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## **Amicus Curiae Brief: Private For Profit Incarceration Violates the 13th Amendment of the United States Constitution**

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7  
8 **UNITED STATES DISTRICT COURT**  
9 **DISTRICT OF ARIZONA**

10 Jeffrey Nielsen and Brian Boudreau on  
11 behalf of themselves and all others  
12 similarly situated; and Arizona State  
13 Conference of the National Association for  
14 the Advancement of Colored People, as an  
15 organization and on behalf of its members,

16 Plaintiffs,

17 v.

18 David Shinn, Director, Arizona  
19 Department of Corrections, Rehabilitation  
20 & Reentry, in his official capacity,

21 Defendant.

Case No. 2:20-cv-01182-PHX-DLR(JZB)

**AMICUS CURIAE BRIEF  
OF LAW PROFESSORS AND LAW  
STUDENTS FROM ARKANSAS**

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1 **INTRODUCTION**

2 The Thirteenth Amendment to the United States Constitution outlawed chattel  
3 slavery in the United States following a violent Civil War and a chilling era of slavery  
4 conducted primarily in the nation’s southern states. In passing this Amendment,  
5 Congress included a clause that excepted a certain population from this general  
6 prohibition, namely, prisoners. In what has become known as the “punishment clause,”  
7 Section I of the Thirteenth Amendment states explicitly “Neither slavery nor involuntary  
8 servitude, *except as a punishment for crime whereof the party shall have been duly*  
9 *convicted*, shall exist within the United States, or any place subject to their jurisdiction.”  
10 U.S. Const. amend. XIII (emphasis added). Amici here argue that the Thirteenth  
11 Amendment intended to end private chattel slavery, full stop; the Thirteenth  
12 Amendment’s punishment clause was never intended to support, enable or promulgate  
13 private, for-profit re-enslavement of American citizens.

14 Despite this intention of the Thirteenth Amendment to end private for-profit  
15 chattel slavery, the punishment clause has regrettably evolved into a loophole that has  
16 allowed and continues to allow American prisoners to be re-enslaved by private parties  
17 and corporations for money. Southern states in the 1800 and 1900s discovered ways to  
18 avoid this prohibition by enacting laws that bastardized the punishment clause, allowing  
19 re-enslavement of newly freed Black Americans. This re-enslavement by private profit  
20 centers took the form of southern state Black Codes and Convict Leasing. Today, in the  
21 21st century, this private profit center re-enslavement has taken the form of private  
22 corporations like CoreCivic, the GEO Group, and others usurping the government  
23 function of citizen incarceration and are maximizing profits from the bodies of prisoners  
24 and the prison labor that these prisoners engage. Both Black Codes and Convict Leasing  
25 violated the Thirteenth Amendment (as evidenced by Congressional prohibitions through  
26 later legislation, like the Civil Rights Acts of 1866 and 1875).

27 Today, this bastardization of the punishment clause continues, through the likes of  
28 private, for-profit prison corporations that treat prisoners as commodities and profit from

1 their often-free labor in violation of the Thirteenth Amendment. Private prison  
2 corporations violate the Thirteenth Amendment by enslaving prisoners for profits.

3 Amici note here that the Amended Complaint plainly states Thirteenth  
4 Amendment claims in the alternative: First, that the prohibition of slavery is absolute; and  
5 Second, that private slavery is prohibited. This amicus curiae brief provides historical  
6 context for the Court's consideration of primarily the second claim; i.e., that the  
7 Thirteenth Amendment prohibits private slavery as punishment for a crime.  
8 Notwithstanding this, the state defendant argues in its Response Brief that the punishment  
9 clause strips all Thirteenth Amendment rights from prisoners (Doc. 41, p. 7), thereby  
10 sanctioning the practice of re-enslavement which sounds in chattel slavery and convict  
11 leasing. This reading of the punishment clause however, is not consistent with the  
12 historical context in which the Thirteenth Amendment was enacted nor is it coherent  
13 when compared to the intent, purpose, tone and prose from which the Thirteenth  
14 Amendment language was crafted, as demonstrated below. In fact, events before and  
15 after the passage of the Thirteenth Amendment demonstrate that the punishment clause  
16 language was understood to allow for public prison labor, *not* for the reintroduction of  
17 private slavery, the end of which was the very aim of the abolition amendment.

