state legislatures and private actors continued to deploy silencing tactics to keep the institution alive.[375] This trend has birthed the modern speech suppression efforts that abound today. That evolution should come as no surprise; as Deborah Archer has observed, "racism has demonstrated a stunning ability to adapt."[376] Thus, before the Thirteenth Amendment abolished slavery, "state officials and private actors severely punished those who had the temerity to challenge the system of slavery."[377] Today, state legislatures and private actors punish those resisting sacrifice zone creation, through fines, criminalization, SLAPP suits, and other methods.[378] For example, in response to dissent against what Pastor Robert Taylor has judged a "genocide . . . against the [B]lack people of Cancer Alley,"[379] Louisiana updated its critical infrastructure law to threaten protestors with up to five years in prison at hard labor for merely standing on or near critical infrastructure.[380] Similar speech suppression efforts across the country

370 *See* Carter, *The Thirteenth Amendment and Constitutional Change*, *supra* note 72, at 586.

371 *See* Campbell, *supra* note 106, at 269.

372 *See* Carter, *The Thirteenth Amendment and Constitutional Change*, *supra* note 72, at 585.

373 CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864) (statement of Sen. James Harlan).

374 *See* Carter, *The Thirteenth Amendment and Pro-Equality Speech*, *supra* note 40, at 1863 (citing CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864) (statement of Sen. James Harlan)).

375 *See supra* Sections II.B–C.

376 Archer, *supra* note 65; *see also* ARCHER, DIVIDING LINES, *supra* note 23, at 36 ("From chattel slavery to Jim Crow, and from state-sanctioned brutality to more subtle forms of oppression, the history of racial oppression in America is a story not of stasis but of transformation, with the oppressors' tools evolving as the law changed."); *id.* at 172 ("[T]he enemies of racial justice have innovated over the decades to maintain racial inequality in the face of . . . progress.").

377 Carter, *The Thirteenth Amendment and Pro-Equality Speech*, *supra* note 40, at 1860–61.

378 *See supra* Section III.C.

379 Taylor, *supra* note 359.

380 *See* Mipro, *supra* note 287. *But see* White Hat v. Murrill, 141 F.4th 590, 609 (5th Cir. 2025) (interpreting the statute to apply only to certain types of property not open to the public).

sharply curtail the ability of communities to advocate against one of slavery's legacies.[381]

Just as racism adapts, so, too, should our understanding of what constitutes a badge and incident of slavery evolve to encompass sacrifice zone speech suppression,[382] under both Section 1 and Section 2 of the Thirteenth Amendment.[383] Moreover, the Thirteenth Amendment embraces sacrifice zone speech protections both for descendants of enslaved people[384] and also others who find their anti-sacrifice zone speech suppressed. After all, by taking away the voices of *any* anti-sacrifice zone advocates—whether descended from enslaved people or otherwise—state legislatures and the oil and gas industry strip people of color and other community members of their ability to marshal collective action toward creating a society free from this aspect of slavery's afterlife.[385] Indeed, as Louisiana activist Ramon Mejía has explained, "[f]or many of us, who come from historically underrepresented, disproportionately impacted, communities, exercising our right to dissent is a catalyst for the advancement of our collective rights."[386] Anti-protest laws, which respond to "effective racial justice organizers and multiracial demonstrations,"[387] inhibit this progress toward realizing racial justice and equal rights,[388] no matter whom they impact.

These modern speech suppression efforts, like the racially motivated violence Congress has attacked via Thirteenth Amendment legislation upheld by federal courts, "communicate[] to the victim that he or she must remain in a subservient position, unworthy of the

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381 *See supra* Part III.

382 *See supra* notes 104–05, 134–37 and accompanying text.

383 *See supra* Section I.B.

384 *See generally* Carter, *The Thirteenth Amendment and Constitutional Change*, *supra* note 72, at 585 (explaining that the Framers intended the Thirteenth Amendment to cover not only enslaved people and their descendants but also anyone impacted by slavery—regardless of race).

385 *See generally* Baher Azmy, *Taking Back the Streets: Impact Litigation as Movement Lawyering*, 100 N.Y.U. L. Rev. 277 (2025) (explaining the importance of community dissent in enacting change).

386 *Bayou Bridge Pipeline Protestors*, *supra* note 6; *see also* Tadepalli, *supra* note 360 (quoting the activist Tariq Alkebu-Lan as saying, "In order to get our leaders to do the right thing and actually give people their rights, we have to disrupt things.").

