

OLD LINES IN NEW BATTLES: AN OVERLOOKED YET USEFUL STATUTE TO CONFRONT EXPLOITATION OF UNDOCUMENTED WORKERS BY EMPLOYERS AND BY ICE

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Justice Ruth Bader Ginsburg concluded her most recent visit to the William S. Richardson School of Law on Lincoln's Birthday, 2017.¹ During her visit, the Ninth Circuit Court of Appeals handed down its unanimous decision upholding the initial order that enjoined the Trump Administration's initial travel ban,² and I had the great pleasure of informing Justice Ginsburg of that significant judicial action—and of being present as she immediately imbibed the opinion in a way that gave new meaning to “being focused.”

Justice Ginsburg's presence, her words to high school students as well as law students and members of the larger community, coupled with the dramatic Ninth Circuit decision that paid attention to the rule of law, prompted some initial thoughts about a possible way to follow Justice Ginsburg's own example of effective, creative use of existing legal materials to advance the search for justice in the face of the new Trump Terror.

The Trump Administration's enthusiastic targeting of undocumented residents of the United States directly aids employers across the United States by supplying a realistic scare tactic (or worse) that they can use against their

* Dean and Professor, William S. Richardson School of Law, University of Hawai'i. I would like to thank the staff of the Nevada Law Journal for being exceptionally pleasant and helpful. Professor Ruben Garcia deserves special mention for his customary graciousness and great skill in organizing this entire Symposium, and my fellow participants also have earned my great respect and gratitude. My greatest debt is to Taylor Brack, William S. Richardson School of Law '19, who is among a handful of the very best research assistants I have ever had in over 40 years of publishing law review articles.

¹ See generally Kelli Trifonovitch, *Supreme Court Associate Justice Ruth Bader Ginsburg Shares Decades of Wisdom with UH Law Students*, U. HAW. NEWS (Feb. 9, 2017), <https://www.hawaii.edu/news/2017/02/09/supreme-court-associate-justice-ruth-bader-ginsburg-shares-decades-of-wisdom-with-uh-law-students/> [<https://perma.cc/3DEN-FX5N>].

² *Washington v. Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017) (per curiam), *reh'g en banc denied*, 858 F.3d 1168, 1168 (9th Cir. 2017). The Supreme Court reversed a subsequent Ninth Circuit decision that had upheld a nationwide injunction against the third Trump travel ban in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

workers. In the shadowy gloom of possible deportation, employers can now even more effectively exploit those workers who lack “proper papers.”

My suggestion is that this harsh reality might be at least slowed through a lawsuit or lawsuits aimed directly at employers who, with the help of federal agents, are now further emboldened to squeeze undocumented workers even harder. And there is a virtually unknown 1867 federal statute that speaks directly to this harsh reality—the Peonage Abolition Act of 1867, now codified as 42 U.S.C. § 1994 (2012). The original context as well as the current statutory language might well be useful in litigating against the personal devastation wrought by Immigration and Customs Enforcement (ICE), the Trump Administration, and the “outsourcing of American Democracy.”³

Much as the 1960s led creative lawyers to rediscover and invoke civil rights statutes such as the Civil Rights Act of 1866 and to do so with noteworthy success, our perilous times now call for attention to the Peonage Abolition Act, passed by the same 39th Congress and based on the Thirteenth Amendment, thus not requiring “state action.” As Attorney Ruth Bader Ginsburg and her colleagues poured new meaning into the Civil Rights Act of 1964 and the Fourteenth Amendment, the Peonage Abolition Act similarly offers relevant textual support along with the bonus of clear and supportive legislative intent.⁴

Currently codified as 42 U.S.C. § 1994, the statute states in its entirety:

The holding of *any person to service or labor* under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, *directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise*, are declared null and void.⁵

Attention to the origins of this statute enhances the possibilities to invoke it on behalf of noncitizens. In fact, the 39th Congress specifically focused on the exploitation of Mexicans and Indians, undeniably noncitizens, in the territory of New Mexico in 1866—exploitation in which members of the US Army actively

³ See generally JODY FREEMAN & MARTHA MINOW, GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (2009). See also CAM SIMPSON, THE GIRL FROM KATHMANDU (2018) for a discussion of the twelve Nepalese laborers killed by terrorists while working in Iraq through a contract between United States military and KBR Halliburton.

⁴ CONG. GLOBE, 39th Cong., 2d Sess. 239–40 (1867). Senator Charles Sumner stressed a report that US Army personnel had been aiding in the capture of Mexicans and Indians so that they would be made peons as he introduced the bill that became the Peonage Abolition Act on the first day of the lame-duck 39th Congress.

⁵ 42 U.S.C. § 1994 (2012) (emphasis added). The current version is virtually unchanged from what the 39th Congress adopted, with the exception of omitting the specific reference to the Territory of New Mexico and replacing it with “Territory or State.”

collaborated.⁶ The protection the act sought to provide was not, and still is not, limited to citizens. It extends to “any person” held to “service or labor [in a] system known as peonage” by means “directly or indirectly.”⁷ And though the statute has been virtually ignored, its definition of peonage is sweeping: the statute bans “the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt *or obligation, or otherwise.*”⁸

As the Civil Rights Act of 1866 had long been relegated to history’s dustbin until it was resuscitated in *Jones v. Alfred H. Mayer Co.*, attention could and should be paid to the specific provisions of an important 150-year-old statute.⁹ In many ways parallel to the 1866 Civil Rights Act,¹⁰ an only slightly older sibling to the Peonage Abolition Act, the 39th Congress added broad protections even for noncitizens who were being exploited through benighted public-private partnerships within the jurisdiction of the United States.¹¹ Though initially it may seem far-fetched to invoke an almost unknown statute, the old promise of enacting into law “a new birth of freedom” in the wake of the Civil War could be central to the current and ongoing civil rights struggles.¹² Before turning to several ways in which the Peonage Abolition Act is strikingly relevant to the current crisis for undocumented workers, as well as the plight of foreign workers exploited through the iron triangle of public-private partnerships involving the US military-industrial complex and American contract law, a brief summary of its historical context may be useful.

