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More to Lose Than Your Chains: Realizing the Ideals of the Thirteenth Amendment

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INTRODUCTION

It is anecdotal that in every challenge there lies an opportunity. Community organizer Saul Alinsky applied this principle to political movements when he wrote to young activists, "If you push a negative hard and deep enough it will break through into its counterside."[1] A major challenge of the present era for progressives working toward the expansion of civil and labor rights has been our legal system's generally hostile attitude to their agenda. The "originalist" approach to civil rights has largely rejected expansive readings of the Constitution under the argument that its text was never intended to cover "new and unjustifiable claims."[2]

Encapsulated within this philosophy, however, is a view of the past that obscures important aspects of our legal heritage. Con-

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1 SAUL D. ALINSKY, RULES FOR RADICALS 129 (1971).

2 *See* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 159 (1990).

servative originalism ignores the fact that the amendments to the Constitution that were born out of movements to expand rights are not the legacy of conservatives, but of reformers and radicals. It dismisses the possibility that a document born of a revolution and drafted by activists could still have radical force today. Given the Constitution's origin, there is little reason to assume that originalism is a necessarily conservative philosophy. To embrace the original understanding of the rights-granting provisions of our most revered legal document is to adopt the perspective of people who were willing to fight and die for those rights. Those who claim to honor the legacy of the Framers by limiting the force of their ideals imagine nearsighted visionaries and milquetoast revolutionaries.

In the case of the Thirteenth Amendment,[3] there is evidence that the original understanding was far more expansive and radical than the modern one. The Thirteenth Amendment was passed shortly after the Civil War, when the Radical Republicans dominated Congress.[4] The Congressional debates from this era reveal an understanding of the Thirteenth Amendment, and of the institution of slavery, that went far beyond an end to the physical bondage suffered by slaves. As explained by one of the Amendment's leading advocates, "[W]e 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."[5] The Radicals saw a deep connection between the slave and the "free" worker. Their contemporaneous understanding of slavery included a critical view of the work relationship, one that recognized the existence of social dimensions of work affecting not only the entire life of the laborer, slave or free, but also the fabric of society and the legal system itself. For them, an end to "involuntary servitude" could only come about through a transformation of both the work relationship and the social status of working people

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[3] U.S. CONST. amend. XIII, §§ 1, 2.

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

Id.

[4] Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 447 (1989).

[5] Sen. Henry Wilson, CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866), *quoted in* VanderVelde, *supra* note 4, at 440.

Although not fully developed at the time of the Thirteenth Amendment's passage, the "free labor" ideology did not end with Reconstruction. It found expression throughout the history of the labor movement during the early 20th century.[6] It became the theoretical basis for a wide array of labor reforms that eventually formed the basis of the Wagner Act.[7] The Wagner Act version of labor rights, however, was ultimately much more limited than the Thirteenth Amendment version. Rather than explicitly passing labor law reform as an extension of the Thirteenth Amendment's promise of freedom from involuntary servitude, progressive lawyers adopted a strategy of grounding the Act in the Commerce Clause, and they succeeded.[8]

Scholars have suggested that if the Wagner Act had been passed as an expression of Congress's power to eliminate involuntary servitude under § 2 of the Thirteenth Amendment, the constitutional history of the following eighty years might have been far different.[9] Labor rights would have been an expression of fundamental freedoms, rather than a means to promote the "free flow of commerce."[10] The commerce clause approach, which eventually prevailed, opened the door to the Taft–Hartley amendments,[11] and allowed courts to gradually chip away at the freedoms claimed

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6 James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997) [hereinafter Pope, *Labor's Constitution*].

7 The National Labor Relations Act, Ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C.A. §§ 151–69).

8 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, 24 (2002) [hereinafter Pope, *The Thirteenth Amendment Versus the Commerce Clause*].

9 *Id.* at 115–119.

10 The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce . . . . It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . . .

29 U.S.C.A. §151 (West 2008).

11 Labor Management Relations Act, 61 Stat. 136 (codified at 29 U.S.C.A. §§ 141–144, 167, 171–187). Among other amendments to the Wagner Act, 49 Stat. 449 (codified at 29 U.S.C.A. 151–169), Taft–Hartley added to the preamble cited above:

> [C]ertain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free

by working people, in the name of promoting the free flow of goods and services.[12] The commerce-based concept of labor law analogized labor rights to rights over property, rather than tying them to the deeper social dimensions of work.

The vision put forward by the Wagner Act also built an administrative apparatus that put lawyers and labor "experts" in a dominant and dominating role within organized labor.[13] It facilitated the evolution of a labor movement that moved away from what reformers have called "social movement unionism"[14] and toward a bureaucratic "business model."[15] Even at their most radical, the unions that have grown under the National Labor Relations Act ("NLRA") now talk about organizing, at least publicly, in terms of adding numbers of dues-paying members, rather than in terms of workers' commitment to and ownership of a movement to promote rights.[16] Current proposals to reform labor law reflect this;

> flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

29 U.S.C.A. § 151 (West 2008). Thus, Taft–Hartley posited that the elimination of strikes is necessary to safeguard workers' rights to organize, and thereby made the elimination of strikes and "other forms of industrial unrest" part of the policy of the United States.

12 *See generally* ELLEN DANNIN, TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS 6–7 (2006) (listing examples of how courts have weakened labor protections). Dannin's argument is that judicial interpretations, rather than the Wagner Act itself, is to blame for the diminishment of labor rights over the past six decades. Dannin finds the source of judges' restrictive readings in their class bias and in their general ignorance of labor law. Among the judicial "amendments" to the N.L.R.A., she names the limited remedies afforded to the NLRB, the ability of employers to impose their final offers when an impasse is reached in bargaining, and the "right" to replace economic strikers on a permanent basis. *Id.*

13 *See* Pope, *The Thirteenth Amendment Versus the Commerce Clause, supra* note 8, at 26–28.

14 DAN CLAWSON, THE NEXT UPSURGE: LABOR AND THE NEW SOCIAL MOVEMENTS 19 (2003).

15 MIKE PARKER & MARTHA GRUELLE, DEMOCRACY IS POWER: REBUILDING UNIONS FROM THE BOTTOM UP 22–25 (1999).

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> The 1.9 million-member Service Employees International Union is the fastest-growing union in North America . . . . Since . . . 1996, nearly 900,000 workers have united in SEIU . . . . SEIU is the largest health care union . . . the largest property services union . . . and the second largest public employee union . . . . SEIU is the nation's largest union of health care workers with over half of the union's 1.8 million members working in the field, including 110,000 nurses and 40,000 doctors . . . . 440,000 home care and 160,000 nursing home workers are also winning improvements in wages and benefits. In April 2005, in one of the largest union election victories ever, 41,000 home care workers in Michigan voted to unite with SEIU . . . . 49,000 Illinois family child care providers joined together in SEIU . . . . SEIU is the largest union of

the Employee Free Choice Act,[17] the current legislative project of the AFL–CIO, would make it easier for workers to join unions, but says little about their participation in them.[18]

The original understanding of servitude and of labor, from the standpoint of the Thirteenth Amendment's framers, was one that went beyond economic conditions. It included the social dimensions of the work relationship. Slavery affected the rights of laborers, both free and slave, by denying them full participation in society, and by compromising their human and civil rights as well as their economic status. Altering this system required change at many levels: in the courts, in the legislature, and in civil society itself. As carried on by the labor movement, the free labor ideal would come to include efforts to increase the rights of workers through litigation, legislation, and organizing.

