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# CONTRACT LAW & RACIAL INEQUALITY: A PRIMER

DANIELLE KIE HART<sup>†</sup>

## INTRODUCTION

America was founded on institutionally recognized and supported oppression, namely, slavery and conquest.<sup>1</sup> So, the fact that the inequality spawned by this oppression continues to exist today should surprise absolutely no one. That said, the extent of the racialized social and economic inequality that pervades American society today is being exposed in horrifying and glaring detail, as a result of the COVID-19 pandemic.

African Americans, the Latinx community, indigenous communities, and immigrants are at much greater risk of getting sick and dying from COVID-19<sup>2</sup> because of now widely-

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<sup>1</sup> While the United States Constitution makes no explicit mention of slavery, it nevertheless granted legal recognition of its existence by: (i) determining state populations, for the purposes of apportionment of Representatives and direct taxes, “by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons,” U.S. CONST. art. I, § 2, cl. 3; (ii) forbidding Congress to prohibit “importation of such persons as any of the States . . . shall think proper to admit” before 1808, U.S. CONST. art. I, §9, cl. 1; and (iii) forbidding states from enacting any law that would alter the status of any escaping “person held to service or labour” in another state, and requiring that such person “be delivered up on claim of the party to whom such service or labour may be due,” U.S. CONST. art. IV, §2, cl. 3. *See generally* William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 775–78 (1979). With respect to conquest, *see generally* Joseph William Singer, *Property, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 240, 248 (David Kairys 3d ed., 1998) [hereinafter, Singer, *Property*]; Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 5 (1991) [hereinafter, Singer, *Sovereignty*]; Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1716–20 (1992).

<sup>2</sup> *Tracking the COVID-19 Economy's Effect on Food, Housing, and Employment Hardships*, CTR. ON BUDGET & POL'Y PRIORITIES [hereinafter *Tracking the COVID-19*

acknowledged systemic health and social inequality and inequity.<sup>3</sup> More specifically, in July 2021, the CDC reported that the death rate for African Americans was 2.0 times higher than the death rate for whites, for American Indians and Alaskan Natives the death rate was 2.4 times higher, and for Hispanics/Latinx people the death rate was 2.3 times higher.<sup>4</sup>

The economic devastation wrought by the pandemic is also being felt disproportionately by people of color. According to the Pew Research Center, 61% of Hispanic Americans and 44% of Black Americans suffered job or wage losses in April 2020 due to the pandemic, compared to 38% of white adults.<sup>5</sup> As of October 2021, the Center for Budget and Policy Priorities reported that “renters of color were more likely to report that their household[s] [were] not caught up on rent: 28 percent of Black renters, 18 percent of Latino renters, and 20 percent of Asian renters said they were not caught up on rent, compared to 12% of white renters.”<sup>6</sup> Black and Hispanic adults were also more likely than their white counterparts to be unable to pay some or all of their bills.<sup>7</sup> Not surprisingly, given the job and wage data, more than twice as many Black (37.4%) and Hispanic adults (39.3%) were food insecure as compared to white adults (17.6%).<sup>8</sup>

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*Economy's Effect*], <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and> (last updated Oct. 21, 2021); Tiffany Ford et al., *Race Gaps in COVID-19 Deaths Are Even Bigger Than They Appear*, BROOKINGS (June 16, 2020), <https://www.brookings.edu/blog/up-front/2020/06/16/race-gaps-in-covid-19-deaths-are-even-bigger-than-they-appear/> [https://perma.cc/7FC3-YJQ5]; see, e.g., *Health Equity Considerations & Racial & Ethnic Minority Groups*, CDC (Apr. 19, 2021) [hereinafter *Health Equity Considerations*], <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> [https://perma.cc/54QC-UK6L]; The Editors, *Too Many Black Americans Are Dying from COVID-19*, SCIENTIFIC AMERICAN (Aug 1, 2020), <https://www.scientificamerican.com/article/too-many-black-americans-are-dying-from-covid-19/>.

<sup>3</sup> See, e.g., *Health Equity Considerations*, *supra* note 2; see also The Editors, *supra* note 2.

<sup>4</sup> *Hospitalization and Death by Race / Ethnicity*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> (updated July 16, 2021).

<sup>5</sup> Mark Hugo Lopez et al., *Financial and Health Impacts of COVID-19 Vary Widely by Race and Ethnicity*, PEW RES. CTR. (May 5, 2020), <https://www.pewresearch.org/fact-tank/2020/05/05/financial-and-health-impacts-of-covid-19-vary-widely-by-race-and-ethnicity/> [https://perma.cc/4MXL-GAYR].

<sup>6</sup> *Tracking the COVID-19 Economy's Effect*, *supra* note 2.

<sup>7</sup> *Id.*

<sup>8</sup> Steven Brown, *The COVID-19 Crisis Continues to Have Uneven Economic Impact by Race and Ethnicity*, URB. INST.: URB. WIRE (July 1, 2020), <https://www.urban.org/urban-wire/covid-19-crisis-continues-have-uneven-economic->

In contrast, Wall Street and American billionaires were doing phenomenally well during the COVID-19 pandemic.<sup>9</sup> The United States apparently minted 56 new billionaires between mid-March and December 22, 2020, bringing the total number of American billionaires to a whopping 659.<sup>10</sup> The wealth of American billionaires actually increased by more than \$1 *trillion* since the pandemic began.<sup>11</sup> On November 27, 2020, a headline by the Associated Press read, “Stocks rise on Wall Street as S&P 500 hits record high.”<sup>12</sup> But an October 16, 2020, *New Yorker* story by John Cassidy captured the chasm that exists in American society best. Cassidy wrote that, between June and September 2020, “the number of Americans living in poverty [rose] by about six million,” with the largest increase affecting African Americans—18.2% in June to 22.8% in September.<sup>13</sup> In comparison, during the three month period from July to September, Morgan Stanley posted \$2.7 billion in profits, “a rise of twenty-five per cent compared to a year ago.”<sup>14</sup> Goldman Sachs did even better—“it announced quarterly profits of \$3.62 billion, virtually double what the firm earned in the same quarter in 2019.”<sup>15</sup>

The punch line to all of this is one that we have seen and heard before—even in times of national and global crisis, the Haves come out ahead. But two important details are obscured and therefore

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impact-race-and-ethnicity [https://perma.cc/Y6JA-LCED]; see also *Tracking the COVID-19 Economy's Effect*, *supra* note 2.

<sup>9</sup> See Carmen Ang, *The Rich Got Richer During COVID-19. Here's How American Billionaires Performed*, VISUAL CAPITALIST (Dec. 30, 2020), https://www.visualcapitalist.com/the-rich-got-richer-during-covid-19-heres-how-american-billionaires-performed/ [https://perma.cc/QRB9-YHBV]; see also Martha C. White, *Wall Street Minted 56 New Billionaires Since the Pandemic Began—but Many Families Are Left Behind*, NBC NEWS (Dec. 30, 2020, 10:18 AM), https://www.nbcnews.com/business/business-news/wall-street-s-best-year-ever-why-pandemic-has-been-n1252512 [https://perma.cc/5LLT-VK86].

<sup>10</sup> White, *supra* note 9.

<sup>11</sup> *Id.*; Niall McCarthy, *U.S. Billionaires Gained \$1 Trillion Since the Pandemic Started*, STATISTA (Nov. 30, 2020), https://www.statista.com/chart/22068/change-in-wealth-of-billionaires-during-pandemic/ [https://perma.cc/HEB2-H78W]; Ang, *supra* note 9.

<sup>12</sup> *Stocks Rise on Wall Street as S&P 500 Hits Record High*, AP NEWS (Nov. 27, 2020), https://apnews.com/article/seoul-tokyo-hong-kong-shanghai-coronavirus-pandemic-eddb4ca8ddaa9fc749a8d83c0aff76b3.

<sup>13</sup> John Cassidy, *The Great Coronavirus Divide: Wall Street Profits Surge as Poverty Rises*, NEW YORKER (Oct. 16, 2020), https://www.newyorker.com/news/our-columnists/the-great-coronavirus-divide-wall-street-profits-surge-as-poverty-rises [https://perma.cc/UT5Q-S4AV].

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

overlooked in this widely accepted observation: the role that contracts and contract law play in facilitating this reality and the profound and often devastating social consequences that contracts and contract law help produce in this process.

A lot has been said about the roles that contracts and contract law play in American society.<sup>16</sup> But to be very clear upfront, this Essay is a primer, meaning it is going to be relatively short and definitely to the point. Part I provides a brief step-by-step analysis of contract law in action, the practical effect of which is to ensure that contracting parties who start with more end up with more. Part I thus shows how contracts and contract law help to create and perpetuate inequality in American society. Part II explains why contracts' and contract law's roles in producing economic and social inequality are largely ignored. The short answer is because, depending on who the adversely-affected contracting party is, a contract is usually understood as a private transaction between private parties asserting their private rights. To understand how you get everyone to buy into the fiction that contracts are usually private is to understand ideology and how it is reproduced in the field of contract law. Perhaps counterintuitively, Part II therefore traces part of contract law's evolution story to the Emancipation of the slaves and the Reconstruction that followed. Part III briefly revisits the housing market crash that precipitated the Great Recession of 2007-2009 to illustrate the devastating consequences that contracts and contract law helped produce, and the skewed response to those consequences that are engendered, at least in part, because we cling to the fiction that contracts and contract law have nothing to do with inequality.

Clearly, there are other explanations for the extent and intransigence of racial inequality in the United States. That said, we ignore contracts and contract law at our peril, because they both play an integral part in how inequality is perpetuated in American society.

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<sup>16</sup> See generally Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 475 (1923); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 591-92 (1933); Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 829-30 (1983); Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 897 (1997); Hila Keren, "We Insist! Freedom Now": *Does Contract Doctrine Have Anything Constitutional to Say?*, 11 MICH. J. RACE & L. 133, 138 (2005); Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 182-83 (2009) [hereinafter, Hart, *Formation*].

## I. INEQUALITY

Inequality in America starts with property, specifically, what and how much a person owns.<sup>17</sup> Property rights are determined by the State, which means the State decides what constitutes property, how it can be acquired and what one can and cannot do with it.<sup>18</sup> The starkest example of the State's power to determine what constitutes property is a slave.<sup>19</sup> On December 31, 1862, the day before the Emancipation Proclamation was issued, slaves were property under the laws of the Southern States.<sup>20</sup> They could be made to work, punished, and bought and sold as their owners saw fit.<sup>21</sup> On January 1, 1863, the Emancipation Proclamation

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<sup>17</sup> See generally Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12–13 (1927).

<sup>18</sup> The vast majority of the land in the United States was originally owned by American Indian nations. Singer, *Property*, *supra* note 1, at 248. That land was taken from the American Indian nations and given to white settlers. *Id.* According to Singer, “under both colonial and U.S. law, title was transferred from the [American Indian] tribes to the United States government before individual titles could vest. Thus, all titles to land in the United States have their source in a government grant or sale . . .” *Id.* at 241–42. See also Singer, *Sovereignty*, *supra* note 1, at 5; Harris, *supra* note 1, at 1719–21; Cohen, *supra* note 17, at 13–14.

<sup>19</sup> Paul Finkelman, *Slavery in the United States: Persons or Property?*, in THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 127, 132–33 (Jean Allain ed., 2012); Harris, *supra* note 1, at 1720. The North Carolina Supreme Court held in 1869 that the buying and selling of a slave at auction in North Carolina in 1864 was a valid and enforceable contract. *Harrell v. Watson*, 63 N.C. 454, 456–57 (1869). The Court reasoned:

In what point of view can this transaction be considered against public policy, or as so violating good morals as to authorize a court of justice to refuse to enforce the contract? As is said *Phillips v. Hooker*, Phil. Eq. 193 “the transaction was one in the ordinary course of business, done without any reference to the operations of the government of the United States, or of the Confederate States, without any criminal intent to aid the rebellion, and to hold the contract void, will simply have the effect to encourage dishonesty.”

*Id.* at 459–60.

<sup>20</sup> See AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 18 (1998).

