Federal Protection, Paternalism, and Voluntary Peonage

“Under the constitutional amendment Congress is bound to see that freedom is in fact secured to every person throughout the land; he must be fully protected in all his rights of person and property, and any legislation or any public sentiment which deprives any human being in the land of these great rights of liberty will be in defiance of the Constitution, and if the States and local authorities, by legislation or otherwise, deny these rights, it is incumbent on us to see that they are secured.”

Recently we have been blessed with an outpouring of excellent legal scholarship about the Thirteenth Amendment. That Amendment’s guarantee of universal freedom is no longer nearly forgotten nor is it still viewed almost exclusively as a half-way house en route to the Fourteenth Amendment. Impressive new work illuminates the importance of distinguishing between concepts of freedom of contract and freedom of labor, for example, and scholars

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2 Alex’s key role and Columbia Law Review’s great job.
recently have convincingly emphasized the importance of Congress’s broad enforcement power to reach private actions through Section 2 of the Thirteenth Amendment.

Important books by Michael Vorenberg, Risa Goluboff, and Alexander Tsesis among others have helped focus attention on the rapid changes in the evolution of the language of the Amendment and on its use and abuse in the decades that followed its enactment. Despite the strained and, at times, appalling recent judicial interpretations of the remnants of the 1866 Civil Rights Act that remain on the federal statute books, legal scholars have never before recognized the importance of that Act’s bold guarantees as they now do. We are beginning to heed what great historians have been pointing out for decades. More than 20 years ago, for example, Eric Foner explained that the 1866 Civil Rights Act “embodied a profound change in federal-state relations and reflected how ideas once considered radical had been adopted by the [Republican] party’s mainstream….Reflecting the conviction, born of the Civil War, that the federal government possessed the authority to define and protect citizens’ rights, the bill represented a striking departure in American jurisprudence.”

Nonetheless, even the best and most careful recent legal scholarship does not come to grips with the enormity and the fluidity of the crisis the 39th Congress faced and the changes they wrought in response. Nor has attention been paid adequately to the extent of the federal

5 Cite all in single footnote?


7 Some of us in legal academia have been poking at the issue of the breadth and significance of the 1866 Civil Rights Act for decades, but William Wiecek has led in this quest throughout his distinguished career. It is therefore worthy of particular note that he recently declared, “The 1866 Civil Rights Act, enacted under Congress’s Thirteenth Amendment authority to end the incidents of slavery and involuntary servitude, is the key to understanding the meaning of freedom, equality, and civil status after abolition.” William M. Wiecek, Emancipation and Civic Status: The American Experience, 1865-1915, in THE PROMISES OF LIBERTY 79, 86 (Alexander Tsesis 2010).

power Congress believed it possessed and should use on the basis of the Thirteenth Amendment. In particular, it has not been sufficiently noticed how extensively the actions of the 39th Congress during its final session in early 1867 changed federalism, thereby underscoring the extent of subsequent judicial interposition regarding state action and federalism. If anything, however, the egregious doctrinal errors of late nineteenth century judges have been compounded in recent years.

The specific focus of this article is on the Peonage Abolition Act of 1867. I argue that the 39th Congress, in its effort to abolish multiple forms of peonage throughout the United States and all federal territory, explicitly swept beyond the freedoms guaranteed by Section 1 of the newly-ratified Thirteenth Amendment. Congress clearly believed that its enforcement power, as provided to it by Section 2 of the Amendment, provided the basis for legislation not only to prohibit numerous forms of involuntary peonage but also to forbid “voluntary peonage” —even though Section 1 of the Thirteenth Amendment had declared simply that “[n]either slavery or involuntary servitude...shall exist within the United States, or any place subject to their jurisdiction.”

The historical context makes it abundantly clear that this broad anti-peonage statute, enacted on the very day in March, 1867 that Congress voted to divide the South into five districts under military rule, undercuts the idea of abiding concern for state sovereignty and states’ rights in the 39th Congress. Congress sought to stamp out not only vestiges of slavery but also all forms of peonage, no matter what state laws or state failures to act might allow. This article concludes by discussing briefly a few of the knotty issues surrounding the very concept of “voluntary peonage.” In a sense, the article moves from what at first might seem an anomalous statutory text to its context and, briefly, then to policy considerations. It never

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U.S. Const. amend. XIII, § 1. The words omitted contain the exception “except as a punishment for crime whereof the party shall have been duly convicted.” It is striking that the final phrase of Section One still refers to the United States in the plural, though the Civil War itself had already done much to forge a unitary national entity and to make the United States singular.
claims, however, that any of these approaches affords a singular conceptual path for lawyers, judges, and citizens to follow.

I. The Peonage Abolition Act of 1867: Changing Context and Text

A. Some Background

President Andrew Johnson’s March 27th veto of the 1866 Civil Rights Act—and his remarkably provocative veto message—triggered the first Congressional override of a presidential veto of a major bill in the nation’s history. His veto of the Civil Rights Act closely followed Johnson’s veto of the Freedmen’s Bureau Bill, which had shocked Moderate republicans such as Senator Lyman Trumbull of Illinois, who believed he had assurances that the President would sign the bill to assist and to protect the newly-freed slaves.

Just two days after his earlier Freedmen’s Bureau Bill veto in February, Johnson had added insult to injury during his rambling Washington Birthday address to a crowd of well-wishers. In his hour-long harangue, Johnson referred to himself over 200 times and he identified Congressional leaders Thaddeus Stevens and Charles Sumner along with antislavery activist Wendell Philips as men just as treasonous as were the leaders of the Confederacy. “This speech stunned Northern opinion,” and Johnson’s veto of the Civil Rights Act that soon followed “made Radical leadership the only alternative to congressional surrender.” The 1866 Civil Rights Act that was passed over Johnson’s veto in early April, 1866 proclaimed broad national citizenship

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10 W.R. Brock, _An American Crisis: Congress and Reconstruction_ 1865-1867 115 (1963). Brock succinctly described the dilemma faced by Moderate Republicans: “On the one hand was a President, intimate with men whom all Republicans distrusted, and apparently reviving in all its former dogmatism the State rights theory which many believed to have been the cause of the war; on the other hand stood the Radicals still urging that the only way to reconstruct was to reconstruct Southern society. If the moderate or bewildered Republican was asked to choose between the two there was little doubt in which direction he would move.” _Id._, at 116.

11 _Id._, at 111, 121. As Eric Foner put it, “Like his rejection of the Freedmen’s Bureau Bill, Johnson’s veto message repudiated not merely the specific terms of the Civil Rights Bill, but the entire principle behind it. Federal protection of blacks’ civil rights and the broad conception of national power that lay behind it, he insisted, violated ‘all our experience as a people’ and constituted a ‘stride towards centralization, and the concentration of all legislative powers in the national Government.” Foner, _supra_ note 8, at 250 (footnotes omitted).
and protected a vital list of rights. Particularly significant, albeit generally overlooked, was the Act’s guarantee of “full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.” I have argued elsewhere that this phrase sought to protect rights more substantially and more actively than simply to command that everyone be treated equally. Indeed, the “full” aspect of “full and equal” might well be read as a statutory precursor to the constitutional guarantee of “protection” in the Fourteenth Amendment.

