

"The Thirteenth Amendment, Coercion, and 'Socialism, or Some Form of Socialism.'"

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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 don't 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 liberty*.

Abraham Lincoln
April 18, 1864

I have been fortunate to be one of the members of an informal traveling troupe of scholars who are fascinated by the Thirteenth Amendment. We have gathered recently for four symposia,¹ and another is in the offing as we mark the 2015 sesquicentennial of the amendment that Lincoln proclaimed to be "a King's cure for all the evils"² of slavery. Many of us have focused on the historical context as well as the current and future implications of this amendment, which "[b]y its unaided force and effect...abolished slavery and established universal freedom."³ Some of us also pounded computers to illuminate the statutory framework that Congress established, based on the Thirteenth Amendment and prior to passage of the Fourteenth Amendment.⁴

¹ Columbia U, Chicago, Maryland, Toledo

² 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." Roy M. Basler, ed., 8 *Collected Works of Abraham Lincoln* 255. Lincoln's uncharacteristically active role in lobbying for the Thirteenth Amendment is captured well in Doris Kearns Goodwin, *Team of Rivals* (2005) and, albeit in somewhat exaggerated form, in Steven Spielberg's movie, *Lincoln* (2012).

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

⁴ Actually I began this effort many years before personal computers existed. See, e.g.,

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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*, 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 slavery, but an absolute declaration that slavery and involuntary servitude shall not exist in any part of the United States."⁵

Compelled to try to say something new about the Thirteenth Amendment and the statutes based upon it, I recently pushed forward into early 1867. There I found that on the last day of the lame-duck 39th Congress, when 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.⁶

This paper begins with a brief reprise of what would be a problematic textual "gotcha," if our Justices actually were concerned with original texts and/or originalism. Next the paper

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⁵ Id. Bradley added the following 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."

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.

⁶ An Act to Provide for the More Efficient Government of the Rebel States (Military Reconstruction Act), ch. 153, Sec. 5, 14 Stat. 428 (1867).

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focuses on the issue of coercion as a recent constitutional concern. It briefly describes the Court's sensitivity about voluntary and intelligent agreements by states, as well as maintaining the dignity of states and state officials, and it compares this politesse—generally described to be anchored in federalism—with the Court's considerably more relaxed view of federal coercive power over individuals. The final section considers the jagged-edged dilemma of what could or should qualify as “voluntary service or labor of any person as peons, in liquidation of any debt or obligation, or otherwise.”⁷

I. Congress's Enforcement Power

With adoption of the Thirteenth Amendment, “A structurally proslavery Constitution became, in a flash, stunningly antislavery.”⁸ 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 in some detail 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 ever did something like this regarding any major legislation—and to pass the Peonage Abolition Act of 1867. 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.”

SECTION 2. **Congress shall have power to enforce this article by appropriate legislation** (emphasis added).

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

⁷ Peonage Abolition Act, ch. 187, 14 Stat. 546, 546 (1867) (codified at 42 U.S.C. Sec. 1994).

⁸ Akhil Amar, *America's Constitution* 360 (2005).

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and an overwhelming victory for the Republicans. Radical Republican leaders Senator Charles Sumner (R-MA) and Representative Thaddeus Stevens (R-PA) 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.”⁹ By March 2, Congress had decided both to send troops to protect those “loyal brethren at the South,” over a presidential veto, and to enact the Peonage Abolition Act, which provided:

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

As might well have been stated 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 than it is to the crabbed view repeatedly embraced by the Rehnquist and

⁹ Cong. Globe, 39th Cong. 2d Sess. 239-40, 251 (1867).

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Roberts Courts. It finds direct echoes in *South Carolina v. Katzenbach*¹⁰ and *Katzenbach v. Morgan*¹¹; but this approach has been firmly rejected in more recent decisions such as *City of Boerne v. Flores*,¹² *United States v. Morrison*,¹³ and *Board of Trustees, University of Alabama v. Garrett*.¹⁴ The current Court's concern for federalism and for 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 we will see in the next section, 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 that the Supreme 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" 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

¹⁰ 383 U.S. 301 (1966).

¹¹ 384 U.S. 641 (1966).

¹² 521 U.S. 507 (1997).

¹³ 529 U.S. 528 (2000).

¹⁴ 531 U.S. 356 (2001).

