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by

Benjamin P. Quest

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Process Theory and Emerging Thirteenth Amendment Jurisprudence: The Case of Agricultural Guestworkers

By BENJAMIN P. QUEST*

A RESURGENCE OF CONSTITUTIONAL scholarship on the Thirteenth Amendment¹ has been emerging since the 1950s. In 1951, Jacobus tenBroek argued that courts could construe the Constitution's ban on slavery as not only an attack upon compulsory servitude but also as an assault on the harms and legacies associated with slavery.² The Supreme Court adopted this view a decade later and held that the Thirteenth Amendment authorized Congress to eliminate purely private acts of racial discrimination in housing sales as a legacy of slavery.³ Lea VanderVelde has explored the legislative record of the Thirteenth Amendment and concluded that nineteenth-century legislators envisioned the harms and legacies of slavery as more than the elimination of race-based involuntary servitude.⁴ Many nineteenth-century legislators viewed the Thirteenth Amendment as establishing mini-

* Class of 2007; B.A., University of California, Berkeley, 1999; M.A., Middlebury College, 2004; Articles Editor, *U.S.F. Law Review*, Volume 41. I would like to thank my husband, Charles, and my parents for encouraging and supporting my legal education. I would also like to thank Professor Maria L. Ontiveros who provided me the inspiration for this topic. Lastly, I would like to thank my friend and editor, Nicholas Tsukamaki, for his hard work in preparing this Comment for publication.

1. U.S. CONST. amend. XIII. The Thirteenth Amendment states that “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation.” *Id.*

2. Jacobus tenBroek, *The Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 172-73 (1951).

3. *Jones v. Mayer Co.*, 392 U.S. 409, 439-41 (1968) (referring to the harms and legacies associated with slavery as “badges and incidents” of slavery).

4. Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 495 (1989).

mum labor standards applicable to all workers inside the United States.⁵

James Pope demonstrates that early twentieth-century workers also viewed the Thirteenth Amendment as fashioning a broad range of labor rights.⁶ Also focusing on labor, Maria Ontiveros critiques the denial of back pay for undocumented victims of labor violations as a legal sanction of unequal labor rights between undocumented and documented workers and, hence, a violation of the Thirteenth Amendment.⁷ Others look beyond the labor arena and advocate for an interpretation of the Thirteenth Amendment that pushes Congress to enact a sweeping range of federal civil-rights legislation.⁸ This Comment adds to the debate by applying process theory⁹ as a limiting principle to an expansive substantive interpretation of the Thirteenth Amendment and uses United States agricultural guestworker policy¹⁰ as a case study. Viewed through a process theory lens, the Thirteenth Amendment compels Congress to revise guestworker¹¹ statutes since guestworkers are unable to take advantage of democratic channels to combat employment practices that replicate slavery-like harms.¹²

Process theory interprets the Constitution as mainly providing procedural mandates rather than enumerating substantive rights.¹³ Although the theory is commonly associated with judicial review, this Comment advocates its use as a congressional guide to identify and

5. See *id.* at 451–52.

6. James Gray Pope, *Labor's Constitution of Freedom*, 106 *YALE L.J.* 941, 942 (1997).

7. Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 *GEO. IMMIGR. L.J.* 651, 651 (2004).

8. Alexander Tsisis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 *B.C. L. REV.* 307, 307 (2004).

9. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 74, 80, 87 (Harvard Univ. Press 1980). Process theory is a judicial theory that interprets the Constitution as mandating intensified judicial scrutiny where history and common sense demonstrate a procedural breakdown in individual and collective political processes. *Id.*

10. “Guestworker policy” refers to both the historical and present practice of lawfully employing non-citizens to temporarily work in the United States. See Cindy Hahamovitch, *Creating Perfect Immigrants: Guestworkers of the World in Historical Perspective*, 44 *LAB. HISTORY* 69, 70 n.1 (2003) (“In the last 40 years, state-authorized, temporary foreign workers have come to be known collectively as ‘guestworkers.’”).

11. Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1101(H)(1)(b) (West 2005) (authorizing and establishing the requirements under which U.S. employers may hire guestworkers). See also U.S. Citizenship and Immigration Services, <http://www.uscis.gov/graphics/services/tempbenefits/TempWorker.htm> (last visited Sept. 5, 2006) (discussing the procedures for lawfully employing temporary foreign workers).

12. See *Jones v. Mayer Co.*, 392 U.S. 409, 438–41 (1968). “Slavery-like harms” refers to the badges and incidents of slavery mentioned in *Jones*. *Id.*

13. See ELY, *supra* note 9, at 88–101.

limit those situations calling for legislative action under Section Two of the Thirteenth Amendment.¹⁴ Instead of asking whether a fundamental right is at stake, process theory inquires whether the underlying procedures giving rise to legal relationships are fair.¹⁵ Under circumstances where discrete and insular minorities are unable to protect their interests through conventional democratic channels, process theory requires heightened governmental scrutiny.¹⁶

Part I of this Comment examines the substantive scope of the Thirteenth Amendment by looking at the legislative debates during the Amendment's creation as well as subsequent Thirteenth Amendment case law. Although commoditization and family unity concerns; labor, political, and citizenship rights; freedom of movement; and, ultimately, liberty lie at the Thirteenth Amendment's core, this Comment does not argue that all laws that interfere with these rights offend the Thirteenth Amendment. Rather, Part II introduces process theory¹⁷ as a constitutional interpretive guide and limiting principle to help Congress resolve when to invoke the Thirteenth Amendment. In borderline cases exhibiting abuses that the Thirteenth Amendment potentially prohibits, process theory tips the balance in favor of legislation pursuant to the Thirteenth Amendment.

Next, Part III presents two interrelated Thirteenth Amendment borderline cases involving guestworkers: the mid-twentieth century Bracero Program¹⁸ and the current United States agricultural guestworker program. This section shows that guestworkers have been and still are a vulnerable, insular, and discrete minority.¹⁹ Applying process theory, the minority status of guestworkers merits heightened congressional review of guestworker programs. This section also demonstrates that past and present guestworker programs create labor situations that replicate slavery's harms, interfering with substantive rights protected by the Thirteenth Amendment. Subject to heightened scrutiny, these discredited labor situations demand congress-

14. U.S. CONST. amend. XIII, § 2 (authorizing Congress to enforce the prohibition of slavery and involuntary servitude, except as punishment for a duly convicted offense, by "appropriate legislation").

15. See ELY, *supra* note 9, at 74.

16. See *id.*; see also James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 228 (1993) (describing Ely's process theory as requiring judicial review to ensure that political communication and participation remain open and to guarantee that such processes are free of prejudice against discrete and insular minorities).

17. See ELY, *supra* note 9.

18. Deborah Cohen, *Caught in the Middle: The Mexican State's Relationship with the United States and Its Own Citizen-Workers, 1942-1954*, 2001 J. AM. ETHNIC HISTORY 110 (2001).

19. See *infra* text accompanying notes 142-43, 181-89.

sional reform pursuant to Section Two of the Thirteenth Amendment.

Lastly, this Comment concludes by proposing that Congress enact guestworker legislation, pursuant to the Thirteenth Amendment, that guarantees guestworker participation during the creation of guestworker employment programs.

I. The Thirteenth Amendment Enables Congress to Eliminate the Lingering Badges and Incidents of Slavery and Involuntary Servitude

Section One of the Thirteenth Amendment states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."²⁰ Section Two declares: "Congress shall have power to enforce this article by appropriate legislation."²¹

The Thirteenth Amendment recognizes the substantive right to be free from both slavery and involuntary servitude.²² Interpreting the Amendment, however, raises many questions, as it is far from clear what "slavery" or "involuntary servitude" mean.²³ Nor is it readily apparent what constitutes the "existence" of slavery or what sort of "appropriate legislation" is necessary to eradicate slavery and involuntary servitude.

