Washington Law Review

Volume 99 | Number 2

6-1-2024

State Constitutional Prohibitions of Slavery and Involuntary Servitude

Michael L. Smith
St. Mary's University School of Law

STATE CONSTITUTIONAL PROHIBITIONS OF SLAVERY AND INVOLUNTARY SERVITUDE

Michael L. Smith*

Abstract: In recent years, the Thirteenth Amendment has drawn sustained criticism for its "Punishment Clause," which exempts those duly convicted of criminal offenses from the Amendment's prohibition of slavery and involuntary servitude. Citing the Punishment Clause, courts have struck down challenges by those sentenced to forced labor, arguing that such involuntary servitude is explicitly permitted for those convicted of crimes. Recent criticism draws on concerns over mass incarceration and expansive forced labor practices—urging that the Thirteenth Amendment be revised to remove the Punishment Clause.

Prompted by increased attention to and criticism of the Punishment Clause, some states have taken matters into their own hands. Many state constitutions contain provisions prohibiting slavery and involuntary servitude, yet most of these provisions include similar language permitting involuntary servitude to be imposed as punishment for crimes. Starting in 2018, seven states amended their constitutions to remove the punishment exemptions—creating a meaningful difference between the scope of state constitutional protection and the limited protection afforded by the Thirteenth Amendment.

This Article examines state-level constitutional prohibitions of slavery and involuntary servitude, and recent trends toward eliminating punishment clause language from these provisions. Several recent amendments fall short of meaningful reform by inserting additional qualifications that undo any substantive changes these amendments may have made. Other provisions are limited by state constitutional requirements that mandate forced labor practices. Despite these shortcomings, Alabama's, Colorado's, and Nebraska's constitutions now contain unequivocal bans on slavery and involuntary servitude—provisions that may lend meaningful support to challenges of forced labor regimes. The Article concludes by encouraging other states to adopt similar amendments and urging those pursuing mass incarceration reforms to take note of state constitutional provisions.

INTRODUCTION 524
I. THE THIRTEENTH AMENDMENT: A BRIEF OVERVIEW 527
A. The Thirteenth Amendment and Its Punishment Clause 527
B. Constitutional Challenges to Prison Labor: The Current State 531
II. STATE CONSTITUTIONAL SLAVERY PROHIBITIONS ... 534
A. State Constitutional Slavery Provisions: An Overview 534
B. The Recent Trend Toward Blanket Bans on Slavery and Involuntary Servitude 535

*Assistant Professor, St. Mary's University School of Law. The author thanks participants at the ACS Constitutional Scholar's Forum for their comments and feedback, including Daniel Correa and Jennifer Safstrom.

III. STATE CONSTITUTIONAL CHALLENGES TO CONVICT LABOR PRACTICES 543
A. Rhode Island's Absolute Ban of Slavery Only..... 543
B. Recent Absolute Bans of Slavery and Involuntary Servitude..... 545
C. Recent Qualified Bans of Slavery and Involuntary Servitude..... 549
D. Vermont's Constitutional Contradictions..... 552
IV. LESSONS GOING FORWARD 557
CONCLUSION 559

INTRODUCTION

In November 2022, four states approved measures to amend their constitutions' prohibitions of slavery and involuntary servitude.[1] The state constitutions of Alabama, Oregon, Tennessee, and Vermont already contained provisions prohibiting slavery and involuntary servitude—all of which were modeled after the language of the Thirteenth Amendment to the United States Constitution.[2] These preexisting prohibitions, however, were qualified. Like the Thirteenth Amendment, they prohibited slavery and involuntary servitude, "except as a punishment for crime whereof the party shall have been duly convicted."[3] This exception, known as the "Punishment Clause," has had profound, lasting effects on incarceration practices and racial disparities in criminal punishment.[4]

In the immediate aftermath of Reconstruction, the exception allowed states to impose harsh criminal regimes targeting African Americans that rebuilt much of the preexisting system of slavery through the apparatus of criminal law and punishment.[5] Michele Goodwin writes that "while the Thirteenth Amendment granted freedom for Blacks trapped under slavery's extreme, burdensome weight, southern legislators, law enforcement, and private businesses reinvented the practice through new

1. Aaron Morrison, *Slavery, Involuntary Servitude Rejected by 4 States' Voters*, AP (Nov. 9, 2022), [hereinafter *Slavery, Involuntary Servitude Rejected*], https://apnews.com/article/2022-midterm-elections-slavery-on-ballot-561268e344f17d8562939cde301d2cbf [https://perma.cc/S6Z5-YDQE].

2. *Compare* ALA. CONST. art. I, § 32, OR. CONST. art. I, § 34, TENN. CONST. art. 1, § 33, *and* VT. CONST. ch. I, art. 1, *with* U.S. CONST. amend. XIII, § 1.

3. U.S. CONST. amend. XIII, § 1; *see Slavery, Involuntary Servitude Rejected*, *supra* note 1.

4. *See infra* section I.A.

5. Cortney E. Lollar, *The Costs of the Punishment Clause*, 106 MINN. L. REV. 1827, 1850 (2022) ("[I]mmediately subsequent to the Thirteenth Amendment's passage, many Southern states passed criminal laws specifically aimed at circumventing the prohibitions on chattel slavery contained in the new constitutional provision. Local sheriffs used those laws to impose unpayable financial obligations on the formerly enslaved which the newly 'freed' then had to work to pay off.").

forms of servitude, bondage, and threat."[6] She goes on to describe practices including the Black Codes (restrictions on ownership of land, business operations, and harsh criminal laws targeting Black people) and convict leasing (allowing counties and businesses to hire prisoners to do hard, dangerous work) that enabled private parties to effectively re-enslave people through transfers of Black people's debt, and other practices.[7]

The Punishment Clause's impact pervades modern incarceration practices as well—leading to expansive incarceration and forced employment of both men and (as Goodwin emphasizes) women.[8] Those who aren't physically incarcerated may also find themselves forced into work through the imposition of fines and fees—the nonpayment of which may result in rearrest and further penalties.[9] Narrow interpretations of the Thirteenth Amendment tend to exclude the Amendment as a feasible means of challenging these practices, as prevailing interpretations tend to restrict slavery's definition to the "worst instantiation" of chattel slavery, rather than broader potential definitions.[10]

These discussions and critiques of mass incarceration and labor by incarcerated persons center around the Thirteenth Amendment. The Thirteenth Amendment, its Punishment Clause, and courts' narrow interpretation of the Amendment tend to be the focal points for proposed solutions.[11] But this focus on the U.S. Constitution neglects state constitutional prohibitions on slavery—an area of law that demands more attention in light of recent state constitutional amendments.

In this Article, I survey these recent reforms and analyze the merits of potential state constitutional challenges to forced labor practices. Within the past several years, multiple states have amended their constitutional provisions regarding slavery and involuntary servitude—with many states seeking to eliminate language permitting the imposition of involuntary

---

6. Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 933–34 (2019).

7. *Id.* at 933–46.

8. *Id.* at 953–57.

9. *See* Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1607–08 (2015) (discussing how modern fines and fees in criminal proceedings "function to maintain an economic caste system").

10. Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1496–99 (2012).

11. *See, e.g.*, Lollar, *supra* note 5, at 1880–86 (arguing for the elimination of the Thirteenth Amendment's Punishment Clause); Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 882–85 (2012) (arguing that the Punishment Clause should be read restrictively to permit only prison labor that approximates involuntary servitude, and not labor that approximates slavery).

servitude as a punishment for a crime.[12] Several of these reforms have resulted in absolute prohibitions of slavery and involuntary servitude—prohibitions that may grant new, stronger constitutional support to those seeking to reform forced labor practices.[13] Those arguing for constitutional, legislative, and administrative reforms to punishment practices would do well to incorporate state constitutional arguments into their efforts.

Part I briefly summarizes the Thirteenth Amendment, its origins, and the state of constitutional law relating to prison labor. In line with much of the commentary on the subject, I acknowledge that federal constitutional challenges to forced labor sentences have little chance of success in light of the Thirteenth Amendment's Punishment Clause that permits the imposition of involuntary slavery upon those convicted of crimes. In Part II, I survey state constitutional provisions relating to slavery and involuntary servitude. While many of these provisions track the language (and exemptions) of the Thirteenth Amendment, several states take a more absolute approach. With the exception of Rhode Island, these are all relatively recent developments, with the earliest absolute provision enacted in 2018.[14]

There is a fair amount of variation in state constitutional prohibitions of slavery and involuntary servitude. Part III delves into those states with absolute prohibitions or recently amended provisions. I conclude that several of these state constitutions likely provide no meaningful additional support for constitutional challenges to forced labor sentences. Rhode Island, for example, has a longstanding provision that absolutely prohibits slavery, but early precedent from the Rhode Island Supreme Court takes a restrictive, narrow view of what counts as prohibited slavery, and permits the imposition of sentences requiring those convicted of crimes to engage in forced labor.[15] Other recent reforms also miss the mark. While some states have enacted amendments removing explicit authorization of slavery or involuntary servitude as a punishment for a crime, they have enacted additional qualifying language that, at best, neutralizes the substantive impact of these reforms and, at worst, broadens the range of permissible slavery and involuntary servitude beyond even that permitted by the Thirteenth Amendment.[16]

---

12. *See infra* section II.B.

13. *See infra* section II.B.

14. *See infra* section II.B.

15. *See* Anderson v. Salant, 96 A. 425, 430–31 (R.I. 1916).

16. *See, e.g.*, UTAH CONST. art. 1, § 21 (creating an exception to the slavery and involuntary servitude prohibition by stating that the prohibition "does not apply to the otherwise lawful administration of the criminal justice system").

Alabama, Colorado, and Nebraska, however, recently enacted absolute prohibitions of slavery and involuntary servitude.[17] Each of these amended provisions replaced earlier versions with punishment clauses similar to the Thirteenth Amendment's. These recent enactments and their explicit rejection of the punishment provision provide a new, potentially significant source of state constitutional authority for those seeking to challenge forced labor practices in prisons and jails. Part V situates this discussion in a broader context, urging additional states to implement similar, absolute reforms while avoiding qualified reforms.

One clarification is warranted at the outset: In discussing and critiquing systems of forced labor, this Article does not oppose systems of incarceration that provide opportunities for those convicted of crimes to maintain gainful employment, pursue educational degrees, or develop skills that may aid in their ultimate reentry to society. Such opportunities, if implemented in a non-coercive manner, may ultimately aid in the rehabilitation and reentry of those convicted of crimes.[18] Rather, my concern is with the profit-motivated state of prison labor, in which hundreds of thousands of inmates are forced into labor not for rehabilitative purposes, but to lessen the costs of an unsustainable system of mass incarceration and increase the profits of those running or contracting with penal institutions.[19]

I. THE THIRTEENTH AMENDMENT: A BRIEF OVERVIEW

A. The Thirteenth Amendment and Its Punishment Clause

The Thirteenth Amendment states: "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."[20] The Thirteenth Amendment's language

17. *See* ALA. CONST. art. I, § 32; COLO. CONST. art. 2, § 26; NEB. CONST. art. I, § 2. Vermont also recently amended its constitution to provide for the absolute prohibition of slavery and involuntary servitude, but language elsewhere in the constitution that continues to require forced labor punishment complicates the analysis. *See infra* section III.D.

18. *See, e.g.*, RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 62–63 (2019) (noting that while "many people in prison are participating in a work program, . . . the majority are performing jobs to support the functioning of the prison, such as food preparation or janitorial work, which impart few marketable skills and do not improve the person's employment prospects upon release").