<sup>21</sup> See *id.*; Judith K. Schafer, “*Details Are of a Most Revolting Character*”: *Cruelty to Slaves as Seen in Appeals to the Supreme Court of Louisiana*, 68 CHI.-KENT L. REV. 1283, 1284 (1993); see also *Spencer v. Pilcher*, 35 Va. 565, 579, 584 (1837) (contract between plaintiff and defendant by which defendant hired the plaintiff's slave for a year to work on the defendant's plantation; the slave accidentally drowned when he was put to work on a boat, instead of the plantation. The court held that the defendant was liable to the plaintiff for the slave's loss.); *Wilder v. Richardson*, 23 S.C.L. (Dud.) 323, 323–24 (Ct. App. Law 1838) (holding that when plaintiff's slave was hired by defendant for a year but ran away before the year was up, “[i]t is one of the risks, both in contracts of purchase and hiring, that the slave may run away, and hence the party buying or hiring must sustain the loss.”).

changed the legal status of slaves such that they were no longer legally considered property and were instead freed persons.<sup>22</sup>

So, property starts with the State. How the State *should* distribute property is a contested question,<sup>23</sup> but the reality is that the State has never distributed property equally.<sup>24</sup> In fact, the State limited the original distribution of property to white people.<sup>25</sup> It should therefore come as no surprise that some people own more property than others. Consider, for example, the following: On December 31, 1862, a white plantation owner in the South owned the land on which his plantation was situated, along with any buildings, equipment, farm animals located on the plantation, probably some money from the crops grown on his plantation, and slaves. A slave owned absolutely nothing. On January 1, 1863, the white plantation owner still owned everything that he owned the day before minus his slaves. The newly-freed slave, however, owned—in the sense of having autonomy over oneself and no longer being owned by another—only himself.

Property and contracts have a symbiotic relationship because a contract is the device we use to transfer property—real and personal, tangible and intangible—from one party to another. But in the context of contract law, property also means bargaining power, because property is the original basis of bargaining power.<sup>26</sup> At its most basic, property as bargaining power works

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<sup>22</sup> See, e.g., *Haden v. Phillips*, 21 La. Ann. 517, 518 (1869) (holding that the sale of a slave after the Emancipation Proclamation was issued “conveyed no title to nor property in such person, and the payment of the alleged price could not be enforced”) (citing *Posey v. Driggs*, 20 La. Ann. 199, 199 (1868)).

<sup>23</sup> Compare *Harris*, *supra* note 1, at 1715–19, 1721–24 (documenting some of the ways in which property was racially constructed in the United States to the benefit of white people), with Robert Ellickson, *Property in Land*, 102 YALE L.J. 1315 *passim* (1993) (lauding traditional conceptions of property).

<sup>24</sup> Cohen, *supra* note 17, at 12–14.

<sup>25</sup> A couple short but powerful examples will suffice to make the point. The State sanctioned slavery and legally made slaves property. See *supra* notes 17–20 and accompanying text. Black people were enslaved, whereas white people were “free” and could not be enslaved. Consequently, only white people could own slaves. *Harris*, *supra* note 1, at 1720–21. Further, after the United States took all the land from Native American tribes, it then distributed the land to only white settlers. See *id.* at 1716.

<sup>26</sup> Cohen, *supra* note 17, at 12–13; Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 627–28 (1943). Bargaining power still includes, but is not limited to property—real and personal, tangible and intangible. Instead, bargaining power is much broader and includes many other things, such as social, cultural, and embodied capital. See generally Danielle Kie Hart, *A Realist View*

like this: One of the main rights associated with property is the right to exclude or withhold that property from others.<sup>27</sup> The right to withhold thus provides the property owner leverage when negotiating to force a non-owner to agree to the owner's terms.<sup>28</sup> Consequently, the more property a person owns, the more potent their right to withhold, and, therefore ability to get his preferred terms, becomes.<sup>29</sup> Consider, again, the white plantation owner and the newly-freed slave the day after the Emancipation Proclamation was issued. The plantation owner owned the land, buildings, equipment, and farm animals on the plantation; the freedman owned only himself. Unless the freedman had another source of income, which he would not, he would need to sell his labor to earn money for, among other things, food and a place to live. Not so for the plantation owner whose property would enable him to sustain himself, at least for a while. Under these circumstances, the freedman would be forced to work for someone, such as the plantation owner, for whatever the plantation owner decided to pay him. Failure to agree to the plantation owner's terms would result in the plantation owner withholding what he owned from the freedman and, consequently, the freedman going without the means to support himself.

The fact that the parties to a contract come to the contract negotiating table with unequal amounts of property and, hence, unequal bargaining power, is something that contract law has recognized for a long time. Indeed, the United States Supreme Court in *Coppage v. Kansas* acknowledged as much when it wrote in 1915 that, "unless all things are held in common, some persons must have more property than others."<sup>30</sup> What someone owns will therefore determine not only that person's bargaining power in the market but also what that person will ultimately be able to acquire.<sup>31</sup>

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*of Bargaining Power*, in FROM STATUS TO CONTRACT: THE STORY OF CONTRACT LAW AND INEQUALITY (on file with author).

<sup>27</sup> Singer, *Property*, *supra* note 1, at 244; Elizabeth Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 34–35 (David Kairys 3d ed. 1998).

<sup>28</sup> Mensch, *supra* note 27, at 35.

<sup>29</sup> Cohen, *supra* note 17, at 11–13; Hale, *supra* note 16, at 471–73; Hale, *supra* note 26, at 627; see Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 486 (1988).

<sup>30</sup> *Coppage v. Kansas*, 236 U.S. 1, 17 (1915).

<sup>31</sup> Cohen, *supra* note 17, at 13; Hale, *supra* note 26, at 627–28.



Of course, contract law does not concern itself with every use of unequal bargaining power that occurs during a contract transaction. On the contrary, it concerns itself only when the use of unequal bargaining power amounts to one party taking some kind of undue advantage of the other party. A good example of this is when one party uses its unequal bargaining power to coerce,<sup>32</sup> the other party to enter into a contract on unfair terms.<sup>33</sup> But even here, the existence of unequal bargaining power would not present a problem for contract law if these questionable types of contracts are not generally enforceable. The reality, however, is that the vast majority of contracts are enforceable under existing contract law. As a result, *all* uses of unequal bargaining power, proper *and* improper, thereby become entrenched and protected by the contract law system with far-reaching consequences for contracting parties and the contract law system as a whole.<sup>34</sup>

To begin with, contract law ignores its own structural inequality, namely, the presence of unequal bargaining power. This is reflected in the fact that contract law applies the same rules to everyone no matter who the contracting parties are or what they bring to the bargaining table with them. In the abstract, applying the same rules to everyone may not seem problematic, but the reality is that some rules end up being more significant in the contracting process and, therefore to the contracting parties, than others. More specifically, everything in

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<sup>32</sup> See generally Hart, *Formation*, *supra* note 16, at 180–81. “Coerce” as used in the text refers to using unfair and deceptive tactics or causing or at least taking advantage of the other party’s financial distress in the context of contract formation. The specific contract doctrines triggered by these references are unconscionability and economic duress, respectively. For unconscionability, see RESTATEMENT (SECOND) OF CONTRACTS. § 208 (AM. L. INST. 1981); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487–88 (1967). For economic duress, see RESTATEMENT (SECOND) OF CONTRACTS. § 175 (AM. L. INST. 1981); *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 926–27 (7th Cir. 1983) (holding that the other party must cause the financial hardship); *accord N. Fabrication Co. v. UNOCAL*, 980 P.2d 958, 962 (Alaska 1999) (per curiam). *But see Rich & Whillock, Inc. v. Ashton Dev., Inc.*, 204 Cal. Rptr. 86, 89 (Ct. App. 1984) (finding that it is enough that one party takes advantage of the other side’s financial circumstances). See generally John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947) (discussing the boundaries of common law duress).

<sup>33</sup> A contract on “unfair terms” is one in which the terms unreasonably favor one of the parties. See *Williams*, 350 F.2d at 449. This definition is traditionally the one used to define substantive unconscionability. See, e.g., *id.*

<sup>34</sup> See Hart, *Formation*, *supra* note 16, at 216–17.

the field of contract law turns on whether a contract is formed, from how the contract should be interpreted, to whether it was performed or breached, and deciding the appropriate remedy for any breach. All of these things are contingent on the existence of a contract.<sup>35</sup>

Contract formation, therefore, is the core of the contract law system.<sup>36</sup> Significantly, and from a practical standpoint, formation is key because at the moment a contract is formed, contract law will presume that a valid contract exists, and the burden of rebutting this presumption of contract validity is placed on the party that wants to challenge the contract or one or more of its terms.<sup>37</sup> That said, applying the same rules to everyone is not necessarily a problem if it is relatively hard to form a contract to begin with or relatively easy to get out of a contract once it is formed—in other words, if it is relatively easy to rebut the presumption of contract validity. But the reverse is actually true—it is relatively easy to get into a contract and very difficult to get out of one.<sup>38</sup>

It is relatively easy to get into a contract online or in person because the entire contract law system is premised on the notion of consent. Parties have to consent, meaning they have to voluntarily agree, to enter into a contract. If consent does not exist, there can be no contract.<sup>39</sup> So the question really becomes: how easy is it to consent to a contract?

There are several different theories of consent espoused by contract scholars, including but not limited to Robert Hillman and Maureen O'Rourke's "reasonable notice" theory<sup>40</sup> and Karl

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<sup>35</sup> *Id.* at 199, 200–02.

<sup>36</sup> *Id.* at 216.

<sup>37</sup> *Id.* at 206, 211–16.

<sup>38</sup> See generally Danielle Kie Hart, *In and Out—Contract Doctrines in Action*, 66 HASTINGS L.J. 1661 (2015) [hereinafter, Hart, *Doctrines*].

<sup>39</sup> Randy E. Barnett, *Contract is Not Promise; Contract is Consent*, 45 SUFFOLK U. L. REV. 647, 654 (2012); MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 3, 18–20 (2013); Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1247 (1998); Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1286 (1990).

<sup>40</sup> The reasonable notice theory argues that it is not necessary to make sure that people read the terms of the contract before agreeing to the contract as long as people are given reasonable notice that the exists and an opportunity to read them. If those two prerequisites are met, then consent can and should be imputed. Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1756–57 (2014); Robert A. Hillman & Maureen O'Rourke, *Defending Disclosure in Software Licensing*, 78 U. CHI. L. REV. 95, 105–06 (2011).

Llewellyn's "blanket assent" theory.<sup>41</sup> But the most widely-accepted theory of consent focuses on the parties' intent to be bound.<sup>42</sup> This test simply looks to a party's words and conduct to see if those words and conduct manifested an intent to be bound to a contract and, if so, asks if that party intended to say those words or engage in those actions. If she did, for example, by clicking "I agree" on a website, then that party's consent to the agreement will be legally established, even if she did not actually intend to enter into a contract or understand the legal consequences of her actions.<sup>43</sup> Regardless of which theory of consent is used, the one thing they have in common is that they all end up concluding that valid consent exists. In other words, each theory finds a way to explain and justify why consent is present in just about every conceivable contracting situation.<sup>44</sup> What this means is that it is quite easy to consent, or be deemed to have consented, to a contract. Stated another way, it is fairly easy to get into, or to form, a contract.<sup>45</sup>

Coupled with the fact that it is relatively easy to enter into a contract is the reality that it is very difficult to rebut the presumption of contract validity in practice. It is widely understood in the field of contract law that courts rarely let parties out of their contracts.<sup>46</sup> This is true regardless of the legal excuse being advanced, including situations in which one of the contracting parties is accused of improperly using its unequal

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<sup>41</sup> KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960). Llewellyn argued that parties assenting to terms in a standard form contract should be deemed to specifically assent to any terms that were actually negotiated and as giving their "blanket assent" to any other terms in the form that were "not unreasonable or indecent." Hart, *Formation*, *supra* note 16, at 209; Wilkinson-Ryan, *supra* note 40, at 1756–57.

<sup>42</sup> See Wilkinson-Ryan, *supra* note 40, at 1757; E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* §§ 3.01, 3.06–3.07 (4th ed. 2019); JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* § 30–31 (5th ed. 2011); JOSEPH M. PERILLO, *CALAMARI & PERILLO ON CONTRACTS* § 2.4 (6th ed. 2009). See also Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 *FORDHAM L. REV.* 427, 446–63 (2000).

<sup>43</sup> Hart, *Formation*, *supra* note 16, at 209; FARNSWORTH, *supra* note 42, at § 3.06; MURRAY, *supra* note 42, at § 31; PERILLO, *supra* note 42, at § 2.4.

<sup>44</sup> Hart, *Formation*, *supra* note 16, at 206–10; Wilkinson-Ryan, *supra* note 40, at 1756–58.

<sup>45</sup> See RADIN, *supra* note 39, at 10–13.

