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## Contract, Race, and Freedom of Labor in the Constitutional Law of “Involuntary Servitude”

**ABSTRACT.** The Supreme Court has yet to adopt and apply a standard for assessing labor rights claims under the Involuntary Servitude Clause. This Article suggests that one may be found in the leading decision of *Pollock v. Williams* (1944), which contains the Court’s most thorough discussion of the interpretive issues. Under *Pollock*, a claimed right should be protected if it is necessary to provide workers with the “power below” and employers the “incentive above” to prevent “a harsh overlordship or unwholesome conditions of work.” Although this is not the only conceivable standard, it does fit well with the text, history, and case law of the Amendment. The absence of any racial element, which might appear dishonest in light of the fact that most of the leading cases involved workers of color, nevertheless corresponds to the Amendment’s original meaning and appears to have important advantages from a doctrinal point of view. The Article discusses the legal and philosophical justifications of various labor rights in relation to the *Pollock* standard, including the right to quit, the right to change employers, the right to name the wages for which one is willing to work, and the right to strike.

**AUTHOR.** Professor of Law & Sidney Reitman Scholar, Rutgers University School of Law–Newark. This Article is dedicated to the memory of C. Edwin Baker (1947–2009), long-time friend and fellow Kentuckian. Ed’s generosity of spirit, uncompromising integrity, and steady faith in reason will be sorely missed.

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## INTRODUCTION

Mayor Barrows—Dear Sir:—*At a meeting of the colored Washerwomen of this city, on the evening of the 18th of June, the subject of raising the wages was considered . . . :*

*Be it resolved . . . , That on and after the foregoing date, we join in charging a uniform rate for our labor . . . , and any one belonging to the class of washerwomen, violating this, shall be liable to a fine regulated by the class.*

. . .

*The prices charged are:*

*\$1.50 per day for washing*

*\$15.00 per month for family washing*

*\$10.00 per month for single individuals*

*We ask you to consider the matter in our behalf, and should you deem it just and right, your sanction of the movement will be gratefully received.*

—Petition of the Colored Washerwomen  
Jackson, Mississippi, June 20, 1866<sup>1</sup>

Six months before the washerwomen of Jackson enacted their rule and submitted their petition, Secretary of State William Seward certified the ratification of the Thirteenth Amendment to the United States Constitution. Section 1 of the Amendment provides: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” This text presents a unique interpretive problem. Nearly everyone—from the Congress that proposed it down to the courts of today—has agreed that it is a rights-granting provision.<sup>2</sup> Yet it mentions no right.

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- 1 THE BLACK WORKER: A DOCUMENTARY HISTORY FROM COLONIAL TIMES TO THE PRESENT 345 (Philip S. Foner & Ronald L. Lewis eds., 1978).
  - 2 See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443-44 (1968); *The Civil Rights Cases*, 109 U.S. 3, 22 (1883); CONG. GLOBE, 38th Cong., 1st Sess. 2954 (1864) (statement of Rep. Kellogg) (finding in it “rights which are inalienable”); CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864) (statement of Rep. Ingersoll) (finding “certain inalienable rights” including the “right to till the soil, to earn his bread by the sweat of his brow, and enjoy the rewards of his own labor”); ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* 44-46 (2004); REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS* 41-42 (2006); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 893-99 (1986); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 475-504 (1989).

Instead, it prohibits two conditions—slavery and involuntary servitude—without specifying what rights are necessary to negate those conditions. It is thus the one provision of the Constitution that clearly calls on courts and Congress to identify and enforce unenumerated rights.<sup>3</sup> One of those rights, the inalienable right to quit work, is so prominent in our constitutional consciousness that it tends to overshadow other possibilities. But workers have, with varying degrees of success, claimed a number of Thirteenth Amendment labor rights, including the right to change employers, the right to set wages (as opposed, for example, to wage setting by the state or an employer cartel), the right to refrain from working altogether (in challenges to vagrancy laws), the right to practice one's chosen trade (most prominently in cases involving entertainers and professional athletes), the right to receive fair wages, and the rights to organize and strike for higher wages and better conditions, as in the petition of the colored washerwomen reprinted above.<sup>4</sup>

The question then arises: what principle or principles can guide a conscientious constitutionalist in determining whether a particular labor right is implied by the ban on involuntary servitude? About a half century ago, Harvard Law Professor and later Solicitor General Archibald Cox suggested that a standard could be found in Justice Robert Jackson's opinion for the Supreme Court in *Pollock v. Williams*.<sup>5</sup> In *Pollock*, the Court struck down a Florida peonage law and set forth its most extensive justification for protecting the inalienable right to quit work under the Thirteenth Amendment. "[I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers," explained Justice Jackson's opinion for a seven-member majority. "When the master can compel and the

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3. Section 2 provides: "Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII, § 2. The Amendment does not mention judicial enforcement, but section 1 outlaws slavery and involuntary servitude of its own force. *Civil Rights Cases*, 109 U.S. at 20, 23. By contrast, the Ninth Amendment—which makes clear the existence of unenumerated rights—says nothing about any federal government role in their identification or enforcement, arguably leaving those tasks to the states and the people of the United States. U.S. CONST. amend. IX.
  4. See, e.g., WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 135-41 (1991) (reviewing the rights to organize and strike); RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 51, 69-70, 143, 155-57 (2007) (describing the rights to fair wages and to refrain from work); ROBERT J. STEINFELD, *COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY* 285-89 (2001) (describing how the Amendment guarantees the right to change employers); Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 *YALE L.J.* 775 (1992) (deriving the right to pursue a calling); VanderVelde, *supra* note 2, at 493-94 (discussing a right to set wages).
  5. 322 U.S. 4 (1944).

laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work.”<sup>6</sup> From this language, Cox concluded that the standard for determining whether a given labor right is protected by the Thirteenth Amendment hinges on whether the right is necessary to provide workers with the “power below” and employers the “incentive above” to prevent “a harsh overlordship or unwholesome conditions of work.”<sup>7</sup>

The courts have not embraced Cox’s proposal. Nor have they adopted any other standard for assessing labor rights claims under the Thirteenth Amendment. The result is an area of law lacking consistent rationales for past decisions or guideposts for the future. It is no exaggeration to say that Thirteenth Amendment doctrine is “severely underdeveloped” and remains to be “meaningfully translated into the present industrial context.”<sup>8</sup>

This Article reconsiders the text, history, and doctrine of the Thirteenth Amendment with regard to the question of labor rights. It rejects the view, expressed by the Supreme Court in 1872, that the words of the Amendment “seem hardly to admit of construction, so vigorous is their expression.”<sup>9</sup> The question of what constitutes “involuntary” or coerced action has long been a subject of intense and inconclusive debate.<sup>10</sup> Demonstrating the lack of consensus, Congress recently went beyond the Supreme Court’s definition, criminalizing the extraction of labor by threats of “serious harm,” physical or nonphysical, to the victim or to other persons.<sup>11</sup> Looking further back in time, the leading sponsors of foundational labor rights statutes like the Norris-LaGuardia Anti-Injunction Act and the Wagner National Labor Relations Act believed that economic coercion could bring about a condition of involuntary servitude, and the statutes they promoted reflected that philosophy.<sup>12</sup>

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6. *Id.* at 18.

7. *Id.*; Archibald Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 576-77 (1951).

8. Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 974 (2002).

9. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 69 (1872).

10. See, e.g., GERTRUDE EZORSKY, *FREEDOM IN THE WORKPLACE?* 5-14 (2007); STEINFELD, *supra* note 4, at 1-26.

11. See Victims of Trafficking and Violence Protection Act of 2000, 18 U.S.C. § 1589 (2000); *United States v. Kozminski*, 487 U.S. 931, 943-44 (1988) (holding that the “involuntary servitude” criminalized in federal statutes consisted only of physical and legal coercion); *United States v. Bradley*, 390 F.3d 145, 150-51 (1st Cir. 2004) (observing that the Act was “intended expressly to counter *United States v. Kozminski*” and upholding a jury instruction that defendants charged with violating it could be convicted based on nonphysical coercion), *vacated and remanded on other grounds*, 545 U.S. 1101 (2005).

12. See *infra* Section VI.D.

Consistent with their view, the Department of Justice maintained during the 1940s that the grossly substandard pay and conditions of African-American agricultural laborers constituted evidence of involuntary servitude in violation of the Thirteenth Amendment.<sup>13</sup> The term “servitude” has received less attention, but, as discussed below, it too can be read in various ways, ranging from a synonym for slavery to employment in general.<sup>14</sup> Then there is the question of how the two words relate to one another. If servitude carries a connotation of coercion (as it does in present-day dictionaries), then what does the term “involuntary” add? Conversely, if servitude means employment in general (as it did to some people in the 1860s), then could it be said that most Americans have no practical alternative but to enter into servitude?

This Article proposes that the *Pollock* standard should be adopted by courts, legislators, and other interpreters of the Constitution. Part I examines the origins of the standard in judicial opinions and congressional enactments applying the ban on involuntary servitude. It challenges the notion, widespread in our constitutional culture, that the inalienable right to quit arose straightforwardly and obviously from the text and history of the Amendment. To the contrary, that right prevailed only after a series of interpretive struggles extending back more than two centuries to the time when the phrase “involuntary servitude” first appeared in the Northwest Ordinance. The outcome was in no sense foreordained; in fact, it was a very near thing. At each stage, the proponents of the right to quit made the same, crucial interpretive choices—choices that were eventually refined and summarized in *Pollock*.

Part II inquires into the role of race in Thirteenth Amendment labor rights claims. The petition of the self-described “Colored Washerwomen” of Jackson, reprinted above, raises concerns both of race and of labor rights. Likewise, the Supreme Court cases that established the individual right to quit work all involved black laborers. Although the Court proceeded as if the peonage laws challenged in those cases had nothing whatever to do with race, everyone involved was fully aware that they were enforced primarily against African-Americans. From this, one might surmise that those decisions should be viewed as race cases that would have come out differently had the laborers involved been white. However, Part II suggests that the *Pollock* Court did not err in holding that a Thirteenth Amendment labor rights violation can be established without proof of a racial element. It proposes that race should play a role in the analysis, but not as an element of the violation. Further, although a full treatment of the relation between sex and labor rights is beyond the scope

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13. GOLUBOFF, *supra* note 4, at 143-44.

14. See *infra* Section III.A.

of this Article, Part II does suggest that sex might—at a minimum—play a similar role to race in the analysis.

Part III presents the case for adopting the language of *Pollock* as a standard. It assesses the fit of the language with the text, history, and case law of the Thirteenth Amendment. Part IV takes a closer look at the standard, examining its particular role in negating involuntary servitude, its workability, and the division of labor between courts and Congress in its implementation.

Part V considers the legal and philosophical justifications for three constitutional labor rights: to quit, to change employers, and to set wages. It suggests that, in a nation of employees, these rights function not so much to allow workers to *escape* servitude, as to enable them to *transform* it into something better. If the labor market is functioning reasonably well, these rights should give workers the “power below” to give employers the “incentive above” to provide jobs that do not entail servitude. This leaves the question of what happens if workers enjoy all of these market rights, but nevertheless have no practical alternative but to accept servitude. Part V concludes that nothing in either the *Pollock* standard or its philosophical foundations precludes the possibility that nonmarket rights might be necessary to prevent servitude.

Part VI addresses the principal nonmarket labor rights that have been claimed under the Thirteenth Amendment, which fall under the heading of the worker’s freedom of association. It suggests that—if we take the time to apply ordinary methods of constitutional interpretation—the case for the Thirteenth Amendment rights to organize and engage in concerted activity is compelling on the merits. Although no court has recognized or enforced any such right since the late 1940s, the text, history, and judicial interpretation of the Amendment do favor the claim—a fact that might help to account for the otherwise surprising absence of any interpretive reasoning in judicial decisions to the contrary. Part VI ends by considering the fit between associational rights and the Amendment’s objective of race equality.

## I. ORIGINS OF THE INALIENABLE RIGHT TO QUIT WORK

At first glance, the right to quit might seem to spring from the Amendment without any need for interpretation. After all, if your employer can force you to remain on the job, then you must literally be in a condition of “involuntary servitude.” Unfortunately for simplicity, however, indentured servitude and peonage commonly arise from contractual agreement, and if a laborer *voluntarily* enters into a contract for indentured servitude or peonage, then it is hard to see how he or she could be in a condition of *involuntary* servitude. As far as the text goes, then, there are two equally plausible interpretations. According to one, servitude becomes involuntary the moment that a worker



wishes to cease work and is prevented from doing so. According to the other, servitude is involuntary only if it is entered into involuntarily.

These two readings set two great freedoms against each other: freedom of contract and, as labeled by the Supreme Court, the “freedom of labor.”<sup>15</sup> If the laborer is granted the right to quit at any time, then she loses the freedom to make a fully enforceable labor contract. But if she enjoys the right to make a fully enforceable labor contract, then she could bargain away her freedom of labor and find herself in a relation of abject submission to her employer.

The seriousness of this problem was clear from the outset. Senator Sumner quoted a New Mexico military officer’s opinion that “[p]eonage is voluntary and not involuntary servitude,” and that the Constitution “does not prohibit it.”<sup>16</sup> Because of this difficulty, he proposed that an antipeonage bill be developed by the Judiciary Committee, which had gained expertise on constitutional questions in the course of drafting both the Thirteenth Amendment and legislation to enforce it.<sup>17</sup> As enacted, however, the new peonage law appeared to flaunt the constitutional problem by brazenly prohibiting not only “involuntary service,” but also the “*voluntary* . . . service or labor of any persons as peons.”<sup>18</sup>

With the benefit of hindsight, we know that the Supreme Court eventually resolved this tension in favor of labor freedom and the right to quit. Contrary to popular belief, however, there was nothing obvious or inevitable about this outcome. Both of the competing readings found support in the text and history of the Amendment. The Supreme Court leaned first one way and then the other, finally making a forthright interpretive choice in favor of “the freedom of labor upon which alone can enduring prosperity be based.”<sup>19</sup> The history of this choice reveals much about the interpretive issues inherent in the text of the Involuntary Servitude Clause, its original meaning (or meanings), and the minimum requirements for a principled assessment of other claimed rights under the Clause.

#### A. *The Right To Quit Under the Northwest Ordinance of 1787*

Senator Sumner’s fear that a ban on peonage might exceed the scope of the Thirteenth Amendment was well founded. The text of the Amendment was

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15. *Bailey v. Alabama*, 219 U.S. 219, 245 (1911).

16. CONG. GLOBE, 39th Cong., 2d Sess. 240-41 (1867) (statement of Sen. Sumner).

17. *Id.*

18. Peonage Act of 1867, ch. 187, § 1, 14 Stat. 546 (emphasis added).

19. *Bailey*, 219 U.S. at 245.

drawn directly from the Northwest Ordinance of 1787.<sup>20</sup> Proponents of this wording pointed not to its substance, but to its provenance and familiarity.<sup>21</sup> Senator Howard of Michigan, a member of the Senate Judiciary Committee, stressed that it had “been adjudicated upon repeatedly” and was “perfectly well understood both by the public and by judicial tribunals.”<sup>22</sup>

Unfortunately, however, the language was “perfectly well understood” to produce two entirely opposite outcomes on the issue. Illinois famously rejected the right to quit in favor of the freedom of contract. Early on, Governor Harrison interpreted the Ordinance not to prohibit indentured servitude (meaning bound service for a period of years enforceable by specific performance), a view that was incorporated into territorial laws beginning in 1803, and in the Illinois State Constitution of 1818.<sup>23</sup> The Illinois courts maintained that even a long-term indenture entered into “voluntarily” and “without fraud or collusion” was valid under the Ordinance.<sup>24</sup> This interpretation could be defended on the ground that the Constitution included persons “bound to Service for a Term of Years” in the category of “free

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20. MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 56-57 (2001). The Ordinance provided: “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 convicted . . . .” Northwest Ordinance of 1787, art. VI, Confederate Congress.
  21. VORENBERG, *supra* note 20, at 56-57; Howard Devon Hamilton, *The Legislative and Judicial History of the Thirteenth Amendment*, 9 NAT’L B.J. 26, 30-31 (1951).
  22. CONG. GLOBE, 38th Cong., 1st Sess. 1489 (1864) (statement of Sen. Howard).
  23. Hamilton, *supra* note 21, at 50-51. The Constitution of 1818 incorporated the Ordinance’s prohibition of slavery and involuntary servitude and in the next sentence authorized indentures. *Id.*
  24. The quotation is from Justice Thomas’s concurrence in *Sarah, Alias Sarah Borders, a Woman of Color v. Borders*, 5 Ill. (4 Scam.) 341, 347 (1843) (Thomas, J., concurring). The indenture in *Sarah* was for forty years. Strangely, none of the cases cited by historians for the existence of the “Illinois rule” are on point. This is because the Illinois Supreme Court held that when Congress accepted Illinois into the Union with its 1818 constitution approving involuntary indentured servitude, the Ordinance was no longer binding on Illinois. *Phoebe, a Woman of Color v. Jay*, 1 Ill. (Breese) 268, 272 (1828). In *Phoebe*, the court opined that an Illinois territorial statute had been void under the Ordinance because it authorized indentures that were not entered into voluntarily, but this was dictum because—according to the court—the 1818 constitution and its acceptance by Congress exempted Illinois from the Ordinance. Whatever the strength of the case law, however, it was widely known that indentured servitude thrived in Illinois despite the Northwest Ordinance both before and after 1818. Hamilton, *supra* note 21, at 49-51. On the “Illinois rule,” see STEINFELD, *supra* note 4, at 259-61. *But see* Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020, 2047-48 (2009) (arguing that the Illinois and Indiana approaches to the interpretive issues regarding involuntary servitude were more similar than appears in Steinfeld’s account).

Persons.”<sup>25</sup> It permitted slave owners to convert their human property into indentured servants by forming a “voluntary” contract. In 1818, Congress admitted Illinois to the Union over objections that its constitution permitted slavery, apparently approving the freedom-of-contract rule.<sup>26</sup>

Indiana took the opposite approach from Illinois and, in the process, set the pattern for future justifications of the right to quit. In *The Case of Mary Clark, a Woman of Color*, the Indiana Supreme Court held that a twenty-year contract of indenture constituted “involuntary servitude” under the state constitution (which incorporated the language of the Ordinance) even though the servant had “voluntarily” consented to the contract.<sup>27</sup> The court framed the issue as whether Clark’s service, though “involuntary in fact” given her current desire for freedom, was “voluntary by operation of law” because of her voluntary assent to the indenture.<sup>28</sup> Here, the court looked not to the validity of Clark’s consent, but to the social consequences of permitting a person to enter into a long-term labor contract that could be enforced by specific performance. Because such a contract “must be personally performed under the eye of the master,” such enforcement “would produce a state of servitude as degrading and demoralizing in its consequences, as a state of absolute slavery; and if enforced under a government like ours, which acknowledges a personal equality, it would be productive of a state of feeling more discordant and irritating than slavery itself.”<sup>29</sup> Permitting masters to enforce such contracts through self-help (the actual issue in *Mary Clark*) would likewise injure the “state of society” by producing “a state of domination in the one party, and abject humiliation in the other.”<sup>30</sup> The gravamen of a violation, then, lay not in

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25. U.S. CONST., art. I, § 2, cl. 3. At the time the Constitution was enacted, white, as well as black laborers could be “bound to Service for a Term of Years” by contract, for debt, or as punishment for crime. RICHARD B. MORRIS, *GOVERNMENT AND LABOR IN EARLY AMERICA* 29-32 (1946).

26. Hamilton, *supra* note 21, at 51-52.

27. 1 Blackf. 122, 125-26 (Ind. 1821).

28. *Id.* at 123-24.

29. *Id.* at 124-25.

30. *Id.* at 125. It has been argued that *Mary Clark* did not equate specific performance with involuntary servitude. Oman, *supra* note 24, at 2043-44. Because the actual issue in the case involved self-help enforcement, and not specific performance, the decision arguably contains no holding on the status of specific performance under the state constitution. However, the court’s decisive reasoning on the two issues is virtually identical. On specific performance, the court cited the common law ban and then observed that “if the law were silent, the policy . . . would settle this question.” 1 Blackf. at 124. The court stated the policy in terms that evoked constitutional concerns, as noted above. See *supra* text accompanying note 29. Indeed there was no reason for the court to digress on the issue of specific

the presence or absence of individual consent, but in the relationship of domination and subjugation.

When Congress began to consider proposals for a thirteenth amendment banning slavery, the conflict between the Illinois rule favoring freedom of contract and the Indiana rule favoring freedom of labor remained unresolved. Only a few years before, in 1860, northern members of Congress had promoted legislation to abolish criminal enforcement of labor contracts in New Mexico, which embraced the Illinois rule in its state constitution.<sup>31</sup> But southerners replied that the situation in New Mexico was no worse than in “philanthropic England” – or, for that matter, in the northern states themselves – and the bill was defeated.<sup>32</sup> By that time, the practice in the northern states conformed generally to the Indiana rule, but there were few judicial opinions linking this practice to the ban on slavery or involuntary servitude.<sup>33</sup> In short, Senator Howard’s observation that the language of the Ordinance – soon to be that of the Thirteenth Amendment – was “perfectly well understood both by the public and by judicial tribunals” did not apply to the issue of the inalienable right to quit.

*B. The Right To Quit and the Peonage Act of 1867*

There was scant discussion of the right to quit or any other specific labor right in the congressional debates over the Thirteenth Amendment. A number of outside commentators did suggest that peonage and West Indies-style apprenticeship constituted “involuntary servitude,” but their observations did not bear on the clash between the freedom of contract and the freedom of labor.<sup>34</sup> Given that both peonage and apprenticeship could be created involuntarily as well as by contractual consent (peonage quite commonly, apprenticeship generally), it is not at all clear that their mention implied an endorsement of the Indiana rule.

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performance except to support its ultimate conclusion “that the appellant is in a state of involuntary servitude; and we are bound by the Constitution, the supreme law of the land, to discharge her therefrom.” 1 Blackf. at 126. The possibility that the same considerations might not apply to relatively privileged workers is discussed *infra* text accompanying notes 191-198.

31. See STEINFELD, *supra* note 4, at 265.

32. H.R. REP. NO. 36-508, at 32-33 (1860); STEINFELD, *supra* note 4, at 266.

33. STEINFELD, *supra* note 4, at 264.

34. JAMES D. SCHMIDT, *FREE TO WORK: LABOR LAW, EMANCIPATION, AND RECONSTRUCTION, 1815-1880*, at 116 (1998).

The clash between freedom of contract and freedom of labor resumed in earnest shortly after ratification when the Thirty-Ninth Congress, which included most of the senators and representatives who had proposed the Thirteenth Amendment, debated and passed the Peonage Act of 1867.<sup>35</sup> Congress was concerned primarily about debt peonage in the territory of New Mexico, but the bill covered all U.S. territories and states. In a sharp departure from the wording of the Thirteenth Amendment, it prohibited “the *voluntary* or involuntary service or labor of any persons as peons,” thus clearly embracing the Indiana rule.<sup>36</sup> In opposition, Senator Davis of Kentucky argued—consistently with the Illinois position—“that to the extent that [peonage] is voluntary there is no necessity and no power on the part of Congress to interfere with it.”<sup>37</sup>

To the bill’s proponents, however, what mattered was not whether the laborer chose servitude, but whether the resulting condition was degrading to workers and employers. Senator Doolittle freely admitted that in a system of peonage, “the first thing the laborer desired to do was to get in debt to his master, and get in debt as much as he could, and go and live with him.”<sup>38</sup> In fact, some laborers had chosen to remain in servitude even after a federal court in New Mexico declared peons to be free and entitled to writs of habeas corpus. “Not knowing their rights, not being in a position to go into court to assert their rights, or *not having a desire to do so*, [laborers] were generally remaining in the families of their masters . . . .”<sup>39</sup> The existence of freedom was to be tested not by individual worker consent, but by whether freedom was operating to produce fair conditions. The terms of debt service were, observed Senator Buckalew, “always exceedingly unfavorable to” the laborer, and the system “degrade[d] both the owner of the labor and the laborer himself.”<sup>40</sup> Senator Henry Wilson, the bill’s strongest proponent, compared this “wretched system” with the situation in the large towns of New Mexico, where

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35. Compare CONG. GLOBE, 38th Cong., 1st Sess. 1 (1863) (reporting the senators present at the Senate session that proposed and passed the proposed amendment), and CONG. GLOBE, 38th Cong., 2d Sess. 1-2 (1864) (reporting the representatives present at the House session that passed the amendment), with CONG. GLOBE, 39th Cong., 2d Sess. 1 (1866) (reporting the senators present at the Senate session that proposed and passed the Peonage Act of 1867), and *id.* at 1-2 (reporting the representatives present at the House session that passed the Act).

36. Peonage Act of 1867, ch. 187, § 1, 14 Stat. 546 (emphasis added).

37. CONG. GLOBE, 39th Cong., 2d Sess. 1571 (1867) (statement of Sen. Davis).

38. *Id.* at 1572 (statement of Sen. Doolittle).

39. *Id.* at 1571-72 (emphasis added).

40. *Id.* at 1572 (statement of Sen. Buckalew).

peonage had disappeared, “and peons who once worked for two or three dollars a month are now able to command respectable wages, to support their families, elevate themselves, and improve their condition.”<sup>41</sup> The Act’s proponents thus reiterated the *Mary Clark* court’s condemnation of domination and degradation and added new, distributional concerns that would be echoed in the future: exploitation and poverty.

C. *The Right To Quit in the Supreme Court*

The same clash of views played out in the Supreme Court.<sup>42</sup> At first, the Court leaned toward the Illinois view that servitude entered into voluntarily could not be “involuntary servitude.” In the 1897 case of *Robertson v. Baldwin*, the Court upheld federal statutes making it a crime for seamen to quit their jobs during the contract term, and directing federal marshals to arrest deserting seamen and return them forcibly to their ships.<sup>43</sup> The statutes’ validity, reasoned the Court, depended on the answer to the question:

Does the epithet “involuntary” attach to the word “servitude” continuously, and make illegal any service which becomes involuntary at any time during its existence [the Indiana rule], or does it attach only at the inception of the servitude, and characterize it as unlawful because unlawfully entered into [the Illinois rule]?<sup>44</sup>

Without directly stating an answer, the Court made clear its preference for the Illinois rule on grounds both of policy and tradition. Under the Indiana rule, “no one, not even a soldier, sailor, or apprentice, can surrender his liberty, even for a day, and the soldier may desert his regiment upon the eve of battle, or the sailor abandon his ship at any intermediate port or landing, or even in a storm at sea . . . .”<sup>45</sup> The Court noted that contracts “for a limited personal servitude at one time were very common in England,” and that it was a crime for tradesmen or laborers to desert during the contract term.<sup>46</sup> The Court saw no need for constitutional protection against such a rule because American “public opinion” would not “tolerate a statute” that criminalized the breach of a contract for personal service “except in the cases of soldiers, sailors and

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41. *Id.* at 1571 (statement of Sen. Wilson).