18 When confronted with two inconsistent interpretations of the punishment clause  
19 language, one supported by the state defendant arguing that the punishment clause strips  
20 all Thirteenth Amendment protections from prisoners and the other supported by  
21 plaintiffs and Amici arguing that the punishment clause was to allow for public prison  
22 labor, most likely temporarily, and not for the re-enslavement of freed Black Americans,  
23 the interpretation supported by history, intent, logic, and nearly all historians, including  
24 legal historians, should prevail. The Courts (and Congress) must recognize this truth and  
25 close the punishment clause loophole by staying true to the Thirteenth Amendment's  
26 prohibition of private chattel slavery through ending for-profit incarceration.

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## ARGUMENT

**I. The Thirteenth Amendment, through the punishment clause, was never intended to promote, enable or allow private for-profit incarceration.**

Legal historians agree that the Thirteenth Amendment to the U.S. Constitution as enacted was inspired by the language from the Northwest Ordinance of 1787 and Thomas Jefferson's vision as outlined in his proposed Land Ordinance of 1784. Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (New York, 2019) 45. Therein, Jefferson imagined an evolving nation where slavery would be barred in all new territories but that included an expectation that involuntary labor could be used as punishment for crimes duly convicted. Thomas Jefferson, William Peden, *Notes on the State of Virginia, ed.* (New York, 1954), 138. Christopher R. Green, "Duly Convicted: The Thirteenth Amendment as Procedural Due Process, *GJLP*, 15 (2017), 80. As a devotee of Enlightenment prison reform, historians agree that Jefferson believed labor was good for character and that hard labor as punishment for crime could serve two functions, deterrence and rehabilitation. Thomas Jefferson, David Konig, *Jefferson's Legal Commonplace Book (Papers of Thomas Jefferson, Second Series)* (2019).

Therefore, the drafters of the Thirteenth Amendment and its punishment clause clearly intended to mimic the tone and purpose of the Northwest Ordinance of 1787 by straightforwardly ending slavery. Cong. Globe, 38<sup>th</sup> Congress., 1<sup>st</sup> Session 1488 (1864). Based on Jefferson's original vision of prohibiting slavery as written into his proposed Land Ordinance of 1784, with that language then migrating directly into the Northwest Ordinance of 1787, and such language eventually becoming the exact expression of the Thirteenth Amendment, it is extremely difficult to imagine that the drafters intended for the punishment clause to become a loophole to re-establish private chattel slavery. In truth, it is unfathomable that the original intention of the drafters of the Thirteenth Amendment, whose language was expressly anchored in the Northwest Ordinance and

1 the proposed Land Ordinance, was to tolerate newly freed Black Americans to be  
2 imprisoned and then summarily re-enslaved.

3 Further, historical evidence exists that both businessmen of the South and  
4 merchants of the North, following the devastation of the Civil War, desperately needed  
5 labor to rebuild the burned out South following enactment of the Thirteenth Amendment.  
6 Eric Foner, *Reconstruction: America's Unfinished Revolution* (Updated Edition. New  
7 York, 2002) 1863-1877. Therefore, a logical assumption at the time of the passage of the  
8 Thirteenth Amendment is that the punishment clause could have been included to allow a  
9 temporary labor pool to be developed through prisoners, who could then rebuild the  
10 broken down and burned-out industries of the South following its defeat in the Civil War.