19. *See* Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143, 1177–81 (2006); *id.* at 1208–13 (describing the shift away from rehabilitative punishment ideals and to incarceration); *id.* at 1208 (noting a "resurgence of interest in correctional labor" that exploits African Americans on behalf of state and private entities).

20. U.S. CONST. amend. XIII, § 1.

was based on the text of the Northwest Ordinance of 1787, which "prohibited slavery and involuntary servitude 'except as a punishment for crime whereof the party shall have been duly convicted.'"[21] While Senator Charles Sumner objected to the text, arguing that the language regarding involuntary servitude and punishment of crimes was surplusage, the alternatives he proposed faced heavy objections and Sumner withdrew his proposals.[22] That language—"except as a punishment for crime whereof the party shall have been duly convicted"—wasn't discussed further and was ultimately enacted along with the rest of the Thirteenth Amendment.[23] It is now referred to as the "Punishment Clause."[24]

States soon sought to take advantage of the Punishment Clause to continue the systemic legal oppression of recently freed slaves. Benno Schmidt describes some of these efforts:

> A more or less unbroken momentum of law and history carried peonage into the twentieth century. Despite the thirteenth amendment's command that "[n]either slavery nor involuntary servitude, except as a punishment for crime . . . shall exist within the United States," forcing blacks to work was the paramount concern of the Black Codes passed in the relaxed years of presidential reconstruction following the Civil War. Under the Codes, black males who did not enter employment contracts could be charged as criminal vagrants. Those who quit jobs for which they had contracted could be arrested and returned to their employers. Enticement laws prohibited other employers from hiring laborers already under contract. Black children could be "apprenticed" to their former masters by order of the probate courts. Indigents fined for petty offenses such as vagrancy avoided harsh punishment by contracting to work for private employers who paid their fines, and the force of the state's criminal law fell behind the employment obligation.[25]

---

21. James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1474 (2019) (citing CONG. GLOBE, 38th Cong., 1st Sess. 1313 (1864)).

22. *Id.* at 1474–75; CONG. GLOBE, 38th Cong., 1st Sess. 1488–89 (1864).

23. Pope, *supra* note 21, at 1474–75.

24. *See id.* at 1470; *see also* Loller, *supra* note 5, at 1829–30.

25. Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The* Peonage Cases, 82 COLUM. L. REV. 646, 650 (1982); *see also* ERIC FONER, FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION 96 (2005) ("Along with denying blacks equality before the law and political rights, the Black Codes required all African Americans to sign yearly labor contracts each January. Those who failed to do so could be arrested as vagrants and fined; if they proved unable to pay, they could be auctioned off to an employer who

In the late nineteenth century, practices such as convict leasing—in which prisoners were contracted out to private entities like railroads and other industries to provide a cheap source of labor—generated profits that motivated harsh criminal laws and increased incarceration rates.[26] Michele Goodwin argues that historic patterns of racially discriminatory incarceration and forced labor continue to the present day.[27] She supports this claim by surveying patterns of prison labor and the profit motives underlying them, and argues that prison labor "provides evidence of slavery's enduring legacy and the formidability of legal innovations related to race."[28] Simeon Spencer of the NAACP's Legal Defense Fund argues that "[s]lavery is [s]till [l]egal in America," as a result of the Punishment Clause, highlighting widespread prison labor practices, coupled with low wages and the high prices of "simple necessities sold to incarcerated people."[29] Commentators elsewhere reflect these critical sentiments—arguing that the Thirteenth Amendment's Punishment Clause has been used to usher in a new era of slavery behind bars.[30]

Throughout all of this, the Thirteenth Amendment's "scope remains ambiguous."[31] William Carter, Jr. notes the Supreme Court's construction of the Amendment in *Jones v. Alfred H. Mayer Co.*,[32] in which the Court stated that the Thirteenth Amendment empowered Congress to "pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[33] Carter argues that the lack of any clarity regarding the Amendment's meaning "has resulted in a growing divide between Thirteenth Amendment case law and Thirteenth Amendment scholarship," with courts consistently limiting the Amendment to "only literal slavery, involuntary servitude, or other forms of coerced labor,"

---

would pay their fines, and then forced to work to reimburse him."); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II, at 53 (2008).

26. FONER, *supra* note 25, at 202.

27. Goodwin, *supra* note 6, at 953–75.

28. *Id.* at 975; *see id.* at 953–75.

29. Simeon Spencer, *Emancipation on the Ballot: Why Slavery Is Still Legal in America – and How Voters Can Take Action*, LEGAL DEF. FUND (June 17, 2022), https://www.naacpldf.org/13th-amendment-emancipation/ [https://perma.cc/B2Y3-LHMZ] (last updated Oct. 18, 2022).

30. *See* Taja-Nia Y. Henderson, *The Ironic Promise of the Thirteenth Amendment for Offender Anti-Discrimination Law*, 17 LEWIS & CLARK L. REV. 1141, 1180–87 (2013); Armstrong, *supra* note 11, at 900–05; Megan Massie, Note, *Locked Up and Trafficked Out: Prison Labor and the Thirteenth Amendment*, 19 U. ST. THOMAS L.J. 498, 500–01 (2023).

31. William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS. L. REV. 1311, 1313 (2007).

32. 392 U.S. 409 (1968).

33. Carter, *supra* note 31, at 1313 (quoting *Jones*, 392 U.S. at 439).

rather than the "expansive interpretation" urged by "scholars and litigants."[34]

The Punishment Clause's continuing effects bear out Carter's claim that courts have "been unwilling to extend the Amendment to its full scope."[35] Inmate labor is widespread, and states exercise substantial latitude over requiring inmates to work in connection with fulfilling their sentences.[36] Laura Appleman details the history of prison labor, tracing its development through the antebellum era, Jim Crow, and into the modern age.[37] Appleman argues profit motives incentivize states to develop laws that encourage prison labor by classifying inmates as something other than employees, which exempts them from Fair Labor Standards Act and Occupational Safety and Health Administration protections.[38] Adam Lamparello and andré douglas pond cummings write that private prisons coordinate "with large multinational corporations to provide labor in exchange for lucrative contracts that do not inure to the benefit of those inmates that provide the labor—an exchange that looks and feels in many instances strikingly like modern-day involuntary servitude or slavery."[39] Adam Davidson argues that courts' "permissive interpretation"[40] of the Punishment Clause have rendered it "a one-way ratchet to restrict the rights of imprisoned people," and that those forced to work while imprisoned find themselves enmeshed in prison bureaucracies that force imprisoned people into slavery with little in the way of due process.[41]

In the modern era, nearly one million inmates "are working full time in jails and prisons throughout the United States."[42] In the early twenty-first century, estimates suggested that "over $2 billion worth of commodities, both goods and services," originated with state and federal inmate labor.[43] And extensive investigative reporting by *The Associated Press* reveals that "some of the world's largest food companies and most popular

34. *Id.* at 1316.

35. *Id.* at 1319.

36. *See* Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 409 (2009) (noting that hundreds of thousands of inmates work full time in U.S. prisons and jails).

37. *See* Laura I. Appleman, *Bloody Lucre: Carceral Labor and Prison Profit*, 2022 WIS. L. REV. 619.

38. *Id.* at 671–76.

39. andré douglas pond cummings & Adam Lamparello, *Private Prisons and the New Marketplace for Crime*, 6 WAKE FOREST J.L. & POL'Y 407, 415 (2016).

40. Adam Davidson, *Administrative Enslavement*, 124 COLUM. L. REV. 633, 638 (2024).

41. *Id.* at 639.

42. Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 868 (2008).

43. Appleman, *supra* note 37, at 664.

brands" rely on extensive work by prisoners affecting "hundreds of millions of dollars' worth of agricultural products" tied "to goods sold on the open market."[44]

The scope of prison labor and its relationship to the Thirteenth Amendment hasn't gone unnoticed, resulting in calls for reform and occasional political action. In 2020, several federal legislators introduced legislation "dubbed the Abolition Amendment," aimed at amending the Constitution to remove the Punishment Clause from the Thirteenth Amendment.[45] In 2021, shortly after Congress passed legislation making Juneteenth a federal holiday, several legislators again introduced similar legislation.[46] Federal legislators sought to revise the Thirteenth Amendment again in 2022.[47] None of these amendment attempts succeeded.

B. Constitutional Challenges to Prison Labor: The Current State

The United States Supreme Court has long held that states may punish convicted criminals through forced labor. In *United States v. Reynolds*,[48] the Court invoked the Thirteenth Amendment to conclude that "[t]here can be no doubt that the state has authority to impose involuntary servitude as a punishment for crime. This fact is recognized in the Thirteenth Amendment, and such punishment expressly excepted from its terms."[49] The Court, however, has recognized limits to the Thirteenth Amendment's Punishment Clause, noting that it should not be read in so broad a manner as to "destroy the prohibition" of slavery.[50] But these limits don't apply to criminal punishments and instead curtail the imposition of slavery or involuntary servitude in other circumstances,

---

44. Robin McDowell & Margie Mason, *Prisoners in the US Are Part of a Hidden Workforce Linked to Hundreds of Popular Food Brands*, AP (Jan. 29, 2024, 5:03 AM PDT), https://apnews.com/article/prison-to-plate-inmate-labor-investigation-c6f0eb4747963283316e494eadf08c4e [https://perma.cc/3F97-AL9G].

45. Brakkton Booker, *Democrats Push 'Abolition Amendment' to Fully Erase Slavery from U.S. Constitution*, NPR (Dec. 3, 2020), https://www.npr.org/2020/12/03/942413221/democrats-push-abolition-amendment-to-fully-erase-slavery-from-u-s-constitution [https://perma.cc/XUD3-TFGK].

46. Terry Tang, *Lawmakers Mark Juneteenth by Reviving 'Abolition Amendment,'* AP (June 18, 2021), https://apnews.com/article/or-state-wire-race-and-ethnicity-lifestyle-juneteenth-963c58a1a19ba501f5677343b9c786e0 [https://perma.cc/5T7U-J89T].

47. Shawna Mizelle, *Ahead of Juneteenth, Congressional Lawmakers Again Seek to Remove Exception for Slavery from US Constitution*, CNN (June 16, 2023), https://www.cnn.com/2023/06/16/politics/abolition-amendment-slavery-constitution/index.html [https://perma.cc/G34A-9HC9].

48. 235 U.S. 133 (1914).

49. *Id.* at 149.

50. *See* Bailey v. Alabama, 219 U.S. 219, 244 (1911).

such as to "compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt."[51] The United States Claims Court concluded that "the [T]hirteenth [A]mendment, in abolishing slavery and involuntary servitude, specifically adds the phrase, 'except as a punishment for crime whereof the party shall have been duly convicted,' which covers the plaintiff's situation"[52]—the "situation" being the plaintiff complaining that he was forced to work in prison and paid at a rate below the minimum wage.[53]

Decisions by the Court regarding other constitutional rights of prison inmates have entrenched the power of states to force inmates to work. In *Jones v. North Carolina*,[54] for example, the Supreme Court ruled that prohibiting prisoners from engaging in union activities did not violate inmates' rights to free speech or association in light of correctional officers' concern that unions would disrupt the prison environment and the Court's deference to the opinions of those officers.[55]

To be sure, other constitutional avenues still exist for inmate challenges to labor requirements. In *Smith v. Peters*,[56] the Seventh Circuit Court of Appeals held that a plaintiff stated a claim for an Eighth Amendment violation when he alleged his prison forced him to work outdoors in freezing temperatures without gloves.[57] But there are limits to Eighth Amendment challenges to work requirements, which often only succeed if "prisoners are compelled to perform physical labor which is beyond their strength, endangers their lives or health, or causes undue pain."[58]

Some state constitutions limit or prohibit states from providing inmate labor to private parties, or from producing goods or services to be sold on the private market. Such provisions exist in California, New Mexico, New York, Oklahoma, Oregon, Utah, and Washington.[59] Where operable, they

51. *Id.*

52. Emory v. United States, 2 Cl. Ct. 579, 580 (1983).

53. *See id.*

54. 433 U.S. 119 (1977).

