Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"

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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. 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." 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

^{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."¹¹⁹ 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.¹²⁰

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. ¹²¹ 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." 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."

^{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.

THE YALE LAW JOURNAL

119:1474 2010

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"?¹⁷⁹ 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

^{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." 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." 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

^{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.

THE YALE LAW JOURNAL 119:1474 2010

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." ¹⁸²

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.¹⁸³ 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.¹⁸⁴ 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. The Peonage Act of 1867 prohibited "voluntary" as well as

^{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."¹⁸⁶

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."187 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. 188 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.¹⁸⁹ If constitutional enforcement focuses

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.¹⁹⁰ 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 brightline 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

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.¹⁹¹

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. ¹⁹²

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." "193 Lumley's American progeny ignored

^{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).

THE YALE LAW JOURNAL 119:1474 2010

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. 194 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, 195 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. 196 She might note the possibility of serious

^{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.¹⁹⁷ 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.¹⁹⁸ 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. 199 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

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.

THE YALE LAW JOURNAL 119:1474 2010

century.²⁰⁰ Employers might reply that the rule was abandoned primarily for reasons other than concerns about worker freedom.²⁰¹ 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.202 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.²⁰³ 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.²⁰⁴ Under the *Pollock*

^{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.²⁰⁵ 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.²⁰⁶ 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."²⁰⁷ 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 and fundamental nonfundamental interests; and 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. 208 Interestingly, the Supreme Court of

^{205.} Pollock v. Williams, 322 U.S. 4, 24 (1944); Bailey v. Alabama, 219 U.S. 219, 244-45 (1911).

^{206.} Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968).

^{207.} United States v. Kozminski, 487 U.S. 931, 951 (1988).

^{208.} 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.²⁰⁹ "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."²¹⁰ Categorical deference on that scale, combined with a willingness to apply other difficult provisions, hints unsubtly 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." Under this schema, the Involuntary Servitude Clause resembles more closely the first ten amendments than "the general prohibitions of the Fourteenth Amendment." 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.²¹³ However, the courts have

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 (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.²¹⁴ A more expansive interpretation of the Thirteenth Amendment would alter the substance, not the scope, of judicial intervention in private employment relations.

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