

Introduction

The Thirteenth Amendment Through the Lens of Class and Labor

*Maria L. Ontiveros**

Approximately ten years ago, a group of Thirteenth Amendment scholars and practitioners gathered at the University of Toledo College of the Law for a symposium titled “A New Birth of Freedom: The Thirteenth Amendment—Past, Present and Future.”¹ At the time, Professor Rebecca Zietlow gazed out at the auditorium full of attendees and quipped, “In planning this conference, we asked ourselves ‘If we throw a party for the Thirteenth Amendment, will anyone show up?’ I’m happy to say that the answer is ‘Yes!’” Since then, there have been other major conferences exploring the Thirteenth Amendment at the University of Chicago School of Law² and Columbia University,³ as well as other smaller panels and events.⁴

On the occasion of the sesquicentennial of the Thirteenth Amendment, many of the original group of scholars, along with others,⁵ reconvened at Seattle University School of Law. This conference, “The Thir-

* Professor of Law, University of San Francisco School of Law.

1. *Thirteenth Amendment Symposium*, 39 U. TOL. L. REV. 791 (2007).

2. Many of the papers presented at the conference appear in *THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT* (Alexander Tsesis ed., 2010).

3. Symposium, *The Thirteenth Amendment: Meaning, Enforcement, and Contemporary Implications*, 112 COLUM. L. REV. 1447 (2012).

4. See, e.g., *Symposium on the Constitutionalization of Labor and Employment Law*, 27 WIS. J.L. GENDER & SOC’Y 93 (2012); *The Maryland Constitutional Law Schmooze: Plus or Minus One: The Thirteenth and Fourteenth Amendment*, 71 MD. L. REV. 12 (2011).

5. The planning committee for this symposium included Charlotte Garden (Seattle University School of Law); Darrell A.H. Miller (Duke University School of Law); Maria Linda Ontiveros (University of San Francisco School of Law); James Gray Pope (Rutgers University School of Law); Aviam Soifer (William S. Richardson School of Law); Lea VanderVelde (University of Iowa College of Law); Ahmed White (University of Colorado School of Law); Rebecca E. Zietlow (University of Toledo College of Law).

teenth Amendment Through the Lens of Class and Labor,” has been generously sponsored by the Fred T. Korematsu Center for Law and Equality at the Seattle University School of Law, the Seattle University School of Law, and the University of Washington School of Law. The organizers chose to focus on issues of class and labor to give these themes a place of prominence in the discussion.

This focus resulted in a lively conference and the thirteen engaging articles published in this Symposium. The articles in this Symposium are arranged in three clusters. One cluster focuses on the definition of slavery and involuntary servitude and the reach of the Thirteenth Amendment in prohibiting oppressive labor relationships. Another cluster analyzes several positive class-based rights that emanate from the Thirteenth Amendment. The final cluster examines contemporary examples of oppressive labor that could violate the Thirteenth Amendment’s proscription against slavery and involuntary servitude.

The first group of articles focuses on the definition of slavery and involuntary servitude and the reach of the Thirteenth Amendment. Two articles embrace an evolving definition of slavery and expansive reach of the Amendment. In *Is Modern Day Slavery a Private Act or a Public System of Oppression?*, Maria L. Ontiveros canvassed the internet to see how the phrase modern day slavery is being used in popular discourse. She discovered that the U.S. government uses the language of slavery in its fight against trafficking and views modern day slavery as a private act—a criminal act committed by an individual or group of individuals involving forced labor. Immigrant workers’ advocates, on the other hand, use the language of slavery to describe a public system of class oppression that is facilitated by government policies. After exploring the nature of chattel slavery as a system of private acts supported by state law and the post-emancipation enforcement of the Thirteenth Amendment, she explains how advocates can use this information to craft an agenda for social change that reaches both private acts and governmental policies. George Rutherglen explores the extraterritorial enforcement of the Thirteenth Amendment in *The Constitution and Slavery Overseas*. He argues that Congress has ample power, under the Thirteenth Amendment and other Constitutional provisions, to pass laws to prevent or remedy slavery overseas, even as the definition of what constitutes slavery evolves beyond the historic forms of chattel slavery.

These expansive visions of the Thirteenth Amendment seek to counter a more limited historical reach of the Amendment explored in two other articles. In *The Last Legally Beaten Servant in America: From Compulsion to Coercion in the American Workplace*, Lea VanderVelde explains how the demise of a master’s ability to strike a servant led to

other forms of workplace discipline and injustice that have remained unexamined. As the master's right to use corporal punishment against workers eroded, the use of corporal punishment against slaves and African Americans broadened and intensified. With the move from compulsion to coercion, the state no longer found an obvious activity—whipping—to regulate, so state regulation of employer punishment eroded as well. Employers didn't necessarily lose in the transformation. The modern workplace may be free from corporal punishment, but coercive and even abusive employer practices remain unchecked with the development of the at-will rule. Professor VanderVelde argues that this presents less of a gain to the concept of free labor in the modern workplace than one might have hoped for. Dean Aviam Soifer, in his article *Of Swords, Shields, and a Gun to the Head: Coercing Individuals, But Not States*, shows how federalism issues following emancipation led the federal government to allow states to circumvent the Thirteenth Amendment and the ways in which federalism issues continue to influence the reach of the Thirteenth Amendment.