42. See STEINFELD, *supra* note 4, at 270-85.

43. 165 U.S. 275 (1897).

44. *Id.* at 280.

45. *Id.*

46. *Id.* at 281.

possibly some others.”<sup>47</sup> Having said all this, the Court rendered it unnecessary by holding that the Thirteenth Amendment “was not intended to introduce any novel doctrine” concerning certain “exceptional” occupations that had always been subject to specific performance, one of which was seafaring.<sup>48</sup> In dissent, Justice Harlan vigorously attacked the majority’s preference for the Illinois rule, arguing that permitting a person voluntarily to enter into a condition of servitude enforceable by law was no different from allowing him to choose a condition of slavery.<sup>49</sup> The majority’s view, however, was no fluke. At least one state court and one U.S. territorial court had upheld criminal prosecutions against workers for quitting in violation of a labor contract.<sup>50</sup>

In *Clyatt v. United States*, decided in 1905, the Court reversed direction and unanimously adopted the Indiana rule, but without any supporting reasoning.<sup>51</sup> Six years later, *Bailey v. Alabama* filled that gap.<sup>52</sup> The majority opinion by Justice Charles Evans Hughes and the dissent by Justice Oliver Wendell Holmes replayed the clash between the Indiana and Illinois rules one final time. In order to circumvent state constitutional provisions barring imprisonment for debt, southern states had made it a crime for a laborer to obtain an advance on wages by means of a fraudulent promise of future labor. Fraud was presumed from the breach of promise, and the laborer was barred from rebutting the presumption with testimony “as to his uncommunicated motives, purpose or intention.”<sup>53</sup> The majority found no relevant distinction between this law and straightforward peonage:

What the State may not do directly it may not do indirectly. If it cannot punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, it is not permitted to accomplish the same

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47. *Id.*

48. *Id.* at 282-83.

49. *Id.* at 300-01 (Harlan, J., dissenting).

50. See *Hilo Sugar Co. v. Mioshi*, 8 Haw. 201 (1891); STEINFELD, *supra* note 4, at 268-70 (citing *State v. Williams*, 10 S.E. 876 (S.C. 1889)); see also CHRISTOPHER G. TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES: CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT 340-43 (2d ed. 1900) (asserting that the Thirteenth Amendment is not violated by the specific performance of term labor contracts or by the criminal punishment of laborers for violating such contracts, and providing examples of criminal statutes barring the breach of labor contracts in various southern states).

51. 197 U.S. 207, 215 (1905).

52. 219 U.S. 219 (1911).

53. *Id.* at 228 (quoting *Bailey v. State*, 49 So. 886, 886 (1909)).

result by creating a statutory presumption which upon proof of no other fact exposes him to conviction and punishment.<sup>54</sup>

Like the Indiana Supreme Court and the congressional proponents of the Peonage Act, the *Bailey* majority looked to the purposes of banning involuntary servitude and the consequences of denying the right to quit. In addition to abolishing slavery, the Thirteenth Amendment was intended “to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another’s benefit which is the essence of involuntary servitude.”<sup>55</sup> The evil, then, was to be found in the relation of control, and not in the presence or absence of consent to be controlled. “There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based,” declared the Court, and if the Alabama law were allowed to stand, then the legal protections for labor freedom “would soon become a barren form.”<sup>56</sup> The Court did not restrict itself to applying the Peonage Act, but held instead that the Alabama law violated both the Act and the Thirteenth Amendment itself.<sup>57</sup>

In dissent, Oliver Wendell Holmes clung to the Illinois rule, insisting that criminal punishment for breaching a “perfectly fair and proper contract” could not constitute peonage or involuntary servitude.<sup>58</sup> “Breach of a legal contract without excuse is wrong conduct, even if the contract is for labor,” he maintained, “and if a State adds to civil liability a criminal liability to fine, it simply intensifies the legal motive for doing right, it does not make the laborer a slave.”<sup>59</sup> From fines to imprisonment was, for Holmes, an easy step. Surely, he reasoned, the state could imprison a laborer for failing to pay a fine for breach of contract.<sup>60</sup>

*Bailey* resolved the question of the right to quit in the world of legal doctrine, but not of social practice. Southern states tested the Court’s commitment to the right to quit, some by openly defying *Bailey* and others by

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54. *Id.* at 244.

55. *Id.* at 241.

56. *Id.* at 245.

57. *Id.*; see also *United States v. Reynolds*, 235 U.S. 133, 142, 150 (1914) (striking down a state statute making it a crime to breach a criminal surety contract under which one person, usually a landowner, paid the fine of a convicted criminal, usually an agricultural laborer, in exchange for a term of labor).

58. *Bailey*, 219 U.S. at 247 (Holmes, J., dissenting).

59. *Id.* at 246.

60. *Id.* at 246-47.



circumventing the decision with more subtle legal mechanisms.<sup>61</sup> Not until the 1940s did the Supreme Court confront this resistance. In *Taylor v. Georgia* and *Pollock v. Williams*, the Court struck down a Georgia statute and a Florida statute that were similar to the one invalidated in *Bailey*.<sup>62</sup> Justice Robert Jackson's opinion for the Court in *Pollock* recounted the history of Florida's resistance to *Bailey*<sup>63</sup> and then explained the Court's determination to protect the right to quit. "[I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers," wrote Jackson.<sup>64</sup>

When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition.<sup>65</sup>

The Court acknowledged that there was "great" value in enforcing contracts, but Congress had "put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service."<sup>66</sup> Accordingly, the Florida statute was "null and void" both "by virtue of the Thirteenth Amendment and the Antipeonage Act of the United States."<sup>67</sup>

*Pollock* provides the clearest and most recent statement of the doctrine announced in *Mary Clark*. The right to quit (extended to "the right to change employers") is protected not because its presence or absence formally defines the condition of involuntary servitude, but because it provides workers with a necessary "defense against oppressive hours, pay, working conditions, or

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61. See PETE DANIEL, *THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901-1969*, at 183-92 (1972); JACQUELINE JONES, *THE DISPOSSESSED: AMERICA'S UNDERCLASSES FROM THE CIVIL WAR TO THE PRESENT* 107 (1992); Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 926-28 (1998).

62. *Pollock v. Williams*, 322 U.S. 4, 25 (1944); *Taylor v. Georgia*, 315 U.S. 25, 29 (1942).

63. *Pollock*, 322 U.S. at 11-13.

64. *Id.* at 18.

65. *Id.*

66. *Id.*

67. *Id.* at 25.

treatment.”<sup>68</sup> Without it, there is no “power below” or “incentive above” to curb domination or to promote wholesome conditions.<sup>69</sup>

*D. Conclusion: Interpretive Choice and Involuntary Servitude*

What can we learn from this history? First, the inalienable right to quit was in no sense a natural or uncontroversial corollary to the abolition of slavery. It was contested under the Northwest Ordinance, in the halls of Congress immediately following the Thirteenth Amendment’s ratification, and in the courts until 1911. As late as 1897, three decades after ratification, it was disapproved by a majority of the Supreme Court.<sup>70</sup>

Second, the text of the Thirteenth Amendment contributed little to the resolution of the question. Although there was a plausible reading that “servitude” became “involuntary” the moment the laborer wished to quit work and was prevented from doing so, there was an equally plausible reading that “servitude” could not be “involuntary” if it was voluntarily contracted for. Moreover, the prior interpretation of “involuntary servitude” under the Northwest Ordinance revealed only an unresolved conflict between these two readings, with Indiana favoring the right to quit while Illinois rejected it.<sup>71</sup>

The third point follows from the first two. The status of the right to quit today—as the only major, unenumerated constitutional right to win near-universal approval—did not result from that right’s being somehow obvious. It resulted first from interpretive choices made by Congress and the courts, and later from acceptance in the political culture at large.

Fourth, *Bailey*’s conclusive recognition of the right to quit leaves us not only with that result, but also with a more general resolution of the tension between the freedom of contract and what the *Bailey* Court called the “freedom of labor.” It would be a mistake to view this as a head-to-head conflict ending in a total victory for labor freedom. No one questioned the value of freedom of contract in the abstract. But in order to choose between the two readings in favor of the right to quit, courts and other interpreters had to reject the notion that the Involuntary Servitude Clause guaranteed the freedom of contract and nothing more, and accept the possibility that the freedom of contract could conflict with the freedom of labor. Ultimately, the freedom of contract was treated as a means to the end of ensuring labor freedom. The rights to quit and

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68. *Id.* at 18.

69. *Id.*

70. See *supra* notes 42-47 and accompanying text.

71. See *supra* text accompanying notes 23-30.

to change employers—each essential to the freedom of contract—were protected not for that reason primarily, but because they aided workers in avoiding employer tyranny and unwholesome conditions. When an exercise of contractual freedom came into conflict with these objectives, it was the contract—and not the freedom of labor—that gave way.

At each stage of the struggle, the proponents of labor freedom made the same crucial interpretive choice. The Supreme Court of Indiana, the Congress that passed the Peonage Act of 1867, and the *Bailey* Court all read the Amendment not to guarantee a contractual procedure for the structuring of employment relations, but to impose a substantive ban on relations of domination and subjugation. Why protect laborers against their own free choice? For one thing, it would be difficult to ascertain with confidence that their choice was truly free; laborers might consent to servitude because they did not know their rights, because they were not “in a position to go into court to assert their rights,” or even because they lacked the “desire to do so.”<sup>72</sup> For another, laborers might need paternalistic protection; criminal punishment for breach of a labor contract would be “peculiarly effective as against the poor and the ignorant, its most likely victims.”<sup>73</sup> More fundamentally, however, the condition of involuntary servitude harmed not only the laborers themselves, but also society as a whole. On this view, the point of the prohibition was not to endow individuals with rights that could be traded away, but to prevent a relation of domination and subjugation that would conflict with the health of the Republic. Peonage “degrade[d] both the owner of the labor and the laborer himself.”<sup>74</sup> Indentures injured the “state of society” by producing “a state of domination in the one party, and abject humiliation in the other.”<sup>75</sup> Such domination did not fit “under a government like ours, which acknowledges a personal equality.”<sup>76</sup> Regardless of the laborer’s consent, a contract for forced labor would damage “the freedom of labor upon which alone can enduring prosperity be based.”<sup>77</sup> A denial of the right to quit would drive down the

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72. CONG. GLOBE, 39th Cong., 2d Sess. 1571-72 (1867) (statement of Sen. Doolittle).

73. *Bailey v. Alabama*, 219 U.S. 219, 245 (1911).

74. CONG. GLOBE, 39th Cong., 2d Sess. 1572 (1867) (statement of Sen. Buckalew).

75. *The Case of Mary Clark, a Woman of Color*, 1 Blackf. 122, 124-25 (Ind. 1821).

76. *Id.*; cf. *Peonage Cases*, 136 F. 707, 708 (E.D. Ark. 1905) (stating that in passing the Peonage Act, Congress had recognized that voluntary peonage might be even more dangerous to a Republic than slavery, because “men of large wealth” might gain control over the votes of “thousands of people”).

77. *Bailey*, 219 U.S. at 245.

working conditions and living standards not only of the affected laborer, but also of “every other with whom his labor comes in competition.”<sup>78</sup>

## II. RACE AND INVOLUNTARY SERVITUDE

Conspicuously missing from the account so far is any mention of race. This silence reflects the public position of the constitutional decisionmakers. Although the leading cases from *Mary Clark* to *Pollock* all involved black workers, judges either ignored the question of race or affirmatively denied that it had anything to do with a determination of “involuntary servitude.”<sup>79</sup> Meanwhile, in another line of cases, courts held that the Thirteenth Amendment condemns racialized “badges and incidents of slavery” whether or not they have any connection to involuntary servitude or to the extraction of labor in general.<sup>80</sup> The effect has been to entrain Thirteenth Amendment jurisprudence on two separate tracks, one for each of the Amendment’s two great thrusts: labor liberty and race equality.<sup>81</sup>

This split exists in sharp tension with social and legal-historical realities. As many scholars have confirmed, the outcome of *Bailey* was—despite the Court’s denial—heavily influenced by considerations of race.<sup>82</sup> Moreover, it is no secret that the harshest forms of labor exploitation, for example chattel slavery and peonage, are often reserved for members of subordinate, racially defined groups. The question then arises: should the race/labor split give way to a doctrine that is more sensitive to the intertwined dynamics of racial subordination and the denial of labor rights? I propose that the answer is yes and no; the doctrine should reflect the interconnection, but—perhaps paradoxically—the result is to underscore the importance of protecting a minimum floor of labor rights without regard to any provable racial element. Race should be considered, but not as a required element of involuntary

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

79. See William M. Wiecek, *Synoptic of United States Supreme Court Decisions Affecting the Rights of African-Americans, 1873-1940*, 4 BARRY L. REV. 21, 30 (2003); *infra* notes 83-84 and accompanying text.

80. Initially, the Court limited the Amendment’s racial equality thrust to cases of forced labor. *Hodges v. United States*, 203 U.S. 1, 16-17 (1906). Eventually, however, the Court overruled *Hodges* and recognized a broad power in Congress “rationally to determine what are the badges and the incidents of slavery.” *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

81. On these two thrusts, see VanderVelde, *supra* note 2, at 495.

82. See *infra* notes 86-89 and accompanying text.

servitude. This conclusion holds, I believe, even if one values race equality over labor liberty.

*A. Race and the Origins of the Thirteenth Amendment Right To Quit*

In the decisive case of *Bailey v. Alabama*, the Supreme Court asserted famously that the Amendment was “a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag.”<sup>83</sup> Race, insisted the Court, had nothing to do with the result: “We at once dismiss from consideration the fact that the plaintiff in error is a black man. . . . The statute, on its face, makes no racial discrimination, and the record fails to show its existence in fact.”<sup>84</sup>

From the outset, however, the Court’s claim of race-neutrality was greeted with skepticism. In dissent, Oliver Wendell Holmes wondered how the Alabama law could be considered harmful “except on a tacit assumption that this law is not administered as it would be in New York, and that juries will act with prejudice against the laboring man.”<sup>85</sup> Viewed as a race-blind labor case, *Bailey* appears anomalous. The labor jurisprudence of the time, epitomized by such decisions as *Lochner v. New York* and *Coppage v. Kansas*, is remembered for its devotion to the formal liberty of contract and its indifference to inequalities of bargaining power between industrial workers and employers. By contrast, Justice Hughes’s opinion in *Bailey* exhibited a strong concern for the actual impact of laws on agricultural laborers and a corresponding lack of concern both for Bailey’s contractual “consent” and for the employer’s need for effective contract enforcement.<sup>86</sup> Race is the obvious explanation. While refusing to hear coercion claims from industrial workers, the *Lochner*-era Court took a more sensitive approach toward “groups it understood as weak,” a category including women and black peons, but not industrial workers.<sup>87</sup> Race went

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83. *Bailey v. Alabama*, 219 U.S. 219, 241 (1911); see also *Hodges v. United States*, 203 U.S. 1, 17 (1906) (“Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon are as much within its compass as slavery or involuntary servitude of the African.”).

84. 219 U.S. at 231.

85. 219 U.S. at 248 (Holmes, J., dissenting). On Holmes’s view of the role of race in *Bailey*, see Aziz Z. Huq, *Peonage and Contractual Liberty*, 101 COLUM. L. REV. 351, 384-85 (2001); and Klarman, *supra* note 61, at 923-24.

86. See Huq, *supra* note 85, at 382-83; Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646, 702-03 (1982).

87. Huq, *supra* note 85, at 353, 386. On the Progressive Era Court’s paternalistic treatment of groups it considered weak, as compared to industrial workers, see FORBATH, *supra* note 4, at 52-53; STEINFELD, *supra* note 4, at 278; and Aviam Soifer, *The Paradox of Paternalism and*

unmentioned for reasons both jurisprudential (a race-based holding would have required a major doctrinal transformation)<sup>88</sup> and political (avoiding a confrontation with the southern system of white supremacy).<sup>89</sup>

Assuming that race was relevant as a matter of history, then, there is a disjuncture between *Bailey's* race-conscious origins and its enduringly race-blind doctrinal product.<sup>90</sup> It has been suggested that “by ignoring the racial dynamic at issue in the *Peonage Cases* the Court merely lost an opportunity to explicate an additional dimension of the Thirteenth Amendment.”<sup>91</sup> If so, then the question is: what should the Court have done with this opportunity?

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*Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 L. & HIST. REV. 249, 255 (1987).

88. The Alabama law was race-neutral on its face, and it is unlikely that *Bailey* could have prevailed under *Yick Wo v. Hopkins*, which held that a facially neutral law could be overturned on racial grounds only by proving that it was administered with “an evil eye and an unequal hand.” 118 U.S. 356, 373-74 (1886). Although white peonage was relatively rare, it was clear that the authorities—far from exempting whites as in *Yick Wo*—diligently assisted employers in keeping white, as well as black, workers bound to labor. DANIEL, *supra* note 61, at 82-109. Accordingly, *Bailey's* attorneys—backed by the United States—argued not that the facially neutral law was administered in a discriminatory manner, but that it was *intended* by the legislature “to give the large planters of the State absolute dominion over the negro laborer.” Schmidt, *supra* note 86, at 681. Had the Court accepted this claim, *Bailey* would have transformed the law of racial discrimination. See Klarman, *supra* note 61, at 919-20 (noting that “the judicial battle against Jim Crow had little chance of success until courts became willing either to undertake motive inquiries or to shift the constitutional focus from purpose to effect”).
89. Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1647 (1986) (noting that *Bailey* “paid homage” to the Reconstruction-ending Hayes-Tilden Compromise, a major purpose of which was “to remove the race issue from the national political agenda and to remit southern blacks to the ‘care’ of their former masters”); Klarman, *supra* note 61, at 925-27 (arguing that *Bailey* and *Reynolds* “represent minimalist interpretations of the Thirteenth Amendment—the very least the Court could do short of acquiescing in southern nullification of the amendment”); Wiecek, *supra* note 79, at 30 (suggesting that the Court kept up the “pretense” that race had nothing to do with the results in the peonage cases in order to avoid a confrontation with the southern system of white supremacy).
90. The race-neutrality of the doctrine has been repeatedly confirmed in the near-century since *Bailey*. In *Pollock*, three decades later, for example, the Court continued to eschew any reliance on race. Not only did Justice Jackson fail to mention the possibility of discrimination, but he also took pains to note that the U.S. Immigration Commission had found that peonage existed in all but two states, and that “probably . . . the most complete system of peonage in the entire country” affected not black workers in the South, but immigrant workers in the lumber camps of Maine. *Pollock v. Williams*, 322 U.S. 4, 8-19 (1944).
91. Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 1031 (2002).

*B. Should Racial Subordination Be an Element of Involuntary Servitude?*

Most obviously, the Court could have confirmed Holmes's suspicion that the Alabama peonage law would have been upheld but for its racial aspect. Under that approach, race would have become an element in the determination of involuntary servitude. One system of peonage might have been invalidated while another, identical to the first except for the absence of a legally cognizable racial element, survived. For example, at the time of *Bailey*, peonage thrived in the Maine lumber industry and in southern agriculture.<sup>92</sup> In Maine, the workforce was composed mostly of recent European immigrants who had been lured to remote lumber camps. This workforce could be thought of as "racially defined" in the broad sense that its members were categorized as "others" available for exploitation.<sup>93</sup> Almost a century later, however, the courts have yet to accept such a broad notion of race, and it seems highly unlikely that the Progressive Era Court could have recognized this phenomenon as racial discrimination. If the *Bailey* Court had required a finding of racial subordination to establish an involuntary servitude violation, southern agricultural peonage would have been ruled unconstitutional while peonage in the Maine lumber industry went untouched.

Such an outcome-determinative use of race finds no support in the text or history of the Thirteenth Amendment. Although its immediate objective was to abolish a particular, racialized form of labor oppression, the Amendment was understood from the outset to include a race-blind component. It was said to protect all "citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men."<sup>94</sup> As contemporary newspaper reports make clear, the protection of those rights was understood to shield against race-neutral as well as discriminatory forms of suppression.<sup>95</sup> The concern of many Republicans for

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92. S. DOC. NO. 61-747, at 443, 447 (1910) (describing peonage in Maine); STEINFELD, *supra* note 4, at 279 (detailing peonage in northern lumber and mining industries).

93. Wolff, *supra* note 8, at 1027 (describing the lumber workforce as "a racially defined, captive workforce, tied by economic vulnerability and physical coercion" to the industry).

94. CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866) (statement of Rep. Wilson); JACOBUS TENBROEK, EQUAL UNDER LAW 168 (1965); TESIS, *supra* note 2, at 44; William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 27 (1999); Hamilton, *supra* note 21, at 34.

95. Kaczorowski, *supra* note 2, at 897 n.153 (presenting evidence from contemporary newspapers that the Civil Rights Act of 1866, enacted to enforce the Thirteenth Amendment, was understood to protect the fundamental rights of members of all races against suppression whether the suppression was based on race or not). Although Congress eventually proposed the Fourteenth Amendment as a way of ensuring that the Civil Rights Act would be upheld

the rights of white laborers, as well as their endorsement of a broad free labor vision encompassing people of all races, have been well documented.<sup>96</sup> The various evils of slavery that they deplored arose not specifically from the racialized form, but more generally from relations of exploitation and subjugation, leading to the creation of an arrogant aristocracy on the one hand, and degraded labor on the other.<sup>97</sup> Less than two years after the ratification of the Thirteenth Amendment, Congress exercised its enforcement power to outlaw peonage with the immediate aim of liberating white peons in New Mexico. Senator Henry Wilson, the bill's leading proponent, acknowledged that it "applies not to negroes, but to white men," and explained that "while I have been against negro slavery, I am also against slavery of this kind for white men."<sup>98</sup>

From our viewpoint today, there are at least four reasons to approve the *Bailey* Court's refusal to require a showing of race discrimination or subordination. First, as noted in the preceding paragraph, the text and history of the Amendment strongly support it. Second, the denial of basic labor rights often precedes and contributes to the formation of racial subordination. In early colonial Virginia, for example, planters subverted both constitutional and religious norms against enslavement as part of their project to reduce white laborers to chattel bondage. "[W]hite servitude was the proving ground," summarizes historian Lerone Bennett, Jr. "The plantation pass system, the slave trade, the sexual exploitation of servant women, the whipping post and slave chain and branding iron, the overseer, the house servant, the Uncle Tom: all these mechanisms were tried out and perfected first on white men and women."<sup>99</sup> Prior to Bacon's Rebellion of 1676, European indentured servants

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by the courts, the Act was passed under the authority of the Thirteenth Amendment, and repassed by an overwhelming majority after Andrew Johnson vetoed it on constitutional grounds and before the Fourteenth Amendment was enacted. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 244, 250-51 (1988).

96. ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 40-69 (1970); VanderVelde, *supra* note 2, at 442-43, 445-48.
97. See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864) (statement of Rep. Ingersoll); *id.* at 2984 (statement of Rep. Kelley); *id.* at 2979 (statement of Rep. Farnsworth); *id.* at 2955 (statement of Rep. Kellogg); *id.* at 2615 (statement of Rep. Morris); *id.* at 1459-60 (statement of Sen. Henderson); *id.* at 1439 (statement of Sen. Harlan); *id.* at 1369 (statement of Sen. Clark); *id.* at 1313 (statement of Sen. Trumbull); *id.* at 1202-03 (statement of Sen. Wilson).
98. 76 CONG. GLOBE, 39th Cong., 2d Sess. 1571 (1867).
99. LERONE BENNETT, JR., *THE SHAPING OF BLACK AMERICA* 41 (1975); see also, 2 THEODORE W. ALLEN, *THE INVENTION OF THE WHITE RACE: THE ORIGIN OF RACIAL OPPRESSION IN ANGLO-AMERICA* 124-47, 267-69 (1997) (documenting the harsh oppression of bond laborers both before and after the arrival of Africans).



and African slaves found considerable common ground as members of a subjugated population, and it would have been difficult to distinguish prejudice based on race from prejudice based on class.<sup>100</sup> But in that year, black slaves joined with white indentured servants and rebelled under the leadership of Nathaniel Bacon. Before the revolt was suppressed, Jamestown had been torched. Having experienced the power of a cross-race, class-based revolt, white planters resolved to establish a system of racial hierarchy, elevating even the lowliest white person above the highest black person on the ladder of social status.<sup>101</sup> By dividing white from black workers, the planters were able not only to reinforce and intensify the subjugation of black labor, but also to deprive southern white workers of basic rights that were enjoyed by northern white workers.<sup>102</sup> This dynamic was very much on the minds of the Thirteenth Amendment's Framers, who stressed the ill effects of slavery on white as well as black labor.<sup>103</sup>

Third, without race-blind protection, many race-based violations of labor rights would escape the law. Racial subordination is a complex and constantly changing phenomenon that is difficult to define doctrinally and to prove in particular cases. The status of a given group may shift based on a variety of context-specific factors that can be hard to perceive both as to their existence in fact and as to their significance in constructing racial identity. In the early twentieth century, for example, Italians were considered white in some contexts and nonwhite in others. "In Texas, the presence of thousands of Mexicans helped make Italians white; in Canada, the absence of Mexicans or a newer immigrant group . . . helped keep Italians nonwhite."<sup>104</sup> The migration of African-Americans and Mexicans northward during the 1920s and 1930s made European immigrant workers seem less foreign and more "white" to entrenched whites in the North.<sup>105</sup> Class position and economic circumstances can shape, as well as reflect, racial categories. Transience, for example, was a

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100. EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 326-27 (1975); see also 2 ALLEN, *supra* note 99, at 148-62, 210-15 (documenting solidarity among black and white bond laborers).

101. 2 ALLEN, *supra* note 99, at 240, 250-53; MORGAN, *supra* note 100, at 328.

102. See, e.g., MORRIS, *supra* note 25, at 482-99 (noting that in the southern colonies, masters were given greater latitude to punish workers, often escaping conviction even for murder, brutal torture, and rape).

103. VanderVelde, *supra* note 2, at 443-48.

104. GUNTHER PECK, *REINVENTING FREE LABOR: PADRONES AND IMMIGRANT WORKERS IN THE NORTH AMERICAN WEST, 1880-1930*, at 169 (2000).

105. DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA'S IMMIGRANTS BECAME WHITE: THE STRANGE JOURNEY FROM ELLIS ISLAND TO THE SUBURBS* 149-55 (2005).

“marker of nonwhiteness” in the American west around 1900.<sup>106</sup> Similarly, racial identity influences and is influenced by gender and sexual identity.<sup>107</sup> The difficulty of defining and proving race discrimination today is compounded by international mobility in the context of “a complex and transnational racial hierarchy involving ‘blacks, Mexicans, Indians, Chinese, Japanese, and other racialized groups.’”<sup>108</sup> These complexities, together with the general tendency for vulnerable groups to be channeled into the least desirable jobs, suggest that courts would likely miss many instances of racialized labor domination, especially during transitional periods or in localities with demographics not reflected in a judge’s particular experience.

