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Accountable to None? Challenging Sovereign Immunity Through the Trafficking Victims Protection Act

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ACCOUNTABLE TO NONE? CHALLENGING SOVEREIGN IMMUNITY THROUGH THE TRAFFICKING VICTIMS PROTECTION ACT

Abstract: Although amendments to the Trafficking Victims Protection Act (TVPA) have opened the door to greater corporate liability, government liability under the TVPA remains murky. A critical barrier that plaintiffs suing government entities confront is the broad protection from suit that states enjoy under the Eleventh Amendment. One of the few exceptions to this protection is congressional abrogation of state sovereign immunity. In 1996, the Supreme Court held in *Seminole Tribe of Florida v. Florida* that to abrogate state sovereign immunity, Congress must do so pursuant to a valid source of power. It further held that this valid source includes Congress's Fourteenth Amendment enforcement powers, but not its Article I powers. Although some courts interpreting the TVPA have noted its roots in the Commerce Clause of the Constitution (an Article I power), others reason that Congress enacted it pursuant to its Thirteenth Amendment enforcement power. This Note argues that Congress enacted the TVPA based on the Thirteenth Amendment, and therefore, suits against state defendants present a novel legal issue: can Congress abrogate state sovereign immunity pursuant to its power to enforce the Thirteenth Amendment? This Note answers in the affirmative. It contends that plaintiffs suing states under the TVPA have an opportunity to simultaneously seek remedy for violations of their rights, while also chipping away at restrictive abrogation precedent that continues to protect states at a high cost to individuals.

INTRODUCTION

Consider Scenario A.[1] In *Barrientos v. CoreCivic, Inc.* in 2020, the Court of Appeals for the Eleventh Circuit considered immigrant plaintiffs' claims against CoreCivic, Inc. (CoreCivic) the private contractor that operated the Immigration and Customs Enforcement (ICE) facility where they were detained in Lumpkin, Georgia.[2] In their class action lawsuit, these ICE detainees alleged that CoreCivic had subjected them to forced labor, in violation of the Trafficking Victims Protection Act (TVPA).[3] Their complaint highlighted that the "so-called voluntary work program" that CoreCivic managed was actually

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[1] The following scenario is based on the facts alleged in *Barrientos v. CoreCivic, Inc.*, which describes a Trafficking Victims Protection Act (TVPA) lawsuit brought by detainees in Immigration and Customs Enforcement (ICE) facilities. 951 F.3d 1269, 1271 (11th Cir. 2020).

[2] *Id.*

[3] *Id.* Wilhen Hill Barrientos, Margarito Velazquez-Galicia, and Shoaib Ahmed were the named plaintiffs in the case. *Id.* at 1271, 1274.

highly coercive.[4] If they refused to work, CoreCivic deprived them of food, toiletries, and basic goods, and threatened them with isolation and criminal prosecution, among other harms.[5] CoreCivic argued that in the narrow context of running an ICE detention center's "federally mandated voluntary work program," it could not be held liable under the TVPA.[6] The court disagreed, holding that private contractors operating such centers *could* face TVPA liability.[7]

Now, consider Scenario B.[8] In *Mojsilovic v. Oklahoma* ex rel. *Board of Regents for the University of Oklahoma* in 2016, the Tenth Circuit Court of Appeals considered two Serbian scientists' claims against the University of Oklahoma, which had hired them to support DNA research.[9] The Mojsilovics alleged that the university subjected them to forced labor and other violations of the Trafficking Victims Protection Reauthorization Act (TVPRA), by forcing them to work more than their visas allowed, depriving them of pay, and coercing them through threats to their immigration status.[10] The Tenth Circuit affirmed the district court's dismissal of their claims, holding that the state university was shielded from suit by state sovereign immunity.[11] It rejected the plaintiffs' argument that Congress had abrogated that immunity through the TVPRA.[12]

The plaintiffs in both cases experienced threats, deprivation, and coercion that they claimed amounted to forced labor.[13] The defendants' identities, how-

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[4] *See id.* at 1273–74 (detailing conditions at the Stewart Detention Center and explaining how the voluntary work program functioned).

[5] *Id.* at 1273.

[6] *Id.* at 1276. CoreCivic, Inc. (CoreCivic) contended that it could not be liable under the TVPA "even where the work performed through that program is obtained through, for example, force, physical restraint, or threats of serious harm." *Id.*

[7] *Id.* at 1271 (concluding that "the TVPA covers the conduct of private contractors operating federal immigration detention facilities," and that "private contractors that operate [voluntary] work programs are not categorically excluded from the TVPA"). If the plaintiffs succeed in proving the factual content of their claims, CoreCivic could be held criminally and civilly liable under the TVPA. *See* 18 U.S.C. § 1589 (establishing the "[f]orced labor" offense); *id.* § 1595 (providing a cause of action for civil liability for those who violate or benefit from violations of the TVPA's criminal provisions).

[8] The following scenario is based on the facts alleged in *Mojsilovic v. Oklahoma ex rel. Board of Regents for University of Oklahoma*, 841 F.3d 1129, 1130 (10th Cir. 2016).

[9] *Id.*

[10] *Id.* at 1130–31.

[11] *Id.* at 1130, 1134.

[12] *Id.* at 1134.

[13] *See* Barrientos v. CoreCivic, Inc., 951 F.3d 1269, 1273 (11th Cir. 2020) (describing CoreCivic's use of a "deprivation scheme" to coerce detainees into working). This scheme consisted of "threats of 'serious harm' in the form of deprivation of privacy and safety, threats of referral for criminal prosecution, and threats of solitary confinement," as well as "withholding basic necessities like food, toothpaste, toilet paper, and soap," and "deprivation of outside contact with loved ones." *Id.*; *see also Mojsilovic*, 841 F.3d at 1130 (explaining that the Mojsilovics's supervisor made them "work longer hours than permitted by their visa applications, without pay, and threatened to have their visas revoked if they objected," sometimes becoming "verbally abusive").

ever—a private corporation in *Barrientos* versus a state university in *Mojsilovic*—critically impacted the available defenses.[14] This Note explores the question of state liability under the TVPA and its subsequent reauthorizations, discussing how sovereign immunity shields defendant states and considering potential exceptions to this broad protection.[15] Ultimately, it recommends that Congress amend the TVPA to name government entities as appropriate defendants, including by explicitly mentioning states.[16] It further argues that the Thirteenth Amendment is the clearest source of authority for enacting the TVPA.[17] Therefore, courts should hold that abrogation of state sovereign immunity based on Congress's power to enforce the Thirteenth Amendment is appropriate in TVPA suits against states.[18] By bringing such challenges against offending states, plaintiffs have the opportunity to help shape a less restrictive abrogation doctrine.[19] In the long-term, this will provide individuals with increased possibilities for legal recourse against state actors.[20]

Part I of this Note provides a historical overview of the TVPA and of state sovereign immunity doctrine.[21] Part II discusses avenues for state liability under the TVPA, examining interpretations of the text and considering the Supreme Court precedent that narrowed the doctrine of congressional abrogation of state sovereign immunity.[22] Part III recommends that Congress amend the language of the TVPA to explicitly account for state liability and government liability more generally.[23] It concludes by contending that the TVPA's basis in

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[14] *Compare Barrientos*, 951 F.3d at 1277 (highlighting Congress's decision to include "corporations and companies in the general definition of 'whoever,'" in the Dictionary Act as evidence that private contractors were included within this term and could face TVPA liability), *with Mojsilovic*, 841 F.3d at 1130 (confirming that the University of Oklahoma, a state entity, "was entitled to sovereign immunity").

[15] *See infra* notes 84–186 and accompanying text (analyzing the text and constitutional sources of power behind the TVPA in light of Supreme Court precedent that specifies the requirements for abrogating state sovereign immunity).

[16] *See infra* notes 193–205 and accompanying text (arguing that the current degree of ambiguity within the TVPA's text should animate Congress to amend the statute to explicitly address government liability, including explicit textual mention of "states").

[17] *See infra* notes 206–212 (comparing the Thirteenth Amendment and the Commerce Clause as two proffered sources of congressional power behind the enactment of the TVPA).

[18] *See infra* notes 206–221 (contending that the Thirteenth Amendment is a valid source of power for abrogating state sovereign immunity due to its parallels with the Fourteenth Amendment and in light of the history behind its enactment).

[19] *See infra* notes 75–83 and accompanying text (noting the Supreme Court precedent that has narrowed in on Congress's Fourteenth Amendment enforcement powers as the only valid source of power for abrogating state sovereign immunity).

[20] *See infra* notes 206–231 and accompanying text (arguing that TVPA claims against state entities present a strong test case for pushing against the limits of current state sovereign immunity precedent).

[21] *See infra* notes 25–83 and accompanying text.

[22] *See infra* notes 84–186 and accompanying text.

[23] *See infra* notes 187–205 and accompanying text.

the Thirteenth Amendment enforcement power provides Congress with appropriate authority to abrogate state sovereign immunity under the Act.[24]

I. HISTORICAL OVERVIEW: THE TRAFFICKING VICTIMS PROTECTION ACT AND SOVEREIGN IMMUNITY DOCTRINE

To understand potential state liability under the TVPA, it is important to first consider the historical context in which the statute evolved.[25] Further, to anticipate the defenses that state defendants may raise, plaintiffs must understand the scope and implications of sovereign immunity doctrine.[26] Section A of this Part presents the history of the Trafficking Victims Protection Act, including its antecedents, enactment, and reauthorizations.[27] Section B discusses several recent TVPA lawsuits to demonstrate its potential as a tool for accountability.[28] Section C then discusses the defense of state sovereign immunity, providing a brief history of the Eleventh Amendment, clarifying which entities qualify as the "state," and explaining how Congress may abrogate state sovereign immunity.[29]

A. History of the Trafficking Victims Protection Act

Near the Civil War's conclusion in 1865, the United States formally abolished slavery and indentured servitude through the enactment of the Thirteenth Amendment.[30] Subsequently, however, the oppression of African Americans

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[24] *See infra* notes 206–231 and accompanying text.

[25] *See generally* BRIDGETTE CARR, ANNE MILGRAM, KATHLEEN KIM & STEPHEN WARNATH, HUMAN TRAFFICKING LAW AND POLICY, at ix–xvii (2014) (providing a detailed timeline of the history of slavery, and highlighting key cases, international conventions, and legislation such as the Trafficking Victims Protection Act that have sought to address diverse forms of human exploitation); Jennifer Nguyen, Note, *The Three Ps of the Trafficking Victims Protection Act: Unaccompanied Undocumented Minors and the Forgotten P in the William Wilberforce Trafficking Prevention Reauthorization Act*, 17 WASH. & LEE J. C.R. & SOC. JUST. 187, 192 (2010) (noting that the roots of human trafficking trace back to the slave trade).

[26] *See* Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 765 (2008) (explaining the sovereign immunity doctrine as the general prohibition of damages suits against sovereigns). Different forms of the immunity doctrine exist in relation to states, tribes, the federal government, and foreign governments. *Id.* at 769.

[27] *See infra* notes 30–53 and accompanying text.

[28] *See infra* notes 54–61 and accompanying text.

[29] *See infra* notes 62–83 and accompanying text.

[30] U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."); *see* CARR ET AL., *supra* note 25, at 1 (noting that "antebellum slavery" lasted from 1619 to 1865). "[A]ntebellum slavery" refers to the "legally sanctioned system of labor" that enslaved persons of African heritage in the United States. CARR ET AL., *supra* note 25, at 1. Congress enacted the Thirteenth Amendment on January 31, 1865, and three-fourths of the states ratified it in December of that same year, officially incorporating it into the Constitution. *Id.* at 16.

continued in similarly cruel but less overt forms, often operating "under the guise of 'freedom of contract.'"[31] Although in 1867 Congress criminalized peonage, or forced labor to repay a debt, this practice continued well into the twentieth century.[32]

In 1948, Congress passed legislation to address another form of oppression known as involuntary servitude, which differs from state-sanctioned oppression like slavery and peonage in that it refers to individual coercive conduct meant to forcibly compel labor.[33] In its 1988 decision, the Supreme Court, in *United States v. Kozminski*, addressed a circuit split over the meaning of the involuntary servitude statute.[34] The Court opted for a narrow reading of "involuntary servitude," holding that it covers labor coerced by physical or legal threats or force, but not by psychological or economic means.[35] This limited

[31] *See* CARR ET AL., *supra* note 25, at 26 (noting similarities and differences between the systems of peonage and slavery). Under the peonage model, African Americans were arrested, often under false charges, and strapped with a resulting fine. *Id.* at 21. When unable to pay, they were leased to employers in a range of industries and their debt was used as a coercive tool to compel them to work. *Id.* Although the physical restraint and punishment commonly used in slavery was less prominent in peonage, these forms of coercion were replaced by "less visible and more economic" methods, such as using interest rates and the forced purchase of tools to keep people in cycles of debt. *Id.* at 26. Convict leasing was another similar practice, but unlike peonage, it did not depend on debt to compel labor. *Id.* at 21 n.1. Instead, it was "a system where state prisons leased out people convicted on all types of offenses to work as forced laborers." *Id.*

[32] *See id.* at 28, 42 (defining peonage, and noting that it stayed in effect into the 1940s).

[33] *See id.* at 42–43 (noting the differences between involuntary servitude and state-sanctioned forms of oppression, and detailing the history of 18 U.S.C. § 1854, which the Truman administration's Committee on Civil Rights initially proposed to Congress). Congress passed the involuntary servitude statute under its Thirteenth Amendment enforcement power. *Id.* at 47. In contrast, the earlier Mann Act of 1910, passed amidst moral outrage over "white slavery," was arguably based more on Congress's Commerce Clause power than its Thirteenth Amendment enforcement power. *Id.* at 97, 102 (noting that, in *Hoke v. United States*, 227 U.S. 308 (1913), the United States Supreme Court focused on the Commerce Clause due to the Act's requirement that women be transported for prostitution). Authors have noted that "white slavery" is a poorly-defined term, but in the context of the Mann Act, it centered "on the coerced prostitution of white women and girls." *See id.* at 97–98.

[34] *Id.* at 97–98; *see* United States v. Kozminski, 487 U.S. 931, 938 (1988) (noting that the Sixth Circuit Court of Appeals interpretation of involuntary servitude differed from that of other circuit courts). The United States Court of Appeals for the Second, Fourth, and Fifth Circuits defined involuntary servitude more narrowly, focusing on "threatened or direct physical harm or legal restraint" to compel labor, whereas the United States Court of Appeals for the Ninth and Eleventh Circuits opted for a more expansive definition that considered other forms of compulsion as well, such as psychological duress. CARR ET AL., *supra* note 25, at 47, 59–60, 66–67.

