



ST. MARY'S
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The Scholar: St. Mary's Law Review on Race
and Social Justice

Volume 15 | Number 1

Article 3

12-1-2012

Payday Peonage: Thirteenth Amendment Implications in Payday Lending.

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**PAYDAY PEONAGE: THIRTEENTH AMENDMENT
IMPLICATIONS IN PAYDAY LENDING**

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ABSTRACT

During the recent economic downturn, payday lenders’ business and profits have soared while traditional banks have tightened up their lending practices and experienced plummeting stock values. Payday lenders thrive in depressed economic climates. They do so by making short term, high interest loans to the underclass, generally the poor in urban and immigrant communities who need money to meet basic needs and who are without the sophistication to properly assess the risks of payday loans. Members of the underclass, therefore, are especially vulnerable to and ideal targets for predatory practices and exploitive loans. As the underclass—almost by definition—do not have the resources to pay back payday loans, they must “rollover” the loans and eventually owe exponentially more than the terms of their original loan. In effect, pay-

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day loans enrich lenders while perpetuating the limited economic and social position of the underclass.

As a result, the payday lending industry must be regulated. This Note argues that the Thirteenth Amendment of the United States Constitution, which formally ended slavery, is the proper vehicle for Congress to impose federal usury caps on payday loans. In order to make this case, this Note provides an overview of payday lending practices, describes the underclass, discusses the Thirteenth Amendment—including its ratification, judicial history, and modern development—and applies the Thirteenth Amendment to payday lending and the underclass.

Much has been written on the subject of payday lending practices, notably Professor Nathalie Martin's work on the predatory nature of payday lenders. Yet, the Thirteenth Amendment implications of payday lending have not been addressed and little has been done to address the conditions faced by the underclass. This Note makes clear that the Thirteenth Amendment is triggered by payday lenders' targeting of a vulnerable social and economic people and that the Amendment provides an appropriate avenue for regulating this particular industry.

I. INTRODUCTION

Visit the Predatory Lending Association (PLA) website and one can view its motto: "Helping payday lenders extract maximum profit from the working poor."¹ The site helps users identify the working poor and explains how the "debt trap" of the working poor may be optimized.² While the PLA's website parodies the predatory nature of payday lenders, the humor is unfortunately rooted in the truth.

Payday loans are "small, short-term, triple-digit interest rate" loans that usually range from \$200 to \$500 dollars.³ These loans are generally secured by the borrower's post-dated check or debit authorization and are intended to sustain the borrower until payday, when they will pay back the loan in one lump sum on receipt of their paycheck.⁴ As of March 2010, "more than 19 million U.S. households had taken out payday loans worth more than \$35 billion."⁵ A payday lender's business plan is to build a base of customers who borrow frequently in order to keep up

1. PREDATORY LENDING ASS'N, <http://www.predatorylendingassociation.com> (last visited June 25, 2012).

2. *Id.*

3. Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 564 (2010).

4. *Id.*

5. *Id.*

with their loan payments.⁶ Payday lenders target people who they believe will have trouble paying off their debt and thus will be repeat customers.⁷

Take for example Sandra Harris, who borrowed \$2,510 in separate loans from a payday lender and ultimately paid \$10,000 in fees.⁸ Ms. Harris said that while it was fast and easy to take out the loan, no one told her “about the bad side . . . [b]ecause they wanted you to come back, that’s how they made their money.”⁹ Five years after Ms. Harris first went to see a credit counselor she had only one \$300 loan to pay off.¹⁰ That \$300 loan cost her \$1,200 per year in interest.¹¹ Ms. Harris is the type of person that the PLA facetiously encourages other payday lenders to target; as an African-American woman suffering tough economic times, she is certainly the demographic that payday lenders actually target. Payday lenders disproportionately target minorities¹² and those on the “fringes of the financial system.”¹³ The PLA’s parody demonstrates what payday lenders are covertly and coercively doing, and in doing so, the PLA exposes the predatory design of payday lenders.

The payday loan industry thrives at the expense of millions of underclass Americans, who are generally defined as those who are economically impoverished and without the means to escape their economic condition, which includes minorities who have been hit the hardest by the current depressed economic climate.¹⁴ In 2011, the stocks of payday lenders soared to record highs as stocks in large banks plummeted.¹⁵ The anemic economic growth in the United States, banks’ increasing unwillingness to lend money, and the lack of regulations on payday loans have allowed the industry to thrive. These loans trap the borrower because they are directly connected to the borrower’s paycheck. The practice of

6. *Id.* at 577.

7. *Id.* at 573 (explaining the importance of repeat customers).

8. Rebecca Leung, *Paying More for Payday Loans*, CBS NEWS, Feb. 11, 2009, <http://www.cbsnews.com/stories/2005/05/16/6011/main695461.shtml>.

9. *Id.*

10. *Id.*

11. *Id.*

12. Michael A Satz, *How The Payday Predator Hides Among Us: The Predatory Nature of the Payday Loan Industry and Its Use of Consumer Arbitration to Further Discriminatory Lending Practices*, 20 TEMP. POL. & CIV. RTS. L. REV. 123, 138 (2010).

13. Lynn Cowan & Isabel Ordonez, *Short-Term Lenders Seize the Day*, WALL ST. J., Oct. 19, 2011, <http://online.wsj.com/article/SB10001424052970203658804576639431624988572.html?KEYWORDS=payday+lender>.

14. See generally Darwinder S. Sidhu, Article, *A Constitutional Remedy for Urban Poverty*, 61 DEPAUL L. REV. (forthcoming 2012) (manuscript at 6) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (describing the urban underclass).

15. Cowan, *supra* note 13.

payday lending and its success in keeping the economically disadvantaged mired in a cycle of poverty raises serious questions under the Thirteenth Amendment, which formally banned slavery, and which applies to modern circumstances sufficiently resembling slavery. Are payday borrowers the modern day peon whose labor is tied directly to paying off a deceitful and excessive loan? Do these loans take advantage of, and promote the residual badges and incidents of slavery that the Thirteenth Amendment sought to eliminate in society?

This Note discusses the Thirteenth Amendment implications found in payday loans and argues that the Thirteenth Amendment is a proper federal path through which to regulate payday lenders. Specifically Part II discusses Thirteenth Amendment history, scholarship, and court interpretations of peonage. Part III reviews payday lending by examining who typically takes out these loans, what the conditions of the loans generally are, and evidence as to how these loans affect the borrowers. This section also discusses the coercive techniques payday lenders use to rope borrowers into abusive loans. Finally, Part IV analyzes how conditions of payday loans trigger Thirteenth Amendment concerns. Part IV argues that by looking at the structure of the loan itself, its organization around a person's paycheck, its direct relationship with a person's labor, and the lender's coercive means to compel a borrower to take out additional loans, the Thirteenth Amendment is implicated. The targeted victims of payday lending, particularly the underclass,¹⁶ are proper recipients of Thirteenth Amendment relief, as they are suffering the precise effects of involuntary servitude that the Amendment was designed to eliminate.

To be sure, there will be many who disagree with the comparison of payday borrowers to antebellum slaves. I do not argue that these borrowers are subjected to the same racially infused servitude, hate, violence, and abuse. However, I do argue that the free labor concepts that drove the Thirteenth Amendment's ratification apply, and that the type of contract that payday lenders rope borrowers into is like that of the peonage contracts that are already acknowledged to fall within the bounds of the Thirteenth Amendment's prohibitions. Payday debtors, because of the type of loan that suppresses their free labor, suffer from the badges and incidents of slavery that the 38th Congress—which enacted the Thirteenth Amendment—and subsequent Supreme Court decisions sought to eliminate. Today's underclass suffers from social and economic conditions that restrict their social and physical mobility, and constrain their economic options and life decisions.¹⁷ These are conditions the Thirteenth Amendment aimed to prevent. While initially

16. See generally Sidhu, *supra* note 14 (describing the urban underclass).

17. See generally *id.* (describing the urban underclass).

passed to end African Slavery in this country, the Thirteenth Amendment is relevant today, as the conditions poor people face do not allow them to be meaningfully free.¹⁸

II. THIRTEENTH AMENDMENT BACKGROUND AND SCHOLARSHIP

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.¹⁹

A. *Thirteenth Amendment History and Judicial Development*

Enacted in 1865, the Thirteenth Amendment prohibited the institution of chattel slavery in the United States.²⁰ The framers of the Amendment did not utilize specific language to narrow its scope to African-American ex-slaves.²¹ Consequently, the Amendment protects “anyone regardless of race or their relationship to nineteenth-century slavery; the remnants of slavery as encountered by anyone regardless of race or their relationship to nineteenth-century slavery; or any discrimination, humiliation, or subjugation as to anyone.”²² As the Supreme Court held, “While the immediate concern [of the Thirteenth Amendment] was with African slavery, the Amendment was not limited to that . . . [i]t was a charter of

18. See generally Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 717–18 (1985) (arguing the need for a new test, other than the one in *Carolene’s Products*, to protect groups’ rights in today’s political and social conditions). He writes:

[I]f we fail to rethink *Carolene’s* dictum about discrete and insular minorities, we will succeed only in doing two different kinds of damage. On the one hand, we will fail to do justice to the very racial and religious groups that *Carolene* has done so much to protect in the past half-century. By tying their rights to an increasingly unrealistic model of politics, we will place them on the weakest possible foundation. On the other hand, we will fail to do justice to *Carolene’s* basic insight into the problem posed by prejudice in a pluralist democracy. The end of politics of exclusion hardly implies that pluralist democracy now functions fairly; it does mean, however, that the groups most disadvantaged by pluralism in the future will be different from those excluded under the old regime. The victims of sexual discrimination or poverty, rather than racial or religious minorities, will increasingly constitute the groups with the greatest claim under *Carolene’s* concern with the fairness of pluralist process.

Id.

