

Of Swords, Shields, and a Gun to the Head: Coercing Individuals, But Not States

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The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare for liberty; but in using the same *word* we do not all mean the same *thing*.

The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as a *liberator*, while the wolf denounces him for the same act as a destroyer of liberty¹

Mrs. Premise [on the phone with Mrs. Sartre]: When will [Jean-Paul Sartre] be free? . . . Ooooooh. Ha ha ha ha. (To Mrs. Conclusion) She says he's spent the last sixty years trying to work that one out.²

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* Dean and Professor, William S. Richardson School of Law, University of Hawai'i. The author expresses great gratitude to the organizers and participants in this Symposium; to the unusually helpful editors and staff of the *Seattle University Law Review*; and to Tom Michener '17 of the William S. Richardson School of Law for his exemplary research assistance.

1. Abraham Lincoln, Address at Sanitary Fair, Baltimore, Maryland (Apr. 18, 1864), in 7 COLLECTED WORKS OF ABRAHAM LINCOLN 301–02 (Roy P. Basler ed., 1953).

2. *Mrs. Premise and Mrs. Conclusion Visit Jean-Paul Sartre*, MONTYPYTHON.NET, <http://www.montypython.net/scripts/premise.php> (last visited Jan. 13, 2016); see also *Monty Python – Mrs. Premise and Mrs. Conclusion*, YOUTUBE, <https://www.youtube.com/watch?v=crIjvcWkVcs> (last visited Jan. 13, 2016). My brother, Eldon, brought this exchange to my attention. Eldon teaches philosophy and he is one of the few philosophers to be connected specifically to the insights of The Simpsons. See Jason Holt, *Springfield Hypocrisy*, in THE SIMPSONS AND PHILOSOPHY: THE D'OH! OF HOMER 179, 185 (William Irwin et al. eds., 2001) (citing Béla Szabados & Eldon Soifer, *Hypocrisy After Aristotle*, 37 DIALOGUE 545, 563 (1998)).

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INTRODUCTION

This excellent Symposium specifically celebrated the sesquicentennial year of the amendment that President Lincoln proclaimed to be “a King’s cure for all the evils”³ of slavery. Many of the participants have been fortunate to take part in a series of additional symposia on Thirteenth Amendment issues; some of us have focused on the historical context as well as the current and future implications of this amendment which “[b]y its own unaided force it abolished slavery, and established universal freedom.”⁴ Others pounded computer keyboards to illuminate the statutory framework that Congress established, the framework based on the Thirteenth Amendment and prior to passage of the Fourteenth Amendment.⁵ And, to the credit of the organizers of this Symposium, its call for articles yielded impressive work by several newcomers to Thirteenth Amendment issues.

This Article begins with a brief reprise of what should be a textual “gotcha” about the Enforcement Clauses of the post-Civil War Amendments—if our current Supreme Court Justices actually cared about original texts, originalism, or a combination of the two. Next, the Article focuses on the gnarled issue of “coercion.” It argues that, contrary to a great deal of Anglo-American legal doctrine, coercion is best understood along a spectrum rather than as a binary phenomenon. Coercion is actual-

3. Abraham Lincoln, Response to a Serenade (Feb. 1, 1865), in 8 COLLECTED WORKS OF ABRAHAM LINCOLN 254 (Roy P. Basler ed., 1953). The day after passage of the Thirteenth Amendment on January 31, 1865, Lincoln told a celebratory crowd gathered at the White House that the amendment “winds the whole thing up” as he embraced “this great moral victory.” *Id.* at 255–56. Lincoln’s uncharacteristically active role in lobbying for the Thirteenth Amendment is captured well in Doris Kearns Goodwin’s book *Team of Rivals* (2005) and, in somewhat exaggerated form, in Steven Spielberg’s movie *Lincoln* (2012).

4. Civil Rights Cases, 109 U.S. 3, 20 (1883).

5. Actually, I began this effort many years before personal computers were in use. See, e.g., Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger’s History*, 54 N.Y.U. L. REV. 651 (1979); see also Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921*, 5 LAW & HIST. REV. 249 (1987) [hereinafter Soifer, *The Paradox*]; Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916 (1987).

ly much contested and highly contextual across many legal categories. Federal coercion—also described as commandeering⁶ or dragooning⁷—has become a particular constitutional focus in recent decades.

Part II briefly describes the Court's particular concern regarding the need for agreements by states to be intelligent, voluntary, and uncoerced, which entails maintaining the equal dignity of all states and state officials. It compares this politesse, generally proclaimed to be anchored in federalism,⁸ with the Court's considerably more relaxed acceptance of federal coercive power over individuals.

Part III considers the jagged edges around decisions about what could or should qualify as “voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise.”⁹ Starting with the recognition, at one end of the spectrum, that any contract could be considered coercive, Part III briefly compares and contrasts the doctrine of duress in mainstream standard contract law doctrine with the historic evisceration of the very concept of freedom from voluntary peonage. This evisceration was perpetrated by U.S. Supreme Court Justices as well as by innumerable employers imposing harsh *realpolitik* as a devastating form of law in action.¹⁰

It is thus noteworthy that even in the course of the Supreme Court's infamously crabbed description of what civil rights should entail in the *Civil Rights Cases*,¹¹ Justice Bradley's majority opinion also proclaimed:

Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding

6. *Printz v. United States*, 521 U.S. 898, 914 (1997).

7. *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2605 (2012) (Roberts, C.J., plurality opinion).

8. See, e.g., Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 176 (2013), <http://yalelawjournal.org/forum/the-dignity-of-the-south> (“The idea that states have dignity, and that this dignity has some constitutional force—although not, to be sure, because of any specific piece of constitutional text—emerged as an important theme in the ‘new’ federalism jurisprudence of the 1990s.”); Aviam Soifer, *Courting Anarchy*, 82 B.U. L. REV. 699 (2002) (describing the U.S. Supreme Court's “metafederalism”).

9. Peonage Abolition Act of 1867, ch. 187, §1, 14 Stat. 546, 546 (codified at 42 U.S.C. § 1994 (2012)).

10. See, e.g., PETE DANIEL, *THE SHADOW OF SLAVERY* 19–42 (1972); DANIEL A. NOVAK, *THE WHEEL OF SERVITUDE* 44–62 (1978); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 70–72, 82–118 (2d rev. ed. 1966); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646, 648–49, 710–11 (1982).

11. 109 U.S. 3 (1883).

slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.¹²

In looking more deeply into the Thirteenth Amendment and statutes based upon it, I found that on the last day of the lame-duck 39th Congress, the authors of what became the Fourteenth Amendment passed the Peonage Abolition Act of 1867. They did so on March 2, 1867, the same day that Congress divided the South into five districts and sent in federal troops.¹³

I. CONGRESS'S ENFORCEMENT POWER

With adoption of the Thirteenth Amendment, “[a] structurally pro-slavery Constitution became, in a flash, stunningly antislavery.”¹⁴ For a myriad of reasons, for the first time in American history, Congress also added a clause giving Congress enforcement power. Elsewhere, I have reviewed the historic context for how and why Congress decided to use its new enforcement power to override President Johnson’s veto of the 1866 Civil Rights Act—the first time Congress exercised such power regarding a major legislation—and how and why Congress decided to pass the Peonage Abolition Act of 1867.¹⁵ But a basic logical point merits emphasis here.

The Thirteenth Amendment states:

Section 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.

12. *Id.* at 20. Bradley added a broad description of Congress’s power to enforce the Thirteenth Amendment, pointing out that the amendment not only nullified all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with the power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States

Id. This broad view, and a great deal of surrounding evidence, should go far toward answering any question as to whether the rights anchored in the Thirteenth Amendment give rise to a private right of action, a federal courts issue that surely never occurred to be a problem in the years immediately after the Civil War.

13. An Act to Provide for the More Efficient Government of the Rebel States (Military Reconstruction Act), ch. 153, § 1, 14 Stat. 428 (1867).

