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ARTICLE

ADMINISTRATIVE CONSTITUTIONALISM AT THE “BORDERS OF BELONGING”: DRAWING ON HISTORY TO EXPAND THE ARCHIVE AND CHANGE THE LENS

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Research on administrative constitutionalism has generally come out of law schools, from scholars specializing in public law. A limitation of the existing scholarship is its relatively thin empirical foundation. Administrative constitutionalism

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is hard to see because much of what administrators do is hard to see, and because the significance of some administrative interpretations only becomes apparent over time. This Article expands the archive, by alerting legal scholars to fine-grained historical research on Americans' encounters with administrative agencies. This body of work—coming largely out of history departments—is particularly attentive to the experiences of marginalized and non-elite populations. And although the historians writing in this vein have not always emphasized the constitutional aspects of their stories, those aspects are there between the lines. By analyzing two examples—the Freedmen's Bureau's interpretation of the Thirteenth Amendment and immigration officials' interpretation of the Fifth Amendment due process guarantee—this Article demonstrates what historians have to offer the study of administrative constitutionalism, both empirically and normatively. American history, this research reminds us, is about competing constitutional visions. Administrators helped pick winners and losers in an ongoing battle for formal legitimacy.

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INTRODUCTION

This symposium builds on a decade of scholarship on the role of administrative agencies in constructing and elaborating constitutional meaning—a phenomenon we now call “administrative constitutionalism.”¹ Drawing on scattered evidence from across the contemporary administrative state, as well as a discrete set of historical case studies, legal scholars have made this phenomenon visible and intelligible. Sophia Lee’s pathbreaking work explored the way that administrators in the Federal Communications Commission, the Federal Power Commission, and the National Labor Relations Board, respectively, interpreted the constitutional requirement of equal protection in the labor and employment arena between the 1930s and

¹ See Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801 (2010) (using the term to refer to “regulatory agencies’ interpretation and implementation of constitutional law”). Other scholars define the term differently. I employ Lee’s formulation.

the 1970s.² Risa Goluboff, Anjali Dalal, and Eric Fish have separately examined the role of the Department of Justice in defining the scope of constitutional civil rights and liberties.³ Joy Milligan and I have done the same for the Department of Health, Education, and Welfare (the precursor of what is now the Department of Education and the Department of Health and Human Services).⁴ Mining federal regulations and appellate court decisions, Gillian Metzger has found contemporary examples of administrative constitutionalism in the work of the federal Department of Housing and Urban Development, the Food and Drug Administration, and the Office of Legal Counsel.⁵ Other legal scholars have identified significant constitutional interpretations coming from the U.S. Post Office,⁶ the Federal Radio Commission,⁷ the Social Security Administration,⁸ and the War Department.⁹ And a raft of recent work illuminates how bureaucrats outside the federal government, at the state and local levels, have engaged questions of constitutional significance.¹⁰

² See *id.*; see also SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (2014). For another example of pathbreaking early work on administrative constitutionalism, employing a broader understanding of the term, see WILLIAM ESKRIDGE & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010).

³ RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); Anjali S. Dalal, *Shadow Administrative Constitutionalism and the Creation of Surveillance Culture*, 2014 MICH. ST. L. REV. 59 (2014); Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237 (2017).

⁴ Joy Milligan, *Plessy Preserved: Agencies and the Effective Constitution*, YALE L.J. (forthcoming); Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847 (2018); Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015).

⁵ Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013). For a recent article that also looks at multiple agencies—including the Department of Education and the Department of Housing and Urban Development (“HUD”)—and focuses specifically on costs to constitutionally protected speech, see David E. Bernstein, *Antidiscrimination Laws and the Administrative State: A Skeptic’s Look at Administrative Constitutionalism*, 94 NOTRE DAME L. REV. 1381 (2019). On administrative constitutionalism at HUD, see Blake Emerson, *Affirmatively Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing*, 65 BUFF. L. REV. 163 (2017). See also Lewis A. Grossman, *AIDS Activists, FDA Regulation, and the Amendment of America’s Drug Constitution*, 42 AM. J.L. & MED. 687, 691, 699-734 (2016) (characterizing the Food, Drug, and Cosmetic Act as America’s “drug constitution” and illuminating the politics that animated administrative interpretations of that statute in the late 1980s and 1990s).

⁶ Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 STAN. L. REV. 553 (2007).

⁷ Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 43-51 (2000).

⁸ Tani, *supra* note 4.

⁹ Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083 (2014).

¹⁰ See, e.g., Bernstein, *supra* note 5; Marie-Amélie George, *Agency Nullification: Defying Bans on Gay and Lesbian Foster and Adoptive Parents*, 51 HARV. C.R.-C.L.L. REV. 363 (2016) (identifying state and local bureaucrats as important actors in the discursive shift that led ultimately to constitutionally recognized marriage equality for gay and lesbian citizens); Marie-Amélie George,

Many of these legal scholars have also tackled normative questions, starting with those of greatest salience to the field of American public law: What does the phenomenon of administrative constitutionalism mean for a system of government that is democratic, federalist, and committed to separation of powers? In such a system, are agencies legitimate and appropriate interpreters of constitutional meaning?¹¹

This Article places that scholarship into conversation with a robust strand of historical research on Americans' everyday experiences with law and government, including administrative agencies. Contributors to this strand of research—which has generally come out of history departments—display little interest in the questions about institutional competency and democratic accountability that drive many legal scholars. But through careful and creative archival research, they have documented administrative constitutionalism in action. Their findings offer legal scholars not only a broader empirical foundation, but also a different and important set of questions: Who has reaped the benefits of administrative constitutionalism and who has borne its burdens? How have agencies used the Constitution to shape and police the “borders of belonging” that have figured so crucially in American life?¹²

This Article proceeds in four parts. Part I explains why historians have been well positioned to see administrative constitutionalism in action (even if they remain uninterested in it as a legal phenomenon). The two subsequent parts offer extended examples. Part II discusses the Freedmen's Bureau's interpretations of the terms “slavery” and “involuntary servitude”—practices that the Thirteenth Amendment barred but did not define. Part III turns to federal immigration officials' interpretation of the Fifth Amendment guarantee of due process in the late nineteenth century, amidst struggles over Chinese immigration. Part IV concludes with a discussion of why historians' questions—not simply their findings—enrich the study of administrative constitutionalism and one of its parent fields, administrative law. Unlike

Bureaucratic Agency: Administering the Transformation of LGBT Rights, 36 YALE L. & POL'Y REV. 83 (2017) (applying an administrative constitutionalism lens to the actions of state and local bureaucrats grappling with the equality rights of gay and lesbian citizens); Joanna L. Grisinger, *Municipal Administrative Constitutionalism: The New York City Commission on Human Rights, Foreign Policy, and the First Amendment*, 167 U. PA. L. REV. 1669 (2019).

¹¹ See, e.g., ESKRIDGE & FEREJOHN, *supra* note 2; Metzger, *supra* note 5; Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519 (2015). For an excellent distillation of what existing historical case studies offer these normative debates, see Sophia Z. Lee, *From the History to the Theory of Administrative Constitutionalism*, in ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 109 (Nicholas R. Parrillo ed., 2017).

¹² The term “borders of belonging” comes from Barbara Welke's scholarship on the lines of exclusion and inclusion that have defined citizenship in the United States. See generally BARBARA YOUNG WELKE, *LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES* (2010).

many scholars of administrative law, historians tend not to focus on how agencies should make decisions, or how much power agencies should have vis-à-vis other governmental institutions. Their interest, rather, is how administrators wielded the power of the state to affect people on the ground—materially, politically, socially, and otherwise—and how people who were subject to regulation in turn affected the content and limits of administrative action. Historians’ work thus offers a useful reminder of the stakes of administrative law. These stakes include not only the legitimacy and jurisdiction of the so-called fourth branch but also the chances and choices of everyone it touches.

I. HISTORIANS AS EXCAVATORS OF ADMINISTRATIVE CONSTITUTIONALISM

A defining trait of scholarship on administrative constitutionalism, according to Gillian Metzger, is a “conceptual commitment to seeing constitutional law in ordinary law contexts.”¹³ When it comes to the “ordinary law” of administrative agencies, however, “seeing” is not so easy. Much of what agencies do is insulated from the broader public and unlikely to attract the attention of Congress, the courts, or the White House. By extension, a vast amount of administrative activity is not visible in the types of sources that legal scholars most often consult—legislative records, regulations, published court opinions, and the like. Further hindering visibility is the subtlety of some administrative interpretations of the Constitution.¹⁴ Only in the fullness of time does their significance become apparent.¹⁵

All of these factors suggest the value of a historical approach, one that looks back on an agency’s work and recovers evidence of day-to-day administration. And as it turns out, historians have been doing this very work, albeit not with administrative constitutionalism in their sight lines.

Importantly, many of the historians doing this work are also committed to the ordinary—or at least, to counterbalancing generations of prior scholarship that privileged elite perspectives and formal politics. They entered the profession when cultural history was ascendant and social history established; as a result, they see value in studying people whose low status or limited access to formal power may have prevented them from “making

¹³ Metzger, *supra* note 5, at 1912.

¹⁴ *Id.* at 1902.

