California Lawyers Association

presents

Roots of Racism Series – Our Hispanic and Latinx Communities

1.25 Hours MCLE; 1.25 Elimination of Bias

Friday, September 22, 2023

10:30 AM - 11:45 AM

Speakers:

Professor Maria Linda Ontiveros

Hon. Magdalena Reyes Bordeaux

Conference Reference Materials

The California Lawyers Association is an approved State Bar of California MCLE provider.

"Roots of Racism: Our Hispanic/Latinx/Chicano Communities"

California Lawyers Association – Racial Justice Committee

CLA Annual Meeting – San Diego, CA

September 22, 2023

PROGRAM MATERIALS

Attachments

- Some Noteworthy History

- Maria L. Ontiveros, Noncitizen Immigrant Workers and the Thirteenth Amendment: Challenging Guest Worker Programs, 38 Univ. of Toledo Law Rev. 923 (2007)

- Juan Perea, Destined for Servitude, 44 USF Law Rev. 245 (2009)

San Diego Links

San Diego La Raza Lawyers Association (SDLRLA)
https://sdlrla.com/

The Lemon Grove Incident
https://sandiegohistory.org/journal/1986/april/lemongrove/

"Border Report: Migrants from All Over the World at Our Border"
https://voiceofsandiego.org/2023/09/18/border-report-migrants-from-all-over-the-world-are-at-our-border/?utm_source=Voice+of+San+Diego+Master+List&utm_campaign=7c712b2581-Border_Report&utm_medium=email&utm_term=0_c2357fd0a3-7c712b2581-81855053&goal=0_c2357fd0a3-7c712b2581-81855053

"Roots of Racism: Our Hispanic/Latinx/Chicano Communities"

California Lawyers Association – Racial Justice Committee

September 22, 2023

Some Noteworthy History (focusing on California, particularly Southern California)[1]

1848 **Treaty of Guadalupe-Hidalgo**. Ending the Mexican-American War, the treaty gives the U.S. 55 percent of Mexico's territory (including modern-day California). Mexicans who want to remain can keep title to their homes and choose to be U.S. citizens.

1850 **California admitted as a state**.

1851 **California Land Commission**. Imposes complicated legal procedure to demonstrate title; many former Mexican citizens lose title to their homes or go bankrupt in court proceedings trying to prove title.

1850-1900 **Gold Rush and Aftermath**. Gold Rush (1848-55) attracts White settlers and prospectors. Attacks mounted on foreign miners and Mexican residents. Political unrest in Mexico prompts immigration to U.S., providing U.S. employers cheap labor (e.g. Southern Pacific Railroad), but anti-Mexican sentiment grows against both native Mexicans and immigrants, leading to exclusion from white establishments, segregation into barrios, and treatment as an underclass. Cattle theft and competition harms native Mexican ranchos. Land ownership decreases dramatically. Large increase in White population renders Mexican population a powerless minority, working unskilled jobs.

1910-20 **Immigration and Labor Needs**. Unrest during the Mexican Revolution (1910-17) results in immigration to U.S. Labor shortages during WWI (1914-18) causes U.S. dependence on Mexican agricultural workers.

1924 **Immigration Act of 1924**. Establishes border patrol (also prohibits immigration from Asia and sets quotas for immigration from Eastern and Southern Europe).

1930s **The Great Depression and "Mexican Repatriation**." During the Great Depression (1929-39), U.S. and states forcibly remove 2 million people of Mexican descent from the country, 60% of whom are American citizens, in deportations or "repatriations." Approximately one-third of LA's Mexican population is removed. (In 2006, the State of California issues a formal apology (SB 670); LA County follows in 2012.)

[1] Although the description of these events is intended to be objective as well as accurate, it should not be attributed to any of the panelists at today's presentation.

1931 **Lemon Grove Incident**. In San Diego County, Mexican-American children are denied entrance to the elementary school and directed to attend another "school." *Roberto Alvarez v. the Board of Trustees of the Lemon Grove School District* (San Diego Superior Court) becomes the first successful school desegregation decision in U.S. history.

1934 **Creation of Federal Housing Administration**. FHA guarantees home loans issued by approved lenders, making it easier for people to obtain mortgages and buy homes. *However*, for the next decades the FHA dictates that certain areas (predominantly Black or Mexican) were unsafe, refusing to approve loans for those areas ("redlining"). Solidified residential segregation and minimized home ownership in neighborhoods of color, resulting in less generational wealth. As property values decline, less property tax revenue for education.

1935 **Social Security Act**. Provides retirement benefits for workers, *except* for farm and domestic workers – jobs usually held by Hispanic/Mexican workers and other persons of color.

1938 **Fair Labor Standards Act**. Prohibits child labor and requires minimum wage – but *excludes* agricultural businesses that largely employ Hispanic/Mexican workers and other persons of color.

1942 **Bracero Program**. During WWII, the program issues temporary work permits to millions of Mexicans. Program continues until 1964.

1943 **Zoot suit riots in LA**. Influx of Mexican workers elevates racial tensions, Mexican youth blamed for increase in crime, and the flashy attire of some is viewed to be contrary to the austerity efforts during the war. Over a period of days in June, thousands of U.S. servicemen attack anyone wearing a Zoot suit and strips them of their clothes, injuring 150. First Lady Eleanor Roosevelt describes the incident as a racial issue: "It is a problem with roots going a long way back, and we do not always face these problems as we should." In response, the Los Angeles Times accuses her of being a communist and stirring racial discord.

1946 ***Mendez v. Westminster***. Families sue four Orange County school districts who were requiring children of Mexican descent to attend segregated schools. The school districts defend on the grounds of hygiene, language barriers, and inferior ability. The trial judge rules the practice unconstitutional; the Ninth Circuit affirms. *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947).

1950s **Eminent Domain and Chavez Ravine**. Chavez Ravine, a community largely of Mexican-Americans, is chosen in 1949 to be converted to public housing. The city takes the land by eminent domain beginning in 1950, forcing the residents out, but the public housing is never built. Instead, Dodger Stadium is built there in 1962.

1954-58 **"Operation Wetback."** After AG sees the number of immigrants in Southern California, INS deports 3.8 million Mexicans, some of them US citizens.

1964 **Civil Rights Act of 1964**. Prohibits discrimination based on race, color, religion, sex, or natural origin in areas including voting, public accommodations, and employment.

1965 **Voting Rights Act of 1965**. Among other things, prohibits states from barring vote based on (English) literacy tests or any procedure that would deny the vote based on race or color. Upheld in *Katzenbach v. Morgan*, 384 U.S. 641 (1966). (Another aspect was ruled unconstitutional in *Shelby County v. Holder* (2013).)

1965 **Immigration and Nationality Act** (Hart-Celler). Replaces national origins quotas with a preference system prioritizing individuals who are relatives of citizens or lawful permanent residents, possess certain skills, or are refugees. Places caps on immigration from each hemisphere.

1965-70 **United Farm Workers**. Southern California farmworkers, mostly of Mexican descent, had been working for small wages, lacked adequate housing, and were exposed to dangerous chemicals and sexual harassment. Cesar Chavez and Dolores Huerta organize the workers to strike against major grape growers, resulting in a collective bargaining agreement that increases pay and gives the right to unionize. Additional strikes against lettuce and strawberry growers.

1968 **East LA Walkouts**. 15,000 high school students walk out of school to protest treatment of Mexican American students, who were experiencing higher dropout rates and lower reading levels, were prohibited to speak Spanish, or were funneled into programs for students with mental disabilities – directing them to vocational jobs.

1970s **Latin American Refugees**. Civil unrest in Central America (El Salvador, Guatemala) in late 1970s leads to increase of refugees into the U.S.

1974 **Equal Education Opportunity Act**. Bilingual education.

1975 ***U.S. v. Brignoni-Ponce* (1975)**. U.S. Supreme Court holds that Border Patrol's interrogation and search is unconstitutional if based on racial appearance alone, without reasonable suspicion. (422 U.S. 873.)

1975 **Voting Rights Act of 1975**. Requires language assistance to voters.

1978 **Forced sterilization ended**. From the early 1900s to the late 1970s, 60,000 people had been sterilized under the US eugenic program in 32 states. In California, a law allowing sterilization of anyone committed to a state institution was passed in 1909.

In California 1920s-1950s, 20,000 people were sterilized as unfit to reproduce, with a disproportionate number of Mexican descent. In 1970s, residents of East Los Angeles sued LA County medical center for involuntary sterilization of low income and minority women, after Dr. Bernard Rosenfield blows the whistle. The court rules in favor of the medical center, finding that the sterilizations were due to miscommunication and language barriers (*Madrigal v. Quilligan*). Nevertheless, California revokes its sterilization law.