14. AKHIL REED AMAR, *AMERICA’S CONSTITUTION* 360 (2005).

15. See, e.g., Aviam Soifer, *Protecting Full and Equal Rights: The Floor and More*, in *THE PROMISES OF LIBERTY* 196 (Alexander Tsesis ed., 2010); Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607 (2012).

Section 2. *Congress shall have power to enforce this article by appropriate legislation.*¹⁶

On January 3, 1867, the 39th Congress returned for its lame-duck session following the 1866 congressional election, which had turned out to be a disaster for President Johnson and an overwhelming victory for the Republicans.¹⁷ Radical Republican leaders Senator Charles Sumner of Massachusetts and Representative Thaddeus Stevens of Pennsylvania immediately gave speeches decrying, respectively, the peonage of Mexicans and Indians in the Southwest and the failure to protect “loyal brethren at the South, whether they are black or white, whether they go there from the North or are natives of the South . . . from the barbarians who are daily murdering them.”¹⁸ By March 2, Congress had decided to send troops to protect those “loyal brethren at the South,” and to enact the Peonage Abolition Act, which provided:

[T]he holding of any person to service or labor under the system known as peonage is hereby declared to be unlawful, and the same is hereby abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or of any other Territory or State of the United States, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, *the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise*, be, and the same are hereby, declared null and void.¹⁹

As it might have been put at the time, it cannot be gainsaid that the 39th Congress thus used its enforcement power to go beyond the rights protected in Section 1 of the Thirteenth Amendment. By adding a statutory prohibition of “voluntary” service to the Amendment’s explicit prohibition of “involuntary service,” the 39th Congress clearly believed that it possessed the power to protect rights in addition to those protected explicitly within the amendment’s text.

It should be clear that such a “latitudinarian” approach to the power granted to Congress through the Enforcement Clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments comes much closer to the view of the extent of Congress’s enforcement power taken by the Warren Court

16. U.S. CONST. amend. XIII (emphasis added).

17. Soifer, *Federal Protection*, *supra* note 15, at 1615–19.

18. CONG. GLOBE, 39th Cong., 2d Sess. 239–40, 251 (1867).

19. Peonage Abolition Act of 1867, ch. 187, §1, 14 Stat. 546, 546 (codified at 42 U.S.C. § 1994 (2012)) (emphasis added).

than it is to the crabbed view repeatedly embraced by the Rehnquist and Roberts Courts. It finds direct echoes in *South Carolina v. Katzenbach*²⁰ and *Katzenbach v. Morgan*,²¹ but, this approach has been firmly rejected in more recent decisions such as *City of Boerne v. Flores*,²² *United States v. Morrison*,²³ and *Board of Trustees of the University of Alabama v. Garrett*.²⁴ The Court's recent devotion to the limits of federalism and to the sovereignty of the states aggressively protects states' rights from Congress's authority in ways that undoubtedly would have surprised the congressional authors of the Civil War Amendments.

As the next Part makes clear, the Court now believes that it must intervene if an unstated (and often directly misstated) deep structure of federalism seems to a majority of the Justices to be inconsistent with the powers granted to Congress in Article 1 of the Constitution, even as broadly supplemented by the Enforcement Clauses of the Reconstruction Amendments.

II. OVERWHELMING THE FREE WILL OF THE STATES

A. *Social Security v. Obamacare*

It is a commonplace idea that the Court, beginning in 1937, changed course dramatically and began to uphold extensive use of congressional power of the sort it had been in the practice of invalidating for many years. One of many examples of such a "switch in time that saved nine"²⁵ was the Court's decision to deny constitutional challenges to the Social Security Act of 1935.

The Court emphatically rejected a claim that the tax and credit elements of the original Social Security Act's unemployment compensation provisions involved "the coercion of the states in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government."²⁶ Justice Cardozo's 5-4 majority opinion emphasized the national scope of the unemployment problem during the Great Depression and seemed to mock the claim that the statute's "dominant end . . . is to drive the state Legislatures under the whip of economic pressure into the

20. 383 U.S. 301 (1966).

21. 384 U.S. 641 (1966).

22. 521 U.S. 507 (1997).

23. 529 U.S. 598 (2000).

24. 531 U.S. 356 (2001).

25. A popular, but contested, story is that Justice Owen Roberts reversed his previous relatively conservative course and voted to uphold a minimum wage law in the face of President Franklin Roosevelt's plan to pack the Court with the President's supporters. See, e.g., Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 622 (1994); Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 70 (2010).

26. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 585 (1937).

enactment of unemployment compensation laws at the bidding of the central government.”²⁷ Rather, Cardozo wrote:

[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems.²⁸

Cardozo conceded that there could be times when a statute might “call for a surrender by the states of powers essential to their quasi-sovereign existence,”²⁹ but he left drawing “the outermost line” to “the wisdom of the future.”³⁰

Chief Justice Roberts clearly believed that the wisdom of the future required drawing just such a line in *National Federation of Independent Business v. Sebelius (NFIB)*.³¹ Congress’s financial inducement to the states to participate in the Affordable Care Act, said the Court, “is much more than ‘relatively mild encouragement’—it is a gun to the head.”³² Because the states could lose all their federal Medicaid funding, they faced “economic dragooning that leaves the States with no real option but to acquiesce.”³³ The Court also felt compelled to protect the states from federal intrusion on their police power, anchored in the Commerce Clause, because “[a]ny police power to regulate individuals as such, as opposed to their activities, remains vested in the States.”³⁴ Ironically, of course, Chief Justice Roberts nonetheless managed to stitch together enough votes to uphold the mandate requiring individuals to participate in the Affordable Care Act by labeling that form of purported coercion a tax penalty, within the broad scope of Congress’s taxing power.³⁵

27. *Id.* at 587.

28. *Id.* at 589–90. In a companion case, Cardozo again wrote for the Court upholding the old age benefit provisions of the 1935 Social Security Act. He emphasized the problem states would face of what we would now call a “race to the bottom” in which states that did provide benefits would find that their programs would become “a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose. Only a power that is national can serve the interests of all.” *Helvering v. Davis*, 301 U.S. 619, 644 (1937).

29. *Steward*, 301 U.S. at 593.

30. *Id.* at 591.

31. *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2566 (2012).

32. *Id.* at 2604 (Roberts, C.J., plurality opinion).

33. *Id.* at 2605. Roberts also emphasized that there was a large amount of money involved and that, in his view, the changes required in Affordable Care Act regarding Medicaid funding constituted a retroactive change that the states could not have anticipated and which, if upheld, could force the states to continue to accept new conditions tied to the funding they accepted. *See id.* at 2604.

34. *Id.* at 2591.

35. *Id.* at 2598. Consider also the sequence reaching toward socialism in several Dormant Commerce Clause decisions involving solid waste disposal. In *City of Philadelphia v. New Jersey*,

B. Freeing the States from Federal Coercion

NFIB was hardly alone among recent decisions in its emphasis on the importance of assuring states that the Court would intervene to protect their autonomy. Justice O'Connor triggered the successful modern state autonomy doctrine writing for the majority in *New York v. United States*.³⁶ In the course of invalidating the "take title" aspect of the complex Low-Level Radioactive Waste Policy Amendments of 1985, O'Connor endorsed the Court's earlier recognition that "[t]he Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology."³⁷ Nonetheless, the Court declared that even the "consent" of state officials could not validate what the Justices themselves perceived to be unconstitutional federal coercion.³⁸

"In the end," Justice O'Connor wrote, "the [Constitutional] Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States."³⁹ The Court sought to limit the power of Congress to "commandeer" the states, and emphasized the idea that "the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself"⁴⁰

A number of more recent and much more far-reaching decisions have indeed regarded state sovereignty as an end in itself. The Court now has repeatedly elevated both state sovereignty and the Tenth Amendment over individual rights, whether protecting state officials from being commandeered to keep gun registration records⁴¹ or invalidating Con-

437 U.S. 617 (1978), New Jersey's claim understandably worrying about its environment fell victim to the free flow of commerce; similarly, in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), a majority was unwilling to accept even a limited public-private partnership. Yet in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007), Chief Justice Roberts's majority opinion stressed the public ownership of the waste processing facility and fit its compulsory use within the acceptable realm of governmental "responsibility of protecting the health, safety, and welfare of its citizens." *Id.* at 342.

