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Recommended Citation

James G. Pope, *What's Different About the Thirteenth Amendment, and Why Does It Matter?*, 71 Md. L. Rev. 189 (2011)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol71/iss1/10>

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WHAT'S DIFFERENT ABOUT THE THIRTEENTH AMENDMENT, AND WHY DOES IT MATTER?

JAMES GRAY POPE*

When I entered law school back in 1980, the Thirteenth Amendment beckoned as the noblest and most fascinating of all constitutional provisions. Most spectacularly, it had singlehandedly transformed the Constitution of the United States from that of a slave nation to that of a modern republic.¹ From my point of view as a recently laid-off ship welder, it also mattered that the Thirteenth Amendment is the only currently operative constitutional provision that addresses the law of labor, having displaced the fugitive slave (“held to Service or Labour”) clause.² Moreover, the Thirteenth Amendment stands out as the sole rights guarantee that protects not only against government, but also against private concentrations of power, including multi-national corporations.³ Yet, to put it mildly, others did not share my fascination. In fact, many considered it a waste of time to converse about an Amendment that, in their view, had been conclusively consigned to the dustbin of history. They agreed with me that the Amendment was unique but, to my frustration, they found it to be uniquely suited for narrow interpretation.

Why? We might speculate that some people oppose broad interpretation because they fear the likely substantive outcomes. The same features that attracted a laid-off ship welder might well repel others, and for similarly result-oriented reasons. Over time, however, I have come to believe that at least part of the explanation may be found in the distinctively difficult interpretive questions posed by the Amendment. Part I of this Essay discusses four unique features of the

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1. On the centrality of slavery to the original United States Constitution, see ALFRED W. BLUMROSEN & RUTH G. BLUMROSEN, *SLAVE NATION: HOW SLAVERY UNITED THE COLONIES & SPARKED THE AMERICAN REVOLUTION* 171-202 (2006); DAVID WALDSTREICHER, *SLAVERY’S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* 3–20 (2009).

2. On the labor dimension of the Amendment, see Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989).

3. The Civil Rights Cases, 109 U.S. 3, 20 (1883); *United States v. Kozminski*, 487 U.S. 931, 932 (1988).

Amendment that give rise to interpretive questions of unfamiliar kinds. The difficulty of these questions may help to account for why, approaching the sesquicentennial of the Amendment, courts have yet to make any serious attempt at answering them, and the Amendment—in spite of its potentially broad scope—remains limited to a few, narrowly circumscribed doctrines.⁴ To put the point positively, scholars may have a crucial role to play in puzzling out these unfamiliar and difficult questions, so as to unblock the development of Thirteenth Amendment jurisprudence. Specifically, Part I suggests that the Amendment is: (1) the only constitutional provision that mandates the official identification and protection of unenumerated rights; (2) the only constitutional provision that calls for the development of rights protections based on the dynamics of a nongovernmental system (the First Amendment “system of freedom of expression” notwithstanding); (3) the only constitutional provision that directly commands the government to undertake a project of social transformation; and (4) the only constitutional rights guarantee that is generally acknowledged to attack relations of subjugation and exploitation.

Part II of the Essay considers three purportedly unique features of the Amendment that have been invoked as reasons to limit its scope and relevance. Specifically, the Amendment has been said: (1) to be uniquely unambiguous, and therefore unsuited for interpretation; (2) to require uniquely bright-line or “absolute” doctrines; and (3) to be uniquely limited by its historical context or purposes. Upon examination, however, these claims appear misplaced.

I. FOUR UNIQUE FEATURES OF THE THIRTEENTH AMENDMENT

1. *The Thirteenth Amendment is the only constitutional provision that clearly mandates the official identification and enforcement of unenumerated rights.* From the earliest congressional debates to the most recent court decisions, nobody has doubted that Section 1 of the Thirteenth Amendment guarantees certain fundamental rights.⁵ Nor has it been

4. On the potentially broad scope of the Amendment, see Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403 (1993). On its currently truncated scope, see Alexander Tsesis, *The Thirteenth Amendment's Revolutionary Aims*, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 1, 13-14 (Alexander Tsesis ed., 2010) [hereinafter THE PROMISES OF LIBERTY].

