

WORKER COLLECTIVE ACTION IN THE TIME OF FISSURING: INDEPENDENT CONTRACTOR LABOR BOYCOTTS, THE THIRTEENTH AMENDMENT, AND ANTITRUST LAW

Richard Blum*

TABLE OF CONTENTS

INTRODUCTION.....	366
I. THE COLLISION OF ANTITRUST LAW AND LABOR LAW BEFORE THE <i>SCTLA</i> DECISION	369
II. SIGNIFICANCE OF THE ISSUE: THE FISSURED WORKPLACE AND THE GIG ECONOMY	372
A. <i>Employees v. Independent Contractors: Statutory Lines and Their Consequences</i>	372
B. <i>Labor Boycotts Outside the Protections of the NLRA</i>	377
III. THE THIRTEENTH AMENDMENT RIGHT TO WITHHOLD LABOR	379
IV. THE <i>SCTLA</i> CASE ANALYZED	383
V. THE THIRTEENTH AMENDMENT RIGHT OF WORKERS TO BOYCOTT... 387	387
A. <i>The Constitutional Right of Workers to Act Collectively in Their Self-Interest</i>	387
B. <i>The Thirteenth Amendment Right to Withhold Labor v. Market Logic</i>	391
CONCLUSION	395

* Richard Blum, Staff Attorney, The Legal Aid Society; former Adjunct Clinical Professor, CUNY School of Law; B.A. 1984, Yale University; J.D. 1989, New York University; M.A. Labor Studies, 2015, Joseph S. Murphy Institute for Worker Education and Labor Studies, CUNY School of Professional Studies. The author wishes to thank the organizers of and participants in the conference on the Thirteenth Amendment and Economic Justice held on March 3, 2018 at the William S. Boyd School of Law and Cynthia Estlund for graciously giving her time to critique an earlier draft. The author would also like to thank Sanjukta Paul for her intellectual inspiration and input.

INTRODUCTION

In 1990, the Supreme Court upheld an antitrust action brought by the Federal Trade Commission (FTC) against a group of trial lawyers from a panel of court-appointed attorneys for indigent criminal defendants in the District of Columbia (DC).¹ The FTC sued the trial lawyers' organization and its leadership because the lawyers collectively refused to take more criminal defense assignments.² The refusal was in protest of fees that were so low that the lawyers believed they were compromising their clients' Sixth Amendment right to effective assistance of counsel.³ The lawyers' boycott successfully induced the DC municipal government to enact legislation raising the hourly rate for court-appointed criminal defense cases.⁴

If the trial lawyers' action sounds like a strike, that is because it was a strike. Except that unlike myself, and my fellow employees at The Legal Aid Society in New York, the lawyers were each independent practitioners, employed by themselves.⁵ Because of that distinction, those lawyers lost the statutory protections for collective labor actions in the Clayton Antitrust Act,⁶ the Norris-LaGuardia Act,⁷ and the National Labor Relations Act (NLRA).⁸ As statutory "independent contractors," their collective action was not only subject to the prohibitions of antitrust law, but, as the Supreme Court held, it was deemed a per se violation of the antitrust rule against price fixing.⁹ Therefore, the FTC did not have to prove market impact to obtain a finding of liability.¹⁰ The collective worker protest was unlawful in and of itself, regardless of the consequences to the government, other attorneys in that area of practice, or their clients.

The Court's decision in *FTC v. Superior Court Trial Lawyers' Association (SCTLA)*, authored by Justice Stevens, is problematic for a number of reasons, especially its application of antitrust law to a labor action and its treatment of

¹ Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n (*SCTLA*), 493 U.S. 411, 436 (1990).

² *Id.* at 416–19.

³ *See id.* at 414–16; Brief for Respondent/Cross-Petitioner Superior Court Trial Lawyers Ass'n at 4–5, Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (Nos. 88-1198, 88-1393), 1989 WL 1126841.

⁴ *Id.* at 418.

⁵ The Legal Aid Society is a private not-for-profit law firm that serves, inter alia, as the primary provider of representation to indigent criminal defendants in New York City. *See Criminal Defense Practice*, LEGAL AID SOC'Y, <https://www.legalaidnyc.org/criminal> (last visited Jan. 5, 2018) [<https://perma.cc/6LSN-6QZA>]. The Association of Legal Aid Attorneys, the union of attorneys at the Legal Aid Society, of which the author is a member, has conducted several strikes over the years under the protection of the NLRA. The most recent strike took place in 1994, four years after the decision in the *SCTLA* case.

⁶ 15 U.S.C. § 17 (2012); 29 U.S.C. § 52 (2012).

⁷ 29 U.S.C. §§ 101–115 (2012).

⁸ *Id.* §§ 151–69.

⁹ *See SCTLA*, 493 U.S. at 428–32.

¹⁰ *See id.*

the First Amendment.¹¹ In particular, the decision purports to distinguish *NAACP v. Claiborne Hardware*,¹² also written by Justice Stevens, on the grounds that the boycott in the *NAACP* case was selflessly aimed at helping others, while the boycott by the trial lawyers was to obtain higher fees for themselves. That supposed distinction fails to acknowledge that the civil rights boycotters in *Claiborne*, Mississippi, were seeking to advance their own economic opportunities, or that the boycotting lawyers were seeking to vindicate the constitutional rights of their clients.

In addition, since the DC municipal government was fixing the prices at issues, i.e., the attorneys' fees, one might ask how the lawyers' collective action was truly anti-competitive in a market sense. In particular, since the criminal defendants for whom the government was purchasing the service had no market power, the market allowed the government to set pay at a level that sufficient numbers of lawyers in the market for government-paid work might accept, without any market guarantee that the lawyers would necessarily provide their clients with constitutionally-adequate service. The market of lawyers looking for government-paid work had no capacity to correct that problem.

I will return to both of those points later,¹³ but I want to examine another justification that the Court offered: that while petitioning the government to fix prices is constitutionally protected under the *Noerr* doctrine,¹⁴ boycotting as a means of seeking better pay is itself unlawful for independent contractors, and, therefore, not protected by the First Amendment. In other words, for workers who are not deemed employees under labor law, collectively withholding labor to obtain better pay rates is an unlawful action per se under antitrust law, and therefore is not a protected form of expression under the First Amendment. Scholars have addressed why this reasoning is problematic under antitrust law and the First Amendment.¹⁵ But the Court's reasoning is even more problematic under the Thirteenth Amendment.

This article focuses on how the Court's prohibition against the collective refusal to provide labor can be squared with the Thirteenth Amendment's prohibition against involuntary servitude. Specifically, the Supreme Court has re-

¹¹ See Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 1043 (2016).

¹² *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 906 (1982) [hereinafter *NAACP*].

¹³ See *infra* Part V.

¹⁴ *E. R.R. Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1961); see also *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 667 (1965).

¹⁵ See Paul, *supra* note 11, at 1043–48. The *SCTLA* Court's reasoning is reminiscent of the Supreme Court's First Amendment decision in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 504 (1949), in which the Court upheld the use of state antitrust law to prohibit union picketing of wholesalers to induce them not to sell to nonunion retailers. The Court held that the First Amendment did not protect methods of expressive action that were violative of generally-applicable laws. *Id.* at 495. *Giboney* became the cornerstone of the Court's retreat from First Amendment protection of labor picketing. See Richard Blum, *Labor Picketing, the Right to Protest, and the Neoliberal First Amendment*, 42 N.Y.U. L. REV. & SOC. CHANGE 595, 604 (2019).

peatedly ruled that quitting one's job is protected under the Thirteenth Amendment.¹⁶ In addition, the Court has indicated that in the context of strikes, abandoning work individually or collectively is protected under the Thirteenth Amendment.¹⁷ The principle is that a system of free labor requires that workers, whether acting alone or collectively, have the capacity to leave their jobs to create pressure on employers to respond to workers' complaints, needs, and demands. Not having the capacity to abandon a job leaves workers with no power to prevent the type of exploitation that is constitutionally constitutive of involuntary servitude.¹⁸

The core argument of this article is that if leaving a job due to unsatisfactory working conditions is protected, then deciding not to take the job in the first place must also be protected. If workers leaving a job collectively are protected, then workers collectively refusing to take jobs, the key constitutive act of a labor boycott by independent contractors, should also be protected. Since independent contractors are not understood as having employment, each job they undertake, even if it is for the same purchaser of labor, e.g., the government, is a new job. Thus, for independent contractors, a strike or boycott will normally take the form of refusing new job assignments, just as it did in the *SCTLA* case.

In the context of what is deemed employment, it would obviously violate the Thirteenth Amendment to declare it illegal, even criminal, for someone to reject a job offer. Enjoining a job applicant to accept the job or imposing fines or other penalties for turning it down would not be permitted by the Constitution. I do not know of any case vindicating the right to reject a job outside the immigration detention system, perhaps because the point is so obvious.¹⁹ But this principle has deep Thirteenth Amendment roots in the striking down of anti-vagrancy laws used to try to re-enslave black workers in the aftermath of the Civil War and the enactment of the Thirteenth Amendment and in the collective protests of newly-freed black workers in the Deep South during the same time period. I argue here that the refusal of labor should be protected regardless of one's statutory status as an employee or prospective employee.

This article argues that what antitrust law calls an unlawful boycott of a buyer of labor can actually constitute constitutionally-protected activity under the Thirteenth Amendment, if the people engaging in the boycott are selling their own labor. These Thirteenth Amendment arguments to protect labor boycotts, regardless of statutory status, were not argued or addressed in the *SCTLA*

¹⁶ *Pollock v. Williams*, 322 U.S. 4, 7–8 (1944); *Bailey v. Alabama*, 219 U.S. 219, 227 (1911).

¹⁷ *Int'l Union v. Wisconsin Emp't Relations Bd.*, 336 U.S. 245, 251 (1949), *overruled on other grounds by Lodge 76*, *Int'l Ass'n of Machinists v. Wisconsin Emp't Relations Comm'n*, 427 U.S. 132 (1976).

¹⁸ *See infra* Parts III, V.

¹⁹ *See, e.g., Menocal v. GEO Grp., Inc.*, 113 F. Supp. 3d 1125, 1131–33 (D. Colo. 2015) (denying motion to dismiss forced labor claims under the Trafficking Victims Protection Act against owner-operator of immigrant detention facility that allegedly required detainees to clean living areas under threat of solitary confinement).

decision.²⁰ However, they do implicate the Court's reasoning in a number of ways set forth below.

Part I of this article provides the context for the *SCTLA* decision by analyzing the decisional law that had developed prior to that case concerning the intersections of antitrust and labor law since the passage of the Norris-LaGuardia Act and the NLRA. Part II places the issue of independent contractor collective action in the context of today's disputes over classifying workers as employees or independent contractors, and the legal implications of such classification, with special focus on the gig economy and drivers. Part III argues for a right to refuse work, both individually and collectively, as grounded in the Thirteenth Amendment. Part IV takes a close look at the competing arguments in the *SCTLA* case to highlight the differences between a pure First Amendment defense of boycotting and a Thirteenth Amendment approach. Finally, Part V offers a critique of the *SCTLA* decision in light of the Thirteenth Amendment right to boycott.

