

# THE THIRTEENTH AMENDMENT AND MINIMUM WAGE LAWS

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*The Thirteenth Amendment is undergoing a renaissance in scholarship and advocacy. Labor scholars and advocates are looking at the Thirteenth Amendment as a new source of constitutional rights for several reasons. First, its prohibition against involuntary servitude applies both to the public and private spheres. Second, its capacious text and history allows for new interpretive approaches. Third, the idea of a constitutional floor for free labor is an appealing one in an era of retrenchment in legislatures and the courts.*

*The Trump Administration and the Republican Congress can significantly change the direction of labor policy in the coming years. Now, the prospects are dim for an increase in the minimum wage at the federal level. The moral underpinnings of increasing the minimum wage are even greater now as economic inequality continues to increase. But the control of all three branches of government means that the foundations of the New Deal—in place for over eighty years—must be reexamined and reasserted. Thus, new grounds must be developed to bolster the original commitments to the New Deal.*

*In this Article, I argue that the Thirteenth Amendment coupled with the Fourteenth Amendment provides a basis for the equal application of minimum wage laws to all workers. Then, I apply the Amendment as safeguard against the erosion of minimum labor standards in three current controversies—the subminimum wage, the tipped minimum wage, and workers in immigration detention.*

*There are historical precedents for the Thirteenth Amendment being used as a basis to regulate working conditions. The Freedmen's Bureau Act of 1865 provides an example of when the federal government intervened in the regulation of labor standards. The Act also provides a basis for an aggressive campaign of the federal government to regulate the labor standards of workers. History can show a way for an expanded role of the government in the setting and enforcing of labor standards.*

*Yet, the Commerce Clause has always been an unsteady and historically contingent grounding for Congress's power to regulate the economy. In this Article, then, I argue that the Thirteenth Amendment provides alternative constitu-*

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*tional support for the federal minimum wage. This Article will also shine a light on workers who are not covered by any minimum wage because their states do not have a minimum wage and they are not covered by FLSA jurisdiction. Next, the Article will show how the movement for higher wages in the fast food industry has adopted the public-private flexibility of the Thirteenth Amendment as against the government and employers. The Article then concludes by exploring legal strategies—under the Thirteenth Amendment—to expand minimum wage laws to workers who are not covered by the laws.*

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#### INTRODUCTION

The movements to raise minimum wage laws have had several successes in recent years. The “Fight for 15” movement achieved several victories at the state and local levels.<sup>1</sup> Even though the federal minimum wage has remained at \$7.25 per hour, state and local minimum wages have risen and will continue to rise in the coming years.<sup>2</sup> Even so, these movements have several other goals

<sup>1</sup> In 2016, seven states raised their minimum wage levels, three which almost hit the \$15 per hour level. Including local governments, twenty-five states and localities raised their minimum wage laws in 2016. *25 States & Localities Approved Minimum Wage Increases in 2016, More Than Any Other Year Since Fight for \$15 Began*, NAT'L EMP. L. PROJECT (Dec. 21, 2016), <https://www.nelp.org/wp-content/uploads/PR-Minimum-Wage-Increases-New-Year-2016-2017.pdf> [<https://perma.cc/RJ55-4GBZ>].

<sup>2</sup> The minimum wage in California is currently \$10 or \$10.50 an hour depending on the size of the business and will go to \$15 per hour in 2022 for employers with 26 or more employees, and a year later in 2023. *California Minimum Wage Workers Will Receive \$15 per Hour by 2023*, GovDOCS (Apr. 8, 2016), <https://www.govdocs.com/california-15-statewide-minim>

that include raising the minimum wage for tipped workers and stronger enforcement of existing laws covering minimum wage and overtime laws.<sup>3</sup> These goals have been stalled by the gridlock that occurred under President Obama's administration.<sup>4</sup> Now with the presidency of Donald Trump, there likely will be retrenchment in federal labor policy.

While the federal minimum wage may be set at \$7.25 for now, the possibility that the federal government will attempt to preempt state and local legislation to raise the minimum wage makes the need for protective legal theories at the federal and state levels more urgent.<sup>5</sup> Even if there is a rise in the federal minimum wage, it is quite likely that the federal government will scale back its enforcement of wage and hour law.

In this Article, I argue that the Thirteenth Amendment can challenge instances of unequal applications of minimum wage laws. I argue that the history, text and structure of the Amendment can support the passage of minimum wage legislation. Further, I argue that in conjunction with the Fourteenth Amendment, the Thirteenth Amendment imposes obligations on States to enforce minimum labor standards. These obligations, coupled with the racial and nativist history of exclusions and exemptions to minimum wage laws, render exemptions for certain kinds of workers and employment vulnerable to constitutional challenge.

In the new and growing literature of government obligations under the Constitution, the possibilities under the Thirteenth Amendment remain to be further developed.<sup>6</sup> The Fourteenth Amendment is generally considered to pro-

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um-wage [<https://perma.cc/J6UT-23P4>]. In New York City, the minimum wage is currently \$9.70 an hour but went up to \$15 per hour for businesses of a certain size in 2018. See *Minimum Wage*, N.Y. STATE DEP'T LABOR, <https://www.labor.ny.gov/workerprotection/laborstandards/workprot/minwage.shtm> [<https://perma.cc/V4BW-THRN>] (last visited Nov. 11, 2018). In Washington D.C., the minimum wage will be \$15 per hour by 2020. Matt Vasilogambros, *D.C.'s Minimum-Wage Hike*, ATLANTIC (June 7, 2016), [www.theatlantic.com/news/archive/2016/06/dc-minimum-wage/486041/](http://www.theatlantic.com/news/archive/2016/06/dc-minimum-wage/486041/) [<https://perma.cc/3MFX-84SQ>].

<sup>3</sup> See *It's Time to do More Than Raise the Tipped Minimum Wage*, ONE FAIR WAGE <http://onefairwage.com/about> [<https://perma.cc/38D6-97PK>] (last visited Jan. 25, 2018).

<sup>4</sup> After passage of the Patient Protection and Affordable Care Act of 2010, no major legislation was enacted for the rest of the Obama Administration. See generally Ruben J. Garcia, "An Equally Divided Court": *Workplace Law in the U.S. Supreme Court 2015-2016*, 20 EMP. RTS. & EMP. POL'Y J. 197 (2016); see also Tamara Lytle, *Obama's Grand Plans Face Troubled Times*, AARP BULL. (Nov. 3, 2010), [https://www.aarp.org/politics-society/government-elections/info-11-2010/elections\\_impact\\_on\\_obamas\\_agenda.html](https://www.aarp.org/politics-society/government-elections/info-11-2010/elections_impact_on_obamas_agenda.html) [<https://perma.cc/8T38-PP5M>].

<sup>5</sup> The Fair Labor Standards Act currently makes clear that state and local governments may enact minimum wage and hour legislation. See generally 29 U.S.C. § 213 (2012). Some states, such as Alabama, have preempted state laws that have been challenged. *Bailey v. Alabama*, 219 U.S. 219, 243–44 (1911). As of now, however, the law is stayed pending appeal. See *id.* at 245.

<sup>6</sup> See Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 689 (2014) (stating basic principles of the democracy of opportunity tradition remain affirmative constitutional obligations of government); Rebecca E. Zietlow, *A Positive*

vide rights against government interference, but not positive obligations.<sup>7</sup> Attempts to locate responsibility to the government to provide education, housing and healthcare under the Fourteenth Amendment have generally been unsuccessful.<sup>8</sup> But there is also growing literature about the Thirteenth Amendment.<sup>9</sup> In keeping with my past work on new sources of worker protections in an era of political gridlock, the question this Article addresses is whether the structure, text, and history of the Thirteenth Amendment suggest that the amendment provides an obligation for government to regulation.<sup>10</sup>

Several scholars have applied the Thirteenth Amendment to labor problems, including James Gray Pope, Rebecca Zietlow, and Lea VanderVelde.<sup>11</sup> This Article applies these insights to several contemporary problems involving the minimum wage. While there are several reasons to focus on the Thirteenth Amendment as an independent basis for minimum labor standards, in this Article I argue that the Thirteenth and Fourteenth Amendments in conjunction provide a powerful case for equally applied minimum wages for all those who work.

There is an emerging shift in scholarship toward what the Constitution obligates government to do (positive), rather than what the Constitution prevents government from doing (negative).<sup>12</sup> William Forbath and Joseph Fishkin have argued that government is required to preserve the republic and the “anti-oligarchy” Constitution.<sup>13</sup> Forbath and Fishkin focused on the guarantee of a

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*Right to Free Labor*, 39 SEATTLE U. L. REV. 859, 861 (2016) (explaining how the Thirteenth Amendment contains a positive guarantee of rights).

<sup>7</sup> See generally NW Barber, *Constitutionalism: Negative and Positive*, 38 DUBLIN U. L.J. 249 (2015) (arguing the constitutionalism doctrine requires the creation of effective, competent state institutions).

<sup>8</sup> See generally MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960-1973 81-97 (1993).

<sup>9</sup> See, e.g., ALEXANDER TESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 114 (2004).

<sup>10</sup> See generally RUBEN J. GARCIA, MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION (2012).

<sup>11</sup> See generally James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 943 (1997); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 495 (1989) (“By abolishing slavery and involuntary servitude, the framers of the thirteenth amendment sought to advance both a floor of minimum rights for all working men and an unobstructed sky of opportunities for their advancement.”); Zietlow, *supra* note 6.

<sup>12</sup> See Sotirios A. Barber, *Fallacies of Negative Constitutionalism*, 75 FORDHAM L. REV. 651, 651 (2006) (comparing the negative and positive views of the United States Constitution).

<sup>13</sup> See Fishkin & Forbath, *supra* note 6, at 678-79 (arguing that government has a constitutional obligation to prevent oligarchy, preserve a broad middle class, and construct a democracy of inclusion and opportunity and urging the recovery of a tradition in which issues of political economy are understood as constitutional).

republican form of government as a counterweight to the Court's *Citizens United* decision, which tilted the political system toward elites.<sup>14</sup>

In the American constitutional system, it is usually assumed that the Constitution sets up a system of negative rights, dictating what the government must refrain from doing.<sup>15</sup> But this vision of the Constitution stems largely from United States Supreme Court constrained interpretations of the Bill of Rights and the Fourteenth Amendment.<sup>16</sup> The Thirteenth Amendment can be a positive basis for the establishment of labor standards, including the minimum wage, given the history, purpose and interpretations of the Amendment.<sup>17</sup> Congressional action, however, should not be expected nor necessary. In this Article, I argue that the Thirteenth Amendment places obligations for governments to provide and enforce minimum labor standards. The remaining question is what those standards should be. The government's obligation to legislate a minimum wage seems to be a core obligation under the free labor system mandated by the Thirteenth Amendment.<sup>18</sup> In combination with the Fourteenth Amendment, there is a compelling case that governments have a duty to enforce minimum labor standards.

There is much debate now about increasing the minimum wage, but there is very little chance of any increase in the federal minimum wage until politics in Washington D.C. change.<sup>19</sup> Nonetheless, public opinion polls routinely place support for raising the federal minimum wage above 70 percent.<sup>20</sup> At the same

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<sup>14</sup> See *id.* at 695–96.

