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1-1-2009

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## Recommended Citation

Margaret Howard, *Bankruptcy Bondage*, 2009 U. Ill. L. Rev. 191 (2009).

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## BANKRUPTCY BONDAGE

Margaret Howard\*

*Initially, it might seem an affront to the history of slavery in this country to suggest that similar concerns are raised by an expectation that debtors pay their debts. Nevertheless, certain aspects of the Bankruptcy Code present genuine constitutional difficulties under the Thirteenth Amendment. These difficulties have been recognized for several decades, albeit as a matter of speculation. Now, however, under the 2005 Amendments to the Bankruptcy Code, this issue is no longer speculative. Under the 2005 Amendments, an individual debtor may be put into a chapter 11 proceeding involuntarily, and required to make payments under a plan proposed by creditors out of future income.*

*This Article examines the history of the Thirteenth Amendment, focusing on its application in the context of involuntary servitude and peonage, and assesses the merits of the constitutional case. The Article demonstrates why bankruptcy courts may be statutorily empowered to enter orders that they cannot constitutionally enforce. It then examines the prohibitions on imprisonment for debt that may also be implicated by the use of coercive orders.*

*This Article illustrates how, in effect, the Bankruptcy Code has created a system of rights for creditors that are unenforceable. As the Thirteenth Amendment prohibits courts from enforcing confirmation orders against uncooperative debtors by issuing coercive orders, the only remedies available to a bankruptcy court facing a recalcitrant debtor are dismissal and conversion. Congress may not have expected this when it passed the 2005 Amendments, but only because it did not bother to do the necessary constitutional analysis.*

Section 1. 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.

Section 2. Congress shall have power to enforce this article by appropriate legislation.<sup>1</sup>

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## I. INTRODUCTION

Perhaps it is an affront to the history of slavery in this country—to the memory of those who were bound by its shackles and to the daily experience of those who feel its legacy—to suggest that similar concerns might be raised by an expectation that debtors pay their debts. Nor does it seem possible, at first blush, that anything in the bankruptcy system might implicate the Thirteenth Amendment. One's initial reaction is to doubt that the compulsive features of bankruptcy law, which stand alongside its provisions for debtor relief, could do so. Nevertheless, certain aspects of the Bankruptcy Code present genuine constitutional difficulties under the Thirteenth Amendment. These difficulties have been recognized for several decades, albeit as a matter of speculation. Now, however, under amendments to the Bankruptcy Code passed in 2005, this issue is no longer speculative.

Under the 2005 Amendments, an individual debtor may be put into a chapter 11<sup>2</sup> proceeding involuntarily,<sup>3</sup> and required to make payments under a plan proposed by creditors out of future income. During consideration of the 1978 Bankruptcy Code, Congress thought that similar provisions proposed for chapter 13<sup>4</sup> raised problems under the Thirteenth Amendment. We now, however, have the very statutory configuration that was rejected at that time, partly on constitutional grounds. Now that these provisions are part of the law, full discussion of the Thirteenth Amendment's possible application is timely.

This Article will discuss the Thirteenth Amendment concerns expressed by, and in testimony before, Congress during the years leading up to enactment of the 1978 Bankruptcy Code,<sup>5</sup> and describe the statutory changes that create the current difficulties.<sup>6</sup> The Article will then examine the history of the Thirteenth Amendment, with a focus on its application in the context of involuntary servitude and peonage, and as-

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1. U.S. CONST. amend. XIII.

2. Chapter 11 is a reorganization provision under which the debtor pays creditors over several years, typically out of post-petition income, under a plan. This chapter is used most often by business entities, and its requirements are the most complex in the Bankruptcy Code. It is also more expensive than other types of bankruptcy proceedings.

3. Most bankruptcy cases are "voluntary," in that they are filed by the debtor. In an involuntary case, the bankruptcy proceeding is filed by one or more creditors against the debtor. Section 303 of the Bankruptcy Code, 11 U.S.C. § 303, imposes rather strict limitations on involuntary cases in order to prevent creditors from using them to pressure debtors inappropriately.

4. Chapter 13 is another type of reorganization proceeding, but it may only be used by individual debtors who have a steady source of income and whose debts do not exceed the statutory ceiling. Payments are made, in accordance with a three- to five-year plan proposed by the debtor, out of post-petition income. Chapter 13 debtors may keep all of their property, whether exempt or not, as long as creditors are paid the minimum amount required by the Code. By contrast, debtors in chapter 7—the liquidation proceeding—may keep their post-petition earnings free and clear of creditors' claims, but nonexempt assets are sold and the proceeds paid to creditors.

5. See *infra* notes 9–26 and accompanying text.

6. See *infra* notes 31–43 and accompanying text.

sess the merits of the constitutional case.<sup>7</sup> In particular, the Article will demonstrate why bankruptcy courts may be statutorily empowered to enter orders that they cannot, constitutionally, enforce. The Article will, finally, examine the prohibitions on imprisonment for debt that may also be implicated by the use of coercive orders.<sup>8</sup>

This Article concludes that Congress's Thirteenth Amendment concerns were well placed, but perhaps not for the reasons that are usually cited. In fact, questions of peonage and imprisonment for debt are not raised until a court imposes a coercive order in an attempt to force a recalcitrant debtor to comply with a plan under which payments are made out of future income. In effect, the Bankruptcy Code has created a system of rights for creditors that are unenforceable.

## II. EVOLUTION OF THE BANKRUPTCY CODE

For many decades, creditors have advanced various proposals designed to require debtors in bankruptcy to repay more of their debts.<sup>9</sup> The most recent and familiar proposals have focused on chapter 13 (or its statutory predecessor) and have taken two principal forms: (1) "mandatory 13," under which debtors able to repay some portion of their debts would be prohibited from obtaining a discharge in a liquidation proceeding, leaving chapter 13 as the only feasible bankruptcy alternative for the debtor to choose;<sup>10</sup> and (2) "involuntary 13," under which creditors would be able to file involuntary chapter 13 proceedings against debtors.<sup>11</sup>

The second of these proposals more clearly implicates the Thirteenth Amendment because, in chapter 13, the debtor's post-petition income is part of the estate and available to creditors.<sup>12</sup> If an involuntary proceeding is permitted, therefore, creditors will be able to reach a debtor's future income without the debtor's consent. The combination of these two features—an involuntary filing, coupled with a chapter under which future income is devoted to repayment—presents the possible

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7. See *infra* notes 44–252 and accompanying text.

8. See *infra* notes 254–70 and accompanying text.

9. The earliest effort, apparently, dates from 1932. For discussions of this legislative history, see Douglass G. Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69, 112–18 (1982); Vern Countryman, *Bankruptcy and the Individual Debtor—And a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809, 821 (1982); Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953, 987 (1981). The proposal advanced in 1932 would have imposed a two-year suspension of the discharge for debtors unable to pay at least 50% of their debts, during which time the debtors would have had to turn over all nonexempt property and future income in excess of necessary living expenses. Boshkoff, *supra*, at 112–13.

10. See Charles J. Tabb, *The Top Twenty Issues in the History of Consumer Bankruptcy*, 2007 U. ILL. L. REV. 9, 23–24.

11. See Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 586–88 (2005).

12. *Id.*

constitutional difficulty. The legislative history to the 1978 Bankruptcy Code clearly reflects these concerns, as the Report of the House Judiciary Committee stated:

As under current law, chapter 13 is completely voluntary. This Committee firmly rejected the idea of mandatory or involuntary chapter XIII in the 90th Congress. The [T]hirteenth [A]mendment prohibits involuntary servitude. Though it has never been tested in the wage earner plan context, it has been suggested that a mandatory chapter 13, by forcing an individual to work for creditors, would violate this prohibition.<sup>13</sup>

Congress was concerned that involuntary chapter 13 might raise constitutional problems and identified that concern as one reason<sup>14</sup> why involun-

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13. H.R. REP. NO. 95-595, at 120 (1977) (footnotes omitted), as reprinted in 1978 U.S.C.C.A.N. 5963, 6080-81 [hereinafter H.R. REP. NO. 95-595].

14. Constitutional concern has never been the sole argument against proposals for either "mandatory" or "involuntary" chapter 13 cases. The other principal argument focused on the impracticability of attempting to force unwilling debtors to work for their creditors. A classic statement of the practical problems that are raised when creditors reach a debtor's wages is found in a now-famous passage from *Local Loan Co. v. Hunt*:

The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much as, if not more than, it is a property right. To preserve its free exercise is of the utmost importance, not only because it is a fundamental private necessity, but because it is a matter of great public concern. From the viewpoint of the wage earner there is little difference between not earning at all and earning wholly for a creditor. Pauperism may be the necessary result of either. The amount of the indebtedness, or the proportion of wages assigned, may here be small, but the principle, once established, will equally apply where both are very great. The new opportunity in life and the clear field for future effort, which it is the purpose of the bankruptcy act to afford the emancipated debtor, would be of little value to the wage earner if he were obliged to face the necessity of devoting the whole or a considerable portion of his earnings for an indefinite time in the future to the payment of indebtedness incurred prior to his bankruptcy.

292 U.S. 234, 245 (1934). The Report of the 1970 Bankruptcy Commission cited similar concerns in rejecting a proposal to require, as a condition of discharge, that debtors use some portion of their future income to repay creditors:

The Commission has considered the arguments made for conditioning the availability of bankruptcy relief, including discharge, on a showing by the debtor that he cannot obtain adequate relief from his condition of financial distress by proposing a plan for payment of his debts out of his future earnings. The Commission has concluded that forced participation by a debtor in a plan requiring contributions out of future income has so little prospect for success that it should not be adopted as a feature of the bankruptcy system.

REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 159 (1st Sess. 1973) [hereinafter 1973 COMMISSION REPORT], quoted in H.R. REP. NO. 95-595, *supra* note 13. The legislative history to the 1978 Bankruptcy Code expressed similar concerns that debtors would be unlikely to cooperate in involuntary cases, and that success would be improbable in the absence of such cooperation:

On policy grounds, it would be unwise to allow creditors to force a debtor into a repayment plan. An unwilling debtor is less likely to retain his job or to cooperate in the repayment plan, and more often than not, the plan would be preordained to fail. Therefore, the bill prohibits involuntary cases under chapter 13, and forbids the conversion of a case from chapter 7, liquidation, to chapter 13, unless the debtor requests.

H.R. REP. NO. 95-595, *supra* note 13, at 6081.

Creditors achieved some success, beginning in 1984 with the addition of § 707(b) to the Code. As then drafted, the subsection authorized dismissal of chapter 7 cases for "substantial abuse." Most courts held the statutory standard met if debtors could afford to repay a substantial portion of their obligations out of future income. Chemerinsky, *supra* note 11, at 588. The provision was a first step on the road toward "mandatory 13"—that is, a requirement that debtors file chapter 13 rather than

tary chapter 13 proceedings should not be permitted. That concern was rooted in the fact that, in chapter 13, debtors' future income is used to fund the plan under which creditors are repaid (whether that repayment is in part or in full). Indeed, this protection of post-petition earnings from prepetition claims has been "one of the hallmarks of American bankruptcy law"<sup>15</sup> that Congress chose to protect in chapter 13 by prohibiting involuntary filings.

The constitutional concerns did not spring out of nowhere. Rather, they were given most prominent, and repeated, voice by Professor Vern Countryman. In hearings before the House Judiciary Committee in 1975, he said that he was "prepared to argue" that mandatory chapter 13 would be unconstitutional.<sup>16</sup> Testifying before the same Committee in 1976, he explained why the National Bankruptcy Conference had opposed legislation proposed in 1967 that would have denied relief in a liquidation case to any debtor eligible for relief under chapter 13's statutory predecessor.<sup>17</sup> One reason for that opposition, according to Professor Countryman's prepared remarks as well as his oral testimony, was that

[c]ompulsory wage earner plans would be inconsistent with the policy and traditions of a country which has abolished involuntary servitude by the Thirteenth Amendment to its federal Constitution, has abolished peonage, or debt slavery by federal statute . . . and has abolished all but a few vestiges of imprisonment for debt by state constitutions and statutes.<sup>18</sup>

A suggestion that mandatory 13 would be inconsistent with America's "policy and traditions" is hardly the same thing as an absolute assertion of unconstitutionality,<sup>19</sup> and use of the passive voice in the legislative his-

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chapter 7 if they have enough future disposable income to make substantial repayment. Section 707(b), however, did not alter Congress's refusal to permit involuntary chapter 13 filings.

Section 707(b) was radically altered in 2005, when Congress instituted a "means test" to determine whether chapter 7 debtors can, in fact, make substantial repayments to their creditors. Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 231 (2005). Such debtors cannot remain in chapter 7, so chapters 11 and 13 are their only bankruptcy options, but creditors still cannot commence an involuntary chapter 13. The story under chapter 11, as revised in 2005, is the tale forming the crux of this Article.

15. John D. Ayer, *How to Think About Bankruptcy Ethics*, 60 AM. BANKR. L.J. 355, 375 (1986).

16. *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 94th Cong. 348 (1975) [hereinafter *House Judiciary Committee Hearings*] (testimony of Prof. Countryman).

17. *Id.* at 1410, 1420 (statement and testimony of Prof. Countryman).

18. *Id.*

19. Professor Harris noted the ambiguity in Professor Countryman's remark, which was made in answer to a question. Professor Countryman, according to Professor Harris, could have meant either that he was "prepared to assert that an involuntary chapter 13 violates the [T]hirteenth [A]mendment, or only that he would not have been embarrassed to argue that it does. He recently informed me that he meant the latter." Steven L. Harris, *A Reply to Theodore Eisenberg's Bankruptcy Law in Perspective*, 30 UCLA L. REV. 327, 348 n.118 (1982).

In a later article, however, Professor Countryman strongly suggested that mandatory chapter 13 proposals would be vulnerable to a Thirteenth Amendment challenge. See Countryman, *supra* note 9, at 827. If he did not say outright that such a challenge would be successful, he came close enough to be cited for that proposition. Robert J. Keach, *Dead Man Filing Redux: Is the New Individual Chapter Eleven Unconstitutional?*, 13 AM. BANKR. INST. L. REV. 483, 491 n.54 (2005).

tory to the 1978 Code<sup>20</sup> leaves room for the argument that Congress recognized the difference. Nevertheless, commentators<sup>21</sup> and courts<sup>22</sup> have not been deterred from asserting the constitutional argument as an established fact, despite dissenting voices to the contrary.<sup>23</sup>

Even the Supreme Court joined the chorus, albeit indirectly. In *Toibb v. Radloff*,<sup>24</sup> the Court decided that an individual not conducting a business is eligible for chapter 11. Amicus argued that such a filing would expose consumer debtors to the risk of an involuntary case, contrary to the intent that Congress expressed in the chapter 13 context, and that an involuntary debtor would not be cooperative.<sup>25</sup> The Court rejected the argument, relying in part on the then-existing exclusion of future wages from the individual debtor's chapter 11 estate:

[T]he argument overlooks Congress' primary concern about a debtor's being forced into bankruptcy under Chapter 13: that such a debtor, whose future wages are not exempt from the bankruptcy es-

20. As stated in the legislative history, "it has been suggested that" mandatory 13 would violate the Thirteenth Amendment. *See supra* note 14 and accompanying text.

21. G. Eric Brunstad Jr., *The Inapplicability of "Means Testing" to Cases Converted to Chapter 7*, AM. BANKR. INST. J., Nov. 2005, at 60; Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165, 166 (1990).

22. *See, e.g., In re Nahat*, 315 B.R. 368, 374 (Bankr. N.D. Tex. 2004); *In re Spencer*, 137 B.R. 506, 513 (Bankr. N.D. Okla. 1992); *In re Paolino*, [1990-1991 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 73,883, 98,961 n.13 (Bankr. E.D. Pa. Jan. 11, 1991); *In re Noonan*, 17 B.R. 793, 800 (Bankr. S.D.N.Y. 1982).

23. *See, e.g., Eisenberg, supra* note 9 at 988-89. In *In re Graham*, 21 B.R. 235 (Bankr. N.D. Iowa 1982), debtor's ex-wife moved to convert his chapter 7 case to a chapter 11, thereby enabling unsecured creditors (including herself) to impose a repayment plan that would reach his substantial post-petition income. The court noted that converting the case would divert the fruits of the debtor's labors to his prepetition creditors, much like a mandatory chapter 13. *Id.* at 238. The court thought it unclear whether Congress was correct on the constitutional questions such cases would raise, *id.*, but the court's own views were anything but:

The constitutionality under the [T]hirteenth [A]mendment of a mandatory repayment scheme under the Bankruptcy Code is not before the Court, and the Court does not purport to decide the issue. Such a mandatory repayment scheme is so radically different in character from the slavery that the [T]hirteenth [A]mendment was meant to abolish, however, that the Court questions whether the framers of that [A]mendment had the prohibition of mandatory repayment plans in mind when they drafted it.

*Id.* at 238 n.3. The court, however, could not "ignore an explicit statement of congressional intent on a policy issue," and Congress clearly thought mandatory repayment plans unwise. *Id.* at 238. Thus, the court denied the motion on the grounds that it would, in effect, force the debtor into a repayment plan against his will. *Id.* at 239.

Most of the constitutional dissenters have focused on particular features of the pre-2005 Code as reasons why Thirteenth Amendment concerns were overblown. *See, e.g., In re Herberman*, 122 B.R. 273, 283-84 (Bankr. W.D. Tex. 1990) (calling Thirteenth Amendment concerns a "shibboleth," in a voluntary case); R. Glen Ayers, Jr., *Reforming the Reform Act: Should the Bankruptcy Reform Act of 1978 Be Amended to Limit the Availability of Discharges to Consumers?*, 17 NEW ENG. L. REV. 719, 726 (1982) ("[T]his line of reasoning ignores the effect of a voluntary decision to file bankruptcy. For as long as debtors may pursue other courses, such as common law assignments, or are free to ignore their creditors' attempts at collection, the Thirteenth Amendment right is not applicable."). Similarly, Professor Klee, in presenting a proposal for compulsory debt restructuring, argued that the proposal escaped constitutional problems because debtors could simply forego the discharge. Kenneth N. Klee, *Restructuring Individual Debts*, 71 AM. BANKR. L.J. 431, 447-49 (1997).