⁶ See CONG. GLOBE, 39th Cong., 2d Sess. 239–40 (1867) (remarks of Sen. Sumner); see also Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607, 1614–18 (2012) [hereinafter Soifer, *Federal Protection and Paternalism*].

⁷ 42 U.S.C. § 1994 (2012).

⁸ 42 U.S.C. § 1994 (emphasis added). There was not yet a Fourteenth Amendment, and thus Congress relied on its new authority under the Thirteenth Amendment. Strikingly, Congress used the Thirteenth Amendment’s section 2 enforcement clause to extend rights beyond the reach of the language of the Thirteenth Amendment, which abolished only slavery and involuntary servitude, and did not extend to the knotty issue of “voluntary servitude.”

⁹ See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 421–22 (1968).

¹⁰ Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–1982). For discussion of the Civil Rights Act, see *infra* note 15.

¹¹ See, e.g., *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419–20 (1948); Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662, 670 (1975) (“But section 1981, because of its foundation in the fourteenth amendment, has long been interpreted as banning state action which discriminates on the basis of alienage.”); *id.* at 664 (“In *Jones v. Alfred H. Mayer Company*, however, the Court concluded that the thirteenth amendment, in outlawing the institution of slavery, also empowered Congress to ban both public and private racial or color discrimination as vestiges of slavery not immediately eradicated by the prohibition of the institution itself As a result of the Court’s re-assessment of the thirteenth amendment and the Civil Rights Act, sections 1981 and 1982 have become important vehicles for combatting private discrimination . . .”).

¹² President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863); see also CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM* (1997).

I. THE 39TH CONGRESS

The central purpose of the Civil Rights Act of 1866 was to eliminate the ongoing vestiges of slavery and to protect all those whom the act made citizens.¹³ In overriding President Johnson's veto—the first time a presidential veto was overridden on a major piece of legislation in the nation's history—the members of the 39th Congress found it necessary to respond to the Black Codes newly adopted throughout the South as well as to try to prevent more of the vicious violence that recently-freed slaves regularly encountered.¹⁴ President Johnson exacerbated the situation repeatedly with his outrageous, belligerent statements as well as his efforts to readmit the southern states without extracting any meaningful conditions.¹⁵

Johnson further blundered as he tried, but miserably failed, to launch a new national political party in the summer of 1866.¹⁶ Senator James R. Doolittle (R-WI), who had chaired Johnson's failed National Union Convention, stated that Johnson's subsequent disastrous "Swing Round the Circle" attempt to take his Reconstruction policies to the people had probably cost Johnson and his allies one million votes.¹⁷

Against this backdrop, and with considerable enthusiasm among the voters for the 39th Congress's newly proposed Fourteenth Amendment, many Moder-

¹³ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866) (remarks of Sen. Trumbull) ("[T]he very object of the bill is to break down all discrimination between black men and white men[.] . . . [It] is simply intended to carry out a constitutional provision, and guaranty to every person of every color the same civil rights.")

¹⁴ See *id.* at 474 (remarks of Sen. Trumbull) ("Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the constitutional amendment."); *id.* at 1293–94 (remarks of Rep. Shellabarger); *id.* at 1118 (remarks of Rep. Wilson).

¹⁵ President Johnson claimed that the Civil Rights Bill "frustrate[d] the inevitable 'adjustment' by former slaves and former masters to a new economic model. If only 'left to the laws that regulate capital and labor,' a 'harmonious' new equilibrium would arise between the two." Darrell A.H. Miller, *A Thirteenth Amendment Agenda for the Twenty-first Century: Of Promises, Power, and Precaution*, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 293 (Alexander Tsesis ed., 2010) (alteration in original); see also ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988). Indeed, President Johnson's veto message specifically rejected the Civil Rights Act of 1866 because in it: "a perfect equality of the white and black races is attempted to be fixed by Federal law, in every state of the Union, over the vast field of State jurisdiction covered by these enumerate rights." Miller *supra* at 204. Aviam Soifer, *Protecting Full and Equal Rights: The Floor and More*, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 204 (Alexander Tsesis ed., 2010) [hereafter Soifer, *Protecting Full and Equal Rights*].

¹⁶ See DAVID O. STEWART, IMPEACHED: THE TRIAL OF PRESIDENT ANDREW JOHNSON AND THE FIGHT FOR LINCOLN'S LEGACY 59–73 (2009).

¹⁷ See Soifer, *Federal Protection and Paternalism*, *supra* note 6, at 1615–19.

ate Republicans found themselves driven into the arms of the Radical Republicans. The Republican Party won a smashing congressional victory in November 1866 and the 40th Congress promised to be considerably more Radical (and what we might term “veto-proof”) than the 39th had been.¹⁸ The current necessity for swift and dramatic responses to the outrages being perpetrated almost daily echoes the Northern political mood of late 1866 and early 1867.