[35] *See Kozminski*, 487 U.S. at 952–53 (holding that involuntary servitude is a circumstance where "the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process"). In *Kozminski*, two "mentally disabled" men were isolated and forced to labor without pay on a farm in Michigan, where they were frequently abused and deprived of sufficient food, clothing, and health care. *Id.* at 934–35; *id.* at 955 (Brennan, J., concurring).

definition led to a push for legislation that would address a wider scope of conduct and better account for "modern forms of slavery."[36]

Those calls for a legislative response eventually led to the enactment of the TVPA.[37] The TVPA defined involuntary servitude, as well as various forms of "trafficking in persons."[38] It further made substantive additions to Chapter 77 of Title 18 of the U.S. Code, namely: forced labor,[39] "trafficking with respect to peonage, slavery, involuntary servitude, or forced labor,"[40] sex trafficking,[41]

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[36] *See* CARR ET AL., *supra* note 25, at 87–89 (detailing the movement for legislation to address human trafficking that began in the 1990s). Reform efforts were motivated, at least in part, by the need to address the narrow involuntary servitude definition adopted in *Kozminski*, which failed to account for subtler forms of coercion apart from physical force or legal restraint. *Id.*

[37] *Id.* at 89; Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, div. A, 114 Stat. 1464, 1466 (codified as amended at 22 U.S.C. §§ 7101–7110). Congress's enactment of the TVPA on October 28, 2000, represented "the first comprehensive federal legislation that addresses human trafficking." CARR ET AL., *supra* note 25, at 109; *see* Sara Sun Beale, *The Trafficking Victim Protection Act: The Best Hope for International Human Rights Litigation in the U.S. Courts?*, 50 CASE W. RESERVE J. INT'L L. 17, 22 (2018) (noting that the TVPA was part of a broader bill, the Victims of Trafficking and Violence Protection Act). The TVPA represented Division A of this broader bill, and the Violence Against Women Act of 2000 represented Division B. *See generally* Violence Against Women Act of 2000, Pub. L. No. 106-386, div. B, 114 Stat. 1464, 1491 (codified at 42 U.S.C. §§ 13701–14071) (covering violent acts against women and children).

[38] Trafficking Victims Protection Act of 2000 § 103 (defining "involuntary servitude," "severe forms of trafficking in persons," "sex trafficking," "victim of a severe form of trafficking in persons," and "victim of trafficking," among other definitions listed in Section 103); CARR ET AL., *supra* note 25, at 113 (noting that the TVPA was the nation's first legislation to make "trafficking in persons" a legal offense).

[39] 18 U.S.C. § 1589 (2000) (establishing criminal liability for forced labor, defined in the 2000 version of the TVPA as "[w]hoever knowingly provides or obtains the labor or services of a person" through one of three means, including abuse of legal processes, threats of bodily harm or restraint, or schemes that would make the victim believe that such harm or restraint would occur if they failed to comply). Congress subsequently amended the forced labor offense so that § 1589(a) reflects four potential means by which it can be achieved. 18 U.S.C. § 1589(a). Further, Congress amended it to also establish criminal punishment for "[w]hoever knowingly benefits" from participation in a venture linked to forced labor. *Id.* § 1589(b).

[40] 18 U.S.C. § 1590. Section 1590 is broader than § 1589, in that it criminalizes not only providing or obtaining forced labor, but also "knowingly *recruiting, harboring, or transporting*" victims of a range of offenses. CARR ET AL., *supra* note 25, at 123 (emphasis added).

[41] § 1591 (defining the offense of "[s]ex trafficking of children or by force, fraud or coercion"). This provision penalizes "[wh]oever knowingly . . . in or affecting interstate commerce, recruits, entices, harbors, transports, provides, or obtains by any means a person; or . . . benefits, financially or by receiving anything of value, from participation in a venture" that compels commercial sexual acts. *Id.* § 1591(a). Notably, the statute clarifies that sex trafficking of a minor need not involve elements of "force, fraud, or coercion," and in fact, punishes both those who recruit and harbor individuals for sex trafficking, as well as those who financially benefit from it. *Id.* § 1591(b).

document servitude,[42] provisions aimed at victim restitution,[43] and attempted trafficking.[44]

The TVPA's legislative history reveals that Congress's concern over the sex trafficking of foreign nationals fueled them to pass the Act.[45] Although this dominated much of the narrative in Congress, the bill covered a wider swath of conduct, particularly in its criminalization of forced labor.[46] In fact, the TVPA refers repeatedly to "slavery" and "involuntary servitude," especially in its opening Purposes and Findings section, harkening back to the language and aims of the Thirteenth Amendment.[47] The statute also refers, albeit less frequently, to the impact of human trafficking on domestic and international commerce.[48]

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[42] *Id.* § 1592 (criminalizing the offense of "[u]nlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor" with the penalty of a fine or a five-year maximum prison sentence).

[43] *Id.* § 1593.

[44] *Id.* § 1594 (establishing that both attempted and completed violations of the TVPA's various criminal provisions warrant the same punishment and outlining sentencing and property forfeiture concerns).

[45] *See* CARR ET AL., *supra* note 25, at 112 (noting that the history of the TVPA "reads like a chapter out of the creation of the Mann Act" and explaining that legislators largely ignored narratives about labor trafficking and instead focused almost solely on the sex trafficking of foreign women and girls as the impetus for passing the TVPA).

[46] *See* Beale, *supra* note 37, at 23 (noting that, "[a]lthough Congress's primary concern has been sex trafficking . . . from the outset the TVPA offenses also included forced labor and trafficking with respect to forced labor" (citing 18 U.S.C. §§ 1589–1590)). Outrage over the egregious treatment of Thai garment workers forced to work in a compound in El Monte, California played an important role in stimulating support for the Act. *Id*. *See generally* § 1589 (criminalizing forced labor). The TVPA also criminalizes "[t]rafficking with respect to peonage, slavery, involuntary servitude, or forced labor." *Id.* § 1590.

[47] *See* U.S. CONST. amend. XIII, § 1 (forbidding slavery and involuntary servitude); Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, div. A, § 102, 114 Stat. 1464, 1466 (codified as amended at 22 U.S.C. §§ 7101–7110) (stating that the TVPA's purposes "are to combat trafficking in persons, a *contemporary manifestation of slavery* whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims" (emphasis added)). The Findings subpart of the TVPA states that "[t]rafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today," and refers to it as "an evil requiring concerted and vigorous action." Trafficking Victims Protection Act of 2000 § 102(b)(1), (21). The Findings section also references the Declaration of Independence and its recognition of unalienable rights, stating, "[t]he right to be free from slavery and involuntary servitude is among those unalienable rights." *Id.* § 102(b)(22). The Section likens modern day sexual slavery and human trafficking to antebellum slavery, which Congress and the states banned in 1865 through the enactment of the Thirteenth Amendment, calling these current issues "similarly abhorrent" to the United States' founding values. *Id*.

[48] *See* Trafficking Victims Protection Act of 2000 § 102(b)(12) (stating that human trafficking "substantially affects interstate and foreign commerce," and mentioning that it "has an impact on the nationwide employment network and labor market"). The only other reference to "commerce" within the 2000 version TVPA is in the sex trafficking provision, which defines this offense in part as "[w]hoever knowingly . . . *in or affecting interstate commerce*, recruits, entices, harbors, transports, provides, or obtains by any means a person" for purposes of commercial sex acts. 18 U.S.C. § 1591 (2000) (emphasis added).

Since enacting the TVPA in 2000, Congress amended it multiple times and reauthorized it in 2003, 2005, 2008, 2013, and 2017.[49] Several of these additions created openings for expanded liability under the TVPA.[50] In 2003, for example, building from the TVPA's existing criminal provisions, Congress added a civil cause of action to provide victims with monetary damages for harm suffered.[51] In 2008, Congress amended the forced labor offense to include not only those who provide or obtain labor through coercive means, but also those who *benefit* from that labor, be it financially or otherwise.[52] The 2008 reauthorization also allowed for extraterritorial jurisdiction, although courts have since disagreed about whether this extends to the TVPA's civil cause of action or applies strictly to the criminal provisions.[53]

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[49] *See* CARR ET AL., *supra* note 25, at 109 (noting the reauthorizations of 2003, 2005, 2008, and 2013); Off. to Monitor & Combat Trafficking in Persons, *International and Domestic Law*, U.S. DEP'T OF STATE, https://www.state.gov/international-and-domestic-law/ [https://perma.cc/UD2M-8YYT] (noting those same authorizations, as well as the most recent 2017 TVPA reauthorization). *See generally Human Trafficking: Key Legislation*, U.S. DEP'T OF JUST., https://www.justice.gov/human trafficking/key-legislation [https://perma.cc/67NC-ZHFP] (Jan. 6, 2017) (describing the major innovations of the TVPA's various reauthorizations). Scholars note that the TVPA's connection between its funding source and substantive provisions created a vehicle for amending it regularly as shortcomings became evident through practice. *See* Beale, *supra* note 37, at 24 (noting that regular funding reauthorizations provided civil society and law enforcement groups with the ability to promote amendments to the Act that they felt were needed).

[50] Beale, *supra* note 37, at 25 (listing key amendments that impacted corporate liability under the TVPA: (1) an expanded scope of the forced labor offense to include not only those who provide or obtain labor through coercive means, but also those who benefit from it; (2) the addition of extraterritorial jurisdiction; and (3) the addition of a civil remedy for victims, as well as other compulsory forms of compensation).

[51] Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(4)(A), 117 Stat. 2875, 2878. *See generally* ALEXANDRA F. LEVY, HUM. TRAFFICKING LEGAL CTR., FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION: 15 YEARS OF THE PRIVATE RIGHT OF ACTION 7 (2018) (discussing quantitative and qualitative trends in TVPA civil suits from 2003 to 2018). The 2003 reauthorization of the TVPA created the civil remedy for victims of criminal offenses under §§ 1589, 1590, and 1591, and the 2008 amendments made that remedy available for victims of all TVPA violations. CARR ET AL., *supra* note 25, at 128. The addition of the civil remedy provided victims of human trafficking with greater agency, as it allowed them to pursue damages even if prosecutors chose not to pursue criminal charges in their case. Abigail W. Balfour, Note, *Where One Marketplace Closes, (Hopefully) Another Won't Open: In Defense of FOSTA*, 60 B.C. L. REV. 2475, 2487 (2019).

[52] Beale, *supra* note 37, at 25.

[53] 18 U.S.C. § 1596(a)(2) (providing extraterritorial jurisdiction for alleged perpetrators of TVPA offenses under §§ 1581, 1583, 1584, 1589, 1590, and 1591, "irrespective of the[ir] nationality," so long as they are "present in the United States"); Beale, *supra* note 37, at 28 (noting that the 2008 reauthorization allowed for extraterritorial jurisdiction for most offenses under the TVPA); *see also* Lindsey Roberson & Johanna Lee, *The Road to Recovery After Nestlé: Exploring the TVPA as a Promising Tool for Corporate Accountability*, COLUM. HUM. RTS. L. REV. ONLINE 1, 22–24 (Nov. 9, 2021), http://hrlr.law.columbia.edu/files/2021/11/11_9-Nestle-HRLR-Online.pdf [https://perma.cc/SNZ5-VQLF] (discussing several cases that considered extraterritorial jurisdiction for TVPA claims). *Compare* Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 200–02 (5th Cir. 2017) (noting that extraterritorial jurisdiction applied to a TVPA civil claim, but only for conduct occurring after the 2008 amendment to § 1596), *with* Doe v. Apple, Inc., No. 19-cv-03737, 2021 BL 473713, at *18

B. Contemporary TVPA Suits Demonstrate Its Potential Power as an Accountability Mechanism

Scholars have debated how successful the various amendments to the TVPA have been in expanding liability in practice, yet overall, an uptick in TVPA lawsuits indicates that the Act retains meaningful potential to hold perpetrators accountable for forced labor, sex trafficking, and other offenses.[54] This potential is especially apparent in the immigration detention context, where plaintiffs have filed several forced labor lawsuits in recent years against corporate and government entities alike.[55]

For instance, before the United States Court of Appeals for the Eleventh Circuit in 2020, plaintiffs in *Barrientos v. CoreCivic, Inc.* sued a private company administering the Stewart Detention Center in Lumpkin, Georgia.[56] They alleged that CoreCivic subjected them to forced labor under the auspices of the center's Voluntary Work Program (VWP) and mandatory cleaning policies.[57] If they refused to work, they faced physical injury, solitary confinement, and the denial of essential goods.[58] In allowing the case to continue, the Eleventh Cir-

(D.D.C. Nov. 2, 2021) (concluding that the 2008 amendment to the TVPA, which allowed for extraterritorial jurisdiction over criminal TVPA offenses, did not extend to civil claims under § 1595).

[54] *See* Beale, *supra* note 37, at 46–47 (making the case for more proactive enforcement of the TVPA as a tool for corporate liability for forced labor, but noting that relatively few plaintiffs pursued suits in the years following adoption of the civil remedy and extraterritorial jurisdiction amendments); *see also* Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3003 (2006) (explaining that the 2003 and 2008 amendments to the TVPA fell short in establishing expansive corporate liability because, although they increased liability for those who financially benefit from labor trafficking, they maintained that perpetrators must do so "knowingly"). This knowledge requirement continues to safeguard corporations from trafficking suits, just as it has in the past from labor law liability. Chacón, *supra*, at 3003. Overall, some scholars conclude that more time is needed to see if the TVPA will contribute in meaningful ways to enhanced corporate accountability for abuses in downstream supply chains. *See, e.g.*, Beale, *supra* note 37, at 46 (noting a lack of clear definitions for important statutory terms as well as outstanding jurisdictional questions). Worth noting, is a six-fold increase in the number of civil cases brought under the TVPA from 2004 to 2017, from six to thirty-seven cases. LEVY, *supra* note 51, at 10.

[55] *See* Jonathon Booth, *Ending Forced Labor in ICE Detention Centers: A New Approach*, 34 GEO. IMMIGR. L.J. 573, 588–89 (2020) (noting that, at the time of writing, private immigration detention companies CoreCivic and GEO Group, were "facing six class action lawsuits alleging that forced labor in the immigration detention facilities they manage violates the TVPA"). The plaintiffs' ability to bring TVPA suits against these corporations withstood preliminary challenges across multiple courts, such as denials of the companies' motions to dismiss and class certifications under the TVPA. *Id.*

[56] 951 F.3d 1269, 1271 (11th Cir. 2020).

[57] *Id.* (linking the alleged TVPA violations to CoreCivic's operation of the detention center's Voluntary Work Program); *see* Booth, *supra* note 55, at 589 (listing the Voluntary Work Program and "mandatory and uncompensated cleaning of the detention facilities" as the two primary policies at issue in recent TVPA suits against GEO Group and CoreCivic).

