MASS INCARCERATION, CONVICT LEASING, AND THE THIRTEENTH AMENDMENT: A REVISIONIST ACCOUNT

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Judging from present-day legal and popular discourse, one might think that the Punishment Clause of the Thirteenth Amendment has always had one single, clear meaning: that a criminal conviction strips the offender of protection against slavery or involuntary servitude. Upon examination, however, it appears that the Amendment's Republican framers took an entirely different view. It was the former slave masters and their Democratic allies in Congress who promoted the interpretation that prevails today. From their point of view, the text clearly specified that, once convicted of a crime, a person could be sold into slavery for life or leased for a term at the discretion of state legislatures and officials. But contemporary Republicans emphatically rejected that reading. They held that convicted persons retained protection against any servitude that was inflicted not as a punishment for crime but for some non-penological end, such as raising state revenue, generating private profits, or subjugating black labor. Within a few months of the Amendment's ratification, the Republican majority in the Thirty-Ninth Congress had outlawed the early, race-based forms of convict leasing. When that proved insufficient, the House passed a bill outlawing race-neutral convict leasing, which the Senate postponed when the focus of Republican strategy shifted to black voting rights.

The Republican reading faded from view after the Democratic Party regained control of the Deep South. For several decades, white supremacist regimes incarcerated African-American laborers en masse and leased them to private employers without facing a serious Thirteenth Amendment challenge. Present-day scholars sometimes treat this silence as evidence that the Amendment authorizes such practices. Courts similarly honor the Democratic reading on the assumption it has always prevailed. So thoroughly has it triumphed that even prisoners' rights advocates accept it as constitutional truth.

Neither courts nor advocates have, however, taken into account the framers' views. Their interpretation sank from sight not because it was wrong but because Democratic paramilitaries terminated Reconstruction, freeing states to expand convict leasing and insulate it against challenges, constitutional or otherwise. Had the Republican reading been enforced during the era of convict leasing, it might have prevented one of the most barbaric and shameful episodes in United States history. And perhaps, if revived today, it might yet accomplish similar results. Nothing in the text, original meaning, or Supreme Court jurisprudence of the Punishment Clause blocks that path.

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"[A]s the Constitution of the United States [gives] the power to inflict involuntary servitude as a punishment for crime, a suitable law should be framed by the state jurists [to] enable them to sell into bondage once more those Negroes found guilty of certain crimes."

—John T. Morgan
Former Confederate General, 1866[1]

"Slavery's still alive
Check Amendment 13
Not whips and chains
All subliminal
*Instead of 'ni**a'*
They use the word 'criminal'"

—Common, featuring Bilal
for Ava Duvernay's film, *13th*, 2016[2]

Introduction

The Thirteenth Amendment prohibits slavery and involuntary servitude "except as a punishment for crime whereof the party shall have been duly convicted."[3] From John T. Morgan to Common, Americans of many political stripes have read the exception broadly to strip Thirteenth Amendment protection from any person convicted of a crime. Today, even the fiercest critics of mass incarceration generally accept that the Punishment Clause permits practices they condemn as brutal and exploitative.[4] This stance reflects the prevailing jurisprudence. "The Thirteenth Amendment," asserts Circuit Judge Richard Posner, "has an express exception for *persons* imprisoned pursuant to conviction for crime."[5] On this view of the Clause, a sen-

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[1] Sidney Andrews, The South Since the War: As Shown by Fourteen Weeks of Travel and Observation in Georgia and the Carolinas 324 (1866) (quoting county newspaper's paraphrase of a public speech).

[2] Common, featuring Bilal, *Letter to the Free*, *on* Black America Again (Def Jam Recordings 2016).

[3] U.S. Const. amend. XIII, § 1.

[4] Ava Duvernay's film 13th, for example, casts the Amendment as the villain, affirmatively authorizing convict leasing, mass incarceration, and the sale of convict labor to private corporations. *See* 13th (Netflix 2016) (paraphrasing the Amendment and concluding: "So once you have been convicted of a crime, you are in essence a slave of the state"); *see* Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 Harv. L. Rev. 1, 8 (2019) (observing that prison abolitionists rarely draw on the Constitution and that some view it as a cause of the problem).

[5] Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (emphasis added); *see also* Hale v. Arizona, 993 F.2d 1387, 1394 (9th Cir. 1993) ("Convicted criminals do not have the right freely to sell their labor and are not protected by the Thirteenth Amendment against involuntary servitude."); Ray v. Mabry, 556 F.2d 881, 882 (8th Cir. 1977) (calling an inmate's complaint against required 90–120 hours of manual work per week "meritless"

tence of imprisonment renders a person vulnerable to servitude at the discretion of legislatures, administrative agencies, or prison officials for any variety of purposes including generating public revenue or private profit; "punishment for crime" need not be the decisive factor or even a factor in determining whether any particular person is condemned to forced labor.[6] To most courts, this conclusion flows directly from the text, with no need to probe history for evidence of original meaning. As one court put it, "reading of the words of the Amendment would be all that could possibly be necessary to treat as frivolous" an inmate's claim that he had been unconstitutionally subjected to forced labor.[7]

But the Amendment is subject to a very different reading of at least equivalent plausibility. It provides: "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." The text excepts not *persons* convicted of crime, but instances of slavery or involuntary servitude that exist "as a punishment for crime whereof the party shall have been duly convicted." It would appear, then, that convicted offenders retain protection against slavery or involuntary servitude unless it has been imposed as a punishment for the specific crime whereof they have been duly convicted.[8] Under this reading, any particular instance of prison slavery or servitude could be challenged if, on the facts, it fell outside the exception. Prisoners might allege, for example, that they had been forced to work not as a punishment for crime but as a means for achieving any number of other possible ends, for example raising revenue for the state, generating private profit, or socializing inmates to accept an inferior status as civilly dead outcasts from society.[9] They might challenge the widespread practice of imposing servitude without a sentence of hard labor; after all, the sentencing authority is—by definition—charged with specifying the punishment, while prison administrators inflict servitude for reasons having

because "[c]ompelling prison inmates to work does not contravene the Thirteenth Amendment").

[6] *See infra* Section III.B.

[7] Wendt v. Lynaugh, 841 F.2d 619, 620 (5th Cir. 1988) (discussed *infra*, notes 376–81 and accompanying text).

[8] *See* Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 978 (2019) ("From a strict textualist point of view, modern-day prison slavery is not actually permitted by the Punishment Clause because it is not itself 'punishment' even though it is ancillary to the sentence actually imposed.").

[9] *See, e.g.*, Craine v. Alexander, 756 F.2d 1070, 1075 (5th Cir. 1985) (suggesting that forced labor "outside the scope of a corrective penal regimen" might violate the Thirteenth Amendment) (discussed *infra*, notes 434–36 and accompanying text).

nothing to do with the inmate's criminal culpability, for example prison discipline and preparation for labor market re-entry.[10]

If it is accepted that there are two plausible readings of the text, then extra-textual sources necessarily come into play including—in the mainstream view—historical evidence of original meaning. And, as between the two readings, the historical record is surprisingly clear. The Amendment's Republican framers overwhelmingly embraced the alternative reading; it was the former slave masters and their Democratic allies who promoted the interpretation that reigns today. As recounted in Part I below, the Thirty-Ninth Congress (1865–1867), which included most of the senators and representatives who proposed the Amendment,[11] rejected the first attempts to put General Morgan's strategy into effect. Southern states were leasing prisoners into servitude under private masters for terms ranging from months to decades. Echoing the views of ex-Confederate planters, Democratic senators and representatives—nearly all of whom had opposed the Amendment—held that the Punishment Clause authorized such practices.[12] But members of the Republican majority condemned that view as an erroneous construction of the Amendment. They emphatically rejected the notion that the Clause excepted *persons* convicted of crime, and instead critically scrutinized penal practice to determine whether *servitude* had actually been imposed "as a punishment for crime whereof the party shall have been duly convicted," and not, for example, as a means of subjugating black laborers or creating a supply of unfree labor for planters and industrialists.

Unfortunately, as recounted in Part II, the Republican reading faded from view with the restoration of one-party, Democratic rule in the South. Legislators and courts tacitly accepted General Morgan's interpretation of the Amendment, standing by while Southern planters, "New South" industrialists, and government officials developed an extensive system of convict leasing shaped not for penological purposes but for profit. Some scholars have argued that this history

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[10] *See, e.g.*, Watson v. Graves, 909 F.2d 1549, 1552 (5th Cir. 1990) (stating that "a prisoner who is not sentenced to hard labor retains his Thirteenth Amendment rights" against involuntary servitude and slavery) (discussed *infra*, notes 422–29 and accompanying text).

[11] *Compare* Cong. Globe, 38th Cong., 1st Sess. 1 (1863) (reporting the senators present at the Senate session that proposed and passed the proposed amendment), *and* Cong. Globe, 38th Cong., 2d Sess. 1–2 (1864) (reporting the representatives present at the House session that passed the amendment), *with* Cong. Globe, 39th Cong., 2d Sess. 1 (1866) (reporting the senators present at the first session of the Thirty-Ninth Congress), *and id*. at 3–4 (reporting the representatives present at the first session of the Thirty-Ninth Congress).

[12] *See infra* notes 107–08 and accompanying text.

serves as support for the propositions that the Amendment authorized such practices, and, therefore, that it must authorize analogous practices today. Part II considers the history and jurisprudence of convict leasing in light of the Republican reading and arrives at a different conclusion. Part III explores possible implications for the constitutionality of various practices associated with mass incarceration today.

I
ORIGINAL MEANINGS OF THE PUNISHMENT CLAUSE

The Punishment Clause is an exception to the Thirteenth Amendment's general prohibition on slavery and involuntary servitude. If read broadly, it could—like many exceptions—be used to evade, undermine, or even swallow the rule. From the outset, Republicans and Democrats took opposite views of this possibility. To most Democrats, it posed no threat at all because the prohibition itself was worthless. During the debates over proposal and ratification, they insisted that the Amendment would so fundamentally alter the nature of the Constitution that it exceeded the scope of the amendment power.[13] Afterward, they treated it as a narrow and unfortunate exception to the original compact, reading the prohibition narrowly and the exception broadly. The most vocal among them held that the freedom guaranteed by the Amendment consisted solely in the right to move freely from one place to another, what Blackstone called the right of locomotion.[14] In this view, ordinary imprisonment by itself

[13] *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 1483 (1864) (statement of Sen. Powell) (warning that if the Constitution can be amended to "regulate the relation of master and servant," then "it certainly can, on the same principle, make regulations concerning the relation of parent and child, husband and wife, and guardian and ward"); *id.* at 1458 (statement of Sen. Hendricks) (claiming that the Amendment violates the rights of the states and that its passage would betray "the compacts and agreements of our fathers"); *id.* at 1365 (statement of Sen. Saulsbury) (maintaining that the Amendment violates the original compact and could not be enforced against non-consenting states even if it were ratified according to Article V); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 444 (1989) (recounting argument that the Amendment violated the Takings Clause of the Fifth Amendment).

[14] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866) (statement of Sen. Cowan). Cowan, a nominal Republican who voted with the Democrats, claimed that the Amendment "was intended . . . to give to the negro the privilege of the *habeas corpus*; that is, if anybody persisted in the face of the constitutional amendment in holding him as a slave, that he should have an appropriate remedy to be delivered. That is all." *Id.*; *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *134 ("[P]ersonal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law."); William M. Wiecek, *Emancipation and Civic Status: The American Experience, 1865–1915*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 79 (Alexander Tsesis ed., 2010) (observing that under the slave states' "understanding of status, a former slave had only one right,

extinguished the one and only Thirteenth Amendment right; no prison inmate could possibly retain the right of locomotion. And since nobody questioned the constitutionality of ordinary imprisonment, it followed that a criminal conviction simply stripped the convicted person of all Thirteenth Amendment protection. Thus, as will become apparent below, the Democrats needed nothing more than the text of the exception to conclude that prison servitude in general, and convict leasing in particular, passed constitutional muster.[15]

The Amendment's Republican proponents agreed that the Amendment would fundamentally transform the Constitution, but in a very different way. Far from repudiating the original document, the Amendment would purge it of discordant elements and restore its true nature.[16] Senator Charles Sumner propounded this view in characteristically sharp fashion, anticipating the "complete emancipation of the Constitution itself, which has been degraded to wear chains so long that its real character is scarcely known."[17] On the day of its ratification, promised Senator John Hale of New Hampshire, the American people would "wake up to the meaning of the sublime truths which their fathers uttered years ago and which have slumbered dead letters upon the pages of our Constitution, of our Declaration of Independence, and of our history."[18] Others similarly noted that the Constitution had been burdened by slavery at the outset, a situation that would be corrected by the Amendment.[19] Loyal Americans across the country celebrated the Amendment's enactment as an

locomotion, the ability to go where he or she wanted"). For additional documentation of the right of locomotion, see James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. Rev. 426, 438 (2018).

15 *See infra* notes 107–08 and accompanying text.

16 *See* Alexander Tsesis, The Thirteenth Amendment and American Freedom: A Legal History 17 (2004) (summarizing Frederick Douglass's exposure of slavery's pervasive influence on the original Constitution and recounting that the "superabundance of slaveholding compromises rendered the Thirteenth Amendment not only critical to ending the physical bondage of slaves; the Abolition Amendment liberated the entire Constitution").

17 Cong. Globe, 38th Cong., 1st Sess. 1480 (1864) (statement of Sen. Sumner).

18 Cong. Globe, 38th Cong., 1st Sess. 1443 (1864) (statement of Sen. Hale). On the importance of the Declaration of Independence as a foundation for the Thirteenth Amendment, see Alexander Tsesis, *Safeguarding Fundamental Rights: Judicial Incursion into Legislative Authority*, Loy. U. Chi. eCommons, Jan. 2014, at 25–27.

19 *See, e.g.*, Cong. Globe, 38th Cong., 1st Sess. 1461 (1864) (statement of Sen. Henderson) (regretting that while the Constitution had proclaimed liberty, "the liberty of the African is not secured" and that "[i]n this contradiction is the element of strife"); *id.* at 1368–69 (statement of Sen. Clark) (lamenting that "the great evils of slavery as it now exists in these United States have arisen from this very Constitution" and asserting that the proposed amendment "goes deep into the soil, and upturns the roots of this poisonous plant to dry and wither" so that "[o]n all the slave-accursed soil it shall plant new institutions of freedom"); *id.* at 1313 (statement of Sen. Trumbull) (recounting that, "while

epochal event, the beginning of a new era.[20] William Lloyd Garrison, the veteran abolitionist who had once condemned the Constitution as a "covenant with death," now acclaimed it as a "covenant with life."[21] The Thirteenth Amendment, then, was conceived as a regime shift in constitutional law, a provision that, in abolishing slavery, necessarily stripped away layers of encrusted norms that had been generated to sustain it.

Accordingly, the Republicans read the Amendment's prohibitory clause broadly and its exception narrowly. In their view, the command that "[n]either slavery nor involuntary servitude . . . shall exist" could be satisfied only by eliminating each and every oppressive component of those systems, variously labeled "incidents," "vestiges," "roots," and "features."[22] These included not only core elements like chattelization and forced labor but also the denial of any right indispensable to practical freedom including, for example, the right of all citizens to enjoy the same rights of contract, property, and participation in court as were enjoyed by white citizens.[23] The system of slavery would thus be replaced by the system of freedom and, in particular, of "free labor."[24]

The Republicans' reading of the Punishment Clause cannot be understood apart from this commitment to free labor. They objected

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proclaiming the equal rights of all to life, liberty, and happiness," the founders had "denied liberty, happiness, and life itself to a whole race, except in subordination to them").

[20] *See* MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 207–10 (2001) (recounting popular reactions).

[21] *Id*. at 208 (citing LIBERATOR, Feb. 10, 1865, at 2).

[22] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866) (statement of Rep. Thayer) ("features"); CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864) (statement of Sen. Harlan) ("incidents"); *id.* at 1369 (Sen. Clark) ("roots"); *id.* at 1324 (statement of Sen. Wilson) ("vestiges"). For additional documentation, see Pope, *supra* note 14, at 440–45.

[23] These rights were guaranteed by the Civil Rights Act of 1866, which was enacted into law over President Johnson's veto four months after the Amendment's ratification. Ch. 31, § 1, 14 Stat. 27. Most Republicans who spoke on the issue indicated that these rights flowed directly from the prohibitory clause. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull) (asserting that the Amendment "declared that all persons in the United States should be free" and that the 1866 Civil Rights Act was "intended to give effect to that declaration and secure to all persons within the United States practical freedom"); *see also infra* note 92. For additional quotations and documentation, see Pope, *supra* note 14, at 442–43.

[24] *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 1440 (1864) (statement of Sen. Harlan) (advocating for the Thirteenth Amendment on the ground that even slave owners would benefit from a "change of their system of labor from compulsory to voluntary"); James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude*,*"* 119 YALE L.J. 1474, 1518 (2010) (assembling quotations concerning free labor rights). On the central importance of labor freedom, see VanderVelde, *supra* note 13, at 451–54; Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 SEATTLE U. L. REV. 859 (2016).

to slavery not because slaves were effectively compelled to work (so were Northern free laborers, who faced the choice of working or starving), but because slavery transformed work from self-motivated action, undertaken for the laborer's own benefit, into servitude, performed under the command and for the benefit of a master.[25] By its text, the Amendment outlawed not involuntary *work*, but involuntary *servitude*, a relation of domination and subjugation.[26] As the Supreme Court would later expound, the "essence of involuntary servitude" consisted in "that control by which the personal service of one man is disposed of or coerced for another's benefit."[27] Even humble forms of free labor exuded dignity, but unfree labor demeaned not only the slave, but all laborers.[28] "Put the brand of degradation upon the brow of one working man," explained Senator and future Vice President Henry Wilson, "and the toiling millions of the globe share the degradation."[29] Not only did it demean labor symbolically, but it also undercut the pay and conditions of all free laborers.[30] As the Supreme Court would later explain, the "[r]esulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition."[31]

On this reading of the Prohibitory Clause, the Democrats' broad interpretation of the Punishment Clause posed a serious threat. If a criminal conviction sufficed to strip offenders of Thirteenth

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25 Eric Foner, Politics and Ideology in the Age of the Civil War 64 (1980) ("there was no contradiction, in northern eyes, between the freedom of the laborer and unrelenting personal effort in the marketplace").

26 *See, e.g.*, Noah Webster, An American Dictionary of the English Language 1207 (1865) (defining "servitude" as the "state of voluntary or involuntary subjection to a master"); Joseph E. Worcester, Dictionary of the English Language 1314 (1860) (defining "servitude" as the "state or condition of a servant, or more commonly of a slave; slavery; bondage").

27 Bailey v. Alabama, 219 U.S. 219, 241 (1911).

28 *See, e.g.*, Eric Foner, Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War 62 (1970); Rebecca E. Zietlow, The Forgotten Emancipator: James Mitchell Ashley and the Ideological Origins of Reconstruction 62 (2017); VanderVelde, *supra* note 13, at 447–48, 459–61.

29 *See* VanderVelde, *supra* note 13, at 467; *see also* Cong. Globe, 38th Cong., 1st Sess. 2948 (1864) (statement of Rep. Shannon) (supporting the Amendment on the ground that it would "elevate and disinthrall [sic] that most injured and dependent class of our fellow white men from their downtrodden and degraded condition"); *id.* at 1369 (statement of Sen. Clark) (urging proposal of the Amendment and cataloguing the evils of slavery, including degrading labor and rearing an aristocracy).

30 VanderVelde, *supra* note 13, at 466 (relating Senator Wilson's view that slavery "pulled white workers down in two ways: one, by direct competition with slave labor in the South, and two, by associating all the industrious efforts of workers with those of the degraded slaves"); *id*. at 468–74 (reporting and analyzing these themes during the congressional debates over proposing the Amendment).

31 Pollock v. Williams, 322 U.S. 4, 18 (1944).

Amendment protection, then—as General Morgan proposed—states could use the criminal justice system to create a supply of unfree labor. Not only would this deprive individual workers of their labor freedom, but it would also undermine the free labor system by degrading work generally and undercutting the wages and conditions of free workers. Most Republicans, however, failed to perceive this danger until after ratification, when they were forced to confront Southern convict leasing laws. The remainder of this Part recounts the pre-ratification debates about the Punishment Clause, attempts to explain why so little concern was expressed, and relates the Republican responses to early forms of convict leasing.

A. Pre-Ratification Discussion of the Punishment Clause

On March 29, 1864, Senator Lyman Trumbull of Illinois, a moderate Republican leader, reported the Senate Judiciary Committee's proposed text for the Thirteenth Amendment, which was eventually enacted into law without modification.[32] Instead of drafting from scratch, the Committee had modeled its text closely on the Northwest Ordinance of 1787.[33] Section 1 prohibited slavery and involuntary servitude "except as a punishment for crime whereof the party shall have been duly convicted."[34]

Senator Charles Sumner objected to the Committee's text on a number of grounds including the Punishment Clause:

> Now, unless I err, there is an implication from those words that men may be enslaved as a punishment of crimes whereof they shall have been duly convicted. There was a reason, I have said, for that at the time, for I understand that it was the habit in certain parts of the country to convict persons or to doom them as slaves for life as a punishment for crime, and it was not proposed to prohibit this habit. But slavery in our day is something distinct, perfectly well known, requiring no words of distinction outside of itself. Why, therefore, add "nor involuntary servitude otherwise than in the punishment of crimes whereof the party shall have been duly convicted"? To my mind they are entirely surplusage. They do no good there, but they absolutely introduce a doubt.[35]

Sumner proposed a substitute modeled on the French revolutionary constitution: "All persons are equal before the law, so that no

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[32] *See* CONG. GLOBE, 38th Cong., 1st Sess. 1313 (1864) (statement of Sen. Trumbull).

[33] *See* VORENBERG, *supra* note 20, at 55 (2001); Howard Devon Hamilton, *The Legislative and Judicial History of the Thirteenth Amendment*, 9 NAT'L B.J. 26, 30–31 (1951).

[34] CONG. GLOBE, 38th Cong., 1st Sess. 1313 (1864).

[35] *Id.* at 1488 (statement of Sen. Sumner). Sumner had earlier offered a shorter version of this objection. *Id.* at 1482.

person can hold another as a slave."[36] As a fallback, he suggested that the Committee proposal be amended to read "Slavery shall not exist anywhere within the United States or the jurisdiction thereof; and the Congress shall have power to make all laws necessary and proper to carry this prohibition into effect."[37]

Unfortunately for present purposes, the ensuing discussion shed little or no light on the Punishment Clause. Leading Republicans reacted so negatively to the French proposal that Sumner withdrew it and refrained from moving his fallback.[38] Nobody mentioned the Punishment Clause. It is possible that some Senators silently disapproved Sumner's omission of a punishment exception, but we have no way of knowing because neither of his proposals cleanly presented the issue. As Senator Jacob Howard pointed out, the French text might have failed even to abolish slavery; the effect of its equality language "in a common-law court" was unknown, and the French had actually terminated slavery "by another and separate decree expressly putting an end to [it] within the dominions of the French republic and all its colonies."[39] Moreover, both the French proposal and Sumner's fallback deleted the prohibition on involuntary servitude. Although Sumner considered that language to be surplusage, other Republicans might well have read it to prohibit practices not covered by the ban on slavery,[40] as does the Supreme Court.[41]

Given that nobody but Sumner mentioned the Punishment Clause, we are left with a mystery: Why did the framers include it? As of 1787, when Congress enacted the Northwest Ordinance, the exception was unremarkable. Penal servitude had arrived in the colonies from Britain early on, and "by the moral standards of a society characterized by various relations of servitude (both involuntary and voluntary), bonding these men and women in some way or other appeared the natural thing to do."[42] To the American revolutionaries, hard labor beckoned as an enlightened, republican alternative to the pre-

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[36] *Id*. Sumner had proposed a slightly different version of this text prior to the Committee's deliberations. CONG. GLOBE, 38th Cong., 1st Sess. 521 (1864) (statement of Sen. Sumner).

[37] *Id.* at 1483.

[38] *See id.* at 1488–89 (statements of Sens. Trumbull & Howard); *id.* at 1489 (statement of Sen. Sumner).

[39] *Id.* at 1488–89 (Sen. Howard).

[40] *See* Lea VanderVelde, *Henry Wilson: Cobbler of the Frayed Constitution, Strategist of the Thirteenth Amendment*, 15 GEO. J.L. PUB. POL'Y 173, 178 n.12 (2017).

[41] In the line of cases striking down peonage laws, for example, the Court relied specifically on the involuntary servitude clause. *See, e.g.*, Bailey v. Alabama, 219 U.S. 219 (1911).

[42] REBECCA M. MCLENNAN, THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941, at 28–29 (2008).

vailing "royal" practice of inflicting death and other bloody punishments even for minor offenses.[43] And in the context of a new Constitution that—albeit without using the word—affirmatively protected slavery in such provisions as the Fugitive Slave Clause and the Three-Fifths Clause, it hardly seemed noteworthy that the Ordinance contained an exception for punishment.

The Thirteenth Amendment, on the other hand, was supposed to resolve the issue completely and for all time. Why would leading Republicans, some of whom had promised that the Amendment would obliterate every last vestige of slavery, tolerate what was arguably the first-ever, textually explicit constitutional sanction for "slavery"? It has been suggested that the Clause was deliberately inserted to make possible the continuation of African slavery.[44] It seems more likely, however, that its presence in the Amendment reflected the general prestige of the Northwest Ordinance rather than any particular views about the Punishment Clause. Anti-slavery Republicans venerated the Ordinance for its alleged success at eliminating slavery in the Northwest Territory.[45] Moreover, an Amendment that merely echoed "Jefferson's Ordinance" held out the possibility of attracting support from Democrats.[46] The mystery, then, might be less why the framers included the Punishment Clause than why they neglected to delete it. Although the evidence is inconclusive at best, there is reason to believe that they failed to perceive a threat serious enough to warrant tampering with the Ordinance. Sumner himself later opined that the Senators had "supposed that the [Clause] was simply applicable to ordinary imprisonment," rejecting his own view "that it might be extended so as to cover some form of slavery."[47] Even the Amendment's opponents agreed that it guaranteed the right of locomotion, from which it followed that imprisonment would—unless excepted—violate the Amendment. Thus, some kind of punishment exception—whether in the text or by judicial

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[43] *Id.* at 19–20.

[44] Scott W. Howe, *Slavery As Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 995–96 (2009) (contending that, after Senator Sumner's objections to the Punishment Clause, "there was clarity that it allowed slavery and a common knowledge, derived from an awareness of conditions in the South, of what slavery entailed").

[45] *See* James Oakes, *"The Only Effectual Way": The Congressional Origins of the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL'Y 115, 124 (2017) ("Among political abolitionists and antislavery politicians, particularly in the Midwest, the Ordinance of 1787 was the touchstone of antislavery constitutionalism."). For a discussion of this rosy perception and its disjuncture with the Ordinance's actual performance, see *infra* text accompanying notes 175–83.

[46] VORENBERG, *supra* note 20, at 58–59.

[47] CONG. GLOBE, 39th Cong., 2d Sess. 238 (1867).

interpretation—was inevitable. As Senator Cowan put it, "that exception might just as well have been left out; it was put into the old Ordinance of 1787, and has been handed down as a kind of traditional heir-loom among the Constitution-makers ever since."[48] Indeed, punishment exceptions became so common in both federal and northern state slavery bans "as almost to qualify as 'boilerplate' language."[49]

With the benefit of hindsight, the peril posed by the Clause might seem obvious. At the time, however, there were few harbingers. Prison populations were small in the North and even smaller in the South, considering only convicted offenders (the constituency excepted by the Clause).[50] And although Southern states were already engaging in some practices that presaged post-war convict leasing, these were inflicted not only on criminal offenders but also on African Americans jailed for various other reasons.[51] It is not surprising, then, that although major newspapers reported regularly on the congressional debates including Sumner's speeches, they passed over the Punishment Clause issue.[52] Abolitionist meetings and African American conventions endorsed ratification without mentioning the Clause.[53] At a time when the Civil War still raged, few proponents of the Amendment were looking past proposal and ratification to antici-

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[48] CONG. GLOBE, 39th Cong., 1st Sess. (1866), at 1784 (Sen. Cowan).

[49] ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 46 (2019).