5. See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864) (Rep. Ingersoll) (explaining that the Thirteenth Amendment was created to protect “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”); *The Civil Rights Cases*, 109 U.S. at 22; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-44 (1968); Tsesis, THE PROMISES OF LIBERTY, *supra* note 4, at 10-12;

questioned either that Section 1 authorizes courts to enforce those rights or that Section 2 empowers Congress to do the same.⁶ Yet, the Amendment mentions no right. Instead, courts and Congress are left with the task of determining what rights are necessary to negate the prohibited conditions of slavery and involuntary servitude. By contrast, the Ninth Amendment declares the existence of unenumerated rights, but provides no criteria for recognizing them and says nothing about who is to identify or enforce them.⁷

This feature would not be remarkable if the only rights guaranteed were the “right to be free from slavery” and the “right to be free from involuntary servitude.”⁸ Immediately following ratification, southern states adopted that position. They enacted “Black Codes” that enforced labor discipline on freed people using vagrancy laws, restrictions on mobility, and a variety of other measures that differed significantly from slavery but also infringed basic freedoms like the right to change employers. The great majority of northerners, however, reacted to the Black Codes with outrage. While southerners held that the Amendment did nothing more than abolish the specific conditions of slavery and involuntary servitude, northerners assumed “that when the positive law of slavery fell away, the former slave was left with a broad panoply of basic civil rights.”⁹ Under authority of the Thirteenth Amendment, Congress promptly enacted this view into law. The Civil Rights Act of 1866 guaranteed a set of rights that extended far beyond those necessary to negate a condition of slavery or involuntary servitude (narrowly defined as forced labor), including “the same right . . . as is enjoyed by white citizens” to “make and enforce contracts, to sue, be parties, and give evidence, inherit, purchase, lease, sell, hold, and convey real and personal property.”¹⁰ The Peonage Act of 1867 prohibited “voluntary” as well as involuntary peonage without any racial referent.¹¹

MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 235 (2001); VanderVelde, *supra* note 2, at 443–504.

6. Section 1 is self-enforcing. *The Civil Rights Cases*, 109 U.S. at 20, 23. Section 2 provides: “Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XIII.

7. The Amendment reads in full: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

8. *Guam Soc’y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 700 (9th Cir. 1996); *United States v. Kozminski*, 487 U.S. 931, 934 (1988).

9. William M. Wiecek, *Emancipation and Civic Status: The American Experience, 1865–1915*, in *THE PROMISES OF LIBERTY*, *supra* note 4, at 78, 83.

10. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

11. Peonage Act of 1867, ch. 187, § 1, 14 Stat. 546.

Today, Thirteenth Amendment rights claims generally fall into one of two categories: rights to be free from certain forms of race discrimination, conceptualized as “badges and incidents of slavery,” and rights of labor freedom, analyzed under the involuntary servitude clause.¹² Scholars have proposed standards for assessing particular rights claims in both categories, but—reflecting the general underdevelopment of Thirteenth Amendment doctrine—no standard has been clearly articulated or consistently applied by the courts.¹³ The choice of such a standard might be facilitated by taking into account the following additional features of the Amendment.

2. *The Thirteenth Amendment is the only constitutional provision that calls for the development of rights protections based on the dynamics of a non-governmental system.* There is a natural tendency to interpret broad or ambiguous rights guarantees in relation to their functions in the constitutional system of government. For example, the Equal Protection Clause has been read to establish the principle of one-person, one-vote on the ground that the “right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”¹⁴ But judges and legal scholars are also drawn to engage in systemic interpretation outside the governmental context. Consider, for example, the First Amendment’s Free Speech Clause. Thomas Emerson famously conceptualized free speech rights as components of a system of freedom of expression designed not only to facilitate political discussion, but also to promote individual self-realization and the search for truth. Emerson’s book, *The System of Freedom of Expression*, has been

12. In cases involving race discrimination, the question has hinged on whether the particular type of race discrimination (for example, in the sale or rental of housing) constitutes a “badge or incident” of slavery. *See, e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440–41 (1968). In cases involving race-neutral infringements of the freedom of labor, on the other hand, the issue usually centers on the extent and nature of employer control. *See, e.g., Kozminski*, 487 U.S. at 948; *Pollock v. Williams*, 322 U.S. 4, 18 (1944).

