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FOR THE PUNISHMENT OF CRIME: SLAVERY, INDENTURE, AND CONVICT SERVITUDE UNDER ANTEBELLUM NORTHERN STATE CONSTITUTIONS

Robinson Woodward-Burns[*]

ABSTRACT

The Thirteenth Amendment outlaws slavery and involuntary servitude except "as a punishment for crime whereof the party shall have been duly convicted." Jim Crow Southern state lawmakers used this "punishment clause" to lease Black convicts to infrastructure and agriculture projects in a system some scholars call "slavery by another name." This paper traces the punishment clause to the earlier state constitutions of the Old Northwest. From the founding to the 1850s, upper Midwest state lawmakers used state constitutional punishment clauses to distinguish convict laborers, often white, from Black slaves and indentured servants, affording protections to the former. These Northern punishment clauses informed the framers of the Thirteenth Amendment in Congress and of matching state punishment clauses in Reconstruction-era Southern conventions. Only with Jim Crow did Southern state lawmakers co-opt the clause to entrench Black convict labor. By tracing this history, we can see how nineteenth-century lawmakers used state constitutional punishment clauses to distinguish free and enslaved labor and clarify that convicts were not slaves.

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[*] Associate Professor of Political Science, Howard University

I. INTRODUCTION

The Thirteenth Amendment forbids slavery and involuntary servitude except "as a punishment for crime whereof the party shall have been duly convicted."[1] This is the Amendment's Punishment Clause. After the Amendment's ratification in 1865, freedmen travelled the South seeking work.[2] Newspapers and presses often cast itinerant Black workers as drunks and criminals, spurring new laws against vagrancy, contract evasion, and other petty crimes.[3] Freedmen convicted under these laws, facing prohibitively high bail, were often imprisoned under the Punishment Clause and then rented as cheap labor to private infrastructure, mining ventures, and agriculture, with state officials collecting leases and court fees.[4] Convict leasing in Alabama, for example, earned the state up to a million dollars per year by 1912.[5] This revenue subsidized the reemerging administrative state in the South, and the rented labor rebuilt postwar Southern infrastructure.[6] Progressive-era race science and criminology, particularly as promoted by the National Prison Association, legitimized convict leasing by reviving antebellum arguments that Black people lacked the capacity for independent labor or citizenship.[7] Finally, Southern Redeemer political coalitions appealed to white voters by promising to suppress Black

1. U.S. CONST. amend. XIII, § 1.

2. *See* William G. Thomas, III et al., *Reconstructing African American Mobility After Emancipation, 1865–67*, 41 SOC. SCI. HIST. 673, 687–88 (2017).

3. *See, e.g.*, John K. Bardes, *Redefining Vagrancy: Policing Freedom and Disorder in Reconstruction New Orleans, 1862–1868*, 84 J. S. HIST. 69, 74, 83, 99 (2018).

4. *See, e.g.*, DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 1–2, 425 (2008); Christopher Muller, *Freedom and Convict Leasing in the Postbellum South*, 124 AM. J. SOCIO. 367, 367 (2018).

5. Paul M. Pruitt, *The Trouble They Saw: Approaches to the History of the Convict Lease System*, 29 REV. AM. HIST. 395, 397 (2001) (reviewing MARY ELLEN CURTIN, BLACK PRISONERS AND THEIR WORLD, ALABAMA, 1865–1900 (2000)); *see also* EDWARD L. AYERS, THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION 154 (1992); MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928, at 112 (1996).

6. *See, e.g.*, ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH 38 (1996).

7. Pruitt, *supra* note 5, at 396; *see also* MARY ELLEN CURTIN, BLACK PRISONERS AND THEIR WORLD, ALABAMA, 1865–1900, at 171–72 (2000).

political ambitions.[8] In the Jim Crow years, the Punishment Clause let states force Black workers into what some have called "slavery by another name."[9]

Recent criticism of the American prison system has reignited interest in the Punishment Clause, with scholars often addressing the clause in the Thirteenth Amendment.[10] Studying the Punishment Clause in the Federal Constitution is certainly easier than surveying the fifty state constitutions and their 7,813 amendments, much less the 145 state constitutions ratified and 255 state constitutional conventions held since 1776.[11] Further, state constitutions, which are detailed, lengthy, and locally-tailored, command less esteem.[12] As the *New York Times* once put it, in the eyes of many scholars, "the study of state law is considered parochial. Of even more vital interest to professors anxious to make a name for themselves, national reputations have generally been thought to come only by studying 'national law.'"[13] Consequently, scholars tend to neglect the state constitutions.[14] This is a problem, particularly when studying the Punishment Clause. The Federal Tenth Amendment

8. *See* C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH: 1877–1913, at 254 (1951); RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 50 (2004).

9. Rebecca McLennan, *The Buried Roots of Carceral Labor*, INQUEST (May 16, 2023), https://inquest.org/the-buried-roots-of-carceral-labor/.

10. *See, e.g.*, Michele Goodwin, *The Thirteenth Amendment's Punishment Clause: A Spectacle of Slavery Unwilling to Die*, 57 HARV. C.R.-C.L. L. REV. 47, 83, 112 (2022); LICHTENSTEIN, *supra* note 6, at 193–94. For works on convict leasing under the Thirteenth Amendment, see, e.g., Christopher R. Adamson, *Punishment After Slavery: Southern State Penal Systems, 1865–1890*, 30 SOC. PROBS. 555, 558, 566–67 (1983); BLACKMON, *supra* note 4, at 53–54; CURTIN, *supra* note 7, at 1–2; Goodwin, *supra*, at 84; TALITHA L. LEFLOURIA, CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE NEW SOUTH 66 (2015); LICHTENSTEIN, *supra* note 6, at xv. For a comprehensive overview of this literature, see generally Pruitt, *supra* note 5, at 396–97.

11. *See* Council of State Gov'ts, *General Information on State Constitutions (As of January 1, 2022)*, THE BOOK OF THE STATES (2023), https://bookofthestates.org/tables/2022-1-3/; ALA. CONST. pmbl. (ratified 2022); ROBINSON WOODWARD-BURNS, HIDDEN LAWS: HOW STATE CONSTITUTIONS STABILIZE AMERICAN POLITICS 1 (2021).

12. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 2 (1998).

13. David Margolick, *State Judges Are Shaping Law That Goes Beyond the Supreme Court*, N.Y. TIMES (May 19, 1982), https://www.nytimes.com/1982/05/19/us/state-judges-are-shaping-law-that-goes-beyond-supreme-court-courts-trial-last.html.

14. For a summary of the issue, and a defense of the significance of state constitutions, see, e.g., JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 2–3 (2006); SANFORD LEVINSON, FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 14, 28 (2012); Donald S. Lutz, *The Purposes of American State Constitutions*, 12 PUBLIUS 27, 27, 29–30 (1982); TARR, *supra* note 12, at 1–3; ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 1–3 (2009); WOODWARD-BURNS, *supra* note 11, at 13–14; EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 2–3 (2013).

affirms the states' longstanding police powers to regulate health, safety, morals, and general welfare.[15] Consequently, the states are the primary site for regulating punishment, policing, and prisons.[16] Fifty-eight ratified state constitutions have included punishment clauses,[17] and recent reform campaigns have pushed several states to repeal their clauses.[18] To fully understand the Punishment Clause, one needs to look to the state constitutions.