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form of government.”¹⁵ Justice Cardozo's opinion for a 5-4 majority emphasized the national scope of the unemployment problem during the 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 enactment of unemployment compensation laws at the bidding of the central government.”¹⁶ 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.”¹⁷ 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,” but he left drawing “the outermost line” to “the wisdom of the future.”¹⁸

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*.¹⁹ 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.”²⁰ 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.”²¹ The Court also felt compelled to protect the states from an intrusion on their police power, anchored in the Commerce Clause,

¹⁵ Charles C. Steward Machine Co. v. Davis, 301 U.S. 548, ___ (1937).

¹⁶ Id. at __, __.

¹⁷ Id. at __. 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, __ (1937).

¹⁸ 301 U.S. 548 at __.

¹⁹ __ U.S. __, 132 S.Ct. 2566 (2012)

²⁰ Id. at __.

²¹ Id. at __. Roberts also emphasized that there was a large amount of money involved and that, in his view, the changes in Medicaid constituted a retroactive change in kind for the program, which the states could not anticipate and which, if upheld, could force the states to continue to accept new conditions tied to the funding they accepted.

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because “Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.”²² Ironically of course, Chief Justice Roberts managed to stitch together enough votes to uphold requiring individuals to participate in the Affordable Care Act by labeling that form of purported coercion to be a tax penalty, within the broad scope of Congress's taxing power.²³

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 with her majority decision in *New York v. United States*.²⁴ In the course of invalidating the “take title” aspect of the complex provisions of the Low-Level Radioactive Waste Policy Amendments of 1985, O'Connor's majority opinion endorsed the Court's earlier recognition that “The 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.”²⁵ Nonetheless, the Court declared that even the “consent” of state officials could not validate unconstitutional federal coercion.

“In the end,” 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.”²⁶ The Court sought to limit the power of Congress to “commandeer” the states, and emphasized the idea that “the Constitution divides authority between federal

²² *Id.* at __.

²³ *Id.* at __.

²⁴ 505 U.S. 144 (1992), construing Pub.L. 99-240, 99 Stat. 1842, 42 U.S.C. § 2021b *et seq.* Then-Justice Rehnquist had tried earlier to limit Congress's Commerce Clause power in *National League of Cities v. Usery*, 426 U.S. 833 (1976) if the Court determined that a statute interfered with traditional, integral, or essential state functions, but Rehnquist lost Justice Blackmun's vote and thus his majority less than a decade later in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

²⁵ 505 U.S. at 156-7.

²⁶ *Id.* at 165.

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and state governments for the protection of individuals. State sovereignty is not an end in itself.”²⁷

A number of subsequent and more far-reaching decisions did indeed seem to regard state sovereignty as an end in itself. Whether protecting state officials from being commandeered to keep gun registration records²⁸ or invalidating Congress's effort to afford additional protection for victims of sexual violence, even though a substantial majority of the states supported the measure and filed an amicus brief to that effect,²⁹ the Court now has repeatedly elevated both state sovereignty and the Tenth Amendment substantially. And the sword as well as the shield that were to guarantee protection to individuals through the post-Civil War amendments and the statutes based upon them—recognized even by Justice Rehnquist in his early years on the bench³⁰—have long since been shelved on behalf of states' rights.

*Shelby County v. Holder*³¹ was but the latest 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 by Chief Justice Roberts distorted both constitutional text and history in remarkable ways in the course of striking down Congress's renewal of the

²⁷ Id. at 181.

²⁸ *Printz v. United States*, 521 U.S. 898 (1997).

²⁹ *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 Attorneys General from 38 States urged Congress to enact the Civil Rights Remedy. Moreover, 36 states and the Commonwealth of Puerto Rico filed an *amicus* brief in support of the petitioners in these cases, and only one state has taken respondents' side. Id. at 553-4.

³⁰ *Fitzpatrick v. Bitzer*, 447 U.S. 445, __ (1976). Rehnquist may have been channeling Justice Jackson, for whom he served as a law clerk, who wrote for the Court in *Pollock v. Williams*, 322 U.S. 4 (1944). In striking down a conviction for fraud allegedly perpetrated by Emanuel Pollock for accepting \$5 without doing the required work—and thus being subject to a fine of \$100 and 60 days in jail—Jackson declared that through 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 __. See also *Patsy v. Board of Regents, Florida*, 457 U.S. 496 (1982).

³¹ 133 S. Ct. 2612 (2013).