<sup>46</sup> See, e.g., Robert A. Hillman, *Contract Excuse and Bankruptcy Discharge*, 43 *STAN. L. REV.* 99, 99 (1990) ("Notwithstanding academic writing that reports or urges expansion of the grounds of excuse, courts actually remain extremely reluctant to release parties from their obligations.") (footnote omitted).

bargaining power to take undue advantage of the other party.<sup>47</sup> The conventional wisdom that it is extremely difficult to get out of a contract has been substantiated by empirical scholarship specifically examining doctrines like duress,<sup>48</sup> unconscionability,<sup>49</sup> contract modifications,<sup>50</sup> impossibility, impracticability of performance, and frustration of purpose.<sup>51</sup>

Five important implications thus flow from the fact that the presumption of contract validity is difficult to rebut in practice. First, because legal excuses like those mentioned above do not get people out of their contracts very often, this must mean that even though unequal bargaining power exists, it is not a problem in a majority of contracts. This must be the case because, surely, if unequal bargaining power was being misused, courts would have discovered it and done something about it, such as let the party adversely affected by the improper use of bargaining power out of the contract. But based on the empirical research, courts do not actually let contracting parties out of their contracts very often, regardless of the legal excuse being raised.<sup>52</sup> Second, if unequal bargaining power is not being misused in most contracts, then it must be safe to conclude that most contracts are in fact the product of consent, notwithstanding the presence of any unequal bargaining power. Third, and practically speaking, since most

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<sup>47</sup> See *id.*; E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203, 225 (1990) (discussing unconscionability); Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 110 (1998) (noting that there is a dearth of cases excusing performance for duress, unconscionability and undue influence); Michael G. Rapsomanikas, *Frustration of Contract in International Trade Law and Comparative Law*, 18 DUQ. L. REV. 551, 558–59 (1980) (discussing that impracticability of performance and frustration of purpose does not generally excuse performance).

<sup>48</sup> See Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 463–65 (2005); Hart, *Doctrines*, *supra* note 38, at 1672–73.

<sup>49</sup> See generally Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 65 VILL. L. REV. 773, 789–92, 794 (2020) (Professor McCall conducted his own empirical study of unconscionability and summarized other existing empirical studies covering the same doctrine).

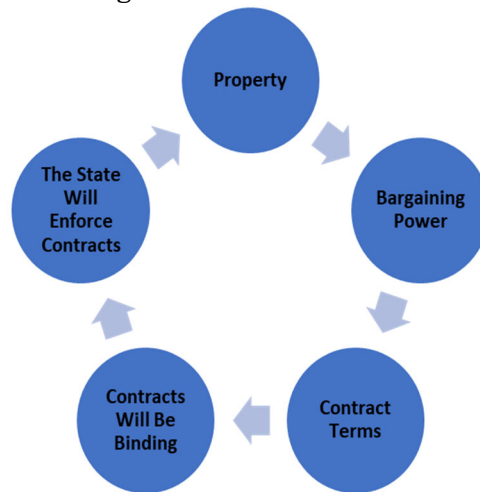
<sup>50</sup> See Hart, *Doctrines*, *supra* note 38, at 1672–73.

<sup>51</sup> See generally Danielle Kie Hart, *If Past is Prologue, Then the Future is Bleak: Contracts, COVID-19 and the Changed Circumstances Doctrines* (Sw. L. Sch. Res. Paper No. 21-01), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3785621](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3785621) (Feb. 14, 2021) (empirical study examining impossibility, impracticability of performance and frustration of purpose); see also Arthur Anderson, *Frustration of Contract—A Rejected Doctrine*, 3 DEPAUL L. REV. 1, 21–22 (1953) (analyzing frustration of purpose cases).

<sup>52</sup> See, e.g., Hillman, *supra* note 46, at 99; Giesel, *supra* note 48, at 463–66; McCall, *supra* note 49; Hart, *supra* note 51; Anderson, *supra* note 51.

contracts are the product of consent, most people should not be able to get out of them. In the parlance of contract law, this means that most contracts should be and will be binding.<sup>53</sup> Fourth, because most contracts will be binding, how a contract is formed and the terms that are included in it are critical. This is because, fifth and finally, the State will enforce these contracts.<sup>54</sup>

The practical effect of all of this is that the party that starts out with more will end up with more. Recall that what a party owns—its property rights—determines that party's bargaining power in the market.<sup>55</sup> Unsurprisingly, the party with more bargaining power will get to dictate the terms of the contract, which means that the party with more bargaining power will be able to reap more gains from each contract that it enters into than it otherwise would with less bargaining power at its disposal. Making contracts binding *and* enforceable thus ensures that the party with more bargaining power gets to keep the gains from each of its contracts. Over time, the party with more bargaining power will end up owning more—more land, money, labor, and other resources, both tangible and intangible. The more one party owns the more bargaining power that party has *ad infinitum*.<sup>56</sup> In short, the Haves come out ahead. Schematically, this re-instantiation of the pre-existing and intersecting hierarchies of race and class (rich whites) (the Haves) over poor people of color (the Have Nots) in the field of contract law might look like this:



<sup>53</sup> See Hart, *Formation*, *supra* note 16, at 216.

<sup>54</sup> *Id.* at 216.

<sup>55</sup> See *supra* notes 24–29 and accompanying text.

<sup>56</sup> See Hart, *Formation*, *supra* note 16, at 190 n.82; Betty Mensch, Book Review, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753, 764 (1981).

To make this entire discussion more concrete, consider the following contract case. *McCook v. Cousins* was decided just eight years after President Lincoln issued the Emancipation Proclamation in 1861 and four years after the Civil War ended in 1865.<sup>57</sup> McCook, a landowner, sold all of the cotton that was harvested on his land for \$841.21.<sup>58</sup> Edmund, whose last name was never provided in the opinion, was a recently emancipated slave who contracted with McCook to work McCook's land in exchange for half of the proceeds of the cotton produced.<sup>59</sup> Edmund, however, was only entitled to \$210, having agreed to split his half with another party.<sup>60</sup> But McCook proved that Edmund owed him \$571 for the provisions provided to him and his family.<sup>61</sup> After fully performing the contract, therefore, Edmund owed his contracting partner McCook, the landowner, \$361.<sup>62</sup> The landowner, on the other hand, remained the owner of his land, ended up with his *and* Edmund's share of the crops, *and* now owned the amount of Edmund's remaining debt.<sup>63</sup>

## II. IDEOLOGY

Right/wrong. Fair/unfair. Efficient/inefficient. Everyone is certainly entitled to their own opinion about the outcome in the *McCook v. Cousins* case. Nonetheless, contracts and contract law in action help create and perpetuate inequality in American society.<sup>64</sup> Even so, their roles will for the most part go unnoticed because, depending on who the adversely affected contracting party is, a contract is usually understood as a private transaction voluntarily entered into by private parties.<sup>65</sup> As such, any inequality that might be produced as a result of these private transactions is simply a by-product of the parties' exercise of their private rights. To convince everyone to internalize the message

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<sup>57</sup> 39 Ga. 125 (1869).

<sup>58</sup> *Id.* at 126–27.

<sup>59</sup> *Id.* at 125–26.

<sup>60</sup> *Id.* at 126–27.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 129.

<sup>64</sup> See, e.g., Deborah Zalesne, *Racial Inequality in Contracting: Teaching Race as a Core Value*, 3 COLUM. J. OF RACE & L. 23, 37 (2013) (demonstrating how contract law may perpetuate racial inequality).

<sup>65</sup> Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CASE W. RES. L. REV. 57, 59 (2012).

that contracts and their consequences are private matters requires transforming the ideological content of the message into taken-for-granted assumptions about the way the world works;<sup>66</sup> and this transformative process is facilitated through discourse.

First, a brief word about ideology. Ideology can be defined as a coherent “system of beliefs, values, fears, prejudices, reflexes, and commitments.”<sup>67</sup> Ideology is often associated with Marxism and invokes the idea that the way we know and understand the world is determined by political interests, which is often conflated with a ruling class.<sup>68</sup> But ideology is no longer limited to this top-down approach. Instead, ideology is something that we acquire through discourse and everyday institutional norms and practices.<sup>69</sup> This is because ideology cannot be imposed by material strength, like violence and the use of force, alone. Instead, ideology must be represented to everyone in ways that make the ideas seem natural and inevitable, that is, to make them “fit the everyday experience[s]” of everyday people.<sup>70</sup> Ideology, in other words, is a subtle form of power because its success depends on the widespread consent of the people to whom it is directed.<sup>71</sup>

The reproduction of ideology through discourse is a complex and contested process well beyond the scope of this Article.<sup>72</sup> But

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<sup>66</sup> Antonio Gramsci, Italian theorist and cofounder of the Italian communist party, called these taken-for-granted assumptions “common sense.” KATE CREHAN, *GRAMSCI'S COMMON SENSE: INEQUALITY AND ITS NARRATIVES* x (2016). According to anthropologist Kate Crehan, “common sense” to Gramsci was “all those heterogeneous beliefs people arrive at not through critical reflection, but encounter as already existing, self-evident truths.” *Id.* Gramsci’s “common sense” is similar to what French anthropologist Pierre Bourdieu called “doxa,” which are unstated but fundamental beliefs that everyone accepts as a given. See PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 159–71 (Richard Nice trans. 1977).

<sup>67</sup> ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 4 (1995); see ANDREW EDGAR & PETER SEDGWICK, *CULTURAL THEORY: THE KEY CONCEPTS* 171 (2d ed. 2008) (“Its most common use may be simply to refer to a more or less coherent set of beliefs (such as a political ideology, meaning the beliefs, values and basic principles of a political party or faction).”).

<sup>68</sup> EDGAR & SEDGWICK, *supra* note 67, at 172.

<sup>69</sup> *Id.* at 173 (discussing Antonio Gramsci’s theory of hegemony which posits that control by the dominant group in society must be premised on consent.); see also Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025, 1056–57 nn.167–68 (2003) (citations omitted).

<sup>70</sup> EDGAR & SEDGWICK, *supra* note 67, at 155.

<sup>71</sup> *Id.* at 173, 223, 232; Houh, *supra* note 69, at 1056–57 n.168; STEVE JONES, ANTONIO GRAMSCI 3–4 (2006).

<sup>72</sup> Compare BOURDIEU, *supra* note 66, and CREHAN, *supra* note 66 (discussing Gramsci), with MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE AND THE*

in keeping with the premise of a primer, the basic ideas can be summarized as follows: For the social world to work, where “work” simply means to exist in some predictable fashion, there has to be some basic understanding and acceptance between members about how that world is set up and the rules that govern all of the interactions that take place therein.<sup>73</sup> These rules can be explicit—for example, a red light means that cars must stop at the intersection—or they can be implicit—for example, cutting in line is usually considered improper behavior. One of the ways that the members of a social world are taught and thereby learn the rules of the game is through discourse.<sup>74</sup> Discourse is “the production of knowledge through language”<sup>75</sup> that occurs in social contexts and social institutions,<sup>76</sup> like the family, education, law, politics, and religion.<sup>77</sup> Discourse is an active process, the purpose of which is to fashion specific and ultimately shared understandings of the world that not only legitimize the meanings proffered but also the responses to those meanings.<sup>78</sup> To the extent that the rules that everyone ends up internalizing reproduce hierarchy by ensuring that the Haves of the world come out ahead and stay that way, the rules are ideological.<sup>79</sup> In short, *how* something ends up

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DISCOURSE ON LANGUAGE 4–6 (A.M. Sheridan Smith transl. 1972). For a brief explanation of Bourdieu’s theory of reproduction in the social world, see Danielle Kie Hart, *Cross-Purposes & Unintended Consequences: Karl Llewellyn, Article 2, and the Limits of Social Transformation*, 12 NEV. L.J. 54, 72–78 (2011) [hereinafter, Hart, *Llewellyn*]. Ideology itself is a highly contested term. See, e.g., John Gerring, Field Essay, *Ideology: A Definitional Analysis*, 50 POL. RSCH. Q. 957, 957–59 (1997) (“Few concepts in the social science lexicon have occasioned so much discussion, so much disagreement, and so much self[-]conscious discussion of the disagreement, as ‘ideology.’”).

<sup>73</sup> See, e.g., BOURDIEU, *supra* note 66; CREHAN, *supra* note 66 (discussing Gramsci). For a brief explanation of Bourdieu’s theory of reproduction in the social world, see Hart, *Llewellyn*, *supra* note 72, at 72–78.

<sup>74</sup> See Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 605 (2020).

<sup>75</sup> REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES 44 (Stuart Hall ed., 2009) [hereinafter REPRESENTATION].

<sup>76</sup> Social institutions are defined by contemporary sociologists as “complex social forms that reproduce themselves such as governments, the family . . . hospitals, business corporations, and legal systems.” Seumas Miller, *Social Institutions*, STAN. ENCYCLOPEDIA OF PHIL. (Apr. 9, 2019), <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=social-institutions> [<https://perma.cc/3JCX-7M2G>].