36. 505 U.S. 144 (1992) (construing Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240, 99 Stat. 1842). Then-Associate Justice Rehnquist had tried earlier to limit Congress's Commerce Clause power in *National League of Cities v. Usery*, 426 U.S. 833 (1976), holding that if the Court determined that a federal statute interfered with traditional, integral, or essential state functions, the statute would be unconstitutional. Rehnquist lost Justice Blackmun's vote, however, and thus his majority, less than a decade later in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

37. *New York*, 505 U.S. at 156-57.

38. *Id.* at 182 ("Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the 'consent' of state officials.").

39. *Id.* at 165.

40. *Id.* at 181.

41. *Printz v. United States*, 521 U.S. 898 (1997).

gress's effort to afford additional protection for victims of sexual violence—even if a substantial majority of the states supported the measure and filed an amicus brief to that effect.⁴² And the sword and shield that were meant to guarantee protection to individuals through the post-Civil War Amendments and federal statutes based upon them have long since been shelved on behalf of states' rights.

These decisions are a far cry even from what then-Associate Justice Rehnquist said for the Court in the 1970s. Though the Court expanded the reach of state sovereign immunity in *Edelman v. Jordan*,⁴³ for example, Rehnquist's majority opinion embraced the "noble lie"⁴⁴ of *Ex parte Young*⁴⁵ and said of that decision: "This holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect."⁴⁶ Writing for the Court a few years later in *Fitzpatrick v. Bitzer*,⁴⁷ Rehnquist further developed the theme of sword-as-well-as-shield in the post-Civil War Amendments as he proclaimed, "As ratified by the States after the Civil War, [the Fourteenth] Amendment quite clearly contemplates limitations on their authority."⁴⁸ Indeed, his *Bitzer* opinion stressed the importance of the Fourteenth Amendment's Enforcement Clause through which Congress sought to guarantee protection if states failed in their duties to individuals, which the Court held Connecticut had done when it distinguished between men and women in its state pension scheme.⁴⁹ As he broadly construed Title VII, Rehnquist stated: "The sub-

42. *United States v. Morrison*, 529 U.S. 598 (2000). Justice Souter, dissenting with Justices Stevens, Ginsburg, and Breyer, noted that the National Association of Attorneys General supported the Act unanimously, and the Attorneys General from thirty-eight states urged Congress to enact the Civil Rights Remedy. *Id.* at 653 (Souter, J., dissenting). Moreover, thirty-six states and the Commonwealth of Puerto Rico filed an amicus brief in support of the petitioners in these cases, and only one state took respondents' side. *Id.* at 654.

43. 415 U.S. 651 (1973).

44. See Aviam Soifer, *Truisms That Never Will Be True: The Tenth Amendment and the Spending Power*, 57 U. COLO. L. REV. 793, 833 n.7 (1986); Larry Yackle, *Young Again*, 35 U. HAW. L. REV. 51 (2013).

45. *Ex parte Young*, 209 U.S. 123 (1908).

46. *Edelman*, 415 U.S. at 664. Rehnquist may have been channeling Justice Jackson, for whom he served as a law clerk starting in 1952. Linda Greenhouse, *William H. Rehnquist, Chief Justice of Supreme Court, Is Dead at 80*, N.Y. TIMES (Sept. 4, 2005), available at http://www.nytimes.com/2005/09/04/politics/william-h-rehnquist-chief-justice-of-supreme-court-is-dead-at-80.html?_r=0.

Jackson's opinion for the Court in *Pollock v. Williams*, 322 U.S. 4 (1944), struck down a conviction for fraud allegedly perpetrated by Emanuel Pollock for accepting five dollars without doing the required work—and thus being subject to a fine of one hundred dollars and sixty days in jail—and declared that through passage of the Thirteenth Amendment and the Peonage Abolition Act, "Congress thus raised both a shield and a sword against forced labor because of debt." *Id.* at 8; see also *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982).

47. 427 U.S. 445 (1976).

48. *Id.* at 453.

49. See *Corning Glass Works v. Brennan*, 417 U.S. 188, 209–10 (1974).

stantive provisions [of the Fourteenth Amendment] are by express terms directed at the States. Impressed upon them by those provisions are *duties with respect to their treatment of private individuals*.^{50]} Standing behind these imperatives is Congress' power to 'enforce' them 'by appropriate legislation.'⁵¹ Thus in 1976, Rehnquist could confidently note that the Fourteenth Amendment sword had carved congressional power out of state authority. He emphasized *Ex parte Virginia*'s "early recognition of this shift in the federal-state balance" and he insisted that recognition of this change "has been carried forward by more recent decisions of this Court."⁵²

*Shelby County v. Holder*⁵³ is the latest stark example of the Court's aggressive stance toward Congress's efforts to provide federal protection. Out of its concern for the dignity of the states, the majority opinion

50. For a sharp contrast, see Chief Justice Rehnquist's majority opinion in *DeShaney v. Winnebago Cnty. Soc. Servs. Dep't*, 489 U.S. 189, 195 (1989) (no state obligation to protect a four-year-old boy from savage beatings by his father because "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors"). See generally Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of DeShaney*, 57 GEO. WASH. L. REV. 1513 (1989).

51. *Fitzpatrick*, 427 U.S. at 453 (emphasis added). Rehnquist went on to rely heavily on *Ex parte Virginia*, 100 U.S. 339 (1880), noting that in that decision, "The Court first observed that these Amendments 'were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress.'" *Id.* at 454 (quoting *Ex parte Virginia*, 100 U.S. at 345). He proceeded to quote *Ex parte Virginia* at considerable length:

The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. . . . It is said the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. *Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.*

The argument in support of the petition for a *habeas corpus* ignores entirely the power conferred upon Congress by the Fourteenth Amendment. Were it not for the fifth section of that amendment, there might be room for argument that the first section is only declaratory of the moral duty of the State But the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete.

Id. at 454–55 (quoting *Ex parte Virginia*, 100 U.S. at 346–48) (first emphasis added).

52. *Id.* at 455 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) and *Mitchum v. Foster*, 407 U.S. 225, 238–39 (1972)).

53. 133 S. Ct. 2612 (2013).

by Chief Justice Roberts distorted both constitutional text and history in remarkable ways in the course of striking down Congress's renewal of the preclearance requirement in Section 4b of the Voting Rights Act of 1965. First, for example, Roberts proclaimed: "Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. Amdt. 10."⁵⁴ But the Tenth Amendment does not say this.⁵⁵ In fact, precisely because the powers of the federal government were limited to what had been "expressly granted," James Madison led a successful fight to eliminate "expressly" from the text of the Tenth Amendment.⁵⁶

Next, not only did Roberts's paean to state sovereignty and the deep structural values of federalism lack a textual basis, it also entirely ignored the changes in federalism wrought by the Civil War. In addition, the Court's new emphasis on the doctrine of "equal sovereignty" merits close attention. The initial source for the phrase and the doctrine is *Coyle v. Smith*,⁵⁷ a decision written by Justice Lurton that allowed Oklahoma to break its "irrevocable" promise, made in 1906 as a condition for entering the Union, not to move the state capitol from Guthrie to Oklahoma City before 1913.⁵⁸ Now that Oklahoma had become a state, said the Court, it

54. *Id.* at 2623.

55. The Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

56. See, e.g., THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 683 (Neil H. Cogan ed., 1997) (Madison "[o]bjected to this amendment, because it was impossible to confine a government to the exercise of express powers, there must necessarily be admitted powers by implication, unless the constitution descended to recount every minutiae. [Madison] remembered the word 'expressly' had been moved in the convention of Virginia, by the opponents to the ratification, and after full and fair discussion was given up by them, and the system allowed to retain its present form."); Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and "Expressly" Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1899–1902 (2008).

57. 221 U.S. 559 (1911). Justices McKenna and Holmes dissented, without opinion. *Id.* at 580.

