

CONSTITUTIONALIZING EMPLOYEES' RIGHTS:
LESSONS FROM THE HISTORY OF THE THIRTEENTH
AMENDMENT

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INTRODUCTION.....	162
I. THE MINIMAL THIRTEENTH AMENDMENT.....	164
II. CONSERVATIVE ARGUMENTS FROM THE THIRTEENTH AMENDMENT.....	168
III. THE RECENT RECORD OF LABOR RIGHTS IN THE SUPREME COURT.....	172
CONCLUSION.....	174

INTRODUCTION

The last two decades have seen a revival of interest in the Thirteenth Amendment as a source of constitutional rights. Arguments based on the amendment have taken various forms to support different rights, ranging from protecting children, to safeguarding abortion rights, to prohibiting discrimination, and to the topic of today's panel, protecting employees—both in their individual rights and in their right to organize unions, to engage in collective bargaining, and to strike.¹ These positions have been asserted in the service of a progressive and liberal agenda for social change, in a tradition that goes back to the radical and abolitionist roots of the amendment. Together with the Civil War and the Emancipation Proclamation, the Thirteenth Amendment initiated the most profound social revolution in our nation's history.² Emancipation rescued the nation from its original sin of injustice, for which it is still doing penance, and it set off the transformations in constitutional

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1. For recent books and essays on the Thirteenth Amendment, see RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); *THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT* (Alexander Tsesis ed., 2010); ALEXANDER TSESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* (2004); MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* (2001); Mark A. Graber, *Foreword: Plus Or Minus One: The Thirteenth And Fourteenth Amendments*, 71 MD. L. REV. 12 (2011); see also *infra* notes 29-40 and accompanying text.

2. DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 298 (2006) (stressing the revolutionary meaning of the Civil War and emancipation).

structure and individual rights worked by Reconstruction, with consequences still being worked out today.

The transformative potential of the Thirteenth Amendment cannot be denied, but it was immediately subdued, for both good reasons and bad. The good reasons crystalized in the Fourteenth and Fifteenth Amendments. These amendments, and the Reconstruction legislation based upon them, became the principal doctrinal vehicles for pursuing equality in American life. The bad reasons inhere in the abandonment of Reconstruction, with the consequent formal and restrictive interpretation of its major accomplishments. The Thirteenth Amendment escaped complete nullification in the era of Jim Crow, as did the Civil Rights Act of 1866 and the Anti-Peonage Act of 1867 passed under its authority,³ but none of these laws put an effective end to subterfuges to large scale, if isolated, forms of peonage, until the second half of the twentieth century. In the process, the Thirteenth Amendment became focused on a narrow core of labor practices that amounted to slavery or its equivalent.

The self-enforcing provisions in section 1 of the amendment have never expanded beyond this narrow interpretation. As the Supreme Court has said, in summarizing its decisions through 1948, and then following them in 1988: “all of the Court’s decisions identifying conditions of involuntary servitude had involved compulsion of services through the use or threatened use of physical or legal coercion.”⁴ Meanwhile, the decisions on enforcement legislation, enacted under section 2 of the amendment, have gone considerably further, mainly as a result of *Jones v. Alfred H. Mayer & Co.*⁵ That case recognized the power of Congress “rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”⁶ Whatever might be said for and against *Jones*, it represents an accurate assessment of the course of development under the Thirteenth Amendment—under section 2 instead of section 1, and with the support of federal legislation rather than without it. The decision did not engage in judicial review under section 1 of the amendment, which simply provides that “[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.” Instead, it upheld legislation under section 2, providing that “Congress shall have the power to enforce this article by appropriate legislation.”

Current attempts to revive the influence of the amendment must take its history into account. This history offers three salutary lessons for efforts to protect employees’ rights. First, such efforts are not likely to be accomplished by judicial interpretation of the amendment alone. Second, decisions interpreting the amendment, to the extent they depart from enforcement

3. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 18 U.S.C. § 242 (2006) and 42 U.S.C. §§ 1981-1982 (2000)); Anti-Peonage Act of 1867, ch. 187, 14 Stat. 546 (1867) (codified as amended at 18 U.S.C. § 1581 (2006) and 42 U.S.C. § 1994 (2006)).

4. *United States v. Kozminski*, 487 U.S. 931, 945 (1988).

5. 392 U.S. 409 (1968).