Finally, it does not appear that race prejudice—as distinct from class prejudice—is an essential component of slavery. The “outsider status’ of the slave” could arise from any of a number of criteria including the simple operation of law.<sup>109</sup> History is replete with examples of slavery existing within ethnic groups and without any firm connection to racialized categories.<sup>110</sup> When the Framers and Ratifiers of the Thirteenth Amendment insisted that it protected all workers, and not just members of subjugated racial groups, they prefigured the conclusion of scholars today “that limiting the idea of slavery to

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106. PECK, *supra* note 104, at 166; see also ROEDIGER, *supra* note 105, at 37, 41, 43-44, 54, 66 (recounting the “interpellation of cultures of poverty with ideas about racial inheritance,” including the origin of racist epithets like “guinea,” “greaser,” and “hunky” in economic as well as biological concepts); Tanya Katerí Hernández, *The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 OR. L. REV. 731, 742-43 (1997) (observing that European immigrants were transformed into whites “for the purpose of having them function as a middle-tier buffer against a growing minority community of surplus labor”).

107. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 132 (1994) (observing that the “archaeology of race soon becomes the excavation of gender and sexual identity”).

108. PECK, *supra* note 104, at 234-35. What appears to be a single racially defined group may turn out, upon closer examination, to be riddled with complex, race-based cleavages that raise serious problems for antidiscrimination law. Tanya Katerí Hernández, *Latino Inter-Ethnic Employment Discrimination and the “Diversity” Defense*, 42 HARV. C.R.-C.L. L. REV. 259 (2007).

109. ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 7 (1982).

110. See A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT’L L. 303, 317-20 (1999) (citing PATTERSON, *supra* note 109, at viii; and ERIC WILLIAMS, *CAPITALISM & SLAVERY* 4, 7, 29 (1994)).

the prevailing Western concept of racial domination makes it more difficult to identify and eradicate.”<sup>111</sup>

C. *The Role of Race in the Constitutional Law of Involuntary Servitude*

The rejection of a racial criterion for involuntary servitude does not preclude decisionmakers from taking race into account in assessing particular forms of labor subordination. The fact that a particular method of labor control is imposed disproportionately on people of color raises a suspicion of involuntary servitude. No doubt, the fact that southern peonage laws were applied primarily to black people helped the Supreme Court to recognize the oppressive and exploitative character of those laws. The *Bailey* Court could have acknowledged this factor without requiring proof of racial subjugation as an element of the violation. Similarly, Maria Ontiveros has pointed out that decisions like *Hoffman Plastic Compounds, Inc. v. NLRB*, which strip undocumented immigrant workers of effective remedies for labor rights violations, disproportionately affect people of color.<sup>112</sup> Nevertheless, her conclusion that the rule of *Hoffman Plastic* violates the Involuntary Servitude Clause would, if implemented, protect undocumented workers of all colors.<sup>113</sup>

In addition to race, sex might play an important role in Thirteenth Amendment jurisprudence. The black washerwomen’s petition reprinted at the beginning of this Article, for example, raises issues of sex and gender as well as race and labor freedom. The relation of sex to labor rights is complicated by the ideology of separate spheres, the unpaid character of women’s work in the home, and the problem of uncompensated reproductive labor—all topics beyond the scope of this Article. However, it seems that—at a minimum—sex could play a role similar to that proposed here for race. Women, like members

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111. See Amy Kathryn Brown, Note, *Baghdad Bound: Forced Labor of Third-Country Nationals in Iraq*, 60 RUTGERS L. REV. 737, 741 n.23 (2008).

112. 535 U.S. 137, 142-43 (2002) (holding that when undocumented employees are discharged for exercising their statutory right to organize a labor union, they may not be awarded back pay as a remedy and that the employer need only post a notice promising not to repeat its violations); Maria L. Ontiveros, *Immigrant Workers’ Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651, 654 (2004).

113. Ontiveros, *supra* note 112, at 678-80; see also Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737, 754-55 (2003) (contending that the denial of labor rights to immigrants in decisions like *Hoffman* effectively reduces them to a condition of involuntary servitude).

of subordinate racially defined groups, often tend to be targeted for especially harsh forms of labor control.<sup>114</sup>

On this view, workers of color and women could play a role in the protection of labor freedom resembling that of the miner's canary; being the most vulnerable, they are the most likely to be targeted for oppressive methods of labor control. A disproportionate racial impact is one factor tending to indicate undue interference with the freedom of labor, but not one that is either necessary or sufficient. Once a particular method is recognized as a constitutional violation, moreover, it is unconstitutional as applied to any worker. This approach recalls to mind a famous observation made by Senator Wilson, a leading proponent of the Thirteenth Amendment, that

we have advocated the rights of the black man because the black man was the most oppressed type of the toiling men of this country. . . . The same influences that go to keep down and crush down the rights of the poor black man bear down and oppress the poor white laboring man.<sup>115</sup>

To sum up, there are good reasons to reject a requirement of race discrimination or subordination as an element of “involuntary servitude.” First and foremost, neither the text nor the evidence of original meaning supports any such requirement. The phrase “involuntary servitude” contains no hint of race, and the Amendment’s Framers proclaimed—without contradiction—that it protected the members of all races and colors. Nor is there any reason to regret these conclusions. The protection of labor rights contributes not only to the Amendment’s goal of protecting labor freedom, but also to its other central purpose of abolishing race-based caste. Given the ever-changing and complex nature of racial categories and hierarchies, a requirement of legally cognizable race discrimination or subjugation would prevent effective enforcement in a variety of contexts, for example (1) where labor oppression precedes racialization; (2) where the subtleties of race formation make proof difficult; (3) where the doctrinal definition of race fails to capture new forms that have

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114. See, e.g., ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 142 (1982); VanderVelde, *supra* note 4, at 776-77. On the complexities of the interaction between gender and labor subjugation, see, for example, CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998); Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment’s Role in the Struggle for Reproductive Rights*, 3 J. GENDER RACE & JUST. 401 (2000); Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANCESTRY L.J. 11 (2001); and Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990).

115. CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866); VanderVelde, *supra* note 2, at 440.

developed on the ground; and (4) where race is not an element of labor oppression. On the other hand, there is no reason to follow the *Bailey* Court in pretending that race is irrelevant. When a particular method of labor extraction is applied disproportionately to groups defined by race, sex, or other criteria that tend to indicate vulnerability, it should be scrutinized with special care.<sup>116</sup>

### III.A STANDARD FOR ASSESSING LABOR RIGHTS CLAIMS UNDER THE THIRTEENTH AMENDMENT

In addition to the right to quit, various other labor rights have been claimed under the Thirteenth Amendment, including the right to change employers, the right to set one's wages (as opposed to wage setting by government or employer cartels), the right to refrain from working altogether (in challenges to vagrancy laws), the right to strike, and the right to organize unions.<sup>117</sup> Given that the text of the Amendment does not mention the right to quit or any other right, the question arises: what principles can guide a conscientious interpreter in determining whether a particular right is implied by the ban on slavery and involuntary servitude? The term "involuntary servitude" does not, by itself, supply the answer to these questions. As recounted in Part I, not even the inalienable right to quit could be derived without making interpretive choices. For guidance in resolving other labor rights claims, then, it would seem that the obvious place to look is the Supreme Court's handling of those choices.

Justice Robert Jackson's opinion for the Court in *Pollock v. Williams* contains the Court's most extensive discussion of the issue. It suggests that the standard for determining whether a given labor right is protected by the Thirteenth Amendment hinges on whether the right is necessary to provide workers with the "power below" and employers the "incentive above" to prevent "a harsh overlordship or unwholesome conditions of work."<sup>118</sup> This language closely tracks that of *Bailey v. Alabama*, which justified the right to quit as necessary to prevent "that control by which the personal service of one

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116. Even outright slavery is so thoroughly disguised that the intensity of scrutiny is highly relevant. See, e.g., KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* 26-28, 62-63, 84-85, 106-07, 137-38, 169, 237-38 (rev. ed. 2004) (reporting that many enslaved people fail to protest or attempt escape because of social or religious norms, that slavery is hidden behind fictive contracts, and that the actual owners may be distanced from the slave by layers of subcontractors).

117. See *supra* note 4.

118. *Pollock v. Williams*, 322 U.S. 4, 18 (1944); Cox, *supra* note 7, at 576-77.

man is disposed of or coerced for another's benefit."<sup>119</sup> Two central features of involuntary servitude are to be negated: domination ("control," "harsh overlordship") and exploitation (the disposal of one person's labor for "another's benefit," "unwholesome conditions"). This dual focus echoes the reasoning offered by proponents of the right to quit from the days of the Northwest Ordinance forward.<sup>120</sup>

The Court has thus far declined, however, to use *Pollock* as a standard for assessing other rights claims. For example, the Court failed to apply *Pollock*—or any other standard—to the labor movement's claim of a Thirteenth Amendment right to strike.<sup>121</sup> Furthermore, the Court has provided no explanation for its approach or, more accurately, lack of approach. This Part assesses the fit of the *Pollock* principle with (A) the text of the Thirteenth Amendment; (B) its early history; and (C) the case law.

#### A. *The Pollock Principle and the Constitutional Text*

If the Amendment were concerned solely with enabling workers to *escape* servitude, then the *Pollock* principle's focus on preventing domination and exploitation in the employment relation might appear misplaced. But the prohibited condition of "involuntary servitude" may be negated in either of two ways: (1) by rendering servitude "voluntary," or (2) by transforming "servitude" into something else that is constitutionally acceptable. *Pollock* takes the latter approach. The right to quit is justified not on the ground that it will enable workers to escape servitude (thereby rendering servitude voluntary for those who remain), but as the "defense against oppressive hours, pay, working conditions, or treatment." By quitting or threatening to quit, workers can exert a "power below" giving employers an "incentive above" to prevent "a harsh overlordship or unwholesome conditions of work."<sup>122</sup> Formulating this reasoning in terms of the constitutional text, the right to quit provides the "power below" and "incentive above" to prevent the employment relation from sinking into "servitude."

This reading is neither confirmed nor excluded by the generally accepted definitions of "servitude" as of the 1860s, which, unfortunately for precision, encompassed a wide range of usages. The term could be a synonym for slavery

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119. 219 U.S. 219, 241 (1911).

120. See *supra* notes 74-78 and accompanying text.

121. See *infra* Section VI.A.

122. *Pollock*, 322 U.S. at 18.

or—at the other end of the spectrum—for “service” in general.<sup>123</sup> A few members of Congress did address the meaning of the term during the debates over the Thirteenth Amendment, but in contradictory ways. One representative quoted James Madison to the effect that servitude signified “the condition of slaves,” while service meant “the obligation of free persons.”<sup>124</sup> We can, however, safely reject this equation of servitude with slavery, both because it would reduce the Involuntary Servitude Clause to a redundancy, and also because it conflicts with the broader usage of courts and legislatures from the early time of the Northwest Ordinance forward.<sup>125</sup> Another representative opined that servitude would be present in all societies, but that “servitude rendered necessary by circumstances which the servile party cannot control, is bondage.”<sup>126</sup> This statement could be read to equate servitude with service. The fact is, however, that the Framers were not interested in the particular definitional problem that confronts us today. Direct references to the meaning of servitude were few, far between, and contradictory.

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123. See *infra* p. 1505, tbl.1.

124. CONG. GLOBE, 38th Cong., 2d Sess. 190 (1864) (statement of Rep. Kasson).

125. As recounted above, in Part I, courts and legislatures agreed that the clause extended beyond chattel slavery to encompass, at a minimum, some forms of indentured servitude.

126. CONG. GLOBE, 38th Cong., 2d Sess. 177 (1864) (statement of Rep. Ward).

**Table 1.**  
Contemporary Definitions of Slavery, Servitude, and Service

	JOSEPH E. WORCESTER, A DICTIONARY OF THE ENGLISH LANGUAGE (1860)	NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1865)
Slavery	The state of absolute subjection to the will of another; the condition of a slave; servitude; bondage. (1352)	The condition of a slave; the state of entire subjection of one person to the will of another. (1241)
Servitude	The state or condition of a servant, or more commonly of a slave; slavery; bondage. (1314)	The state of voluntary or involuntary subjection to a master; service; the condition of a slave; slavery; bondage; hence, a state of slavish dependence. (1207)
Service	The act of one who serves; labor or duty performed for, or at the command of, a superior. (1314)	The act of serving; the occupation of a servant; the performance of labor for the benefit of another, or at another's command; attendance of an inferior, or hired helper, or slave, &c., on a superior, employer, master, or the like . . . (1206)

Over the past 150 years, the meaning of “servitude” has narrowed to one that fits the *Pollock* standard snugly. The term now encompasses only relations that involve a level of subordination inconsistent with citizenship in a democracy. In addition to slavery, it signifies “bondage, subjugation, subjection” and “domination,” with an antonym of “liberty.”<sup>127</sup> Thus, on the view that the text should be read consistently with the average person’s present-day understanding, it supports *Pollock*’s assumption that some employment relations sink to the level of servitude while others do not.<sup>128</sup>

This “person-in-the-street” form of textualism has few supporters today because it can alter the meaning of a constitutional provision based on

127. THE OXFORD AMERICAN WRITER’S THESAURUS 819 (2004); see also THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1650 (3d ed. 1992) (defining servitude as “[a] state of subjection to an owner or a master,” “[l]ack of personal freedom, as to act as one chooses,” and “[f]orced labor imposed as a punishment for crime”); MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/servitude> (last visited March 2, 2008) (defining servitude as “a condition in which one lacks liberty especially to determine one’s course of action or way of life”).

128. On this view, see PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 4 (1991).



linguistic changes unrelated to the purpose of the provision. The present-day usage of “servitude,” however, appears to reflect social change that is germane to the Amendment’s application. In the 1860s, it was possible to equate servitude with employment while, at the same time, believing that workers could escape servitude. An industrious employee could reasonably expect to become an independent farmer or artisan.<sup>129</sup> As long as the scale of industry remained relatively small, Americans could cling to the traditional republican tenet that economic independence was the necessary foundation of democratic citizenship, and yeoman farmers and artisans—not servile employees—were the backbone of the country.<sup>130</sup>

In our present-day nation of employees, however, an equation of “servitude” with employment would necessarily mean that the majority of adult Americans are in servitude. Instead of the free labor system envisioned by the Framers, in which a residuum of voluntary servitude existed as a way-station to economic independence, we would have a servile labor system in which most workers were in servitude with no realistic possibility of escape.<sup>131</sup> The narrowing of “servitude” to encompass only relations of domination and degradation—with no connotation of employment in general—reflects the modern view that employment need not descend to domination and degradation if employees enjoy sufficient rights and protections.<sup>132</sup> Although most employees can no longer escape employment, they can (in the language of *Pollock*) prevent “a harsh overlordship or unwholesome conditions of work” or (in the language of the Amendment) prevent employment from descending into “servitude.”

To summarize, the term “servitude” encompassed a wide range of meanings during the 1860s—some consistent with the *Pollock* principle and some not. References during the debates were scattered and contradictory. Over time, however, the meaning of the term narrowed to become consistent with the *Pollock* principle. Today, “servitude” connotes a subset of employment relations that involve a level of subjugation inconsistent with liberty. This linguistic shift reflects the decline of self-employment as an escape from

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129. See FONER, *supra* note 96, at 33. At that time, most Americans worked on farms, and the average factory employed ten people. ROSS M. ROBERTSON, HISTORY OF THE AMERICAN ECONOMY 228 (1955); GEORGE ROGERS TAYLOR, THE TRANSPORTATION REVOLUTION 1815-1860, at 247 (1951).

130. See, e.g., DANIEL T. RODGERS, THE WORK ETHIC IN INDUSTRIAL AMERICA 1850-1920, at 33-35 (1978); VanderVelde, *supra* note 2, at 471-74, 484.

131. For a discussion of this point, see *infra* Section V.D.

132. This change is also reflected in the abandonment of “master-servant” as the label for what we now call labor and employment law.

servitude, and thus appears to vindicate *Pollock's* approach of providing employees with the rights necessary to prevent a harsh overlordship or unwholesome conditions of work.<sup>133</sup>

*B. The Pollock Principle and the Early History of the Thirteenth Amendment*

Under the Supreme Court's current approach to original meaning, congressional actions following the ratification of a constitutional provision can supply "contemporaneous and weighty evidence" of the provision's meaning.<sup>134</sup> Less than two years after the Thirteenth Amendment was ratified, Congress passed the Peonage Act of 1867 under its authority. The Act's immediate target was peonage in the territory of New Mexico. During the Congressional debates, proponents acknowledged that many laborers voluntarily accepted peonage, and that some chose to remain in servitude even though the U.S. District Court had ruled that they were free. Despite this apparent consent, proponents condemned the system for producing terms "always exceedingly unfavorable to" the laborer<sup>135</sup> and claimed that its abolition would enable laborers "to command respectable wages, to support their families, elevate themselves, and improve their conditions."<sup>136</sup> Accordingly the Act prohibited not only "involuntary" but also "voluntary" peonage. This focus on the actual existence and consequences of subjugation, as opposed to its voluntariness, fits well with *Pollock's* approach of judging any particular threat to labor liberty (whether a peonage law, a vagrancy law, an antistrike law, or something else as yet unanticipated) based on whether it deprives workers of the "power below" and employers of the "incentive above" to avoid a "harsh overlordship or unwholesome conditions of work."<sup>137</sup>

Congressional discussions of the rights of freed people to change employers and set their own wages proceeded along similar lines. Southern planters were attempting to subjugate their former slaves through a variety of measures that did not involve physical or legal coercion to work. Reports of the planters' tactics came before Congress, and lively debates ensued about whether they fell

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133. On the decline of self-employment, see *infra* Section V.A.

134. *Printz v. United States*, 521 U.S. 898, 905 (1997) (quoting *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986)); see also *Jones v. Alfred H. Mayer Co.* 392 U.S. 409, 423-39 (1968) (drawing on the legislative history of the Civil Rights Act of 1866 as an aid to interpreting the Thirteenth Amendment).

135. CONG. GLOBE, 39th Cong., 2d Sess. 1572 (1867) (statement of Sen. Buckalew).

136. *Id.* at 1571 (statement of Sen. Wilson).

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

within its proscription.<sup>138</sup> Under the rule of entireties, for example, a worker who quit during the term of her contract (typically one year) would forfeit all earnings accrued to that point.<sup>139</sup> Although the worker had consented to the contract, and the rule involved only economic coercion, Republicans in Congress denounced it for placing the employee “at the control and will” of the employer.<sup>140</sup> Other measures, including tort actions for “enticing” laborers away from their employers and the setting of wages by state legislatures or employer associations, were similarly censured.<sup>141</sup> It has been argued that—instead of condemning each of these mechanisms per se—the Republican majority opposed them only in the context of “the brutal conditions of New Mexican peonage or the Reconstruction south.”<sup>142</sup> No doubt, those contexts provided both the impetus and the vivid exposures necessary to generate Congressional opposition, but the resulting denunciations ran against each mechanism in particular. When Congress outlawed a practice, as in the Peonage Act of 1867 or the Padrone statute of 1874, the prohibition extended throughout the nation without regard to any particular context of racism or violence.<sup>143</sup>

The majority’s expansive notions of labor freedom did not go unchallenged. Edgar Cowan, a conservative Republican senator from Pennsylvania, vocally insisted that the Thirteenth Amendment guaranteed nothing more than physical liberty. He argued that the whole purpose of the Amendment was “simply to abolish negro slavery,” and that only one right was required to accomplish that purpose: “[t]he right to go wherever one pleases without restraint or hinderance on the part of any other person.”<sup>144</sup> Cowan

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138. See VanderVelde, *supra* note 2, at 453-54, 475-76. For additional discussion of the *Pollock* principle’s fit with the original meaning, see *infra* text accompanying notes 185-186.

139. STEINFELD, *supra* note 4, at 291-92.

140. CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866) (statement of Sen. Wilson); VanderVelde, *supra* note 2, at 492-93.

141. VanderVelde, *supra* note 2, at 491, 493-94.

142. Oman, *supra* note 24, at 2071.

143. The Padrone statute was enacted to prevent the importation of Italian children for forced labor in the United States, but the terms of the prohibition were general and contained no reference to the particular context. See *United States v. Kozminski*, 487 U.S. 931, 947 (1988) (quoting the Congressional Record and the Padrone statute, Act of June 23, 1874, ch. 464, 18 Stat. 251). On the Peonage Act, see *supra* Section I.B.

144. VanderVelde, *supra* note 2, at 478 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1789 (1866)). Cowan’s argument echoed those of moral abolitionists, who insisted that a laborer who “is under no *physical* coercion . . . thus escapes essential and perpetual degradation.” NORTHERN LABOR AND ANTISLAVERY: A DOCUMENTARY HISTORY 131 (Philip S. Foner & Herbert Shapiro eds., 1994) (quoting an antislavery newspaper).

engaged in a running battle with the Radical Republicans culminating in a dramatic showdown over a proposed extension of the Freedmen's Bureau bill. Cowan charged that under the Radicals' egalitarian approach, there would be no one to perform "the menial offices of the world," like blacking boots and currying horses, and if such tasks "were not done I should like to know how we could live at all."<sup>145</sup> In response, Senator Henry Wilson, who would later sponsor the Peonage bill, declared:

The Senator knows what we believe. He knows that we have advocated the rights of the black man because the black man was the most oppressed type of the toiling men of this country. . . .

The Senator tells us that if all men were equal and all men were learned, we could not get our boots blacked. . . . [That] has been the language of the negro drivers in this country for sixty years—of the men who had just as much contempt for the toiling white millions of the country as they had for their own black slaves.<sup>146</sup>

After this debate, Cowan's influence waned. He continued to speak out, but the Republican leaders rarely deigned to respond. His narrow view of the Amendment was repeatedly outvoted, and he was effectively isolated on issues relating to freed persons.<sup>147</sup>

In short, the *Pollock* principle echoes Congress's approach to the application of the Thirteenth Amendment in the period immediately following ratification. Rejecting arguments that the Amendment protected only physical liberty, Congress assessed each mechanism of employer control in terms of its likely effect on the levels of domination and exploitation in the employment relation. Although it might be possible to formulate other principles that fit the original understanding, the fact that the one chosen by the Supreme Court satisfies that criterion would seem to place the burden on its opponents to come forward with a superior alternative.

### C. *The Pollock Principle and the Case Law*

The *Pollock* principle identifies rights that are necessary to enable workers to avoid servitude, and not solely rights that, by their absence, *define* the condition of "involuntary servitude." In *Shaw v. Fisher*, for example, the South

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145. CONG. GLOBE, 39th Cong., 1st Sess. 342 (1866) (statement of Sen. Cowan).

146. VanderVelde, *supra* note 2, at 481-82 (quoting *id.* at 343).

147. *Id.* at 482-83. For additional discussion of this point, see *infra* text accompanying notes 185-186.

Carolina Supreme Court invalidated the tort of hiring a laborer who was under a contractual obligation to work for another, even though there was no finding that the particular laborer involved could not have left the state or worked with family members.<sup>148</sup> Similarly, the *Pollock* Court did not inquire as to the harshness of domination or unwholesomeness of conditions faced by the laborers involved. Involuntary servitude was to be eliminated not solely by defining and outlawing that condition itself, but also by giving laborers the “power below” to give employers the “incentive above” to relieve harsh domination and unwholesome conditions.<sup>149</sup>

The Supreme Court’s 1988 decision in *United States v. Kozminski* is often cited to support a narrower, definitional approach to involuntary servitude. In *Kozminski*, several defendants were convicted of subjecting two mentally impaired men to involuntary servitude in violation of two federal statutes that incorporated the ban on involuntary servitude.<sup>150</sup> The convictions rested partly on the ground that the defendants had inflicted psychological coercion—including withholding pay, providing inadequate nutrition and shelter, and isolating the two men from outside contact—to convince them that they could not quit.<sup>151</sup> The Court held that the “involuntary servitude” prohibited by the criminal statutes encompassed only physical and legal coercion, and not psychological coercion.<sup>152</sup> Instead of applying the *Pollock* approach, which would have asked whether freedom from the kind of psychological coercion inflicted in *Kozminski* was necessary to avoid involuntary servitude, the Court determined simply that the ban on involuntary servitude had “never been interpreted specifically to prohibit compulsion of labor” by means other than physical or legal coercion.<sup>153</sup>

Justice O’Connor’s opinion for the Court made it clear, however, that this narrow reading resulted from special constraints on the interpretation of criminal statutes and did not limit the scope of the Thirteenth Amendment itself: “By construing § 241 and § 1584 to prohibit only compulsion of services through physical or legal coercion, we adhere to the time-honored interpretive guideline that uncertainty concerning the ambit of criminal statutes should be

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148. *Shaw v. Fisher*, 102 S.E. 325, 327 (S.C. 1920) (discussed *infra* text accompanying notes 231-232).

149. See *supra* text accompanying notes 63-69.

150. 487 U.S. 931 (1988).

151. *Id.* at 935-36.

152. *Id.* at 943-44. *Bailey* and *Pollock* were distinguished on that ground.

153. 487 U.S. at 944.

resolved in favor of lenity.”<sup>154</sup> Although this statement seems clear enough, the relationship between the constitutional and statutory concepts of involuntary servitude is sufficiently complicated that the case has often been mistakenly cited for the proposition that the constitutional concept includes only physical or legal coercion. Accordingly, it will be necessary to discuss *Kozminski* in some detail. The first of the two statutes at issue, 18 U.S.C. § 241, forbids conspiracies to interfere with rights secured “by the Constitution or laws of the United States.”<sup>155</sup> In the words of the Court, this language “incorporates the prohibition of involuntary servitude contained in the Thirteenth Amendment.”<sup>156</sup> However, the statutory context alters the mode of interpretation:

Congress intended the statute to incorporate by reference a large body of potentially evolving federal law. This Court recognized, however, that a statute prescribing criminal punishment must be interpreted in a manner that provides a definite standard of guilt. The Court resolved the tension between these two propositions by construing § 241 to prohibit only intentional interference with rights made specific either by the express terms of the Federal Constitution or laws or by decisions interpreting them.<sup>157</sup>

At the time of *Kozminski*, Congress had yet to enact a statute that, by its express terms, recognized a right to be free from forms of labor control other than physical or legal compulsion. As for judicial decisions, the Court conducted a review of previous Supreme Court decisions and concluded that the Involuntary Servitude Clause had “never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion.”<sup>158</sup> That historical fact, however, limited the scope of “involuntary servitude” only in the context of a criminal statute:

We draw no conclusions from this historical survey about the potential scope of the Thirteenth Amendment. Viewing the Amendment, however, *through the narrow window that is appropriate in applying § 241*, it is clear that the Government cannot prove a conspiracy to violate

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<sup>154.</sup> *Id.* at 952.