¹⁵ *Id.* at 1932; *see also* Lee, *supra* note 1, at 883 (noting that administrative constitutionalism is “not necessarily divulged” in the formal opinions, orders, and rules that are most accessible to legal scholars). On the wide range of administrative decisions that occur without triggering the accountability and oversight procedures that might create greater visibility, *see* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004), and Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95 (2003).

history” in the traditional sense.¹⁶ Under the now dominant approach to studying political history, what counts as politics includes much more than contests over political leadership, and history’s “losers” often merit as much attention as the “winners.”¹⁷ Legal history has long since moved in the same direction—beyond the mandarins of the bench and bar and toward an approach that emphasizes law’s messy and sometimes unpredictable encounters with the people it presumes to govern.¹⁸

These trends are relevant here because they have resulted in deep and creative readings of the detritus of administrative agencies—including from time periods that predate the modern administrative state (as conventionally understood).¹⁹ Historian Gautham Rao, for example, has mined the day-to-day records of custom houses in the early national period to illuminate the waxing and waning of distinct visions of governance.²⁰ Historian Cathleen Cahill has used the archives of the U.S. Indian Service to provide a revisionist account of the modern administrative state itself, pegging its origins not to Gilded Age railroad regulation or to the New Deal but to an older project of settler colonialism.²¹

Twentieth-century regulatory innovations have provided even richer fodder for historians. Margot Canaday has drawn on records from the Immigration and Naturalization Service, the Selective Service System, and the Federal Emergency Relief Administration, among many other agencies, to show how contemporary understandings of homosexuality took shape and how the label “homosexual” came to signal the citizen’s quintessential

¹⁶ For a brisk summary of major trends in historical writing across the twentieth century, including the rise of social and cultural history, see Sean Wilentz, *American Political Histories*, 21 OAH MAG. HIST. 23 (2007).

¹⁷ See generally THE DEMOCRATIC EXPERIMENT: NEW DIRECTIONS IN AMERICAN POLITICAL HISTORY (Meg Jacobs, William J. Novak & Julian E. Zelizer eds., 2003).

¹⁸ On these general trends, see William E. Forbath, Hendrik Hartog & Martha Minow, *Introduction: Legal Histories from Below*, 1985 WIS. L. REV. 759; Robert W. Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 L. & SOC’Y REV. 9 (1975); and Risa Goluboff, *Lawyers, Law, and the New Civil Rights Historiography*, 126 HARV. L. REV. 2312 (2013) (reviewing KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012)).

¹⁹ Some of the people I have described as legal scholars are also first-rate historians. Situated in law schools, they are nonetheless in dialogue with professional historians and deeply committed to the methods of the discipline. The historical work that I draw from in this Article comes primarily from historians who have made their institutional home in history departments and, for the most part, lack formal legal training.

²⁰ GAUTHAM RAO, NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE (2016).

²¹ CATHLEEN D. CAHILL, FEDERAL FATHERS AND MOTHERS: A SOCIAL HISTORY OF THE UNITED STATES INDIAN SERVICE, 1869–1933 (2011). Political scientist Stephen Rockwell has advanced a similar argument. STEPHEN J. ROCKWELL, INDIAN AFFAIRS AND THE ADMINISTRATIVE STATE IN THE NINETEENTH CENTURY (2010).

“other.”²² Michael Willrich used the records of Chicago’s agency-like municipal courts to explore Progressive-Era tactics for governing poor and working-class Americans.²³ From the records of the federal Office of War Information, among other agencies, James Sparrow documented how Americans grew acclimated to a much more visible and powerful federal government during and after World War II.²⁴ Studying the military as a bureaucracy (specifically, the military chaplaincy), Ronit Stahl has shown how the modern American state managed religious pluralism and, over time, built “state-sponsored American religion.”²⁵ The list could continue.²⁶ These scholars might not describe their work as histories of administrative governance, and yet that is what they have illuminated, in fine-grained detail.²⁷

22 MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* (2009). For a fuller account of the many agencies and bureaucratic actors that have regulated sex and sexuality in U.S. history, see Melissa Murray & Karen Tani, *Something Old, Something New: Reflections on the Sex Bureaucracy*, 27 CALIF. L. REV. ONLINE 122, 127-40 (2016).

23 MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* (2003).

24 JAMES T. SPARROW, *WARFARE STATE: WORLD WAR II AMERICANS AND THE AGE OF BIG GOVERNMENT* (2011).

25 RONIT Y. STAHL, *ENLISTING FAITH: HOW THE MILITARY CHAPLAINCY SHAPED RELIGION AND STATE IN MODERN AMERICA* 14 (2017).

26 Scholars of Native history, immigration history, social welfare history, and civil rights history have made especially effective and creative use of administrative records. For Native history, see, for example, CAHILL, *supra* note 21; CHRISTOPHER D. HAVEMAN, *RIVERS OF SAND: CREEK INDIAN EMIGRATION, RELOCATION, AND ETHNIC CLEANSING IN THE AMERICAN SOUTH* (2016); and MARGARET D. JACOBS, *WHITE MOTHER TO A DARK RACE: SETTLER COLONIALISM, MATERNALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880–1940* (2009). For immigration history, see, for example, CANADAY, *supra* note 22; S. DEBORAH KANG, *THE INS ON THE LINE: MAKING U.S. IMMIGRATION LAW ON THE US-MEXICO BORDER, 1917–1954* (2017); ERIKA LEE, *AT AMERICA’S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943* (2003); DEIRDRE M. MOLONEY, *NATIONAL INSECURITIES: IMMIGRANTS AND U.S. DEPORTATION POLICY SINCE 1882* (2012); MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004); and LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995). For work on welfare bureaucracy, see, for example, FELICIA KORNBLUH, *THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA* (2007); LISA LEVENSTEIN, *A MOVEMENT WITHOUT MARCHES: AFRICAN AMERICAN WOMEN AND THE POLITICS OF POVERTY IN POSTWAR PHILADELPHIA* (2009); and KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972* (2016). For work on the bureaucracy of civil rights enforcement and its obverse, the bureaucracy of segregation, see, for example, GOLUBOFF, *supra* note 3; LEE, *supra* note 2; PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* (2009); and KATHERINE TURK, *EQUALITY ON TRIAL: GENDER AND RIGHTS IN THE MODERN AMERICAN WORKPLACE* (2016).

27 This Article foregrounds historical work, but I would be remiss if I did not mention social science research that draws on administrative records and implicates constitutionally protected rights and values. See, e.g., Jennifer Carlson, *The Hidden Arm of the Law: Examining Administrative Justice in Gun Carrying Licensing*, 51 L. & SOC’Y REV. 346 (2017) (analyzing the workings and

In some cases, historians have also illuminated administrative interpretations of the Constitution—albeit without naming those interpretations as such. The subsequent Parts offer two dramatic and consequential examples. Taken together, these examples showcase the raw material that historians have to offer legal scholars, as well as the normative value of engaging with their findings. Recovering the experiences of marginalized and non-elite people, many now long dead, might not lead to any particular policy prescription for the present-day administrative state, but it foregrounds the human stakes.

II. THE FREEDMEN’S BUREAU AND THE MEANING OF “INVOLUNTARY SERVITUDE”

A natural starting point for this exercise is the Civil War: In the wake of that great conflict, the legal landscape changed dramatically (even if on the ground, much remained the same). A fundamental feature of this new landscape was the Thirteenth Amendment, passed by the Republican-dominated U.S. Congress on January 31, 1865, and ratified the following December. The amendment abolished both slavery and “involuntary servitude” throughout the United States, “except as a punishment for crime whereof the party shall have been duly convicted.”²⁸

In one sense, the meaning of these words was plain. The institution of slavery was dead. Emancipation was no longer a matter of politics or wartime strategy, but of formal constitutional law. In another sense, however, these words were ambiguous. What conditions amounted to “involuntary servitude”?²⁹ It

decisions of county-level gun boards); Vicki Lens et al., *Choreographing Justice: Administrative Law Judges and the Management of Welfare Disputes*, 40 J.L. & SOC’Y 199 (2013) (analyzing administrative “fair hearings” in the welfare context); Keramet Reiter, *Reclaiming the Power to Punish: Legislating and Administering the California Supermax, 1982–1989*, 50 L. & SOC’Y REV. 484 (2016) (drawing on interviews with prison administrators, among other sources).

²⁸ U.S. CONST. amend. XIII, § 1.

²⁹ Many works of legal scholarship have attempted to discern what the framers of the Amendment meant by “involuntary servitude.” See, e.g., JAMES D. SCHMIDT, *FREE TO WORK: LABOR LAW, EMANCIPATION, AND RECONSTRUCTION, 1815–1880*, at 116–17 (1998) (arguing that the drafters likely understood the “involuntary servitude” clause as a guarantee that workers would “be free to choose individual employers” and that “negotiations over remuneration and conditions of employment” would “be unfettered”); Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020, 2024, 2065–66 (2009) (arguing that to the framers, the term likely had a relatively clear meaning, based on “more than seventy years of legal practice,” but also noting that the term received “very little attention” during congressional debates and that “revolutionary aspirations” were in the air); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 448–50, 452–53 (1989) (noting a range of views among the framers and arguing that Congress did not give “substance and meaning to the term ‘involuntary servitude’ [until] after passing the amendment,” because the term could really only be defined “in the context of the post-slavery state”); see also Michael Les Benedict, *Constitutional Politics, Constitutional Law, and the Thirteenth Amendment*, 71 MD. L. REV. 163, 187 (2011) (“Exactly what freedom meant was an argument for another day.”); James Gray Pope, *Contract, Race, and Freedom*

would be nearly two decades before the Supreme Court handed down the “badges and incidents” language familiar to us today³⁰ (and even that language is ambiguous).³¹ One thing was clear, however: Given the vast inequalities of power between formerly enslaved people and those who had enslaved them, as well as between wage laborers and employers more generally, the precise content of the Thirteenth Amendment was a pressing question.