In our ongoing struggle to determine what it might mean to be “equal,” we have virtually forgotten Section 1’s guarantee of “protection.” Yet the national duty to protect the newly-freed slaves emerges overwhelmingly as the central theme for Moderate Republicans as well as for their Radical Republican colleagues during the debate leading up to the passage of the 1866 Civil Rights Act over Johnson’s veto. Furthermore, the breadth of rights guaranteed to all citizens of the United States by the 1866 Civil Rights Act—an Act that Congress passed only a few months before the same men approved the text of what became the Fourteenth Amendment—illuminates the core assumptions that the 39th Congress made about the

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12 “Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.” Civil Rights Act, ch.31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. 1981, 1982).

13 Soifer, supra note 6 at 211-212. Senator Nye of Nevada may have described the guarantee most succinctly when he embraced Congress’s duty to afford “equalized protection under equalized laws.” CONG. GLOBE, 39th Cong., 1st Sess. 1074 (1866).

14 For a detailed treatment of the theme of national protection for basic rights, see Aviam Soifer, Protecting Civil Rights, supra note 8, at 651, 671-690.
expansive reach of the freedoms announced by the Thirteenth Amendment as well as the broad Congressional authority it granted.\textsuperscript{15}

As if to underscore these broad guarantees, a series of events in early 1866 exacerbated the irreparable rupture between President Johnson and Congress. They provide the crucial backdrop for the process of drafting the Fourteenth Amendment, done initially by the Joint Committee of Fifteen established as the 39\textsuperscript{th} Congress convened. The temptation to pick apart the words of the Fourteenth Amendment in a quest for a particular end often leads to “law office history” at its worst, relying on selective quotation and ignoring context entirely.\textsuperscript{16} Ironically, however, if we heed the context in which the Fourteenth Amendment was drafted and sent to the states, it is virtually impossible to find support for the “state action” doctrine during a period when the need for federal protection was clear and the status of the former states that composed the Confederacy was entirely up for grabs. In early 1866, Congress was awash in reports about formal discriminations rampant within the new Black Codes adopted by the Southern states. In addition, however, the Joint Committee of Fifteen that had been appointed to guide Congress’s Reconstruction efforts gathered voluminous searing testimony about private depredations that freedpersons and their supporters encountered throughout the South.

It is not surprising that there were over seventy proposed drafts for a Fourteenth Amendment by early 1866. Thus, for example, Senator Stewart of Nevada introduced a compromise proposal on behalf of the Moderate Republicans that would exchange universal

\textsuperscript{15} Civil Rights Act of 1866, ch.31, Sec. 1, 14 Stat. 27 (1866). The only exceptions to the broad coverage of Section 1 were for those “subject to any foreign power” and for “Indians not taxed.” The broad scope of the Act’s citizenship declaration, as well as the vast range of the rights it enumerated and sought to protect with civil, criminal, and removal power in the federal courts, illustrates how sweeping was the power that the men of the 39\textsuperscript{th} Congress believed they had been afforded by the Thirteenth Amendment—which many of them had voted for as members of the 38\textsuperscript{th} Congress.

amnesty for Southerners for an amendment that read: “All discriminations among the people because of race, color, or previous condition of servitude, either in civil rights or the right of suffrage, are prohibited....” And, as Eric Foner pointed out in his summary of the tangled legislative history of the Fourteenth Amendment, the draft amendment proposed by Ohio Congressman John A. Bingham “granting Congress the authority of secure the ‘privileges and immunities’ and ‘equal protection of life, liberty, and property’ of all citizens” was tabled because “[m]ost Republicans believed Congress already possessed this power.”

The duty to protect all those who had been made national citizens by Section 1 of the 1866 Civil Rights Act became the core concern of the 39th Congress. President Johnson’s multiple blunders had only begun with his drunken performance at his inauguration as Vice President in March, 1865; Johnson’s enthusiasm for returning to the federalism of the pre-Civil War and for readmission of the Southern states as quickly as possible made it seem necessary for Congress to take the lead. Johnson’s blatant racism further fed their desire for a new federal order.

B. The 1866 Election and the Peonage Abolition Act of 1867

The summer and fall following the battles over Johnson’s vetoes of the Freedmen’s Bureau Bill and the Civil Rights Act of 1866 produced a stunning political disaster for President Johnson. It should not be forgotten, however, that over the same period blacks in the South suffered much more serious harm. Terrible race riots in Memphis and New Orleans took scores of black

17 S.J. Res. 62, § 1, Cong. Globe. 39th Cong., 1st Sess. 1906 (1866). For a brief discussion of Alexander Bickel’s reading of this proposal, see Soifer, supra note 8, at 685, n. 169 (1979); for an explanation of how Johnson’s veto of the Civil Rights Act doomed Stewarts’ proposal, see Brock, supra note 10, at 117-18.

18 Foner, supra note 8 at 253.

lives and these were only the most dramatic among the multiple assaults and blatant
deprivations of rights repeatedly encountered by freedpersons and their allies throughout the
South. Meanwhile, in the summer of 1866 President Johnson sought to form a new National
Union Party, combining Conservative Republicans with sympathetic Democrats. The
Philadelphia Convention called to launch this new alliance was a complete bust, however, and
internal divisions quickly doomed Johnson’s efforts. Nonetheless, Johnson decided to take his
own Reconstruction ideas directly to the people.

Johnson’s unprecedented “Swing Round the Circle” campaign proved such a debacle that
even the President’s stalwart supporters were appalled. His ham-handed attempts to utilize
patronage similarly backfired. The Republicans won in a national landslide in November, in part
because of the political appeal of the Fourteenth Amendment they had just promulgated over
Johnson’s objections. Not surprisingly, in the wake of the terrible Civil War, voters in the
victorious North simply could not abide Johnson’s plan for unconditional and immediate
readmission of the Southern states.

The lame-duck 39th Congress that got down to business in January, 1867 thus was well aware
that the Congress that would soon succeed them would have a solid majority, easily able to
muster the two-thirds votes needed to override Johnson’s vetoes. As the 39th Congress
reconvened, it was prepared to do battle over black suffrage as well to fight the President over
the question of whether, when, and how to reinstate the Southern states.

