THE LABOR VISION OF THE THIRTEENTH AMENDMENT

LEA S. VANDERVELDE†

INTRODUCTION

The thirteenth amendment[1] is often viewed as a commemoration of the North's Civil War victory over slavery. The conventional understanding of the amendment is that it abolished the particular antebellum southern institution that subjugated black persons as slaves.[2] The texts of the congressional debates on the amendment, however, contain a far richer vision of constitutional reform. They address what constitutes fair and just labor relations. Highlighting this labor vision is important both for historical reasons and for practical legal reasons.

---

† Professor of Law, University of Iowa College of Law. I wish to thank Professors James Atleson, Bob Clinton, Mary Lou Fellows, Matt Finkin, William Forbath, Herb Hovenkamp, Jeff Powell, Eric Schnapper, Kathy Stone, Sheldon Stromquist, Clyde Summers, Mark Tushnet, Adrien Wing, and members of the Project on the Rhetoric of Inquiry of the University of Iowa for very useful conversations and comments on earlier drafts of this Article. I would also like to thank the trustees and contributors of the Fund for Labor Relations Studies for allowing this research to continue. Charles Biebesheimer and Michael Caywood provided excellent research assistance on this work.

[1] U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

[2] *See* H. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 290 (1973). *See also* Belz, *The Civil War Amendments to the Constitution: The Relevance of Original Intent*, 5 CONST. COMMENTARY 115, 139-140 (1988) (postulating that the purpose of the thirteenth amendment was to prohibit chattel slavery and establish a limited civil liberty centering on protection of person and property). Scholars generally conceptualize any lingering significance of the thirteenth amendment in terms of race relations, and even then the fourteenth amendment's call for equality has tended to overshadow the thirteenth amendment.

A line of cases involving debt servitude also stems from the thirteenth amendment. *See, e.g.*, Bailey v. Alabama, 219 U.S. 219 (1910) (holding that in the case of an employee who breaches a personal services contract, "the contract exposes the debtor to liability for the loss due to the breach, but not to enforced labor") (followed in Taylor v. Georgia, 315 U.S. 25 (1942)). In addition, there is the somewhat aborted development of the notion of incidents of servitude. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (recognizing that the thirteenth amendment concerned not just freedom from slavery per se, but also the freedom to purchase and sell property) (followed in Runyon v. McCrary, 427 U.S. 160 (1976)). Finally, the recent case Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), brought renewed interest in the thirteenth amendment as the constitutional basis for Congress' enactments of the Civil Rights Statutes.

First, historians have often assumed that the progressive concept of free labor originated in the Gilded Age, late in the nineteenth century.[3] The Reconstruction debates indicate, however, that a fairly developed notion of what constituted free labor existed at least two decades earlier and, more importantly, that it greatly influenced the discussion that led to the thirteenth amendment's passage.

Second, the thirteenth amendment offers contemporary reformers an unexplored legal avenue for addressing employer threats to meaningful individual independence. For most Americans today, employment is central to their well-being, and the thirteenth amendment addresses the relation of private power between employer and employee.[4] Although to date no court has substantively interpreted the amendment as providing more than a right to quit,[5] the thirteenth amendment can be interpreted to stand for a much broader idea of employee autonomy and independence. The theme of free labor that inspired the debates goes far beyond the limited issue of slave status. As the members of the Reconstruction Congress expressed their visions of fair and just labor relations, they gave form and substance to the possibilities of redressing some power imbalances in the employment relation today.

Many members of Congress envisioned the amendment as a charter for labor freedom, and they defined that ideal in extensive debates. For these members, free labor was not just the absence of slavery and its vestiges; it was the guarantee of an affirmative state of labor autonomy.[6] They delineated the free labor ideal by a recitation

---

[3] *But see* E. FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 (1988); R. Steinfeld, The Disappearance of Indentured Servitude and the Invention of Free Labor in the U.S. (forthcoming 1989) (describing the decline of indentured servitude in the early nineteenth century as contributing to the emergence of the concept of "free labor").

[4] Unlike the fourteenth amendment, the thirteenth amendment contains no state action requirement. *Compare* U.S. CONST. amend. XIV, § 1 *with* U.S. CONST. amend. XIII, § 1.

[5] *See generally* Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment,* 12 HOUS. L. REV. 1 (1974) (discussing the Supreme Court's limiting construction of the thirteenth amendment during the late nineteenth century and its occasional treatment of the amendment since 1968). Even the scope of the right to quit is in question. It is fairly well established that a court cannot order specific performance of a labor contract. It is unclear, however, whether the law can impinge upon the employee's right to quit by imposing other incentives on employees to keep them performing their contractual duties.

[6] *See* E. FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 11 (1970). Carl Schurz, one of the Republican party's leading orators, declared in 1860 that "[t]he Republicans stand before the country, not only as the anti-slavery party, but emphatically as the party of

of specific freedoms that were the inalienable prerogatives of the working man.[7]

A careful examination of this labor vision reveals a structure formed by three types of statements.[8] The first group addresses the historical need to rid employment relations of the master's patriarchal dominion over all laborers in his household and to accord the employee a realm of family and personal privacy free from employer control.[9] The second describes the core concept of autonomy for laborers in their social and economic relations with employers.[10] The final group condemns certain specific labor practices as inconsistent with the spirit of labor autonomy.[11] This three part configuration is useful in exploring the amendment's reach in restructuring the modern employment relation.[12] As scholars devote increasing attention to the important task of exploring the baseline of rights in the employment relation,[13] the Reconstruction debates constitute an important resource because they record the original attempt to mandate constitutionally a minimum level of worker protection.

One would be mistaken to claim that the labor vision was the

---

free labor." *Id.* Richard Yates, another prominent Republican, stated that "[t]he great idea and basis of the Republican party, as I understand it is free labor. . . . To make labor honorable is the object and aim of the Republican party." *Id.*

7 *See* Maltz, *Fourteenth Amendment Concepts in the Antebellum Era,* 32 AM. J. LEGAL HIST. 305, 308 (1988) ("The right to freely buy and sell one's labor was perhaps foremost in the antislavery pantheon.").

I have consciously used masculine terms in referring to the subject groups who play a role in this history: congressmen, freedmen, working men. Not only were there no women in Congress, hence the use of the term "congressmen," the image projected of slaves and working people in the congressional debates was distinctly masculine. References to working women, free or slave, are extremely rare. This reveals an important problem with the methodology of using framers' intent as the orienting perspective for interpreting the Constitution. However, I prefer to draw the reader's attention to the limitations of this gendered perspective than to assume that using gender neutral language eliminates the problem presented by historical patterns of bias.

8 *See infra* text following note 78.

9 *See infra* text accompanying notes 86-101.

10 *See infra* text accompanying notes 102-204.

11 *See infra* text accompanying notes 205-258.

12 This analysis is of particular interest today since many courts have indicated a willingness to restructure employment rights governed by the employment-at-will doctrine. *See generally* M. ROTHSTEIN, A. KNAPP & L. LIEBMAN, CASES AND MATERIALS ON EMPLOYMENT LAW 752-99 (1987) [hereinafter M. ROTHSTEIN] (discussing recent judicial alterations of the employment-at-will rule).

13 *See, e.g.,* J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983) (relating values expressed in nineteenth century judicial opinions to modern labor law); Pope, *Labor and the Constitution: From Abolition to Deindustrialization,* 65 TEX. L. REV. 1071 (1987) (reconsidering the role of constitutional jurisprudence in labor law).

only major theme animating the thirteenth amendment debates. Historical events rarely result from a single cause, and a single idea rarely drives legislative action. In addition to purely labor-based concerns, the thirteenth amendment debates reflected themes such as racial equality,[14] the importance of access to education,[15] the integrity of families,[16] and the natural rights of mankind.[17] Those congressmen who had been influenced by the abolitionist tradition expressed more concern over issues of race and divine salvation than they did over issues of labor and the terms and conditions of employment.[18] Nonetheless, beside the more religious abolitionist arguments, one finds a number of speakers who focused on labor conditions. The remarks of Senator Henry Wilson are typical of this labor perspective. In explaining the position of the thirteenth amendment's proponents, he stated:

> [W]e have advocated the rights of the black man because the black man was the most oppressed type of the toiling men of this country. . . . The same influences that go to keep down and crush down the rights of the poor black man bear down and oppress the poor white laboring man.[19]

This theme has largely been lost in the modern interpretation of the amendment.[20] Consequently, this Article attempts to recapture the strong pro-labor theme that runs consistently through the

---

[14] *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 1479-83 (1864) (remarks of Sen. Sumner) (arguing against racial inequality).

[15] *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. app. at 118 (1864) (remarks of Sen. Howe) ("I think that your amendment should go further than as I understand it does. I think that when the American people command that these persons shall be free, they should command that they be educated . . . .").

[16] *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 2955 (1864) (remarks of Rep. Kellogg, quoting John Brown) ("What cared [the slave sellers] for the sufferings of families whom they separated? . . . They are men but . . . they have no right to their wives; no right to their children . . . .").

[17] *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 2978 (1864) (remarks of Rep. Farnsworth) ("The old fathers who made the Constitution, the men who fought the battles of the Revolution, fought for the rights of *human nature,* and they believed that slavery was at war with the rights of *human nature.*").

[18] *See* Walters, *The Boundaries of Abolitionism,* in ANTI-SLAVERY RECONSIDERED: NEW PERSPECTIVES ON THE ABOLITIONISTS 3 (L. Perry & M. Fellmann eds. 1979) [hereinafter ANTISLAVERY RECONSIDERED].

[19] CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866).

[20] This Article does not make express claims about the thirteenth amendment's precise meaning. Such claims would require an analysis of the various schools of intentionalism. I am content to take the first step of identifying and tracing the nature and influence of the free labor theme. For an excellent discussion of the use of history in constitutional interpretation, see generally Powell, *Rules for Originalists,* 73 VA. L. REV. 659 (1987).

debates.[21] The Reconstruction debates are replete with images of a much stronger interpretation of the purpose of the amendment than ever has been put into practice in decisions of the Supreme Court or actions of Congress. These images lie dormant in the history of the amendment, awaiting their time to come.

I. THE RECONSTRUCTION CONGRESS AND ITS MISSION

The Reconstruction Congress confronted a heroic task. Consider the unique magnitude of the historical moment: through a series of congressional enactments, the nation attempted to eliminate the slave status of four million working people, a condition on which an entire region's economy depended. Although the Emancipation Proclamation had already freed most slaves,[22] it was, by its terms, a one time event.[23] It was up to the Reconstruction Congress to eliminate permanently the possibility of slavery and other forms of extreme labor exploitation.[24]

The Reconstruction Congress could not have contemplated the abolition of slavery without anticipating the profound effect this action would have upon the entire legal structure of labor relations. Slaves occupied the bottom rung in a progression of distinct status positions: peons, bonded servants, apprentices, employees not under written contract, employees under written contract and, finally, professional status employees.[25] The abolition of slavery raised the floor, and in turn altered the internal logic of the remaining structure.

---

[21] Why the dream of continuing labor reform seemed to die out after Reconstruction is in itself an interesting issue. Similarly, it would be interesting to reflect upon why judicial decisions have resisted the latent power of reform found in the debates. An examination of these issues and their implications, however, must be left to another day.

[22] By its terms, the Emancipation Proclamation freed slaves only in certain areas, notably those still in rebel hands. *See* The Emancipation Proclamation, 12 Stat. 1268 (1863). The Proclamation had no effect on the legal status of slaves in Kentucky, Missouri, Maryland, or Delaware. There was some doubt whether slaves in Union-held lands had been liberated as opposed to emancipated or whether they continued to be enslaved. *See* J. FRANKLIN, THE EMANCIPATION PROCLAMATION 132 (1965).

[23] *See* The Emancipation Proclamation, 12 Stat. 1268 (1863).

[24] *See* H. HYMAN, *supra* note 2, at 264 (discussing contemporary fears that the Emancipation Proclamation might later be revoked). *But see* J. FRANKLIN, *supra* note 22, at 132 (arguing that slavery could not have survived the Proclamation).

[25] *Cf.* M. TUSHNET, THE AMERICAN LAW OF SLAVERY 37-42 (1981) (describing the difficulties of Southern slave law in attempting to categorize rigidly slaves and non-slaves).

The effect of eliminating slavery would necessarily be complex. On one hand, the law defined the status of lower laborers in opposition to slavery. Distinctions were drawn between the types of control a master had over his slaves and over his other servants. For example, masters could beat their slaves, but not their apprentices.[26] Laborers may have had little real autonomy from their employers, but they could pride themselves on the differences between their status and that of slaves.

On the other hand, there were great similarities between the slave relation and other low-status employee relations. For example, just as slave masters could sue someone who took away their slaves, employers could sue someone who hired away their employees.[27]

Moreover, slavery's existence and legal legitimacy encouraged tolerance of certain abusive employment practices. Public acceptance of masters' prerogatives threatened to allow some of these abuses to seep into employment relations involving employees of higher status. Pro-labor speakers publicly expressed fear over a threatened statute that would entitle masters to beat their servants as they could their slaves.[28] In another instance, the Michigan territorial legislature had enacted a "white slave law" that provided that "any vagrant . . . could . . . be delivered over to any constable, to be . . . hired out for the best wages."[29]

Similarly, one widely publicized incident of the antebellum period demonstrated the volubility of abusive labor practices. In the District of Columbia, a congressman shot and killed a headwaiter who had refused to serve him a late breakfast. In acquitting the legislator, the judge drew on analogies to slavery, where the law consid-

---

[26] *See* Cannon v. Davis, F. Cas. 18 (C.C.D.C. 1807) (No. 2385) (ordering removal of apprentice from cruel master); Vinalhaven v. Ames, 32 Me. 299 (1850) (upholding cause of action by abused apprentice against master). It was unclear whether indentured servants could be beaten and by whom. *Compare* Matthews v. Terry, 10 Conn. 455 (1835) (stating that master may not corporally punish hired servant) *with* Milburne v. Byrne, 17 F. Cas. 283 (C.C.D.C. 1805) (No. 9542) (discussing Virginia law authorizing court to order corporal punishment of disobedient servant) *and* Hamilton, *The Legislative and Judicial History of the Thirteenth Amendment*, 9 NAT'L B. J. 26, 49-50 (1951) (discussing an 1803 Illinois law that provided that "[a] disobedient or lazy servant could be 'corrected by stripes on order from a justice of the county' ").

[27] *See, e.g.*, Campbell v. Cooper, 34 N.H. 49 (1856) (action for enticing away a servant); *see also* H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 452-65 (2d. ed. 1886) (setting forth law against enticement of servants).

[28] *See* Speech by Senator Henry Wilson, *How Ought Workingmen to Vote in the Coming Election?* (Oct. 15, 1860) (discussed *infra* notes 123-29 and accompanying text).

[29] J. RAYBACK, FREE SOIL: THE ELECTION OF 1848, at 237 (1970).

ered stabbing insolent slaves excusable homicide.[30] Northern newspapers reacted with horror to the acquittal, while one southern newspaper retorted that "[i]t is getting time that waiters at the North were convinced that they are servants, and not 'gentlemen' in disguise. We hope this . . . affair will teach them prudence."[31]

These lessons were not lost on progressive reformers. Thaddeus Stevens, in an 1850 letter, expressed the fear of slavery's permeation into white workers' conditions, declaring that "[t]he people will ultimately see that laws which oppress the black man and deprive him of all safeguards of liberty, will eventually enslave the white man."[32] Thus, many saw the abolition of slavery as necessary for the preservation and enhancement of the conditions of white workers.[33]

The abolition of slavery posed for the Reconstruction Congress an important question of employment customs and rights.[34] If freedmen were no longer slaves, what was their legal status as workers? What would be the attributes of this new legal status? The Reconstruction Congress recognized that the thirteenth amendment would thrust the federal government into an area that previously had been the exclusive province of the states.[35] Congress realized it would have to define the dimensions of the labor system's new floor,[36] and in the process it would have to examine the specific attributes of the new minimum to decide if they were as objectionable as slavery's attributes. Simply banning slavery could not have eliminated conditions of extreme labor exploitation[37] or ensured the employment liberty the framers imagined.

Of course, the Reconstruction Congress did not necessarily speak with one voice. Some members intended to punish the South

---

30 *See* B. MANDEL, LABOR: FREE AND SLAVE 151 (1955).

31 *Id.*

32 H. TREFOUSSE, THE RADICAL REPUBLICANS 56 (1969).

33 *See* CONG. GLOBE, 38th Cong., 1st Sess. 1322 (1864) (remarks of Sen. Wilson) (stating that slavery "bade the legislators of New Mexico enact a barbarous slave code, and also a degrading code for the oppression of white laboring men; but those legislators hastened to repeal those dishonoring cases, when the nation put its heels on the neck of the slave power").

34 *See* Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981,* 98 YALE L.J. 541, 549 (1989).

35 Members often mentioned this point in opposition to the thirteenth amendment's passage. *See* CONG. GLOBE, 38th Cong., 1st Sess. app. 104 (1864) (remarks of Sen. Davis) ("[t]he States [must] have the entire and exclusive control of their own local and domestic institutions and affairs").

36 *See* Sullivan, *supra* note 34, at 549.

37 Even the amendment's opponents recognized this point. *See* CONG. GLOBE, 38th Cong., 1st Sess. 2962 (1864). As Representative Holman of Indiana said: "Mere exemption from servitude is a miserable idea of freedom." *Id.*

for the Civil War,[38] some grudgingly agreed to reforms in an attempt to limit the advances of the most progressive members,[39] and some fought emancipation tooth and nail.[40] As some members of Congress argued for the new vision of worker freedom, others argued that freeing the slaves from their masters would violate the Constitution's takings clause.[41]

In the antebellum years, the halls of Congress had reverberated with a wide range of opinions on the subject of slavery. (There was a long period of silence on the subject following the caning of Senator Charles Sumner on the floor of the Senate for his speech urging abolition.[42]) By the time of the enactment of the thirteenth amendment, however, Congress' composition had changed. The Civil War had caused most of the southern states and their representatives to withdraw. As a result, Congress was composed primarily of representatives of northern states and, of these members, the newly formed Republican Party constituted the majority and the moving force.[43] Though newly founded, the Republican Party had its factions too. On one side of the party was Senator Henry Wilson's vision of equality for all laborers. Wilson sought to do more than simply abolish the institution of slavery. He sought to usher in a state of autonomy and empowerment for all working people or, at least, to create a situation where free institutions could continue to elevate the condition

---

38 *See* H. TREFOUSSE, *supra* note 32, at 362 ("At Lawrence, Kansas, [Senator Benjamin Wade] delivered an impromptu speech in which he . . . threatened that 'another turn would be given to the screw' if the South did not accept the Reconstruction acts. . . .").

39 *See, e.g., infra* notes 171-72 and accompanying text (the speeches of Sen. Edgar Cowan) (agreeing to the abolition of slavery but not to "revolutioniz[ing] all the laws of the various States everywhere.").

40 *See, e.g.,* CONG. GLOBE, 38th Cong., 1st Sess. 1364-67 (1864) (the speeches of Sen. Saulsbury, a Democrat) (arguing against the proposed thirteenth amendment).

41 *See, e.g.,* CONG. GLOBE, 38th Cong., 1st Sess. 2941 (1864) (remarks of Rep. Wood) ("I insist further, that, as the States themselves could not justly take away property or destroy social relations without giving just compensation [any amendment the states approve] must . . . be connected with the condition of allowing the masters a proper equivalent for the property taken or destroyed.").

42 For a description of the caning of Sumner, see D. DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 293-97 (1960).

