

A STRATEGIC PLAN FOR USING THE THIRTEENTH AMENDMENT TO PROTECT IMMIGRANT WORKERS

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INTRODUCTION

The time has come to actively use the Thirteenth Amendment to protect immigrant workers. The Thirteenth Amendment (“the Amendment”), which proclaims that “neither slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States,”¹ remains an underappreciated but potent mechanism for protecting contemporary workers. During the last ten years, the ground work for unleashing its potential has been laid. Activists, attorneys, and legislatures have been using the Amendment to protect the most vulnerable workers in our society, specifically “trafficked” workers. Meanwhile, scholars and academics have been uncovering its history and developing its theory to shed light on its potential in other areas. This essay argues that, with respect to immigrant workers, it is time to move from a theoretical approach to an activist one. Drawing on the successes found in the anti-trafficking movement, this article charts a strategic plan to actively use the Thirteenth Amendment to help this group of workers.

The first section of the essay reviews the theoretical work that has been done in the Thirteenth Amendment field in general, as well as the historical and theoretical justifications for applying the Thirteenth Amendment to immigrant workers. The application to immigrant workers draws extensively on the history of both the Thirteenth Amendment and the use of immigrant workers in the United States, as well as the current situation of these workers. The second section describes the ways in which the Thirteenth Amendment is being used successfully today to fight for victims of human trafficking. This section focuses on actual cases, new laws, and effective movements based on the Thirteenth Amendment, which show how a broader understanding of slavery and involuntary servitude is making its way into the law and public consciousness through the anti-trafficking movement. The third section maps out a practical, concrete action plan that should be taken to protect immigrant workers, using the Thirteenth Amendment. The section uses the successes in the trafficking world to chart a path moving from theoretical advocacy alone to action in the courts, in administrative agencies, in the streets, and in Congress.

I. THE THEORETICAL ARGUMENT FOR APPLYING THE THIRTEENTH AMENDMENT TO PROTECT IMMIGRANT WORKERS.

On its face, the Thirteenth Amendment bars two different institutions: slavery and involuntary servitude. This section begins by describing the Supreme Court cases and academic scholarship that analyze the Amendment by focusing on these as these as separate and distinct prohibitions, considering

1. U.S. CONST. amend. XIII, § 1.

slavery and involuntary servitude independently. This approach is contrasted with a broader approach, which looks at the underlying purpose of the Thirteenth Amendment as a whole. My approach to the Thirteenth Amendment – which looks at the Amendment as prohibiting systemic oppression that strikes at the intersection of human rights, civil rights, citizenship rights, and labor rights – is presented. After relevant key immigration principles are presented, this section then explains how both the traditional approach and the broader, holistic approach can theoretically be used to protect immigrant workers. This argument explores the historical and contemporary lives of immigrant workers to understand how certain parts of their experience fit the definitions of “slavery” and “involuntary servitude,” and implicate the broader concerns of the holistic interpretation. Existing Doctrinal and Theoretical Approaches to the Thirteenth Amendment

Much of the legal doctrine and scholarship surrounding the Thirteenth Amendment examine the Amendment in two separate lines of analysis – considering, for example, whether the practice of debt bondage is involuntary servitude or whether racially restrictive covenants are unconstitutional badges and incidents of slavery. Cases which fit into the first category include *Bailey v. Alabama*,² which struck down an Alabama statute that imprisoned workers who failed to fulfill a contract for labor; *United States v. Reynolds*,³ which prohibited a system whereby individuals convicted of minor crimes had to work off surety bonds or face reimprisonment; and *Pollock v. Williams*,⁴ which found that state statutes which criminalize fraud in relation to an employment contract, linking debt to service, violates the Thirteenth Amendment. Professor James Gray Pope has explored the historical definition of involuntary servitude developed in these cases to show how they apply to current labor issues.⁵ The well-known Supreme Court case, *Jones v. Alfred H. Mayer Co.*, struck down private, racially restrictive covenants on selling property as violative of the Thirteenth Amendment’s prohibition against not just slavery, but its badges and incidents.⁶ Scholars have explored how a variety of social institutions from child abuse⁷ and mail order brides⁸ to racial profiling⁹ and hate crimes¹⁰ may also be prohibited as a badge and incident of slavery.

2. 219 U.S. 219 (1910).

3. 235 U.S. 133 (1914).

4. 322 U.S. 4 (1944).

5. James Gray Pope, *Contract, Race and Freedom of Labor in the Constitutional Law of ‘Involuntary Servitude,’* 119 YALE L.J. 1474 (2010). See also, David M. Oshinsky, *Convict Labor in the Post-Civil War South: Involuntary Servitude After the Thirteenth Amendment*, in THE PROMISES OF LIBERTY: THE HISTORY & CONTEMPORARY RELEVANCE OF THE 13TH AMENDMENT 100, (Alexander Tsesis ed., 2010).

6. 392 U.S. 409 (1968). See, Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States—Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171 (1951), for the theoretical analysis for this path breaking approach.

7. Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359 (1992).

Other scholarship has explored a broader approach to the Amendment, especially when analyzing its legislative history, the popular understanding of the Amendment, and its potential use in making policy. Professor Pope's historical exploration of the popular understanding of the Thirteenth Amendment has demonstrated how workers perceive the Amendment as a broad grant of labor rights, including the right to organize, strike, and collectively bargain.¹¹ Meanwhile, Professor Lea VanderVelde's analysis of the Amendment's legislative history¹² uncovers its intent to provide a floor for free labor, eliminating labor subjugation in general. Professors Risa L. Goluboff¹³ and Rebecca Zietlow¹⁴ have traced the Amendment from its passage, through the 1940's and up to today, to demonstrate how it can be used as a broad grant of anti-subordination, civil and economic equality, and "belonging" (or inclusion) for African Americans.

While the legal cases and scholarly work that track the dual prohibitions of the Thirteenth Amendment have been helpful in understanding it and ending egregious practices, I advocate the more "holistic" vision of the Amendment. Specifically, I read the legislative history, social history, and case doctrine of the Thirteenth Amendment to prohibit systemic oppression that strikes at the intersection of human rights, civil rights, citizenship rights and labor rights.¹⁵ In addition to accurately describing the problems at which the Thirteenth

8. Suzanne H. Jackson, *Marriages of Convenience: International Marriage Brokers, 'Mail Order Brides,' and Domestic Servitude*, 38 U. TOL. L. REV. (2007); Vanessa B.M. Vergara, Comment, *Abusive Mail Order Bride Marriage and the Thirteenth Amendment*, 94 Nw. U. L. REV. 1547 (2000).

9. William M. Carter, Jr., *Toward a Thirteenth Amendment Exclusionary Rule as a Remedy for Racial Profiling*, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 266 (Alexander Tsesis ed., 2010); William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. Davis L. Rev. 1311 (2007).

10. ALEXANDER TSEISIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* (2004).

11. James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1 (2002); James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997).

12. Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989); Lea VanderVelde, *The Thirteenth Amendment of Our Aspirations*, 38 U. TOL. L. REV. (2007).

13. Risa L. Goluboff, *Race, Labor, and the Thirteenth Amendment in the 1940s Department of Justice*, 38 U. TOL. L. REV. 883 (2007); Rebecca E. Zietlow, *Belonging and Empowerment: A New "Civil Rights" Paradigm Based on Lessons of the Past* (reviewing RISA GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007)), 25 CONST. COMMENT. 353 (2009).

14. Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255 (2010); Rebecca E. Zietlow, *Belonging and Empowerment: A New "Civil Rights" Paradigm Based on Lessons of the Past* (reviewing RISA GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007)), 25 CONST. COMMENT. 353 (2009).

15. Maria L. Ontiveros & Joshua R. Drexler, *The Thirteenth Amendment and Access to Education for Children of Undocumented Workers: A New Look at Plyler v. Doe*, 42 U.S.F.L. REV. 1045, 1064 (2008).

Amendment has been aimed, focusing on a broader understanding and interpretation of the Amendment is particularly useful for persuading the public and coalition building.¹⁶ This is the approach I have taken in my previous work to develop a theoretical framework for using the Thirteenth Amendment to help immigrant workers.¹⁷

A. *Understanding Immigration Law in the Thirteenth Amendment Context*

The current debate over the treatment of immigrant workers must be informed by the Thirteenth Amendment. Otherwise, immigration policy runs the risk of replicating a system where large groups of workers of color, those who work in the fields and in the homes of white citizens, are deprived of basic human rights, labor protections, and the right to participate in the political process *because of* their race and their status as immigrants. A brief introduction to the world of immigration law, as it relates to immigrant workers, is necessary to understand these arguments.

