2001

Peonage and Contractual Liberty

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Supreme Court jurisprudence concerning the Thirteenth Amendment is sparse. However, in 1911 and 1914, the Court decided two cases concerning peonage laws: laws that had the effect of extracting labor from blacks under threat of criminal sanction. Although the Court in this epoch was typically hostile to claims of racial subordination, in both these cases, black litigants won. This Note argues that these cases are best understood in light of freedom of contract jurisprudence. In particular, freedom of contract theory suggested an understanding of coercion that was transplanted into the Thirteenth Amendment context. Recent case law suggests that this theory persists in the Court's understanding of the Thirteenth Amendment.

INTRODUCTION

The Thirteenth Amendment's promise of relief from "slavery [and] involuntary servitude"[1] has borne little fruit, unlike its contemporaneous kin the Fourteenth and Fifteenth Amendments.[2] The impotence of an Amendment drafted to remedy the economic subjugation of African-Americans is ironic in light of the persistent income gap between races.[3] This Note analyzes a rare instance of expansive Thirteenth Amendment articulation—cases involving peonage.[4] These cases diverged from the

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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." U.S. Const. amend. XIII, § 1.

2. See Douglas L. Colbert, Liberating the Thirteenth Amendment, 30 Harv. C.R.-C.L. L. Rev. 1, 2 (1995) (arguing that "constitutional law professors view the Amendment as having historical meaning only"); Lauren Kares, Note, The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine, 80 Cornell L. Rev. 372, 372 (1995) (asserting that "the Thirteenth Amendment is notable for its lack of a coherent jurisprudence").

3. On the political context of the Thirteenth Amendment's drafting and ratification, see Guyora Binder, Did the Slaves Author the Thirteenth Amendment? An Essay in Redemptive History, 5 Yale J.L. & Human. 471, 484–87 (1993) (describing the role of the slaves' values in the elaboration of the Thirteenth Amendment); William E. Forbath, Caste, Class, and Equal Citizenship, 98 Mich. L. Rev. 1, 27 (1999) [hereinafter Forbath, Caste, Class, and Equal Citizenship] (noting that "Republicans . . . celebrated the Thirteenth Amendment as a charter of free labor"); Lea S. Vandervelde, The Labor Vision of the Thirteenth Amendment, 138 U. Pa. L. Rev. 437, 438 (1989) (noting that many congressmen "envisioned the [Thirteenth] Amendment as a charter for labor freedom").

On the persistence of racial inequality, see Chuck Collins & Felice Yeskel, Economic Apartheid in America: A Primer on Economic Inequality and Insecurity 43–46 (1999) (quantifying the racial component of economic inequality in the United States); William Julius Wilson, The Bridge over the Racial Divide: Rising Inequality and Coalition Politics 12–39 (1999) (reviewing the role of race in rising economic inequality).

4. See United States v. Reynolds, 235 U.S. 133 (1914); Bailey v. Alabama, 219 U.S. 219 (1911).

Progressive Era pattern of judicial hostility to minority claims,[5] while having only a limited impact on the quotidian reality of race relations.[6] This Note argues that these cases' divergence from their era's racial hostility and their limited impact can be explained by viewing them as instances of "interest convergence," wherein the dominant (white) ideology informing the court happened to coincide with the needs of black workers.[7] In Derrick Bell's words, "[t]he interest of blacks in achieving racial equality [is] accommodated only when it converges with the interests of whites."[8] Specifically, the Supreme Court pressed the Thirteenth Amendment into the service of liberty of contract doctrine to solve a pressing ideological problem.

The ideological crisis addressed in cases involving peonage arose from a disjunction between the era's liberty of contract ideology and its economic realities: At the close of the nineteenth century, rapid industrialization, increasing concentration of capital, and a shrinking share of returns for labor produced industrial unrest and periodic depression.[9] Claims that wage labor was coercive were pervasive, often being invoked to justify redistributive legislation.[10] Laborers claimed to be coerced by the wage labor system;[11] women claimed to be coerced by their physical frailty.[12] The pervasiveness of coercion rhetoric jarred with the dominant vision of liberty of contract as the sine qua non of fair and just social ordering.[13]

Courts struggled to restrain legislative redistribution, to limit claims of economic coercion, and to preserve laissez-faire's ideological coherence. Relying on the Due Process Clause of the Fourteenth Amendment,

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5. See, e.g., Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (noting that segregation may "stamp[ ] the colored race with a badge of inferiority" solely because "the colored 'race' chooses to put that construction upon it"); The Civil Rights Cases, 109 U.S. 3, 25 (1883) (implying that the time had come when blacks "cease[ ] to be the special favorite of the laws").

6. See infra note 235 and accompanying text.

7. Derrick A. Bell, Jr., *Brown v. Board of Education* and the Interest Convergence Dilemma, *in* Critical Race Theory 20, 22 (Kimberlé Williams Crenshaw et al. eds., 1995). Bell discusses how the desegregation decisions of the 1950s and 1960s can be explained by a convergence between longstanding efforts by the NAACP and others, on the one hand, and white elites' policymaking interests on the other. See id. at 22–23.

8. Id. at 22.

9. See generally Eric Foner, Reconstruction: America's Unfinished Revolution 1863–1877, at 460–69 (1988) [hereinafter Foner, Reconstruction] (discussing the rapid industrialization of the post-Civil War North).

10. See Gregory S. Alexander, The Limits of Freedom of Contract in the Age of Laissez-Faire Constitutionalism, *in* The Fall and Rise of Freedom of Contract 103, 109–10 (F.H. Buckley ed., 1999) (discussing how anxiety over the growth of corporate power led to an increase in labor regulation).

11. See Coppage v. Kansas, 236 U.S. 1, 26 (1915) (invalidating a Kansas law that prohibited employers from requiring that workers promise not to join a union).

12. See Muller v. Oregon, 208 U.S. 412, 416 (1908) (validating a statute that restricted the number of bours women could work).

13. See infra Part I.B.

they invalidated labor regulations as violations of the freedom to contract: Only if contracting was voluntary, and sheltered from redistributive legislation, would the market produce fair and equitable outcomes.[14] Confronted by workers' claims of coercion, the Court sought a substantive theory to *limit* cognizable coercion, without disrupting laissez-faire theory's insistence on voluntary contracting.

The Court solved this coercion problem by labeling some categories of plaintiffs—principally blacks and women—as per se vulnerable to coercion, and refusing other claims.[15] This definition of coercion spilled over into the Thirteenth Amendment when the Court interpreted the phrase "involuntary servitude" in *Bailey v. Alabama* and *United States v. Reynolds* (together called "the Peonage cases").[16] Previously, the Court had refused to find meaningful protection against racial subordination in the Reconstruction Amendments. In the *Civil Rights Cases*, for instance, it found that the Thirteenth Amendment provided no protection against private discrimination, since it "simply abolished slavery."[17] In the Peon-

14. See Clyde E. Jacobs, Law Writers and the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon Upon American Constitutional Law 65–97 (1954) (reviewing the ascendancy of anti-regulatory jurisprudence in state and federal courts after 1889); Bernard Schwartz, A History of the Supreme Court 179–82 (1993) (discussing the pre-*Lochner* development of liberty of contract).

15. The place of paternalism in a non-market ordering has been noted by other authors. See Alexander, supra note 10, at 118 ("By limiting interference with contractual freedom to discrete instances of vulnerability that posed risks for the proper social order, the Court sought to accommodate the new ethic of liberty of contract with vestiges of the inherited proprietarian tradition."); Aviam Soifer, The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921, 5 L. & Hist. Rev. 250, 255 (1987) (arguing that during the *Lochner* era, the Court became "the ultimate paternalist[ ]" even as it tried "tenaciously to root[ ] out paternalism"). Both Soifer and Alexander identify the link between the acceptable regulations and the Court's preconceived ideas of which classes were vulnerable. Neither links the Court's paternalism with the ideological and political needs of laissez-faire ideology and practice. Indeed, Alexander argues both that the Court sought to define "legitimately" protective legislation and that these boundaries coincided with an older "proprietarian tradition." Alexander, supra note 10, at 116. This Note, on the other hand, argues that paternalism and racism are not only compatible with, but are constitutive of, capitalist market ordering.

16. 219 U.S. 219 (1911); 235 U.S. 133 (1914). *Bailey* and *Reynolds* are not the only peonage cases. However, they are the most interesting and hence are the focus of this Note. For other Supreme Court confrontations with peonage, see Pollock v. Williams, 322 U.S. 4, 18–20 (1944) (striking down a Florida statute that "as a practical matter" reinstituted peonage); Taylor v. Georgia, 315 U.S. 25, 29 (1942) (invalidating, pursuant to *Bailey*, a Georgia statute that criminalized acceptance of a contract under false pretenses); Butler v. Perry, 240 U.S. 328, 333 (1916) (invalidating a peonage prosecution); Hodges v. United States, 203 U.S. 1, 20 (1906) (reversing a peonage conviction); Clyatt v. United States, 197 U.S. 207, 222 (1905) (overturning a peonage prosecution because "there is not a scintilla of testimony to show that [the alleged peons] were ever theretofore in a condition of peonage").

17. The Civil Rights Cases, 109 U.S. 3, 23 (1883); see also id. at 20–25 (noting that private acts of discrimination have "nothing to do with slavery or involuntary servitude"). The Privileges or Immunities clause of the Fourteenth Amendment also received a crushing blow in the *Slaughter-House Cases* on federalism grounds, ending the possibility of

age cases, however, the Court invalidated two state statutes designed to coerce labor from indigent, usually African-American, laborers by placing them in peonage.[18] This Note argues—principally through the historical context and language of the Peonage cases—that *Bailey* and *Reynolds* are best understood as corollaries of laissez-faire ideology, and not as the beginning of minority-friendly jurisprudence departing from the pattern of *Plessy* and the *Civil Rights Cases*.[19] The Court's acquiescence to minorities' claims is best explained by the fortuitous convergence of dominant ideological interests and otherwise unheard pleas for racial justice.

Peonage involved "a man indebted to an employer" and forced, under pain of criminal punishment, to continue laboring for that employer.[20] In neither of the Peonage cases did the law in question explicitly fashion a peonage bond. The false pretenses law at issue in *Bailey* defined acceptance of an advance and the subsequent failure to repay it as prima facie evidence of fraud; the criminal surety law in *Reynolds* allowed third parties to pay convicted criminals' fines in return for their future labor.[21] Both, in the context of a racist and oppressive criminal justice system,[22] effectively bound black labor to employers at little cost to

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using it as a shield from racial injustice. The *Slaughter-House Cases* themselves involved the claims of white butchers that a municipally mandated monopoly had deprived them of their trade, and violated the Fourteenth Amendment. See The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 78–79 (1872) (finding that an interpretation that "radically changes the whole theory of relations of the State and Federal governments" was not intended by the Amendment's framers or ratifiers). Notwithstanding the "almost crushing weight of conventional wisdom," one recent commentator has argued that *Slaughter-House*'s vision of the Privileges or Immunities clause as protective of "'uniquely federal' rights" still might provide some significant leverage. Kevin Christopher Newsom, Setting Incorporationism Straight: A Reinterpretation of the *Slaughter-House Cases*, 109 Yale L.J. 643, 648, 650 (2000).

18. While many immigrants fell into peonage briefly, blacks bore "the major burden of Southern peonage." Pete Daniel, The Shadow of Slavery: Peonage in the South 1901–1969, at 108 (1972) [hereinafter Daniel, Shadow of Slavery].

19. But see Michael J. Klarman, Race and the Court in the Progressive Era, 51 Vand. L. Rev. 881, 921–30 (1998) (arguing that the Peonage cases are instances of minimalist constitutional interpretation in furtherance of blacks' interests). Both Klarman and Professor Benno Schmidt view the Peonage cases as inklings of a minority-friendly jurisprudence, through which blacks started to make incremental gains. For an assessment of Schmidt's position, see infra note 164 and accompanying text.

20. Daniel, Shadow of Slavery, supra note 18, at x. Daniel notes that "no thorough investigation of peonage ever revealed even an approximate estimate of black peons." Id. at 108. However, in one of his case studies, Daniel notes that in one Georgia county (Jasper) "most of the . . . planters . . . were guilty of peonage." Id. at 129.

21. See Alexander M. Bickel & Benno C. Schmidt Jr., A History of the Supreme Court Volume IX: The Judiciary and Responsible Government, 1910–21, at 856–58, 882–83 (1984). Only in Louisiana was simple breach of an employment contract criminal. See id. at 854.

22. See David M. Oshinsky, "Worse Than Slavery": Parchman Farm and the Ordeal of Jim Crow Justice 31–34, 124–33 (1996) (sketching the emergence of a new law-enforcement regime after the Civil War, which involved "keeping the ex-slaves in line," and describing criminal justice in turn-of-the-century Mississippi); Katheryn K. Russell, The Color of Crime 14–25 (1998) (describing ways in which the Southern criminal justice system targeted blacks).

the latter. Both laws were mere cogs in a complex machinery of "customs and laws" designed to retain cheap labor for turpentine farms, cotton farms, and railway construction.[23] Both continued de facto slavery. In both cases, the Court struck down state law components of this system on grounds that resembled rationales used in laissez-faire jurisprudence.

Part I of this Note outlines the historical context of the Peonage cases, sketching conditions in the labor market and focusing on the South. The laissez-faire theory of limited government is then outlined. Part II reviews *Lochner*-era substantive due process cases concerning women and white laborers to illuminate judicial understandings of coercion. Changing judicial attitudes toward women illustrate the culturally contingent nature of market baselines. The final Part analyzes the Peonage cases as products of the same notion of coercion, again hinging on the Justices' understanding of African-Americans' place in the labor market. Examination of a contemporary Thirteenth Amendment case suggests that traces of this framework persist.[24]

I. BUILDING THE FREE MARKET IN PRACTICE AND IN THEORY

This Part sketches post-Civil War labor relations. The jurisprudential framework used to understand economic legislation, as it evolved from Thomas Cooley and Christopher Tiedeman to the courts, is then examined. Judicial theory diverged from the reality of the labor market because of the prevalence of coerced (non-voluntary) transactions in the

23. Daniel, Shadow of Slavery, supra note 18, at ix; see also id. at 21–22 (discussing prevalence of peonage through the entire South, and the difficulties inhering in measuring its spread); Martha A. Myers, Race, Labor, & Punishment in the New South 225–27 (1998) (comparing trends in incarceration of blacks and whites in Georgia between the Civil War and the Second World War to conclude that "punishment of black men . . . was more firmly linked than comparable white punishments to economic events and conditions"). Another instance of oppressive labor law was the convict lease system, whereby blacks arrested on minor offenses were hired out by the state as cheap labor. See Alex Lichtenstein, Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South 10–12 (1996); see also Myers, supra, at 15–21 (describing the growth of the convict lease system in Georgia after the Civil War); Oshinsky, supra note 22, at 70–84 (describing convict leasing in Tennessee, Florida, and Alabama in coal mines and turpentine farms).

