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**Article**

**Specific Performance and the Thirteenth Amendment**

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## I. INTRODUCTION

Consider two cases. In the first, a farmer finds a disabled man with the intellectual capacity of a twelve-year-old by the side of the road and takes him home. He makes the man work seven days a week for seventeen hours a day. The farmer pays him fifteen dollars a week for a while, but eventually requires that he work for free, providing him with only minimal food, shelter, clothing, and medical care. The farmer isolates the man from any contact with the outside world and subjects him to physical abuse. When the man escapes, the farmer captures him and returns him to work. This continues for twenty years.<sup>1</sup>

In the second case, a successful college football coach contracts with a university to work for five years in return for a six-figure annual salary. After coaching four seasons, the coach takes a more lucrative offer from a rival school. The first university sues, seeking an order of specific performance requiring the coach to finish out his remaining season.<sup>2</sup>

In a bit of perverse irony, the conventional wisdom on contract remedies assumes that these two situations are essentially analogous. Both are said to be examples of “involuntary servitude,” conditions so closely resembling slavery that they are constitutionally prohibited.<sup>3</sup> The thesis of this Article is that the constitutional equation of these two cases is insupportable.

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1. These facts are based on *United States v. Kozminski*, 487 U.S. 931 (1988).

2. These facts are based on *Vanderbilt University v. DiNardo*, 174 F.3d 751 (6th Cir. 1999). Under current law, of course, specific performance of a personal-service contract is not available, and in fact Vanderbilt sought the enforcement of a liquidated damages clause against DiNardo. *Id.* at 753.

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

U.S. CONST. amend. XIII.

Properly understood, the Thirteenth Amendment outlaws the farmer's action but provides no protection to the coach, who can be held to his contract without violating the Constitution.

All first-year law students learn the rule that "[a] promise to render personal service will not be specifically enforced,"<sup>4</sup> and many of them learn that the Thirteenth Amendment's prohibition on "involuntary servitude" requires this per se rule.<sup>5</sup> American courts,<sup>6</sup> treatise writers,<sup>7</sup> and commentators<sup>8</sup> fre-

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4. RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (1981).

5. See, e.g., RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE 224–30 (3d ed. 2003) (discussing specific performance and the Thirteenth Amendment); JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 617 (4th ed. 1998) (same); HOWARD O. HUNTER, MODERN LAW OF CONTRACTS ¶ 6.05, at 6-27 to -30 (1986) (same); AMY HILSMAN KASTELY ET AL., CONTRACTING LAW 1062 (1996) (same).

6. See, e.g., *Woolley v. Embassy Suites, Inc.*, 278 Cal. Rptr. 719, 727 (Cal. Ct. App. 1991) ("There are a variety of reasons why courts are loathe to order specific performance of personal services contracts . . . . It would also run contrary to the Thirteenth Amendment prohibition against involuntary servitude." (citations omitted)); *Beverly Glen Music, Inc. v. Warner Commc'ns, Inc.*, 224 Cal. Rptr. 260, 261 (Cal. Ct. App. 1986) ("An unwilling employee cannot be compelled to continue to provide services to his employer either by ordering specific performance of his contract, or by injunction. To do so runs afoul of the Thirteenth Amendment's prohibition against involuntary servitude." (citing *Poultry Producers of S. Cal., Inc. v. Barlow*, 189 Cal. 278, 288 (1922))).

7. See, e.g., ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1204, at 401 (2006) ("A second reason [specific enforcement of personal-service contracts is not given] is that we have a strong prejudice against any kind of involuntary personal servitude. We insist upon liberty even at the expense of broken promises."); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 127(E)(2), at 846 (4th ed. 2001) ("It is clear that personal service promises will not be specifically enforced. While the original resistance to specific enforcement of such promises was based on the difficulties of judicial supervision, the prohibition of involuntary servitude under the Thirteenth Amendment to the Constitution of the United States also may be violated by such an equitable decree."); JOHN D. CALAMARI & JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 640 (5th ed. 2003) ("Such an order might well violate the involuntary servitude clause of the [T]hirteenth [A]mendment."); EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS 358 (1989) ("At least one commentator has suggested that specific performance might violate the prohibition of involuntary servitude in the Thirteenth Amendment to the United States Constitution.").

8. See Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 444 (1993) ("[C]ourts have suggested that to give one person a claim against another's human capital would create a form of involuntary servitude. The argument occasionally, but not always, suggests possible violations of the federal Constitution's Thirteenth Amendment."); Lea VanderVelde, *The Thirteenth Amendment of Our Aspiration*, 38 U. TOL. L. REV. 855, 856 (2007) (arguing that the Thirteenth Amendment prohibits specific performance of personal-service contracts); Jeffrey Abbas et al., *Model Human Reproductive Technologies and Surrogacy Act*, 72 IOWA L. REV. 943, 985–86

quently justify it on these grounds. The U.S. Supreme Court, however, has never directly ruled on the issue. Indeed, with few exceptions, the courts and commentators who make this claim do so with little detailed analysis of the text, history, or precedent construing the Thirteenth Amendment.<sup>9</sup> This Article rejects the conventional wisdom, arguing that in most situations specific performance of a personal service contract does not violate the Thirteenth Amendment.

Unlike most constitutional provisions, the Thirteenth Amendment contains no state action requirement. Rather, it forbids a particular set of conditions—slavery and “involuntary servitude”—declaring categorically that they shall not exist within the United States, *regardless of how the conditions are brought about*. Ultimately, the reach of the Thirteenth Amendment is determined not by what legal remedy is used, but rather by the condition of the promisor and whether he is in a condition of “involuntary servitude.” Accordingly, a contract that was legally enforceable only by money damages would be unconstitutional if the background circumstances were such that the contract reduced the promisor to a condition of “involuntary servitude.” Likewise, the specific performance of a personal service contract would not violate the Thirteenth Amendment so long as the conditions resulting from its enforcement did not constitute “involuntary servitude.” On the other hand, in some circumstances the specific performance of a contract could be unconstitutional, not because of any per se constitutional prohibition on the remedy but because its use in a particular context would reduce the promisor to the condition of “involuntary servitude.” In short, the Thirteenth Amendment is concerned with the conditions of the contracting party, rather than any particular contractual remedy.

The scope of the Thirteenth Amendment hinges on the meaning of “involuntary servitude.” The term has a rich history. When the Reconstruction Congress adopted the Thirteenth Amendment in 1865, it lifted its text virtually verbatim from the Northwest Ordinance of 1787.<sup>10</sup> Furthermore, prior to the Civil War, the term “involuntary servitude” had been used in

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(1987) (“[S]pecific enforcement of a personal service contract often puts the breaching party into a form of involuntary servitude.”).

9. There are important exceptions to this generalization, particularly the work of Lea VanderVelde. *See generally* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989).

10. *See infra* Part III.A.

the constitutions of more than a dozen states, and there was a body of case law construing its meaning.<sup>11</sup> Hence, this Article argues that, when the Thirteenth Amendment was adopted, the term “involuntary servitude” already had an established legal meaning, making it analogous to other pre-existing legal terms incorporated into the Constitution. The pre-Thirteenth Amendment understanding of “involuntary servitude” indicates that the condition did not result from government compulsion of an unwilling actor, *per se*. Rather, courts and legislatures drawing the line between permissible enforcement of contracts and the creation of “involuntary servitude” under the guise of a voluntary agreement looked at four interrelated factors.<sup>12</sup> First, did the promisor enter the contract while in a state of “perfect freedom,” or did the promisee have some overarching power over the promisor? Second, was the promisor compensated for her services with a “bona fide consideration,” or did the relationship constitute “unrequited toil?” Third, were there temporal limits on the contract? Agreements extending over extremely long periods of time were suspect while more limited engagements were not. Finally, did the promisee—the master—physically dominate and degrade the promisor—the servant—with abuse and claim a right to personally capture her and return her to service if she tried to quit?

Those who adopted the Thirteenth Amendment understood that they were choosing language whose meaning had been settled by more than seventy years of legal practice.<sup>13</sup> To be sure, many also had revolutionary aspirations regarding the changes they hoped to bring about through emancipation. The congressional debates over the Thirteenth Amendment and its implementing legislation, however, do not suggest any linguistic revolution as to the meaning of “involuntary servitude.” The fact that even the most radical supporters of the Thirteenth Amendment used the language of the pre-war state laws and referenced the four factors constituting “involuntary servitude” to describe the post-war machinations of former slave owners suggests they were operating within a widely accepted linguistic tradition.

After a century and a half, the Supreme Court has yet to develop a clear doctrinal framework for analyzing claims of “involuntary servitude.” Some of its more sweeping dicta suggest

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11. *See infra* Part III.

12. *See infra* Part III.B.

13. *See infra* Part IV.

that any attempt to coerce performance of a contract would constitute “involuntary servitude.”<sup>14</sup> However, in every instance in which the Court has actually found “involuntary servitude,” all four of the pre-war factors have been present.<sup>15</sup>

Given this background of a well-developed legal meaning prior to the Civil War, the absence of any radical linguistic redefinition of “involuntary servitude” in the period of the Amendment’s adoption, and an inchoate but in many ways consistent body of Supreme Court holdings, I conclude that specific performance of a contract where none of the four factors is present would not violate the Constitution. To put the case in the starkest terms, the Thirteenth Amendment protects citizens against degrading and slave-like domination regardless of how that condition is brought about. It does not protect, however, those who voluntarily enter into limited and well-compensated contracts that involve no ongoing physical abuse or domination by the other party. Such parties can be held to their contracts without violating the Constitution.

In Part II of this Article, I situate my argument within the broader context of debates over contract law, constitutional interpretation, and the meaning of the Thirteenth Amendment. Part III examines the meaning of “involuntary servitude” prior to the Thirteenth Amendment, laying special emphasis on the attempts of courts and lawmakers to distinguish between the legitimate enforcement of a contract and the creation of “involuntary servitude.” Part IV turns to the Thirteenth Amendment ratification debates and the adoption of contemporary implementing legislation, showing how the pre-Civil War meaning of “involuntary servitude” was carried forward into the new constitutional amendment. Part V examines the interpretation of “involuntary servitude” in the courts. It concludes that these cases reveal the absence of a clear doctrinal framework for applying the Thirteenth Amendment’s prohibition on “involuntary servitude” and contain some dicta suggesting that any coerced performance of a contract runs afoul of the Amendment. However, when the cases are understood in context, each instance in which the Court has found “involuntary servitude” is consistent with the pre-Thirteenth Amendment understanding of the term. Part VI then applies this Article’s theory regarding “involuntary servitude” to a typical case where a plaintiff might ask for specific enforcement of a personal service contract and con-

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14. See *infra* Part V.B.

15. See *infra* Part V.

cludes that such a remedy would not run afoul of the Thirteenth Amendment.

## II. SITUATING THE ARGUMENT

As a preliminary matter, it is worthwhile to consider three issues regarding the context of the Thirteenth Amendment: First, why does the constitutional claim about the per se rule against specific performance matter? Second, how have previous scholars approached the Thirteenth Amendment? Third, what constitutional methodology informs the arguments put forward in this Article?

### A. SPECIFIC PERFORMANCE, THE COMMON LAW, AND THE CONSTITUTION AS A CONVERSATION-STOPPER

Both doctrinal and scholarly developments in contract law suggest that there is a strong prima facie case to be made for the specific performance of personal service contracts. However, so long as the Thirteenth Amendment is generally accepted as foreclosing this development, there is little reason for courts and commentators to address this possibility. This Article argues that the Thirteenth Amendment does not bar the use of specific performance as a remedy and therefore seeks to open a space for conversation regarding its extension.

In private law the basic remedial choice is between money damages and a court order.<sup>16</sup> In contract law, “the modern trend is clearly in favor of the extension of specific relief at the expense of the traditional primacy of damages.”<sup>17</sup> This trend can be seen, for example, in the availability of negative injunctions for breach of personal service contracts. Initially, courts insisted that, because the law would not order a party to perform under an employment contract, it would also not issue an

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16. There are other options, of course. For example, Article 9 of the Uniform Commercial Code gives secured creditors a self-help remedy, allowing them to take possession of debtors' collateral and sell it without any judicial intervention. See U.C.C. § 9-609 (2004) (“Secured Party's Right to Take Possession After Default”). Cf. REPO MAN (Edge City 1984) (cult classic about the repossession industry).

17. E. ALLAN FARNSWORTH, CONTRACTS § 12.4, at 854 (2d ed. 1990); see also J. Berryman, *The Specific Performance Damages Continuum: An Historical Perspective*, 17 OTTAWA L. REV. 295, 295 (1985) (“In the area of contract law a number of common law jurisdictions, both here [i.e., Canada] and abroad, are currently reappraising the availability of contractual remedies. A discernable trend appears to be forming around the liberalization of specific relief vis-à-vis damages.”) (citation omitted).

injunction forbidding an employee from working for a competitor.<sup>18</sup> This rule was relaxed in *Lumley v. Wagner*,<sup>19</sup> where the court forbade Wagner, an opera singer, from performing for a rival theater in breach of her contract with Lumley.<sup>20</sup> The rule has been further relaxed by allowing negative injunctions even when the original contract does not contain an explicit negative covenant.<sup>21</sup>

The same trend can be seen with covenants not to compete. Initially, the law treated them with extreme suspicion. Indeed, in one early case the judge declared, “By God, if the plaintiff [suing on the negative covenant] were here he should go to prison until he paid a fine to the king.”<sup>22</sup> Less colorfully, courts considered such covenants to be restraints of trade that had to be “cautiously considered, carefully scrutinized, looked upon with disfavor, strictly interpreted and reluctantly upheld.”<sup>23</sup> Over the years, however, the rule has been substantially relaxed, although courts continue to be concerned that such covenants could contribute to monopolies.<sup>24</sup> Nevertheless, at least

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18. See, e.g., *Kimberley v. Jennings*, (1836) 58 Eng. Rep. 621, 621 (Ch.); *Kemble v. Kean*, (1829) 58 Eng. Rep. 619, 619 (Ch.).

19. (1852) 42 Eng. Rep. 687 (Ch.).

20. *Id.*; cf. *Whitwood Chem. Co. v. Hardman*, (1891) 2 Ch. 416, 420 (C.A.) (following *Lumley*); *Montague v. Flockton*, (1873) 16 L.R.Eq. 189, 192 (Ch.) (U.K.) (same); RESTATEMENT OF CONTRACTS § 380(2) (1932); *id.* § 380 *illus.* 6 (based on *Lumley*). *But see* Note, *Lumley v. Wagner Denied*, 8 HARV. L. REV. 172 (1894) (noting Justice Holmes’s rejection of the *Lumley* rule in *Rice v. D’Arville*, Mass. Suffolk Equity Session, Sept. 29, 1894). Interestingly, Justice Holmes did not seem to object in principle to specific performance of a contract to perform:

I do not [sic] quite see why, if an equitable remedy is to be given for the purpose of making an artist keep his contract, the usual remedy should not be given, and the whole of it; why, if I say, “If you do not sing for the plaintiff you shall not sing elsewhere.” I should not say, “If you do not sing for the plaintiff you shall go to prison.”

*Id.* *But see* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) (“The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else.”).

21. See YORIO, *supra* note 7, at 369 (noting that in contrast to the British practice, “[u]nder American law, if the plaintiff otherwise meets its requirements, an injunction may issue even in the absence of a negative covenant in the contract”).

22. RICHARD A. LORD, 25 WILLISTON ON CONTRACTS § 67:58, at 398 (4th ed. 2002) (quoting *Dyer’s Case*, Y.B. 2 Hen. 5, pl. 26 (1414)).

23. *Arthur Murray Dance Studios v. Witter*, 105 N.E.2d 685, 693 (Ohio Ct. Com. Pl. 1952).

24. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279–91 (6th Cir. 1898) (tracing the history of the common law hostility to covenants not to compete and the various exceptions created to the *per se* rule); Alan J. Meese,

one modern court has suggested that injunctions to enforce covenants not to compete should issue as a matter of course.<sup>25</sup> Even if this position is not widely followed, courts are willing to specifically enforce such covenants in many cases.<sup>26</sup>

Likewise, contracts scholars have offered powerful arguments in favor of specific performance. Approached normatively, economics suggests that contract remedies should be arranged so as to provide incentives for contracting parties to behave efficiently. Parties should perform their contracts when it is efficient for them to do so, but the law should not incentivize performance in cases when breach would be more efficient.<sup>27</sup> In a world of perfect judicial information, we could force the breaching party to internalize the costs of breach through damages so that it would only be profitable to breach when the benefits gained exceed the value of the lost performance to the breachee.<sup>28</sup> But when courts cannot accurately determine the position that the breachee would have been in had the breacher performed, damages will not be set at a level where promisors will be given the proper incentives to perform. Furthermore, contract doctrine suggests that courts systematically under-compensate promisees.<sup>29</sup> For example, when courts cannot determine the value of a promisee's expectancy with certainty, they award nominal damages rather than trying to put the

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*Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 21–23 (1999) (tracing the evolution of arguments against contracts providing for “general” restraints of trade); see also RESTATEMENT (SECOND) OF CONTRACTS § 188(2) (1981) (setting forth the conditions under which a covenant in restraint of trade is merely ancillary to a valid transaction and therefore potentially enforceable).

25. See *Moore v. Serafin*, 301 A.2d 238, 243 (Conn. 1972) (holding that an injunction is issued automatically when a party threatens to violate a restrictive covenant); *CUNA Mut. Life Ins. Co. v. Butler*, No. CV075002153, 2007 WL 2038626, at \*4 (Conn. Super. Ct. June 21, 2007) (“Irreparable injury and lack of an adequate remedy at law is considered to be automatically established where a party seeks to enforce a covenant not to compete.”). *But see* *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004) (requiring the moving party to establish three factors in addition to irreparable injury before an injunction will issue); *Laidlaw, Inc. v. Student Transp. of Am., Inc.*, 20 F. Supp. 2d 727, 751 (D.N.J. 1998) (same).

26. See FARNSWORTH, *supra* note 17, at 358–59 (discussing the enforcement of covenants not to compete).

27. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 131 (5th ed. 1998) (noting that breach of contract is in some cases efficient, not opportunistic).

28. See *id.* at 132–33.

29. See, e.g., *Freund v. Wash. Square Press, Inc.*, 314 N.E.2d 419, 422 (N.Y. 1974) (awarding nominal damages when the value of the plaintiff's royalties—i.e., his expectation damages—was indeterminate).

promisee in the position she would have been in had the contract been performed.<sup>30</sup>

From an economic perspective, specific performance can encourage more efficient outcomes. In their seminal article on legal remedies, Calabresi and Melamed argue that any legal entitlement can be protected by either a liability rule, a property rule, or an inalienability rule.<sup>31</sup> Liability rules allow parties to violate a legal right so long as they pay damages, while property rules affirmatively require that parties not violate legal rights on pain of criminal prosecution or contempt of court.<sup>32</sup> Hence, contract damages constitute a liability regime, while specific enforcement is a property rule. According to Calabresi and Melamed, a liability rule functions best when it is costly for parties to bargain with one another so that the “market valuation of the entitlement is deemed inefficient.”<sup>33</sup> When transaction costs are relatively low, a property rule promotes economic efficiency regardless of its allocation because parties can simply bargain to a Pareto optimal outcome.<sup>34</sup> Contracts by definition involve situations where transaction costs are low enough that parties have already bargained with one another. Therefore, specific performance—a property rule—is unlikely to lead to inefficient outcomes because, if it leaves the promisee with a right to performance that is of greater value to the promisor, the promisor can simply pay the promisee to give it up.<sup>35</sup> In short, the difficulty of accurately calculating damages and the possibility of economically efficient negotiation ex post counsels in favor of specific performance.

Evaluating the ultimate merits of these trends and arguments is beyond the scope of this Article. They indicate, however, that there is a powerful prima facie case in favor of specific performance in general. Notwithstanding these developments, however, the per se rule against specific performance of personal service contracts has remained firmly entrenched in the common law. Asking whether specific performance should be

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30. *Id.*

31. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 (1972).

32. *See id.* at 1092.

33. *Id.* at 1110.

34. *See id.* at 1093–98. *See generally* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (setting forth the argument for what later came to be called Coase’s Theorem).

35. *See* POSNER, *supra* note 27, at 146.

available as a remedy in at least some of these cases is meaningless so long as the specter of a Thirteenth Amendment ban occupies the field. The Constitution acts as a “conversation-stopper,” foreclosing a potentially fruitful discussion before it has begun.<sup>36</sup> The goal of this Article is to show that, despite the conventional wisdom, the field of specific performance is not fully occupied by the Constitution. A tour through previous treatments of the Thirteenth Amendment and the methodology adopted in this Article follows.

#### B. ARGUING OVER THE THIRTEENTH AMENDMENT

The Thirteenth Amendment is the unloved step-child of the Reconstruction additions to the Constitution, receiving far less attention than the Fourteenth Amendment, which has been the focus of exhaustive judicial and scholarly commentary. Like the Third Amendment, it is apparently so successful at suppressing a particular evil as to seem anachronistic. A small but important body of literature on the Amendment shows that such a view, however, is mistaken. The first thread of commentary in the literature focuses on race and what role, if any, the Thirteenth Amendment might play as either a fount of legislative authority for civil rights laws or as an independent source of substantive rights against various forms of racial subordination. The second conversation looks beyond race to the possibility of using the Thirteenth Amendment as a vehicle for combating a broader range of social ills. Ultimately, this Article is more at home in the second conversation. In contrast to this literature, however, I use a more rigorously textualist and originalist analysis of the Thirteenth Amendment, which leads me to adopt a narrower interpretation of its terms, at least as they apply to the specific performance of personal service contracts.

Much of the discussion regarding race and the Thirteenth Amendment has focused on Section 2, which states that “Con-

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36. In a sense, the constitutional claim acts as an authority that renders any discussion of specific performance of personal-service contracts purely hypothetical. As Joseph Raz has observed:

There is a sense in which if one accepts the legitimacy of an authority one is committed to following it blindly. One can be very watchful that it shall not overstep its authority and be sensitive to the presence of non-excluded considerations. But barring these possibilities, one is to follow the authority regardless of one's view of the merits of the case (that is, blindly). One may form a view on the merits but so long as one follows the authority this is an academic exercise of no practical importance.