This Comment will consider these three levels of change. I will begin with a brief review of the relevant history, as well as of the original labor vision of the Thirteenth Amendment. This history will continue in the next section, as I discuss how "involuntary servitude" has been defined by the courts. I will suggest areas for expansion of that definition that could encompass broader labor rights. I will then discuss legislation that has been passed under section 2 of the Thirteenth Amendment, and how courts have treated the scope of Congress's power to legislate under that section. Finally, I will discuss what the Thirteenth Amendment vision means for organizing, and how claims to fundamental rights protected by the Thirteenth Amendment could provide a unifying theme for workers' movements. I will conclude by exploring how worker centers might operate as a vehicle for promoting this alternative agenda, putting forward a rights-based vision that is more aligned with international labor standards and that has greater rhetorical and legal force for workers in America, both native and foreign-born.

> child care workers in America, representing more than 200,000 people who work in child care and early education.

Service Employees' International Union, A Closer Look Inside Labor's Fastest-Growing Union, http://www.seiu.org/about/closer%5Flook/ (last visited Mar. 3, 2009).

17 Employee Free Choice Act, H.R. 800, 110th Cong. (2007), *available at* http://thomas.loc.gov/ (search term "Employee Free Choice Act" in "Search Bill Text").

18 *See* James Gray Pope, Peter Kellman & Ed Bruno, *The Employee Free Choice Act and a Long-term Strategy for Winning Workers' Rights*, WORKINGUSA, March 2008, at 127. Admittedly, a greater degree of member engagement in unions is unlikely to come from reforms in the law; it has a good deal more to do with organizing and with the internal politics of unions themselves. But as the history of the Wagner Act suggests, legal paradigms can shape unions' understanding of how they relate to their members.

I. The Thirteenth Amendment and Free Labor

A. Reconstruction

Lea VanderVelde has documented the legislative history and the congressional debates surrounding the passage of the Thirteenth Amendment.[19] That history, as she persuasively argues, reveals an underlying philosophy that went beyond the abolition of slavery and aimed to promote the dignity of all labor. Proponents of the Thirteenth Amendment following the Civil War were split between two political factions: Abolitionists, who were primarily concerned with eliminating slavery, and Republicans from the Free Soil Party who had deep roots in the labor movement of the time.[20] This wing of the party, the so-called "Radical Republicans," objected to slavery on the basis that it degraded the status of all labor. Henry Wilson, the foremost proponent of the Thirteenth Amendment in the Senate, summed up this perspective in an appeal to white workers in Boston: "Put the brand of degradation upon the brow of one working man and the toiling millions of the globe share the degradation."[21]

The radicals' objections to slavery were more than simply moral. They had practical legal ramifications. As VanderVelde points out, in the economy of the time, slavery was simply one especially oppressive form of employment relation, in "a progression of distinct status positions: peons, bonded servants, apprentices, employees not under written contract, employees under written contract and, finally, professional status employees."[22] All of these status positions had broader social aspects. Just as property is correctly understood as a bundle of rights in relation to a thing, one's status defined others' rights in relation to that individual; slaves, for example, could not enter into contracts, have families, testify in court, or hold property.[23] They could be beaten by their masters;[24] an apprentice, in contrast, could not be beaten.[25] The law prohibited one employer from hiring away another's employee, just as it prohibited one master from taking another's slave.[26] The impact

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19 VanderVelde, *supra* note 4.

20 *Id.* at 444–48.

21 Senator Henry Wilson, How Ought Workingmen to Vote in the Coming Election?, Address to East Boston Workers (Oct. 15, 1860) *quoted in* VanderVelde, *supra* note 4, at 467.

22 VanderVelde, *supra* note 4, at 441.

23 *See The Civil Rights Cases*, 109 U.S. 3, 22 (1883).

24 *See* Echols v. Dodd, 20 Tex. 190 (1857).

25 Inhabitants of Vinalhaven v. Ames, 32 Me. 299 (1850).

26 Campbell v. Cooper, 34 N.H. 49 (1856).

of the Thirteenth Amendment was thus far greater than is commonly understood today. By analogy, we might imagine the effect of an amendment stating that, "no person shall hold a property interest in land within the United States." Such a provision would sweep away entire branches of law. Beyond this, it would raise serious doubts about the foundations of other rights.

The Radicals' vision of "free labor" encompassed these social dimensions of work, and recognized the wide array of oppressive statuses. This led them to go beyond slavery and include the term "involuntary servitude" in the Thirteenth Amendment. While the term "slavery" had a commonly understood definition, the meaning of "involuntary servitude" was subject to wider interpretation; a great deal of debate in Congress concerned the scope of this term.[27]

The Radical Republicans' power in Congress gradually faded, and Reconstruction came to an end. The extent to which the "involuntary servitude" language might be applied to working people not in an apparent position of coerced labor, though, would remain an important issue in the decades to follow. During this time, the economy and the shape of work relations were changing in dramatic ways, and the nascent labor movement was emerging to meet these changes.

B. The Labor Movement

At the turn of the century, two of the major legal weapons used by employers against organized labor were anti-strike injunctions and yellow-dog contracts.[28] Unions railed against these court-imposed and court-enforced attacks, and argued that they inflicted forms of involuntary servitude on workers.[29] To trade unionists of the time, a court that ordered strikers back to work compelled them to labor under conditions that they found unacceptable—a situation tantamount to slavery.[30] The American Federation of La-

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[27] VanderVelde, *supra* note 4, at 454–59. "Involuntary Servitude" would come to include debt peonage, a practice then common in New Mexico. *See* 42 U.S.C.A. § 1994 (West 2008). It was eventually applied to a wide range of laws that inhibited individuals from leaving their employment, although interestingly, most of these laws were first established in Northern states, and only adopted in Southern states following the Civil War. *See* VanderVelde, *supra* note 4, at 486–95.

[28] *See* Debs–Jones–Douglass Institute, *Toward a New Labor Law*, 8 n.24 (2003), *available at* http://www.djdinstitute.org/laborlaw.pdf. "Yellow dog" contracts were contracts between a worker and an employer by which the worker agreed not to join or be represented by a labor union.

[29] Pope, *Labor's Constitution*, *supra* note 6, at 964.