Black's Law Dictionary defines slavery as a "situation in which one person has absolute power over the life, fortune, and liberty of another"²⁴ and describes involuntary servitude as "[t]he condition of one forced to labor—for pay or not—for another by coercion or imprisonment."²⁵ Although academics have criticized these definitions as incomplete,²⁶ the Supreme Court's interpretation of involuntary

20. U.S. CONST. amend. XIII, § 1.

21. *Id.* § 2.

22. *Id.*

23. See *United States v. Kozminski*, 487 U.S. 931, 942 (1988).

24. BLACK'S LAW DICTIONARY 1402 (8th ed. 2004).

25. *Id.* at 1422.

26. Criticizing this definition of slavery, academics have emphasized that owners never exercised absolute control over their slaves. See ROBERT J. STEINFELD, *COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY* 7 (Christopher Tomlins ed., 2001). Although sanctions were too often swift and cruel, American slaves regularly interrupted work production at critical moments as a means to usurp power and bargain for better labor conditions. See *id.* Likewise, labor scholar Robert Steinfeld has criticized the legal definition of involuntary servitude as too absolute, characterizing the difference between

servitude and slavery in *United States v. Kozminski* was even more restrictive.²⁷ There, the Court referred to involuntary servitude as forced labor through threat of physical or legal punishment²⁸—not through mere psychological coercion—and defined slavery as a narrow subset of involuntary servitude.²⁹

The definitions of involuntary servitude and slavery in *Kozminski* apply primarily to Section One of the Thirteenth Amendment.³⁰ Thus, the holding in *Jones v. Meyer Co.*³¹ that Congress may enact “appropriate legislation” to stamp out the “badges and incidents” of slavery and involuntary servitude under Section Two of the Thirteenth Amendment, has not been curtailed by subsequent jurisprudence.³²

Legislative debates during the drafting of the Thirteenth Amendment support the proposition that Section Two of the Thirteenth Amendment empowers Congress to eliminate not only slavery, but commoditization of humans, lack of labor rights, conditions hostile to family maintenance, restraints to free movement, exclusion from the political process, and an outright ban on citizenship.³³ This Comment briefly reviews the legislative discussion surrounding the Thirteenth Amendment as a starting point to assess slavery’s badges and incidents. When conditions that invoke process theory appear and a significant number of harms associated with slavery arise, the Thirteenth Amendment directs Congress to take action.

A. Nineteenth-century Legislators Envisioned the Thirteenth Amendment as a Means to Guarantee Labor, Family, and Political Rights

The Amendment’s drafters perceived human commoditization—treating people as property³⁴—as one of slavery’s more pernicious vices. For example, Massachusetts Representative Charles Sumner stated that “traffic in human beings, as an article of ‘commerce among

voluntary and involuntary servitude as a continuum contingent upon varying degrees of economic and physical coercion. *Id.* at 8.

27. *Kozminski*, 487 U.S. at 952.

28. *Id.*

29. *Id.*

30. *Id.* at 938–41.

31. 392 U.S. 409 (1968) (holding that the Thirteenth Amendment authorized Congress to eliminate purely private racial discrimination in housing sales as a legacy of slavery).

32. *Kozminski*, 487 U.S. at 951.

33. See *infra* text accompanying notes 34–43.

34. See Ontiveros, *supra* note 7, at 674.

States,' [should] be extirpated."³⁵ Representative John Farnsworth of Illinois remarked: "[God] gave man dominion over things animate and inanimate, He established property. Nowhere do you read that He gave man dominion over another man."³⁶ These statements denounced commoditization as reducing humans to property and equating people with commercial objects.³⁷ In the extreme, regarding humans as a commodity leads to a complete deprivation of liberty, as human well-being and freedom are cast aside for pecuniary gain.

Proponents of the Thirteenth Amendment also viewed the poor labor condition of unreasonable wages as a constraint upon liberty and part and parcel of slavery.³⁸ Abraham Lincoln's *Emancipation Proclamation* condemns slavery as smothering the possibility to "[l]abor faithfully for reasonable wages."³⁹ Inadequate daily compensation severely limits individual freedom by binding one to the continual task of surviving. As Ebon Ingersoll, Representative from Illinois, opined, "[the black man] has a right to live, and live in a state of freedom. . . . He has a right to till the soil, to earn his bread by the sweat of his brow, and enjoy the rewards of his own labor."⁴⁰ Ingersoll's statement underscores the notion that reasonable wages for labor are a foundational condition for freedom and liberty. A systemic failure to provide reasonable wages deprives laborers of freedom, constituting a badge and incident of slavery.

Ingersoll also found slavery reprehensible because it decimated the nuclear family.⁴¹ Slavery separated husbands from their wives and mothers from their children, leaving whole segments of society with-

35. CONG. GLOBE, 38th Cong., 1st Sess. 1482 (1864), *reprinted in* STATUTORY HISTORY OF THE UNITED STATES CIVIL RIGHTS: PART I 82 (Bernard Schwartz ed., Chelsea House 1970).

36. CONG. GLOBE, 38th Cong., 2d Sess. 200 (1865), *reprinted in* STATUTORY HISTORY OF THE UNITED STATES CIVIL RIGHTS: PART I 91 (Bernard Schwartz ed., Chelsea House 1970).

37. *Id.* See also Ontiveros, *supra* note 7, at 674 (critiquing the denial of back pay for undocumented victims of labor violations as a legal sanction of unequal labor rights between undocumented and documented workers and, hence, a violation of the Thirteenth Amendment).

38. STATUTORY HISTORY OF THE UNITED STATES CIVIL RIGHTS: PART I 25-96 (Bernard Schwartz ed., Chelsea House 1970).

39. President Abraham Lincoln, The Emancipation Proclamation (Jan. 1, 1863) (excerpts available in STATUTORY HISTORY OF THE UNITED STATES CIVIL RIGHTS: PART I 23 (Bernard Schwartz ed., Chelsea House 1970)).

40. CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864), *reprinted in* STATUTORY HISTORY OF THE UNITED STATES CIVIL RIGHTS: PART I 53 (Bernard Schwartz ed., Chelsea House 1970).

41. See *id.*

out the "right to the endearments and enjoyment of family ties."⁴² Whether viewed as an egregious effect of commoditization or a separate horror of slavery, forced familial separation severs the passing of love, affection, and intellectual capital from one generation to the next. Also, the absence of such love and knowledge limits child development, creating an entire class of persons poorly equipped to succeed in society. This perpetuates the damaging illusion that certain communities are inherently ill-suited for success in America. The stereotype of a group predisposition for failure breeds racism, which in turn is used to justify slavery, creating a legacy that is difficult to reverse.

In addition to familial separation, the drafters of the Thirteenth Amendment understood that slavery restrained free movement for both African-Americans enslaved in the South and those who were free in the North.⁴³ For southern African-Americans, their owners controlled their movement.⁴⁴ In the North, "[t]wenty million free men . . . were practically reduced to the condition of semi-citizens of the United States: for the enjoyment of their rights, privileges, and immunities as citizens depended upon a perpetual residence north of Mason and Dixon's line."⁴⁵ In this way, limitations on African-American mobility in the nineteenth century constituted yet another badge and incident of slavery.

Slavery also robbed African-Americans of a panoply of political rights. Slaves could not vote, participate, or play any meaningful role in the political process.⁴⁶ Slavery barred African-Americans from effectively accessing the legislative, executive, and judicial branches.⁴⁷ Forced bondage silenced the voices of slaves regarding any policy affecting their ability to seek dignified work and maintain family cohesion. At best, African-Americans were represented by benevolent politicians who had never personally experienced the plight of slaves. At worst, they were represented by politicians who viewed their continued wealth and power as contingent on the maintenance of chattel slavery.

