THOUGHTS ON HODGES V. UNITED STATES

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Professor Karlan has done us all a great service by focusing her attention on the neglected case of Hodges v. United States. Hodges involved an appeal of a conviction of several white men in Arkansas for violating federal law by using violence and threats to force African American workers to leave their jobs at a sawmill. The indictment in Hodges arose under sections 1977 and 5508 of the U.S. Code. Section 1977 guaranteed to all persons the same right to make and enforce contracts “as is enjoyed by white citizens.” Section 5508 banned conspiracies to deprive individuals of their constitutional rights. The defendants argued on appeal that Congress had no constitutional authority to


2 See Hodges v. United States, 203 U.S. 1, 2 (1906).

3 Id. at 14.


ban private intimidation against black workers. The Thirteenth Amendment, the defendants argued, was limited in scope and did not reach the conduct at issue, and the Fourteenth Amendment applied only to state action. By the time the case reached the Supreme Court, the issue was limited to the scope of the Thirteenth Amendment, and the Court ruled in favor of the defendants.

I generally agree with Professor Karlan’s understanding of Hodges. I would, however, like to elaborate on some of the points she raises. First, Professor Karlan asserts that the motivation behind the Hodges prosecution was not the protection of black workers. Rather, the federal government was acting on behalf of prominent white citizens, especially factory owners, who objected to the harassment of their black workers by lower-class white workers. Her assessment seems accurate, and her point is well-taken. But we should be aware that this is just one example of a much broader phenomenon; during the Lochner era, the interests of white industrialists and black workers often converged in opposition to the racially exclusionary policies and attitudes of working class whites.

Indeed, before the New Deal transformation of American politics, the dominant economic and political strategy among urban African Americans, leaders and rank and file alike, was to align themselves with relatively sympathetic American capitalists in common opposition to economic radicalism and labor unionism. As early as 1902, W.E.B. Du Bois wrote that “the industrial up-building of the South has brought to the front a number of white mechanics, who from birth have regarded Negroes as inferiors and can with the greatest difficulty be brought to regard them as brothers in this battle for better conditions of labor.” Twenty-seven years later, Du Bois, despite his socialist sympathy with the labor movement, wrote that

the white employers, North and South, literally gave the Negroes work when white men refused to work with him; when he ‘scabbed’ for bread and butter the employers defended him against mob violence of white

6 See Hodges, 203 U.S. at 6-7.
7 Id.
8 Id.
9 See Karlan, supra note 1, at 786.
10 Id.
11 I would, however, like to know more about the U.S. Attorney, Warren G. Whipple, who brought this case.
12 See Bernstein, Only One Place of Redress, supra note 1, at 115 (arguing that the African American interests were often advanced as a fortuitous by-product of freedom to contract attacks on special interest litigation).
laborers; they gave him educational institutions when white labor would have left him in ignorance.15

Similarly, Marcus Garvey, a black nationalist and leader of the Back to Africa movement, argued in the 1920s that “the only convenient friend the Negro worker or laborer has in America at the present time is the white capitalist.”16 Bishop Archibald Carey of Atlanta, a prominent black churchman, added that black interests lay with the strength of the American economy and the white industrial leaders who controlled it, rather than with labor unions.17 Fifty-two black newspaper editors meeting in 1924 unanimously condemned “all forms of Unionism and economic radicalism.”18

I also agree with Professor Karlan that the Court’s failure to rule for the government in Hodges did not reflect any ambivalence about freedom of contract,19 nor, as Professor Karlan points out, were the Justices merely sticking their heads in the sand.20 Rather, the Court recognized that upholding the prosecution in Hodges could result in a tremendous increase in federal power and a wide broadening of the Thirteenth Amendment.21 These prospects conflicted with the Court’s commitment to limited federal power and federalism.

We are fortunate to have the transcript of the fascinating oral argument in Hodges, which is part of the official record of the case in the Supreme Court archives.22 There the Attorney General argued that the Thirteenth Amendment only allows the federal government to punish private denial of individual rights when such denials are motivated by racial hatred.23 The Attorney General, however, declined to argue that the Thirteenth Amendment protected only blacks.24 Instead, he argued that the Thirteenth Amendment protected any

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17 Id. (discussing the similarity in the views of Marcus Garvey and Bishop Carey).
19 See generally David E. Bernstein, Lochner Era Revisionism, Revised: Lochner and the Rise of Fundamental Rights Constitutionalism, 92 GEO. L.J. 1, 42-46 (2003) (discussing the Justices’ support at this time for the idea that the Constitution protected a right to liberty of contract, subject to the states’ police power).
20 See Karlan, supra note 1, at 790-94.
21 See id.
23 Id. at 13.
24 Id. at 19 (stating that “I have not been able to satisfy my mind that [the Thirteenth Amendment] makes a permanent distinction between negroes and persons of other races”).
victim of racial hatred (including white ethnics, who in those days were considered to be members of distinct “races”).