11 **A. As borrowed from the Northwest Ordinance, the punishment clause of the**  
12 **Thirteenth Amendment was intended to serve a rehabilitative purpose.**

13 The drafters of the Thirteenth Amendment borrowed the punishment clause's  
14 language from the Northwest Ordinance. "There shall be neither slavery nor involuntary  
15 servitude in the said territory, otherwise than in punishment of crimes whereof the party  
16 shall have been duly convicted." U.S. Const. amend. XIII; Larry Ceplair, *ed., The Public*  
17 *Years of Sarah and Angelina Grinke: Selected Writings* (New York, 1989) 1835-2839,  
18 194-95; William Yates, *Rights of Colored Men to Suffrage, Citizenship and Trial by Jury*  
19 (Philadelphia, 1838); Manisha Sinha, *The Slave's Cause: A History of Abolition* (New  
20 Haven, 2016), 462; *The Constitution of the American Anti-Slavery Society: with the*  
21 *Declaration of the National Anti-Slavery Convention at Philadelphia, 1833* (New York,  
22 1838), 7.; Martha S. Jones *Birthright Citizens: A History of Race and Rights in*  
23 *Antebellum America* (New York, 2018), 1-8. Historians agree that Thomas Jefferson  
24 drafted the ordinance's anti-slavery language, intending to end the slave trade. The  
25 punishment clause likely emulated his Enlightenment philosophy, with the idea of labor  
26 redeeming prisoner's souls. Thomas Jefferson, David Konig, *Jefferson's Legal*  
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1 *Commonplace Book (Papers of Thomas Jefferson, Second Series)* (2019). Thomas  
2 Jefferson copied the Northwest Ordinance’s punishment clause language from his then  
3 recently drafted Land Ordinance of 1784. This language likely modeled the Northwest  
4 Ordinance’s punishment clause after similar criminal systems Jefferson would have been  
5 familiar with at the time such as England’s “houses of corrections.” In fact, renowned  
6 Jefferson historians Peter Onuf and Alan Taylor refer to Jefferson’s prisoner exemption  
7 language as “boilerplate.” David R. Upham, “*The Understanding of ‘Neither Slavery Nor*  
8 *Involuntary Servitude Shall Exist, Before the Thirteenth Amendment,*” *GJLP*, 15 (2017),  
9 139; Charles Fairman, *Reconstruction and Reunion*, (1971) 1119; Christopher Green,  
10 “*Duly Convicted,*” *Georgetown Journal of Law & Public Policy*, Vol.15 (2017) 79-80;  
11 CG, 38<sup>th</sup> Congress, 1<sup>st</sup> Session, 1325. Francis N. Thorpe, *ed.*, *The Federal and State*  
12 *Constitutions* (Washington, 1909). Further, historians agree Jefferson believed that by  
13 “being forced to work within the institution, the prisoners were trained in a trade,” with  
14 the rehabilitative hope being that upon release, prisoners “would voluntarily flood the  
15 labor market.” Genevieve LeBaron, *Rethinking Prison Labor: Social Discipline and the*  
16 *State in Historical Perspective* (2012). Thus, historians claim that Jefferson included the  
17 punishment clause language as rehabilitative with the objective to avoid recidivism based  
18 on poverty related crimes. Eric Foner, *The Second Founding: How the Civil War and*  
19 *Reconstruction Remade the Constitution* (New York, 2019) 46-47. Jefferson hoped that  
20 released prisoners would have no need to steal again because they had learned to work in  
21 a trade during their time incarcerated and could prove serviceable members of society  
22 upon release. *Id.* Additionally, Jefferson believed that forced labor would not just help to  
23 rehabilitate criminals, it would also offer an alternative to less humane punishments such  
24 as branding, long term solitary confinement, and execution. Melossi, D., and M. Pavarini.  
25 *The Prison and the Factory: Origins of the penitentiary system.* (London, 1977).  
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28 With the above established, Thomas Jefferson could not have meant for, nor