1980 **Refugee Act of 1980**. System for admitting refugees and asylum-seekers at border.

1982 ***Plyler v. Doe***. U.S. Supreme Court rules that the 14th Amendment Equal Protection Clause entitles all children, whether citizens or not, to free public education K-12 (absent a showing that exclusion furthers some substantial state interest).[2]

1986 **Immigration Reform and Control Act of 1986**. Imposes civil and criminal penalties on employers who knowingly hire undocumented immigrants (I-9 form), but offers legalization and prospective naturalization to undocumented immigrants who entered before 1982. Approximately 3 million, mostly Hispanic, gain legal status.

1990 **1990 Immigration Act**. Among other things, ends judicial discretion to recommend against deportation.

1994 **Proposition 187**. During an economic recession in the state, California voters pass the proposition, limiting undocumented immigrants' access to public services, including public education and healthcare. In addition, teachers and healthcare professionals are required to report suspected undocumented individuals to the INS. Never enacted; federal court (CD Cal.) rules (most of) the Proposition unconstitutional.

1996 **Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA)**. Legal but noncitizen immigrants, including green card holders, can be deported for a broader array of crimes. Immigrants who are unlawfully present will be expelled for 3 or 10 years depending on how long they have been in the US unlawfully. Increase in expedited removals. Local law enforcement can be deputized to enforce immigration laws. More difficult to obtain asylum. Reduces judicial review of deportation decisions. Reduces government benefits.

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[2] The court observed: "Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial 'shadow population' of illegal migrants – numbering in the millions – within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law." *Plyler*, 457 U.S. at 218-19.

1997-98	Acts providing relief from deportation and adjustment to status for groups including Nicaraguans, Cubans, Salvadoreans, Guatemalans, and Haitians.
2002	**Homeland Security Act**. Among other things, creates DHS and transfers INS responsibilities for immigration and borders to CBP, ICE, and USCIS.
2002-11	**Development Relief and Education for Alien Minors (DREAM) Act**. Proposed law that would grant undocumented youth, who finished high school and wanted to attend college in the US, a way of obtaining citizenship. Several attempts to pass various iterations all fail.
2006	**Secure Fence Act**. Authorizing construction of more than 700 miles of border fence.
2011	**Deferred Action for Childhood Arrivals (DACA)**. Executive Order provides that undocumented youth who came to the US as children will be protected from deportation, granted work permits and drivers licenses (but no citizenship); must meet educational requirements and have no criminal history. Over 800,000 DACA recipients in 2017.
2017	**DACA rescinded**.
2020	**Title 42**. On public health grounds under Title 42 of the Public Health Service Act of 1944, entry is denied to persons at the Mexico (and Canada) border, even if seeking asylum.
2020	**DACA revived: *Dept. of Homeland Security v. Regents of Univ. of California***. Ninth Circuit holds that DHS did not comply with procedural requirements for rescinding DACA. (DACA still being enforced as of this date, despite additional litigation.)
2021	***Brnovich v. Democratic National Committee***. U.S. Supreme Court holds that state laws that disproportionately burden racial minority groups do not necessarily violate Voting Rights Act of 1965. (594 U.S. ___, 143 S.Ct. 2321 (2021).)
2023	***Students for Fair Admissions, Inc. v. President and Fellows of Harvard College***. U.S. Supreme Court holds that race cannot be a factor in admissions decisions at colleges and universities. Harvard estimated the result would mean 9-14% fewer Hispanic students. (600 U.S. ___ (2023).)
2023	**Title 42 expires**.

NONCITIZEN IMMIGRANT LABOR AND THE THIRTEENTH AMENDMENT: CHALLENGING GUEST WORKER PROGRAMS

*Maria L. Ontiveros**

I. INTRODUCTION

CURRENTLY, immigration is a hot-button issue. Hundreds of thousands of people march in the streets to demand human rights and dignity for immigrant workers and their families.[1] Armed citizens patrol the border to apprehend unauthorized immigrants,[2] while human rights groups leave water in the desert in a desperate attempt to prevent the deaths of more migrants from exposure and dehydration.[3] Congress debates legislation on border control, citizenship for unauthorized immigrants, and guest worker programs.[4] While commentators have discussed these issues as human rights, sovereignty, or labor issues, this article argues that these issues can and should be discussed in terms of the Thirteenth Amendment.

Specifically, this article focuses on so-called guest worker programs, which Congress is currently debating. It argues that poorly crafted guest worker programs violate the Thirteenth Amendment when they provide for deportation of workers upon termination of employment, limit the societal participation rights of a worker's family members, and do not allow workers to apply for citizenship. Such provisions violate the prohibition against "slavery and involuntary servitude" because, like slavery, they interfere with a unique combination of workers rights, citizenship rights, human rights, and civil rights. Thus, they implicate the same concerns behind the Thirteenth Amendment.

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1. Randal C. Archibold, *Immigrants Take to U.S. Streets in Show of Strength*, N.Y. TIMES, May 2, 2005, at A1, *available at* http://www.nytimes.com/2006/05/02/us/02immig.html?ex=1304222400&en=4835431ff97lafbl&ei=5088&partner=rssnyt&emc=rss.

2. James Sterngold & Mark Martin, *Governor Signals He'd Welcome Minutemen on California Border*, S.F. CHRON., Apr. 30, 2005, at A1.

3. Gregory Alan Gross, *Heat is Deadly Peril to Immigrants, Border Agents*, SAN DIEGO UNION-TRIB., May 24, 2000, at B10.

4. Carl Hulse & Rachel L. Swans, *Senate Passes Bill on Building Border Fence*, N.Y. TIMES, Sept. 30, 2006, at A4.

This article begins with a brief description of a holistic vision of the Thirteenth Amendment. The second section describes currently existing guest worker programs and those under consideration in Congress. The final section argues that one can best understand poorly crafted guest worker programs as programs for "noncitizen immigrant labor" that violate the Thirteenth Amendment. This section places the current programs in historical perspective with the treatment of other noncitizen immigrant labor, especially in California agriculture, to demonstrate the ways in which they violate the Thirteenth Amendment. The article concludes with policy recommendations for crafting guest worker programs, which could pass constitutional muster.

II. THE HOLISTIC INTERPRETATION OF THE THIRTEENTH AMENDMENT: AN AMENDMENT CONCERNED WITH WORKERS RIGHTS, CITIZENSHIP RIGHTS, HUMAN RIGHTS AND CIVIL RIGHTS

The Thirteenth Amendment is a vibrant, multi-faceted section of the Constitution with several implications and meanings. The argument in this article rests on a reading of Thirteenth Amendment history and case law, which situates its concern at the intersection of workers rights, citizenship rights, human rights, and civil rights. This vision of the Thirteenth Amendment provides a perfect lens to view issues affecting immigrant workers.[5] This holistic view of the Thirteenth Amendment contrasts with a more traditional, structuralist vision of the Thirteenth Amendment.

A traditional approach to the Thirteenth Amendment divides cases into two groups: those dealing with the prohibition of involuntary servitude and those dealing with the prohibition of slavery. Cases in the first category arguably examine whether a worker has the ability to quit or terminate an employment relationship.[6] Cases in the second category, such as *Jones v. Alfred H. Mayer Co.*,[7] look at the types of restrictions that courts and legislatures must eliminate because these restrictions are "badges and incidents" of slavery.[8] A holistic vision of the Thirteenth Amendment reveals that these categories present a narrow reading of the history and social understanding of the Thirteenth

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5. While this essay focuses on guest worker programs, I have addressed the impact of the Thirteenth Amendment on other issues affecting immigrant workers in Maria L. Ontiveros, *Immigrant Workers Rights in a Post-*Hoffman *World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651 (2004) [hereinafter Ontiveros, *Hoffman*]; and Maria L. Ontiveros, *Female Immigrant Workers and the Law—Limits and Opportunities*, *in* THE SEX OF CLASS: WOMEN TRANSFORMING AMERICAN LABOR (Dorothy Sue Cobble ed., 2007) [hereinafter Ontiveros, *Female Immigrant Workers*].

6. Cases in this category include *Bailey v. Alabama*, 219 U.S. 219 (1910), *United States v. Reynolds*, 235 U.S. 133 (1914), and *Pollock v. Williams*, 322 U.S. 4 (1944).

7. 392 U.S. 409 (1968).

8. Commentators writing in this field include William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. (forthcoming 2007); William M. Carter, Jr., *Judicial Review of Thirteenth Amendment Legislation: "Congruence and Proportionality" or "Necessary and Proper"?*, 38 U. TOL. L. REV. 973 (2007).