I. THE COLLISION OF ANTITRUST LAW AND LABOR LAW BEFORE THE *SCTLA* DECISION

The Sherman Antitrust Act of 1890 declared combinations and conspiracies in restraint of interstate or foreign trade to be illegal.²¹ In 1914, Congress enacted the Clayton Antitrust Act to both limit and extend the Sherman Act.²² Of significance here, the Clayton Antitrust Act clarified that labor organizations are to be exempt from antitrust laws.²³ However, the Supreme Court hon-

²⁰ See *infra* Part IV.

²¹ Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012). Violations of antitrust law are deemed a felony, punishable with fines up to \$100,000,000 for a corporation and \$1,000,000 for any other person, and/or with prison for up to 10 years. *Id.* §§ 1–3. Federal district courts have jurisdiction to issue equitable relief to prevent and restrain violations. *Id.* § 4. Treble damages for violations of antitrust law are also available. *Id.* § 15. The antitrust law also establishes the Federal Trade Commission (FTC) and empowers it to enforce the antitrust laws. *Id.* §§ 41–58. That subchapter declares unfair competition in or affecting commerce to be unlawful, *id.* § 45(a)(1), and gives the FTC the authority to investigate violations and to prevent persons, partnerships, and corporations from engaging in unfair methods of competition in or affecting commerce. *Id.* § 45(a)(2). The FTC may issue complaints and, after hearings, cease and desist orders, *id.* § 45(b), which can be appealed to a United States court of appeals and to the Supreme Court. *Id.* § 45(c)–(k). When applied to worker boycotts, all of these sanctions are problematic under a Thirteenth-Amendment analysis, because they render constitutionally-protected activity unlawful and they are all intended to prevent and restrain workers from engaging in that activity. Other remedies for withholding labor under other laws, such as compensatory damages for breach of contract, lie beyond the scope of this article.

²² *Id.* § 17; 29 U.S.C. § 52 (2012).

²³ 15 U.S.C. § 17 reads:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations, from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the

ored that exemption more in the breach than in the observance.²⁴ Consequently, Congress, in enacting the Norris-LaGuardia Act, stripped federal courts of jurisdiction to enjoin activities arising from labor disputes.²⁵ In turn, the NLRA declared concerted activity by workers covered by the Act to be protected.²⁶

In a series of decisions in the 1940s, the Supreme Court set forth the basic rules for applying the labor protections of the Clayton Act, the Norris-LaGuardia Act, and the NLRA to antitrust claims against labor unions. In *Apex Hosiery Co. v. Leader*, the Court struck down antitrust claims against a union for engaging in a sit-down strike.²⁷ The Court noted that the union was not being used by the industry to suppress competition or fix prices.²⁸ Rather, the union was seeking to compel the employer to accede to its labor demands by removing the employer's product from interstate commerce during the strike.²⁹ The Court concluded that the Sherman Act was not intended to reach every local factory strike stopping production and shipment of a product interstate.³⁰ Otherwise, practically every strike would bring within federal jurisdiction what are merely possible violations of local laws in the conduct of the strike.³¹ Thus, the fact that the strike at issue involved violence did not bring it within the prohibitions of the antitrust law.³²

In *United States v. Hutcheson*,³³ the Court rejected criminal antitrust charges against a union president whose union struck a business over a jurisdictional dispute with another union. Relying on the Norris-LaGuardia Act,³⁴ the Court

members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17 (2012).

This explicit exemption for labor organizations in the Clayton Act came in response to Supreme Court decisions applying the Sherman Act to union activity. *See, e.g., Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 445 (1911); *Loewe v. Lawlor*, 208 U.S. 274, 308 (1908).

²⁴ *See, e.g., Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 483–84 (1921).

²⁵ 29 U.S.C. § 107 (2012).

²⁶ 29 U.S.C. § 157 (2012).

²⁷ *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

²⁸ *See id.* at 501.

²⁹ *Id.*

³⁰ *Id.* at 512.

³¹ *Id.* at 513.

³² *See id.*; *see also Milk Wagon Driver's Union v. Lake Valley Farm Prods., Inc.*, 311 U.S. 91 (1940) (applying the Norris-LaGuardia Act to deny federal court jurisdiction to issue injunction against action of union in labor dispute); *New Negro All. v. Sanitary Grocery Co.*, 303 U.S. 552 (1938).

³³ *United States v. Hutcheson*, 312 U.S. 219 (1941). For an analysis of the significance of the *Apex Hosiery* decision, *see Paul, supra* note 11, at 1024–27.

³⁴ *Hutcheson*, 312 U.S. at 227. The Court noted in passing and without explanation that “Concededly an injunction either at the suit of the Government or of the employer could not issue.” *Id.* Presumably, this concession is due to the Norris-LaGuardia Act's removal of federal court jurisdiction to issue such injunctions. *See* 29 U.S.C. § 107 (2012). For a critique of this move to rely exclusively on the Norris-LaGuardia Act and not on an interpretation of the

ruled that the use of “conventional, peaceful activities by a union in controversy with a rival union over certain jobs” did not constitute a violation of the anti-trust laws.³⁵ The *Hutcheson* Court set forth these basic principles in applying labor protections to antitrust claims: “So long as a union acts in its self-interest and does not combine with non-labor groups,” it has not violated the antitrust laws.³⁶

The Supreme Court next applied the labor exemption to protect workers’ rights to collectively refuse work. In *Hunt v. Crumboch*,³⁷ the Court held that “[i]t is not a violation of the Sherman Act for laborers in combination to refuse to work. They can sell or not sell their labor as they please, and upon such terms and conditions as they choose, without infringing the Anti-trust laws.”³⁸ A union had refused to provide workers to an employer that it blamed for killing a union member.³⁹ Citing the Clayton Act and the Norris-LaGuardia Act, the Court made it clear that:

A worker is privileged under congressional enactments, acting either alone or in concert with his fellow workers, to associate or to decline to associate with other workers, to accept, refuse to accept, or to terminate a relationship of employment, and his labor is not to be treated as “a commodity or article of commerce.”⁴⁰

Thus, workers are insulated from antitrust liability, even when collectively refusing to accept work from a given employer, if their actions are protected by the labor laws.

In applying labor law protections to antitrust law, the Court distinguished between labor disputes involving employees from those involving independent contractors. In *Columbia River Packers Ass’n v. Hinton*,⁴¹ the Court withheld labor law protections from a union of fishermen who refused to sell fish to non-union canneries, because the fishermen were independent contractors and not

Sherman Act itself, and of the implications of that move, see Paul, *supra* note 11, at 1027–33.

³⁵ *Hutcheson*, 312 U.S. at 227.

³⁶ *Id.* at 232. Unions lose their immunity from antitrust law when they “aid nonlabor groups to create business monopolies and to control the marketing of goods and services.” *Allen Bradley Co. v. Local 3*, 325 U.S. 797, 808 (1945). In short, unions are protected only when engaged in what the Court would recognize as a proper labor dispute and not in collusion with an employer or group of employers to enhance their competitive standing for reasons not directly related to claims concerning the terms and conditions of employment. So, a union cannot serve as a stalking horse for an employer in knocking out competition for the sake of profit. Although this principle derives directly from the language of the labor laws, it also resonates with the distinction set forth in the Clayton Act between labor and commodities. When a union is acting to advance traditional labor interests, its actions are exempt from antitrust prohibitions, but when a union is acting as a player in the market for commodities, it loses its protections.

³⁷ *Hunt v. Crumboch*, 325 U.S. 821 (1945).

³⁸ *Id.* at 824 (citing *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 502–03 (1940)).

³⁹ *Id.*

⁴⁰ *Id.* (quoting 15 U.S.C. § 17 (2012)).

⁴¹ *Columbia River Packers Ass’n, Inc. v. Hinton*, 315 U.S. 143 (1942).

employees of anyone.⁴² The Court acknowledged that an employer-employee relationship is not required for workers to enjoy the labor antitrust exemption.⁴³ For example, the labor dispute could concern an employer's refusal to hire a set of workers.⁴⁴ But, the statutory term "labor dispute" does not protect "controversies upon which the employer-employee relationship has no bearing."⁴⁵ As a matter of statutory construction, independent contractors under labor law were left subject to the prohibitions of the antitrust laws when they joined together to engage in collective bargaining and to protect the standards that they bargain for.⁴⁶ Thus, the Court resolved the tension between antitrust law and labor law by reading the labor laws as creating statutory exemptions from the antitrust law.

Sanjukta Paul has argued that by exempting those protected by labor statutes, the Court did not reject its earlier understanding that the antitrust law applies to collective worker action.⁴⁷ As a result, workers not covered by the labor laws remained unprotected when engaging in collective action to advance their interests as workers. Moreover, relying on statutory interpretation alone, none of these decisions applying labor law to antitrust law addressed whether the Thirteenth Amendment itself ever protects the collective withholding of labor, including the refusal to accept work.

II. SIGNIFICANCE OF THE ISSUE: THE FISSURED WORKPLACE AND THE GIG ECONOMY

A. *Employees v. Independent Contractors: Statutory Lines and Their Consequences*

The Supreme Court's decision to define the labor exemption from antitrust law according to coverage under the nation's principal labor statutes, has serious implications for today's workers. Employers often deem workers to be "independent contractors," rather than employees of the entities that set the terms and conditions of their labor.⁴⁸ Courts must frequently adjudicate whether

⁴² *Id.* at 145–46. The decision's reliance on the fact that the fishermen were engaged in selling a product, fish, could have allowed the Court to distinguish this case as one concerning a commodity and not labor. But the Court did not take that bait.

⁴³ *Id.* at 146.

⁴⁴ *See id.* at 145.

⁴⁵ *Id.*

⁴⁶ The circuit courts of appeals have applied this principle on various occasions to people selling their own labor. *See, e.g.,* San Juan Racing Ass'n, Inc. v. Asociacion de Jinetes de Puerto Rico, Inc., 590 F.2d 31 (1st Cir. 1979) (applying to jockeys); Conley Motor Express, Inc. v. Russell, 500 F.2d 124 (3rd Cir. 1974) (applying to steel haulers); Taylor v. Local 7, Int'l Union of Journeymen Horseshoers, 353 F.2d 593 (4th Cir. 1965) (applying to horseshoers).

⁴⁷ Paul, *supra* note 11, at 1027.