58. The term "irrevocable" occurred in both the territorial and congressional sides of the pre-statehood agreement. See CLINTON O. BUNN & WILLIAM C. BUNN, CONSTITUTION AND ENABLING ACT OF THE STATE OF OKLAHOMA ANNOTATED AND INDEXED 137 (1907) ("Sec. 497.—Enabling Act Accepted by Ordinance Irrevocable.—Be it Ordained by the Constitutional Convention for the proposed State of Oklahoma, that said Constitutional Convention do, by this ordinance irrevocable, accept the terms and conditions [of the admission act]."); Oklahoma Enabling Act of June 16, 1906, ch. 3335, § 22, 34 Stat. 267, 278 ("That the constitutional convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this Act."); Oklahoma Enabling Act § 2 ("The capital of [Oklahoma] shall temporarily be at the city of Guthrie, in the present Territory of Oklahoma and shall not be changed therefrom previous to [1913] . . ."). The Oklahomans who nonetheless declined to follow the terms of the admission act as to where to locate their capital continued the independent thinking, if not lawlessness, of their Sooner heritage. See 1 LUTHER B. HILL, A HISTORY OF THE STATE OF OKLAHOMA 258 (1910) ("Thus was created a new word in the vocabulary of the English language. The man who violated the acts of Congress and the president's proclamation opening Oklahoma to settlement came to be known as a 'sooner.'").

was entitled to revoke its emphatic promise. To hold otherwise would be to treat Oklahoma differently and less favorably than all the other states.⁵⁹ States must equally be allowed to break their solemn promises. More recently, in the name of the sovereign immunity said to be anchored in the Eleventh Amendment and states' rights, states can also escape bad bargains unless it can be demonstrated that they fully understood what the deal entailed when they had previously accepted it.⁶⁰

III. VOLUNTARY SERVITUDE

A. State Action?

If taken seriously, the history of the Thirteenth Amendment and its relationship to the Fourteenth Amendment supports the argument made by Charles Black, with characteristic verve and eloquence, that state action is a judicial construct that ought to be abandoned.⁶¹ Without plumbing those depths now, however, it is illuminating to consider briefly the Supreme Court's interpretation of coercion and consent in the context of decisions construing the Thirteenth Amendment.

The story of the great extent to which the Supreme Court is implicated in the dismantling of the Reconstruction Era protections and the rise of Jim Crow has often been told, beginning with the Court's shocking opinion in *Blyew v. United States*.⁶² *Blyew* held that a Kentucky law forbidding blacks from testifying took precedence over the federal Civil Rights Act of 1866.⁶³ Because two black witnesses to the horrific murder in Kentucky of several members of a black family therefore could not testify, there was no federal jurisdiction and the indictment had to be dismissed.⁶⁴

59. See *Coyle*, 221 U.S. at 567–68.

60. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (holding that a state must unequivocally waive its sovereign immunity and that Congress must unequivocally intend to abrogate state sovereign immunity); *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (holding that the Eleventh Amendment barred retroactive benefit payments by state officials from federal-state benefit program). Similarly, in *New York v. United States*, 505 U.S. 144, 181 (1992), the Court answered its question, “How can a federal statute be found an unconstitutional infringement of state sovereignty when state officials consented to the statute's enactment?” by surrounding New York with the cloak of federalism in the name of protecting individuals. It mattered not that the state of New York had benefitted substantially from “a compromise to which New York was a willing participant and from which New York has reaped much benefit.” *Id.*

61. See Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69 (1967); Aviam Soifer, *Charles L. Black, Jr.: Commitment, Connection, and the Ceaseless Quest for Justice*, 7 ASIAN-PAC. L. & POL’Y J. 7, 15–16 (2006).

62. 80 U.S. 581 (1871).

63. *Id.* at 593.

64. See *id.*; see also Soifer, *Federal Protection*, supra note 15, at 1620–21 (discussing *Blyew*).

Then, with the *Civil Rights Cases*,⁶⁵ the Court explicitly began to leave former slaves, their allies, and their descendants to their own devices. Less than eighteen years after the Thirteenth Amendment had formally ended slavery, Justice Bradley's majority opinion proclaimed that it was past time when a black man "takes the rank of a mere citizen, and ceases to be the special favorite of the laws."⁶⁶ In fact, said the Court, "[i]t would be running the slavery argument into the ground"⁶⁷ to hold that Thirteenth Amendment protections against the badges and incidents of slavery could extend to prohibiting racial discrimination in places of public accommodation. The Court thus encouraged states to look the other way—or worse—as Jim Crow laws and practices gained traction.

The "state action" requirement mandated by the *Civil Rights Cases* made it terribly easy for private citizens as well as state authorities to assert that sharecroppers, as well as those convicted of petty crimes who were leased by white employers out of confinement and off chain gangs, actually were the beneficiaries of a freedom of contract regime. The acceptance of voluntary peonage grew from deep roots in America's social, cultural, and legal traditions.⁶⁸

B. Voluntary Servitude and the Story of Jacob

The Hebrew Bible's story of Jacob has been celebrated through the centuries because of Jacob's persistence during his voluntary slavery. In order to marry Rachel, the daughter of Laban, Jacob agreed to work for Laban for seven years.⁶⁹ Laban tricked Jacob, however, and Jacob instead married Rachel's older sister, Leah. Undeterred, Jacob toiled for Laban for another seven years and finally did get the chance to marry Rachel, too.⁷⁰

Notwithstanding the appeal of this Bible Story, the issue of agreement to be a slave or a peon remains deeply troubling. Adam Smith was certain that "[t]he property which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred

65. 109 U.S. 3 (1883).

66. *Id.* at 25.

67. *Id.* at 24.

68. See generally ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970); DAVID MONTGOMERY, *BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS, 1862–72* (1981); DAVID MONTGOMERY, *CITIZEN WORKER* (1993); ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350–1870* (1991).

69. *Genesis* 29:20 (Eitz Hayim).

70. *Genesis* is succinct in explaining Jacob's preference for Rachel, whom he had fallen in love with at first sight. "Leah had weak eyes; Rachel was shapely and beautiful." *Genesis* 29:17. I owe this point to my mother, Ahuva Soifer.

and inviolable.”⁷¹ And John Stuart Mill asserted, “The principle of freedom cannot require that a man should be free not to be free.”⁷² Mill also noted, “All that makes existence valuable to any one, depends on the enforcement of restraints upon the actions of other people.”⁷³ Yet both theology and law have at times allowed and even embraced the choice of an individual to give up freedom for slavery or peonage.

Many religious people justified slavery not only because it was rooted in the Bible,⁷⁴ but also because it was an example of how the greater power could include a lesser power. The widespread theory was that slaves were captive in battle and thus could be killed. To spare them was therefore benign, and certainly well within the power of their captors.⁷⁵

Prior to the abolition of slavery, Lemuel Shaw, the eminent Chief Justice of the Massachusetts Supreme Judicial Court for thirty years, had decided that it would be “a denial of her freedom” not to allow the choice made by Betty—a young former slave who was free because she had been brought into Massachusetts voluntarily by her owners—to return to slavery and to her home and family in Tennessee.⁷⁶ Southern states defended slavery as preferable to the wage slavery of the North; Virginia even passed a statute establishing a process through which a free black could choose to become a slave.⁷⁷ Even long after the Thirteenth

71. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 55 (1863).

72. JOHN STUART MILL, ON LIBERTY 114 (Oxford University Press 1991) (1859). For an extensive discussion, see Alexander Bickel & Benno C. Schmidt, *The Judiciary and Responsible Government, 1910-1921*, in IX HISTORY OF THE SUPREME COURT 820-907 (1984).

73. MILL, *supra* note 72, at 114. See generally JOSEPH W. SINGER, NO FREEDOM WITHOUT REGULATION: THE HIDDEN LESSONS OF THE SUBPRIME CRISIS (2015).

74. See ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 9-19 (1975) (exploring tensions between moral and formal law and between natural law and positive law); Kevin Giles, *The Biblical Argument for Slavery: Can the Bible Mislead? A Case Study in Hermeneutics*, 66 EVANGELICAL Q. 3 (1994).