[30] At a time when slavery was still a living memory for many workers, this connec-

bor adopted a policy, at its 1909 convention, of openly defying court orders that enjoined what they believed was a constitutionally protected right to strike.[31] The Federation's position was that a worker faced with an anti-strike injunction should "refuse obedience and . . . take whatever consequences may ensue."[32] This legal theory was echoed in Justice Brandeis's dissent in *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n.*, in which he wrote that an injunction against a refusal to work was an "instrument for imposing restraints upon labor which reminds one of involuntary servitude."[33]

There were broader contours to the unions' defiance, and their understanding of the Thirteenth Amendment went beyond the right to strike. Besides referring to the condition of the unorganized worker as "wage slavery," the labor movement argued that workers had rights that were distinct from, and superior to, property rights, and explicitly argued that the Thirteenth Amendment protected these rights on their own terms, not as expressions of property rights: "If . . . you construe labor as being property and the right to labor a property right, then the Thirteenth Amendment goes into the wastebasket entirely," argued Andrew Furuseth, President of the Sailors' Union of the Pacific.[34]

The labor movement used this theory proactively as well as rhetorically. In addition to mobilizing constitutional arguments against anti-labor laws, unions lobbied for legislation prohibiting anti-strike injunctions and protecting organizing rights under the power granted to Congress by the Thirteenth Amendment. They argued that true freedom of labor could only exist when workers were free to organize, and that ensuring these rights was a means to the elimination of involuntary servitude. This argument posed a direct challenge to the theory of economic due process invoked in *Lochner v. New York*[35] and similar cases.

Under the *Lochner* theory, liberty of contract existed between workers and employers because workers were free to quit if they

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tion was clear for those who had lived as both slaves and as workers laboring under court injunctions. George Echols, a union activist, testifying before Congress about the suppression of a miners' strike in West Virginia, said, "I was raised a slave . . . and I know the time when I was a slave, and I feel just like we feel now." Pope, *Labor's Constitution*, *supra* note 6, at 981.

31 Debs–Jones–Douglass Institute, *supra* note 28, at 10.

32 Pope, *Labor's Constitution*, *supra* note 6, at 968.

33 Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n., 274 U.S. 37, 65 (1927) (Brandeis, J., dissenting).

34 Pope, *The Thirteenth Amendment Versus the Commerce Clause*, *supra* note 8, at 24.

35 198 U.S. 45 (1905).

were dissatisfied with the terms and conditions of their employment; indeed, this right was protected by the Thirteenth Amendment.[36] But labor argued that as an individual right, the ability to quit one's job was empty, and its exercise reflected a condition of slavery, not of liberty: "just imagine what a wonderful influence such an individual would have, say for instance [on] the U.S. Steel Corporation," remarked Samuel Gompers.[37]

Although Andrew Furuseth and others fought to ground the Norris–LaGuardia Act,[38] The National Industrial Recovery Act,[39] and the Wagner Act in the Thirteenth Amendment, all but the first of these were explicitly passed as exercises of Congress's powers under the Commerce Clause.[40] As James Pope has documented, this was largely due to the influence of progressive lawyers like Felix Frankfurter, whose attitude towards unions' fundamental-rights claims was that, "talk of the Thirteenth Amendment is too silly for any practical lawyer's use."[41]

C. The Commodification of Labor and its Results

James Pope suggests that if unions had been successful, and if the Wagner Act had been passed under the Thirteenth Amendment, constitutional history might have been very different. The Supreme Court ultimately upheld the Wagner Act under the Commerce Clause in *NLRB v. Jones & Laughlin Steel Corp.*,[42] under the threat of President Roosevelt's court-packing scheme and in the face of one of the largest strike waves in industrial history.[43] In the process, they laid the groundwork for an historic expansion of the scope of the commerce power. What they did not consider was Congress's ability to enact labor legislation under the Thirteenth Amendment power to abolish involuntary servitude. If they had accepted this theory, Pope argues, modern constitutional law would not reflect an "infinitely expandable commerce power and

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36 *See* Pollock v. Williams, 322 U.S. 4, 17–18 (1944).

37 Debate between Samuel Gompers and Henry J. Allen at Carnegie Hall, New York, May 28, 1920, *quoted in* Debs–Jones–Douglass Institute, *supra* note 28, at 9–10.

38 Norris–LaGuardia Act, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–15).

39 National Industrial Recovery Act, 48 Stat. 195 (1933).

40 "The Congress shall have Power . . . . To regulate Commerce with foreign Nations, and among the several States . . . ." U.S. CONST. art. I, § 8, cl. 1, 3.

41 Letter from Felix Frankfurter, Professor, Harvard Law School, to Roger N. Baldwin, Director, ACLU (Dec. 9, 1931) *quoted in* Pope, *The Thirteenth Amendment Versus the Commerce Clause, supra* note 8, at 40.

42 301 U.S. 1 (1937).

43 Pope, *The Thirteenth Amendment Versus the Commerce Clause, supra* note 8, at 81–90.

[a] permanently truncated human rights power . . . ."[44]

The Wagner Act and its subsequent interpretation by the courts might have been very different, too. Because the preamble to the Wagner Act states, "The denial . . . of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce . . . ,"[45] the Act was primarily defended as a means to punish and deter strikes. Notwithstanding that parts of the Act seem to protect the right to strike,[46] courts have looked to this preamble as a guide to interpreting the Act. The results have included allowing permanent replacement of strikers,[47] firing of workers on strike,[48] and discrimination in rehiring of striking workers.[49] Furthermore, legislating labor rights as a means of promoting interstate commerce also allowed Congress to pass the Taft–Hartley Act in 1947, once again permitting anti-picketing injunctions and the elimination of secondary boycotts. Notwithstanding labor's condemnation of Taft–Hartley as "the Slave Labor Law,"[50] it entered the statute books as a mere extension of the power to regulate interstate commerce, placing a thumb on the scale in what has become accepted as a necessary "balance" of the rights of labor and capital.[51]

Some have argued that the labor vision of the Thirteenth Amendment should be revived, and labor law reform based on a fundamental rights approach rather than on Congress's commerce power.[52] They have even gone so far as to suggest that the Thirteenth Amendment could be construed to incorporate the First Amendment against private employers.[53] To flesh out a few con-

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44 *Id.* at 5.

45 29 U.S.C.A. §151 (West 2008).

46 "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 29 U.S.C.A. § 163 (West 2008).

47 NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938).

48 NLRB v. Sands Manufacturing Company, 306 U.S. 332 (1939).

49 NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).

50 Pope, *The Thirteenth Amendment Versus the Commerce Clause*, *supra* note 8, at 97–111.

51 *See, e.g.*, Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wis. Employment Relations Comm'n, 427 U.S. 132 (1976) (holding that certain state regulation of labor relations is preempted, as the NLRA and LMRA embody the judgment of Congress as to which "economic weapons" are allowed to parties in a labor dispute).