In studying the state constitutions, this short article offers four points. First, the Punishment Clause and associated convict servitude date to the antebellum era. Fifteen state constitutions ratified before the Civil War included punishment clauses.[19] Second, these antebellum punishment clauses were found in the constitutions of the Old Northwest states: Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota. Lawmakers in these states, which entered the Union between 1803 and 1858, sought cheap labor for infrastructure, extractive, and agricultural ventures.[20] Prisons also proliferated in these years, offering cheap workers.[21] Northern lawmakers ratified at least fifteen constitutions allowing convict servitude, mainly for whites, or long-term indenture, mainly for Blacks, with many states also allowing Black slave leasing.[22]

15. *See* U.S. CONST. amend. X.

16. *See* United States v. Morrison, 529 U.S. 598, 618 (2000).

17. *See* Table 1. For state-specific histories of convict leasing, see, e.g., Nathan Cardon, *"Less Than Mayhem": Louisiana's Convict Lease, 1865–1901*, 58 LA. HIST. 417, 418–20 (2017); MARK T. CARLETON, POLITICS AND PUNISHMENT: THE HISTORY OF THE LOUISIANA STATE PENAL SYSTEM 82–83 (1971); CURTIN, *supra* note 7, at 1–2; ALLEN JOHNSTON GOING, BOURBON DEMOCRACY IN ALABAMA, 1874–1890, at 119–21 (1951); KARIN A. SHAPIRO, A NEW SOUTH REBELLION: THE BATTLE AGAINST CONVICT LABOR IN THE TENNESSEE COALFIELDS, 1871–1896, at 6 (1998); ROBERT DAVID WARD & WILLIAM WARREN ROGERS, CONVICTS, COAL, AND THE BANNER MINE TRAGEDY 28–30 (1987).

18. For example, repeal measures were passed in Colorado in 2018, Nebraska in 2020, Utah in 2020, and Alabama in 2022. 51 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 9 (2019), https://issuu.com/csg.publications/docs/bos2019; 53 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 246, 248 (2021), https://issuu.com/csg.publications/docs/bos_2021_issuu; ALA. CONST. art. I, § 32 (removing the prior language of "otherwise than for the punishment of crime, of which the party shall have been duly convicted").

19. *See* Table 1.

20. *See* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 49, 75, 90 (3d ed. 2014); CONG. RSCH. SERV., ADMISSION OF STATES TO THE UNION: A HISTORICAL REFERENCE GUIDE 3–4 (2024), https://sgp.fas.org/crs/misc/R47747.pdf.

21. *See* Ashley T. Rubin, *Three Waves of American Prison Development, 1790–1920*, *in* SOCIOLOGY OF CRIME, LAW, AND DEVIANCE 145–46 (Mathieu Deflem ed., 2014); Rebecca McLennan, *Untangling the Nineteenth-Century Roots of Mass Incarceration*, LPE PROJECT (May 16, 2023), https://lpeproject.org/blog/roots-of-mass-incarceration/.

22. *See* Table 1 (counting Northern and Northwestern states with punishment clauses); McLennan, *supra* note 9; FINKELMAN, *supra* note 20, at 74–75.

These convicts, servants, and slaves worked state-run extractive ventures, building infrastructure and industry in the new states through the antebellum years.[23] Third, these Northern documents shaped the Thirteenth Amendment. During the Civil War, Northern congressmen, citing the success of these Old Northwest state practices, adopted the language from the Northwest Ordinance and state constitutions into the Thirteenth Amendment, which subsequently spread across the Reconstruction South.[24]

The fourth point is perhaps the most important: Convict servitude was and is distinct from slavery. Antebellum state lawmakers distinguished convict servitude, in which the laborer (usually white) was not a form of property, from slavery, in which the laborer (always Black) was a form of property.[25] Unlike slaves, convicts could not and cannot be sold as chattel property, held to lifelong labor, or have their children held to labor.[26] This distinction protects convicts. By conflating convict servitude with slavery—by calling conviction "slavery by another name"—we risk neglecting this distinction. Under the Punishment Clause, convicts held to servitude were not and are not slaves by another

23. McLennan, *supra* note 9.

24. *See* David B. Kopel, *Lyman Trumbull: Author of the Thirteenth Amendment, Author of the Civil Rights Act, and the First Second Amendment Lawyer*, 47 LOY. U. CHI. L.J. 1117, 1149–50 (2016). Between 1781 and 1894, over seventy editions of state constitutional compilations were printed, and these were used in nearly every nineteenth-century convention. Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 976 n.112 (1984). Framers often borrowed from recently drafted documents and neighboring states, so constitutions tended to resemble their neighbors. *See id.* For more on borrowing and regional traditions, see, e.g., DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 103 (2d. ed. 1972); Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 PUBLIUS 11, 18–22 (1982); DON E. FEHRENBACHER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH 29 (1989); Fritz, *supra*, at 975–80; KERMIT L. HALL & JAMES W. ELY, JR., AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 29 (1989); TARR, *supra* note 12, at 98.

25. *See* Lawrence M. Friedman, *Turning the Tables: Slaves and the Criminal Law*, 15 L. & SOC. INQUIRY 611, 620, 622 (1990) (reviewing PHILIP J. SCHWARZ, TWICE CONDEMNED: SLAVES AND THE CRIMINAL LAWS OF VIRGINIA, 1705–1865 (1988)); BLACKMON, *supra* note 4, at 44.

26. *See* FINKELMAN, *supra* note 20, at 93. While a convict might be sentenced to lifetime imprisonment, and this imprisonment might include forced labor, conviction itself does not entail lifetime forced labor, unlike chattel slavery. Statement from Darrell A. H. Miller, Professor of Law, Univ. Chi. Law Sch. to author (Mar. 2023).

name.[27] Antebellum state lawmakers highlighted this distinction, which we would do well to remember.[28]

In sum, the antebellum Punishment Clause, rooted in the Old Northwest state constitutions, distinguishes the convict, often white, from the Black slave or indentured servant.[29] This article illustrates the distinction between these labor regimes in two parts, first offering a history of indenture, slave leasing, and convict servitude under Old Northwest state constitutions, and then closes by noting how these clauses informed the drafting of the Thirteenth Amendment. By studying the state constitutions, we see a fuller set of punishment clauses and practices and better understand the Punishment Clause.

II. INDENTURE, CONVICT LEASING, AND SLAVE LEASING IN THE OLD NORTHWEST

The Punishment Clause originated in the 1787 Northwest Ordinance, which organized federal land west of the Appalachians and north of the Ohio River into the Northwest Territory.[30] As a representative to the Confederation Congress, Thomas Jefferson proposed a 1784 draft Ordinance which included the clause, holding that in western territory, "after the year 1800 of the Christian æra, there shall be neither slavery nor involuntary servitude in any of the said states, otherwise than in punishment of crimes, whereof the party shall have been duly convicted to have been personally guilty."[31] The clause did not gain the assent of the Confederation Congress.[32]

However, in July 1787, Massachusetts Representative Nathan Dane proposed language that passed as Article VI of the Northwest Ordinance, with the first section stating: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly

27. *See* REBECCA M. MCLENNAN, THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941, at 9, 86 (2008).