[58] *Barrientos*, 951 F.3d at 1271, 1273.

cuit reached an important decision about corporate liability under the TVPA, holding that private immigration detention contractors could be found liable.[59]

In a similar case involving immigrant detainees in February 2021, *Ruelas v. County of Alameda*, the District Court of the Northern District of California upheld the potential for TVPA liability against a county and the county sheriff operating the detention center.[60] Although the holdings from these two cases are specific to corporate and county defendants, they show that plaintiffs are using the TVPA as a tool to seek recourse, raising important questions about how TVPA liability might be interpreted in future cases—particularly against *state* defendants.[61]

C. Sovereign Immunity: A Defense to State Liability Under the TVPA

Plaintiffs have lodged TVPA suits against a range of government actors, including a state university, state corrections department, county, city, and local school board.[62] For suits against states, sovereign immunity afforded by the Eleventh Amendment serves as a salient defense.[63] Subsection 1 of this Section provides a brief history of state sovereign immunity under the Eleventh

[59] *Id.* at 1271. Plaintiffs also encountered success in similar suits before the United States Court of Appeals for the Tenth Circuit. *See* Menocal v. GEO Grp., Inc., 882 F.3d 905, 910 (10th Cir. 2018) (upholding the district court's class certification in a TVPA claim against a private immigrant detention contractor).

[60] *See* 519 F. Supp. 3d 636, 647–48 (N.D. Cal. 2021) (denying the defendant county's motion to dismiss the TVPA claim against it). In reaching this decision, the court noted that "the context of the TVPA indicates an intent by Congress to bring the sovereign within the scope of the law." *Id.* at 648.

[61] *See infra* notes 84–186 and accompanying text (discussing varying interpretations of government liability under the TVPA, noting in particular the strong defense that states can raise through the Eleventh Amendment).

[62] *See* Mojsilovic v. Oklahoma *ex rel.* Bd. of Regents for the Univ. of Okla., 841 F.3d 1129, 1134 (10th Cir. 2016) (barring a Trafficking Victims Protection Reauthorization Act (TVPRA) suit against a state university on sovereign immunity grounds); *Ruelas*, 519 F. Supp. 3d at 647–48 (permitting TVPA claims to continue forward against county defendants); Does 1–12 v. Mich. Dep't of Corr., No. 13-14356, 2018 WL 5786199, at *10 (E.D. Mich. Nov. 5, 2018) (dismissing TVPA counts against the Michigan Department of Corrections on sovereign immunity grounds, concluding that there was nothing in the relevant TVPA provisions to indicate that Congress meant to abrogate state sovereign immunity); McCullough v. City of Montgomery, No. 15-cv-463, 2017 WL 956362, at *18 (M.D. Ala. Mar. 10, 2017), *rev'd sub nom.* McCullough v. Finley, 907 F.3d 1324 (11th Cir. 2018) (allowing TVPA claims to continue against the local city government); Nuñag-Tanedo v. E. Baton Rouge Par. Sch. Bd., No. SACV 10-1172-AG, 2011 WL 13153190, at *12 (C.D. Cal. May 12, 2011) (barring a TVPA suit against a local school board).

[63] *See Mojsilovic*, 841 F.3d at 1134 (preventing a TVPRA claim on the basis of sovereign immunity). Given the vast scope of the immunity doctrine and its differing application based on the type of government entity, this Note focuses narrowly on the legal questions raised by potential state liability under the TVPA. *See infra* notes 69–72 and accompanying text (explaining that state sovereign immunity does not apply to county and municipal entities, but noting other defenses such as qualified immunity).

Amendment and clarifies which entities qualify as the "state."[64] Subsection 2 then highlights congressional abrogation of state sovereign immunity as an important exception to this otherwise expansive protection.[65]

1. History and Scope of the Eleventh Amendment

Sovereign immunity doctrine, which historically protected a sovereign from lawsuits, reaches as far back as the early monarchical system in Great Britain.[66] In 1795, the United States enshrined a limited version of immunity doctrine into the Constitution through the Eleventh Amendment, barring suits "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[67] Although the Amendment's language is fairly narrow, the Supreme Court in 1890, in *Hans v. Louisiana*, interpreted it to protect states not only from suits by citizens of other states or of foreign countries, but also by citizens of their own state.[68]

Since those early cases, courts have gone on to clarify which entities are "states" for Eleventh Amendment purposes.[69] Municipal and county entities

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[64] *See infra* notes 66–74 and accompanying text (providing a historical background on the Eleventh Amendment and clarifying its scope).

[65] *See infra* notes 75–83 and accompanying text (providing an overview of the abrogation doctrine and summarizing the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*); Seminole Tribe of Fla. v. Florida. 517 U.S. 44, 55 (1996) (outlining two steps that courts must consider in determining if Congress abrogated state sovereign immunity).

[66] MARILYN E. PHELAN, KIMBERLY MAYFIELD & JAY M. PAT PHELAN, SOVEREIGN IMMUNITY LAW 1–3 (2019). In England, the concept originally sprouted from the doctrine of absolute immunity—that a "king could do no wrong," and therefore, cannot be sued. *Id.* at 2–3. Scholars note that this doctrine appears out of place in American history, particularly given that the original colonists' very own Declaration of Independence cited a laundry list of wrongs by the King as their reason for breaking away from the English crown. *Id.* at 3. Despite these roots, sovereign immunity doctrine has become embedded in American jurisprudence. *See id.* at 1 (noting that "while scholars and some courts have recognized the lack of justification for, and what some have termed inequities caused by, the judicially created sovereign immunity doctrine, [it] has evolved into an inviolable principle of American jurisprudence" (first citing Towing Co. v. United States, 350 U.S. 61, 69 (1955); and then citing Hans v. Louisiana, 134 U.S. 1, 16 (1890), *superseded by statute*, 42 U.S.C. § 2000d-7)).

[67] U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); *see* PHELAN ET AL., *supra* note 66, at 13–14 (noting that the rationale behind enacting the Eleventh Amendment boiled down to a desire to limit the scope of federal judicial power).

[68] *See* 134 U.S. at 15 (surmising that the drafters of the Eleventh Amendment did not conceive of the amendment as allowing citizens to sue their own states, asking, "[c]an we suppose that, when the eleventh amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled?"); PHELAN ET AL., *supra* note 66, at 13–14 (noting that the Eleventh Amendment initially prohibited suits from citizens of one state against another state, but later expanded through case law to also prevent a citizen from suing their own state).

[69] *See* Richard D. Freer & Edward H. Cooper, *What Constitutes the State for Eleventh Amendment Purposes?*, *in* 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND

generally do not enjoy state sovereign immunity.[70] State agencies, on the other hand, tend to be considered a representation of the state, and are therefore protected by the Eleventh Amendment.[71] This is, however, a factual question that varies based on the specific circumstances of the case.[72]

Today, the Eleventh Amendment continues to protect states from suit, but exceptions exist when a state has waived immunity, when the suit involves injunctive relief against a state official, or when Congress has abrogated state sovereign immunity.[73] This Note focuses on the last of these exceptions.[74]

PROCEDURE § 3524.2 (3d ed. 2020), Westlaw (database updated Apr. 2021) (discussing various categories of government entities and actors in the context of Eleventh Amendment immunity).

[70] *See* Jinks v. Richland County, 538 U.S. 456, 466 (2003) (noting that municipalities do not benefit from Eleventh Amendment immunity); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 n.54 (1978) (same); Lincoln County v. Luning, 133 U.S. 529, 530 (1890) (rejecting the county's argument that it represented an "integral part of the state," and therefore, was subject to the protections of the Eleventh Amendment). Although courts have consistently held that local governments are not protected by state sovereign immunity, plaintiffs still encounter barriers when suing them. *See* Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 409 (2016) (arguing that, in practice, in the context of federal constitutional claims, "a form of sovereign immunity" shields local governments from lawsuits). Plaintiffs suing local governments for federal constitutional claims, for example, face a high bar to demonstrate causation, as they must show that a city's policy actually caused the constitutional harm. *Id.* at 413. Although this requirement appears "deceptively simple," its effect is that the Supreme Court has not found a municipal policy that meets this causation requirement in approximately thirty years. *Id.* at 413–14. Other barriers to suing local government actors are the immunities that these actors are privy to as individuals. *See id.* at 411–12 (arguing that qualified and absolute immunity for different types of local government actors contribute to a "de facto form of 'local sovereign immunity'"). For example, prosecutors, judges, and legislators enjoy absolute immunity for acts done within the context of their adversarial, judicial, and legislative roles, respectively. *Id.* at 440. Furthermore, various local officials like police and school board members are often protected by qualified immunity. *Id.* at 442.

[71] *See* Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 463 (1945) (concluding that a claim against Indiana's Department of Treasury violated the Eleventh Amendment because it "constitute[d] an action against the State"), *overruled on other grounds by* Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613 (2002).

[72] *See* Freer & Cooper, *supra* note 69, § 3524.2 (noting that courts consider several aspects when determining if a state agency represents the state itself, such as the agency's organic statute, if the defendant is immune from suit in state court, guiding precedent in that state, and precedent regarding similar agencies in other states).

[73] *See* PHELAN ET AL., *supra* note 66, at 15–16, 24–25 (discussing key Supreme Court decisions that contributed to current precedent concerning waiver, abrogation, and injunctive relief). In *Lapides v. Board of Regents of the University System of Georgia*, the Court established that states could waive their Eleventh Amendment immunity by voluntarily presenting themselves in court. 535 U.S. at 619–20; *see also* PHELAN ET AL., *supra* note 66, at 15–16. In *Ex parte Young*, the Court held that in a suit against a state official for injunctive relief, where the official was enforcing an unconstitutional state law, the official was acting in his personal capacity and therefore was not protected by Eleventh Amendment immunity. 209 U.S. 123, 159–60 (1908); *see also* PHELAN ET AL., *supra* note 66, at 24–25.

[74] *See infra* notes 75–83 and accompanying text (discussing the modern abrogation of state sovereign immunity doctrine).

2. Congressional Abrogation of State Sovereign Immunity

In 1996, in *Seminole Tribe of Florida v. Florida*, the Supreme Court reiterated the requirements for Congress to abrogate Eleventh Amendment immunity.[75] It noted that first, Congress must clearly demonstrate its intent to do so in the challenged legislation, and second, it must act "pursuant to a valid exercise of its power."[76] Courts have interpreted the first step stringently, requiring that Congress's intent be "unmistakably clear" in the language of the statute.[77] For instance, in *Welch v. Texas Department of Highways and Public Transportation*, the Supreme Court in 1987 held that the Jones Act's relatively broad language, which it concluded granted "general authorization" for injured seamen to sue in federal courts, failed to demonstrate that Congress intended to abrogate state sovereign immunity.[78]

For the second prong of the test, the Court's decision in *Seminole Tribe of Florida* restricted what courts can consider a valid source of congressional power for abrogating state sovereign immunity.[79] Previously, Congress could abrogate state sovereign immunity via legislation enacted under its Article I

[75] 517 U.S. 44, 55 (1996) (citing Green v. Mansour, 474 U.S. 64, 68 (1985)). The Court in *Green v. Mansour*, in turn, cited to the earlier case of *Pennhurst State School & Hospital v. Halderman*, to support its conclusion that suits against states are only permitted if states consent to them or if Congress, "pursuant to a valid exercise of power" demonstrates its clear intent to abrogate state sovereign immunity. *Green*, 474 U.S. at 68. Notably, in *Halderman*, although the Court stated that abrogation of state sovereign immunity requires a clear expression of Congress's intent to do so, it did not explicitly discuss that this must be done pursuant to a valid source of constitutional power. *See* 465 U.S. 89, 99 (1984).

[76] *Seminole Tribe of Fla.*, 517 U.S. at 45, 55, 59 (requiring that Congress's intent to abrogate state immunity be clearly demonstrated in the statute and that the legislation at hand be "passed pursuant to a constitutional provision granting Congress such power"); *see* PHELAN ET AL., *supra* note 66, at 35 (same).

[77] *Compare* Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 476 (1987) (holding that Congress's use of "general language" to authorize federal suits through the Jones Act failed to express its intent to abrogate state sovereign immunity), *with* Ussery v. State of La. on Behalf of La. Dep't of Health & Hosps., 150 F.3d 431, 435 (5th Cir. 1998) (noting that Congress's amendments to "person" and "employee" in Title VII to explicitly account for government entities and actors demonstrated clear intent to abrogate state sovereign immunity); *see also* PHELAN ET AL., *supra* note 66, at 43, 46 (discussing *Welch* and *Ussery*).

[78] *See Welch*, 483 U.S. at 469 (noting that "this general authorization for federal-court suits is not the kind of unequivocal statutory language that is sufficient to abrogate the Eleventh Amendment").

[79] *See Seminole Tribe of Fla.*, 517 U.S. at 59–60 (applying the second prong of the test in its analysis of whether the Indian Commerce Clause, the source of Congress's power in enacting the Indian Gaming Regulatory Act, constituted a valid exercise of power for abrogating state sovereign immunity); Gregory J. Newman, Note, *The* Seminole *Decision's Effect on Title IX Claims: Blockading the Path of Least Resistance*, 46 EMORY L.J. 1739, 1751 (1997) (noting that, in *Seminole Tribe of Florida*, "the Court sent a clear message to Congress . . . that infringement upon the states' Eleventh Amendment sovereign immunity was not to be tolerated except in very limited circumstances"—namely when abrogation was done pursuant to Section Five of the Fourteenth Amendment).

powers.[80] In *Seminole Tribe of Florida*, however, the Court overturned prior precedent, concluding that all Article I powers, including Congress's power to regulate interstate commerce, were invalid sources of power for abrogation purposes.[81] Instead, courts have increasingly recognized the enforcement power in Section Five of the Fourteenth Amendment as the only valid source from which Congress can abrogate state sovereign immunity.[82] The Supreme has never considered, however, whether Congress can abrogate state sovereign immunity pursuant to its power to enforce the Thirteenth Amendment.[83]

[80] *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 13–14 (1989) (holding that the Commerce Clause was a valid source of power upon which Congress could abrogate state sovereign immunity), *overruled sub nom. by Seminole Tribe of Fla.*, 517 U.S. 44.

[81] *See Seminole Tribe of Fla.*, 517 U.S. at 72–73; *see also* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 727 (2003) (stating that *Seminole Tribe of Fla.* meant that Congress could not exercise its Commerce Clause power to abrogate state sovereign immunity); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 627, 648 (1999) (same). In *Seminole Tribe of Fla.*, by holding that Congress could not abrogate state sovereign immunity based on its powers under the Commerce Clause, the Court directly overruled its previous ruling in *Pennsylvania v. Union Gas Co.* Newman, *supra* note 79, at 1750; *see Seminole Tribe of Fla.*, 517 U.S. at 66, 72 ("In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government."). In so doing, the "Court noted that *Union Gas Co.* could not be reconciled with the firmly established holding of *Hans* that states' sovereign immunity, derived from the Eleventh Amendment, limited federal court jurisdiction derived from Article III." Newman, *supra* note 79, at 1750 (footnote omitted) (citing *Seminole Tribe of Fla.*, 517 U.S. at 63). The Fourteenth Amendment came *after* the Eleventh Amendment, and in turn, its "drafters . . . were cognizant of state sovereign immunity" and meant to abrogate state sovereign immunity through the Fourteenth Amendment enforcement clause; yet the same could not be said for the Commerce Clause. *See id.* at 1751 ("[T]he Framers of Article I had no such intent since the Eleventh Amendment did not yet exist at the time of the Constitution's ratification." (footnote omitted) (citing *Seminole Tribe of Fla.*, 517 U.S. at 63).

