
The Right to Freedom



The U.S. Constitution and its Bill of Rights contain the rights of a free people, but they do not guarantee freedom explicitly. The Thirteenth Amendment does. Designed to fulfill the promise of the Emancipation Proclamation of 1863, it outlawed slavery—“Neither slavery nor involuntary servitude. . . shall exist within the United States, or any place subject to their jurisdiction”—and, by implication, it also established freedom as a fundamental American right. Freedom has had many meanings for Americans, but at its core, the definition has always been set against slavery, the opposite of what freedom promised, which was the liberty to choose and act without coercion or restraints.

In 1863, President Abraham Lincoln issued his proclamation abolishing slavery in regions not under Union control, but in fact the document did not free a single slave. Americans at the time recognized its limited effect: the Emancipation Proclamation had no legal status. The Thirteenth Amendment, ratified in December 1865, remedied this problem by making emancipation part of the nation’s fundamental law. Debated then and now was the question of whether the amendment went beyond merely freeing the slaves. Did it promise, in addition, a full measure of freedom for all Americans?

Efforts to define freedom began with the European settlement of North America, but the struggle was most fierce during the Civil War and its aftermath of Reconstruction. Until then, Americans usually defined freedom in relationship to the African slavery they knew—slaves were not free, and free men were not slaves. By abolishing slavery, the war destroyed this assumption. It also changed the way Americans thought about the Constitution. In the decades leading to the Civil War, the Constitution had become an increasingly sacred text. Americans rarely considered changing it; after the Bill of Rights, it had been amended only twice, the last time in 1804. They especially avoided changing the founding generation’s language on slavery, but the debate over abolition forced Americans to view the framers’ work as imperfect and incomplete. It also provided them an opportunity to build on the founders’ commitment to liberty. In this sense, the adoption of the Thirteenth Amendment represented a transforming moment when the nation redefined freedom and made it part of its fundamental law. Americans were reconstructing the nation to create a more perfect Union and to extend its promise of liberty to all people.

Adoption of the Thirteenth Amendment came after a long political struggle as first Congress and then the state ratification conventions debated what its words meant. Its champions believed the amendment proclaimed not only the end of slavery and its vestiges, or traces, but also guaranteed former slaves all the rights that defined freedom. “Mere exemption from servitude is a miserable idea of freedom,” a legislator from Massachusetts argued. Others did not favor extending a full complement of rights to African Americans but recognized that slavery was incompatible with the nation’s claims of liberty. Opponents objected to the broad enforcement power granted to the federal government in

“If our free society is to endure, and I know it will, those who govern must recognize that the Framers of the Constitution limited their power in order to preserve human dignity and the air of freedom which is our proudest heritage. The task of protecting these principles does not rest solely with nine Supreme Court justices, or even with the cadre of state and federal judges. We all share the burden.”

—Justice William J. Brennan, Jr., “My Life on the Court” (1997)

Section 2, arguing that it undermined federalism, the division of power between state and central governments. In this view, opponents were correct. The amendment altered the American constitutional order. For the first time, a national law significantly limited the power of the states to define the status of its residents.

The amendment quickly spawned two statutes under its enforcement authority—the Civil Rights Act of 1866 and the Freedmen’s Bureau Act. The bureau bill extended equal rights to state laws and enforced them through military courts when states failed to do so. Readmission of states into the Union would end the military courts, however, so the civil rights law declared that blacks were citizens and guaranteed them legal equality throughout the nation. They were entitled to the “full and equal benefit of all laws and proceedings for the security of persons and property” as whites enjoyed. Both measures asserted broad national authority to define rights essential to freedom and provided for enforcement of these rights, if necessary, in federal courts. These acts, and others that followed, depended in part on the enforcement power given to Congress under the Thirteenth Amendment. Tolerating discrimination, one senator explained, “would be perpetuating that lingering prejudice growing out of a race having been slaves which it is as much our duty to remove as it was to abolish slavery.” It was necessary to remove these vestiges for the guarantee of freedom to have any meaning.

This view failed to receive support from the Supreme Court, which tended to ignore the Thirteenth Amendment. The justices conceded that the amendment guaranteed freedom from slavery, and not simply for blacks. Although “[N]egro slavery alone was in the mind of the Congress,” the Court noted in its 1873 decision in the Slaughterhouse Cases, “if Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race . . . this amendment may safely be trusted to make it void.” The Court’s decision in the Civil Rights Cases (1883) also suggested that the enforcement section gave Congress the authority to outlaw “badges and incidents” of slavery. But the justices defined these badges and incidents narrowly. They ruled, for example, that the amendment did not give Congress the power to enact laws against private discrimination or to prohibit racial discrimination in public accommodations, such as railroads. Finally, in 1906, the Court struck its strongest blow against the amendment when it declared that state courts alone could decide when violations of the amendment had occurred.