42. *Id.*

43. See CONG. GLOBE, 38th Cong., 1st Sess. 1202-03 (1864), reprinted in STATUTORY HISTORY OF THE UNITED STATES CIVIL RIGHTS: PART I 38 (Bernard Schwartz ed., Chelsea House 1970).

44. *Id.*

45. *Id.*

46. See *Scott v. Sanford*, 60 U.S. 393 (1856).

47. See *id.*

Thirteenth Amendment opponent William Kelley feared that slavery's death entailed "the negro [as] a free citizen . . . protected everywhere, in defiance of existing State constitutions and laws . . . and . . . the negro [as] a voting citizen."⁴⁸ Kelley's fears reinforce the argument that Thirteenth Amendment proponents desired to confer political and citizenship rights upon African-Americans and viewed the absence of such rights as a badge and incident of slavery.⁴⁹

The legislative discussion leading to the Thirteenth Amendment illuminates the drafters' understanding of the badges and incidents of slavery. Legislators believed that the evils associated with slavery encompassed economic, labor, familial, political, and citizenship abuses, as well as constraints on mobility. The drafters desired to eliminate the conditions of the "worst off working man."⁵⁰ Their views serve as a guide for current legislators in determining which abuses to combat pursuant to Section Two of the Thirteenth Amendment.

B. Case Law Extended the Scope of the Thirteenth Amendment Beyond the Context of African-American Enslavement, Authorizing Congress to Abolish Not Only Slavery and Involuntary Servitude, but Also Its Badges and Incidents

As envisioned by nineteenth-century legislators, the Thirteenth Amendment protected African-Americans from commoditization, labor abuse, family disruption, restraints on mobility, and the denial of political and citizenship rights. At the very least, it mandated an end to African-American enslavement in the United States. At the close of the Civil War, whether the judiciary would construe the Thirteenth Amendment as applying to other groups remained unanswered.

Congress was the first to act. Under the authority of the Thirteenth Amendment, Congress crafted legislation to prohibit slavery-like abuses within labor arrangements.⁵¹ In 1867, for example, Con-

48. See STATUTORY HISTORY OF THE UNITED STATES CIVIL RIGHTS: PART I 50 (Bernard Schwartz ed., Chelsea House 1970).

49. See *infra* Part III.B. The claim that the absolute denial of citizenship and political rights represents a badge and incident of slavery has particular relevance to legally-sanctioned immigrant labor. This Comment argues that through a process theory lens, guestworker abuses demand congressional action pursuant to Section Two of the Thirteenth Amendment. Professor Maria Ontiveros has discussed with the author that regardless of any procedural flaws in the creation of guestworker programs, some guestworker abuses directly implicate the Thirteenth Amendment.

50. VanderVelde, *supra* note 4, at 495-96.

51. See Ontiveros, *supra* note 7, at 660.

gress outlawed the New Mexico territory's labor system that forced debtors to work in order to pay off their debt.⁵² Five years later, the Supreme Court indirectly reinforced Congress's action in New Mexico in the *Slaughter-House Cases*.⁵³ Despite rejecting the plaintiff's claim that Louisiana's regulation of privately-owned slaughterhouses violated the Thirteenth Amendment, the Court expanded the Amendment's reach by declaring that it could regulate labor conditions beyond those associated with African slavery.⁵⁴ The Court specified that "the language and spirit" of the Thirteenth Amendment encompassed both the "Mexican peonage or the Chinese Coolie labor system"⁵⁵ and emphasized that the Amendment aimed to remedy slavery's evils and not just slavery itself.⁵⁶ The Thirteenth Amendment permitted Congress to effectuate American aspirations of racial equality, basic labor rights, and liberty after the Civil War.⁵⁷

Early Thirteenth Amendment jurisprudence thus established a judicial concern with the horrors of slavery, regardless of race.⁵⁸ Equally significant, unlike the Fourteenth Amendment,⁵⁹ the Court applied the Thirteenth Amendment to private and not solely public matters, expanding the scope of the Amendment beyond other constitutional provisions that combat civil-rights violations.⁶⁰

The Thirteenth Amendment's prohibition of certain private labor arrangements, regardless of race, was reaffirmed in *Bailey v. Alabama*.⁶¹ In *Bailey*, a 1903 Alabama statute rendered the failure to perform a labor contract without repaying an advance in salary as prima facie evidence of intent to defraud, and made it punishable by forced labor.⁶² The law did not permit an employee to testify and rebut this presumption unless he could marshal outside evidence to the contrary.⁶³ The Supreme Court declared that Alabama's statute vio-

52. *See id.*

53. 83 U.S. 36 (1873); *see also* Ontiveros, *supra* note 7, at 659.

54. *See Slaughter-House Cases*, 83 U.S. at 72; *see also* Ontiveros, *supra* note 7, at 659.

55. *See Slaughter-House Cases*, 83 U.S. at 72.

56. *Id.*

57. Ontiveros, *supra* note 7, at 659–62.

58. *See id.*

59. U.S. CONST. amend. XIV.

60. *See* Tsesis, *supra* note 8, at 311.

61. 219 U.S. 219 (1911). *Bailey* involved labor contracts where an employee could receive money up front to work for a fixed period. *Id.* at 228–30. If an employee quit without paying back the advanced sum, Alabama statute permitted the employer to compel the employee to work "involuntarily" until the debt was paid off. *Id.*

62. *Id.*

63. *Id.* at 236.

lated the Thirteenth Amendment.⁶⁴ The Court reasoned that one could subvert the Thirteenth Amendment if, under the guise of contract law, employers could enforce compulsory labor where the employer had allotted payment advances.⁶⁵ The Court then concluded that the moment one compels another to work against his will, involuntary servitude begins.⁶⁶ The opinion underscored the idea that compelled labor is no less involuntary simply because the original employment agreement was freely negotiated.⁶⁷ Narrowly construed, *Bailey* confirms little more than a racially neutral proscription of specific performance in labor contracts.⁶⁸ Nonetheless, prominent dicta within the opinion characterizes the Thirteenth Amendment as a charter of universal freedom designed to "abolish slavery of whatever name and form and all its badges and incidents."⁶⁹

In the 1968 case *Jones v. Mayer Co.*,⁷⁰ the Court referenced language discussing slavery's badges and incidents from past cases to support its central argument that the Thirteenth Amendment grants Congress the authority to determine the badges and incidents of slavery.⁷¹ Applying this rule to the facts of the case, the Court held that the Thirteenth Amendment prohibits nationwide private-housing discrimination aimed at African-Americans.⁷² The Court utilized research by Jacobus tenBroek,⁷³ noting that the drafters of the Thirteenth Amendment envisioned Section Two as sanctioning a wide range of positive governmental action to protect the descendants of former slaves.⁷⁴ In *Jones*, the Court declared that racially motivated restraints upon fundamental rights, such as buying and selling property, epitomize the badges and incidents of slavery.⁷⁵

Recent judicial opinion has left untouched the *Jones* deference toward congressional action to define and combat the badges and incidents of slavery, while at the same time limiting the types of practices that constitute involuntary servitude to physical or lawful coercion.⁷⁶

64. *Id.* at 245.

65. *Id.* at 242.

66. *Id.*

67. *Id.*

68. *Id.* at 244-45.

69. *Id.* at 241.

70. 392 U.S. 409 (1968).

71. *Id.* at 438-44.

72. *Id.* at 439-41.

73. *See id.* at 429 n.46.

74. *Id.* at 440.

75. *Id.* at 441.

76. *See United States v. Kozminski*, 487 U.S. 931, 944 (1988).