19. U.S. CONST. amend. XIII.

20. *Id.*

21. See generally Sidhu, *supra* note 14 (manuscript at 3).

22. See generally *id.* at 16–17.

universal civil freedom for all persons, of whatever race, color, or estate, under the flag.”²³

In addition to the text, the intent of Congress was to expand the Amendment to non-Blacks. In 1865, Congress was committed to ridding the country of slavery and to promoting free labor in which all people were entitled to enjoy the fruits of their own labor.²⁴ This commitment encompassed both Blacks and Whites, as Congress recognized that Southern slavery had decreased workers’ wages and had stigmatized agricultural and hard labor.²⁵ Senator H. Wilson, addressing Congress during the Thirteenth Amendment debates, stated:

[t]his gigantic crime against the peace, the unity, and the life of the nation is to make eternal the hateful dominion of man over the souls and bodies of his fellow men. Those sacrifices of property, of health, and of life, these appalling sorrows and agonies now upon us, are all the merciless inflictions of slavery Yes, slavery is the conspirator that conceived and organized this mighty conspiracy against the unity and existence of the Republic²⁶

23. *Bailey v. Alabama*, 219 U.S. 219, 240–41 (1911); see also Margaret Howard, *Bankruptcy Bondage*, 2009 U. ILL. L. REV. 191, 208 (arguing that *Bailey* and *Clyatt v. United States* “clearly disconnect[ed] the Thirteenth Amendment from its racial roots, at least as far as peonage is concerned.”).

24. Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 *FORDHAM L. REV.* 981, 1009 (2002).

25. William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 *U.C. DAVIS L. REV.* 1311, 1357 (2007). Representative Ingersoll of Illinois stated as a reason for supporting the Amendment, “for the sake of the seven millions of poor [W]hite people who live in the slave States but who have ever been deprived of the blessings of manhood by reason of this trice-accursed institution of slavery. Slavery has kept them in ignorance, in poverty, and in degradation.” *CONG. GLOBE*, 38TH CONG., 1ST SESS. 2990 (1864). Senator Wilson further stated, “Then the wronged victim of the slave system, the poor [W]hite man, the sand-hiller, the clay-eater of the wasted fields of Caroline, impoverished, debased, dishonored by the system that makes toil a badge of disgrace, and the instruction of the brain and soul of man a crime, will lift his abashed forehead to the skies and begin to run the race of improvement, progress and elevation.” *CONG. GLOBE*, 38TH CONG., 1ST SESS. 1324 (1864).

26. *CONG. GLOBE*, 38TH CONG., 1ST SESS. 1320 (1864) (statement of Sen. H. Wilson). Senator Wilson concluded his address to Congress stating:

Our country is now floating on the stormy waves of civil war. Darkness lowers and tempests threaten. The waves are rising and foaming and breaking around us and over us with engulfing fury. But amid the thick gloom, the star of duty casts its clear radiance over the dark and troubled waters, making luminous our pathway. That duty is, with every conception of the brain, every throb of the heart, every aspiration of the soul, by thought, by work, and by deed to feel, to think, to speak, to act so as to obliterate the last vestiges of slavery in America, subjugate rebel slave masters to the authority of the nation, hold up the weary arm of our struggling Government, crowd with heroic manhood the ranks of our armies that are bearing the destinies of the

Senator Wilson pronounced that slavery was the only “foe our country has on the globe . . .” and that “every word spoken, every line written, every act performed, that keeps the breath of life in slavery for a moment, is against the existence of democratic institutions, against the dignity of the toiling millions, against liberty, the peace, the honor, the renown, and the life of the nation.”²⁷

Accordingly, the Thirteenth Amendment—passed to end immoral, racial slavery—was also passed with a broader view: that one should own his own labor and be free.²⁸ Thus, its passage prohibited “all repressive conduct rationally related to the impediments of freedom, not simply racist labor practices.”²⁹ When Senator Wilson and Representative Ingersoll addressed to the 38th Congress that the “poor [W]hite man” was also a victim of slavery, they recognized that poor people, regardless of their race, suffered the effects of slavery—not just African Americans.³⁰ The debates give us insight into the broader scope of the Thirteenth Amendment’s vision. While the 38th Congress had yet to recognize that others in the country were suffering from badges and incidents of slavery—namely Native Americans³¹—the vision of the Thirteenth Amendment was to prevent the involuntary servitude of all in the country, to whom ever was suffering from its conditions.³²

country on the points of their glittering bayonets, and thus forever blast the last hope of the rebel chiefs Then shall the waning star of the rebellion go down in eternal night, and the star of peace shall ascend the heavens, casting its mild radiance over fields now darkened by the storms of this fratricidal war Then the star of United America, now obscured, will reappear, radiant with splendor on the forehead of the skies, to illumine the pathway and gladden the heart of struggling humanity.

Id. at 1324.

27. *Id.* at 1324.

28. See Azmy, *supra* note 24 (recognizing a free labor system in which all people could enjoy the “fruits of their own labor”).

29. Alexander Tsesis, *Furthering American Freedom: Civil Rights and the Thirteenth Amendment*, 45 B.C. L. REV. 307, 389 (2004).

30. CONG. GLOBE, 38TH CONG., 1ST SESS. 2990, 1324 (1864) (statement of Sen. H. Wilson).

31. Rodney M. Baine, *Indian Slavery in Colonial Georgia*, 79 GA. HIST. Q. 418, 418 (1995) (pointing out that Indian slavery has largely been ignored by historians).

32. *The Slaughter House Cases*, 83 U.S. 36, 72 (1872).

If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we do with to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to

B. *Peonage—The Work Contracts that Broke the Debtor's Bank*

Subsequent statutes, stemming from the Thirteenth Amendment, made peonage unconstitutional.³³ Prior to the enactment of the Thirteenth Amendment and these statutes, peonage was the subject of a seminal New Mexico case, *Jaremillo v. Romero*.³⁴ The case concerned, Mariana Jaremillo, a servant whose father took her away from the service of her master while she still owed \$51.75 that her master previously advanced.³⁵ Mariana did not appear at trial, and was rendered a judgment for twenty-six months of work, or for the amount she owed, interest, and all costs.³⁶ The district court held that Mariana owed her employer, Romero, the securities on her appeal bond, the sum of \$56.21, and the costs of the suit to be taxed.³⁷ Furthermore, in default of the payment that she owed, she had to serve her master as a peon until debt was paid.³⁸

Ultimately the Supreme Court of the Territory of New Mexico reversed the judgment of the lower court with costs to Romero for a lack of evidence of debt owed.³⁹ The court defined “peon” and “peonage” as people indebted to their masters.⁴⁰

This was the cord by which they seemed bound to their masters' service Upon entering the new service, or while continuing therein, the peon was held rigorously to fulfill his pledge and render

remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

Id.

33. U.S. CONST. amend. XIII, § 1. *See also* 42 U.S.C. § 1994 (2006) (outlawing peonage and any method utilized to bind someone to voluntary or involuntary servitude).

The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.

Id. *See also* 18 U.S.C. §§ 1581–1596 (2006) (setting out the law regarding peonage by criminalizing peonage, slavery, and trafficking in persons).

34. 1 N.M. 190 (1857).

35. *Id.* at 1.

36. *Id.*

37. *Id.*

38. *Id.*

39. *See id.* at 9 (noting that the requisitorial letters had no legal force as evidence of Mariana's debt to Romero).

40. *See id.* at 2 (describing peons also as coming from no particular race, color, cast, or origin, and as owning little or no personal property).

his labor so long as his debts remained, or an additional one was incurred.⁴¹

The characteristic that separated peonage from slavery was that “[c]onsent of the parties was invariably the foundation upon which a servant became bound to service.”⁴² Peons could leave their service by paying back the debt to the master, or by working it off.⁴³ A person in the condition of peonage lost:

[n]one of his rights as a citizen by contracting with a master to serve him. He [was] under no political disqualifications; he [voted] at all elections if otherwise legally qualified; his servitude [did] not render him under our laws ineligible to the offices of the precinct, the country, the legislature or delegate in congress.⁴⁴

In 1911, the U.S. Supreme Court opined on the unconstitutionality of peonage under the strictures of the Thirteenth Amendment in *Bailey v. Alabama*.⁴⁵ There, Bailey was convicted under an Alabama statute for obtaining fifteen dollars under a written contract with intent to injure or defraud his employer.⁴⁶ Bailey borrowed fifteen dollars and agreed to

41. *Id.*

42. *See id.* at 3 (asserting that the principle of peonage had its roots in Spanish law, which later spread to Mexico).

43. *Id.* at 8 (establishing that peonage was a contract between a master and servant, and that the servant could not leave the master’s service during the time specified in said contract except by repaying the master or working off his debts).

44. *Id.*

45. *See* 219 U.S. 219, 241 (1911) (addressing the U.S. Supreme Court’s contention that peonage is a violation of the provisions of the Thirteenth Amendment).

The plain intention [of the Thirteenth Amendment] 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.

46. *Id.* at 229. Bailey “entered into the written contract to perform labor or services for the Riverside Company, a corporation, and obtained the sum of \$15 . . . and afterwards with like intent, and without just cause failed or refused to perform such labor or services or to refund such money” *Id.* The manager of Riverside Company testified that Bailey worked for only a month and a few days before ceasing further performance on the contract; this was the only evidence offered by the state. *Id.* at 230. The jury instruction submitted by the state indicated that refusing to perform under the contract without just cause was prima facie evidence “of the intent to injure his employer, or to defraud him.” *Id.* The court accepted this instruction over Bailey’s objection and a jury found him guilty. *Id.* at 231. In addition to awarding the injured party fifteen dollars in damages and another thirty dollars in fines, it was ordered that if Bailey defaulted on this payment he would be required to perform twenty days hard labor to cover the fine, and one hundred and sixteen days to cover the costs. *Id.*

spend a year working off the debt.⁴⁷ The Court found that although in the system of peonage the debtor contracted to perform the labor, this did not legalize the state's attempt to enforce the contract.⁴⁸ In fact, the Court held the contract to be unconstitutional under the Thirteenth Amendment and it did not matter whether the debtor voluntarily or involuntarily entered into a peonage loan.⁴⁹ The *Bailey* Court found that, whether entered into voluntarily or involuntarily, the classification of the loan:

implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily 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.*⁵⁰

It was not the employment contract that was found unconstitutional, rather the type of contract that prevented a person from enjoying the fruits of their labor⁵¹—a coercive contract. The contract was tied to the

47. *Id.* Specifically, the contract stated that in exchange for the \$15 Bailey agreed to “work and labor” for Riverside Company as a farm hand on one of their Montgomery county farms. *Id.* The contract began December 30, 1907 and ended December 30, 1908 for which he was to be paid \$12 per month to apply towards the debt. *Id.* at 229–30.