By contrast, deprivation of rights motivated purely by general “ill will” toward an individual did not come within the purview of the Amendment. The Attorney General told the Court, “Now, it seems to me that the Government’s case rests on that distinction. If it can be maintained at all, it must be maintained by that distinction.”

The Attorney General’s argument makes little sense. The Thirteenth Amendment bans involuntary servitude, but does not speak specifically of racial hostility or any other motivating factor as necessary to trigger the Amendment’s protections. The Attorney General could have argued that the Thirteenth Amendment and Sections 1977 and 5509 had the specific intent and purpose of ensuring practical freedom to African Americans for the indefinite future. But once the Attorney General conceded that the Thirteenth Amendment protected Italian or Irish immigrants as much as blacks, it is not at all clear why racial hostility would bear on the scope of the Thirteenth Amendment, given the Amendment’s total silence on that issue.

Indeed, Justice White raised this very point in oral argument. He asked the Attorney General:

What has the question of race to do with it? I hear the words of your distinction but they do not make an impression upon me. Why does race enter into the question of involuntary servitude unless you confine the words “involuntary servitude” to the race to which freedom was given by the amendment?

The Attorney General had no good answer.

Justice Day, obviously sensing disaster, invited the Attorney General to reconsider his position:

Mr. Justice Day: This amendment everybody supposed was intended to protect the colored race. Other races were never thought of at all.

The Attorney-General: I can easily rest this case upon the fact that the persons injured were of the colored race, and therefore peculiarly within the protection of the thirteenth amendment. But I have not been able to satisfy my mind that this amendment makes a permanent distinction between negroes and persons of other races. Its benefits extend to all persons of all races.

Mr. Justice Day: The indictment charges that the offense was committed because they were colored.

25 Id.
26 Id. at 15.
27 Id. at 25.
28 See U.S. CONST. amend. XIII.
30 See id.
The Attorney-General: I can find no lodgment in my mind for the thought that a mob which deprives a negro of the right to labor because of his race has violated this amendment, while another mob which deprives an Italian of the right to labor on account of his race has not.31

This exchange demonstrates how one major issue in Hodges was whether the Thirteenth Amendment granted special protections for African Americans, or whether it was a “charter of freedom” for all Americans. The Court, by a vote of 6-2, chose the latter interpretation.32 Justice Harlan’s dissenting opinion, in contrast, argued that the Thirteenth Amendment was specifically meant to protect African Americans, and should be interpreted in that light.33

In fairness to the Hodges majority, when Hodges was decided there were numerous reports in the media of Italian immigrants being held in peonage in the South.34 Indeed, the federal government was prosecuting such cases at this time.35 The Attorney General likely did not want to jeopardize these prosecutions by arguing that the Thirteenth Amendment was meant to protect only blacks. Moreover, despite the official end to legal immigration from China, there was continuing controversy over whether Chinese immigrants had arrived in the United States as “Coolies,” or indentured servants, and thus unfairly competed with other workers from a position of servitude.36

Once the Court’s majority decided that the Thirteenth Amendment protected all Americans to the same degree, its next task was to rule on the scope of rights protected by the Thirteenth Amendment. The Court could have ruled, for example, that the Amendment granted Congress the authority to protect every American from any concerted effort to deprive him of his ability to exercise the rights of American citizens. The Court declined to adopt that rule, no doubt in part because the Justices feared granting the federal government a general police power.

Lochner, and, perhaps even more importantly Allgeyer v. Louisiana,37 may have had a cautionary influence here. In Allgeyer, the Court stated that the liberty protected by the Due Process Clause means

not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but [liberty] is deemed to embrace the

31 Id. at 19.
33 See id. at 31 (Harlan, J., dissenting).
35 See id.
37 165 U.S. 578 (1897) (using an expansive definition of the Due Process Clause to declare unconstitutional a Louisiana law regulating maritime contracts).
right of the citizen to be free in the enjoyment of all of his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.\(^{38}\)

Once the Court held that liberty of contract, broadly construed, was a protected right, a decision granting the federal government the authority to protect that right from private infringement would have given the federal government unheard-of power.