Broadly speaking, individuals in the United States are classified into one of five different legal statuses.¹⁸ *Citizens* are those individuals who were either born in the U.S. or who went through a naturalization process to become a citizen. They have the legal right to be physically present and work in the United States. They also, generally, have an unrestricted ability to participate in the political and social systems of the United States, including such things as voting, going to public school, accessing social services (such as health care and welfare), the ability to marry, get a driver's license, etc. *Documented Resident Workers (DRW)* are those individuals who, while not U.S. citizens, have the legal right to both live in and work in the United States. This group includes those individuals often referred to as permanent resident aliens or people who have a "green card."¹⁹ *Guest Workers* are noncitizen immigrant workers who have been brought to the United States on a restricted visa to

16. Maria Ontiveros, *Immigrant Rights and the Thirteenth Amendment*, 16 NEW LAB. FORUM, no. 2, 2007 at 26.

17. Maria L. Ontiveros, *Immigrant Workers and the Thirteenth Amendment*, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 279 (Alexander Tsesis ed., 2010) (applying the Amendment to immigrant workers in general); 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*] (applying the Amendment to undocumented workers); Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923 (2007) [hereinafter Ontiveros, *Guest Worker Programs*] (applying the Amendment to guest workers); Maria L. Ontiveros, *Female Immigrant Workers and the Law: Limits and Opportunities*, in The Sex of Class: Women Transforming American Labor 235 (Dorothy Sue Coble, ed., 2007) [hereinafter Ontiveros, *Female Immigrant Workers*] (applying the Amendment to immigrant workers in general).

18. Ontiveros, *Hoffman*, *supra* note 17, at 653-54.

19. U.S. Citizenship and Immigration Servs., <http://www.uscis.gov/greencard> (last visited Apr. 18, 2012).

work for a particular employer.²⁰ They have the right to reside and work in the United States as long as they comply with the terms of their visas.²¹ The visas are generally issued for a short term (3 years) and require that the guest worker continue to work for the employer for whom the visa was originally issued.²² Examples of these types of workers include H2A agricultural workers;²³ H2B technical or engineering workers;²⁴ H1C nurses;²⁵ and J-1 nannies or *au pairs*.²⁶ *Documented Visitors (DV)* are the small group of individuals who have the legal right to be in the United States but who do not have the legal right to work in the U.S. These people include visitors on a tourist visa,²⁷ students on restricted student visas²⁸ and, often, the spouses or family members of guest workers.²⁹ *Undocumented workers* are those individuals who possess neither the legal right to be present or to work in the United States. Some of these individuals cross the border illegally into the U.S.; others overstay a visa, failing to return to their country of origin when legally required to do so.

This essay uses the term *immigrant or immigrant worker* to refer to people in the last four groups, as well as to refer to descendants of individuals in those groups whom others view as likely to be part of one of these four groups, even if they are U.S. citizens. This broad term is necessary because of the fluidity and interconnection of these categories. An individual may start in one category and move in to a different category. For example, a guest worker who overstays his visa becomes an undocumented worker or an undocumented worker spouse might naturalize or go through the process to become a DRW. In addition, most immigrant families contain people from different statuses. For example, a DRW mother may give birth to children, making them U.S. citizens, while their father may be an undocumented worker. This essay includes descendants in this definition of “immigrant” because people of immigrant origin are often

20. Ontiveros, *Guest Worker Programs*, *supra* note 17, at 926; *see also Guest Worker Programs*, U.S. Dep’t of Lab., Emp. and Training Admin., <http://www.doleta.gov/business/gw/guestwkr/> (last visited Mar. 19, 2012).

21. Ontiveros, *Guest Worker Programs*, *supra* note 17, at 926.

22. *Id.*

23. *H-2A Temporary Agricultural Program*, U.S. Dep’t of Labor, Emp’t and Training Admin., <http://www.foreignlaborcert.doleta.gov/h-2a.cfm> (last visited Mar. 19, 2012).

24. *H-2B Certification for Temporary Non-Agricultural Work*, U.S. Dep’t of Labor, Emp’t and Training Admin., <http://www.foreignlaborcert.doleta.gov/h-2b.cfm> (last visited Mar. 19, 2012).

25. *H-1C Nurses in Disadvantaged Areas*, U.S. Dep’t of Labor, Emp’t and Training Admin., <http://www.foreignlaborcert.doleta.gov/h-1c.cfm> (last visited Mar. 19, 2012).

26. *J-1 Visas*, U.S. Dep’t of State, Bureau of Educ. and Cultural Affairs, <http://j1visa.state.gov/programs/au-pair> (last visited Mar. 19, 2012); Ontiveros, *Guest Worker Programs*, *supra* note 17, at 926.

27. *Visitor Visas – Business and Pleasure*, U.S. Dep’t. of State, Bureau of Consular Affairs, http://travel.state.gov/visa/temp/types/types_1262.html (last visited Mar. 19, 2012).

28. *Student Visas*, U.S. Dep’t. of State, Bureau of Consular Affairs, http://travel.state.gov/visa/temp/types/types_1268.html (last visited Mar. 19, 2012).

29. Ontiveros, *Guest Worker Programs*, *supra* note 17, at 926, n.15, 926-27 n.18; Marc Taylor, *H-4 Visa Overview*, <http://www.usavisanow.com/h-4-visa/h-4-visa-overview/> (last visited Mar. 19, 2012).

perceived and treated as immigrants, even if they were born in the United States. It is this perception and treatment of the group as a whole which lies at the center of this essay's analysis.

Although I advocate grounding Thirteenth Amendment analysis in a holistic view of the Amendment, in keeping with the predominant legal methodology, the next two sections of this essay follow along the lines of the Amendment's two prohibitions. The next section looks at how the current treatment of undocumented workers can be understood to run afoul of the Amendment's prohibition against "slavery." The final section addresses the treatment of so-called "guest workers" and analyzes the ways in which their treatment can be considered involuntary servitude.

*B. The Treatment of Undocumented Workers is Akin to Slavery*³⁰

Slavery was a system of oppression at the intersection of human rights, civil rights, labor rights, and citizenship rights. It was particularly wrong and odious because of the way it impacted each of these rights individually and in combination. At the most basic level, the human rights of slaves were violated because they were not considered human beings but property. In addition, they were denied freedom of movement, the right to education, the right to marry and maintain families, etc.³¹ In this taxonomy, slavery impacted civil rights because the deprivations were directed against slaves on the basis of their race. The institution of slavery also deprived individuals of labor rights, specifically the right to determine the terms and conditions of labor, the right to gain from their labor, and the right to quit. Finally, slavery deprived individuals of citizenship rights because they were never given the opportunity to become citizens, engage in political activity, or become part of the polity.³² They were outsiders with no power to change the system. Based on this definition of slavery, the argument can be made that the Thirteenth Amendment protects undocumented workers. The argument is bolstered by a historical understanding of how the Thirteenth Amendment treated the workers who came before today's undocumented workers.

i. Undocumented Workers and the Systemic Deprivation of Thirteenth Amendment Rights

The Thirteenth Amendment's prohibition against slavery reaches the current treatment of undocumented workers because the workers live in a situation that deprives them of the same bundle of rights impacted by slavery as discussed above. Currently, in the United States, there are approximately 11

30. Ontiveros, *Hoffman*, *supra* note 17, at 672-74.

31. ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* 18-22 (2004).

32. *See generally*, Michael Vorenberg, *Citizenship and the Thirteenth Amendment*, in *THE PROMISES OF LIBERTY: THE HISTORY & CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT* 62-63 (Alexander Tesis ed., 2010).

million undocumented immigrants (or 3.7% of the population).³³ The subset of undocumented workers is large (8 million people) – comprising approximately 5% of the workforce or about one out of every 20 workers in the United States.³⁴ Although these individuals provide essential services and, in many ways, are integrated into the United States economy and society, they are also legally prohibited from being here and thus face the constant threat of deportation. As a result, these workers live in a situation created by a political, economic, and legal system that severely restricts their labor rights, their human rights, their citizenship rights, and their civil rights.

From a labor rights standpoint, undocumented workers are technically protected by the same labor regulations that govern other workers in their industry.³⁵ They have the right to be paid minimum wage, to organize into a union, and to be free from discrimination based on race, sex, national origin, religion, etc. These protections prove illusory, however, in two key ways.³⁶ First, the workers are unlikely to protest an interference with their rights because they fear that their status will be discovered and they will be deported.³⁷ An individual who is deported faces time spent in a detention facility, separation from their family, relocation to a country where they may not know anybody and the prospect of a perilous border crossing to return to the United States.³⁸ Second, even if an employer is found to have violated the labor rights of an undocumented worker, the remedies available to these workers are severely limited.³⁹ In particular, they are not eligible for the typical remedies or reinstatement (for a discriminatory or retaliatory discharge) or back pay (to make up for the wages they would have earned had they not been treated illegally).⁴⁰ These two forces decrease the incentives for employers to provide undocumented workers with basic labor rights. As a result, this exploitable group of workers often labor beneath the floor for free labor established by our labor and employment laws.⁴¹

This system was not created accidentally and participants' actions are not entirely voluntary. United States economic and trade policy, which has destabilized rural communities in Mexico while driving up the cost of living and limiting job opportunities south of the border, creates strong economic motivation for immigration from Mexico.⁴² The structure of workplace

33. Jeffrey S. Passel, *Unauthorized Immigrant Population: National and State Trends, 2010*, <http://pewresearch.org/pubs/1876/unauthorized-immigrant-population-united-states-national-state-trends-2010> (last visited Mar. 19, 2012).

34. *Id.*

35. Ontiveros, *Hoffman*, *supra* note 17, at 655-57.

36. Ontiveros, *Female Immigrant Workers*, *supra* note 17, at 240-41.

37. *Id.*

38. *Id.*

39. *Id.* at 241.