13. William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1313–14, 1320, 1366 (2007) (noting the absence of any standard for identifying badges or incidents of slavery and proposing that the determination should hinge on “whether the identity of the victim and the nature of the injury demonstrate a concrete link to the system of chattel slavery”); James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of “Involuntary Servitude,”* 119 YALE L.J. 1474, 1478–79 (2010) (noting the absence of any standard for assessing labor rights claims and arguing that the Court should adopt as a general standard the approach used in *Pollock*, 322 U.S. at 18, namely that a claimed labor right is protected under the Amendment 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”).

14. *Reynolds v. Sims*, 337 U.S. 533, 555 (1964); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 116–18 (1980).

cited in no fewer than twenty-two Supreme Court opinions.¹⁵ The Court has also deployed a more particularized systemic model of free speech, the “marketplace of ideas,” which is said to be “open” and “uninhibited.”¹⁶ But the text of the First Amendment, which states simply that “Congress shall make no law . . . abridging the freedom of speech,” provides no apparent sanction for either Congress or the courts to design and institute a free speech system.

By contrast, the text of the Thirteenth Amendment expressly mandates a systemic approach. Slavery and involuntary servitude are not just things that happen to individuals; they are systems of labor control. During the congressional debates, proponents and opponents of the Amendment spoke of “a conflict between two systems; a controversy between right and wrong,” of changing “their system of labor from compulsory to voluntary,” of choosing between slavery, on the one hand, and “free institutions and free labor” on the other, and of supplanting slavery with the “system of free labor.”¹⁷ In this view, the abolition of slavery and involuntary servitude necessarily entailed the establishment of a free labor system. In *Pollock v. Williams*, the Supreme Court confirmed that one “undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States.”¹⁸ It would appear, then, that the Thirteenth Amendment affirmatively commands both Congress and the courts to ascertain what rights are necessary to ensure the permanent extinction of the slave labor system and the ongoing operation of a free labor system.

Only once, however, has the Supreme Court provided a glimpse into the nature of this system. In *Pollock*, the Court struck down a law that restricted the right to quit work and thus imposed “forced labor.”¹⁹ But the Court’s reasoning, which centered on the operation of the “general basic system of free labor,” swept more broadly. “[I]n general,” wrote Justice Robert Jackson, “the defense against oppres-

15. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1971); Lexis search of Supreme Court cases for “System of Freedom of Expression” within the same sentence as “Emerson,” conducted Oct. 6, 2011.

16. *Citizens United v. FEC*, 130 S. Ct. 876, 896, 906 (2010) (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) & *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)).

17. CONG. GLOBE, 38th Cong., 1st Sess. 2615 (1864) (Rep. Morris); *id.* at 1440 (Sen. Harlan); *id.* at 2944 (Rep. Higby); *id.* at 2983 (Rep. Mallory); *see also id.* at 2685 (Rep. Kelley asserting that the Amendment would “establish freedom as a permanent institution, and make it universal”).

18. 322 U.S. 4, 17 (1944).

19. *Id.* at 17–18.

sive hours, pay, working conditions, or treatment is the right to change employers. 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.”²⁰ How does “the right to change employers” generate this “power below” and “incentive above”? Justice Jackson did not explain, but the logic seems clear. As long as workers effectively enjoy that right, then employers that exert harsh domination and impose unwholesome conditions should be punished with quits, while those who offer better terms should be rewarded with loyalty. But what if the right to change employers by itself failed to produce this result? What if, for example, employers formed a cartel and refused to hire any workers who would not submit to starvation wages? Then, by the logic of the systemic approach, workers would also need the right to set the wages for which they were willing to work.²¹ *Pollock* thus suggests, as Archibald Cox pointed out long ago, that the standard for determining whether a given labor right is protected by the Thirteenth Amendment hinges on whether 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.”²² Since *Pollock*, however, the Court has refrained from systemic analysis, leaving this as another area awaiting future development.

3. *Alone among constitutional provisions, the Thirteenth Amendment directly commands the government to undertake a project of social transformation.* Many newly enacted laws change social practice, and some do so in dramatic and far-reaching ways. The Nineteenth Amendment, for example, instantly conferred voting rights on millions of women. And that shift, in turn, altered the field of interpretation on other issues involving women’s rights: Could the same Constitution that welcomed women into the polity as full voting members simultaneously permit legislatures to treat them as inferiors in other realms? Some courts thought not, and read the Amendment “to have implications for mat-

20. *Id.* at 18. On the right to change employers, see *Shaw v. Fisher*, 102 S.E. 325 (S.C. 1920). In *Shaw*, the South Carolina Supreme Court held that the Thirteenth Amendment had “annulled” the tort of hiring a laborer who was under a contractual obligation to work for another, though there was no legal or physical restraint on the laborer’s right to quit, and no finding that he could not have worked with family members, found some other means of support, or departed the state. *Id.* at 326, 327. At stake, evidently, was the laborer’s right to participate in the free labor system.