JOSEPH RAZ, *THE AUTHORITY OF LAW* 24–25 (1979).

gress shall have power to enforce this article by appropriate legislation.”<sup>37</sup> This provision has undergone an evolution from a narrow to more expansive reading by the Supreme Court. Immediately after the Civil War, Congress exercised this enforcement power and passed the Civil Rights Act of 1866 to combat racial discrimination against former slaves.<sup>38</sup> In 1883, the Supreme Court held in the *Civil Rights Cases* that Congress had exceeded its authority under Section 2.<sup>39</sup> The Court denied that discrimination against African-Americans was a “badge of slavery,” concluding that its suppression did not come within congressional enforcement power.<sup>40</sup> A decade and a half later, the Court effectively ended any hope of using the Thirteenth Amendment as a weapon against racial subordination when it held in *Plessy v. Ferguson* that state laws requiring racial segregation have “no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude.”<sup>41</sup>

Despite these decisions, scholars and activists concerned with racial equality continued to focus their attention on reviving the Thirteenth Amendment as a vehicle for combating discrimination. Hence, during the 1930s and 1940s, progressive lawyers in the Justice Department and the National Association for the Advancement of Colored People experimented with using the Thirteenth Amendment to attack Jim Crow.<sup>42</sup> In the 1950s, Jacobus tenBroek launched a scholarly attack on the Court’s reasoning in the *Civil Rights Cases*, showing that the Reconstruction Congress that passed the Thirteenth Amendment understood its enforcement powers under Section 2 of the Amendment to reach far more widely than the Court had held.<sup>43</sup> In *Jones v. Alfred H. Mayer Co.*, the Court in effect vindicated tenBroek’s position, holding that Section 2 “clothed ‘Congress with the power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States*’” and that “Congress has the power [] to determine what

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37. U.S. CONST. amend. XIII, § 2.

38. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (2006)).

39. The Civil Rights Cases, 109 U.S. 3, 25 (1883).

40. See *id.* at 21.

41. *Plessy v. Ferguson*, 163 U.S. 537, 543 (1896).

42. See generally Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609 (2001).

43. See Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 173 (1951).

are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”<sup>44</sup> As the Supreme Court has seemed to limit congressional authority to pass civil rights legislation using the Fourteenth Amendment and the commerce power in recent years,<sup>45</sup> some commentators have suggested a return to the Thirteenth Amendment as a basis for such authority, pointing to the broad congressional power apparently sanctioned in *Jones*.<sup>46</sup>

In addition to the work on race, a number of scholars have looked to the Thirteenth Amendment as a constitutional remedy against a wide variety of evils such as oppressive labor conditions overseas,<sup>47</sup> the plight of immigrant workers,<sup>48</sup> violence against women,<sup>49</sup> and mail-order brides.<sup>50</sup> A detailed summary of this literature is beyond the scope of this Article, but a brief review of a few examples will help to situate my argument within the debate over the Thirteenth Amendment’s meaning.

Scholars have suggested that the Thirteenth Amendment prohibits conditions analogous to slavery. In *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court ruled that a child who was severely brain damaged by a violent and abusive father had no cause of action against the

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44. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439–40 (1968) (quoting *The Civil Rights Cases*, 109 U.S. at 20).

45. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 627 (2000) (striking down a portion of the Violence Against Women Act as exceeding Congress’s Fourteenth Amendment and Commerce Clause powers); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (finding that the Age Discrimination in Employment Act “exceed[ed] Congress’ authority under § 5 of the Fourteenth Amendment”).

46. *See, e.g.*, ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM* 131–36 (2004).

47. *See, e.g.*, Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 973 (2002).

48. *See generally* Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923, 923 (2007); Maria L. Ontiveros, *Immigrant Workers and the Thirteenth Amendment* (June 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=1017066>.

49. *See generally* Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 1 (2006); Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097, 1098–101 (1998).

50. *See generally* Suzanne H. Jackson, *Marriages of Convenience: International Marriage Brokers, “Mail-Order Brides,” and Domestic Servitude*, 38 U. TOL. L. REV. 895, 920 (2007); Suzanne H. Jackson, *To Honor and Obey: Trafficking in “Mail-Order Brides,”* 70 GEO. WASH. L. REV. 475, 568–69 (2002).

state officials who knowingly did nothing to protect him.<sup>51</sup> Akhil Amar and Daniel Widawsky turned to the Thirteenth Amendment as a possible way around the Court's holding.<sup>52</sup> They noted that the Thirteenth Amendment contains no state action requirement—the central issue in *DeShaney*.<sup>53</sup> Their argument was that extreme child abuse constituted a condition similar to slavery, giving *DeShaney* a cause of action even in the absence of any direct involvement by state officials.<sup>54</sup> They looked at the legislative history of the Thirteenth Amendment, slave narratives depicting the conditions under slavery, and subsequent judicial construction of the Amendment.<sup>55</sup> Ultimately, they concluded that the Amendment was meant to reach beyond the de jure abolition of chattel slavery to any condition that was substantially analogous to slavery.<sup>56</sup> Interestingly, however, their argument made no attempt to distinguish between the meaning of “slavery” and “involuntary servitude.”<sup>57</sup>

In the context of labor law, James Gray Pope has argued that American law should have grounded congressional authority to pass labor laws in the Thirteenth Amendment instead of making the mistake of basing these laws in the commerce power.<sup>58</sup> Adopting what he calls “popular constitutionalism,”<sup>59</sup> Pope's approach is to recover the constitutional arguments put forward by labor leaders in the years before the New Deal.<sup>60</sup> These thinkers argued that anti-union measures such as labor injunctions,<sup>61</sup> yellow dog contracts,<sup>62</sup> and anti-closed shop

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51. 489 U.S. 189, 191–203 (1989).

52. Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1376–78 (1992).

53. *Id.* at 1368.

54. *Id.* at 1381–82.

55. *Id.* at 1366.

56. *Id.* at 1384.

57. *Id.* at 1377.

58. 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, 1, 3–7 (2002).

59. *Id.* at 4; see 1 BRUCE ACKERMAN, *WE THE PEOPLE* 6–7 (1991) (arguing that, in times of heightened constitutional politics, democratic action sets the contours of constitutional law); LARRY D. KRAMER, *THE PEOPLE THEMSELVES* 3–8 (2004) (discussing the constitutional validity of popular constitutional arguments as opposed to elite legal constitutional arguments); Pope, *supra* note 58, at 10 n.30 (citing ACKERMAN, *supra*, at 6–7).

60. See Pope, *supra* note 58, at 7.

61. See *id.* at 14.

laws<sup>63</sup> constituted a kind of slavery. Accordingly, they insisted that in some instances the Thirteenth Amendment itself guaranteed pro-union legal outcomes<sup>64</sup> and that Congress had power under Section 2 of the Amendment to pass pro-union legislation such as the Wagner Act.<sup>65</sup> Elite progressive lawyers led by Felix Frankfurter, however, treated these arguments with disdain, insisting that pro-union New Deal legislation had to be justified under the Commerce Clause.<sup>66</sup> This move served to massively expand congressional power under the Commerce Clause while further narrowing the reach of constitutional protection for civil liberties under the Reconstruction Amendments.<sup>67</sup> It also located labor law firmly within the domain of economic, rather than human rights, legislation.<sup>68</sup> Pope's history is structured around a declension narrative in which the democratically authentic constitutional voice of labor was smothered by democratically inauthentic elites bent on preserving the power of their profession.<sup>69</sup> Had labor's constitutional argument been adopted, he argues, many of the distortions of modern constitutional law could have been avoided.<sup>70</sup> In contrast to Amar and Widawsky's attention to the original understanding of the scope of the Amendment, Pope grounds his positive assessment of labor's lost "freedom constitution" in the mass mobilization of working-class Americans behind a constitutional interpretation that they saw as protecting their freedom.<sup>71</sup> As I explain in the next section, the approach adopted in this Article is much closer to that of Amar and Widawsky than to that of Pope.

### C. A NOTE ON METHODOLOGY

Underlying any argument about the meaning of the Thirteenth Amendment is an approach to constitutional interpretation. In order to make this Article's discussion—particularly the historical discussion—easier to follow, it is important to lay

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62. *See id.* at 21–22.

63. *See id.* at 99.

64. *See id.* at 17–25.

65. *See id.* at 46–47.

66. *See id.* at 25–26.

67. *See id.* at 3.

68. *See id.* at 102.

69. *See id.* at 112–13.

70. *See id.* at 115–19.

71. *See id.* at 15–18.

some theoretical cards on the table. The goal in doing so is not to defend a particular interpretative methodology but rather to help readers evaluate these arguments in light of the admittedly controversial methodology this Article has adopted.

The argument herein is essentially textualist and originalist.<sup>72</sup> It is textualist for two reasons. First, it assumes that the constitutional text provides the surest guide to correct constitutional meaning. Second, it assumes that the constitutional argument against specific performance of personal service contracts turns on the meaning of the term “involuntary servitude” in the Thirteenth Amendment. Being required to perform services according to the terms of a contract is not the same thing as slavery. For example, it does not involve the enslavement of one’s children or render one’s person liable to being bought or sold.<sup>73</sup> To be sure, one might argue that specific performance of such contracts is morally objectionable in ways similar to slavery.<sup>74</sup> The text of the Thirteenth Amendment, however, already contemplates the prohibition of objectionable forms of labor that do not rise to the level of chattel slavery with the term “involuntary servitude.” Hence, it is to the meaning of this term that we must turn if we are to evaluate the constitutional case for the per se rule against specific performance of personal service contracts.

The meaning of the constitutional text is best derived from the public meaning of the Thirteenth Amendment at the time of its adoption. Hence, this Article does not attempt to provide a narrative of the political, intellectual, and social forces that called the Thirteenth Amendment into being.<sup>75</sup> It also does not

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72. See generally Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law & Legal Theory Research Papers Series No. 07-24, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244). Obviously the methodology they, and I, adopt here is controversial. See, e.g., Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Stephen Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185.

73. See KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 131 (1989) (“Because they were ‘chattels personal,’ slaves could be bought, sold, leased, used as collateral, bequeathed to subsequent generations, and even freed. In its crudest form, the slave law of the antebellum South simply categorized black human beings as property assets. As in the colonial era, slave status was perpetual and inherited through the mother.”).

74. See Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL’Y 179, 179–80 (1986).

75. See, e.g., MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* (2001) (providing

explore the original intentions of the authors of the Thirteenth Amendment.<sup>76</sup> I am interested in history only to the extent that it provides the context in which we can grasp the original semantic content of the term “involuntary servitude.”<sup>77</sup>

This Article also assumes, however, that there is what Lawrence Solum has called a linguistic division of labor, so that in looking for the original meaning of a particular term, we are not concerned simply with what the person on the street would have thought.<sup>78</sup> Some language acquires a specific, technical legal meaning.<sup>79</sup> As Blackstone put it, such terms of art “must be taken according to the acceptance of the learned in each art, trade, and science.”<sup>80</sup> In particular, when the Constitution includes words from another legal text that had been subject to judicial interpretation, we may assume—in the absence of strong contrary evidence—that the words are best understood by reference to the pre-existing legal gloss.<sup>81</sup>

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a detailed political history of the events leading up to the adoption of the Thirteenth Amendment).

76. *E.g.*, VanderVelde, *supra* note 9 (reconstructing the aspirations and intentions of abolitionist supporters of the Thirteenth Amendment). Ultimately, I believe the text that was chosen mediates the conflicts between, and compromises among, many competing intentions. Furthermore, we cannot know the intentions of every person who participated in the enactment of the Amendment. Neither can we assume this group had a single coherent set of intentions. *See* Solum, *supra* note 72, at 109 (“Although expected applications can be evidence of meaning, they cannot be the meaning of a constitutional provision.”); *infra* text accompanying notes 172–90.

77. *Cf.* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214 (1980) (“If the only way a judge could ascertain institutional intent were to count individual intention-votes, her task would be impossible even with respect to a single multimember law-making body, and a fortiori where the assent of several such bodies were required.”).

78. *See* Solum, *supra* note 72, at 54–56 (discussing terms of art and the linguistic division of labor).

79. For example, a “letter of marque” has a very specific meaning within the eighteenth-century laws of war, and in construing the term in the Constitution we must understand that meaning. *See* U.S. CONST. art. I, § 8 (granting to Congress the power to issue “letters of marque”).

80. 1 WILLIAM BLACKSTONE, COMMENTARIES \*59.

81. *See* INS v. St. Cyr, 533 U.S. 289, 301–04 (2001) (construing the scope of habeas corpus protection under the Constitution by reference to practice “[i]n England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government”); Nixon v. Adm’r of Gen. Servs., 433 U.S. 425, 473–74 (1977) (construing the term “bill of attainder” in the Constitution by reference to the meaning of this legal term in preadoption legal materials); Calder v. Bull, 3 U.S. (3 Dall.) 386, 389 (1798) (noting that the term “ex post facto” in the Constitution was used with knowledge that “the parliament of Great Britain claimed and exercised a power to pass such laws . . . [t]o prevent such and similar acts . . . [and that] the federal and state legislatures

In understanding language, our goal is to clarify for ourselves obscurities in a particular communicative act. Language can be obscure in two ways. It can be either ambiguous, meaning that it is susceptible to multiple meanings, or vague, meaning that the terms used are inherently indeterminate.<sup>82</sup> We can parse ambiguous language by determining from context which specific meaning of the term is being used. Vague language, on the other hand, must be understood through either a value judgment or some kind of functional analysis. When a term in the Constitution is ambiguous, originalism suggests that its meaning can be resolved as a matter of linguistic fact by looking at the original public understanding of the term. As this Article seeks to show below, as applied to virtually all cases of specific performance, the term “involuntary servitude” is ambiguous rather than vague. Hence, the Article is concerned entirely with constitutional interpretation—that is, a recovery of the original public meaning of “involuntary servitude”—and it does not offer a constitutional construction of “involuntary servitude.”

Finally, while its arguments are textualist and originalist, this Article does not assume a stance of original meaning *über alles*. While the semantic content of the constitutional text must be at the center of an analysis of constitutional meaning, due respect for the values of stability and continuity counsel in favor of giving deference to established precedent. Hence, the Article also examines how the Supreme Court has construed the term. To date, the Court has not developed a clear doctrinal structure for analyzing claims of “involuntary servitude.” However, the outcomes and circumstances of the cases the Court has decided are broadly consistent with the original understanding of the term.

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were prohibited from passing any bill of attainder, or any *ex post facto* law”).

82. Of course it is possible for a word to be both vague and ambiguous, depending on the context in which it is used. For example, when I make a face after smelling a jug of milk, and my wife asks me if it is “good,” the term has a determinate, nonvague meaning, although given the multiple possible meanings that the word “good” has, a speaker without a knowledge of milk’s tendency to go sour might be confused. On the other hand, when someone claims that “Richard Nixon was a good president,” their use of the term “good” is vague in that the truth of their statement turns on substantive judgments rather than semantic facts. Likewise, if I go into Starbucks and order a “tall” hot chocolate, the term is ambiguous because it might refer to a drink that is tall as opposed to short, or it might refer to a *Tall* drink as opposed to a *Venti* or a *Grande* drink. On the other hand, if I say “Richard Nixon was tall,” the term is vague. Tall for what purposes or compared to whom?

### III. THE MEANING OF “INVOLUNTARY SERVITUDE” BEFORE THE THIRTEENTH AMENDMENT

The term “involuntary servitude” had a long history before it was incorporated into the Thirteenth Amendment. The first bill calling for a constitutional amendment banning slavery was submitted in December 1863 to the Senate, and on February 10, 1864, the Senate Judiciary Committee reported language that would ultimately be adopted as the Thirteenth Amendment.<sup>83</sup> However, in coupling the prohibition against slavery with one against “involuntary servitude,” the framers of the Amendment were adopting a legal term with more than seventy years of history. Hence, in construing the meaning of this term, we first look to the treatment of the term prior to the adoption of the Amendment.

#### A. THE NORTHWEST ORDINANCE

The drafters of the Thirteenth Amendment lifted the phrase, “neither slavery nor involuntary servitude” verbatim from the Northwest Ordinance of 1787, which was passed by the Confederation Congress to govern the territory north of the Ohio River ceded to the United States at the end of the Revolution.<sup>84</sup> As early as 1782, officers in the Continental Army began lobbying Congress to provide veterans with western land.<sup>85</sup> In April 1783, they presented Congress with a number of propositions regarding the creation of a new state in the nation’s western territories,<sup>86</sup> including Proposition 11, which called for “the total exclusion of slavery from the State to form an essential and irrevocable part” of the constitution of their proposed commonwealth.<sup>87</sup> In April 1784, a congressional committee chaired by Thomas Jefferson produced a report suggesting:

[A]fter the year 1800 of the Christian era there shall be neither slavery nor involuntary servitude in any of the said states [of the Northwest Territory], otherwise than in punishment of crimes, whereof the party shall have been duly convicted to have been personally guilty.<sup>88</sup>

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83. TESIS, *supra* note 46, at 38–39.

84. Ordinance of 1787: The Northwest Territorial Government, 1 Stat. 50 (1789), *reprinted in* 1 U.S.C. at LV (2006) [hereinafter Northwest Ordinance].

85. JAY A. BARRETT, *EVOLUTION OF THE ORDINANCE OF 1787*, at 6–7 (Arno Press 1971) (1891).

86. *Id.*

87. *Id.* at 8.

88. *Id.* at 22. The report is reproduced in full in John M. Merriam, *The Legislative History of the Ordinance of 1787*, 5 PROC. AM. ANTIQUARIAN SOC’Y

Under pressure from Southern delegates, the ban on slavery was dropped, but three years later when Congress passed the Northwest Ordinance of 1787, its sponsors revived Jefferson's language.<sup>89</sup> Consistent with the requirements of the Ordinance, the constitutions of all of the states carved out of the Northwest Territory—Ohio, Michigan, Indiana, Illinois, and Wisconsin—contained prohibitions on both slavery and “involuntary servitude.”<sup>90</sup> Other states followed, and, prior to the adoption of the Thirteenth Amendment, fourteen states already had constitutional provisions—some of them adopted at the instigation of occupying federal troops during the Civil War—outlawing “involuntary servitude.”<sup>91</sup> Hence, far from inventing

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303, 308–10 (1888).

89. See Northwest Ordinance, *supra* note 84, art. VI. The article reads in its entirety:

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: *Provided always*, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid.

*Id.* There is a lively historical debate about why Jefferson's language was ultimately reinserted, as the change was supported by southern delegates to Congress. One possibility was that the language was meant to protect southern states from competition by precluding the creation of slave-facilitated monoculture north of the Ohio River. Another possibility is that by excluding slavery from the northwest, southern delegates were strengthening the hold of slavery in the southwest. See generally Paul Finkelman, *Slavery and the Northwest Ordinance: A Study in Ambiguity*, 6 J. EARLY REPUBLIC 343 (1986); J. David Griffin, *Historians and the Sixth Article of The Ordinance of 1787*, 78 OHIO HIST. 253 (1969); Staughton Lynd, *The Compromise of 1787*, 81 POL. SCI. Q. 225 (1966).

90. See ILL. CONST. art. VI, § 1 (“Neither slavery nor involuntary servitude shall hereafter be introduced into this state, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted . . . .”); IND. CONST. art. XI, § 7 (“There shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted . . . .”); MICH. CONST. art. XI, § 1 (“Neither slavery nor involuntary servitude shall ever be introduced into this state, except for the punishment of crimes of which the party shall have been duly convicted.”); OHIO CONST. art. VIII, § 2 (“There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted . . . .”).

91. See ARK. CONST. art. 5, § 1 (“Neither slavery nor involuntary servitude shall hereafter exist in this state, otherwise than punishment for crime, whereof the party shall have been convicted by due process of law . . . .”); CAL. CONST. § 18 (“Neither slavery, nor involuntary servitude, unless for punishment of crimes, shall ever be tolerated in this State.”); IOWA CONST. art. I, § 23 (“There shall be no slavery in this state; nor shall there be involuntary servi-

a new phrase, the framers of the Thirteenth Amendment adopted a legal term of art with a long history.

B. THE BOUNDARY BETWEEN SLAVERY AND CONTRACT IN THE LAW OF THE OLD NORTHWEST

The earliest gloss on the term “involuntary servitude” appears in Ohio’s 1802 constitution. After recapitulating the Northwest Ordinance’s prohibition on slavery and “involuntary servitude,” that constitution further provided two specific prohibitions aimed at limiting the enforcement of certain kinds of contracts. First, it stated that “nor shall any male person, arrived at the age of twenty-one years, or female person arrived at the age of eighteen years, be held to serve any person as a servant, under the pretence of indenture or otherwise, unless such person shall enter into such indenture while in a state of perfect freedom, and on condition of a bona fide consideration received, or to be received, for their service . . . .”<sup>92</sup> Second, the constitution singled out African-Americans for special protection, stating that “[n]or shall any indenture of any negro or mulatto, hereafter made and executed out of the state, or if made in the state, where the term of service exceeds one year, be of the least validity . . . .”<sup>93</sup>

The first of these Ohio prohibitions was adapted from the Vermont constitution of 1777.<sup>94</sup> In all likelihood, the choice was

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tude, unless for the punishment of crime.”), KAN. CONST. Bill of Rights, § 6 (“There shall be no slavery in this state; and no involuntary servitude, except for the punishment of crime, whereof the party shall have been duly convicted.”); LA. CONST. art. I (“Slavery and involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, are hereby forever abolished and prohibited throughout the State.”); MINN. CONST. art. I, § 2 (“There shall be neither slavery nor involuntary servitude in the State otherwise than as punishment of crime, whereof the party shall have been duly convicted.”); NEV. CONST. art. I, § 17 (“Neither Slavery nor involuntary servitude unless for punishment of crimes shall ever be tolerated in this State.”); ORE. CONST. art. I, § 34 (“There shall be neither slavery nor involuntary servitude in this state, otherwise than as a punishment for crime, whereof the party shall have been duly convicted.”); TENN. CONST. art. I, § 33 (“That slavery and involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, are forever prohibited in this State.”).

92. OHIO CONST. art. VIII, § 2.

93. *Id.*

94. See VT. CONST. ch. I, art. 1 (“Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave or apprentice, after he arrives to the age of twenty-one years; nor female, in like manner, after she arrives to the age of eighteen years, unless they are bound by their own consent, after they arrive to such

not accidental, as Vermont was the first state to declare that its constitution banned slavery.<sup>95</sup> The Ohio constitution, however, showed subtle shifts in emphasis. Both documents categorically banned contracts “to be held in service” by minors.<sup>96</sup> Whereas the Vermont document simply prohibited adults from binding themselves to service unless “they are bound by their own consent,” the Ohio constitution required that such contracts be entered into “while in a state of perfect freedom.”<sup>97</sup> Likewise, the Vermont constitution contemplated the legitimacy of a person being “holden by law, to serve . . . for the payment of debts, damages, fines, costs, or the like,” whereas the Ohio constitution allowed a person to “be held to serve any person as a servant” only “on a condition of a bona fide consideration.”<sup>98</sup>

Both provisions were written against the colonial and early American background of indentured servitude where a servant was subject to criminal penalties if he refused to work as promised.<sup>99</sup> Hence, where Vermont was willing to impose servitude as a remedy for debt and other liabilities, Ohio laid special emphasis on the importance of freely entered into agreements and adequate consideration, ruling out service based on a legal status such as debt.<sup>100</sup> Notably, the Ohio constitution’s gloss on “involuntary servitude” did not limit the remedy available for

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age, or bound by law, for the payment of debts, damages, fines, costs, or the like.”).