40. *Id.*

41. Ontiveros, *Hoffman*, *supra* note 17, at 672-74.

42. See David Bacon, *ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS* (2008); Bill Ong Hing, *see also* *ETHICAL BORDERS* (2010).

immigration laws protects those who hire and profit from undocumented workers.⁴³ Employers are able to avoid serious penalties, so long as they check the immigration status of new employees (even if they know the documents they are reviewing are falsified) or if they discharge those identified by the government as likely to be undocumented.⁴⁴ The United States has created a legal, political, and economic situation where those employers who require an exploitable group of workers (such as those in agriculture, construction, restaurant and domestic work) can find it in today's undocumented workers.

From a human rights standpoint, undocumented immigrants are the subjects of dehumanizing rhetoric reminiscent of that used to describe slaves. They are compared to animals, viewed as promiscuous breeders, and are told that their lives are just not worth much. They have limits on the rights to free movement, to maintain their families, and to access social services.⁴⁵ Although undocumented children still currently have the right to public education, that too is under attack. Although these are all defined as basic human rights in international treaty documents, undocumented immigrants in the United States are denied these rights.⁴⁶

From a citizenship rights standpoint, undocumented immigrants lack access to the political process and political power. A "path to citizenship" is a particularly contested part of immigration reform because it would provide such power. In addition, this group is clearly defined as "outsiders" or "aliens."⁴⁷ This distancing reinforces and helps justify inequality. Thus, it is key that the treatment is due partly to discrimination based on national origin or immigrant status. Finally, from a civil rights perspective, the treatment is also motivated by race.

Some have argued that undocumented immigrants cannot be considered slaves because they could simply leave and go home. However, just as it was impossible to send the slaves back to Africa when slavery was abolished, so too is it impossible to deport 11 million people. In addition, many of these people consider the United States "home," and they simply do not have any place to go in Mexico.⁴⁸ These people are integrated into society in many ways. They are

43. Ontiveros, *Hoffman*, *supra* note 17, at 654-55.

44. *Id.*

45. *Summary of Immigrant Eligibility Restrictions under Current Law*, Office of the Assistant Sec'y for Planning and Evaluation U.S. Dep't. of Health and Human Services, (Feb. 25, 2009), <http://aspe.hhs.gov/hsp/immigration/restrictions-sum.shtml>.

46. Maria L. Ontiveros, *Labor Union Coalition Challenges to Governmental Action: Defending the Civil Rights of Low-Wage Workers*, 2009 Univ. Chi. Leg. Forum 103, 138-39 (2009) (hereinafter Ontiveros, *Labor Union Coalition Challenges*).

47. Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 *FORDHAM L. REV.* 1545, 1571 (2011).

48. Although it is difficult to quantify the number of Mexican citizens residing in the United States who have stronger ties to the United States than Mexico, some idea can be found by looking at the pool of students who would be eligible for the Development, Relief, and Education for Alien Minors (DREAM) Act. [no citation necessary]. Those eligible must have arrived in the United States before the age of sixteen, have lived in the United States for at least five years and have obtained a United States high school diploma or equivalent.

mothers, fathers, brothers, sisters, sons and daughters of U.S. citizens. According to the Pew Hispanic Center, 8% of all newborns (almost one out of every twelve) born between 2009 and 2010 were born to undocumented immigrant parents.⁴⁹ They are also the workers who pick our nation's produce, slaughter our country's meat and poultry, care for our children and build our houses. They are not allowed to be here; they do not have a legal place here; yet they are an integral part of our society. It is a peculiar institution indeed.

ii. The Thirteenth Amendment Targeted the Predecessors of Today's Undocumented Workers

History bolsters the claim that today's undocumented workers should be protected by the Thirteenth Amendment. Distinct parallels exist between current undocumented workers and two groups of workers whom the Thirteenth Amendment was designed to free – chattel slaves and California mission workers. Although traditional immigration scholarship marks the early 1900's as the beginning of immigration policy, a growing number of scholars have begun to consider whether chattel slavery should be considered our country's first immigration law.⁵⁰ Slaves can be considered immigrant workers brought to this country and then regulated by the legal system to deny them the bundle of rights described above. As Professor Rhonda Magee summarized,

My main claims here may be summarized as follows: the hundreds of thousands of people of African heritage forcibly transported to British North America under the chattel slavery system were a certain sort of *immigrant*; and chattel slavery was, among very many other things, *a compulsory form of immigration, the protection and regulation of which, under federal and state law, was our nation's first system of "immigration law."* As a consequence, the formal system that developed was inculcated with the notion of a permanent, quasi-citizen-worker underclass, and privileged white ethnics under naturalization law—its legacies that we can see up to the present day.⁵¹

Jeanne Batalova & Margie McHugh, *Dream vs. Reality: An Analysis of Potential DREAM Act Beneficiaries*, MIGRATION POLICY INSTITUTE INSIGHT, 1-2 (July 2010), <http://www.migrationpolicy.org/pubs/DREAM-Insight-July2010.pdf>. Recent reports estimate that slightly more than 2.1 million youth would qualify for these conditions. *Id.* at 2.

49. Jeffrey S. Passel, *Unauthorized Immigrant Population: National and State Trends, 2010*, PEW RESEARCH CENTER PUBLICATIONS, (Feb. 1, 2011), <http://pewresearch.org/pubs/1876/unauthorized-immigrant-population-united-states-national-state-trends-2010>.

50. *E.g.*, Rhonda V. Magee, *Slavery as Immigration?*, 44 U.S.F. L. REV. 273, 274 (2009); *see, e.g.*, Lolita K. Buckner Inniss, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 DEPAUL L. REV. 85 (1999); *see generally* Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT'L L.J. 207 (2007).

51. Magee, *supra* note 50, at 276.

In addition, while chattel slavery was developing in the American south, a parallel system of labor was developing in the west.⁵² Catholic missionaries brought Mexican workers with them to build the missions and develop an agriculture-based economy to support them.⁵³ When those immigrant workers perished, the missionaries conscripted members of the native Californian Indian tribes to live and work inside their walls.⁵⁴ The native workers were not allowed to leave, except under armed supervision to work in outlying fields.⁵⁵ Family groups were separated. Women were housed with women; men bunked together; and children lived in a separate barracks.⁵⁶ The workers were converted to Catholicism, and escapees were captured and severely punished.⁵⁷ The Thirteenth Amendment was found to apply to and prohibit this system.⁵⁸ When the native inhabitants were eventually freed from this situation, a set of new laws developed which paralleled the Jim Crow system developing in the South. Native workers were required to carry papers to show that they were indeed “free.” The new laws allowed for a system of debt bondage (based on convictions for loitering and alcohol use)⁵⁹ similar to the debt bondage systems in the American south struck down under the Thirteenth Amendment.⁶⁰

Chattel slaves and Native Californians are the predecessors of today’s undocumented workers. These workers performed the same tasks as today’s undocumented workers, laboring in agriculture and domestic work. Additionally, just like chattel slaves and Native Californians, undocumented workers are subordinated because of their race and national origin, and the subordination has become entrenched through systemic deprivations of labor, political, and human rights.

C. “Guest Worker” Program Constitutes Involuntary Servitude

The Thirteenth Amendment prohibits involuntary servitude as well as slavery. The legal definition of involuntary servitude focuses on the inability to quit a contract for labor.⁶¹ Workers who cannot quit because of threats of force or imprisonment fall within this category. On the other hand, those who feel they cannot quit their jobs because they do not want to lose their health insurance are not protected by the Amendment. In between these two poles, courts have struggled to determine the types of coercion that violates the

52. Ontiveros, *Guest Worker Programs*, *supra* note 17, at 931-933.

53. *Id.* at 931.

54. *Id.*

55. *Id.*

56. *See id.*

57. *Id.*

58. *The Slaughter-House Cases*, 83 U.S. (36 Wall.), 72 (1873) (striking down this system as a form of “Mexican peonage”).

59. Ontiveros, *Guest Worker Programs*, *supra* note 17, at 932.

60. *See supra* notes 2-4 and accompanying text.

61. *See* Ontiveros, Hoffman, *supra* note 17, at 662-66.

proscription.⁶² Looking at the “involuntary servitude” prong in isolation makes this analysis difficult. A better analysis focuses on the inability to quit coupled with other systemic factors of oppression at the intersection of human rights, civil rights, labor rights, and citizenship rights.⁶³ The treatment of so-called “guest workers” fits into this pattern and should be regulated by the Thirteenth Amendment. The history of guest worker programs bolsters this argument as well.

i. The Treatment of Guest Workers Constrains their Thirteenth Amendment Rights

Most “guest worker” programs contain similar provisions which make them easily exploitable. A “guest worker” is a person brought from outside the United States on a restricted visa to work.⁶⁴ In most cases, the employer must demonstrate that there is a need for the worker by alleging that no domestic worker is available to fill the position.⁶⁵ A guest worker is recruited to fill the position with that particular employer.⁶⁶ The visa typically lasts for three years and is renewable for one or two terms.⁶⁷ Some visas allow workers to bring their family with them; others do not.⁶⁸ If they are allowed to bring their families, the family is generally not allowed to work here.⁶⁹ The focus is on keeping the worker as a “guest” or “temporary” worker. The expectation is that the worker will come to the United States, work for a few years, and then return to his or her country of origin. In this way, their citizenship rights are limited.