[82] *See Seminole Tribe of Fla.*, 517 U.S. at 59, 72 (noting that the Court had only ever considered the Fourteenth Amendment and the Commerce Clause as authorities for abrogating state sovereign immunity, and subsequently striking down the Commerce Clause as one of these valid sources); *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. at 630–31 (holding that abrogation of state sovereign immunity in the Patent and Plant Variety Protection Remedy Clarification Act was inappropriate because Congress did not enact these statutes pursuant to its Fourteenth Amendment enforcement power); *see also* Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After* City of Boerne v. Flores, 88 WASH. UNIV. L. REV. 77, 140 (2010) ("With respect to federalism, most of the Court's post-*Boerne* decisions have confronted legislation in which Congress attempted to use its Fourteenth Amendment enforcement powers to abrogate state sovereign immunity." (footnote omitted) (first citing Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); and then citing Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000))). *See generally* City of Boerne v. Flores, 521 U.S. 507, 512, 515 (1997) (holding that Congress overreached its Fourteenth Amendment enforcement powers in enacting the Religious Freedom Restoration Act (RFRA) of 1993, *superseded by statute*, 42 U.S.C. § 2000cc). The Supreme Court concluded that "[t]he stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." *Id.* at 533.

[83] *See* Mason McAward, *supra* note 82, at 141 (noting that Congress has not yet utilized the Thirteenth Amendment "to authorize suits against states").

II. State Liability Under the TVPA: Roadblocks and Opportunities

Plaintiffs seeking to sue state entities for TVPA violations encounter significant legal barriers to doing so.[84] First, plaintiffs must prove that Congress intended to abrogate state sovereign immunity in the TVPA.[85] Additionally, they must convince the court that Congress did so "pursuant to a valid exercise of power."[86] Section A of this Part discusses step one of the test articulated in *Seminole Tribe of Florida v. Florida*, analyzing whether the TVPA's statutory language contemplates liability for government entities broadly and states more narrowly, and considering how courts have decided this issue.[87] Section B then addresses step two of the *Seminole Tribe of Florida* test, examining the Thirteenth Amendment and the Commerce Clause as two proffered constitutional sources of Congress's power in enacting the TVPA.[88] It concludes by considering whether Congress can properly abrogate state sovereign immunity based on its Thirteenth Amendment enforcement power.[89]

A. Seminole Tribe of Florida *Step 1: Has Congress Expressed Clear Intent in the TVPA to Abrogate State Sovereign Immunity?*

To analyze congressional intent to abrogate state sovereign immunity, one must first consider the text of the TVPA, particularly the language that identifies which actors can be held liable.[90] To limit the scope of this analysis, the following discussion focuses on the criminal provisions for forced labor and sex trafficking in §§ 1589 and 1591 of the TVPA, as well as the civil remedy in § 1595.[91] It then discusses several cases brought against different government defendants to analyze whether the TVPA contemplates government liability broadly, and state liability more narrowly.[92]

Section 1589 creates criminal liability for forced labor offenses for "*whoever* knowingly provides or obtains the labor or services of a person" through any one of the ways specified in the statute, such as by force, threats, or misuse of the law.[93] Section 1591 establishes criminal liability for sex trafficking.[94] It

[84] *See generally* U.S. Const. amend. XI (providing states with protection from suits).

[85] *Seminole Tribe of Fla.*, 517 U.S. at 55.

[86] *Id.* (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).

[87] *See infra* notes 90–125 and accompanying text.

[88] *See infra* notes 136–162 and accompanying text.

[89] *See infra* notes 163–186 and accompanying text.

[90] *See* 18 U.S.C. §§ 1589, 1591 (giving two of the TVPA's criminal provisions which define forced labor and sex trafficking offenses); *see also id.* § 1595 (providing the TVPA's civil remedy).

[91] *Id.* §§ 1589, 1591, 1595.

[92] *See infra* notes 107–120 and accompanying text.

[93] 18 U.S.C. § 1589(a) (establishing the TVPA's "[f]orced labor" provision).

punishes "*whoever* knowingly" trafficks another person, or "benefits . . . from participation in a venture" where they know that the victim will be forced into a commercial sex act.[95] "Venture" is defined as "any group of two or more individuals associated in fact, whether or not a legal entity."[96] The statute also refers twice to the culpable actor as the "*defendant*."[97] In sum, the forced labor and sex trafficking provisions refer to the culpable entity as "whoever" and "defendant."[98] In contrast, the victim in these two sections is referred to repeatedly and solely as a "person."[99]

Section 1595 for civil remedies complicates matters slightly.[100] It states that a victim of violations of Chapter 77 of Title 18 of the United States Code, referred to collectively as "Peonage, Slavery, and Trafficking in Persons," may bring a civil suit in district court "against the *perpetrator* (or *whoever* knowingly benefits, financially or by receiving anything of value from participation in a venture which that *person* knew or should have known has engaged in an act in violation of this chapter)."[101] Here, the statute uses both the broad language of "whoever" and "perpetrator," alongside "person," to refer to the liable actor.[102] Later in that same section, the statute again refers to "person," noting that a state attorney general may bring a civil suit on behalf of the state's constituents "against such *person*" who violates § 1591.[103]

Across these three sections, the statutory language does not explicitly exclude government entities from coming within the scope of liable actors, and arguably "whoever," "perpetrator," and "defendant" do not, on their face, rule

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[94] *Id.* § 1591 (articulating the TVPA's sex trafficking provision). Liability for cases involving adult victims takes effect if "force, threats of force, fraud, or coercion" are involved, whereas for child victims, the statute does not require force or coercion to establish criminal liability. *Id.* § 1591(b)(1).

[95] *Id.* § 1591(a)(1) (criminalizing "[w]hoever knowingly . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person").

[96] *Id.* § 1591(e)(6).

[97] *Id.* § 1591(c) (emphasis added) (noting that the government does not have to show that a defendant had knowledge that the affected person was a minor if they had a "reasonable opportunity to observe the person").

[98] *See id.* §§ 1589, 1591 (referring to the offending actor as the "defendant," as well as utilizing language like "[w]hoever knowingly provides or obtains," "[w]hoever knowingly benefits," "[w]hoever violates this section," and "whoever obstructs").

[99] *See id.* § 1589(a) (criminalizing the act of acquiring "labor or services of a person by any one of [the listed means]"); *id.* § 1591 (criminalizing a number of acts, including recruiting or transporting "a person" when the perpetrator knew that "the person" would be forced into some form of commercial sexual relations). In the forced labor statute, the word "person" is used twelve times to refer to the victim or to threats made toward other persons to compel the victim's actions. *See id.* § 1589. For example, some of the recognized means of coercion for obtaining labor include using force or bodily restraint "to that person or another person." *Id.* § 1589(a)(1).

[100] *See id.* § 1595 (referring to the actor facing civil liability interchangeably as "perpetrator," "whoever," and "person").

[101] *Id.*

[102] *Id.*

[103] *Id.* § 1595(d).

out such actors.[104] The TVPA, however, creates confusion over how these terms should be understood by failing to affirmatively define them and by using a mixture of terms across different sections of the statute to refer to the liable actor.[105]

Conflicting judicial interpretations of TVPA liability for government entities reflect this confusion.[106] In *Nuñag-Tanedo v. East Baton Rouge Parish School Board*, the U.S. District Court for the Central District of California in 2011 granted a school board's motion to dismiss the TVPA claims against it, holding that government entities are not an appropriate defendant under the TVPA's civil remedy.[107] The court highlighted the statute's use of "whoever" and "person" to describe liable entities.[108] Seeking clarification about these words from the Dictionary Act, the Court noted that they "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[109] The court highlighted the absence of "government" from this list, concluding that the text of the TVPA's civil remedy therefore did not support a reading of government liability.[110]

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[104] *See id.* §§ 1589, 1591, 1595 (making no mention of a carve-out for government entities). Indeed, the U.S. District Court for the Northern District of California held in *Ruelas v. County of Alameda* in 2021 that plaintiffs could sue Alameda County for TVPA violations, noting "no reason why Congress would have excluded the sovereign from liability, without doing so explicitly, in the context of a law that was intended to give 'the highest priority to investigation and prosecution of trafficking offenses.'" 519 F. Supp. 3d 636 (N.D. Cal. 2021) (quoting H.R. REP. NO. 106-487(I), at 27 (1999)).

[105] *See id.* § 1589(c) (defining "abuse or threatened abuse of law or legal process" and "serious harm," but failing to define "whoever"); *id.* § 1591 (defining a variety of terms, like "coercion" and "commercial sex act," among others, but failing to define "whoever" and "perpetrator"); *see also infra* notes 106–125 (highlighting how courts across jurisdictions have differed on whether the TVPA's language authorizes government liability).

[106] *Compare Ruelas*, 519 F. Supp. 3d at 647–48 (ruling that county defendants could be sued under the TVPA), *and* McCullough v. City of Montgomery, No. 15-cv-463, 2017 WL 956362, at *18 (M.D. Ala. Mar. 10, 2017), *rev'd sub nom.* McCullough v. Finley, 907 F.3d 1324 (11th Cir. 2018) (continuing a TVPA claim against the city government), *with* Nuñag-Tanedo v. E. Baton Rouge Par. Sch. Bd., No. SACV 10-1172-AG, 2011 WL 13153190, at *12 (C.D. Cal. May 12, 2011) (stopping a TVPA suit against a school board).

[107] *Nuñag-Tanedo*, 2011 WL 13153190, at *1, *11. The plaintiffs, who were teachers recruited from the Philippines, alleged that the defendant, a government entity that oversaw East Baton Rouge Parish's public schools, engaged in a human trafficking venture. *Id.* at *1. They claimed that the defendant did so through its recruitment and hiring practices, which included collusion with a California-based recruiting company in acts of fraud. *Id.* at *1–2. The plaintiffs sought civil remedy under § 1595, and the defendants filed a motion to dismiss for failure to state a claim. *Id.* at *9.

[108] *Id.* at *10.

[109] *Id.* (citing 1 U.S.C. § 1).

[110] *See id.* at *10–11 (citing the Supreme Court's interpretation of the Dictionary Act's use of "person" in *United States v. Mine Workers of America.*, 330 U.S. 258, 275 (1947)). In *Mine Workers of America*, the Supreme Court stated that statutes using this word would generally be interpreted to exclude the sovereign. 330 U.S. at 275. In reaching its conclusion in *Nuñag-Tanedo*, the District Court for the Central District of California contrasted the absence of government entities from the Dictionary Act's definition of "person" and "whoever," with Congress's affirmative inclusion of these entities when defining "person" in other statutes. 2011 WL 13153190, at *11. The court also found that the

Similarly, in a 2016 case against a state university, *Mojsilovic v. Oklahoma* ex rel. *Board of Regents for the University of Oklahoma*, the Tenth Circuit Court of Appeals noted that the statutory language did not define "perpetrator" or "whoever."[111] In contrast, the court referenced earlier cases where Congress had expressed its clear intent to abrogate state sovereign immunity through the statutory text.[112] For example, in *Coleman v. Court of Appeals of Maryland*, the statute defined "public agency" as "both the government of a state . . . and any agency of a state."[113] Further, in *Seminole Tribe of Florida*, the statute in question explicitly said that "the State" could be sued.[114] Unlike those cases, the Tenth Circuit in *Mojsilovic* concluded that the mere use of "perpetrator" and "whoever" in the TVPA did not show that Congress meant to abrogate Eleventh Amendment immunity.[115]

In contrast, in *Ruelas v. County of Alameda* in February 2021, the District Court of the Northern District of California upheld TVPA liability against a county and the county sheriff.[116] The court rejected the *Nuñag-Tanedo* court's strict reliance on the Dictionary Act to interpret the TVPA in a way that excluded governments as potential defendants.[117] The plaintiffs persuaded the court that county defendants could be liable under the TVPA because nothing in the forced labor provision's use of the word "person" explicitly excluded government entities.[118] To hold otherwise, the court reasoned, would lead the court astray from Supreme Court jurisprudence by undermining the TVPA's

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TVPA's civil remedy did not reflect clear congressional intent to create government liability. *Id.* The plaintiffs argued that the TVPA's statement "that human trafficking 'is often aided by official corruption,'" demonstrated this intent. *Id.* (quoting 22 U.S.C. § 7101(b)(8)). The court found that this was not enough, particularly where the TVPA's legislative history also failed to provide clear evidence of such congressional intent. *Id.*

[111] 841 F.3d 1129, 1132 (10th Cir. 2016).

[112] *Id.*

[113] *See id.* (citing Coleman v. Ct. of Appeals of Md., 566 U.S. 30, 35–36 (2012)) (highlighting that in the statutory language at issue in *Coleman*, Congress clearly demonstrated its intent to abrogate state sovereign immunity).

[114] *See id.* (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 56–57 (1996)) (noting that because of this choice of language, the Supreme Court concluded that Congress intended to abrogate state sovereign immunity).

[115] *Id.* at 1132–33.

[116] *See* Ruelas v. County of Alameda, 519 F. Supp. 3d 636, 642–44, 646–47 (N.D. Cal. 2021) (rejecting the defendant's argument that the court was limited by the Dictionary Act when interpreting the meaning of "person" in the TVPA's forced labor provision); McCullough v. City of Montgomery, No. 15-cv-463, 2019 WL 2112963, at *9–10 (M.D. Ala. May 14, 2019) (concluding that the plaintiffs stated a claim in alleging that the City of Montgomery offended several TVPA provisions).

[117] *See Ruelas*, 519 F. Supp. 3d at 647 (acknowledging the defendant's argument that the court should be bound by the *Nuñag-Tanedo* and *Barrientos* courts' reliance on the Dictionary Act to determine the meaning of the TVPA, but ultimately refusing to apply those courts' interpretations in its decision).

[118] *Id.* The court noted that nothing in the TVPA affirmatively prevents municipalities from being sued under the Act. *Id.*

purpose, which it determined was to carry out the Thirteenth Amendment.[119] The court noted that failing to account for government liability under the TVPA would lead to a confounding result wherein counties could be liable for violating the Thirteenth Amendment, but not for violating legislation enacted to implement its guarantees.[120]

The different outcomes in these cases and the variety of defendants sued leave room to debate whether Congress demonstrated its clear intent to abrogate Eleventh Amendment immunity in the TVPA.[121] On one hand, Congress's use of the broad term "whoever" to refer to actors who can be found criminally and civilly liable under the Act points toward its intent to formulate an expansive statute that would sweep in government actors.[122] The statute's failure, however, to explicitly name "government" or "the State" as a potentially liable actor, and the absence of these terms from the Dictionary Act's definition of "whoever" also present a strong counter-argument.[123] This may demonstrate that, even if Congress intended to abrogate state sovereign immunity, it did not make its intent sufficiently clear to withstand judicial scrutiny for abrogation purposes.[124] In summary, the TVPA's use of relatively broad, but notably unde-

[119] *Id.* To reach its decision, the court referred to prior Supreme Court precedent. *Id.* (citing Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 82–83 (1991), *superseded by statute*, 28 U.S.C. § 1442). In *International Primate Protection League*, the Supreme Court held that the typical reading of "person" should be set aside where the legislative purpose or context "indicate an intent, by the use of the term, to bring state or nation within the scope of the law." 500 U.S. at 83 (citing United States v. Cooper Corp., 312 U.S. 600, 605 (1941), *superseded by statute*, 15 U.S.C. § 15a).