24. Alternative *jurisprudential* models are not considered at length here as extensive discussion exists elsewhere. See, e.g., Akhil Reed Amar, Remember the Thirteenth, 10 Const. Comment. 403, 407 (1993) (arguing that the Thirteenth Amendment should not be subject to a state action requirement and that it should apply "when private economic power is used in racially perverse ways"); Akhil Reed Amar & Daniel Widawsky, Child Abuse as Slavery: A Thirteenth Amendment Response to *DeShaney*, 105 Harv. L. Rev. 1359, 1383–84 (1992) (applying the Thirteenth Amendment paradigm to the parent-child relation); Cynthia A. Bailey, Workfare and Involuntary Servitude—What You Wanted to Know But Were Afraid to Ask, 15 B.C. Third World L.J. 285, 316–21 (1995) (arguing that workfare assignments are a form of involuntary servitude); Binder, supra note 3, at 492–99 (discussing the interpretive choices demanded by the Thirteenth Amendment); Julie A. Nice, Welfare Servitude, 1 Geo J. on Fighting Poverty 340, 354–55 (1994) (comparing workfare to involuntary servitude).

labor market. This Part closes by suggesting why coercion was conceptually difficult for judges.

A. *Postbellum Economic Development*

1. *Labor Unrest and "Wage Slavery" in Northern Industry.* — War's close and Reconstruction witnessed an expansion in the North's economy and the growth of a "powerful class of industrialists and railroad entrepreneurs."[25] Radical Republicanism, with roots in antebellum Free Labor and Free Soil parties, prospered momentarily,[26] but soon foundered as the Republican Party drifted from the principles of Southern Reconstruction toward a pro-business liberalism.[27] Disillusioned by well-publicized corruption, particularly in Southern Reconstruction regimes, "liberal reformers who had once exalted the power of the activist state . . . attacked the 'fallacy of attempts to benefit humanity by legislation.'"[28] When the Northern Pacific Railroad's financial problems triggered the 1870s depression, labor unrest accelerated, culminating in the Great Strike of

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25. Foner, Reconstruction, supra note 9, at 460.

> By 1873, the nation's industrial production stood 75% above its 1865 level, a figure all the more remarkable in view of the South's economic stagnation.... By 1873, with the United States second only to Britain in manufacturing production and the number of farmers outstripped by nonagricultural workers, the North had irrevocably entered the industrial age.

Id. at 461. This is not, however, to suggest that industrial development was taking place solely in the North or that agricultural activities were confined to the South. See id. at 462–66 (discussing the agrarian development of the Midwest); Jonathon M. Wiener, Social Origins of the New South: Alabama, 1860–1885, at 209–14 (1978) [hereinafter Wiener, Social Origins] (discussing the genealogy of Reconstruction boosters of industry in the South).

26. See Eric Foner, Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War 11–39 (1970) (discussing original free labor ideals).

27. See Foner, Reconstruction, supra note 9, at 466, 500 (noting the reforms that took place within the Republican Party that precipitated the "growing connection of Republican leaders with business corporations"); see also William E. Forbath, The Ambiguities of Free Labor: Labor and the Law in the Gilded Age, 1985 Wis. L. Rev. 767, 786–90 [hereinafter Forbath, Ambiguities] (describing the unraveling of "Free Labor" Republicanism in the face of growing labor unrest). Power also shifted away from the Republican Party. See 2 Bruce Ackerman, We the People: Transformations 247 (1998) (charting the swing toward the Democrats). Foner notes elsewhere that Abolitionists were never sympathetic to labor's allegations of "wage slavery," since they diluted the attack of racial slavery. See Eric Foner, The Meaning of Freedom in the Age of Emancipation, 81 J. Am. Hist. 435, 448 (1994) [hereinafter Foner, Meaning of Freedom]. This is one part of the "bitter debates of the Reconstruction era [that] revolved in large measure around the definition of freedom in the aftermath of emancipation." Id. at 454.

28. Foner, Reconstruction, supra note 9, at 492; see id. at 497–99 (noting increasing disillusionment with the project of Southern Reconstruction). In particular, blacks in the Reconstruction regimes were seen as barriers to effective administration since they would never support limiting government services: "[A] remarkable reversal of sympathies took place, with Southern whites increasingly portrayed as victims of injustice, while blacks were deemed unfit to exercise suffrage." Id. at 499; cf. W.E. Burghardt Du Bois, Reconstruction and its Benefits, 15 Am. Hist. Rev. 781, 789 (1910) (noting that "[t]he chief charges against the negro governments are extravagance, theft, and incompetency of officials").

1877.[29] The labor unions leading such protests, such as the Knights of Labor, found themselves pitched against an increasingly powerful alliance of "the new industrial bourgeoisie [with] the Republican Party and the national state."[30] Further strikes followed, with gradually stronger showings by Populists in national polls.[31] Business interests responded fiercely, with an increasingly critical view of labor demands and a gathering insistence upon the unfettered operation of market forces.[32] Casting aside the travails of maintaining the Union and the moral ardor of the Radical cause, the North plunged into full-fledged class struggle.[33]

Union growth attests to a pervasive sentiment that Reconstruction remained "unfinished."[34] In particular, artisans and skilled factory workers suffered as they "found themselves competing against new machines and new unskilled and underpaid workers."[35] Factories expanded and became more common.[36] Workers endured long hours and low wages,[37] a condition of oppression and penury often explicitly analogized to slav-

29. See Foner, Reconstruction, supra note 9, at 512–19, 583–85.

30. Id. at 584; see also Morton J. Horwitz, The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy 65 (1992) (noting that "the Great Railroad Strike of 1877 triggered a pervasive fear that, by succumbing to the disease of the European class struggle, America had finally been drawn into the bitter cycles of European history"); William E. Forbath, The Shaping of the American Labor Movement, 102 Harv. L. Rev. 1109, 1121–25 (1989) (describing the various groups within the labor movement during the Gilded Age, and focusing on the largest and most radical, the Knights of Labor); Peter Kolchin, The Business Press and Reconstruction, 1865–1868, 33 J. S. Hist. 183, 190 (1967) (describing the business press's hostility toward Radical projects) [hereinafter Kolchin, Business Press].

31. See Horwitz, supra note 30, at 65–66.

32. The Northern urban press, according to Foner, described labor leaders as "'enemies of society' . . . . and insisted the laws of political economy dictated only one way out of the depression: 'Things must regulate themselves.'" Foner, Reconstruction, supra note 9, at 517–19. The urban bourgeoisie, which was moving rapidly to the right, welcomed the Depression as "'not an unmixed evil' since it promised to lower wages, discipline labor, and curb the power of unions." Id. at 518.

33. See Forbath, Caste, Class, and Equal Citizenship, supra note 3, at 26 (noting that "the Labor question eclipsed the Slavery Question in the politics of the rapidly industrializing postbellum North").

34. Id. at 30; see also David Montgomery, The Fall of the House of Labor 5 (1987) (noting that union membership quadrupled between 1897 and 1903); David Montgomery, Workers' Control in America 93–101 (1981) (charting the use of strikes after 1900). Nevertheless, union growth never crystallized into political power. See Seymour Martin Lipset and Gary Marks, It Didn't Happen Here: Why Socialism Failed in the United States 100–07 (2000) (explaining the failure of unionist efforts to form an alliance with a political party). Lipset and Marks further note that one reason for labor's failure at political log rolling was the "intense mutual hostility" between the Socialist party and the American Federation of Labor. Id. at 123.

35. Forbath, Caste, Class, and Equal Citizenship, supra note 3, at 28.

36. See Eric Foner, The Story of American Freedom 117 (1998) [hereinafter Foner, Story of Freedom] (noting that by 1900 "nearly half the laborers in manufacturing worked in establishments with more than 250 employees").

37. Although real wages rose in this period, monetary deflation and falling prices meant that "much of the working class remained desperately poor." Id. at 117. According

ery.[38] Just as the Nation celebrated free labor's triumph over feudal relations, legislatures and courts were flooded with allegations of a fresh mode of servitude resulting directly from free markets: Industrial workers saw their working conditions as "wage slavery," wherein "the 'lash of gold' fell not on 'one slave alone,' but on 'the backs of millions.'"[39] White workers articulated this fear of becoming slaves through racial violence: In strikes and racial programs, white workers, such as longshoremen on the New York City docks, would attempt to purge their jobs of the "'taint of blackness'" by "driv[ing] blacks from the labor market altogether and, in the process, redefin[ing] the jobs they appropriated as 'white.'"[40] The labor regulations challenged in cases such as *Lochner*,[41] *Coppage*,[42] and *Adair*[43] responded to such ferment in the labor market by attempting to ameliorate the inequitable distribution of surplus profits between labor and capital.

2. *Persistent Unfree Labor in the South.* — In parts of the South,[44] unfree forms of labor flourished alongside racial violence and disenfranchisement.[45] Postbellum labor relations in many parts of the South

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to Foner, the depressions of the 1870s and 1890s affected the poor particularly harshly. See id. at 121.

38. This tradition finds foundations in the hopes inspired by the Thirteenth Amendment's passage. "Labor spokesmen referred to the Thirteenth Amendment as a 'glorious labor amendment' that enshrined the dignity of labor in the Constitution and whose prohibition of involuntary servitude was violated by court injunctions undermining the right to strike." Id. at 124–27 (discussing in addition the resurgence of discussions of "wage slavery"). Indeed, the drafters of the Thirteenth Amendment had argued that "the degradation of one worker was the degradation of all working people." Vandervelde, supra note 3, at 445.

39. Amy Dru Stanley, From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation 84–86 (1998) (internal citations omitted). Stanley notes that labor activists refined the abolitionist critique of slavery, arguing against freedom of contract that "a man with his labor cannot be bought and sold, without recognizing slavery as a right." Id. at 90 (internal citations omitted); see also Foner, Reconstruction, supra note 9, at 477–79 (noting that union campaigns focused on "wage slavery"); Foner, Story of Freedom, supra note 36, at 143 (noting that the term "wage slavery" was in popular currency at least until 1919); Forbath, Ambiguities, supra note 27, at 813–14 ("The Reconstruction legislation and amendments affirmed that the condition of a laboring class was of constitutional moment . . . .").

40. Bruce Nelson, Divided We Stand: American Workers and the Struggle for Black Equality 20–21 (2001). Nelson describes how Irish longshoremen would establish their white identity by "creating social and psychological distance between themselves and African-Americans and, as a first priority, severing the occupational and residential ties that linked the two groups in the popular imagination." Id. at 200.

41. Lochner v. New York, 198 U.S. 45 (1905).

42. Coppage v. Kansas, 236 U.S. 1 (1915).

43. Adair v. United States, 208 U.S. 161 (1908).

44. This section is intended to give a brief survey of developments in the Southern labor market and hence does not do justice to the heterogeneity of the postbellum Southern experience. The sources cited in the footnotes provide specific instances of region-by-region analysis of Southern agriculture and industry.

45. See J. Morgan Kousser, Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction 23–25 (1999) (documenting techniques used

thus approximated slavery in substance, if not in legal form. While antebellum slavery had often been portrayed as absolute and literal domination,[46] recent historal work has emphasized the surprising incidence of negotiation, in which passive resistance and maroonage, subtly and at the edges, eroded planters' dominance.[47] While the practice of slavery varied immensely between different parts of the South, in a handful of instances slaves contested, occasionally successfully, "the organization of labor, the hours and pace of work, the sexual division of labor, and the composition of the labor force."[48]

Emancipation strengthened the hand of black labor without fundamentally altering this economic ordering.[49] Negotiations between black laborers and white landowners still occurred against a backdrop of immense inequality. Some planters failed to inform slaves of Emancipation;[50] others attempted to reestablish plantation-like labor arrange-

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during Redemption to disenfranchise blacks); Oshinsky, supra note 22, at 23–29 (describing Klan violence in Mississippi after Emancipation).

46. The plantation social order "conceded nearly everything to the slaveowner and nothing to the slave." Ira Berlin, Many Tbousands Gone: The First Two Centuries of Slavery in North America 97–100 (1998); see also Eugene D. Genovese, Roll, Jordan, Roll: The World the Slaves Made 25–49 (1974) (describing the legal ordering of master-slave relations).

47. Berlin documents a plethora of fronts upon which resistance took place. Maroonage, for instance, was the practice of fleeing plantations for encampments of former slaves and Indians in the wild. See Berlin, supra note 46, at 169–71 (noting that "in the Chesapeake, slaves found truancy a powerful weapon in the struggle to maintain control over their own lives"). Berlin also notes that slaves expressed considerable antipathy and resistance toward the task system. See id. at 166–67. In Louisiana, a shadow slave economy developed with slaves finding "a measure of independence in the cartage trades." Id. at 201–11; see also id. at 269–72, 276–77 (describing independent slave economies in Maryland and Virginia); Genovese, supra note 46, at 5 ("The slaves of the Old South displayed impressive solidarity and collective resistance to their masters . . . .").

48. Berlin, supra note 46, at 11. Across the South, "slaves created new economies and societies that tried to protect them from the harsbest aspects of the slave regime." Id. at 215.

49. See Barbara Jeanne Fields, Slavery and Freedom on the Middle Ground: Maryland during the Nineteenth Century 167 (1985) (noting that "nowhere did a new order arise immediately from the ashes of the old," but arguing that Reconstruction nonetheless fostered real change); see also id. at 175 (noting that land redistribution was rare in Maryland). A brief exception occurred in 1863 in the Sea Islands of South Carolina, where a group of antislavery missionaries from New York worked with freedmen to establish a system of titling and black landownership. See Willie Lee Rose, Rehearsal for Reconstruction: The Port Royal Experiment 272–96 (1964) (describing the partitioning of land among former slaves). This experiment ended when, pursuant to President Johnson's orders, "regular military forces seized control [and] restor[ed] the lands to their late owners." Id. at 357.

50. See Oshinsky, supra note 22, at 16; Pete Daniel, The Metamorphosis of Slavery, 1865–1900, *in* 3 From Slavery to Sharecropping: White Land and Black Labor in the Rural South 1865–1900, at 64, 66 (Donald G. Nieman ed., 1994) [hereinafter Daniel, The Metamorphosis of Slavery].

ments.[51] Through the Black Codes, early postbellum Southern legislatures attempted openly to "reinstitut[e] the law of master and servant for African Americans."[52] Little land redistribution actually occurred,[53] except in isolated and anomalous pockets such as the South Carolina Sea Islands and at Davis Bend in Mississippi.[54] Legal impediments to increased productivity reduced blacks' incentive to invest in skills,[55] so most blacks remained in the lower echelons of the labor market, mostly as sharecroppers and tenant farmers.[56]

Ironically, the Freedman's Bureau, a federal agency established to aid the former slaves, entrenched initial black disadvantage in the labor market.[57] Its agents stressed the "solemn obligation of contracts," declaring that "if [former slaves] can be induced to enter into contracts, they are taught that there are duties as well as privileges of freedom."[58] In

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51. See David Montgomery, Black Workers and Republicans in the South, *in* Civil Rights Since 1787: A Reader on the Black Struggle 141, 144 (Jonathon Birnbaum & Clarence Taylor eds., 2000) (noting how sharecropping developed as a way of retaining a plantation-like system in the context of planter illiquidity in 1866).

52. Id. at 143.

53. See Rose, supra note 49, at 349–52 (describing President Johnson's failure to confiscate land from former slaveholders); Du Bois, supra note 28, at 784 (same). This is true of the Republican and later Redemption governments. See Montgomery, supra note 51, at 142 ("Even though the Depression of the 1870s threw vast tracts of southern land into state hands through tax defaults, most of that acreage made its way back to former owners.").

54. See Janet Sharp Hermann, The Pursuit of a Dream 109–216 (1981) (describing the failed attempt of Benjamin Montgomery, a former slave of Joseph Davis, who was Jefferson Davis's brother, to establish a "black, cooperative community"); Rose, supra note 49, at 272–96 (discussing the division of land in the South Carolina Sea Islands).