75. See JEAN ALLAIN, THE LAW AND SLAVERY: PROHIBITING HUMAN EXPLOITATION 4-5 (2015).

76. *Betty's Case*, 20 Monthly L. Rep. 455 (Mass. 1857) (unreported); see Aviam Soifer, *Constrained Choices: New England Slavery Decisions in the Antebellum Era*, in FREEDOM'S CONDITIONS IN THE U.S.-CANADIAN BORDERLANDS IN THE AGE OF EMANCIPATION 173, 188-90 (Tony Freyer & Lyndsay Campbell eds., 2011); see also Soifer, *Status*, *supra* note 5, at 1916-30 (discussing *Betty's Case*). See generally STEINFELD, *supra* note 68; EDLIE L. WONG, NEITHER FUGITIVE NOR FREE: ATLANTIC SLAVERY, FREEDOM SUITS, AND THE LEGAL CULTURE OF TRAVEL (2009).

77. See, e.g., THEODORE B. WILSON, THE BLACK CODES OF THE SOUTH 41 & n.82 (1965) (citing Virginia statute). Massachusetts included a similar provision in its first codification of law, the Body of Liberties, in 1641 and later broadened the opportunity to consent to be a slave. See GEORGE H. MOORE, NOTES ON THE HISTORY OF SLAVERY IN MASSACHUSETTS 12-15 (1866). Pride of place for the formal abolition of slavery in the United States belongs to Vermont, but even the

Amendment, however, the Supreme Court repeatedly allowed individuals to be the victims of their own bargains in contexts all too reminiscent of slavery or peonage. This proved to be a key element of depredations imposed in the name of freedom of contract and an allegedly free market.

In *Robertson v. Baldwin*,⁷⁸ for example, Justice Brown's majority opinion upheld both state and federal incarceration of three white sailors who jumped ship and refused to follow orders. Locking the sailors up was for their own good, Brown explained, and the Thirteenth Amendment had not interfered with an individual's freedom to "contract for the surrender of his personal liberty for a definite time and for a recognized purpose,"⁷⁹ even if the sailor's contract thereafter meant subordinating his will. Two years earlier, the Court also rejected a badges and incidents of slavery argument premised on the Thirteenth Amendment in *Plessy v. Ferguson*.⁸⁰ Similarly through Justice Brown, the majority found the Thirteenth Amendment irrelevant to Homer Plessy's attack on segregated railroad carriages because the amendment had abolished only slavery, bondage, and "the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services."⁸¹

Within a few years, the Court boldly narrowed the definition of peonage even more. It overturned that great rarity, a successful peonage prosecution, this one of a brutal overseer and his minions for bringing two black workers back to Georgia from Florida. The two black workers were taken at gunpoint, placed in handcuffs, and returned to the awful working conditions involved in the production of turpentine.⁸² Justice Brewer's majority opinion explained that peonage meant only "a status or condition of compulsory service, based upon the indebtedness of the peon to the master."⁸³

document that did so, the Vermont Constitution of 1777, explicitly continued to permit consensual slavery. VT. CONST. ch. I, art. I.

78. 165 U.S. 275 (1897).

79. *Id.* at 280. Because the Court considered sailors to be in particular need of paternalistic care as they were "deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults," it was held to be well within Congress's authority to extend "the protection of the law in the same sense in which minors and wards are entitled to the protection of parents and guardians." *See id.* at 287. In his ringing dissent, the first Justice Harlan rejected the idea that protecting seamen could extend to the use of force to compel them to render personal service and raised the specter of future advertisements for fugitive seamen. *See id.* at 303 (Harlan, J., dissenting).

80. 163 U.S. 537 (1896).

81. *Id.* at 542.

82. *Clyatt v. United States*, 197 U.S. 207 (1905).

83. *Id.* at 215. Justice Brewer held that debt was the "basal" condition, necessary for any legal definition of peonage. This, of course, directly contradicted the definition promulgated by Congress in the Peonage Abolition Act of 1867. Justice Harlan filed another opinion, concurring in part. *Id.* at 222–23 (Harlan, J., concurring).

The following year, the Court went even further as it echoed and extended the theme of the *Civil Rights Cases*. To allow blacks to invoke federal protection when a mob terrorized them so that they could not work in an Arkansas lumber mill was to ignore the fact that the Thirteenth Amendment was “not an attempt to commit that race to the care of the nation.”⁸⁴ Arkansas law would have to suffice, Justice Brewer wrote for the Court in *Hodges v. United States*, because the Thirteenth Amendment could not reach wrongs perpetrated against persons who were not shown in the record to be slaves or the descendants of slaves.⁸⁵ To determine otherwise would be to treat blacks as “wards of the Nation.”⁸⁶ Justice Harlan again dissented vigorously against this denial of national protection for “millions of citizen-laborers of African descent” who were denied the right to earn a living solely because of their race.⁸⁷ Harlan considered this a direct betrayal of the promise of the Thirteenth Amendment, which had “destroyed slavery and all its incidents and badges, and established freedom,”⁸⁸ and which had “an affirmative operation the moment it was adopted.”⁸⁹

In a sense, decisions such as *Robertson*, *Clyatt*, and *Hodges* could serve as further examples of the kind of cognitive dissonance Robert Cover described in discussing judges who protested too much that their hands were tied as they returned fugitive slaves to slavery.⁹⁰ But such decisions also underscore the jagged nature of judicial resistance to paternalism, particularly during an era that celebrated the glory of freedom of contract in tandem with obeisance to the values of federalism and respect for state sovereignty. Blacks were told early and often that they should look to the states for protection, but not to Congress or the federal courts.⁹¹

84. *Hodges v. United States*, 203 U.S. 1, 16 (1906).

85. *Id.* at 19. Justice Brewer claimed that there was a relevant syllogism: because Chinese workers still were required to carry certificates, as free blacks had been required to do during slavery, the Thirteenth Amendment did not protect any of those to whom Congress had granted citizenship at the end of the Civil War. Thus, Brewer argued, Congress had assumed of black citizens that “thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the states where they should make their homes.” *Id.* at 20.

86. *Id.* at 20. The *Hodges* decision was formally overruled in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968).

87. *Hodges*, 203 U.S. at 37 (Harlan, J., dissenting).

88. *Id.* at 27.

89. *Id.* at 29. Justice Day joined Harlan’s dissent. *Id.* at 20.

90. COVER, *supra* note 74, at 9–19.

91. *See, e.g.*, *Williams v. Mississippi*, 170 U.S. 213 (1898); *Brownfield v. South Carolina*, 189 U.S. 426 (1903) (Holmes’s first U.S. Supreme Court opinion); *Giles v. Harris*, 189 U.S. 475 (1903). Holmes’s majority opinion rejected a black man’s equitable challenge to an Alabama statute that grandfathered veterans of all wars, including those on either side in the Civil War, and imposed stringent registration requirements for new voters. *See Giles*, 189 U.S. at 486–88. Holmes wrote,

C. Tracking Justice Holmes

By 1911, the Court had begun to question its faith in freedom of contract and in state law. The well-known decision in *Bailey v. Alabama*⁹² exemplifies this change. Though both Justices Hughes for the majority and Holmes in dissent claimed that the fact that the case arose in Alabama made no difference to them,⁹³ both men also claimed to be taking the context into account. For Hughes, writing his first major opinion on the Court, the prima facie case of criminal fraud established under an amended Alabama statute governing breach of contract had become “an instrument of compulsion peculiarly effective as against the poor and ignorant, its most likely victims.”⁹⁴ This criminal law presumption against a black farm worker who abandoned his year-long contract after working for a little over a month was invalid under the Thirteenth Amendment, which prohibited “control by which the personal service of one man is disposed of or coerced for another’s benefit.”⁹⁵

Holmes’s dissent accused the majority of assuming that Alabama juries would be prejudiced; he claimed further that, to the contrary, it was appropriate for Alabama to leave such matters to juries because of “their experience as men of the world.”⁹⁶ In characteristic pithy fashion, Holmes also made the point that “[t]he [Thirteenth] Amendment does not outlaw contracts for labor.”⁹⁷ Strikingly, Holmes summarized his position in moral terms: “Breach of a legal contract without excuse is wrong conduct, even if the contract is for labor; and if a state adds to civil liability a criminal liability to fine, it simply intensifies the legal motive for doing right, it does not make the laborer a slave.”⁹⁸

“Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form.” *Id.* at 488. Justices Brewer and Harlan wrote dissents, *id.* at 493, 488, and Justice Brown dissented without opinion, *id.* at 493.