28. *See* James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1553 (2019).

29. *See* Friedman, *supra* note 25, at 620, 622.

30. The Territory comprised modern Ohio, Indiana, Illinois, Michigan, Wisconsin, and eastern Minnesota. FINKELMAN, *supra* note 20, at 49.

31. 6 THOMAS JEFFERSON, *Report of the Committee, 1 Mch. 1784, in* THE PAPERS OF THOMAS JEFFERSON 603–04 (Julian P. Boyd ed., 1952). In 1785, Rufus King proposed a similarly worded unsuccessful resolution in the Confederation Congress. STEPHEN MIDDLETON, THE BLACK LAWS IN THE OLD NORTHWEST: A DOCUMENTARY HISTORY, at xxiii–xxiv (1993).

32. MIDDLETON, *supra* note 31, at xxiv.

convicted."[33] This first section, containing the punishment clause, forbade both slavery and involuntary servitude, with the exception that convicts could be held to involuntary servitude.[34] Contemporaries likely understood this section to allow only convict servitude, and to forbid convict slavery, and all other slavery.[35] For example, a 1796 reprinting of the Article summarized the first section simply: "*No* slavery is permitted."[36] While this first section prohibited slavery, it did not prohibit voluntary servitude through indenture.[37]

The Article had another, second section: "Provided always, that any person escaping into the same, from whom labor 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 labor or service as aforesaid."[38] This second section of Article VI recognized that a person could be held to labor—enslaved—under the laws of the original states, such that entering the Territory did not emancipate a fugitive or visiting slave.[39] A slave visiting the Territory from out of state could remain legally enslaved under this second section.[40] Thus, Article VI allowed three forms of coerced labor: (1) convict servitude, expressly allowed under the first section, (2) indenture, not forbidden under the first

33. FINKELMAN, *supra* note 20, at 50; Northwest Ordinance of 1787, art. VI, ch. 8, 1 Stat. 50, 53 (1789).

34. Northwest Ordinance of 1787, art. VI.

35. *See* Pope, *supra* note 28, at 1553.

36. LAWS OF THE TERRITORY OF THE UNITED STATES NORTH-WEST OF THE OHIO, at xii (1796) [hereinafter LAWS OF THE NORTH-WEST] (emphasis added). Contemporaries may have understood the Article's second section to allow only the recapture of fugitive convicts. FINKELMAN, *supra* note 20, at 50. The same 1796 source held under the second section: "Offenders escaping into other states may be reclaimed." LAWS OF THE NORTH-WEST, *supra*, at xii. Subsequent state constitutional interpreters also understood state punishment clauses to allow convict servitude, not convict slavery. *See, e.g.*, SUSAN P. FINO, THE MICHIGAN STATE CONSTITUTION: A REFERENCE GUIDE 43 (G. Alan Tarr ed., 1996); WILLIAM P. MCLAUCHLAN, THE INDIANA STATE CONSTITUTION: A REFERENCE GUIDE 61–62 (G. Alan Tarr ed., 1996). For example, the constitutions of Louisiana and Georgia make this explicit. LA. CONST. art. I, § 3 ("Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime."); GA. CONST. art. I, § 1, para. 22 ("There shall be no involuntary servitude within the State of Georgia except as a punishment for crime after legal conviction thereof or for contempt of court.").

37. *See* LAWS OF THE NORTH-WEST, *supra* note 36, at xii; FINKELMAN, *supra* note 20, at 54 & 71 n.25.

38. Northwest Ordinance of 1787, art. VI.

39. *See* FINKELMAN, *supra* note 20, at 50. Similarly, Congress's Fugitive Slave Acts reaffirmed the right of private agents to recapture fugitive slaves, indentured servants, and convicts in the Northwest Territory. *See, e.g.*, Fugitive Slave Act of 1793, ch. 7, §§ 3–4, 1 Stat. 302, 302–04 (1793); Fugitive Slave Act of 1850, ch. 60, §§ 5–8, 9 Stat. 462, 462–65 (1850).

40. *See* Pope, *supra* note 28, at 1498–99.

section, and (3) slavecatching and out-of-state slave leasing, allowed under the second section.[41]

Two other parts of the Ordinance allowed slavery—Articles II and V, which distinguished free inhabitants from enslaved ones and recognized prior "private contracts or engagements."[42] Arthur St. Clair, a slaveholder who presided over the Ordinance's passage in Congress, soon assumed the first governorship of the Territory and read the Ordinance to recognize prior contracts for ownership of slaves.[43] Thus, St. Clair did not derive support for Black slavery from the punishment clause, which endorsed only convict servitude.[44] The Confederation Congress accepted this interpretation by St. Clair.[45] Slavery in the Territory was allowed under parts of Articles II and VI,[46] but not under the punishment clause.[47]

Territorial lawmakers petitioned Congress for statehood, adopting Congress's Ordinance verbatim into their territorial laws.[48] In 1800, Congress ceded the western half of the Northwest Territory to the new Indiana Territory, admitting the eastern part as the State of Ohio.[49]

41. FINKELMAN, *supra* note 20, at 49–50, 85.

42. *See* Northwest Ordinance of 1787, art. II, V. The "private contracts or engagements" language forbade ex post facto laws but preserved existing contracts for the sale and ownership of slaves. *See id.* For accounts on the passage of the Ordinance, *see, e.g.*, DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 254–55 (Ward M. McAfee ed., 2001); FINKELMAN, *supra* note 20, at 46–53; Staughton Lynd, *The Compromise of 1787*, 81 POL. SCI. Q. 225, 229–38 (1966); DONALD ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765–1820, at 381–84 (W. W. Norton & Co. 1979) (1971).

43. St. Clair also read the Ordinance to prohibit slave importation into the Territory. MIDDLETON, *supra* note 31, at xxvi.

44. *Id.*

45. *Id.* This distinguished Article VI from contemporary state measures for immediate abolition. *See* FINKELMAN, *supra* note 20, at 47.

46. *See* FINKELMAN, *supra* note 20, at 54.

47. *See* Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 978 (2019). Congress also protected slavery south of the Ohio River. FEHRENBACHER, *supra* note 42, at 256. In 1798, when Representative George Thatcher of Maine proposed abolition south of the Ohio, in the new Mississippi Territory, South Carolinians Robert Goodloe Harper and John Rutledge, Jr. rallied all but eleven House members against Thatcher's amendment. JOHN CRAIG HAMMOND, SLAVERY, FREEDOM, AND EXPANSION IN THE EARLY AMERICAN WEST 24–25, 27 (2007). As Harper explained, extending abolition to the Mississippi Territory would "strike[] the customs of the people" of the South. *Id.* at 24. Representative John Nicholas added that "[i]t was not for them to attempt to make a particular spot of country more happy than all the rest." 33 ANNALS OF CONG. 1310 (1798).

48. *See* FINKELMAN, *supra* note 20, at 74, 88, 91 (demonstrating that Indiana and Illinois adopted the Ordinance's punishment clause verbatim).

49. *Id.* at 80 & 97 n.19.