21. For a more detailed discussion of this point, see Pope, *supra* note 13, at 1533–36.

22. *Pollock*, 322 U.S. at 18; Archibald Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 576–77 (1951).

ters other than voting, including matters concerning the law of marriage.”²³ We might say, then, that the Nineteenth Amendment worked a transformation by declaring a new right, directing the government to enforce it, and causing ripple effects beyond the scope of the newly declared right. The Thirteenth Amendment issued a different kind of transformative command, directly banning the social practices of slavery and involuntary servitude. A women’s rights equivalent might have proclaimed something like “Patriarchy shall not exist within the United States.”

This type of command commits the government to root out the prohibited practice wherever it appears and to enact whatever measures might be necessary to prevent it from recurring. The Thirteenth Amendment imposes this difficult and continuing duty on both Congress (by virtue of Section 2) and the courts (because the Amendment is self-enforcing). With regard to an enumerated right, like the right of women to vote or the right to speak freely, courts and Congress might reasonably consider their job done once individuals possess an effective 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”²⁴ In light of events since 1865, this pronouncement recalls to mind the tale of Cnut the Great, who reportedly set up his throne on a beach and commanded that the tide not rise to wet his robes. As illustrated by the Black Codes of the late 1860s, no sooner has one form of servitude been eliminated than others will emerge to replace it. Despite the Peonage Act of 1867, backed up by broad Supreme Court interpretations, old-fashioned debt peonage remained common in southern agriculture through the 1960s.²⁵ Recent decades have seen the emergence of new forms of slavery, grouped under the label of “human trafficking” or the “new slavery.”²⁶ By any definition, involuntary servitude continues to exist in the United States today.²⁷ This poses an ongoing challenge for

23. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 953 (2002).

24. U.S. CONST. amend. XIII (emphasis added).

25. See PETE DANIEL, *THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901–1969*, 170–92 (1990); DANIEL A. NOVAK, *THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY* 46–62 (1978).

26. See, e.g., KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* (rev. ed. 2004) (1999).

27. See KEVIN BALES & RON SOODALTER, *THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY* (2009).

courts, Congress, and all Americans who take seriously fidelity to the Constitution.

4. *The Thirteenth Amendment is the only constitutional rights guarantee that is generally acknowledged to attack relations of subjugation and exploitation.* As Abraham Lincoln pointed out in 1864, the concept of “liberty” could support either effective freedom for all or the “liberty” to dominate and exploit others: “With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men’s labor.”²⁸ Similarly, the phrase “equal protection of the laws” has been read to require “equal” protection of dominant and subordinate racially defined groups, thereby blocking targeted affirmative action on behalf of the latter with the effect, arguably, of preserving white racial privilege.²⁹ By contrast, the Thirteenth Amendment directly attacks relations of domination and exploitation. “Slavery” and “servitude” involve, by definition, relations between masters and subordinates. Slavery is the “state of entire subjection of one person to the will of another,” while servitude is the “state of voluntary or involuntary service to a master.”³⁰ Admittedly, the text leaves a loophole; it could be read to permit a worker “voluntarily” to enter into a contract for servitude that would then become involuntary by virtue of the enforcement mechanisms available to the employer. The Supreme Court rejected that approach a century ago, however, reasoning that the 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

28. Tsesis, *supra* note 4, at 9 (quoting Abraham Lincoln, At the Fair in Baltimore, in Aid of the Sanitary Commission (April 18, 1864), in ABRAHAM LINCOLN, THE MARTYR’S MONUMENT 252 (The American News Co. ed., 1865)).

29. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 201, 226 (1995) (holding that strict scrutiny applies to benign as well as invidious racial classifications because “it may not always be clear that a so-called preference is in fact benign”). This doctrine provides white people with an effective constitutional right to enjoy the benefits of past societal discrimination as well as present discrimination that cannot be proven to be intentional. See Derrick Bell, *Xerxes and the Affirmative Action Myth*, 57 GEO. WASH. L. REV. 1595, 1609 (1989); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1766–77 (1993).

30. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1241, 1207 (1865); see also *Hodges v. United States*, 203 U.S. 1, 17 (1906) (defining servitude as “the state of voluntary or compulsory subjection to a master”); JOSEPH E. WORCESTER, A DICTIONARY OF THE ENGLISH LANGUAGE 1314, 1352 (1860) (defining slavery as “[t]he state of absolute subjection to the will of another” while defining servitude as “[t]he state or condition of a servant, or more commonly of a slave; slavery; bondage”).

benefit which is the essence of involuntary servitude.”³¹ The concept of “badges and incidents of slavery” incorporates this focus on domination. The Amendment is concerned not with the irrationality or unfairness of race-based decisionmaking in the abstract, but with its function as a badge of *slavery*. Thus, what made housing discrimination objectionable in *Jones v. Alfred H. Mayer Co.* was its functional equivalence to the Black Codes in securing “the exclusion of Negroes from white communities,” in “herd[ing them] into ghettos,” and in depriving them of the important right to buy property based on “the color of their skin.”³²

The question is thus raised: What kinds of domination and exploitation fall within the scope of the Amendment? Scholars have proposed a wide variety of applications including, for example, child abuse, spouse abuse, forced childbearing, and the denial of basic rights to immigrant workers.³³ These claims, in turn, pose the doctrinal question: By what criteria should such claims be addressed? The current limitation to intentional race discrimination and coerced labor appears arbitrary in light of the Amendment’s text, which is not restricted to forms of slavery or servitude based on race or targeted at productive labor. Scholars have proposed a wide variety of criteria in the course of advocating various types of claims, but we have yet to conduct a sustained discussion of the question.

II. THREE PURPORTEDLY UNIQUE FEATURES OF THE AMENDMENT THAT MAY NOT BE

1. *The Thirteenth Amendment does not appear to be uniquely unambiguous or unsuited for interpretation.* In the *Slaughter-House Cases*, a majority of the Supreme Court signed on to the view that the words of the Thirteenth Amendment “seem hardly to admit of construction, so vigorous is their expression.”³⁴ Since I began studying the Amendment three decades ago, many people have told me that I was wasting my

31. *Bailey v. Alabama*, 219 U.S. 219, 241 (1911). For a detailed discussion of the cases, see Pope, *supra* note 13, at 1481–91.

32. 392 U.S. 409, 441 (1968); see also Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 284 (2010).

33. See, e.g., Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359 (1992); Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude, and the Thirteenth Amendment*, 4 YALE J. L. & FEMINISM 207 (1992); Andrew Koppelman, *Forced Labor Revisited: The Thirteenth Amendment and Abortion*, in *THE PROMISES OF LIBERTY*, *supra* note 4, at 226; Maria Ontiveros, *Immigrant Workers and the Thirteenth Amendment*, in *THE PROMISES OF LIBERTY*, *supra* note 4, at 279.

34. 83 U.S. (16 Wall.) 36, 69 (1873).

time because of this purportedly undeniable fact. Upon examination, however, the text of the Amendment appears to raise its full share of interpretive quandaries. For example, the question of what makes action “involuntary” or coerced has long been a topic of sharp disputation among philosophers.³⁵ Nor is it obvious what constitutes “servitude,” a term that has been used to describe relations ranging from ordinary “service” to full-blown “slavery.”³⁶ More broadly, the inclusion of the phrase “involuntary servitude,” in addition to the narrower term “slavery,” raises the possibility that the Amendment might have been “purposely left to gather meaning from experience” and that it might have “created new meanings of freedom even for the twentieth and twenty-first centuries.”³⁷ Then there is the clause permitting slavery “as a punishment for crime whereof the party shall have been duly convicted.” Is convict labor truly “a punishment for crime” when instituted with the economic purpose or effect of removing jobs from the free labor system and depressing the “working conditions and living standards” of free workers?³⁸ For a final example, the concept of badges of slavery raises numerous questions ranging from the validity of the doctrine itself to various possible applications, for example to the denial of important rights based on immigration status.³⁹

2. *The Thirteenth Amendment does not appear to require uniquely bright-line or “absolute” doctrines.* Beginning with moral abolitionists like William Lloyd Garrison, there has been a tendency to view slavery as a uniquely horrific evil that is sharply distinguishable from other, more nuanced forms of oppression. Kevin Bales, a leading scholar of present-day abolitionism, maintains that slavery amounts to the “theft

35. See, e.g., GERTRUDE EZORSKY, FREEDOM IN THE WORKPLACE? 5–14 (2007); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 262–64 (1974); ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY 1–26 (2001). For a discussion of the concept as used in the Thirteenth Amendment, see Pope, *supra* note 13, at 1527–36.