95. See James Oakes, “*The Compromising Expedient*”: *Justifying a Proslavery Constitution*, 17 CARDOZO L. REV. 2023, 2027 (1996) (“Vermont . . . flatly abolished slavery without fanfare in its 1777 constitution and, less than a decade later, its legislature reinforced emancipation with a comprehensive implementation statute.”).

96. See OHIO CONST. art. VIII, § 2; VT. CONST. ch. I, art. 1.

97. See OHIO CONST. art. VIII, § 2; VT. CONST. ch. I, art. 1.

98. See OHIO CONST. art. VIII, § 2; VT. CONST. ch. I, art. 1.

99. See generally ABBOT EMERSON SMITH, *COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA, 1607–1776*, at 264–78 (1947). Although most often associated with the colonial period, indentured servitude continued well into the nineteenth century. ROBERT J. STEINFELD, *COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY* 29–30 (2001). Labor historian Robert J. Steinfeld writes:

After the American Revolution, important changes began to take place in American life. During the early years of the nineteenth century, Congress closed the slave trade to Americans. Until 1820, however, Americans continued to import large numbers of indentured servants and contract laborers whenever the international situation permitted it. But in 1820 the market in imported servants collapsed. Thereafter, between 1820 and 1830, relatively few adult white servants were imported, and after the early 1830s, none were.

*Id.* (footnotes omitted).

100. OHIO CONST. art. VIII, § 2.

breach of an obligation to serve but only insisted that the obligations flow from genuine agreements.<sup>101</sup>

The second additional prohibition in Ohio's constitution was aimed at a frequently used method of circumventing state prohibitions on slavery. When a slaveholder took his slave into a free state, the slaveholder and the slave would enter into a long-term indenture contract under which the slave would "voluntarily" agree to serve his or her master. Ohio simply invalidated any such agreement in which the term extended beyond a year and categorically refused to recognize indenture agreements made by African-Americans in other states.<sup>102</sup> The Ohio Supreme Court provided a further gloss on the distinction between slavery and "involuntary servitude" that emphasized both consideration and length of service:

The prohibition [in the Ohio constitution] is against slavery and involuntary servitude as a state and condition of man in Ohio. The slavery prohibited consists in the right of one person to hold another person and his posterity in perpetual bondage to labor in Ohio, *without compensation*, save the reciprocal obligation of the master to support his slave. And the involuntary servitude inhibited is the same thing, with the exception, that the *bondage may not be for the entire life of the servant*, nor involve his posterity.<sup>103</sup>

While the constitutional provisions of other states carved out of the Northwest Territory provided no additional gloss on "involuntary servitude,"<sup>104</sup> the courts of both Illinois and Indiana grappled with the meaning of "involuntary servitude" in the years prior to the Civil War. In 1821, the Indiana Supreme Court decided the case of *In re Mary Clark*.<sup>105</sup> In 1816, Clark had "voluntarily bound herself to serve" a man named Johnson

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101. *Id.*

102. *Id.*

103. *Anderson v. Poindexter*, 6 Ohio St. 622, 690–91 (1856) (emphasis added) (emphasis omitted) (internal quotation marks omitted).

104. Compare IND. CONST. art. XI, § 7 ("There shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted . . ."), and MICH. CONST. art. XI, § 1 ("Neither slavery nor involuntary servitude shall ever be introduced into this state, except for the punishment of crimes of which the party shall have been duly convicted."), with OHIO CONST. art. VIII, § 2 ("There shall be neither slavery nor involuntary servitude in this state . . . , unless such person shall enter into such indenture while in a state of perfect freedom, and on condition of a bona fide consideration . . .").

105. *In re Clark*, 1 Blackf. 122 (Ind. 1821); see also Sandra Boyd Williams, *The Indiana Supreme Court and the Struggle Against Slavery*, 30 IND. L. REV. 305, 307–09 (1997) (discussing the Indiana Supreme Court's decision in *In re Clark*).

for a period of twenty years.<sup>106</sup> She subsequently sued for a writ of habeas corpus, asking that she be released from his service.<sup>107</sup> According to the court, the question presented was “whether her service, although involuntary in fact, shall not be considered voluntary by operation of law, being performed under an indenture voluntarily executed.”<sup>108</sup> The court initially approached the case as one where “the obligee requires a specific performance.”<sup>109</sup> This move allowed it to point out that under the common law, it could not specifically enforce the contract.<sup>110</sup> It supported this non-constitutional rule by reference to the classical equitable arguments against specific performance in such cases.<sup>111</sup>

The court, however, extended its analysis beyond these traditional arguments to take some account of the reality of the relationship between Clark and Johnson. “[A] covenant for service,” wrote the court, “might, as in the case before us, require a number of years. Such a performance, if enforced by law, would produce a state of servitude as degrading and demoralizing in its consequences, as a state of absolute slavery . . . .”<sup>112</sup> Furthermore, the court noted that Johnson was not actually asking for a court order forcing Clark to serve under the indenture agreement.<sup>113</sup> Rather, having no way of obtaining such an order, Johnson was personally forcing Clark to work under the contract.<sup>114</sup> The court wrote:

Deplorable indeed would be the state of society, if the obligee in every contract had a right to seize the person of the obligor, and force him to comply with his undertaking. . . . We may, therefore, unhesitatingly conclude, that when the law will not directly coerce a specific performance, it will not leave a party to exercise the law of the strong, and coerce it in his own behalf. A state of servitude thus produced, either by direct or permissive coercion, would not be considered voluntary either in fact or in law.<sup>115</sup>

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106. *In re Clark*, 1 Blackf. at 122–23.

107. *Id.* at 122.

108. *Id.* at 123.

109. *Id.*

110. *Id.* The court, however, went on to acknowledge that under certain circumstances—such as apprenticeship agreements or “[t]he case of soldiers and sailors”—the courts would require specific performance of personal obligations to work. *Id.* at 123–24.

111. *Id.* at 124.

112. *Id.*

113. *Id.* at 125.

114. *Id.*

115. *Id.*

*In re Clark* has been read as holding that whenever a person no longer wishes to perform under a contract for personal service any order that he or she continue performance would constitute “involuntary servitude.”<sup>116</sup> The court’s analysis, however, was more nuanced than this account suggests. It focused on the conditions that would result were Clark forced to perform under a long-term agreement with Johnson.<sup>117</sup> Perhaps more importantly, the court distinguished Clark’s relationship with Johnson from that of an ordinary worker with her employer by the fact that Johnson claimed the right to personally force Clark to perform, without any state intervention. Making the comparison explicit, the court wrote:

If a man, contracting to labor for another a day, a month, a year, or a series of years, were liable to be *taken by his adversary, and compelled* to perform the labor, it would either put a stop to all such contracts, or produce in their performance a state of domination in the one party, and abject humiliation in the other.<sup>118</sup>

In such a case it was apparently not the fact that a worker was compelled to work under the contract that produced “involuntary servitude.” Rather, it was that the master had a personal right to physically dominate the servant. The point is supported by the court’s conditioning of its conclusion about “involuntary servitude” on the assumption that “the law will not directly coerce specific performance.”<sup>119</sup> In other words, because the common law did not allow the court to order specific performance, the only way to force Clark to perform would be to license self-help violence by her master, which would produce “involuntary servitude.”<sup>120</sup> Seen in this light, the Indiana court’s approach to “involuntary servitude” is largely consistent with that taken by Ohio. *In re Clark*, however, looks not simply at the length of the relationship, but also the extent to which it involves one party’s exercise of complete dominion over the other party. In the case of Clark, the master’s claimed right to physically prevent her departure and personally force her to work was sufficient evidence of such domination.<sup>121</sup>

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116. See STEINFELD, *supra* note 99, at 263 (“Here, the legal right to withdraw from the labor relationship at any time the laborer wished marked the boundary between ‘free labor’ and ‘involuntary servitude.’”).

117. See *In re Clark*, 1 Blackf. at 125.

118. *Id.* (emphasis added).

119. *Id.*

120. See *id.* at 124 (noting that the remedy of specific enforcement would result in the master’s complete and unchecked dominion over the servant).

121. *Id.* at 125–26.

The treatment of “involuntary servitude” under the Illinois constitution was more complicated. Anti-slavery sentiment was weaker in Illinois than in the other states of the Northwest Territory, and this more accommodating attitude was reflected in its constitution.<sup>122</sup> Indeed, the Northwest Ordinance never fully excluded slavery from Illinois, even while it was a territory.<sup>123</sup> Pre-Ordinance settlers brought in slaves prior to 1787, and under the terms of Virginia’s cession of the territory to the federal government, the rights of these masters in their slaves were deemed to be excluded from the Northwest Ordinance’s prohibition on slavery.<sup>124</sup>

The enabling act for Illinois required a new constitution that was “not repugnant to” the Northwest Ordinance of 1787.<sup>125</sup> Initially, the constitutional convention adopted a provision exactly mirroring Ohio’s prohibition on slavery and “involuntary servitude,” including its limitations on the enforcement of indenture agreements.<sup>126</sup> In the final version of the constitution, however, the slavery provision was amended to read, “[n]either slavery nor involuntary servitude shall *hereafter* be introduced in this state,” grandfathering in the rights of current slave owners.<sup>127</sup> The rights of masters under previous indenture agreements were similarly protected. Hence, the language borrowed from the Ohio constitution limiting the enforceability of indentured agreements by “any negro or mulatto” was modified so that it applied only to those “hereafter made.”<sup>128</sup> More strikingly, a separate provision said that “[e]ach and every person who has been bound to service by contract or indenture in virtue of the laws of the Illinois territory heretofore existing . . . shall be held to a specific performance of their

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122. See ILL. CONST. art. VI, § 1; PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 149 (1981) (“In Ohio antislavery sentiment grew to be quite strong . . . , [but i]n Illinois, on the other hand, few antislavery politicians reached positions of power before the late 1850s.”).

123. See JANET CORNELIUS, A HISTORY OF CONSTITUTION MAKING IN ILLINOIS 1–2 (1969) (discussing slavery under the territorial government).

124. See *id.*

125. An Act to enable the people of the Illinois Territory to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States, Ch. 67, § 4, 3 Stat. 428, 430 (1818).

126. CORNELIUS, *supra* note 123, at 8 (discussing the legislative history of the 1818 constitution’s slavery provision).

127. ILL. CONST. art. VI, § 1 (emphasis added); see also CORNELIUS, *supra* note 123, at 9.

128. ILL. CONST. art. VI, § 1; CORNELIUS, *supra* note 123, at 8–9.

contracts or indentures.”<sup>129</sup> When the proposed Illinois constitution was presented to Congress in 1818, it contained a preamble asserting that it was consistent with the 1787 law,<sup>130</sup> but antislavery senators claimed that it violated the Northwest Ordinance.<sup>131</sup> In the end, however, Illinois was accepted into the Union despite its compromised prohibition on slavery.

In 1807, the territory of Indiana passed a law governing indentured servitude that was carried into the laws of the territory of Illinois when it was divided from Indiana.<sup>132</sup> Under the terms of the act, any slave owner bringing a slave into the territory could transform his or her slave into an indentured servant by going before a local magistrate and agreeing “upon the term of years which the said negro or mulatto will and shall serve his or her said owner.”<sup>133</sup> In 1814, a slave named Phoebe was taken to Illinois by her master, Joseph Jay, where she executed an indenture to serve him for forty years.<sup>134</sup> Over a decade later, after ratification of the state constitution, she brought “an action of trespass, assault, battery, wounding, and false imprisonment” against Jay, arguing that the enforcement of her indenture agreement constituted “involuntary servitude” under the 1787 ordinance and the Illinois constitution.<sup>135</sup> Jay admitted to “a little force and beating” but insisted that the indenture was valid under the Illinois constitution’s saving clause grandfathering in the enforceability of pre-statehood agreements.<sup>136</sup>

When the case arrived in the Illinois Supreme Court in 1828, Justice Lockwood made short work of any claim that

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129. ILL. CONST. art. VI, § 3. The constitution also explicitly allowed the use of slave labor in the salt mines of Gallatin County. *See id.* § 2; *see also* CORNELIUS, *supra* note 123, at 9 (discussing the history of Section 2 and noting that it was believed at the time that white men were physically incapable of working under the harsh conditions in the mines).

130. ILL. CONST. pmb. (“The people of the Illinois territory having the right of admission into the general government as a member of the union, consistent with . . . the ordinance of congress of 1787 . . . do, by their representatives in convention, ordain and establish the following constitution or form of government . . .”).

131. CORNELIUS, *supra* note 123, at 11–12 (discussing Congressional opposition to the 1818 constitution).

132. STEINFELD, *supra* note 99, at 259–60 (discussing the passage of the Indiana act and its adoption by Illinois).

133. An Act concerning the introduction of Negroes and Mulattoes into this Territory, *in* THE LAWS OF INDIANA TERRITORY 136, 137 (Philbrick ed., 1931).

134. *Phoebe v. Jay*, 1 Ill. (Breese) 268, 268 (1828).

135. *Id.* at 268, 270.

136. *Id.* at 269–70.

Phoebe had “voluntarily” agreed to the 1814 contract. He wrote:

Nothing can be conceived farther from the truth, than the idea that there could be a voluntary contract between the negro and his master . . . . I conceive that it would be an insult to common sense to contend that the negro, under the circumstances in which he was placed, had any free agency. The only choice given him was a choice of evils.<sup>137</sup>

He went on to state explicitly that the “indenturing was in effect an involuntary servitude for a period of years.”<sup>138</sup> Notwithstanding this conclusion, however, the court upheld Phoebe’s indenture.<sup>139</sup> The constitutional clause validating pre-statehood indenture agreements, according to the court, was an exception to the prohibition on “involuntary servitude,” one that had been blessed by Congress when it accepted Illinois into the Union.<sup>140</sup> Over the succeeding years, the Illinois Supreme Court repeatedly followed its holding in *Phoebe v. Jay*.<sup>141</sup> Indeed, in *Sarah v. Borders*, the court reaffirmed that the Illinois constitution imposed “involuntary servitude” upon those whose indentures were clearly invalid under the Northwest Ordinance, causing one dissenting justice to express incredulity that the court had construed “the constitution to make indentures valid which were before void, and reduce to a state of involuntary servitude, those who were legally free.”<sup>142</sup>

Robert Steinfeld has examined the interpretation of “involuntary servitude” in the jurisprudence of the states of the Northwest Territory and concluded that there were three approaches to determining when a contract became a species of “involuntary servitude.”<sup>143</sup> In Ohio, he argues, the issue turned on the length of time specified in the contract.<sup>144</sup> Requiring performance of short-term contracts was not “involuntary servitude,” while performance of long-term contracts was.<sup>145</sup> In Indiana, according to Steinfeld, the courts held that forced performance of any contract became “involuntary servitude” as

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137. *Id.* at 270.

138. *Id.*

139. *Id.* at 276.

140. *Id.* at 270–72.

141. See, e.g., *Sarah v. Borders*, 5 Ill. (4 Scam.) 341, 346 (1843); *Choisser v. Hargrave*, 2 Ill. (1 Scam.) 317 (1836).

142. *Sarah*, 5 Ill. (4 Scam.) at 352 (Canton, J., concurring).

143. See STEINFELD, *supra* note 99, at 256 (“Three separate and distinct constitutional traditions interpreting the term ‘involuntary servitude’ emerged . . .”).

144. *Id.* at 257.

145. *Id.*

soon as the party no longer wished to perform.<sup>146</sup> Finally, in Illinois, he says, no contract—regardless of its length or the unwillingness of the party to perform—could constitute “involuntary servitude” if it was freely entered into *ab initio*.<sup>147</sup> However, there are some problems with this neat tripartite division of approaches. For example, Steinfeld’s discussion of the distinction between the Illinois and Ohio approaches glosses over the fact that the Illinois Supreme Court held on numerous occasions that the enforcement of indenture agreements between slaves and their masters was a species of “involuntary servitude” nevertheless allowed under the state constitution. To be sure, he is well aware of the complex interplay of constitution and territorial statutes under Illinois law, but he still reads the Illinois cases as offering a gloss on “involuntary servitude.”<sup>148</sup>

Read together, the jurisprudence in Ohio, Indiana, and Illinois shows a fairly unified approach to the question of “involuntary servitude.” Rather than hanging the meaning of the term on a single concept, these states recognized that drawing the line between enforcing a contract and “involuntary servitude” necessarily required a nuanced understanding of the relationship between the two parties. Taken together, these materials suggest that Ohio, Illinois, and Indiana had determined—before the adoption of the Thirteenth Amendment—that “involuntary servitude” had four basic characteristics: First, it was not entered into “in a state of perfect freedom.”<sup>149</sup> Second, it lacked compensation or “bona fide consideration.”<sup>150</sup> Third, it extended over a long period of time that exceeded at least a year but could be less than the entire life of the servant.<sup>151</sup> Fourth, it involved complete domination by the master of the servant, including the right to use violence to coerce the servant.<sup>152</sup>

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146. *Id.* at 263.

147. *Id.* at 260.

148. *See id.* at 259–61.

149. *See* OHIO CONST. art. VIII, § 2; VT. CONST. ch. I, art. 1.

150. *See* OHIO CONST. art. VIII, § 2; VT. CONST. ch. I, art. 1.

151. OHIO CONST. art. VIII, § 2.

152. Although Illinois treated indenture agreements in a more lax fashion, the unified understanding of “involuntary servitude” is not undermined because the Illinois Supreme Court repeatedly held that its enforcement of agreements between slaves and masters was a species of involuntary servitude blessed by Congress and the Illinois constitution. *See, e.g.*, *Phoebe v. Jay*, 1 Ill. (Breese) 268, 270–72 (1828). Rather, the Illinois court acknowledged the enforcement of territorial slave indentures to be a species of “involuntary ser-

## C. OTHER STATE CONSTITUTIONAL CONVENTIONS

Prior to the Civil War, a number of other states adopted constitutions that prohibited “involuntary servitude.” Generally, these provisions were adopted with little or no debate about the wording or meaning of the amendments, but these conventions provide further evidence as to the public meaning of “involuntary servitude” in the years leading up to the adoption of the Thirteenth Amendment. The Iowa convention, for example, changed the wording of its amendment slightly to make it clear that only “involuntary servitude”—not slavery—could be imposed as a punishment for crime.<sup>153</sup> The states that adopted prohibitions against “involuntary servitude” without debate, however, did so with the awareness that they were using language with an established legal meaning. For example, Nevada’s 1864 convention copied exactly the language from California’s 1849 constitution because, as one delegate put it: “It now reads in the exact words of the California Constitution, and if it has been the subject of judicial investigation in that State, by retaining the same language we have the advantage of adopting with it such interpretation as has been given to it in that State.”<sup>154</sup>

At the Minnesota convention in 1857, the proposed prohibition on slavery varied slightly from the text of the Northwest Ordinance.<sup>155</sup> A delegate objected, saying:

Now, sir, I would prefer that this section should be made to conform in phraseology precisely with the clause in the Ordinance of 1787. That clause is the point upon which the whole question of Slavery has clung. It is in the Constitution. It was adopted into the Wilmot Provision, and has been used so extensively the public mind is prepared for just that phraseology. It is true, the language used excludes Slavery

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vitute,” one which had the characteristics identified by the courts and constitutions of the other states. *Id.*

153. See 1 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 209 (1857). The original proposal read, “Neither slavery nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this State.” *Id.* It was replaced with a provision reading, “There shall be no slavery in this State; nor shall there be involuntary servitude, unless for the punishment of crime.” *Id.*

154. OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA 783 (1866).

155. The original language read, “Neither Slavery nor involuntary servitude, unless for the punishment of crimes, shall ever exist or be tolerated in this State.” THE DEBATES AND PROCEEDINGS OF THE MINNESOTA CONSTITUTIONAL CONVENTION INCLUDING THE ORGANIC ACT OF THE TERRITORY 203 (1857).

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as effectually as any language could do it, but I would prefer that the language of the Ordinance of 1787 should be used . . . .<sup>156</sup>

Accordingly, the convention adopted language exactly matching that of the Ordinance.<sup>157</sup>

In some cases, however, debate over the issues not directly related to the meaning of “involuntary servitude” cast some light on how the term was understood at the time. For example, in 1859, Kansas—despite the small-scale civil war over slavery leading to its constitutional convention—adopted a provision on “involuntary servitude” without debate, and reserved the rhetorical fireworks over slavery for a proposed preamble to the bill of rights that sought unsuccessfully to declare that citizens had an “inalienable right to the control of their persons.”<sup>158</sup> Although the language was ultimately changed,<sup>159</sup> none of the delegates seemed to have thought the question was disposed of by the language on “involuntary servitude,” suggesting a public understanding of the term that was consistent with some alienation of control over one’s person.

At its first constitutional convention at Monterey in 1849, California’s convention unanimously agreed that slavery and “involuntary servitude” were prohibited in the state.<sup>160</sup> More contentiously, there was a proposal to exclude all freed African-Americans from the state.<sup>161</sup> Proponents of this measure repeatedly raised the specter of southern slave owners entering into agreements under which their slaves would agree to work in the California gold fields for a period of time in return for

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156. *Id.* at 281.

157. The language adopted by the convention read, “There shall be neither Slavery nor involuntary servitude in the State, otherwise than in the punishment of crime, whereof the party shall have been duly convicted.” *Id.*

158. See KANSAS CONSTITUTIONAL CONVENTION: A REPRINT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION WHICH FRAMED THE CONSTITUTION OF KANSAS AT WYANDOTTE IN JULY, 1859, at 187, 276–86 (1920).

159. *Id.* at 276–86. It was thought by some delegates to adopt the “higher law” justification put forward by the Wisconsin Supreme Court in its refusal to enforce the Fugitive Slave Act, which required state officials to return runaway slaves to their masters. See *id.* at 279; *In re Booth & Raycraft*, 3 Wis. 144, 160–61 (1854); *In re Booth*, 3 Wis. 13, 67–71 (1854). These cases were consolidated on appeal to the U.S. Supreme Court in *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859). The Court rejected the “higher law” justifications offered by the state tribunal. See *id.* at 525–26. Other delegates to the Kansas convention thought the measure was inconsistent with the idea of incarceration for crime. KANSAS CONSTITUTIONAL CONVENTION, *supra* note 158, at 280–85.

