Constitutionalizing Employees’ Rights: Lessons from the History of the Thirteenth Amendment

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The last two decades have seen a revival of interest in the Thirteenth Amendment as a source of constitutional rights. Arguments based on the amendment have taken various forms to support different rights, ranging from protection of children, to safeguarding abortion rights, to prohibiting discrimination, and to the topic of this conference—protecting employees, both in their individual rights and in their right to organize unions, to engage in collective bargaining, and to strike. These positions have been asserted in the service of a progressive and liberal agenda for social change, in a tradition that goes back to the radical and abolitionist roots of the amendment. Yet the self-enforcing provisions in section 1 of the amendment have never expanded far beyond abolition. As the Supreme Court observed in United States v. Kozminski, decisions enforcing these provisions have never gone beyond identifying conditions of involuntary servitude that “involved compulsion of services through the use or threatened use of physical or legal coercion.” Meanwhile, the decisions on enforcement legislation, enacted under section 2 of the amendment, have gone considerably further, mainly to support civil rights legislation, such as the Civil Rights Act of 1866 insofar as it prohibits private discrimination.

Current attempts to revive the influence of the amendment must take this history into account. It offers three salutary lessons for efforts to protect employees’ rights by this means. First, it is not likely to be accomplished by judicial interpretation of the amendment alone. Second, decisions interpreting the amendment, to the extent they depart from enforcement legislation, have historically served conservative purposes as frequently as they have served progressive purposes. And third, the current Supreme Court has shown little sympathy for the progressive uses of constitutional law, especially to protect employees, and if anything has shown the reverse. It follows that constitutional arguments under the Thirteenth Amendment must be deployed as part of a larger strategy to obtain legislative endorsement of labor’s goals. Only in that way will current efforts to revive the amendment learn from its history, rather than repeating it.