THIRTEENTH AMENDMENT
ABOLITION OF SLAVERY

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THIRTEENTH AMENDMENT—ABOLITION OF SLAVERY

Amdt13.1 Overview of Thirteenth Amendment, Abolition of Slavery

The Thirteenth Amendment prohibits slavery and involuntary servitude in all places subject to U.S. jurisdiction, except when imposed as punishment for a crime for which a person has been duly convicted.[1] Proposed by Congress and ratified by the states in the wake of the Civil War, the Thirteenth Amendment was the first of the three Reconstruction Amendments.[2] Together, these amendments aimed to safeguard the rights of newly emancipated slaves and ensure that states accorded due process and equal protection of the laws to all persons.[3] Unlike the other Reconstruction Amendments—the Fourteenth and Fifteenth Amendments and, indeed, the rest of the Constitution—the Thirteenth Amendment's prohibitions apply directly to private individuals in addition to government actors.[4]

The states' ratification of the Thirteenth Amendment abolishing slavery effectively negated two of the Constitution's original provisions: (1) the so-called "Fugitive Slave Clause," which granted a slave owner the right to seize and repossess the slave in another state, regardless of that state's laws;[5] and (2) the Three-Fifths Clause, a compromise among the Founders that counted three-fifths of a state's slave population for the purposes of apportioning seats in the House of Representatives and levying certain types of taxes.[6]

Because the Thirteenth Amendment was self-executing, its prohibitions on slavery and involuntary servitude became effective upon ratification without the need for further government action.[7] Nonetheless, Section 2 of the Thirteenth Amendment grants Congress the power to enforce the prohibitions in Section 1 by enacting "appropriate legislation."[8] The Supreme Court has long held that Congress may use its enforcement power to remove or remedy burdens on individuals that constitute the "badges" or "incidents" of slavery.[9]

Questions about the scope of Congress's Section 2 enforcement power have played a central role in the Supreme Court's Thirteenth Amendment jurisprudence. After the Civil War, newly

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[1] U.S. Const. amend. XIII, § 1.

[2] The other two Reconstruction Amendments were the Fourteenth Amendment, which, among other things, requires states to accord due process and equal protection of the laws to all persons, and the Fifteenth Amendment, which prohibits the federal and state governments from denying or abridging the right to vote based on "race, color, or previous condition of servitude." For more on the Fourteenth Amendment, see Amdt14.1 Overview of Fourteenth Amendment, Equal Protection and Rights of Citizens through Amdt14.S5.4 Modern Doctrine on Enforcement Clause. For more on the Fifteenth Amendment, see Amdt15.1 Overview of Fifteenth Amendment, Right of Citizens to Vote through Amdt15.S2.2 Federal Remedial Legislation.

[3] *See supra* note 2. Congress proposed the Thirteenth Amendment in January 1865, shortly before the end of the Civil War. The states ratified the Amendment in December 1865, seven months after the war ended. *See* Intro.3.1 Ratification of Amendments to the Constitution Generally.

[4] George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 Va. L. Rev. 1367, 1370 (2008) ("The Thirteenth Amendment stands out in the Constitution as the only provision currently in effect that directly regulates private action. The Eighteenth Amendment, imposing Prohibition, applied directly to private individuals, but its repeal by the Twenty-First Amendment eliminated that instance of direct constitutional regulation of private conduct.").

[5] U.S. Const. art. IV, § 2, cl. 3. *See also* ArtIV.S2.C3.1 Fugitive Slave Clause.

[6] U.S. Const. art. I, § 2, cl. 3. *See also* ArtI.S2.C3.1 Enumeration Clause and Apportioning Seats in the House of Representatives. Subsequently, the Fourteenth Amendment explicitly repealed the Three-Fifths Clause. U.S. Const. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.").

[7] The Civil Rights Cases, 109 U.S. 3, 20 (1883) ("This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances.").

[8] U.S. Const. amend. XIII, § 2.

[9] The Civil Rights Cases, 109 U.S. at 20.

freed slaves faced various forms of state-sanctioned and private discrimination. For example, some states enforced Black Codes that denied African Americans equal rights under the law, including the rights to vote, hold property, and use public facilities.[10] Some states codified the practice of peonage, enabling individuals to use the threat of force or legal action to compel African Americans to perform services to satisfy a financial obligation.[11] In addition, some operators of public accommodations, such as hotels and restaurants, sought to prevent African Americans from patronizing their businesses.[12] In response, beginning in 1866, Congress enacted civil rights legislation that sought to ensure that people of all races would have equal rights to make and enforce contracts and hold property, among other fundamental rights.[13]

Despite these legislative efforts, for more than a century after the states ratified the Thirteenth Amendment, the Supreme Court determined that Congress could not use its power to legislate against the "badges" and "incidents" of slavery to protect African Americans from many forms of private racial discrimination or state-sanctioned segregation.[14] However, the Court's view of the scope of Congress's enforcement power changed significantly with its 1968 decision in *Jones v. Alfred H. Mayer Co*.[15] In that case, the Court adopted a more deferential approach toward Congress's enforcement power, determining that Congress may play a significant role in determining the scope of that power through the enactment of legislation.[16] Although the Court has since upheld Congress's power to enforce the Thirteenth Amendment by enacting laws to combat some of the harms of private racial discrimination, the precise scope of Congress's Thirteenth Amendment power remains unclear.[17]

The following essays examine the Thirteenth Amendment's prohibitions on slavery and involuntary servitude beginning with an overview of the Amendment's historical background. The essays then examine relevant Supreme Court decisions and historical practices related to the scope of the Amendment's prohibitions and its exception for criminal punishment. The essays conclude by discussing the extent of Congress's power to enforce the Thirteenth Amendment through the enactment of legislation.

[10] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 426–37 (1968); Bell v. Maryland, 378 U.S. 226, 288, 303 (1964) (Goldberg, J., concurring).

[11] *See* Peonage Cases, 123 F. 671, 673–74 (M.D. Ala. 1903).

[12] *See, e.g.*, The Civil Rights Cases, 109 U.S. at 8–10, 23.

[13] *See, e.g.*, Act of April 9, 1866, ch. 31,14 Stat. 27. *See also* 42 U.S.C. §§ 1981–1982.

[14] *See* Amdt13.S2.2 Early Doctrine on Enforcement Clause of Thirteenth Amendment. *See also* Plessy v. Ferguson, 163 U.S. 537, 542–43 (1896) (upholding the constitutionality of a Louisiana law mandating racial segregation in railway cars).

[15] 392 U.S. 409 (1968).

[16] *Id.* at 440.

[17] *See* Amdt13.S2.2 Early Doctrine on Enforcement Clause of Thirteenth Amendment.

Amdt13.2 Slavery and Civil War

Thirteenth Amendment:

> *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. Congress shall have power to enforce this article by appropriate legislation.*
>
> *Congress shall have power to enforce this article by appropriate legislation.*

During the Federal Convention of 1787, the Constitution's Framers vigorously debated the role that slavery would play in the newly created United States.[1] Conflicts over slavery, which had been practiced in the British colonies of North America for over a century often pitted delegates from southern states that relied heavily on slave labor against northern states whose inhabitants increasingly opposed the practice on moral grounds.[2] Despite fervent disagreement over the issue of slavery at the Convention, the Constitution's original text did not specifically refer to slavery. For example, the so-called "Fugitive Slave Clause" did not employ the term "slave" but instead granted the owner of a "person held to service or labor" the right to seize and repossess him in another state, regardless of that state's laws.[3] Moreover, the Three-Fifths Clause, a cornerstone of the Great Compromise[4] among the Founders, counted three-fifths of "all other Persons"—a term that included slaves—for the purposes of apportioning seats in the House of Representatives and levying certain types of taxes.[5]

In 1808, two decades after the Constitution's ratification, Congress prohibited importing slaves from other countries.[6] Although northern states had already abolished (or begun to abolish) slavery within their jurisidictions,[7] the domestic slave trade continued to flourish in the South.