92. *Bailey v. Alabama (Bailey II)*, 219 U.S. 219 (1911). In the same case three years earlier, Holmes wrote for the Court in rejecting the attempt to “take a short cut” to get the case before the Supreme Court, over dissents by Harlan and Day. *Bailey v. Alabama (Bailey I)*, 211 U.S. 452, 455 (1908).

93. *Bailey II*, 219 U.S. at 231 (“No question of a sectional character is presented, and we may view the legislation in the same manner as if it had been enacted in New York or in Idaho.”); *id.* at 245 (“We all agree that this case is to be considered and decided in the same way as if it arose in Idaho or New York.”) (Holmes, J., dissenting).

94. *Id.* at 245.

95. *Id.* at 241.

96. *Id.* at 248.

97. *Id.* at 246.

98. *Id.* Holmes’s concern about contract breach as “wrong conduct” here sharply contrasts with his hard-nosed position regarding contract breach in his book, OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881), and in his essay, Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897), as well as in his usual jaded embrace of life’s struggles.

Holmes is generally credited as the first American legal expert to suggest that a breach of contract might be desirable in some situations, particularly in terms of economic efficiency.⁹⁹ He repeatedly made the further point that morality ought not to play a role in legal analysis,¹⁰⁰ yet this statement of an unexcused contract breach as “wrong contract” seems to have been generally overlooked. And in his characteristic succinct manner, Holmes also pointed out that even when faced with the credible threat, “Your money or your life,” an individual still has a choice.¹⁰¹

In the course of two Supreme Court decisions in 1911, *Coyle v. Smith* held that Oklahoma was free to breach its “irrevocable” promise, yet Holmes urged that Alonzo Bailey could not breach his contract unless he could convince a jury of the merits of his particular decision.¹⁰² To Hughes and the majority in *Bailey*, however, it mattered that Alabama’s criminal breach presumption primarily affected “poor” and “ignorant” farm workers.¹⁰³

99. Cf. Stephen A. Smith, *Duties, Liabilities, and Damages*, 125 HARV. L. REV. 1727, 1739 n.33 (2012) (“The idea that contractual duties are disjunctive duties to perform or pay is usually associated with Holmes.”).

100. E.g., HOLMES, JR., *THE COMMON LAW*, *supra* note 98, at 145 (“As the law, on the one hand, allows certain harms to be inflicted irrespective of the moral condition of him who inflicts them, so, at the other extreme, it may on grounds of policy throw the absolute risk of certain transactions on the person engaging in them, irrespective of blameworthiness in any sense.”); HOLMES, JR., *The Path of the Law*, *supra* note 98, at 464 (“I hope that my illustrations have shown the danger, both to speculation and to practice, of confounding morality with law, and the trap which legal language lays for us on that side of our way. For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.”). But note his policy-based yet also somewhat moralistic preference regarding adverse possession within this essay. Holmes, Jr., *The Path of the Law*, *supra* note 98, at 476–77.

101. See Holmes, Jr., *The Path of the Law*, *supra* note 98, at 47 (“[E]ven the deliberate taking of life will not be punished when it is the only way of saving one’s own. This principle is not so clearly established as that next to be mentioned; but it has the support of very great authority. If that is the law, it must go on one of two grounds, either that self-preference is proper in the case supposed, or that, even if it is improper, the law cannot prevent it by punishment, because a threat of death at some future time can never be a sufficiently powerful motive to make a man choose death now in order to avoid the threat.”); cf. *Your Money or Your Life*, YOUTUBE (Jan. 13, 2016), <https://www.youtube.com/watch?v=tVzdUczMT0> (skit from “The Jack Benny Program”).

102. See *Bailey II*, 219 U.S. at 248–49.

103. *Id.* at 245. The Progressive movement muckrakers who celebrated the *Bailey II* decision nonetheless denigrated Bailey himself. See, e.g., Ray Stannard Baker, *A Pawn in the Struggle for Freedom*, 72 AM. MAG. 608, 608 (1911) (“However you will probably not be able to distinguish him from a thousand—or a million—other black men whose backs are bent daily to the heaviest burdens of the South. Look well at the dull black face and you will see there the unmistakable marks of ignorance, inertia, irresponsibility.”); *Deathblow to Peonage System*, NEW YORK AGE, Jan. 19, 1911, at 8 (describing Bailey as a cipher who was “last heard from slinging hash at club house, caring not

When the Court a few years later invalidated a test case regarding the widespread convict lease system in *United States v. Reynolds*,¹⁰⁴ Holmes reluctantly concurred after repeating his objections to the *Bailey* decision.¹⁰⁵ Holmes now conceded that “impulsive people with little intelligence or foresight may be expected to lay hold of anything that affords a relief from present pain, even though it will cause greater trouble by and by.”¹⁰⁶ As *C. Wright Mills* more graciously made the point some years later, “Each day men sell little pieces of themselves in order to try to buy them back each night and week end”¹⁰⁷

D. Permissible Coercion

By 1916, the Court made it clear in a unanimous opinion that the long tradition of mandatory roadwork did not offend the Thirteenth Amendment.¹⁰⁸ Two years later, the Court simply declared that a challenge to the World War I military draft as a form of involuntary servitude was “refuted by its mere statement.”¹⁰⁹ Further, in the wake of that war, the Court upheld rent control laws in Washington, D.C. and New York City in companion decisions written by Justice Holmes.

In his lead opinion in *Block v. Hirsh*,¹¹⁰ Holmes stressed the pressure put on available housing by the growth of the federal government during the war, and he accepted the claim that the housing shortage posed an ongoing problem that government had the authority to meet.¹¹¹ He also maintained that the Court should not address the wisdom of the rent control measure, and that the rent control scheme had a time limit and a mechanism in place to ascertain whether rents were reasonable.¹¹² Holmes wrote, “The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law.”¹¹³ In addition, he warned: “The fact that tangible property is also visible tends to

which way the winds of court blew, so they robbed him not of his good meals and freedom to break contracts whenever he listed”).

104. 235 U.S. 133 (1914).

105. *Id.* at 150 (Holmes, J., concurring).

106. *Id.*

107. *C. WRIGHT MILLS, WHITE COLLAR* 237 (1951).

108. *Butler v. Perry*, 240 U.S. 328 (1916). Justice McReynolds, who was to become an outspoken champion of freedom of contract, explained for the unanimous Court that “[t]he great purpose in view [of the Thirteenth Amendment] was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers.” *Id.* at 333.

109. *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918).

110. 256 U.S. 135 (1921).

111. *See id.* at 154–56.

112. *Id.* at 156–58.

113. *Id.* at 155.

give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed.”¹¹⁴

In the companion New York City case, Holmes made short work of the claim that to compel a landlord to rent to a tenant at a controlled price violated the Thirteenth Amendment.¹¹⁵ He wrote:

It is true that the traditions of our law are opposed to compelling a man to perform strictly personal services against his will even when he had contracted to render them. But the services in question although involving some activities are so far from personal that they constitute the universal and necessary incidents of modern apartment houses.¹¹⁶

Justice McKenna, who was often Holmes’s rival on the Court, vigorously dissented in both decisions, joined by Chief Justice White and Justices McReynolds and Van Devanter.¹¹⁷ To McKenna, the text of the Constitution itself clearly answered all the legal questions in the two cases,¹¹⁸ and the majority had started down a very slippery slope. “The facts are significant,” McKenna claimed.¹¹⁹ He then asked rhetorically, “[H]ave conditions come not only to the District of Columbia embarrassing the federal government, but to the world as well, that are not amenable to passing palliatives, so that Socialism, or some form of Socialism, is the only permanent corrective or accommodation?”¹²⁰ McKenna added, “It is indeed strange that this court, in effect, is called upon to make way for it and, through the instrument of a Constitution based on personal rights, and the purposeful encouragement of individual incentive and energy, to declare legal a power exerted for their destruction.”¹²¹ By 1924, even Holmes was skeptical as to whether the District of Columbia could con-

114. *Id.*

115. *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 199 (1921).