⁴⁸ *See generally* Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21

workers are misclassified as independent contractors under any of a variety of federal and state labor laws, including the NLRA.⁴⁹ The stakes in these disputes are high, particularly when NLRA coverage is at issue.⁵⁰ As discussed above, if workers are found not to be employees under the NLRA, their collective activities not only lose the protection of the NLRA, but also become subject to the strictures of antitrust law.

Yet, significant disputes have arisen on how to determine employee status under the NLRA, which applies common law agency principles.⁵¹ For example, the DC Circuit recently reaffirmed its previous rejection of the National Labor Relations Board's (NLRB) approach to evaluating employee status under the NLRA.⁵² That dispute centers on whether entrepreneurial opportunity should be the focus of the inquiry.⁵³ More recently, the Board overruled its *FedEx* deci-

COMP. LAB. L. & POL'Y J. 187 (1999); Julia Tomassetti, *From Hierarchies to Markets: FedEx Drivers and the Work Contract as Institutional Marker*, 19 LEWIS & CLARK L. REV. 1083 (2015); Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 A.B.A. J. LAB. & EMP. L. 279 (2011).

⁴⁹ See, e.g., *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) (applying common law principles to determine if insurance agent was an employee under ERISA); *NLRB v. United Ins. Co.*, 390 U.S. 254 (1968) (applying common law agency test to determine employee status under the NLRA); see generally THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT ch. 27.III.C.2.e (7th ed. 2017) (reviewing cases determining employee versus independent contractor status under the NLRA).

⁵⁰ The Fair Labor Standards Act (FLSA) defines "employ" to include "to suffer or permit to work," using a much broader standard to determine if someone is an employee under wage and hour laws and other provisions of that act. 29 U.S.C. § 203(g) (2012); see also *United States v. Rosenwasser*, 323 U.S. 360, 362–63 (1945). The recent California Supreme Court decision in *Dynamex Operations West, Inc. v. Superior Court of L.A. Cty.*, provided that under California's wage orders, a worker can only be deemed an independent contractor if the company can demonstrate:

(A) that the worker is free from the control and direction of the [hiring entity in the performance of the work]; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Dynamex Operations W., Inc. v. Superior Court of L.A. Cty., 416 P.3d 1, 7 (Cal. 2018). However, this approach to state wage laws is distinct from the test adopted by the NLRB or courts applying the NLRA.

⁵¹ See *NLRB v. United Ins. Co.*, 390 U.S. 254 (1968).

⁵² *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017) (confirming the approach taken in *FedEx Home Delivery v. NLRB.*, 563 F.3d 492 (D.C. Cir. 2009) (*FedEx 1*), which focused the common law determination of employee versus independent contractor status on entrepreneurial opportunity and rejecting the NLRB's approach in *FedEx Home Delivery*, 361 N.L.R.B. 55 (2014), which equally considered all common law factors).

⁵³ The factors to be considered under the common law can be found in the Restatement (Second) of Agency § 220:

In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;

sion, holding that that decision overemphasized the right to control factors relating to economic dependence and diminished the significance of entrepreneurial opportunity.⁵⁴ As a consequence of such disputes and the resulting uncertainty, without engaging in lengthy and costly litigation, workers may not know if their collective actions are protected by labor law or prohibited by anti-trust law.

The Supreme Court's treatment of independent contractors under antitrust law holds particular significance in today's fissured workplace.⁵⁵ Through methods such as subcontracting,⁵⁶ franchising,⁵⁷ and spinning off segments of supply chains,⁵⁸ many businesses have, over the last decades, externalized aspects of their operations that they consider to lie outside their core functions. In doing so, these businesses have distanced themselves from the workforce that once clearly consisted of direct employees. In some instances, businesses have structured or restructured their relationships with workers to classify or reclassify them as independent contractors and not employees, allowing them to avoid responsibility or liability under labor laws. For example, FedEx treats the drivers who deliver for the company as independent contractors.⁵⁹ As business-

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in the business.

Restatement (Second) of Agency § 220(2) (AM. LAW INST. 1958). In addition, the Board has stated that it considers, "as one factor among the others, whether putative contractors have 'significant entrepreneurial opportunity for gain or loss.'" *FedEx Home Delivery*, 361 N.L.R.B. 55 at 612 (2014). Related to that question, "the Board has assessed whether purported contractors have the ability to work for other companies, can hire their own employees, and have a proprietary interest in their work." *Id.* (citations omitted).

⁵⁴ *SuperShuttle DFW, Inc.*, 367 N.L.R.B. 75, 7–12 (2019).

⁵⁵ See generally DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

⁵⁶ *Id.* at 99–121.

⁵⁷ *Id.* at 122–58.

⁵⁸ *Id.* at 159–77.

⁵⁹ *Id.* at 161–62. As noted above, this classification has been the subject of an ongoing dispute between the company, on the one hand, and the National Labor Relations Board (NLRB) and drivers in various parts of the country, on the other. Compare *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1126 (D.C. Cir. 2017), with *Craig v. FedEx Ground Package System, Inc.*, 335 P.3d 66, 72 (Kan. 2014) (rejecting the D.C. Circuit's approach in *FedEx I* and finding FedEx drivers to be employees under state wage statute using common law right-to-control analysis), *Slayman v. FedEx Ground Package Sys., Inc.* 765 F.3d 1033 (9th Cir. 2014) (finding FedEx drivers to be employees under both the right-to-control and economic-realities tests), and *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 997

es have restructured their relationships with their workforces to externalize responsibility for labor conditions and avoid labor laws, a range of low-wage workers have been deemed to be independent contractors. Sometimes, these independent contractors work directly for the principal business and sometimes they work through a labor subcontractor—generally under worse (and often unlawful) conditions than employees. Examples include supermarket delivery workers,⁶⁰ taxi drivers,⁶¹ and port truck drivers.⁶²

In some instances, workers have not challenged their classification as independent contractors, but have engaged in collective protest nonetheless. For example, yellow-cab drivers in New York City, whose rates are set by a city agency, have been deemed independent contractors. The New York Taxi Workers' Alliance (NYTWA), whose national body is an affiliate of the international AFL-CIO,⁶³ has, in the past, organized strikes by yellow cab drivers in New York City to put pressure on the municipal agency that sets rates and closely regulates the industry.⁶⁴

At the same time, there is considerable ongoing litigation over the correct labor-law classification of drivers who receive their jobs through franchises and marketplace applications,⁶⁵ such as Uber and Lyft drivers.⁶⁶ Without waiting

(9th Cir. 2014) (finding FedEx drivers to be employees under state wage statutes applying common law right-to-control analysis). For a catalog of cases concerning the employee or independent contractor status of FedEx drivers, see Tomassetti, *supra* note 48, at 1089, n.26–29.

⁶⁰ IMMANUEL NESS, *IMMIGRANTS, UNIONS, AND THE NEW U.S. LABOR MARKET* 102–10 (2005).

⁶¹ *Id.* at 140–41.

⁶² RUTH MILKMAN, *L.A. STORY: IMMIGRANT WORKERS AND THE FUTURE OF THE U.S. LABOR MOVEMENT* 177–78 (2006). Recently, port truck drivers and warehouse workers struck in Los Angeles and Long Beach to protest their classification as independent contractors. See Samantha Masunaga, *L.A. and Long Beach Port Truckers and Warehouse Workers Begin Strike*, L.A. TIMES (Oct. 1, 2018, 12:00 PM), <http://www.latimes.com/business/la-fi-port-truckers-strike-20181001-story.html> [<https://perma.cc/3YQL-TSQ5>]. Home health aides have also been treated as independent contractors. EILEEN BORIS & JENNIFER KLEIN, *CARING FOR AMERICA: HOME HEALTH WORKERS IN THE SHADOW OF THE WELFARE STATE* 132–33 (2012). However, both aggressive labor political activism and the situation of these workers in the welfare state have resulted in many states deeming them to be employees, whether of private agencies, the state itself, and/or consumers. *Id.* at 133–34, 141–42, 166, 194–95.

⁶³ See *Mission & History*, N.Y. TAXI WORKERS ALLIANCE, <http://www.nytw.org/mission-and-history/> [<https://perma.cc/6TEF-WFQL>] (last visited Oct. 29, 2018) (chronicling history of the New York Taxi Workers Alliance and its charter to build the National Taxi Worker Alliance, the first AFL-CIO charter for a union of independent contractors).

⁶⁴ See *Victories: A Few Brief Highlights*, N.Y. TAXI WORKERS ALLIANCE, <http://www.nytw.org/victories/> [<https://perma.cc/VKU2-ANE7>] (last visited Oct. 29, 2018) (providing chronology of activities, including two strikes against municipal agency rules).

⁶⁵ See, e.g., *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 149 (2d Cir. 2017) (holding that black drivers who received their work through a particular franchisor were independent contractors under the FLSA); see also *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071, 1093 (N.D. Ca. 2018) (finding that a Grubhub delivery driver is an independent contractor under California wage law); but see *Dynamex Operations W., Inc. v. Superior Court of L.A. Cty.*,

for those questions to be resolved, the City of Seattle enacted legislation to allow drivers who obtain their work through these companies to collectively bargain without running afoul of antitrust law.⁶⁷ However, the Chamber of Commerce has successfully stopped the law from being implemented on the grounds that it does not fall within the exception to antitrust law for anti-competitive actions by states to further the public interest.⁶⁸ As perverse as it may seem, without the protections of the city law, Uber drivers would be at risk of antitrust prosecution if they attempted to act collectively to pressure Uber to improve the terms and conditions of their work,⁶⁹ and they were adjudicated not to be employees of Uber under the NLRA.⁷⁰

Despite the high stakes involved, the unsettled state of these disputes over statutory lines leaves both businesses and workers unsure of their rights under both labor and antitrust law. Yet, in all of these examples, the individual seller of labor has little or no bargaining power against the entities that purchase or regulate their labor, regardless of how labor law classifies them.⁷¹ However, as

416 P.3d 1 (Cal. 2018) (establishing different test for determining employee status under California wage laws).

⁶⁶ See, e.g., N.Y. Unemployment Insurance Appeal Board (No. 596722) (July 12, 2018); see also Omri Ben-Shahar, *Are Uber Drivers Employees? The Answer Will Shape the Sharing Economy*, FORBES (Nov. 15, 2017, 11:24 AM), <https://www.forbes.com/sites/omribensshahar/2017/11/15/are-uber-drivers-employees-the-answer-will-shape-the-sharing-economy/#552bc0cd5e55> [<https://perma.cc/7NLR-RPFV>]; Megan Geuss, *Uber Drivers are Employees, California Labor Commission Ruling Suggests*, ARS TECHNICA (June 17, 2015, 12:55 PM), <https://arstechnica.com/information-technology/2015/06/uber-drivers-are-employees-california-labor-commission-rules/> [<https://perma.cc/E8X8-EFE4>]; Dan Rivoli, *N.Y. Judge Grants Uber Drivers Employee Status*, N.Y. DAILY NEWS (June 13, 2017), <http://www.nydailynews.com/new-york/n-y-judge-grants-uber-drivers-employee-status-article-1.3245310> [<https://perma.cc/3SGB-CYPZ>].