[50] Unfortunately, no reliable statistics are available for the period before 1880. MARGARET WERNER CAHALAN, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES 1850–1984, at 27 (1986). However, early census results are suggestive. Leaving out 1860 (when special efforts were made to count minor offenses), the prison population count grew from 6737 in 1850 (29 per 100,000 in the general population) to 32,901 in 1870 (85.3 per 100,000 in the general population). *Id*. at 28 tbl. 3-1; *id.* at 208 tbl. A-1. While prison populations were small in the North, they were far smaller in the South, the Republicans' immediate concern. MCLENNAN, *supra* note 42, at 65 ("[T]he antebellum Southern prison population was as little as one-tenth the size of the North's."). This changed quickly after emancipation. In Tennessee, for example, the number of inmates grew sixfold—from 240 to 1500—from 1865 to 1890, while the general population grew only 60%. KARIN A. SHAPIRO, A NEW SOUTH REBELLION: THE BATTLE AGAINST CONVICT LABOR IN THE TENNESSEE COALFIELDS, 1871–1896, at 56 (1998).

[51] In Virginia, for example, jailors leased out suspected fugitives from slavery and free black inmates without any requirement of a criminal conviction. Taja-Nia Y. Henderson, Crucibles of Discontent: Penal Practice in the Shadow of Slavery, Virginia 1796–1865, at 5, 50, 103–04, 137–38 (2013) (PhD. dissertation, New York University). Such practices dated back to colonial times. *Id.* at 136–37.

[52] *See, e.g.*, *Proceedings of* Congress, N.Y. TIMES, Apr. 9, 1864 (reporting on Sumner's speeches without mentioning the Punishment Clause issue); *Thirty-Eighth Congress, First Session*, PHILA. INQUIRER, Apr. 9, 1864, at 1 (same); *Thirty-Eighth Congress: First Session*, DAILY NAT'L INTELLIGENCER (D.C.), Apr. 8, 1864, at 2 (same); *see also* FONER, *supra* note 49, at 47 (recounting that the Clause "was almost never discussed in the press").

[53] FONER, *supra* note 49, at 47. According to Foner, "only a handful of critics sensed that [the Clause] might cause problems." *Id.*

pate ways in which it might be circumvented.[54] As late as the House vote to propose the Amendment, most labored under the comfortable illusion that the enacted text alone would forever solve the problem.[55]

In any case, if we accept that the framers did deliberately include the Clause to facilitate such abuses as convict leasing, then we must confront an even greater mystery: Why, within months of the Amendment's ratification, they suddenly about-faced and condemned it as a flagrant violation?

B. Discussion and Enactment of the 1866 Civil Rights Act

No sooner had the Thirteenth Amendment been ratified than Republican members of Congress charged that Southerners were violating it. They claimed that states had, among other abuses, construed the Punishment Clause to permit the re-enslavement of black labor through the criminal law. "[Southern states] have ratified the Amendment," acknowledged Representative Henry C. Deming of Connecticut, but with "a construction and gloss upon it which is more trumpet-tongued proof of their perennial perfidy to the black race than all the hypocritical mouthings of acquiescence in emancipation which could be collected in a six-months' hunt from Richmond to the Rio Grande."[56] Deming, who generally voted with the more conservative Republicans, proceeded to specify what had provoked him to such outrage: "They have ratified it with a construction that it merely abolishes the infamy of buying, selling, and owning human beings; and under the exceptional clause ('except as a punishment for crime') reconstructed North Carolina is now selling black men into slavery for petty larceny."[57] Like Deming, the radical leader Thaddeus Stevens condemned the use of criminal punishment as an excuse for subjugating black labor. "Under the pretense of [the Punishment Clause] they are taking men . . . for assault and battery," he charged, "and selling them into bondage for ninety-nine years."[58] Although these Republicans objected to the "selling" of offenders, it should be clear

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[54] *See* VORENBERG, *supra* note 20, at 105.

[55] *Id.* at 208–10.

[56] *Id.* at 332 (statement of Rep. Deming).

[57] *Id.* (statement of Rep. Deming). On Deming's conservative inclinations, see MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863–1869, at 349–50 (1974), which classifies Deming as a conservative Republican based on his pattern of voting.

[58] CONG. GLOBE, 39th Cong., 1st Sess. 655 (1866) (statement of Rep. Stevens); *see* Christopher R. Green, *Duly Convicted: The Thirteenth Amendment as Procedural Due Process*, 15 GEO. J.L. & PUB. POL'Y 73, 94 n.82 (2017) (observing that the "pretense" to which Stevens referred was "that the southern states were genuinely concerned with assault and battery").

that they were referring to the practice of renting them out for a temporary period (later tagged "convict leasing"), and not to a transfer of title. They condemned, for example, the "selling" of offenders to private masters for terms lasting less than a year.[59]

Republicans were especially affronted by the leasing of prisoners as punishment for vagrancy, a nebulously-defined condition that included simple unemployment.[60] "Vagrant laws have been passed," warned Representative Burton C. Cook of Illinois, "laws which, under the pretense of selling these men as vagrants, are calculated and intended to reduce them to slavery again; and laws which provide for selling these men into slavery in punishment of crimes of the slightest magnitude."[61] To Cook, such laws reduced the freedmen "virtually to the condition of slavery" and established a "system of slavery."[62] Senator Jacob Howard of Michigan, a well-respected radical leader, likewise decried the "narrow" and "absurd construction" of the Amendment that would, among various other abuses, permit a state legislature to declare the former slave "to be a vagrant, and as such commit him to jail, or assign him to uncompensated service."[63] He queried "whether it is possible innocently and sincerely to ascribe to the advocates of this amendment any such cruel and inhuman purpose as this."[64] Others voiced similar sentiments.[65]

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[59] *See* Cong. Globe, 39th Cong., 1st Sess. 1621 (1866) (statement of Rep. Myers) ("a term not exceeding twelve months, at the discretion of the court"); *id*. at 589 (statement of Rep. Donnelly) ("sold to the highest bidder for a term of months or years"); *see also infra* note 96 and accompanying text.

[60] Carl Schurz, Report on the Condition of the South (1865). Sumner brought the report to the attention of the Senate on December 18, 1865. Cong. Globe, 39th Cong., 1st Sess. 79 (1865).

[61] Cong. Globe, 39th Cong., 1st Sess. 1123 (1866) (statement of Rep. Cook).

[62] *Id.* at 1124.

[63] *Id.* at 504 (statement of Sen. Howard).

[64] *Id.*

[65] *See, e.g.*, *id.* at 834 (statement of Sen. Clark) (charging that the former master "will give [the freedman] no work, that he may starve or steal; and if he steal he will convict him of crime, sell him into servitude, and hold him again as a slave"); *id.* at 603 (statement of Sen. Wilson) (complaining that in "North Carolina two men were sold into slavery for years under the vagrant laws," and suggesting that this and numerous other abuses perpetrated by the black laws defied "the rights of the freedmen and the will of the nation embodied in the [thirteenth] amendment to the Constitution"); *id*. at 1621 (statement of Rep. Myers) (querying whether Florida had any basis for complaining about its continued exclusion from Congress when the same state constitutional convention that purported to accept that "slavery had been destroyed in this State by the Government of the United States" also enacted a vagrancy law under which a vagrant could be sold into servitude); *id*. at 589 (statement of Rep. Donnelly) (condemning the arrest of blacks as vagrants for refusing to work at the wages offered by masters, and then selling them "to the highest bidder for a term of years" so that he becomes "in fact a slave").

Vagrancy prosecutions posed a double threat to the free labor system. First, like other prosecutions, they could be used to create a supply of offenders available for leasing. But they also had the additional advantage, from the viewpoint of former slave masters, of restricting worker choices in the "free" labor market by criminalizing the search for better employment. Brigadier General Carl Schurz, who had been sent by President Johnson to tour the South and report on conditions, brought this problem to the attention of Congress. Schurz quoted a local law directing patrol officers "to arrest and take up all idle and vagrant persons running at large without employment" and commented that a "regulation like this certainly would make it difficult for freedmen to leave their former masters for the purpose of seeking employment elsewhere."[66] During the ensuing debates over enforcement legislation, Republicans took up this theme. "The masters have formed combinations and have put down the rate of wages to the freedmen below a living price," charged Representative Ignatius Donnelly of Minnesota, a radical stalwart.[67] "[T]he negro refusing to work for these wages is seized as a vagrant, sold to service 'for the best wages that can be procured' for three months; if he runs off he shall work another month with ball and chain for nothing."[68] In this scheme, the selling of the convict into service not only provided a supply of unfree labor, but also implemented the policy of less eligibility; laborers would accept the masters' offer of sub-living wages rather than submit to outright servitude. As Donnelly concluded: "The slave now has a mob for his master."[69]

Here, the Republicans' commitment to practical labor freedom propelled them into conflict with longstanding practice in the North and elsewhere. The transition from feudalism to capitalism had been marked not only by the rise of free wage labor, but also by the use of law to establish a low baseline for the wage bargain. Beginning with the Enclosure Acts, vagrancy laws, and Poor Laws of Britain, owners of land and capital wielded political power to deprive non-owners of the resources and rights necessary to support insistence upon what

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66 Schurz, *supra* note 60.

67 Cong. Globe, 39th Cong., 1st Sess. 589 (1866) (statement of Rep. Donnelly).

68 *Id.* By "wages," Donnelly meant payments made by the purchaser of labor to the government. *See also id*. at 1124 (statement of Rep. Cook) (expressing similar sentiments in stronger language).

69 *Id.* at 589 (statement of Rep. Donnelly); *see* Darrell A.H. Miller, *Racial Cartels and the Thirteenth Amendment Enforcement Power*, 100 Ky. L.J. 23 (2011–2012) (describing how racial cartels operated to limit African Americans' legal freedoms); VanderVelde, *supra* note 13, at 490–91 (recounting the view of leading Republicans that employer cartels violated the Amendment).

Donnelly called "a living price."[70] Driven from their common lands, facing confinement in the work house, fearing arrest for appearing in public without an employer-protector, and deprived of customary sources of sustenance, generations of laborers exercised their "freedom of contract" to accept employer demands.[71] Many Republicans, however, did not accept that such outcomes were consistent with a free labor system. They adhered to a pre-industrial vision of labor liberty, according to which freedom hinged on economic independence.[72] In response to Southern defenders of slavery, who charged that Northern free laborers were treated worse than slaves, they portrayed wage labor as a relatively unimportant relation, a step on the road to becoming an independent farmer or artisan. Abraham Lincoln, for example, claimed that the relation between capital and labor "does not embrace more than one-eighth of the labor of the country," and that the wage laborer of today would become the independent free laborer of tomorrow.[73] Far from forging a class of permanent employees along British lines, the Republicans sought to avoid classes altogether.[74] When emancipation suddenly propelled four million enslaved Africans into the wage labor market, they did not hesitate to attack vagrancy laws, convict leasing, and other Southern practices that had counterparts in the North.[75]

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70 Cong. Globe, 39th Cong., 1st Sess. 589 (1866) (statement of Rep. Donnelly); *see, e.g.*, Christopher Tomlins, Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865, at 76, 200–02 (2010); *see also* David Garland, Punishment and Modern Society: A Study in Social Theory 91–92 (1990) (summarizing the view that, with the rise of capitalism, criminal punishment was shaped to control the poorer classes).

71 *See generally* 1 Karl Marx, Capital: A Critique of Political Economy (1887) (Samuel Moore et al. trans.) (recounting these developments and explaining them in terms of class struggle); Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time (1944) (recounting these developments and explaining them as a breakdown in the social fabric).

72 Zietlow, *supra* note 28, at 62; VanderVelde, *supra* note 40, at 196.

73 3 Abraham Lincoln, The Collected Works of Abraham Lincoln 459 (Roy P. Basler ed., 1953).

74 *See* Cong. Globe, 42d Cong., 2d Sess. 4018, 4040 (1872) (statement of Sen. Wilson) (declaring that he "never heard the term 'laboring class' here without the same sort of sensation which I used to have on hearing the word 'slave,'" and urging that the law should never recognize "classes in this land of equality"); Foner, *supra* note 28, at 15 (observing that Republicans "drew no distinction between a 'laboring class' and what we could call the middle class," and that "they considered the farmer, the small businessman, and the independent craftsmen, all as 'laborers'"); VanderVelde, *supra* note 13, at 459–60 (recounting the Republican ideal of leveling class differentials between laborer and employer).

75 VanderVelde, *supra* note 13, at 486–87 (describing how Northern Congress members criticized Southern labor "reforms" modeled on Northern practices). For more on the Republicans' willingness to condemn Southern practices that were common in the North, see *infra* notes 156–58 and accompanying text.

One Representative did appear to doubt whether convict leasing violated the Amendment. William Higby of California urged passage of the Fourteenth Amendment to end a practice that was flourishing despite the Thirteenth. He worried that the Punishment Clause would permit states to re-enslave the freed people by enacting a facially race-neutral statute authorizing slavery as a punishment. "Such a provision operates equally upon all classes, but the judge could discriminate, and could say to the white offender, 'Go to the State prison,' while he could say to the black man, 'Go into slavery.'"[76] Higby warned that Southern states were currently engaging in such practices, and that Congress could do nothing about it "because those States are acting under the amendment of the Constitution, and can pass such laws in spite of anything which we may do in this Hall, and you leave slavery sealed upon the Government."[77] Combine this with the fact that Higby had previously blamed such practices on the Punishment Clause,[78] and it would appear that he read it to permit them.[79]

Higby's next sentence, however, calls that conclusion into question. "That is one of the results," he averred, "*if the Executive is right in his position*."[80] This raises the question: Did Higby, a radical, embrace President Johnson's position on the merits (and reject that of his radical colleagues), or was he concerned that—merits aside—it posed a practical obstacle to legislation? It might be relevant that Higby was speaking on February 27, 1866, eight days after Johnson had vetoed the Freedmen's Bureau Bill, partly on constitutional grounds, and seven days after Congress failed to override.[81] Whether Johnson was right or wrong, his successful veto made it appear that he

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76 CONG. GLOBE, 39th Cong., 1st Sess. 1056 (1866) (statement of Rep. Higby).

77 *Id.*

78 *See id.* at 427.

79 *See* Green, *supra* note 58, at 93.

80 CONG. GLOBE, 39th Cong., 1st Sess. 1056 (1866) (emphasis added).

81 Johnson barely mentioned the Amendment in his veto of the bill (which contained protections for civil rights that were similar to those in the Civil Rights Bill), but—among other objections to the bill—he urged that the freedmen needed no further assistance because "[t]he institution of slavery . . . has been already effectually and finally abrogated throughout the whole country by an amendment of the Constitution of the United States," implying that there was no legitimate basis for further legislation. Andrew Johnson, Veto of the Freedmen's Bureau Bill, *in* LILLIAN FOSTER, ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES; HIS LIFE AND SPEECHES 228, 232 (1866) (printing Johnson's veto message). In response, Senator Lyman Trumbull found it "most extraordinary" that the President could condemn the bill as unconstitutional while failing to mention "that provision of the Constitution which, in the opinion of its supporters, clearly gives the authority to pass it," namely the Amendment. CONG. GLOBE, 39th Cong., 1st Sess. 941 (1866) (statement of Sen. Trumbull). To Trumbull, "so far from the bill being unconstitutional, I should feel that I had failed in my constitutional duty if I did not propose some measure that would protect these people in their freedom." *Id.* at 942.

and the Democrats held the upper hand in the struggle over constitutional meaning. Six weeks later, Higby was among those who turned the tables on Johnson by overriding his veto of the Civil Rights Act, Section 2 of which did precisely what Higby had feared impossible: prohibiting, under authority of the Thirteenth Amendment, judges from discriminating in sentencing.[82]

Like Higby, Representative John F. Farnsworth of Illinois supported the proposed Fourteenth Amendment as a means of preventing convict leasing, among other things. He complained that, despite the Thirteenth Amendment, Southern states were "now reducing these men to slavery again as a punishment for crime, and declaring for every little petty offense the black man may commit that he shall be sold into bondage."[83] The Amendment, "which was intended to knock the shackles off every man who was not guilty of crime in the United States, is avoided and got around by these cunning rebels."[84] It is conceivable that Farnsworth, a radical, agreed with the rebels that the Punishment Clause, properly interpreted, permitted them to use "every little petty offense" as an excuse for reenslavement.[85] More likely, however, he agreed with his radical colleagues that the Amendment already banned the practice, but that an unambiguous constitutional provision would do a better job of stopping it: "We have learned by experience that it is necessary that whatever is put in the Constitution, and whatever laws we make in reference to the rights of the men in the rebellious States," he warned, "must be so hedged about with guards and protections, they must be so plain and so clear, that 'the wayfaring man though a fool may not err therein,' or else they will in some cunning manner devise a way of avoiding them."[86] The reference is to *Isaiah* 35:8, which tells of God marking out a "way of holiness" so clearly that even fools cannot fail to recognize it.[87] This suggests a wide gap between Farnsworth's own reading of the Thirteenth Amendment and that of the Southerners who needed to be provided with clearer directions by a Fourteenth.[88]

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82 Cong. Globe, 39th Cong., 1st Sess. 1861 (1866).

83 *Id*. at 383 (statement of Rep. Farnsworth).

84 *Id*.

85 Green, *supra* note 58, at 94–95 (quoting Cong. Globe, 39th Cong., 1st Sess. 332 (1866)).

86 Cong. Globe, 39th Cong., 1st Sess. 383 (1866) (statement of Rep. Farnsworth).

87 *Isaiah* 35:8 (King James) ("And an highway shall be there, and a way, and it shall be called The way of holiness; the unclean shall not pass over it; but it *shall be* for those: the wayfaring men, though fools, shall not err *therein.*").

88 Unless, of course, Farnsworth meant to include himself among the fools who needed to be instructed by a Fourteenth Amendment. *See also* Mark A. Graber, Constructing Constitutional Politics: Thaddeus Stevens, John Bingham, and the Forgotten Fourteenth Amendment (2014) (unpublished research paper) (on file with the University of Maryland

To combat convict leasing and numerous other perceived violations of the Amendment, Congress passed the Civil Rights Act of 1866.[89] Instead of directly correcting the Southerners' broad construction of the Punishment Clause, which would have entailed a difficult line-drawing exercise to distinguish permissible "punishment" from prohibited intrusions on the free labor system, it pegged the treatment of African Americans generally to that of whites. As far as the Act was concerned, states could continue to apply the Punishment Clause broadly, but only if they did so for whites as well as blacks. Citizens "of every race and color" would henceforth enjoy the "same" basic civil rights as were "enjoyed by white citizens, *and shall be subject to like punishment, pains, and penalties, and to none other*."[90] To implement this guarantee, the statute made it a crime for any person to subject, under color of law or custom, any inhabitant of the United States "to different punishment, pains, or penalties . . . by reason of his color or race, than is prescribed for the punishment of white persons."[91]

During the congressional debates, constitutional issues took center stage. Opponents charged that the bill exceeded the scope of the Thirteenth Amendment, while proponents insisted that the Amendment already guaranteed the rights protected by the Act; the statute, they claimed, merely provided mechanisms for enforcement.[92] It was during this controversy that Senator Howard denounced the "absurd construction" of the Amendment that would permit a state to adjudge a former slave a vagrant and force him to work without pay.[93] The Senate and House passed the bill by large margins, but President Johnson promptly vetoed it on constitutional grounds.[94] On April 9, 1866, supermajorities of both houses overturned Johnson's veto and

Francis King Carey School of Law) ("John Bingham aside, very few members of Congress thought Section 1 [of the Fourteenth Amendment] contributed much more than a restatement of existing constitutional commitments.").

[89] *See generally* Civil Rights Act of 1866, ch. 31, 14 Stat. 27–30.

[90] *Id.* § 1 (emphasis added).

[91] *Id.* § 2.

[92] Republican members of Congress held that the practices prohibited by the Civil Rights Act were already outlawed by Section 1 of the Amendment. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 43 (1866) (statement of Sen. Trumbull) ("These are rights which the first clause of the constitutional amendment meant to secure to all; and to prevent the very cavil which the Senator from Delaware suggests to-day, that Congress would not have power to secure them, the second section of the amendment was added."). For further documentation, see William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1342–46 (2007); Pope, *supra* note 14, at 439–48.

[93] CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (statement of Sen. Howard).

[94] *Id.* at 1367, 1413; *see* Johnson, *supra* note 81, at 228.

enacted the Civil Rights bill into law, the first time in history that Congress overrode a presidential veto of major legislation.[95]

C. The Kasson Resolution and the Kasson-Thayer Bill

By late 1866, Republican leaders were beginning to doubt whether the Civil Rights Act would suffice to curb abuses of the Punishment Clause. On December 17, Senator Charles Sumner of Massachusetts and Representative Robert Schenck of Ohio alerted their respective Senate and House colleagues to this notice, published in an Annapolis newspaper:

> *Public Sale*.—The undersigned will sell at the courthouse door in the city of Annapolis at 12 o'clock [p.]m. on Saturday, 8th December, 1866, a negro man named Richard Harris, for six months, convicted at the October term, 1866, of the Anne Arundel circuit court for larceny, and sentenced by the court to be sold as a slave. Terms of sale, cash. WM. BRYAN, *Sheriff Anne Arundel county*, December 3, 1866.[96]

Congressman Thaddeus Stevens of Massachusetts reported similar abuses in Florida and Georgia, and observed that "there are laws all over the South which provide for taking up these people on charges of vagrancy and other things of that kind and selling them into bondage as actual as any that ever existed there, though not perhaps to the same extent."[97] The Senate and House each voted to instruct its judiciary committee to ascertain whether such practices violated the Constitution or the Civil Rights Act and, if so, to report on possible responses.[98]

Representative John Kasson of Iowa did not wait for the Committees to report. On January 7, 1867, he proposed a Joint Resolution on the issue.[99] Instead of prohibiting any particular practice, it purported to express the opinion of Congress on the proper interpretation of the Punishment Clause. Kasson's resolution warrants extended quotation, not only for its historical significance, but also for

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[95] Cong. Globe, 39th Cong., 1st Sess. 1809, 1861 (1866); Benedict, *supra* note 57, at 165; Aviam Soifer, *Protecting Full and Equal Rights: The Floor and More*, *in* The Promises of Liberty, *supra* note 14, at 196, 204.

[96] Cong. Globe, 39th Cong., 2d Sess. 153 (1867) (House); *id*. at 238 (Senate). For background on this and other sales of convicts in Maryland, see Dennis Childs, Slaves of the State: Black Incarceration from the Chain Gang to the Penitentiary 57–59 (2015). *See also* Peter Wallenstein, *Slavery Under the Thirteenth Amendment: Race and the Law of Crime and Punishment in the Post-Civil War South*, 77 La. L. Rev. 1, 2–4 (2016) (analyzing how the Thirteenth Amendment authorized the continuation of slavery through convict leasing).

[97] Cong. Globe, 39th Cong., 2d Sess. 153 (1867).

[98] *See id.* at 154 (House); *see id*. at 239 (Senate).

[99] *Id.* at 324.

its carefully thought-out attempt to draw a clear line between legitimate punishment and prohibited servitude:

> [T]he true intent and meaning of said amendment prohibits slavery or involuntary servitude forever in all forms, except in direct execution of a sentence imposing a definite penalty according to law, which penalty cannot, without violation of the Constitution, impose any other servitude than that of imprisonment or other restraint of freedom under the immediate control of officers of the law and according to the usual course thereof, to the exclusion of all unofficial control of the person so held in servitude; and that all orders, judgments, or decrees authorizing or directing the sale or other disposition into servitude of any person within the jurisdiction of the United States otherwise than as above declared to be lawful, are and shall be taken and held to be in violation of the thirteenth constitutional amendment aforesaid, and therefore void.[100]

Kasson stressed that to comply with the Amendment, "there must be a direct condemnation into that condition under the control of the officers of the law, like the sentence of a man to hard labor in the State prison . . . that is the only kind of involuntary servitude known to the Constitution and the law."[101] He justified this reading on the general principle that "the construction of every doubtful law in this free country shall be in the interest of freedom and for the protection of individual rights."[102] Here, Kasson invoked not only a theory, but also the ongoing practice of the Thirty-Ninth Congress. During the debates over the Freedmen's Bureau Bill and the Civil Rights Act, Republican senators and representatives repeatedly stressed the Amendment's central purpose of guaranteeing "practical freedom" to justify broad interpretations of the Amendment.[103] In light of this record, the moderate Republican leader Martin Russell Thayer of Pennsylvania might have been exaggerating only moderately when he declared: "I presume no man doubts that the true interpretation of the constitutional amendment is exactly that which is proposed" in the Kasson Resolution.[104]

In the Senate, John Creswell of Maryland had previously advanced a similar view during the debate over Sumner's motion to refer the problem to the Judiciary Committee. "I cannot imagine," he declared, "that any reasonable interpretation given to the phraseology

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100 *Id.*

101 *Id.* at 345–46.

102 *Id.* at 345.

103 CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull); *id.* at 1152 (statement of Rep. Thayer); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 431, 439 (1968) (quoting members of the Thirty-Ninth Congress).

104 CONG. GLOBE, 39th Cong., 1st Sess. 346 (1866) (statement of Rep. Thayer).

used in the constitutional amendment could justify any such practice as has been attempted and acted out in Maryland."[105] To Creswell, "the words 'unless for crime' . . . signified only that sort of involuntary servitude which a culprit may be obliged to render to the State, and never intended to authorize any individual, by reason of a decree of court or a public sale, to hold any other human being in bondage."[106]

In the House, nobody offered an alternative reading, but in the Senate, two conservatives responded to Creswell by claiming that the clause clearly authorized states to sell convicts. "The Constitution of the United States provides that persons may be sold into slavery or involuntary servitude for crime," observed Democrat Willard Saulsbury of Delaware, "and I apprehend that there is nothing in the Constitution to prevent the proceedings in the State of Maryland."[107] Given that the Amendment "seems to suppose that there may be slavery or involuntary servitude for crime," added Reverdy Johnson of Maryland, one of the few Democrats who had voted for it, "it is difficult to see why the exception does not authorize the existence of slavery in an individual if he has committed a crime and the Legislature of the State where the crime is committed makes that a mode of punishment."[108]

Unfortunately for historians, the argument between Creswell and the conservatives was left hanging when the Senate endorsed Sumner's motion (supported by Creswell and opposed by Saulsbury and Johnson) to submit the matter to the Judiciary Committee.[109] For his part, Sumner, who had opposed the inclusion of a punishment exception in the proposed Thirteenth Amendment, averred that he was "not sure" whether the sale of convicts might be permitted by the Amendment: "I do not pronounce any positive opinion, but I desire to have the opinion of the committee after ample consideration."[110] Even as he professed uncertainty on the issue, however, Sumner suggested that most of his Senate colleagues had voted under the assumption that the Clause applied only "to ordinary imprisonment," rejecting his own warning "that it might be extended so as to cover some form of slavery."[111]

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[105] CONG. GLOBE, 39th Cong., 2d Sess. 239 (1867) (statement of Sen. Creswell).

[106] *Id.*

[107] *Id.* at 238 (statement of Sen. Saulsbury).

[108] *Id.* at 238–39 (statement of Sen. Johnson).

[109] *See id.* at 239.

[110] *Id.* (statement of Sen. Sumner). On Sumner's objections to the Clause, see *supra* notes 35–38 and accompanying text.

[111] CONG. GLOBE, 39th Cong., 2d Sess. 238 (1867).

Here, as on numerous other issues, the logic of constitutional enforcement pushed Northern and Western Republicans beyond the standard practice in their own states. According to Kasson's Resolution, states could not constitutionally "impose any other servitude than that of imprisonment or other restraint of freedom under the immediate control of officers of the law and according to the usual course thereof, to the exclusion of all unofficial control of the person so held in servitude."[112] But Northern and Western states commonly placed prisoners under the immediate control of prison contractors. As of the end of the Civil War, nearly all Northern prisons were "contracting or leasing out the labor of the majority of their prisoners to private interests, and prison contractors were commonly enjoying annual profit margins of upwards of twice their costs."[113] Although state officials exercised nominal control, in practice contractors shaped prison discipline around the objective of labor extraction.[114] It appears that neither Kasson nor his opponents were aware of these practices. No conservative exploited the opportunity to charge the Republicans with hypocrisy for imposing standards on the South that the North and West routinely violated.

Kasson's interpretive language never came to a vote. Thayer and others objected to the notion that Congress could or should enact a resolution that professed merely to express an opinion about constitutional interpretation.[115] To correct this deficiency, Thayer proposed an amendment to the resolution that transformed it into "[a] bill to enforce the thirteenth amendment to the Constitution of the United States."[116] The bill retained the preamble to Kasson's Resolution, which advanced the broad proposition that the Thirteenth Amendment "recognizes no involuntary servitude, except to the law and to the officers of its administration."[117] The operative clause made

112 *Id.* at 344.

113 McLennan, *supra* note 42, at 84.

114 *Id.* at 116 (recounting that, despite statutes and contracts giving the state control over prison discipline, "in practice, they proved wholly permeable to the contractor and the imperatives of profit-making" and that contractors "exerted a tremendous degree of control over the convicts' lives" including food, hours of work, sleep, and worship, type and intensity of punishments, which together determined the prisoners' health and life expectancy).