48. *Id.* at 242. The term peonage comes from Spanish America where it was used to describe the practice of compulsory service in order to pay off a debt. *Id.* When the Thirteenth Amendment was passed, Congress “was not concerned with mere names . . . It was concerned with . . . a condition, however named and wherever it might be established, maintained or enforced.” *Id.* Similarly, the amendment would serve little purpose if “through the guise of contracts” a debtor was “held to compulsory service.” *Id.*

49. *Id.* at 245.

50. *Id.* at 243 (emphasis added). While a peon may earn his release by paying off the debt, his service is enforced until such time as the debt is paid. *Id.* The difference between peonage and the voluntary performance of labor in payment of a debt is clear in that a voluntary laborer can elect at anytime to break his contract and be subject to a breach action for damages, but will not be subject to a law that compels performance or service. *Id.* Congress specifically sought to nullify all state laws that attempted to compel service or labor by making it a crime to refuse to perform. *Id.* at 243–44. “The Thirteenth Amendment prohibits involuntary servitude except as punishment for crime,” but that prohibition does not permit states to establish involuntary servitude “by making it a crime to refuse to submit to the one or to render the service which would constitute the other.” *Id.* at 244. Essentially, while a state may order a man to labor as a criminal punishment, it may not order him to labor for another as criminal punishment for failing to perform or pay. *Id.*

51. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* §§ 23, 27 (Drover Thrift ed., Courier Dover Publications 2002) (1690). Locke was instrumental in the Framers' construction of this concept. Locke wrote, “Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands we may say are properly his.” *Id.* § 27. On Slavery Locke wrote, “The freedom from absolute, arbitrary power, is so necessary to, and closely joined with a man's preservation, that he cannot part

debtor's labor; this was unconstitutional. The employer–employee relationship was not at issue.

Justice Field's dissent in the *Slaughter House Cases* further synthesized the right to control one's labor with the Thirteenth Amendment.⁵² Justice Field wrote that the Thirteenth Amendment should prevent peonage and any other form of "compulsory service for the mere benefit or pleasure of others."⁵³ He concluded that involuntary servitude manifested itself into the effects of the type of one's labor, stating:

[the Thirteenth Amendment] was intended to make every one born in this country a freeman, and as such to give to him the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. A prohibition to him to pursue certain callings, open to others of the same age, condition, and sex, or to reside in places where others are permitted to live, would so far deprive him of the rights of a freeman, and would place him, as respects others, in a condition of servitude.⁵⁴

Furthermore, Justice Field pronounced that any compulsion that would force one into labor, even for his own benefit "only in one direction or in one place" would be nearly as oppressive as the "compulsion that would

with it, but by what forfeits his preservation and life together; for a man, not having the power of his own life, cannot, by compact, or his own consent, enslave himself to any one, nor put himself under the absolute, arbitrary power of another, to take away his life when he pleases. ." *Id.* § 23.

52. *The Slaughter House Cases*, 83 U.S. 36, 83–91 (1872).

53. *Id.* at 89–90. The plaintiffs contended that:

[W]herever a law of a State, or a law of the United States, makes a discrimination between classes of persons, which deprives the one class of their freedom or their property, or which makes a caste of them to subserve the power, pride, avarice, vanity, or vengeance of others, there involuntary servitude exists within the meaning of the [T]hirteenth [A]mendment.

Id. at 91.

54. *Id.* at 90. The Thirteenth Amendment was passed by Congress on December 18, 1865, and the Civil Rights Act passed shortly on its heels in April 1866, were designed to give citizens of any "race and color"—regardless of their background—the same basic freedoms enjoyed by White Americans. *Id.* at 91. The driving theory was that all citizens should be "entitled to the rights and privileges enumerated" and denying or subjugating those rights in any manner was to subject a citizen to a form of involuntary servitude. *Id.* at 91–92. The drafter of the Civil Rights Act, Senator Trumbull declared to the Congress "I take it that any statute which is not equal to all, and which deprives any citizen of civil rights, which are secured to other citizens, is an unjust encroachment upon his liberty; and it is in fact a badge of servitude which by the Constitution is prohibited." *Id.* at 92. Justice Field's dissent was based on the idea that a state law that opened industry to some, while closing it off to others, was a clear violation of the spirit of both the Thirteenth Amendment and the Civil Rights Act. *Id.* at 93.

force him to labor for the benefit or pleasure of another, and would equally constitute an element of servitude.”⁵⁵ Following Justice Field’s line of reasoning, it matters not why someone enters into the oppressive contract, but only that one is forced by their social conditions into involuntary servitude.

The Supreme Court also wrote about the cyclical debt that is inherent in peonage. In *United States v. Reynolds*,⁵⁶ G.W. Broughton acted as surety for two convicts by paying their court fines and contracting them to work in order to pay off the debt.⁵⁷ One of the convicts was charged with violating a labor contract to work off debt to another creditor.⁵⁸ The Court found that the labor contracts created by surety were harsher than the labor requirements of the state to repay the fines.⁵⁹ While the convicts were technically being punished for their crime as allowed by the express terms of the Thirteenth Amendment,⁶⁰ the terms of their labor

55. *Id.* at 90. Justice Field wrote that the effect of the act was that in an area measuring 1,100 square miles, a population of over 200,000 people would be compelled by operation of law to use the “buildings of the favored company” for slaughtering their animals or stabling their horses. *Id.* at 92. In addition, they would have to pay these companies for the privilege of using their grounds, even though they are using them under compulsion, and would have to leave a portion of any animal slaughtered. *Id.* They were not even permitted to undertake these actions on their own land, resulting in restrictions so “odious in character” that they were reminiscent of 17th century France before the peasants revolted against the nobles for the severe oppression forced upon them. *Id.* at 92–93.

56. *United States v. Reynolds*, 235 U.S. 133, 140 (1942).

57. *Id.* Ed Rivers was convicted of petit larceny and was ordered to pay a total of \$58.75 in fines and costs. *Id.* at 139. Reynolds paid the sum to the court as surety for Rivers and the two entered into a contract requiring Rivers to work as a farm hand earning \$6 a month until the amount was paid off. *Id.* at 139–140. When Rivers was convicted again for refusing to labor any longer for Reynolds, Broughton acted as surety for that court ordered sum, allowing Rivers to contract once again as a farm hand. *Id.* at 140. The second person was E.W. Fields, charged with selling mortgaged property and ordered to pay a total of \$119.70 to the court. *Id.* Broughton paid the total and contracted Fields to work as a farm and logging hand for a little under two years until the debt was paid in full. *Id.*

58. *Id.* Under Rivers’ first contract with Reynolds he contracted to work nine months and twenty-four days. *Id.* He worked from May 4, 1910 through June 6, 1910, until he refused to work for Reynolds any further. *Id.* He was subsequently arrested for “violating the contract of service” and fined \$87.06. *Id.* After that he contracted to work for Broughton—who covered his fines and costs—for a period of fourteen months and fifteen days. *Id.*

59. *Id.* at 147. Under Alabama law the maximum sentence Ed Rivers would have been ordered to pay off his costs and fines was sixty-eight days hard labor. *Id.* Fields would have been facing a maximum of not more than four months of hard labor. *Id.*

60. 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. U.S. CONST. amend. XIII, § 1 (emphasis added).

contract were not fixed by the state.⁶¹ The convicts were working under constant coercion and threat of arrest, thus the system was found to be in violation of the Thirteenth Amendment.⁶² The Court wrote, “The convict is thus kept chained to an ever-turning wheel of servitude to discharge the obligation which he [h]as incurred to his surety, who has entered into an undertaking with the state, or paid money in his behalf.”⁶³

The U.S. Court of Appeals for the Ninth Circuit in *United States v. Mussry*⁶⁴ suggested that due to modern economic realities, the slaves that were the original concern of the Thirteenth Amendment are today’s migrant workers and domestic servants, and that the methods of coercion have become more subtle yet equally effective.⁶⁵ Accordingly, the court held that psychological coercion of workers is a form of threat ad-

61. *Reynolds*, 235 U.S. at 147. In both cases the men were subjected to sentences that far exceeded what they would have faced had their labor contracts been created by the state. *Id.* In fact, in a number of Alabama cases the “hirer becomes the transferee of the right of the state to compel the payment of the fine and costs, and by this exaction of involuntary servitude the convict has only changed masters,” and this practice is not considered illegal because the convict “is not being imprisoned for indebtedness.” *Id.* at 148. The result is that the only connection between Alabama’s Thirteenth Amendment right to order labor as punishment for a crime, and the surety’s agreement with a convict is that it allows the practice and charges the convict if he breaches it. *Id.*

62. *Id.* at 146–47.

Under this statute, the surety may cause the arrest of the convict for violation of his labor contract. He may be sentenced and punished for this new offense, and undertake to liquidate the penalty by a new contract of a similar nature, and, if again broken, may be prosecuted . . . The rearrest of which we have spoken is not because of his failure to pay his fine and costs originally assessed against him by the state. He is arrested at the instance of the surety, and because the law punishes the violation of the contract which the convict has made with him.

Id.

