RACE, LABOR, AND THE THIRTEENTH AMENDMENT IN THE 1940s DEPARTMENT OF JUSTICE

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I. INTRODUCTION

A number of the articles for this symposium concern the labor pedigree of the Thirteenth Amendment. Several others discuss the Amendment's relationship to race-based civil rights. That separate articles address these two issues is unsurprising. In contemporary legal culture, labor questions and race questions often occupy separate spheres. But the history I explore in this article predates that division; it shows how, at least at one critical moment in time, the Thirteenth Amendment defied the current dichotomy between labor issues and race-based civil rights.

That history concerns the role of the Thirteenth Amendment in a fledgling civil rights section of the Department of Justice ("DOJ") in the 1940s.[1] When Attorney General Frank Murphy created what was originally called the Civil Liberties Unit ("CLU") in 1939, he largely thought the civil liberties it would protect were the rights of workers to organize into unions and bargain with their employers, as well as the First Amendment protections such workers would need to exercise those rights. Reporting on Murphy's creation of the unit, the *New York Times* concluded that although "many cases affecting civil liberties will arise as a result of the conflict between labor and industry, officials said the field would not be confined to labor matters."[2] Viewed in the context of the 1930s—a decade saturated with discussion about and protection of workers' rights and related rights to economic security—it seems fitting that at its creation the first federal governmental unit devoted specifically to protecting civil rights was deeply concerned with labor's rights. The unit's priorities and caseload in its early years reflected this commitment. Although the CLU lawyers pursued other kinds of cases, they prominently discussed and prosecuted cases involving workers' rights.[3]

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1. For a more in-depth history of civil rights in the 1940s, see RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007).

2. *"Civil Rights" Unit Set Up By Murphy*, N.Y. TIMES, Feb. 4, 1939, at 2.

3. *See, e.g.*, Henry A. Schweinhaut, *The Civil Liberties Section of the Department of Justice*, 1 BILL RTS. REV. 1 206, 210-11 (1941); Lewis Wood, *Attacks Bar Group for Fight on Hague*, N.Y.

With the outbreak of World War II, the focus of civil rights in national politics changed. The war's domestic and international dimensions gave racial—and in particular African-American—civil rights greater salience both in mainstream political discourse and among legal professionals. As had occurred during World War I, a national economy mobilizing for war once again drew African Americans out of the South and into the North and West where they could vote. As black voters turned increasingly to the Democratic Party, their political support became critical to its success. Bolstering their protests with reference to the war, African Americans engaged in a "Double V" campaign for victory against fascism at home and abroad.[4] In unions, the military, organizations like the NAACP, and outspoken black newspapers, African Americans protested segregation, discrimination, and inequality. Even those who lacked such organizational support protested on a more individual level—on streetcars in the South, in relationships with employers, and by calling on the federal government to vindicate their rights.[5]

The new national attention to these black protests did not altogether eclipse the labor and economic rights that had been prominent in the 1930s. During and just after the war, labor rights and rights to economic security remained politically robust. The Roosevelt Administration continued to signal to lawyers in the renamed Civil Rights Section ("CRS") the political salience as well as legal appeal of such rights. President Roosevelt pronounced "freedom from want" as part of his Four Freedoms in 1941.[6] Three years later, his "Economic Bill of Rights" continued the trend of publicizing the importance of economic rights in general and the rights of labor in particular.[7] Thus, both labor and economic

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TIMES, July 14, 1939, at 3; O. John Rogge, *Justice and Civil Liberties*, 25 A.B.A. J. 1030, 1030-31 (1939); JEROLD S. AUERBACH, LABOR AND LIBERTY 184 (1966).

4. *The Courier's Double 'V' for a Double Victory Campaign Gets Country-Wide Support*, PITTSBURGH COURIER, Feb. 14, 1942, at 1.

5. On rising black rights consciousness, see, e.g., PATRICIA SULLIVAN, DAYS OF HOPE: RACE AND DEMOCRACY IN THE NEW DEAL ERA (1996); Richard M. Dalfiume, *The 'Forgotten Years' of the Negro Revolution*, 55 J. AM. HIST. 90, 92-93, 95-98 (1968); Harvard Sitkoff, *Racial Militancy and Interracial Violence in the Second World War*, 58 J. AM. HIST. 661, 662-65 (1971); John Modell et al., *World War II in the Lives of Black Americans: Some Findings and an Interpretation*, 76 J. AM. HIST. 838, 838-39 (1989); ROBIN D.G. KELLEY, RACE REBELS: CULTURE, POLITICS, AND THE BLACK WORKING CLASS 55-75 (1994). On increasing black radicalism, see, e.g., PENNY M. VON ESCHEN, RACE AGAINST EMPIRE: BLACK AMERICANS AND ANTICOLONIALISM, 1937–1957 (1997); CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955 (2003). On blacks in unions and working-class activism, see, e.g., ERIC ARNESEN, BROTHERHOODS OF COLOR: BLACK RAILROAD WORKERS AND THE STRUGGLE FOR EQUALITY (2001); AUGUST MEIER & ELLIOTT RUDWICK, BLACK DETROIT AND THE RISE OF THE UAW 120 (1979); Robert Korstad & Nelson Lichtenstein, *Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement*, 75 J. AM. HIST. 786 (1988).