115 Cong. Globe, 39th Cong., 2d Sess. 344–45 (1867). In Thayer's view, a law enacted "to enforce a particular construction of the Constitution . . . should assume . . . that the evil intended to be prevented . . . is already prohibited by the Constitution." *Id.* at 347. Kasson's popular constitutionalist response (that his resolution would not usurp the courts but would encourage them to endorse Congress's interpretation "by the construing and positive legislative power of the United States") garnered no recorded support. *Id*. at 345.

116 *Id*. at 348 (reporting the title of the bill).

117 *Id*. at 344.

it a felony to "sell, or offer for sale, or attempt to sell any person" or to "hold in servitude any person so sold," with violations punishable by a prison term of up to ten years, a fine of up to ten thousand dollars, or both.[118] On January 8, 1867, the House approved the bill by a vote of 121 in favor, 25 against, and 45 not voting.[119]

The Kasson-Thayer bill never came to a vote in the Senate. Instead, the Judiciary Committee recommended "indefinite postponement," and the full Senate approved.[120] Senator Luke Poland of Vermont offered this terse explanation on behalf of the Committee: "We think the whole subject is covered by the civil rights bill."[121] Evidently, Poland was referring to Section 2 of the 1866 Civil Rights Act, which prohibited "'any person . . . under color of any law' from subjecting 'any inhabitant of any State or Territory' to 'different punishment, pains, or penalties'" on account of color, race, or previous condition of servitude.[122] Viewed in isolation, this postponement could be interpreted as a rejection of the bill, but the context indicates another possibility.

As of February 27, when the Senate voted to postpone the Kasson-Thayer bill, Congress was embroiled in a high-stakes struggle over a radical bill that offered a chance to curb not only convict leasing, but the entire range of white-supremacist abuses.[123] Frederick Douglass and other black leaders had been arguing that black freedom hinged not on the direct federal regulation of local Southern matters, but on the radical reconstruction of Southern politics. Grant black suffrage, they urged, and the freed people could protect themselves through state politics.[124] Given that African Americans consti-

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[118] *Id*. at 346 (reporting the text of the bill as initially proposed); *id*. at 347 (reporting Thayer's addition of the phrase "or who shall hereafter hold in servitude any person so sold" at Kasson's request).

[119] *Id.* at 348.

[120] *Id*. at 1866.

[121] The quoted sentence contains Poland's entire explanation for the recommendation. *Id*.

[122] Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 Wm. & Mary Bill Rts. J. 395, 423 (2009). This explanation finds support in the Senate's initial discussion of the problem, during which Sumner and Creswell both indicated that the Civil Rights Act might already have dealt with the problem. *See* Cong. Globe, 39th Cong., 2d Sess. 238 (1867) (statement of Sen. Sumner); *see id.* at 239 (statement of Sen. Creswell).

[123] For an account of the struggle over this bill, which went through various iterations, see Benedict, *supra* note 57, at 227–40.

[124] *See, e.g.*, The Colored Citizens of Norfolk, VA., Equal Suffrage, Address to the People of the United States (1865), *reprinted in* Proceedings of the Black National and State Conventions, 1865–1900, at 83–103 (Philip S. Foner & George E. Walker eds., 1986). "[G]ive us the suffrage, and you may rely upon us to secure justice for ourselves, and all Union men, and to keep the State forever in the Union." *Id.* at 85.

tuted a huge voting bloc in the Southern states, including outright majorities in Louisiana, Mississippi, and South Carolina,[125] this was no pipe dream. When the Senate postponed action on the Kasson-Thayer bill, Congress was only days away from voting on a measure designed to bring about black suffrage.[126] In light of this impending showdown, it is not surprising that the senators felt little urgency over a partial measure dealing only with convict leasing. On March 2, the Radicals made good; the First Reconstruction Act called on the Southern male electorate of all races, colors, and economic classes to select delegates to state constitutional conventions.[127] Less than a month later, the Second Reconstruction Act ensured that the process would be overseen by the U.S. military, not the all-white legislatures installed by Johnson.[128] Sure enough, the state conventions enacted universal male suffrage without regard to race, color, property, or wealth.[129] From that point until the waning days of Reconstruction, Congress focused more on protecting Southern Republicans and Republican-controlled, racially integrated state governments against white supremacist terror than on direct, federal regulation of Southern practices such as convict leasing.[130] The Senate's postponement of the Kasson-Thayer bill, then, might have reflected not a rejection of its substance, but a shift in strategy from direct federal regulation to the radical reconstruction of Southern state politics.

D. *Interpretive Significance of the Early History*

What can this history tell us about the original meaning or meanings of the Punishment Clause? It seems clear that there were at least two competing interpretations—one advanced by the former slave masters and their Democratic allies, the other by an overwhelming majority of Republicans. According to the Democrats, the Clause stripped all Thirteenth Amendment protection from any person who

125 U.S. CENSUS BUREAU, TABLE A-18: RACE FOR THE UNITED STATES, REGIONS, DIVISIONS & STATES: 1870 (2002), https://perma.cc/N2UM-5WMU. Apparently bearing out these hopes, the resulting conventions decreed universal manhood suffrage without regard to race or economic status. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 73 (2009). These expanded electorates promptly installed Republican Party majorities in state houses across the South.

126 *See* BENEDICT, *supra* note 57, at 239–40.

127 Act of Mar. 2, 1867, ch. 153, § 5, 14 Stat. 428.

128 Act of Mar. 23, 1867, ch. 168, 15 Stat. 2.

129 *See* KEYSSAR, *supra* note 125, at 73.

130 *See generally* Act of Apr. 20, 1871, 17 Stat. 13 (KKK Act) (empowering the President to combat white supremacy organizations like the Ku Klux Klan by suspending the writ of habeas corpus); Act of May 31, 1870, 16 Stat. 140 (generally enforcing the right to vote despite race or previous servitude, rather than specifically focusing on the practice of convict leasing).

had been convicted of a crime, thereby opening the door to any and all forms of prison servitude, including convict leasing. Republicans, on the other hand, held that the clause left intact the Amendment's protection against a variety of practices. While the Democrats urged that prison servitude be left to the discretion of state officials, Republicans applied a version of what we would today call critical or strict scrutiny, looking past the fact of a conviction to probe whether servitude had actually been imposed as a punishment for the particular crime of which the person had been duly convicted. In particular, they held that the Amendment directly outlawed the early forms of Southern convict leasing. Some said so bluntly, charging that the contrary reading lay outside the bounds of "any reasonable interpretation"[131] of the Amendment or that it amounted to an "absurd construction"[132] or "a construction and gloss" that reflected "perfidy to the black race."[133] Others made the point by implication, accusing the Southern states of selling convicts into servitude "[u]nder the *pretense*" of the Punishment Clause,[134] or complaining that the Amendment had been "avoided and got around by these cunning rebels."[135] Two Republican representatives did urge passage of the Fourteenth Amendment partly to end convict leasing, but not—it appears—because of any deficiency in the Thirteenth, but rather because President Johnson and the cunning rebels had misread it to permit the practice.[136] Senator Sumner did express doubt on the matter, but he also indicated that most of his colleagues had, at the time of the vote on the Amendment, believed that the Clause "was simply applicable to ordinary imprisonment."[137]

Republican senators and representatives did not offer a unified theory to explain the distinction between constitutional and unconstitutional forms of prison servitude. Instead, they condemned particular practices and proposed particular protective rules. In the course of the debates, however, a reasonably coherent pattern emerged. Republicans sought to draw a line between the sphere of criminal

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131 CONG. GLOBE, 39th Cong., 2d Sess. 239 (1867) (statement of Sen. Creswell).

132 CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (statement of Sen. Howard).

133 *Id.* at 332 (statement of Rep. Deming); *see also id.* at 603 (statement of Sen. Wilson) (complaining that "[i]n North Carolina two men were sold into slavery for years under the vagrant laws," and suggesting that this and numerous other abuses perpetrated by the black laws defied "the rights of the freedmen and the will of the nation embodied in the [thirteenth] amendment to the Constitution").

134 *Id.* at 655 (statement of Rep. Stevens) (emphasis added); *id.* at 1123–24 (statement of Rep. Cook).

135 *Id*. at 383 (statement of Rep. Farnsworth).

136 *See supra* text accompanying notes 76–88.

137 CONG. GLOBE, 39th Cong., 2d Sess. 238 (1867).

punishment, governed by considerations of public protection, and the sphere of labor, where the Amendment abolished slavery and established a free labor system.[138] They read the Punishment Clause narrowly to cover only those features of slavery or involuntary servitude that fell within what they conceived as the "ordinary" or "usual" operation of a penal system.[139] In their view, Southern convict leasing exceeded that limit and encroached on the sphere of free labor in various particulars, including the placing of inmate laborers under private control,[140] the extension of servitude outside prison walls,[141] the infliction of servitude for crimes not serious enough to warrant such a severe penalty[142] (especially vagrancy, which appeared to have been criminalized less for public protection than for labor control),[143] the condemnation of prisoners to servitude by anyone other than the sentencing authority,[144] and the selective imposition of servitude on blacks but not on whites guilty of the same crimes.[145]

The clash between Democratic and Republican readings confronts present-day constitutionalists with an interpretive choice. Should we honor the broad reading propounded by the former slave masters and their Democratic allies, nearly all of whom opposed both the Amendment and the ensuing enforcement legislation? Or, should we embrace the narrow readings advocated and implemented by the Amendment's Republican proponents and enforcers?

Applying standard methods of interpretation, the Republican reading would appear the obvious choice. Supreme Court majorities have signed on to the proposition that congressional actions closely following the ratification of a constitutional provision provide

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[138] In various forms, this distinction has long been a central theme in the legal and popular discourse of prison labor. *See, e.g.*, McLennan, *supra* note 42, at 72–75 (recounting that, by the 1830s, Northern workers had made a public issue of the threat posed by prison contract labor to the conditions and rights of free workers, and that—while conceding the need for "punishment"—they sought to disassociate punishment from productive labor); *see also* Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 Vand. L. Rev. 857, 864 (2008) ("[P]risoners' labor is located outside the economy on conventional maps of social spheres drawn by lawyers, demographers, and economists.").

[139] Cong. Globe, 39th Cong., 2d Sess. 238 (1867) (statement of Sen. Sumner) ("ordinary"); *id.* at 324 (1867) (Kasson Resolution) ("usual").

[140] *See infra* notes 446–48 and accompanying text; *see also supra* notes 57–61, 106 and accompanying text (reporting objections to the leasing out of convicts to private parties).

[141] *See supra* note 447 and accompanying text.

[142] *See supra* notes 57–58, 60, 83 and accompanying text.

[143] *See supra* notes 60–69 and accompanying text.

[144] *See supra* note 101 and accompanying text.

[145] *See supra* notes 89–90 and accompanying text.

"weighty evidence" of its meaning.[146] Within four months of the Amendment's ratification, Congress had enforced it with the Civil Rights Act of 1866, which prohibited blacks-only convict leasing.[147] The congressional debates focused on the issue of constitutionality, with most Republican speakers indicating that the Constitution directly prohibited the practices covered by the Act; the point of the legislation was to provide effective tools to enforce the rights guaranteed by the Amendment.[148] The House and Senate voted by strong majorities first to pass the Act, and then to override Johnson's veto. When the Act failed to eliminate the practice, the House passed a race-neutral prohibition that the Senate postponed only after it became possible to enact a far more radical solution, black suffrage.[149]

With regard to the Reconstruction Amendments, however, the Supreme Court does not always apply standard methods. Instead of relying on contemporary debates and congressional actions, the Court sometimes chooses to emphasize opinions expressed after Democratic paramilitaries had terminated Reconstruction by violence—a time when most Republicans had come to acquiesce in the triumph of one-party, "white man's government" in the Deep South. In one case, for example, the Court looked to the post-Reconstruction opinions of Supreme Court Justices for evidence of original meaning, touting their "intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment."[150] As historian Eric Foner points out, the Court apparently believed that "the judges gutting Reconstruction had more insight into the purposes of the laws and Amendments of Reconstruction than those who actually enacted

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[146] Printz v. United States, 521 U.S. 898, 905 (1997) (quoting Bowsher v. Synar, 478 U.S. 714, 723–24 (1986)); Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 117, 122 (2011) (quoting *Printz*, 521 U.S. at 905).

[147] *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (providing that citizens of all races and colors would be subject to the same "punishment, pains, and penalties" as were white citizens, "and to none other").

[148] *See supra* note 92.

[149] *See supra* text accompanying notes 116–30.

[150] United States v. Morrison, 529 U.S. 598, 620 (2000) (reaffirming the state action limitation on the Fourteenth Amendment based in part on judicial opinions issued twelve to fifteen years after the Amendment's ratification). Chief Justice Rehnquist, who wrote the Court's opinion, justified this approach by pointing out that the Justices involved had all been appointed by Republicans. *Id*. He did not, however, take into account the consensus view among historians that the Republicans' initial determination to reconstruct the South had, by the time of those decisions, been worn down by Southern white resistance, economic crisis, and Democratic resurgence. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 145 (2009).

them."[151] This approach would favor the Democrats' permissive reading of the Punishment Clause, but it is difficult to imagine a principled justification for choosing it. Assuming that we are interested in discerning the meaning of a text at its time of enactment—the generally accepted goal of originalist analysis—it is nonsensical to pass over contemporary congressional debates and actions in favor of evidence separated from the Amendment's ratification not only by years, but also by an epochal change in context from Reconstruction to white supremacist rule in the South.

It has also been argued that the Punishment Clause should be read broadly to authorize any practice that was common in the North at the time of its enactment. In *Holt v. Sarver*, for example, a federal district court concluded that because "the convict-leasing system came into existence at a very early stage as the States found that it was more profitable to lease their convicts than to work them themselves," the clause must have "manifested a Congressional intent not to reach such policies and practices."[152] This approach finds support in the abstract proposition, endorsed by many contemporary Republicans, that the North would serve as the model for the reconstructed South.[153]

The *Holt* court, however, did not consider the history presented here. Given the Republicans' commitment to eradicate not just the legal institution of chattel slavery, but the entire system, including all of its badges, incidents, roots, vestiges, and "oppressive" features,[154] it seems inevitable that their efforts would run up against Northern practice. As Richard Davies Parker noted:

> The social and economic vestiges of a slave culture were still very much alive in the North; the framers most likely did not intend to alter these. Yet they also appear not to have drawn the connection between the institution in the South and that in the North. As a

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[151] Eric Foner, *The Supreme Court and the History of Reconstruction – and Vice-Versa*, 112 COLUM. L. REV. 1585, 1602–03 (2012).

[152] Holt v. Sarver, 309 F. Supp. 362, 372 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

[153] *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 1460–61 (1864) (statement of Sen. Henderson) (advocating for the Thirteenth Amendment by reciting the advantages of Northern freedom over Southern slavery). During the struggle over slavery, the Republican Party and its predecessors held up the North as exemplifying the free labor counterpart to Southern slavery. *See* FONER, *supra* note 28, at 51–52, 56, 71 (reporting the Republicans' juxtaposition of Southern slavery, characterized by degraded labor (both black and white), ignorance, laziness, and despotism, with Northern free labor, characterized by learning, motivation, and democratic institutions).

[154] *See supra* notes 22–23 and accompanying text.

result, they may have written more into the Constitution than they realized or intended.[155]

Whatever their intentions, most Republicans readily found constitutional violations in Southern practices that had close analogues in the North. The Kasson Resolution asserted, for example, that the Amendment prohibited servitude under the direction of private masters, a common phenomenon in most states.[156] And numerous Republicans charged that the leasing out of vagrants, another Northern tradition, violated the Amendment.[157] Indeed, Republican members of Congress condemned a variety of practices that were unexceptional in the North.[158] The experience of fighting a bloody civil war over slavery might have sensitized them to evils that had previously gone unnoticed except by prison reformers. It seems likely, for example, that they would have perceived the danger of profit-driven penal servitude more easily when imposed by former slave masters on a mass scale than by fellow members of the Northern elite on a tiny proportion of the population.[159]

Perhaps not coincidentally, the gap between Northern practice and Republican aspirations narrowed rapidly during this period. Even before the Amendment's ratification, Northern states were moving to align their practices with the new norm of freedom. By the time that the House of Representatives voted to propose the Amendment, for example, the Republican-controlled legislature of Illinois had repealed that state's black codes, including a provision mandating convict leasing.[160] Even as Republicans in Congress discussed the

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155 Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1302 (1969); *see also* VORENBERG, *supra* note 20, at 105 (observing that, at the time of the Amendment's drafting in the midst of the Civil War, the Republicans "saw only a rough outline of the contours of freedom in a nation without slavery").

156 *See supra* note 100 and accompanying text (quoting the Resolution); *see also supra* notes 101, 117–18, *infra* note 187 and accompanying text (quoting similar, but less precise, statements in the Kasson-Thayer bill and in statements by Senators Creswell and Sherman); MCLENNAN, *supra* note 42, at 63–64 (describing how many Northern and Southern states in the early 19th century required convicts in prison to work for private businesses).

157 On the hiring out of vagrants in the North, see JAMES D. SCHMIDT, FREE TO WORK: LABOR LAW, EMANCIPATION, AND RECONSTRUCTION, 1815–1880, at 66–81 (1998). For the Republicans' constitutional critique of vagrancy laws, see *supra* notes 60–69.

158 *See* VanderVelde, *supra* note 13, at 486–89 (recounting that, after the abolition of slavery, "the South unsurprisingly instituted labor 'reforms' that copied northern practices," including, for example, authorizing employers to discharge workers for various reasons, and using the phrase "Master-Servant" to describe a law, and that Republicans criticized such practices as conflicting with the Amendment).

159 On penal population statistics, see *supra* note 50.

160 N. DWIGHT HARRIS, THE HISTORY OF NEGRO SERVITUDE IN ILLINOIS AND OF THE SLAVERY AGITATION IN THAT STATE 1719–1864, at 240 (1904).

Kasson Resolution, their counterparts in Northern legislatures worked to implement a similar program: "For a few short years, roughly corresponding to those of radical Reconstruction (1867-c.1872), many [Northern] states attempted to rein in the contract prison labor system . . . ."[161]

Present-day constitutionalists are thus confronted with a second interpretive choice between pre-Amendment Northern practice and stated Republican understandings. This choice might depend on one's broader views on interpretive methodology. The stated understandings would, for example, appear to be the better choice if one accepts Michael McConnell's theory that "actual arguments made by opponents and proponents regarding the meaning" of a constitutional provision provide "a more reliable guide to legal meaning than either popular opinion or actual practice."[162] The same result would also follow from a purposive, as opposed to formalistic, methodology. As we have seen, the Republicans generally applied a purposive approach, seeking to eradicate all of slavery's oppressive features.[163] It was this commitment that led them to extend the Amendment's application outward to counter Southern attempts at circumvention—far enough that they came to condemn practices that were common in the North, including convict leasing.[164] At the level of principle, then, it seems that their understanding of the Amendment was not limited by Northern practice.

Finally, it is sometimes said that the Thirteenth Amendment should be interpreted in line with judicial and popular understandings

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161 McLennan, *supra* note 42, at 90. Similar developments have also occurred in other areas of law. *See, e.g.*, Lea S. VanderVelde, *The Gendered Origins of the* Lumley *Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 Yale L.J. 775, 795–99 (1992) (relating Northern efforts to reign in the *Lumley* doctrine, which permitted negative injunctions against performers who violated contracts to perform).

162 Michael W. McConnell, *The Originalist Justification for* Brown*: A Reply to Professor Klarman*, 81 Va. L. Rev. 1937, 1941 (1995). McConnell explains that, although "[c]onstitutional amendments generally reflect, rather than contradict popular opinion," Reconstruction "was a time when a political minority, armed with the prestige of victory in the Civil War and with military control over the political apparatus of the rebel states, imposed constitutional change on the Nation as the price of reunion, with little regard for popular opinion." *Id.* at 1939.

163 *See supra* Sections I.B, I.C (discussing the 1866 Civil Rights Act, the Kasson Resolution, and the Kasson-Thayer Bill).

164 *See supra* Sections I.B, I.C (recounting escalating Republican responses to convict leasing). This dynamic of attempted circumvention leading to more expansive interpretation and application has been observed in other periods. *See, e.g.*, Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049, 1079–1102 (1978) (recounting and analyzing the process by which the Supreme Court was drawn to embrace the principle that a violation of the 1964 Civil Rights Act could be proven with evidence of disparate impact).

of the Northwest Ordinance, upon which the Amendment was modeled.[165] According to Alfred Avins, for example, "the judicial interpretations of that ordinance . . . were intended to be carried along with the language of the ordinance itself into the United States Constitution."[166] This view is not without support in the record. Proponents of the Amendment explained their choice of language not in terms of its substance, but of its origins in the Ordinance.[167] Senator Jacob Howard of Michigan, for example, stressed that the language "ha[d] been adjudicated upon repeatedly" and was "perfectly well understood both by the public and by judicial tribunals."[168] One such adjudication was *Nelson v. People*, decided in January, 1864, three months before Howard's speech.[169] In *Nelson*, the Illinois Supreme Court read the Punishment Clause of the Illinois Constitution, which had been drawn from the Ordinance,[170] to permit the public sale at auction of "any negro or mulatto, bond or free" who had been convicted of violating the state's ban on "negro or mulatto" immigration and had failed to pay the fine.[171] The Court reasoned that this punishment was common in Illinois and that many states had criminalized vagrancy and authorized the sale of offenders into servitude.[172] Moreover, because the purchaser would own the offender only for a limited

[165] Article VI of the Northwest 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." Northwest Ordinance of 1787, art. VI, 1 Stat. 50, 53 n.(a) (1789).

[166] Alfred Avins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination Legislation*, 49 CORNELL L.Q. 228, 236 (1964); *see also* Butler v. Perry, 240 U.S. 328, 332–33 (1916) (rejecting Thirteenth Amendment challenge to state law requiring adult males to either provide one week per year of road work, provide a substitute, or pay a sum of money, reasoning in part that such laws existed in the Northwest Territory under the Ordinance and in states formed from the Territory that incorporated similar language in their state constitutions).

[167] *See* VORENBERG, *supra* note 20, at 56–57 ("[T]he committee's measure simply took the Northwest Ordinance, already a cornerstone in northern antislavery law, and applied it to the South"); Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1477–79 (2012) (explaining that lawmakers preferred the language of the Ordinance because it was familiar, had no foreign associations, and was deeply rooted in the American political tradition, having been written by Thomas Jefferson); Hamilton, *supra* note 33, at 30 ("The Committee's proposal was American, historical, and definite because of prior adjudication.").

[168] CONG. GLOBE, 38th Cong., 1st Sess. 1489 (1866) (statement of Sen. Howard).

[169] 33 Ill. 390 (1864).

[170] The Illinois Constitution provided that "[t]here shall be neither slavery nor involuntary servitude in this State, except as a punishment for crime whereof the party shall have been duly convicted." ILL. CONST. of 1848, art. XIII, § 16.

[171] *Nelson*, 33 Ill. at 392–95. The statute authorizing this practice provided that the winning buyer would be the "person who will pay the fine and costs for the shortest period." *Id*. at 393.

[172] *Id.* at 394.

period of time (enough to pay off the fine), the relation was one of "apprenticeship," and not of "involuntary servitude" under the state constitution.[173] If, as at least one scholar has suggested, the *Nelson* Court's reading of the Illinois Constitution holds for the nearly identical language of the Thirteenth Amendment, then the Republican members of the Thirty-Ninth Congress clearly misinterpreted their Amendment.[174]

There is good reason to believe, however, that neither Howard nor his Republican colleagues read their text to incorporate the jurisprudence or practice of the Northwest Ordinance. It is inconceivable, for example, that they meant to authorize outright slavery, yet the territories of Illinois and Indiana had done just that under the Ordinance. Both, for example, permitted employers to bring human chattels into the state and give them the formally "voluntary" choice of agreeing to long terms of servitude or being forcibly returned to a slave state.[175] And both authorized salt mine operators to import slaves on the ground that free laborers could not be induced to do the work, a potentially capacious exception to the prohibitory clause.[176] Illinois went so far as to claim that the Ordinance's command that slavery not "exist" somehow left intact any slavery that predated the Ordinance.[177] More fundamentally, both territories flaunted the principle of freedom by applying a general presumption that blacks present in the territory were slaves or long-term indentured servants.[178] Even this crabbed reading of the Ordinance was routinely flouted in

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[173] *Id.* at 394–95.

[174] *See* David R. Upham, *The Understanding of "Neither Slavery nor Involuntary Servitude Shall Exist" Before the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL'Y 137, 170 (2017) (suggesting that *Nelson* provides persuasive evidence of the Amendment's original meaning on the issue of badges and incidents of slavery).

[175] *See* Paul Finkelman, *Evading the Ordinance: The Persistence of Bondage in Indiana and Illinois*, 9 J. EARLY REPUBLIC 21, 35–39, 41 (1989).

[176] *Id.* at 42. Formally, the laws required that the slaves consent to this employment (though it is not clear how a slave could consent to anything given the master's unrestricted power of discipline), and only for a term of one year. *Id.* So porous was the exception, however, that one Illinois governor was moved to comment that "[t]o roll a barrel of salt once a year, or put salt into a salt-cellar, was sufficient excuse for any man to hire a slave, and raise a field of corn." GEORGE FLOWER, HISTORY OF THE ENGLISH SETTLEMENT IN EDWARDS COUNTY ILLINOIS, FOUNDED IN 1817 AND 1818, BY MORRIS BIRKBECK AND GEORGE FLOWER 155 (2d ed. 1909). Due to lax interpretation and enforcement, "slavery existed in the Territory of Illinois as completely as in any of the Southern States." HARRIS, *supra* note 160, at 15.

[177] Finkelman, *supra* note 175, at 24–25.

[178] *Id.* at 39, 41–42, 48. Once Indiana became a state, it did effectively eliminate chattel slavery, but under state constitutional provisions that were far stronger than the Ordinance. *See id.* at 40 ("Implementation of the state constitution turned out to be far more effective than implementation of the ordinance. By 1830 slavery had virtually ceased in Indiana . . . .").

practice as, by the early 1800s, pro-slavery settlers of the Northwest Territory had concluded that they could enslave black people "as long as lip service was paid to the Ordinance and slaves were called 'servants.'"[179]

These illiberal principles and practices flowed naturally from the distinctive nature of the Ordinance as a limited exception to a general rule sanctioning slavery. During the period of the Ordinance and its successor state constitutional provisions, the United States Constitution not only permitted slavery in the states, the District of Columbia, and the Southwest Territory, but also affirmatively supported it through the Fugitive Slave Clause and the Three-Fifths Clause.[180] Beginning with *Prigg v. Pennsylvania* in 1844, the Supreme Court applied a nationwide presumption that persons of African ancestry were chattels who could be seized and transported to slave states with no due process whatever.[181] This background solicitude for slavery was reflected in *Nelson*, where the Court justified its validation of convict leasing partly by citing a previous decision, *Eells v. People*, upholding the conviction of an Illinois man for harboring a fugitive slave.[182] *Eells*, in turn, relied on Chief Justice Taney's concurrence in *Prigg* for the proposition that the Fugitive Slave Clause imposed a duty on states to protect slave owners' property rights.[183] In short, then, much of the jurisprudence that Avins and others cite as

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[179] PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 118 (1987).

[180] Reflecting this reality, the Ordinance itself contained a Fugitive Slave Clause. Northwest Ordinance of 1787, art. VI, 1 Stat. 50, 53 n.(a) ("Provided always, that any person escaping into the [Northwest Territory], from whom labour or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labour or service as aforesaid.").

[181] *See* 41 U.S. 539, 612–16 (1842) ("[U]nder and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace, or any illegal violence."); *id*. at 672 (McLean, J., dissenting) (noting that the outcome hinged on elevating the presumption of slavery, "unsustained by any proof," over "[t]he presumption of the state that the coloured person is free"); Paul Finkelman, *Sorting Out* Prigg v. Pennsylvania, 24 RUTGERS L.J. 605, 637 (1993) ("In the South, race was a presumption of slave status and by giving masters and slave-hunters a common-law right of recaption, Story nationalized this presumption." (footnote omitted)).

[182] Nelson v. People, 33 Ill. 390, 394 (1864) ("In the case of *Eells* v. *The People*, 4 Scam. 498, it was said, that a State has the power to define offenses and prescribe the punishment, and that the exercise on such powers cannot be inquired into by a court of justice."); *see* Eells v. People, 5 Ill. (4 Scam.) 498, 512–13 (1843).

