NOTE

THE THIRTEENTH AMENDMENT'S UNINVITED GUEST: *UNMASKING THE CONSTITUTIONAL DILEMMA OF THE H-2A GUEST WORKER PROGRAM IN THE UNITED STATES*

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ABSTRACT

This research paper will explore the different conflicts between the H-2A guest worker program in the United States and the Thirteenth Amendment, which prohibits indentured servitude. It will delve into the structure of migrants' working contracts pertaining to their guest worker programs, as well as the alarming conditions in the guest worker environments.

The examination of the guest worker initiatives, labor conditions, contractual agreements, freedom of movement restrictions, and wage and living conditions will hopefully provide the necessary insight into the darker side of guest worker programs. This exploration will also extend to include the legal framework and oversight governing these programs, assessing their effectiveness in preventing Thirteenth Amendment violations. In forming the foundation for a thesis, this paper will analyze the legal interpretations of the Thirteenth Amendment's prohibitions on indentured servitude, as well as discuss how the H-2A program's characteristics pose a violation of those legal interpretations. Because H-2A visas are granted primarily for agricultural type jobs and because agricultural jobs are the ones most often subject to exploitation and poor working conditions, these are the guest worker programs that begin to look most like slavery. Accordingly, potential violations with the Thirteenth Amendment arise.

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* Georgetown Law, J.D. 2025. I would like to thank Professor Michele Bratcher Goodwin for her feedback and invaluable expertise on the Thirteenth Amendment, and the staff of the Georgetown Immigration Law Journal for the hard work they put in to reviewing this Note. A special thanks to my family and friends for their continued support and encouragement. This Note is dedicated to the H-2A workers across the United States whose labor sustains the nation's agricultural industry, even as they endure systemic injustices and exploitation under the very programs meant to regulate their employment. May their dignity and humanity never be forgotten in the pursuit of reform. A los trabajados agrícolas del programa H-2A en los Estados Unidos: esta Nota se escribe en reconocimiento de sus contribuciones indispensables y en solemne reconocimiento de la crueldad estructural incrustada en los sistemas que rigen su labor. Que sus luchas impulsen la rendición de cuentas y el cambio.

The paper will then provide solutions for these violations, centering mostly on stricter oversight through the Thirteenth Amendment of working conditions, compensation, and contractual arrangements. Through an application of a novel "badges and incidents" test, this paper will argue that Congress is within its power to effectuate the change necessary to bring the program into compliance with the Thirteenth Amendment. By analyzing this issue through the lens of intending to promote human rights for migrants coming into the United States, this paper will provide a helpful rhetorical framework for engaging in discussions moving forward to solve this issue.

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I. BACKGROUND OF H-2A VISAS

Agricultural workers play an indispensable role in the American economy. Their work allows the everyday American to access the most basic necessities like food and clothing. The United States has had a history of hiring foreign workers, mostly from Mexico, to satisfy the consistently high demand for agricultural workers.[1] The earliest of these programs, The Bracero Program, began in 1942. This program was a series of diplomatic agreements between the United States and Mexico that permitted Mexican men to work in the United States on a short-term basis, in order to fulfill specific agricultural shortages during World War II. Although the program ended in 1964 due to the mechanization of many agricultural jobs, it became the impetus for the H-2A visa program that exists today. As Mexican workers continue to remain an important part of the U.S. agricultural landscape, large-scale migration can be drawn back to the Bracero Program.[2] Though the criticism of the H-2A program is well warranted, it is undoubtedly one of the most utilized pathways to working in the United States as a migrant worker: The H-2A program provides visas to the largest number of temporary workers in the United States.[3]

A. *Why The Program Exists and its Evolution*

Migrant labor in the United States has remained a vital underpinning of American society. This role has been recognized by administrations and federal lawmakers for decades in America. The recognition of the importance of migrant labor is what led to the Bracero Program's inception. During the mid 1900s, millions of Mexican agricultural workers came into the United States to labor as farm workers through the governmentally sponsored Bracero Program.[4] Although the Bracero Program provided meaningful employment and wages for many Mexicans, it was accompanied by a dark underbelly of treating the workers as less than human.[5] As the "Braceros" – the term coined to refer to these workers – entered the border in Texas, they were sprayed with

1. Sadikshya Nepal, *Primer: Evolution of the H-2A Visa Program*, BIPARTISAN POL'Y CTR. (Sept. 15, 2021), https://perma.cc/3XMK-WLD9. This paper proceeds with the understanding that "migrant" refers to an individual who willingly leaves home and moves from one place to another, most often in search of employment and "immigrant" as an individual who willingly leaves their country of origin and legally enters another country where they are granted permission to permanently resettle, thus qualifying them to work without restriction.
2. *Id.*
3. *Id.*
4. Philip Martin, *Mexican Braceros and US Farm Workers*, WILSON CTR. (July 10, 2020), https://perma.cc/A8PY-Z6SP.
5. *Featured Document: Bracero Workers*, AM. SOC. HIST. PROJECT (Mar. 30, 2011), https://perma.cc/53YD-7LNZ.

the now-banned pesticide DDT.[6] Braceros were forced to undergo fumigation for lice with harsh pesticides, likening them to livestock being sprayed down before slaughter.[7]

The wider American society viewed Braceros as less than human.

When the Bracero Program ended in the 1960s, the numbers of immigrants coming to the United States for work did not stop growing. Over 12,000 workers were admitted to the United States between 1960 and 1980 under a provision within the Immigration and Nationality Act (INA). This provision, the "H-2" visa, granted temporary visas to migrants coming to the United States for temporary employment. As more and more migrants began taking advantage of the program, the enforcement over the living conditions and wages faltered. This permitted labor violations to go both unnoticed and unpunished.

Recognizing the growing issue, Congress passed an amendment in 1986 to the INA which divided the pre-existing H-2 visa program into two separate categories: H-2A visas, provided to migrants coming to the United States for agricultural work; and H-2B visas, provided to migrants coming to the United States for seasonal non-agricultural employment.[8] By separating the two visa programs, Congress hoped to more acutely monitor the labor conditions within each visa environment. This monitoring system has ended in failure, as explained later.

B. *The Process of Securing an H-2A Visa*

While securing an H-2A visa is a straightforward process, it is riddled with corruption and exploitative undertones. To begin an application for an H-2A visa, the farmer employer must file an application with the Department of Labor's Employment and Training Administration (ETA) stating that there is an insufficient number of workers who are willing to complete the work for which they are seeking.[9] The farmer employer must present to the government a need to hire agricultural workers before H-2A visas can be granted to applicants for work on that farm. Furthermore, the farmer employer must present proof that it has exhausted all efforts to fulfill the employment needs by utilizing citizens of the United States. Only then can the government officially recognize the need for H-2A laborers, and subsequently grant those visas.[10] Thus, the jobs which are to be granted to H-2A laborers are the jobs that, presumably, no U.S. citizen wants. H-2A workers are recruited for

6. *Id.*

7. Leonard Nadel, Photograph of Bracero Workers being fumigated at Hidalgo Processing Center, *in Outside/Inside Exhibition Collection*, NAT'L LIBR. OF MED., https://perma.cc/Y3G6-UB4R.

8. Nepal, *supra* note 1.

9. Dep't of Labor Wage & Hour Div., H-2A: Temporary Agricultural Employment of Foreign Workers, https://perma.cc/4CXJ-XKGX.

10. *Id.*

employment that even U.S. citizens outright refuse. Once the government recognizes the need for workers, it may begin selecting applicants for H-2A visas to fill those employment positions. While the farmer employer is presenting its case to the government for workers, H-2A recruiters are hard at work in Mexico making promises of "free housing," "fair wages," and reimbursement for loans to interested H-2A applicants.[11] Although U.S. law prohibits recruiters from charging recruitment fees for the H-2A visa, these recruitment fees are regularly charged and collected.[12] Once the employer's labor needs are matched with an applicant's petition filed by a recruiter, the visa is provided and the H-2A worker enters the United States to begin working.

It is important to note that the entire process of granting an H-2A visa is exclusively dependent upon the employer. While the soon-to-be employees are often recruited in their home countries by H-2A employment recruiters, the employers are the ones who hold the power in beginning and maintaining the application process for an H-2A visa. This inherent characteristic of the process is where often exploited vulnerabilities are embedded at the expense of the employee. In the application of the Thirteenth Amendment to the characteristics and nature of the program, this paper will flesh out the unsettling nature which exists in the H-2A visa program and resembles the power structure present in indentured servitude.