<sup>77</sup> See, e.g., EDGAR & SEDGWICK, *supra* note 67, at 80; REPRESENTATION, *supra* note 75, at 47.

<sup>78</sup> See generally FOUCAULT, *supra* note 72. For abbreviated but very helpful discussions of discourse, see REPRESENTATION, *supra* note 75, at 41–43; EDGAR & SEDGWICK, *supra* note 67, at 172.

<sup>79</sup> For example, Andrew Edgar and Peter Sedgwick write that:



getting discussed is key, because these discussions, this discourse, help define our shared reality.

Emancipation was not only a critical moment in the history of this country, it was also a moment that cemented the role that contracts and contract law would play in shaping society.<sup>80</sup> What did a country owe to the people it had enslaved for centuries?<sup>81</sup> So much was theoretically possible and morally required to try at a minimum to repair some of the damage and suffering inflicted upon the emancipated slaves during and because of their subjugation. According to Priya Kandaswamy, “freed people held broad and diverse visions of freedom that included reparations, land ownership, freedom of mobility, and other self-defined mechanisms of individual and collective self-determination.”<sup>82</sup>

Unfortunately, nothing of long-lasting consequence was done to alleviate the material devastation wrought by slavery.<sup>83</sup>

Marx's approach to ideology may be introduced through the famous observation that, for any society, the ideas of the ruling class are the ruling ideas. This is to suggest that our understanding and knowledge of the world (and especially, if not exclusively, of the social world) is determined by political interests. There are certain beliefs, and certain ways of seeing the world, that will be in the interests of the dominant class (but not in the interests of subordinate classes).

EDGAR & SEDGWICK, *supra* note 67, at 172. For Antonio Gramsci, the Haves were the dominant social group, *see* JONES, *supra* note 71, at 3–4. For Bourdieu, the Haves would be the dominant group with the most capital, *see* Hart, *Llewellyn*, *supra* note 72, at 74–75.

<sup>80</sup> *See* SAIDIYA HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 171 (1997) (“[I]t is equally important to consider the dominance of particular interpretations and assessments of the law—that is, the partial fixation of meaning at decisive ‘nodal points.’”).

<sup>81</sup> *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 115 (1988). Though contested, many people trace the starting point of slavery in America to the year 1619 when twenty enslaved Africans were brought to Jamestown, Virginia, which was then a British colony. *See Slavery in America*, HISTORY, <https://www.history.com/topics/black-history/slavery> [<https://perma.cc/2K7G-AXAH>] (last updated Aug. 23, 2021); *but see*, E.R. Shipp, *1619: 400 Years Ago, A Ship Arrived in Virginia, Bearing Human Cargo*, USA TODAY (Feb. 8, 2019, 6:11 PM), <https://www.usatoday.com/story/news/investigations/2019/02/08/1619-african-arrival-virginia/2740468002/> [<https://perma.cc/FJU4-E5TX>]. President Abraham Lincoln issued the Emancipation Proclamation on January 1, 1863. *Slavery in America*, *supra*.

<sup>82</sup> Priya Kandaswamy, *The Obligations of Freedom and the Limits of Legal Equality*, 41 SW. L. REV. 265, 266 (2012) (citations omitted).

<sup>83</sup> The Reconstruction Congress passed the Freedmen's Bureau Act on March 3, 1865. Freedman's Bureau Act, ch. 90, 13 Stat. 507–09 (1865). The Act created the Freedmen's Bureau, which was charged with establishing schools for the recently emancipated slaves, supervising contracts between freedmen and employers, and managing land that had been confiscated or abandoned. *Id.* But the Freedmen's Bureau was only authorized to operate “during the [American Civil War]of rebellion,

Instead, the country settled on formal equality as the full measure of its obligation to the newly freed slaves.<sup>84</sup> Parts of the Reconstruction Amendments thus provide:<sup>85</sup>

- *Thirteenth Amendment*: Neither slavery nor involuntary servitude, except as a punishment for crime . . . shall exist within the United States, or any place subject to their jurisdiction.<sup>86</sup>
- *Fourteenth Amendment*: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

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and for one year thereafter.” *Freedman’s Bureau Acts of 1865 and 1866*, <https://www.senate.gov/artandhistory/history/common/generic/FreedmensBureau.htm#:~:text=On%20March%203%2C%201865%2C%20Congress,includin%20newly%20freed%20African%20Americans>. The work of the Freedmen’s Bureau was eventually extended but only for an additional two years beyond the original timeframe. *Id.*

<sup>84</sup> HARTMAN, *supra* note 80, at 176. Notwithstanding the abstract nature of the rights conferred on the emancipated slaves, it goes without saying that the Reconstruction Amendments and early Civil Rights Acts were profoundly important and necessary to, among other things, legally abolish slavery and explicitly recognize the political and civil rights to which the freed people were now legally entitled. Formal equality and the emphasis on legal rights during and ever since Reconstruction embodies both critique and aspiration. The critique is that legal rights simply mask and therefore legitimize the way the world is by stamping the imprimatur of law on it. *See* KIMBERLE CRENSHAW ET AL., *CRITICAL RACE THEORY, THE KEY WRITINGS* xxiii (1995). But rights also have the potential to transform and empower people and social movements. *Id.*; *see also* HARTMAN, *supra* note 80, at 122–23.

<sup>85</sup> This commitment to formal equality was mirrored in the 1866 and 1875 Civil Rights Acts. They provide in relevant part:

*1866 Civil Rights Act*: Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States . . . .

1866 Civil Rights Act, ch. 31, 14 Stat. 27 (1866).

*1875 Civil Rights Act*: An Act to Protect All Citizens in Their Civil and Legal Rights. Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law . . . .

Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).

<sup>86</sup> U.S. CONST. amend. XIII, § 1.

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>87</sup>

- *Fifteenth Amendment*: The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.<sup>88</sup>

To be sure, different interpretations of “equality” animated the debates during Emancipation and Reconstruction that followed. The abolitionists advocated for an expansive view of equality, one that would redress the effects of racial oppression.<sup>89</sup> In contrast, pro-slavery opponents argued for a much more restrictive interpretation of equality, one that focused on equality as a process not equality in results.<sup>90</sup> That said, Emancipation and

<sup>87</sup> U.S. CONST. amend. XIV, § 1.

<sup>88</sup> U.S. CONST. amend. XV, § 1.

<sup>89</sup> Senator James Harlan [R. Iowa] stated in the Senate Debates on the Thirteenth Amendment that:

If I am right in my conclusions that slavery as it exists in this country cannot be justified by human reason, has no foundation at common law, and is not supported by the positive municipal laws of the States, nor by the divine law, and that none of its incidents [specifically discussing as “incidents” the right to marry, parental rights, the right to bring a suit in court] are desirable, and that its abolition would injure no one, and will do no wrong, but will secure unity of purpose . . . as it seems to me, the Senate of the United States ought not to hesitate to take the action necessary to enable the people of the States to terminate its existence forever . . .

STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS PART I at 72-75 (Bernard Schwartz ed., 1970) (Senate Debate—Thirteenth Amendment; remarks of Senator James Harlan [R. Iowa]); *id.* at 131 (House Debate—Civil Rights Act of 1866; remarks of Representative Martin Thayer [R., PA]) (“I thought when I voted for the amendment to abolish slavery that I was aiding to give real freedom to the men who had so long been groaning in bondage. I did not suppose that I was offering them a mere paper guarantee.”) But historian Eric Foner argues that moral opposition to slavery was only one aspect of the Republican Party’s ideology before and after Emancipation and that the “primary aim of the [Republicans] was not to redistribute the property of the rich, but to open the avenues of social advancement to all laborers.” FONER, *supra* note 67, at 5, 19. In fact, Republicans did not differ much from their Democratic counterparts in terms of their positions on property rights and economic individualism. *Id.* at 19. Republicans in the North and West also shared something else in common with Democrats in the South, namely, racism. Racial prejudice was also rampant and “all but universal in antebellum northern society.” *Id.* at 261.

<sup>90</sup> For example, during the House Debate on the 1875 Civil Rights Act, Representative Charles Eldredge stated:

The law has done all it can accomplish for them. So far as the law is concerned, the black man is in all respects the equal of the white. He stands and may make the race of life upon terms of perfect equality with the most

the Reconstruction that followed it were firmly situated in and framed by the tenets of classical liberalism, which essentially equated liberty with property rights and relied on the market to preserve and protect freedom.<sup>91</sup> Under classical liberalism, therefore, the quintessential liberal subject was an owner; and the most basic proprietary right of each truly free person was the right to own oneself and one's labor.<sup>92</sup> The State's main duties were to establish laws to protect private property that would apply to everyone equally and to enforce the law.<sup>93</sup> As a result, the rhetoric used during the debates over the Reconstruction Amendments and early Civil Rights Acts, that is, *how* equality was discussed, reflects the classical liberal understanding of the world. While it was not clear from the debates which approach to equality would prevail in the long run, the Supreme Court quickly determined that equality would be limited to formal equality going forward.<sup>94</sup>

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avored citizen. There is no right, privilege, or immunity secured to any citizen of the Republic that is not confirmed to the colored. There is no court, no tribunal, no judicial jurisdiction, no remedy, no means of any sort in the land, provided by law for the redress of wrongs or the protection of the rights of life, liberty, or property of the white man that is not equally open and available to the black man. The broad panoply of the Constitution and the whole body of laws, civil and criminal, and every means provided for their enforcement, cover and extend to every American citizen without regard to color or previous condition . . . There is no distinction, no exception, no immunity in favor of the white race.

SCHWARTZ, *supra* note 89, at 737 (House Debate—Civil Rights Act of 1875; remarks of Representative Charles Eldredge [Dem., Wis.] (emphasis omitted); *cf.* Houh, *supra* note 69, at 1061 (discussing the expansive and restrictive views of equality).

<sup>91</sup> See Gerald Gaus, Shane D. Courtland & David Schmitz, *Liberalism*, STAN. ENCYCLOPEDIA PHIL. (Jan. 22, 2018), <https://plato.stanford.edu/entries/liberalism/> [<https://perma.cc/AY5V-RT95>]; Justin Desautels-Stein, *The Market as a Legal Concept*, 60 BUFF. L. REV. 387, 417–18 (2012).

<sup>92</sup> DRU STANLEY, *supra* note 20, at 8; Desautels-Stein, *supra* note 91, at 413–14.

<sup>93</sup> Desautels-Stein, *supra* note 91, at 417–20.

<sup>94</sup> See *The Slaughter House Cases*, 83 U.S. 36, 72–76 (1873) (interpreting the privileges and immunities clause of the Fourteenth Amendment to mean that the states were only prohibited from abridging those privileges or immunities granted to citizens of the United States by the federal government itself; thus, rights that exist or existed separate and apart from the federal government, like life and property, were still left to state control); *The Civil Rights Cases*, 109 U.S. 3, 4, 10–12, 25 (1881) (interpreting the Civil Rights Act of 1875, which prohibited racial discrimination in places of public accommodation. The Act was based on Section 5 of the Fourteenth Amendment, which granted Congress authority to enact legislation to effectuate the provisions of the Amendment. The Court held that the enforcement section of the Fourteenth Amendment, like its substantive provisions, was limited to state action only. Consequently, Congress could not, through the 1875 Act, reach purely private discriminatory conduct.).

Consequently, the congressional debates surrounding the passage of the Reconstruction Amendments, the early Civil Rights Acts, and the Freedmen's Bureau Acts provide the most revealing indication of how the people who were responsible for Reconstruction after the American Civil War understood what was being granted to the emancipated slaves.<sup>95</sup> The commitment to formal equality as the sum total of what was required of the federal government in response to the gross injustice of slavery was grounded in the conception people had about the role that government was supposed to play in society. According to Representative Fernando Wood, a Democratic Representative from New York who opposed Reconstruction, the proper role of government was to simply protect the individual in his pursuit and enjoyment of "life and liberty, and in the exercise of his faculties for labor, physical and mental, [and] in the acquisition and preservation of property."<sup>96</sup> Hence, all that the government needed to do was to secure equal rights under the law for all citizens, which is exactly what was done.<sup>97</sup>

The debates thus make clear that *all of the rights* being enacted during Reconstruction *applied equally to everyone*. The remarks of Senator Jacob Howard, the Republican Senator from Michigan who presented the Fourteenth Amendment to the Senate, are illustrative. He said:

[I]f [the Fourteenth Amendment is] adopted by the States, [it will] forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction. *It establishes equality before the law*, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection

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<sup>95</sup> FONER, *supra* note 67, at 7 ("In all the slavery debates . . . I have spoken to the people rather than [to] the Senate." Foner concludes, however, that to remain effective leaders, the views of politicians "could not diverge too sharply from those of the general public.") (quoting Senator William Seward); *id.* at 8 ("It is, no doubt, safe to assume that the Republican ideology received its most coherent expression from the political leaders [in their] speeches, letters, and writings . . .").