The answer, in the first instance, came neither from Congress nor from the courts,³² but from a new administrative agency, housed within the War Department: the Bureau of Refugees, Freedmen, and Abandoned Lands—commonly known as the Freedmen’s Bureau.³³ Established by Congress on March 3, 1865, the Freedmen’s Bureau was in charge of managing all the lands that were confiscated, captured, or abandoned during the war.³⁴ Congress also

of Labor in the Constitutional Law of “Involuntary Servitude,” 119 YALE L.J. 1474, 1481-87, 1491 (2010) (arguing that there was no consensus among the framers of the Thirteenth Amendment regarding whether it protected “the right to quit”). A related but distinct question was what the bounds were of Congress’s authority under the Enabling Clause of the Thirteenth Amendment. *See* U.S. CONST. amend. XIII, § 2 (giving Congress the “power to enforce this article by appropriate legislation”).

³⁰ *See* The Civil Rights Cases, 109 U.S. 3, 20 (1883) (holding that § 2 of the Thirteenth Amendment empowered Congress “to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States”). On whether § 1 of the Thirteenth Amendment directly bans the “badges and incidents of slavery,” see James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 U.C.L.A. L. REV. 426 (2018).

³¹ *See* Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 J. CONST. L. 561, 564 (2012) (noting that, despite post-1883 elaborations of the badges-and-incidents phrase, there remains “no generally accepted understanding as to [its] meaning”); *see also* Pope, *supra* note 30, at 465-69, 477 (suggesting that a search for the framers’ understanding of “badges and incidents” would surface general agreement on the core incidents of slavery, but, beyond that, partisan disagreement).

³² Congress’s first pronouncements about the meanings of “slavery” and “involuntary servitude” were the Slave Kidnapping Act of 1866 and the Peonage Act of 1867. Neither Act, however, purported to identify the outer bounds of these phrases. Early judicial opinions on this issue were scarce. One of the earliest was *In re Turner*, 24 F. Cas. 337 (C.C.D. Md. 1867) (Chase, C.J.), discussed *infra* at notes 86-100 and the accompanying text. The Supreme Court’s earliest elaboration of the term “involuntary servitude” did not occur until 1872, in the *Slaughter-House Cases*, 83 U.S. 36, 49 (1872). The relative silence of the courts in these early years is consistent with Michael Les Benedict’s argument that “when Congress proposed and the state legislatures ratified the Thirteenth Amendment, they did not conceive that the courts would be the primary agency that would enforce it.” Benedict, *supra* note 29, at 176.

³³ On the Freedmen’s Bureau as one of the nation’s first administrative agencies, albeit one that has not received much attention from legal scholars, see SCHMIDT, *supra* note 29. Schmidt also notes the role of Bureau agents in giving life to the Thirteenth Amendment: “[I]n the months and years after passage of the Thirteenth Amendment,” they “would attempt . . . to transform its promises into realities.” *Id.* at 121. On the Freedmen’s Bureau’s role in answering other vital questions, such as the legitimacy of freed persons’ family arrangements, see TERA W. HUNTER, *BOUND IN WEDLOCK: SLAVE AND FREE BLACK MARRIAGE IN THE NINETEENTH CENTURY* 233-44 (2017); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 44-46 (1998); and Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 279-90 (1999).

³⁴ Randall M. Miller, *Introduction*, in *THE FREEDMEN’S BUREAU AND RECONSTRUCTION: RECONSIDERATIONS* xiii, xv (Paul A. Cimbala & Randall M. Miller eds., 1999).

gave the Bureau the broad and demanding task of handling all issues relating to refugees and freed persons.³⁵ At a time when local and state governments remained hostile to black interests, and when state-level Bureau commissioners and their local appointees “often constituted the only federal presence in much of the South,” this authority was significant.³⁶ “For newly freed blacks,” historian Randall Miller has summarized, the Bureau was very simply “the government.”³⁷

That the Bureau’s work would so directly implicate the Thirteenth Amendment was not obvious at the agency’s birth, but Reconstruction politics quickly forced the issue. President Andrew Johnson’s generous pardon policies effectively precluded Bureau officials from redistributing land (because after being pardoned, former slave owners were able to recover their land).³⁸ This, in turn, meant that formerly enslaved people had little choice but to work on plantations and farms. Their prospective employers, meanwhile, were eager for their labor, but not accustomed to paying for it, nor were they inclined to honor the rights and privileges that many black workers now demanded.³⁹

In this context, Bureau agents became crucial brokers and adjudicators.⁴⁰ Their everyday decisions—about what kind of labor arrangements were fair and what kind of agreements were binding—helped draw a line between labor relationships that amounted to slavery or involuntary servitude and those

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* Among historians, interest in the Freedmen’s Bureau has surged over the last four decades. Robert Harrison, *New Representations of a ‘Misrepresented Bureau’: Reflections on Recent Scholarship on the Freedmen’s Bureau*, 8 AM. NINETEENTH CENTURY HIST. 205, 205 (2007); see generally *id.* (giving a historiographical overview of writing on the Freedmen’s Bureau). See also MARY FARMER-KAISER, *THE FREEDWOMEN AND THE FREEDMEN’S BUREAU: RACE, GENDER, AND PUBLIC POLICY IN THE AGE OF EMANCIPATION* 1-10 (2010).

³⁸ ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877*, at 159-61 (1988).

³⁹ *Id.*; DONALD G. NIEMAN, *TO SET THE LAW IN MOTION: THE FREEDMEN’S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-1868*, at xvi (1979). For a detailed examination of the importance of land to escaping conditions of servitude, see generally CLAUDE F. OUBRE, *FORTY ACRES AND A MULE: THE FREEDMEN’S BUREAU AND BLACK LAND OWNERSHIP* (1978).

⁴⁰ See James D. Schmidt, *‘A Full-Fledged Government of Men’: Freedmen’s Bureau Labor Policy in South Carolina, 1865-1868*, in *THE FREEDMEN’S BUREAU AND RECONSTRUCTION: RECONSIDERATIONS*, *supra* note 34, at 219, 221 (explaining that when it came to “the legal boundaries of the employment relation,” local agents of the Bureau “opened some options and closed others”); see also CHRISTOPHER B. BEAN, *TOO GREAT A BURDEN TO BEAR: THE STRUGGLE AND FAILURE OF THE FREEDMEN’S BUREAU IN TEXAS* 34 (2016) (noting that the Freedmen’s Bureau “could have been easily called the Labor Bureau” and that its agents were sometimes referred to as “employment agents”). A description of the type of people who became Bureau agents and how they tended to approach their work also appears in James Schmidt and Christopher B. Bean’s respective works cited above. See also FARMER-KAISER, *supra* note 37, at 16-24 (providing another overview of the kinds of people who worked for the Bureau).

that, while perhaps coercive and unequal, were not unconstitutional.⁴¹ This line was never perfectly clean and sharp, given the lack of uniformity in Bureau decisionmaking, but it mattered. When legislatures and judges later attempted to give content to the Thirteenth Amendment's promises, I explain below, they did so against this backdrop. And, of course, for people on the ground, the Bureau was often the last stop on their journey toward constitutional vindication.

Crucial to my argument is the fact that many freed people were deeply suspicious of labor contracts, equating them, in the words of one Union officer, with "a practical return to slavery."⁴² Some freed people also retained hope of farming on their own account and saw no need to commit themselves to low-paying, closely supervised labor.⁴³ In the face of these preferences, Bureau officials often insisted that freed persons enter contracts and undermined efforts to pursue alternative, non-contractual arrangements.

Historical accounts are filled with examples. Consider Bureau assistant commissioner Thomas Osborn's response in early 1866 to reports of underemployed freedmen in Jacksonville, Florida (the men apparently refused to work for local planters): Osborn ordered the men shipped by rail to Tallahassee, to labor under contracts that Osborn would draw up for them.⁴⁴ In Arkansas, the assistant commissioner did not himself issue such directives, but "sometimes winked at agents' use of heavy-handed methods."⁴⁵ In Virginia, assistant commissioner Orlando Brown ordered his agents to

⁴¹ A similar argument might be made regarding federal military officers stationed at territorial outposts and parts of the postwar South. Historian Stacey L. Smith documented an instance in August 1865 in which a resident of New Mexico territory asked for federal assistance in capturing a "peon" who had fled his service and the federal officer refused, claiming that returning a fugitive debtor to his master would be "contrary to the established rules and regulations of the government under which we live." A superior officer subsequently reversed that decision, reasoning that "[p]eonage is voluntary and not involuntary servitude." Stacey L. Smith, *Emancipating Peons, Excluding Coolies: Reconstructing Coercion in the American West*, in *THE WORLD THE CIVIL WAR MADE* 46, 53-54 (Gregory P. Downs & Kate Masur eds., 2015). Historian Leslie Schwalm has pointed out that in 1865, in lowcountry South Carolina, military authorities had a larger role than the Freedmen's Bureau in "instituting and enforcing the contract labor system." LESLIE A. SCHWALM, *A HARD FIGHT FOR WE: WOMEN'S TRANSITION FROM SLAVERY TO FREEDOM IN SOUTH CAROLINA* 171 (1997); see also DANIEL A. NOVAK, *THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY* 12 (documenting the role of the Union Army in forcing formerly enslaved people into labor contracts in 1865).

⁴² FONER, *supra* note 38, at 161; see also STANLEY, *supra* note 33, at 40-42 (noting freedpeople's aversion to labor contracts and deep distrust of white employers).

⁴³ STEVEN HAHN, *A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION* 153 (2003); see also Eric Foner, *Rights and the Constitution in Black Life during the Civil War*, 74 J. AM. HIST. 863, 871 (1987) (noting that "[n]umerous freedmen emerged from slavery convinced they had a 'right' to a portion of their former owners' land").

⁴⁴ NIEMAN, *supra* note 39, at 164.