<sup>15</sup> See generally VanderVelde, *supra* note 11 (arguing the Thirteenth Amendment addresses fair and just labor relations).

<sup>16</sup> See generally Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 COLUM. L. REV. 1697 (2012) (describing Representative James Ashley's theories of racial and class-based oppression concerning the Thirteenth Amendment).

<sup>17</sup> See generally Rebecca E. Zietlow, *The Rights of Citizenship: Two Framers, Two Amendments*, 11 PA. J. CONST. L. 1269 (2009) (discussing views of citizenship held by Representatives Ashley and Bingham).

<sup>18</sup> See, e.g., Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEX. L. REV. 1361, 1366 (2016) (showing how “the Second Freedmen's Bureau Bill's Constitution . . . was better structured to place economic inequality and dependency at the core of American constitutionalism than the judicially driven constitutionalism of the present.”); Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1737 (2012) (explaining some pessimism about Thirteenth Amendment optimism); Ayesha Bell Hardaway, *The Paradox of the Right to Contract: Noncompete Agreements as Thirteenth Amendment Violations*, 39 SEATTLE U. L. REV. 957, 978–80 (2016) (arguing that noncompete agreements between employers and workers earning low wages while performing unskilled labor are a violation of the Thirteenth Amendment); see generally Cynthia Estlund, *The “Constitution of Opportunity” in Politics and in the Courts*, 94 TEX. L. REV. 1447 (2016) (exploring the potential of the “constitution of opportunity” in the labor arena).

<sup>19</sup> See Garcia, *supra* note 4, at 199–200.

<sup>20</sup> See, e.g., Niv Elis, *Poll: Bipartisan Majority Supports Raising Minimum Wage*, HILL (June 1, 2017, 12:01 PM), <https://thehill.com/homenews/335837-poll-bipartisan-majority-supports-raising-minimum-wage> [<https://perma.cc/QU9R-5CLQ>] (stating that a poll shows 74 percent of respondents supported increasing the federal minimum wage); see also Bruce

time, minimum wage laws remain very popular public policies for legislators and voters at the state and local levels.<sup>21</sup> Still, there are holes in the system of free labor that a jurisprudence of constitutional obligation jurisprudence may be used to address: (1) the lack of any state minimum wage laws, as is the case currently in five states; (2) exemptions that leave large sections of the workforce unprotected; and (3) government's failure to adequately enforce minimum wage laws that do exist. This Article discusses these gaps in the free labor system and the workers that fall through them and how a dialogue of constitutional obligations under the Thirteenth Amendment might be utilized to challenge them. The racial underpinnings of labor laws are the "badges and incidents" of servitude that the Thirteenth Amendment intended to eradicate.

For years, even with these gaps, there has been criticism of minimum wage law as an ineffective antipoverty tool, or whether it is counterproductive to economic growth.<sup>22</sup> Various economists questioned the efficiency of the minimum wage, while others have found no substantial loss of employment with increases in the minimum wage.<sup>23</sup> Several states have launched successful campaigns to increase the minimum wage, but the federal minimum wage has remained stagnant since 2009.<sup>24</sup>

Further, recent decisions of the Supreme Court raise questions about the durability of the Commerce Clause as the constitutional authority for the federal minimum wage.<sup>25</sup> After the United States Supreme Court decided the *United States v. Darby* case in 1941, the constitutionality of the minimum wage was settled.<sup>26</sup> However, placing the constitutional basis for minimum wage on Con-

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Drake, *Polls Show Strong Support for Minimum Wage Hike*, PEW RES. CTR. (Mar. 4, 2014), <http://www.pewresearch.org/fact-tank/2014/03/04/polls-show-strong-support-for-minimum-wage-hike/> [https://perma.cc/6ACJ-Y54B].

<sup>21</sup> See Jaclyn Diaz, *Minimum Wages Set to Rise in Several States, Cities*, BLOOMBERG L. (Dec. 26, 2018, 6:30 AM), <https://news.bloomberglaw.com/daily-labor-report/minimum-wages-set-to-rise-in-several-states-cities> [https://perma.cc/672M-FEXE] (providing that minimum wage is set to rise in nineteen states in 2019).

<sup>22</sup> Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?*, 2009 U. CHI. LEGAL F. 1, 33–42 (2009) (discussing how the minimum wage might be justified under new theories).

<sup>23</sup> See generally David Neumark & William Wascher, *Minimum Wages and Low-Wage Workers: How Well Does Reality Match the Rhetoric*, 92 MINN. L. REV. 1296 (2008) (assessing "how the economic effects of minimum wages match the rhetoric that minimum wage proponents and opponents have espoused").

<sup>24</sup> See *History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938-2009*, DEP'T LAB.: WAGE & HOUR DIV., <https://www.dol.gov/whd/minwage/chart.htm> [https://perma.cc/36DD-V9E3] (last visited Nov. 14, 2018).

<sup>25</sup> See *United States v. Darby*, 312 U.S. 100, 125–26 (1941) (upholding the constitutionality of the Fair Labor Standards Act).

<sup>26</sup> KIRSTIN DOWNEY, *THE WOMAN BEHIND THE NEW DEAL: THE LIFE OF FRANCES PERKINS, FDR'S SECRETARY OF LABOR AND HIS MORAL CONSCIENCE* 268 (2009).

gress's authority to regulate interstate commerce lacks a basis in labor norms.<sup>27</sup> Further, basing the federal minimum wage on the Commerce Clause could be destabilized by future changes in Supreme Court doctrine.<sup>28</sup>

#### I. THE TEXTUAL AND HISTORICAL FOUNDATIONS OF THE THIRTEENTH AMENDMENT

Section One of the Thirteenth Amendment to the United States Constitution provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."<sup>29</sup> Section Two of the Amendment gives Congress the power to enforce the Amendment through "appropriate legislation."<sup>30</sup> Since its enactment in 1865, the Thirteenth Amendment has become the basis for several federal statutes, including the Civil Rights Act of 1866 and the Peonage Act of 1867.<sup>31</sup> History shows that the Reconstruction Congress intended to make a fundamental change in the state-federal relationship.<sup>32</sup> The Reconstruction Congress wanted to encourage states to enact legislation to remove the badges and incidents of slavery.<sup>33</sup> The Radical Republicans enacted the Freedmen's Bureau which ensured fair contracts for former slaves and set minimum wages.<sup>34</sup> Further, the principle that no one can voluntarily enter a peonage relationship shares the same normative commitment of the Fair Labor Standards Act (FLSA)—that no one can agree to work for less than the minimum wage.<sup>35</sup>

<sup>27</sup> See generally James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1 (2002).

<sup>28</sup> See generally Thomas C. Leonard, *The Very Idea of Applying Economics: The Modern Minimum-Wage Controversy and Its Antecedents*, 32 HIST. POL. ECON. 117 (2000) (explaining how the minimum-wage controversy is important to economics as a policy science).

<sup>29</sup> U.S. CONST. amend. XIII, § 1.

<sup>30</sup> U.S. CONST. amend. XIII, § 2.

<sup>31</sup> See, e.g., 18 U.S.C. § 245(b)(2) (2012); see also Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607, 1608–11, 1629 (2012) (Congress based the Peonage Abolition Act of 1867 on the Enforcement Clause of the Thirteenth Amendment); *The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009*, DEP'T JUST., <https://justice.gov/crt/matthew-shepard-and-james-byrd-jr-hate-crimes-prevention-act-2009-0> [<https://perma.cc/B9NE-9699>] (last visited Nov. 27, 2018) (stating that the James Byrd Hate Crimes Act was enacted pursuant to the Thirteenth Amendment).

<sup>32</sup> MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 28 (2004).

<sup>33</sup> *Id.* at 26.

<sup>34</sup> LAURA F. EDWARDS, *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS 90–95* (2015); RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 151–52 (2007).

<sup>35</sup> Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1647–67 (2001) (discussing how lawyers in the Department of Justice turned to the Thirteenth Amendment as a constitutional basis for civil rights protection).

Thus, both the FLSA and the Anti-Peonage Act are non-waivable.<sup>36</sup> An agreement between an employer and employee under the FLSA to work below the minimum wage is void and unenforceable.<sup>37</sup>

The Fair Labor Standards Act of 1938 was passed, under the authority of the Commerce Clause, at twenty-five cents an hour.<sup>38</sup> In the legislative findings of the FLSA, Congress made clear that it intended to provide more wholesome living conditions for workers.<sup>39</sup> At section 202(a) of the FLSA, Congress found that:

the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . burdens commerce and the free flow of goods in commerce . . . .<sup>40</sup>

The buying power of wages stalled over the last three decades.<sup>41</sup> The federal minimum wage has not risen since 2009 and in 2011 was 37 percent of the non-supervisory wage.<sup>42</sup> As such, many states and localities have increased their minimum wage in recent years.<sup>43</sup> In Seattle, the wage has gone up to \$11 per hour, and will go to \$15 per hour by 2021.<sup>44</sup> On January 1, 2017, nineteen states raised their minimum wage laws, and in 2019, nineteen states will again raise their minimum wages.<sup>45</sup> Cities such as Seattle and Tacoma were among the first to raise their minimum wage to \$15 hour.<sup>46</sup> In July 2016, several locali-

<sup>36</sup> See Zietlow, *supra* note 6, at 884 (“The prohibition of even ‘voluntary’ peonage in the 1867 Act indicates that the Reconstruction Era Congress wanted to protect workers from exploitative practices even if the worker chose to accept the exploitative job.”).

<sup>37</sup> *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 713–14 (1945).

<sup>38</sup> VIVIEN HART, *BOUND BY OUR CONSTITUTION: WOMEN, WORKERS, AND THE MINIMUM WAGE* 151–52 (1994).

<sup>39</sup> Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22, 25 (1978).

<sup>40</sup> 29 U.S.C. § 202(a) (2012).

<sup>41</sup> Drew Desilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RES. CTR. (Aug. 7, 2018), <http://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/> [https://perma.cc/4Z8K-X732].

<sup>42</sup> *Wages*, ECON. POL’Y INST., [www.stateofworkingamerica.org/fact-sheets/wages](http://www.stateofworkingamerica.org/fact-sheets/wages) [https://perma.cc/TW77-6AHS] (last visited Dec. 27, 2018).

<sup>43</sup> See generally DAVID ROLF ASSISTED BY CORRIE WATTERSON BRYANT, *THE FIGHT FOR FIFTEEN: THE RIGHT WAGE FOR A WORKING AMERICA* (2016).

<sup>44</sup> Lynn Thompson & Amy Martinez, *Seattle City Council Approves Historic \$15 Minimum Wage*, SEATTLE TIMES (Jan. 25, 2016, 5:02 PM), <https://www.seattletimes.com/seattle-news/seattle-city-council-approves-historic-15-minimum-wage/> [https://perma.cc/PUB9-YFGL].

<sup>45</sup> Karl Russell, *A Higher Minimum Wage in 2017*, N.Y. TIMES (Jan. 5, 2017), <https://www.nytimes.com/interactive/2017/01/05/business/economy/state-minimum-wages.html?register=email&auth=register-email> [https://perma.cc/F557-5FEG].