On January 3, 1867, the day that the lame duck session of 39th Congress officially convened, Senator Charles Sumner (R-MA) rose to make a troubling report.¹⁹ Sumner, the Radical Republican leader and a hero within the antislavery movement,²⁰ informed his colleagues of the scandalous fact that—despite an executive proclamation and supporting orders from the War Department—federal troops were aiding in a system of peonage in the Territory of New Mexico.²¹

Sumner’s comments were based directly upon the 1866 Report of the Commissioner on Indian Affairs as well as a report made by Special Agent J.K. Graves to the Commissioner of Indian Affairs.²² Both reports sought swift congressional action to end the alarming situation in New Mexico.²³ Special Agent Graves warned that such an important change would not be easy because people in the Territory of New Mexico had been living under this detestable “system of labor for centuries” and thus probably would “cling tenaciously to their

¹⁸ See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 11–18 (1995); STEWART, *supra* note 16, at 73.

¹⁹ See CONG. GLOBE, 39th Cong., 2d Sess. 239–40 (1867).

²⁰ See generally DAVID HERBERT DONALD, *CHARLES SUMNER AND THE RIGHTS OF MAN* (1970); DAVID HERBERT DONALD, *CHARLES SUMNER AND THE COMING OF THE CIVIL WAR* (Sourcebooks, Inc. 2009) (1960). Sumner’s fame primarily rested on his fervent antislavery views and speeches and his leadership in the Senate, but his reputation was enhanced when he barely survived being caned in 1856 by South Carolina Representative Preston (“Bully”) Brooks while Sumner sat pinned by his desk on the Senate floor. *Id.* at 242–46.

²¹ Senator Sumner proclaimed:

I think you will be astonished when you know that the evidence is complete that at this moment in a Territory of the United States there is a system of slavery which a proclamation of the President has down to this day been unable to root out. During the life of [President] Lincoln I more than once appealed to him to exercise his power as the head of the executive, to root this evil out of the Territory of New Mexico. The result was a proclamation and also definite orders from the Department of War; but in the face of that proclamation and of those definite orders this abuse has continued, and according to the official evidence it seems to have increased.

CONG. GLOBE, 39th Cong., 2d Sess. 240 (1867).

²² See *id.*

²³ U.S. DEP’T OF THE INTERIOR, OFFICE OF INDIAN AFFAIRS, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1866), <http://images.library.wisc.edu/History/EFacs/CommRep/AnnRep66/reference/history.annrep66.i0003.pdf> [<https://perma.cc/SBR4-VMXV>] (last visited Dec. 9, 2018); U.S. DEP’T OF THE INTERIOR, OFFICE OF INDIAN AFFAIRS, REPORT OF SPECIAL AGENT J.K. GRAVES, No. 40 133–34 (1866), <http://images.library.wisc.edu/History/EFacs/CommRep/AnnRep66/reference/history.annrep66.i0011.pdf> [<https://perma.cc/TYY8-849W>] (last visited Dec. 9, 2018) [hereinafter REPORT OF SPECIAL AGENT J.K. GRAVES].

old customs.”²⁴ Graves asserted that nothing short of vigorous governmental intervention could change the existing system.²⁵

Slavery and peonage in the American Southwest did not exactly mirror the enslavement of African Americans in the South yet conflicts among Native American tribes and between those tribes and the Mexican settlers were a fact of life in the region.²⁶ Captives from both sides, mostly women and children, were placed in, or returned to, peonage through the direct assistance of members of the United States Army.²⁷

Ironically, it is only recently that the complexity of the enslavement of Indians in Mexico and across the southwestern United States has been studied systematically. The work of Andrés Reséndez, for example, stands out for Reséndez’s mastery of fine detail in his study of the Texas and New Mexico frontier and in his sweeping description of the myriad of forms that constituted Native American enslavement.²⁸

The enslavement of indigenous people had persisted in the Americas for centuries before 1866—initially by the Native Americans themselves—yet “with the arrival of Europeans, practices of captivity originally embedded in specific cultural contexts became commodified, expanded in unexpected ways,

²⁴ REPORT OF SPECIAL AGENT J.K. GRAVES, *supra* note 23, at 133–34.

²⁵ *See id.* at 133.

²⁶ *See* JAMES F. BROOKS, CAPTIVES AND COUSINS: SLAVERY, KINSHIP, AND COMMUNITY IN THE SOUTHWEST BORDERLANDS 33 (2002) (“To explore this region’s slave economy is to complicate and enrich our understanding of North American slavery. Indigenous peoples like Apaches, Comanches, Utes, Navajos, Pawnees, and Pueblos (to name but a few) had practiced the capture, adoption, intermarriage, and occasional sacrifice of outsiders since well before European entry into the region . . . [T]he Spanish colonists who came to northern New Spain (later Mexico) in the sixteenth century also carried with them customs of capture, enslavement, adoption, and exploitation of non-Christian peoples, dating from the Iberian reconquista, when the Muslim-Christian borderlands formed a field of violence and intercultural negotiation within which a volatile coexistence prevailed across several centuries.”).