24. 501 U.S. 157 (1991).

25. *Id.* at 165.

tate, would be compelled to toil for the benefit of creditors in violation of the Thirteenth Amendment's involuntary servitude prohibition. Because there is no comparable provision in Chapter 11 requiring a debtor to pay future wages to a creditor, Congress' concern about imposing involuntary servitude on a Chapter 13 debtor is not relevant to a Chapter 11 reorganization.<sup>26</sup>

Given that these were the words of the Supreme Court,<sup>27</sup> it comes as no surprise that they would be taken as a constitutional pronouncement.<sup>28</sup> The Court's discussion, like those of lower courts, however, was the stuff of dicta or theory.<sup>29</sup> Because Congress had refused to configure the bankruptcy statutes to permit mandatory or involuntary chapter 13 cases, the question was not presented directly either to the Court in *Toibb* or to any other court in any other case.<sup>30</sup> Until now, that is, and not in the context of chapter 13, but in the context of chapter 11.

In 2005, Congress amended the Bankruptcy Code to present exactly the statutory configuration that, several decades before, it thought questionable under the Thirteenth Amendment—namely, the possibility of an involuntary case against an individual debtor who would be required to devote future income to repayment of prepetition debts. Several changes have produced this possibility. First, the amendments added § 1115 to the Code. It augments an individual debtor's bankruptcy estate

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26. *Id.* at 165–66 (citations omitted).

27. The Court also suggested in *Norwest Bank Worthington v. Ahlers* that creditors cannot enforce a debtor's promises to fund a plan out of future income, but offered no explanation or supporting authority. 485 U.S. 197, 204 (1988). “Viewed from the time of approval of the plan, respondents' promise of future services is intangible, inalienable, and, in all likelihood, unenforceable.” *Id.*

28. Although this language hardly constitutes a holding on the issue, it has been cited as such. Stacy L. Daly, Note, *Post-Petition Earnings and Individual Chapter 11 Debtors: Avoiding a Head Start*, 68 *FORDHAM L. REV.* 1745, 1763 n.153 (2000); see also *In re Farrell*, 150 B.R. 116, 119 (Bankr. D.N.J. 1992); *In re Molina Y Vedia*, 150 B.R. 393, 399–400 (Bankr. S.D. Tex. 1992); Keach, *supra* note 19, at 500 (“If the comments in *Toibb* mean anything . . . the [2005] amendments would appear to be unconstitutional.”).

29. Not so in one context, however—the conversion of chapter 7s to chapter 11s. Courts have been reluctant, at least in the past, to permit such conversions due to concerns that creditors could accomplish the involuntary reorganization of an individual debtor, in circumvention of chapter 13's prohibition. See *In re Graham*, 21 B.R. 235, 238–39 (Bankr. N.D. Iowa 1982); *In re Noonan*, 17 B.R. 793, 797–99 (Bankr. S.D.N.Y. 1982). Such concerns seem much less viable today, given that chapter 11 clearly permits involuntary cases against individual debtors, 11 U.S.C. § 303(a), and includes post-petition wages in property of the estate. *Id.* § 1115(a)(2).

The Bankruptcy Code's express prohibition of the conversion of a chapter 7 or chapter 11 case to one under chapter 13 without the debtor's consent, *id.* §§ 706(c), 1112(d), has been explained on Thirteenth Amendment grounds. See *In re Carrow*, 315 B.R. 8, 16 (Bankr. N.D.N.Y. 2004) (stating flatly that converting a chapter 7 case to chapter 13, without the debtor's request, “would violate both § 706(c) . . . and the United States Constitution”); *In re Vitti*, 132 B.R. 229, 230 n.2 (Bankr. D. Conn. 1991) (stating that § 706(c) reflects Congress's Thirteenth Amendment concerns); *In re Aberegg*, No. 90-30156, 1990 Bankr. LEXIS 1392, at \*11 (N.D. Ind. June 15, 1990) (observing that chapter 7 and chapter 11 cases can be converted to chapter 13 only with the debtor's request or consent, because of Congress's concerns about involuntary servitude).

30. As the legislative history to the 1978 Bankruptcy Code said, the constitutional argument “has never been tested in the wage earner plan context.” See *supra* text accompanying note 13. Of course “the Thirteenth Amendment issue has seldom been directly confronted,” Keach, *supra* note 19, at 497; before 2005, the statute did not present the issue.



with “earnings from services performed by the debtor after the commencement of the case.”<sup>31</sup> Second, the amendments added § 1123(a)(8), which requires that an individual debtor’s chapter 11 plan “provide for the payment to creditors . . . of all or such portion of earnings from personal services performed by the debtor after the commencement of the case . . . as is necessary for the execution of the plan.”<sup>32</sup> Finally, the amendments added § 1129(a)(15)(B), which requires, as a condition for confirmation, that the debtor commit his or her “projected disposable income” for the next five years to the plan.<sup>33</sup>

These new provisions, obviously, operate in conjunction with preexisting chapter 11 rules: first, individual consumer debtors are eligible for chapter 11;<sup>34</sup> second, involuntary cases are permissible under chapter 11;<sup>35</sup> third, individual chapter 11 debtors cannot convert an involuntary case to another chapter;<sup>36</sup> fourth, chapter 11 plans have no statutory maximum time limit<sup>37</sup> and can be extended on a creditor’s motion;<sup>38</sup> fifth, unlike in chapter 13, creditors can propose a plan in chapter 11 if the debtor has not;<sup>39</sup> and, finally, debtors in involuntary cases do not have an absolute right to dismiss the case.<sup>40</sup>

Taken together, these provisions allow creditors to use an involuntary bankruptcy to reach a debtor’s future income—the very statutory configuration that has raised Thirteenth Amendment concerns for years<sup>41</sup>—and do so under circumstances from which the debtor cannot easily escape by seeking conversion or dismissal. Thus, the constitutional question is no longer theoretical in chapter 11.<sup>42</sup> Now the question of

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31. 11 U.S.C. § 1115(a)(2).

32. *Id.* § 1123(a)(8).

33. *Id.* § 1129(a)(15)(B). This subsection applies only if an unsecured creditor objects to confirmation of the plan. *Id.* § 1129(a)(15). In the alternative, a debtor may pay all allowed unsecured claims in full. *Id.* § 1129(a)(15)(A).

34. *Toibb v. Radloff*, 501 U.S. 157, 160–61 (1991).

35. 11 U.S.C. § 303(a).

36. *Id.* § 1112(a)(2).

37. *Id.* § 1129(a)(15)(B).

38. *Id.* § 1127(e)(2).

39. *Id.* § 1121(c) (permitting creditors to file a plan if the debtor fails to do so within the first 120 days of the proceeding, or if the debtor’s plan fails to garner the requisite support within 180 days).

40. *Id.* § 1112(b) (requiring a showing of cause).

41. *See, e.g., In re Powell*, 187 B.R. 642, 646 (Bankr. D. Minn. 1995) (“Nowhere is the threat of impinging upon the protection afforded by the Thirteenth Amendment to the United States Constitution more real than in the case such as this where a creditor is attempting to harness the postpetition wages of individual debtors in a Chapter 11 proceeding.”).

42. Virtually no bankruptcy cases, at present, are filed involuntarily by creditors against debtors. David S. Kennedy et al., *The Involuntary Bankruptcy Process: A Study of the Relevant Statutory and Procedural Provisions and Related Matters*, 31 U. MEM. L. REV. 1, 3 (2000) (“[L]ess than 1/1000 of one percent of all bankruptcy cases filed were commenced involuntarily.”). The numbers will not necessarily remain so low, however, once creditors become aware of the possibilities presented by the 2005 Amendments. *See* Lisa M. Schiller & Craig A. Pugatch, *Involuntary Petitions Under BAPCPA*, THE BANKRUPTCY STRATEGIST (May 29, 2007), [http://www.lawjournalnewsletters.com/issues/ljn\\_bankruptcy/24\\_8/news/148724-1.html](http://www.lawjournalnewsletters.com/issues/ljn_bankruptcy/24_8/news/148724-1.html) (“In the wake of BAPCPA’s implementation, the expanded remedies available to recover from a debtor’s property for the benefit of the estate make involuntary

such a statute's constitutionality under the Thirteenth Amendment is ripe.<sup>43</sup>

### III. THE THIRTEENTH AMENDMENT

Evaluation of the constitutional validity of the new bankruptcy provisions requires an understanding of the governing constitutional principles. In this situation, those principles derive from the Thirteenth Amendment—its text, the intent of its drafters, and the judicial interpretation it has experienced.

#### A. History

The Thirteenth Amendment grew out of the Civil War. By the time the Amendment was proposed by Congress and ratified by the necessary majority of states,<sup>44</sup> slaves in the rebellious states had been free for more than two years through the Emancipation Proclamation,<sup>45</sup> and the Civil War was all but over.<sup>46</sup> A constitutional amendment that merely banned slavery was hardly necessary, given the success of the war effort. The drafters believed, however, that an abolitionist declaration with constitutional status was necessary as a symbol of the nation's commitment and

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petitions an increasingly attractive tool in creditors' arsenal."). Nor are constitutional violations, if such they be, made more acceptable by infrequency.

43. Interestingly, Congress apparently paid no attention to any constitutional problems that the 2005 Amendments might raise in this regard. See John E. Matejkovic & Keith Rucinski, *Bankruptcy "Reform": The 21st Century's Debtors' Prison*, 12 AM. BANKR. INST. L. REV. 473, 494 (2004) ("The involuntary servitude concerns echoed by the Congress in 1977 appears [sic] to be no longer a concern."). That makes Professor Harris look particularly prescient in his response to Professor Eisenberg's assertion that the 1978 Congress, in believing involuntary chapter 13 violative of the Thirteenth Amendment, was ignorant of constitutional law:

When Congress thought it might have found the appropriate structure and jurisdiction for the bankruptcy courts, it sought expert opinions of the scheme's constitutionality and then proceeded to amend title 28 to its liking notwithstanding constitutional objections. I strongly suspect that had Congress been convinced of the desirability of a mandatory chapter 13, it likewise would have dismissed the constitutional objections. I submit that the 94th and 95th Congresses failed to pursue proposals for mandatory conditional discharge not because of widespread ignorance, but because the proponents failed to come forward and make a persuasive case.

Harris, *supra* note 19, at 349 (footnotes omitted).

44. Congress approved the Amendment on January 31, 1865, and it was ratified by the necessary three-quarters of the states on December 18, 1865. U.S.C.A. Const. Amend. XIII 535 (West 2006) (listing dates of ratification). The most recent ratification—Mississippi's—occurred in 1995. *Id.*

45. The Emancipation Proclamation consisted of two executive orders. The first, issued on September 22, 1862, declared the freedom of all slaves in Confederate states that did not return to Union control by January 1, 1863. Proclamation No. 16, 12 Stat. 1267 (1862). The second, issued on January 1, 1863, listed the pertinent states. Proclamation No. 17, 12 Stat. 1268–69 (1863). The border states were not included, and slaves in all but two of those states were freed by other actions. See, e.g., DAN FRIEDMAN, *THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE* 6–7 (Praeger Publishers ed., 2006) (noting that Article 24 of the Declaration of Rights in the Maryland Constitution of 1864 abolished slavery in Maryland). Slaves in those remaining two states—Kentucky and Delaware—were not emancipated until passage of the Thirteenth Amendment.

46. Robert E. Lee surrendered the Army of Northern Virginia, at Appomattox Court House, on April 9, 1865. 2 J.T. HEADLEY, *THE GREAT REBELLION: A HISTORY OF THE CIVIL WAR IN THE UNITED STATES* 596–98 (1866).

purpose.<sup>47</sup> This hortatory purpose was only the beginning, of course; the drafters clearly intended more.<sup>48</sup> They recognized that the system of slavery constituted more than legal bondage, and that the mere abolition of slavery as a legal status would be insufficient. As Professor tenBroeck observed in his seminal discussion of the Thirteenth Amendment's history, the "slavery" that the Amendment was to abolish had a three-fold meaning, only the first of which was "legally enforceable personal servitude."<sup>49</sup> The other two were part of a broader purpose than merely striking "the shackle . . . from the limbs of the hapless bondman."<sup>50</sup> They sought to address the status of "[t]he free colored person . . . [who] was only less degraded, spurned and restricted than his enslaved fellow," and to abolish "the incidents of the system which impaired and destroyed the rights of the whites."<sup>51</sup>

Thus, the phrase "involuntary servitude" was added to Section 1 of the Thirteenth Amendment to prevent evasion of the ban on slavery<sup>52</sup> by

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47. The Supreme Court addressed these points in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872):

In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel. And when hard pressed in the contest these men (for they proved themselves men in that terrible crisis) offered their services and were accepted by thousands to aid in suppressing the unlawful rebellion, slavery was at an end wherever the Federal government succeeded in that purpose. The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles.

*Id.* at 68; see also Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 179 (1951).

The Thirteenth Amendment cannot accurately be said to have accomplished nothing regarding emancipation, since slavery continued to be legal in Kentucky and Delaware until its passage. On the other hand, a cure as powerful as a constitutional amendment was surely not necessary in order to deal with the legal status of slaves in those states.

48. As two commentators have put it, the Thirteenth Amendment "was designed to challenge long-standing institutions and practices that violated its core values of personhood and dignity." Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1374 (1992).

49. tenBroek, *supra* note 47, at 179.

50. *Id.* (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1863-64)).

51. *Id.* at 180.

52. The Supreme Court recognized this broader scope in the *Slaughter-House Cases*: The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word slavery had been used.

83 U.S. at 69. Justice Harlan, in his monumental dissent in the *Civil Rights Cases*, 109 U.S. 3 (1883), reiterated the broader intent of the drafters through a series of rhetorical questions, in the course of discussing congressional power under Section 2 of the Thirteenth Amendment:

My brethren admit that [the Thirteenth Amendment] established and decreed universal *civil freedom* throughout the United States. But did the freedom thus established involve nothing

bringing slavery's "badges and incidents" within the Amendment's prohibition.<sup>53</sup>

Section 2 empowers Congress to enact "appropriate legislation" needed to achieve the purposes of Section 1.<sup>54</sup> Congress wasted no time in the peonage context,<sup>55</sup> passing the Anti-Peonage Act in 1867.<sup>56</sup> The Act abolished peonage, voided state laws that sanctioned it, and made it a crime to hold another person in "a condition of peonage."<sup>57</sup> The Act's civil successor, as currently worded, provides that "[t]he holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in . . . the United States."<sup>58</sup> Its criminal successor imposes a fine and imprisonment up to twenty years for "[w]hoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage."<sup>59</sup> Analysis of whether either of these statutory formulations applies to an involuntary individual chapter 11 bankruptcy case requires an understanding of the Supreme Court's interpretation of the original Anti-Peonage Act as well as of the Thirteenth Amendment itself.

### B. *Early Interpretation in the Supreme Court*

It took nearly forty years for the Supreme Court to hear its first peonage case,<sup>60</sup> but not nearly that long for the Court to limit the reach

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more than exemption from actual slavery? Was nothing more intended than to forbid one man from owning another as property? Was it the purpose of the nation simply to destroy the institution, and then remit the race, theretofore held in bondage, to the several States for such protection, in their civil rights, necessarily growing out of freedom, as those States, in their discretion, might choose to provide? Were the States against whose protest the institution was destroyed, to be left perfectly free, so far as national interference was concerned, to make or allow discriminations against that race, as such, in the enjoyment of those fundamental rights which by universal concession, inhere in a state of freedom?

*Id.* at 34 (Harlan, J., dissenting); *see also* *Bailey v. Alabama*, 219 U.S. 219, 241 (1911) (noting that the phrase "involuntary servitude" has a "larger meaning than slavery"). *But see* Sydney Brodie, *The Federally Secured Right to Be Free from Bondage*, 40 GEO. L.J. 367, 386 (1952) (arguing that "the terms are for all practical purposes synonymous").

53. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440–41 (1968); *Civil Rights Cases*, 109 U.S. at 35 (Harlan, J., dissenting).

54. U.S. CONST. amend. XIII, § 2.

55. Congress addressed other issues as well. The Civil Rights Act of 1871, also known as the "Ku Klux Klan Act," criminalized conspiracies to deprive any person of the equal protection or privileges and immunities of the law. Civil Rights Act of 1871, ch. 22, 17 Stat. 13. Section 2 of that Act was held unconstitutional in *United States v. Harris*, 106 U.S. 629 (1882), on the grounds that a statute reaching violence against whites was not authorized under the Thirteenth Amendment. The Court ignored the facts of the case presented, which involved violence against blacks. *Id.* at 641. The Civil Rights Act of 1875, at issue in the *Civil Rights Cases*, prohibited racial discrimination in jury selection and in the use and enjoyment of many types of public accommodations. Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

56. Ch. 187, 14 Stat. 546 (1867).

57. *Id.*

58. 42 U.S.C. § 1994 (2000).

59. 18 U.S.C. § 1581 (2000).