<sup>46</sup> See generally ROLF, *supra* note 43. Due to the political success of the Seattle minimum wage ordinance, business groups challenged the ordinance in the courts. See *Chamber of Commerce v. City of Seattle*, 890 F.3d 769, 775 (9th Cir. 2018).

ties in California raised their minimum wage.<sup>47</sup> Other states, like California, will be moving their minimum wage up in the years to come.<sup>48</sup>

States and localities pass increases to the minimum wage through their police power.<sup>49</sup> Seattle has led the way in this regard.<sup>50</sup> Even then, Seattle legislation has faced several challenges.<sup>51</sup> The Seattle Chamber of Commerce sued to block the minimum wage law on grounds that it is preempted by ERISA and the Commerce Clause.<sup>52</sup> While that litigation is presently unsuccessful, it raises the concern that an alternate basis for minimum wage laws may be needed.

Current data shows that a person working full time at the federal minimum wage of \$7.25 makes \$15,089 year, or approximately \$4,000 below the federal poverty line for a family of three.<sup>53</sup> In five states, however, there is no minimum wage for work that is not covered by the Fair Labor Standards Act (FLSA).<sup>54</sup>

In some states, state legislatures have prevented local jurisdictions from raising the minimum wage.<sup>55</sup> For example, when the City of Birmingham passed a higher minimum wage than the State of Alabama, the legislature responded by preventing cities from enacting their own wage levels.<sup>56</sup> A coalition of civil rights groups and unions challenged the law on several grounds, including the Thirteenth and Fourteenth Amendments.<sup>57</sup> These challenges raise the question of how firmly minimum wage provisions are rooted in our law. As with any statute, the FLSA can be repealed by new legislation in Congress and signed the by the President.<sup>58</sup> That power is why the Thirteenth Amendment is an important new basis for minimum and equal labor standards.

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<sup>47</sup> *Minimum Wage*, CAL. DEP'T INDUS. REL.: LAB. COMM'R'S OFFICE, [https://www.dir.ca.gov/dlse/faq\\_minimumwage.htm](https://www.dir.ca.gov/dlse/faq_minimumwage.htm) [<https://perma.cc/9MT5-MEJZ>] (last visited Nov. 15, 2018).

<sup>48</sup> *See id.*

<sup>49</sup> *See* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 386, 397 (1937).

<sup>50</sup> *See* ROLF, *supra* note 43, at 122 (explaining the Seattle minimum wage campaign).

<sup>51</sup> *See, e.g., Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 397 (9th Cir. 2015).

<sup>52</sup> *Id.* at 398.

<sup>53</sup> *What are the Annual Earnings for a Full-Time Minimum Wage Worker?*, U.C. DAVIS CTR. POVERTY RES. (Jan. 12, 2018), <https://poverty.ucdavis.edu/faq/what-are-annual-earnings-full-time-minimum-wage-worker> [<https://perma.cc/U4Q7-JKC7>].

<sup>54</sup> These states are South Carolina, Louisiana, Alabama, Mississippi and Tennessee. *State Minimum Wages: 2018 Minimum Wage by State*, NAT'L CONF. ST. LEGISLATURES (July 1, 2018), <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx> [<https://perma.cc/SBH5-R9PV>].

<sup>55</sup> *See, e.g., Ahiza Garcia, \$10.10 Minimum Wage Struck Down in Birmingham, Alabama*, CNN (Feb. 27, 2016, 5:03 PM), <https://money.cnn.com/2016/02/27/news/economy/minimum-wage-birmingham-alabama/index.html> [<https://perma.cc/43YD-8HCE>].

<sup>56</sup> *See id.*

<sup>57</sup> Melanie Trottman, *Workers Sue Over Alabama Wage Law, Citing Civil Rights*, WALL STREET J. (Apr. 28, 2016, 10:28 AM), <https://www.wsj.com/articles/workers-sue-over-alabama-wage-law-citing-civil-rights-1461853686> [<https://perma.cc/4JV8-GL2Q>].

<sup>58</sup> *See* U.S. CONST. art. I, § 7, cl. 2–3 (describing the passage of legislation by both chambers of Congress and presentation to the President).

## II. THE FLSA MINIMUM WAGE AND ITS EXEMPTIONS

Besides showing the constitutional antecedents of minimum wage laws, the FLSA's minimum wage laws have achieved a firm position in the law. From the beginning, however, the statute has exempted many workers from coverage.<sup>59</sup> The first threshold to be met is whether the worker will be considered an employee or "independent contractor."<sup>60</sup> Once a worker is properly classified as an employee, however, several exemptions might still prevent them from receiving minimum wages.<sup>61</sup>

Employees who are considered "trainees" will not receive any compensation.<sup>62</sup> The definition of "trainees" has shifted as the leadership of the Department of Labor has changed under different presidential administration.<sup>63</sup> Employees under the "companionship" exemption will not receive minimum wage or overtime.<sup>64</sup> This exemption, like the one in the National Labor Relations Act, which precludes workers engaged in domestic service from being federally recognized for the purpose of collective bargaining.<sup>65</sup> There is a direct line from these exemptions to the legacy of slavery and servitude.

Even with these exemptions, minimum wage laws have proven politically resilient.<sup>66</sup> Like Title VII of the Civil Rights Act of 1964, these "quasi-constitutional" enactments are seen as relatively immune from legislative repeal but not from judicial retrenchment.<sup>67</sup> As discussed above, there are some questions about whether minimum wages are efficient, and yet they have strong popular support.<sup>68</sup> Debates about the economics of the minimum wage will continue but the federal provisions in the FLSA achieved what Professors Eskridge and Ferejohn call "super-statutes."<sup>69</sup> These statutes are so ingrained in the law that there is little chance that they will be repealed, except by the

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<sup>59</sup> See 29 U.S.C. § 203 (2012).

<sup>60</sup> See *id.* (defining "employee").

<sup>61</sup> See *id.*

<sup>62</sup> *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947).

<sup>63</sup> See Bradley Babendir, *Let Them Eat Experience*, JACOBIN (Feb. 22, 2018), <https://jacobinmag.com/2018/02/trump-unpaid-internships-labor-department> [<https://perma.cc/QM59-GUYV>].

<sup>64</sup> 29 U.S.C. § 213(a)(15) (2012).

<sup>65</sup> 29 U.S.C. § 152(2)–(3) (2012).

<sup>66</sup> See generally William N. Eskridge Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001). The FLSA "defines the verb 'employ' expansively," thus "stretch[ing] the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Nationwide Mut., Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

<sup>67</sup> Eskridge Jr. & Ferejohn, *supra* note 66, at 1217 (explaining how super-statutes are normatively powerful and are legitimized by the populace, experts, and officials).

<sup>68</sup> See Brent Kreider, *What Would Happen if the Minimum Wage Laws Were Repealed? Would Businesses Pay Their Employees a Penny an Hour?*, IOWA ST. U.: DEP'T ECON., <https://www.econ.iastate.edu/node/712> [<https://perma.cc/LX9Z-L6SL>] (last visited Nov. 9, 2018).

<sup>69</sup> Eskridge Jr. & Ferejohn, *supra* note 66, at 1217.

courts.<sup>70</sup> This is why fundamental constitutional bases for the minimum wage are needed.

Economists have analyzed minimum wage laws from all sides.<sup>71</sup> Some economists argue that minimum wage laws have a negative impact on employment, such as loss of jobs.<sup>72</sup> On the other hand, studies show that the fast food industries in New Jersey have not lost employment with increases in the minimum wages.<sup>73</sup> Also, local ordinances increasing the minimum in San Francisco and Santa Fe show no appreciable impact on employment.<sup>74</sup>

Many aspects of the federal minimum wage laws make the FLSA unlikely to be repealed. First, the amount of time the FLSA has been in effect makes it one of the things that the majority of the public has come to expect.<sup>75</sup> All but five states passed their own version of minimum wage and overtime laws.<sup>76</sup>

Second, polls uniformly show strong support for minimum wage laws, and increases to existing minimum wage laws.<sup>77</sup> The political consequences of repealing minimum wage laws would likely be severe in cities where constituencies such as unions are strong.<sup>78</sup> Thus, there does not seem a likelihood of wholesale repeal.

Third, the FLSA is an elaborate statutory scheme.<sup>79</sup> The Department of Labor (DOL) enforces the Fair Labor Standards Act through litigation and regula-

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<sup>70</sup> *Id.*

<sup>71</sup> Brishen Rogers, *Justice at Work: Minimum Wage Laws and Social Equality*, 92 TEX. L. REV. 1543, 1582–86 (2014).

<sup>72</sup> Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?*, 2009 U. CHI. LEGAL F. 1, 5 (2009), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1439&context=ulcf>.

<sup>73</sup> See, e.g., Alan B. Krueger, *The Minimum Wage: How Much is Too Much?*, N.Y. TIMES (Oct. 9, 2015), <https://www.nytimes.com/2015/10/11/opinion/sunday/the-minimum-wage-how-much-is-too-much.html> [<https://perma.cc/65LU-CME2>].

<sup>74</sup> Jacqueline Sullivan, *New Study: High Minimum Wages in Six Cities, Big Impact on Pay, No Employment Losses*, INST. RES. ON LAB. & EMP'T (Sept. 6, 2018), <http://irle.berkeley.edu/high-minimum-wages-in-six-cities/> [<https://perma.cc/DDV3-D27F>].

<sup>75</sup> The FLSA celebrated its 80th anniversary on June 28, 1938. See Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, MONTHLY LAB. REV. 32, 36 (2000), <https://www.bls.gov/opub/mlr/2000/12/art3full.pdf>.

<sup>76</sup> Teresa Tritch, *Southern States Resist the Minimum Wage*, N.Y. TIMES (June 25, 2015, 12:32 PM), <https://takingnote.blogs.nytimes.com/2015/06/25/southern-states-resist-the-minimum-wage/> [<https://perma.cc/4VLQ-96MX>].

<sup>77</sup> See generally Drake, *supra* note 20.

<sup>78</sup> See DAVID NEUMARK & WILLIAM L. WASCHER, MINIMUM WAGES 282–83 (2008) (“Many of the studies surveyed here do find a relationship between the size of labor or business groups and either the voting tendencies of members of Congress or the relative levels of state- or province-specific minimum wages.”).

<sup>79</sup> See generally David J. Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?*, 20 BERKELEY J. EMP. & LAB. L. 74 (1999).

tions.<sup>80</sup> Over nearly eighty years, the DOL enacted hundreds of regulations and litigated thousands of cases supporting minimum wage and overtime protections.<sup>81</sup>

Most of the debate about the social utility of minimum wage laws exists between economists.<sup>82</sup> Yet minimum wage laws continue to be expanded in a number of states and cities.<sup>83</sup> In the 2014 elections, several states that regularly elect more conservative elected officials voted to increase its minimum wage laws.<sup>84</sup>

Some scholars have criticized minimum wage laws as protectionist for unions and male workers.<sup>85</sup> While there were certain elements of that historically, there was also a growing realization, as there is today, that economic inequality would continue to widen unabated unless there were policy interventions.<sup>86</sup> These mixed motivations do not make the minimum wage less fundamental to labor standards.<sup>87</sup> Further, the beneficiaries of the minimum wage laws now are largely immigrants, women, and people of color.<sup>88</sup>

The FLSA was enacted in 1938 under the authority of the Constitution's Commerce Clause.<sup>89</sup> The Supreme Court in the early 20th Century attempted to roll back the New Deal through the courts by narrowing the Commerce power.<sup>90</sup> Then came the court packing scheme of 1937 and the "switch in time that saved nine."<sup>91</sup> This was when the Supreme Court began upholding the constitutionality of the New Deal when President Franklin Delano Roosevelt proposed adding up to six additional justices for each one over the age of 70.5 years. At

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<sup>80</sup> *Handy Reference Guide to the Fair Labor Standards Act*, DEP'T LAB.: WAGE & HOUR DIV. 1, 14 (Sept. 2016), <https://www.dol.gov/whd/regs/compliance/wh1282.pdf>.

