

THE THIRTEENTH AMENDMENT IN HISTORICAL PERSPECTIVE

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One of the first cases I teach in my required first-year course on constitutional law is *McCulloch v. Maryland*.¹ Like other constitutional law teachers, I use *McCulloch* in part as a preview of approaches to constitutional interpretation—it offers up historical, textual, structural, and representation-reinforcing theories of interpretation. Most relevant here, I emphasize that the historical approach to constitutional interpretation in *McCulloch* actually represents two approaches. The first is what constitutional scholars most readily think of as historical interpretation: originalism. That is the approach that many papers in this conference take, and the primary questions to which this conference is addressed. Following that approach, much ink has been spilled on the original meaning of the Thirteenth Amendment, the relationship between precursors to the Amendment and the Amendment itself, and the relationship between the Thirteenth, Fourteenth, and Fifteenth Amendments.

The second historical approach in *McCulloch* leads to a very different kind of historical endeavor. This approach assumes that constitutional understandings are elaborated by historical practice in American history long after the founding. Relevant history in *McCulloch* does not end with the writing of the Constitution; it develops over time up to the very moment of judicial intervention. *McCulloch* thus suggests that the ways in which laypeople, politicians, scholars, lawyers, and jurists interpret the Constitution during the decades and centuries since 1789 offer up important glosses on constitutional meaning.

It is this second historical approach—the nonoriginalist historical approach—that this paper engages. What concerns me here is not what the Thirteenth Amendment meant in originalist terms, but how its meaning has changed over time. Unsurprisingly, dominant currents of political thought have influenced interpretations of the

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¹ 17 U.S. (4 Wheat.) 316 (1819).

Amendment at any given moment. The meaning of the Thirteenth Amendment has diverged widely at different moments in history—emphasizing the right to contract during the *Lochner* era, New Deal labor and economic rights in the 1930s and 1940s, and desegregation and antidiscrimination during the civil rights era of the 1960s.

These shifting historical meanings of the Thirteenth Amendment offer up a resource for thinking about the Amendment's purview today. That said, there is no linear or inexorable relationship between these changing meanings of the Thirteenth Amendment and new doctrinal arguments based on the Amendment. Historical evidence does not lead to the conclusion that the Thirteenth Amendment requires any particular legal outcome. History can, however, provide resources for constitutional interpretation on two levels. First, it reveals ways of thinking about the Amendment that have since disappeared from mainstream constitutional thought. These alternative understandings of the Amendment can re-open questions that have long been thought settled. Second, exploring the Amendment's changing meanings invites scholars to contemplate the relationship between constitutional interpretations and historical contexts. By analyzing that relationship in particular historical settings, current scholars and lawyers can gain a better understanding of why they use the Thirteenth Amendment as they do today, and how they might do so more self-consciously and without unnecessary (and perhaps unpersuasive) claims to legitimacy through original intent.

Toward these ends, this paper explores the ways in which political developments affected the understanding of the Thirteenth Amendment during the fifteen years of constitutional and civil rights uncertainty that lasted from the New Deal revolution until the Supreme Court's decision in *Brown v. Board of Education*.² During that period, lawyers in the newly created Civil Rights Section ("CRS") of the Department of Justice ("DOJ") used the New Deal as a springboard for a new and quite expansive understanding of the Thirteenth Amendment. Exploring their efforts at reinterpretation underscores both the process and the lessons of the nonoriginalist historical approach to constitutional interpretation.³

² 347 U.S. 483 (1954).

³ The discussion that follows draws on my prior work; most notably, RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007), and Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 *DUKE L.J.* 1609 (2001).

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When CRS lawyers began aggressively prosecuting Thirteenth Amendment cases in the late 1930s and 1940s, they inherited a way of thinking about the Amendment closely tied to the *Lochner* era. During the early twentieth century, the Department of Justice had prosecuted southern officials and individual employers under the Peonage Act of 1867. A statutory enforcement of the Thirteenth Amendment, that act prohibited peonage, a form of involuntary servitude in which a worker was forced to work out a debt to an employer. In the 1905 case of *Clyatt v. United States* and the 1914 case of *United States v. Reynolds*, the Court upheld the Peonage Act and indictments under it.⁴ Moreover, in the 1911 state criminal case of *Bailey v. Alabama*, the Court invalidated a state contract labor law common in the South. The law presumed a criminal intent to defraud when an employee accepted an advance from an employer but broke his labor contract without repaying his debt to his employer.⁵

The Court's opinions in these cases predictably reflected a *Lochner*-era focus on contractual freedom. The problem in *Bailey*, as the Court saw it, was that the Alabama law functionally required specific performance for the breaking of a labor contract. Although decided under the Peonage Act and the Thirteenth Amendment, the language and logic of contract law and contract rights pervaded the opinion: "[t]he full intent of the constitutional provision could be defeated with obvious facility if, through the guise of contracts under which advances had been made, debtors could be held to compulsory service. . . . The contract exposes the debtor to liability for the loss due to the breach, but not to enforced labor."⁶ In these peonage cases, as in many *Lochner*-era cases, the Supreme Court saw itself as intervening sporadically into private relationships to ensure the contractual freedom of the parties.⁷

Even after the *Lochner* framework began to lose its hold on constitutional understandings of individual rights in the late 1930s, the debt element of peonage kept enforcement of the Thirteenth Amendment closely tied to its contract-based interpretation. Although many instances of forced labor during the first half of the

⁴ 235 U.S. 133 (1914); 197 U.S. 207, 218 (1905).

⁵ 219 U.S. 219, 231 (1911).

⁶ *Id.* at 242.

⁷ Similarly, the Court treated the criminal surety law it struck down in *United States v. Reynolds* as punishing the violation of the contract between the criminal and the surety for whom he agreed to work in lieu of time served on the state chain gang. 235 U.S. at 147. See Aziz Z. Huq, Note, *Peonage and Contractual Liberty*, 101 COLUM. L. REV. 351 (2001).

century did not involve contracted debt—as where employers maintained immobility through violence or threats of violence—every successful federal involuntary servitude prosecution before 1937 involved contractual indebtedness. All three involuntary servitude cases that reached the Supreme Court during World War II—*Taylor v. Georgia*,⁸ *United States v. Gaskin*,⁹ and *Pollock v. Williams*¹⁰—also conformed to the conventional definition of peonage: all three involved contracted debt, and all three arose under the Peonage Act of 1867.¹¹

During World War II, however, lawyers in the CRS began to unshackle the Thirteenth Amendment from the contract-based framework of the *Lochner* era. They began to draw on the New Deal rather than *Lochner* as they conceptualized both the government's role in enforcing the Thirteenth Amendment and the substance of the Amendment's prohibitions. This new conceptualization led to three new and expansive interpretations of the Amendment. The first concerned the government's role: the lawyers shifted their understanding of the government's role from one in which the government occasionally intervened into private contracts that had gone wrong to one in which the government had an ongoing obligation to protect individuals from rights violations. The second two New Deal-based interpretations of the Thirteenth Amendment were more substantive. In the second, the CRS lawyers drew on the New Deal's commitment to free labor protections to inform the content of the Thirteenth Amendment. In the third, they drew on the New Deal's guarantee of a minimum standard of living and working.