Relative to the Indiana Territory, Ohio had few slaves.[50] Consequently, delegates to Ohio's 1802 state constitutional convention, the first in the Old Northwest, adopted Article VI of the Ordinance, forbidding slavery and involuntary servitude, "otherwise than for the punishment of crimes, whereof the party shall have been duly convicted."[51] This language forbade involuntary servitude, but excepted convicts, and expressly allowed voluntary servitude through indenture.[52] Convention delegates, many of them immigrants from slaveholding states, sought to deter free Black settlement.[53] The section also allowed indentured servitude for Black Ohioans up to one year, and for Black apprentices without limitation; aiming to discourage immigration of free Blacks, it forbade free Black people from voting, holding office, and providing legal testimony against whites, and later restricted their free movement within the state.[54]

Black indenture in Ohio was limited.[55] At statehood, the Black population was small and scattered—the county with the largest Black population, Wayne County, held only 139 Black residents.[56] In total, Black settlers comprised only six hundred of the territory's 100,984 residents in 1803.[57] Many were manumitted former slaves who had followed their former owners, but were "indentured, so that freedom had little real meaning for them" under the state constitution.[58] Subsequent Black laws in 1804 and 1807 deterred further free Black immigration, which state legislators feared might undersell white labor. By 1830, only

50. *See id.* at 58 & 71 n.32, 80.

51. *See* HAMMOND, *supra* note 47, at 78; Northwest Ordinance of 1787, art. VI, ch. 8, 1 Stat. 50, 53 (1789).

52. The section forbade indenture for women under eighteen and men under twenty-one, "unless such person shall enter into such indenture while in a state of perfect freedom, and on a condition of a bona fide consideration, received or to be received, for their service." FINKELMAN, *supra* note 20, at 92.

53. James H. Rodabaugh, *The Negro in Ohio*, 31 J. NEGRO HIST. 9, 13–14 (1946).

54. *See id.* at 14–15; OHIO CONST. of 1802 art. IV, § 1. But note that these delegates were more moderate than the overtly proslavery Federalist Territorial Governor Arthur St. Clair, and that the Constitution required that non-apprenticed black servants renew their contracts yearly. *See* STEVEN H. STEINGLASS & GINO J. SCARSELLI, THE OHIO STATE CONSTITUTION: A REFERENCE GUIDE 11–12 (2004); OHIO CONST. of 1802 art. VIII, § 2. The document also declared, "no alteration of this constitution shall ever take place, so as to introduce slavery or involuntary servitude into this state." OHIO CONST. of 1802 art. VII, § 5. Delegates nearly passed a measure enfranchising Black Ohioans. STEINGLASS & SCARSELLI, *supra*, at 17–18; HAMMOND, *supra* note 47, at 93.

55. Rodabaugh, *supra* note 53, at 14.

56. *Id.* at 13.

57. Charles Stewart, III & Barry R. Weingast, *Stacking the Senate, Changing the Nation: Republican Rotten Boroughs, Statehood Politics, and American Political Development*, 6 STUD. AM. POL. DEV. 223, 256 (1992).

58. Rodabaugh, *supra* note 53, at 13.

one percent of the state's population was Black, and Black labor remained marginal to Ohio's development.[59]

Empowered by the state constitution's punishment clause, Ohio legislators and prison administrators developed a contract labor system that predominantly exploited white convicts.[60] In 1813, the state legislature called for the construction of a state penitentiary, and two years later, under the state constitution's punishment clause, the legislature authorized punishment by hard labor, funneling cheap convict labor to state infrastructure projects.[61] The state penitentiary used convict laborers, primarily white men, to construct the Ohio Canal and, working within the prison, to produce consumer goods, including cabinets, guns, wagons, shoes, barrels, and clothing for sale to the state's growing population.[62] When the legislature reauthorized punishment by hard labor in 1835, penitentiary administrators first leased convicts to external, private ventures, binding between fifty and one hundred convicts to five years' service making saddlery, and two hundred more to consumer goods production the following year.[63] Similar convict leasing contracts in 1837, 1838, and 1839 let the penitentiary turn a profit for the first time, which the prison maintained over succeeding years, prompting prison directors to partner with larger limestone quarrying and road and railroad building enterprises, and in 1839, to endorse longer sentences to extract more labor and profit.[64] In 1854, the legislature authorized the penitentiary to lease convicts to the highest bidder, and in 1857, allowed leasing of male convicts under twenty.[65] As historian Dona Reaser concludes about leasing convicts: "Money was the prime objective for the prison and the state."[66] In sum, Ohio allowed limited Black indenture and broader white convict leasing, both legally distinct from chattel slavery.

The Indiana Territory, comprising modern Indiana, Illinois, Wisconsin, eastern Minnesota, and western Michigan, held more

59. *Id.* at 18.

60. *See* ALEXIS GUILBAULT, CREATING A COMMON CULTURE OF SLAVERY: NATIVE, BLACK, AND WHITE UNFREEDOM IN THE OHIO RIVER VALLEY, 1700–1865, at 203 (2021).

61. DONA MAE REASER, PROFIT AND PENITENCE: AN ADMINISTRATIVE HISTORY OF THE OHIO PENITENTIARY FROM 1815 TO 1885, at 40, 43–44 (1998); GUILBAULT, *supra* note 60, at 207.

62. REASER, *supra* note 61, at 52–53. But note that the legislature in 1821 rejected petitions for convict leasing to private ventures. *Id.* at 53–54.

63. *Id.* at 84–85.

64. *Id.* at 86–87, 91.

65. *Id.* at 142, 144.

66. *Id.* at 89.

slaveholders, many of them longstanding French settlers.[67] In 1796, 1799, and 1800, settlers in the Territory's far west unsuccessfully petitioned Congress to allow territorial slavery.[68] In 1802, Territorial Governor William Henry Harrison presided over a convention of settlers that asked Congress to relax the Northwest Ordinance's abolition clause, allowing slave imports for ten years.[69] Northern congressmen blocked the petition, but a subsequent Southern-led committee, hoping to enlarge their congressional wing, accepted it in 1804, only to be defeated by floor votes in 1804 and 1806.[70]

Indiana, nonetheless, allowed some coerced labor. Deferring to longstanding French slaveholding and the need for cheap infrastructure and salt refining workers, Harrison applied Virginia's slave code to the Territory.[71] The Indiana territorial legislature in 1804 allowed lifelong indenture and the indenture of servants' children until adulthood, and later clarified that free Blacks could be legally presumed to be enslaved or indentured.[72] This indenture effectively constituted coerced labor, but was nominally voluntary, and so did not violate Article VI.[73] Congress thus refused to enforce Article VI against these laws.[74] But in 1809, Congress ceded the western half of the Indiana Territory to the new Illinois Territory, comprising modern Illinois, Wisconsin, and eastern Minnesota, including proslavery western counties along the Mississippi.[75] Relieved of these proslavery counties, Indiana moved toward abolition.[76] In 1816, Indiana's first state constitutional framers

67. Richard Day, Ind. Dep't of Nat. Res., *The Capital of the Indiana Territory*, IND. HIST. BUREAU, https://www.in.gov/history/about-indiana-history-and-trivia/explore-indiana-history-by-topic/indiana-documents-leading-to-statehood/capital-of-indiana-territory-by-richard-day/ (last visited July 20, 2025); *see also* GUILBAULT, *supra* note 60, at 54.