⁶⁷ *Parker v. Brown*, 317 U.S. 341, 350–51 (1943) (holding that federal-antitrust law does not prohibit states from legislating arrangements in the public interest that would otherwise violate antitrust law if established by private contract, combination, or conspiracy).

⁶⁸ See *Chamber of Commerce of the United States v. City of Seattle*, 890 F.3d 769, 795 (9th Cir. 2018).

⁶⁹ See generally Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233 (2017) (accusing Uber of trying to use antitrust law against collective bargaining to create a reverse hiring hall, one in which the company can set standards for its benefits, but the workers cannot do so).

⁷⁰ See generally Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The “Independent Worker,”* HAMILTON PROJECT (Dec. 2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf [<https://perma.cc/DHS6-DFB3>]. Harris and Krueger have proposed a new legal category, independent worker, to capture what they describe as the triangular relationship among gig economy workers, their customers (passengers, for example), and the “intermediaries” who connect them (Uber or Lyft, for example). The authors cite antitrust law protection for collective action as one motivation for creating this third category.

⁷¹ My argument here is not directed at where the statutory line should be drawn, though I would favor a much more expansive standard for employee status than the DC Circuit. The argument here is that, no matter where Congress, the courts, and the Board draw the relevant

Winter 2018]

WORKER COLLECTIVE ACTION

377

discussed below, under the Thirteenth Amendment, Congress and the courts' choices as to where to draw the contours of the employment relationship for various labor laws with various purposes, histories, and compromises, should not strip workers of all protections if they find themselves on the outside of the line. In particular, I argue that those congressional policy choices should not, under the Thirteenth Amendment, leave workers whose work relationships fall on the outside of any labor or employment law without the right to withhold their labor collectively to improve their working conditions.

B. Labor Boycotts Outside the Protections of the NLRA

Labor boycotts that are outside the coverage of the NLRA might arise in several contexts. In the *SCTLA* case, the purchaser of labor was the DC government. The government also set the fees for the people selling their labor. In other words, the government was acting both as a purchaser of labor and as regulator of labor terms.

In contrast, with the striking tax workers in New York City, the government was serving a purely regulatory function, but that regulatory function entirely circumscribed the terms and conditions under which the drivers could sell their labor.⁷² In the case of FedEx or Uber or Lyft drivers, a boycott would be against a private company that is setting rates. With Uber and Lyft, as with other marketplace apps, vast numbers of individual workers with little or no bargaining power receive work assignments from a private company that circumscribes the terms and conditions of the sale of the workers' labor. Together, the two companies have almost total control of the online marketplace for driving services in many geographic areas around the country and beyond, and they

lines, workers who are selling their own labor have a Thirteenth Amendment right to withhold that labor collectively to enhance their bargaining power against the purchasers of their labor.

⁷² The New York Taxi Worker's Alliance (NYTWA)'s most recent strike deviated from that model. Eli Blumenthal, *The Scene at JFK as Taxi Drivers Strike Following Trump's Immigration Ban*, USA TODAY (Jan. 28, 2017, 8:15 PM), <https://www.usatoday.com/story/news/2017/01/28/taxi-drivers-strike-jfk-airport-following-trumps-immigration-ban/97198818/> [<https://perma.cc/8P4A-HJAG>]. On the day that the president implemented his first executive order banning migrants from a number of predominantly Muslim nations, the NYTWA staged a strike, refusing to provide service to JFK airport, where people were being detained. *Id.* Indeed, Uber caught flack for offering to provide substitute service, leading to a consumer boycott of Uber. Ashley Lutz, *Furious Customers are Deleting the Uber App After Drivers Went to JFK Airport During a Protest and Strike*, BUS. INSIDER (Jan. 29, 2017, 11:38 AM), <https://www.businessinsider.com/delete-uber-hashtag-jfk-airport-taxi-strikes-2017-1> [<https://perma.cc/8WBB-2XG8>]. Under Supreme Court precedent, however, it is unclear that even this overtly political boycott would necessarily enjoy First Amendment protection. See *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 218 (1982). *But see* Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685, 729 (1985). That said, a political protest boycott would not normally implicate antitrust laws.

have the power to dictate the range of terms and conditions of work to their drivers, subject to any state regulation.⁷³

These cases serve to illustrate the significance of stripping independent contractors of their right to collectively withhold their labor to improve the terms and conditions on which they sell their labor. In all of these cases, a group of individual or small-scale sellers of their own labor are facing purchasers who can dictate unilaterally the terms and conditions of the labor being sold. Individually, they lack the power to effectively pressure the purchasers of their labor to meet their needs adequately as workers. Yet, in all of these cases, the workers lack statutory protection from labor law and run afoul of antitrust law if they act collectively to affect the purchaser's rates or other terms⁷⁴ since, according to the Supreme Court, collectively refusing to provide labor constitutes a violation of antitrust law.⁷⁵

When people who are selling their own labor collectively refuse to provide it to the government as purchaser or regulator or to private corporations, some of which may control the terms and conditions of the entire relevant labor market,⁷⁶ they are deploying their most effective tool to protect against exploita-

⁷³ See Adam Santariano, *Uber Regains its License to Operate in London, a Win for its New C.E.O.*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/technology/uber-london.html> [<https://perma.cc/AJG3-5X98>]; see also Shirin Ghaffary, *New York City Has Set the Nation's First Minimum Pay Rate for Uber and Lyft Drivers*, RECODE (Dec. 4, 2018, 2:36 PM), <https://www.recode.net/2018/12/4/18125789/uber-lyft-drivers-wage-minimum-new-york> [<https://perma.cc/6N38-4268>]; Emma G. Fitzsimmons, *Uber Hit with Cap as New York City Takes Lead in Crackdown*, N.Y. TIMES (Aug. 8, 2018), <https://www.nytimes.com/2018/08/08/nyregion/uber-vote-city-council-cap.html> [<https://perma.cc/8SJY-GMM7>].

⁷⁴ Paul, *supra* note 11, at 991. Sanjukta Paul has argued that antitrust law was never intended to be applied to collective worker action. Others have argued that the scope of the antitrust labor exemption should be expanded. See Brief of Amicus Curiae Professor Samuel Estreicher in Support of Defendants-Appellees., *Chamber of Commerce v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018) (No. 17-35640); Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543 (2018); see also Warren S. Grimes, *The Sherman Act's Unintended Bias Against Lilliputians: Small Players' Collective Action as a Counter to Relational Market Power*, 69 ANTITRUST L.J. 195, 240 (2001) (arguing for the need for different treatment under antitrust law of actors with limited market power). However, my argument is not based on the antitrust laws or antitrust principles. I am arguing that constitutionally, workers of whatever statutory category, are entitled to deploy the weapon of withholding their own labor to improve their bargaining power, regardless of arguments concerning market values. This argument is independent of, and may at times be hostile to, market values because it insists that labor is not to be treated as just another commodity under the Thirteenth Amendment. See *infra*, Section V.B.

⁷⁵ Paul, *supra* note 11, at 1010–11.

⁷⁶ A recent study of the United States labor market concluded that “most labor markets (as defined by occupation and geography) are very concentrated, and that that [sic] concentration has a robust negative impact on posted wages for job openings.” Marshall Steinbaum, *How Widespread is Labor Monopsony? Some New Results Suggest It's Pervasive*, ROOSEVELT INST. (Dec. 18, 2017), <http://rooseveltinstitute.org/how-widespread-labor-monopsony-some-new-results-suggest-its-pervasive/> [<https://perma.cc/8JAZ-4KPS>]. At the same time, a recent study argues that notwithstanding the importance of employer concentration on wage suppression, the “erosion of worker-side power is the dominant factor in the power

tion. Without the ability to refuse their labor, these workers would be at the mercy of the rate setters. They would have no market power to affect those rates themselves.

The collective action of the trial lawyers did yield fee rates that gained them more money, and improved their ability to provide the service that the government was obligated to provide to indigent criminal defendants.⁷⁷ In contrast, a recent suicide note by an Uber driver in New York City describes the pervasive exploitation in that industry.⁷⁸ Recent studies of the take-home pay of Uber drivers after expenses also highlight the exploitation in this form of labor exchange.⁷⁹

Of course, each driver has the legal right to quit, and many Uber drivers have exercised that right.⁸⁰ But debts incurred to become a driver make exit difficult for many.⁸¹ More important, the ability to exit in a market with an enormous supply of labor has allowed the harsh conditions of work described in the suicide note to remain in place. The right to refuse work collectively, that is, to boycott or strike, is critical to these and other independent contractor workers obtaining improvements for themselves and for others.

III. THE THIRTEENTH AMENDMENT RIGHT TO WITHHOLD LABOR

In 1911, the Supreme Court in *Bailey v. Alabama*⁸² struck down a statute that enabled the state to prosecute a worker who accepted an advance from an

imbalance in the labor market.” Josh Bivens & Heidi Shierholz, *What Labor Market Changes Have Generated Inequality and Wage Suppression?*, ECON. POLICY INST. (Dec. 12, 2018), <https://www.epi.org/publication/what-labor-market-changes-have-generated-inequality-and-wage-suppression-employer-power-is-significant-but-largely-constant-whereas-workers-power-has-been-eroded-by-policy-actions/> [https://perma.cc/CZK3-TE7R].

⁷⁷ Fed. Trade Comm’n v. Superior Court Trial Lawyers Ass’n (*SCTLA*), 493 U.S. 411, 421 (1990).

⁷⁸ Eduardo Munoz, *‘It’s the New Slavery’: NYC Cab Driver Blasts Uber, City Officials in Suicide Note*, RT U.S. NEWS (last edited Mar. 21, 2018, 11:37 AM), <https://www.rt.com/usa/418352-schifter-suicide-ny-driver-uber/> [https://perma.cc/EQ5X-GGP7].

⁷⁹ UCLA INST. FOR RESEARCH ON LABOR & EMP’T ET AL., *MORE THAN A GIG: A SURVEY OF RIDE-HAILING DRIVERS IN LOS ANGELES* (May 2018), <https://www.labor.ucla.edu/wp-content/uploads/2018/06/Final-Report.-UCLA-More-than-a-Gig.pdf> [https://perma.cc/KPZ6-NFJG]; Alexa Noel, *Revised MIT Study Says Uber, Lyft Drivers Make About \$8 or \$10 per Hour*, POINTS GUY (Mar. 8, 2018), <https://thepointsguy.com/2018/03/revised-mit-study-says-uber-lyft-drivers-make-about-8-or-10-per-hour/> [https://perma.cc/3BNQ-KF38].