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The New Deal influenced the CRS lawyers' understanding of the Thirteenth Amendment in the first instance by providing the lawyers with a new model of the role of government in protecting rights. During the *Lochner* era, lawyers and judges had thought about peonage in terms of debt and the policing of contracts. Once the New Deal offered wide-ranging statutory protections to many Americans, the government lawyers began to see an ongoing relationship between individuals and the federal government, with the government offering affirmative protection of rights. They increasingly under-

8 315 U.S. 25 (1942).

9 320 U.S. 527 (1944).

10 322 U.S. 4 (1943).

11 *Pollock*, 322 U.S. at 5–8; *Gaskin*, 320 U.S. at 527–28; *Taylor*, 315 U.S. at 26–30.

stood peonage as a “[f]ederally-[s]ecured [r]ight to [b]e [f]ree [f]rom [b]ondage.”¹²

This conceptual transformation was rooted in the New Deal’s overall guarantees of security. “Security” in the economic sense was the watchword of the federal government’s attack on the Depression of the 1930s. New Deal legislation attempted to provide such economic security (mostly for white men) through unemployment insurance, public works projects, Social Security, relief, the protection of unions, and other economic and social welfare programs. The New Deal thus demonstrated that the exercise of government power, rather than its restraint, might serve to safeguard the vulnerable. Attorney General Biddle made this very point in a lecture he delivered at the end of 1942. He acknowledged that the Founders had been most concerned with a limited government. He argued, however, that after the Industrial Revolution, Americans came to realize that “the powers of unregulated business had to be checked by transferring much of their control from private to public hands.”¹³

The Truman administration reinforced this new emphasis on the government’s provision of affirmative protections. When President Harry S. Truman created his groundbreaking Committee on Civil Rights in 1946,¹⁴ he declared the end of complacency “with a civil liberties program which emphasizes only the need of protection against the possibility of tyranny by the Government.”¹⁵ Modern conditions required the creation of “new concepts of civil rights to safeguard our heritage.”¹⁶ The “extension of civil rights today,” Truman announced, “means, not protection of the people *against* the Government, but protection of the people *by* the Government.”¹⁷

In its final report, Truman’s Committee argued that increased national authority for protecting civil rights extended the “positive governmental programs designed to solve the nation’s changing problems.”¹⁸ The report described how the Supreme Court had found in

12 Sydney Brodie, *The Federally-Secured Right to Be Free from Bondage*, 40 GEO. L.J. 367 (1952).

13 FRANCIS BIDDLE, *DEMOCRATIC THINKING AND THE WAR: THE WILLIAM H. WHITE LECTURES AT THE UNIVERSITY OF VIRGINIA [1942–1943]*, at 19 (1944).

14 *See TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT’S COMMITTEE ON CIVIL RIGHTS* vii (1947) [hereinafter *TO SECURE THESE RIGHTS*] (quoting Harry S. Truman, Statement on Executive Order 9808 (Dec. 5, 1946) (establishing the President’s Committee on Civil Rights)).

15 Address Before the National Association for the Advancement of Colored People, 1947 PUB. PAPERS 311 (June 29, 1947).

16 *Id.*

17 *Id.*

18 *TO SECURE THESE RIGHTS*, *supra* note 14, at 106.

the Constitution a “basis for governmental action at the national level . . . for such policies as the control of prices; regulation of agricultural production; requirement of collective bargaining; social security benefits for millions of people; prohibitions of industrial monopolies,” and more.¹⁹ The Committee built on those interpretations, concluding that “freedom in a civilized society is always founded on law enforced by government.”²⁰

Truman and his committee also rejected the notion that the new governmental duty to provide security began and ended with economic security. Invoking FDR’s identification of “Freedom From Fear” as one of the Four Freedoms, the committee’s report made clear that fear did not stem from economic hardship and uncertainty alone.²¹ It grew as well out of the personal insecurity of living as a racial minority in a society that publicly and privately, systematically and informally, oppressed such minorities. As a result, freedom from fear now required not only the economic safety net the New Deal had provided mostly white workers but also freedom from involuntary servitude, lynching, and police brutality for African Americans.²²

By the late 1940s and early 1950s, then, the New Deal’s catchphrase of “economic security” had mutated in some contexts into the “security of the person” or “the safety and security of the person.” The phrase drew on a venerable but long-submerged understanding of civil rights, with common law roots traceable to Blackstone’s 1765 Commentaries²³ and statutory roots in the 1866 Civil Rights Act and the Freedman’s Bureau Bill of the same year.²⁴ Eighty years later, the security of the person formed a central component of the report of the President’s Committee on Civil Rights in 1947.²⁵ And it was the phrase used to describe the category of harms that included involuntary servitude and peonage, lynching, and police brutality in the first casebook on civil rights, published in 1952.²⁶

19 *Id.*

20 *Id.* at 103.

21 *Id.* at vii.

22 See Frank Coleman, *Freedom from Fear on the Home Front*, 29 IOWA L. REV. 415, 416 (1944) (describing how federal prosecutions of lynch mobs and “village tyrants” following Pearl Harbor helped secure “freedom from fear”).

23 1 WILLIAM BLACKSTONE, COMMENTARIES *117, *125.

24 See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866); Freedman’s Bureau Bill, ch. 200, § 14, 14 Stat. 173, 176 (1866).