Amendment. Further, the case law interpreting the Thirteenth Amendment is consistent with a broader, more holistic interpretation of it.[9]

The holistic vision of the Thirteenth Amendment reveals that the Amendment prohibits arrangements that interfere with the unique combination of workers' rights, citizenship rights, human rights, and civil rights even outside the context of chattel slavery. Understood through its history, case law, and social meaning, the Thirteenth Amendment did more than free and protect the rights of slaves. It also sought to protect workers by providing a floor for free labor, under which no worker may struggle.[10] In addition, it sought to guarantee certain social citizenship rights. These social citizenship rights, separate from paper citizenship and naturalization rights, are similar to those things denied freed blacks and sometimes described as the badges and incidents of slavery.[11]

Last, but certainly not least, the Amendment meant to protect society by ensuring the prohibition of certain kinds of evils, which we often view as human rights or civil rights violations.[12] The various commentators who address these concerns individually are not wrong in their interpretations; however, commentators can enrich Thirteenth Amendment jurisprudence by examining situations where all of these strands come together.[13] The creation of a guest worker program to provide non-citizen immigrant labor provides that nexus.

III. GUEST WORKER PROGRAMS

This section describes current guest worker programs and outlines the themes present in legislation that Congress is currently considering. It also presents an

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9. Ontiveros, *Hoffman*, *supra* note 5, at 662-70.

10. *See* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 441-45 (1989); James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 944 (1997).

11. *See generally* ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 96-97, 124-27 (2004); Carter, Jr., *Race, Rights, and the Thirteenth Amendment*, *supra* note 8.

12. Commentators that focus on this implication of the Thirteenth Amendment include: Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359, 1384-85 (1993); Vanessa B.M. Vergara, *Abusive Mail-Order Bride Marriage and the Thirteenth Amendment*, 94 NW. U. L. REV. 1547, 1569-71 (2000); and Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 239-43 (1992). In the labor context, these ideas are discussed primarily in those articles and cases dealing with trafficked workers. *See, e.g.*, Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting* United States v. Kozminski *and Understanding Human Trafficking*, 38 U. TOL. L. REV. 941 (2007); Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1 (2004).

13. Social mobilization and organization can also be enhanced by recognizing the linkages between the various groups currently representing workers rights (traditionally organized labor), citizenship rights (immigrant rights groups), human rights (those working with enslaved or trafficked workers), and civil rights (groups addressing the systemic deprivation of rights caused by membership in a racial or ethnic minority). For more on social mobilization and organizational implications of the holistic vision of the Thirteenth Amendment, see Maria L. Ontiveros, *Immigration Rights and the Thirteenth Amendment*, NEW LAB. F., Spring 2007.

argument that these programs could violate even a traditional interpretation of the Thirteenth Amendment.

A. *Current Guest Worker Programs*

Guest workers are immigrants admitted into the United States on visas, which allow them to work in this country for a temporary period of time. Although there are many different types of guest worker programs, each program has some similarities.[14] First, the visas generally limit the amount of time an immigrant may stay in the United States, and they expect that the immigrant will leave at the end of the visa period, which is usually a maximum of three years. Thus, the government does not see these visas generally as a prelude to permanent immigration and citizenship. In addition, the ability to stay in the United States during the visa period is contingent upon continued employment with the specific employer that sponsored the visa initially. If the immigrant quits or the employer fires him, the immigrant and his or her family face deportation. Finally, the visas have different limitations on the ability of the immigrant's family to immigrate and participate fully in U.S. society.

Current guest worker programs cover a variety of industries. The H-1B program,[15] typically used for engineers, allows employers to certify that a job fits certain requirements and that the person fits the requirements. The employee can bring his family, but the visa limits their ability to work and participate in other social programs. If the employee loses his sponsor, he must return to his country of origin. The visa is good for three years and the immigrant can renew it for a total of six years. If the employee starts a permanent residence application before five years, the government can extend the visa indefinitely while it processes the application as long as the employee does not lose his sponsor.

The J-1 visa program brings exchange program participants to the United States, including women who work as au pairs.[16] The visa regulations specify the au pair pay rate at $139 per week, for a maximum of 45 hours.[17] In addition, an au pair may not leave an unsatisfactory arrangement without deportation. The H-2 agricultural program[18] and the H-2B[19] non-agricultural program allow an

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14. For an overview of visas, see U.S. Dep't of State, Visas, http://travel.state.gov/visa/visa_1750.html (last visited Mar. 25, 2007), and FindLaw: Immigration Law Center, http://www.immigration.findlaw.com (last visited Mar. 25, 2007).

15. H-1B visas are in the Immigration and Nationality Act ("INA"), § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2000). *See also* 8 C.F.R. § 214.2(h)(2) (2006). The children and spouses of H-1B visa holders may apply for H-4 visas, covered in INA § 101(a)(15)(H)(iii), 8 U.S.C. § 1101(iii) (2000). *See also* 8 C.F.R. § 214.2(h)(9)(iii) (2006).

16. J-1 visas are in INA § 101(a)(15)(J)(I), 8 U.S.C. § 1101(a)(15)(J)(I) (2000). *See also* 8 C.F.R. § 214.2(j) (2006).

17. *Weekly Wage Due to Au Pair Program Participants*, OFFICE OF EXCH. COORDINATION & DESIGNATION, U.S. DEP'T OF STATE, *available at* http://exchanges.state.gov/education/jexchanges/private/AuPair_Wage.pdf (last visited Apr. 18, 2007).

18. H-2A visas are in INA § 101(a)(15)(H)(ii)(a), 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2000). *See also* 8 C.F.R. § 214.2(h)(5) (2006). Children and spouses of H-2A visa holders are may apply for

employer to identify a labor shortage and sponsor applicants to fill positions. There are a limited number of these visas, and, if the employee loses a sponsor, he must return to his country of origin.

B. Proposed Legislation

Although it is unclear what immigration legislation, if any, will be passed in the near future, as of early 2007, the U.S. Senate and the House of Representatives have charted two different courses. Any new legislation will likely follow the themes of their two options. The Senate approach contains themes of naturalization, guest worker programs, and nationalism.[20] The House approach focuses on themes of border enforcement and criminalization.[21]

Under the Senate approach, many unauthorized immigrants currently in the country will have the opportunity to stay in the United States and apply for permanent resident status.[22] The Senate bill also includes the addition of a new guest worker category, the H-2C, to cover temporary laborers. Some versions of the bill provide for the portability of visas between employees[23] and allow for some period of unemployment without deportation.[24] The Senate bill also provides for increased fencing along the United States-Mexican border and a declaration that English is the country's national language.

The House approach to immigration reform does not include any provision for naturalization or guest worker program reform. Instead, it focuses on enforcing existing immigration restrictions along the border and at the workplace. The House bill provides for even more fencing along the United States-Mexican border and makes it a felony to be in the country as an unauthorized immigrant.[25]

C. Guest Worker Programs as Involuntary Servitude

Using a traditional approach to the Thirteenth Amendment, one could argue that these visa programs are unconstitutional. Since visa workers cannot quit without facing deportation, the argument goes, they work in a state of involuntary servitude. This argument rests on two realities. First, a highly textured

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H-4 visas, covered in INA § 101(a)(15)(H)(iii), 8 U.S.C. § 1101(a)(15)(H)(iii) (2000). *See also* 8 C.F.R. § 214.2(h)(9)(iv) (2006).

19. 8 C.F.R. § 214.2(h)(6) (2006).

20. *See, e.g.*, Comprehensive Immigration Reform Act, S.2611, 109th Cong. (2006).

21. 152 CONG. REC. H6850 (daily ed. Sept. 21, 2006) (statement of Rep. Gingrey).

22. Unauthorized immigrants are divided into three categories, with different consequences. Unauthorized immigrants who have been in the country for more than five years could stay and apply for permanent resident status if they pay back taxes, learn English, and have no serious criminal records. Unauthorized immigrants who have been in the country between two and five years would return to a point of entry in Mexico or Canada and apply for a green card, which would allow for their immediate return. Unauthorized immigrants who have been in the country for less than two years would be deported.

23. S.2611, 109th Cong. § 218A(j) (2006).

24. *Id.* § 218A(f)(3)(A)(ii).