43 One hundred seventy-five Representatives voted on the second attempt at passage of the thirteenth amendment. *See* CONG. GLOBE, 38th Cong., 2d Sess. 531 (1865). Of these, 82 were Republicans, 63 were Democrats, and 30 belonged to various other parties. *See* U.S. CONGRESS, BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS 1774-1989, at 525-2096 (1989). Forty-four Senators voted on the thirteenth amendment. *See* CONG. GLOBE, 38th Cong., 1st Sess. 1490 (1864). Of these 44 senators, 30 were Republicans, nine were Democrats, and five were Unionists. *See* U.S. CONGRESS, *supra,* at 542-2067.

of working people.[44] On the other side stood Senator Edgar Cowan who, although a Republican, argued the Democratic line. Cowan urged that the amendment strictly be limited to enslaved blacks, and he adamantly resisted any broader interpretation of the thirteenth amendment as well as any additional Reconstruction reforms.[45] In the end, Cowan lost his arguments against all additional reform measures, including the fourteenth amendment.

Despite this disagreement over the amendment's scope and purpose, Wilson's faction of the party, the so-called "Radical" Republicans, is generally recognized as having carried the day.[46] The most progressive and articulate of these men, Senators Henry Wilson, Charles Sumner, Timothy Howe, Jacob Howard, and Representative Thomas Shannon, provided commentary and argument that outlined the most complete vision of a more autonomous, less dependent laborer.[47] This group, with its vision of labor freedom, shaped the debates and achieved the passage of the Reconstruction amendments, including the thirteenth, fourteenth, and fifteenth amendments, and the Anti-Peonage and Civil Rights statutes.[48] These leaders, however, were not alone; their vision resonated in the speeches of other members as well.[49]

In the Republican ideology, the degradation of one worker was the degradation of all working people. Although the freedmen ran

---

44 *See infra* notes 131-36 and accompanying text.

45 *See infra* notes 171-72 and accompanying text.

46 *See* H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 402 (1982).

47 Senator Sumner's position was to emphasize racial equality, see *infra* note 67, although he also used the language of free labor. *See infra* text accompanying notes 166-69. Senator Lyman Trumbull's status as a Radical Republican is uncertain. Professor Hyman argues that the Senator was a conservative, or at least defected rightward later in the Reconstruction. *See* H. HYMAN, *supra* note 2, at 304.

48 *See* CONG. GLOBE, 39th Cong., 1st Sess. 606-07 (1866) (Senate passes Civil Rights Bill); CONG. GLOBE, 39th Cong., 1st Sess. 1367 (1866) (House passes Civil Rights Bill); CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866) (Senate passes fourteenth amendment); CONG. GLOBE, 39th Cong., 1st Sess. 3149 (1866) (House passes fourteenth amendment); CONG. GLOBE, 39th Cong., 2d Sess. 1572 (1867) (Senate passes Anti-Peonage statute); CONG. GLOBE, 39th Cong., 2d Sess. 1770 (1867) (House passes Anti-Peonage statute); CONG. GLOBE, 40th Cong., 3d Sess. 1641 (1869) (Senate passes fifteenth amendment); CONG. GLOBE, 40th Cong., 3d Sess. 1563 (1869) (House passes fifteenth amendment). *See also* E. FONER, *supra* note 6, at 11-13 (noting the Republicans' championing of the cause of labor freedom). *But see* H. HYMAN, *supra* note 2, at 306 ("Radical Republicans did not cease being Republicans. Needs for re-elections kept Radicals marching not too far in advance of party peers or constituents, for fear of tumbling out of office. And many Radicals were only relatively and intermittently in a Radical posture.")

49 *See infra* notes 140 & 148-51 and accompanying text.

the greatest risk of being deprived of their rightful due, the Republicans did not limit the scope of their labor vision to freedmen or even to people of color. In addition to discussing the application of the thirteenth amendment to Chinese and Native American workers in the West and the Southwest,[50] Republicans often characterized the breadth of the amendment as limited to "neither black nor white."[51] Other members expressly disavowed that their interest in reforms was for blacks alone.[52] When Senator Richard Yates of Illinois stated that he had never been "a one-idea man," and that he had "never had the negro on the brain," he elicited laughter from the Senate.[53] That phrase became a shared joke for discrediting the position of Abolitionists, who many felt were concerned exclusively with the plight of blacks.[54]

Moreover, the Republican reformers' political roots were firmly positioned to advance the cause of all working people. In 1860, one of the party's leading orators declared, "The Republicans stand before the country, not only as the anti-slavery party, but emphatically as the party of free labor."[55] Squabbles that drove the Abolitionist and labor movements apart in the 1830s and 1840s united them on the subject of the thirteenth amendment. In contrast to pro-labor groups, the Abolitionists tended to eschew politics, and their power base stemmed from churches and pulpits rather than

---

50 *See, e.g.*, CONG. GLOBE, 39th Cong., 2d Sess. 1571 (1867) (discussing peonage in New Mexico as modified slavery "inconsistent with our institutions"); CONG. GLOBE, 39th Cong., 1st Sess. 498-99 (1866) (discussing rights of Native Americans and Chinese Americans).

51 *See* CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866) (remarks of Sen. Wilson) (Freedmen's Bureau Bill's basis of representation); CONG. GLOBE, 39th Cong., 2d Sess. 1571 (1867) (remarks of Sen. Wilson) (Abolition of Peonage) ("[W]hile I have been against negro slavery, I am also against slavery of this kind for white men."); *see also* CONG. GLOBE, 38th Cong., 1st Sess. 2955 (1864) (remarks of Rep. Kellogg) (attacking "[t]he atrocious sentiment that it was better for society that the capitalists of the country should own the laborers, whether white or black"); CONG. GLOBE 38th Cong., 1st Sess. 1202 (1864) (remarks of Rep. Wilson) (attacking "the atrocious assertion that 'slavery is the natural and normal condition of the laboring man, whether white or black' ").

52 *See* CONG. GLOBE, 38th Cong., 1st Sess. 2955 (1864) (remarks of Rep. Kellogg); CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (remarks of Rep. Wilson).

53 CONG. GLOBE, 39th Cong., 1st Sess. app. at 102 (1866) (remarks of Sen. Yates).

54 Unfortunately, even the Republicans were neither free of racist sentiments nor above using subtly racist comments for political advantage. *See infra* note 125. The Radicals would, however, slam those who made blatantly racist remarks. *See infra* text accompanying notes 184-88. One should not construe my depiction of the Republicans as in any way indicating approval of their racist remarks.

55 Speech by Carl Schurz, *quoted in* E. FONER, *supra* note 6, at 11.

political organizations.[56] The pro-labor interests, on the other hand, coalesced in the grounding of the Free Soil party in 1848.[57] The Radical Republicans of the 1860s evolved from the politically oriented Free Soil movement rather than the religious-centered Abolitionist movement.[58]

The core principle of Free Soil's ideology was the universal dignity of labor,[59] and supporters, as a result, expected their labor reform efforts to sweep up other disadvantaged laboring groups,

---

[56] The Abolitionists never succeeded in forming an effective political party. *See* Walters, *supra* note 18, at 17-18.

[57] The Free Soilers, who took as their slogan "Free Soil, Free Speech, Free Labor & Free Men," were a conglomeration of the Barnburners, the Conscience Whigs, some Abolitionists, and land reformers. As Professor Rayback has described them:

> While each of the elements present harbored fears, prejudices, and predilections, they all had one cause in common—the advancement of the democratic ideal. Full recognition of human rights and dignities and the betterment of the welfare of the common man were their goals. . . . Freedom of opportunity for the free man was the common desire of the elements gathered at Buffalo. The leavening quality of this ideal tempered old differences and gave birth to a new party.

J. RAYBACK, *supra* note 29, at 223-26.

Among the principles these elements embraced were such pro-labor themes as those of the Abolitionists, with their program of personal liberty for all men, slavery for none, white or black; the Barnburners, who were determined to prevent the extension of an institution that completely denied democracy and to dedicate the western plains to the free laborer, who epitomized the democratic concept; and the Conscience Whigs of Massachusetts, who hoped to curb the power of the textile manufacturers. In addition:

> Land Reformers were intent upon improving the welfare and status of [laborers] whose advance was being limited by an apparently excessive labor supply. . . . They aimed at keeping the western lands out of the hands of the great landlords and speculators by giving land to the needy poor, who would thereby achieve the self-sufficiency and self-respect due to all members of the nation.

Id. at 223-24.

[58] *See* E. FONER, *supra* note 6, at 124-33. *See generally* J. MAYFIELD, REHEARSAL FOR REPUBLICANISM: FREE SOIL AND THE POLITICS OF ANTISLAVERY (1980) (suggesting that the Free Soil Party's earlier experiences opened the door to American politics for the Republican party).

[59] *See* J. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 55 (1988).

> All free soilers—except perhaps some of the Van Burenites—concurred with the following set of propositions: free labor was more efficient than slave labor because it was motivated by the inducement of wages and the ambition for upward mobility rather than by the coercion of the lash; slavery undermined the dignity of manual work by associating it with servility and thereby degraded white labor wherever bondage existed; slavery inhibited education and social improvements and kept poor whites as well as slaves in ignorance; the institution therefore mired all Southerners except the slaveowning gentry in poverty and repressed the

such as immigrants, bonded servants, and apprentices.[60] The Republicans' appeal encompassed the entrepreneurial efforts of middle class small businessmen as well as those of manual laborers.[61] The Republicans believed that all people, with the application of industrious labor, could make their way into the middle class.[62] The work ethic was pervasive in Republican speeches, but so too was the belief that the system should reward individuals who applied their efforts industriously. Republicans believed that laborers were entitled to enjoy the "fruits of their labor"[63] and the system of laws should assure that they received them.

As a whole, the Reconstruction debates reflect a desire to improve all workers' status by recognizing the dignity of labor, guaranteeing workers a wide range of opportunities for advancement, and raising the floor of legal rights accorded all working men. These three themes go well beyond the narrower notion of merely banning a few types of legally sanctioned compulsory service. Within the Reconstruction debates, one finds descriptions of an ideal state and sometimes descriptions of a continual process of elevation. These discussions envision a new minimum level of worker independence. If the fourteenth amendment spoke in terms of equality of rights and the fifteenth in terms of universal suffrage, the thirteenth amendment spoke in terms of a set of minimum standards that laboring men could expect in their employment relations.

II. THE THIRTEENTH AMENDMENT

A. *The Text*

Despite the extensive debates over the values and objectives of the thirteenth amendment, the members of the Reconstruction Congress directed very little attention to its actual text. The members of Congress rarely considered whether the actual language of the amendment conveyed the breadth of meanings its advocates ascribed

---

development of a diversified economy; slavery must be kept out of all new territories so that free labor could flourish there.

Id.

60 The text of the congressional debates vividly illustrates this point. *See infra* text accompanying notes 112-15.

61 *See* E. FONER, *supra* note 6, at 15 ("[Republicans] drew no distinction between a laboring class and what we could call the middle class. . . . [T]hey considered the farmer, the small businessman, and the independent craftsmen, all as 'laborers'.").

62 *See id.* at 13-14.

63 For a discussion of the significance of this phrase, see *infra* notes 152-58 and accompanying text.

to it. In the end, the amendment's text was selected more for its symbolic significance than for its ability to state the members' intention with exactness.

The Senate Judiciary Committee recommended that the amendment read: "Neither slavery nor involuntary servitude . . . shall exist," and that was the language that Congress adopted. The Committee looked at several alternative phrasings,[64] but Senator Lyman Trumbull, the chairman of the Committee, reined in any objectors when the final version was presented on the Senate floor. He commented that while no one was completely satisfied with the amendment's wording, it was unlikely that any phrasing could please everyone.[65] Trumbull's sentiment took hold and, as a result, there were only two attempts to modify the substantive wording of the amendment during the debate period:[66] one by Senator Charles Sumner, a supporter of the effort,[67] and another by Representative James Brown, an opponent who sought to qualify the wording and

---

[64] For a comparison of these proposals' texts, see Hamilton, *supra* note 26, at 29-31. There are no records of the debates within the Committee. *See id.* at 31.

[65] *See* CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864) (remarks of Sen. Trumbull) ("[I]f every member of the Senate is to select the precise words in which a law shall be clothed, and will be satisfied with none other, we shall have very little legislation.").

[66] Senator Henderson of Missouri also proposed a modest language change: "Slavery or involuntary Servitude . . . shall not exist . . . ." *Id.* at 1487. In addition, some opponents tried to change the amendment's language drastically in order to sabotage its passage. *See e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 1364, 1370, 1424-25 (1864) (amendments offered by Sen. Davis).

[67] Senator Sumner submitted substitute wordings to the Judiciary Committee, and he also proposed new language on the Senate floor. He proposed that the amendment read: "All persons are equal before the law, so that no person can hold another as a slave . . . ." He continued:

> Should the Senate not incline to this form, there is still another which I would suggest as follows: "Slavery shall not exist anywhere within the United States or the jurisdiction thereof. . . ." This is simple, and avoids all language which is open to question. The word "slavery" is explicit, and describes precisely what it is proposed to blast.

CONG. GLOBE, 38th Cong., 1st Sess. 1482-83 (1864).

Initially Sumner's objection appeared to be one of stylistic elegance. As he said, he wanted text which would embody the law "like a precious casket." *Id.* at 1483. Sumner, though, also expressed a substantive concern with the scope of the traditional language. He feared that the qualifying phrase, "except as punishment for crime," was too great a loophole in the prohibition of slavery. *Id.* at 1488. Sumner suggested that the term "involuntary servitude" was superfluous and introduced doubt about the prohibition's absoluteness. "[S]lavery in our day is something distinct, perfectly well known, requiring no words of distinction outside of itself. Why, therefore, add 'nor involuntary servitude otherwise than in the punishment of crimes whereof the party shall have been duly convicted?' To my mind they are entirely surplusage." *Id.* at 1488. Apparently, it did not occur to Sumner that the additional

lessen the amendment's impact.[68] Neither of these individuals, however, could even engage his congressional colleagues in discussion of the text.

The members of Congress were already familiar with the phrase "neither slavery nor involuntary servitude" from the text of the Northwest Ordinance.[69] Other than eliminating chattel slavery, the phrase carried with it no other fixed meaning. Instead, the language assumed mythical proportions in the Reconstruction debates because it was attributed to Thomas Jefferson.[70] The members of Congress took solace in the fact that although they were amending a sacred document, they did so with the language of one of its original architects.[71] Thus, the amendment stood, or would have fallen, on the "Jeffersonian" wording recommended by the Committee.

---

language would be useful in the post-slavery state and that limiting the scope of the prohibition to slavery could also be construed very narrowly.

Sumner's motion drew a response from Senator Powell of Kentucky, who opposed the amendment altogether. Powell lambasted the Republicans, saying, "[T]he negro absorbs your every thought. For him you will destroy the country. . . ." *Id.* at 1484.

Sumner eventually withdrew his motion, and it is difficult to know what to make of his words and their rejection. It was late in the day, the Senate wished to get on with the vote and, ultimately, he apologized for appearing obstructionist. The important issue, however, is why neither the Judiciary Committee nor the Senate accepted his suggestions.

One might suggest that Congress chose the language because pro-labor members found the ban on involuntary servitude appealing in itself. The phrase "involuntary servitude" resonates much like the term "subservience," and that phrase would have appealed to the anti-slavery forces that deplored the degradation of labor. Moreover, contrary to Sumner's view, the phrase may not have been surplusage. Banning involuntary servitude broadened the constituency of benefitted laborers beyond Southern slaves. Furthermore, by broadening the scope of the prohibition to "involuntary servitude," the amendment's proponents could blunt some of the criticism of opponents, like Senator Powell, that the amendment was a one-idea proposition designed only to benefit blacks. *See supra* text accompanying notes 53-54.

68 *See* CONG. GLOBE, 38th Cong., 2d Sess. 528 (1865) (remarks of Rep. Brown). For discussion of this attempt to amend the language, see *infra* text accompanying note 90.

69 *See* CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864) (remarks of Sen. Dolittle and Sen. Sumner). It had also been used in the 1846 Wilmot Proviso that applied to the territory gained from Mexico at the end of the Mexican-American War. *See* J. RAYBACK, *supra* note 29, at 23.

70 *See* CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864) (remarks of Sen. Dolittle and Sen. Sumner). Despite the attribution of this phrase to Jefferson by the Reconstruction Congress, there is some historical evidence that he did not coin the phrase. *See* J. BARRETT, EVOLUTION OF THE ORDINANCE OF 1787, at 28-31 (1971).

71 *See* CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864) (remarks of Sen. Dolittle and Sen. Sumner).

B. *The Objectives: Three Approaches to the Labor Vision*

Rather than examining the amendment's text, the debates focused primarily on the amendment's objectives and expected effects. For the Radical Republicans, a primary objective was to bring about their vision of free labor.

While their aspirations soared, the Radical Republicans were understandably naive about the forces necessary to bring about their imagined ideal state. Many of the Radicals were self-made men of humble origins who saw their own successes as evidence of existing opportunity for individual betterment.[72] As they recounted their own paths to success in the debates, they emphasized the importance of free institutions to elevate the working man[73] and the importance of minimum labor freedoms at every step.[74] As Professor Foner has described the Republicans, "[t]he ideal of equal opportunity for social mobility and economic independence seemed [to them] to be not dreams but living realities."[75]

A few others tacitly acknowledged that their ideal of free labor did not yet fully exist anywhere, not even in the North.[76] Although increasing industrialization loomed on the horizon and threatened to bring about greater concentrations of employer power, these concentrations had not yet become the norm;[77] the average workshop in the North still consisted of only ten workmen and a small amount of capital.[78] If the Radical Republicans were blind to the impending threat to labor autonomy that would materialize over the next sev-

---

[72] *See* E. FONER, *supra* note 6, at 16.

[73] *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 1321 (1864) (remarks of Sen. Wilson) ("Slavery fills the hearts of the Southern people . . . with its bitter scorn and contempt for . . . the institutions that improve and elevate [the toiling masses].")

[74] *See id.* (describing the contempt which slavery has for "the policy that cares for [the] rights and interests" of the working man).

[75] E. FONER, *supra* note 6, at 29.

[76] *See infra* notes 135-36 & 157 and accompanying text.

[77] *See* E. FONER, *supra* note 6, at 31. Professor Foner wrote:

> On the eve of the Civil War . . . these developments still lay largely in the future. If economic mobility was contracting in Northern cities, the old social opportunity was at least close enough in time to lend plausibility to the free labor ideology. And in the rural and small-town North, the Republican picture of Northern society corresponded to a large degree with reality.

Id. at 33.

[78] *See id.* at 31; *see also* S. WILENTZ, CHANTS DEMOCRATIC: NEW YORK CITY & THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850, at 114-15 (1984) (noting that most craft industries and workshops were small enterprises, although manufacturing and large factory enterprises were rapidly increasing in number).

eral decades, they were, nevertheless, convinced that labor autonomy was their goal. Slavery was the obstacle to attaining this goal.

Three kinds of statements gave structure to the framers' vision of free labor. First, speakers expressed concern that certain types of relationships, principally non-labor relations, be excluded from the amendment's scope. Second, when speaking of the core ideal of the amendment, the Radical Republicans described a vision of employment relations in terms of substantial equality between employees and their employers and sufficient labor autonomy to permit individual autonomy. These speeches were the most lofty and ambitious but the least clearly defined. Finally, many speakers lamented the post-emancipation state of the freedmen in the south. The framers identified and clearly rejected certain private and state actions as tending to perpetuate the dependency of this lowest class of laborers. The framers condemned these specific actions as incompatible with minimal labor freedom and totally inconsistent with the thirteenth amendment's spirit. These denouncements provided the most concrete definition of the meaning of the prohibitions in the amendment. While the framers could not clearly specify what free labor was, they were emphatic in denouncing what it was not. They labelled a variety of employment customs as "perpetuations of slavery."