60. *See infra* notes 81–82 and accompanying text.

of the Thirteenth Amendment, despite the drafters' broad purposes. The Court began its curtailment with the first case that dealt with the Amendment's scope. In the *Slaughter-House Cases*, challengers to a Louisiana statute that effectively created a monopoly in the slaughterhouse business argued, *inter alia*, that the measure imposed an involuntary servitude on other butchers who were unable to use their own land for that purpose.<sup>61</sup> The Court described the Thirteenth Amendment as a "grand yet simple declaration of the personal freedom of all the human race" that seems "hardly to admit of construction."<sup>62</sup> That description was, in fact, "damning praise."<sup>63</sup> The Court construed the Amendment as primarily concerned with African slavery.<sup>64</sup> Thus, the case served as the opening salvo to decades of limited construction.<sup>65</sup>

The Court also took a restricted view of the Thirteenth Amendment's scope in the next case, which was a decade in coming. The issue presented in the *Civil Rights Cases*<sup>66</sup> fits, perhaps, more naturally and comfortably within the Thirteenth Amendment than does the property servitude argued in the *Slaughter-House Cases*.<sup>67</sup> The *Civil Rights Cases* involved the constitutionality of the first two sections of the Civil Rights Act of 1875, which provided equal access to public accommodations, such as inns and theaters, as well as to public transportation.<sup>68</sup> The case was a consolidation of five separate lower court decisions. Four involved criminal charges for refusing hotel accommodations and theater seats to blacks; the fifth was a civil suit to recover a statutory penalty from a railroad for refusal to permit a black woman to sit in the ladies' car.<sup>69</sup> The Court invalidated the statutes, finding that the Thirteenth Amendment

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61. 83 U.S. (16 Wall.) 36, 66 (1873).

62. *Id.* at 69.

63. Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 *FORDHAM L. REV.* 981, 998 (2002).

64. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 69 (noting that the "obvious purpose" of the Thirteenth Amendment was to "forbid all shades and conditions of African slavery").

65. See Azmy, *supra* note 63, at 998.

66. 109 U.S. 3 (1883).

67. Indeed, one might comfortably read the *Slaughter-House* opinion to imply that the property servitude argued therein was beneath the lofty purposes of the Amendment:

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government—a declaration designed to establish the freedom of four millions of slaves—and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.

83 U.S. (16 Wall.) at 69. That kind interpretation, however, is belied by the Court's decisions in subsequent Thirteenth Amendment cases, which proved the extent to which the *Slaughter-House* Court had placed a chokehold on the Amendment. See, e.g., *Civil Rights Cases*, 109 U.S. at 36–37 (Harlan, J., dissenting); see also Azmy, *supra* note 63, at 1007 ("[T]he *Slaughter-House Cases* and the *Civil Rights Cases* enshrined an understanding of the Thirteenth Amendment that barely resembles the richness and promise its ratifiers intended.").

68. *Civil Rights Cases*, 109 U.S. at 9.

69. *Id.* at 4–5.

“has only to do with slavery and its incidents,”<sup>70</sup> with those “incidents” rather severely limited:

Conceding the major proposition to be true, that Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theatre, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the Thirteenth Amendment.

. . . [A] long list of burdens and disabilities of a servile character . . . was presented for the purpose of showing that all inequalities and observances exacted by one man from another were servitudes, or badges of slavery . . . .

But is there any similarity between such servitudes and a denial by the owner of an inn, a public conveyance, or a theatre, of its accommodations and privileges to an individual, even though the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? . . .

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory 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 a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution.<sup>71</sup>

Thus, the *Civil Rights Cases*, coupled with the *Slaughter-House Cases*, put the Thirteenth Amendment in a vise-grip<sup>72</sup> that was not escaped for eighty years<sup>73</sup> (if in fact escape has yet been accomplished<sup>74</sup>).

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70. *Id.* at 23.

71. *Id.* at 20–22.

72. Professor Buchanan, in his monumental multipart work on the Thirteenth Amendment, described the *Civil Rights Cases* as accomplishing the “judicial emasculation” of the Thirteenth Amendment. G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 1, 332 (1974).

73. Cases decided during this period include *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896), holding that a state statute excluding blacks from railroad cars reserved for whites did not violate the Thirteenth Amendment, and *Hodges v. United States*, 203 U.S. 1, 16–17 (1906), which held that the Thirteenth Amendment did not reach the use of threats and intimidation by whites to force black workers to give up their jobs. Both of those cases continued the Court’s narrow construction of the Thirteenth Amendment, or even further narrowed it. Buchanan, *supra* note 72, at 595–96.

Professor Buchanan credited *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968), which expressly overruled *Hodges*, with accomplishing the escape: “In sustaining the constitutionality of § 1982 under the [T]hirteenth [A]mendment, the *Jones* decision resurrected the ‘badge of slavery’ concept buried by the Court in 1883 in the *Civil Rights Cases*.” Buchanan, *supra* note 72, at 845; *see also* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 22 (1995) (following the *Civil Rights Cases*, “the Thirteenth Amendment lay dormant until 1968, when the Supreme Court decided *Jones v. Alfred H. Mayer Co.*”).

These cases made the Thirteenth Amendment effectively irrelevant except in circumstances of the most overt compulsion of labor. The Court may not have believed that the Thirteenth Amendment was about economic monopolies or the reordering of “the social rights of men . . . in the community,”<sup>75</sup> but forced labor was the very “involuntary servitude” prohibited by Section 1. Both the *Slaughter-House Cases* and the *Civil Rights Cases* read the Thirteenth Amendment as a prohibition on coerced labor, which was a primary feature of slavery. Criticisms of those decisions focus not on any inaccuracy in that reading of the Thirteenth Amendment, but upon the Court’s failure to read it more broadly.<sup>76</sup>

### C. Peonage

The Court, in holding that the Thirteenth Amendment bans coerced labor, perfectly understood that one intent of the Amendment’s drafters was to create a free and open market for labor.<sup>77</sup> This purpose was expressed in statutes designed to prevent evasion of the hopes and promises of the Thirteenth Amendment by devices that effectively constituted indentured servitude.<sup>78</sup> In one variant, private employers entered labor contracts obligating a worker to repay an advance.<sup>79</sup> Another type of arrangement permitted an employer to pay a worker’s fine for some petty offense, even vagrancy, and then require the worker’s labor until the fine, along with subsequent obligations to the employer, was satisfied.<sup>80</sup>

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74. Azmy, *supra* note 63, at 998 (“The Court has never departed from the substance of its early, lofty dismissiveness. . . . Even in the modern era, the Court has balked at a substantive evaluation of the Amendment, cavalierly dismissing it as ‘simple’ or a ‘skimpy collection of words’ and rejecting any suggestion that it grants positive rights.”); Buchanan, *supra* note 72, at 626 (observing that “[d]oubts concerning the constitutionality of the badge-of-slavery theory contributed strongly to congressional refusal to rely expressly on the [T]hirteenth [A]mendment in passing the modern civil rights enactments”); Aziz Z. Huq, Note, *Peonage and Contractual Liberty*, 101 COLUM. L. REV. 351, 391 (2001) (“[U]ntil racist assumptions of black incapacity [that still] persist in the Thirteenth Amendment’s current incarnation . . . are rooted out and refuted, the Thirteenth Amendment will remain a withered and vestigial constitutional appendage.”).

75. *Civil Rights Cases*, 109 U.S. at 22.

76. See, e.g., Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 74 (1990) (characterizing the Court’s subsequent Thirteenth Amendment jurisprudence as entirely too narrow).

77. See Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438 (1989) (stating that during Congressional debates at the time “[m]any members of Congress envisioned the [A]mendment as a charter for labor freedom”). In *Pollock v. Williams*, the Supreme Court finally made this clear: “The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States.” 322 U.S. 4, 17 (1944).

78. Peonage was already established in the United States, having first appeared with the acquisition of the territory of New Mexico in 1846. Buchanan, *supra* note 72, at 597. The versions that appeared after the Civil War, however, were directed towards former slaves by a recalcitrant South. Kimi Jackson, *Farmworkers, Nonimmigration Policy, Involuntary Servitude, and a Look at the Sheepherding Industry*, 76 CHI.-KENT L. REV. 1271, 1289–90 (2000); Pamela S. Karlan, *Contracting the Thirteenth Amendment: Hodges v. United States*, 85 B.U. L. REV. 783, 808 (2005).

79. See, e.g., *Bailey v. Alabama*, 219 U.S. 219, 229–30 (1911).

80. See, e.g., *United States v. Reynolds*, 235 U.S. 133, 139–40 (1914).

In both variants, the worker's failure to complete the repayment usually resulted in incarceration.

The Anti-Peonage Act<sup>81</sup> was designed to address these devices. It did not receive Supreme Court attention until 1905, when its constitutionality was tested in *Clyatt v. United States*.<sup>82</sup> The case arose during the long years of Thirteenth Amendment desuetude and, despite the Court's quite technical reading of the statute, was the first in a series of peonage cases that ultimately experienced a greater measure of success than did other cases involving the Thirteenth Amendment.<sup>83</sup>

In *Clyatt*, two black men, Gordon and Ridley, were indebted to the firm for which they worked in Georgia.<sup>84</sup> When they went to Florida without paying their obligations, Clyatt followed them there and forced them to return with him to Georgia.<sup>85</sup> Clyatt was convicted of returning them to a condition of peonage, under statutory language that abolished "[t]he holding of any person to service or labor under the system known as peonage"<sup>86</sup> and punished anyone "who holds, arrests, returns, or causes to be held, arrested, or returned . . . any person to a condition of peonage."<sup>87</sup> The Court reversed the conviction because no evidence showed that Gordon and Ridley had been in a condition of peonage to which they could have been "returned." For that reason, the majority believed, the case should not have gone to the jury.<sup>88</sup>

Despite the result and the Court's restrictive reading of the Thirteenth Amendment,<sup>89</sup> *Clyatt* advanced the cause of peonage prosecutions in two ways. First, the Court upheld the constitutionality of the Anti-

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81. Ch. 187, 14 Stat. 546 (1867) (codified as amended in 18 U.S.C. § 1581 (2000) & 42 U.S.C. § 1994 (2000)).

82. 197 U.S. 207 (1905).

83. Buchanan, *supra* note 72, at 597.

84. 197 U.S. at 209 (Statement of the Case).

85. *Id.* Professor Soifer described the employer as a "turpentine farm" and the defendant as a "brutal white overseer." Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1950 n.140 (1987).

86. U.S. Rev. Stat. § 1990 (1878). The current version of the statute is substantially similar. See *supra* text accompanying note 58.

87. U.S. Rev. Stat. § 5526 (1878). The current version of this statute is also substantially similar. See *supra* text accompanying note 59.

88. *Clyatt*, 197 U.S. at 222. The Court was aware "that these criminal proceedings were only an excuse for securing the custody of Gordon and Ridley and taking them back to Georgia to work out a debt." *Id.* Nevertheless, in the majority's view, "[t]hat they were in debt, and that they had left Georgia and gone to Florida without paying that debt, does not show that they had been held in a condition of peonage, or were ever at work, willingly or unwillingly, for their creditor." *Id.*

Justice Harlan believed that the trial court did not err in failing to take the case from the jury: "[I]t is going very far to hold in a case like this, disclosing barbarities of the worst kind against these negroes, that the trial court erred in sending the case to the jury." *Id.* at 223 (Harlan, J., concurring).

89. In this respect, *Clyatt* was consistent with earlier cases, such as the *Civil Rights Cases*, that had construed the Thirteenth Amendment as limited to slavery and to the instances of forced labor—"involuntary servitude"—that so resembled it. Compare *Clyatt*, 197 U.S. 207, with *The Civil Rights Cases*, 109 U.S. 3 (1883). See also *Hodges v. United States*, 203 U.S. 1 (1906), *overruled by Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968); *Plessy v. Ferguson*, 163 U.S. 537 (1896).



Peonage Act under Section 2 of the Thirteenth Amendment.<sup>90</sup> Second, the Court provided the now-classic definition of “peonage,” as that word is used in the Act: “What is peonage? It may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness.”<sup>91</sup>

The next peonage case<sup>92</sup> to reach the Supreme Court, *Bailey v. Alabama*,<sup>93</sup> adopted *Clyatt*'s definition of peonage under a set of facts quite different from those in the earlier case. Whereas in *Clyatt* peonage was used as a sword, in that the criminal charges were brought against the person allegedly attempting to enforce peonage, in *Bailey* peonage was used as a shield<sup>94</sup>—the peon himself was the target of the prosecution, and he raised peonage defensively. Bailey received a \$15 advance in exchange for obligating himself to work as a farmhand for a year.<sup>95</sup> His wages were \$12 per month, but he was to receive only \$10.75, thereby working off the advance over the course of the year-long employment.<sup>96</sup>

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90. *Clyatt*, 197 U.S. at 218 (“It is not open to doubt that Congress may enforce the Thirteenth Amendment by direct legislation, punishing the holding of a person in slavery or in involuntary servitude except as a punishment for crime. In the exercise of that power Congress has enacted these sections denouncing peonage, and punishing one who holds another in that condition of involuntary servitude. . . . We entertain no doubt of the validity of this legislation . . .”).

91. *Id.* at 215–16.

92. *Hodges v. United States*, 203 U.S. 1 (1906), which arose the year after *Clyatt*, is sometimes described—inaccurately—as a peonage case. Huq, *supra* note 74, at 353 n.16. *Hodges* did not involve compulsory service to enforce repayment of a debt, however. Rather, the defendants in *Hodges*, white men, had used threats and intimidation to drive black workers from their jobs at a lumber mill, solely because of their race. 203 U.S. at 9–10. The defendants were charged with conspiracy to deprive the workers of their statutory right to make and enforce contracts to the same extent as white citizens. *Id.* at 2–3 (Statement of the Case). The Court reversed the convictions, holding that the Thirteenth Amendment did not give the federal government jurisdiction over the offenses that were charged: “[I]t was not the intent of the Amendment to denounce every act done to an individual which was wrong if done to a free man and yet justified in a condition of slavery, and to give authority to Congress to enforce such denunciation.” *Id.* at 9.

Justice Harlan, in dissent, may have created the erroneous impression that *Hodges* was about peonage, because he found support in *Clyatt* for his disagreement with the majority:

Is it consistent with the principle upon which that case [*Clyatt*] rests to say that an organized body of individuals who forcibly prevent free citizens, solely because of their race, from making a living in a legitimate way, do not infringe any right secured by the National Constitution, and may not be reached or punished by the Nation? One who is shut up by superior or overpowering force, constantly present and threatening, from earning his living in a lawful way of his own choosing, is as much in a condition of involuntary servitude as if he were forcibly held in a condition of peonage. In each case his will is enslaved, because illegally subjected, by a combination that he cannot resist, to the will of others in respect of matters which a freeman is entitled to control in such way as to him seems best.

*Id.* at 34. Although *Hodges* was not a peonage case, it did play a central role in the Supreme Court's curtailment of the Thirteenth Amendment's reach in other fact patterns. Buchanan, *supra* note 72, at 596. In any event, *Hodges* was ultimately overruled by *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968), and has been the subject of pointed criticism. See, e.g., Karlan, *supra* note 78, at 808–09.

93. 219 U.S. 219 (1911).

94. As the Supreme Court later observed in *Pollock v. Williams*, the Anti-Peonage Act “raised both a shield and a sword against forced labor because of debt.” 322 U.S. 4, 8 (1944). It can provide grounds on which prosecution rests, as was attempted in *Clyatt*, or it can provide a defense to criminal charges, as in *Bailey*.

95. *Bailey*, 219 U.S. at 229.

96. *Id.* at 230.

He left “without legal excuse”<sup>97</sup> and without repaying the advance, after working only a little more than a month. He was convicted under a state statute making it a crime for anyone, with intent to defraud, to enter into an employment contract in exchange for an advance and then to leave the employment without refunding the advance (in the absence of “just cause”).<sup>98</sup> Failure to perform the contract was prima facie evidence of fraudulent intent, which made it impossible for Bailey to testify to his lack thereof.<sup>99</sup> He was convicted and fined \$30 plus costs or, in the alternative, imprisonment at hard labor for 136 days.<sup>100</sup> He appealed, arguing, *inter alia*, that the Alabama statute violated the Thirteenth Amendment.<sup>101</sup> The Alabama Supreme Court affirmed his conviction, finding no constitutional infirmity in the state statutes.<sup>102</sup> The Supreme Court, relying on *Clyatt*’s definition of “peonage,” reversed and remanded.<sup>103</sup>

Peonage, therefore, is a type of involuntary servitude—a subset, if you will—that fits squarely within the reach of even a stingy construction of the Thirteenth Amendment.

#### D. Peonage and Bankruptcy

*Clyatt* and *Bailey*, along with the Supreme Court’s other peonage cases,<sup>104</sup> provide several analytical threads that are critical to an assess-

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97. *Id.* at 236.

98. *Id.*

99. *Id.* at 227.

100. Bailey had been incarcerated pending trial. He sought pre-trial habeas corpus on the grounds that the state statute violated the Thirteenth and Fourteenth Amendments. *Id.* at 229. The trial court denied the writ and the Alabama Supreme Court affirmed. *Id.* The United States Supreme Court, in a brief opinion by Justice Holmes, affirmed on the grounds that the case “is brought here prematurely by an attempt to take a short cut.” *Bailey v. Alabama*, 211 U.S. 452, 455 (1908). The possibility remained that the State might introduce evidence of fraud, rather than relying on the statutory presumption, with the result that the validity of the presumption would not be at issue. *Id.* at 454. Justice Harlan dissented on the grounds that the Alabama Supreme Court had considered Bailey’s constitutional arguments and had not found an unacceptable “short cut.” *Id.* at 457–58 (Harlan, J., dissenting).

101. *Bailey*, 219 U.S. at 227.

102. *Bailey v. State*, 49 So. 886, 888 (Ala. 1909).

103. *Bailey*, 219 U.S. at 242.

104. In three cases other than *Clyatt*, criminal charges were brought against perpetrators. One of those, *Hodges v. United States*, 203 U.S. 1 (1906), involved allegations that white defendants had prevented blacks from working, rather than that they had forced their victims to work involuntarily. For a discussion of *Hodges*, see Karlan, *supra* note 78. In the second case, *United States v. Kozminski*, 487 U.S. 931 (1988), the defendants were charged with holding two mentally retarded men in involuntary servitude. For a discussion of *Kozminski*, see *infra* notes 145–55 and accompanying text.