160. See J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION 43–44 (1850).

161. See *id.* at 137.

their freedom.<sup>162</sup> One delegate insisted that by freeing a slave with a market value of “four to six hundred dollars” and paying “seven hundred dollars to get a slave here,” a slave owner could get one year of labor where “[the slave] produces, according to the ordinary rates in the mines, from two to six thousand dollars.”<sup>163</sup>

At the heart of this argument was the assumption that a slave owner could enter into a contract with his slave that would create an indenture valid under California law in return for his freedom.<sup>164</sup> The opponents of the exclusionary provisions, however, rejected this assumption, and in so doing threw light on the contemporary understanding of the term “involuntary servitude.” First, it is clear that they did not reject per se the possibility of entering into an enforceable indenture agreement under the new constitution. One opponent of the drive to exclude freedmen from the new state said:

I have yet to learn that there is any law of California by which a freeman can be indentured. If colored boys in the States are indentured to the age of twenty-one and brought here before the expiration of the indenture, I suppose the indenture would be recognized; they would be required to serve to that period. But at the age of twenty-one they would undoubtedly become free.<sup>165</sup>

This delegate was even willing to enforce indentured agreements entered into by minor slaves outside of the state. As to adults, however, he said, “[t]he moment they enter our limits they are subject to our laws, and cease to be slaves.”<sup>166</sup> Another delegate was equally emphatic as to an indenture agreement entered into by an adult slave with his master outside of the state: “[T]hey are free the moment they touch the soil of California.”<sup>167</sup>

Second, it is noteworthy that the proponents of excluding African-Americans from the state did not dispute this interpretation of the ban on slavery and “involuntary servitude.” Their primary concern was the presence of any African-American within the state, an “evil” they saw as existing independently of the technical question of what sorts of indentures could be enforced under the proposed constitution.<sup>168</sup> These debates sug-

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162. *Id.* at 137–38.

163. *Id.* at 138.

164. *See id.* at 141.

165. *Id.*

166. *Id.*

167. *Id.* at 139.

168. *Id.* at 137.

gest an understanding of “involuntary servitude” that allowed the possibility of indenture agreements, provided that they were contracted in California, but excluded the enforcement of indentures entered into by slaves outside of the state who were not in a state of freedom when they entered into the agreements. This was precisely the understanding of “involuntary servitude” enshrined in Ohio’s 1802 constitution.<sup>169</sup>

Finally, they understood the prohibition of “involuntary servitude” as not reaching minor apprentices, regardless of where their indenture was contracted.<sup>170</sup> This final proviso was consistent with the notion that the master of a minor apprentice was a kind of *in loco parentis*, whose authority derived not from a contract per se but rather was analogous to the authority of a father over his own children.

The constitution of Arkansas also included a provision outlawing slavery and “involuntary servitude.”<sup>171</sup> In the spring of 1864, while the war still raged in much of the state, a constitutional convention elected by a tiny minority of Unionist voters met in Little Rock to draft the state constitution.<sup>172</sup> Isaac Murphy, the only man who had voted against secession at Arkansas’s 1861 secession convention, was elected governor of the new state government.<sup>173</sup> During his inaugural address, in which he suggested that the horrors inflicted on Arkansas by the war might be the judgment of God upon the state for the sin of slavery, he said:

The colored freedman should be as fully protected in all his rights of life, liberty, character, and property as the white freeman. He should also be compelled to perform his contracts, whether with the white man or the colored, by legislation suitable to his condition, and to effect this object, some change in the law of evidence may be necessary.<sup>174</sup>

Murphy’s remarks evidence an understanding of “involuntary servitude” consistent with legislation requiring the compelled performance of contracts. They also, of course, reflect a willingness to countenance the subordination of freed African-

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169. See OHIO CONST. art. VIII, § 2.

170. See *id.*

171. ARK. CONST. art. V, § 1.

172. See THOMAS A. DEBLACK, WITH FIRE AND SWORD: ARKANSAS, 1861-1874, at 104–06 (2003).

173. *Id.* at 105.

174. JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE SESSIONS OF 1864, 1864-65 AND 1865, at 18 (1870).

Americans.<sup>175</sup> Given southern attitudes toward freed slaves after the Civil War and the desire of many southern whites to reinstitute a system of de facto slavery, any gloss they offer on the term “involuntary servitude” must be treated with suspicion and may perhaps be disregarded entirely. Still, Murphy’s remarks represent at least some evidence as to the public meaning of “involuntary servitude.”

Unlike other state conventions, the topic of slavery and emancipation proved particularly acrimonious in the drafting of Louisiana’s 1864 constitution. Lincoln’s Emancipation Proclamation had specifically exempted several Louisiana parishes that were occupied by Union troops when it was issued.<sup>176</sup> There was wide support for emancipation among the pro-Union delegates to the 1864 convention, which was held in federal-occupied New Orleans, but a vocal minority insisted that loyal

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175. It would be a mistake, however, to classify Murphy as an unreconstructed southern die hard or a prophet of Jim Crow. He was a Pennsylvania-born lawyer. He married a Tennessee woman whose slave-owning father disowned her for Murphy’s antislavery views. See JOHN I. SMITH, *THE COURAGE OF A SOUTHERN UNIONIST: A BIOGRAPHY OF ISAAC MURPHY, GOVERNOR OF ARKANSAS 1864-68*, at 7 (1979). He was virtually the only Arkansas politician who publicly supported the passage of the Fourteenth Amendment, and he opposed—albeit ineffectively—the ex-Confederates who captured Arkansas politics after the war. See *id.* at 92–93. Murphy’s attitude toward the Fourteenth Amendment was complex. His biographer states: “[N]o evidence exists that Murphy wanted to bring the freedmen forward as fast as did the radicals [i.e. radical Republicans] or that he favored the Fourteenth Amendment fully.” *Id.* at 84. He was initially extremely cautious about bringing the Amendment for a vote, refusing to call a state ratifying convention or to call a lame-duck Unionist legislature to vote on it. At the time, Murphy insisted that no Arkansas newspaper would print a call for a ratifying convention and that it was not possible to obtain a quorum, although his main concern was probably the advisability of forcing passage of the amendment in the face of widespread popular opposition. See *id.* at 84–85. However, once ex-Confederates swept into power in Arkansas, he unsuccessfully pushed for passage of the Amendment as a way of speeding reunification with the North. *Id.* at 91–94. Indeed, these politicians viewed Murphy as the chief impediment to their “scheme for the restoration of the old slave-holding regime in the State.” See DEBLACK, *supra* note 172, at 146 (quoting statements of an anti-Murphy political activist in 1866).

176. “Now, therefore, I, Abraham Lincoln . . . do . . . designate as the States . . . in rebellion against the United States, the following . . . Louisiana, (except the Parishes of St. Bernard, Plaquemines, Jefferson, St. Johns, St. Charles, St. James, Ascension, Assumption, Terrebonne, Lafourche, St. Mary, St. Martin, and Orleans, including the City of New-Orleans) . . . And . . . I do order and declare that all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free . . .” Abraham Lincoln, *The Final Emancipation Proclamation* (Sept. 22, 1862), in *ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865*, at 424–25 (1989).

slave owners should be compensated.<sup>177</sup> They made their argument with such fervor that at one point a riot broke out on the floor of the convention.<sup>178</sup> As initially reported to the convention by the Committee on Emancipation, the proposed constitutional provision contained five sections.<sup>179</sup> Section one essentially copied the Northwest Ordinance's prohibition on "slavery and involuntary servitude."<sup>180</sup> The remaining sections, however, went on to secure abolition by forbidding the legislature from passing any law "recognizing the right of property in man," repealing the state's so-called "Black Code, and legislation on the subject of slavery" and stating that "[n]o penal laws shall be made against persons of African descent, different from those enacted against white persons."<sup>181</sup> Finally, section five read:

The Legislature shall, at its first session under this constitution, enact laws providing for the indenture of persons of African descent as apprentices to citizens of the State, on the same terms and conditions as those prescribed, or which may hereafter be prescribed, for the apprenticing of white persons.<sup>182</sup>

Although ultimately only the first two sections were adopted,<sup>183</sup> the un-adopted language provides some gloss on how the term "involuntary servitude" was understood. It sought to protect newly freed slaves by demanding that they be subject to the same laws as others, rather than placing restrictions on particular enforcement devices.<sup>184</sup> On the other hand, section

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177. See DEBATES IN THE CONVENTION FOR THE REVISION AND AMENDMENT OF THE CONSTITUTION OF THE STATE OF LOUISIANA 205–06 (1864) [hereinafter LOUISIANA DEBATES].

178. See *id.* at 207 ("The sergeant-at-arms, with one of his assistants, approach[ed] Mr. Campbell and made a feeble attempt to pacify him, but he shook them off without paying them the slightest attention, until he had read his proviso to the end, and then he resumed his seat, and they gave up the attempt to arrest him.").

179. *Id.* at 205.

180. *Id.* ("Slavery and involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, are hereby forever abolished and prohibited throughout the State."); *supra* note 89 and accompanying text.

181. LOUISIANA DEBATES, *supra* note 177, at 205.

182. *Id.*

183. *Id.* at 224.

184. *Id.* at 154–55 ("You cannot make laws to restrain [freed slaves] because laws must be general. If you make any discrimination you only remove one system of slavery by introducing another."). This argument was made by an opponent of immediate emancipation, who was seeking to show the parade of horrors that would result from adoption of the provisions on slavery. See *id.*

five contemplates “indentures”—albeit racially neutral ones—although the delegates may have only contemplated it as applying to minors.<sup>185</sup> At the same time, even proponents of immediate emancipation acknowledged that a situation of de facto “peonage or slavery” could exist notwithstanding any legal prohibition.<sup>186</sup> What emerges from these debates is an understanding of “involuntary servitude” as a condition that existed wherever slave-like conditions existed, rather than as a prohibition on any particular method of enforcement.

#### D. POPULAR USAGE OF THE TERM “INVOLUNTARY SERVITUDE”

Finally, non-technical uses of the term “involuntary servitude” from the period immediately prior to the adoption of the Thirteenth Amendment also reference factors similar to those considered by the antebellum courts. These sources show that the term was used to refer to conditions short of slavery that could be differentiated from the enforcement of legitimate contracts. For example, in his *History of the United States*, George Bancroft, a historian opposed to slavery, discussed the system of indentured servitude in the American colonies and drew a distinction between what he called “conditional servitude” and “involuntary servitude.”<sup>187</sup> Conditional servitude, said Bancroft, was created by a contract whereby the servant promised his labor in exchange for the cost of his transportation to America.<sup>188</sup> In addition, a distinction between slavery and “conditional servitude” lay in the length of the servitude. “The condition of apprenticed servants in Virginia differed from that of slaves chiefly in the duration of their bondage,”<sup>189</sup> Bancroft wrote, and he noted that “[o]ppression early ensued.”<sup>190</sup> Interestingly, however, he identified this oppression with the absence of adequate consideration and fraud in the creation of the contract.<sup>191</sup> Ban-

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185. An earlier version of Section 5 referred to “minors.” *Id.* at 96.

186. *Id.* at 97 (reproducing the minority report of the Committee on Emancipation).

187. See GEORGE BANCROFT, 1 HISTORY OF THE UNITED STATES, FROM THE DISCOVERY OF THE AMERICAN CONTINENT 175–76 (15th ed. 1852) (discussing indentured servitude in Virginia). In his passage on the introduction of slavery into Virginia, Bancroft speaks of “the ultimate evils of slavery” and “the sad epoch of the introduction of negro slavery in the English colonies.” *Id.* at 177.

188. *Id.* at 175.

189. *Id.* at 176.

190. *Id.* at 175.

191. *Id.* (“[M]en who had been transported into Virginia at an expense of eight or ten pounds, were sometimes sold for forty, fifty, or even threescore

croft used “involuntary servitude” to refer to obligations created without consent. Hence, he applied the term to “Scots . . . who were taken in the field of Dunbar” and “royalist prisoners of the battle of Worcester” who as prisoners of war were transported to be servants in America.<sup>192</sup> He applied the same term to Irish Catholics captured in anti-English insurrections and forcibly sent to the colonies.<sup>193</sup>

Similarly, in his *History of the State of Rhode Island and Providence Plantations*, Samuel Greene Arnold lauded the colonial Rhode Islanders for “the first legislative enactment in the history of this continent, if not of the world, for the suppression of involuntary servitude.”<sup>194</sup> According to Arnold, the law in question did this by requiring that “no man could be held to service more than ten years from the time of his coming into the colony, at the end of which time he was to be set free.”<sup>195</sup> The importance of these sources lies not in the particular legal details they describe, but rather in the way that their authors use the term “involuntary servitude” to refer to relationships that fall short of slavery but are distinguished from ordinary contracts by fraudulent or coerced initiation, the absence of fair consideration, and an extended period of duration. Their usage of the term shows how popular meaning drew a rough and ready distinction between “involuntary servitude” and the legitimate enforcement of contracts that more or less paralleled the dividing line carved out by the courts. Indeed, even pro-slavery speakers used the terms in roughly the same way. For example, Thornton Stringfellow, a southern apologist for slavery immediately prior to the Civil War, differentiated “voluntary” from “involuntary” servitude by noting that the former involved “stipulated wages, and a specified time.”<sup>196</sup>

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pounds . . . and a class of men, nicknamed spirits, used to delude young persons, servants and idlers, into embarking for America . . .”).

192. *Id.*

193. *See id.* at 176.

194. SAMUEL GREENE ARNOLD, 1 HISTORY OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 240 (1859).

195. *Id.*

196. THORNTON STRINGFELLOW, SCRIPTURAL AND STATISTICAL VIEWS IN FAVOR OF SLAVERY 17–18 (4th ed. 1856). Stringfellow’s discussion comes in an exegesis of the Bible, which he uses to defend slavery. *Id.* Strikingly, anti-slavery exegetes also used the term “involuntary servitude” to describe the same biblical passages. Hence, John Prince, a liberal New England Universalist pastor, wrote ten years before Stringfellow:

Involuntary servitude,—the subjection of an intellectual and moral being to the will and caprice of another, who ranks him with goods

#### IV. LEGISLATIVE HISTORY OF THE THIRTEENTH AMENDMENT

The legislative history of the Thirteenth Amendment suggests that the pre-Civil War understanding of the term “involuntary servitude” remained in place when the provision was adopted. Congressmen engaged in debate over the Thirteenth Amendment in the spring and summer of 1864.<sup>197</sup> After passing in the Senate, the Amendment initially failed to garner the necessary two-thirds majority in the House.<sup>198</sup> After the election in the fall of that year, the House once more took up the proposed amendment and after additional debate adopted it.<sup>199</sup> Not surprisingly, the precise meaning of the term “involuntary servitude” received very little attention during the debates. Rather, the senators and representatives spent the vast bulk of their time attacking or defending slavery,<sup>200</sup> arguing over the effect that the Amendment would have on the still raging war with the Confederacy,<sup>201</sup> the propriety of amending the Constitution,<sup>202</sup> states’ rights,<sup>203</sup> and, not least, partisan attacks.<sup>204</sup>

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and chattels ; the deliberate violation of human life by process of law, and its direful waste in battle ;—these infernal practices, as well as some degrading superstitions, are sought to be defended by a direct appeal to the books containing a record of the Mosaic code and a history of the customs and social regulations of the patriarchs in olden time.

See JOHN PRINCE, EIGHT HISTORICAL AND CRITICAL LECTURES ON THE BIBLE 79 (1846). Universalists represented a kind of popular rationalism that rejected Calvinist orthodoxy and subjected scripture to a less literal and more “reasonable” or “rational” interpretation. See generally E. BROOKS HOLIFIELD, THEOLOGY IN AMERICA 218–33 (2003) (discussing Universalism in America).

197. VORENBERG, *supra* note 75, at 107–12.

198. *Id.* at 138.

199. See *id.* at 176, 207.

200. See, e.g., CONG. GLOBE, 38th Cong., 2d Sess. 194 (1865) (statement of Rep. Fernando Wood) (“I now repeat the assertion, that the condition of domestic servitude as existing in the southern States is the highest condition of which the African race is capable, and when compared with their original condition on the continent from which they came is superior in all the elements of civilization, philanthropy, and humanity.”).

201. See, e.g., *id.* 1st Sess. app. at 126 (1864) (statement of Rep. Wheeler) (“I do not believe the adoption of this amendment would prolong the war one day.”).

202. See, e.g., *id.* 2d Sess. 214 (1865) (statement of Rep. C.A. White) (“I maintain, therefore, that the proposed amendment of the Constitution cannot be made of binding force and effect upon the States except by the ratification and consent of the States given in the exercise of the sovereign power of the States.”).

203. See, e.g., *id.* 1st Sess. 2991 (1864) (statement of Rep. Randall) (“Mr. Speaker, I cling to the States as a shipwrecked man clings to the plank.”).

## A. DEBATES OVER THE THIRTEENTH AMENDMENT

The debates do provide some clues as to the meaning of “involuntary servitude.” The framers of the Amendment were aware of the provenance and long use of the term in the Northwest Ordinance.<sup>205</sup> Senator Sumner of Massachusetts was the only person who raised any real objections to the wording of the Amendment.<sup>206</sup> He would have preferred to have substituted it with one modeled on the revolutionary constitutions of France, which used a right to equality before the law as the basis for abolition.<sup>207</sup> Senator Sumner’s proposal was ultimately withdrawn.<sup>208</sup> In passing, however, Senator Sumner noted, “I venture to doubt the expediency of perpetuating in the Constitution language which, if it have any signification, seems to imply that ‘slavery or involuntary servitude’ may be provided ‘for the punishment of crime.’”<sup>209</sup> He explained his concerns lat-

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204. See, e.g., *id.* (“We lived under [the Constitution] happily, cheerfully, and prosperously up to the advent of this Administration. I believe a change of the Administration will again make us united, happy, and prosperous.”).

205. See, e.g., *id.* 1st Sess. app. at 111 (1864) (statement of Sen. Howe) (noting that the passage of the Northwest Ordinance was one of the “grand opportunities” and “grand achievements” leading to the abolition of slavery).

206. See *id.* 1st Sess. 1482–83 (1864) (setting forth alternative language modeled on various French constitutions which he traced back to the concept of isonomia found in Herodotus). Sumner proposed that in place of the language ultimately adopted, the Constitution should have been amended to read:

All persons are equal before the law, so that no person can hold another as a slave; and the Congress shall have power to make all laws necessary and proper to carry this declaration into effect everywhere within the United States and the jurisdiction thereof.

*Id.* at 1483.

207. *Id.*

208. *Id.* at 1489. Senator Howard responded to Sumner, saying:

The learned Senator from Massachusetts, I apprehend, has made a very radical mistake in regard to the application of this language of the French constitution. The purpose for which this language was used in the original constitution of the French republic of 1791, was to abolish nobility and privileged classes. . . . It was never intended there as a means of abolishing slavery at all. The Convention of 1794 abolished slavery by another and separate decree expressly putting an end to slavery within the dominions of the French republic and all its colonies.

Now, sir, I wish as much as the Senator from Massachusetts in making this amendment to use significant language, language that cannot be mistaken or misunderstood; but I prefer to dismiss all reference to French constitutions or French codes, and go back to the good old Anglo-Saxon language employed by our fathers . . . .

*Id.* at 1489 (statement of Sen. Howard).

209. *Id.* at 1482 (statement of Sen. Sumner).

er in the debate:

I understand that it was the habit in certain parts of the country to convict persons or to doom them as slaves for life as a punishment for crime, and it was not proposed to prohibit this habit [by the Northwest Ordinance]. But slavery in our day is something distinct, perfectly well known, requiring no words of distinction outside of itself. Why, therefore, add “nor involuntary servitude otherwise than in the punishment of crimes whereof the party shall have been duly convicted?” To my mind they are entirely surplusage. They do no good there, but they absolutely introduce a doubt.<sup>210</sup>

Yet Senator Sumner did not explain what doubt he thought the language introduced.<sup>211</sup> He might have been referring to the struggles of the courts in Ohio, Indiana, and Illinois<sup>212</sup> to construe the term, but he makes no reference to them. Furthermore, his understanding of “the habit in certain parts of the country” seems to have been mistaken. The reported cases from the Northwest Territory do not indicate that anyone was ever condemned to life-time slavery as punishment for a crime, although, as noted above, a similar concern with the wording of the Northwest Ordinance was raised at Iowa’s Constitutional Convention.<sup>213</sup> Not surprisingly, Senator Sumner’s objections were treated as pedantic niggling by his fellow Senators and were ultimately ignored.<sup>214</sup>

There are, however, some faint hints in the 1864 debates that the Thirteenth Amendment was meant to reach beyond the eradication of chattel slavery. In cataloging the evils that slavery had perpetrated upon the nation, Senator Wilson argued that the power of slavery had “bade the Legislature of New Mexico enact a slave code, and also a code for the enslavement of white laboring men.”<sup>215</sup> The reference was to the system of debt bondage or peonage that existed in the southwest under the Spanish and Mexicans and which was continued after the territory was incorporated into the United States under the Treaty of Guadalupe-Hidalgo in 1848.<sup>216</sup>

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210. *Id.* at 1488.

211. *Id.*

212. *See* Sarah v. Borders, 5 Ill. (4 Scam.) 341, 346 (1843); Choisser v. Hargrave, 2 Ill. (1 Scam.) 317 (1836); *In re Clark*, 1 Blackf. 122 (Ind. 1821); Anderson v. Poindexter, 6 Ohio St. 622, 690–91 (1856).

213. *See supra* Part III.B; *supra* note 153 and accompanying text.

214. *See* CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864) (statement of Sen. Trumbull); *id.* at 1489 (statement of Sen. Davis).

215. *Id.* at 1321.

216. *See id.*; *see also* Treaty of Peace, Friendship, Limits, and Settlement, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922 (1848).

In his speech supporting the Amendment, Senator Harlan discussed the distinction between slavery and contract in ways suggesting that specific performance was not equated with “involuntary servitude.” Following Locke, he argued that “the title of the individual to property originates in the labor and skill and toil which he uses in reducing it to possession and in enhancing its value after it may have been rightfully acquired.”<sup>217</sup> Once acquired, title could be transferred by contract. He went on: “That property may exist in the services of others will hardly be seriously questioned. . . . I think all admit that title to the service of men may be acquired by contracts both express and implied.”<sup>218</sup>

Such property in the services of another, however, could only arise through a contract supported by consideration in exchange for the services.<sup>219</sup> Accordingly, Senator Harlan concluded that if one traced the title to a slave back through all his or her previous owners one would not find a voluntary contract, but rather “you will be told that [the slaveholder] conquered [the slave] on the battle-field.”<sup>220</sup> Senator Harlan reasoned, however, that these origins of the slave relationship might, at best, only justify ownership of the services of the captive but could not be extended to his children.<sup>221</sup> Senator Harlan’s argument did not equate slavery with any and all labor under threat of legal sanctions in part because he acknowledged the legitimacy of property in the services of another.<sup>222</sup> Rather, the evil of slavery lay in how the property was acquired—involuntarily and without compensation—and how it was maintained—by the enslavement of the children of slaves.