The labor rights of guest workers are constrained because most of the visas require that the worker continue to work for the same employer.⁷⁰ If the worker quits or gets fired, the visa expires and the worker must return to his or her country of origin.⁷¹ As a result, guest workers are limited in their ability to protest working conditions for fear of being terminated.⁷² Employers recognize this limitation and often exploit guest workers, forcing them to work in sub-market working conditions.⁷³ Employers have also used the availability of exploitable guest workers as a reason to pay citizen workers less and treat them worse.⁷⁴ Employers threaten citizen workers with replacement by visa workers

62. *See id.* at 668-69.

63. Ontiveros, *Guest Worker Programs*, *supra* note 17, at 927-30.

64. *Id.* at 926-27.

65. *Supra*, Part IB.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Ontiveros, *Guest Worker Programs*, *supra* note 17, at 927-29, 937-38.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

if they complain.⁷⁵ Examples from legal cases and interviews show that employers often berate guest workers using racist language and referring to their immigrant status, revealing the civil rights implications of this exploitation.⁷⁶

Guest workers are unable to quit their employment if they do not want to return to their country of origin.⁷⁷ While it is unclear whether this penalty for quitting is sufficient by itself to qualify guest worker employment as involuntary servitude, the system becomes problematic when placed in the larger context of a systemic deprivation of the bundle of rights discussed here.⁷⁸

ii. The History of “Guest Workers” Reveal a Systemic Violation of the Thirteenth Amendment

Although the impact on these rights can be limned in the current situation of “guest workers,” they come into sharper relief when the history of guest workers in California agriculture is examined. The history reveals a series of programs designed to bring immigrant workers into the United States in situations that infringed on their human rights, labor rights, citizenship rights, and civil rights, creating an exploitable class of workers. Each program brought in a different racial group and ended when that particular group began to gain rights, power, and citizenship. The system would then move on to a new group of workers.

The Native Californians used in the missions and discussed above were the first group of agricultural workers in California.⁷⁹ When those workers were no longer available (primarily because they died), the United States developed an immigration system designed to bring in Chinese workers.⁸⁰ Only men were allowed to immigrate,⁸¹ and they were not allowed to become citizens.⁸² A system requiring documents for travel severely restricted their ability to move freely.⁸³ When the Chinese workers started to agitate for better working conditions, the United States immigration system replaced them with agricultural workers from Japan.⁸⁴ When the Japanese workers started to gain power and make movements toward assimilation and citizenship, legal structures emerged to bar this development.⁸⁵ To replace their labor, the United States developed a program recruiting Mexican Braceros.⁸⁶ The Braceros were a

75. *Id.*

76. Ontiveros, *Guest Worker Programs*, *supra* note 17, at 927-29, 937-38.

77. *Id.*

78. *Id.*

79. *Id.* at 931-33.

80. *Id.* at 933-34.

81. *Id.* at 933.

82. Ontiveros, *Guest Worker Programs*, *supra* note 17, at 934.

83. *Id.* at 933-34.

84. *Id.* at 934-36.

85. *Id.* at 935.

86. *Id.* at 936-37.

group of Mexican men brought into the United States under labor contracts.⁸⁷ Their plight, which included sub-standard housing, lack of payment of wages, and physical and emotional abuse have been well documented.⁸⁸ The Bracero program is noted for being called “legalized slavery.”⁸⁹ This history shows how current guest worker programs are simply the most recent immigration system developed to exploit workers by restricting their civil rights, labor rights, human rights and citizenship rights.

II. CURRENT SUCCESSFUL USES OF THE THIRTEENTH AMENDMENT: THE FIGHT TO END HUMAN TRAFFICKING

Activists opposed to human trafficking have effectively used the rhetoric of the Thirteenth Amendment to educate Americans about the problems of human trafficking and to gain support to end the practice.⁹⁰ When female Thai workers are seen being freed from behind bars in El Monte, California where they were forced to sew clothes,⁹¹ people accepted the notion that this is “modern day slavery” and should be prohibited under the Thirteenth Amendment. People have a similar response to girls and young women sold into prostitution. So called “sex trafficking” is widely condemned, especially by conservative forces who see this issue as an avenue for attacking all prostitution.⁹² These cases appeal to people because they match a very narrow, easily understood definition of slavery and involuntary servitude. Within the anti-trafficking movement, however, some groups have taken the next step and are successfully advocating for a broader definition of slavery and involuntary servitude. This section examines three successful efforts in the anti-trafficking field to discern strategies that can be used to bring a broader definition of the Thirteenth Amendment into the law and public consciousness: The Trafficking Victim Protection Act; the Not for Sale Campaign; and the National Guestworker Alliance. These campaigns will set the stage for the final section of this essay, which will describe ways in which these campaigns can be used beyond trafficking discourse to help all immigrant workers.

87. Ontiveros, *Guest Worker Programs*, *supra* note 17, at 936-37.

88. *Id.*

89. *Id.* at 937.

90. International Communications Research, New Poll by Lifetime Television/Entertainment Industries Council, Inc., Shows Americans Support Harsher Penalties for Human Trafficking and More Protection for ‘Mail Order Brides,’ Sept. 15, 2005, available at http://www.icrsurvey.com/Study.aspx?f=Lifetime_1005.htm (last visited March 19, 2012); Human Trafficking: A Scourge Needs Greater Attention, Washington Post, June 27, 2011, available at http://www.washingtonpost.com/opinions/human-trafficking-a-scourge-needs-greater-attention/2011/06/27/AGNoYDoH_story.html (last visited March 19, 2012).

91. Samantha C. Halem, *Slaves to Fashion: A Thirteenth Amendment Strategy to Abolish Sweatshops in the Garment Industry*, 36 San Diego L. Rev. 397, 404-406 (1999).

92. Grace Chang and Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives*, 3 Stan. J.C.R. & C.L. 317 (2007).

A. *Legislation and Litigation: The Trafficking Victims Protection Act of 2008*

Anti-trafficking advocates have successfully used the legislative process to expand protection for workers and to expand the legal definitions of slavery and involuntary servitude. Shortly after the end of the Civil War, Congress passed the Anti Peonage Statute of 1867 to give effect to the Thirteenth Amendment.⁹³ From the 1960's through the 1990's, the government prosecuted a variety of cases under this statute, many involving immigrant workers in agricultural labor camps.⁹⁴ In 2000, Congress passed the Trafficking Victims Protection Act (TVPA) to amend the Anti Peonage Statute of 1867 and to provide guidance to courts on the types of labor arrangements that would run afoul of the Act.⁹⁵ The TVPA provided for criminal penalties against those who obtained labor from people "through the use of force, fraud or coercion for the purposes of subjection to involuntary servitude, peonage, debt bondage or slavery."⁹⁶ Although the definitions of "coercion" and "involuntary servitude" were broad, courts tended to give them a narrow reading because of their vagueness.⁹⁷

Anti-trafficking activists worked to amend the TVPA and give it a broader and more protective meaning. The statute was reauthorized and amended in 2003 (when a private cause of action was added),⁹⁸ and in 2008 (when the definitions were changed to reach a wider range of conduct and to give even more civil rights to trafficked workers).⁹⁹ The statute now prohibits, among other things, the extraction of labor by "means of serious harm or threats of serious harm to that person or another person" or through "the abuse or threatened abuse of the law or legal process."¹⁰⁰ The term "serious harm" is defined to include "any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm."¹⁰¹ The term "abuse or threatened abuse of the legal process" includes threats of deportation

93. 14 Stat. 546 (1867)(codified at 42 U.S.C. Sec. 1994 (2004) and 18 U.S.C. Sec. 1581 (2004)).

94. Ontiveros, Hoffman *supra* note , at 667-70.

95. Victims of Trafficking and Protection Act of 2000, Pub. L. 106-386, Division A, 114 Stat. 1464, 1466-1491 (current version codified as amended at 22 U.S.C. §§ 2152d, 7101-7112)

96. *Id.* at 22 U.S.C. 7102(9) (2006 & Supp. IV 2011)

97. Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 437-450 (2011).

98. 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).

99. 18 U.S.C. § 1589(a) (2006 & Supp. II 2007-2009).

100. *Id.* at § 1589(a)(2)-(3).

101. *Id.* at § 1589(c)(2).

because the statute prohibits “the use or threatened use of . . . administrative [process] . . . for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.”¹⁰²

Professor Kathleen Kim has analyzed these provisions and case law surrounding them to formulate a theory of coercion based on “situational coercion” and “structural coercion.”¹⁰³ She argues that trafficking victims should be found to be victims of involuntary servitude when “the alleged trafficker took advantage of these vulnerabilities [such as irregularized immigration status, cultural and linguistic isolation, poverty and impoverished dependent family members, youth, and illiteracy] and power imbalances to obtain labor or services at an exploited price.”¹⁰⁴ Her theory focuses upon the situational vulnerabilities of a particular worker, rather than structural coerciveness caused by the immigration system in general or coercive action taken by a trafficker.¹⁰⁵

She argues that courts have adopted this approach in a trio of cases.¹⁰⁶ In *United States v. Bradley*,¹⁰⁷ the court upheld jury instructions that emphasized the importance of “special vulnerabilities” and power imbalances in determining whether the labor was involuntary.¹⁰⁸ In *United States v. Calimlim*,¹⁰⁹ the court focused on whether the defendant “manipulated the situation” to compel the worker to stay and emphasized the fact that the worker’s family was poor and dependent upon her salary and that she had no freedom to leave and find other work because she was an undocumented worker.¹¹⁰ The court reached a finding of forced labor because the defendant targeted her “special vulnerability” as an undocumented worker.¹¹¹ Finally, in *United States v. Kaufman*,¹¹² the court emphasized the power differential between the plaintiffs (a group of mentally ill adults in a residential treatment facility) and the defendant (their doctor who also lived at the facility) to find coercion.¹¹³ This theory of “situational coercion” brings a much broader definition to what constitutes a “trafficked worker” and can be useful in covering a wide variety of workers.