116. *Id.* Holmes added that the services required of the landlord were “analogous to the services that in the old law might issue out of or be attached to land.” *Id.*

117. *Block*, 256 U.S. at 158 (McKenna, J., dissenting); *Marcus Brown*, 256 U.S. at 199 (McKenna, J., dissenting).

118. *Block*, 256 U.S. at 159 (McKenna, J., dissenting) (“The grounds of dissent are the explicit provisions of the Constitution of the United States; the specifications of the grounds are the irresistible deductions from those provisions and, we think, would require no expression but for the opposition of those whose judgments challenge attention.”).

119. *Id.* at 162 (McKenna, J., dissenting).

120. *Id.*

121. *Id.* McKenna’s overheated dissent also proclaimed, “A contract existing, its obligation is impregnable,” *id.* at 163, and the dissenters went on to warn, “Contracts and the obligation of contracts are the basis of [the nation’s] life and of all its business, and the Constitution, fortifying the conventions of honor, is their conserving power. Who can foretell the consequences of its destruction or even question of it?” *Id.* at 168.

tinue to claim World War I emergency conditions as a basis for its rent control measures.¹²²

In *Coppage v. Kansas*,¹²³ however, Holmes dissented from the Court's decision invalidating the attempt by a progressive Kansas legislature to prohibit employers from demanding "yellow-dog contracts," which were contracts that required employees to promise not to join any union.¹²⁴ In dissent, Holmes noted that it was reasonable for a workman "not unnaturally" to believe that "only by belonging to a union can he secure a contract that shall be fair to him."¹²⁵ Holmes asserted further, "If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law *in order to establish the equality of position between the parties in which liberty of contract begins.*"¹²⁶

By 1937 in *West Coast Hotel Co. v. Parrish*,¹²⁷ Chief Justice Hughes proclaimed for a 5–4 majority that

exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay.¹²⁸

This bold, broad statement by the Court in upholding minimum wages for women was accompanied, however, with considerable overt paternalism.¹²⁹ Indeed, paternalism generally may be said to be at the heart of those judicial decisions that question or invalidate individual contracts as

122. *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924).

123. 236 U.S. 1 (1915). Justice Pitney's majority opinion declared, "No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances." *Id.* at 17.

124. *See id.* at 9.

125. *Id.* at 27 (Holmes, J., dissenting). Justice Day also dissented, joined by Justice Hughes. *Id.* at 27, 42.

126. *Id.* at 27 (Holmes, J., dissenting) (emphasis added).

127. 300 U.S. 379 (1937).

128. *Id.* at 399.

129. *Id.* at 398 ("What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The Legislature of the state was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances.").

coercive.¹³⁰ The same might be said on a larger scale concerning some of the Court's decisions to protect states from themselves, even when states had the advantage of lawyers who had not objected to the obligations undertaken.

But there is paternalism and then there is paternalism.

E. Duress and Contract Law

Robert Hale, a remarkable legal realist and precursor of the law and economics movement, once wrote:

What in fact distinguishes this counterfeit system of "*laissez faire*" from paternalism is not the absence of restraint, but the absence of any conscious purpose on the part of the officials who administer the restraint, and of any responsibility or unanimity on the part of the numerous owners at whose discretion the restraint is administered.¹³¹

As Barbara Fried makes abundantly clear in her excellent book about Hale that places his thought among the progressive thinkers of his time, many critical thinkers began a century ago to recognize that coercion is a malleable and ultimately often misleading concept.¹³² Hale himself wrote what remain some of the best discussions ever about the slippery issue of "coercion" and what he believed to be the fallacy of state action.¹³³

A basic point made by Hale and several of his contemporaries was that claims of coercion ought not to be separated from underlying inequalities.¹³⁴ To wrestle with that fundamental inequality, however, is to begin to sense how overwhelming it could be to take seriously legal limitations on "voluntary servitude." Law students still learn in their first

130. Soifer, *The Paradox*, *supra* note 5.

131. BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 50 (1998) (quoting Robert Hale, *Economic Nationalism versus Representative Government* (unpublished manuscript)).

132. *Id.* at 15–28. For a forceful critique of Hale's ideas, see Richard Epstein, *The Assault That Failed: The Progressive Critique of Laissez Faire*, 97 MICH. L. REV. 1697 (1999). Throughout, however, Epstein illustrates Fried's key point that core concepts of liberty and property remain intertwined, and he does not engage the ways in which Hale exposed the function performed by law in the production and distribution of wealth, as Fried does. See FRIED, *supra* note 131, at 16–17. As Fried put it, "Hale debunk[ed] the notion that the market was a natural (prepolitical) and neutral (apolitical) entity." *Id.* at 10.

133. See, e.g., Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935). Toward the end of his life, Hale participated in briefing a challenge to racially restrictive covenants that became *Shelley v. Kraemer*, the key "state action" case once aptly described as the *Finnegan's Wake* of constitutional law. *Shelley v. Kraemer*, 334 U.S. 1 (1948); Philip B. Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 148 (1964).

134. See generally Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

year that American tradition and case law do not permit equity to require specific performance, which is largely explained in terms of the Thirteenth Amendment.¹³⁵ Good law teachers also help their students understand that there are multiple means that can achieve the same goal, often through only slightly more subtle forms of legally permissible coercion.

It is understood by many people that, at its core, the very act of making a contract restricts the liberty of the parties.¹³⁶ In fact, this is a central purpose of the contractual commitment.¹³⁷ Further, standard contract law acknowledges in rare situations that a contract can be so one-sided or unfair that it should not bind a party to it, even if she agree to its terms.¹³⁸ Contracts of adhesion, promissory estoppel, and unconscionable contracts are doctrinal examples that continue to curse or delight virtually all first-year law students in American law schools.

It also may be that their professors tend to believe these and related concepts are underutilized and undertheorized, particularly when they consider the problematic congruence of the ability to contract and personal autonomy that has dominated American legal thought for well over a century. It may shock those not exposed to the curses and delights of law school that a breach of one's contract generally is provocatively described as neither inherently immoral nor even inefficient.¹³⁹ Nonetheless, the very voluntary nature of contracts remains an article of faith among most American lawyers and judges as well as within the general public.

135. See, e.g., CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 1033 (7th ed. 2012) (citing RESTATEMENT (SECOND) OF CONTRACTS § 367 cmt. a. (1981) for the proposition that courts are reticent to impose specific performance because of involuntary servitude concerns).

136. See, e.g., 3 WILLISTON ON CONTRACTS § 7:44 (4th ed. 2009) ("Just as a promisor may make an agreement for acts or promises to act, so too may it bargain for forbearances or promises to forbear."); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 461 (1909) ("[L]iberty of contract cannot be restricted merely in the interest of a contracting party. His right to contract freely is to yield only to the safety, health, or moral welfare of the public.").

137. The seminal case of *Hamer v. Sidway*, in discussing consideration, states: "'Consideration' means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first." 124 N.Y. 538, 546 (1891) (quoting FREDERICK POLLOCK, PRINCIPLES OF CONTRACT: A TREATISE ON THE GENERAL PRINCIPLES CONCERNING THE VALIDITY OF AGREEMENTS IN THE LAW OF ENGLAND 166 (5th ed. 1889)).

138. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. c, d (1981).