55. *See id.* at 126, 130–33.

56. 631 F.3d 418 (7th Cir. 2011).

57. *Id.* at 420–21.

58. *See* Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994).

59. CAL. CONST. art. 14, § 5; N.M. CONST. art. 20, § 18; N.Y. CONST. art. 3, § 24; OKLA. CONST. art. 23, § 2; OR. CONST. art. I, § 41(10) ("To the extent determined possible by the corrections director, the corrections director shall avoid establishing or expanding for-profit prison work programs that produce goods or services offered for sale in the private sector if the establishment or expansion would displace or significantly reduce preexisting private enterprise."); UTAH CONST. art. 16, § 3; WASH. CONST. art. 2, § 29.

may be employed to strike down certain instances of labor by convicted persons—although the right to assert the challenge is that of private parties or organized labor interests rather than the convicted people themselves.[60]

Other states, however, have constitutional provisions that mandate convict labor. The Texas Constitution, for example, requires the State Legislature to enact laws for the establishment of public roads and bridges, and requires that the Legislature "utiliz[e] fines, forfeitures, and convict labor to all these purposes."[61] Vermont requires that, to better deter people from crime and to reduce the need for "sanguinary punishments . . . , means ought to be provided for punishing by hard labor" people convicted of non-capital crimes, and that "all persons at proper times ought to be permitted to see them at their labor."[62] Kentucky requires that those convicted of felonies "shall be confined at labor within the walls of the penitentiary."[63] Oregon's Constitution asserts that those convicted of crimes "should work as hard as the taxpayers who provide for their upkeep," and therefore requires that "[a]ll inmates of state corrections institutions shall be actively engaged full-time in work or on-the-job training."[64] The same provision clarifies that inmates do not have a right to work that they may assert, and exempts inmate labor from minimum wage requirements.[65]

In reforming the landscape of extensive forced labor practices, the Thirteenth Amendment appears to be of little assistance. The Punishment Clause, and courts' expansive interpretation of it, suggests that Thirteenth Amendment challenges are unlikely to meaningfully reform forced labor practices.[66] As a result, those arguing against forced labor often turn to alternative policy proposals, or attempts at applying the

60. *See, e.g.*, Pitts v. Reagan, 14 Cal. App. 3d 112, 119–21 (1971) (striking down "Emergency Harvest Program," in which prison inmates worked on farms during labor shortages, in response to a challenge by a union that this violated California's constitutional restriction on private labor by prison inmates).

61. TEX. CONST. art. 16, § 24; *see also* Walton v. Travis Cnty., 24 S.W. 352, 352 (Tex. Civ. App. 1893) (recognizing Texas laws requiring that convicts "be put to work upon the public roads, bridges, or other public works when their labor cannot be utilized in the county workhouse or on the county farm").

62. VT. CONST. ch. II, § 64. For more on how this provision complicates the interpretation of Vermont's now-absolute prohibition of slavery and involuntary servitude, see *infra* section III.D.

63. KY. CONST. § 253.

64. OR. CONST. art. I, §§ 41(1)–(2).

65. *Id.* §§ 41(3), (8).

66. *See, e.g.*, Lollar, *supra* note 5, at 1880–83 (proposing amending the Thirteenth Amendment to remove the Punishment Clause, among other reforms).

Thirteenth Amendment to those circumstances that most resemble slavery rather than the broader notion of involuntary servitude.[67]

But constitutional solutions shouldn't be counted out entirely. While the Thirteenth Amendment hasn't been much help, the United States Constitution exists alongside a host of state constitutions—many of which have their own provisions prohibiting slavery and involuntary servitude. In recent years, states have begun to strengthen these provisions, raising the possibility that state constitutional challenges to forced labor practices may succeed where federal constitutional challenges have failed.

II. STATE CONSTITUTIONAL SLAVERY PROHIBITIONS

While it may be a surprise to many in the general public, the United States Constitution isn't the only game in town.[68] Every state has its own constitution. And unlike the federal constitution, these constitutions are detailed and dynamic. Many have been amended "more than once for every year that they have been in operation."[69] Many of these states have their own provisions prohibiting slavery and involuntary servitude and, in recent years, several states have strengthened these prohibitions so much that they could be avenues for challenging forced labor practices.

A. State Constitutional Slavery Provisions: An Overview

To date, the Thirteenth Amendment remains unchanged. Its Punishment Clause continues to permit involuntary servitude as a punishment for criminal offenses.[70] Critics lament it. Politicians speak out against it. Yet the difficulties facing any present federal constitutional amendment dim the prospects of revising the Thirteenth Amendment.[71]

State constitutions, however, are an underdiscussed part of the picture. Many state constitutions contain prohibitions of slavery and involuntary servitude. Some of these reflect the language in the

---

67. *See id.* at 1886–900 (suggesting legislative measures that Congress may take to reduce the profits of prison labor). *See generally* Armstrong, *supra* note 11 (distinguishing slavery from involuntary servitude, and arguing for an approach using both the Eighth and Thirteenth Amendments to challenge forced labor sentences on plantations that most resemble historic slavery practices).

68. *See* G. Alan Tarr, *The State of State Constitutions*, 62 LA. L. REV. 3, 9 n.23 (2001) (noting a 1991 survey, which found that "only 52 percent of respondents even knew that their state had its own constitution").

69. *Id.* at 9.

70. U.S. CONST. amend. XIII, § 1.

71. *See generally* Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 CALIF. L. REV. 2005 (2022). Albert discusses the myriad obstacles facing amendments to the U.S. Constitution and concludes that the U.S. Constitution "may be the world's most difficult to amend." *Id.* at 2007.

Thirteenth Amendment. But other state slavery bans lack the punishment exception and are therefore broader in scope.

Twenty-four states and Puerto Rico have enacted constitutional provisions prohibiting slavery or involuntary servitude. Of these, sixteen states and Puerto Rico mirror the Thirteenth Amendment's Punishment Clause, with Arkansas, California, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Nevada, North Carolina, North Dakota, Ohio, Puerto Rico, and Wisconsin incorporating this language into their constitutions.[72] Of these states, Georgia's provision is more permissive of involuntary servitude than the Thirteenth Amendment, as it permits involuntary servitude as a punishment for contempt of court, as well as for criminal convictions.[73]

Other states take a more restrictive approach to slavery. Five state constitutions absolutely prohibit slavery and involuntary servitude: Alabama, Colorado, Nebraska, Oregon, and Vermont.[74] Additionally, Rhode Island's Constitution contains an absolute prohibition of slavery, but does not mention involuntary servitude.[75] Two other states, Tennessee and Utah, fall somewhere in between, prohibiting slavery and involuntary servitude, but with exceptions that are different from the Thirteenth Amendment's Punishment Clause.[76] Of particular relevance to this Article are those states with absolute prohibitions of slavery and involuntary servitude.

B. The Recent Trend Toward Blanket Bans on Slavery and Involuntary Servitude

Rhode Island's absolute prohibition, "[s]lavery shall not be permitted in this state," was included in its 1842 constitution, and remains in the

---

72. ARK. CONST. art. II, § 27; CAL. CONST. art. I, § 6; GA. CONST. art. I, § 1, ¶ XXII; IND. CONST. art. I, § 37; IOWA CONST. art. I, § 23; KAN. CONST. BILL OF RTS. § 6; KY. CONST. § 25; LA. CONST. art. I, § 3; MICH. CONST. art. 1, § 9; MINN. CONST. art. I, § 2; MISS. CONST. § 15; NEV. CONST. art. I, § 17; N.C. CONST. art. I, § 17; N.D. CONST. art. I, § 6; OHIO CONST. art. I, § 6; P.R. CONST. art. II, § 12; WIS. CONST. art. I, § 2.

73. *See* GA. CONST. art. I, § 1, ¶ XXII.

74. ALA. CONST. art. I, § 32; COLO. CONST. art. II, § 26; NEB. CONST. art. I, § 2; OR. CONST. art. I, § 34; VT. CONST. ch. I, art. 1.

75. *See* R.I. CONST. art. I, § 4.

76. TENN. CONST. art. I, § 33 ("Nothing in this section shall prohibit an inmate from working when the inmate has been duly convicted of a crime."); UTAH CONST. art. 1, § 21 (providing in subsection (1) that "[n]either slavery nor involuntary servitude shall exist within this State," but providing in subsection (2) that "[s]ubsection (1) does not apply to the otherwise lawful administration of the criminal justice system").

present constitution, which was adopted in 1986.[77] For many years, Rhode Island was the only state with an unequivocal prohibition of slavery.[78] But starting in the twenty-first century, states began to revisit their own constitutional provisions and enact unqualified bans on slavery and involuntary servitude.

More than 150 years after Rhode Island enacted its blanket prohibition of slavery, several other states began amending their own slavery provisions to remove punishment exceptions. Colorado started the trend. Prior to 2018, article II, section 26 of its state constitution stated: "[T]here shall never be in this State either slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted."[79]

A ballot measure to eliminate the punishment provision from the slavery ban narrowly failed in 2016.[80] But in 2018, Colorado's voters approved Amendment A, which removed the language at the end of section 26, revising it to its present version, which states: "There shall never be in this state either slavery or involuntary servitude."[81] Opponents of the bill raised concerns over whether the amendment would affect "offender work programs, such as those used in prisons."[82] The amendment's supporters responded by noting that twenty-three other states do not have any language regarding slavery or involuntary servitude in their constitutions—and that they have prison work programs.[83] This response, however, neglects to note the broader, federal context: States without their own constitutional slavery provisions are still bound by the

77. R.I. CONST. art. I, § 4; *see also* Chilton Williamson, *Rhode Island Suffrage Since the Dorr War*, 28 NEW ENGLAND QUART. 34, 34 (1955) (noting the adoption of a written constitution in 1842); Fred Zilian, *In 1843, Slavery Was Banned in Rhode Island*, NEWPORT DAILY NEWS (May 28, 2018, 6:14 PM ET), https://www.newportri.com/story/lifestyle/columns/2018/05/28/looking-back-at-our-history-in-1843-slavery-was-banned-in-rhode-island/12119944007/ [https://perma.cc/94V9-KPKK] (noting Rhode Island's constitutional ban on slavery); Steven H. Steinglass, *Constitutional Revision: Ohio Style*, 77 OHIO ST. L.J. 281, 332–33, 333 n.353 (2016) (describing Rhode Island's adoption of a new constitution through a constitutional convention in 1986).

78. *See* Spencer, *supra* note 29 (noting that Colorado's 2018 amendment to its constitution made it the "first state to explicitly abolish slavery *without exception* in its constitution since Rhode Island did so in 1842" (emphasis in original)).