The debates do not fix a single, static meaning for the amendment or the concept of free labor. Instead, they establish parameters within which many interpretations are possible. The resulting boundaries of meaning fence out certain relationships as beyond the scope of the amendment. They encompass a vast array of possible interpretations emanating from the statements of the framers' core values and objectives. And finally, the debates mark certain customs and actions as evils to be proscribed.

The amendment's objectives also continued to develop during the tenure of the Reconstruction Congresses. The amendment's terms evolved, drawing meaning from new contexts. Even after passing the amendment, the members of Congress continued to clarify its goals.[79] For example, Congress gave substance and meaning to the term "involuntary servitude" for the first time *after* passing the amendment and, to a certain extent, after ratification. This sequence is understandable because abolishing "involuntary servitude" was more forward-looking than abolishing "slavery." The term could not be defined before the abolition of slavery because the worst case

---

79 *See* H. HYMAN & W. WIECEK, *supra* note 46, at 387.

of involuntary servitude, slavery, would dominate the discourse. The term could be defined only in the context of the post-slavery state.

The amendment's terms gathered meaning over time in a particular rhetorical sequence. Pre-passage statements addressed slavery, its evils, and the abolition of the institution. They stressed the degradation of labor, "both black and white," that slavery created.[80] Members of Congress usually personified slavery as a demon or monster that threatened the nation, a dragon to be slain.[81]

Following passage, the dialogue shifted to attaining the ideal of free labor.[82] If the slaves were no longer slaves, what was freedom? What was a free laborer? Unlike the pre-passage statements which contrasted slavery and freedom, the post-passage statements emphasized the difference between the current conditions of freedmen and true freedom.[83] In this manner, the entire spectrum of debate changed, as bondage dropped from view and the focus shifted to labor autonomy, the positive objective.

The context for this shift of emphasis was the southern states' attempts to preserve as much as they could of slavery.[84] As Congress deliberated over the passage of the fourteenth amendment and the Civil Rights statutes, the Freedmen's Bureau gathered information on public and private attempts to replace slavery with laws and customs geared to achieving similar results. The remarkable feature of this era was that Congress, while still in session, received information from the field about attempts to circumvent the thirteenth amendment, attempts by state and private actors to recapture the

---

[80] *See supra* notes 50-53 and accompanying text, and *infra* text accompanying notes 148-49.

[81] *See, e.g.*, CONG. GLOBE, 38th Cong., 2nd Sess. 142 (1865) (remarks of Rep. Orth) ("Like the poisonous upas . . . like the old serpent, it entered our Garden of Eden . . . and yet we have gentlemen within this hall of freedom . . . who hesitate to strike this last blow which shall exterminate the monster forever and ever . . . .").

[82] *See infra* text accompanying notes 165-69, 177-80.

[83] In the language of literary theory, the shift was in the terms in opposition. Pre-passage, the contrast was between slavery and "other." Post-passage, the focus was free labor; the "other" was how far short of labor freedom were the existing conditions of freed men.

[84] One commentator writes:

> Southern whites likewise conceived of the labor question as the driving issue of public policy. As one Southerner explained . . . "You will find that this question of the control of labor underlies every other question of state interest." Former masters were neither prepared nor disposed to deal with former slaves on the grounds assumed by free labor ideology. They struggled to recreate the discipline and control of a slave system . . . ."

Sullivan, *supra* note 34, at 549.

labor of former slaves and reinstate employer dominance over their lives. These Freedmen's Bureau reports provided the opportunity for congressmen to decry specific laws and practices as counter to the spirit of the thirteenth amendment.

It is against this backdrop that one glimpses the most concrete details of the framers' labor vision. With these examples brought to their attention, the framers had the rare opportunity to express their disapproval of specific aspects of labor dependency as their labor vision evolved, while claiming that they had already enacted this vision in the thirteenth amendment.

One of the more interesting twists in the vision's evolution occurred when southern lawmaking replicated the northern common law of labor relations.[85] Quite often, southern states passed statutes that paralleled common law rules regarding the master-servant relation then in effect in northern states. These mid-nineteenth century common law rules gave employers considerable power and discretion, but the reports from the field convinced Congress that southern employers could not be trusted with such discretionary power. Hence, when the Reconstruction Congress examined some of these established legal rules, members condemned them as incompatible with their vision of labor autonomy. In rejecting these rules as violative of the spirit of the thirteenth amendment, the Reconstruction Congress indicated the amendment's forward momentum as a vehicle for change.

1. Beyond the Pale: True Family Relationships and Perhaps Apprentices

Several congressmen's comments demonstrate their intent to limit the thirteenth amendment's application to the labor setting. These congressmen expressed concern that the term "involuntary servitude" not apply to family relationships where the head of the household legally held a property right in the services of other household members.

This concern surfaced first in the arguments against abolition. Representative Chilton White of Ohio, for example, argued against abolition by equating the master-slave relation to the master's property right in his apprentice, the parents' right to the service of their child, and the husband's right to the services of his wife.

> The parent has the right to the service of his child; he has a prop-

---

[85] *See infra* text accompanying notes 203-04.

> erty in the service of that child. A husband has a right of property in the service of his wife; he has the right to the management of his household affairs. The master has a right of property in the service of his apprentice. All these rights rest upon the same basis as a man's right of property in the service of slaves. The relation is clearly and distinctly defined by the law, and as clearly and distinctly recognized by the Constitution of the United States.[86]

Representative White went on to say that breaking these property bonds required due process and compensation.[87] To the twentieth century mind, compensation claims seem inconsistent with the notion of a familial relationship. Nonetheless, the pairing of a compensation claim with the analogy to family ties clearly reveals White's primary motivation. As he stated it, the slavemaster was entitled to the same paternalistic property interest in his slave that he was in his household.[88] The argument was not based on the slaves' innate dependency upon a master to lead and to protect them, but rather on the notion that to rob a master of his slave was to rob him of his paternalistic privileges. White's analogy between families and slaves was a common rhetorical device at the time.[89]

---

[86] CONG. GLOBE, 38th Cong., 2d Sess. 215 (1865) (remarks of Rep. White).

[87] Rep. White declared:

> The right to service in slaves, then, is recognized as property. That right of property cannot be taken away from any person except by "due process of law." "Due process of law," as I before remarked, imports day in court and trial by jury. The only power, then, that can reach this question is the omnipotent sovereignty of the State, which rises above and overshadows, controls and molds, every other power and every other right and interest. Why, sir, the right to possess and enjoy property is essential to the very existence of man. We could not live without it. It is guarantied [sic] in the Constitution. Maryland and Missouri have abolished slavery. How did they do it? They did it by the exercise of the sovereignty of the State, and consistently with this provision of the Constitution, guarantying [sic] the right of individuals in property. They did it by conventions representing the sovereignty of the State. They did it consistently with the provisions of the Constitution, because the Constitution itself recognizes the sovereignty of the States.

Id.

[88] *See also* CONG. GLOBE, 38th Cong., 1st Sess. 2941 (1864) (remarks of Rep. F. Wood, N.Y.)

> The social and domestic relations are equally matters of individual ownership with flocks and herds, houses, and lands. The affections of a man's wife and children are among the dearest of his possessions.... The domestic institution of slavery is one of these relations, and was recognized in the states of this Confederation as a species of proprietary interest.

Id.

[89] *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 2939 (1864) (remarks of Rep.

The comparison to family relations emerged again in the debates as the House prepared to pass the amendment. When it appeared that there were sufficient votes for passage, Representative Brown of Wisconsin moved to substitute a more limited version of the amendment. Brown proposed wording that would have abolished slavery and all involuntary servitude, "except that arising from the relations of parent and child, master and apprentice, guardian and ward."[90] Brown's reference to family was very different from White's earlier use of the family analogy. Before passage, White sought to defeat the amendment by analogizing slaves to family members, but once passage was imminent, Brown had to break the analogy by emphasizing the differences between the relationships. For Brown, although the fight for slavery was lost, it was still important to preserve the privileges of the master in his household. This contrast conveyed an additional message: labor relations and family relations are fundamentally different. The "servitude" that the amendment encompassed was labor servitude.

Brown's motion failed, but the need to distinguish the slave relation from the family relation continued to occupy some members' attention. After the states ratified the thirteenth amendment, Senator Edgar Cowan, the primary voice for a limited thirteenth amendment,[91] used the distinction to attempt to limit the scope of the amendment.

> Now . . . in all good faith, what was the meaning of that [phrase, "involuntary servitude"]? What was its intent? Can there be any doubt of it? . . . That amendment, everybody knows and

---

Pruyn) ("The relations of parent and child, of master and servant; the law of marriage; the mode of alienating property; the law of descent; in short, almost all that concerned the social relations, and the every-day life and pursuits of the great body of the people, were left to be regulated by each State as it chose."). Representative Fernando Wood applied the same analogy to children and apprentices. *See id.* at 2941 (remarks of Rep. Wood) ("The Constitution describes slaves, and I suppose children and apprentices might come under the same class as persons bound to service.").

90 CONG. GLOBE, 38th Cong., 2nd Sess. 528 (1865) (remarks of Rep. Brown).

91 Sen. Cowan was somewhat reluctant to break the analogy between slavery and family. He said:

> It seems to me that the slave ought not to testify for the same reason that the wife ought not to testify either for or against the husband. Would you ask a negro to testify against his master, to go back to that master and be subjected to his ill-will because of his testimony?

CONG. GLOBE, 39th Cong., 1st Sess. 96 (1865) (remarks of Sen. Cowan).

For a full discussion of Cowan's position, see *infra* notes 170-72 and accompanying text.

> nobody dare deny, was simply made to liberate the negro slave from his master. That is all there is of it. Will . . . anybody . . . undertake to say that that was to prevent the involuntary servitude of my child to me, of my apprentice to me, or the *quasi* servitude which the wife to some extent owes to her husband? Certainly not.[92]

Cowan's comment argued against applying the term "involuntary servitude" to anything more than Black slavery. Providing more insight to his message, however, are the key relations that Cowan identified as clearly beyond the term's ambit. He did not say the amendment was clearly inapplicable to white working men; instead, he was on safe ground when he claimed it was inapplicable to family relations.[93]

Cowan appears to protest too much, though. The fact that some members worried that the term was applicable to family settings suggests its meaning lay somewhere between restricting it to Black slaves and extending it to include family relations. No congressmen claimed the term should apply to wives or children, relationships within the family which could be considered unequal and potentially abusive. Many contemporary speakers, however, indicated that it was not limited, as Cowan urged, to Black slavery and its vestiges.[94]

The distinction that the speakers made is still somewhat problematic, however, because it does not explain the classification of apprentices. Both Brown and Cowan emphasized that the amendment did not speak to the master-apprentice relation, and other references in the texts also suggest that the framers did not intend to abolish the apprentice's bound status. For example, in a speech describing the freedmen's continued conditions of oppression,

---

92 CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866) (remarks of Sen. Cowan).

93 *See* CONG. GLOBE, 39th Cong., 1st Sess. 1784 (1866) (Civil Rights Bill) (remarks of Sen. Cowan).

> What was the involuntary servitude mentioned there? Was it the service that was due from the minor to his parent? Was it the right the husband had to the services of his wife? Nobody can pretend that those things were within the purview of that amendment; nobody believes it. It was mentioned as a matter of ridicule, in some places, that it did actually liberate the minor from the control of his parent or guardian; that it did actually entitle the wife to be paid for her own services, that they should not go to the husband; but that was false.

Id. Again in this speech, the senator sought to interpret "involuntary servitude" as co-extensive with black slavery.

94 *See supra* text accompanying notes 46-51. Today there is little argument that the amendment applies regardless of race or previous condition of slavery. *See* Bailey v. Alabama, 219 U.S. 219, 240-41 (1911).

Thomas Eliot of Massachusetts made a curious, but significant, reference to apprenticeship: "All [the Freedmen's Bureau's] reports are replete with instances of violence and cruelty towards the freedmen - murders, whipping, tying up by the thumbs, defrauding of wages, overworking, combining for purposes of extortion, and *binding out of children as apprentices without their parent's consent. . . .*"[95]

Eliot's outrage did not stem from the practice of binding out children, but rather from the fact that there was no parental consent. The distinction between familial relations and employment relations explains the position.

At the time of the amendment's consideration, apprenticeships provided minors with vocational training.[96] Fathers, for the most part, bound their underage sons to some master for training and tutelage. The fathers, not their minor sons, were legally liable if the boys failed to perform labor for their masters.[97] Fathers could also exercise parental pressure to force their sons back into the master's service. In essence, the apprenticeship relation was more an extension of the father's dominion of the family than the master's control of the workplace. Apprenticeship was an extension of the family relation more than it was of the labor relation. Unlike the slave relation, or other labor relations for that matter, the underage apprentice's true father was central to the relationship.[98]

Despite the framers' indications that "involuntary servitude" should not apply to apprentices, these arrangements eventually came within the term's ambit. As patriarchal domination of the family eroded, apprenticeship came to be seen more as a labor relationship. Since the scope of the term "involuntary servitude" was broader than slavery and narrower than family relations, apprenticeships ultimately fell within the proscription of the thirteenth amendment.[99]

---

95 H.R. REP. No. 30, 40th Cong., 2d Sess. 5 (1868) (remarks on Bureau of Freedmen and Refugees by Rep. Eliot) (emphasis added).

96 Apprenticeships declined throughout the 19th century, but were not completely obsolete until the Spanish-American War. *See* W. RORABAUGH, THE CRAFT APPRENTICE 208-09 (1986).

97 *See* H. WOOD *supra* note 27, at 44-92.

98 By the end of the 19th century, apprenticeships became obsolete, in part because fathers' control over their sons eroded, and fathers could no longer discipline their sons or speak for their sons' labor. As a result, the master had little hope of enforcing labor bonds against the fathers. Other factors led to the decline of the institution, too. For example, when the standard means of production changed, masters no longer held the valuable secrets they once could pass on to willing apprentices in exchange for years of service. *See* W. RORABAUGH, *supra* note 96, at 208-09.

99 By 1911, the Supreme Court's language in Bailey v. Alabama, 219 U.S. 219

This move to split the labor relation from the family relation is significant in the context of reforms generally occurring in employment relations over the course of the nineteenth century. In the household workshop industry of the early nineteenth century, the master's servant was a member of his household, part of his private domain.[100] Neither the servant who lived in the master's household nor the slave had any private domain of his own. Freeing the slave from the master's family was a necessary step to viewing the employment relation as more public than private and, accordingly, to granting the servant his own protected sphere of private domain, a sphere that would be beyond the master's control.[101]

2. The Core Ideal of Free Labor

The framers envisioned free labor as an ideal state, where with the help of free institutions, workers could elevate themselves to be their employer's equals. In this ideal state, free labor meant not just upward mobility of a few workers but the levelling of class differentials between laborer and employer, by raising the status of laborers. The speakers' rhetoric oscillated between claims that laborers were

---

(1911), officially ended bound apprenticeships. The modern view of the thirteenth amendment is that it abolished bound apprenticeships as well as slavery. Yet, as late as 1877, Horace Wood described the status of Apprenticeship as one of the two general labor status categories of the day. *See* H. WOOD, *supra* note 27, at 2.

[100] In the legal relationship of dependence (master and servant, husband and wife, parent and child) . . . [the head of household] was given, in varying degrees, legal jurisdiction or control over [his dependents]. The jurisdiction included rights to their services, and even, in certain cases, rights to chastise or confine them. . . .

> At the same time, the Revolution advanced the transformation of another one of the traditional relationships of dependence. Though the process would not be complete until sometime in the nineteenth century, the master/servant relationship also underwent reconceptualization. In the place of a purely hierarchical relationship of dependence and governance, employment would be understood to retain the legal right to govern themselves under all circumstances.

Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 344-45, 350-51 (1989). Professor Steinfeld goes on to explain how these forces were in tension throughout the 19th century and gave rise to the concern in the wage slavery debate that the power of employers' property ownership made employees slaves. *Id.* at 366-370.

[101] In other speeches Congress took further steps to create that private domain for the former slaves. For example, in his speech advocating the thirteenth amendment, Representative Ingersoll stated, "[the slave] has a right to the endearments and enjoyment of family ties; and no white man has any right to rob him of or infringe upon any of these blessings." CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1865).

already innately equal to their employers and claims that, although such was not the case, the laborers deserved to be treated as equals and that the government should act to assure such treatment.

Sometimes the speakers framed the core ideal as a matter of dignity. At other times, they spoke of the ideal strictly in economic terms, such as opportunity for jobs, elevation, advancement, or the right to a just economic return for labor.[102] Speakers who gave form to the ideal sometimes disagreed about the most effective means to reach the desired end, but they shared a common view of that end.

The goal was independence which would come about by enabling all freedmen to attain an independent base of property.[103] In the minds of the Republicans, property ownership was within the reach of all industrious laborers, that is, if obstacles to its attainment could be eliminated. This labor ideology had been elaborately outlined in speeches made by members of the Free Soil Party, individuals who would later become Republicans with the founding of that party in 1854. By the time of the Reconstruction Congress, many former Free Soil adherents sat in Congress and had ascended to leadership positions. These key members spoke about the thirteenth amendment in the same terms they had used advocating free labor before the Civil War. Thus, it is important to begin with the pre-Civil War speeches.

a. *Pre-Civil War Speeches on Free Labor*

In 1857, Ohio Representative John Bingham made an impassioned speech on the floor of Congress about the natural rights of

---

[102] Ironically, conservative Republicans speaking against voting rights for freedmen sometimes expressed quite lofty views of economic rights and dignity in the labor relation. In Congress' labor vision, the right to enjoy the fruits of one's labor was more basic than the right to vote. Several comments by more conservative members and President Lincoln demonstrate that the basis for reading the labor vision from the amendment is broader than just the views of the Radicals. Representative William Windom of Minnesota, for example, made an apologist's argument for the Civil Rights Bill:

> It does not . . . confer the privilege of voting for that is a political right. . . . It does not attempt to confer on the freedmen social privileges. It merely provides safeguards to shield them from wrong and outrage, and to protect them in the enjoyment of that lowest right of human nature, the right to exist. Its object is to secure to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding and enjoying the proceeds of their toil.

CONG. GLOBE, 39th Cong., 1st Sess. 1159 (1866).

[103] *See* E. FONER, *supra* note 6, at 11-39.

man and the ennobling character of labor. His speech introduced three core themes that were carried through the Reconstruction debates. First, he argued that labor is central to value in the world. Property, according to Bingham, was important because it was the product of labor. For Bingham, this labor theory of property was the foundation for constitutional protection of property. Second, he attacked all class systems that subordinated laborers to those who did not labor. To Bingham, true systems of nobility and dignity should elevate laborers and denigrate non-laboring pretenders. Third, Bingham argued that the laborer was entitled to a fair return for his efforts. He said of the Constitution:

> It protects not only life and liberty, but also property, the product of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life. The Constitution also provides that no title of nobility shall be granted by [the government]. Why this restriction? Was it not because all are equal under the Constitution; and that no distinctions should be tolerated, except those which merit originates, and no nobility except that which springs from the practice of virtue, or the honest, well-directed effort of brain, or heart, or hand? . . .
>
> I do but utter the spirit of the Constitution when I say, that nobility cannot be conferred by the empty titles of a monarch, however august or however debased, bestowed upon his servile parasites, who "bow at every nod, and simper at every word." That is not nobility, though throned in power and "clothed in purple," which crushes and enslaves the millions who lift up their haggard faces, and stretch forth their shriveled hands, asking for leave to eat of the crumbs which fall from their master's table. But, sir, there is nobility in that patient, humble toil which makes a blade of grass to grow where none grew before, thereby giving a drop of nourishing milk to one of God's creatures. There is nobility in that cunning handicraft which converts the wool, the cotton, the silk, and the flax into beautiful fabrics, with which the form of humanity is clothed. There is nobility in that sturdy arm of intelligent industry, which lets in the sun upon the fertile earth, which plows its fields, scatters the seed, gathers in the harvest, and gives bread to nations—which hews from the forest and the rock the material, and builds the habitations of man.[104]

Bingham's language emphasized the central importance of labor, particularly manual labor, to all merit in the world,[105] and to

---

[104] CONG. GLOBE, 34th Cong., 2d Sess. app. at 140 (1857).

