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By Maria L. Ontiveros

IMMIGRANT RIGHTS AND THE THIRTEENTH AMENDMENT

WHEN THOUSANDS OF IMMIGRANTS AND IMMIGRANT RIGHTS SUPPORTERS TOOK TO THE streets on May 1, 2006, it felt like the coming of age of a social movement akin to the civil rights movement of the 1950s-60s or the labor movement of the 1930s-40s. Just as sanitation workers in Memphis, supported by Martin Luther King, Jr., carried signs proclaiming "I Am a Man" to support their fight for

labor, civil, and human rights, immigrant rights groups have also invoked a range of moral justifications. Immigrant rights groups speak about human rights, workers' rights, citizenship rights, and civil rights. Immigrants, especially immigrant workers and their families, might as well draw on the language of the Thirteenth Amendment.

The Thirteenth Amendment provides a compelling moral and analytical description of the immigrant rights issue. A case can be made that the Amendment prohibits abusive work relationships that interfere with workers'

rights, citizenship rights, human rights, and civil rights in ways similar to the institution of chattel slavery. Currently, two labor arrangements affecting immigrant workers arguably violate this holistic vision of the Thirteenth Amendment—the limited remedies available to undocumented workers and the treatment of "guest workers" on temporary visas.

Moreover, the Thirteenth Amendment offers an organizational bridge connecting citizenship rights groups with liberal constituencies focusing on workers rights, human rights, and civil rights. The Amendment's history, so-

cial meaning, and case law weave together and highlight the interrelatedness of these four key rights. Too often they are advanced independently by four different groups. Labor unions and other labor organizations currently advocate for workers' rights. Immigrant rights groups focus on citizenship rights. Various human rights organizations, including "nongovernmental organizations," fight on behalf of enslaved workers, trafficked workers, and workers employed in coercive work relationships. Finally, civil rights groups combat discrimination against racial or ethnic minorities. The time is ripe to bring these constituencies together, and the Thirteenth Amendment provides the means to do so.

Contrary to popular belief, the Thirteenth Amendment goes far beyond the elimination of chattel slavery as practiced in the South prior to the Civil War. Its prohibitions against "slavery and involuntary servitude" sought both to rid the country of an immoral, inhumane social system and to eliminate oppressive labor arrangements. By ending slavery, it sought to help the slaves and improve *society* by eliminating certain types of evils, which we currently think of as human rights or civil right violations, such as the selling of human beings, forced labor, lack of family autonomy, and racial inequality. As early as 1883, the Supreme Court announced that the Thirteenth Amendment "has a reflexive character also, establishing and decreeing universal civil and political freedom throughout the United States . . . [it] clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."¹ In the 1960s, the Supreme Court began to give meaning to the phrase "badges and incidents of slavery" when it recognized that the oppres-

sions associated with slavery went beyond physical or workplace abuses to include certain social deprivations. In *Jones v. Alfred H. Mayer, Co.*,² for example, the Court used the Thirteenth Amendment to justify the federal prohibition of private discrimination in real estate transactions.

In addition, when declaring slavery and involuntary servitude unconstitutional, the Amendment sought to affirmatively protect free labor by establishing a definition of free labor more expansive than the absence of chattel slavery.³ As the Supreme Court explained, in 1944, when deciding *Pollock v. Williams*:

The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage 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 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.⁴

This conception of free labor protects the uniquely human rights of workers—rights which are inherently placed in danger when labor becomes a commodity. The Supreme Court found that the Thirteenth Amendment, at its core, stands for the proposition that human labor must be treated differently and given more respect and protection than other things

which get bought and sold via contracts.⁵ The Amendment protects workers rights as human rights.

This conception of the Thirteenth Amendment, as a constitutional imperative to prohibit workplace abuses that interfere with citizenship rights, human rights, and civil rights, provides the opportunity to attack two labor arrangements affecting immigrant workers: the limited remedies available to undocumented workers for violations of their workplace rights, and the visa programs for so-called “guest workers.”