55. "Because the black laborer perceived that the market limited his opportunities due to his race, and that the true nature of his skills, experience, and abilities were never measured or tested, he had little incentive to invest in measures which might improve his productivity." R. Sutch & R. Ransom, The Ex-Slave in the Post-Bellum South: A Study of the Economic Impact of Racism in a Market Environment, *in* 3 From Slavery to Sharecropping, supra note 50, at 323, 337.

56. See, e.g., Fields, supra note 49, at 176–81 (describing the position of black farmers in Maryland in the 1880s). This occurred in the context of the breakup of the plantation system and the advent of sharecropping. See Ralph Shlomowitz, The Origins of Southern Sharecropping, *in* 3 From Slavery to Sharecropping, supra note 50, at 199, 216 (describing the post-War progression from a centralized gang system of agricultural labor to a tenant sharecropping system).

57. See Wiener, Social Origins, supra note 25, at 47 (noting that the Bureau "became part of the repressive apparatus of the new agricultural system"). "[F]ederal officials [especially the Freedman's Bureau] often cooperated directly with planters" in Alabama. Peter Kolchin, First Freedom: The Response of Alabama's Blacks to Emancipation and Reconstruction 33 (1972) [hereinafter Kolchin, First Freedom].

58. Stanley, supra note 39, at 36 (1998) (noting that part of the educational programs launched by the Freedman's bureau were "little talks" in which the sanctity of the contract bond was exalted). Reconstruction "ideas of freedom were disseminated through the language of contract." Id. at 2. Extending the rights of contractual freedom to former slaves was part of the "Americaniz[ing] of the blacks." Eric Foner, Reconstruction Revisited, 10 Rev. Am. Hist. 82, 87 (1982).

stressing contracts, the Bureau did contest the views of "southerners . . . unwilling to bargain with free blacks as equals"[59] because they persistently feared the threat of black "'insolence' and 'insubordination.'"[60] The emphasis on contract nonetheless had pernicious effects. Contracts at first required that "the negro [sic] promises to work for an indefinite time for nothing but his board and clothes, and the white man agrees to do nothing."[61] Nevertheless, the Bureau strongly encouraged blacks to enter year-long contracts.[62] In the South Carolina Sea Islands, for instance, freedmen who had fleetingly tasted land tenure were evicted, and those "freedmen who refused to make contracts were forced to leave."[63] In other parts of the South, such as Alabama, black tenant farmers became peons after being "[d]efrauded of their wages and deprived of mobility either by threats that they could not legally move until their debts were paid or by actual force."[64] Forced work on plantations and mandatory contracts for blacks thus persisted in many parts of the South, intensifying after Redemption.[65] Changes in Southern industry also brought cold comfort. Coal mines and turpentine farms in Georgia, Florida, and Alabama exploited and strengthened the "iso-

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Dependency on the state and idleness, claimed the Bureau, vitiated freedom, and fostered a new slavery. The Union army forged fresh contracts for slaves to work on plantations, assigning soldiers to maintain discipline over liberated slaves even before the end of the war. See Stanley, supra note 39, at 35.

> The lack of a definitive constitutional resolution of the interpretive question even at this date may help to explain why the United States Army, and in certain cases agents of the Freedman's Bureau, could believe that they were introducing a "free labor" system into the South even as they went about providing for the criminal enforcement, in numerous cases, of the labor contracts of former slaves.

Robert J. Steinfeld, Changing Legal Conceptions of Free Labor, *in* Terms of Labor: Slavery, Serfdom, and Free Labor 137, 151 (Stanley L. Engerman ed., 1999).

59. Stanley, supra note 39, at 41 (quoting a former slaveholder as saying: "No nigger knew what a contract was and would keep one unless forced to"); see also Dan T. Carter, When the War Was Over: The Failure of Self-Reconstruction in the South, 1865–1867, at 149 (1985) ("[S]outhern whites believed only the carefully controlled use of force could keep the slave at work . . . .").

60. Carter, supra note 59, at 22–23.

61. Kolchin, First Freedom, supra note 57, at 35 (quoting Captain J.W. Cogswell of the Freedman's Bureau).

62. Tenants began each season unable to finance the year's crop and had to seek credit from their landlords or the local merchants, who required that the tenant remain until the debt was paid . . . . Hard-working tenants could be made to stay by exaggerating their indebtedness through dishonest bookkeeping.

Jonathan M. Wiener, Class Structure and Economic Development in the American South, 1865–1955, *in* 3 From Slavery to Sharecropping, supra note 50, at 358, 367 [hereinafter Wiener, Class Structure and Economic Development]; see also Rebecca J. Scott, Fault Lines, Color Lines, and Party Lines, *in* Beyond Slavery, 61, 66 (Frederick Cooper et al. eds., 2000) (noting freed slaves' contesting of Freemen's Bureau's rules).

63. Rose, supra note 49, at 357.

64. Daniel, Shadow of Slavery, supra note 18, at 19. For instance, "80 percent of the sharecroppers in Alabama had an indebtedness of more than one year's standing." Wiener, Class Structure and Economic Development, supra note 62, at 367.

65. See Stanley, supra note 39, at 124.

lated, low-wage labor market" that was slavery's legacy.[66] Racially-targeted convict lease laws and chain gangs fueled state-run factories and the development of the railroads.[67] Northern interest in blacks, except as labor for the cotton harvest, waned by the 1880s.[68]

Redemption legislators also criminalized blacks' refusal to labor, hence ensuring a constant pool of readily-available and cheap labor.[69] Laws restricting the mobility of the black labor force included emigrant-agent provisions,[70] contract-enforcement statutes, vagrancy statutes, convict-labor laws,[71] and criminal surety systems.[72] The false pretenses and criminal surety laws challenged in the Peonage cases were critical components of this system.[73]

In sum, freedom was "a constantly moving target."[74] The free market established by Emancipation and the Freedman's Bureau shaped a "free laboring class" trapped "on the plantations and under the planter class."[75] Nevertheless, a coherent and pervasive social philosophy grew to

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66. Lichtenstein, supra note 23, at 10–12; see Oshinsky, supra note 22, at 57–84 (providing a state-by-state account of the industrial uses of convict labor in turpentine camps, coal mines, and the like). The convict lease system endured well into the 1920s, for instance, in the Florida and Alabama coal and turpentine industries. See Lichtenstein, supra note 23, at xv. Nonetheless, the precise relation between racism and industrial development is still contested. Compare Montgomery, supra note 51, at 147 (noting that Southern black labor disputes threatened to rupture relations with the Republican Party), with Wiener, Class Structure and Economic Development, supra note 62, at 365 (arguing that "racism slowed capitalist development in the postwar South almost to a halt").

67. See Lichtenstein, supra note 23, at 28–29 (noting that "existing felony laws were sufficiently severe and arbitrary that blacks found themselves with long penitentiary sentences for petty crimes, and whites seemed to avoid prison sentences altogether").

68. See Kolchin, Business Press, supra note 30, at 187 ("Concern for the cotton crop led the *United States Economist* to deplore the idleness of Southern Negroes."). Nor did Northern unions spare much thought for black laborers. See Philip S. Foner, The IWW and the Black Worker, 55 J. of Negro Hist. 45, 48 (1970) (noting that "with the exception of the United Mine Workers . . . the I.W.W. was the *only* labor organization in the second decade of the twentieth century which stood squarely for the organization of Negro workers on the basis of complete equality").

69. The criminal laws were thus not applied consistently, but rather only when labor was particularly scarce. See William Cohen, Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis, *in* 12 African American Life, 1861–1900: Black Southerners and the Law, 1865–1900, at 32–56 (Donald G. Nieman ed., 1994). Only when labor was superabundant could blacks take advantage of windows of lax enforcement to flee to the Southwest, as they did in large numbers after 1916. See id.

70. These assessed prohibitive licensing fees against those who moved labor from state to state. See Wiener, Class Structure and Economic Development, supra note 62, at 362.

71. See Lichtenstein, supra note 23, at 1–30.

72. See Daniel, Metamorphosis of Slavery, supra note 50, at 71–72; see also Wiener, Class Structure and Economic Development, supra note 62, at 362–63 (listing the ways planters controlled black labor, including restrictive laws, manipulation of the Freedman's Bureau, and Klan violence targeted at labor contract violators).

73. See Daniel, Shadow of Slavery, supra note 18, at 19–20 (describing the laws that constituted peonage).

74. Fields, supra note 49, at 193.

75. Weiner, Social Origins, supra note 25, at 57–58.

support the preeminence and naturalness of free market relations. This vision of contractual liberty, which convinced many state courts and briefly entranced the United States Supreme Court, is detailed below.

B. *The Laissez-Faire Market*

Laissez-faire jurisprudence flourished at the confluence of several intellectual and historical tides: Jacksonian individualism,[76] the abolitionists' emphasis on contract as the solvent of antiquated status relations,[77] and the need to constrain labor unrest.[78] Economists, such as John Bates Clark, and lawyers, including Thomas Cooley and Christopher Tiedeman, developed a theory of markets and law that justified the status quo by fusing formal equality in contracting with an emphasis on the fairness of voluntary transacting.[79] Laissez-faire's proponents contended that "the market would automatically reward labor and capital in proportion to the

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76. See Paul D. Carrington, The Constitutional Law Scholarship of Thomas McIntyre Cooley, 41 Am. J. Legal Hist. 368, 370 (1997) (noting that Cooley's views were "clearly derived from the Jacksonian democratic persuasion he imbibed as a youth"); Phillip S. Paludan, Law and the Failure of Reconstruction: The Case of Thomas Cooley, 33 J. Hist. Ideas 597, 602 (1972) (describing Cooley's debt to the Jacksonian ideal that "constitutional government was limited government, and that under just law all men's rights were equal").

77. See Foner, Meaning of Freedom, supra note 27, at 448–49 (discussing Abolitionist allegiance to freedom of contract); Stanley, supra note 39, at 20–25 ("Legitimating wage labor was a central part of the abolitionist project.").

78. See Jacobs, supra note 14, at 24 ("[L]iberty of contract as a limitation upon the powers of both the state and the national governments was a judicial answer to the demands of industrialists in the period of business expansion following the Civil War."); cf. Duncan Kennedy, The Role of Law in Economic Thought: Essays on the Fetishism of Commodities, 34 Am. U. L. Rev. 939, 939 (1985) [hereinafter Kennedy, Role of Law] ("[M]ainstream economic thought has been a vehicle for legitimating the actual arrangements of the capitalism of the time.").

79. Thomas Cooley's 1868 treatise was the first extremely influential treatise to be published in the wake of the Reconstruction Amendments, even though it was initially intended as a commentary on state, not federal, constitutions. See Jacobs, supra note 14, at 22, 29. It "formulated the doctrines of class legislation, of implied limits on state legislative power, and of substantive due process." Id at 27. Christopher Tiedeman's treatise was published in 1886 and was "the most extreme defense of constitutional laissez faire principles ever written." Id. These are the bookends of laissez-faire's induction into the legal canon. See Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 175–263, 533–602, 735–754 (Boston, Little Brown & Co. 1927) (1868); 1 Christopher G. Tiedeman, A Treatise on the Limitations of the Police Power 1–19 (St. Louis, The F. H. Thomas Law Book Co. 1886) [hereinafter Tiedeman, Limitations of the Police Power]; see also John Bates Clark, The Distribution of Wealth: A Theory of Wages, Interest, and Profits 1–9 (New York, Augustus M. Kelley 1965) (1899); John Chipman Gray, Restraints on the Alienation of Property 1–6 (Boston, Boston Book Co. 1895) (1883); 1 Christopher G. Tiedeman, A Treatise on State and Federal Control of Persons and Property in the United States 1–23 (1900). For a general overview of these works, see Barbara H. Fried, The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement 1–2, 23–26 (1998) (describing the ideas of Tiedeman and Clark, and focusing on the marginalist theory of value).

value each had generated."[80] Clark, one of the more sophisticated economists of the period, argued that "in a competitive market, each factor of production . . . would be paid an amount exactly equal to the value of its marginal product."[81] Prices were "'natural' . . . . [I]t would violate human nature . . . to pay more for a commodity than its labor value" because a buyer could just produce the good for the same output of labor.[82] "[T]he market-clearing price would equal the marginal cost to suppliers."[83] Voluntary, private contracts would hence generate fair outcomes without state intervention since parties would never pay more than the marginal value of a commodity.[84] Laissez-faire provided a pre-political ground for elaborating legal norms by claiming to establish a set of "intrinsically just ground rules for economic struggle among private actors."[85] Fairness was predicated on the voluntary nature of transactions, and equality could be guaranteed by ensuring that "no one shall receive from the law special privileges,"[86] and by ignoring "the fact of a society of unequal individuals."[87]

Clark's model of just market outcomes required that law facilitate market outcomes by "respect[ing] the will of private parties concerning property and contracts."[88] Courts accordingly derived liberty of contract from "immutable principles of justice," established through "'settled usages and modes of proceeding existing in the common and statute law of England.'"[89] Liberty of contract could be extrapolated in particular from

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80. Fried, supra note 79, at 2.

81. Id. Of course, Clark's was not the only theory used to justify the free market.

82. Kennedy, Role of Law, supra note 78, at 944 (noting that in sophisticated markets competition prevented prices from diverging from natural levels).

83. Fried, supra note 79, at 26.

84. See, e.g., Adkins v. Children's Hosp., 261 U.S. 525, 555 (1923) (disapproving of a minimum wage law for women because "[t]he price fixed by the board need have no relation to the capacity or earning power of the employee").

85. Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940, 3 Res. L. & Soc'y 3, 5 (1980) [hereinafter Kennedy, Legal Consciousness]. Horwitz identifies a late nineteenth century "tendency to generalize and systematize" which had the "goal of rendering private law more scientific and less political." Horwitz, supra note 30, at 14–15.

86. Paludan, supra note 76, at 602. Suspicion of government led Cooley, for instance, to interpret the Fourteenth Amendment narrowly. See id. at 614.

87. Id. at 604–05 ("Cooley would never clearly understand the contradiction between equality and individualism."). In 1909, legal realists lodged the same complaint. Roscoe Pound observed that courts "force upon legislation an academic theory of equality in the face of practical conditions of inequality." Roscoe Pound, Liberty of Contract, 18 Yale L.J. 454, 454–58 (1909).

88. Kennedy, Role of Law, supra note 78, at 956. Duncan Kennedy uses this phrase to describe legal economic thought in general.

89. Holden v. Hardy, 169 U.S. 366, 389–90 (1898) (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855)). Christopher Tiedeman restricted the role of government to "enforcement of the legal maxim, *sic utere tuo, ut alienum non laedas.*" 1 Tiedeman, Limitations of the Police Power, supra note 79, at vii; see also Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897) (arguing that in the "privilege

the common law's solicitude for property.[90] One supposedly natural and immutable principle forbade "that one man's property, or right to property, shall be taken for the benefit of another."[91] Since property was acquired and transmitted through contract, the latter was equally sacrosanct.[92] In addition, constitutional tradition demanded protection of settled property rights against jealous majorities.[93] Through a promise of formal equality before the law, put into effect via a prohibition on "class legislation,"[94] and a guarantee of voluntariness in transactions, the Court

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of pursuing an ordinary calling or trade and of acquiring, holding, and selling property must be embraced the right to make all proper contracts in relation thereto").

90. The recognition of property as a foundational liberty can be traced back to the English common law, and the "customs of freeholders, sanctioned and enforced by the King's justices" out of which "the institutions of property and liberty were fashioned." John R. Commons, Legal Foundations of Capitalism 49 (1924).

91. *Holden*, 169 U.S. at 390.