#### B. DEBATES OVER IMPLEMENTING LEGISLATION

Debates over the two major laws implementing the Thirteenth Amendment reflect indicia of “involuntary servitude” similar to those relied on by the pre-Civil War courts construing the Northwest Ordinance and its progeny. Given that both bills were passed shortly after the ratification of the Thir-

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217. CONG. GLOBE, 38th Cong., 1st Sess. 1437 (1864).

218. *Id.*

219. *See id.* (“It is held, I believe, by all jurists that a contract without consideration is void; or at least it is voidable on proving the absence or failure of consideration.”).

220. *Id.*

221. *See id.* at 1437–38.

222. *See id.* at 1437.

teenth Amendment and many of the same senators and representatives participated in debate on the bills and the Amendment, these records provide further evidence as to the original meaning of “involuntary servitude.”

The Civil Rights Act of 1866 declared that notwithstanding any state law to the contrary, freed slaves were to have the same rights “enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other.”<sup>223</sup> The law went on to make it a federal crime for any person acting under color of state law to deprive freed slaves of these rights.<sup>224</sup> The Anti-Peonage Act of 1867 stated, “the holding of any person to service or labor under the system known as peonage is hereby declared to be unlawful.”<sup>225</sup> The debates over the Anti-Peonage Act in particular are instructive because peonage was a system that in some cases was at least nominally contractual.<sup>226</sup> Accordingly, the drafters of the Act had to wrestle with the question of how to distinguish between enforcing ordinary contracts of labor and “involuntary servitude.” Given the widespread attempts by local governments and white employers to re-impose de facto slavery in the defeated Confederacy, the debates over the Civil Rights Act, which sought to respond to Southern mistreatment of newly freed slaves, also touched on the relationship between contract and “involuntary servitude.”

### 1. The Civil Rights Act

The debates over the Civil Rights Act focused on the issue of contract enforcement in two ways. First, supporters of the Act were concerned about legislation by southern legislatures that deprived newly freed slaves of the ability to make certain kinds of contracts. One congressman, for example, insisted that federal legislation was needed to prevent states from trying to:

Pass laws and enforce laws which reduce this class of people [i.e., freed slaves] to the condition of bondsmen; laws which prevent the enjoyment of the fundamental rights of citizenship; laws which declare, for example, that they shall not have the privilege of purchasing a home for themselves and their families; laws which impair their abili-

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223. Civil Rights Act of 1866 § 1, 14 Stat. 27–30 (codified as amended at 42 U.S.C. § 1981 (2006)).

224. *Id.* § 2.

225. Anti-Peonage Act of 1867 § 1, 14 Stat. 546 (codified as amended at 42 U.S.C. § 1994 (2006)).

226. See CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (statement of Rep. Thayer).

ty to make contracts for labor in such manner as virtually to deprive them of the power of making such contracts, and which then declare them vagrants because they have no homes and because they have no employment.<sup>227</sup>

Elsewhere, the ability “[t]o make and enforce contracts” was listed among the civil rights that the bill was drafted to protect.<sup>228</sup>

The second contractual issue that concerned the drafters was the rise of vagrancy statutes in the former Confederacy, an issue closely associated with concerns about contractual disabilities.<sup>229</sup> Essentially, these laws provided that African-Americans without either employment or a fixed place of residence could be arrested for vagrancy.<sup>230</sup> Violators were sentenced to hard labor, and their labor would then be sold to whites. The drafters of the Civil Rights Act recognized that such laws could be used to re-impose de facto slavery, particularly when they operated against a backdrop of other regulations restricting the contractual rights of African-Americans.<sup>231</sup>

The system of servitude-via-vagrancy was further reinforced by collusion between potential employers and state officials who openly condoned the pervasive—and often sadistic—use of violence against freed slaves. One congressman reported:

Planters combine together to compel them to work for such wages as their former masters may dictate, and deny them the privilege of hiring to anyone without the consent of the master; and in order to make it impossible for them to seek employment elsewhere, the pass system is still enforced. If a freedman is found away from home he is taken up and whipped, and if he has the impudence to complain he is whipped again.<sup>232</sup>

Elsewhere, Congress considered reports of an “old negro . . . kicked to death” whose body was then roasted on his own cabin fire.<sup>233</sup> The same attackers “also burnt two others

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227. *Id.* Elsewhere, Mr. Thayer asked rhetorically, “What kind of freedom is that under which a man may be deprived of the ability to make a contract . . . ?” *Id.* at 1152.

228. *Id.* at 1832 (statement of Rep. Lawrence).

229. *Id.* at 1151 (statement of Rep. Thayer).

230. *Id.*; see also Robin Yeamans, *Constitutional Attacks on Vagrancy Laws*, 20 STAN. L. REV. 782, 786 (1968) (citing several state statutes).

231. CONG. GLOBE, 39th Cong., 1st Sess. 1123 (1866) (statement of Rep. Cook). According to Representative Cook, under “the pretense of selling these men as vagrants,” these laws were often “calculated and intended to reduce them to slavery again . . .” *Id.*

232. *Id.* at 1160 (statement of Rep. Windom).

233. *Id.* at 1835 (statement of Rep. Lawrence).

nearly to death, putting out the eye of one.”<sup>234</sup> In short, the congressmen saw “involuntary servitude” as arising out of a combination of contractual disempowerment, state vagrancy laws, private collusion, and direct violence against freed slaves.

## 2. The Anti-Peonage Act

A year later, Congress passed the Anti-Peonage Act of 1867. Originally developed in Latin America,<sup>235</sup> peonage was described by the Supreme Court as “compulsory service,” which rendered the peon bound to their master’s service by indebtedness.<sup>236</sup> The Court stated, “The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced.”<sup>237</sup>

New Mexican peonage, however, cannot be understood as simply a legal condition. Rather, legal rules operated against a background of quasi-legal and blatantly illegal practices. In New Mexico, peonage could involve “debts ingeniously contrived and cynically augmented to justify bondage; the *de facto* sale of peons, as if they were chattel slaves; harsh social control involving physical confinement in barracoons; long, debilitating, unhealthy work; repeated corporal punishment, often of an extreme, sadistic kind.”<sup>238</sup> Likewise, as an outraged territorial supreme court made clear, in New Mexico peons could not count on local officials to protect them from overbearing masters.<sup>239</sup>

Hence, peonage was an amalgamation of law and social practice. “[A peon] could not abandon the service; and if he did, his master pursued, reclaimed, and reduced him to obedience and labor again . . . .”<sup>240</sup> Likewise, law and tradition authorized “masters . . . to punish servants who fail[ed] in the faithful ful-

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234. *Id.*

235. See generally Harry E. Cross, *Debt Peonage Reconsidered: A Case Study in Nineteenth-Century Zacatecas, Mexico*, 53 BUS. HIST. REV. 473 (1979) (discussing the relatively mild forms of peonage found in the records of one hacienda); Alan Knight, *Mexican Peonage: What Was It and Why Was It?* 18 J. LATIN AM. STUD. 41 (1986) (discussing the various forms of peonage found in different regions of Mexico).

236. See *Clyatt v. United States*, 197 U.S. 207, 215 (1905).

237. *Id.*

238. Knight, *supra* note 235, at 50.

239. See *Jaremillo v. Romero*, 1 N.M. 190, 193 (1857) (discussing “the unscrupulous disregard which too often prevails in justices’ courts in this country as to the legal rights of the unfortunate, the peon and the feeble, when contesting with the influential and more wealthy”).

240. *Id.* at 194.

fillment of their duties or disobey[ed] their superiors, by arrest or with shackles . . . .”<sup>241</sup> An 1851 territorial act simply stated that “on the payment of the amount yet due [on a debt to his master] he [i.e., a peon] cannot be bound to continue service; but if he does not pay, he shall be bound.”<sup>242</sup> As one historian explained, however, “the act had been so abused that slavery resulted. Generations of Mexican-American remained in bondage to repay some forgotten ancestor’s debts; men, women, and children were sold like sheep or cattle.”<sup>243</sup>

Disturbed by reports that the Army in New Mexico was returning escaped peons to their former masters, Senator Sumner began a push in the Senate for federal legislation.<sup>244</sup> Frustrated junior officers in the Army in New Mexico reported that Army superiors had ordered them to return peons to masters because “[p]eonage is voluntary and not involuntary servitude.”<sup>245</sup> While some Democratic members of the Senate argued that to the extent peonage was voluntary, there was no need for Congress to intervene,<sup>246</sup> proponents of the bill pointed out that many of the peons were Native Americans who had been kidnapped by “the Mexicans.”<sup>247</sup> Senator Wilson insisted that while peonage was “in some cases . . . voluntary,” the practice was “in most cases forcible.”<sup>248</sup> Furthermore, because peonage could continue so long as an outstanding debt existed, a “very small debt with the interest, where the peon has a family to support and the creditor supports him, amounts to a servitude

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241. *Id.* at 198 (quoting Decree No. 67, an 1828 Texas statute).

242. *Id.* at 199 (reproducing language from an 1851 New Mexico act). New Mexico further amended its master and servant acts in 1852 to criminalize the breach of a labor contract, even when there was no underlying indebtedness. *See id.* at 204–05. The law also purported to give peons certain rights against their masters, although the New Mexico Territorial Supreme Court acknowledged that peons could not rely on the local courts for justice. *See id.* at 205–06 (“No authority is given the tribunal in this course to adjudicate the servant to the master upon giving the latter judgment for his debt.”); *see also supra* note 239 and accompanying text.

243. Lawrence R. Murphy, *Reconstruction in New Mexico*, 43 N.M. HIST. REV. 99, 100 (1968).

244. *See* CONG. GLOBE, 39th Cong., 2d Sess. 240 (1867) (statement of Sen. Sumner) (pointing to the persistence of a system of slavery which even a presidential proclamation has been “unable to root out”).

245. *Id.*

246. *See id.* at 1571 (statement of Sen. Davis) (“I think this feature of a man’s working to pay the debts that he owes to his creditors, in a modified form at least, ought to exist.”).

247. *Id.* (statement of Sen. Doolittle).

248. *Id.* (statement of Sen. Wilson).

for life.”<sup>249</sup> In addition, the drafters were concerned that “the creditor . . . had a right by an involuntary process to the labor of the peon.”<sup>250</sup> In other words, not only would peonage bind a person who promised to work off a debt to work until the debt was paid, but it would also force into involuntary work one who borrowed money but never made any promise to work in repayment.

### C. A RESPONSE TO ALTERNATIVE INTERPRETATIONS

Several scholars have supported a broad reading of the Thirteenth Amendment, which would ban the specific performance of personal service contracts to protect laborers.<sup>251</sup> This line of thinking is best represented by the scholarship of Lea VanderVelde, who argues that the Thirteenth Amendment must be construed in light of the free labor ideology of some of its Radical Republican supporters in the Reconstruction Congresses.<sup>252</sup> Rather than focusing on the Thirteenth Amendment as a vehicle for combating racial subordination, VanderVelde argues that it also served to constitutionally prohibit any subjugation of employees to employers. This line of analysis does not begin with the text of the Amendment, but rather with the debates, which she rightly points out “focused primarily on the amendment’s objectives and expected effects.”<sup>253</sup> VanderVelde concedes that “[d]espite the extensive debates over the values and objectives of the [T]hirteenth [A]mendment, the members

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249. *Id.* (statement of Sen. Lane). Elsewhere, Senator Buckalew said:

In practice, this is not a system of service for the payment of a debt, in view of which the servitude commences. As already explained, the almost invariable fact is that the peon continues accumulating debt, and as that debt is formed while he is subject to a master the terms of it are always exceedingly unfavorable to him, and for a very nominal consideration he is continued in the system of service during his whole lifetime.

*Id.* at 1572.

250. *Id.* at 1571 (statement of Sen. Lane).

251. See, e.g., James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071, 1099 (1987) (supporting an “elastic” interpretation of the Thirteenth Amendment in support of labor rights); Heidi Marie Werntz, *Waiver of Beck Rights and Resignation Rights: Infusing the Union-Member Relationship with Individualized Commitment*, 43 CATH. U. L. REV. 159, 217–20 (1993) (noting courts’ interpretation of the Thirteenth Amendment to outlaw personal-service contracts).

252. See generally VanderVelde, *supra* note 8, at 856–57 (arguing that the framers intended the Thirteenth Amendment to maintain a system of “completely free and voluntary labor”); VanderVelde, *supra* note 9, at 437–38 (arguing that the drafters’ notion of free labor extended beyond slavery).

253. See VanderVelde, *supra* note 9, at 451.

of the Reconstruction Congress directed very little attention to its actual text.”<sup>254</sup> Indeed, she sees something of a disjunction between the text of the Amendment and the line of thinking that she identifies as the labor vision of the Thirteenth Amendment, writing, “[t]he members of Congress rarely considered whether the actual language of the amendment conveyed the breadth of meanings its advocates ascribed to it.”<sup>255</sup> Her extensive analysis of the congressional debates, however, uncovers a coherent line of thinking that linked the suppression of slavery to the suppression of abusive labor practices. She writes:

These dual strands grew out of the Republican Party’s origins in the Free Soil, Free Labor Movement as well as the self-interest of the northern white working class. As the condemnation of slavery provided the negative side of the labor vision, the free labor ideal provided its affirmative side. The two together present a powerful argument for constitutionally grounding the protection of working people from overreaching subjugation and abuses at the hands of employers.<sup>256</sup>

VanderVelde however, does “not make express claims about the [T]hirteenth [A]mendment’s precise meaning,”<sup>257</sup> which would require an explicit constitutional theory.<sup>258</sup> Historically, she identifies three ways in which the framers of the Thirteenth Amendment articulated their understanding of how the Amendment would reach beyond the suppression of chattel slavery.

First, she notes that all parties were eager to insist that certain kinds of relationships be excluded from the reach of the Amendment. In particular, several Senators and Representatives expressed concern that the Amendment would undermine the control of a patriarch over his family.<sup>259</sup> VanderVelde concludes that “[n]o congressmen claimed the term [‘involuntary

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254. *Id.* at 448.

255. *Id.* at 448–49.

256. *Id.* at 495.

257. *Id.* at 440 n.20.

258. *Id.* (“Such claims would require an analysis of the various schools of intentionalism. I am content to take the first step in identifying and tracing the nature and influence of the free labor theme.”). As explained in Part II, the argument offered in this Article is originalist, but it does not rest on the “original intentions” of the constitutional framers. Rather, it focuses on the original public meaning of the constitutional text.

259. *See id.* at 454–57 (citing CONG. GLOBE, 38th Cong., 1st Sess. 2941 (1864) (statement of Rep. Wood) (“The Constitution describes slaves, and I suppose children and apprentices might come under the same class as persons bound to service.”)).

servitude] should apply to wives or children, relationships within the family which could be considered unequal and potentially abusive” but that there was widespread agreement that it reached beyond the mere abolition of chattel slavery in the South.<sup>260</sup> She also notes that apprenticeship agreements, by which a minor was bound in service to a craftsman by his or her parent, were also not regarded as an object of the Amendment because “in essence, the apprenticeship relations was more an extension of the father’s dominion of the family than the master’s control of the workplace.”<sup>261</sup> As we have seen, these conclusions are consistent with the understanding of “involuntary servitude” and its relationship to apprenticeship evident in pre-Thirteenth Amendment debates in state constitutional conventions.

Second, she analyzes the rhetoric of the Radical Republicans, describing “a vision of employment relations in terms of substantial equality between employees and their employers and sufficient labor autonomy to permit individual autonomy.”<sup>262</sup> Much of the pre-Civil War rhetoric revolved around the status of labor. Southern apologists for slavery were eager to compare northern laborers to slaves, while northern anti-slavery activists sought to mobilize opposition to slavery by arguing that it degraded white laborers. For example, Senator Henry Wilson of Massachusetts argued during the 1860 election that slavery “degraded labor and the meaning of labor for poor white working men in the South.”<sup>263</sup> Likewise, during the congressional debates over the Thirteenth Amendment, Wilson

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260. See *id.* at 457 (arguing that the term “involuntary servitude” was “not limited . . . to Black slavery and its vestiges”).

261. *Id.* at 458. Given her historical approach, VanderVelde concludes somewhat oddly:

Despite the framers’ indication that “involuntary servitude” should not apply to apprentices, these arrangements eventually came within the term’s ambit. As patriarchal domination of the family eroded, apprenticeship came to be seen more as a labor relationship. Since the scope of the term “involuntary servitude” was broader than slavery and narrower than family relations, apprenticeships ultimately fell within the proscription of the [T]hirteenth [A]mendment.

*Id.* In support of this claim, however, she cites not any contemporary source from the debates over the Thirteenth Amendment, but rather the 1911 decision of the Supreme Court in *Bailey v. Alabama*, 219 U.S. 219 (1911), an opinion dealing with promissory fraud statutes rather than apprenticeships (Bailey was himself an adult). See *id.*

262. *Id.* at 452.

263. *Id.* at 466 (quoting Sen. Henry Wilson, How Ought Workingmen to Vote in the Coming Election? (Oct. 15, 1860)).

and other Radical Republicans insisted, “[t]he same influences that go to keep down and crush down the rights of the poor black man bear down and oppress the poor white laboring man.”<sup>264</sup>

This rhetoric, in turn, drew on debates over the status of labor and capital. In particular, VanderVelde links debates over the suppression of chattel slavery in the South to the “wage slavery” debates over the rights of the working man to the “fruits of his labor.”<sup>265</sup> At the heart of this vision was the assumption that freedom required more than simply the absence of chattel slavery and mere wage labor. Rather, to be a “freeman” meant that one enjoyed economic independence, social equality with one’s employer, and a set of legal rights insuring the reality rather than a simulacrum of freedom.<sup>266</sup>

Third, VanderVelde looks to the specific arrangements in the post-war South that the Radical Republicans thought could be addressed by the Thirteenth Amendment or implementing legislation passed pursuant to the authority that it granted.<sup>267</sup> She provides a litany of the labor practices objected to by supporters of the Thirteenth Amendment. In addition to condemning the practice of physically apprehending freedmen who fled from their employers, congressmen also criticized less blatant forms of coercion.<sup>268</sup> In the southern states a variety of rules were put in place designed to suppress competition among employers, thus effectively depriving potential employees of mea-

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264. *Id.* at 440 (citing CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866) (statement of Sen. Wilson)).

265. *See id.* at 472–77 (discussing the use of rhetoric tying “degraded labor” and “wage slavery” to chattel slavery in congressional debates).

266. *See id.* at 476 (citing CONG. GLOBE, 39th Cong., 1st Sess. 111 (1865) (statement of Sen. Wilson)). Senator Wilson, for example, said in the debates after the passage of the Thirteenth Amendment:

[W]e must see to it that the man made free by the Constitution . . . is a freeman indeed; that he can go where he pleases; work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; that the rights and guarantees of the good old common law are his, and that he walks the earth, proud and erect in the conscious dignity of a free man.

*Id.*

267. *See id.* at 485–86 (discussing the congressional denouncement of employer overreaching and abuse).

268. *See id.* at 487 (noting congressional disapproval of employers’ efforts to limit workers’ postemployment opportunities, fix wage rates, and restrict employees’ private conduct).

ningful choice or job mobility. These included compacts between former slave owners fixing wages and working conditions and prohibitions on the hiring of a freedman without the consent of his former master.<sup>269</sup>

In addition, states passed laws that allowed employers to bring “enticement” actions against competitors who lured away labor with higher wages.<sup>270</sup> Other laws allowed employers to cheat employees out of their wages by withholding earnings from any worker who quit before the end of a contract term, or alternatively provided pretexts for not paying those workers who did complete their contracts.<sup>271</sup> Finally, congressmen condemned imprisonment for debt and the system of peonage in New Mexico under which a debtor could be forced to work for his creditor in liquidation of the debt.<sup>272</sup> From this evidence, VanderVelde concludes:

From the texts of the debates, there is little doubt that Congress intended to accord workers the right to quit, but the parameters of this right were more complex. In addition to widespread agreement to prohibit specific performance of labor contracts, speakers repeatedly raised the specter of laborers forcibly being dragged back to either their former masters or their new employers and subjected to the boss’s will.<sup>273</sup>

In short, VanderVelde’s research presents a powerful case for an understanding of the term “involuntary servitude” reaching specific performance of all personal service contracts.

This objection can be met with two lines of argument. The first response relies on an essentially philosophical claim about the relationship between the drafters’ intentions and the meaning of the constitutional text. The second response is essentially historical, and seeks to show that the statements of intention

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269. *Id.* at 488–91.

270. *Id.* at 490 (citing D. NOVAK, *THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY*, 3, 5–7, 39–40 (1978)).

271. *See id.* at 492–93 (citing CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866) (statement of Sen. Wilson)). Senator Wilson said:

The Legislature of Louisiana has passed an act by which . . . any freedman who makes a contract under it is perfectly at the control and will of the man with whom he makes the contract. If that man is a bad man, at the end of the year the freedman will not receive a farthing for his year’s labor. He can trump up charges to cheat and defraud the laborer. So odious are these laws that the Freedmen’s Bureau has set them aside . . . because they in reality reduce the freedman to the condition of a serf, or at any rate of a peon.

CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866).

272. *See* VanderVelde, *supra* note 9, at 490 (citing CONG. GLOBE, 39th Cong., 2d Sess. 1571–72 (1867) (statement of Sen. Doolittle)).

273. *Id.* at 489.

on which VanderVelde's argument relies are essentially consistent with the meaning of "involuntary servitude" that existed prior to the drafting of the Thirteenth Amendment. Of these two lines of argument, the first claim is more important than the second. This is because the philosophical argument points towards the important way in which the historical arguments that I have offered serve a limited purpose. Specifically, I am *not* purporting to offer an account of the hopes, motivations, or aspirations of those who drafted the Thirteenth Amendment. Rather, this Article represents an effort to determine the public meaning of the term "involuntary servitude" when it was incorporated into the U.S. Constitution. There is obviously some overlap between this project and the historical project of understanding the politics of Reconstruction, but they are nevertheless different and distinct endeavors.