36. For a discussion of various definitions, see Pope, *supra* note 13, at 1503–07.

37. Note, *The “New” Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1301 (1969); David Brion Davis, *Foreword: The Rocky Road to Freedom: Crucial Barriers to Abolition in the Antebellum Years*, in THE PROMISES OF LIBERTY, *supra* note 4, at xi, xxiii.

38. *Pollock v. Williams*, 322 U.S. 4, 18 (1944) (observing that the “[r]esulting depression of working conditions and living standards affects not only the laborer under the system [of forced labor], but every other with whom his labor comes in competition”). On convict labor as an economically driven policy with negative effects on free labor, see David M. O’Shinsky, *Convict Labor in the Post-Civil War South*, in THE PROMISES OF LIBERTY, *supra* note 4, at 100, 103–06, 111–15; ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* (1996).

39. George A. Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, in THE PROMISES OF LIBERTY, *supra* note 4, at 163, 177; Maria L. Ontiveros, *Immigrant Workers’ Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651, 677–78 (2004).

of an entire life” and that it is “more closely related to the concentration camp than to questions of bad working conditions.”⁴⁰ This sentiment finds jurisprudential expression in the idea that Thirteenth Amendment rights should be demarcated by bright-line doctrines so that protection can be “absolute” (i.e., not subject to balancing) within their scope. For example, Archibald Cox acknowledged that despite purposive arguments of “considerable force” to the contrary, the Amendment should protect only rights that could be exercised by individuals acting alone because protection for associational rights could not be absolute in view of the compelling public interest in regulating them.⁴¹

Upon reflection, however, this approach of exclusive absolutism appears unworkable and ill-advised. No right is truly absolute. Even the individual right to cease work, for example, would not protect a surgeon who quits during an operation or a bus driver who abandons her bus in the middle of a desert. And if the concern is to prevent the erosion of core rights by *ad hoc* balancing, there is nothing to prevent the application of hard-edged rules to certain core rights (for example, those that by definition are necessary to negate a condition of slavery or involuntary servitude), while applying balancing tests ranging from strict to relatively deferential scrutiny to other rights. This would seem to accord better with the Amendment’s purpose not solely to eliminate the prohibited conditions of slavery and involuntary servitude, narrowly defined, but to leave in their place a free labor system.⁴² Furthermore, and most importantly, an exclusively absolutist approach is not likely to be effective. However distinctive the evil of slavery might be, it does not follow that its effective elimination can be accomplished with a narrow set of absolute rights. Even Kevin Bales has argued that various free labor rights, including the right to form and join unions, may be essential to the practical elimination of slavery.⁴³

40. BALES, *supra* note 26, at 7.

41. Cox, *supra* note 22, at 577, 579.

42. See *supra* text accompanying notes 18–22.

43. Bales has joined with Ron Soodalter in proposing that the protections of the National Labor Relations Act (which guarantees the rights to organize and engage in concerted activities) be extended to all American agricultural and domestic workers on the grounds that “otherwise, as recent history has shown, they will continue to be more susceptible to enslavement than other workers in America” and that, where free and enslaved workers labor in close proximity, organized free workers can provide economical and highly effective enforcement service. BALES & SOODALTER, *supra* note 27, at 263. Building on the work of Bales, Soodalter, and others, I have suggested elsewhere that a Thirteenth Amendment free labor approach to labor and sex trafficking might usefully supplement

3. *The Thirteenth Amendment is not uniquely limited by its historical context or purposes.* The notion that the Thirteenth Amendment has present-day relevance is often met with the objection that it was enacted to eliminate slavery, and that was accomplished long ago. Proponents of this view can point to the Supreme Court's observation that the "obvious purpose" of the clause was to "forbid all shades and conditions of African slavery" including, for example, long-term apprenticeships, serfdom, Mexican peonage, and the "Chinese coolie" labor system.⁴⁴ Arguments that the Amendment applies to less egregious forms of labor control are sometimes met by claims that this would "demean" the suffering of enslaved Africans.