6. Franklin D. Roosevelt, *The Annual Message to the Congress* (Wash., D.C., Jan. 6, 1941), *in* 9 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 663, 663-72 (comp. Samuel I. Rosenman, 1969) [hereinafter FDR PUBLIC PAPERS].

7. Franklin D. Roosevelt, *Message to the Congress on the State of the Union* (Wash., D.C., Jan. 11, 1944), *in* 13 FDR PUBLIC PAPERS, *supra* note 6, at 41, 42. For the continuing emphasis on economic rights, see, e.g., Charles E. Merriam, *The National Resources Planning Board: A*

rights and the rights of African Americans remained politically salient to American conceptions of individual rights. Indeed, the most prominent black civil rights issue during the war—the right to work without discrimination in war industries and labor unions—capitalized on the labor and economic rights that were also prominent. Where race and labor met, African Americans protested most vigorously and politicians responded most strenuously.[8]

For lawyers practicing at such a time of ferment in civil rights, the ultimate role that race, labor, and economic rights would play in modern civil rights conceptions remained uncertain. Would additional political upheavals continue to highlight racial, labor, and economic rights? Would the national will to address race discrimination fade with the war and a reassertion of southern Democratic power? Or would the rights of African Americans come to define the legal meaning of civil rights? To civil rights lawyers at the time, the answers to these questions were unknown and unknowable.

In this context, the lawyers of the CRS did not eschew the labor rights that had spurred the creation of the section. Instead, they used the Thirteenth Amendment as a bridge between their historical commitment to the still-robust labor and economic rights of the 1930s and their commitment to the emerging racial rights of the 1940s. The Thirteenth Amendment acted as a bridge in two distinct ways. First, it provided a doctrinal foundation for claims from African-American workers that challenged both the economic and the racial aspects of Jim Crow. Second, it provided a conceptual link between the affirmative governmental obligations to provide economic security associated with the New Deal and the government's potential obligations to provide for what contemporaries called the "safety and security" of African Americans. Both of these roles suggest the difficulty of dividing the Thirteenth Amendment into separate labor and racial elements, as well as more generally the historical contingency of the current separation between labor and race-based civil rights.

II. THE THIRTEENTH AMENDMENT AS DOCTRINAL FOUNDATION

The complaints that gave the CRS lawyers an opportunity to use the Thirteenth Amendment in the 1940s came largely from African-American agricultural workers in the South. The complaints these workers lodged with the federal

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Chapter in American Planning Experience, 38 AM. POL. SCI. REV. 1075, 1079-80 (1944); CHARLES E. MERRIAM, ON THE AGENDA OF DEMOCRACY 98-99 (1941); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 628 (1943). For the relation of these developments to the international scene, see Declaration of Principles, Known as the Atlantic Charter, U.S.-U.K., Aug. 14, 1941, 55 Stat. 1603, 204 L.N.T.S. 384; U.K. INTER-DEPARTMENTAL COMM. ON SOC. INS. & ALLIED SERVS., SOCIAL INSURANCE AND ALLIED SERVICES: REPORT BY SIR WILLIAM BEVERIDGE (London, 1942); ELIZABETH BORGWARDT, A NEW DEAL FOR THE WORLD: AMERICA'S VISION FOR HUMAN RIGHTS 46-86, 285-300 (2005).