[183] *See Eells*, 5 Ill. (4 Scam.) at 511 (citing *Prigg*, 41 U.S. at 628 (Taney, C.J., concurring)). In *Eells*, the Court upheld the conviction of an Illinois resident for harboring a fugitive slave allegedly belonging to a Missouri master, reasoning that the federal Fugitive Slave Act did not preempt state law on the subject. *See* 5 Ill. (4 Scam.) at 508, 514.

authoritative on the Thirteenth Amendment stemmed from the very background rule of slavery that it abolished.

Indeed, the Thirteenth Amendment swept away the entire constitutional context in which decisions like *Nelson* had been rendered. Far from a geographical exception to a general rule authorizing slavery, the Amendment was understood by all to resolve permanently and throughout the nation the question of slavery versus freedom.[184] When Republican members of the Thirty-Ninth Congress mentioned the jurisprudence of the Ordinance, they did so either to distinguish or to idealize it. Representative Kasson took the first approach, arguing that the construction of the Ordinance regarding convict leasing did not carry over to the Amendment. Why not? Because the Ordinance had been administered before slavery was abolished: "There was, therefore, at that time, according to law, an existing condition of slavery, into which men could be sold if necessary, according to the language of that ordinance."[185] But the Thirteenth Amendment had abolished slavery, so that "the reason for that construction of this language . . . failed."[186]

Senator Creswell reached the same result through a more direct route. He simply denied that the Ordinance had ever spawned any jurisprudence authorizing convict leasing.[187] This sanitized picture reflected more than simple ignorance. During the long struggle over slavery, the Ordinance had assumed a symbolic role that had little to do with actual practice.[188] As most of the states formed from the Northwest Territory finally managed to eliminate chattel slavery and indentured servitude, the Ordinance's failures were forgotten and it came to share the credit for successes actually achieved under state constitutions.[189] "Rightly or wrongly," recounts historian James

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184 *See supra* text accompanying note 55.

185 CONG. GLOBE, 39th Cong., 2d Sess. 344 (1867).

186 *Id.* at 344–45. As noted above, Sumner had gone a step further during the debates over proposing the Amendment, arguing that the Clause itself had been rendered surplusage. *See supra* text accompanying note 35.

187 *See* CONG. GLOBE, 39th Cong., 2d Sess. 239 (1867) (claiming that the words of the Ordinance had "received an interpretation for the last eighty years" and that pursuant to that interpretation, "a case ha[d] never been presented where a human being was . . . sold publicly . . . to perform involuntary service . . . by way of punishment for crime"). Senator John Sherman of Ohio supported Creswell by reporting vaguely that he had heard of an Illinois or Indiana case in which the court "decided that the 'involuntary servitude' referred to [in the Amendment] must be performed under the direction of the State authorities, in the way of punishment, and must be rendered to the State." *Id*.

188 *See* Oakes, *supra* note 45, at 125.

189 Although each of the state constitutions contained language resembling Article VI of the Northwest Ordinance, they varied widely in scope. *See, e.g.*, Finkelman, *supra* note 175, at 39–40, 45–48 (describing state constitutions in Indiana and Illinois). Most subsequent judicial decisions reflected these particularities, not the Ordinance itself. For example,

Oakes, "by the 1860s the Northwest Ordinance occupied an almost sacred place in the constitutional politics of the antislavery movement."[190] As explained by VanderVelde, this romanticized view of the Ordinance helped Northerners to project the image of a slavery-free North, which—in turn—reinforced their "self-image as being morally superior to the South."[191] Given this context, it seems far less likely that the framers of the Thirteenth Amendment meant to reach back and resurrect the actual practice under the Ordinance than to enact an idealized, aspirational version free from earlier, crabbed interpretations. None of this precludes a choice to do so today, but it is hard to see why Americans should accept judicial understandings of the Ordinance, shaped by a context of slavery, as limits on the scope of an Amendment enacted as the consummation of a bloody conflict that, if it did not begin as a war against slavery, certainly ended as one.

II
Convict Leasing and the Punishment Clause

Black suffrage did not terminate convict leasing. African Americans did succeed in electing relatively sympathetic Republican state legislators across the South, but those legislators found themselves confronted with an economic catastrophe of colossal dimensions. Much of the South's infrastructure had been destroyed during the war, including its prisons.[192] Southern state governments turned to convict leasing as a means of financing penal operations.[193] Even black legislators initially embraced the practice.[194] After a short time,

Illinois courts permitted long-term indentures while Indiana courts held that they constituted "involuntary servitude" under the state constitution. *See* Sarah v. Borders, 5 Ill. (4 Scam.) 341, 346 (1843); The Case of Mary Clark, 1 Blackf. 122, 125–26 (Ind. 1821); Pope, *supra* note 24, at 1483–85 ("Early on, [Illinois] Governor Harrison interpreted the Ordinance not to prohibit indentured servitude . . . . Indiana took the opposite approach from Illinois and, in the process, set the pattern for future justifications of the right to quit.").

[190] Oakes, *supra* note 45, at 125.

[191] Lea VanderVelde, Territorial Origins of "Except as a Punishment for Crime": From Settler Colonialism to the Reconstruction Congress 5 (Feb. 22, 2018) (unpublished manuscript) (on file with the *New York University Law Review*).

[192] *See* Edward L. Ayers, Vengeance and Justice: Crime and Punishment in the 19th-Century American South 186–88 (1984) (describing the decline of Southern penitentiaries in the 1860s); Alex Lichtenstein, Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South 3 (1996) (listing "the destruction of southern penitentiary buildings during the Civil War" as a factor in the rise of convict leasing).

[193] Ayers, *supra* note 192, at 189–90; *see* Malcolm M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons 152 (1998) (describing Southern states as "economically exhausted").

[194] Ayers, *supra* note 192, at 190.

however, Southern Republicans began to discover the dangers of leasing and moved to end abuses.[195] Republican-controlled state governments enacted reforms, including skills training and payment for labor.[196] South Carolina abolished leasing in 1874, and Louisiana outlawed convict labor "outside [of] the prison walls" in 1875.[197]

Unfortunately, this progress was derailed when the Supreme Court nullified the Enforcement Acts in *United States v. Cruikshank*,[198] unleashing Democratic paramilitaries to conduct a series of terrorist attacks that destroyed black organization, suppressed the Republican vote, and brought Reconstruction to a close.[199] The Deep South states, now embedded in a one-party political system dominated by the self-proclaimed "white man's party,"[200] revived convict leasing and expanded it into an enormous engine of

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[195] McLennan, *supra* note 42, at 93–95; Nathan Cardon, *"Less than Mayhem": Louisiana's Convict Lease, 1865–1901*, 58 La. Hist. 417, 424 (2017). In Georgia, black Republican legislators sought to correct abuses but met resistance from their white colleagues. *See* Lichtenstein, *supra* note 192, at 56–57.

[196] McLennan, *supra* note 42, at 95–96.

[197] Cardon, *supra* note 195, at 429 (quoting *Protection of Labor*, New Orleans Republican, Mar. 24, 1875, https://chroniclingamerica.loc.gov/data/batches/lu_haunter_ver01/data/sn83016555/00295874144/1875032401/0441.pdf); *see* Ayers, *supra* note 192, at 190 (explaining that two years after black Republicans in South Carolina worked to introduce a convict lease system, they helped end it). By the time of the Louisiana legislation, white paramilitaries had already ousted Republican officials from a number of parishes, and Republican power was crumbling. *See* Cardon, *supra* note 195, at 429. The state never succeeded in enforcing the law and the Republicans reversed themselves on the issue, possibly as part of an attempt to hold on to office. *Id.*

[198] 92 U.S. 542 (1876) (overturning Enforcement Act convictions of white Democratic paramilitaries for violating the constitutional rights of black Republicans and holding—for the first time—that the Fourteenth Amendment did not incorporate the Bill of Rights and reached only state action).

[199] *See, e.g.*, Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877, at 531 (1988) ("[T]he decision rendered national prosecution of crimes committed against blacks virtually impossible, and gave a green light to acts of terror where local officials either could not or would not enforce the law."); A. Leon Higginbotham, Jr., Shades of Freedom: Racial Politics and Presumptions of the American Legal Process 90 (1996) ("By denying to African Americans access to justice in the federal courts, the Supreme Court had effectively disabled the federal government's ability to prosecute those who could or would not be effectively prosecuted in state courts."); Charles Lane, The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction 251 (2008) ("The combined impact of mass murder and legal retrenchment made it easier for Southern blacks to be gradually dispossessed of the political power they thought they had won in the Civil War."). For additional documentation as well as responses to counterarguments, see James Gray Pope, *Snubbed Landmark: Why* United States v. Cruikshank *(1876) Belongs at the Heart of the American Constitutional Canon*, 49 Harv. C.R.-C.L. L. Rev. 385 (2014).

[200] On the Democrats' self-description as the "white man's party," see Heather Cox Richardson, The Death of Reconstruction 48 (2001).

labor exploitation.[201] Gone was any serious effort to pursue rehabilitative goals or control abuses. Lessees subjected prisoners to conditions reminiscent of, and often more severe than, those suffered by chattel slaves.[202]

As recounted above, Republican members of the Thirty-Ninth Congress had hoped that they could end convict leasing by legislating that black citizens would be subject to the same "punishment, pains, and penalties" as white citizens, "and to none other."[203] But white Southerners proved unexpectedly willing to sacrifice members of their own race in order to sustain the supply of unfree labor. Even as Congress debated the Act, state legislators were already beginning to legislate in race-neutral language, leaving discrimination to the discretion of individual law enforcement officers and judges.[204] This produced a convict labor force that was overwhelmingly black, but not so overwhelmingly as to amount to provable discrimination under the demanding standard of contemporary Fourteenth Amendment decisions like *Yick Wo v. Hopkins*.[205] Although it had been designed with black labor in mind, convict leasing "also fell heavily on those whites

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201 *See* Lichtenstein, *supra* note 192, at 40 (relating that the use of convict leasing as a system of labor control began during "the first five years of restored Democratic rule in Georgia"); David M. Oshinsky, "Worse Than Slavery": Parchman Farm and the Ordeal of Jim Crow Justice 37 (1996) ("[C]onvict leasing did not fully take hold in Mississippi until after 1875, when the Republican party was routed and the federal troops went home."); Vernon Lane Wharton, The Negro in Mississippi 1865–1890, at 238–39 (Harper & Row 1965) (1947) (explaining how convict leasing became "a tremendous enterprise" in Mississippi between 1876 and 1885); *see also* Foner, *supra* note 49, at 50 (recounting that convict leasing "only burgeoned after white supremacist Democrats regained control of southern governments and enacted laws greatly expanding the number of crimes that constituted felonies").

202 For a discussion, see *infra* Section II.A. Descriptions of convict labor systems are drawn primarily from the following sources: Douglas A. Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II (2008); Mary Ellen Curtin, Black Prisoners and Their World, Alabama, 1865–1900 (2000); Sarah Haley, No Mercy Here: Gender, Punishment, and the Making of Jim Crow Modernity (2016); Talitha L. LeFlouria, Chained in Silence: Black Women and Convict Labor in the New South (2015); Lichtenstein, *supra* note 192; Matthew J. Mancini, One Dies, Get Another: Convict Leasing in the American South, 1866–1928 (1996); Oshinsky, *supra* note 201; Charles W. Russell, Report on Peonage (1908); Shapiro, *supra* note 50; U.S. Bureau of Labor, Second Annual Report of the Commissioner of Labor, 1886: Convict Labor (1887) [hereinafter Second Annual Report]; Donald R. Walker, Penology for Profit: A History of the Texas Prison System, 1867–1912 (1988).

203 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

204 *See* Theodore Brantner Wilson, The Black Codes of the South 107 (1965) (discussing laws in North Carolina "which, though applicable in theory without distinction of color, certainly seem[ed] to have been drawn to effect new controls over the freedmen without subjecting the state to the charge of discrimination").

205 118 U.S. 356, 374 (1886) (finding violation of the Fourteenth Amendment Equal Protection Clause where authorities applied a race-neutral laundry permitting law to reject

unlucky enough and socially isolated enough to run afoul of the law" as well as those convicted of heinous crimes.[206]

So far as one can tell from the official case reporters, no lawyer filed a Thirteenth Amendment challenge to convict leasing. Nor did political opponents invoke the Amendment in support of their cause. Even as he proposed abolishing all forms of prison servitude, for example, the prominent prison expert E. Stagg Whitin cited the Amendment for the proposition that the "State has a property right in the labor of the prisoner" that it "may lease or retain for its own use."[207] And when reformers searched for a source of constitutional power to support federal legislation abolishing or restricting prison servitude, they looked not to the Thirteenth Amendment, but to the commerce power, the tax power, or a new constitutional amendment.[208]

Only a few lonely voices kept alive the Republican point of view. Thomas M. Cooley embraced a moderate version in his influential and long-running treatise, *Constitutional Limitations*, opining that "it might well be doubted if a regulation which should suffer the convict to be placed upon the auction block and sold to the highest bidder, either for life or for a term of years, would be in harmony with the constitutional prohibition."[209] Echoing the Kasson Resolution, Cooley suggested that the Amendment would not "permit the convict to be

all 200 applications submitted by Chinese applicants while granting 79 of 80 submitted by Caucasians).

206 LICHTENSTEIN, *supra* note 192, at 59–60 (reporting that whites made up 10–16% of leased convicts in Georgia); *see also* AYERS, *supra* note 192, at 197–98 (reporting statistics for two Southern counties, one of which sent 47 blacks and 7 whites to the convict leasing system between 1866 and 1879 and the other of which sent 13 blacks and 8 whites, and observing that wealthy whites faced little or no danger of such treatment); CURTIN, *supra* note 202, at 2 (explaining that as of 1890, less than 4% of Alabama state prisoners were white); OSHINSKY, *supra* note 201, at 72 (reporting observation of convict labor camp administrator that "it was possible to send a negro to prison on almost any pretext but difficult to get a white there, unless he committed a very heinous crime").

207 E. STAGG WHITIN, PENAL SERVITUDE, at i (1912) (presenting a summary of the findings of the National Committee on Prison Labor).

208 *See* MCLENNAN, *supra* note 42, at 183 (recounting that when the House Labor Committee determined that prison labor contracting should be abolished, it proposed a constitutional amendment); Julian Leavitt, *Forty Friends of Crime*, PEARSON'S MAG., Feb. 1915, at 204–05 (urging federal legislation to remove Dormant Commerce Clause obstacles to state regulation of convict leasing, and proposing the Commerce Clause or tax power as sources of constitutional power).

209 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 319 (2d ed. 1871) [hereinafter COOLEY, 2d ed.]; THOMAS M. COOLEY & ALEXIS C. ANGELL, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 363 (6th ed. 1890) [hereinafter COOLEY, 6th ed.]. This statement had been sharpened slightly from the first edition, which asserted more vaguely that the practice might not have been "in harmony with *the spirit of* the constitutional prohibition." THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 299 (1st ed. 1868) (emphasis added).

subjected to other servitude than such as is under the control and direction of the public authorities, in the manner heretofore customary."[210] In 1908, more than three decades after the termination of Reconstruction, Assistant U.S. Attorney General Charles Wells Russell charged that convict leasing amounted to "a system of involuntary servitude—that is to say, persons are held to labor as convicts under those laws who have committed no crime."[211] Federal District Judge Emory Speer of Atlanta not only issued a passionate opinion condemning the informal surety systems run by county sheriffs as involuntary servitude but also managed to survive the inevitable threat of impeachment that followed.[212]

What legal significance should we attribute to this history today? Most scholars treat it as confirmation that the Amendment, properly interpreted, permits convict leasing. "Convict labor and convict lease seem obviously constitutional," posits legal scholar Michael Klarman, "given the Thirteenth Amendment's express allowance of involuntary servitude as punishment for crime."[213] Historians of convict leasing unanimously agree. Alex Lichtenstein, for example, asserts that "despite its resemblance to slavery, convict labor was perfectly in accord with the Thirteenth Amendment."[214] Rebecca McLennan goes further, suggesting that convict leasing and other forms of prison servitude received "official recognition and implicit approval in the

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[210] Cooley, 2d ed., *supra* note 209, at 319; Cooley, 6th ed., *supra* note 209, at 363.

[211] Russell, *supra* note 202, at 17.

[212] *See* United States v. McClellan, 127 F. 971, 973, 976 (E.D. Ga. 1904) (holding that the "illegal arrest and sale of a citizen into involuntary servitude" constituted peonage under the Anti-Peonage Act and were "inimical to" Section 1 of the Amendment); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The* Peonage *Cases*, 82 Colum. L. Rev. 646, 658, 669–71 (1982) (recounting Speer's involvement and the efforts to impeach him).

[213] Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 74 (2004); *see also* Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 Ariz. L. Rev. 983, 1009 (2009) (suggesting that the absence of Thirteenth Amendment challenges "supports an original public meaning . . . that gave states expansive immunity from claims that their abuse of convicts violated the principal prohibition in the Thirteenth Amendment"); Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 Am. U. L. Rev. 531, 608 (1989) (pointing to the void of Thirteenth Amendment challenges as evidence that "the thirteenth amendment does not appear to prohibit privately operated prison facilities from requiring prisoners to work"). It should be noted that Howe does not advocate that his view of the clause's original meaning be applied today; he argues that if the methodology of original meaning affirms, as he claims it does, the constitutionality of convict leasing, then the methodology should be abandoned because it would produce such a heinous result. *See* Howe, *supra*, at 1029, 1034.

[214] Lichtenstein, *supra* note 192, at 43.

Thirteenth Amendment."[215] Numerous others concur.[216] These scholars accurately report the dominant reading of the Amendment during the post-Reconstruction period of convict leasing. However, they do not consider the early history of congressional debates and enforcement legislation, recounted above in Part I, or its bearing on the Amendment's meaning.

This Part investigates the present-day interpretive significance of convict leasing in light of the Amendment's early history, focusing on (A) original meaning, (B) precedent, and (C) constitutional tradition.

A. Convict Leasing and the Original Meanings of the Punishment Clause

As recounted above, the Thirteenth Amendment's framers held that the early, blacks-only forms of convict leasing violated the Amendment, notwithstanding the Punishment Clause. This Section considers the possibility that, as a matter of original meaning, the post-Reconstruction versions of convict leasing also violated the Amendment. If so, then there is a case to be made that—instead of confirming the Democrats' broad reading of the Clause—the history of convict leasing should stand as a negative precedent, a time when courts, legislators, and ordinary Americans failed to take action against widespread and systematic constitutional violations.

Over the past few decades, there has been an outpouring of historical scholarship on convict leasing. The works vary in focus and approach, but there is little disagreement on the points of most interest here. As the Democrats regained control of the Southern states, convict leasing systems came to be shaped not primarily for the purpose of punishing crime but for a range of economic purposes including profit for private masters, pay for individual public officials, revenues for government, and expendable labor for fast-paced industrial development.[217] Employers confronted a severe shortage of labor

[215] McLennan, *supra* note 42, at 9.

[216] *See, e.g.*, Blackmon, *supra* note 202, at 53 ("Forcing convicts to work as part of punishment for an ostensible crime was clearly legal too; the Thirteenth Amendment to the Constitution, adopted in 1865 to formally abolish slavery, specifically permitted involuntary servitude as a punishment for 'duly convicted' criminals."); Feeley & Rubin, *supra* note 193, at 152–53 ("Prisoners, after all, are the one group of people explicitly excluded from the Thirteenth Amendment's prohibition against slavery, and southerners took this obscure detail of constitutional prose very much to heart."); LeFlouria, *supra* note 202, at 8 ("[T]he language of the Thirteenth Amendment to the U.S. Constitution allowed for thousands of 'duly convicted' African American men, women, and youth to be subjected to slavery or involuntary servitude . . . .").

[217] In addition to the quotations immediately following in text, see Lichtenstein, *supra* note 192, at 19, for the suggestion that convict leasing continued the tradition of employing

in many regions of the South, and they did not hesitate to solve the problem with forced labor.[218] "In a region where dark skin and forced labor went hand in hand," observes David Oshinsky, "leasing would become a functional replacement for slavery, a human bridge between the Old South and the New."[219] Convict labor played a crucial role not only in plantation agriculture, but also in the most dynamic industrializing sectors of the Southern economy including railroad construction and coal mining.[220]

Lessees shaped their policies to maximize profit with no apparent concern for penological goals. Whether an offender had been consigned to servitude for murder or inability to pay court fees, they faced brutal beating, whipping, food deprivation, and sadistic torture for such disciplinary infractions as failing to keep up with the fastest worker, failing to meet quota, "slow hoeing," "sorry planting," and "being light with cotton."[221] Under slavery, the skill of the overseer had consisted, as described by one Mississippi Delta planter, in "knowing exactly how hard [the slaves] may be driven without incapacitating them for future exertion."[222] Convict leasing removed that constraint.[223] "Before the war we owned the negroes," famously com-

slaves in industrial enterprises, but after emancipation also helped to shift labor out of agriculture into industry. *See also infra* note 257 and accompanying text.

[218] AYERS, *supra* note 192, at 192.

[219] OSHINSKY, *supra* note 201, at 57; *see also* AYERS, *supra* note 192, at 192 ("Convict labor depended upon both the heritage of slavery and the allure of industrial capitalism."); BLACKMON, *supra* note 202, at 4 (observing that convict leasing was "distinctly different from that of the antebellum South," but "it was nonetheless slavery"); FEELEY & RUBIN, *supra* note 193, at 153 (observing that the "South's approach to the punishment of criminals represented another recreation of the slave plantation," that the "model for this system was not the antebellum penitentiary but slave labor," and that "[i]f there was any distinction between prewar slavery and postwar convict leasing, it was that the leasing system was harsher").

[220] *See* LEFLOURIA, *supra* note 202, at 66 ("Inspired by the New South doctrine and emboldened by the Thirteenth Amendment, which permitted slavery or involuntary servitude as punishment for crime, southern industrialists capitalized on the expanding pool of prison 'slaves' that could produce 'twice the work of free labor.'"); LICHTENSTEIN, *supra* note 192, at xv (describing how convict leasing "helped forge the peculiar New South 'Bourbon' political alliance, by accommodating the labor needs of an emerging class of industrialists without eroding the racial domination essential to planters"); SHAPIRO, *supra* note 50, at 16 (noting that Tennessee's state convicts mined coal, which was "[t]he [w]edge of [i]ndustrial [c]apitalism" and powered industrial development); Harold D. Woodman, *Sequel to Slavery: The New History Views the Postbellum South*, 43 J.S. HIST. 523, 549 (1977) (observing that the "desire for a dependent, easily controlled, docile, and cheap labor force burns as fiercely in the heart of a thoroughly bourgeois factory owner as it does in the heart of a plantation owner").

[221] OSHINSKY, *supra* note 201, at 45; *see also* CURTIN, *supra* note 202, at 69, 133–34, 206; LICHTENSTEIN, *supra* note 192, at 52–53; MANCINI, *supra* note 202, at 75–76, 115.

[222] BLACKMON, *supra* note 202, at 45.

[223] *See* LICHTENSTEIN, *supra* note 192, at 61 (quoting Georgia's top state prison official commenting on deaths among convict laborers engaged in railroad construction:

mented one employer in 1883, "[b]ut these convicts: we don't own 'em. One dies, get another."[224] Planters and industrialists implemented this policy diligently; offenders were driven without regard to their health, strength, or ability to work.[225] The death rate among state-level convict laborers often reached or exceeded ten percent per year, and no Mississippi convict laborer survived more than ten years.[226] By the same logic, lessees tolerated escape rates that no serious penological institution would countenance.[227] Lessees cut costs by skimping on food and clothing. As one Mississippi doctor reported, "sub-lessees [take] convicts for the purpose of making money out of them, . . . so naturally, the less food and clothing used and the more labor derived from their bodies, the more money in the pockets of the sub-lessee."[228] When an Alabama health official charged that the nearly 2000 prisoners at the Sloss-Sheffield corporation's prison mine suffered conditions so severe that "a large number are condemned to

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"casualties would have been fewer if the colored convicts were property, having a value to preserve"); OSHINSKY, *supra* note 201, at 59 (quoting a railroad official: "if he dies it is a small loss"); *id.* at 44 (noting that when convicts died or escaped, the state or a primary contractor would provide a replacement); *cf.* Cardon, *supra* note 195, at 424 (noting that Louisiana slave owners declined to risk their valuable human property on the highly dangerous task of constructing levees and hired immigrant workers instead).

224 FEELEY & RUBIN, *supra* note 193, at 152.

225 *See* LICHTENSTEIN, *supra* note 192, at 53 (quoting Georgia legislative committee: "in some instances prisoners have been required to do more labor than they could physically endure"); MCLENNAN, *supra* note 42, at 95 (quoting C.W. Loomis, warden of the Missouri state prison, opposing convict leasing on the ground that convict lessees "will tax the convict to his utmost capacity"); OSHINSKY, *supra* note 201, at 80 (quoting a member of the Alabama Prison Board, 1904: "The demand for labor and fees has become so great that most convicts who go to the mines are unfit for such work . . . . They drag out a miserable existence and die.").

226 BLACKMON, *supra* note 202, at 57 (death rates of 20–45% of leased convicts annually during the first 4 years of leasing in Alabama); OSHINSKY, *supra* note 201, at 46, 50 (9–16% annual death rate of Mississippi's convicts in the 1880s compared to 1% for prisoners incarcerated in Ohio and Illinois penitentiaries); *id.* at 60 (death rate of 45% over 3 years at South Carolina railroad); *id.* at 61 (average life of Texas convict 7 years); J. THORSTEN SELLIN, SLAVERY AND THE PENAL SYSTEM 150 (1976) (20% death rate in Louisiana in 1896); SHAPIRO, *supra* note 50, at 68 (10% annual death rate at Tennessee coal mines in the mid-1880s); Cardon, *supra* note 195, at 436 (death rate of 10.5% in Louisiana between 1882 and 1894). These numbers may underreport the actual death rates as some wardens sent weakened convicts home to die. AYERS, *supra* note 192, at 201. Statistics are not available for the far greater number of county-level convict laborers who toiled on plantations and farms, because in rural areas, processes were informal, records spotty, and the prospect of any legal challenge virtually non-existent. *See* BLACKMON, *supra* note 202, at 80 (noting the lack of county records).

227 *See* LICHTENSTEIN, *supra* note 192, at 53 (one out of six in Georgia between 1866 and 1878); OSHINSKY, *supra* note 201, at 50–51 (10% annual escape rate in Mississippi in the late 1880s); *id*. at 68 (up to 25% in Arkansas in 1890s).

228 OSHINSKY, *supra* note 201, at 44 (alteration in original).

die," company President Thomas Seddon shot back: "The negro dies faster."[229]

In short, convict leasing functioned more as a system of unfree labor than as a means of preventing or punishing crime—precisely what Republicans in the Thirty-Ninth Congress had feared. Numerous specific features of the system fell outside the scope of the Punishment Clause as they had interpreted it. Indeed, the abuses associated with convict leasing underscore the perspicacity of Republicans like Kasson, who worried that unless the Clause were read strictly, it would serve as a pretext for undermining the prohibitory clause's promise of a free labor system.

1. Servitude in the Employ of Private Businesses

As related above, the Republicans strongly objected to the leasing out of offenders to private masters.[230] Post-Reconstruction convict leasing systems not only consigned inmates to private masters, but also left them free to extract labor without restraint. "[O]nly in the South," recounts Alex Lichtenstein, "did the state entirely give up its control of the convict population to the contractor; and only in the South did the physical 'penitentiary' become virtually synonymous with the various private enterprises in which convicts labored."[231] Lease contracts purported to limit hours and require healthful conditions, but the lessees flaunted them.[232] State officials ignored violations and painted a rosy picture of leasing.[233] On those rare occasions that officials did attempt enforcement, lessees reacted vigorously and effectively. In 1897, for example, Georgia ousted the lessees' supervisors and replaced them with state officers only to see the lessees regain control by putting the officers on salary.[234]

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229 Blackmon, *supra* note 202, at 109–10.

230 *See* Cong. Globe, 39th Cong., 2d Sess. 348 (1867) (statement of Sen. Kasson) (describing the purpose of a bill to clarify the construction of the Thirteenth Amendment); *id.* at 239 (statement of Sen. Sherman); *id*. (statement of Sen. Creswell); *see supra* text accompanying notes 57–61, 106, 187, *infra* notes 447–48.

231 Lichtenstein, *supra* note 192, at 3.

232 *Id.* at 139; *see also* Curtin, *supra* note 202, at 108 (noting unsuccessful efforts to bring Alabama lessees under state control); Cardon, *supra* note 195, at 426 (relating that in Louisiana, a state board theoretically oversaw conditions, but the board's members received their salaries not from the state but from the lessee employer).