⁴⁵ *Id.*

arrest freedmen who refused to accept fair offers of employment and force those freedmen to labor without compensation on public works.⁴⁶ The same threat was implicit in Alabama and Mississippi, where agents reminded freedmen that if they did not enter contracts, they would be treated as vagrants under local law—with all the penalties that attached to that status.⁴⁷ In South Carolina, agents helped evict black laborers who were “squatt[ing]” on the plantations where they had worked in 1865; those laborers had hoped to convince planters to rent them land for the 1866 season, but when faced with eviction, they often acquiesced to less desirable wage or share contracts.⁴⁸ This is not to say that Bureau tactics were always so coercive, because they were not. The point is that Bureau agents strongly encouraged freed persons—especially men—to enter labor contracts, in a context in which the balance of power favored employers and in which many employers were eager to replicate the conditions of slavery.

Simultaneously, Bureau agents failed to support viable alternatives to the contract labor system. Plausible alternatives for freed persons included working without contracts, or, with help from Bureau officials, demanding that landowners rent them land. Bureau leaders rejected these alternatives.⁴⁹ The Bureau might also have offered freed persons direct economic support, so that they did not feel compelled to enter labor agreements that replicated the conditions of slavery. Bureau agents sometimes provided such support to women, historian Mary J. Farmer has shown, but they excluded men, as part of an overarching “war on dependency.”⁵⁰ Facilitating labor contracts was the norm.

In many locations Bureau agents reviewed the contracts and even provided the terms. Assistant commissioners “stipulated that the Bureau would recognize as legitimate only written contracts that were fair to employees” (with fairness a matter for Bureau officials to decide), historian Donald Nieman summarizes, and they “strongly recommended that parties have their contracts approved by agents.”⁵¹ Employers had an incentive to

⁴⁶ *Id.* at 165.

⁴⁷ *Id.* at 166-67 (Alabama); *id.* at 164-65 (Mississippi); NOVAK, *supra* note 41, at 11 (Mississippi).

⁴⁸ NIEMAN, *supra* note 39, at 167-69.

⁴⁹ *Id.* at 156-59; SCHWALM, *supra* note 41, at 226-31.

⁵⁰ Mary J. Farmer, “Because They Are Women’: Gender and the Virginia Freedmen’s Bureau’s ‘War on Dependency,’” in THE FREEDMEN’S BUREAU AND RECONSTRUCTION: RECONSIDERATIONS, *supra* note 34, at 161, 162-63; see also Robert Harrison, *Welfare and Employment Policies of the Freedmen’s Bureau in the District of Columbia*, 72 J.S. HIST. 75, 89 (2006) (describing the “rigorously spartan form of benevolence advocated by the bureau”); JIM DOWNS, SICK FROM FREEDOM: AFRICAN-AMERICAN ILLNESS AND SUFFERING DURING THE CIVIL WAR AND RECONSTRUCTION (2012) (showing how concerns about dependency constrained the Freedmen’s Bureau’s response to disability and disease among freed people).

⁵¹ NIEMAN, *supra* note 39, at 163.

submit to this process because, at least in 1865, it seemed likely that a Bureau agent would adjudicate any kind of contract dispute that might arise. When the Bureau began its work, many states in the former Confederacy still did not allow African Americans to testify in court, leading to the creation of a system of Freedmen's Bureau courts for civil disputes.⁵² State courts in the South had regained control over these disputes by the fall of 1866, but Bureau agents continued to assert jurisdiction as needed.⁵³ In this institutional context, many employers actually did submit their contracts for Bureau approval and conform their agreements to Bureau baselines.⁵⁴

In some regards, freed persons appeared to benefit from the Bureau's influence, gaining guarantees that differentiated post-emancipation labor from slavery. For example, some Bureau officials set wage floors and insisted that planters disclaim the right to use physical coercion.⁵⁵ In the sugar region of Louisiana, Bureau regulations expressly urged freed persons to "obtain the best terms they can for their service" and insisted that in addition to wages, freed persons receive such basic necessities as food, clothing, housing, and medical attention.⁵⁶

Bureau officials took no exception, however, to other contract terms that, in practice, maintained formerly enslaved people in nearly the exact conditions they had ostensibly escaped. As historian Eric Foner notes, "[s]ome Bureau officers approved agreements in which the laborer would receive nothing at all if the crop failed and could incur fines for such vaguely defined offenses as failure to do satisfactory work or 'imprudent, profane or indecent language.'"⁵⁷ And many Bureau-approved contracts provided for postponement of payment until the crop had been harvested and sold. Such a "practice not only left share workers penniless in the event of a poor crop," Foner explains, "but offered numerous opportunities for fraud on the part of planters," including charges for rations that exceeded the wages owed and deductions from wages for poor work or other infractions.⁵⁸ Under the terms of many contracts, such infractions could include possessing "deadly weapons" or "ardent spirits," having visitors or leaving the plantation without permission,

⁵² See James Oakes, *A Failure of Vision: The Collapse of the Freedmen's Bureau Courts*, 25 CIVIL WAR HIST. 66, 68 (1979).

⁵³ *Id.* at 70-73.

⁵⁴ NIEMAN, *supra* note 39, at 163; Julie Novkov, *Making Citizens of Freedmen and Polygamists*, in STATEBUILDING FROM THE MARGINS: BETWEEN RECONSTRUCTION AND THE NEW DEAL 32, 37-38 (Carol Nackenoff & Julie Novkov eds., 2014).

⁵⁵ FONER, *supra* note 38, at 165; NIEMAN, *supra* note 39, at 165; Sara Rapport, *The Freedmen's Bureau as a Legal Agent for Black Men and Women in Georgia: 1865-1868*, 73 GA. HIST. Q. 26, 32 (1989).

⁵⁶ John C. Rodrigue, *The Freedmen's Bureau and Wage Labor in the Louisiana Sugar Region*, in THE FREEDMEN'S BUREAU AND RECONSTRUCTION: RECONSIDERATIONS, *supra* note 35, at 193, 199.

⁵⁷ FONER, *supra* note 38, at 165.

⁵⁸ *Id.* at 172.

denying the employer entry into the freedman's cabin, or rendering anything less than "perfect obedience."⁵⁹ Such terms were in clear contradiction to what historian Tera Hunter has called African Americans' "guiding assumption" during this era: "that wage labor should not emulate slavery."⁶⁰

Had freed persons been able to cut their losses and walk away, the effect of such contract provisions would not have been as harsh, but planters were determined to foreclose that option and the Bureau placed few obstacles in their path. In 1865 and 1866, state legislatures throughout the South made violation of a labor contract a crime; planters then turned to the Freedmen's Bureau for assistance in compelling specific performance.⁶¹ The Bureau's response is another example of the sometimes subtle ways in which this agency gave meaning to the fledgling Thirteenth Amendment. Some assistant commissioners ordered freed persons to finish out their contracts or incentivized them to do so with the threat of imprisonment or forced labor.⁶² These actions are noteworthy, for as legal scholar Lea VanderVelde has argued, a plausible interpretation of the Thirteenth Amendment—consistent with Radical Republican ideology—was that it banned specific performance of labor contracts.⁶³ Other assistant commissioners declined to compel specific performance, especially after Congress enacted the Civil Rights Act of 1866, but still did less than they might have to support workers who abandoned exploitive employers.⁶⁴

The "compulsory" system of "free" labor⁶⁵ that the Bureau helped establish has prompted searching questions from historians. In Eric Foner's words, "how 'voluntary' were labor contracts agreed to by blacks when they were denied access to land, coerced by troops and Bureau agents if they refused to sign, and fined or imprisoned if they struck for higher wages?"⁶⁶ Foner

⁵⁹ LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 409 (1979); see also HANNAH ROSEN, *TERROR IN THE HEART OF FREEDOM: CITIZENSHIP, SEXUAL VIOLENCE, AND THE MEANING OF RACE IN THE POSTEMANCIPATION SOUTH* 42 (2009) (noting that in 1865, a Bureau official in the Memphis area enhanced contractual restrictions on mobility by forbidding "ferrymen from transporting freedpeople across the Mississippi River from Arkansas into Memphis unless the prospective passengers carried a note from their employer authorizing their travels").

⁶⁰ TERA W. HUNTER, *TO 'JOY MY FREEDOM: SOUTHERN BLACK WOMEN'S LIVES AND LABORS AFTER THE CIVIL WAR* 27 (1997).

⁶¹ NIEMAN, *supra* note 39, at 173.

⁶² *Id.* at 173-76; see also SCHMIDT, *supra* note 29, at 128 (describing how an assistant commissioner in Texas fined planters who enticed laborers to break Bureau-approved contracts, as well as laborers who "allowed themselves to be enticed," thereby "reviv[ing] a part of labor contract law long since dead" in the United States).

⁶³ VanderVelde, *supra* note 29, at 489-90.

⁶⁴ FARMER-KAISER, *supra* note 37, at 76, 88-89; NIEMAN, *supra* note 39, at 173-76.

⁶⁵ FARMER-KAISER, *supra* note 37, at 81.

⁶⁶ FONER, *supra* note 38, at 166.

posed this question in order to probe the Bureau's commitment to the principles of free labor, an ideology that helped inspire the Civil War and that animated the project of Reconstruction. But his question also brings into focus the concern of this Article: the Bureau's witting or unwitting interpretation of the Constitution. Bureau agents, by their actions and inactions, signaled that certain labor arrangements did not amount to "involuntary servitude," despite ample indication that freed people felt otherwise.

Strong statements about the import of the Bureau's constitutional interpretations must await more research, keyed specifically to this question, but at a minimum, the existing secondary literature suggests that these interpretations had two lines of influence, one that ran through Congress and the other that ran through the judiciary.