92. 2 Cooley, supra note 79, at 801 ("Freedom in the making of contracts of personal employment [was] . . . an elementary part of the rights of personal liberty and private property."); see also Commons, supra note 90, at 22 ("Property means anything than can be bought and sold, and since one's liberty can be bought and sold, liberty is assets, and therefore liberty is property."); Jacobs, supra note 14, at 37 ("[L]iberty and property are related by means of the economic hypothesis that labor as the source of property is property."); Paul Kens, Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age 5 (1997) ("Under laissez-faire theory, property and free exchange were natural rights."); Louise A. Halper, Christopher G. Tiedeman, 'Laissez-Faire Constitutionalism' and the Dilemmas of Small-Scale Property in the Gilded Age, 51 Ohio St. L.J. 1349, 1359–61 (1990) (discussing the possible textual sources for this limitation upon governmental power).

93. James Madison argued that "a pure democracy" would be "incompatible with personal security or the rights of property" because of the danger that "a majority of the whole will have a common motive to invade the rights of other citizens." The Federalist No. 10, at 81, 83 (James Madison) (Clinton Rossiter ed., 1961). Indeed, "through the republic's first century and a half, property . . . was the paradigm of the constitutionally protected private sphere." Frank I. Michelman, Possession vs. Distribution in the Constitutional Idea of Property, 72 Iowa L. Rev. 1319, 1327–28 (1987) (arguing also that "property seems to have been, above all others, the realm of affairs in which it was feared that factional interest would overcome civic empathy and enlightened deliberation, propelling government toward exploitative and unjust action"); see also Horwitz, supra note 30, at 9 (noting that the "paramount dangers of redistribution of wealth and of levelling" were recognized early in American constitutional thought); Gordon S. Wood, The Radicalism of the American Revolution 268–70 (1992) (noting an early concern for the representation of property interests in legislatures). This tradition derives from eighteenth-century England, where "[t]he British state . . . existed to preserve the property and, incidentally, the lives and liberties, of the propertied." E.P. Thompson, Whigs and Hunters 21 (Penguin Books 1990) (1977).

94. 1–2 Cooley, supra note 79, at 393, 740 (noting that legislation that favors one class was "purely arbitrary or capricious" and "a wrongful and highly injurious invasion of property rights"). Throughout the *Lochner* era, a concern for class legislation can be seen. See Adair v. United States, 208 U.S. 161, 180 (1908) (invalidating federal legislation that forbade employers from requiring employees not to join unions); Lochner v. New York, 198 U.S. 45, 63–64 (1905) (arguing for close judicial scrutiny of legislative motives in light of potential resource transfers, and opposing any redistributive regulation).

established "proper limits on government."[95] The "law of the land (or due process of law)" thus became "a substantive limitation upon legislative powers."[96]

With powerful roots in constitutional tradition, the common law, and the imprimatur of leading social scientists, liberty of contract pierced Supreme Court jurisprudence through a dissent in the *Slaughter-House Cases*.[97] In contrast to the majority's vision of the Fourteenth Amendment as fundamentally conservative of antebellum federalism, dissenting Justices Field and Bradley presented a vision of liberty of contract as a near-immutable right protected by federal law.[98] The dissenters posited a "right to pursue the ordinary avocations of life without other restraint than such as affects all others,"[99] and argued that this right limited the state's ability to regulate under the "police power."[100] A liberty of contract limit on the police power proved congruent with previous understandings of the police power's margins.[101] Legislative power to regulate was somewhat analogous to the power to resolve private disputes by adjudicating private rights.[102] The *Slaughter-House* dissenters' view of the market was rapidly adopted by several state courts, which "distinguish[ed] between exercises of the police power and exercises of arbitrary power" favoring one class.[103] While at first the Supreme Court "failed to keep

95. Sian E. Provost, Note, A Defense of a Rights-Based Approach to Identifying Coercion in Contract Law, 73 Tex. L. Rev. 629, 629 (1995).

96. Jacobs, supra note 14, at 32.

97. 83 U.S. (16 Wall.) 36 (1873).

98. The natural-law vision of property rights was heavily buttressed by abolitionist ideas. See Charles W. McCurdy, Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897, 61 J. Am. Hist. 970, 973–74 (1975) (describing Justice Field's allegiances to antislavery ideas); William E. Nelson, The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America, 87 Harv. L. Rev. 513, 527–32, 551–56 (1974) (describing the way in which Justices Field and Bradley put antislavery notions of natural rights into practice).

99. 83 U.S. (16 Wall.) at 90 (Field, J., dissenting); see also Dent v. West Virginia, 129 U.S. 114, 121 (1889) (Field, J.) ("[I]t is undoubtedly the right of every citizen . . . to follow any lawful calling, business, or profession."); Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 139 (1873) (Field, J., concurring) (affirming the right to a lawful calling).

100. The Slaughter-House Cases, 83 U.S. (16 Wall.) at 87 (Field, J., dissenting); see also Horwitz, supra note 30, at 29–31 (describing the increasing judicial scrutiny of police power regulation).

101. Nuisance was the "standard legal category for talking about the state's regulatory power over the health, safety and morals of its citizens." Horwitz, supra note 30, at 27. The state could regulate when the regulated activity was within the "class of per se nuisance[s] . . . derived from customary . . . norms." Id. at 28. If the state could intervene to prevent a nuisance, the theory went, it also had power to intervene by statute. What had traditionally been denominated a nuisance could be regulated.

102. See Kennedy, Legal Consciousness, supra note 85, at 14–19 (describing this translation of legal concepts from one field to another).

103. Jacobs, supra note 14, at 36; see id. at 39–97 (describing the spread of freedom of contract doctrine). For instances of state court applications of liberty of contract, see In re Jacobs, 98 N.Y. 98, 115 (1885) (invalidating labor laws for tenant-sweatshop workers);

pace with the state judiciaries," and later fell short of laissez-faire's extreme applications, it nonetheless integrated notions of formal equality and voluntariness into Fourteenth Amendment substantive due process jurisprudence.[104]

C. *The Problem of Coercion*

The contrast between the labor markets of Progressive Era America and the formal elegance of laissez-faire jurisprudence provoked an intractable problem: Such jurisprudence invited challenges that wage labor had been coerced. Indeed, such accusations flooded into legislatures, precipitating maximum hour and minimum wage legislation, threatening to disrupt the status quo distribution of surpluses. Mindful that "[b]argains are made only when both parties *consent* to them"[105]—so coercion invalidated a contract—the Court needed a limiting principle for coercion claims that could choke redistributive legislation and maintain laissez-faire's ideological coherence.[106]

Coercion is difficult to account for systematically. At least three elementary definitions of coercion—based on efficiency, subjective experience, and normative commitments—provide recognizable, but unstable, definitions. A brief survey reveals problems with all three approaches. First, a court concerned with efficiency might contend that when "the amount buyers gain from more favorable obligations, measured by the maximum buyers would be willing to pay for those obligations, [is greater than] the amount sellers would lose," a contract is voluntary.[107] However, this test for coercion is underinclusive[108] and difficult to execute in

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Godcharles v. Wigeman, 6 A. 354, 356 (Pa. 1886) (holding unconstitutional the use of company scrip); State v. Goodwill 10 S.E. 285, 288 (W. Va. 1889) (striking down a West Virginia statute that made the use of company stores illegal).

104. Jacobs, supra note 14, at 85–97 (charting applications of freedom of contract in the Supreme Court). The Court first acknowledged the validity of freedom of contract ideas in Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

105. Robert L. Hale, Freedom through Law 9 (1952) [hereinafter Hale, Freedom through Law] (emphasis added).

106. Cf. Horwitz, supra note 30, at 33 ("[E]very interference with the contract system—such as the regulation of the terms and conditions of a labor contract—was treated as an attack on the very idea of the market as a natural and neutral institution for distributing rewards.").

107. Richard Craswell, Property Rules and Liability Rules in Unconscionability and Related Doctrines, 60 U. Chi. L. Rev. 1, 21 (1993). This is simply the assumption of mutual gain articulated in some detail.

108. For instance, where "Y is drowning (through no one's fault), and X refuses to rescue him unless he agrees to have his leg amputated." Id. at 34. David Hume reached the same conclusion:

> Can we seriously say that a poor peasant or artisan has a free choice to leave his country when he knows no foreign langnage or manners and lives from day to day by the small wages which he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master, though he was carried on board while asleep and must leap into the ocean and perish the moment he leaves her.

practice.[109] Second, courts could look to the victim's subjective feeling of being constrained to ascertain the presence of coercion.[110] This definition of coercion thus fluctuates between victims. Since endorsement of a subjective understanding of coercion would precipitate "a failure to make rules understandable [and] such frequent change in the rules that the subject cannot orient his action by them," it must be rejected for rule of law reasons.[111] Finally, a normative account of coercion might establish a baseline to distinguish benefits and harms, independent of plaintiffs' subjective perceptions. While there are several contenders for this baseline, through a clear precommitment, courts could establish a predictable rule.[112] In practice however, a stable baseline is difficult to formulate, as

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David Hume, Of the Original Contract, *in* David Hume's Political Essays 43, 51 (Charles W. Hendel ed., 1953); see also Richard A. Posner, Economic Analysis of Law 101 (3d ed. 1986) (suggesting that a highwayman's offer of "your money or your life" could be described as prompting a free choice by the victim).

109. See Craswell, supra note 107, at 21–24 (discussing the complexity and difficulty of such an inquiry by a court); Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563, 603 (1982) (noting that many efficiency arguments rest "on empirical data that no one seems to have ready at hand").

The efficiency model has another difficulty. All transactions *can* be described as pervasively coercive. In the putatively voluntary transaction, "each [party] yields in order to avoid the disadvantage to which the other can subject him. That is, he yields to a threat." Hale, Freedom through Law, supra note 105, at 9. Even if A is willing to part with her money for B's goods, only the threat of B's withholding forces A to part with her dollars. If any trade is tainted by coercion, the policy decision to define one transaction as "coercive" and another as "voluntary" cannot rest on the mere *presence* of coercion. Contra Richard A. Epstein, The Assault that Failed: The Progressive Critique of Laissez Faire, 97 Mich. L. Rev. 1697, 1703–04 (1999) (arguing that coercion still has a normative meaning when defined in efficiency terms).

110. Peter Westen points out that the common working notion of coercion is more complex than this, involving "'an interpersonal relation requiring a complex intention by the agent.'" Peter Westen, "Freedom" and "Coercion"—Virtue Words and Vice Words, 1985 Duke L.J. 541, 569 (quoting Bayles, A Concept of Coercion, *in* Nomos XIV: Coercion 19 (J. Pennock & J. Chapman eds. 1972)). According to Westen, the agent must have knowledge of and intend the coercive effect, and the coerced action must be one the victim was unlikely to do anyway. See id.

111. Lon L. Fuller, The Morality of Law 39 (rev. ed. 1975). For evidence that, even in the context of middle class, suburban culture, widely variant understandings of coercion are possible, see Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 458–64 (2d Cir. 1996) (finding that a mandatory school community service program had no constitutional defect); Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 899 F. Supp. 1443, 1447–55 (M.D.N.C. 1995) (refusing to find that a school community service program violated the Thirteenth Amendment); Steirer v. Bethlehem Area Sch. Dist., 789 F. Supp. 1337, 1341–47 (E.D. Pa. 1992) (granting summary judgment to a school in a Thirteenth Amendment challenge to its community service requirement). Kansas lawyers resenting the burden of mandatory representation of indigent clients presented another extreme claim of coercion. See Sharp v. State, 783 P.2d 343, 346–48 (Kan. 1989) (rejecting this claim).

112. See, e.g., Jeffrie G. Murphy, Consent, Coercion, and Hard Choices, 67 Va. L. Rev. 79, 81 (1981) ("When a person A consents to a proposal from B, and when his only or paramount reason for consenting to the proposal is his suffering wrongful treatment from B, then in such a case A has no moral obligation (even prima facie) generated from the act

equivocation in the Supreme Court's unconstitutional conditions jurisprudence demonstrates.[113]

Thus, traditional understandings of coercion prove difficult to formulate as adjudicative rules. The Supreme Court chose a different way to define coercion. By taking judicial notice of its own preconceived notion of what plaintiffs *could* be coerced, the Court constructed its own, rather solipsistic, categorization of cognizable coercion claims[114] whereby only those classes it understood to be naturally weak and incapable received protection. In other words, the Court established *its own normative baseline* premised upon *its own subjective notions* of "the standard of a responsible, freely choosing employee."[115] Those notions derived from cultural

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of consent."); Robert Nozick, Coercion, *in* Philosophy, Science, and Method: Essays in Honor of Ernest Nagel 440, 463 (Sidney Morgenbesser et al. eds., 1969) (arguing that coercion depends on whether the new set of alternatives presented by the putatively coercive act would have been preferred ex ante to the offer); Westen, supra note 110, at 589 ("A coercive constraint is anything that leaves a person worse off either than he otherwise expects to be or than he ought to be for refusing to do the proponent's bidding.").

113. See Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415, 1436 (1989) ("The notion of a 'penalty' . . . poses problems; the characterization of a condition as a 'penalty' or as a 'nonsubsidy' depends on the baseline from which one measures."). Distinguishing harms from helpful acts is complicated by the law's tendency to describe inaction that is to be discouraged as an act. When the law stigmatizes behavior, often "language is used which makes my wrong conduct seem to consist of wrongful acts instead of wrongful *failure* to act." Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 Pol. Sci. Q. 470, 475 (1923) [hereinafter Hale, Coercion and Distribution].

Most baselines prove impracticable. First, a rule that found coercion only where an immoral action is threatened fails: Disagreements on morality would lead afresh to rule of law problems. See Murphy, supra note 112, at 81–82. Nor would a baseline that distinguished criminal from legitimate acts work. Many laws treat "a threat to do what one *has a right to do* . . . as coercive." Sullivan, supra, at 1443–44 (emphasis added). This would include a blackmailer's threat of revealing information, an employer's threat of interfering with or restraining a worker's exercise of rights, or even a contracting party's "'improper threat . . . that leaves the victim no reasonable alternative.'" Id. (quoting Restatement (Second) of Contracts § 175(1) (1981)). Hence, the Court would have to distinguish between (a) acts one has a right to do which are coercive and (b) acts one has a right to do which are *not* coercive, without a principled way to distinguish between the two.

Finally, asking whether the act proffered is a benefit or a burden to the victim also produces rule of law problems. "Benefit" and "burden" are "relative terms [that] refer to a change in an agent's condition." Westen, supra note 110, at 572.

114. The Legal Realists have noted the importance of classification. See Karl N. Llewellyn, The Constitution as an Institution, 34 Colum. L. Rev. 1, 8 (1934) (noting that the "classification of the facts may be so clear that rules can 'decide' cases even out of court").

115. Mark Barenberg, Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production, 94 Colum. L. Rev. 753, 763 (1994). This is not to argue that the Court was unaware of other means of analyzing coercion. In *Frost & Frost Trucking Co. v. R.R. Comm'n*, Justice Sutherland noted that coercion could result where a person "is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." 271 U.S. 583, 593

stereotypes. Once the Court ceased viewing a particular category as weak, protective regulation could no longer be justified.[116] This model for coercion had advantages for a court attempting to limit the redistributive impact of legislation, since it meant that only already-marginalized groups with little political muscle, such as women and African-Americans, merited protective legislation. Most of the redistributive legislation that would be demanded by populist legislators could thus be rejected.

The next Part explores the reasoning used by the Court in several *Lochner*-era cases and argues that when a regulation's validity depended on a judgment about coercion (and not health or safety), the Court engaged in an imaginative construction of persons it believed could be coerced. The final Part looks at the spillover of this idea into the definition of "involuntary servitude" in the Peonage cases.