<sup>81</sup> See *The Fair Labor Standards Act: Is it Meeting the Needs of the Twenty-First Century Workplace? Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. in the Workforce*, 112th Cong. 2, 4 (2011).

<sup>82</sup> NEUMARK & WASCHER, *supra* note 78, at 292–93 (describing their disagreement with other economists about the benefits of minimum wage laws); see also DAVID CARD & ALAN B. KRUEGER, *MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE* 6 (1995).

<sup>83</sup> Jeanne Sahadi, *Minimum Wage: Congress Stalls, States Act*, CNN MONEY (Apr. 28, 2014, 12:09 PM), <http://money.cnn.com/2014/04/28/news/economy/states-minimum-wage/index.html> [<https://perma.cc/MV3F-TFMD>].

<sup>84</sup> *Id.*

<sup>85</sup> See generally DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* (2001).

<sup>86</sup> H.R. REP. NO. 93-913, at 6–8 (1974).

<sup>87</sup> *Id.* at 8.

<sup>88</sup> Laura Huizar & Tsedeye Gebreselassie, *What a \$15 Minimum Wage Means for Women and Workers of Color*, NAT'L EMP. L. PROJECT 1 (2016), <https://www.nelp.org/wp-content/uploads/Policy-Brief-15-Minimum-Wage-Women-Workers-of-Color.pdf>.

<sup>89</sup> 29 U.S.C. § 202(b) (2012).

<sup>90</sup> See generally Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 *FORDHAM L. REV.* 459 (2001).

<sup>91</sup> *Id.*

that point, the FLSA and other national labor legislation and federal agencies could begin to function.<sup>92</sup>

In 1937, President Franklin Delano Roosevelt challenged Congress “to devise ways and means of insuring to all our able-bodied working men and women a fair day’s pay for a fair day’s work,” because “[a] self-supporting and self-respecting democracy can plead no justification for . . . chiseling workers’ wages.”<sup>93</sup> A year later, Congress passed the FLSA.<sup>94</sup> The United States Supreme Court affirmed the purposes of the law more than fifty times; such as in *Barrentine v. Arkansas Best-Freight* in 1981: “[T]he FLSA was designed to give specific minimum protections to *individual* workers and to ensure that each employee covered by the Act . . . would be protected from the ‘evil of overwork’ as well as ‘underpay.’”<sup>95</sup>

While the likelihood of the FLSA being struck down as unconstitutional is low, the Commerce Clause being the basis for minimum wage legislation is limited.<sup>96</sup> First, as discussed above, the power to regulate under the Commerce Clause is historically contingent and dependent on the composition of the U.S. Supreme Court.<sup>97</sup> Second, as reformers argued in the early 20th Century, because the Thirteenth Amendment is the only part of the Constitution that explicitly addresses labor, the Amendment should be the constitutional basis for labor freedom.<sup>98</sup> Finally, as the only part of the Constitution that addresses both private action and territories (“any place subject to their jurisdiction”), the Thirteenth Amendment can address a number of exploitative conditions committed by private actors.<sup>99</sup>

### III. THE THIRTEENTH AMENDMENT AS CONSTITUTIONAL INFRASTRUCTURE FOR MINIMUM WAGE LAWS

One might ask why the Thirteenth Amendment should be a constitutional basis for minimum labor standards when the Fourteenth Amendment is capa-

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<sup>92</sup> See *id.* at 460.

<sup>93</sup> H.R. REP. NO. 93-913, at 7 (1974).

<sup>94</sup> 29 U.S.C. § 201 (2012).

<sup>95</sup> *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942)) (quotation marks omitted). The FLSA was intended to provide “greater dignity and security and economic freedom for millions of American workers.” H.R. REP. NO. 93-913, at 9 (1974).

<sup>96</sup> See Pope, *supra* note 27, at 7.

<sup>97</sup> *Id.* at 3–4, 7.

<sup>98</sup> U.S. CONST. amend. XIII; Pope, *supra* note 27, at 121.

<sup>99</sup> Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 *FORDHAM L. REV.* 981, 984, 986-87 (2002); Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, 105 *HARV. L. REV.* 1359, 1364 (1992).

cious and should sustain a number of theories to support workers' rights.<sup>100</sup> As described by James Gray Pope, there are several reasons why the Thirteenth Amendment should be the basis for arguments about enhanced labor rights.<sup>101</sup> First, it is the only provision explicitly addressed to labor.<sup>102</sup> Second, the courts have interpreted it more broadly than the Fourteenth Amendment.<sup>103</sup> Third, the fact that the Thirteenth Amendment applies to private action as well as government action is also a source of interpretive power.<sup>104</sup>

Under the Fourteenth Amendment, fundamental rights such as the right to travel, the right to procreate, and the right to marry can only be abridged upon the government providing a compelling government interest accomplished through the least restrictive means.<sup>105</sup> But what if government fails to act to protect the dignity of workers? Fundamental rights analysis is inapplicable here. Until labor rights are viewed as fundamental rights, substantive due process will likely not apply to minimum wage laws.<sup>106</sup>

The Fourteenth Amendment is not necessarily the only constitutional basis for the minimum wage.<sup>107</sup> The Thirteenth Amendment is another basis for minimum standards legislation.<sup>108</sup> I will discuss this as a basis for minimum standards legislation.

What should be the responsibility of government—whether federal, state or local—for minimum labor standards? This is a question for which the Thirteenth Amendment can be relevant. In our system of negative constitutional rights, the government's obligations are generally considered to be minimal under the Fourteenth Amendment.<sup>109</sup> Little attention is paid to the Thirteenth Amendment as a source of positive obligations.<sup>110</sup>

The text of the Thirteenth Amendment is a command to both private and public actors: "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within

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<sup>100</sup> Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 172 (1951).

<sup>101</sup> Pope, *supra* note 11, at 943.

<sup>102</sup> *Id.* at 961.

<sup>103</sup> *Id.* at 959.

<sup>104</sup> *Id.* at 961.

<sup>105</sup> *State v. J.P.*, 907 So. 2d 1101, 1112, 1116–17 (Fla. 2004).

<sup>106</sup> See *McDonald v. City of Chicago*, 561 U.S. 742, 759–63 (2010) for a discussion on fundamental rights and incorporation.

<sup>107</sup> Substantive due process in the labor context has so far been applied to cases like *State v. Coppage*, 125 P. 8, 11 (Kan. 1912) (upholding an employer's right to fire an employee for any reason, but denying an employer's right to force employees to sign yellow dog contracts).

<sup>108</sup> See *Lochner v. New York*, 198 U.S. 45, 62–64 (1905) (striking down maximum hours law for bakers in New York).

<sup>109</sup> See generally Zietlow, *supra* note 6.

<sup>110</sup> See generally *id.* at 861.

the United States, or any place subject to their jurisdiction.”<sup>111</sup> This text contrasts with the Equal Protection Clause of the Fourteenth Amendment, which reads: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>112</sup> As is clear from the textual differences, the language of the Fourteenth Amendment is more active than the language in the Thirteenth Amendment.<sup>113</sup> In both cases, Congress has the power to enforce the Amendments through appropriate legislation.<sup>114</sup>

The other interpretive question that arises is the term “involuntary servitude.”<sup>115</sup> Several cases make it clear that even arrangements that are voluntary, such as debt bondage, can violate the law.<sup>116</sup> Many states and the federal government have laws that prohibit debt bondage and peonage.<sup>117</sup> These laws were generally passed in the Reconstruction era to deal with the legacies of the end of slavery.<sup>118</sup> As the United States moved toward an urban industrial economy from an agricultural one, sharecropping and other debt bondage schemes were replaced by factory labor.<sup>119</sup> As the textile mills of Lowell, Fall River, and other Massachusetts factories teemed with workers in the late 1800s and early 1900s, the state of Massachusetts began to look for ways to keep the children and adults working in the factories out of the involuntary servitude that investigations of these factories revealed.<sup>120</sup> The legislative response was the first state minimum wage.<sup>121</sup>

The long journey to the end of slavery in the United States culminated in the passage of the Thirteenth Amendment to the U.S. Constitution.<sup>122</sup> Besides the formal ending of the most obvious and brutal forms of subjugation, the Amendment proactively prohibited future forms of involuntary servitude.<sup>123</sup> Reconstruction brought peonage and other forms of subordination—while not forms of chattel slavery—that had the impact of servitude that the Amendment

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<sup>111</sup> U.S. CONST. amend. XIII, § 1; *see generally* Zietlow, *supra* note 6.

<sup>112</sup> U.S. CONST. amend. XIV, § 1.

<sup>113</sup> *Id.*; U.S. CONST. amend. XIII.

<sup>114</sup> U.S. CONST. amend. XIV, § 2.

<sup>115</sup> *Id.*; U.S. CONST. amend. XIII, § 1; *see also* James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of “Involuntary Servitude”*, 119 YALE L.J. 1474, 1477 (2010).

<sup>116</sup> *See* Hardaway, *supra* note 18, at 973–74.

<sup>117</sup> *See id.* at 974.

<sup>118</sup> *See id.* at 972.

<sup>119</sup> PHILIP DRAY, *THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA* 17 (2010).

<sup>120</sup> *See* DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 263 (2008).

<sup>121</sup> *See generally* Clifford F. Thies, *The First Minimum Wage Laws*, 10 CATO J. 715 (1991).

<sup>122</sup> *See generally* Greene, *supra* note 18.

<sup>123</sup> *Id.*

intended to prohibit.<sup>124</sup> The Thirteenth Amendment is also unique in that it applies to private conduct as well as state action.<sup>125</sup>

There were also attempts to set working conditions right after Reconstruction.<sup>126</sup> In 1868, Congress set eight-hour days for workers on federal projects.<sup>127</sup> Then, states and the federal government made several attempts over the next forty years to regulate minimum wages and maximum hours. However, the line of jurisprudence from *Lochner v. New York* stopped those attempts.<sup>128</sup> Finally, after the “switch in time,” the Supreme Court began to uphold New Deal legislation designed to regulate the workplace under the Commerce Clause.<sup>129</sup>

The Thirteenth Amendment provided a floor for free labor but did not define what the terms and conditions of that labor should be.<sup>130</sup> The Amendment also gave power to Congress to enforce the prohibition on involuntary servitude through “appropriate legislation.”<sup>131</sup>

It would be nearly fifty years after the ratification of the Thirteenth Amendment before states began to legislate work conditions.<sup>132</sup> In 1912, Massachusetts passed the first minimum wage law.<sup>133</sup> At the same time, other aspects of the employment relationship began to be regulated by the state.<sup>134</sup> In 1911, Wisconsin passed the first comprehensive workers’ compensation law, instigated by progressive reformers there as well as in other states.<sup>135</sup> Moreover, despite the Haymarket protestors in Chicago calling for an eight-hour day in 1887, Illinois did not pass its first minimum wage statute until 1933.<sup>136</sup>

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<sup>124</sup> See *id.* at 1741.