²⁷ *See id.* at 30, 34 (“Native American and Spanish colonial men found that the survival of their communities depended, in part, on their ability to exchange both human and material resources across cultural boundaries. Often undertaken in acts of violence, these exchanges also produced unexpected, often fortuitous results because the women and children who crossed cultures proved remarkably adept at making something of their unfortunate circumstances. The combined product of these structural imperatives and the creative potential of human action emerged as a system of slavery unique to the Southwest Borderlands but with strong similarities to other regions where colonial and indigenous people met in relative parity. . . . Here, beneath the profound cultural differences and steady conflicts punctuating Indian and Spanish colonial relations, native and Spanish men shared similar notions of honor, shame, and gender, with the control of women and children as a central proof of status. Both branches of borderland slavery could interact because they grew from shared patriarchal structures of power and patrimony that contrast sharply with the racial divisiveness and labor exploitation around which the more familiar forms of Euramerican enslavement of Africans functioned.”). *See also* ANDRÉS RESÉNDEZ, THE OTHER SLAVERY: THE UNDISCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA 8–9 (2016) (regarding the surge in Indian enslavement during the Civil War in the West as culminating in the Navajo campaign of 1863–1864).

²⁸ *See generally* ANDRÉS RESÉNDEZ, CHANGING NATIONAL IDENTITIES AT THE FRONTIER (2005); RESÉNDEZ, *supra* note 27.

and came to resemble the kinds of human trafficking that are recognizable to us today.”²⁹ The practice evolved and took on many different names and descriptions that encompassed a “range of forms of captivity and coercion.”³⁰

In the aftermath of the Civil War, Senator Sumner and his colleagues sought to end the involvement of Americans in the practice of unfree labor once and for all.³¹

The fact that the 39th Congress took seriously the “protection” part of “equal protection” is largely overlooked. But, it is important to note that Congress first articulated the idea at length within the 1866 Civil Rights Act’s guarantee of “full and equal benefit of all laws and proceedings.”³² As Congress considered a nation very badly in need of reconstruction, the men of the 39th Congress echoed Chief Justice John Marshall’s pronouncement for the unanimous Court in *Marbury v. Madison*: “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”³³ These words, and the attitude that informed them, clearly influenced the writing and passage of the Peonage Abolition Act.

On March 2, 1867, Congress easily adopted the Peonage Abolition Act that Sumner had proposed—the same day that Congress divided the South into five sections and sent in the US Army.³⁴ As the texts of both the Thirteenth and Fourteenth Amendments make clear, those who passed and sought to implement this Second Constitution in the wake of the Civil War certainly did not embrace state sovereignty. Nonetheless, belief in an unwritten states’ rights version of the Constitution remains a hardy perennial. Chief Justice Roberts recently provided a disturbing example of its mystical power.

To be sure, there are substantial holes in Roberts’s majority opinion in *Shelby County v. Holder*,³⁵ due to its illogic, abuse of precedent, and blatant lack of respect for a co-equal branch³⁶ Yet Roberts also relies upon a remarkable revision of the text of the Tenth Amendment. That amendment states: “The

²⁹ RESÉNDEZ, *supra* note 27, at 3.

³⁰ *Id.* at 10.

³¹ *See, e.g.*, CONG. GLOBE, 39th Cong., 2d Sess. 240 (1867) (remarks of Sen. Conness in response to the 1866 Report of Special Agent J.K. Graves) (“It is also known to me, as it has been for perhaps four years past, that the administration of military affairs in the Territory of New Mexico has been a standing disgrace to this Government . . . I have failed utterly in all the attempts I have been able to make in getting such attention to the subject as would lead to a correction. I hope that this inquiry will go in that direction and finally be effective.”).

³² Soifer, *Protecting Full and Equal Rights*, *supra* note 15, at 197.

³³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

³⁴ Anti-Peonage Act of 1867, ch. 187, 14 Stat. 546 (1867) (outlawing peonage); An Act to Provide for the More Efficient Government of the Rebel States (Military Reconstruction Act), ch. 153, 14 Stat. 428 (1867) (dividing the southern states).

³⁵ *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).

³⁶ For my own brief critique of *Shelby County*, see Aviam Soifer, *Of Swords, Shields, and a Gun to the Head: Coercing Individuals, But Not States*, 39 Seattle U. L. Rev. 787, 796-98 (2016) [hereinafter Soifer, *Of Swords, Shields, and a Gun to the Head*].

powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”³⁷ The Chief Justice paraphrased the Tenth Amendment much differently. Roberts wrote, “Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. Amdt. 10.”³⁸

His insertion of the word “specifically” is particularly striking because, when the First Congress proposed this amendment, James Madison led a successful fight against including the word “expressly” precisely at the point where Roberts inserted “specifically.”³⁹ Madison successfully argued that this limitation in the Articles of Confederation undermined its effectiveness. Roberts added a second major alteration as he transformed the amendment’s reserved power “to the *people*” into power reserved only for “*citizens*.” The Peonage Abolition Act’s broad protection for noncitizens specifically illustrates the 39th Congress’s commitment to protect all “persons” within the jurisdiction of the United States.

The same 39th Congress, which earlier promulgated the Fourteenth Amendment, similarly included broad protection of the rights of persons—as distinguished from the rights of citizens—in several important places in its text. Though Chief Justice Roberts may have been only paraphrasing, his apparently willful inaccuracies are misleading at best, and constitute an alarmingly clear departure from the “originalism” and “textualism” celebrated by members of the *Shelby County* majority.