68. FINKELMAN, *supra* note 20, at 77, 80–81.

69. *Id.* at 81.

70. *Id.* at 81–83.

71. *See id.* at 54, 85; HAMMOND, *supra* note 47, at 101.

72. FINKELMAN, *supra* note 20, at 86–87.

73. *See id.* at 87.

74. *See id.* at 84–85.

75. *Id.* at 88–89; *Laws of Illinois Territory*, W. ILL. UNIV., https://www.wiu.edu/libraries/govpubs/illinois_laws/illinoisTerritory.php (last visited July 20, 2025).

76. FINKELMAN, *supra* note 20, at 88.

abolished slavery, involuntary servitude, and Black indenture,[77] which state courts quickly upheld.[78]

Indiana then instituted a separate system of convict labor. In 1821, the legislature opened the first state penitentiary at Jeffersonville, where inmates worked cooperatively during daytime hours.[79] Starting in 1824, the legislature leased the prison and its labor to private contractors on three-year terms,[80] and in 1829, the legislature recorded profits from the prison, reporting that "the farming out of the prisoners is salutary and calculated to relieve the state of the burthen of annual draughts from the Treasury."[81] Complaints of harsh labor conditions through the 1840s and 1850s forced delegates to Indiana's 1851 convention to call for more moderate punishment, and the legislature to resume state management in the mid-1850s.[82] This system, coercive as it was, remained legally and economically distinct from the state's short-lived experiment with Black indenture and slavery.[83]

Slavery found defenders in Illinois. The new Illinois Territory maintained Indiana's implicit authorization of slavery until 1814, when the territorial legislature formally authorized slave hiring for salt works, accessing low-cost slave labor primarily from Kentucky.[84] The Act, noting that "the erection of mills and other valuable improvements are greatly retarded in this Territory, from the want of Laborers," allowed contract slavery in the territory's lead mines, mills, and salt works, where labor-

77. *Id.* at 88–89. While the 1816 Indiana Constitution did not outlaw black indenture, it refused to recognize out-of-state indenture contracts. *Id.* at 88; *see also* IND. CONST. of 1816, art. XI, §7. After the state Supreme Court twice upheld the ban on slavery, slaveholders fled west. State v. Lasselle, 1 Blackf. 60, 62 (Ind. 1820) (per curiam); *In re* Clark, 1 Blackf. 122, 126 (Ind. 1821) (per curiam); *see also* HAMMOND, *supra* note 47, at 123. In 1800, Black individuals constituted 5.3% of Indiana's population, with 45.3% of them enslaved. ROBINSON, *supra* note 42, at 404. By 1820, their proportion had fallen to 1%, and only 13% of Black residents were enslaved. *Id.* The state's 1851 Constitution consequently forbade Blacks from immigrating into Indiana and fined resident blacks for engaging in contract, using profits from these fines to pay Blacks to leave the state. MCLAUCHLAN, *supra* note 36, at 19; IND. CONST. art. XIII, § 1 (amended 1881); *id.* art. XIII, § 2 (repealed 1881).

78. *See, e.g.*, *Lasselle*, 1 Blackford at 62; *Clark*, 1 Blackford at 126. *See also* FINKELMAN, *supra* note 20, at 89.

79. David J. Bodenhamer, *Criminal Punishment in Antebellum Indiana: The Limits of Reform*, 82 IND. MAG. HIST. 358, 362–63 (1986).

80. *Id.* at 364.

81. *Id.*

82. *Id.* at 365, 367; *see also* IND. CONST. art. I, § 18.

83. *See* GUILBAULT, *supra* note 60, at 125, 127; Bodenhamer, *supra* note 79, at 361, 367.

84. *See* Thomas Bahde, *"I Would Not Have a White Upon the Premises": The Ohio Valley Salt Industry and Slave Hiring in Illinois, 1780–1825*, 15 OHIO VALLEY HIST. 49, 62–63, 65 (2015).

intensive conditions had deterred free white laborers.[85] Local French-owned slaves, imported from Haiti, had refined salt in Illinois since 1720, but slave leasing increased with the establishment of United States Saline, a salt works which relied almost exclusively on leased slave labor.[86] With congressional permission, federal authorities leased salt springs and salt wells to private ventures, some chartered in neighboring Kentucky,[87] which in turn leased slaves from Kentucky.[88] By allowing leasing, these lawmakers circumvented the prohibition on slavery or involuntary servitude.[89] Nevertheless, Territorial Governor Ninian Edwards, who also served as the United States Saline salt works superintendent, pushed for the formal legalization of slavery.[90]

While Edwards's efforts failed, in 1818, Illinois's constitutional framers authorized some forms of coerced labor.[91] They forbade the future institution of slavery, but exempted convict servitude, hereditary Black indenture, and slave leasing in the salt works along the Ohio River.[92] Further, the 1818 Constitution held that slaves shall not "*hereafter* be introduced into this State," thereby recognizing existing arrangements for enslavement.[93] On receiving Illinois's proposed constitution, antislavery congressman James Talmadge rallied thirty-three House members against the document, but failed to block passage, and Illinois entered the Union.[94] As Paul Finkelman concludes: "[W]hen Illinois entered the union as a 'free' state in 1818, slavery was a fact of life for numerous residents."[95]

85. FINKELMAN, *supra* note 20, at 90; Bahde, *supra* note 84, at 62.

86. GUILBAULT, *supra* note 60, at 49; Jacob W. Myers, *History of the Gallatin County Salines*, 14 J. ILL. STATE HIST. SOC'Y 337, 346 (1921); Bahde, *supra* note 84, at 62.

87. Myers, *supra* note 86, at 339.

88. *See* Bahde, *supra* note 84, at 58.

89. *Id.* at 50.

90. Myers, *supra* note 86, at 340; *see also* Bahde, *supra* note 84, at 62–63.

91. Bahde, *supra* note 84, at 62; *see also* Myers, *supra* note 86, at 347.

92. FINKELMAN, *supra* note 20, at 91–92; Myers, *supra* note 86, at 348. The 1818 Constitution let a person in "state of perfect freedom" indenture himself after "a bona-fide consideration," including any "negro or mulatto" undertaking an apprenticeship. ILL. CONST. of 1818, art. VI, § 1. The Constitution further granted slaveholders a seven-year grace period before slavery was expressly abolished, and allowed the indenture of servants' children, such that male children of servants would be freed at twenty-one and females at eighteen. *Id.* art. VI, §§ 2–3.