8. Of course, there was, and there remains today, a debate as to how effective the main federal response—that is, the Fair Employment Practice Committee—was. *See, e.g.*, MERL E. REED, SEEDTIME FOR THE MODERN CIVIL RIGHTS MOVEMENT: THE PRESIDENT'S COMMITTEE ON FAIR EMPLOYMENT PRACTICE, 1941–1946 (1991); DANIEL KRYDER, DIVIDED ARSENAL: RACE AND THE AMERICAN STATE DURING WORLD WAR II 53-66 (2000).

government revealed that they understood Jim Crow somewhat differently from the way we commonly imagine it today. To them, Jim Crow—like slavery before it—was a system of both racial subordination and economic exploitation.[9] The Thirteenth Amendment's abolition of slavery following the Civil War had spawned two related problems for many southern whites: a race problem and a labor problem. How, they asked themselves, would they prevent the newly freed African Americans from contaminating the white race and debasing white politics? And how would they find a replacement for the cheap labor black slaves had previously provided and on which the southern economy was largely based? As one observer commented in 1936, "Slavery was too integral a part of the social life of the South and too vital to the interests of certain classes to be suddenly eliminated by a mere constitutional amendment."[10] Rather, the Amendment made "necessary the finding of new ways of perpetuating the Negro's enslavement."[11]

Toward that end, and despite the Thirteenth Amendment, southern whites had recaptured, sometimes swiftly and sometimes incrementally, political and economic power over those they had once enslaved. Whites established control over the legal system and political structures of late nineteenth-century South that allowed them to dominate government at all levels into the 1940s.[12] Whites with economic power over black farmworkers controlled the local boards and committees that implemented and administered various New Deal programs in agriculture, as well as wartime draft, wage, and price boards. Most black southerners, especially rural southerners, could not vote, let alone hold public office.[13] Despite favorable long-standing constitutional precedent, they could not sit on juries.[14] African Americans did not serve as judges or police officers. In fact, those officials often perpetrated violence against African Americans rather

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9. In viewing Jim Crow as both a racial and an economic system, I draw on ROBERT RODGERS KORSTAD, CIVIL RIGHTS UNIONISM: TOBACCO WORKERS AND THE STRUGGLE FOR DEMOCRACY IN THE MID-TWENTIETH-CENTURY SOUTH (2003); ARNESEN, *supra* note 5, at 101; Thomas J. Sugrue, *Affirmative Action from Below: Civil Rights, the Building Trades, and the Politics of Racial Equality in the Urban North, 1945–1969*, 91 J. AM. HIST. 145 (2004).

10. PETE DANIEL, THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901–1969, at 174 (1972) (quoting Editorial, *Slavery Seventy Years After*, 53 CHRISTIAN CENTURY 1645 (1936)).

11. *Id.*

12. Southern legislatures deemed even reading about elections or voting inappropriate for African Americans, and they required textbooks for Jim Crow schools to omit references to such topics. Editorial, *Textbooks in Mississippi*, 18 OPPORTUNITY 99, 99-100 (1940). On African-American activism in this period despite these developments, see generally STEVEN HAHN, A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION (2003); GRETA DE JONG, A DIFFERENT DAY (2002); NAN ELIZABETH WOODRUFF, AMERICAN CONGO (2003).

13. In 1940, approximately two percent of the eligible black population was registered to vote. After *Smith v. Allwright*, 321 U.S. 649 (1944), eliminated the white primary in 1944, southern blacks registered in greater numbers. Eighty to eighty-five percent of these black voters, however, lived in cities. DAVID R. GOLDFIELD, BLACK, WHITE, AND SOUTHERN: RACE RELATIONS AND SOUTHERN CULTURE, 1940 TO THE PRESENT 45-47 (1990). *See generally* STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969 (1976).

14. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

than protected them from it. At the very least, white government officials, white police, and white juries acquiesced in racial violence committed by private white citizens.[15] In 1947, the President's Committee on Civil Rights observed that "[t]he almost complete immunity from punishment enjoyed by lynchers is merely a striking form of the broad and general immunity from punishment enjoyed by whites in many communities for less extreme offenses against Negroes."[16] Indeed, black southerners might not have directed their protests to lawyers outside the South if they had not been completely unrepresented in every level of government and politics within the region.

Such political powerlessness made possible, and was made possible by, an economic structure aimed at keeping black agricultural workers propertyless, dependent, and obedient. White planters desired cheap and docile labor while black farmworkers wanted financial and physical independence. The tenancy system that developed facilitated white economic exploitation of black farmworkers while simultaneously making black land ownership a distant possibility. As tenant farmers, and more frequently sharecroppers, many African Americans lived on the land of a (usually white) landowner. Cash tenant farmers paid the landlord with money made from the crop while other types of tenants and sharecroppers paid with a share of the crop.[17] Those who could not even afford such arrangements or preferred mobility to potential advancement worked as wage laborers. They had no stake in the land they tilled and even less hope of eventually owning their own land.[18]