25 See TO SECURE THESE RIGHTS, *supra* note 14, at vii.

26 1 THOMAS I. EMERSON & DAVID HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES: A COLLECTION OF LEGAL AND RELATED MATERIALS 1 (2d ed. 1958) (noting that “[t]he right to security of the person . . . is a fundamental right”). Language about the “security of the person” also occasionally resurfaced in some of the signal civil rights dis-

Drawing on this conception of “the security of the person,” and this New Deal approach to civil rights more generally, the CRS lawyers rejected the essence of *Lochner*-era peonage cases as the occasional interference of courts into private contracts. Instead, they focused on a direct, ongoing relationship between the executive branch of the federal government and its citizens. In fact, they saw the Thirteenth Amendment as a particularly apt site for this new conception because, as CRS lawyer Sidney Brodie noted, the victims of peonage were often “defenseless or without capacity to pursue [their] personal remedies,” and the government needed to “act on its own initiative.”²⁷

Once the CRS lawyers based their understanding of the government’s role in Thirteenth Amendment cases on a positive conception of rights, their use of the Amendment and related statutes changed. They began to use the Thirteenth Amendment beyond the specific, time-worn cases of peonage proper and beyond prosecutions under the Peonage Act itself. In Circular No. 3591, Attorney General Biddle requested that United States attorneys “defer[] [prosecutions under the peonage statute] in favor of building the cases around the issue of involuntary servitude and slavery . . . disregarding entirely the element of debt.”²⁸ To accomplish this shift from contract-based peonage to the “federally-secured right to be free from bondage,” the CRS lawyers revitalized other statutory weapons from the recent and distant past. The section put to use a Slave Kidnapping Statute from 1866, which prohibited the holding of a person as a slave, as well as the 1932 Lindbergh Law, a federal kidnapping law passed after the abduction of Charles Lindbergh’s infant son. Most significantly, for the first time since the ratification of the Thirteenth Amendment, the Department of Justice used general civil rights laws to prosecute involuntary servitude cases not based on an underlying debt. Once the CRS lawyers read the Thirteenth Amendment as establishing a federal right, a pair of Reconstruction criminal civil rights statutes could provide far broader authority for prosecution than the Peonage Act alone. Section 51 of the criminal code criminalized all conspiracies

sents of the late nineteenth century, such as the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 115–19 (1873) (Bradley, J., dissenting), and *Plessy v. Ferguson*, 163 U.S. 537, 555–56, 560 (1896) (Harlan, J., dissenting).

27 Brodie, *supra* note 12, at 376.

28 Francis Biddle, Department of Justice Circular No. 3591 (Dec. 12, 1941), in 16 JUSTICE DEPARTMENT CIVIL RIGHTS POLICIES PRIOR TO 1960: CRUCIAL DOCUMENTS FROM THE FILES OF ARTHUR BRANN CALDWELL 61–63 (1991) [hereinafter JUSTICE DEPARTMENT CIVIL RIGHTS POLICIES]; see also Department of Justice Circular No. 3356, *supp.* no. 1 (May 21, 1940), in JUSTICE DEPARTMENT CIVIL RIGHTS POLICIES, *supra* at 12–35 (discussing 18 U.S.C. §§ 51 and 52).

to violate rights guaranteed against private interference, and Section 52 criminalized all governmental violations of constitutional rights. Because the Thirteenth Amendment lacked a state action requirement, it protected the right to be free from bondage against virtually all comers.²⁹

Even before Biddle made it a policy to use these general civil rights statutes, the CRS had begun experimenting with a variety of statutory cocktails that suggested the New Deal demotion of debt and contract. The celebrated prosecution of the notorious William T. Cunningham in Oglethorpe County, Georgia, offers a prime example. As anti-peonage crusader William Henry Huff and others publicized, Cunningham had provided his workers with so little food they frequently went hungry. He threatened to beat them with a pistol if they could not keep his pace. And he hunted his terrified, escaping workers all the way from Georgia to Chicago, where he convinced the police to arrest them. Cunningham's indictment included counts of conspiracy to deprive the farmworkers of the right to be free from slavery and involuntary servitude under § 51 and counts of holding them as slaves under the Slave Kidnapping statute, as well as the traditional counts of peonage under the 1867 act.³⁰

CRS investigations into the servitude of young black men working in the Florida cane fields illustrate the change even more dramatically. After Biddle's circular, case titles altered from "Peonage" to "Involuntary Servitude," and so did the emphasis of the FBI's questions and the lawyers' analyses of their trial evidence. Before Biddle's circular, questions and memos had focused on the amount and details of the debts the youngsters owed the sugar company. Afterwards, the lawyers wrote memos organizing their investigative reports

29 GOLUBOFF, *supra* note 3, at 146, 323 n.11 (describing how the 1932 Lindbergh Law was put to use to accomplish the shift from peonage to involuntary servitude and citing John T. Elliff, *Aspects of Federal Civil Rights Enforcement: The Justice Department and the FBI, 1939-1964*, in *LAW IN AMERICAN HISTORY* 608-09 (Donald Fleming & Bernard Bailyn eds., 1971)); Brodie, *supra* note 12, at 367 (noting the useful statutes that deal with slavery, involuntary servitude, or peonage). For the statutes, see Slave Kidnapping Act, ch. 86, § 1, 14 Stat. 50 (1866) (current version at 18 U.S.C. § 1583 (2000)); Lindbergh Kidnapping Act, ch. 271, § 1, 47 Stat. 326 (1932) (current version at 18 U.S.C. §§ 1201-1202 (2000)); Brodie, *supra* note 12, at 374 n.34 (citing unreported cases, including the unreported case of *United States v. Gantt*, No. 10, 031n (N.D. Ala. Nov. 5, 1949), which resulted in prosecution under forced labor statutes).

30 PETE DANIEL, *THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH 1901-1969*, at 175 (1972) (describing the peonage charges against William T. Cunningham); GOLUBOFF, *supra* note 3, at 147, 324 n.14 (citing "Memorandum, May 1941, [file] 50-708, [RG 60, National Archives]" [hereinafter DOJ Files]); *I.L.D. Brings Charge of Peonage Against Georgia Planter*, *DAILY WORKER*, Nov. 20, 1939, at 5.

by references to threats, shootings, and beatings, among other things.³¹

Safeguarding the security of Americans against both public and private rights violations was institutionally, doctrinally, and culturally different from enforcing the narrow terms of the Peonage Act. The New Deal had begun this trend with its promise of economic security. The CRS lawyers broadened it to include African Americans' rights to the "safety and security of the person," prime among which was the right to be free from bondage. This conceptual shift suggested that African Americans as well as whites deserved "security," that that security went beyond economics, and that affirmative federal power could and should be used to protect individuals. When the CRS expanded the "economic security" of the New Deal into the "safety and security" of African Americans, they transformed the Thirteenth Amendment from a bulwark against constitutionally problematic contracts into a positive guarantee of freedom from servitude.

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The CRS lawyers drew on the New Deal not only in thinking about the role of government in enforcing the Thirteenth Amendment but also to fill in the very substance of the Amendment's protections. The second reconceptualization of the Thirteenth Amendment thus emerged out of the New Deal's commitment to free labor. In particular, it emerged out of the New Deal's particular vision of what free labor meant.

Since the debates that accompanied its proposal, advocates of an expansive vision of the Thirteenth Amendment had generally agreed that it was meant not only to end slavery and involuntary servitude but that it should, in the words of Attorney General Biddle, also guarantee "a system of completely free and voluntary labor . . . throughout the United States."³² What made labor free for the CRS lawyers during and after World War II differed substantially from what had made it free in the free-labor ideology of Reconstruction and in the freedom-of-contract jurisprudence of the *Lochner* era, however. During the Reconstruction era, the term carried connota-

³¹ GOLUBOFF, *supra* note 3, at 109–114, 324 (citing DOJ files, 50-18-15).