[105] Bingham's language recalls the language of the English radical Ricardians and the New York Radicals of the 1820s, such as Robert Owen. *See* S. WILENTZ, *supra*

all provisions in the Constitution. Property, to Bingham, was neither a God-given entitlement nor a necessary cornerstone of a system of wealth. Rather, the law respected property because labor created it. Robbing a man of his property was objectionable because it robbed him of his labor. Thus, the constitutional limits on the deprivation of property really protected working people from being wrongfully deprived of the fruits of their labor. Slavery and other exploitations of labor were inconsistent with the property protections of the Constitution.[106] Bingham's speech also heralded the theme that workers have a more worthy claim to status and respect than non-laborers clothed in a false nobility. Gaining titles without labor was parasitic. The sweep of Bingham's language encompassed all laborers, the master in relation to his servants as well as the master in relation to his slaves.

In addition to the dignity dimension of the free labor ideology, however, Bingham's speech implicitly recognized the economic aspects of the ideology. Laborers deserved more than "crumbs which fall from their master's table."[107] This theme is less developed in Bingham's speech than is the dignity theme, and yet the seed of an entitlement claim is there. Altogether, the essential components of the core ideal of free labor are clear in this early speech of a man who would become an active Reconstruction debate participant.[108]

Senator Henry Wilson was probably the most important speaker on free labor ideology. An active Republican speaker and former editor of the *Republican* newspaper, Wilson rose from being a cobbler in the politically active Massachusetts labor movement to become a ranking Radical Republican Senator.[109] In his many speeches and editorials, Wilson elaborated upon and polished the labor themes more extensively than most other congressmen,[110] and he became

---

note 78, at 162 ("Owen insisted, along with the Ricardians, that 'manual labor, properly directed, is the source of all wealth.' He denounced capitalists as parasites.").

106 This argument anticipated and countered the slave owners' argument that abolition would be a taking. *See, e.g., supra* text accompanying note 86.

107 CONG. GLOBE, 34th Cong., 3d Sess. app. at 140 (1857).

108 For a discussion of Bingham's role in the fourteenth amendment debates, see W. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 40-63 (1988).

109 *See generally,* R. ABBOTT, COBBLER IN CONGRESS (1972) (detailing Wilson's political career, his rise to power, and his ideology).

110 His reputation for making anti-slavery speeches was so well known that Senator Edgar Cowan claimed Wilson's thousands of speeches had gone to his head. *See* CONG. GLOBE, 39th Cong., 1st Sess. 345 (1866).

the Republican Party's point man in debates over the scope of the amendment.[111]

In 1858 the debate over Kansas' constitution generated many of the arguments that later would be utilized in the discussions of the thirteenth amendment. Although the pro-slavery forces won the Kansas round, when Congress adopted the Lecompton Constitution and made Kansas a slave state, the exchange between Massachusetts Senator Henry Wilson and South Carolina Senator Hammond framed the labor issue for the debates to come. This exchange provided rhetorical rallying cries that appeared throughout Lincoln's election campaign and in the debates over constitutional amendment.

In his notorious Lecompton debate speech, Senator Hammond analogized the condition of slaves to the condition of white laborers in the North.[112] This analogy served as a significant foil and goad for the free labor voices in future debates. Senator Hammond's often-quoted words were:

> The man who lives by daily labor—in short, your whole class of hireling manual laborers and operatives as you call them, are slaves. . . . The difference between [the South and the North] is, that our slaves are hired for life—yours are hired by the day. . . Your slaves are white—of your own race.[113]

This powerful analogy both insulted the free laborers in the North by aligning them with the degraded slaves and pointed out the com-

---

111 *See infra* text accompanying notes 131-36.

112 According to Senator Hammond:

> [A]ll the powers of the earth cannot abolish it. God only can do it when he repeals the *fiat*, "the poor ye always have with you;" for the man who lives by daily labor, and scarcely lives at that, and who has to put out his labor in the market and take the best he can get for it; in short, your whole hireling class of manual laborers and "operatives," as you call them, are essentially slaves. The difference between us is, that our slaves are hired for life and well compensated; there is no starvation, no begging, no want of employment among our people, and not too much employment either. Yours are hired by the day, not cared for, and scantily compensated, which may be proved in the most painful manner, at any hour, in any street in any of your large towns. Why, you meet more beggars in one day, in any single street of the city of New York, than you would meet in a lifetime in the whole South. We do not think that whites should be slaves, either by law or necessity. Our slaves are black, of another and inferior races. . . . Yours are white, of your own race; you are brothers of one blood. They are your equals in natural endowment of intellect, and they feel galled by their degradation.

CONG. GLOBE, 35th Cong., 1st Sess. app. at 71 (1858).

113 *Id.*, quoted in Speech by Sen. Wilson, *supra* note 28.

monality of the interests between working slaves and working free men.[114] If laborers were to continue to make advances, if free labor institutions were to continue to elevate workers, it was imperative that slavery be abolished.[115]

Senator Wilson's initial response to Hammond broke the paths for a number of avenues of future debate. Wilson repeatedly emphasized that slavery degraded labor, and he described the South as a place where "labor is dishonored and laborers despised." Kansas was the battle-field "between free labor which elevates, and that servile labor which degrades."[116] This degradation created the contrast, in Wilson's opinion, between the cultural and economic richness of New England and the South's relative bankruptcy.[117]

Wilson also took issue with Hammond's view that there would be slavery as long as poverty existed.[118] Wilson's response here was particularly significant because it demonstrated his position on an issue over which labor and abolitionist groups had been deeply divided. Abolitionists tended to be unconcerned whether freed slaves found themselves in poverty. Labor groups, though, found poverty to be as debilitating and objectionable as slavery.[119] Wilson's phrasings equating laborers and the poor indicated his alliance with the labor rather than the abolitionist tradition.

To Hammond's argument that poverty is inevitable, Wilson said:

---

114 "I mean to brand these wanton insults to the free laboring men of the country." CONG. GLOBE, 35th Cong., 1st Sess. app. at 170 (1858) (remarks of Sen. Wilson).

115 *See* B. MANDEL, *supra* note 30, at 92-93.

116 CONG. GLOBE, 35th Cong., 1st Sess. app. at 175 (1858).

117 Wilson detailed this comparison with an extensive description of the culture and economy of New England and the South. *See, e.g.*, CONG. GLOBE, 35th Cong., 1st Sess. app. at 171-72 (1858) (stating that the economy and culture of "[t]he Free States maintain a position of unquestioned preeminence"). This argument about the productivity of free labor was important in the constitutional debates as well. *See, e.g.*, CONG. GLOBE, 38th Cong., 2d Sess. 141 (remarks of Rep. Ashley) (1864) ("under the inspiration of free labor the productions of the country will be tripled and quadrupled."); CONG. GLOBE, 38th Cong., 2d Sess. 482 (remarks of Rep. Patterson) ("When this driftless system shall have been supplanted by an educated and enterprising population of free labores [sic], the measureless wealth of her mines and soil will pass into productive capital . . . ."). Beyond the regional chauvinism of this comparison, however, remained Wilson's point that free labor elevates and servile labor degrades.

118 Hammond stated that only God could abolish slavery because according to the Bible, "The poor ye always have with you." *See* CONG. GLOBE, 35th Cong., 1st Sess. app. at 71 (1858).

119 *See* Glickstein, *"Poverty is Not Slavery: American Abolitionists and the Competitive Labor Market,"* in ANTISLAVERY RECONSIDERED, *supra* note 18, at 195-218.

> [The words] "the poor ye have always with you" [remind mankind] of their dependence and their duties. . . . To men blessed in their basket and their store, [those words] say, "property has its duties as well as its rights!" To men clothed with authority to shape the policy or to administer the laws of the State, they say, "lighten, by wise, humane, and equal laws, the burdens of the toiling and dependent children of men!" Sir, I thank God that I live in a Commonwealth which sees no warrant in these words of inspiration to oppress the sons and daughters of toil and poverty.[120]

This response foreshadowed Wilson's later emphasis on obtaining substantive labor reforms rather than accepting merely a formalist understanding of emancipation. Wilson saw the phrase "the poor ye have always with you" as a reminder of the need for continual reform to lighten the burden of working people rather than as an expression of futility.

Wilson's speech is also noteworthy for its commentary on the theme of labor equality and its criticism of class structure. To Hammond's claim of the innate subservience of laborers, Wilson made a very personal response:

> I am the son of a "hireling manual laborer" who . . . "lives by daily labor." I, too, have "lived by daily labor." I, too, have been a "hireling manual laborer." Poverty cast its dark and chilling shadow over the home of my childhood. . . . Many a weary mile have I traveled "[t]o beg a brother of the earth [t]o give me leave to toil."
>
> Sir, I have toiled as a "hireling manual laborer". . . and I tell the Senator from South Carolina that I never "felt galled by my degradation." . . . I was the peer of my employer; I knew that the laws and institutions of [my states] threw over him and over me alike the panoply of equality . . . I have employed others, hundreds of "hireling manual laborers." Some of them then possessed, and now possess, more property than I ever owned; some of them were better educated than myself . . . and many of them, in moral excellence and purity of character, I could not but feel, were my superiors. . . . I was never conscious that my hireling laborers were my inferiors.[121]

In this speech, Wilson set up conditions in the North as the standard for free labor.[122] He wished to extend this benevolent state of

---

120 CONG. GLOBE, 35th Cong., 1st Sess., app. at 173 (1858).

121 *Id.*

122 Just as the image of free labor in the congressional debates was male, *see supra* note 7, so too the image was white. The congressmen tended to ignore the existence and conditions of free black laborers.

affairs to the people of Kansas, so it is not surprising that Wilson spoke uncritically of the state of free labor in the North.

In October 1860, in the midst of the Lincoln-Douglas Presidential campaign, Senator Wilson delivered another significant speech entitled, *"How Ought Working Men To Vote in the Coming Election?"* Wilson's objective was to persuade East Boston workingmen to vote for Abraham Lincoln, primarily because of the party's platform that slavery not be extended to the western territories. To make his case persuasive, Wilson had to demonstrate that it was in the interests of Boston's white workers that slavery, an institution foreign to East Boston, not be extended to a geographic region even more remote to their lives.

Wilson's rhetoric is subtle in allying the interests of workers with anti-slavery forces. Wilson purposely criticized labor exploitation in a general manner for the first several minutes before subtly slipping into the subject of slavery. In this long preamble, he set up the basic tension between those who labored and those who exploited others' labor. Not only did man experience the fall from grace in the Garden of Eden, he fell to exploitation at the hands of other men.

> Doomed at his fall from original purity and innocence to eat his bread in the sweat of his face, man, forgetful of the brotherhood of all humanity, has sought through all ages, to eat his bread, not in the sweat of his own face, *but by the enforced and unrequited toil of his brother man.* The powerful, unmindful of the sacred rights of a common humanity, have sought to avert from themselves the doom of the race, *by wringing from the weak the fruits of unpaid toil.* To filch from his brother man the bread gathered by the sweat of his face, man has stained the world with crime.[123]

Wilson then made his basic points: slavery was evil because it destroyed much of the richest land in the South; it degraded labor and the meaning of labor for poor white working men in the South; it robbed the South of culture by degrading the efforts of laborers; and it allowed southern aristocrats to further insult northern white workers by demeaning their laboring efforts as crabbed and mean. It was the association between labor and slavery in the minds of southern aristocrats that demeaned the efforts of industrious northern laborers. Thus, slavery pulled white workers down in two ways: one, by direct competition with slave labor in the South, and two, by associating all the industrious efforts of workers with those of the degraded slaves.

---

[123] Speech by Senator Henry Wilson, *supra* note 28 (emphasis added).

The second of these rhetorical devices is curious and revealing. Wilson never risked insulting the East Boston workers by arguing that their status was no better than that of a slave. He let southerners in the Democratic Party make that equation. Again in this speech, Wilson made use of Senator Hammond's line that the only difference between southern slaves and the slaves in northern workshops was that the former were black and slaves for life, while the latter were white and hired by the day.[124]

Wilson made a standard appeal to the brotherhood of all workers, but his use of Hammond's rhetoric to make the equation between black southern slaves and white northern workers conveyed a different message. Wilson did not simply tell the white workers that the slave's struggle was theirs. Instead, he emphasized that the southern white aristocrats, who set themselves above slaves, would set themselves above Boston laborers as well. Wilson's attack was an attack on class hierarchy. Moreover, by allowing a southerner to make the comparison, Wilson probably tapped some latent racist attitudes among the white workers as well.[125]

Wilson's rhetoric stressed that the slave's cause was also the cause of the white worker because an insult to one laborer was an insult to all. He said: "Put the brand of degradation upon the brow of one working man and the toiling millions of the globe share the degradation. Slavery makes labor dishonorable . . . ."[126]

Wilson's use of repetition was a more subliminal alignment of the plight of the southern slave with the plight of northern workers. Late in the long speech, perhaps at the point where the audience's interest would otherwise have waned, Wilson created a repetitive refrain. He quoted Herschel V. Johnson, the vice presidential candidate of the Douglas Democrats, for his belief that "Capital should own labor."[127] He wove this into a refrain akin to "This is the house that Jack Built," adding stanza by stanza, but always ending with the statement that that is the same Democratic Party that "believes that

---

124 *Id.*

125 The undercurrent of racism in Wilson's speech is most apparent where he quotes from Hammond: "Herschel V. Johnson . . . who avows that 'so help him God' he 'had rather have one of his negroes President than Abe Lincoln the railsplitter,' is endorsed by the Douglas Democracy of Massachusetts for his 'able and fearless promulgation of Democratic truth'!" *Id.* The incredulity with which Wilson cites this passage evinces not just the legal and practical reality that many Blacks could not vote, let alone run for President, but the belief that thinking of a slave as a better Presidential candidate than Lincoln was ludicrous.

126 *Id.*

127 *Id.*

Capital should own labor." He made use of the sentence seven times in all. It was the most repeated refrain in the speech.[128]

The most interesting aspect of Wilson's speech to the white East Boston workers was his alignment of their interests with the anti-slavery interests in free labor. The only direct appeals to the conditions of the workers in his audience were subsumed within the major anti-slavery theme. Only at the close of his speech did Wilson mention two concrete demands for labor reform that would directly benefit northern white workers. Appealing directly to the "Workingmen of Massachusetts," Wilson presented the audience with a series of questions primarily about slavery and its influence. Interlaced with such questions as "would you suppress the reviving African slave trade," Wilson asked two questions that addressed the everyday concerns of white East Boston laborers: "would you erase . . . the more infamous code authorizing employers to degrade white laboring men with blows," and "would you adjust the revenue laws so as incidentally to favor American labor."[129]

For Wilson, being anti-slavery was a pro-labor position, and the gains for slaves were inseparable from protections against employers beating their employees or favorable tax treatment for American labor. In his later statements on the thirteenth amendment, the fused nature of these concerns would be even more apparent.[130]

b. *Speeches Made While the Congress Considered the Thirteenth Amendment*

On March 28, 1864, Senator Wilson reiterated these now familiar themes in his speech to advocate the thirteenth amendment.[131] By this time, more than a year after the Emancipation Proclamation, the nation knew that slavery was dead.[132] Wilson stressed the prospective nature of the amendment by repeating that the measure would prohibit slavery "forevermore."[133] In this speech, he again

---

128 *See id.*

129 *Id.*

130 *See infra* text accompanying notes 134-35.

131 *See* CONG. GLOBE, 38th Cong., 1st Sess. 1319-24 (1865).

132 *See* E. FONER, *supra* note 3, at 66; *see also* CONG. GLOBE, 38th Cong., 2nd Sess. 225 (1865) (remarks of Rep. Jenckes) ("[S]lavery commenced the fight; it chose its own battle-field; it has fought its battle, and it is dead. . . . Let us bury it quickly, and with as little ceremony as possible, that the foul odor of its rotting carcass may no longer offend us and the world.").

133 According to Wilson:

> [T]he crowning act in this series of acts for the restriction and extinction of slavery in America, is this proposed amendment to the Constitution

portrayed slavery as having debased the southern "free" white laborer by stigmatizing labor:

> [When the Constitution is amended] the wronged victim of the slave system, *the poor white man*, the sand-hiller, the clay-eater, of the wasted fields of Carolina, impoverished, debased, dishonored by the system that makes toil a badge of disgrace, and the instruction of the brain and soul of man a crime, *will lift his abashed forehead to the skies and begin to run the race of improvement, progress, and elevation.*[134]

Wilson continued by making explicit that abolishing slavery would affect the entire labor system:

> [T]he nation, "regenerated and disinthralled by the genius of universal emancipation," will run the career of development, power, and glory, quickened, animated, and guided by the spirit of the Christian democracy, that "pulls not the highest down, but lifts the lowest up."[135]

This link between the slave, the poor white southerner, and the entire nation was crucial. It revealed Wilson's deep-seated belief that the plight of slaves and laborers were inseparable. In Wilson's mind, slavery dragged down the poor white laborer and the nation as it crushed the slaves. With these words, Wilson shifted slightly his reference to the ideal state. He did not just anticipate that abolishing slavery would raise the South to the standard of free labor set by northern laws, he predicted that the entire nation would be uplifted. He continued to develop these themes later in the debates.[136]

Other Senators took up these themes too. Senator Timothy Howe of Wisconsin criticized slavery because it stole the slave's labor and forced the slave to work.[137] Both of these elements are present in what he called his first "proof" that slavery was wrong:

> [I]f by my voluntary labor I have accumulated enough to buy a sack of flour or a bag of corn . . . and you deprive me of it by force and violence, you commit an act which all civilized nations denounce as robbery and punish infamously. . . . But if, instead of lying in wait

---

> prohibiting the existence of slavery forevermore in the Republic of the United States. . . . The incorporation of this amendment into the organic law of the nation will make impossible forevermore the reappearing of the discarded slave system, and the returning of the despotism of the slavemasters' domination.

CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864).

134 *Id.* (emphasis added).

135 *Id.*

136 *See infra* notes 186-88 and accompanying text.

137 *See* CONG. GLOBE, 38th Cong., 1st Sess. app. at 112 (1864) (remarks of Sen. Timothy Howe).