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preclearance requirement in Section 4b of the Voting Rights Act of 1965. First, for example, Roberts proclaimed that: "Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. Amdt. 10."³² But the Tenth Amendment does not say this. 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.³³

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*,³⁴ 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. Now that Oklahoma had become a state, it was entitled to revoke that promise because to hold otherwise would treat it differently and less favorably than all the other states. States are equally allowed to break their solemn promises. More recently, in the name of sovereign immunity said to be anchored in the Eleventh Amendment, states can also escape bad bargains unless it can be demonstrated that they fully understood what the deal entailed that they had undertaken.³⁵

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

³² Id. at 2623.

³³ _____

³⁴ 221 U.S. 529 (1911). Justices McKenna and Holmes dissented, without opinion.

³⁵ *Pennhurst State Hospital; Seminole Tribe; Alden v. Maine.*

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verve and eloquence, that state action is a judicial construct that ought to be abandoned.³⁶ Without plumbing those depths now, however, it is illuminating briefly to consider 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*,³⁷ holding that a Kentucky law that forbade blacks from testifying took precedence over the federal Civil Rights Act of 1866. Because two black witnesses to the horrific murder of several members of a black family therefore could not testify, there was no federal jurisdiction and the indictment had to be dismissed.³⁸

Beginning with the *Civil Rights Cases*,³⁹ however, the Court explicitly began to leave former slaves and their allies and descendants to their own devices. Less than 18 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."⁴⁰ In fact, said the Court, "It would be running the slavery argument into the ground"⁴¹ 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 convicts for petty crimes who were leased out of confinement and chain gangs by white employers,

³⁶ Black's Harv. L. Rev. Forward and my article about him.

³⁷ 80 U.S. (13 Wall.) 581 (1872).

³⁸ Discussed in my Columbia L. Rev. article at 1621.

³⁹ 109 U.S. 3 (1883).

⁴⁰ Id. at 25.

⁴¹ Id. at ___.

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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.

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 within voluntary slavery. In order to marry the daughter of Laban, Rachel, Jacob agreed to work for Laban for seven years. 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 to marry Rachel, too.⁴²

Yet, 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: "The property that every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable."⁴³ And John Stuart Mill asserted that, "The principle of freedom cannot require that a man should be free not to be free."⁴⁴ 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, 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.

⁴² 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 (Eitz Hayim). I owe this point to my mother, Ahuva Soifer.

⁴³ Quoted by Justice Field at the end of his Slaughter-House Cases dissent, 83 U.S. (16 Wall.) at 110.

⁴⁴ On Liberty at 126. See Benno Schmidt's extensive discussion in Bickel and Schmidt, 9 Holmes Devise: The Judiciary and Responsible Government, 1910-1921 at 820-907.

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Prior to the abolition of slavery, Lemuel Shaw, the eminent Chief Justice of the Massachusetts Supreme Judicial Court for 30 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.⁴⁵ And 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.⁴⁶ Even long after the Thirteenth 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.

In *Robertson v. Baldwin*,⁴⁷ 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,”⁴⁸ even if it 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*.⁴⁹ 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

⁴⁵ My Constrained Choices chapter and Yale L. J. article; Willie Forbath; Edlie Wong; Robert Steinfeld; Amy Dru Stanley.

⁴⁶ My Yale L.J. article.

⁴⁷ 160 U.S. 275 (1898).

⁴⁸ Id. at 280. Because the Court considered sailors to be in particular need of paternalistic care because they were “deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults,” it was 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.” 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.

⁴⁹ 163 U.S. 537 (1896).

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services of one man for the benefit of another, and in the absence of a legal right to the disposal of his own person, property, and services.”⁵⁰

Within a few years, however, the Court boldly narrowed the definition of peonage and overturned a rarity, a successful peonage prosecution of a brutal overseer and his minions for bringing two black workers back to Georgia from Florida at gunpoint and in handcuffs to return to the awful conditions they faced working to produce turpentine. 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.”⁵¹ 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 them to the care of the nation.”⁵²

Arkansas law would have to suffice, Justice Brewer wrote for the Court, 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.⁵³ To determine otherwise would be to treat blacks as “wards of the Nation.”⁵⁴ 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. This betrayed the promise of the Thirteenth Amendment, Harlan noted, which had

⁵⁰ Id. at 542.