25. H.R. 3938, 109th Cong. § 275A(a) (2006); H.R. 6061, 109th Cong. § 3(2)(I)(A) (2006).

understanding of the realities faced by deported immigrants reveals that quitting is an unacceptable option. As a result, the work becomes involuntary. Immigrants here, even those on temporary visas, form ties in the United States and form a transnational identity.[26] When an immigrant is deported, he or she must spend time in deportation processing.[27] Once deported, the immigrant faces the danger of an illegal border crossing to return to the United States. Crossing the United States-Mexican border is a deadly affair. Nearly 2,000 people have died in the last ten years, and approximately one person has lost his or her life every day during the last several years.[28] Most of the deaths result from exposure to the elements.[29] Immigrants attempting to cross the border also face danger from the guides who arrange the crossings. These so-called coyotes, polleroes, or pateroes routinely swindle immigrants out of money, frequently abandon them, and sexually abuse female immigrants.[30] Faced with this alternative, immigrants may feel unable to quit.[31]

In addition, from an economic standpoint, these visa programs exert downward pressure on "free" wages in the same way that involuntary servitude did. Silicon Valley engineers have difficulty demanding wage increases or better working conditions when their employer can simply replace them with cheap foreign labor.[32] Domestic licensed childcare providers can hardly hope to compete against au pairs who are statutorily paid less than $140 per week. Agricultural employers can use threats of hiring exploitable H-2A workers to keep other workers from demanding better treatment. In *Pollock v. Williams*, the U.S. Supreme Court highlighted these same concerns in explaining why other labor arrangements violated the prohibition against involuntary servitude:

> The undoubted aim of the Thirteenth Amendment as implemented by the Anti[-P]eonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States . . . [I]n general, the defense against oppressive hours, pay, working conditions, or treatment is the right to

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26. Maria L. Ontiveros, *New Perspectives on Labor and Gender: Lessons from the Fields: Female Farmworkers*, 55 ME. L. REV. 157, 165-66 (2003).

27. *See generally* Samuel A. Yee, *Survey: Final Exit or Administrative Exhaustion? The Departed Aliens Catch-22*, 8 ADMIN. L.J. AM. U. 605 (1994); Myrna Pages, *Indefinite Detention: Tipping the Scale Toward the Liberty Interest of Freedom After* Zaduydas v. Davis, 66 ALB. L. REV. 1213 (2003).

28. Don Villarejo, *Are Migration and Free Trade Appropriate Forms of Economic Development? The Case of Mexico and U.S. Agriculture*, 9 U.C. DAVIS J. INT'L L. & POL'Y 175, 192 (2003) (citing California Rural Legal Assistance Foundation's Border Project, www.stopgatekeeper.org) (last visited Mar. 25, 2007).

29. *See* Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121 (2001).

30. Ontiveros, *Lessons from the Fields*, *supra* note 26, at 165. Women have also reported rapes and sexual assaults committed by officers of the U.S. Border Patrol. EITHNE LUIBHEID, ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER 121-27 (2002).

31. *See* Samantha C. Halem, *Slaves to Fashion: A Thirteenth Amendment Litigation Strategy to Abolish Sweatshops in the Garment Industry*, 36 SAN DIEGO L. REV. 397, 400-02, 408-09 (1999).

32. *See* Anna Lee Saxenian, *Brain Circulation: How High-Skill Immigration Makes Off*, 20 BROOKING REV. 28 (2002).

> change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition.[33]

IV. GUEST WORKERS AS NONCITIZEN IMMIGRANT LABOR: A HISTORICAL AND CONTEMPORARY ANALYSIS

In contrast to the traditional Thirteenth Amendment approach discussed above, this section draws on the holistic interpretation discussed in the first section of this article. It begins by arguing why the systematic use of noncitizen immigrant labor generally violates the holistic vision of the Thirteenth Amendment. It then presents a historical analysis of other uses of noncitizen immigrant labor in California agriculture to illustrate the Thirteenth Amendment violation.

A. The Theoretical Framework

The term "guest worker" is the current politically correct word to describe a certain group of workers. It sounds pleasant and welcoming. A more accurate description for this group is "noncitizen immigrant labor." Focusing on the juxtaposition of the words noncitizen, immigrant, and labor reveals that the United States wants immigrants as labor but not as citizens or full participants in our society. We want them to come here, work, and then leave. We want their labor, but not their human essence. This systemic rendering of labor from humanity is an act of commodification of human beings.[34]

The ultimate commodification of human beings took place during slavery. Merchants sold people at auction and separated families without regard for their interests. Owners were free to punish, kill, or dispose of their human property. In examining the link between chattel slavery and noncitizen immigrant labor, a parallel exists because one can view slaves as forced immigrants brought to the United States against their will. In addition, like the so-called aliens of today, slaves were situated outside of legitimate society. Slaves were definitely noncitizen workers. Court cases made it clear that slaves were not citizens. Even after the Thirteenth Amendment granted them freedom, they did not receive *de jure* citizenship until the passage of the Fourteenth Amendment several years later. Further, they did not receive full social citizenship rights for over a century after the states ratified the Thirteenth Amendment. Arguably, the lack of full citizenship rights is part of what is included in the badges and incidents of slavery decried in modern Thirteenth Amendment cases.

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33. 322 U.S. 4, 17-18 (1944).

34. Maria L. Ontiveros, *A Vision of Global Capitalism that puts Women and People of Color at the Center*, 3 J. SMALL & EMERGING BUS. L. 27, 30-31 (1999).

Noncitizen labor programs violate the Thirteenth Amendment because they replicate the same harms to workers' rights, citizenship rights, human rights, and civil rights that chattel slavery did. The creation of a group of primarily nonwhite workers, excluded from citizenship, that work in abusive conditions beneath the floor for free labor, violates the holistic vision of the Thirteenth Amendment.

B. California Farmworkers

In looking at noncitizen immigrant labor, this section focuses on the historic and contemporary use of noncitizen immigrant labor in agriculture, with an emphasis on California agriculture. Currently, the California farm economy is a twenty-seven billion dollar industry, producing forty-four percent of the nation's labor intensive fruit and nut crops, vegetables, melons, and flower and nursery products.[35] Over half a million people labor as farmworkers, and the entire farmworker population, including spouses and children, totals approximately 1.5 million people.[36]

In addition to the size and importance of this population, agriculture provides an excellent lens with which to view contemporary application of the Thirteenth Amendment because of its historical connection to chattel slavery. As an industry, our labor and employment laws have systematically excluded agricultural workers from protection. This exclusion ranges from the lack of the right to organize to differential applications of wage and hour provisions. Historical records indicate that the exclusion stemmed from the fact that slaves had primarily engaged in agricultural work and freed slaves continued to dominate that industry.[37] The decision to exclude them from labor protections directly relates to the oppression that the Thirteenth Amendment sought to end. In addition to the statutory exclusion of these workers from workers' rights laws, agricultural workers have also been commodified and treated differently, most likely because of their race, ethnicity, and immigration status.[38]

The history of California farmworkers illustrates how current guest worker programs are the latest example of noncitizen immigrant labor that could violate the Thirteenth Amendment. It reveals a series of noncitizen—mostly immigrant—labor brought to work in the fields in disempowered labor relationships. When workers tried to increase their rights or attain citizenship, they were either killed, jailed, deported, or stripped of their citizenship. This pattern began in the California fields in 1776 and it continues today.

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35. Ontiveros, *Lesson from the Fields*, *supra* note 26, at 159.

36. *Id.* at 159 n.6.

37. Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1337-38 (1987).

38. Guadalupe T. Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, 1 U. PA. J. LAB. & EMP. L. 487, 489-91 (1998); Ontiveros, *Lessons from the Fields*, *supra* note 26, at 169-70.

1. *1770–1848: Native Californians and the Missions*

In mid-1700, Spain controlled Mexico, including the geographic area currently known as California. The Spanish Catholic Church sent missionaries north into the Internal Provinces of New Spain (now California), and established an agricultural-based system of missions across the lower half of the state.[39] The first California farmworkers arrived with these missionaries. They were indigenous Mexicans brought north as slaves to work in and around the missions.[40] The indigenous Mexicans soon perished, and the missionaries turned to indigenous Californians to work in and around the missions. At the time of the Hispanic entry into California, approximately 310,000 to 700,000 native Californians lived in California in tribes, such as the Miwok, Costanoan, Pomas, Chumas, Yokuts, and Yumans.[41] When the missionaries finally finished using the workers to farm the land, only 15,000 native Californians would remain.[42]

Spanish control of California existed from approximately 1770 to 1820. In 1773, Father Junipero Serra and Viceroy Bucareli met in Mexico City to draw up the first farmworker legislation, known as the "Representacion," with the goal of recruiting more campesinos (farmworkers).[43] The missionaries brought the indigenous Californians into the missions to baptize them as Catholics and to extract their labor.[44] Once baptized, the missionaries expected them to stay and work for the "common good." The Spaniards housed the men, women, and children separately, and expected them to live and work within the mission and its adjacent grounds.[45] At the mission, the missionaries locked them in their dormitories,[46] kept them under constant surveillance,[47] prohibited them from riding horses,[48] discouraged or prohibited them from visiting family outside the mission,[49] and forcibly returned, beat, or killed them if they tried to escape.[50] Many of the missionaries viewed the escapees as revolutionaries and felt they presented the same threat to the system.[51] Few can argue that this labor system, in which the farmworkers were unable to leave and in which the missionaries deprived them of human and citizenship rights, does not offend the spirit of the Thirteenth Amendment.

