SLAVERY AND INVOLUNTARY SERVITUDE

THIRTEENTH AMENDMENT

SECTIONS 1 AND 2. 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.

ABOLITION OF SLAVERY

Origin and Purpose

On January 1, 1863, President Lincoln issued the Emancipation Proclamation [1] declaring, based on his war powers, that within named states and parts of states in rebellion against the United States "all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free . . . ." The Proclamation did not allude to slaves held in the loyal states, and, moreover, there were questions about the Proclamation's validity. Not only was there doubt concerning the President's power to issue his order at all, but also there was a general conviction that its effect would not last beyond the restoration of the seceded states to the Union.[2] Because the power of Congress was similarly deemed not to run to legislative extirpation of the "peculiar institution," [3] a constitutional amendment was then sought. After first failing to muster a two-thirds vote in the House of Representatives, the amend-

[1] 12 Stat. 1267. On September 22, 1862, Lincoln had issued the preliminary Emancipation Proclamation, which announced his intention to issue the Emancipation Proclamation on January 1, 1863.

[2] The legal issues were surveyed in Welling, *The Emancipation Proclamation*, 130 NO. AMER. REV. 163 (1880). *See also* J. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 371–404 (rev. ed. 1951); ALLEN C. GUELZO, LINCOLN'S EMANCIPATION PROCLAMATION: THE END OF SLAVERY IN AMERICA (2004); and Frank J. Williams, "Doing Less" and "Doing More": The President and the Proclamation—Legally, Militarily, and Politically, in HAROLD HOLZER, EDNA GREENE MEDFORD, AND FRANK J. WILLIAMS, THE EMANCIPATION PROCLAMATION: THREE VIEWS (2006).

[3] K. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (1956).

ment was forwarded to the states on February 1, 1865, and ratified by the following December 18.[4]

In selecting the text of the Amendment, Congress "reproduced the historic words of the ordinance of 1787 for the government of the Northwest Territory, and gave them unrestricted application within the United States."[5] By its adoption, Congress intended, said Senator Trumbull, one of its sponsors, to "take this question [of emancipation] entirely away from the politics of the country. We relieve Congress of sectional strifes . . . ."[6] An early Supreme Court decision, rejecting a contention that the Amendment reached servitudes on property as it did on persons, observed in dicta that the "word servitude is of larger meaning than slavery, . . . and the obvious purpose was to forbid all shades and conditions of African slavery."

Although the Court was initially in doubt whether persons other than African-Americans could share in the protection afforded by the Amendment, it did continue to say that, although "[N]egro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void."[7]

"This Amendment . . . is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom."[8] These words of the Court in 1883 have generally been noncontroversial and have evoked little disagreement in the intervening years. The "force and effect" of the Amendment itself has been invoked only a few times by the Court to strike down state legislation which it considered to have reintroduced servitude of persons, and the Court has not used

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[4] The congressional debate on adoption of the Amendment is conveniently collected in 1 B. Schwartz, Statutory History of the United States: Civil Rights 25–96 (1970).

[5] Bailey v. Alabama, 219 U.S. 219, 240 (1911). During the debate, Senator Howard noted that the language was "the good old Anglo-Saxon language employed by our fathers in the ordinance of 1787, an expression which has been adjudicated upon repeatedly, which is perfectly well understood both by the public and by judicial tribunals. . . ." Cong. Globe, 38th Cong., 1st Sess. 1489 (1864).

[6] Cong. Globe at 1313–14.

[7] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 69, 71–72 (1873). This general applicability was again stated in Hodges v. United States, 203 U.S. 1, 16–17 (1906), and confirmed by the result of the peonage cases, discussed under the next topic.

[8] *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

section 1 of the Amendment against private parties.[9] In 1968, however, the Court overturned almost century-old precedent and held that Congress may regulate private activity in exercise of its section 2 power to enforce section 1 of the Amendment.