1 intended for the possibility that slavery would be extended or perpetuated through the  
2 Thirteenth Amendment's punishment clause. Further evidence of this intention is that in  
3 Jefferson's publication "Notes on the State of Virginia," he outlined a detailed and  
4 gradual plan for eventual emancipation of slaves where those slaves would return to their  
5 home countries. William Peden, Thomas Jefferson, *Notes on the State of Virginia*, ed.  
6 (New York, 1954). Jefferson, therefore, could not have intended for freed Black  
7 Americans to be re-enslaved through a prison regime as at the time of the drafting of the  
8 land ordinance of 1784 and the Northwest Ordinance of 1787 Jefferson imagined that  
9 white and Black Americans would not peacefully co-exist believing that freed Black  
10 slaves would return to Africa and their nations of origin upon abolition of slavery.  
11 Brown, Ralph H. "Jefferson's Notes on Virginia." *Geographical Review* 33, no. 3 (1943)  
12 467-73. Thus, Thomas Jefferson in drafting the language that eventually became the  
13 Thirteenth Amendment with its attendant punishment clause, never could have intended  
14 for private chattel slavery to extend through the clause, as it eventually was extended  
15 through Black Codes, Convict Leasing, and later in the advent of 21<sup>st</sup> century private, for-  
16 profit prisons. Balkin, Jack M., and Sanford Levinson. "The Dangerous Thirteenth  
17 Amendment." *Columbia L. Rev.*, vol. 112, no. 7, (2012) 1459–1499.

18  
19       Thomas Jefferson drafted the punishment clause of the Thirteenth Amendment  
20 intending for prisons to allow rehabilitative labor; he never intended for slavery to be  
21 extended through the clause. Nicholas E. Magnis, *Thomas Jefferson and Slavery: An*  
22 *Analysis of His Racist Thinking as Revealed by His Writings and Political*  
23 *Behavior*. *Journal of Black Studies*, 29(4), 491-509. Additionally, of the four states that  
24 abolished slavery through their constitutions before Jefferson composed the Land  
25 Ordinance of 1784—Vermont, Pennsylvania, Connecticut, and Rhode Island—no  
26 mention was made in any of those states of involuntary labor as a punishment for crime.  
27 Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the*  
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1 *Constitution* (New York, 2012) 46. Neither Jefferson, nor the northern states that  
2 outlawed slavery before 1784, intended for slavery to be excepted for prisoners through  
3 the Thirteenth Amendment. Historians agree that Thomas Jefferson when drafting the  
4 language that would become the Thirteenth Amendment's punishment clause fully  
5 intended to abolish chattel slavery completely, and that for prisoners, forced hard labor  
6 could provide strong rehabilitative and deterrent incentives for those imprisoned. *Id.*  
7 Jefferson never intended that the language that would become the punishment clause  
8 would support slavery.  
9

10 **B. Evidence exists that some Southern Legislators and Northern Merchants viewed**  
11 **the punishment clause as a vehicle to enable free labor by using prisoners to assist**  
12 **the South in rebuilding following the Civil War.**

13       Following the Emancipation Proclamation, and shortly following, the Thirteenth  
14 Amendment ending chattel slavery throughout the entire United States, southern  
15 legislators and northern merchants worried incessantly about what they deemed to be two  
16 problems: first, upon what labor supply would the south rely to rebuild itself following  
17 the destruction inflicted during the Civil War; and second, and more importantly to the  
18 southern legislators and municipal leaders, how would they control the newly freed Black  
19 slaves and continue to uphold white supremacy in the face of a very large newly freed  
20 Black population. Christopher R. Adamson. *Punishment after Slavery: Southern State*  
21 *Penal Systems, 1865-1890*, 30 *Social Problems* 5, (1983) 555-569. For southern  
22 legislators, the answer to these two problems, a large and free labor market and the  
23 perpetuation of white supremacy and racial hierarchy, would be solved through the  
24 enactment of Black Codes and then a powerful expansion of the already existing and  
25 brutal Convict Leasing system. *Id.*  
26

27       Evidence exists to support the proposition that the punishment clause of the  
28 Thirteenth Amendment, while never intended to support, enable or uphold private for-