[120] *Ruelas*, 519 F. Supp. 3d at 647.

[121] *See supra* notes 90–105 and accompanying text (noting the relative ambiguity of terms like "whoever" and "perpetrator," as used throughout the TVPA, especially absent a statutory definition of such terms); *see also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996) (noting that the first step in determining if state sovereign immunity has been properly abrogated is by asking whether Congress showed its express intent to do so, as indicated by a "clear legislative statement" (citing Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 786 (1991))).

[122] *See Ruelas*, 519 F. Supp. 3d at 647 (noting that the TVPA's statutory language did not bar government liability, and highlighting that the Act's legislative history showed that Congress meant "to bring all traffickers within the TVPA's ambit").

[123] *See* Mojsilovic v. Oklahoma *ex rel.* Bd. of Regents for the Univ. of Okla., 841 F.3d 1129, 1131 (10th Cir. 2016) (noting that Congress must demonstrate its "*unmistakably clear*" intent to abrogate state sovereign immunity through the statutory text (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000))). The United States Court of Appeals for the Tenth Circuit contrasted the TVPA's use of "whoever" to identify a criminal defendant for forced labor violations with other statutes' use of more explicit language, such as "the State," to identify liable defendants. *Id.* at 1132.

[124] *See id.* (noting that § 1595's use of the broad words "perpetrator" and "whoever" do not indicate Congress's express intent to abrogate state sovereign immunity); *see also* Does 1–12 v. Mich. Dep't of Corr., No. 13-14356, 2018 WL 5786199, at *10 (E.D. Mich. Nov. 5, 2018) (noting that the TVPA provisions did not suggest that Congress intended to abrogate state sovereign immunity). The court ultimately dismissed the TVPA counts against the Michigan Department of Corrections on sovereign immunity grounds. *Does 1–12*, 2018 WL 5786199, at *10.

fined language to refer to responsible entities continues to provide courts with interpretive leeway in deciding about government liability.[125]

B. Seminole Tribe of Florida *Step 2: Is Abrogation of State Sovereign Immunity in the TVPA Based on a Valid Source of Congressional Power?*

Even assuming that courts conclude that Congress expressed its intent to abrogate state sovereign immunity clearly in the TVPA, the more complicated analysis is determining whether Congress abrogated that immunity based on an appropriate source of power, per the Supreme Court's holding in *Seminole Tribe of Florida*.[126] Scholars and courts disagree on the source of congressional authority in enacting the TVPA.[127] They point primarily to two sources: the enforcement power of the Thirteenth Amendment and the Commerce Clause.[128]

If the Commerce Clause is the congressional source of power for the TVPA, the abrogation conversation ends there.[129] The Supreme Court has explicitly stated that Article I powers, including the Commerce Clause, are not valid sources of power for abrogating state sovereign immunity.[130] If, however, the Thirteenth Amendment is the source of Congress's power in enacting the TVPA, the abrogation conversation takes an interesting turn.[131] To date, the Supreme Court has not ruled on whether the Thirteenth Amendment provides a valid basis for abrogating state sovereign immunity.[132] Subsection 1 discusses competing arguments about whether Congress enacted the TVPA pursuant to its powers under the Commerce Clause or the Thirteenth Amendment.[133] Sub-

[125] *See supra* notes 90–105 and accompanying text (analyzing the text of 18 U.S.C. §§ 1589, 1591, and 1595 of the TVPA).

[126] *See Seminole Tribe of Fla.*, 517 U.S. at 55 (noting that the second part of the two-step test to determine if state sovereign immunity has been properly abrogated is whether it was done based on a valid source of power); *supra* notes 75–83 and accompanying text (explaining the test for congressional abrogation of state sovereign immunity recognized by the Supreme Court in *Seminole Tribe of Florida*).

[127] *See infra* notes 136–162 and accompanying text (discussing different scholarly and judicial interpretations of Congress' source of power in enacting the TVPA).

[128] *See* U.S. CONST. amend. XIII, § 2 (empowering Congress to execute the Thirteenth Amendment's ban on slavery via legislation); *id.* art. I, § 8, cl. 3 (granting Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

[129] *See Seminole Tribe of Fla.*, 517 U.S. at 66 (overruling prior precedent that had permitted Congress to abrogate state sovereign immunity pursuant to its powers under the Commerce Clause).

[130] *See* Alden v. Maine, 527 U.S. 706, 730–31 (1999) (noting that the only circumstance in which Congress can rely on its Article I power to abrogate state sovereign immunity is if "there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design" (citing Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 781 (1999))).

[131] *See infra* notes 175–186 and accompanying text (exploring rationales for why the Thirteenth Amendment might serve as a valid source of power for state sovereign immunity abrogation).

[132] *See* Mason McAward, *supra* note 82, at 141 (noting that Congress has never relied on its Thirteenth Amendment enforcement powers to abrogate state sovereign immunity).

[133] *See infra* notes 136–162 and accompanying text.

section 2 highlights the implications of the Thirteenth Amendment serving as a potential source of congressional power for abrogating state sovereign immunity.[134] Subsection 3 concludes by comparing the Thirteenth and Fourteenth Amendments in the context of abrogation doctrine.[135]

1. Constitutional Sources of Power for the TVPA: The Commerce Clause Versus the Thirteenth Amendment

Courts disagree on the source of Congress's power in enacting the TVPA.[136] Judges have tended to conclude that the TVPA's forced labor section is drawn from Congress's Thirteenth Amendment enforcement power, whereas its sex trafficking section is based on its Commerce Clause power.[137] An emblematic case interpreting the constitutional source of power for the TVPA's forced labor offense came in 2003, in the U.S. District Court of the Western District of New York's decision in *United States v. Garcia*.[138] The defendants faced a laundry list of charges for bringing Mexican men and youth to work in agriculture in New York.[139] In response to the forced labor count, they argued that the forced labor provision of the TVPA should be held unconstitutional because it violated the Commerce Clause.[140] The district court squarely rejected this argument because it instead recognized the "[c]onstitutional authority

[134] *See infra* notes 163–174 and accompanying text.

[135] *See infra* notes 175–186 and accompanying text.

[136] *Compare* United States v. Garcia, No. 02-CR-110S-01, 2003 WL 22938040, at *3 (W.D.N.Y. Dec. 2, 2003) (finding that the Thirteenth Amendment was the source of congressional power to pass the TVPA's forced labor provision), *with* Mojsilovic v. Oklahoma *ex rel.* Bd. of Regents for the Univ. of Okla., 841 F.3d 1129, 1133 (10th Cir. 2016) (concluding that Congress enacted the TVPRA pursuant to its Commerce Clause power).

[137] *See* Chris Kozak, Comment, *Originalism, Human Trafficking, and the Thirteenth Amendment*, 11 S.J. POL'Y & JUST. 62, 64 (2017) (noting that the federal appellate courts' differing holdings are likely informed by the history behind the sex trafficking and forced labor sections of the TVPA). The former developed from interstate prostitution laws, whereas the latter addressed the Supreme Court's limited interpretation of involuntary servitude in *United States v. Kozminski*, 487 U.S. 931, 938 (1988). *Id*. The United States Court of Appeals for the Tenth Circuit and the United States District Court for the Western District of New York are among the courts which have ruled the Thirteenth Amendment is the source of Congress's power in enacting the forced labor provision of the TVPA. *See id*. at 64 n.144 (first citing United States v. Kaufman, 546 F.3d 1242, 1261 (10th Cir. 2008); and then citing *Garcia*, 2003 WL 22938040, at *2). In contrast, the United States Court of Appeals for the Eleventh Circuit concluded that the Commerce Clause was the basis of congressional power in enacting the TVPA's sex trafficking provision. *See id.* at 64 n.146 (citing United States v. Evans, 476 F.3d 1176, 1178–80 (11th Cir. 2007)).

[138] *See Garcia*, 2003 WL 22938040, at *3 (rejecting the defendants' argument that the charges against them were invalid based on the argument that § 1589 was unconstitutional).

[139] *Id.* at *1. The men that Ms. Garcia and her co-defendants hired were not paid, were forced to remain in their houses beside for work, and were bullied if they tried to leave. *Id.*

[140] *See id.* (noting that Ms. Garcia hoped to obtain a declaration that § 1589 was unconstitutional and argued that the other charges based on § 1589 should consequently be dismissed).

for this legislation . . . in the Thirteenth Amendment."[141] The court subsequently denied the defendants' motion for an order declaring the § 1589 forced labor provision unconstitutional.[142]

In 2008, in *United States v. Kaufman*, the Tenth Circuit Court of Appeals also considered the constitutional source of authority for the TVPA.[143] In that case, the defendants' argument drew parallels between the TVPA and Congress's Thirteenth Amendment enforcement power.[144] The defendants, who had been convicted of forced labor and involuntary servitude, maintained on appeal that "labor" and "services" as referred to in the TVPA's forced labor statute did not extend to the non-economic labor at issue in their case.[145] They reasoned that this corresponded with most Thirteenth Amendment jurisprudence.[146] Although the Tenth Circuit disagreed with the defendants' interpretation of prece-

[141] *Id.* at *2. The court stated that the defendants' analysis of Article 1, Section 8 of the U.S. Constitution "missed the mark" and noted that it need not evaluate the Commerce Clause because Congress enacted the TVPA pursuant to its Thirteenth Amendment enforcement power. *Id.* Other courts have likewise found that the TVPA is rooted in the Thirteenth Amendment. *See, e.g.*, Ruelas v. County of Alameda, 519 F. Supp. 3d 636, 647 (N.D. Cal. 2021) (stating that Congress passed the TVPA "to implement the Thirteenth Amendment" (citing United States v. Toviave, 761 F.3d 623, 629 (6th Cir. 2014))). *See generally* Jennifer Mason McAward, *The Thirteenth Amendment, Human Trafficking, and Hate Crimes*, 39 SEATTLE UNIV. L. REV. 829, 831–32 (2016) (suggesting that the TVPA's legislative history, particularly rhetoric characterizing human trafficking as "a contemporary form of slavery" and comparing it to the Transatlantic Slave Trade, demonstrates that it should be addressed pursuant to Congress's power to enforce the Thirteenth Amendment). Mason McAward states that the TVPA "has never been challenged as beyond Congress's power to enforce the Thirteenth Amendment," but notes that it could be vulnerable to such a challenge. *Id.* at 833 (citing George Rutherglen, *The Thirteenth Amendment, the Power of Congress, and the Shifting Sources of Civil Rights Law*, 112 COLUM. L. REV. 1551, 1577 (2012)). If courts faced with that question follow the same reasoning used by the Western District of New York in *United States v. Garcia*, however, this seems unlikely to present a serious issue. *See* No. 02-CR-110S-01, 2003 WL 22938040, at *2–3 (W.D.N.Y. Dec. 2, 2003) (holding that the court held that the TVPA was a constitutional exercise of Congress's Thirteenth Amendment enforcement power).

[142] *Garcia*, 2003 WL 22938040, at *3. The court stated that the defendants did not demonstrate that Congress exceeded its power in enacting § 1589, and could not do so, "since Section 2 of the Thirteenth Amendment expressly confers power on Congress to enact § 1589 as 'appropriate legislation to enforce' the provision set forth in Section 1." *Id.*

[143] *See* United States v. Kaufman, 546 F.3d 1242, 1260 (10th Cir. 2008) (analyzing the defendants' argument that the district court erred by instructing the jury that "labor," and "services," for the involuntary servitude count covered conduct beyond economic work). The defendants argued that "involuntary servitude" came directly from the Thirteenth Amendment, and that this amendment is generally understood to cover strictly economic work. *Id.*

[144] *See id.* (noting that Thirteenth Amendment cases typically required "work that was economic in nature," and arguing that this same interpretation should have been applied to the meaning of "labor" and "services" covered by § 1589). The defendants appealed their convictions by the lower court for violation of the involuntary servitude and forced labor statutes of the TVPA, along with multiple other offenses. *Id.* at 1246. The defendants forced "mentally ill residents" at their so-called "Treatment Center" to engage in "sexually explicit acts and farm labor in the nude" for fifteen years. *Id.*

[145] *See id.* at 1247 (contending on appeal that the lower court's jury instruction was erroneous because it failed to limit these terms to "work in an economic sense").

[146] *Id.* at 1260.

dent about the meaning of "labor" and "services," importantly, it did not dispute that the TVPA was rooted in the Thirteenth Amendment.[147]

In contrast with the rulings in *Garcia* and *Kaufman*, other courts analyzing the congressional authority used to enact the TVPA and its subsequent reauthorization, the Trafficking Victims Protection Reauthorization Act (TVPRA), have instead pointed to the Act's roots in the Commerce Clause.[148] In 2016, on appeal to the Tenth Circuit Court of Appeals, the plaintiffs in *Mojsilovic* sought civil damages from the University of Oklahoma for forced labor violations.[149] The Tenth Circuit held that the Eleventh Amendment protected the state university from suit.[150] The plaintiffs argued that Congress enacted the TVPRA pursuant to the Thirteenth Amendment, and therefore, state sovereign immunity did not apply.[151] The court disagreed, concluding instead that Congress passed the Act pursuant to its Commerce Clause authority.[152] To support this conclusion, the court cited a 2003 House Report, language from the § 1591 sex trafficking provision which refers to interstate commerce, and two cases that discussed the Commerce Clause as the source of power for the TVPRA's predecessor statute.[153] Noting that *Seminole Tribe of Florida* rejected Congress's

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[147] *See id.* at 1261–62 (citing Bailey v. Alabama, 219 U.S. 219 (1911)). Although it recognized that the defendants' cited cases often referred to labor "that was economic in nature," the court ultimately concluded that they also referred to involuntary servitude and slavery more expansively, noting that the Thirteenth Amendment not only abolishes chattel slavery, but also "all [of] its badges and incidents." *Id.* (quoting *Bailey*, 219 U.S. at 241).

[148] *Compare* United States v. Garcia, No. 02-CR-110S-01, 2003 WL 22938040, at *3 (W.D.N.Y. Dec. 2, 2003) (concluding that the Thirteenth Amendment's enforcement power is the source of congressional authority for § 1589 of the TVPA), *with* Mojsilovic v. Oklahoma *ex rel.* Bd. of Regents for the Univ. of Okla., 841 F.3d 1129, 1133 (10th Cir. 2016) (concluding that the Commerce Clause serves as the source of congressional authority behind the TVPRA).