The relationship between the intentions of the Radical Republican supporters of the Thirteenth Amendment and the meaning of the term "involuntary servitude" is complex. There are two problems with simply equating their intentions with the meaning of the term. First, as a semantic matter, to reduce the meaning of a legal text to its expected application would lead to paradoxical results. Lawrence Solum gives the following example:

Suppose we limited the application of the Constitution of 1789 to those applications that were expected by the framers. Expectations are occurrent or dispositional mental states—individuals either have an expectation or they don't. Let's assume that framers were of one mind (they all shared the same expectations) and that their expectations were abundant: they thought about lots of possible applications. But even assuming that the framers [sic] minds were racing at a mile per minute, their expectations would quickly run out. That is, if the meaning of a constitutional provision were identical to the original expectations, there would simply be "no meaning" in most cases. For example, it might well be the case that no framer would have thought of the possibility of a tie between the President and Vice President in the Electoral College [a possibility under the original constitution of 1789]. If the meaning of the relevant provision were identical with the expectations, then there is simply no constitutional provision at all to deal with this situation.<sup>274</sup>

The very fact that a constitution by definition must apply to unforeseen circumstances implies that its meaning cannot be reduced to its drafters' expectations about its application without risking an absence of meaningful content. The other problem with equating the meaning of "involuntary servitude" with

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274. Solum, *supra* note 72, at 109–10.

the intentions of the Radical Republicans was that they were by no means the only constitutionally relevant actors in its enactment. For example, the Thirteenth Amendment passed Congress on January 31, 1865 and was signed by the President on February 1, 1865, but it did not take effect until December 6, 1865, when it was ratified by Georgia. In the end, twenty-seven states ratified the amendment, including all the former Confederate states except Florida, Texas, and Mississippi. Hence, in addition to abolitionist Senators, the adopters of the Thirteenth Amendment included ex-Confederate slaveholders whose goal was not social transformation but rather reintegration into the Union and the withdrawal of federal troops with as little disruption to existing hierarchies as possible. This does not mean that the Thirteenth Amendment must be construed with reference to the wishes of slaveholders, but it does illustrate the complexity involved in identifying the relevant group of intentions if intentions are to be made the touchstone of meaning. Nevertheless, the intentions of the Radical Republicans documented by VanderVelde<sup>275</sup> are important because they provide linguistic evidence as to the term's publicly available meaning at the time of the Thirteenth Amendment's adoption. This leads to the second, historical, response to VanderVelde's claims.

As a historical matter, the very complexity that VanderVelde flags<sup>276</sup> undermines her claim that specific performance was universally regarded as unconstitutional. First, nowhere did the congressmen and senators ever directly consider the question of equitable enforcement of an otherwise legally enforceable, affirmative promise to work. Given that no common law jurisdiction had such a remedy, it is unsurprising that the issue did not surface. Extending language discussing the brutal conditions of New Mexican peonage or the Reconstruction South to all personal service contracts, however, is unwarranted. These relationships involved coercion, exploitation, duration, and violence that made them far more similar to the de facto slavery via indenture, condemned by antebellum courts as "involuntary servitude," than to specific enforcement of a voluntary, well-compensated, limited, non-violent contract for personal services. Senator Cowan, who VanderVelde cites in support of her claim, argued that short of slavery an equitable order of specific performance of a labor contract was "the only way I know by

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275. See VanderVelde, *supra* note 9, at 445.

276. See *id.* at 488–90.

which the laborer can be put at the mercy of the hirer in a contract for labor; it is the only possible and conceivable way apart from slavery.”<sup>277</sup> Senator Cowan, however, was a staunch opponent of Reconstruction and by insisting that the Thirteenth Amendment prohibited only orders of specific performance—and outright slavery—he was seeking to confine its meaning to pre-Amendment decisions of the equity courts.<sup>278</sup> In other words, the specific performance claim was made to assert erroneously that the term “involuntary servitude” did nothing but codify the existing common law. Not surprisingly, supporters of the Amendment did not adopt Senator Cowan’s position. Rather, they made the actual condition of the workers, rather than a specific remedy, the touchstone, highlighting, for example, state laws under which “any freeman who [made] a contract . . . is perfectly at the control and will of the man with whom he makes the contract.”<sup>279</sup> Under this formulation, the forced performance of contracts that would result in domination akin to slavery could be “involuntary servitude,” but such an understanding would not make specific performance of *all* personal service contracts per se unconstitutional.

The legislative history surrounding the Thirteenth Amendment shows that it was originally understood to extend beyond chattel slavery to include extremely oppressive but nominally contractual relationships. This concern with extremely oppressive relationships, however, need not be understood as co-extensive with the equitable rule against specific performance of personal service contracts. Rather, such an interpretation is both under- and over-inclusive, exempting many oppressive relationships from the Amendment’s reach, while covering the enforcement of many contracts that would not result in the kind of slave-like conditions encompassed by the original understanding of the term.

#### V. “INVOLUNTARY SERVITUDE” IN THE COURTS

The U.S. Supreme Court has yet to provide a clear doctrinal framework for analyzing claims under the Thirteenth Amendment. Rather, judicial treatment of the Amendment has been ad hoc, involving sweeping and contradictory dicta with-

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277. *Id.* at 489 n.224. (citing CONG. GLOBE, 39th Cong., 1st Sess. 342 (1866) (statement of Sen. Cowan)).

278. *See* CONG. GLOBE, 39th Cong., 1st Sess. 341–43 (1866) (statement of Sen. Cowan).

279. *Id.* at 340 (statement of Sen. Wilson).

out clear doctrinal elaboration.<sup>280</sup> Nevertheless, when read against the original understanding of “involuntary servitude,” the cases largely fit within the contours of the concept fleshed out by the states carved from the Northwest Territory before the Civil War.

#### A. EARLY CASES CONSTRUING THE THIRTEENTH AMENDMENT

The Thirteenth Amendment was adopted in 1865. Although some lawyers feared it would invalidate a host of contracts,<sup>281</sup> the notion that specific performance of a personal service contract is a form of “involuntary servitude” did not find its way immediately into the mainstream legal consciousness. For example, John Norton Pomeroy’s 1879 *Treatise on the Specific Performance of Contracts* makes no mention of an argument based on the prohibition of “involuntary servitude,” focusing entirely on the practical inability of courts to enforce such obligations.<sup>282</sup> One possible counterexample is the case of *Ford v. Jermon*<sup>283</sup> decided in the District Court of Philadelphia in 1865. Originally, the plaintiff, a theater owner, sought an order of specific performance against an actress who had contracted to perform at his theater.<sup>284</sup> He subsequently amended his complaint to seek only a negative injunction,<sup>285</sup> based on the recent-

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280. See, e.g., William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1313–17 (2007) (noting the lack of consistent jurisprudence interpreting the Thirteenth Amendment).

281. See HAROLD M. HYMAN, *THE RECONSTRUCTION JUSTICE OF SALMON P. CHASE* 130 (1997) (“Warnings proliferated that any party to any civil contract who regretted entering into it might allege Thirteenth Amendment grounds in order to win release.”).

282. See JOHN NORTON POMEROY, *A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS* § 22 (1879) (“As a general proposition, contracts which provide for the personal services of the parties, are not specifically enforced in equity, not because the legal remedy of damages is always sufficiently certain and adequate, but because the courts do not possess the means and ability of enforcing their decrees, which would necessarily be very special, and of compelling the performance which constitutes the equitable remedy.”). Forty-seven years later, the third edition of Pomeroy’s treatise likewise contained no clear reference to the Thirteenth Amendment argument. See JOHN NORTON POMEROY & JOHN C. MANN, *A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS* (3d ed. 1926). *But see id.* § 310 n.(a) (“Any system or plan by which the court could order or direct the physical coercion of the laborer would be wholly out of harmony with the spirit of our institutions . . . .” (quoting *H.W. Gossard Co. v. Crosby*, 109 N.W. 483 (Iowa 1906))).

283. 6 Phila. 6 (Dist. Ct. 1865).

284. *Id.* at 6.

285. *Id.*

ly decided English case of *Lumley v. Wagner*.<sup>286</sup> After rehearsing various practical difficulties involved in granting such a remedy, the court in *Ford* stated that such an order would be “a mitigated form of slavery” and would not be given.<sup>287</sup> Despite this ringing statement, there are good reasons for not reading *Ford v. Jermon* as a contemporary gloss on the Thirteenth Amendment. The opinion never cites or references the Amendment.<sup>288</sup> Rather, the reference to slavery seems to be a rhetorical flourish added to what seems like a relatively straightforward common-law analysis. Although later commentators unsuccessfully advocated rejecting the *Lumley* rule on constitutional grounds, this does not seem to be what the court is doing in *Ford*.<sup>289</sup>

The earliest explicit judicial construction of the effect of the Thirteenth Amendment on the enforcement of a contract of personal service came in the 1867 circuit case of *In re Turner*.<sup>290</sup> The case arose out of an indenture agreement between a young girl, Elizabeth Turner, her mother, and their former master, Philemon T. Hambleton, who may also have been Turner’s father.<sup>291</sup> In 1864, Maryland had adopted a new constitution that outlawed slavery.<sup>292</sup> As the court explained:

Almost immediately thereafter many of the freed people of Talbot county [on Maryland’s eastern shore] were collected together under some local authority, the nature of which does not clearly appear, and the younger persons were bound as apprentices, usually, if not always, to their late masters.<sup>293</sup>

According to her indenture, Turner agreed to work for Hambleton for ten years.<sup>294</sup> Under the state’s newly adopted “black code,” Hambleton had no duty to provide her with the education in reading, writing, and arithmetic to which white

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286. (1852) 42 Eng. Rep. 687 (Ch.).

287. *Ford*, 6 Phila. at 7.

288. *See id.* at 6–8.

289. Compare Robert S. Stevens, *Involuntary Servitude by Injunction*, 6 CORNELL L.Q. 235, 235 (1921) (arguing that the rule in *Lumley v. Wagner* constitutes involuntary servitude), with RESTATEMENT OF CONTRACTS: SPECIFIC PERFORMANCE § 380(2) (1932) (endorsing negative injunctions of personal-service contracts), and *id.* § 380 illus. 6 (describing a situation based on *Lumley v. Wagner*).

290. 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247).

291. *See* HYMAN, *supra* note 281, at 125 (noting the possible paternity).

292. *See id.* at 124.

293. *In re Turner*, 24 F. Cas. at 339.

294. *See id.* at 338.

apprentices had a right under Maryland law.<sup>295</sup> Also, in contrast to white indenture agreements, the black code declared the master's authority over an African-American apprentice a "property and interest" that in contrast to rights over a white servant could be transferred without the servant's consent.<sup>296</sup> In return for her decade of service, Turner's mother was to receive \$22.50, and Turner herself would get \$15.00 at the end of the contract.<sup>297</sup>

Turner sued for a writ of habeas corpus in federal court, claiming that her detention under the contract constituted "involuntary servitude."<sup>298</sup> In an extremely terse decision, Chief Justice Chase, sitting as a circuit justice, held that the indenture agreement constituted "involuntary servitude" under the Amendment and that Maryland's differing rules for African-American and white apprentices violated the newly passed Civil Rights Act.<sup>299</sup> The court ordered Turner released,<sup>300</sup> and Hambleton did not appeal.<sup>301</sup> The opinion contains no arguments for its conclusions.<sup>302</sup> The factual recitation, however, focuses on all of the elements considered by antebellum courts in the Northwest, a body of law with which Chief Justice Chase, a long-time anti-slavery lawyer from Ohio, was no doubt familiar.<sup>303</sup> The contract was probably involuntary *ab initio*. Turner agreed to it while she was still functionally a slave.<sup>304</sup> The Maryland constitution emancipating slaves went into effect three days prior to the indenture agreement.<sup>305</sup> In addition, Turner was a minor at the time<sup>306</sup> and seems to have been coerced by local officials.<sup>307</sup> The contract extended over a long

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295. *Id.*

296. *Id.* at 339.

297. *Id.* at 338.

298. *Id.* at 339.

299. *Id.* at 339–40.

300. *Id.* at 40.

301. See HYMAN, *supra* note 281, at 128.

302. *In re Turner*, 24 F. Cas. at 339 ("For the present, I shall restrict myself to a brief statement of these conclusions, without going into the grounds of them.").

303. *Id.* at 339–40; see HYMAN, *supra* note 281, at 33.

304. *In re Turner*, 24 F. Cas. at 338.

305. See *id.* at 338 (noting that the new constitution went into effect on November 1, 1864 and the indenture was executed on November 3, 1864).

306. See *id.* (finding that Turner was born in 1856, making her barely twelve years old when the indenture was executed).

307. See *id.* at 339 (noting that local officials rounded up newly freed slaves immediately after the new constitution went into effect and had the younger

period, lasting ten years.<sup>308</sup> The compensation to be provided was nominal at best.<sup>309</sup> Finally, while the record does not contain any explicit mention of direct physical coercion by Hambleton, Turner's action was styled as a petition for a writ of habeas corpus directed at Hambleton,<sup>310</sup> which implied his ability to control Turner's movements, and in his reply he all but admitted direct coercion of her person, stating "I herewith produce the body of Elizabeth Turner showing the cause of her *capture and detention*."<sup>311</sup>

The U.S. Supreme Court first addressed the meaning of the Thirteenth Amendment five years later in the *Slaughterhouse Cases*, which considered a challenge to a Louisiana law granting a twenty-five year monopoly on slaughterhouses in New Orleans.<sup>312</sup> In attacking the law, counsel for the petitioners argued that the "prohibition of 'slavery and involuntary servitude' . . . compromises much more than the abolition or prohibition of African slavery," likening the state-granted monopoly to the feudal obligations of serfs.<sup>313</sup> Writing for the Court, Justice Miller was not persuaded. Acknowledging that the "word servitude is of larger meaning than slavery,"<sup>314</sup> he insisted that to "endeavor to find in it a reference to servitudes, which may have been attached to property . . . requires an effort, to say the least."<sup>315</sup>

The majority opinion, however, did provide some guidance as to what sorts of relationships short of chattel slavery might constitute "involuntary servitude."

It was very well understood that, in long-term apprenticeships—as had been practiced in the West India Islands after the abolition of slavery by the English government—or in the slaves' reduction to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word slavery had been used.<sup>316</sup>

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people execute indentures).

308. *See id.* at 338 (finding that the contract was to last until October 18, 1874).

309. *See id.* (noting that Turner was to receive fifteen dollars in return for ten years of service).

310. *Id.* at 337.

311. *Id.* at 338 (emphasis added).

312. 83 U.S. (16 Wall.) 36 (1872).

313. *Id.* at 49–50.

314. *Id.* at 69.

315. *Id.*

316. *Id.*

The Court's next major pronouncement on the meaning of the Thirteenth Amendment came in the *Civil Rights Cases*.<sup>317</sup> In 1875, Congress forbade racial discrimination in public accommodations.<sup>318</sup> Several persons indicted under the law claimed that Congress had exceeded its authority under the Thirteenth and Fourteenth Amendments in passing the statute.<sup>319</sup> Writing for the Court, Justice Bradley struck the law down.<sup>320</sup> Even while acknowledging that the Thirteenth Amendment is "an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States,"<sup>321</sup> he insisted that private discrimination was beyond Congress's enforcement power.<sup>322</sup> In a vigorous dissent, Justice Harlan insisted that the Court's approach rested "upon grounds entirely too narrow and artificial."<sup>323</sup>

Shortly after the *Civil Rights Cases*, Justice Harlan decided *Arthur v. Oakes*<sup>324</sup> while sitting as a circuit judge. The decision has been widely cited for the proposition that specific performance of a personal service contract would violate the Thirteenth Amendment.<sup>325</sup> The case involved a dispute between the Northern Pacific Railroad Company, and the Brotherhood of Locomotive Engineers and other unions.<sup>326</sup> The lower court issued an injunction directed at the railroad's employees, enjoining them "[f]rom . . . quitting the service of the said [railroad], with or without notice."<sup>327</sup> On appeal, the workers challenged this portion of the injunction.<sup>328</sup> Justice Harlan chose to construe the issue presented very broadly, writing that "the vi-

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317. 109 U.S. 3 (1883).

318. *Id.* at 4.

319. *See id.* at 8–9.

320. *Id.* at 25.

321. *Id.* at 20.

322. *Id.* at 24–25 ("It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business.").

323. *Id.* at 26 (Harlan, J., dissenting).

324. 63 F. 310 (7th Cir. 1894) (Harlan, J.).

325. *See* 5A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1204, at 401 (1964); *see also* Kemp v. Div. No. 241, Amalgamated Ass'n of St. & Elec. Ry. Employees of Am., 99 N.E. 389, 404 (Ill. 1912); Henderson v. Cambria Smokeless Coal Co., 21 Pa. D. & C. 654, 658 (Com. Pl. 1934).

326. *Arthur*, 63 F. at 314.

327. *Id.* at 313.

328. *Id.* at 316.

tal question [is] whether a court of equity will, under any circumstances, by injunction, prevent one individual from quitting the personal service of another.”<sup>329</sup> The railroad workers in the case, however, were apparently at-will employees,<sup>330</sup> so strictly speaking the case did not present the issue of whether an employer could specifically enforce a contract affirmatively promising to perform a particular service for a particular time. Rather, the real question in *Arthur* was the narrower issue of whether a court could keep an at-will employee from exercising his contractual right to quit his employment at any time. The injunction in the case would have effectively gone beyond the scope of the contract between the railroad and the laborers by requiring them to continue working when they had no contractual obligation to do so.

Nevertheless, Justice Harlan decided the case in sweeping terms. He insisted that, “[i]t would be an invasion of one’s natural liberty to compel him to work for or to remain in the personal service of another.”<sup>331</sup> He likened this type of constraint to a condition of “involuntary servitude,” which, under the Thirteenth Amendment, shall not exist in the United States.<sup>332</sup> Having grounded his decision in the Constitution, however, Justice Harlan went on to argue that his conclusion was also dictated by ordinary rules of equity jurisprudence. “The rule, we think, is without exception that equity will not compel the actual, affirmative performance by an employé [sic] of merely personal services . . . .”<sup>333</sup>

The Supreme Court first directly passed on the meaning of “involuntary servitude” in the 1897 case of *Robertson v. Baldwin*.<sup>334</sup> Robertson, a seaman on the barkantine *Arago*, was jailed and returned to his ship under a federal statute after he attempted to breach his contract to crew her on a voyage to South America.<sup>335</sup> He petitioned for a writ of habeas corpus, challenging the statute on the ground that it imposed “involuntary servitude.”<sup>336</sup> The Court rejected his argument, ruling that

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329. *Id.*

330. *See id.* at 317.

331. *Id.* at 317–18.

332. *Id.* at 318.

333. *Id.*

334. 165 U.S. 275 (1897).

335. *See id.* at 275–76.

336. *Id.* at 275.

requiring seamen upon pain of imprisonment to perform their contracts did not run afoul of the Amendment.<sup>337</sup>

The Justices relied in part on tradition. Seamen had historically been subject to forced performance of their contracts, a rule the opinion traced in excruciating detail from “the maritime law of the ancient Rhodians” to the nineteenth century.<sup>338</sup> The opinion also insisted that the forced performance of the contract could not be “involuntary servitude” because it was entered into voluntarily.<sup>339</sup> The Court noted that “if one should agree, for a yearly wage, to serve another in a particular capacity during his life . . . the contract might not be enforceable for the want of a legal remedy, or might be void upon grounds of public policy, but the servitude could not be properly termed ‘involuntary’”<sup>340</sup> Pointedly, the Court noted that under the English master and servant acts, a laborer could be criminally punished for breach of contract.<sup>341</sup> Such contracts, said the Court, were among those that were not involuntary.<sup>342</sup> Such criminal punishment did not exist in the United States, said the Court, simply because “public opinion” would not “tolerate a statute to that effect.”<sup>343</sup>

#### B. THE PEONAGE CASES

The Court’s most extensive foray into the meaning of “involuntary servitude” came in the so-called *Peonage Cases*. In a series of opinions in the early twentieth-century, the Court declared in sweeping dicta that any attempt to enforce a contract with legal sanctions would constitute “involuntary servitude.”<sup>344</sup> Not surprisingly, these cases have been cited in sup-

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337. *Id.* at 281.

338. *Id.* at 282–87. In addition, the Court noted approvingly that “seamen are treated by Congress . . . as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults.” *Id.* at 287. The Court’s reliance on history has drawn the ire of some modern commentators. See Lauren Kares, Note, *The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, 80 CORNELL L. REV. 372, 392, 394 (1995) (criticizing the rationale in *Robertson*).

339. See *Robertson*, 165 U.S. at 281.

340. *Id.*

341. See *id.* at 285–86.

342. See *id.* at 283.

343. *Id.* at 281.

344. See, e.g., *Pollock v. Williams*, 322 U.S. 4, 18 (1944) (concluding that “no state can make the quitting of work any component of a crime”); *Bailey v. Alabama*, 219 U.S. 219, 243 (1911) (“The act of Congress [under the Thirteenth Amendment] . . . necessarily embraces all legislation which seeks to

port of the claim that specific performance of a personal service contract would be unconstitutional.<sup>345</sup> None of the *Peonage Cases*, however, involved equitable remedies for breach of contract.<sup>346</sup> More importantly, they all dealt with labor relations in the South at the height of Jim Crow, and when the decisions are read against their historical background, they cannot be understood as standing for the sweeping proposition that any legally required labor is unconstitutional, a fact recognized by dissenting justices at the time and courts and commentators since.<sup>347</sup> Rather, the practices banned in these cases bear all of the hallmarks of extreme domination that characterized the original understanding of “involuntary servitude” discussed above.

In the decades after Reconstruction, debt bondage emerged as part of the effort to reassert white dominion over African-American workers.<sup>348</sup> This was done in a variety of ways. Georgia and Alabama adopted legislation creating an irrebuttable presumption of fraud when a worker indebted to his employer quit, allowing employers to threaten workers with fines and incarceration if they walked off the job.<sup>349</sup> Other jurisdictions auctioned off the labor of those jailed for certain offenses with so-called “criminal-surety” laws.<sup>350</sup> A potential employer would post a bond to free the prisoner in return for a promise to work off the debt.<sup>351</sup> In theory, those posting bond could bid against

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compel the service or labor by making it a crime to refuse . . . to perform it.”).

345. See, e.g., *Ex parte Lloyd*, 13 F. Supp. 1005, 1009 (E.D. Ky. 1936) (holding that an inmate in a state drug treatment facility can breach an entrance contract to work for the facility, and the state was not entitled to specific performance of the contract); *Fitzpatrick v. Michael*, 9 A.2d 639, 642 (Md. 1939) (using the *Peonage Cases* to argue that executory contracts cannot be specifically enforced until performance is completed); *State ex rel. Norton v. Janing*, 156 N.W.2d 9, 10 (Neb. 1968) (citing the *Peonage Cases* to invalidate a state statute criminalizing the failure to pay a contractual obligation); *Am. League Baseball Club v. Chase*, 86 Misc. 441, 465 (N.Y. Sup. Ct. 1914) (holding that the Thirteenth Amendment barred specific enforcement of an employment contract).