Indeed, the Court seems to have had a specific concern, given the facts of *Hodges*, that a broad interpretation of the Thirteenth Amendment’s scope would have given the federal government the power to directly interfere with labor unions. This colloquy between Justice Brewer, Justice White, and the Attorney General reveals this concern:

Mr. Justice Brewer: You think the concerted action of individuals denying the right of another to labor is putting him in a condition of slavery?

The Attorney-General: Concerted action against another person, on account of his race, to deprive them of one of the essential rights to freedom, the right to labor, is a violation of the thirteenth amendment.

Mr. Justice Brewer: One of another race – against any person of another race – wouldn’t the action of labor organizations in forbidding any person to labor unless he was a member of their organizations be depriving him of liberty?

The Attorney-General: There might be different considerations. I prefer not to go beyond the necessity of this case.

Mr. Justice White: . . . Take the case of an Irishman who strikes an Italian working on the railroad. A body of Irish say, We do not like ‘Dagos’ and will not work with them, and they drive them off; they wouldn’t do that if they were Irish.

The Attorney-General: Yes, sir.

Mr. Justice White: The Irishman goes into a bar room and he sees an Italian there and knocks him down. Would that be a violation under your theory?

The Attorney-General: I wouldn’t go that far.\(^{39}\)

If the Court had adopted the Attorney General’s argument regarding the scope of the Thirteenth Amendment, the national government, and, by extension the

\(^{38}\) *Id.* at 598.

federal courts, could be dragged in to policing the membership policies of labor unions.

Moreover, Hodges adopted the view that racial or ethnic discrimination was not necessary for a violation of the Thirteenth Amendment to occur.40 Therefore, a decision that involuntary servitude encompassed the purposeful deprivation of one’s right to labor would have required the courts to enjoin labor unions from having any sort of restrictive membership policies. Yet the entire practical purpose of the dominant craft unions during the Lochner era was to restrict the supply of labor in specific occupations in order to raise wage levels beyond the normal market clearing rate.41 Under these circumstances, it is not especially surprising that the Hodges Court, though not terribly sympathetic to labor unions, was also not inclined to adopt a decision that would have imperiled the very existence of craft unions.42

The Court instead limited the scope of the Thirteenth Amendment to its literal terms and held that involuntary servitude required a master/servant relationship.43 The Attorney General had argued that it was “well settled”

40 See Hodges v. United States, 203 U.S. 1, 16-17 (1906).

41 See, e.g., Harry M. McKiven, Jr., Iron and Steel: Class, Race, and Community in Birmingham, Alabama, 1875-1920, at 4 (1995) (explaining how skilled white iron workers used labor unions to prevent competition from black workers); Sterling D. Spier & Abram L. Harris, The Black Worker, the Negro and the Labor Movement 21-22 (1931) (discussing how local unions in Tennessee and Arkansas refused to accept black workers affiliated with other unions, thereby maintaining a superior white working class). Moreover, while craft unions were exclusionary by their very nature, their leaders sought to enhance the unions’ political power by dispelling the public’s impression that the unions’ activities aided only self-interested, relatively well-paid, elite workers. See Eric Arnesen, “Like Banquo’s Ghost, It Will Not Down”: The Race Question and the American Railroad Brotherhoods, 1880-1920, 99 Am. Hist. Rev. 1601, 1609 (1994) (explaining how railroad workers’ unions maintained power by condemning both capitalist industrialization and continued immigration, both of which they claimed “constituted a deadly threat to the wages and working and living conditions of true American workers”). By engaging in discrimination against blacks and other minorities, and acting as leading advocates of racist public policies, craft unions positioned themselves as defenders of all white workers against attempts by capitalists to subvert the white American working man’s standard of living. See Michael Kazin, Barons of Labor: The San Francisco Building Trades and Union Power in the Progressive Era 146-47 (1987) (explaining how labor unions pressed their own economic demands and prevented incursions by minority workers by advocating for all white wage-earners and speaking out against what they claimed were threatening, hostile races).

42 See generally Loewe v. Lawlor, 208 U.S. 274 (1908) (stating that labor unions were legal under both the common law and under the Sherman Antitrust Act, but that secondary boycotts were unlawful); Kersch, supra note 13, at 156-58 (noting the intense criticism directed at the Court for applying the Sherman Act to labor unions, criticism that undoubtedly would have been even stronger if the Court had used Reconstruction statutes to hamper unions).

43 See Hodges v. United States, 203 U.S. 1, 16-18 (1906).
doctrine from the *Civil Rights Cases* that the Thirteenth Amendment forbids not only slavery and involuntary servitude, but also the badges and incidents of slavery.\textsuperscript{44} But a close reading of the *Civil Rights Cases* shows that Justice Bradley’s majority opinion was merely assuming *arguendo* that the Thirteenth Amendment included a ban on all the badges and incidents of slavery.\textsuperscript{45} It is hardly surprising that the *Hodges* Court, which was less sympathetic to the goals of Reconstruction than were Bradley’s contemporaries, would reject a broad interpretation of the Thirteenth Amendment.