> until I have accumulated that sack of flour or the bag of corn, you employ that amount of force which makes me go to work, not voluntarily, not according to *my* will but according to *yours,* and accumulate the sack of flour or the bag of corn, is it any the less robbery for you to take the product as soon as it is accumulated? Is not that robbery also?[138]

In his second "proof," Howe reemphasized how the slave was deprived of the rewards of his labor:

> Now when you say that a negro is worth $750, what do you mean by it? [You] mean[ ] that the negro can earn the interest of $750 more than the cost of keeping him. . . . Four million slaves, at an average of $750 each, would amount to about three thousand million dollars. That was one fourth part of the assessed value of the United States in 1860. . . . One fourth part of the product of the property and of the labor of the United States went, where? *Not in the pockets of the laborer, not a dollar of it,* but went into the pockets of men who were permitted by law to own the laborer, taken by force, taken by violence.[139]

In the House of Representatives, members debated the issue in similar terms. On March 19, 1864, the day of the thirteenth amendment's introduction in the House, Iowa Representative James Wilson (no relation to Henry Wilson) reiterated some of the free labor themes. In a speech lamenting the lack of open discussion of slavery in the South, Representative Wilson cast the anti-slavery claims as pro-labor claims:

> Where, except in the free States of this Union, have the nation's toiling millions been permitted to assert their great protective doctrine, "The laborer is worthy of his hire?" What member of our great free labor force, North or South, could stand up in the presence of the despotism which owns men and combat the atrocious assertion that "Slavery is the natural and normal condition of the laboring man, whether white or black," with the noble declaration that "Labor being the sure foundation of the nation's prosperity should be performed by free men, for they alone have an interest in the preservation of free government". . . ?[140]

In this passage, James Wilson explicitly linked the plight of

---

138 *Id.*

139 *Id.* (emphasis added).

140 CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864). James Wilson considered free speech and free assembly necessary to the realization of the labor vision. He believed that the same forces that suppressed discussion of slavery in the South would stifle the advocacy of legal protections for the average worker. This concern for free speech and assembly as a means to attain improved conditions for workers

white and black workers and demonstrated that the anti-slavery principle crossed racial lines. To bolster his point, he paraphrased a southern defender of slavery whose proslavery argument was not based on race. While pro-slavery George Fitzhugh claimed that "slavery is the natural and normal condition of society,"[141] Representative Wilson stressed the labor aspect of the argument by substituting "laboring man" for "society:" "slavery is the natural and normal condition of *the laboring man, whether white or black.*" Most slavery proponents argued the racial inferiority of blacks,[142] so by paraphrasing Fitzhugh in this way, Wilson characterized the thirteenth amendment as a principle of universal free labor, not just one of racial equality.

Few New England congressmen directly criticized the northern labor system. Few directly conceded the degree to which employers controlled the lives of laborers, and few used the language of "laborers" and "capitalists." Members from the less industrialized Midwest and West made these points instead. Thomas Shannon of California, for example, highlighted the problems of a class structure where some lived off the labor of others. He said: "Slavery is inconsistent with [liberty regulated by law]; it makes the many subject to the few, makes the laborer the mere tool of the capitalist, and centralizes the political power of the nation."[143] Shannon elaborated on the degradation of labor by lamenting a situation "where men and women are compelled to labor illy fed, more illy clothed, and unpaid, to the end that one, no better before God, should live in ease and without labor . . . ."[144]

Shannon also echoed Senator Wilson's concern for the poor, white Southerner "whose vocation [was to] pander and pimp to the vices of both master and slave, and ultimately dependent on both . . . but an outcast from both and despised by both."[145] He proclaimed: "[L]et it never be forgotten that our mission also is to elevate and

---

foreshadowed similar concerns that would come to a head as the union movement grew later in the century.

141 G. FITZHUGH, CANNIBALS ALL! OR, SLAVES WITHOUT MASTERS 40 (C. Woodward ed. 1960).

142 *See* J. MCPHERSON, *supra* note 59, at 197.

143 CONG. GLOBE, 38th Cong., 1st Sess. 2948 (1864).

144 *Id.*

145 *Id.; see also id.* at 2944 (remarks of Rep. Higby) ("Slavery was the rule and freedom the exception, and the poor whites under its shadow were insignificant in comparison with master or even bondsman."); *Id.* at 2990 (remarks of Rep. Ingersoll) ("Slavery has kept [poor white people who live in the slave states] in ignorance, in poverty, and in degradation.").

disinthrall that most injured and dependent class of our fellow white men from their downtrodden and degraded condition, that they too may be men, and enjoy the independence and rights of manhood."[146]

As he condemned slavery and concentrations of employer power, Shannon depicted his ideal of the free labor society:

> I conceive, Sir, that that nation is greatest [where] the largest proportion of . . . people are educated, possessed of the comforts of life, and are endowed with citizenship. Let the voting masses of any country be composed of an independent yeomanry the majority of whom are freeholders of moderate yet sufficient estate, let them be fairly schooled, intelligent, each one bearing a fair share of the responsibilities of the Government, and that nation will be healthy; more, sir, it will be great in a noble sense that Rome was great.
>
> Small farms, small towns, manufacturing communities and villages, rather than cities or large estates, are among the conditions of true national greatness. To each of these slavery is in antagonism.[147]

In a similar vein, Francis Kellogg of Michigan opined that slavery threatened white laborers because "the atrocious sentiment that it was better for society *that the capitalists of the country should own the laborers,* whether white or black, found ready advocates among [the slave holders of the South]."[148] He also noted, "[Southerners] would degrade the laboring classes to a condition below that of the peasantry of Europe and render it impossible for them to rise in society."[149]

Not all supporters of the amendment articulated the labor vision as originally and specifically as Senator Wilson and other leaders did. For many other members, the free labor ideology was invoked by a set of frequently used catch phrases that had been coined by the leading free labor spokesmen. The widespread usage of these terms indicates how far the free labor ideology reached. One of these trace phrases was the claim that slavery "degrades labor."[150] For exam-

---

146 *Id.* at 2984.

147 *Id.*

148 CONG. GLOBE, 38th Cong., 1st Sess. 2955 (1864) (emphasis added).

149 *Id.*

150 *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 2984 (1864) (remarks of Rep. Kelley) ("the dignity of labor"); CONG. GLOBE, 38th Cong., 1st Sess. 2955 (1864) (remarks of Rep. Kellogg) ("degrade the laboring classes"); CONG. GLOBE, 38th Cong., 1st Sess. 2948 (1864) (remarks of Rep. Shannon) ("degradation of labor"); CONG. GLOBE, 38th Cong., 1st Sess. 1369 (1864) (remarks of Sen. Clark) ("degraded

ple, in a long bill of particulars discussing the evils that slavery had produced, Senator Clark made sure to mention that slavery had "degraded labor" and, in his more original phrasing, stated that slavery had "reared an aristocracy and trampled down the masses."[151]

Probably the most meaningful and repeated phrase was the laborer's "right to the fruits of his labor."[152] Representative Bingham used this phrase in his 1857 speech on the labor theory of value,[153] and Senator Wilson used it in his speech on the Lecompton Constitution.[154] The phrase's origin is also significant. In the decades before the Civil War, abolitionists and free labor adherents who opposed slavery argued over the appropriate priority of goals.[155] "[W]hereas labor leaders tended to see abolition as a diversion from the grievances of Northern labor and slavery as simply one example of more pervasive problems in American life, abolitionists considered the labor issue as artificial or secondary."[156] As abolitionist and labor newspapers staked out their respective positions and exchanged editorials over priorities, the phrase "fruits of one's labor" came to belong particularly to the pro-labor adherents.[157]

---

labor"); CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (remarks of Rep. Wilson) ("Slavery could . . . trample upon the rights of labor . . . .").

151 CONG. GLOBE, 38th Cong., 1st Sess. 1369 (1864).

152 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866) (remarks of Sen. Trumbull) ("the fruit of their own labor"); CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (remarks of Sen. Howard) ("the fruits of his toil"); CONG. GLOBE, 39th Cong., 1st Sess. 41-42 (1865) (remarks of Sen. Sherman) ("the fruits of their own labor"); CONG. GLOBE, 38th Cong., 2nd Sess. 200 (1865) (remarks of Rep. Farnsworth) ("the fruits of his own industry"); CONG. GLOBE, 38th Cong., 1st Sess. app. at 113 (remarks of Sen. Howe) ("the fruits of their own toil"); CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864) (remarks of Rep. Ingersoll) ("rewards of his own labor"); CONG. GLOBE, 38th Cong., 1st Sess. 2979 (1864) (remarks of Rep. Farnsworth) ("the fruits of his own toil"); CONG. GLOBE, 38th Cong., 1st Sess. 572 (1864) (remarks of Rep. Eliot) ("the proceeds of his labor").

153 *See supra* text accompanying note 104.

154 *See supra* note 116.

155 *See generally* Glickstein, *supra* note 119 (arguing that abolitionism in some ways subverted inequalities within the northern economic order and in other ways supported those inequalities).

156 E. FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 67 (1980).

157 In 1831, *The Liberator* carried an exchange between abolitionist William Lloyd Garrison and labor reformer William West. William West argued that "there was, in fact, a 'very intimate connexion' between abolition and the labor movement, since each was striving to secure the fruits of their toil to a class of working men." *Id.* at 62. One of the New York radical labor reformers, Owen Blatchly, included "the fruits of their labor" as one of the four basic rights to which all men were entitled. S. WILENTZ, *supra* note 78, at 159.

Ironically, Justice Marshall used the phrase as early as 1825 in The Antelope, 23

In the language of the labor movement, a right to "the fruits of one's labor" was a well-known critique of the industrial system where employees were paid only wages for their efforts.[158] The phrase stood for the claim that workers were entitled to something more than mere wages: they were entitled to some share in the fruits of their efforts. The number of times that congressional speakers repeated this phrase is a testament to the labor vision's breadth of influence.

Another important rhetorical device that tied the Radical Republicans to the labor movement was the "wage slavery" debate. Before the war, the labor movement often referred to the condition of northern factory workers as "wage slavery" that paralleled southern "chattel slavery."[159] Labor reformer William Evans noted: "They do not hate chattel slavery less, but they hate wages slavery more. Their rallying cry is, 'Down with all slavery, both chattel and wages.' "[160] Although there is no explicit discussion of wage slavery in the debates, Reconstruction congressmen must have been aware of the phrase's dual meaning.[161] As Professor Foner explained: "The Republicans accepted the labor leaders' definition of freedom as resting on economic independence rather than, as the abolitionists had insisted, on self-ownership. To [the Republicans], the man who worked for wages all his life was indeed almost as unfree as the southern slave."[162]

One can only assume that when other members of Congress resorted to these trace phrases of the free labor ideology, they wished to invoke the more complete concept of free labor that had been elaborated in the speeches of the movement's leaders.

U.S. (10 Wheat.) 66, 120 (1825) where he admitted that "every man has a natural right to the fruits of his own labour" and then went on to uphold the slave trade. "The dissemination of the writings of the English radical Ricardians in the 1820s helped establish the [labor theory of property] as an attack on economic inequality . . . ." S. WILENTZ, *supra* note 78, at 158.

158 *See* B. MANDEL, *supra* note 30, at 83 (noting that the labor movement also argued for such entitlements as "easy and equal access to the land, public education, a shorter work day . . . and the abolition of slavery").

159 *See id.* at 77.

160 E. FONER, *supra* note 156, at 70.

161 *See* Berlin, Book Review, 36 DISSENT 281, 282 (1989) (reviewing E. FONER, RECONSTRUCTION (1988)). Berlin describes the wage slavery debate and concludes: "Americans, whites as well as black, came to realize that in deciding the slaves' future, they were shaping their own destiny." *Id.*

162 E. FONER, *supra* note 156, at 73.

c. *Post-Amendment Speeches on Free Labor and the Purpose of the Thirteenth Amendment*

As Professor Foner has described the event, when the thirteenth amendment finally passed in the House, "[t]he vote set off wild cheering in the galleries, while Congressmen 'joined in the shouting . . . [and] wept like children.' "[163]

As Congress undertook the task of implementing the thirteenth amendment, the debates moved into their next phase. Reports from the field made the members realize that it was unreasonable to expect the thirteenth amendment to be self-executing. The majority of Congress believed additional measures were needed to prevent freedmen from being pressed into some other form of servitude. Two enforcement mechanisms in particular, a series of Freedmen's Bureau bills and the Anti-Peonage statute, provided an additional opportunity for Congress to more clearly define the thirteenth amendment's meaning. As the debate over additional measures proceeded, speakers harked back to the original purpose of the amendment, on which they had felt a common accord.

One method of preventing the freedmen from being enslaved in another form of servitude was to construct for them certain rights. These rights became the hallmarks of the free labor status.[164] Senator Wilson remarked:

---

163 E. FONER, *supra* note 3, at 66.

164 *See* Sullivan, *supra* note 34, at 550 ("These rights would enable [the freedmen] to act as autonomous productive workers, who could hope to accumulate some material wealth."); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (remarks of Sen. Howard) ("all civil rights" to freedmen); CONG. GLOBE, 38th Cong., 1st Sess. 2954 (1864) (remarks of Rep. Kellogg) ("rights which are inalienable"); CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864) (remarks of Rep. Ingersoll):

> I believe that the black man has certain inalienable rights, which are as sacred in the sight of Heaven as those of any other race. I believe he has a right to live, and live in a state of freedom. He has a right to breathe the free air and enjoy God's free sunshine. He has a right to till the soil, to earn his bread by the sweat of his brow, and enjoy the rewards of his own labor. He has a right to the endearments and enjoyment of family ties . . . .

Id.

The ambiguities of free labor appeared to be too much for some of the senators. John Sherman of Ohio, for example, urged that Congress should specify rights in clear language so the South would know what was expected.

> It seems to me that when we legislate on this subject we should secure to the freedmen of the Southern States certain rights, *naming them, defining precisely what they should be*. . . . We should secure to these freedmen the right to acquire and hold property, to enjoy the fruits of their own labor,

> [W]e must see to it that the man made free by the Constitution . . . is a freeman indeed; that he can go where he pleases; work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; that the rights and guarantees of the good old common law are his, and that he walks the earth, proud and erect in the conscious dignity of a free man . . . .[165]

Securing these benefits would give workers independence and autonomy, just as property protection meant independence and autonomy to the framers of the Constitution almost a century earlier.

Senator Charles Sumner used a virtually identical list of rights by reading from, of all things, the Russian Czar's 1861 proclamation which emancipated the serfs.[166] The Russian proclamation itemized the serfs' newly granted rights in a manner that paralleled the free labor vision's hallmarks: the rights of family, contract, property, and equality in the courts, political affairs, and education.[167] As to the rights of contract, Senator Sumner noted that the proclamation's regulations specified the freed serfs' right to "inscribe themselves in the guilds, and exercise their trades in the villages; and [to] found and conduct factories and establishments of commerce." As Senator Sumner described each category of rights listed, he repeated the comment: "Surely here again is an example for us."[168] He concluded: "Surely a republic cannot in [securing the rights of freedmen] lag behind an empire. . . . [A bill securing these rights] is essential to complete Emancipation. Without it Emancipation will be only *half done*. It is our duty to see that it is wholly done. Slavery must be abolished not in form only, but in substance . . . ."[169]

The post-ratification debates also featured a controversy over the thirteenth amendment's core principles that culminated in a heated verbal exchange between Senators Henry Wilson and Edgar Cowan. This exchange presented starkly contrasting visions of the good society and the purposes for the thirteenth amendment's enactment.

Senator Cowan believed that the thirteenth amendment was

> to be protected in their homes and family, the right to be educated, and to go and come at pleasure. These are among the natural rights of free men.

CONG. GLOBE, 39th Cong., 1st Sess. 42 (1866) (emphasis added).

165 CONG. GLOBE, 39th Cong., 1st Sess. 111 (1865).

166 *See id.* at 91.

167 *See id.*

168 *Id.*

169 *Id.*

self-enforcing. He argued that the amendment did nothing more than free the slave from his master and that enforcement provisions should be extremely limited. Cowan, however, was the only Republican to espouse this position in the Senate, and he eventually lost in his attempts to limit Reconstruction reform to the enactment of the thirteenth amendment alone.[170]

Proponents of additional measures saw a much broader purpose for the thirteenth amendment. These speakers, who were far more vocal and numerous than their opponents, argued that the amendment stood for a general freedom from labor exploitation. While they all agreed that the amendment would be useless if it left the freedmen only formally free, these advocates of broader reform differed as to which measures would bring about results. The fact that Congress passed most of the proposed reform measures, even if in some circumstances only to be vetoed by President Johnson, constituted an indirect referendum on the thirteenth amendment's broader goals.

i. The Position of Cowan and the Democrats

As a steadfast opponent of additional measures to aid the freedmen, Cowan sought to limit the thirteenth amendment's scope by advocating a restrictive construction of its language.[171] In the face of additional initiatives to aid the freedmen, Cowan vociferously urged a limited, formalistic reading of its purpose. In Cowan's view, the amendment gave the slave no more than the right to habeas corpus against his master. He maintained:

---

170 To avoid being clearly outvoted on later reform measures, Senator Cowan absented himself when these measures came up for overwhelmingly favorable votes. *See* M. BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863-1869, at 149 (1974).

171 Although Cowan voted for the amendment, he made only one minor comment during the debates, asking whether the amendment would apply to family relations and apprentices. *See* CONG. GLOBE, 38th Cong., 1st Sess. 1421 (1864) (remarks of Senator Cowan):

> "[S]uppose that . . . the United States requiring citizens of the several States for military service . . . were to disturb for a time the relation which existed between the parent and child, the master and his apprentice, but not disturb it long enough to cover the whole period of the tutelage or apprenticeship; what would be the effect afterwards upon the discharge of the minor or the apprentice from military service? Would he fall back again into his natural place under the master or under the parent as before? Is there any authority in this Government to prevent that return to his original status of owing service either to the master or the parent?"

Id.

> The true meaning and intent of that amendment was simply to abolish negro slavery. That was the whole of it. What did it give to the negro? It abolished his slavery. Wherein did his slavery consist? It consisted in the restraint that another man had over his liberty, and the right that the other had to take the proceeds of his labor. This amendment deprived the master of that right, and conferred it upon the negro. What more did it do? Nothing . . . . It gave to the negro that which is described in the elementary books of the law as the right of personal liberty. What is that right of personal liberty? The right to go wherever one pleases without restraint or hinderance on the part of any other person.
>
> . . . I will agree to any *habeas corpus* law that may be passed to rescue the negro from any unlawful restraint of any kind. I will go further . . . if anybody does restrain improperly of his liberty a negro who has been freed by the amendment to the Constitution, I will give the negro a right to damages against him, so that he may answer in damages to the negro himself, and if you please you may make kidnaping an offense. . . . I have no objection to that . . . .[172]

Senator Saulsbury, who had been the thirteenth amendment's most active opponent in the Senate,[173] agreed with Cowan's position.[174] Ironically, opponents of the amendment, like Saulsbury, had construed its meaning broadly prior to passage in hopes of defeating its adoption.[175] Now, these same conservative voices urged the narrowest possible construction in order to limit its effect.

---

[172] CONG. GLOBE, 39th Cong., 1st Sess. 1784 (1866) (remarks on the Senate's attempt to override veto of the Civil Rights Bill). This language parallels Cowan's earlier objections to passage of the Civil Rights Bill. Cowan said:

> Enforce what? The breaking of the bond by which the negro slave was held to his master; that is all. It was not intended to overturn this Government and to revolutionize all the laws of the various States everywhere. It was intended, in other words, and a lawyer would have so construed it, to give to the negro the privilege of the *habeas corpus*; that is, if anybody persisted in the face of the constitutional amendment in holding him as a slave, that he should have an appropriate remedy to be delivered. That is all.

Id. at 499.

[173] *See id.* at 113 (remarks of Sen. Saulsbury).

[174] *See id.* at 503 (remarks of Sen. Howard) (linking the interpretations of the Senator from Delaware and the Senator from Pennsylvania).