The majority in *Kozminski* feared that including psychological coercion within the definition of involuntary servitude would give rise to Thirteenth Amendment claims involving religious indoctrination and family issues that have little in common with slavery's legacy.⁷⁷ Even within the tailored definition of involuntary servitude given in *Kozminski*, the Court specifically noted that "it is possible that threatening . . . an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude."⁷⁸

In sum, the Thirteenth Amendment embodies familial, political, and citizenship rights, as well as the right to be free from commoditization and other labor abuses. Early congressional action following the Amendment's ratification demonstrates that Congress viewed it as a legislative grant to eradicate abuses associated with slavery and involuntary servitude. Moreover, Supreme Court precedent signals judicial approval of the Amendment's use outside of the African-American context and of Congress' authority to determine current manifestations of the badges and incidents of slavery pursuant to the Thirteenth Amendment. *Jones* and other judicial opinions from the twentieth century also emphasize that the Thirteenth Amendment did not become irrelevant with the eradication of African-American chattel slavery. Expansively interpreting *Jones*, Congress could strike down laws that infringe upon fundamental rights, such as political participation or collective bargaining, as badges and incidents of slavery.

II. Process Theory Establishes Parameters for Congressional Action Under Section Two of the Thirteenth Amendment

Although the Thirteenth Amendment extends beyond incidents directly analogous to American slavery, the precise scope of the Thirteenth Amendment is still unclear. Process theory can assist Congress in determining the badges and incidents of slavery in the twenty-first century. Process theory interprets the Constitution as mandating intensified judicial scrutiny where history and common sense demonstrate a breakdown in popular democracy.⁷⁹ Instead of inquiring whether a fundamental right is at stake, process theory asks whether the foundational procedures establishing legal relationships are fair.⁸⁰

77. See *id.* at 943-44, 964 (Brennan, J., concurring); *id.* at 967 (Stevens, J., concurring).

78. *Id.* at 948.

79. See ELY, *supra* note 9, at 74, 80, 87.

80. *Id.* at 74.

Unfair scenarios often arise where discrete and insular minorities are unable to protect themselves from majority-driven oppressive measures through conventional democratic mechanisms.⁸¹ Although commonly viewed as a judicial tool, this Comment advocates using process theory as a legislative guide to identify situations that may constitute a badge and incident of slavery demanding action under Section Two of the Thirteenth Amendment. Where the victims of labor abuse are unable to affect change through conventional democratic channels, Congress should abolish those abuses that implicate wage, familial, political, and citizenship concerns.⁸²

A. Past Legislation, Judicial History, and an Originalist Interpretation of the Constitution Offer Inadequate Guidance to Thirteenth Amendment Congressional Action

The Thirteenth Amendment prohibits abuses that deny basic liberties.⁸³ However, blanket protection of familial, labor, political, and citizenship rights without parameters leads to regulations beyond the scope of the Thirteenth Amendment. Military deployments in foreign countries over multiple years divide families. Economic strains cause many Americans to feel trapped, unable to leave their jobs or relocate. Laws permitting surrogate pregnancy and legalized prostitution commoditize women's bodies. Even though these practices replicate some of slavery's harms,⁸⁴ neither the Supreme Court nor Congress has argued that they violate the Thirteenth Amendment.⁸⁵ The thrust of judicial opinion suggests that the badges and incidents of slavery likely involve fundamental rights⁸⁶ as well as some level of coercion compelling one to participate or remain in a given situation.⁸⁷ Nevertheless, the legislative history and judicial opinions, without the additional guidance of process theory, do not adequately settle whether current scenarios exhibiting slavery-like abuse require congressional action pursuant to the Thirteenth Amendment.

Applying the Thirteenth Amendment by exclusively adhering to the legislative intent, as an originalist might, forces one to prioritize

81. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

82. See *supra* Part I.A.

83. See *Slaughter-House Cases*, 83 U.S. 36 (1873); see also *Jones v. Mayer Co.*, 392 U.S. 409 (1968); *Bailey v. Alabama*, 219 U.S. 219 (1911).

84. See *supra* Part I.

85. See *supra* Part I.

86. See *Jones*, 392 U.S. at 441.

87. See *Bailey*, 219 U.S. at 219.

between potentially conflicting legislative documents. Whether congressional action pursuant to the Thirteenth Amendment must implicate one, some, or all of the substantive issues that legislators discuss is unclear. One has to discern whether the views of various statesmen represent personal beliefs, their constituents' views, the views of society at large, or some combination of all three, and to what degree this should influence current congressional action.⁸⁸

On one end of the originalist spectrum, Justice Antonin Scalia would refer to the legislative record of the Thirteenth Amendment only where it represents nineteenth-century public thought.⁸⁹ Given that the views of women and minorities are largely absent from these records, an assessment of nineteenth-century public thought solely based on official legislative records is incomplete. In addition, the Thirteenth Amendment legislative discussion occurred within a country divided by the Civil War, leading to a congressional record that reflects the views of radical northern Republicans.⁹⁰ It is also difficult to exclusively rely on legislative history when nineteenth-century expectations concerning the abolition of slavery never contemplated twenty-first century global labor interactions.⁹¹ Therefore, a constitutional interpretive method that provides a comprehensive, yet limiting and workable, Thirteenth Amendment analysis is necessary. This method is process theory.

B. Process Theory Characterizes the Constitution as Primarily Preoccupied with Procedural Fairness

John Hart Ely revitalized constitutional scholarship by interpreting the Constitution as predominantly focused on procedure and structure rather than on substantive rights.⁹² Ely's theory is known as process theory and views the search for fundamental rights within the Constitution as elusive and overly discretionary.⁹³ Ely's interpretation of the Constitution advocates for heightened procedural protections to protect vulnerable groups within society rather than establishing a

88. See Ronald Dworkin, *Comment in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 115, 115–18 (Amy Gutmann ed., 1997) (commenting on Justice Antonin Scalia's essay, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, within the same collection of works).

89. See *id.* at 118.

90. See VanderVelde, *supra* note 4, at 495–96.

91. See Dworkin, *supra* note 88, at 118.

92. See ELY, *supra* note 9, at 92.

93. See *id.* at 73.

concrete list of fundamental rights.⁹⁴ Process theory interprets the Constitution as providing "procedural fairness in the resolution of individual disputes . . . [and] with ensuring broad participation in the processes of distributions of government."⁹⁵ Instead of asking whether a fundamental right is at stake, process theory inquires whether the procedures underlying a set of democratic outcomes are fair.⁹⁶

By in large, majority rule is the principal governmental procedure in the United States.⁹⁷ Even with carefully-crafted checks and balances, American democracy frequently fails to protect vulnerable, isolated, and unpopular minority groups where such groups have no avenue to affect power.⁹⁸ In *United States v. Carolene Products*,⁹⁹ the Supreme Court pointed out that popular democracy may often threaten a small and insular minority's ability to participate in society,¹⁰⁰ leading to the tyranny of the majority.¹⁰¹ To protect minorities against the majority's injustices, process theory aims to ensure accessible political communication and participation for all members in society and to maintain "these processes free of prejudice against discreet [sic] and insular minorities."¹⁰²

Process theory supports the claim that the Constitution is primarily procedural by focusing on the overarching structure of American government as set out in the Constitution.¹⁰³ From balancing federal and state power to apportioning responsibility between the executive, judiciary, and the legislature, the Constitution repeatedly promotes procedures that guarantee separation of powers.¹⁰⁴ This prevents one faction within government from monopolizing power to the nation's detriment.¹⁰⁵ For example, Article IV's Privileges and Immunities Clause and the Commerce Clause protect out-of-state citizens and goods from in-state prejudices and monopolies.¹⁰⁶ The Ex Post Facto

94. See *id.* at 80 (quoting Madison's *Federalist 51*, which warned of the injustice wrought on minorities where an unjust majority asserts its will upon all members of society).

95. *Id.* at 87.

96. *Id.*

97. See *id.* at 78.

98. *Id.*

99. 304 U.S. 144 (1938).

100. *Id.* at 152-53 n.4.