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39. Guadalupe T. Luna, *Gold, Souls and Wandering Clerics: California Missions, Native Californians and LatCrit Theory*, 33 U.C. DAVIS L. REV. 921, 929-30 (2000).

40. RICHARD STEVEN STREET, BEASTS OF THE FIELD: A NARRATIVE HISTORY OF CALIFORNIA FARMWORKERS, 1769–1913, at 8-9 (2004).

41. Luna, *supra* note 39, at 928-29.

42. *Id.* at 941.

43. STREET, *supra* note 40, at 15.

44. *Id.* at 25-30.

45. Although the first migrant farm workers were probably those native field hands that were moved between the estancias and the missions to tend the fields. *Id.* at 42-43.

46. *Id.* at 47.

47. *Id.* at 43-44.

48. *Id.* at 42.

49. *Id.* at 46, 57.

50. *Id.* at 25, 71-74.

51. *Id.* at 73.

Between approximately 1820 and 1848, a newly independent Mexico controlled the California region. Technically, Mexico freed all native Californians in 1826[52] through steps outlined by Governor Figueroa in the Emancipation of Mission Indians.[53] In reality, a variety of factors allowed the mission system to remain in place during this period. In 1834, the production of agricultural commodities from the missions—wool, leather, tallow, beef, wheat, maize, and barley—was valued at seventy-eight million dollars.[54] During this time period, punishment for the commission of crimes was one method for the return of the native Californians to the missions.[55] Like so many former African slaves following emancipation, native Californians found themselves arrested, placed in shackles, and forced to work in the same fields that they did before freedom.

In 1848, the Treaty of Guadalupe Hidalgo ushered in a period of U.S. control of California. Under U.S. control, native Californians continued as the principal field hands sustaining California agriculture.[56] A series of statutes facilitated their use as labor. In 1846, the Proclamation to the Inhabitants of California prohibited slavery, but compelled native Californians to work. In 1847, the Ordinance Respecting the Employment of Indians made clear the limited amount of freedom which native Californians had in regard to their labor. Similar ordinances required all Indians to have jobs and abide by their contracts. Further, they proclaimed that no person could "employ an Indian without first obtaining a written release from the Indian's previous employer."[57]

In 1850, the Act for the Government and Protection of Indians compelled Indian labor and gave white justices of the peace all legal authority over Indian matters.[58] The Act prevented the native Californians from taking legal action to claim their land. It created a vagrancy law where citizens could auction off for labor Indians found loitering or strolling about. It also provided for the arrest and the auctioning of unemployed or drunk Indians.[59] The 1850 Indian Indenture Act provided that a farmer needing labor could petition a local judge to indenture Indians.[60]

Given the slavery-like conditions in which native Californian farmworkers found themselves, it is not surprising that Congress drafted the Anti-Peonage Act of 1867 to implement the Thirteenth Amendment broadly enough to reach the "serfage, vassalage, villenage, peonage, and all other forms of compulsory

52. *Id.* at 82.

53. *Id.* at 84.

54. Luna, *supra* note 39, at 936-37.

55. STREET, *supra* note 40, at 95-97. Freed native Californians also found themselves unable to enforce claims for land on which they had worked and that their employers had promised to them. *Id.* at 84.

56. *Id.* at 109.

57. *Id.*

58. *Id.* at 119-23.

59. *Id.* at 120.

60. *Id.* at 124-25.

service for the mere benefit or pleasure of others."[61] Like those in chattel slavery, property owners had forced native Californians to labor through threats of physical violence. Native Californians lost their family autonomy, and they could not live like free citizens. By the mid-nineteenth century, this slavery-like system had taken its toll on the native Californian population, depressing it to a level unable to provide sufficient labor. After the Act's passage, employers needed a new source of noncitizen immigrant labor, and it came in two different waves from Asia.

2. *1849–1910: Chinese Field Workers*

The first wave of Chinese immigrants came to the United States as merchants with dreams of earning their fortunes in California's Gold Rush.[62] However, by 1852, most of the immigrants were peasant farmers working in California's fields.[63] The Chinese agricultural population concentrated in certain geographic areas and product markets. For example, in Tehama County, over sixty percent of the Chinese population were farmers, and in Sacramento, Chinese farmworkers accounted for approximately half the population.[64] The completion of the transcontinental railroad in 1870 brought growth in agricultural employment, in general, and of Chinese farmworkers, in particular.

These Chinese workers found themselves facing restrictions on their labor and social citizenship rights. Many accumulated immigrant related debt that would be difficult to repay if they were not willing to work for Chinese labor bosses.[65] In addition, their contracts failed to provide any job security or recourse for grievances.[66] Employers could fire the workers without notice or pay.[67] As a result of the economic conditions both in America and in China, as well as legal and social pressures, these men were essentially unable to marry and bring wives to the United States.[68] Like the native Californians before them and current visa workers, the government forced the Chinese to register and carry papers. Under the Geary Act of 1893, Chinese field laborers had to obtain and carry a certificate of residence.[69] If they failed to comply, they were subject to arrest, one year of

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61. The Slaughter-House Cases, 83 U.S. 36, 90 (1873) (Field, J., dissenting).

62. STREET, *supra* note 40, at 237.

63. *Id.* at 242 (noting that the immigrants also worked in mines, in small businesses, and as domestic servants).

64. In Tehama County, 64% of the Chinese population worked on farms. In Sacramento, 45.2% of the field hands were Chinese. The figures for San Mateo and Alameda counties were approximately 25%. *Id.* at 243.

65. *Id.* at 260-61. These arrangements mirror the debt peonage practiced against African Americans in the South.

66. *Id.* at 261.

67. *Id.*

68. *Id.* at 300. The Mann Act worked to exclude Asian women by constructing them as prostitutes and then deporting them. *See* Act of Mar. 26, 1910, ch. 128, § 1, 36 Stat. 263.

69. Act of May 5, 1892, ch. 60, § 6, 27 Stat. 25. This Act was known as the Geary Act. STREET, *supra* note 40, at 377.

hard labor, and deportation.[70] The law also sought to eliminate Chinese labor by prohibiting Chinese immigration after 1882.[71]

The Geary Act was part of a legal framework limiting the immigration and naturalization of Chinese workers. The framework developed in response to efforts by and the nascent success of Chinese workers in overcoming the limitations placed on their labor and social citizenship rights.[72] These immigration laws also reflected a deep-seated racial hostility against Asian immigrants.[73] Beginning in 1790, Congress limited the privilege of naturalization to free white persons.[74] In 1870, to facilitate the change in status of blacks from chattel to citizens, Congress amended the immigration law to allow those of African descent to naturalize.[75] In 1940, Congress amended the Act to allow for naturalization by those races indigenous to the Western hemisphere.[76] Amazingly, the law did not allow Asians, as a racial group, to naturalize until 1952.[77] Without the ability to naturalize, Asians could never hope to be considered full citizens of the United States.

3. *1900–World War II: Japanese Field Workers*

Following the Chinese Exclusion Act of 1882, California growers turned to Japanese immigrants to harvest California's produce.[78] The Japanese immigrants initially came as field hands, working in Southern California and the Central Valley, especially in the citrus and sugar beet industry. At first, the growers found the Japanese immigrants to be an excellent source of labor that they could exploit and control. However, over time, these immigrants grew more powerful and sought human, civil, and labor rights.

Once again, the law reacted to prevent the farmworkers from securing these rights. Many of the repressive and racially motivated immigration laws targeted

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70. *See* STREET, *supra* note 40, at 377.

71. The Chinese Exclusion Act abrogated existing treaties and prohibited any further Chinese immigration. Act of July 5, 1884, ch. 220, 23 Stat. 115.

72. *Id.*

73. This argument has been forcefully developed in the scholarship of Gabriel Chin. *See, e.g.*, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Richard P. Cole & Gabriel J. Chin, *Emerging from the Margins of Historical Consciousness: Chinese Immigrants and the History of American Law*, 17 LAW & HIST. REV. 325 (1999).

74. Act of Mar. 26, 1790, ch. III, 1 Stat. 103.

75. Act of July 14, 1870, ch. 254, sec. 7, 16 Stat. 254. This Act, along with the Thirteenth, Fourteenth, and Fifteenth Amendments, gave freed blacks formal citizenship. Social citizenship—those rights associated with citizenship beyond formal naturalization—remained elusive for the freed blacks.