<sup>155.</sup> *Id.* at 940 (quoting 18 U.S.C. § 241).

<sup>156.</sup> *Id.*

<sup>157.</sup> *Id.* at 941.

<sup>158.</sup> *Id.* at 944. Some state courts have interpreted it to prohibit some economic coercion. See *infra* Section V.B.

rights secured by the Thirteenth Amendment without proving that the conspiracy involved the use or threatened use of physical or legal coercion.<sup>159</sup>

The second of the two statutes involved in *Kozminski*, 18 U.S.C. § 1584, mandates the criminal punishment of “[w]hoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude any other person for any term.” After noting that the phrase “involuntary servitude” had been drawn from the Thirteenth Amendment and inserted in a statute enacted to enforce it, the Court concluded that Congress “intended the phrase to have the same meaning in both places.”<sup>160</sup> However, that identity of meaning existed only at the moment of the statute’s enactment in 1948. “At that time, all of the Court’s decisions identifying conditions of involuntary servitude had involved compulsion of services through the use or threatened use of physical or legal coercion.” Accordingly, “[b]y employing the constitutional language, Congress apparently was focusing on the prohibition of comparable conditions.”<sup>161</sup> Thus, the scope of the statutory phrase, but not the constitutional one, was limited to forms of labor control that had already been adjudicated as of 1948. “Congress chose to use the language of the Thirteenth Amendment in § 1584 and this was the scope of that constitutional provision *at the time § 1584 was enacted*.”<sup>162</sup> From that moment forward, there would be nothing to stop the constitutional applications from expanding as new forms of labor control were brought before the Court.

It might be argued that if Congress intended the phrase involuntary servitude “to have the same meaning in both” the statute and the Constitution, then—if *Pollock* accurately stated the Amendment’s meaning—that meaning would have been incorporated into the statute.<sup>163</sup> But the Court’s notion of “meaning” was a technical one shaped by the criminal statutory context. Instead of looking to any abstract definition or explication of “involuntary servitude”—whether broad or narrow—the Court limited its statutory “meaning” to forms of labor control that had already been challenged and adjudicated. Section 241 did not criminalize psychological coercion because, “[I]ooking behind the broad statements of purpose to the actual holdings, we find that in every case in which this Court has found a condition of involuntary

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159. 487 U.S. at 944 (emphasis added).

160. *Id.* at 944-45.

161. *Id.* at 945.

162. *Id.* at 948 (emphasis added).

163. *Pollock* was decided in 1944; the statute was reenacted in 1948.

servitude, the victim had no available choice but to work or be subject to legal sanction.”<sup>164</sup> The Court reached the same conclusion with regard to § 1584 because, at the time of its enactment, “all of the Court’s decisions identifying conditions of involuntary servitude had involved compulsion of services through the use or threatened use of physical or legal coercion.”<sup>165</sup> Only specific holdings—and not “amorphous definitions”—could provide the certainty required by the principle of lenity.<sup>166</sup>

The *Kozminski* Court, then, never reached the question of whether psychological coercion was encompassed within the constitutional term “involuntary servitude.” It held only that a statute criminalizing involuntary servitude will be read to prohibit exclusively activities that—at the time of the offense in the case of § 241, and at the date of enactment in the case of § 1584—were *already* expressly encompassed within the constitutional term as evidenced by specific statutory language or Supreme Court holdings. Since the Court had never addressed a claim of psychological coercion, no such holding existed. As Justice O’Connor explained, the Court drew “no conclusions from this historical survey about the potential scope of the Thirteenth Amendment.”<sup>167</sup> Congress subsequently broadened the scope of involuntary servitude to include nonphysical forms of coercion, so far without objection from the courts.<sup>168</sup> *Kozminski* leaves the *Pollock* standard intact.

*Butler v. Perry* is also cited as a limitation on the Amendment’s scope. In *Butler*, the Court stated that “the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results.”<sup>169</sup> This language echoes the Court’s earlier observation that the “obvious purpose” of

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164. 487 U.S. at 942-43.

165. *Id.* at 945.

166. *Id.* at 951-52. Thus, the Court rejected Justice Brennan’s argument that the statute should be interpreted as banning all forms of coercion that effectively placed workers in “a slavlike condition of servitude,” *id.* at 964 (Brennan, J., concurring), not on the merits of the standard (to the contrary, the Court agreed that “Congress intended to prohibit ‘slavlike’ conditions of servitude,” *id.* at 951 (majority opinion)), but because such a standard “would delegate to prosecutors and juries the task of determining what working conditions are so oppressive as to amount to involuntary servitude.” *Id.* at 950.

167. *Id.* at 944; see also *id.* at 952 (“Absent change by Congress, we hold that, for purposes of criminal prosecution under § 241 or § 1584, the term ‘involuntary servitude’ necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.” (emphasis added)).

168. See sources cited *supra* note 11; sources cited *infra* note 215.

169. *Butler v. Perry*, 240 U.S. 328, 332 (1916).



the clause was to “forbid all shades and conditions of African slavery,” for example long-term apprenticeships, serfdom, or “Mexican peonage or the Chinese coolie labor system.”<sup>170</sup> *Butler* could be read to limit the term “involuntary servitude” to relations that share particular features with chattel slavery, Mexican peonage, or other forms of labor exploitation that existed in the 1860s. Some judges have suggested that involuntary servitude must be akin to slavery in the specific sense of subjecting workers to physical or legal coercion.<sup>171</sup> Such a reading would conflict with the approach of *Bailey and Pollock*, which is concerned with the actual ability of workers to protect themselves against harsh domination and unwholesome conditions, and not with the presence or absence of particular, nineteenth-century mechanisms of control.

It would also conflict with the Court’s usual approach to rights-granting provisions, which applies general principles to present-day conditions rather than pickling historical applications. The Court could have held, for example, that the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth protected only against the particular historical evils they were intended to eliminate—prior restraints on speech and de jure race discrimination in the area of civil, but not social or political, rights. Instead, however, the Court took seriously the broad wording of those provisions, and approached them as a source of principles, not as a freeze-frame ban on particular historical practices. As a result, the Free Speech Clause protects against punishment of speech as well as prior restraint, and the Equal Protection Clause addresses non-de jure intentional discrimination pertaining to social and political as well as civil rights.<sup>172</sup> Consistently with this approach, Congress has extended the Involuntary Servitude Clause beyond physical or legal coercion to include psychological coercion—so far with judicial approval.<sup>173</sup> Just as the First, Second, and Fourth Amendments encompass modern forms of communication, weaponry, and search,<sup>174</sup> so should the Thirteenth extend to modern forms of labor control and labor activity.

Moreover, *Butler* is generally read to require that involuntary servitude be “akin to African slavery” at a higher level of abstraction.<sup>175</sup> It has been applied

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170. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 69, 72 (1872).

171. See, e.g., *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 180-81 (4th Cir. 1996); *United States v. Shackney*, 333 F.2d 475, 486-87 (2d Cir. 1964) (Friendly, J.).

172. For more on this point, see *infra* text accompanying notes 361-362.

173. See sources cited *supra* note 11; sources cited *infra* note 215.

174. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2791-92 (2008).

175. *Butler v. Perry*, 240 U.S. 328, 332 (1916).

mainly to the question of what kinds of relationships other than private employment (the Amendment's core concern) are covered by the clause, and the results have been consistent with *Bailey* and *Pollock*. In *Butler* itself, the Court upheld a state law making every able-bodied male liable to be drafted for six days each year to work on public roads. The Amendment, explained the Court, "certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc."<sup>176</sup> The Court could have relied on the text of the Amendment, which does not prohibit forced labor in general, but a particular kind of involuntary labor relation, namely "servitude." Unlike civic duties, which are performed under the direction of representative government for the benefit of the people, "servitude" typically involves work performed under the direction of a master for the benefit of the master.<sup>177</sup> *Butler* has also been applied in other contexts where service is performed not for the benefit of a master, but for other purposes including, for example, education, therapy, or religiosity. In such cases, the inquiry centers on the authenticity and importance of the nonexploitative purpose, and whether the Amendment's concern with subjugation is raised on the facts.<sup>178</sup> Whether the challenged relations are sufficiently "akin to African slavery" thus depends on the presence or absence

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176. *Id.* at 333.

177. See *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918) (distinguishing involuntary servitude from "the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people"); *Bailey v. Alabama*, 219 U.S. 219, 241 (1911) (referring to "that control by which the personal service of one man is disposed of or coerced for another's benefit" as "the essence of involuntary servitude"); *Hodges v. United States*, 203 U.S. 1, 19 (1906) (defining "servitude" as "the state of voluntary or compulsory subjection to a master") (quoting WEBSTER'S DICTIONARY (1901)); see also Koppelman, *supra* note 114, at 521 n.176 (noting the distinction between involuntary servitude and "honorable public duties"); *supra* p. 1505, tbl.1.

178. See, e.g., *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 460 (2d Cir. 1996) (upholding a community service requirement for high school graduation after determining that its purpose was "educational" and "not exploitative"); *United States v. King*, 840 F.2d 1276, 1281 (6th Cir. 1988) (upholding conviction of religious cult leaders for compelling children to work where "force was utilized by the defendants to compel extra services from the children that accrued to defendants' personal benefit"); *Jobson v. Henne*, 355 F.2d 129, 132 (2d Cir. 1966) (sending mental patient's claim of involuntary servitude to trial on the ground that a program of mandatory chores for mental patients might be "so ruthless in the amount of work demanded, and in the conditions under which the work must be performed, and thus so devoid of therapeutic purpose, that a court justifiably could [find] involuntary servitude"). For other examples, see Lauren Kares, Note, *The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, 80 CORNELL L. REV. 372, 395 (1995).

of exploitation and subjugation—not of specific, nineteenth-century methods of labor control.

Within the employment context, then, the *Bailey/Pollock* standard specifies the kind of employment relation that is “akin to African slavery” and produces “like undesirable results.” On their facts, *Bailey* and *Pollock* do not go beyond the line of physical or legal coercion. However, the principle of those cases condemns all forms of power that effectively eliminate the workers’ “power below” and the employers’ “incentive above” to avoid a harsh overlordship or unwholesome conditions of work. Viewing the case law as a whole, it would seem that the standard should be applied in future cases unless it is unworkable or imprudent.

#### IV. A CLOSER LOOK AT THE *POLLOCK* PRINCIPLE

For the reader who is persuaded that the *Pollock* principle warrants serious consideration, questions arise as to its workability and likely consequences. This Part examines (A) the particular role of the *Pollock* principle in negating involuntary servitude, (B) the workability of the principle as a standard for assessing labor rights claims, and (C) prudential problems arising from the principle.

##### A. *The Role of the Pollock Principle in Negating Involuntary Servitude*

The project of negating a condition, here slavery or involuntary servitude, entails basic choices about objectives. Lea VanderVelde offers an illuminating formulation. Is the goal accomplished, she asks, when the condition is “obliterated into nothingness, like eliminating a spot on an otherwise pure fabric, or vanquishing a travesty?” Or would that approach defeat the purpose by creating “a vacuum into which other forms of exploitation and oppression could flow”?<sup>179</sup> The cases on involuntary servitude exhibit two contrasting approaches to labor rights claims, each of which reflects a distinct set of answers to these questions. One is the definitional approach deployed in *Kozminski* and other decisions applying statutory bans on “involuntary servitude.” This approach seeks to eliminate the travesty of involuntary servitude as if it were a spot on an otherwise pure fabric. It protects only those rights that, by their absence, define the condition of involuntary servitude. It asks whether, without the claimed right, the individual laborer would be in the

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179. Lea VanderVelde, *The Thirteenth Amendment of Our Aspirations*, 38 U. TOL. L. REV. 855, 875-76 (2007).

prohibited condition of “involuntary servitude.” If so, then the right is protected. On this view, the inalienable right to quit can be explained as negating the “involuntary” element of involuntary servitude. This definitional approach provides the irreducible minimum of constitutional protection. At the very least, the constitutional command that slavery and involuntary servitude “not exist” must guarantee the right to be free from those conditions.

*Pollock* adds a second, functional approach to labor rights claims. Here, involuntary servitude is seen not as a spot on an otherwise pure fabric, but as a system of unfree labor locked in struggle with the system of free labor. The negative goal of obliterating involuntary servitude is intertwined with the positive goal of “maintain[ing] a system of completely free and voluntary labor throughout the United States.”<sup>180</sup> The Thirteenth Amendment guarantees a given right not only if its absence ipso facto defines the prohibited condition of involuntary servitude, but also if it is essential to the functioning of the free labor system.

Where the definitional approach seeks to enforce directly each individual’s freedom from involuntary servitude, the functional approach protects workers’ rights to participate in the free labor system, which, in turn, operates to prevent involuntary servitude. Within the employment relation, the Amendment protects all rights necessary to provide workers with the “power below” and employers with the “incentive above” to remedy “a harsh overlordship or unwholesome conditions of work.” The workers’ power and the employers’ incentive are generated not at the individual level, between a particular laborer and employer, but in the aggregate, through the workings of the free labor system. This is apparent in Justice Jackson’s formulation of the right at issue: not simply as the right to quit (which, given that the law challenged in *Pollock* criminalized quitting, might have been the more natural framing), but as “the right to change employers.”<sup>181</sup> By the time that an individual laborer has exercised this right, she is working for another employer and cannot benefit directly from whatever influence her “power below” might have exerted on her previous employer. Systemically, however, each worker’s exercise of the right operates to ensure that employers who seek to impose harsh domination and unwholesome conditions will be punished with high employee turnover, while those who offer better terms will be rewarded with loyalty. Even if the particular rights claimant is not in imminent danger of

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180. *Pollock v. Williams*, 322 U.S. 4, 17 (1944); see also *Bailey*, 219 U.S. at 245 (noting the Amendment’s purpose to “safeguard the freedom of labor upon which alone can enduring prosperity be based”). For similar statements by the Amendment’s Framers, see *infra* note 185.

181. *Pollock*, 322 U.S. at 17-18.

involuntary servitude, the right may be protected as “in general” necessary to provide workers with an effective “defense against oppressive hours, pay, working conditions, or treatment.”<sup>182</sup>

Consider, for example, *Shaw v. Fisher*, a case that—unlike *Pollock*—actually did involve a constraint on the right to change employers. In *Shaw*, a sharecropper named Carver broke his contract with Shaw, and subsequently found employment with Fisher.<sup>183</sup> Shaw sued Fisher for the common law tort of harboring a worker who had quit another employer in breach of contract. The South Carolina Supreme Court held that the Thirteenth Amendment had “annulled” the tort, even though Carver was free to quit and there was nothing in the opinion to indicate that he lacked alternative means of supporting himself, for example by working with family members, going into business for himself, or migrating outside the state.<sup>184</sup> Apparently, Carver’s freedom to participate in the free labor system was at stake.

This functional approach echoed the proceedings and legislative enactments of the Thirty-Eighth and Thirty-Ninth Congresses, which proposed the Thirteenth Amendment and shaped its early enforcement. Senators and representatives stressed that the Amendment would protect the freedom of labor, including a set of rights extending far beyond those that defined the conditions of slavery and involuntary servitude. Among those mentioned, for example, were the rights to “enjoy the rewards of his own labor,” to “name the wages for which he will work,” and to change employers.<sup>185</sup> The Peonage Act of 1867 prohibited “voluntary” as well as

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182. *Id.* at 18.

183. *Shaw v. Fisher*, 102 S.E. 325, 326 (S.C. 1920); see *infra* text accompanying notes 231-232.

184. *Id.* at 326-27. The court drew on *Bailey*, quoting its admonition that the purpose of the Amendment was to “render impossible any state of bondage; to make labor free . . . .” *Id.* at 326 (quoting *Bailey*, 219 U.S. at 241).

185. CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864) (statement of Rep. Ingersoll); CONG. GLOBE, 39th Cong., 1st Sess. 1160 (1866) (statement of Sen. Windom); *id.* at 111 (statement of Sen. Wilson) (discussing freedman’s right to “work when and for whom he pleases”); VORENBERG, *supra* note 20, at 235 (observing that the Amendment was intended to protect natural rights, and that the “right to the fruit of one’s labor was the natural right most commonly mentioned”). For general statements concerning the purpose of the Amendment not merely to abolish slavery, but to establish freedom, see, for example, CONG. GLOBE, 38th Cong., 1st Sess. 2985 (1864) (statement of Rep. Kelley) (“Let us establish freedom as a permanent institution, and make it universal.”); *id.* at 2983 (statement of Rep. Mallory) (complaining that proponents of the Amendment seek to supplant slavery by the “system of free labor”); *id.* at 2944 (statement of Rep. Higby) (observing that passage of the Amendment represents the choice between slavery and “free institutions and free labor”); *id.* at 2615 (statement of Rep. Morris) (advocating passage of the Thirteenth Amendment on the ground that “this is not a mere struggle between the North and the South; it is a conflict

involuntary peonage, and the Civil Rights Act of 1866 protected a broad array of freedoms against race-based (and, in the popular understanding, race-neutral) infringements, including the rights “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property.”<sup>186</sup>

The *Pollock* approach reflects the unique character of the Thirteenth Amendment as a rights guarantee that specifies no rights. With regard to an enumerated right—like the right to bear arms or to speak freely—judges and legislators might reasonably consider their job done once individuals possess an enforceable legal entitlement to exercise the right. But Thirteenth Amendment rights cannot be considered successful unless they are actually exercised to ensure that “[n]either slavery nor involuntary servitude . . . shall exist.”<sup>187</sup> If workers choose not to exercise their rights, then the rights guarantees have failed, and the government must find some other way to fulfill the constitutional command.<sup>188</sup> By itself, the definitional approach invites this kind of failure. It waits until a worker has been deprived of a right that, by its absence, defines the condition of involuntary servitude. It is unlikely that workers who have been crushed into involuntary servitude will suddenly discover and exert the “power below” to erase it. Workers who are immediately threatened with servitude are likely to be relatively vulnerable, lacking the economic, social, cultural, political, and legal resources to resist. Moreover, subjugation typically involves repeated experiences of defeat, leading to demoralization and self-abnegation.<sup>189</sup> If constitutional enforcement focuses

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between two systems; a controversy between right and wrong”); *id.* at 1440 (statement of Sen. Harlan) (advocating the Thirteenth Amendment on the ground that even slaveholders would benefit from “a change of their system of labor from compulsory to voluntary”); and *id.* at 1369 (statement of Sen. Clark) (asserting that the Amendment will “plant new institutions of freedom”).

186. Peonage Act of 1867, ch. 187, § 1, 14 Stat. 546; Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27. On the scope of the Civil Rights Act and its grounding in the Thirteenth Amendment, see *supra* note 95 and accompanying text.
187. U.S. CONST. amend. XIII, § 1. The Amendment bans those conditions not solely out of concern for the individual victim, but also—as the *Pollock* Court, echoing the Framers, observed—for all other workers “with whom his labor comes in competition.” *Pollock*, 322 U.S. at 18; see also VanderVelde, *supra* note 2, at 445-48 (documenting the Framers’ concern with the impact of slavery and involuntary servitude on free laborers).
188. This was the situation in New Mexico during the lead-up to the Peonage Act of 1867. As related in Congress, New Mexican peons already had an enforceable legal right to depart their employers, but many lacked the desire to do so. See *supra* notes 39-40 and accompanying text.
189. Studies of power suggest that the experience of subjugation tends to spawn feelings of powerlessness and acceptance, which are fostered and reinforced by socialization. See

exclusively on these workers, then its efficacy will depend on the willingness of government to commit the financial and other resources necessary to detect and root out practices of unfree labor.<sup>190</sup> By contrast, *Pollock* relies on free workers to exercise and enforce rights *before* falling into a servile state. Workers who remain free from harsh domination and unwholesome conditions stand as both guardians and exemplars of the Amendment's success; by exercising their "power below," they give employers the "incentive above" to provide nonservile jobs.

*B. Workability of the Pollock Principle*

The *Pollock* standard calls for judgments that cannot be reduced to bright-line criteria capable of mechanical application. The determination whether a given claimed right is necessary to provide workers with the "power below" and employers the "incentive above" to avoid servitude necessarily involves judgments about how the world works, as well as choices concerning the significance and weight of precedent, original meaning, tradition, consensus, and structural considerations bearing on the claimed right. Such open-textured judgments are, however, endemic to the enterprise of applying broadly worded rights guarantees. The role proposed here for *Pollock* in the jurisprudence of involuntary servitude roughly parallels that of the doctrines of suspect classifications, fundamental interests, high- and low-value speech, and content discrimination in the jurisprudence of equal protection and freedom of speech. Each of these doctrines draws on the history and purposes of a constitutional provision to construct principles intermediate in specificity between the highly abstract constitutional text, on the one hand, and tests that can be applied to the particular facts of specific cases (like strict, intermediate, and rational basis scrutiny) on the other. None can be implemented without contestable judgments both about the way the world works (for example, whether a particular form of speech is important to the channels of political change, or whether a given classification tends to be based on stereotypes) and about the significance and weight of the various constitutional sources bearing on the

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MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 181-82 (1964); JOHN GAVENTA, *POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY* 12-13 (1980); STEVEN LUKES, *POWER: A RADICAL VIEW* 119-20, 137-39 (2d ed. 2005).

190. See generally BALES, *supra* note 116, at 26-29, 237-38 (describing the difficulty of revealing and eliminating forms of slavery that are disguised by contract and distanced by layers of functionaries and subcontractors from the ultimate masters, most of whom are "respectable" businesspeople").

claimed right (for example, whether indecent speech should be protected despite the lack of historical or early precedential support).

*Pollock's* concept of servitude operates in two domains: subjugation (“control,” “harsh overlordship”) and exploitation (the disposal of one person’s labor for “another’s benefit,” “unwholesome conditions of work”). But what, exactly, is a “harsh overlordship,” and what are “unwholesome conditions of work”? Throughout the heated controversy over the inalienable right to quit, both Congress and the Court sidestepped these questions. Instead of defining and prohibiting the substance of servitude, they sought to provide workers with the procedural rights necessary to avoid it. By guaranteeing the procedural “right to change employers” as the means to prevent substantively “oppressive hours, pay, working conditions, or treatment,” the Court avoided the need to specify the level of oppression that would trigger the Amendment.<sup>191</sup>

Even regarding procedural rights, however, issues may arise that call for specifying the meaning of “harsh overlordship” and “unwholesome conditions,” if not by stated definition then by accumulated holdings. The key judicial opinions and statutes protecting the right to quit were drafted with relatively poor and powerless workers in mind, for example New Mexican peons and southern agricultural laborers. But what about relatively privileged workers? Does a Thirteenth Amendment right, once recognized, extend even to workers who hold desirable jobs and earn relatively high pay? Consider, for example, entertainers and professional athletes. Courts have held that although no person may be enjoined to perform a contract for personal services, a person who performs “unique” services may be barred from performing those services for others. The fount of this doctrine was the famous English case of *Lumley v. Wagner*, in which an opera singer under contract to Her Majesty’s Theatre was enjoined from singing for anyone else during the contract term.<sup>192</sup>

A negative injunction of this type would be unconstitutional if directed at an unskilled laborer. The Amendment guarantees “the right to change employers,” and that right is violated by a general prohibition on hiring a person who is under contract to another. “If no one else could have employed Carver during the term of his contract with plaintiff,” reasoned one court, “the result would have been to coerce him to perform the labor required by the contract; for he had to work or starve.”<sup>193</sup> *Lumley's* American progeny ignored

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

192. *Lumley v. Wagner*, (1852) 42 Eng. Rep. 687, 693 (Ch.).

193. *Shaw v. Fisher*, 102 S.E. 325, 327 (S.C. 1920) (discussed *infra* text accompanying notes 231-232).



this principle in particular and the problem of labor freedom generally, focusing instead on the employer's need for injunctive relief to secure the "unique" services of the worker.<sup>194</sup> How would the *Lumley* rule fare under *Pollock*?

To begin with, the standard would shift the inquiry away from the employer's need for unique services to the worker's need for the right to choose the employer for whom she would practice her trade. Suppose, for example, that a young actor contracted to perform with a particular theater company for a two-year period. Suppose also that a two-year negative injunction would likely ruin her acting career, but that she would have little difficulty finding employment as a cocktail server at any number of bars. Would the negative injunction violate *Pollock*? The company might contend that the prospect of serving cocktails is, unlike the prospect of starvation in Carver's case, insufficiently coercive. If cocktail servers are not generally considered to be in a condition of servitude, then the actor can escape servitude. The company might also contend that the harsh overlordship and unwholesome conditions associated with servitude necessarily involve "extreme" abuses like physical violence,<sup>195</sup> and that theater companies do not typically commit such abuses. The actor might reply that the rights to change employers and to pursue a chosen calling are both essential elements of a free labor system. She might point to the centrality of a person's trade or profession to her happiness and standing in the community, and argue that if theater companies hold the power to banish actors from their trade, actors will lack the "power below" to give theater companies the "incentive above" to avoid a harsh overlordship or unwholesome conditions of work.<sup>196</sup> She might note the possibility of serious

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194. VanderVelde, *supra* note 4, at 841-42.

195. See Oman, *supra* note 24, at 2072 (proposing that the scope of the Thirteenth Amendment be limited to "extremely oppressive relationships").

196. Cf. *Ford v. Jermon*, 6 Phila. 6, 7 (Dist. Ct. 1865) (declining to issue negative injunction enforcing female performer's promise to sing, and querying: "Is it not obvious that a contract for personal services thus enforced would be but a mitigated form of slavery, in which the party would have lost the right to dispose of himself as a free agent, and be, for a greater or less length of time, subject to the control of another?"). The court's opinion did not mention the Thirteenth Amendment, but it echoed the free labor vision propounded by its Framers. VanderVelde, *supra* note 4, at 795-99; see also *Gardella v. Chandler*, 172 F.2d 402, 409-10 (2d Cir. 1949) (Frank, J.). *Gardella* involved the reserve clause inserted into professional baseball players' contracts, according to which the employing team retained the exclusive right to employ a player for a period of one year after his contract expired. New York Giants outfielder Danny Gardella violated the reserve clause by playing briefly in the Mexican League, for which he was barred from baseball for a period of years. His antitrust suit was dismissed by the District Court and reinstated by the Second Circuit Court of Appeals. Circuit Judge Jerome Frank, an influential legal realist scholar, explained his vote

employer abuses (for example unsafe conditions and high rates of exploitation) even in relatively privileged jobs.<sup>197</sup> In line with the doctrinal role of race and sex proposed here, she might point out that the *Lumley* rule originally gained its hold on American law in a series of cases involving efforts by male theater managers to control the lives of female performers.<sup>198</sup> However contentious these issues might be, they appear susceptible to resolution using ordinary methods of constitutional reasoning.