101. See ELY, *supra* note 9, at 75-80.

102. James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 228 (1993).

103. See ELY, *supra* note 9, at 79-80; see also *Scott v. Sanford*, 60 U.S. 393 (1856).

104. See ELY, *supra* note 9, at 79-80.

105. *Id.* at 80.

106. *Id.* at 83.

and Bill of Attainder Clauses deal with separation of powers.¹⁰⁷ In fact, the Bill of Rights, popularly perceived as substantive, contains overriding procedural components.¹⁰⁸ The Fifth through the Eighth Amendments involve judicial procedure.¹⁰⁹ Even First Amendment free speech concerns stem from fears that the political process will break down unless ideas flow freely.¹¹⁰ Ely also reinforces his assertion that the Constitution is, at heart, a procedural document by characterizing Supreme Court decisions under the Warren Court not as creations of new substantive rights, but rather as procedural commands to apply governmental protections to everyone.¹¹¹

Within constitutional provisions that protect individual rights, such as the Thirteenth Amendment, process theory compels courts to invalidate legislation where procedural malfunctions exacerbate rights-based violations.¹¹² The Thirteenth Amendment undoubtedly has a procedural component: slaves did not and legally could not officially participate in the political process.¹¹³ Thus, Congress cannot adequately abolish the badges and incidents of slavery without focusing on the procedural breakdowns that fuel them.

Determining whether labor situations should give rise to congressional action pursuant to the Thirteenth Amendment requires analyzing slavery-like abuses and the procedural protections afforded to employers and employees. Re-examining this section's previous discussion on current practices that may constitute a badge or incident of slavery,¹¹⁴ Congress should assess the procedural protections provided to the participating parties—such as meaningful access to the legislative process—as well as consult history and case law before interfering with labor relationships under the Thirteenth Amendment. This additional procedural analysis would help Congress define the

107. *Id.* at 90.

108. *See id.* at 93.

109. *Id.* at 95.

110. *Id.* at 90.

111. *Id.* at 73–74. Warren Court opinions concerning voter qualification and malapportionment are examples of procedural commands to apply governmental protections to everyone. *Id.*

112. *See* Fleming, *supra* note 102, at 224.

113. *See* ELY, *supra* note 9, at 98.

114. *See supra* text accompanying notes 83–87 (noting that employees who feel forced to remain in unwanted jobs, military-induced family disruption, and reproductive practices that commoditize women may conceivably constitute modern instances of slavery's badges and incidents).

scope of Section Two of the Thirteenth Amendment, avoiding the pitfalls referenced in *Kozminski*.¹¹⁵

Process theory focuses on procedural fairness rather than substantive rights,¹¹⁶ demanding heightened scrutiny for discrete and insular minorities.¹¹⁷ Next, this Comment explores past and current guestworker programs as an example of borderline situations implicating the Thirteenth Amendment. When viewed through a process theory lens, however, these interrelated guestworker programs demand congressional action under the Thirteenth Amendment.

III. Past and Present Guestworker Programs Confirm that Insular, Discrete, and Vulnerable Agricultural Laborers with Minimal Political Influence Are Susceptible to Slavery-like Victimization

Guestworker programs represent a compromise between employers who desire cheap foreign labor to fill undesirable jobs and native populations reluctant to bestow citizenship rights on foreign workers.¹¹⁸ To appease both groups, governments worldwide have devised restrictive temporary work programs.¹¹⁹ With few in government looking out for the interests of guestworkers,¹²⁰ history is replete with examples of guestworker abuse.¹²¹ Where United States guestworkers suffer slavery-like abuses and have inadequate mechanisms to affect governmental processes, Congress should utilize Section Two of the Thirteenth Amendment to require guestworker participation in the crafting of guestworker policy.

115. 487 U.S. 931, 943-44, 964, 967 (1987) (Brennan & Stevens, JJ., concurring) (fearing that an overly expansive interpretation of the Thirteenth Amendment could lead to children challenging the custody of their parents and religious indoctrination claims).

116. See ELY, *supra* note 9, at 92.

117. See Fleming, *supra* note 102, at 228 (describing Ely's process-perfecting theory of judicial review).

118. See Hahamovitch, *supra* note 10, at 72-73.

119. *Id.*

120. See *id.* at 73, 76.

121. See *id.* at 76-84.

A. The Bracero Program: As Governmental Representation of Mexican Guestworkers Declined, Slavery-like Abuses Surfaced

1. Braceros Became a Discrete and Insular Minority Isolated from the Political Processes Shaping Their Employment Conditions

World War Two ("WWII") gave rise to the Bracero Program ("Program"),¹²² a bilateral negotiation between Mexico and the United States that legally sent Mexican agricultural employees to work on American farms.¹²³ Implemented on August 4, 1942, the Program lasted until 1964.¹²⁴ The last years of the Program witnessed egregious labor violations¹²⁵ that replicated the badges and incidents of slavery and reflected a breakdown in the Program's procedural fairness.¹²⁶

During WWII, the United States faced an unusually vulnerable bargaining position in relation to Mexico, as it desperately needed Mexican labor to fuel the war effort.¹²⁷ The United States' weak bargaining position permitted Mexico to demand certain labor protections for its citizens.¹²⁸ The United States agreed to act as the Braceros' employer¹²⁹ and bore the responsibility of ensuring compliance with all employment contracts within the Program.¹³⁰ These contracts guaranteed sanitary housing and the prevailing wage for the crops harvested.¹³¹

122. Bracero derives from the Spanish "brazos," and means "arms." Cassell's Spanish-English Dictionary 110 (1978). Mexican migrants were called Braceros, as both governments attested that the name symbolized a collective United States-Mexican valuation of Mexican labor. See Cohen, *supra* note 18, at 111.

123. See Cohen, *supra* note 18, at 113.

124. *Id.* at 110.

125. See Manuel Pastor & Susan Alva, *Guest Workers and the New Transnationalism: Possibilities and Realities in an Age of Repression*, 31 Soc. JUST. 92, 95 n.1-2 (2004). Ernesto Galarza's important 1956 report, *Strangers in Our Fields*, and the well regarded Edward R. Murrow 1960 documentary, *Harvest of Shame*, exposed widespread abuse of Mexican migrants in the Bracero Program. *Id.*

126. See Cohen, *supra* note 18, at 116. Once the United States and Mexico withdrew from directly managing the Program, growers became responsible for the welfare of Braceros from whose labor they profited. *Id.* Forcing the Program's workers to appeal to those who were abusing them represented a collapse in the Program's procedural fairness. See *id.*

127. *Id.* at 115.

128. *Id.*

129. *Id.*

130. *Id.* at 113.

131. *Id.*

Both Mexico and the United States gravely underestimated the desire of some Mexicans to earn a livelihood in the United States.¹³² Soon, neither country could curb the flood of Mexicans illegally entering and working in the United States.¹³³ Mexico lost much of its ability to represent and negotiate fair labor practices for its citizens, since many Mexicans were working outside any labor arrangement over which Mexico could assert control.¹³⁴ Private United States employers, on the other hand, benefited from this excess supply of Mexican workers as they could pay non-Bracero laborers less and evade the Program's fair wages and guaranteed housing mandates.¹³⁵

The United States government's refusal to continue as an employer and the reduction in Mexico's ability to represent and protect its citizens working in the United States initiated the decline in labor standards for Mexicans legally employed under the Program.¹³⁶ In the late 1940s, the United States transferred management of the Program to private employers.¹³⁷ These private employers now controlled the terms and conditions for legal authorization for foreign work on United States' farms.¹³⁸ Employers faced little pressure to uphold labor standards because they could threaten workers who complained about conditions in the fields with deportation or replace such workers with an abundant supply of undocumented help.¹³⁹ Furthermore, though many Mexican officials wanted to protect Braceros, they also feared that if they persistently protested Program labor conditions, they would lose remittances generated by the Program's work opportunities.¹⁴⁰ Thus, Braceros could neither look towards the United States nor Mexico for labor protection, and the result was rampant labor abuse.¹⁴¹

In addition to a lack of effective government representation, at the height of the Program in 1955, Braceros only numbered 400,000,

132. *Id.* at 115-16.