93. ILL. CONST. of 1818, art. VI, § 1 (emphasis added); FINKELMAN, *supra* note 20, at 92.

94. HAMMOND, *supra* note 47, at 122–23; FEHRENBACHER, *supra* note 42, at 263; FINKELMAN, *supra* note 20, at 91.

95. FINKELMAN, *supra* note 20, at 76.

Slave leasing enriched the new state. These slaves were often leased to clear forests and to salt and lead works.[96] Profits from slave-leasing on agricultural and extractive ventures also padded the federal treasury, allowing the development of the frontier.[97] In 1819, the legislature recognized slavery in the state, requiring registration of slaves, and prohibited free Blacks from moving freely in the state.[98]

Slavery and indentured servitude became increasingly marginal in Illinois, replaced by a legally distinct system of convict labor.[99] The enslaved population declined through the 1820s,[100] especially after Illinois Governor Edward Coles defeated an 1824 attempt to call a new state constitutional convention to formally recognize slavery and prolong salt works slavery.[101] On leaving the governorship, Coles called instead for the institution of a state penitentiary, as did his successor, Ninian Edwards, under whom the legislature sold the saline lands in 1828, beginning penitentiary construction nearby in 1830.[102] Months later, the legislature revised the state criminal code to allow convict leasing from the penitentiary.[103] The penitentiary fell quickly into disrepair, prompting the legislature to lease the prison and its inmates to private individuals.[104] Reports of poor living and working conditions prompted the legislature to call for improved labor conditions in 1847 and 1849.[105] Parallel to this, judicial abolition of Black slavery came to Illinois in 1845, and an 1848 constitutional convention fully extinguished slavery in the state.[106]

96. *See* Bahde, *supra* note 84, at 62.

97. *See* Myers, *supra* note 86, at 342.

98. FINKELMAN, *supra* note 20, at 94.

99. *See* Myers, *supra* note 86, at 348; MCLENNAN, *supra* note 27, at 84 n.128, 236 n.139.

100. By 1820, in Illinois and Indiana, 39.8% of Blacks were enslaved, representing 1,107 slaves among 2,784 total Black residents in those states. *See* FINKELMAN, *supra* note 20, at 73 n.57.

101. *Id.* at 47–48; Bahde, *supra* note 84, at 66.

102. William Robert Greene, *Early Development of the Illinois State Penitentiary System*, 70 J. ILL. STATE HIST. SOC'Y 185, 186 (1977).

103. *Id.* at 187–88.

104. *Id.* at 188–89.

105. *Id.* at 189–90.

106. PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 150–51 (1981); FINKELMAN, *supra* note 20, at 64, 68 n.8. In 1845, the Illinois Supreme Court abolished slavery. Jarrot v. Jarrot, 2 Gilman 1, 12 (Ill. 1845). This decision was later reinforced by the 1848 Constitutional Convention, which additionally prohibited the immigration of both free and enslaved Blacks. FINKELMAN, *supra* note 20, at 64; ILL. CONST. of 1848, art. XIV, § 1. For a charitable history of Old Northwest abolitionism, see generally DANA ELIZABETH WEINER, RACE AND RIGHTS: FIGHTING SLAVERY AND PREJUDICE IN THE OLD NORTHWEST, 1830–1870, at 1–11 (2013).

Other Midwestern and Western framers adopted the punishment clause. Iowa state framers adopted the Northwest Ordinance's punishment clause in their 1846 and 1857 constitutions.[107] Michigan similarly included the punishment clause in its 1835 and 1850 documents, as did Wisconsin in 1848, Ohio in 1851, Iowa in 1857, and Minnesota in 1857.[108] In 1849, California convention delegates adopted Iowa's abolition and punishment clauses.[109] Oregon framers in 1857 also adopted the punishment clause, hoping to imitate "the great States of Ohio, Indiana, and Illinois."[110] This helped prevent the introduction of Black chattel slavery in California and Oregon.[111] And after years of conflict and the proposal of four competing state constitutions, in 1859, Kansas ratified a document including the punishment clause.[112] In the Old Northwest, convict servitude, Black indenture, and chattel slavery dwindled.[113] State constitutions, particularly in Indiana, deterred Black

107. *See* IOWA CONST. of 1846, art. I, § 23; IOWA CONST, art. I, § 23. Iowa was not part of the original Northwest Territory. *See* FINKELMAN, *supra* note 20, at 49. Instead, it was acquired through the Louisiana Purchase of 1803, and was organized under the Missouri Enabling Act of 1820, which held that in the area of the purchase north of the 36°30' parallel, except for Missouri, "slavery and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be, and is hereby, forever prohibited." *The Senate Approves for Ratification the Louisiana Purchase Treaty*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/treaties/senate-approves-louisiana-purchase-treaty.htm (last visited July 20, 2025); NICOLE ETCHESON, BLEEDING KANSAS: CONTESTED LIBERTY IN THE CIVIL WAR ERA 12 (2004); 4 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2145, 2148 (1909).

108. *See* MICH. CONST. of 1835, art. XI; MICH. CONST. of 1850, art. XVIII, § 11; WIS. CONST. art. I, § 2; OHIO CONST. art. I, § 6; IOWA CONST. art. I, § 23; MINN. CONST. art. I, § 2; *see also* FINO, *supra* note 36, at 9; John Zumbrunnen, *Wisconsin: Rejection, Ratification, and the Evolution of a People*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES 473 (George E. Connor & Christopher W. Hammons eds., 2008); JACK STARK, THE IOWA STATE CONSTITUTION: A REFERENCE GUIDE 65–66 (G. Alan Tarr ed., 1998); MARY JANE MORRISON, THE MINNESOTA STATE CONSTITUTION: A REFERENCE GUIDE 5 (G. Alan Tarr ed., 2002).

109. *See* CAL. CONST. of 1849, art. I, § 18; *see also* Gordon Lloyd, *The 1849 California Constitution: An Extraordinary Achievement by Dedicated Ordinary People*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES 717 (George E. Connor & Christopher W. Hammond eds., 2008); WOODWARD-BURNS, *supra* note 11, at 259 n.23.

110. *See* OR. CONST. art. XVIII, § 4 (amended 2002) (presenting alternative slavery provisions subject to popular vote, with one incorporating the language from the punishment clause); DAVID ALAN JOHNSON, FOUNDING THE FAR WEST: CALIFORNIA, OREGON, AND NEVADA, 1840–1890, at 151 (1992).

111. *See* Fritz, *supra* note 24, at 979–80.

112. *See* Stephen R. McAllister, *Kansas's Constitution Is a Source of Expanded Rights*, STATE CT. REP. (Nov. 22, 2024), https://statecourtreport.org/our-work/analysis-opinion/kansass-constitution-source-expanded-rights; KAN. CONST. Bill of Rights, § 6.

113. *See, e.g.*, GUILBAULT, *supra* note 60, at 163.

immigration, such that convict servitude and indenture had largely died in the upper Midwest by the 1850s, expunged in law and practice.[114]

III. STATE CONSTITUTIONAL PUNISHMENT CLAUSES AND THE THIRTEENTH AMENDMENT

Members of Congress drafted the Thirteenth Amendment to interlock with matching state constitutional clauses.[115] Even before the Thirteenth Amendment's proposal, Massachusetts Senator Charles Sumner, a staunch abolitionist, blocked West Virginia's admission until March 1863, when state framers appended an abolition clause to the proposed constitution.[116] In December 1863, the U.S. House of Representatives heard a pair of proposed federal abolition amendments.[117] The following month, Sumner proposed another constitutional amendment stating, "All persons are equal before the law, so that no person can hold another a slave," thereby granting Congress necessary and proper powers to enforce Black citizenship.[118] The Senate Judiciary Committee accepted Sumner's proposal, but redacted the equality provision.[119] On April 5, 1864, Kentucky Senators Garrett Davis and Lazarus Powell offered opposing amendments for compensated emancipation and prohibiting Black citizenship and office-holding.[120]

With the Senate hamstrung between these measures, Lyman Trumbull proposed an abolition provision matching those of the state constitutions, including the punishment clause.[121] As Congressman Jacob Howard noted, such a provision could win support in Midwestern

114. *See* FINKELMAN, *supra* note 20, at 89–90; IND. CONST. art. XIII, § 1 (amended 1881); Michael L. Smith, *State Constitutional Prohibitions of Slavery and Involuntary Servitude*, 99 WASH. L. REV. 523, 535 (2024).