Similarly, issues will arise concerning particular threats to labor rights. Consider the inalienable right to quit. We know that the right is protected against legal and physical compulsion, but what about economic constraints? Under the old rule of entireties, for example, a worker was required to serve for the entire contract period—typically six months or a year—before receiving any wages. If she quit before the end, she forfeited her wages up to that point. Would this rule violate *Pollock*? The standard directs attention away from the formal distinction between legal and economic compulsion, and toward the question of whether the rule effectively deprives workers of the “power below” to give employers the “incentive above” to prevent servitude. The affected employee might contend that the rule could be “nearly as” effective as penal sanctions in light of the dire consequences of large monetary losses on marginal wage laborers, for example malnutrition, loss of shelter, and consequent harm to physical and mental health.<sup>199</sup> She might point out that the Freedmen’s Bureau set aside such laws, that state courts have held that economic pressure can constitute coercion under the Thirteenth Amendment, and that most states had abandoned the rule by the end of the nineteenth

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for reinstatement partly by citing the Thirteenth Amendment and opining that the reserve system “results in something resembling peonage of the baseball player.” He added that “if the players be regarded as quasi-peons, it is of no moment that they are well paid; only the totalitarian-minded will believe that high pay excuses virtual slavery.” *Id.* at 409, 410. Frank went on to warn, unfortunately without explanation, that he was “not to be understood as implying that [the player contracts] violate the Thirteenth Amendment or the statutes enacted pursuant thereto.” *Id.* at 410. This comment might have indicated either an inclination to reject any possible Thirteenth Amendment claim, or simply an unwillingness to confront the issue where it was not essential to resolving Gardella’s case. The reserve system was eventually abandoned after a lengthy struggle in which Curt Flood, an African-American center fielder who deeply resented being treated as exchangeable property, played a central role. BRAD SNYDER, *A WELL PAID SLAVE: CURT FLOOD’S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS* (2006).

197. It is estimated, for example, that under the reserve system the rate of exploitation of baseball players was more than three times the rate under free agency. STANLEY L. ENGERMAN, *SLAVERY, EMANCIPATION & FREEDOM: COMPARATIVE PERSPECTIVES* 19 n.35 (2007).

198. VanderVelde, *supra* note 4, at 819-21.

199. STEINFELD, *supra* note 4, at 291, 310.

century.<sup>200</sup> Employers might reply that the rule was abandoned primarily for reasons other than concerns about worker freedom.<sup>201</sup> They might suggest that a monetary penalty does not exert the kind of extreme coercion that the Amendment was intended to prohibit. Again, the standard does not mechanically dictate a result, but the issue appears amenable to resolution by ordinary methods.

Both of the preceding examples involve the claim that the Thirteenth Amendment bans only “extreme” forms of labor oppression. Without attempting a complete discussion of this possibility, a preliminary question should be raised: against what baseline is the “extreme” character of oppression to be determined? If “extreme” means unusual or exceptional in terms of social practice, then a method of labor extraction—no matter how egregious its impact on workers—might become constitutional by virtue of widespread use, a result that would conflict with the *Pollock* standard. Around the turn to the twentieth century, for example, workers in core industries faced a high risk of mutilation or death from work-related accidents.<sup>202</sup> From our perspective today, such carnage might appear to be extremely unwholesome, but at the time it was widely perceived to be routine. A similar problem would arise if “extreme” means unusual or exceptional in terms of cultural attitudes. What is perceived as “extreme” about a given form of labor oppression may have little to do with the actual harshness or unwholesomeness of the practice. In the decades following enactment of the Thirteenth Amendment, for example, the exotic and archaic-appearing “padrone” loomed large in public opinion as the villain responsible for oppressing vulnerable immigrant workers.<sup>203</sup> In fact, however, major corporations—including many that were considered among the most progressive of their day—not only relied upon labor supplied by padrones, but also duplicated their methods of labor control. It was much easier for reformers to direct their energies against the padrones, who could be depicted as extreme, than against the mainstream American corporations that were fostering and imitating padronism.<sup>204</sup> Under the *Pollock*

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200. See, e.g., *Thompson v. Box*, 112 So. 597, 599 (Miss. 1927); *Shaw v. Fisher*, 102 S.E. 325, 327 (S.C. 1920); STEINFELD, *supra* note 4, at 312; VanderVelde, *supra* note 2, at 492-93.

201. SCHMIDT, *supra* note 34, at 195-96; STEINFELD, *supra* note 4, at 312.

202. JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* (2004).

203. PECK, *supra* note 104, at 23.

204. See *id.* at 49-51, 67-68, 230. Historians have noted a similar dynamic with regard to the Mann “White Slavery” Act, which was targeted at “foreigners,” especially Jews. Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts To Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 3016 (2006).

standard, however, what matters is the harshness of subjugation and the unwholesomeness of conditions, not whether the employers involved are perceived as exceptional. Adding a requirement of “extreme” oppression might invite timidity and discourage principled enforcement.

*C. Prudential Concerns*

In *Bailey* and *Pollock*, the Court held that the state statutes at issue transgressed not only the Peonage Act, but also the Thirteenth Amendment itself. Instead of relying on the discretion of Congress, the Court affirmatively adjudged that the Amendment had been violated.<sup>205</sup> Usually, however, the Court defers to Congress in defining violations of the Thirteenth Amendment. Congress is empowered “rationally to determine what are the badges and the incidents of slavery” and to eliminate them.<sup>206</sup> The question of whether methods of employer control other than physical or legal coercion amount to involuntary servitude is, according to the Court, “a value judgment . . . best left for Congress.”<sup>207</sup> Thus, Congress may be empowered to enact legislation protecting various rights under its Section 2 enforcement power even though the Court would not, on its own, hold those rights to be protected under Section 1.

It is also true, however, that the Court routinely enforces many constitutional provisions that are more difficult to apply than the Involuntary Servitude Clause. The phrases “freedom of speech” and “equal protection of the laws,” for example, sweep far more broadly than “involuntary servitude.” Speech is integral to a vast range of human activities, and statutes invariably treat some people differently (unequally) from others. Accordingly, these phrases have given rise to intricate doctrinal structures replete with value hierarchies (as noted above, for example: high-, intermediate-, and low-value speech; fundamental and nonfundamental interests; and suspect, quasi-suspect, and nonsuspect classifications) as well as imprecise phrases like “substantially related” and “substantial” or “compelling” governmental interests. Although courts are justified in allowing Congress leeway to protect Thirteenth Amendment rights, mere difficulty of application cannot justify a complete judicial retreat from the field.<sup>208</sup> Interestingly, the Supreme Court of

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<sup>205</sup>. *Pollock v. Williams*, 322 U.S. 4, 24 (1944); *Bailey v. Alabama*, 219 U.S. 219, 244-45 (1911).

<sup>206</sup>. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

<sup>207</sup>. *United States v. Kozminski*, 487 U.S. 931, 951 (1988).

<sup>208</sup>. See William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1339-55 (2007). Carter concludes, based

Canada recently reached a similar conclusion in the process of repudiating its precedents and recognizing the right of workers to bargain collectively under the Canadian Charter of Rights. “It may well be appropriate for judges to defer to legislatures on policy matters expressed in particular laws,” observed the Court.<sup>209</sup> “But to declare a judicial ‘no go’ zone for an entire right on the ground that it may involve the courts in policy matters is to push deference too far.”<sup>210</sup> Categorical deference on that scale, combined with a willingness to apply other difficult provisions, hints subtly at a class bias against working people.

It might be argued that judicial enforcement of the *Pollock* principle would amount to a revival of *Lochner*-Era economic due process. But the Court’s rationale for repudiating economic due process, explained in the famous *Carolene Products* footnote four, does not appear to cover the Involuntary Servitude Clause. According to the footnote, legislatures are generally entitled to judicial deference, but less deference may be due in cases involving “a specific prohibition of the Constitution, such as those of the first ten amendments.”<sup>211</sup> Under this schema, the Involuntary Servitude Clause resembles more closely the first ten amendments than “the general prohibitions of the Fourteenth Amendment.”<sup>212</sup> Unlike the clauses guaranteeing “equal protection” or “liberty,” it refers to a particular relationship and provides limiting criteria. The constitutional text prohibits “involuntary servitude,” and there is no apparent reason—at least in the abstract—why the courts cannot apply the already-tested approach developed in the right-to-quit cases to resolve other labor rights claims.

Finally, it might be thought that because the Thirteenth Amendment is not limited to governmental action, an expansive interpretation would authorize intrusive judicial regulation of private activity.<sup>213</sup> However, the courts have

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on the legislative debates, that the Amendment was understood to create a “concurrent power of Congress, the judiciary, and the executive branch to enforce the freedmen’s rights,” and not to limit the judiciary’s power to instances of literal slavery. *Id.* at 1345.

209. *Health Servs. & Support-Facilities Subsector Bargaining Ass’n v. British Columbia*, [2007] 2 S.C.R. 391, 414, 2007 SCC 27 (Can.).

210. *Id.*

211. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

212. *Id.*

213. Cf. George Rutherglen, *The Thirteenth Amendment, the Power of Congress, and the Politics of Civil Rights* (manuscript at 10), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1473160](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1473160) (suggesting that the contrast between the pattern of judicial decisions under the self-enforcing provisions of the Thirteenth Amendment (“few and restrictive”) and the Fourteenth Amendment (“many and expansive”) reflects the absence of a state-action limitation in the former).

always regulated private employment relations. Judges, not legislatures, developed the common law of master and servant, imported the crime of labor conspiracy from England, and developed the labor injunction. Judges continue to shape the law of individual employment rights today. It is one thing to argue that judges should defer to legislatures in the regulation of private activity, a contention addressed immediately above. But the notion that judicial regulation of private employment relations is objectionable per se is unpersuasive in light of the fact that private employment relations have been subject to judicial and legislative regulation from the outset.<sup>214</sup> A more expansive interpretation of the Thirteenth Amendment would alter the substance, not the scope, of judicial intervention in private employment relations.

#### **V. COERCION AND SERVITUDE IN THE JURISPRUDENCE OF INVOLUNTARY SERVITUDE**

The theory of *Bailey* and *Pollock* hinges, as we have seen, on the “servitude” element of involuntary servitude. Instead of rendering servitude “voluntary,” the right to quit gives workers the “power below” and employers the “incentive above” to raise the employment condition above servitude. In popular discourse, however, the focus is more likely to be on the “voluntary” element. Surely, an individual who enjoys the right to quit could not possibly be in a condition of slavery or involuntary servitude. If her employment descends to servitude, then it must—by virtue of the right to quit—be voluntary servitude. Part V probes this intuitively powerful claim and concludes that its viability hinges on the assumption that the approach of *Bailey* and *Pollock* is working: that the right to quit is, in fact, providing workers with the “power below” and employers with the “incentive above” to provide employment opportunities that rise above servitude.

The right to quit can render servitude voluntary only if, after the worker quits, some constitutionally acceptable alternative is available. As *Bailey* and *Pollock* make clear, for example, going to jail or facing physical punishment for quitting is unacceptable. In addition, psychological and other nonphysical forms of punishment (for example, warnings about possible deportation and threats not to send money home to an immigrant worker’s family) have been outlawed by federal legislation enacted to enforce the Thirteenth

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214. CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* (1993).

Amendment.<sup>215</sup> But what about the worker in servitude who faces no consequences for quitting other than the resulting loss of wages, benefits, status, and membership in a workplace community? For such a worker, there are three basic alternatives to remaining in servitude: (1) escaping the employment relation by going into business for oneself (self-employment), (2) escaping the employment relation by forgoing the gainful use of labor power, or (3) finding a new job. Unless at least one of these alternatives is both constitutionally sufficient and available as a practical matter, then the worker is in a condition of involuntary servitude.<sup>216</sup> Which, if any, of the alternatives are constitutionally acceptable? Do they, individually or in combination, obviate the need for any labor rights other than the right to quit?

This Part argues that (1) self-employment does provide a constitutionally sufficient alternative to servitude, but it is not—in practice—available to many workers; (2) forgoing the gainful use of labor power is not a constitutionally sufficient alternative to servitude; and (3) obtaining another job can be a constitutionally sufficient alternative to servitude, but only if the new job does not entail a relation of servitude. The third point brings the argument back to *Bailey* and *Pollock*, with their focus on empowering workers to elevate the employment condition above servitude.

#### A. Remain in Servitude or Escape into Self-Employment (*The Right To Quit*)

It seems fairly obvious that genuine self-employment provides a constitutionally sufficient alternative to servitude.<sup>217</sup> A self-employed individual

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215. Victims of Trafficking and Violence Protection Act of 2000, 114 Stat. 1486 (codified at 18 U.S.C. § 1589 (2000)); *United States v. Calimlim*, 538 F.3d 706, 711 (7th Cir. 2008) (upholding conviction for subjecting a domestic worker to forced labor based mainly on defendants' threats not to send money back to her home in the Philippines, and warnings as to "her precarious position under the immigration laws"); *United States v. Bradley*, 390 F.3d 145, 150-51 (1st Cir. 2004), *vacated on other grounds*, 545 U.S. 1101 (2005).

216. *Cf. New York v. United States*, 505 U.S. 144, 176 (1992) (explaining that a choice between two unconstitutional alternatives is "no choice at all"). The set of three alternatives was formulated to encompass the full range of possibilities without skipping over any point that requires justification. Starvation is not listed as a possible alternative, but it is considered along with the first and second listed alternatives. The notion that one individual cannot be subjected to involuntary servitude except by the wrongful action of another is addressed in the discussion of the third alternative.

217. Self-employment is nongenuine when a person is nominally self-employed, but in fact has little or no control over her labor. Examples include nominally "independent" cleaning contractors who labor under the direction of their "customers." See Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y J. 187 (1999).

might face the choice of working or starving, but her work is outside any relation of servitude. As long as an economy provides plenty of opportunity for self-employment, the right to quit can plausibly be seen as a way to escape servitude. Abraham Lincoln, for example, claimed that the relation between capital and labor “does not embrace more than one-eighth of the labor of the country,” and that the wage worker of today would become the independent free laborer of tomorrow.<sup>218</sup> Most opponents of slavery presumed that the alternative to slave labor was not wage labor, but economic independence as a self-employed farmer, artisan, or entrepreneur. It was expected that many people would go through a period of wage labor, but for all but the indolent or unwilling, this would be a temporary stop on the way to self-employment.<sup>219</sup>

Suppose, however, that Lincoln’s one-eighth proportion were reversed, and the relation between capital and labor embraced more than seven-eighths of the economy—as it does in the United States today.<sup>220</sup> Then, the right to quit would enable—at most—only one out of every eight workers to escape the employment relation. What about the other seven? Interestingly, the possibility of self-employment could—theoretically—render them free as well. Under the assumption that no more than one out of eight workers *wants* self-employment, each individual would be free to choose and nobody would be forced to remain in servitude.<sup>221</sup>

The assumption, however, appears to be counterfactual. The total number of self-employed Americans is about fifteen million, a figure that has been declining or stable since 1948.<sup>222</sup> At any given time, roughly five to seven million Americans are engaged in starting up a business.<sup>223</sup> The “main factor leading to survival” is having employees, but even companies with employees

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218. 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 459 (Roy P. Basler ed., 1953).

219. See, e.g., FONER, *supra* note 96, at 33; RODGERS, *supra* note 130, at 33-35; VanderVelde, *supra* note 2, at 471-74.

220. As of 2003, the self-employed accounted for 11.1 percent of all employment. Steven Hipple, *Self-Employment in the United States: An Update*, MONTHLY LAB. REV., July 2004, at 14-15. This figure was obtained by adding unincorporated self-employment, *id.* at 14 tbl.1, to incorporated self-employment, *id.* at 15 tbl.2.

221. See G.A. Cohen, *The Structure of Proletarian Unfreedom*, 12 PHIL. & PUB. AFF. 3, 9-11, 32 (1983).

222. Hipple, *supra* note 220, at 14 & tbl.1, 15 & tbl.2.

223. William J. Dennis, Jr., *More Than You Think: An Inclusive Estimate of Business Entries*, 12 J. BUS. VENTURING 175, 188-89 (1997) (estimating, based on survey of 36,000 households, that about 4.9 million people were engaged in starting up a business in 1995); Paul Reynolds, *The Truth About Start-Ups*, 17 INC. 23, 24 (1995) (estimating that seven million Americans are engaged in starting up a business at any given time).



face a greater than fifty-fifty chance of termination within four years.<sup>224</sup> There are no reliable survival statistics for start-ups without employees, which make up more than eighty-five percent of the total,<sup>225</sup> but they are considered “very volatile.”<sup>226</sup> Beyond lack of employees, two of the most reliable predictors of failure are shortage of capital and lack of a college degree.<sup>227</sup> The workers who are of most concern under the Thirteenth Amendment, those in servitude or in danger of servitude, are unlikely to have college degrees, adequate capital, or the capacity to hire employees. For such workers, the most likely results of an attempt at self-employment would be loss of the current job, exhaustion of savings, failure of the business within a few years, and return to the job market. Thus, the worker’s actual choice is not between servitude and self-employment but between servitude and a long-odds gamble on escaping into self-employment. Under these circumstances, the worker who remains in servitude is voluntarily declining self-employment in much the same way that a person who refrains from buying a lottery ticket is voluntarily declining to strike it rich. If self-employment were the only alternative to servitude, then, many workers would be submitting to servitude, and they would be doing it involuntarily. (The counterargument that their servitude is voluntary because nobody is wrongfully blocking their escape is considered below.<sup>228</sup>)

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224. Brian Headd, *Redefining Business Success: Distinguishing Between Closure and Failure*, 21 SMALL BUS. ECON. 51, 56 (2003); see Amy E. Knaup, *Survival and Longevity in the Business Employment Dynamics Data*, MONTHLY LAB. REV., May 2005, at 50, 51. Not all terminated businesses close because of failure. In one survey, 29.1% of the owners of closed businesses reported that the “status” of their business at the time of closure was “successful” as opposed to “unsuccessful” (the only other choice). Headd, *supra*, at 56.

225. See U.S. DEP’T OF COMMERCE, U.S. CENSUS BUREAU, CHARACTERISTICS OF BUSINESSES: 2002, at 1 (2006), available at <http://www.census.gov/prod/eco2/sbo200cscb.pdf> (reporting that roughly 12% of 12,595,657 nonemployer businesses reported being created within the past year, as compared to 4.2% of 4,091,884 employer businesses, leading to the conclusion that 90% of start-ups were nonemployer businesses).

226. Headd, *supra* note 224, at 60 n.9.

227. *Id.* at 55. Even if a worker succeeds in remaining self-employed, she has a one-sixth chance of earning less than the minimum wage. John F. Pinfeld, *The Expectations of New Business Founders: The New Zealand Case*, J. SMALL BUS. MGMT., July 2001, at 279, 279 (citing a finding of the U.S. Small Business Administration).

228. See *infra* text accompanying notes 251-257.

*B. Remain in Servitude or Forgo Gainful Labor (The Right To Change Employers)*

Suppose that a worker is physically and legally free to quit her job and cease working altogether. Suppose also, for the moment, that she will starve if she quits. Is this a constitutionally sufficient alternative to servitude? Generally, an employee who faces the alternatives “work or starve” is not considered to be in a condition of forced labor or involuntary servitude.<sup>229</sup> Part of the reason for this is the assumption that she can seek a job from any number of other employers (a possibility discussed below).<sup>230</sup> But what if her *only* alternative were to forgo gainful labor altogether?

Recall that the Supreme Court of South Carolina confronted this issue in *Shaw v. Fisher*. A sharecropper named Carver breached his one-year employment contract with Shaw and took a job with Fisher. Shaw obtained an award of damages against Fisher for the tort of knowingly hiring a worker who had quit his previous employer in violation of a labor contract. The high court reversed. “If no one else could have employed Carver during the term of his contract with plaintiff,” reasoned the court, “the result would have been to coerce him to perform the labor required by the contract; for he had to work or starve.” Because this “compulsion would have been scarcely less effectual than if it had been induced by the fear of punishment under a criminal statute for breach of his contract,” it violated the Thirteenth Amendment.<sup>231</sup> Although the Court posed the alternatives as *work* or *starve*, that language did not fully capture the gravamen of the violation. Stated more precisely, Carver’s alternatives were to work *for his current employer* or to quit and starve.

The holding of *Shaw* can be framed in either of two ways. In the words of the Court, the tort action violated Carver’s right to quit because, by removing

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229. The contrary position would require an affirmative guarantee of sustenance regardless of labor output, never a widely held view in the United States except for enslaved individuals and those unable to work. “The true *incentives to labor* in the free States,” observed one reconstruction official, “are hunger and cold.” SCHMIDT, *supra* note 34, at 138.

230. *Cf. Moss v. Superior Court*, 950 P.2d 59, 67 (Cal. 1998) (finding no involuntary servitude where a parent was convicted of criminal contempt for violating a court order commanding him to obtain employment in order to pay child support, reasoning that he remained “free to elect the type of employment and the employer”).

231. *Shaw v. Fisher*, 102 S.E. 325, 327 (1920); *see also* *Thompson v. Box*, 112 So. 597, 599-600 (Miss. 1927) (observing that a statute prohibiting a person from knowingly employing a laborer who had breached his contract would violate the Thirteenth Amendment because the laborer would, as a practical matter, be forced to “stay or starve,” and construing the statute not to require such a result so as to avoid the constitutional violation); STEINFELD, *supra* note 4, at 287-88.

his chances of obtaining another job, it “coerce[d]” him not to quit his current one. His practical alternatives—work for his current employer or starve—amounted to unconstitutional coercion. *Shaw* could also be read, however, to hold that a worker enjoys not only the right to quit, but also what the Supreme Court would later describe as “the right to change employers.”<sup>232</sup> Without this right, the right to quit would be rendered pointless. Because Carver’s only alternative was to quit and starve, his employer could offer any set of terms and conditions superior to starvation, including servitude. In the language of *Pollock*, the right to quit by itself provided Carver with no “power below” or “incentive above” to prevent a harsh overlordship or unwholesome conditions of work.

The Thirty-Ninth Congress, which included most of the senators and representatives who had framed and debated the Thirteenth Amendment,<sup>233</sup> confronted similar problems. Southern planters were attempting to regain control over their former slaves by preventing them from obtaining new employment after quitting their jobs. For example, planters agreed among themselves not to hire any freed person without the permission of his or her previous employer.<sup>234</sup> Under this system, the worker could quit his job, but then nobody would employ him. Prominent Republicans in Congress charged that this, and other measures to prevent quitting workers from finding new jobs, amounted to a reestablishment of slavery.<sup>235</sup> The formal right to quit and starve was not enough; the worker must also enjoy the right to find another job. Not all agreed, but the dissenters were in the minority, and their influence declined rapidly over time.<sup>236</sup>

Today, some workers who quit will eventually qualify for public assistance. Although this option reduces the immediate pressure against quitting, it does not in itself provide a constitutionally sufficient alternative to servitude. If the relief is temporary, it only postpones starvation. And if it is permanent, it makes a mockery of the Amendment’s central purpose, which was to establish a system of free labor.<sup>237</sup> A person who faces a choice between remaining in

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232. *Pollock v. Williams*, 322 U.S. 4, 18 (1944). The right to change employers was also mentioned in the Thirty-Ninth Congress. CONG. GLOBE, 39th Cong., 1st Sess. 1160 (1866) (statement of Sen. Windom) (“Do you call that man free who cannot choose his own employer . . . ?”); *id.* at 111 (1865) (statement of Sen. Wilson) (discussing a freedman’s right to “work when and for whom he pleases”).

233. See *supra* note 35.

234. SCHMIDT, *supra* note 34, at 99.

235. See VanderVelde, *supra* note 2, at 491 & nn.237-40 (quoting and paraphrasing the senators).

236. See *id.* at 453-54, 475-76, 482-83.

237. See *supra* notes 180, 185 and accompanying text.

servitude or forgoing gainful labor is excluded altogether from whatever free labor system might exist. Slavery was considered evil not because it entailed labor (all able-bodied adults were expected to work for a living), but because the labor of slaves was coerced, degraded, and uncompensated. In the discourse of the time, labor was celebrated as an essential expression of human nature, a reflection of civic virtue, and a source of prosperity.<sup>238</sup> Unlike slavery, the free labor system would provide the opportunity for every citizen “to till the soil, to earn his bread by the sweat of his brow, and enjoy the rewards of his own labor.”<sup>239</sup> Instead of the independent laborer envisioned by the Framers and Ratifiers, an individual excluded from productive labor would become a noncontributing, dependent idler unfit for citizenship in a democracy—in effect an involuntary vagrant. Modern social science has since documented the human costs of this status, including grossly increased rates of clinical depression, alcoholism, drug addiction, physical illness, abuse of family members, and suicide.<sup>240</sup>

*C. Remain in Servitude or Find Another Job (The Right To Set One’s Wages)*

With abstention from labor eliminated as a sufficient option, only one alternative remains for a worker in servitude: quit and find another job. Is this a constitutionally sufficient alternative? If a worker can quit and obtain another job in which she is treated—for example—like a “partner” (Richard Epstein’s characterization of the typical employment relation in the United States),<sup>241</sup> then she could escape servitude by exercising her right to change employers. Or, if changing employers or threatening to change employers gave workers the “power below” and employers the “incentive above” to raise employment

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238. See, e.g., RODGERS, *supra* note 130, at 6-7, 10-14; VanderVelde, *supra* note 2, at 447-48, 461-62, 464. Central to the critique of slavery was its tendency to foster worship of leisure and contempt for honest work among free laborers as well as slaves. FONER, *supra* note 96, at 46-47, 58-59.

239. CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864) (statement of Rep. Ingersoll) (emphasis removed).

240. Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 162-63 (2005) (citing studies on the psychological, physical, and behavioral effects of unemployment); see also Forbath, *supra* note 94, at 16 (observing that “all the empirical literature suggests that the most salient border between minimum respect and degradation in today’s class structure falls along the line between” the employed (and their spouses) and the unemployed).

241. See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 962-77 (1984) (analogizing the employment contract to a partnership agreement). This view is reflected in the growing tendency of employers to label their employees “associates.”

conditions above servitude, there would be no more servitude. But what if the worker could only exchange one master for another, enduring servitude either way? Her alternatives—“submit to servitude or starve”—would seem to be no more acceptable than the alternatives “remain in servitude or starve.” In this situation, the right to change employers would be—by itself—insufficient to prevent involuntary servitude.

It might be objected that the term “involuntary servitude” implies “involuntary servitude for a particular master,” and that one cannot—by definition—be in a condition of involuntary servitude if one can quit one’s master. In contract law, for example, labor contracts are distinguished from other contracts on the ground that they involve a personal relationship. Specific performance is said to be inappropriate because one person should not be forced into a personal relationship with another. If the employee can terminate the relationship, then the distinction disappears, and labor contracts can be treated like other contracts.<sup>242</sup> Only rarely do courts express concern that in an unfavorable labor market “the fear of economic distress is a compelling force which, when combined with the superior position of the employer, destroys the free agency of the employee.”<sup>243</sup>

The Thirteenth Amendment, however, is concerned with far more than a forced personal relationship between two individuals. Imagine, for example, an economy in which employers collectively and unilaterally set the terms and conditions of employment for all workers. In this hypothetical economy, workers enjoy the right to quit and change employers, but employers invariably adhere to an unofficial norm of compliance with the collectively set terms and conditions. Assuming that the workers’ right to quit is genuine, and employers do not undermine it by punishing its exercise, then it would provide effective protection against a forced personal relationship with a particular individual. It would not, however, enable workers to avoid a harsh overlordship or unwholesome conditions of work. Workers would quickly learn the futility of quitting as a means of obtaining better wages and conditions.