387 Shelton, *supra* note 282.

388 *See, e.g.*, Lakhani & Beaumont, *supra* note 29 (quoting Kirk Herbertson, a senior policy adviser for EarthRights International, as saying, "They're threatening activists . . . to take this tactic [of civil disobedience] off the table—because it has such a successful record of placing high levels of pressure on companies."); Kusnetz, *supra* note 5 (quoting Caroll Muffet, then-president of the Center for International Environmental Law: "All of the social progress we've made has depended . . . on that ability to speak out against things that are wrong, things that are legal but should not be. . . . These bills put that fundamental element of our democracy in jeopardy.").

decency afforded to other races."[389] To quote #StopCopCity organizer Bridgette Simpson:

> [They] use the law to systemically silence [us] because we have been—we have the right to—peacefully protest. You know civil disobedience is how our ancestors have leapfrogged us, with the rights that we do have, into the future[.] . . . People bled for this. People bled for us to be able to resist[.] . . . We have the right to peaceably protest. It says that in the Constitution, but I notice that they are so down to make a slave, they take *that* part of the Constitution to heart, but they don't want us to peacefully protest.[390]

Sacrifice zone speech suppression thus impedes today's society from eradicating the same "customs, practices, and systemic forms of racial subordination that . . . enabled the system of slavery to prosper and persist."[391]

Ultimately, the Thirteenth Amendment's Framers "viewed the suppression of [anti-slavery] speech via state and private retaliation as an incident of" slavery.[392] Just as analogous speech suppression efforts by both private and governmental actors have functioned throughout American history as a means of entrenching slavery and prolonging its afterlife, sacrifice zone speech suppression prevents activists from ending a legacy of slavery.[393] Thus, sacrifice zone speech suppression itself amounts to a Thirteenth Amendment badge, incident, and relic of slavery, and eradicating—or at least regulating—it falls within Congress's power under Section 2 of the Thirteenth Amendment. Perhaps more importantly, individuals should also be able to challenge sacrifice zone speech suppression under Section 1, allowing litigants to privately enforce the Thirteenth Amendment on their own terms.

Whenever sacrifice zone speech suppression disparately impacts the ability of people to advocate against the badges, incidents, or relics of slavery, it should presumptively fall within the scope of the Thirteenth Amendment, subject only to narrow limitations, discussed below. Attacking sacrifice zone speech suppression as a Thirteenth

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389 *See* United States v. Hatch, 722 F.3d 1193, 1206 (10th Cir. 2013).

390 Rose, *supra* note 207 (emphasis added).

391 Carter, *The Thirteenth Amendment and Constitutional Change*, *supra* note 72, at 584; *see also* Okonta, *supra* note 103, at 260–61 ("[The Framers] understood that the system of slavery also included the foundation of customs, practices, and systemic forms of subordination that allowed white supremacy to persist and enabled slavery to flourish for centuries.").

392 Carter, *The Thirteenth Amendment and Pro-Equality Speech*, *supra* note 40, at 1876.

393 *See supra* notes 359–91 and accompanying text.

Amendment violation would allow racial justice advocates to bypass the shortcomings of First and Fourteenth Amendment litigation, thereby potentially providing a more fruitful pathway forward in halting sacrifice zone creation across the country.[394] For example, if the Supreme Court were finally to answer the open question about Section 1's breadth by agreeing that Section 1 (like Section 2) abolishes not only slavery but also its badges and incidents, the Thirteenth Amendment could provide a private cause of action to overturn anti-protest laws. Then, despite the absence of congressional Thirteenth Amendment legislation, litigants could challenge laws that prevent activists from advocating against sacrifice zone creation—even if a court may not find that a particular law violates the First or Fourteenth Amendment. Such a possibility would return some power to the people most affected by allowing them to sue independent of a congressional statute. Alternatively, if Congress were to pass legislation under Section 2 of the Thirteenth Amendment to regulate sacrifice zone speech suppression, activists would not need to wait at the mercy of courts to adopt a broad view of Section 1. They could use the legislation itself as a basis for a lawsuit challenging state laws and private actors' conduct.

Significantly, litigation under the Thirteenth Amendment also yields an option for limiting powerful private and monied actors' ability to contribute to sacrifice zone speech suppression.[395] Private companies play an indispensable role in suppressing speech in sacrifice zones.[396] Although the First Amendment protects pro-oil and gas lobbyists' efforts to introduce repressive laws alongside state legislators,[397] the Thirteenth Amendment arguably bars private companies—among others—from sending their own security forces to arrest anti-sacrifice zone protestors, at least in certain cases where those arrests disproportionately silence activists. Similarly, the Thirteenth Amendment provides a potential counterclaim against the SLAPP suits that the oil and gas industry employs to intimidate activists into silence.[398] The Thirteenth Amendment thus offers a broad and novel range of possibilities for protecting anti-sacrifice zone speech.