A criminal surety system was at issue in the third case, *United States v. Reynolds*, 235 U.S. 133 (1914). That system allowed a person convicted of a minor crime to contract to work for a surety in exchange for payment of those fines. *Id.* at 140. Failure to complete the service would expose the debtor to further criminal penalties. *Id.* The defendants in *Reynolds* were the sureties, who were charged with holding the debtors in a state of peonage. *Id.* at 139. The lower court found that no violation of federal law had been appropriately charged, but the Supreme Court disagreed. *Id.* at 146. Central to the Supreme Court’s conclusion was the fact that “under pain of recurring prosecutions, the convict may be kept at labor, to satisfy the demands of his employer.” *Id.* at 150. In this case, the convict-debtor faced a maximum of sixty-eight days of hard labor under his original conviction. *Id.* at 147.

ment of the constitutionality of the Bankruptcy Code as currently configured. These cases reveal the strong parallel between peonage and an involuntary petition under the new provisions of the Code, and, in addition, reveal why several of the objections to a peonage analysis of the 2005 Amendments are unsustainable.

First, these cases clearly disconnect the Thirteenth Amendment from its racial roots, at least as far as peonage is concerned.<sup>105</sup> In *Bailey*, for example, the defendant was identified as a black man, and the United States as amicus curiae noted that “[t]he statute hit[] especially, as was intended, negro laborers on farms and plantations.”<sup>106</sup> Nevertheless, the Court seemed at pains to point out that the case was not about race:

We at once dismiss from consideration the fact that the plaintiff in error is a black man. . . . The statute, on its face, makes no ra-

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After entering and defaulting under two surety agreements, he was required to labor for fourteen months and seventeen days. *Id.* at 140.

Peonage was raised as a defense to criminal charges in two cases after *Bailey*. In *Taylor v. Georgia*, the defendant received an advance of \$19.50 on a labor contract, and left the employment without repaying the advance. 315 U.S. 25, 27 (1942). He was convicted under a Georgia statute substantially similar to the Alabama statute struck down in *Bailey*. *Id.* at 29. The Supreme Court invalidated the statute, rejecting the state Supreme Court’s view that *Bailey* was distinguishable because Georgia’s statute, unlike Alabama’s, did not prevent the defendant from testifying. *Id.* at 31.

Both the facts and the state statute involved in *Pollock v. Williams*, 322 U.S. 4 (1944), were almost identical to those in *Bailey*, but the defendant had pleaded guilty to the criminal charge. The state court thought that the constitutional infirmity identified by *Bailey* was the statutory presumption of fraud, and that no constitutional question arose when the statutory presumption played no role. *Id.* at 7. The Supreme Court rejected that argument, in large part because of the state’s persistence in passing such statutes:

[W]e cannot doubt that the presumption provision had a coercive effect in producing the plea of guilty. . . . Of course the function of the *prima facie* evidence section is to make it possible to convict where proof of guilt is lacking. No one questions that we clearly have held that such a presumption is prohibited by the Constitution and the federal statute. The Florida Legislature has enacted and twice re-enacted it since we so held. We cannot assume it was doing an idle thing. Since the presumption was known to be unconstitutional and of no use in a contested case, the only explanation we can find for its persistent appearance in the statute is its extra-legal coercive effect in suppressing defenses. It confronted this defendant. There was every probability that a law so recently and repeatedly enacted by the legislature would be followed by the trial court, whose judge was not required to be a lawyer. The possibility of obtaining relief by appeal was not bright, as the event proved, for Pollock had to come all the way to this Court and was required, and quite regularly, to post a supersedeas bond of \$500, a hundred times the amount of his debt. He was an illiterate Negro laborer in the toils of the law for the want of \$5. Such considerations bear importantly on the decision of a prisoner even if aided by counsel, as Pollock was not, whether to plead guilty and hope for leniency or to fight. It is plain that, had his plight after conviction not aroused outside help, Pollock himself would have been unheard in any appellate court.

*Id.* at 15–16.

105. A slight hint of this decoupling can be found in the *Slaughter-House Cases* when the Court noted that the Thirteenth Amendment applies equally to all races, even “though the party interested may not be of African descent.” 83 U.S. (16 Wall.) 36, 72 (1872). But the Court also read the Amendment restrictively by limiting it to the prohibition of badges and incidents of slavery, and then defining that concept narrowly. See Karlan, *supra* note 78, at 783 (“Although the Court was unwilling to say, given the Amendments’ sweeping language, ‘that no one else but the negro can share in this protection,’ the Court thought that ‘any fair and just construction’ of the Amendments had to rest on an understanding of the centrality of the condition of African Americans.”).

106. Brief for the United States as Amici Curiae Supporting Appellant, *Bailey v. Alabama*, 219 U.S. 219 (1911) (No. 300).

cial discrimination, and the record fails to show its existence in fact. No question of a sectional character is presented, and we may view the legislation in the same manner as if it had been enacted in New York or in Idaho. Opportunities for coercion and oppression, in varying circumstances, exist in all parts of the Union, and the citizens of all the States are interested in the maintenance of the constitutional guarantees, the consideration of which is here involved.<sup>107</sup>

Although *Bailey*'s severing of peonage from the Thirteenth Amendment's racial roots may have been "extraordinarily disingenuous," as Professor Karlan has charged,<sup>108</sup> one purpose of the Amendment's drafters was to create a system of free labor.<sup>109</sup> That purpose, of course, was born out of slavery, as the drafters surveyed slavery and other types of involuntary servitude along with their accompanying "badges and incidents," but the purpose could not be achieved without recognizing rights that transcend race. Whites were also hurt by the system of slavery, albeit in quite different ways than the blacks who suffered actual enslavement, and the Amendment's drafters wanted a complete obliteration of the system and its effects on both blacks, whether previously enslaved or free, and whites.<sup>110</sup> Thus, despite the Thirteenth Amendment's racial roots, the fact remains that the Amendment's anti-peonage application is, post-*Bailey*, as colorblind<sup>111</sup> as is bankruptcy itself.

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107. *Bailey*, 219 U.S. at 231.

108. Karlan, *supra* note 78, at 808 n.158. The Court recognized that the "poor and ignorant" were the most likely victims of the Alabama statutory scheme, *Bailey*, 219 U.S. at 245, but apparently turned a blind eye to the fact that statutes like these were part of the Black Codes, targeted almost exclusively at blacks. For a discussion of whether *Bailey* can be taken at face value on this point, however, see 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, 702-03 (1982).

109. According to *Bailey*, the phrase "involuntary servitude" gives the Thirteenth Amendment a "larger meaning than slavery." 219 U.S. at 241 (quoting *Slaughter-House Cases*, 83 U.S. at 69). As the court noted:

The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude.

*Id.*; see also sources cited *supra* note 67.

110. See Buchanan, *supra* note 72, at 21; James H. Haag, Comment, *Involuntary Servitude: An Eighteenth-Century Concept in Search of a Twentieth-Century Definition*, 19 PAC. L.J. 873, 879-80 (1988). As Professor Schmidt observed, "Some of the energy that gathered behind peonage reform and distinguished it from other efforts to improve the status of blacks stemmed from the tendency of peonage to escape racial boundaries. . . . The tendency of peonage to victimize whites as well as blacks helped to pique the sympathetic imagination of Southern reformers." Schmidt, *supra* note 108, at 658. According to Professor Amar, Section 1 of the Thirteenth Amendment "is not logically tied to race; it protects persons of all races against slavery and involuntary servitude." Akhil Reed Amar, Comment, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 156 (1992). The Supreme Court, however, has always been cognizant of the connections between slavery and race, and that "race-based oppression [is] a unique badge and incident of slavery that may be specially targeted and punished." *Id.*

111. "While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag." *Bailey*, 219 U.S. at 240-41; see also *Pollock v. Williams*, 322 U.S. 4, 11 (1944) (The evil of

Secondly, these cases reject the notion that failure to repay debt can be criminalized so that it falls under the Thirteenth Amendment's exception for "punishment for crime whereof the party shall have been duly convicted."<sup>112</sup> The Court found in *Bailey*, for example, that the "natural and inevitable effect" of the statute at issue was "to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt."<sup>113</sup> As so understood, the statute violated the Thirteenth Amendment<sup>114</sup> and the Anti-Peonage Act, despite the constitutional exception for criminal sanctions:

The Thirteenth Amendment prohibits involuntary servitude except as punishment for crime. But the exception, allowing full latitude for the enforcement of penal laws, does not destroy the prohibition. It does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other. The state may impose involuntary servitude as a punishment for crime, but it may not 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.<sup>115</sup>

Finally, these cases make it clear that the voluntariness with which a debtor incurs the debt, or enters into the contract requiring service, is irrelevant to a determination of involuntary servitude. Before the earliest of the peonage cases, the Court in *Robertson v. Baldwin*<sup>116</sup> flirted with the idea that voluntariness precludes application of the Thirteenth Amendment. *Robertson* dealt with the constitutionality of a statute, passed in 1790, providing that a seaman who breached a contract to serve during a voyage could be returned, by force, to complete the promised performance.<sup>117</sup> One of the two justifications given by the majority in finding no violation of the Thirteenth Amendment was that involuntary servitude could not result when the seaman voluntarily agreed to the service:

Does the epithet "involuntary" attach to the word "servitude" continuously, and make illegal any service which becomes involuntary

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peonage is "neither sectional nor racial."); *Hodges v. United States*, 203 U.S. 1, 17 (1906) ("Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon are as much within its compass as slavery or involuntary servitude of the African."). Professor Buchanan noted that "the trend of modern judicial authority is to bring protection of non-racial classes within the ambit of the badge of slavery concept." Buchanan, *supra* note 72, at 1076. As far as peonage is concerned, however, the trend was established at the outset, in the earliest cases to reach the Supreme Court.

112. U.S. CONST. amend. XIII.

113. 219 U.S. at 238.

114. The Court's finding of unconstitutionality under the Thirteenth Amendment made consideration of Bailey's Fourteenth Amendment argument unnecessary. *Id.* at 245.

115. *Id.* at 243-44; *see also Pollock*, 322 U.S. at 18 ("Whatever of social value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service. This congressional policy means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor.").

116. 165 U.S. 275 (1897).

117. *Id.* at 277-78.

at any time during its existence, or does it attach only at the inception of the servitude, and characterize it as unlawful because unlawfully entered into? If the former be the true construction, then no one, not even a soldier, sailor or apprentice, can surrender his liberty, even for a day, and the soldier may desert his regiment upon the eve of battle, or the sailor abandon his ship at any intermediate port or landing, or even in a storm at sea, provided only he can find means of escaping to another vessel. If the latter, then an individual may, for a valuable consideration, contract for the surrender of his personal liberty for a definite time and for a recognized purpose, and subordinate his going and coming to the will of another during the continuance of the contract,—not that all such contracts would be lawful, but that a servitude which was knowingly and willingly entered into could not be termed involuntary.<sup>118</sup>

Although the majority did not expressly say that it was adopting the latter position,<sup>119</sup> it clearly did so, as Justice Harlan's dissent charged.<sup>120</sup> He objected that the Court's reasoning would permit individuals to enslave themselves by voluntarily entering into such a contract.<sup>121</sup> Nor could any such contract be saved on the grounds that it was for a particular duration,<sup>122</sup> because the same justification would permit such a contract for any length of time, including a lifetime.<sup>123</sup>

The Court was again confronted with the question of voluntariness in *Clyatt*, but came to a different answer:

Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor volun-

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118. *Id.* at 280–81.

119. The Court, after posing these questions, said that “even if the contract of a seaman could be considered within the letter of the [T]hirteenth [A]mendment, it is not, within its spirit, a case of involuntary servitude.” *Id.* at 281.

120. As Justice Harlan expressed it,

The decision just made proceeds upon the broad ground that one who voluntarily engages to serve upon a private vessel in the capacity of a seaman for a given term, but who, without the consent of the master, leaves the vessel when in port before the stipulated term is ended and refuses to return to it, may be arrested and held in custody until the vessel is ready to proceed on its voyage, and then delivered against his will, and if need be by actual force, on the vessel to the master.

*Id.* at 291 (Harlan, J., dissenting).

121. *Id.* at 292 (“A condition of enforced service, even for a limited period, in the private business of another, is a condition of involuntary servitude.”). Justice Harlan's view is consistent with that taken many years earlier by a lower court confronted with the padrone system. Under that system, which was outlawed by legislation passed in 1874, 18 Stat. 251 (1874), young Italian boys were brought to the United States to work as street musicians for a term of years. Their wages were sent to their parents, who consented to the arrangement, and physical brutality was usually not involved. Jackson, *supra* note 78, at 1289. Even so, the court in *United States v. Ancarola*, 1 F. 676, 683–84 (C.C.S.D.N.Y. 1880), found a violation of the statute. The consent of the boys themselves was a “sham” because of their age. *Id.* at 683.

122. The contract at issue in *Robertson* was not for a specified term; rather, it obligated the seamen to serve for the duration of the voyage. *Robertson v. Baldwin*, 165 U.S. 275, 288 (1897) (Harlan, J., dissenting).

123. *See id.* at 295.

tarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service. . . . That which is contemplated by the statute is compulsory service to secure the payment of a debt.<sup>124</sup>

Thus, the majority in *Clyatt* aligned itself with Justice Harlan's dissent in *Robertson*,<sup>125</sup> at least as far as the question of voluntariness is concerned. When *Bailey* took the same position, therefore, it did not break new ground in this regard. Rather, it might be described as having solidified the Court's conclusion that the voluntariness with which debt is incurred does not strip a debtor of whatever Thirteenth Amendment protection might otherwise be available:

The fact that the debtor contracted to perform the labor which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the statute. The full intent of the constitutional provision could be defeated with obvious facility if, through the guise of contracts under which advances had been made, debtors could be held to compulsory service. It is the compulsion of the service that the statute inhibits, for when that occurs the condition of servitude is created, which would be not less involuntary because of the original agreement to work out the indebtedness. The contract exposes the debtor to liability for the loss due to the breach, but not to enforced labor.<sup>126</sup>

The counterargument based on freedom of contract, as espoused by Justice Holmes in his *Clyatt* dissent,<sup>127</sup> has not carried the day.

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124. 197 U.S. 207, 215–16 (1905).

125. See *supra* text accompanying note 120. Justice Harlan's dissent in *Robertson* has been described as "exemplary judicial craftsmanship" that "hoists the majority on its own two-pronged peltard," David Wiese, *Court-Ordered Support and the Thirteenth Amendment's Prohibition Against Imposition of Involuntary Servitude*, 11 J. CONTEMP. LEGAL ISSUES 419, 425 n.28 (2000), and as "a masterpiece of destructive criticism," Schmidt, *supra* note 108, at 662 n.58 (quoting N.Y. TIMES, June 4, 1911, § 5, at 2).

126. *Bailey v. Alabama*, 219 U.S. 219, 242 (1911). Later cases are consistent. See *Pollock v. Williams*, 322 U.S. 4, 24 (1944) (although a state may deal with fraud by laborers who take advances with no intent to continue working, "[i]t may not directly or indirectly command involuntary servitude, even if it was voluntarily contracted for"); *United States v. Reynolds*, 235 U.S. 133, 144 (1914) ("Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude.").

127. Justice Holmes argued that statutes like Alabama's protect the sanctity of contract:

The Thirteenth Amendment does not outlaw contracts for labor. That would be at least as great a misfortune for the laborer as for the man that employed him. For it certainly would affect the

Under these authorities, the fact that debts were voluntarily incurred does not strip debtors of Thirteenth Amendment protections in the bankruptcy context, despite suggestions (or, perhaps more accurately, mere hints) by both courts<sup>128</sup> and commentators<sup>129</sup> to the contrary. In fairness, however, one must acknowledge that the voluntariness arguments to date have been somewhat different. One such argument, made in defense of both mandatory and involuntary chapter 13,<sup>130</sup> is that debtors who choose to file bankruptcy, and are steered into a chapter 13, cannot then object that rules requiring them to devote their future income to repayment of their debts present Thirteenth Amendment prob-

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terms of the bargain unfavorably for the laboring man if it were understood that the employer could do nothing in case the laborer saw fit to break his word.

*Bailey*, 219 U.S. at 246 (Holmes, J., dissenting). This position is not without some logic, of course. See Schmidt, *supra* note 108, at 656, 711–12. In fact, Justice Holmes’s argument bears a great deal of similarity to arguments made, in a number of contexts, by proponents of an economic analysis of bankruptcy law. See, e.g., *In re Wright*, 492 F.3d 829, 830 (7th Cir. 2007) (asserting that creditors pass losses in bankruptcy along to solvent borrowers); Eisenberg, *supra* note 9, at 981–83 (arguing that more generous discharge provisions would result in higher credit costs).

128. See, e.g., *United States v. Redovan*, 656 F. Supp. 121, 129 (E.D. Pa. 1986) (stating, as one reason why a scholarship contract obligating a medical student to work in an underserved location did not violate the Thirteenth Amendment, that the student had entered the contract voluntarily, with knowledge of the conditions); *State v. Williams*, 10 S.E. 876, 877 (S.C. 1890) (stating that “every one who undertakes to serve another in any capacity parts for a time with that absolute liberty which it is claimed that the constitution secured to all, but, as he does this voluntarily, it cannot be properly said that he is deprived of any of his constitutional rights”).