On the first: In the months after ratification, Congress was still considering how to wield its enforcement authority under the Thirteenth Amendment, and Bureau agents provided eyes and ears on the ground. Senator Henry Wilson (a Republican from Massachusetts), for example, referenced the work of the Freedmen's Bureau when attempting to convince his fellow Congressmen to annul state "black codes" that required employees to forfeit all wages if they quit before the end of the contract term.⁶⁷ Considered "odious" by the Freedmen's Bureau, such laws surely merited the attention of Congress, Wilson argued.⁶⁸ By extension, the Bureau's tolerance of other coercive labor practices could well have sent the opposite message: that such practices were not worthy of Congress's attention, or were perhaps even beyond its purview. The Anti-Peonage Act of 1867 is noteworthy here. In enacting this law, Congress clarified that the labor system "known as peonage" was unlawful; attempts to "establish, maintain, or enforce" that system were punishable by fine and imprisonment.⁶⁹ But the Act declined to define "peonage" broadly (indeed, declined to define it at all, other than by reference to the coercive, debt-based labor system that then existed in New Mexico territory) and was silent as to a range of other exploitative labor practices.⁷⁰

On the second line of influence, running through the courts: taken cumulatively, the Bureau's actions suggested a relatively restrictive reading of the phrases "slavery" and "involuntary servitude." Indeed, the Bureau's interpretations are consistent with a narrative in which, in the span of a few decades, the courts squeezed out more capacious understandings of these

⁶⁷ VanderVelde, *supra* note 29, at 462, 488, 492-93.

⁶⁸ *Id.* at 493. For further evidence that members of Congress read and relied upon reports from the Freedmen's Bureau, see ROSEN, *supra* note 59, at 76, and Pamela Brandwein, *Slavery as an Interpretive Issue in the Reconstruction Congresses*, 34 L. & SOC'Y REV. 315, 341 (2000).

⁶⁹ Ch. 187, 14 Stat. 546 (1867).

⁷⁰ *Id.*

terms. In cases such as the *Slaughter-House Cases*⁷¹ and the *Civil Rights Cases*,⁷² litigants pushed for expansive interpretations of the Thirteenth Amendment—ones that might guarantee “the rights of every man to the fruits of his own labor” or authorize broad antidiscrimination legislation.⁷³ The Court responded by anchoring the amendment’s meaning in the “shades and conditions,” or “badges and incidents,” of racialized slavery,⁷⁴ terms that, in turn, took meaning from the Court’s invocation of classic master-and-servant-type controls: “compuls[ion],” “restraint,” and legal “disability.”⁷⁵

There is, however, at least one early case—regarding the indenture of freed children—in which Bureau agents adopted a more generous reading of the Thirteenth Amendment and invited an influential federal court judge to do the same. This case thus provides an interesting twist to the story above. Here, Bureau officials’ constitutional interpretation overlapped substantially with that of their charges.

“As soon as blacks became free,” summarizes historian Barry Crouch, “whites moved with dispatch to apprentice black children.”⁷⁶ In doing so, they relied on familiar tactics of coercion and manipulation, as well as new state laws (part and parcel of the infamous Black Codes) created to assist planters in reclaiming the labor of freed children. Often these statutes used the seemingly benign language of stewardship, allowing former slave owners to become the legal guardians of orphaned black youth, or of youth whose parents failed to demonstrate industry and good habits.⁷⁷ Other statutes created mechanisms for identifying such children, by giving local magistrates

⁷¹ 83 U.S. (16 Wall.) 36 (1872).

⁷² 109 U.S. 3 (1883).

⁷³ Brief for Plaintiffs on History, Object, Aim and Intent of the 13th, 14th and 15th Amendments, and of Contemporaneous Legislation, *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872) (No. 61), 1872 WL 15120, at *8-9.

⁷⁴ *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 69; *The Civil Rights Cases*, 109 U.S. at 20-21.

⁷⁵ *Civil Rights Cases*, 109 U.S. at 22. Justice Harlan’s dissent offers a glimpse of a different interpretive path. *See id.* at 33-38 (Harlan, J., dissenting) (arguing that Congress’s power under the Thirteenth Amendment “is not necessarily restricted to legislation against slavery as an institution upheld by positive law, but may be exerted to the extent, at least, of protecting the liberated race against discrimination in respect of legal rights belonging to freemen where such discrimination is based upon race”).

⁷⁶ Barry A. Crouch, ‘To Enslave the Rising Generation’: *The Freedmen’s Bureau and the Texas Black Code*, in *THE FREEDMEN’S BUREAU AND RECONSTRUCTION: RECONSIDERATIONS*, *supra* note 34, at 262, 267.

⁷⁷ *See, e.g.*, *Apprentice Law of Mississippi, 1865*, reprinted in MELVIN I. UROFSKY & PAUL FINKELMAN, 1 *DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY* 461 (2d ed. 2002) (making it the duty of civil officers to report to the probate court “all freedmen, free negroes, and mulattoes, under the age of eighteen . . . who are orphans, or whose parent or parents have not the means or who refuse to provide for and support” them, and making it the duty of the probate court to order that the minors be “apprentice[d] . . . to some competent and suitable person,” with priority given to the “former owner of said minors”).

the power to seize freed children and assess whether their parents were capable and suitable. Once bound out, children could expect to labor for their “guardians” until they reached adulthood.⁷⁸

Freed persons, especially freedwomen, routinely called on the Bureau to release young relatives from such arrangements. In doing so, historian Mary Farmer-Kaiser has argued, freedwomen advanced their own understanding of freedom—one that included the reestablishment of their families and the right to control their children’s labor. To be “free ourselves but deprived of our children,” explained freedwoman Lucy Lee, was only a small improvement over slavery.⁷⁹ Their many complaints seem to have helped Bureau agents see the evils of so-called apprenticeships. The practice “fosters the old ideas of compulsory labor and dependence,” observed a Bureau agent in North Carolina in early 1866.⁸⁰ It was a “system of slavery,” masquerading behind the unfulfilled promise of care and tutelage, agreed a Mississippi agent.⁸¹

This is not to say that Bureau agents never supported apprenticeship arrangements, for in fact, they sometimes did—generally in cases involving the children of poor, single mothers, and generally on the condition that guardians provide a minimum level of education and service.⁸² In some cases, Bureau agents themselves approved the apprenticeship contracts.⁸³ In other cases, however, Bureau agents stood up to planters, at personal peril, and disallowed or voided indenture agreements. In some jurisdictions, they also sought to make examples of prominent guardians by aiding freed persons when they pursued their interests in court.⁸⁴ There, they helped establish that some indenture agreements, at least, violated the Thirteenth Amendment.

⁷⁸ See generally *id.*; Rebecca J. Scott, *The Battle over the Child: Child Apprenticeship and the Freedmen’s Bureau in North Carolina*, in *GROWING UP IN AMERICA: CHILDREN IN HISTORICAL PERSPECTIVE* 193, 193-98 (N. Ray Hiner & Joseph M. Hawes eds., 1985); see also FARMER-KAISER, *supra* note 37, at 99-100; KARIN L. ZIPP, *LABOR OF INNOCENTS: FORCED APPRENTICESHIP IN NORTH CAROLINA, 1715-1919*, at 40-83 (2005); Richard Paul Fuke, *Planters, Apprenticeship, and Forced Labor: The Black Family Under Pressure in Post-Emancipation Maryland*, 62 *AGRIC. HIST.* 57, 62-68 (1988); J. Michael Rhyne, “Conduct . . . Inexcusable and Unjustifiable”: *Bound Children, Battered Freedwomen, and the Limits of Emancipation in Kentucky’s Bluegrass Region*, 42 *J. SOC. HIST.* 319, 324 (2008).

⁷⁹ FARMER-KAISER, *supra* note 37, at 139-40 (quoting Lee as saying, “[O]ur condition is bettered but little”).

⁸⁰ *Id.* at 57.

⁸¹ *Id.* at 105; see also *id.* at 104-06 (collecting a number of similar observations); *id.* at 121-22 (describing agents’ efforts to assist two mothers in reclaiming their children from indenture).

⁸² *Id.* at 108-18, 128-29; see also Scott, *supra* note 78, at 199-204 (describing the “case-by-case judgments” Bureau agents made in these circumstances).

⁸³ ZIPP, *supra* note 78, at 80 (noting that Freedmen’s Bureau agents in North Carolina apprenticed hundreds of children, including in cases where there was no parental consent).

⁸⁴ FARMER-KAISER, *supra* note 37, at 108, 121-26; see also Crouch, *supra* note 76, at 270-71 (describing the efforts of some Bureau agents to “oppose[] binding as a county policy and opposing the binding out of individual children); cf. SCHWALM, *supra* note 41, at 252-54 (documenting the

The habeas corpus case *In re Turner*, decided by a federal circuit court in Baltimore, Maryland, in 1867, testifies to the Bureau's influence.⁸⁵ The case involved a young woman, Elizabeth Turner, who had been apprenticed to her former owner a mere two days after the abolition of slavery.⁸⁶ In keeping with Maryland's new apprenticeship statute, the indenture contract for Turner bore little resemblance to the contracts required for white children: Whereas white children were to receive education in reading, writing, and arithmetic, Turner had no such guarantees; her education would be in "the art or calling of a house servant."⁸⁷ And unlike contracts for white children, Turner's allowed her to be "transferred at the will of [her] master to any person in the same county."⁸⁸ With the assistance of two Freedmen's Bureau lawyers, Henry Stockbridge and Nathan Pusey, Turner's family sought her release.⁸⁹

According to historian W. Augustus Low, Stockbridge's appointment to the Bureau was specifically "to aid . . . in its fight against the apprentice system."⁹⁰ Stockbridge was a Radical Republican who, as early as May 1865, had sought the aid of state courts in releasing black children from these coerced contracts of service.⁹¹ In Turner's case, where Stockbridge at last had an audience with a federal judge, he took a strong stand.⁹² This sort of apprenticeship was "an evasion of the constitutional amendment abolishing slavery and involuntary servitude," he argued to the presiding judge, U.S. Supreme Court Chief Justice Salmon P. Chase.⁹³ He also reminded the Chief Justice that "the [C]onstitution by its own powers executes itself," signaling that a favorable decision need not rest on the 1866 Civil Rights Act.⁹⁴

Hardly a friend to slavery, Chief Justice Chase likely did not require much convincing.⁹⁵ In a case of first impression, he accepted Stockbridge's invitation and declared Turner's apprenticeship "involuntary servitude,

"usual[]" rule that "unless 'improper treatment' could be proven . . . , apprenticeships would stand," but also noting other, conflicting instructions that Bureau officials received).