394 *See supra* notes 44–60 and accompanying text; *supra* Part IV.

395 *See supra* Section I.C.

396 *See supra* notes 290–309 and accompanying text.

397 *See* E.R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127, 137 (1961) (reasoning that "[i]n a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends on the ability of the people to make their wishes known to their representative").

398 *See supra* Sections III.C, IV.A.

B. Practical Limitations

At the same time, a Thirteenth Amendment pathway possesses limitations. For one, after *Jones*, lower courts have declined to interpret Section 1 of the Thirteenth Amendment broadly.[399] Although Supreme Court case law has left open the possibility that Section 1 reaches badges and incidents of slavery in the same way Section 2 does,[400] and scholars and litigators have pushed the judiciary to recognize a badges-and-incidents approach to Section 1,[401] so far courts have been reticent to allow such claims.[402] Successful Section 1 litigation depends upon this more liberal interpretation.

Additionally, even if Congress were to legislate against sacrifice zone speech suppression under Section 2—an unlikely scenario, especially given the lobbying power of the oil and gas industry[403]—successful legislation may be redundant with existing First Amendment protections against overbroad, viewpoint-based, or content-based laws. Thirteenth Amendment legislation could nevertheless add value by more aggressively regulating private actors and providing broader protections in places not considered public fora.[404] For example, the First Amendment may provide a legal defense to prosecution *after* private security companies arrest protestors, but as the Supreme Court has acknowledged, speakers should not have to wait to be prosecuted to vindicate their rights.[405] Section 2 legislation could provide a proactive supplement that makes up for that shortcoming, preemptively banning and deterring private actors from targeting and arresting anti-sacrifice zone protestors to silence them.[406]

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399 *See* Kares, *supra* note 79, at 379.

400 *See* Pope, *supra* note 78, at 428; Carter, *The Thirteenth Amendment and Constitutional Change*, *supra* note 72, at 588 (citing Palmer v. Thompson, 403 U.S. 217 (1971), in which the Supreme Court rejected the plaintiffs' Thirteenth Amendment argument that the City of Jackson, Mississippi's refusal to integrate swimming pools imposed a badge or incident of slavery in violation of the Thirteenth Amendment); *see also* City of Memphis v. Greene, 451 U.S. 100, 125–26 (1981) ("In *Jones*, the Court left open the question whether § 1 of the Amendment by its own terms did anything more than abolish slavery. It is also appropriate today to leave that question open . . . .").

401 *See* Carter, *Race, Rights, and the Thirteenth Amendment*, *supra* note 82; Pope, *supra* note 78; *see, e.g.*, *Inclusive La.* Complaint, *supra* note 84, at 134–36.

402 *See* Carter, *The Thirteenth Amendment and Constitutional Change*, *supra* note 72, at 589 (citing Palmer v. Thompson, 403 U.S. 217 (1971)).

403 *See The Gaslight Effect: Lobbying in the Fossil Fuel Industry*, Climate Action (Oct. 30, 2024), https://www.earthday.org/the-gaslight-effect-lobbying-in-the-fossil-fuel-industry [https://perma.cc/C9BW-47E9].

404 *See supra* Section IV.A.

405 *See supra* Section IV.A.

406 *See supra* notes 337–38 and accompanying text.

Furthermore, even if Section 1 included a badges-and-incidents pathway, the Thirteenth Amendment could not eliminate all laws that chill sacrifice zone speech. The sections of these laws that genuinely and precisely target damage or trespass on private property would almost certainly survive Thirteenth Amendment challenges, even if those aspects chill speech by imposing felony charges and deterring peaceful protest. Even using a disparate impact approach to the Thirteenth Amendment,[407] states could still impose some restrictions on Section 1 enforcement. Namely, courts may not see Thirteenth Amendment concerns as overriding state interests in preventing damage, incitement to violence, public health and safety threats, or trespass on private property, including when the law disparately impacts speakers advocating against sacrifice zones or other legacies of slavery.