B. Popular Messaging and Personal Activism: The Not for Sale

102. *Id.* at § 1589(c)(1).

103. Kim, *supra* note 97, at 459-72.

104. *Id.* at 461.

105. *Id.* at 471-72.

106. *Id.* at 453-57.

107. 390 F.3d 145 (1st Cir. 2004), *vacated on other grounds*, 545 U.S. 1101 (2005).

108. *Id.* at 152-53 (these vulnerabilities included the parties’ background, physical and mental condition, experience, education, socioeconomic status and inequalities).

109. 538 F.3d 706 (7th Cir. 2008).

110. Kim, *supra* note 97, at 455-56.

111. *Calimlim*, 538 F.3d at 717.

112. 546 F.3d 1242 (10th Cir. 2008).*cert. denied* 130 S.Ct. 1013 (2009).

113. *Id.* at 1248-50.

Campaign

An innovative social change campaign called “Not for Sale” (NFS) presents an example where the anti-trafficking movement is effectively using a broad vision of the Thirteenth Amendment to educate and engage the public around the Amendment’s values.¹¹⁴ Co-founded by David Batsone, NFS calls itself a “Movement to Re-Abolish Slavery.”¹¹⁵ The campaign “combines technology, intellectual capital, abolitionist groups and a growing network of individuals like yourself – joined together to end slavery in our lifetime.”¹¹⁶ Three aspects of the NFS Campaign deserve note: its bold message and use of the slavery taxonomy; its positive rights approach to trafficking (focusing on the rights of people to be free, rather than on prohibiting certain enumerated practices); and its approach to personal activism. These aspects of the campaign provide examples of effectively using a broad, holistic vision of the Thirteenth Amendment.

The Not for Sale website, which serves as the campaign’s umbrella communication device, unabashedly uses the words “slavery” and “abolition.”¹¹⁷ Unconstrained by legal trappings or the need to define the terms “slavery” and “involuntary servitude,” it boldly proclaims that “there are more than 30 million slaves in the world today, more than at any other point in human history.”¹¹⁸ It invites people to become “backyard abolitionists” who raise awareness of slavery and human trafficking.¹¹⁹ In addition, individuals are encouraged to report instances of slavery by placing reports onto an online slavery map.¹²⁰ A short four-minute video embedded in the website explains how to research and report suspected incidents of slavery.¹²¹ Thus, individuals are given the power to help develop a modern day definition of slavery. By defining slavery broadly and encouraging a grass roots approach, the language of the Thirteenth Amendment becomes part of the conversation.

Second, the campaign focuses broadly on affirmative rights to be free from slavery and ties those rights to the interests of individual activists. An important part of NFS’s message is that the fight against slavery is not just about freeing trafficked people. It is about understanding and dismantling the structures that support the enslavement of people and about recognizing the

114. NOT FOR SALE: END HUMAN TRAFFICKING AND SLAVERY , <http://www.notforsalecampaign.org> (last visited Apr. 25, 2012).

115. *Id.*; *See also Staff*, NOT FOR SALE: END HUMAN TRAFFICKING AND SLAVERY, <http://www.notforsalecampaign.org/about/staff> (last visited Apr. 25, 2012).

116. *About*, NOT FOR SALE: END HUMAN TRAFFICKING AND SLAVERY, <http://www.notforsalecampaign.org/about> (last visited Apr. 25, 2012).

117. NOT FOR SALE: END HUMAN TRAFFICKING AND SLAVERY (Dec. 5, 2011), <http://www.notforsalecampaign.org>.

118. *Slavery*, NOT FOR SALE: END HUMAN TRAFFICKING AND SLAVERY, <http://www.notforsalecampaign.org/about/slavery/> (last visited Apr. 19, 2012).

119. THE ACADEMY: NOT FOR SALE, <http://www.nfsacademy.org/> (last visited Apr. 19, 2012).

120. SLAVERY MAP, <http://www.slaverymap.org/> (last visited Apr. 19, 2012).

121. *How To*, SLAVERY MAP, <http://www.slaverymap.org/> (last visited Apr. 19, 2012).

positive rights of worker to be “Free 2 Work,”¹²² as they call one of their campaigns. As part of its work, NFS establishes micro-enterprises where freed slaves can start a new productive life.¹²³ In addition, their “Free2Play” campaign brings in artists, musicians, and athletes to focus on guaranteeing children around the globe the positive right to be free to play, rather than being forced to work.¹²⁴ Focusing on a positive right provides an opportunity to expand the use of the Thirteenth Amendment because it allows the debate to focus on the types of rights that need to be available to all people.¹²⁵

Finally, NFS uses a model of what it calls “smart activism” and “open source activism,” which combines various forms of individual action, group action, and technology.¹²⁶ The website incorporates the “empower” interface to allow visitors to find the best place for them to join the movement.¹²⁷ Avenues for involvement include the Student Abolition Movement; Backyard Academy (three day local events); the Academy (week long intensive training); the Underground Church Network; Zero Tolerance communities (working essentially as neighborhood watch programs looking to ferret out slavery); and global and regional summits.¹²⁸ Their innovative methods include the use of technology, such as a bar code scanning application for smart phones to determine whether products were created using slave labor¹²⁹ and the online “Slavery Map” discussed above. By utilizing these methods, NFS has been able to spread the message of the Thirteenth Amendment to a wide, diverse audience.

122. *I am a Consumer*, NOT FOR SALE: END HUMAN TRAFFICKING AND SLAVERY, <http://www.notforsalecampaign.org/action/consumer/> (last visited Apr. 19, 2012); *see also FREE2WORK: END HUMAN TRAFFICKING AND SLAVERY*, <http://www.free2work.org/> (last visited Apr. 19, 2012).

123. *Social Ventures Methodology & Global Impact*, NOT FOR SALE: END HUMAN TRAFFICKING AND SLAVERY, <http://www.notforsalecampaign.org/global-initiatives/international-projects-methodology/> (last visited Apr. 20, 2012).

124. *I Am an Athlete*, NOT FOR SALE: END HUMAN TRAFFICKING AND SLAVERY, <http://www.notforsalecampaign.org/action/athlete/> (last visited Apr. 19, 2012).

125. James Gray Pope, *A Free Labor Approach to Human Trafficking*, 158 U. Pa. L. Rev. 1849, 1858-62 (2010) (discussing the advantages of the free labor approach, as opposed to the prohibition approach).

126. *Supra* note 116.

127. <http://www.notforsalecampaign.org/empower/>

128. *Student Abolitionist Movement*, NOT FOR SALE: END HUMAN TRAFFICKING AND SLAVERY, <http://www.notforsalecampaign.org/studentabolitionistmovement/> (last visited Apr. 20, 2012); *THE ACADEMY: NOT FOR SALE*, <http://www.nfsacademy.org/> (last visited Apr. 19, 2012); *The Underground Church Network*, NOT FOR SALE: END HUMAN TRAFFICKING AND SLAVERY, <http://www.notforsalecampaign.org/action/faith/underground-church-network/> (last visited Apr. 20, 2012); *Zero Tolerance Community*, NOT FOR SALE: END HUMAN TRAFFICKING AND SLAVERY, <http://notforsalecampaign.org/ztc/> (last visited Apr. 2012).

129. *FREE2WORK: END HUMAN TRAFFICKING AND SLAVERY*, <http://www.free2work.org/> (last visited Apr. 19, 2012).

C. *Advocating for Guest Workers as Trafficked Workers*

The National Guestworker Alliance (hereinafter “the Alliance”)¹³⁰ began life as the Alliance of Guestworkers and pursues a variety of innovative strategies to advocate for guest workers using a broad vision of the Thirteenth Amendment. Their work emphasizes the ways in which guest workers are trafficked into the United States and the ways in which their work situations violate the Thirteenth Amendment. As a result, the Alliance has expanded accepted notions of the types of work relationships which could violate the Amendment. After describing the origins of the organization, this section focuses on the organizing, advocacy and litigation work of the Alliance to show how it uses the Thirteenth Amendment.