Planters tried to ensure that tenant farmers, sharecroppers, and wage laborers lived within a closed economic universe. They wanted black farmworkers to spend what little money they had in plantation commissaries or in stores that took advantage of their lack of mobility, choice, and contact with the outside world. Planters made every effort to keep both tenants and wage laborers in debt. Most renters of any type rarely had the cash necessary to buy the seeds, fertilizer, storage space, or tools they would need for the coming season. They had to rely on their landlords or other local white landowners or merchants to "furnish" some or all of these things. The rates at which they repaid the loans after harvest were usually exorbitant and nonnegotiable. Sharecroppers were often so far into debt by harvest time that their share of the crop could not even cover the prior season's debt, let alone provide enough capital to forego debt for the coming season. Debt prevented renters from gaining financial independence and land

15. *See* Screws v. United States, 325 U.S. 91, 92-93 (1945). *See generally* HARVARD SITKOFF, A NEW DEAL FOR BLACKS (1978).

16. TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 24 (1947).

17. ARTHUR F. RAPER, PREFACE TO PEASANTRY: A TALE OF TWO BLACK-BELT COUNTIES 148-49 (1936) ("Cropper farming is a Negro institution.").

18. On the real possibility of black land ownership, see, e.g., ROBERT HIGGS, COMPETITION AND COERCION: BLACKS IN THE AMERICAN ECONOMY, 1865–1914 (Phoenix ed. 1980); Stephen J. DeCanio, *Accumulation and Discrimination in the Postbellum South*, *in* MARKET INSTITUTIONS AND ECONOMIC PROGRESS IN THE NEW SOUTH, 1865–1900: ESSAYS STIMULATED BY ONE KIND OF FREEDOM: THE ECONOMIC CONSEQUENCES OF EMANCIPATION 103 (Gary M. Walton & James F. Shepherd eds., 1981).

ownership, and it undermined wage laborers' and tenants' physical independence and ability to choose their work.[19] Although the Supreme Court had repeatedly outlawed such peonage—whereby employers forced workers to work out their debts—the practice persisted into the 1940s.[20]

The complaints black farmworkers lodged with CRS lawyers reflected and challenged this racialized political economy. The black workers understood that their lack of political and economic power were together responsible for their plight. African-American farmworker Robert Hammond articulated it this way:

> The negroes here most of them is afreaid of the white people here and all of them is afreaid to go to the court house to vote, now take thing's to a consideration, we live's in a free house such as it is, but you can't live in the free house with nothing to eat one half of the time and no shoes and cloth to wear in the winter.[21]

Complaints like Hammond's offered the lawyers of the CRS opportunities to use the Thirteenth Amendment. As the original constitutional intervention into the racial and economic system of chattel slavery, that Amendment was an excellent resource for challenging the newer incarnations of servitude that southern blacks continued to endure. The Amendment did not require CRS lawyers to disaggregate the racial and economic aspects of the farmworkers' complaints; it did not sever the world of civil rights in two. Rather, it offered an integrated legal tool to address involuntary servitude as an integrated problem of labor exploitation and racial subordination.

As I will discuss in more detail below, the CRS accordingly used the Thirteenth Amendment to challenge peonage and involuntary servitude of various kinds. It took on servitude enforced by violence and threats of violence, by psychological coercion, and by the imposition of inhumane living and

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19. For a detailed description of both the terms by which black farmworkers labored and the system as a whole, see Frank J. Welch, *The Plantation Land Tenure System in Mississippi*, 385 BULL. MISS. AGRIC. EXPERIMENT STATION 5 (1943). On the accumulation of debt and the effects thereof, see JACQUELINE JONES, THE DISPOSSESSED: AMERICA'S UNDERCLASSES FROM THE CIVIL WAR TO THE PRESENT 13-205 (1992); DE JONG, *supra* note 12, at 10-40. Historians have debated the extent of African-American mobility following the Civil War and into the twentieth century. For the argument that the combination of law and custom succeeded in curtailing almost all African-American movement, see, e.g., DANIEL, *supra* note 10; GERALD DAVID JAYNES, BRANCHES WITHOUT ROOTS: GENESIS OF THE BLACK WORKING CLASS, 1862–1882 (Oxford Univ. Press 1986) (1985); JAY R. MANDLE, NOT SLAVE, NOT FREE: THE AFRICAN AMERICAN ECONOMIC EXPERIENCE SINCE THE CIVIL WAR (1992); DANIEL A. NOVAK, THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY (1978). For those who find that despite the law, African Americans moved freely throughout the South, see, e.g., HIGGS, *supra* note 18; DeCanio, *supra* note 18. For integrative views, see ROGER L. RANSOM & RICHARD SUTCH, ONE KIND OF FREEDOM: THE ECONOMIC CONSEQUENCES OF EMANCIPATION (1977); WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL, 1861–1915 (1991).