Though the Fourteenth Amendment was not yet in place, these veteran members of the
39th Congress were convinced that Section 2 of the Thirteenth Amendment afforded them
ample constitutional authority to forbid peonage of any kind. The debate on this issue kicked
off on January 3, 1867, the first day of the session, with a troubling report introduced by
Senator Charles Sumner of Massachusetts about U.S. Army personnel directly aiding a system
of peonage that exploited Mexicans, as well as Indians captured for the purpose of making
them peons in the New Mexico Territory. 20 Congress easily adopted the Peonage Abolition Act of 1867 21 on March 2, 1867, after debates in both the Senate and the House made it clear that the Act’s coverage stretched well beyond protecting former black slaves. It is noteworthy that the language of the Act swept very broadly as it banned “the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise.” The Act thus did not restrict the definition of the peonage it forbade to compulsion to work because of “debt.” And the 1867 Act also recognized that the treatment it sought to prohibit, whether involuntary or voluntary, could be compelled in many different ways. This included “usages” as well as the laws and ordinances now generally considered necessary to supply the “color of law” and/or state action that is currently requisite to obtain coverage under most federal civil

20 CONG. GLOBE, 39th Cong., 2d Sess. 239-40 (1867). Other items on the Senate agenda that day included land grants for railroads, the Tenure of Office Act, attempts to control false representations to immigrants that induced them into servitude, and a proposed resolution seeking to instruct the Judiciary Committee to seek measures, if any, that could be taken “to prevent the Supreme Court from releasing and discharging the assassins of Mr. Lincoln and the conspirators to release the rebel prisoners at Camp Douglas, in Chicago.” Id, at 249. This resolution failed to obtain unanimous consent.

On the House side, Representative Thaddeus Stevens delivered a blistering speech in which he cried out for protection of “our loyal brethren in the South, whether they be black or white, whether they go there from the North or are natives of the rebel States,” and who desperately needed Congress to proceed at once to protect them “from the barbarians who are now daily murdering them.” Id, at 251. Stevens also asserted that in the United States, “the whole sovereignty rests with the people, and is exercised through their Representatives in Congress assembled.” Thus, Stevens declared, “No Government official, from the president and the Chief Justice down, can do any one act which is not prescribed and directed by legislative power.” Id., at 252. The Supreme Court’s recent decision in Ex parte Milligan, 71 U.S. 2 (1866) drew particular ire because Stevens read it to endanger all efforts to use the military to protect freed blacks and loyal unionists.

21 Ch. 187, Sec.1, 14 Stat. 546. “The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the territory of New Mexico, or 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 been 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.” [current version at 42 U.S.C.A. § 1994]

rights statutes. As in the statutory reference to “custom and usage” in the Ku Klux Klan Act of 1871, the 39th Congress understood all too well that anonymous nightriders, for example, were often entirely successful in depriving former slaves and their allies of basic rights—and many times of their lives—without overt involvement by the state or by any state officials whatsoever.

With the Peonage Abolition Act, Congress extended its statutory protections considerably. It directly reached beyond the prohibitions that the text of Section 1 of the Thirteenth Amendment announced explicitly. The Amendment’s ban of “slavery and involuntary servitude” afforded the constitutional basis for the 39th Congress to add protection against any attempt “to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons.” Clearly, the 39th Congress believed it had adequate authority under the Thirteenth Amendment to add “voluntary” peonage to the involuntary peonage that the Amendment’s text specifically banned. The Peonage Act’s protections also stretched beyond the traditional definition of peonage anchored in debt or obligation; the new statute would reach obligations “otherwise” imposed. Though effective enforcement clearly was and would remain an overwhelming problem, it bears noting that the 39th Congress finally passed the Military Reconstruction Act over President Johnson’s veto on March 2, 1867—the same day it adopted the Peonage Act.

The Military Reconstruction Act, which divided the eleven Southern states (except Tennessee) into five military districts to be occupied by the United States Army, is hardly rooted

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23 Justice John M. Harlan’s strained reading of the statutory language of 42 U.S. C. Sec. 1983 to interpret “custom and usage” to require acts by government officials in Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) demonstrates the kinds of somersaults required to maintain the state action barrier. Rather incredibly, the Court rejected the civil rights claim of a white schoolteacher refused service at a lunch counter in Hattiesburg, Mississippi when she accompanied six black students there because she had not proved the requisite involvement of state officials with store personnel before she was arrested for vagrancy upon leaving the store.

On the other hand, if Shelley v. Kraemer, 334 U.S. 1 (1948) is to be taken seriously, there seems no stopping place once the origin story identifies the arm of the state behind the enforcement of the laws. Like turtles in the ancient myth, it becomes state action all the way down.
in an ethos of states’ rights or state sovereignty. For many good reasons, Congress remained deeply concerned about the adequacy of the protection that was being provided by state and local officials to blacks and their allies in the South. Indeed, for Congress to order military occupation suggests an overarching legislative concern regarding the tragic consequences that freedmen and Unionists faced in the face of egregious, widespread failure to afford them even basic protection. Defying the President, the Act also laid out steps for the organization and admission of new states that included affording manhood suffrage to all, writing new state constitutions, and ratifying the Fourteenth Amendment. Andrew Johnson’s most recent biographer, Annette Gordon-Reed, described the President as “beside himself” as he declared the Act to be a product of “anarchy and chaos” and saw it as an attempt to hurt Southerners in order “to protect niggers.”

The 39th Congress also added a new Habeas Corpus Act that, like the Civil Rights Act of 1866, extensively increased the possibilities for removal of state cases to federal court. Finally, the 39th Congress ended by calling the 40th Congress into session two days later.

C. Cases and Implications

W.R. Brock argued in his exemplary study of the early Reconstruction period, An American Crisis that Congress sought legislative supremacy somewhat akin to the British parliamentary

24 Annette Gordon-Reed, ANDREW JOHNSON: THE AMERICAN PRESIDENTS SERIES: THE 17TH PRESIDENT, 1865-1869 129-30 (Arthur M. Schlesinger & Sean Wilentz eds., 2010), quoting sources in Hans L. Trefousse, ANDREW JOHNSON: A BIOGRAPHY 279 (1989). Johnson also had declared, “This is a country for white men, and by God, as long as I am President, it shall be a government for white men.” Id., at 112, citing Trefousse at 243.

25 Foner, supra note __, at 276-77. Foner noted: “The astonishingly rapid evolution of Congressional attitudes that culminated in black suffrage arose both from the crisis created by the obstinacy of Johnson and the white South, and the determination of the Radicals, blacks, and eventually Southern Unionists not to accept a Reconstruction program that stopped short of this demand.”
system. There is certainly considerable evidence that the men of the 39th Congress trusted neither the Executive nor the Supreme Court. They were also committed to changing the nature of federalism.