233 Blackmon, *supra* note 202, at 70, 107.

234 Lichtenstein, *supra* note 192, at 145. Wardens and guards sometimes received larger salaries from the lessees than from the state. *Id*.

2. *Punishment Too Harsh for the Particular "Crime Whereof the Party Shall Have Been Duly Convicted"*

Republican members of Congress also held that the Amendment prohibited the infliction of servitude as punishment for offenses so minor as to make it improbable that servitude had actually been imposed to punish the particular "crime whereof the party shall have been duly convicted."[235] Writing in 1911, U.S. Attorney William H. Armbrecht reported that convict leasing had become an "'engine of oppression' against blacks . . . and the trivial nature of many of the underlying crimes 'gives rise to the thought that the prosecution is [n]ot instigated with any idea of up-holding the majesty of the law, but with the idea of putting these negroes to work.'"[236] The work of historians confirms the accuracy of Armbrecht's observations. Thousands of people were convicted of minor crimes and condemned to lengthy terms toiling in the mines.[237] County-level leasing systems were fueled by convictions for such crimes as using obscene language, stealing items worth only a few dollars, selling whisky, gambling, and bastardy.[238] When Arkansas Governor George Donaghey decided to launch a crusade against convict leasing, he had no trouble finding abuses to illustrate his case: African Americans sentenced to thirty-six years and eighteen years for forgery, to three years "for stealing a few

[235] *See* CONG. GLOBE, 39th Cong., 1st Sess. 383 (1866) (statement of Rep. Farnsworth) (inveighing against the Southern states "declaring for every little petty offense the black man may commit that he shall be sold into bondage"); *id.* at 332 (statement of Rep. Deming) (rejecting Southerners' construction of the Amendment to permit "selling black men into slavery for petty larceny"); *id.* at 1123 (statement of Rep. Cook) (attacking "laws which provide for selling these men into slavery in punishment of crimes of the slightest magnitude"); Green, *supra* note 58, at 94 n.82.

[236] Schmidt, *supra* note 212, at 693 (alteration in original) (quoting Letters from W. Armbrecht to G. Wickersham (Oct. 27, 1911 & June 10, 1911), Justice Department File No. 155322).

[237] *See* BLACKMON, *supra* note 202, at 108–09 (relating that, according to an Alabama official, the "largest portion" of the 1926 convicts leased to a coal mining company near Birmingham had been "sentenced for slight offenses and sent to prison for want of money to pay the fines and costs"); *id.* at 99 (listing the recorded offenses of state convicts working at the Pratt Mines around 1890, for example bigamy, homosexuality, miscegenation, illegal voting, and false pretense); Julia S. Tutwiler, *Alabama*, *in* PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION 25, 26 (Isabel C. Barrows ed., 1903) ("Hundreds of men are serving long terms in the mines for carrying pocket pistols, stealing a ride on the train, fighting, or some other trivial offense."); ROBERT DAVID WARD & WILLIAM WARREN ROGERS, CONVICTS, COAL, AND THE BANNER MINE TRAGEDY 54 (1987) (listing the types of crimes of those killed, including "crap shooting, . . . concealed weapons," "public drunkenness or profanity, riding trains illegally, vagrancy, and violating Sunday 'blue' laws").

[238] BLACKMON, *supra* note 202, at 99.

articles of clothing off a clothes-line," and to "180 days for disturbing the peace."[239]

3. Servitude Inflicted Without Any Sentence to Hard Labor

The Amendment could be read strictly to bar the imposition of servitude "except," as the Kasson Resolution put it, "in direct execution of a sentence imposing a definite penalty according to law."[240] A penalty would not seem to be "definite" unless it were spelled out in the formal sentence. Kasson gave this as an example of a proper penalty: "the sentence of a man to hard labor in the State prison in the regular and ordinary course of law," which he described as "the only kind of involuntary servitude known to the Constitution and the law."[241] Nor would the execution appear to be "direct" unless it were carried out promptly on all prisoners sentenced to servitude. Without such a limitation, states could use the sentence of hard labor to create a pool of prisoners available for sale or use at the discretion of prison officials and for a wide range of purposes unrelated to punishment.

The practice of convict leasing bore out these concerns. Numerous convict laborers were leased out not because they had been sentenced to hard labor, but to pay off fines or court fees.[242] At the county level, many, if not most, "convicts" were leased without any record of their offenses, sentences, or debts.[243]

4. As a Punishment for "Crimes" Shaped Not for Public Protection, but for Labor Extraction and Racial Control

States could also exploit the Clause by shaping criminal law to ensnare black laborers. During the debates over the 1866 Civil Rights Act, Republican members of Congress had complained, for example,

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[239] OSHINSKY, *supra* note 201, at 69; *cf.* Jamison v. Wimbish, 130 F. 351, 352, 355 (S.D. Ga. 1904) (Speer, J.) (overturning, on Fourteenth Amendment due process grounds, the sentence of a "respectable colored man" to the chain gang for a minor municipal offense, and observing approvingly that the municipal authorities would thereby be deprived "of the profits which arise from involuntary and unpaid servitude, imposed, not for crime, but for peccadillos"), *rev'd*, 199 U.S. 599 (1905).

[240] CONG. GLOBE, 39th Cong., 2d Sess. 324 (1867).

[241] *Id.* at 345–46.

[242] BLACKMON, *supra* note 202, at 108–09; LICHTENSTEIN, *supra* note 192, at 85; OSHINSKY, *supra* note 201, at 21.

[243] BLACKMON, *supra* note 202, at 80; *see also id.* at 109 (noting that a survey of about two thousand prison miners at one Alabama mine revealed "at least five hundred workers not accounted for in the state's official records at the time—indicating that hundreds of laborers had been sold into the mine through extralegal systems"); DANIEL A. NOVAK, THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY 62 (1978) (recounting that the surety system operated informally in states that lacked surety statutes); RUSSELL, *supra* note 202, at 17 (reporting the use of informal surety arrangements to place laborers charged with minor offenses into mines).

that the "crime" of vagrancy functioned more as a mechanism of labor control than of public protection, forcing black laborers to choose between compulsory labor and employment at a sub-living wage.[244] After Reconstruction, it became evident that vagrancy was only one of many crimes that could be used for this purpose. Writing in 1908, Assistant U.S. Attorney General Charles Wells Russell pointed out that if a state can punish a person for "whatever it chooses to call a crime," then "it can nullify the amendment and establish all the involuntary servitude it may see fit."[245] Southern state governments were well aware of that opportunity and shaped the criminal law to render poor, mostly black laborers vulnerable to exploitation. The Thirteenth Amendment had transformed black slaves into free trespassers on the real property of their former owners. Homeless and without means of production, they were forced to choose between accepting whatever terms were offered by white employers or committing one or more of the many crimes that were shaped and selectively enforced to target their behaviors.[246] Some laws, such as vagrancy laws, licensing requirements, and false pretense laws, directly restricted black laborers' market activity.[247] Others, such as pig laws, prohibitions on selling cotton after sundown, strict petty larceny laws, and the outlawing of grazing animals, targeted the predictable survival strategies of destitute laborers who had previously enjoyed customary privileges to appropriate small quantities of plantation produce.[248] Still other

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244 *See supra* text accompanying notes 61–69.

245 RUSSELL, *supra* note 202, at 31.

246 *See* RANDALL G. SHELDEN, CONTROLLING THE DANGEROUS CLASSES: A CRITICAL INTRODUCTION TO THE HISTORY OF CRIMINAL JUSTICE 170 (2001) (describing laws passed that were designed to subjugate African Americans).

247 *See, e.g.*, BLACKMON, *supra* note 202, at 7, 99 (discussing vagrancy and false pretense laws); FONER, *supra* note 199, at 593–95 ("Broad new vagrancy laws allowed the arrest of virtually any person without a job . . . ."); RUSSELL, *supra* note 202, at 28, 30–31 (reporting on the various forms of peonage laws); Schmidt, *supra* note 212, at 674–75 (describing the prevalence of vagrancy laws in the Southern states between 1893 and 1909). False pretense laws were theoretically invalidated in *Bailey v. Alabama*, 219 U.S. 219, 245 (1911), but they persisted at least into the 1940s. *See* Pollock v. Williams, 322 U.S. 4, 12–13 (1944) (discussing the continued existence of peonage laws even though they were struck down numerous times in the early 1900s).

248 FONER, *supra* note 199, at 593–94; *see also* GERALD DAVID JAYNES, BRANCHES WITHOUT ROOTS: GENESIS OF THE BLACK WORKING CLASS IN THE AMERICAN SOUTH, 1862–1882, at 141–57 (1986) (reporting that many black laborers used larceny to implement their customary claims); LICHTENSTEIN, *supra* note 192, at 28 (recounting that black agricultural laborers "persisted in 'stealing what had previously been theirs by customary right'" (quoting ROAD REPORTS (Jan. 3, 1908), *in* WILLIAM L. SPOON PAPERS, 1858–1957, folder 625 (on file with Southern Historical Collection, University of North Carolina))); MANCINI, *supra* note 202, at 120, 136 (commenting that Mississippi's pig law, which reclassified stealing a pig as grand larceny, "can be interpreted . . . as part of a larger strategy to make forced labor more easily available to the state's leading planters");

laws criminalized violations of racial and gender norms (for example, black men talking loudly in the presence of a white woman,[249] or black women engaging in masculine behaviors like "public quarreling, using profane language, and public drunkenness"[250]) and penalized ordinary behavior (e.g., using obscene language, carrying a weapon, selling cotton after sunset[251]) so as to ensure a reliable supply of convict labor.[252] Criminal law also served as an effective weapon against African Americans who clung to the freedoms they had enjoyed during Reconstruction.[253] In 1875, for example, Georgia's top prison official reported that most of his charges were preachers, teachers, politicians, and "negro boys," dupes of "carpetbaggers and scalawags" who "have been so stirred up, and confused on the subjects of politics and religion, that they have forgotten common respect for themselves."[254] "The tendency of the legislative enactments of this State since the Reconstruction period," summarized U.S. Attorney Erastus J. Parsons in 1908, referring to Alabama, "has been uniformly, to weave about the ignorant laborer, and especially the blacks, a system of laws intended to keep him absolutely dependent upon the will of the employer and the land owner."[255]

5. *Convicted for the Purpose of Generating Public Revenue and Private Profit*

Not only did legislators create crimes to ensnare black labor, but also law enforcement officers tailored their enforcement efforts to generate revenue and profit. Sheriffs, who depended on fines and fees

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Oshinsky, *supra* note 201, at 40–41 ("[T]he Pig Law did nothing to stop crime but quite a lot to spur convict leasing."); Shapiro, *supra* note 50, at 58 ("Tennessee's postbellum system of criminal justice turned poor citizens who stole small, inexpensive items into convict laborers. With the erosion of customary rights came the criminalization of the poor and, in Tennessee especially, the urban poor.").

249 Blackmon, *supra* note 202, at 7.

250 Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 Calif. L. Rev. 1239, 1262 (2012).

251 Blackmon, *supra* note 202, at 99.

252 *See also* Mancini, *supra* note 202, at 136 (describing convicts as a "source of revenue to the state"); Oshinsky, *supra* note 201, at 40–41 (listing cases of black individuals being imprisoned for stealing an "old suit of clothes," for stealing a horse, and for being an "idiot").

253 Eric Foner, Nothing but Freedom: Emancipation and Its Legacy 59–61 (1983); Foner, *supra* note 199, at 593–95; Michael Perman, The Road to Redemption: Southern Politics, 1869–1879, at 243–45 (1984); *see also* Shapiro, *supra* note 50, at 6–7 ("In tandem with the criminal justice system that generated its laborers, the lease helped to forge a new postemancipation structure of racial subordination."); *infra* note 307.

254 Lichtenstein, *supra* note 192, at 59–60.

255 Pete Daniel, The Shadow of Slavery: Peonage in the South 1901–1969, at 66 (1972).

for their livelihood, had a strong incentive to maximize arrests and convictions.[256] Arrest rates responded more to fluctuations in the demand for labor than in the crime rate.[257] Blackmon found numerous telegrams and letters sent by labor agents, company executives, and sheriffs seeking black labor or offering to arrest blacks for a reward.[258] In one case unearthed by Oshinsky, a turpentine operator sat down with the local sheriff and drew up a "list of some eighty negroes known to both as good husky fellows, capable of a fair day's work," all of whom were arrested within a few weeks and convicted by a justice of the peace, a co-conspirator.[259]

6. *Undermining the Free Labor System*

As we have seen, the Amendment's framers abhorred slavery not only for its immoral oppression of the enslaved people themselves, but also for its effects on laborers as a class.[260] While a criminal conviction might alter the moral calculus of inflicting servitude, convict labor did not differ from African slavery in its effects on free labor. Indeed, if anything, convict laborers offered tougher competition, as they could literally be driven to death without depriving employers of any valuable property interest.[261] From the outset, proponents of convict labor trumpeted its competitive advantages to employers. The utilitarian philosopher Jeremy Bentham, for example, extolled the virtues of his

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256 BLACKMON, *supra* note 202, at 62; CURTIN, *supra* note 202, at 46; *see also* CHILDS, *supra* note 96, at 86 ("[F]ar from being disinterested referees of the surety arrangement, local municipalities, courts, police, lawyers, and clerks were actually awash in the money and power generated at every stage of this particular vector of the overall trade in criminalized southern black bodies."); Tutwiler, *supra* note 237, at 26–27 ("There is no doubt that arrests are often made solely for the purpose of increasing the fees of minor officials."); *see also* OSHINSKY, *supra* note 201, at 21 ("If the vagrant did not have fifty dollars to pay his fine—a safe bet—he could be hired out to any white man willing to pay it for him.").

257 BLACKMON, *supra* note 202, at 65–66; *see also* RAY STANNARD BAKER, FOLLOWING THE COLOR LINE: AMERICAN NEGRO CITIZENSHIP IN THE PROGRESSIVE ERA 50 (1964) (attributing the "large number of arrests [ ] in Georgia" to "the fact that the state and the counties make a profit," and that "[t]he demand for convicts by rich sawmill operators, owners of brick-yards, large farmers, and others is far in advance of the supply"); OSHINSKY, *supra* note 201, at 77 ("[The convict population] ebbed and flowed according to the labor needs of the coal companies and the revenue needs of the counties and the state. When times were tight, local police would sweep the streets for vagrants, drunks and thieves."); Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 128–29 (2001) (noting that "the enforcement of the criminal law assumed a seasonal character" tailored to the labor needs of employers).

258 BLACKMON, *supra* note 202, at 100; *see also id.* at 64, 129, 137–38 (presenting additional evidence).

259 OSHINSKY, *supra* note 201, at 71.

260 *See supra* text accompanying notes 25–31.

261 *See supra* text accompanying notes 222–26.

proposed prison factory: "What hold can any other manufacturer have upon his workmen, equal to what my manufacturer would have upon his? What other master is there that can reduce his workmen, if idle, to a situation next to starving, without suffering them to go elsewhere?"[262] Southern industrialists fully grasped this point and extolled its effects on free labor. Henry F. DeBardeleben, founder of the Pratt Coal and Coke Company, concisely summarized this view when he informed the Alabama General Assembly that "convict labor competing with free labor is advantageous to the mine owner" because "[i]f all were free miners they could combine and strike and thereby put up the price of coal, but where convict labor exists the mine owner can sell coal cheaper."[263] In his 1886 report, the U.S. Commissioner of Labor estimated that convict competition dragged down the wages of Alabama's free miners by ten to twenty percent and reported that the "brick-making industry around Atlanta, formerly employing about 600 hands, has been broken up almost entirely by convict-labor competition."[264]

In short, convict leasing exemplified the oppressions that the Republican members of the Thirty-Ninth Congress had attempted to prevent. Had judges and legislators applied their reading of the Amendment, the practice would have been outlawed. The question then arises: Did the failure of judges and legislators to enforce the Republican reading reflect negatively on its merits?

B. Punishment Clause Jurisprudence During the Era of Convict Leasing

No Thirteenth Amendment challenge to convict leasing appears in the case reporters. The Supreme Court did, however, decide two

262 Jeremy Bentham, The Panopticon Writings 71 (Miran Bozovic ed., 1995).

263 Lichtenstein, *supra* note 192, at 96; *see also id.* at 97 (quoting industrialist James Bowron: "So long as coal is mined here by convicts the mine workers will never close this district"); *id.* at 104 (quoting U.S. Steel Executive George Crawford: "The chief inducement for the hiring of convicts was the certainty of a supply of coal for our manufacturing operations in the contingency of labor troubles"); Shapiro, *supra* note 50, at 52 (quoting Arthur St. Clair Colyar, a coal operator and former slaveowner: "For some years after we began the convict labor system . . . we found that we were right in calculating that the free laborers would be loath to enter upon strikes when they saw that the company was amply provided with convict labor"); *id.* at 147–48 (paraphrasing E.J. Sanford, a director of the Coal Creek Mining & Manufacturing Company, who advocated convict labor by "reiterat[ing] the conventional business wisdom that the presence of convict laborers curbed the demands of free miners"); Second Annual Report, *supra* note 202, at 301 ("Mine owners say they could not work at a profit without the lowering effect in wages of convict-labor competition."). "Throughout the South," concludes historian David Oshinsky, "free miners viewed convict labor 'as a Sword of Damocles dangling above their heads.'" Oshinsky, *supra* note 201, at 81.

264 Second Annual Report, *supra* note 202, at 300.

cases in which Southern states invoked the Punishment Clause to defend statutes that compelled labor: *Bailey v. Alabama*[265] and *United States v. Reynolds*.[266] Although these cases did not directly address convict leasing, they warrant careful attention both because they contain the Court's most relevant holdings on the scope of the Punishment Clause and because they apply broad principles that bear on convict leasing and present-day practices associated with mass incarceration.

The statutes at issue in *Bailey* and *Reynolds* had both been crafted to circumvent another Supreme Court decision, *Clyatt v. United States*.[267] *Clyatt* involved a Florida criminal statute that prohibited ceasing work in breach of a contract to repay a debt with labor.[268] Under the statute, employers could evade the Amendment by offering impoverished laborers an advance up front if they signed a multi-month contract promising to repay the advance with service. The laborer would then be confronted with the choice of working under whatever conditions the employer imposed or facing criminal punishment. The *Clyatt* Court struck down Florida's version of the statute under the Anti-Peonage Act, which prohibited "voluntary" as well as "involuntary" peonage.[269] The Court held that this application of the Act fell within Congress's power to enforce the Thirteenth Amendment because the laborer's consent to the contract could not render their legally-enforced servitude voluntary: "peonage, however created, is compulsory service, involuntary servitude."[270]

Bailey involved an Alabama statute designed to sidestep *Clyatt* by reframing the violation as fraud. Theoretically, laborers could be convicted only if they had entered into the contract with intent to defraud. However, the breach itself constituted prima facie evidence of intent to defraud, and laborers were barred from testifying as to their unstated intent at the time of contract formation.[271] Alabama argued that the "offense is but a species of the common-law crime of cheating by false pretenses, and if in fact the statute does define and punish a crime, there can be no question here of its validity."[272] The statute, claimed the state, "was meant to prevent employés from making fraudulent contracts and to prevent them from obtaining

265 219 U.S. 219 (1911).
266 235 U.S. 133 (1914).
267 197 U.S. 207 (1905).
268 *Id*. at 209.
269 *Id*. at 215; Anti-Peonage Act of 1867, ch. 187 § 1, 14 Stat. 546 (repealed 2000).
270 *Clyatt*, 197 U.S. at 215.
271 Bailey v. Alabama, 219 U.S. 219, 227–28 (1911).
272 *Id.* at 224.

money by promising service."[273] Bailey urged a far more critical approach: "In construing the Alabama statute the court will bear in mind that the legislature would naturally seek to accomplish by indirection what it could not do directly."[274] The Court struck down the statute as a violation of both the Anti-Peonage Act and the Amendment itself. After observing that the exception for punishment "does not destroy the prohibition," the Court continued:

> What the State may not do directly it may not do indirectly. . . . Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid; an instrument of compulsion peculiarly effective as against the poor and the ignorant, its most likely victims. There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based.[275]

The second case, *Reynolds*, concerned Alabama's criminal surety statute. Unlike the laws involved in *Clyatt* and *Bailey*, criminal surety statutes did not directly coerce labor from free workers. Instead, they targeted offenders who had already been convicted of crimes other than withholding labor. The case of Ed Rivers, the black worker involved in *Reynolds*, was typical. Rivers was fined $15.00 for petit larceny and charged $43.75 in fees. Alabama law imposed ten days confinement or hard labor in lieu of fines under $20, and one day of hard labor for each $0.75 of unpaid fees.[276] Judge I.G. Slaughter sentenced Rivers to ten days hard labor for the fine and another forty-eight for the fees.[277] Like virtually every other agricultural laborer, Rivers had no money. The criminal surety statute presented him with a choice: join the chain gang or obtain a surety, a person who would pay the fine and fees in exchange for a promise to work for a specified time. Not surprisingly, given the horrific consequences of assignment to the chain gang, Rivers contracted with a white farmer to work for about ten months at a rate of six dollars a day.[278] He quit after a month and was convicted of violating the surety contract, a crime under the statute. This time, Judge Slaughter fined him one cent for

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[273] *Id.*

[274] *Id.* at 222.

[275] *Id.* at 244–45 (citation omitted).

[276] United States v. Reynolds, 235 U.S. 133, 141 (1914).

[277] Schmidt, *supra* note 212, at 692.

[278] *Id.*; *see also* Jamison v. Wimbish, 130 F. 351, 355–56 (S.D. Ga. 1904) (Speer, J.) (describing in detail the degradation and tortures of a county chain gang), *rev'd*, 199 U.S. 599 (1905).

the breach and assessed costs of $87.05.[279] Rivers entered into a new surety contract with a different farmer, this one for fourteen months and fifteen days.[280]

The District Court upheld the statute, quoting an Alabama Supreme Court decision to the effect that it merely provided the offender with the "humane"[281] option of avoiding the standard punishment of imprisonment at hard labor.[282] The statute, reasoned that court, "offers to convicted offenders the opportunity of selecting their own task master, the kind of service they will render, and of having a voice in the measure of compensation."[283] Alabama stressed this claim in its Supreme Court brief, pointing out that even though the laborer might "serve for two or three times as long" as he would under the standard punishment, he would not be forced to toil "in stripes under the watchful eye of an armed guard, often shackled."[284] Indeed, enthused the state, he would be "practically a free man and 'the law delights in the liberty and the happiness of the citizen.'"[285]

As in *Bailey*, the Supreme Court held that the statute violated both the Anti-Peonage Act and the Thirteenth Amendment. Where Alabama saw a "humane" alternative to the chain gang, the Supreme Court perceived an engine of oppression:

> Under this statute, the surety may cause the arrest of the convict for violation of his labor contract. He may be sentenced and punished for this new offense, and undertake to liquidate the penalty by a new contract of a similar nature, and, if again broken, may be again prosecuted, and the convict is thus kept chained to an everturning wheel of servitude to discharge the obligation which he has incurred to his surety, who has entered into an undertaking with the State or paid money in his behalf.[286]

Although *Reynolds* dealt only with criminal surety laws, it contains broad language bearing on convict labor. After noting that the state's authority "to impose involuntary servitude as a punishment for crime . . . is recognized in the Thirteenth Amendment, and such pun-

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279 Schmidt, *supra* note 212, at 692.

280 *Reynolds*, 235 U.S. at 140.

281 *Id.* at 138.

282 *See* United States v. Broughton, 213 F. 345, 349 (S.D. Ala. 1914) (quoting Lee v. State, 75 Ala. 29, 31 (1883)), *rev'd sub nom*. United States v. Reynolds, 235 U.S. 133 (1914); United States v. Reynolds, 213 F. 352, 353 (S.D. Ala.), *rev'd*, 235 U.S. 133 (1914). Note that these two District Court cases were consolidated in the Supreme Court. *Reynolds*, 235 U.S. at 138–39.

283 *Broughton*, 213 F. at 349 (quoting *Lee*, 75 Ala. at 31).

284 Brief for the Defendants in Error at 14, United States v. Reynolds, 235 U.S. 133 (1914).

285 *Id.*

286 *Reynolds*, 235 U.S. at 146–47.

ishment expressly excepted from its terms," the Court asserted that "[o]f course, the State may impose fines and penalties which must be worked out for the benefit of the State, and in such manner as the State may legitimately prescribe."[287] Some scholars have read this passage to say that the Thirteenth Amendment authorizes the leasing of prisoners to private parties.[288] This view is consistent with the Court's explanation as to why the surety system fell outside the Punishment Clause. Rivers had been convicted "not because of his failure to pay his fine and costs originally assessed against him by the State,"[289] but because he violated his private contract with the surety, which "is made between the parties concerned, who determine and fix its terms, and is not fixed by the State as the punishment for the commission of an offense."[290] No such claim could be made for convict leasing, where the state directly commanded the offender to work, chose the employer, and itself contracted with the chosen employer. Had the Court been confronted with a challenge to convict leasing, it could have relied upon this formal reasoning to distinguish *Reynolds*.

It is also true, however, that in both *Bailey* and *Reynolds*, the Court had rejected formal distinctions of at least equivalent plausibility, choosing instead to probe the actual operation of the statutes involved. In *Bailey*, the Court could have distinguished *Clyatt* on the ground that Bailey's crime included a fraud element and thus could formally be characterized as "cheating by false pretenses," not quitting work.[291] But the Court looked past such technicalities to examine the "natural operation of the statute" as a "convenient instrument" for coercing labor.[292] Although the Court hastened to deny that it was "imputing any actual motive to oppress," that denial only broadened the scope of the holding;[293] not only did the Court reject the state's formal distinction, but it did so without requiring proof of invidious motive. Likewise, the *Reynolds* Court could have distinguished *Bailey* on the ground that Rivers, unlike Bailey, had been convicted of petit larceny, a crime that did not involve quitting work at all. Nothing stopped the Court from agreeing with Alabama that everything from that point on flowed from the larceny conviction; the surety contract came about only as an optional—and arguably less harsh—alternative

[287] *Id.* at 149.

[288] *See* McLennan, *supra* note 42, at 8–9 (citing *Reynolds* for the proposition that the Thirteenth Amendment authorizes involuntary servitude); Robbins, *supra* note 213, at 605–06.

[289] *Reynolds*, 235 U.S. at 147.

[290] *Id.* at 149.

[291] *See* Bailey v. Alabama, 219 U.S. 219, 224 (1911).

[292] *Id.* at 244.

[293] *Id.*

to the standard punishment. Instead, however, the Court looked to the actual operation of the statute as "an everturning wheel of servitude."[294]

If applied to convict leasing, the broad principles and purposive approach of *Bailey* and *Reynolds* would appear to support a strong Thirteenth Amendment challenge. It seems clear, for example, that the "natural operation" of the convict leasing system, no less than the false pretenses law invalidated in *Bailey*, supplied "a convenient instrument" for circumventing the Amendment.[295] Moreover, judging from both *Bailey* and *Reynolds*, there would be no need to support that conclusion with empirical proof along the lines of a Brandeis brief. Those decisions are remarkable not only for the Justices' willingness to look past form to function, but also to draw conclusions about function from no proof other than the record of abuse suffered by the individual laborers involved. Evidently, as legal historian Benno Schmidt points out, the Justices shaped their rulings in response to the well-known persistence of forced labor in "a legal and historical context of racial exploitation that rendered inappropriate the usual presumption of constitutionality of legislative action."[296] Had there been a subsequent challenge to convict leasing, the typical victim—convicted of a petty crime, leased out because of his inability to pay fines and fees, brutally disciplined not in proportion to his crime but to his pace of work, and subjected to horrific conditions[297]—would have provided a similarly compelling narrative. No wonder the state of Alabama conjured a slippery slope in *Reynolds*, contending that if the Thirteenth Amendment empowered Congress to outlaw the surety statute, then "why cannot Congress go further and forbid the lease of its convicts by a state to manufacturers? Or the lease by a county to the hirer of a single convict?"[298] The Court responded with its dictum drawing the line at the private surety contract, but there is no apparent reason why that limiting distinction would have held up any better than did the ones rejected in *Bailey* and *Reynolds*.

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[294] *Reynolds*, 235 U.S. at 147; *see also* KLARMAN, *supra* note 213, at 75 ("[I]nvalidating criminal surety seems to have required the justices to take account of the social realities of surety arrangements—a departure from their usual formalistic approach to race cases.").

[295] *Bailey*, 219 U.S. at 244–45.

[296] Schmidt, *supra* note 212, at 715 ("Can one imagine a Hughes opinion of such uncompromising activism—and in his fledgling judicial effort in a serious case to boot—had his attitude toward the judicial function in the *Bailey* case not been shaped by the stubborn persistence of forced labor practices for black people in Alabama . . . ?").