115. *See* Pope, *supra* note 28, at 1474.

116. WOODWARD-BURNS, *supra* note 11, at 82, 264 n.42; Robert E. DiClerico, *The West Virginia Constitution: Securing the Popular Interest*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES 219 (George E. Connor & Christopher W. Hammond eds., 2008); W. VA. CONST. of 1863, art. XI, § 7. Note that the West Virginia Constitution is one of only six constitutions to mandate abolition without including a punishment clause. *See* W. VA. CONST. of 1863, art. XI, § 7. Maryland's 1867 constitution did not include a punishment clause, nor did the ratified constitutions in Rhode Island in 1842 and Vermont in 1777, 1786, and 1793. *See* MD. CONST. Declaration of Rights, art. 24; R.I. CONST. of 1842, art. I, § 4; VT. CONST. of 1777, ch. I, art. 1; VT. CONST. of 1786, ch. I, art. 1; VT. CONST. ch. I, art. 1 (amended 2022).

117. WOODWARD-BURNS, *supra* note 11, at 82.

118. *Id.*

119. HERMAN BELZ, A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN'S RIGHTS, 1861 TO 1866, at 126 (2000).

120. CONG. GLOBE, 38th Cong., 1st Sess. 1424–25 (1864).

121. WOODWARD-BURNS, *supra* note 11, at 266–67 n.53.

state ratification votes, which Congress, unlike Southern state votes, could not compel by force through military reconstruction.[122] Having spread through Midwest state constitutions, the clause was, in Howard's words, "[P]erfectly well understood both by the public and by judicial tribunals, a phrase, I may say further, which is particularly near and dear to the people of the Northwest Territory . . . . no court of justice, no magistrate, no person, old or young, can misapprehend the meaning and effect of that clear, brief, and comprehensive clause."[123] To Howard's point, Ohio's legislature had earlier instructed the state's congressmen to support congressional abolition measures that included a punishment clause.[124] Sumner tried redacting Trumbull's provision, but Trumbull pushed the Senate to pass the full amendment with little attention to the punishment clause, and the Thirteenth Amendment was ratified the following year.[125]

Subsequent state constitutional framers imitated the Thirteenth Amendment's language. With the Thirteenth Amendment's passage, Southern framers ratified abolition clauses to match the new federal model, for fear of congressional reprisal under the Thirteenth Amendment's second section.[126] Arkansas and Louisiana's 1864 conventions, early models for Reconstruction, passed abolition clauses matching the federal one, as did Maryland framers the same year.[127] Florida's 1865 convention adopted a clause copying and expressly

122. *See* Christopher R. Green, *Duly Convicted: The Thirteenth Amendment as Procedural Due Process*, 15 GEO. J.L.& PUB. POL'Y 74, 86, 103–05 (2017); *Reconstruction Timeline*, PBS, https://www.pbs.org/wgbh/americanexperience/features/reconstruction-timeline/ (last visited July 20, 2025).

123. CONG. GLOBE, 38th Cong., 1st Sess. 1489 (1864).

124. *See* Green, *supra* note 122, at 79. However, note that this 1857 resolution by the Ohio legislature pertained to congressional admissions or enabling acts to create new states, rather than for a federal amendment to abolish slavery. *See* MIDDLETON, *supra* note 31, at 23. The resolution held: "Resolved, That our senators and representatives in Congress are hereby requested to vote against the admission of any state in the union, unless slavery, or involuntary servitude, except for crime, be excluded in the constitution thereof." *Id.*

125. BELZ, *supra* note 119, at 126; ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 282 (1997). Congress had included the same language in acts banning slavery in the territories and in the District of Columbia in 1862. ALBERT H. HOWE, THE INSULAR CASES 488 (1901). On April 8, 1864, during Senate debates, Delaware's Willard Saulsbury presented a twenty-section amendment stripping black citizenship and requiring Congress to reimburse each state up to a hundred dollars per emancipation, including the servitude slavery language, which he likely derived from the 1862 statute for emancipation in the District. *See* CONG. GLOBE, 38th Cong., 1st Sess. 1489–90 (1864); HOWE, *supra*, at 488; *see also* DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at 160–61 (1996).

126. WOODWARD-BURNS, *supra* note 11, at 83.

127. *See* ARK. CONST. of 1864, art. V, § 1; LA. CONST. of 1864, art. 1, § 1; MD. CONST. of 1864, Declaration of Rights, art. 24.

recognizing the supremacy of the Federal Abolition Clause.[128] Western states did the same. For example, the Nevada Enabling Act of 1864 expressly required inclusion of a punishment clause in the state constitution.[129] Nebraska entered the union in 1866 with similar language.[130] Between 1863 and the end of military Reconstruction, in 1877, the states ratified a total of thirty constitutions with abolition clauses, all but two of which included punishment clauses.[131] In the South, these punishment clauses gave later constitutional justification for the private leasing of convict labor, with the unanticipated consequence of retrenching coerced labor in the South.[132] The year after the Thirteenth Amendment's ratification, a surprised Representative John Farnsworth declared, "[W]e find those states now reducing these men to slavery again as punishment for crime, and declaring every little petty offense the black man may commit that he shall be sold into bondage."[133]