63. *Id.*

64. 726 F.2d 1448, 1453 (9th Cir. 1984), *abrogated by* *United States v. Kozminski*, 487 U.S. 931 (1988).

65. *Id.* The purpose of the Thirteenth Amendment and the statutes passed to help enforce its objectives apply to more than just the traditional form of slavery. *Id.* The statutes and amendment were intended to bring an end to slavery in its classic form and any other form of involuntary servitude, creating a free labor system throughout the country. *Id.* At all times the laborer must be free to move on to other income sources when he sees fit; without the ability to leave there is little incentive for the employer to treat the worker properly. *Id.* See also Ragini Tripathi, Comment, *The H-2B Visa: Is This How We Treat a Guest?*, 11 SCHOLAR 519, 533 (2009) (analyzing the plight of guest workers in the United States and how the visa system subjects them to involuntary servitude). “The plight of guest workers has been referred to as a form of contract slavery” and is commonly considered “one of the most prevalent forms of modern slavery.” *Id.*

dressable under the Thirteenth Amendment.⁶⁶ More specifically, in *Mussry*, the defendants led their Indonesian servants to believe they had to work in order to repay the defendants for money spent on their travel to the United States.⁶⁷ The defendants took advantage of the fact that their Indonesian servants were “in a strange country where they had no friends, and had nowhere to go, did not speak English, had no work permit, social security card, or identification, no passport or return airline ticket . . .” and therefore, “no means by which to seek other employment, and with insufficient funds to break their contracts”⁶⁸ There the court held:

[c]onduct other than the use, or threatened use, of law or physical force may, under some circumstances, have the same effect as the more traditional forms of coercion—or may even be more coercive; such conduct, therefore, may violate the 13th amendment and its enforcing statutes. The crucial factor is *whether a person intends to and does coerce an individual into his service by subjugating the will of the other person*. A holding in involuntary servitude occurs when an individual coerces another into his service by improper or wrongful conduct that is intended to cause, and does cause, the other person to believe that he or she has no alternative but to perform the labor.⁶⁹

66. *Mussry*, 726 F.2d at 1453. “Conduct other than the use, or threatened use, of law or physical force may, under some circumstances, have the same effect as the more traditional forms of coercion—or may even be more coercive, such conduct, therefore, may violate the [Thirteenth] Amendment and its enforcing statutes.” *Id.* The real measure is whether the person intended to and actually did coerce another into service by subjugating his will. *Id.* The person must be made to believe that there is no other “alternative but to perform the labor.” *Id.*

67. *Id.* The Indonesian servants were forced to surrender passports and plane tickets until they could work to pay back the “costs of their transportation to the United States.” *Id.* The servants spoke little English, had no friends or family to rely on for support, lacked the legal documents necessary to work, and therefore had no other alternative but to perform the labor. *Id.*

68. *Id.* While the servants were paid a much higher wage than they received in their home country, they were still paid significantly below the required minimum wage. *Id.* However, just because someone was coerced to accept lower wages based on truthful representations does not mean a violation of the Thirteenth Amendment has occurred. *Id.* “It is the act of the employer, as well as the effect upon the worker, that the 13th amendment and its enforcing statutes address.” *Id.* See also Tripathi, *supra* note 65, at 532 (analyzing the plight of guest workers in the United States and how the visa system subjects them to involuntary servitude).

69. *Mussry*, 726 F.2d at 1453.

In determining the question of involuntariness, the court should consider whether the challenged conduct would have had the claimed effect upon a *reasonable person of the*

The *Mussry* test therefore finds a sufficient showing of psychological coercion to prove involuntary servitude, even in the absence of physical or threatening force.⁷⁰

The early cases addressing peonage, whether voluntary or involuntary, all have a common denominator: labor contracts restricting an individual's free exercise of labor and economic independence.⁷¹ Professor Baher Azmy wrote of the peonage cases discussed above, contending "[t]hat the cases nevertheless advanced a central concern of the Thirteenth Amendment framers: protecting the mobility of labor and meaningful opportunities for economic independence."⁷² In Professor Azmy's analysis of *Bailey v. Alabama* he wrote:

[T]he Court was advancing a central Republican insistence that men be able to enjoy the 'fruits of their own labor.' This distinctive libertarian vision required that labor be mobile, and untethered to absolute control of another private person and that men must have the right to control basic life choices, including when and for whom they work. In such a free system, Republicans believed that men could partake in the continuing, natural process of progressing toward economic independence and social improvement.⁷³

Modern day Thirteenth Amendment scholarship calls for protection of all people from arbitrary restraints of freedom.⁷⁴ Freedom of labor aside, Thirteenth Amendment expert Professor Alexander Tsesis argues that the Amendment should protect free people's "conceptions of, and quests for, qualitatively good lives."⁷⁵ Under this standard, peonage suppresses "life aspirations [by] prohibiting [debtors] from entering into marital contracts, from choosing professions, and from making a host of other important life decisions."⁷⁶ In his call for modern Thirteenth Amendment litigation and legislation, Professor Tsesis writes "[p]rotecting essential freedoms means ending coercive practices and enabling people to make reasonable choices Using the Thirteenth Amendment for that end

same general background and experience. Thus, the particular individual's background is relevant in deciding whether he or she was coerced into laboring for the defendant. *Id.* (emphasis added).

70. James Henry Haag, *Involuntary Servitude: An Eighteenth-Century Concept in Search of a Twentieth-Century Definition*, 19 PAC. L.J. 873, 892 (1988). The test even extends to threats of legal action made against the victim in an attempt to keep them from breaching the contract. *Id.*

71. Azmy, *supra* note 24, at 986.

72. *Id.*

73. *Id.* at 1031.

74. Tsesis, *supra* note 29.

75. *Id.*

76. *Id.*

would be a legitimate use of governmental power to provide for the common good.”⁷⁷

C. *The Badges of Slavery Apply Even Without Slavery*

The state of peonage was considered a symptom of slavery, but certainly was not the only symptom. In *Bailey* the Court stated that the plain intention of the Thirteenth Amendment was to:

[A]bolish 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.⁷⁸

The *Bailey* court thus recognized that the symptoms of slavery still existed, and that these symptoms, called the “badges and incidents” of slavery, were unconstitutional under the Thirteenth Amendment.⁷⁹

The Supreme Court in *The Civil Rights Cases* elaborated on the relationship between badges and incidents of slavery and the Thirteenth Amendment:

It may be that by the black code . . . in the times when slavery prevailed, the proprietors of inns and public conveyances were forbidden to receive persons of the African race, because it . . . was merely a means of preventing . . . escapes, and was no part of the servitude itself 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 [W]hite person, and such like burdens and incapacities were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses.⁸⁰

The Court in *Jones* expanded on this concept, reversing a district court's dismissal of a complaint brought by plaintiffs who were not allowed to buy a home because of their race.⁸¹ The Court explained that

77. *Id.*

78. *Bailey v. Alabama*, 219 U.S. 219, 241 (1911) (emphasis added).

79. *Id.* “[L]egislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit.”

80. *The Civil Rights Cases*, 109 U.S. 3, 21–22 (1883).

81. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 (1968).

just as the Black Codes enacted after the Civil War had restricted the free enjoyment of rights, so did the exclusion of African-Americans from White communities.⁸² The Court continued, “[w]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.”⁸³

Since *Jones*, the Court has indicated that it is Congress’ responsibility to interpret and give meaning to the “badges and incidents” of slavery.⁸⁴ The Court also has acknowledged that the Amendment’s reach is much broader than that of the other Reconstruction Amendments—the Fourteenth and Fifteenth Amendments.⁸⁵ Accordingly, the Supreme Court has never ruled that the Thirteenth Amendment is limited only to the conditions of literal slavery.⁸⁶ Rather, actual slavery, as well as the “badges and incidents” of slavery, or the legacies of slavery, are both prohibited by the Thirteenth Amendment.⁸⁷

The question becomes, what reasonably constitutes a “badge or incident” of slavery? Professor Donald P. Judges argues that today’s underclass experience badges and incidents of slavery in their impoverished economic and related social conditions, regardless of race, “joblessness, crime, welfare dependency, drug addiction, inadequate health care and broken families”⁸⁸ Conditions that are severe enough to form a caste society thus are considered badges and incidents of slavery,⁸⁹ especially when they promote a cycle of poverty, rendering the underclass “chronically disadvantaged.”⁹⁰ More specifically, these conditions are manifested through “denial of freedom of movement, ability to own or dispose of property, the right to make and enforce contracts”⁹¹ Furthermore, scholars have posited that “human trafficking, hate speech, child abuse, violence against women, abortion, the citizenship of children of immigrants, the autonomy of American workers, and U.S. corporations’ use of exploited foreign laborers” are all encompassed by the Thirteenth Amendment’s prohibition of incidents of “involuntary servitude.”⁹²

82. *Id.* at 442.

83. *Id.* at 442–43.

84. Carter, *supra* note 25, at 1327.

85. *Id.*

86. *Id.* at 1328.

87. *Id.* at 1365.

88. Douglas P. Judges, *Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods*, 19 *HASTINGS CONST. L.Q.* 599, 682 (1992).

89. *Id.* at 688–89.

90. *Id.* at 688.