³² Francis Biddle, Civil Rights and the Federal Law, in *SAFEGUARDING CIVIL LIBERTY TODAY: THE EDWARD L. BERNAYS LECTURES OF 1944 GIVEN AT CORNELL UNIVERSITY* 109–144 (1945). For the classic treatment of antebellum free labor ideology, see ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 11–51 (Oxford Univ. Press 1995) (1970).

tions of the right to pursue a calling, the dignity of labor, and the autonomy of the individual. It also embraced the opportunity to find jobs, to advance economically, and to receive just compensation for labor. This ideal provided part of the basis for *Lochner*-era liberty of contract, and it persisted with some force even after the *Lochner* era ended.³³

The “free and voluntary labor” to which Biddle tied the Thirteenth Amendment drew more directly on the New Deal, however. The essence of free labor became rights to organize, bargain, and strike. “The tendency of modern economic life toward integration and centralized control,” an early version of the National Labor Relations Act (“NLRA”) stated, “has long since destroyed the balance of bargaining power between the individual employer and the individual employee, and has rendered the individual, unorganized worker helpless to exercise actual liberty of contract, to secure a just reward for his services, and to preserve a decent standard of living.”³⁴ In order for the free-labor ideology of the Reconstruction and *Lochner* eras to become a reality in the twentieth-century United States, workers had to have the right to act collectively.³⁵

Even as the New Deal took steps to protect these labor rights, it largely forsook black workers’ rights by accommodating the racial hierarchies and economic coercion of the southern labor market. The NLRA, the Fair Labor Standards Act (“FLSA”), and the Social Security Act (“SSA”) all exempted from coverage the agricultural and domestic work that most African Americans in the South performed.³⁶ The National Recovery Administration failed to eliminate regional

³³ For an excellent discussion of laborers’ changing conceptions of free labor in the postbellum period, see William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 782–787, 801–814. See also James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071, 1096–1104 (1987); James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941, 962–66 (1997); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 437–39 (1989); Risa Lauren Goluboff, *The Work of Civil Rights in the 1940s: The Department of Justice, the NAACP, and African American Agricultural Labor 17–63* (Nov. 2003) (unpublished Ph.D. dissertation, Princeton University) (on file with author).

³⁴ Labor Disputes Act, 78 CONG. REC. 3,444 (1934).

³⁵ See generally James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitution Law, 1921-1957*, 102 COLUM. L. REV. 1, 46–122 (2002).

³⁶ For the NLRA, see National Labor Relations Act, ch. 372, § 2(3), 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151–169 (2000)). For the FLSA, see Fair Labor Standards Act of 1938, ch. 676, § 13(a)(6), 52 Stat. 1060, 1067 (current version at 29 U.S.C. §§ 201–219 (2000)). For the SSA, see Social Security Act, ch. 531, §§ 210(b)(1)–(2), 811(b)(1)–(2), 907(c)(1)–(2), 49 Stat. 620, 625, 639, 643 (1935) (current version at 42 U.S.C. § 301 (2000)).

wage differentials, and its local administrators maintained racial differentials through discriminatory implementation. Locally administered federal relief agencies similarly catered to the Southern system by customarily cutting from the rolls workers needed for agricultural work during planting and harvesting seasons. And the Agricultural Adjustment Act even strengthened the economic power of white planters at the expense of white and black tenants and sharecroppers.³⁷ New Deal legislation thus simultaneously embraced a new, robust definition of free labor and excluded from it a significant portion of American workers. Without addressing these New Deal biases and attacking the Southern labor market as a whole, the CRS lawyers realized, free labor would remain an elusive goal.³⁸

Drawing on this New Deal conception of free labor, the CRS used the Thirteenth Amendment to broaden the application of New Deal principles beyond the federal protections themselves. CRS lawyers' Thirteenth Amendment practice targeted for constitutional protection precisely those workers the New Deal left unprotected and unions left organized. As the lawyers saw the problem, workers who could not move physically or occupationally to exert market pressure were poor candidates for labor organization. The immobility created by pervasive Southern laws—vagrancy, hitchhiking, contract labor, anti-enticement, and emigrant agent licensing laws—posed a barrier to organization and bargaining. It therefore posed a barrier to the full and effective implementation of New Deal free labor principles. The ability to protect oneself from coercion by exercising the right to strike and the right to work for minimum wages under minimally acceptable conditions had become the means by which American workers would resist labor exploitation. They were the means by which workers could protect themselves against the kind of involuntary servitude the Thirteenth Amendment prohibited. Contemporary commentator Howard Devon Hamilton recognized this when he included “resistance to organization and movement of agricultural labor”

³⁷ See 1 HARVARD SITKOFF, *A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE* 34–57 (1978); NANCY J. WEISS, *FAREWELL TO THE PARTY OF LINCOLN: BLACK POLITICS IN THE AGE OF FDR* 163–68 (1983); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 76 (1999); see also IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005).

³⁸ For discussions of the existence of a separate southern labor market until World War II, see GAVIN WRIGHT, *OLD SOUTH, NEW SOUTH: REVOLUTIONS IN THE SOUTHERN ECONOMY SINCE THE CIVIL WAR* (1986) and BRUCE J. SCHULMAN, *FROM COTTON BELT TO SUNBELT: FEDERAL POLICY, ECONOMIC DEVELOPMENT, AND THE TRANSFORMATION OF THE SOUTH, 1938–1980*, at 1–85 (Duke Univ. Press 1994) (1991).

among the obstacles that workers faced in violation of “the Thirteenth Amendment’s objective of a system of completely free and voluntary labor throughout the United States.”³⁹

Over the course of World War II, top Justice Department officials increasingly tied the Thirteenth Amendment to such unfettered regional and national mobility. By the time Justice (and former Attorney General) Robert Jackson penned the opinion in the 1944 peonage case of *Pollock v. Williams*,⁴⁰ Attorney General Biddle had set himself squarely behind using the Thirteenth Amendment to create a unified labor market unimpeded by southern attempts to control the region’s black laborers. In *Pollock*, the Court invalidated a contract labor statute similar to the laws the Court had struck down more than thirty years earlier in *Bailey v. Alabama*⁴¹ and less than two years before in *Taylor v. Georgia*.⁴² Despite the doctrinal similarities, the Court’s language indicated a newly expansive view of unconstitutional involuntary servitude deeply inflected with New Deal conceptions of free labor.