52 Debs–Jones–Douglass Institute, *supra* note 28.

53 *Id.* at 20. Because the First Amendment states that "Congress shall make no law

crete steps in this direction, it is important to look to how courts have interpreted the Thirteenth Amendment in the 143 years since its passage.

II. LITIGATION

A. Peonage and the Civil Rights Section

The first expansion of the Thirteenth Amendment beyond chattel slavery came in 1867, with the Anti-Peonage Act.[54] Initially aimed at a system of labor that had taken root in New Mexico under Spanish Colonial rule, the statute prohibited the use of debt to hold an individual "to service or labor."[55] The law saw little use until the turn of the century, when it was upheld in the *Peonage Cases*.[56] Shortly thereafter, the Supreme Court struck down an Alabama criminal statute which made it a crime to enter into a written contract for service and obtain money with intent to defraud the employer, and which made failure to perform the service prima facie evidence of intent to defraud.[57] Taken in combination, these provisions meant that anyone who entered into a work contract, got an advance, then failed to perform the work, was guilty of a crime. Discussing the Thirteenth Amendment's application to this law, the Supreme Court observed that "[t]he words 'involuntary servitude' have a 'larger meaning than slavery.'"[58] The purpose of the Amendment, explained the Court, was "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 . . . ."[59]

Three years later, in *United States v. Reynolds*,[60] the Court struck down another Alabama law that allowed an individual to pay a surety for an individual convicted of a crime, then hold him to a work contract in order to pay off the debt. Violation of the contract was punishable by further forced labor. The Court observed, "the convict is thus kept chained to an ever-turning wheel of servitude . . . ."[61]

. . ." regarding freedoms of speech and association, it applies only to state action. U.S. CONST. amend I. The Thirteenth Amendment has no such limitations, applying to private actors as well as state and federal government.

54 42 U.S.C.A. § 1994 (West 2008).

55 42 U.S.C.A. § 1994 (West 2008).

56 123 F. 671 (M.D. Ala. 1903).

57 Bailey v. Alabama, 219 U.S. 219 (1911).

58 *Id.* at 241.

59 *Id.*

60 235 U.S. 133 (1914).

61 *Id.* at 146–7.

In the late 1930's, shortly after the Wagner Act had been passed as an expansion of the commerce power, and as the labor movement's constitutional claims were beginning to fade, the Civil Rights Section was created within the Justice Department under Attorney General Frank Murphy.[62] A former governor of Michigan, Murphy was pro-labor, and he focused the early work of the Civil Rights Section on prosecuting peonage cases under the Thirteenth Amendment.[63] The Civil Rights Section's lawyers litigated aggressively to try to expand the definitions of debt peonage.[64] Murphy was succeeded as Attorney General by Francis Biddle, the former first chairman of the National Labor Relations Board ("NLRB"). Under Biddle's leadership, the Civil Rights Section successfully expanded the application of the anti-peonage law to cases not involving debt.[65] The focus had shifted to include "not only the availability of exit but also the conditions in which laborers found themselves working."[66]

B. Expanding and Contracting Definitions

The Civil Rights section saw some success in *United States v. Ingalls*.[67] The case involved a young woman, Dora Jones, who had been held as a domestic servant for over twenty-five years. She was subjected to various forms of abuse; her employers threatened to blackmail her by revealing that she had what the court characterized as "an adulterous relationship"[68] with the her employer, threatening her with prison. Jones believed that her employers could make good on these threats. The district court upheld the sufficiency of the evidence under the lower court's definition of "slave": "A slave is a person who is wholly subject to the will of another, one who has no freedom of action and whose person and services are wholly under the control of another, and who is in a state of enforced compulsory service to another."[69] Recounting the conditions under which Jones lived and worked, the court found her "wholly subject" to the will of the defendant.

The Second Circuit pulled back somewhat from this ex-

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62 Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1616 (2001).
63 *Id.* at 1617–18.
64 *Id.* at 1648–68.
65 *Id.* at 1651.
66 *Id.* at 1648.
67 73 F. Supp. 76 (S.D. Cal. 1947).
68 *Id.* at 77.
69 *Id.* at 78.

panding trend in *United States v. Shackney*.[70] The case concerned a family of laborers who had been recruited in Mexico to come work on a farm in Connecticut. Their living conditions were far below what they had been promised; the laborers became indebted to the farm owner, and were threatened with various measures, including deportation, if they left. Holding that these facts did not establish coercion, Judge Friendly stated:

> [W]e see no basis for concluding that because the statute can be satisfied by a credible threat of imprisonment, it should also be considered satisfied by a threat to have the employee sent back to the country of his origin, at least absent circumstances which would make such deportation equivalent to imprisonment or worse.[71]

Other courts were willing to take a broader view. The Fifth Circuit, in *United States v. Bibbs*,[72] held that "the law takes no account of the means of coercion." The availability of escape made no difference. "[A] defendant is guilty of holding a person to involuntary servitude if the defendant has placed him in such fear of physical harm that the victim is afraid to leave, regardless of the victim's opportunities for escape."[73]

By this point, courts were willing to consider forms of servitude that applied to individuals other than African Americans, making good on the claim in *The Slaughterhouse Cases* that "[i]f Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, . . . [the Thirteenth] amendment may safely be trusted to make it void."[74] In *United States v. Mussry* the Ninth Circuit echoed this promise: "we must consider the realities of modern economic life: yesterday's slave may be today's migrant worker or domestic servant."[75] Holding that conduct not including the use or threat of force could be enough to establish coercion, the court held that "[t]he crucial factor is whether a person intends to and does coerce an individual into his service by subjugating the will of the other person."[76]

In 1988, the Supreme Court put a stop to the expanding defi-

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70 333 F.2d 475 (2d Cir. 1964).

71 *Id.* at 486.

72 564 F.2d 1165 (5th Cir. 1977).

73 *Id.* at 1168.

74 *The Slaughterhouse Cases*, 83 U.S. 36 (1872).

75 United States v. Mussry, 726 F.2d 1448, 1451 (9th Cir. 1984).

76 *Id.* at 1453.

nition of involuntary servitude in *United States v. Kozminski*.[77] The Court narrowed the definition to encompass only situations "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."[78] At the same time that it closed a door, however, the Court opened a window:

> Our holding does not imply that evidence of other means of coercion, or of poor working conditions, or of the victim's special vulnerabilities is irrelevant in a prosecution under these statutes . . . . a trial court could properly find that evidence of other means of coercion or of extremely poor working conditions is relevant to corroborate disputed evidence regarding the use or threatened use of physical or legal coercion, the defendant's intention in using such means, or the causal effect of such conduct.[79]

Thus, the quality of working conditions themselves were still relevant, at least as evidence of involuntary servitude. Congress partially rejected the Supreme Court's limited definition of involuntary servitude in the Victims of Trafficking and Violence Protection Act of 2000.[80]

The shift in focus of the definition of "servitude" over time has moved the emphasis away from formalistic requirements of debt to cases where extremely harsh working conditions could provide corroborating evidence of coercion, applied by the threat or use of violence or legal process.

