

Cinque, Joseph; Garrison, William Lloyd; Tappan, Arthur; the *Emancipator*; the *Liberator*; Underground Railroad

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Thirteenth Amendment

On December 18, 1865, Congress passed the Thirteenth Amendment, a Constitutional amendment that freed slaves nationally. Today, the Thirteenth Amendment arguably remains a little-used but potentially important federal power for enforcing civil rights against all vestiges of slavery that reincarnate as racial discrimination.

African American history is partly legal history, and constitutional law is at the heart of it. Although freedom is enshrined as a universal principle in the Declaration of Independence, the U.S. Constitution, in its original form, protected both slavery and liberty. This was as contradictory as it was paradoxical. Striking a compromise with delegates from South Carolina and Georgia at the 1787 Constitutional Convention in a pact-with-the-devil exchange for ratification (William Lloyd Garrison, America's leading abolitionist, stigmatized it as "an agreement with Hell"), several constitutional provisions preserved the institution of slavery: the Fugitive Slave Clause (barring free states from emancipating runaway slaves and requiring their return to their masters); the now-lapsed Slave Importation Clause (allowing the Atlantic slave trade to continue for 20 years, until 1808, by immunizing it from congressional action); and the Three-Fifths Clause (diminishing blacks to three-fifths the value of whites for numeration, thereby giving the South a disproportionate representation in the House of Representatives). The Importation Clause was not truly a sunset clause because it contained no express prohibition of slavery. Even passage of the Bill of Rights (the First through Tenth Amendments) in 1791 failed to attenuate, much less

eliminate, the original Constitution's protections of slavery. This changed in 1865. The Thirteenth Amendment abolished slavery and thus radically altered the Constitution, as part of what some legal scholars call the "Second Constitution." Ironically, ratification of the Thirteenth Amendment marked the first time that the word "slavery" appeared in the Constitution, even though the Constitution explicitly protected slavery.

Abolition of slavery is not freedom from all oppression. Slavery's roots are deep in American history and are not yet fully extirpated. Racism is a ghost of the slaver's psyche, and legislation alone cannot transform human behavior. Yet the Thirteenth Amendment empowered the government to strike down any legislation that abridges liberties on the basis of race. But this was not always so. Originally known as the Abolition Amendment, its intent was to give practical effect to the Declaration of Independence's self-evident truths "that all men are created equal; that they are endowed by their creator with certain unalienable rights; that among these, are life, liberty, and the pursuit of happiness." Of course, such *unalienable* rights did not extend to *aliens* (non-citizens), which is why the Fourteenth Amendment (1868) had to precede the Fifteenth, by granting citizenship to anyone born or naturalized in the United States. Grounded in liberty and equality principles, the Thirteenth Amendment bans involuntary labor except as punishment for a crime, and it authorizes Congress to pass laws rationally tailored to extinguish all traces of slavery.

Under Section 2, which legal scholars call the Enforcement Clause, the Thirteenth Amendment was also supposed to eradicate any vestiges of forced labor. Thus, to enforce the Thirteenth Amendment, Congress quickly passed the Civil Rights Act of 1866 (over President Andrew Johnson's veto), the Slave Kidnapping Act of 1866, the Peonage Act of 1867, and the Judiciary Act of 1867. But a series of Supreme Court decisions during Reconstruction effectively emasculated the amendment, through crabbed interpretation and curtailed application. With the splendid exception of peonage cases, the Thirteenth Amendment remained a dead letter under such segregationist Supreme Court rulings as *Plessy v. Ferguson*, which used color as a badge for discrimination while professing an "equal but separate" doctrine. One reason for this is that the Thirteenth Amendment was deficient in that it lacked any formal recognition of equality under the law. This defect would later be cured by

enactment of the Equal Protection Clause under the Fourteenth Amendment.

The Thirteenth Amendment is far more than an emancipation law. Through its enforcement power, it is also a civil rights instrument, although rarely used. The social transformation that the framers of the Thirteenth Amendment had envisioned could be achieved only where the federal government could enforce freedom. Sadly, it took over a century for the Supreme Court to discover in the Thirteenth Amendment a fresh constitutional source of power for enforcing certain civil rights. The landmark decision of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), restored the civil rights value of the amendment and transformed it into a potentially potent civil rights instrument. *Jones* established Congress's power to enact legislation against private racial discrimination. It did so by empowering Congress to pass laws that prevent any intrusions on liberty that are "rationally related" to slavery, thus providing a new and powerful basis for federal legislation barring race discrimination.

There are lessons to be learned from the role of the Thirteenth Amendment in African American history. Alexander Tsesis, who may be today's leading authority on the Thirteenth Amendment, observes that each new generation must reexamine the nation's past, its core documents, and its moral progress as a constitutional democracy. Tsesis argues that the Thirteenth Amendment offers a more forthright warranty of freedom than other constitutional provisions on which the Supreme Court has relied. And beyond the amendment's role in barring racist labor practices, Tsesis advocates a progressive legal theory that legislatively and judicially expands the power of the Thirteenth Amendment to curb all coercive practices and repressive conduct rationally related to abridgments of freedom. Congress has virtual plenary power to protect individual rights under the Thirteenth Amendment. Yet this legislative power remains largely untapped. The Supreme Court, moreover, has yet to fully consider what freedoms Congress may protect pursuant to the Thirteenth Amendment. Judicial analysis under the Thirteenth Amendment asks the question, Is the act or law an incident or badge of servitude? An answer of "yes" to this constitutional test should trigger the Thirteenth Amendment's enforcement power. The Thirteenth Amendment has transformed the Declaration's national aspiration for freedom and equality by abolishing the Constitution's protections of slavery—thereby establishing federal power to enforce civil rights against all recrudescing vestiges

of slavery that (as stated previously) reincarnate as racial discrimination.

See also: Abolition, Slavery; Lincoln, Abraham; Radical Republicans

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Three-Fifths Compromise

The three-fifths compromise is a term that refers to the taxation and apportionment accommodation reached between Northern and Southern states at the Philadelphia Convention of 1787. Under it, each slave counted as three-fifths of a person for purposes of direct taxation and apportionment of the House of Representatives.

The Philadelphia Convention met under the rubric of an effort to devise amendments to the Articles of Confederation. Proposed in 1777 as a charter for the Revolutionary union of the states, the Articles seemed inadequate to Federalists from the beginning. Even before their ratification, leading figures such as George Washington, James Madison, Robert Morris, and John Jay favored a stronger union. Thus, when the Convention assembled, Madison was prepared. Through its spokesman, Governor Edmund Randolph, the Virginia delegation presented the Virginia Plan, a proposal