1 profit chattel slavery, was relied upon by southern lawmakers and northern merchants to  
2 use free prison labor as a means of rebuilding the south. *Id.*; Genevieve LeBaron,  
3 *Rethinking Prison Labor: Social Discipline and the State in Historical Perspective*  
4 (2012). Southern legislators most likely believed that re-enslavement through the Black  
5 Codes and Convict Leasing would enable them to control the large newly freed Black  
6 population, but in order to resolve the labor problem, both the south and the north relied  
7 upon the punishment clause to imprison many freed Blacks in order to use their labor to  
8 rebuild the destroyed south, including working on and rebuilding railroads, mines, fields,  
9 and cities. *Id.*; Christopher R. Adamson. *Punishment after Slavery: Southern State Penal*  
10 *Systems, 1865-1890,30 Social Problems 5, (1983) 555-569. Importantly then, while never*  
11 *intended to support the re-enslavement of newly freed Black slaves, one justification for*  
12 *the punishment clause through the eyes of rebuilding the south, could be that temporary*  
13 *usage of free slave labor as promulgated through the Thirteenth Amendment would be*  
14 *tolerated as the paid labor market was scarce upon conclusion of the Civil War and the*  
15 *prescription of slaves to rebuild would offer a solution needed in the late 1800s by*  
16 *necessity, but is no longer needed nor tolerable today. Christopher R. Adamson.*  
17 *Punishment after Slavery: Southern State Penal Systems, 1865-1890,30 Social Problems*  
18 *5, (1983) 555-569, Genevieve LeBaron, Rethinking Prison Labor: Social Discipline and*  
19 *the State in Historical Perspective, The Journal of Labor & Society (2012).*  
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22 **II. Northern Senators and Representatives' powerful reactions to the South's**  
23 **polluting of the Thirteenth Amendment provides strong evidence that it was never**  
24 **intended to support or allow private for-profit incarceration.**

25 Following the Emancipation Proclamation and enactment of the Thirteenth  
26 Amendment, legislators in the south quickly mobilized to control the slave labor pool that  
27 had just been freed and to concretize the racial hierarchy of white supremacy and black  
28 inferiority. Christopher R. Adamson. *Punishment after Slavery: Southern State Penal*

1 *Systems, 1865-1890, Vol. 30 Social Problems No. 5, (1983) 555-569. Black Codes were*  
2 *soon adopted throughout the south that criminalized the normal behavior of newly freed*  
3 *Black Americans who as suddenly free had nowhere to go or live, nothing yet to do, and*  
4 *no fair paid work prospects. These Black Codes criminalized vagrancy, loitering and*  
5 *unemployment, among many other minor crimes or simply normal behaviors. Eric*  
6 *Foner, *Reconstruction: America's Unfinished Revolution, 1863-1977* (Updated Edition,*  
7 *New York, 2002) 370. Once these never-before-criminalized behaviors were now*  
8 *characterized as crimes, like being homeless, not finding paid employment, or simply*  
9 *“hanging out,” these laws were mostly only enforced against African American citizens,*  
10 *and were harshly penalized, often charging free Black Americans with vagrancy and then*  
11 *sentencing them to hard labor over five or ten years for nothing more than loitering or*  
12 *failing to produce proof of adequate and paid employment. *Id.* Through the abhorrent*  
13 *adoption of Black Codes, the south was able to re-establish the racial hierarchy of white*  
14 *supremacy ensuring that Black Americans existed at the bottom and white Americans*  
15 *maintained their position at the top. Francis B. Simkins and Robert H. Woody, *South**  
16 **Carolina During Reconstruction* (Chapel Hill, 1932), 48-50.*

17 **A. Southern states adopt Black Codes using the Thirteenth Amendment's**  
18 **punishment clause as a loophole, to the horror of Northern legislators, to re-enslave**  
19 **newly freed Black Americans.**

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22 To achieve their twin purpose of securing a deep labor pool to rebuild the south  
23 and reaffirming white supremacy, southern legislators adopted punitive and ruthless  
24 Black Codes to control the large populations of newly freed slaves enforcing these laws  
25 only against Black Americans. Blackmon, Douglas A. *One Dies, Get Another: Convict*  
26 *Leasing in the American South* (South Carolina, 1996) 20-41. Once vast swaths of freshly  
27 freed former slaves were arrested for simply existing in the south through the pretextual  
28 crimes of vagrancy, loitering, unemployment, walking beside a railroad, and even talking