<sup>96</sup> SCHWARTZ, *supra* note 89, at 44–45 (House Debate—Thirteenth Amendment, remarks of Fernando Wood [Dem. N.Y.]).

<sup>97</sup> The Civil Rights Act of 1866, for example, provided that every citizen of the United States "shall have the same right, . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property . . ." 1866 Civil Rights Act, ch. 31, 14 Stat. 27.

before the law as it gives to the most powerful, the most wealthy, or the most haughty.<sup>98</sup>

That said, the commitment to formal equality adopted by the Reconstruction Congress only made sense because the people in the Reconstruction Congress held key misconceptions about the world in general and the people in it. More specifically, elected officials erroneously assumed that, once they obtained freedom and were granted the same rights as all other citizens of the country, the newly-freed slaves should take care of themselves. In his veto message to Congress of the Freedmen's Bureau Act, for example, President Andrew Johnson, who was a fierce opponent of Reconstruction, said that, "[t]he idea on which the slaves were assisted to freedom was, that on becoming free they would be a self-sustaining population."<sup>99</sup> According to President Johnson:

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<sup>98</sup> SCHWARTZ, *supra* note 89, at 262 (emphasis added). *See also id.* at 693–94 (remarks of Senator Henry Pease, a Republican from Mississippi, during the debate of the 1875 Civil Rights Act, stating, "I believe that the fourteenth amendment to the Constitution clearly indicates that it was the policy of this Government to protect by all needful legislation every citizen, high or low, rich or poor, white or black, native or foreign, who should comply with the terms of citizenship; that all classes should have the equal protection of American law and be protected in their inalienable rights, those rights which grow out of the very nature of society, and the organic law of this country. . . . The American people are disposed to establish justice and the equality of the citizen before the law."); *id.* at 715 (remarks of Senator Aaron Sargent, a Republican from California, during the debate of the 1875 Civil Rights Act, stating, "[t]he [F]ourteenth [A]mendment was not intended merely to say that black men should have rights, but that black and white men and women should have rights. It was a guarantee of equality of right to every person within the jurisdiction of the United States, be he black or white."); *id.* at 737 (Remarks of Representative Charles Eldredge, a Democrat from Wisconsin, in the House debate on the 1875 Civil Rights Act, stating, "[t]he broad panoply of the Constitution and the whole body of laws, civil and criminal, and every means provided for their enforcement, cover and extend to every American citizen without regard to color or previous condition."); *id.* at 743 (remarks of Representative Benjamin Butler, a Republican from Massachusetts and former Union Army General, in the House debate on the 1875 Civil Rights Act, stating, "this bill is the very essence of constitutional liberty. What does it do? It simply provides that there shall be equality of law all over the Union.").

<sup>99</sup> Andrew Johnson, *Veto Message of February 19, 1866*, U. CAL. SANTA BARBARA: THE AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/veto-message-437> [<https://perma.cc/PX5J-3WES>] (last visited Feb. 20, 2021). An important corollary to the argument that the recently emancipated slaves were capable of taking care of themselves was the argument that cast the Civil Rights Acts, for example, as "special rights" for the freed people. More specifically, the argument essentially challenged the former slaves to prove that they were worthy of their freedom. After all, truly free people, truly capable and responsible people would not need "special rights" to protect them. Referring to the Freedmen's Bureau Act, President Andrew Johnson thus said, "Any legislation that shall imply that [the freed people] are not expected to attain a self-sustaining condition must have a tendency injurious alike to their character and their prospects." *Id.*; accord SCHWARTZ, *supra* note 89, at 737–38

[S]ufficient consideration [has not been] given to the ability of the freedmen to protect and take care of themselves. It is no more than justice to them to believe that as they have received their freedom with moderation and forbearance, so they will distinguish themselves by their industry and thrift, and soon show the world that in a condition of freedom they are self-sustaining, capable of selecting their own employment and their own places of abode, of insisting for themselves on a proper remuneration, and of establishing and maintaining their own asylums and schools. It is earnestly hoped that instead of wasting away they will by their own efforts establish for themselves a condition of respectability and prosperity. It is certain that they can attain to that condition only through their own merits and exertions.<sup>100</sup>

These same elected officials could only assume that the freed slaves should take care of themselves without any material

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(remarks of Representative Charles Eldredge, a Democrat from Wisconsin, in the house debate for the 1875 Civil Rights Act that, “[t]o make the colored citizen feel that he is the pet, the especial favorite of the law, will only feed and pander to that conceit and self-consequence which is now his weakest and perhaps most offensive characteristic. If he be made to feel that extraordinary provisions of law are enacted in his favor because of his weakness or feebleness as a man, the very fact weakens and enfeebles him. The consciousness that there is necessity for such legislation and protection must necessarily humiliate and degrade him. Such laws, too, are a constant reminder to him that he is inferior to the white race.”); *see also id.* at 154 (President Andrew Johnson’s Veto Message to Congress of the Civil Rights Act of 1866; Johnson said, “[i]n all our history, in all our experience as a people living under Federal and State law, no such system as that contemplated by the details of this bill has ever before been proposed or adopted. They establish for the security of the colored race safeguards which go infinitely beyond any that the General Government has ever provided for the white race.”); HARTMAN, *supra* note 80, at 133, 175–78; DRU STANLEY, *supra* note 20, at 36.

<sup>100</sup> Andrew Johnson, *Veto Message of February 19, 1866*, U. CAL. SANTA BARBARA: THE AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/veto-message-437> [<https://perma.cc/2SVF-RC6Q>] (last visited Feb. 20, 2021); In President Andrew Johnson’s Veto of the 1866 Civil Rights Act, he stated:

To me the details of the bill seem fraught with evil. The white race and the black race of the South have hitherto lived together under the relation of master and slave capital owning labor. Now, suddenly, that relation is changed, and as to ownership capital and labor are divorced. *They stand now each master of itself*. . . . Each has equal power in settling the terms, and if left to the laws that regulate capital and labor it is confidently believed that they will satisfactorily work out the problem. Capital, it is true, has more intelligence, but labor is never so ignorant as not to understand its own interests, not to know its own value, and not to see that capital must pay that value.

Andrew Johnson, *Veto Message on Civil Rights Legislation*, MILLER CENTER, <https://millercenter.org/the-presidency/presidential-speeches/march-27-1866-veto-message-civil-rights-legislation> [<https://perma.cc/SL88-8WAJ>] (emphasis added) (last visited Feb. 20, 2021).

assistance from the State, because they also speciously assumed that formal equality established enough equality to enable the freed slaves to successfully negotiate their post-Emancipation lives and that market forces would ensure fair outcomes.<sup>101</sup> Again, President Johnson's veto of the Freedmen's Bureau Act illustrates this point perfectly when he said:

[The freedman's] condition is not so exposed as may at first be imagined. He is in a portion of the country where his labor cannot well be spared. Competition for his services from planters, from those who are constructing or repairing railroads, or from capitalists in his vicinage, or from other States, will enable him to command almost his own terms. He also possesses a perfect right to change his place of abode, and if, therefore, he does not find in one community or State a mode of life suited to his desires, or proper remuneration for his labor, he can move to another where labor is more esteemed and better rewarded . . . . The laws that regulate supply and demand will maintain their force, and the wages of the laborer will be regulated thereby. There is no danger that the great demand for labor will not operate in favor of the laborer.<sup>102</sup>

That there was not actual equality between the former masters and former slaves was certainly acknowledged. But that disparity was of no moment. This is because former masters and former slaves not only had a vested interest in sorting things out to their mutual benefit, they were also equally equipped to set the terms of their engagements going forward. Here again, market forces, not the State, would guarantee that these engagements would be satisfactory to both parties. In his veto message to Congress of the 1866 Civil Rights Act, President Andrew Johnson explained the situation as follows:

The white race and the black race of the South have hitherto lived together under the relation of master and slave—capital owning labor. Now that relation is changed; and as to ownership, capital and labor are divorced. They stand now, each master of itself. In this new relation, one being necessary to the other, there will be a new adjustment, which both are deeply interested in making harmonious. Each has equal power in settling the terms; and, if left to the laws that regulate capital and labor, it is confidently

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<sup>101</sup> See FONER, *supra* note 67, at 40 (discussing the Republican party's free labor ideology as one of the forces that drove the Civil War and Emancipation).

<sup>102</sup> President Andrew Johnson, Veto of the Freedmen's Bureau Bill (Feb. 19, 1866), reprinted in LILLIAN FOSTER, ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, HIS LIFE AND SPEECHES 235–36 (1866).



believed that they will satisfactorily work out the problem. Capital, it is true, has more intelligence; but labor is never so ignorant as not to understand its own interests, not to know its own value, and not to see that capital must pay that value.<sup>103</sup>

This, then, was the understanding of the world and how it was supposed to work that was reproduced during Emancipation and Reconstruction: "Freedom" as "formal equality" under Emancipation and through Reconstruction "entailed a movement from subjugation to self-possession"<sup>104</sup> for the newly freed slaves with all of the same rights to acquire property and the right to contract enjoyed by white people but without any resources to sustain themselves in the process.<sup>105</sup> This meant that the ravages created by slavery were simply obstacles that the emancipated slaves had to overcome through their own efforts, self-discipline, and the prudent exercise of the rights they were just granted. Henceforth, freedom and the quality of life produced thereby was to be determined solely by the efforts of the freed persons themselves.<sup>106</sup>

By shifting the responsibility for freedom onto the backs of the recently emancipated slaves, the State absolved itself of any responsibility for the horrors and devastation produced by slavery and the actual inequality that existed between the parties because of it. This shift also obscured the principal role the State had played in creating the inequality that actually existed through its centuries long sanctioning of the institution of slavery.<sup>107</sup> Significantly, because success and failure going forward were to be determined entirely by individual effort, specifically how well freed persons navigated the ostensibly free market and sold their labor, the State could not be held responsible for the outcomes of these essentially private market transactions between private citizens or for the distribution of wealth and power that resulted from them. In other words, any inequality resulting from these

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<sup>103</sup> President Andrew Johnson, Veto of the Civil Rights Bill (Mar. 27, 1866), reprinted in FOSTER, *supra* note 102, at 277-78. The belief that capital and labor were equal and mutually dependent was not limited to those who opposed Reconstruction but was instead held by Republicans and Democrats alike. See FONER, *supra* note 67, at 19.

<sup>104</sup> HARTMAN, *supra* note 80, at 132.

<sup>105</sup> Saidiya Hartman calls this "the double bind of freedom: being freed from slavery and free of resources . . ." *Id.* at 117.

<sup>106</sup> *Id.* at 129-30, 132-33; see also DRU STANLEY, *supra* note 20, at 36-37; FONER, *supra* note 67, at 261.

<sup>107</sup> HARTMAN, *supra* note 80, at 118, 132.

transactions going forward had nothing to do with the inequality that existed at the end of slavery.

Transactions were thus “private” both because the parties to it were explicitly and intentionally cast as private actors exercising their private rights and because a powerful narrative was crafted that explicitly portrayed the State as outside of these transactions and as having absolutely nothing to do with them. Because inequality existed and was going to persist into the future, it too could now be framed as simply the result of private parties pursuing their own private interests in private transactions through the exercise of their equal private rights. Equal rights, personal responsibility, individual effort and decision-making thus became the keys to success or failure.

This understanding of the world and how it was supposed to work has been reproduced through contracts and contract law ever since.<sup>108</sup> This is because contracts in the age of Emancipation became synonymous with freedom and individual responsibility.<sup>109</sup> What were otherwise “abstract rights of freedom” granted to the emancipated slaves became concrete in contracts of wage labor where the exchange required in every contract “established the symmetry of the relation, entailing reciprocity of rights and duties while also testifying to the mutual assent of the contracting parties.”<sup>110</sup> The *role* of contracts and contract law, therefore, was to help impose social discipline, which was defined as taking responsibility for oneself, on the newly freed slaves, everyone already in the country, and anyone who later flocked to its shores.<sup>111</sup> After all, contracts could only effectively serve this disciplinary function if most of them end up being enforced, that is, through the practice of contract law in court. A couple cases illustrate the extent to which the understanding of the world following Emancipation and Reconstruction have been reproduced widely with respect to everyone and consistently over time.