In the years that followed the final adjournment of the 39th Congress, the Supreme Court offered ample evidence for that distrust. In Blyew v. United States, for example, in the context of a horrific murder of members of a black family, the Court held that the federal Civil Rights Act of 1866 did not trump a Kentucky statute that forbade blacks from testifying against whites. Dissenting, Justices Bradley and Swayne explained that Section 1 of the 1866 Civil Rights Act reached state inaction and that it “provides a remedy where the State refuses to give one; where the mischief consists in inaction or refusal to act, or refusal to give requisite relief.” The evisceration of the Privileges or Immunities Clause of the Fourteenth Amendment

26 Brock, supra note 10. Brock wrote, for example, “In fact the Republicans could hardly fail to be conscious of the weight of opinion behind them, and it was not unexpected that they should have spoken of themselves as national representatives of the national will, and regarded a President who had been repudiated and a Supreme Court which represented no one and still contained members who had concurred in the notorious Dred Scott decision as their inferiors in the scales of popular government.” Id., at 7.

Brock continued: “Legislative supremacy looked more logical, more desirable and more just than executive encroachments or judicial usurpations. If this view was challenged, as Johnson challenged it, by stating that a Congress which excluded eleven States was no Congress, it could be claimed that a Congress which had had authority to fight the war must have equal authority to decide the conditions of peace.” Id.

27 Blyew v. United States, 80 U.S. 581 (1872).


29 Blyew, 80 U.S. at 597. In fact, Justice Bradley’s dissent offered a précis of the predominant argument throughout the final year of the 39th Congress that clearly embraced national protection of civil rights: “Merely striking of the fetters of the slave, without removing the incidents and consequences of slavery, would hardly have been a boon to the colored race. Hence, also, the amendment abolishing slavery was supplemented by a clause giving Congress power to enforce it by appropriate legislation. No law was necessary to abolish slavery: the amendment did that. The power to enforce the amendment by appropriate legislation must be a power to do away with the incidents and consequences of slavery, and to instate the freedmen in the full enjoyment of that civil liberty and equality which the abolition of slavery meant.” Id., at 601.
in the Slaughter-House Cases, which was anchored in states’ rights rhetoric and in pre-Civil War notions of federalism, soon followed. By 1875, the unanimous Supreme Court could proclaim that it was obliged to “roll back the tide of time, and to imagine [ourselves] back in Mississippi before abolition.” Once having performed this extraordinary feat of time travel, the Court found it remarkably easy to deny a former slave any share from the proceeds of cotton sold after the United States Army impounded it in 1863 on the plantation where he literally had slaved away for many years. Everyone knew, after all, that a slave in Mississippi could not make a contract. The fervor to return to what purported to be some form of normalcy—and the urge to reconstitute both states’ rights and racial discrimination—was powerful enough to bury the vital statutory protections of 1866-1867. The radical revision of federalism triggered by the Civil War and its aftermath that had boldly proclaimed a New Birth of Freedom quickly became an abandoned child.

D. Dimensions of Added Protections

The motivations among the members of Congress and their supporters were not entirely benign, to be sure. Some wanted to make sure that the recently freed blacks did not migrate North, for instance, and others were interested primarily in black suffrage and what it might do to help the Republican Party. Some betrayed many of the appalling qualities of paternalistic

30 Slaughter-House Cases, 83 U.S. 36 (1873).

31 Hall v. United States, 92 U.S. 27, 30 (1875). Hall asserted that he had been born a free man, but the Court determined that it did not have to reach this issue because Hall had been sold and held in Mississippi as a slave, his color presumptively made him a slave, and he had not availed himself of a Mississippi statute that was the exclusive means to claim one’s freedom.

32 For the unanimous Court, Justice Swayne further explained: “It was an inflexible rule of the law of African slavery, wherever it existed, that the slave was incapable of entering into any contract, not excepting the contract of marriage…. [Thus] it is clear that if Hall did contract with Roach, as he alleges he did, the contract was an utter nullity. In the view of the law, it created no obligation, and conferred no rights as to either of the parties. It was as if it were not. This case must be determined as if slavery had not been abolished in Mississippi, and the laws referred to were still in force there. The destruction of the institution can have no effect upon the prior rights here in question. Id., at 30-31.
racism. In addition, in 1866 Congress was engaged in a complex, practical tug-of-war about when and how the Southern states that had seceded could re-enter the Union. As Leon Litwack’s great book, Been in the Storm So Long, makes abundantly clear, however, it also was terribly apparent that life in the South was chaotic and dangerous at best and that the Freedmen’s Bureau and military personnel who were present were woefully inadequate to the task of affording actual protection.

The government’s duty to afford protection was a major trope in the discussion of slavery and of the meaning of rights leading up to the Civil War, perhaps most famously when it was listed first among all rights in Justice Bushrod Washington’s much-cited opinion in Corfield v. Coryell. Though the phrase “equal protection” had taken on some particular connotations prior to the Civil War, we have almost entirely lost the “protection” part of that phrase through our focus on its implications for equality considerations. Furthermore, the awkward phrasing of Section 1 of the Fourteenth Amendment—as it was declared to be ratified by Secretary of State William Seward in 1868—has allowed judges and scholars to assume that that the obligation imposed on every state not to “deny to any within its jurisdiction the equal protection of the laws” forbade only active denial of such protection.

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35 Chief Justice Lemuel Shaw’s opinion in Roberts v. City of Boston, 59 Mass (5 Cush.) 198 (1855), in which the Massachusetts Supreme Judicial Court rejected a challenge to the segregation of Boston’s public schools, interpreted equal protection not to include the notion that “men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment.” Id, at 209-10. Rather, Shaw proclaimed, the equal protection that was mentioned in the Massachusetts Constitution meant “only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security.” Id.

This embrace and at least partial conflation of “paternal consideration” and “protection of the law” helps to explain why Justice Brown was delighted to invoke Shaw’s decision and to quote his language in rejecting Homer Plessy’s attack on segregation in Plessy v. Ferguson, 163 U.S. 537, 544 (1896). To the Plessy Court, it was “too clear for argument” that the Thirteenth Amendment abolished nothing beyond slavery, bondage, and—somewhat remarkably—“the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services.” Id., at 542.

36 There may be a little willful amnesia regarding the building blocks of judicial review under the Constitution taught in Constitutional Law I. In Marbury v. Madison, 5 U.S. 137, 163 (1803), Chief Justice John Marshall noted for
If the historical context of the Fourteenth Amendment still warrants consideration, as many people still believe it should, it ought to be of considerable concern that Chief Justice Rehnquist carried his binary action/inaction approach to absurd lengths in DeShaney v. Winnebago County.37 Writing for the majority, Rehnquist announced that the purpose of the Due Process Clause of 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 in the latter area to the democratic political processes.”38

Using a rigidly dichotomous approach, the Court held that Wisconsin had no constitutional duty to protect a four-year-old child who was being regularly visited by social workers employed by the state after the state courts had awarded custody to the abusive father. Because “poor Joshua”39 was not formally in state custody, Rehnquist explained, the state owed him no protection.