II. BACKGROUND OF THE THIRTEENTH AMENDMENT

The Thirteenth Amendment served as a constitutional marker of the United States' position on slavery. It not only abolished the abhorrent institution of slavery, but also provided the groundwork for redefining the essence of human dignity within the American labor force. However, while the longer journey of the end to slavery culminated in the ratification of the Thirteenth Amendment, the Amendment's passage was a far cry from achieving equality for African Americans living in the United States. Over the next hundred years, the Amendment would find itself subject to the interpretive biases and agendas of Supreme Court justices as they sought to guide the American public on how the newly enacted Amendment ought to interact with American labor standards. This section will provide a narrowly focused background on the type of labor that interpretive applications of the Thirteenth Amendment permit and prohibit. It will explain what the public policy underpinnings of the Amendment are, and how they have been realized by the Supreme Court.

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11. *MASH2A*, https://perma.cc/DES8-CSHD (last visited 2024).

12. *See* Dep't of Labor Wage & Hour Div., Guidance on H-2A Temporary Labor Certification (TLC), https://perma.cc/PL4B-BYQP.

A. *The Impetus of the Thirteenth Amendment*

In the aftermath of the emancipation, the newly found right to freedom of African Americans unleashed a tidal wave of economic restructuring. In this social shake-up, the South was dealing with constant upheaval from whites over African Americans trying to find their place in labor. This ultimately led to a specter of exploitation and oppression instigated by white employers against the newly-freed African Americans in a variety of forms including sharecropping, convict leasing, and discriminatory labor practices. What ultimately unfolded in the South was a system of widespread slavery-like labor conditions that mirrored the indentured servitude Black people had just been emancipated from.

As lawsuits over these slave-like labor conditions began making their way to Washington and unfolding thereafter, so did the legal substructure of the Thirteenth Amendment. For each decision from the Supreme Court on the Thirteenth Amendment, there was a paralleling novel contour to the legal landscape that guided lower courts. Regarding interpretive applications of the Amendment that are most relevant to H-2A workers, three important cases arise. It is out of these cases (and others, but for the sake of brevity are mentioned elsewhere) that we can retroactively and more deeply understand the impetus for the Thirteenth Amendment.

The first case, *Pollock v. Williams*, centered on a statute that considered failing to perform contracted services – after receiving advance payment for those services – as a prima facie case of intent to defraud.[13] The Supreme Court struck down the statute, holding that it violated the Thirteenth Amendment. Looking beyond the Thirteenth Amendment's provision of enabling workers to escape servitude, and focusing on the prevention of domination and exploitation by employer upon employee, the Court expanded the previously insular interpretive application of the Thirteenth Amendment.[14] Writing the majority opinion, Justice Robert Jackson stated that "the undoubted aim of the Thirteenth Amendment . . . is not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States."[15] This was groundbreaking as it further realized the impetus of the Thirteenth Amendment.

The principle laid out in *Pollock* harkened back to the language used by the Court in the second important case that should be highlighted: *Bailey v. Alabama*. There, the Court held that the Thirteenth Amendment protected the right of a laborer to stop work in order to prevent a situation in which the personal service of that laborer is coercively disposed of for the benefit of his

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13. David Gordon, *Pollock v. Williams 322 U.S. 4 (1944)*, ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION (1986), https://perma.cc/K4JX-ETV4.

14. James G. Rope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 YALE L.J. 1474, 1503 (2010).

15. Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 359 (2004).

employer.[16] The Court noted that the compulsion of such service, through weaponizing the constant fear of imprisonment under the criminal laws, rendered the work compulsory.[17] This gives depth to the meaning of the Thirteenth Amendment in a modern context. In his piece published in the *Yale Law Journal*, James Pope draws out the two important features of involuntary servitude according to the court in *Bailey v. Alabama*: domination and exploitation. Domination is drawn from the "control and harsh overlordship" that an employer may have, while exploitation refers to the "disposal of one person's labor for 'another's benefit.'"[18] These two features point to the aim of the Thirteenth Amendment, which was to get rid of any kind of labor system that promotes domination and exploitation.

The final case which can be used to draw an understanding of the Thirteenth Amendment into harmony for our purposes is *Clyatt v. United States*. The Court here ultimately held that Congress had the ability under the Thirteenth Amendment to pass the Anti-Peonage Act of 1867 which was a statute that prohibited peonage.[19] It found that because the statute prohibited using compulsory service to secure the payment of a debt, which is in line with the aim of the Thirteenth Amendment, Congress had the authority to pass such legislation.[20] Importantly, the Court provided guidance for a more complete understanding of the Thirteenth Amendment by justifying Congress' action as aligning with the aim of the Thirteenth Amendment. In passing a statute prohibiting peonage, Congress comprehended the intention of the Amendment.

B. *The Importance of the Thirteenth Amendment*

Beyond the immediate impact of the Thirteenth Amendment on ending chattel slavery in the 1800s, the Amendment has produced ripple effects on various aspects of American law, including immigration. The Thirteenth Amendment emphasizes the importance of human dignity, aims to prevent laborers from being subject to exploitation, enumerates a framework for understanding fundamental labor rights, and intersects with immigration law. At its core, the Thirteenth Amendment's proclamation embodies the principles of equality and human dignity. By abolishing slavery and involuntary servitude, it affirms that all individuals, regardless of race, ethnicity, or nationality, are entitled to fundamental rights and freedoms. This principle extends to migrant laborers working within the United States by ensuring that they are treated with dignity and respect under the law.

Further, the Thirteenth Amendment works to establish a legal framework that prohibits the exploitation of vulnerable populations, like H-2A migrant laborers seeking a more profitable employment to provide for themselves and

16. *See Rope*, 119 YALE L.J. at 1502; *see also* Bailey v. Alabama, 219 U.S. 219, 241 (1911).
17. *Bailey*, 219 U.S. at 242.
18. *See Rope*, 119 YALE L.J. at 1502.
19. *See* Clyatt v. United States, 197 U.S. 207 (1905).
20. *Id.* at 216.

their families. It prohibits practices such as forced labor, debt bondage, and human trafficking, which regularly and disproportionately affect H-2A laborers. This protection is especially crucial in cases where migrants are subjected to exploitative working conditions or coerced into involuntary servitude due to threats by their H-2A employer. Migrants play a significant role in the labor force in the agricultural sector, contributing to one of the most important underpinnings of American society.[21] The Thirteenth Amendment reinforces the principle that all workers, regardless of their immigration status, are entitled to inherent labor rights while in the United States. This includes the right to fair wages, safe working conditions, and freedom from exploitation or coercion at the hands of their employers.

The Thirteenth Amendment continues to intersect with immigration law in several ways. For instance, it has been invoked in cases involving the rights of undocumented immigrants who may face exploitation or abuse in the workplace.[22] Additionally, the Amendment reiterates the importance of ensuring that immigration policies by the Department of Labor (DOL) do not inadvertently result in conditions akin to involuntary servitude or forced labor. Over the years, the Thirteenth Amendment has been subject to interpretation and legal challenges in the context of immigration. Courts have grappled with issues such as the extent of protection afforded to immigrant workers and the applicability of the amendment to various forms of labor exploitation.[23] The ongoing relevance and significance of the Thirteenth Amendment in shaping immigration law and policy are highlighted by the court's attention and interpretive applications of these scenarios. Ultimately, the Thirteenth Amendment stands as a cornerstone of American jurisprudence regarding human rights, affirming the principles of equality, freedom, and human dignity. In the context of immigration law, it provides the necessary groundwork for the legal protections of migrants and stresses the importance of upholding their labor rights and freedoms within the United States. By recognizing the inherent dignity of all individuals, regardless of their immigration status, the Thirteenth Amendment reinforces the ideals of justice and equality enshrined in the nation's founding principles.

III. ISSUES PRESENT IN H-2A VISA WORK

The H-2A visa worker programs have become extremely controversial in the recent past due to their exploitative labor practices of discrimination, sexual violence, and wage theft, causing human rights advocates to question the ethical implications of the guest worker program in the United States as a

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21. Joint Economic Committee, *The Economic Contribution of America's Farmers and the Importance of Agricultural Exports*, U.S. CONG. 6 (2013). https://perma.cc/4SB9-DCUC.