A more recent decision, *In re Krohn*, 87 B.R. 926 (Bankr. N.D. Ohio 1988), *aff’d*, 886 F.2d 123 (6th Cir. 1989), has also been cited for that proposition. See Keach, *supra* note 19, at 491 n.56. The case does not really say that, however. In *Krohn*, the bankruptcy court dismissed a debtor’s chapter 7 petition *sua sponte* under § 707(b), as then phrased, for “substantial abuse.” 87 B.R. at 928–30. The debtor, who was ineligible for chapter 13 because he exceeded the debt limits under § 109(e), argued on appeal that denial of a chapter 7 discharge would place him in involuntary servitude to his creditors. *Id.* at 931. The compulsion that is necessary under the Thirteenth Amendment rested, according to the debtor, in the fact that some of his credit card issuers had encouraged him to use the cards. *Id.* The district court’s failure to be swayed by the debtor’s arguments is hardly a surprise:

[E]ncouragement given to the debtor by creditors must be distinguished from compulsion by force, coercion or imprisonment. The liability for payment of the escalating debt was *voluntarily* assumed by the debtor, and he alone is responsible for the decisions which resulted in his filing for relief under Chapter 7.

Accordingly, this court finds that the debtor’s rights under the Thirteenth Amendment to the United State [sic] Constitution have not been violated because the debtor voluntarily and without compulsion incurred the debt which he seeks to have discharged.

*Id.* This statement cannot be fairly read to mean that Thirteenth Amendment arguments are unavailable to a debtor who voluntarily incurred the debt at issue. *Krohn* was discussing what constitutes sufficient compulsion for Thirteenth Amendment purposes, and few would quarrel with the court’s conclusion.

Regardless, the debtor apparently abandoned his Thirteenth Amendment argument after the district court’s decision. No mention was made of it by the Sixth Circuit on appeal, see *In re Krohn*, 886 F.2d 123, and criticisms of both the district and circuit-level decisions in *Krohn* have focused on their interpretations of what constituted “substantial abuse.” See, e.g., J. Kaz Espy, Comment, *Chapter 7 Bankruptcy and Section 707(b): Should the Subjective “Substantial Abuse” Standard Be Replaced by an Objective “Means-Testing” Formula?*, 56 MERCER L. REV. 1385, 1400–05 (2005).

129. Cf. Klee, *supra* note 23, at 447–49 (noting, as one reason why a proposal for compulsory individual debt restructuring did not raise Thirteenth Amendment issues, that “[n]obody forced the debtor to incur the debts”).

130. See *supra* text accompanying note 9.



lems.<sup>131</sup> The corollary of this observation is that involuntary servitude concerns cannot arise as long as the debtor is free to dismiss the bankruptcy case, even though the debtor's earnings are available to creditors in bankruptcy.<sup>132</sup> Another, closely related, argument is that denial of a discharge to debtors who fail to repay their obligations when they could do so poses no Thirteenth Amendment issue.<sup>133</sup> Both of these points are well taken, although the former argument falls away in the context addressed by this Article—namely, the filing of an involuntary chapter 11 under statutory provisions making post-petition wages property of the estate and restricting dismissal. The latter argument rests on the fact that debtors have no constitutional right to a discharge in bankruptcy.<sup>134</sup> Thus, provisions barring chapter 7 to individuals who can repay some portion of their debts are not unconstitutional.<sup>135</sup> Similarly, debtors can be required, as a condition of discharge, to repay their debts out of their future income, under a multi-year plan, without constitutional implications.<sup>136</sup> Debtors who object, even in an involuntary case, can protect their income stream by choosing to forego the discharge.<sup>137</sup> One might surmise in an involuntary case, however, that the debtor prefers not to be in bankruptcy at all and, therefore, is not interested in a discharge. Dismissal of the case, and the resulting denial of discharge, is not an unpleasant sanction to such a debtor.

Peonage requires coercion, as *Bailey* said: “The essence of the thing is compulsory service in payment of a debt.”<sup>138</sup> In virtually all of the peonage cases, the victimized debtor was physically compelled to labor or, in the alternative, face imprisonment that might itself require hard labor. That was *Bailey's* fate.<sup>139</sup> The Court had no reason to address the question of what, exactly, constitutes the requisite level of coercion, given that the coercion factually presented was about as clear as it could possibly get. Many of the subsequent peonage cases have also involved coer-

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131. Ayers, *supra* note 23, at 726; Eisenberg, *supra* note 9, at 988.

132. Irving A. Breitowitz, *New Developments in Consumer Bankruptcies: Chapter 7 Dismissal on the Basis of “Substantial Abuse,”* 60 AM. BANKR. L.J. 33, 40–41 (1986). In chapter 13, a debtor may convert to chapter 7 “at any time.” 11 U.S.C. § 1307(a) (2000).

133. Klee, *supra* note 23, at 447 n.28. This was, of course, the argument for why a “means test” in bankruptcy would not violate the Thirteenth Amendment. *But see* Ronald J. Mann, *Bankruptcy and the Entitlements of the Government: Whose Money Is It Anyway?*, 70 N.Y.U. L. REV. 993, 1052 n.216 (1995) (“Those who find a discharge inappropriate should review the conditions for debtors in England during the nineteenth century and consider whether they can imagine toleration of those conditions in this country.”).

134. *United States v. Kras*, 409 U.S. 434, 446 (1973). *But see* Gross, *supra* note 21, at 165–66 (arguing that requiring individual debtors to repay debts out of their future income creates an unconstitutional condition).

135. Edith H. Jones & James I. Shepard, *Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law*, in NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 21–23 (1997) [hereinafter Jones-Shepard, *Dissent*].

136. Eisenberg, *supra* note 9, at 988–89. *Contra* Gross, *supra* note 21, at 188–89.

137. Klee, *supra* note 23, at 447 n.28.

138. 219 U.S. 219, 242 (1911).

139. *Id.* at 236.

cion every bit as undeniable.<sup>140</sup> Not all cases are as factually clear cut, however, and a disagreement on this question developed in the lower courts.<sup>141</sup> The Supreme Court finally addressed it in *United States v. Kozminski*, deciding that only physical or legal coercion will suffice.<sup>142</sup> Defendants were convicted under 18 U.S.C. §§ 241 and 1584<sup>143</sup> of holding two mentally retarded men in involuntary servitude<sup>144</sup> and those convictions were affirmed by a divided panel of the Sixth Circuit.<sup>145</sup> After rehearing en banc, however, the circuit reversed the convictions on the grounds that the lower court had used too broad a definition of “involuntary servitude,” one that would bring “general psychological coercion” within the reach of the statutes.<sup>146</sup>

The Supreme Court stated that the task before it on appeal was to determine the scope of “involuntary servitude” for purposes of criminal

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140. Two of the other cases in which a defendant successfully argued peonage as a shield against criminal prosecution, *Taylor v. Georgia*, 315 U.S. 25 (1942), and *Pollock v. Williams*, 322 U.S. 4 (1944), presented virtually identical facts. For a discussion of *Taylor* and *Pollock*, see *supra* note 104.

Peonage arguments were less successful in two other cases in which peonage was used as a sword. The different outcomes are not explained by differences in the nature of the coercion, however. In *Clyatt*, the defendant was convicted of peonage for forcibly returning two black men to Georgia, to work for the firm to which they were indebted. See *supra* text accompanying notes 82–91. The Supreme Court overturned the conviction not because the defendant’s actions were insufficiently coercive, but because he was charged with “returning” the men to a condition of involuntary servitude and the evidence did not show that they had been in such a condition previously. *Id.* In *Hodges v. United States*, 203 U.S. 1 (1906), overruled by *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968), the Court overturned criminal convictions, under the Civil Rights Act of 1866, of whites who used threats and intimidation to force blacks to give up their jobs. The Court found, in effect, that the Thirteenth Amendment only prevents the use of force to make someone work, not to make someone stop working. *Id.* at 11–12. *Hodges* is not inconsistent with *Bailey*, however, as far as the requisite level of coercion is concerned. See *Bailey*, 219 U.S. at 236.

141. Since physical coercion was so clearly present in the early peonage cases, some courts, unsurprisingly, required it in order to sustain a finding of peonage. See, e.g., *United States v. Shackney*, 333 F.2d 475, 487 (2d Cir. 1964); *United States v. Ancarola*, 1 F. 676, 683–84 (C.C.S.D.N.Y. 1880) (finding, in case dealing with padrone system, that physical control was exercised because affected boys lacked a means of escape). Other courts were more flexible, finding coercion even in the absence of physical compulsion. See, e.g., *United States v. Mussry*, 726 F.2d 1448, 1453 (9th Cir.), cert. denied, 469 U.S. 855 (1984) (finding that denial of a deeply desired reward, or other types of psychological pressure, might suffice).

142. 487 U.S. 931, 954 (1988).

143. Section 241 imposed criminal penalties when “two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same.” 18 U.S.C. § 241 (1988). Section 1584, as then worded, authorized punishment of “[w]hoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude any other person for any term.” *Id.* § 1584. Both of these provisions, as currently codified, are substantially the same. See 18 U.S.C. §§ 241, 1584 (2000 & Supp. 2005).

144. *Kozminski*, 487 U.S. at 939. The men worked on defendants’ farm, often seventeen hours a day, originally for \$15 per week and later for no pay. *Id.* at 935. Defendants kept them there by subjecting them to physical and verbal abuse for not doing their work, discouraging them from leaving, bringing them back when they did leave, and threatening to have one of them institutionalized if he tried to leave. *Id.* In trying to persuade the jury that defendants were guilty, the government relied not only on the physical threats but also argued that defendants had brainwashed the men and made them “psychological hostages.” *Id.* at 936.

145. *United States v. Kozminski*, 821 F.2d 1186, 1189 (6th Cir. 1987).

146. *Id.* at 1193.

prosecution under §§ 241 and 1584,<sup>147</sup> and it noted the division of authority on the question.<sup>148</sup> The issue was not actually so limited, however. The Court noted that § 241 prohibited conspiracies to interfere with constitutional rights, which would include the Thirteenth Amendment's prohibition of involuntary servitude.<sup>149</sup> Defendants had been charged with conspiring to violate the Thirteenth Amendment, so the Court had to decide the scope of the Amendment itself.<sup>150</sup>

The Court looked first to the exception in the Amendment for criminal punishment, and discerned from it that the drafters "thought involuntary servitude includes at least situations in which the victim is compelled to work by law."<sup>151</sup> The Court then deduced, from the fact that the Amendment was intended to prohibit conditions "akin to African slavery"<sup>152</sup> and from the lack of a state action limitation, "an intent to prohibit compulsion through physical coercion."<sup>153</sup> Those conclusions were confirmed for the Court by a review of prior decisions, every one of which involved a situation in which "the victim had no available choice but to work or be subject to legal sanction."<sup>154</sup> The Constitution's guarantee of freedom from involuntary servitude, therefore, does not prohibit compulsion of labor by means other than physical coercion or legal sanction—means such as psychological coercion.<sup>155</sup>

Bankruptcy law is coercive in many ways, as is debtor-creditor law generally.<sup>156</sup> Under *Kozminski's* definition of the level of coercion necessary for involuntary servitude, however, these aspects of compulsion do

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147. *Kozminski*, 487 U.S. at 939.

148. *Id.* at 938–39. The cases cited by the Court included *United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964), and *United States v. Mussry*, 726 F.2d 1448 (9th Cir.), *cert. denied*, 469 U.S. 855 (1984). They are discussed in note 141, *supra*.

149. *Kozminski*, 487 U.S. at 940.

150. *Id.* at 940–42.

151. *Id.* at 942.

152. *Id.* (quoting *Butler v. Perry*, 240 U.S. 328, 332–33 (1916)).

153. *Id.*

154. *Id.* at 942–43. That review included all of the Court's peonage cases—*Clyatt, Bailey, Pollock, Taylor*, and *Reynolds*.

155. *Kozminski*, 487 U.S. at 944. The Court read § 1584 similarly. *Id.* at 944–48. Although the Court was defining the scope of the Thirteenth Amendment itself, the opinion interpreted the statutes "[a]bsent change by Congress." *Id.* at 952. This was an implicit recognition that Congress has the power, under Section 2 of the Thirteenth Amendment, to pass statutes that reach more broadly than the Amendment itself. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) ("Whether or not the Amendment *itself* did any more than [abolish slavery and establish universal freedom]—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed 'Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*'" (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883))).

156. Professor Gross has discussed the coerciveness of dunning letters, high interest rates, and creditors' rights of self-help repossession, and the legal restrictions designed to curb the worst excesses by creditors. Gross, *supra* note 21, at 195–96. Garnishment, which is certainly one of the most coercive remedies available to creditors, is also subject to limitations. See G. Ray Warner, *Garnishment Restrictions and the Involuntary Chapter 11: Rethinking Kokoszka in a Means Test World*, 13 AM. BANKR. INST. L. REV. 733, 733 (2005). For a discussion of the interaction between garnishment and the post-2005 Bankruptcy Code, see *id.*

not rise to the level of peonage. For example, the infamous “means test,”<sup>157</sup> which was imposed by the 2005 Amendments in revisions to § 707(b), does not carry a constitutional infirmity. It closes the chapter 7 door to individual debtors able to repay a certain amount of consumer debts, and restricts them to a choice between filing chapter 13 (if they are eligible) and chapter 11, but it does not subject debtors to the sort of compulsion the Thirteenth Amendment contemplates.<sup>158</sup> Similarly, making future income property of the estate, and conditioning the availability of discharge on the debtor’s payment of the requisite minimum to creditors out of that stream of income,<sup>159</sup> does not constitute a threat of physical or legal coercion.<sup>160</sup>

The situation with which this Article is concerned is different, however—namely, a case involuntarily commenced under a chapter that does not permit ready dismissal by the debtor and that requires the commitment of future income to a plan.<sup>161</sup> This case is not saved from any constitutional infirmity by the fact that the debtor chose to file bankruptcy. Nor is it saved by pointing to the debtor’s right to dismiss. This case is finally possible, given the 2005 Amendments to chapter 11, and it poses the constitutional question that Congress evaded (or presumed, depending upon your point of view) in the 1970s.

This involuntary chapter 11 case permits creditors to reach an individual debtor’s future income without the debtor’s consent or cooperation. It is, in essence, the bankruptcy version of garnishment. The two cases seem constitutionally indistinguishable,<sup>162</sup> and if garnishment is constitutional then the involuntary chapter 11 case would seem to be as well.<sup>163</sup> And the question of garnishment’s constitutionality is readily an-

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157. Under the so-called means test, a chapter 7 case is dismissed as presumptively an abuse of bankruptcy if the debtor is determined, under a mechanical mathematical formula, to be able to pay a designated minimum to creditors each month. For a discussion of the means test, see Wedoff, *supra* note 14.

158. Constitutional infirmity is also avoided because the debtor foreclosed from using chapter 7 may choose, voluntarily, to file under another chapter. *In re Higginbotham*, 111 B.R. 955, 963 (Bankr. N.D. Okla. 1990) (“[F]ears of involuntary servitude are absolutely unfounded so long as the bankruptcy petition itself, under whatever chapter, is filed by the debtor and not by his creditors.”).

159. These are features of chapter 13. A debtor’s post-petition income is property of the estate. 11 U.S.C. § 1306(a)(2) (2000). Discharge is conditioned on performance of the plan, *id.* § 1328(a) (or at least part of it, under limited circumstances, *id.* § 1328(b)), which cannot be confirmed unless a required minimum is paid to creditors. *Id.* § 1325(a)(4)–(5).

160. Breitowitz, *supra* note 132, at 40–41; Klee, *supra* note 23, at 449 n.28. *But see* Countryman, *supra* note 9, at 827. It bears mention, however, that lack of constitutional infirmity does not equate with wise policy.

161. See *supra* text accompanying notes 26–34.

162. See Ayer, *supra* note 15, at 375; Breitowitz, *supra* note 132, at 41 n.183.

163. A different but related question is whether federal restrictions on garnishment apply in bankruptcy cases. Professor Warner discussed that question, and concluded that federal statutes limiting the amount of a debtor’s wages that may be garnished apply to bankruptcy courts, thus limiting the provisions that are permissible under the plan. See generally Warner, *supra* note 156.

swered: no constitutional problems are found in the fact that a debtor's wages are available to creditors,<sup>164</sup> as long as due process is observed.<sup>165</sup>

Involuntary chapter 11 is, in fact, constitutionally indistinguishable from garnishment if the bankruptcy court confirms a plan that merely designates the amount and timing of payments to be made to creditors. Such a plan simply sets out the legal rights of the parties;<sup>166</sup> it is not made constitutionally objectionable by the fact that the debtor's post-petition earnings are the only source for the payments, given the fact that such earnings are property of the individual debtor's chapter 11 estate.

But what becomes of the debtor, involuntary to the last, who is interested in the ultimate defiance (and is in a position to pursue it<sup>167</sup>)? If the debtor refuses to cooperate with this chapter 11, under which creditors are trying to seize post-petition wages, one alternative for the court is conversion of the case to chapter 7.<sup>168</sup> Involuntary cases are permitted under chapter 7,<sup>169</sup> however, and a creditor who preferred it could have chosen it in the first place. Thus, one must assume that the creditor had a reason for choosing to file an involuntary chapter 11 case instead. The most likely reason is that the debtor has more income (or income-producing potential) than current assets, and the only bankruptcy proceeding permitting creditors to reach that income, without the debtor's acquiescence, is chapter 11.<sup>170</sup> Income is accessible outside of bankruptcy via garnishment, however, so the creditor must have had a reason for

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164. *Cf. Vickroy v. Rockwell Int'l Corp.*, 1996 U.S. App. LEXIS 29479, at \*3 (9th Cir. Nov. 5, 1996) (holding debtor not subjected to involuntary servitude when he chose to continue working while employer garnished his wages); *Sibley v. U.S. Dep't of Educ.*, 913 F. Supp. 1181, 1189 n.8 (N.D. Ill. 1995) (finding federal employee's argument that a salary offset for repayment of student loans violated the Thirteenth Amendment to be "patently meritless").

165. Specifically, prejudgment garnishment requires notice and a hearing, *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 611 (1975); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 342 (1969), unless extraordinary circumstances justify the use of summary procedures. *Connecticut v. Doehr*, 501 U.S. 1, 7-8 (1991). For a discussion of due process issues raised by postjudgment garnishment, see *Diana Gribbon Motz & Andrew H. Baida, The Due Process Rights of Postjudgment Debtors and Child Support Obligors*, 45 MD. L. REV. 61 (1986).