6. *Id.* at 440.

legislation, have historically served conservative purposes as frequently as they have served progressive purposes. And third, the current Supreme Court has shown little sympathy for the progressive uses of constitutional law, especially to protect employees, and if anything has shown the reverse. It follows that constitutional arguments under the Thirteenth Amendment must be deployed as part of a larger strategy to obtain legislative endorsement of labor's goals. Only in that way will current efforts to revive the amendment learn from its history, rather than repeating it.

I. THE MINIMAL THIRTEENTH AMENDMENT

Throughout its history, the Thirteenth Amendment has offered a remarkably narrow basis for judicial review. Decisions solely under section 1 have never strayed far from slavery and involuntary servitude, refusing to recognize analogies to these practices by reasoning from general principles of freedom or equality. Immediately upon ratification, the Supreme Court rejected claims that the amendment applied retroactively to prevent recovery of the purchase price of slaves delivered before the amendment took effect.⁷ If the amendment did not interfere with pre-existing contract claims, neither did it prevent government regulation of contracts. The amendment's prohibition was limited to contracts involving personal servitude, a limitation applied in the *Slaughter-House Cases*,⁸ which rejected claims under the Thirteenth Amendment as well as the Fourteenth. The notorious decision in *Plessy v. Ferguson*⁹ refused to find that segregation amounted to involuntary servitude. The slightly later decision in *Baldwin v. Robertson*¹⁰ rejected the conclusion that the onerous terms under which sailors worked constituted a form of slavery. In the twentieth century, the Court upheld rent regulation against challenges under the amendment.¹¹ Unions later invoked the Thirteenth Amendment to protect the right to strike, but they were unsuccessful in arguing that regulation amounted to involuntary servitude.¹² Constitutional attacks upon the draft and other forms of public service failed, although for different reasons based on the special demands that government could make upon its citizens.¹³ Most recently, in *Bray v. Alexandria Women's Health Clinic*, the Supreme

7. *Boyce v. Tabb*, 85 U.S. 546, 548 (1873); *Osborn v. Nicholson*, 80 U.S. 654, 662-63 (1871). The amendment was also held not to confer special treaty rights on the freed slaves of the Chickasaw Nation, which had sided with the Confederacy in the Civil War. *United States v. Choctaw Nation*, 193 U.S. 115, 124 (1904).

8. 83 U.S. 36, 69 (1872).

9. 163 U.S. 537, 542-43 (1896).

10. 165 U.S. 275, 282 (1897).

11. *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 199 (1921).

12. *UAW Local 232 v. Wis. Employment Relations Bd.*, 336 U.S. 245, 251 (1949) (upholding state regulation of right to strike); *United States v. Petrillo*, 332 U.S. 1, 13 (1947) (upholding federal statute prohibiting coercion of broadcast licensees to hire extra employees).

13. See e.g., *Hurtado v. United States*, 410 U.S. 578, 589-90 n.11 (1973) (witnesses paid at one dollar a day); *Selective Draft Law Cases*, 245 U.S. 366, 389 (1918) (draft); *Butler v. Perry*, 240 U.S. 328, 330-33 (1916) (work on public roads).

Court held that the right to an abortion fell outside those protected against private discrimination under the Thirteenth Amendment.¹⁴

The undeveloped implications of the amendment no doubt have attracted scholars with the prospect of expanding its scope, and with it, the scope of constitutional rights generally. Unlike the Fourteenth Amendment, the Thirteenth Amendment does not suffer from the encumbrances of the state action doctrine. Unlike the Commerce Clause, it need not be limited to rights and duties “affecting commerce,” no matter how broadly that term is construed. Unlike the spending power, its scope is not tied to federal expenditures. The Thirteenth Amendment also bears a stronger and more natural relationship to universal rights than either of these last two sources of federal power and a more immediate connection to labor and employment than any of these provisions or, indeed, to any other provision in the Constitution. It excludes altogether certain forms of the master-servant relationship from among those allowed by American law. All of these features have made the Thirteenth Amendment an attractive target of scholarly attention.