76. The Nationality Act of 1940, ch. 876, § 303, 54 Stat. 1137.

77. In 1952, the law changed to allow all racial groups to naturalize, but it set a very low quota for the number of Asians who could naturalize each year. INA, Pub. L. No. 82-414, §§ 201-02, 66 Stat. 163 (1952). It is not until 1965 that Congress eliminated the country of origin quota for naturalization and allowed Asians equal access to naturalization. Act of Oct. 3, 1965, Pub. L. No. 89-236, §§ 1-2, 79 Stat. 911.

78. *See* STREET, *supra* note 40, at 403, 407-08.

at Chinese immigrants covered all Asian immigrants and therefore also affected the Japanese field workers. In addition, Congress passed several specific laws in direct response to concerns that the Japanese were becoming too powerful. Japanese immigrants' power became apparent in two ways: labor activism and land ownership. Japanese immigrants practiced labor activism by joining together in labor associations called *keiaju-nin*.[79] The associations struck for higher wages and securing collective bargaining rights. In response to the labor activism, President Roosevelt worked to limit Japanese immigration as early as 1907.[80] Eventually, in 1924, Congress amended the Chinese Exclusion Act and Immigration Act to prohibit the immigration of Asians, including all Japanese, to the United States.[81]

Despite the immigration restrictions, many Japanese continued to arrive in California by emigrating to Mexico or Canada and then crossing into the United States.[82] By 1911, over 3,000 former Japanese field hands, known as *keiyaku-nin,* and laborers had become farmers.[83] They owned 16,980 acres of farmland, sharecropped 59,399 acres of land, and leased an additional 89,464 acres of land.[84]

In response, California passed the Alien Land Act of 1913.[85] The Act prohibited those "ineligible for citizenship" from owning agricultural land or leasing it for longer than three years. Thus, the racially based naturalization laws served as the springboard to limit Japanese immigrants' rights to land ownership.[86] The antipathy and fear of the Japanese immigrants reached a crescendo when the government imprisoned Japanese immigrants, citizens and noncitizens alike, in internment camps during World War II.[87] In addition to the loss of liberty experienced by the Japanese immigrants, many repudiated their U.S. citizenship and others lost their property.[88]

In the case of both the Chinese and the Japanese field workers, the United States sought to have access to foreign labor without having to recognize or accept the immigrants as human beings or citizens. To do so, the law set up various restrictions on the groups' labor, citizenship, human, and civil rights.

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79. *Id.* at 413-14.

80. In 1907, Japan and the United States negotiated a "gentlemen's agreement" that Japan would not issue travel documents to Japanese laborers wanting to work in the United States. *Id.* at 478.

81. Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed 1952).

82. STREET, *supra* note 40, at 489.

83. *Id.* at 515.

84. *Id.* at 515-17.

85. Act of May 19, 1913, ch. 113, 1913 Cal. Stat. 206–08.

86. Notably, restrictions on the right to purchase property was the "badge and incident of slavery" challenged in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968).

87. The imprisonment was found to be constitutional in *Korematsu v. United States*, 323 U.S. 214, 216 (1944). That decision has been roundly criticized. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200, 214-15 (1995); Holmes v. Cal. Army Nat'l Guard, 920 F. Supp. 1510, 1533 n.25 (N.D. Cal. 1996).

88. MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 187-201 (2004).

When these groups became more powerful and began asserting their human, labor, and citizenship rights, the law responded by deporting them. When viewed today, commentators often analyze the practices as civil rights violations unconstitutional under the Fourteenth Amendment. Alternately, like the abuses visited upon the native Californians, they can be understood as treading upon the same bundle of rights as those infringed by chattel slavery and protected by the Thirteenth Amendment. As history marched forward, the same practices and infringements continued in the California fields.

4. *1940–1960: Mexicans and the Bracero Program*

Early in the twentieth century, labor flowed freely from Mexico to the United States. Between 1920 and 1930, the Mexican population in the Southwest and California doubled to over 1.4 million.[89] Much of the Mexican immigration during this period, however, was migratory in nature, which led to a subordinated and ostracized population, segregated from white society.[90] Starting in the 1920s, the government began formalizing the border, and Mexican immigrants arriving outside the formal process became known as undocumented. Undocumented immigrants were subject to detainment and deportation, and this vulnerability led to an exploitable agricultural workforce. Even operating within this constrained structure, Mexican immigrants began to seek labor and social rights, staging a variety of strikes and beginning to settle further north.[91] Labor unrest continued into the 1930s, even in the face of a repatriation program aimed at 400,000 Mexicans and Mexican-American citizens.[92]

Beginning in the 1940s, the United States and Mexico entered into a treaty that would provide five million workers over twenty-two years for employers—mainly agricultural—in the United States.[93] The workers, called braceros,[94] arrived on a contract, which they may or may not have seen before coming to the United States. This consequently led to widespread abuse. Braceros worked for low wages, depressed by an oversupply of labor without the ability to leave or change employers. They also worked for too few hours to earn a subsistence wage with huge deductions for room and board, as well as illegal payroll deductions for nonexistent services. Further, they lived in substandard housing.[95] Last, the Braceros saw ten percent of their meager paychecks deducted by the U.S. government; the government was supposed to return this when the workers

89. *Id.* at 130.

90. *Id.* at 131.

91. *Id.* at 133-34.

92. *Id.* at 135.

93. KITTA CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S. 1 (1992).

94. The Spanish word *brazo* translates to "arm," which again emphasizes that the workers are commodified and viewed not as humans, but as something less.

95. Lorenzo A. Alvarado, Comment, *A Lesson From My Grandfather, the Bracero*, 22 CHICANO-LATINO L. REV. 55, 62-64 (2001).

returned to Mexico as an incentive to return to Mexico and not settle in the United States. However, most never saw this money.[96]

The Bracero program lasted from 1942 to 1951 when Congress replaced it with Public Law 78, which lasted until 1964.[97] Although originally started as a treaty program between governments to deal with wartime labor shortages, it morphed into a long-term immigration program for noncitizen immigrant labor.[98] One commentator evaluated the effects of these programs:

> [T]his transnational Mexican labor force ... constituted a kind of "imported colonialism" that was a legacy of the nineteenth-century American conquest of Mexico's northern territories. Modern, imported colonialism produced new social relations based on the subordination of racialized foreign bodies who worked in the United States but who remained excluded from the polity by both law and by social custom.[99]

Lee G. Williams, a U.S. Department of Labor official in charge of the Bracero program, simply called it legalized slavery.[100] The program, with racially segregated workers, laboring in abusive work conditions without formal or informal citizenship rights, violated the groups' civil rights, labor rights, citizenship rights and human rights in ways similar to slavery. Therefore, it violated the holistic vision of the Thirteenth Amendment. Not surprisingly, many critics refer to the current guest worker programs as the New Bracero program.

5. *Contemporary Programs*

In 1996, approximately 15,000 workers had a visa under the H-2A program.[101] These workers labor in substandard conditions with no hope of improving their conditions. Many of these workers do not see their contracts before they arrive in the United States.[102] Farmworker advocates argue that, in the absence of a true agricultural labor shortage, H-2A workers and other agricultural workers face

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96. Laura Wides, *Braceros Rally for Drive to Recover Millions in Missing Wages*, L.A. TIMES, Feb. 5, 2001, at B3.

97. CALAVITA, *supra* note 93, at 113.

98. For an argument that the transition from a treaty program with the Mexican government ostensibly representing workers to an immigration program should lead to heightened constitutional scrutiny, see generally Benjamin P. Quest, Comment, *Process Theory and Emerging Thirteenth Amendment Jurisprudence: The Case of Agricultural Guestworkers*, 41 U.S.F. L. REV. 233 (2006).

99. NGAI, *supra* note 88, at 129.

100. LINDA C. MAJKA & THEO J. MAJKA, FARM WORKERS, AGRIBUSINESS, AND THE STATE 136 (1982).

101. William M. Ross, *The Road to H-2A and Beyond: An Analysis of Migrant Worker Legislation in Agribusiness*, 5 DRAKE J. AGRIC. L. 267, 276 (2000).

102. Cecilia Danger, Comment, *The H-2A Non-Immigrant Visa Program: Weakening Its Provisions Would Be a Step Backward for America's Farmworkers*, 31 U. MIAMI INTER-AM. L. REV. 419, 426 (2000).

depressed wages.[103] The employers know of their vulnerability to deportation and routinely exploit it.[104] When employers violate H-2A visa workers rights, they do not have access to courts to protect themselves.[105] In North Carolina, no H-2A worker has ever filed a complaint with a government agency.[106] This is a graphic example of how effectively fear of deportation keeps H-2A visa workers from protesting.