The Alliance, an outgrowth of the New Orleans Workers’ Center for Racial Justice, began to assist guest workers who arrived to help rebuild New Orleans, Louisiana after Hurricane Katrina.¹³¹ They found persistent problems affecting these workers and recognized that many were laboring in trafficking situations that should be called involuntary servitude. According to their report “And Injustice for All,”¹³²

Abusing and exploiting temporary workers has been an inherent part of ‘guestworker’ programs that do not permit portability regarding employment, have no path to permanent status, and include no labor protections for workers. Human trafficking is a modern form of indentured servitude fueled by both international labor smuggling rings and domestic demands for cheap labor. . . upon arrival to their destination victims are under the complete control of their traffickers. . .¹³³

The Alliance focuses on empowering workers through organization. For example, they helped a group of Central and South American workers recruited by Cumberland Environmental Resources to organize when the workers realized that they would never be able to work their way out of the debt they incurred to come to the United States as guest workers. The workers recognized that they had no power to negotiate individually because they lacked power to change employers and that collective action was their only hope.¹³⁴ More recently, the Alliance helped a group of J-1 student visa workers who found

130. *About NGA, NATIONAL GUESTWORKER ALLIANCE*, <http://www.guestworkeralliance.org/about-nga/> (last visited on Apr. 19, 2012).

131. *Id.*

132. Judith Browne-Dianis, Jennifer Lai, Marielena Hincapie & Saket Soni, *AND INJUSTICE FOR ALL: WORKERS’ LIVES IN THE RECONSTRUCTION OF NEW ORLEANS*, 47-49, <http://www.nowcrj.org/wp-content/uploads/2010/03/and-injustice-for-all.pdf>.

133. *Id.* at 49.

134. See *Hearing on H2-B Guestworker Program & Improving the Dep’t of Labor’s Enforcement of the Rights of Guestworkers Before the Subcomm. on Domestic Policy of the Comm. on Oversight & Gov’t Reform H.R., 111th Cong. 26, 28 (2009)* (Statement of Miguel Angel Jovel Lopez, Member, Alliance of Guestworkers for Dignity).

themselves working in abusive conditions for Hershey Company instead of living with families and enjoying the educational and cultural exchange they were promised.¹³⁵ The students organized protests, causing the State Department to begin an investigation of the situation.¹³⁶ One protest leader characterized the situation like this, “[t]hey take students who came on a cultural exchange to slave for them and make next to nothing, when these jobs could be going to families in Pennsylvania.”¹³⁷ In February 2012, as a result of this work, the U.S. State Department banned the company responsible for these abuses from participating in the J-1 program.¹³⁸ The Alliance has also fought to ensure that guest workers affected by the BP Deepwater Horizon oil spill were not treated as “disposable” workers and would, instead, receive compensation equal to other workers who lost employment as a result of the disaster.¹³⁹ Each of these campaigns uses the language and theory of the Thirteenth Amendment to describe the plight of guest workers and to energize their claims.

The Alliance has also used the Thirteenth Amendment as part of its litigation strategy.¹⁴⁰ For example, the Alliance represents a group of Indian workers brought to the United States to work for Signal International.¹⁴¹ The workers were forced to live in crowded, dilapidated “man camps” with little sanitation and were berated with racist comments.¹⁴² When they complained and started to organize, company officials attempted to perform an illegal private deportation.¹⁴³ The Alliance filed a law suit that included causes of action for trafficking with respect to peonage, slavery, involuntary servitude, or forced labor under the TVPA; a racketeering charge which included the predicate acts of enticement into slavery, involuntary servitude, forced labor, trafficking for purposes of forced labor and/or involuntary servitude, and document servitude); and violations of the Ku Klux Klan Act of 1871 (including violations of the Thirteenth Amendment).¹⁴⁴ A New York Times editorial echoed the language of the movement when it argued that “[t]his is the latest twist in a sad tale of human trafficking and another reason why Congress,

135. Julia Preston, *Pleas Unheeded as Students' U.S. Jobs Soured*, N.Y. TIMES, Oct. 17, 2011, at A1.

136. *Id.*

137. *Id.*

138. Julia Preston, *Company Banned in Effort to Protect Foreign Students from Exploitation*, N.Y. TIMES, Feb. 2, 2012, at A12.

139. Tamar Lewin, *Mexican Guest Workers Laid Off, Want BP's Help*, N.Y. TIMES, Aug. 6, 2010, at A13.

140. *Category: Litigation*, NATIONAL GUESTWORKER ALLIANCE, <http://www.guestworkeralliance.org/category/litigation/> (last visited April 12, 2012).

141. *EEOC v. Signal International, LLC*, NATIONAL GUESTWORKER ALLIANCE, <http://www.guestworkeralliance.org/category/litigation/> (last visited April 12, 2012).

142. Complaint & Jury Trial Request at 5-7, *EEOC v. Signal Int'l, LLC*, No. 1:11-cv-00179-LG RHW (D.M.S. Apr. 20, 2011).

143. Julia Preston, *Suit Points to Guest Worker Program Flaws*, N.Y. TIMES, Feb. 2, 2010, at A12.

144. Complaint at 55-70, *David v. Signal Int'l, LLC*, Civ. No. 08-1220 JCZ/DEK (D.L.A. Nov. 23, 2010).

as part of its immigration reform efforts, must solve a problem that dates back to the Mexican bracero program: how to accept guest workers in this country while preventing their exploitation.¹⁴⁵ As these cases go forward, the linkages between the Thirteenth Amendment and exploitation of immigrant workers become clearer.

III. A STRATEGIC PLAN FOR USING THE THIRTEENTH AMENDMENT.

Immigrant rights activists can use the successes of the anti-trafficking movement as a foundation to construct a concrete strategic plan for using the Thirteenth Amendment to protect immigrant workers. The three anti-trafficking efforts described above have successfully used the Thirteenth Amendment in innovative and expansive ways to help vulnerable workers. This section suggests five specific action items that can and should be implemented with respect to immigrant workers. Each of these action items explicitly use the Thirteenth Amendment or its message and use a variety of tools, including litigation, lobbying, public persuasion and organization. Litigating cases based on a Thirteenth Amendment cause of action can create a new and helpful body of law. Utilizing administrative processes to increase the issuance of certain types of visas can help define the types of labor arrangements that violate the Thirteenth Amendment. Challenging the constitutionality of the agricultural and domestic work exclusions from the National Labor Relations Act will educate the courts about the linkages between slavery and today's immigrant workers. Lobbying to amend Title VII to cover discrimination based on migrant or immigration status can demonstrate the linkage between the civil rights, citizenship rights, labor rights, and human rights encompassed in the Thirteenth Amendment. Finally, building coalitions to oppose anti-immigrant laws can build on these linkages to help all workers. This strategic plan, while ambitious, draw inspiration, theoretical support, and strategic ideas from the successful efforts of the anti-trafficking movement.

A. Attorneys Should Bring Cases Using the Thirteenth Amendment.

Immigrant workers' rights attorneys should embrace a well-formulated litigation plan focused on the Thirteenth Amendment. Although some Thirteenth Amendment scholars focus on lobbying in Congress as the best avenue for using the Amendment,¹⁴⁶ well orchestrated litigation plans can also lead to major improvements in protective laws.¹⁴⁷ Until recently, few attorneys

145. Editorial, *A Bitter Guest Worker Story*, N.Y. TIMES, Feb. 4, 2010, at A26; See also Editorial, *Standing Up for Guest Workers*, N.Y. TIMES, May 2, 2011, at A26 (describing an EEOC suit addressing the same situation, as well as several others, by stating: "Slavery and human trafficking are alive and well in the United States.").

146. See, Rebecca Zietlow, *The Promise of Congressional Enforcement*, THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELIANCE OF THE THIRTEENTH AMENDMENT 182 (Alexander Tsesis, ed., 2010).

147. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 17 (2004) (discussing the

have used litigation to really develop Thirteenth Amendment protections. The cases being brought by the National Guestworker Alliance provide successful examples of the types of cases that can be litigated using both the TVPA and the Thirteenth Amendment as either underlying predicate acts or as independent causes of action.

The analytical theories for these cases should draw on the broad, holistic understanding of the Thirteenth Amendment. Kathleen Kim's definition of situational coercion,¹⁴⁸ as well as the historical explanation of James Gray Pope¹⁴⁹ and others,¹⁵⁰ can provide the analytical theory for these cases. Additionally, the definition of situational coercion should focus on vulnerabilities that exist because of restrictions at the intersection of labor rights, human rights, citizenship rights, and civil rights. Focusing on these Thirteenth Amendment rights can provide definitional guideposts for judges and juries to determine which vulnerabilities are sufficient to establish a violation, especially in the cases that Kim refers to as " 'blurry line' cases where trafficked workers experience coercion through subtle and sometimes unspoken ways."¹⁵¹ These types of arrangements reflect the multi-faceted evils of slavery and involuntary servitude. When these evils are translated to our contemporary experiences, the Thirteenth Amendment should be utilized to challenge them.

B. Increase the use of "T" and "U" Visas to Expand the List of Labor Arrangements which Violate the Thirteenth Amendment

Administrative processes, specifically those that deal with the issuance of visas, provide a second locus for expanding the use of the Thirteenth Amendment to protect immigrant workers. Undocumented workers have been understandably hesitant to bring claims against employers because they fear deportation once their status becomes known to immigration officials. Currently, two types of visas can be issued to protect undocumented workers who help officials prosecute legal violations. The "T visa" is available for victims of "severe forms of trafficking" who cooperate with law enforcement.¹⁵² Severe forms of trafficking include sex trafficking and labor trafficking for the "purpose of subjection to involuntary servitude, peonage,

NAACP Legal Defense and Education Fund strategy to overturn *Plessy v. Ferguson* in the context of education); Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 432-35 (2005) (discussing the NAACP Legal Defense and Education Fund strategic plan for implementing Title VII).