Yet the amendment has not received similar attention from the judiciary, at least in the absence of enforcement legislation. Long before *Jones v. Alfred H. Mayer & Co.*, the Court endorsed efforts to enforce the amendment through the Anti-Peonage Act of 1867.¹⁵ A leading decision in this line is *Bailey v. Alabama*, which held that Alabama could not create a statutory presumption of fraud leading to a criminal conviction based on an indebted employee’s refusal to perform a contract for services.¹⁶ The Court found the statute to establish a form of peonage, defined as any attempt “to compel the service or labor by making it a crime to refuse or fail to perform it.”¹⁷ The Alabama law did not fall within the exception to the Thirteenth Amendment for “punishment for crime whereof the party shall have been duly convicted,” because the crime itself constituted involuntary servitude in violation of the amendment.¹⁸ The Court could have relied solely upon section 1 of the amendment to reach this conclusion, but it also invoked the support of Congress in passing enforcement legislation under section 2.¹⁹

Another case illustrating the interplay between the constitutional language and statutory prohibitions is *United States v. Kozminski*, which equated the meaning of “involuntary servitude” under the amendment to the meaning of the phrase in a federal criminal statute.²⁰ The statute punished anyone who “knowingly and willfully holds to involuntary servitude or sells into any

14. 506 U.S. 263, 278 (1993).

15. See Act of April 9, 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-1982 (2006)); Act of Mar. 2, 1867, ch. 187, 14 Stat. 546 (codified as amended in 18 U.S.C. § 1581 (2006)).

16. 219 U.S. 219 (1911).

17. *Id.* at 243.

18. *Id.* at 240, 244.

19. *Id.* at 241.

20. 487 U.S. 931, 952 (1988).

condition of involuntary servitude any other person for any term.”²¹ Based on existing interpretations of the amendment when the statute was passed, the Court limited it to involuntary servitude resulting from physical coercion or coercion through legal sanctions.²² The Court excluded psychological forms of coercion from the scope of the statute.²³ Congress soon responded to this decision by amending the statute to include psychological coercion,²⁴ a change that the lower federal courts have assumed to be within the power of Congress under section 2 of the amendment.²⁵ Language in the decision certainly invited this response from Congress.²⁶ Although the Court relied upon the constitutional definition of “involuntarily servitude” under section 1, it left open the possibility that Congress could pass enforcement legislation with a broader definition of the term under section 2.²⁷

The breadth accorded to enforcement legislation follows the precedent set in *Jones v. Alfred H. Mayer & Co.*, both in recognizing that Congress can address discrete components of slavery as among the “badges and incidents” of the practice and in assuming that the amendment applied to private discrimination.²⁸ By contrast, the decisions under section 1 alone have resolutely confined the self-enforcing effect of the amendment to practices that are, taken as a whole, the equivalent of slavery. Disaggregation of slavery into its component parts can be accomplished under section 2, but not under section 1. This institutional division of responsibility has posed a problem for advocates of the Thirteenth Amendment as a source of new law. Either they have to rely upon dicta and reasoning from the principles implicit in prior decisions interpreting section 1 because they have no holdings to rely upon, or they must await congressional action under section 2, which only occasionally has been forthcoming.

James Gray Pope has been among the foremost of these advocates, grounding his arguments in a comprehensive analysis of the entire history of the Thirteenth Amendment, from its adoption through its interpretation, by both the Supreme Court and Congress.²⁹ He does not, as I read his work, dispute the limited actual effect that the amendment has had on judicial decisions and legislation. His main claims depend upon an expansive reading of *Pollock v.*

21. *Id.* at 944 (quoting 18 U.S.C. § 1584 (1982)).

22. *Id.* at 952-53.

23. *See id.*

24. 22 U.S.C. § 7102(2) (2006) (defining “coercion” in anti-trafficking legislation).

25. *See e.g.*, *United States v. Calimlim*, 538 F.3d 706, 712, 714 (7th Cir. 2008) (recognizing that the statute superseded *Kozminski*); *United States v. Bradley*, 390 F.3d 145, 150, 156-57 (1st Cir. 2004) (same).

26. *See* 487 U.S. at 952.

27. *See id.*

28. 392 U.S. 409, 436-44 (1968).

29. James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of Involuntary Servitude*, 119 YALE L.J. 1474 (2010) [hereinafter Pope, *Contract*]; 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 (2002) [hereinafter Pope, *Thirteenth Amendment*].