Another group of articles examines positive class-based rights that may emanate from the Thirteenth Amendment. Dean William Carter argues that the Thirteenth Amendment protects a special type of class-based discrimination—subordination that is “so impermeable and of such magnitude as to transform class into caste, thus constituting a near-total alienation from civil society akin to that characteristic of the system of slavery.” In his article, *Class as Caste: The Thirteenth Amendment's Applicability to Class-Based Subordination*, he analyzes mass incarceration as an example of this theory. Jennifer Mason McAward in *The Thirteenth Amendment, Human Trafficking, and Hate Crimes* analyzes the differential treatment of the Trafficking Victims Protections Act of 2000 and the Shepard-Byrd Hate Crimes Act of 2009 by the federal courts. She concludes that the courts are more likely to use the Thirteenth Amendment to protect free labor than racial equality in general. As a counterpoint, in *The Thirteenth Amendment, Disparate Impact, and Empathy Deficits*, Darrell A.H. Miller suggests that the Thirteenth Amendment can be used to bolster the right to racial equality in employment by creating the racial empathy necessary to support acceptance of the doctrine of disparate impact. Rebecca Zietlow posits that the Thirteenth Amendment creates *A Positive Right to Free Labor*. Drawing upon the history of the Thirteenth Amendment, she argues that “the Thirteenth Amendment protected a positive right to free labor that encapsulated fundamental human rights, including the right not to be unduly exploited by one's employer” and that “the positive right to free

labor remains part of our constitutional tradition, with exciting potential as a source of workers' rights in the twenty-first Century."

The Symposium also brings together several articles that explore contemporary examples of compelled labor that might violate the Thirteenth Amendment. In *The Thirteenth Amendment at the Intersection of Class and Gender: Robertson v. Baldwin's Exclusion of Infants, Lunatics, Women, and Seamen*, James Gray Pope analyzes the "domestic" exclusion to the Thirteenth Amendment that has been used to compel labor by women and children based on issues of class and gender. He argues that the time is right to argue that the Thirteenth Amendment protects women and children in domestic settings. Noah Zatz criticizes the growing tendency of the state to incarcerate certain individual for refusal to work in his article *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*. He argues that compulsory child support payments, where individuals can be imprisoned if they do not earn income to pay the debt, amount to incarceration for nonwork, debt bondage or peonage in violation of the Thirteenth Amendment. In *The Paradox of the Right to Contract: Noncompete Agreements as Thirteenth Amendment Violations*, Ayesha Bell Hardaway describes the surprisingly common practice of employers requiring low-wage workers to sign non-compete agreements. As a result of the lack of mobility, workers are compelled to work in oppressive conditions in violation of the Thirteenth Amendment. Richard Blum argues in *"They Outlawed Solidarity!"* that the ban on secondary boycott strikes found in the National Labor Relations Act results in compelled labor. The historical foundation for why certain oppressive relationships are allowed to stand may be found in John C. Williams's article, *Slave Contracts and the Thirteenth Amendment*. Williams shows how courts continued to enforce contracts for sales of slaves even after emancipation. Courts privileged the law of contract over the policy of emancipation and forced slave buyers to bear the cost of freedom.

While the articles are grouped into these clusters for easy reading, several important themes emerge from the whole. First, employers utilize a wide variety of methods to compel labor, including corporal punishment, threat of imprisonment, contracts, and injunctions. For many of these, the state, through the legal system, plays a key role in supporting, legitimizing or enforcing this coercion. The Thirteenth Amendment provides a tool to examine and challenge these labor arrangements. Second, although this Symposium examined the Thirteenth Amendment through the lens of class and labor, intersections between class and other areas, such as race, gender, and immigration status are readily apparent. Subordination and empowerment require an understanding of these intersec-

tions. When examining intersections with gender, in particular, issues regarding the domestic and family spheres complicate the class and labor analysis. Many of the articles also demonstrate the importance of history as setting the agenda for the future. Finally, the articles examine the role of free labor in empowering workers as a class. The ability to control one's own labor, to find dignity and autonomy at work, becomes a precursor to a worker's ability to become an effective member of society. These articles demonstrate that the Thirteenth Amendment, when examined through the lens of class and labor, continues to be vital to the well-being of workers.