148. See *supra* Part II.A.

149. James Gray Pope, *Contract, Race and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 Yale L.J. 1474 (2010).

150. See *supra* notes 9-15 and accompanying text.

151. Kim, *supra* note 97, at 468.

152. Victims of Trafficking and Violence Protection Act of 2000, Sec. 103(8), 114 Stat. at 1470 (codified as amended at 22 U.S.C. § 7102(8)-(9) (2006)).

debt bondage, or slavery.”¹⁵³ As a practical matter, the “T” visa has primarily been used for victims of sex trafficking,¹⁵⁴ but it could and should be used for victims of labor trafficking as well.¹⁵⁵ The “U” visa is available to cover victims of crimes, such as trafficking, peonage, involuntary servitude, and slave trade, as well as other crimes such as rape, torture, sexual assault, abusive sexual contact, unlawful criminal restraint, false imprisonment, blackmail, witness tampering, obstruction of justice, and conspiracy.¹⁵⁶ Both of these visas allow visa-holders to remain in the United States and apply for permanent residency.¹⁵⁷

Expanding the use of these visas outside the realm of sex trafficking into cases involving labor exploitation can lead to administrative findings that a broader range of exploitive labor arrangements violate the Thirteenth Amendment. Theoretically, this provides a way to better understand the exploitation of immigrant workers as a criminal act and a violation of human rights. From a practical standpoint, the importance of these types of visas has led legislatures to propose the Power Act “to protect victims of crimes or serious labor violations from deportation during Department of Homeland Security enforcement actions and for other purposes.”¹⁵⁸ The theory and language of the Thirteenth Amendment, as it applies to immigrant workers, can be utilized to understand how these exploitive labor arrangements qualify as severe forms of trafficking.

C. Challenge the Exclusion of Domestic and Agricultural Workers from the National Labor Relations Act (“NLRA”)

The exclusion of domestic and agricultural workers from the NLRA should be challenged as being unconstitutional. Currently, agricultural workers and domestic workers are excluded from the protections of the NLRA.¹⁵⁹ This exclusion primarily impacts immigrant workers because immigrants make up

153. *Id.*

154. Leticia M. Saucedo, *A New “U”: Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 910 (2008).

155. Dina Francesa Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 353-57 (2007).

156. 8 U.S.C. Sec. 1101(a)(15)(U)(iii)(2000).

157. *Victims of Human Trafficking & Other Crimes*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/portal/site/uscis> (last visited March 20, 2012); see also Billing Code 911-97, Dep’t of Homeland Sec., <http://www.uscis.gov/files/nativedocuments/T%20and%20U%20Interim%20Final%20Rule.pdf>.

158. H.R. 2169, 112th Cong. (2011); See also Editorial, *What Would You Do?*, N.Y. TIMES, Apr. 22, 2010, <http://www.nytimes.com/2010/04/22/opinion/22thu3.html>.

159. 29 U.S.C.A. § 152 (3) (West 1998).

the bulk of the agricultural¹⁶⁰ and domestic industry¹⁶¹ workforces. Without protection from the NLRA, these immigrant workers can be disciplined or discharged for organizing a union or engaging in collective action. This often prevents workers from advocating for themselves. More importantly, this excludes a group of workers from freedom of association, a core labor and human right.¹⁶²

There are two potential constitutional avenues to challenge this exclusion. A traditional challenge could be made under Fourteenth Amendment analysis.¹⁶³ A statute may be found unconstitutional under strict scrutiny analysis if it targets a class because of race and has a disproportionate impact on that group.¹⁶⁴ There is substantial evidence that this exclusion is a result of racial discrimination – to continue the exploitation of African Americans in the areas where they labored during slavery.¹⁶⁵ In addition, this exclusion has a disproportionate impact on immigrant workers because they make up the bulk of the labor force in these two industries. Even if the exclusion is not seen as racial in nature, an equal protection challenge may be brought arguing that the classification lacks a rational basis.¹⁶⁶ Finally, an argument could be made that the classification is unconstitutional because it affects a fundamental right; in this case, the fundamental right being impacted is the right to free labor under the Thirteenth Amendment.¹⁶⁷

A second challenge can be made directly using the Thirteenth Amendment. The argument can be made that the creation of a class of

160. Philip Martin, *Immigration Reform: Implications for Farmers, Farm Workers and Communities*, MIGRATION DIALOGUE at 11, (June 23, 2011), <http://migration.ucdavis.edu/cf/files/2011-may/conference-report.pdf>.

161. Excluded Workers Congress, Unity for Dignity 18 (2010), available at <http://www.excludedworkerscongress.org/domestic-workers> (last visited March 20, 2012).

162. Tonia Novitz, *Workers' Freedom of Association*, Human Rights in Labor and Employment Relations 123 (James A. Gross & Lance Compa, eds., LERA 2006); Lance Compa, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* (ILR Press 2005).

163. See Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 127-37 (2011); Michael H. LeRoy & Wallace Hendricks, *Should "Agricultural Laborers" Continue to be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489 (1999).

164. *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

165. Perea, *Echoes of Slavery*, *supra* note 163, at 127;; Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987); Juan F. Perea, *Destined For Servitude*, 44 U.S.F.L. REV. 245 (2009); Guadalupe T. Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, 1 U. PA. J. LAB. & EMP. L. 487 (1998); Maria L. Ontiveros, *Lessons From the Fields: Female Farm Workers*, 55 ME. L. REV. 157 (2003).

166. Ontiveros, *Labor Union Coalition Challenges*, *supra* note 46, at 118-19 (discussing this approach to challenge citizenship requirement for airport screeners).

167. Ontiveros & Drexler, *supra* note 15, at 1069-71 (making a similar argument that the denial of education violates a fundamental right under the Thirteenth Amendment which can be used as the basis for a Fourteenth Amendment equal protection challenge).

workers laboring below the floor for free labor, especially where that exclusion is related to issues of race, citizenship, and human rights, violates the Thirteenth Amendment's holistic prescription.¹⁶⁸ A racially based two-tier system can be viewed as a slavery-like system prohibited by the Thirteenth Amendment.¹⁶⁹ This argument could be bolstered by the stories of agricultural and domestic workers employed in labor arrangements and working in labor conditions that fall below the standards set for free labor. To the extent that these workers are in a semi-free caste that brings down the protection for all workers, the exclusion also violates the "involuntary servitude" prong of the Thirteenth Amendment.¹⁷⁰ This approach to a constitutional challenge to the exclusion is much riskier than a Fourteenth Amendment approach because there is insufficient case law to support it. However, as more Thirteenth Amendment cases are brought and more visas are issued in labor exploitation cases, the argument may become stronger.

*D. Amend Title VII to Prohibit Discrimination based on
Citizenship/Migrant Status*

Discrimination in employment, on the basis of immigration status, should be prohibited. International law recognizes this type of discrimination as a human rights violation.¹⁷¹ Such discrimination clearly interferes with the labor rights of immigrant workers as well since it is based on immigrant status. Because immigrant workers have a different race or ethnicity, such discrimination also impacts their civil rights. Unfortunately, Title VII¹⁷², the statute that regulates employment discrimination, does not prohibit such discrimination. Although the statute prohibits discrimination based on national origin, the Supreme Court ruled that discrimination based on citizenship or migrant status is not prohibited under this category.¹⁷³ As a result, the interrelationship between citizenship status and national origin discrimination has been truncated. Even when the Equal Employment Opportunity Commission brings cases which it bills as "trafficking" cases, the causes of action that it brings focus on harassment and discrimination based on national origin, not on discrimination because of migrant status.¹⁷⁴ Building on the success of legislative work in the trafficking field, a concerted effort should be made to amend Title VII to cover immigrant workers.

168. Ontiveros, *Hoffman*, *supra* note 17, at 672-74.

169. *Id.* at 673.

170. *Id.* at 672-73.

171. Maria L. Ontiveros, Employment Discrimination, in James A. Gross and Lance Compa, ed., *Human Rights in Labor and Employment Relations* 195, 210-11 (LERA 2006); Rebecca Smith, Prosecute, Prevent, Protect: Migrant Labor, Forced Labor, and Human Rights, in James A. Gross and Lance Compa, ed., *Human Rights in Labor and Employment Relations* 155, 164-66 (LERA 2006).

172. 42 U.S.C. §§ 2000e-1(a), -2(a) (2006).

173. *Espinoza v. Farrah*, 414 U.S. 86, 95-96 (1973).

174. William R. Tamayo, *The EEOC and Immigrant Workers*, *U.S.F. Law Rev.* 253, 259 (2009).

E. Organize and Build Coalitions around the Intersection of Civil Rights, Citizenship Rights, Labor Rights and Human Rights.