20. United States v. Gaskin, 320 U.S. 527 (1944) (reversing judgment granting defendant's demurrer to the charge of arresting a man to a condition of peonage); Taylor v. Georgia, 315 U.S. 25 (1942) (reversing judgment affirming a conviction for a violation of a condition of peonage in state statute).

21. Letter from Robert Hammond to Sir, [NAACP] (Apr. 26, 1947), *microformed on* Papers of the NAACP, pt. 13C, reel. 12:679-680 (Univ. Publ'n of Am.).

working conditions. The CRS also used the Amendment to challenge southern laws that maintained control over African-American labor. Through prosecutions and other interventions into the southern racialized political economy, the CRS lawyers used the Thirteenth Amendment to undermine the combined racial and economic oppression of rural Jim Crow.

As the section's lawyers directed civil rights cases across the country from their perch in Washington, D.C., these Thirteenth Amendment violations made up the conceptual core of the section's civil rights practice. Unlike the section's other practice areas—lynching, police brutality, and voting rights cases—its Thirteenth Amendment cases uniquely responded to the combined racial and economic harms about which African-American farmworkers complained. Moreover, these Thirteenth Amendment cases invoked both sets of rights—labor and economic rights and rights to racial equality—within the CRS lawyers' wartime mandate.

Again and again, when CRS lawyers discussed their priorities, the right to be free from involuntary servitude played a prominent role. As CRS lawyer Victor Rotnem observed, "Probably no single constitutional provision is the basis of so many complaints to the Department."[22] One of his fellow section lawyers noted, "No small part of the work of the [CRS] is that concerned with the enforcement of the right secured by the Thirteenth Amendment, the right of persons to be free of involuntary servitude."[23] "[T]he importance of these relatively old laws, designed to eradicate every form of compulsory labor," a section chief concluded in the early 1950s, "cannot be overemphasized."[24]

III. THE THIRTEENTH AMENDMENT AS CONCEPTUAL BRIDGE

In addition to providing a doctrinal foundation for bringing claims challenging both the economic and racial aspects of Jim Crow, the Thirteenth Amendment acted as a conceptual bridge between labor and race rights in the 1940s. During the New Deal, the federal government took on greater responsibility for the economic welfare of Americans than ever before. "Economic security" was a watchword of the decade.[25] Labor unions and working and poor Americans

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22. Victor W. Rotnem, *Criminal Enforcement of Federal Civil Rights*, LAW. GUILD REV., May 1942, at 18, 21.

23. Fred G. Folsom, Jr., *A Slave Trade Law in a Contemporary Setting*, 29 CORNELL L.Q. 203, 203 (1943).

24. *Peonage and Slavery, Hearing on H.R. 2118 Before Subcomm. No. 4 of the U.S. House Committee on the Judiciary*, 82d Cong. 3 (1951) (statement of George Triedman), *in* UNPUBLISHED U.S. HOUSE OF REPRESENTATIVES COMMITTEE HEARINGS, 1947–1954 (1992), *microformed on* CIS 82-HJ-T.15A8 (Cong. Info. Serv.).

25. *See, e.g.*, Franklin D. Roosevelt, New Conditions Impose New Requirements upon Government and Those Who Conduct Government, Address at the Commonwealth Club, in San Francisco, Calif. (Sept. 23, 1932), *in* The FDR PUBLIC PAPERS, *supra* note 6, at 742; *Democratic Platform of 1936*, *in* NATIONAL PARTY PLATFORMS, 1840–1972, at 360 (comp. Donald Bruce Johnson & Kirk H. Porter, 5th ed. 1973); Sidney M. Milkis, *Franklin D. Roosevelt, The Economic Constitutional Order, and the New Politics of Presidential Leadership*, *in* THE NEW DEAL AND THE TRIUMPH OF LIBERALISM 40-41, 56-60 (Sidney M. Milkis & Jerome M. Mileur eds., 2002);

claimed rights to relief, unemployment insurance, and social security, as well as rights to organize into protected unions and bargain collectively. These rights were affirmative rather than negative: they required federal government action, not judicially imposed restraints on governmental action.