II. The Supreme Court's Understanding of Coercion in Substantive Due Process Cases (1905–1923)

In this Part, cases from *Lochner* onward are examined for evidence of this model of coercion. Legislation was vindicated in many substantive due process challenges because the Court found valid health and safety reasons or through extensions of nuisance doctrine.[117] The following account of coercion does not apply to such cases. Furthermore, the theory was not held by all members of the Court;[118] nor was it the only theory expressed in majority opinions during the period in question.[119] Rather,

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(1926). This coercion analysis rejects the facile privilege/burden distinction, noting that even when a litigant does not necessarily have an immutable right to some good, deprivation of this good can be devastating. Hence, tbe Court was quite capable of engaging in sophisticated debates about an appropriate normative baseline for a coercion analysis, but chose not to do so.

116. As a consequence, the Court was solicitous of women in Muller v. Oregon, 208 U.S. 412 (1908), but not in Adkins v. Children's Hospital, 261 U.S. 525 (1923). See infra notes 143–147 and accompanying text.

117. Since health reasons posed less danger of majoritarian redistributive motives and were therefore more central to the police power, the law would have been much easier to justify as a health measure. See G. Edward White, Revisiting Substantive Due Process and Holmes's *Lochner* Dissent, 63 Brook. L. Rev. 87, 100 (1997) ("The question of whether the statute in *Lochner* was a 'public health' or a 'labor' measure was thus seen as central to the decision of its constitutionality.").

118. See, e.g., Coppage v. Kansas, 236 U.S. 1, 41 (1915) (Day, J., dissenting) ("[T]he proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide . . . ." (citation omitted)); Adair v. United States, 208 U.S. 161, 191 (1908) (Holmes, J., dissenting) ("The section simply prohibits the more powerful party to exact certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds against those already employed.").

119. See, e.g., Knoxville Iron Co. v. Harbison, 183 U.S. 12, 20 (1901) ("The legislature evidently deemed the laborer at some disadvantage . . . . [The law's] tendency, though slight it may be, is to place the employer and employé upon equal ground in the matter of wages . . . ."); Holden v. Hardy, 169 U.S. 366, 397 (1898) ("[T]he fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality."); Jacobs, supra note 14, at

it was one of various strands of jurisprudence contesting for supremacy in the *Lochner* era.

A. *Defining the Wards of the State:* Lochner, Adair, *and* Coppage

In *Lochner v. New York*, the Court envisaged a market in which coercion was defined in terms of categories the Court understood as inherently weak and incapable.[120] *Lochner* invalidated a New York statute providing that no employee would work in a biscuit, bread, or cake bakery establishment more than sixty hours in any one week, or more than ten hours in any one day, because the law burdened the "general right to make a contract [which is] part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[121]

An initial criterion Justice Peckham, writing for the Court, identified for regulation was the possibility of weakness and incapacity on the part of the protected class. Regulation would be permitted when those protected were "not equal in intelligence and capacity to men in other trades . . . [o]r . . . able to assert their rights and care for themselves . . . ."[122] Only "wards of the State" merited a solicitude that could be manifested as regulation.[123] Hence, only the personal incapacity of a contracting party, a lack of intelligence or inability to function within the market, undermined "the right to purchase and sell labor upon such terms as the parties may agree" and could as a result justify state coercion.[124] In *Lochner*, Peckham felt no need even to inquire into the status of the bakers as fully capable contracting parties; their capacity was obvious. The task of judging consisted, for Peckham, not in the examination of disputable facts, but in "the objective task of drawing lines" by classifying bakers as a non-coercible class.[125]

Next, Peckham considered possible health and safety rationales, since the law in question had to "be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker."[126]

85–96 (describing the Supreme Court's vacillating allegiance to laissez-faire doctrine); Alexander, supra note 10, at 105 (arguing that the "Supreme Court never consistently applied liberty of contract"). In other cases, another, stronger principle foreclosed the option of protecting the vulnerable class. For instance, in *Hammer v. Dagenhart*, the Court invalidated the Federal Child Labor Act of 1916 on federalism grounds. See 247 U.S. 251, 273 (1918).

120. 198 U.S. 45 (1905).

121. Id. at 53.

122. Id. at 57.

123. Id.

124. Id. at 64. Justice Peckham pays particular attention to the analysis of coercion in *Lochner* because of his belief that the health reason otherwise proposed by the state was clearly specious.

125. Kennedy, Legal Consciousness, supra note 85, at 12.

126. *Lochner*, 198 U.S. at 57; see also Adkins v. Children's Hosp., 261 U.S. 525, 555–56 (1923) (rejecting the argument that a minimum wage law for women would protect morals on the grounds that "[i]t cannot be shown that well paid women safeguard their morals more carefully than those who are poorly paid"); Bunting v. Oregon, 243 U.S. 426, 434–36

Rather than reviewing the validity of evidence proffered for the health justification or reaching, as Justice Harlan did, to the authority of textbooks and social science reports, Justice Peckham took judicial notice of the Court's "common knowledge."[127] In assessing the risks of the bakery trade, he noted that "[t]o the common understanding the trade of a baker has never been regarded as an unhealthy one."[128] Justice Peckham asked whether in *his* understanding of bakers solicitude was warranted, hence measuring and evaluating legislative judgment against the *Court's*, not the legislature's, common knowledge.[129] Both of Peckham's lines of reasoning thus rested on a comparison between the New York statute and the Court's own understanding of the world.

In *Adair v. United States*, coercive regulation could not be justified because a class conceived by the Justices to be weak was unavailable.[130] In his opinion for the majority in *Adair*, Justice Harlan abandoned his nuanced, contextual *Lochner* approach[131] and rejected federal legislation banning yellow-dog contract clauses (which forbade employees from joining unions), in disregard of labor's well-known bargaining weakness. The opinion is remarkable for its positive disavowal of factual inquiry: "We will not indulge in any such [factual] conjectures, nor make them, in whole or in part, the basis of our decision."[132] Instead of assessing facts,

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(1917) (distinguishing real health laws from pretextual redistributive legislation); cf. Holden v. Hardy, 169 U.S. 366, 396 (1898) (finding a maximum hours law for miners valid as a health measure).

127. *Lochner*, 198 U.S. at 58. Commentators have noted the use of "common knowledge" by the Court in other cases of the period. In particular, in the racial prerequisite cases, the Court "naturalized Whiteness by locating the definitions of racial difference in common knowledge." Ian F. Haney López, White by Law: The Legal Construction of Race 163 (1996).

128. *Lochner*, 198 U.S. at 59; cf. Horwitz, supra note 30, at 30 (noting that the Court had to determine "whether the particular occupation in question was 'in and of itself' unhealthy").

129. See *Lochner*, 198 U.S. at 59–60 ("But are we all . . . at the mercy of legislative majorities?"). The Court then launches into a parade of horribles that would result if the bakers' claim was granted. One way of looking at this argument is as a rule of law concern relating to the subjective nature of coercion. If anyone's version of coercion were valid, Justice Peckham argued, and subjective definitions of coercion were acted upon by the legislature, then there would be no predicting what sort of laws would be passed; indeed, the legislative power would become, in effect, wholly arbitrary. Justice Holmes responded to this rule of law problem: Where the majority acts, Holmes implied, there is no problem with the rule of law, since logically, the legislative will is that of the majority, so the majority will know what type of laws to expect. See id. at 76 (Holmes, J., dissenting) (noting the right of a majority to embody its opinions in law).

130. 208 U.S. 161, 179 (1908).

131. See *Lochner*, 198 U.S. at 70–73 (Harlan, J., dissenting) (discussing social science evidence for regulating bakers).

132. *Adair*, 208 U.S. at 179. Contra id. at 191 (Holmes, J., dissenting) (arguing that the statute "simply prohibits the more powerful party to exact certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds").

Harlan searched for a "legal or logical" basis for judgment.[133] Such legal and logical categories grew from the stock of judicial common sense, which told the Court that railway workers were not predisposed to coercion. Rather, they were a *dangerous* class with potentially redistributive aspirations.[134] By refusing to move beyond the Court's preconceived categories, Justice Harlan confidently grounded his decision on a formal "equality of right" that, in practice, was a nullity.[135]

Similarly, in *Coppage v. Kansas*, a challenge to a state law that penalized anti-union contractual clauses, Justice Pitney could establish, upon "a little reflection," the "self-evident" impossibility of remedying distributional inequality.[136] Reflection turned not on the context of the law but on Pitney's intuitive categorization of the world. Tellingly, the Kansas Supreme Court similarly adverted to "common knowledge" in upholding the law before the Supreme Court took the case.[137] By appealing to "the nature of things," Justice Pitney suggested that laborers' coercion by employers was not a cognizable form of coercion, and so could not be remedied by the state.[138]

However, one labor regulation case, *Holden v. Hardy*, deviates from this pattern.[139] *Holden* involved health and safety regulations for miners, which the Court principally vindicated as extensions of the state's power to regulate unusual activities under nuisance doctrines.[140] Justice Brown nonetheless noted that the relation of miners to owners was one tinged by coercion, since "laborers are practically constrained to obey" owners.[141] Acknowledging the coercion claim even so obliquely in *Holden* may have been possible because the Court knew that the law applied only to a small group of workers[142] and hence could not be the basis of broad redistribution.

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133. Id. at 178 (arguing that a "legal or logical connection" with interstate commerce is absent). Justice Harlan here analyzed the viability of the statute under the Commerce Clause power: He could not find the requisite "connection" because he cannot see the railroad worker in *Adair* as oppressed, and hence could not see the need for federal intervention.

134. See id. at 179 (refusing to impute to Congress "the purpose to accord to one class of wage-earners privileges withheld from another class of wage-earners").

135. Id. at 175 ("[T]he employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract . . . .").

136. 236 U.S. 1, 17 (1914).

137. Id.

138. Id. Justice Pitney's argument that inequality is pervasive fails to respond to the notion that at some point, inequality is so great that it is coercive, an argument made by Justice Day: "[L]aborers are practically constrained [and] self-interest is often an unsafe guide." Id. at 41 (Day, J., dissenting).

139. 169 U.S. 366 (1898).

140. The Court noted that the legislature's power encompassed the abatement of nuisances, which were a more frequent occurrence, since the people in the several States pursued trades that were no longer "purely . . . agricultural." Id. at 392–93.

141. Id. at 397.

142. See id. at 396–97.

In sum, the Court's willingness to accept a class's claim of coercion generally depended on its preconceived categories of weakness. Where the latter was unavailable (as for bakers and railway workers), the Court proved unwilling to analyze factual contexts. Instead, the common sense of the Justices served as the basis for rejecting claims in each instance.

B. *Women as a 'Coercible' Class:* Muller, Bradwell, *and* Adkins

The judicial construction of the 'coercible' subject also helps explain shifting judicial attitudes toward women in *Muller v. Oregon*,[143] *Bradwell v. Illinois*,[144] and *Adkins v. Children's Hospital*.[145] In *Muller*, the Court upheld an Oregon statute that forbade the employment of women for more than ten hours in any one day,[146] despite having rejected such a minimum wage law in *Lochner* three years earlier.[147] Women's potential to be coerced was not factually weighed, but asserted on the basis of universal truths. Justice Brewer's opinion is not so much an analysis of the disadvantages facing women in economic life as a disquisition into an essential nature of women, understood as inherently incapable of protecting themselves. The "fact" of female inferiority could be deduced through "judicial cognizance" of "general knowledge."[148] Women's competitive disadvantage in life was "obvious," female dependency revealed by mere "history."[149] Female incapacity followed from an inherent "disposition and habits of life which will operate against a full assertion of . . . rights."[150] Thus, common knowledge modulated sub silentio into established fact in the course of the opinion.

The majority's reliance on self-evident propositions suggests a mistrust of factual evidence. Indeed, the Court expressed skepticism about the value of legislative and social fact to constitutional interpretation. Legislation was only evidence of "widespread belief"—hence hardly "authorit[ative]."[151] Legislative will required verification against the self-evident and timeless truths embodied by the Court's categorization of the world. Justice Brewer, rather than drawing from Louis Brandeis's fact-

143. 208 U.S. 412 (1908).

144. 83 U.S. (16 Wall.) 130 (1872).

145. 261 U.S. 525 (1923).

146. 208 U.S. at 423; cf. Bunting v. Oregon, 243 U.S. 426, 438–39 (1917) (upholding on health grounds a statute that established a maximum ten-hour day for factory workers of both sexes).

147. See Lochner v. New York, 198 U.S. 45, 53 (1905) (rejecting a similar restriction on the number of hours male bakers could work).

148. *Muller*, 208 U.S. at 421.

149. Id. at 421. Justice Brewer, rather effusively, asserted that courts have long shared in this acceptance of women's special status, and have accordingly treated them with "especial care." Id. at 421. For a less sanguine view of the judicial treatment of women at approximately the same time, see Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117, 2121–41 (1996) (examining the regulation of domestic violence in the nineteenth century).

150. *Muller*, 208 U.S. at 422.

151. Id. at 420.

heavy brief,[152] contrasted the "unchanging" Constitution with "debated and debatable" facts.[153] According to Professor Fiss, he used this "distancing technique" to establish the Court's mistrust of mere facts:[154] Brewer's basic cognitive tools thus derived from his preconceived categorization of the world, not the facts available to the Court.[155] The Court applied the same presumptions in *Bradwell v. Illinois*, endorsing a prohibition on women's entry to the bar.[156] Even Justices Field and Bradley, who had stoutly protested barriers to entry to other professions, acquiesced on the basis of "the constitution of the family organization" as provided by "the law of the Creator."[157] From such common knowledge they could deduce that "[t]he paramount destiny and mission of woman [are] to fulfil the noble and benign offices of wife and mother."[158]

In *Adkins*, on the other hand, the Court invalidated on substantive due process grounds a minimum wage law for women because "differences [between the sexes] have now come almost, if not quite, to the vanishing point."[159] Justice Sutherland reached once more to "common thought and usage" to assess women's status.[160] As in *Muller* and *Bradwell*, the crucial metric for whether a class could be subject to special protec-

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152. See Schwartz, supra note 14, at 215 (noting that Brandeis's 113-page brief had 111 pages of facts and two of law).

153. *Muller*, 208 U.S. at 420.

154. Justice Brewer "did not treat the brief as demonstrating a factual connection between health and the number of hours worked, but only as evidence 'of a widespread belief . . . .'" Owen M. Fiss, History of the Supreme Court, Volume VII: Troubled Beginnings of the Modern State, 1888–1910, at 176 (1993) (quoting *Muller*, 208 U.S. at 419–20). Justice Brewer further warned in the opinion against relying upon facts, as opposed to established constitutional and judicial doctrine. See 208 U.S. at 420 ("Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for . . . a written constitution . . . places in unchanging form limitations upon legislative action."). As opposed to Holmes, who deferred to majority will and its fact-finding capacity, Brewer concluded that the Court was better equipped to identify truth, at least in constitutional terms. Contra Adkins v. Children's Hosp., 261 U.S. 525, 553 (1923) (citing as empirical evidence "the present day trend of legislation").

155. Indeed, "ignorance of the actual situations of fact . . . and the supposed lack of legal warrant for knowing them" proved sufficient for the law's invalidation. Pound, supra note 87, at 470.

156. 83 U.S. (16 Wall.) 130, 139 (1872) (holding that admission to the bar was not among the federal privileges or immunities protected by the Fourteenth Amendment).

157. Id. at 141 (further noting the "natural and proper timidity and delicacy" of women) (Bradley, J., concurring).

158. Id.

159. *Adkins*, 261 U.S. at 553.