A sense of an overarching and vital obligation to afford protection even to noncitizens—explicitly extending even to those whose citizenship and loyalty lay elsewhere—helps to explain the Court’s somewhat cryptic decision in *Yick Wo v. Hopkins*, in which Justice Matthews held for a unanimous Court that even a Chinese alien who still owed loyalty to the Emperor had United States constitutional rights deserving of protection.⁴⁰ The Court noted that the Constitution protected Yick Wo against a law that, although “fair on its face,” was “applied and administered by public authority with an evil eye and an unequal hand.”⁴¹ Less well known is the Court’s pronouncement of a “universal” promise “to all persons within the territorial jurisdiction, without regard to any dif-

³⁷ U.S. CONST. amend. X.

³⁸ *Shelby Cty.*, 570 U.S. at 543.

³⁹ Soifer, *Of Swords, Shields, and a Gun to the Head*, *supra* note 36, at 797.

⁴⁰ *Yick Wo v. Hopkins*, 118 U.S. 356, 367 (1886) (quoting *Barbier v. Connolly* for the key point that the Fourteenth Amendment was “undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights.” 113 U.S. 27, 31 (1884)).

⁴¹ *Id.* at 374.

ferences of race, of color, or of nationality;” this promise specifically included the “pledge of the protection of equal laws.”⁴²

Nonetheless, victims of labor exploitation within the United States did not long enjoy the broad coverage of the Peonage Abolition Act. The pinched definitions of peonage adopted by many judges, including the Justices of the US Supreme Court, frustrated victims’ attempts to seek legal remedies for the abuse they suffered under their employers.⁴³ These later, extremely narrow definitions of peonage in criminal law proclaimed that debt was a necessary element⁴⁴ and that physical coercion was a necessary condition.⁴⁵

Even in recent times in *United States v. Shackney*, for example, the distinguished Second Circuit Court of Appeals Judge Henry J. Friendly held that federal criminal law could not reach the plight of a Mexican worker on a chicken farm, though a Rabbi—himself an immigrant—kept the worker from leaving the farm or drinking anything alcoholic under a two-year contract by threatening to have him deported.⁴⁶ Friendly explained that for as long as the worker “still has a choice, however painful,” federal criminal law did not extend to his situation.⁴⁷ Congress finally did extend the protection of federal criminal law through the Victims of Trafficking and Violence Protection Act of 2000.⁴⁸

⁴² *Id.* at 369. For an intriguing scholarly debate about the core meaning of *Yick Wo*, compare Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About Yick Wo*, 2008 U. ILL. L. REV. 1359 with Thomas W. Joo, *Yick Wo Re-Visited: Nonblack Nonwhites and Fourteenth Amendment History*, 2008 U. ILL. L. REV. 1427.

⁴³ Years ago, I explored these and related decisions construing the Thirteenth Amendment in Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249, 269 (1987).

⁴⁴ See, e.g., *Hodges v. United States*, 203 U.S. 1, 16 (1906) (rejecting badges and incidents of slavery claim for protection from mob because Thirteenth Amendment “not an attempt to commit [blacks] to the care of the nation.”); *Clyatt v. United States*, 197 U.S. 207, 215 (1905) (debt was the necessary “basal” condition for peonage). *But see United States v. Reynolds*, 235 U.S. 133, 149–50 (1914) (invalidating Alabama’s convict leasing alternative to the chain gang); *Bailey v. Alabama*, 219 U.S. 219, 245 (1911) (invalidating conviction for fraud as basis for Alabama sharecropping system). The Court finally spoke boldly against peonage in *Pollock v. Williams*, 322 U.S. 4, 25 (1944). On the basis of the Peonage Abolition Act, Justice Jackson’s majority opinion struck down the vicious Florida sharecropping system. Jackson noted that in passing the statute in 1867, “Congress thus raised both a shield and a sword against forced labor because of debt.” *Id.* at 8. See generally James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of “Involuntary Servitude,”* 119 YALE L.J. 1474 (2010).

⁴⁵ See *United States v. Kozminski*, 487 U.S. 931, 934, 953 (1988) (even psychological coercion of two mentally challenged farm workers on a dairy farm, kept “in poor health, in squalid conditions, and in relative isolation” for well over a decade, insufficient to sustain a criminal conviction under 18 U.S.C. § 1584 and 18 U.S.C. § 241).

⁴⁶ *United States v. Shackney*, 333 F.2d 475, 476–77 (2d Cir. 1964).

⁴⁷ *Id.* at 487.

⁴⁸ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered titles of the U.S.C.). See generally Rebecca E. Zeitlow, *The Promise of Congressional Enforcement*, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 182, 190–91 (Alexander Tsesis ed., 2010). It nonetheless frequently still has proven difficult to convict

In contrast to the jagged history of attempts to use the criminal law against the coercion of workers, the language of the Peonage Abolition Act offers virtually untapped potential for civil law. Its historical context underscores how broadly the veteran members of the 39th Congress—the authors of the Fourteenth Amendment—viewed their constitutional authority and their commitment to assist former slaves, to protect the vulnerable, and to forbid peonage of any kind, premised on the need to give specific meaning to the Thirteenth Amendment.⁴⁹

And it certainly does not require a “latitudinarian”⁵⁰ construction to grasp the statute’s breadth; the protection it provides explicitly was not limited to citizens in any way. In fact, it specifically extends to “any person” held to “service or labor in a system known as peonage” by means “directly or indirectly” anywhere in the United States or its territories.⁵¹ It prohibited “all acts, laws, resolutions, orders, regulations, or usages” anywhere within the jurisdiction of the United States that put or kept anyone in peonage in the past, present, or future.⁵² In addition, the statute’s definition of peonage is strikingly broad: it bans “the voluntary or involuntary service or labor of any persons as peons, in liqui-

those who are exploiting workers through psychological coercion, confiscation of passports, and similar coercive measures.