In order to help their constituents, advocates of labor rights, citizenship rights, human rights, and civil rights should seize the opportunity offered by the Thirteenth Amendment to organize and build coalitions because the Amendment offers a theoretical bridge between these groups.¹⁷⁵ Some connections have already been made between these groups. For example, campaigns aimed at helping immigrant workers fight governmental oppression have brought these groups together.¹⁷⁶ Within the anti-trafficking movement itself, efforts have started and must continue to form alliances between traditional groups focused on prostitution and sex trafficking and groups focused on labor trafficking, so that the definition of trafficking will become as broad as possible.¹⁷⁷ This section argues that additional coalition building opportunities exist, specifically to fight anti-immigrant laws. In addition, it argues that the groups should use a positive, rights-based approach within these coalitions.

The language and message of the Thirteenth Amendment should be used by coalitions of labor rights, immigrant rights, civil rights, and human rights groups to fight draconian state and local immigration laws. For example, Alabama recently passed and a local judge upheld several portions of a very restrictive immigration law.¹⁷⁸ The judge upheld a section that requires state and local law enforcement officials to try to verify a person's immigration status during routine traffic stops or arrests, if "a reasonable suspicion" exists that the person is in the country illegally.¹⁷⁹ Further, she ruled that a section that criminalized the "willful failure" of a person in the country illegally to carry federal immigration papers did not pre-empt federal law.¹⁸⁰ Among the other sections Judge Blackburn upheld: one that nullifies any contracts entered into by an illegal immigrant;¹⁸¹ another that forbids any transaction between an illegal immigrant and any division of the state,¹⁸² a proscription that has already led to the denial of a Montgomery man's application for water and sewage service;¹⁸³ and, most controversially, a section that requires elementary and secondary schools to determine the immigration status of incoming students.¹⁸⁴ On the other hand, the judge did issue a preliminary injunction against several

175. Maria L. Ontiveros, *Immigrant Rights and the Thirteenth Amendment*, New Labor Forum, Spring 2007, at 26, 30-32.

176. Ontiveros, *Labor Union Coalition Challenges*, *supra* note 46, at 136-46.F

177. Kim & Chang, *supra* note 92.

178. See Campbell Robertson, *Alabama Wins in Ruling on Its Immigration Law*, N.Y. TIMES, Sept. 29, 2011, at A16. See generally *Memorandum Opinion* (Sept. 28, 2011, 12:35 PM), <http://lawprofessors.typepad.com/files/11-2746-memopn-entered.pdf>.

179. Robertson, *Alabama Wins in Ruling on Its Immigration Law*.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

sections of the law, agreeing with the government's case that they pre-empted federal law.¹⁸⁵ She blocked a broad provision that outlawed the harboring or transporting of illegal immigrants and another that barred illegal immigrants from enrolling in or attending public universities.¹⁸⁶

Several groups have started to use Thirteenth Amendment rhetoric in response to the Arizona law. The law has been characterized as a modern day version of Jim Crow laws, and dubbed "Juan Crow" laws.¹⁸⁷ Both NBC News¹⁸⁸ and USA Today¹⁸⁹ ran editorials making the connections between these deprivations and the deprivations that freed slaves encountered following emancipation. African American ministers of the Greater Birmingham Ministries in Alabama compared the law to the Fugitive Slave Law, calling this "one of [the] worst times since Jim Crow,"¹⁹⁰ and they urged young people to protest the violation of human rights. The AFL-CIO has also joined the protest, emphasizing the ways in which the Arizona law is an anti-worker law and the ways in which it replicates the human rights abuses of Jim Crow.¹⁹¹ These responses are powerful and potentially transformative because they recognize the connections between the underlying labor rights, human rights, civil rights, and citizenship rights values of the Thirteenth Amendment. They should serve as a cornerstone upon which to build coalitions between these groups.

These coalitions can be even stronger if they use a positive rights approach, like the one modeled by Not-for-Sale.¹⁹² James Pope has argued that the Thirteenth Amendment provides a constitutional path for the labor movement to claim core labor rights¹⁹³ and has also explained the linkages between human trafficking and this free labor constitutional model.¹⁹⁴ As he argued, the use of a positive rights model for the Thirteenth Amendment provides a strong analytical basis to develop this constitutional right. The

185. *Id.*

186. *Id.*

187. Paul Kleyman, *From Jim Crow to Juan Crow – a Boomer Reflects on Alabama's Civil Rights Legacy*, HUFFINGTON POST (Oct. 13, 2011, 2:16 PM), http://www.huffingtonpost.com/paul-kleyman/alabama-immigration-law_b_1006219.html.

188. See Kyle Drenner, *NBC: New Alabama Law Treats Illegal Immigrants Like Blacks of the Jim Crow Era*, NEWSBUSTERS (Nov. 15, 2011, 10:48 AM), <http://newsbusters.org/blogs/kyle-drennen/2011/11/15/nbc-alabamas-new-law-treats-illegal-immigrants-blacks-jim-crow-era>.

189. See David Person, *'Juan Crow' Law Alive and well in Alabama*, USA TODAY (Nov. 1, 2011, 5:28 PM), <http://www.usatoday.com/news/opinion/forum/story/2011-11-01/alabama-illegal-immigration-law/51031138/1>.

190. *One of Alabama's Worst Times Since Jim Crow*, AM. CIVIL LIBERTIES UNION, <http://www.aclu.org/immigrants-rights/one-alabamas-worst-times-jim-crow>.

191. *Crisis in Alabama: Investigating the Devastating Effects of HB56*, AFL-CIO, <http://edit.aflcio.org/content/download/4367/46496/version/1/file/alabama.pdf> (last visited Apr. 14, 2012).

192. See *supra* Part II.B.

193. James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-first Century*, 51 RUTGERS L. REV. 941, 961-5 (1999).

194. Pope, *A Free Labor Approach to Human Trafficking*, *supra* note 125, at 1867-68.

Freedom Network, which bills itself as “the only national coalition of anti-trafficking service providers to adopt a rights-based framework” provides an example.¹⁹⁵ In its literature on the labor rights of trafficked workers, it argues that specific rights available to all workers (such as the right to minimum wage, the right to organize, the right to leave an abusive employment relationship, the right to be free of discrimination and retaliation) would benefit trafficked workers as well.¹⁹⁶ Its literature on human trafficking and immigrant rights also focuses on the need for positive rights such as a path to legalization, protection of immigrant worker rights to ensure economic security, and fair and effective enforcement of immigration laws in order to ensure that trafficked workers will be guaranteed human dignity and avoid exploitation.¹⁹⁷ Coalitions should follow this approach because it allows for the development of a broad, holistic and ultimately more powerful vision of the Thirteenth Amendment.

CONCLUSION

The Thirteenth Amendment, which on its face bars slavery and involuntary servitude, can be interpreted to prohibit those institutions that systematically infringe on the intersection of human rights, civil rights, citizenship rights and labor rights. Opponents of human trafficking have successfully used the Amendment to pass legislation and win court cases to help victims of the most egregious forms of modern day slavery. This essay has argued that the Amendment can and should be used more expansively than that. In particular, the Amendment should be used to protect immigrant workers. The theoretical basis for this expansion can be found by putting the treatment of today’s immigrant workers into the historical context of chattel slavery and guest workers. Today’s undocumented workers and guest workers form a caste of workers of color that labor beneath the floor created for free labor in America. They perform much of the same type of work performed by antebellum slaves and suffer from the same deprivations of labor rights, civil rights, citizenship rights, and human rights. The theoretical justification for expanding protection is clear.

This essay takes the next step and formulates a concrete, strategic plan to move from theory to protection. Lessons can be drawn from three innovative anti-trafficking initiatives which have expanded the use of the Thirteenth Amendment: TVPA legislation and litigation; the Not for Sale Campaign; and the National Guestworker Alliance. Using the theories and methodologies of these initiatives, the essay suggests five concrete steps based in the Thirteenth

195. *Advocacy*, FREEDOM NETWORK USA, <http://www.freedomnetworkusa.org/advocacy/index.php> (last visited Apr. 14, 2012).

196. *Human Trafficking and Worker’s Rights*, FREEDOM NETWORK USA (Sept. 2010), http://www.freedomnetworkusa.org/files/Human_Trafficking_and_Worker_s_Rights_September_2010_final.pdf.

197. *Human Trafficking and Immigrant Rights*, FREEDOM NETWORK USA (Sept. 2010), http://www.freedomnetworkusa.org/files/Human_Trafficking_and_Immigrant_Rights_September_2010_final.pdf.

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Amendment that should be pursued to help immigrant workers. Cases should be brought using the Thirteenth Amendment and developing a theory of situational coercion based on oppression at the intersection of human rights, labor rights, civil rights and citizenship rights to determine when labor arrangements constitute involuntary servitude. Administrative agencies should be pushed to issue visas for victims of a variety of oppressive labor relationships to establish that these labor arrangements violate the Thirteenth Amendment. The constitutionality of excluding agricultural and domestic workers from the National Labor Relations Act should be challenged to show the connection between the type of oppression prohibited by the Thirteenth Amendment and the lives of contemporary immigrant workers in these industries. Title VII should be amended to protect migrant and immigrant workers from discrimination. Finally, coalitions between immigrant rights groups, civil rights groups, human rights groups, and labor groups can organize around the Thirteenth Amendment to create positive rights that will help immigrant workers. These five steps are a comprehensive plan involving litigation, lobbying, administrative law and activism, which can help establish the Thirteenth Amendment as a constitutional basis for protecting contemporary immigrant workers.