79. *See* COLO. CONST. art. 2, § 26; Bill Chappell, *Colorado Votes to Abolish Slavery, 2 Years After Similar Amendment Failed*, NPR (Nov. 7, 2018), https://www.npr.org/2018/11/07/665295736/colorado-votes-to-abolish-slavery-2-years-after-similar-amendment-failed [https://perma.cc/U886-4GDY].

80. Chris Walker, *Amendment A Clearly Asks Coloradans: Should the State Abolish Slavery?*, WESTWORD (Oct. 24, 2018), https://www.westword.com/news/after-defeat-in-2016-abolish-slavery-colorado-comes-back-with-amendment-a-10926880 [https://perma.cc/R5XQ-CU4Y].

81. COLO. CONST. art. 2, § 26; Chappell, *supra* note 79.

82. Walker, *supra* note 80.

83. *Id.*

Thirteenth Amendment, which, as noted above, permits the imposition of involuntary servitude as punishment for a crime.[84] While federal constitutional provisions set a minimum threshold for the protection of rights, states can, and do, provide greater protections for their own citizens through state constitutions.[85] While this response in support of the proposed amendment and its context wasn't particularly explanatory, Colorado's amendment passed by a margin of sixty-five to thirty-five percent.[86]

In 2020, Nebraska joined Colorado, removing its Punishment Clause analogue from its state constitution.[87] Prior to 2020, Nebraska's slavery prohibition was set forth as enacted in its 1875 constitution, which stated: "There shall be neither slavery nor involuntary servitude in this state, otherwise than for punishment of crime, whereof the party shall have been duly convicted."[88]

Nebraska's legislature approved a ballot measure to amend this provision in March 2019, with supporters arguing that the provision's punishment language had been used as a legal justification for convict leasing.[89] In November 2020, Nebraska voters approved the amendment.[90] The provision now states: "There shall be neither slavery nor involuntary servitude in this state."[91]

Utah amended its slavery provision in 2020 as well—although its prohibition of slavery remains qualified. Utah's 1895 Constitution contained a provision prohibiting slavery, stating: "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within this State."[92] In 2020, a "coalition of politicians, religious leaders, and civil rights activists"

---

84. *See* U.S. CONST. amend. XIII, § 1.

85. *See* Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 DENV. U. L. REV. 85, 87–88 (1985).

86. *See* Eli Meixler, *Colorado Voters Approve Amendment to Abolish Slavery as a Punishment for Crime*, TIME (Nov. 8, 2018), https://time.com/5448693/colorado-vote-amendment-abolish-slavery/ [https://perma.cc/4TZZ-XUG6].

87. *See Nebraskans Vote for Initiative Removing Slavery as a Punishment for Crime*, KETV 7 OMAHA (Nov. 4, 2020, 7:42 AM CST), https://www.ketv.com/article/nebraskans-vote-for-initiative-removing-slavery-as-a-punishment-for-crime/34568245 [https://perma.cc/P7PY-Q26Q].

88. NEB. CONST. art. I, § 2 (1875).

89. *Nebraska Slavery Amendment to Appear on 2020 Ballot*, KETV 7 OMAHA (Mar. 7, 2019, 10:00 AM CST), https://www.ketv.com/article/nebraska-slavery-amendment-to-appear-on-2020-ballot/26750377 [https://perma.cc/232N-UVRZ].

90. Kaelan Deese, *Utah, Nebraska Voters Approve Measures Stripping Slavery Language from State Constitutions*, HILL (Nov. 4, 2020), https://thehill.com/homenews/state-watch/524469-utah-nebraska-voters-approve-measure-stripping-slavery-language-in/ [https://perma.cc/PL3K-D27X].

91. NEB. CONST. art. I, § 2.

92. UTAH CONST. art. 1, § 21 (1895); Deese, *supra* note 90.

backed Amendment C—a ballot measure to amend Utah's slavery prohibition.[93] In addition to legislators and civil rights groups, "The Church of Jesus Christ of Latter-Day Saints made a fairly rare move to directly support" the measure.[94] Supporters argued that the provision's language was outdated and condemned the notion that slavery could possibly be a punishment for a crime.[95]

The amendment passed.[96] Most reporting on the change characterized the amendment as removing slavery as a punishment from the state constitution.[97] This characterization, however, overlooks the qualification that remains in the updated version of the prohibition, which now states: "(1) Neither slavery nor involuntary servitude shall exist within this State. (2) Subsection (1) does not apply to the otherwise lawful administration of the criminal justice system."[98]

While Amendment C eliminated the punishment language from the provision, it added subsection (2), which limits the scope of the amendment.[99] Subsection (2) limits Utah's slavery prohibition by exempting any "otherwise lawful administration of the criminal justice system."[100] As discussed in greater detail below, this qualification is significant and arguably negates the removal of the punishment clause language by exempting all criminal proceedings from the scope of the ban, so long as those proceedings are authorized by law.[101] Accordingly, Utah's reform is far from the absolute ban on slavery and involuntary servitude that the amendment's supporters claim.

---

93. Lee Davidson, *Slavery in Utah? LDS Church, Others Urge Voters to Wipe It from the State Constitution*, SALT LAKE TRIB. (Sept. 23, 2020, 6:42 AM), https://www.sltrib.com/news/politics/2020/09/22/slavery-utah-lds-church/ [https://perma.cc/5KTM-8XT8].

94. *Id.*

95. *Id.*

96. Josh Rose, *Utahns Vote to Remove Slavery as a Punishment for a Crime from Constitution*, ABC 4 (Nov. 4, 2020, 2:09 AM MST), https://www.abc4.com/news/politics/election/utahns-vote-to-remove-slavery-as-a-punishment-for-a-crime-from-constitution/ [https://perma.cc/466L-VKJW].

97. *See id.*; Deese, *supra* note 90; Jeff Tavss, *Utah to Officially Ban Slavery After Amendment C Passes*, FOX 13 SALT LAKE CITY (Nov. 3, 2020, 10:47 PM), https://www.fox13now.com/news/election-2020/utah-to-officially-ban-slavery-after-amendment-c-passes [https://perma.cc/85BM-NDLK].

98. UTAH CONST. art. 1, § 21.

99. *See id.*; *see also* Kate Bradshaw & Billy Hesterman, *Election 2020: Proposed Amendments to the Utah Constitution*, HOLLAND & HART (Oct. 12, 2020), https://www.hollandhart.com/election-2020-proposed-amendments-to-the-utah-constitution [https://perma.cc/UVS5-46EF].

100. UTAH CONST. art. 1, § 21.

101. *See infra* section III.C.

Even more activity occurred in 2022, as five states contemplated constitutional amendments to strengthen their slavery prohibitions.[102] In the end, Alabama, Oregon, Tennessee, and Vermont amended their constitutions to strengthen their slavery prohibitions.[103] Louisiana rejected a similar amendment.[104] Each of the successful amendments is discussed below.

Alabama's amendment of its slavery provision was part of a much broader measure to revise its constitution to remove "racist language and repealed provisions," along with organizing the document so that its numerous provisions would be better arranged by subject matter.[105] The recompilation ultimately succeeded, which included a reform of Alabama's slavery prohibition.[106] Alabama's 1901 Constitution included a provision prohibiting slavery that remained in place until 2022, which stated: "[N]o form of slavery shall exist in this state; and there shall not be any involuntary servitude, otherwise than for the punishment of crime, of which the party shall have been duly convicted."[107] As of 2022, however, Alabama's prohibition of slavery is absolute, stating: "[N]o form of slavery shall exist in this state; and there shall not be any involuntary servitude."[108]

Oregon also amended its constitutional prohibition on slavery, although its revision was more elaborate than Alabama's. Oregon did not include a provision regarding slavery in its initial constitution, opting to leave it up to the voters to decide whether to adopt or reject slavery while voting for the state constitution.[109] Oregon's electors voted to accept the constitution and to reject slavery, leading to the inclusion of an anti-slavery provision that stated: "There shall be neither slavery, nor

---

102. *See* Kimberlee Kruesi, *Slavery Is on the Ballot for Voters in 5 US States*, AP (Oct. 22, 2022), https://apnews.com/article/2022-midterms-13th-amendment-slavery-4a0341cf82fa33942bda6a5d17ac4348 [https://perma.cc/CX98-FRX2].

103. *Slavery, Involuntary Servitude Rejected*, *supra* note 1.

104. *Id.*

105. *See Alabama Constitution, 10 Amendments on Nov. 8 Ballot*, AP (Nov. 1, 2022), https://apnews.com/article/technology-crime-alabama-constitutions-c60ebc8a25b2291dc622906bdd8f0a97 [https://perma.cc/7JT5-C7TD].

106. *See* John H. Glenn, *Alabama Voters Approve New Constitution, 10 Amendments on Ballot*, ALA. POL. REP. (Nov. 9, 2022), https://www.alreporter.com/2022/11/09/alabama-voters-approve-new-constitution-10-amendments-on-ballot/ [https://perma.cc/9LYN-ZKB2].

107. ALA. CONST. art. I, § 32 (1901); *see also* Glenn, *supra* note 106.

108. ALA. CONST. art. I, § 32.

109. *See* OR. CONST. art. XVIII, §§ 1–2 (scheduling the date for voting on whether to adopt Oregon's Constitution, and setting forth questions to be asked of the electors on whether to vote for the constitution and for slavery).

involuntary servitude in the State, otherwise than as a punishment for crime, whereof the party shall have been duly convicted."[110]

Advocates of amending Oregon's slavery provision argued that its language was outdated and served as a continuing justification for slavery.[111] In 2022, voters passed Measure 112, which amended the slavery provision.[112] The provision now states:

> (1) There shall be neither slavery nor involuntary servitude in this state.
>
> (2) Upon conviction of a crime, an Oregon court or a probation or parole agency may order the convicted person to engage in education, counseling, treatment, community service or other alternatives to incarceration, as part of sentencing for the crime, in accordance with programs that have been in place historically or that may be developed in the future, to provide accountability, reformation, protection of society or rehabilitation.[113]

In addition to removing the punishment language from subsection (1), Measure 112 added subsection (2). Of note in this subsection is its reference to "other alternatives to incarceration . . . that have been in place historically," a provision likely referencing existing inmate labor programs.[114]

Vermont's slavery prohibition appears within a broader provision setting forth a list of inalienable rights. The version of chapter 1, article 1 enacted in 1777, stated:

> That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety. Therefore, no male person, born in this

---

110. *See* OR. CONST. art. I, § 34; *see also id.* art. XVIII, § 4 (setting forth the language of alternate slavery provisions to be enacted, depending on whether the electors voted for or against slavery).

111. *See* Dianne Lugo, *'Long Overdue': Oregon Voters Can Prohibit Slavery, Involuntary Servitude in State Constitution*, SALEM STATESMAN J. (Oct. 3, 2022, 1:13 PM PT), https://www.statesmanjournal.com/story/news/politics/elections/2022/10/02/oregon-voters-slavery-measure-112-inmates-prison-ballot-voting-election/69527731007/ [https://perma.cc/6DPN-C9DA].

112. Conrad Wilson, *Measure 112 Passes, Removing Slavery Language from Oregon Constitution*, OR. PUB. BROAD. (Nov. 9, 2022, 12:06 AM), https://www.opb.org/article/2022/11/08/oregon-election-measure-112-removes-exception-state-constitution-slavery-forced-labor/ [https://perma.cc/RTA4-636K].