C. From Individualism to Collective Power

For those seeking protection for collective rather than individual rights under the Thirteenth Amendment, judicial opinions

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77 487 U.S. 931 (1988).

78 *Id.* at 952.

79 *Id.*

80 Victims of Trafficking and Violence Protection Act of 2000, §102(b)(13) P.L. 106-386, 114 Stat. 1464 (2000).

> Involuntary Servitude statutes are intended to reach cases in which the persons are held in a condition of servitude through nonviolent coercion. In *United States v. Kozminski*, 487 U.S. 931 (1988), the Supreme Court found that section 1584 of title 18, United States Code, should be narrowly interpreted, absent a definition of involuntary servitude by Congress. As a result, that section was interpreted to criminalize only servitude that is brought about through use or threatened use of physical or legal coercion, and to exclude other conduct that can have the same purpose and effect.

Id.

sometimes seem to point in two directions. In *Pollock v. Williams*,[81] striking down a law nearly identical to the one at issue in *Bailey v. Alabama*,[82] the Supreme Court issued the following dictum: "The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States."[83] Only a few sentences later, however, the Court made clear the limits on this freedom:

> [I]n general the defense against oppressive 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. Resulting depression of wages and working conditions and living standards affects not only the laborer under this system, but every other with whom his labor comes in competition.[84]

The statement is layered with complexity. While it explicitly embraces an individual rather than a collective right, it frames that right in terms of power; the reason that the right to quit is important is because it corrects the imbalance between worker and employer. Though the opinion might exaggerate the impact of this power, it does recognize the need to strike a balance between capital and labor. Finally, the statement reflects the New Deal progressive understanding that competition spreads and replicates working conditions throughout the market, but stops just short of recognizing the social dimensions of labor that were at the heart of Reconstruction-era thinking. The opinion thus looks back to the *Lochner* concept of freedom of contract, with its mythical equality between capital and labor, even while it accepts the progressive notion that working conditions should be standardized throughout the national economy; it does not see as far as the Thirteenth Amendment's original meaning.

Organized labor would use statements like these to challenge infringements on the collective right to quit work as a group (i.e., to strike) even after the passage of the Wagner Act. In *United States v. Petrillo*,[85] the Chicago Federation of Musicians was charged with violating the Federal Communications Act when it directed three

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[81] 322 U.S. 4 (1944).
[82] 219 U.S. 219 (1911).
[83] Pollock v. Williams, 322 U.S. 4, 17 (1944).
[84] *Id.* at 18.
[85] 68 F. Supp. 845 (N.D. Ill. 1946).

of its members to leave their jobs and picket their employer, a radio station. The Illinois District Court agreed with the union that the restriction on the right to leave work in a group violated the Thirteenth Amendment: "[t]he freedom to quit and refuse to undertake work may as readily be exercised through a group organization as individually."[86] The Supreme Court overturned this holding, but with noticeable reticence and minimal discussion:

> [W]e consider the Thirteenth Amendment question only with reference to the statute on its face. Thus considered, it plainly does not violate the Thirteenth Amendment. Whether some possible attempted application of it to particular persons in particular sets of circumstances would violate the Thirteenth Amendment is a question we shall not pass upon until it is appropriately presented.[87]

The Court had such an opportunity just two years later, but declined to take advantage of it. In 1945, a Wisconsin local of The International Union, United Automobile Workers of America ("UAW") began holding a series of work actions against Briggs & Stratton, a manufacturer.[88] The union's tactic was to call unannounced union meetings on work time, which all employees were to attend. This amounted to a series of intermittent work stoppages, for which the employer could not prepare. The NLRB issued a cease and desist order, which the UAW challenged, arguing that the order, as applied, violated the Thirteenth Amendment. The Supreme Court dismissed this argument in a single paragraph, saying, "[t]he facts afford no foundation for the contention that any action of the State has the purpose or effect of imposing any form of involuntary servitude."[89]

Thirteenth Amendment claims as applied to labor rights would gradually become dormant in the federal courts as unions increasingly confined themselves to the processes of the NLRB. They reemerged periodically, however, at the state level. In *County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees' Ass'n.*,[90] the California Supreme Court held that it was not unlawful for public employees to strike. In so doing, the majority opinion speculated that the case raised constitutional questions, but confined its holding to a discussion of the common law

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86 *Id* at 849.

87 United States v. Petrillo, 332 U.S. 1, 13 (1947).

88 Int'l Union, U.A.W., A.F. of L., Local 232 v. Wis. Employment Relations Bd., 336 U.S. 245 (1949).

89 *Id.* at 251.

90 699 P. 2d 835, 38 Cal. 3d 564 (Cal. 1985).

prohibition on public employee strikes.[91] Two Justices' concurring opinion, however, squarely confronted the Thirteenth Amendment issue. The concurrence argued that there existed a constitutional right to strike, grounded in part in the Thirteenth Amendment[92]; it found a "close nexus" between the Amendment and the right to strike.[93] Reasoning from the U.S. Supreme Court's dicta in *Bailey v. Alabama*, *Pollock v. Williams*, and other cases, the concurring Justices stated that "the amendment is concerned not merely with the formal right to quit, but also with the *practical ability of working people to protect their interests in the workplace*,"[94] and that "[t]o withdraw the right to strike is to deprive the worker of his or her only effective bargaining power."[95] The opinion's discussion of this right was far-ranging, and included a critique of previous opinions that had rejected constitutional protections for strikers. It also connected broad union rights with the First Amendment rights of association and speech,[96] and considered the application of these protections to boycotts.[97]

To date, this opinion has been the most thorough discussion of Thirteenth Amendment labor rights in a judicial opinion. It is a good example of how the rights to organize, to strike, and to show solidarity with other workers might be connected with constitutional protections. While limited in its effect, it provides some hope that labor's constitutional claims might be revived and given life once again.

D. Room for Growth

While most of the holdings of federal cases discussing the

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91 38 Cal. 3d at 587–93.

92 *Id.* at 594 (Reynoso, J., and Bird, C.J., concurring).

93 *Id.* at 598. Though it did not explicitly reference Justice Marshall's dissent in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the concurrence's use of the "nexus" language suggests the approach to Equal Protection cases described in that opinion. Marshall's dissent stated:

> [T]he task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.

411 U.S. at 102–3 (Marshall, J., dissenting).

94 38 Cal. 3d at 598 (emphasis in original).

95 *Id.*

96 *Id.* at 600.

97 *Id.* at 601.