When the CRS lawyers, often steeped both personally and professionally in the New Deal, turned their attention to race, they brought with them and expanded upon this new affirmative role of government in protecting civil rights. The Thirteenth Amendment was central to this conceptual transformation. In 1947, Robert Carr wrote *Federal Protection of Civil Rights: Quest for a Sword.*[26] As a political science professor at Dartmouth and the executive secretary of President Truman's 1946 Committee on Civil Rights, Carr intended the book to publicize the work of the CRS. Carr organized *Quest for a Sword* around a metaphor Supreme Court Justice Robert Jackson used in the 1944 peonage case of *Pollock v. Williams*.[27] Jackson described two ways to protect those caught in involuntary servitude. "Congress," Jackson declared, "raised both a shield and a sword against forced labor because of debt."[28] When victims of peonage found themselves imprisoned on charges of accepting advances under false pretenses or breaking parole by leaving a particular job, they invoked the shield of federal law. They defended themselves "by requesting a federal court to invalidate the state action that [was] endangering [their] rights."[29] When, on the other hand, the federal government brought prosecutions against individual perpetrators of peonage, it raised a sword against them. It took "the initiative," Carr described, "in protecting helpless individuals by bringing criminal charges against persons who [were] encroaching upon their rights."[30]

Adopting Jackson's metaphor, Carr concluded that in recent years the CRS had taken up the sword not only in peonage cases but also in civil rights cases generally. "Government has traditionally been regarded as the villain in the civil rights drama," he wrote.[31] "The government threat remains, but threats from other sources are extremely serious. They can and should be met by government action." Carr saw "the great achievement of the [CRS]" as making "[t]his new role of government [seem] to be inescapable."[32]

Carr's choice to describe the CRS's achievements—and civil rights more generally—through the lens of its peonage and involuntary servitude prosecutions is telling. The Thirteenth Amendment cases that the CRS lawyers pursued during the 1940s provided the perfect opportunity to apply New Deal ideas about economic rights and government responsibility to the rights of

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JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE 6-7 (2003); MEG JACOBS, POCKETBOOK POLITICS: ECONOMIC CITIZENSHIP IN TWENTIETH-CENTURY AMERICA (2005).

26. ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD (1947).

27. 322 U.S. 4 (1944).

28. *Id.* at 8.

29. CARR, *supra* note 26, at 5.

30. *Id.* at 5.

31. *Id.* at 193.

32. *Id.* at 210.

African Americans. Following changing trends within the involuntary servitude complaints of African Americans themselves, the CRS lawyers went about expanding the protections of the Thirteenth Amendment in order to make the Constitution serviceable for African Americans in the post-New Deal era. In pursuing involuntary servitude cases, the CRS lawyers aspired to a civil rights framework that assumed the government was responsible for eliminating some of the worst and most fundamental aspects of Jim Crow. These cases built on New Deal protections for free labor and economic security and responded to wartime imperatives for racial justice.

The starting point for these cases was a series of narrow but important peonage precedents from the early twentieth century. Even though the Supreme Court had whittled away the Thirteenth Amendment's power to protect workers generally in the *Slaughter-House Cases*,[33] to protect African-American civil rights generally in the *Civil Rights Cases*,[34] and even to protect the rights of black workers specifically in *Hodges v. United States*,[35] it had always respected the Thirteenth Amendment's protection against slavery and involuntary servitude. In a series of cases in the early twentieth-century, the Court upheld the power of the Thirteenth Amendment and the Anti-Peonage Act of 1867 to invalidate peonage practices.[36] But those cases were narrow—they only invalidated involuntary servitude when created by contracted indebtedness.

In two related but distinct directions, the CRS lawyers expanded this longstanding federal interest in peonage in a way that broadened New Deal conceptions of affirmative rights and put them to use for African-American civil rights. First, the CRS lawyers reconceptualized Thirteenth Amendment violations from the narrow contractual understanding of peonage to a "federally-secured right to be free from bondage."[37] Peonage was about contract and debt. The government's role was to intervene into private contracts only when they went wrong. In the 1940s, that role shifted. The government lawyers began to project an ongoing relationship between individuals and the federal government with the government offering affirmative protection of rights. The New Deal had begun this trend with its promise of economic security. The CRS lawyers broadened it to include African Americans' right to the "safety and security of the person": the right to be free from bondage, lynching, and police brutality.[38]

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33. 83 U.S. 36 (1873).

34. 109 U.S. 3 (1883).

35. 203 U.S. 1 (1906).

36. United States v. Reynolds, 235 U.S. 133 (1914); Bailey v. Alabama, 219 U.S. 219 (1911); Clyatt v. United States, 197 U.S. 207 (1905).