The fact that the Thirteenth Amendment was enacted to accomplish a specific historical purpose does not, however, differentiate it from other constitutional rights guarantees. The Free Speech Clause of the First Amendment was adopted to outlaw prior restraints on speech, for example, and the Equal Protection Clause of the Fourteenth to protect against race discrimination in the area of civil (as opposed to political and social) rights. Eventually, however, the Supreme Court focused on the broad wording of those provisions and approached them as sources of principles and not as freeze-frame bans on specific historical practices. As a result, the Free Speech Clause now protects against punishment of speech as well as prior restraints, and the Equal Protection Clause against sex as well as race discrimination, and against discrimination pertaining to social and political as well as civil rights. Furthermore, upon reflection, it appears perverse to single out the Thirteenth Amendment for crabbed, freeze-frame interpretation on the ground that applying the usual methods of interpretation would demean the suffering of African slaves. Today, nearly a century-and-a-half after the Amendment's ratification, workers of color continue to be concentrated in the most dangerous, unhealthy, and poorly remunerated sectors of the economy. Being born with black skin has roughly the same impact on a worker's prospects of employment as a felony conviction.⁴⁵ As in 1865, workers of color stand to gain from full and effective enforce-

the prevailing approach of criminal prohibition. James Gray Pope, *A Free Labor Approach to Human Trafficking*, 158 U. PA. L. REV. 1849 (2010).

44. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 69, 72 (1873); see also *Butler v. Perry*, 240 U.S. 328, 332–33 (1916) (opining that the Amendment covers only the historical practice of African chattel slavery along with "forms of compulsory labor akin to African slavery which, in practical operation, would tend to produce like undesirable results").

45. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 955–62 (2003) (study involving four testers posing as job applicants, two black and two white, one of each racial category with a felony conviction and one without).

ment of the Amendment. Thus, it is not surprising that, instead of claiming special ownership of the Amendment, African-American workers have welcomed its application to workers of all colors in situations quite different from nineteenth century chattel slavery. With assistance from the New Orleans Workers Center for Racial Justice (“NOWCRJ”), for example, workers trafficked from South Asia challenged their conditions as amounting to involuntary servitude under the Thirteenth Amendment. NOWCRJ Director Saket Soni reported that “the African-American community, which is also part of our membership, didn’t say ‘You don’t have the right to say this is involuntary servitude.’ Instead, they said ‘you know what, that reminds us of what’s been going on down here for a long time.’”⁴⁶

III. CONCLUSION

The past few years have seen an undeniable surge of scholarly interest in the Thirteenth Amendment. Some people view this as a boon, a long overdue reassessment of an underutilized and vitally important constitutional provision. Others see it as a misguided attempt to read a “wish list” of present-day demands into a provision that has been deservedly relegated to obscurity. Whichever one’s point of view, controversies arising from the four unique features of the Amendment discussed here are likely to exert an important influence on the outcome. If, as argued above in Part I, the Amendment clearly mandates the identification of unenumerated rights, then what standard should guide that determination? And if the Amendment calls for a systemic approach to the elimination of slavery and its replacement by free labor, then what are the defining attributes of a free labor system, and what rights are essential to its operation? Further, if the Amendment commands the government to undertake a difficult and as yet incomplete social transformation, then how can this imperative be met? Finally, if the Amendment unambiguously attacks relations defined by subjugation and domination, then how is the constitutionally objectionable level of subjugation and domination to be determined?

46. Saket Soni, Speech at the Left Forum (March 21, 2010) (*available at* <http://www.radioproject.org/2010/08/working-beyond-unions-labor-day-special-encore/>) (last visited Oct. 6, 2011). Historically, black workers analogized labor injunctions to slavery and invoked the Thirteenth Amendment. See JOE WILLIAM TROTTER, JR., *COAL, CLASS, AND COLOR* 114 (1990) (quoting black miners’ testimony before Congress); WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 138–39 (1991) (quoting black unionist’s newspaper article).

It is often said that the Thirteenth Amendment is uniquely unsuited for the kind of probing interpretation that will be necessary to answer such questions. People have insisted that it is uniquely unambiguous and therefore unfit for interpretation, that it is uniquely absolute and therefore in need of simple, bright-line boundaries, and that it is uniquely limited to its historical context and therefore inapplicable to present-day practices. As argued in Part II above, however, these claims appear to be without any principled basis, and therefore give us no excuse for interpreting the Thirteenth Amendment with any less diligence and thoroughness than we apply to other constitutional provisions.