<sup>125</sup> See generally Azmy, *supra* note 99; Amar & Widawsky, *supra* note 99.

<sup>126</sup> See Zietlow, *supra* note 6, at 879–80 (discussing the use of the 1866 Civil Rights Act to transform former slaves into free workers); see also VanderVelde, *supra* note 11, at 489.

<sup>127</sup> See *Federal Limitation of Hours of Labor on Public Works*, 3 MONTHLY REV. U.S. BUREAU LAB. STATS. 526 (1916).

<sup>128</sup> See generally *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>129</sup> William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 201 (2001).

<sup>130</sup> *Id.* at 191.

<sup>131</sup> U.S. CONST. amend. XIII, § 2.

<sup>132</sup> Antitrust Act of 1914, ch. 323, 38 Stat. 730, 731 (codified as amended 15 U.S.C. §§ 12–27, 44 (2012); 29 U.S.C. §§ 52–53 (2012)) (stating “the labor of a human being is not a commodity or article of commerce”).

<sup>133</sup> See Thies, *supra* note 121, at 716.

<sup>134</sup> See *Worker’s Compensation Brief History*, WISCONSIN DEP’T WORKFORCE DEV., [https://dwd.wisconsin.gov/wc/brief\\_history.htm](https://dwd.wisconsin.gov/wc/brief_history.htm) [<https://perma.cc/L3HF-MP7M>] (last visited Nov. 13, 2018).

<sup>135</sup> See Robert Asher, *The 1911 Wisconsin Workmen’s Compensation Law: A Study in Conservative Labor Reform*, 57 WIS. MAG. HIS. 123, 140 (1973), [https://www.jstor.org/stable/4634868?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/4634868?seq=1#metadata_info_tab_contents).

<sup>136</sup> See DAVID R. ROEDIGER & PHILIP S. FONER, OUR OWN TIME: A HISTORY OF AMERICAN LABOR AND THE WORKING DAY 123, 139–40 (1989); John E. Hannigan, *Minimum Wage Legislation and Litigation*, 16 B.U. L. REV. 845, 868 (1936).

The focus of the labor movement in the early part of the 20th Century was the right to organize and bargain collectively.<sup>137</sup> Nonetheless, organized labor got involved in lobbying to try to increase wages through state and federal laws.<sup>138</sup>

#### IV. THE POTENTIAL APPLICATIONS OF CONSTITUTIONAL OBLIGATIONS TO LEGISLATE MINIMUM LABOR STANDARDS

What are the consequences of a constitutional obligation to legislate minimum labor standards? Under existing Supreme Court doctrine, state obligations under the Fourteenth Amendment are generally thin.<sup>139</sup> However, states may have positive obligations under the Thirteenth Amendment, because of both its capacious language and its history.<sup>140</sup> The Amendment was intended to end slavery, but it was also intended to set a floor for free labor.<sup>141</sup> In this regard, I will focus on three questions. First, what are the ramifications of no minimum wage in those states?<sup>142</sup> Second, if states do have obligations, do cities and localities also have obligations?<sup>143</sup> Third, if there is a constitutional right to a minimum wage, does the state meet its obligation by setting the minimum wage at a level that does not qualify as a living wage?<sup>144</sup> Additionally, some states have a lower tipped minimum wage and the subminimum wages for the disabled, which I will discuss later.<sup>145</sup>

The question remains: when is a wage-floor so low that it qualifies as “involuntary servitude.”<sup>146</sup> The anti-peonage cases give us some assistance on this

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<sup>137</sup> See Graham Boone, *Labor Law Highlights, 1915-2015*, MONTHLY LAB. REV. 1–2 (Oct. 2015), <https://www.bls.gov/opub/mlr/2015/article/pdf/labor-law-highlights-1915-2015.pdf>.

<sup>138</sup> WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 16 (1991).

<sup>139</sup> See, e.g., *Deshaney v. Winneabago Cty. Dep’t Soc. Servs.*, 489 U.S. 189, 191 (1989).

<sup>140</sup> Zietlow, *supra* note 6, at 877.

<sup>141</sup> *Id.*

<sup>142</sup> Jordan Weissmann, *What Would Happen if We Got Rid of the Minimum Wage?*, SLATE (May 14, 2014, 5:56 PM), [http://www.slate.com/articles/business/moneybox/2014/05/ending\\_the\\_minimum\\_wage\\_what\\_happens\\_if\\_we\\_tear\\_up\\_the\\_pay\\_floor.html](http://www.slate.com/articles/business/moneybox/2014/05/ending_the_minimum_wage_what_happens_if_we_tear_up_the_pay_floor.html) [<https://perma.cc/7THL-PKGG>].

<sup>143</sup> See Gillian B. White, *Should Cities Have a Different Minimum Wage Than Their State?*, ATLANTIC (Jan. 15, 2015), <https://www.theatlantic.com/business/archive/2015/01/should-cities-have-a-different-minimum-wage-than-their-state/384516/> [<https://perma.cc/9SSC-4ENP>].

<sup>144</sup> For more on the living wage movement, see Jenifer Grady, *What is the Living Wage Movement?*, ALA APA (June 2004), <http://ala-apa.org/newsletter/2004/06/16/what-is-the-living-wage-movement/> [<https://perma.cc/99AM-HK2L>].

<sup>145</sup> See Sylvia A. Allegretto & David Cooper, *Twenty-Three Years and Still Waiting For Change: Why it’s Time to Give Tipped Workers the Regular Minimum Wage*, ECON. POL’Y INST. (July 10, 2014), <https://www.epi.org/publication/waiting-for-change-tipped-minimum-wage/> [<https://perma.cc/6NGA-PQX4>]; *Fact Sheet #39: The Employment of Workers with Disabilities at Subminimum Wages*, DEP’T LAB.: WAGE & HOUR DIV. (2008), <https://www.dol.gov/whd/regs/compliance/whdfs39.htm> [<https://perma.cc/VQ4L-DKMC>].

<sup>146</sup> See Pope, *supra* note 115, at 1553.

question.<sup>147</sup> The courts deemed many arrangements that were formally voluntary as so exploitative as to violate the Thirteenth Amendment.<sup>148</sup> And, if minimum wages are an entitlement, what are the elements of the minimum floor? That is, what is a constitutionally appropriate living wage? Clearly, the definition of a living wage has changed over time. Nonetheless, it seems beyond debate that the minimum wage of twenty-five cents per hour wage in 1938 would not provide a living wage today.<sup>149</sup> The fact that the Constitution does not set or mention a living wage does not undermine the need for governments to try to set a basic living standard.

Finally, what is the effect of no state minimum wage? After all, many states simply tie their state minimum wage to the federal law.<sup>150</sup> In most cases, there will not be an issue as long as there is federal jurisdiction, however there are three problems with that assumption.<sup>151</sup> First, there will be some small employers who are not subject to enterprise coverage, and thus federal law will not apply to them.<sup>152</sup> Second, state minimum wage laws are often more favorable in their remedial options than the FLSA.<sup>153</sup> Finally, *Wal-Mart v. Dukes* raises the issue of whether federal collective action provisions will be effective in the future.<sup>154</sup> Thus, state law class actions will become more important.

In the next section, I will describe four areas where the Thirteenth Amendment can be a framework for challenging the subminimum wages in five areas: (1) prison and detained labor; (2) the “gig economy”; (3) states without minimum wage laws; (4) subminimum wages for disabled workers in sheltered workshops; and (5) State preemption of minimum wage laws. I will explain each of these in turn.

#### A. *Detained and Bonded Labor*

Despite the exception clause which will be described below, prison labor paid below the minimum wage can still be legally problematic under the Thir-

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<sup>147</sup> See Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607, 1633–35 (2012).

<sup>148</sup> *Id.* at 1610.

<sup>149</sup> Annalyn Kurtz & Tal Yellin, *Minimum Wage Since 1938*, CNN MONEY (Nov. 3, 2015), <https://money.cnn.com/interactive/economy/minimum-wage-since-1938/> [<https://perma.cc/P5JZ-EH22>].

<sup>150</sup> See *Minimum Wage Laws in the States*, DEP’T LAB.: WAGE & HOUR DIV. (July 1, 2018), <https://www.dol.gov/whd/minwage/america.htm> [<https://perma.cc/84N8-F67J>].

<sup>151</sup> 28 U.S.C. § 1331 (2012).

<sup>152</sup> See *Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA)*, DEP’T LAB.: WAGE & HOUR DIV. (July 2009), <https://www.dol.gov/whd/regs/compliance/whdfs14.htm> [<https://perma.cc/B6R5-SQY6>].

<sup>153</sup> See generally Daniel V. Dorris, Comment, *Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims*, 76 U. CHI. L. REV. 1251 (2009).

<sup>154</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 356–60 (2011). Enterprise coverage under the Fair Labor Standards Act is found where the enterprise generates a gross annual volume of more than \$500,000. 29 U.S.C. § 203(s)(1)(A) (2012).

teenth Amendment. The “exception clause” in the Amendment exempts work that is “punishment for crime whereof the party shall have been duly convicted” from the prohibition on involuntary servitude.<sup>155</sup> Additionally, the FLSA applies only to employees under the control of an employer.<sup>156</sup> Some courts have held that prisoners who work for the government are categorically not employees, while other courts have suggested that prisoners could be considered employees.<sup>157</sup>

In states that have no state minimum wage the plaintiff was sometimes without relief.<sup>158</sup> The rights of prisoners to receive wages has been contested in several cases.<sup>159</sup> In *Alexander v. Sara, Inc.*, a section 1983 case, the district court held that Louisiana prisoners who were making FLSA claims were not employees.<sup>160</sup> Thus, the district court dismissed their claims.<sup>161</sup>

Many abuses that occur in states where there is no minimum wage are committed against guest workers—they are often paid below the minimum wage.<sup>162</sup> They have sued with the help of the National Guestworkers Alliance and the New Orleans Worker Center for Racial Justice.<sup>163</sup> Recently, workers in South Carolina brought in through the H2-B program to work at the Professional Golf Association tournament alleged violations of the minimum wage and other labor standards.<sup>164</sup>

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<sup>155</sup> U.S. CONST. amend. XIII, § 1.

<sup>156</sup> See *Fact Sheet #14*, *supra* note 152.

<sup>157</sup> Ruben J. Garcia, *US Prisoners' Strike is Reminder How Commonplace Inmate Labor Is—and That it May Run Afoul of the Law*, CONVERSATION (Aug. 30, 2018, 6:47 AM), <https://theconversation.com/us-prisoners-strike-is-reminder-how-commonplace-inmate-labor-is-and-that-it-may-run-afoul-of-the-law-101948> [<https://perma.cc/89FH-Y68C>].

<sup>158</sup> See, e.g., *Alexander v. Sara, Inc.*, 559 F. Supp. 42, 42–44 (M.D. La. 1983) (finding no jurisdiction for federal wage claims and no state minimum wage claims under Louisiana law).