22. *See* Maria L. Ontiveros, *Immigrant Rights and the Thirteenth Amendment*, 16 NEW LABOR FORUM 26, 28 (2007).

23. *See generally* Maria L. Ontiveros, *A Strategic Plan for Using the Thirteenth Amendment to Protect Immigrant Workers*, 27 WISC. J. L. GENDER & SOC'Y 134 (2021).

whole. This section seeks to review the current discourse surrounding the H-2A visa program. It will begin with analyzing the horrific working conditions present in many different working environments for immigrants, by shedding light on not just the violations pertaining to labor conditions, but also on the blatant violations of basic human rights. It will then give space to outline the range of perspectives that exist with regard to the H-2A visa program, including proponents of the program, opponents of the program, and those voices that find themselves in the middle. Ultimately, this section will provide the necessary background for intersecting the rights granted under Thirteenth Amendment with the H-2A visa program.

A. *Working Conditions and Human Rights Violations*

It has become clear through surveying, reporting, and accountability efforts by advocacy groups that numerous violations of labor conditions and employment practices are occurring at the hands of agricultural employers involved in the H-2A visa program. A revolutionary report compiled by the Centro de los Derechos del Migrante corporation ("CD Migrante") revealed numerous different types of violations occurring in different H-2A working environments. Its report found alarmingly high rates of discrimination against women when eighty-six percent of the workers interviewed said that women were either not hired or were offered less favorable pay than their male counterparts, while sixty-seven percent reported workplaces that had explicit prohibitions on hiring women altogether.[24]

H-2A visa workers also face the negative impacts of labor trafficking, restrictions on freedom of movement, and coercion. As previously explained, an individual employer applies for and obtains the visa for their employee. Thus, H-2A workers lack job mobility, as it is understood by an average American, because their immigration status is tied to a single employer.[25] Accordingly, these migrants cannot leave the employer who provided them with their visa because if they were to leave, they would be forfeiting their right to the visa.[26] This creates an environment of deeply unequal bargaining power between employer and employee,[27] and one that leaves the migrants with no other option than to stay in their current place of employment for fear

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24. Ripe for Reform: Abuses of Agricultural Workers in the H-2A Visa Program, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC 16 (2020) https://perma.cc/7W6D-6YR7 [hereinafter *CD Migrante Report*].

25. Annie Smith, *Imposing Injustice: the Prospect of Mandatory Arbitration for Guestworkers*, 40 N.Y.U. REV. L. & SOC. CHANGE 375, 389 (2016).

26. Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 595 (2001).

27. Elizabeth A. Glass, *Crops Can't Wait: The Pandemic Plight of the H-2A Farmworker*, 11 WAKE FOREST J. L. & POL'Y 667, 673 (2021); Sylvia Woodmansee, *Invisible Hands: Forced Labor in the United States and the H-2 Temporary Worker Visa Program,* 111 CAL. L. REV. 1223, 1225 (2023) ("[B]y the time the workers had finally arrived at their work, they were 'desperate for money, for basic necessities, including food, and had no means of returning to Mexico.'") (quoting Reyes-Trujillo v. Four Star Greenhouse, Inc., 513 F. Supp. 3d 761, 776 (E.D. Mich. 2021)).

of the alternative: deportation.[28] This unconscionable arrangement leaves migrants vulnerable to suffering labor violations with no recourse, due to the "disincentives to report abuse, as workers often fear retaliation if they complain about mistreatment."[29]

Should a migrant speak up about their work environment or even leave, numerous concerns will be raised. First, because a significant number of workers only know their direct supervisor, but not their employer, submitting a complaint over the working conditions would prove to be an obscure and confusing process.[30] This lack of information makes it "all the more difficult to report abusive conduct, especially when supervisors or coworkers are the perpetrators of such conduct."[31] Second, employers have been reported to threaten immediate deportation to migrants that begin to raise concerns over housing and working conditions.[32] Third, if the migrants were to leave their employer and have their visa forcibly removed, the alternative is returning to Mexico to find work. There, it would be next to impossible to find a job with as good of pay as the one in the United States. Accordingly, submitting complaints about the environment or even leaving the work altogether is not an option for these migrants.[33]

Further, there are concerns surrounding fair pay for work and "wage theft." In the report by CD Migrante, many migrants recounted being underpaid, often times less than minimum wage. Immigration attorneys have explained that wage theft goes beyond just paying below the minimum wage in H-2A work, but occurs in convoluted ways involving illegal fees obtained by recruiters and "middlemen,"[34] unpaid hours, and employers who promise to reimburse workers for travel[35] or purposefully misclassify them for lower-paying jobs.[36] These kinds of illegal actions by employers, recruiters, and middlemen not only violate explicit statutory regulations prohibiting such conduct, but also further subjugate migrants to their employment by depriving them of any kind of bargaining power. This substantiates the evidence

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28. *Labor Trafficking on Specific Temporary Work Visas: A Data Analysis 2018-2020*, THE POLARIS PROJECT 26 ("[V]ictims on H-2A visas reported being threatened with . . . deportation if they demanded promised wages or decent living and working conditions.") https://perma.cc/V6ZR-UNS7.

29. Woodmansee, *supra* note 27, at 1236.

30. *See* CD Migrante Report, *supra* note 24, at 27 ("[T]wenty-five percent of workers interviewed for this report knew only their direct supervisor, but not their employer").

31. *See id*.

32. *See id*. at 24.

33. *See id*. at 25 ("[W]e wanted to leave, but could not").

34. *See* OFF. WHITE HOUSE, STRENGTHENING PROTECTIONS FOR H-2B TEMPORARY WORKERS, Report of the H-2B Worker Protection Task Force, at 9 (Oct. 2023) (middlemen refer to the group of people that often illegally collect recruiting fees in supplying H-2A employers with H-2A employees).

35. Reyes-Trujillo v. Four Star Greenhouse, Inc., 513 F. Supp. 3d 761, 775 (E.D. Mich. 2021) (finding that Mexican workers who had taken out personal loans to travel to the US for work were not reimbursed within the first week of work, causing them to accrue significant amounts of interest on their loans).

36. Tina Vasquez, *Human Trafficking or a guest worker program? H-2A's systemic issues result in catastrophic violations*, PRISM (Apr. 14, 2023), https://perma.cc/5HKR-8GKS.

pointing to a coercive working environment. Other kinds of wage theft include misrepresentation about wages promised versus wages granted, unlawful reduction of wages, and illegal kickbacks to supervisors.[37]

Finally, the issue of labor trafficking within the H-2A guest worker program remains rampant. An entire industry of recruiting and contracting out of workers has arisen in the United States and other countries, including Mexico, from the H-2A visa program. This system contributes the most to creating traffic-like conditions in the labor market for H-2A visa workers, instigated by the industry's primary actors – H-2A Labor Contractors ("H-2ALCs").[38] These contractors have manufactured the system of labor trafficking that is to blame for the nearly 3,000 incidents of labor trafficking that was reported to the National Human Trafficking Hotline from 2018-2020.[39]

In the H-2A context, labor trafficking is intertwined with debt bondage, which has become another area of concern under the program. Many H-2A workers take out large personal loans in order to cover travel expenses to the United States, relying on the promise that their salary will be enough to repay the debt and will make the investment worthwhile. Abusive employers are aware that this debt holds the workers in their employment, which allows the employers to force the workers to work for little pay or otherwise exploit their labor. This type of work environment is a type of debt bondage and is another form of labor trafficking under US law.[40]

Along with the violations of labor rights that are occurring in the worker program, there are also violations of the most basic provisions of human rights that are occurring. Sexual harassment regularly occurs against both women and men in these environments. While the CD Migrante report stated that twelve percent of those interviewed (men and women) had experienced some form of sexual harassment while employed, other reports signal that number to be a gross understatement due to the difficulty of the matters being questioned in a survey provided by a stranger.[41] For example, a 2010 study found that among 150 Mexican immigrant workers in California interviewed, eighty percent said they had experienced sexual harassment.[42] A report conducted by the Southern Poverty Law Center has similar findings.[43]

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37. *See* CD Migrante Report, *supra* note 24, at 21.