133. *Id.*

134. *Id.*

135. *Id.* at 115.

136. *Id.*; see also Hahamovitch, *supra* note 10, at 82-83.

137. See Cohen, *supra* note 18, at 116.

138. See *id.*

139. See *id.* at 115-16; see also Hahamovitch, *supra* note 10, at 82-83.

140. See Hahamovitch, *supra* note 10, at 83. Remittances refer to the money that migrants earn in the United States and then send back to their native country. DEBORAH WALLER MEYERS, MIGRANT REMITTANCES TO LATIN AMERICA: REVIEWING THE LITERATURE (MAY 1998) (non-numbered working paper, on file with The Tomás Rivera Policy Institute), available at <http://www.iadialog.org/publications/meyers.html>.

141. Cohen, *supra* note 18, at 116.

a fraction of the United States population.¹⁴² As a discrete minority insulated from the political process, Braceros had no access to conventional democratic protections.¹⁴³ Through a process theory lens, this collapse in democratic protections should have raised congressional concern about procedural fairness towards Mexican migrants. The lack of procedural fairness served as both a cause and an effect of Bracero labor abuse.

2. The Braceros' Discrete, Insular, and Minority Status Required Heightened Scrutiny of the Program's Labor Abuses

The Supreme Court has already declared that purely private racial discrimination in housing constitutes a badge and incident of slavery.¹⁴⁴ Congressional authority to determine and abolish the badges and incidents of slavery¹⁴⁵ extends to labor, familial, political, and citizenship issues.¹⁴⁶ Given the breakdown in democratic protections for Braceros, Congress should have closely scrutinized labor abuses directed at Braceros and found that these abuses constituted badges and incidents of slavery.

Employer control over Braceros translated to unreasonable wages, increased commoditization of Braceros, and other labor abuses.¹⁴⁷ The Bracero Program permitted the American Southwest to become an agricultural powerhouse.¹⁴⁸ California fruit and vegetable production rose sharply in the 1950s.¹⁴⁹ However, the average farm worker's earnings barely increased. Agricultural wages rose from \$0.85 an hour in 1950 to \$1.20 an hour in 1960, while factory workers' wages increased from \$1.60 to \$2.60 an hour.¹⁵⁰ Farm wages fell from fifty-three percent to forty-six percent of factory wages during the 1950s.¹⁵¹ Wages equal to less than fifty percent of other working class sectors indicate that Braceros were not earning a reasonable wage, particularly since many of them were supporting families back in Mexico.¹⁵² A failure to provide Braceros reasonable wages prevented them from

142. *Id.*; see also Pastor & Alva, *supra* note 125, at 95.

143. See Cohen, *supra* note 18, at 115–16; see also Hahamovitch, *supra* note 10, at 82–83.

144. *Jones v. Mayer Co.*, 392 U.S. 409, 438–41 (1968).

145. *Id.* at 439 (quoting Civil Rights Cases, 109 U.S. 3, 20 (1883)).

146. See *supra* Part I.A.

147. See Cohen, *supra* note 18, at 116.

148. See Philip Martin, *Mexican Workers and U.S. Agriculture: The Revolving Door*, 36 INT'L MIGRATION REV. 1124, 1129 (2000).

149. *Id.*

150. *Id.*

151. *Id.*

152. See Hahamovitch, *supra* note 10, at 86; see also Cohen, *supra* note 18, at 115.

enjoying the fruits of their labor and infringed upon their liberty and freedom by ensnaring them in a perpetual state of poverty.¹⁵³

During the 1950s, Mexican and American newspapers often portrayed the Program as discriminatory and exploitative.¹⁵⁴ Ernesto Galarza's groundbreaking study, *Strangers in Our Fields*, and an influential 1960 documentary film titled *Harvest of Shame* documented a sharp reduction in Program wages through extortion-like charges for meals and housing maintenance fees.¹⁵⁵ To this day, ex-Braceros are seeking legal remedies to recover earned wages that were withheld.¹⁵⁶ Viewed in the aggregate, unreasonable wages and the denial of full pay suggest that some agricultural owners disregarded the desires and well-being of Braceros, leading to indifference and abuse. Thus, the Bracero Program perpetuated an unhealthy cycle of commoditization of foreign labor. Low Program wages and corresponding labor abuse constituted badges and incidents of slavery.

In 1953, Senator Eugene McCarthy publicly condemned the abuses of the Bracero Program during congressional hearings.¹⁵⁷ Most senators, however, advocated terminating existing subsidies and safeguards for Braceros as it was evident that the United States did not need the Program to encourage Mexicans to work in the United States.¹⁵⁸ Senator McCarthy's comments and widespread calls to end the Program underscore the fact that there was awareness in the United States of Bracero abuse and that the Braceros were politically vulnerable.

American slavery tore apart the African-American family, an injustice the drafters of the Thirteenth Amendment aimed to eradicate.¹⁵⁹ Similarly, the Bracero Program prevented male Braceros from bringing their spouses to the United States, forcing Mexican families to separate.¹⁶⁰ Women migrants could bear children, increasing the likelihood that guestworker families would permanently remain in the United States, an outcome the Program wished to avoid.¹⁶¹ Additionally, an all-male Program allowed employers to offer lower wages since

153. See *supra* text accompanying notes 38–40.

154. See Cohen, *supra* note 18, at 123.

155. See Pastor & Alva, *supra* note 125, at 95.

156. *Id.*

157. See Cohen, *supra* note 18, at 122.

158. *Id.* at 122–23.

159. See *supra* text accompanying notes 41–42; see also VanderVelde, *supra* note 4, at 440 n.16.

160. See Hahamovitch, *supra* note 10, at 86.

161. See *id.*

Braceros' families shouldered the costs of survival in Mexico.¹⁶² The continuous stream of Mexicans crossing into the United States signaled the difficulty of surviving in rural Mexico.¹⁶³ Thus, many Braceros sent their wages back to Mexico to support their families.¹⁶⁴ With dependent families and an agricultural crisis exacerbating existing rural poverty in Mexico, losing employment was not an option for many Braceros.¹⁶⁵ The economic and labor consequences stemming from the disruption to the family life of Braceros differed from the permanent separation of family members that often occurred during nineteenth-century American slavery.¹⁶⁶ Nonetheless, the extent of the hardships and additional pressures the Program's familial separation placed on the Bracero and his family represented a badge and incident of slavery.

Braceros, facing unreasonably low wages, commoditization, labor abuses, and familial separation, confronted two unattractive alternatives: complain and risk losing authorization to work in the United States, which would make them even more susceptible to exploitation as illegal workers, or return to Mexico.¹⁶⁷ Tying legal immigration status to employment necessarily led to a decline in labor rights, since the threat of deportation often silenced any demands for employee rights.¹⁶⁸ As the Supreme Court clarified in *Kozminski*, "it is possible that threatening . . . an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude."¹⁶⁹ Therefore, upon a showing that deportation amounted to a Bracero's inability to support himself and his family, there is a strong claim that incidents within the Program violated Section One of the Thirteenth Amendment.¹⁷⁰

As for Section Two,¹⁷¹ the Program's breakdown in procedural fairness should have led Congress to view the unreasonably low pay of

162. *Id.*

163. See Cohen, *supra* note 18, at 122.

164. *Id.*

165. See *id.* at 115.

166. See STEVEN MINTZ, *HUCK'S RAFT: A HISTORY OF AMERICAN CHILDHOOD* 95 (Belknap Press 2004) (discussing instances of permanent familial separation during American slavery).