The Thirty-Ninth Congress confronted a similar situation when southern planters entered into compacts regulating the wages that they would pay to laborers, or accomplished the same result by obtaining the passage of state maximum wage legislation. These measures did not restrict the individual right to quit or impose any kind of physical or legal coercion on employees to

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242. See, e.g., *H.W. Gossard Co. v. Crosby*, 109 N.W. 483, 490 (Iowa 1906).

243. *Caivano v. Brill Contracting Corp.*, 11 N.Y.S.2d 498, 502 (Mun. Ct. 1939) (holding that an employment contract obligating a plumber to make kick-back payments to the employer had been entered into under economic duress and was therefore void).

work. Nevertheless, leading Republicans condemned the fixing of wages, whether by private agreement among the planters or by legislation, and maintained that the free laborer necessarily enjoyed not only the right to quit, but also the right to set his own wages.<sup>244</sup> As Senator Windom demanded: “Do you call that man free who cannot choose his own employer, or name the wages for which he will work?”<sup>245</sup> On this view, the point of the individual right to quit is not merely to enable the worker to escape a particular master or to change employers, but also to empower her to influence her wages and other conditions of employment—the philosophy Congress expressed in the Peonage Act of 1867 and the Supreme Court endorsed in *Bailey and Pollock*.<sup>246</sup> In the view of most Republicans, one defining distinction between a free labor system and a slave system was the capacity of the former to ensure that the laborer could “enjoy the rewards of his own labor.”<sup>247</sup>

It should be noted that employer wage-fixing can be framed as a Thirteenth Amendment violation in either of two ways. First, as Senator Windom suggested, workers might enjoy a Thirteenth Amendment right to set their own wages, in which case employer wage-fixing would violate that right. Alternatively, employer wage-fixing might violate the right to quit itself. By eliminating any possibility of obtaining higher wages, it would render the right pointless—like a law that permitted anybody to speak all they wanted, but only if nobody heard.

If an employer- or government-enforced maximum wage violates Thirteenth Amendment rights, then does it follow that a *minimum* wage also violates the Amendment? This question raises once again the clash between the freedom of contract and the freedom of labor. If the worker’s right to set her

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244. VanderVelde, *supra* note 2, at 493-94. On the combinations of planters to fix the wages of freed people, see 1 *THE BLACK WORKER*, *supra* note 1, at 341-42, 345-46.

245. CONG. GLOBE, 39th Cong., 1st Sess. 1160 (1866) (statement of Sen. Windom); *see also id.* at 589 (statement of Rep. Donnelly) (charging that under the planters’ measures, the freedman “shall work at a rate of wages to be fixed by a county judge or a Legislature made up of white masters, or by combinations of white masters, and not in any case by himself”).

246. *See supra* Sections I.B.-C.

247. CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864) (statement of Rep. Ingersoll); *see also id.* at 1313 (statement of Sen. Trumbull) (asserting “the right of every man to eat the bread his own hands had earned”); CONG. GLOBE, 39th Cong., 1st Sess. 588 (1866) (statement of Rep. Donnelly) (“[S]lavery is not confined to any precise condition. . . . A man may be a slave . . . when deprived of a portion of the wages of his labor as fully as if deprived of all . . .”). Some slaves were permitted to hire themselves out to labor for others, retaining a portion of the proceeds for themselves and transmitting the remainder to their owners. STERLING D. SPERO & ABRAM L. HARRIS, *THE BLACK WORKER: THE NEGRO AND THE LABOR MOVEMENT* 6 (1968).

own wages sounds in contract, then it would seem that she could set them as low as she pleases. Under *Bailey* and *Pollock*, however, the Amendment guarantees rights necessary to protect the freedom of *labor*—to avoid a harsh overlordship and unwholesome conditions of work. Permitting workers to undercut each other could defeat that purpose. The payment of a living wage has long been cited as one of the basic distinctions between freedom and slavery.<sup>248</sup> If, as found by Congress in the Fair Labor Standards Act, the spontaneous operation of the market fails to prevent “the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers,” then minimum wage regulation might be not only permissible, but required under the Amendment.<sup>249</sup>

#### D. Beyond Market Rights

Thus far, the discussion has proceeded on the assumption that—in the absence of employer cartels or government regulation—the labor market will operate so that the market rights to quit, to change employers, and to set wages will suffice to provide workers with the “power below” and employers the “incentive above” to prevent servitude. But suppose that the labor market did not function in this way (a supposition that, as related below, finds considerable support in judicial and legislative sources, as well as the economic literature).<sup>250</sup> Suppose that, without any provable cartel or norm enforcement, employers were able to impose authority so overweening and conditions so harsh as to amount to servitude. Under such circumstances, would the

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248. See STANLEY, *supra* note 114, at 153-57; VanderVelde, *supra* note 2, at 473-74, 499-500. During the 1940s, the U.S. Department of Labor explored the possibility that the Thirteenth Amendment mandated minimum standards of compensation and working conditions. GOLUBOFF, *supra* note 4, at 143.

249. Fair Labor Standards Act of 1938, 29 U.S.C. § 202(a) (2006); see also *infra* text accompanying notes 324-332 (summarizing the economic literature on imbalances of bargaining power in the employment relation). The FLSA was enacted under authority of the Commerce Clause, not the Thirteenth Amendment. Although early versions of the legislation focused on implementing the living wage, a concept compatible with *Bailey* and *Pollock*, the final version sought primarily to “redress substandard wages as a means to remedy the underconsumption which President Franklin D. Roosevelt and his allies believed sparked and prolonged the Depression.” Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 21 (2000); see also *id.* at 139-41 (recounting defeat of living-wage concept).

250. See *infra* Section VI.D.

servitude of workers who accepted jobs to avoid starvation be voluntary or involuntary?

At first glance, this question appears virtually identical to one that has been extensively debated by philosophers. “Whether a person’s actions are voluntary depends on what it is that limits his alternatives,” argues Robert Nozick.<sup>251</sup> Before a person’s actions can be considered involuntary (or coerced), he contends, two elements must be present. First, the limiting force must be human, not natural. When a castaway struggles to survive on a desert island, for example, she does so voluntarily despite being faced with the choice of working or starving. Only people—not nature—can put coercive limits on a person’s available opportunities. Second, the people who impose the limits must not be acting within their rights.<sup>252</sup> Nozick hypothesizes a laborer, Z, who faces the choice of working or starving because the actions of persons A through Y “do not add up to providing Z with some other option.” If Z works to avoid starvation, does she do so voluntarily? Nozick answers yes, provided that “the other individuals A through Y each acted voluntarily and within their rights.”<sup>253</sup> In other words, as long as A through Y are not conduits for outside coercion, and as long as they are within their rights (for example, to exclude Z from their property), their insistence that she work for her food does not amount to coercion and does not render her work involuntary.

Accepting Nozick’s analysis as a starting point, it does not follow that a worker who enters *servitude* to avoid starvation does so voluntarily *within the meaning of the Thirteenth Amendment*. The Thirteenth Amendment does not prohibit involuntary work or labor; it prohibits involuntary *servitude*. Moreover, unlike the philosophical concept of involuntary labor, the constitutional phrase “involuntary servitude” is embedded in an authoritative legal text with a context and a history that must be considered in determining the scope of employer rights. Neither the terminological difference nor the context affects Nozick’s first requirement for coercion—that the limiting force be human. Unlike work in general, servitude is a human relationship. Every worker in servitude has one or more human masters.<sup>254</sup> But on the second

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251. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 262 (1974).

252. *Id.*

253. *Id.* at 263–64.

254. Servitude is defined in relational terms. See, e.g., *Hodges v. United States*, 203 U.S. 1, 17 (1906) (defining servitude as “the state of voluntary or compulsory subjection to a master” (quoting WEBSTER’S DICTIONARY (1901))); NOAH WEBSTER, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* 1207 (1865) (defining servitude as “[t]he state of voluntary or involuntary subjection to a master”); JOSEPH E. WORCESTER, *A DICTIONARY OF THE ENGLISH*



requirement—that employers A through Y not be acting within their rights—the Thirteenth Amendment fundamentally alters Nozick’s hypothetical in two ways. First, the question whether A through Y enjoy a right to impose *servitude* as a condition of employment differs importantly from the question whether they have a general right to propose an unspecified labor contract requiring a person to *work*. If we were to conclude that merely by proposing an unspecified labor contract, A through Y were compelling individuals to *work* involuntarily, then the capitalist wage bargain would be inherently involuntary, and it would appear that only socialism could conceivably deliver actual labor freedom. Nozick formulated his analysis to refute this contention. But—assuming that “servitude” is not inherent in the capitalist employment relation—no such conclusion follows from denying a right to propose *servitude*. Employers do not coerce workers merely by offering them *jobs* as an alternative to starvation; they do so by offering them *servitude*—a condition of employer domination and worker subjugation. Alternatively, an employer might propose a partnership of equals or membership in a cooperative enterprise, or the government might guarantee rights that raise employment above *servitude*, for example the right to organize a union and/or to participate in a works council or other form of effective industrial democracy.<sup>255</sup> If wrongfulness is a required element of coercion, then, it would appear to be satisfied in the Thirteenth Amendment context when an employer offers harsh domination or unwholesome conditions of employment.

More fundamentally, it is questionable whether the voluntariness of one person’s actions should be determined with reference to the wrongfulness of another’s. G.A. Cohen has argued, for example, that Nozick’s analysis is a “false account, because it has the absurd upshot that if a criminal’s imprisonment is morally justified, he is then not forced to be in prison.”<sup>256</sup> Whatever the merits of this argument in the context of philosophical debate, it becomes compelling in the context of the Thirteenth Amendment. It is far more in keeping with the philosophy of the Amendment to determine the rights of employers by assessing their impact on worker freedom than to determine the scope of worker freedom by assessing the rightfulness of employer contract proposals. At each stage of the historic struggle over the right to quit, one side focused on the rights of employers and workers to enter into binding contracts, while the other stressed the effective ability of workers

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LANGUAGE 1314 (1860) (defining *servitude* as “[t]he state or condition of a servant, or more commonly of a slave; slavery; bondage”).

255. For an increasingly common analogy that imagines the capitalist employee as having the dignity and freedom of a partner, see *supra* note 241.

256. Cohen, *supra* note 221, at 4.

to protect themselves against domination and exploitation.<sup>257</sup> On the latter, prevailing view, it would seem that if a worker is confronted with two alternatives—endure servitude under one master or endure servitude under another—then that person has no choice, and her servitude is involuntary regardless of whether her master has committed a wrongful act.

To sum up, self-employment is a constitutionally acceptable alternative to servitude, but it is available only to a small fraction of American workers. Unemployment is not an acceptable alternative, because a worker whose options are limited to unemployment and servitude is excluded from the free labor system. Finally, it appears that a worker who must choose between remaining in servitude under one master and entering into a new relation of servitude under another master is in a condition of involuntary servitude. It does not matter whether this choice results from a legal constraint, from unofficial collective action by employers, or simply from the uncoordinated action of individual employers who prefer that their employees enter into servitude and who have the bargaining power to obtain that result. In a nation of employees, workers can *escape* servitude only if nonservile jobs are available. And if the market rights to quit, to change employers, and to name wages do not provide workers with the “power below” and employers the “incentive above” to ensure a supply of nonservile jobs, then something more is required to ensure compliance with the constitutional command that “[n]either slavery nor involuntary servitude . . . shall exist within the United States.”

What might that something more be? Historically, two basic forms of nonmarket labor rights have been considered. First, the government could attempt to prevent harsh domination and unwholesome conditions through direct regulation establishing a baseline of minimum labor standards. After Congress enacted the Fair Labor Standards Act under the commerce power, for example, the Civil Rights Section of the Justice Department drew on the Thirteenth Amendment in its efforts to extend similar protections to agricultural and other workers who had been excluded from the Act’s coverage.<sup>258</sup> Second, government could protect nonmarket procedural rights (for example, the workers’ freedom of association, including the rights to organize and strike) in an effort to extend *Pollock’s* approach of giving workers the “power below” to give employers the “incentive above” to prevent harsh domination and unwholesome conditions. These methods could be used singly or in combination. As a vehicle for exploring the possibility of nonmarket labor rights under the Thirteenth Amendment, the second possibility offers several

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257. See *supra* text accompanying notes 71–78.

258. GOLUBOFF, *supra* note 4, at 143.

advantages. First, because it shares the procedural character of the right to quit and other rights discussed earlier, it fits more readily into the case law. Second, it would be easier for courts to adjudicate and enforce (as opposed to setting minimum wages and other standards for “wholesome” conditions). Finally, there is a long and distinguished history of struggle over the issue that can serve as a starting point for the inquiry.

## VI. THE WORKERS’ FREEDOM OF ASSOCIATION UNDER THE THIRTEENTH AMENDMENT

*Not servitude, but service.*

— Slogan of the Brotherhood of Sleeping Car Porters, 1926<sup>259</sup>

Beginning around the turn of the twentieth century, American workers and unions claimed the rights to organize and strike under the Thirteenth Amendment. Quoting *Bailey* and *Pollock*, they argued that the rights to organize and strike were necessary to provide workers with the “power below” to prevent “that control by which the personal service of one man is disposed of or coerced for another’s benefit, which is the essence of involuntary servitude.”<sup>260</sup> Congress of Industrial Organizations (CIO) General Counsel Lee Pressman explained that “the right of individual workers to quit their jobs has meaning only when they may quit in concert, so that in their quitting or in their threat to quit they have a real bargaining strength.”<sup>261</sup> The American Federation of Labor maintained that

every human being has under the Thirteenth Amendment . . . the right to associate with other human beings for the protection and advancement of their common interests as workers, and in such

259. ERIC ARNESEN, BROTHERHOODS OF COLOR: BLACK RAILROAD WORKERS AND THE STRUGGLE FOR EQUALITY 90 (2001); A. Saggiarius, *Not Servitude but Service*, 8 MESSENGER 324 (1926), reprinted in THE BLACK EXPERIENCE IN AMERICA: NEGRO PERIODICALS IN THE UNITED STATES, 1840-1960: MESSENGER: VOLUME 8, 1926, at 324 (1969).

260. *Pollock v. Williams*, 322 U.S. 4, 18 (1944); *Bailey v. Alabama*, 219 U.S. 219, 241 (1911); FORBATH, *supra* note 4, at 135-41; James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941 (1997); James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1 (2002) [hereinafter Pope, *The Thirteenth Amendment*].

261. *Hearings Before the S. Comm. on Labor & Public Welfare on S. 55 & S.J. Res. 22*, 80th Cong. 1150 (1947) (memorandum of Lee Pressman, General Counsel, Congress of Industrial Organizations).

association to negotiate through representatives of their own choosing concerning the terms of employment and conditions of labor, and to take concerted action for their own protection in labor disputes.<sup>262</sup>

If courts were to recognize Thirteenth Amendment rights of association, the law would be changed in several ways. First, rights of association would be extended to domestic workers, agricultural workers, and other categories of workers that are presently excluded from statutory protections. Second, labor laws and doctrines that pertain to associational rights would be subject to critical judicial scrutiny. Among the most vulnerable would be the rule that employers may permanently replace workers who strike for better wages and conditions, the flat ban on secondary boycotts, the absence of effective remedies for employer retaliation, and state bans on public worker collective bargaining, all of which violate international standards.<sup>263</sup> Third and finally, Congress would be provided with a new source of authority for enforcing workers' rights. Up to now, Congress has relied upon the power to regulate interstate commerce, which was chosen over the labor movement's objections. As a result, workers' rights have been treated not as essential elements of labor freedom, but as mere means to the end of facilitating commerce.<sup>264</sup> This kind of thinking has influenced the results in numerous cases, including those announcing the permanent replacement rule, denying workers a right of self-help, authorizing employers to exclude union organizers from their property, and denying the NLRB the power to punish unfair labor practices so as to deter future violations.<sup>265</sup>

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**262.** AFL EXECUTIVE COUNCIL, TEXT OF THE ANTI-INJUNCTION BILL APPROVED BY THE EXECUTIVE COUNCIL OF THE AMERICAN FEDERATION OF LABOR 1 (1931).

**263.** HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 18, 31, 171-90, 212 (2000).

**264.** In *Emporium Capwell Co. v. Western Addition Community Organization*, for example, the Supreme Court held that a group of black workers who picketed their employer to protest race discrimination were outside the protection of section 7 because their picketing had not been authorized by their white-led union. Writing for the majority, Justice Thurgood Marshall famously observed that section 7 rights "are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.'" 420 U.S. 50, 62 (1975) (quoting 29 U.S.C. § 151).

**265.** NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 257-58 (1939); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235-36 (1938); NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345-46 (1938); see James Gray Pope, *How American Workers Lost the Right To Strike, and Other Tales*, 103 MICH. L.

A half century ago, Archibald Cox suggested that the appropriate standard for assessing the claimed Thirteenth Amendment right to strike is to be found in *Pollock v. Williams*, an approach defended in Part III above.<sup>266</sup> But the Court has never applied *Bailey* or *Pollock* or any other standard in a case involving the right to strike. This Part discusses the merits of the labor movement's Thirteenth Amendment claims, focusing on precedent, text, and original meaning. It also considers the relationship between the freedom of association and the thrust of the Thirteenth Amendment toward racial equality.

A. *The Supreme Court: A "Momentous" Question Unanswered*

In the 1923 case of *Charles Wolff Packing Co. v. Court of Industrial Relations*, the Supreme Court held that workers do enjoy the constitutional right to strike—applying reasoning similar to that of *Bailey* and *Pollock*—but under the Due Process Clause of the Fourteenth Amendment. The Court invalidated the wage-fixing provisions of a state law that prohibited strikes in key industries and established an industrial court to resolve the underlying disputes. The Court reasoned, in part, that the worker was “forbidden, on penalty of fine or imprisonment, to strike against” the wages fixed, and thus was “compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him.”<sup>267</sup> The Court reached this conclusion despite the fact that the state law expressly affirmed the individual right to quit.<sup>268</sup> The challenge was brought by an employer, but the Court opined that the law's requirement of continuous production imposed a “more drastic exercise of control” on the worker than on the owner, and declared that such a requirement could not be forced on either in the absence of “a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service.”<sup>269</sup> Even Felix Frankfurter, a relentless foe of the labor movement's Thirteenth

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REV. 518, 520-39, 542-44 (2004) (discussing the influence of NLRA's Commerce Clause foundation on the results in *Fansteel*, *Mackay*, *Consolidated Edison*, and *Babcock & Wilcox*).

266. Cox, *supra* note 7, at 576-77.

267. *Charles Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 540 (1923).

268. *Id.* at 534.

269. *Id.* at 541; *cf.* *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918) (upholding the military draft against a Thirteenth Amendment challenge on the ground that the “supreme and noble duty of contributing to the defense of the rights and honor of the nation” could not be equated with involuntary servitude).

Amendment claims, acknowledged that “[t]he right to strike, generally, is in the *Wolff Packing Company* case recognized as a constitutional right.”<sup>270</sup>

From our vantage point today, *Wolff Packing*’s holding on the right to strike appears far more compatible with Thirteenth than with Fourteenth Amendment doctrine. Chief Justice Taft’s opinion for the Court echoed the Thirteenth Amendment ruling in *Bailey v. Alabama* while departing sharply from the contemporary Fourteenth Amendment cases. As in *Bailey*, the claimed right was justified in terms of its capacity to counter employer domination. To Taft, the worker’s right to strike was “a most important element of his freedom of labor.”<sup>271</sup> Why? Because it gave him a “means of putting himself on an equality with his employer.”<sup>272</sup> This positive, constitutional valuation of actual equality, consistent with the *Bailey* Court’s focus on preventing the “coercion” of employees to the benefit of employers, found no analogue in the Fourteenth Amendment labor decisions. In cases like *Coppage v. Kansas* and *Lochner v. New York*, individual freedom of contract was the *sine qua non* of labor freedom, while the inequality between workers and employers was not only “natural,” but “legitimate.” The Court went so far as to hold that the Fourteenth Amendment barred government from attempting to remedy such inequalities.<sup>273</sup>

*Wolff Packing*’s holding on the constitutional right to strike has been ignored for more than half a century. Its anchorage in Fourteenth Amendment economic due process, never secure, has altogether washed away. Nevertheless, the holding has never been overruled.<sup>274</sup> Justice Louis Brandeis’s subsequent opinion for the Court in *Dorchy v. Kansas* denied that the Fourteenth

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270. Felix Frankfurter, *Exit the Kansas Court, in* FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 140, 141 (Philip B. Kurland ed., 1970) (reprinting Frankfurter’s unsigned editorial from the *New Republic*, June 27, 1923).

271. *Wolff Packing*, 262 U.S. at 542.

272. *Id.* at 540.

273. See, e.g., *Coppage v. Kansas*, 236 U.S. 1, 17 (1915) (striking down a ban on yellow dog contracts, reasoning that “it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights”); *Lochner v. New York*, 198 U.S. 45, 57 (1905) (invalidating a maximum hours law for bakers and asserting that “[t]here is no reasonable ground” for interfering with bakers’ right of free contract because there “is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades” or that bakers are “wards of the State”).

274. *Wolff Packing*’s holdings on price-fixing and wage-fixing were later overruled during the retreat from *Lochner*-era substantive due process, but not the holding on the right to strike. See *Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 536 & n.6 (1949).

Amendment conferred the “absolute right to strike,” but few, if any, constitutional rights are “absolute.”<sup>275</sup> One year after *Dorchy*, for example, Brandeis pointed out—in the midst of a paean to the First Amendment—that “although the rights of free speech and assembly are fundamental, they are not in their nature absolute.”<sup>276</sup> As the free speech example indicates, there is plenty of room for meaningful protection of a right short of treating it as “absolute.” Today, *Wolff Packing* remains available as authority for the proposition that there is a constitutional right to strike, and one that flows from concerns about the balance of power in dealings between workers and employers.

Meanwhile, labor’s claim of a Thirteenth Amendment right to strike—though labeled “momentous” by Justices Wiley Rutledge and Frank Murphy in 1949—has never been squarely resolved.<sup>277</sup> The Court came closest in *UAW Local 232 v. Wisconsin Employment Relations Board (WERC)*, which involved a state statute barring workers from engaging in “any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike.”<sup>278</sup> The Court held that the Thirteenth Amendment did not prohibit a state from outlawing intermittent, unannounced strikes, and explained:

The Union contends that the statute as thus applied violates the Thirteenth Amendment in that it imposes a form of compulsory service or involuntary servitude. However, nothing in the statute or the order makes it a crime to abandon work individually (compare *Pollock v. Williams*, 322 U.S. 4) or collectively. Nor does either undertake to prohibit or restrict any employee from leaving the service of the employer, either for reason or without reason, either with or without notice. The facts afford no foundation for the contention that any

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275. 272 U.S. 306, 311 (1926). In *Dorchy*, Justice Brandeis framed the issue narrowly as whether a state could prohibit a strike called to collect a former employee’s two-year old wage claim, and concluded that “[t]o collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose” for a strike. *Id.* at 309, 311. The Thirteenth Amendment was missing both from the Court’s opinion and from *Dorchy*’s brief. *Id.* at 306; Brief of Plaintiff in Error at 8-13, *Dorchy*, 272 U.S. 306 (No. 119).

276. *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

277. *AFL v. Am. Sash & Door Co.*, 335 U.S. 538, 559 (1949) (Rutledge, J., joined by Murphy, J., concurring in *Lincoln Fed. Labor Union No. 19129 v. Nw. Iron & Metal Co.*, 335 U.S. 525 (1949)); Pope, *The Thirteenth Amendment*, *supra* note 260, at 104 nn.536-37, 112.

278. 336 U.S. 245, 247 n.1 (1949), *overruled on other grounds*, *Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers v. WERC*, 427 U.S. 132 (1976). The Wisconsin State Employment Relations Board issued an order incorporating this language. *Id.* at 250.

action of the State has the purpose or effect of imposing any form of involuntary servitude.<sup>279</sup>

*WERC* held that the Thirteenth Amendment does not protect quickie strikes, but reserves the question of a Thirteenth Amendment right to “abandon work . . . collectively.” The word “abandon” (as opposed to “cease” or “stop”) could be read to suggest that the Court was referring only to a permanent quitting of work as opposed to a strike, in which workers cease work temporarily pending a settlement of their demands. However, in the sentence immediately preceding the quoted paragraph, the Court announced that the “only question” at issue was whether Wisconsin could “prohibit the particular course of conduct described,” namely a series of brief, unannounced work stoppages.<sup>280</sup> By contrast, the Wisconsin statute exempted “leaving the premises in an orderly manner for the purpose of going on strike,” the likely referent for “abandon work . . . collectively.”<sup>281</sup> Thus, *WERC* appears to hold out the possibility that there is a Thirteenth Amendment right to strike, in the sense of withdrawing from work in a body with the objective of obtaining concessions from the employer.<sup>282</sup>

Although the Court has never resolved the issue, there are a host of decisions announcing results that are inconsistent with the existence of any meaningful Thirteenth Amendment right to strike. The Court has, for example, upheld the privilege of employers to permanently replace economic strikers, sustained a ban on secondary strikes, and upheld a flat prohibition of public employee strikes.<sup>283</sup> Because the Thirteenth Amendment issue was not discussed, however, there is no way of divining a conclusion on it. Had the Justices considered it, they could have rejected the constitutional claim altogether, or recognized the right to strike while deferring to Congress in the definition of its scope, or recognized the right and invalidated the statute. The last time that the Court addressed any claim of a constitutional right to strike, it assumed that the right existed but held that the statute at issue (which

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279. *Id.* at 251.

280. *Id.*

281. *Id.* at 250, 251.

282. Alfred Avins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination Legislation*, 49 CORNELL L. Q. 228, 244 (1964); Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685, 734 (1985).

283. *United Brotherhood of Carpenters & Joiners v. NLRB*, 341 U.S. 707 (1951); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938); *Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C.), *aff'd*, 404 U.S. 802 (1971).



denied food stamps to the families of striking workers) did not violate the right.<sup>284</sup>

*B. Lower Courts: Limiting the Involuntary Servitude Clause to Market Rights*

While the Supreme Court avoided the question, state and lower federal courts initially gave conflicting answers. Some invoked the Thirteenth Amendment as a justification for overturning antistrike injunctions and statutory strike prohibitions.<sup>285</sup> By the 1950s, however, a growing majority held that the Amendment did not reach the right to strike, either because strikers ceased work collectively instead of individually,<sup>286</sup> or because they quit work temporarily instead of permanently,<sup>287</sup> or because the restriction at issue did not interfere directly with the right to cease work collectively.<sup>288</sup> None of the

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284. *Lyng v. Int'l Union of Automobile Workers*, 485 U.S. 360, 368 (1988) (reasoning that “the strikers’ right of association does not require the Government to furnish funds to maximize the exercise of that right”).