160. Id. Dissenting, Chief Justice Taft fixed upon this shift in the nature of general knowledge: "I don't think we are warranted in varying constitutional construction based on physical differences between men and women, because of the [Nineteenth] Amendment." Id. at 567 (Taft, C.J., dissenting). This explanation is still available at the vanishing cusp of the *Lochner* era for dissenting Justice Sutherland in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 411–12 (1937) (Sutherland, J., dissenting): "Women today stand upon a legal and political equality with men. There is no longer any reason why they should be put in different classes in respect of their legal right to make contracts."

tion was the Court's general knowledge. Between *Bradwell* and *Adkins*, the Justices' understanding of the categorization of women transformed, migrating across the line that bounded those classes that could be coerced. Beyond the scope of this Note's inquiry is the question of whether this shift was caused by fundamental cultural changes or a peculiarity local to the law.[161]

Adkins, *Bradwell*, and *Muller* hence support the thesis that the Court's perception of a protected group's inferiority could on occasion, but not invariably, justify regulatory deviations from the freedom of contract norm.[162] The Court applied 'common knowledge' to distinguish classes that could be coerced from those that could not. This test allowed the Court to construct its own understanding of victims' subjective experience of coercion and to deny contrary factual evidence. Characterizing the Court's behavior as "paternalistic,"[163] however, obscures the Justices' conscious and principled neutrality that strove to rise above contestable facts to universal truths. These cases, despite their ultimately questionable results, evince a genuine desire for neutral, apolitical, and shared terrain upon which to ground decisions.

III. Defining Coercion in the Thirteenth Amendment

A. *The Peonage Cases and the Judicial Categorization of Blacks*

This Part considers the Peonage cases. In the prevailing academic view, the Peonage cases "advanced the rights of blacks and gave realistic scope to the Thirteenth Amendment's protection against involuntary servitude."[164] In contrast, this Part argues that these cases are best understood as extensions of the *Lochner* Court's approach to coercion, which

161. Some commentators have argued that this shift in attitudes towards women may have been provoked partially by the passage of the Nineteenth Amendment: "[T]he *Adkins* case presented a view of women's history that credited the suffrage amendment [the Nineteenth Amendment] as a virtual declaration of women's equality—at least in most spheres." Jennifer K. Brown, Note, The Nineteenth Amendment and Women's Equality, 102 Yale L.J. 2175, 2192 (1993). Certainly, feminists in the 1910s and 1920s focused on the "economic aspects of women's political subordination." Nancy F. Cott, The Grounding of Modern Feminism 117–29 (1987) (describing the differing attitudes of feminist groups in the 1910s to labor legislation and the proposed equal rights amendment).

162. These cases do not, however, prove that the Court's recognition of vulnerability *necessitated* the conclusion that the Court would provide assistance, only that the Court could *chose* to furnish assistance to the vulnerable.

163. Soifer, supra note 15, at 277, (arguing that the "Court enthusiastically thrust itself into the role of the ultimate paternalist").

164. Bickel & Schmidt, supra note 21, at 820. Compare 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 (1982) (arguing that the Peonage cases stand for "undoubted progress in their impact on civil rights"), with Randall Kennedy, Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt, 86 Colum. L. Rev. 1622, 1647 (1986) [hereinafter Kennedy, Race Relations Law] (countering that the Peonage cases had little impact on minorities).

established narrow categories of people understood to be weak, incapable, and hence meriting state protection. Assumptions of black incapacity constituted the foundation of the legal attack on peonage. Thus, the victory against peonage, such as it was, reinforced deep presumptions of black workers' incapacity. Further, the Peonage cases impeded other claims of coercion, by limiting their availability to those willing to self-identify as black. Since such identification risked a loss of social capital—what might be called the "wages of whiteness"—the legal construction of a gendered and race-conscious coercion constituted a barrier to similar legal claims by those elements of the working class with sufficient political power to challenge the distribution of rents from industrial development.[165]

1. *The Context of Racial Attitudes During the Peonage Cases.* — The Peonage cases occurred in the context of virulent and pervasive racism.[166] Stereotypes of blacks' incapacity abounded, constituting part of an ideology that justified oppressive labor laws including vagrancy and criminal surety laws.[167] While blacks were crucial to the South's economic development, they never penetrated sectors of the Southern economy, such as textile factories, where owners believed that white labor was required.[168]

Professor Schmidt argues that *Bailey* and *Reynolds* are best understood as emanations of a Progressive concern for "economic individualism and freedom of choice," and a liberty of contract doctrine that saw barriers to leaving employment as substantive due process violations. Bickel & Schmidt, supra note 21, at 832–33 ("A laborer's freedom of contract . . . necessarily included two precious, though necessarily limited, freedoms: the freedom to change jobs or move on in search of a better one, and the freedom to respond to abusive or unreasonable demands by walking off the job.").

165. "Chattel slavery provided white workers with a touchstone against which to weigh their fears and a yardstick to measure their reassurance." David R. Roediger, The Wages of Whiteness 66 (1991) (quoting W.E.B. DuBois) [hereinafter Roediger, The Wages of Whiteness]. In other works, Roediger has shown how white working class identity has been fabricated "in partly racial terms." David R. Roediger, Towards the Abolition of Whiteness: Essays on Race, Politics, and Working Class History 25 (1994).

166. Blacks had long been viewed as "a race of . . . laborers." C. Vann Woodward, The Strange Career of Jim Crow 80 (1957). Northern white workers evoked the image of black slavery to protest wage labor: In 1830s New York, they evoked images of slavery to express disgust at restrictions upon their freedom to unionize, inventing terms such as "white nigger" and "work like a nigger" to protest the new industrialization and its suppression of artisans' freedoms. Roediger, The Wages of Whiteness, supra note 165, at 68.

167. "The conventional wisdom regarding black labor insisted that without supervision the black farmer would be certain to fail as an independent farmer." Sutch & Ransom, supra note 55, at 329. Not that such views were ever universal. A meager handful of officials in the Freedman's Bureau did think the freedmen capable of meaningful and independent work. See, e.g., Letter from C. W. Buckley to General C. Schurz (Aug. 19, 1865), Observations on the Labor of Freedmen, *in* Black Workers: A Documentary History from Colonial Times to the Present, 135, 135 (Philip S. Foner & Ronald L. Lewis, eds., 1989) ("I have the greatest confidence that the freedman will become reliable & efficient laborers in every branch of industry.").

168. See Lichtenstein, supra note 23, at 39 ("Textile operators' reluctance to hire black convicts stemmed from the racist belief that African-Americans were inherently unsuited to indoor factory labor . . . .").

"The putative inborn capacity of the one or another 'races' was commonly invoked to explain everything [from labor conditions to political participation]."[169] Restrictive Southern labor laws that fostered peonage were premised upon this assumption, and through regular application, ensured the foundering of black economic hopes.[170] The Court most likely knew of the Jim Crow system of forced labor, and its pernicious impact, particularly upon blacks: "The Progressive era [press] delighted in throwing the light of publicity on hidden horrors in American life."[171] The Justice Department's report on peonage also identified the invidious racial impact of seemingly neutral laws such as the criminal surety and false pretenses statutes.[172] Indeed, the Attorney General's amicus brief, which accompanied Bailey's first attempt at the Supreme Court, recounted sufficient detail to convince Justice Harlan of the need to accept the case.[173] Hence, the Court was almost certainly aware of the racial content and the pervasiveness of the peonage laws.

In interpreting other parts of the Reconstruction Amendments, the Court refused to remedy racial subjugation.[174] *Plessy v. Ferguson*, for instance, found no remedy in the Fourteenth Amendment's Equal Protection Clause when "one race [is] inferior to another socially."[175] Indeed, the *Plessy* Court placed responsibility for the psychological effects of segregation upon blacks.[176] In the *Civil Rights Cases*, the Court refused to find in the Thirteenth Amendment protection from private discrimina-

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169. Foner, Story of Freedom, supra note 36, at 131.

170. Weiner, Class Structure and Economic Development, supra note 62, at 370 (noting that studies reflect "fairly extensive reliance on the law to repress labor").

171. Bickel & Schmidt, supra note 21, at 832. Justice Harlan's awareness of peonage's reality is demonstrated in his dissent in *Clyatt v. United States*, wherein he noted how the case "disclos[ed] barbarities of the worst kind against these negros [sic]." 197 U.S. 207, 223 (1905) (Harlan, J., dissenting).

172. See Charles W. Russell, Report on Peonage 30–31 (1908) (describing the use of vagrancy laws in rounding up lahor (mostly of blacks) during labor shortage in the South). Federal enforcement of the peonage laws in the South was relatively weak, principally because Southern juries tended to acquit defendants who were seen as justified in inflicting coercion. See Bickel & Schmidt, supra note 21, at 823 (noting also that "complacency about racial injustice and preoccupation with matters thought to be more pressing" also hindered enforcement).

173. Bailey v. Alabama, 211 U.S. 452, 456 (1908) (Harlan J., dissenting). The Court, writing under Justice Holmes, dismissed the complaint in 1908 as premature since Bailey had yet to be brought to trial. See id. at 453–55.

174. Cases involving the racial composition of the national body politic generally brought forth a less attractive side of the Court. See, e.g., United States v. Thind, 261 U.S. 204, 213 (1923) (refusing to define an Indian as a "white person" eligible for naturalization); Ozawa v. United States, 260 U.S. 178, 194–98 (1922) (holding that a Japanese person, as a non-white, could be excluded from citizenship under the pertinent statute). Contra United States v. Wong Kim Ark, 169 U.S. 649, 675–77, 688 (1898) (finding a general rule of universal citizenship by birth in the Fourteenth Amendment).

175. Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

176. Id. at 551. (noting that segregation may "stamp[ ] the colored race with a badge of inferiority" solely because it "chooses to put that construction upon it").

tion in the provision of public accommodation.[177] With the close of Reconstruction, the Court announced, the time had arrived for blacks to "cease[ ] to be the special favorite of the laws" for "[m]ere discriminations on account of race or color were not regarded as badges of slavery."[178] These cases reflect a persistent unwillingness to find significant protection for minorities in the Reconstruction Amendments and an inclination to view minorities as inferior. In the Peonage cases, the Thirteenth Amendment received an interpretation favoring blacks, even though the Court could have fallen back on the *Civil Rights Cases* dictum that the Amendment "simply abolished slavery."[179] This exception can be explained by the needs of a laissez-faire ideology straining under the weight of white proletarian coercion claims. Involuntary servitude in the Thirteenth Amendment proved fortuitously congruent with the notion of coercion in liberty of contract. White supremacy, on the other hand, was unaffected by the Peonage cases because only minor components of the Southern labor system were invalidated,[180] and because the cultural image of black incapacity prevailed.

2. *The Legal Status of Peonage Statutes and the Use of Criminal Sanctions Upon Breach of an Employment Contract.* — A preliminary objection to reopening the inquiry into the Peonage cases might be as follows: Surely the laws at issue in *Bailey* and *Reynolds*, by imposing criminal sanctions for a worker's breach of an employment contract, constituted peonage by restraining labor under pain of criminal punishment. They were thus patently invalid. Why then the need to explain?

The idea that the Thirteenth Amendment prohibited criminal sanctions for contract breach was not clearly accepted at the time the Peonage cases were decided.[181] Peonage had been defined narrowly by the federal courts to require "indebtedness,"[182] with criminal sanctions for contract breach traditionally distinct from debt. Indentured servitude, which applied criminal sanctions on breach of contract, persisted at the time in

177. See The Civil Rights Cases, 109 U.S. 3, 23 (1883).

178. Id. at 25; see also Hodges v. United States, 203 U.S. 1, 20 (1906) (contending that the Reconstruction Amendments had not left blacks the "wards of the Nation").

179. *The Civil Rights Cases*, 109 U.S. at 23.

180. See infra note 235 and accompanying text.

181. This is certainly not to contend that there would be no arguments available against the use of criminal sanctions upon contract breach. The Supreme Court in *Robertson v. Baldwin* distinguished between involuntary servitude which can exist "lawfully as a punishment for crime of which the party shall have been duly convicted," as opposed to criminalizing violation of a "private contract voluntarily made." 165 U.S. 275, 292 (1897) (Harlan, J., dissenting); see also Adair v. United States, 208 U.S. 161, 175–76 (1908) ("[I]t cannot be . . . that an employer is under any legal obligation, against his will, to retain an employé, . . . any more than an employé can be compelled, against his will, to remain in the personal service of another.").

182. Clyatt v. United States, 197 U.S. 207, 215 (1905) (defining the "basal fact [of peonage as] indebtedness").

England,[183] and had been widely accepted in the North until the 1820s and 1830s.[184] At the beginning of the twentieth century, three Northern states—Maine, Minnesota, and Michigan—had false pretenses statutes, similar to the one invalidated in *Bailey*.[185] Further, despite federal prohibitions forbidding the importation of foreign contract labor, a highly organized and highly coercive system of debt-based labor prospered alongside the growth of the Western railroads.[186] Contractual provisions threatening criminal sanctions could be found in the maritime context, where the Supreme Court, in *Robertson v. Baldwin*, held that the Thirteenth Amendment had not "introduce[d] any novel doctrine with respect to certain descriptions of service."[187] *Robertson* validated a contract in which "an individual . . . for a valuable consideration, contract[ed] for the surrender of his personal liberty for a definite time."[188] *Robertson* could have been extended to the Freedman's Bureau's equally traditional use of contracts backed by criminal sanctions. Indeed, the Freedman's Bureau use of "penal sanctions against idleness and vagrancy" *was* extended in the North through laws against vagrancy.[189] If beggars could be compelled "to obey the rules of the market and enter into transactions of voluntary exchange,"[190] blacks could in theory be forced to adapt to the free market through contracts backed by the criminal law. In sum, contemporary "freedom of contract theory [did] not speak unambiguously to the baseline question posed, whether breach of labor contracts may be treated as criminal."[191]

Nor was the illegitimate nature of the criminal sanctions for contract breach evident to Justice Holmes, who dissented in *Bailey* and concurred only reluctantly in *Reynolds*. Holmes argned that restrictions on sanctions for contract violations harmed workers, who otherwise received higher

183. The United Kingdom maintained forms of indentured servitude until the early twentieth century. Key among these was the practice of apprenticeship, which in fact promoted the "upward mobility of workers." Christopher T. Wonnell, The Contractual Disempowerment of Employees, 46 Stan. L. Rev. 87, 118 (1993).

184. See Robert J. Steinfeld, The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350–1870, at 8 (1991).

185. See Steinfeld, supra note 58, at 157 (noting that these states had "false pretense labor contract statutes of their own, aimed at enforcing the labor agreements of white workers who had received transportation advances to remote lumbering, mining, or railroad construction sites"). But cf. Schmidt, supra note 164, at 705 ("[T]he long-accepted position of the Anglo-American criminal law is that an individual breaching a contract should not be subject to criminal penalties.").

186. See Gunther Peck, Reinventing Free Labor: Immigrant Padrones and Contract Laborers in North America, 1885–1925, 83 J. Am. Hist. 848, 869 (1996) (describing "the North American West [as] a bastion of coercive labor relations in the early twentieth century").

187. Robertson v. Baldwin, 165 U.S. 275, 282, 287–88 (1897) (holding that the Thirteenth Amendment did not apply to sailors' contracts).

