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No Exceptions: The New Movement to Abolish Slavery and Involuntary Servitude

The Thirteenth Amendment's Except Clause, which creates an exception to the prohibition on slavery and involuntary servitude for those duly convicted of crimes, has long been interpreted to mean that incarcerated people can be forced to work and be punished, harshly, if they refuse.

In 2018, Colorado voters passed an amendment to their state constitution in order to ban slavery and involuntary servitude entirely. No exceptions: Article II, § 26 of the Colorado Constitution went from a near duplicate of the Thirteenth Amendment to stating simply, "There shall never be in this state either slavery or involuntary servitude." This was the first in a growing line of state constitutional amendments that successfully removed Except Clauses as a matter of state law. While it was not clear what removing the exception might mean—there are, after all, consequences for refusing to work whether one is incarcerated or not—one would seemingly expect something to change in Colorado's prisons.

The immediate question is how the state constitutional amendments like Colorado's that have swept the country should be interpreted and how the organizers behind them might shape their eventual interpretation by the courts or other legal actors. These organizers have chosen the battlefield of the law and, more specifically, of state constitutional law to bring about the



change they want to see in the world. That field, while steeped in social and political considerations, is ultimately shaped by legal structure. This means that even if those social or political motivations control the eventual outcome of many cases, it is through legal frameworks that those outcomes are reached. Far from being merely a problem of process, however, law provides constraints that, even if they can be overcome with sufficiently strong political will, make certain outcomes more or less likely. Sometimes, an opinion or a legislative goal cannot be fulfilled, no matter how creative the drafters.

This analysis comes at a pivotal moment. While a number of states have passed constitutional amendments, there has been sparse scholarly work on these amendments because commentators thus far have focused on limited interpretative issues instead of a comprehensive overview of their history and functioning within past and present carceral systems. This lack of attention is compounded by the absence of legal organizations at the root of this movement. While some notable civil rights organizations have recently brought or supported suits under these provisions, the overwhelming bulk of this organizing work has been done by nonlegal actors. Organizers, litigators and courts are thus faced with a potentially massive legal change and a paucity of guidance on how to interpret the text at that change's heart. But changing the text of the law, even at the constitutional level, does not guarantee changes in people's lived experiences. Even if we assume that the reach of these laws affects only prison labor, breaking the status quo of forced labor will likely require an assault from many directions. Four categories interact to build or undermine enduring changes to the status quo: the text of the amendment, litigation, government structure, and political changes.