Because Justices Harlan and Day, in the *Hodges* dissent, had concluded that the Thirteenth Amendment was primarily meant to secure freedom for blacks, and thus was relatively limited in scope, they were able to adopt a broad interpretation of the Thirteenth Amendment.\textsuperscript{46} Harlan’s dissent asserted that the Thirteenth Amendment protected blacks from being deprived by private action of all the rights that the Fourteenth Amendment’s Due Process Clause protected against State invasion.\textsuperscript{47} These rights, according to Harlan, including the rights recognized by the Court in *Allgeyer v. Louisiana*.\textsuperscript{48}

Harlan and Day were apparently not concerned that their interpretation of the Thirteenth Amendment, if adopted by the full court, would lead to federal interference with the membership policies of labor unions, a potential progressive nightmare. Despite (or perhaps because of) their relatively liberal views regarding the rights of African Americans, neither Day nor Harlan particularly sympathized with organized labor. Indeed, in *Adair vs. United States*, decided in 1908, Harlan, joined by Justice Day, wrote an opinion invalidating a federal law prohibiting railroad labor contracts that banned workers from joining unions.\textsuperscript{49} Harlan wrote, “it cannot be . . . that an employer is under any legal obligation, against his will, to retain an employ[ee] in his personal service any more than an employ[ee] can be compelled, against his will, to remain in the personal service of another.”\textsuperscript{50} Harlan, then, saw unreasonable infringements of an employer’s liberty of contract as analogous to a form of involuntary servitude.

Consider also Justice Day’s dissenting opinion in the 1917 case of *Wilson v. New*, in which Justice Day argued that a law intended to raise the hourly wage

\textsuperscript{44} See Attorney General Oral Argument, *supra* note 22, at 36.

\textsuperscript{45} See *Civil Rights Cases*, 109 U.S. 3, 20 (1883) (“It is assumed that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States . . . .” (emphasis added)).

\textsuperscript{46} See *Hodges*, 203 U.S. at 37 (Harlan & Day, JJ., dissenting).

\textsuperscript{47} Id. at 28.

\textsuperscript{48} Id. at 35-36 (arguing that the broad liberties adjudged to be protected by the Fourteenth Amendment in the *Allgeyer* case were also “essential in the freedom conferred by the Thirteenth Amendment”).

\textsuperscript{49} See *Adair v. United States*, 208 U.S. 161, 166-80 (1908) (Harlan, J., dissenting).

\textsuperscript{50} Id. at 175-76.
of railroad employees violated the Due Process Clause of the Fifth Amendment.\textsuperscript{51} Justice Day wrote:

Such legislation, it seems to me, amounts to the taking of the property of one and giving it to another in violation of the spirit of fair play and equal right which the Constitution intended to secure in the due process clause to all coming within its protection, and is a striking illustration of that method which has always been deemed to be the plainest illustration of arbitrary action, the taking of the property of A and giving it to B by legislative fiat.\textsuperscript{52}

Thus, it is clear that the debate between the Justices in the Hodges case was between two camps of Lochnerians. One camp was willing to use an expansive interpretation of federal power under the Thirteenth Amendment to guarantee African Americans the practical ability to exercise their right to liberty of contract. The other camp declined to read the Thirteenth Amendment specifically as a charter of freedom for African Americans and also refused to countenance a broad expansion of federal police powers.

A final point: Professor Karlan concludes her paper by celebrating the Warren Court’s decision in Jones v. Alfred H. Mayer Co.\textsuperscript{53} Jones held that the federal government had the power under the Thirteenth Amendment to ban discrimination in housing.\textsuperscript{54} Interestingly, in 1906 none of the Justices, including Harlan and Day, would have adopted this view of the Thirteenth Amendment. At the time, as the Attorney General noted in oral argument in Hodges, the asserted right to buy from an unwilling seller was not considered a right at all.\textsuperscript{55} That this seems surprising to us today shows how much things have changed in the last century, and how difficult it therefore is to understand and appreciate the debates of yesteryear. For this reason, there is all the more reason to commend Professor Karlan for her excellent job in recovering and explaining the Hodges case.

\textsuperscript{52} Id. at 370.
\textsuperscript{53} See Karlan, supra note 1, at 809.
\textsuperscript{55} See Attorney General Oral Argument, supra note 22, at 19.