⁸⁵ *In re Turner*, 24 F. Cas. 337 (C.C.D. Md. 1867) (Chase, C.J.).

⁸⁶ HAROLD M. HYMAN, *THE RECONSTRUCTION JUSTICE OF SALMON P. CHASE: IN RE TURNER AND TEXAS V. WHITE* 120, 124-29 (1997).

⁸⁷ *In re Turner*, 24 F. Cas. at 338 (describing the parties' arguments in the case synopsis).

⁸⁸ *Id.* at 339.

⁸⁹ *Id.* at 338.

⁹⁰ W. A. Low, *The Freedmen's Bureau and Civil Rights in Maryland*, 37 J. NEGRO HIST. 221, 228 (1952).

⁹¹ Fuke, *supra* note 78, at 72.

⁹² *See id.* (noting that prior to the Turner case, Bureau agents in Maryland had "flooded state courts with applications for writs of habeas corpus" and been rebuffed; Chief Justice Chase's agreement to hear the Turner case while on federal circuit duty offered a new and important opportunity).

⁹³ *In re Turner*, 24 F. Cas. at 339 (case synopsis).

⁹⁴ *Id.*

⁹⁵ *See generally* JOHN NIVEN, *SALMON P. CHASE: A BIOGRAPHY* (1995) (describing Chase's long career as an opponent of slavery).

within the meaning of these words in the [Thirteenth] [A]mendment.”⁹⁶ As a result, he determined, Turner must be released.⁹⁷

In the short term, the *Turner* decision was of modest value to freed people. It was an important statement of law, but enforcement required resources, institutional capacity, and political will, all of which were in short supply in the late 1860s. Maryland’s legally “moribund” apprenticeship system lingered on for years.⁹⁸

And yet *In re Turner* remains a landmark in constitutional law. In historian Risa Goluboff’s words, it is a reminder of the Thirteenth Amendment’s “expansive possibilities for establishing freedom and equality”⁹⁹—even as, in the words of another scholar, the Amendment’s judicially recognized meaning “has shrunk to the size of an antebellum grave marker.”¹⁰⁰ Administrators from the Freedmen’s Bureau are implicated in both facets of this history.

III. CHINESE INSPECTORS AND THE MEANING OF DUE PROCESS

As Americans in former slaveholding states adjusted to the demise of the legal institution of slavery and the reality of emancipation, those in the West were also engaged in tense negotiations over race, citizenship, and nation—negotiations that offer another example of administrative constitutionalism in action.

As in the South, race and labor were central, but the conflict in the West stemmed from a different complex of factors: post-“Gold Rush” population growth, including tens of thousands of immigrants from China; powerful ideologies of white, Anglo-Saxon superiority and Asian inferiority; and, by the early 1870s, a scarcity of jobs for unskilled laborers. Western nativists and labor organizations pressured Congress to address what they called the “Chinese problem,” resulting in the Chinese Exclusion Act of 1882.¹⁰¹ The Act suspended immigration of Chinese laborers, imposed criminal penalties on those who aided or abetted such immigration, and prohibited Chinese

⁹⁶ *In re Turner*, 24 F. Cas. at 339.

⁹⁷ *Id.*; HYMAN, *supra* note 86, at 120, 128-29.

⁹⁸ BARBARA JEANNE FIELDS, *SLAVERY AND FREEDOM ON THE MIDDLE GROUND: MARYLAND DURING THE NINETEENTH CENTURY* 153-56 (1985). *But see* Fuke, *supra* note 78, at 73 (noting that, according to Bureau sources, the *Turner* decision enabled Bureau agents in Maryland to secure the release of most apprentices by the summer of 1868).

⁹⁹ Risa Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1637 (2001).

¹⁰⁰ Lea VanderVelde, *The Thirteenth Amendment of Our Aspirations*, 38 U. TOL. L. REV. 855, 860 (2007).

¹⁰¹ See LEE, *supra* note 26, at 23-46; *see generally* ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943 (Sucheng Chan ed., 1991); SALYER, *supra* note 26; BETH LEW-WILLIAMS, *THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA* (2018).

immigrants already in the country from obtaining U.S. citizenship.¹⁰² A series of follow-on laws, such as the Geary Act of 1892, extended and reinforced the exclusionist project.¹⁰³

Federal administrators were primarily in charge of enforcing Chinese exclusion, first under the auspices of the U.S. Customs Service (within the Treasury Department) and then, after 1903, via the Bureau of Immigration (part of a newly created Department of Commerce and Labor).¹⁰⁴ In carrying out their duties, “Chinese inspectors” gave content to the abstract idea of due process of law, as embodied in the Fifth Amendment. The Amendment, after all, spoke of *persons*, not citizens, meaning that everyone who came into contact with government authority arguably fell under its protection.¹⁰⁵ An open question was what process was due to Chinese immigrants, who sought entry into the country for the same familial, political, and economic reasons as non-Chinese immigrants, but whom the law now disfavored.

Historians agree that administrators at the nation’s primary points of entry shared the anti-Chinese biases that permeated the West and that they were deeply invested in the project of exclusion.¹⁰⁶ In general, then, they processed admissions cases “with skepticism, expecting the testimony to be fraudulent.”¹⁰⁷ They questioned applicants and their witnesses extensively, with an eye toward prompting and probing inconsistencies.¹⁰⁸ An interpreter attended the proceedings, but was not always conversant in the applicant’s dialect.¹⁰⁹ And administrators generally refused to allow applicants’ lawyers or friends to be present, lest they “coach[]” the applicant through the process.¹¹⁰

¹⁰² The Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58, 59, 61 (1882).

¹⁰³ See, e.g., Geary Act, Pub. L. No. 52-60, 27 Stat. 25 (1892) (providing for the arrest, sentencing to hard labor, and removal of people of Chinese descent not lawfully in the United States, and requiring lawful residents of Chinese origin to register with the Internal Revenue Service); see also McCreary Amendment, Pub. L. No. 53-14, 28 Stat. 7 (1893) (further restricting the entry to and movement within the United States of Chinese immigrants and persons of Chinese descent); Immigration Act of 1891, Pub. L. No. 51-551, 26 Stat. 1084 (1891) (extending the exclusionary project to categories of persons that an administrator might easily place a Chinese immigrant in, such as “paupers or persons likely to become a public charge”); Scott Act, Pub. L. No. 50-1015, 25 Stat. 476 (1888) (further restricting entry of people of Chinese origin, including by preventing Chinese laborers formerly in the United States from returning unless the laborer had a “lawful wife” or family or owned property in the United State of at least one thousand dollars in value).

¹⁰⁴ SALYER, *supra* note 26, at 18, 101-02; Kitty Calavita, *The Paradoxes of Race, Class, Identity, and “Passing”: Enforcing the Chinese Exclusion Acts, 1882–1910*, 25 L. & SOC. INQUIRY 1, 5 (2000).

¹⁰⁵ See U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

¹⁰⁶ LEE, *supra* note 26, at 48.

¹⁰⁷ SALYER, *supra* note 26, at 59.

¹⁰⁸ *Id.* at 59-60.

¹⁰⁹ *Id.* at 62.

¹¹⁰ *Id.* at 61-62.

After the administrator had made a decision on the case, an attorney was allowed to intercede, but days, or even months, might pass in the meantime.¹¹¹

These patterns reflect choices about how Chinese immigrants deserved to be treated, and these choices were constitutional in nature. Chinese immigrants said as much—repeatedly and forcefully. With the help of savvy advocates and lawyers, Chinese immigrants filed thousands of habeas corpus petitions in the decades after 1882, questioning the legality of exclusion policies and demanding that administrative procedures respect applicants' rights under the Constitution.¹¹² Some cases made it all the way to the U.S. Supreme Court, resulting in important pronouncements about the rights and legal status of immigrants writ large.¹¹³

The regular involvement of courts in this episode of constitutional history might make it seem like a poor example of *administrative* constitutionalism: arguably, administrators were simply implementing the courts' constitutional interpretations, and to the extent that administrators innovated, Chinese habeas petitioners ensured that the courts checked administrators' work. Two features of this history undermine that argument. First, administrative practices shaped how judges engaged with the concept of due process, as well as how judges thought about the interpretive stakes. In case after case, government lawyers defended the summary procedures that administrators used and suggested the devastating implications of greater procedural protections.¹¹⁴ Such narratives cast due process not as a sacred Anglo-American tradition but as a weapon of determined and unscrupulous foreigners—a weapon to be carefully guarded.¹¹⁵

Second, courts were hardly keeping a tight rein over this particular clause of the Constitution. Indeed, the gist of the courts' decisions over time was to give immigration officials more interpretive power, not less, at least in

¹¹¹ *Id.* at 62-63. In deportation cases involving Chinese immigrants, courts retained greater control over the meaning of "due process," but administrators remained influential. See *infra* note 119, note 124 & accompanying text.