285. *See United States v. Petrillo*, 68 F. Supp. 845, 849-50 (N.D. Ill. 1946), *rev'd*, 332 U.S. 1 (1947) (citing the Thirteenth Amendment to justify overturning provision of the Federal Communications Act that banned strikes in the radio industry); *Henderson v. Coleman*, 7 So. 2d 117, 121 (Fla. 1942) (construing an injunction not to compel union workers to unload nonunion trucks on the ground that a contrary reading would impose involuntary servitude within the meaning of the Involuntary Servitude Clause of the Florida state constitution); *Kemp v. Division No. 241, Amalgamated Ass'n of Street & Elec. Ry. Employees of Am.*, 99 N.E. 389, 392 (Ill. 1912) (overturning an injunction against strike called to protest employment of nonunion members, reasoning in part that “the right of every workman to refuse to work with any co-employee who is for any reason objectionable to him, provided his refusal does not violate his contract with his employer” is “[i]ncident” to the Thirteenth Amendment right to be free from involuntary servitude); *State ex rel. Dairyland Power Coop. v. Wis. Employment Relations Bd.*, 21 L.R.R.M. (BNA) 2508, 2510 (Wis. Cir. Ct. 1948) (holding that a statute prohibiting strikes by employees of public utilities violated the Thirteenth Amendment).

286. *See New Orleans S.S. Ass'n v. General Longshore Workers, ILA Local Union No. 1418*, 626 F.2d 455, 463 (5th Cir. 1980), *aff'd sub nom. Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702 (1982); *Itasca Lodge 2029 v. Ry. Express Agency, Inc.*, 391 F.2d 657, 663 (8th Cir. 1968); *Fr. Packing Co. v. Dailey*, 166 F.2d 751, 753-54 (3d Cir. 1948); *Dayton Co. v. Carpet, Linoleum & Resilient Floor Decorators' Union*, 39 N.W.2d 183, 197 (Minn. 1949), *app. dismissed*, 339 U.S. 906 (1950); *State v. Local No. 8-6, Oil, Chem. & Atomic Workers Int'l Union*, 317 S.W.2d 309, 325 (Mo. 1958). The *Dayton* Court explained that the appeal was “dismissed for the reason that the judgment of the court below is based upon a non-federal ground adequate to support it.” 339 U.S. at 906.

287. *See United States v. Martinez*, 686 F.2d 334, 345-46 (5th Cir. 1982); *Fr. Packing Co.*, 166 F.2d at 753-54.

288. *See NLRB v. Local 74, United Brotherhood of Carpenters & Joiners*, 181 F.2d 126, 132 (6th Cir. 1950) (reasoning that the “order of the Labor Board directs the respondent union and

lower court opinions—pro or con—contained any reasoning to explain why the right to strike either was or was not necessary to negate a condition of involuntary servitude.<sup>289</sup> The potentially relevant Supreme Court precedents of *Bailey*, *Pollock*, and *Wolff Packing* were either ignored altogether or—rarely—cited for one side or the other with no explanation. One court, for example, invalidated a strike injunction and quoted *Bailey*'s language concerning the essence of involuntary servitude (namely “that control by which the personal service of one man is disposed of or coerced for another’s benefit”), but neglected to explain how the quoted language applied to a strike injunction as opposed to the peonage law involved in *Bailey*.<sup>290</sup> Another court upheld an NLRB order barring union officials from calling a strike and distinguished *Pollock* on the ground that the order did not “expressly forbid employees to leave their jobs, individually or in concert.” The court failed, however, to explain why that factual distinction should make a legal difference in light of the claim that the NLRB order deprived workers of the “power below” and employers of the “incentive above” to avoid servitude.<sup>291</sup> If, as the Supreme Court once opined, “a decision without principled justification would be no judicial act at all,”<sup>292</sup> then none of the on-point decisions—pro or con—would seem to carry any precedential weight. More modestly, they certainly would not “foreclose” the recognition of rights based on an analysis of the text, original meaning, and history—the standard recently applied by the Supreme Court with regard to precedent concerning the Second Amendment right to bear arms.<sup>293</sup>

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its business agent, and not the union members themselves” to cease from striking or inducing others to strike), *aff'd on other grounds*, 341 U.S. 707 (1951); NLRB v. National Maritime Union, 175 F.2d 686, 692 (2d Cir. 1949) (reasoning that “the Board’s order does not expressly forbid employees to leave their jobs, individually or in concert” and that it “is directed only against the Union and its agents”).

289. The one exception was the concurring opinion of California Chief Justice Rose Bird in *County Sanitation District No. 2 v. Los Angeles County Employees Association, Local 660*, 699 P.2d 835 (Cal. 1985). The court overturned California’s common law ban on public employee strikes, partly to avoid constitutional questions. *Id.* at 854. Judge Bird elaborated extensively on the constitutional point, relying partly on *Bailey* and *Pollock* in concluding that the strike ban violated the California Constitution. *Id.* at 858–59 (Bird, C.J., concurring).
290. *United States v. Petrillo*, 68 F. Supp. 845, 849 (N.D. Ill. 1946) (quoting *Bailey v. Alabama*, 219 U.S. 219, 241 (1911)), *rev'd on other grounds*, 332 U.S. 1 (1947).
291. NLRB v. National Maritime Union, 175 F.2d 686, 692 (2d Cir. 1949).
292. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 865 (1992).
293. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2812–16 (2008).

C. *The Freedom of Association and the Question of Power*

Had the courts wished to provide a justification for the majority position, they might have pointed out that the distinction between an individual permanently quitting work, on the one hand, and a group of workers temporarily quitting work, on the other, tracks the distinction between the market mechanism of exit and the political mechanism of voice.<sup>294</sup> The rights of the individual to quit work, change employers, and name her wages are market rights. They operate not through conscious, organized pressure, but through the “invisible hand” of the labor market. If enough workers quit an employer and go elsewhere, that employer will have an “incentive above” (in the language of *Pollock*) to raise wages and improve conditions. By the time that the employer changes its policies, the workers who exerted their “power below” are working for other employers. By contrast, strikers claim to retain their status as employees. Instead of exiting the employment relation and seeking better terms on the market, they cease work temporarily and collectively with the aim of pressuring their employer to improve the terms and conditions of employment. The strike is, literally, a concerted quitting of work, but it does not gain its effectiveness from the operation of market mechanisms. To the contrary, it hinges on insulating the affected jobs from market competition through norms of solidarity nurtured in communities and associations, and enforced by picketing, social disapproval, and other means. Without strong solidarity, workers compete with each other, undermining the collective demands.

Clearly, then, there is an intelligible distinction between an individual permanently quitting her job and a group of workers temporarily withholding labor until their employer changes its policies. For Thirteenth Amendment purposes, however, the significance of this distinction hinges on whether nonmarket rights are necessary to prevent involuntary servitude. The text of the Amendment flatly prohibits involuntary servitude and contains no limitation to market rights. If, as suggested in Part III above, *Bailey* and *Pollock* set forth the appropriate principle for the assessment of labor rights claims under the Thirteenth Amendment, then the issue hinges on whether nonmarket rights are necessary to provide workers with the “power below” and employers the “incentive above” to avoid a “harsh overlordship or unwholesome conditions of work.”<sup>295</sup>

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294. On this distinction, see RICHARD FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 6-11 (1984); and ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* (1970).

295. *Pollock v. Williams*, 322 U.S. 4, 18 (1944); see generally *supra* Section V.D. (considering when nonmarket rights are constitutionally necessary and what those rights might be).

It is clear, however, that there is strong resistance to the notion of applying *Bailey* or *Pollock* to nonmarket rights. As we have seen, numerous courts have declined to do so. Moreover, they have done so in a peremptory way, refusing to dignify labor's arguments with a response on the merits.<sup>296</sup> Why? Perhaps judges are worried that the *Pollock* standard would entangle them in difficult judgments about economic and social policy that are best left to the legislative branch, a concern discussed above in Section IV.C. Another possibility, however, is that the judges concur with Edward Corwin, the United States' leading constitutional scholar of the mid-twentieth century, who rejected the claim of a constitutional right to strike by quoting Edmund Burke: "Liberty is an individual matter; for as Edmund Burke remarks in the *Reflections*, 'When men act in concert, liberty is power.'" <sup>297</sup> This objection taps into a resilient strand of American individualism, according to which collective labor organization and action is inherently suspect.<sup>298</sup>

In the 1940s, when Corwin invoked Burke and the Supreme Court dodged labor's Thirteenth Amendment claims, there was no constitutional concept of a freedom of association.<sup>299</sup> Since then, however, individuals have gained the freedom to associate in the exercise of advocacy rights, and advocacy organizations have come to enjoy the full protection of the First Amendment.<sup>300</sup> Individual consumers may join together to boycott products or companies.<sup>301</sup> According to the doctrine developed in these cases, claimants must prove first that they are doing something that they have a constitutional right to do, and second that if they are prohibited from doing it in

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296. See *supra* Section VI.B.

297. EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 91 (1947) (quoting EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 7 (J.G.A. Pocock ed., Penguin 2004) (1790)).

298. See, e.g., ROBERT FRANKLIN HOXIE, *TRADE UNIONISM IN THE UNITED STATES* 23, 30 (1922) (observing that American law is so permeated with individualism that unionism "conflicts with the legal theory upon which our social and industrial system is based and with the established law and order"); CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at xiii (1985) (suggesting that collective labor action has never achieved more than "contingent legitimacy" in the United States).

299. The first mentions of a constitutional freedom of association came in the 1950s, in cases involving investigations of communism. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 245, 250 (1957); *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring). Earlier cases had dealt with facts that we now recognize as involving the issue, but the concept was lacking.

300. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981).

301. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-15 (1982).

combination, their exercise of the right will be rendered ineffective.<sup>302</sup> Workers and unions prefigured these elements in their case for the Thirteenth Amendment right to strike. They maintained that (1) employees enjoy the Thirteenth Amendment right to quit individually; and (2) if they are prohibited from exercising that right in combination, then the whole point of the right to quit—preventing a “harsh overlordship” or “unwholesome conditions of work”—is defeated.<sup>303</sup> The first element is not disputed, and the second finds support in statements by both Congress and the Supreme Court that the individual unorganized worker is “helpless” in dealings with an employer, unable to exercise real liberty of contract or to protect her freedom of labor.<sup>304</sup> Since the development of the doctrine, the Court has not heard a Thirteenth Amendment argument for the right to strike. (In one case, as noted above, the Court assumed *arguendo* that workers enjoyed the right to strike under the First Amendment, but ruled that the restraint at issue did not violate the right.)<sup>305</sup>

How, then, can the majority rule be justified? It has been argued that workers gain *disproportionate* power through concerted activity. Compared to consumer boycotters, for example, strikers enjoy “specialized and very unequal market power.”<sup>306</sup> But the relevant comparison for Thirteenth Amendment purposes is not consumers, but employers. In a nation of employees, labor liberty *must* rest on power. Even the right to quit no longer functions by enabling individuals to *escape* servitude; when it is working well, it provides them with the “power below” to raise employment above servitude. Each individual quits alone, but it is the combined effect of many individual actions that gives employers the “incentive above” to provide decent conditions.

Admittedly, there are important differences between power collectively exerted and power that results from uncoordinated, individual actions. Those differences have sparked intense controversy since the days of labor conspiracy

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302. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958); SHELDON LEADER, *FREEDOM OF ASSOCIATION: A STUDY IN LABOR LAW AND POLITICAL THEORY* 22-23 (1992).

303. See *supra* text accompanying notes 260-261.

304. *Norris-LaGuardia Act*, 29 U.S.C. § 102 (2006); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937); *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921) (Taft, C.J.). This is the standard way of getting to the freedom of association in American constitutional law.

305. *Lyng v. Int'l Union*, 485 U.S. 360, 368 (1988) (upholding denial of food stamps to families of strikers on the ground that “the strikers’ right of association does not require the Government to furnish funds to maximize the exercise of that right”).

306. Michael C. Harper, *The Consumer’s Emerging Right To Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law*, 93 *YALE L.J.* 409, 426-29 (1984).

prosecutions. In the economic sphere, labor organization is said by some to interfere with market competition and thus economic efficiency, but by others to promote efficiency by apprising management of employee preferences and the realities of the labor process.<sup>307</sup> In the political sphere, labor organizations are said by some to function as “special interest groups” promoting legislation against the public interest, but by others to exert a countervailing power to business corporations that is essential to democracy.<sup>308</sup> Many employers find it far easier to accept the verdict of impersonal market mechanisms than to sit down and bargain on an equal basis with organized workers and, conversely, many workers consider quitting to be a mute and futile mode of expressing discontent as compared to concerted action and negotiation.<sup>309</sup>

None of these considerations, however, can relieve a conscientious constitutionalist of the duty to determine whether the rights to organize and strike are necessary to enable workers to avoid involuntary servitude. In particular, none can justify cutting off the inquiry at the line between market and nonmarket rights, as in: “Collective labor rights are so bad for economic efficiency that I decline to consider whether they are necessary to prevent involuntary servitude”; or: “Collective labor rights are so bad for economic efficiency that I will interpret the phrase ‘involuntary servitude’ with efficiency—and not labor freedom—primarily in mind.” Given the currently prevailing view that southern slave labor was about as efficient as northern free labor, it would be exceedingly dangerous to vary the test for involuntary servitude depending upon the perceived economic efficiency of a challenged form of labor control.<sup>310</sup> The same goes for other policies that might conflict with a ban on involuntary servitude. The Constitution prohibits all involuntary servitude, and not just involuntary servitude that comports with economic efficiency and other values. If the test that produced the rights to quit and to change employers is appropriate for market rights, then it should be applicable to nonmarket rights as well.

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307. See, e.g., John T. Addison & Clive R. Belfield, *Union Voice*, in *WHAT DO UNIONS DO?: A TWENTY-YEAR PERSPECTIVE* 238, 238-74 (James T. Bennett & Bruce E. Kaufman eds., 2007); Barry T. Hirsch, *What Do Unions Do for Economic Performance?*, in *WHAT DO UNIONS DO?*, *supra*, at 193, 193-237.

308. See, e.g., JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* 115-57 (1952) (setting out the theory of countervailing power); Henry C. Simons, *Some Reflections on Syndicalism*, 52 *J. POL. ECON.* 1, 23 (1944) (discussing special interest groups).

309. See, e.g., NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 6-7, 105-08 (2002).

310. See Robert Whaples, *Where Is There Consensus Among American Economic Historians? The Results of a Survey on Forty Propositions*, 55 *J. ECON. HIST.* 139, 141 (1995).

*D. Pollock Applied to the Rights To Organize and Strike*

The case for the rights to organize and strike under *Pollock* is simple and straightforward. As Archibald Cox observed, “it may be urged with considerable force that in terms of the purposes of the Thirteenth Amendment the strike is the modern counterpart of the right to change employers.”<sup>311</sup> In other legal contexts, both the Supreme Court and Congress have rejected the sufficiency of market rights and endorsed the need for organized pressure to ensure basic labor freedom. According to the Court, a single employee without organization

was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer.<sup>312</sup>

As noted above, the Court made a similar point to justify its invalidation of a state strike ban on substantive due process grounds.<sup>313</sup> Congress endorsed this view in the Norris-LaGuardia Act of 1932, which eliminated federal court jurisdiction to enforce yellow dog contracts (agreements not to join a union) or to enjoin peaceful strikes and picketing. According to the Court, “the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment.”<sup>314</sup> In the National Labor Relations Act of 1935, which barred employers from interfering with the rights to organize and engage in concerted activities for mutual aid or protection, Congress likewise decried the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association.”<sup>315</sup>

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311. Cox, *supra* note 7, at 577.

312. *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921) (Taft, C.J.); *see also* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (paraphrasing this language).

313. *Charles Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 540 (1923); *see supra* notes 271-272 and accompanying text.

314. Norris-LaGuardia Act, 29 U.S.C. § 102 (2006).

315. National Labor Relations Act, 29 U.S.C. § 151.

Although Congress did not ground these laws on the Thirteenth Amendment, prominent proponents did embrace the substance of labor's claim that without the rights to organize and strike, workers would be reduced to slavery or involuntary servitude. Senator George Norris, who oversaw the drafting of the Norris-LaGuardia Act, charged that labor injunctions brought about "involuntary servitude on the part of those who must toil in order that they and their families may live."<sup>316</sup> Senator Robert Wagner, who shaped the National Labor Relations Act, maintained that in view of the "economic duress" imposed on individual workers by large corporations, "the right to bargain collectively . . . is a veritable charter of freedom of contract; without it there would be slavery by contract."<sup>317</sup> These themes ran through the congressional debates on both bills.<sup>318</sup>

During the 1940s and 1950s, legislative attention turned to abuses of union power, but these core principles were not challenged.<sup>319</sup> Today, the rights to organize and strike are generally recognized in first-wave industrialized nations

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316. 75 CONG. REC. 4502 (1932). During the Congressional hearings, Norris had defended labor's view that injunctions prohibiting workers from combining to quit work violated the Thirteenth Amendment. See *Limiting Scope of Injunctions in Labor Disputes: Hearings Before the Subcomm. of the S. Comm. on the Judiciary*, 70th Cong. 672 (1928).

317. 78 CONG. REC. 3679 (1934) (statement of Sen. Wagner), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 20 (1985).

318. On the Norris-LaGuardia Act, see 75 CONG. REC. 5493 (1932) (statement of Rep. Garber) (contending that the continued use of yellow dog contracts "will finally destroy the labor organizations, the independence of the worker, and create a general labor condition of involuntary servitude"); *id.* at 5489 (statement of Rep. Celler) (asserting that if a worker "must accept the company union or 'yellow-dog' contract, he is being forced into 'involuntary servitude'"); *id.* at 5487 (statement of Rep. Sparks) (charging that yellow dog contracts "seek the enslavement of the laborer by rendering him helpless to protect his own interests"); *id.* at 5481 (statement of Rep. Oliver) ("This bill says that a federal court shall not . . . bring down into slavery those who are attempting to negotiate for what they believe to be the necessities of their lives and the happiness of their children."); *id.* at 5467 (statement of Rep. Nelson) (charging that labor injunctions "have become intolerable and un-American, in many cases reducing the workers to a state of economic slavery"); and *id.* at 5464 (1932) (statement of Rep. O'Connor) (arguing that under yellow dog contracts, "the worker practically enters into 'involuntary servitude'"). For similar quotations from the debates over the National Labor Relations Act, see ZIETLOW, *supra* note 2, at 75; and Pope, *The Thirteenth Amendment*, *supra* note 260, at 48-49 nn.227-28.

319. The last time the government conducted a serious inquiry into industrial relations policy, even the employer representatives who testified endorsed the basic principle that workers should enjoy "full freedom of association, self-organization, and designation of representatives of their own choosing." U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, FACT FINDING REPORT: COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 63 (1994) (quoting the National Labor Relations Act, 29 U.S.C. § 151 (2000)).



and enshrined in international law as fundamental human rights.<sup>320</sup> The Supreme Court of Canada recently repudiated its own precedents and held for the first time that the right of collective bargaining is protected under the Canadian Charter of Rights, quoting the U.S. Supreme Court's observation that a single, unorganized employee was "helpless in dealing with an employer."<sup>321</sup> Although the salience of non-U.S. law to American jurisprudence is disputed, the continued vitality of these rights internationally demonstrates that the conclusions reached by Congress and the Court in the twentieth century reflect more than a temporary political victory for organized labor or a time-bound response to employment conditions generated by mass production industry.<sup>322</sup>

It might be argued that—however weighty the supporting authorities might be—Congress and the Supreme Court were simply wrong when they asserted that the freedom of association was necessary to protect labor liberty. According to some scholars writing in the vein of neoclassical law and economics, for example, individual bargaining suffices to protect the legitimate interests of workers. If employers fail to provide workers with the full value of their labor (a commonly stated goal of the Thirteenth Amendment), then the workers will quit and go elsewhere.<sup>323</sup> This claim, however, fails to confront a fundamental difference between labor markets and ordinary commodity markets, namely that labor power is a human capacity and not a commodity

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320. See HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 13-14 (2000); TONIA NOVITZ, INTERNATIONAL AND EUROPEAN PROTECTION OF THE RIGHT TO STRIKE: A COMPARATIVE STUDY OF STANDARDS SET BY THE INTERNATIONAL LABOUR ORGANIZATION, THE COUNCIL OF EUROPE AND THE EUROPEAN UNION (2003).

321. Health Services and Support—Facilities Subsector Bargaining Assn. v. British Columbia [2007] 2 S.C.R. 391, 440 (Can.), (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937)), available at <http://scc.lexum.umontreal.ca/en/2007/2007scc27/2007scc27.html>.

322. For more on the philosophical and economic justifications for these rights, see, for example, RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984); JOSIAH BARTLETT LAMBERT, "IF THE WORKERS TOOK A NOTION": THE RIGHT TO STRIKE AND AMERICAN POLITICAL DEVELOPMENT (2005); SHELDON LEADER, FREEDOM OF ASSOCIATION: A STUDY IN LABOR LAW AND POLITICAL THEORY (1992); WILLIAM M. REDDY, MONEY AND LIBERTY IN MODERN EUROPE: A CRITIQUE OF HISTORICAL UNDERSTANDING 64-73 (1987); and WORKERS' RIGHTS AS HUMAN RIGHTS (James A. Gross ed., 2003). For a critical intellectual history of the issue written from a viewpoint sympathetic to libertarianism, see HOWARD DICKMAN, INDUSTRIAL DEMOCRACY IN AMERICA: IDEOLOGICAL ORIGINS OF NATIONAL LABOR RELATIONS POLICY (1987).

323. See, e.g., Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1370-72, 1382 (1983). On the Thirteenth Amendment's goal of ensuring that the laborer would receive the full value of her labor, see *supra* note 247.

produced for sale.<sup>324</sup> Because labor is inseparable from the human mind and body, workers face serious structural disadvantages in bargaining with employers. Workers cannot, for example, control the supply of their fictive commodity. Labor power is produced not strategically for exchange on the market, but nonstrategically according to the biological processes and social customs that shape human reproduction.<sup>325</sup> Nor can workers temporarily remove their labor power from the market, for it perishes each day and must be continuously sustained through the provision of food, shelter, health care, and other necessities.<sup>326</sup> Under ordinary conditions, then, workers experience far greater pressure than employers to reach a deal. The departure of any particular employee will not seriously affect the employer's revenue stream, while the individual worker will lose her entire income. The consequences are immediate and dire for the worker, who needs her paycheck to obtain the basic necessities of life for herself and her dependents, but merely inconvenient for most employers, who can fall back on financial reserves.<sup>327</sup> Compounding these

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324. KARL POLANYI, *THE GREAT TRANSFORMATION* 72-73 (1957); Bruce E. Kaufman, *Labor Law and Employment Regulation: Neoclassical and Institutional Perspectives*, in *LABOR AND EMPLOYMENT LAW AND ECONOMICS* 3, 27 (Kenneth G. Dau-Schmidt, Seth D. Harris & Orly Lobel eds., 2009). This principle is embodied in international law, as the first of four "fundamental principles on which the [International Labour] Organization is based," and in U.S. law as one of several statutory provisions exempting labor from the antitrust statutes. *Declaration Concerning the Aims and Purposes of the International Labour Organisation*, Constitution of the International Labour Organization, annex, art. 1, § (a) (declaring that "labour is not a commodity"); Clayton Act, ch. 323, § 6, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. § 17 (2006)) ("The labor of a human being is not a commodity or article of commerce.").
325. CLAUS OFFE, *DISORGANIZED CAPITALISM: CONTEMPORARY TRANSFORMATIONS OF WORK AND POLITICS* 16 (1985); Alan Hyde, *What Is Labour Law?*, in *BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK* 37, 54-55 (Guy Davidov & Brian Langille eds., 2006). Even if parents wanted to act strategically, they would face huge information costs attempting to predict the supply and demand for labor eighteen or sixteen or even twelve years in the future.
326. OFFE, *supra* note 325, at 17, 20; Kaufman, *supra* note 324, at 38-39; Kenneth G. Dau-Schmidt & Arthur R. Traynor, *Regulating Unions and Collective Bargaining*, in *LABOR AND EMPLOYMENT LAW AND ECONOMICS*, *supra* note 323, at 96, 107. The requirements of subsistence hinge on the conditions in a particular society. In the United States today, for example, motorized transportation (whether public or private) to and from food stores, health care providers, and work is a necessity for most people.
327. REDDY, *supra* note 321 at 64-73; Kaufman, *supra* note 323, at 30-34; *see also* *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921) (observing that because the individual employee was "dependent ordinarily on his daily wage for the maintenance of himself and family," he was "unable to leave the employ and to resist arbitrary and unfair treatment"); ADAM SMITH, *THE WEALTH OF NATIONS* 58 (Everyman's Library 1910) (1776) (suggesting that in disputes with labor, "the masters can hold out

imbalances, the human character of labor imposes severe constraints on its geographic and industrial mobility. While inanimate commodities and capital can be shifted from one location to another without disrupting the lives of their owners, workers must move themselves along with their labor power, abandoning support networks in local communities and associations, and forcing family members either to relocate or accept separation. Further, while inanimate commodities and capital can be converted to cash and shifted to other industries, human beings cannot be liquidated; the workers' closest equivalent would be unlimited retraining.<sup>328</sup> And because workers cannot control the supply of their "commodity," employers "typically face more alternative job seekers than individual workers face alternative job openings (that is, workers are usually on the 'long side' of the labor market)."<sup>329</sup> Most employers also enjoy huge advantages in information. To the extent that there is any actual bargaining between an individual worker and a corporate employer, the worker typically faces a "human resources" professional with access to relevant market information and guidance from policies developed by corporate economists at the national and international level; only through organization can workers obtain similar levels of knowledge.<sup>330</sup> Finally, although both employers and workers constantly seek to enhance strategic control through organization, the "masters, being fewer in number, can combine much more easily."<sup>331</sup> All of these factors point toward the inadequacy of individual quits, and none has been satisfactorily answered by scholars of neoclassical law and economics.<sup>332</sup>

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much longer" because they "could generally live a year or two upon the stocks which they have already acquired" while "[m]any workmen could not subsist a week, few could subsist a month, and scarce any a year without employment").