[175] Senator Saulsbury characterized the amendment's objectives as overbroad and unworkable in light of history and the Bible:

> We have grown . . . vain enough to imagine that had we been the creators of the universe . . . we could improve upon the workmanship of the Almighty. Had such been the case . . . no Adam would have been doomed to earn his bread in the sweat of his brow . . . the air would have been always balmy; the food of man would have been manna . . . [and] nothing but happiness, universal happiness, would have ever existed.

ii. The Position of Free Labor Proponents

Senator Cowan's rhetorical campaign for a limited construction did not go unanswered. His statements set up an impassioned response from Michigan Senator Jacob Howard concerning the amendment's scope and intention.[176] Identifying himself as a member of the Judiciary Committee that had drafted the amendment,[177] Senator Howard blasted Cowan for construing the amendment's language counter to its spirit:

> [T]he absurd construction now forced upon [the amendment] leaves [the freedman] without family, without property, without the implements of husbandry, and even without the right to acquire or use any instrumentalities of carrying on the industry of which he may be capable; it leaves him without friend or support, and even without the clothes to cover his nakedness. . . . [W]e are called upon to abandon the poor creature whom we have emancipated. . . .
>
> Now, Mr. President, I ask these gentlemen - *I appeal not only to their knowledge of the true principles of construction, but I appeal to their humanity* - to say whether it is possible innocently and sincerely to ascribe to the advocates of this amendment any such cruel and inhuman purpose as this? No, sir; I think they cannot [honestly] say that in advocating this amendment we intended to leave the negro in so helpless and destitute a condition. But if theirs be the true construction, then it is competent for the Legislature of each

---

CONG. GLOBE, 38th Cong., 1st Sess. 1364 (1864). Rep. Holman, hoping to defeat adoption, drew the implications of a broad construction of the amendment:

> [T]he Amendment goes further. It confers on Congress the power to invade any State to enforce the freedom of the African in war or peace. What is the meaning of all that? Is freedom the simple exemption from personal servitude? No, sir; in the language of America it means the right to participate in government. . . . Mere exemption from servitude is a miserable idea of freedom. A pariah in the State, a subject, but not a citizen holding any right at the will of the governing power. What is this but slavery?

Id. at 2962.

176 Senator William Stewart of Nevada was another respondent to Cowan's assertion that the amendment did nothing more than provide habeas corpus. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1784 (1866). If Cowan was right, Stewart asked, what was the point of the amendment's second section which gave Congress the authority to pass legislation appropriate to enforce the amendment. "Would [the freedman] not have . . . a right to a writ of *habeas corpus* without any act of Congress . . . ? If he has that right, and had that right at the passage of the constitutional amendment, what was contemplated by the phrase giving Congress power to pass appropriate legislation . . . ?" *Id.* Cowan responded: "I have always been of opinion that the second clause of that amendment amounted to just nothing at all." *Id.*

177 *See id.* at 503.

> State to declare by law that no negro who has once been a slave shall ever . . . have the right [of acquiring property, home, or family]; thus leaving it in the power of these interested States to . . . deprive him of a home, to deprive him of all the fruits of his toil and his industry, and finally to reduce him to a condition infinitely worse than that of actual slavery, by compelling him to labor at such price as the old master may see fit to pay him, while at the same time, he not being a slave, has no claim whatever upon that old master for support. . . .
>
> No, sir, such was not the intention of the advocates of this amendment.[178]

Here, Howard turned the argument from a discussion of the freedman's condition in comparison to slavery to a discussion of the freedman's condition in comparison to the free labor ideal.

> No, sir, such was not the intention of the advocates of this amendment. *Its intention was to make him the opposite of a slave, to make him a freeman.* And what are the attributes of a freeman according to the universal understanding of the American people? Is a freeman to be deprived of the right of acquiring property, of the right of having a family, a wife, children, home? What definition will you attach to the word "freeman" that does not include these ideas? The once slave is no longer a slave; he has become, by means of emancipation, a free man. If such be the case, then in all common sense is he not entitled to those rights which we concede to a man who is free?[179]

Senator Howard's statement used the hallmarks of the free labor vision[180] to define the difference between slavery and freedom. He repeated the invocation of family, property, the implements of husbandry, and the instrumentalities of maintaining industry, in his juxtaposition of the slave and the free state. Slavery denied these hallmarks and, until the federal government ensured these rights to the freedmen, they would continue to be in a state of slavery, or worse.

The showdown between Senators Cowan and Wilson on January 22, 1866, however, was the most dramatic of the exchanges and marked a turning point in the tenor of the debates. The issue was whether to expand the Freedman's Bureau's powers so that it would have jurisdiction in loyal states that deprived freedmen's rights as well as in rebel states. By this measure the changes and reforms that

---

178 *Id.* at 504 (emphasis added).

179 *Id.* (emphasis added).

180 *See supra* notes 164-69 and accompanying text.

Reconstruction imposed on the South were being turned back upon the North itself.

Senator Cowan made a long speech against the extension of the Freedman's Bureau bill.[181] Cowan doubted that the federal government had the constitutional authority to establish a Freedman's Bureau in loyal states.[182] He also expressed doubts about the accuracy of the reports about freedmen's conditions,[183] and he maintained that the nation was rid of slavery. In the course of the speech, Cowan revealed his own views on race by ridiculing physical characteristics of the Black race.[184] This speech also contained the most poignant statement of Cowan's social vision:

> There is a large amount of work that has to be done in this world that has to be done by exceedingly humble instruments, and if the instruments were not there the work would not be done. For instance, if all men were to be as learned as [Senator Henry Wilson,] my friend from Massachusetts, who would black boots and curry the horses, who would do the menial offices of the world? And if they were not done I should like to know how we could live at all. This world . . . after all is said and done, is pretty well arranged, in my judgment, and always has been.[185]

This statement set up an opportunity for Wilson to articulate his clearest statement of Congress' motive in passing the thirteenth amendment. Cowan had expressed a philosophy that was an anathema to everything for which Wilson and the Radical Republicans stood. Wilson had always maintained that employees were properly the equals of their employers.[186] Senator Wilson returned fire:

> The Senator knows what we believe. He knows that we have advocated the rights of the black man because the black man was the most oppressed type of the toiling men of this country. I tell you, sir, that the man who is the enemy of the black laboring man is the enemy of the white laboring man the world over. The same influences that go to keep down and crush down the rights of the

---

181 *See* CONG. GLOBE, 39th Cong., 1st Sess. 341-43 (1866).

182 *See id.*

183 *See id.* at 342.

184 *See id.* at 343.

185 *Id.* at 342.

186 *See* CONG. GLOBE, 35th Cong., 1st Sess. app. at 173 (1858). Wilson had long been proud of his background as a manual laborer. In his Lecompton Constitution debates he said, "I never 'felt galled by my degradation.' . . . I was the peer of my employer . . . ." As an employer, Wilson said, "I was never conscious that my 'hireling laborers' were my inferiors," and concluded by announcing: "That man is a snob . . . who assumes any superiority over others because he is an employer." *Id.*

> poor black man bear down and oppress the poor white laboring man.
>
> The Senator tells us that if all men were equal and all men were learned, we could not get our boots blacked. . . . [That statement] has been the language of the negro drivers in this country for sixty years - of the men who had just as much contempt for the toiling white millions of the country as they had for their own black slaves.[187]

Wilson continued the attack by characterizing the positions Cowan took on the matter through the last five years of civil war. Clearly, the gloves were being removed:

> The Senator from Pennsylvania tells us that he is the friend of the negro. . . . He has hardly ever uttered a word upon this floor the tendency of which was not to degrade and to belittle a weak and struggling race. . . . If there be a man on the floor of the American Senate who has tortured the Constitution . . . to find powers to arrest the voice of this nation which was endeavoring to make a race free the Senator from Pennsylvania is the man. . . .
>
> . . . .
>
> I do not say that we have had to carry the Senator from Pennsylvania, for he did not go at all; he neither took himself nor let us carry him. . . . He was not of us; he is not of us now, or he would not rise here and utter these sneers about [the physical characteristics of Blacks].[188]

Cowan replied in kind, maintaining that Wilson was the one who was off on his own and that the Senate had "to carry him".[189] At this point, Senator Lyman Trumbull, who had introduced the amendment and had the responsibility of maneuvering subsequent bills through the Senate, attempted to keep the peace. "I was in hopes that we would go on with the bill, avoiding this general discussion."[190] Wilson, though, would not be appeased, even by his ally Trumbull, and Wilson got in the last word.

> I have not a doubt of what [Senator Cowan] will do in the future [to resist additional reform measures] and I have not any doubt but that the same result will happen in the future as has happened in the past, that his counsels will not be the counsels of the Senate.[191]

Subsequent events bore out Wilson's words of prophesy.

---

187 CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866).
188 *Id.* at 343-44.
189 *See id.* at 345.
190 *Id.*
191 *Id.*

Cowan rose again to urge his narrow construction of the amendment, and he spoke against additional measures such as the Civil Rights Act and the fourteenth amendment.[192] He repeated his position that the thirteenth amendment stood for nothing more than a right of habeas corpus,[193] but in the end, the Senate outvoted him on every reform measure.[194]

After the fiery exchange with Wilson, few Senators bothered to reply to Cowan's arguments.[195] Edgar Cowan's voice had effectively been marginalized, and the Radicals were generally able to prevail. President Johnson later rewarded Cowan for supporting the *de minimis* approach to Reconstruction with an appointment as Ambassador to Austria, but the appointment went down in defeat when Cowan's Senate colleagues refused to confirm him.[196] Wilson, on the other hand, continued to advocate labor reforms, and a substantial majority in Congress solidly endorsed his proposal of the Anti-Peonage Statute.[197]

The clash of these two senators was more than a conflict of personalities. It represented a battle over competing views of the good society and the thirteenth amendment's intended role in bringing it about. As a leader of the dominant group, Wilson recognized the significance of the amendment's race-based concern,[198] as his sensitivity to Cowan's blatantly racist comments demonstrated, but when Wilson made the most direct statement about the amendment's purpose, his primary concern was for the least well-off laborer: "[W]e have advocated the rights of the black man because the black man was the most oppressed type of the toiling men in this country. . . . The same influences that go to keep down . . . the rights of the poor

---

192 *See id.* at 499 (speaking against the Civil Rights Bill); *see also id.* at 2987 (speaking against the fourteenth amendment).

193 *See id.* at 1784.

194 *See id.* at 606-07 (Cowan voting against the Civil Rights Bill); *id.* at 1809 (Cowan voting against veto override of Civil Rights Bill); *id.* at 3042 (Cowan voting against the fourteenth amendment's passage); *See generally* M. BENEDICT, *supra* note 170 (discussing legislative history of reconstruction reforms).

195 *But see supra* notes 176-80 and accompanying text (noting exchanges with Senators Howard and Stewart). These exchanges were anticlimactic compared with the full scale argument between Wilson and Cowan.

196 *See* WHO WAS WHO IN AMERICA 124 (1963)

197 *See* CONG. GLOBE, 39th Cong., 2d Sess. 1770 (1867) (House passes Anti-Peonage statute); CONG. GLOBE, 39th Cong., 2d Sess. 1572 (1867) (Senate passes Anti-Peonage statute). Wilson went on to become Vice-President of the United States under President Grant.

198 "[T]he voice of this nation . . . was endeavoring to make a race free. . . ." CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866).

black man . . . bear down and oppress the poor white laboring man."[199]

In the post-amendment debates, proponents of the free labor ideology differed among themselves on how best to guarantee freedmen the fruits of their labor. Free labor spokesmen endorsed the view that workers needed opportunity. For example, Representative Donnelly urged:

> If [the freedman] is not to remain a brute you must give him that which will make him a man—opportunity. . . . If he is, as you say, not fit to vote, give him a chance; let him make himself an independent laborer like yourself; let him own his homestead; let the courts of justice be opened to him. . . . If after all this he proves himself an unworthy savage and brutal wretch, condemn him, but not till then.[200]

Others, attempting to put the brakes on Reconstruction, argued that opportunity was there for the taking. After President Lincoln's assassination, President Johnson initially followed in Lincoln's footsteps in advocating the welfare of the freedmen, but he later broke with the Radicals and vetoed their legislation. In January, 1866, President Johnson's message to Congress included a strong distributional claim that freedmen were entitled to a fair wage: "Good faith requires the security of the freedmen in their liberty and their property, their right to labor, and their right to claim *the just return* of their labor."[201] Senator Trumbull quoted that language in urging more assistance for the freedmen.[202] The Radicals felt shocked and betrayed, however, when President Johnson vetoed the second Freedmen's Bureau Bill later that year. In explaining his veto, Johnson announced that supply and demand would take care of everything:

> [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, and from capitalists in his vicinage or from other States, will enable him to command almost his own terms. . . . [If] he does not find in one

---

199 Richard H. Abbott, Wilson's biographer, notes that this statement more than any other represented Wilson's primary political and personal conviction. *See* R. ABBOTT, *supra* note 109, at 260.

200 CONG. GLOBE, 39th Cong., 1st Sess. 589 (1866).

201 *See* CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (remarks of Sen. Trumbull) (quoting Pres. Johnson) (emphasis added).

202 *Id.*

> community or State a mode of life suited to his desires, or proper remuneration for his labor, he can move to another, where that labor is more esteemed and better rewarded. In truth, however, each State, induced by its own wants and interests, will do what is necessary and proper to retain within its borders all the labor that is needed for the development of its resources. 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 exceedingly great demand for labor will not operate in favor of the laborer.[203]

The Radical Republicans scoffed at this idea. Quoting Johnson's optimistic appraisal of the situation, Senator Lot Morrill of Maine said:

> Now, Mr. President, consider that that language is uttered as a reason for refusing to give the necessary executive consent to a law designed for the protection of the freedman, designed to protect him from his old master, to open up opportunities to him, to reach out the hand of the nation and stand between him and absolute want. To this homeless, houseless, defenseless wanderer who has no abiding place, the Congress of the United States [offered the nation's help] and . . . the reply from the chief Executive is, "Leave him to the laws of demand and supply." . . . In a condition of destitution and suffering and want, the black man cries to the nation for recognition of his manhood, for protection; the nation answers back, there is for you no justice, no protection, no courts, no rights, civil or political; in the language of the chief Executive, you are left to "the great law of supply and demand."[204]

The three stages of debate on the core ideal reveal the pervasiveness of the thirteenth amendment's labor vision. In addition to the many speeches outlining the affirmative aspects of the free labor vision, each time a public leader spoke against the idea, proponents strongly and immediately rebuked him. From these discussions, it appears that many members of Congress envisioned, or came to envision, slavery's repeal as only a way station on the path to attaining the ideal of free labor in substantive terms.

3. The Specific Prohibitions

The speeches that gave the greatest definition to the scope of the thirteenth amendment, however, were those that responded to

---

203 CONG. GLOBE, 39th Cong., 1st Sess. 917 (1866).

204 CONG. GLOBE, 39th Cong., 1st Sess. app. at 156 (1866).

the immediate contemporary context. The reconstructing South provided a set of examples to which congressmen could apply their understanding of the amendment. A steady stream of reports poured in, detailing objectionable labor conditions in certain southern states. Congressional speakers denounced these employer attempts at overreaching in no uncertain terms. These speeches represent the most concrete indicia of congressional intention.

In the pattern of labor provisions denounced by the congressional speakers, one can see a blueprint for further labor reform. The Reconstruction Congress, however, never deliberated upon or enacted much more labor legislation.[205] An increasingly hostile Johnson Administration, as well as racist opposition to civil rights and freedmen suffrage, thwarted the Radicals' efforts[206] and sapped the movement of its strength to continue reform. Nonetheless, the congressional records chart an unfinished labor agenda which was within the contemplation of the amendment's framers and which formed part of the expression of the labor vision of the thirteenth amendment.

As the South reconstructed itself, southern planters and politicians borrowed contemporary northern labor laws and experimented with their own novel legal devices. It was not surprising that the South borrowed northern law in attempts to recapture the labor of the freedmen since Southerners had routinely used the condition of northern workers to justify slavery.[207] Southerners had often asserted that slavery's paternalism was beneficial because it provided for the slaves' needs when little work was available and when they were too old to work. By contrast, northern employers simply fired employees when they were no longer of use. When northerners attacked slavery, southerners regularly raised this comparison.[208] Once the slave system was banned, the South unsurprisingly instituted labor "reforms" that copied northern practices. In one of the

---

205 The exception is the Anti-Peonage Statute. *See* Act of Mar. 2, 1867, 14 Stat. 546, ("An Act to Abolish and Forever Prohibit the System of Peonage in the Territory of New Mexico and Other Parts of the United States"); CONG. GLOBE, 39th Cong., 2nd Sess. 1770 (1867) (House passes Anti-Peonage statute); CONG. GLOBE, 39th Cong., 2d Sess. 1572 (1867) (Senate passes Anti-Peonage statute).

206 *See* J. BURGESS, RECONSTRUCTION AND THE CONSTITUTION 67-73, 219-21 (1902); E. FONER, *supra* note 3, at 247-51; J. MCPHERSON, ORDEAL BY FIRE 513-16 (1982); H. TREFOUSSE, *supra* note 32, at 436-70.

207 *See supra* note 112 and accompanying text (speech of Sen. Hammond).

208 *See, e.g.*, CONG. GLOBE, 35th Cong., 1st Sess. app. at 71 (1858) (remarks of Sen. Hammond) (discussing the Lecompton Constitution and the proposed admission of Kansas to the union).

great Reconstruction ironies, northern members denounced southern initiatives that closely paralleled northern labor laws.

In response to these southern initiatives, Senator Henry Wilson opened a new type of congressional dialogue on the meaning of the thirteenth amendment. "In several of these States new laws are being framed containing provisions wholly inconsistent with the freedom of the freedmen."[209] Other members followed suit, reciting a litany of examples from the post-war South and holding each example up for edification.[210] At the same time some senators, notably Senator Cowan, expressed doubt that the South was reinstating the slave codes.[211] The thirteenth amendment, Cowan claimed, took care of slavery, so the reports of objectionable practices had to be false. Senator Wilson responded by offering to furnish Cowan with those legislative acts, or, as Wilson said, "I will take them and analyze them for his instruction."[212] Wilson never produced the promised analysis, but he did introduce a new pattern in the dialogue which others joined.

Members began to marshall anecdotal information on southern labor practices, including eyewitness accounts, texts of state legislative codes, and texts of private agreements by groups of planters.[213] The accuracy of these accounts, however, is not as important here as the opinions expressed about the legal invalidity of such laws in the face of the thirteenth amendment. These accounts were hypothetical situations on which the speakers could express their interpretation of the amendment. The speakers routinely concluded that these laws and practices were inconsistent with the labor autonomy that the thirteenth amendment guaranteed.

The particular instances of employee abuse that were held up for examination and criticism assumed several different forms. The most blatant were efforts to physically apprehend laborers who fled from their employers;[214] however, most of the criticized practices were more subtle and indirect. Among the more subtle attempts to

---

209 CONG. GLOBE, 39th Cong., 1st Sess. 39 (1865).

210 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 588-89 (1866) (remarks of Rep. Donnelly) (criticizing vagrancy laws and other prohibitions that several southern states directed against freedmen).

211 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 342 (1866) (remarks of Sen. Cowan).

212 CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866).

213 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 517 (1866) (discussing the James River Farmers resolutions and other private agreements).