⁵¹ *Clyatt v. United States*, 197 U.S. 207, 215 (1905). Justice Brewer held that debt was the necessary “basal” condition for peonage; Justice Harlan again vigorously dissented.

⁵² 203 U.S. 1, 16 (1906).

⁵³ Id. at 16. 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 whom Congress had granted citizenship at the end of the Civil War. Congress, Brewer argued, 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.

⁵⁴ 203 U.S. at 20. The *Hodges* decision was formally overruled in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 4__n.__ (1968).

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“destroyed slavery and all its incidents and badges, and established freedom” and which had “an affirmative operation the moment it was adopted.”⁵⁵

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.⁵⁶ 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, and not to the federal courts.⁵⁷

C. Tracking Justice Holmes

By 1911, the Court had begun to question more directly its faith in freedom of contract and in state law. The well-known decision in *Bailey v. Alabama*⁵⁸ exemplifies the change. Though both Hughes for the majority and Holmes in dissent claimed that the fact that the case arose in Alabama made no difference to them, both Justices 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, particularly effective as

⁵⁵ Id. at 37, 27, 29. Harlan was joined in dissent by Justice Day.

⁵⁶ Robert Cover, *Justice Accused* (1975).

⁵⁷ 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. Holmes wrote, “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, and Justice Brown dissented without opinion.

⁵⁸ 219 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*, 211 U.S. 452, 455 (1908).

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against the poor and ignorant, its most likely victims.”⁵⁹ 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.”⁶⁰

Holmes’s dissent accused the majority of assuming that Alabama juries would be prejudiced and claimed that, to the contrary, it was appropriate for Alabama to leave such matters to juries because of “their experience as men of the world.”⁶¹ In characteristic pithy fashion, Holmes also made the point that “The Thirteenth Amendment does not outlaw contracts for labor.” Surprisingly, however, 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.⁶²

In two quite different 1911 decisions, therefore, Oklahoma remained 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 decision. To Hughes and the majority, however, it mattered that Alabama’s criminal breach presumption primarily affected “poor” and “ignorant” farmworkers.⁶³

⁵⁹ Id. at 245.

⁶⁰ Id. at 241.

⁶¹ Id. at 248.

⁶² Id. at 246. Holmes’s concern about contract breach as “wrong conduct” here sharply contrasts with his hard-nosed position regarding contract breach in his book, *The Common Law* (1881) and in his “The Path of the Law” essay, as well as in his usual jaded embrace of life’s struggles.

⁶³ Id. at 245. The Progressive movement muckrakers who celebrated the *Bailey* decision nonetheless denigrated Bailey himself. See, e.g., Ray Stannard Baker, “A Pawn in the Struggle for Freedom,” 72 *American Magazine* 608 (“But you will probably not be able to distinguish him from a thousand—or a million—other blacks 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

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When the Court a few years later invalidated a test case regarding the widespread convict lease system in *Reynolds v. United States*,⁶⁴ Holmes reluctantly concurred after repeating his objections to the *Bailey* decision. 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.”⁶⁵ As C. Wright Mills insightfully put it, however, “Each day men sell little pieces of themselves in order to try to buy them back each night and week end.”⁶⁶

D. Permissible Coercion

By 1916, the Court had made it clear in a unanimous opinion that the long tradition of mandatory roadwork did not offend the Thirteenth Amendment.⁶⁷ Two years later, the Court declared that an involuntary servitude challenge the World War I military draft was “refuted by its mere statement.”⁶⁸ 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.

unmistakable marks of ignorance, inertia, irresponsibility.”) *New York Age*, January 19, 1911 at 8, describing Bailey as a cipher who was “last heard from slinging hash at the clubhouse, caring not which way the winds of court blew, so they robbed him not of his good meals and freedom to break contracts whenever he listed.”

⁶⁴ 235 U.S. 133 (1914)

⁶⁵ *Id.* at 150.

⁶⁶ C. Wright Mills, *White Collar* __ (1951), quoted in Jill Lepore, “Away From My Desk” *New Yorker*, May 12, 2014.

⁶⁷ *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 “The 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.

⁶⁸ *Selective Service Cases*, 245 U.S. 366, 390 (1918).