In the decades leading up to the Civil War, political tensions simmered as abolitionists and proponents of slavery argued over whether new U.S. territories would be admitted to the union as "slave" or "free" states.[8] Initially, Congress resolved some of these disagreements. For example, in the Missouri Compromise of 1820, Congress admitted Maine as a free state and

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[1] *See, e.g.*, 2 The Records of the Federal Convention of 1787, at 364–65 (Max Farrand ed., 1911) (Madison's notes, Aug. 21, 1787) (recording a debate over banning the importation of slaves); *id.* at 369–74 (Madison's notes, Aug. 22, 1787).

[2] *See id.*

[3] U.S. Const. art. IV, § 2, cl. 3. *See also* ArtIV.S2.C3.1 Fugitive Slave Clause.

[4] The delegates to the Federal Convention devised the Great Compromise to address the states' fear of an imbalance of power in Congress by providing for a bicameral legislature with proportional representation based on a state's population for one chamber and equal state representation in the other. 1 The Records of The Federal Convention of 1787 at 524 (Max Farrand ed., 1911). *See also* Max Farrand, The Framing of the Constitution of the United States 104–07 (1913).

[5] U.S. Const. art. I, § 2, cl. 3. In addition, Article V, while not mentioning slavery specifically, prohibited amendments prior to 1808 that would have affected the Constitution's limitations on Congress's power to (1) restrict the slave trade, or (2) levy certain taxes on land or slaves. *Id.* art. V. *See also id.* art. I, § 9, cls. 1, 4.

[6] Act of March 2, 1807, ch. 22, 2 Stat. 426.

[7] *See* George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 Va. L. Rev. 1367, 1373 & n.23 (2008).

[8] The 1787 ordinance that the Confederation Congress enacted to govern the newly acquired Northwest Territory prohibited slavery and involuntary servitude, except as punishment for a crime. *An ordinance for the government of the territory of the United States, North-west of the river Ohio*, Libr. of Cong., https://www.loc.gov/resource/bdsdcc.22501/?st=gallery. The Northwest Ordinance, however, allowed for the "reclaiming" of slaves who escaped into the territory. *See id.* The Ordinance established the Ohio River as the boundary between newly admitted, northern territories that forbade slavery and southern territories that permitted slavery. *Id.*

Missouri as a slave state.[9] In addition, Congress sought to achieve additional understandings on the issue of slavery in the five Acts that made up the Compromise of 1850.[10] Despite these early efforts, compromises on the issue of slavery began to unravel during the 1850s. The Kansas-Nebraska Act of 1854 repealed the Missouri Compromise, allowing each territory's population to decide whether to permit slavery.[11] This led to an outbreak of violence between abolitionists and proponents of slavery in Kansas.[12] The Supreme Court's 1857 decision in *Dred Scott v. Sandford* exacerbated tensions by declaring the Missouri Compromise to have been an unconstitutional deprivation of slaveholders' property.[13] Disagreements over slavery and President Abraham Lincoln's election to the presidency were the primary causes of the Civil War, which erupted when the Confederate army fired on Fort Sumter on April 12, 1861.[14]

After almost two years of war, President Lincoln issued the "Emancipation Proclamation" by exercising his executive war powers.[15] The Proclamation declared that, as of January 1, 1863, "all persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free."[16] The Proclamation did not apply to slaves that resided in "loyal" states that had not seceded from the Union.[17] Nor did it apply to slaves in portions of southern states under Union control.[18] However, it applied to slaves in most of the rest of the core Confederate states' territory.[19]

As the nation approached the end of the Civil War, questions arose about the legal authority for the Emancipation Proclamation; Congress's power to ban slavery by enacting legislation; and the future status of slaves and freedmen throughout the United States.[20]

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[9] *Missouri Compromise: Primary Documents in American History*, Libr. of Cong., https://guides.loc.gov/missouri-compromise. The compromise also limited the geographic expansion of slavery westward into newly acquired territories. *Id.*

[10] *Compromise of 1850: Primary Documents in American History*, Libr. of Cong., https://guides.loc.gov/compromise-1850. The compromise strengthened federal judicial officials' obligations to capture and return fugitive slaves; abolished the slave trade in Washington, D.C.; admitted California as a free state; and allowed New Mexico and Utah to decide whether to join the United States as free states or slaves states. *Id.*

[11] *Kansas-Nebraska Act: Primary Documents in American History*, Libr. of Cong., https://guides.loc.gov/kansas-nebraska-act.

[12] *Id.*

[13] 60 U.S. (19 How.) 393, 451–52 (1857), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

[14] *Battle of Fort Sumter, April 1861*, Nat'l Park Serv., https://www.nps.gov/articles/battle-of-fort-sumter-april-1861.htm.

[15] *The Emancipation Proclamation*, Nat'l Archives, https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation. On September 22, 1862, President Lincoln issued the preliminary Emancipation Proclamation, which announced his intention to issue the Emancipation Proclamation on January 1, 1863. *See Preliminary Emancipation Proclamation*, Nat'l Archives, https://www.archives.gov/exhibits/american_originals_iv/sections/preliminary_emancipation_proclamation.html. Although President Lincoln issued the Proclamation in 1863, some slaves in the South did not attain freedom until much later. For example, slaves in Texas attained freedom when Major General Gordon Granger and Union troops arrived in Galveston, Texas on June 19, 1865. *Juneteenth*, Lib. of Cong., https://www.loc.gov/loc/lcib/9908/juneteenth.html.

[16] *See* sources cited *supra* note 15. In 1861 and 1862, Congress enacted legislation known as the "Confiscation Acts" that freed slaves who came within Union lines and had been under Confederate masters, but this legislation was ineffective. President Lincoln was initially reluctant to enforce these laws strictly because of concerns that it would cause border states to secede from the Union. *See* Cong. Globe, 38th Cong., 1st Sess. 1313 (1864); Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 Sup. Ct. Rev. 349, 367–70 (2008). Congress abolished slavery in the District of Columbia in 1862 via the District of Columbia Compensated Emancipation Act. Act of Apr. 16, 1862, 37 Cong. ch. 54, 12 Stat. 376 . Congress abolished slavery in the territories in the Abolition of Slavery Act (Territories), 37 Cong. ch. 111, 12 Stat. 432 (1862).

[17] Sources cited *supra* notes 15–16.

[18] *Id.*

[19] *Id.*

[20] *See* Cong. Globe, 38th Cong., 1st Sess. 1313–14 (1864).