214 Some employers even attempted to use the state's power to help apprehend workers. *See infra* text accompanying notes 232-34.

recapture dominance in labor relations were a variety of employer efforts designed to limit workers' subsequent work opportunities and thereby discourage them from quitting.[215] Other provisions that received congressional criticism ranged from attempts to fix wage rates[216] to attempts to specify private conduct that would render the employee susceptible to discharge, whether done on or off the job.[217] Even with respect to these more subtle practices, members expressed their desire that the thirteenth amendment bar such indirect forms of abuse.[218]

It is important to reemphasize that the congressional dialogues, as well as the text of the amendment, did not require state action before the thirteenth amendment would apply. It made no difference to the congressmen whether the planters acted singly or in concert, through private means or through their influence over the local or state governments to achieve their ends. The central focus of the congressional discussion was the amendment's effect on freedmen and the securing of their substantive rights to be free laborers.[219]

Some of the provisions held up for condemnation, the so-called "black codes," applied by their very terms to blacks alone.[220] Nonetheless, a significant number of provisions that Congress identified as incompatible with the thirteenth amendment were written in racially neutral terms. Because the members viewed the efforts of southern planters with distrust, they analyzed these provisions, many of which would otherwise seem natural and familiar, in a much different light.[221] Viewed with suspicion, these labor laws and practices reflected starkly different degrees of power accorded to employers and to employees.

Some of the provisions were criticized for their symbolism. At

---

215 *See infra* note 231 and accompanying text.

216 *See infra* text accompanying note 252.

217 *See infra* text accompanying notes 257-58.

218 *Cf.* CONG. GLOBE, 42d Cong., 1st Sess. app. at 150 (1871) (remarks of Rep. Garfield) ("Congress is empowered to enforce the [thirteenth amendment] on every inch of soil covered by our flag. Congress may by its legislation prevent any person from being made a slave by any law, usage, or custom, or by any act direct or indirect. This, I presume, will not be denied. . . .").

219 *See* Sullivan, *supra* note 34, at 545-47.

220 *See, e.g.*, CONG. GLOBE, 41st Cong., 2d Sess. 2611 (1870) (remarks of Sen. Howe) (proposing conditional admission to the union for states with black codes); CONG. GLOBE, 39th Cong., 1st Sess. 95 (1865) (remarks of Sen. Sumner) (advocating a bill for protecting freed slaves). This was true particularly when Congress debated the principle of equality under the Civil Rights Bill and the fourteenth amendment.

221 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 365 (1866) (remarks of Sen. Fessenden) (expressing distrust of the South).

one point, Senator Wilson objected to the term "master" in the phrase "Master-Servant" in the title of a southern legislative bill governing employment relations,[222] even though in northern legal circles this phrase was commonly used to describe the labor relationship.[223] This incident typifies the heightened sensitivity to post-slavery labor exploitation that resulted from the members' concern with the power imbalance in the employment relation and their distrust of the individuals exercising that power.

From the texts of the debates, there is little doubt that Congress intended to accord workers the right to quit, but the parameters of this right were more complex. In addition to widespread agreement to prohibit specific performance of labor contracts,[224] speakers repeatedly raised the specter of laborers forcibly being dragged back to either their former masters or their new employers and subjected to the boss's will.[225]

---

[222] Senator Wilson remarked:

> A bill is pending before the Legislature of South Carolina making these freedmen servants, providing that the persons for whom they labor shall be their masters, that the relation between them shall be the relation of master and servant. . . . [T]he bill now lies over waiting for events here. That bill makes the colored people of South Carolina serfs, a degraded class, the slaves of society.

CONG. GLOBE, 39th Cong., 1st Sess. 39 (1865).

[223] One text published in 1886 states that the word "servant" is, in most cases, synonymous with employee. *See* H. WOOD, *supra* note 27, at 2. Cases from the North also show how common the phrase was. *See, e.g.*, Walker v. Cronin, 107 Mass. 555, 567 (1871) (allowing an action for enticement of contracted "servant" away from "master"); Bixby v. Dunlap, 56 N.H. 456, 460 (1876) (allowing an action for enticement of contracted "servant" away from "master"); Tuel v. Weston, 47 Vt. 634, 634 (1874) (holding that the "master" is responsible for the hired "servant's" negligence).

[224] Even Senator Cowan, who consistently advocated the most restrictive interpretations of the thirteenth amendment, concurred in this interpretation. Cowan took as a basic assumption that employees could not be ordered to specifically perform their labor contracts. He conceded:

> Now, we are told the most impossible things in the world. . . . [W]e are told gravely that the Legislature of Louisiana . . . have provided that . . . the laborer is to be at the mercy of the hirer. How? Has the Legislature of Louisiana declared that a contract for the performance of labor can be specifically performed, and that you can compel specific performance in her courts? If she has such a law (and that is the only way I know by which the laborer can be put at the mercy of the hirer in a contract for labor; it is the only possible and conceivable way apart from slavery) such law is clearly void, and there is no possible difficulty in obtaining a remedy for it anywhere and everywhere.

CONG. GLOBE, 39th Cong., 1st Sess. 342 (1866).

[225] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 93 (1865) (remarks of Sen. Sumner) ("Thus is the freedman, whose liberty the United States are bound to

The issue of specific performance reappeared in the congressional discussion of peonage as practiced in New Mexico.[226] There, white settlers captured Native Americans and forced them into service. Refinements of this practice involved lending money, goods, or credit to Native Americans and holding those individuals to work off their debt. As the Congress debated the Anti-Peonage Act, members contemplated whether the pre-arranged debt rendered the servitude voluntary.[227] One senator, citing his own debts, felt this form of debt servitude was outside the scope of the thirteenth amendment's terms.[228] Senator Wilson insisted that even if occasionally the servitude was "voluntary," it was "forcible" nonetheless and therefore invidious.[229] Not coincidentally, during this same debate, Congress also passed a statute abolishing imprisonment for debt.[230]

In addition to these devices, there were other ways of keeping employees working for their current employers. Employers structured private arrangements as well as legal relations to keep workers from quitting. Some planters entered into compacts agreeing not to hire freedmen without their former employer's permission,[231] and some states passed statutes creating legal actions against employers who "enticed away" laborers. A freedman's former employer could typically bring such an action against any successor employer.[232]

Both of these mechanisms prevented employees from taking advantage of competing job opportunities and therefore denied them a role in determining their own future. By conspiring in advance to recognize the assignments of workers to particular employers, the planters, in effect, treated their workers like property. This system of recognized claims to workers violated the spirit of employee autonomy that the framers cherished.[233] Senator Trum-

---

maintain, to be handed over to *compulsory service* . . . [under the former master]."); CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866) (remarks of Sen. Wilson) ("The Legislature of Louisiana has passed an act by which the Senator, if he reads it, will see that any freedman who makes a contract under it is perfectly at the control and will of the man with whom he makes the contract.").

226 *See* CONG. GLOBE, 39th Cong., 2d Sess. 1571-72 (1867).

227 *See id.*

228 *See id.* (remarks of Sen. Davis).

229 *See id.* (defining peonage).

230 *See id.* at 1579-80.

231 *See* CONG. GLOBE, 39th Cong., 1st Sess. 93 (1865) (remarks of Sen. Sumner). The most extensive agreement was the James River Farmers Compact. *See id.* at 517 (1866).

232 *See* D. NOVAK, THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY 3, 5-7, 39-40 (1978).

233 *See supra* text accompanying notes 6-11.

bull lamented: "[A] freedman is not allowed to hire out without written permission from his former master; at least planters have held meetings and have agreed not to hire freed people without such permission. These facts are known to me from personal observation, and written statements of reliable men."[234]

The report on conditions in the James River Valley detailed the most elaborate planters' agreement.[235] The James River Valley planters drafted an extensive code, binding themselves to pay only uniform wages and providing uniform terms and conditions of employment, so they would not compete among themselves for laborers. The planters also expressly agreed not to hire each other's employees without permission.[236]

The possibility that causes of action for enticement would be recognized legally made the property nature of inter-employer relations even more graphic. In essence, the enticement action was an action for trespass with the employee treated as the property. The employer, then, had a right to exclude other "users" of the employee's labor. Some southern states went as far as criminalizing enticement.[237] Senator Wilson labelled enticement actions as "degrad[ing]" and "arbitrary."[238] Senator Donnelly viewed the conditions created by the southern statutes as a reestablishment of slavery: "[The employee] shall not leave that master to enter service with another. If he does he is pursued as a fugitive, charged with the expenses of his recapture, and made to labor for an additional period, while the white man who induced him to leave is sent to jail."[239] Donnelly characterized the effect of these conditions as "continued degradation and oppression."[240]

Like many other of these provisions, enticement actions had direct counterparts in the North.[241] There, enticing servants away

---

234 CONG. GLOBE, 39th Cong., 1st Sess. 941 (1866) (remarks of Sen. Trumbull) (quoting a Freedmen's Bureau report from Houston, Texas).

235 This compact was so detailed and extensive that the congressmen had the clerk read it into the record. *See id.* at 517.

236 *See id.*

237 *See id.* at 39 (1865) (remarks of Sen. Wilson) (describing, among others, a Georgia bill that had been passed: "[E]nticing servants away is a misdemeanor, punishable by a fine of $500 or imprisonment for four months.").

238 *Id.*

239 *Id.* at 589 (1866) (remarks of Sen. Donnelly) (advocating the Freedmen's Bureau Bill and criticizing Virginia's labor code).

240 *Id.*

241 *See, e.g.*, Campbell v. Cooper, 34 N.H. 49, 61 (1856) ("It is well settled that to entice away from the service of the master one to whose services he is entitled, is in law an injury for which he may have redress in damages.").

continued to be a civil, if not criminal, cause of action well into the late nineteenth century.[242] The implication of this congressional outrage was that the practice of employers treating employees as property was inconsistent with the thirteenth amendment.

Another method of capturing and keeping employees under contract was to require employees to forfeit all wages if they quit before the end of the contract term.[243] Under the conventional contract interpretation of the day, fixed term contracts required the employee to complete the entire term as a condition precedent to receiving any wages at all. Under that interpretation, workers could not sue under quantum meruit for services already rendered,[244] and they were liable for the return of any wages already paid during the contract term.[245] The courts tended to enforce the rule rigidly[246] and, as a result, the rule greatly limited employees' job mobility. Unless an employee could afford to forfeit wages for work already performed, he could only take a new job immediately after his formal contract term expired. As a result, this system left only a narrow window of time during which the average employee could take advantage of other job opportunities.

Although this set of legal rules existed in some of the northern states,[247] Senator Wilson protested when the state of Louisiana passed a similar provision:

> The Legislature of Louisiana has passed an act by which . . . any freedman who makes a contract under it is perfectly at the control

---

242 *See, e.g.*, Walker v. Cronin, 107 Mass. 555, 567 (1871) (noting that it is "a familiar and well established doctrine . . . that one who entices away a servant, or induces him to leave his master, may be held liable in damages"); Bixby v. Dunlap, 56 N.H. 456, 460-61 (1876) (allowing actions for enticement when employees are induced to breach valid labor contracts and interrupt the master-servant relationship).

243 *See* H. WOOD, *supra* note 27, at 240.

244 *See id.* at 168-71. Servants could recover under quantum meruit only if their master rescinded the entire contract for wrongful dismissal of the servant, waived the contract, or abandoned the business for which the master employed the servant. *See id.*

245 *See id.* at 240.

246 *See, e.g.*, Hutchinson v. Wetmore, 2 Cal. 310, 312 (1852) (holding that when a laborer contracts for a fixed time period, complete performance is a condition precedent to recovery of any payment); Isaacs v. McAndrew, 1 Mont. 437, 451 (1872) (holding that a laborer who voluntarily breaches a fixed time period contract before completion of services has no claim for compensation for services rendered); Baltimore & Ohio R.R. v. Polly, Wood & Co., 55 Va. (14 Gratt.) 447, 460 (1858) (holding that full performance of a labor contract, if possible and legal, is a condition precedent to recovery of payment).

247 *See* Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 122-23 (1976) (noting that no consensus ever existed over the rule).

> and will of the man with whom he makes the contract. If that man is a bad man, at the end of the year the freedman will not receive a farthing for his year's labor. He can trump up charges to cheat and defraud the laborer. So odious are these laws that the Freedmen's Bureau has set them aside . . . because they in reality reduce the freedman to the condition of a serf, or at any rate of a peon.[248]

Senator Wilson also objected to a new Georgia forfeiture provision.[249] As he said: "I hope the people of the rebel States will understand . . . that the slave codes of those States fell when slavery fell. If these laws went down with slavery, what right have the people there to make laws tending to the same end?"[250]

Certainly, northern employers had as much opportunity to manipulate work requirements to deny their employees wages as did the southern planters. The northern employer could also cheat the laborer and, no doubt, some did. The difference was that the Reconstruction Congress distrusted the southern employers. In this light, Senator Wilson was moved to state that it was the rule itself that was odious, not simply the practice of manipulating the rule to advantage. In Wilson's language, the law put the employee too much "at the control and will" of the employer.[251]

In addition to laws that discouraged employees from changing jobs, another group of provisions attempted to fix area wage rates.[252] Members of Congress widely criticized standardized wage provisions constructed either privately by groups of planters or publicly by the states because the artificially set wage rates prevented the freedman's wage from rising in response to competitive demand.[253] Thus, freedmen could not take advantage of any existing economic opportunities in regions that were dependent on their labor. Representative Donnelly identified the inherent injustice of this practice: "[The freedman] shall work *at a rate of wages to be fixed* by a county judge or a Legislature made up of white masters, or by combinations

---

248 CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866).

249 *See id.* at 39 (1865) (stating that under the provision, "[w]ages are forfeited by leaving").

250 *Id.* at 340 (1866).

251 *Id.*

252 *See, e.g., id.* at 589 (remarks of Sen. Donnelly) (outlining the provisions of the Virginia code).

253 *See, e.g., id.* at 1159-60 (remarks of Sen. Windom) (taking issue with the President's belief that competition for the services of freedmen allowed them to set their own wage rates, and arguing that the planters really set the rates).

of white masters, and *not in any case by himself.*"[254] Senator Windom remarked that:

> Planters combine together to compel them to work for such wages as their former masters may dictate, and deny them the privilege of hiring to any one without the consent of the master. . . . Do you call that man free who cannot choose his own employer, or name the wages for which he will work?[255]

Still other state laws attempted to regulate the requirements of contract formation to disadvantage freedmen who, by custom or inability, could not meet the necessary formalities. A Georgia bill "provide[d] that if over one month, the contract must be made in writing."[256] In an economy based on oral customs, requiring written labor contracts disadvantaged both black and white laborers who were generally illiterate.

Finally, employers attempted to gain control over employees by intruding into matters of the employees' private lives or their off-hours. In the post-emancipation South, some planters sought to extend their control over freedmen's lives and thereby recapture some of the prerogatives they had exercised previously.

Some employers attempted to control employees by specifying certain conduct as cause for discharge, even if done outside of work. For example, the James River Farmers Compact provided: "The employer may discharge servants for disobedience, drunkenness, immorality, or want of respect."[257] Presumably, under the compact, employees could be discharged for drunkenness or statements indicating want of respect that occurred in the privacy of their homes. Other agreements provided for the discharge of employees who exercised the right to vote.[258] The members' criticisms of these provisions demonstrate that the Reconstruction Congress' view of labor autonomy included a sphere of private activities belonging to employees which was beyond the control of employers.

Taken together, the variety of labor measures that Congress condemned covers broad ground. These examples represent key

---

254 *Id.* at 589 (emphasis added).

255 *Id.* at 1160.

256 *Id.* at 39 (remarks of Sen. Wilson).

257 *See id.* at 517 (quoting the Compact).

258 *See, e.g.*, A DOCUMENTARY OF THE NEGRO PEOPLE IN THE UNITED STATES 562 (H. Aptheker ed. 1951) (noting that planters made agreements not to employ a worker belonging to a political club in order to keep laborers away from the ballot box); King, *Postwar Plantation Life*, in THE NEGRO IN AMERICAN HISTORY 230-31 (M. Adler ed. 1969) (noting that planters did not allow freedmen on their plantations to vote).

developments in labor reform that were taking place over the course of the nineteenth century. The pattern in the debates is clear. On every measure, even those that only subtly or symbolically oppressed the laborer, the Reconstruction Congress aligned itself on the side of labor reform.

CONCLUSION

The rhetoric of the thirteenth amendment debates followed an interesting dialectical pattern. In order to respond to the criticisms of slavery's advocates, the Radical Republicans had to create the dual strands of the labor vision. These dual strands grew out of the Republican Party's origins in the Free Soil, Free Labor Movement as well as the self-interest of the northern white working class. As the condemnation of slavery provided the negative side of the labor vision, the free labor ideal provided its affirmative side. The two together present a powerful argument for constitutionally grounding the protection of working people from overreaching subjugation and abuses at the hands of employers.

The evidence suggests that the thirteenth amendment was animated by a conception of labor reform broader than the elimination of racial servitude which was its catalyst. By abolishing slavery and involuntary servitude, the framers of the thirteenth amendment sought to advance both a floor of minimum rights for all working men and an unobstructed sky of opportunities for their advancement. One of the primary principles that led the Radicals to oppose slavery was a desire to improve the condition of the working man.[259] From this perspective, race slavery was objectionable not only for its pernicious racism, but also as the most obvious and brutal violation of the free labor principle. The thirteenth amendment was a milestone in the elimination of racial oppression, but it was also a milestone in the elimination of labor subjugation.

Moreover, in the minds of the Radicals, abolishing slavery and involuntary servitude was more than merely abolishing the formal legal status of human beings held as property.[260] The debates make clear a much broader set of objectives. The Radical Republicans

---

259 *See supra* text accompanying note 55.

260 This point is most clearly seen in the texts of the debates, but it is even somewhat evident from the text of the thirteenth amendment itself. The word "slavery" appears to mean more than chattel slavery when read in the context of the wage slavery debate. *See supra* text accompanying notes 159-62. By adding "involuntary servitude," the language of the amendment speaks to conditions broader than slavery.

were interested in substantive reforms of the condition of the "worst off working man," rather than merely his formal legal reclassification.[261] Senator Cowan's view, that the thirteenth amendment merely broke the bonds between the slave and his master, clearly did not represent the majority view.[262] The Radicals' immediate condemnation of southern attempts to construct new oppressive labor statuses in place of slavery indicates that additional conditions of servitude were within the scope of the Radicals' understanding of the thirteenth amendment.

Still, the precise substantive dimensions of the concept of free labor as viewed by the framers are somewhat hazy. The Radicals sought to remove the slave from his master's household and create for the free laborer the right to a household beyond the master's will and control.[263] In addition, if the workers were to be free from bondage, they had to be assured certain rights. They had to have the right to quit and to secure new employment without the former employer's consent. They also had to have the right to choose employers and the terms on which they would work. The framers considered it important that employers not be permitted to conspire for the purpose of keeping wages low or for the purpose of limiting the employees' opportunities.

Beyond those attempts to hold employees to service were the additional dimensions of the employment relation, characterized by the framers as more slave-like than free. The payment of minimal token wages did not satisfy the framers as being anything other than a perpetuation of slavery. The framers repeatedly stated that laborers were entitled to the fruits of their labor and wages that were just and fair. Taken together, these strands created a minimal sphere of protection for the least well-off workers. Beyond that, within the aspirational dimension of the vision, the congressmen posited that workers had to have the opportunities necessary to elevate their condition with the industrious application of labor. Workers were inherently equal to their employers, and no class differentiations should separate those who labored manually from those who did not.

It could be argued that the conditions of northern free laborers at the time constituted the standard for measuring these minimums.

---

261 *See, e.g., In re* Turner, 24 F. Cas. 337, 339 (C.C.D. Md. 1867) (No. 14,247) (holding that a Maryland law attempting to reclassify all slaves as apprentices was in violation of the thirteenth amendment prohibition of involuntary servitude).

262 *See* comments of Senators Howard, Stewart, and Wilson, *supra* notes 176-99 and accompanying text.

263 *See supra* text accompanying notes 100-01.