⁸⁰ Chantel McGee, *Only 4% of Uber Drivers Remain on the Platform a Year Later, Says Report*, CNBC.COM (Apr. 20, 2017, 4:11 PM), <https://www.cnbc.com/2017/04/20/only-4-percent-of-uber-drivers-remain-after-a-year-says-report.html?view=story&%24DEVICE%24=native-android-mobile> [https://perma.cc/FK8J-DYUH].

⁸¹ Maya Kosoff, *Why Uber Drivers Say They Just Can’t Quit Working for the Company*, BUS. INSIDER (Oct. 22, 2014, 3:17 PM), <https://www.businessinsider.com/why-uber-drivers-just-cant-quit-2014-10> [https://perma.cc/6DSD-S24E].

⁸² *Bailey v. Alabama*, 219 U.S. 219 (1911).

employer, and then quit before the agreed-upon term of service had ended.⁸³ The Court held that this law, which created a presumption that the quitting worker had defrauded the employer, violated the Thirteenth Amendment. The Court declared that the intention of the Thirteenth Amendment was “to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another’s benefit, which is the essence of involuntary servitude.”⁸⁴ The Court added that the goal of the Thirteenth Amendment was to be “a charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag.”⁸⁵

Over thirty years later, the Court in *Pollock v. Williams*⁸⁶ struck down a similar statute under the Thirteenth Amendment, and reiterated that the aim of the Thirteenth Amendment “was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States.”⁸⁷ In the key passage, the Court declared that:

[I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition.⁸⁸

It is important to consider the different elements of the Court’s holdings in these two landmark cases:

- 1) The Thirteenth Amendment is not limited to ending or eliminating slavery.
- 2) The Thirteenth Amendment requires that the United States have a system of free labor and does not only create an individual right.
- 3) Critical to the creation and enforcement of a free-labor system is the right of workers to leave work.
- 4) That right is critical not only because the right to leave enables the worker who quits to escape oppressive working conditions. The right is also critical because it creates power or pressure on the boss to respect the demands and needs of the workers.
- 5) That power or pressure reverberates throughout a labor market to the benefit of all workers who might be competing for work.

All of these principles come into play when workers who are selling their own labor to an entity, be it the government or a private business, collectively withhold or refuse their labor. Under these principles, the Thirteenth Amend-

⁸³ *Id.* at 230, 245.

⁸⁴ *Id.* at 241.

⁸⁵ *Id.* at 240–41.

⁸⁶ *Pollock v. Williams*, 322 U.S. 4 (1944).

⁸⁷ *Id.* at 17, 25.

⁸⁸ *Id.* at 18.

ment mandates that such workers participate in a free-labor system. For the labor system in which they work to be a free-labor system, these workers must have the right to withhold their labor. That right is not only critical to their own ability to escape exploitative conditions. It is also critical to ensuring that the labor system is free by ensuring that all the sellers of labor in a particular market be in a position to pressure the labor purchaser to provide work conditions that do not constitute a harsh overlordship or unwholesome conditions.

Bailey and *Pollock* both directly address the right of an individual to quit a job without being criminally prosecuted.⁸⁹ Recently, a court specifically upheld the right to quit a job collectively under the Thirteenth Amendment. In *Vinluan v. Doyle*, a New York State appellate court issued a writ of prohibition enjoining the trial judge and prosecutor from proceeding with the criminal prosecution of a group of ten nurses who had quit their jobs at a nursing home together after unsuccessfully protesting harsh labor conditions.⁹⁰ The indictment alleged that they had conspired with their lawyer to endanger the disabled residents of the nursing home.⁹¹ The trial court earlier rejected a Thirteenth Amendment challenge to the prosecution, holding that while an individual nurse might have the right to quit, the fact that the nurses had acted “together with forethought and planning” made their action a legitimate target of prosecution.⁹² The appellate court, in contrast, held that the collective resignation was protected by the Thirteenth Amendment.⁹³

The logic of *Bailey*, *Pollack*, and *Vinluan* applies, with at least equal force, to the right to refuse to accept work. If workers’ ability to get out of abusive labor relationships is necessary to create a system of free labor, then the ability to stay out of such a relationship in the first place is an equally necessary component of free labor.

History also supports this understanding of the Thirteenth Amendment’s commitment to free labor. In the immediate aftermath of the Civil War, southern states enacted what are known as Black Codes attempting to preserve the

⁸⁹ The Court’s subsequent decision in *WERB* contains important dicta on the question of the Thirteenth Amendment’s applicability to collective work stoppages. *Int’l Union v. Wisconsin Emp’t Relations Bd.*, 336 U.S. 245, 247–48 (1949). In that case, the Court rejected a Thirteenth-Amendment challenge to a cease and desist order against a union conducting intermittent and unannounced work stoppages. *Id.* at 264–65. However, in so ruling, the Court noted that “nothing in the statute or the order makes it a crime to abandon work individually, compare *Pollock v. Williams* [] or collectively.” *Id.* at 251 (citation omitted). In other words, the Court implicitly recognized that collectively abandoning work is constitutionally protected, at least from prosecution. For a more detailed discussion of the Thirteenth Amendment’s applicability to collective work stoppages, see generally Richard Blum, “*They Outlawed Solidarity!*”, 39 SEATTLE U. L. REV. 983 (2016).

⁹⁰ *Vinluan v. Doyle*, 873 N.Y.S.2d 72, 74–75 (N.Y. App. Div. 2009). The author discloses that he participated in the *Vinluan* litigation.

⁹¹ *Id.* at 74.

⁹² Indictment at 2, *People v. Vinluan*, 873 N.Y.S.2d 72 (N.Y. App. Div. 2009) (No. 00769A-2007).

⁹³ *Vinluan*, 873 N.Y.S.2d at 75.

political, social, legal, and above all, labor relationships that whites had enjoyed over blacks before the war and the enactment of the Thirteenth Amendment.⁹⁴ Central to that project were laws against vagrancy.⁹⁵ These laws criminalized unemployment by blacks who refused to accept the coercive labor relations that whites, particularly plantation owners, sought to preserve.⁹⁶ At times, the vagrancy laws specifically targeted collective action to refuse work.⁹⁷ As documented by the great historian of Reconstruction, Eric Foner, for example, “Virginia attempted to outlaw collective action for higher pay by including within the definition of vagrancy those who refused to work for ‘the usual and common wages given to other laborers.’”⁹⁸ Reconstruction military authorities overturned this and other vagrancy statutes as attempts to reestablish slavery.⁹⁹ These anti-vagrancy measures were seen as inconsistent with the “principles of the free labor ideology.”¹⁰⁰

In the immediate aftermath of the enactment of the Thirteenth Amendment and the end of the Civil War, newly-freed black workers used collective refusals to sign labor contracts as one of a variety of means to protest bad working conditions.¹⁰¹ Often spurred on by the Union League, a political organization affiliated with the Radical Republicans, former slaves in Alabama and Mississippi, for example, repeatedly responded to oppressive working conditions on plantations by boycotting and striking particular owners, among other actions.¹⁰² These organized collective actions had an impact on planters throughout the region and helped create what the former slaves regarded as a freer labor system.¹⁰³ At the time of that collective labor disruption, the NLRA’s distinction between employee and independent contractor for purposes of collective bargaining remained many decades away and held no relevance to the former slaves or their allies or opponents who were fighting, literally on the ground, over the significance of the Thirteenth Amendment. What was relevant to these pitched battles over the meaning and practice of free labor was the abil-

⁹⁴ ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877 199 (Perennial Library ed. 1989).

⁹⁵ *Id.* at 199–200.

⁹⁶ *Id.* at 200.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 209.

¹⁰⁰ *Id.* at 208.

¹⁰¹ See MICHAEL W. FITZGERALD, THE UNION LEAGUE MOVEMENT IN THE DEEP SOUTH 144–47 (1989).

¹⁰² *Id.* at 136–37, 141, 145, 176.

¹⁰³ Fitzgerald argues that the former slaves’ labor activism in conjunction with the activities of the Union League helped bring about a decentralized tenancy system under which black agricultural workers initially had greater autonomy than under the plantation system that the planters had hoped to preserve. *Id.* at 159–60. That the tenancy system developed into an oppressive sharecropping system highlights the argument that workers’ formal independence is not sufficient to create a truly free labor system.

ity of the newly freed slaves to refuse collectively to sell their labor as a means of creating a freer labor system.

Even the narrowest approach to the free labor ideology of the nineteenth century would have defended the right to refuse work. The laissez-faire liberalism behind court decisions striking down protective labor legislation on the grounds that it interfered with the freedom of contract relied on the notion, some would say fiction, that labor contracts were entered into freely. It would have been inconsistent with that liberal notion of free labor that flourished in the latter half of the nineteenth century for the state to coerce workers into accepting labor contracts.¹⁰⁴

The opposing approach to free labor in the decades following the Civil War assumed a much more radical and robust posture toward collective worker action. The radical free labor ideology of “labor republicanism,” perhaps most clearly embodied in the positions of the Knights of Labor, would surely have defended workers’ right to collectively refuse to accept work, regardless of legal category or the manner in which owners of capital structured the relationship.¹⁰⁵ In sum, the right to collectively refuse to take work is deeply embedded in this country’s historical understanding of free labor, and is grounded in the jurisprudence of the Supreme Court.

IV. THE *SCTLA* CASE ANALYZED

Now, let us take a closer look at the *SCTLA* decision. In the 1970s and 1980s, DC met its constitutional obligation to provide free representation to indigent criminal defendants through a combination of a Public Defender Service (PDS) that took only about 8–10 percent of all cases, usually more serious felonies, and a Criminal Justice Act (CJA) panel of private lawyers, whom the government reimbursed. The CJA lawyers covered about 85 percent of the cases, usually less serious felonies and misdemeanors.¹⁰⁶ Generally, about 100 of the

¹⁰⁴ See ALEX GOUREVITCH, FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY 56–64 (2015). Interestingly, Darrell Miller has argued that the Reconstruction Congress’s intervention into the market economy to protect the civil rights of newly emancipated people through the Civil Rights Act of 1866, enacted following the adoption of the Thirteenth Amendment, later helped inspire the Sherman Antitrust Act, specifically its intervention into the market economy to address the excessive power of trusts. Darrell A. H. Miller, *White Cartels, the Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co.*, 77 *FORDHAM L. REV.* 999, 1036–38 (2008).

¹⁰⁵ GOUREVITCH, *supra* note 104, at 98–99. As Gourevitch explains, labor republicans saw wage labor itself as slavery and advanced a vision of a cooperative commonwealth of independent laborers. *Id.* at 102–03. It is ironic that today, so-called independent contractors are so often wage laborers stripped of the labor law protections that developed to respond to their lack of bargaining power vis-à-vis capital. It would be bitterly ironic from a labor republican perspective that laws passed to combat trusts are being deployed to prevent workers from withholding their labor to gain bargaining power against capital, specifically because the workers are not deemed to be wage laborers.