[149] *Mojsilovic*, 841 F.3d at 1130. The plaintiffs were two Serbian researchers who came to work in a laboratory at the University of Oklahoma. *Id.* Seeking relief under the TVPRA, they alleged that Dr. William Hildebrand, the director of the university's Health Sciences Center and their direct supervisor, forced them to work more than their H1-B visas allowed. *Id.* They also alleged that Dr. Hildebrand forced them to work for an additional biotechnology company that he owned, and that he made threats about their immigration status to coerce them into compliance. *Id.*

[150] *Id.*

[151] *See id.* at 1131 (noting the plaintiffs' argument that the Thirteenth Amendment supplied constitutional authority for the TVPRA and that the states, by adopting the Thirteenth Amendment, had effectively waived sovereign immunity). Essentially, the plaintiffs contested that there was "no sovereign immunity for Congress to abrogate" in TVPRA claims. *Id.* at 1133. Even if the states could assert sovereign immunity for these suits, the plaintiffs argued that the TVPRA's language demonstrated that Congress explicitly intended to abrogate immunity. *Id.* at 1131.

[152] *Id.* at 1133. Some scholars argue that the Tenth Circuit, in *Mojsilovic*, failed to discuss the prospect that both the Commerce Clause and the Thirteenth Amendment might serve as sources of power for the TVPA, noting that § 1591 includes the phrase "'in or affecting' commerce," whereas § 1589 lacks such language. John Cotton Richmond, *Federal Human Trafficking Review: An Analysis & Recommendations from the 2016 Legal Developments*, 52 WAKE FOREST L. REV. 293, 347 (2017).

[153] *Mojsilovic*, 841 F.3d at 1133. The Tenth Circuit cited a 2003 House Report for the reauthorization of the TVPA in support of its conclusion. *Id.* In the report, the Committee on International Relations stated that it considered Article I, Section 8 of the Constitution to be the source of congres-

exercise of Article I powers to abrogate state sovereign immunity, the Tenth Circuit in *Mojsilovic* accordingly found that Congress did not abrogate state sovereign immunity for TVPRA suits.[154]

Couching the TVPA and its reauthorizing legislation within Congress's Commerce Clause might appear unnatural given the statute's stated aims to address human exploitation.[155] This, however, is not entirely surprising in light of a nearly century-long trend in American jurisprudence that has situated many human rights laws within Congress's Commerce Clause powers, rather than the Thirteenth Amendment.[156] This trend dates back to the 1930s, when lawyers representing labor activists defended legislation such as the Wagner Act in economic terms, even though workers understood their rights to collective bargaining and protest as rooted in the Thirteenth Amendment.[157] Similarly, civil rights and feminist activists throughout the twentieth century also contemplated their movements in human rights terms, yet lawyers backing these

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sional authority for the reauthorization of the TVPA. H.R. REP. NO. 108-264(I), at 14 (2003). The Tenth Circuit also found support for its conclusion in the language of the TVPA's sex trafficking provision, which describes sex trafficking as "in or affecting interstate or foreign commerce." *Mojsilovic*, 841 F.3d at 1133 (quoting 18 U.S.C. § 1591(a)). The court also cited to *Francisco v. Susano* and *Ditullio v. Boehm*, noting that these cases discussed the statute preceding the TVPRA and concluded Congress enacted it pursuant to its Commerce Clause power. *Id.*; *see* Francisco v. Susano, 525 F. App'x 828, 834 n.8 (10th Cir. 2013); Ditullio v. Boehm, 662 F.3d 1091, 1097 n.4 (9th Cir. 2011).

[154] *Mojsilovic*, 841 F.3d at 1133.

[155] *See* 22 U.S.C. § 7101 (explaining that the TVPA's purpose is to fight human trafficking, punish perpetrators, and safeguard victims). The Act refers to human trafficking in its purpose and findings section as "a contemporary manifestation of slavery." *Id.* § 7101(a).

[156] *See* James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of the Post-New Deal Constitutional Order, 1921–1957*, 102 COLUM. L. REV. 1, 5 (2002) (noting the repeated historic positioning of human rights laws that arose during labor, civil rights, and feminist movements of the twentieth century as within the purview of Congress's commerce powers). Critics warn that characterizing human rights laws within interstate commerce terms misrepresents the real impetus behind these laws. *Id.* at 4. Today, human rights laws face serious challenges as advocates try to fit them within either Commerce Clause or Thirteenth and Fourteenth Amendment justifications, both to little avail. *See id.* at 6–7 (noting that "human rights statutes are not merely misclassified as exercises of the commerce power; they may fall outside the scope of congressional power altogether").

[157] *Id.* at 5. The labor movement of the early 1930s articulated its aims within the terms of worker liberation and characterized any attempts to limit workers' collective organizing rights as analogous to slavery and involuntary servitude, prohibited by the Thirteenth Amendment. *Id.* at 7, 47, 112. Senator Robert Wagner, a leading proponent of the Wagner Act, reflected these sentiments in his repeated comparisons of nonunionized worksites to "feudalism." *Id.* at 48. Despite this rhetoric, Wagner and other lawyers eventually argued that the Commerce Clause served as the foundation for the Wagner Act, also known as the National Labor Relations Act (NLRA). *Id.* at 7. Scholars argue that this may have been due in part to Wagner's awareness of a general preference among legal progressives for the Commerce Clause instead of the Thirteenth Amendment. *Id.* at 56. Wagner and other lawyers' strategic and personal decisions likely contributed to the posturing of the NLRA in this way, as did the Supreme Court's desire to avoid a looming industrial shutdown brought on by massive strikes. *Id.* at 1, 8, 12.

movements repeatedly based their legal arguments on the more expansive Commerce Clause doctrine, rather than the Thirteenth Amendment.[158]

Despite these trends in case law, several scholars argue that the Thirteenth Amendment is, in fact, the more natural and preferable source of congressional power for the TVPA.[159] One argument is that current jurisprudence, which tends to assign different constitutional sources of power to the TVPA's sex trafficking and labor trafficking provisions, is inconsistent, given that both crimes are rooted in the same issue: power imbalances used "to compel labor."[160] Pointing to historical context, scholars note that when Congress enacted the Thirteenth Amendment, the forced prostitution of African American women was "one of the ills of slavery."[161] Further, scholars argue that because Congress considered human trafficking a form of modern slavery within the TVPA's legislative history, the Act must therefore be based on the Thirteenth Amendment enforcement power.[162]

2. The Thirteenth Amendment and Abrogation of State Sovereign Immunity: Uncharted Waters

Even if one resolves the debate over the source of Congress's power in enacting the TVPA in favor of the Thirteenth Amendment, an important question remains: can Congress abrogate state sovereign immunity pursuant to the

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[158] *Id.* at 5. By the end of the twentieth century, "human rights movements had provided the impetus for a stupendous expansion of the commerce power, while the congressional powers that the movements themselves had championed remained unrescued [sic] from nineteenth-century limitations." *Id.*

[159] *See* Kozak, *supra* note 137, at 83–84 (arguing that the Thirteenth Amendment is preferable to the Commerce Clause as the basis for congressional power to enact the TVPA for three reasons: (1) it benefits from a broader jurisdiction; (2) many human trafficking lawsuits are only brought in federal courts; and (3) it is not inhibited by the Tenth Amendment).

[160] *Id.* at 82.

[161] Mary De Ming Fan, Comment, *The Fallacy of the Sovereign Prerogative to Set De Minimus Liability Rules for Sexual Slavery*, 27 YALE J. INT'L L. 395, 420 (2002) (contending that forced prostitution should be understood as conduct that the Thirteenth Amendment aimed to abolish by noting similarities between modern forced prostitution and antebellum slavery); *see* Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403, 405 (1993) (stating that many slaves were not only exploited for their labor, but also subjected to "sadism and torture"); Neal Kumar Katyal, Note, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 798–801 (1993) (noting the prevalence of rape and sexual abuse of enslaved persons during antebellum slavery, and describing slave markets where African American women were sold into forced prostitution).

[162] *See* Mason McAward, *supra* note 141, at 843–44 (explaining that Congress's factual findings when it enacted the TVPA show that modern day human trafficking is closely related to antebellum slavery). This supports the conclusion that there is a direct connection between the TVPA and the Thirteenth Amendment. *Id.*

Thirteenth Amendment?[163] Although the Supreme Court has never directly addressed this question, a related issue arose in the context of tribal sovereign immunity.[164] In *Vann v. Kempthorne*, in 2008, the D.C. Circuit Court of Appeals upheld the Cherokee Nation's tribal sovereign immunity in a suit brought by individuals referred to as Freedmen.[165] The Freedmen, who were descendants of people previously enslaved by the tribe, alleged that the tribe's decision to prevent them from voting in tribal elections infringed on their rights under the Thirteenth Amendment.[166] Determining, however, that Congress had not clearly established its intent to abrogate tribal sovereign immunity in the text of the Thirteenth Amendment or in an 1866 treaty between the United States and the Cherokee Nation, the court concluded that tribal immunity remained intact.[167] It held, therefore, that the Freedmen could not continue their suit against the tribe.[168] Having identified a lack of congressional intent to abrogate tribal immunity, the court never broached the subject of whether such abrogation was based on a valid source of congressional power.[169]

Given the differences between state and tribal immunity and the lack of direct precedent regarding abrogation of state sovereign immunity pursuant to

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[163] *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996) (noting that the second question a court must ask itself when faced with abrogation of state sovereign immunity is whether Congress "acted 'pursuant to a valid exercise of power'" (quoting Green v. Mansour, 474 U.S. 64, 68 (1985))).

[164] *See* Vann v. Kempthorne, 534 F.3d 741, 748–49 (D.C. Cir. 2008) (ruling that the defendant was immune from suit on tribal sovereign immunity grounds and rejecting the plaintiffs' argument that the Thirteenth Amendment served to abrogate that immunity where Congress failed to demonstrate its clear intent to do so). *See generally Seminole Tribe of Fla.*, 517 U.S. at 59 (stating that the Court had only ever recognized two sources of constitutional authority for abrogation: (1) the Fourteenth Amendment; and (2) the Commerce Clause). The Court went on to overturn its earlier precedent, striking the Commerce Clause from the constitutional sources of power deemed appropriate for abrogation purposes. *Id.* at 65–66.

[165] 534 F.3d at 749.

[166] *Id.* at 745. The plaintiffs alleged that their disenfranchisement violated their right to be free of a "badge and incident of slavery." *Id.* at 747. Additionally, the Freedman claimed that the Cherokee Nation had violated their rights under the Fifteenth Amendment, the Cherokee constitution, a treaty between the U.S. and the Cherokee Nation, and several other statutes. *Id.* at 745.

[167] *Id.* at 749.

[168] *Id.* at 744.

[169] *See id.* at 749 (ending the court's analysis once it determined that the Thirteenth Amendment and 1866 Treaty did not demonstrate clear congressional intent to abrogate tribal sovereign immunity and stopping short of considering whether Congress can abrogate this immunity pursuant to its Thirteenth Amendment enforcement power); Lydia Edwards, Comment, *Protecting Black Tribal Members: Is the Thirteenth Amendment the Linchpin to Securing Equal Rights Within Indian Country?*, 8 BERKELEY J. AFR.-AM. L. & POL'Y 122, 137 (2006) (noting that determinations of tribal sovereign immunity abrogation depend on if Congress demonstrated "clear and plain" intent to do so) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)). In analyzing abrogation of tribal sovereign immunity in the conflict between the Freedmen and the Cherokee Nation, some scholars have noted that it is not obvious whether the Thirteenth Amendment even applies to Native nations. *See* Jessica Jones, *Cherokee by Blood and the Freedmen Debate: The Conflict of Minority Group Rights in a Liberal State*, 22 NAT'L BLACK L.J. 1, 23 (2009) (noting that those who argue that Native nations are in fact subject to the Thirteenth Amendment compare them to states or private bodies).

the Thirteenth Amendment, a more general consideration of the Thirteenth Amendment lends a hand to this analysis.[170] Significantly, courts tend to hold that the Thirteenth Amendment applies more broadly than the Fourteenth Amendment.[171] In fact, the Supreme Court has interpreted Congress's Thirteenth Amendment enforcement power as permitting Congress "to pass all laws necessary and proper for abolishing all badges and incidents of slavery."[172] The Court concluded that this requires only that legislation be "rationally related to the incidents of involuntary servitude."[173] In light of this broad language, scholars have contended that the Thirteenth Amendment is directly relevant to a wide range of contemporary issues, from abuse of migrant farmworkers and domestic workers to the victimization of individuals in the forced sex trade.[174]

3. Comparing the Thirteenth and Fourteenth Amendments as Sources of Congressional Power for Abrogating State Sovereign Immunity

With this understanding of the application of the Thirteenth Amendment in mind, it is also important to consider specific ways in which it parallels the Fourteenth Amendment.[175] Given the Supreme Court's explicit recognition of the Fourteenth Amendment as a valid source of power for abrogating state

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[170] *See generally* Brian L. Pierson, *The Precarious Sovereign Immunity of Tribal Business Corporations*, FED. LAW., Apr. 2015, at 61 (noting several ways in which the sovereign immunity of tribes differs from that of the states).

[171] *See* William M. Carter, Jr., *Judicial Review of Thirteenth Amendment Legislation: "Congruence and Proportionality" or "Necessary and Proper"?*, 38 U. TOL. L. REV. 973, 973 (2007) (noting that courts interpret the Thirteenth Amendment as giving Congress expansive powers, but also warning that a similar approach was previously taken as a given for the Fourteenth Amendment, which was later limited by the decision in *City of Boerne v. Flores*); *see also* City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (introducing the "congruence and proportionality" test for determining whether Congress has overstepped its authority to enforce the Fourteenth Amendment), *superseded by statute*, 42 U.S.C. § 2000cc; Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 MD. L. REV. 40, 40 (2011) (noting widespread scholarly recognition of the expansive authority afforded by the Thirteenth Amendment, and arguing that courts should not impose the narrower interpretation of the Fourteenth Amendment powers on the Thirteenth Amendment).

[172] Carter, *supra* note 171, at 973 (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968)). The standard of review for legislation enacted based on the Thirteenth Amendment parallels the relatively low bar of rational basis review previously used to examine legislation based on the Commerce Clause. Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 U. PA. J. CONST. L. 1337, 1345 (2009). *See generally* Golinski v. U.S. Off. of Pers. Mgmt., 824 F. Supp. 2d 968, 981 (N.D. Cal. 2012) (explaining rational basis review as requiring that the law at issue merely "be rationally related to the furtherance of a legitimate governmental interest" (citing Clark v. Jeter, 486 U.S. 456, 461 (1988))).

[173] Tsesis, *supra* note 172, at 1345.

[174] *See* Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1843–44 (2006) (noting that abolitionists around the time of the Thirteenth Amendment's enactment thought that it should inform, but not restrict, interpretation of the amendment's modern-day applications).

[175] *See infra* notes 177–186 and accompanying text (highlighting several similarities between the Thirteenth and Fourteenth Amendments).

sovereign immunity, such parallels might imply that Congress can also rely on its Thirteenth Amendment enforcement powers to do so.[176]

To start, both amendments have enforcement clauses authorizing Congress to carry out its aims through appropriate legislation.[177] Further, the states ratified both amendments *after* the Eleventh Amendment took effect, demonstrating that they considered state sovereign immunity when enacting these amendments.[178] This is significant because, in *Seminole Tribe of Florida*, the Supreme Court noted the timing of the Fourteenth Amendment's ratification as part of the reason why it constituted a valid source of power for abrogating state sovereign immunity.[179] The Court reasoned that the Fourteenth Amendment, by shifting state-federal power dynamics, transformed the existing understanding of the Eleventh Amendment as a limit on the judiciary's Article III powers.[180] In contrast, the Commerce Clause was not a valid source of power

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[176] *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996) (recognizing that Congress may abrogate state sovereign immunity pursuant to its power in Section 5 of the Fourteenth Amendment).