113. OR. CONST. art. I, § 34.

114. *Id.*; *see also* Randy Stapilus, *Almost Everyone Opposes Slavery, but What Does It Mean?*, OR. CAP. CHRON. (Nov. 1, 2022), https://oregoncapitalchronicle.com/2022/11/01/almost-everyone-opposes-slavery-but-what-does-it-mean/ [https://perma.cc/BSN2-PNDY] (quoting Rob Persson of Oregon's Department of Corrections, who testified that it was the Department's view that equating compelled prison labor to modern-day slavery was a "misplaced" notion).

> country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave, or apprentice, after he arrives to the age of twenty-one years; nor female, in like manner, after she arrives to the age of eighteen years, unless they are bound by their own consent, after they arrive to such age, or bound by law for the payment of debts, damages, fines, costs, or the like.[115]

Vermont's 1786 Constitution retained this same language.[116] In 1924, the provision was revised to be gender-neutral:

> That all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety; therefore no person born in this country, or brought from over sea, ought to be holden by law, to serve any person as a servant, slave or apprentice, after arriving to the age of twenty-one years, unless bound by the person's own consent, after arriving to such age, or bound by law for the payment of debts, damages, fines, costs, or the like.[117]

Following the 2022 amendment, the detailed qualifications to Vermont's slavery ban were finally removed.[118] The provision now states: "That all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety; therefore slavery and indentured servitude in any form are prohibited."[119]

Tennessee also passed a constitutional amendment in 2022 to strengthen its slavery prohibition.[120] Like Oregon, and unlike Alabama and Vermont, Tennessee's amendment added qualifying language to its slavery ban.[121] Tennessee's 1870 Constitution added a prohibition on slavery, stating: "That slavery and involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, are forever prohibited in this State."[122]

---

115. VT. CONST. ch. I, art. 1 (1777).

116. *See* VT. CONST. ch. I, art. 1 (1786).

117. VT. CONST. ch. I, art. 1 (1924).

118. *See* Auditi Guha, *Vermont Voters Pass Constitutional Amendment Explicitly Prohibiting Slavery*, VTDIGGER (Nov. 9, 2022, 12:44 PM), https://vtdigger.org/2022/11/08/vermont-voters-remove-slavery-references-from-the-states-constitution/ [https://perma.cc/3UGV-E9SY].

119. VT. CONST. ch. I, art. 1.

120. *See* TENN. CONST. art. I, § 33.

121. *Compare id.*, *with* OR. CONST. art. I, § 34, ALA CONST. art. I, § 32, *and* VT. CONST. ch. I, art. 1.

122. TENN. CONST. art. I, § 33 (1870).

Supporters of a constitutional amendment argued that historical vestiges of slavery should be removed from Tennessee's Constitution.[123] In 2022, Tennessee voters approved Amendment 3, which changed the language of Tennessee's slavery ban to the following: "Slavery and involuntary servitude are forever prohibited. Nothing in this section shall prohibit an inmate from working when the inmate has been duly convicted of a crime."[124]

Unlike other states that have enacted absolute bans on slavery and involuntary servitude, Tennessee's constitutional prohibition adds language that restricts its application to convicted inmate labor. As discussed in the following Part, this difference may be significant to the provision's implications for sentences involving forced labor.

Other potential constitutional amendments are in the works. Hoping to build on momentum in other states, California's Assembly members introduced a proposed constitutional amendment in February 2023, seeking to remove punishment language from California's constitutional prohibition on slavery and involuntary servitude.[125] Section 6 of California's Constitution currently states: "Slavery is prohibited. Involuntary servitude is prohibited except to punish crime."[126] The amendment would change section 6 to state: "*(a)* Slavery *in any form* is prohibited. *(b) As used in this section, slavery includes forced labor compelled by the use or threat of physical or legal coercion.*"[127] The amendment was passed by the Assembly and is currently pending in California's Senate.[128]

While attempts to remove the Thirteenth Amendment's Punishment Clause haven't succeeded, the foregoing examples demonstrate recent and ongoing change at the state level. It is encouraging to see states devote attention to this issue and change their fundamental

---

123. *See* Jeff Keeling, *Proponents Say Amendment to Ban Slavery in Tennessee Constitution Not Just Symbolically Important*, WJHL 11 (Oct. 24, 2022, 6:24 PM EDT), https://www.wjhl.com/news/your-local-election-hq/proponents-say-amendment-to-ban-slavery-in-tennessee-constitution-not-just-symbolically-important/ [https://perma.cc/EY4E-VZQL]; Bob Freeman, *Citizens Should Abolish Slavery From Tennessee's Constitution Once and for All*, TENNESSEAN (Sept. 16, 2022), https://www.tennessean.com/story/opinion/contributors/2022/09/16/abolish-slavery-from-tennessees-constitution-once-and-for-all/69500045007/ [https://perma.cc/PJ4B-3F6Y].

124. TENN. CONST. art. I, § 33.

125. *See* Assemb. Const. Amend. 8, 2023 Assemb., Reg. Sess. (Cal. 2023); Hannah Wiley, *California Lawmakers Revive Effort to Ban Involuntary Servitude as Punishment for Crimes*, L.A. TIMES (Feb. 27, 2023), https://www.latimes.com/california/story/2023-02-27/california-involuntary-servitude-slavery-constitution-amendment-prisons [https://perma.cc/X2KZ-7G9J].

126. *See* CAL. CONST. art. I, § 6.

127. *See* Assemb. Const. Amend. 8, 2023 Assemb., Reg. Sess. (Cal. 2023) (emphasis in original).

128. *See id.*

laws as a result. The next section, however, details why some of these changes are unlikely to make any meaningful difference to existing practices, although others may well lead to significant reform.

III. STATE CONSTITUTIONAL CHALLENGES TO CONVICT LABOR PRACTICES

To date, state constitutional challenges to forced labor sentences have gone largely unexamined in favor of Thirteenth Amendment-centered discussions and reform proposals. Until recently, this oversight was understandable, as many state constitutional slavery and involuntary servitude provisions included exemptions similar to the Thirteenth Amendment's Punishment Clause.[129] And, as discussed below, the only state with an unqualified slavery ban ultimately interpreted its ban as equivalent to the Thirteenth Amendment, despite the lack of a similar punishment clause at the state level.[130] As the preceding Part demonstrates, however, several states have amended their constitutions in recent years to broaden their bans on slavery and involuntary servitude. This Part compares these broader constitutional provisions, distinguishing between absolute bans and historical bans and discussing how these provisions may relate to broader goals of prison labor reform.

A. Rhode Island's Absolute Ban of Slavery Only

Of states that lack criminal punishment exceptions to their constitutional bans on slavery, Rhode Island is the only state with an absolute ban enacted before 2018.[131] With such a longstanding, absolute prohibition, it shows how state constitutional provisions may be implicated in cases of convict labor. As it happens, the Rhode Island Supreme Court's narrow treatment of Rhode Island's constitutional prohibition of slavery shows how challenges may falter if courts are unwilling to account for broad bans in the context of qualified prohibitions like that of the Thirteenth Amendment.

In *Anderson v. Salant*,[132] the Rhode Island Supreme Court rejected a state constitutional argument by a plaintiff convicted of burglary and sentenced to "a term of three years' imprisonment at hard labor," during which the plaintiff alleged he was "compelled, by force and threats,

129. *See supra* note 72 and accompanying text.

130. *See infra* section III.A.

131. *Compare* R.I. CONST. art. I, § 4, *with* ALA. CONST. art. I, § 32, COLO. CONST. art. II, § 26, NEB. CONST. art. I, § 2, OR. CONST. art. I, § 34, *and* VT. CONST. ch. I, art. 1.

132. 96 A. 425 (R.I. 1916).

against his will, to perform labor and services" without compensation.[133] The plaintiff argued that this violated article I, section 4 of Rhode Island's Constitution,[134] which states that "[s]lavery shall not be permitted in this state."[135] This, he argued, supported a quantum meruit claim against a defendant business that profited from his labor.[136]

The Rhode Island Supreme Court reasoned that the provision "had the same effect upon slavery as the Thirteenth Amendment to the federal Constitution," and proceeded to consider a variety of dictionary definitions that described "slavery" as holding a person as chattel or property against that person's will.[137] The plaintiff cited definitions of slavery in *Plessy v. Ferguson*,[138] *Hodges v. United States*,[139] and the *Civil Rights Cases*,[140] which, respectively, defined the term to "impl[y] involuntary servitude,"[141] involve the "state of entire subjection of one person to the will of another,"[142] and consist of "incidents of the institution" of slavery, including "[c]ompulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have standing in court, to be a witness against a white person, and such like burdens and incapacities."[143] From these cases, the plaintiff derived three elements of slavery: "(1) The control of the labor and services of a person (2) for the benefit of another, and (3) the absence of a legal right in the former to the disposal of his own person, property and services."[144] The plaintiff argued that all these elements existed under the circumstances of the plaintiff's sentence to imprisonment at hard labor.[145]

The court rejected the plaintiff's claim that their sentence was equivalent to slavery.[146] It noted that the plaintiff's "inability to dispose of his person, property, and services" was "an incident of his condition as a convict," not the contract to provide labor and services to the

133. *Id.* at 426.
134. *Id.*
135. R.I. Const. art. I, § 4.
136. *Anderson*, 96 A. at 426.
137. *Id.* at 428.
138. 163 U.S. 537 (1896).
139. 203 U.S. 1 (1906).
140. 109 U.S. 3 (1883).
141. *Anderson*, 96 A. at 430 (quoting *Plessy*, 163 U.S. at 542).
142. *Id.* (quoting *Hodges*, 203 U.S. at 17).
143. *Id.* (quoting *Civil Rights Cases*, 109 U.S. at 22).
144. *Id.*
145. *Id.*
146. *Id.* at 431.

defendant.[147] Taking a historical view, the court rejected the argument that convict labor and slavery were equivalent, finding that the term "slavery" referred to "the institution of slavery" in place at the time of the Rhode Island Constitution's ratification.[148] The court further noted that "prison labor existed, without question, contemporaneously with the adoption of the Constitution," which was "strong evidence that the prohibition was not intended to include such labor."[149] Finally, the court emphasized the "long acquiescence in the legislative exercise of the power to let prison labor" extend from 1847 to the early 1900s, which the court construed as a "strong argument in favor of the validity of that power."[150] The court therefore rejected the plaintiff's claim that the prison labor contract rendered the plaintiff a slave.

Subsequent cases cite *Anderson* to stand for the proposition that Rhode Island common law provides that prison inmates may be "compelled to work without any recompense" and have "no right to profit from their labors."[151] This approach to Rhode Island's Constitution mirrors the narrow approach courts have taken when interpreting the Thirteenth Amendment.[152] But *Anderson*'s narrow approach may be less justified than similar Thirteenth Amendment interpretations, given that Rhode Island's prohibition has no explicit exception permitting slavery as a punishment for a crime.

While Rhode Island's absolute ban has been held as effectively equivalent to the qualified language of the Thirteenth Amendment, other state constitutional provisions that absolutely prohibit both slavery and involuntary servitude may provide a far stronger case for those challenging forced labor practices. It is to these provisions—all of which are the product of constitutional amendments dating back less than six years—that this Article now turns.

B. Recent Absolute Bans of Slavery and Involuntary Servitude

Unlike Rhode Island's prohibition of slavery only, recent amendments to state constitutions have begun to enact absolute bans of both slavery *and* involuntary servitude. In particular, Alabama, Colorado, Nebraska, and Vermont all have constitutional provisions that absolutely prohibit both slavery and involuntary servitude, without any language mirroring

147. *Id.* at 430.

148. *Id.* at 432.