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<sup>108</sup> The political philosophy that frames the social world and, therefore, contract law has shifted from classical liberalism to modern liberalism to neoliberalism. But the basic commitment that contracts and contract law are always and only private has never wavered. See Danielle Kie Hart, *Contract Law Now—Reality Meets Legal Fictions*, 41 U BALT. L. REV. 1, 10, 12 (2011) [hereinafter Hart, *Contract Law Now*].

<sup>109</sup> DRU STANLEY, *supra* note 20, at 35–37; HARTMAN, *supra* note 80, at 125, 132–34.

<sup>110</sup> DRU STANLEY, *supra* note 20, at x, 2.

<sup>111</sup> *Id.* at 1–2, 12–14, 35–37; Kandaswamy, *supra* note 82, at 267–68 (citations omitted); P. S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 654–55 (1979).

In *Coppage v. Kansas*, the United States Supreme Court struck down a Kansas statute that made it unlawful for employers to require their employees to sign a contract provision promising not to join a union.<sup>112</sup> According to the Court, the employer and employee who was refusing to sign the contract were equals in that each possessed the same rights, specifically, the right to liberty, private property, and to contract, and the equal right to assert those rights.<sup>113</sup> Thus, Justice Pitney, writing for the majority declared that,

[i]ncluded in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. . . . The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.<sup>114</sup>

Consequently, and specifically because the parties were equals, the Court had no trouble concluding that the employee in *Coppage* was perfectly capable of taking care of himself in the market.<sup>115</sup> While the Court acknowledged that the employee stood to gain monetarily in the form of a \$1,500 insurance benefit if he were permitted to join the union, Justice Pitney dismissed the implication that the employment contract, which required the employee to forego this benefit, amounted to any kind of coercion. He wrote, “aside from this matter of pecuniary interest, there is nothing to show that [the employee] was subjected to the least pressure or influence, or that he was not a free agent, in all respects competent, and at liberty to choose what was best from the standpoint of his own interests.”<sup>116</sup> The employee was, therefore, free to exercise his right to refuse to sign a contract provision prohibiting him from joining a union and the employer was equally free to exercise its right to terminate the employee for his refusal.<sup>117</sup> The Court thus concluded that, “any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free

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<sup>112</sup> 236 U.S. 1, 14 (1915).

<sup>113</sup> *Id.* at 23–24 (“[T]he rights of the employer and employee are equal.”).

<sup>114</sup> *Id.* at 14.

<sup>115</sup> *Id.* at 21 (“To ask a man to agree, in advance, to refrain from affiliation with the union while retaining a certain position of employment, is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, . . .”).

<sup>116</sup> *Id.* at 8–9.

<sup>117</sup> *Id.* at 21.

land.”<sup>118</sup> In other words, this was a private transaction between private parties, which the government had no right to interfere with.

As for the statement by the Kansas Supreme Court acknowledging that actual inequality existed between employers and their employees because employees were not as financially independent as employers, Justice Pitney replied:

No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts . . . . Indeed, a little reflection will show that wherever the right of private property and the right of free contract coexist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none . . . . And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things 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.<sup>119</sup>

In short, the actual inequality that the Supreme Court acknowledged existed was cast as the by-product of “private parties exercising their private rights,” much in the same way that inequality was understood following Emancipation.<sup>120</sup> Moreover, and based on the Court’s rhetoric, the fact that contracts and contract law play(ed) central roles in facilitating and perpetuating such “inequalities of fortune” could and should be overlooked.

While subsequent cases are not as explicit as *Coppage* about the status of the parties or their rights, the courts have remained committed to the assumptions that the parties to a contract are roughly equal in terms of their rights and capable of taking care of themselves in their private market transactions without the need for intervention from the State, notwithstanding any inequality between them. One more case, decided eighty-five years after *Coppage*, will have to suffice to illustrate the extent to which these contract law assumptions have been reproduced widely and consistently over time.

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<sup>118</sup> *Id.* at 11.

<sup>119</sup> *Id.* at 17 (emphasis added).

<sup>120</sup> Gary Peller, *Privilege*, 104 GEO. L.J. 883, 889 (2016).

In *Flynn v. AerChem, Inc.*, the plaintiff, Paulette Flynn, worked for the defendant, AerChem, from August or September of 1995 until September 10, 1999.<sup>121</sup> As an employee at will, AerChem could fire Flynn for any reason or no reason at all. In October of 1998, Flynn was asked to and did sign an "Employee Arbitration Agreement" (the "Agreement") with AerChem, which obligated Flynn to submit any claims arising out of her employment with AerChem to arbitration.<sup>122</sup> The arbitration agreement was part of an employee handbook that all of AerChem's employees were asked to sign.<sup>123</sup> It is not clear from the opinion why Flynn left AerChem's employment. But Flynn sued AerChem on January 28, 2000, for, among other things, violations of Title VII of the Civil Rights Act of 1964.<sup>124</sup> In response, AerChem filed a motion to compel arbitration of Flynn's claims, which the district court granted.<sup>125</sup>

Flynn argued that a valid contract to arbitrate was not formed because she never consented to the Agreement.<sup>126</sup> In rejecting Flynn's argument, Chief Judge Sarah Evans Barker held that Flynn's failure to understand what she agreed to in the Arbitration Agreement was "not a viable excuse for non-performance."<sup>127</sup> Instead, Judge Barker stated, "[i]t is a basic tenet of contract law that a person is assumed to have read and understood documents that they sign."<sup>128</sup> Judge Barker then explained that, "[t]he freedom to contract includes the freedom to contract improvidently, and in the absence of countervailing policy considerations, private reservations or mistake[s] will not avoid the results of apparent consent."<sup>129</sup> As a result, Flynn's signature on the agreement constituted her consent to the agreement, notwithstanding that she did not have full knowledge of its terms or what they meant.<sup>130</sup>

Flynn then argued that the Agreement was not enforceable because her agreement to arbitrate all of her claims was the

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<sup>121</sup> 102 F. Supp. 2d 1055, 1057 (S.D. Ind. 2000).

<sup>122</sup> *Id.* at 1057.

<sup>123</sup> Flynn claimed that everyone was forced to sign the Agreement. *Id.* at 1060.

<sup>124</sup> *Id.* at 1057.

<sup>125</sup> *Id.* at 1063.

<sup>126</sup> *Id.* at 1060.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* (alteration in original) (quoting *Rutter v. Excel Indust., Inc.*, 438 N.E.2d 1030, 1031 (Ind. Ct. App. 1982)).

<sup>130</sup> *Id.* at 1061.

product of economic duress and unconscionability.<sup>131</sup> To prove duress, Flynn was required to prove that “the duress resulted from the defendant’s wrongful and oppressive conduct and not by the plaintiff’s necessities.”<sup>132</sup> Judge Barker concluded that Flynn failed to satisfy her burden and, therefore, her duress claim failed.<sup>133</sup>

To begin with, Judge Barker held that AerChem’s threat to fire Flynn if she did not sign the Agreement to Arbitrate was not wrongful because, as an at-will employee, AerChem had the right to terminate Flynn at any time with or without cause.<sup>134</sup> Thus, according to Judge Barker, AerChem simply did what it had a legal right to do.<sup>135</sup> Judge Barker also concluded that Flynn did not need to give in to AerChem’s threat to fire her if she did not sign the Agreement.<sup>136</sup> Judge Barker acknowledged that losing her job with AerChem “might have caused Flynn some inconvenience, considering the economic hardship she faced due to her pending divorce.”<sup>137</sup> But, according to Judge Barker, Flynn had other options available to her, because AerChem’s threat “did not rob her of her volition.”<sup>138</sup> More specifically, Judge Barker stated that, “Flynn at all times retained the option of refusing to sign the Agreement and seeking other employment, if necessary.”<sup>139</sup> Finally, Judge Barker concluded that “Flynn’s personal decisions, not AerChem’s actions, were the cause of her economic duress.”<sup>140</sup> Flynn’s financial distress was caused by her pending divorce and not because AerChem threatened to fire her if she refused to sign the Agreement.<sup>141</sup> According to Judge Barker, the fact that “AerChem may have been well aware of and exploited her situation” in no way changed the conclusion that “no act or omission by AerChem was the source of her financial troubles.”<sup>142</sup> In other words, Flynn was responsible for the unfortunate situation she found herself in.

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 1062.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

To prove unconscionability, Flynn was required to prove that there was great disparity in bargaining power between the parties that essentially caused the weaker party to sign an agreement unwillingly or without awareness of its terms *and* the agreement so signed was one that “no person not under delusion, duress or in distress would make, or one that no honest and fair [person] would accept.”<sup>143</sup> The fact that one party merely “enjoys an advantage over the other” is not sufficient to make a contract unconscionable.<sup>144</sup>

Judge Barker acknowledged that there was some actual disparity in bargaining power between AerChem and Flynn but nevertheless concluded that, “the disparity was not great enough to sustain a finding of unconscionability.”<sup>145</sup> Judge Barker reasoned that, “[a]lthough AerChem had the power to terminate Flynn’s employment, Flynn possessed the corresponding power to refuse to sign and leave its employ, thereby withholding her services from AerChem.”<sup>146</sup> This reasoning was remarkably similar to Justice Pitney’s reasoning in *Coppage*.<sup>147</sup> More specifically, Flynn’s right to quit her job and look for other work, regardless of whether other work would be difficult to find (as Judge Barker did not comment on this), was enough to counter AerChem’s right to threaten to fire her and eliminate her source of income. Flynn, in other words, had enough rights to take care of herself. Finally, because mandatory arbitration agreements are “commonplace in the employment setting,” Judge Barker concluded that the Arbitration Agreement at issue in the case was *not* one that “no sensible person not under delusion or distress would make, and such as no honest and fair man would accept.”<sup>148</sup> Consequently, Flynn’s unconscionability claim failed, too.<sup>149</sup>

Based on how the world is supposed to work,<sup>150</sup> therefore, Paulette Flynn was simply not entitled to any help from the State through its courts in sorting out her private transaction with her employer, AerChem. Yes, there was actual inequality between the parties; and yes, AerChem’s threat to fire Flynn may have caused

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<sup>143</sup> *Id.* (alteration in original) (citation omitted).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See *Coppage v. Kansas*, 236 U.S. 1, 14 (1915); see also *supra* notes 106–07 and accompanying text.

<sup>148</sup> *Flynn*, 102 F. Supp. 2d at 1062.

<sup>149</sup> *Id.* at 1063.

<sup>150</sup> See *supra* notes 95–102 and accompanying text.

Flynn some “inconvenience;” and, yes AerChem may have “exploited her situation.”<sup>151</sup> But Flynn had enough rights to protect her own interests and failed to do so. Instead, her own “personal decisions” put her in the difficult financial situation she found herself in, namely, choosing to get a divorce and voluntarily entering into the arbitration agreement with AerChem (instead of choosing to lose her job and source of income).<sup>152</sup> Then, as now, equal rights, personal responsibility, individual effort, and decision-making dictated the outcome.

### III. REALITY

So, what happens when this understanding of how the world is supposed to work—that inequality is simply the result of private parties pursuing their own private interests in private transactions through the exercise of their equal private rights—is transposed on the real world? What are the practical effects of this ideology? Briefly revisiting the housing market crash that precipitated the Great Recession of 2007–2009 provides an example of the devastating social consequences that contracts and contract law sometimes help produce and the skewed response to those consequences that are engendered, at least in part, because we cling to the fiction that contracts and contract law have nothing to do with inequality.<sup>153</sup>

Beginning in the early 2000s, mortgage lending expanded dramatically. A large portion of this lending consisted of predatory subprime loans. These loans included refinancing transactions where homeowners would borrow against the equity of their homes.<sup>154</sup> They also included loans to purchase single family homes that targeted younger, single or divorced women of color living in minority neighborhoods.<sup>155</sup> But even amongst this

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<sup>151</sup> *Flynn*, 102 F. Supp. 2d at 1062.

<sup>152</sup> *Id.*

<sup>153</sup> A lot has been written about the housing market crash and the Great Recession. See generally JANIS SARRA & CHERYL WADE, PREDATORY LENDING AND THE DESTRUCTION OF THE AFRICAN AMERICAN DREAM (2020); see COLIN MCARTHUR & SARAH EDELMAN, CTR. AM. PROGRESS, THE 2008 HOUSING CRISIS: DON'T BLAME FEDERAL HOUSING PROGRAMS FOR WALL STREET'S RECKLESSNESS 1, 4 (2017), <https://www.americanprogress.org/issues/economy/reports/2017/04/13/430424/2008-housing-crisis/> [<https://perma.cc/SD5Q-2NJV>]. See *infra* note 155, for a discussion of the housing crisis studies. Again, because this Article is only a primer, I only attempt to outline the basics, as opposed to all of the nuances about the housing market crash.