With this history, it is not surprising that much of the twentieth century’s civil rights legislation relied not on the Thirteenth Amendment but on the Fourteenth Amendment, adopted in 1868. The latter amendment forbade states from abridging the rights of citizenship or denying citizens due process and equal

protection of the laws. In the late 1960s, however, the Thirteenth Amendment did emerge suddenly and dramatically as a constitutional guarantee of freedom. This outcome was not on the minds of a mixed-race couple from St. Louis in 1965, however. They simply wanted to buy a nice house in a quiet suburb, but discovered they could not.

Joseph Lee Jones and his wife, Barbara, both federal employees in Missouri, read an advertisement in 1965 for the Paddock Woods subdivision then being developed in St. Louis County. The new suburb sounded ideal. It would house around one thousand people and boasted all the amenities needed for a comfortable lifestyle, including a country club. But when they made an offer on a home, they were told they could not buy it. Joseph Jones was an African American, and the agent explained that the developer, the Alfred H. Mayer Company, did not sell to blacks as a matter of policy. It believed whites would not buy lots if blacks were their neighbors. The fear was based in an unfortunate reality: the vast majority of Americans in the 1960s lived in residentially segregated neighborhoods.

In 1948, the Supreme Court had ruled in *Shelley v. Kraemer* that state enforcement of such restrictive covenants, or legal restrictions forbidding blacks to purchase property, was unconstitutional under the equal protection clause of the Fourteenth Amendment. The Joneses could have used this decision to challenge the Mayer Company's policy. But the company, in anticipation, claimed that it was operating solely as a private company; it had developed the subdivision solely on its own, without any state involvement. So the Joneses relied instead on the Civil Rights Act of 1866, which Congress had passed to enforce the Thirteenth Amendment. The company's actions, they argued, violated a surviving remnant of this act that promised "all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof, to purchase real property." Joseph and Barbara Jones were asking the justices to do something the Court had refused to do ever since the Thirteenth Amendment passed—declare that the amendment outlawed private discrimination as a violation of the rights of free citizens. The Supreme Court agreed with the Joneses, by a vote of 7 to 2, that the Thirteenth Amendment abolished the "incidents and badges of slavery" as well as slavery itself. This concept was not new to the Court; it had used the language in its 1883 decision in the Civil Rights Cases, but with a different result.

Then, it interpreted the incidents and badges of slavery narrowly to exclude private acts of discrimination; now, it viewed these acts as impermissible. "Just as the Black Codes, enacted after the Civil War . . . were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery," the Court determined.

The real issue at stake was the meaning of freedom itself. During the debate over the Civil Rights Act of 1866, Senator Lyman Trumbull from Illinois, who led the fight to adopt the Thirteenth Amendment, warned that measures such as the Black Codes threatened the freedom won for all Americans on the battlefields of the Civil War: "The trumpet of freedom that we have been blowing throughout the land has given an 'uncertain sound,' and the promised freedom is a delusion," he claimed. In *Jones v. Alfred Mayer Co.*, the justices answered his concern. "At the very least," the majority opinion stated, "the freedom that Congress is empowered to secure under the Thirteenth Amendment includes

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

With the ratification of the Thirteenth Amendment, Americans had reimagined their Constitution. This first Reconstruction amendment established freedom as a condition of U.S. citizenship, but its meaning was uncertain. As the nation’s attention turned away from the conditions of ex-slaves in the 1870s, the Thirteenth Amendment faded into relative obscurity—until the decision in *Jones v. Alfred Mayer Co.*

Although dormant for many decades, the amendment was never entirely forgotten. On numerous occasions, especially in the nineteenth century, the Supreme Court struck down various laws on peonage (forced labor for payment of debts) as violations of the ban on involuntary servitude. But memory of the amendment’s promise rested largely with African Americans, who viewed it in both a negative and positive light. For many blacks in segregated America, freedom still was more hope than reality, though the amendment was also a symbol of how far they had come. Many African-American communities, for example, celebrated February 1, the date in 1865 when Abraham Lincoln signed the Thirteenth Amendment, as Freedom Day. When Congress in 1947 established the date as an annual celebration, the man who lobbied most for the new National Freedom Day, an ex-slave from Georgia, said the amendment “not only freed the black man legally, but laid the groundwork for the white man’s [freedom] as well.”

What this freedom entailed was open to debate, but increasingly in the twentieth century a variety of causes invoked the amendment’s promise. Since the 1960s, legal scholars have argued that the Thirteenth Amendment should protect exploited workers, abused women, neglected children, and all other victims of relationships that bore the vestiges of slavery or involuntary servitude. In a 1969 case concerning major league baseball, a star player, Curt Flood, challenged league rules against free agency, or the ability to negotiate his own contract, as a violation of the amendment’s guarantee of freedom. He lost his case (although baseball owners later abandoned their restrictive rules), but what was important was a renewed debate about what defines freedom.