346. See *infra* text accompanying note 389.

347. See *infra* text accompanying notes 389–413.

348. See generally PETE DANIEL, *THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901–1969* (1972); N. Gordon Carper, *Slavery Revisited: Peonage in the South*, 37 *PHYLON* 85 (1976); William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 *J. S. HIST.* 31 (1976).

349. See Act of Mar. 9, 1911, No. 98, 1911 Ala. Laws 93; *Procuring Money on Contract for Service*, No. 345, 1903 Ga. Laws 90; see also Cohen, *supra* note 348, at 53.

350. See Cohen, *supra* note 348, at 53.

351. *Id.*

one another with shorter work periods. In practice, those jailed found themselves bound upon pain of re-imprisonment to work off a debt incurred as a result of an “agreement” made on pain of continued imprisonment.<sup>352</sup> Florida went beyond mere criminal sanctions for walking off the job and passed a law that made “willful disobedience of orders” and “wanton impudence” criminal offenses that could result in fines and incarceration.<sup>353</sup>

While some of these statutes—such as Florida’s sanctions for impudence—went beyond the mere punishing of breach of contract, all of them operated within a thick web of other laws that had the effect of suppressing competition between employers, further restricting the choices available to African-American workers. First, states passed anti-enticement laws that created penalties for those who tried to lure away employees with offers of better wages or working conditions.<sup>354</sup> Second, emigrant agents, who recruited African-American workers in areas of low employment and transported them to jobs in distant, labor-starved markets, were subject to onerous licensing and taxation requirements.<sup>355</sup> Georgia, for example, levied a tax of \$500 on emigrant agents for each county in which they operated.<sup>356</sup> Mississippi made it a crime to “entice . . . [any] negro” to leave the state.<sup>357</sup> Third, restrictive

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352. See, e.g., *Thomas v. State*, 13 Ala. App. 431 (Ala. Ct. App. 1915); *Lee v. State*, 75 Ala. 29, 30–31 (1883); *Wilson v. State*, 138 Ga. 489, 494 (1912); see also Cohen, *supra* note 348, at 54–55.

353. See *An Act in Relation to Contracts of Persons of Color*, ch. 1470, 1865 Fla. Laws 32, amended by Act of Dec. 13, 1866, ch. 1551, 1866 Fla. Laws 21–22; see also Cohen, *supra* note 348, at 42.

354. See Act of Feb. 16, 1866, No. 100, 1865–66 Ala. Laws 111; Act of Mar. 8, 1867, No. 122, 1866–67 Ark. Acts 298; Act of Dec. 21, 1865, No. 16, 1865 La. Acts Extra Sess. 24; Act of Mar. 2, 1866, ch. 58, 1866 N.C. Spec. Sess. Laws 122, amended by Act of Feb. 25, 1867, ch. 124, 1866–67 N.C. Sess. Laws 197; Act of Mar. 23, 1875, ch. 93, 1875 Tenn. Pub. Acts 168; Act of Nov. 1, 1866, ch. 82, 1866 Tex. Gen. Laws 80; Act of Feb. 20, 1866, ch. 15, 1865–66 Va. Acts 83; see also Cohen, *supra* note 348, at 33. See generally DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001).

355. See, e.g., Act of Jan. 22, 1879, No. 175, 1878–1879 Ala. Acts 205; Act of June 1, 1903, ch. 5192, 1903 Fla. Laws 135; Act of Feb. 16, 1876, ch. 4, 1876 Ga. Laws 17; Act of Mar. 11, 1912, ch. 94, 1912 Miss. Laws 73; Act of Dec. 24, 1891, no. 697, 1891 N.C. Acts 1084; Act of Feb. 6, 1891, ch. 75, 1891 N.C. Sess. Laws 77; see also Cohen, *supra* note 348, at 31. See generally BERNSTEIN, *supra* note 354 (examining how post-Civil War labor regulations harmed African-Americans).

356. Act of Feb. 28, 1877, No. 122, 1877 Ga. Laws 120; see also Cohen, *supra* note 348, at 39.

357. Act of Nov. 25, 1865, ch. 4, 1865 Miss. Laws 82, 85; see also Cohen,

banking regulations stifled the development of credit markets, giving creditor-employers monopoly power over their debtor-employees.<sup>358</sup> Share croppers engaged in monocultural farming—generally cotton—were dependent on credit to purchase the equipment and foodstuffs that they could not produce themselves. Shielded from competition, many employers sold necessities to workers on credit at inflated prices, creating a condition of chronic indebtedness that could then be the predicate for prosecution in the event that the worker quit.<sup>359</sup>

Southern states also enacted extremely broad vagrancy laws that in effect made unemployment a crime. For example, in “September 1901 a number of Mississippi towns rounded up ‘idlers and vagrants’ and drove them ‘into the cotton fields where the farmers are crying for labor to pick the season’s crop.’”<sup>360</sup> Likewise, one Tennessee judge announced that any African-American brought before him on vagrancy charges be set “free provided they would accept jobs offered by farmers who have set up a cry over scarcity of ‘hands.’”<sup>361</sup> Hence, African-American workers frequently faced the threat of criminal prosecution for vagrancy if they did not enter into contracts with employers, which then often involved an advance on wages, creating debt bondage.<sup>362</sup> Vagrancy arrests, of course, could also be used as the predicate offense for sale of labor under the criminal surety system.<sup>363</sup> Finally, in at least some cases the system of peonage was accompanied by violence<sup>364</sup> and sexual exploitation.<sup>365</sup>

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*supra* note 348, at 39.

358. See Roger L. Ransom & Richard Sutch, *Debt Peonage in the Cotton South After the Civil War*, 32 J. ECON. HIST. 641, 652–55 (1972). Legislation passed during the Civil War forbade nationally chartered banks from providing agricultural mortgage credit, which basically shut them out of the Southern market. *Id.* at 646. Congress, however, also passed a law heavily taxing the note issue of all nonnational banks. *Id.* Finally, deposit banking—i.e., the use of checks as a substitute for bank notes—failed to develop because “the sparseness of the population and the high rate of illiteracy in the rural South[] meant that the transaction costs associated with accepting and clearing checks discouraged the use of deposits.” *Id.* at 647.

359. See *id.* at 642, 653–54.

360. Cohen, *supra* note 348, at 50.

361. *Id.*

362. See *id.* at 50–53.

363. See *id.*

364. See, e.g., Carper, *supra* note 348, at 95 (“Brown beat his laborers unmercifully. On several occasions his nephew, Mose Brown, whipped the laborers so severely that they died.”).

365. See, e.g., *id.* (“According to Lizzie Rush, if a good looking woman came

Given the reality of coercion, financial exploitation, duration, and domination involved in Jim Crow labor relationships, it is not surprising that the Court upheld convictions under the Anti-Peonage Act as a legitimate exercise of congressional power under Section 2 of the Thirteenth Amendment,<sup>366</sup> struck down state laws creating a presumption of fraud when an indebted worker quit,<sup>367</sup> and overturned criminal-surety statutes.<sup>368</sup> In doing so, it struck at conditions well within the original understanding of “involuntary servitude.”

The Court, however, ultimately rested its holding on sweeping assertions that cannot be reconciled with either this original understanding of “involuntary servitude” or its own subsequent holdings. In *Clyatt v. United States* the Court heard a challenge to the criminalization of “holding of any person to service or labor under the system known as peonage.”<sup>369</sup> Since the term “peonage” was not defined in the statute, the Court turned to New Mexican cases for its meaning. In doing so, however, the Court simply defined peonage as a status or condition of compulsory service based on indebtedness.<sup>370</sup> It failed to acknowledge the reality of peonage, which involved not only legal or contractual obligations to work off a debt, but also the background laws and practices that forced African-American workers into peonage agreements with employers,<sup>371</sup> allowed masters to extend the servitude of peons over long periods of time in return for nominal compensation,<sup>372</sup> and allowed masters to coerce service from peons with direct physical violence.<sup>373</sup> The failure to acknowledge the social reality of peonage and focus solely on formally enacted laws is puzzling, given that the Court acknowledged that the Thirteenth Amendment reached

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to Brown’s camp and one of the laborers told the Captain that he ‘wanted’ her, Brown would order the husband of the woman to other quarters while the wife stayed with the stranger.”).

366. See, e.g., *Clyatt v. United States*, 197 U.S. 207, 218 (1905).

367. See, e.g., *Bailey v. Alabama*, 219 U.S. 219, 244–45 (1911).

368. See, e.g., *United States v. Reynolds*, 235 U.S. 133, 149–50 (1914).

369. 197 U.S. at 208 (quoting Act of Mar. 2, 1867, ch. 187, 14 Stat. 546).

370. See *id.* at 215–16 (discussing the meaning of “peonage”).

371. See *supra* text accompanying notes 360–65 (discussing the role of vagrancy laws in coercing agreement to harsh labor contracts by African-American workers).

372. See *supra* text accompanying note 352 (discussing laws that lowered peon wages by preventing competition among employers and granting them monopoly power over the extension of credit).

373. See *supra* text accompanying notes 364–65 (discussing private violence against peons by masters).

beyond state action to ban the condition of “involuntary servitude,” whatever its origins.<sup>374</sup>

In its next peonage case, the Court again focused narrowly on the legal status of the peon rather than the reality of the peonage system itself. In *Bailey v. Alabama*, Alonzo Bailey challenged an Alabama statute that created a presumption of fraud whenever a laborer quit work while indebted to his employer.<sup>375</sup> The practical effect of the law was to criminalize the breach of a labor contract where the employer had advanced wages. Bailey entered into a one-year contract to work for twelve dollars per month and received a fifteen dollar advance.<sup>376</sup> He subsequently quit after one month and was fined thirty dollars plus court costs and sentenced to 136 days of hard labor in lieu of payment.<sup>377</sup> The Court spent the bulk of its opinion deciding that the intent of the complicated Alabama fraud statute was to coerce compliance with labor contracts.<sup>378</sup> Having disposed of that issue, the Court went on to hold that “involuntary servitude” existed whenever there was “compulsory service.” Writing for the Court, Justice Hughes stated:

The act of Congress [i.e. the Anti-Peonage Act], nullifying all state laws by which it should be attempted to enforce the “service or labor of any person as peons, in liquidation of any debt or obligation, or otherwise,” necessarily embraces all legislation which seeks to compel the service or labor by making it a crime to refuse or fail to perform it.<sup>379</sup>

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374. See *Clyatt*, 197 U.S. at 216 (“This amendment denounces a status or condition, irrespective of the manner or authority by which it is created.”).

375. See *Bailey v. Alabama*, 219 U.S. 219, 227–28 (1911) (describing the Alabama statute and the cases construing it). Bailey had already made one unsuccessful trip to the Supreme Court by 1911. He originally sought to challenge the Alabama statute by petitioning for a writ of habeas corpus in state court prior to being tried on the underlying offense. This procedure was allowed under state law, and Bailey litigated his challenge up to the state supreme court and appealed from thence to the U.S. Supreme Court. The Court, however, ruled that while such a preconviction collateral attack may be allowed under state law, the Court could not consider the question until Bailey’s case had been fully tried on the merits in the court below. See *Bailey v. Alabama*, 211 U.S. 452 (1908).

376. *Bailey*, 219 U.S. at 229–30.

377. *Id.* at 230–31.

378. See *id.* at 238 (“We cannot escape the conclusion that, although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt, and judging its purpose by its effect that it seeks in this way to provide the means of compulsion through which performance of such service may be secured.”).

379. *Id.* at 243.

The Court, however, did not recognize that the Alabama statute was embedded in a context of repressive labor regulations and violent employment practices. The combination of the statute with this context created the conditions under which Bailey was forced to work.

In *United States v. Reynolds*, several men charged under the Anti-Peonage Act for obtaining labor under state criminal surety laws challenged their indictments.<sup>380</sup> The Court upheld the indictments, but rather than focusing on the fact that the contract between the surety and the prisoner was essentially coerced—if the prisoner did not agree he would be sent to prison—the Court chose to rely on *Bailey*'s claim that any contract performed under the threat of state sanction constituted “involuntary servitude.”<sup>381</sup> Indeed, in order to avoid the blessing conferred by the Thirteenth Amendment on “involuntary servitude” in punishment for a crime, the Court laid special emphasis on the fact that “[t]he surety and convict have made a new contract for service, in regard to the terms of which the state has not been consulted,” as though the negotiation between the prisoner and the surety partook of standard bargaining between an employer and a potential employee.<sup>382</sup>

In 1944, the Court revisited the issue of peonage in *Pollock v. Williams*.<sup>383</sup> After reaffirming its previous holdings in two brief opinions in earlier cases,<sup>384</sup> the Court issued a much longer opinion in *Pollock* striking down a Florida anti-fraud statute similar to the one held unconstitutional in *Bailey*.<sup>385</sup> The Court repeated the sweeping language of the earlier cases,<sup>386</sup> but it

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380. *United States v. Reynolds*, 235 U.S. 133, 138–40 (1914).

381. *See id.* at 146 (“Compulsion of such service by the constant fear of imprisonment under the criminal laws renders the work compulsory, as much so as authority to arrest and hold his person would be if the law authorized that to be done.” (referencing *Bailey*, 219 U.S. at 244)).

382. *Id.* at 149–50.

383. 322 U.S. 4 (1944).

384. *See id.* at 10–11 (referencing *United States v. Gaskin*, 320 U.S. 527, 529–30 (1944) (reversing a lower court holding that one could not be convicted under the Anti-Peonage Act for merely arresting someone with the intent of returning them to peonage), and *Taylor v. Georgia*, 315 U.S. 25, 29 (1942) (striking down a Georgia law virtually identical to the Alabama law struck down in *Bailey*)).

385. In *Pollock* the defendant pled guilty to fraud and the state argued that accordingly he could not challenge the portion of the law that created a virtually irrebuttable presumption of fraud for workers who quit without repayment of advances. *Id.* at 6–7. The Court ultimately decided that this distinction could not save the Florida law. *Id.* at 24–25.

386. *See id.* at 18 (“[The Anti-Peonage Act] means that no state can make

also offered a more nuanced picture of peonage, suggesting that it resulted from more than simply the laws directly at issue: “In each there was the same story, a necessitous and illiterate laborer, an agreement to work for a small wage, a trifling advance, a breach of contract to work.”<sup>387</sup> It also linked the Thirteenth Amendment to concern about suppression of competition within the labor market although it failed to explicitly acknowledge the way in which peonage was maintained by banking and labor regulations that exacerbated this problem:

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 . . . . 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 relive a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition.<sup>388</sup>

Read most expansively, the *Peonage Cases* render any sanction for breach of a labor contract beyond compensatory damages unconstitutional.<sup>389</sup> The problem with such a reading, as the Court acknowledged even at the time, is that it has upheld compulsory labor other than as punishment for a crime in other cases.<sup>390</sup> Hence, during the same period that it handed down the *Peonage Cases*, the Court upheld laws compelling seamen to work ships according to their contracts,<sup>391</sup> laws re-

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the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor.”).

387. *Id.* at 22.

388. *Id.* at 17–18.

389. *See, e.g.,* *Clyatt v. United States*, 197 U.S. 207, 215–16 (1905) (“A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service.”).

390. *See, e.g., Pollock*, 322 U.S. at 17–18 (“Forced labor in some special circumstances may be consistent with the general basic system of free labor. For example, . . . there are duties such as work on highways which society may compel.”); *Bailey v. Alabama*, 219 U.S. 219, 243 (1911) (“We need not stop to consider any possible limits or exceptional cases, such as the service of a sailor, or the obligations of a child to its parents, or of an apprentice to his master, or the power of the legislature to make unlawful and punish criminally an abandonment by an employé of his post of labor in any extreme cases.” (citing *Clyatt*, 197 U.S. at 216 (citations omitted))).

391. *See* *Robertson v. Baldwin*, 165 U.S. 275, 281–88 (1897) (upholding a federal statute compelling seamen to perform their contracts on pain of impri-

quiring labor on public highways,<sup>392</sup> and laws drafting men for military service,<sup>393</sup> all of which involved non-compensatory sanctions for failure to work. Such cases, of course, might be explained as arising in situations where the government has traditionally exercised a right to compel service. There is, however, a deeper problem with the notion that any labor under a contract done because of the threat of a sanction constitutes “involuntary servitude.” As Justice Holmes pointed out in his dissent in *Bailey*:

The Thirteenth Amendment does not outlaw contracts for labor. That would be at least as great a misfortune for the laborer as for the man that employed him. For it certainly would affect the terms of the bargain unfavorably for the laboring man if it were understood that the employer could do nothing in case the laborer saw fit to break his word. But any legal liability for breach of a contract is a disagreeable consequence which tends to make the contractor do as he said he would. Liability to an action for damages has that tendency as well as a fine.<sup>394</sup>

At least part of the purpose of entering into a legally binding contract is to make the performance of a promise more likely by attaching legal sanctions to its breach. Allowing sanctions in the form of compensatory damages but not other sanctions (such as civil or criminal contempt for refusal to obey a court order) is arbitrary. What is needed is some principle that explains why sanctions are unconstitutional in one context but not the other. The solution suggested by the original understanding of “involuntary servitude” is to examine the actual condition of the promisor, rather than the particular remedy used to enforce the contract. Read according to the terms of their most broadly phrased dicta, however, the *Peonage Cases* fail to provide such a principle. Any performance under a contract done out of fear of a legal sanction would become “involuntary servitude.” Not surprisingly, in subsequent cases neither the U.S. Supreme Court nor lower courts have followed the sweeping language contained in the *Peonage Cases*. Rather, they have upheld various forms of compulsory work in the face of Thirteenth Amendment challenges when the severity of either the sanction or labor involved failed to rise to the level of some inchoate standard of “involuntary servitude.”

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sonment).

392. See *Butler v. Perry*, 240 U.S. 328, 333 (1916) (upholding a Florida statute requiring able-bodied citizens to work on state roads).

393. See *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918) (upholding the constitutionality of the draft).

394. *Bailey*, 219 U.S. at 246 (Holmes, J., dissenting).

## C. MODERN CASES

The Court emphasized the complete domination required to find “involuntary servitude” in its most recent case to consider the Thirteenth Amendment, *United States v. Kozminski*.<sup>395</sup> The case involved a circuit split over the meaning of federal statutes criminalizing the imposition of “involuntary servitude.”<sup>396</sup> The Kozminskis had “employed” two mentally retarded men for nearly twenty years, providing them with little or no compensation beyond inadequate housing, food, clothing, and medical care, and subjected them to physical and verbal abuse.<sup>397</sup> They were tried for violating federal law and objected to the jury instructions stating that involuntary servitude “may also include situations involving either physical and other coercion, or a combination thereof, used to detain persons in employment.” The Sixth Circuit agreed, holding that the district court improperly allowed the jury to consider psychological coercion.<sup>398</sup>

On appeal, the Court upheld the circuit court. In construing the statutes, Justice O’Connor looked to the *Peonage Cases*, noting that, in those cases, “involuntary servitude” had been predicated on the fact that “the victim had no available choice but to work or be subject to legal sanction.”<sup>399</sup> In the next paragraph, however, the Court acknowledged, “Our precedents reveal that not all situations in which labor is compelled by

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395. 487 U.S. 931 (1988). The Court’s resolution of the specific issue in this case—the necessity of a showing of physical or legal coercion to demonstrate the absence of voluntary consent—has been subject to some criticism by commentators. See Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting United States v. Kozminski and Understanding Human Trafficking*, 38 U. TOL. L. REV. 941, 944 (2007) (describing the necessity of recognizing psychological coercion as sufficient to meet the legal standard for involuntary labor); Aric K. Short, *Slaves for Rent: Sexual Harassment in Housing as Involuntary Servitude*, 86 NEB. L. REV. 838, 872–78 (2008) (stating that there is little reason to distinguish physical and legal coercion from psychological, economic, or social coercion).

396. See 18 U.S.C. § 241 (2006) (criminalizing conspiracy to interfere with constitutionally protected rights); *id.* § 1584 (criminalizing the knowing and willful holding of another in “involuntary servitude”). Compare *United States v. Kozminski*, 821 F.2d 1186, 1192–93 (6th Cir. 1987) (en banc) (holding that “involuntary servitude” did not include psychological coercion), *judgment aff’d and remanded*, 487 U.S. 931 (1988), with *United States v. Mussry*, 726 F.2d 1448, 1453 (9th Cir. 1984) (holding that “involuntary servitude” can include psychological coercion).

397. *Kozminski*, 487 U.S. at 934–36.

398. *Kozminski*, 821 F.2d at 1193.

399. *Kozminski*, 487 U.S. at 943.

physical coercion or force of law violate the Thirteenth Amendment.”<sup>400</sup> Faced with these conflicting precedents, the Court found that at minimum prosecutors must prove “the use or threatened use of physical or legal coercion.”<sup>401</sup>

Lower courts faced with claims of “involuntary servitude” have adopted a similarly narrow reading of the Thirteenth Amendment, particularly in the context of challenges to equitable relief. For example, state courts have uniformly rejected the claim that orders to pay alimony constitute involuntary servitude.<sup>402</sup> Additionally, in *Warwick v. Warwick*,<sup>403</sup> the trial court’s order to appellant to get a job in order to pay a debt on pain of contempt did not impose involuntary servitude, according to the Minnesota appellate court.<sup>404</sup>

In *Moss v. Superior Court*,<sup>405</sup> the California Supreme Court provided the most extensive analysis to date of the constitutionality of court orders requiring a party to affirmatively work. Early California cases held that while contempt could be used to force a husband to pay alimony if he had the money to do so, it could not be used to sanction his inability to do so, including a refusal to obtain available employment.<sup>406</sup> In *Moss*, the Cali-

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400. *Id.*

401. *Id.* at 944. In a concurring opinion, Justice Brennan argued that “involuntary servitude” existed whenever a person was reduced to a slave-like condition, regardless of the means used to do so. *See id.* at 955–65 (Brennan, J., concurring). Interestingly, Justice Brennan cites a 1910 *Webster’s Dictionary* that included in the definition of “servitude”: “In French and English Colonies of the 17th and 18th centuries, the conditions of transported or colonial laborers who, under contract or by custom rendered service with temporary and limited loss of political and personal liberty.” *Id.* at 961 (quoting *Webster’s New International Dictionary of the English Language*). The blanket inclusion of indenture agreements within the scope of “involuntary servitude,” however, cannot be squared with its pre-Civil War usage, which was often assumed to be consistent with indenture agreements. *See generally supra* text accompanying notes 102, 105–16, 126–42.