91. Carter, *supra* note 25, at 1329.

92. See Sidhu, *supra* note 14 (manuscript at 3–4) (describing the lack of constitutional protections afforded to those residing in urban areas). The Thirteenth Amendment has

Economic independence is a priority of the Thirteenth Amendment's goal to eliminate the badges and incidents of slavery, and is an essential predicate for an inclusive, free democratic society.⁹³ "Economic independence is necessary if the citizen is to be able to deliberate on the common good, the *res publica*, the thing public."⁹⁴ The freedoms afforded under the Thirteenth Amendment are threatened when citizens have failed to be set free from economic dependence.⁹⁵ Professor Amar argues that the Thirteenth Amendment should be interpreted to "guarantee each American a certain minimum stake in society."⁹⁶ This will help create independent citizens who have economic opportunity, a voice in the political arena, and who are not socially isolated—a central goal of the Thirteenth Amendment.⁹⁷ Professor Amar suggests that insurance of minimal entitlements are a constitutional duty and the nation needs minimum birthrights for every individual.⁹⁸ If you view the minimum stake in society as a floor for minimum rights enjoyed by every individual in this country, those below the floor will suffer from economic, political, and social isolation which leaves them vulnerable to suffering the "badges and incidents of slavery."⁹⁹

III. CONDITIONS OF TAKING OUT A PAYDAY LOAN

The underclass¹⁰⁰ is the payday lender's most profitable customer base, therefore, payday lenders market directly to members of the underclass

been interpreted to be extensive in scope. *Id.* at 4. The amendment covers circumstances concerning racial profiling, limited opportunities in education, housing, and traveling. *Id.* This category of protection correlates to a larger problem: the perpetual "urban underclass," which triggers the requirements of the Thirteenth Amendment. *Id.*

93. See Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J. L. & PUB. POL'Y 37, 38 (1990) (describing the deeply rooted American tradition which the author refers to as the "R/republican tradition" and how it has shaped American politics).

94. *Id.*

95. See *id.* at 40 (discussing the importance of different constitutional rights).

96. *Id.*

97. See *id.* at 40–42 (discussing the importance of being self-sufficient).

98. *Id.* at 43.

99. See generally Sidhu, *supra* note 14 (manuscript at 3–4) (describing the lack of constitutional protections afforded to those residing in urban areas). The Thirteenth Amendment established a floor of educational and economic conditions in order to give the urban underclass their own liberty resulting in "minimally effective" individuals in our society. *Id.* at 5.

100. The underclass exemplifies the Thirteenth Amendment problem with payday lending, but Thirteenth Amendment relief may not necessarily be limited to the underclass.

even if the loans are unaffordable.¹⁰¹ Affluent and sophisticated consumers are less likely to make mistakes when shopping for loans because they are better educated about financial products or they can hire experts to help them.¹⁰² Additionally, to the extent they make a mistake, they have the financial ability to recover.¹⁰³ By contrast, payday lenders design products that exploit poorer consumers' mistakes.¹⁰⁴ Lenders advertise that payday loans are a fast and easy way to get a loan, especially for those with "bad" credit.¹⁰⁵ The industry advertises via radio, television, internet, and mail.¹⁰⁶ Moreover payday lenders will entice debtors to take loans by offering free and promotional payday loans to first time borrowers as well as referral fees to existing customers for referring new customers.¹⁰⁷ The underclass "lack[s] the financial cushion that rich consumers have, and therefore they are more vulnerable to the unexpected costs of credit products and more likely to stumble into financial distress."¹⁰⁸

Furthermore, payday lenders disproportionately target minorities¹⁰⁹ especially African-Americans and Hispanics,¹¹⁰ along with military members and women.¹¹¹ Payday lenders target minority communities by opening in poorer neighborhoods that are often comprised of a large number of minorities.¹¹² The lenders even go so far as to develop business plans to promote the targeting of minorities and welfare recipients.¹¹³ It is well known that payday loans are "designed to extend credit to borrowers who are denied access to traditional credit prod-

101. See generally Shane M. Mendenhall, *Payday Loans: The Effects of Predatory Lending on Society and the Need for More State and Federal Regulation*, 32 OKLA. CITY U. L. REV. 299, 307-08 (2007) (explaining the advertising tactics used by predatory lenders).

102. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 64 (2008).

103. *Id.* Usually, more affluent customers are able to recover by paying off a credit card bill or even refinancing a mortgage that contains more favorable terms. *Id.*

104. See *id.* (explaining how the vulnerability of poor consumers causes them to fall into financial distress).

105. Mendenhall, *supra* note 101, at 307.

106. *Id.* at 306.

107. Martin, *supra* note 3, at 574.

108. Bar-Gill, *supra* note 102.

109. Satz, *supra* note 12.

110. *Id.*

111. Bar-Gill, *supra* note 102, at 68. "In Chicago, for example, 41% of the city's subprime refinancing occurs in [B]lack neighborhoods, although only 10% of the overall refinancing takes place in these same neighborhoods. An Illinois study found that there were 37% more payday loans issued in minority neighborhoods than in [W]hite neighborhoods." *Id.*

112. Satz, *supra* note 12; Mendenhall, *supra* note 101, at 307.

113. Satz, *supra* note 12.

ucts . . . [and] the broad exposure of minorities to payday loans and sub-prime mortgages implies a broad exposure to the risks associated with these products.”¹¹⁴

In further taking advantage of the borrower, payday lenders are fully aware that “many lower-income people are intimidated by banks.”¹¹⁵ Using this to their advantage, “friendly” payday lenders make customers feel at home and accepted so that they are comfortable taking out initial loans and then returning to borrow more.¹¹⁶ These practices suggest that lenders are wolves in sheep’s clothing. When the debtor’s loan rolls over, the borrower typically will end up paying \$1800 for a \$300 loan.¹¹⁷ Lenders know that borrowers will pay any interest rate for fear of not making other basic payments, such as for food or electricity.¹¹⁸

Payday lenders characterize a payday loan as a short-term loan, yet the loan is designed as interest-only so the “principal essentially stays out forever, while the lender recoups the money he has loaned in only four weeks.”¹¹⁹ This distinguishes payday loans from other types of loans, such as credit card loans or home mortgages, which are designed to pay off the principal and the interest in installments.¹²⁰ The typical payday debtor finds it impossible to repay the principal balance by the end of the loan period.¹²¹ This leads to a “rollover”—which occurs “when a customer, unable to repay the full principal and unwilling to fall into default if the payday lender attempts to cash her check, rolls the payday loan

114. Bar-Gill, *supra* note 102, at 68.

115. Martin, *supra* note 3, at 576.

116. *Id.* at 567.

117. Satz, *supra* note 12, at 132.

118. *See* Mendenhall, *supra* note 101 (“The assumption is that people with financial difficulties in dire need of money will pay almost any interest rate to get it.”).

119. Martin, *supra* note 3, at 564. “A typical short-term loan product in today’s market allows a customer to borrow \$400, for fourteen days or less, for a \$100 fee. The loan is usually designed as an interest-only loan, with the interest payment—here \$100—due every two weeks.” *Id.*

120. Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 9892 MINN. L. REV. 1110, 1158–59 (2008) (discussing how characterizing the APR of a payday loan as fees misleads the borrower into thinking it is just as good, if not better than other types of loans). “While focusing on a dollar amount might simplify comparison of one payday loan to another payday loan, it confuses the more important price comparison to *other types* of debt such as credit cards, pawnshop loans, home mortgages, and personal loans from finance companies, banks, or credit unions.” *Id.* *See also* Consumer Union of U.S., *Payday Lenders: Small Loans, Hefty Fees, Big Problem*, CONSUMER REPORTS MAGAZINE, Feb. 2009, available at <http://www.consumerreports.org/cro/aboutus/mission/viewpoint/small-loan-big-problems/overview/small-loan-big-trouble-ov.htm>.

121. Satz, *supra* note 12, at 129.

over for another pay cycle”¹²² Rollovers are the “bread and butter” of the payday lending business.¹²³

Payday loans are not necessarily related to a borrower’s income.¹²⁴ While a credit report is not required to take out a payday loan,¹²⁵ the lenders do whatever they can to make sure they receive payments.¹²⁶ The borrower is required to “enter into a bank debit agreement that enables the lender to debit the rollover fee from her bank account every two weeks.”¹²⁷ Moreover, it is becoming increasingly popular to have a borrower authorize her employer to pay a lender directly from her wages.¹²⁸ These wage assignments ensure that the payday lender will receive its payment before the borrower is able to pay other bills, creating a dependence on the payday lender to provide more loans,¹²⁹ proliferating the borrower’s cycle of debt.

There is a great deal of direct and indirect coercion in payday lending. Discussing examples of such coercion, and even outright fraud, in predatory lending, Professor Kathleen C. Engel and Professor Patricia A. McCoy wrote, “[l]ending fraud comes in endless varieties and is only limited by the ingenuity of the perpetrators The first type of fraud consists of deception aimed at borrowers.”¹³⁰ “The most notorious deceptions include fraudulent disclosures, failures to disclose information as required by law, bait-and-switch tactics, and loans made in collusion with home-repair scams.”¹³¹

Coercion exists within the methods by which payday lenders characterize the annual percentage rate (APR). The APR is advertised to the borrower as a fee for procuring the payday loan, but generally comes with

122. *Id.* at 130.

123. Martin, *supra* note 3, at 575.

124. *See generally* Mendenhall, *supra* note 101, at 305 (explaining that since lenders know borrowers do not have sufficient funds in their bank accounts at the time the loan is granted, they agree to wait until the borrower receives their paycheck to obtain payment); Satz, *supra* note 12, at 128.

125. Satz, *supra* note 12, at 128.

126. *See* Mendenhall, *supra* note 101, at 314 (explaining the frequently unfair and illegal collection practices of the payday lending industry).

127. Satz, *supra* note 12, at 132.

128. *Id.*

129. *Id.*

130. Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1267 (2002).