These questions played a prominent role in debates over Congress's consideration of the joint resolution that would become the Thirteenth Amendment.[21]

Amdt13.3 Drafting of Thirteenth Amendment

Thirteenth Amendment:

> *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. Congress shall have power to enforce this article by appropriate legislation.*
>
> *Congress shall have power to enforce this article by appropriate legislation.*

The drafters of the Thirteenth Amendment drew upon earlier efforts to abolish slavery within various U.S. states and territories. Before the Civil War, several states had banned slavery in their jurisdictions through various means, including by adopting language in their state constitutions.[1] In addition, Article 6 of the 1787 federal ordinance governing the Northwest Territory banned slavery in that territory.[2] That ordinance, which the Framers of the Thirteenth Amendment drew upon directly, provided: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes whereof the party shall have been duly convicted."[3]

On January 13, 1864, more than a year before the end of the Civil War, Senator John Henderson introduced a joint resolution proposing an amendment to the Constitution to abolish slavery and involuntary servitude.[4] Representatives James Ashley and James Wilson had introduced similar resolutions in the House a month earlier.[5] The Senate Judiciary Committee favorably reported a joint resolution that drew upon these drafts.[6]

Early in 1864, the Senate debated the resolution proposing the Thirteenth Amendment. Senator Lyman Trumbull blamed slavery as the cause of the war and argued that the nation's Founders intended for the practice to end.[7] A constitutional amendment was necessary, he argued, because of uncertainty over Congress's power to prohibit slavery in the United States through legislation, and the need to prevent future majorities in Congress or state legislatures from reinstituting the practice.[8] The intent of the amendment, in his view, was to take the question of slavery "entirely away from the politics of the country."[9] Proponents of the

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[21] *See, e.g.*, *id.*

[1] *See e.g.*, Ohio Const. of 1802, art. VIII, § 2; Mich. Const. of 1835, art. XI, § 1; Wis. Const. of 1848, art. I, § 2. *See also* George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 Va. L. Rev. 1367, 1373 & n.23 (2008).

[2] *An ordinance for the government of the territory of the United States, North-west of the river Ohio*, Libr. of Cong., https://www.loc.gov/resource/bdsdcc.22501/?st=gallery.

[3] *Id.* At least one commentator has noted, however, that as "interpreted and applied . . . the Ordinance effected less than a complete abolition of slavery." George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 Va. L. Rev. 1367, 1373 (2008)

[4] Cong. Globe, 38th Cong., 1st Sess. 145 (1864). Senator Charles Sumner unsuccessfully proposed a different formulation of the Thirteenth Amendment: "All persons are equal before the law, so that no person can hold another as a slave; and the Congress shall have power to make all laws necessary and proper to carry this declaration into effect everywhere in the United States." *Id.* at 1482.

[5] *Id.* at 19, 21 (1863).

[6] *See id.* at 1313 (1864).

[7] *Id.*

[8] *Id.* at 1314.

[9] *Id.*

Thirteenth Amendment also argued passionately that slavery was wrong on moral grounds.[10] Opponents of the Thirteenth Amendment generally argued that it would allow the federal government to intrude on property rights and other areas traditionally viewed as the exclusive domain of state authority.[11]

The Senate passed the joint resolution proposing the Thirteenth Amendment on April 8, 1864.[12] The House considered the resolution in June 1864 but initially rejected it.[13] In his State of the Union speech in December 1864, President Lincoln urged Congress to enact the joint resultion proposing the Thirteenth Amendment as soon as possible.[14] After the Lincoln Administration engaged in a sustained effort to secure the necessary votes,[15] the House passed the joint resolution on January 31, 1865.[16]

President Lincoln signed the joint resolution proposing the Thirteenth Amendment even though his signature was unnecessary for proposal or ratification of the Amendment.[17] The Amendment was then submitted to the states for ratification.[18]

Amdt13.4 Ratification of Thirteenth Amendment

Thirteenth Amendment:

> *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. Congress shall have power to enforce this article by appropriate legislation.*
>
> *Congress shall have power to enforce this article by appropriate legislation.*

Congress submitted the Thirteenth Amendment to the states for their consideration only a few months before the end of the Civil War.[1] On April 14, 1865, President Abraham Lincoln, one of the Amendment's foremost proponents, was assassinated.[2] Vice President Andrew Johnson succeeded to the presidency and successfully pressured several southern states to ratify the Thirteenth Amendment as a condition of rejoining the Union.[3] Secretary of State William Seward proclaimed the states' ratification of the Thirteenth Amendment on December 18, 1865.[4]

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[10] *Id.* at 1320.

[11] *Id.* at 1366.

[12] *Id.* at 1490.

[13] *Id.* at 2995.

[14] Cong. Globe, 38th Cong., 2nd Sess. app'x at 3 (1864).

[15] *See* Rebecca E. Zietlow, *James Ashley, the Great Strategist of the Thirteenth Amendment*, 15 Geo. J. L. & Pub. Pol'y 265, 300–01 (2017).

[16] Cong. Globe, 38th Cong., 2nd Sess. 531 (1865).

[17] *13th Amendment to the U.S. Constitution: Abolition of Slavery (1865)*, Nat'l Archives, https://www.ourdocuments.gov/document_data/pdf/doc_040.pdf.

[18] A Resolution Submitting to the Legislatures of the Several States a Proposition to Amend the Constitution of the United States, https://memory.loc.gov/cgi-bin/ampage? collId=llsl&fileName=013/llsl013.db&recNum=596.

[1] A Resolution Submitting to the Legislatures of the Several States a Proposition to Amend the Constitution of the United States, https://memory.loc.gov/cgi-bin/ampage? collId=llsl&fileName=013/llsl013.db&recNum=596.

[2] Rebecca E. Zietlow, *James Ashley, the Great Strategist of the Thirteenth Amendment*, 15 Geo. J. L. & Pub. Pol'y 265, 301 (2017).

[3] Bruce Ackerman, *Constitutional Politics / Constitutional Law*, 99 Yale L.J. 453, 503–04 (1989).

[4] Proclamation No. 52, 13 Stat. 774, 775 (1865) (proclamation by Secretary of State William H. Seward of December 18, 1865). The Amendment attained the threshold for ratification and entry into force on December 6, 1865.

Although the Thirteenth Amendment abolished slavery, state governments and private individuals continued to discriminate against African Americans and deny them equal rights under the law.[5] Concerns that the Thirteenth Amendment did not sufficiently protect African Americans from various forms of discrimination led the Reconstruction-era Congress to enact civil rights legislation and propose the language that became the Fourteenth and Fifteenth Amendments to the Constitution.[6]

Section 1—Prohibition on Slavery and Involuntary Servitude

Amdt13.S1.1 Prohibition Clause

Thirteenth Amendment, 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 1 of the Thirteenth Amendment prohibits slavery and involuntary servitude in all places subject to U.S. jurisdiction.[1] Since the states ratified the Amendment in 1865, the Supreme Court has decided cases interpreting the Prohibition Clause and applying it to various forms of government or private action. In particular, the Court has examined: (1) whether particular burdens imposed on individuals constitute prohibited "badges" or "incidents" of slavery;[2] and (2) the meaning of "involuntary servitude."[3]

Amdt13.S1.2 Defining Badges and Incidents of Slavery

Thirteenth Amendment, Section 1

> *Neither slavery nor involuntary servitude, shall exist within the United States, or any place subject to their jurisdiction.*

The Supreme Court has often addressed the scope of the Thirteenth Amendment's prohibitions when considering the extent of Congress's power to enforce the Thirteenth

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Although slavery had already been abolished in most U.S. jurisdictions by the time of ratification, the Thirteenth Amendment freed some slaves in Delaware and Kentucky. Eric Foner, *Abraham Lincoln, the Thirteenth Amendment, and the Problem of Freedom*, 15 Geo. J.L. & Pub. Pol'y 59, 62 (2017).

[5] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 426–37 (1968); Bell v. Maryland, 378 U.S. 226, 288, 303 (1964) (Goldberg, J., concurring); The Civil Rights Cases, 109 U.S. 3, 8–10, 23 (1883); Peonage Cases, 123 F. 671, 673–74 (M.D. Ala. 1903).