149. *Id.*

150. *Id.*

151. Young v. Wall, 642 F.3d 49, 53–54 (1st Cir. 2011) (citing *Anderson*, 96 A. at 432).

152. *See* Balkin & Levinson, *supra* note 10, at 1460–61.

the Thirteenth Amendment's Punishment Clause or further qualifications.[153] Of these states, Alabama, Colorado, and Nebraska offer the strongest potential opportunities to challenge state prison labor systems. As discussed in greater detail below, Vermont's Constitution contains a separate requirement for forced labor that complicates the analysis.[154]

These state constitutional amendments directly relate to convict labor. Supporters of these amendments argued for their passage by claiming that they would support reform in prison labor practices previously permitted under punishment clauses at the state and federal constitutional level.[155] Parties seeking to challenge current forced labor regimes in Alabama, Colorado, and Nebraska may argue that because the Thirteenth Amendment and all of these states' prior slavery and involuntary servitude provisions explicitly permitted involuntary servitude as a punishment for crime, the removal of that permission no longer permits the forced labor systems previously established in accordance with those punishment clause provisions.

The states would likely respond by arguing that forced labor as a punishment for a crime is distinct from prohibited involuntary servitude. They may draw on Rhode Island's longstanding absolute prohibition and its continued authorization of forced labor sentences, which it distinguished from the institution of slavery. The problem with this response, however, is that Rhode Island's prohibition, while unqualified, applies only to slavery, and omits any mention of involuntary servitude. Alabama, Colorado, and Nebraska's prohibitions are broader—banning both slavery and involuntary servitude without the qualification of a punishment provision.[156]

---

153. *Compare* ALA. CONST. art. 1, § 32, COLO. CONST. art. 2, § 26, NEB. CONST. art. I, § 2, *and* VT. CONST. ch. I, art. 1, *with* U.S. CONST. amend. XIII, § 1.

154. *See infra* section III.D.

155. *See* Kelly Kasulis Cho, *Slavery Is Still Allowed in U.S. Prisons. Now It's on the Ballot in 5 States.*, WASH. POST (Oct. 21, 2022), https://www.washingtonpost.com/national-security/2022/10/21/slavery-ballot-vote-prison-labor/ [https://perma.cc/8Y22-UCGU] (noting expert commentary on state constitutional amendments to remove prison provisions suggesting that the amendments "could buoy growing prison-reform efforts" that are permitted under the Thirteenth Amendment); Edwin Rios, *Movement Grows to Abolish US Prison Labor System that Treats Workers as 'Less than Human,'* GUARDIAN (Dec. 24, 2022), https://www.theguardian.com/us-news/2022/dec/24/us-prison-labor-workers-slavery-13th-amendment-constitution [https://perma.cc/NKJ7-WAE2] (quoting advocates supporting state constitutional amendments to remove punishment clause language who argue that the amendments will help reform prison labor practices); *see also* ACLU & U. CHI. L. SCH. GLOB. HUM. RTS. CLINIC, CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS (2022) (surveying prison labor practices and arguing that these practices are permitted as a result of the Thirteenth Amendment's Punishment Clause).

156. *See* ALA. CONST. art. 1, § 32; COLO. CONST. art. 2, § 26; NEB. CONST. art. I, § 2.

Still, the states may argue that the logic the Rhode Island Supreme Court applied precludes a reading that results in meaningful change to existing punishment regimes. Recall that in upholding a system of prison labor, the court noted that prison labor had existed before and after Rhode Island's constitutional provision prohibiting slavery, stating that "[t]he fact that prison labor existed, without question, contemporaneously with the adoption of the Constitution, is also strong evidence that the prohibition was not intended to include such labor."[157]

Alabama, Colorado, and Nebraska may argue that, to the extent they engaged in prison labor practices prior to the enactment of absolute slavery and involuntary servitude prohibitions, these practices should be presumed constitutional. The problem with this claim, however, is that Rhode Island relied not only on prior practices, but contemporaneous and subsequent practices following the enactment of its absolute prohibition.[158] Additionally, this argument was only part of the analysis—the larger issue was how the term "slavery" should be interpreted. In answering this question, the court contrasted "the institution of slavery"[159] with broader notions like "involuntary servitude,"[160] concluding that Rhode Island's slavery-only prohibition was narrow and did not implicate forced labor by those convicted of crimes.[161] No such maneuver is available to courts with absolute bans that specify both slavery and involuntary servitude.

State arguments referencing preexisting convict labor practices are unconvincing for the additional reason that these practices were the motivation for the absolute prohibitions in the first place. Concerns over convict labor—a practice amplified by mass incarceration that disproportionately affects people of color—prompted the dramatic solution of revising states' most foundational laws.[162] Limiting absolute slavery and involuntary servitude provisions so that they do not apply to practices already in place would therefore render these amendments toothless and ineffective. Such a result would be out of step with these

157. Anderson v. Salant, 96 A. 425, 432 (R.I. 1916).

158. *See id.*

159. *Id.*

160. *Id.* at 430.

161. *See id.* at 430–32.

162. *See* Appleman, *supra* note 37, at 671–76 (discussing the profit motivation behind convict labor). *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (describing the phenomenon of mass incarceration and its disproportionate impacts on African Americans).

states' rules of constitutional interpretation that require courts to give effect to each constitutional provision.[163]

To date, challenges citing absolute slavery bans have not undergone serious analysis or consideration by the courts. As of this writing, there have been no reported opinions referencing Alabama's or Nebraska's absolute prohibitions of slavery, although a recent Alabama lawsuit raises various challenges to state prison labor practices, including state constitutional challenges.[164]

Colorado's new slavery prohibition is cited in two district court cases—yet isn't ultimately analyzed or evaluated. In *Fletcher v. Williams*,[165] the plaintiffs raised a number of federal statutory challenges in federal court, all while referencing Colorado's recent amendment enacting an absolute slavery prohibition.[166] The magistrate judge noted that the plaintiffs' reliance on Colorado's Constitution was misplaced, and concluded that if the plaintiffs sought to challenge inmate work rules, they "should probably be suing under that state constitutional provision in Colorado state court, not federal court."[167] In *Ochoa v. Williams*,[168] another case filed in the United States District Court for the District of Colorado, the court concluded that the plaintiff had mistakenly attempted to cite article II, section 25 of Colorado's Constitution, rather than the slavery ban at section 26, and therefore did not address Colorado's slavery prohibition at all.[169]

---

163. *See* State Docks Comm'n v. State *ex rel.* Cummings, 150 So. 345, 346 (Ala. 1933) ("A constitutional provision, as far as possible, should be construed as a whole and in the light of entire instrument and to harmonize with other provisions, *that every expression in such a solemn pronouncement of the people is given the important meaning that was intended in such context and such part thereof*." (emphasis added)); Patterson Recall Comm., Inc. v. Patterson, 209 P.3d 1210, 1215 (Colo. App. 2009) ("We must favor a construction of a constitutional amendment that will render every word operative, rather than one that may make some words meaningless or nugatory."); Banks v. Heineman, 837 N.W.2d 70, 77–78 (Neb. 2013) ("It is a fundamental principle of constitutional interpretation that each and every clause within a constitution has been inserted for a useful purpose.").

164. *See* Michael Levenson, *Prisoners Sue Alabama, Calling Prison Labor System a 'Form of Slavery,'* N.Y. TIMES (Dec. 12, 2023), https://www.nytimes.com/2023/12/12/us/alabama-prisons-lawsuit-labor.html (last visited May 26, 2024).

165. No. 21-cv-02125, 2022 WL 4591809 (D. Colo. Sept. 30, 2022).

166. *See* Report and Recommendation on Plaintiff's Verified Motion for Summary Judgment as to Claim One Against Defendant Dean Williams (Dkt. #46) and Defendant's Motion to Dismiss Verified Amended Complaint Under Fed. R. Civ. P. 8(a) and 12(b)(6) (Dkt. #73), Fletcher v. Williams, No. 21-cv-02125, 2022 WL 3153906, at *1 (D. Colo. Aug. 8, 2022).

167. *Id.* The District Court rejected the plaintiffs' objections to the magistrate's recommendations and ordered the plaintiffs' case dismissed. *See Fletcher*, 2022 WL 4591809, at *1, *6–7.

168. No. 20-cv-01301, 2021 WL 2400127 (D. Colo. June 11, 2021).

169. *See id.* at *1 n.5.

States have recently taken noteworthy action in amending their constitutions to remove longstanding language permitting the involuntary servitude of those convicted of crimes. Those seeking to reform these practices now have unprecedented state constitutional provisions that they may use in support of their claims. If state courts are to give meaningful effect to these recent reforms, they must not resort to the narrow, deferential approaches of Rhode Island and the federal courts. Courts must reckon with these new constitutional requirements prohibiting forced labor in all circumstances and respond to challenges to these systems accordingly.

Litigants should consider drawing on state constitutional provisions in future challenges to forced labor practices. It may be strategic to start on a smaller scale, as lawsuits challenging low or nonexistent wages and extensive working hour requirements may be more likely to form a foundation of useful precedent before seeking to undo systems of prison labor altogether. While incremental reforms may appear inconsistent with the absolute language of state slavery and involuntary servitude bans, establishing a foundation of precedent recognizing the change in state constitutional law may bolster support for stronger cases in the future—rather than risking an outright rejection to an overly bold challenge.[170]

C. Recent Qualified Bans of Slavery and Involuntary Servitude

While some recent state reforms have been absolute and uncomplicated, other states' removal of language permitting involuntary servitude as a punishment for crime is accompanied by language that imposes new limitations and qualifications on the prohibition. These qualifications vary in breadth—but all pose serious obstacles to those who would seek to challenge systems of forced labor under these updated state constitutional provisions.

Starting with the broadest qualification, Utah's updated slavery and involuntary servitude prohibition states: "(1) Neither slavery nor involuntary servitude shall exist within this State. (2) Subsection (1) does not apply to the otherwise lawful administration of the criminal justice system."[171]

---

170. To be clear, this is only a high-level, pragmatic recommendation for how challenges ought to proceed regarding this particular issue. I do not take a position on the desirability of incrementalist reform more generally, which is the subject of its own lively debate. *See, e.g.*, Margo Schlanger, *Incrementalist vs. Maximalist Reform: Solitary Confinement Case Studies*, 115 NW. U. L. REV. 273, 275–79 (2020) (summarizing debates between those supporting incremental changes to solitary confinement practices, and those urging more comprehensive reforms).

171. UTAH CONST. art. 1, § 21.

Subsection (2) is the elephant in the room for those who would seek to challenge preexisting practices of convict labor. But it has implications even beyond this issue. Subsection (2) effectively exempts all criminal laws, and actions in accordance with these laws, from Utah's prohibition of slavery and involuntary servitude. This means that, so long as any action by Utah's criminal justice system is carried out in accordance with the law, it cannot run afoul of Utah's slavery ban. While those supporting the amendment expressed concerns over slavery as a possibility for the punishment of crimes, the amended provision does nothing to address these concerns, as its exemption permits slavery as punishment so long as the punishment is part of the "lawful administration" of the criminal justice system.[172]

Indeed, were the state constitution read in isolation, those merely in custody awaiting a determination of guilt, those held in criminal contempt, as well as those duly convicted of a crime could all be subjected to slavery or involuntary servitude because there is no longer a prerequisite that the imposition of slavery or involuntary servitude be a punishment for a crime for which one has been convicted.[173] To be sure, such an expansive reading runs afoul of the Thirteenth Amendment, which does contain such a prerequisite.[174] But to the extent that Amendment C was meant to strengthen Utah's prohibition of slavery, its ultimate, qualified wording does the opposite, rendering Utah's prohibition even weaker than the Thirteenth Amendment.