The struggle over the amendment’s meaning is far from over. In this sense, the first part of the Constitution to establish freedom as a right of all Americans is not unlike the more well-known amendment, the Fourteenth, that followed it. With the Fourteenth Amendment, the questions that begged answers centered on the rights included in its elusive phrases of “due process” and “equal protection.” The Court over time has interpreted the Fourteenth Amendment to include many of the rights outlined in the Bill of Rights. The Thirteenth Amendment cannot claim this constitutional legacy, but it does not need to. Its contribution is different but complementary. With its passage, Americans understood that the Constitution was not written on tablets of stone, with their rights engraved for all times and incapable of change. Each generation has the ability to challenge and enlarge on the work of previous generations. Rights can be expanded and created, not simply accepted. Freedom can be evaluated and redefined, not simply celebrated. Both freedom and the Constitution that protects the rights that accompany freedom are living achievements, not relics of a dead past. The Thirteenth Amendment made freedom part of our constitutional birthright; it also invited us all to continue the debate over what freedom means.

“We tend to think the case has been made that a free society is a stable society, that a free society is the birthright of all people. We do not know why we must make the case all over again when judgment has been given in our favor. . . . History teaches that freedom must make its case, again and again, from one generation to the next. The work of freedom is never done.”

—Justice Anthony M. Kennedy,
speech at the annual meeting
of the American Bar
Association, August 9, 2003

Civil Rights for Former Slaves

After the Civil War, Congress passed two civil rights acts (1866 and 1875) that sought to secure the rights of freed slaves and to enforce the provisions of the Thirteenth and Fourteenth Amendments. The 1875 act especially sought to prohibit private discrimination against blacks in such matters as access to inns and public transportation. One of the central issues that emerged was whether the Thirteenth Amendment allowed Congress to outlaw “vestiges of slavery,” or the discrimination that resulted from African Americans’ previous status as noncitizens.

In the Civil Rights Cases of 1883, Justice Joseph P. Bradley wrote for an 8-to-1 majority of the Supreme Court, which interpreted the Thirteenth Amendment narrowly and ruled that it did not authorize Congress to outlaw discrimination.

It is true that slavery cannot exist without law any more than property in lands and goods can exist without law, and therefore the thirteenth amendment may be regarded as nullifying all state laws which establish or uphold slavery. . . . We must not forget that the province and scope of the thirteenth and fourteenth amendments are different: the former simply abolished slavery: the latter prohibited the states from abridging the privileges or immunities of citizens of the United States, from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of congress under them are different. . . . Under the thirteenth amendment, it has only to do with slavery and its incidents. . . . Under the thirteenth amendment the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not. . . . When a man has emerged from slavery, . . . there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected. . . . Mere discriminations on account of race or color were not regarded as badges of slavery.

Justice John Marshall Harlan registered a strong dissent in the Civil Rights Cases. His view was later adopted by the court in Jones v. Alfred Mayer Co. (1968).

The thirteenth amendment. . . did something more than to prohibit slavery as an institution, resting upon distinctions of race, and upheld by positive law. . . . [I]t established and decreed universal civil freedom throughout the United States. But did the freedom thus established involve nothing more than exemption from actual slavery? . . . Was it the purpose of the nation simply to destroy the institution, and then remit the race. . . to the several states for such protection, in their civil rights, necessarily growing out of freedom, as those states, in their discretion, choose to provide? Were the states, against whose solemn protest the institution was destroyed, to be left perfectly free. . . to make or allow discriminations against that race, as such, in the enjoyment of those fundamental rights that inhere in a state of freedom? . . .

That there are burdens and disabilities which constitute badges of slavery and servitude, and that the express power delegated to congress to enforce, by appropriate legislation, the thirteenth amendment, may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable.

I do hold that since slavery. . . was the moving or principal cause of the adoption of that [thirteenth] amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races.

“A New Birth of Freedom”

Military historians agree that the Battle of Gettysburg was the turning point of the Civil War. It also marked the time when the abolition of slavery, rather than preservation of the Union, began to emerge as a goal of the war. On November 19, 1863, President Abraham Lincoln delivered the Gettysburg Address, to dedicate the battlefield. The short speech signaled this new goal when he spoke about “a new birth of freedom.” The Thirteenth Amendment, which abolished slavery when it was ratified after the war, guaranteed freedom to all Americans.

Fourscore and seven years ago our fathers brought forth on this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation or any nation so conceived and so dedicated can long endure. We are met on a great battlefield of that war. We have come to dedicate a portion of that field as a final resting-place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this. But in a larger sense, we cannot dedicate, we cannot consecrate, we cannot hallow this ground. The brave men, living and dead who struggled here have consecrated it far above our poor

power to add or detract. The world will little note nor long remember what we say here, but it can never forget what they did here. It is for us the living rather to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain, that this nation under God shall have a new birth of freedom, and that government of the people, by the people, for the people shall not perish from the earth.