38. POLARIS, LABOR TRAFFICKING ON SPECIFIC TEMPORARY WORK VISAS 24 (2021), https://perma.cc/4VMX-G59E.

39. *Id*. at 26.

40. POLARIS, LABOR EMPLOYER ESSENTIALS: LABOR TRAFFICKING AND H-2A VISAS 24 (2021), https://perma.cc/HJL9-XBUE; POLARIS, *supra* note 38, at 24; 22 USC §7102(7) (debt bondage is "the condition of a debtor arising from a pledge by the debtor of their personal services as a security for debt, if the value of those services as reasonable assessed is not applied toward the liquidation of the debt").

41. *See* CD Migrante Report, *supra* note 24, at 26 (noting "our experience working with survivors of sexual violence suggests that this number grossly underreports the pervasiveness of this problem . . . these are difficult matters to report in a survey with questioned asked by a relative stranger").

42. Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women,* 16 VIOLENCE AGAINST WOMEN 3, 241 (2010).

43. *See* Mary Bauer & Monica Ramirez, S. POVERTY L. CTR., INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE U.S. FOOD INDUSTRY 46 (2010) (finding that among 150 interviewed women,

Along with the regular occurrence of sexual violence, migrant workers also experience routine physical injuries in the workplace with no compensation or remedy. A comparative study conducted in Washington state (one of the states with the largest number of workers on an H-2A visa) found that the rates of medical only workers' compensation claims were significantly higher in H-2A visa employers when compared to those who did not apply for H-2A workers. Among agricultural workers, the rate of injury was sixty-seven percent higher in H-2A employees compared to non-H-2A employees.[44] Because the risk of injury remains the same between these two groups due to the similarity of the physical work itself, there is debate about why the injury rates are higher among H-2A workers. One reason for this was proffered by Luke Sampson, a fellow with the Washington State Department of Labor, who concluded that higher "medical only" claims rates may be due to H-2A workers shifting from a potential wage replacement claim to a medical only claim through light duty work opportunities.[45] He noted that lower wage replacement claim rates of H-2A workers compared to non-H-2A workers may be due to the characteristics of the H-2A program, citing the "power dynamics between employer, worker, and financial stability."[46] The cause of the lower wage replacement rates is revealed by analyzing the median cost of wage replacement claims among H-2A employers. These lower costs indicate varying amounts of underreporting by workers, lower wages generally, and pressure to continue working even through injuries.[47] Although H-2A agricultural workers are entitled to workers' compensation under the program, considerable amounts of migrant workers are not aware of these protections upon entering their contracts, nor are informed of these protections by their employers.[48]

Violations of housing requirements are also rampant in H-2A employment. While federal regulations require H-2A employers to provide their H-2A workers with "safe housing, adequate meals, and transportation" to their worksites, "safe housing" is often not enjoyed by the workers.[49] There have been cases where workers are forced to live with shattered windows, leaky doorways, and broken fridges. In the worst cases, they are crammed into trailers with no air conditioning.[50] Among some of the workers who were interviewed, they recounted living in an "iron chicken coop" with bunk

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almost all of the women interviewed said they had experienced sexual violence and that it was a serious problem in their workplace).

44. Luke Sampson & Jennifer Marcum, CSTE Applied Epidemiology Fellow, Wash. State Dep't Lab. & Indus., *Comparing Injury Rates Between Employers with and without H-2 Visa Workers*, 6 (Sept. 16, 2022), https://perma.cc/H74K-6BGT.

45. *Id*. at 10.

46. *Id*.

47. *Id*.

48. Farmworker Justice, *Workers' Compensation Varies by State*, https://perma.cc/GPX9-Q3ZZ (last visited Oct. 11, 2024).

49. Ryan Murphy, *Employers banned from hiring H-2A workers can "reinvent" themselves to hire again*, INVESTIGATE MIDWEST (Sept. 14, 2023), https://perma.cc/RN8N-85AM.

50. *Id*.

beds.[51] It's the unfortunate reality that regulations supposedly guaranteeing the workers' protections from these types of living conditions exist, but they are clearly failing to work. While this regulatory failure will be addressed in depth later, it's important to note for now that even with regulations in place, housing violations routinely occur.

Finally, while not explicitly a violation under statutory provisions, it should be noted that these workers face severe isolation, unlike their American national counterparts. Researchers have pointed out that guest workers experience profound senses of physical, linguistic, social, and cultural isolation.[52] Agricultural workers often live in remote housing that is located near the fields they work in, and are often miles away from their nearest neighbors.[53] Further, many of these workers have no means of transportation on their own and may not have access to public transport depending on the remoteness of their housing.[54] This kind of physical isolation provides a shield of accountability for employers regarding labor and human rights violations, and opens up the guest workers to numerous kinds of abuses and exploitative employment practices.[55]

These guest workers also experience linguistic and social isolation. Depending on where the guest workers are employed, they may not be able to communicate except for with their co-workers.[56] This means that these workers will have a harder time explaining, in English, what their experiences are like as guest workers and what kinds of abuse they are suffering. Ultimately, these various forms of isolation make guest workers vulnerable to being exploited at the hands of the H-2A employers.

B. *Conflicting Perspectives on the Program*

Proponents and opponents clash in the debate over the H-2A guest worker program. Proponents vigorously advocate for the program, pointing to the benefits that it provides to America's agricultural sector. Proponents of the program point to the "win-win" outcome of the program, as espoused by its staunchest supporters when it was first created in the 1980s.[57] These supporters argue that the program addresses labor shortages in America's agricultural industries, while providing job opportunities superior to those that may be found within a guest worker's home country.

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51. *Id.*

52. Annie Smith, *Imposing Injustice: The Prospect of Mandatory Arbitration for Guestworkers*, 40 N.Y.U. REV. L. & SOC. CHANGE 375, 389 (2016); Woodmansee, *supra* note 27, at 1235.

53. *See* Smith, *supra* note 52, at 389.

54. JAVESH RATHOD & ADRIENNE LOCKIE, AMER. UNIV. WASH. COLL. OF L. INT'L HUM. RTS. CLINIC & CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., PICKED APART: THE HIDDEN STRUGGLES OF MIGRANT WORKER WOMEN IN THE MARYLAND CRAB INDUSTRY 17 (2010), https://perma.cc/CXE5-FV55 [hereinafter *PICKED APART*].

55. *See* Smith, *supra* note 52, at 390.

56. *See* Woodmansee, *supra* note 27, at 1236.

57. *Governor Signs Bill to Strengthen Washington Agriculture Economy*, WASH. STATE EMPLOYMENT SEC. DEP'T, (May 21, 2019), https://perma.cc/5L6J-9Q4L.

Proponents of the program take issue with the claim of coercion by arguing that the work environment does not amount to real "coercion" because the workers are still able to leave their job at any point.[58] They may contrast this with slavery in the 1800s in which enslaved people's alternative to quitting their job would be living in fear of death for the rest of their lives at best, or being killed at worst.[59] Because migrant workers don't face a similar dilemma, skeptics point out that migrants are not in a "coercive" work environment.[60] However, the legal ability to change jobs alone, or leave without fear of death, does not amount to providing adequate protections for workers.[61] Further, even though coercion is not explicitly present in H-2A guest worker programs like that of what was present in slavery, thirty two percent of workers on the H-2A visa interviewed reported that they felt as though they were "not free to quit."[62]

Opponents of the H-2A visa work program call for an entire abolition of the program. In the spring of 2022, the Dignity Campaign, a conglomerate of several different human rights advocacy groups from across the country, released a statement on the abolishment of the agricultural guest worker programs.[63] The initiative argued that the H-2A program cannot be changed by filing lawsuits against a few growers and members of the government for failure to properly regulate the programs, as enforcement has become virtually ineffective. The initiative believes that the labor abuses are built into the mechanics of the program itself and that detangling systemic abuses cannot be done without dismantling the entire program.[64]

Finally, there is a middle ground position. While the H-2A guest worker program does provide jobs to migrants and a workforce to an understaffed industry, concerns around the customs and practices of the program are well founded. However, the middle ground position offers an alternative view to abandoning the program and advocates for stricter regulations and oversight. These solutions will be broken down later on, but suffice it to note for now that this position is becoming increasingly popular among advocacy groups and governmental actors.[65]

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58. *See* United States v. Shackney, 333 F.2d 475, 486 (2d Cir. 1964) (finding that when an employee "has a choice between continued service to his employer and an unpleasant alternative, that unpleasant choice alone does not constitute coercion.").