Once one places current guest worker programs in proper historical perspective, the argument that they violate the Thirteenth Amendment seems much less far-fetched. Like their predecessors, the programs are simply a nicely labeled program for noncitizen immigrant labor. We want the immigrants' labor, but we do not want them as fellow members of our society. Like chattel slavery, the mission economy, the use of Chinese and Japanese workers, and the Bracero program, guest worker programs target a group of immigrant workers of color. As a result, their treatment implicates civil rights issues. By limiting workers' ability to quit or protest their work conditions without facing deportation, the program compromises their labor rights. Their inability to naturalize, to seek legal redress, or to participate fully in society limits their citizenship rights. Finally, their treatment in the workplace and at the border as less than human aliens raises human rights concerns. The same bundle of rights that form the concerns which prompted the passage of the Thirteenth Amendment are once again under attack for agricultural workers and other workers on restricted visas. In this way, one can see that a poorly crafted guest worker program violates the Thirteenth Amendment.

V. CONCLUSION

If Congress can develop a guest worker program that respects the labor, citizenship, civil, and human rights of the workers, it should be able to pass constitutional muster and not violate the Thirteenth Amendment. Such a program would have several important requirements. First, once the government issues a visa, workers must be able to stay for the length of the visa even if they quit or their employer fires them. Without this guarantee, workers will not have the freedom to quit guaranteed by the Thirteenth Amendment. In addition, they will be unable to advocate for decent pay and work conditions. Second, Congress must guarantee the workers the same basic worker and human rights as other workers. They cannot be bound to a sub-market rate contract or excluded from minimum wage, overtime, or other labor standards protections. Without

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103. Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 580-81 (2001); Alvarado, *supra* note 95, at 65; Kimi Jackson, *Farmworkers, Nonimmigration Policy, Involuntary Servitude, and a Look at the Sheepherding Industry*, 76 CHI.-KENT L. REV. 1271, 1294-95 (2000).

104. Holley, *supra* note 103, at 595.

105. *Id.* at 597-616 (arguing that administrative and court decisions deny H-2A workers access to the legal system).

106. Jackson, *supra* note 103, at 1286 (complaints have been made, instead, by worker advocate or church groups).

both of these protections, their vulnerability will negatively impact all workers, contrary to the purposes of the Thirteenth Amendment.

The visa program must also avoid the badges and incidents of slavery by protecting the social citizenship rights of the visa workers. Most importantly, Congress must give the workers some ability to apply for citizenship and earn their right to stay. Without this requirement, employers and society will always consider the workers "noncitizen," temporary, alien workers; that is, unconstitutionally commodified workers who are not recognized as a legitimate part of our society. In addition, the law must not limit family autonomy by restricting immigration of family members or by not allowing family members to participate fully in U.S. society. Family members must have access to employment and other informal aspects of citizenship. Society should not deny these basic human rights to workers or their families simply because they are noncitizen, immigrant labor.

Speeches

Destined for Servitude

By JUAN F. PEREA*

Introduction

I AM HONORED TO PRESENT this lecture in honor of Jack Pemberton, a tireless warrior for civil rights and justice.[1] My lecture is titled "Destined for Servitude." I will explore some of the present vestiges of constitutional evil in the pro-slavery provisions contained in the U.S. Constitution.[2] As I will demonstrate, the desire to protect slavery casts a long shadow into the present.

The original Constitution of 1787 contains several provisions that protect slavery. These include: Article I, section 2, clause 3—the infamous "three-fifths" provision—which increased the representation of

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1. I'd like to give special thanks to Professor Maria Ontiveros, who invited me to deliver this lecture, and to Bettyann Hinchman, for her help in making all the necessary arrangements. I'd also like to thank the members of the University of San Francisco Law Review for their assistance in publishing this lecture.

2. I'd like to acknowledge Professor Mark A. Graber for his insightful book, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006), to whom I owe the phrase "constitutional evil" and some of my understanding of its ramifications.

southern states in Congress by adding three-fifths the number of slaves held as property to the number of free persons residing in each state; Article I, section 9, which uniquely limited Congress' commerce power, forbidding its exercise to limit the slave trade until 1808; Article IV, section 2, clause 3—the Fugitive Slave Clause—which guaranteed to slave owners the right to reclaim escaped slaves; and finally, Article V, which prohibited amending Article I, section 9 for a period of twenty years. Paul Finkelman has identified several other provisions of the Constitution that either directly or indirectly protected slavery and slave ownership.[3]

A series of antebellum enactments and cases further supported these constitutional provisions and the institution of slavery. A federal fugitive slave law was enacted in 1793, and later modified in 1853, despite its dubious constitutionality.[4] Despite antebellum priority of state interests over federal, the U.S. Supreme Court, in *Prigg v. Pennsylvania*,[5] found that federal fugitive slave legislation was constitutional and that state laws adding more requirements than the federal law, like Pennsylvania's, were not. Lastly, the Supreme Court in *Dred Scott v. Sandford*,[6] relying in part on framers' intent, held that blacks were never intended to have federal citizenship, and therefore Scott, lacking such citizenship, was not entitled to invoke the federal court's diversity jurisdiction. While the *Dred Scott* decision is almost uniformly condemned in constitutional law textbooks and commentaries, it can persuasively be argued that it was legally correct given the Court's reasoning and the premises of the time.[7] While one might consider *Dred Scott* morally wrong today, it was almost certainly correct in its basic assertions about framers' intent. In short, the *Dred Scott* case is condemnable only because the framers' Constitution sanctioned the evil supported by the case.

Given the text of the Constitution and its legislative and decisional progeny, it is a fairly straightforward conclusion to understand

3. PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 6–10 (2d ed. 2001).

4. *See* Paul Finkelman, *Fugitive Slaves*, *in* OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 319–20 (Kermit L. Hall et. al eds., 1992). The constitutionality of the federal legislation was dubious because, despite the existence of the Fugitive Slave Clause, Congress had been given no explicit enumerated power under Article I, section 8, to enact legislation to enforce the clause. Justice Harlan makes this point in his dissenting opinion in the *Civil Rights Cases*, 109 U.S. 3 (1883).

5. 41 U.S. (16 Pet.) 539 (1842).

6. 60 U.S. (19 How.) 393 (1857).

7. *See* MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 15–16, 28–30, 46–48 (2006).

the antebellum Constitution as a pro-slavery document. Indeed, in 1788, just after its drafting, General Charles Pinckney, delegate to the constitutional convention from South Carolina and primary advocate for its pro-slavery provisions, commented: "In short considering all circumstances, we have made the best terms for the security of this species of property [slaves] it was in our power to make. We would have made better if we could; but on the whole, I do not think them bad."[8] While it is certainly true that not every delegate to the convention approved of slavery or the pro-slavery compromises, the text of the Constitution speaks for itself.

The Constitution—our organic law—explicitly sanctioned and supported a system of slave labor[9] mostly used for southern agriculture. I will argue that slavery as a labor system, and near-slavery after Reconstruction, have been deeply entrenched in our social structure since the founding and still persist today. To a significant degree, our national union depended on acquiescence in the slave labor system.

But to what extent has the production of a slave labor class, defined by race, persisted beyond the Constitution's origins? One could argue that the radical transformation wrought by the Reconstruction amendments altered the national consensus regarding slavery. Yet while the Thirteenth Amendment abolished slavery, and the Fourteenth Amendment required equal protection, the command of these amendments was largely ignored at the end of radical Reconstruction.[10] The price of reconciliation between North and South was the North's withdrawal of federal troops from the South, which allowed southerners essentially to re-enslave nominally free blacks through abusive sharecropping and tenant farmer systems, black codes, and white mob violence—an intricate system of quasi-slavery.[11] Thus, it is possible to recognize, at the end of radical Reconstruction, the outlines of the original Constitutional bargain, a consensus to preserve racially defined slave labor as an important feature of our national union.

I. The New Deal Era

It is also possible to recognize the outlines of this Constitutional bargain in the enactment of New Deal labor and welfare legislation.

8. FINKELMAN, *supra* note 3, at 10. R

9. When I refer to slavery as a labor system, I mean the promotion and production of a permanent, exploited class of manual laborers, defined by race, destined for servitude.

10. GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 457–64 (5th ed. 2005).

11. WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION, 1869–1879, at 346–48 (1979).

Several major federal statutes were proposed and enacted during Franklin D. Roosevelt's presidency, including the Social Security Act, the National Labor Relations Act, and the Fair Labor Standards Act. In order to win the votes of Southern Democrats, which he needed to pass the legislation, Roosevelt agreed to a series of measures and limitations that would exclude most black employees from most of the benefits offered by these federal labor and welfare statutes.