188. Id. at 280.

189. Stanley, supra note 39, at 99–100.

190. Id. at 114.

191. Bickel & Schmidt, supra note 21, at 989.

wages from employers no longer fearing their flight.[192] Holmes noted that as a rule "the State . . . throw[s] its weight on the side of performance."[193] As late as 1944, Justice Reed could unabashedly argue, albeit in dissent, that a state could "punish the fraudulent procurement of an advance of wages" as in *Bailey*.[194]

Finally, neither of the statutes at issue in the Peonage cases directly penalized contract breach. The false pretenses law in *Bailey* made acceptance of an advance and the subsequent failure to repay it prima facie evidence of fraud, while the criminal surety law in *Reynolds* allowed convicted criminals to have a third party pay their fines in return for the promise of labor.[195] Both could have fallen within the exception to the Thirteenth Amendment, which explicitly permitted involuntary servitude "as a punishment for crime."[196] A 1867 federal anti-peonage statute forbade "the holding of any person to service or labor to pay a debt due from the laborer to the employer, when such employé desires to leave the employment before his debt is paid off."[197] Southern peonage laws, on the other hand, included a finding of criminality and rested on more than mere indebtedness.[198] Pursuant to this logic, Alabama District Court Judge Thomas Goode Jones, one of the leaders of the Justice Department's attack on peonage,[199] upheld the false pretenses law later struck down in *Bailey*, on the theory that it did not "coerce the performance of civil obligations by criminal penalties."[200]

At the beginning of the *Lochner* era then, the "place of compulsion in a free market economy," was still an open question.[201] Understanding the malignant consequences of the peonage laws demanded a contextual

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192. An analogous argument was available for the enforcement of indentures. See Bailey v. Alabama, 219 U.S 219, 246 (1911) (Holmes, J., dissenting); see also Bickel & Schmidt, supra note 21, at 989–90 (discussing Holmes's views in *Bailey*).

193. *Bailey*, 219 U.S. at 247 (Holmes, J., dissenting).

194. Pollock v. Williams, 322 U.S. 4, 27 (1944) (Reed, J., dissenting).

195. Bickel & Schmidt, supra note 21, at 856–58, 882–83. Only in Louisiana was simple breach of an employment contract criminal. See id. at 854.

196. U.S. Const. amend. XIII, §1; see also Lichtenstein, supra note 23, at 2–5 (describing how this exception was used to circumvent the rule against forced labor).

197. Peonage Cases, 136 F. 707, 707 (E.D. Ark. 1905) (quoting the 1867 federal Anti-Peonage law).

198. This would also have comported with the emphasis placed by laissez-faire theorists, not only on the freedom to enter contracts, but also on the ability to choose upon entering a contractual relation those conditions the parties felt appropriate. Freedom of contract was the "right of a person to sell his labor upon such terms as he deems proper . . . [and] the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it." 2 Cooley, supra note 79, at 801.

199. See Daniel, Shadow of Slavery, supra note 18, at 44.

200. Peonage Cases, 123 F. 671, 691 (M.D. Ala. 1903). Nonetheless, Judge Goode in the same case struck down two other Alabama laws as violations of the Thirteenth Amendment. See id.

201. Stanley, supra note 39, at 115. Some courts thought differently. An Alabama court struck down one peonage law as a violation of liberty of contract. See Toney v. State,

analysis of their impact. If the Court had engaged in the formalist analysis of *Adair* or *Coppage*, it is easy to imagine the Peonage cases coming out the other way. Given the Court's proclivity for formalist, acontextual argument and its unwillingness to protect minorities in other cases, the question can legitimately be posed: Why did the Court decide the way it did?

3. *The Peonage cases.* — This section suggests that the Peonage cases were in fact characterized by the same sort of acontextual analysis used in other *Lochner*-era substantive due process cases. Distrusting factual information and the briefs, the Court relied on its stereotypes of black labor to strike down the false pretenses statute in *Bailey* and the criminal surety law in *Reynolds*.[202] The use of these techniques, similar to the methodology used in substantive due process cases, provides evidence that the framework of laissez-faire was the starting point for analysis in the Peonage cases. Hence, the Peonage cases should be seen as appendages to laissez-faire doctrine, which helps explain their anomalous status in race relations law.

While in *Adair* and *Coppage*, the Court accepted formalist readings of statutes, in *Bailey* and *Reynolds*, it engaged in a reconstruction of what it believed (more or less accurately) to be the statute's impact based on its own preconceptions of black labor.[203] In *Bailey*, Justice Hughes refused to accept Alabama's insistence upon the formal legitimacy of the false pretenses law, which allowed juries to convict workers of fraudulently accepting advances absent evidence by creating a presumption of fraudulent intent.[204] Nor did he look at the *actual* operation of the statute. As in *Muller*, the decision provides no sign of reliance on the briefs, which here would have included the Justice Department's detailed factual reports on peonage and Bailey's lawyers' insistence upon the racial component of the laws.[205]

Instead, the Court applied its preconceived categories, in an effort to imagine the statute's "natural" effect.[206] Justice Hughes notes that "[p]lainly" the law targeted cases "destitute" of possible inference.[207] The "law . . . did not permit [a defendant] to testify that he did not intend to

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37 So. 332, 334 (Ala. 1904) ("Because of the restrictions it purports to place on the right to make contracts for employment . . . this act is wholly invalid.").

202. United States v. Reynolds, 235 U.S. 133 (1914); Bailey v. Alabama, 219 U.S. 219 (1911).

203. Of course, "southerners knew [that the false pretenses law was] intended to maintain white control of the labor system." Cohen, supra note 69, at 34.

204. *Bailey*, 219 U.S. at 232–33.

205. See Daniel, Shadow of Slavery, supra note 18, at 74–75 (noting that five "thorough but repetitive" briefs were submitted in Bailey's defense, including an amicus curiae brief by the Justice Department); id. at 76 (touching on Bailey's lawyers' insistence on race's importance).

206. 219 U.S. at 238.

207. Id. at 235.

injure or defraud."[208] Justice Hughes imagined Bailey as "stripped" of his natural rights and "exposed" to the danger of conviction.[209] In spite of Justice Holmes's protest that evidence of the statute's de facto operation was lacking even in the case at hand, the Court imagined the statute's "natural and inevitable effect," in a way that it had been unwilling to do in *Adair* or *Coppage*.[210] Further, the Court could have invalidated only the particular application of the statute before it, instead of striking down the entire statute. Indeed, Justice Holmes, in denying a hearing in the first *Bailey* case, suggested that the statute's flaw, if any, lay in its application rather than its formulation.[211] The Court knew that the law's targets were black peons, described elsewhere as "helpless and pathetic."[212] Since blacks fit its preconceived notions of incapacity, it was willing to see the laws as extensions of private coercion.[213]

Further, in *Reynolds*, the Court performed a similar analysis on a convict surety statute, which allowed black criminals to have their fines paid by white farmers in exchange for labor.[214] Justice Day refused to endorse a purely formalist understanding of the statute that legitimated the imposition of a penalty pursuant to a criminal conviction. He contended that the surety was a new contract, not part of a state punishment, even though the state, through its statute, branded the surety contracts as punishment.[215] Justice Day also highlighted laborers' initial indebtedness, unlike the *Coppage* Court, which had refused to consider workers' initial

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208. Id. at 236.

209. Id. at 236.

210. Id. at 238; see Adair v. United States, 208 U.S. 161 (1908) (refusing to consider the possibility that workers and employers were unequal). Holmes might have argued that the evidence of the case at hand provided only enough evidence to invalidate the law as applied, and not on its face. Hence, the Court should not have struck down a law since it was only the incompetence of a state prosecutor at issue.

211. Bailey v. Alabama, 211 U.S. 452, 454 (1908) (noting that if "[w]hen the case comes to trial . . . the prosecution will not rely upon the statutory presumption, but will exhibit satisfactory proof of a fraudulent scheme," there would be no constitutional defect).

212. United States v. McClellan, 127 F. 971, 977 (S.D. Ga. 1904).

213. See Soifer, supra note 15, at 273 (arguing that Hughes "could not avoid seeing 'poor' and 'ignorant' farm workers").

214. In *Reynolds*, one Ed Rivers was convicted of petty larceny. To pay his fine and court costs required sixty-eight days in jail; rather, Rivers chose to work in a surety contract for nine months and twenty-four days. Deserting before its completion, Rivers was rearrested, fined again (this time, a penny, but with $87.75 court costs), and again re-released on a surety, this time for more than fourteen months. See Cohen, supra note 69, at 54.

215. "[H]ere the State has taken the obligation of another for the fine and costs, imposed upon one convicted for the violation of the laws of the State. . . . The surety and convict have made a new contract for service, in regard to the terms of which the State has not been consulted." United States v. Reynolds, 235 U.S. 133, 149–50 (1914). Justice Day's reading of the situation departs from the historical facts: The state clearly knew of and endorsed the second contract. It had written the law with the intention of extracting labor from blacks, allowing white employers to come into Court and pay the fee; then, the state inflicted increased fines, as in Rivers's case, in the event of a second breach. The

positions.[216] He saw the new contract as a new creation, and the peon's indebtedness as manufactured by the law, instead of an inevitable background inequality. Again, the only reason to shift from *Coppage*'s analytic stance was the presence of a group that the Court already perceived as weak and vulnerable—hence worthy of protection—coupled with the pressing ideological needs of laissez-faire jurisprudence outlined in Part I.[217]

4. *The Holmes Opinions.* — Justice Holmes's *Bailey* dissent and *Reynolds* concurrence provide the strongest evidence for this reading. By adopting an "uncharacteristically formalistic" approach,[218] Holmes emphasized that if the statute applied to all contracts, it would be valid. Logically then, it was not the statute itself, but the fact that it was applied primarily to one vulnerable group that had persuaded the majority. Indeed, in his first *Bailey* decision, he had noted that the false pretenses law would be invalid only if "a certain class in the community was mainly affected."[219] Absent this evidence, Holmes implied, the Court lacked reasons to invalidate the law.[220]

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proposition that the state's stamp of approval was lacking in these schemes was thus inaccurate.

216. See Coppage v. Kansas, 236 U.S. 1, 17 (1915) (noting that it is "impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights").

217. While whites, especially Italian immigrants, were also subject to coercive false pretenses statutes in other parts of the country, the Court's adjudication of a case involving blacks probably made the striking down of the statute easier to justify. See Bickel & Schmidt, supra note 21, at 851–53; see also Pete Daniel, Up from Slavery and Down to Peonage: The Alonzo Bailey Case, 57 J. Am. Hist. 654, 656 (1970) (discussing the types of people enslaved by peonage laws); Peck, supra note 186, at 849–50 (noting that Greeks, Mexicans, and Italians were also caught in coercive labor relations). There is no pattern discernable in lower courts' decisions involving different races of peons. *Davis v. United States*, for instance, seems to have involved a successful prosecution where the peon was white. 12 F.2d 253 (5th Cir. 1926). In another case, in which the defendant "refused to allow [the white peon] to stop working, and the defendant . . . said . . . that [the peon] must work for Taylor [the defendant] or go on the chain gang," the conviction was reversed because the threat was never realized. Taylor v. United States, 244 F. 321, 323 (4th Cir. 1917).

218. G. Edward White, Justice Oliver Wendell Holmes: Law and the Inner Self 337 (1993) [hereinafter White, Law and the Inner Self]. Holmes refused to consider the socioeconomic conditions of false pretenses prosecutions. How else can his defense of the prima facie standard as "only evidence, [which] may be held by a jury to make out guilt," id. at 248, be read? Certainly, this assessment bears no relation to the reality of Southern justice. See Russell, supra note 22, at 14–25 (discussing the impact of race in criminal trials).

219. Bailey v. Alabama, 211 U.S. 452, 454 (1908).

220. The decisions cannot simply be chalked up to Holmes's opposition to substantive due process. On numerous occasions, Holmes joined the Court in invalidating legislation under substantive due process grounds. See, e.g., Pa. Coal Co. v. Mahon, 260 U.S. 393, 413–16 (1922) (recognizing that regulation that goes "too far" will be construed as a taking). Readings of Justice Holmes's *Lochner* dissent often overlook the fact that he did see a role for "fundamental principles as they have been understood by the traditions of

Dissenting in the Court's second hearing of *Bailey*, he highlighted the case's racial content with ironic verve: "[T]he fact that in Alabama it mainly concerns the blacks does not matter."[221] Immediately after noting this racial content, he reiterated the majority's reference to *Yick Wo v. Hopkins*, a seminal case on disparate racial impact.[222] Holmes thus contrasted the obvious racial content of the law with the fact that the majority had gone out of its way to deny this racial content proper legal significance. This ironic contrast suggests that Holmes did not take the majority's denial of the importance of race at face value. Rather, he believed that racial factors had been determinative for the majority. By stressing the obvious racial context of the law, Holmes was calling the majority's bluff, implicitly challenging their putatively race-neutral decision.[223] Holmes thus indicated his belief that the Court was importing subjective judgments, specifically, its beliefs that blacks were weak and merited protection, to invalidate a legislative decision. Justice Holmes's *Bailey* dissent might be read as an attempt to embarrass the Court, which was leery of inflaming fresh tensions between North and South, by parading and mocking its implicit use of racial categories.[224]

In *Reynolds*, Justice Holmes noted that only "impulsive people with little intelligence or foresight" would be caught in the folds of criminal surety.[225] These words were "the shibboleths of respectable racism in moderate Northern discourse,"[226] and indicated his belief that the law was being struck down, not necessarily because it was inherently coercive, but because it was generally applied to a weak and incapable people, who needed protection from the potentially harsh outcomes of the market. One biographer, G. Edward White, suggests that Holmes might have distinguished between the permissible criminalization of breaches of labor contracts, and an impermissible taking "advantage" of "impulsive" labor-

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our people." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting); see also Michael J. Phillips, The Substantive Due Process Decisions of Mr. Justice Holmes, 36 Am. Bus. L.J. 437, 450–60 (1999) (noting that, in many instances, Justice Holmes argued for the invalidation of legislation on due process grounds).

221. Bailey v. Alabama, 219 U.S. 219, 246 (1911) (Holmes, J., dissenting).

222. Id. (citing Yick Wo v. Hopkins, 118 U.S. 356, 368 (1886) (upholding an equal protection challenge by "aliens and subjects of the Emperor of China")).

223. Cf. Soifer, supra note 15, at 272 ("Holmes accused the majority of tacitly assuming that Alabama juries would be prejudiced.").

224. Professor Schmidt notes that the Court was careful to stimulate "the impetus for sectional reconciliation" and that in every case in which it struck down a piece of Jim Crow, it avoided "any implication of judicial disapproval." Bickel & Schmidt, supra note 21, at 982, 987 (discussing the involuntary servitude, franchise restriction, and segregation cases). Schmidt considers but rejects the suggestion that the choice of Hughes as writer of the *Bailey* decision, instead of Harlan, who had already professed strong feelings on race, was an effort on the latter's part to minimize perceived conflict within the Court over the issue of race. See id. at 863.