⁴⁹ Their emphasis on providing protection permeates the debates over the Freedman’s Bureau Act and the Civil Rights Act of 1866, as well as the Peonage Abolition Act. This aspect of Congress’s reforming zeal to afford needed protection has rarely been acknowledged by the US Supreme Court. Even in the period when *Plessy v. Ferguson*, 163 U.S. 537 (1896) dominated equal protection analysis, however, the Court did strike down a Louisville, Kentucky ordinance that supported a private restrictive covenant in *Buchanan v. Warley*, 245 U.S. 60, 76–77 (1917). Justice Day’s opinion for a unanimous Court quoted *Strauder v. West Virginia* as follows:

It [the Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the states. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any state the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation.

Id. (alteration in original) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 306–07 (1880)). *But see, e.g.*, Chief Justice Rehnquist’s opinion in *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989) (stating that the Fourteenth Amendment was “to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation . . . to the democratic political processes.”).

⁵⁰ “Latitudinarian” referred to a tolerant approach within religious disputation beginning in the seventeenth century. By the mid-nineteenth century, the word was often used as a pejorative gibe in congressional debates. The Oxford English Dictionary defines latitudinarian as “[a]llowing, favouring, or characterized by latitude in opinion or action, esp. in matters of religion; not insisting on strict adherence to or conformity with an established code, standard, formula, etc.; tolerating free thought or laxity of belief on religious questions; characteristic of the latitudinarians[.]” *Latitudinarian*, OXFORD ENGLISH DICTIONARY (2d ed. 1991).

⁵¹ 42 U.S.C. § 1994 (2012).

⁵² *Id.*

dation of any debt or obligation, or otherwise.”⁵³ It is so sweeping, in fact, that its very breadth may explain why it may seem frightening to begin to ask judges to determine what its reach and its limits ought to be.

The very concept of “voluntary peonage,” for example, may trigger a clash among deeply held beliefs. Is every contract at base a form of voluntary peonage? Does it make sense that courts over many decades have refused to order specific performance by opera singers,⁵⁴ for example, yet will give very little attention to other forms of coercion? Indeed, the concept of coercion may be so malleable as to mislead rather than illuminate a great deal of legal analysis.⁵⁵

Despite the contradictions within the “freedom to contract” that remains part of the foundation of the American labor market, the pervasive and persistent problem of labor exploitation, then and now, demands, not only attention to existing broad legal definitions of peonage, but also a willingness on the part of victims to pursue justice in a court of law.⁵⁶

Despite the potential within both the language and the history of the statute, it is necessary to recognize and address the desuetude of the Peonage Abolition Act. The following section addresses a few of the practical difficulties as well as a few possible avenues for lawyerly originality if this 1867 statute is to be revived as a partial response to today’s very troubled times. It is undertaken

⁵³ *Id.* There was not yet a Fourteenth Amendment, and Congress therefore relied on its new authority under the Thirteenth Amendment. There would be, therefore, no need to prove state action in a section 1994 action. It is noteworthy that Congress used the Thirteenth Amendment’s section 2 enforcement clause to extend rights clearly stretching beyond the reach of the language of the Thirteenth Amendment, which abolished only slavery and *involuntary* servitude, and did not extend to “*voluntary servitude*.” This contemporaneous example of the 39th Congress’s sense of its own authority through the Thirteenth Amendment to “enforce this article by appropriate legislation” strongly suggests parallel broad congressional authority through the Fourteenth Amendment’s section 5: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” Despite this unusually compelling historical context, however, the Supreme Court over the past quarter century has adopted an extremely parsimonious view of Congress’s enforcement power in the name of federalism limits. *See, e.g.,* *Shelby Cty. v. Holder*, 570 U.S. 529, 556–57 (2013) (limiting the Voting Rights Act); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (limiting the Americans with Disabilities Act); *United States v. Morrison*, 529 U.S. 598, 601 (2000) (limiting the Violence Against Women Act); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (limiting the Religious Freedom Restoration Act).

⁵⁴ *See Lumley v. Wagner* (1852) 42 Eng. Rep. 687, 687 (holding it inappropriate to order specific performance by an individual artist).

⁵⁵ *See, e.g.,* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470 (1923); Robert L. Hale, *Force and the State: A Comparison of “Political” and “Economic” Compulsion*, 35 COLUM. L. REV. 149, 149–50 (1935). An impressive introduction to, and analysis of, Hale’s work may be found in BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE* (1998). *See also* Soifer, *Federal Protection and Paternalism*, *supra* note 6, at 1630–37; Soifer, *Of Swords, Shields, and a Gun to the Head*, *supra* note 36, at 808–12.

⁵⁶ *See* RESÉNDEZ, *supra* note 27, at 8 (“Disguised as debt peonage, which stretched the limits of accepted labor institutions and even posed as legal work, this other slavery was the direct forerunner of the forms of bondage practiced today.”).

with considerable humility, however; this brief section reflects tentative ideas admittedly launched from the ivory tower by an academic who is anything but a litigator. Yet it also may be that even a lawsuit that ultimately does not succeed may have preemptive value as well as offering a bully pulpit.