Thirteenth Amendment are unhelpful in establishing concrete rights, the concurrence in *Los Angeles County Employees' Ass'n.* demonstrates that their dicta provide some spark of hope. There may be some room at the margins of these cases for litigation that could expand rights discourse. While it is unlikely, particularly given the current composition of the courts, that full-blown rights of organization and labor action will be embraced on constitutional grounds, the foundation might be laid to begin the construction of legislative protections.

One starting point might be the holding in *United States v. Kozminski*.[98] While the case limited the definition of involuntary servitude, it explicitly recognized factors that could be used as evidence of servitude: "evidence of other means of coercion or of extremely poor working conditions is relevant to corroborate disputed evidence regarding . . . use of physical or legal coercion."[99] The opinion stated that "the victim's special vulnerabilities" might be relevant as well.[100] This suggests that involuntary servitude cases might probe into important areas. Cases where a worker is paid subminimum wages, or where health and safety laws are routinely violated, immediately suggest evidence that might support convictions for involuntary servitude. The reference to "special vulnerabilities" practically begs for an examination of factors such as immigration status, past criminal convictions, or even of socioeconomic position as it is tied to race and gender. As one example, advocates should be quick to point out to prosecutors[101] that under

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98 487 U.S. 931 (1988).

99 *Id.* at 952.

100 *Id.*

101 Because the anti-peonage statutes are criminal laws, it is difficult for advocates to control such litigation. There are a few possible solutions to this problem. One is to persuade a court to imply a civil remedy directly under the Thirteenth Amendment, under the authority of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Although two cases to date have declined to create such a remedy (*Turner v. Unification Church*, 473 F. Supp. 367 (D.R.I. 1978), and *Manliguez v. Joseph*, 226 F. Supp. 2d 377 (E.D.N.Y. 2002)), the decisions were both arguably flawed in significant ways. *See* Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981 (2002). *Manliguez* suggested another approach: implying a civil remedy from the criminal statutes. 226 F. Supp. at 384. This would import the same evidentiary standards discussed by the Supreme Court. Michael Wishnie has also suggested that advocates bring claims for Thirteenth Amendment violations under the Alien Tort Claims Act. *See generally* Michael Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Rights*, 4 U. PA. J. LAB. & EMP. L. 529 (2002). While this would not directly expand the definitions of servitude under criminal statutes, it would allow reference to international norms on involuntary servitude and labor rights. Finally, he points out that reporting criminal cases to prosecutors can help lead to the regularization of workers' immigration status. *Id.* at 541.

Hoffman Plastics,[102] undocumented workers' practical ability to address their working conditions through the rights afforded by the NLRA is severely compromised.

The rights-expanding purpose of litigating involuntary servitude cases, or reporting them to criminal prosecutors, is twofold. First, it allows courts to expand on the connection between working conditions and the balance of power in the workplace, opening the door to a broader understanding of the role that various forms of coercion play in work relationships. Second, it calls on courts to look at the status of the workers involved, and to confront squarely the dilemma that undocumented workers find themselves in after *Hoffman*. While a substantial amount of criticism has been leveled at the decision outside of the courts,[103] judicial recognition of the ways in which U.S. law makes undocumented workers "specially vulnerable" can be a useful form of pressure on the courts and the legislature to address the connection between immigration status and labor rights.

III. Appropriate Legislation

A. Badges and Incidents

Section 2 of the Thirteenth Amendment provides that "Congress shall have power to enforce this article by appropriate legislation."[104] Under this section, the Congress of 1867 passed the anti-peonage laws and criminal statutes to punish slavery, as well as the Civil Rights Act of 1866.[105] The Supreme Court held relatively early in the Amendment's history that it applied not only to state, but to private action.[106] The Court circumscribed the extent of Congress' reach, too; in *The Civil Rights Cases* it held that the Thirteenth Amendment granted Congress the power to pass laws to

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[102] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

[103] *See, e.g.*, Gabriela Robin, *Hoffman Plastic Compounds v. NLRB: A Step Backwards for All Workers in the United States*, 9 New Eng. J. Int'l & Comp. L. 679 (2003); Thomas J. Walsh, *Hoffman Plastic Compounds v. NLRB: How the Supreme Court Eroded Labor Law and Workers Rights in the Name of Immigration Policy*, 21 Law & Ineq. 313 (2003); David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. Rev. 1 (2003); Beth L. Throne, *Hoffman Plastic Compounds, Inc. v. NLRB: Empowering the Unscrupulous Employer and Stigmatizing the Undocumented Worker*, 17 Temp. Int'l & Comp. L.J. 595 (2003).

[104] U.S. Const. amend. XIII, § 2.

[105] Civil Rights Act of 1866, 14 Stat. 27 (1866) (codified at 42 U.S.C.A. §§ 1982–1992).

[106] *The Civil Rights Cases*, 109 U.S. 3 (1883).

"abolish[ ] all badges and incidents of slavery,"[107] but drew a limit by holding that "[m]ere discriminations on account of race or color were not regarded as badges of slavery."[108] The Court had set another limitation earlier in *The Slaughterhouse Cases*[109]; while it held that the prohibition against slavery did not apply only to freed slaves of African descent, it set a rule of construction that "it is necessary to look to the purpose which we have said was the pervading spirit . . . the evil which they were designed to remedy."[110]

Thus, while Congress clearly has the power to eliminate slavery or debt peonage, and pass laws applying to private actors to do so, it is unclear whether the "badges and incidents" language would apply to anyone but descendants of slaves held before the Civil War. Professor Maria L. Ontiveros of the University of San Francisco School of Law argues that it could; with reference to *Hoffman Plastics* she says "the inability to appeal to statutorily provided labor rights is a 'badge[ ] and incident' of slavery that violates the Thirteenth Amendment."[111] It is true that the inability to access the courts is among the "badges and incidents" which the Supreme Court has recognized as within Congress's power to prohibit through legislation.[112] But while the Court has held that Congress may eliminate slavery and the badges and incidents that flowed from its pre-Civil War existence, it has not to date held that the existence of badges and incidents of slavery *establishes* a slave-like condition.

Of course, as discussed earlier, the presence of legal impediments that parallel the recognized "badges and incidents" of slavery may constitute evidence of coercion under federal criminal statutes. While Congress may well be hesitant, for political reasons, to exercise its Thirteenth Amendment power to overturn *Hoffman Plastics*—as Professor Ontiveros argues it has the ability to do[113]—

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107 *Id.* at 20.

108 *Id.* at 25.

109 *The Slaughterhouse Cases*, 83 U.S. 36 (1872).

110 *Id.* at 72.

111 Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651 (2004).

112 In *The Civil Rights Cases*, the Court listed as "incidents" of slavery: "[c]ompulsory service for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, *to have a standing in court*, to be a witness against a white person . . . ." 109 U.S. at 22 (emphasis added). Judicially held incidents have also included "the freedom to buy whatever a white man can buy, the right to live wherever a white man can live," Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968), and (under the freedom to enter into contracts) the right to send one's child to a private school. Runyon v. McCrary, 427 U.S. 160, 173 (1976).