37. Sydney Brodie, *The Federally-Secured Right to be Free from Bondage*, 40 GEO. L.J. 367, 385-86 (1952).

38. The phrase drew on a venerable but long-submerged understanding of civil rights, with common law roots traceable to Blackstone's 1765 *Commentaries*. There, Blackstone defined personal security as "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." WILLIAM BLACKSTONE, 1 COMMENTARIES *125. The American roots of the concept went back to the 1866 Civil Rights Act and the Freedman's Bureau Bill of the same year. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27; Freedman's Bureau Bill, ch. 200, § 14, 14 Stat. 173, 176 (1866). The very first Reconstruction-era civil rights statute guaranteed all

This conceptual shift suggested that African Americans as well as whites deserved "security," that that security went beyond economics, and that affirmative federal power could and should be used to protect individuals. As President Truman said when creating his Civil Rights Commission in 1947, "The extension of civil rights today means, not protection of the people *against* the Government, but protection of the people *by* the Government."[39]

Second, the CRS used the Thirteenth Amendment to fill in gaps in New Deal legislation. In the lawyers' hands, the Thirteenth Amendment deepened what had been the New Deal's equivocal commitment to free labor within a unified national economy. The National Labor Relations Act ("NLRA") offered labor rights to industrial workers, for example, but it largely accommodated the desire of southern whites to exclude many African Americans from the Act's protections.[40] The South was thus able to maintain a southern labor market relatively separate from that of the rest of the United States.[41] For black agricultural workers especially, that market was characterized by legal and extralegal constraints on mobility, earnings, and property ownership. Emigrant-agent, enticement, vagrancy, and other laws restricted the mobility and market power of black farmworkers. In the 1940s, the CRS determined to attack not just particular instances of servitude, but these laws themselves. With these attacks, the CRS suggested that the Thirteenth Amendment should protect African Americans in the South from more than simply the chattel slavery the Amendment most centrally proscribed. The Thirteenth Amendment could

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citizens the same "full and equal benefit of all laws and proceedings for the security of person and property" that white citizens enjoyed. *Id.* When African-American civil rights reemerged as a national political issue in the 1940s, the "security of the person" reemerged with them. It was a central component of the report of the President's Committee on Civil Rights in 1947. REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, *supra* note 16, at 20. And it was the phrase used to describe the category of harms that included involuntary servitude and peonage, lynching, and police brutality in the only casebook on civil rights in existence in 1952. THOMAS I. EMERSON & DAVID HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES: A COLLECTION OF LEGAL AND RELATED MATERIALS 1 (1952). Language about the "security of the person" also occasionally resurfaced in some of the signal civil rights dissents of the late-nineteenth century, such as the *Slaughter-House Cases*, 83 U.S. 36, 115-19 (1873) (Bradley, J., dissenting), and *Plessy v. Ferguson*, 163 U.S. 537, 555-56, 560 (1896) (Harlan, J., dissenting).

39. Harry S. Truman, Address before the National Association for the Advancement of Colored People at the Lincoln Memorial, Washington, D.C. (June 29, 1947), *in* 3 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN, 1947, at 311 (1961).

40. National Labor Relations Act, ch. 372, § 2(3), 49 Stat. 449, 450 (1935) (codified at 29 U.S.C. §§ 151–169 (2000)). *See also* SITKOFF, *supra* note 15, at 34-57; NANCY J. WEISS, FAREWELL TO THE PARTY OF LINCOLN: BLACK POLITICS IN THE AGE OF FDR 163-68 (1983); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 76 (1999); Ira Katznelson et al., *Limiting Liberalism: The Southern Veto in Congress, 1933–1950*, 108 POL. SCI. Q. 283, 292 (1993); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1336 (1987).

41. *See* BRUCE J. SCHULMAN, FROM COTTON BELT TO SUNBELT: FEDERAL POLICY, ECONOMIC DEVELOPMENT, AND THE TRANSFORMATION OF THE SOUTH, 1938–1980, at 1-85 (1991). *See generally* GAVIN WRIGHT, OLD SOUTH, NEW SOUTH: REVOLUTIONS IN THE SOUTHERN ECONOMY SINCE THE CIVIL WAR (1986).

guarantee free labor for those workers excluded from New Deal labor protections.[42]

Similarly, section lawyers used the Thirteenth Amendment to provide a modicum of economic security to black workers excluded from the Fair Labor Standards Act, the Social Security Act, and other economic security measures.[43] Before the end of World War II, lawyers had to prove that employers kept workers in servitude through debt, violence, or legal coercion. After the war, they began to view servitude not only as a problem of force but as a problem of extreme economic coercion. When employers overworked their workers, did not pay them, did not educate them, or gave them substandard food and accommodations, it began to seem that employers enslaved their workers. No one with free will would choose such inhumane conditions of work and life. Thus, these workers must be under duress to remain in these employment relationships. The CRS accordingly prosecuted cases in which employers kept both agricultural workers and domestic workers in shockingly substandard conditions. Here, too, the CRS's use of the Thirteenth Amendment filled in the legislative gaps of the New Deal. In attacking the poor conditions in which African-American agricultural and domestic workers lived as problematic under the Thirteenth Amendment, the CRS lawyers indicated that such workers were entitled to a version of the economic rights to minimal living standards that the Fair Labor Standards Act and the Social Security Act offered industrial workers.[44]