<sup>154</sup> MCARTHUR & EDELMAN, *supra* note 153, at 4.

<sup>155</sup> See ALLEN J. FISHBEIN & PATRICK WOODALL, CONSUMER FED'N OF AM., WOMEN ARE PRIME TARGETS FOR SUBPRIME LENDING: WOMEN ARE



demographic, African American women were disproportionately represented.<sup>156</sup> In many cases, the people to whom these loans were sold did not qualify for them.<sup>157</sup> But the lenders never told them this. Some of the predatory terms common in these subprime loans included high prepayment penalty provisions, very high origination and post-origination fees (totaling 20% of the entire loan amount), and a 2/28 adjustable-rate mortgage.<sup>158</sup>

Subprime loans, like the ones mentioned above, were made possible because lenders funded these mortgages by bundling them into mortgage-backed securities, which were then sold as

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DISPROPORTIONATELY REPRESENTED IN HIGH-COST MORTGAGE MARKET 1–4 (2006) (finding that “[w]omen[,] [particularly African-American and Latino women, were] more likely to receive subprime mortgages than men”); CAPITAL AREA ASSET BUILDERS ET AL., SUBPRIME MORTGAGE LENDING IN THE DISTRICT OF COLUMBIA: A STUDY FOR THE DEPARTMENT OF INSURANCE, SECURITIES AND BANKING 1, 7, 10, 14–15 (2008) (finding that subprime loans were disproportionately made to low income, African-American borrowers); CONSUMERS UNION SWRO, WOMEN IN THE SUBPRIME MARKET 1–2 (2002) (data from Texas); IRA GOLDSTEIN ET AL., THE REINVESTMENT FUND, MORTGAGE FORECLOSURE FILINGS IN MARYLAND: A STUDY BY THE REINVESTMENT FUND FOR THE BALTIMORE HOMEOWNERSHIP PRESERVATION COALITION 6, 26, 34 (2008) (finding that African-Americans living in predominantly African-American neighborhoods received a higher percentage of subprime loans than other racial categories, and that most loans in foreclosure were obtained for home purchases rather than refinances); Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073, 1089 (2009) (“[I]n 2006, 42.4 percent of first-lien subprime loans were purchase loans.”)

<sup>156</sup> See, e.g., FISHBEIN & WOODALL, *supra* note 155, at 1; see also CONSUMERS UNION SWRO, *supra* note 156, at 1–4 (data from Texas); SARRA & WADE, *supra* note 153, at 2, 10.

<sup>157</sup> Qualifying for a loan is the process by which a lender determines the likelihood that the borrower applying for a loan will be able to repay the loan according to its terms. Nathaniel R. Hull, Comment, *Crossing the Line: Prime, Subprime, and Predatory Lending*, 61 ME. L. REV. 287, 288 (2009). Lenders generally use several established criteria to determine whether a borrower qualifies for a home mortgage loan: the borrower’s credit score—usually a FICO score higher than 660; documentation of income, debt, employment, and assets (including financial resources and other property or collateral); and “a loan amount less than the maximum size loan that Fannie Mae and Freddie Mac are allowed to purchase.” *Id.* at 292 & nn. 33–34 (footnotes omitted); see also *How Do I Qualify for a Mortgage?*, INCHARGE DEBT SOLS., <https://www.incharge.org/housing/how-do-i-qualify-for-a-mortgage/> [<https://perma.cc/87J3-WYBW>] (last visited Sept. 27, 2021). If a borrower satisfies the criteria, she qualifies for a prime mortgage, which is a mortgage at the best interest rate then available. If she does not meet the criteria, then she generally only qualifies for a subprime mortgage, which is a mortgage at a higher interest rate. Hull, *supra*, at 292.

<sup>158</sup> Bar-Gill, *supra* note 155, at 1076–77; see Julia Kagan, *2/28 Adjustable-Rate Mortgage (2/28 ARM)*, INVESTOPEdia (Feb. 6, 2021), <https://www.investopedia.com/terms/2/228arm.asp> [<https://perma.cc/4DXH-LD89>].

investment instruments to investors around the world.<sup>159</sup> Because loans, even these very risky loans, were being made available to more people, more people wanted to purchase houses. Lenders, therefore, sold a lot more of these predatory subprime mortgages to other people. As a result of the increased demand for houses and the resulting decrease in the supply of homes, housing prices went up and initially kept going up. This created an “asset bubble” in the housing market.<sup>160</sup>

But the bubble was unsustainable. The downward spiral in the housing market went something like this: When housing prices peaked, selling homes became more difficult, which resulted in rising mortgage loss rates for lenders and investors. Mortgage-backed securities were then labeled high-risk, some subprime lenders closed up shop and others either stopped making or restricted access to sub-prime loans all of which lowered the demand for homes.<sup>161</sup> Lower demand led to lower housing prices.<sup>162</sup> In addition, the Federal Reserve raised the federal funds rate.<sup>163</sup> This sent the adjustable mortgage interest rates skyrocketing.<sup>164</sup> Because most subprime loans sold between 2003–2007 that were bundled into the mortgage-backed securities included adjustable-rate mortgages, this meant that the monthly payments due under those mortgages also soared.<sup>165</sup> Buyers could no longer afford their monthly payments, which meant that more and more buyers started to default on their loans.<sup>166</sup> As more buyers either defaulted or became delinquent on their mortgage loans, foreclosures increased, banks repossessed more homes, and both buyers and the banks tried to sell these homes in a now weakened housing market, which further reduced housing prices and

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<sup>159</sup> John V. Duca, *Subprime Mortgage Crisis 2007-2010*, FED. RES. HIST., <https://www.federalreservehistory.org/essays/subprime-mortgage-crisis> (last visited Oct. 2, 2021).

<sup>160</sup> Kimberly Amadeo, *The Causes of the Subprime Mortgage Crisis*, BALANCE (Sept. 17, 2020), <https://www.thebalance.com/what-caused-the-subprime-mortgage-crisis> [<https://perma.cc/BA8D-6KWU>].

<sup>161</sup> Duca, *supra* note 159.

<sup>162</sup> Amadeo, *supra* note 160.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Bar-Gill, *supra* note 155, at 1098 (“According to the [Federal Reserve Board], approximately three-fourths of originations in securitized subprime ‘pools’ from 2003 to 2007 were ARMs or hybrids with two- or three-year ‘teaser’ rates followed by substantial increases in the rate and payment (so-called ‘2-28’ and ‘3-27’ mortgages).”); SARRA & WADE, *supra* note 153, at 8 (“Of the \$600 billion of sub-prime loans originated in 2006, most were securitized.”) (footnote omitted).

<sup>166</sup> Amadeo, *supra* note 160.

demand.<sup>167</sup> The housing market crashed and, as a result, the mortgage-backed securities became worthless, which then precipitated the Great Recession.<sup>168</sup>

At the outset of the Great Recession, trillions of dollars in risky mortgages were circulating through the financial system<sup>169</sup> and banks, financial institutions and investors were facing hundreds of billions of dollars in losses.<sup>170</sup> According to Janis Sarra and Cheryl Wade, subsequent investigations found that collusion between market players, careless and predatory lending practices, securitization, fraudulent and egregious conduct by lenders and mortgage servicers, “shadow banking” resulting from deregulation, complicity of credit rating agencies, and failures of regulatory oversight all contributed to the housing market crash and Great Recession.<sup>171</sup>

It is very clear, therefore, that *a lot* of things contributed to the housing market crash and Great Recession. But overlooked in all of this is the fact that at the heart of the housing market bubble and subsequent crash were countless *individual contracts* in the form of mostly subprime mortgage loans.<sup>172</sup> *Each mortgage loan was a contract* between two private parties—a lender and a borrower. But the private parties to these ostensibly private contracts were treated very differently by the State.<sup>173</sup>

**The Borrowers:** Most of these individual mortgage contracts were found to be valid and enforceable. More specifically, unless each of the individual borrowers was able to rebut the presumption of contract validity that springs into existence when a contract is formed,<sup>174</sup> which is extremely hard to do,<sup>175</sup> each of those contracts would have been deemed valid. In addition, all of these cases

<sup>167</sup> Duca, *supra* note 159.

<sup>168</sup> Amadeo, *supra* note 160.

<sup>169</sup> SARRA & WADE, *supra* note 153, at 51.

<sup>170</sup> *Id.* at 51–53.

<sup>171</sup> *Id.* at 23–68; *see also* Hart, *Contract Law Now*, *supra* note 108, at 36–39 (discussing a very brief regulatory history of the financial market); Amadeo, *supra* note 160.

<sup>172</sup> Amadeo, *supra* note 160

<sup>173</sup> MEHRSA BARADARAN, HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY 120 (2015).

<sup>174</sup> *See supra* notes 36–37 and accompanying text. Borrowers could try to rebut the presumption of contract validity either by suing their lenders to rescind their contracts or otherwise get out of having to continue to perform them or raising claims to rebut the presumption as a defense in a lawsuit brought by the lenders. Query how many borrowers would have actually been able to sue or mount a defense in a lawsuit, given that so many of them defaulted on their mortgagors.

<sup>175</sup> *See supra* notes 46–50 and accompanying text.

would have been decided against a backdrop in which courts held that lenders: (1) owed no fiduciary duty to borrowers;<sup>176</sup> (2) had no duty to disclose whether borrowers actually qualified for the loans they were sold;<sup>177</sup> (3) had no duty to determine the borrowers' ability to repay the loan;<sup>178</sup> (4) had no duty to refrain from making loans to borrowers whom the lenders knew could not repay the loan;<sup>179</sup> and (5) had no duty to give borrowers the best rates<sup>180</sup>—all

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<sup>176</sup> *Oaks Mgmt. Corp. v. Super. Ct.*, 51 Cal. Rptr. 3d 561, 570 (Ct. App. 2006) (“[I]t is established that absent special circumstances . . . a loan transaction is at arms-length and there is no fiduciary relationship between the borrower and lender.”); *Nymark v. Heart Fed. Sav. & Loan Ass’n*, 283 Cal. Rptr. 53, 60 n.1 (Ct. App. 1991) (rejecting breach of fiduciary duty claim by borrower and holding instead that the claim failed as a matter of law); *Pimental v. Wachovia Mortg. Corp.*, 411 F. Supp. 2d 32, 39 (D. Mass. 2006) (holding that lenders owe no fiduciary duty to borrowers).

The relationship between a lending institution and its borrower-client is not fiduciary in nature. A commercial lender is entitled to pursue its own economic interests in a loan transaction. This right is inconsistent with the obligations of a fiduciary which require that the fiduciary knowingly agree to subordinate its interests to act on behalf of and for the benefit of another.

*Nymark*, 283 Cal. Rptr. at 55 n.1 (citations omitted).

<sup>177</sup> *Cross v. Downey Sav. & Loan Ass’n*, No. CV 09–317 CAS (SSx), 2009 WL 481482, at \*9 (C.D. Cal. Feb. 23, 2009) (holding that the financial institution “had no duty to disclose to [the borrower] that he could not qualify for the loan”); *cf.* *Baylor v. Jordan*, 445 So. 2d 254, 256 (Ala. 1984) (“Courts have traditionally viewed the relationship between a bank and its customer as a creditor-debtor relationship which does not impose a fiduciary duty of disclosure on the bank.”); *Nymark*, 283 Cal. Rptr. at 56 (“[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution’s involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.”); *In re Vincent v. Ameriquest Mortg. Co.*, 381 B.R. 564, 574 (Bankr. D. Mass., Rosenthal 2008) (holding that plaintiff failed to allege facts that would impose a fiduciary duty on defendant (lender) “to make sure that the loan was suitable based on her circumstances”).

<sup>178</sup> *Renteria v. United States*, 452 F. Supp. 2d 910, 922 (D. Ariz. 2006) (“[T]he world might well be a better place if lenders had a duty to the borrower to determine the borrower’s ability to repay the loan. No such duty exists. The lender’s efforts to determine the creditworthiness and ability to repay by a borrower are for the lender’s protection, not the borrower’s.”); *Norwich Sav. Soc’y v. Caldrello*, No. CV89-512204, 1993 WL 268512, at \*9 (Conn. Super. Ct. July 12, 1993) (“A bank does not have a duty to investigate a borrower’s ability to repay the loan.”); *Anderson v. Franklin*, No. 2:09-cv-11096, 2010 WL 742765, at \*8 (E.D. Mich. Feb. 26, 2010).