167. See Cohen, *supra* note 18, at 123.

168. See Hahamovitch, *supra* note 10, at 82–83.

169. *United States v. Kozminski*, 487 U.S. 931, 948 (1988).

170. U.S. Const. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.")

171. *Id.* § 2 ("Congress shall have power to enforce this article by appropriate legislation.")

Braceros, their commoditization, and their diminished labor and family rights as badges and incidents of slavery demanding government action. This would have provided process theory-inspired Thirteenth Amendment precedent in both labor and immigration issues for future cases. Although Congress missed an opportunity to use a process theory application of the Thirteenth Amendment to abolish labor abuses during the Bracero Program, now is the ideal time to resurrect process theory and the Thirteenth Amendment in order to shape guestworker policy today.¹⁷²

B. The Current United States Guestworker Program Perpetuates the Bracero Program's Procedural Flaws and Labor Abuses, Requiring Congressional Action Under the Thirteenth Amendment

1. Employer Control of the Current Program Creates Procedural Unfairness

Modeled after the Bracero Program, the most recent United States agricultural guestworker visa program ("H-2A Program") began in 1986.¹⁷³ The United States Citizenship and Immigration Services ("USCIS") allows employers to legally hire non-Americans by issuing nonimmigrant employment visas.¹⁷⁴ Migrants learn about H-2A visas

172. See Randal C. Archibold, *Planned Boycott Evolves into Protests*, N.Y. TIMES, May 2, 2006, at A1. Hundreds of thousands of immigrants left work and school and boycotted all economic activity from Los Angeles to New York on the first full workday of May 2006. *Id.* This protest was just one of many that occurred throughout the country during the winter and spring of 2006. *Id.* The boisterous but largely peaceful demonstrations protested congressional immigration proposals to deport thousands of immigrant workers. *Id.* On a more general level, the protests symbolized a growing immigrant rights movement demanding greater labor protections and political representation. *See id.*

173. See Martin, *supra* note 148, at 1131. After the Bracero Program, there was a "golden age" of unionized agricultural work in the 1960s and 1970s led by Cesar Chavez and the United Farm Workers. *Id.* at 1130. This "golden age" collapsed under poor leadership, the ascendancy of the Republican Party, and rising illegal immigration. *Id.* at 1130. Rising illegal immigration spurred on the 1986 Immigration Reform and Control Act, which offered many unauthorized farm workers amnesty while implementing tougher border controls. *Id.* at 1130–31. Tougher border controls failed to stop illegal immigration. *Id.* at 1131. Further unionization and increased political pressure to change agricultural wages never materialized since employers continued to have access to a large supply of cheap, non-unionized, and unauthorized workers. *See id.* at 1131–33. New and largely powerless migrant workers entered the fields, perpetuating 1950s-style immigrant labor abuses into the twenty-first century. *See id.* at 1133.

174. U.S. Citizenship and Immigration Services Temporary Workers, <http://www.uscis.gov/graphics/services/tempbenefits/TempWorker.htm> (last visited Oct. 23, 2006).

from recruiters within their home countries.¹⁷⁵ In 2003, roughly 43,000 primarily male workers lawfully labored on American agricultural land.¹⁷⁶

The H-2A program requires employers to petition for legal seasonal and temporary agricultural workers from the Department of Labor ("DOL").¹⁷⁷ The DOL certifies employers capable of showing insufficient or unavailable American workers in a given labor field.¹⁷⁸ It also requires employers to demonstrate that guestworkers will not adversely affect American wages and working conditions by undercutting employment of United States citizens.¹⁷⁹ Additionally, employers must provide seasonal workers with employment for seventy-five percent of the work time within a given contract period as well as furnish housing.¹⁸⁰

Despite these protections, the H-2A visa forecloses any path to lawful permanent residency, denying guestworkers protections and political rights afforded to those with more permanent visas.¹⁸¹ Also, H-2A employers control an employee's access to legal immigration status.¹⁸² Once an employer fires a guestworker, the guestworker no longer enjoys legal access to work and live in the United States unless another employer sponsors him.¹⁸³ None too often, employers blacklist and refuse future employment to "problem employees."¹⁸⁴ As some forthright employers have pointed out, "[i]f you bring a [guestworker] into the country and he or she decides to jump ship, its [sic] likely that the ship he or she will have to jump on is the one that's going back to the home country."¹⁸⁵ The threat of deportation or blacklisting chills complaints of labor abuse and may force one to remain in a hostile work environment.¹⁸⁶ As articulated in *Kozminski*,

175. Marta Hummel, *Field: Tending to Family, Not Crop, of Field and Family*, NEWS & REC. (Greensboro, N.C.), Nov. 20, 2005, at A1 [hereinafter Hummel, *Field*].

176. *Id.*

177. See 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2000).

178. See Patricia Medige, *Perspectives on the Bush Administration's New Immigrant Guestworker Proposal: Immigrant Labor Issues*, 32 DENV. J. INT'L L. & POL'Y, 735, 738 (2004).

179. *Id.*

180. *Id.*

181. See *id.* at 739. In contrast, the H-1B visa, often used by the computer industry, allows the holder to bring family members to the United States and can lead to legal residency. See Pastor & Alva, *supra* note 125, at 99.

182. Medige, *supra* note 178, at 739.

183. See *supra* text accompany notes 177-80.

184. See Medige, *supra* note 178, at 739.

185. Norman Matloff, *On the Need for Reform of the H-1B Non-Immigrant Work Visa in Computer-Related Occupations*, 36 U. MICH. J.L. REFORM 815, 866 (2000-2003).

186. See Medige, *supra* note 178, at 739.

threatening deportation to compel work may alone violate the Thirteenth Amendment's prohibition against involuntary servitude.¹⁸⁷ At a minimum, employer control of a temporary visa that provides few avenues to political participation and representation insulates guestworkers from governmental protection, rendering them vulnerable.

Legal guestworkers make up only ten percent of the number of Braceros who were working at a given time in the 1950s.¹⁸⁸ Their extreme minority status, coupled with their inability to formally influence United States agricultural policy or protest abuses in the field to a neutral agency that oversees their visa status,¹⁸⁹ should direct Congress to replace the current H-2A program.

2. H-2A Workers Face Abuses that Replicate the Badges and Incidents of Slavery

Since political participation and representation do not meaningfully exist for H-2A employees, Congress should vigorously scrutinize H-2A labor abuses and find that they constitute badges and incidents of slavery. Congress already prohibits purely private racial discrimination in housing as a badge and incident of slavery.¹⁹⁰ The Amendment's drafters viewed the Thirteenth Amendment as establishing labor, familial, political, and citizenship rights,¹⁹¹ offering guidance for discerning contemporary badges and incidents of slavery.

Similar to the Bracero Program, employer control over the issuing of H-2A visas has led to unreasonable wages and other labor abuses.¹⁹² The systemic payment of unreasonable wages to H-2A workers encroaches upon their liberty and freedom, trapping them in a continual state of poverty while in the United States.¹⁹³ In addition to employer control over the visa process, other factors drive wages downward for today's guestworker.¹⁹⁴

Many employers feel that economic forces threaten the survival of their small farms, often family-owned for generations.¹⁹⁵ In North Car-

187. *United States v. Kozminski*, 487 U.S. 931, 948 (1988).

188. *See* Cohen, *supra* note 18, at 116.

189. *Id.*

190. *Jones*, 392 U.S. at 438-41.

191. *See supra* Part I.A.

192. *See* Medige, *supra* note 178, at 739.

193. *See supra* text accompanying notes 136-38, 150.

194. *See infra* text accompanying notes 197-200.