[6] *See, e.g.*, Act of April 9, 1866, ch. 31, 14 Stat. 27. The Fourteenth Amendment was enacted, in part, because of concerns about the civil rights of African Americans after the Civil War. *See Bell*, 378 U.S. at 293 (Goldberg, J., concurring) ("A review of the relevant congressional debates reveals that the concept of civil rights which lay at the heart both of the contemporary legislative proposals and of the Fourteenth Amendment encompassed the right to equal treatment in public places—a right explicitly recognized to be a 'civil' rather than a 'social' right."). *See also* Amdt14.S1.1.1 Historical Background on Citizenship Clause through Amdt14.S1.1.2 Citizenship Clause Doctrine; Amdt15.1 Overview of Fifteenth Amendment, Right of Citizens to Vote through Amdt15.S2.2 Federal Remedial Legislation.

[1] U.S. Const. amend. XIII, § 1. The Thirteenth Amendment prohibits the enslavement of all races of people. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1872).

[2] *See, e.g.,* The Civil Rights Cases, 109 U.S. 3, 20–22 (1883). In a pair of cases decided shortly after ratification of the Thirteenth Amendment, the Supreme Court concluded that, although the Amendment freed slaves from bondage, it did not annul contracts that private parties had entered into for the sale of slaves before ratification. Boyce v. Tabb, 85 U.S. (18 Wall.) 546, 548 (1873); Osborn v. Nicholson, 80 U.S. (18 Wall.) 654, 662–63 (1872).

[3] *See, e.g.*, Clyatt v. United States, 197 U.S. 207, 215 (1905).

Amendment by enacting legislation.[1] For example, in 1883, the Supreme Court considered the scope of the Amendment's Prohibition Clause in cases that implicated Congress's power to criminalize the racially discriminatory denial of a person's access to public accommodations.[2] In the consolidated *Civil Rights Cases*, the Court held that the Thirteenth Amendment prohibited "slavery and its incidents."[3] However, the Court determined that the Thirteenth Amendment's concept of prohibited "badges" and "incidents" of slavery did not encompass private racial discrimination that denied a person access to accommodations.[4] Instead, the Court explained, the "badges and incidents" of slavery included: (1) compulsory service for another's benefit; (2) restrictions on freedom of movement; (3) the inability to hold property or enter into contracts; and (4) the incapacity to have standing in court or testify against a White person.[5]

Although the Supreme Court's decision in the *Civil Rights Cases* rested on its interpretation of the prohibitions in Section 1 of the Thirteenth Amendment, the Court implied that Congress's enforcement power under Section 2 did not authorize Congress to prohibit the private racial discrimination at issue.[6] Subsequently, in *Plessy v. Ferguson*, the Court held that state-sanctioned segregation in railway cars did not violate Section 1 of the Thirteenth Amendment, writing that a "statute which implies merely a legal distinction between the white and [African American] races . . . has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude."[7]

During the Civil Rights Era of the 1960s, the Supreme Court's views shifted significantly. The Court held that Congress may play an important role in determining the scope of its enforcement power through the enactment of legislation.[8] The Court also held that Congress's power may enable it to forbid some forms of private racial discrimination that might not fall within the prohibitions of Section 1 of the Thirteenth Amendment, but, in Congress's view, amount to "badges" or "incidents" of slavery.[9]

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[1] For more on Congress's enforcement power under Section 2 of the Thirteenth Amendment, see Amdt13.S2.1 Overview of Enforcement Clause of Thirteenth Amendment.

[2] The Civil Rights Cases, 109 U.S. 3, 8–9 (1883).

[3] *Id.* at 23.

[4] *Id.* at 25. *See also* Corrigan v. Buckley, 271 U.S. 323, 327, 330–32 (1926) (holding that the Thirteenth Amendment did not prohibit the Supreme Court of the District of Columbia from enforcing a covenant among private individuals that forbade the lease, sale, or occupancy of real estate by African Americans for twenty-one years).

[5] *The Civil Rights Cases*, 109 U.S. at 22.

[6] *Id.* at 24–25.

[7] Plessy v. Ferguson, 163 U.S. 537, 542–43 (1896) (upholding the constitutionality of a Louisiana law mandating racial segregation in railway cars), *overruled* by Brown v. Bd. of Educ., 347 U.S. 483 (1954). For an example of another case involving state action in which the Supreme Court interpreted the Thirteenth Amendment's prohibition on slavery without addressing the scope of Congress's Section 2 enforcement power, see Palmer v. Thompson, 403 U.S. 217, 226–27 (1971) (holding that a city's closing of swimming pools to all persons, even if done with the intent to prevent African Americans and Whites from swimming together, did not amount to a "badge or incident" of slavery prohibited under the Thirteenth Amendment).

[8] For a discussion of the relevant cases, see Amdt13.S2.3 Scope of Enforcement Clause of Thirteenth Amendment.

[9] *See id.*

Amdt13.S1.3 Defining Involuntary Servitude

Amdt13.S1.3.1 Scope of the Prohibition

Thirteenth Amendment, Section 1

> *Neither slavery nor involuntary servitude, shall exist within the United States, or any place subject to their jurisdiction.*

In addition to interpreting the scope of the term "slavery" in the Thirteenth Amendment, the Supreme Court has also examined the meaning of the Amendment's prohibition on "involuntary servitude." This form of servitude generally involves compulsion of a person's labor through the use of physical force, legal action, or threats thereof.[1] Even after the Thirteenth Amendment's ratification, some states subjected African Americans and other racial groups to involuntary servitude by enacting peonage laws.[2] These laws often used the threat of force or legal action to compel individuals to perform services to satisfy a real or concocted debt or obligation.[3] The Court had acknowledged that the Thirteenth Amendment prohibited peonage[4] and, in the 1905 case *Clyatt v. United States*, it later held that the Thirteenth Amendment authorized Congress to prohibit this practice.[5] In doing so, the Court distinguished peonage from the legally permissible situation in which a person voluntarily performs services to pay off a debt, which does not involve the use of law or force to compel "performance or a continuance of the service."[6]

In the 1911 case *Bailey v. Alabama*, the Supreme Court clarified that the Thirteenth Amendment prohibits states from compelling a person to perform a contract for personal services through the use of criminal sanctions.[7] In *Bailey*, an Alabama law created a statutory presumption that a worker intended to commit criminal fraud if he did not perform a labor contract and did not return property he had already received as compensation to his employer.[8] Under the statute, fraud was punishable by a fine or, alternatively, "hard labor."[9] The Court held that the law indirectly compelled workers to perform labor in violation of the Thirteenth Amendment's prohibition on involuntary servitude and federal laws prohibiting peonage.[10]

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[1] *See* United States v. Kozminski, 487 U.S. 931, 942–44 (1988), *superseded by statute*, 18 U.S.C. § 1589; Clyatt v. United States, 197 U.S. 207, 215 (1905).

[2] *See, e.g.*, Peonage Cases, 123 F. 671, 673–74, 682 (M.D. Ala. 1903).

[3] *See id.*

[4] The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1873). In these cases, the Supreme Court also indicated that the Thirteenth Amendment prohibited slavery and involuntary servitude when imposed on people of any racial group. *Id.* Congress also enacted several laws prohibiting peonage and activities in support thereof pursuant to its Thirteenth Amendment enforcement power. *See, e.g.*, 18 U.S.C. § 1581; *id.* § 1584; 42 U.S.C. § 1994. *See also* United States v. Gaskin, 320 U.S. 527, 527–28 (1944).