Where the *Bailey* opinion emphasized the constitutionality of various mechanisms of enforcing contracts, *Pollock* emphasized the relationship between this particular law and the labor market as a whole. Justice Jackson could not fathom the purpose behind a law meant to bind employees to particular employers. Rather, he saw “the right to change employers” as the worker’s prime “defense against oppressive hours, pay, working conditions, or treatment.”⁴³ He maintained that “[w]hen 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.”⁴⁴ Jackson warned that the “[r]esulting 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.”⁴⁵ Laws such as Florida’s contract labor statute, Jackson cautioned, not only imposed immobility on particular individuals, but they depressed the labor market as a whole and infringed on the rights of all workers.⁴⁶

39 Howard Devon Hamilton, *The Legislative and Judicial History of the Thirteenth Amendment: What Is Not Involuntary Servitude*, 10 NAT’L B.J. pt. 2, 72. (1952).

40 322 U.S. 4 (1943).

41 219 U.S. 241 (1911).

42 315 U.S. 25 (1942).

43 *Pollock*, 322 U.S. at 18.

44 *Id.*

45 *Id.*

46 *Id.*

Justice Department lawyers took Justice Jackson's observations and ran with them. They saw that many state and local laws were designed to keep the southern labor market impermeable. So long as such laws continued to restrict some laborers in their bargaining power, laborers of all kinds and in all regions of the nation would not be truly free. Echoing Jackson, section lawyer Brodie discussed "[t]he depressing effect of slave labor upon our society and economic system" in his 1951 article.⁴⁷ He described "the detriment suffered by the public as well as by the individual victim who is forced to work for another against his will [as] serious and substantial."⁴⁸ A United States Attorney from Alabama was even more specific about the relationship between peonage and the labor market. The purpose of using contract labor laws, he explained, was to get individuals "to work for less money than labor could be obtained ordinarily in the open market."⁴⁹

Biddle and the lawyers in the Justice Department thus read *Pollock* and the other wartime cases as "substantially strengthen[ing] the federal guaranty of freedom from involuntary servitude." According to Biddle, *Pollock* placed "the right to freedom from involuntary servitude on so broad a base that the way has been opened to an attack on the 'enticing labor' and 'emigrant agent' statutes, and some of the vagrancy statutes and 'work or fight' orders." The department had learned from experience that such laws had "proved to be in reality indirect means of enforcing involuntary servitude, especially against Negro farm hands and laborers." These laws were the very ones that minimized African American mobility, made employment recruitment impracticable in the South, and closed off the channels of information necessary to facilitate widespread migration for work.⁵⁰

As a result, CRS lawyers and U.S. attorneys during and after the war made wholesale, rather than retail, efforts to eliminate peonage by ensuring that justices of the peace, county sheriffs, and local prosecutors knew when they were violating the Thirteenth Amendment. United States Attorneys lobbied legislatures to repeal contract labor statutes like those the Supreme Court had struck down. They tried to educate law enforcement officials by speaking at events like annual

47 Brodie, *supra* note 12, at 398.

48 *Id.*

49 See GOLUBOFF, *supra* note 3, at 157, 326 n.37 (citing "Percy C. Fountain to attorney general, July 15, 1948, DOJ Files, 50-1-24").

50 See Goluboff, *supra* note 3, at 1656 n.180 (citing Francis Biddle, Civil Rights and the Federal Law, Speech at Cornell University 25 (Oct. 4, 1944) (on file with the Duke Law Journal)).

meetings of the Georgia Peace Officers Association. And they repeatedly wrote local officials about laws the Supreme Court had held unconstitutional. They told the officials to “read [the *Pollock* opinion] in full, so that you will understand the ruling of the Supreme Court.”⁵¹

In its second use of the New Deal to inform the Thirteenth Amendment, then, the CRS not only targeted laws that created a particular employment relationship from which exit was difficult but also the larger legal framework that made it difficult for workers to leave all employment relationships. Drawing on unrealized New Deal aspirations for a free national labor market, Biddle concluded that vindicating the Thirteenth Amendment meant far more than stopping a particular employer from directly coercing a particular employee. It meant protecting truly free labor, even in the South and even, “especially,” for southern African Americans. Biddle and his staff thus took the old, abolitionist, free-labor ideology, transformed it from the *Lochner* era for service in the post-New Deal era, and tried to make it constitutionally foundational.

* * *

The third influence of the New Deal on the CRS’s understanding of the Thirteenth Amendment similarly reflected unfulfilled New Deal aspirations. As the nation put the war behind it, and predictions of a postwar recession largely fell flat, the CRS began to suggest that black agricultural and domestic workers, who had not shared significantly in either the wartime economic boom or the nation’s postwar prosperity, might nonetheless find some measure of economic security in the Thirteenth Amendment. More than a decade after the New Deal promised better working conditions and an economic safety net for most Americans, these African American men and women were still denied rights to the most basic economic security. The New Deal’s guarantees of economic security in the FLSA, the SSA, and other laws were as racially exclusionary as the NLRA’s protections of labor rights. As the Civil Rights Section turned its attention to the conditions in which these workers lived and worked, its

⁵¹ See GOLUBOFF, *supra* note 3, at 157–58, 327 n.40 (citing “J. Sewell Elliott to William M. Sneed, Justice of the Peace, and Sheriff J.R. Nix, n.d., NARA, RG 60, No. 50-19M-48,” and also pointing to “John P. Cowart to attorney general, Dec. 28, 1949, DOJ Files, 50-19-37; Alexander M. Campbell to director, FBI, Oct. 26, 1948, DOJ Files, 50-19-31; Herbert S. Phillips to Hon. Warren Olney, III, Apr. 16, 1953, DOJ Files, 50-18-63; Cowart to attorney general, Apr. 13, 1950, DOJ Files, 50-19-37”).

cases suggested that no worker in the United States, not even those excluded by political compromise, could constitutionally endure such extreme economic privation. The lawyers suggested that the Thirteenth Amendment might protect workers unable to take advantage of New Deal economic rights, just as it might protect those unable to take advantage of New Deal labor rights.

As the section lawyers increasingly defined the Thirteenth Amendment in terms of economic coercion in the late 1940s, they drew on changing academic, political, and popular meanings of peonage and involuntary servitude. These meanings stemmed from the social and economic “realities” of involuntary servitude, which the earlier attention to contract had overshadowed. Political scientist Howard Devon Hamilton, for example, defined peonage “[i]n every day parlance” as “used loosely to cover almost any variety of forced labor, or simply exploited labor.”⁵² Moreover, Hamilton extended his discussion of the Thirteenth Amendment from peonage proper to “peonage-like conditions,” condemning the latter as those in which “men get sick or die from overwork or bad conditions.”⁵³ He discussed how contract workers were “farm[ed] out” to other employers during slack periods and how Mexican workers endured “hideous living conditions and . . . low wages.”⁵⁴ Hamilton was not alone in thinking that peonage encompassed all of these coercions and indignities. Although some lawyers continued to emphasize the importance of forced immobility in making out legal claims, the conditions of the work, the hardship it entailed, and the inadequate pay often sufficed to demonstrate “practical peonage” among non-lawyers.⁵⁵

Complaints to the Department of Justice and to organizations like the NAACP reflected these changes in the meaning of involuntary servitude. Male agricultural laborers began to protest their lack of amenities, rather than the violent or contractual means by which they were forced to work. They “wore rags” and slept in “chicken

52 HAMILTON, *supra* note 39, at 15.

53 *Id.* at 57.