113 Ontiveros, *supra* note 111, at 675.

recognition by courts that low wages and conditions are closely tied to the inability of undocumented workers to access legal protections would both provide doctrinal support for such legislation and could shift the debate. Overturning *Hoffman* would not be simply about protecting migrant workers, but about eliminating a form of coerced labor.

There are other facets of labor law with direct connections to slavery. For example, Professor James Atleson has drawn the connection between status conditions under slavery and other forms of servitude and the doctrine of the duty of loyalty under the NLRA.[114] This doctrine, enunciated in cases such as *Jefferson Standard*,[115] denies the protection of labor law to workers who disparage their employer in some manner not directly related to a labor dispute. The impact of this rule is essentially to chill speech by employees, placing them in a position of vulnerability if they choose to speak freely about their employers. The consequence is to remove one avenue of appeal to the public in a labor dispute, and to keep the reality of workplace relations hidden from public view.

Given the connection between the notion that employees are forbidden from speaking ill of their employers and the status assumptions that emerged from the institution of slavery, Congress could feasibly pass a labor law reform bill that would include the elimination of the duty of loyalty under the Thirteenth Amendment. Such an enactment would have the practical effect of reforming social relations that continue to shape the modern workplace, but that are as antiquated as systems of bonded labor.

B. Wage and Hour Laws

Tying low wages to involuntary servitude, as *United States v. Kozminski* did, suggests another possible arena for Thirteenth Amendment legislation. Federal minimum wage and maximum hour legislation, in the form of the Fair Labor Standards Act ("FLSA"),[116] is, like the National Labor Relations Act, grounded in the Commerce Clause. But if low wages are sufficiently connected with involuntary servitude, it might be possible to pass similar legislation under the Thirteenth Amendment. Given the persistent

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114 JAMES ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 87–90 (1984). Professor Atleson currently teaches at the University of Buffalo Law School.

115 NLRB v. Local Union No. 1229, Intern. Broth. of Elec. Workers, 346 U.S. 464 (1953).

116 29 U.S.C.A. §§ 201–19 (West 2008).

problem of undocumented workers who are never paid at all for the work they do,[117] framing unpaid wages as slavery makes a good deal of sense intuitively. Artificially suppressed wages might be framed as a "badge and incident" of slavery insofar as it results from acts of coercion that are akin to bonded labor.

In her book *Suburban Sweatshops*,[118] Workplace Project founder Jennifer Gordon describes the fight of several worker centers in New York to pass the Unpaid Wages Prohibition Act, a law designed to toughen state wage standards and enforcement mechanisms. A federal version of this bill, passed under the Thirteenth Amendment, would have significant advantages over the FLSA. For one, the Thirteenth Amendment is universal in its application; it does not discriminate on the basis of citizenship or occupation. Because there is no need to tie it to commercial activity, there would be no need to establish that a worker is engaged in an enterprise in interstate commerce.[119]

Additionally, there would be little justification for exempting large numbers of workers from the bill's provisions, as the FLSA does.[120] In particular, exemptions such as those applying to farm workers and domestic service workers (who were originally excluded from minimum wage legislation as a concession to Southern Democrats who wanted to keep down the wages of African-American workers still heavily employed in these occupations)[121] could be directly overturned as "badges and incidents" of slavery.

In terms of coalition building, there is some risk that an exclusive focus on the rights of the most exploited workers, while a sensible approach to the Thirteenth Amendment, will not include workers who are not earning wages close to the legal minimum, and who do not suffer from the same "special vulnerabilities" as the most exploited workers. One issue that might have broader appeal than the minimum wage is maximum hour legislation. Current wage and hour laws afford workers no right to refuse to work overtime when required by an employer, although union contracts might structure the process for how overtime is distributed. In *The*

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117 For some of the most egregious examples, given the context, see Immigrant Justice Project, Southern Poverty Law Center, Broken Levees, Broken Promises: New Orleans' Migrant Workers in their Own Words (2008), *available at* http://www.splcenter.org/legal/news/article.jsp?pid=21.

118 JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (2005).

119 *Cf.* Fair Labor Standards Act, 29 U.S.C.A. §§ 206(a), 207(a)(1) (West 2008).

120 *See* 29 U.S.C.A. § 213 (West 2008).

121 Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1353–56 (1987).

Civil Rights Cases, the Supreme Court said that "[t]he long existence of African slavery in this country gave us a very distinct notion of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will . . . and such like burdens and incapacities were the inseparable incidents of the institution."[122] If compulsory service and the restraint of one's movement were "badges and incidents" of the slavery relationship, then nothing should preclude Congress from eliminating them under section two of the Thirteenth Amendment. The fact that the same incidents are shared by "free" labor, as they were at the time of the Thirteenth Amendment's founding, simply illustrates the power of the "free labor" philosophy of the amendment's founders. The condition of one laborer affects all others by association; the oppressiveness of the work relationship under the institution of slavery caused all labor to be viewed with disdain, and led to compromises of free workers' rights as well as those of the slave. To give the master ultimate power over the time of the servant is an incident of slavery, because it is a relationship that would have been unthinkable under a regime of truly free work relations. It exists, as the Thirteenth Amendment's framers might have argued, because we view all work as essentially slave-like.

Grounding minimum work standards in the elimination of involuntary servitude also highlights the moral dimension of work conditions in a way that a focus on interstate commerce does not. This is as important to the experiences of workers engaged in a movement as it is for the legal framework. Framing the issue as "slave wages" posits workers' demands as a matter of personal dignity and freedom. This can have a deep impact on how workers relate to their movements and the organizations within them.

IV. ORGANIZING

One hundred years ago, the labor movement's demands were couched in the language and theory of constitutional rights. The fact that the legal system rejected the movement participants' understanding of the Constitution did not deter them from making the claims. In resisting a Kansas law that would have submitted miners' disputes to an Industrial Court for adjudication, Alexander Howat, president of the miners' local, said "whether the law is declared constitutional or not, we have made up our minds that we

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122 *The Civil Rights Cases*, 109 U.S. 3, 22 (1883).

would rather go to prison than to be a party to enslaving the workers of this State."[123] James Pope calls this form of resistance "constitutional insurgency." Beginning from the premise that the purpose of a written Constitution is to allow the people, rather than the courts, to read and interpret it, this form of resistance uses constitutional claims as an animating principle. Its use can be traced through any number of successful movements, from women's suffrage to civil rights.