[5] *Clyatt*, 197 U.S. at 218.

[6] *Id.* at 215–16.

[7] 219 U.S. 219, 244 (1911) ("The State may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt.").

[8] *Id.* at 227. The Court also noted that, under the Alabama Rules of Evidence, the accused worker was unable to rebut this presumption by testifying about his "uncommunicated motives, purpose or intention." *Id.* at 228.

[9] *Id.* at 231.

[10] *Id.* at 243–45. The Court defined a "peon" as "one who is compelled to work for his creditor until his debt is paid" and stated that the "fact that [the worker] contracted to perform the labor which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the [peonage laws]." *Id.* at 242. *See also* Pollock v. Williams, 322 U.S. 4, 7, 25 (1944) (holding unconstitutional and in violation of federal peonage laws a Florida law that considered a worker's failure to perform labor after obtaining an advance *prima facie* evidence of intent to defraud); Taylor v. Georgia, 315 U.S. 25, 26, 29 (1942) (holding violative of the Thirteenth Amendment a Georgia law that punished a person who had received an advance on a contract for services, did not repay the advance, and was "bound

Amdt13.S1.3.1
Scope of the Prohibition

Much later in the twentieth century, the Supreme Court had occasion to consider whether the use of psychological coercion to compel work could constitute prohibited "involuntary servitude."[11] In *United States v. Kozminksi*, the operators of a dairy farm were indicted for allegedly using physical and psychological coercion to compel two persons with mental disabilities to perform work on the farm.[12] The alleged means of psychological coercion included subjecting the individuals to "substandard living conditions" and "isolation from others."[13] The district court instructed the jury that a person could be kept in a condition of involuntary servitude through the use of physical, legal, or "other coercion."[14]

On appeal, the Supreme Court examined whether the concept of "involuntary servitude" in relevant provisions of federal criminal law encompassed the use of psychological coercion to compel labor.[15] Because one of these statutes—18 U.S.C. § 241—prohibited "conspiracy to interfere with an individual's Thirteenth Amendment right to be free from involuntary servitude," the Court examined the scope of the Thirteenth Amendment's prohibition on involuntary servitude under the Court's precedents.[16] The Court had never adopted the view that a person could be subject to involuntary servitude through the use of psychological coercion.[17] However, the Court suggested that Congress could legislatively expand the definition of "involuntary servitude" to include psychological coercion.[18] Because Congress had not done so at the time of its decision in 1988, the Court reversed the convictions and remanded the case for a new trial.[19]

After the Supreme Court decided *Kozminski*, Congress enacted legislation to broaden the definition of "involuntary servitude" for purposes of federal criminal law.[20] In the Victims of Trafficking and Violence Protection Act of 2000, Congress referenced *Kozminski* and clarified that "involuntary servitude" included servitude maintained through nonviolent coercion.[21] Congress's legislative response to the *Kozminksi* decision is an example of the exercise of its Thirteenth Amendment enforcement powers.[22]

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by the threat of penal sanction to remain at his employment until the debt [had] been discharged"); United States v. Reynolds, 235 U.S. 133, 149–50 (1914) (holding that a person convicted of a crime is held in a condition of peonage when he faces arrest for violating a contract to perform services for a surety that payed fines resulting from his conviction to the state).

[11] United States v. Kozminski, 487 U.S. 931, 935–36 (1988), *superseded by statute*, 18 U.S.C. § 1589.

[12] *Id.* at 934.

[13] *Id.* at 936.

[14] *Id.* at 937 (explaining that the district court had instructed the jury that "[involuntary servitude] may also include situations involving either physical and other coercion, or a combination thereof, used to detain persons in employment").

[15] *Id.* at 939.

[16] *Id.* at 934, 941 (internal quotation marks omitted). The other provision, 18 U.S.C. § 1584, criminalized knowingly and willfully holding another person "to involuntary servitude" but did not specifically mention the Thirteenth Amendment. *See id.* at 934.

[17] *Id.* at 944 ("The guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion. We draw no conclusions from this historical survey about the potential scope of the Thirteenth Amendment.").

[18] *Id.* at 952.

[19] *Id.* at 952–53 ("The District Court's instruction on involuntary servitude, which encompassed other means of coercion, may have caused the Kozminskis to be convicted for conduct that does not violate either statute. Accordingly, we agree with the Court of Appeals that the convictions must be reversed and the case remanded for a new trial.").

[20] 22 U.S.C. § 7102(8).

[21] *Id.* §§ 7101(b)(13), 7102(8).

[22] For additional examples, see Amdt13.S2.1 Overview of Enforcement Clause of Thirteenth Amendment.

Amdt13.S1.3.2 Historical Exceptions

Thirteenth Amendment, Section 1

> *Neither slavery nor involuntary servitude, shall exist within the United States, or any place subject to their jurisdiction.*

The Supreme Court has recognized several limited historical exceptions to the Thirteenth Amendment's prohibition on involuntary servitude. The Court has held that some forms of involuntary service do not violate the Thirteenth Amendment because they implicate public duties that a citizen owes to his government.[1] These duties include compelled military service in a war that Congress has declared;[2] mandatory road work required under state law;[3] and, likely, jury service.[4] The Court has indicated that the common law may also furnish exceptions to the Thirteenth Amendment's prohibition on involuntary servitude.[5] For example, the Court upheld federal laws requiring a sailor to serve on a ship in accordance with his contract because the common law had long recognized this duty.[6]

Amdt13.S1.4 Exceptions Clause

Thirteenth Amendment, Section 1

> *. . . except as a punishment for crime whereof the party shall have been duly convicted, . . .*

Although the Supreme Court has long recognized limited historical exceptions to the Thirteenth Amendment's ban on involuntary servitude,[1] the Amendment also contains a specific, textual exception that permits the government to compel a person convicted of a crime

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[1] Butler v. Perry, 240 U.S. 328, 332–33 (1916) ("[The Thirteenth Amendment] certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers." (citations omitted)).

[2] Selective Draft Law Cases, 245 U.S. 366, 390 (1918) ("[W]e are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, [and thus] we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.").

[3] *Butler*, 240 U.S. at 332–33.

[4] United States v. Kozminski, 487 U.S. 931, 943–44 (1988) (stating, in dicta, that the Thirteenth Amendment does not prevent the state or federal governments from compelling jury service by threatening criminal sanctions), *superseded by statute*, 18 U.S.C. § 1589; Hurtado v. United States, 410 U.S. 578, 589 n.11 (1973) (stating that the federal government's $1-per-day payment to an incarcerated material witness before trial was not "so low as to impose involuntary servitude prohibited by the Thirteenth Amendment"); *Butler*, 240 U.S. at 332–33 (suggesting, in dicta, that the Thirteenth Amendment was not meant to prohibit mandatory jury service). *See also* Int'l Union v. Wis. Emp. Relations Bd., 336 U.S. 245, 251–52 (1949) (holding that, as applied, a Wisconsin statute authorizing the State Employment Relations Board to order employees of a labor union to cease unannounced work stoppages did not violate the Thirteenth Amendment), *overruled* by Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Rels. Comm'n, 427 U.S. 132 (1976); United States v. Petrillo, 332 U.S. 1, 12–13 (1947) (rejecting a facial Thirteenth Amendment challenge to a federal statute that criminalized coercing a communications licensee to employ more persons than necessary to conduct his business); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 199 (1921) (determining that a state law did not violate the Thirteenth Amendment by making it a misdemeanor for a lessor or his agent to fail intentionally to furnish water, heat, light, and other essential services to tenants because the law did not compel the provision of personal services but rather services "attached to land").