131. *Id.* at 1268. With regard to fraudulent deception “aimed at capital sources, such as secondary-market purchasers of loans, federal loan guarantors, and sometimes even loan originators themselves[,]” such fraud is commonly seen in “falsified loan applications or inflated real estate appraisals.” *Id.*

additional features, trapping unwary consumers with inordinate fees.¹³² These “fees” are essentially a finance charge and when they are actually expressed as an APR it is clear that the percentage rate is astronomically higher. For example, a borrower who requests a \$100 loan, writes a check for \$115, and receives a cash advance of \$100; the \$15 fee on that loan translates to an APR of 390%.¹³³ Depending on the transaction and the jurisdiction, the APR for a payday loan can reach even higher, and range up to 871%.¹³⁴ The borrower will not realize that this fee is actually an APR because lenders do everything they can to make sure the borrower does not fully understand the implications of the fees. Payday lenders profit enormously from this type of deception through APR fees.¹³⁵

Professor Michael A. Satz identifies further deceptive practices payday lenders employ to reel in borrowers. “Affinity marketing” schemes are used to mislead customers into thinking that the loans offered are government sanctioned.¹³⁶ In addition, lenders encourage borrowers to “enter alternative lending transactions that are designed to skirt, or even break, the laws attempting to regulate the payday lending industry.”¹³⁷ “These alternative lending practices include the sale-leaseback transaction, the cash-catalog sale and cash-back advertising.”¹³⁸

Finally, debt collection options that traditional debt collectors may not use are available to payday lenders.¹³⁹ Payday lenders will harass customers and their employers and relatives with vexing telephone calls,

132. Patrick L. Hayes, *A Noose Around the Neck: Preventing Abusive Payday Lending Practices and Promoting Lower Cost Alternatives*, 35 WM. MITCHELL L. REV. 1134, 1142 (2009). In 1999, a survey by the Consumer Federation of America (CFA) revealed lenders making “payday loans of \$100 to \$400 had interest rates of 390% to 871%.” *Id.* Furthermore, CFA found that in 2001 many lenders were charging more than 500% APR for a fourteen-day loan of \$100. *Id.*

133. Pearl Chin, *Payday Loans: The Case for Federal Legislation*, 2004 U. ILL. L. REV. 723, 729 (2004). To illustrate the magnitude of these fees, “[t]hese rates are even higher than those of organized crime loan sharks in Las Vegas, who traditionally have charged about 5% interest per week, or 260% APR.” *Id.*

134. Hayes, *supra* note 132.

135. Martin, *supra* note 3, at 570. An industry website proudly advertises the fact that payday lending is extremely profitable, emphasizing the words “tremendous profits available” in their summary. *Id.*

136. Satz, *supra* note 12, at 133. “For example, payday lenders regularly target military personnel for their fringe banking products.” *Id.* Lenders located near military bases lure military customers with official looking advertisements in private publications targeted to create the mistaken belief that the lenders are endorsed by the military. *Id.*

137. *Id.* at 134.

138. *Id.* “The sale-leaseback transaction is written up as though the lender buys an appliance from the customer[.]” but while the lender leases the appliance back to the customer for a fee, the lender doesn’t take possession, just a post-dated check. *Id.* If the customer defaults, the lender often will not accept the appliance to satisfy the debt. *Id.*

139. *Id.* at 135.

threaten violence against customers unable to repay, collect excessive damages from customers, and threaten criminal prosecution against customers who fail to make payments.¹⁴⁰ Some criminal bad-check statutes enable a payday lender to coerce borrowers into paying their debts to avoid criminal prosecution.¹⁴¹ The analogy has been made that “payday lenders use the threat of jail just as a loan shark might have used the threat of physical violence.”¹⁴² Some of the lenders file criminal complaints in faraway jurisdictions, rendering it impossible for the borrower to respond to the suit.¹⁴³ Payday lenders may place a hold on a debtor’s checking account to enforce a payment.¹⁴⁴ Complicated arbitration agreements are now emerging in payday loan contracts, and “payday loan companies rely on the *in terrorem* effect to dissuade consumers from bringing lawsuits.”¹⁴⁵ Borrowers generally sign away any meaningful legal redress available to them when executing many payday lenders’ agreements that include mandatory binding arbitration agreements.¹⁴⁶

When it comes to receiving their money, payday lenders emerge like wolves, using coercive and frightening tactics to get their payments. As this discussion makes clear, payday lenders engage in various conduct at several stages—from marketing, issuing the loans, and collecting payment—that can be described as opportunistic or aggressive at best, and coercive and predatory at worst.

IV. PAYDAY DEBT PEONAGE

Peonage stemming from payday lending is a legitimate Thirteenth Amendment problem that should give rise to remedial action under this

140. Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 78 (2002). The Community Financial Services Association of America (CFSA) adopted a best practices list, under which members pledge to follow appropriate collection practices. *Id.* at 77. For example, members “pledge to follow the best practice of not threatening or seeking criminal action against customers who fail to repay loans.” *Id.* Nonetheless, the loan industry continues to use harassment techniques on consumers. *Id.*

141. Satz, *supra* note 12, at 135.

142. *Id.*

143. *Id.*

144. *Id.* The customer may be further limited from opening an account at another bank, because “many banks refuse to open accounts for people whose previous banks have closed their accounts.” *Id.* at 136. Essentially, a customer may undertake a payday loan and thereby go from being a “banked” customer to an “unbanked” individual, creating further problems with the already precarious financial position of the borrower. *Id.*

145. *Id.* at 150.

146. *Id.* at 137. Professor Satz argues that these binding arbitration agreements “deny the payday lending customer the opportunity to have her case heard in court and suggest that the payday lending industry targets and takes advantage of entire classes of customers.” *Id.*

constitutional provision. As a threshold matter, it is critical to respond to an important anticipated criticism. Because payday lenders do not employ their borrowers, some might argue that Thirteenth Amendment peonage arguments do not apply in this context. This critique, however, takes too narrow a view of peonage under the Thirteenth Amendment. The lack of a literal employment relationship is inconsequential as the court in *Jaremillo v. Romero* explained.¹⁴⁷ The circumstances surrounding the loans render them coercive, and the loans are tied directly to the debtor's paycheck. Furthermore:

[t]he 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.¹⁴⁸

A. *Peonage: Economically Trapped & Involuntary Serving Payday Lenders*

While payday lenders are not literally the debtor's employers, their relationship is analogous to the typical employer–employee relationship present in the peonage cases. The Thirteenth Amendment, the Anti-Peonage Act, and multiple judicial decisions guarantee freedom from forced labor to those trapped by indebtedness.¹⁴⁹ The structure of payday loans traps debtors in their indebtedness, forcing them into a cycle of never-ending debt.¹⁵⁰ Payday loans are designed to maintain a borrower until her payday, require the debtor to secure the loan with a post-dated check or debit authorization, and are meant to be paid back in one lump sum

147. See generally *Romero*, 1 N.M. at 195–96 (explaining the endless cycle of debt existing within the master-servant system in New Mexico around 1846).

148. Margaret Howard, *Bankruptcy Bondage*, 2009 U. ILL. L. REV. 191, 234 (2009). “Peonage is a type of involuntary servitude . . . in which a debtor is forced through the mechanism of physical or legal coercion to work in order to pay a debt. *Id.*”

149. Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165, 182 (1990). An analogous relationship exists between the Thirteenth Amendment and bankruptcy, particularly in that bankruptcy provides a similar freedom from forced labor as do the anti-peonage laws. *Id.* Furthermore, “[p]eonage and bankruptcy can be seen as analogous when bankruptcy coerces work through imprisonment” *Id.*

150. Mendenhall, *supra* note 101, at 311. “The goal of these payday loans is to make it next to impossible for consumers to have the ability to pay off the loan in full at the end of the loan period without needing to borrow again before the next payday.” *Id.*

when the consumer receives her paycheck.¹⁵¹ Thus, the debtor is quite literally working off the debt for the payday lenders. Payday loans have a direct relationship to the debtor's labor, and the fruits of her labor. Like the court found in *Jaremillo v. Romero*, these loans hold a debtor until she fulfills her debt and render her a laborer so long as the debt remains.

Threats of criminal prosecution for failing to pay back the debt are unconstitutional under the Thirteenth Amendment, yet this does not stop payday lenders.¹⁵² The loan structure, issuing borrowers the loan via a post-dated check, is another tool of coercion.¹⁵³ Payday lenders take advantage of the borrower's fears of prosecution and jail by threatening customers with criminal prosecution for writing bad checks.¹⁵⁴ Historically payday lenders threatened to present the wage assignment (now replaced by a post-dated check) to the debtor's employer, who could terminate the debtor.¹⁵⁵ Today, even if payday lenders cannot legally prosecute a borrower, they still "use the criminal justice system as a collection agency."¹⁵⁶ Payday lenders possess "a strong economic incentive to threaten customers with criminal prosecution. Payday loan customers will do whatever it takes to keep from going to jail; thus, payday lenders are assured of getting paid as long as consumers fear imprisonment."¹⁵⁷

Furthermore, borrowing from payday lenders traps the borrower in a cycle of debt and a coercive labor-for-debt relationship.¹⁵⁸ As Professor Nathalie Martin points out:

151. See generally Martin, *supra* note 3, at 564 (explaining by example that a short-term loan for \$400 attaches a \$100 fee, which on interest-only loans becomes a \$100 interest due every two weeks).

152. See generally *Reynolds*, 235 U.S. at 147 (exploring the illegality of threats to prosecute used to force an individual into service, per the Thirteenth Amendment).

153. See Michael A. Stegman, *Payday Lending*, 21 J. ECON. PERSP. 169, 169 (2007) (explaining that in order to receive a payday loan, a borrower usually presents the lender with a post-dated check). See generally Johnson, *supra* note 140, at 87 (stating that the "available evidence shows that payday lenders threaten prosecution across the nation—even in jurisdictions where governmental attorneys will not pursue bad-check convictions against payday borrowers").

154. Johnson, *supra* note 140, at 86–87.

155. Martin, *supra* note 3, at 571 ("According to some, the payday lending industry initially grew from the salary-buying business of the early twentieth century. Salary buyers advanced cash at steep fees on the security of a wage assignment. If the loan was not repaid or renewed on time, the salary buyer would threaten to present the wage assignment to the borrower's employer, who might then terminate the employee.").