<sup>159</sup> *Compare Vanskike v. Peters*, III, 974 F.2d 806, 808 (7th Cir. 1992) (finding inmates could state a claim under the FLSA for unpaid wages), *with Reimonenq, Jr., v. Foti, Jr.*, 72 F.3d 472, 475–76 (5th Cir. 1996) (finding that state officials are not employers under the Fair Labor Standards Act as a matter of law); *Watson v. Graves*, 909 F.2d 1549, 1552–53 (5th Cir. 1990) (holding that inmates could not show that they were compelled to labor and thus could not show a Thirteenth Amendment violation); *Patterson v. Oberhauser*, 331 F. Supp. 220, 221 (C.D. Cal. 1971) (holding that California’s work furlough program does not violate the Thirteenth Amendment). For an excellent discussion of the meaning of employment in these cases, see generally Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857 (2008).

<sup>160</sup> *Alexander v. Sara, Inc.*, 559 F. Supp. 42, 44 (M.D. La. 1983) (finding no jurisdiction for federal wage claims nor state minimum wage claims under Louisiana law).

<sup>161</sup> *Id.*

<sup>162</sup> See *Category: Litigation*, NAT’L GUESTWORKER ALLIANCE, <http://www.guestworkeralliance.org/category/litigation/> [<https://perma.cc/9ATN-56U2>] (last visited Nov. 29, 2018).

<sup>163</sup> See *id.*

<sup>164</sup> Complaint at 1, *Moodie v. Kiawah Island Inn Co.*, 124 F. Supp. 3d 711 (D.S.C. 2015) (No. 2:15-CV-1097-RMG).

As discussed above, the Thirteenth Amendment's exception clause allows for servitude as punishment for commission of a crime.<sup>165</sup> Yet, several immigration detention centers have been sued for violating anti-trafficking laws enacted pursuant to the Thirteenth Amendment and other labor violations.<sup>166</sup> So far, the Thirteenth Amendment claims survived motions to dismiss.<sup>167</sup>

Another important contemporary use of the Thirteenth Amendment has been in litigation challenging conditions in immigration detention centers. The very need for the Thirteenth Amendment's exceptions clause strongly suggests that the Amendment was intended to deal with exploitative labor conditions. Unfortunately, the growing number of detention centers for immigrants has resulted in the detainees performing labor for less than minimum wage.<sup>168</sup> The contractors that operated these facilities and exploited these immigrants, including in some cases young children, were the GEO Group and CoreCivic (previously known as Corrections Corporation of America and sued in many different cases before).<sup>169</sup>

These practices have been challenged in a series of lawsuits in federal court in California and Colorado. In *Sylvester Owino and Jonathan Gomez v. CoreCivic*, plaintiffs represented a class of former civil immigration detainees in Otay Mesa who performed tasks for the defendants, which included cleaning bathrooms, performing barber services for other detainees, and clerical work for Core Civic, for \$1 a day.<sup>170</sup> Plaintiffs allegedly did other work for "no pay at all" upon threat of "confinement, physical restraint, substantial and sustained restriction, deprivation, and violation of their liberty, and solitary confinement."<sup>171</sup> Defendants responded by arguing for a civic duty exception to the Thirteenth Amendment that governments can invoke.<sup>172</sup> The district court rejected the argument, because any civic duty exception would not apply to a contractor such as CoreCivic.<sup>173</sup> Discovery in the case continues.<sup>174</sup>

In *Menocal v. GEO Group*, immigrants in a detention center in Colorado were forced to labor at the facility filed suit against the private contractor that ran the detention facility for forced labor and unpaid wages. The District Court in Colorado denied GEO's motion to dismiss, denied GEO's request for an interlocutory appeal, and so GEO appealed to the Tenth Circuit Court of Ap-

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<sup>165</sup> U.S. CONST. amend. XIII, § 1.

<sup>166</sup> For example, litigation involving the Geo Group, a private contractor managing immigration detention centers in Colorado, went to the United States Court of Appeals for the Tenth Circuit. See generally *Menocal v. Geo Group, Inc.*, 882 F.3d 905 (10th Cir. 2018).

<sup>167</sup> *Id.* at 912.

<sup>168</sup> See, e.g., *Owino v. CoreCivic, Inc.*, No.17-CV-1112 JLS (NLS), 2018 WL 2193644, at \*1 (S.D. Cal. May 14, 2018).

<sup>169</sup> See *Menocal*, 882 F.3d at 910; *Owino*, 2018 WL 2193644, at \*1.

<sup>170</sup> *Owino*, 2018 WL 2193644, at \*1.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at \*3.

<sup>173</sup> *Id.* at \*10.

<sup>174</sup> *Id.* at \*28.

peals.<sup>175</sup> As in the *Owino* case discussed above, the defendants raised defenses to the plaintiff's claims based on the Thirteenth Amendment.<sup>176</sup> The Tenth Circuit affirmed the district court's decision and noted that defendants argued that an exception to the Thirteenth Amendment applied for civic duty, but the district court rejected that argument and denied their motion to dismiss.<sup>177</sup> These cases represent the leading edge of what will be a growing challenge to detained and bonded labor.

### B. States' and Cities' Responsibilities in the Gig Economy

The Thirteenth Amendment may also provide a framework for challenges to federal, state and local government actions which facilitate companies paying subminimum wages in the gig economy. The Fourteenth Amendment has not been held to require the government to enforce federal law.<sup>178</sup> The Thirteenth Amendment, before now, has not been utilized to support better enforcement of state laws. Individual states are responsible for ensuring that chattel slavery is not reintroduced in the United States "or any place subject to their jurisdiction."<sup>179</sup>

Particularly when considering the Thirteenth and the Fourteenth Amendments together, the obligation of states to enforce minimum labor standards becomes clearer. When states support or foster exploitative "independent contractor" arrangements, their support might also be a Thirteenth Amendment violation. There are also a number of specific recent issues involving the new on-demand economy that raise Thirteenth Amendment concerns.<sup>180</sup> Many city and local government are in contractual relationships with companies, like Uber and Lyft, for data sharing and service provision.<sup>181</sup> Governments may be complicit in the exploitation of workers by allowing subminimum wages to exist within their borders.<sup>182</sup>

Recently, workers sued companies, such as Uber, Lyft and Homejoy, for minimum wage and overtime violations on the theory that they are misclassified as employees.<sup>183</sup> Their lawsuits are proceeding in federal court in Califor-

<sup>175</sup> *Menocal v. Geo Group, Inc.*, 882 F.3d 905, 911–12 (10th Cir. 2018).

<sup>176</sup> See *supra* notes 168–70 and accompanying text.

<sup>177</sup> *Menocal*, 882 F.3d at 911–12, 927.

<sup>178</sup> See *DeShaney v. Winnebago*, 489 U.S. 187, 189 (1989).

<sup>179</sup> U.S. CONST. amend XIII, § 1.

<sup>180</sup> See Shaun King, *How the 13th Amendment Didn't Really Abolish Slavery, but Let it Live on in U.S. Prisons*, N.Y. DAILY NEWS (Sept. 21, 2016), <http://www.nydailynews.com/news/national/king-13th-amendment-didn-abolish-slavery-article-1.2801218> [<https://perma.cc/8DBA-HWFT>].

<sup>181</sup> See Deepa Das Acevedo, *Unbundling Freedom in the Sharing Economy*, 91 S. CAL. L. REV. 793, 812 (2018).

<sup>182</sup> See *id.* at 831–32.

<sup>183</sup> See, e.g., Carmel DeAmicis, *Homejoy Shuts Down After Battling Worker Classification Lawsuits*, RECODE (July 17, 2015, 11:17 AM), <https://www.recode.net/2015/7/17/11614814/cleaning-services-startup-homejoy-shuts-down-after-battling-worker> [<https://perma.cc/GRM>].

nia under both the Fair Labor Standards Act and California law.<sup>184</sup> Some of these lawsuits have been settled, but these cases have led to some decisions that have raised serious questions about whether these arrangements can be legally structured as contractor relationships.<sup>185</sup>

Uber drivers are also given the opportunity to lease their cars from the company.<sup>186</sup> These labor arrangements look very similar to the arrangements that the Supreme Court struck down in cases under the Thirteenth Amendment.<sup>187</sup> Liability under statutes may be premised on employee status, but the Thirteenth Amendment does not depend on whether a worker is an employee or an independent contractor.

But on the chance that they are not employees, the arrangements have many similar characteristics that would run afoul of anti-peonage statutes.<sup>188</sup> They require workers to essentially work off their debt. The ability to sue under the Thirteenth Amendment is limited to the instances where Congress has provided for a cause of action under section two of the Amendment.<sup>189</sup> Another option is for victimized individuals to successfully get federal prosecutors to bring criminal charges under 18 U.S.C. § 241.<sup>190</sup> That statute prohibits conspiracy to deny a person's right to be free from "involuntary servitude," or 18 U.S.C. § 1584, which makes it a crime to "knowingly and willfully" hold another person to involuntary servitude.<sup>191</sup>

In our legal system, criminal statutes require proof beyond a reasonable doubt because of the risk of error in depriving someone of their life or liberty is severe. Since the bar for criminal statutes is understandably high, the need for some affirmative obligation on states and localities to police involuntary servi-

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9-RQHU]; Tracey Lien, *Uber Sued Again Over Drivers' Employment Status*, L.A. TIMES (May 2, 2016), <http://www.latimes.com/business/technology/la-fi-tn-uber-nationwide-class-action-20160502-story.html> [<https://perma.cc/TT4K-5G5X>]; Tracey Lien, *Lyft Settles Worker Misclassification Lawsuit for \$12.25 Million*, L.A. TIMES (Jan. 27, 2016), <http://www.latimes.com/business/technology/la-fi-tn-lyft-settlement-20160126-story.html> [<https://perma.cc/MA2B-CJG9>]; Sarah Kessler, *The Gig Economy Won't Last Because It's Being Sued to Death*, FAST CO. (Feb. 17, 2015), <https://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death> [<https://perma.cc/ZZ28-K3NY>].

<sup>184</sup> See generally Lien, *Uber Sued Again*, *supra* note 183; Lien, *Lyft Settles Worker Misclassification Lawsuit*, *supra* note 183.

<sup>185</sup> See generally Lien, *Uber Sued Again*, *supra* note 183; DeAmicis, *supra* note 183; Kessler, *supra* note 183.

<sup>186</sup> Uber spun off this part of its business to another company. Tracey Lien, *Uber Reportedly Selling Its Car Leasing Business to Santa Monica Startup Fair.com*, L.A. TIMES (Dec. 26, 2017, 12:00 PM), <https://www.latimes.com/business/technology/la-fi-tn-uber-xchange-fair-20171226-story.html> [<https://perma.cc/9L9E-CBTD>].

<sup>187</sup> See *Pollock v. Williams*, 332 U.S. 4, 25 (1944); *Bailey v. Alabama*, 219 U.S. 219, 245 (1911).

<sup>188</sup> *But see United States v. Kozminski*, 487 U.S. 931, 938 (1988).

<sup>189</sup> U.S. CONST. amend XIII, § 2.