38 489 U.S., at196. In denying that Wisconsin had any affirmative duty to protect a child who was two years old when state officials first became involved with his case and four when his father beat him so severely that he suffered “brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded,” id., at 193, Chief Justice Rehnquist hewed closely to Judge Posner’s analysis for the Seventh Circuit below. Posner had said: “The state does not have a duty enforceable by the federal courts to maintain a police force or a fire department, or to protect children from their parents,” 812 F.2d 298, 301 (7th Cir. 1987). Dissenting, Justice Brennan, joined by Justices Marshall and Blackmun, offered a devastating critique of the majority’s “fixation on the general principle that the Constitution does not establish positive rights.” Id., at 205.

39 Id., at 213 (Blackmun, J., dissenting.) Blackmun added: “Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents, who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, ante at 193, ‘dutifully recorded these incidents in [their] files.’ It is a sad commentary upon American life, and constitutional principles -- so full of late of patriotic fervor and proud proclamations about ‘liberty and justice for all,’ that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.”
This is not to say that it would be easy to sort out when and how and to whom government actors owe protection. Such protection surely has jagged edges much of the time, not least because it easily blurs into paternalism. By 1866, for example, the self-evident problems surrounding the ways in which the federal government had been mistreating its Indian “wards” underscored the pitfalls and complexity of such guardian-ward relationships. Yet members of the 39th Congress were all too aware of the desperate need to protect the freedpersons and their allies. Eric Foner summed up the situation: “Again and again during the debate on Trumbull’s bills, Congressmen spoke of the national government’s responsibility to protect ‘fundamental rights’ of American citizens.”40 Foner added, however, that “as to the precise content of these rights, uncertainty prevailed.”41 Nonetheless even Moderates preferred to give both Congress and the federal courts “maximum flexibility in implementing the [Fourteenth] Amendment’s provisions and combating the multitude of injustices that confronted blacks in many parts of the South.”42

E. State Action?

It seems a major mistake, considering both the broad and the specific historical context, to attempt to draw a fundamental or bright line between private actions reached by the Thirteenth Amendment and private actions that remain insulated from judicial review by the after-the-fact “state action” requirement, purportedly imposed by the Fourteenth Amendment. The substantial restraint on both federal legislative and judicial power that the state action requirement imposes actually was a judicial construct, infamously applied by the Supreme Court.

Blackmun’s *cri de Coeur* also tellingly invokes Robert Cover, *Justice Accused* (1975), a brilliant study of the cognitive dissonance among judges personally opposed to slavery yet who protested too much that their hands were tied and that they thus were obliged to return fugitives to slavery.

40 Foner, supra note 8, at 244.

41 Id.

42 Id., at 258.
Court in the Civil Rights Cases\textsuperscript{43} to invalidate the public accommodations provisions of the 1875 Civil Rights Act that had been passed in large measure to memorialize Senator Sumner.

Justice Bradley’s opinion for the majority in the Civil Rights Cases instructed black citizens that, less than eighteen years after slavery ended, it was past time that a black man “takes the rank of a mere citizen, and ceases to be the special favorite of the laws.”\textsuperscript{44} In addition, the Court held that it would be “running the slavery argument into the ground” if Thirteenth Amendment protections against the badges and incidents of slavery were to be extended to prohibit racial discrimination in places of public accommodation.\textsuperscript{45}

In fact, however, there is very little if any support for the “state action” limitation within the debates and the legislation promulgated by the 39\textsuperscript{th} Congress that also drafted and approved the Fourteenth Amendment. In his dissent in Jones v. Alfred H. Mayer Co.,\textsuperscript{46} Justice Harlan struggled to make the case for a state action requirement within the 1866 Civil Rights Act, but the majority had much the better of the argument. Indeed, if one reads the very quotations that Justice Harlan relied upon in his dissent in the context of the recognized governmental duty to protect the rights of all citizens in the wake of the Civil War, it is clear that the men of the 39\textsuperscript{th} Congress hoped in the first instance that the states would do their duty, but that they also sought to make sure that the federal government would serve as a backstop and guarantor if the states did not.\textsuperscript{47} The 1866 Civil Rights Act greatly expanded the coverage of federal criminal law as well as the removal jurisdiction of federal courts if and when states failed to protect the broad panoply of civil rights identified in its first section. Until 1968 and Jones v. Alfred H. Mayer Co., however, the portions of the 1866 Act that remained on the statute books

\begin{itemize}
\item \textsuperscript{43} 109 U.S. 3, 25 (1883).
\item \textsuperscript{44} Id., at 25. It is noteworthy that the majority assumed that blacks had in fact been special favorites of the law—presumably referring to Congressional legislation anchored in both the Thirteenth and Fourteenth Amendments.
\item \textsuperscript{45} Id., at 19.
\item \textsuperscript{46} Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).
\item \textsuperscript{47} Soifer, supra note 6.
\end{itemize}
had long been buried under an avalanche of decisions making “state action” and “color of state law” inescapable prerequisites in civil rights litigation.

Charles L. Black, Jr., the great constitutional law scholar, teacher, and lawyer, published a remarkable article in 1967 that made a compelling case for abandoning the “state action” requirement entirely for rights guaranteed by the Fourteenth Amendment.  He pointed out that by 1967—long before the chaotic development of state action doctrine in a series of opinions written largely by Chief Justice Rehnquist—lawyers and judges were spending a great deal of time, effort, and resources to answer a question entirely preliminary to getting to the merits of any particular dispute. Black acknowledged that there might well be privacy claims, for instance, that could and sometimes should trump equal protection arguments. His forceful argument was, however, that it would be best to get to the merits and to wrestle directly with such a conflict, rather than to wastefully shadow-box through seemingly endless inquiries as to what facts, circumstances, and entanglements by state actors would suffice to constitute the required state action.

Black was well into his eighties when he published A New Birth of Freedom, in which he explained and expounded upon Abraham Lincoln’s concept of national citizenship rights, and his own constitutional theory that combined the Declaration of Independence and the Ninth Amendment with the rights and protections afforded by the post-Civil War Amendments. Black said that the alternative to a fundamental “recognition of kinship”—as he put it with characteristic flair—was to be haunted by the “grisly undead corpse of ‘states rights.’”


50 Charles L. Black, Jr., “Paths to Desegregation” in The Occasions of Justice, Essays Mostly on Law 160 (1963); Black, A New Birth of Freedom, at 80.).
Ironically, albeit perhaps not entirely intentionally, the plurality and the concurring opinions in *McDonald v. Chicago* 51 follow Charles Black in recognizing the incorporation of fundamental protections through the post-Civil War Amendments in ways that radically altered federalism.