156. Johnson, *supra* note 140, at 96.

157. *Id.*

158. See generally Christopher Konneker, *How the Poor are Getting Poorer: The Proliferation of Payday Loans in Texas via State Charter Renting*, 14 SCHOLAR 489, 494–95 (2011) (discussing components of the cycle of debt associated with payday lending). See also, Molly McDonough, *Payday Lenders Using Courts to Create Modern-Day Debtors' Prisons in Missouri*, Critics Say, ABA Journal, Aug. 20, 2012, available at <http://www.aba>

[V]ery few customers can afford to pay back the loans. Rather . . . most customers find it necessary to continue to pay \$1000 to borrow \$500 for twenty weeks, or to pay \$100 in interest every two weeks—for the rest of time—on an original loan of \$400.¹⁵⁹

Payday loan fees and interest hikes are other tools of coercion.¹⁶⁰ Debtors, worried about mounting interest and the unpaid principals, must work tirelessly just to keep up with payments.¹⁶¹ The thought of accruing more debt under the terms of the loan is frightening to debtors, as many of them spend their entire paycheck to keep up with the payments.

Although the initial decision to enter into a payday loan is generally considered to be voluntary, the nature of the subsequent relationship between the lender and the debtor often becomes coercive. As *Bailey* clarifies, coercion can exist irrespective of whether a loan was entered into voluntarily.¹⁶² Payday lenders often encourage repeat borrowing, and borrowers often feel they must take out additional loans to keep up with payments on a previous loan.¹⁶³

Furthermore, some payday loans are not even truly voluntary at the outset.¹⁶⁴ Individuals who utilize payday loans are disproportionately a part of the underclass.¹⁶⁵ Professor Randall Kennedy characterizes the

journal.com/news/article/payday_lenders_using_courts_to_create_modern-day_debtors_prisons (showing that “[a] practice in Missouri of summoning debtors to civil court for an ‘examination’ is resulting in arrests and prompting critics to complain about modern-day debtors’ prison tactics in the state.”).

159. Martin, *supra* note 3, at 577.

160. See, e.g., Stegman, *supra* note 153, at 169–70 (discussing payday loan fees and interest rates).

161. See generally Mendenhall, *supra* note 101, at 311–12 (contending that mounting interest makes it nearly impossible for borrowers to pay back the principal).

162. *Bailey v. Alabama*, 219 U.S. 219, 243 (1911) (stating that “peonage, however created, is compulsory service, involuntary servitude”).

163. Martin, *supra* note 3, at 575. See also Uriah King and Leslie Parrish, *Payday Loans, Inc.: Short on Credit, Long on Debt*, CENTER FOR RESPONSIBLE LENDING, Mar. 31, 2011, at 2–3.

[R]epeated borrowing is a result of the structure of the payday loan product itself—requiring a borrower to repay the entire amount due with a single paycheck virtually ensures that they will not have enough money left over to get through the rest of their pay period without quickly taking out another loan. Borrowers are misled by the promise of a short-term credit product to take a loan that is designed to keep them indebted for extended periods.

Id. at 1–2.

164. See Satz, *supra* note 12, at 133 (detailing the payday lending industry as one that “targets communities in which individuals have little to no choice as to where to obtain a loan. These individuals are, in effect, a captive audience.”).

165. See generally Mendenhall, *supra* note 101, at 308. “Consumers who enter the payday loan market ‘are not even living paycheck to paycheck.’” *Id.* They are “borrowing

consequences of being poor as being particularly vulnerable to “terrors of nature, bad luck and communal failure,” and further argues that people living in poverty turn to financial loans and payday lenders to meet basic survival needs.¹⁶⁶ Under contract law, a person who agrees to take out another loan in order to make an existing loan payment and pay rent is arguably under duress, as he or she is trying to prevent the potentially devastating alternatives to not having that money.¹⁶⁷ The creditor knows the status of the debtor’s credit,¹⁶⁸ income, debt, and that the short-term credit product is “harmful if used on a continuing basis.”¹⁶⁹ Payday lend-

against their next paycheck to meet living expenses. The market is structured around people living below the middle-class in this country.” *Id.*

166. Randall Kennedy, *U.S.’s Deepest Fault Line*, CENTER FOR SOC. COHESION, <http://cohesion.asu.edu/?p=536> (last visited June 28, 2012).

167. RESTATEMENT (FIRST) OF CONTRACTS § 493 (1932) (emphasis added):

Duress may be exercised by

- (a) personal violence or a threat thereof, or
- (b) imprisonment, or threat of imprisonment, except where the imprisonment brought about or threatened is for the enforcement of a civil claim, and is made in good faith in accordance with law, or
- (c) threats of physical injury, or of wrongful imprisonment or prosecution of a husband; wife, child, or other near relative, or
- (d) *threats of wrongfully destroying, injuring, seizing or withholding land or other things, or*
- (e) *any other wrongful acts that compel a person to manifest apparent assent to a transaction without his volition or cause such fear as to preclude him from exercising free will and judgment in entering into a transaction.*

Id. The Restatement gives the following example for clause d:

A threatens to eject immediately B, a tenant at will who is ill and unable to find another residence at once, unless B signs a lease at double the existing rent. B signs the lease because of fear of immediate ejectment. If the rent demanded is unconscionable there is duress. Though A did not create the circumstances making dispossession so serious a matter, oppressive use of these circumstances may amount to duress.

Id. The Restatement gives the following examples for clause e:

A, a banker, holds a note of B who has been discharged in bankruptcy. B needs banking accommodations in order to carry on his business. A threatens B that unless B signs a new note in substitution for the one held by A’s bank, A will use his influence with all the banks in the neighborhood to prevent B from having banking accommodation. Induced by fear, B signs a new note. There is duress.

Id. Furthermore,

A, a creditor of B, threatens B to bring proceedings to have a guardian appointed for B, and take charge of his property unless he will sign a note for A’s claim. B is an aged person of infirm will, and induced by fear signs the note. There is duress.

Id.

168. See Martin, *supra* note 3, at 572 (“[Lenders] assess a borrower’s creditworthiness using the industry-wide TeleTrack credit reporting system and then offer a loan through a retail store location.”).

169. Uriah King and Leslie Parrish, *Payday Loans, Inc.: Short on Credit, Long on Debt*, CENTER FOR RESPONSIBLE LENDING, Mar. 31, 2011, at 1.

ers are indifferent to the dire financial situation of many borrowers, and instead exacerbate such problems by making it next to impossible for borrowers to pay back the loan.¹⁷⁰ In addition, lenders take advantage of borrowers' fears of increased poverty or possible imprisonment by using aggressive and inappropriate collection practices, which encourage debtors to borrow even more.¹⁷¹

This is not unlike the defendants in *Mussry* who knew that their domestic servants had no other recourse but to work for them.¹⁷² Lenders know that the debtors are desperate, and struggling to stay afloat financially.¹⁷³ They use psychological tactics to coerce debtors into thinking that their loans are the only way to stay financially ahead.

B. *Payday Loans Perpetuate the Badges and Incidents of Slavery*

Trapped by payday loans, a debtor's ability to escape her marginalized economic and social situation is stunted—a valid Thirteenth Amendment concern.¹⁷⁴ Mobility is restricted, as it takes capital to move, and any of the debtor's extra capital is dedicated to paying off these loans. Payday lenders make most of their money from repeat debtors,¹⁷⁵ which suggests that borrowers' confinement to the debt cycle is not only financial, but also geographical. Debtors cannot make important life decisions such as

170. See Mendenhall, *supra* note 101, at 311 (discussing the payday lender's intent to put the debtor into a debt cycle).

171. See generally *id.* at 314 (stating that “collection practices used by payday lenders are not imposed on consumers defaulting from traditional forms of credit”).

172. See *United States v. Mussry*, 726 F.2d 1448, 1451–52 (9th Cir. 1984) (deciding that enticing Indonesian servants to travel to the United States and subsequently forcing them to work off the debt incurred by transportation, was a violation of the Thirteenth Amendment, if proven).

173. See generally Johnson, *supra* note 140, at 63.

One research assistant obtained a total of nine loans in three days. Most of the subsequent lenders asked why the researcher needed another loan so soon after the previous one. In response, the research assistant gave various answers such as ‘[t]he loan I got yesterday wasn’t large enough,’ ‘[m]y paycheck wasn’t big enough,’ and ‘I lost money gambling last night.’ Even though Tele-Track informed these lenders about existing payday loans, most granted the loans. With statements such as ‘[i]t’s none of my business,’ some loan clerks ignored signs that a research assistant could be a consumer in grave financial trouble.

Id.

174. Sidhu, *supra* note 14 (manuscript at 51). “[D]enial of physical, or horizontal, liberty . . . establishes a cognizable Thirteenth Amendment problem. The inability of slaves to move beyond accepted boundaries or travel broadly was a fundamental part of slavery.” *Id.* at 53. “Accordingly, the Supreme Court recognized that ‘restraint of . . . movements’ is an ‘inseparable incident[] of the institution’ of slavery that falls squarely within the core of the amendment’s original concerns.” *Id.* at 54.

175. Martin, *supra* note 3, at 573.

whether to move, get married, or change professions. The inability of many payday loan borrowers to make such life decisions creates physical isolation and indicates social and economic conditions that present Thirteenth Amendment concerns.

Geographic isolation only perpetuates payday borrowers' poverty and lack of access to resources. Professor Sidhu writes, "Importantly, as a result of their physical isolation and exposure to the conditions within them, including inadequate public education, the probability of modest economic success for the urban underclass is practically a foregone conclusion."¹⁷⁶ Like "[t]he inability of slaves to move beyond accepted boundaries or travel broadly was a fundamental element of slavery,"¹⁷⁷ the payday debtor is unable to move out of his or her physical location to another that may present better economic opportunities. A large part of this isolation is due to the extreme debt the debtors find themselves in because of payday lenders. This inability to move out of their physical environment is reminiscent of a slave's inability to leave their master's plantation.¹⁷⁸

The argument for a minimum stake in society posited by Professor Amar also calls for the freedom of movement. Physical immobility is "an additional manifestation of the absence of a nominal stake in society that the Thirteenth Amendment ensures, as the meaningful freedom of movement is a precondition for participation in the modern economy."¹⁷⁹ Furthermore, debtors trapped by payday loans are not afforded the same opportunities as those with a certain measure of economic wherewithal (i.e., the upper classes), and thus do not have a minimum stake in society. Payday debtors have negative capital that keeps growing negatively due to the nature of the loan.¹⁸⁰ When the poor have a growing negative capital, they become consumed with keeping up with payments, becoming more and more dependent on payday loans.¹⁸¹ This economic dependency, Professor Amar argues, is what the Thirteenth Amendment seeks

176. Sidhu, *supra* note 14 (manuscript at 45).

177. *See id.* at 53.