The Social Security Act ("SSA"), for example, was first intended by Roosevelt to cover all employees.[12] However, the prospect of cash benefits paid to black agricultural and domestic workers proved too inclusive for Southern Democrats:

> The Old-Age Insurance provisions of the Social Security Act were founded on racial exclusion. In order to make a national program of old-age benefits palatable to powerful southern congressional barons, the Roosevelt administration acceded to a southern amendment excluding agricultural and domestic employees from OAI coverage. This provision alone eliminated more than half the African Americans in the labor force and over three-fifths of black southern workers. The systematic exclusion of blacks through occupational classifications was crucial to the passage of the act.[13]

By denying old-age insurance benefits and other benefits under the SSA to most black employees, Southern Democrats guaranteed that most blacks, and especially southern blacks, would remain an impoverished and dependent underclass still subject to the whims of the white masters of the segregated South.[14]

Like the original version of the SSA, the original version of the National Labor Relations Act ("NLRA") included agricultural workers.[15] However, agricultural and domestic workers were later excluded from the Act in an amendment by the Senate Committee on Education and Labor.[16] This exclusion remained unchanged in all subsequent versions, including the version finally enacted. There was apparently no debate on the explicitly racial effects of the exclusion of agricultural and domestic employees, leading some commentators to

12. *See, e.g.*, IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 43 (2005).

13. Robert C. Lieberman, *Race, Institutions, and the Administration of Social Policy*, 19 SOC. SCI. HIST. 511, 514–15 (1995).

14. Some commentators have understood this exclusion as a result of administrative difficulties in accounting for these types of employees. *See, e.g.*, Gareth Davies & Martha Derthick, *Race and Social Welfare Policy: The Social Security Act of 1935*, 112 POL. SCI. Q. 217, 224–26 (1997). For a critique of their argument, see KATZNELSON, *supra* note 12, at 43–44 n.56. R

15. KATZNELSON, *supra* note 12, at 57. R

16. *Id.* at 57–58.

understand the exclusion as more racially neutral than other contemporary statutes.[17] However, some collateral support for the view that racism was a motivation behind the NLRA can be found in Congress' failure to enact non-discrimination provisions applicable to unions. Unions were left free to discriminate against blacks seeking to join. The benefits of collective bargaining, then, were disproportionately available only to industrialized and unionized white workers.

It is more persuasive to view the exclusion of agricultural and domestic workers in the NLRA as consistent in intent with contemporaneously passed statutes rather than being viewed as an isolated exception. In the preceding SSA, legislators had crafted a formula—exclusion of agricultural and domestic workers—to satisfy Southern Democrats by denying federal benefits to most black employees. Having found a formula that would secure passage of the legislation, it seems natural that Congress would adopt the same formula in subsequent legislation that would have otherwise conferred substantial federal rights on black employees. The exclusion of black employees kept them in a subservient position, dependent on the whims of white landowners and employers, and preserved the racial caste system of the segregated South. It strains credulity to think that southern white landowners and employers would support a federal right to bargain collectively for agricultural and domestic workers, which would strengthen their bargaining position and create the possibility of federal interference in the racial caste system. Why would southerners support a right so potentially disruptive of the structure of their society?

Southern Democratic concerns about excluding blacks from federal benefits and the threat of federal tampering with southern racial prerogatives were key features of the debate on the subsequent Fair Labor Standards Act ("FLSA"). The prospects of a minimum wage, equalized wages between whites and blacks, and centralized federal administration of such a program raised strong objections among southern congressmen. For example, Representative J. Mark Wilcox of Florida stated:

> [T]here is another matter of great importance in the South, and that is the problem of our Negro labor. There has always been a difference in the wage scale of white and colored labor. . . . You cannot put the Negro and the white man on the same basis and get

17. *See id.* at 57; *see also* Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1336 n.12 (1987) (commenting that the NLRA was a possible exception to the rule of racism structuring the other New Deal enactments).

> away with it. Not only would such a situation result in grave social and racial conflicts but it would also result in throwing the Negro out of employment and in making him a public charge.[18]

Once again, the prescribed solution was to exclude agricultural and domestic workers from the coverage of the Act. It was well understood that this exclusion would harm black farm and domestic workers.

Three major pieces of New Deal legislation—the Social Security Act, the National Labor Relations Act, and the Fair Labor Standards Act—all excluded agricultural and domestic workers from their protections. The motive, in each case, was to secure necessary southern support for passage of the legislation by keeping black workers in an impoverished, dependent state in which neither they nor the federal government posed any threat to the racist regime of segregation in the South.

Like the original constitutional bargain to protect slavery, the New Deal congresses passed legislation that replicated a slavery-style labor system in which the most vulnerable and exploited participants, black agricultural and domestic workers, were excluded from labor protections. In enacting the Constitution, slavery was protected in order to assure southern support for the Constitution and the national union. One hundred and fifty years later, New Deal era legislators again protected racist southern prerogatives in exchange for the passing of novel federal labor legislation.

II. The Present

Most of the exclusionary provisions described before have been modified, creating greater racial fairness in the Social Security System and the FLSA.[19] One provision in the FLSA continues to exclude agricultural and domestic workers.[20] This exclusion means that these workers, unlike most others, have no protection against being forced to work unreasonable numbers of hours and entitlement to overtime pay.[21]

18. 82 CONG. REC. 1404 (1937).

19. *See, e.g.*, Linder, *supra* note 17, at 1388–93 (tabular data and descriptions of repealed exclusions from FLSA coverage). R

20. *See* 29 U.S.C. §§ 207(b), 213(a)–(b) (2006).

21. According to Marc Linder: "Farm workers employed on large farms remain today, as they were in 1938, the only numerically significant group of adult minimum-wage workers wholly excluded from the maximum hours provision of the FLSA on the basis of a criterion unrelated to the size of the employer." Linder, *supra* note 17, at 1389. R

Remarkably, the exclusion for agricultural and domestic workers still exists, unaltered, in the NLRA.[22] Today, agricultural and domestic workers have absolutely no federally protected right to organize and bargain collectively. Consider the damage this exclusion does: absent protective state legislation, farm owners, or labor contractors, can fire farm workers with impunity for acting collectively or seeking to unionize, therefore contributing to their exploitation and vulnerability at the bottom rungs of the economy.

Though the people affected have changed, the operation of the agricultural and domestic worker exclusions have not. The huge majority of agricultural laborers and domestic workers today, approximately eighty-three percent, are Latino immigrants and citizens.[23] Statutorily sanctioned exploitation and oppression intended to keep Blacks subservient now keep Latino farm workers subservient. This exploitation of brown Latino employees is no more justifiable than was the earlier exploitation of Blacks. This exclusion continues to function as historically intended by guaranteeing the profitability and permanence of plantation-style, quasi-slave labor that deprives these employees of minimum standards of labor protection. One can only imagine the benefit these workers could reap from competent union representation.

The preservation and continuing operation of this debilitating exception in our primary labor law can teach us powerful lessons. First, laws designed to preserve racial inequality and caste have been remarkably effective and, in this case, long-lived. Second, racially targeted inequality has been accomplished through the carefully calculated use of racially neutral language. Third, the failure to examine closely the origins of oppressive statutory language leads to an easy acceptance of ostensibly race-neutral language as somehow "natural" or "necessary," rather than as a racist structure that should be challenged as such. This is how structural racism occurs—when we lose the collective memory of the very precise reasons why oppressive legislation was enacted in the first place.

Lastly, there is a prescription here for advocates of the undocumented and of farm and domestic laborers. Immigration reform pro-

22. *See* 29 U.S.C. § 152(3) (2006) ("The term 'employee' shall include any employee . . . *but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home* . . . .") (emphasis added).

23. DANIEL CARROLL, RUTH M. SAMARDICK, SCOTT BERNARD, SUSAN GABBARD & TRISH HERNANDEZ, U.S. DEP'T OF LABOR, REPORT NO. 9, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY 2001–2002: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARM WORKERS 4 (2005).

posals continue to make the news. The principal feature of these proposals is a path to citizenship and legal status in the country. Surely that is a necessary and important step.

However, my analysis suggests that citizenship alone is not enough. Without meaningful reform of the labor laws, citizenship alone for the undocumented will simply guarantee a more-or-less permanent class of exploited citizens still toiling on today's equivalent of the plantation. Blacks were, and remain, such a class of exploited citizens, indicating that immigration reform alone is not enough. It must be coupled with the repeal of labor laws intended to oppress.

It is past time to amend the labor laws and to purge one more vestige of our antebellum evil from that which we respect as law.