[177] *See* U.S. CONST. amend. XIII, § 2 (vesting Congress with the authority to enforce the substantive promises of Section 1 of the amendment through legislation); *id.* amend. XIV, § 5 (giving Congress the ability to enforce the prior four provisions of the Fourteenth Amendment through legislation).

[178] *See id.* amend. XI (having been ratified in 1795); *id.* amend. XIII, § 2 (having been ratified in 1865); *id.* amend. XIV, § 5 (having been ratified in 1868); *see also* George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1381 (2008) (noting that the enactment of the Reconstruction Amendments meant that "[m]atters that previously had been the exclusive domain of the states were now subject to federal regulation that could, under the Supremacy Clause, displace state law").

[179] *See Seminole Tribe of Fla.*, 517 U.S. at 65–66. The Court found that the plurality in that case had mistakenly depended on another Supreme Court decision, *Fitzpatrick v. Bitzer*. *Id.* at 65; Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). The Court reasoned that Congress properly abrogated state sovereign immunity under the Fourteenth Amendment in *Fitzpatrick* because that case involved legislation enacted pursuant to Congress's Fourteenth Amendment enforcement powers. *Seminole Tribe of Fla.*, 517 U.S. at 65; *see* Tanika Michelle Capers, Comment, *The Curtailment of Federal Court Jurisdiction:* Seminole Tribe of Florida v. Florida, 24 T. MARSHALL L. REV. 109, 138 (1998) (explaining the Court's rationale in *Seminole Tribe of Florida*). In contrast, in *Pennsylvania v. Union Gas Co.*, Congress passed the legislation at issue pursuant to the Commerce Clause. 491 U.S. 1, 1–2 (1989); Capers, *supra*, at 138. This was relevant because the Commerce Clause already existed at the time that the Eleventh Amendment was enacted, whereas the Fourteenth Amendment, which came afterwards, actively shifted the power balance between the states and the federal government. Capers, *supra*, at 138; *see Seminole Tribe of Fla.*, 517 U.S. at 65–66 (noting how the Fourteenth Amendment "operated to alter the pre-existing balance between state and federal power"); *see also* Rutherglen, *supra* note 178, at 1380–81 (stating that the Thirteenth, Fourteenth, and Fifteenth Amendments simultaneously restricted state authority and increased federal authority).

[180] *Seminole Tribe of Fla.*, 517 U.S. at 65–66; *see* Scott Dodson, *The Metes and Bounds of State Sovereign Immunity*, 29 HASTINGS CONST. L.Q. 721, 761 (2002) (arguing that all constitutional amendments that have enforcement clauses aimed at restricting state behavior imply some level of congressional abrogation power). In addition to the Fourteenth Amendment's Section Five enforcement power, the article also refers to the Thirteenth, Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth amendments among that group. Dodson, *supra*, at 761 n.203.

for state sovereign immunity abrogation because Congress and the states enacted it *before* the Eleventh Amendment.[181]

Notably, the Thirteenth Amendment, like the Fourteenth Amendment, provides the federal government with authority to regulate state action.[182] The Fourteenth Amendment prohibits states from enforcing laws that deny people equal protection or that deprive them of certain rights absent due process.[183] Although the Thirteenth Amendment's language prohibits slavery and involuntary servitude without explicitly mentioning the states, it has been interpreted to apply to both state and private action.[184] Indeed, Congress and the states enacted the Thirteenth Amendment for the very purpose of eliminating state-sanctioned slavery.[185] The parallels between these two amendments provide support for the theory that, like the Fourteenth Amendment, Congress should have authority to abrogate state sovereign immunity pursuant to its Thirteenth Amendment enforcement powers.[186]

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[181] Capers, *supra* note 179, at 138 (explaining that the Court in *Seminole Tribe of Florida* rejected the theory of congressional abrogation of state sovereign immunity based on the Commerce Clause in part due to the fact that all Article I powers existed prior to the enactment of the Eleventh Amendment); *see Seminole Tribe of Fla.*, 517 U.S. at 65–66 (highlighting that the Fourteenth Amendment, adopted after the Eleventh Amendment, "operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment").

[182] *See* Ryan D. Walters, *The Thirteenth Amendment "Exception" to the State Action Doctrine: An Originalist Reappraisal*, 23 GEO. MASON UNIV. C.R.L.J. 283, 283–84 (2013) (discussing the "state action doctrine," or the idea "that the U.S. Constitution applies only to governmental actors" rather than individuals). Congress enacted section one of the Thirteenth Amendment as a "ban on slavery against states." *Id.* at 286. Most scholars agree that the Thirteenth Amendment represents "an exception" to the state action doctrine in that it also "applies directly to private actors," although others argue that it is only through section two of the amendment that the requirements of section one are extended to private actors. *Id.*

[183] *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[184] *See id.* amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."); Kozak, *supra* note 137, at 69 n.193 ("[The Thirteenth 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." (quoting The Civil Rights Cases, 103 U.S. 3, 20 (1883))).

[185] *See* Tsesis, *supra* note 171, at 42 (noting that the Thirteenth Amendment's main goals were to end slavery and authorize Congress to protect formerly enslaved persons from any attempts to re-subjugate them into slavery).

[186] *See infra* notes 206–231 and accompanying text (arguing that the similarities between the Thirteenth and Fourteenth Amendments imply that the Thirteenth Amendment is also a valid source of power from which Congress can abrogate state sovereign immunity).

III. NOT OFF THE HOOK: WHY STATES SHOULD BE HELD LIABLE FOR TVPA VIOLATIONS, AND HOW TO GET THERE

State liability under the TVPA as it currently stands is not impossible, yet it presents significant challenges.[187] To afford plaintiffs who have suffered violations at the hands of states clear remedial pathways, Congress should amend the TVPA to explicitly account for government liability, including specific mention of "states."[188] Further, in interpreting future TVPA suits against state entities, courts should rule that the Thirteenth Amendment represents the overarching source of Congress's power in enacting the TVPA, and should consequently hold that state sovereign immunity is appropriately abrogated based on this power.[189]

Section A of this Part explains why Congress should amend the TVPA, suggesting that its failure to do so leaves the question of TVPA liability for government entities, and states in particular, unacceptably ambiguous.[190] Section B then argues that the Thirteenth Amendment is both the source of Congress's power in enacting the TVPA and a valid source for abrogation purposes.[191] It suggests that plaintiffs who sue state entities for TVPA violations are uniquely positioned to help expand the narrow abrogation doctrine established by the Supreme Court's 1996 decision in *Seminole Tribe of Florida v. Florida*.[192]

A. Congress Should Amend the Trafficking Victims Protection Act to Explicitly Extend Liability to States and Other Government Entities

To improve plaintiffs' abilities to hold states accountable for TVPA violations, Congress should amend the TVPA to affirmatively name them as poten-

[187] *See* Beale, *supra* note 37, at 38–39 (noting several cases where courts have held that government entities cannot face TVPA liability). *But see* Ruelas v. County of Alameda, 519 F. Supp. 3d 636, 647 (N.D. Cal. 2021) (allowing a TVPA suit to move forward against a county and county sheriff).

[188] *Cf.* Fitzpatrick v. Bitzer, 427 U.S. 445, 448–49, 452 (1976) (holding that by amending Title VII of the Civil Rights Act of 1964 to explicitly include government entities, Congress demonstrated its intent to permit suits against states). Congress amended "person" in the definitions section of the Act to also account for "governments, governmental agencies, (and) political subdivisions." *Id.* at 449 n.2 (alteration in original).

[189] *See* United States v. Garcia, No. 02-CR-110S-01, 2003 WL 22938040, at *3 (W.D.N.Y. Dec. 2, 2003) (holding that Congress had authority to pass the TVPA's forced labor provision based on its Thirteenth Amendment enforcement power). *But see* Mojsilovic v. Okla. *ex rel.* Bd. of Regents for the Univ. of Okla., 841 F.3d 1129, 1133 (10th Cir. 2016) (declining to follow this holding and instead concluding that Congress passed the TVPRA based on its authority under the Commerce Clause).

[190] *See infra* notes 193–205 and accompanying text.

[191] *See infra* notes 206–221 and accompanying text. *See generally* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996) (articulating the test courts apply to determine if Congress properly abrogated the states' Eleventh Amendment immunity).

[192] *See infra* notes 222–231 and accompanying text.

tial defendants.[193] Currently, the use of broad terms to refer to the responsible actors, such as "whoever," "defendant," and "perpetrator," do not go far enough in demonstrating congressional intent to subject states to TVPA liability.[194] Appellate courts have relied on the statute's use of "whoever" to uphold a plaintiffs' right to sue corporate entities, but admittedly, they have done so by looking to the Dictionary Act's definition of this word, which includes corporations.[195] Although a small handful of TVPA cases have proceeded against local governments, the absence of government entities from the language of the TVPA and the Dictionary Act, and especially the failure to explicitly mention "states," mean that unless the TVPA is amended, some courts will surely continue to exempt state and other government authorities from TVPA liability.[196]

Advocates for protecting states from suit would likely find such an outcome desirable, pointing to traditional rationales for sovereign immunity.[197] Historically, defenders of this doctrine have suggested that allowing suits against the sovereign burdens government with onerous lawsuits and directs its attention away from more pressing issues.[198] Others justify sovereign immunity based on the notion of respect for a state's inherent "dignity" and sovereign

[193] *See supra* notes 90–106 (discussing the difficulties in establishing government liability under the current language of the TVPA).

[194] *See* 18 U.S.C. §§ 1589, 1591, 1595 (having no mention of "government" or similar variations of this word as a potential defendant in the TVPA's criminal provisions for forced labor and sex trafficking, and its provision for civil remedy); *see also Mojsilovic*, 841 F.3d at 1132 (holding that Congress did not contemplate state liability under the TVPRA because the statutory language failed to explicitly name state governments). *See generally* Dellmuth v. Muth, 491 U.S. 223, 230 (1989) (holding that legislative history is not determinant of congressional abrogation of state sovereign immunity and instead noting that Congress must make its intent evident through the statutory text).

[195] *See* Barrientos v. CoreCivic, Inc., 951 F.3d 1269, 1277 (11th Cir. 2020) (noting that the Dictionary Act's use of corporations and companies in its definition of "whoever" supported the argument that private immigration detention contractors could be liable under the TVPA). The court also noted that the TVPA's plain text was unambiguous and did not restrict liability to particular types of defendants in any way. *Id*. at 1276–77.

[196] *Compare* Ruelas v. County of Alameda, 519 F. Supp. 3d 636, 647 (N.D. Cal. 2021) (ruling that county governments are not excluded from TVPA liability), *with Mojsilovic*, 841 F.3d at 1131 (concluding that Congress did not make its intent to abrogate state sovereign immunity unequivocally clear in the TVPRA), *and* Nuñag-Tanedo v. E. Baton Rouge Par. Sch. Bd., No. SACV 10-1172-AG, 2011 WL 13153190, at *11 (C.D. Cal. May 12, 2011) (concluding that a local school board could not be sued under the TVPA because the Dictionary Act excluded government from its definition of "whoever," which the TVPA uses to identify responsible actors).

[197] *See* Florey, *supra* note 26, at 784–96 (discussing four rationales behind sovereign immunity doctrine: (1) the "[s]overeign [e]ssentialist" rationale; (2) the need to safeguard the "public treasury"; (3) the need to protect democracy; and (4) concerns over "judicial competence").

[198] *See* PHELAN ET AL., *supra* note 66, at 7 (considering early justifications for sovereign immunity). Following the American Revolution, much of the impetus for adopting the Eleventh Amendment grew out of states' worries about being sued to collect on wartime debts. Christina Bohannan, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 N.Y.U. L. REV. 273, 279 (2002).

power.[199] Opponents of sovereign immunity, on the other hand, criticize it as an outdated doctrine unsuited for a democratic society where the people are supposed to be sovereign.[200]

Even if one accepts pro-sovereignty arguments at face value, leaving the TVPA as is leads to an untenable irony: it leaves the government as the *only* actor explicitly off the hook when it benefits from or contributes to acts like sex trafficking, forced labor, and peonage.[201] It is absurd to think that Congress, when it spoke of the need to pass the TVPA to eradicate modern slavery, meant to exempt state or other government authorities from responsibility for such heinous acts.[202] Indeed, it would present a dark and unacceptable irony if the same government that permitted and actively facilitated slavery for almost a century now sought to exempt itself from TVPA suits for forced labor and sex trafficking.[203] Although shielding states from lawsuits may be warranted in

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[199] *See* Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1038 (2000) (noting that the Supreme Court in *Alden v. Maine*, 527 U.S. 706 (1999), relied on a value-laden rationale for state sovereign immunity). The dignity argument in favor of state sovereign immunity is lacking, scholars argue, because "unlike humans, [states] lack emotions and cannot suffer affronts." *Id.* at 1039 (citing Michael C. Dorf, *The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 61 (1998)). Indeed, the Constitution already accounts for states' dignity by giving the Supreme Court, the highest court of the nation, with original jurisdiction over suits in which states are parties. *Id.*; *see* U.S. CONST. art. III, § 2, cl. 2 (providing the Original Jurisdiction Clause). Further, the very idea of states' dignity is based on the idea of "royal dignity," a notion that warrants reappraisal in a democratic society. Meltzer, *supra*, at 1040 (citing Alden v. Maine, 527 U.S. 706, 764–768 (1999) (Souter, J., dissent)).

[200] PHELAN ET AL., *supra* note 66, at 249–50. Opponents of sovereign immunity criticize its historical justifications, arguing that instead of protecting citizens from wasteful use of public resources, it actually functions to increase such costs as governments spend time and money hiding their unlawful conduct. *Id.* at 249. They also argue that the near impunity that the doctrine provides governments with comes at the detriment of everyday citizens when their rights are violated, and they are left without redress. *Id.*; *see* Chrystal Bobbitt, Comment, *Domestic Sovereign Immunity: A Long Way Back to the Eleventh Amendment*, 22 WHITTIER L. REV. 531, 531 (2000) (characterizing the Eleventh Amendment as a symbol of "oppression and judicially sanctioned state lawlessness").

[201] *See* Barrientos v. CoreCivic, Inc., 951 F.3d 1269, 1277 (11th Cir. 2020) (implying the TVPA can hold liable: "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals," but not government actors) (quoting Dictionary Act, 1 U.S.C. § 1)).

[202] *See* Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, div. A, § 102, 114 Stat. 1464, 1466 (codified as amended at 22 U.S.C. §§ 7101–7110) (stating that the TVPA aims to combat human trafficking, which is characterized as a "modern form of slavery"); *see also* H.R. REP. NO. 106-939, at 1 (2000) (describing the TVPA as "an Act to combat trafficking of persons, especially into the sex trade, slavery, and slavery-like conditions").