II. PRACTICAL ISSUES

A. *Plaintiffs:*

The most obvious first necessary step is to identify possible plaintiffs. Given the broad reach and extreme deference accorded to ICE, any potential individual plaintiff would quite understandably be fearful about coming forward. There is the possibility of anonymity in court filings, of course, and it could well be that a suit in federal court might even afford some protection to, for instance, a “Juanita Roe.” Just about any federal judge would be miffed, to say the least, to learn of plaintiffs being deported before getting their full day in court if they had been accorded standing and were within the judge’s jurisdiction.

Another possibility would be for a group to seek standing, most probably on behalf of particular members. To be sure, there is strength in numbers. In addition, some of the groups working on behalf of undocumented people could meet the usual requirements for standing, and so might some progressive unions who could credibly claim that the exploitation of those who are vulnerable because they are undocumented interferes directly with a union’s organizing efforts as well as directly harming the pocketbook interests of its members.

Finally, undocumented people who are being held in detention and being paid a pittance for work they are supposed to do within the detention center might make a particularly strong claim to have standing.

B. *Private Cause of Action*

In many decisions since *Alexander v. Sandoval*,⁵⁷ lower federal courts have followed the U.S. Supreme Court’s lead in making it increasingly difficult to infer private causes of action throughout a large array of federal statutes.⁵⁸ And the Peonage Abolition Act does not specify who may sue and for what remedy.

⁵⁷ *Alexander v. Sandoval*, 532 U.S. 275, 278–79 (2001) (holding no Title VI private right of action to challenge English-only driver’s license test).

⁵⁸ See, e.g., *Allco Renewable Energy Ltd. v. Mass. Elec. Co.*, 875 F.3d 64, 67 (1st Cir. 2017) (ruling a claim under the Public Utility Regulatory Policies Act failed because plaintiff did not show that Congress unequivocally conferred a private cause of action); *Abrahams v. MTA Long Island Bus*, 644 F.3d 110, 112 (2d Cir. 2011) (holding that public participation requirement in developing and assessing paratransit services did not establish a private cause of action, under 42 U.S.C. § 12143); *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1093, 1097 (9th Cir. 2005) (stating that the National Historic Preservation Act’s “look and listen” provision akin to the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370m, weighed against an implied cause of action).

Nonetheless, its companion statutory civil rights statutes have long been held correctly to imply private rights of action.⁵⁹

This is clearly the case with the language of the Ku Klux Klan Act,⁶⁰ for example, as well as in the ability of individuals to invoke the statutory remnants of the 1866 Civil Rights Act.⁶¹ The constitutional and statutory company surrounding the Peonage Abolition Act make an implied private right of action anchored in the Peonage Abolition Act clearly more plausible than not—even applying the crabbed rubric now used by the Supreme Court in deciding whether there is indeed an implied cause of action within federal statutes.⁶²

The key issue in assessing whether an implied cause of action is available to potential federal plaintiffs remains what Congress intended in the specific statute at issue. *Alexander v. Sandoval* led the way toward the Court's recent and increasingly narrow approach.⁶³ Yet the intricacies of that decision's distinction between Title IX and Title VII within the Civil Rights Act of 1964—and their relative weight in construing a federal agency's regulations—are all but irrelevant to the Peonage Abolition Act of 1867.⁶⁴

In fact, the 39th Congress could not leave litigation to the Department of Justice because there was no Department of Justice until 1870.⁶⁵ Nor is there

⁵⁹ See, e.g., *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 632–33 (1999) (upholding private cause of action under Title IX, 20 U.S.C. §§ 1681–1688 to remedy student-on-student harassment); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (recognizing implied cause of action for Fourth Amendment claims against Federal Bureau of Narcotics agents); *Monroe v. Pape*, 365 U.S. 167, 172 (1961) (recognizing implied cause of action under 42 U.S.C. § 1983 because Congress “meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position.”).

⁶⁰ An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for Other Purposes, ch. 22, 17 Stat 13. (1871) (currently enacted as 42 U.S.C. § 1983 (2012)); see *The Ku Klux Klan Act of 1871*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, <https://history.house.gov/HistoricalHighlight/Detail/15032451486> [<https://perma.cc/X9YJ-EP4Q>] (last visited Dec. 9, 2018) (stating that the Act of the same title is “also known as the ‘Ku Klux Klan Act.’”).

⁶¹ 42 U.S.C. §§ 1981–1982 (2012). See generally Soifer, *Protecting Full and Equal Rights*, *supra* note 15.

⁶² See *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018). For example, Justice Kennedy’s plurality opinion noted “this Court’s general reluctance to extend judicially created private rights of action.” *Id.* Though *Jesner* dealt with foreign corporations, Kennedy emphasized that:

[R]ecent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law, where this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.

Id.

⁶³ See generally *Alexander v. Sandoval*, 532 U.S. 275 (2001).

⁶⁴ *Id.* at 279–80.

⁶⁵ There is a dispute about whether the establishment of the Department of Justice was primarily to enforce rights established during Reconstruction or part of a retrenchment, intended to save money because payments to private attorneys to do federal work seemed to have

any evidence that Congress intended the rights guaranteed in the Peonage Abolition Act to be left only to the mercies of part-time US Attorneys sprinkled throughout the country, particularly in the un-Reconstructed South.