1 loudly while in the presence of a white woman, southern legislators were then not only  
2 able to re-establish the preexisting racial hierarchy, but through Convict Leasing were  
3 able to control a free labor pool to conduct the work that slaves had been formerly forced  
4 to perform. Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of*  
5 *Black People in America from the Civil War to World War II* (New York, 2008), 7. The  
6 pernicious Black Codes, however, did not escape notice of northern legislators who  
7 recognized that the very purpose of the Thirteenth Amendment was being circumvented  
8 by their legislative brethren in the south.  
9

10 In 1867, Iowa Representative John Adam Kasson exclaimed “[I]f states can  
11 impose Black Codes with impunity, then I demand to know of what practical value is the  
12 Amendment abolishing slavery?” Eric Foner, *The Second Founding* (New York, 2019)  
13 49. Representative Kasson recognized that southern legislators were thwarting the  
14 Thirteenth Amendment’s true purpose of abolishing slavery by using the punishment  
15 clause to re-enslave Black Americans. CG, 39<sup>th</sup> Congress, 2<sup>nd</sup> Session, 344-48. Indeed,  
16 southern Senators and Representatives were actively searching for loopholes to the  
17 Thirteenth Amendment and battling against the original intent of the Thirteenth  
18 Amendment drafters. To wit, a Georgia newspaper printed that the very ongoing  
19 existence of the south and its prosperity depended on “one single condition—the ability  
20 of the planter to command labor.” Eric Foner, *The Second Founding* (New York, 2019)  
21 49. This labor control was exacted through the Black Codes. Thereafter, the southern  
22 states proved to be successful in reinstating a “plantation like” system through prison  
23 labor slavery. Southern white slaveholders, despite passage of the Thirteenth  
24 Amendment, were not ready to let go of the vast wealth extracted through slave labor,  
25 and so craftily and nefariously developed a system of Black Codes and Convict Leasing  
26 thereby tainting and fouling the purpose and intent of the Thirteenth Amendment. Eric  
27 Foner, *Reconstruction, 1863-1877* (Updated Edition, 2002) 519.  
28

1 **B. Southern states massively expand Convict Leasing, paving the way for slavery by**  
2 **another name despite the Thirteenth Amendment' prohibition against slavery.**

3       Enactment of Black Codes were simply the first step in the plan of southern  
4 legislators to gain control of the newly freed Black labor pool and to continue the system  
5 of white supremacy that pervaded the south prior to the Thirteenth Amendment. The  
6 second step was to hugely expand the brutal system of Convict Leasing. Just as slaves  
7 were sold to the highest bidder under the just-abolished system of slavery, once the Black  
8 Codes enabled the south to imprison significant numbers of newly free-from-slavery  
9 Black Americans, thereafter, the states would then auction off to corporations, private  
10 parties, and merchants the labor of the recently imprisoned Black freemen, again, to the  
11 highest bidder. Joseph Logsdon, Horace White: *Nineteenth Century Liberal* (Westport,  
12 Conn., 1971), 263-67. Therefore, despite the clear and unquestionable intention of the  
13 Thirteenth Amendment to thoroughly and completely end slavery, southern politicians  
14 were able to re-enslave the very Black Americans that had just been freed by creating a  
15 loophole through the punishment clause.  
16

17       Stated another way, by criminalizing free Blacks and imprisoning them on false,  
18 fake, trumped up, or minor charges for long periods of time, and then leasing these  
19 prisoners to private parties for cash payments, slavery was reinstated in the south.  
20 Black prisoners worked for no pay, due to the punishment clause, as governments  
21 extracted large sums of money from private interests for the work of these Black  
22 prisoners, and private parties profited from this cheap labor, which often ended in the  
23 brutal deaths of these Black prisoners due to abhorrent work conditions. A. Elizabeth  
24 Taylor, "*The Origins and Development of the Convict Lease System.*" (1942) 339. When  
25 private contractors drove their cheap laborers to death, another numbered convict would  
26 be bid out to fill the vacancy. Historians argue that Convict Leasing was more brutal  
27 than slavery itself as private contractors had no incentive to keep the prisoners alive,  
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1 often working their convicted laborers to death. Lichtenstein, A. *Twice the work of free*  
2 *labor: The political economy of convict labor in the New South*. (London, 1996).