In 2002, the United States Supreme Court decided *Hoffman Plastic Compounds*,⁶ which limited the remedies available to undocumented workers. In *Hoffman*, the Court stated that undocumented workers are covered by most protective labor and employment laws; however, it also found that undocumented workers may not be entitled to the same remedies as documented workers when their rights are violated. For example, an undocumented worker discharged for trying to organize a union need not be reinstated in his job and need not receive back pay for the wages lost as a result of his illegal discharge. The only remedy available to the undocumented worker in this situation is for the employer to post a sign promising that it will not discriminate on the basis of union activity in the future! A documented worker, on the other hand, would receive the remedies of reinstatement and back pay as a matter of course.

By effectively stripping undocumented workers of legal protection, the *Hoffman* decision creates a caste of rights-deprived workers available for exploitation. Since employers do not face the same penalties for

violating the labor rights of undocumented workers, these people become cheaper to employ and easier to abuse. In addition, undocumented workers have been dissuaded from filing workplace claims because they fear that their documentation status will be revealed when it comes time to determine the available remedies.

From a Thirteenth Amendment perspective, *Hoffman* creates a caste of workers, primarily people of color, whose status is beneath that established for free labor.⁷ Despite the Court’s lip service to the idea that these workers are adequately protected by the labor and employment laws, they simply do not enjoy the same statutory rights and protections guaranteed to free labor in the United States. They have no effective way to demand the minimum workplace conditions we have statutorily set as the

Despite the Court’s lip service to the idea that [undocumented] workers are adequately protected by [law], they ... have no effective way to demand the minimum work place conditions ... set as the floor for free labor.

floor for free labor. Further, their inability to safely organize, protest, or demand fair treatment creates unfair competition, undermining the conditions of free labor generally, docu-

mented as well as undocumented, of which the Supreme Court warned against, in *Pollock v. Williams*. The Hoffman decision infringes the human rights to organize and engage in concerted activity. It abridges the social citizenship rights of undocumented workers by effectively preventing access to the courts, and it does this because of their national origin. In these ways, then, the Hoffman decision arguably violates the holistic vision of the Thirteenth Amendment.

The treatment of “guest workers” on temporary visas also raises Thirteenth Amendment concerns. Currently, a variety of noncitizen workers arrive legally on short-term visas that require the employee to stay employed with the same employer.⁸ If the employee quits or gets fired, or when the visa period expires, the workers must return to their country of origin. Examples of these types of workers include H-1B engineers from India employed in California’s Silicon Valley; J-1 au pairs from Eastern Europe employed in New York; and H-1A agricultural workers employed on Washington apple farms.

These “guest worker” programs raise Thirteenth Amendment concerns because the visa programs infringe upon the worker rights, citizenship rights, human rights, and civil rights of the visa holders in ways that mirror the injuries of slavery and involuntary servitude. Since the workers cannot demand decent wages and cannot quit or protest abusive working conditions for fear of deportation, their servitude borders on the involuntary and erodes the conditions for the free labor against whom they compete. In addition, the workers and their families are significantly limited in their fam-

ily autonomy and their ability to fully participate in society. Some workers are prohibited from bringing their families with them. Even when they can, spouses are generally not al-

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lowed to work, and family members may be excluded from social services. Finally, the fact that the workers are temporary residents with no hope of becoming citizens ensures that they will forever be viewed as disposable, alien labor, rather than community members.

The history of “guest worker” programs helps illuminate how they violate the Thirteenth Amendment. Current “guest worker” programs are simply the latest in a long line of morally suspect and discredited programs designed to exploit noncitizen immigrant labor. The history of California farmworkers provides a compelling example. When California was still a Spanish colony, the Spanish missionaries conscripted Native Californians to farm the land and create a booming economy. The Native Californians were not considered citizens and were not able to leave the missions or protest work conditions, out of fear for their lives.⁹ The mission economy decimated the Native Californian

population. A thriving population of approximately 500,000 Miwoks, Costanoans, Yokats, Yumans and others dropped to only 15,000 Native Californians between 1770 and 1850.¹⁰