[5] Robertson v. Baldwin, 165 U.S. 275, 282–83 (1897) (determining that federal laws requiring a sailor to serve on a ship in accordance with his contract did not violate the Thirteenth Amendment because historically the "contract of the sailor has been treated as an exceptional one [involving] to a certain extent, the surrender of his personal liberty during the life of the contract").

[6] *Id. See also* Patterson v. Bark Eudora, 190 U.S. 169, 174–75 (1903).

[1] *See* Amdt13.S1.3.2 Historical Exceptions.

to perform labor.[2] The Thirteenth Amendment's drafters borrowed this exception from Article 6 of the 1787 ordinance governing the Northwest Territory.[3] That ordinance provided that "[t]here shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes whereof the party shall have been duly convicted."[4]

In the 1911 case *Bailey v. Alabama*, the Supreme Court clarified that the Thirteenth Amendment's exception for criminal punishment does not permit a state to compel a person to perform a contract for personal services by imposing criminal sanctions for nonperformance.[5] In *Bailey*, an Alabama law established a presumption that a worker intended to commit criminal fraud if he did not perform a labor contract and failed to return property he had received as compensation to his employer.[6] Under the statute, fraud was punishable by a fine or, alternatively, "hard labor."[7] The Court held that the law indirectly compelled workers to perform labor in violation of the Thirteenth Amendment's prohibition on involuntary servitude and federal laws prohibiting peonage.[8]

Section 2—Enforcement

Amdt13.S2.1 Overview of Enforcement Clause of Thirteenth Amendment

Thirteenth Amendment, Section 2

Congress shall have power to enforce this article by appropriate legislation.

Because the Thirteenth Amendment is self-executing, its prohibitions on slavery and involuntary servitude became effective upon ratification without the need for further government action.[1] Nonetheless, Section 2 of the Amendment grants Congress the power to enforce the Amendment's prohibitions by enacting "appropriate legislation."[2] Congress may use its enforcement power to address specific circumstances and provide remedies for violations of the Thirteenth Amendment's prohibitions.[3] Because the Thirteenth Amendment's Prohibitions Clause extends to private conduct as well as government action, the Supreme

[2] U.S. Const. amend. XIII, § 1.

[3] *An ordinance for the government of the territory of the United States, North-west of the river Ohio*, Libr. of Cong., https://www.loc.gov/resource/bdsdcc.22501/?st=gallery.

[4] *Id.*

[5] 219 U.S. 219, 244 (1911) ("The State may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt.").

[6] *Id.* at 227. The Court also noted that, under the Alabama Rules of Evidence, the accused worker was unable to rebut this presumption by testifying about his "uncommunicated motives, purpose or intention" for ceasing to perform work and keeping the compensation already paid to him. *Id.* at 228.

[7] *Id.* at 231.

[8] *Id.* at 243–44. *See also* United States v. Reynolds, 235 U.S. 133, 149–50 (1914) (holding that a person convicted of a crime is held in a condition of peonage when he faces arrest for violating a contract to perform services for a surety that payed fines resulting from his conviction to the state).

[1] The Civil Rights Cases, 109 U.S. 3, 20 (1883) ("This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances.").

[2] U.S. Const. amend. XIII, § 2.

[3] The Civil Rights Cases, 109 U.S. at 20. The Fourteenth and Fifteenth Amendments contain similar enforcement language. For more information on Congress's power to enforce the Fourteenth Amendment, see Amdt14.S5.2 Who Congress May Regulate. For more information on Congress's power to enforce the Fifteenth Amendment, see Amdt15.S2.2 Federal Remedial Legislation.

Court has long held that Congress may enforce the Amendment through legislation that directly regulates private individuals' activities.[4]

After the Civil War, newly freed slaves faced various forms of state-sanctioned and private discrimination. For example, some states enforced Black Codes that denied African Americans equal rights under the law, including the rights to vote, hold property, and use public facilities.[5] Some states codified the practice of peonage, enabling individuals to use the threat of force or legal action to compel African Americans to perform services to satisfy a financial obligation.[6] In addition, some operators of public accommodations, such as hotels and restaurants, sought to prevent African Americans from patronizing their businesses.[7] In response, beginning in 1866, Congress enacted civil rights legislation that sought to ensure that people of all races would have equal rights to make and enforce contracts and hold property, among other fundamental rights.[8] In various cases, individuals challenged the constitutionality of these laws, arguing that Congress's Thirteenth Amendment enforcement power did not authorize it to enact such laws.

For more than a century after the states ratified the Thirteenth Amendment, the Supreme Court determined that Congress's power to legislate against the "badges" and "incidents" of slavery did not authorize it to enact legislation that broadly sought to protect African Americans from private racial discrimination.[9] However, the Court's views on Congress's enforcement power changed significantly with its 1968 decision in *Jones v. Alfred H. Mayer Co*.[10] In that case, the Court adopted a more deferential approach toward Congress's enforcement power, determining that Congress may play a significant role in determining the scope of its power through the enactment of legislation.[11] Although the Court has since upheld Congress's power to enforce the Thirteenth Amendment by enacting laws to combat some forms of private racial discrimination, Congress's power to combat harms beyond racial discrimination is less clear.[12]

Amdt13.S2.2 Early Doctrine on Enforcement Clause of Thirteenth Amendment

Thirteenth Amendment, Section 2

Congress shall have power to enforce this article by appropriate legislation.

For more than a century after the states ratified the Thirteenth Amendment, the Supreme Court adopted a narrow view of the scope of Congress's power to enforce the Amendment's prohibitions. In an early decision, the Court considered the extent of Congress's enforcement power in cases that addressed equality of access to public accommodations (e.g., hotels and restaurants).[1] In the consolidated 1883 *Civil Rights Cases*, the federal government indicted several defendants for violating the Civil Rights Act of 1875[2] by denying African Americans

[4] Clyatt v. United States, 197 U.S. 207, 217 (1905) (citing The Civil Rights Cases, 109 U.S. at 20, 23).

[5] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 426–37 (1968); Bell v. Maryland, 378 U.S. 226, 288, 303 (1964) (Goldberg, J., concurring).

[6] *See* Peonage Cases, 123 F. 671, 673–74 (M.D. Ala. 1903).

[7] *See, e.g.*, The Civil Rights Cases, 109 U.S. at 8–10, 23.

[8] *See, e.g.*, Act of April 9, 1866, 39 Cong. ch. 31, 14 Stat. 27, 27–30. *See* also 42 U.S.C. §§ 1981–1982.

[9] *See* Amdt13.S2.2 Early Doctrine on Enforcement Clause of Thirteenth Amendment.

[10] 392 U.S. 409 (1968).

[11] *Id.* at 440.

[12] *See* Amdt13.S2.3 Scope of Enforcement Clause of Thirteenth Amendment.

[1] The Civil Rights Cases, 109 U.S. 3, 8–11 (1883).