Justice Alito’s plurality opinion emphasized that the protections embodied in Section 1 of the Fourteenth Amendment built directly on the earlier statutes and extended well beyond anti-discrimination. He claimed, for example, that: “The unavoidable conclusion is that the Civil Rights Act, like the Freedmen’s Bureau Act, aimed to protect ‘the constitutional right to bear arms’ and not simply to prohibit discrimination.” 52 Alito’s expansive concept of foundational rights guaranteed by the federal government to both blacks and their white supporters through statutes and the Fourteenth Amendment gave short shrift to federalism concerns. To assure that the right to bear arms is not “a second-class right” and that the Fourteenth Amendment affords protection beyond its anti-discrimination meanings, Alito emphasized the statutory and constitutional promise of “full and equal” federal protection for foundational, substantive rights. 53 Justice Scalia, despite what he declared to have been initial reluctance, again concurred in what he called a “long established and narrowly limited” selective incorporation approach to judicial intervention premised on Substantive Due Process. 54

51 *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). As a textual and historical matter, however, even Justice Thomas’s broad privileges and immunities theory ought not to apply the Takings Clause to the states. That clause from the Fifth Amendment was intentionally omitted from the language of the Fourteenth Amendment while other Fifth Amendment language was repeated verbatim, I argue, primarily to avoid attempts by former slaveholders to seek compensation for having had their slave property taken from them. Aviam Soifer, *Symposium: Federalism Issues Following Kelo v. City of New London: Text-Mess: There is No Textual Basis for Application of the Takings Clause to the States* 28 HAWAI’I L. REV. 373, 379-380 (2006)


53 *Id.*, at 3044, 3039-01. It is striking that Alito relies on such Radical Republican leaders as Senator Charles Sumner and Representative Thaddeus Stevens—and even the outspoken abolitionist Lysander Spooner—as well as Charles Black, Jr. and Eric Foner to build his case for federal protection of fundamental rights.

It was Justice Thomas’s attempt to resuscitate the Privileges or Immunities of the Fourteenth Amendment that most emphatically argued for basic rethinking of the post-Civil War period—a time when constitutional amendments were enacted to “repair the Nation from the damage slavery had caused.” Indeed, Thomas proclaimed, “§ 1 of the Fourteenth Amendment, significantly altered our system of government.”

These *McDonald* opinions almost surely say more about the Court’s enthusiasm for guns—redefined as “self-defense as a basic right”—than about any fundamental rethinking of the recent recrudescence of judicial limits on Congress’s power that is purportedly anchored in federalism. The source for the new right applied to the states may be a new category of undifferentiated fundamental rights that stretch well beyond antidiscrimination principles or, perhaps, some grudgingly accepted new substantive due process rights, or even the revitalized attention to the Privileges or Immunities of national citizens urged by Justice Thomas. Nonetheless, unless McDonald turns out to be a ticket good for this right and this right only, its reasoning ought to complicate renewed efforts to retrench post-Civil War constitutional guarantees premised on abstract states’ rights theories.

That said, however, the capacity of lawyers and judges to ignore history and to interpose the barriers they desire remains quite alarming. Several recent cases that involved alleged human trafficking and other forms of appalling exploitation construed the Thirteenth Amendment and

55 *Id.*., at 3060 (Thomas, J., concurring). To be sure, that the Court has recognized this fundamental change before has not seemed to matter much. See, e.g., Edelman v. Jordan, 415 U.S. 651, 664 (1974) (“Civil War Amendments to the Constitution...serve as a sword, rather than merely as a shield, for those they were designed to protect.” (Rehnquist, J.)); Patsy v. Board of Regents of State of Florida, 457 U.S. 496, 503 (1982) (“[T]he basic alteration of our federal system accomplished during the Reconstruction Era.” (Marshall, J.))

56 *Id.* Thomas went on to explain that the logical reading of the provision in Section 1 that “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” is as an affirmative guarantee of rights. The same could and should be said of the provision that follows, which declares that “Nor shall any state...deny to any person within its jurisdiction the equal protection of the laws.”

57 *Id.*, at 3035.
the contemporary version of the Anti-Peonage Act of 1867 in alarming ways. After all, even the Civil Rights Cases majority had acknowledged:

This [Thirteenth] amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.  

Yet federal judges in recent years have gone so far as to assert that the Thirteenth Amendment cannot be self-executing and that federal civil actions based on the current version of the Anti-Peonage Act require state action. Without explanation, a statute passed before the Fourteenth Amendment was ratified thus has taken on a state action requirement that is

58 109 U.S. 3, 20. Justice Bradley continued: “It is true, that slavery cannot exist without law, any more than property in lands and goods can exist without law: and, therefore, the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and 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.”

dubious within the terms of the Fourteenth Amendment, but non-existent within the Thirteenth Amendment.

The need to act forcefully in the face of extraordinary failures to protect citizens was a major theme informing both Amendments, as I argued above. Congress was quite confident of its broad enforcement power when it passed the Civil Rights Act of 1866 and the Peonage Act of 1867. Yet it now seems impossible to reconcile the contemporaneous 39th Congress’s views of its own enforcement power with recent interpretations by the Court. To describe Board of Trustees, University of Alabama v. Garrett60 and United States v. Morrison,61 for example, as “crabbed interpretations” of Congress’s power to enforce constitutional rights seems almost insulting to crabs. Neither abstract theories of “our federalism” nor uncritical faith in the virtues of individualism ought to blind us to promises made by the 39th Congress. Unlike Andrew Johnson, they came to understand the need to protect all citizens and to guarantee full as well as equal benefits of all laws and proceedings, even for those who seemingly consented to contracting away their basic rights.

II. Protection and Paternalism: The Concept of “Voluntary Peonage”

Voluntary peonage might seem a contradiction in terms—it would initially appear that peonage, by definition, cannot be voluntary. Indeed, the idea of entering peonage voluntarily does pose a philosophical challenge. Yet even brief consideration of the concept will suggest


that voluntary peonage has a distinguished lineage. In addition, a sampling of judicial decisions about involuntary servitude—including relatively recent several examples by distinguished judges—illustrates how important this provision in the Peonage Abolition Act of 1867 might have been had it survived stingy judicial interpretations and what almost seems to be purposeful amnesia.

A. Bible Stories

The Hebrew Bible’s story of Jacob—another kind of founding father—offers a striking example of voluntary servitude. Jacob’s decisions have been discussed over many centuries, but he is generally celebrated for his persistence within an extended condition of voluntary peonage.\(^{62}\) In order to marry Laban’s daughter, Rachel, a woman he loved at first sight, Jacob proposed that he work for Laban for seven years. When Jacob finished his term of years, however, Laban tricked him and he wound up marrying Laban’s older daughter, Leah, instead.\(^{63}\) Undeterred, Jacob signed on for another seven years and, finally, the hero of the story did get the girl.