Williams, a case striking down a Florida statute that made it a crime for employees to breach their contracts of employment.³⁰ He also offers an alternative history of the Wagner Act, finding a superior basis for it in the Thirteenth Amendment rather than the Commerce Clause.³¹ He would constitutionalize various labor rights, notably the right to strike, based on “the *Pollock* principle,” taken from this passage in the opinion: “When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work.”³² With respect to the Wagner Act, he finds that the strategic maneuvers preceding passage of the act caused it to be based on the Commerce Clause rather than the Thirteenth Amendment.³³ The amendment had also fallen into some disrepute under the influence of the Dunning School of Reconstruction history, which made the South out to be a victim of corrupt intrusions from the North.³⁴

These arguments have much to be said for them, and if anything is to be said against them, it must be based on an equally thorough analysis of the historical record. That is not my purpose in this brief comment. It is not to criticize these arguments but to remark on the carefully qualified conclusions that they yield. James Pope addresses the implications of the *Pollock* principle—not any holding based upon it, including *Pollock* itself—and he discusses the possibility of general labor legislation under the amendment—not any statute passed by Congress on that ground. He does not contradict either of the conclusions to be gained from the brief survey of the Thirteenth Amendment’s history offered earlier: no decisions do much to expand rights under section 1, and such expansive decisions as there are depend upon enforcement legislation under section 2. Pope candidly recognizes that, as a source for new constitutional rights, the record of adjudication under the Thirteenth Amendment can only be described as minimal.³⁵

Other advocates of an expansive interpretation of the amendment implicitly concede the same point. For Akhil Amar, who sees the amendment as a source of rights against hate speech and rights against child abuse, it is one of the “missing amendments.”³⁶ Andrew Koppelman argues from the amendment to support the right to an abortion, but he concedes that this argument has been cited only once by a court that said only that it was “not

30. 322 U.S. 4, 5, 25 (1944).

31. Pope, *Thirteenth Amendment*, *supra* note 29, at 112-22 & n.592.

32. Pope, *Contract*, *supra* note 29, at 1478-79 (citing *Pollock v. Williams*, 322 U.S. at 18).

33. Pope, *Thirteenth Amendment*, *supra* note 29, at 27-29, 38-46.

34. See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION xix-xxiv (Henry Steele Commager & Richard B. Morris eds., 1988).

35. Pope, *Thirteenth Amendment*, *supra* note 29, at 117-20 (acknowledging the basis for labor legislation in the Thirteenth Amendment as “counterfactual”).

36. Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 155-60 (1992); Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1360 (1992).

frivolous.”³⁷ For Lea VanderVelde, the Thirteenth Amendment is the source of “our aspirations,”³⁸ and for Alexander Tsesis, the source of “pressing issues” that await an activist response.³⁹ William Carter goes only so far as making arguments “toward a Thirteenth Amendment exclusionary rule” for racial profiling.⁴⁰ Each of these authors advances claims at some distance from existing law, emphasizing abstract reasoning from the principles of the amendment to highly normative conclusions. They do not argue what the law is, but what it should be, and they cite few, if any, steps actually taken in the directions that they recommend.

II. CONSERVATIVE ARGUMENTS FROM THE THIRTEENTH AMENDMENT

Anyone who accepts the validity of the arguments for a progressive interpretation of the Thirteenth Amendment must come to terms with the puzzling and disappointing failure of the courts to give them any but the most cursory attention. This failure cannot be laid entirely at the feet of the current Supreme Court, conservative though it may be. Its current decisions on labor and employment law hardly explain the failure of the Court over the many decades since Reconstruction to embrace a progressive interpretation of the amendment. A look at the decisions from the nineteenth century reveals an alternative explanation, one more ominous reason than simple neglect of the amendment. In the nineteenth century, when the amendment was successfully invoked as a basis for individual rights, these took on a distinctly conservative cast, embracing the predominant ideology of free labor and free markets, not union rights. If supporters of labor rights have little to gain from the amendment now, perhaps they should be relieved that they also have little to lose.

The landmark among conservative interpretations is to be found in the *Civil Rights Cases*.⁴¹ That decision invalidated the prohibition in the Civil Rights Act of 1875 against racial discrimination by the private owners of public accommodations, such as inns, restaurants, hotels, and theaters. The Court found no authority for passage of the act under the enforcement provisions of either the Thirteenth or the Fourteenth Amendment. Justice Bradley devoted most of his opinion for the Court to the absence of state action under the

37. Andrew Koppelman, *Forced Labor Revisited: The Thirteenth Amendment and Abortion*, reprinted in *THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT* 226, 234 (Alexander Tsesis ed., 2010).