128. FLA. CONST. of 1865, art. XVI, § 1.

129. MICHAEL W. BOWERS, THE NEVADA STATE CONSTITUTION 13 (G. Alan Tarr ed., 2d ed. 2014).

130. NEB CONST. of 1866, art. I, § 2.

131. *See* ALA. CONST. of 1865, art. I, § 34 (punishment exception); ALA. CONST. of 1868, art. I, § 35 (punishment exception); ALA. CONST. of 1875, art. I, § 33 (punishment exception); ARK. CONST. of 1864, art. V, § 1 (punishment exception); ARK. CONST. of 1868, art. I, § 37 (punishment exception); ARK. CONST. art. II, § 27 (punishment exception); COLO. CONST. art. II, § 26 (amended 2018) (punishment exception pre-amendment); FLA. CONST. of 1865, art. XVI, § 1 (punishment exception); FLA. CONST. of 1868, Declaration of Rights, § 19 (punishment exception); GA. CONST. of 1865, art. I, § 20 (punishment exception); GA. CONST. of 1868, art. I, § 4 (punishment exception); GA. CONST. of 1877, art. I, § 1, para. 17 (punishment exception); LA. CONST. of 1864, tit. I, art. I (punishment exception); LA. CONST. of 1868, tit. I, art. 3 (punishment exception); MD. CONST. of 1864, Declaration of Rights, art. 24 (punishment exception); MD. CONST. Declaration of Rights, art. 24 (absolute prohibition); MISS. CONST. of 1868, art. I, § 19 (punishment exception); MO. CONST. of 1865, art. I, § 2 (punishment exception); MO. CONST. of 1875, art. II, § 31 (punishment exception); NEB. CONST. of 1866, art. I, § 2 (punishment exception); NEB. CONST. of 1875, art. I, § 2 (amended 2020) (punishment exception pre-amendment); N.C. CONST. of 1868, art. 1, § 33 (punishment exception); NEV. CONST. art. I, § 17 (amended 2024) (punishment exception pre-amendment); S.C. CONST. of 1865, art. IX, § 11 (punishment exception); S.C. CONST. of 1868, art. I, § 2 (punishment exception); TENN. CONST. art. I, § 33 (amended 2022) (punishment exception pre-amendment); TEX. CONST. of 1866, art. VIII, § 1 (punishment exception); TEX. CONST. of 1869, art. I, § 22 (punishment exception); VA. CONST. of 1868, art. I, § 19 (punishment exception); W. VA. CONST. of 1863, art. XI, § 7 (absolute prohibition).

132. *See* BLACKMON, *supra* note 4, at 53.

133. CONG. GLOBE, 39th Cong., 1st Sess. 383 (1866). Prior to the Amendment, few Southern states constitutionally allowed convict servitude, but by the Amendment's ratification, convict servitude was spreading throughout the majority of Southern and border-South states. *See* FINKELMAN, *supra* note 20, at 5–6; Pope, *supra* note 28, at 1507 n.220.

In conclusion, Article VI of the Northwest Ordinance, first drafted by Thomas Jefferson and reformulated by Nathan Dane, forbade slavery and involuntary servitude in the Northwest Territory, exempting convict servitude.[134] Old Northwest framers copied Article VI into their state constitutions, authorizing legally distinct systems of indenture, convict leasing, and slave leasing.[135] The framers of the Thirteenth Amendment adopted this phrasing, which subsequent Southern Reconstruction framers copied into the state constitutions, authorizing continued convict leasing.[136] A curious corollary of this history is that Thomas Jefferson first drafted the language that became the Thirteenth Amendment's first section.[137]

The article thus offers four lessons. First, convict leasing under the Punishment Clause predates Jim Crow. Second, this system originated in the Old Northwest. Third, these Northern antebellum punishment clauses informed the drafters of the Thirteenth Amendment and subsequent Southern states' constitutional framers. Though Old Northwest and Jim Crow Southern lawmakers adopted nearly identical punishment clauses, these clauses authorized different labor systems: in the Old Northwest, Black indenture and slave leasing and white convict leasing; and in the Jim Crow South, Black convict leasing, with no slave leasing or formal indenture. Finally, in both regimes, convict servitude was a legally distinct category from chattel slavery, as it still is today.

134. FEHRENBACHER, *supra* note 42, at 253–55.

135. *See* Pope, *supra* note 28, at 1500–01 n.189; FINKELMAN, *supra* note 20, at 75–76

136. Smith, *supra* note 114, at 527–28; Pope, *supra* note 28, at 1506 n.216.

137. *See* Pope, *supra* note 28, at 1497 n.167; FEHRENBACHER, *supra* note 42, at 253; Northwest Ordinance of 1787, art. VI, ch. 8, 1 Stat. 50, 53 (1789); U.S. CONST. amend. XIII, § 1.

TABLE 1: STATE CONSTITUTIONAL CLAUSES PROHIBITING SLAVERY OR INVOLUNTARY SERVITUDE, 1776–2024

State	Ratified	Section	Punishment Clause
AL	1865	Art. I, § 34	Yes
AL	1868	Art. I, § 35	Yes
AL	1875	Art. I, § 33	Yes
AL	1901	Art. I, § 32 (amended 2022)	Yes (pre-amendment)
AR	1864	Art. V, § 1	Yes
AR	1868	Art. V, § 37	Yes
AR	1874	Art. II, § 27	Yes
CA	1849	Art. I, § 18	Yes
CA	1879	Art. I, § 18	Yes
CO	1876	Art. II, § 26 (amended 2018)	Yes (pre-amendment)
FL	1865	Art. XVI, § 1	Yes
FL	1868	Declaration of Rights, § 19	Yes
FL	1887	Declaration of Rights, § 19	Yes
GA	1865	Art. I, § 20	Yes
GA	1868	Art. I, § 4	Yes
GA	1877	Art. I, § 1, para. 17	Yes
IA	1846	Art. I, § 23	Yes
IA	1857	Art. I, § 23	Yes
IL	1818	Art. VI, § 1	Yes
IL	1848	Art. XIII, § 16	Yes
IN	1816	Art. VIII, § 1; Art. XI, § 7	Yes
IN	1851	Art. I, § 37 (amended 1984)	Yes
KS	1859	Bill of Rights, § 6	Yes
KY	1891	Bill of Rights, § 25	Yes
LA	1864	Tit. I, Art. 1	Yes
LA	1868	Tit. I, Art. 3	Yes
LA	1879	Bill of Rights, Art. 5	Yes

LA	1974	Art. I, § 3	Yes
MD	1864	Declaration of Rights, Art. 24	Yes
MD	1867	Declaration of Rights, Art. 24	No
MI	1835	Art. XI	Yes
MI	1850	Art. XVIII, § 11	Yes
MI	1909	Art II, § 8	Yes
MI	1964	Art. I, § 9	Yes
MN	1857	Art. I, § 2	Yes
MN	1974	Art. I, § 2	Yes
MO	1820	Art. III, § 26	No
MO	1865	Art. I, § 2	Yes
MO	1875	Art. II, § 31	Yes
MS	1832	Slaves, § 1	No
MS	1868	Art. I, § 19	Yes
MS	1890	Art. III, § 15	Yes
MT	1889	Art. III, § 28	Yes
NC	1868	Art. I, § 33	Yes
NC	1970	Art. I, § 17	Yes
ND	1889	Art. I, § 17	Yes
NE	1866	Art. I, § 2	Yes
NE	1875	Art. I, § 2 (amended 2020)	Yes (pre-amendment)
NV	1864	Art. I, § 17 (amended 2024)	Yes (pre-amendment)
OH	1802	Art. VIII, §2	Yes
OH	1851	Art. I, § 6	Yes
OR	1857	Art. I, § 34 (amended 2021)	Yes (pre-amendment)
RI	1842	Art. I, § 4	No
SC	1865	Art. IX, § 11	Yes
SC	1868	Art. I, § 2	Yes
TN	1870	Art. I, § 33 (amended 2022)	Yes
TX	1866	Art. VIII, § 1	Yes

TX	1869	Art. I, § 22	Yes
UT	1895	Art. I, § 21 (amended 2020)	Yes (pre-amendment)
VA	1868	Art. I, § 19	Yes
VT	1777	Ch. 1, Art. 1	No
VT	1786	Ch. 1, Art. 1	No
VT	1793	Ch. 1, Art. 1 (amended 2022)	No
WI	1848	Art. I, § 2	Yes
WV	1863	Art. XI, § 7	No