225. United States v. Reynolds, 235 U.S. 133, 150 (1914) (Holmes, J., concurring).

226. Schmidt, supra note 164, at 700. Further, Randall Kennedy asserts tbat Holmes had a "low regard for blacks [in] general." Kennedy, Race Relations Law, supra note 164, at 1643.

ers.[227] For Holmes, the latter is determinative in *Reynolds* but not *Bailey*.[228] Hence, in both cases, the Holmes opinions illuminate a consciousness of the racial context, and his belief that it was crucial for the majorities' decisions. Later peonage decisions, perhaps influenced by Holmes's irony, acknowledged the salience of race.[229]

In conclusion, *Bailey* and *Reynolds* do not need to be seen as anomalies in the era of judicial hostility to racial claims. Rather, they transpired at a moment when laissez-faire ideology urgently required a definition of unfree labor to staunch majoritarian cries for redistributive legislation. The Court's solution to this problem—permitting coercion claims from only those groups it understood as weak—seeped into the Peonage cases. Where minorities' claims had been rejected in *Plessy v. Ferguson*[230] and the *Civil Rights Cases*,[231] the pleas of black laborers were heard in *Bailey* and *Reynolds* because such recognition proved congruent with the ideological necessities of laissez-faire. For an instant, black subordination was remedied, not for the sake of justice or equality, but for ideological coherence. Other scholars have noted similar contemporaneous moments of interest convergence. According to Professor David Bernstein, freedom of contract jurisprudence also "protected African Americans from facially neutral legislation that restricted their access to, and mobility in, the labor market."[232] He concludes that such protection was "a fortuitous by-product of Lochnerism's hostility to special-interest legislation rather than a product of a conscious decision by the courts to protect these groups."[233] A focus upon the Peonage cases, however, counsels for a less sanguine view of fortuitous judicial aid.[234] The practical effects of decisions concerning peonage for blacks were limited since "peonage continued, not only in Alahama but throughout the South."[235] The Pe-

227. White, Law and the Inner Self, supra note 218, at 339.

228. One remaining question is why Holmes would dissent in *Bailey* and concur in *Reynolds*, since substantively the same sort of law was involved in both cases. White, not particularly helpfully, suggests that the two decisions reflect the tension between his positivism and "his interest in exposing the practical consequences of legal rules." Id.

229. E.g., Pollock v. Williams, 322 U.S. 4, 15 (1944) ("He [the peon] was an illiterate Negro laborer in the toils of the law for the want of $5.").

230. 163 U.S. 537 (1896).

231. 109 U.S. 3 (1883).

232. David E. Bernstein, Only One Place of Redress: African Americans, Labor Regulations, & the Courts from Reconstruction to the New Deal 7 (2001).

233. Id. at 115.

234. Professor Bernstein also argues that the history of freedom of contract jurisprudence also casts doubt on the "purported social benefits of the modern regulatory state." Id. at 116. Unlike Professor Bernstein's work, this Note contains insight into neither the public choice dynamics of economic legislation, nor the relative possibilities of conflict and cooperation between various subalteru groups.

235. Daniel, Shadow of Slavery, supra note 18, at 79; see also Kennedy, Race Relations Law, supra note 164, at 1648 ("[A] thick web of peonage-like legal arrangements were left untouched by *Bailey* and its immediate progeny."). Hence the Court "perpetuat[ed] racial subordination in practice while paying deference to the formalities of equal treatment under the law." Id. at 1649.

onage cases as rules of law for "many agricultural workers . . . proved impotent,"[236] especially as those U.S. Attorneys who continued to work on peonage cases received little aid from the Justice Department.[237] The Peonage cases thus provided a way for the Court to cement the cohesion and integrity of laissez-faire jurisprudence at minimal cost to white supremacy.

B. *The Continuing Relevance of the Peonage Cases' Logic:* Kozminski

If the Court's preconceived categories determined who would receive Thirteenth Amendment protection, a dearth of jurisprudence might follow naturally. As the Court abandoned blatantly prejudicial views, and its perception of subordinate groups as weaker withered, Thirteenth Amendment protection of the latter died on the vine.[238] Further, by the end of the 1930s, the Court had ceased to review economic legislation.[239] And yet, the persistence of the aforementioned model is apparent in a 1988 Supreme Court decision construing the Thirteenth Amend-

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236. Daniel, Shadow of Slavery, supra note 18, at 80. Daniel begins his account by criticizing the "inability of federal, state, and local law-enforcement officials to end peonage." Id. at xi.

237. See id. at 148; see also id. at 110–31 (describing the manifold difficulties of a peonage prosecution in Georgia).

238. According to Risa Goluboff, another reason for this change was the shift in the NAACP's litigation strategy in the 1940s. See Risa L. Goluhoff, A Road Not Taken: The Thirteenth Amendment and the Lost Origins of Civil Rights, 50 Duke L.J. (forthcoming April 2001) (manuscript at 5–6, on file with the *Columbia Law Review*). The Court decided one major case under the Thirteenth Amendment since its skirmishes with peonage, a case that ended up as a lonely, little-cited outlier in constitutional jurisprudence. See Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (holding that racial discrimination in the real and personal property market could be regulated by Congress under the Thirteenth Amendment); Note, The "New" Thirteenth Amendment: A Preliminary Analysis, 82 Harv. L. Rev. 1294, 1300 (1969) ("The [T]hirteenth [A]mendment as it appears to have been originally understood bears little relation to the "new" [T]hirteenth [A]mendment applied in *Jones.*").

For examples of other cases decided under the Thirteenth Amendment, see, e.g., United States v. Mussry, 726 F.2d 1448, 1450 (9th Cir. 1984) (holding that withholding passports and airline tickets while indigent immigrants worked off the cost of travel violated the Thirteenth Amendment); Jobson v. Henne, 355 F.2d 129, 134 (2d Cir. 1966) (holding that state mental institution personnel who subjected an inmate to conditions like involuntary servitude could be held liable under civil rights statutes).

239. See, e.g., United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938) (outlining limited categories that would trigger heightened judicial scrutiny, and conspicuously omitting economic regulation); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) (upholding the validity of a Washington minimum wage statute and rejecting the constitutionalization of freedom of contract).

ment through its statutory armatures 18 U.S.C. § 241 and 18 U.S.C. § 1584,[240] a decision entitled *United States v. Kozminski*.[241]

Kozminski concerned the criminal prosecution of farmers who had held by force and threats, and then extracted labor from, two mentally handicapped individuals. Justice O'Connor held that the standard for involuntary servitude under these statutes was the "use or threatened use of physical or legal coercion."[242] Noting that the "exact range of conditions [the Amendment] prohibits is hard[ ] to define," provoking problems of notice in the use of criminal sanctions,[243] she "abruptly concluded that psychological coercion would not satisfy its test."[244] Further, she rejected definitions of involuntary servitude that encompassed psychological coercion or "slavelike conditions" because of the same rule of law problem.[245] Her standard thus attempted to exclude uncertainty in the definition of coercion by avoiding a subjective definition.[246]

Nevertheless, it is far from clear that the majority's standard *does* exclude subjective judgments. Defining legal coercion requires that courts confront a baseline problem: Determining when the exercise of a legal right is coercive.[247] One problem is that a law might be only *part* of the reason for accepting work. Where the law plays a part in coercing work, but other factors also play a role, the Court might have to determine

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240. See 18 U.S.C. § 241 (1988) (criminalizing conspiracies to "injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution . . . ."); 18 U.S.C. § 1584 (1988) (penalizing a person who "knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term . . . ."). The Court deems that the "Congress intended the phrase to have the same meaning in both places . . . ." United States v. Kozminski, 487 U.S. 931, 945 (1988).

241. 487 U.S. at 931.

242. Id. at 953. The Court explicitly drew "no conclusions . . . about the potential scope of the Thirteenth Amendment." Id. at 944.

243. Id. at 942, 949–55. Contra Kares, supra note 2, at 390 ("The use of the criminal standard in federal tort cases achieves the same effect as the stringent requirements for bringing civil rights actions under § 1985(3): it limits the availability of a constitutional tort.").

244. Scott J. Gorsline, Casenote, Criminal Law—Involuntary Servitude, 66 U. Det. L. Rev. 297, 304 (1989).

245. United States v. Kozminski, 487 U.S. 931, 951 (1988). Justice O'Connor describes as "inherently legislative" the task of "determining what type of coercive activities are so morally reprehensible that they should be punished as crimes" since there is "no objective indication of the conduct or condition they prohibit." Id. at 949.

246. In addition, the Court wanted to assuage problems of notice in *Kozminski* itself. See id. at 942–44.

247. See id. at 931, 948. For a brief discussion of this problem, see supra note 113. A legal realist view of law might require the Court to acknowledge that law, in the form of property right allocations—particularly the property of others—always restricts options. Law is hence *always* a partial constraint. See Hale, Coercion and Distribution, supra note 113, at 473.

whether the subjective reasons for submitting to the threat pertained to the exercise of the legal right or to non-legal factors.[248]

However, Justice O'Connor's opinion contains sub rosa strands of another analytic technique for closeting coercion, one with roots in the *Lochner* era. Rather than examining the plaintiff's subjective view of the coercion in question, the Court categorized victims into different classes based on the Court's conception of whether the victim was suitably weak and incapable. Justice O'Connor gave several examples of 18 U.S.C. § 241 and § 1584 violations: "children . . . stranded in large, hostile cities"; a "child who is told he can go home late at night in the dark through a strange area"; "an incompetent [threatened with] institutionalization" and "an immigrant [threatened] with deportation."[249] On the other hand, "a parent who coerced an *adult* son or daughter into working in the family business by threatening withdrawal of affection," could not be described as coercive.[250] Religious and political leaders who obtain "work without pay" or "personal services" from adult followers are also excluded from involuntary servitude prosecution.[251] Finally, an at-will firing was a "beneficial" situation that would be compromised by coercion liability.[252] A common thread illuminates these examples: Only plaintiffs with special vulnerabilities, or who lack capacity, are protected.[253] The "vulnerabilities of the victim" and "evidence of other means of coercion" are not only "relevant," but, given the difficulty of articulating a baseline for legal coercion, may be determinative.[254] Courts following *Kozminski* will inevitably look to these examples, even though they are dicta, to identify legal coercion. The First Circuit, the only circuit yet to analyze *Kozminski* extensively, has noted the "evidentiary role of the victim's 'special

248. For instance, if an immigrant accepted work rather than returning home, and was threatened by an employer with a loss of work authorization, would it make a difference to the Court in a coercion analysis if the immigrant in this case was a well-educated professional from Canada, or a manual laborer from a poorer country which was suffering from a major civil war? It seems unavoidable that these contextual factors, besides the type of legal pressure applied, would make a difference in the Court's adjudication.

249. 487 U.S. at 947–48.

250. *Kozminski*, 487 U.S. at 949 (emphasis added). Justice O'Connor emphasizes that this example arose in oral argument, suggesting its importance to the Court.

251. Id.

252. Id. at 950 (agreeing that "[t]he most ardent believer in civil rights legislation might not think that cause would be advanced by permitting the awful machinery of the criminal law to be brought into play whenever an employee asserts that his will to quit has been subdued by a threat which seriously affects his future welfare") (quoting United States v. Shackney, 333 F.2d 475, 487 (2d Cir. 1964)).

253. This occurred in *Kozminski*. Even though the case was reversed and remanded, the Court recognized the special weakness of the two "mentally retarded" men held by the Kozminskis. According to the Sixth Circuit Court of Appeals, the I.Q.s of the two farmhands were 67 and 60. See United States v. Kozminski, 821 F.2d 1186, 1188 (6th Cir. 1987).

254. *Kozminski*, 487 U.S. at 952.

vulnerabilities,'" which the court must draw to the jury's attention.[255] *Kozminski* hence demands that plaintiffs construct themselves as hapless victims.

In sum, the *Kozminski* standard solves the coercion problem by drawing on the *Lochner*-era's model, thus drastically limiting the scope of Thirteenth Amendment protection.[256] Yet sucb a constricted definition of involuntary servitude is not a necessary result. With close scrutiny of the impact of background economic conditions, courts could proceed in a case-by-case manner to outline a shared sense of coercion. Even absent "apparent consensus in society or in the legal community, [the Court] can often create some kind of agreement in the context of the narrow case, and through the case enlighten attitudes in the larger community."[257] So long as only parties understood as weak and incapable, such as the idiot and the child, merit judicial protection, the Thirteenth Amendment will fall far short of its full potential.[258]

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255. United States v. Alzanki, 54 F.3d 994, 1000–01 n.4 (1st Cir. 1995) (finding that "the jury is to consider the victim's 'special vulnerabilities,' with a view to 'whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve'").

256. See also William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321, 376 (1990) (arguing that the *Kozminski* court did not accord sufficient weight to fairness values).

257. Id. at 384. Concurring in *Kozminzki*, Justice Stevens was confident that sufficient social agreement already existed concerning the meaning of involuntary servitude, that, in a majority of cases, outcomes would be sufficiently predictable to assuage rule of law problems. Further, he argued that since "[n]o legal rule . . . produces certainty," a degree of uncertainty must *always* be accepted. *Kozminski*, 487 U.S. at 965–66, 967 n.1 (Stevens, J., concurring). A standard for coercion could be "developed in the common-law tradition of case-by-case adjudication." Id. at 965–66.

Justice Stevens's model of legal interpretation abandons the Court's monopoly on the meaning of coercion and "puts . . . emphasis on ordinary understanding and purpose." Kent Greenawalt, The Nature of Rules and the Meaning of Meaning, 72 Notre Dame L. Rev., 1449, 1477 (1997). It opens the interpretive inquiry to "individuals attempting to conform their conduct to the rule of law, prosecutors, and jurors," *Kozminski*, 487 U.S. at 969 (Stevens, J., concurring), and abandons the idea that "law is something handed down to the populace by high officials." William N. Eskridge, Jr., Public Law from the Bottom Up, 97 W. Va. L. Rev. 141, 142 (1994). Acknowledging the difficulty of articulating a consistent normative standard for coercion, Justice Stevens urged the Court to broaden the enterprise of constitutional interpretation, allowing the Court to serve as a prism through which manifold visions of coercion could be reconciled.

258. Asking people to construe themselves as victims effectively prevents many people from claiming they have been subject to coercion. "[W]hen blacks are told that they should not be deploying the use of victimology as a way of articulating demands, they are essentially being forced into a catch-22." Kimberlé Williams Crenshaw, Color Blindness, History, and the Law, *in* The House That Race Built 280, 287 (Wahneema Lubiano ed., 1997). Justice O'Connor acknowledges, at least implicitly, what Lawrence Sager has called the "constricted reach of the federal judicial doctrines which govern the enforcement of constitutional norms." Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1263 (1978). Professor Sager describes instances where "the Court, because of institutional concerns, has failed to enforce a provision of the Constitution to its full conceptual boundaries." Id. at 1213.

CONCLUSION

In his seminal work *Whigs and Hunters*, E.P. Thompson demonstrated how law, while initially a mechanism to "mediate existent class relations to the advantage of the rulers," rapidly develops an independent logic and evolutionary momentum, to impose "again and again, inhibitions upon the actions of the rulers."[259] This Note has proposed an alternative interpretation of the Peonage cases that advances Thompson's critique one further step. Just as hegemonic legal norms might incidentally constrain the actions of the powerful, so might legal forms adopted for the benefit of subordinate classes be pressed into the service of a ruling class. The Reconstruction Amendments underwent this same process. One strain of substantive due process developed into freedom of contract, a theory that required an understanding of "coercion"—that which could vitiate an otherwise free contract. This theory required the establishment of limits to those who could claim legal relief from coercion. Applying their preconceived notions, the Justices determined that only those presumed to be weak could be coerced, although these preconceived categories changed as culture changed. By extension, to warrant the solicitude of the Thirteenth Amendment, a party had to show the incapacity and impulsivity attributed to blacks. Thus, racist assumptions of black incapacity at once constituted the foundation of the laissez-faire market and the Thirteenth Amendment. Such assumptions persist in the Thirteenth Amendment's current incarnation. Until these assumptions are rooted out and refuted, the Thirteenth Amendment will remain a withered and vestigial constitutional appendage.

259. Thompson, supra note 93, at 264.