In the late nineteenth century, California farmers turned to immigrants from China and Japan to farm the land. These workers were prohibited from becoming citizens; denied the right to own land; required to register with the government, carry identification papers, and receive permission to travel; and forced to work under abusive work contracts. When the Asian immigrant workers demanded human, citizenship, and labor rights in the mid-twentieth century, they were eventually deported, interned, or stripped of their citizenship.¹¹ The treatment of these Asian workers is now roundly condemned as unconstitutional and racist.¹²

Around World War II, the United States replaced Asian agricultural workers with workers from Mexico, via the bracero program. Under the program, workers were required to sign a contract setting forth the terms and conditions of employment. Many workers did not see the contract until they arrived in the United States. The contracts provided for sub-market wages and included a variety of employer deductions for poorly equipped housing and other dubious expenses. The braceros worked long hours in deplorable conditions, lived in segregated housing, and were not allowed to participate in U.S. society. If a bracero quit or was fired, or at the end of the contract term, he had to return to Mexico.¹³ The conditions of life and labor established by the bracero program were so awful that the administrator of the program characterized it as “legalized slavery.”¹⁴ After the bracero program was discontinued, the United

States switched to the current temporary visa immigration programs (often referred to as “guest worker” programs) to provide agricultural labor. Although the name is different, the effect on the workers is remarkably similar to every other use of noncitizen immigrant labor in California’s agricultural economy during the last two and a half centuries.

Between the Hoffman decision’s effect on undocumented workers and the guest worker program’s effect on documented workers, immigrant workers find themselves exploited in ways that arguably violate the Thirteenth Amendment. Three different avenues are available for promoting the use of the Thirteenth Amendment in the struggle against immigrant exploitation and discrimination: organization and education, legislation, and litigation. From an organizational or educational standpoint, the various constituent groups (labor, immigrant rights groups, human rights organizations, and civil rights groups) need to make a concerted

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effort to talk to each other. Using the Thirteenth Amendment as an organizing framework for these discussions would enable them to see what they share and give them a cohesive, moral position from which to move forward. Labor

groups can certainly benefit from claiming the Thirteenth Amendment as a Constitutional justification for the right to organize and strike.¹⁵ Human rights groups already use the language of the Thirteenth Amendment when fighting “new forms of slavery.”¹⁶ Recent research documents how civil rights advocates in the 1930s and 1940s viewed the Thirteenth Amendment’s concern for free labor and economic equality as the foundation for true racial equality.¹⁷

Immigrant rights groups seek many of the same rights protected by the Thirteenth Amendment. On one hand, the “citizenship rights” movement has been seeking a path to legitimacy and naturalization for people who entered the country without authorization—those often referred to as “illegal aliens.” Concern for decent treatment and respect of human rights is core to the Thirteenth Amendment. For authorized, noncitizen immigrants, such as those with legal permanent resident sta-

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tus or green cards, they have been encouraging naturalization, voter registration, and participation in traditional politics. For immigrant workers (who can be either authorized or unauthorized), they have organized workers centers and day labor centers to address their work-

related issues. The campaign for drivers’ licenses, union representation, education, and access to social services build on the slogan that “citizenship is more than just papers.” The exclusion from social citizenship rights “beyond papers and naturalization” mirrors the “badges and incidents of slavery” struck down by the Thirteenth Amendment. Recognizing these common moral interests brings the immigrant rights groups to the table with those struggling for labor, human, and civil rights.

This coalition could then move forward with a legislative agenda based on the Thirteenth Amendment.¹⁸ One obvious place to start is by supporting a legislative “fix” of the Hoffman Plastics problem—that is, ensuring the availability of equal and adequate remedies for undocumented workers whose workplace rights have been violated. Both traditional labor groups and citizenship rights groups have already challenged Hoffman in international

fora, including the International Labor Organization and the Inter-American Court of Human Rights,¹⁹ and they could easily add it to their domestic legislative agendas. For their part, human rights groups bring a proven track record in using the Thirteenth Amendment as the basis for legislative action. As recently as 2004, they used the Thirteenth Amendment to amend trafficking legislation to cover more workers and to provide for more expansive remedies.²⁰ Civil rights groups should also welcome a new basis

for civil rights legislation.