It could be argued, of course, that the Hebrew Bible also accepts slavery and it surely does. Indeed, the Bible is quite specific about slavery. A Hebrew slave, for instance, was to be freed after seven years. “But,” according to Genesis 21:5-6, “if the slave declares, ‘I love my master, and my wife and children: I do not wish to go free,’” then the slave was to be free to make such a choice—though the master was commanded to pierce the ear of the slave with an awl and the slave was then to remain a slave for the rest of his life.

In the nineteenth century, the Bible’s embrace of slavery became a commonplace in the defense of slavery and was a key element in the schisms that split many Christian


\(^{63}\) As Genesis 29:17 succinctly puts it: “Leah had weak eyes; Rachel was shapely and beautiful.”
denominations in the United States. For centuries, a central justification for slavery had been that captors were entitled to kill their captives; therefore, it was argued widely, the decision merely to enslave captives was actually an act of mercy. This classic example of the “greater power includes the lesser power” type of argument focuses on the consent of the master, but the truly tragic choices that slaves faced in the United States also purportedly contained elements of consent as well as emotional and intellectual resistance. As the old freedom song put it, for example: “Oh freedom, oh freedom, oh freedom over me/ And before I'd be a slave I'll be buried in my grave/And go home to my Lord and be free.”

As the Civil War approached, advocates speaking on behalf of what antislavery activists began to call the Slave Power grew increasingly defensive and their attacks on what they labeled as Wage Slavery in the North became more vehement. Indeed, their defense of the humanity of slavery, in contrast to the harshness of the wage system, extended so far as to include creating a statute that established a process through which a free black could find a master and then choose to become a slave. It is not a surprise that there is no evidence this statute was ever utilized. Furthermore, in the spring of 1862 before there was any word of Lincoln’s Emancipation Proclamation, Major General David Hunter jumped the gun when he declared that all former slaves who came within the territory his troops controlled in the Department of the South were instantly free and that volunteer black soldiers were welcome. Hunter defended his action by explaining that he had armed former slaves so that, under his “fugitive master law,” they could “pursue, capture, and bring back those persons of whose protection they have been suddenly bereft.” Though Hunter’s sardonic humor caused controversy and his bold declaration was reversed by President Abraham Lincoln, Eric Foner’s

65 Lucy Kichen—post-Civil War song [cite]; Toni Morrison, Beloved (1987).
prize-winning recent study of Lincoln compellingly demonstrates how quickly and how much Lincoln himself and the views of many in the North changed in the course of the war concerning how to deal with former slaves.

B. The Freedom to Choose Slavery

Even under the law of slavery, blacks who became free when their masters took them into states that had abolished slavery often confronted gut-wrenching decisions. To remain free in the North often would mean abandoning partners—because slave marriages were not allowed—as well as children who remained enslaved. In Betty’s Case, for example, Massachusetts Chief Justice Lemuel Shaw declared, after a 10-minute interview with a young woman who had been a slave in Tennessee, that it would be “a denial of her freedom” to reject her decision to return to slavery. As Edlie Wong recently put it, freedom actually could be “yet another form of trauma” under such circumstances. Indeed, antislavery activists “found themselves at an impasse: the hermeneutic limit of an emergent liberal discourse of contract premised on universalized notions of will and free choice in a partially free world.”

Members of the 39th Congress might well have recalled and worried about some of the still-recent cases of slaves who “voluntarily” chose slavery over freedom. In addition, the old apprenticeship system had not fully disappeared by the 1860s. As Robert Steinfeld explained, “From its inception, indentured servitude had primarily been considered a form of contracted freedom.” Concepts about contractual freedom changed significantly throughout the nineteenth century as workers began to believe that “[p]art of possessive individualism was the

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69 Edlie L. Wong, NEITHER FUGITIVE NOR FREE 104, 100 (2009).

right to alienate the property in their own capacities to other persons.” 71 Even within the rise of formal contract law after the Civil War, however, any laborer who contracted to work for another could be seen as surrendering his or her freedom while, at the same time, coerced labor was largely accepted for paupers and the like. 72 Even the core of the contract law paradigm could, at times, be considered to be a form of peonage. Even if courts would not order specific performance in the name of the liberty of the individual, the potential damages that could be assessed against a laborer might effectively do much the same thing.

C. Probing Paternalism

A working definition of paternalism that could be of use might be as follows: someone else deciding for you, allegedly for your own good. And paternalism has considerable potency as a pejorative label. Yet we ought to recognize that our parents and teachers exercise paternalism to and for us repeatedly, to both good and ill effect. Even were the letters of “paternalism” rearranged to become “parentalism,” however, how to ascertain genuine consent looms large and lasts for a long time in most families as well as in the law. This typically is the case on both sides of parent-child equations. Judges often anoint themselves as protectors of individuals against paternalism, but they lack adequate criteria to determine if and when paternalism ought to be invalidated. In reality, it is exceedingly difficult for any outside decision-makers to discern when a decision made on behalf of someone else seems to go too far. And judges often miss the fact that they often are assuming a paternalistic role themselves in determining what constitutes impermissible paternalism. 73


73 In West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937)—a decision that upheld minimum wages for women and that marked a crucial turning point, as the Court moved away from its aggressive
It is striking—even shocking—to read some of the judicial interpretations of criminal laws that forbade peonage over the past several decades. Perhaps most notorious was Justice O’Connor’s opinion for the Court in United States v. Kozinski. The decision invalidated the convictions of members of the Kozinski family who had held two mentally retarded farm workers on a dairy farm “in poor health, in squalid conditions, and in relative isolation from the rest of society” for well over a decade. Stressing the concept of lenity in construing criminal statutes, the Court held that even extreme psychological coercion would not suffice to render involuntary servitude criminal. Remarkably, the decision was unanimous, though Justices Brennan and Stevens wrote concurring opinions, in which Justices Marshall and Blackmun, respectively, joined. There was no suggestion, however, that someone should have and could have intervened—paternally, perhaps—to seek lost wages and other remedies on behalf

activism on behalf of “liberty of contract” that dominated its decisions for several decades—Chief Justice Hughes wrote for the Court that “exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay.” See also Pope, supra note 4, at ___.[page cites].


75 id., at 934. The workers, Robert Fulmer and Louis Molitors, were directed not to leave the farm and they worked “seven days a week, often 17 hours a day, at first for $15 per week and eventually for no pay. The Kozminkskis subjected the two men to physical and verbal abuse for failing to do their work and instructed herdsmen employed at the farm to do the same.” Id.

76 The Court held that 18 U.S.C. Sec. 1854 and 18 U.S.C. Sec. 241 both required proof of “compulsion of services by the use or threatened use of physical or legal coercion,” id., at 949. Congress responded in 2000 by enacting the Victims of Trafficking and Violence Protection Act, 22 U.S. C. Sec. 7101 et seq. See generally Rebecca E. Zietlow, “The Promise of Congressional Enforcement” in The Promises of Liberty, supra note 6 at 182.