[297] *See supra* Section II.A.

[298] Brief for the Defendants in Error, *supra* note 284, at 14.

There remains the question why—if such a strong Thirteenth Amendment challenge was available—did nobody bring it? Indeed, it could be argued that the silence on convict leasing affirmed its constitutionality more eloquently even than an on-point holding; surely the victims and their allies would have brought the Thirteenth Amendment challenge if it had even a scintilla of merit.[299] So "unquestioned" was the constitutionality of leasing that Solicitor General John W. Davis felt compelled to reassure the *Reynolds* Court that it could invalidate surety contracts without casting doubt on the issue.[300]

More likely, however, the convict lease was "unquestioned" because the beneficiaries of convict leasing wielded sufficient power to discourage challenges. "Once established," recounts historian Edward L. Ayers, "the South's network of convict labor became a force of its own in the region, shaping local justice, labor relations, and politics."[301] Far from a fading echo of the antebellum past, forced labor lay at the center of the post-war Southern economy.[302] Forward-looking capitalists, including Northern corporations, depended upon convict labor.[303] In Atlanta, the showcase of the New South, the "personal fortunes that built the downtown banks and office buildings and monuments like the Cyclorama at the turn of the century were gained by men who leased convicts, men who were the city's business and

299 *See* Robbins, *supra* note 213, at 605–08 (pointing to the void of Thirteenth Amendment challenges as evidence that "the thirteenth amendment does not appear to prohibit privately operated prison facilities from requiring prisoners to work," but also noting that "this does not mean that the thirteenth amendment could not now be employed" for that purpose).

300 Schmidt, *supra* note 212, at 698.

301 Ayers, *supra* note 192, at 185; *see also* White, *supra* note 257, at 128–29 (noting the power of convict lessees not only to influence the substance of criminal laws and their administration but also to defy laws when necessary).

302 *See supra* notes 217–18 and accompanying text. At first glance, the statistics might seem to undercut this conclusion. In 1886, at the peak of convict leasing, Southern states leased out only 9699 offenders, Lichtenstein, *supra* note 192, at 20, a modest number in an economy with millions of laborers. But state-level convict leasing was merely the visible and formally legal surface of an unfathomable cesspool of servitude generated by criminal laws and enforcement. As Blackmon states, "[A]n exponentially larger number of African Americans [were] compelled into servitude through the most informal—and tainted—local courts." Blackmon, *supra* note 202, at 6; *see also* Daniel, *supra* note 255, at 23 ("A. J. Hoyt, who had spent years investigating whitecapping and peonage, estimated in 1907 that in Georgia, Alabama, and Mississippi 'investigations will prove that 33 1/3 per cent of the planters . . . are holding their negro employees to a condition of peonage . . . .'"); Klarman, *supra* note 213, at 88 (noting that, although the statistics will never be known, experts agree that forced labor was widespread). Extrapolating from Hoyt's estimate, Childs suggests that a "conservative estimate" of peonage throughout the South "would easily approach one million 'privately' imprisoned bodies." Childs, *supra* note 96, at 209 n.58.

303 *See supra* note 220 and accompanying text.

civic elite."[304] And in the rural areas, sheriffs, justices of the peace, store owners, and prominent local planters and business men—hardly "marginal or disreputable figures"—organized and profited from the convict leasing system.[305] With African Americans disenfranchised and excluded not only from juries, but also from positions in law enforcement, the legal profession, and the bench, this network could freely deploy not only legal, but also extralegal and illegal forms of power to block would-be challengers from gathering the facts and establishing the contacts necessary to bring a case.[306] Local sheriffs and judges targeted assertive blacks for arrest and servitude.[307] When pushed, the beneficiaries of convict labor deployed violence against whites whom they adjudged race and class traitors.[308] In Mississippi, newspaper editors were murdered for daring to expose abuses.[309] Even federal agents feared for their personal safety.[310]

As revealed in histories of the peonage cases, such tactics could block even meritorious constitutional claims. Today, it is generally accepted that debt peonage violates both the Thirteenth Amendment and the Anti-Peonage Act of 1867, enacted under its authority.[311] Yet, nobody challenged peonage in federal court until after 1900, and the Supreme Court did not rule on the issue until *Clyatt* in 1905, four

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304 LICHTENSTEIN, *supra* note 192, at xix; *see also* OSHINSKY, *supra* note 201, at 62 (recounting that despite shocking revelations of brutality, the Texas convict leasing system survived because "the major lessees in Texas were bank presidents and railroad builders, cattle barons and cotton planters, merchants and politicians").

305 BLACKMON, *supra* note 202, at 80; *see also* SHAPIRO, *supra* note 50, at 7 (recounting that the system served to generate patronage networks composed of the "numerous people who fed, clothed, and guarded the state's convicts").

306 *See, e.g.*, DANIEL, *supra* note 255, at 65 ("The seclusion of the plantations, collusion between local law officers and planters, and the violence that visited those who threatened the peonage system shielded the institution from view.").

307 LICHTENSTEIN, *supra* note 192, at 59–60; *see also id*. at 60, 81 (reporting that the problem was identified as the "new negro," shaped by Reconstruction); BLACKMON, *supra* note 202, at 6 ("The laws passed to intimidate black men away from political participation were enforced by sending dissidents into slave mines or forced labor camps."); KLARMAN, *supra* note 213, at 95 ("In most of the rural Deep South, merely establishing an NAACP branch would have jeopardized lives."); Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703, 704 (2010) ("Thanks to several pathbreaking studies it became clear that southern whites [in the post-Civil War South] responded to African American claims on freedom by redefining crime and imprisoning unprecedented numbers of black men.").

308 White, *supra* note 257, at 130.

309 OSHINSKY, *supra* note 201, at 50.

310 BLACKMON, *supra* note 202, at 262 (recounting that "[j]ust as the federal Freedmen's Bureau agents sent into remote southern towns had learned immediately after the Civil War, the new representatives of northern justice brought more risk upon themselves than to any person still holding slaves," and that "[i]ndeed it was open season on Secret Service investigators").

311 Pollock v. Williams, 322 U.S. 4 (1944); Bailey v. Alabama, 219 U.S. 219 (1911).

decades after the Amendment's ratification.[312] Evidently, a void of challenges does not necessarily reflect constitutional truth. As Schmidt explains, victims of peonage "had neither knowledge nor money with which to assert their rights," a serious obstacle under normal circumstances and a fatal one given the weight of Southern custom, the power of the employer opposition, and the "confusing welter of pseudolegalities which supported peonage practices."[313] Even if a case got to court, the prospects were bleak given that the juries were all white, and the attorneys and judges were members of the white elite. When the federal government finally dared to launch peonage prosecutions, the Attorney General reported that convictions were "notoriously difficult" to obtain because of the "antecedents and surroundings of the victims and witnesses and the frequent existence of strong local sympathy for the defendants."[314] Planters subjected victims and witnesses to threats and physical violence up to and including murder,[315] and juries in many localities sympathized with defendants because it seemed unfair to penalize particular employers when so many were violating the law. As a South Carolina newspaper commented in 1910, it was "not at all surprising" that a jury acquitted a man of peonage, "for while everybody knows that he is guilty it is equally well known that he is not any more guilty than scores or perhaps hundreds of other men."[316]

To overcome such impediments, a poor laborer would require a "network of support," as illustrated by the *Bailey* case.[317] Having no chance of prevailing before an all-white jury, Bailey had no choice but to embark on a protracted journey through the appellate process. To get all the way to the Supreme Court, he needed an extraordinary convergence of resources, supporters, and good fortune. For starters, his wife was determined and resourceful enough to make her way to a city (Montgomery) and find an energetic young attorney willing to take the case. Booker T. Washington and a prominent Alabama attorney joined the effort, as did a group of reform-minded whites in Montgomery.[318] On Washington's request, a sympathetic federal district judge contacted prominent people in the North, including

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[312] Clyatt v. United States, 197 U.S. 207 (1905); Schmidt, *supra* note 212, at 655.

[313] Schmidt, *supra* note 212, at 655; *see also* DANIEL, *supra* note 255, at 25.

[314] 1908 ATT'Y GEN. ANN. REP. 6.

[315] KLARMAN, *supra* note 213, at 88.

[316] DANIEL, *supra* note 255, at 23 (quoting the ANDERSON DAILY MAIL, Apr. 29, 1910). As Schmidt and Klarman point out, many jurors accepted the planters' shibboleth—firmly entrenched since the days of slavery—that black workers could be induced to work only by force. KLARMAN, *supra* note 213, at 88; Schmidt, *supra* note 212, at 654.

[317] Schmidt, *supra* note 212, at 655.

[318] *See* DANIEL, *supra* note 255, at 68–75 (relating Bailey's journey through the courts).

President Theodore Roosevelt. The Justice Departments of both the Roosevelt and Taft administrations supported the effort, with Taft's submitting an amicus brief to the Supreme Court on Bailey's behalf.

Despite the obstacles, litigators did eventually succeed in overturning straightforward peonage laws (*Clyatt*), false pretense laws (*Bailey*), and criminal surety laws (*Reynolds*), so why did they stop short of convict leasing? In brief, by the time *Reynolds* was decided, all of the Southern states except Alabama and Florida had formally abolished leasing, and it was clearly "on the road to extinction."[319] The 1912 presidential election victory of Woodrow Wilson, a Democrat with close ties to the white South, sapped the energy for federal prosecutions, and subsequent Republican administrations failed to resume the effort.[320] The last clear target disappeared in 1928, when Alabama's final lease expired.[321] Given that it took four decades to bring a simple peonage law before the Court, it is hardly surprising that no prosecutor or laborer managed to do the same with convict leasing, a more difficult challenge both legally and politically. It was one thing for Bailey's team to mobilize Booker T. Washington, white Southern liberals, and the Justice Departments of two Presidential administrations on behalf of a laborer who had committed no crime other than refusing to work; it would have been another altogether to organize such a coalition in support of a laborer convicted of an ordinary crime like larceny. Even the strongest proponents of black rights, normally far bolder than Washington, prioritized respectable African Americans over convicted offenders.[322] W.E.B. DuBois, for example, condemned convict leasing as a brutal form of profiteering and a "new slavery,"[323] but he also joined with other scholars in lamenting that so many "of the freedmen's sons have not

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[319] William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 J.S. HIST. 31, 57 (1976); *see also* MANCINI, *supra* note 202, at 127, 150, 165, 182, 196, 203, 222.

[320] KLARMAN, *supra* note 213, at 88; NOVAK, *supra* note 243, at 64. All of the forced labor cases except *Bailey* were brought by federal prosecutors, and—as we have seen—*Bailey* reached the Supreme Court as a result of extraordinary circumstances.

[321] Cohen, *supra* note 319, at 57.

[322] OSHINSKY, *supra* note 201, at 96–99; *see also* ANGELA YVONNE DAVIS, THE ANGELA Y. DAVIS READER 75 (Joy James ed., 1998) (criticizing Frederick Douglass's silence on convict leasing, and suggesting that it contributed to the subsequent criminalization of blackness); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 9–10 (2010) (noting that some black crime experts and reformers distanced themselves "from 'uncouth' and 'criminally inclined' poor blacks" and contributed to the prevailing racialized discourse on crime).

[323] W.E.B. DuBois, *The Spawn of Slavery: The Convict-Lease System in the South*, *in* AFRICAN AMERICAN CLASSICS IN CRIMINOLOGY AND CRIMINAL JUSTICE 83, 85 (Shaun L. Gabbidon, Helen Taylor Greene & Vernetta D. Young eds., 2002); *see also* W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 698–99 (1935).

yet learned to be law-abiding citizens or steady workers," and thus were holding back the progress of the race.[324]

In short, the void of Thirteenth Amendment challenges to convict leasing, like the four-decades-long silence on peonage, more likely reflected the power of the convict labor network than any deficiency in the legal merits of potential challenges. A present-day court could choose to put its imprimatur on the network's victory simply by applying the *Reynolds* Court's formal distinction between convict leasing and the purportedly private surety system.[325] However, that choice would conflict both with the best evidence of original meaning and with the non-formalist method of *Bailey* and *Reynolds*. It would honor a victory achieved through what we now recognize as unconstitutional methods, such as the paramilitary termination of Reconstruction and the establishment of one-party, white supremacist state governments founded on denying African Americans the rights to vote, participate on juries, serve as attorneys and judges, and engage in self-organization.

Alternatively, a present-day court could build on the purposive methodology employed by the Supreme Court in the peonage cases. In each case, the Court followed the Republican members of the Thirty-Ninth Congress in looking past formal distinctions to consider the actual operation of the challenged statutes as means of reducing laborers to a condition of servitude. And in each case, the Court upheld the Thirteenth Amendment challenge.

C. The Present-Day Significance of Convict Leasing

Suppose it is true that, as suggested above, convict leasing violated the Amendment as understood by its framers. And suppose too that the void of Thirteenth Amendment challenges reflected not the legal merits, but the raw power of leasing's beneficiaries. A skeptic might ask: So what? The fact remains that convict leasing persisted for half a century and was never targeted for a serious constitutional challenge. Perhaps, whatever we might think about its moral or legal merits, it amounted to the kind of constitutional tradition that provides evidence of how the constitutional order is supposed to work. According to Felix Frankfurter, a tradition would appear to carry considerable weight if it were "systematic, unbroken . . . long pursued . . .

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[324] OSHINSKY, *supra* note 201, at 99 (quoting ATLANTA UNIVERSITY AND THE NINTH CONFERENCE FOR THE STUDY OF NEGRO PROBLEMS, SOME NOTES ON NEGRO CRIME, PARTICULARLY IN GEORGIA 65 (W.E.B. DuBois ed., 1904)). For a nuanced discussion of DuBois's views, see MUHAMMAD, *supra* note 322, at 67–70.

[325] United States v. Reynolds, 235 U.S. 133, 145–47 (1914).

and never before questioned . . . ."[326] It is probably fair to say that, with the exception of isolated voices like Thomas Cooley, the constitutionality of convict leasing has not been seriously questioned since the end of Reconstruction in 1877. And the practice itself persisted in its fully developed form for half a century until Alabama, the last holdout, abolished it in 1927.[327] Even after its formal abolition at the state level, leasing continued in many counties and localities.[328]

It is questionable, however, whether convict leasing ever won sufficient acceptance to be considered a positive tradition of constitutional significance. From the outset, it sparked intense controversy. Prison reformers charged that it replicated the worst horrors of slavery;[329] Southern populists complained that it favored the plantation elite over ordinary people;[330] and union workers assailed it for undermining labor standards and taking jobs from free workers.[331] By the mid-1880s, these forces were gaining traction. South Carolina, Mississippi, and Louisiana formally abolished leasing in 1885, 1890, and 1898.[332] Tennessee terminated it in 1895, after collective action by white and black union miners "raised the costs of the convict lease to prohibitive levels."[333] Georgia, Arkansas, Texas, and Florida followed in 1908, 1913, 1913, and 1919 respectively.[334] Convict leasing, in short, was embattled throughout its existence and suffered rejection, state by state, beginning only seven years after the termination of Reconstruction made possible its consolidation. This is not the kind of "tradition" that could plausibly provide evidence of the proper operation of constitutional government.

In addition, and more fundamentally, a tradition can be either positive or negative. Legal thinkers who emphasize tradition consider "the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the tradi-

[326] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). Frankfurter was referring to presidential practice in particular, but these attributes, formulated at a general level (e.g., long pursued to the knowledge of the public), would appear to indicate vitality in any tradition. *See also* McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) (holding that the right to bear arms is protected under the doctrine of substantive due process because it is "deeply rooted in this Nation's history and tradition").

[327] MANCINI, *supra* note 202, at 116.

[328] *Id.* at 222; OSHINSKY, *supra* note 201, at 73–74.

[329] *See, e.g.*, WHITIN, *supra* note 207, at 8, 50.

[330] MANCINI, *supra* note 202, at 221.

[331] MCLENNAN, *supra* note 42, at 164.

[332] SELLIN, *supra* note 226, at 158 (stating South Carolina terminated leasing in 1885); MANCINI, *supra* note 202, at 140, 150 (stating Mississippi terminated leasing in 1890 and Louisiana followed in 1898).

[333] SHAPIRO, *supra* note 50, at 233.

[334] MANCINI, *supra* note 202, at 98, 182, 196, 222.

tions from which it broke."[335] Some once-venerable American customs, for example systematically disadvantaging women and people of color, are currently recognized as negative traditions triggering critical constitutional scrutiny. Judging from the historical accounts summarized above, there is a strong case for classifying convict leasing as a similarly negative tradition—one that evidences how our constitutional order should *not* work, and one that we should strive to purge from our constitutional future. As recounted above, the system of convict leasing operated less for the punishment of crime than for the extraction of labor through the infliction of pain, terror, and inhuman living conditions on victims selected more for their race and poverty than for criminal culpability.[336] Far from a tradition worth honoring, it stands out as a shameful episode in the American saga. If anything, the history of convict leasing confirms the wisdom of the framers' interpretation. Their constitutional critiques of the early, rudimentary forms of leasing applied with equal force to the somewhat more sophisticated systems of the post-Reconstruction South.

III
Mass Incarceration and the Thirteenth Amendment

Suppose present-day Americans were to resurrect and apply some version of the Republican understanding today; what consequences might follow? At the level of general principle, the answer seems fairly clear: We would cease to honor the Democrats' broad reading of the Punishment Clause to strip convicted persons of Thirteenth Amendment protection. Instead, like the Republican members of the Thirty-Ninth Congress, we would critically scrutinize penal practices to ascertain whether, in law and in fact, they fall within the Clause.[337] The Supreme Court's admonition that the exception for punishment "does not destroy the prohibition"[338] would have to be taken seriously. If a policy would otherwise violate the Amendment, it would fall under the exception only if it were truly implemented "as a punishment for crime whereof the party shall have been duly convicted," and not, for example, as a means of raising revenue or generating private profit. The Punishment Clause could no longer be cited

[335] Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)); Moore v. City of East Cleveland, 431 U.S. 494, 501 (1977) (same).

[336] *See supra* Section II.A.

[337] *See supra* Sections I.B, I.C.

[338] Bailey v. Alabama, 219 U.S. 219, 244 (1911).

as affirmative authorization for convict leasing and analogous practices. Instead of villainizing the Amendment, social movements might claim it as authority for constitutional challenges to various aspects of mass incarceration. Such challenges might work synergistically with ongoing efforts to excise the Punishment Clause by constitutional amendment, as did Fourteenth Amendment challenges to gender discrimination with the campaign for the Equal Rights Amendment.[339]

This Part addresses (A) the rise of mass incarceration and its similarities and contrasts with convict leasing, (B) the current jurisprudence of the Punishment Clause as an obstacle to Thirteenth Amendment challenges, (C) potential applications of the Republican understanding to present-day prison labor, and (D) the possibility of broader challenges based on the doctrine of the badges and incidents of slavery.

A. *Mass Incarceration from a Thirteenth Amendment Perspective*

Beginning shortly after the civil rights upsurge of the 1960s, the prison population of the United States shot up at rates not seen since the first round of mass incarceration following Reconstruction.[340] No sooner had the Supreme Court at long last struck down traditional vagrancy laws,[341] than they were replaced with a host of new statutory

[339] *See* Frontiero v. Richardson, 411 U.S. 677, 687–88 (1973) (plurality opinion) (considering the proposal of the Equal Rights Amendment as evidence that "Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration"); Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 827 (2004) (suggesting that "the ERA's pendency moved at least four justices to the view that" sex classifications should be subject to strict scrutiny). *But see Frontiero*, 411 U.S. at 692 (Powell, J., dissenting) (arguing that courts should have deferred to the ratification process).

[340] For statistics, see *infra* text accompanying notes 348–50. On the connection between civil rights and mass incarceration, see MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 54 (2010), which observes that the "shift to a general attitude of 'toughness' toward problems associated with communities of color began in the 1960s, when the gains and goals of the Civil Rights Movement began to require real sacrifices on the part of white Americans." *See also* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 4 (2006) ("[T]he prison boom was a political project that arose partly because of rising crime but also in response to an upheaval in American race relations in the 1960s and the collapse of urban labor markets for unskilled men in the 1970s."); Thompson, *supra* note 307, at 706 ("In the same way that rural African American spaces were criminalized at the end of the Civil War, resulting in the record imprisonment of black men . . . the criminalization of urban spaces of color . . . fundamentally altered the social and economic landscape of the late twentieth- and early twenty-first-century United States.").

[341] Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). The *Papachristou* Court did not mention the Thirteenth Amendment, framing the issue instead as a challenge to the standardless criminalization of nonconforming behavior. On the sidelining of the Thirteenth Amendment in vagrancy cases, see Noah D. Zatz, *Carceral Labor Beyond the*

crimes, harsh sentences, and enforcement policies targeted at behaviors, conditions, and locations associated with poverty and racial disadvantage. States criminalized such activities as "gang loitering," panhandling, and sleeping on park benches, and imposed harsh sentences on minor crimes such as drug possession, especially drugs such as crack cocaine that were favored by poor city dwellers.[342] Law enforcement agencies engaged in "broken windows" policing[343] and targeted "potential" criminals[344] (young, urban, and mostly of color) including "pre-delinquent" children for intrusive surveillance.[345] In a self-reinforcing feedback loop, targeting yielded higher black and urban arrest rates, which, in turn, served to justify harsher laws and more targeting.[346] As in the era of convict leasing, arrests, convictions, and penal policies were heavily shaped by racial, financial, and other concerns unrelated to public protection.[347] Between 1973 and 2009,

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Prison, *in* PRISON/WORK: LABOR IN THE CARCERAL STATE (Erin Hatton ed., forthcoming 2019) (manuscript at 6–7).

342 ALEXANDER, *supra* note 340, at 51–53; MICHAEL A. HALLETT, PRIVATE PRISONS IN AMERICA: A CRITICAL RACE PERSPECTIVE 88–89, 139–40 (2006); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 265, 272 (2016).

343 RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960s, at 339, 341–42 (2016).

344 HINTON, *supra* note 342, at 23–24, 183–84, 224, 323.

345 Dorothy E. Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1713 (2019) (reviewing VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (2018)); *see also* COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 50 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) [hereinafter THE GROWTH OF INCARCERATION].

346 MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 104 (2015); HINTON, *supra* note 342, at 235, 332; William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 66 (2004); Robert J. Sampson & Charles Loeffler, *Punishment's Place: The Local Concentration of Mass Incarceration*, 139 DAEDALUS 20, 20–21 (2010); *see also* Roberts, *supra* note 345, at 1713 (analyzing the use of big data to predict, describe, and target the behaviors of poor people, especially of color, and concluding that the "future predicted by today's algorithms . . . is predetermined to correspond to past racial inequality").

347 *See, e.g.*, ALEXANDER, *supra* note 340, at 72–73, 75–83 (reporting financial incentives for local governments to arrest and incarcerate urban drug offenders despite local perceptions that other, more serious, crimes posed a greater problem); HINTON, *supra* note 342, at 318 (same); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 125–27 (2007) (maintaining that the prison population boom in California was shaped by fiscal and other economic concerns); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 203–07 (2009) (suggesting that when the Northern civil rights struggle spilled out of the urban ghettos, white people responded by creating a "carceral continuum which entraps a redundant population of younger black men (and increasingly women), who circulate in closed circuit between" the ghetto and prison).

the population of federal and state prisons increased by 750%, from 200,000 to 1.5 million.[348] By 2015, more than 2.1 million Americans were incarcerated in prisons or jails while an additional 4.6 million were on probation or parole—a total of 6.7 million, or 2.7% of the adult population.[349] As of 2012, the United States held 25% of the world's prisoners and sustained the highest incarceration rate in the world, five to ten times greater than European and other democracies.[350]

Unlike convict leasing, mass incarceration is not a straightforward engine of labor exploitation. In contrast to Southern planters and industrialists, who craved convicts' labor power, today's prison entrepreneurs view inmates not only as exploitable workers, but also as captive consumers and tenants, as well as tickets to government money. The present-day prison has become the ultimate company town, where management can force inmates to work, unilaterally set their wages (at zero, if desired), unilaterally set rent, force inmates to buy necessities from the company store, compel inmates to work beyond their normal release dates by driving them into debt, and use them to obtain public money for housing, punishing, and rehabilitating them.[351] Any or all of these revenue generators may be contracted out, for example to private corporations seeking cheap and servile labor,[352] private suppliers or service providers pursuing monopoly profits (most famously, telephone companies),[353] or private

348 THE GROWTH OF INCARCERATION, *supra* note 345, at 2. These figures do not include jails, facilities that house prisoners awaiting trial or serving short sentences. Jails housed an additional 700,000 in 2009. *Id*. Prior to 1973, the rate of incarceration had remained stable for half a century. *Id*. at 33, 34.

349 DANIELLE KAEBLE & LAUREN GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015, at 1 (2016).

350 THE GROWTH OF INCARCERATION, *supra* note 345, at 2.

351 In 1985, the National Institute of Justice proposed turning the prison into a company town, albeit without applying the label. Inmates could be legally reconceived as captive tenants and consumers, forced to pay for room and board at whatever price management desired on the theory that otherwise they would not be "paying their 'debt' to society." James K. Stewart, *From the Director*, GEORGE E. SEXTON ET AL., NAT'L INST. JUSTICE, THE PRIVATE SECTOR AND PRISON INDUSTRIES 1 (1985); *see also* CURTIN, *supra* note 202, at 215 (suggesting that, because of such practices, "[o]ne could argue that today's prisons are even more highly commodified than was the [convict] lease"); Kirsten D. Levingston, *Making the "Bad Guy" Pay: Growing Use of Cost Shifting as an Economic Sanction*, *in* PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 52, 55 (Tara Herivel & Paul Wright eds., 2007).

352 *See* Zatz, *supra* note 138, at 868–69; Genevieve LeBaron, *Prison Labour, Slavery, and the State*, *in* REVISITING SLAVERY AND ANTISLAVERY: TOWARDS A CRITICAL ANALYSIS 151 (Laura Brace & Julia O'Connell Davidson eds., 2018); *infra* text accompanying note 462.

353 *See* Eric Markowitz, *Making Profits on the Captive Prison Market*, NEW YORKER (Sept. 4, 2016), https://www.newyorker.com/business/currency/making-profits-on-the-

prison corporations chasing lucrative government contracts.[354] As in the era of convict leasing, the intensity of exploitation falling on any particular offender bears little or no relation to the severity of that person's crime. Also resembling convict leasing, mass incarceration has spawned a powerful network of beneficiaries dependent on the system. The people who administer prisons, guard their inmates, provide services and supplies, employ unpaid or underpaid convict laborers, build jails and penitentiaries, and finance construction all have an economic incentive to ensure a constant supply of inmates through tough-on-crime policies.[355] Most claim to act on penological concerns, but private prison companies, because they are subject to disclosure requirements designed to protect investors, openly acknowledge that they engage in "competition for inmates" and that their profitability hinges on strict sentencing, aggressive enforcement, and the continued criminalization of drugs and immigration.[356]

As in the era of convict leasing, black Americans are disproportionately affected, but not enough to run afoul of contemporary equal protection standards. Like convict leasing (and unlike Jim Crow[357]) mass incarceration targets class as well as race, burdening enough

captive-prison-market. Phone companies charge up to fifteen dollars for a short phone call. Because these companies are not publicly traded, it is difficult to obtain information about their practices. *Id*.

[354] *See generally* HALLETT, *supra* note 342 (discussing in detail the contracting out of state penal functions to private prison corporations that reap high rates of profit).

[355] *See, e.g.*, JOSHUA PAGE, THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA (2011); PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION, *supra* note 351 (identifying and documenting the various constituencies that benefit from incarceration); DONNA SELMAN & PAUL LEIGHTON, PUNISHMENT FOR SALE: PRIVATE PRISONS, BIG BUSINESS, AND THE INCARCERATION BINGE (2010).

[356] Corr. Corp. of Am., Annual Report (Form 10-K) 25 (Feb. 25, 2015) [hereinafter CCA Report]; *see* HALLETT, *supra* note 342, at 77. Despite protestations to the contrary, private prison companies lobby and make political contributions to maintain the aggressive police tactics, strict sentencing, and criminalization of drugs and immigration that sustain high prison occupancy rates. GOTTSCHALK, *supra* note 346, at 233; Judith Greene, *Banking on the Prison Boom*, *in* PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION, *supra* note 351, at 3–24; andré douglas pond cummings & Adam Lamparello, *Private Prisons and the New Marketplace for Crime*, 6 WAKE FOREST J.L. & POL'Y 407, 411–12 (2016). According to political scientists, private prisons dangle contributions and employment opportunities to lure supportive elected officials into the small elite of state-level decisionmakers, thereby tilting the overall correctional governance process away from penological considerations and toward profit. *See* HALLETT, *supra* note 342, at 92–93; Barbara Ann Stolz, *Privatizing Corrections: Changing the Corrections Policy-Making Subgovernment*, 77 PRISON J. 92, 93–102 (1997).