59. *See*, *e.g.*, CD Migrante Report, *supra* note 24, at 26.

60. *Id*.

61. *Second-Class Workers: Assessing H-2 Visa Programs' Impact on Workers*, Hearing Before the Subcomm. on Workplace Prots. of H. Comm. on Educ. and Lab. (2022) (statement of Daniel Costa, Researcher, Econ. Pol'y Institute), https://perma.cc/WP4G-AR3Z.

62. CD Migrante Report, *supra* note 24, at 23.

63. Dignity Campaign, *Viewpoint: Abolish the H-2A Program!*, LABOR NOTES (Apr. 19, 2022), https://perma.cc/B2Q6-HXTN.

64. *Id*.

65. Mary L. Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C.J. INT'L L. 521, 535 (2001).

IV. BADGES AND INCIDENTS OF INDENTURED SERVITUDE AND SLAVERY

The Supreme Court has held that slavery is clearly prohibited under the language of the Thirteenth Amendment and that Congress is empowered to enact legislation that ends any surviving badges and incidents of slavery.[66] However, the Supreme Court has not provided direction to courts for determining the "badges and incidents." Rather, the Court has explicitly left that interpretive authority up to Congress to rationally determine the badges and incidents of slavery.[67] Thus, absent Congress' clear guidelines on what constitutes a badge or incident of slavery and absent a judicial test to determine the presence of badges or incidents of slavery, scholars and litigants are left with an indeterminate legal landscape out of which to draw these principles. This section will seek to provide a broad survey of the wide range of principles drawn from this indeterminate landscape. It will then argue for the application of a novel two-pronged test which strives to unite the differing viewpoints on how to define what constitutes a badge or incident of slavery. A later section will then apply this two pronged approach to the context of what badges and incidents of slavery, if any, exist in H-2A guest worker programs.

A. *Defining Badges and Incidents of Slavery*

There is a considerable amount of dissension regarding the scope of Congress' ability to enact legislation pertaining to the badges and incidents of slavery. Judge Higginbotham, an appeals court judge, represented a part of this discussion when he gave his "test" for determining a badge of slavery: the badge must "target African Americans as a class, in a way that labels them inferior, and is historically linked to slavery and its aftermath."[68] Adopting this approach, other scholars argue that a more effective approach would consider both the affected individual's race generally speaking and her previous condition of slavery or involuntary servitude in the United States.[69] By removing the requirement of the African-American identity marker, these scholars move beyond an originalist reading of the Thirteenth Amendment.

An originalist reading of the Thirteenth Amendment may induce an understanding that because the Thirteenth Amendment was directed at eradicating slavery of African American people, its exclusive application is to eradicate the slavery of African American people. However, even originalist judges often consult sources beyond the written text of the provisions to distinguish the meaning of the text. Further, constitutional law scholars acknowledge

66. *See generally* Jones v. Alfred H Mayer Co., 392 U.S. 409 (1968).
67. *Id*. at 440.
68. Jennifer M. McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 600 (2011-2012).
69. *Id*. at 48.

that the intent of the framers was likely to extend the Thirteenth Amendment's protections beyond African Americans, at least in some circumstances. Accordingly, concluding that the Thirteenth Amendment was reserved exclusively for the eradication of the enslavement of Black people would be a parochialistic misstep.

While broadening the interpretation may be attractive, an overly broad interpretation could lead to issues too. Many scholars argue for a broad interpretive construction of the Thirteenth Amendment's prohibitions of the badges and incidents of slavery, extending far beyond the social boundaries of race.[70] This is referred to as the "expansionist approach." Admittedly, this inclusive perspective is appealing as a matter of social justice. However, a limited version of the expansionist approach is both supported by modern Thirteenth Amendment scholars and respects the necessary restraints that must be applied in constitutional interpretation.[71]

B. *The Two-Pronged Approach to Defining Badges and Incidents*

A limited expansionist approach to defining the badges and incidents of slavery can be understood through the framework of William Carter's novel two-pronged test. This test defines badges and incidents of slavery with reference to two issues: "(1) the connection between the class to which the plaintiff belongs and the institution of chattel slavery, and (2) the connection the complained-of injury has to that institution."[72] This test reorients the application of the Thirteenth Amendment away from an overly broad application of its protections, while also maintaining the impetus for the Amendment: eradicating any and all forms of indentured servitude, not just slavery in the traditional understanding in the early 1800s.[73]

The first prong of this test calls for some overt injurious factor in the harmed individual's case that sufficiently links the harm to the institution of slavery. Carter applies this prong to the case of *United States v. Nelson* in which a Jewish person was stabbed to death for his identity as a Jew. The court tacitly acknowledged that the Jews have been targets of discrimination "as virulent . . . as that inflicted upon the descendants of the enslaved."[74] Carter argues that this connection between the class (Jewish identity) and the injury is sufficiently linked to the institution of slavery to satisfy the first prong of the test.

The second prong then analyzes the connection that the complained-of injury has to that institution. Analyzing a case of race-based criminal suspicion used

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70. *See* Keithly v. Univ. of Tex. Sw. Med. Ctr. at Dall., Civil Action No. 3:03-CV-0452-L, 2003 U.S. Dist. LEXIS 20857, *1 (N.D. Tex. Nov. 18, 2003).

71. *See* William M. Carter Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1366 (2007).

72. *Id.*

73. *See id.* at 1369.

74. *Id.* at 1371.

against Arabs and Muslims in terrorism investigation, Carter outlines that the "singling out" by law enforcement officials against members of a minority group, and assuming that affiliation with the groups signals danger, is considered a sufficient connection to the complained-of injury to the institution.[75] As will later be explored, this framework may be helpful for determining the presence of the badges and incidents of slavery present in H-2A guest worker programs.

V. REVAMPING LEGAL OVERSIGHT OF THE H-2A WORKER PROGRAM

The H-2A guest worker bears striking resemblance to slavery in its customs and practices. The H-2A program has been attacked by non-profits and human rights advocacy groups for its slave-like conditions.[76] This final section will ground the thesis of this chapter by arguing why the Thirteenth Amendment should be invoked to prohibit the current customs that exist within the H-2A guest worker program, in the same way, and for the same reasons, that it was used to both eradicate slavery and prevent its badges and incidents from persisting. This section will begin by explaining the current system of failed enforcement over the H-2A program. It will then explain how a successful invocation of the Thirteenth Amendment could address the current illegal customs and benchmarks of indentured servitude that exist within H-2A work environments. It will conclude by explaining how the H-2A program carries the badges and incidents of slavery through an application of Carter's novel two-pronged approach.

A. *The Failure of the Current System of Oversight*

The egregious violations of labor conditions that already persist in the working environments of those on the H-2A visa should be sufficient evidence to deduce the utter failure of the current enforcement framework over H-2A working conditions. However, there are three clear reasons why these kinds of violations continue persisting. The first is that the main umbrella of law that protects agricultural workers does not extend to cover H-2A visa workers, resulting in a lack of enforcement.[77] The Migrant and Seasonal Agricultural Worker Protection Act allows workers to sue in federal court to enforce standard living conditions while laboring, but does not cover the claims brought by H-2A workers. Further, H-2A employers are not under an obligation to pay federal unemployment insurance, nor Social Security taxes on H-2A worker wages.[78] This results in an eight percent differential which is

75. *Id.*
76. *See Dignity Campaign*, *supra* note 63 (calling the program "close to slavery").
77. Teresa Romero, President, United Farm Workers, Statement to House Education and Labor Subcommittee on Workforce Protections Second Class Workers, Assessing H2 Visa Programs Impact on Workers 10 (July 20, 2022), https://perma.cc/4A4K-HXH3.
78. *Id.*

returned to the employers' pockets as a kickback.[79] Elizabeth Glass points out that this resulting lack of enforcement perpetuates an unfair power dynamic between laborers and employers and has led to the violations that H-2A workers suffer today.[80]

The second reason is because the current system of enforcement is easy to evade. According to the statutory and regulatory provisions covering H-2A workers, there is a narrow complaint-resolving mechanism baked into the law.[81] However, these mechanisms consistently fail in practice because the structure of the visa program itself enables worker exploitation. Because "governmental enforcement agencies often turn a blind eye to mistreatment and are woefully ineffective" at enforcing H-2A visa program rules, these statutory and regulatory labor conditions standards are easy to evade.[82]

Finally, the third reason for these persistent violations is because enforcement measures have simply failed. For example, under the provisions, recruitment fees for H-2A work are flatly prohibited. Yet, a DOL investigation revealed that many H-2A workers suffer from paying illegal recruitment fees in their home country before obtaining an H-2A visa.[83] Even when the government is aware that illegal fees are being collected in violation of the laws regulating H-2A visas, it fails to take appropriate measures to ensure that illegal violations are remedied, regardless of the fact that the initial violations take place outside of the United States.[84] Other scholars argue that there is not a single component of the H-2A program which can be equitably enforced.[85] They argue that the entire oversight framework, as a collective structure, is inept at stopping and remedying the labor violations.[86]

These issues illuminate how the current enforcement mechanism is inadequate at addressing the labor violations taking place in H-2A work. It also beckons one to question what framework can be used to effectuate a better working environment for the H-2A guest worker programs. The Thirteenth Amendment can provide a promising path forward.