38. Lea S. VanderVelde, *The Thirteenth Amendment of Our Aspirations*, 38 U. TOL. L. REV. 855, 879 (2007) (Congress abolished subjugation for “the entire legal order” in the Thirteenth Amendment).

39. ALEXANDER TSEISIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* 162 (2004).

40. William M. Carter, Jr., *Toward a Thirteenth Amendment Exclusionary Rule as a Remedy for Racial Profiling*, in *THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT* 266, 266-75 (Alexander Tsesis ed., 2010).

41. 109 U.S. 3 (1883).

Fourteenth Amendment. In the remainder, he denied that discrimination in public accommodations involved any of the “badges and incidents of slavery” under the Thirteenth Amendment.⁴² To support this conclusion he relied upon the rights enumerated in the Civil Rights Act of 1866, such as those to make and enforce contracts, to hold property, and to sue, be parties, and give evidence.⁴³ According to Justice Bradley, “at that time (in 1866) Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community.”⁴⁴

This passage relies upon the distinction between civil, political, and social rights, which has since been discredited as a limitation on protected civil rights, and whose boundaries were even contested at the time, as evidenced by Justice Harlan’s dissent in the *Civil Rights Cases*.⁴⁵ For present purposes, it is enough to note what Justice Bradley included in the category of “social rights.” As he asserted later in the opinion:

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.⁴⁶

This list comprises many of the forms of private discrimination later prohibited by the Civil Rights Act of 1964, subject to a narrow exception that would now be based in the right of free association under the First Amendment.⁴⁷ Justice Bradley framed the exception, in personal correspondence at the time of the *Civil Rights Cases*, as an implication of the Thirteenth Amendment:

The 13th amendment declares that slavery and involuntary servitude shall be abolished, and that Congress may enforce the enfranchisement of the slaves. Granted: but does freedom of the blacks require the slavery of the whites? And enforced fellowship would be that.⁴⁸

42. *Id.* at 20-25.

43. Act of April 9, 1866, 14 Stat. 27 (codified as amended, 42 U.S.C. §§ 1981, 1982 (2006)).

44. 109 U.S. at 22.

45. *Id.* at 59-60 (Harlan, J., dissenting) (arguing that access to public accommodations is a civil right, not a social right).

46. *Id.* at 24-25 (majority opinion).

47. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (finding that state public accommodations law could not be applied to require admission of gays to Boy Scouts).

48. 7 CHARLES FAIRMAN, *Reconstruction and Reunion 1864-88, Part Two*, in *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 564 (1971). He meant “enfranchisement” in the sense of “[r]elease from slavery or custody,” the primary definition in NOAH WEBSTER,

For Justice Bradley, freedom entailed the choice whether or not to associate with others. Individuals could exercise their civil rights to discriminate or not as they saw fit. For him, enforced social rights would amount to the denial of civil rights.

This vision of the Thirteenth Amendment, like the distinction between civil, political, and social rights on which it is based, has been deeply undermined. The Warren Court implicitly rejected it when it upheld the constitutionality of the Civil Rights Act of 1964 and then it made its rejection explicit in interpreting the Civil Rights Act of 1866 to prohibit private discrimination. The decision in *Heart of Atlanta Motel, Inc. v. United States* rejected arguments against the validity of the 1964 Act based on the Thirteenth Amendment,⁴⁹ even though the public accommodations provisions of the act were almost identical to those in the 1875 Act that had been held unconstitutional in the *Civil Rights Cases*. The two acts were distinguishable, according to the Court, because the 1964 Act was passed under the Commerce Clause instead of the Thirteenth Amendment, and the prohibition against discrimination in public accommodations was not “in any way akin to African slavery.”⁵⁰ When the Warren Court later turned to the interpretation of the Civil Rights Act of 1866 in *Jones v. Alfred H. Mayer & Co.*, it held that the act prohibited private discrimination in economic transactions and that, as so interpreted, it was within the power of Congress to enforce the Thirteenth Amendment. By then, the Thirteenth Amendment had shifted from a basis for objecting to modern civil rights legislation to a reason for broadly construing and upholding legislation passed during Reconstruction.