166. Section 1141(a) provides that "the provisions of a confirmed plan bind the debtor . . . and any creditor," as well as other entities. 11 U.S.C. § 1141(a) (2005).

167. A debtor who needs to continue working in order to support a family, or to improve the quality of his or her life, may be faced with hard choices. Having to choose between unattractive alternatives, however, does not constitute the requisite "coercion."

The obligation to pay one's debts may, however, coerce some debtors to work more than they would otherwise want to or to take jobs they would prefer not to take. If a debtor wants to improve his lifestyle or his family's standard of living, either now or in the near future, he may be "forced" to earn more money now to pay off his creditors. To do this, he may have to work more or work in more remunerative but less enjoyable employment. This, however, is hardly the sort of coercion that justifies excusing debtors because of concerns about involuntary servitude.

Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 445-46 (1993); *cf. Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 998-1000 (3d Cir. 1993) (holding high school students required to perform community service as a condition on graduation not coerced within the meaning of the Thirteenth Amendment, as they could choose to go to private school, get a high school equivalency diploma, or forego a diploma altogether).

168. 11 U.S.C. § 1112(a).

169. *Id.* § 303.

170. See Warner, *supra* note 156, at 735.

preferring bankruptcy's collective proceeding over an individualistic garnishment.<sup>171</sup> Conversion of the case to chapter 7, therefore, is not a response that creditors are likely to welcome.

Another alternative for a court faced with a recalcitrant debtor is dismissal of the case, leaving the debtor and creditors to their nonbankruptcy rights. These rights include garnishment, of course, so dismissal of the case will not save the debtor's post-petition wages.<sup>172</sup> (If there are any, that is. Creditors are helpless to prevent the debtor from frustrating a garnishment by choosing not to work.<sup>173</sup>) Dismissal, of course, allows a debtor to obtain, through recalcitrance, a result that the Bankruptcy Code does not grant as a matter of right. A bankruptcy court might be understandably reluctant to permit a debtor to turn bankruptcy into an empty shell and to stymie his or her creditors so neatly.

But an even more serious situation arises, because the debtor's refusal may be seen as an affront to the court itself, and federal courts are not known to take such affronts lightly. Recall that creditors have a right to propose a plan of reorganization,<sup>174</sup> and confirmation of that plan constitutes an order of the court.<sup>175</sup> If the plan merely obligates the debtor to make payments to creditors out of future earnings,<sup>176</sup> an order confirming that plan will be violated by a debtor who refuses to cooperate in making the payments,<sup>177</sup> but it will not be violated by a debtor who simply chooses not to earn anything. In either case, the debtor has effectively rendered the bankruptcy fruitless and pointless. Such an affront to the court's authority is not addressed by conversion or dismissal.

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171. *Id.*

172. If, as Professor Warner discussed, creditors are able to reach a greater percentage of the debtor's wages in bankruptcy than could be reached outside of bankruptcy, under garnishment's federal limitations, then the debtor would prefer to be out of bankruptcy in order to save the additional portion. *See id.* That may explain why creditors chose to file an involuntary bankruptcy case in the first place.

173. *Beltran v. Cohen*, 303 F. Supp. 889, 893 (N.D. Cal. 1969) (holding that a statute permitting levy on a debtor's wages without allowing any exemptions does not violate Thirteenth Amendment because the debtor may choose not to work). Indeed, one of the justifications for limitations on garnishment is to prevent debtors from choosing to substitute leisure for work. Such a substitution might become attractive if a large portion of the debtor's wages is diverted to creditors through garnishment. *See Sterk, supra* note 167, at 425–27.

174. 11 U.S.C. § 1121(c)(2)–(3) (giving creditors the power to propose a plan if the debtor has not filed a plan within 120 days after the order for relief, or if the debtor's plan has not been accepted by the requisite number of creditors within 180 days of the order for relief).

175. *Cf. id.* § 1141(a). Under § 1142, the debtor is required to carry out the plan and to comply with court orders. *Id.* § 1142.

176. Garnishment law might impose its own limitations, however. *See Warner, supra* note 156, at 735.

177. If the debtor continues to generate a stream of earnings, the bankruptcy court may be able to use a coercive order akin to garnishment, addressed to the debtor's employer. That approach will not work, however, when the debtor is self-employed.

*E. Coercive Orders*

A court facing such an affront to its authority has but one remaining alternative—entry of a coercive order designed to compel the debtor's compliance. Bankruptcy courts have ample authority to enter coercive orders. First, Bankruptcy Code authority, if any is needed, is found in § 105.<sup>178</sup> This is bankruptcy's "all writs statute." It gives a bankruptcy court power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."<sup>179</sup> Additional statutory authority for such an order is available under the All Writs Act applicable to all federal courts.<sup>180</sup> Finally, bankruptcy courts, like all courts, have inherent power to enforce their orders.<sup>181</sup>

Substantial authority approves the use of coercive orders to require debtors to hand assets over to the bankruptcy estate.<sup>182</sup> The individual targeted by such an order truly "holds the keys to the jail"<sup>183</sup> and can purge the contempt by handing over assets currently in his or her possession<sup>184</sup> that the Bankruptcy Code makes available to creditors.<sup>185</sup> These

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178. 11 U.S.C. § 105.

179. *Id.* An order issued under § 105 must be rooted in the substantive provisions of the Code, and cannot be used to "create substantive rights that would otherwise be unavailable under the Bankruptcy Code." *In re Cont'l Airlines*, 203 F.3d 203, 211 (3d Cir. 2000) (quoting *United States v. Pepperman*, 976 F.2d 123, 131 (3d Cir. 1992)). That poses no problem here, since an individual debtor in a chapter 11 case is required to make his or her income available to creditors, in compliance with the plan.

180. 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."). This statute includes bankruptcy courts. *EEOC v. Rath Packing Co.*, 787 F.2d 318, 325 (8th Cir.), *cert. denied*, 479 U.S. 910 (1986).

181. *Shillitani v. United States*, 384 U.S. 364, 370 (1966) ("There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt."); *see also* *Green v. United States*, 356 U.S. 165, 197 (1958) (Black, J., dissenting) (civil contempt is a remedy that "has quite properly been exercised for centuries to secure compliance with judicial decrees"); *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 737 (7th Cir. 1999) ("A court's civil contempt power rests in its inherent limited authority to enforce compliance with court orders and ensure judicial proceedings are conducted in an orderly manner.").

182. *See, e.g., In re Shore*, 193 B.R. 598, 601–02 (Bankr. S.D. Fla. 1996) (holding that a debtor was not denied due process on the grounds that contempt order, entered for failure to turn over estate property, did not specify that it concerned civil rather than criminal contempt).

183. This expression dates at least from 1902. *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902) ("They carry the keys of their prison in their own pockets.").

184. *Compare* *Linda R. S. v. Richard D.*, 410 U.S. 614, 618 (1973) (noting that under the civil contempt model "the defendant 'keeps the keys to the jail in his own pocket' and may be released whenever he complies with his legal obligations"), *and In re Crededio*, 759 F.2d 589, 590 (7th Cir. 1985) ("The rationale underlying civil contempt is simply that contemnors hold 'the key of their prison in their own pocket.'"), *with* *McBride v. McBride*, 431 S.E.2d 14, 18 (N.C. 1993) ("A defendant who is found in civil contempt and incarcerated for nonsupport does not 'hold the keys to the jail' if he cannot pay the child support arrearage which will procure his release. Under such circumstances, the deprivation of liberty that occurs is tremendous and may not be diminished by the fact that a civil contempt order contains a purge clause providing for the contemnor's release upon payment of arrearages.").

185. *See* *SEC v. Brennan*, 230 F.3d 65, 77 (2d Cir. 2000) (discussing use of contempt order to force debtor to repatriate assets in an offshore trust); *cf. Broyles v. Broyles*, 573 So. 2d 357, 360 (Fla. Dist. Ct. App. 1990) (holding contempt order requiring husband to pay amounts owed to wife as a property

orders present no Thirteenth Amendment problem<sup>186</sup> because they do not require the obligor to undertake any labor whatsoever.

A coercive order designed to force a recalcitrant chapter 11 debtor's cooperation is quite different. Such an order would do more than merely set out the rights and obligations of the parties; it might compel the debtor to make the payments required by the plan,<sup>187</sup> or if the debtor has revealed a preference for leisure over work, the coercive order might require the debtor to obtain employment so as to fund the plan. Either way, this upping of the ante begins to look suspiciously like peonage<sup>188</sup> because the teeth in any coercive order can only be the debtor's incarceration, in the absence of compliance, for contempt of court.<sup>189</sup>

An order directing a debtor to continue working for a particular employer clearly constitutes peonage.<sup>190</sup> The more difficult question, however, is whether peonage is implicated *only* when the debtor is ordered to work for a particular employer. That seems to be the fact pattern found in the Supreme Court's peonage cases,<sup>191</sup> which might be a reason to believe that such facts are fundamental to the charge.<sup>192</sup> Certainly there is language in the Supreme Court's opinions,<sup>193</sup> as well as in

settlement, or go to jail, defective, *inter alia*, for not including a finding that he had *present* ability to pay).

186. See, e.g., *Santibanez v. Wier McMahon & Co.*, 105 F.3d 234 (5th Cir. 1997).

187. If the court merely orders the debtor to pay his or her future earnings over to creditors as required by the plan, the order does nothing in effect but repeat the confirmation order itself. Confirmation constitutes a determination of liability, much the same as any other judgment determining a monetary liability. The court's additional order, if it is to have an independent effect, must order compliance on pain of contempt—incarceration—for noncompliance.

188. Cf. *Chemerinsky*, *supra* note 11, at 590 (“[I]t is certain that it will be argued that an involuntary individual Chapter 11 case coupled with the commitment of five years’ disposable income to the plan constitutes impermissible peonage. A debtor in this instance seems to be compelled to work for five years after having pledged his future earnings to his creditors.”); see also *Gross*, *supra* note 21, at 157 (“Requiring a debtor to work to repay his creditors to obtain a discharge is strikingly close to the condition of peonage . . .”).

189. *Keach*, *supra* note 19, at 501–02. This may be the reason why certain orders have been said to be “unenforceable.” See, e.g., *In re Stegall*, 865 F.2d 140, 142 (7th Cir. 1989) (noting debtor’s promise of work unenforceable under the Thirteenth Amendment); *In re Bolton*, 188 B.R. 913, 917 (Bankr. D. Vt. 1995) (refusing to confirm a chapter 11 plan funded by the debtor’s future earnings because the promise could not be enforced under the Thirteenth Amendment); cf. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 204 (1988) (holding debtors’ promise to fund a chapter 11 plan with future individual services is “in all likelihood, unenforceable,” but not specifying why).

190. See, e.g., *Moss v. Superior Court*, 950 P.2d 59, 66 (Cal. 1998) (“In those decisions in which a Thirteenth Amendment violation has been found on the basis of involuntary servitude, the court has equated the employment condition to peonage, under which a person is bound to the service of a particular employer or master until an obligation to that person is satisfied.”) (emphasis added); *Brenda McCune, Family Law Corner: Get a Job!*, 43 ORANGE COUNTY L. 42, 43 (2001) (when courts have found a violation of the Thirteenth Amendment, “the conditions were such that they could be equated with peonage, a form of slavery under which a person is bound to the service of a master or employer until such time as an obligation to that master is satisfied”) (emphasis added).

191. See cases cited *supra* notes 82–104.

192. For a discussion of a case in which the court took this position, *Moss v. Superior Court*, 950 P.2d 59 (Cal. 1998), see *infra* text accompanying notes 210–32 and 263–70.

193. Such language appears in cases involving the use of peonage both as a sword and as a shield. In *Clyatt v. United States*, an example of the former, the Court defined peonage “as a status or condition of compulsory service, based upon the indebtedness of the peon to the master.” 197 U.S. 207, 215



opinions of other courts,<sup>194</sup> speaking of the exercise of dominion by a particular employer over a particular employee. In none of these cases, however, does the reasoning turn on those facts. Nor is there any indication whatsoever that such facts are so central to the result that peonage itself turns upon it. In the absence of even a hint in that direction, one should be reluctant to elevate facts *qua* facts to constitutional significance. Granted, “the essence of peonage is an employment relationship,”<sup>195</sup> but the relationship with a particular employer is not determinative.

The more probable order is one requiring the debtor to start or to continue working generally, but not specifying a particular job or employer.<sup>196</sup> This debtor could quit one job and take another. Such an order hardly seems consistent with the desire for a free and open market for labor that the drafters of the Thirteenth Amendment wanted to assure,<sup>197</sup> especially given that the ultimate in freedom of labor is the freedom to choose leisure instead. Even if such an order appears to permit the debtor to retain sufficient choice to defeat an allegation of peon-

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(1905) (emphasis added); *see also* *Hodges v. United States*, 203 U.S. 1, 34 (1906) (Harlan, J., dissenting) (characterizing peonage as “the compulsory holding of one individual *by another individual* for the purpose of compelling the former by personal service to discharge his indebtedness to the latter”) (emphasis added).

In cases in which peonage was used as a shield—*Bailey*, *Pollock*, and *Taylor*—the debtors were committed by contract to work for a particular employer. Naturally, the cases focused on that fact pattern. *See* *Pollock v. Williams*, 322 U.S. 4, 6 (1944); *Taylor v. Georgia*, 315 U.S. 25, 27 (1942); *Bailey v. Alabama*, 219 U.S. 219, 229–30 (1911).

194. One of the lower court cases, *United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964), surveyed Supreme Court precedent as well as lower court decisions, in an effort to determine the meaning of “involuntary servitude.” The court reported the results of the survey in terms suggesting that peonage requires that the debtor be forced to work for a particular employer:

This survey indicates to us that the prime purpose of those who outlawed “involuntary servitude” in the predecessors of the 13th Amendment, in the Amendment itself, and in statutes enacted to enforce it, was to abolish all practices whereby subjection having some of the incidents of slavery was legally enforced, either directly, by a state’s using its power *to return the servant to the master*, as had been the case under the peonage system in New Mexico, or indirectly, by subjecting persons who left the employer’s service to criminal penalties.

*Id.* at 485–86 (emphasis added) (citation omitted).

195. *Gross*, *supra* note 21, at 185.

196. The court in *In re Marriage of Smith*, 396 N.E.2d 859 (Ill. App. Ct. 1979), drew a similar distinction, in the family context, between an order of support and an order requiring the obligor to take a particular job:

The husband contends that requiring a man to support his ex-wife is “peonage” and is therefore violative of the [Thirteenth Amendment] of the United States Constitution which prohibits slavery and involuntary servitude. This argument is completely without merit. Purely monetary obligations, whether based on ordinary commercial contracts or upon a relationship such as marriage or parenthood cannot be equated with peonage or slavery.

We cannot and do not hold that the husband must continue working at [his former job], or at any other particular job or, indeed at all. We merely hold that the amount of maintenance he must pay to the wife must be calculated on the basis of his ability to pay which, in turn, is linked to the amount he could have made had he chosen not to resign.

*Id.* at 864; *see also* *Freeman v. Freeman*, 397 A.2d 554, 557 n.2 (D.C. 1979) (rejecting as meritless the argument that an order requiring an obligor to seek “gainful employment commensurate with his abilities and educational background” violates the constitutional prohibition against involuntary servitude).

197. *See supra* text accompanying note 77.

age,<sup>198</sup> proper analysis should focus on the quality of choice with which the debtor is presented. That forms the essence of the coercion requirement, not the nature of the labor or the identity of the employer.

An order directed to a debtor who lacks sufficient current assets but who has ample earning capacity to find work or to continue working, and to make payments to creditors out of that income stream, runs head-on into the Thirteenth Amendment. It is the question of coercion that is foremost, and this debtor faces the very sort of coercion—through legal sanction—that *Kozminski* required for a finding of criminal violations of the peonage statute.<sup>199</sup> It is the very sort of coercion involved in *Bailey* and later cases in which debtors raised peonage as a defense to prosecution—incarceration designed to compel labor. It is the very sort of coercion some commentators thought, obviously erroneously, to be unavailable under the current configuration of the Code.<sup>200</sup> And it would come in the absence of the safeguards various authorities have cited as reasons why previous configurations of the Bankruptcy Code did not raise Thirteenth Amendment issues: involuntary filings are no longer impermissible,<sup>201</sup> future income is now available to creditors in the absence of the debtor's consent,<sup>202</sup> and debtors do not have a right to dismiss or to convert the case to a chapter 7.<sup>203</sup>

A contempt order imposed by a bankruptcy court in such a case would be civil, rather than criminal, in nature. Admittedly, all of the Supreme Court's peonage cases involved crimes: either perpetrators were criminally charged, as in *Clyatt*, *Hodges*, and *Kozminski*,<sup>204</sup> or debtors were convicted of crimes for failing to fulfill labor contracts, as in *Bailey*, *Pollock*, and *Taylor*.<sup>205</sup> And at least two commentators have thought that

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198. An ability to change jobs has sufficed to defeat involuntary servitude arguments in other contexts. For example, professional baseball's reserve clause survived a constitutional challenge brought by Kurt Flood because, according to the court, he could pursue other employment. *Flood v. Kuhn*, 309 F. Supp. 793, 807–08 (S.D.N.Y. 1970). Similarly, restrictive covenants in employment contracts attract judicial hostility when they effectively require an employee to stay with a particular employer. *Sterk*, *supra* note 167, at 410.

199. *United States v. Kozminski*, 487 U.S. 931, 952 (1988). This is true even if the order does not specify a sanction for failure to comply, because “or else” is clearly implied.