B. *The Promising Potential of Oversight Through the Thirteenth Amendment*

The Thirteenth Amendment has an important role to play in regulating the labor and working conditions of H-2A work. However, indispensable questions arise to whether the Thirteenth Amendment can be invoked at all when

79. *Id.*
80. Glass, *supra* note 27, at 675.
81. *See Fact Sheet #77D: Retaliation Prohibited under the H-2A Temporary Visa Program*, U.S. DEP'T LAB. WAGE AND HOUR DIVISION (Apr. 2012), https://perma.cc/SS85-BCDR.
82. *See Ryan*, *supra* note 49.
83. Modernizing H-2 Program Requirements, Oversight, and Worker Protections, 8 CFR 214 (2023).
84. CD Migrante Report, *supra* note 24, at 25.
85. Glass, *supra* note 27, at 675.
86. Andrea Hsu and Ximena Bustillo, *America's farms are desperate for labor. Foreign Workers bring relief and controversy*, NPR, (July 27, 2023, 5:19 AM), https://perma.cc/P4GM-D6Z7.

discussing the issue of protecting a class of people not based on race. The Supreme Court has repeatedly confirmed that the "slavery" and "involuntary servitude" prohibited by the Thirteenth Amendment's text are not limited to any particular race, and, importantly, not even to "race" at all.[87] The Court has consistently reaffirmed its holding that "the undoubted aim of the Thirteenth Amendment . . . is not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States."[88] Accordingly, the Thirteenth Amendment has a distinguishable part in protecting the rights of migrant workers in H-2A programs. Its role is triggered through the widespread presence of three labor condition violations in H-2A work: wage theft, coercion, and debt bondage.

1. *The Oversight of Prohibiting Wage Theft*

Wage theft is the practice of not paying the proper wages to employers, especially when done through the form of paying inordinately low salaries or failing to comply with employment law and regulations over salaries. Wage theft is a common practice in H-2A work, and its intersection with the Thirteenth Amendment is often overlooked as inapplicable. However, there is an important role that the Thirteenth Amendment has to play in regulating wage generally. James Gray Pope has pointed to three distinct reasons for why the Thirteenth Amendment should serve as the underpinning that protects the minimum wage. First, the Thirteenth Amendment is the only part of the Constitution which explicitly addresses labor.[89] Second, the courts have interpreted the Thirteenth Amendment more broadly than the Fourteenth Amendment.[90] Third, "the fact that the Thirteenth Amendment applies to private action as well as government action is a source of interpretive power."[91]

As discussed by Ruben Garcia in his piece, *The Thirteenth Amendment and Minimum Wage Laws*, the operative question to ask in determining positive constitutional obligations of the Thirteenth Amendment is "when is a wage-floor so low that it qualifies as 'involuntary servitude.'"[92] He argues that the Thirteenth Amendment can provide a basis to legislate minimum wage laws against states that have no minimum wage.[93] Joining Garcia, other scholars have argued that wage theft should be viewed as a legacy of slavery, "banned by the Thirteenth Amendment, but still 'continuing in various ways

87. *See* United States v. Nelson, 277 F.3d 164, 176 (2d Cir. 2002).
88. Pollock v. Williams, 322 U.S. 4, 17 (1944).
89. Ruben Garcia, *The Thirteenth Amendment and Minimum Wage Laws*, 19 NEV. L. J. 479, 492 (2019).
90. *Id.*
91. *Id.*
92. *See id.* at 495; *see also* James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 YALE L.J. 1474, 1553 (2010).
93. *See* Garcia, *supra* note 89, at 501.

today.'"[94] Thus, the Thirteenth Amendment's prohibition on involuntary servitude extends to include a prohibition on wage theft.

In the context of H-2A work, the Thirteenth Amendment's prohibition on wage theft has an important role to play. In February of 2022, a DOL investigation revealed that Jorgensen Management, an H-2A employer, had intentionally withheld $160,000 from H-2A workers' salaries and threatened the workers with deportation if they refused to accept the wages.[95] This kind of wage theft is rampant across H-2A employers in the United States, and H-2A wages are even more prone to abuse in states with no minimum wage laws. Of the H-2A workers in the United States, over 73,000 workers are employed in states that do not have minimum wage laws at all, or have a minimum wage below $7.25/hour.[96] Tennessee, Alabama, Louisiana, South Carolina, Georgia and Mississippi lack adequate federal resources for oversight, which means there is a higher likelihood that the federal DOL will not police H-2A working conditions and inadvertently overlook actions like those taken by Jorgensen Management.[97] The Thirteenth Amendment's work in American society is not complete until the systems of wage theft and abuse are eliminated. Thus, its role in regulating and overseeing fair and adequate payment of services rendered is pivotal in H-2A guest worker programs.

2. *The Oversight of Prohibiting Coercion and Unfair Contracting*

The Thirteenth Amendment also has an important role to play in regulating H-2A work regarding the presence of coercion and unfair contracting. Immediately after the Civil War, many southern states passed Black codes, which were a set of laws aimed at controlling and repressing the newly freed African American population. The codes attempted to maintain a system of oppression and inferiority, regardless of the newfound "freedom" of Black people in the South. They were designed to restore aspects of the pre-Civil War racial hierarchy. In the 1860s, a case arose in Maryland out of a contract between Elizabeth Turner, a young African American girl, her mother, and their former slave-master Hambleton. The contract stipulated that Turner work for Hambleton for ten years. And under Maryland's newly passed Black codes, Hambleton had full property and ownership interests over his African-American "apprentice" while she worked. This arrangement stood in stark contrast to the indentures between white people, where ownership over

94. Brooklyn Law School, *Critical Wage Theory Panel Examines Race's Role in Labor Movements* (Dec. 7, 2022), https://perma.cc/WJG5-FFLJ.

95. Grace Dean, *An Idaho potato farm threatened to fire foreign workers and deport them to Mexico if they didn't accept wages below the legal limit, the DOL says*, BUSINESS INSIDER (Feb. 23, 2022), https://perma.cc/H5GE-ZXQ8.

96. *See H-2As: 5 States had 50% H-2A Jobs in FY23*, RURAL MIGRATION NEWS (Jan. 10, 2024) https://perma.cc/E395-VS2F; *State Minimum Wages,* NAT'L. CONF. OF STATE LEGISLATURES (Apr. 12, 2024) https://perma.cc/RT3H-W4DX.