In the meantime, however, the vision of the Thirteenth Amendment from the *Civil Rights Cases* had resurfaced as objections to the Civil Rights Act of 1964 while it was under consideration by Congress. The supporters of the act had to overcome a filibuster by southern senators opposed to any meaningful form of civil rights legislation, and so they looked for the narrowest ground on which the legislation could be passed by the Senate and upheld by the Supreme Court. They turned understandably to the Commerce Clause because appeal to the Thirteenth Amendment might have alienated legislators whose support was crucial to passage of the act. The critical group appeared to be conservative Republicans who might join with southern Democrats in supporting the filibuster in the Senate.⁵¹

FIRST EDITION OF AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828, reprint 1967).

49. 379 U.S. 241 (1964).

50. *Id.* at 261 (internal quotation marks and citation omitted).

51. HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972* 145-49 (1990). Only a single legislator, Senator Prouty of Vermont, spoke in favor of civil rights legislation based on the Thirteenth Amendment. 109 Cong. Rec. 14707-08 (1963); *id.* at 17444-47 (1963); 110 Cong. Rec. 8256-58 (1964). The Kennedy Administration had supported an earlier version of the act on this ground also, but had run into the predictable objection that the *Civil Rights Cases* foreclosed this source of congressional authority. 110 Cong. Rec. 7916-17 (1964) (remarks of Sen. Thurmond) (quoting and criticizing the testimony of Attorney General Kennedy and Assistant Attorney

The opponents of the act based their objections under the Thirteenth Amendment on a detailed memorandum by Alfred Avins, a legal scholar who returned to the argument from the *Civil Rights Cases* that the amendment invalidated any legislation that compelled one private individual to perform services for another.⁵² His analysis reframed traditional principles of freedom of contract into principles of freedom under the Thirteenth Amendment, studiously ignoring the erosion of those principles since the New Deal and the expansion of congressional power under the Commerce Clause. Avins' conclusions were decidedly libertarian and the threat they posed to passage of the act came less from Southern senators, who would oppose it anyway, than from conservative Republicans, whose support was necessary for the two-thirds vote needed to break the filibuster. Some Republicans, notably Senator Barry Goldwater, remained unpersuaded and voted against the act.⁵³ Others were concerned about the burden of federal regulation on private business, an issue not too distant from freedom of contract. Supporters of the act therefore made the strategic decision to keep the Thirteenth Amendment in the background, if not wholly removed from the debate.

The key document making the case for this strategy was written by Paul Freund and served as the basis for testimony by the Attorney General and Assistant Attorney General in Senate hearings on a predecessor to the 1964 Act.⁵⁴ Freund's memorandum had almost nothing in common with Avins' opposing memorandum. Whereas Avins concentrated on the central role of the Reconstruction Amendments, Freund assiduously sought to minimize their significance. He hardly mentioned the Thirteenth Amendment at all, discussing the Fourteenth Amendment as the only alternative to the Commerce Clause. The latter, he argued, was far superior to the former because of the freedom it gave Congress to legislate pragmatically and incrementally, without the risk of contravening established judicial precedent. The Commerce Clause did not carry any of the historical baggage of the Reconstruction amendments, which had been compromised by the *Civil Rights Cases* as a basis for civil rights legislation.

Freund's strategy did not stop opponents of the 1964 Act from citing the *Civil Rights Cases*, along with Avins' memorandum, as a constraint on any federal legislation regardless of the power exercised by Congress.⁵⁵ In the event, it did not prevent passage of the act or the decisions that quickly upheld its validity. To all appearances, Avins failed to gain acceptance for his

General Burke Marshall). After the legislation had passed the House of Representatives and was in the critical stages of consideration by the Senate, this argument dropped out of consideration by anyone other than Senator Prouty.

52. 110 Cong. Rec. 1917-22 (1964).

53. Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation*, 151 U. PA. L. REV. 1417, 1461-63, 1478 (2003).

54. Graham, *supra* note 52, at 92-93. The memorandum appears at Hearing Before the S. Comm. on Commerce, 88th Cong., 2d Sess. 1183-90 (1963).

55. *See supra* note 53.

conservative uses of the Thirteenth Amendment, just as progressives today have failed to gain acceptance for a liberal interpretation. Although the *Civil Rights Cases* continue to survive in their holding on state action doctrine under the Fourteenth Amendment,⁵⁶ they appear to have expired as a decision under the Thirteenth Amendment—or so we might hope.⁵⁷

The right of free association has meanwhile shifted from the Thirteenth Amendment to the First Amendment, as noted earlier, and several recent decisions of the Supreme Court, to be discussed shortly, have restricted labor rights on this ground. For better or for worse, the arguments for free association have moved beyond their basis solely in the Thirteenth Amendment. James Pope, for instance, has argued for a right of free association for labor under the Thirteenth Amendment, but his argument might be turned against him under the First Amendment.⁵⁸ The project of constitutionalizing labor rights, once it goes beyond the boundaries of the Thirteenth Amendment, still must confront the risk that the current Supreme Court will take it only in a conservative direction.