[2] *See* Act of March 1, 1875, ch. 114, 18 Stat. 335.

equal access to accommodations.[3] The defendants argued that the Court should quash their indictments because Congress lacked the constitutional authority to enact the Act's provisions the government alleged they violated.[4]

The Supreme Court acknowledged that the Thirteenth Amendment authorized Congress to enact laws that directly addressed some forms of private conduct.[5] However, when addressing the government's argument that the Thirteenth Amendment authorized Congress to enact the disputed provisions of the Act, the Supreme Court wrote that Congress's enforcement power extended only to the subject of "slavery and its incidents."[6] The Court defined these "badges and incidents" of slavery to include: (1) compulsory service for another's benefit; (2) restrictions on freedom of movement; (3) the inability to hold property or enter into contracts; and (4) the incapacity to have standing in court or testify against a White person.[7]

In the *Civil Rights Cases*, the Court held that racial discrimination by private individuals in the context of access to accommodations did not amount to a badge or incident of slavery as prohibited under the Thirteenth Amendment.[8] Consequently, Congress lacked the power to outlaw such practices pursuant to its Thirteenth Amendment enforcement power. Accordingly, the provisions of the Civil Rights Act of 1875 at issue were unconstitutional.[9]

During the early twentieth century, the Supreme Court again adopted a narrow interpretation of Congress's power under the Thirteenth Amendment's Enforcement Clause. The Court considered whether Congress could punish conspiracies that sought to interfere with labor contracts entered into by African Americans.[10] In *Hodges v. United States*, a group of White men threatened African Americans who worked at a lumber mill, seeking to prevent the workers from performing their jobs.[11] The defendants were convicted under federal laws that criminalized conspiracies to deprive American citizens of their constitutional rights, which included the right to enter into contracts.[12] Appealing their convictions, the defendants argued that Congress lacked the authority to enact legislation criminalizing such conspiracies.[13] The Court, after determining that Congress lacked such power over private contracts under the Constitution's original text, reviewed the Reconstruction Amendments to decide whether they authorized Congress to enact the legislation.[14]

The Supreme Court first determined that neither the Fourteenth nor Fifteenth Amendments authorized Congress to enact the laws at issue because these Amendments

[3] The Civil Rights Cases, 109 U.S. at 26.

[4] *See id.* at 8–9.

[5] *Id.* at 20 ("And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.").

[6] *Id.* at 23.

[7] *Id.* at 22.

[8] *Id.* at 24.

[9] *Id.* at 26. The Supreme Court also held that Congress lacked the power to legislate the relevant provisions of the Act under the Fourteenth Amendment because that Amendment authorized Congress to enact corrective legislation negating state laws that violated Fourteenth Amendment guarantees and not to legislate new federal laws prohibiting private discrimination. *Id.* at 11–13. *See also Ex parte* Virginia, 100 U.S. 339, 344–46 (1879) (determining that the Thirteenth, Fourteenth, and Fifteenth Amendments authorized Congress to enact civil rights legislation prohibiting racial discrimination in jury selection because such discrimination implicated state action).

[10] Hodges v. United States, 203 U.S. 1, 14–20 (1906), *overruled* by Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 n.78 (1968).

[11] The Supreme Court's opinion in *Hodges* does not provide much detail as to the case's background. *See Jones*, 392 U.S. at 441 n.78 (discussing the facts of *Hodges*).

[12] *Id.*

[13] *See id.*

[14] *Hodges*, 203 U.S. at 14–15.

restricted state action, not private action.[15] However, because the Thirteenth Amendment applied to private action, the Court considered whether Congress could enact the laws as an exercise of its power to enforce that Amendment.[16] Ultimately, the Court answered this question in the negative, holding that private interference with an individual's freedom to contract did not subject an individual to slavery or involuntary servitude within the Thirteenth Amendment's meaning.[17] The Court held that the federal government lacked jurisdiction over the conduct at issue and set aside the convictions.[18] In so holding, the Court adopted a narrow view of the Thirteenth Amendment's prohibitions on involuntary servitude, determining that, while the Amendment prohibited slavery, it did not protect many other individual rights of African Americans.[19]

Amdt13.S2.3 Scope of Enforcement Clause of Thirteenth Amendment

Thirteenth Amendment, Section 2

Congress shall have power to enforce this article by appropriate legislation.

For more than a century after the states ratified the Thirteenth Amendment, the Supreme Court determined that Congress's power to legislate against the "badges" and "incidents" of slavery did not authorize it to enact legislation that sought to protect African Americans from some forms of private racial discrimination.[1] However, the Court significantly changed course with its 1968 decision in *Jones v. Alfred H. Mayer Co.*[2] In that case, the Court overruled its earlier decision in *Hodges v. United States* and adopted a much more deferential approach, determining that Congress may play a significant role in determining the scope of its enforcement power by enacting legislation.[3]

In *Jones*, the Supreme Court held that Congress had authority to enact a provision in the Civil Rights Act of 1866 that barred private racial discrimination in the sale or rental of property.[4] Overruling its earlier decision in *Hodges*, the Court held that Congress could prohibit private acts that interfered with African Americans' "fundamental rights which are the essence of civil freedom," including the right to lease or purchase real property, so long as Congress had a rational basis for doing so.[5] The Court wrote that "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

[15] *Id.*

[16] *Id*

[17] *Id.* at 18–19.

[18] *Id.* at 20. *See also* United States v. Harris, 106 U.S. 629, 642–43 (1883) (declaring that Congress lacked power under the Thirteenth Amendment to enact a law criminalizing conspiracies of two or more persons that sought to deprive another person of equal protection of the laws because upholding the law would "accord to Congress the power to punish every crime by which the right of any person to life, property, or reputation is invaded").

[19] *Id.* The Court later determined that judicial enforcement of such covenants violated the Fourteenth Amendment's Equal Protection Clause. Shelley v. Kraemer, 334 U.S. 1, 23 (1948). In a separate case, the Court determined that enforcement of such covenants in the District of Columbia, which is not subject to the Fourteenth Amendment, violated federal law and policy. Hurd v. Hodge, 334 U.S. 24, 32–36 (1948).

[1] *See* Amdt13.S2.2 Early Doctrine on Enforcement Clause of Thirteenth Amendment.

[2] 392 U.S. 409 (1968).

[3] *Id.* at 440–42 & 441 n.78. The Supreme Court has confirmed that Congress's power to address private racial discrimination is not limited to discrimination against African Americans, but encompasses all races. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 288 n.18 (1976) (citing Hodges v. United States, 203 U.S. 1, 16–17 (1906)), *overruled* by Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 n.78 (1968).

[4] *Jones*, 392 U.S. at 417–22, 440–44.

[5] *Id.* at 440, 441 & n.78.

legislation."[6] Thus, in *Jones*, the Court adopted a more deferential approach toward Congress's enforcement power, determining that legislation could prohibit practices, such as the discriminatory refusal to engage in real estate transactions with African Americans, that did not amount to slavery but retained the vestiges of some of its "badges" or "incidents."[7]

After deciding *Jones*, the Supreme Court held that Congress's Thirteenth Amendment enforcement power allowed it to prohibit private racial discrimination in a variety of other contexts.[8] For example, the Court confirmed that Congress's enforcement power authorized it to enact laws barring racial discrimination in making and enforcing contracts, which prohibited racially discriminatory admissions policies for private schools.[9] In addition, the Court held that Congress could enact remedial laws that granted individuals a statutory remedy against private persons that allegedly conspired to violate their civil rights because of their race.[10]

The Court has suggested, however, that the Congress that proposed the Thirteenth Amendment did not intend to prohibit practices that lacked discriminatory *intent* and merely had a disparate negative *impact* on African Americans.[11] As a result, it is unclear whether Congress's Thirteenth Amendment enforcement power extends to prohibiting such practices.

[6] *Id.* at 440.