<sup>190</sup> 18 U.S.C. § 241, § 1584 (2012).

<sup>191</sup> *Id.* §§ 241, 1584.

tude within its borders is evident.<sup>192</sup> Further, the high degree of prosecutorial discretion that is generally given is another reason why affirmative obligations on the states are important.<sup>193</sup>

In light of these concerns, states must be very careful not to endorse or sanction employment arrangements that approach “involuntary servitude.”<sup>194</sup> If new employment arrangements, such as sharing economy, are tantamount to involuntary servitude, then states should join with private attorneys who are already suing these companies to ensure that involuntary servitude does not exist within its borders.<sup>195</sup>

### C. States Without a Minimum Wage

The Thirteenth Amendment may also provide a basis to legislate minimum wage laws at the state government levels. Forty-five states and the District of Columbia have minimum wage laws.<sup>196</sup> Five states—Alabama, Louisiana, Mississippi, South Carolina, and Tennessee—have no minimum wage law for work that is not covered by the Fair Labor Standards Act.<sup>197</sup> This means that if a worker is not covered by the tests for federal FLSA jurisdiction, they will not have a remedy for poor employment conditions. Generally, if the employer is engaged in interstate commerce or is part of an enterprise with a gross volume of more than \$500,000 per year, it will be subject to the FLSA.<sup>198</sup> But what of recent high-profile instances of domestic servitude? These examples include: guest workers in Florida who were held in slavery and workers on J-1 visas at the Hershey plant in Pennsylvania.<sup>199</sup> While these might also involve criminal

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<sup>192</sup> See *Federal Passivity*, HUM. RTS. WATCH (June 1998), <https://www.hrw.org/legacy/reports/98/police/usp33.htm> [<https://perma.cc/5MTW-MYQL>].

<sup>193</sup> Rhonda Brownstein, *Are There Limits to Prosecutorial Discretion?*, SOUTHERN POVERTY L. CTR. (2007), <https://www.splcenter.org/fighting-hate/intelligence-report/2003/are-there-limits-prosecutorial-discretion> [<https://perma.cc/W3PB-3BLX>].

<sup>194</sup> For state responsibility for labor violations, see *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994).

<sup>195</sup> For a discussion of the term “subject to their jurisdiction,” see Tobias Barrington Wolff, *Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 1042–44 (2002).

<sup>196</sup> See *Minimum Wage Laws in the States*, DEP’T. LAB.: WAGE & HOUR DIV. (July 1, 2018), <https://www.dol.gov/whd/minwage/america.htm> [<https://perma.cc/4ZTN-JZ8C>].

<sup>197</sup> See *id.*

<sup>198</sup> See *Fact Sheet #14*, *supra* note 152.

<sup>199</sup> Anthony Man, *South Florida “Hotspot” for Human Trafficking; Lawmakers Offer Solution*, ORLANDO SUN SENTINEL (Jan. 11, 2018, 4:45 PM), <https://www.sun-sentinel.com/news/nationworld/fl-reg-human-trafficking-visas-deutch-frankel-20180111-story.html> [<https://perma.cc/HQA5-TG6B>]; Julia Preston, *Foreign Students in Work Visa Program Stage Walkout at Plant*, N.Y. TIMES (Aug. 18, 2011), <https://www.nytimes.com/2011/08/18/us/18immig.html> [<https://perma.cc/7FC4-PVW7>].

violations of trafficking laws, the need to get prosecutors to bring charges can be an obstacle.<sup>200</sup> These instances might not have a minimum wage remedy.<sup>201</sup>

In many of these states, there have been rampant wage abuses, particularly in the aftermath of Hurricane Katrina in 2005.<sup>202</sup> Guest workers brought in to do cleanup by the company Allied Signal were mistreated and sued to recover back wages.<sup>203</sup> Because of inadequate federal resources, there is a higher likelihood that the federal Department of Labor will not police the working conditions of all the state residents.<sup>204</sup>

#### D. Subminimum Wages: Disabled and Tipped Workers

An unequal floor for wage labor goes against the spirit and intent of the Thirteenth Amendment. As the above discussion shows, there are a number of exemptions to the minimum wage under the FLSA.<sup>205</sup> Some of these disparities have been implemented in different ways.<sup>206</sup> What happens when Congress or the Department of Labor allows for some workers to be paid less than the minimum wage? In certain instances, the federal government has sanctioned subminimum wages for disabled and tipped workers.<sup>207</sup> For disabled workers, the rationale is that employers might be less inclined to hire disabled workers if they have to be paid the same as non-disabled workers under 29 U.S.C. § 214(c).<sup>208</sup> Some of the workers in sheltered workshops—workplaces for disabled workers that are segregated from the rest of the workplace—may be earn-

<sup>200</sup> See *Domestic Servitude, an Especially Hidden Form of Labor Trafficking*, HUM. RTS. FIRST (Aug. 2, 2016), <http://www.humanrightsfirst.org/blog/domestic-servitude-especially-hidden-form-labor-trafficking> [https://perma.cc/SCU6-ZQX8].

<sup>201</sup> If there is a lack of minimum wage remedies under federal law, the state law would fill gaps. But if there is no minimum wage, the worker would be without a remedy. See *Student Guestworkers at Hershey Plant Allege Exploitative Conditions*, HUFFINGTON POST (Aug. 17, 2011, 10:14 PM), [https://www.huffingtonpost.com/2011/08/17/student-guestworkers-at-hershey-plant\\_n\\_930014.html](https://www.huffingtonpost.com/2011/08/17/student-guestworkers-at-hershey-plant_n_930014.html) [https://perma.cc/LU5N-LKVX]; Man, *supra* note 199.

<sup>202</sup> See Griselda Nevarez, *Latino Workers Helped Rebuild New Orleans, But Many Weren't Paid*, NBC NEWS (Aug. 28, 2015, 4:17 AM), <https://www.nbcnews.com/storyline/hurricane-katrina-anniversary/latino-workers-helped-rebuild-new-orleans-many-werent-paid-n417571> [https://perma.cc/PL6D-U9WZ].

<sup>203</sup> See Michelle Chen, *These Workers Came from Overseas to Help Rebuild After Hurricane Katrina—and Were Treated Like Prisoners*, NATION (Feb. 20, 2015), <https://www.thenation.com/article/these-workers-came-overseas-help-rebuild-after-hurricane-katrina-and-were-treated-prison> [https://perma.cc/K4VB-CZXS].

<sup>204</sup> See *Case Studies from Ongoing Work Show Examples in Which Wage and Hour Division Did Not Adequately Pursue Labor Violations*, GEN. ACCOUNTABILITY OFF.: DEP'T LAB. 2–6 (July 15, 2008), <https://www.gao.gov/new.items/d08973t.pdf>.

<sup>205</sup> See *Subminimum Wage*, DEP'T LAB., <https://www.dol.gov/general/topic/wages/subminimumwage> [https://perma.cc/CD33-GYJ6] (last visited Nov. 11, 2018); see also *Minimum Wages for Tipped Employees*, DEP'T LAB. (Jan. 1, 2018), <https://www.dol.gov/whd/state/tipped.htm> [https://perma.cc/3DKN-UP59].

<sup>206</sup> See *Minimum Wages*, *supra* note 205.

<sup>207</sup> See *Subminimum Wage*, *supra* note 205.

<sup>208</sup> See 29 U.S.C. § 214(c) (2012).

ing less than one dollar an hour.<sup>209</sup> This disparity occurs even when disabled workers have made great strides in other areas of law. For example, even with the passage of the Americans with Disabilities Act of 1990, which required employers to offer reasonable accommodations to people with disabilities, disabled employees are still subjected to disparate wage treatment because they earn less than the minimum wage in sheltered workshops.<sup>210</sup>

The benefits of the sheltered workshops provision of the FLSA will continue to be debated, but a question remains whether Congress should have legislated subminimum wages in light of the Thirteenth Amendment.<sup>211</sup> Does the exemption for sheltered workshops rise to the level of involuntary servitude? Again, a broad interpretation of the Thirteenth Amendment suggests yes, but even without the broad interpretation the creation of classes of labor seems counter to the universal nature of the Thirteenth Amendment.<sup>212</sup>

The justification for a lower wage for tipped workers is even more elusive—the amount they receive from customers will remedy any deficiencies in the minimum wage.<sup>213</sup> Tipped workers can be paid as low as \$2.13 per hour in states (currently forty-seven of them).<sup>214</sup> There are many instances where employees cannot live on the subminimum wage.<sup>215</sup> The Restaurant Opportunity Council (ROC) took the lead in arguing for an end to the tipped minimum

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<sup>209</sup> Lydia DePillis, *Disabled People are Allowed to Work for Pennies Per Hour—But Maybe Not for Much Longer: The Era of the “Sheltered Workshop” is on the Way Out*, WASH. POST (Feb. 12, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/02/12/disabled-people-are-allowed-to-work-for-pennies-per-hour-but-maybe-not-for-much-longer/?utm\\_term=.cb1c75c2996e](https://www.washingtonpost.com/news/wonk/wp/2016/02/12/disabled-people-are-allowed-to-work-for-pennies-per-hour-but-maybe-not-for-much-longer/?utm_term=.cb1c75c2996e) [<https://perma.cc/89Y8-QAEN>].

<sup>210</sup> See Samuel R. Bagenstos, *Disability Rights and Labor: Is This Conflict Really Necessary?* 92 IND. L.J. 277, 289–90 (2016); Samuel R. Bagenstos, *The Case Against the Section 14(c) Subminimum Wage Program*, GA. ADVOC. OFF. (2011), [http://thegao.org/wp-content/uploads/2012/09/14c\\_report\\_sam\\_bagenstos-1.pdf](http://thegao.org/wp-content/uploads/2012/09/14c_report_sam_bagenstos-1.pdf) [<https://perma.cc/S2VX-2KM8>]; see also Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327 (1990).

<sup>211</sup> See generally Bagenstos, *The Case Against the Section 14(c)*, *supra* note 210.

<sup>212</sup> See generally Alexander Tsesis, *Into the Light of Day: Relevance of the Thirteenth Amendment to Contemporary Law*, 112 COLUM. L. REV. 1447 (2012) (addressing the Thirteenth Amendment in relation to other constitutional provisions, the significance of the Amendment in restructuring federalism, the limits of the Amendment’s grant of congressional and judicial authority, and the implications to current affairs and contemporary constitutional theory); James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941, 945–46 (1997).

<sup>213</sup> See Dana Liebelson, *The Minimum Wage Loophole That’s Screwing Over Waiters and Waitresses*, MOTHER JONES (May 12, 2014, 10:00 AM), <http://www.motherjones.com/politics/2014/05/minimum-wage-tip-map-waiters-waitresses-servers/> [<https://perma.cc/CS8W-AHGY>]; see also *Fair Labor Standards Advisor*, DEP’T LAB., <https://webapps.dol.gov/elaws/faq/esa/flsa/002.htm> [<https://perma.cc/3EUS-C3TK>].

<sup>214</sup> See *Fair Labor Standards Advisor*, *supra* note 213.