As Justice Scalia explained for the Court in *Armstrong v. Exceptional Child Center*,⁶⁶ the Supremacy Clause is not the source of any federal rights, but “private suits *can* go forward without statutory authority—if they seek to enjoin violations of federal law.”⁶⁷ That is, unless and until Congress negates that authority, which Congress clearly has never done in respect to section 1994, that authority exists and may be interpreted in light of related statutory language. In *Armstrong*, the Court emphasized the extensive administrative mechanism that Congress put in place to enforce the standards of section 30(A) of the Medicaid Act⁶⁸ in the course of rejecting a claim of an implied private cause of action.⁶⁹ In sharp contrast, as we have seen, there was no administrative mechanism whatsoever for enforcement of the Peonage Abolition Act, and precious little capability among any other federal entities.⁷⁰

C. Possible Defendants and Remedies

The nexus between federal officials and private exploitation in the Territory of New Mexico that was central to Senator Sumner’s efforts as he introduced the bill ought to be heeded if and when plaintiffs seek to sue both federal officials and the employers those officials are aiding in exploiting undocumented workers.⁷¹ On the other hand, the Peonage Abolition Act nowhere suggests that both types of defendants are necessary; indeed, its Thirteenth Amendment pedigree also makes clear that no state action is necessary either.⁷²

Matters become more complex, of course, if a hypothetical lawsuit were to seek damages against federal officials as well as private employers. Even in

gotten out of hand to many in Congress. Compare Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 122 (2014), with Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 438 (2011), and Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1297, 1300–01 (2000).

⁶⁶ *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1381 (2015) (no implicit private cause of action based on the Supremacy Clause).

⁶⁷ LARRY W. YACKLE, FEDERAL COURTS: THE CURRENT QUESTIONS 92 (2017).

⁶⁸ 42 U.S.C. § 1396a(a)(30)(A) (2012). The existence of this administrative recourse thus substantially bolstered Scalia’s conclusion for the majority that there was no private remedy intended by Congress.

⁶⁹ *Armstrong*, 135 S. Ct. at 1393–94.

⁷⁰ See generally LEON F. LITWACK, BEEN IN THE STORM SO LONG 231 (1979); Handelsman Shugerman, *supra* note 65.

⁷¹ See CONG. GLOBE, 39th Cong., 2d Sess. 240–41 (1866) (remarks of Sen. Sumner).

⁷² See 42 U.S.C. § 1994 (2012); see also *Runyon v. McCrary*, 427 U.S. 160, 170 (1976) (holding that civil rights protections afforded individuals by the Civil Rights Act of 1866 could be violated by private discrimination in housing and in contracts, without any showing of state action); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 461–62 (1968).

such a situation, however, there may still be several ways to sue federal government officials that might allow artful ways to get around or through sovereign immunity or to have it waived. Ideally, however, the initial salvos attempting to use the statute would seek only declaratory and injunctive relief against any and all defendants.

A very brief and ancient statute—at least by American standards—sought to protect vulnerable laborers against many forms of exploitation. The members of the 39th Congress were painfully aware that the formal end of slavery had not and could not itself make people free. Their Peonage Abolition Act was a bold—albeit, at least in part, naïve—attempt to provide an important practical legal tool to establish freedom in the workplace. The protection was to extend to noncitizens as well as citizens anywhere in the United States, and it was intended to afford protection to all those who encountered overwhelmingly coercive employment. Those being exploited could come to federal court even if they were not working to pay off a debt and even if they encountered intolerable employment situations they might have seemed to enter voluntarily.

Coercion is a jagged concept whose meaning often depends on specific contexts,⁷³ yet the free labor ideology of the Republican Party both before and after the Civil War managed to drive memories and ideas of acceptable indentured servitude back into the conveniently overlooked past, though indentured servitude had helped settle America.⁷⁴ And the violence, intimidation, and horrific daily experiences former slaves encountered in the years immediately after Appomattox demonstrated dramatically that the free market was hardly free and that newly freed laborers were in desperate need of protection.⁷⁵ On the last day of its final session, the 39th Congress sent in the troops; that same day, Congress also sought to provide a lasting legal mechanism to protect vulnerable workers from blatant coercion in the workplace.⁷⁶

While visiting Hawai'i last year, Justice Ginsburg urged lawyers and law students to use their knowledge and skill to work toward repairing a torn world.⁷⁷ Within old statutory provisions, there may be found important old lines that are yet to be poured into new battles.

⁷³ This is an ongoing problem. See, e.g., John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 266 (1947); Edwin W. Patterson, *Compulsory Contracts in the Crystal Ball*, 43 COLUM. L. REV. 731, 741 (1943).

⁷⁴ See generally FONER, *supra* note 18; ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY (2001); ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870 (1991); CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC (1993); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 441 (1989).

⁷⁵ See generally LITWACK, *supra* note 70.

⁷⁶ See CONG. GLOBE, 39th Cong., 2d Sess. 1995 (1867).

⁷⁷ See Trifonovitch, *supra* note 1.

CONCLUSION

To be sure, effective use of an 1867 statute that remains virtually a *tabula rasa* will require a great deal of strategizing and organizing, as well as a demanding level of skillful lawyering. But it is worth remembering that we have had other examples of effective use of older legal language to create more justice in our world. When Justice Ginsburg—herself a vivid exemplar of this approach—was last in Hawai’i in February 2017, she urged the lawyers and law students with whom she spoke to use their legal knowledge and advocacy skills to try to repair instances where the world is clearly torn.⁷⁸ It can hardly be doubted that ripping and tearing asunder is going on now throughout our country. The exploitation of the undocumented human beings cries out for reparative justice and the rule of law.

⁷⁸ *See id.*