Within these Thirteenth Amendment expansions, we can see immanent civil rights frameworks quite foreign to our own. Where the New Deal had emphasized labor and economic rights and assisted African Americans only partially and incidentally, these novel involuntary servitude prosecutions aimed to bring African Americans within the New Deal rights framework. They suggested affirmative governmental responsibility for the security of the person, as well as affirmative governmental responsibility for labor and economic rights for all, including the poorest African Americans. They pointed toward a new civil rights in which the protection of African Americans was an expansion of the New Deal itself, an expansion of the increased power the federal government had amassed to provide economic security during the Depression.

IV. CONCLUSION

Taken together, these two roles of the Thirteenth Amendment—providing a doctrinal foundation for challenging both the racial and the economic aspects of Jim Crow and providing a conceptual link between the affirmative economic rights of the New Deal and the affirmative racial rights of the 1940s—suggest

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42. *See* GOLUBOFF, *supra* note 1, at 152-59.

43. Fair Labor Standards Act, ch. 676, § 13(a)(6), 52 Stat. 1060, 1067 (1938) (codified at 29 U.S.C. §§ 201–219 (2000 & Supp. II 2002)); Social Security Act, ch. 531, §§ 210(b)(1)-(2), 811(b)(1)-(2), 907(c)(1)-(2), 49 Stat. 620, 625, 639, 643 (1935) (codified at 42 U.S.C. §§ 301–1397jj (2000 & Supp. II 2002)).

44. *See* GOLUBOFF, *supra* note 1, at 159-68.

that "race" and "labor" have not always been as distinct as they are today. In these cases, as in Jim Crow itself and the complaints black agricultural workers lodged against Jim Crow, economic exploitation and racial oppression were intertwined. These cases also suggested that the government might offer affirmative protection against all of the harms—public and private, racial and economic—of the nation's caste system.

That understanding of Jim Crow, of civil rights, and of the Thirteenth Amendment has largely been lost to history. When *Brown v. Board of Education*[45] captured the legal and popular imagination about civil rights, civil rights became something very different from what the CRS's Thirteenth Amendment cases had indicated. The Fourteenth Amendment, equal protection emphasis of *Brown* ultimately made racial classifications the main problem of Jim Crow. *Brown* and the doctrine it inaugurated left to one side the substantive economic inequalities the CRS's Thirteenth Amendment practice had targeted. Once legal scholars rewrote *Brown*'s pedigree as starting with *Carolene Products*' footnote four[46] and *Korematsu*'s "most rigid scrutiny,"[47] the division between economics and race became even more imbedded in legal doctrine. Now racial civil rights stood in opposition to, rather than as an extension of, the labor and economic rights of the New Deal. The government had power to regulate the economy—which included the protection of labor and economic rights—but it lacked the power to regulate on race or on substantive racial and economic equality. In the end, we constructed a proceduralist civil rights that restrains the government from classifying on the basis of race and that embraces negative rights against the government rather than affirmative rights to government protection. We lost the substantive economic components of the CRS's 1940s legal practice.

Moreover, we lost the unique heritage and meaning of the Thirteenth Amendment. When the Thirteenth Amendment returned to the doctrinal scene in *Jones v. Alfred E. Mayer Co.* in 1968,[48] the Supreme Court treated it as a Fourteenth Amendment without a state action requirement. The Court denuded the Amendment of its labor and economic component and used it instead in service of the equal protection, classification-based conception of civil rights.

The history of the Thirteenth Amendment in the CRS of the 1940s reminds us of the Thirteenth Amendment's roots in both race and labor. It reminds us that it was once possible to practice civil rights that embraced both components of civil rights simultaneously in defense of the poorest African Americans. It reminds us of the possibility of generating affirmative rights. In doing so, this history can perhaps point us toward new civil rights possibilities beyond the current regime. It opens up the contingencies in civil rights and suggests that we might once again find ways to help the poorest African Americans redress the vestiges of Jim Crow that remain today.

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45. 347 U.S. 483 (1954).
46. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
47. Korematsu v. United States, 323 U.S. 214, 216 (1944).
48. 392 U.S. 409 (1968).