97. *See* Garcia, *supra* note 89, at 502.

an apprentice could not be transferred without the servant's consent.[98] Turner sued in federal court claiming that the conditions of the contract constituted involuntary servitude.[99] Acknowledging the unequal bargaining power, the position which Turner was in because of her ethnicity, and the resulting exploitation by Hambleton, Chief Justice Chase held that the indenture agreement constituted involuntary servitude under the Amendment.[100] Discussing the case in his piece, *Specific Performance and the Thirteenth Amendment*, Nathan Oman believed that the indenture was likely to be involuntary *ab initio*, which likely played a role in the court's decision to find that the contract constituted involuntary servitude.[101]

These kinds of arrangements persist in the world of H-2A visas. In a complaint recently filed by numerous H-2A guest workers, it is alleged that the employers had used coerced transportation and threats of abuse of the legal system, physical harm, and restraint to provide labor services at the farm they had been employed at.[102] It also alleged that the employers had participated in a pattern of use of coercive threats like calling the immigration authorities if the guest workers complained about the working conditions.[103] And under previous Supreme Court precedent from *Bailey v. Alabama*, compulsion of labor through constant fear of imprisonment renders the work contradictory to the Thirteenth Amendment.[104] H-2A employers were cognizant of the fact that the guest workers believed that failure to comply would cause the workers, and/or their families back in Mexico, to suffer serious harm.[105]

This parallels the situation of Elizabeth Turner. There, the work agreement was involuntary from the beginning. She was not allowed to negotiate with her employer, Hambleton, about working conditions, nor was she provided redress in her employment. Recognizing the resemblance to involuntary servitude, the court voided the working agreement and provided justice to Elizabeth Turner. Here, the guest workers were not allowed to negotiate with their farmer-employer. They were told to keep silent about grievances they had with the working conditions, and were coercively threatened by their employer if they attempted to seek redress. Accordingly, a court in application of the Thirteenth Amendment can step in, recognize the resemblance to involuntary servitude, and void the working arrangements which the H-2A workers were coerced into being parties to.

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98. In re Turner, 24 F. Cas. 337, 339 (Cir. Ct., MD. 1867).

99. *Id.*

100. *Id.* This was before the Thirteenth Amendment was passed, but "the amendment" refers to a change in Maryland's own laws, which included an amendment that outlawed slavery, and the language mimicked that of the forthcoming Thirteenth Amendment.

101. Nathan Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020, 2073-75 (2009).

102. Plaintiffs' Civil Complaint, ¶ 115, Velasco Rojas v. First Pick Farms LLC., No. 1:23-cv-00604 (W. D. Mich. filed June 9, 2023).

103. *Id.* at ¶ 110.

104. *See* Bailey v. Alabama, 219 U.S. 219, 244 (1911); United States v. Reynolds, 235 U.S. 133, 149 (1953).

105. Plaintiffs' Civil Complaint, supra note 102, at ¶ 110.

3. *The Oversight of Debt Bondage/Debt Peonage*

Finally, the Thirteenth Amendment has an important role to play in prohibiting debt bondage and debt peonage in H-2A work. Debt peonage in the United States is generally understood as a system where debtors are forced into labor to pay off their debts, and has been widely recognized as akin to a form of indentured servitude or slavery. The "basal fact [of peonage] is indebtedness," upon which compulsory service is based.[106] In *Taylor v. Georgia*, the Supreme Court struck down a statute which made it a crime for individuals to contract for labor and then fail to perform that labor.[107] The court noted that the necessary consequence of the statute was that a laborer unable to repay ends up finding himself bound by his employer's "threat of penal sanction to remain at his employment until the debt has been discharged."[108] Seeing this coerced labor as a form of debt peonage, the Supreme Court struck down the statute as violative of the Thirteenth Amendment.

This situation is strikingly similar to the position which H-2A workers find themselves in. Laborers take out loans in order to travel to the United States for their H-2A work, and thus arrive in the United States already heavily in debt.[109] They believe that their wages in the United States will make the debt worthwhile and short lived.[110] Exploitative employers are aware that this debt effectively binds the workers to the employers, which prevents the laborers from seeking alternative routes to paying off the debt.[111] In *Taylor v. Georgia* the court found that the employers used their laborers' debt as a tool to exploit the workers constituted debt peonage. Given that H-2A employers similarly use the indebtedness of the workers as a tool to exploit the laborers for their work, the H-2A program should be reevaluated under the precedent from *Taylor v. Georgia*.

C. *The Enforcement Clause of the Thirteenth Amendment*

1. *The Application of the Two-Pronged Approach*

Section 2 of the Thirteenth Amendment provides Congress with the authority to enforce the prohibitions of slavery that are outlined in the Amendment. Through the Supreme Court's interpretive application of this Amendment, it has reserved for Congress the power to clarify the badges and incidents of slavery, while providing protections for persons discriminated against.[112] Section 2 provides Congress the ability to pass legislation that is both retroactive, in remedying actual violations of Section 1, and "prophylactic," in targeting otherwise constitutional conduct in order to deter future

106. *See* Reynolds, 235 U.S. at 144.
107. Taylor v. Georgia, 315 U.S. 25, 30 (1942).
108. *Id.* at 29.
109. POLARIS, *supra* note 38, at 18.
110. *Id.*
111. *Id.* at 19.
112. *See* Jones, *supra* note 66, at 439.

violations of Section 1.[113] The Supreme Court reaffirmed Congress' power to enforce the Thirteenth Amendment through necessary legislation in the landmark case of *Clyatt v. United States*. There, it held that "Congress may enforce the Thirteenth Amendment by direct legislation, punishing the holding of a person in . . . involuntary servitude."[114] Because of the human rights violations, labor agreement breaches, and discrimination against those in the H-2A guest worker program that echoes that of slavery, Congress has the power to enact legislation through the Enforcement Clause of the Thirteenth Amendment which would better protect migrant workers from suffering the badges and incidents of slavery and punish employers who hold guest workers in involuntary servitude.

Applying the two-pronged approach to defining the badges and incidents of slavery will illuminate the badges and incidents of slavery present in the H-2A guest worker program. As promulgated by Carter, the first step of the test is to clarify a connection between the class to which the plaintiff belongs and the institution of chattel slavery.[115] This approach considers not just African Americans, but non-African Americans as well in cases where there is a form of discrimination that is closely tied to the structures that attempted to maintain the system of slavery.[116] While migrants to the United States on the H-2A visa do not definitionally fall within the race class associated with the institution of slavery, these migrants do find themselves within a legal immigration framework ripe with a history of discrimination and racism – one that is closely tied to the same kinds of structures that attempted to maintain the system of slavery.

Just like how the prejudicial laws from the eras of Jim Crow and Black codes carried the badges and incidents of slavery,[117] tying it to the structures attempting to maintain slavery, there has been a series of discriminatory laws that adversely impact migrants and immigrants. During Jim Crow, laws were passed that mandated racial segregation in a variety of public facilities in the former Confederate states.[118] This created a legal structure that attempted to maintain a system of slavery and enforce a racial superiority. Similarly, during the late 1800s, Congress enacted the Chinese Exclusion Act which effectively

113. McAward, *supra* note 68, at 605.
114. Clyatt v. United States, 197 U.S. 207, 218 (1905).
115. *Carter*, supra note 71 at 1366.
116. *Id*. at 1369.
117. Taru Taylor, *Guest Blog: Badges and Incidents of Slavery*, DAVIS COMMUNITY ENVIRONMENTAL LEGAL DEFENSE FUND (Jan. 16, 2023), https://perma.cc/PT8Q-ENCW (noting that the court in Jones v. Alfred H. Mayer described the Black codes as substitutes for the slave system).
118. Melvin I. Urofsky, *Jim Crow Law*, BRITANNICA (May 6, 2024), https://perma.cc/LSG5-5DW8.

barred immigration from all of Asia to the United States.[119] What followed was a societal reconceptualization of the Asian immigrant's presence in the western United States. Because of the Chinese Exclusion Act, a plethora of discriminatory immigration laws were passed and racial profiling intensified throughout California.[120]

Trump's recent "Muslim ban" similarly generated a system of racism against immigrants in denying visa applications to immigrants from majority Muslim countries. This bigoted move relied on a national security exception to masquerade its clearly xenophobic impetus.[121] And in March of 2024, the Supreme Court upheld one of the most discriminatory anti-immigrant laws to ever go into effect.[122] The law, passed in Texas, allows law enforcement officers to arrest, detain, and remove individuals who are suspected to have entered Texas from another country without federal authorization.

Regarding the H-2A visa program itself, it carried the same discriminatory impetus as other discriminatory laws. While the H-2A visa program's legislation publicly lauded itself as a program built for protecting the working migrants and providing livable wages for them, there is a less palatable cause behind the program: arrest of illegal migrants and deportation.[123] The H-2A program finds its roots in the Bracero Program, which established a foundation of discriminatory practices permeating the H-2A program, despite statutory protections for workers.[124] And in the years immediately preceding the genesis of the H-2A visa program, there was a significant influx of immigrants to the United States that obtained jobs in the agricultural sector. Part of this influx of immigrants resulted from the momentum that began in the Bracero Program. Although the Bracero Program had ended years prior, the exponential growth of foreign nationals coming to the United States, both for work and to provide a better life for their families, continued to increase. The government needed a more comprehensive system of distinguishing between those migrants who were here legally and illegally.