Certain early cases suggested broad congressional powers,[10] but the *Civil Rights Cases*[11] of 1883 began a process, culminating in *Hodges v. United States*,[12] that substantially curtailed these powers. In the former decision, the Court held unconstitutional an 1875 law[13] guaranteeing equality of access to public accommodations. Referring to the Thirteenth Amendment, the Court conceded that "legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. 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." Appropriate legislation under the Amendment, the Court continued, could go beyond nullifying state laws establishing or upholding slavery, because the Amendment "has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States," and thereby empowering Congress "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[14]

These badges and incidents as perceived by the Court, however, were those that Congress in its 1866 legislation[15] had sought "to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, pur-

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[9] In Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968), the Court left open the question whether the Amendment itself, unaided by legislation, would reach the "badges and incidents" of slavery not directly associated with involuntary servitude, and it continued to reserve the question in City of Memphis v. Greene, 451 U.S. 100, 125–26 (1981). *See* Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Justice Harlan dissenting). The Court drew back from the possibility in Palmer v. Thompson, 403 U.S. 217, 226–27 (1971).

[10] United States v. Rhodes, 27 F. Cas. 785 (No. 16,151) (C.C. Ky. 1866) (Justice Swayne on circuit); United States v. Cruikshank, 25 Fed. Cas. 707, (No. 14,897) (C.C.D. La. 1874) (Justice Bradley on circuit), aff'd on other grounds, 92 U.S. 542 (1876); United States v. Harris, 106 U.S. 629, 640 (1883); Blyew v. United States, 80 U.S. 581, 601 (1871) (dissenting opinion, majority not addressing the issue).

[11] 109 U.S. 3 (1883).

[12] 203 U.S. 1 (1906). *See also* Plessy v. Ferguson, 163 U.S. 537, 542–43 (1896); Corrigan v. Buckley, 271 U.S. 323, 331 (1926); Hurd v. Hodge, 334 U.S. 24, 31 (1948).

[13] Ch. 114, 18 Stat. 335.

[14] *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

[15] Ch. 31, 14 Stat. 27 (1886), now 42 U.S.C. §§ 1981–82.

chase, lease, sell and convey property, as is enjoyed by white citizens."[16] But the Court could not see that the refusal of accommodations at an inn or a place of public amusement, without any sanction or support from any state law, could inflict upon such person any manner of servitude or form of slavery, as those terms were commonly understood. "It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make. . . ."[17]

Then, in *Hodges v. United States*,[18] the Court set aside the convictions of three men for conspiring to drive several African-Americans from their employment in a lumber mill. The Thirteenth Amendment operated to abolish, and to authorize Congress to legislate to enforce abolition of, conditions of enforced compulsory service of one to another, and no attempt to analogize a private impairment of freedom to a disability of slavery would suffice to give the Federal Government jurisdiction over what was constitutionally a matter of state remedial law.

Hodges was overruled by the Court in a far-reaching decision that concluded that the 1866 congressional enactment,[19] far from simply conferring on all persons the *capacity* to buy and sell property, also prohibited private denials of the right through refusals to deal,[20] and that this statute was fully supportable by the Thirteenth Amendment. "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. . . . Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery. . . . At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white

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[16] *Civil Rights Cases*, 109 U.S. 3, 22 (1883).

[17] 109 U.S. at 24.

[18] 203 U.S. 1 (1906), *overruled by* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 n.78 (1968).

[19] Ch. 31, 14 Stat. 27 (1866). The portion at issue is now 42 U.S.C. § 1982.

[20] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 420–37 (1968). Justices Harlan and White dissented from the Court's interpretation of the statute. Id. at 449. Chief Justice Burger joined their dissent in Sullivan v. Little Hunting Park, 396 U.S. 229, 241 (1969). The 1968 Civil Rights Act forbidding discrimination in housing on the basis of race was enacted a brief time before the Court's decision. Pub. L. No. 90–284, 82 Stat. 81, 42 U.S.C. § 3601–31.

man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep." [21]

The Thirteenth Amendment, then, could provide the constitutional support for the various congressional enactments against private racial discrimination that Congress had previously based on the Commerce Clause.[22] Because the 1866 Act contains none of the limitations written into the modern laws, it has a vastly extensive application.[23]

Peonage

Notwithstanding its early acknowledgment in the *Slaughter-House Cases* that peonage was comprehended within the slavery and involuntary servitude proscribed by the Thirteenth Amendment,[24] the Court has had frequent occasion to determine whether state legislation or the conduct of individuals has contributed to reestablishment of that prohibited status. Defined as a condition of enforced servitude by which the servitor is compelled to labor against his will in liquidation of some debt or obligation, either real or pretended, peonage was found to have been unconstitutionally sanctioned by an Alabama statute, directed at defaulting sharecroppers, which imposed a criminal liability and subjected to imprisonment

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[21] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440–43 (1968). *See also* City of Memphis v. Greene, 451 U.S. 100, 124–26 (1981).