However, the statements of the Radicals' vision of free labor exceeded the conditions of northern white working men. The Radicals approached the task of reconstructing the South with the belief that slavery had distorted the system and that free labor did not previously exist in the South, for either black or white men.[264] Faced with the task of creating something new, the congressmen sought to achieve an even more elevated position for laborers than then existed in the North. It is difficult to predict the arc of an emancipatory idea such as the labor vision. Did the Radicals intend that the thirteenth amendment be used to press advances beyond the state of free labor that existed in the North at that time? The liberating impulse was there even if the vision was never fully realized, even in the South. Certainly, one of the goals that impelled the Radicals to oppose slavery was their interest in the *continuing* elevation of workers,[265] but there is always ambiguity about how far the framers of a constitutional amendment can see into the future, and how far they intend to push reform.

The ambiguity surrounding the Radicals' labor vision is much the same as the ambiguity that shrouds their conception of the fourteenth amendment's effect on northern race relations.[266] As the Radicals could not foresee the repressive Jim Crow era that would set back the attainment of more egalitarian race relations,[267] so too, they could not foresee the forces that would concentrate private power in the hands of employers and threaten the continual elevation of workers that they so cherished.

Beyond its historical significance, this vision of free labor has potentially far-reaching implications for constitutional interpretation of the thirteenth amendment[268] and for many aspects of the modern employment relation. Regardless of one's views about original intent,[269] the texts can teach many lessons about free labor. The Radicals' statements of purpose, and the blueprint they left as they

---

264 *See supra* notes 134-36 & 145 and accompanying text.

265 *See supra* text accompanying notes 134-35.

266 *See* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58-59 (1955) (stating that it cannot be assumed that the Radicals wished for a changed role of the Constitution despite their fervor in pressing for changes).

267 *See* D. BELL, RACE, RACISM, AND AMERICAN LAW 8-9 (2d ed. 1980).

268 For a brief discussion of various interpretative theories of the Civil War amendments, see Belz, *The Civil War Amendments to the Constitution: The Relevance of Original Intent*, 5 CONST. COMMENTARY 115 (1988).

269 To a certain extent, this argument rests on the legal relevance of the intent of the framers. For an excellent but brief discussion of the issues raised in using framers' intent in constitutional interpretation, see G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 34-36 (1986).

critically evaluated the conditions of the freedmen, provide a rich repository for legal argument and analysis about the modern condition.

It is interesting to note that immediately after the Civil War at least one court did attempt to apply lessons learned from the slave experience to the legal treatment of other employees.[270] Less than a decade after Reconstruction, however, influential treatises that codified the common law of master and servant virtually ignored these developments. As a result, the common law evolved without regard for the constitutional tradition of free labor; and that same common law has remained the law of employment relations in many states for most of this century.[271]

As we have contemplated removing the badges of slavery that persist in race relations,[272] the labor vision invites us to begin stripping away the vestiges of slavery and involuntary servitude that have remained in employment relations law and that continue to influence legal opinions and popular expectations. The task will not be a simple one, as these vestiges are deeply embedded. An analysis of these implications is beyond this Article's scope, but a few tentative applications of the vision can be identified. Of course, each of these

---

[270] *See, e.g.*, Ford v. Jermon, 6 Phila. 6, 7 (1865) (court using analogy to slavery to deny employer theater an order enjoining actress from performing at competing theaters).

[271] How and why this free labor tradition was lost is itself an interesting story to explore. A leading authority on master-servant law in the late nineteenth century, H.G. Wood, completely ignored the prohibition on slavery and involuntary servitude in his influential work, A TREATISE ON THE LAW OF MASTER AND SERVANT COVERING THE RELATION, DUTIES, AND LIABILITIES OF EMPLOYERS AND EMPLOYEES (2d ed. 1886). Wood's treatise, and others, turned out to be very influential in shaping state common law, and the Supreme Court later reinforced the assumptions these treatises made about employer prerogatives in decisions about economic substantive due process in the employment context. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915) (holding that an employer has a right to discharge, at will, an employee who joins a union against the wishes of the employer).

[272] *See e.g.*, Bailey v. Alabama, 219 U.S. 219, 241 (1911) ("The plain intention [of the thirteenth amendment] was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free. . . ."); *see also* Buchanan, *supra* note 5, at 21, 622-28 (discussing the Supreme Court's early interpretation of the thirteenth amendment and how the Court "construed [slavery] liberally to include not only the formal system of slavery . . . [but also] all of the system's indicia, incidents and badges."). Unfortunately, in recent years, the Supreme Court has not been very receptive to this argument. *See, e.g.*, Memphis v. Greene, 451 U.S. 100 (1981) (Court rejecting respondents' claim that a state's actions, increasing the sense of physical separation between black and white neighborhoods, could be characterized as a badge or incident of slavery under the thirteenth amendment).

sketches requires more thorough examination and additional qualifications.

The place to begin is with the key attributes that distinguish slave labor from free labor. First among these is the scope of the right to quit and the right to seek new employment without the permission of one's former employer. These rights determine what penalties employers may impose on employees who quit and how employers may attempt to control their employees' access to competing employment opportunities.[273] Thus, for example, the thirteenth amendment could supply a public policy forbidding an employer from discharging a worker for simply looking into employment elsewhere.[274] This policy also has potential implications for the legality of covenants not to compete.[275] In addition, the framers considered it important that employers not be permitted to conspire for the purpose of keeping wages low. This tenet would affect multi-employer bargaining units, in which employers join forces instead of competing against each other for employees' services.

Second, beyond those measures that attempt to hold employees to service are the additional dimensions of the employment relation that the framers identified as more slave-like than free. Since the framers considered token wages to be merely a perpetuation of slavery under another guise, laborers should have a legitimate claim to a certain minimal wage level.[276] What constitutes "just and fair wages" seems to be contingent on changing economic conditions or the cost of living. The framers were obviously concerned about the

---

273 *See generally* M. ROTHSTEIN, *supra* note 12, at 705-37 (discussing employers' ability to impose penalties on and exercise control over employees); H. SPECTER & M. FINKIN, INDIVIDUAL EMPLOYMENT LAW AND LITIGATION § 15.02 (1989) [hereinafter H. SPECTER] (same). Arguably, these rights also have implications for a second employer who relies on former employers' references when making employment decisions. *See* Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d. 876, 888 (Minn. 1986).

274 *See* McCartney v. Meadowview Manor, 353 Pa. Super. 34, 508 A.2d 1254 (1986); H. SPECTER, *supra* note 273, at § 10.49 nn. 216 & 222.

275 *See* M. ROTHSTEIN, *supra* note 12, at 713-37. A covenant not to compete bars an employee from competing with the former employer and is generally enforceable if reasonable and supported by consideration. *See* H. SPECTER, *supra* note 273, at §§ 8.01-8.14.

276 This is usually taken care of today by federal and state minimum wage laws. However, it may suggest that exclusions from minimum wage coverage (or other labor protective laws) may be challenged constitutionally. *See* Linder, *What Is an Employee? Why It Does, But Should Not, Matter,* 7 L. & INEQUALITY 155, 184-85 (1989); Linder, *Farm Workers and Fair Labor Standards Act: Racial Discrimination in the New Deal,* 65 TEX. L. REV. 1335, 1337 (1987) (discussing the exclusion of farm workers from the Fair Labor Standards Act).

ability of freedmen to earn enough not only for their own subsistence[277] but also to acquire a base of independence from which they could rise in the world. These issues challenge the very foundation of our common assumption that an employee's right is limited to accepting or rejecting whatever wage the employer offers.[278]

Third, the debates establish a constitutional basis on which working people can ground the popularly held expectation that an employee's home life is, or at least should be, secure from his or her employer's demand.[279] Although the debates about separating the slave from the master's household are part of the nineteenth century evolutionary trend that tended to eliminate those patriarchal prerogatives from the employment relationship, vestiges of employer control have not been totally eliminated.[280] Employees file dozens of lawsuits each year to stop employer attempts to control such deeply personal and arguably non-job-related issues as employees' personal relationships[281] and political affiliations.[282]

The thirteenth amendment arguably limits the ability of employers to command employees' obedience in areas that primarily involve the employee's privacy and autonomy.[283] This interpretation is

---

277 Even those congressional commentators who claimed that the freedmen could take care of themselves without additional federal intervention, usually the Johnson Republicans, premised that opinion on a view that there would be a labor shortage that would allow the freedmen to bargain well for their services. *See supra* text accompanying note 203.

278 *See* J. ATLESON, *supra* note 13, at 11-15. Assuring employees the right to the fruits of their labor also has implications for employer control by contract of employee-generated intellectual property or ideas.

279 *See* S. TERKEL, WORKING 17-25 (1975).

280 *See* Steinfeld, *Property and Suffrage in the Early American Republic,* 41 STAN. L. REV. 335, 344 (1989); *see generally* W. RORABAUGH, *supra* note 96 (discussing the liberating spirit that effected change in the master-apprentice relationship in the 19th century).

281 *See, e.g.,* Trumbaur v. Group Health Coop., 635 F. Supp. 543 (W.D. Wash. 1986) (employee discharged for prior relationship with new supervisor); Salazar v. Furr's Inc., 629 F. Supp. 1403 (D.N.M. 1986) (employee discharged because husband worked for competitor); Rogers v. IBM, 500 F. Supp. 867 (W.D. Pa. 1980) (discharge for relationship with subordinate); Crosier v. United Parcel Serv., 150 Cal. App. 3d 1132, 198 Cal. Rptr. 361 (1984) (employee of 25 years discharged for relationship with another employee); Grzyb v. Evans, 700 S.W.2d 399 (Ky. 1985) (discharge for fraternizing with fellow employee); Patton v. J.C. Penney Co., 301 Or. 117, 719 P.2d 854 (1986) (fired for maintaining relationship with co-worker); Ward v. Frito-Lay Inc., 95 Wis. 2d 372, 290 N.W.2d 536 (1980) (employee discharged for living with co-worker).

282 *See, e.g.,* Davis v. Louisiana Computer Corp., 394 So. 2d 678 (La. Ct. App. 1981) (employee fired because of his candidacy for political office).

283 This theory of the potential reach of the thirteenth amendment could be applied to numerous cases involving issues of employees' personal lives. *See, e.g,*

grounded in statements indicating that the slave was no longer under the master's patriarchal dominion. Other statements affirmatively created the laborer's right to domestic privacy beyond the masters' command.

This aspect of the labor vision challenges the foundation of the employment-at-will doctrine.[284] This doctrine provides that an employer can require an employee to do virtually anything under penalty of termination,[285] unless the request is specifically banned by a written contract provision, a statute or common law rule, or an express statement of public policy.[286] The doctrine renders employees vulnerable whenever they assert claims of privacy, autonomy, or personal security in resistance to their employers.[287] Employers have on occasion attempted to interfere in the employee's choice of whom to date or marry;[288] they have fired unmarried women for choosing to bear children;[289] and they have strip-searched employees on a moment's notice.[290] The doctrine provides few limits on this kind of employer overreaching, and most often does not even require that the employer provide a business justification for its "request."[291] Yet, these employer prerogatives are exactly the types

---

Ferguson v. Freedom Forge Co., 604 F. Supp. 1157 (W.D. Pa. 1985) (association with former company president); Page Airways v. New York State Div. of Human Rights, 50 A.D.2d 83, 376 N.Y.S.2d 32 (1975) (hair length), *aff'd*, 39 N.Y.2d 877, 352 N.E.2d 140 (1976); Martin v. Capital Cities Media, 354 Pa. Super. 199, 511 A.2d 830 (1986) (fired for placing ad in rival paper). This theory could possibly apply to drug testing as well. *See generally* Cross & Haney, *Legal Issues Included in Private Sector Medical Testing of Job Applicants and Employees*, 20 IND. L. REV. 453 (1987) (discussing the intrusiveness of medical testing into the private lives of applicants and employees); Hartsfield, *Medical Examinations as a Method of Investigating Employee Wrongdoing*, 37 LAB. L.J. 692 (1986) (same).

284 *See* M. ROTHSTEIN, *supra* note 12, at 738-49.

285 *Id.* Refusal to follow an employer demand may constitute disobedience, disloyalty, or insubordination.

286 *Id.*

287 Under this doctrine, the employee, before entering the employment relationship, is forced to negotiate for his or her own sphere of privacy in order for it to be respected by the employer. Given the usual power arrangement between employees and employers, this assumption is impractical.

288 *See, e.g.*, Rulon-Miller v. IBM, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984) (marketing manager discharged by employer because of her romantic relationship with manager of a rival firm).

289 *See, e.g.*, Chambers v. Omaha Girls Club, 629 F. Supp. 925 (D. Neb. 1986) (firing female employee for choosing to bear child).

290 *See, e.g.*, Bodewig v. K-Mart, Inc., 54 Or. App. 480, 635 P.2d 657 (1981) (employees strip-searched without prior notice).

291 *See generally* M. ROTHSTEIN, *supra* note 12, at 436-60, 465-82 (noting cases on privacy and employer regulation of off-work activity). A few courts have begun making in-roads on the totality of employer freedom by causes of action such as the

of intrusive master's prerogatives that the Radical Republicans would have characterized as describing the slave rather than the free laborer. The thirteenth amendment debates could be used to provide a base for grounding the employee's expectation that there are certain issues of privacy and autonomy that are not the employer's business.[292]

Each of these examples presents an instance of a legal doctrine formulated without regard to the constitutional tradition of free labor. By intending to usher in a state of basic employee rights and by articulating certain criteria as the hallmarks of free labor, the Reconstruction Congress identified a storehouse of public policies that should be revived and considered in reformulating the law governing employment relations.[293]

---

tort of outrageous conduct. *See, e.g.*, Bodewig v. K-Mart, Inc., 54 Or. App. 480, 483, 635 P.2d 657, 661 (1981) (court recognized the tort of outrageous conduct if an employer's actions exceed the "bounds of social toleration" and is in reckless disregard of the action's effect on the employee).

292 There are several theories on which to base the thirteenth amendment's protection of the employee against employer interference in primarily personal matters. In doctrinal terms, the employer's insistence on intrusive commands could be deemed an unconstitutional condition of employment. Alternatively, the thirteenth amendment's expanded interpretation could be used as the foundation of an express public policy of limiting employer's discretion.

There is little precedent upon which to base the former theory, because the development of theories of unconstitutional conditions is premised on unconstitutional conditions imposed by the state. *See* Sullivan, *Unconstitutional Conditions,* 102 HARV. L. REV. 1413, 1421-22 (1989). The expanded interpretation of the thirteenth amendment, however, stands on firmer ground. Since the thirteenth amendment, unlike the other provisions of the Constitution, is directed at abuse of private power rather than abuse of public power, there should be no impediment to finding a condition of employment imposed by the employer to be an unconstitutional condition.

Another method by which the employment-at-will doctrine could be reformed is the recognition by the courts that this type of employer overreaching is against public policy. *See* M. ROTHSTEIN, *supra* note 12, at 753-67. Grounds which traditionally have been deemed to be "public policies of the state" have often been limited to express legislative statements such as workmen's compensation statutes. The affirmative liberties that the Reconstruction Congress sought to bestow on working people can be viewed as an additional source of public policies.

293 Since there are relatively few cases examining the thirteenth amendment's labor law applications, there is little precedent blocking development in this area. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873), may present the only significant limiting precedent. For a discussion of the free labor concept in the Slaughterhouse Cases, see Dudziak, The Social History of the Slaughterhouse Cases: The Butchers of New Orleans and the Sacred Right of Labor (unpublished manuscript on file at the *University of Pennsylvania Law Review*).

In addition, section 3 of the amendment authorizes Congress to enact legislation to further the amendment's purposes. U.S. CONST. amend. XIII, § 3. At the very least, given the free labor purpose of the amendment, this section authorizes

These examples by no means exhaust the interpretive possibilities; they simply derive most directly from examples cited in the Reconstruction debates. Giving full effect to the core labor ideal of the Reconstruction Congress would suggest another entire range of meaning. Recognizing labor as the central value that creates property, regarding the employee as the social and political equal of his or her employer, ensuring that the employee is able to enjoy fully "the fruits of his toil," and guaranteeing that free institutions continue to elevate the condition of working individuals, would propel the thirteenth amendment into a sphere of influence beyond the blueprint's concrete examples. If the thirteenth amendment's purpose of introducing a state of minimum employee rights were read as broadly as it is described by the Radical Republicans, the amendment would provide protection against a wide range of employer overreaching.

Clearly, the free labor principle was only one of the animating ideals of the thirteenth amendment.[294] Nonetheless, its existence and influence have been neglected in the development of law. The remarkable point is not that the thirteenth amendment lends itself to a broader reading but that, unlike the clauses of the first or fourteenth amendments,[295] further doctrinal interpretation has not developed its meaning.[296] Instead, restrictive interpretation has reduced the amendment to its least common denominator: the abolition of mid-nineteenth century southern racial chattel slavery. This reduction has occurred to the point that the amendment has virtually no possibility of application.[297] Would the framers of the Constitution have amended the Constitution so that the amendment would become obsolete in less than a decade?[298] Could the drafters of the

---

Congress to adopt certain measures to redress power imbalances in the employment relation without invoking the commerce clause.

294 Numerous comments in the debates were addressed at eliminating racism. For an excellent examination of these themes, see Cottrol, *The Thirteenth Amendment and the North's Overlooked Egalitarian Heritage,* 11 NAT'L BLACK L.J. 198 (1989).

295 For historical description of the evolution of these provisions, see P. BREST & S. LEVENSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (1986).

296 The limited exception to this statement would be the brief line of cases starting with Robertson v. Baldwin, 165 U.S. 275 (1896) and Bailey v. Alabama, 219 U.S. 219 (1911). *See also* Jones v. Alfred H. Mayer, Co., 392 U.S. 409 (1968) (developer's refusal to sell home to a black couple held to be an incident of slavery).

297 *See* United States v. Kozminski, 108 S.Ct. 2751, 2761 (1988) (holding that a criminal statute based on the thirteenth amendment was to be narrowly construed in a manner consistent with the understanding at the time of the amendment's adoption).

298 If the strictest construction had been maintained, it is doubtful that the Supreme Court could have ruled in favor of the laborers in Bailey v. Alabama, 219

amendment have contemplated that the narrow interpretation of Senator Cowan, an interpretation that the Republican majority denounced, would become the only remaining legacy of the thirteenth amendment?

The history of the labor vision of the thirteenth amendment is the history of a pattern of labor reform in the most dramatic and fundamental way, a reform of the Constitution itself. Modern interpretation of this amendment has been much too narrowly circumscribed. The point of examining the period of Reconstruction is to convey the rich and multifaceted meaning of the debates, which must be understood if one is to understand the texts adopted.

As Representative Thomas Davis of New York stated in the debates:

> [T]his world is after all a progressive world. Its advances are slow but sure. . . . We see evidences of progress in the institutions of society as well as in the physical world. . . . The despotism and tyranny of old Governments and empires, and the barbaric customs of former generations, are passing away. Other institutions have succeeded, better but not yet perfect, and these in turn must give way to the more beneficent and more perfect creations of a brighter future. And perhaps hereafter some explorer in our history shall find for the astonishment of his times, a monster fossil more wonderful than the mastodon, and more terrible than the pterodactylus, which shall be recognized as the last vestige of African slavery.[299]

If one looks to the history of the Reconstruction debate for a broader labor vision, it is there to be found.

U.S. 219, 241 (1911) (stating that although the thirteenth amendment was concerned with "African slavery," it was not limited to that, but rather was intended to abolish slavery, its badges and incidents, and any form of bondage), or Pollock v. Williams, 322 U.S. 4, 17 (1943) (broadly interpreting the thirteenth amendment's purpose as "not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States").

[299] CONG. GLOBE, 38th Cong., 2nd Sess. 155 (1865).