¹¹² Christian G. Fritz, *A Nineteenth Century "Habeas Corpus Mill": The Chinese Before the Federal Courts in California*, 32 AM. J. LEG. HIST. 347, 347-49, 354 (1988); see also SALYER, *supra* note 26, at 74 (reproducing "[o]ne of the thousands" of habeas petitions filed during this period, on a "standardized form" that suggests that such petitions were filed in great numbers).

¹¹³ As examples of particularly important decisions, see *United States v. Ju Toy*, 198 U.S. 253 (1905); *United States v. Wong Kim Ark*, 169 U.S. 229 (1896); *Wong Wing v. United States*, 163 U.S. 228 (1896); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); and *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). For other noteworthy decisions, see *Ng Fung Ho v. White*, 259 U.S. 276 (1922); *Low Wah Suey v. Backus*, 225 U.S. 460 (1912); *Chin Yow v. United States*, 208 U.S. 8 (1908); *Chin Bak Kan v. United States*, 186 U.S. 193 (1902); *United States v. Sing Tuck*, 194 U.S. 161 (1904); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895); and *Chew Heong v. United States*, 112 U.S. 536 (1884).

¹¹⁴ SALYER, *supra* note 26, at 170-216.

¹¹⁵ *Id.*

decisions involving procedural fairness for non-citizens. In the four decades following the inauguration of Chinese exclusion, challenges to admission and deportation decisions established that “aliens enjoyed constitutional rights only at the sufferance of Congress,” to use historian Lucy Salyer’s words.¹¹⁶ This followed from the Supreme Court’s finding that Congress possessed “plenary power” over immigration—a power that the text of the Constitution did not make explicit but that the justices now deemed an essential attribute of a sovereign nation. The practical upshot of this finding was that whatever vestigial constitutional rights detained immigrants had were left to administrators to enforce—or not.¹¹⁷

The Supreme Court displayed greater caution when it came to Chinese admission-seekers who claimed to be citizens, having recognized in previous cases that citizens and non-citizens were differently situated vis-à-vis the Constitution. But nonetheless the Court initially rejected litigants’ demand that judges, rather than agencies, be the ultimate arbiter of the fact of citizenship.¹¹⁸ In doing so, the Court also implicitly endorsed administrators’ fact-finding procedures—which fell well short of a judicial trial. Where the administrator was acting within powers conferred by Congress, Justice Holmes explained in the 1905 *Ju Toy* case, the administrator’s decision “is due process of law.”¹¹⁹ It was a bold pronouncement and likely inconsistent with the

¹¹⁶ *Id.* at 53.

¹¹⁷ *Id.* at 53-58, 216, 248. Key cases in this vein are *Fong Yue Ting*, 149 U.S. at 714, which held that “Congress, having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification,” and *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892), which held that, as to the admission of “foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law,” “the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.” Some cases toward the end of this period made clear that, at least in deportation proceedings, aliens were entitled to a fair opportunity to be heard. *See, e.g., Chin Yow*, 208 U.S. at 11 (implying that denial of “a fair opportunity” to produce evidence would constitute a sound basis for a habeas corpus petition). But fairness remained largely a matter for Congress (and thus, in practice, for administrators) to define. *See, e.g., Low Wah Suey*, 225 U.S. at 469-70, 471-72 (rejecting the argument that denial of counsel at deportation hearings violated due process). The precise scope of the plenary power remains a live question among courts and legal scholars.

¹¹⁸ *See Ju Toy*, 198 U.S. at 263 (citing *Nishimura Ekiu* and *Fong Yue Ting* to support holding that executive officers were competent to hear citizenship disputes and that even for persons who claimed citizenship, “due process of law does not require a judicial trial”); Kristin A. Collins, *Bureaucracy as the Border: Administrative Law and the Citizen Family*, 66 DUKE L.J. 1727, 1729 (2017) (highlighting the significance of allowing administrators to serve as the gatekeepers of citizenship, by documenting “the role played by administrators in developing practices, policies, statutes, and constitutional understandings that have governed recognition of the parent-child relationship for the purpose of resolving claims to citizenship and immigration status”).

¹¹⁹ *Ju Toy*, 198 U.S. at 263 (emphasis added); *see also* SALYER, *supra* note 26, at 113-14 (classifying *Ju Toy* as a departure from prior immigration decisions because it “appeared to blur the distinction between aliens and citizens and to subject both to the same bureaucratic discretion and authority”).

intentions of the Constitution's framers, as legal scholar Thomas Reed Powell noted in 1907, but the perceived "horde of immigrants on the frontier" provided ready justification for a decision that might otherwise appear "monstrous."¹²⁰

The Supreme Court eventually moved away from aspects of the *Ju Toy* decision. In 1908, the Court clarified that a Chinese admission-seeker who claimed to be a U.S. citizen was entitled to a fair hearing, albeit a "summary" one, and that if immigration authorities provided "nothing but the semblance of a hearing," a federal court could revisit the merits of the case.¹²¹ In the context of deportation—which courts treated as a much more severe action than exclusion—the Court went further. In a 1922 case involving two residents who claimed to be China-born sons of native-born citizens, Justice Brandeis deemed the fact of citizenship an "essential jurisdictional" one, meaning that the petitioners were entitled to a judicial determination of that fact, even absent any procedural irregularities below.¹²²

And yet in other regards, *Ju Toy* remained "good law"—and remains so today, along with many other judicial pronouncements from the Chinese exclusion context. The day-to-day administrative practices that informed those decisions thus mattered greatly. And as legal historian Lucy Salyer has demonstrated, these practices "deviated significantly from the norms of due process elaborated in Anglo-American jurisprudence."¹²³

As for how, and to whom, that deviation mattered, the effects are clearest in the realm of immigration, but not confined to immigrants from China. In the decades after the Chinese exclusion era, immigrants of all nationalities struggled to establish that the Fifth Amendment required something more than what administrators had accorded Chinese litigants at the turn of the twentieth century.¹²⁴

¹²⁰ Thomas Reed Powell, *Conclusiveness of Administrative Determinations in the Federal Government*, 1 AM. POL. SCI. REV. 583, 605 (1907) (quoted in Gabriel Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L.L. REV. 1, 61 (2002)).

¹²¹ *Chin Yow*, 208 U.S. at 11, 12.

¹²² *Ng Fung Ho*, 259 U.S. at 284. In issuing this holding, the Court emphasized a fact that arguably narrowed the decision's reach: both petitioners had presented evidence that was sufficient (if believed) to prove their claims of citizenship. *Id.* at 282, 284-85. A case from a decade later—*Crowell v Benson*, 285 U.S. 22 (1932)—provided a clearer statement of what is now taken for granted: that citizenship is a "jurisdictional fact," which courts *must* be allowed to determine. Mark Tushnet, *The Story of Crowell: Grounding the Administrative State*, in FEDERAL COURT STORIES 259, 387-88 (Vicki C. Jackson & Judith Resnik, eds. 2010).

¹²³ SALYER, *supra* note 26, at 136.

¹²⁴ See Gabriel J. Chin, Chae Chan Ping and Fong Yue Ting: *The Origins of Plenary Power*, in IMMIGRATION STORIES 7, 21-23 (David A. Martin & Peter H. Schuck eds., 2005) (noting continuing effects of the Chinese exclusion cases, including the holdings that "for noncitizens, living in the United States is a privilege rather than a right" and that "deportation is not punishment"); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 854-63 (1987) (describing the extension of the reasoning of the Chinese Exclusion Case, 130 U.S. 581 (1889), to cases involving other immigrant groups and other

Legal scholar Gabriel Chin has extended the argument further, to all persons, immigrant and otherwise, who found themselves in conflict with an administrative agency. The scant procedural protections that the Supreme Court approved in the immigration context set a more general “due process threshold” for the administrative state, Chin explains.¹²⁵ “[W]hen Congress wants to grant administrators the discretion to work without oversight, the constitutional minimum is still set in many respects by the Asian Exclusion cases.”¹²⁶

Historians hint at still another way in which this episode of administrative constitutionalism matters: it affected the worldviews and practices of Chinese immigrants who did make it through the gates, even legitimately. In the decades after 1882, “Chinese immigrants and residents . . . often lived a shadowed existence,” explains historian Erika Lee.¹²⁷ Aware of their legal vulnerabilities, they were “constantly anxious about their immigration status, about harassment by immigration officials . . . , and about their personal safety in general.”¹²⁸

This “psychology of fear” spilled over into the lives of native-born Chinese American citizens¹²⁹—and not without reason. Historian Mae Ngai estimates that at least twenty-five percent of the Chinese American population in 1950 was unlawfully present.¹³⁰ This itself was a legacy of administrative action, at least in part. Faced with hostile immigration inspectors, ever-heightening evidentiary standards, and little hope of meaningful judicial review, Chinese admission-seekers had turned the immigration bureaucracy’s own procedures against it: they drew on evidence supplied in prior successful admission cases to craft elaborate, fictitious family histories.¹³¹ Between 1920 and 1940, over

contexts); Natsu Taylor Saitu, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for On-Going Abuses of Human Rights*, 10 *ASIAN L.J.* 13, 17-29 (2003) (describing courts’ ongoing recognition of Congress’ plenary power to regulate borders and applications of this power in situations involving refugees, suspected terrorists, Native nations, and U.S. territories). Savvy litigants shifted their attention away from the Constitution and focused on statutory interpretation instead. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *YALE L.J.* 545, 601 (1990).

¹²⁵ Gabriel Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 *HARV. C.R.-C.L.L. REV.* 1, 25 (2002).

¹²⁶ *Id.* He elaborates on this argument by documenting the influence of the Asian exclusion cases on four important areas: (1) the constitutionality of final administrative factfinding and (2) exceptions to final administrative factfinding; (3) the requirement that litigants exhaust administrative remedies; and (4) the permissibility of administrative punishment. *See id.*

¹²⁷ LEE, *supra* note 26, at 229.