402. *See Hicks v. Hicks*, 387 So. 2d 207, 208 (Ala. Civ. App. 1980); *Freeman v. Freeman*, 397 A.2d 554, 557 n.2 (D.C. 1979); *In re Marriage of Smith*, 396 N.E.2d 859, 864 (Ill. App. Ct. 1979); *Clark v. Clark*, 278 S.W. 65, 68 (Tenn. 1925).

403. 438 N.W.2d 673 (Minn. Ct. App. 1989).

404. *Id.* at 679 (citing *Freeman v. Freeman*, 397 A.2d 554, 557 n.2 (D.C. App. 1979)).

405. 950 P.2d 59 (Cal. 1998).

406. *See Ex parte Todd*, 50 P. 1071, 1071 (Cal. 1897) (holding that contempt where a husband “had wholly failed and neglected to make any effort to obtain employment . . . was clearly in excess of the power of the court . . . .”); *In re Brown*, 288 P.2d 27, 27 (Cal. Dist. Ct. App. 1955) (holding that a husband’s choice to remain unemployed to avoid paying alimony to his ex-wife was “insufficient to warrant citation for contempt”).

ifornia Supreme Court overturned this line of cases, holding that a child-support obligor could be punished with criminal contempt for failure to work, the Thirteenth Amendment notwithstanding.<sup>407</sup>

The California Supreme Court began its analysis by looking to the origins of the Thirteenth Amendment, noting that the prohibition on “involuntary servitude” was drawn from the Northwest Ordinance, which “expressly permitted contracts for apprenticeship and indenture if voluntarily entered into for valuable consideration.”<sup>408</sup> “Involuntary servitude,” the court noted, “is found only when a person is held to labor under conditions akin to peonage or slavery.”<sup>409</sup> In contrast, the court insisted that despite the court order to work, the “parent is free to elect the type of employment and the employer. . . .”<sup>410</sup> Furthermore, such employment does not become “involuntary servitude” merely “because a person would prefer not to work but must do so in order to comply with a legal duty to support the person’s children.”<sup>411</sup> Rather, the court’s analysis relied on the fact that when “compulsory labor akin to African slavery”<sup>412</sup> is not involved, the “Thirteenth Amendment does not bar labor that an individual may, at least in some sense, choose not to perform, even where the consequences of that choice are ‘exceedingly bad.’”<sup>413</sup>

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407. See *Moss*, 950 P.2d at 64 (“[I]nsofar as *Todd* may apply to child support obligations, it should be disapproved. . . . We are satisfied that there is no constitutional impediment to use the contempt power to punish a parent who, otherwise lacking monetary ability to pay child support, willfully fails and refuses to seek and accept available employment commensurate with the parent’s skills and abilities.”).

408. See *id.* at 66 n.5.

409. *Id.* at 68.

410. *Id.* at 67.

411. *Id.* at 71–72. The court’s reasoning here recognizes the absence of a sharp divide between labor to which one freely consents and labor done to avoid some legally created sanction. In doing so, the court implicitly adopts the line of analysis offered by Justice Holmes in his dissent in *Bailey v. Alabama*. See 219 U.S. 219, 246 (1911) (Holmes, J., dissenting).

412. *Moss*, 950 P.2d at 68 (quoting *Butler v. Perry*, 240 U.S. 328, 332 (1916)).

413. *Id.* at 72 (quoting *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 459 (2d Cir. 1996)). The *Moss* court offered an alternative line analysis to its argument that court-ordered employment did not constitute “involuntary servitude.” See *id.* at 67–68. Noting that the duty to support one’s children “rests on fundamental natural laws and has always been recognized by the courts in the absence of any statute declaring it,” *id.* at 67 (citation omitted), the court said:

Even if the necessity of accepting employment in order to meet this obligation were somehow analogous to those forms of compelled labor

VI. "INVOLUNTARY SERVITUDE" AND SPECIFIC PERFORMANCE

When read against the background of its original meaning and subsequent construction by the U.S. Supreme Court, the Thirteenth Amendment cannot support a per se rule against equitable enforcement of personal service contracts. The constitutions and courts of the states carved from the Northwest Territory provide a coherent account of the meaning of the 1787 ordinance's ban on "involuntary servitude."<sup>414</sup> "Involuntary servitude" did not encompass any attempt to sanction the breach of a labor contract. Rather, it was an amalgamation of four concerns. The first was with contracts where the initial agreement was a sham because the background laws and social practices put the promisor completely under the power of the promisee.<sup>415</sup> The second was the inadequate compensation of workers for their services.<sup>416</sup> The absence of meaningful pay—"unrequited toil"—was a *sine qua non* of slavery, and to avoid the possibility of "involuntary servitude" a contract required "bona fide consideration."<sup>417</sup> Third, "involuntary servitude" could result when contracts of service extended over very long periods of time.<sup>418</sup> Hence, Ohio had a per se ban on contracts binding "negroes" to service for over a year, and the Indiana Supreme Court denounced as "involuntary servitude" a contract stretching over twenty years.<sup>419</sup> Finally, "involuntary servitude" involved the right of masters to physically punish and detain their servants, thereby completely dominating them.<sup>420</sup>

While these four factors never constituted a formalized doctrinal test prior to the Civil War, Congress clearly adopted the Northwest Ordinance's language in drafting the Thirteenth Amendment.<sup>421</sup> It is this language that became part of the Con-

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[i.e., peonage and slavery], we have no doubt that this form of labor would be recognized as an exception to the ban on involuntary servitude found in the Thirteenth Amendment.

*Id.* at 68.

414. *See supra* text accompanying notes 92–118.

415. *See supra* text accompanying notes 92, 94–101.

416. *See supra* text accompanying notes 93, 99–103.

417. *See supra* text accompanying notes 92–103.

418. *See supra* text accompanying notes 102–03.

419. *See supra* text accompanying notes 102–11.

420. *See supra* text accompanying notes 112–21.

421. *Compare* U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude . . . shall exist within the United States . . ."), *with* Northwest Ordinance, *supra* note 84 ("There shall be neither slavery nor involuntary servitude in the said territory . . .").

stitution, and whatever the aspirations of some of the Amendment's supporters, they were operating within established linguistic conventions. Indeed, congressional supporters repeatedly noted that "involuntary servitude" served to expand the reach of the Amendment's prohibition beyond chattel slavery to include relationships that involved the same degradation as slavery.<sup>422</sup> Furthermore, in the debates over implementing legislation, congressmen frequently cited instances of these four concerns as evidence of "involuntary servitude" within their power to suppress.<sup>423</sup>

It is unclear whether each of these factors is individually necessary or sufficient for "involuntary servitude," but nothing in this original meaning forbids a court from ordering specific performance of a contract that does not involve *any* of these four elements. Hence, for example, ordering specific performance of a contract by a sophisticated music performer who voluntarily agreed to perform a single concert for a substantial fee after an arms length negotiation cannot reasonably be construed as "involuntary servitude." The original obligation is freely entered into. The work is well compensated. The temporal extent of the contract is limited. The owner of the venue lacks the power to personally detain, beat, or otherwise abuse the performer. On the other hand, the original meaning of "involuntary servitude" could prohibit the specific performance of certain kinds of contracts. Suppose, for example, that an illegal immigrant promised to work for a violent sweatshop owner for ten years in return for subsistence wages and under the threat of being turned into the immigration authorities. The specific enforcement of such a contract would tread on all four elements of "involuntary servitude."

The judicial construction of the Thirteenth Amendment is not doctrinally organized around these four elements. Indeed, the Court lacks any clear doctrinal framework for evaluating claims of involuntary servitude. In *Robertson*, the Court suggested that the penal enforcement of any contract voluntarily entered into cannot be involuntary servitude.<sup>424</sup> In contrast, the *Peonage Cases* suggest that even a fully voluntary contract becomes "involuntary servitude" if its performance results from any threat of legal sanctions.<sup>425</sup> Neither of these approaches,

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422. See *supra* text accompanying notes 215–21.

423. See *supra* Part IV.B.

424. See *Robertson v. Baldwin*, 165 U.S. 275, 280–81 (1897).

425. See, e.g., *Pollock v. Williams*, 322 U.S. 4, 18 (1944) ("[N]o state can

however, can be reconciled with subsequent holdings, which have tended to uphold sanction-backed obligations to perform certain kinds of labor, so long as the conditions of the obligation itself are not extreme.<sup>426</sup> Indeed, in the face of the doctrinal incoherence of judicial construction of “involuntary servitude,” the multi-factor approach of the original meaning resolves the outcomes of the cases and better orients analysis of Thirteenth Amendment claims than anything yet offered by the Court.

Even taken at face value, the most sweeping dicta in the *Peonage Cases* and the judicial opinions following their lead suggest only that breach of a labor contract cannot be made a crime.<sup>427</sup> There is no reason, however, that such a rule would preclude civil contempt for breach of contract, particularly in light of the fact that the *Peonage Cases* explicitly endorse the civil sanction of money damages for breach of contract, which, as Justice Holmes pointed out, can have precisely the same effect as a fine.<sup>428</sup> Indeed, it is not clear that even criminal contempt would necessarily come within a prohibition making breach of contract a crime. In *Smolczyk v. Gaston*,<sup>429</sup> the Nebraska Supreme Court held that punishing contempt with imprisonment at hard labor would constitute involuntary servitude under a Nebraska state constitutional provision virtually identical to the Thirteenth Amendment, precisely because contempt sanctions did not constitute punishment for a crime, and therefore did not come under the criminal sentence exception to the Amendment’s ban.<sup>430</sup> This holding, however, suggests that punishment for criminal contempt is not the same thing as punishment for a crime. Hence, one could argue that an order of specific performance backed by criminal contempt would not be tantamount to criminalizing breach of contract.

The application of these arguments is best illustrated with an example. This Article began with two hypothetical scenarios, the second of which was based on the case of *Vanderbilt University v. DiNardo*.<sup>431</sup> Gerry DiNardo, a successful college football coach, entered into a contract with Vanderbilt Univer-

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make the quitting of work any component of a crime . . .”).

426. See, e.g., *Moss v. Superior Court*, 950 P.2d 59, 64 (Cal. 1998); *Warwick v. Warwick*, 438 N.W.2d 673, 679 (Minn. Ct. App. 1989).

427. See *supra* note 344 and accompanying text.

428. See *supra* text accompanying note 394.

429. 24 N.W.2d 862 (Neb. 1946).

430. *Id.* at 865.

431. 174 F.3d 751 (6th Cir. 1999).

sity to coach its team for five years.<sup>432</sup> The contract was subsequently extended for an additional two years.<sup>433</sup> Under the terms of the contract, DiNardo's base salary was \$100,000 per year with various bonuses based on the performance of the team.<sup>434</sup> After coaching at Vanderbilt for four years, DiNardo accepted a much more lucrative offer from Louisiana State University.<sup>435</sup> Vanderbilt sued for breach of contract, and, unable to ask for specific performance, sought payment under a liquidated damages clause.<sup>436</sup> After Vanderbilt's victory in the district court was partially overturned on appeal, DiNardo and the University settled for an undisclosed amount.<sup>437</sup>

Imagine that rather than seeking liquidated damages, Vanderbilt had sought specific performance of the contract. The term "specific performance" can sometimes mean simply the doing of what is promised in a contract,<sup>438</sup> but generally it refers to a court order requiring a breaching party to perform his obligations on pain of contempt.<sup>439</sup> Contempt can be punished by either fines or imprisonment, neither of which eliminates the offense.<sup>440</sup> Rather, the contempt can only be discharged by

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432. *Id.* at 753.

433. *See id.* at 754. This fact was disputed, and ultimately remanded to the district court for further fact finding. *Id.* at 760.

434. *See* Employment Contract between Vanderbilt University & Gary DiNardo § 4(a) (Dec. 3, 1990) (on file with author) (setting forth a "Base Salary" of \$100,000 and offering an "incentive bonus" of 1/12th the "Base Salary" "if the football team is selected and plays in a post-season bowl game sanctioned by the NCAA"). *See also id.* § 4(c) ("As additional compensation, the University agrees to provide Mr. DiNardo on a loan basis two (2) automobiles selected by the University for his use for so long as he is Head Football Coach.").

435. DiNardo's salary from LSU was \$585,000. *See* Michael Smith, *SEC Coaches' Salaries Reflect Competitive Times, Schools Paying More, Adding Perks to Keep Up*, THE STATE (S.C.), June 18, 1999, at C1.

436. *Vanderbilt University v. DiNardo*, 174 F.3d 751, 752 (6th Cir. 1998).

437. *See DiNardo Settles Suit with Vanderbilt*, BATON ROUGE ADVOC., May 11, 2000, at 7.

438. *See, e.g., In re Mary Clark*, 1 Blackf. 122, 124 (Ind. 1821) (speaking of "a specific performance of a covenant" that the law might or might not choose to enforce).

439. *See* BLACK'S LAW DICTIONARY 1407 (7th ed. 1999) (defining "specific performance" as "[a] court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate, as when the sale of real estate or a rare article is involved").

440. *See Cheap-O's Truck Stop, Inc. v. Cloyd*, 567 S.E.2d 514, 519 (S.C. Ct. App. 2002) ("The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice." (quoting *Curlee v. Howle*, 287 S.E.2d 915, 917 (S.C. 1982) (internal quotation omitted))); *Carty v. Schneider*,

complying with the court's order.<sup>441</sup> Hence, in theory a court requiring specific performance could imprison a breaching party indefinitely until he complied with the judicial order to do what he promised under the contract.<sup>442</sup> Such incarceration for contempt is not unlimited, however. Once performance under the court order becomes impossible, a contemnor must be released. In actual practice, imprisoning parties for contempt is rare, and courts generally enforce their orders with the civil sanction of a fine. Hence, in seeking specific performance of the DiNardo contract, Vanderbilt would be seeking to have the state intervene in its dispute not to punish DiNardo for breach but rather to exert pressure on him to perform, so long as such performance was possible.

The first question presented would be whether an order of specific performance by DiNardo would constitute "involuntary servitude" under the Thirteenth Amendment. The answer here would clearly be no. There was absolutely no evidence that DiNardo's consent to the contract lacked the "perfect freedom" required under the state constitutions of the Old Northwest. DiNardo had the assistance of his brother, who was an attorney, and if anything, he operated in a market in which successful coaches rather than universities have the bargaining power.<sup>443</sup> The contract did potentially extend over seven years, and the order of specific performance would have extended for from one to three years. At some point, the term of a contract becomes

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986 F. Supp. 933, 939 n.13 (V.I. 1997). The court in *Carty* described civil contempt sanctions as conditional sentences that "permit the contemnor to relieve himself from all sanctions through compliance. Thus, the penalty is usually either (1) a jail sentence of indefinite duration, which the contemnor may avoid by agreeing to comply with the underlying order, or (2) a fine triggered by future violations of the underlying order." *Id.*

441. See, e.g., *Lance v. Plummer*, 353 F.2d 585, 592 (5th Cir. 1965) ("[S]ince sanctions imposed in civil contempt proceedings must always give to the alleged contemnor the opportunity to bring himself into compliance, the sanction cannot be one that does not come to an end when he repents his past conduct and purges himself.").

442. *State v. Cottrill*, 511 S.E.2d 488, 497 (W.Va. 1998) ("The appropriate sanction in a civil contempt case is an order that incarcerates a contemner for an indefinite term and that also specifies a reasonable manner in which the contempt may be purged thereby securing the immediate release of the contemner . . .").

443. See *Vanderbilt University v. DiNardo*, 174 F.3d 751, 754 (6th Cir. 1998) (noting that DiNardo consulted with his brother Larry, the lawyer); Pam Louwagie, *Contract Provisions Favor College Coaches*, STAR TRIB. (Minneapolis), Apr. 4, 2002, at 1A ("Colleges and universities feel they have little bargaining power, and allow agents to write protections into contracts for the coaches . . . but few protections for the schools . . .").

“too long,” under the Thirteenth Amendment, but the Ohio constitution’s gloss on “involuntary servitude” suggests that at a minimum a single year of government-enforced service under a contract is unobjectionable.<sup>444</sup> There is no plausible question here about whether or not DiNardo’s contract was supported by “bona fide consideration.”<sup>445</sup> Over \$100,000 per year simply cannot be characterized as “unrequited toil.”<sup>446</sup> Finally, Vanderbilt University did not seek to exert direct physical control or dominion over DiNardo.

These four elements—involuntariness *ab initio*, extended time, the absence of real compensation, and personal dominion over the servant by the master—constituted “involuntary servitude” at the time that the Thirteenth Amendment was passed, and the Supreme Court has yet to find “involuntary servitude” in any case except those in which at least some of the elements—and arguably all of them—are present. Accordingly, it cannot be maintained that a case in which they are wholly absent constitutes “involuntary servitude.” In short, requiring DiNardo to perform under his contract to Vanderbilt would not have constituted slavery or anything like it for constitutional purposes.

One might argue that the Thirteenth Amendment demonstrates that it simply preempts certain kinds of contracts, rendering them void and unenforceable even by an award of damages. On this view, the Thirteenth Amendment might nullify DiNardo’s contract regardless of the remedy that Vanderbilt sought. The problem with this preemption argument is that it misconceives how the Thirteenth Amendment operates. Although it mentions slavery, which was a legal relationship under antebellum law, the Amendment is not ultimately directed at any particular legal category *per se*.<sup>447</sup> This is why, for ex-

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444. See OHIO CONST. art. VIII, § 2.

445. See *id.*

446. See *id.*

447. See *United States v. Kozminski*, 487 U.S. 931, 942 (1988) (“The primary purpose of the Amendment was to abolish the institution of African slavery . . . , but the Amendment was not limited to that purpose; the phrase ‘involuntary servitude’ was intended to extend ‘to cover those forms of compulsory labor akin to African slavery . . . .’” (quoting *Butler v. Perry*, 240 U.S. 328, 332 (1916))); *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (“[S]lavery cannot exist without law[] any more than property in lands and goods can exist without law: . . . therefore, the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom . . .”).

ample, the Amendment has no state action requirement.<sup>448</sup> Rather, it forbids the actual existence of a particular set of conditions within the United States.<sup>449</sup> The Amendment is violated not when someone *promises* to enter into a condition of “involuntary servitude,” but rather when the individual *actually* enters into that condition, with or without the complicity of the state. Hence, I propose that specific performance of a personal service contract would only violate the Thirteenth Amendment in those relatively rare cases where specific performance of the contract would actually result in “involuntary servitude.” Likewise, allowing the award of damages for breach of a contract could only violate the Amendment when the debt created by such an award would itself cause “involuntary servitude” to result. Given current law, even a very large debt would not cause “involuntary servitude.” Laws such as the Fair Debt Collection Practices Act and state homestead exemptions limit the power of judgment creditors over their debtors.<sup>450</sup> Likewise, with the exception of certain special kinds of debts such as federally subsidized student loans,<sup>451</sup> debt created by contract can be discharged in bankruptcy.<sup>452</sup> To be sure, when remedies for debt allow the kind of domination seen in the *Peonage Cases*, an award of damages might lead to a condition of “involuntary servitude.”<sup>453</sup> Likewise, public policy exceptions and the doc-

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448. *Kozminski*, 487 U.S. at 942 (“[T]he Thirteenth Amendment extends beyond state action . . .”); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968) (“As its text reveals, the Thirteenth Amendment ‘is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.’” (quoting *The Civil Rights Cases*, 109 U.S. at 20)); see also 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-15, at 924 (3d ed. 2000) (observing that the Thirteenth Amendment “is not subject to a state action requirement”).

449. See *Kozminski*, 487 U.S. at 942 (stating that the Amendment is “self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances” (quoting *The Civil Rights Cases*, 109 U.S. at 20) (internal quotations omitted)); cf. *The Civil Rights Cases*, 109 U.S. at 20 (“By its own unaided force and effect, [the Thirteenth Amendment] abolished slavery, and established universal freedom.”).

450. See, e.g., Fair Debt Collection Practices Act, 15 U.S.C. § 1692(f) (2006); LYNN M. LOPUCKI & ELIZABETH WARREN, *SECURED CREDIT* 13–19 (5th ed. 2006) (discussing state homestead exemptions).

451. See 11 U.S.C. § 523(a)(8) (2006) (exempting federally subsidized student loans from discharge in bankruptcy except in cases of “undue hardship on the debtor and the debtor’s dependents”).

452. See *id.* § 524(a) (describing the effects of a discharge of indebtedness in bankruptcy).

453. Cf. *Clyatt v. United States*, 197 U.S. 207, 215–17 (1905) (holding that

trine of unconscionability might void contracts whose specific enforcement could lead to “involuntary servitude.”<sup>454</sup> However, so long as the breach of contract gives rise only to a claim for damages, it is unlikely that the mere enforcement of a contract by damages would violate the Thirteenth Amendment given the current law associated with debt.<sup>455</sup>

In short, DiNardo could be compelled to perform his contract without running afoul of the Thirteenth Amendment. Whether it would be wise to do so as a matter of common-law development is beyond the scope of this article. The Thirteenth Amendment is not a conversation stopper in this case.

### CONCLUSION

For more than a century, the assumption that ordering specific performance of a personal service contract would constitute “involuntary servitude” under the Thirteenth Amendment has hung over the law of contract remedies. This claim has had the effect of ossifying development of the law, precluding courts from critically examining the merits of specific performance in the employment context. A recovery of the original meaning of “involuntary servitude,” coupled with a reading of the cases construing the Thirteenth Amendment, however, reveals that the argument against specific performance cannot be sustained in any but the most extreme situations. To be sure, when a contract is entered into while under the domination of another, extends for a long period of time, lacks adequate compensation, and involves the on-going domination of the master over the servant, the specific performance of such a contract would violate the Constitution’s ban on “involuntary servitude.”

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debt bondage was a form of “involuntary servitude” under the Thirteenth Amendment).

454. *Cf.* *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948) (“[A] party who has offered and succeeded in getting an agreement as tough as this one is, should not come to a chancellor and ask court help in the enforcement of its terms. That equity does not enforce unconscionable bargains is too well established to require elaborate citation.”); RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981) (“A promise or other term of an agreement is unenforceable on grounds of public policy if . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”).

455. *But cf.* Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165, 167–68 (1990) (arguing that forcing debtors to work in repayment of debts under a Chapter 13 bankruptcy in order to obtain a discharge of indebtedness may create a Thirteenth Amendment problem of unconstitutional conditions).

Affirmative contracts to perform services—as opposed to at-will employment relationships—are relatively rare, and they generally involve elites such as entertainers, professional athletes, coaches, and professors. Even when such contracts involve more ordinary workers, the agreements are still generally voluntary, limited, compensated, and free from direct physical coercion. In short, they fall outside the Constitution’s domain. The question of whether they ought to be enforced is left open by this examination, but the analysis does show that common law development in this area ought to proceed without conversation-stopping constitutional claims.