Tennessee's amended prohibition includes a new qualification that explicitly forecloses challenges to forced labor practices. While Tennessee "forever prohibit[s]" slavery and involuntary servitude, this prohibition is followed by the caveat: "Nothing in this section shall prohibit an inmate from working when the inmate has been duly convicted of a crime."[175] Tennessee's recent amendment is therefore little more than rhetoric: It removes the punishment clause, but, like Utah, adds new language that has the equivalent effect by removing forced labor sentences from the scope of the slavery and involuntary servitude ban.

Oregon's prohibition of slavery and involuntary servitude is a bit more complicated due to the length of its qualifying language regarding the treatment of people convicted of crimes. Oregon's provision includes two subdivisions, the first of which prohibits slavery and involuntary

172. *See id.*; Davidson, *supra* note 93.

173. *See* UTAH CONST. art. 1, § 21.

174. *See* U.S. CONST. amend XIII, § 1.

175. *See* TENN. CONST. art. I, § 33.

servitude.[176] The second subdivision, however, permits courts to order that convicted people undertake a variety of educational or service-oriented actions, as well as "other alternatives to incarceration . . . in accordance with programs that have been in place historically or that may be developed in the future, to provide accountability, reformation, protection of society or rehabilitation."[177] This reference to historical practices gives strong support to arguments that any preexisting convict labor programs are unaffected by the new, unequivocal ban on slavery and involuntary servitude to the extent that courts might deem them covered under "other alternatives to incarceration . . . that have been in place historically."[178] Even future forced labor practices may be permitted, as the provision leaves room for programs "that may be developed in the future," and permits a wide range of penal justifications for these programs—not just rehabilitation, but "accountability, reformation, [and] protection of society" as well.[179]

Beyond Oregon's slavery and involuntary servitude provision, one must not forget other provisions of Oregon's Constitution that not only permit, but mandate, work by those who are imprisoned. Article I, section 41 of Oregon's Constitution requires that "inmates confined within corrections institutions must be fully engaged in productive activity,"[180] mandating these work requirements "for all state corrections institutions,"[181] and requiring the state's corrections director to "contact public and private enterprises in [the] state and seek proposals to use inmate work."[182] A provision like this within the same constitution makes a strong case that prison labor remains a constitutionally permitted practice.

While some states' recent reforms to their slavery and involuntary servitude provisions may have a substantive impact on the law, Utah, Tennessee, and Oregon demonstrate an insidious alternative approach. These states claim progress through constitutional amendment, yet leave the actual treatment of those convicted of crimes the same—or potentially even worse. Qualified amendments tend to fly below the radar of media coverage and political debates because all of these state constitutional amendments are portrayed as removing slavery as a punishment for

176. OR. CONST. art. I, § 34(1).

177. *Id.* § 34(2).

178. *Id.*

179. *Id.*

180. *Id.* § 41(1).

181. *Id.* § 41(6).

182. *Id.* § 41(7).

crimes.[183] But removing language that reflects the Thirteenth Amendment's Punishment Clause, only to add equivalent (or even broader) exceptions, is no change at all. Despite states' recent efforts, slavery and involuntary servitude remain permitted as punishments for those convicted of crimes.

D. Vermont's Constitutional Contradictions

As discussed above, Vermont's Constitution was amended in 2022 to broaden its prohibition of slavery. Vermont's Constitution had previously prohibited slavery of those over twenty-one years of age, unless they were bound by their own consent or for the payment of debts, damages, or fines.[184] In 2022, the numerous qualifications of Vermont's slavery ban were removed, leaving Vermont's slavery provision to state:

> That all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety; therefore slavery and indentured servitude in any form are prohibited.[185]

While this may seem similar to the absolute bans on slavery and involuntary servitude discussed above, another provision complicates the analysis. Vermont's Constitution goes on to provide:

> To deter more effectually from the commission of crimes, by continued visible punishments of long duration, and to make sanguinary punishments less necessary, means ought to be provided for punishing by hard labor, those who shall be convicted of crimes not capital, whereby the criminal shall be employed for the benefit of the public, or for the reparation of injuries done to private persons: and all persons at proper times ought to be permitted to see them at their labor.[186]

The coexistence of these provisions makes interpreting both a challenge—particularly in light of Vermont's law of interpretation requiring provisions governing "the same subject matter" to be read

---

183. *See, e.g.*, Tavss, *supra* note 97 ("While Utah's constitution bans slavery, it currently allows slavery or involuntary servitude to be used as punishment for a crime in which someone has been convicted. That will no longer be the case when the constitution is changed following the passing of Amendment C."); Rose, *supra* note 96 ("Utah voters have spoken, and an amendment to remove slavery as punishment for a crime from the state constitution has passed.").

184. VT. CONST. ch. I, art. 1 (1924).

185. VT. CONST. ch. I, art. 1.

186. *Id.* ch. II, § 64.

together "as parts of a system" rather than in isolation.[187] Still, one potential avenue may be to interpret Vermont's ban on slavery and "indentured servitude"[188] as referring to practices other than the "hard labor" referenced elsewhere in the constitution.[189] Drawing on Rhode Island's cramped reading of its slavery provision, Vermont's courts may read the new, absolute prohibition of involuntary servitude to refer to a specific institution rather than a more generalized practice of prison labor.[190]

This reading is doubtful, however, because it effectively neutralizes any substantive change resulting from the recent amendment. An alternative reading of Vermont's now-absolute prohibition on slavery and involuntary servitude is to read it as invalidating Vermont's constitutional provision requiring an option for punishment by hard labor. The coercive nature of the labor and the fact that it is used to benefit the state or other parties renders it analogous to the involuntary servitude that now cannot be the punishment for a crime. For Vermont's recent removal of involuntary servitude as a punishment for a crime to be anything more than symbolic, it must be taken to undercut Vermont's provision requiring punishment by hard labor.

Beyond urging that provisions be read in the context of other provisions regarding similar substance and absurd interpretations be avoided, Vermont's law of constitutional interpretation offers little direct guidance for resolving potential conflicts between constitutional provisions.[191] The Vermont Supreme Court noted that constitutional enactments tend to "delineate the framework of government," leaving the "working details . . . for legislative definition."[192] Accordingly, the court urged avoidance of interpretations that are "so narrow as to present an obstacle to that function."[193] Where there is a choice between deciding a case on state grounds or federal constitutional grounds, the Vermont Supreme Court has held that it has a duty to decide cases based on the state

187. *See* State v. Lohr, 236 A.3d 1277, 1281 (Vt. 2020).

188. *See* VT. CONST. ch. I, art. 1.

189. *See id.* ch. II, § 64.

190. *See* David W. Galenson, *The Rise and Fall of Indentured Servitude in the Americas: An Economic Analysis*, 44 J. ECON. HIST. 1, 1–6 (1984) (describing the practice of indentured servitude as an institution involving loans advanced with the requirement that recipients pay off their debt in the form of labor—either as a portion of wages, or as a result of being rented to third parties).

191. *See* Munson v. City of S. Burlington, 648 A.2d 867, 870 (Vt. 1994).

192. Peck v. Douglas, 530 A.2d 551, 554 (Vt. 1987).

193. *Id.*

constitution.[194] As for what to do when there is an apparent conflict or tension between provisions, however, the court has little to say.

Turning to other states provides potential guidance. Some courts and commentators suggest that attempting to overrule one provision of a constitution with another provision in the same constitution is nonsensical. In *Leandro v. State*,[195] the North Carolina Supreme Court considered the plaintiffs' argument that disparate funding of school districts provided in accordance with state constitutional provisions violated the state constitution's guarantee of equal protection, reasoning that such a claim could be "reduced to arguing that one section of the North Carolina Constitution violates another."[196] The court rejected the argument, stating that it "is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself."[197] Raymond Ku, contemplating the legitimacy of constitutional change, concludes that an evaluation of "procedural legitimacy" is necessary, "rather than the substantive propriety of constitutional amendments."[198] Ku claims that "[t]o argue that an amendment to a constitution is unconstitutional is hopelessly circular."[199]

Similarly, some states urge a harmonious approach to constitutional interpretation consistent with these sentiments, although the need for harmony is often noted alongside a need to give effect to each provision of the constitution.[200] There is a tension here: The interest of harmony urges courts to avoid interpreting provisions in a manner that leads to conflict and contradiction, but the interest in giving effect to each may necessarily lead to conflict where multiple provisions appear inconsistent.

---

194. Chittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d 539, 547 (Vt. 1999).

195. 488 S.E.2d 249 (N.C. 1997).

196. *Id.* at 258.

197. *Id.*

198. *See* Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 FORDHAM L. REV. 535, 540 (1995).

199. *Id.*

200. *See, e.g.*, State *ex. rel.* Montgomery v. Mathis, 290 P.3d 1226, 1232–33 (Ariz. Ct. App. 2012) (noting the need to interpret constitutional amendments in harmony with the rest of the state constitution, as well as the need to give meaning to each word and phrase in the constitution); Patterson Recall Comm., Inc. v. Patterson, 209 P.3d 1210, 1214 (Colo. App. 2009) (recognizing the need to interpret in a manner that "harmonizes different constitutional provisions, rather than one that would create a conflict between them"); *id.* at 1215 (recognizing the need to interpret in a manner that "favor[s] a construction of a constitutional amendment that will render every word operative, rather than one that may make some words meaningless or nugatory"); Van Slyke v. Bd. of Trs. of State Insts. of Higher Learning, 613 So. 2d 872, 876 (Miss. 1993) ("[P]rovisions of the constitution should be read 'so that each is given a maximum effect and a meaning in harmony with that of each other.'" (quoting Dye v. State *ex rel.* Hale, 507 So. 2d 332, 342 (Miss. 1987))).

In light of the strong language employed in both of Vermont's constitutional provisions, such a conflict appears to be inevitable if both provisions are to be given effect.

Other state courts, however, recognize that conflict between constitutional provisions is a possibility, and suggest means of resolving such conflicts. Turning to principles of statutory interpretation, some state courts find that detailed or specific provisions are to prevail over more general provisions when they conflict, with courts treating the specific provisions as carve-outs or exceptions to the general provisions.[201] Recency is also relevant, with courts giving priority to recently enacted provisions rather than older provisions.[202] And other states give priority to certain parts of their constitutions. The Alabama Supreme Court, for example, states that "if two provisions of the Constitution are seen to conflict, and one of them is contained in Article I, the Declaration of Rights, the provision from the Declaration of Rights will prevail."[203]

Applying these principles illuminates arguments that may be made regarding the constitutionality of sentenced forced labor in Vermont. A defendant sentenced to hard labor may challenge the constitutionality of the sentence, arguing that it runs afoul of Vermont's prohibition on slavery or involuntary servitude. As with the broader state constitutional provisions discussed above, the provision applies to both slavery and involuntary servitude—undermining attempts at narrow interpretation like that employed by the Rhode Island Supreme Court.[204] The defendant challenging the statute can also emphasize that Vermont's absolute ban was enacted to replace a qualified ban that permitted involuntary servitude as a punishment for crime—suggesting that Vermont's prior practices of

---

201. *See* State v. Williams, 548 S.W.3d 275, 280 n.5 (Mo. 2018) ("When two provisions appear to conflict, this Court has no authority to side with the provision it deems the most prudent. Instead, this Court must attempt to harmonize the provisions, giving effect to each, or if this is not possible, to determine which should take precedence in a given circumstance using standard cannons of construction, e.g., by applying the more specific or more recently enacted provision."); Robinson Twp. v. Pennsylvania, 83 A.3d 901, 946 (Pa. 2013) ("A specific provision will prevail over a general principle found elsewhere but, because the Constitution is an integrated whole, we are cognizant that effect must be given to all of its provisions whenever possible.").