¹²⁸ *Id.*

¹²⁹ *Id.* at 237, 238.

¹³⁰ Mae M. Ngai, *Legacies of Exclusion: Illegal Chinese Immigration During the Cold War Years*, 18 *J. AM. ETHNIC HIST.* 3, 3 (1998).

¹³¹ NGAI, *supra* note 26, at 204-06; Ngai, *supra* note 130, at 6.

71,000 Chinese entered the U.S. as China-born sons of American citizens, and many of these claims were fraudulent (they were “paper sons”).¹³²

During the mid-1950s, the Immigration and Naturalization Service helped thousands of Chinese Americans “confess” to their crimes and gain legal status, as part of a broader federal government campaign to eliminate “paper immigration,” but in doing so, Ngai argues, they “reproduced racialized perceptions that all Chinese immigrants were illegal and dangerous.”¹³³ This only lent further credence to one of the Chinese inspectors’ most important legal interpretations: that although the Constitution’s reach extends to all persons within the nation’s jurisdiction, its protections may be weakened or denied to those who threaten dominant visions of the ideal national community.¹³⁴

IV. ADMINISTRATIVE CONSTITUTIONALISM AS AN “ARENA OF STRUGGLE”

The examples in Parts II and III are a sample of what historians have to offer the study of administrative constitutionalism. I hope they inspire legal scholars to read more deeply in the scholarship that historians have crafted from administrative records. I would not want to imply, however, that legal scholars can turn to historians for insight into *whatever* constitutional provision captures their interest, or that I chose my examples at random.

Over the past few generations, historians have been deeply invested in understanding what Barbara Welke calls the “borders of belonging”—the changing set of meanings ascribed to particular aspects of individual identity, such as race, gender, and ability, and the consequences of those meanings for individuals’ ability to participate in society.¹³⁵ Law is intimately related to these borders of belonging, for law both shapes meaning and creates consequences. In this regard, the Bill of Rights and Reconstruction Amendments may be the most important law there is. These amendments have long served as a touchstone for marginalized and excluded groups, offering them tools for demanding greater freedom and equality. At the same

¹³² NGAI, *supra* note 26, at 205; Ngai, *supra* note 130, at 4.

¹³³ NGAI, *supra* note 26, at 223; *see also id.* at 218-21 (providing background on the INS confession program).

¹³⁴ For another interesting historical example of administrative constitutionalism in the immigration context, see Bonnie Honig, *Bound by Law? Alien Rights, Administrative Discretion, and the Politics of Technicality: Lessons from Louis Post and the First Red Scare*, in *THE LIMITS OF LAW* 209, 215 (Austin Sarat, Lawrence Douglas & Martha Merrill Humphrey eds., 2005), which recounts the story of former Assistant Secretary of Labor Louis F. Post, who, in the context of the Palmer Raids, “applied to administrative cases standards of evidence and due process that normally would have been thought at the time to obtain only in judicial settings, not administrative ones”).

¹³⁵ WELKE, *supra* note 12, at 4.

time, these amendments have sometimes functioned to preserve the status quo. Invoked by those in power, they have said, “wait your turn,” “don’t take mine,” and “trust the system.” Indeed, Welke credits the Supreme Court’s “narrow, nugatory interpretation” of the Reconstruction Amendments in the late nineteenth and early twentieth centuries with “thwart[ing] a politics of human rights.”¹³⁶ Agencies are part of that story, too, just as they are part of the Court’s resuscitation of those amendments decades later.¹³⁷

By asking scholars of administrative constitutionalism to engage more with historical work, including on periods preceding the rise of the modern administrative state, I am thus taking a particular stance. I am not simply offering scholars a means of expanding their archive, but encouraging them to expand the archive in a particular way. I am asking for greater attention to people on the margins—people who are often the subject of regulation but whose voices and concerns are less likely to make it into an agency’s formal legal pronouncements or a top administrator’s testimony before Congress. And I am asking scholars to consider, as systematically as possible, who has reaped the benefits of administrative constitutionalism and who has borne the burdens.

At a time when the concept of administrative governance is highly politicized, with some commentators rushing to the defense of the administrative state and others attacking it, such a position may seem imprudent.¹³⁸ The work I am asking for might add fuel to this fire, by suggesting that administrative interpretations of the Constitution have tended to skew in one direction or another.

But I have my sights on another problem: the prospect of the field of administrative constitutionalism replicating administrative law scholarship more generally—ever attentive to congressional and judicial constraints on agency behavior and, increasingly, to the complexities of day-to-day administrative decisionmaking,¹³⁹ but only obliquely concerned with distribution (aside from a general assumption that “agency capture” exists and

¹³⁶ *Id.* at 142.

¹³⁷ On the “resuscitation” part of the story, see generally GOLUBOFF, *supra* note 3; LEE, *supra* note 2; and Tani, *supra* note 4.

¹³⁸ See, e.g., Gillian Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 4 (2017) (noting a trend of “anti-administrativism” in some recent opinions of the current Supreme Court).

¹³⁹ For recent examples of important empirical work on what agencies do and why, see Jennifer Nou & Edward H. Stiglitz, *Regulatory Bundling*, 128 YALE L.J. 1174 (2019); Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. REG. 165 (2019); Amy Semet, *An Empirical Examination of Agency Statutory Interpretation*, 103 MINN. L. REV. 2255 (2019); and Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369 (2019). The critique I raise here does not diminish the contributions of careful empirical research.

must be guarded against).¹⁴⁰ Here, I mean distribution in the broadest sense—of not only material resources, but also opportunity, risk, and power. At the end of the day, when we look at the actual work of administrative agencies and the way that other legal institutions have (or have not) constrained them, who has gotten what? And at what cost? Further, do those distributions map onto familiar lines of inclusion and exclusion (race, gender, sexuality, ability, national origin, class)?¹⁴¹ In my opinion, too few self-described scholars of administrative law are asking these critical questions (although perhaps times are changing).¹⁴²

Scholars of administrative constitutionalism ought to do better, not least because of the high political and cultural stakes of decisions involving the Constitution.¹⁴³ “[A] signal feature of American constitutional history,” historian Hendrik Hartog wrote in 1987, in a landmark essay, is “the passionate insistence of various groups that the Constitution must be (in other words, *must be made to be*) a recognition and an expression of legitimate aspirations.”¹⁴⁴ According to Hartog, past actors routinely read into the Constitution messages that, at the time, looked “subversive and disruptive

¹⁴⁰ Nicholas Bagley advances this argument forcefully and persuasively in his recent article *The Procedure Fetish*, 118 MICH. L. REV. (forthcoming 2019). See also Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1500–01, 1578 (2018) (challenging the “orthodox view” among academics that regulatory policy should not take into account distributional consequences and aspiring to “fill th[e] void” created by “decades” of inattention).

¹⁴¹ In foregrounding these questions, I take inspiration from Barbara Welke’s call for a history of the administrative state that is alert to the importance of “fundamentally abled, racialized, and gendered borders of belonging.” WELKE, *supra* note 12, at 146.

¹⁴² For examples of administrative law scholarship that I think does engage these questions, see Wendy A. Bach, *Welfare Reform, Privatization and Power: Reconfiguring Administrative Law Structures from the Ground Up*, 74 BROOKLYN L. REV. 275 (2008); Bagley, *supra* note 140; Ming Hsu Chen, *Governing by Guidance: Civil Rights Agencies and the Emergence of Language Rights*, 49 HARV. C.R.-C.L.L. REV. 291 (2014); Chin, *supra* note 124; Collins, *supra* note 118; Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122 (2019); Grossman, *supra* note 5; Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339 (2012); Olatunde C.A. Johnson, *Overreach and Innovation in Equality Regulation*, 66 DUKE L.J. 1771 (2017); David Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097 (2017); Revesz, *supra* note 140; Bertrall L. Ross II, *Administering Suspect Classes*, 66 DUKE L.J. 1807 (2017); Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677 (2017); and Karen M. Tani, *An Administrative Right To Be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847 (2017).

¹⁴³ For another take on why we need administrative constitutionalism scholarship that engages the insights of critical legal scholarship, see Yxta Maya Murray, *What FEMA Should Do After Puerto Rico: Toward Critical Administrative Constitutionalism*, 72 ARK. L. REV. 165 (2019), which argues that a “critical administrative constitutionalism” perspective could be incorporated into administrative practice in a way that would help agencies live up to their constitutional obligations.

¹⁴⁴ Hendrik Hartog, *The Constitution of Aspiration and “The Rights That Belong to Us All,”* 74 J. AM. HIST. 1013, 1014 (1987) (emphasis added).

and utopian.”¹⁴⁵ They saw in that document messages about the duty of public authorities to destroy structures of hierarchy and oppression; messages about the meaning of equality—who was equal to whom, and what that equivalence meant; and messages about which rights and freedoms trumped others.¹⁴⁶ Today, some of these once-radical messages are widely accepted as constitutional truths. Other messages have never been incorporated into constitutional doctrine, but remain alive—vying, still, for recognition. Their endurance reminds us that, in any era, constitutional interpretation is “an arena of struggle.”¹⁴⁷

As the administrative constitutionalism literature grows and matures, we should remember this long American tradition of constitutional struggle. We should analyze administrators as not simply interpreters but *arbiters*—mediators of contending constitutional visions. We should pay attention to whose constitutional aspirations gained legitimacy as they came into contact with the administrative state, and whose suffered humiliation and defeat. We should investigate what consequences followed. Engagement with historians is crucial to this end.

¹⁴⁵ *Id.* at 1017.

¹⁴⁶ *See id.* at 1020.

¹⁴⁷ *Id.* at 1026.