[7] In this case, those vestiges were private acts that interfered with African Americans' rights to hold property or enter into contracts. *See id.* at 441. The Court did not address whether the Thirteenth Amendment's Prohibition Clause would itself have prohibited the practices at issue in the case without Congress's enactment of legislation. Palmer v. Thompson, 403 U.S. 217, 226–27 (1971) (holding that a city's closing of swimming pools to all persons, even if done with the intent to prevent African Americans and Whites from swimming together, did not amount to a "badge or incident" of slavery directly prohibited under the Thirteenth Amendment). In *Palmer*, however, the Court noted that Congress had not enacted a federal law barring this practice. *Id.*

[8] In the 1960s, the Supreme Court also upheld congressional enactments against private racial discrimination in public accommodations that served interstate travelers as a proper exercise of Congress's Commerce Clause power. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 250–51, 261–62 (1964). The Court rejected the notion that such enactments violated the Thirteenth Amendment as applied to the businesses furnishing public accommodations. *See id*. *See also* Katzenbach v. McClung, 379 U.S. 294, 304–05 (1964).

[9] Runyon v. McCrary, 427 U.S. 160, 179 (1976) (evaluating Section 1 of the Civil Rights Act of 1866, which provided that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens"), *superseded* by 42 U.S.C.§ 1981(c). *See also* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 235–40 (1969) (confirming that 42 U.S.C. § 1982, which Congress enacted pursuant to its Thirteenth Amendment enforcement power, prohibited private individuals from excluding an African American lessee, on the basis of race, from using community recreational facilities).

[10] Griffin v. Breckenridge, 403 U.S. 88, 105 (1971). Nonetheless, the Supreme Court cautioned that the federal statute at issue in *Griffin*, 42 U.S.C. § 1985, was not a source of "general federal tort law" and that a successful claim required a showing of "invidiously discriminatory animus behind the conspirators' action." *Id.* at 102.

[11] City of Memphis v. Greene, 451 U.S. 100, 126–29 (1981) (holding that a city's closing of one end of a street to reduce the flow of traffic and increase safety, even if it disproportionately inconvenienced African American citizens, was not a "badge" of slavery prohibited under the Thirteenth Amendment). *See also* Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 387–89 (1982) (determining that the Congress that proposed the Thirteenth Amendment was not concerned with practices that had a disparate negative impact on African Americans but lacked a discriminatory purpose). For a discussion of how the Fourteenth Amendment's guarantee of equal protection applies to facially neutral laws that have a disparate negative impact on a racial minority but lack discriminatory intent, see Amdt14.S1.8.5 Facially Neutral Laws Implicating Racial Minorities.

Amdt13.S2.4 Use of Enforcement Clause Power Beyond Harms of Racial Discrimination

Thirteenth Amendment, Section 2

Congress shall have power to enforce this article by appropriate legislation.

The scope of Congress's power to enforce the Thirteenth Amendment to combat harms beyond racial discrimination is unclear.[1] Questions about the scope of Congress's Thirteenth Amendment enforcement power arose when the 111th Congress enacted the Hate Crimes Prevention Act of 2009. The Act criminalized conduct that willfully caused, or attempted to cause, bodily injury to individuals because of their actual or perceived race, color, religion, or national origin.[2] The prohibition did not require that such criminal offenses involve state action or have a nexus to interstate commerce, prompting questions as to whether Congress's Thirteenth Amendment enforcement power authorized its criminalization of privately inflicted harms.[3]

Although the Supreme Court has not yet considered the 2009 Act's constitutionality, the Department of Justice's Office of Legal Counsel (OLC) opined that Congress could rely on its Thirteenth Amendment enforcement power to enact the legislation. The OLC advised that the Act was constitutional at least "insofar as the violence is directed at members of those religions or national origins that would have been considered races at the time of the adoption of the Thirteenth Amendment."[4] The OLC reasoned that Congress could punish private, racially motivated violence "as part of a reasonable legislative effort to extinguish the relics, badges and incidents of slavery."[5] The OLC noted that race-based violence had been used in the past to maintain slavery and involuntary servitude.[6] In determining that Congress's Thirteenth Amendment enforcement power authorized legislation protecting certain religious and

[1] Some commentators have argued that the Thirteenth Amendment prohibits practices that do not involve racial discrimination but are allegedly comparable to slavery or involuntary servitude. For example, some scholars have argued that the Amendment prohibits parents from abusing their children or prevents the government from banning abortion. *See, e.g.*, Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1365–66 (1992) (contending that the Thirteenth Amendment prohibits certain forms of child abuse); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U.L. REV. 480, 484 (1990) ("When women are compelled to carry and bear children, they are subjected to 'involuntary servitude' in violation of the thirteenth amendment."). The Supreme Court has never applied the Prohibition Clause in Section 1 of the Thirteenth Amendment to child abuse or abortion bans. Moreover, the Court has not addressed whether Congress could use its Section 2 enforcement power to address these issues. *See generally* George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1403 (2008) ("Congress, unlike the courts, has the capacity to select the elements associated with slavery for prohibition or regulation and to reflect the political support necessary to curtail or eliminate those elements of servitude. By contrast, under Section 1, the judiciary can only go so far in finding that otherwise justifiable relationships, such as that between parent and child, can be regulated when they take on pathological forms equivalent to involuntary servitude.").

[2] 18 U.S.C. § 249(a)(1).

[3] *See* Constitutionality of the Matthew Shepard Hate Crimes Prevention Act, 33 Op. O.L.C. 240 (2009), https://www.justice.gov/olc/file/2009-06-16-hate-crimes/download. Another section of the Hate Crimes Prevention Act prohibits offenses committed because of a person's actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability. *See* 18 U.S.C. § 249(a)(2). However, this prohibition requires a nexus between the offense and interstate commerce. *See id*. Thus, Congress's Commerce Clause power arguably provided the requisite authority for the criminal prohibition.

[4] 33 Op. O.L.C. 240 (2009). The OLC did not evaluate whether Congress's Commerce Clause power or Fourteenth Amendment enforcement power might authorize the law. *See id.* at 242 n.3.

[5] *Id.* at 242.

[6] *Id.*

Amdt13.S2.4
Use of Enforcement Clause Power Beyond Harms of Racial Discrimination

national origin groups, the OLC relied on a series of Supreme Court opinions holding that such groups would have been considered races at the time that Congress debated, and the states ratified, the Thirteenth Amendment.[7]

Uncertainty over whether the Thirteenth Amendment authorizes legislation prohibiting private forms of violence against certain groups illustrates that much remains unclear about the scope of Congress's enforcement power. One major unresolved question involves the extent to which Congress, when enacting legislation to enforce the Thirteenth Amendment, has the power to define the specific forms of government or private action that the Amendment prohibits.[8]

[7] *Id.* at 242–43. *See also* Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617–18 (1987) (suggesting that Jews are a race in this context); Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610–13 (1987) (holding that Arabs were considered a racial group at the time the states ratified the Thirteenth Amendment); Hodges v. United States, 203 U.S. 1, 17 (1906) ("Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon are as much within its compass as slavery or involuntary servitude of the African."). The OLC suggested that Congress's authority to protect other groups under the legislation could derive from its Commerce Clause power. *See Constitutionality of the Matthew Shepard Hate Crimes Prevention Act*, 33 Op. O.L.C. 240 (2009), https://www.justice.gov/olc/file/2009-06-16-hate-crimes/download.

[8] *See* G. Sidney Buchanan, *The Thirteenth Amendment and the Badge of Slavery Concept: A Projection of Congressional Power*, 12 Hous. L. Rev. 1070, 1070 (1975); Rutherglen, *supra* note 1, at 1403–04.