200. Professor Chemerinsky does not believe that incarceration is a possibility under these circumstances: “The challenge is made especially difficult because there is no possibility of contempt or imprisonment for those who fail to make the required payments.” Chemerinsky, *supra* note 11, at 590. With all due respect, Professor Chemerinsky does not take sufficient account of the likely response of a federal bankruptcy court to a defiant debtor. Of course, Professor Chemerinsky may very well have meant that contempt or imprisonment is not *constitutionally* possible; if so, he is clearly correct.

201. See, e.g., Michael A. Fagone, *Involuntary Individual Chapter 11 Post-BAPCPA as a Collection Device?*, AM. BANKR. INST. J., Dec./Jan. 2007, at 28, 28.

202. *Id.* at 75.

203. *Id.*

204. *Clyatt v. United States*, 197 U.S. 207, 222 (1905); *Hodges v. United States*, 203 U.S. 1, 1–2 (1906); *United States v. Kozminski*, 487 U.S. 931, 934 (1988).

205. *Bailey v. Alabama*, 219 U.S. 219, 227 (1911); *Pollock v. Williams*, 322 U.S. 4, 5 (1944); *Taylor v. Georgia*, 315 U.S. 25, 26 (1942).

criminal charges are necessary in order to constitute peonage.<sup>206</sup> That, however,

appears to read more into *Kozminski* than is there. . . . [T]he *Kozminski* Court did not say “criminal” sanction or imprisonment was required. Indeed, prior to *Kozminski*, lower courts had found that forms of legal sanction other than criminal fines or imprisonment provided the compulsion necessary to trigger a violation of the Thirteenth Amendment.<sup>207</sup>

*Kozminski* required legal compulsion, not penal compulsion.<sup>208</sup> Under civil contempt, the debtor is incarcerated and can obtain release only by submitting to the coercion—in the instance at issue here, by working.<sup>209</sup> Thus, the fact that a bankruptcy court’s coercive order is civil rather than criminal will not save it under the Thirteenth Amendment.<sup>210</sup>

### F. *The Child Support Analogy*

This conclusion runs headlong into one fairly substantial counterexample—namely, authority approving the use of coercive orders against parents who fail to pay child support.<sup>211</sup> One tempting response is to de-

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206. Professor Gross discussed a hypothetical case that, in her view, implicated peonage. Gross, *supra* note 21, at 170. Her fact pattern involved the possibility that a debtor might be criminally convicted and imprisoned under a bad check statute. *Id.* Professor Klee responded to Professor Gross’s concerns, in the course of proposing his own scheme for individual debt restructuring, by noting that his proposal did not present any chance of criminal imprisonment and, therefore, did not raise Thirteenth Amendment problems. Klee, *supra* note 23, at 448 n.28. Thus, he apparently accepted Professor Gross’s underlying assumption that imprisonment for a crime is the only sort of legal coercion implicating the Thirteenth Amendment.

207. Keach, *supra* note 19, at 501 (citing *Brooks v. Cent. Bank of Birmingham*, No. 81-G1303-S, 1982 U.S. Dist. LEXIS 13877 (N.D. Ala. June 14, 1982), *rev’d on other grounds*, 717 F.2d 1340 (11th Cir. 1983) (finding that a threat of disbarment constituted sufficient compulsion)); *see also In re Nine Applications for Appointment of Counsel in Title VII Proceedings*, 475 F. Supp. 87 (N.D. Ala. 1979) (holding that an attorney coerced into representing a Title VII complainant was subjected to involuntary servitude).

208. Jackson, *supra* note 78, at 1288 n.171.

209. The difference between incarceration for civil and criminal contempt is that, in the former instance, the debtor “holds the keys to the jail.” *See supra* notes 183–84 and accompanying text. A debtor ordered to work, and jailed for refusing, could purge the contempt by agreeing to work and doing so upon release. That does not suffice to save the order from unconstitutionality, of course, since the contempt is purged by the very coercion that condemns the order under the Thirteenth Amendment.

210. This is, perhaps, a corollary of *Bailey*’s point that states may not criminalize the breach of a labor contract and thereby fit the case under the Thirteenth Amendment’s exception: “The state may impose involuntary servitude as a punishment for crime, but it may not 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.” *Bailey*, 219 U.S. at 244.

211. *United States v. Ballek*, 170 F.3d 871 (9th Cir. 1999) (order incarcerating child support obligor for six months under statute dealing with willful violation of support obligations, with finding of willfulness based on his failure to maintain gainful employment, did not violate Thirteenth Amendment); *Moss v. Superior Court*, 950 P.2d 59, 62 (Cal. 1998) (“[A] willfully unemployed, non-supporting parent is subject to contempt sanctions if the parent fails to comply with a child support order . . . .”); *Warwick v. Warwick*, 438 N.W.2d 673, 679 (Minn. Ct. App. 1989) (rejecting husband’s argument that court order requiring him to seek a job, and threatening incarceration for failure to do so, constituted involuntary servitude); *Freeman v. Freeman*, 397 A.2d 554, 557 n.2 (D.C. Ct. App. 1979) (rejecting as

clare this authority simply wrong under the Thirteenth Amendment for reasons set out in this Article. That is too dismissive, however, even if not erroneous. Instead, some more substantive response is appropriate, although complete discussion is beyond the scope of this undertaking.

The most notorious decision presenting this fact pattern, *Moss v. Superior Court*,<sup>212</sup> found

no constitutional impediment to imposition of contempt sanctions on a parent for violation of a judicial child support order when the parent's financial inability to comply with the order is the result of the parent's willful failure to seek and accept available employment that is commensurate with his or her skills and ability.<sup>213</sup>

The court reconsidered a century-old decision, *Ex parte Todd*,<sup>214</sup> that the lower courts in the *Moss* case had believed to be controlling. According to the *Moss* court, *Todd* had proceeded either on the assumption "that employment sought under even an indirect threat of imprisonment for violation of the support order constituted involuntary servitude or a belief that imposition of a contempt or criminal sanction for failure to pay support constituted imprisonment for debt."<sup>215</sup> *Moss* disapproved *Todd*, but only insofar as it applied to child support orders, and not in the spousal support context actually involved in the earlier case.<sup>216</sup> *Todd* was

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meritless appellant's argument that an order directing him to seek "gainful employment commensurate with his abilities and educational background" violated the constitutional prohibition against involuntary servitude). For discussions of this issue, see Alfred J. Sciarrino & Susan K. Duke, *Alimony: Peonage or Involuntary Servitude?*, 27 AM. J. TRIAL ADVOC. 67 (2003); Walter W. Klein, *Moss v. Superior Court: Enforcing Child Support Orders with New Rules for Contempt Actions*, 29 SW. U. L. REV. 529 (2000). Professor Chemerinsky noted that child support and alimony are "the closest analogue to the provisions of the Bankruptcy Code," Chemerinsky, *supra* note 11, at 588, but he distinguished the two on the grounds that failure to pay alimony may result in a jail sentence, whereas failure to make payments under a chapter 11 plan will only result in dismissal of the case and loss of the discharge. *Id.* at 590. As this Article demonstrates, his assumption is not necessarily correct.

Other courts have been more willing to see constitutional problems in such orders. See, e.g., *Simmons v. Simmons*, 708 A.2d 949, 962 (Conn. 1998) (finding that public policy required entry of a modifiable alimony order, rather than treating a husband's medical degree as property: "To conclude that the plaintiff's medical degree is property and to distribute it to the defendant as such would, in effect, sentence the plaintiff to a life of involuntary servitude in order to achieve the financial value that has been attributed to his degree"); *Severs v. Severs*, 426 So. 2d 992, 994 (Fla. Dist. Ct. App. 1983) ("[Awarding] a vested interest in the husband's education and professional productivity, past and future, . . . would transmute the bonds of marriage into the bonds of involuntary servitude contrary to Amendment XIII of the United States Constitution."); see also *Olsen v. Olsen*, 557 P.2d 604, 606 (Idaho 1976) (Shepard, J., dissenting) (stating, in dissent from majority's refusal to modify alimony after husband paid for thirty years and then retired, "the question facing the Court is whether a judicially imposed system of involuntary servitude is to be continued wherein one human being is placed in bondage to another for what is effectively the remainder of his natural life").

212. 950 P.2d 59 (Cal. 1998).

213. *Id.* at 61.

214. 50 P. 1071 (Cal. 1897).

215. *Moss*, 950 P.2d at 61.

216. Because *Moss* involved only child support, the court had "no occasion to consider whether *Todd* should be overruled in toto." *Id.* at 64 n.4. The *Moss* court did not reverse, however, because its holding might be viewed as an unanticipated change in the law and because the custodial parent had failed to meet her burden to prove that the obligor had the actual financial ability to comply with the order. *Id.* at 62.

only a page or so in length and gave no reasons for its conclusion that courts cannot punish a parent for failing to comply with an order to seek work so as to meet alimony obligations.<sup>217</sup> At least one intervening case had grounded *Todd* in the Thirteenth Amendment,<sup>218</sup> however, and *Moss* did as well.<sup>219</sup>

*Moss* first observed that in all of the Supreme Court's peonage cases, the individual had been bound to the service of a particular employer.<sup>220</sup> Child support orders are different, *Moss* asserted, because the obligor is free to choose the type of employment and the employer "subject only to an expectation that to the extent necessary to meet the familial support obligation, the employment will be commensurate with the education, training, and abilities of the parent."<sup>221</sup> Merely observing these facts from the Supreme Court's cases is insufficient, however. A court's mere statement of its holding in terms of the facts before it says nothing about whether that particular aspect of the fact pattern is important or even relevant to the outcome, much less determinative. *Moss* did not explain why this factual distinction might have constitutional significance.

Next, the court in *Moss* quoted extensively from *Pollock v. Williams*,<sup>222</sup> and summarily concluded that the obligation of a parent to support a child, and to become employed if necessary to do so, "is in no way comparable or akin to peonage or slavery. It is among the most fundamental obligations recognized by modern society."<sup>223</sup> The court supported its point about the strength of the public policy mandating that parents support their children by referencing Supreme Court cases permitting certain types of forced labor—military service,<sup>224</sup> road work,<sup>225</sup> and jury service.<sup>226</sup> *Moss* then drew a two-pronged conclusion: first, mandatory child support is a social obligation that is at least as important

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217. *Todd*, 50 P. at 1071. *Moss* seemed quite critical of *Todd*'s failure to explain its reasoning, 950 P.2d at 65, but *Moss* lives in a glass house in that regard; mere quotation of precedents, no matter how lengthy, does not constitute analysis.

218. *In re Jennings*, 184 Cal. Rptr. 53, 59 (Cal. Ct. App. 1982).

219. *Moss*, 950 P.2d at 66–73.

220. *Id.* at 66–67.

221. *Id.* at 67. For a discussion of this point, see *supra* text accompanying notes 190–94.

222. 322 U.S. 4 (1944). For a discussion of *Pollock*, see *supra* note 104.

223. *Moss*, 950 P.2d at 67.

224. *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918) ("[A]s we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.").

225. *Butler v. Perry*, 240 U.S. 328, 333 (1916) (holding that the Thirteenth Amendment "introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers") (citing *Slaughter-House Cases*, *Plessy*, *Robertson*, *Clyatt*, and *Bailey*).

226. *Hurtado v. United States*, 410 U.S. 578, 589 (1973).

as these types of forced labor, and thus it is an exception to involuntary servitude;<sup>227</sup> and second, the order at issue “does not impose on the parent any government control over the type of employment, the employer for whom the parent’s labor will be performed, or any other aspect of the parent’s individual freedom that might be associated with peonage or slavery.”<sup>228</sup>

While the first of these conclusions is undoubtedly correct—indeed, probably axiomatic—the second is analytically very troubling. *Moss* referred to “government control,” which carries the whiff of state action. State action is both irrelevant to the Thirteenth Amendment<sup>229</sup> and simultaneously provided by the action of a court that imposes a coercive order. Thus, the reference to “government control” is not particularly sensible. Even worse, *Moss* distinguished child support orders from instances in which the Supreme Court had found that forced labor did *not* violate the Thirteenth Amendment.<sup>230</sup> In other words, *Moss* distinguished its fact pattern from *exceptions* to the Thirteenth Amendment. Sound analysis would have required the court to distinguish its fact pattern from Supreme Court cases finding Thirteenth Amendment violations. This the *Moss* court made no effort to do, beyond conclusory assertions of disagreement.

Thus, *Moss*—if it is correct at all—is not particularly good authority for any point beyond this: child support orders are so socially important and rooted in our legal fabric that they can be enforced by the most coercive of orders without creating Thirteenth Amendment concerns.<sup>231</sup> Or, as the court expressed it, “Family support obligations are not ordinary debts.”<sup>232</sup> This puts child support orders squarely within the reasoning the Supreme Court adopted in *Robertson v. Baldwin*,<sup>233</sup> which held that the Thirteenth Amendment does not apply to “exceptional” practices that were well-established in the common law at the time of the Amendment’s enactment.<sup>234</sup>

The constitutionality of coercive orders in the family context has not been fully analyzed by the state supreme courts, or determined by

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227. *Moss*, 950 P.2d at 68.

228. *Id.*

229. *United States v. Kozminski*, 487 U.S. 931, 939 (1988); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968).

230. *Moss*, 950 P.2d at 68.

231. *Cf. Wohlfort v. Wohlfort*, 225 P. 746, 750 (Kan. 1924) (holding that incarceration to enforce an order to pay alimony would constitute involuntary servitude if the husband lacked current resources, but an order to perform work of which he is capable is proper); *see also United States v. Ballek*, 170 F.3d 871, 873 (9th Cir. 1999) (noting that child support “is not an ordinary debt”).

232. *Moss*, 950 P.2d at 76.

233. 165 U.S. 275 (1897). For a discussion of *Robertson*, see *supra* text accompanying notes 116–23. *See also Ballek*, 170 F.3d at 874 (citing *Robertson*, and finding child support awards “within that narrow class of obligations that may be enforced by means of imprisonment without violating the constitutional prohibition against slavery”).

234. In *Robertson*, the well-established practice was the requirement that seamen complete their contract of service. 165 U.S. at 334.

the United States Supreme Court. Cases permitting the use of coercive orders in the child support context are context-specific, however, and do not provide a persuasive analogy for bankruptcy cases.

#### IV. SECTION 1 OF THE THIRTEENTH AMENDMENT

This Article concludes that a coercive order seeking to force an individual debtor in an involuntary chapter 11 case to work for the benefit of his or her creditors would violate the Anti-Peonage Act. Another possibility, however, is that such an order might violate Section 1 of the Thirteenth Amendment itself. That Section is self-executing;<sup>235</sup> no statutory authority has to be available in order to find a violation.

The Court's opinion in *Jones v. Alfred H. Mayer Co.*<sup>236</sup> provides some authority for this approach, although the Court specifically said that it was not addressing the independent reach of Section 1 of the Thirteenth Amendment.<sup>237</sup> *Jones* found, much as Congress had when it passed the Civil Rights Act of 1866, that private racial discrimination in housing is "a relic of slavery."<sup>238</sup> If so, no legislation should have been needed; Section 1 reaches all "badges and incidents" of slavery.<sup>239</sup> Similarly, Section 1's self-executing power also reaches involuntary servitude,<sup>240</sup> and peonage is within that reach. Thus, legislation should not be a prerequisite in this context, either.

Commentators have advanced analogous arguments in discussing possible application of the Thirteenth Amendment in areas that appear to be far removed from its origins. Some of those arguments call for an expansive view of Section 2, taking it into applications beyond current legislation and beyond the facts of any Supreme Court case to date.<sup>241</sup> Other arguments call for application of Section 1 in novel areas, such as abortion rights,<sup>242</sup> battered women<sup>243</sup> and racist speech.<sup>244</sup> Arguments for

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235. U.S. CONST. amend. XIII, § 1; *see also* The Civil Rights Cases, 109 U.S. 3, 20 (1883) ("This [A]mendment, as well as the [F]ourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom.").

236. 392 U.S. 409 (1968).

237. "Whether or not the Amendment *itself* did any more than that . . . [is] a question not involved in this case." *Id.* at 439.

238. *Id.* at 443.

239. *Id.* at 439.

240. U.S. CONST. amend. XIII, § 1.

241. *See, e.g.,* Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539 (2002) (arguing that federal legislation to ban displays of the Confederate flag on state property would fall within congressional power under Section 2 of the Thirteenth Amendment).

242. *See generally* Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990) (arguing that women unable to obtain abortions are subjected to involuntary servitude).

243. *See generally* Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207 (1992) (arguing that battered women are

reinterpretation of Section 1 are no more impermissible than any other argument for an expansion or reinterpretation of the law. These arguments face obstacles in addition to novelty, however.<sup>245</sup>

*Jones* itself may provide support for the counterargument. The Court recognized that Congress has very broad powers under Section 2,<sup>246</sup> and the case concerned only the question whether a particular enactment had exceeded those powers. The reasoning provides authority for the proposition that Congress could enact a statute banning coercive orders in bankruptcy on Thirteenth Amendment grounds. If the anti-peonage provisions of current law are insufficient in the bankruptcy context, however, it means little to assert that Congress *could* pass something more specific. The simple answer is that Congress has not.<sup>247</sup> *Jones* held that Congress may *expand* the reach of the Thirteenth Amendment,<sup>248</sup> that holding says nothing about whether courts are free to interpret the independent reach of the Amendment itself beyond the constricted boundaries set, to date, by the Supreme Court.

*Kozminski* provides an additional counterargument, because the Court addressed the independent scope of the Thirteenth Amendment. Defendants had been charged with conspiracy to violate the victims' Thirteenth Amendment right to be free from involuntary servitude.<sup>249</sup> Thus, the propriety of that conviction depended, according to the Court, on the meaning of "involuntary servitude" as that phrase is used in Section 1 of the Thirteenth Amendment.<sup>250</sup> To determine the meaning of

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held in involuntary servitude and have both civil and criminal claims under the Thirteenth Amendment).