The guest worker visa issue can also be addressed at the legislative level by ensuring portability of visas and the ability of guest workers to apply for citizenship, and eliminating the need to return “home” if a worker quits or is

fired. Alternatively, poorly crafted guest worker programs can be challenged in the courts. A legal battle could be difficult to win because courts may not allow a private right of action, that is, the ability for an individual to bring a Thirteenth Amendment law suit challenging government policy. Courts also may not be ready to expand the scope of the Thirteenth Amendment, especially in the area of immigration where courts have been particularly deferential to the legislative and executive branches under the so-called “plenary powers” doctrine. The “plenary powers” doctrine holds that courts may not even review certain types of legislative action. Some fear that such cases will lead to adverse decisions and bad precedent, but human rights groups are already bringing Thirteenth Amendment cases. They are more likely to succeed with support from allied groups. In addition, exposing the courts to more and more cases brought under the Thirteenth Amendment will, at the very least, make it seem less and less like a far-fetched idea. Finally, many people do believe that the time is right to overturn to “plenary powers” doctrine, and a constitutionally based challenge to a specific immigration practice may be the most ef-

fective way to do that.²¹

Properly understood, the Thirteenth Amendment protects the intersection of workers’ rights, citizenship rights, human rights, and

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civil rights. It provides powerful moral and constitutional grounds for attacking the problems confronting immigrant workers and other workers today. Building on the momentum of immigrant rights groups, movements for worker rights, civil rights, and human rights can move forward together to improve conditions for everyone. ■

Notes

1. The Civil Rights Cases, 109 U.S. 3, 28 (1883)
2. 392 U.S. 409 (1968)
3. Lea S. Vandervelde, “The Labor Vision of the Thirteenth Amendment,” *University of Pennsylvania Law Review* 130 (1989), p. 437, 495. See also James Gray Pope, “Labor’s Constitution of Freedom,” *Yale Law Journal* 106 (1997), p. 941.
4. *Pollock v. Williams*, 322 U.S. 4, 17–18 (1944).
5. See *Bailey v. Alabama*, 219 U.S. 219 (1910), and *Pollock v. Williams*, 322 U.S. 4 (1944) discussed in Maria L. Ontiveros, “Immigrant Workers’ Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment,”

Georgetown Immigration Law Journal 18 (2004), p. 651, 663–666.

6. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

7. Ontiveros, 2004, at p. 672–74. Ruben Garcia, a labor attorney turned academic, planted the seed of a Thirteenth Amendment analysis in my brain with his article “Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws,” 36 U. Mich. J. L. Reform 737, 754–55 (2003).

8. A comprehensive overview of these visas can be found at <http://uscis.gov> and <http://www.immigration.findlaw.com>.

9. Richard Steven Street, *Beasts of the Field*,

2004.

10. Guadalupe T. Luna, *Gold, Souls and Wandering Clerics: California Missions, Native Californians and Lat Crit Theory*, 33 U.C. Davis L. Rev. 921, 928, 941 (2000).

11. Street, 2004.

12. Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, U.C.L.A. Law Review 46 (1998), p. 1.

13. Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, Maine Law Review 55 (2003), p. 158, 161.

14. Lee G. Williams, U.S. Dept. of Labor official, quoted in Linda C. Majka & Theo J. Majka, *Farmworkers, Agribusiness and the State* (1982), p. 136.

15. See companion essays.

16. Two organizations working in this field are the

Break the Chain Campaign, <http://www.ips-dc.org/campaign> and the Coalition of Immokalee Workers, <http://www.ciw-online.org>.

17. Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, Duke Law Journal 50 (2001), p. 1609.

18. For the importance of basing a legislative agenda on the Thirteenth Amendment, rather than the Commerce Clause or the Fourteenth or First Amendment, see James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law*, 2002 Columbia Law Review 102, 1.

19. Ontiveros, 2004, at p. 678–79.

20. Ibid p.670.

21. Chin, 1998.