[357] James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 23 (2012) ("[T]he Jim Crow analogy obscures the fact that mass incarceration's impact has been almost exclusively concentrated among the most disadvantaged African Americans.").

working-class white people to circumvent antidiscrimination law. By 2009, for example, black men lacking a high school degree faced a more than 60% chance of incarceration during their lifetimes, as compared with about 27% for white dropouts and 22% for black high school graduates.[358] Black men are thus disadvantaged at every level of the class hierarchy, but so are working-class white men across every level of the racial hierarchy. The racial disparity, though gross, is not sufficient to prove *intentional* discrimination as required by current equal protection law, just as the far greater racial disparities of the convict leasing era fell short of the *facial* discrimination required at that time.[359] Proponents of mass incarceration quickly learned to avoid overtly racist remarks in public discourse,[360] and those uttered privately have been exposed only with time and luck. Not until 1994, for example, did the publication of White House Chief of Staff H.R. Haldeman's diary reveal that, at the start of mass incarceration a quarter century earlier, Richard Nixon had opined that the crime "problem is really the blacks. The key is to devise a system that recognizes this while not appearing to."[361] Moreover, tough-on-crime policies fall lightly enough on relatively prosperous African Americans that some support them, thereby blurring the racial issue.[362]

On the other hand, the Supreme Court has held out the possibility that the Thirteenth Amendment might reach not only intentional race discrimination, but also disparate impacts on racially defined groups.[363] Several scholars have picked up on this possibility,

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358 THE GROWTH OF INCARCERATION, *supra* note 345, at 67 fig.2-16.

359 *See supra* note 204–06 and accompanying text.

360 ALEXANDER, *supra* note 340, at 43. Research indicates that racial disparities generally result from an accumulation of policies and decisions and not from a single, racially motivated decision by an identifiable individual or body. *See* GOTTSCHALK, *supra* note 346, at 123–24 (summarizing research).

361 H.R. HALDEMAN, THE HALDEMAN DIARIES: INSIDE THE NIXON WHITE HOUSE 66 (1994).

362 *See, e.g.*, TA-NEHISI COATES, BETWEEN THE WORLD AND ME 53, 75–77 (2015) (noting that Prince George's County, a relatively prosperous, majority-black jurisdiction, had elected politicians who "superintended a police force as vicious as any in America"); GILMORE, *supra* note 347, at 109 (noting that "[p]oliticians of all races" joined in promoting the policies that led to mass incarceration in California); HINTON, *supra* note 342, at 8–9 (recounting that some "black politicians, community leaders, and clergymen . . . responded to disorder by demanding tougher crime control measures in urban communities").

363 City of Memphis v. Greene, 451 U.S. 100, 128–29 (1981) ("To decide the narrow constitutional question presented by this record we need not speculate about the sort of impact on a racial group that might be prohibited by the Amendment itself."); *see also* Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 616–17 (2012) (suggesting that the Amendment might lack a requirement of intentional discrimination so that disparate impact claims could be brought under its authority).

arguing that the Amendment directly prohibits certain health care policies and labor market practices that exert racially disparate impacts, particularly on African Americans.[364] Under such an approach, various practices associated with mass incarceration might violate the Amendment, such as inflicting strict sentences for drug offenses involving substances used primarily by people of color, but not for similarly harmful substances used mainly by white people.[365] Such practices would appear to lie outside the Punishment Clause, applied in accord with a Republican understanding, because it does not permit differential punishments based on race.[366]

Whatever the long-term potential of the disparate impact theory, however, there is a far more immediate and basic issue concerning the application of the Punishment Clause to compulsory labor in prison.

B. The Current Jurisprudence of the Punishment Clause

Forced prison labor violates the Amendment unless it falls under the Punishment Clause.[367] "Punishment," as defined in both contem-

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[364] *See* Darrell A.H. Miller, *The Thirteenth Amendment, Disparate Impact, and Empathy Deficits*, 39 SEATTLE U. L. REV. 847, 848 (2016) (contending that racially disparate impacts typically reflect "systemic empathy deficits towards minorities," that those deficits constitute badges of slavery, and that their remediation is a compelling governmental interest justifying race-conscious affirmative action); Larry J. Pittman, *Physician-Assisted Suicide in the Dark Ward: The Intersection of the Thirteenth Amendment and Health Care Treatments Having Disproportionate Impacts on Disfavored Groups*, 28 SETON HALL L. REV. 774, 777 (1998) (arguing for the application of strict judicial scrutiny to health care policies that exert racially disparate impacts, especially on African Americans); Pope, *supra* note 14, at 473–74 (suggesting that the racially disparate treatment faced by African-American job applicants in today's labor market amounts to a badge or incident of slavery prohibited by the Amendment).

[365] *Compare* State v. Russell, 477 N.W.2d 886, 889 (Minn. 1991) (striking down such a law, reasoning that laws that impose a "substantially disproportionate burden on the very class of persons whose history inspired the principles of equal protection" should be subject to a critical version of "rational basis" scrutiny under the state constitution's equal protection guarantee), *with* United States v. Clary, 34 F.3d 709, 711, 713–14 (8th Cir. 1994) (striking down District Court's invalidation of such a law despite the fact that 98.2% of defendants convicted of crack cocaine charges between 1988 and 1992 were African American, reasoning that disparate impact was insufficient to prove intentional discrimination). For an explanation why it is virtually impossible to meet the Fourteenth Amendment requirement of racial intent when challenging criminal sentences, even where the disparate impact is extreme, see ALEXANDER, *supra* note 340, at 109–14. *See generally* GOTTSCHALK, *supra* note 346, at 124–26 (summarizing statistical evidence of disparities in sentencing).

[366] *See supra* text accompanying notes 90–91 (discussing the 1866 Civil Rights Act's prohibition on differential punishments based on race).

[367] *See, e.g.*, McGarry v. Pallito, 687 F.3d 505, 511–12, 514 (2d Cir. 2012) (assuming that pre-trial detainees may be required to "perform personally related housekeeping chores such as, for example, cleaning the areas in or around their cells, without violating the Thirteenth Amendment," but holding that a detainee who was forced to work long hours in a prison laundry stated a valid claim under the Amendment).

porary and modern dictionaries, consists in "pain or suffering inflicted on a person because of a crime or offense."[368] Most present-day courts have, however, embraced the old Democratic tenet that the clause simply strips convicted persons of Thirteenth Amendment protection. "Where a person is duly tried, convicted, sentenced and imprisoned for crime in accordance with law," it is said, "no issue of peonage or involuntary servitude arises."[369] On this view, a sentence of imprisonment renders a person vulnerable to forced labor for any variety of purposes including generating public revenue or private profit; neither "punishment for crime" generally nor punishment for the particular "crime whereof the party shall have been duly convicted" need be a factor in the determination. As Taja-Nia Henderson points out, this exclusion of *persons* from Thirteenth Amendment protection carries forward the old notion that convicted criminals are "slaves of the State," to be disposed of as the state pleases.[370]

The jurisprudential roots of this approach lie in a Supreme Court decision that did not mention the Amendment, *Ex Parte Karstendick*.[371] Karstendick had been convicted of a federal crime and sentenced to imprisonment. The lower court determined that there was no suitable prison in Louisiana, where the proceedings took place, and ordered that he serve his time at the federal penitentiary in Moundsville, West Virginia, where hard labor was required of all pris-

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368 WEBSTER, *supra* note 26, at 1062 (defining "punish" as "[t]o afflict with pain, loss, or calamity for a crime or fault," and "punishment" as (1) "[t]he act of punishing"; (2) "[a]ny pain or suffering inflicted on a person because of a crime or offense; especially, pain so inflicted in the enforcement or application of law"); WORCESTER, *supra* note 26, at 1155 (defining "punish" as "[t]o afflict with pain, loss, confinement, death, or other penalty, for some fault or crime; to chastise; to correct; to castigate; to chasten" and "punishment" as "[t]he act of punishing; any infliction, suffering, or pain, imposed on one who has committed a fault or crime, or has neglected the performance of a required act; a penalty; correction"); *Punishment*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/punishment (last visited July 28, 2019) (defining "punishment" as "suffering, pain, or loss that serves as retribution," and "a penalty inflicted on an offender through judicial procedure").

369 Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963); Williams v. Henagan, 595 F.3d 610, 621–22 (5th Cir. 2010) (quoting *Draper*, 315 F.2d at 197); Omasta v. Wainwright, 696 F.2d 1304, 1305 (11th Cir. 1983) (quoting *Draper*, 315 F.2d at 197); *see also* Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (opining, in dictum, that a Thirteenth Amendment challenge to the shipping of Wisconsin prisoners to an out-of-state, privately-owned prison where they would be forced to work for the owner would be "thoroughly frivolous" and would "earn [the prisoners] a strike"); Hale v. Arizona, 993 F.2d 1387, 1394 (9th Cir. 1993) ("Convicted criminals do not have the right freely to sell their labor and are not protected by the Thirteenth Amendment against involuntary servitude.").

370 Taja-Nia Y. Henderson, *The Ironic Promise of the Thirteenth Amendment for Offender Anti-Discrimination Law*, 17 LEWIS & CLARK L. REV. 1141, 1184–85 (2013).

371 93 U.S. 396 (1876).

oners.[372] Karstendick argued that he could not be forced to work because he had not been sentenced to hard labor. The Court rejected this argument in sweeping terms:

> In cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence. But where the statute requires imprisonment alone, the [laws] place it within the power of the court, at its discretion, to order execution of its sentence at a place where labor is exacted as part of the discipline and treatment of the institution or not, as it pleases.[373]

Aided by decisions like *Karstendick*, Moundsville became a model of prison self-sufficiency, operating a coal mine and a number of factories using workers who toiled unpaid and spent their time off stacked in five-by-seven-foot cells, three to a cell.[374]

It would appear that Karstendick could have mounted a strong constitutional challenge grounded on the text of the Amendment. His servitude resulted not from any legislative, judicial, or even executive determination that his crime should be punished by servitude, but from prison roulette; the facility that happened to be available implemented a policy of forced labor. Yet, most courts today uphold servitude on similar facts in cases where inmates do raise Thirteenth Amendment claims.[375]

A trio of frequently cited Fifth Circuit cases illustrates the enormous gap between present-day jurisprudence and contemporary Republican understandings. In *Wendt v. Lynaugh*,[376] Wendt was sentenced to imprisonment and forced to work without pay under a Texas statute providing that "[p]risoners shall be kept at work under such rules and regulations as may be adopted by the manager with the Board's approval."[377] The court speedily determined that Wendt's Thirteenth Amendment challenge was "obviously . . . frivolous."[378] Since Wendt had been duly convicted of a crime, "[h]is situation in precise words is exempted from the application of the Thirteenth Amendment."[379]

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[372] *See id.* at 399.

[373] *Id.*

[374] *See* Jonathan D. Clemins, West Virginia Penitentiary 18, 26–27, 30, 34–35, 47 (2010).

[375] *See* Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. Rev. 607, 621 n.82 (2008) (collecting cases); *see also* cases cited *supra* note 5.

[376] 841 F.2d 619 (5th Cir. 1988).

[377] *Id.* at 620.

[378] *Id.* at 619–20.

[379] *Id.* at 620.

No doubt, the three-judge panel in *Wendt* was unaware that the reading they considered to be so glaringly obvious had been roundly rejected by the Amendment's framers within months of its ratification. As we have seen, they read the Punishment Clause to exempt only servitude imposed as a punishment for the particular crime of which the prisoner had been convicted.[380] Wendt, who brought his case *pro se*, did not introduce any facts indicating a purpose or effect other than punishment. However, the Texas statute at issue commanded the infliction of servitude across the board on each and every inmate without regard to the magnitude or character of their particular offense.[381] Contemporary Republicans expected that the level of suffering would reflect the seriousness of the crime, so that the imposition of such a degrading punishment as servitude for a minor offense raised the suspicion that it was serving some purpose other than punishment.[382] If applied to the facts of *Wendt*, then, the Republican approach would call for critical scrutiny of the Texas statute, especially its application to inmates convicted of minor crimes.

The second decision, *Ali v. Johnson*,[383] went further to uphold servitude inflicted at the discretion of an administrative agency. Like Wendt, Ali was sentenced to imprisonment and forced to work under Texas law. By the time of his incarceration, however, the statute mandating forced labor had been repealed.[384] In the absence of any apparent legal authorization for servitude, the Fifth Circuit Court of Appeals requested the Texas Department of Criminal Justice (TDCJ) to "address the question of whether inmates . . . may be required to work in prison."[385] The TDCJ replied that forced labor was "just a regular part of prison discipline and needs no specific legislative blessing or directive."[386] Texas law gave the agency "discretion to force its inmates to work during a period when there was no statute mandating that TDCJ force its inmates to work."[387] Moreover, that discretion had no apparent relation to the choice of punishment for the "crime whereof the party shall have been duly convicted." To the contrary, it fell under the Director's authority to "adopt policies gov-

380 *See supra* Sections I.B, I.C.

381 *See Wendt*, 841 F.2d at 620.

382 *See supra* text accompanying notes 57–65.

383 259 F.3d 317 (5th Cir. 2001).

384 *Id.* at 318.

385 Appellees' Brief at 1, *Ali*, 259 F.3d 317 (No. 00-10777) (reporting the request of the Court of Appeals for the Fifth Circuit).

386 *Id.* at 13.

387 *Id.* at 3.

erning the humane treatment, training, education, rehabilitation, and discipline of inmates."[388]

The Court of Appeals ruled in favor of the TDCJ. Writing for a unanimous panel, Circuit Judge Edith Jones declared that "inmates sentenced to incarceration cannot state a viable Thirteenth Amendment claim if the prison system requires them to work."[389] Where *Wendt* found nothing suspicious in the infliction of servitude as a "punishment" for any and all crimes regardless of severity, *Ali* went further to approve servitude openly imposed for reasons other than punishment. Having been sentenced to imprisonment, an inmate can be subjected to servitude or not at the discretion of an administrator who is permitted to consider not only the type of pain and suffering to be inflicted, but also other institutional policies including labor policies like training and education as well as, presumably, raising revenue for the state.

Finally, in *Murray v. Mississippi Department of Corrections*,[390] Samuel Lee Murray III was forced to work without pay on private property in violation of a state law that prohibited the working of inmates on private property.[391] In a one-page, per curiam opinion, the court rejected Murray's Thirteenth Amendment challenge, holding that neither the violation of state law nor the location of the forced labor on private property warranted a departure from the general principle that "[c]ompelling an inmate to work without pay is not unconstitutional."[392] On the statutory violation, the court reasoned simply that it could "find no authority for the proposition that a violation of Section 47-5-133 rises to constitutional proportions."[393] And on the location of the forced labor, it could "find no basis from which to conclude that working an inmate on private property is any more violative of constitutional or civil rights than working inmates on public property."[394]

In sharp contrast to the Amendment's framers, who viewed servitude as a degrading punishment and dangerous threat to free labor, today's courts accept it as a natural and unproblematic incident of incarceration. As *Wendt*, *Ali*, and *Murray* illustrate, they defer to legislatures and prison officials in preferring forced over voluntary labor even where the decisionmakers are not selecting a punishment for

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388 *Id.* at 14 (quoting TEX. GOV'T CODE ANN. § 494.002(a) (West 2000)).
389 *Ali*, 259 F.3d at 317.
390 911 F.2d 1167 (5th Cir. 1990) (per curiam).
391 *Id.* at 1168.
392 *Id.* at 1167.
393 *Id.* at 1168.
394 *Id.*

crime, but a form of job training, rehabilitation, or prison discipline. Procedurally, although a person must be "duly convicted" of some crime before undergoing servitude, the decision to impose servitude may occur without any process at all, and without any consideration whether servitude is an appropriate "punishment" for that particular crime.

C. Republican Understandings Applied to Present-Day Prison Labor

Suppose that present-day Americans were to abandon the ex-Confederate understanding of the Punishment Clause and embrace the Republican version? How would prison labor be affected? To begin with, the focus of the analysis would shift from the particular person to the particular instance of servitude. As related above, contemporary Republicans categorically rejected the notion that a criminal conviction stripped a *person* of protection, rendering her available for servitude at the discretion of legislatures, administrative agencies, or prison officials.[395] Instead, following the text, they critically scrutinized prison *servitude* to determine whether, in actual practice, it had been truly implemented "as a punishment for crime whereof the party shall have been duly convicted," and not, for example, as a device for subjugating black labor or conscripting unpaid workers to serve private or governmental masters.[396] This approach so thoroughly permeated their deliberations and actions from the 1866 Civil Rights Act through the Kasson-Thayer bill that, if post-enactment history can ever give rise to an original meaning binding on present-day Americans, critical scrutiny of prison servitude might be such a meaning.

Before proceeding to consider particular applications of the Republican understanding, it is important to be clear on the issue at stake. Thirteenth Amendment protection for prisoners would not eliminate rehabilitative prison labor programs; it would outlaw only "involuntary servitude," a limit that—as Raghunath points out—"should serve, rather than detract from, those programs' non-punitive purposes."[397] This result fits well not only with the Amendment's text, which permits involuntary servitude only "as a punishment," but also with the views of the Amendment's framers, who celebrated work, but opposed slavery and involuntary servitude as relations of subjugation that degraded labor and robbed it of its value both to individuals and

[395] *See supra* Sections I.B, I.C.

[396] *See supra* Sections II.A.1–6.

[397] Raghunath, *supra* note 122, at 407.

to the Republic.[398] In his *pro se* papers, Texas inmate Rubin Crain IV presented the gravamen of the complaint:

> [T]he state maintains such discretion to illegally determine whether and under what circumstances an inmate are . . . paid (*nothing*) for their labor; however, can make us work, and charge for medical, commissary item(s), as well as take the awarded good time for not fulfilling such unconstitutional control due to they cannot maintain a viable Thirteenth Amendment claim if the prison system requires them to work (i.e. slavery). . . . Wherefore, the petitioner object[s to the] . . . method(s) of using the petitioner and other human beings as an animal and for personal gain; however, the property interest is me, but it doesn't exist, meaning as a human being. I don't exist nor as a public interest, according to such an opinion by the court.[399]

While objecting to servitude, most prisoners crave opportunities to work. Inmates have claimed that deprivation of work opportunities constitutes cruel and unusual punishment.[400] A group of radical California prisoners once staged a strike partly to demand more prison industries jobs.[401] Award-winning journalist and former inmate Chandra Bozelko recounts that she looked forward to her job in the prison kitchen, cooking and serving food for between 75 cents and $1.75 a day.[402] She suggests that work provides a lifeline for inmates, who object not to working, but to being treated as "lifeless targets for exploitation," a view shared by many.[403] The solution is not to eliminate prison labor, she says, but to extend to prisoners workers' rights such as the minimum wage, unemployment compensation, and the right to form and join labor unions.[404] Bozelko's proposal could be framed in Thirteenth Amendment terms as a demand that prison labor be elevated above the level of "servitude."

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398 *See supra* text accompanying notes 25–31.

399 Crain v. Dir. of Tex. Dep't of Criminal Justice, No. 6:16cv16, 2016 U.S. Dist. LEXIS 49342, at *4–5 (E.D. Tex. Apr. 12, 2016) (second alteration in original).

400 *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 348 (1981) (rejecting prisoner's argument that "limited work hours" amount to cruel and unusual punishment); Campbell-El v. District of Columbia, 881 F. Supp. 42, 44 (D.D.C. 1995) (rejecting prisoner's argument that the denial of work opportunities constitutes cruel and unusual punishment).

401 *See* Donald F. Tibbs, From Black Power to Prison Power: The Making of Jones v. North Carolina Prisoners' Labor Union 121 (2012).

402 *See* Chandra Bozelko, *Think Prison Labor Is a Form of Slavery? Think Again*, L.A. Times (Oct. 20, 2017, 4:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-bozelko-prison-labor-20171020-story.html.

403 Chandra Bozelko, *Give Working Prisoners Dignity—and Decent Wages*, Nat'l Rev. (Jan. 11, 2017, 9:00 AM), https://www.nationalreview.com/2017/01/prison-labor-laws-wages; *see also* Goodwin, *supra* note 8, at 963–64 (finding "a sharp and profound distinction between work and slavery" centering on compensation and servitude, and reporting prisoners' views on the issue).

404 *See* Bozelko, *supra* note 403.

Most of the United States' 2.1 million prisoners work, receiving wages ranging from zero to two dollars an hour, as compared to the federal minimum wage of $7.25.[405] Some prison industry programs require wages at or above the minimum, but officials often intercept payment and deduct wages to pay for lodging, food, and other necessities purchased from the prison at monopoly prices.[406] It is true that, compared to the era of convict leasing, today's prison labor programs are hedged about with restrictions, some of which date back to the New Deal. After decades of agitation by unions and prison reformers, for example, Congress banned the interstate shipment of inmate-produced goods to private parties, thereby drastically reducing the demand for prison labor.[407] With the onset of mass incarceration, however, restrictions were loosened and prison industries began a recovery that continues today.[408]

Various features of present-day prison labor might be vulnerable to Thirteenth Amendment challenge were courts to abandon the blanket rule that inmates are excluded from protection.

1. Servitude Inflicted Without Any Sentence to Hard Labor

As we have seen, the Kasson Resolution interpreted the Amendment to bar the imposition of servitude "except in direct execution of a sentence imposing a definite penalty according to law," by which Kasson meant a sentence to "hard labor."[409] The Resolution further required that the execution of the sentence be "direct." It would appear, then, that the decision whether or not to require hard labor could be made only by a judge or jury at the time of sentencing. A sentence of hard labor for a term would operate as a determinate punishment and not as an authorization for officials to impose or refrain from imposing servitude at their discretion. Kasson's resolution never went to a vote, and the only evidence that anyone other than Kasson supported it comes from Thayer's remark that he "presume[d] no man doubts that the true interpretation of the constitu-

[405] *See* LeBaron, *supra* note 352, at 166; *see also* Beth Schwartzapfel, *Modern-Day Slavery in America's Prison Workforce*, AM. PROSPECT (May 28, 2014), https://prospect.org/article/great-american-chain-gang ("The median wage in state and federal prisons is 20 and 31 cents an hour, respectively.").

[406] *See* Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 372 (1998); Goodwin, *supra* note 8, at 968–70; *see also* GOTTSCHALK, *supra* note 346, at 61 (reporting that, because of lax enforcement, "[p]rison industries levy improper deductions on inmates' wages").

[407] *See* Ashurst-Sumners Act, 18 U.S.C. § 1761(b) (Supp. II 2002); Garvey, *supra* note 406, at 363, 366–67; Zatz, *supra* note 138, at 869.

[408] Zatz, *supra* note 138, at 868–69 (noting that the restrictions have eased and are virtually nonexistent for services performed by prisoners).

[409] CONG. GLOBE, 39th Cong., 2d Sess. 324, 345–46 (1867).

tional amendment is exactly that which is proposed" in the resolution.[410] But Thayer went on to propose a substitute bill that did not require a sentence at hard labor.[411] As far as on-point discussion goes, then, the record tells us only that such an application was within the range of Republican opinion.

Nevertheless, there may be good reason to embrace the requirement. The Amendment bars all involuntary servitude that is not imposed "as a punishment" for the crime of which the person has "been duly convicted." The Republicans read this language to require that servitude be inflicted only for purposes of punishment, and not to raise revenue or generate private profit.[412] Kasson's sentencing requirement appears well suited to implement this limitation. Consistently with the constitutional text, it requires that servitude be chosen at the time and by the authority that selects a convicted person's "punishment."[413] By definition, the sentence specifies the punishment to be inflicted on an offender.[414] When a legislature chooses the available sentences for a crime, or when a court or jury selects one for an individual offender, it is clear that the issue is supposed to be punishment—not prison discipline, training for future employment, raising revenue for prison operations, generating private profit, or compensating victims. Nor could servitude be imposed as a means of collecting criminal justice debt, a practice that effectively makes servitude a punishment for poverty, not crime.[415] Any or all of those

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410 *Id.* at 346 (statement of Rep. Thayer).

411 *See supra* notes 116–18 and accompanying text.

412 *See supra* Sections I.B, I.C.

413 *See* Goodwin, *supra* note 8, at 978 ("[A]s a textual matter, the Thirteenth Amendment's Punishment Clause does not permit prison slavery, at least in the way it currently operates, because the clause protects slavery only as 'punishment for crime,' which if narrowly defined, is meted out by statute or sentencing judge." (citing Wilson v. Seiter, 501 U.S. 294 (1991))). In *Wilson*, the Court stated that if pain is "not formally meted out *as punishment* by the statute or the sentencing judge," then additional evidence is required to bring it under the Eighth Amendment's prohibition against "cruel and unusual *punishment*." 501 U.S. at 300 (italics in original).

414 *See, e.g.*, *Sentence*, BLACK'S LAW DICTIONARY (rev. 4th ed. 1968) ("[T]he judgment formally pronounced by the court or judge upon the defendant after his conviction in a criminal prosecution, awarding the punishment to be inflicted."); *Sentence*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/sentence (last visited Jan. 2, 2019) ("[A] judgment . . . formally pronounced by a court or judge in a criminal proceeding and specifying the punishment to be inflicted upon the convict.").

415 Although the Fourteenth Amendment bars imprisonment for debt, Tate v. Short, 401 U.S. 395, 399 (1971), offenders often find that, once imprisoned, their stays can be extended until they work off debts, and their parole may be revoked for failure to work and keep up payments. *See* Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595 (2015); Noah D. Zatz, Peonage or Prison?: A 13th Amendment Analysis of Criminal Justice Debt 13 (Feb. 27, 2018) (unpublished manuscript) (on file with author). Prior to *Tate*, the Thirteenth Amendment had been held not to protect against

goals might be favored as a matter of policy, but the Amendment—read according to Republican understandings—does not permit governments to achieve them by enslaving inmates or subjecting them to involuntary servitude.

In addition, legislatures and courts select sentences for particular crimes, ensuring that there is at least some link between the penalty of servitude and the particular crime "whereof the person shall have been duly convicted." Thus, servitude could not be inflicted without a legislative, judicial, or jury determination that the crime was of sufficient seriousness to warrant such a punishment—a Republican concern on which we have substantial evidence.[416] Even those who favor deference on the question whether to impose a punishment of servitude might agree that there should at least be a decision to which deference can be accorded.

As a matter of process, Kasson's sentencing requirement would ensure that the Amendment's prohibitory clause could not be evaded without both public debate and due process of law. As it is now, most states implement prison servitude under a general requirement that able-bodied prisoners work, and not according to particularized sentences of hard labor.[417] Were courts to adopt the requirement, then, most states would be confronted with the choice of abandoning prison servitude or enacting legislation authorizing hard labor as a punishment. Legislation would entail an opportunity for public debate, legislative investigations, and political action.[418] Once authorized, servitude could be imposed only by courts, which are subject to the requirements of due process. Unless the legislature made the sentence mandatory, offenders would have a chance to argue that servitude was unduly severe or otherwise inappropriate for their particular crimes.

Furthermore, servitude could not be imposed as an incident to some other sentence. As it is today, convicted persons can be subjected to servitude because they are too poor to pay fines.[419] Under Kasson's resolution, servitude could be imposed only "in direct execution of a sentence imposing a definite penalty according to law."[420] Under this rule, poor Americans would not find themselves trapped in servitude for some reason other than punishment for the crime of

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imprisonment for failure to pay a fine. City of Chicago v. Kunowski, 139 N.E. 28, 29 (Ill. 1923).

[416] *See supra* text accompanying notes 57–64.

[417] *See* Raghunath, *supra* note 122, at 395, 397.

[418] *See id.* at 404.

[419] *See* Zatz, *supra* note 415, at 2 (discussing the concept of "debtors prisons").

[420] CONG. GLOBE, 39th Cong., 2d Sess. 324 (1867).

which they had "been duly convicted," for example failure to pay a criminal justice debt.[421] The fact that wealthy, as well as poor, offenders would serve a "definite penalty" of servitude might sharpen legislative and judicial deliberations about whether to impose hard labor as a punishment for crime.