178. *Id.* at 55.

179. *Id.* Two main characteristics of the underclass are "their limited economic position and [their] restrained physical situation;" both characteristics are legitimate Thirteenth Amendment concerns. *Id.* *See Amar, supra* note 93, at 40 (stating that the Thirteenth Amendment should be interpreted to "guarantee each American a certain minimum stake in society").

180. *See Johnson, supra* note 140, at 10–11 (explaining that when a payday loan customer cannot repay the loan, he or she must roll over the loan by paying a fee and thus increasing the total cost of the loan).

181. *See Id.* at 56–57 (discussing that although a rollover is usually defined as "a customer's payment of a fee to extend the payday loan's due date," the rollover definition should also encompass the "borrowing from Peter and paying off Paul—that is, taking out

to eliminate.¹⁸² When the lower class does not have a minimum stake in society, they are more vulnerable to suffering from the devices and incidents of slavery.

In California alone, repeat African-American and Hispanic borrowers spend \$247 million in payday loan fees annually.¹⁸³ This takes money away from their communities—money that could be spent on bills or emergency costs, and to keep the borrower out of debt. The Center for Responsible Lending found that payday lenders were about eight times as concentrated in neighborhoods that were predominately African-American and Latino as compared to Caucasian neighborhoods.¹⁸⁴ Seemingly, payday lenders are taking advantage of the physical isolation of poor minorities, perpetuating the badge of slavery identified in *Jones*—herding minorities into ghettos and inhibiting their economic ability.¹⁸⁵

Moreover, the cycle of debt perpetuated by payday lenders is a huge factor in keeping the underclass chronically disadvantaged. Because payday lenders specifically target the underclass, especially the minority underclass, they are exploiting the economic conditions this class lives under.¹⁸⁶ Moreover, payday lenders actively work to keep the underclass “under,” knowing poor people yield the highest profits for their lending institutions.¹⁸⁷

a new loan from a different/second lender to pay off an outstanding loan previously obtained from the first lender.”).

182. Amar, *supra* note 93, at 40.

183. Wei Li et al., *Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California*, CENTER FOR RESPONSIBLE LENDING, Mar. 26, 2009, at 1, available at <http://www.responsiblelending.org/payday-lending/research-analysis/predatory-profiling.pdf>.

184. *Id.*

185. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 (1968); see also Sidhu, *supra* note 14 (manuscript at 39–40) (noting that the Court, in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), restored, at least partially, “the broader vision of the Thirteen Amendment’s reach.”).

186. See Johnson, *supra* note 140, at 100, construed in SHARON HERMANSON & GEORGE GABERLAVAGE, AARP, THE ALTERNATIVE FINANCIAL SERVICES INDUSTRY 4 fig.4, 51 (2001), available at http://assets.aarp.org/rgcenter/consume/ib51_finance.pdf (describing the target profile of payday lenders are primarily female-headed households). Particularly, the American Association of Retired People (AARP) analyzed locations of check-cashing outlets, over half of which offer payday loan services, and found that “low-income and minority households are significantly more likely to have [check-cashing outlets] located within one mile of their homes than higher-income and nonminority households.” *Id.* See also Satz, *supra* note 12 (indicating that payday lenders “know their most profitable customer base—cash-strapped consumer with little financially savvy . . .”).

187. See generally Martin, *supra* note 3, at 575. “Lenders encourage employees to get customers to take out as many new loans as possible . . .” One former employee explained, “[w]e were trained to encourage customers the day they paid a loan off to make

V. CONCLUSION

The payday lending crisis is a symptom of a larger social mobility problem in the United States—regulating payday lenders will be a significant step towards improving our nation’s economy and creating a fairer economy for our poor. Upward social mobility in the United States has all but become stagnant in recent years, and payday lenders profit from and promote this stasis. To illustrate, in Denmark, Finland, Norway, Sweden, and the United Kingdom, between twenty-three and thirty percent of sons and daughters born to fathers who were in the bottom fifth of their country’s earnings remained in the bottom fifth.¹⁸⁸ However, in the United States, the same statistic rises to forty-two percent.¹⁸⁹ The U.S. Census reported 46.2 million people were living in poverty in 2010, the highest poverty rate since 1959.¹⁹⁰

A lending industry that profits from a weakening economy and targets the underclass as their most lucrative borrowers creates constitutional consequences that must be addressed. The terms of these loans, the coercive nature of the lenders, and the demoralizing and destructive consequences for the borrowers reflect exactly what the framers of the Thirteenth Amendment sought to eliminate. A line can be drawn to distinguish payday loans from other types of loans. Historically, loans have not been interest-only loans.¹⁹¹ Not every loan presents the issues of peonage and promotion of the badges and incidents of slavery as a means of greater income. Payday loan consumers must be protected. These loans, at the very least, must be regulated to do away with the involuntary servitude they create.

Seventeen states have already effectively banned payday lenders.¹⁹² Continuing this trend would solve this constitutional issue most effec-

another loan as early as the next day. We tried to get customers to keep getting loans and borrow up to their maximum approval amount whether they wanted it or not.” *Id.*

188. Scott Winship, *Mobility Impaired*, NAT’L REV. ONLINE, (Nov. 7, 2011, 4:00 AM), <http://www.nationalreview.com/articles/282292/mobility-impaired-scott-winship>.

189. *Id.* See also ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), A FAMILY AFFAIR: INTERGENERATIONAL SOCIAL MOBILITY ACROSS OECD COUNTRIES 6 (2010), available at <http://www.oecd.org/dataoecd/2/7/45002641.pdf> (“[E]xisting estimates of the extent to which sons’ earnings levels correlate with those of their fathers . . . find persistence to be particularly pronounced in . . . the United States . . .”).

190. U.S. CENSUS BUREAU, NUMBER IN POVERTY AND POVERTY RATE: 1959 TO 2010, Figure 4 (2010), available at <http://www.census.gov/hhes/www/poverty/data/incpovhlth/2010/figure4.pdf>.

191. See Peterson, *supra* note 120, at 1111 (stating that historically, “all but a small minority of states have capped interest rates on loans to consumers . . . ,” while during the past twenty years the payday loan market has become highly unregulated).

192. *Online Payday Loans Come With a High Price* (CBS television broadcast Sept. 26, 2011), available at www.cbsnews.com/video/watch/?id=7382455n. See also Josh Baugh,

tively. Until all states safeguard borrowers from payday lenders, federal involvement is appropriate and the Thirteenth Amendment is, as demonstrated, a proper federal mechanism for Congress to use in regulating payday lending.

There is a danger in not recognizing the Thirteenth Amendment issues payday lenders present. There is essentially a caste in American society that has extremely limited economic opportunity, no political stake in their community, and is socially isolated. This raises serious Thirteenth Amendment concerns. Payday lenders trap an already vulnerable group, keeping them tethered to the dire economic situation that they live in, while profiting from it.

There is a solution already in place in our Constitution. The Supreme Court has never struck down Congress when exercising its Thirteenth Amendment powers. The Thirteenth Amendment is the vehicle that Congress should use to regulate payday lenders. Instituting federal usury caps would halt triple digit interest rates in this country, and provide legal protection for the poor.¹⁹³ Placing a national usury cap¹⁹⁴ on these types of loans would be a huge step toward preventing the cycle of debt payday lenders promote. Borrowers would still have the opportunity to borrow, but the impossible interest rates that act as a strangle-hold on debtors would not be a part of the loans.

There is a broader danger if Congress fails to act on this Thirteenth Amendment problem. If Congress does not recognize and remedy the fact that these lenders are preying upon underclass in America, they fail to recognize that the underclass is a viable part of our economy and our society that deserves the same protections as those who already have a minimum stake in society. The underclass will continue to be disempowered, and will continue to suffer from the badges and incidents of slavery.¹⁹⁵ If our country allows payday lenders to continue to profit from the underclass because of their economic, political, and social isola-

Councilman Wants to Curtail Predatory Lending Practices, SAN ANTONIO EXPRESS NEWS, June 13, 2012, www.mysanantonio.com/news/local_news/article/Councilman-wants-to-curtail-predatory-lending-3628770.php (stating that at least twelve states have banned payday lending while others have limited the amount of the loans).

193. Federal usury caps would protect the poor from online payday lenders as well as payday lending shops in their neighborhoods.

194. Usury is defined, “historically, [as] the lending of money with interest;” and “today, [as] the charging of an illegal rate of interest as a condition to lending money. BLACK’S LAW DICTIONARY (9th ed. 2009). Usury also refers to “[a]n illegally high rate of interest.” *Id.*

195. See Amar, *supra* note 93, at 53 (“The absence of such opportunity to advance economically, vertically, and thus the absence of the baseline conditions necessary for meaningful participation in society, can provide the basis for a legitimate grievance under the Thirteenth Amendment.”).

tion, our country is not only approving these predatory, practices, but saying that it is acceptable for the underclass to be shackled to their place in society, and that it is acceptable for payday lenders to profit from their suffering.

Finally, to allow payday lenders to continue preying on the underclass, to allow them to continue making loans that de facto enslave borrowers, is to allow them to act without regard for the purpose of the Thirteenth Amendment, for it is an act taken against democracy, against the dignity of the toiling millions, against liberty, the peace, the honor, the renown, and the life of the nation.¹⁹⁶

196. CONG. GLOBE, 38TH CONG., 1ST SESS. 1320, 1324 (1864).