202. *See* Izazaga v. Superior Ct., 815 P.2d 304, 371 (Cal. 1991) ("As a means of avoiding conflict, a recent, specific provision is deemed to carve out an exception to and thereby limit an older, general provision."); Sharpe v. State *ex rel.* Okla. Bar Ass'n, 448 P.2d 301, 306 (Okla. Jud. App. Div. 1968) ("Later provisions of the Constitution or statutes on the same subject matter must prevail when in conflict with earlier provisions.").

203. Henderson *ex rel.* Hartsfield v. Ala. Power Co., 627 So. 2d 878, 892 (Ala. 1993), *abrogated on other grounds by Ex parte* Apicella, 809 So. 2d 865 (Ala. 2001).

204. *See* VT. CONST. ch. I, art. 1. For a discussion of Rhode Island's narrow interpretation of its blanket ban on slavery, see *supra* section III.A.

prison labor fell under this now-eliminated qualification of the slavery ban.

In response, Vermont may argue that the Vermont Constitution not only permits, but appears to require that punishment at hard labor be available as a potential punishment for convicted criminals.[205] Drawing on other states' treatment of constitutional conflicts, Vermont may argue that this specific requirement trumps the broader ban on slavery and involuntary servitude.[206] To harmonize Vermont's constitutional slavery prohibition and hard labor requirement, a court may conclude that the slavery provision still has effect with regard to those who aren't convicted of crimes. A court may also read the slavery provision as prohibiting the imposition of forced labor in some circumstances, yet continuing to allow Vermont to sentence people to hard labor to the extent this achieves goals of deterrence. Such a notion may be consistent with prior Vermont case law rejecting challenges to out-of-state transfers of prisoners, in which the Vermont Supreme Court reasoned that enough prisoners remained in Vermont, performing hard labor, to achieve the constitutional goal of deterrence.[207]

While Vermont may be able to take advantage of specific provisions trumping the general involuntary servitude prohibition, the defendant challenging the sentence may push right back with precedents, urging that courts apply recent provisions rather than older enactments.[208] Because Vermont's absolute ban on slavery and involuntary servitude was enacted in 2022, it is far more recent than Vermont's forced labor provision, which dates back to 1777.[209] Additionally, the defendant may argue that reading Vermont's slavery ban in the context of the recent amendment makes the ban more specific—the 2022 enactment was a specific rejection of involuntary servitude as a punishment for a crime. Adopting this focused reading may undermine efforts by the state to contend that the forced labor requirement is the more specific constitutional provision.

The ultimate answer remains unclear. Between Vermont's minimal guidance for conflicting constitutional provisions, dueling out-of-state authorities and methodologies, and alternate potential readings of the provisions at issue, there are arguments on either side regarding the constitutionality of sentences to forced labor. As a matter of constitutional

---

205. VT. CONST. ch. II, § 64.

206. *See supra* note 201 and accompanying text.

207. *See* Daye v. State, 769 A.2d 630, 638 (Vt. 2000) ("So long as Vermont citizens have access 'at proper times' to those inmates remaining, the goal of deterrence through 'visible punishments' would appear to be more than adequately served." (quoting VT. CONST. ch. II, § 64)).

208. *See supra* note 202 and accompanying text.

209. *See* VT. CONST. ch. II, § 35 (1777).

cohesiveness, however, Vermont's forced labor requirement is in an uneasy position. Chapter 2, article 64 of Vermont's Constitution hearkens back to the archaic practices of the eighteenth century with its references to observing public forced labor as an alternative to sanguinary punishments. At the same time, Vermont recently took a step to modernize its constitution by prohibiting slavery and involuntary servitude as punishments for convicted criminals.[210] An additional step to bring the constitution into the present would be to do away with its archaic constitutional requirement of forced labor punishment.

IV. LESSONS GOING FORWARD

Jamal Greene describes a phenomenon of "Thirteenth Amendment optimism," which consists of arguments that the Thirteenth Amendment "prohibits in its own terms, or should be read by Congress to prohibit, practices that one opposes but that do not in any obvious way constitute either chattel slavery or involuntary servitude as those terms are ordinarily understood."[211] Greene identifies several such arguments, initially suggesting that they appear to be "fool's gold" with little chance of practical success.[212] But, upon deeper consideration, Greene concludes that optimism about the Thirteenth Amendment may work to build "a movement fit to integrate arguments into higher law," and that Thirteenth Amendment optimism may work to propel such a movement.[213]

There is little Thirteenth Amendment optimism when it comes to reforming prison labor. The Punishment Clause explicitly leaves room for at least indentured servitude as a punishment for crime.[214] The Supreme Court has cited the Punishment Clause as confirmation that states may impose involuntary servitude on those convicted of crimes.[215] And in the decades since, patterns of mass incarceration and profit motives have led to hundreds of thousands of convicted people—including a

210. *See* VT. CONST. ch. I, art. 1.

211. Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1735 (2012).

212. *Id.* at 1738–39.

213. *Id.* at 1764.

214. *See* U.S. CONST. amend. XIII, § 1.

215. *See, e.g.*, United States v. Reynolds, 235 U.S. 133, 149 (1914) ("There can be no doubt that the state has authority to impose involuntary servitude as a punishment for crime. This fact is recognized in the 13th Amendment, and such punishment expressly excepted from its terms.").

disproportionate number of Black Americans—being forced into labor as part of a criminal sentence.[216]

And yet, there may be cause for optimism when one refocuses attention from the federal level to the state level.[217] Several states have changed their constitutions to remove the language that the Supreme Court has used to justify ongoing prison labor practices.[218] These provisions remain untested, but they should not be discounted in future efforts to reform laws and practices pertaining to labor by jail and prison inmates.

Future states considering similar constitutional reforms should take note of both recent reforms, and historical treatment of various forms of slavery and involuntary servitude bans. To start, states should be aware of the Thirteenth Amendment's Punishment Clause and its implications for ongoing incarceration and forced labor practices. States without constitutional provisions pertaining to slavery and involuntary servitude are subject to the Thirteenth Amendment and its Punishment Clause. And many state constitutional provisions purporting to prohibit slavery and involuntary servitude contain similar exceptions.[219] The fairly high success rate of recent state constitutional amendments to such provisions suggests that other states may be able to enact similar changes should they take the initiative.

A cautionary tale throughout this process, however, is that of the qualified amendment. Oregon, Utah, and Tennessee purported to recently amend their state constitutions to remove slavery and involuntary servitude as a punishment for people convicted of crimes, but the language added to the constitutions in the process ultimately undid much of the progress the reforms were supposed to make.[220] Oregon made something of a difference—rejecting slavery and involuntary servitude, but simultaneously retaining existing punishment schemes and leaving a great deal of flexibility for future punishments.[221] Tennessee explicitly exempted forced labor for inmates from any prohibition of slavery and involuntary servitude, meaning that while the constitution states these practices are forbidden, it substitutes in near-equivalent language in the

---

216. *See generally* Appleman, *supra* note 37, at 619 (detailing the racialized scope and impact of labor by imprisoned people); A.E. Raza, *Legacies of the Racialization of Incarceration: From Convict-Lease to the Prison Industrial Complex*, 11 J. INST. JUST. INT'L STUD. 159 (2011) (same).

217. This move hasn't gone entirely unnoticed. *See* Nicholas Ansel, Comment, *Advancing Criminal Reform Through Ballot Initiatives*, 53 ARIZ. ST. L.J. 273, 274, 286 (2021) (urging reform through ballot initiatives, and highlighting Colorado's removal of its punishment provision as one example of such a reform).

218. *See supra* section II.B.

219. *See supra* section II.A.

220. *See supra* section III.B.

221. *See* OR. CONST. art. I, § 34.

place of the preexisting punishment clause.[222] And Utah's broad limitation on its slavery provision results in a slavery ban that provides less protection than the Thirteenth Amendment itself, stating that any "otherwise lawful administration of the criminal justice system" is exempt from Utah's purported ban on slavery and involuntary servitude.[223] Each attempt at banning slavery that has sought to add language or otherwise modify the impact of an otherwise absolute prohibition has resulted in undermining the motivating purpose of the amendment itself or, in Utah's case, replacing language similar to the already-deficient Thirteenth Amendment with an even weaker slavery ban.

This is only a small component of the massive task of prison reform—a task that implicates legislative efforts, litigation, and political action at the local, state, and federal level.[224] Still, the recency and absolute nature of some recent state constitutional reforms, and because they take place at the most foundational level of state law, makes state constitutional challenges an avenue worth pursuing.

CONCLUSION

Mass incarceration is a complex phenomenon, perpetuated by a myriad of social, political, and legal structures and incentives.[225] No single solution will undo the entrenched systems of prosecution and punishment that affect millions of people each year. Still, in the face of a complex problem, the more potential solutions and arguments, the better. While much has been written on mass incarceration, and many solutions proposed, state constitutional prohibitions on slavery and involuntary servitude have emerged as an unnoticed mechanism for reform.

---

222. *See* TENN. CONST. art. I, § 33.

223. *See* UTAH CONST. art. I, § 21.

224. *See, e.g.*, Sharon Dolovich, *The Failed Regulation and Oversight of American Prisons*, 5 ANN. REV. CRIMINOLOGY 153 (2022) (identifying failures in checks and balances of systems of incarceration in all areas of government); Aaron Littman, *Jails, Sheriffs, and Carceral Policymaking*, 74 VAND. L. REV. 861 (2021) (describing the roles of sheriffs at various levels of the incarceration process, including the construction of jails, release of those incarcerated, and how such systems are funded); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357 (2018) (identifying the need for significant changes to the Court's treatment of constitutional challenges to incarceration practices and describing how these changes may occur); Lauren-Brooke Eisen, *Criminal Justice Reform at the State Level*, BRENNAN CTR. FOR JUST. (Jan. 2, 2020), https://www.brennancenter.org/our-work/research-reports/criminal-justice-reform-state-level [https://perma.cc/97UF-MEXK] (arguing for greater attention to state-level criminal justice reforms, since this is where the majority of incarcerated people are held).

225. For examples of overviews of the extent and origins of mass incarceration, including the political motivations and legal frameworks that allow mass incarceration to persist, see generally BARKOW, *supra* note 18; MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015).

Challenging sentences that force people into involuntary servitude may reduce the harshness of punishments for those sentenced to forced labor. Additional states should take notice of the growing trend of state constitutional amendments and adopt provisions similar to Alabama, Colorado, and Nebraska to remove the vestiges of slavery and Jim Crow from their constitutions and to lend state constitutional support to meaningful reform. Those states that have enacted qualified reforms should take stock of their mistakes and try again.

The Thirteenth Amendment exempts those punished for crimes from its prohibition on slavery and involuntary servitude. This has played a significant role in establishing a federal constitutional regime that is of little meaningful assistance to those subjected to harsh punishment and forced labor. State constitutional prohibitions of slavery and involuntary servitude provide a much-needed alternative, and courts should take state constitutional challenges seriously to give effect to recent amendments that reflect a desire for serious change.