[203] *See* Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261, 262 (2000) (noting the numerous ways that the U.S. government institutionalized and constitutionalized slavery). In addition to more obvious constitutional provisions that facilitated slavery, including the Three-Fifths Clause and the Fugitive Slave Clause, many additional provisions and doctrines were derived, at least in part, from states' interests in maintaining slavery within their territory. *Id.* For example, the Insurrections Clause allowed for federal soldiers to be summoned to address insurrections of various types, including to disperse slave revolts. *Id.* at 262–63. Furthermore, slavery significantly impacted many arguments surrounding federalism, states' rights, preemption doctrine, and state police powers. *Id.* at 263. Although Congress and the states codified protections of slavery

some circumstances, TVPA claims—which reflect some of the most significant intrusions on human dignity and autonomy imaginable—are certainly not one of them.[204] Congress should therefore correct this gaping hole in accountability by amending the TVPA to explicitly account for government liability generally, and state liability specifically.[205]

B. TVPA Suits Present a Strong Test Case for Advocates to Challenge Restrictive State Sovereign Immunity Abrogation Precedent

Courts confronted with TVPA suits against state governments should conclude that Congress's Thirteenth Amendment enforcement power is its primary source of authority for enacting this legislation.[206] The TVPA's stated purpose to fight human trafficking, which it refers to as a "contemporary manifestation of slavery," is clearly derived from the Thirteenth Amendment's guarantee that "neither slavery nor involuntary servitude" would be permitted in the United States.[207] This is evidenced in the TVPA's findings section, where Congress repeatedly characterized human trafficking as modern slavery, referred to the use of violence to force victims into sex or "slavery-like labor," explained that trafficking violates anti-slavery laws, and noted the fundamental "right to be free from slavery and involuntary servitude."[208] Although the Act also refers to human trafficking's effects on interstate commerce, this is far outweighed by its overarching focus on combatting human exploitation.[209] Admittedly, the Supreme Court has upheld many pieces of legislation that are arguably related to human rights based on Congress's Commerce Clause powers rather than the Thirteenth Amendment.[210] Yet, scholars have criticized this practice as "dis-

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into the Constitution not long after the founding of the United States, slavery existed in the colonies far before this. *See* CARR ET AL., *supra* note 2525, at ix (noting that African slaves were forced into the Virginia Colony as early as 1619).

[204] *See* Florey, *supra* note 26, at 784–97 (critiquing various arguments in favor of sovereign immunity).

[205] *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996) (requiring Congress to "unequivocally" demonstrate its goal of abrogating state sovereign immunity in the statute in question (quoting Green v. Mansour, 474 U.S. 64, 68 (1985))).

[206] *See* United States v. Garcia, No. 02-CR-110S-01, 2003 WL 22938040, at *3 (W.D.N.Y. Dec. 2, 2003) (concluding that the Thirteenth Amendment serves as the source of Congress's authority in enacting the TVPA's forced labor provision).

[207] *See* U.S. CONST. amend. XIII, § 1 (prohibiting slavery in the United States or other places within its jurisdiction); 22 U.S.C. § 7101 (outlining the purposes and findings of the TVPA).

[208] § 7101.

[209] *See id.* § 7101(b)(12) (mentioning once in the purpose and findings section of the TVPA that human trafficking "substantially affects interstate and foreign commerce"); *id.* § 7101(b)(1)–(23) (using "slavery" thirteen times and "involuntary servitude" six times within the purpose and findings section).

[210] *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 242–43, 261 (1964) (rejecting a constitutional challenge to Title II of the Civil Rights Act of 1964 and concluding that Congress had authority to enact this legislation pursuant to its power to regulate interstate commerce).

honest" and "distorting."[211] Indeed, if Congress did not enact the TVPA pursuant to its Thirteenth Amendment enforcement power, it is difficult to imagine any other modern legislation based on this constitutional authority.[212]

Having determined that Congress enacted the TVPA based on its Thirteenth Amendment enforcement powers, courts should then hold that due to the Thirteenth Amendment's many parallels to the Fourteenth Amendment, it too serves as a valid source of authority for abrogation of state sovereign immunity.[213] Like the Fourteenth Amendment, Congress and the states enacted the Thirteenth Amendment subsequent to the Eleventh Amendment, and therefore contemplated state sovereign immunity at the time of its creation.[214] The Thirteenth Amendment has also been interpreted to apply to state action, and similar to the Fourteenth Amendment, it has an enforcement clause that authorizes Congress to implement it through appropriate legislation.[215]

Further, strong historical arguments counsel in favor of concluding that Congress can abrogate state sovereign immunity pursuant to its power to enforce the Thirteenth Amendment.[216] This Amendment affirmatively dismantled the constitutional structures that had long-provided a legal basis for slavery.[217] Up until its enactment, the Constitution actively protected slavery through pro-

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[211] *See* Pope, *supra* note 156, at 4 (noting that basing human rights legislation on a constitutional power to regulate commerce has also been criticized as "artificial" and "cagey").

[212] *See* Mason McAward, *supra* note 141, at 832 (concluding that the TVPA's text and legislative history demonstrate that the Thirteenth Amendment is an appropriate tool to remedy the offenses it articulates).

[213] *See* U.S. CONST. amend. XIII, § 2 (empowering Congress to implement the amendment's Section 1 aims to ban slavery and involuntary servitude in the U.S.); *id.* amend. XIV, § 5 (authorizing Congress to legislate to enforce the aims of § 1 of the amendment, which guarantees equal protection of the laws, due process, and establishes birthright citizenship).

[214] *See Ex parte* Virginia, 100 U.S. 339, 345 (1879) (noting that both the Thirteenth and Fourteenth Amendments sought to enhance congressional power at the expense of state power); Kozak, *supra* note 137, 68–69 (noting that the Thirteenth Amendment differed from the amendments that preceded it, in that, rather than placing limits on the federal government, it aimed "to regulate the States and their citizens" (citing United States v. Rhodes, 27 F. Cas. 785, 788 (C.C.D. Ky. 1866))); *see also supra* notes 178–181 (noting the significance of the timing of the enactment of the Thirteenth and Fourteenth Amendments subsequent to the Eleventh Amendment).

[215] *See* U.S. CONST. amend. XIII, § 2 (authorizing Congress to enact legislation to implement the Thirteenth Amendment); *id.* amend. XIV, § 5 (authorizing Congress to enact implementing legislation for the Fourteenth Amendment); *see also* Tsesis, *supra* note 172, at 1338 (noting that the Thirteenth Amendment required states as well as individuals to liberate enslaved persons).

[216] *See* Tsesis, *supra* note 174, at 1843–44 (claiming that courts should interpret the Thirteenth Amendment to apply to modern issues like human trafficking, peonage, and exploitation of workers). Congressional debates surrounding the Thirteenth Amendment's enactment drew on moral arguments about the Founders' "unfulfilled vision" for the country. *Id.* at 1843. Indeed, Tsesis argues that, "[t]here is nothing neutral about a constitutional provision containing a moral stance against the exploitation of human lives." *Id.*

[217] *See* Walters, *supra* note 182, at 286 (noting that the Thirteenth Amendment, viewed through an originalist lens, "was a prohibition on the positive legal structures that created and enforced the legal institution of slavery," which included exemptions within the context of slavery from otherwise applicable assault, kidnapping, and false imprisonment laws).

visions including the Three-Fifths Clause, the Fugitive Slave Clause, and the 1808 Clause.[218] In fact, some scholars have acknowledged that the Thirteenth Amendment "singlehandedly transformed the Constitution of the United States from that of a slave nation to that of a modern republic."[219] Surely, the very amendment that sought to abolish a government-sanctioned system of slavery cannot plausibly be interpreted to *defer* to state sovereign immunity.[220] Concluding otherwise would directly conflict with the language and purpose of the Thirteenth Amendment.[221]

Additionally, abrogation precedent, which has been interpreted to depend almost entirely on Congress's enforcement power under the Fourteenth Amendment, is highly restrictive.[222] It is high time to bring suits that can chip away at this narrow doctrine and expand opportunities for greater government accountability.[223] Because the Supreme Court has yet to directly consider whether the Thirteenth Amendment is a valid source of power for abrogating

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[218] Finkelman, *supra* note 203, at 262. The Three-Fifths Clause stated that for apportioning taxation and representation in Congress, the number of free people would be combined with "three fifths of all other Persons," a reference to enslaved persons. U.S. CONST. art. I, § 2, cl. 3. The Fugitive Slave Clause required that any enslaved persons who escaped into another state be "delivered up on claim of the party to whom such service or labor may be due." *Id.* art. IV, § 2, cl. 3. The 1808 Clause prohibited Congress from banning the slave trade at any time before 1808. *Id.* art. I, § 9, cl. 1.

[219] James Gray Pope, *What's Different About the Thirteenth Amendment, and Why Does It Matter?*, 71 MD. L. REV. 189, 189 (2011); *see* Aviam Soifer, *Of Swords, Shields, and a Gun to the Head: Coercing Individuals, but Not States*, 39 SEATTLE UNIV. L. REV. 787, 790 (2016) (noting that the Thirteenth Amendment changed the Constitution's very structure from proslavery to antislavery). Significantly, the Thirteenth Amendment marked the first time Congress ever afforded itself explicit authority to carry out a constitutional amendment, through the creation of an enforcement clause. Soifer, *supra*, at 790.

[220] *See* Soifer, *supra* note 219, at 812 ("[L]egal intervention to prevent the exploitation of vulnerable workers was at the core of Thirteenth Amendment guarantees.") The history behind both the Thirteenth Amendment and the other Reconstruction Amendments demonstrate that they "were not deferential to states' rights and state sovereignty." *Id.*

[221] *See* Mason McAward, *supra* note 141, at 843–44 (noting the close ties between the aims of the Thirteenth Amendment and efforts to combat human trafficking). The constitutional rationale behind the TVPA is that "[h]uman trafficking is modern-day slavery," and therefore, the TVPA constitutes implementing legislation expressly authorized by Section Two of the Thirteenth Amendment. *Id.* at 843.

[222] *See* Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167, 1170 (2003) ("Since its landmark decision in *Seminole Tribe of Florida v. Florida*, the Supreme Court has steadily constricted the set of circumstances in which private parties may sue states." (internal footnote omitted) (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996))).

[223] *See* PHELAN ET AL., *supra* note 66, at 249–50 (criticizing the sovereign immunity doctrine and its historical roots for shifting sovereignty away from the people to the state); Katherine Florey, *Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity as an Article III Doctrine*, 92 CALIF. L. REV. 1375, 1377–78 (2004) (noting the significant growth of the doctrine of sovereign immunity that occurred particularly during the Rehnquist Era Supreme Court).

state sovereign immunity, TVPA suits present an ideal opportunity to test the limits of this unresolved area of law.[224]

In conclusion, although analyzing the TVPA's statutory text and considering questions of abrogation doctrine can feel esoteric and abstract, the tangible consequences of these legal questions should remain at the forefront.[225] If Congress were to amend the TVPA to expressly account for state entities as potential defendants, plaintiffs like the Mojsilovics would have encountered a much clearer path forward for their forced labor suit.[226] By creating greater clarity surrounding criminal and civil liability for government entities, including states, an amendment to the TVPA can help dissuade them from engaging in or benefitting from prohibited behavior in the first place.[227] Some courts have already held that private corporations and local government entities can face TVPA liability for forced labor.[228] Why, then, should plaintiffs experiencing the same or similar conduct at the hand of states face greater challenges to legal redress?[229] Considering the parallels between acts of forced labor, peonage, and sex trafficking that are among modern-day TVPA violations, and the atrocities of antebellum slavery which the Thirteenth Amendment sought to eradicate, there should be no excuse for states.[230] They, too, must face TVPA liability.[231]

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[224] *See Seminole Tribe of Fla.*, 517 U.S. at 59, 72–73 (noting that the Court had only ever recognized the Fourteenth Amendment and the Commerce Clause as constitutional sources for abrogating state sovereign immunity, and subsequently striking the Commerce Clause as a valid source); William J. Rich, *Privileges or Immunities: The Missing Link in Establishing Congressional Power to Abrogate State Eleventh Amendment Immunity*, 28 HASTINGS CONST. L.Q. 235, 284 (2001) (noting how the Supreme Court in *Seminole Tribe of Florida* significantly limited abrogation doctrine, in effect making it so that "only a source of congressional power that modified Eleventh Amendment immunity could therefore be used to protect individual rights from state interference").

[225] *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1985) (explaining how legal interpretation intimately intersects with and contributes to violence). Cover contended that for one, legal interpretation often serves to justify past violence, leaving behind in its wake, those "victims whose lives have been torn apart by these organized, social practices of violence." *Id.*

[226] *See* Mojsilovic v. Oklahoma *ex rel*. Bd. of Regents for the Univ. of Oklahoma, 841 F.3d 1129, 1132 (10th Cir. 2016) (noting that the TVPRA's use of sweeping terms like "perpetrator" and "whoever," without a clarifying definition, "signal[ed] no intent to abrogate state sovereign immunity").

[227] *See* Chacón, *supra* note 54, at 3037 (noting that TVPA prosecutions of employers who exploit undocumented workers could serve to discourage such behavior).

[228] *See* Barrientos v. CoreCivic, Inc., 951 F.3d 1269, 1271 (11th Cir. 2020) (ruling that private contractors can be held liable under the TVPA); Ruelas v. County of Alameda, 519 F. Supp. 3d 636, 647–48 (N.D. Cal. 2021) (declining to exempt county defendants from TVPA liability, instead noting that the TVPA's context showed that Congress meant to sweep in sovereign actors).

[229] *See Mojsilovic*, 841 F.3d at 1130 (concluding that the state university was protected from TVPRA litigation because of its sovereign immunity).

[230] *See supra* notes 30–53 and accompanying text (discussing the historical context and drawing connections between the slave trade and TVPA violations).

[231] *See supra* notes 193–205 and accompanying text (arguing that the TVPA should be amended to expressly contemplate government liability).

CONCLUSION

In recent years, courts have recognized new grounds for liability under the TVPA by upholding plaintiffs' rights to sue corporations. This raises important questions about the possibilities for government liability broadly, and state liability more narrowly. Along with this opportunity, however, come the challenges inherent in suing state entities. Sovereign immunity provides states with significant protection from suit, yet even this expansive protection is not absolute. Currently, the TVPA's language does not go far enough in expressing clear congressional intent to abrogate state sovereign immunity. To resolve this shortcoming of the nation's principal counter-human trafficking statute, Congress should amend it to affirmatively cover states, as well as other government entities. Courts faced with TVPA suits against states should, in turn, conclude that Congress enacted the TVPA pursuant to its Thirteenth Amendment enforcement power, and that this power is a valid source for congressional abrogation of state sovereign immunity. Ultimately, these statutory and interpretive shifts will allow individuals like the Mojsilovics to seek the remedy they deserve when states violate their rights under the TVPA.

HEATHER ODELL