The creation of the H-2A program helped solve this problem by more aggressively focusing on enforcement of legal migration and immigration. A program which permits, and continues to permit, discrimination by farmers and enforcement officials alike has been disguised as a legislative champion of immigrant labor rights. This program, the Bracero Program, the anti-immigrant law in Texas, the Chinese Exclusion Act and Trump's "Muslim Ban" all created legal structures which paralleled that of Jim Crow, causing deep

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119. Kevin Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 INDIANA L. J. 1456, 1457–58 (2022).

120. *Id*. at 1456–57.

121. Silvia Martelli, *Trump's Travel Ban Is Islamophobic and Xenophobic, Civil Rights Groups Say*, MEDILL NEWS SERVICE (Feb. 4, 2020), https://perma.cc/X6KR-88D4.

122. ACLU, *Supreme Court Allows Anti-immigrant Texas Law to Go into Effect* (Mar. 19, 2024), https://perma.cc/M5YU-LMDL.

123. *Nepal*, supra note 1, at 2.

124. *Glass*, supra note 27, at 672–74.

racism and discrimination against immigrants and migrants alike, mimicking the disparate impacts on African Americans. Through the context of the uniform discriminatory impacts of these legislative actions, the first prong requiring a connection between the class and the institution of chattel slavery is fulfilled.

The second prong asks if there is a connection between the complained-of injury and the institution to which the individual is a part of.[125] There are statistically significant and widespread areas of injury that seem to be commonplace among H-2A programs. The first of these injury areas is the threat of deportation, and in some instances, deportation itself.[126] Labor traffickers who understand the dependency of an H-2A visa on agricultural employment are quick to use threats of deportation against their migrant victims.[127] For example, a potato farm in Idaho that had hired H-2A workers threatened to deport workers for not accepting wages below minimum standards.[128] The DOL investigation into the farm found it had used intimidation to exploit workers and showed a willful disregard for the law by creating a toxic workplace and victimizing vulnerable workers.[129]

Another area of injury is overt discrimination in the hiring process of H-2A workers. The overwhelming majority of employers are looking for a specific demographic to hire: young, able-bodied men without families in the United States.[130] For example, a strawberry picking advertisement specified that it only wanted short men, while another ad to pick oranges in California specified that it only wanted able-bodied men between the ages of 18 and 39.[131] The fact that that discrimination is prohibited under 29 § 501.4 (the H-2A program legislation) reveals the level of illegality which these ads are acting with.[132] Ultimately, the injury that unfolds is that in which older men, women, or differently-abled people have little to no chance of being selected for an H-2A visa. And those few that are selected for a visa, but who don't meet the employers' desired characteristics, face workplace discrimination.[133]

The presence of each of these complained-of injuries to the class of people harmed, agricultural workers, is exclusively dependent upon their connection with the institution which these workers are a part of, H-2A work. This fulfills the second prong of Carter's approach. Through the application of this two-pronged approach, it becomes clear that the H-2A guest worker program

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125. *See* Carter, *supra* note 68, at 1366.

126. FARMWORKER JUSTICE, *Rampant Violations of Workers' Rights Reveal Flaws of H-2A Visa Program* (June 2022), https://perma.cc/C46Y-RLUE .

127. *Polaris*, *supra* note 38, at 27.

128. *See* Dean, *supra* note 95.

129. *Id*.

130. CD Migrante Report, *supra* note 24, at 25.

131. *Id*.

132. *Fact Sheet*, *supra* note 81.

133. Jordan, Miriam, *Black Farmworkers Say They Lost Jobs to Foreigners Who Were Paid More*, N.Y. TIMES (Nov. 12, 2021), https://perma.cc/NK8S-XPRR.

does carry with it the badges and incidents of slavery. Accordingly, Congress is within its power to enact legislation aimed at protecting these workers.

2. *Congress' Next Steps*

After establishing the path to addressing the concerns through Section 2 of the Thirteenth Amendment, Congress should delegate its enforcement powers to regulatory institutions that already oversee the agricultural programs to ensure strict compliance with regulations and more frequent auditing of the workplace conditions. This can be most efficiently done through an updated use of the DOL's delegated authority. In response to the growing criticisms of executive oversight regarding the H-2 program, the Department of Homeland Security (DHS) proposed amendments to its regulations affecting the temporary agricultural visas.[134] The amendments begin by addressing the current downfalls of federal oversight and acknowledges the widespread abuses by employers in the system. While this is a notable first step in reforming the broken system, there are additional steps that should be taken.

Firstly, while the DHS's proposed amendments create stronger enforcement of punishments against exploitative employers, the DHS needs to take further action in harshening punishments. The Economic Policy Institute points out that the current amendment allows a discretionary denial of application for an H-2A worker to an employer who has been found to be in violation of labor laws in the past five years.[135] While this change explicitly highlights the importance of employers' compliance with regulations, the denial of applications in such instances should be mandatory, rather than discretionary. An employer who has violated labor conditions in the recent past is clearly unfit to be a host employer for H-2A workers and should outright be denied the opportunity to host future H-2A employees. Through this kind of mandatory denial, currently compliant employers will be motivated to maintain their accession to regulations while employers with questionable practices will be incentivized to bring their working conditions into compliance. This kind of change will further address one of the badges of slavery present in H-2A work by clearly prohibiting and punishing exploitative practices by employers.

Secondly, the H-2A visa needs to be detangled from the requirement of a specific employer's labor contract. While it makes sense for these two to be interdependent in the initial granting of a visa to a worker, once that worker begins his employment, the visa needs to be detangled. As explained earlier, the dependency that a worker's legal presence in the United States has on his continued employment with his specific employer is too often used by the employer as a way to threaten legal action, up to and including deportation, to force the worker into continued labor. Rather than tying the worker's visa

134. *Modernizing*, *supra* note 83.
135. Costa, *supra* note 61.

to his specific employer, an H-2A worker's visa could be tied to a unique temporal standard, that provides a grace period between or after periods of employment. This grace period would be established for a worker who, after experiencing abuse at their current H-2A employment, chooses to transfer to a different H-2A employer. This would allow the worker to leave the abusive workplace and begin new employment without falling into undocumented status in the period between employers. By detangling the visa from the contract with a specific employer once the worker arrives in the United States, the unequal bargaining power between employer and employee is removed and all access by the employer to the tool used to coerce workers is cut off. This further addresses one of the badges of slavery present in H-2A work by removing the unequal bargaining power of the employer that leads to coercion and exploitation.

Lastly, as proposed by Daniel Costa in his letter to DHS Secretary Mayorkas, the H-2A's novel pathway to lawful permanent residency should explicitly apply to workers seeking Lawful Permanent Resident status through not just employment-based categories, but also through family based categories.[136] Because H-2A workers often are providing for their families still living in America, it's important to make a pathway to citizenship for their families to the United States.[137] While the DHS took an important step forward in providing a path to citizenship from the H-2A visa that had not previously been present, further action needs to be taken that would provide a similar pathway for family members.

CONCLUSION

As the United States continues struggling to ensure equal protections for all, Congress must continue to consider and implement ways of protecting migrant workers in the United States on H-2A visas. Through an application of the badges and incidents test promulgated by Carter, it becomes evident that these programs bear unsettling resemblances to slavery. By establishing this connection to slavery through the invocation of the Thirteenth Amendment, Congress is within its constitutionally delegated authority to take measures to increase protections for these workers. These measures must be aimed at providing redress to injury resulting from the worst conditions facing H-2A workers today including wage theft, unfair labor practices and coercion, and debt bondage. Through a meaningful interpretation of the Thirteenth Amendment's jurisprudential scope within the American labor industry and a successful application of this scope to the labor conditions in which H-2A workers are subject to, an adequate and justified solution may be reached that promises the constitutionally required protections for H-2A workers.

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136. *Id.*

137. Jesus Cañas and Ana Pranger, *Strong U.S. labor market drives record remittances to Mexico*, FEDERAL RESERVE BANK OF DALLAS (Oct. 20, 2023), https://perma.cc/DT98-7BLG.