¹⁰⁶ Fed. Trade Comm’n v. Superior Court Trial Lawyers Ass’n (*SCTLA*), 493 U.S. 411, 414–15 (1990).

1200 lawyers in the CJA panel regularly took most of the cases assigned through the CJA system.¹⁰⁷ Those lawyers derived most of their income from these assignments.¹⁰⁸ DC created a Joint Committee on Judicial Administration to establish rates for CJA lawyers within the cap set by federal law.¹⁰⁹ For several years, bar organizations “express[ed] concern about the low fees paid to CJA lawyers.”¹¹⁰ Eventually, the Superior Court Trial Lawyers Association (SCTLA) sought unsuccessfully to convince the DC government to enact legislation raising the rate, despite uniform support.¹¹¹ The SCTLA formed a strike committee and about 100 CJA lawyers voted not to accept more cases after a certain date if the rates were not increased.¹¹²

As of September 6, 1983, about 90 percent of the CJA regulars refused to accept new assignments.¹¹³ The lawyers’ publicity campaign engendered favorable responses in the press, although according to the Court, there was no evidence that the favorable publicity generated public pressure or that public pressure caused the rates to be raised.¹¹⁴ As the Court recites the story, the lawyers’ “refusal to take new assignments had a severe impact on the District’s criminal justice system.”¹¹⁵ The PDS and the CJA lawyers who continued taking cases became overwhelmed and the private bar’s response was “feeble.”¹¹⁶ Key leaders of the criminal justice system delivered a letter to the mayor warning that the system would “reach a crisis point” by early the following week.¹¹⁷ The mayor then offered to raise the rates, the SCTLA voted to accept the offer, the City Council enacted the necessary legislation, and on September 21, a few weeks after the strike began, the striking lawyers resumed accepting new cases, and the crisis subsided.¹¹⁸

In response to the strike, the FTC filed a complaint against the SCTLA and four of its officers claiming that they had “entered into an agreement among themselves and with other lawyers to restrain trade by refusing to compete for or accept new appointments under the CJA program beginning on September 6, 1983, unless and until the District of Columbia increased the fees offered under the CJA program.”¹¹⁹ The FTC complaint “characterized respondents’ conduct

¹⁰⁷ *Id.* at 415.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 416.

¹¹³ *Id.*

¹¹⁴ *Id.* at 416–17. The Court based its recitation of the facts on the findings of the ALJ, as affirmed by the FTC. *Id.* at 418–19. As discussed below, the SCTLA and the individual respondents, in their briefs to the Court, advanced a different interpretation of events.

¹¹⁵ *Id.* at 417.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 418.

¹¹⁸ *Id.*

¹¹⁹ *Id.* (quoting the FTC’s complaint against SCTLA).

as ‘a conspiracy to fix prices and to conduct a boycott’ and concluded that they were engaged in ‘unfair methods of competition in violation of . . .’¹²⁰ anti-trust law.¹²¹

An administrative law judge (ALJ) conducted a hearing, found that the facts alleged had been proved, and rejected the respondents’ defenses.¹²² “The ALJ nevertheless concluded that the complaint should be dismissed because . . . [the] net effect [of the strike] was beneficial” because the fee increase would increase the supply of lawyers in the CJA system, thus increasing competition and yielding better representation.¹²³ The FTC reversed the ALJ, “noting that the boycott forced the city government to increase the CJA fees from a level that had been sufficient to obtain an adequate supply of CJA lawyers to a level satisfactory to the respondents.”¹²⁴ In short, the FTC concluded that the lawyers’ refusal to accept new assignments had not only been an unlawful conspiracy to fix prices, but had also resulted in the lawyers’ reaping a premium above what the market supposedly would have yielded if left to its own devices. As a remedy, the FTC issued a cease and desist order prohibiting the SCTLA and its leadership from engaging in various boycott-related activities, compelling SCTLA to notify its members of the FTC’s decision, and imposing on the individual lawyers a duty to notify the FTC of changes in the nature of their legal practice for five years.¹²⁵

On appeal, the circuit court of appeals agreed that the SCTLA and its leaders had violated the antitrust law and rejected their First Amendment arguments based on *Claiborne Hardware* and *Noerr*.¹²⁶ It also rejected the argument that the boycott was justified because it sought to improve the quality of representation.¹²⁷ However, that court found that the boycott contained an element of expression.¹²⁸ Applying the Supreme Court’s rule for protecting First Amendment expression embedded in unlawful conduct,¹²⁹ the circuit court held that the FTC should have had to prove, rather than presume, that the SCTLA had sufficient market power for its actions to have had a market impact.¹³⁰

¹²⁰ *Id.* (quoting the FTC’s complaint against SCTLA).

¹²¹ *Id.* at 419.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* (internal quotation marks omitted).

¹²⁵ *Id.* at 420.

¹²⁶ See *Superior Court Trial Lawyers Ass’n v. Fed. Trade Comm’n (SCTLA)*, 856 F.2d 226, 233–47 (D.C. Cir. 1988).

¹²⁷ *Id.* at 243–48.

¹²⁸ *Id.* at 248.

¹²⁹ See *United States v. O’Brien*, 391 U.S. 367, 382 (1968).

¹³⁰ *SCTLA*, 856 F.2d at 250. Antitrust law distinguishes between per se violations, such as price fixing, for which bad market impact is ordinarily presumed, and other violations for which the complaining party must prove under the “Rule of Reason” that the conduct complained of had an adverse market impact under the principles of antitrust law. See *id.* at 249.

In their briefs to the Supreme Court, the SCTLTA argued that the strike was a political act; a well-publicized petitioning of the legislature protected under *Noerr*.¹³¹ The lawyers' organization argued that the strike gave political cover to the government officials responsible for enacting the raise to do what they wanted to do anyway without political risk.¹³² They also argued, *inter alia*, that, although it was not necessary to reach the issue, the striking lawyers lacked market power, and the boycott was not economically coercive.¹³³ In short, the SCTLTA strategy was to claim that the strike served as a piece of political theater to facilitate political actions by the government, rather than a genuinely economically coercive tactic that succeeded by inducing a crisis.¹³⁴

The individual lawyers also emphasized the political nature of the boycott and its antecedents in United States history.¹³⁵ In contrast to possible conspiracies by other sellers of goods or services to the government, the lawyers in this case were acting openly in order to affect the legislative process through public pressure, not economic coercion. The City Council retained various political options in responses to the strike, including a public relations campaign against the SCTLTA or providing additional funding to the PDS.¹³⁶ In sum, the primary defense strategy was to distinguish between political and economic pressure, asserting First Amendment protection for the former.

The Supreme Court rejected all of the proposed defenses. It analyzed the case as a simple example of price fixing, and therefore, as a *per se* violation of the antitrust law.¹³⁷ The Court was willing to assume that the boycott served a worthwhile cause, that pre-boycott rates were unreasonably low, that the increase resulted in improved representation for indigent criminal defendants, and that given the lack of political power of both the criminal defendants and their lawyers, the increase would not have happened absent the boycott.¹³⁸ Nevertheless, the Court held that the antitrust laws prohibited the boycott and that the First Amendment did not protect it.¹³⁹

The Court distinguished *Noerr* by making a distinction between petitioning the government with the goal of generating anticompetitive legislation, and us-

¹³¹ Brief for Respondent/Cross-Petitioner Superior Court Trial Lawyers Ass'n, *supra* note 3, at 21–22.

¹³² *Id.* at 22.

¹³³ *Id.*

¹³⁴ *Id.* at 24. In arguing that their actions were not coercive, the SCTLTA even argued that the crisis was not real, in particular, that the PDS, in sympathy, refrained from seeking help in covering cases that was available through the private bar. *Id.* at 41. Moreover, during the strike, the court could have ordered the lawyers to accept cases, a peculiar wrinkle that raises interesting questions under the Thirteenth Amendment, discussed below. *Id.* at 29.

¹³⁵ Brief of the Individual Respondents at 35–36, *Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (Nos. 88-1198, 88-1393), 1989 WL 1126840.

¹³⁶ *Id.* at 28.

¹³⁷ *Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n (SCTLTA)*, 493 U.S. 411, 422 (1990).

¹³⁸ *Id.* at 421.

¹³⁹ *Id.* at 422–32.

ing the means of anticompetitive actions to accomplish a legislative goal. Using a boycott as the means to accomplish its legislative ends was not protected by *Noerr*.¹⁴⁰

The Court also distinguished the lawyers' boycott from the boycott of the civil rights demonstrators in *Claiborne Hardware*. The Court acknowledged that it had held in *Claiborne Hardware* that the "right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself."¹⁴¹ However, the Court found that the boycotters in that case "sought no special advantage for themselves."¹⁴² In contrast, the SCTL A boycotters sought a raise in pay for themselves, no matter how altruistic their motives may have been.¹⁴³ In short, the self-interested economic goal of the lawyers' boycott took it out from under the protection of the First Amendment. In contrast, I argue that the Thirteenth Amendment protects self-interested labor boycotts as a coercive tactic that is necessary to ensuring a system of free labor.

V. THE THIRTEENTH AMENDMENT RIGHT OF WORKERS TO BOYCOTT

A. *The Constitutional Right of Workers to Act Collectively in Their Self-Interest*

Whichever way the lawyers in the *SCTLA* case described their action, they were withholding or refusing to sell their labor to the court system in order to induce the government to address what they regarded as unconscionable rates. As mentioned above, the *SCTLA* Court tried to distinguish the lawyers' boycott from the one in *NAACP v. Claiborne Hardware*, by asserting that the civil rights boycott was somehow selfless.¹⁴⁴ Of course, that assertion mischaracterizes the civil rights boycott at issue, which unabashedly sought to open economic access to the community conducting the boycott.¹⁴⁵ More ironically, it inexplicably devalues the lawyers' convincing argument that they were seeking to vindicate the constitutional rights of their clients who, as a practical matter, had no power to pressure the courts to increase the rates. But from a Thirteenth Amendment perspective, this argument is also wrong because it overlooks the

¹⁴⁰ *Id.* at 424–25.

¹⁴¹ *Id.* at 426 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914 (1982)).

¹⁴² *Id.* Indeed, *Claiborne Hardware* itself suggests that economic boycotts are less protected than by the First Amendment than political boycotts. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912–13 (1982). For a critique of the *Claiborne Hardware* distinction between political and economic protest, see Blum, *supra* note 15, at 606–08.

¹⁴³ *SCTLA*, 493 U.S. at 427. Interestingly, The *SCTLA* brief notes that one of the leaders of the boycott was already preparing to end her CJA practice and thus had nothing to gain by helping to organize the strike. She acted out of political conviction. Brief for Respondent/Cross-Petitioner Superior Court Trial Lawyers Ass'n, *supra* note 3, at 11–12.