Jennifer Gordon describes a similar organizing theory in her book *Suburban Sweatshops*.[124] Through her discussion of "Rights Talk," she paints a picture of immigrant workers who go from believing (erroneously) that they have no rights to both claiming the limited rights that they do have and, more importantly, insisting on rights that the legal system denies them.[125] The process, as important as the product, is a key part of developing a group consciousness that fuels organizing: "In the discussions that grew from the organization's critical approach to talking about rights, Workplace Project members imagined the forms [that] group unity and action to build power might take—and simultaneously reinforced a sense of group identity through their deliberations."[126]

This describes workers actively engaged not only in formulating their aspirations and goals as a movement, but in formulating a strategy to achieve them. It is a model that draws strength from the active engagement of workers, rather than looking at internal democracy as an impediment to power.[127] This is the dominant model of worker centers organized along models of participatory democracy. This model is critical to leadership development and to maintaining an active base of members.[128]

The level of engagement that worker centers require of their members meshes well with the philosophy underlying a Thirteenth Amendment approach to labor rights. The current economic model of unionism is built on a legal theory based in the com-

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123 Letter from Alexander Howat, President, District 14, United Mine Workers of America, to John H. Walker (Mar. 8, 1921), *quoted in* Pope, *Labor's Constitution, supra* note 6, at 970.

124 GORDON, *supra* note 118.

125 *Id.* at 167–73.

126 *Id.* at 172.

127 In *Democracy is Power*, Mike Parker and Martha Gruelle argue against what they see as the predominant view within unions, that democracy and power are in tension with one another. They argue instead that democracy creates a form of power that unions desperately need to embrace. PARKER & GRUELLE, *supra* note 15, at 33.

128 JANICE FINE, SUBURBAN SWEATSHOPS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 208 (2006).

merce clause, goals that are framed in terms of union density and prevailing wages, and an organizing practice measured in terms of numbers of members rather than depth of commitment. In contrast, a fundamental rights model grounds its legal philosophy in ideas of freedom of association and civic participation, articulates its goals as respect and full inclusion within society, and defines the success of its organizing in terms of members' engagement with the organization. It demands redress of the full range of social impediments that are tied to the work relationship. An organization built on this model is more stable because members have a personal stake in not only the goals, but in their inclusion within the group. Gordon asserts, "Through structures to develop internal democracy and member leadership, it can model the democracy it works toward in the outside world."[129] The internal life of worker centers reflects the aspirational goals of fundamental labor rights.

V. Workers Centers and Rights Consciousness

A shift to a regime of labor rights grounded in the Thirteenth Amendment is unlikely to occur without a movement behind it. Incremental legal changes, such as those discussed above, will be useful steps along the way, but are unlikely to bring about major transformation.

Labor unions would initially seem to be well situated to carry out this project, and indeed, their political strength, staff and financial resources, and presence in so many communities throughout the country make them important participants. Unions' current proposals for labor law reform, however, are not particularly reflective of a Thirteenth Amendment approach.

The Employee Free Choice Act ("EFCA"), the current legislative project of the AFL–CIO and the Change to Win coalition, would allow workers to organize unions through a card check process,[130] in which a union is recognized as soon as a majority of workers in a given workplace sign cards stating their intent to organize a union.[131] It also mandates that, if a union and an employer are unable to negotiate a contract within a given time frame,

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129 Gordon, *supra* note 118, at 273.

130 Employee Free Choice Act, H.R. 800, 110th Cong. (2007), *available at* http://thomas.loc.gov/ (search term "Employee Free Choice Act" in "Search Bill Text").

131 The definition of a "workplace," or, in the NLRA's terms, a "bargaining unit," is a complicated question that has a substantial body of agency law built around it. This matter is beyond the scope of this paper.

they take the subjects of bargaining before an arbitrator, whose decision will be binding.

The law would facilitate formation of unions, but displaces the participation of workers in the organizing process. Organizing a union can take place through a minimal commitment. As under the current bargaining framework, winning a good contract will still require significant mobilization of the workers in a bargaining unit, but there will be some foundational level created by the prospect of binding arbitration. The default position shifts; now, the union will end up with a contract that likely includes some gains, even if the membership is not highly mobilized.

Even under the current NLRA framework, the challenges of organizing and winning a first contract can be liberatory processes, through which workers develop a critical consciousness and become mobilized to confront their employers. With an eased path to unionization, the opportunity for such mobilization, in which worker engagement and participation form the core of organizing strategy, fades somewhat. The fastest and easiest path to growth under the EFCA follows a track that further concedes the narrow definition of the work relationship that the economic model of unionism embraces.

This is not to say that EFCA is a bad thing for the labor movement. At a time when private sector union density is below ten percent, an easier path to union growth is essential. Even without a deeper vision of workplace rights and an active membership base, union density has a major impact on the power of unions to affect working conditions. There is no doubt that most unions will always fight for better contracts, and engage in qualitative membership mobilization in order to achieve them. The danger lies in limiting the goals of the movement to growth and power building, without also articulating broader social goals. An organizing method based on constitutional insurgency and "rights talk" posits a feedback model in which the pursuit of broad-based rights spurs further growth. It is growth reflected in the building of internal capacity, not just numerical increase.

As discussed above, worker centers are in some ways ideally suited to carry forth this project of rights-based organizing. Many of them are based in constituencies that are outside of the mainstream labor movement, with members who have some of the strongest claims to Thirteenth Amendment protections. Many of

them have significant legal staff that could take on litigation.[132] And the grant-making institutions that are often crucial to their financial support may have a wish to support projects that include impact litigation.[133]

One of the major challenges to worker centers that might engage in this project will be the need for legislative power. Individual worker centers, with a base in a single community and memberships that include large numbers of noncitizens, will find lobbying difficult. The best hope for addressing this dilemma lies in building alliances, not only with other worker centers, but with unions and other advocacy groups. A second challenge lies in connecting a distinctly American constitutional discourse with the political traditions of workers coming from countries with different histories, and with a wide range of experiences. Within this challenge, however, lies the opportunity to develop a labor consciousness with a distinctly international character; it invites comparison of domestic worker protections with international labor norms,[134] and suggests a new vision of workers' rights that transcends national boundaries, even while it recognizes close connections with national traditions.

The challenges inherent in developing a fundamental rights approach to labor law, one rooted in constitutional and international protections against slavery and involuntary servitude, are many. But they carry with them tremendous opportunities to strengthen worker movements, to set new standards of what work should provide, and to shift public consciousness about labor issues to encompass the broader human and social dimensions of work. The fundamental rights project carries with it the promise to complete the work of those who fought for the elimination of all forms of slavery, and to bring all working people a step closer to liberation.

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132 FINE, *supra* note 128, at 74.

133 Interview with Deborah Axt, Director of Legal and Support Services, Make the Road, NY, in New York, NY (Mar. 19, 2008).

134 In 2000, Human Rights Watch published a report detailing how U.S. labor law falls short of international standards articulated by the International Labor Organization and in the International Covenant on Economic, Social and Cultural Rights. HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (2000), *available at* http://www.hrw.org/reports/2000/uslabor/. For the use of international labor norms in organizing strategies, see Rebecca Smith, *Human Rights at Home: Human Rights as an Organizing and Legal Tool in Low-Wage Worker Communities*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 285 (2007).