139. See RESTATEMENT (SECOND) OF CONTRACTS ch. 16, Intro. Note (1981) ("[A] party may find it advantageous to refuse to perform a contract if he will still have a net gain after he has fully compensated the injured party for the resulting loss."); Holmes, Jr., *The Path of the Law*, *supra* note 98, at 462 ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.").

In the years surrounding World War II, however, several leading contracts law scholars joined Hale in stressing that realism about coercive pressures ought to pierce the veil of free will that is central to basic assumptions about contract law. Edwin Paterson, for example, wrote:

The attempt to solve legal problems by the touchstone of “free will,” by postulating an individual will insulated from its social environment, only serves to obscure the genuine problems of ethics and policy. If a man is deemed not to “consent” because he was induced by pressure outside himself, then consent becomes a useless concept in the administration of justice.¹⁴⁰

Further, John Dawson’s *tour de force* review of the historical roots of various facets of the doctrine of duress pointed out that earlier, “[i]t was not yet fully recognized that the freedom of the ‘market’ was essentially a freedom of individuals and groups to coerce one another, with the power to coerce reinforced by agencies of the state itself.”¹⁴¹ In addition, Dawson agreed with Hale that, even in physical duress cases, “courts had been slow to realize that the instances of more extreme pressure were precisely those in which the consent expressed was *more* real; the more unpleasant the alternative, the more real the consent to a course which would avoid it.”¹⁴²

Nonetheless, Dawson remained pessimistic about reality actually prevailing in judicial consideration of duress.¹⁴³ He also expressed great doubt about the emergence of any doctrinal coherence, beyond his urging that actual effect and perceived motive ought to enter judicial decisions.¹⁴⁴ In Dawson’s view, it ought to be enough to constitute duress if a party to a contract faced overwhelming circumstances; such a contract should not be considered truly voluntary without a great deal of speculation about the concept of free will.¹⁴⁵ As Holmes once noted for a unani-

140. Edwin W. Patterson, *Compulsory Contracts in the Crystal Ball*, 43 COLUM. L. REV. 731, 741 (1943).

141. John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 266 (1947).

142. *Id.* at 267 (citing, *inter alia*, Robert L. Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603, 616–17 (1943)).

143. *See id.* at 288–89.

144. *See id.* at 264 (“A closer reading of the undue influence cases reveals the operation of some objective tests, side by side with the analysis of individual motives that is chiefly accented in judicial opinions. Transactions must be judged not only in terms of motive but in terms of their effects.”).

145. *See id.* at 267 n.36 (“The notion that compulsion negates consent arises of course through importing into the concept of ‘consent’ a whole body of assumptions as to the degree of freedom of choice that normally characterizes the relations of the individual to his environment. Once these assumptions are rejected and the universality of pressure restricting choice has been recognized, it becomes clear, as Patterson has said, that ‘The attempt to solve legal problems by the touchstone of ‘free will,’ by postulating an individual will insulated from its social environment, only serves to

mous Court, “It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that the choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.”¹⁴⁶

In recent years, unfortunately, most legal analysis and the bulk of mainstream judicial opinions seem to move further and further away from the hard-nosed insights of such legal realists concerning context and consent.¹⁴⁷ Whether it is mandatory arbitration¹⁴⁸ or a vast variety of frauds that are perpetrated against consumers,¹⁴⁹ the free, knowing, and voluntary consent of the individual is blithely assumed, often beyond any challenge whatsoever. Ironically, then, there appears to have been many recent instances of judicial activism that intervene on behalf of deference to both the states and the status quo.¹⁵⁰ If anything, the stagnation of

obscure the genuine problems of ethics and policy. If a man is deemed not to “consent” because he was induced by pressure outside himself, then consent becomes a useless concept in the administration of justice.” (quoting Patterson, *supra* note 140, at 741).

146. *Union Pac. R. Co. v. Pub. Serv. Comm’n of Mo.*, 248 U.S. 67, 70 (1918).

147. *Compare, e.g., Selmer Co. v. Blakeslee-Midwest Co.*, 704 F. 2d 924 (7th Cir. 1983) (desperate need of cash did not constitute duress in settlement agreement unless other side caused the financial hardship), *with Butitta v. First Mortg. Corp.*, 578 N.E.2d 116 (Ill. App. Ct. 1991) (duress may consist of taking undue advantage of the business or financial distress of the other party).

148. See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Right*, 124 *YALE L.J.* 2804 (2015); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, *N.Y. TIMES* (Oct. 31, 2015), <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>; Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System’*, *N.Y. TIMES* (Nov. 1, 2015), <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

149. See, e.g., CONSUMER FIN. PROTECTION BUREAU, *Semi-Annual Report of the Consumer Financial Protection Bureau* 89–111 (2015), available at http://files.consumerfinance.gov/f/201511_cfpb_semi-annual-report-fall-2015.pdf (summarizing CFPB public enforcement actions from October 1, 2014 through September 30, 2015).

150. *E.g., DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (holding as enforceable a contract’s binding arbitration clause); *Imburgia*, 136 S. Ct. at 478 (2015) (Ginsburg, J., dissenting) (“Demeaning [the California Supreme Court’s] judgment through harsh construction, this Court has again expanded the scope of the [Federal Arbitration Act], further degrading the rights of consumers and further insulating already powerful economic entities from liability for unlawful acts.”); *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (holding unconstitutional the Voting Rights Act provision setting forth coverage formula); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1429 (2013) (decertifying class for inability to establish damages across the class); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (decertifying class for failure to satisfy commonality requirement); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (mandatory final arbitration clause held to extend to the full extent of Commerce Clause power, thus preempting employee’s civil rights claim in state court); *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that states are not required to make accommodations for the disabled, and that saving money is a sufficiently rational basis for the state); *United States v. Morrison*, 529 U.S. 598 (2000) (holding the Violence Against Women Act civil remedy unconstitutional). *But see, e.g., Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016) (holding that consumer’s complaint was not rendered moot by unaccepted offer of judgment); Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories*,

wages and the numbing uncertainty of employment opportunities, for example, make judicial disregard for the sharp edges of “voluntary servitude” particularly foreboding. States may escape bad deals, but individuals remain bound by them.

CONCLUSION

The Fourteenth Amendment sword meant to afford protection for vulnerable individuals has been sheathed and locked away; license to carry is facilely denied to the federal government. The Court’s glib invocation of “federalism” now creates an invisible ring around the states that will protect them, even from themselves, whenever a majority of the Justices agree to summon its special magic. By contrast, the federal shield for individuals that was eloquently described by the Court in earlier times has been pierced or knocked away by a majority of the Justices on numerous occasions.

We still have on the books a federal ban on all voluntary as well as involuntary service that amounts to peonage, whether for debt or otherwise. The contemporary task of realizing the hoary promise of free labor, currently codified as 42 U.S.C. § 1994, remains open-ended, if not downright scary. Nonetheless, legal intervention to prevent the exploitation of vulnerable workers was at the core of Thirteenth Amendment guarantees. The post-Civil War Amendments and the several statutes anchored within their Enforcement Clauses surely were not deferential to states’ rights and state sovereignty. Recent Supreme Court decisions, however, have turned whatever originalism may be found in the enactments of the post-Civil War era upside down. As a matter of current constitutional law, paradoxically, the federal government must not coerce states or state officials, and yet it can much more easily force individual citizens to do its will.

What it is to be free to contract for one’s labor is necessarily contextual and mushy. Yet the same can be said about many other overarching legal concepts such as liberty, property, equality, and even who legally can be said to be a reasonable person; nonetheless, we invoke and develop these legal tropes readily and regularly. It is time to begin to do the same for the vital idea of free labor.

Any worthwhile journey requires a start.

and Across Districts: An Empirical Study of Three Large Federal Districts (Cornell Law Faculty Publ’ns, Paper No. 108, 2008), available at http://scholarship.law.cornell.edu/lrsp_papers/108?utm_source=scholarship.law.cornell.edu%2Flrsp_papers%2F108&utm_medium=PDF&utm_campaign=PDFCoverPages (“[W]e find no evidence of a broad-based increase in summary judgment rates after the Supreme Court’s 1986 [summary judgment] trilogy.”).