¹⁴⁴ *SCTLA*, 493 U.S. at 426; see also *supra* notes 142–43 and accompanying text.

¹⁴⁵ *Claiborne Hardware Co.*, 458 U.S. at 899.

critical significance of self-interested action, specifically the withholding of labor, to establish and preserve a system of free labor.

The argument that a boycott must be selfless to be constitutionally protected misses the point that workers have a constitutional right to assert their own interests. As the *Pollock* Court articulated, it is only by doing so that they can attain for themselves and for others in the same labor market the right to labor freely.¹⁴⁶ In other words, even though the First Amendment distinguishes between expressions on matters of public and private concern, the Thirteenth Amendment, as interpreted by the Supreme Court, recognizes that to have a system of free labor, workers need to be able to act in their own interest. The fact that the lawyers in the *SCTLA* case may have acted out of both self-interest and concern for their clients, just as the members of my public defenders' union did when they went on strike, should not have affected whether the Thirteenth Amendment protected them from legal sanction.

Accordingly, when the government is setting the price of labor, the First Amendment does not define the outer limits of what protest activity to pressure the rate setter is protected. The way the *SCTLA* Court distinguished the *Noerr* decision may or may not be defensible as a matter of First Amendment doctrine, but it does not address the Thirteenth Amendment's unique protection of labor and specifically, its protection of the right to withdraw or withhold labor. Because boycotting a purchaser is generally prohibited under antitrust law, arguably, it can be prohibited as a means of expression under the First Amendment. However, a boycott by sellers of labor should still enjoy protection as a method of protest under the Thirteenth Amendment.

Even if the price of labor is considered a market factor subject to antitrust regulation, it is a factor that differs qualitatively and constitutionally from other market factors, such as commodity prices. The mandate of the Thirteenth Amendment, as described by the *Bailey* and *Pollock* Courts, requires that labor be treated differently from commodities, and defends the ability of sellers of labor to take action to protect their rights in ways that sellers of commodities do not enjoy. Specifically, withholding labor to get the government or other rate setter to fix a better price is not only permissible, but protected.

The Clayton Act recognized the critical distinction between labor and commodities.¹⁴⁷ As set forth above, early on, the Court chose to ignore that statutory distinction. Eventually, in light of congressional action to protect labor, both in the Norris-LaGuardia Acts and the NLRA, the Court came to respect that collective labor action to improve the terms and conditions of work was to be treated differently from collectively action to affect commodity prices.¹⁴⁸ But regardless of congressional action through labor statutes, or courts' willingness to honor that congressional action, the Thirteenth Amendment de-

¹⁴⁶ *Pollock v. Williams*, 322 U.S. 4, 17–18 (1944); see also *supra* notes 88–90 and accompanying text.

¹⁴⁷ See 15 U.S.C. § 17 (2012).

¹⁴⁸ See *supra* Part I.

mands that workers should have power to challenge the unilateral setting of the price of their labor.¹⁴⁹

In making this argument, I am not seeking to define precisely the contours of boycotts that are protected under the Thirteenth Amendment.¹⁵⁰ In general, my argument concerns boycotts by sellers of their own labor, recognizing that they may also have some staff supporting their work, such as secretaries and paralegals. Or, that they may have made some capital investments in their work, such as the purchase or leasing of cars.¹⁵¹ The Thirteenth Amendment analysis would have to focus on whether the seller is primarily selling her own labor, even if supported by some staff or capital investment.¹⁵² At some point, a firm providing selling services can no longer claim Thirteenth Amendment protection against antitrust law. If New York City's major corporate firms colluded to set minimum rates for services to the City, they would not be able to invoke the Thirteenth Amendment, even though the partners are selling their own labor. Moreover, the collective boycott would have to address the terms and conditions of the sale of labor and not serve as a stalking horse for one business competitor versus another, a distinction that antitrust law already applies to union activity.¹⁵³ Although there may be difficult cases for drawing the line, these cases do not negate the constitutional protections for those who would satisfy

¹⁴⁹ As James Pope has reminded us, Congress enacted the NLRA under its power to regulate interstate commerce, not under the Thirteenth Amendment. 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, 7 (2002). Thus, the NLRA does not even purport to define the scope of worker rights under the Thirteenth Amendment.

¹⁵⁰ Antitrust experts have offered arguments on where to draw lines under antitrust law to protect small-scale market participants against monopsonies and oligopsonies. See, e.g., Grimes, *supra* note 74, at 196–97. A monopsony is a market with only one buyer, which gives great control over pricing. *Monopsony*, LAW DICTIONARY, <https://thelawdictionary.org/monopsony/> [<https://perma.cc/H349-2JQA>] (last visited Oct. 31, 2018). Similarly, oligopsony is a market with only a few buyers, again giving them great control over pricing. See *Oligopsony*, LAW DICTIONARY, <https://thelawdictionary.org/oligopsony/> [<https://perma.cc/54DP-V3BX>] (last visited on Oct. 31, 2018). Such arguments concern the goals of antitrust law, not the constitutional guarantee of a free labor system. The extreme and increasingly prevalent market conditions they address simply illustrate the applicability to today's labor conflicts of my constitutional argument for the right to refuse labor in order to enhance workers' bargaining power. See Steinbaum, *supra* note 76. That constitutional argument is distinct from those based on market failures and economic efficiency or other economic principles under antitrust law, even though both types of argument may, at times, be responding to significant imbalances in bargaining power.

¹⁵¹ See Brief of Amicus Curiae Professor Samuel Estreicher in Support of Defendants-Appellees City of Seattle et al., *supra* note 74, at 4–5.

¹⁵² The cost of a worker's capital investments seems an arbitrary measure of whether the worker is still selling his or her own labor. The tools of one trade may just happen to be more expensive than the tools of another trade. That difference in cost should be irrelevant to the constitutional question presented here.

¹⁵³ *Allen Bradley Co. v. Local 3*, 325 U.S. 797, 807–10 (1945); *United States v. Hutcheson*, 312 U.S. 219, 231–33 (1941).

any normal definition of worker, regardless of where labor statutes draw their lines.¹⁵⁴

Adapting the *SCTLA* dissent, one could argue that relative market power should be considered in determining if a collective refusal to accept work should be protected under the Thirteenth Amendment. According to that approach, if a group of independent contractors already possesses disproportionate bargaining power against potential purchasers of their labor, perhaps because of a high level of unusual skills, the contractors should not be constitutionally protected. After all, some sellers of labor would not need additional power from below or incentives from above to prevent exploitative working conditions. Indeed, the metaphors of above and below might not even apply in some instances. However, this proposal does not readily suggest a definable metric for determining what constitutes too much market or bargaining power. My argument is that sellers of labor, however they are statutorily classified, are constitutionally entitled to withhold their labor collectively in order to impact the market in anti-competitive ways. There is no obvious market or non-market metric to determine when that impact is too great.¹⁵⁵

We do not apply that limiting principle to workers who are employees under the NLRA. In contrast, we have accepted the principle that employees may withhold their labor from their employers and we have left the results to the respective power of striking workers and their employers.¹⁵⁶ Consequently, some very well-paid highly-skilled employees, such as professional athletes, have the statutory right to withhold their labor collectively to gain even higher pay, albeit in contests against very powerful foes. The NLRA offers no way to determine when these employees have too much power or have been too successful to justify the results, even when critical services, such as health care, are at issue.¹⁵⁷

¹⁵⁴ Harris and Krueger's proposal of a third category of independent worker, does not resolve the problem of drawing a constitutional line, although it might arguably result in some greater protections from antitrust law for worker collective action where those workers would otherwise be classified as independent contractors. See Harris & Krueger, *supra* note 70, at 15. First, the proposal might primarily result in reclassifying workers who, arguably, should be regarded as employees under current law, including Uber and Lyft drivers. Second, the proposal might not benefit genuine independent contractors, like the lawyers in the *SCTLA* case, who should still be able to withhold their labor collectively to improve the terms and conditions of their work.

¹⁵⁵ See James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 YALE L.J. 1474, 1550–51 (2010) (countering arguments "that workers gain *disproportionate* power through concerted" strike activity).

¹⁵⁶ The NLRA, as interpreted by the Board and the courts, curtails union power in various ways, for example, by permitting permanent replacements under certain circumstances during a strike. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938). But the law permits workers protected by the NLRA to collectively withhold their labor regardless of their power relative to the employer. *Id.* at 347.

¹⁵⁷ The NLRA does impose some procedural restrictions on the right to strike, including a notice requirement specific to the health care industry. 29 U.S.C. §§ 158(d), (g) (2012). The reasonableness or constitutionality of these restrictions is beyond the scope of this article. In

As with employees whose right to strike is statutorily protected, public policy may raise questions about whether existing markets present the best way to provide various services or goods, but curtailing the constitutional right to withhold labor should generally not be the answer to those questions.

In response to concerns that the Thirteenth Amendment right for which I am arguing may go too far, I would propose that the best approach, particularly in the absence of targeted legislation, is to apply strict scrutiny, rather than a predefined absolute line, to any attempt to restrict collective refusals to sell labor. That judicial analysis would demand proof of a compelling public reason, such as health and safety, to limit the right to collectively refuse labor. General principles of market efficiency or competition would not suffice. If the purchaser of labor can prove that a compelling public interest exists, then the next inquiry is whether the restriction is sufficiently narrowly tailored not to impede the constitutional right any more than necessary to protect the compelling public interest. Any penalty that chills activity under the general rule is not sufficiently narrowly tailored. Given the history of judicial hostility to collective worker action, specifically through application of antitrust law, and given the litigation costs required to defend against antitrust claims, it is important to frame this possible exception through strict scrutiny to emphasize how difficult it should be to curtail this right and to discourage litigation that might seek to curtail it.

B. The Thirteenth Amendment Right to Withhold Labor v. Market Logic

Just as the Thirteenth Amendment free labor mandate is not circumscribed by labor statutes, it is also not limited to the market logic of antitrust law. In *SCTLA*, the Supreme Court used a market lens to find the lawyers' boycott to be unlawful. The Court characterized the lawyers as competitors whose individual decisions to enter or exit from the relevant labor market would guide the government rate setter. By colluding or conspiring to exit the market together for a period of time, the lawyers were disrupting the proper functioning of these market signals, which might have permitted the government to continue to pay at a lower rate. Individual lawyers who found the rates were too low could have left the system until the rates were raised. If enough individual lawyers decided to exit, the government would have had to raise the rates. But if enough lawyers stayed in the system or entered the system under existing rates, those rates would be properly treated as the correct market rates. By acting collectively or with collective intent, the lawyers obtained a higher rate than the market might have borne.