Nevertheless, courts could prevent these exceptions from swallowing the rule. Just as the First Amendment sometimes allows for sniffing out pretext,[408] courts could import methods of scrutinizing whether a law either intends to or does suppress more speech than necessary. For instance, in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Supreme Court laid out a non-exhaustive list of factors for courts to consider in determining whether discriminatory intent exists under the Equal Protection Clause.[409] These factors include the disparate impact of the action, the historical background of the decision, the sequence of events leading up to the challenged decision, departures from the normal procedural sequence of events, substantive departures from typical decisions, and the legislative or administrative history.[410] Later, in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court imported these *Arlington Heights* factors into its Free Exercise Clause jurisprudence.[411] Courts could similarly use the *Arlington Heights* factors to discern a discriminatory purpose in the Thirteenth Amendment context. Because so many states have passed these laws with the aim of silencing dissent,[412] and because Congress passed the Thirteenth Amendment in part to eliminate the vestiges of slavery whether they manifest overtly or discreetly,[413] courts should take an especially vigorous approach to scrutinizing pretextual justifications. Such a tactic would enhance the Thirteenth Amendment's efficacy where the First Amendment falls

407 *See supra* notes 90–93 and accompanying text.
408 *See supra* Section IV.A.
409 *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).
410 *Id.*
411 Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993).
412 *See supra* Section III.C.
413 *See supra* notes 103–06 and accompanying text.

short, especially because Thirteenth Amendment jurisprudence could develop to embrace discriminatory impact challenges.

Ultimately, despite its limitations, a Thirteenth Amendment approach to speech suppression in sacrifice zones provides another powerful tool in activists' toolboxes.

C. Future Directions

Future scholarship could explore other ways in which the Thirteenth Amendment limits private actors' interference with free speech, depending on myriad covert ways in which private actors contribute to sacrifice zone speech suppression. Additionally, developing a speech-protective federal law under the Thirteenth Amendment that does not significantly overlap with the First Amendment would be complex but worthwhile, particularly if the law reached private actors' attempts at speech suppression.

Finally, this Note has focused on speech in sacrifice zones as one example of the Thirteenth Amendment's potential application to the broader category of speech suppression efforts. Keeping in mind, however, that state and private actors also endeavor to silence speech agitating against other forms of slavery's afterlives, this Note leaves open for further exploration what additional speech suppression efforts constitute Thirteenth Amendment violations.[414]

Conclusion

"Justice is possible."

—Bill Quigley, 2025[415]

As Roger Baldwin once said, "Silence never won rights . . . . They are not handed down from above—they are forced by pressures from

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414 For example, this theory may be extended to analyze suppression of protests against police violence as Thirteenth Amendment violations. *See generally* Angela Y. Davis, Freedom Is a Constant Struggle: Ferguson, Palestine, and the Foundations of a Movement 16 (2016) ("The use of state violence against Black people, people of color, has its origins . . . in colonization and slavery. . . . We may not experience lynchings and Ku Klux Klan violence in the same way we did earlier, but there is still state violence, police violence, military violence.").

415 E-mail from William P. Quigley, Clinical Professor of L. Emeritus, Loy. U. of New Orleans Coll. of L., to author (Feb. 15, 2025, at 13:56 ET) (on file with author). Professor Quigley, a human and civil rights lawyer based in Louisiana, has long supported activists' struggle toward liberation all over the world, including in Cancer Alley. *See also* William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DePaul J. Soc. Just. 1, 22 (2007) ("When hope is alive, change is possible.").

below."[416] This Note has explored the long history of speech suppression as a legacy of the American institution of slavery. Using sacrifice zone speech as an example, it has argued that racial-justice-oriented speech—which dissents against the modern-day afterlives of slavery—deserves robust protection under the Thirteenth Amendment.

This Note has suggested two prescriptions. First, this Note offers as its primary prescription a litigation option: Courts should adopt a more expansive approach to Section 1 of the Thirteenth Amendment, thus opening the door for private litigants to sue directly under the Thirteenth Amendment and challenge sacrifice zone speech suppression as a badge and incident of slavery. This route allows people with lived experience to assert what constitutes a badge or incident of slavery, rather than putting this power solely in the hands of a more removed Congress. Second, Congress can and should legislate against sacrifice zone speech suppression as a badge and incident of slavery under the Thirteenth Amendment. This prescription, though, which follows the more democratic route of securing rights expansion, may not be politically viable anytime soon.

Both prescriptions derive from a historical understanding of speech suppression as tied to slavery and its afterlife. As governmental and private methods of silencing advocates evolve to meet the times, speech suppression in sacrifice zones—from Standing Rock to the swamp—persists as a pressing problem requiring a remedy. The Thirteenth Amendment could provide the solution. By so arguing, this Note pays homage to the many advocates who have spent years, decades, and centuries fighting for an end to the legacies of slavery. In seeking another way forward, this Note shares those activists' hope and conviction that "justice is possible."

416 *Silence Never Won Rights*, ACLU OF ME. (Nov. 5, 2009, at 10:48 ET), https://www.aclumaine.org/en/news/silence-never-won-rights [https://perma.cc/LD3S-ZU9R].