One court has endorsed the sentencing requirement in dictum. A panel of the Fifth Circuit Court of Appeals asserted in *Watson v. Graves*[422] that "a prisoner who is not sentenced to hard labor retains his thirteenth amendment rights."[423] Judge Jacques Loeb Wiener, who wrote the opinion, did not provide any reasoning to support that conclusion, but it appears that he was influenced by the facts, which reflect some of the same evils that were targeted by contemporary Republicans. The case involved a jail that supplied convict laborers to local employers for a flat rate of $20 per day.[424] The plaintiffs, Kevin Watson and Raymond Thrash, volunteered for the program and were sent to work for the Sheriff's daughter and son-in-law, who ran a construction business employing only themselves and convict laborers. Watson and Thrash sometimes toiled for more than twelve hours per day, with no monitoring or even spot visits by official personnel.[425]

Judge Wiener labeled these facts "egregious" and "misanthropic," commenting that "[u]p to now this court believed, apparently naively, that in the last decade of the twentieth century scenarios such as the one now before us no longer occurred in county or parish jails of the rural South except in the imaginations of movie or television script writers."[426] Wiener did not connect this assessment to his discussion of the Thirteenth Amendment (he held that although the Punishment Clause did not apply, Watson and Thrash had failed to make out a violation because they freely chose to participate in the program and thus had not been subjected to servitude[427]), but the

[421] *Cf.* Birckhead, *supra* note 415, at 1638 (arguing that the Thirteenth Amendment is violated when people find themselves burdened with criminal justice debt and trapped in the system "because they lack the tools—such as a lawyer, transportation, or employment—necessary to successfully navigate it. When these individuals are convicted of a crime . . . they have not, in fact, been 'duly convicted,' as 'duly' is defined as 'correctly, fairly, legitimately, as required, or rightfully.'" (footnote omitted)).

[422] 909 F.2d 1549 (5th Cir. 1990).

[423] *Id.* at 1552.

[424] *Id*. at 1551.

[425] *Id*.

[426] *Id*. at 1550.

[427] *Id*. at 1552. It is not clear why the court concluded that Watson and Thrash, whose only alternative to laboring for the Sheriff's family was to remain in jail, had freely consented. As the Supreme Court made clear in *Reynolds*, the mere availability of a choice does not render servitude voluntary. *See* United States v. Reynolds, 235 U.S. 133 (1914) (striking down a criminal surety statute even though the statute merely gave the offender an additional option of signing a labor contract instead of working on the chain gang).

facts of *Watson* certainly reflected some of the evils targeted by Republican members of the Thirty-Ninth Congress. Not only was servitude inflicted without direction from the sentencing judge, but convicted persons were farmed out to private employers with no supervision from the state.[428] Far from the "ordinary imprisonment" contemplated by the Republicans, the work release program had become a labor market institution, directly competing with the free labor system. As Wiener observed in the portion of his opinion dealing with the Fair Labor Standards Act, the son-in-law "had at his disposal a 'captive' pool of workers whom he had only to pay token wages," and—as a result—other construction contractors could not compete with his prices.[429]

Unfortunately, *Watson*'s Thirteenth Amendment dictum was repudiated by Circuit Judge Edith Jones in *Ali v. Johnson*,[430] which—as noted above—upheld servitude imposed without a sentence of hard labor at the discretion of an administrative agency. "*Watson*'s statement about involuntary servitude," she wrote, "is an anomaly in federal jurisprudence."[431] It is true that the *Watson* court's dictum finds little support in other cases, but it is also true that the rule chosen by Jones, according to which the fact of a conviction forecloses a challenge to involuntary servitude,[432] directly contradicts everything we know about the framers' reading of their Amendment. Moreover, the jurisprudence supporting that rule rests on nothing more than conclusory assertions in cases brought by inmates who lacked counsel.[433] In only one of the cases Jones cited was the inmate represented by counsel, and the court in that case actually rejected Jones's broad reading of the Clause. In *Craine v. Alexander*,[434] a Fifth Circuit panel

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And, as the Court held in *Bailey*, a choice between labor and imprisonment does not render labor voluntary. *See* Bailey v. Alabama, 219 U.S. 219 (1911) (invalidating peonage law that gave the laborer a choice between continuing to perform a contract for labor or going to prison).

[428] As recounted above, contemporary Republicans objected to the leasing of persons to private employers, and Kasson read the Amendment to prohibit all servitude not "under the immediate control of officers of the law and according to the usual course thereof, to the exclusion of all unofficial control of the person so held in servitude." CONG. GLOBE, 39th Cong., 2d Sess. 324 (1867).

[429] *Graves*, 909 F.2d at 1555.

[430] 259 F.3d 317 (5th Cir. 2001).

[431] *Id.* at 318.

[432] *See id.* ("[F]orcing inmates to work without pay . . . [does] not violate the Thirteenth Amendment.").

[433] The other cited cases, all brought *pro se*, were Murray v. Mississippi Department of Corrections, 911 F.2d 1167–68 (5th Cir. 1990) (per curiam); Mikeska v. Collins, 900 F.2d 833, 837 (5th Cir. 1990); Plaisance v. Phelps, 845 F.2d 107, 108 (5th Cir. 1988); and Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963).

[434] 756 F.2d 1070 (5th Cir. 1985).

dismissed the inmate's challenge, but suggested that he might have prevailed had he alleged that labor was "forced upon him by a custom or usage of the state that is, at the same time, outside the scope of a corrective penal regimen."[435] To support the availability of such a claim, the court cited cases involving successful Thirteenth Amendment challenges to mandatory work requirements in a juvenile detention center and a state school for people with developmental disabilities.[436] In each of those cases, the Court looked past the fact of confinement to determine whether the particular work requirement actually served the purpose of institutionalization.[437] The *Craine* court's standard for a successful challenge, "outside the scope of a corrective penal regimen,"[438] might not require an explicit sentence of hard labor, but it is considerably more rigorous than the *Ali* court's blanket dismissal of protection for convicted persons.

Short of implementing the Kasson Resolution's sentencing requirement, it would seem that courts should at least comply with the existing requirement that, "[i]n the context of a guilty plea, a trial court must inform a defendant 'of the nature of the charges against him, of his right to be counseled regarding his plea, *and of the range of allowable punishments attendant upon the entry of a guilty plea*.'"[439] If involuntary servitude is a "punishment," as required by the Amendment, then people pleading must be informed whenever it can be inflicted, whether automatically or at the discretion of officials. Given that more than ninety percent of criminal convictions occur as the result of plea bargains, this might call attention to the widespread and indiscriminate infliction of servitude on offenders regardless of the severity of their crimes.

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[435] *Id*. at 1075.

[436] *See id*. (citing Jobson v. Henne, 355 F.2d 129, 132 (2d Cir. 1966); Santiago v. City of Philadelphia, 435 F. Supp. 136, 156–57 (E.D. Pa. 1977)).

[437] *See Jobson*, 355 F.2d at 132 (sending mental patient's claim of involuntary servitude to trial on the ground that a program of mandatory chores for mental patients might be "so devoid of therapeutic purpose, that a court justifiably could [find] involuntary servitude"); *Santiago*, 435 F. Supp. at 156–57 (rejecting motion to dismiss Thirteenth Amendment claim, reasoning that "[d]eclaring that juveniles confined at YSC are prisoners or civilly committed persons should not control the outcome," and that the determination whether work assignments were appropriate to "the justification for confining juveniles" required "a full record").

[438] Craine v. Alexander, 756 F.2d 1070, 1075 (5th Cir. 1985).

[439] United States v. Feliciano, 498 F.3d 661, 665 (7th Cir. 2007) (quoting Iowa v. Tovar, 541 U.S. 77, 81 (2004)) (emphasis added). I am indebted to Gabriel J. Chin for bringing this to my attention.

2. *Punishment Too Harsh for the Particular "Crime Whereof the Party Shall Have Been Duly Convicted"*

Somewhere along the way, Americans have abandoned the Republican understanding that the involuntary servitude permitted by the Amendment is, at least presumptively, a severe punishment.[440] From the inmate's viewpoint, this seems obvious. It is one thing to be confined in a prison, with resulting loss of the right of locomotion, and something both additional and degrading to be placed at the disposal of others—like an animal, as Robert Crain IV put it.[441] Yet, modern courts uphold the infliction of servitude for misdemeanors, a category that includes such offenses as marijuana possession, disorderly conduct, and loitering.[442] And, as noted above, courts hold that the Amendment permits states to impose servitude on all prisoners across the board without regard to the severity of the offense.[443] Indeed, some petty offenders are forced to work because, unlike others convicted of the same crimes and sentenced to the same minor punishments, they lack money to pay off their fines.[444] Under a Republican approach, such policies would, at a minimum, trigger critical scrutiny. To reach this result, it would be necessary to set aside the *Reynolds* Court's dictum approving the imposition of forced labor to work off fines and penalties, a dictum that, as noted above, appears to conflict with the functional approach of *Bailey* as well as *Reynolds* itself.[445]

3. *Servitude in the Employ or for the Benefit of Private Businesses*

Contemporary Republicans maintained that the Amendment "recognizes no involuntary servitude, except to the law and to the officers of its administration," and objected to the leasing of convicted persons for any length term.[446] Kasson went further, holding that the

[440] On the Republican understanding, see *supra* notes 57–64 and accompanying text.

[441] *See supra* note 399 and accompanying text.

[442] *See, e.g.*, Howerton v. Mississippi Cty., 361 F. Supp. 356, 363–64 (E.D. Ark. 1973) (upholding constitutionality of servitude as punishment for a misdemeanor).

[443] *See supra* text accompanying notes 5–7. Prison labor is no longer calibrated to particular crimes. Instead, it is justified either as rehabilitation, appropriate for all offenders, or on "the belief that prisoners [are] a separate group deserving only punishment and deprivation," again without regard to the severity or nature of the offense. Leroy D. Clark & Gwendolyn M. Parker, *The Labor Law Problems of the Prisoner*, 28 RUTGERS L. REV. 840, 841 (1975); *see* Raghunath, *supra* note 122, at 413–17 (explaining and documenting this view).

[444] *See* Zatz, *supra* note 341, at 6–7.

[445] *See* United States v. Reynolds, 235 U.S. 133, 149 (1914); *supra* notes 274–80 and accompanying text.

[446] CONG. GLOBE, 39th Cong., 2d Sess. 344 (1867); *see id.* at 239 (statement of Sen. Sherman); *id*. (statement of Sen. Creswell); *supra* notes 57–61, 106, 187, and accompanying text.

Amendment permitted only servitude "within the walls of prisons, and within the [sole] jurisdiction of the law and the officers of the law" and the Reconstruction legislature of Louisiana outlawed inmate servitude "outside the prison walls" in 1875.[447] Thomas Cooley echoed Kasson in *Constitutional Limitations*, suggesting that the Amendment would not "permit the convict to be subjected to other servitude than such as is under the control and direction of the public authorities, in the manner heretofore customary."[448] On this point, Kasson and Cooley prefigured the present-day international standard, which permits prison servitude only where the work "is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations."[449]

Like convict leasing, the private prison industry runs afoul of this principle.[450] Private prisons take full custody of offenders, enjoy the privilege of forcing them to work for little or no compensation, and work assiduously to shield company operations from public scrutiny.[451] Also like convict lessees, private prisons spend as little as possible on the care and rehabilitation of inmates in order to keep costs low and profits high.[452] Not coincidentally, private prisons experience higher rates of safety and security incidents than public prisons.[453] In contrast to convict lessees, private prisons seek inmates not primarily

[447] Cong. Globe, 39th Cong., 2d Sess. 344–45 (1867); Cardon, *supra* note 195, at 428–29.

[448] Cooley, 2d ed., *supra* note 209, at 319.

[449] Convention Concerning Forced or Compulsory Labour, art. 2, ¶ 2(c), *adopted* June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932); *see* Faina Milman-Sivan, *Prisoners for Hire: Towards a Normative Justification of the ILO's Prohibition of Private Forced Prisoner Labor*, 36 Fordham Int'l L.J. 1619, 1620 (2013) (recounting that the Convention outlawed convict leasing as practiced in the United States).

[450] *See* Hallett, *supra* note 342 (describing similarities between convict leasing and present-day private prisons); White, *supra* note 257, at 137–44 (analyzing various similarities between convict leasing and private prisons that result from the blurred line between state and private control).

[451] *See* Gottschalk, *supra* note 346, at 72 ("Private prisons and corrections services are subject to even less accountability and scrutiny than public ones."); Hallett, *supra* note 342, at 34 (noting that private prison authorities "are less accountable and indeed less visible to citizens than their public prison counterparts," and that they protect themselves from public scrutiny by claiming that information concerning their operations is "proprietary").

[452] *See* Hallett, *supra* note 342, at 51 (observing that the incentive structure for both private prisons and convict lessees "was to spend as little as possible on inmates in order to keep profits at their highest level").

[453] *See* Evaluation and Inspections Div. 16-06, U.S. Dep't of Justice, Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons, at ii, 21 (2016) (concluding that "contract prisons incurred more safety and security incidents per capita than comparable BOP institutions," and reporting that even though private prisons cherry pick low-risk inmates, they were nine times more likely to lockdown their facilities); *see*

for their labor, "but for their bodily ability to generate per diem payments for their private keepers."[454] It is for that feature that prisoners are now traded in interstate and international markets.[455] Nevertheless, prison servitude remains integral to the private prison business model, which depends on unpaid or cut-rate labor to minimize costs.[456]

Unlike private prisons and convict leasing, today's prison industrial programs run the gamut from private to official control over inmate labor.[457] Whether private businesses supervise workers or merely purchase their output, however, all such programs arguably violate the Republicans' core principle that prison servitude passes constitutional muster only when inflicted as punishment, and not for other purposes. Indeed, punishment is rarely mentioned in connection with prison industries; instead, they are touted or criticized in terms of rehabilitation, revenue raising, and profit generation. "Despite the statutory language articulating a rehabilitative purpose," concluded a 1979 Department of Justice study, "the statutory provisions reviewed indicate that the primary benefit from the establishment of prison industries is to be derived by the state."[458] In 1985, the National Institute of Justice publicly recommended that convict labor be placed at the disposal of private businesses not for the purpose of punishment but to raise revenue, framed as recouping costs from prisoners who were not "paying their 'debt' to society."[459] Prosperous inmates could avoid servitude by paying in cash, but those unable to pay would be

also GOTTSCHALK, *supra* note 346, at 70 ("Studies indicate that, all things being equal, private facilities tend to be more dangerous places for inmates and correctional officers.").

454 HALLETT, *supra* note 342, at 3–4, 133.

455 *See* Benjamin Levin, *Inmates for Rent, Sovereignty for Sale: The Global Prison Market*, 23 S. CAL. INTERDISC. L.J. 509 (2014).

456 This aspect of private prisons receives little attention because it does not distinguish them from public prisons.

457 *See* Stewart, *supra* note 351, at 1–3 (describing numerous programs involving varying levels of private involvement).

458 NAT'L CRIMINAL JUSTICE REFERENCE SERV., STUDY OF THE ECONOMIC AND REHABILITATIVE ASPECTS OF PRISON INDUSTRY: VOL. IV: PRISON AND STATUTES 6 (1978); *see also* Gordon Lafer, *The Politics of Prison Labor: A Union Perspective*, *in* PRISON NATION: THE WAREHOUSING OF AMERICA'S POOR 120, 125 (Tara Herivel & Paul Wright eds., 2003) (observing that "prison work programs themselves are not operated along job-training lines" and that "[e]ven those prisoners who do pick up skills often are being trained in jobs that do not exist, or do not pay living wages, in the free economy").

459 Stewart, *supra* note 351, at 1. As additional benefits, it would improve prison efficiency and provide inmates with skills. *Id.*; *see also* Levingston, *supra* note 351, at 55 (describing how officials quell taxpayer concern of prison costs by shifting costs onto prisoners).

compelled to work by one device or another.[460] Today, states market their unfree workforces to private employers, urging that they can help to "reduce costs, increase profits, and return operations from offshore."[461] In recent years, prison laborers have toiled for private corporations performing such functions as staffing corporate call-in centers, cleaning up toxic waste, and sewing clothing.[462] Although such programs remain too small to influence national or regional labor markets, they can exert substantial influence on local markets.[463]

Courts have rejected constitutional challenges to forced labor in both prison industrial programs and private prisons on the general principle that the Thirteenth Amendment "has an express exception for *persons* imprisoned pursuant to conviction for crime."[464] Applying that principle, it makes no difference whether the excepted person is incarcerated in a public or private prison,[465] forced to work for a public or private employer,[466] or employed on public or private prop-

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460 The report did not spell out this result, but it necessarily follows from the use of the debt mechanism. *See generally* Zatz, *supra* note 415 (summarizing the law of criminal justice debt and the various methods of compelling labor to ensure payment).

461 LeBaron, *supra* note 352, at 168 (discussing the California Prison Industries Authority's marketing of prisoner labor to private firms); *see also* Goodwin, *supra* note 8, at 969 (reporting the federal Bureau of Justice Assistance's former characterization of the federal Prison Industry Enhancement Certification Program as private businesses contracting with local correctional authorities for "low-cost labor").

462 *See* Zatz, *supra* note 138, at 868; Stewart, *supra* note 351, at 3; Abe Louise Young, *BP Hires Prison Labor to Clean Up Spill While Coastal Residents Struggle*, NATION (July 21, 2010), https://www.thenation.com/article/bp-hires-prison-labor-clean-spill-while-coastal-residents-struggle; Emily Yahr, *Yes, Prisoners Used to Sew Lingerie for Victoria's Secret – Just Like in 'Orange is the New Black' Season 3*, WASH. POST (June 17, 2015), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/06/17/yes-prisoners-used-to-sew-lingerie-for-victorias-secret-just-like-in-orange-is-the-new-black-season-3.

463 GOTTSCHALK, *supra* note 346, at 61.

464 Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (emphasis added).

465 *Id.*; Lambert v. Sullivan, 35 F. Supp. 2d 1131, 1133 (E.D. Wis. 1999) ("[T]he same rule applies regardless of whether the convict is incarcerated in a public or private facility."). To support the latter point, the *Lambert* court cited Ira Robbins's ABA-commissioned study suggesting that, in light of the void of Thirteenth Amendment challenges to nineteenth-century convict leasing, "it would seem irrelevant whether prisoners worked for publicly or privately owned facilities," Robbins, *supra* note 213, at 607, but neglected to note that on the next page Robbins observed that the Amendment could nevertheless be used to prohibit forced labor in private prisons and that, judging from the nineteenth-century experience, "[a] strong policy argument could be made that such an arrangement would act as an incentive for abusing and exploiting prisoners." *Id.* at 608.

466 *See, e.g.*, Patterson v. Oberhauser, 331 F. Supp. 220, 221 (C.D. Cal. 1971) (dismissing Thirteenth Amendment claim involving prisoner's employment by private employers).

erty.[467] No doubt, the courts that issued these rulings were unaware that they were choosing to apply the principle favored by the Amendment's Democratic opponents and rejecting the contemporary Republican understanding that the Punishment Clause excepts certain instances of *servitude*, not *persons*. Applying that approach, private involvement raises the suspicion that servitude may be imposed and implemented not as a punishment, but as a means of generating public revenue and private profit.

D. *Mass Incarceration and the Badges and Incidents of Slavery*

Any Thirteenth Amendment challenge to the treatment of convicted offenders necessarily raises two questions: First, does the challenged practice violate the prohibitory clause? And second, is the practice excepted from the prohibitory clause by the Punishment Clause? Thus far, we have discussed the Punishment Clause issue only in relation to what would otherwise be a clear violation of the prohibitory clause: prison servitude. But the Thirteenth Amendment extends more broadly to the so-called "badges and incidents of slavery." Under that doctrine, it reaches racial classifications and, arguably, other caste distinctions that resemble race.[468] This raises the question whether, under a Republican reading of the Punishment Clause, the Amendment might prohibit aspects of mass incarceration other than forced labor.

William Carter and Taja-Nia Henderson have suggested that the imposition of post-carceral disabilities such as felony disfranchisement, employment discrimination, and housing discrimination constitute badges or incidents of slavery.[469] As Henderson explains, such "collateral consequences" do not fall under the Punishment Clause because it applies only to criminal sanctions and not to "civil, regulatory, or private discriminatory treatment of formerly convicted

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[467] *See* Murray v. Miss. Dept. of Corr., 911 F.2d 1167, 1168 (5th Cir. 1990) (per curiam) ("[W]e can find no basis from which to conclude that working an inmate on private property is any more violative of constitutional or civil rights than working inmates on public property.").

[468] *See, e.g.*, Carter, *supra* note 92, at 1371–72 (religion); Pope, *supra* note 14, at 478–79 (gender); *see also supra* text accompanying notes 364–66 (suggesting that some aspects of mass incarceration could be challenged on the theory that some policies and practices that exert a racially disparate impact on African Americans constitute badges or incidents of slavery banned by the Amendment).

[469] William M. Carter, Jr., *Class as Caste: The Thirteenth Amendment's Applicability to Class-Based Subordination*, 39 SEATTLE U. L. REV. 813, 815, 825 (2016); Henderson, *supra* note 370, at 1150–51; *see also* Darrell A.H. Miller, *A Thirteenth Amendment Agenda for the Twenty-First Century: Of Promises, Power and Precaution*, *in* THE PROMISES OF LIBERTY, *supra* note 14, at 291, 294–95 (proposing that Congress could prohibit felon disfranchisement under authority of the Thirteenth Amendment).

people."[470] Accordingly, these scholars focus on the question whether collateral consequences violate the prohibitory clause (Carter) or fall within Congress's power to enforce the Amendment (Henderson). Carter suggests that the "status of having been incarcerated" functions as a badge of slavery, much as blackness did in the antebellum South. Where non-whiteness formerly "defin[ed] one's status before the law for all time, with no possibility of redemption as a member of civil society,"[471] a record of imprisonment operates similarly today. The tainted individual experiences what Gabriel (Jack) Chin has called "civil death," the loss of vital rights and protections taken for granted by other citizens.[472] The result is "a permanent caste distinction of such magnitude and impermeability as to arguably amount to a badge or incident of slavery."[473] In effect, the status of having been incarcerated might define a new, functionally racial classification, as pithily suggested by the saying "orange is the new black."

By limiting his challenge to collateral consequences, Carter avoids a confrontation with the Punishment Clause. His legal theory could, however, extend to various carceral practices as well if present-day Americans were to embrace the contemporary Republican reading of the Clause. As a practical matter, the caste that he identifies and challenges is formed not at the moment of release, when collateral consequences kick in, but at the moment of conviction, when—according to the contemporary Democratic reading now embraced by most courts—the *person* loses protection against enslavement and involuntary servitude. Civil death follows immediately, as the person becomes available for exploitation and degradation at the discretion of legislatures, administrative agencies, and prison officials. Not only can they be forced to work, but they become a thing, a chattel, a tool to be used for the benefit of others as a captive consumer, captive

470 Henderson, *supra* note 370, at 1180.

471 Carter, *supra* note 469, at 826; *see also* ALEXANDER, *supra* note 340, at 94 ("Once a person is labeled a felon, he or she is ushered into a parallel universe in which discrimination, stigma, and exclusion are perfectly legal, and privileges of citizenship such as voting and jury service are off-limits."); Levin, *supra* note 455, at 547 ("The new penology . . . embraces a total separation of prisoner from society, drawing stark lines between the community, and a new subclass or underclass of criminals.").

472 Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790–91 (2012). For a list of disabilities, see *id*. at 1810. While Chin addresses only officially imposed facial disabilities, Henderson focuses on private discrimination in employment and housing. *See* Henderson, *supra* note 370, at 1148–49.

473 Carter, *supra* note 469, at 825; *see also* George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of* Infamia, 46 UCLA L. REV. 1895, 1898 (1999) (suggesting that criminal disfranchisement brands felons "as the untouchable class of American society").

tenant, and ticket to public money.[474] If they try to organize in response, they face punishment.[475] Worse yet, year after year and decade after decade, judges deliberately and with the full panoply of law sentence even petty offenders to confinement in facilities where they daily face a substantial risk of severe, illegal violence.[476] Far from an anomalous departure from civilized norms, such violence has become—according to legal scholar Ahmed White—"constitutive of the social order of the prison," the "means by which authority, hierarchy, and privilege are articulated among prisoners and between prisoners and their keepers."[477]

The theory that convict race amounts to a badge or incident of slavery raises questions beyond the scope of this article. The point here is simply that the Punishment Clause does not preclude its acceptance. Under a Republican reading, convicted persons would be left with some quantum of rights that—at a bare minimum—would enable them to challenge exploitative and degrading practices unconnected to the crime of which the party has "been duly convicted."[478] If, but for the Punishment Clause, a given deprivation selectively imposed on convicted offenders would constitute a badge or incident of slavery, then—under a Republican reading of the Clause—it would violate the Amendment unless justified "as a punishment for crime whereof the person shall have been duly convicted." Official tolerance of private rape and assault, for example, was integral to the master-slave relation (and thus arguably a badge or incident of slavery) and would be difficult to justify as a punishment for crime.[479]

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474 *See supra* notes 351–55 and accompanying text.

475 *See, e.g.*, Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 121, 130–34 (1977) (rejecting First Amendment challenge to a prison policy banning inmates from soliciting membership in a prisoners' union, holding union meetings, or receiving bulk union mailings, while imposing no such restrictions on other membership organizations in the prison, reasoning that the prisoners had failed to prove that the policy was unreasonable).

476 Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 STAN. L. REV. 71, 124–25 (2019) (reporting, e.g., *annual* rape rates of 3.6% to 4.0% (34 to 40 times the non-prison rate)); RACHEL E. MORGAN & JENNIFER L. TRUMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 252472, CRIMINAL VICTIMIZATION, 2017, at 3 (2018) (giving sexual assault statistics for non-prison population).

477 Ahmed A. White, *The Concept of "Less Eligibility" and the Social Function of Prison Violence in Class Society*, 56 BUFF. L. REV. 737, 738, 773 (2008).

478 *See supra* Section III.C.

479 *See* Ghali, *supra* note 375, at 641–42 (arguing that sexual slavery in prison falls outside the Punishment Clause); Gifford, *supra* note 476, at 113–16 (presenting moral, consequential, and legal reasons why the criminal victimization of inmates cannot be justified as "part of the punishment").

Conclusion

Judging from present-day legal and popular discourse, one might think that the Thirteenth Amendment's Punishment Clause has always had one single, clear meaning: that a criminal conviction strips the offender of protection against slavery or involuntary servitude. Upon examination, however, the meaning of the clause was hotly contested at the outset. Like General Morgan, whose quotation commenced this article, ex-Confederates and their Democratic allies in Congress promoted the interpretation that prevails today. From their point of view, the text clearly specified that, once convicted of a crime, a person could be sold into slavery for life or leased for a term at the discretion of state legislatures and officials. But contemporary Republicans unequivocally rejected that reading. They held that a convicted person retained protection against any slavery or servitude that was inflicted not as a punishment for crime, but for some non-penological end such as raising state revenue, generating private profits, or subjugating black labor. They questioned the substance of state criminal policy (for example, imposing servitude on black people but not white people, or on offenders whose crimes were not serious enough to warrant servitude), the ways in which servitude was implemented (for example, placing offenders under the control of private masters outside prison walls), and the process by which individuals were condemned to servitude (for example, without an official sentence to hard labor). Applying this critical approach, they overrode the Democratic opposition and enforced their reading in the Civil Rights Act of 1866, which outlawed the early, race-based forms of convict leasing. When that proved insufficient, the House passed a bill outlawing race-neutral convict leasing, which the Senate postponed when the focus of Republican strategy shifted to black voting rights.

The Republican reading faded from view after the Democratic Party regained control of the Deep South states. For several decades, one party, white supremacist regimes incarcerated African-American laborers *en masse* and leased them to private employers without facing a serious Thirteenth Amendment challenge. Present-day scholars sometimes treat this silence as evidence that the Amendment, correctly interpreted, authorizes such practices. Courts similarly honor the Democratic reading on the assumption that it has always prevailed. So thoroughly has it triumphed that even prisoners' rights advocates accept it as constitutional truth.

Neither courts nor advocates have, however, taken into account the framers' views. Their interpretation sank from sight not because it was wrong, but because Democratic paramilitaries terminated

Reconstruction, paving the way for white supremacist state governments to expand convict leasing and insulate it against challenges, constitutional or otherwise. Had the Republican reading been implemented during the era of convict leasing, it might have prevented or shortened one of the most barbaric and shameful episodes in United States history. And perhaps, if revived today, it might yet accomplish similar results. Nothing in the text, original meaning, or Supreme Court jurisprudence of the Punishment Clause blocks that path. Whether to continue denouncing the Amendment or to reclaim it for prisoners' rights is, then, less a question of jurisprudence than of constitutional politics.[480]

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[480] *See* Roberts, *supra* note 4, at 9 (analyzing the potential role of constitutionalism in the movement to abolish the prison-industrial complex and presenting "an abolition constitutionalism that attends to the theorizing of prison abolitionists").