[22] *E.g.*, federal prohibition of racial discrimination in public accommodations, found lacking in constitutional basis under the Thirteenth and Fourteenth Amendments in the *Civil Rights Cases*, 109 U.S. 3 (1883), was upheld as an exercise of the commerce power in Heart of Atlanta Motel v. United States, 379 U.S. 241 (1965), and Katzenbach v. McClung, 379 U.S. 294 (1965).

[23] The 1968 statute on housing and the 1866 act are compared in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413–17 (1968). The expansiveness of the 1866 statute and of congressional power is shown by Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) (1866 law protects share in a neighborhood recreational club which ordinarily went with the lease or ownership of house in area); Runyon v. McCrary, 427 U.S. 160 (1976) (guarantee that all persons shall have the same right to make and enforce contracts as is enjoyed by white persons protects the right of black children to gain admission to private, commercially operated, nonsectarian schools); Johnson v. Railway Express Agency, 421 U.S. 454, 459–60 (1975) (statute affords a federal remedy against discrimination in private employment on the basis of race); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 285–96 (1976) (statute protects against racial discrimination in private employment against whites as well as nonwhites). *See also* Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973). The Court has also concluded that pursuant to its Thirteenth Amendment powers Congress could provide remedial legislation for African-Americans deprived of their rights because of their race. Griffin v. Breckenridge, 403 U.S. 88, 104–05 (1971). Conceivably, the reach of the 1866 law could extend to all areas in which Congress has so far legislated and to other areas as well, justifying legislative or judicial enforcement of the Amendment itself in such areas as school segregation.

[24] 83 U.S. (16 Wall.) 36 (1873).

farm workers or tenants who abandoned their employment, breached their contracts, and exercised their legal right to enter into employment of a similar nature with another person. The clear purpose of such a statute was declared to be the coercion of payment, by means of criminal proceedings, of a purely civil liability arising from breach of contract.[25]

Several years later, in *Bailey v. Alabama*,[26] the Court voided another Alabama statute that made the refusal without just cause to perform the labor called for in a written contract of employment, or to refund the money or pay for the property advanced thereunder, *prima facie* evidence of an intent to defraud, and punishable as a criminal offense, and that was enforced subject to a local rule of evidence that prevented the accused, for the purpose of rebutting the statutory presumption, from testifying as to his "uncommunicated motives, purpose, or intention." Because a state "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," the Court refused to permit it "to accomplish the same result [indirectly] by creating a statutory presumption which, upon proof of no other fact, exposes him to conviction." [27]

In 1914, in *United States v. Reynolds*,[28] a third Alabama enactment was condemned as conducive to peonage through the permission it accorded to persons, fined upon conviction for a misdemeanor, to confess judgment with a surety in the amount of the fine and costs, and then to agree with said surety, in consideration of the latter's payment of the confessed judgment, to reimburse him by working for him upon terms approved by the court, which, the Court pointed out, might prove more onerous than if the convict had been sentenced to imprisonment at hard labor in the first place. Fulfillment of such a contract with the surety was viewed as being virtually coerced by the constant fear it induced of rearrest, a new prosecution, and a new fine for breach of contract, which new penalty the convicted person might undertake to liquidate in a similar manner attended by similar consequences.

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[25] *Peonage Cases*, 123 F. 671 (M.D. Ala. 1903).

[26] 219 U.S. 219 (1911). Justice Holmes, joined by Justice Lurton, dissented on the ground that a state was not forbidden by this Amendment from punishing a breach of contract as a crime. "Compulsory work for no private master in a jail is not peonage." Id. at 247.

[27] 219 U.S. at 244.

[28] 235 U.S. 133 (1914).

Bailey v. Alabama was followed in *Taylor v. Georgia* [29] and *Pollock v. Williams*,[30] in which statutes of Georgia and Florida, not materially different from the one voided in *Bailey*, were held unconstitutional. Although the Georgia statute prohibited the defendant from testifying under oath, it did not prevent him from entering an unsworn denial both of the contract and of the receipt of any cash advancement thereunder, a factor that, the Court emphasized, was no more controlling than the customary rule of evidence in *Bailey*. In the Florida case, notwithstanding the fact that the defendant pleaded guilty and accordingly obviated the necessity of applying the *prima facie* presumption provision, the Court reached an identical result, chiefly on the ground that the presumption provision, despite its nonapplication, "had a coercive effect in producing the plea of guilty."