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In his lead opinion in *Block v. Hirsch*,⁶⁹ Holmes stressed the pressure put on available housing by the growth of the federal government during the war, and he accepted the claim that it posed an ongoing problem that government could meet. 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. 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."⁷⁰ In addition, he warned: "The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed."⁷¹

Holmes made short work of the claim in the companion New York City case that to compel a landlord to rent to a tenant at a controlled price violated the Thirteenth Amendment. 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."⁷²

Justice McKenna, who was often Holmes's rival on the Court, vigorously dissented to both decisions and he was joined by the Chief Justice and by Justices McReynolds and Van Devanter. To McKenna, the text of the Constitution itself clearly answered all the legal questions in the two cases, and the majority had started down a very slippery slope. "The facts are significant," McKenna claimed, and 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

⁶⁹ 256 U.S. 135 (1921).

⁷⁰ *Id.* at ___.

⁷¹ *Id.* at ___.

⁷² *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 199 (1921). 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.*

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form of socialism, is the only permanent corrective or accommodation?"⁷³ 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."⁷⁴ By 1924, even Holmes was skeptical as to whether the District of Columbia could continue to claim that the World War I emergency could continue to supply a basis for its rent control measures.⁷⁵

In *Coppage v. Kansas*,⁷⁶ however, Holmes dissented from the Court's decision invalidating the attempt by Kansas to prohibit employers from demanding "yellow-dog contracts," which required employees to promise not to join any union. 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."⁷⁷ Holmes asserted further that "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**" (emphasis added).⁷⁸

By 1937 in *West Coast Hotel Co. v. Parrish*,⁷⁹ Chief Justice Hughes could proclaim 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 defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden

⁷³ Id. at 162

⁷⁴ Id. at 163. McKenna's overheated dissent also proclaimed that "A contract existing, its obligation is impregnable" and the dissenting Justices went on to warn that, "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 169.

⁷⁵ *Chasleton Corp. v. Sinclair*, 264 U.S. 543 (1924).

⁷⁶ 236 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.

⁷⁷ Id. at 27. Justice Day also dissented, joined by Justice Hughes.

⁷⁸ Id.

⁷⁹ 300 U.S. 379 (1937).

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for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay.”⁸⁰ This bold and broad statement in the course of the Court's decision to uphold minimum wages for women was accompanied, however, with considerable overt paternalism. Indeed, paternalism generally may be at the heart of all judicial decisions that question or invalidate individual contracts as coercive. The same might even be said on a larger scale concerning some of the Court's decisions to protect states from themselves, even when states have had lawyers who had not objected to the obligations undertaken. But there is paternalism and then there is paternalism.

Conclusion

Robert Hale, a remarkable legal realist and longtime faculty member at Columbia Law School, once wrote: “Adam Smith's ‘obvious and simple system of natural liberty’ is not a system of liberty at all, but a complicated network of constraints, imposed in part by individuals but very largely by the government itself as the behest of some individuals on the freedom of others, and at the behest of others on the behest of the ‘some.’” As Barbara Fried makes abundantly clear in her excellent book placing Hale among the progressive thinkers of his time, many smart people began to recognize that coercion is a malleable and ultimately often misleading concept a century ago.⁸¹ Hale himself wrote some of the best critical discussions to date about both the issue of coercion and what he believed to be the fallacy of state action. Towards the end of his life, Hale participated in briefing the state action case that became *Shelley v. Kraemer*,⁸² once aptly described as “the Finnegan's Wake of constitutional law.”⁸³

⁸⁰ Id. at 399.

⁸¹ Barbara Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (1998)

⁸² 331 U.S. 1 (1948)

⁸³ Philip Kurland, “1963 Term--Foreword: “Equal in Origin and Equal in Title to the Legislative and Executive Branches,” 73 Harv. L. Rev. 143, 148 (1964).

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A basic point made by Hale and others was that claims of coercion ought not to be separated from underlying inequalities. To wrestle with that fundamental inequality, however, is to begin to sense how overwhelming it might be to take seriously legal limitations on “voluntary servitude.” First-year law students still learn that American tradition and case law do not permit equity to require specific performance, largely explained in terms of the Thirteenth Amendment. Yet if we were to begin to apply the contextual difficulties as well as the frequently complex variations on the theme of paternalism that seem inherent in policing contracts for the possible imposition of “voluntary servitude,” we might face a task as open-ended--and downright scary—as taking the Ninth Amendment’s textual commitment to natural rights seriously. Nonetheless, we still have 42 U.S. C. Sec. 1994 on the books. And any worthwhile journey requires a beginning.