77 Perhaps even more striking was Judge Henry Friendly’s pinched interpretation of Sec. 1584 in United States v. Shackney, 333 F.2d 475 (2nd Cir. 1964), largely relied on by the Kozminski Court. Friendly warned of a slippery slope—“the awful machinery of the criminal law to be brought into play whenever an employee asserts that his will to quit has been subdued by a threat which seriously affects his future welfare but as to which he still has a choice, however painful,” id., at 487—and reversed the conviction of an immigrant Rabbi who kept a Mexican worker working on his chicken farm with threats to have the worker deported after he had signed a two-year contract that required that he never drink or leave the farm. Friendly interpreted the criminal statute to require a showing that there was “no way to avoid” the owner’s compulsion, id., at 486.
of Fulmer and Molitoris. Such a lawsuit might even have been based on the statutory successor to the Peonage Abolition Act of 1867.

Elsewhere I explored the paradoxical nature of paternalism in the context of Thirteenth Amendment decisions by the Supreme Court from 1888-1921. The Court’s actions then ranged from continuing to compel service by those too young or too old to enlist in the army to eviscerating the claims made by black freedmen against Indian tribes that had enslaved them and to rejecting claims of seamen to be free from the longstanding paternalism that imprisoned them and forced them back to work—allegedly for their own good. Relatively obscure decisions often turned on whether someone was said by a judge to have consented to harsh, long-term working conditions. In an era when men “seemed to relish a ruthless theory,” it turned out—as it probably still would turn out today—that there were both good and bad kinds of paternalism. Close study of the Court’s well-known peonage decision in Bailey v. Alabama, for example, makes this clear.

Ultimately, as Justice Brennan stated in his concurrence in Kozinski, “It is of course not easy to articulate when a person’s actions are ‘involuntary.’ In some minimalist sense the laborer always has a choice no matter what the threat: the laborer can choose to work, or take a beating; work, or go to jail. We can all agree that these choices are so illegitimate that any decision to work is ‘involuntary.’” Brennan went on to emphasize the need for the prosecutor to prove the existence of compulsion akin to servitude to meet the criminal statute’s

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80 Bailey v. Alabama, 219 U.S. 219 (1911) has been discussed by many scholars; for my view, see Paradox of Paternalism, supra note 78, at 271-73.

81 487 U.S. 931, at 959.
requirement. Nonetheless, he also noted that “Congress intended to protect persons subjected to involuntary servitude by forms of coercion more subtle than force.”

Both Brennan and Stevens mentioned but also sought to avoid the task of resolving “the philosophical meaning of free will” in their concurring opinions. That such a question looms large and implicates judgments that are “highly individualized” and perhaps “hopelessly subjective” makes the very concept of “voluntary peonage” seem even more problematic.

Nonetheless, as the Court summarized in Pollock v. Williams, “The undoubted aim of the Thirteenth Amendment...was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States.” The theme of free labor permeated the early ideology of the Republican Party and it pervaded debates concerning freedom throughout the 39th Congress as well as in the evolving thought of Abraham Lincoln. That Congress banned voluntary peonage throughout the land has long been overlooked. That ban through the Peonage Abolition Act of 1867 is particularly significant in terms of Congressional power to enforce the Civil War Amendments in quest of the promise of freedom. That freedom, paradoxically, may require the intervention of others to protect individuals from making free choices that are not and cannot be truly free.

III Conclusion

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82 Id., at 957.
83 Id., at 959.
84 Id., at 960.
Recently there has been fine scholarly work that focuses on the debates over the Thirteenth Amendment and that takes various positions on its intended scope.\textsuperscript{87} It is my claim that in passing the Peonage Abolition Act of 1867 on the same day as the Military Reconstruction Act, the 39\textsuperscript{th} Congress demonstrated its belief that it had broad constitutional authority. The political and institutional context helps to explain why Congress believed that it could ban voluntary as well as involuntary peonage of all sorts. The old federalism had died a bloody death through the years of the Civil War. The men of the 39\textsuperscript{th} Congress wished to assure that when the states that had seceded were reconstructed and readmitted, they would protect the rights of freedpersons and their supporters not only from violence authorized by state and local governments but from the private depredations that still dominated Southern life in 1867. If and only if that occurred would the federal government recede from its obligation to protect all its citizens.

John Locke maintained that people were willing to relinquish the state of nature to gain protection. Indeed, this might be considered the crux of the Lockean Social Contract. Yet protection often seems to import paternalism; in addition, people tend to deny that they need protection even when they do. The American belief in self-reliance is deep and wide. During the Civil War, for example, as people in the North debated what to do with the former slaves, Frederick Douglass insisted: “Do nothing with them. Your \textit{doing} with them is the great misfortune.”\textsuperscript{88} Of course neither Douglass nor Lincoln was fully consistent in his views about the duty of government to protect those in need.\textsuperscript{89} In addition, a central theme that weaves

\textsuperscript{87} Compare, \textit{e.g.}, Alexander Tsesis, \textit{Congressional Authority to Interpret the Thirteenth Amendment}, 71 Md. L. Rev. 40 (2011); Jennifer Mason McAward, \textit{Congressional Authority to Interpret the Thirteenth Amendment: A Response to Professor Tsesis}, 71 Md. L. Rev. 60 (2011); [Add new McAward article?]; George Rutherglen, \textit{State Action, Private Action, and the Thirteenth Amendment}, 94 Va. L. Rev. 1367 (2008).

\textsuperscript{88} 3 The Life and Writings of Frederick Douglass 188-89 (Philip Foner ed. 1955).

\textsuperscript{89} President Franklin Delano Roosevelt, for instance, delighted to quote Lincoln’s statement that: “The legitimate object of Government is to do for a community of people whatever they need to have done but cannot do at all or
throughout recent studies of Reconstruction is that the context for decisions seemed to change rapidly and repeatedly. By early 1867, Congress believed that the nation faced a crisis. They anchored their responses to how to reconstruct the South in their growing belief that sweeping federal power was legitimate and necessary, even unto sending in the troops. Disastrously, they believed, the pre-Civil War Constitution had protected the Slave Power. Now federal protection was necessary for those who had been enslaved as well as for their beleaguered allies. Congressional authority stretched throughout the entire territory of the United States to all who might find that they had become peons, even if they purportedly had entered peonage voluntarily.

cannot do so well for themselves in their separate and individual capacities.\textsuperscript{•} 3 Life and Works of Abraham Lincoln 215-16 (Marion Mills Miller ed., 1907), quoted in Franklin D. Roosevelt, Fireside Chat 6: On Government and Capitalism (September 30, 1934). Roosevelt continued: "I am not for a return to that definition of Liberty under which for many years a free people were being gradually regimented into the service of the privileged few." [formal cite].