Even the market reasoning of this position is flawed for two reasons. First, the ultimate consumers of the service in question, the criminal defendants, had no voice in the market. As long as the court system did not rule that they were

any event, they stand in marked contrast to the blunderbuss and market-driven prohibition on labor boycotts under the antitrust laws.

receiving constitutionally ineffective assistance of counsel, they had no way of making the government pay for them to get better representation. Second, as the lawyers argued to the Court,¹⁵⁸ and as the FTC's ALJ found,¹⁵⁹ the increased rates actually brought more lawyers into the system and increased the pool of competitors. By cutting off any examination of market impact of the boycott in treating the violation as per se, the Court precluded proof that they lawyers' action may have actually enhanced labor market competition, consistent with the goals of the antitrust laws. But even without these flaws in the Court's reasoning, I argue that the Thirteenth Amendment does not permit the law to raise the market and its logic above the mandate for a free labor system that includes the right to withhold labor. The error of the *SCTLA* Court was not in refusing to consider market impact, but in not setting aside its statutory concern for the market in favor of a constitutional mandate concerning the freedom of labor. As seen in the language of both *Pollock* and *Bailey*, the Thirteenth Amendment is not neutral between markets concerns and free labor when they are at odds.¹⁶⁰ The Thirteenth Amendment sides with labor and demands that the sellers of labor have the ability to withhold their labor to ensure that when it is sold, it is sold freely.

Pollock, in particular, establishes the principle that withholding labor is necessary for workers to have sufficient power to create an incentive for those who are purchasing their labor not to impose "a harsh overlordship or unwholesome conditions."¹⁶¹ The history and logic of the Thirteenth Amendment, as interpreted in *Bailey* and *Pollock*, requires that people who are selling their labor power be able to withhold that labor before or after accepting work, and whether individually or collectively, to have sufficient power to act freely as laborers. These principles must apply regardless of the market logic embedded in antitrust law.

Someone taking a market approach might argue that the use of antitrust law against labor boycotts by independent contractors can be consistent with the Thirteenth Amendment rights of those workers to refuse work. For example, one could argue that the rights of independent contractors could be vindicated as long as they are free to act individually as labor market actors, but without the right to conspire to pressure the purchaser or regulator of their labor. If the market is left to work, as antitrust law arguably envisions, the free labor system is protected, or so goes the argument.

There may be circumstances in which labor markets function consistently with the mandate of a free labor system. However, there is nothing in the Thirteenth Amendment or the decisional law establishing the right to withhold labor

¹⁵⁸ Brief of the Individual Respondents, *supra* note 135, at 38.

¹⁵⁹ See *Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n (SCTLA)*, 493 U.S. 411, 419 (1990).

¹⁶⁰ *Pollock v. Williams*, 322 U.S. 4, 17–18 (1944); *Bailey v. Alabama*, 219 U.S. 219, 245 (1911).

¹⁶¹ *Pollock*, 322 U.S. at 18.

that justifies limiting that right according to market methods or goals. *Pollock* and *Bailey* squarely endorse the method of withholding labor to gain bargaining power and the goal of a free labor system. Neither the logic or the history described above would justify circumscribing that method or that goal based on market principles.¹⁶²

As argued above, the logic of *Bailey* and *Pollock* shows the need to protect collective refusals to withhold labor, and the language of the *WERB* decision confirms that understanding of the Thirteenth Amendment.¹⁶³ Moreover, the Reconstruction response to vagrancy laws that sought to stop collective actions by freed slaves to refuse work demonstrates that the right to withhold labor collectively is embedded in the earliest history and implementation of the Thirteenth Amendment.

Another market-based approach to labor conflict might be to argue that the lawyers in *SCTLA* had the option to leave the assignment system permanently without declaring a temporary boycott to pressure the government. If they had all just left the system, the market would have forced the government to respond to the shortage, and their Thirteenth Amendment right to withhold labor would have been vindicated. Assuming it is true that they were free to leave the court's assignment system, and that there was no obligation for criminal defense practitioners to take such cases unless ordered to so by the court system,¹⁶⁴ I argue that the distinction between refusal to accept new cases temporarily in the form of a boycott, on the one hand, and permanently leaving the assignment system, on the other, is one without a constitutionally relevant difference.

The decisions in *Bailey* and *Pollock* do not limit the rationale for why the Thirteenth Amendment protects the right to quit to the right to sever ties per-

¹⁶² See Pope, *supra* note 155, at 1548–49 (arguing that *Bailey* and *Pollock* should be applied to nonmarket rights).

¹⁶³ *Int'l Union v. Wisconsin Emp't Relations Bd.*, 336 U.S. 245, 251 (1949).

¹⁶⁴ As noted above, a peculiar twist in the *SCTLA* case is that the strikers acknowledged that the local court system had the authority to order members of the bar to take cases, so it could have ended the strike coercively. See Brief for Respondent/Cross-Petitioner Superior Court Trial Lawyers Ass'n, *supra* note 3, at 15. As officers of the court, the conduct of lawyers is heavily regulated to a degree that the conduct of other workers, even that of drivers, is not. Being admitted to the bar includes acceptance of certain social responsibilities. Moreover, the courts have recognized certain forms of state conscription as permissible, notwithstanding the Thirteenth Amendment, for example, military conscription, jury duty, and even public road work. See generally *Arver v. United States*, 245 U.S. 366 (1918); *Butler v. Perry*, 240 U.S. 328, 333 (1916). However, for most independent contractors in the private sector, these historical exceptions for certain types of public service do not apply to their work. Neither FedEx nor Uber enjoys the authority to conscript its workers. Moreover, the argument here concerns the application of antitrust law to stop or prevent labor boycotts, specifically the attempt at coercive economic regulation to prohibit the withholding of labor. The ability of the court system to order lawyers admitted to the bar to meet a constitutional need for representation of criminal defendants is simply irrelevant to whether the government may regulate the economy by taking away the right to withhold labor as a weapon in economic warfare over the terms and conditions under which that labor is sold.

manently. Indeed, quitting can be temporary, particularly in an independent contractor context. An independent contractor can tell a purchaser of their labor that they will no longer do business with that purchaser, and then change their mind later on when offered more money.

The lawyers involved in the boycott could have all resigned from the assignment system en masse until the rates went up. It is hard to see a constitutionally relevant distinction between that action, and the action they took. Either way, the lawyers would have collectively withdrawn their labor from the system to pressure the court to raise its rates. If they had all said they were leaving the assignment system, the court system might not have known whether they would return if the rates went up. In the action the lawyers actually took, the court system had more reason to believe that they would return. But that level of uncertainty about the future should have no bearing on the application of the *Bailey* or *Pollock* principles. Either way, these workers would be withholding their labor to pressure the purchaser of that labor to improve terms and conditions of work. The Thirteenth Amendment does not require that workers be coy about their intentions when protesting unjust working conditions, including low pay.

Nor does the First Amendment permit the government to base its punitive enforcement actions on how clearly the workers articulate their intentions and goals, punishing only those who express the meaning of their collective action more overtly.¹⁶⁵ Specifically, it would be an instance of prohibited viewpoint discrimination to say that workers are permitted to collectively withdraw from a labor market without declaring their intention to see rates go up, but that they will be punished if they attach an expression of intention to that action.¹⁶⁶

In sum, the Thirteenth Amendment should protect labor boycotts like the one in *SCTLA* as much as the collective or mass individual withdrawal from a labor assignment system. The Thirteenth Amendment should protect the trial lawyers' association's assertion of a boycott on future cases as much as it unquestionably would have protected mass resignation from the case assignment panel. This argument applies equally to Uber drivers, for example.¹⁶⁷ It should not matter constitutionally whether they collectively withhold their labor by leaving Uber altogether until terms and conditions of the work improve sufficiently, or by announcing a collective boycott until their goals are met.

¹⁶⁵ See Blum, *supra* note 89, at 1005–06.

¹⁶⁶ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (ordinance in cross-burning case stricken as facially unconstitutional under First Amendment because it imposes special prohibitions on speakers who express views on disfavored subjects and includes viewpoint discrimination).

¹⁶⁷ In the professional context, the same principle would apply to individual doctors or other health care providers who participate in Medicaid or Medicare or any other insurance networks. They should be able to collectively boycott an insurance provider to raise reimbursement rates. The government or insurance company may respond in various ways, but the right of the provider of the medical services to withhold that labor is constitutionally protected.

I noted above the irony that the Supreme Court's approach to antitrust law would protect a wealthy corporation that controls a labor market against collective attempts by workers with little or no bargaining power to band together to gain some of that power.¹⁶⁸ It is particularly ironic to consider that if Uber were purchasing labor power from a company that employed some large number of drivers directly, there would be no per se antitrust prohibition against that supplier company using its market power to exact better prices from Uber.

Where hundreds of public defenders are employed by one entity, that entity is entitled to use its unique position to bargain with the City over rates without any fear of antitrust law. If this entity rejected the City's last best offer of a contract, and chose not to provide the labor until the City raised its rates, it would not be colluding with anyone; it would just be using its own market power, or, perhaps, political power. It is precisely because the lawyers in *SCTLA* were each self-employed and had no bargaining power on their own, that the antitrust law deprived them of the opportunity to act collectively.

This approach to regulating the sale and purchase of labor stands the mandate and principles of the Thirteenth Amendment on their head. As discussed above, the Thirteenth Amendment's right to withhold labor is premised on the need for those without bargaining power over their labor to gain enough power to prevent exploitation. Individual workers outside of corporate structures are entitled to the highest degree of solicitude under the Thirteenth Amendment, including protection of their right to act collectively with one another to withhold labor. It simply cannot be that, under the Thirteenth Amendment, a corporation can legally withhold services when groups of individual workers acting in concert are prohibited from doing so.

CONCLUSION

As creative fissuring of the workplace and the gig economy generate more challenges to statutory classifications, it is incumbent on the courts to enforce the Thirteenth Amendment's overarching guarantee of a system of free labor, and of its protection of the refusal or withholding of labor as a means to ensure that system for all workers.

In regulating labor conflict, we are accustomed to looking to statutory rules and, sometimes, the First Amendment right to free speech. The mandate of the Thirteenth Amendment is too often overlooked. But the Thirteenth Amendment should serve as the foundation for jurisprudence concerning the withholding of labor whether by quitting one's job or striking, or in forms, such as a labor boycott, that are adapted to the contemporary labor market. Laws that regulate labor conflict solely to regulate the market should be strictly scrutinized through a Thirteenth Amendment lens to determine if their rules or penalties chill constitutionally protected activity. That scrutiny requires adjudicators to pull back from standard market principles and approaches, and to consider both

¹⁶⁸ See *supra* note 71 and accompanying text.

the fundamental right to withhold labor by refusing work and to place a constitutional value on securing the bargaining power of people who are selling their labor for a living. That right and that bargaining power should be recognized as essential to the mandate that we establish, and maintain a system of free labor in the United States.