III. THE RECENT RECORD OF LABOR RIGHTS IN THE SUPREME COURT

Liberal law professors, it might be supposed, lost their enthusiasm for judicial review when they lost their enthusiasm for the current Supreme Court. Judicial activism appealed to them only when it served the political positions that they espoused. Perhaps this observation judges them too harshly, but it does give them the benefit of the doubt in one respect: it attributes to them a realistic appreciation of the risks, as well as the benefits, of judicial review. Inviting judges to make law does not guarantee that they reach the right results, no matter how those results are assessed. Assessing recent constitutional decisions against a conventional view of what is good for labor—decisions in favor of employee rights when those are not opposed to union rights—does not give much cause for optimism. The few decisions there are in favor of employee rights generally seem to be opposed to union rights, but mainly employees lose when they go up against the interests of employers.

Foremost among the anti-union decisions are those returning to the theme of freedom of association, most often as related to freedom of speech. Associational rights have a checkered reputation and a long history as a source for objecting to laws against discrimination, one that extends long after the *Civil Rights Cases*. Herbert Wechsler offered a celebrated criticism of *Brown v. Board of Education* on this ground, finding that it could not rest on neutral principles if it privileged the rights of black school children to associate over

56. *United States v. Morrison*, 529 U.S. 598 (2000).

57. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 407, 441-43 n. 78 (1968) (stating that the holding of the *Civil Rights Cases* was “rendered largely academic” by *Heart of Atlanta Motel*).

58. Pope, *Contract*, *supra* note 26, at 1548-51.

the freedom of white school children not to do so.⁵⁹ Reasoning in the same vein as Justice Bradley, Wechsler took freedom of association to protect equally the right to associate and the right not to. Transposed to the labor setting, it has become the right either to support or not to support a union. Consequently, the Supreme Court easily found in *Abood v. Detroit Board of Education* that dissenting employees could not be required to provide financial support to union activities involving political speech.⁶⁰ Mandatory agency shop fees could be used only to support the union's work as an agent for collective bargaining, not as a political representative. As the Court declared: "Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments."⁶¹ Recent decisions have only reinforced this principle.⁶² Constitutional restrictions on the collection of agency shop fees apply to private and public employees alike, since collection from unwilling employees depends upon government legal compulsion.

Constitutional decisions on the rights of public employees cover a wider range of issues since state action is pervasive in their relationship with government employers. But these decisions, although broader in scope, have been narrower in their support of the interests of unions and employees. Public employees have had an especially difficult time making out claims for freedom of speech. The latest and most restrictive decision on this issue, *Garcetti v. Ceballos*, denied constitutional protection to speech made "pursuant to their official duties."⁶³ Employees who speak out in the course of their employment, and who are therefore most likely to speak knowledgeably about their employing agencies, have no immunity from employer discipline or discharge for their speech. And even employees who pass the threshold test of *Garcetti* and speak outside the scope of their official duties must still surmount other hurdles in order to prevail. They have to speak on a matter of "public concern,"⁶⁴ and they have to overcome any legitimate reason offered by the employer for restricting their speech based on any reasonable version of the facts.⁶⁵ Any recovery of monetary relief must also overcome defenses based on various forms of immunity.⁶⁶

59. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

60. 431 U.S. 209 (1977).

61. *Id.* at 233-34.

62. *Davenport v. Washington Education Ass'n*, 551 U.S. 177, 181 (2007) (upholding state law imposing further restrictions on use of agency shop fees); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 873-74 (1998) (upholding the right of objecting employees to sue without exhausting arbitration procedures to which they have not agreed).

63. 547 U.S. 410, 421 (2006).

64. *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004) (per curiam) (finding no protection for pornographic video by police officer in police uniform); *Connick v. Meyers*, 461 U.S. 138, 149 (1983) (finding that grievances about internal union affairs are not a matter of public concern).