3 Northern merchants were also interested in developing this inexpensive labor pool.  
4 Following the Civil War, much industry and investment was needed in the south to  
5 rebuild and northern merchants worried along with southern legislators that the labor pool  
6 would be too shallow to move products and rebuild properly. Genevieve LeBaron,  
7 *Rethinking Prison Labor: Social Discipline and the State in Historical Perspective*.  
8 (2012). Thus, Convict Leasing solved the problem of a depleted labor market, due to the  
9 death of so many southern soldiers who might have provided labor and enabled northern  
10 merchants to profit while simultaneously providing the south with the tool it needed to  
11 reaffirm its racial hierarchy. *Id.*

12 Perhaps blindsided by Black Codes and Convict Leasing, northern legislators were  
13 shocked to see the Thirteenth Amendment circumvented and slavery by another name re-  
14 established in the south.

15  
16 **C. Northern legislators are aghast following successful passage of the Thirteenth**  
17 **Amendment that southern states reconstituted slavery through the punishment**  
18 **clause.**

19 Historians agree that most northern legislators failed to appreciate at the  
20 Thirteenth Amendment's drafting stage, how vehemently the southern legislators would  
21 seek to subvert and circumvent the abolishment of slavery. Timothy S. Huebner, *Liberty*  
22 *and Union: The Civil War Era and American Constitutionalism* (Lawrence, 2016), 323-  
23 47. After all, the south had just lost a war and had suffered enormous consequences  
24 weakening them politically. *Id.* Further, most northern legislators failed to perceive how  
25 the punishment clause in the Thirteenth Amendment might allow an end-around to the  
26 abolishment of slavery. Senator Charles Sumner of Massachusetts seemingly recognized  
27 the potential for mayhem in the punishment clause immediately and therefore proposed  
28

1 that the Thirteenth Amendment include the following language: “all persons are equal  
2 before the law, so that no person can hold another as a slave.” Cong. Globe, 38th Cong.,  
3 1st Sess. 1482 (1864); *Id. at 521*; *see also Id. at 523*.

4 Sumner’s goal was to make the language as clear and distinct as possible so that  
5 no interpretation would allow for the re-enslavement of freed Black Americans in any  
6 form. The response to Senator Sumner’s proposed language from his fellow northern  
7 legislators was dismissive and cynical, most likely because of Sumner’s bombastic  
8 presence and unpopularity amongst his Senate colleagues. Sumner’s language was  
9 rejected in favor of the Northwest Ordinance’s prose and the punishment clause was  
10 given life which the south used to imperil and destroy the lives of many freed Black  
11 slaves. Cong. Globe, 38th Cong., 1st Sess. 1489 (1864); *see also id. at 553*.

12 Not until after the Thirteenth Amendment was adopted and northern political  
13 leaders watched with anguish as the south adopted Black Codes and used Convict  
14 Leasing to re-enslave freed Black Americans, did the full weight of this decision to adopt  
15 the punishment clause come to bear. Historians claim that most northern legislators  
16 agreed with Thomas Jefferson’s view that the punishment clause would be used to  
17 rehabilitate prisoners and deter some from committing jailable offenses. Eric Foner, *The*  
18 *Second Founding: How the Civil War and Reconstruction Remade the Constitution*  
19 (2020, New York). Sumner’s view regrettably proved the more accurate.

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21  
22 Shortly after the northern legislators recognized that the southern states were  
23 corrupting the Thirteenth Amendment, northern members of Congress began confronting  
24 southern members for defiling it. Representative Henry Deming of Connecticut was  
25 outraged by how he saw the south construing the punishment clause to re-enslave the  
26 newly freed Black Americans. Michael Vorenberg. *Final Freedom: The Civil War, the*  
27 *Abolition of Slavery, and the Thirteenth Amendment*. (2001)207-210 (statement of Rep.  
28 Deming). Representative Deming was disgusted that the southern states “have ratified

1 [the Thirteenth Amendment] with a construction that it merely abolishes the infamy of  
2 buying, selling, and owning human beings; and under the exceptional clause  
3 reconstructed selling black men into slavery for petty larceny.” *Id.* (statement of Rep.  
4 Deming).