54 *Id.* at 57–58.

55 *Id.* at 15, 57–58. See, e.g., GOLUBOFF, *supra* note 3, at 161, 328 n.46 (citing “Allan Keller, 22 Brooklyn Boys Flee Slave Farm, N.Y. WORLD-TELEGRAM AND SUN, Aug. 6, 1953, [at] 1”); *id.* (citing “NAACP, FBI Asked to Probe New York State Farm, news release, Aug. 6, 1953, in NAACP PAPERS, pt. 13A, 213”); *Peonage: Monthly Summary of Events and Trends in Race Relations*, Aug.–Oct. 1946, in 13C PAPERS OF THE NAACP 650–51 (August Meier ed., 1982) [hereinafter PAPERS OF THE NAACP]; Letter from Marian Wynn Perry, Assistant Special Counsel, NAACP to Edward Knott, Jr., Secretary, Meridian Branch, NAACP (Dec. 1, 1947), in PAPERS OF THE NAACP, *supra*, at 690.

house[s]” or on “old rusty cot[s].”⁵⁶ Moreover, a new group of workers began to complain about involuntary servitude in similar terms. Female domestic workers like Elizabeth Coker, Polly Johnson, and Dora Jones complained about the poor conditions of their working lives, their isolation from American freedom, and their exclusion from its plenty.⁵⁷ They emphasized lack of pay, degrading conditions, and work too onerous for their sex.⁵⁸ They rarely mentioned forced immobility. In fact, Polly Johnson testified not that she was kept by force, but that “she was not allowed to leave [her employer’s] premises except when [her employer] sent her to the store and then she had to return within a given period.” Because Johnson could leave her workplace and home unaccompanied, the essence of her servitude was not in the force by which she was held, but rather the conditions that ensured that she would indeed “return within a given period.”⁵⁹ At the heart of such complaints was the sense that these women, as Elizabeth Coker put it, had “never enjoyed any [of the] privileges of a free person.”⁶⁰

Dora Jones’ similar complaints led to a watershed case in 1947. Judge Jacob Weinberger decided that the conviction of Elizabeth Ingalls for holding Jones as a slave was novel and important enough to warrant the publication of his opinion denying Ingalls’ motion for a new trial.⁶¹ Because the case was prosecuted under the Slave Kidnaping Statute, the trial court emphasized the conditions of Jones’ life in a way never before discussed in a published opinion.⁶² The essence of slavery for the court was the subjection of the will of one individual to that of another. For more than twenty-five years, Jones had been

required to arise at an early hour in the morning and perform practically all of the household labor in connection with the maintenance of the Ingalls household. She was forbidden to leave the household except for the commission of errands and performed drudgery of the most menial and laborious type

56 See, e.g., Letter from Clay A. Williams, Assistant Secretary, NAACP Committee, to Thurgood Marshall, General Council, NAACP (Feb. 18, 1946), in PAPERS OF THE NAACP, *supra* note 55, at 847–48.

57 Aff. of Polly Johnson (1946), *in id.* at 764; Aff. of Elizabeth Coker (Jan. 30, 1947) in PAPERS OF THE NAACP, *supra* note 55, at 390–91; see also Letter from Mattie Lomax to NAACP (Mar. 10, 1946) in PAPERS OF THE NAACP, *supra* note 55, at 752.

58 Aff. of Polly Johnson (1946), *in PAPERS OF THE NAACP*, *supra* note 55, at 764.

59 *Id.*

60 Aff. of Elizabeth Coker (Jan. 30, 1947) in PAPERS OF THE NAACP, *supra* note 55, at 391; see also GOLUBOFF, *supra* note 3, at 162, 328 n.49 (citing “Walter Pate, FBI Report, Feb. 24, 1945, DOJ Files, 50-67-9.”); Letter from Mattie Lomax to NAACP (Mar. 10, 1946) in PAPERS OF THE NAACP, *supra* note 55, at 752.

61 United States v. Ingalls, 73 F. Supp. 76, 77 (S.D. Cal. 1947).

62 *Id.* at 77–78.

All this, he noted, was performed “without compensation[,] . . . days off[,] . . . [or] vacation[s].” Jones’ “quarters were among the poorest in the several homes occupied by the defendant during this period of years.” Her board “was of a substantially lower standard than that common to servants generally.”⁶³

After detailing additional poor treatment, the court concluded that “the servant, Dora L. Jones, was a person wholly subject to the will of defendant; that she was one who had no freedom of action and whose person and services were wholly under the control of defendant and who was in a state of enforced compulsory service to the defendant.” The facts of Jones’ life spoke for themselves: an individual exercising her free will would simply not have countenanced such treatment. That Jones had opportunities to leave and did not suggested all the more that she was indeed “wholly subject to the will of [the] defendant” with “no freedom of action” of her own.⁶⁴ She was, as the *Los Angeles Times* put it, “a 20th century slave.”⁶⁵

The chain of reasoning that led to a conviction in *Ingalls* differed greatly from that which had led to peonage convictions less than a decade earlier. In the intervening period, promising complaints began to include not only physical restraint and imprisonment but also the quality of the victims’ lives and the conditions of their work. By 1952, *Ingalls* represented an acute example of the modern slavery and involuntary servitude the Thirteenth Amendment prohibited. In discussing the question whether “slavery” and “involuntary servitude” should be considered the same thing, CRS lawyer Sydney Brodie concluded that because *Ingalls* had been such an extreme case, it had not disposed of the problem.⁶⁶ “The sordid facts of the case actually established more than mere unwilling labor, service rendered another because of duress, fear, threats or intimidation,” Brodie wrote. Even someone with “privileges such as going home after work, receiving some remuneration, maintaining a form of private life,” privileges that Jones most certainly did not enjoy, might still “clearly be in a condition of involuntary servitude” even if not slavery itself.⁶⁷

Elizabeth Ingalls’s sentence also represented this new gloss on the Thirteenth Amendment. Prior to *Ingalls*, criminal prosecutions of involuntary servitude, like criminal prosecutions generally, primarily aimed to vindicate the government itself. The perpetrator’s fine and

63 *Id.* at 77.