244. Professor Amar argued that the Supreme Court should have decided a case involving cross burning on Thirteenth Amendment grounds, *inter alia*, rather than relying on the First Amendment. Amar, *supra* note 110, at 155. He argued that the Thirteenth Amendment authorized a city's cross-burning ordinance. *Id.* That authority could only be found in Section 1, since Section 2 applies only to federal enactments. *Id.* at 156. *But see* Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1649 (1993) (arguing that Professor Amar's reading of Thirteenth Amendment is "undoubtedly a stretch").

245. Novelty is simply another way of observing that current authority does not support the argument. The cramped interpretation accorded the Thirteenth Amendment to date, *see supra* text accompanying notes 61–75, does not foreclose arguments that more expansive application is appropriate.

246. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968). Constitutional scholar Laurence Tribe opined that "[i]f [*Jones*] is read literally, Congress possesses an almost unlimited power to protect individual rights under the Thirteenth Amendment." LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 5-15, at 926 (3d ed. 2000).

247. *Cf. Palmer v. Thompson*, 403 U.S. 217 (1971). The Court rejected the "faint and unpersuasive argument" that the city's decision to close all swimming pools violated the Thirteenth Amendment. *Id.* at 226. To hold otherwise, the Court reasoned, "would severely stretch its short simple words and do violence to its history," granting the Court "a lawmaking power far beyond the imagination of the [A]mendment's authors." *Id.* at 226–27. Rather, the Amendment "is a skimpy collection of words to allow this Court to legislate new laws to control the operation of swimming pools throughout the length and breadth of this Nation," but Congress has the power to outlaw badges of slavery and it has not acted. *Id.* at 227.

248. *Buchanan*, *supra* note 72, at 849.

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

250. For further discussion of *Kozminski*, *see supra* text accompanying notes 142–55. Defendants were convicted under two federal statutes: § 1584, which prohibited holding another person in involun-



Section 1, and thus of the statute, the Court looked to its prior Thirteenth Amendment opinions.<sup>251</sup> The problem with this methodology is that the Court looked to precedents, none of which had tested the scope of Section 1 of the Thirteenth Amendment, in order to determine that scope. It was *Kozminski*'s own facts that provided the test.<sup>252</sup>

*Kozminski* might be explained away on the grounds that the Court was concerned with fair notice in the context of criminal statutes.<sup>253</sup> Otherwise, *Kozminski*'s approach leaves Section 1 with a reach no broader than that of the anti-peonage statutes at issue in the earlier cases. Accordingly, it leaves Section 1 with no independent reach, notwithstanding the Court's bow to the self-executing force of the Amendment.<sup>254</sup> Its own methodology circumscribes that force, and *Kozminski* may be cited as an example of the Court's stingy interpretation of the Thirteenth Amendment.

#### V. THE "SPIRIT" OF THE AMENDMENT AND IMPRISONMENT FOR DEBT

Rather than arguing the extent of the Thirteenth Amendment's self-executing power, another possibility is to focus on "the spirit if not the letter." Recall that Professor Countryman has been credited with (or accused of) the assertion that involuntary chapter 13 would violate the

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tary servitude, and § 241, which prohibited a conspiracy for interfering with another person's constitutional rights. The latter, according to the Court,

incorporates the prohibition of involuntary servitude contained in the Thirteenth Amendment.

The indictment in this case, which was read to the jury, specifically charged the Kozminskis with conspiring to interfere with the "right and privilege secured . . . by the Constitution and laws of the United States to be free from involuntary servitude as provided by the Thirteenth Amendment of the United States Constitution." Thus, the indictment clearly specified a conspiracy to violate the Thirteenth Amendment. The indictment cannot be read to charge a conspiracy to violate § 1584 rather than the Thirteenth Amendment, because the criminal sanction imposed by § 1584 does not create any individual "right or privilege" as those words are used in § 241.

487 U.S. at 940 (citations omitted); see also *id.* at 942 ("The Amendment is 'self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances,' *Civil Rights Cases*, 109 U.S. 3, 20 (1883), and thus establishes a constitutional guarantee that is protected by § 241.").

251. *Id.* at 941 ("[O]ur task is to ascertain the precise definition of that crime by looking to the scope of the Thirteenth Amendment prohibition of involuntary servitude specified in our prior decisions."). The cases included in the survey were *Clyatt*, *Reynolds*, *Pollock*, *Taylor*, and *Bailey*. *Id.* at 943.

252. The issue in *Kozminski* was what level of coercion is necessary to constitute "involuntary servitude," and the Court decided that only physical or legal compulsion will suffice. *Id.* at 948. Granted, that level of compulsion was present in each of the precedents, but none of them involved the question whether the amount of coercion sufficed. None of them tested the constitutional limit.

253. The Court rejected the Government's argument for a broader reading because that would criminalize "a broad range of day-to-day activity." 487 U.S. at 949. The Court's construction, on the other hand, would

adhere to the time-honored interpretive guideline that uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity. The purposes underlying the rule of lenity—to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts—are certainly served by its application in this case.

*Id.* at 952 (citations omitted).

254. *Id.* at 942.

Thirteenth Amendment.<sup>255</sup> The truth may be that he only came close. Perhaps very, very close. Rather than provide a substantive Thirteenth Amendment analysis, however, he slid over into a somewhat different argument—that such a statute would be inconsistent with our values, and would violate the spirit if not the letter of the Thirteenth Amendment.<sup>256</sup> That is, in fact, the formulation followed by a great many authorities dealing with the Thirteenth Amendment implications of various bankruptcy questions.<sup>257</sup>

The difficulty with policy arguments is that perspective makes all the difference. This is the turf upon which many of the recent debates about bankruptcy have been played. (Just to give one example, one person's commendable fresh start<sup>258</sup> is another person's lamentable erosion of stigma.<sup>259</sup>) When questions about statutory direction are under discussion—questions such as whether to institute “means testing,” or how broad the exceptions to discharge should be—then policy is the best, and perhaps only, possible guide. One hopes that discussions of constitutional law, however, can be more tethered.

The best way to provide some structure to the discussion is to frame it with reference to its “close cousin”<sup>260</sup>—imprisonment for debt. That makes sense, given that a coercive order, issued to compel a bankruptcy debtor to make earnings available to creditors and to get a job if necessary, looks startlingly like imprisonment for debt.

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255. See *supra* text accompanying notes 16–18.

256. Professor Countryman clearly did this in his congressional testimony. See *id.* He made a more clear-cut Thirteenth Amendment assertion in a later article, discussing a credit industry proposal for mandatory chapter 13:

True, the proposal's draftsmen have tried to save it from the [T]hirteenth [A]mendment. . . . That artifice should not, in my judgment, save the proposal from [T]hirteenth [A]mendment challenge. . . . But, preferable to any attempt to invalidate the industry's proposal under the Constitution would be its defeat in Congress. And it should be defeated in Congress. In a country which has abolished slavery and involuntary servitude, has largely abolished imprisonment for debt, and has long provided a “fresh start” for financially distressed debtors, the industry's proposal is, as was said by a witness opposing the conditional and suspended discharge proposals fifty years ago, “contrary to the genius of our institutions.”

Countryman, *supra* note 9, at 827.

257. See, e.g., *In re Fitzsimmons*, 20 B.R. 237, 240 (B.A.P. 9th Cir. 1982), *aff'd*, 725 F.2d 1208 (9th Cir. 1984); *In re Markman*, 5 B.R. 196, 199 (Bankr. E.D.N.Y. 1980); *Bankruptcy Reform: Hearing Before the Subcomm. on Courts of the S. Comm. on the Judiciary*, 98th Cong. 257 (1983) (statement of Professor Lawrence P. King).

258. Countryman, *supra* note 9, at 827 (credit industry's proposal of mandatory chapter 13 is “a proposal for indentured service on a grand scale, for mass peonage, with the federal bankruptcy courts providing free collection services for the consumer credit industry”); Gross, *supra* note 21, at 196 (“[A]utonomy, reciprocity and equality . . . [are the] very values which are preserved by the anti-peonage laws and the fresh start policy.”).

259. See Jones-Shepard, *Dissent*, *supra* note 135, at 11–13. These concerns about eroding stigma, however, are largely based on conjecture. Boshkoff, *supra* note 9, at 71 n.9; Margaret Howard, *Bankruptcy Empiricism: Lighthouse Still No Good*, 17 BANKR. DEV. J. 425, 450–55 (2001) (reviewing TERESA A. SULLIVAN ET AL., *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* (2000)).

260. *United States v. Ballek*, 170 F.3d 871, 874 (9th Cir. 1999).

This goes beyond policy, of course, since many state constitutions prohibit imprisonment for debt.<sup>261</sup> The United States Constitution does not, although a federal statute provides that a person may not be imprisoned for debt if such imprisonment is prohibited by that person's state constitution.<sup>262</sup> That provision measures the power of a federal court by the relevant state's law.<sup>263</sup> Considerable laxity has been accomplished by restrictively defining "debt,"<sup>264</sup> but that ploy is unavailing in the bankruptcy context. Use of a coercive order against a debtor who refuses to cooperate in an involuntary chapter 11 case looks exactly like imprisonment for debt. Indeed, if this is not imprisonment for debt, what is?

Family support, however, may again provide the counterargument. In *Moss v. Superior Court*, the father obligated to pay child support argued that his incarceration for contempt violated the state's constitutional ban on imprisonment for debt.<sup>265</sup> That argument was as unsuccessful as his other—that the Thirteenth Amendment did preclude an order imposing contempt sanctions when he failed to seek employment commensurate with his skills and ability.<sup>266</sup> The ban on imprisonment for debt had an exception for fraud, which an earlier case had found applicable when an employer, having the ability to pay, refused to pay wages

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261. *E.g.*, TEX. CONST. art. I, § 18.

262. 28 U.S.C. § 2007(a) (2000). According to Charles Warren's classic account of bankruptcy history, virtually every state had abolished imprisonment for debt by 1857. CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 52 (1935).

263. The Fifth Circuit interpreted § 2007(a) to include contempt orders, and stated that "federal courts are prevented from imprisoning a party for contempt when doing so would conflict with the state's prohibition of debt imprisonment." *Santibanez v. Wier McMahon & Co.*, 105 F.3d 234, 242 (5th Cir. 1997). The case involved efforts by creditors to enforce a money judgment. When garnishment proved fruitless, the creditors began a receivership proceeding, and the court ordered the debtor to turn over his nonexempt assets. *Id.* at 237. The debtor refused to comply, asserting that the order was unenforceable, but after his ability to comply was established he was promptly faced with enforcement in the form of incarceration pending compliance. The court noted the prohibition against imprisonment for debt in Texas's constitution, and that § 2007(a) subjects a federal court to that prohibition, but cited Texas authority for the proposition that the constitutional defense is only available when a contemnor is unable to pay. *Id.* at 242 (citing *Ex Parte Buller*, 834 S.W.2d 622, 626 (Tex. App. 1992)). Thus, *Santibanez* is a fairly unremarkable example of the proposition that coercive orders are appropriately used to force debtors to turn over currently owned assets. See *supra* text accompanying notes 182–86.

264. A support obligor argued in *Warwick v. Warwick*, 438 N.W.2d 673 (Minn. Ct. App. 1989), that threatening him with jail violated Minnesota's constitutional prohibition on imprisonment for debt, but the court disagreed. It found that "debt" is an obligation arising out of contract, which does not include support. *Id.* at 679; see also *In re Watson*, 2005 Tex. App. LEXIS 5278, at \*4–5 (Tex. App. July 7, 2005) (noting that attorney's fees awarded in proceedings to enforce child support payments are not "debts" and may be enforced through contempt, but the same is not true of attorney's fees awarded to a wife in divorce proceedings); cf. *In re McGonagill*, 2007 Tex. App. LEXIS 1867, at \*8–9 (Tex. Ct. App. Mar. 5, 2007) (granting divorcing husband's petition for habeas relief because he was imprisoned for failure to pay certain household expenses, in violation of the state constitution's prohibition of imprisonment for debt).

This approach seems reminiscent of the "subtle distinctions" drawn in early common law: "One might be put in jail for failure to pay a sum of money, and yet this might not be what was technically called imprisonment for debt. Thus, imprisonment on failure to pay a fine was not imprisonment for debt." Richard Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 26 (1926).

265. 950 P.2d 59, 76 (Cal. 1998).

266. For a discussion of this argument, see *supra* text accompanying notes 211–34.

he knew were owing.<sup>267</sup> *Moss* concluded that an obligation to pay child support, which arises out of both statute and court order, is indistinguishable from the employer's refusal to pay wages. The reason is that child support obligations are not ordinary debts.<sup>268</sup> Children are completely dependent on their parents, much as ordinary workers are dependent upon their wages, and the satisfaction by parents of their support obligations is essential to the public welfare.<sup>269</sup> Thus, *Moss* concluded that child support obligations fall within the fraud exception to the state constitution's ban on imprisonment for debt.<sup>270</sup>

This reasoning, aside from the special status of child support, would justify expansion of the fraud exception to the ban on imprisonment for debt whenever a debtor knows a debt is owed and has the ability to pay it, but refuses to do so. Even more—this reasoning would justify application of the fraud exception whenever a debtor chooses not to work at all, or chooses not to maximize his or her earning potential. Such expansiveness would stretch the fraud exception beyond recognition, if it did not gut it completely. It is reminiscent of the presumption of fraud that led to the demise of Alabama's labor statute in *Bailey*.<sup>271</sup> There, the debtor had no opportunity to testify as to motives or intent. Here, the obligor need only have the ability to work. The constitutional infirmity is indistinguishable.

*Moss*'s reasoning also equates a debtor's ability to earn with a debtor's refusal to turn over nonexempt assets currently in his or her possession. A debtor in the latter position has always been vulnerable, and properly so, to a coercive order requiring turnover of those assets.<sup>272</sup> A coercive order designed to create and reach wages as they are earned is simply not, for constitutional reasons, the same thing.

All of this, however, is aside from the special status of child support. *Moss* depended heavily on the fact that child support is different, and this Article is not the place to undertake any dispute with that proposi-

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267. *Ex parte Trombley*, 193 P.2d 734, 738–39 (1948).

268. The court did not mean by this that child support obligations are not “debts” for constitutional purposes. It cited earlier cases so holding, *Moss*, 950 P.2d at 76, but seemed reluctant to take a position on the point. Instead, the court observed that “[e]ven were the obligation considered a debt,” the analogy to wages was strong enough to support its conclusion. *Id.*

269. This reasoning mimics that applicable in the Thirteenth Amendment discussion, used to explain why child support falls within the judicially recognized exceptions for obligations well-established in the common law at the time of the Amendment's enactment. See *supra* text accompanying notes 211–34.

270. *Moss*, 950 P.2d at 76.

271. For a discussion of *Bailey*, see *supra* text accompanying notes 93–102. This also seems reminiscent of the Michigan practice of some eighty years ago, under statutes prohibiting imprisonment for contract debts, but permitting it for fraud:

[I]t seems that a great many writs are being issued in what are actually contract cases pure and simple. It is said that the attorneys for certain credit jewellers [sic] have secured several body executions on this theory: to buy a diamond ring and fail to pay for it is a tort, because the diamond market is subject to great fluctuations.

Ford, *supra* note 264, at 46.

272. See *supra* text accompanying notes 182–86.

tion. Suffice it to say that a precedent dealing with the permissibility of imprisonment for debt in the child support context does not provide good authority in the context of involuntary individual chapter 11 bankruptcy proceedings.

## VI. CONCLUSION

The 2005 Amendments to the Bankruptcy Code created a situation in which a case may be brought involuntarily, under a chapter that requires the debtor to devote future wages to the repayment of creditors and that severely limits the debtor's ability to convert or dismiss the case. In the 1970s, that statutory configuration was thought to present Thirteenth Amendment problems and, partly for that reason, Congress refused to enact similar provisions. The changes made in 2005 were not accompanied by any examination of the Thirteenth Amendment argument, so this Article has undertaken that task.

Peonage is a type of involuntary servitude, within Section 1 of the Thirteenth Amendment, in which a debtor is forced through the mechanism of physical or legal coercion to work in order to pay a debt. That is exactly what would occur if a bankruptcy court imposed a coercive order on an individual debtor in an involuntary chapter 11 proceeding, requiring the debtor to comply with a plan under which future wages are paid to creditors. The fact that the debts may have been voluntarily incurred is irrelevant. The fact that the debtor may not be tied to a particular employer or type of work is also irrelevant, since the reasoning of the peonage cases does not rest on the existence of a particular employer. Nor is such an order saved by its civil nature, since the keys to the jail are found only in the coerced labor itself.

A coercive order would also violate provisions found in state law, and made applicable to federal courts by federal statute, prohibiting imprisonment for debt. Exceptions to those provisions include imprisonment for crime (not at issue here) and, often, for fraud. To expand the fraud exception to cover bankruptcy cases, however, would run headlong into precedents prohibiting that strategy in the Thirteenth Amendment context. That strategy should fail in the imprisonment for debt context, for similar reasons.

Child support cases provide the strongest analogous counterargument to both the peonage and imprisonment for debt arguments, but the special nature of those obligations undercuts the utility of the analogy. Debts included in the typical bankruptcy case do not carry the same appeal on the basis of social welfare and policy as do child support obligations. Thus, the reasoning of those cases cannot appropriately extend to the bankruptcy context.

Bankruptcy courts can confirm plans in individual, involuntary chapter 11 cases that provide for payments to be made from a debtor's

future earnings. But the courts cannot enforce those confirmation orders against uncooperative debtors by issuing coercive orders. This, the Thirteenth Amendment prohibits. The only remedies constitutionally available to a bankruptcy court facing a recalcitrant debtor in such a case are the old standbys—dismissal and conversion. Congress may not have expected this, but only because it did not bother to do the necessary constitutional analysis.