<sup>215</sup> See Kathryn Casteel, *The Minimum Wage Movement is Leaving Tipped Workers Behind*, FIVETHIRTYEIGHT (Feb. 7, 2017), <https://fivethirtyeight.com/features/the-minimum-wage-movement-is-leaving-tipped-workers-behind> [<https://perma.cc/MDB4-MYC2>].

wage.<sup>216</sup> They catalogued the many instances where workers have made less than the federal minimum wage because of “off nights” or “off shifts.”<sup>217</sup>

One might look at a restaurant worker’s entire day’s or week’s wage and see a higher minimum wage.<sup>218</sup> Once again, however, the underlying problem is applying unequal minimum wages to certain classes of workers.<sup>219</sup> The idea that exemptions are just part of the legislative process should not mean that some workers fall below the floor for minimum decent working conditions.<sup>220</sup> Thus, even if it is hard to fit the practices of tipped employment into the phrase “involuntary servitude,” the practice of paying a class of workers below the minimum wage runs counter to the spirit of a floor for all workers.

Also, the tipped minimum wage allows for employers to shift responsibility for payment of wages to consumers.<sup>221</sup> This runs counter to the employer’s final responsibility for wages. Some states do not allow the employer to take a credit against the minimum wage for employer tips, but forty-five states allow a tip credit.<sup>222</sup> This means that the employer’s responsibility is as little as \$2.13 per hour, and the difference between that and the minimum wage (which can vary between \$7.25 and \$15 per hour) can be made up by tips received by the employee.<sup>223</sup>

There are strong policy reasons why the FLSA should be amended to abolish the tipped minimum wage. The race and gender legacies of these differences provide further reason why the tipped minimum wage should be eliminated. The tipped minimum wage was created as a way to pay women and minority servers less.<sup>224</sup> Under “the equal floor” theory labor standards engrained in the Thirteenth and Fourteenth Amendments, the tipped minimum wage should not continue to exist.

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<sup>216</sup> *End Legacy of Slavery: #IFairWage For All!*, RESTAURANT OPPORTUNITIES CTRS. UNITED, [http://act.rocunited.org/p/dia/action3/common/public/?action\\_KEY=23603](http://act.rocunited.org/p/dia/action3/common/public/?action_KEY=23603) [<https://perma.cc/N6S9-U34D>] (last visited Dec. 30, 2018).

<sup>217</sup> *Our Tips Belong to Us: Overcoming the National Restaurant Association’s Attempt to Steal Workers’ Tips, Perpetuate Sexual Harassment, and Maintain Racial Exploitation*, RESTAURANT OPPORTUNITIES CTRS. UNITED 2 (Oct. 2017), [www.rocunited.org/publications/our-tips-belong-to-us](http://www.rocunited.org/publications/our-tips-belong-to-us) [<https://perma.cc/Q3FZ-NAML>].

<sup>218</sup> See KERRY SEGRAVE, *TIPPING: AN AMERICAN SOCIAL HISTORY OF GRATUITIES* 118 (1998).

<sup>219</sup> *End Legacy of Slavery*, *supra* note 216.

<sup>220</sup> See SARU JAYARAMAN, *FORKED: A NEW STANDARD FOR AMERICAN DINING* 8 (2016).

<sup>221</sup> See L.A. Times Editorial Board, *In Hiking the Minimum Wage, Don’t Leave Tipped Workers Behind*, L.A. TIMES (May 3, 2015, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-tipped-minimum-wage-20150503-story.html> [<https://perma.cc/6N6J-YKK3>].

<sup>222</sup> See *Minimum Wages*, *supra* note 205.

<sup>223</sup> See *id.*

<sup>224</sup> See SARU JAYARAMAN, *BEHIND THE KITCHEN DOOR* 117–56 (2013); SEGRAVE, *supra* note 218, at 51–52.

*E. Preemption of Local Minimum Wage Laws*

One example of the constitutional litigation strategy described above can be seen in the Eleventh Circuit Court of Appeals.<sup>225</sup> In 2016, the city council of Birmingham, Alabama passed the Minimum Wage Act which increased the City minimum wage to \$10.10, from the federally mandated \$7.25 an hour.<sup>226</sup> The State of Alabama legislature responded by preventing local governments in the State from enacting a higher minimum wage level than the state minimum.<sup>227</sup> In *Lewis v. the Governor of Alabama*, the NAACP and the plaintiffs challenged the preemption in federal court alleging violations of: (1) the Thirteenth Amendment; (2) the Fourteenth Amendment; and (3) the Voting Rights Act.<sup>228</sup>

The District Court dismissed the lawsuit on the grounds that there was no standing and there was no plausible theory upon which relief could be granted in the complaint.<sup>229</sup> The Eleventh Circuit reversed the dismissal, holding that the plaintiffs stated a claim based on past precedents that found that seemingly neutral municipal actions could be taken for discriminatory purposes.<sup>230</sup> In 2014, the United States Supreme Court interpreted these precedents in *Schuette v. Coalition to Defend Affirmative Action*.<sup>231</sup> There, the Court held that the State of Michigan did not violate the Equal Protection Clause by passing a law that repealed affirmative action.<sup>232</sup>

Even after the Supreme Court's decision in *Schuette*, the Eleventh Circuit in *Lewis* held that the political process theory remained, and the repeal of the minimum wage laws could be an equal protection violation.<sup>233</sup> There, the court found that there could be a discriminatory purpose to the law.<sup>234</sup> As Judge Conway for the majority opened in his opinion, one day the residents of Birmingham had a raise, and the next day they did not.<sup>235</sup> The court remanded the case to the district court so that discovery can be conducted on whether there was discriminatory intent in passing the law.<sup>236</sup>

A litigation strategy to bring the Thirteenth Amendment into public constitutional dialogue is beginning, but it will be a long discussion for several reasons. First, the Amendment is not self-enforcing, and requires congressional

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<sup>225</sup> See *Lewis v. Governor of Ala.*, 896 F.3d 1282, 1294 (11th Cir. 2018).

<sup>226</sup> *Id.* at 1287.

<sup>227</sup> *Id.* at 1288.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 1288–89.

<sup>230</sup> See, e.g., *Hunter v. Erickson*, 393 U.S. 385 (1969); see also *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

<sup>231</sup> *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 291–97 (2014).

<sup>232</sup> *Id.* at 314.

<sup>233</sup> See *Lewis*, 896 F.3d at 1299.

<sup>234</sup> *Id.* at 1297.

<sup>235</sup> *Id.* at 1288.

<sup>236</sup> *Id.* at 1297.

action as a basis for litigation. Congress has done this before in the anti-peonage, hate crimes, and human trafficking statutes.<sup>237</sup> With Congress very unlikely to enact new legislation enforcing the Thirteenth Amendment, a litigation campaign very similar to the welfare rights movement under the Fourteenth Amendment is necessary.<sup>238</sup> There are formidable conceptual obstacles to judges thinking differently about the Thirteenth Amendment.<sup>239</sup> For one, there is much less litigation and case law under the Thirteenth Amendment. Further, parties have been hesitant to utilize it because it seen simply as the Amendment that ended the Civil War.

The question for advocates of better labor standards is how to change the thinking of the public about the Thirteenth Amendment, as a way to improve labor standards.<sup>240</sup> The most often used example of popular constitutionalism is the gun-rights movement and its elevation of the Second Amendment from the constitutional wilderness to an individual right that the public frequently invokes.<sup>241</sup>

Several scholars have argued for the Thirteenth Amendment to become a kind of Second Amendment for the labor movement.<sup>242</sup> However, several important distinctions should be noted. First, for much of its history, the gun rights movement did not utilize the Second Amendment as a reason to resist gun regulation until 1968.<sup>243</sup> That year Congress passed comprehensive federal gun legislation.<sup>244</sup> According to Adam Winkler in *Gun Fight*, it was a public campaign for nearly forty years before the Supreme Court's decision in *District of Columbia v. Heller* that led to seeing the Second Amendment as an individual right.<sup>245</sup> This tells us that the road to constitutionalizing labor rights will have to start with significant inroads made on the domestic statutory front. Fortunately, as Professor Kate Andrias argues, there is a new constitutionalism at work in the labor movement.<sup>246</sup> This includes a growing interest in a range of

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<sup>237</sup> See Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. Tol. L. Rev. 923, 932–33 (2007) (analyzing “guest worker programs” through the Thirteenth Amendment).

<sup>238</sup> See tenBrock, *supra* note 100, at 200 (investigating the Thirteenth Amendment's historical purposes).

<sup>239</sup> See *Bailey v. Alabama*, 219 U.S. 219, 227–28 (1911).

<sup>240</sup> See *id.* at 240–41.

<sup>241</sup> See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 239–40 (2008).

<sup>242</sup> See generally ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* (2011).

<sup>243</sup> 18 U.S.C. § 921 (2012).

<sup>244</sup> Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 311–12 (2010) (discussing how section 2 of the Thirteenth Amendment is a source of rights for individuals to belong and participate in our society).

<sup>245</sup> See generally *District of Columbia v. Heller*, 554 U.S. 570 (2008); WINKLER, *supra* note 242.

<sup>246</sup> See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 9 (2016) (identifying a new labor law that has the potential to help achieve greater equality, both economic and political).

state and local measures that provide the minimums that federal statutes have failed to provide. The Thirteenth Amendment is part of the new constitutionalism in the labor movement of the future.

#### CONCLUSION

The foregoing examples of inequalities in minimum wage laws show the need for an underlying normative theory of an equal floor for labor and obligations on governments to protect workers within their borders. In this Article, I have argued that the Thirteenth Amendment provides that underlying theory. The Reconstruction Amendments fundamentally changed the balance between the federal and state governments. It has long been accepted that the ratification of the Thirteenth Amendment one hundred and fifty years ago did more than simply end the institution of slavery in the United States. The Supreme Court has stated in various cases that the Amendment was intended to protect a system of free labor, to prohibit arrangements that prevent the right to quit, oppressive work arrangements, and the “badges and incidents” of slavery.<sup>247</sup> The Amendment is also the only one to formally breach the public/private wall that dominates the rest of constitutional law.<sup>248</sup> Of course, slavery did not include only the lack of payment but a system of violence and economic oppression organized around white supremacy. But the vestiges of that system have continued since 1865 through low wages, racially based pay disparities, and employer-employee power relations. And that is exactly the point—the work of the Thirteenth Amendment is not complete as long as there are systems of economic subordination like subminimum wages, tipped wages, and employee misclassification schemes. The ability of the Thirteenth Amendment to provide for a fair system of free labor, including both the right and *the ability* to quit, is jeopardized when some workers are working for less than the minimum wage. For this reason, states should be constitutionally obligated to legislate and enforce a minimum wage that protects the dignity of workers and the work that they do.

The current debate about prison labor raises the issue of wages for work once again. If the Amendment is not about wages, why is prison labor for no wages justified by the exception clause of the Thirteenth Amendment? The ongoing debate over the meaning of “slavery” and “involuntary servitude” will continue. As long as that debate remains contested, examples of subminimum wages and denial of the minimum wage to low wage workers will continue. There is much to do, but as long as this debate continues, minimum wage laws will remain a part of the floor for free labor envisioned by the Thirteenth Amendment.

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<sup>247</sup> See *Jones v. Alfred H. Mayer Co. et al.*, 392 U.S. 409, 439 (1968).

<sup>248</sup> See *id.* at 413.

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