64 *Id.* at 78.

65 *Daughter Tells More ‘Slave’ Case Details*, L.A. TIMES, Feb. 27, 1947 at A1.

66 See GOLUBOFF, *supra* note 3, at 163, 329 n.57 (citing “DOJ files 50-12-3.”).

67 Brodie, *supra* note 12, at 388.

prison term served as restitution owed for violating the laws of the nation. In a departure from the past, Judge Weinberger required Ingalls to provide restitution to Jones in the amount of \$6,000. This was above and beyond Ingalls's suspended prison sentence and a \$2,500 fine she had to pay the government. The harm, then, was not only against the government but also against Dora Jones personally. The case had made much of the Ingallses' failure to pay Jones, and the sentence provided her with remuneration for her work.

As *Ingalls* drew headlines, waves of similar complaints hit the DOJ. Whereas in 1946, CRS attorney Leo Meltzer had described Polly Johnson's case as "not the ordinary type of peonage or involuntary servitude situation," by 1948 such cases were legion. The complainants described, almost uniformly, how the victims worked long, hard hours with little or no pay other than paltry room and board and some clothing to wear. The lack of schooling these victims received, and the lack of modern amenities they could access, indicated that such workers lacked freedom in the modern, postwar sense of the word.⁶⁸

The CRS saw some success in other cases like *Ingalls*. Yet the section lawyers still sought better enforcement mechanisms for such cases. Though the conditions in which some people lived seemed "shocking," U.S. attorneys and the lawyers in Washington lamented that they were "only a violation of the laws of civilized society and not the laws of the Federal Government." In 1951, both the Senate and the House considered legislation to bolster the legal tools for eliminating involuntary servitude. As part of the House consideration of the bill, Civil Rights Section Chief George Triedman testified before a subcommittee about the need for further changes to the involuntary servitude statutes.⁶⁹ Complaints of forced labor conditions kept "coming up and hitting us constantly," Triedman reported. He and his attorneys found themselves "powerless to go forward" with prosecutions

⁶⁸ See GOLUBOFF, *supra* note 3, at 164, 329 n.55 (citing "Leo Meltzer to file, memorandum, Oct. 22, 1946, DOJ Files, 50-79-2; FBI Report, Maurice D. duBois, Oct. 20, 1950, DOJ Files, 50-35-6," and also pointing to "Henry A. Donahoo, FBI Report, Jan. 5, 1948, DOJ Files, 50-1-23; Joseph A. Canale, FBI Report, Mar. 13, 1952, DOJ Files, 50-40-22; Special Agent George A. Gunter, FBI Report, July 1, 1948, DOJ Files, 50-350; T. Vincent Quinn to James M. Carter, Jan. 26, 1948, DOJ Files, 50-12-6; John B. Honeycutt, FBI Report, Apr. 3, 1948, DOJ Files, 50-41-51; Andrew M. Smith, FBI Report, Nov. 16, 1951, DOJ Files, 50-1-30").

⁶⁹ See *id.* at 166, 329 n.59 (citing "Chester L. Sumners to attorney general, June 23, 1950, DOJ Files, 50-40-18; T. Vincent Quinn to director, FBI, memorandum, Dec. 30, 1947, DOJ Files, 50-80-2"); HAMILTON, *supra* note 39, at 57; Henry Putzel Jr., *Federal Civil Rights Enforcement: A Current Appraisal*, 99 U. PA. L. REV. 439, 445 (1951).

under the laws as they then stood. They were “frustrated with a situation where a condition exists like this.” Although the section had few attorneys and no need “to borrow any more work,” it nonetheless pursued wider jurisdiction in involuntary servitude cases.⁷⁰ “[T]here are actual cases of happenings that have come across my table as well as members of my section and there are no other laws to meet them,” Triedman explained. “That is what prompted us, even at this late date, even after 75 years, to come in and see if we can modernize them a bit.”⁷¹

The cases Triedman brought to Congress’s attention illustrated how much the section’s view of the Thirteenth Amendment and involuntary servitude was now informed by the New Deal’s economic protections. The classic case of peonage—of the poor black man in the rural South held for debt in either agricultural or rural nonagricultural work (like timber or sugar refining) by violence, threats of violence, and arrest—had given way to a New Deal-based understanding about who was forced to work and how. Of the four prototypical cases Triedman described to the committee, only two conformed to the traditional image of involuntary servitude: one employer held his worker through violence and another through threats of arrest. The other two both involved female victims, one of whom was a domestic worker. Triedman spent a considerable part of his testimony describing the women’s plight and the federal law’s inability to help them.⁷²

The CRS thus used its Thirteenth Amendment practice to complement the gaps in the New Deal’s economic protections. The CRS aimed to protect not just industrial and agricultural workers, but all workers. The section included domestic workers normally thought to occupy a private sphere immune from governmental intervention. Although Triedman tried to assure his congressional audience that his bill “would effect no radical change in existing law and would not extend the jurisdiction of the Department to any new situation or type of case,” his domestic worker example belied those reassurances. Such examples were revolutionary, as they indicated a willingness to use federal law to intrude into relationships of household labor, rela-

⁷⁰ *Peonage and Slavery: Hearing on H.R. 2118 Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 82d Cong. 18 (1951) (statement of George Triedman, Chief, Civil Rights Section, Civil Division, Department of Justice).

⁷¹ *Id.* at 13–14.

⁷² *Id.* at 13–14, 18.

tionships that Congress had deemed local, private, and off-limits to the federal government.⁷³

The content of the Thirteenth Amendment in the CRS's cases thus came once again from the New Deal. The economic coercion that ensured immobility in such cases—evidenced not by violence or force of law but by the individual's apparent inability to save herself from objectionable conditions—had never before received systematic federal attention. But the New Deal's partial promise to provide economic security to the American people had wrought a revolution in expectations about work, working conditions, and free will. Against the backdrop of promised federal protection for minimum wages, maximum hours, collective bargaining, and free movement within the labor market, a person choosing his or her employment would obviously not choose to work very long days under squalid and dehumanizing conditions. The baseline was a low one. As the judge had suggested in *Ingalls*, Dora Jones was properly compared to other domestic workers who were not enslaved, not to some middle-class or even working-class ideal. It was not, however, necessary for the conditions to deteriorate so far that the victims became slaves without any free will at all before the federal government could intervene. Rather, as section lawyer Sydney Brodie made clear in 1951, the Thirteenth Amendment could protect even those who (unlike Jones) enjoyed "privileges such as going home after work, receiving some remuneration, [and] maintaining a form of private life."⁷⁴

* * *

By the early 1950s, then, much had changed from the *Lochner* era. In slightly different ways, each of the section's three expansive interpretations of the Thirteenth Amendment showed how African Americans could benefit from new, New Deal-based conceptions of positive rights. The first interpretation understood New Deal promises of "security" to encompass the "safety and security of the person," including peonage and involuntary servitude. The second expanded the New Deal's free labor protections to the South and to the African American agricultural and domestic workers purposefully restricted by state laws and purposefully unprotected by federal ones. And the last expanded New Deal rights to economic security to the same two groups legislatively excluded from such protections.