5         In referring to the Black Codes that harshly criminalized petty larceny with long  
6 prison sentences, Deming acknowledged that the south was “selling black men into  
7 slavery” without remorse. Representative Burton Cook of Illinois condemned southern  
8 states enactment of Black Codes and the subsequent leasing of convicts when he  
9 referenced the vagrancy laws that captured so many newly freed Blacks and placed them  
10 into prison: “laws which, under the pretense of selling these men as vagrants, are  
11 calculated and intended to reduce them to slavery again; and laws which provide for  
12 selling these men into slavery in punishment of crimes of the slightest magnitude.” Cong.  
13 Globe, 39th Cong., 1st Sess. 1123 (1866) (statement of Rep. Cook). Representative Cook  
14 continued stating that these laws “reduced the freedom virtually to the condition of  
15 slavery and established a system of slavery.” *Id.* at 1124.

16  
17         Representative Thaddeus Stevens of Pennsylvania was vehement in his opposition  
18 to the south’s use of the punishment clause to re-enslave freed Black slaves and evade the  
19 clear intent of the Thirteenth Amendment to abolish slavery: “under the pretense of the  
20 punishment clause, they are taking men for . . . assault and battery and selling them into  
21 bondage for ninety-nine years.” Cong. Globe, 39th Cong., 1st Sess. 655 (1866) (statement  
22 of Rep. Stevens). Representative Stevens believed that the southern states were using the  
23 punishment clause as an “excuse” to continue to extricate free labor from Black citizens.  
24 *Id.* (statement of Rep. Stevens).

25  
26         Thus, northern legislators were unquestionably offended and outraged at the  
27 south’s use of Black Codes and Convict Leasing to re-enslave the very individuals that  
28 the Thirteenth Amendment had meant to free. That the south was using language within



1 the Thirteenth Amendment to re-enslave the newly freed Black Americans must have  
2 been particularly galling to these northern political leaders. The punishment clause was  
3 never intended to be used for that purpose—the continuation of private chattel slavery.  
4 The reaction of so many northern lawmakers to the south’s abuse of the punishment  
5 clause is very strong evidence that private for-profit slavery was never an intended  
6 interpretation of the Thirteenth Amendment. That this punishment clause loophole had  
7 been created and exploited to re-enslave dozens of thousands of free Black men and  
8 women forced these northern legislators into further action.

9  
10 **D. Congress is forced to pass the Fourteenth and Fifteenth Amendments as well as**  
11 **the Civil Rights Act of 1866 and 1874 to curtail the South’s attempts to re-enslave**  
12 **free Black Americans.**

13 Because the southern states had corrupted the Thirteenth Amendment’s attempt to  
14 fully eradicate slavery throughout the nation, Congress was compelled to act to stamp out  
15 the Black Codes and Convict Leasing regime that had grown into a devastating situation  
16 for many Black Americans freed from slavery. Had the punishment clause been intended  
17 to support private for-profit incarceration, then there would have been no need for  
18 Congressional action and yet we see that Congress acted repeatedly to try to  
19 instrumentalize the freedoms promised in the Thirteenth Amendment. Northern  
20 legislators enacted the Civil Rights Acts of 1866 and 1875. Eric Foner, *Reconstruction,*  
21 *America’s Unfinished Revolution* (Updated Edition, 2002)553-56, 587. Further, the  
22 Fourteenth and Fifteenth Amendments were adopted to further strengthen the voting  
23 rights and equal protection rights of the freed slaves. *Id.* Additional Congressional action  
24 was necessary in the passage of the Enforcement Acts and the Reconstruction Acts. *Id.*  
25 These Congressional actions show that contemporaneous legislators intended to cover  
26 and reverse activity undertaken by the southern states as they patched holes exploited by  
27 those southern actors.  
28



1 DATED: June 24, 2021

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on June 24, 2021, I electronically transmitted the attached  
3 document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a  
4 Notice of Electronic Filing to the following CM/ECF registrants:

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/s/ Amy Pritchard