Pursuant to its section 2 enforcement powers, Congress enacted a statute by which it abolished peonage and prohibited anyone from holding, arresting, or returning, or causing or aiding in the arresting or returning, of a person to peonage.[31]

The Court looked to the meaning of the Thirteenth Amendment in interpreting two enforcement statutes, one prohibiting conspiracy to interfere with exercise or enjoyment of constitutional rights,[32] the other prohibiting the holding of a person in a condition of involuntary servitude.[33] For purposes of prosecution under these authorities, the Court held, "the term 'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." [34]

Situations in Which the Amendment Is Inapplicable

The Thirteenth Amendment has been held inapplicable in a wide range of situations. Thus, under a rubric of "services which have from time immemorial been treated as exceptional," the Court held

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[29] 315 U.S. 25 (1942).

[30] 322 U.S. 4 (1944). Justice Reed, with Chief Justice Stone concurring, contended in a dissenting opinion that a state is not prohibited by the Thirteenth Amendment from "punishing the fraudulent procurement of an advance in wages." Id. at 27.

[31] Ch. 187, § 1, 14 Stat. 546, now in 42 U.S.C. § 1994 and 18 U.S.C. § 1581. Upheld in Clyatt v. United States, 197 U.S. 207 (1905); *see also* United States v. Gaskin, 320 U.S. 527 (1944). *See also* 18 U.S.C. § 1584, which is a merger of 3 Stat. 452 (1818), and 18 Stat. 251 (1874), dealing with involuntary servitude. *Cf.* United States v. Shackney, 333 F.2d 475, 481–83 (2d Cir. 1964).

[32] 18 U.S.C. § 241.

[33] 18 U.S.C. § 1584.

[34] United States v. Kozminski, 487 U.S. 931 (1988). Compulsion of servitude through "psychological coercion," the Court ruled, is not prohibited by these statutes.

that contracts of seamen, involving to a certain extent the surrender of personal liberty, may be enforced without regard to the Amendment.[35] Similarly, enforcement of those duties that individuals owe the government, "such as services in the army, militia, on the jury, etc.," is not covered.[36] A state law requiring every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation was sustained.[37] A Thirteenth Amendment challenge to conscription for military service was summarily rejected.[38] A state law making it a misdemeanor for a lessor, or his agent or janitor, intentionally to fail to furnish such water, heat, light, elevator, telephone, or other services as may be required by the terms of the lease and necessary to the proper and customary use of the building was held not to create an involuntary servitude.[39] A federal statute making it unlawful to coerce, compel, or constrain a communications licensee to employ persons in excess of the number of the employees needed to conduct his business was held not to implicate the Amendment.[40] Injunctions and cease and desist orders in labor disputes requiring return to work do not violate the Amendment.[41]

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[35] Robertson v. Baldwin, 165 U.S. 275, 282 (1897).

[36] Butler v. Perry, 240 U.S. 328, 333 (1916) ("the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results," id. at 332).

[37] Butler v. Perry, 240 U.S. 328 (1916).

[38] *Selective Draft Law Cases*, 245 U.S. 366 (1918). The Court's analysis, in full, of the Thirteenth Amendment issue raised by a compulsory military draft was the following: "as we 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, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement." Id. at 390.

Although the Supreme Court has never squarely held that conscription need not be premised on a declaration of war, indications are that the power is not constrained by the need for a formal declaration of war by "the great representative body of the people." During the Vietnam War (an undeclared war) the Court, upholding a conviction for burning a draft card, declared that the power to classify and conscript manpower for military service was "beyond question." United States v. O'Brien, 391 U.S. 367, 377 (1968). *See also* United States v. Holmes, 387 F.2d 781, 784 (7th Cir. 1968) ("the power of Congress to raise armies and to take effective measures to preserve their efficiency, is not limited by either the Thirteenth Amendment or the absence of a military emergency"), *cert. denied*, 391 U.S. 936 (1968) (Justice Stewart concurring and Justice Douglas dissenting).

[39] Marcus Brown Co. v. Feldman, 265 U.S. 170, 199 (1921).

[40] United States v. Petrillo, 332 U.S. 1, 12–13 (1947).

[41] UAW v. WERB, 336 U.S. 245 (1949).