328. OFFE, *supra* note 325, at 19. It has been suggested that, because of these constraints on labor mobility, employers may gain monopsonistic market power (monopsony being the equivalent of monopoly, but on the purchasing side) even when they are not alone in the relevant labor market. Dau-Schmidt & Traynor, *supra* note 326, at 108 (citing ALAN MANNING, *MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS* (2003)).
329. Kaufman, *supra* note 324, at 34; Curtis Taylor, *The Long Side of the Market and the Short End of the Stick: Bargaining Power and Price Formation in Buyers', Sellers', and Balanced Markets*, 110 QJ. ECON. 837 (1995); see also Hyde, *supra* note 325, at 55 ("The inability of sellers to restrict supply necessarily drives prices down and prevents labour markets from clearing; there will always be unemployed people.").
330. Hyde, *supra* note 325, at 57.
331. SMITH, *supra* note 327, at 58.
332. More fundamentally, recent scholarship suggests that neoclassical economics is incapable of comprehending the labor market because its root assumption of a smoothly functioning market characterized by zero (or close to zero) transaction costs is belied by the very existence of the employment relation—a command-based and nontransactional system of

*E. The Right To Strike and the Original Meaning of the Thirteenth Amendment*

Scholars as divergent in viewpoint as Robert Bork and Ronald Dworkin have stressed that an inquiry into original meaning should focus on identifying the principles embodied in a constitutional text, and not on reconstructing how the Framers would have applied the text to the facts of their time.<sup>333</sup> In Part III *supra*, I argued that the *Pollock* principle is consistent with the original meaning of the Thirteenth Amendment. If that conclusion is correct, then the analysis above—which applies the *Pollock* principle to the right to strike—is supported by the original meaning.

Also relevant, however, is the more specific question of whether the ban on involuntary servitude was understood by the Framers and Ratifiers to protect the rights to organize and strike. The Framers' opinions about specific applications can provide evidence as to the principles embodied in the text. As we have seen, for example, the Framers' positions on the rights to quit (especially in the context of peonage in New Mexico), to change employers, and to set wages are helpful in ascertaining the principle that they embodied in the Involuntary Servitude Clause. Their views on the rights to organize and strike, if known, could be similarly useful.

Unfortunately, it does not appear that the rights to organize and strike attracted much attention at the time of the Thirteenth Amendment's enactment. Nobody is recorded as mentioning them during the debates, and there appears to have been only one related reference during the discussions on legislation to enforce them. Senator Charles Sumner spoke in favor of a lengthy list of rights that would be "essential to complete Emancipation" among which

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labor extraction that would never have arisen in the absence of serious market malfunctions. Kaufman, *supra* note 324, at 28-29. Kaufman relies partly on Ronald Coase's conclusion that, "[i]n the absence of transaction cost, there is no economic basis for the existence of the firm." *Id.* at 28; see also Bruce Kaufman, *The Non-Existence of the Labor Demand/Supply Diagram, and Other Theorems of Institutional Economics*, 29 J. LAB. RES. 285 (2008) (contending that employment relations come into existence only as responses to market failure).

333. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144-49 (1990); RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7-8 (1996). On this view, for example, courts should ask not whether the Framers of the Fourteenth Amendment intended to abolish segregation in education given the facts of their time, but whether the principle embodied in the Fourteenth Amendment, as understood at that time, is violated by segregation given the facts of our time.

was the right to join a craft guild.<sup>334</sup> The list, however, sparked no recorded discussion.

What about the legal status of the strike in 1865? It is sometimes thought that the Framers and Ratifiers of a constitutional provision could not have meant to protect a right that was denied at the time.<sup>335</sup> During the early decades of the century, many strike activities were punished under the doctrine of criminal conspiracy. In 1842, however, Massachusetts Chief Justice Lemuel Shaw's landmark opinion in *Commonwealth v. Hunt* announced that henceforth combinations to raise wages would be legal provided the strikers were not employing "unlawful means" or pursuing an "unlawful purpose."<sup>336</sup> Although *Hunt* was no ringing declaration of the right to strike, it did have the effect of eliminating conspiracy prosecutions outside the South until after the Civil War.<sup>337</sup> During the war, a few states enacted antistrike laws and some Union Army generals ordered their troops to break strikes in war industries.<sup>338</sup> However, these measures reflected a perception of military necessity and did not challenge the general rule of *Hunt*.<sup>339</sup> The army officers acted without the knowledge or authorization of President Lincoln who, in one case, reportedly ended the intervention by ordering the troops not to "interfere with the legitimate demands of labor."<sup>340</sup>

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334. CONG. GLOBE, 39th Cong., 1st Sess. 91 (1865). This list was drawn from the proclamation of the Czar of Russia emancipating the serfs, see Czar Alexander II, Edict of Emancipation (1861).
335. See, e.g., *Roe v. Wade*, 410 U.S. 113, 174-75 (1973) (Rehnquist, J., dissenting); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).
336. 45 Mass. (4 Met.) 111 (1842); Walter Nelles, *Commonwealth v. Hunt*, 32 COLUM. L. REV. 1128 (1932).
337. See VICTORIA C. HATTAM, *LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES* 67-68 (1993); CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 44 (1985); Henry E. Hoagland, *Humanitarianism (1840-1860)*, in 1 JOHN R. COMMONS ET AL., *HISTORY OF LABOUR IN THE UNITED STATES* 487, 611-13 (1918).
338. DAVID MONTGOMERY, *BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS 1862-1872*, at 98-101 (1967); GRACE PALLADINO, *ANOTHER CIVIL WAR: LABOR, CAPITAL, AND THE STATE IN THE ANTHRACITE REGIONS OF PENNSYLVANIA 1840-68*, at 169-70 (1990).
339. If wartime practice were the standard for protecting rights in peacetime, few rights would be secure. See generally PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* (1983) (recounting the systematic violation of the constitutional rights of Japanese Americans during World War II); GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004) (describing the abrogation of free speech protections in wartime due to understandable but unwarranted fears).
340. G.S. BORITT, *LINCOLN AND THE ECONOMICS OF THE AMERICAN DREAM* 220 (1978).

The most revealing discussion of the strike issue occurred in 1860, thirteen months before the outbreak of civil war, when more than twenty thousand Massachusetts shoemakers staged the largest strike in United States history to date. On banners and in speeches and song, the strikers proclaimed that they would “NOT BE SLAVES,” and accused their employers of “drawing the chains of slavery, and riveting them closer and closer around the limbs of free laboring men.”<sup>341</sup> The reaction of Republican politicians and intellectuals, who would soon be leading the nation through civil war and reconstruction, was remarkably consistent. Most agreed that the strike was unwise, because wages would rise only through the natural operation of supply and demand.<sup>342</sup> Nevertheless, they claimed the strike as evidence that northern factory laborers enjoyed more freedom than southern slaves.<sup>343</sup> Many joined with the editor of the *Newark Advertiser* in embracing “the right to strike for better wages,” while questioning whether the Lynn strike was “expedient.”<sup>344</sup> While proslavery Democrats offered the strike as proof that class conflict was endemic to the free labor system, Republicans suggested that it demonstrated the relative equality of bargaining power between free laborers and capitalists.<sup>345</sup> Speaking in nearby Connecticut, presidential candidate Abraham Lincoln expressed the view of many Republicans:

At the outset, *I am glad to see that a system of labor prevails in New England under which laborers CAN strike* when they want to, where they are not obliged to work under all circumstances, and are not tied down and obliged to labor whether you pay them or not! *I like the system which lets a man quit when he wants to, and wish it might prevail everywhere. One of the reasons why I am opposed to Slavery is just here.*<sup>346</sup>

It has been suggested that Lincoln’s version of the right to strike encompassed nothing more than “the right to quit and ‘go somewhere else.’”<sup>347</sup> This conclusion is consistent with many of Lincoln’s statements on the labor

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341. ALAN DAWLEY, *CLASS AND COMMUNITY: THE INDUSTRIAL REVOLUTION IN LYNN* 82 (1976).

342. James L. Huston, *Facing an Angry Labor: The American Public Interprets the Shoemakers’ Strike of 1860*, 28 *CIV. WAR HIST.* 197, 205-06 (1982).

343. *Id.* at 202 (reporting the results of a study of contemporary newspaper reports and commentary on the strike).

344. *Id.* at 204.

345. *Id.*

346. 4 *THE COLLECTED WORKS OF ABRAHAM LINCOLN*, *supra* note 218, at 24.

347. BERNARD MANDEL, *LABOR: FREE AND SLAVE* 159 (1955).

question. The plight of northern factory labor was a major topic in the debates over slavery, as southerners charged that capitalism was a more ruthless system of labor exploitation than slavery.<sup>348</sup> In response, Lincoln usually stressed escape from the employment relation, not organized protest within. Immediately following the statement on the shoe strike quoted above, for example, Lincoln declared that under “the true system,” every man could “hope to be a hired laborer this year and the next, work for himself afterward, and finally to hire men to work for him!”<sup>349</sup> If he could not find success in one region, he could “strike and go somewhere else.”<sup>350</sup> Based on his perception that the relation between capital and labor encompassed only “one-eighth of the labor of the country,” Lincoln was confident that the wage worker of today would become the independent free laborer of tomorrow.<sup>351</sup>

On the other hand, Lincoln endorsed the system of labor under which “laborers CAN strike” in the midst of a real-life strike. It was obvious that the Massachusetts shoemakers were not quitting their jobs to “go somewhere else.” They were temporarily and collectively ceasing work to pressure their employer into granting better terms and conditions of employment.<sup>352</sup> Lincoln spoke less than two weeks after extensive news coverage of clashes between strikers and armed state militia and police. Later, during his presidency, Lincoln received delegations of striking workers and—according to their reports—invariably expressed support, once going so far as to opine that “in almost every case of strikes, the men have just cause for complaint.”<sup>353</sup> It appears, then, that Lincoln expected most workers to escape employment and go into business for themselves, but also supported the right of those left behind to organize and strike. Influential Republican thinkers like Horace Greeley and E.L. Godkin likewise endorsed labor organization as essential to effective labor freedom.<sup>354</sup>

Based on the public discussion, northern workers might reasonably have thought that the right to strike was a recognized component of the free labor system that they would soon be mustered to defend. There is, however, no

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348. STANLEY, *supra* note 114, at 19-20.

349. 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 218, at 24-25.

350. *Id.* at 24.

351. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 218, at 364; 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 218, at 459.

352. BORITT, *supra* note 340, at 183; DAWLEY, *supra* note 341, at 82-88; 1 PHILIP S. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES 331-33, 354-55 (1947).

353. BORITT, *supra* note 340, at 185.

354. STANLEY, *supra* note 114, at 82 (quoting Godkin); GEORGE A. STEVENS, NEW YORK TYPOGRAPHICAL UNION NO. 6: STUDY OF A MODERN TRADE UNION AND ITS PREDECESSORS 243-44 (1913) (quoting Greeley).

evidence that they—or anyone else—believed that the Thirteenth Amendment resolved the issue. Had it been mentioned during the debates, the Amendment’s proponents probably would have denied that their proposal had anything to say about it. Their immediate purpose was to build a solid constitutional foundation for the abolition of African slavery, and their strategy in the debates was to avoid specifying rights that might spark controversy.<sup>355</sup> In particular, members of Congress failed “to examine the imbalances of power in labor contract bargaining.”<sup>356</sup> No sooner had the Civil War ended, than a scattering of courts began to revive the doctrine of labor conspiracy.<sup>357</sup> Even northern labor leaders, who routinely charged that prohibitions on striking amounted to slavery, neglected to invoke the Amendment in support of their rights claims. Not until a generation later would labor leaders look past the Amendment’s immediate historical purpose and begin to claim its protection for workers of all colors.

Although this evidence establishes that the Thirteenth Amendment was *not understood* to protect the right to strike, it does not show that the Amendment was *understood not* to protect the right to strike. We simply do not know how Congress would have resolved the issue had it been raised. Suppose, for example, that in response to strikes by freed people (which were common during the postemancipation period), southern states had made it a crime for any person to cease work in concert with others for the purpose of coercing an employer to pay higher wages or provide better conditions.<sup>358</sup> Such a law would have gone beyond any antistrike law then in effect in the northern states.<sup>359</sup> At that point, there would have been a discussion of the right to strike just as there actually were discussions of the rights to change employers and set

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355. VORENBERG, *supra* note 20, at 132-33. To the extent that there was substantive discussion, it was concerned mostly with race and not with the scope of labor rights. *Id.* at 189-91, 219-20; TSESIS, *supra* note 2, at 46, 121.

356. SCHMIDT, *supra* note 34, at 115.

357. See HATTAM, *supra* note 337, at 69-70; TOMLINS, *supra* note 336, at 46-52. Hattam’s listing of cases in Pennsylvania and New York shows three ending in conviction between the years of 1865 and 1870. HATTAM, *supra* note 336, at 217-18.

358. During this period, employers resorted not to antistrike laws, but to lynchings and armed attacks by white militias, deputies, and vigilantes. See, e.g., MICHAEL W. FITZGERALD, *THE UNION LEAGUE MOVEMENT IN THE DEEP SOUTH: POLITICS AND AGRICULTURAL CHANGE DURING RECONSTRUCTION* 84 (1989) (observing that Klan violence “demolished the [Alabama] League as a centralized political entity during early 1868”); see also *infra* notes 368-370 and accompanying text (recounting black labor organizing and violent white retaliation during Reconstruction).

359. Even the “Black Laws” passed during the Civil War stopped short of criminalizing the concerted refusal to work itself. MONTGOMERY, *supra* note 338, at 98-99.



one's own wages. Judging from the record of those discussions, Congress would have focused on the question whether the right to strike was necessary for the freed people to avoid employer domination and improve their condition.<sup>360</sup> Unfortunately, however, we have no way of knowing how they would have resolved the issue.

Nor can we draw conclusions from the failure of northern labor to claim Thirteenth Amendment rights at the time. When a broadly worded provision is enacted, it may be understood to respond to a particular problem. Arguably, for example, the First Amendment's Free Speech Clause was meant to prohibit only prior restraints (and not punishment for speech), and the Fourteenth Amendment's Equal Protection Clause to ban *de jure* racial discrimination (but not segregation) in the limited area of civil rights (and not social or political rights). In the immediate post-enactment period, it would be "a kind of trickery" to seize upon the broad language of the provision and apply it outside its generally understood scope.<sup>361</sup> Later, however, the Framers' and Ratifiers' views on how the amendment applied to the facts of their time—considered in light of the scholarly and practical knowledge available to them—should give way to the enacted text.<sup>362</sup> Although the Thirteenth Amendment was initially applied only to individual market rights, we might come to understand—in light both of experience and of such social changes as the reversal of the one-to-eight ratio of employment to self-employment and the rise of the modern corporation—that involuntary servitude cannot be eradicated unless workers enjoy the freedom to associate in dealing with employers.

#### F. *Race and the Rights To Organize and Strike*

Until the 1930s, most American labor unions excluded people of color, and many conducted strikes to drive black and Asian workers from preferred jobs. Labor leaders condemned workers of color as "natural" scabs for crossing the picket lines of unions that excluded them from membership.<sup>363</sup> Andrew

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360. This was their general approach to the threats that did come under discussion. See VanderVelde, *supra* note 2, at 453-95.

361. David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1753 (2003).

362. Strauss says that this "would be inconsistent with the original understanding of the amendment, but consistent with its language." *Id.* at 1753-54. In line with the terminology used here, however, it is inconsistent only with the way in which the Framers would have applied the amendment to the facts of their time.

363. PHILIP S. FONER, *ORGANIZED LABOR AND THE BLACK WORKER 1619-1973*, at 76, 109 (1974); see W.E.B. DUBOIS, *THE NEGRO ARTISAN: REPORT OF A SOCIAL STUDY MADE UNDER THE DIRECTION OF ATLANTA UNIVERSITY 153-76* (1902); PAUL D. MORENO, *BLACK AMERICANS*

Furuseth of the Seamen's Union, the movement's leading Thirteenth Amendment theorist, defended his union's whites-only rule and urged the American Federation of Labor to authorize segregated unions.<sup>364</sup> In the face of union hostility, many African-Americans concluded that collective labor rights impeded black progress. In an 1894 editorial, *The Freeman* complained that the Thirteenth Amendment protected union strikers, but if "some poor fellow" were to fill a position left vacant by a striker, he would be "denounced as a scab, and he may be stoned or otherwise beaten by strikers."<sup>365</sup> Booker T. Washington promoted black labor as "not inclined to trade unionism" and "almost a stranger to strife, lock-outs and labor wars."<sup>366</sup> Relying on neoclassical economics, some scholars have suggested that this history reflects a natural tendency for collective labor rights to foster unions that function as job trusts for the dominant race.<sup>367</sup>

For present purposes, however, this history reflects the unremarkable truth that no right will assist a subordinate group unless the members of that group are actually permitted to exercise the right. Contrary to Booker T. Washington, black workers inclined strongly toward unionism and concerted action, but their employers—typically backed by local and state government—responded with brutal suppression. Following emancipation, black agricultural laborers across the South organized and staged strikes to raise wages and establish labor standards.<sup>368</sup> Beginning in 1868, however, planters and their allies conducted a ruthless campaign of suppression in the countryside, evicting, flogging, and killing black activists and their supporters with the aim of destroying all

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AND ORGANIZED LABOR: A NEW HISTORY 93-102 (2006); ROBERT H. ZIEGER, FOR JOBS AND FREEDOM: RACE AND LABOR IN AMERICA SINCE 1865, at 60-67, 76-81 (2007).

364. 1 THE BLACK WORKER, *supra* note 1, at 5-6; HYMAN WEINTRAUB, ANDREW FURUSETH: EMANCIPATOR OF THE SEAMEN 112-13 (1959).
365. *The Right To Strike and the Right To Work*, THE FREEMAN (Indianapolis), July 21, 1894, reprinted in 1 THE BLACK WORKER, *supra* note 1, at 81.
366. FONER, *supra* note 363, at 79.
367. See DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 7, 53 (2001) (arguing that "in the context of a racist American polity between Reconstruction and the New Deal," legal protection for strikes and organizing facilitated the efforts of white unions to exclude black workers from jobs); MORENO, *supra* note 363, at 4-5 (contending that "unions have usually acted as 'white job trusts' . . . because unions are, first off all, job trusts").
368. HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865-1901, at 55-56, 265 n.30 (2001); FITZGERALD, *supra* note 358, at 6, 165-69; ERIC FONER, NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY 91-106 (1983).

manifestations of black organization.<sup>369</sup> By 1871, President Isaac Myers of the Colored National Labor Union reported that organizers could not reach black workers in some areas “except you are steel-plated against the Ku-Klux bullets” and despaired of making progress under this “fearful reign of terror.”<sup>370</sup> A second round of organization, by the interracial Knights of Labor during the late 1880s, met a similar fate.<sup>371</sup> Over the next several decades, sporadic efforts to organize black farm workers and lumber workers in the South also met with ferocious suppression.<sup>372</sup>

What would have happened if black workers had actually enjoyed the rights to organize and strike? A hint may be gleaned from the experience in southern ports. On the New Orleans waterfront, for example, the pattern of labor organization “ran counter to the dominant trend of black subordination, exclusion, and segregation” in the 1880s and after the turn of the century.<sup>373</sup> Why? The leading history suggests that “the strength of black unions was central in limiting white workers’ ability to impose a racially exclusionist solution on the problems of competition and unemployment.”<sup>374</sup> Unlike individual black workers, black unions could exert strategic pressure on white unions, punishing racist practices with organized “scabbing” and—more importantly—rewarding progressive racial policies with anti-scab enforcement and affirmative support.<sup>375</sup> This history reveals a positive side to Corwin’s observation that when people “act in concert, liberty is power.”<sup>376</sup> Organization makes it possible for the members of a subordinate race to exercise power strategically. Individual black workers might obtain jobs by underbidding white workers, but norms of racial subordination could not be weakened until African-Americans—the overwhelming majority of whom were relatively unskilled laborers—assembled the organizational strength to stand

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369. See, e.g., FONER, *supra* note 95, at 425-44.

370. FONER, *supra* note 363, at 39.

371. *Id.* at 58-62; MELTON ALONZA MCLAURIN, *THE KNIGHTS OF LABOR IN THE SOUTH* 45-51 (1978); Rebecca J. Scott, *Fault Lines, Color Lines, and Party Lines: Race, Labor, and Collective Action in Louisiana and Cuba, 1862-1912*, in *BEYOND SLAVERY: EXPLORATIONS OF RACE, LABOR, AND CITIZENSHIP IN POSTEMANCIPATION SOCIETIES* 61 (Frederick Cooper, Thomas C. Holt & Rebecca J. Scott eds., 2000).

372. See FONER, *supra* note 360, at 118-19, 146-47, 192-93, 207-08 (recounting the demise of integrated unions of sharecroppers and lumber workers after violence and threats of violence including the massacre of one hundred Arkansas sharecroppers in 1919).

373. See ERIC ARNESEN, *WATERFRONT WORKERS OF NEW ORLEANS: RACE, CLASS, AND POLITICS, 1863-1923*, at ix (1991).

374. *Id.*

375. *Id.*

376. CORWIN, *supra* note 297.

up openly in the face of white chauvinism. When black sleeping car porters finally managed to establish the United States' first durable black-led union, it promptly became a leading force in the struggle for civil rights. Despite its base in a trade that symbolized servility in the view of whites, the Brotherhood of Sleeping Car Porters provided crucial organizational resources and leadership for a shift in black politics away from polite and deferential petitioning to confrontational and righteous protest.<sup>377</sup>

It is undeniably true that associational labor rights can be abused in ways that conflict with race equality. Accordingly, unions—as well as employers—are prohibited from discriminating on the basis of race.<sup>378</sup> Moreover, mere anti-discrimination may not be enough; scholars have argued that the labor law should be reformed so as to remove barriers to union participation and concerted activity by workers of color.<sup>379</sup> The goal of such adjustments, however, is to ensure that all workers enjoy the benefits of organization and concerted activity. As in the fields of political rights and market rights, the sensible response to racist exclusion is inclusion, not withdrawing protection from the rights at issue.

## CONCLUSION

When the black washerwomen of Jackson adopted their scale and submitted their petition, the Thirteenth Amendment was new and untested. Most people agreed that the Amendment guaranteed whatever rights were necessary to negate slavery and involuntary servitude, but there was no consensus as to what those rights might be. Even the inalienable right to quit work was vigorously contested in courts and legislatures until 1910, when the Supreme Court embraced it over a forceful dissent by the great jurist and Union veteran Oliver Wendell Holmes.<sup>380</sup>

Today, the Supreme Court has yet to adopt and apply a standard for assessing labor rights claims under the Involuntary Servitude Clause. This Article has argued that one may be found in the leading decision of *Pollock v. Williams*, which contains the Court's most thorough discussion of the

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377. See BETH TOMPKINS BATES, *PULLMAN PORTERS AND THE RISE OF PROTEST POLITICS IN BLACK AMERICA, 1925-1945*, at 11-12 (2001).

378. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c) (2006).

379. See, e.g., Marion Crain, *Colorblind Unionism*, 49 *UCLA L. REV.* 1313 (2002); Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 *HARV. C.R.-C.L. L. REV.* 395 (1993).

380. See *supra* Part I.

interpretive issues.<sup>381</sup> Under *Pollock*, a claimed right should be protected if it is necessary to provide workers with the “power below” and employers the “incentive above” to prevent “a harsh overlordship or unwholesome conditions of work.”<sup>382</sup> Although this is not the only conceivable standard, it does fit well with the text, history, and case law of the Amendment.<sup>383</sup> It calls on legislatures and courts to make difficult judgments on matters of degree, but no more so than do the standards routinely applied under other rights guarantees.<sup>384</sup> The absence of any racial element, which might appear dishonest in light of the fact that most of the leading cases involved workers of color, nevertheless corresponds to the original meaning and has important advantages from a doctrinal point of view. In light of the constantly changing and complex nature of racial categories and hierarchies, a requirement of provable race discrimination would prevent effective enforcement in a variety of important contexts. Accordingly, this Article suggests that although race should play a role in the analysis of involuntary servitude, the Court has not erred in refraining from requiring proof of race discrimination.<sup>385</sup>

The *Pollock* standard also fits well with the justifications—legal and philosophical—for the three Thirteenth Amendment labor rights that are most widely accepted: the rights to quit work, to change employers, and to set the wages for which one is willing to work. In today’s nation of employees, escape from the employment relation is not a realistic possibility for most employees.<sup>386</sup> Freedom from involuntary servitude thus hinges on workers possessing the “power below” to give employers the “incentive above” to ensure a supply of jobs that rise above servitude—jobs that do not entail “a harsh overlordship or unwholesome conditions of work.”<sup>387</sup> If the market rights to quit, change employers, and name wages do not suffice to accomplish this result, then additional, nonmarket rights may be necessary.<sup>388</sup>

The most prominent nonmarket rights claims have centered on the workers’ freedom of association. Beginning in the nineteenth century, American workers and unions insisted that they could not avoid servitude

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381. As noted above, this idea was proposed by former Solicitor General and Harvard Law Professor Archibald Cox more than half a century ago. Cox, *supra* note 7, at 576-77.

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

383. *See supra* Part III.

384. *See supra* Section IV.B.

385. *See supra* Part II.

386. *See supra* Section V.A.

387. *See Pollock*, 322 U.S. at 18; *supra* Sections V.B.-C.

388. *See supra* Section V.D.

without exercising the rights to organize and engage in concerted activity. When the issue came to a head in the 1940s and early 1950s, the Supreme Court avoided a square holding while a majority of lower courts rejected the claimed rights. The opinions in these cases, however, were remarkably peremptory, failing to consider the claims in light of the text, history, or purposes of the Amendment.<sup>389</sup> Had the courts wished to provide a rationale, they might have argued that the associational rights to organize and strike, unlike the market rights to quit and change employers, entail risks of union tyranny and market inefficiency. However, such policy concerns cannot excuse avoidance of the question—inevitably posed by the text of the Amendment—whether the claimed freedom of association is necessary to enable workers to avoid involuntary servitude.<sup>390</sup> Applying the *Pollock* standard to this question, there is no shortage of authoritative statements by Congress and the Supreme Court that, without the rights to organize and engage in concerted activity, the individual, unorganized worker is “helpless” to deal with employers or to protect her freedom of labor. The continuing relevance of these conclusions is supported by a substantial body of economic scholarship and confirmed by international labor standards and rulings.<sup>391</sup> Although the available evidence of original meaning reveals no specific endorsement of the claimed associational rights, it is consistent with the proposed application of the *Pollock* principle to those rights.<sup>392</sup> Finally, as long as the freedom of association is enjoyed by workers of all colors, and not solely by a preferred group, the Amendment’s two great thrusts of labor freedom and race equality should pull in the same direction. When the black washerwomen of Jackson organized their association and enacted their scale, they were deploying a historically proven means not only of winning higher wages and better conditions, but also of resisting racial injustice.<sup>393</sup>

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389. See *supra* Sections VI.A.-B.

390. See *supra* Section VI.C.

391. See *supra* Section VI.D.

392. See *supra* Section VI.E.

393. See *supra* Section VI.F.