⁷³ *Id.* at 28. See generally SUZANNE METTLER, *DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY* xi–xii (1998).

⁷⁴ See Brodie, *supra* note 12, at 388.

Each of these expansions of the Thirteenth Amendment's protections built on a different application of the New Deal's concern for workers to African American workers specifically. Where the New Deal had emphasized labor and economic rights and assisted African Americans only partially and incidentally, these novel involuntary servitude prosecutions aimed to bring African Americans within the New Deal rights framework. Following changing trends within the involuntary servitude complaints of African Americans themselves, the CRS lawyers went about expanding the meaning of involuntary servitude—and the accompanying protection of the Thirteenth Amendment—in order to make the Constitution serviceable for African Americans in the post-New Deal era.

The close correspondence between the CRS's Thirteenth Amendment practice and New Deal conceptions of governmental protections of rights becomes even clearer when viewed not only in contrast to the *Lochner*-era, contract-based Thirteenth Amendment paradigm that preceded it but also to the conception of the Thirteenth Amendment in the succeeding era. When the Supreme Court discussed the Thirteenth Amendment at length for the first time in twenty-five years in the 1969 case of *Jones v. Alfred H. Mayer Co.*,⁷⁵ the Amendment was hardly recognizable. In *Jones*, the Court addressed the question of whether a civil rights statute passed pursuant to the Thirteenth Amendment could proscribe private discrimination in housing. According to the Court, the Amendment empowered Congress to protect the freedom of African Americans “[a]t the very least . . . to buy whatever a white man can buy, the right to live wherever a white man can live.”⁷⁶ In concurrence, Justice William O. Douglas offered a long list of the “badges of slavery” he thought Congress could prohibit under the Thirteenth Amendment. These included discrimination in voting and jury service; segregation of courtrooms, schools, transportation, public accommodations, and housing; and bans on interracial marriage. In this description, the prohibitions of the Thirteenth Amendment were essentially the same as the Fourteenth Amendment with one major difference: unlike the Fourteenth Amendment, the Thirteenth had no state action requirement. Because the Thirteenth Amendment prohibited slavery and involuntary servitude wholesale, the Court reasoned, legislation

⁷⁵ 392 U.S. 409 (1968).

⁷⁶ *Id.* at 443.

passed on the basis of the Thirteenth Amendment, like that at issue in *Jones*, could proscribe private as well as public discrimination.⁷⁷

From the perspective of the pre-*Brown* era, the most striking thing about the *Jones* Court's description of the Thirteenth Amendment was not what it included but what it omitted: any mention of labor or economic rights. Although labor questions pervaded the Reconstruction-era history the Court cited to support its view of the Amendment, that labor pedigree was detached from the Court's description of how the Thirteenth Amendment operated in 1969. Justice Douglas' long list of racial wrongs did not even mention labor or employment.

Just as the early twentieth-century understanding of the Thirteenth Amendment derived from *Lochner*-based free contract and the mid-century paradigm took its cues from the New Deal, the Court's framing of the Thirteenth Amendment in this way was a product of the times. In the aftermath of *Brown v. Board of Education*⁷⁸ in 1954, lawyers, courts, and commentators had generally converged on a civil rights framework characterized by a focus on formal equality and a negative understanding of rights as constraining rather than enabling government action. By 1969, equal protection analysis under the Fourteenth Amendment had become the dominant way of thinking about civil rights: it prevented government actors from segregating or discriminating on the basis of race in a variety of circumstances. As a result, by the time the Court decided *Jones*, it was difficult to envision the Thirteenth Amendment as anything but an equal protection guarantee without a state action requirement.

* * *

Discussion of the variety of uses to which scholars, lawyers, and legislatures have put the Thirteenth Amendment in more recent years is beyond the scope of this paper.⁷⁹ Gesturing at the way in which one burgeoning new vision of the amendment—that reflected

⁷⁷ *Id.* at 445–46 (Douglas, J., concurring).

⁷⁸ 347 U.S. 483 (1954).

⁷⁹ Recently, scholars, lawyers, and the occasional judge have found in the Thirteenth Amendment prohibitions against not only the chattel slavery the Amendment most directly targeted but also against a whole host of other wrongs: child abuse, forced reproduction, hate crimes, segregation and discrimination of all kinds, and various constraints on the freedom of workers. See William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1316 n.13 (2007) (collecting sources on uses of the Thirteenth Amendment); see also Pope, *supra* note 35.

in Michael Wishnie's paper for this symposium—might benefit from the history I have told here will have to suffice. According to Wishnie, the Thirteenth Amendment can, and should, be used to protect immigrants, and especially immigrant workers, suffering exploitation, immobility, and servitude as a result of their economic and immigrant status.

My paper might serve as an interpretive resource for arguments like Wishnie's in two ways. First, this paper provokes the question of why contemporary lawyers and legal scholars (for Wishnie is not alone) have begun to think about the protections the Thirteenth Amendment might offer immigrants. In an era of massive globalization, a greater focus on international human rights, and a growing trans-national antislavery movement, this focus should be no surprise. Awareness of the connection between Wishnie's doctrinal arguments and the larger political and legal trends that support it can facilitate more trenchant, and perhaps more successful, legal arguments. To the extent that past visions of the Amendment have succeeded because they have traded on widely held assumptions about the nature of legal protection and those entitled to it, novel understandings of the amendment might do well to follow their lead.

Second, the history I have told here suggests a deep strain in Thirteenth Amendment jurisprudence for the kinds of arguments that Wishnie and others hope to make. It is not necessary to prove that the framers of the Thirteenth Amendment were concerned with immigrant labor in order for history to be useful to today's advocates. Rather, the history of the Thirteenth Amendment in the *Lochner* era, the New Deal, and the 1960s reveals how significantly the meaning of the Thirteenth Amendment has changed over time. Lawyers who draw on current concerns about citizenship and exclusion, migration and immigration, globalization and internationalization are no less legitimate heirs to the Thirteenth Amendment than the lawyers of the CRS in creating their New Deal-inflected vision of labor freedom and economic security. The meaning of the Thirteenth Amendment was not fixed in time in 1865, nor in 1911, nor 1945, nor 1969. Arguments about its meaning today can draw on the historical, not the original, pedigree of the Amendment even as they interpret it anew.