195. Marta Hummel, *Farm: They Can't Do the Job Alone. A Field Out of Favor*, NEWS & REC. (Greensboro, N.C.), Nov. 19, 2005, at A1 [hereinafter Hummel, *Farm*].

olina, for example, “[w]ithout government subsidies for the first time . . . tobacco farmers have no income guarantees.”¹⁹⁶ Some farmers sell fields to real estate developers or even retire.¹⁹⁷ Despite low employee wages, making ends meet is increasingly difficult for smaller farms.¹⁹⁸ Notwithstanding the power to deny or grant visas, economic fears drive some employers to abandon the guestworker program and hire cheaper undocumented workers, thus bypassing any wage or housing requirements.¹⁹⁹

For almost half a year, working six days a week without overtime or holiday pay, the average H-2A employee in North Carolina earns \$8.24 an hour.²⁰⁰ These wages are below the level most Americans find acceptable for themselves, demonstrated by the fact that many agricultural communities have witnessed an exodus of American labor.²⁰¹ Many Mexicans, on the other hand, are all too eager to work for \$8.24 an hour.²⁰² One day’s pay in the United States equals more than a week’s wages in rural Mexico.²⁰³ The huge discrepancy between wages in Mexico and the United States guarantees a large supply of Mexican labor.²⁰⁴ As a result, guestworkers have little leverage to fight for higher wages, especially when employers know that wages in Mexico are much lower and that guestworkers do not pay taxes to the United States on their income.²⁰⁵

In addition to unreasonable wages, H-2A work is numbing, long, and often dangerous.²⁰⁶ Employers pack men into buses and require them to wear heavy clothing to protect their bodies from pesticides despite the intense heat and oppressive humidity in many areas of the United States during the summer.²⁰⁷ After a hard day’s work, an H-2A

196. *Id.*

197. *Id.*

198. *See id.*

199. *See id.*

200. Marta Hummel, *N.C. Biggest User of Migrant Program: Cultivating the Land of Opportunity*, NEWS & REC. (Greensboro, N.C.), Oct. 2, 2005, at A1 [hereinafter Hummel, *Opportunity*].

201. *See* Medige, *supra* note 178, at 738; *see also* Marta Hummel, *Union Grows in the Fields*, NEWS & REC. (Greensboro, N.C.), Nov. 6, 2005, at A1; Molly Hennesy-Fiske, *Migrant Workers Fill Necessary Niche; Thousands Come from South of U.S. Border to Harvest Crops for America’s Farms*, POST-STANDARD (Syracuse, N.Y.), Oct. 9, 2005, at B1.

202. Hummel, *Field*, *supra* note 175.

203. *Id.*

204. *See id.*

205. *See* Hummel, *Farm*, *supra* note 195; Hummel, *Field*, *supra* note 175.

206. *See* Hummel, *Opportunity*, *supra* note 200.

207. *See id.*

employee may return to inadequate housing.²⁰⁸ Mandated by the H-2A program to provide housing,²⁰⁹ some employers undoubtedly do their best to erect satisfactory housing.²¹⁰ In many instances, however, dwellings are "cramped and sparse,"²¹¹ raising safety concerns. In New York, a propane gas explosion killed several men in a guestworker dwelling.²¹² Their families, and not the employer, reportedly paid for the burial costs to return the bodies to Mexico.²¹³

By separating families, the current H-2A scheme, like the Bracero Program before it, replicates a harm associated with slavery.²¹⁴ Designed for sojourns, the H-2A program prohibits workers from bringing family members to the United States unless a family member can acquire an additional and independent visa.²¹⁵ In practice, H-2A spousal policies force many women throughout Mexico to raise families alone as their husbands forge north to work in the United States for four to six months each year.²¹⁶ In many towns across Mexico, men are absent.²¹⁷ Mothers take charge of families as husbands and sons earn money in the United States to carve out a more economically fulfilling life.²¹⁸ Gervacio Martinez, a H-2A visa holder, sums up a common sentiment: he "wish[es] [his family] could be together all the time, but it is legally impossible at the moment."²¹⁹ H-2A legal barriers to spousal employment access effectively divide families and constitute a modern example of slavery's legacy of familial separation.

Like the Braceros before them, H-2A employees are a vulnerable, insular, and discrete minority. Under process theory, this minority status requires heightened congressional review of the program. Unreasonable wages, inadequate housing, and familial separation within the program replicate the badges and incidents of slavery, interfering with substantive rights protected by the Thirteenth Amendment. Subject to intensified scrutiny, these discredited labor conditions call for congressional reform pursuant to Section Two of the Thirteenth Amend-

208. *Id.*; see also Hennesy-Fiske, *supra* note 201.

209. See Medige, *supra* note 178.

210. See Hummel, *Farm*, *supra* note 195.

211. See Hummel, *Opportunity*, *supra* note 200; see also Hennesy-Fiske, *supra* note 201.

212. Hennesy-Fiske, *supra* note 201.

213. *Id.*

214. See *supra* text accompany notes 159-66.

215. See Pastor & Alva, *supra* note 125, at 99.

216. See Hummel, *Field*, *supra* note 175.

217. *Id.*

218. See *id.*

219. *Id.*

ment. A brief discussion regarding what these revisions might encompass follows.

C. Proposal: Federal Legislation Mandating Guestworker Employee Participation During Policy Making

In light of congressional authority under the Thirteenth Amendment to eradicate the badges and incidents of slavery,²²⁰ proposed guestworker legislation must include continual guestworker representation throughout the life of the temporary work visa program. As this Comment has revealed, a complete denial of political and citizenship rights erodes basic protections for guestworkers, including representation within government and government protection from employer abuse.

Also, because employer abuse may lead to labor practices that replicate the badges and incidents of slavery, Congress should implement procedures that require guestworker employee review of and commentary on all newly proposed or modified guestworker legislation. Instead of being politically isolated and vulnerable, direct participation in the crafting of guestworker policy would guarantee guestworkers a meaningful voice regarding the conditions that shape their lives in the United States.

In fact, the International Labour Organization ("ILO")²²¹ already requires employee participation for member nations drafting and implementing labor law and social policy.²²² The ILO aspires to ensure that the global economy benefits everyone, including employees.²²³ Employee participation would encourage guestworkers to tackle labor practices within the guestworker program before they transform into labor abuses, as well as address process theory concerns regarding procedural fairness. By procedurally securing guestworker influence over policy, employer-controlled immigration status, unreasonable wages,

220. See *Jones v. Mayer Co.*, 392 U.S. 409, 438–44 (1968).

221. International Labour Organization: International Labour Standards: Introduction to ILS, <http://www.ilo.org/public/english/standards/norm/introduction/index.htm> (last visited Nov. 1, 2006) [hereinafter ILO Introduction]. "Since 1919, the International Labour Organization has maintained and developed a system of international labour standards aimed at promoting opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and dignity." *Id.*

222. International Labour Organization: International Labour Standards: How ILS Are Used, <http://www.ilo.org/public/english/standards/norm/introduction/used.htm> (last visited Aug. 25, 2006).

223. See ILO Introduction, *supra* note 221.

and spousal rules that force families to remain apart for significant portions of the year would likely disappear.

While mandated guestworker employee participation does not exhaust available legislative possibilities available to Congress under the authority of the Thirteenth Amendment, it provides a glimpse of the human rights possibilities within the Thirteenth Amendment.

IV. Conclusion

Legal scholars have made impressive strides in clarifying the proper scope and potential of the Thirteenth Amendment. Moreover, reassessment of the badges and incidents of slavery has already influenced Supreme Court decisions regarding Thirteenth Amendment congressional authority, leading to federal legislation prohibiting purely private racial discrimination in housing. However, the Thirteenth Amendment allows for even more progressive civil-rights legislation when viewed through a process theory lens. Applied to borderline cases replicating the badges and incidents of slavery, such as past and current United States guestworker programs, process theory demands congressional action pursuant to the Thirteenth Amendment.