<sup>179</sup> *Wagner v. Benson*, 161 Cal. Rptr. 516, 521 (Ct. App. 1980) (holding that the lenders did not owe a duty of care to the borrowers in approving the loan); *N. Tr. Co. v. VIII S. Mich. Assocs.*, 657 N.E.2d 1095, 1102 (Ill. App. Ct. 1995) (“The lender also has no duty to refrain from making a loan if the lender knows or should know that the borrower cannot repay the loan.”).

<sup>180</sup> *See, e.g., Brazier v. Sec. Pac. Mortg., Inc.*, 245 F. Supp. 2d 1136, 1143 (W.D. Wash. 2003) (holding that no law requires a mortgage broker to negotiate for a borrower to obtain the best rate from the lender).

of which, of course, was contrary to the understanding of most borrowers.<sup>181</sup>

Moreover, given that each of these mortgage loan transactions would have been seen as private transactions between private parties pursuing their private rights, ideologically, courts would not be inclined to step in to protect the borrowers from what turned out to be their own bad decision to enter into the contract, notwithstanding any wrong-doing by the lenders or the fact that actual inequality existed between lenders and borrowers.<sup>182</sup> Commentators made these ideological arguments explicitly. For example, “[m]any pundits, politicians, and even some well-respected academics made the completely unsupported claim that the financial crisis was caused by poor people borrowing money to buy homes they could not afford.”<sup>183</sup> Borrowers were called “greedy”<sup>184</sup> people who lacked “personal responsibility”<sup>185</sup> and failed to exercise “due diligence” before entering into their loans.<sup>186</sup> Consequently, because of the ideology at work and the fact that these mortgage loan contracts would have been deemed valid, the State, through its courts, enforced them.

**The Lenders:** The ideology of personal responsibility and individual effort and decision-making, however, was not deployed against the lenders and banks which were largely responsible for the housing market crash and Great Recession. Nor, when it came to the banks and lenders, was the sanctity of these private loan transactions honored as spaces where private parties were supposed to be left to fend entirely for themselves in the pursuit of their private interests through the exercise of their equal private

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<sup>181</sup> See Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 32 (2008) (“The 2002 Fannie Mae National Housing Survey found that over half of all African-American and Hispanic borrowers erroneously believed that lenders are required by law to provide the best possible loan rates.”).

<sup>182</sup> See *supra* notes 148–50 and accompanying text. Tess Wilkinson-Ryan’s work on the psychology of judgement and decision-making adds support for this conclusion. Wilkinson-Ryan, *supra* note 40, at 1782–84. Wilkinson-Ryan’s work shows that people tend to support enforcement of contracts, specifically, holding the non-drafting party to the terms of their agreements; and people hold this view even when there is evidence of procedural defects or wrongdoing by contract drafters during the formation process. *Id.* at 1782. Unless people are specifically prompted to consider process defects or drafter wrongdoing, therefore, they tend to understand “transactional harms,” like being on the receiving end of a bad bargain, “as products of . . . consent.” *Id.*

<sup>183</sup> BARADARAN, *supra* note 173, at 120.

<sup>184</sup> *Id.*

<sup>185</sup> SARRA & WADE, *supra* note 153, at 97 (citation omitted).

<sup>186</sup> *Id.* (citation omitted).

rights. Instead, all of these individual mortgage loans were *aggregated*; and when aggregated, these same mortgage contracts made the banks too big to fail. So the federal government bailed them out. Congress enacted The Emergency Economic Stabilization Act of 2008,<sup>187</sup> which created the Troubled Asset Relief Program (“TARP”).<sup>188</sup> Pursuant to TARP, the United States Treasury Department was authorized to purchase up to \$250 billion in bank shares in an effort to provide banks with much-needed capital.<sup>189</sup>

But aggregation, and therefore help from the State, only worked in favor of one of the two parties to these private mortgage transactions, namely, the banks and lenders. However, when it came to the *other party* to these mortgage contracts—the *borrowers*—these very same mortgage contracts were disaggregated and viewed as single, private transactions between private parties.<sup>190</sup> As such, government intervention no longer seemed warranted. The borrowers, who were the homeowners in these mortgage transactions, were apparently not worthy of being saved.

Another way to think about all of this, therefore, is to say that a contract is *usually* a private transaction between private parties exercising their private rights, unless the State determines otherwise. And in cases involving private transactions between private parties, any inequality that might be a byproduct of those transactions can and should be ignored. But, if one of the contracting parties is deemed by the State as “too big to fail,” then the State will step in to relieve that party from its own decision-making.

The effects of this skewed response from the State to the contracting parties at the center of these mortgage loan contracts are still being felt today. More specifically, as a result of the life-saving efforts by the State, many of the country’s biggest banks are actually bigger now than they were before the Great Recession. For example, a 2018 story in the Washington Post reported that: JP Morgan Chase had \$1.5 *trillion* in assets in 2007 and \$2.5

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<sup>187</sup> Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (codified as amended at 12 U.S.C. §§ 5201-5261).

<sup>188</sup> Troubled Asset Relief Program, 12 U.S.C. § 5211.

<sup>189</sup> See, e.g., Marc Davis, *US Government Financial Bailouts*, INVESTOPEDIA (Sept. 24, 2021), <https://www.investopedia.com/articles/economics/08/government-financial-bailout.asp#bank-rescue-of-2008-or-the-great-recession> [<https://perma.cc/9ZJQ-NA6A>].

<sup>190</sup> SARRA & WADE, *supra* note 153, at 11.

*trillion* in assets in 2018; Bank of America had \$1.7 trillion in assets in 2007 and \$2.3 trillion in 2018; and Wells Fargo's \$2 trillion in assets were more than double what they were before the Great Recession.<sup>191</sup>

African Americans, however, are not faring nearly as well. A few statistics will have to suffice to paint this bleak picture:

- In 2005, 59% of African American households' net worth was in the form of equity in their homes.<sup>192</sup> The 53% drop in net worth of African American households from \$12,124 in 2005 to \$5,677, therefore, was largely attributed to the housing market crash.<sup>193</sup>
- Between 2007–2010, during the Great Recession, median wealth for all racial groups fell by approximately 30%.<sup>194</sup> But for African American families, their wealth continued to fall another 20% over the next three years.<sup>195</sup>
- In 2016, median black wealth was \$13,460, which was about half of what it was just before the Great Recession.<sup>196</sup> In 2016, average black wealth (\$102,477) was still approximately one-third less than it was before the Great Recession (\$154,557).<sup>197</sup>

A 2019 report by the Institute of Policy Studies found that, “[b]etween 1983 and 2016, the median Black family saw their wealth drop by more than half after adjusting for inflation . . . .”<sup>198</sup>

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<sup>191</sup> Renae Merle, *A Guide to the Financial Crisis—10 Years Later*, WASH. POST (Sept. 10, 2018), [https://www.washingtonpost.com/business/economy/a-guide-to-the-financial-crisis—10-years-later/2018/09/10/114b76ba-af10-11e8-a20b-5f4f84429666\\_story.html](https://www.washingtonpost.com/business/economy/a-guide-to-the-financial-crisis—10-years-later/2018/09/10/114b76ba-af10-11e8-a20b-5f4f84429666_story.html).

<sup>192</sup> PAUL TAYLOR ET AL., PEW RESEARCH CENTER, WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS 5 (2011), [https://www.pewresearch.org/wp-content/uploads/sites/3/2011/07/SDT-Wealth-Report\\_7-26-11\\_FINAL.pdf](https://www.pewresearch.org/wp-content/uploads/sites/3/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf) [<https://perma.cc/G7WV-GR8M>].

<sup>193</sup> *Id.*

<sup>194</sup> Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FED. RES. (last updated Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm> [<https://perma.cc/CUU7-QGHJ>].

<sup>195</sup> *Id.*

<sup>196</sup> ANGELA HANKS ET AL., CTR. AM. PROGRESS, SYSTEMATIC INEQUALITY: HOW AMERICA'S STRUCTURAL RACISM HELPED CREATE THE BLACK-WHITE WEALTH GAP 9, 10 (2018), <https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality/> [<https://perma.cc/KJJ7-39BP>].

<sup>197</sup> *Id.* at 10.

<sup>198</sup> CHUCK COLLINS ET AL., INST. POL'Y STUD., DREAMS DEFERRED: HOW ENRICHING THE 1% WIDENS THE RACIAL WEALTH DIVIDE 1, 3 (2019), [https://inequality.org/wp-content/uploads/2019/01/IPS\\_RWD-Report\\_FINAL-1.15.19.pdf](https://inequality.org/wp-content/uploads/2019/01/IPS_RWD-Report_FINAL-1.15.19.pdf) [<https://perma.cc/JR77-JBAZ>].

That same median Black family owned \$3,600 in 2019.<sup>199</sup> According to the authors of the same report, “[i]f the trajectory of the past three decades continues, by 2050 . . . Black median wealth will be \$600. *The median Black family is on track to reach zero wealth by 2082.*”<sup>200</sup>

To be blunt, the Haves come out ahead. Again. Despite the fact that the Great Recession occurred in 2006–2008, the result for many African Americans who were targeted for predatory subprime loans is eerily similar to what happened with Edmund, the recently emancipated slave, in 1869. Recall that after performing the contract with the landowner, Edmund did not end up with any of the profits from the sale of the cotton harvested and instead ended up indebted to the landowner for the provisions he was provided.<sup>201</sup> Like Edmund, these targeted African Americans in roughly 2009 also came away with nothing, because they lost their homes, and ended up indebted to the banks for the balance of their mortgage loans. Even given the parallels between these stories, it should still come as a shock to learn that, “[i]n 1863, black Americans owned one-half of 1 percent of the national wealth. Today [2019] it’s just over 1.5 percent for roughly the same percentage of the overall population.”<sup>202</sup> Words at this point are simply inadequate.

#### CONCLUSION

Inequality is an intractable and complex problem that has plagued this country for well over two centuries now. Given our history, there is no denying that inequality is racialized. But there is a particular urgency to discussions about inequality right now because the COVID-19 pandemic has exposed in appalling detail the extent of racial and economic inequality in American society. And, as with the Great Recession, contracts are at the heart of many of the problems confronting individuals currently dealing with the havoc wrought by COVID-19. From housing and food, to health insurance and employment, contracts are literally everywhere. So, unless we decide to do things differently,

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.* (emphasis added).

<sup>201</sup> See *supra* notes 57–63 and accompanying text.

<sup>202</sup> Calvin Schermerhorn, *Why the Racial Wealth Gap Persists, More Than 150 Years After Emancipation*, WASH. POST (June 19, 2019), <https://www.washingtonpost.com/outlook/2019/06/19/why-racial-wealth-gap-persists-more-than-years-after-emancipation/> [https://perma.cc/2PL8-YL9T].



including but certainly not limited to acknowledging that the day-to-day practice of contracts and contract law create and perpetuate inequality in American society, it seems very likely that we will be doomed to repeat the trauma of the Great Recession. The Haves will be bailed out.<sup>203</sup> But the Have Nots will end up being evicted from their homes,<sup>204</sup> and they will remain on the hook to their landlords for the back-rent.<sup>205</sup>

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<sup>203</sup> In fact, the State has already acted to shore up the economy. The Federal Reserve acted quickly to shore up the U.S. economy during the COVID-19 pandemic, including, but not limited to, lending \$2.3 trillion to support different sectors of the economy (state and local governments, households, businesses), slashing interest rates to almost zero, and making a slew of asset purchases. See Jeffrey Cheng et al., *What's the Fed Doing in Response to the COVID-19 Crisis? What More Could It Do?*, BROOKINGS (Mar. 30, 2021), <https://www.brookings.edu/research/fed-response-to-covid19/> [<https://perma.cc/6RPP-BXXA>].

<sup>204</sup> The federal eviction moratorium is set to expire on Oct. 3, 2021. See Ann O'Connell, *Emergency Bans on Evictions and Other Tenant Protections Related to Coronavirus*, NOLO (Aug. 16, 2021), <https://www.nolo.com/evictions-ban/> [<https://perma.cc/VF4K-57EE>].

<sup>205</sup> See Jessica Schneider, *DOJ Files Appeal of Trump-Appointed Judge's Ruling on CDC Eviction Moratorium*, CNN (Feb. 27, 2021, 9:06 PM), <https://www.cnn.com/2021/02/27/politics/doj-appeal-cdc-eviction-moratorium/index.html> [<https://perma.cc/W6EJ-QCPF>]. The CDC eviction moratorium was set to expire at the end of December but was extended via a provision in the second stimulus package through January and that President Biden extended the moratorium again through March. *Id.* But the article also notes that, “[u]nder the order, rent is not canceled or forgiven and landlords can evict tenants after the moratorium ends if they are not able to pay the back rent.”