65. *Waters v. Churchill*, 511 U.S. 661, 677-78 (1994) (reasonable interpretation of the facts); *id.* at 690 (Scalia, J., concurring in the judgment) (legitimate reason genuinely held by

Other constitutional rights have fared no better in recent decisions. The privacy rights of public employees in their text messages, in their offices, or in avoiding drug testing have all been compromised.⁶⁷ Equal protection claims cannot be brought by a single employee, representing a “class-of-one.”⁶⁸ Where employees have prevailed against public employers, it has often been in a plainly conservative cause, as it was in *Ricci v. DeStefano*, invalidating the use of race in promotion decisions by an urban fire department.⁶⁹ The decision, although nominally based on Title VII of the Civil Rights Act of 1964, relied on a definition of intentional discrimination identical to that under the Constitution.⁷⁰ When employees prevail before the current Supreme Court, they do so typically on grounds hostile to liberal political positions, as in *Abood* and *Ricci*.

These decisions hardly are news, as are the conservative tendencies of the current Supreme Court. They might do no more than the conclusion offered earlier: that there is little reason to believe that the Supreme Court will soon depart from the pattern of minimalist interpretation of the Thirteenth Amendment. These decisions might do more, however, by raising the specter from the far side of the Thirteenth Amendment of freedom of contract: of reviving individualist conceptions of free labor and free markets, or more likely still, of supporting arguments for conservative rights under other constitutional amendments. We need look no further than the recent decisions under the Second Amendment to find this strategy at work. The Court relied in those cases on originalist sources, including Reconstruction legislation and debate, to support an individualist interpretation of the right to bear arms under the Second Amendment and to incorporate that right in the Due Process Clause of the Fourteenth Amendment.⁷¹ If legislation passed under the Thirteenth Amendment can be deployed for this purpose, there might be some reason to worry that the amendment itself, once revived, might be put to the same uses.

CONCLUSION

This brief comment has not closely analyzed the many and varied arguments put forward to make something of the Thirteenth Amendment. Nor

the employer sufficient). The original case establishing a balancing test was favorable to the employee, *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), but the balance has since swung in favor of the employer, as in decisions like *Waters*.

66. For a summary of these obstacles, see George Rutherford, *Public Employee Speech in Remedial Perspective*, 24 J.L. & POL. 129, 135-45 (2008).

67. *City of Ontario v. Quon*, 130 S. Ct. 2619, 2629-35 (2010) (text messages); *Nat'l Treasury Emp. Union v. Von Raab*, 489 U.S. 656, 678-79 (1989) (drug testing); *O'Connor v. Ortega*, 480 U.S. 709, 726 (1987) (plurality opinion); *id.* at 732 (Scalia, J.) (concurring in the judgment) (offices).

68. *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 597-98 (2008).

69. 129 S. Ct. 2658 (2009).

70. *Id.* at 2675-76.

71. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3039-44 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 615-16 (2008).

does it deny the validity of efforts to preserve the transformative potential of the amendment, which once remade American society and may do so yet again. This essay has asserted only that the potential of the amendment is more likely to be realized in legislation than in judicial decisions alone; that past decisions have served conservative as well as progressive purposes; and that decisions of the Supreme Court are likely to replicate this pattern. Yet arguments rooted in the Constitution have a dimension that transcends their immediate implications for legal doctrine. So it is with arguments over slavery, which have a distinguished lineage going back to the Revolution. Slavery contradicted the promises of the Declaration of Independence; it symbolized the subordinate status from which the colonies rebelled. In the sectional divisions leading to the Civil War, slavery served as the metaphor for subjugation, invoked by states, both slave and free. After the war, it became the consuming object to be overcome in Reconstruction. Slavery served the union movement as the antithesis and frustration of the ideals of free labor, while it also served conservatives who argue for freedom of contract and freedom of association. To deny the meaning and role of the amendment in such arguments is to flatten it into a bare reflection of itself in established legal rules. But if the amendment retains its potential, it offers little in the way of prospect that it will soon be realized. A look through recent decisions of the Supreme Court on the constitutional rights of employees offers an even bleaker prospect. Current proposals to revive the amendment leave unanswered crucial questions: Which judges will accept these arguments? With what degree of popular and legislative support? And with what consequences for individual employees, for unions, and for the ongoing development of the law? Keeping the amendment alive as a source of law might not require a detailed plan for implementing a vision of free labor drawn from it. But without a view of where such arguments might lead, they might not find the audiences they seek.